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Kelly Mackenzie and Supuni Perera

Southampton Student Law Review, Editors-in-Chief

September 2016

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Foreword

Once again the Southampton Student Law Review includes papers on an eclectic mix of topics and areas of law. These articles range from commercial aspects such as tax law, through to healthcare law topics like organ donation, to housing law, psychiatric harm, judicial decision-making and the International Court of Justice. Each reflects the intellectual curiosity and academic rigour inherent in work produced in the Southampton Law School.

Some of the authors have made recommendations for legal reform (Okenyi, Quah and Patterson), while others suggest different judicial approaches to legal dispute resolution (Laryea and Chan). Saunders and Devenish both review areas where legal change might enhance justice for society more generally. All of the pieces locate their argument in the social context within which each area of law operates, making the analysis and recommendations applicable beyond the confines of academic law. Consequently, each of these articles has the potential to inform further academic debate, and perhaps ultimately to lead to revised judicial thinking and legal change. It is laudable that Southampton Law students have been encouraged through their studies to challenge perceived wisdom and question the status quo to this extent. That there are so many free thinkers amongst Southampton's students and graduates is indicative of the vibrant academic community in the Law School.

The editors have put together an impressive collection of articles which showcase the work of Southampton students. They have selected papers that raise important social and legal concerns, and are to be commended for their hard work and attention to detail in producing this volume. The *Southampton Student Law Review* appears only once a year, but it always makes for interesting and informative reading.

Hazel Biggs

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September 2016

Legal Decision Making – A Christian Perspective

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Introduction

Since the days of my early days, I have maintained a clear-eyed opinion about Law and its functions; it has always been to me, the pivotal societal system keeping society in order – a body of rules which keeps human activity and behaviour within. The rule of Law ensured that we not only lived free, with individual rights, but also that we lived in a fair and just society, a society which would punish or censure those who broke the Law, and protect the vulnerable and marginalised. Such is the general perception of all reasonable men and women in society about what Law is and what it does.

The Criminal Law is the body of Law which determines whether certain behaviour constitutes a crime or not. The function of the Criminal Law is largely to set the parameters within which the Criminal Justice System operates. The function of the Criminal Law is largely to set the parameters within which the Criminal Justice System operates. The object of the Criminal Law is to ensure that individuals who commit a crime are punished – and that the individuals punished who for a crime are the individuals who are responsible for crime. [1]

Legal Decision-making is thus at the heart of the success or otherwise of the Criminal Law's operations. In my *Doctoral Thesis* [2] , I argue that Wrongful Convictions/Miscarriages of Justice occur when the Legal decision-making gets locked up in extremes (*Law's Universal nature/the Particularities of the Case).* Thus, Legal Decision-makers must avoid extremes in Legal decision-making so as to avoid Wrongful Convictions/Miscarriages of Justice.

Further to this, I argued that Legal decision-makers can best avoid extremes by engaging in *Middle decision making* – deciding in the Middle – where they have the benefits of both Law's Universal nature and the Particularities of the case, to help them reach the right conclusion. In order for them to be able to do this effectively, I argued, Legal Decision-makers must be prepared to abandon Traditional forms of thinking – they must be flexible and willing to allow the facts of the case to shape their Legal decision-making process – and they have to pay attention to the life story of the individual defendant and respond to it in their Legal Decision Making.

The purpose of this article then is to offer a Christian perspective on *Middle Decision Making* by taking keen note of Jesus' approach to the Law and Legal decision

[1] Molan, M. (2001), *Criminal Law*, London, Old Bailey Publishing.
[2] Laryea, E. (2016), Wrongful Convictions/Miscarriages of Justice, Law as a System, and the Story of the Little Girl, University of Southampton.

making. It will be shown in quasi-legal cases below, that Jesus conducts His Legal decision making process in a manner which avoids extremes by balancing the weight of the Law with the weight of the Particularities of the case. By this, we see that Jesus reaches the objectively right conclusion in each case.
There are lessons on offer for Judges from a discussion and study of how Jesus operates as a Legal decision-maker. The article will magnify those lessons as being lessons which can be applied within the Criminal Law, and more broadly, across all other areas of Law.

Jesus the Lion and the Lamb

The Bible describes Jesus as the son of God, whom God brought forth into the world, for the sole reason of delivering to mankind a better way of relating to God – a way that was based on Grace and Love – a very anti-nomian path.[3]

After Moses had led the Israelites out of slavery in Egypt, they crossed the Red Sea and made their way to the foot of Mount Sinai where God gave Moses the Ten Commandments. The Ten Commandments form the basic foundations of the Western Legal Systems and Western Law, especially Western Criminal Law – they form the basis of almost all the societal norms that have existed for thousands of years in Western society. The Ten Commandments were the very first set of clearly coded, comprehensive Laws which were adopted by human civilisation. God gave the Jewish people these Laws for the purposes of regulating their conduct and ensuring order and Justice in their society.[4]

From the point of its adoption, the Ten Commandments were enforced with strict observance. The keepers of this Law, and those who sat in Judgement in enforcing the Law among the Jewish people, were the Pharisees and Priests. The Pharisees enforced the Law and made judgements with such extreme rigidity, that the people suffered from the harshness of the Law and its inflexibility. It is not at all surprising then that the Law became nothing more than a burden on the people – those who sat in Judgement in applying the Law (Pharisees) applied it in its complete rigidity and complete harshness – they applied the Law in its fullness even in those cases where they were very much aware that the outcomes of such application were undesirable, unjust or wrongful. Jesus' mission on earth was to lessen the burden of the Law by mollifying its extremities and rigidities.

Though this was His mission, Jesus, the master of Love and Grace Himself understand the importance of rules - He understood that Love needed rules and rules needed Love, both depending on one another. He, the purveyor of Grace and Love recognised that Grace and Love would not work without rules. It is therefore no surprise then, that Jesus warns his followers not be under the illusion that He being a purveyor of grace and Love came to abolish the Law[5].

Though His mission was to save man from the extreme harshness of the Law, Jesus states that He came to establish the Law, making it ever firmer. The notion of Jesus being both the purveyor of grace/Love and yet at the same time, being a strong

[3] Holy Bible, The Four Gospels.
[4] Holy Bible, The Book of Exodus, Chapters 19-24.
[5] Holy Bible, Matthew's Gospel, Chapter 5, Verse 17

enforcer of rules is what is captured by the Bible's reference to Him as having a dual personality - the personality of both a Lion and a Lamb.

In many ways, the Lion and the Lamb are two directly opposite animals – they both represent two extremes. The Lion is a carnivore, a devourer of its prey's flesh – the Lamb on the other hand is a herbivore, not a devourer of flesh but rather an eater of pasture. The Lion is a self-reliant animal that is set in its ways – the Lamb on the other hand is not so self-reliant, it needs to be cared for consciously in order for it to survive. The Lion is a fierce, violent and harsh animal – the Lamb on the other hand is a gentle, non-violent animal who is sober at all times. For the purposes of this article, the 'Lion' represents the characteristics of Law and its Universal nature – harsh and rigid. The 'Lamb on the other hand represents the characteristics of the Particularities of a given case – definite and mollifying. Jesus had both the characteristics of a Lion and a Lamb which served Him quite well in His Legal decision-making process.

It is in John's book of Revelations that we see the 'Lion and Lamb' reference. While imprisoned by the Roman Empire on the remote desert penal colony of Patmos, the Apostle John had a revelation of Jesus Christ which he describes in chapter five (5) of the book of Revelations. In verse 5 of that Chapter, he describes Jesus as a Lion; 'And one of the elders said to me; weep no more, behold, the Lion of the tribe of Judah, the root of David, has conquered, so that He can open the scroll and its seven seals.'[6]

In verse six of the same Chapter, John refers to Jesus as a Lamb: 'And between the throne and the four living creatures and among the elders I saw a Lamb standing as though it had been slain …' Jesus being a Lion and at the same time a Lamb offers some confusion, a contradiction even, and perhaps a complexity in terms of our understanding of who Jesus is. Surely it would be much simpler and not all contradictory if He were one or the other – either a Lion or Lamb, either the Universal or Particular - very much like how Law prefers things to be; simple, predictable and certain. As *Zennon Bankowski* advises however, life is never that clear-cut, and it is never that clean a slate. It is always something of a mess but we must get a hold of it as it is and make something constructive of it. We have to confront ourselves as we are and live our life from the middle.[7]

To be in the middle is to be like Jesus – it is to have both extremes in hand – to be both the Lion and the Lamb – to have the capability both harsh and fierce but sober and gentle at the same time – and to navigate the tensions that exist between the extremes creatively by deciding in the middle. *Bankowski*'s take on what deciding in the middle entails begins with a referral to the work of *Klaus Gunther*. *Gunther* draws a line of difference between the justification of norms/rules and their application. The justification for applying a norm/rule, he says, is a arrived at

[6] We know that John is referring to Jesus here because Jesus came from the tribe of Judah (Matthew 1:1-25) – and when John talks about the Lamb being slain, He is referring to the Son of God, who is Jesus (Isaiah 53:7)

[7] Bankowski, Z. Davies, C. (2000) 'Living in and Out of Law'. In Oliver P, Scott S.D & Tadros V, *Faith in Law,* Oxford, Hart Publishing, pp.33-51

through the using of universal criteria. However, it is another matter altogether when it comes to applying that norm/rule which we have justified through the Universal.[8]

For *Gunther*, the problem seems to be that we justify the application of a norm/rule by universalistic means – we do not say that the rule should or should not apply because its application is justified or unjustified by the particularities of the case, we rather say that 'the rule must apply because it is the rule and thus must be applied regardless'. We thus must pay heed to the particularities of the case. A transplanting *Gunther's* thoughts into legal decision making leads to the conclusion that legal decision-makers have to do two things in deciding a case. First, they have to decide what the Law to be applied means, and then they have to decide whether or not the law applies in the particular case and how. For the first, the criteria is quite Universalistic – but for the second, since they have to do with the particularities of the case the criteria will be more Particular.

Bankowski says that the latter will be the case because a potential subject of the law could always ask of the rule, "why me"?[9] This is what *Detmold* means when he says that Law is practical and its application must be practical therefore.[10] Such is the meaning of occupying the middle and make legal decisions from the middle; it means to be both the Lion and Lamb – to be both harsh and gentle – to be both Universal and Particular – to have both extremes in hand so that Law can be smart, flexible and reasonable, being a Lion but also being a Lamb when the facts demand it – being rough but also having the ability to be gentle when the facts demand it – having both the Universal and Particular in hand and managing them both as the facts guide – all this so that we can be more 'Universal' than 'Particular' if we need to be, or more 'Particular' than 'Universal' if the facts demand.

Much of our experience of Jesus in the Scriptures is one of a man very much in the middle. We see Him occupying the middle and making judgements/decisions from the middle in many instances. There are many lessons that could be learned by taking a close look at Jesus' decision making process and noting how he occupies the middle and makes decision from there.

In the scriptures, we see that Jesus engagement with a Legal decision-making process occurs mostly during His exchanges with the Pharisees. The Pharisees were followers of a certain order which existed mostly during the last two centuries of the Second Jewish Common Wealth i.e 152 BC-70 AD.[11] They were a group of people pledged to a strict observance of Levitical purity, to the avoidance of closer association with the impure ignorant boors, to the scrupulous payment of tithes and the regulations handed down by former generations including those that are not even recorded within the Laws of Moses.[12]
These are the sort of characteristics that the Pharisees were associated with in the Synoptic Gospels and the Acts of Apostles. They were strict keepers of the Law and were Formalistic and Universalistic in every sense of the word whenever they engaged in the task of applying the Law to a set of facts. They believed most

[8] Gunther, K. (1993), *The Sense of Appropriateness,* Albany, State University of New York Press, pp15-23
[9] *Ibid 7*, p.39
[10] Detmold, M. (1989), Law as Practical Reason, *The Cambridge Law Journal,* Vol 48(03), pp.436-471
[11] Sanders, E. (1992), *Judaism,* London, SCM Press, pp.45-49
[12] Finkel, A. (1964), *The Pharisees and the Teacher of Nazareth,* Leiden, Brill Publishing, pp.2-3.

unequivocally, that the rules as stipulated in the Law of Moses and as handed down as tradition ought to be followed in every case without exceptions whatsoever.[13] For them, the Law was the Law and therefore had to be applied and adhered to in all cases regardless of the facts/particularities of the case.

Though Jesus was Himself a man of the Law, declaring that He in no way came to do away with the Law, He most often disagreed with the Pharisees and with their very Formalist and Universalistic approach to applying the Law. Jesus was most often angered by their strict demand that the Law was the Law and that it should be followed/applied in all instances irrespective of the facts of the case.[14]

In Jesus' view, the Pharisees represent Universalistic keepers of the Law who are in perpetual pander towards Law's Universal nature whenever they were to apply the Law to facts. They would on all occasions, apply the Law even if its application was not justified by the facts, and they would do so even if the result of such an application would yield an injustice. With the exception of the money changers whom Jesus once drove from the temple in anger,[15] the Pharisees are the only group of people that Jesus condemned vehemently.[16]

It is beneficial for us to take a closer look at Jesus' altercations and interactions with the Pharisees because therein lies the art of legal-decision making from the middle which Judges can draw lessons from. We find one of such interactions and altercations in Chapter 15 of Matthew's Gospel. After Jesus had walked on water, He crossed over to Gennesaret where people recognized Him and brought their sick to Him – the sick touched the edge of His cloak and were healed.

Jesus – A Man in the Middle at Gennesaret

Whiles at Gennesaret, the Pharisees (teachers, keepers and Universalistic appliers of the Law) came to Him from Jerusalem and asked; 'why do your disciples break the tradition (Law) of the elders? They don't wash their hands before they eat.' In a sharp and unequivocal reply to the Pharisees, Jesus asked why they (the Pharisees) break the command of God for the sake of their tradition. Jesus went on to say to them; 'God said honour your father and mother[17] … but you say that if anyone declares that what might have been used to help their father or mother is devoted to God, they are not to honour their father or mother with it … you hypocrites.'[18]

Jesus' rebuke to the Pharisees in this instance was over their fixation with applying the Law in all instances irrespective of the facts. To the Pharisees, the keeping of tradition justified the application of a rule – their legal decision-making process in this regard was very much within the Universal – hence their charge of illegality on account that the disciples do not wash their hands, and their indirect suggestion therefore that he who does not wash his hands before eating breaks the Law.

[13] The Pharisees were the Judges in those days.
[14] MacArthur, J. (2008), *The Jesus you can't ignore,* Nashville, Thomas Nelson Publishing, pp.173-174
[15] Matthew 21:12-13.
[16] Jobling, M. *Jesus and the Brood of Vipers*, Milton Keynes, Treasure House Creative, pp.5-6.
[17] Exodus 20:12, Deuteronomy 5:16
[18] Matthew 15:1-7

Jesus' response to them is that of a legal-decision maker who decides in the middle. Jesus calls the Pharisees hypocrites because of their formalistic/Universalistic approach to rules. For Jesus, it is the facts of a particular case which should justify, or otherwise, the application of the rule – the facts of the case are what should determine whether a rule is applied or not.

What Judges can learn from Jesus in this instance is this: *deciding in the middle means placing a hold on applying the Law if necessary, and doing so because it is important for Law to be applied without rightful purpose, otherwise it produces wrongful convictions/miscarriages of justice; we simply need to ask whether the application of the rule is justified by the facts.*

This is why Jesus posits strongly that it would not be against the Law for one to help their father and mother with a resource that might have been devoted to God – the facts would not justify an application of the Jewish Law ('resources devoted to God shall not be used for any other purposes') in such a case seeing as the outcome would be undesired/unjust (the suffering of parents in need). Jesus is in this instance engaged in 'middle decision-making.' The application of the rule must be practical and with purpose – we must be able to suspend the rule if applying it is not warranted by the facts, and if its application is not practical or appropriate.

Jesus – A Man in the Middle At the Judge's Home

Another of Jesus' altercations with the Pharisees, where we see Him engage in legal decision making from the middle can be found in the account in Luke's Gospel[19] where Jesus visits a Pharisee (keeper of the Law and a judge) at his home. The visit took place on the day of the Sabbath – and there were other Pharisees who were invited to this gathering. Whiles at the house of this Pharisee, Jesus noticed a man in the room (not a Pharisee) who was suffering from an abnormal swelling of his body. Jesus turned to the Pharisees (Judges) and other experts of the Law who were there and he asked them; 'is it lawful to heal on the Sabbath or not.'[20]

Jewish Law at that time concerning the Sabbath was that it was a day of rest, and as such by Law, no work was done on the day of the Sabbath. Legalistically speaking, the act of 'healing' constituted 'work' under Jewish Law at the time. The act of healing would therefore be unlawful if it were done on the day of the Sabbath. The Pharisees were quiet when Jesus asked them whether it was lawful to heal on the Sabbath – but given their approach towards legal-decision making, Jesus knew the answer to the question even before he asked it – He knew their answer though they did not directly answer His question.

That is why after having healed the man, Jesus further asked them; 'if one of you has a child, or an ox that falls into a well on the Sabbath day, will you not immediately pull it out? To this the Pharisees gave no answer but the answer of course was a resounding 'yes we will'.

We see in this altercation that Jesus made a legal decision from the 'middle' – he decides to suspend the rule (you shall do no work on the Sabbath), because the facts

[19] Luke Chapter 14
[20] *Ibid.,* verse 3

did not justify its strict application in this case; is it just to hold that a man suffering from a long term illness should not receive help or healing because the Law states that no work shall be done on the day of the Sabbath? The answer must surely be a resounding no. To do that would be to apply the rule impractically and without purpose – to do that would result in an outcome which is unjust and unfair.

By asking the Pharisees the latter question - would you not pull your ox out of a well on the Sabbath - Jesus was teaching the Pharisees two things:

a) that they themselves would suffer unjustly and unfairly if they were on the receiving end of the Universalistic approach to legal decision making which they so preferred. Jesus' hope was that by making the Pharisees consider a scenario in which they were in the same position as the terminally ill man, the Pharisees would be realise the nature of the injustice and unfairness that their Universalistic approach to Legal decision-making generates.

b) Jesus was trying to teach the Pharisees about the best approach to adopt in making a legal decision; deciding in the middle – where we refrain from applying the rule for application's sake, and resist the impulse to say that the application of the rule is justified merely by the rule's existence and its ability to be applied to the facts on the basis of technicalities (Universal thought process). What we must do instead is to suspend the application of the rule because such an application of it is not warranted by the facts (particularities) of the case. As a judge Himself, what Jesus does in this case is to ask whether the particularities of the case justify an application of the rule. Clearly, Jesus chooses this approach because it leads Him to the most just conclusion possible.

Jesus – A Man in the Middle on the Sabbath

Let us consider yet another altercation that Jesus had with the Pharisees. Matthew's Gospel records Jesus walking through fields of grain on the Sabbath day with His disciples. As they walked, the disciples were hungry so they began to pick some grain to eat. When the Pharisees saw this, they said to Jesus; 'look, your disciples are doing what is unlawful on the Sabbath'.[21] The Pharisees made this claim of illegality because the Law at that time was that nobody shall work on the Sabbath – picking grains in the field constitutes work and therefore Jesus and His disciples had broken the Law and had acted illegally.

Jesus' ultimate answer to the Pharisees' claim of illegality was a simple one; '*The Sabbath was made for man, not man for the Sabbath.*'[22] Though simple and straightforward, Jesus' response is nonetheless profoundly important - it can reinterpreted and restated as this; *the Law was made for man and not man for the Law - rules were made for the benefit of men and not men for rules. Thus, we should be able to suspend the application of a rule if the facts do not justify its application i.e its application would produce injustice and unfairness.* Should we to apply a rule even if its application would mean that men would starve? The answer is a resounding no! This is what it means to make legal-decisions from the middle.

[21] Matthew 12:2
[22] Mark 2:27

As a middle legal-decision maker (Lion and the Lamb) Jesus teaches us that we ought to weigh every rule against the facts of the case and ask ourselves whether our applying the rule would create injustice and would be unfair to those it is applied to. Rules are there to serve us, so we must be able to bend them, suspend them and reshape if we have to in ensuring that they actually do serve us.

We must have the rule/universal in our right hand but also have reason/love/grace/the particular in our left hand and make legal decisions with both. The left ought to know what the right hand is doing, and if the facts of the case do not justify us applying our right hand to it, then we must hold it back and apply the left hand. And if the facts of the case warrants that we apply our right hand then we must apply it to the facts and hold back our left hand – the important thing is that we have both hands, not just one – we can apply our left hand without undermining the right hand, and vice versa – and we must do so by placing our legal minds in between these two hands (left/right) such that it links to the two and we can make legal decisions from there as Jesus demonstrates so brilliantly.

Lessons For Judges From The Lion and Lamb

The lessons drawn from Jesus' function as a Legal-decision maker can be applied by Judges within the Criminal Law, and more broadly, across all other areas of Law. In every single one of his altercations with the Pharisees we observe that Jesus, being a legal-decision maker in each instance, decides firmly in the middle. At Gennesaret, the Pharisees, being *Universalistic* in their application of the Law, did not recognise the *Particularity* of parents in need – but Jesus recognised it and would allow it to shape his Legal decision. Similarly, at the meeting in the Judge's home, the Pharisees did not recognise the particularity of a man suffering from illness – Jesus sees that particularity, and He would allow it to shape the trajectory of his Legal-decision making.

In the instance where Jesus walks the field of grain with His disciples, we see that the very *Universalistic* minded Pharisees do not recognise the *Particularity* of a group of people in hunger and want for food – Jesus, however, does recognise this particular and He allows it to shape His Legal Decision-making.

Judges often fall short in decision-making because very much like the Pharisees in Jesus' day, they are not paying enough attention to the particularities of the case. Judges must be able to see individual defendants as they are and treat as such – they must identify with the circumstances surrounding individual lives, they must feel the uniqueness of the stories of individual defendants - plugging themselves into the flow of the stories of individual actors and feeling its ups and downs – reaching out in a spirit of interest, where they are genuinely interested in the wholeness of an individual's life's story, not just a snapshot within that story where they may have committed possible wrong.
A legal-decision making process conducted in the *middle* ground serves to ensure and reaffirm the notion that the Law exists for the service of mankind, and not the other way around. Whenever the legal-decision making process is anchored within the *Universal* extreme, there is a loss of practicality and purpose in the application of the Law.

It is therefore no wonder that Jesus sounds a very stark warning to Judges and Teachers of the Law in Matthew's Gospel[23], where he says; '*woe to you teachers and keepers of the Law – be careful that you are not hypocrites by tending to the rigidity of Law, so much so that you forget and neglect the more important matters of the Law, which are justice, mercy and faithfulness. You should practice the latter and forget the former.'*

Jesus' warning is a call to all other Judges, to resist the impulse of tending to a formalistic/Universal application of the Law – it is a call for Judges to avoid the Universal extreme and what it represents. Instead, Jesus insists that Judges seek what He calls, the weightier matters of the Law i.e Justice, fairness, mercy and faithfulness.

Jesus teaches us that a good legal-decision making process involves us paying attention to the facts and paying attention to the particularities of the case. Engaging in Legal-decision making the way that Jesus does, provides Judges a safe boat with which to successfully navigate the waters of the void. The notion of allowing the facts to guide the finding a *mean* between extremes and locating the decision-making process at the middle ground aids in preventing an inappropriate, unwarranted, unpractical application of the Law.

Conclusion

In each of the instances discussed above where Jesus gives the Pharisees a good schooling on how to conduct legal-decision making, we see each time that He closes the gap between the rule and its application with the bridge of practical reason; He employs practical reason as a bridge. It is practical reason which leads him to suspend the application of a rule by saying that the Law was made for man and not man for the Law – it is practical reason which would lead Jesus to not apply a Law which would punish his followers for eating while hungry.

As per Jesus' example, Judges would be greatly helped if they cultivated a custom of flexibility and adaptability – where they are willing and able to change/abandon their traditional patterns and blocks of thought which have been formed in their many years of passing judgement, whenever they reach the realization that those traditional patterns and blocks of thought are not suited for the case in hand. They must reconstruct their *habitus* to fit the case - adopt a new culture of flexibility and adaptability which will bring with it, new and solutions which must not be excluded as they would be if a Judge is rooted in traditionally formed blocks and patterns of thought.

What is needed is for Judges to perceive cases with fresh thoughts. Every case is as unique as it is similar to other cases. Every case therefore requires and deserves a freshness of thought, especially where pre-formulated blocks and patterns of thought do not suffice. A Judge who develops such a culture will excel at striking the *mean* and deciding in the *middle ground.*

[23]The Holy Bible, Matthew's Gospel, Chapter 23, Verse 23

Wittgenstein suggests that following a rule is not like the operations of a machine. Rather, it is a social practice – a process which must take account of the factors that bear upon individual social actors. Such socialization of rule application, as it is, requires of a Judge that he/she become a responsible thinking mind, self-reliant for his/her judgements – resisting with stern will, the tendency to see the human agent as a subject of representations – representations about the world outside and depictions of ends desired or feared. Judges must see the agent not primarily as the locus of representations, but as engaged in practices, as a social being who acts in and on a world.[24]

A rule does not apply itself, it has to be applied by someone – and this may involve difficult and finely tuned judgements. Nonetheless, a person (Judge) of practical wisdom is marked out less by their ability to formulate rules, and more by their knowing how to act in applying of those rules in each particular situation.

All Judges must consider that Rules, as they are formulated, are in close interrelation with our *habitus*. Rules are not self-interpreting – without a sense of what they are about, and an affinity with their spirit, they remain mere words.

Very much like Jesus, the Lion and the Lamb, Judges must pay attention to the story of the subject individual, plug themselves into the flow of their stories and derive an understanding of these stories. Rules operate in our lives, and function only along with an inarticulate sense which is encoded in the body. Judges must employ a *habitus* which allows them to move to the *middle* and decide there – and if a Judge's *habitus* does not allow this, then such a Judge must reconstruct his/her *habitus*.

[24] Wittgenstein, L. (1973), *Philosophical Investigations,* Oxford Publishing, Oxford, p.193-194

A Reform Proposal for the Human Tissue Act (2004): Making it more 'appropriate' for Organ Donation in 2020

Emmanuel Okenyi
University of Southampton

Introduction

SECTION 1

1.1 Organ donation for transplantation is a contentious topic in the global health care landscape. The UK has been a key player in leading technological advancement in transplant medicine; with the first successful heart transplant using a non-beating heart in Europe being performed here, this year.[1] However, the UK still has one of the lowest organ donation rates among developed nations.[2] There has been a steadfast tradition of consent, in which cadaveric, as well as living organ donations can only be made following confirmation of donor permission. At present, individuals become organ donors through joining the NHS Organ Donor Register (ODR), a form of 'opting-in' policy.

1.2 Despite this admirable moral stance on organ donation, there remains a significant issue at the heart of this area - organ demand for transplantation far outstrips organ supply. In response to this, in 2006, the government at the time set up the Organ Donation Taskforce (ODT) whose role it was to identify areas for improvement with a view to increasing organ donation rates. Recommendations from their first report, published in 2008, were centred on infrastructural and organisational improvements in donor identification and referral following death, and communication with those closest to potential donors.[3] Following this report,

[1] Ian Sample, 'Success for first non-beating heart transplant in Europe' *The Guardian* (London, 26 March 2015) <www.theguardian.com/science/2015/mar/26/success-for-first-non-beating-heart-transplant-in-europe> accessed 1 April 2015

[2] 'Deceased Donation' (*Organ Donation and Transplantation*) < www.odt.nhs.uk/donation/deceased-donation/> accessed 1 April 2015.

[3] Department of Health, 'Organs for Transplant: A Report from the UK Organ Donation Taskforce' (16 January 2008)

the recommendations were put into practice, and the target of increasing donation rates by 50% in the UK by 2013 was achieved.[4]

1.3 Despite these attempts, there still remains a significant discrepancy between organ supply and demand. A crucial element of the organ donation process is yet to be explored and addressed fully. Currently, families can veto the wishes of their deceased to donate their organs, despite having no legal right to do so. In addition, clinical staff can often feel reluctant to broach the topic of organ donation with families in order to avoid causing further distress in certain cases. The combination of family veto and understandable reluctance of medical staff to discuss this sensitive subject in a time of family distress, places a prominent barrier to organ procurement, and contributes to the current shortage of organs in this country.

1.4 In response to this health care issue, this project proposes an amendment to the current law pertaining to cadaveric organ donation for transplantation by persons over the age of 18, making it a legal requirement to register an organ transplantation decision advocate (OTDA) as part of joining a new register. The OTDA role will be to confirm the deceased's decision regarding organ retrieval, thus circumventing issues of uncertainty around familial decisions concerning organ donation that can arise in often emotionally challenging circumstances, following the death of a relative.

SECTION 2: The Current Law on Organ Donation – Is it 'appropriate'?

2.1 The current law governing the removal, storage and use of 'relevant material'[5] from the deceased is laid out in the Human Tissue (HT) Act (2004), for which transplantation is one of the 'scheduled purposes'.[6] This law covers England, Wales[7] and Northern Ireland (NI). Scotland has its own legislation concerning these matters, which replaces the term 'consent' with 'authorisation'.[8]

2.2 Consent, the 'golden thread'[9] of the 2004 Act, is a theme that permeates throughout the Act. The emphasis on explicit consent was to form the foundations of the statute, following the public outcry that resulted from revelations regarding the widespread practice of retaining human organs of deceased infants without prior parental permission, most notably by pathologists at Bristol Royal Infirmary and Royal Liverpool Children's NHS Trust (also known as Alder Hey Children's Hospital,

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[4] John Fabre, 'Presumed consent for organ donation: a clinically unnecessary and corrupting influence in medicine and politics' (2014) 14 Clinical Medicine <www.clinmed.rcpjournal.org/content/14/6/567.full.pdf> accessed 4 April 2015

[5] Human Tissue Act 2004 (HTA 2004), s 53

[6] HTA 2004, sch 1

[7] Human Transplantation (Wales) Act 2013 (HTWA 2013) (nawm 5). Welsh organ transplantation law to be governed by the HTWA in December 2015.

[8] Human Tissue (Scotland) Act 2006 (asp 4)

[9] David Price, 'The Human Tissue Act 2004' (2005) 68 MLR <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2005.00561.x/abstract> accessed 4 April 2015

Liverpool).[10] The realisation that buried or cremated loved ones were not in fact 'complete' caused great public distrust in the medical profession at the time.

2.3 One of the key recommendations of the Report following the Alder Hey Inquiry[11] was to adopt a system of fully informed consent for the removal and retention of organs from deceased persons, a concept that the then Health Secretary, Alan Milburn supported.[12] Accordingly, the HT Act (2004) was devised and came in to force in April 2006. It repeals and replaces the HT Act (1961) and Human Organ Transplantation Act (1989), as well as the Anatomy Act (1832), Corneal Grafting Act (1952) and Corneal Tissue Act (1986)[13].

2.4 Consent now, quite rightfully, is placed centrally within the 2004 Act, where the removal, storage and use of organs for transplantation can only lawfully occur once 'appropriate consent' has been established. The notion of 'appropriate consent' is the overarching principle regarding the legality of organ removal from deceased adults. However, there is a distinctive lack of clarity regarding the actual meaning of 'appropriate consent' in the law, and how this translates for health professionals on the front line.[14] For deceased adults, such permission is stated as meaning[15]:

a. A consent decision was in force immediately before their death;
b. i) If a. does not apply and
   ii) Consent is given by a 'nominated representative', appointed by the deceased to address the issue after their death;
c. if neither a. or b. is applicable; consent is given by someone who was in a 'qualifying relationship' to the deceased, immediately before they died.

2.5 If a competent adult previously made a consent decision for organ donation, organ retrieval for transplantation can occur. In the first instance, it is essential for transplant teams to check sources, like the NHS ODR. Transplant teams are also required to consult surviving family to ascertain the views and wishes of the now deceased before they died to decide whether to proceed, if their wishes were not formally recorded.

2.6 Another means of permitting organ donation under current law is through appointment of a nominated representative (NR). Appointment of one or more NRs can be made orally in the presence of two witnesses, or in writing in the presence of

[10] Kathleen Liddell and Alison Hall, 'Beyond Bristol and Alder Hey: The Future Regulation of Human Tissue' (2005) 13 Medical Law Review <http://medlaw.oxfordjournals.org/content/early/2005/05/18/medlaw.fwi012.extract> accessed 11 April 2016

[11] Department of Health, *The Royal Liverpool Children's Inquiry Report* (Stationery Office Books 2001).

[12] Department of Health, the Royal Liverpool Children's Inquiry (2001); HC Deb 30 January 2001, vol 362, col 178.

[13] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (5th edn, Penguin 2011)

[14] David Price, Human Tissue in Transplantation and Research: A Model Legal and Ethical Donation Framework (CUP 2009) 105.

[15] HTA 2004, s 3(6)

one witness who attests the signature.[16] The NR can be granted general powers to consent to purposes described in the Act, or they can be purpose-specific e.g. only for organ retrieval. Where more than one NR is nominated, the consent of one representative is sufficient to authorise organ retrieval, unless it is specifically stipulated that they must act jointly.[17]

2.7 In the absence of express consent made by the person before their death, or the appointment of an NR, consent must be sought from someone in a qualifying relationship to the individual before their death. The Act details the ranking order in which health professionals should refer to in order to determine the most appropriate individual to seek consent from:[18]

I. spouse or partner;
II. parent or child;
III. brother or sister;
IV. grandparent or grandchild;
V. child of a person falling within paragraph III i.e. niece or nephew;
VI. stepfather or stepmother;
VII. half-brother or half-sister;
VIII. friend of longstanding.

2.8 Changes to the law in this section are subtly significant. Previously, the 1961 Act stated that objection of one family member in the same class as another relative giving consent (e.g. 'parent' objecting, 'child' consenting) was enough to veto organ removal. Now, perhaps in light of the widely acknowledged organ shortage, the consent of one person in the highest-ranking category is sufficient for organ donation to be lawful, regardless of the potential objection of someone in the same or lower-ranking class.[19]

2.9a In addition to stating the conditions that cadaveric organ donation can occur; the Act promulgates regulatory responsibility to the Human Tissue Authority (HTA). The HTA is the chief body responsible for regulating and licensing organisations with the permit to retain and use human materials for purposes under the Act and producing Codes of Practice, which provides guidance for health professionals in interpreting and practicing in accordance with the 2004 Act. For persons lacking capacity, a decision is based on the person's 'best interests' and the Court of Protection and HTA must approve any proposal.[20] Infringement of the 2004 Act can

[16] HTA 2004, s 4
[17] HTA 2004, s 4(6)
[18] HTA 2004, s 27(4)
[19] Price, 'The Human Tissue Act 2004' (n 9)
[20] Explanatory Notes to the HTA 2004, s6; Human Tissue Authority, 'Code of Practice 2' (2014).

result in a fine and up to 3 years imprisonment, unless it can be proven that the plaintiff 'reasonably believed' that appropriate consent had been given.[21]

2.9b With reference to section 3(6)(a) of the 2004 Act, organ retrieval can occur only if 'a decision of his to consent to the activity, or a decision of his not to consent to it, was in force immediately before he died…' Under the current framework, how is a person's decision to permit or disallow removal of their organs for donation formally confirmed? Transplant teams are required to check the NHS ODR to see if a consent decision had been given in this way.[22] In 2013/2014, 41% of donors were on the NHS ODR,[23] so it begs the question, under what circumstances of consent were the remaining 59% of donor organs donated? Appointment of NRs is comparatively rare, so it may be safe to conclude that in the majority of cases, it is surviving relatives that are approached for consent decisions to organ donation.

2.9c For those deciding not to consent, there is no system in which individuals can formally record their objection, so the issue raised here is how 'the decision of his not to consent to it' is communicated to organ retrieval teams, especially if the deceased did not previously express views regarding organ donation to their family. Under the current statute, there is no imperative for those in a qualifying relationship to make a decision that takes into account what the deceased may have wanted, in the absence of an 'in force' decision by the deceased or appointed NR.[24] With this in mind, one can see how the incoherence around the meaning of 'appropriate consent' in the current statute creates confusion around whether it is acceptable for relatives to consent to organ retrieval from their dead relative; a decision that may be based on their own wishes, as opposed to the, admittedly, unknown wishes of the deceased.[25] Regardless of seemingly admirable motives behind permitting organ harvesting (i.e. to save the life of another), when their views and wishes are absent and not incorporated into the decision-making process as a consequence, it has been argued that this neglect for the views of the dead remains problematic.[26]

2.9d The majority of those who, before death, consent to organ donation do so through joining the ODR via the DVLA driving licence application (DLA) form, an initiative that was introduced in an effort to boost donor numbers[27]. This raises issues of whether this is the most informed and appropriate form of consent achievable, especially when compared to accepted professional standards of the

[21] HTA 2004, s 5(7)
[22] Human Tissue Authority, 'Code of Practice 2' para 100.
[23] NHS Blood and Transplant, 'Organ Donation and Transplantation: Activity Report 2013/2014' (2014) 117
[24] Price (n 19) 117.
[25] ibid.
[26] Sheelagh McGuinness and Margaret Brazier, 'Respecting the Living Means Respecting The Dead Too' (2008) 28 OJLS <http://ojls.oxfordjournals.org/content/28/2/297.full> accessed 10 April 2015
[27] NHS Blood and Transplant (n 21) 119.

consent process.[28] Notwithstanding, where a deceased prospective donor has consented to organ donation through joining the ODR, surviving relatives do not have a legal right to over-rule this decision. However, in practice, the HTA concedes that ODR registration does not create a legal obligation to organ retrieval, and there may be cases where retrieval is inappropriate.[29] This is perhaps due to the emotional as well as logistical practicalities of pursuing with organ retrieval in the face of ardent family objection.

2.9e In 2013/2014, 41% of families of potential organ donors objected to organ donation from a recently deceased relative and 119 families vetoed their intentions to donate.[30] This is surprising, considering the widespread public support for organ donation.[31] Clearly, support in principle is not demonstrated by support in reality. One of the most common reasons cited by families for organ donation refusal is uncertainty over the deceased's wishes.[32] This is understandable. As mentioned in paragraph 2.9e, the most utilised method of joining the ODR is through the DLA. One can imagine that when completing this form, there is uncertainty over whether the individual is fully informed here, and has reflected on their decision with relatives. Indeed, estimates suggest 50% of those that join the register discuss their decision with family members.[33] At the time when a decision has to be made by the surviving family following the unexpected death of a loved one, this may be the time when relatives discover their loved one's intentions regarding organ donation, which may come as an unsettling surprise, subsequently increasingly the likelihood of family refusal.

2.9f The 2004 Act in its present form is inadequate in addressing the need for wider involvement and participation of close family and friends when it comes to both the prospective donor who wishes to consent and individuals wanting to object, when making a decision around organ donation. This is especially significant considering

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[28] General Medical Council, 'Consent: patients and doctors making decisions together' (2008); Dale Gardiner, 'An Unethical Marriage – The Human Tissue Act and the UK NHS Organ Donor Register' (2007) 8 Journal of the Intensive Care Society <http://inc.sagepub.com/content/8/2/42.full.pdf+html> accessed 24 April 2015.

[29] Human Tissue Authority (n 20) para 102.

[30] NHS Blood and Transplant (n 21) 123

[31] Organ Donation and Transplantation, 'Consent Authorisation' <www.odt.nhs.uk/donation/deceased-donation/consent-authorisation/> accessed 18 April 2015

[32] Margaret Sque, Tracey Long, Sheila Payne, 'Organ Donation: Key Factors Influencing Families' Decision-Making' (2005) 37 Transplantation Proceedings <www.sciencedirect.com/science/article/pii/S0041134504013284#> accessed 20 April 2015; Margaret Sque and others, 'Why relatives do not donate organs for transplants: 'sacrifice' or 'gift of life'?' (2008) 61 Journal of Advanced Nursing <http://onlinelibrary.wiley.com/doi/10.1111/j.1365-2648.2007.04491.x/full> accessed 20 April 2015; Gwilym Webb and others, 'Factors Affecting the Decision to Grant Consent for Organ Donation: A Survey of Adults in England' (2015) Transplantation <http://journals.lww.com/transplantjournal/Abstract/onlinefirst/Factors_Affecting_the_Decision_to_Grant_Consent.97872.aspx> accessed 20 April 2015

[33] Angus Vincent and Lesley Logan, 'Consent for Organ Donation' (2012) 108 British Journal of Anaesthesia < http://bja.oxfordjournals.org/content/108/suppl_1/i80.long> accessed 20 April 2015

the central role that relatives often play in the organ retrieval process once someone dies, regardless of ODR status. Tensions can arise between the rights of transplant teams and those of the family, and the law and accompanying HTA Codes of Practice currently fail to be decisive here. An ethical and moral quandary arises, that results in suboptimal donation rates, consequently failed transplant candidates and perpetually ill-defined boundaries of the obligations of medical practitioners and the surviving family regarding where duties should lie with respect to the intentions of the recently deceased whose dying wish was to give the 'gift of life'.

SECTION 3: The Reform Proposal

3.1 The reform to be proposed is an amendment to Section 3 (6) paragraphs (a) and (b) of the 2004 Act, regarding what is deemed 'appropriate consent' for those who want to make a decision to consent and those who do want to consent to organ retrieval for transplantation. This will see the introduction of the Organ Transplantation Decision Register (OTDR), which will require all adults (aged 18 and over) to record a decision on cadaveric organ retrieval. As part of this process, there will also be a requirement to register an Organ Transplantation Decision Advocate (OTDA) who would be contacted to confirm and uphold the recorded wishes of the registrant, following their death.

3.2. The amended subsection would have wording to this effect:

'Where the person concerned has died and the activity is not one to which subsection (4) applies, "appropriate consent" means:

a) if a decision of his to consent to the activity, or a decision of his not to consent to it, was registered on the OTDR;
b) and their registered OTDA confirm(s) the recorded wishes of the person concerned.
c) if paragraphs (a) and (b) do not apply, the consent of a person who stood in a qualifying relationship to the individual concerned, before their death.'

3.3 The current ODR would be overhauled with the OTDR in its place, creating an element of mandated choice (MC). MC has been mooted as a law reform option for improving organ donation rates.[34] It is hoped that the change in wording from 'donor register' to 'transplantation decision register' will be more representative of a reformed system, that will accommodate both prospective organ donors and individuals who wanted to formally object to such practices for various reasons e.g. on religious grounds.[35]

[34] Aaron Spital, 'Mandated Choice: A Plan to Increase Public Commitment to Organ Donation' (1995) 273 Journal of the American Medical Association < http://jama.jamanetwork.com/article.aspx?articleid=386916> accessed 11 April 2016

[35] Gurch Randhawa and others, 'Religion and Organ Donation: The Views of UK Faith Leaders' (2010) 51 Journal of Religion and Health < http://link.springer.com/article/10.1007/s10943-010-9374-3> accessed 20 April 2015

3.4 Just before a person's 18th birthday, they would be posted information on the new register and an invitational letter to register their intentions on the OTDR, once they turn 18. The individual would then record their intentions online on the new register. When registering intensions, they would be given the following decision options, from which only one can be chosen:

i. I consent to my organs to be donated for transplantation purposes.
ii. I do not consent to organ donation for transplantation purposes.
iii. Undecided.

Individuals selecting option i would be given the mandatory task of either donating any of their organs, or selecting certain organs/tissue they want to donate in accordance with options available on the current ODR, simultaneously indicating organs they categorically do not want to donate.[36] People selecting option ii would be given the non-mandatory option of recording (verbatim) their reason for objection.

3.5 Despite widespread public support for organ donation, it would be anticipated that a small minority of individuals would be undecided on this issue, whether it be due to not wanting to make a decision or genuine uncertainty on this subject. Therefore, an 'Undecided' option would be provided. If selected, organ procurement would not be lawful following their death. The same action would follow if someone died, and were not registered on the OTDR. The provisions for those lacking capacity would be unchanged.

3.6 Regardless of consent decision, the individual would have to register up to two OTDAs, who must be adults. Selected OTDAs would be notified and invited (via post and/or email, as selected by the registrant) to verify acceptance of the registrant's decision and their OTDA role online. They would be unable to change the recorded decision of the registrant. If OTDA selection and verification was not completed within 48 hours, the intentions of the registrant would be withdrawn, and they would have to re-record their intentions, and be given another 48 hours to complete OTDA selection and verification.

3.7 The short interval between registering intentions and OTDA nomination will hopefully encourage prior discussion and deliberation with close relatives regarding their decision, before recording intentions on the OTDR. This would encourage prompt OTDA fulfilment following formal notification. OTDAs would ideally be a family member in the first instance, or someone in a friendship of longstanding. If the chosen OTDA initially accepts but later on revokes their role, the registrant would be notified and given time to assign a new advocate.

[36] NHS Blood and Transplant, 'Register now – step 2 of 3' <https://www.organdonation.nhs.uk/how_to_become_a_donor/registration/registration_form.asp > accessed 22 April 2015

3.8 To overcome issues of online accessibility, 'OTDR Hubs' could be setup within common points of access for primary and secondary care, such as GP surgeries, pharmacies and outpatient clinic waiting areas within hospitals, with supervision of these areas falling under the remit of Specialist Nurses in Organ Donation (SNODs), who already play a crucial role in the NHS transplant service.

3.9a People would be able to change a recorded decision and OTDAs as often as they wish; the latest decision as expressed on the OTDR and confirmed by their OTDA would prevail. Those who continually do not record a decision would be reminded at reasonable intervals. In addition, those who do not change their decision within 11 months of a calendar year since last recording their decision would be notified to renew their decision. At the time of initial invitation, an individual alphanumeric code would be assigned, allowing one to securely access and change their register information, with additional password protection, ensuring confidentiality and security.

3.9b Following death, the OTDR would be consulted and the OTDA contacted (if more than one OTDA is named, called concurrently or in a stipulated order) by the transplant team to confirm the deceased's recorded intentions. Therefore, it would be essential for the new register to be easily accessible by health professionals to ensure the communication of accurate and up-to-date information pertaining to recorded intentions and OTDA contact details. In cases of intended organ donation, the assent of the OTDA would be sufficient. However, we would anticipate cases where the OTDA is not contactable or they now revoke the decision in response to pressure imposed by surviving relatives. In these situations, the fact that there is a recorded decision and OTDA support in force before death would be sufficient justification to proceed with organ retrieval. However, the option of family veto would not be unavailable, if the circumstances were deemed inappropriate. It is anticipated that this would be the situation in only a handful of cases.

3.9c The reforms would symbolise a notable change to the way one becomes an organ donor, and would therefore require concerted efforts to publicise these changes. To facilitate implementation, an educational campaign mediated through print, audio-visual and social media would be required before, throughout and following the amendment process to publicise the changes in law and what that means to the majority of the British public who want to, at least in principle, become organ donors. It would also be necessary for this campaign to focus on promoting impassioned discussion and engagement among family and friends around the issue of organ donation, in a similar vain to the 'Share your life, Share your decision' campaign launched in the USA in the 1990s.[37]

[37] Vincent and Logan (n 31)

3.9d Drawing inspiration from the new 'opt-out' statute to govern organ donation in Wales from December 2015, there are specific provisions that place responsibility on health ministers to educate the public on the new changes and how to become organ donors.[38] This could become a subsection of the amended section within the 2004 Act, depending on rates of public approval of this health education strategy. Due to the planned changes in Wales, it should be noted that these amendments would only be in effect in England and NI. There would need to be further political reflection to ensure these reforms and the new Welsh statute could work harmoniously in legal and geopolitical terms. Furthermore, foreign nationals entering England and NI, with these new reforms in place, would have to be residents in the UK for more than 12 months for the new mandate to be applicable.

SECTION 4: Justification for the Proposal

4.1 The provisions in current law relating to organ donation appear to be an after-thought compared to the extensive coverage and statutory weight given to other related uses of donated tissues and organs e.g. for research and education, perhaps understandable considering the scale of deplorable practices revealed at Alder Hey. It is debateable whether legal and ethical dilemmas surrounding the removal of organs for transplantation purposes were given the focussed attention that one might feel this pressing health care issue deserves. Compared to current law, the reforms would be effective in demystifying the ambiguity of 'appropriate consent' and deciphering the paradox between legal principles and the reality of next-of-kin authority in this area of clinical practice.

4.2 Looking at the broader implications for health care practice, these reforms would herald the introduction of a more transparent and fully informed consent model, that better promotes the autonomy of those wanting to express a decision regarding organ donation, compared to the current HT Act and accompanying ODR that, at least superficially, appears to be an adequate framework for willing donors, but significantly lacks options for those wanting to object to this process. It would be the first formal register of its kind that allows recording of explicit objection to organ donation.

4.3 Opinion polls show that around 90% of the public support organ donation. However, only 60% consent to organ donation from a loved one.[39] Understandably, approval in principle is often different to approval in practice, when the dilemma is actually encountered. Through the introduction of a new type of register, the opportunity for further discussion in a 'separate deliberative space' prior to joining the register, and perhaps more importantly, apart from the time of a loved one's

[38] HTWA 2013, s 2; James Douglas and Antonia Cronin, 'The Human Transplantation (Wales) Act 2013: an Act of Encouragement, not Enforcement' (2015) 78 MLR <http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12117/full> accessed 14 April 2015

[39] Organ Donation and Transplant (n 29).

death, will be encouraged and more conducive to rational discussions and decision-making regarding one's wishes around organ donation.[40]

4.4 It is hoped that concerns around organ donation decisions will be reflected on in a supportive and open forum with relatives that are likely to be instrumental in the decision-making process. Studies have established that families are more likely to donate the organs of a loved one if their wishes are known before their demise. The recent transplantation activity report from NHS Blood and Transplant stated that when donor wishes are known, consent rates increase to 89%, compared to the 59% overall consent rate recorded in the year 2013/2014.[41] This data suggests that the consent system proposed by these reforms could have the potential to increase organ donation rates substantially, in a more socially and ethically palatable way than other proposed systems such as presumed consent.[42]

4.5 In addition to relieving the emotional strain placed on families to make a prompt decision due to the time-critical sensitivities of organ retrieval, it is hoped that health professionals will be empowered to respect the wishes of the dying patient and the grieving family, who they have the indubitable duty of caring for both. In the reformed consent system, because the family will have been better able to discuss organ donation issues at a time separate to the time around death, this will hopefully benefit all stakeholders, from the anxious clinician to the new widow. The reforms are unlikely to reduce all family tensions, but it is hoped that prior discussion, inspired by these reforms, will encourage understanding and upholding of one's last dying wishes, addressing the issue of family veto in the process.

4.6 Professional support for a form of MC as proposed above comes from the Royal College of Physicians who commented that research and governmental consideration of this policy is lacking, and deserves further study due to its potential in invigorating current organ donation policy.[43] Furthermore, it was reported in 2012 following an NHSBT public opinion survey, that almost half of respondents would support a move to MC, showing that a substantial proportion of the population would be receptive to these proposals.[44]

4.7 MC is used in other areas of public policy in other jurisdictions such as Australia, where it is used as a way of ensuring that eligible citizens vote in elections, with a

[40] Jurgen de Wispelaere and Lindsay Stirton, 'Advance commitment: an alternative approach to the family veto problem in organ procurement' (2010) 36 Journal of Medical Ethics <http://jme.bmj.com/content/36/3/180.full> accessed 10 April 2015
[41] NHS Blood and Transplant (n 28)
[42] Poonam Chouhan and Heather Draper, 'Modified mandated choice for organ procurement' (2003) 29 Journal of Medical Ethics <http://jme.bmj.com/content/29/3/157.full> accessed 20 April 2015
[43] John Saunders, 'Bodies, organs and saving lives: the alternatives' (2010) 10 Clinical Medicine <www.rcplondon.ac.uk/sites/default/files/clinmed10.1_26-9.pdf> accessed 25 April 2015
[44] Stephen Adams, "Force people to state if they want to be organ donors" *The Telegraph* (9 November 2012) <http://www.telegraph.co.uk/news/health/news/9668040/Force-people-to-state-if-they-want-to-be-organ-donors.html> accessed 25 April 2015

financial sanction for those who refuse. However, the proposed form of MC lacks sanctions for not making a decision. This lacuna is deliberate. Considering how delicate this subject can be within a family, the external influence of a potential sanction could jeopardise the integrity of the deliberation process, undermining the improved autonomy that these reforms hope to encourage.

Conclusion

5.1 In summary, we have highlighted an area of current health care law that requires reform and proposed a way in which law reform could bring about real, tangible change to the reality of the present organ shortage. The introduction of the new, proposed register and decision advocate requirement could act as a change that carries a significance that transcends the legal, economic, moral and ethical complexities inherent in rationing scarce public health resources on a national scale. It would signify a marked shift in public perception that fosters greater public engagement in this health care issue, with a view to improving the regrettable reality of the masses that die whilst on the waiting list for an organ and reducing the need for the increasingly common practice of living organ donation. [45]

5.2 Introduction of these reforms would bring organ transplantation up to par with other purposes in the Act that have more coherent consent criteria, such as anatomical examination, thus emboldening the autonomy of the deceased and those closest to them, without compromising the necessary ethical strides made since Alder Hey.

[45] NHS Blood and Transplant, 'Organ Donation and Transplantation: Activity Report 2013/2014' (2014).

Negligently Caused Psychiatric Harm: Recovering Principle and Fairness after the Alcock-Up at Hillsborough

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Abstract

This article argues that the law concerning pure psychiatric harm caused by negligence has been in a state of disrepair since the decision in *Alcock*. It is contended that the present unsatisfactory situation must be ameliorated in order to give rise to a principled and fair law. Suggestions that the courts should refuse to recognise psychiatric harm as actionable damage are dismissed as unjust and unnecessary. Instead, this article suggests that legislative reform is the best solution and can be achieved without opening the floodgates. Recommendations are made to remove the unprincipled and arbitrary distinctions between primary and secondary victims and the requirement for sudden shock, as well as continuing to use expert medical evidence to help determine causation for psychiatric injury. This article concludes that implementing such changes would lead to a fairer and more balanced situation whereby deserving claimants have a greater chance of succeeding in their actions and, owing to the duty of care requirements, tortfeasors are not subjected to limitless liability.

Introduction

The courts have developed the law on psychiatric illness ever since it was first established that psychiatric harm caused by negligence could give rise to actionable damage.[1] The current approach has been greatly maligned for its unfairness since the Hillsborough Stadium disaster.[2] Despite proposals by the Law Commission almost two decades ago,[3] Parliament has opted not to introduce

[1] *Dulieu* v *White & Sons* [1901] 2 KB 669 (HC) 675 (Kennedy J). The plaintiff, a pregnant barmaid, prematurely gave birth after the shock of seeing an out of control horse and cart crash through a window of the pub where she was working. She was awarded damages for psychiatric harm because, though it did not eventuate, her physical injury was foreseeable as her shock arose "from a reasonable fear of immediate personal injury".

[2] On 15 April 1989, at an FA Cup semi-final between Liverpool and Nottingham Forest, South Yorkshire Police negligently directed an excessively large number of Liverpool supporters to Hillsborough's West Stand. The overcrowding caused a crush that ultimately led to 96 deaths and 766 non-fatal injuries. Relatives of those injured at Hillsborough – parents, siblings and grandparents – and fiancés were unsuccessful in their claims for psychiatric harm in *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL).

legislation[4] to reform the law on psychiatric illness. The government has found it preferable for the courts to develop the law in the area, with concerns of legislation "running the risk of imposing rigid requirements which are not readily able to accommodate developments in medical knowledge and jurisprudence, and… opening the way to speculative and inappropriate claims".[5]

An alternative solution to ameliorate the present unsatisfactory situation is for the courts to refuse to recognise claims for psychiatric illness[6] because "no reasonable boundaries for the cause of action [can] be found, and this [is] an embarrassment to the law".[7] This article will argue that such an approach would be an even greater 'embarrassment' to justice, since deserving claimants would then have no rights at all. In light of the injustice suffered under the existing law, this article will contend that the best way forward for the law on negligently caused pure psychiatric harm[8] is for it to be codified in statute,[9] thus removing the harsh limitations imposed on claimants to give rise to a clearer, more coherent and principled system.[10]

Common Law Development of Psychiatric Harm: Unsatisfactory

The Tort of Negligence: Unbalanced

A successful claim for psychiatric harm caused by negligence requires the claimant to prove that the four elements of the tort have been satisfied – that the defendant owed[11] and was in breach of[12] their duty of care and that the psychiatric illness was

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[3] Law Commission, *Liability for Psychiatric Illness* (Report No 249, 1998) and its accompanying Draft Negligence (Psychiatric Illness) Bill 1998 at 127-34.
[4] Currently the Negligence and Damages Bill 2015-16, a Private Members' Bill presented to Parliament on 13 October 2015, has been nominated for its second reading in the House of Commons on 22 April 2016. See 'Negligence and Damages Bill 2015-16' <http://services.parliament.uk/bills/2015-16/negligenceanddamages.html> accessed 1 April 2016.
[5] Department for Constitutional Affairs, *The Law on Damages* (CP 9/07, 2007) 41.
[6] ibid 39 "the view that the possibility of recovery for psychiatric illness should be denied altogether".
[7] Jane Stapleton, 'In Restraint of Tort' in Peter Birks (ed), *The Frontiers of Liability* (Volume 2, Oxford University Press 1994) 83-102, 95.
[8] This article will focus its attention on pure psychiatric harm, omitting discussion of liability in such areas as stress at work or intentional infliction of psychiatric harm.
[9] (n 5) 39 "the view that liability should be treated in exactly the same way as liability for physical injury".
[10] Statutory reform has been championed by several scholars. See Harvey Teff, 'Personal Injury: Righting Mental Harms' (2009) 159 New Law Journal 1243-4, 1244; Kay Wheat, 'Nervous Shock: Proposals for Reform' (1994) Journal of Personal Injury Litigation 207-14, 214; Michael Jones, 'Liability for Psychiatric Illness – More Principle, Less Subtlety?' (1995) 4 Web Journal of Current Legal Issues <http://www.bailii.org/uk/other/journals/WebJCLI/1995/issue4/jones4.html> accessed 1 April 2016.
[11] The 'neighbour principle' was established by Lord Atkin in *Donoghue* v *Stevenson* [1932] AC 562 (HL) 580: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

caused directly by the breach,[13] subject to the psychiatric harm not being too remote a consequence of the breach.[14] Proving that there is a duty of care has often been very difficult and while different cases disclose different criteria, the three general elements established in *Caparo Industries Plc* v *Dickman*[15] were foreseeable harm, in a proximate relationship, where it is fair, just and reasonable to impose the duty.[16]

The courts have imposed additional taut restrictions to limit claims, requiring a medically recognised psychiatric illness[17] to arise[18] as a result of sudden shock[19] caused by a single event.[20] Different restrictions apply, dependent on whether the

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[12] The 'reasonable man' standard was propounded by Baron Alderson in *Blyth* v *Birmingham Waterworks Co* (1856) 11 Ex 781 (CA) 784: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

[13] The 'but for' test in *Barnett* v *Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (HC) illustrates that factual causation can be satisfied on the balance of probabilities where the claimant would not have suffered loss 'but for' the defendant's negligence.

[14] The test of remoteness was established by Viscount Simonds in *Overseas Tankship (UK) Ltd* v *Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388 (PC) 422-3: "It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour".

[15] [1990] 2 AC 605 (HL).

[16] ibid 617-18 (Lord Bridge).

[17] *Hinz* v *Berry* [1970] 2 QB 40 (CA) 43 (Lord Denning MR): "Somehow or other the court has to draw a line between sorrow and grief for which damages are not recoverable, and nervous shock and psychiatric illness for which damages are recoverable." Mrs Hinz was entitled to recover for morbid depression after seeing Mr Berry's car crash into her family's Dormobile, killing her husband and injuring her children.

[18] Guidance is provided in *Hatton* v *Sutherland* [2002] EWCA Civ 76, [2002] ICR 613, 618 with Hale LJ noting that "there is now a considerable degree of international agreement on the classification of mental disorders and their diagnostic criteria, the two most commonly used tools being the most recent American Diagnostic and Statistical Manual of Mental Disorders, the DSM-IV (1994) [now the DSM-5 (2013) – see 'History of the DSM' (*American Psychiatric Association*) <https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm> accessed 1 April 2016] and the World Health Organisation's ICD-10 Classification of Mental and Behavioural Disorders (1992) [the ICD-11 will be finalised in 2018 – see 'International Classification of Diseases (ICD) Information Sheet' (*World Health Organization*) <http://www.who.int/classifications/icd/factsheet/en/> accessed 1 April 2016]." The DSM-5 is the standard classification used in the United States; the ICD-10 is the standard classification used in the United Kingdom.

[19] "[T]he sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind" in *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL) 401 (Lord Ackner).

[20] A 'single shocking event' was given a rare flexible interpretation by the Court of Appeal in *North Glamorgan NHS Trust* v *Walters* [2002] EWCA Civ 1792, [2003] PIQR P16 P232. Ms Walters was entitled to recover for her pathological grief reaction after negligent misdiagnosis of her son's hepatitis caused him to have a major epileptic seizure leading to a coma and irreparable brain damage and his life support being withdrawn after 36 hours. Liability could be imposed since Ms Walters had been present for the duration of the 36 hours, which was held to constitute one shocking event. *North Glamorgan NHS Trust* v *Walters* [2002] EWCA Civ 1792, [2003] PIQR P16 P247 (Ward LJ) "It is a seamless tale with an obvious beginning and an equally obvious end. It was played out over a period of 36 hours, which for her both at the time and as subsequently recollected was undoubtedly one drawn-out experience." However, *Walters* is the exception to the rule. In *Taylorson* v *Shieldness Produce Ltd* [1994] PIQR P329 (CA) Mr and Mrs Taylorson could not recover for the grief they suffered following a 3-day period where they had seen their son unconscious in hospital before his life support machine was switched off. McCowan LJ at P335 agreed with Kennedy J at page 9F of his judgment, that "these

claimant participated in the event as a primary victim or witnessed the event as a secondary victim.[21]

Primary Victims: Unmoved

A claimant will be considered a primary victim if they have suffered shock after being involved in an event "either mediately or immediately, as a participant".[22] In *White* v *Chief Constable of South Yorkshire Police*,[23] the police officers on duty at Hillsborough who suffered post-traumatic stress disorder after seeing supporters dead and injured were ultimately not regarded as primary victim rescuers because they were not in physical danger.[24] *White* was significantly influenced by policy justifications as it was decided seven years after *Alcock* v *Chief Constable of South Yorkshire Police*,[25] where the bereaved were denied compensation for their psychiatric illnesses as secondary victims.[26] Lord Hoffmann said that rescuers should not be treated favourably as primary victims when they are not in physical danger since "such an extension would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice"[27] if compensation was only given to those arguably less deserving claimants. This author contends that Lord Hoffmann's reasoning here was correct in light of the vexed *Alcock* decision and given that "defendants cannot be expected to compensate the world at large".[28] Hypothetically, a House of Lords ruling that favoured the police officers in *White* would have caused additional problems in

illnesses on the medical evidence, cannot be attributed to one shocking event. They grew out of a whole sequence of events extending over an appreciable period of time, and the law offers no relief for persons so affected". In *Liverpool Women's Hospital NHS Foundation Trust* v *Ronayne* [2015] EWCA Civ 588, [2015] PIQR P20 P337 Mr Ronayne could not recover for the adjustment disorder he suffered after a negligent hysterectomy on his wife caused her to develop septicaemia and peritonitis, making her body swell to the extent that she looked like 'the Michelin Man'. Tomlinson LJ at P354 distinguished *Walters* to find that the 36-hour period where Mrs Ronayne's appearance changed did not constitute a single shocking event; rather there were a series of events over a period of time. For recent commentary on *Ronayne* and criticism of the sudden shock requirement see Andrew Burrows and John Burrows, 'A Shocking Requirement in the Law on Negligence Liability for Psychiatric Illness: *Liverpool Women's Hospital NHS Foundation Trust* v *Ronayne* [2015] EWCA Civ 588' (2016) Medical Law Review 1-8.

[21] *Alcock* (n 19) 407 (Lord Oliver).

[22] ibid.

[23] [1999] 2 AC 455 (HL).

[24] *White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) 465 (Lord Griffiths): "If the rescuer is in no physical danger it will only be in exceptional cases that personal injury in the form of psychiatric injury will be foreseeable for the law must take us to be sufficiently robust to give help at accidents that are a daily occurrence without suffering a psychiatric breakdown".

[25] [1992] 1 AC 310 (HL).

[26] In *White* (n 24) Lord Steyn at 498 also referred to the fact that "police officers who are traumatised by something they encounter in their work have the benefit of statutory schemes which permit them to retire on pension. In this sense they are already better off than bereaved relatives who were not allowed to recover in the *Alcock* case".

[27] *White* (n 24) 510.

[28] *McLoughlin* v *O'Brian* [1983] 1 AC 410 (HL) 422 (Lord Wilberforce).

society.[29] The public would have lost respect in the judicial system and found it deplorable had preferential treatment been awarded to particular classes – police officers in *White*, but not relatives in *Alcock* – for the same type of harm caused from the same disastrous event.

The general principles of negligence apply, meaning that rules relating to liability for psychiatric illness are no different from the rules which apply to claimants who have suffered physical injury.[30] The 'eggshell skull rule'[31] thus entitles primary victims who are peculiarly vulnerable to psychiatric illness to recover for any additional psychiatric injury that they suffer when psychiatric harm is foreseeable in a person of ordinary fortitude.[32] The House of Lords in *Page* v *Smith*[33] confusingly distorted this legal principle by allowing primary victims to succeed in claims for psychiatric injury when physical injury is foreseeable, even where no physical injury actually occurs. Following *Page*, a successful claim for psychiatric harm by a primary victim is not required to show foreseeability of psychiatric injury; foreseeability of physical injury suffices.[34]

Primary victims are thus not constrained, as secondary victims are, by having to prove foreseeability of psychiatric harm. This situation is unsatisfactory since both primary and secondary victims can suffer from the same recognised psychiatric condition, yet the courts have upheld a stance that is more favourable to primary

[29] These problems would have manifested themselves had the Court of Appeal decision in *White – Frost* v *Chief Constable of South Yorkshire Police* [1998] QB 254 (CA) – not been overturned. *Frost* ruled in favour of four police officers on duty at Hillsborough for their negligently caused psychiatric injuries. The ruling prompted Peter Handford and Nicholas Mullany in 'Hillsborough Replayed' (1997) 113 Law Quarterly Review 410-17, 417 to caution that Australia and Canada's highest courts should "take due note of the *Frost* warning: avoid recent House of Lords decisions on psychiatric damage".

[30] *McLoughlin* (n 28) 433 (Lord Bridge). Psychiatric disorders "are no less real and frequently no less painful and disabling" than personal injuries.

[31] In *Smith* v *Leech Brain & Co* [1962] 2 QB 405 (HC) a widow was entitled to recover for her husband's death by cancer after his employer's negligence caused him to suffer a molten metal burn on his pre-malignant lip tissue. Although his cancer was not foreseeable, suffering burns in a molten metal factory were, thus liability extended to cover the additional harm. *Smith* v *Leech Brain & Co* [1962] 2 QB 414 (HC) (Lord Parker CJ): "It has always been the law of this country that a tortfeasor takes his victim as he finds him".

[32] In *Brice* v *Brown* [1984] 1 All ER 997 (HC) the claimant, who had a hysterical personality disorder, was entitled to recover for the disabling depressive illness she suffered after a road traffic accident caused by the defendant's negligence. Although the severity of her psychiatric illness was not foreseeable, suffering a psychiatric illness was, ergo liability stretched so that damages were awarded for the more severe harm.

[33] *Page* v *Smith* [1996] AC 155 (HL). The plaintiff successfully claimed damages after a road traffic accident caused by the defendant's negligence had not injured him physically but led to a recrudescence of his myalgic encephalomyelitis (or chronic fatigue syndrome).

[34] The rationale for abolishing the distinction was explained by Lord Lloyd in *Page* v *Smith* [1996] AC 155 (HL) 188: "In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different 'kinds' of personal injury, so as to require the application of different tests in law".

victims, who are less restricted and more likely to be successful in their claims than secondary victims witnessing the same shocking event.

Secondary Victims: Undermined

A claimant who suffers shock and a psychiatric illness from an incident that they were not directly involved in, such as another person's death, injury or imperilment,[35] may be able to recover damages if they can satisfy the requirements of a secondary victim. To do so, the claimant will have to surmount the high threshold control mechanisms applied in *Alcock* v *Chief Constable of South Yorkshire Police*,[36] which the courts have imposed to restrict liability towards secondary victims because of the greater potential number of claims that can be made compared with primary victims. In order for a secondary victim to succeed in their claim, it must be shown that psychiatric harm was foreseeable in a person of ordinary fortitude;[37] the 'eggshell skull rule' that applies to primary victims does not extend to secondary victims.[38]

The courts have established that a secondary victim must have a close tie of love and affection with the immediate victim, which is presumed between parents and children and spouses and fiancés,[39] but can also be proven evidentially by other relatives and friends.[40] A secondary victim must also be proximate in time and space

[35] *Alcock* (n 19) 407 (Lord Oliver). As "no more than the passive and unwilling witness of injury caused to others".
[36] [1992] 1 AC 310 (HL). The control mechanisms were originally advanced by Lord Wilberforce in *McLoughlin* v *O'Brian* [1983] 1 AC 410 (HL).
[37] In *Bourhill* v *Young* [1943] AC 92 (HL) a pregnant fishwife was unable to recover damages after hearing the defendant's negligently ridden motorcycle crash into a car and later seeing blood on the road caused her to suffer shock and a stillbirth. Lord Porter said at 117 that "The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm".
[38] In *McFarlane* v *EE Caledonia Ltd* [1994] PIQR P154 (CA) the plaintiff was unable to recover damages after his involvement in a rescue operation following the Piper Alpha disaster caused him to suffer shock and psychiatric harm. His two past episodes of depressive illness meant that he was probably more susceptible to psychiatric injury than the average man. Stuart-Smith LJ concluded at P166 that "Not only is there no finding that it was reasonably foreseeable that a man of ordinary fortitude and phlegm would be so affected by what he saw…but there is the finding that the plaintiff was probably not such a person. I think this is fatal to this submission".
[39] *Alcock* (n 19) 350 (Hidden J). "The category of persons to whom the duty of care is owed should not be extended beyond those having the closest of family ties, such as parent and child or husband and wife".
[40] Interpretations of close ties can produce somewhat inhumane results, particularly for siblings whose relationship is not presumed to indicate a close tie of love and affection. In *Alcock* (ibid) Brian Harrison lost two of his brothers but failed in his claim for psychiatric harm as he could not provide evidence of a particularly close tie of love or affection with his brothers. Thus "the crucial factor appears to be the *quality* of the relationship, not its label" per Jyoti Ahuja, 'Liability for Psychological and Psychiatric Harm: The Road to Recovery' (2015) 23 Medical Law Review 27-52, 48.

to the accident or its immediate aftermath.[41] Moreover, they must directly perceive the accident or its immediate aftermath with their own unaided senses.[42]

Public policy concerns have underlain the courts' imposition of strict control mechanisms. The courts have not wanted to relax restrictions for fear of the floodgates opening and numerous claims being made for psychiatric harm,[43] several of which may be fraudulent or speculative in the hope of earning compensation.[44] This may impose disproportionate liability on defendants in breach of their duty of care.

The control mechanisms that the courts have imposed on secondary victims have been rigidly applied in an arbitrary manner. Lord Hoffmann posited in *White* v *Chief Constable of South Yorkshire Police*[45] that "[n]o one can pretend that the existing law…is founded upon principle"[46] in light of the '*Alcock* criteria' for secondary victims. Hence the unprincipled requirements have not been fair, just and reasonable in imposing a duty, but have instead failed to give deserving secondary victims an equal chance of success[47] when seeking damages for a recognised psychiatric illness. The courts' restrictive approach unfairly prevents many claimants with debilitating psychiatric illnesses from being awarded damages for lack of overcoming the unduly harsh control mechanisms.

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[41] In *McLoughlin* v *O'Brian* [1983] 1 AC 410 (HL) the claimant was able to recover damages when the defendant lorry driver's negligence caused an accident which killed one of her children, injured two others and also injured her husband. Upon hearing of the incident around two hours later she immediately attended hospital and saw her family before treatment, which led to her shock, organic depression and personality change. The House of Lords extended the class of persons who could be proximate to an event to find that she was within the ambit of the accident's 'immediate aftermath'. However, the relatives in *Alcock* (n 39) who identified their loved ones in a temporary mortuary nine hours after the Hillsborough disaster were not adjudged to be proximate to its *immediate* aftermath.

[42] See Lord Ackner in *Alcock* (n 39). At 401 "the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind." Relatives' claims based on watching events unfold live on television were unsuccessful in *Alcock* as they did not constitute a direct perception, but rather showed the disaster through a third party cameraman. At 405 "Although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneous television broadcasts of what occurred cannot be equated with the "sight or hearing of the event or its immediate aftermath".

[43] This "pull yourself together" school of legal analysis deems psychiatric injury to be less worthy of compensation than physical injury – see Michael Jones, 'Liability for Psychiatric Illness – More Principle, Less Subtlety?' (1995) 4 Web Journal of Current Legal Issues <http://www.bailii.org/uk/other/journals/WebJCLI/1995/issue4/jones4.html> accessed 1 April 2016. Such an approach is bygone but was seen in *Victorian Railways Commissioners* v *Coultas* (1888) 13 App Cas 222 (PC) when the claimant was unable to recover compensation after a railway crossing gatekeeper negligently allowed the horse and carriage she was in to cross and narrowly avoid being hit by a passing train, with the fright of an impending collision causing her to suffer severe shock and a miscarriage. At the time, liability for psychiatric injury could only be established where there was physical injury.

[44] It should be noted that "while no assessment can be perfect, the chances of fraudulent claims not being spotted are minimal if appropriately trained expert witnesses are used" per Ahuja (n 40) 34. This, along with "[t]he scarcity of cases which have occurred in the past, and the modest sums recovered, give[s] some indication that fears of a flood of litigation may be exaggerated".

[45] [1999] 2 AC 455 (HL).

[46] ibid 511.

[47] Compared to primary victims.

A Potential Solution: Refusing to Recognise Psychiatric Harm as Actionable Damage

It has been suggested, most notably by Jane Stapleton,[48] that the "[in]coherent and morally [in]defensible"[49] situation under the current law[50] can be ameliorated by completely abandoning liability for the tort of negligently causing psychiatric illness.[51] Stapleton has advanced this as a potential solution because, she argues, the law in this area has "the silliest rules",[52] which are arbitrary and artificial and bring the law into disrepute.[53] According to this approach a future for tortious claims in the area is foredoomed since the present law is unsatisfactory and there are legitimate concerns that reform of the law may lead to vast increases in litigants claiming for psychiatric harm, which could prove costly and exacerbate their existing health problems.[54]

Such a proposal should be rejected outright. It would be inexplicable for the legal system to fail to offer any remedy to claimants who have suffered a recognisable psychiatric illness or impose liability on tortfeasors who have negligently caused psychiatric harm. Stapleton's view can be undermined from a social perspective based on her claim that tort law has a symbolic role in "vindicating certain values for society".[55] With respect to psychiatric illness it can be said that "serious disruption to peace of mind is no less worthy of community and legal support than physical injury to the body",[56] thus mental wellbeing must be regarded as an important social value. If tort law did not exist to offer protection in this area then the law would be re-ordering its priorities invidiously, belittling the significance of psychiatric illness and undermining "the growing social recognition of its often serious nature".[57]

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[48] James Stapleton, 'In Restraint of Tort' in Peter Birks (ed), *The Frontiers of Liability* (Volume 2, Oxford University Press 1994) 83-102.
[49] *White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) 500 (Lord Steyn).
[50] "[T]he law concerning liability for causing mental injury is in a dreadful mess" per Stephen Todd, 'Psychiatric Injury and Rescuers' (1999) 115 Law Quarterly Review 345-50, 349.
[51] "Should not our courts wipe out recovery for pure nervous shock…?" per Stapleton (n 48) 95-6.
[52] ibid 95.
[53] ibid. Stapleton argues that instead of enhancing victims' rights to claim damages for psychiatric injury, a fairer and more efficient approach is to adopt a wholesale reform of the compensation system for personal injury.
[54] ibid 95. Stapleton raised concerns that the prospect of compensation for grief could act as a "powerful disincentive to rehabilitation" with feelings of anger aggravated by adversarial legal processes.
[55] ibid 83.
[56] Nicholas Mullany and Peter Handford, *Tort Liability for Psychiatric Damage* (Sweet & Maxwell 1993), 304.
[57] Harvey Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' (1998) 57(1) Cambridge Law Journal 91-122, 95. At 91: "It would be absurd to contend that [psychiatric] harm is somehow intrinsically less serious than physical injury".

Renouncing a cause of action for psychiatric illness would send the law into an abyss,[58] diminishing justice for claimants who would have absolutely no rights in claiming damages. In order to administer justice to those making claims for psychiatric illness, it is imperative that reasonable boundaries are established.[59]

A Potential Solution: Legislative Reform of Negligently Caused Psychiatric Harm

Legislation on psychiatric harm could be the most effective means of finally resolving some of the problems associated with the current unprincipled law[60] and the "convoluted rules that defy logic, medical understanding and legal principle".[61] Teff, among others supporting legislative intervention,[62] has suggested that "[l]egislation would be more effective [than court-led reform] in [producing a coherent, comprehensive framework and] signalling a commitment to enhanced emotional wellbeing".[63] However, any proposal for reform must be argued on stronger bases than the Draft Negligence (Psychiatric Illness) Bill 1998[64] in order to convince Parliament to put the law on psychiatric illness on a statutory footing. A fusion of the legal and medical professions could go some way towards solving the problem, so that expert evidence is first given by medical professionals to confirm psychiatric harm before the courts decide – using their relatively wide scope – whether it is fair, just and reasonable to impose a duty of care and sanction responsibility for the psychiatric harm caused.[65]

Duty of Care and Reasonable Foreseeability of Psychiatric Harm

[58] Stapleton (n 48) 95 contends that any recovery for grief should be denied because "the boundary between normal and pathological grief is of virtually no significance for medical treatment" ergo "medical opinion may define 'pathological grief' much more loosely than the law would find tolerable." Jyoti Ahuja, 'Liability for Psychological and Psychiatric Harm: The Road to Recovery' (2015) 23 Medical Law Review 27-52, 38 contests Stapleton's argument, stating that "[t]he distinction [between normal and pathological grief] is crucial for psychiatrists, and, as with most diagnostic categories in general, is deliberately left ambiguous to facilitate complex clinical judgments".

[59] Teff (n 57) 95 ""reasonable", albeit not perfect, boundaries for "nervous shock" claims can be established".

[60] *McLoughlin v O'Brian* [1983] 1 AC 410 (HL) 431 (Lord Scarman). "There is, I think, a powerful case for legislation".

[61] Harvey Teff, 'Personal Injury: Righting Mental Harms' (2009) 159 New Law Journal 1243-4, 1243.

[62] See: Kay Wheat, 'Nervous Shock: Proposals for Reform' (1994) Journal of Personal Injury Litigation 207-14, 214: "perhaps legislation is the only answer"; Michael Jones, 'Liability for Psychiatric Illness – More Principle, Less Subtlety?' (1995) 4 Web Journal of Current Legal Issues <http://www.bailii.org/uk/other/journals/WebJCLI/1995/issue4/jones4.html> accessed 1 April 2016: "reform must come in the form of legislation".

[63] Teff (n 61) 1244.

[64] Law Commission, *Liability for Psychiatric Illness* (Report No 249, 1998) 127-34.

[65] Such an approach should help to arrest fears of not being "able to accommodate developments in medical knowledge and jurisprudence" per Department for Constitutional Affairs, *The Law on Damages* (CP 9/07, 2007) 41.

Reasonable foreseeability is the sole legal test of liability. Foreseeability is determined by judges based on their foresight as "educated laym[e]n"[66] having considered evidence from expert psychiatrists. A more principled test of foreseeability could be established by restoring the principle in *The Wagon Mound (No 1)*[67] so that the essential factor in determining liability for the consequences of a negligent act is foreseeability of the direct damage complained of.[68] Thus, establishing a duty of care may require reasonable foreseeability that the claimant would suffer psychiatric illness as a result of the tortfeasor's negligent act. This might then include secondary victims particularly susceptible to psychiatric harm under the 'eggshell skull rule', provided other elements are satisfied. To facilitate the establishing of a duty towards secondary victims a statute could be introduced to incorporate a non-exhaustive list of elements, including the closeness of relationship between the secondary victim claimant and immediate primary victim.[69] Consideration could also be given to the secondary victim's temporal and physical proximity to the incident[70] and how the claimant perceived the incident[71] so that a remedy is provided where it is fair, just and reasonable to do so. This would give rise to a more principled and fairer test for establishing a duty of care.

Abolition of the Primary – Secondary Victim Divide

Infelicitously, the law on psychiatric illness lost any potential of being principled after the decision in *Alcock* v *Chief Constable of South Yorkshire Police*,[72] where the law took a wrong turn at the expense of claimants' rights.[73] The practical distinction

[66] *McLoughlin* (n 60) 432 (Lord Bridge).
[67] *Overseas Tankship (UK) Ltd* v *Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388 (PC).
[68] This is the approach taken in Australia, albeit without the need to take into account the views of expert psychiatrists: *Tame* v *New South Wales* [2002] HCA 35; 211 CLR 317 [115] (McHugh J): "It is for the tribunal of fact – be it judge or jury – to determine whether the defendant ought to have reasonably foreseen that his or her conduct might cause a person of normal fortitude to suffer psychiatric injury. It is not a matter for expert evidence".
[69] The Draft Negligence (Psychiatric Illness) Bill 1998 (n 64) para 3(4) suggested a list of relationships which conclusively had a close tie. Para 3(3) allowed other relationships to also show that they had a close tie.
[70] The Draft Negligence (Psychiatric Illness) Bill 1998 (n 64) did not require proximity to be shown. Jyoti Ahuja, 'Liability for Psychological and Psychiatric Harm: The Road to Recovery' (2015) 23 Medical Law Review 27-52, 45 suggests why: "Experiencing the pain associated with death is distressing, but facilitates the process of coming to terms with it" yet for those not proximate to the death of their loved one, recovery is especially hard and "[t]he law, paradoxically, might deny recovery to those who possibly suffer the greatest distress".
[71] The Draft Negligence (Psychiatric Illness) Bill 1998 (n 64) also removed the requirement for direct perception by sight or sound. In the Court of Appeal in *McLoughln* v *O'Brian* [1981] QB 599 (CA) Stephenson LJ at 610-11 questioned the soundness of the requirement for direct perception: "I cannot therefore regard the distinction between the direct perception of an accident or its consequences and learning of them from another as important".
[72] [1992] 1 AC 310 (HL).
[73] See Lord Hoffmann in *White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) 511: "It seems to me that in this area of the law, the search for principle was called off in *Alcock*...No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle".

made between primary victims and secondary victims[74] is problematic and irrational. Judges are now faced with the unenviable task of having to place claimants into either one of two descriptive categories.[75] These defective rules are applied or subjected to strained interpretation,[76] which has led to anomalies in case law.[77] In *W* v *Essex County Council*[78] foster parents were not struck out as primary victims after the council negligently put a child sex offender into their care who molested their four children. The House of Lords held that the parents would not be prevented from being primary victims if their psychiatric injury came from "a feeling that they brought the abuser and the abused together" or "a feeling of responsibility that they did not detect earlier what was happening".[79] It is suggested that the artificial barriers imposed on secondary victims should be removed to ensure fair treatment for those who ultimately suffer from the same type of psychiatric harm as primary victims.[80]

No Shock but Causation

The law should move forward by abrogating the requirement for sudden shock[81] in claims for psychiatric illness. [82] The present requirement is arbitrary and unsatisfactory since there are illnesses which may develop over a longer period of time, or following a series of events.[83] Lord Ackner noted in *Alcock* that "psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system"[84] has not yet been regarded as actionable damage. Adopting a flexible approach to shock causing a recognised psychiatric illness would be beneficial for secondary victims, especially those suffering psychiatric harm from the ongoing impact of supporting their loved ones as they suffer with physical injury. It must, however, be noted that a slackening in the requirement for sudden shock requires a stricter approach to causation. Expert medical evidence should be used as a first port of call to seek to establish a causative link and hold a tortfeasor liable for

[74] (n 72) 407 (Lord Oliver).
[75] Lord Slynn added to the confusion in the area by claiming in *W* v *Essex County Council* [2001] 2 AC 592 (HL) at 601 that "the categorisation of those claiming to be included as primary or secondary victims is not…finally closed. It is a concept still to be developed in different factual situations".
[76] Harvey Teff, 'Personal Injury: Righting Mental Harms' (2009) 159 New Law Journal 1243-4, 1243.
[77] *White* (n 73) 506 (Lord Hoffmann). "In their application to other secondary victims, the *Alcock* control mechanisms stand obstinately in the way of rationalisation and the effect is to produce striking anomalies".
[78] (n 75).
[79] *W* v *Essex County Council* [2001] 2 AC 592 (HL) 601 (Lord Slynn).
[80] The Law Commission, *Liability for Psychiatric Illness* (Report No 249, 1998) suggested at para 5.51 that "the distinction may be more of a hindrance than a help" and recommended at para 5.54 that "the courts should abandon attaching practical significance, in psychiatric illness cases, to whether the plaintiff may be described as a primary or a secondary victim".
[81] *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL) 401 (Lord Ackner). "[T]he sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".
[82] The Law Commission, *Liability for Psychiatric Illness* (Report No 249, 1998) supported the removal of the sudden shock requirement.
[83] See *Liverpool Women's Hospital NHS Foundation Trust* v *Ronayne* [2015] EWCA Civ 588, [2015] PIQR P20.
[84] (n 81) 401.

negligence where they have breached their duty of care and caused the claimant to suffer psychiatric harm.[85]

Policy: Debunking Floodgates Fears

"The Government is committed to tackling perceptions of a compensation culture"[86] was the opening line of the Department for Constitutional Affairs'[87] Consultation Paper on damages. While concerns could be legitimate about a rise in the number of claims having a multiplier effect with rises in insurance premiums jeopardising the affordability of insurance, the likelihood of the floodgates opening and a blame-and-claim society being created has been largely overstated.[88] The reality is that fears of a compensation culture are more of a moral panic than a disincentive to legislate with more relaxed qualifications.[89] Legislative reform should retain some policy restrictions[90] – particularly in establishing a duty of care – to filter out unmeritorious claims. By way of comparison, the introduction of a statute governing psychiatric illness in Australia which loosened the restrictions on actionable claims did not lead to the feared mass influx of claims,[91] demonstrating that such concerns may be "largely imaginary, certainly exaggerated".[92]

Conclusion

It is clear that the present law is highly unprincipled and offers little by way of justice for claimants – especially secondary victims – seeking compensation for their often severe psychiatric illnesses. However, a situation where the courts fail to recognise

[85] Establishing a causative link was all the more difficult when judges were reluctant "to internalize the medical insights into the causes of 'nervous shock' which are supposed to inform their judgment" per Harvey Teff, 'Liability for Psychiatric Illness after Hillsborough' (1992) 12(3) Oxford Journal of Legal Studies 440-52, 452. Though not a panacea, it is contended that medical determinations of psychiatric illness are essential in trying to establishing causation and should allow for clearer distinctions to be made as knowledge becomes more sophisticated.
[86] Department for Constitutional Affairs, *The Law on Damages* (CP 9/07, 2007) 8.
[87] Department for Constitutional Affairs responsibilities were taken over by the Ministry of Justice on 9 May 2007.
[88] Though *McLoughlin* v *O'Brian* [1983] 1 AC 410 (HL) relaxed requirements which might have opened the floodgates, Desmond Greer in 'A Statutory Remedy for Nervous Shock?' (1986) 21 Irish Jurist 57-94, 77 referred to an informal survey four years later which found that none of ten major insurance companies questioned had had any drastic rises in claims for psychiatric harm.
[89] "The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a flood of litigation may be exaggerated" in *McLoughlin* (ibid) 421 (Lord Wilberforce). Following the Hillsborough disaster, the only strangers (people lacking a connection to a primary victim) to bring claims for psychiatric harm were the police officers in *White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL).
[90] "[T]he "floodgates argument", requires special policy limitations to be imposed over and above the test of reasonable foreseeability" per Law Commission, *Liability for Psychiatric Illness* (Report No 249, 1998) para 6.8.
[91] The fear "is largely speculative, and 'promoted by the often hyperbolic rhetoric of defendants and the… prejudice of judges'" per John Fleming, Review of '*Tort Liability for Psychiatric Damage* by Nicholas J Mullany and Peter R Handford' (1994) 2 Tort Law Review 202-4, 204.
[92] ibid).

claims would offer no justice to those suffering psychiatric harm, since they would have no avenue to be recompensed for the negligent harm inflicted on them. The best way to ameliorate the current unsatisfactory situation is for negligently caused psychiatric harm to be codified in statute, removing the unprincipled and arbitrary distinctions between primary and secondary victims and the requirement for sudden shock and continuing to use psychiatrists to help determine causation for psychiatric injury. This would lead to a fairer and more balanced situation whereby deserving claimants have a greater chance of succeeding in their actions and, owing to the duty of care requirements, tortfeasors are not subjected to limitless liability.

Informed Consent and Medical Paternalism: A Prominent Shift in the Paradigm of the Doctor-Patient relationship

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Abstract

Autonomy, or the right to decide for oneself, is synonymous with human dignity and are the foundational pillars of human rights. While autonomy in itself is a daedalian notion that fleshes out into a full canvas of the human being, it is now expected and understood that in the medical context, patients should have the basic right to make informed choices on what he or she believes to be the best medical procedure in line with his or her own objectives.

Yet Bolam evinces that this has not always been the case; that instead medical paternalism has had the mastery of the Courts and indeed of the patients since McNair J's prominent judgment. It took the Courts half a century to finally recognize the value of patient autonomy in Montgomery, rehabilitate the dent caused by Bolam in medical health ethics and repudiate the suggestion that the medical profession was above the law. This paper will examine the antithetical dichotomy between medical paternalism and patient autonomy, concluding with English law's contemporary perspective on the tendentious topic of patient autonomy in the doctor-patient relationship.

Introduction

This essay will begin by defining and situating the context of medical paternalism, followed by exploring its rise to prevalence and finally critically analysing why it was adjudged as indecorous and unethical by society and the judiciary towards the end of the 20th century.
The assessment of whether medical paternalism is still germane to English law today requires traversing the history and justifications of its practice and an evaluation of its implications from both ends of the spectrum.

1. Medical Paternalism

1.1. Medical and Philosophical Perspectives

Medical paternalism was defined as a doctor's practice of interacting with a patient as a father to a child and carrying out acts intended to benefit the child that may

either limit his freedom or be contrary to his wishes.[1] Philosophically, paternalism has been construed as the interference with a person's liberty of action substantiated by grounds citing the well-being, needs, health or interests of the person being coerced.[2] The history of paternalism in the medical field is well chronicled and though its practice is controversial, it is espoused by prominent doctors.[3]

1.2. A Case for Medical Paternalism?

The neoteric surge in favouring autonomy over paternalism or requiring paternalism to be justified,[4] according to the Lalonde Report, creates the conundrum of how much human behaviour can be modified to prevent people from adopting unhealthy behaviours, even if medical practice ethics are ameliorated.[5]

Baroness O'Neill argued that a contrast must be drawn between an adult's capacity for autonomy in day-to-day activities and a patient's reduced capacity in making autonomous decisions, and this is where paternalism must ineluctably step in.[6] Respecting a patient's autonomy should not result in a carte blanche interpretation of autonomy which creates an idealized picture without taking into account the vacillating and imperfect character of human autonomy.[7]

In contemporary times, it has been advanced that it is a patient's inalienable right to receive information about his own health and about different treatment options.[8] However, Sjöstrand controverts that it is one thing to assert that we should respect decisions by autonomous individuals and another thing altogether to claim that we ought to help them exercise their autonomy.[9]

1.3. Distinguishing Paternalism from Authoritarianism

Weiss propounds that in a patient-centred treatment, patient values are pre-eminent. However, in a paternalistic approach, they are but one among several factors the doctor must assess in making a medical decision.[10] After diagnosis, the doctor's main objective is to treat the patient rather than to respect his autonomy; though the distinction is tenuous, paternalism, where a patient's freedom is pruned for his own ultimate well-being, should not be confounded with authoritarianism, where this freedom is lessened purely to empower the doctor.[11]

1.4. The Draconian Doctor

[1] Joseph Segen, *The Dictionary of Modern Medicine* (Pantheon Publishing Group 1992) 535.
[2] Gerald Dworkin, 'Paternalism' (1972) 56 The Monist 64, 65.
[3] Mark Komrad, 'A Defence of Medical Paternalism: Maximizing Patients' Autonomy' (1983) 9 Journal of Medical Ethics 38, 41.
[4] Ronald Bayer, 'The Genesis of Public Health Ethics' (2004) 18 Bioethics 473, 475.
[5] Marc Lalonde, *A new perspective on the Health of Canadians* (Minister of Supply and Services Canada 1974) 13 – 16.
[6] Onora O'Neill, 'Paternalism and Partial Autonomy' (1984) 10 Journal of Medical Ethics 173, 175.
[7] O'Neill (n 6) 176.
[8] Manne Sjöstrand, 'Paternalism in the Name of Autonomy' (2013) 38 Journal of Medicine and Philosophy 710, 712.
[9] Sjöstrand (n 8) 713.
[10] Gary Weiss, 'Paternalism Modernised' (1985) 11 Journal of Medical Ethics 184, 186.
[11] Weiss (n 10) 186.

The image of a paternalistic doctor having little regard for the opinions of his patient may seem autocratic. Yet, from the perspective of an experienced doctor, most illnesses have clear solutions which he will reasonably rigidly adhere to and queries from the patient may be vexatious as they denote a lack of confidence in the doctor's abilities, or an indication of ignorance on the patient's part.[12] The doctor is cognizant that his duty is to treat the patient, but believes that the patient needs to be guided firmly during the process as they are laypersons and do not know what is best for their health.[13]

The crux of the problem manifests itself: it is not the practice of telling the patient what to do; but the doctor's conscious selection of what information he shares and what he withholds from the patient, narrowing the patient's options and thus infringing upon his autonomy, that is so controversial.[14]

2. Autonomy as a Basic Human Value

2.1. The True Worth of Autonomy

Autonomy is the very antithesis of paternalism, more so in the field of medicine, where doctors possess expert knowledge and patients hold but a mere abstraction of what causes the common cold. Mills contended that when basic liberties are not respected, no society, whatever government is in power, can be free.[15] The value of autonomy lies in the ability to lead one's life, rather than be led, making self-determination possible.[16] It is submitted that the draconian doctor fails to see that the liberal conception of autonomy is not limited to a right to be free, but is also rooted in the idea that patients should not be restricted in pursuing their goals according to their own values, beliefs and desires.[17]

2.2. The Right to Self-Determination

If we subscribe to Jefferson's view that all men are created equal,[18] it follows that their rights should be respected and giving patients the right to choose fulfils their basic rights as human beings. If we will not condone a paternalistic attitude in politics today, it follows that medical paternalism is equally ignominious.[19] It is apposite to interpose that self-preservation may not be the cardinal drive of every individual; above all, an individual seeks strength to decide his destiny and that self-preservation is but an indirect consequence.[20]

2.3. Who Bears the Brunt of Medical Paternalism?

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[12] Brian McKinstry, 'Paternalism and the Doctor-Patient Relationship in General Practice' (1992) 42 British Journal of Medical Practice 340, 341.
[13] McKinstry (n 12) 340.
[14] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 28.
[15] John Stuart Mill, *On Liberty* (John W. Parker and Son 1859) 16.
[16] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Alfred A. Knopf 1993) 224.
[17] Emily Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9 Social and Legal Studies 467, 468.
[18] Thomas Jefferson, *Declaration of Independence* (United States 1776) 1.
[19] McKinstry (n 12) 341.
[20] Friedrich Nietzsche, *Beyond Good and Evil* (Dreck and Verlag 1886) 24.

It is advanced that medical paternalism is an almost impossible balancing act, to know when one is acting in the patient's interests and not in one's own is a precarious undertaking.[21] While doctors favouring a paternalistic approach contend that they are minded to bear the consequences of these risks,[22] it is usually their patients who end up having to live with these mistakes, often for the rest of their lives.

Where then, does the English judicial gavel fall between two discordant doctrines amid the contemporary libertarian clamour for equality in the doctor-patient relationship?

3. English Law's Stand on Medical Paternalism

3.1. A Brief History Pre-*Bolam*

With academic, professional and even judicial precedents leaning towards medical paternalism up till the last decade of the 20th century, notably in *Jacobson v Massachusetts*,[23] which was considered to be the corner stone of public health ethics[24] where the United States Supreme Court ruled that there are manifold restraints to which every person is necessarily subject for the common good;[25] it is perhaps understandable that the Court of Session took the significant path it did in *Hunter v Hanley*[26] fifty years later with Lord Clyde ruling that the medical professional is only liable if it is proven that his treatment fell below the standards of a professional man of ordinary skill acting with ordinary care, that to rule otherwise would be to destroy the inducement to make progress in medical science.[27]

In England & Wales, the judiciary has been reluctant to find doctors guilty of negligence; a possible explanation being because doctors, in taking up an important role in society by treating people, required protection from the threat of medical negligence.[28] This school of thought was encapsulated in *Hatcher v Black*,[29] where Denning J [30] described negligence as a dagger in the doctor's back, citing Hippocrates' teaching that the practice of medical paternalism is for the better good of the patient.[31]

Henceforth the foundations were laid and this explicably paved the way for the prominent ruling in *Bolam v Friern Hospital Management Committee*.[32]

3.2. Medical Paternalism Untrammelled

[21] McKinstry (n 12) 342.
[22] Erich Loewy, 'In Defence of Paternalism' (2005) 26 Theoretical Medicine and Bioethics 445, 464.
[23] *Jacobson v Massachusetts* 197 US 11 (1905).
[24] David Buchanan, 'Autonomy, paternalism, and justice: ethical priorities in public health' (2008) 98 American Journal of Public Health 15, 16.
[25] *Jacobson* (n 23) 26 (Harlan J).
[26] *Hunter v Hanley* [1955] SC 200.
[27] *Hunter* (n 26) 206 (Lord Clyde).
[28] Warren Jones, 'Law & ethics: The healthcare professional and the Bolam Test' (2000) 188 British Dental Journal 237, 237 – 238.
[29] *Hatcher v Black* The Times, 2 July 1954 (QB).
[30] The Lord Denning of Whitchurch.
[31] William Jones, *Hippocrates With an English Translation* (16th edn, Heineman 1923) 297.
[32] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB).

In *Bolam*, McNair J, citing the dicta of Lord Clyde in *Hunter*,[33] held that even where there are differences of opinion among bodies of competent medical professionals, the medical professional is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art – this became known as the *Bolam* Test.

Bolam arguably spearheaded and established medical paternalism in English law. However, the accountability issue arising is that a doctor will not be negligent if he does what is generally practiced, but not what he should have done in that particular circumstance; although the two coincide frequently, there are occasions when they do not intersect, resulting in an anomalous lacuna in the law.[34] Montrose argued that *Bolam* is riddled with loopholes, that doctors are bound by their medical expertise and the Courts must be vigilant to protect the citizen against risks which doctors may consciously choose to ignore or divulge.[35]

3.3. 'Bolamization'

The *Bolam* Test has been retrospectively pilloried due to its exploitable nature[36] which expanded the Test further than the Court in *Bolam* intended.[37] Davies contended that *Bolam* dented medical ethics and set medical negligence litigation on a slippery slope especially in technical cases where the Courts will habitually defer to medical expertise instead of making their own judgment.[38]

The trend of English law favouring medical paternalism set by *Bolam* carried on for almost three decades, evincing itself again in *Sidaway v Bethlem Royal Hospital*,[39] where a majority of the House, particularly Lord Diplock, ruled that the *Bolam* Test was still valid and applied it.[40] The light at the end of a very dark tunnel was Lord Bridge's prescient obiter stating that the doctor's failure to disclose a risk obviously required by the patient to make an informed decision would *de facto* fail the *Bolam* Test,[41] forged a key to the previously bolted door of medical negligence claims against paternalistic doctors.

3.4. Ensuing Bedlam

Bolam was seen as over protective and deferential towards doctors, giving rise to a perception that the medical profession was above the law;[42] that it deprived Courts of the opportunity to precipitate changes required in professional standards.[43] There

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[33] *Bolam* (n 32) 587 (McNair J).
[34] Sarah Edwards, 'Research Ethics Committees and Paternalism' (2004) 30 Journal of Medical Ethics 88, 89.
[35] James Montrose, 'Is Negligence an Ethical or a Sociological Concept?' (1958) 21 Modern Law Review 259, 263.
[36] Michael Weintraub, 'Medical Expert Witnesses' (1999) 353 The Lancet 2076.
[37] Margaret Brazier, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8 Medical Law Review 85, 88.
[38] Mark Davies, 'The "New *Bolam*" Another False Dawn for Medical Negligence?' (1996) 12 Professional Negligence 10.
[39] *Sidaway v Bethlem Royal Hospital* [1985] AC 871 (HL).
[40] *Sidaway* (n 39) 892 – 895 (Lord Diplock).
[41] *Sidaway* (n 39) 900 (Lord Bridge).
[42] John Fleming, *The Law of Torts* (9th edn, Sydney Law Book Co 1997) 121.
[43] *Hajgato v London Health Association* (1982), 36 OR (2d) 669, 693 (Callaghan J).

was even the intimation that judges paid lip service to the principles of autonomy and self-determination,[44] but were ultimately unable to cast off the shackles of *Bolam*,[45] leaving citizens no legal recourse against unsafe medical practices which required more judicial safeguards.[46]

3.5. A Manifestation of Fetters

It took four decades before the House of Lords took an enlightened approach in *Bolitho*,[47] holding that even if the *Bolam* Test is satisfied, the lacuna it created required the Court as the final arbiter of justice and guardians of the citizens' liberty,[48] to deliver a decisive judgment; the medical assessment is left to the doctors, but the logicality and reasonableness of that assessment will fall to be assessed by the Courts,[49] hence marking the genesis of fetters upon medical paternalism in English law.

While *Bolitho* is acclaimed as the prominent departure from *Bolam*,[50] declaring the Court entitled to test expert opinion; its distinguished progenitor was *Hucks v Cole*,[51] where the learned Sachs LJ held that when evidence shows that a lacuna in professional practice exists where risks of grave danger are knowingly taken, then that lacuna must be examined however small the risk – particularly if the risk can be simply and inexpensively avoided.[52] Analogous to what Montrose wrote decades ago,[53] the Courts must now be vigilant to examine whether reasons advanced for putting the patient at risk are valid in contemporary medical knowledge and practice, or whether they emanate from an unjustifiable residual adherence to archaic concepts; that the *Bolam* Test is to be given weighty consideration, but is no longer conclusive.

Bolitho tweaked *Bolam*, returning the Court to a position of authority in cases of medical breach;[54] *Bolitho* ushered in a shift of judicial attitude where medical paternalism no longer enjoys an immunity against claims of negligence and when a paternalistic approach results in a hitherto not warned of risk materializing, that professional will held liable.[55]
Perhaps McNair J never foresaw his devised test glissading the slippery slope so quickly and it is testament to his perspicacity that he placed limits on the test, limits that would be adopted in *Bolitho*;[56] the standards adopted by medical professionals

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[44] Kate McCombe, 'Paternalism and Consent: Has the law finally caught up with the profession?' (2015) 70 Anaesthesia 1016, 1017.
[45] *Pearce v United Bristol Healthcare NHS Trust* [1999] BMLR 118 (CA) 121 – 125 (Lord Woolf MR).
[46] Ipp Committee, *Review of the Law of Negligence: Final Report* (2002), [3.10], [3.24].
[47] *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL).
[48] *Bolitho* (n 47) 242 (Lord Browne-Wilkinson).
[49] *Bolitho* (n 47) 241 – 243 (Lord Browne-Wilkinson).
[50] Brazier (n 37).
[51] *Hucks v Cole* [1993] 4 Medical Law Reports 393 (CA).
[52] *Hucks* (n 51) 397 (Sachs LJ).
[53] Montrose (n 35).
[54] *Kingsberry v Greater Manchester Strategic Health Authority* [2005] EWHC 2253 (QB) [11] (McKinnon J).
[55] *Birch v University College London Hospitals NHS Trust* [2008] EWHC 2237 (QB) [75] – [79] (Cranston J).
[56] *Bolitho* (n 47) 241 – 243.

must be from a 'responsible', 'reasonable'[57] and 'respectable' body of opinion per Lord Scarman in *Maynard*.[58]

3.6. The End of an Era, Ushering in A New Age

Though *Bolitho* forged a temporary patina over *Bolam*, its persistence as the standard for disclosure of medical risk resulted in a continuing and implicit support for medical paternalism in English law which perhaps led to the rather unconventional decision in *Chester v Afshar*.[59] In *Chester*, the causative link proved problematic as the probability of the risk materializing was the same on any given day.[60] However, the Court, recognizing that loftier principles were at stake, held that the doctor's failure to disclose the risk violated the patient's autonomy which was a fundamental human value and should be compensated.[61]

Although the House of Lords in *Chester* fell on its jurisprudential face protecting patient autonomy through the promenade of natural law without being able to justify the decision in law,[62] it engendered the landmark ruling in *Montgomery v Lanarkshire Health Board*.[63] Sitting in the Supreme Court and signalling the belated obituary of medical paternalism in English law, all seven Justices ruled that the *Bolam* test shall no longer be perpetuated in the medical context; holding that the hegemony of medical paternalism in English law must yield to the patient's autonomy.[64] More importantly, the assessment of risks cannot be reduced to percentages and must be decided upon whether the patient will attach any significance to that risk materializing.[65]

As Baroness Hale judiciously pointed out, it is now trite law that a patient's physical and psychiatric integrity, a crucial feature of which is their autonomy,[66] is safeguarded by the law.[67] Alluding to concur with Dworkin's seminal text,[68] *Montgomery* vividly illustrates the Court's acknowledgement of the value patients and society place on self-determination and informed consent before settling on a medical procedure, putting paid to the final vestiges of medical paternalism in English law.

Conclusion

4.1. A Semblance of Residuum

[57] *Bolam* (n 32) 587, 588 (McNair J).
[58] *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 (HL) 639 (Lord Scarman).
[59] *Chester v Afshar* [2005] 1 AC 134 (HL).
[60] *Chester* (n 59) [99].
[61] *Chester* (n 59) [16] – [18] (Lord Steyn).
[62] Charles Foster, 'The Last Word on Consent?' (2015) 165 New Law Journal 7647, 8.
[63] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[64] *Montgomery* (n 63) [81] – [87], [107] – [109].
[65] *Montgomery* (n 63) [89], [117].
[66] *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (HL) [123] – [125] (Lord Millett).
[67] *Montgomery* (n 63) [108] (Baroness Hale).
[68] Dworkin, (n 16).

Though *Montgomery* is the leading contemporary judgment which jettisoned medical paternalism from English law,[69] heralding a new age of consent in the medical field,[70] English judicial commentary has long been chipping away at its frameworks.[71] Further abroad, in *Rogers v Whitaker*[72] and *Arato v Avedon*,[73] the High Court of Australia and the Californian Supreme Court ruled that a doctor has a legal duty to disclose all material information to a patient[74] who will likely attach significance to it so he may make an informed decision regarding the suggested medical procedure. [75] Indeed, *Rogers* played an influential role in deciding *Montgomery*.[76]

While *Montgomery* signifies the end of medical paternalism in English law indicated by the express restrictions placed by the Court in suppressing paternalism,[77] it worth noting that judges will inevitably defer to logically defensible medical expertise in technical areas but will now judge whether and what a patient would reasonably want to be warned about before undergoing surgery.[78]

4.2. Death Knell of Medical Paternalism in English Law

Medical paternalism's time in English law has come to pass. However, in an era where patient-based rights hold sway, it is emphasized that the doctors have rights too;[79] as evidenced in *Bolitho*[80] and *Montgomery*.[81]

Hegel once said that the owl of Minerva takes flight only at closing of dusk;[82] after repudiating religious and political tyranny but persisting with medical autocracy for decades,[83] English law has finally ruled that medical paternalism shall follow suit. Today, there is a sea change from the provision of healthcare dosed with paternalism to informed consent being regarded as central to the treatment process;[84] patients are finally masters of their own destiny and the draconian doctor has breathed his last.

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[69] Chika Uzoigwe, 'UK law on consent finally embraces the prudent patient standard' (2015) 350 British Medical Journal 2877.
[70] Robert Wheeler, 'The New Age of Consent' (2015) 97 Bulletin of the Royal College of Surgeons 250.
[71] *Rees* (n 66), *Chester* (n 59), *Hucks* (n 51), *Pearce* (n 45).
[72] *Rogers v Whitaker* [1992] HCA 58.
[73] *Arato v Avedon* 858 P.2d 598 (1993).
[74] *Arato* (n 73) 1188.
[75] *Rogers* (n 72) 490.
[76] *Montgomery* (n 63) [59], [70], [71], [72], [73], [87].
[77] *Montgomery* (n 63) [89] – [91].
[78] McCombe (n 44) 1019.
[79] Rachael Mulheron, 'Trumping *Bolam*: A critical legal analysis of *Bolitho*'s "Gloss"' (2010) 69 Cambridge Law Journal 609, 638.
[80] *Bolitho* (n 47) 243.
[81] *Montgomery* (n 63) [88].
[82] Georg Hegel, *Elements of the Philosophy of Rights* (8th edn, Cambridge University Press 2003) 23.
[83] James Colgrove, 'Vaccination Policy, Politics, and Law in the Twentieth Century' (Columbia University Press 2004) 65.
[84] Rob Heywood, 'R.I.P. *Sidaway*: Patient-Oriented Disclosure – A standard worth waiting for?' (2015) 23 Medical Law Review 455, 463.

The Dominance of the International Court of Justice in the Creation of Customary International Law

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Abstract

In this Article, I seek to challenge the rationale and justification for the ICJ's undue influence over the identification of customary law. Although the Court is prescribed a subsidiary role for the determination of law in Article 38 (1)(d) of the ICJ Statute, it is apparent that the ICJ's influence has manifested beyond its envisioned subsidiary role and instead encompassing a dominant role in creating custom. The Court, which no longer content to determine the substance of customary law, has expanded its role by entering the realms of law creation. This is problematic as the ICJ seems to create customary law without reference to state practice or state consent. Without these two fundamental elements to ground custom with legal basis, the ICJ seems to invent custom at its own convenience. In doing so, the Court is creating a legal fiction, declaring customary law where there is no custom to be found.

Introduction

Customary international law is enshrined as a source of law under Article 38(1)(b) ICJ Statute,[1] where it is defined as "evidence of a general practice accepted as law."[2] Yet, the clarity of this text is questionable when the drafters of the statute themselves, "had no very clear idea as to what constituted international custom."[3] The issue in seeking to define customary law, as Kammerhofer states, is that there is "no 'authoritative text', which has an inherent 'thereness' and whose meaning need only be 'extracted.'"[4] The unwritten nature of customary law has made its content inherently insecure.[5] This absence of an authoritative text has resulted in a reliance on the International Court of Justice's (ICJ) interpretation of Article 38 of the ICJ Statute. [6] As Cassese asserts, "given the rudimentary character of international law… many decisions of the most authoritative courts, in particular the

[1] Statute of the International Court of Justice (1945) 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215
[2] *Ibid*., at Article 38 (1)(b)
[3] International Law Commission, *Yearbook of the International Law Commission 1950*, vol. I, p. 6, at para. 45. (quoting Manley O. Hudson)
[4] J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 15 EJIL, p. 524.
[5] A. Roberts, 'Traditional and Modern Approaches to Customary International Law' (2001) 95 AJIL 757, p. 767.
[6] ICJ Statute [n1] at Article 38

International Court of Justice, are bound to have crucial importance in establishing the existence of customary rules, or in defining their scope and content."[7] However, I would question whether this reliance on the ICJ is justified given that international law lacks a central law-making body. Indeed, in referring to international law as "rudimentary" in character, Cassese notes that the international legal system lacks a "central judicial institution endowed with compulsory jurisdiction."[8]

Hence, this Article seeks to argue that the lack of certainty in the creation of customary law has allowed the Court an unprecedented degree of influence in creating customary international law.[9] The jurisprudence of the ICJ provides evidence that the Court has entered the realms of law creation, when "it is not the court's role to develop law."[10] Given that Article 38 (1)(d) of the ICJ Statute prescribes to the Court a limited scope to serve as a "subsidiary means for the determination of rules of law," it would appear that the ICJ is acting outside its ambit.[11] Thus, I submit that the legitimacy of customary international law is questioned when the ICJ jurisprudence demonstrates "a marked tendency to assert the existence of a customary rule more than to prove it."[12] Without grounding custom in legal foundations, issues of credibility and compliance arise, since custom is meant to develop through the practice of states, with the consent of states. As Lord Hoffman describes, international law "is based upon the common consent of nations."[13] Without such consensus, custom cannot function within the broader architecture of international law.

In order to question the actions of the ICJ, the article begins with outlining the function of the Court and its influence in finding customary international law. Secondly, in needing to ground custom with legitimacy and compliance, the necessity of state practice is emphasised for custom to be found. Thirdly, given the ICJ's detraction from the requirement of state practice, it is discussed that the Court seems no longer content to merely identify custom, but rather creates judge-driven customs. Lastly, the justifications underlying this reinvention of customary law under the ICJ's direction is examined. This article concludes that the ICJ has moved too far away from the original conception of customary law, acting with too much leniency regardless of legal basis.

I. The Function and Influence of the ICJ

A. Subsidiary role

[7] A. Cassese, *International Law* (OUP, 2005) p. 194-5.
[8] *Ibid*
[9] A. Alvarez-Jiménez, "Methods for the identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009" (2011) 60 ICLQ, p. 685.
[10] M. Wood, Special Rapporteur, First Report on Identification of Customary International law, International Law Commission, Sixty-sixth session, A/CN.4/672, May 2014, p. 21.
[11] ICJ Statute [n1] at Article 38 (1)(d)
[12] A. Pellet, "Shaping the Future of International Law: The Role of the World Court in Law Making", in M. H. Arsanjani et al. (eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (Martinus Nijhoff Publishers, 2011), 1065, p. 1076.
[13] *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others* v. *Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, at para. 63

As the ICJ itself described in *Bosnian Genocide*, "the Court's function, according to Art. 38 of its Statute, is to 'decide', that is, to bring to an end 'disputes as are submitted to it.'"[14] Hence, the Court's function in relation to customary international law is to identify and apply customary rules on the cases before it.[15] Under Article 38(1)(d) of the ICJ Statute, judicial decisions of international courts are described as "subsidiary means for the determination of rules of law."[16] The subsidiary nature of the ICJ's judicial decisions is further vindicated under Article 59 of the ICJ Statute, which limits the impact of the Court's decisions as holding that "no binding force except between the parties and in respect of that particular case."[17] This serves as a reminder that the ICJ holds no general competence, since the Court's verdicts are not meant to create formal precedents and the ICJ may only act on cases which appears before it.[18]

However, in practice the formulation of Article 38(1)(d) of the ICJ Statute[19] "underestimates the role of decisions of international courts."[20] The ICJ's influence in the creation of customary international law has grown and this is reflected in the dicta of the judgements. In *Fisheries Jurisdiction*, the Court specified that its role was to ascertain the existence of rules of customary international law, and that it was outside the Court's ambit to create them.[21] The ICJ subsequently expanded its role in contributing to the formation of customary international law in *Nuclear Weapons Advisory Opinion*.[22] Here the Court observed: "In stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."[23] Therefore, the Court has widened its function and in doing so has made itself an important actor in the creation of customary law.

The prescription of a subsidiary role to judicial decisions indicates that the sole function of the judgements and opinions of the ICJ are to act as evidence of customary rules.[24] However, this subsidiary role has been elevated into treatment of the ICJ judgements as primary sources of law. Thus, ICJ's judicial decisions have gone beyond their evidential value and are treated as an "authoritative pronouncements of the current state of international law." [25] To advance Kopelmanas' opinion, the creation of new customary international law through the actions of international judges is "an incontestable positive fact."[26] For instance, in 1950 the International Law Commission (ILC) listed the decisions of international

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina/Serbia and Montenegro]*, Merits, ICJ Reports [2007] p. 43, at para. 116.
[15] M. Wood, First Report on Identification of Customary International law [n10] at para 54.
[16] ICJ Statute [n1] at Article 38(1)(d)
[17] *Ibid.,* at Article 59
[18] *Ibid.*
[19] *Ibid.* at Article 38
[20] R. Bernhardt, 'Custom and Treaty in the Law of the Sea', 205 *Recueil des Cours* (1987) p. 270.
[21] *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)* I.C.J., 1973 I.C.J. 3
[22] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, 18.
[23] *Ibid.*
[24] K. Wolfke, *Custom in Present International Law*, 2nd edition (Martinus Nijhoff Publishers, 1993), p.145.
[25] R. Higgins, *Problems and Process: International Law and How We Use it* (Clarendon Press, 2002), p. 202.
[26] L. Kopelmanas, 'Custom as a Means of the Creation of International Law', *British Yearbook of International Law*, 18 (1937), 127, p. 142.

courts as a primary source of customary law, conflicting with the wording of Article 38(1)(d) of the ICJ Statute.[27] As observed, "Article 24 of the Statute of the Commission [ILC] seems to depart from the classification in Article 38 of the Statute of the Court."[28] To place such importance on the judgements of the ICJ expands the role of the Court beyond its intended role of applying existing law. It creates the impression that the ICJ has the capability to create new rules of customary law.

B. Creators of Custom

Indeed, the ICJ has a prominent role in determining the creation of customary international law. Indeed, whilst interpreting Article 38(1)(b) of the ICJ Statute[29] in the *North Sea Continental Shelf* cases, where court was asked to decide on the delamination of the continental shelf between Germany and Denmark on the one hand, and Germany and the Netherlands on the other, the Court was responsible for creating the criteria for identifying customary law.[30] Here, the Court held that two conditions must be fulfilled: "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[31] Thus, the creation of customary law depends on two elements: a widespread and consistent practice from the States and a subjective element known as *opinio juris sive necessitates*.[32] The function of *opinio juris* is to determine that the relevant practice is motivated by legal obligation, rather than considerations of "courtesy, good-neighbourliness and political expediency."[33] This is the "criteria which [the ICJ] has repeatedly laid down for identifying a rule of customary international law."[34] These conditions must be met, "for the birth of an international custom."[35] Hence, the Court is largely accountable for defining customary international law.

However, in allowing the ICJ such a pivotal role in the creation of customary law there is a danger of creating international law which is judge-made.[36] When the ICJ's jurisprudence is assessed, it seems apparent that the Court has disregarded its own formula for finding customary law, despite the fact that the ICJ puts emphasis on the need for settled state practice and *opinio juris* as the "cornerstones of custom…it

[27] International Law Commission, "Report of the International Law Commission to the General Assembly (Part II): Ways and Means of Making the Evidence of Customary International Law More Readily Available," [1950] 2 Y.B. Int'l L. Comm'n 367, ILC Doc. A/1316, p. 367; ICJ Statute [n1] at Article 38(1)(d)
[28] *Ibid.*, at p. 368
[29] ICJ Statute [n1] at Article 38(1)(b)
[30] *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany v. Netherlands)* [1969] ICJ Rep 3.
[31] *Ibid.*, at para 77.
[32] H. Thirlway, "The Sources of International Law", in M. D. Evans (ed.), *International Law*, 3rd edition (Oxford University Press, 2010) p. 102
[33] *Asylum (Colombia/Peru)*, I.C.J. Reports 1950, p. 266, at paras 285-6.
[34] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, 122, at para. 55
[35] *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* [n21] at p. 47 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda).
[36] H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989', *British Yearbook of International Law* (2005) 76 (1) p. 116.

does not observe its own precept."[37] In particular, it appears that the treatment to state practice by the ICJ is incoherent. As I shall demonstrate, case law suggests that existing state practice is disregarded in case law, with a lack of justification for doing so.[38] To endorse the stance promoted by Thirlway, there is a "tendency of the court to follow and apply earlier decisions rather than to investigate the practice of states supposedly creative of custom."[39] This posture is particularly apt in describing maritime delimitation law, where an array of cases can be seen as "judge-made law rather than customary law."[40]

In the *Gulf of Maine,*[41] for example, the Court focused on the Third United Nations Conference on the Law of the Sea rather than investigating existing state practice. This approach was problematic, given that the treaty adopted by the conference, the United Nations Convention on the Law of the Sea (UNCLOS),[42] was not yet in force.[43] It was known at the time of the judgement that several states, including the US, would not become a party to UNCLOS.[44] In fact, only thirteen states were party to the Convention at the time of the judgement – a significantly lower number than the sixty ratifications required to enter it into force.[45] The low number of signatories at the time indicated that the treaty could not convincingly be held as reflecting the general practice of states. Therefore, it would not be an overstatement to submit that the Court's openly proclaimed standards were "quite different from how the Court really proceeds."[46]

This absence of state practice is a reoccurring feature in the ICJ judgements concerning maritime delimitation. As seen in *Continental Shelf*, the ICJ did not refer to existing state practice which was evident in the announcements of exclusive economic zones made by numerous states. [47] Instead, the Court relied on the Convention on the Continental Shelf[48] and on the drafting history of the UNCLOS to justify the finding of customary law.[49] As I have suggested, the Court's reliance on the UNCLOS over existing state practice is troubling given its low level of ratification.[50] Yet, as seen in the maritime case between *Denmark v Norway,*[51] the Court has persisted in relying on the provisions of UNCLOS, despite acknowledging that the

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[37] R. H. Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal', in U. Fastenrath et al. (eds.), From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (Oxford University Press, 2011), 673, p. 692.
[38] A. M. Weisburd, 'The International Court of Justice and the Concept of State Practice' (2009) UNC Legal Studies Research Paper No. 1282684. p. 295.
[39] H. Thirlway, The Law and Procedure of the International Court of Justice [n36]
[40] *Ibid.*
[41] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can.* v. *U.S.)*, 1984 I.C.J. 246
[42] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397
[43] *Gulf of Maine Case* [n41] at p. 294.
[44] U.S. Votes Against Law of the Sea Treaty (1982) 82 DEP'T ST. BULL. 71, p. 71 (quoting U.S. President Ronald Reagan)
[45] UNCLOS [n42] at Article 308.
[46] R. H. Geiger, Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal [n37] at p. 674
[47] *Continental Shelf Case (Libya* v. *Malta)*, 1985 I.C.J. 3
[48] Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311
[49] *Continental Shelf Case (Libya* v. *Malta)* [n47] at para 48.
[50] A. M. Weisburd, The International Court of Justice and the Concept of State Practice [n38] at p. 314.
[51] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den.* v. *Nor.)*, 1993 I.C.J. 38

treaty had yet to entered into force.[52] Given the various proclamations by States of exclusive economic zones at the time, it seems evident that the Court decided to ignore evidence of state practice.[53] Rather, the ICJ preferred to cite its own decision in *Continental Shelf* to support its finding.[54]

In attempting to recycle its own case law, the ICJ certainly seems to be endorsing the impression that the Court is "relying on precedent rather than repeatedly engaging in detailed analysis of the customary status [of every case]."[55] This lack of detailed analysis is seen in *Icelandic Fisheries,*[56] where the Court failed to consider examples of state practice. Therefore, I would submit that the Court, by ignoring extensive state practice, fails to support its own finding of customary law on the strongest evidence of custom. It seems unsurprising that this approach of the ICJ has been harshly criticised. To advance Boyle and Chinkin's position, the ICJ's "failure to act consistently with its own asserted methodology undermines the legitimacy of judicial decision-making, and the content of the espoused customary laws."[57]

The legitimacy of the ICJ's decision-making process is certainly called into question given its inconsistent approach towards the creation of customary law.[58] As the ICJ acknowledged in *Nicaragua*,[59] the Court is "bound…by Article 38 of its Statute to apply, inter alia, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice."[60] However, there is evidence to suggest that this recognition of the "essential role played by general practice" is only accepted on a superficial level.[61] For instance, principles of non-intervention are upheld to customary status, even when the Court itself acknowledge that occurrences of trespass in violation of these principles "are not infrequent."[62] Hence, the conclusion reached in *Nicaragua* seems dubious, given the frequency of States acting in violation of these international rules.[63] Such evidence of contrary practice, "challenges the basic premise of customary law" which bases itself around conforming state practice.[64]

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[52] *Ibid*., at para 59.
[53] R. W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (Martinus Nijhoff Publishers, 1986) p. 28 – 40.
[54] *Continental Shelf Case (Libya v. Malta)* [n47]
[55] T. Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches* (Oxford University Press, 2011), p. 31.
[56] *Fisheries Jurisdiction (United Kingdom v. Iceland)* [n21] at p. 3.
[57] A. Boyle, & C. Chinkin, *The Making of International Law* (OUP, 2007), p. 280.
[58] B. Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers, 2010), p. 71-86.
[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* Merits, Judgment, I.C.J. Reports 1986, p. 14
[60] *Nicaragua* [n59] at p. 97-98, para. 184
[61] *Ibid.*
[62] *Ibid*., at p. 106, para. 202
[63] J. Wouters and C. Ryngart, "Impact on the Process of the Formation of Customary International Law" in M. Kamminga and M. Scheinin, eds. *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) p. 5.
[64] O. Schachter, 'New Custom: Power, Opinio Juris and Contrary Practice', in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of K. Skubiszewski* (The Hague/London/Boston: Kluwer Law International, 1996) 531, p. 538.

Moreover, whilst the President of the ICJ claimed that the Court is "firmly rooted in the wording of the Statute…that 'the existence of a rule of customary international law requires that there be a 'settled practice' together with *opinio juris*'", [65] this claim seems as a mere assertion which fails to accurately reflect the practice of the ICJ. As evident in the jurisprudence, the requirement of state practice has been marginalised to a great extent. The refrainment of the ICJ from thoroughly analysing the two separate requirements, namely the roles of state practice and *opinio juris*, has been blurred the Court's treatment to customary law.[66] This erosion of the traditional requirements of customary law, as defined in the *North Sea Continental Shelf* cases, has resulted in a change in the creation of customary law.[67] As Jennings recognises, "most of what we perversely persist in calling customary international law is not only not customary law; it does not even faintly resemble a customary law."[68]

C. Judge-made Law

It seems apparent, then, that the ICJ is no longer performing its "normal function of assessing the various elements of State practice and legal opinion." [69] After abandoning its methodology in the *North Sea Continental Shelf* cases,[70] the ICJ has begun a practice of declaring customary international law without the need for detailed analysis.[71] In *Gabčíkovo-Nagymaros Project*,[72] the Court simply quoted the ILC Report, which found succession of states do not effect treaties of territorial character, the Court made no reference to the ILC's analysis of state practice supporting this proposition.[73] Rather than analysing state practice, the ICJ invoked the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.[74] This reliance on the Watercourses Convention lacked justification, since it had only been adopted less than four months earlier with no signatories at the time. Furthermore, the Watercourses Convention had numerous opponents, including some major powers such as China, India and France, which meant that its entry into force was unlikely to be in the near future,[75] and indeed, the Watercourses Convention only entered into force in 2014.[76] These factors weaken the belief that

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[65] P. Tomka, 'Custom and the International Court of Justice', (2013) 12 *The Law & Practice of International Courts and Tribunals*, p. 195, 197.
[66] O. Yasuaki, 'Is the International Court of Justice an Emperor Without Clothes?' (2002) 81 *International Legal Theory*, p. 16.
[67] *North Sea Continental Shelf cases* [n30]
[68] R. Y. Jennings, *The Identification of International Law, in Bin Cheng (ed.), International Law: Teaching and Practice* (Stevens, London, 1982), p. 3, 5.
[69] *Nuclear Tests (Australia* v. *France*), Judgment, I.C.J. Reports 1974, p. 253, at p. 367, para. 112 (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Waldock).
[70] *North Sea Continental Shelf cases* [n30]
[71] J. Crawford, University of Cambridge, 'The identification and development of Customary International Law', (Keynote speech at the ILA British Branch Spring Conference, 23 May 2014) https://www.youtube.com/watch?v=0XBc0ZjMVSM (accessed on 15 January 2015).
[72] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports (1997) 7 p. 7, 38–42.
[73] Report of the International Law Commission to the General Assembly, U.N. Doc. A/9610/Rev. 1 (1974), reprinted in [1974] 2 Y.B. Int'l L. Comm'n 154, 184–86, U.N. Doc. A/CN.4/SER.A/1974/Add.l,
[74] United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted on May 21, 1997), reprinted in 36 I.L.M. 700 (1997).
[75] E. Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' in Eyal Benvenisti and Moshe Hirsch (eds) The Impact of International Law on International Co-operation: Theoretical Perspectives (CUP, 2004) 1.
[76] International Water Law Project, Status of the Watercourses Convention: http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html (accessed on 5 February 2015)

this treaty can be held as reliable evidence of state practice, as it certainly does not seem to meet the threshold of uniform state practice.

Understandably, from Mendelson's perspective, it would indeed be reasonable for the ICJ to assert a well-established rule or principle of customary without delving into further analysis, given that there is no need to reanalyse existing law.[77] It is plausible for reasons of efficiency that the Court may not wish to analyse certain cases as rigorously, if accepted customary norms can be applied. However, this reasoning cannot be applied in *Gabčíkovo-Nagymaros Project,*[78] because of the lack of acceptance of the Watercourses Convention indicates that it cannot convincingly be treated as representing well-established norms of customary law. The ICJ may claim that it is "merely finding the law in a field of state practice, but they are often in fact declaring new law."[79]

Moreover, the ICJ's lack of analysis is problematic as the Court fails to justify its identification of customary law. The Court does not legitimise its finding of customary status of law when it "simply asserts that such-and-such is a 'well-recognized rule of international law' or employ[s] some other vague phrase, without identifying whether the rule derives from custom."[80] As seen in *Armed Activities*,[81] whilst the Court relied on certain provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States,[82] it satisfied the finding of customary law by affirming that the provisions of the Declaration were "declaratory of customary international law."[83] Thus, the Court refrained from any further analysis on the formation of customary law. Without grounding its judgements in detailed analysis, the ICJ creates the impression that rules of custom are being formed largely due to the Court's discretion. To advance Vicuña's opinion, "the Court has found a customary rule whenever and wherever it has deemed it necessary or convenient to identify such a rule or to go beyond treaty rules."[84]

Fundamentally, the function and the influence of the ICJ in the formation of customary law is much greater than envisioned under Article 38(1)(d).[85] In practice, the influence of the ICJ's judicial decisions conflicts with its prescribed role as a subsidiary source, as it has become increasingly frequent practice for international courts and tribunals to rely on the ICJ jurisprudence.[86] Hence, the ICJ decisions

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[77] M. Mendelson "The International Court of Justice and the sources of international law", in V. Lowe and M. Fitzmaurice (eds.), Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (Cambridge University Press, 1996) p. 63, 67.
[78] *Gabčíkovo-Nagymaros Project* [n72] at pp. 38–42.
[79] T. Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, (2004) 45 Va. J. Int'l L. 631, p. 639.
[80] M. Mendelson, The International Court of Justice and the sources of international law [n77] at p. 63, 64.
[81] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, [2005] ICJ Rep 168, p. 226-227, para 162
[82] Principles of Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, General Assembly Resolution 2615 (XXV), 24 October 1970.
[83] *Armed Activities on the Territory of the Congo* [n81] at p. 226-227, para 162
[84] F. Vicuña, "Customary International Law in a Global Community: Tailor Made?" *Estudios Internacionales*, (2005)148, p. 21, 25-6.
[85] ICJ Statute [n1] at Article 38
[86] M. Scharf & M. Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences', (2012) 13 CHI. J. OF INT'L L. 123, 128.

span across the international legal order and have an "important influence on the norm-generating process."[87] For instance, the International Tribunal for Law of the Sea (ITLOS) relied on the judgment in *Gabčíkovo-Nagymaros* for the customary international law character on the defence of the 'state of necessity.'[88] In finding the rule of customary law in *US – Standards for Reformulated and Conventional Gasoline,*[89] the WTO Appellate Body relied on the ICJ judgement in *Territorial Dispute*.[90] Although, the International Criminal Tribunal for Rwanda (ICTR) did not make a specific reference to an ICJ judgement in *Prosecutor v. Akayesu*,[91] the ICTR held that, "the Genocide Convention is undeniably considered part of customary international law as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention."[92] Evidently, the tribunals treat the ICJ judgements as "an important part of community practice."[93] In relying on the decisions of the ICJ, these tribunals recognised the ICJ's findings without further examination of state practice and *opinio juris*.[94] In effect, the tribunals accepted the ICJ judgements at face value and treated the judgements as an authoritative source of law. The influence of the ICJ and its findings on customary law supports the notion that "the claim that international judges do not make international law is increasingly anachronistic."[95]

Whilst, I accept Maria Shapiro's view that, "every court makes law in a few of its cases", [96] these law-making instances should only occur when pre-existing international law fail to provide a solution to the dispute before the ICJ.[97] In essence, the ICJ's activism should be limited to exceptional circumstance. Yet increasingly, the Court is moving further away from its original conception of customary law, in determining *opinio juris* the Court has recycled its own declaration and formal expression rather than examining actual state practice. In the context of customary law, what should be noted is that "it is not the court's role to develop law."[98] As Lord Hoffman describes, it is not for a court to "develop international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."[99] In moving forward, I shall examine the risks of allowing the ICJ such a great degree of influence in the formation of customary international law and the role of States in the creation of custom.

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[87] R. Bernhardt, Custom and Treaty in the Law of the Sea [n20] at p. 270.
[88] *Gabčíkovo-Nagymaros Project* [n72] at p. 40 and 41, paras 51 and 52.
[89] *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 17.
[90] *Territorial Dispute Case (Libyan Arab Jamahiriya* v. *Chad)*, (1994), I.C.J. Reports 1. para. 41, p. 21.
[91] *Prosecutor v. Akayesu* Case No. ICTR-96-4-T, 2 September 1998, at para 495.
[92] *Ibid*
[93] G.M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993), p. 84.
[94] J. R. Crawford, Keynote speech [n71]
[95] D. Terris, C. Romano, L. Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (OUP, 2007) p.104.
[96] M. Shapiro, 'Judges As Liars', (1994) 17 Harv. J.L. & Pub. Pol'y 155, p. 156.
[97] T. Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, (2004) 45 Va. J. Int'l L. p. 631.
[98] M. Wood, First Report [n10]
[99] *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others* v. *Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, at para. 63.

II. The Importance of State Practice

In the drafting process of Art. 38(1)(b) of the ICJ statute,[100] Baron Descamps stated that customary international law is "a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of nations in their mutual intercourse."[101] Based on this reading, the traditional understanding of customary law is dependent upon the actions and consent of States – in this regard it is "very state-centric."[102] As is made clear by Jennings and Watts, the formulation of Art. 38 of the ICJ statute implies that the substance of this source of law is to be found in the practice of States.[103] This interpretation seems accurate, as the requirement of state practice logically precedes the analysis of *opinio juris* in the framing of Article 38(1)(b) of the ICJ Statute.[104] This reasoning is further supported in the dicta of the ICJ, which holds that "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."[105] Hence, the ICJ's disregard of state practice is surprising given the dicta in the judgements which were explicit on the need for "a very widespread and representative participation."[106] That is, the threshold for state practice is high, with the need for "substantially or practically uniform [practice]."[107] Crucially, the requirement of state practice has been held by the Court as being "expressive, or creative, of customary rules."[108] As the ICJ acknowledged in *Nuclear Weapons Advisory Opinion*, the existence of customary rules "have been developed by the practice of States."[109] The fact that Judge Ammoun frames the discussion of state practice around unanimous practice as compared to practice by the generality of States – provides evidence that there is no contemplation of not fulfilling the requirement at all.[110] Hence, customary law is meant to be derived initially from state practice, where it is the behaviour of States that creates custom.

A. Legitimacy

The requirement of state practice is necessary, as it provides legitimacy to customary law and represents the consent of the state. As D'aspremont has described, customary law is derived "on the basis of a bottom-up crystallization process."[111] Where the substance of customary law comes from the behaviour of states, who act

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[100] ICJ Statute [n1]
[101] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annex 3, p. 322, per Baron Descamps
[102] R. B. Baker, Customary International Law in the 21st Century: Old Challenges and New Debates, *European Journal of International Law* (2010) Vol. 21, Issue 1, pp. 173-204.
[103] R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edition (Oxford University Press, 2008) p.25.
[104] ICJ Statute [n1] at Article 38(1)(b)
[105] *Continental Shelf (Libyan v. Malta)* [n47] at p. 29.
[106] *North Sea Continental Shelf*, [n30] at para. 73.
[107] *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* [n21] at p. 90 (Separate Opinion of Judge De Castro)
[108] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, at p. 46, para. 43.
[109] *Nuclear Weapons Advisory Opinion* [n22] at p. 253, para. 64.
[110] *North Sea Continental Shelf* [n30] at p. 104 (Separate Opinion of Judge Ammoun)
[111] J. D'Aspremont, Formalism and the Sources of International Law (Oxford University Press, 2011), p. 162.

in a constant and concurring manner under a belief. The creation of customary law is legitimised through the participation of States. For custom represents the "coming together of the wills of states, as manifested by their behaviour, that creates the rule on the legal plane." [112] If customs are not generally applied and largely ignored than the effectiveness of using state practice as determinative factor of customary law is meaningless. As Judge Lachs recognises, state practice is essential for the creation of a new rule of international law.[113] It is through the participation of States, that all their different political, economic and legal systems are taken into account.[114] Therefore, there is a need to gather significant evidence of state practice from a large number of States.[115] As Akehurst remarks, "the number of states taking part in a practice is a more important criterion [...] than the duration of the practice."[116] As customary international law is meant to reflect the actual behaviour of the States and their interaction in the international community.[117] In basing customary law on state practice that has been widely accepted by the international community, international custom is grounded with "stability, reliability, and legitimacy."[118]

The importance of state practice is further influenced by the treatment of the States. In assessing States' conduct, there is evidence to suggest that States place great importance on their involvement to establishment of customary law. This is demonstrated in the US response to a study of the International Committee of the Red Cross (ICRC)[119] in which, in a formal response at governmental level, the US held that "customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*."[120] Notably, the US emphasised that the existence of custom "must in all events relate to State practice."[121] To illustrate, there are numerous other instances where States' have placed greater emphasis on state practice over *opinio juris*. As seen in the European Union Guidelines, customary international law is defined as a source of law that "is formed by the practice of States, which they accept as binding upon them."[122] In bilateral investment treaties, Rwanda, US and Uruguay have stated, "their shared understanding" that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation."[123] Hence, it seems evident that these States prioritise the need for state practice, in the formation of these statements.

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[112] Brigitte Stern, 'Custom at the Heart of International Law', 11 Duke J. Comp. & Int'l L. 89 (2001), p. 97.
[113] *North Sea Continental Shelf* [n30] at p. 229 (Dissenting Opinion of Judge Lachs)
[114] *Ibid*., at p. 227
[115] *Ibid*., at p. 229
[116] M. Akehurst, 'Custom as a Source of International Law', *British Year Book of International Law*, (1975), 47 1, 16 pg. 18.
[117] C. De Visscher, *Theory and Reality in Public International Law* (P. E. Corbett, trans.) (Princeton University Press, 1957), p.155
[118] M. Wood, First Report [n10] at pg. 47.
[119] J. M. Henckaerts, Study on Customary International Humanitarian Law (2005) *International Review of the Red Cross*, Vol. 87. No. 857, p. 180.
[120] J. B. Bellinger and W. J. Haynes, "A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law", *International Review of the Red Cross*, (2007) 89, p. 443, 444.
[121] *Ibid*
[122] *Updated European Union Guidelines on promoting compliance with international humanitarian law* (2009/C 303/06), section 7.
[123] Annex A to the *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection*

In effect, these States regard customary law as a reflection of their actions in the international arena. The treatment of the state practice requirement in domestic courts also highlights the importance of state practice. As seen in the Supreme Court of Singapore, state practice is set at a high threshold with the need to satisfy the requirement of "extensive and virtually uniform practice by all States."[124] In considering these States' behaviour, it can be presumed that in their view customary law grows from the practice of States. Where custom is able to "reflect accurately the balance of [the States'] conflicting interests and to represent their considered intentions."[125]

However, this interpretation of customary law conflicts with the ICJ's practice of disregarding state practice in their findings of customary law. This is problematic, since the ICJ operates in an international system which is arguably state-centric. The ICJ cannot act independently in its interpretation of international law, its actions are necessarily "constrained by the preferences of states and other actors."[126] To illustrate, the ICJ's effectiveness is largely dependent on the States' willingness to accept its judgements.[127] In a decentralised system, the Court's position is precarious without compulsory jurisdiction.[128] Hence, the legitimacy of the ICJ's denouncements can be inferred from States' willingness to obey custom. In discounting the actual practice of the States, the ICJ is operating without the participation and consent of the States – this will likely result in instances of non-compliance.[129] International law, "must bear some relation to practice if they are to regulate conduct effectively, because laws that set unrealistic standards are likely to be disobeyed and ultimately forgotten."[130]

Given the ICJ's tendency to create judge-made custom unrelated to state practice, it is unsurprising that few States are willing to opt-in to the ICJ's jurisdiction. Currently seventy-one states,[131] recognise the ICJ's jurisdiction under Art. 36 (2) ICJ Statute.[132] Yet, even this small number of States do not adhere to the Court's jurisdiction without retaining a number of reservations, which limit the ICJ's power. These reservations are typically made in order to allow States the option of withdrawing from the ICJ's jurisdiction.[133] The UK is the sole permanent member of

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of Investment (2008) and Annex A to the *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (2005)

[124] *Yong Vui Kong* v. *Public Prosecutor*, [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore — Court of Appeal, 14 May 2010), para. 96-98.

[125] H. Thirlway, *International Customary Law and Codification* (Martinus Nijhoff Publishers, 1972) p. 76.

[126] T. Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, (2004) 45 Va. J. Int'l L. 631, p. 633.

[127] A. M. Weisburd, The International Court of Justice and the Concept of State Practice [n38] at p. 362.

[128] UN Res No. 3232, Review of the Role of the International Court of Justice, 12 Nov. 1974, UN Doc. A/ RES/3232 (XXIX). Para. 1.

[129] J. R. Crawford, Keynote speech [n71]

[130] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] p. 762.

[131] International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3 last accessed 5 February 2015

[132] ICJ statute [n1] at Article 36 (2)

[133] Eric A. Posner & John C. Yoo, 'Judicial Independence in International Tribunals', (2005) 93 CAL. L. REv. 1, p. 38-42

the Security Council that currently recognizes the compulsory jurisdiction of the ICJ, even then the UK's acceptance is moderated by reservations.[134] Hence, the role of the state remains fundamental to the international law structure. The Court's ability to interpret the content of international law depends on the States' willingness to bring cases forward.[135] As recognised by the ICJ, "the consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases."[136] The consent and participation of States is necessary to legitimise the ICJ's findings, similarly the legitimacy of custom relies on state practice. If the ICJ ignores state practice it effectively hinders its own legitimacy and chances of compliance.

B. Compliance

The ICJ faces difficulties in ensuring compliance with its findings of customary law given the noticeable absence of state practice. It is a well-known fact that States consent to the ICJ's jurisdiction on a voluntary basis. Thus, States can withdraw their consent to be bound by the ICJ's jurisdiction. There are various instances to demonstrate how States, who had initially agreed to the ICJ's jurisdiction, subsequently refused to comply with an adverse decision.[137] Perhaps, the most prominent State to act in defiance of the ICJ's decision can be found in the United States. Following *Nicaragua,* the US withdrew from the compulsory jurisdiction of the ICJ, refused to participate in ICJ proceedings and ignored the ICJ's decision.[138] The US has also repeatedly conflicted with the ICJ decisions regarding the Vienna Convention on Consular Relations.[139] As seen in the *LaGrand* case, the US executed two German nationals in violation of the Vienna Convention and provisional measures issued by the ICJ.[140]

Even, smaller countries such as Iceland have refused to comply with the ICJ rulings.[141] In *Corfu Channel,* Albania rejected the ICJ's decision and refused to make the reparations ordered.[142] Further examples of noncompliance with the ICJ judgements have occurred in France, India and Iran.[143] This defiance against the judgements of the Court by States, questions the competence of the ICJ and the judicial role it plays.[144] To put forth the position held by Boyle and Chinkin, the issue is that "when courts ignore the traditional requirements for customary international law or fail to subject them to any strict scrutiny … [In such instances] scant regard is

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[134] International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory (UK) http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=GB (accessed 5 February 2015)
[135]A. M. Weisburd, The International Court of Justice and the Concept of State Practice [n38] at p. 299.
[136] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I. C. J. Reports 1950, p. 71
[137] E. A. Posner & J. C. Yoo, Judicial Independence in International Tribunals [n133] at p. 38-42
[138] *Nicaragua* [n59]
[139] Vienna Convention on Consular Relations (1963) 596 UNTS 261 / 21 UST 77 / TIAS 6820
[140] *LaGrand (Germany* v. *United States of America)*, 40 I.L.M. 1069 (2001).
[141] *Fisheries Jurisdiction (United Kingdom* v. *Ireland)* [n21]
[142] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)* I.C.J. Reports 1949, para. 244.
[143] Ibid
[144] *Armed Activities on the Territory of the Congo (Congo* v. *Uganda)*, Provisional Measures, 39 ILM (2000) 1100, at 1113 (Declaration of Oda J).

given to the niceties of state consent or the likelihood of compliance with such easily pronounced norms."[145]

In seeking to identify customary law, the Court should consider the practice of States to legitimise its finding and increase the likelihood of compliance by States. In basing international custom on state practice, compliance can be reasonably expected from future State behaviour.[146] As Judge Jennings has commented, "it is ironic that the Court's business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards."[147] Custom is meant to consolidate the status of existing practices as law, if custom is declared followed by multiple incidences of non-compliance the legitimacy of the custom will surely be questioned. It is ineffectual of the ICJ to make findings of customary law without considering the existing state practice. For the Court's pronouncements to be meaningful, there should be a positive correlation between the identification of customary law and the States' subsequent behaviour. Whilst, it may be overly simplistic to argue that State consent is central to international law, it is logical to assume that State consent would increase chances of compliance and legitimisation of custom found in the ICJ pronouncements.

C. Structural Difficulties

Having said this, there are practical and structural issues that challenge the use of state practice. As the UK noted, "identifying a rule of customary international law is a rigorous process."[148] This rigorous examination, necessary for ascertaining state practice, can be hindered by the nature of the behaviour in question. As suggested by the International Criminal Tribunal for the Former Yugoslavia (ICTY), it is extremely difficult to assess the actual behaviour of military forces in the field, for the purposes of fulfilling the requirement of state practice.[149] Given the confidential nature of military affairs, where information is often withheld, the tribunal's determination of state practice is hindered. Hence the ICTY held that, "reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions."[150]

However, this kind of an approach has been criticised by John Bellinger and William Haynes in their response to the ICRC study, which emphasised the same points with the ICTY.[151] They argued that this method, "places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict."[152] It would

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[145] A. Boyle & C. Chinkin [n57] at p. 285.
[146] B. Simma and P. Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles", *Australian Yearbook of International Law*, (1988-1989) 12, p. 88-89.
[147] J. Jennings, 'Presentation', in C. Peck and R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Martinus Nijhoff, 1997), p. 78.
[148] Legal Adviser of the Foreign and Commonwealth Office, statement at the Meeting of National Committees on International Humanitarian Law of Commonwealth States, Nairobi, 20 July 2005: *British Year Book of International Law*, 76 (2005) pp. 694-5.
[149] *Prosecutor v. Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction*, ICTY Appeals Chamber, Case nr. IT-94-1-AR72, 2 October 1995, para 99.
[150] *Ibid.*
[151] J. B. Bellinger and W. J. Haynes [n120], pp. 2-4.
[152] *Ibid*

be difficult to treat such military manuals as strong evidence of state practice, when they often act as guidance on policy reasons. Frankly, there is a great distinction to be made between military publications used for training purposes and official government statements.[153] Whilst, I am sympathetic to the difficulties of the international courts had been through while assessing state practice in such sensitive areas, the reliance on such materials fails to reach the prescribed standard of widespread state practice. The US protest demonstrates discontent in using "insufficiently dense" state practice to demonstrate the existence of custom.[154]

D. Democratic Deficit

Another point is that, when a low-threshold is set in terms of the fulfilment the requirement of state practice, this led to accusations of creating a democratic deficit.[155] Indeed, the difficulty in assessment of the practices where there nearly 200 states, has resulted in a highly selective survey of customary international law, where only a handful of states are taken into account.[156] This has resulted in a situation where a "great body of customary international law is made by remarkably few States."[157] This is problematic, for the emphasis of the role of the state in the creation of custom has meant that it is difficult to disregard the disparities of wealth and power between the States.[158] The inequality between States, has allowed powerful states a disproportionate influence on the content and determination of custom.[159]

Current international law purposely ignores the issue of uneven development in favour of prescribing uniform legal regimes.[160] However, the development of the legal order is dynamic and reactive to the actions of States, particularly dominant States. Hence, the need of the international community is defined by the interests of dominant States, who "have unprecedented influence in shaping global policies and law."[161] In effect, the claim that States hold equal status acts as a legal fiction which masks the reality of power politics in the international system.[162] For instance, the ability of the US to influence the development of custom is much greater than Malta, even though they are formally accorded equal status under international law.[163] Thus, it would be "unrealistic" to close one's eyes to the States with the largest influence and power.[164] Yet, this is the exercise that the Court attempts to practice, as

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[153] *Ibid*
[154] *Ibid*
[155] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 767.
[156] N. Petersen, 'Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' *American University International Law Review* 23, no.2 (2007) p. 277.
[157] O. Schachter, 'New Custom: Power, Opinio Juris and Contrary Practice', in J. Makarczyk (ed.) *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 536.
[158] M. Byers, Introduction Power, Obligation, and Customary International Law, 11 *Duke Journal of Comparative & International Law* (2001) 81-88 p. 84.
[159] M. Bedjaoui, *Towards a New International Economic Order,* (Holmes & Meier, 1979) p. 51-52.
[160] B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 Melb. J. Int'l L. 499 p. 5.
[161] *Ibid.,* at p. 7.
[162] J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', (1996) 16 Oxford. Legal Stud. 85 p. 123.
[163] M. Byers, Introduction Power, Obligation, and Customary International Law [n158] at p. 84.
[164] *Nuclear Tests (Australia v. France)* [n69] at p. 306 (Separate Opinion of Judge Petrén)

Judge Shi states "any undue emphasis [on dominant States] would make it more difficult to give an accurate proper view of the existence of a customary rule."[165]

Nonetheless, customary international law is not formed from a democratically accountable political system.[166] Although, Judge Weeramantry may claim that the practice and polices of five States out of nearly 200 are an insufficient basis to assert the creation of custom.[167] The permanent members of the Security Council do, "represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population."[168] Whilst it is acknowledged that the powers of the permanent members have changed over time with the development of States such as China and India, it is nonetheless clear that previously dominant Western states was and are still in the primary focus in terms of state practice in the ICJ proceedings.[169] For Roberts, this lack of democratic accountability is troubling as international custom is capable of binding all States.[170] In relying on state practice, the influence of dominant States has legitimised political and economic *status quos* in their favour.[171] Whereby new states are bound by existing customs, despite a lack of participation in their formation.[172] However, I would argue that it is impossible to escape the reality of power politics in the international system.[173]

As the US Ambassador to the UN, Jeanne Kirkpatrick once described, the ICJ acts as "a semi-legal, semi-juridical, semi-political body."[174] The interaction of politics and law is intertwined in the international community. Arguably, political and economic *status quos* can be implicitly found in the composition of the ICJ, since the seats of the ICJ are held by judges holding the nationalities of each of the five permanent member States of the Security Council.[175] This arrangement of the Court, has been evident since the ICJ's founding and has remained in its tradition – although this conduct has not been prescribed by any statute.[176] In seeking to find evidence of "general practice accepted as law" it is necessary to accept the realities of the international order.[177] As de Visscher eloquently describes, inherently some States will "mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way."[178] In the following section, I shall consider the

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[165] *Nicaragua* [n59] at p. 278 (Declaration of Judge Shi)
[166] W. S. Dodge, 'Customary International Law and the Question of Legitimacy', *Harvard Law Review Forum*, (2007) 120, 19, 26.
[167] *Nicaragua* [n59] at p. 533 (Dissenting Opinion of Judge Weeramantry)
[168] *Ibid*., at p. 312, 319 (Dissenting Opinion of Judge Schwebel)
[169] J. P. Kelly, "The Twilight of Customary International Law" (2000) 40 VA. J. INT'L L. 449, p. 469.
[170] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p.768.
[171] *Ibid*
[172] *Ibid*
[173] A. A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) p. 191-93.
[174] E. A. Posner and M. de Figueiredo, 'Is the International Court of Justice Biased?' (2005) *Journal of Legal Studies*, vol. 34(2) p. 600. (quoting Jeane Kirkpatrick)
[175] D. R. Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice', (2003) 97 AM. Soc'y INT'L L. PROC. 277, p. 278.
[176] S. Rosenne, *The World Court: What it is and how it Works*, 5th ed. (Martinus Nijhoff Publishers, 1995) pp. 155-58.
[177] *Ibid*; ICJ Statute [n1] at Article 38 (1)(b)
[178] Charles de Visscher, *Theory and Reality in Public International Law,* (Princeton: Princeton University Press, 1957) p. 147.

justifications for the ICJ's shift away from state practice and the implications of this shift.

III. Movement away from State Practice

The ICJ has significantly changed its interpretation of Article 38(1)(b) of the ICJ statute.[179] According to Abi-Saab, it seems that:

> 'we are calling different things custom, we are keeping the name but expanding the phenomenon … In fact we have a new wine, but we are trying to put it in the old bottle of custom. At some point…we will have to recognize that we are no longer speaking of the same source, but that we are in the presence of a very new type of law-making.'[180]

A. Redefining Custom: Emphasis on *Opinio Juris*

To reiterate, the traditional understanding of customary law was formed by the ICJ in the *North Sea Continental Shelf Cases.*[181] Here, the Court articulated the requirements of customary law as follows: "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief."[182] This statement frames the requirement of *opinio juris* as subsidiary to state practice. However, the ICJ reformulated its criteria in *Nicaragua* where, "the Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."[183] In doing so, the requirement of *opinio juris* is emphasised over state practice.[184] The primary focus on "state practice from which customary law is derived" is no longer evident.[185] Whilst, the ICJ dicta continues to refer to the elements of state practice and *opinio juris* in forming customary law, there is a fundamental change in the ICJ's treatment of the two elements. The ICJ is less concerned in basing custom on "actual state practice in the real world," rather it seems content to rely "heavily on resolutions of the United Nations."[186]

This is apparent in *Nicaragua,* where the ICJ held that "the attitude of States towards certain General Assembly resolutions" enabled it to conclude "that the attitude referred to expresses an *opinio juris* respecting such rule."[187] Hence, there is an intrinsic change in the creation of customary law under the ICJ's direction. The traditional understanding of custom is abandoned by the ICJ, in preference of *Nicaragua* approach, which "prefers to look for statements of belief by States [to form custom.]"[188] In *Nicaragua,* the Court held that GA Resolution 3314 (XXIX)

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[179] ICJ Statute [n1] at Article 38(1)(b)
[180] A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), 10. (quoting G. Abi-Saab)
[181] *North Sea Continental Shelf Cases* [n30] at para 77.
[182] *Ibid.*
[183] *Nicaragua* [n59] at para 184.
[184] Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP, 2010) 132.
[185] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* Judgment, I.C.J. Reports 2012, p. 99. para. 101.
[186] J. I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', (1985) BYIL 56, p. 171.
[187] *Nicaragua case* [n59] at p. 14
[188] *Ibid*; M. Akehurst, Custom as a Source of International Law [n116] at p. 36.

"may be taken to reflect customary international law."[189] In confirming that the text of the resolution cannot be taken as "reiteration or elucidation" of the treaty obligations under the UN Charter.[190] The ICJ treated the acceptance of the resolution and the declarations within it, as capable of having a direct effect on *opinio juris*.[191]

However, I would express doubts that the acceptance of resolutions can be seen as conclusive evidence of "*opinio juris* possessing all the force of a rule of customary international law."[192] Since the General Assembly acts as a political organ, which does not make it an ideal forum for establishing law.[193] Given that the States are acting in a political arena, they will have various motivations for voting favourably on a resolution. Thus, the act of voting is often an indication of "political desideratum and not a statement of belief that that the law actually requires [for *opinio juris*]."[194] It is importance to contextualise the voting of resolutions, for a State may vote having regard to their function as an organ of the United Nations (UN).[195] For instance, the US initially opposed the draft GA Resolution XVII which prescribed the standard of 'appropriate compensation' following an expropriation.[196] The US preferred the standard of 'prompt, adequate, and effective' compensation, yet the US voted in favour of the resolution "in a spirit of compromise."[197] This spirit of cooperation within the international community is emphasised in the functioning of the UN. However, this greater consideration of the international community cannot be taken as evincing a State's meaningful support for the resolution. Rather, this conciliatory manner of voting by States has been referred to by Judge Schwebel as indicative of "fake consensus."[198]

B. Use of Consensus

The use of consensus as a guiding notion to consider whether a resolution establishes *opinio juris* is contentious. As found in *Nuclear Weapons Advisory Opinion,* "substantial numbers of negative votes and abstentions" by States, would indicate that such resolutions would "fall short of establishing the existence of an *opinio juris*."[199] To infer, the threshold of *opinio juris* is reached if a resolution is adopted unanimously or by a representative majority.[200] This use of consensus is praised by

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[189] *Nicaragua* [n59] at 103, para. 195; Definition of Aggression, General Assembly Resolution 3314 (XXIX) 14 December 1974

[190] *Ibid.,* at p. 99–100, para. 188; United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

[191] *Nicaragua* [n59]

[192] *Ibid*., at p. 182 (Separate Opinion of Judge Ago)

[193] K. Skubiszewski, 'Resolutions of the U.N. General Assembly and Evidence of Custom', in *Le droit international a l'heure de sa codification – etudes en l'honneur de Roberto Ago* (Vol. I) (1987) 503, p. 506–507.

[194] S. Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1984) p. 112.

[195] H. Meijers, 'On International Customary Law in The Netherlands', in I.F. Dekker, H.H.G. Post (eds.), *On the Foundations and Sources of International Law* (T.M.C. Asser Press, 2003), p. 77, 84

[196] Permanent Sovereignty over Natural Resources, G.A. Res.1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (Dec. 14, 1962); *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 658 F.2d 875, p. 890 (2d Cir. 1981).

[197] *Banco Nacional de Cuba* [n196] at p. 890

[198] S. M. Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law', (1979) 73 AM. SOC'Y. OF INT'L. L. PROC. 301, p. 308.

[199] *Nuclear Weapons Advisory Opinion* [n22] at para. 71.

[200] B. Conforti & B. Labella, *An Introduction to International Law* (Martinus Nijhoff Publishers, 2012), p. 42,43.

Barboza who suggests that resolutions "obtained by unanimity, or by consensus…represent the international opinion better than multilateral treaties, having a relatively restricted membership."[201] In disagreeing with this view, I would submit that the use of consensus is a "particularly misleading notion."[202]

The action of voting is considered an affirmative stance of the State without considering the States' motivations for acting in this manner. The negotiations of the States, in forming the resolution, are a more accurate reflection of the States' opinions than the resolutions themselves.[203] In assessing the legal value of resolutions, there is greater relevance to be found in the States' treatment of the resolution, than the resolution itself,[204] as the final text of a resolution fails to reflect the decision-making process undergone by the States.[205] To advance Rosenne's opinion, the use of consensus "conceal[s] the many reservation buried away in the records, and it often only means agreement on the words to be used and on their place in the sentence, and absence of agreement, or even disagreement, on their meaning and on the intent of the document as a whole."[206]

Moreover, the use of consensus as a standard seems futile, when the intent to be legally bound by a resolution is absent from States' actions in voting. States often vote without contemplating that these general, recommendatory resolutions may transform into norms of binding customary law.[207] In the view of a Russian representative, States vote "having precisely in mind that, according to the Charter, [these resolutions] do not create any legal norm and do not imply the recognition of any rules as such, but are only of recommendatory nature."[208] The recommendatory nature of resolutions undermines their ability to present *opinio juris*. General Assembly resolutions are not legally binding instruments, "even if a resolution employs legal terminology and speaks of all States' obligations."[209] It would be foolish to consider a State's vote as decisive evidence of *opinio juris*.

Therefore, any deductions of *opinio juris* made on this basis should be treated "with all due caution."[210] Since the nature of *opinio juris* is difficult to prove, the fact that it is often described as "the philosophers' stone" demonstrates its intangible quality.[211] A significant amount of evidence is needed to verify the certainty of *opinio juris* and I would argue that this evidence seems lacking in the affirmation of resolutions. This

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[201] J. Barboza, 'The Customary Rule: From Chrysalis to Butterfly', in C.A. Armas Barea et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International, 2000) p. 5.
[202] S. Rosenne, *Practice and Methods of International Law* [n194] at p. 112.
[203] H. Thirlway, *International Customary Law and Codification* [n125], at p. 65.
[204] A. Pellet, 'Article 38', in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), p. 817, 825.
[205] J. Wouters & P. De Man, 'International Organizations as Law-Makers', in J. Klabbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing, 2011), 190, p. 208.
[206] S. Rosenne, *Practice and Methods of International Law* [n194] at p. 112.
[207] J. P. Kelly, The Twilight of Customary International Law [n169] at p. 520.
[208] Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (Nov. 10, 1995), http://www.icj-cij.org/docket/files/93/5964.pdf (accessed on 5 January 2015) (quoting Mr. Khodakov, Director of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation) p. 48.
[209] L. Hannikainen, 'The Collective Factor as a Promoter of Customary International Law', *Baltic Yearbook of International Law*, 6 (2006) p. 138.
[210] *Nicaragua* [n59] at p. 188.
[211] H. Thirlway, *International Customary Law and Codification* [n125] at p. 47

view is supported by Judge Barwick who notes that resolutions "however frequent, numerous and emphatic, are insufficient to warrant the view that customary international law now embraces [a certain rule]."[212] Hence, it is questionable for the ICJ to conclude that the action of voting for a resolution, is conclusive evidence of *opinio juris*.[213]

C. Restrictive approach

In recognising these concerns, the ICJ seems to have reconsidered its *Nicaragua* approach, which indicates that resolutions are capable of directly effecting *opinio juris*.[214] A retraction of this stance is apparent in *Nuclear Weapons Advisory Opinion*, where the Court acknowledged that declarations of the General Assembly "may not themselves make law."[215] Rather, the normative value of resolutions is found in their ability to "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*."[216] This finding, establishes a clear withdrawal from the position held in *Nicaragua,*[217] which suggests that a resolution is not capable of directly establishing *opinio juris*. The ICJ's attempt to distance itself from *Nicaragua* is apparent, given the conspicuous lack of referencing to the seminal case of *Nicaragua* in the *Nuclear Weapons Advisory Opinion*.[218]

I find the treatment of resolutions, in their restricted role of evidential sources, more appropriate.[219] This restricted approach has been supported by the *Institut de Droit International* where, "a Resolution may constitute evidence of customary law or of one of its ingredients."[220] Further, the dictum of the Iran-United States Claims Tribunal in Sedco demonstrates the marginalised role of resolutions: "resolutions are not directly binding upon States and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law."[221]

Since one cannot deny that the United Nations has established itself as an appropriate body to look for indications of developments in international law, General Assembly resolutions "have helped shape public international law… [They] are an important material source of customary international law in this regard."[222] The relevance of international organisations has grown, in line with developments in international relations. The diplomatic actions of States in international

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[212] *Nuclear Tests (Australia* v. *France)* [n69] at p. 435- 436 (Dissenting Opinion of Judge Barwick)
[213] O. Schachter, 'Entangled Treaty and Custom', in Y. Dinstein, M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989) p.730.
[214] M. D. Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' EJIL (2005), Vol. 16 No. 5, p. 897.
[215] *Nuclear Weapons Advisory Opinion* [n22] at p. 532 (Dissenting Opinion of Judge Weeramantry)
[216] *Ibid*., at paras. 71–73.
[217] *Nicaragua* [n59]
[218] *Ibid*; *Nuclear Weapons Advisory Opinion* [n22]
[219] *Nuclear Weapons Advisory Opinion* [n22]
[220] *Institut de Droit International* on 'The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective' with regard to Resolutions of the United Nations General Assembly (1987) available at http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_en.PDF, (accessed on 24 January 2015).
[221] *Sedco, Inc.* v. *National Iranian Oil Co. and Iran* Case No. 129, 25 ILM 629, (1986), 633-634
[222] *East Timor (Portugal* v. *Australia),* Judgment, I.C.J. Reports 1995, p. 90, at p. 188 (Dissenting Opinion of Judge Weeramantry)

organisations have legal significance, as evidence of customary law.[223] The General Assembly broadly represents its member States in acting as an international forum.[224] The practice of one state, one vote represents an attempt to even the playing field between developed and developing countries.[225]

Hence, resolutions may indicate dominant trends of international opinion and imply a legal view on certain matters.[226] As Judge Weeramantry observed, "a stream of resolutions" holding similar content can "provide importance reinforcement" on what a customary law is.[227] It is understandably tempting for the ICJ to rely on resolutions to impute a legal perspective, given the participation of States in a public exchange of views.[228] The United Nations, "provides a very clear, very concentrated, focal point for state practice."[229] In engaging with resolutions, the ICJ is able to overcome the difficulties of analysing the collective practice of States in a particular area.

However, I regard the various forms of State conduct in the General Assembly as reflecting a peripheral kind of state practice.[230] There is a difference between what States claim to do and their actions in practice. To illustrate, many States claim to uphold humanitarian goals yet the inconsistency of States' human rights practice, suggests an inability or unwillingness to implement these goals in practice.[231] In ascertaining customary law, it is necessary to determine the right "mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught."[232] State conduct within the General Assembly, may be influenced by political pressure to conform and avoid exclusion from the international community. Hence, consensus is reached in an artificial context.[233]

In suggesting that the ICJ is reconsidering its *Nicaragua* approach, there is still ample reason to suggest that the ICJ is seeking to rely on resolutions to grant itself greater power to create customary law.[234] As custom, under the *Nicaragua* approach, is no longer derived from a bottom-up model dependent on state practice. Rather, a new customary law model is proposed from the top down, where custom is formed

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[223] R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press, 1963), p. 2.
[224] J. Charney, 'International Lawmaking – Art. 38 of the ICJ Statute Reconsidered', in J. Delbruck (ed.), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (1996), pp. 180–183.
[225] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 768.
[226] *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic*, Arbitral Award (1977), 62 ILR, 140, p. 189.
[227] *Nuclear Weapons, Advisory Opinion* [n22] at p. 532 (Dissenting Opinion of Judge Weeramantry)
[228] R. Higgins, *Problems and Process: International Law and How We Use It* [n25] at p. 23, 24.
[229] R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* [n223] at p. 2.
[230] I. MacGibbon, 'General Assembly Resolutions: Custom, Practice and Mistaken Identity', in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), 10, p. 19
[231] J. Wouters and C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 12.
[232] T. Treves, 'Customary International Law', in *Max Planck Encyclopedia of Public International Law* (2012) at para 28.
[233] I. MacGibbon, General Assembly Resolutions: Custom, Practice and Mistaken Identity [n230] at pg. 10, 19.
[234] *Ibid*., at p. 21.

"not by deduction from domestic law but by proclamation in international fora."[235] In doing so, the actions of the ICJ can be seen as using the shield of *opinio juris* to create custom. I shall assess the justifications for this approach in the final section.

IV. Justifications for the *Nicaragua* Approach

International law must address the demands of a complex and varied society.[236] The diversity among States and the growing emergence of global issues means that traditional custom has become regarded as an inappropriate means for developing law.[237] In an era where international law is concerned with "maximiz[ing] the welfare of people," traditional custom is criticised for its design in being "created by nations, rather than by people."[238]

The *Nicaragua* approach is characterised by an "emphasis on community consensus over individual state consent."[239] This shift in focus away from the States and priority of States' values to a welfare system concerned with human values reflects the development of the international community.[240] Increasingly, States act collectively in international bodies in pursuit of universal humanitarian goals. Hence the *Nicaragua* approach evinces the desire of the ICJ to use customary laws to bind all States to desired community aims.[241] As Judge Lauterpacht, has described the "primary purpose of the International Court … lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law."[242]

A. Pursuing Humanitarian Ideals

This motivation for securing peace is evident behind the *Nicaragua* approach, which demonstrates a far greater ability to engage with matters of human rights and international humanitarian law, than demonstrated in traditional custom.[243] Under the *Nicaragua* approach, a 'modern custom' is created which relaxes the criteria of customary law, in doing so the development of custom is given greater flexibility.[244] The ICJ finding in *Nicaragua* would have been substantially different under traditional custom.[245] The context of the Cold War meant that the international law on the use of force faced a "yawning gap between what states practice and what they

[235] B. Simma and A. L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', (1999) 93 AJIL 302,p. 307.
[236] G.J.H. van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers, 1983), p. 115.
[237] J. I. Charney, 'Universal International Law', (1993) 87 AJIL 529, p. 544-45.
[238] J. O. McGinnis, 'The Comparative Disadvantage of Customary International Law', *Harvard Journal of Law and Public Policy*, 30 (2006), 7, p. 11-12.
[239] A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) p. 31, 110.
[240] L. Henkin, 'Human Rights and State "Sovereignty' (1995-96) 25 GA.J. INT'L L. 37.
[241] A. Cassese, *International Law in a Divided World* [n239] at p. 31, p110.
[242] H. Lauterpacht, *The Development of International Law by the International Court* (CUP, 1958) p. 3.
[243] J. Kammerhofer, "Orthodox Generalists and Political Activists in International Legal Scholarship", in M. Happold (ed.), *International Law in a Multipolar World* (Routledge, 2012), p.138, 147.
[244] E. Jiménez de Aréchaga, 'Custom', in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), p. 2,3.
[245] *Nicaragau* [n57]

preach."[246] This gap, in line with traditional customary law, would have prevented a customary rule from crystallising.[247]

Modern custom, in reframing the formula for customary law, only requires state practice as an "evidentiary touchstone."[248] This is particularly relevant for human rights law, which is characterised by inconsistent state practice even when the laws are upheld by international conventions.[249] Under the traditional reading of customary law, evidence of contrary practice, would bar the creation of custom. For instance, the Supreme Court of Singapore ruled in *Yong Vui Kong v. Public Prosecutor* that "there is a lack of extensive and virtually uniform state practice to support … [the] contention that customary law prohibits the mandatory death penalty as an inhuman punishment."[250] In conducting an extensive survey on the status of the death penalty worldwide, the Supreme Court observed that the practice of a majority of states is not equivalent to "extensive and virtually uniform practice by all States."[251] Hence, traditional custom is unable to engage with matters of human rights effectively. As the focus on contrary practice, meant that traditional custom does not properly address the moral concerns raised. As Klabbers observed, traditional custom lacks credibility with "respect to prescriptions of moral relevance."[252]

B. Responsiveness to Modern Developments

Moreover, traditional custom seems unresponsive to the developments in a progressive legal order,[253] since it fails to acknowledge the greater relevance placed on issues such as sustainable development. Deriving custom from treaties and declarations is potentially more democractic than using state practice, for it involves a large number of States.[254] For example, the number of international instruments covering principles of environmental protection indicate the growing concern of the international community. Yet, these prescriptive norms on environmental protection are unable to form customary law, when subjected to the orthordox tests of consistent state practice and *opinio juris*.[255] Hence traditional customary law does not account for indications of a growing international consensus and approval for norm-creating principles. In this manner, traditional custom may be described as stagnant and "simply not forthcoming" in line with progressive developments.[256]

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[246] J. Wouters and C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 5.
[247] *Ibid*
[248] A. T. Guzman, 'Saving Customary International Law', *Michigan Journal of International Law*, 27 (2005), 115, p. 153.
[249] *Nicaragua* [n57]; J. Wouters and C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 5.
[250] [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore - Court of Appeal, 14 May 2010), paras. 95-98
[251] *Ibid*
[252] J. Klabbers, 'The Curious Condition of Custom', *International Legal Theory*, 8 (2002), 29, p.34.
[253] W. M. Reisman, "The Cult of Custom in the Late 20th Century", *California Western International Law Journal*, 17 (1987), p. 133, 134, 142-3
[254] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p.768.
[255] D. Hunter, J. Salzman and D. Zaelke, *International Environmental Law and Policy*, 2nd edition (Foundation Press, 2002), p. 312,313
[256] R. Kolb, 'Selected Problems in the Theory of Customary International Law', *Netherlands International Law Review*, 50 (2003), 119, p. 124, 125.

It seems unsurprising that traditional custom has been criticised for being "ill-suited to the present pace of international relations."[257] The *Nicaragua* approach, on the other hand, was able to address fundamental issues in line with developments on the international system. In a modern era in which we are facing evolving risks such as terrorism, there is a need for instant custom[258] and new customary law can be created much more rapidly without the traditional burden of decades of consistent practice.[259] The General Assembly is able to accelerate the formation of customary law, by serving as a forum in which a state "has the opportunity, through the medium of the organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter."[260]

This creation of instant custom, demonstrates the ICJ's ability to use custom as an efficient mechanism for creating international law. For instance, the Exclusive Economic Zone suddenly emerged as custom under declaration of the US.[261] In marginalising the role of state practice, the ICJ is able to seemingly invent customary international law when "these leaps produce more efficient norms."[262] As modern custom needs not to ground itself in existing practice, "it is called upon to launch one."[263] While deriving custom from abstract statements of *opinio juris*, the ICJ is working from theory to practice.[264] Essentially, modern custom can be taken as attaching greater weight on what law ought to be compared to what the law currently is in practice.[265] Hence, the ICJ is using modern custom to "take the leap and declare new law"[266] and undertakes this exercise in order to address issues that the prevailing practice of States fail to prioritise, such as the inconsistent practice of human rights in the international order.[267] Accordingly, the requirement of state practice and the interests of the States can hinder the development of custom. As Judge Ngcobo stated:

> "one of the greatest ironies of customary international law is that its recognition is dependent upon the practice of states evincing it. Yet at times states refuse to recognise the existence of a rule of customary international law on the basis that state practice is insufficient…In so doing, the states deny the practice from ripening into a rule of customary international law."[268]

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[257] C. De Visscher, "Reflections on the Present Prospects of International Adjudication", *American Journal of International Law*, 50 (1956), 467, p. 472.
[258] B. Langille, 'It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001', 26 B.C. Int'l & Comp. L. Rev. 145 (2003) p. 145.
[259] *Ibid*
[260] *South West Africa Cases (Eth.* v. *S. Afr.)*, 1966 I.C.J. Rep. 248, para 291–93, (quoting Judge Tanaka)
[261] M. Scharf, Accelerated Formation of Customary International Law (2014) 20 *ILSA Journal of International & Comparative Law* 305, Case Legal Studies Research Paper No. 2014-22, p. 313.
[262] E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 86.
[263] I. I. Lukashuk, 'Customary Norms in Contemporary International Law', in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 488, 493.
[264] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 763.
[265] I. I. Lukashuk, [n255] at p. 488, 493.
[266] E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 8.
[267] *Ibid*
[268] *Kaunda and Others* v. *President of the Republic of South Africa and Others* (2004) Case CCT 34/04 (4 August 2004) para. 148,149.

In minimalizing the role of state practice in modern custom, the ICJ is able to attain its desired community goals in an easier fashion.[269] Where the ICJ's treatment of "state practice is selectively used," for modern custom does not need to describe existing state practice.[270] Rather, modern customs prescribes standards of conduct to be achieved.[271] Hence, inconsistent state practice may be overlooked and higher regard placed on *opinio juris* if the common interests of all States are engaged.[272] In adopting the *Nicaragua* approach, the ICJ has arguably re-interpreted the concept of customary law in such a way to ensure that the 'right' answer is provided.[273] As Simma and Alston discern, "there is a strong temptation to turn to customary law as the formal source which provides…the desired answers."[274]

C. Inventing Legal Fiction

However, the ICJ in using customary law to provide desired answers is creating a legal fiction by "inventing custom."[275] The creation of modern custom treats the traditional requirements of customary law as if they are "not only inadequate but even irrelevant for the identification of much new law today."[276] In doing so, the ICJ is opportunistically invoking new customary law without justifying its findings in legal reasoning.[277] For instance, the ICJ has been accredited for giving "a new and lasting direction to the law of the sea in general."[278] Yet, as I sought to demonstrate in Chapter 1, the ICJ's findings on maritime delimitation are questionable. For the ICJ choose to ignore existing state practice, relied on weak examples of *opinio juris* and recycled its own judicial decisions, to identify customary law. Hence, the ICJ can be accused of creating law rather than applying it.[279] Similarly, the ICJ judgement in *Gabcikovo-Nagymaros Project*, demonstrates an attempt to invent custom in order to address environmental concerns.[280]

In seeking to advance the development of law, the ICJ is creating new customs "in the pretext of 'finding' the customary international norms."[281] Yet, this creation of

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[269] F. Vicuña, Customary International Law in a Global Community: Tailor Made? [n84] at p. 38.
[270] J. Wouters and C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 111, 129, 130
[271] G. Schwarzenberger, 'The Inductive Approach to International Law', (1947) 60 HARV. L. REV. 539, pp. 566-70.
[272] J. Wouters & C. Ryngaert, Impact on the Process of the Formation of Customary International Law [n63] at p. 112.
[273] B. Simma and P. Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles [n146] at p. 83.
[274] *Ibid*
[275] E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] p. 85.
[276] R. Y. Jennings, "What Is International Law and How Do We Tell It When We See It?", in *Annuaire suisse de droit international*, (1981), Vol. 37, p. 67.
[277] J. L. Goldsmith and E.A. Posner, "Understanding the Resemblance Between Modern and Traditional Customary International Law", *Virginia Journal of International Law*, 40 (2000), 639, p. 667.
[278] R. Y. Jennings, 'The International Court of Justice after Fifty Years' (1995) 89 AJIL 493, p.493.
[279] P. Dupuy, 'Formation of Customary International Law and General Principles', in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP, 2007) p. 460.
[280] *Gabcikovo-Nagymaros Project* [n70]
[281] E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 85.

law is far outside the ambit of the function prescribed to the ICJ in Article 38(1)(d) of the ICJ Statute.[282] Although an element of dynamic interpretation may be useful for the progression of international law,[283] I would regard the activism of the ICJ as an attempt to use its unique role in the international system as authority to invent custom.[284] In doing so, the overly flexible manner in which the ICJ creates custom has disregarded the traditional requirements, which constitute custom.[285] Thus, the reasoning of the ICJ is no longer based on legal grounds but on ideals of *ex aequo et bono*, according to what is right and good.[286]

This is troubling as it suggests that modern customs are based on ideals and aspirational goals rather than realistic expectations of practice.[287] In marginalising the need for state practice, modern customs are unable to reflect actual and arguably achievable, standards of conduct.[288] A divide occurs, between the asserted custom and existing state practice. For instance, customary international law prohibits torture, yet torture is a practice that still remains today.[289] A similar criticism is made of the emptiness of *jus cogens* norms, which are often flouted in practice.[290] Without reference to state practice, modern customs lack relevance. States must internalise the custom within their own legal orders, for the custom to regulate standards of behaviour.[291] Hence, modern custom lacks legitimacy of state consent since it is formed with little or no reference to state practice.[292] Traditional custom may suffer from a lack of democratic legitimacy; however, it is able to derive legitimacy through state consent and practice. I would suggest that these elements of legitimacy are absent from modern custom altogether, for the ICJ plays the dominant role in the creation of custom.[293]

Moreover, the function of modern custom is questionable, since "law should not consist of abstract, utopian norms, but rather be affiliated with social reality."[294] The reliance on *opinio juris*, allows the ICJ to disguise claims of what the law should be, as pronouncements of what the law is.[295] The text of General Assembly resolutions

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[282] ICJ Statute [n1] at Art. 38 (1)(d)
[283] A. Seibert-Fohr, 'Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order' in Andreas Zimmermann and Rainer Hofmann, (eds) *Unity and Diversity in International Law (*Berlin: Duncker & Humblot, 2006) 257, p. 281.
[284] E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency [n75] at p. 86.
[285] N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge, 2014) p. 56.
[286] W. Friedmann, 'The North Sea Continental Shelf Cases – A critique,' 64 *American Journal of International Law* (1970) 229, p. 236.
[287] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 769.
[288] D. Bodansky, 'Custom and (and Not So Customary) International Environmental Law', *Indiana Journal of Global Legal Studies*: (1995) Vol. 3: Iss. 1, Article 7, pp. 116-19, 110-11.
[289] D. P. Fidler, 'Challenging the Classical Concept of Custom', 39 GERMAN Y.B. INT'L L. 198, p. 227.
[290] A. A. Weisburd, 'The Emptiness of the Concept of Jus Cogens, as illustrated by the War in Bosnia-Herzegovina', (1995) 17 MICH.J. INT'L L. p.49.
[291] H. L. A. Hart, *The Concept of Law* (Clarendon Law Series, 1997) 2nd Ed. p. 86-91.
[292] A. A. Weisburd, 'Customary International Law: The Problem of Treaties', (1988) 21 VAND.J. TRANSNAT'L L. p.1.
[293] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 770.
[294] N. Peterson, Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation, 23 AM. U. INT'L L. REV. 275, 301 (2008) 148.
[295] M. P. Scharf, 'Seizing the 'Grotian Moment': Accelerated Formation of Customary International Law in times of Fundamental Change', *Cornell International Law Journal*, (2010) 43, 439, p. 450, 467,468.

often fail to differentiate between *lex lata*, what the law is and *lex ferenda*, what the law should be.[296] As Roberts observes, resolutions "often reflect a deliberate ambiguity between actual and desired practice, designed to develop the law and to stretch the consensus on the text as far as possible."[297] The ICJ in basing new customary law on desired practice is seeking to create "utopian laws that cannot regulate reality."[298]

A rule that is purely based on *opinio juris* is unlikely to achieve extensive compliance in practice. Though many States may claim to have an interest in achieving humanitarian goals, until action is taken to evidence this belief, it remains a hollow ideal.[299] Hence, the content of modern custom is vague, based on abstract notions. One cannot rely on modern custom to act as an accurate prediction of how States will act in the future. Modern custom seemingly establishes itself from promises of acts, rather than existing evidence of such conduct already occurring, to be continued.[300] Without regard to the constituent element of state practice, I remain sceptical of modern customs' ability to regulate state conduct in its attempt to advance preferred normative objectives. I would regard traditional custom as more capable of producing practical and achievable standards for customary law, since it is based on state practice. Traditional custom in working from practice to theory is able to create expectations of compliance in the future.[301] To advance Berderman's stance:

> The key defect of modern custom is that in lauding ideal standards of state conduct, it has become detached from actual state practice. If legitimacy and transparency matter as metrics for customary international law … then the traditional view of CIL - even as imperfectly captured in Article 38 (1)(b)'s formulation - should continue to be embraced[302]

Conclusion

The ICJ in attempting to ground its creation of custom, without considerations of state practice, have become inventors of a legal fiction. As Dworkin described, a "successful interpretation must not only fit but also justify the practice it interprets."[303] In seeking to find customary law, the ICJ must consider existing practice in order to have descriptive accuracy. The substance of custom should not be derived from abstract moral considerations but on legal expressions of *opinio juris*, "formulated by a majority of states rather than judges."[304] The Court must attempt to "formulate eligible interpretations" of customary law which can be justified, based on the analysis of state practice and *opinio juris*.[305] This is not to say that moral considerations cannot be accounted for in the creation of custom as moral considerations may influence state practice. Customs will develop and evolve in time, for law is dynamic. The status of customary law should be regularly assessed in light

[296] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 763.
[297] *Ibid*
[298] *Ibid*., at p. 773.
[299] A. A. D'Amato, *The Concept of Custom in International Law* [n173] at p. 268.
[300] K. Wolfke, *Custom in Present International Law* [n24] at p. 42.
[301] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 763.
[302] D. J. Bederman, *Custom as a Source of Law* (Cambridge University Press, 2010), p. 145.
[303] R. Dworkin, *Law's Empire* (Harvard University Press, 1986) p. 285.
[304] A. Roberts, Traditional and Modern Approaches to Customary International Law [n5] at p. 779.
[305] *Ibid*., at p. 772.

of new developments in state practice and *opinio juris*.[306] Nonetheless, a "judge's duty is to interpret the legal history he finds, not to invent a better history."[307] The ICJ's interpretation under modern custom is overtly flexible, to such a degree that it has weakened the creation of custom into a "nebulous fiction."[308] Ultimately, in order for customary law to retain its status and relevance in modern public international law, the Court must refer to state practice.

[306] J. Rawls, *A Theory of Justice* (Harvard University Press, 1972) p. 20.
[307] R. Dworkin, *A Matter of Principle* (Harvard University Press, 1986) p.160.
[308] I. Detter de Lupis, *The Concept of International Law* (Norstedts, 1987), p.13, 116.

Article 8 in Housing Law: No Home for Human Rights Values

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The English Courts have clashed with Strasbourg for over a decade on the meaning of Article 8 of the Convention in the context of social housing repossession cases. Although the case of Pinnock v Manchester City Council signified a re-examination of the approach in English law, it amounted to little more than a fig leaf for the continuing divergence between the courts' opposing views. The crux of the dispute hinges on the scope of proportionality review when a tenant is evicted. The English judicial disposition, it will argued, has been towards managerial concerns, namely protecting local authorities' letting decisions and their scarce resources. A consequence of this approach, however, has been to allow eviction in harsh and disproportionate circumstances. The courts' failure to engage with Human Rights values has therefore left Article 8 as a missed opportunity to critically refine English property law and remedy gaps in tenant protection.

Introduction

With the draft British Bill of Rights due to be debated this year in Parliament[1] it is a pertinent time to review the area of Human Rights in Housing Law. The European Convention on Human Rights (ECHR), as made enforceable by the Human Rights Act 1998 (HRA 1998),[2] contains a right to the respect for the home under Article 8. The impact of this on public authorities seeking to evict tenants has been controversial and, as argued in this paper, not without some judicial apathy towards Human Rights values. It is true that, as far back as 1765,[3] the Englishman's home was seen as inviolable by the state without express authorisation of the law; yet as a 2012 Equality and Human Rights Commission paper demonstrates, there are now an estimated 266 statutes that enable the state to lawfully intrude in the home.[4] The issue is accentuated

[1] See: Parliament, 'From the Human Rights Act to a Bill of Rights?: Key issues for the 2010 Parliament' <http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/security-and-liberty/from-the-human-rights-act-to-a-bill-of-rights/> accessed 5 April 2016

[2] HRA 1998, Schedule 1

[3] *Entick v Carrington* [1765] EWHC KB J98

[4] Equality and Human Rights Commission, 'Human Rights Review 2012: Article 8', <http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_8.pdf>
Accessed 5 April 2015

particularly in the cases where an occupant has a non-secure tenancy[5] or licence, as repossession in those cases cannot be forestalled by any merits review.

Lord Walker in the case of *Doherty v Birmingham CC*[6] gave a sense of the difficulties that judges must confront in ruling on a local authority's order for possession. He spoke of the authority's "common law right" (to possession) as being "surrounded on all sides by statutory infrastructure, like a patch of grass in the middle of a motorway junction."[7] It is an area of law which, as Baroness Hale notes, is "much trampled over by the legislature as it has tried to respond to shifting and conflicting social and economic pressures."[8] As a result of the complex statutory framework that exists in this area, the House of Lords and, latterly the Supreme Court, have shown a real reluctance to engage in the Human Rights discussion that Article 8 engenders. The courts are, it will be argued, unduly swayed by the practical concerns of local authorities, at the expense of individual occupants' home life. It will be concluded that the English court's interpretation of Article 8 has been a missed opportunity for English law to refine the more unfair aspects of property law, to produce a legal regime that entails the respect for individuals' homes that the Convention requires (as the gulf between the judgments of Strasbourg and the English courts illuminates).

Article 8: Scope of the Right

The open-eneded wording of this Article lends itself to very broad application.[9] It is a qualified right and, as such, has two clauses; Article 8.1 states that "Everyone has the right to respect for his private and family life, *his home*[10] and his correspondence."[11] Article 8.2., provides the basis on which this right can be interefered with:

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'[12]

'Home' has an autonomous[13] definition and will be a question of fact in each case; the accepted test is whether the individual has "sufficient and continuous links"[14] with

[5] See for example: Introductory tenancies (Housing Act 1996); Demoted tenancies (Housing Act 1985);
[6] [2008] UKHL 57
[7] *Ibid.,* at para. 100
[8] *Kay v Lambeth BC* [2006] UKHL 10, at para. 185
[9] E Wicks, B Rainey, C Ovey, *Jacobs, White and Ovey: the European Convention on Human Rights* (Oxford University Press 2014), p. 334
[10] Emphasis added.
[11] ECHR, Article 8.1
[12] ECHR, Article 8.2
[13] *Buckley v UK (1996) 23 EHRR 101*, 115 [63]

the property (i.e. occupation must be more than temporary).[15] The main issue in the cases, however, turns more on the issue of whether there is an interference with the right as most judges accept the article to be engaged in eviction situations. Arguably Individuals can, in some instances, lose their right to occupy the property they call home, in circumstances which are quite disproportionate to the aim of the legislation that justifies it. In some cases the legislation may itself create a situation where the individual has an unacceptable lack of procedural safeguards. This paper will therefore provide an appraisal of the English courts' approach in Article 8 housing cases. As summarised by Nield, the area of conflict is defined by the "proportionality balance between the respect due to an occupier's home and the wider public interest in achieving an effective and efficient housing policy".[16]

I. Article 8 Jurisprudence

Qazi and *Kay*: the emergence of a "managerial" bias

Latham described the traditional approach of English Courts in housing cases as being "managerial" or in other words, concerned with the practical impact for public authorities. This approach, he commented, focusses "not on the tenants or applicants for housing as rights-holders but on the needs of local authorities to distribute their scarce resources effectively".[17] *Harrow LBC v Qazi,*[18] was the first major decision on the effect of Article 8 on social housing rights and it seemed to confirm that theory. It will be argued in this section that this approach has significant shortcomings and was based on an erroneous and tautological approach that disregarded the individual proportionality of each eviction. Though opinion was initially polarised in the appellate committee with a three-two split, the majority view of *Qazi* came to dominate subsequent judgments. Their lordships expressed strong reservations about the impact of Human Rights on established property law rules and concern for the practical impact on public authorities' decision-making.

Mr and Mrs Qazi lived as joint tenants in a local authority house; when their marriage broke down Mrs Qazi served a notice to quit bringing the tenancy to an end. Mr Qazi applied to the local authority for a sole tenancy but his application was rejected and he was faced with repossession. Whilst their lordships unanimously accepted that the property in question was Mr Qazi's 'home' for the purposes of Article 8, the majority held that repossession was justified under Article 8.2; this was

[14] *Ibid.*
[15] *O'Rourke v UK* [2001] Application No 39022/97
[16] Sarah Nield, 'Clash of the titans: Article 8, occupiers and their home' in Susan Bright (eds), *Modern Studies in Property Law-Volume 6* (Bloomsbury 2011)
[17] Alex Latham, 'Talking without speaking, hearing without listening? Evictions, the Law Lords and the European Court of Human Rights' (2011)-PL 730, 732
[18] [2004] 1 AC 983

principally on the basis that the local authority had an 'unqualified right to possession' following lawful termination of the tenancy.[19]

Lord Steyn's minority judgment is worthy of particular attention at this juncture because it frames the critique that will be substantiated further in this paper. He criticised the line of reasoning adopted by the majority for being based a fallacy; allowing "domestic notions of title, legal and equitable rights, and interests," he said, would have the effect of "colour[ing] the interpretation of article 8(1)",[20] and in his view, this would "emp[ty] article 8(1) of any or virtually any meaningful content".[21] Lord Bingham, also dissenting but with somewhat less zeal, considered that in "very highly exceptional"[22] cases the Article should preclude repossession, though"[i]t is not for the court to second-guess allocation decisions".[23]

Greater weight can be seen attached by the majority to the practical impact that the decision would have on public authorities,[24] avoiding the question of what the Human Right to respect for the home substantively contained. Lord Hope accepted that Article 8 was, in principle, engaged on these facts,[25] but avoided the issue by stating that the case had "much more to do with the law relating to property rights than respect for a person's privacy".[26] Despite envisaging that Article 8 *could* "give a full measure of protection in a wide range of circumstances"[27] he expressed the view that where a public authority landlord has an unqualified right to possession, serving a notice to quit in order to re-let the premises would "not violate the essence" of Article 8.[28] Lord Scott was even more forthright in his opinion, giving short shrift to the argument that Article 8 could protect Mr Qazi's continuing right of occupation. He viewed the issue from the perspective that the article "does not vest any contractual or proprietary right"[29] in the tenant and therefore the public authority should not be obstructed in seeking possession. He appeared to defend this view on the basis that the management of social housing is already governed by a "highly complex" statutory framework[30] and that this case should be no different.

The approach of the majority, it is contended, was tautological resting entirely on the *a priori* basis that the public authority was entitled to evict and disregarding the *a*

[19] *Qazi* (n 18), at para. 78
[20] *Ibid.*, at para. 27
[21] Ibid.
[22] *Ibid.*, at para. 25
[23] Ibid.
[24] Latham (n 17), at p. 733
[25] *Qazi* (n 18), at para. 71
[26] *Ibid.*, at para. 82
[27] Ibid.
[28] *Ibid.*, at para. 83
[29] *Qazi* (n 18), at para. 144
[30] *Ibid.*, at para. 125

posteriori[31] question of whether, on those facts, the eviction would be justified. It was presupposed that any eviction which is made in accordance with the correct procedure, is *ipso facto* justified. This formula, however, reveals nothing about whether the eviction complies with the rest of Article 8.2 which requires an interference to be necessary in a democratic society and proportionate. Even if the values of Article 8 were already reflected in the law as it stands, the court still failed to consider the proportionality of the eviction itself. Cottle concurs with this view, arguing that even if the interference in question were deemed necessary, it would not mean that its justification were a foregone conclusion: "the whole point of protecting Convention rights" he adds, "is that public authorities are to carefully consider the circumstances of the individuals concerned."[32] Though there was sparse guidance from Strasbourg on this issue[33] at the time,[34] the majority did not engage with the real Human Rights question of whether there was a necessary and proportionate interference. The unqualified right to possession was deemed sufficient *a priori* without further justification.

Qazi was followed shortly after by *Connors v UK,*[35] where, for the first time, Strasbourg called into question the House of Lords' "managerial approach". The ECtHR held that Article 8 is not sufficiently protected when the Court ordering repossession has no opportunity to assess the proportionality of the eviction. Mr Connors and his family had lived a traditional travelling lifestyle, residing on a caravan site for a number of years. Following allegations of nuisance and breaches of certain licence terms, however, the local authority had sought to evict them. The Connors thereupon made an application to Strasbourg for violation of their Article 8 rights. Contrary to the managerial approach of the House of Lords, the ECtHR did not accept that the unqualified right to possession by itself obviated the need to assess the proportionality of the repossession. On these facts, such an assessment would be needed *a fortiori* because there was a summary eviction of a minority group with none of the procedural safeguards that accompany a tenancy. The supranational court held that there was a serious interference with Article 8.[36] Although the minority status of the Connors was a factor, the courts *ratio* arguably did not rest solely on the basis of protecting minorities *per se*. Rather, contradicting the arguments made in *Qazi*, the ECtHR had held that there was a need to review the justification of the eviction, concluding that it was not proportionate to the legitimate aim pursued on those facts.[37]

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[31] The Kantian distinction is adopted here in order to highlight the fact that the House of Lords' decision was in essence a foregone conclusion arrived at analytically in that the right to possession was, of itself, sufficient.
[32] Stephen Cottle, 'So you thought it was all over? Recent gypsy cases and the House of Lords decision in Qazi: Part 2' (2005) 8(5) JHL 64, p. 67
[33] *Buckley* (n 13)
[34] It is also noted that Mr Qazi's application to the ECtHR was held inadmissible.
[35] (2005) 40 EHRR 9
[36] *Ibid.*, at para. 86
[37] *Ibid.*, at para. 95

The House of Lords was subsequently invited to consider whether *Qazi* remained the correct approach in light of *Connors* and (the related) *Blecic*[38] judgments. In *Kay v Lambeth LBC*[39] a panel of seven lords distinguished *Connors* after the Court of Appeal had highlighted the contradiction between *Connors* and *Qazi*. The House of Lords had reservations about the value of *Connors* as a precedent. Lord Bingham, for instance, whilst agreeing that *Connors* should not be purely limited to cases involving gypsies facing eviction[40] nonetheless found cause for much concern[41] in adopting it at face value and felt that domestic precedent should continue to have primacy. [42] Echoing the managerialism of *Qazi,* he emphasised the practical consequences that accepting the ECtHR's reasoning could have on the decision-making of the county court, local authority budgets and also the threat of "upset[ting] the important compromises inherent in our property law".[43]

Lord Hope also maintained his view from *Qazi* that an unqualified right to possession was sufficient to justify an interference with Article 8[44] albeit with some clarifications. According to him, for the individual contesting a summary judgment there would be two routes available (that he would later identify as 'gateways a and b').[45] The first, by challenging the law's compatibility with Article 8, which could either involve the court reading down the legislation[46] to ensure compatibility or issuing a declaration of incompatibility.[47] The second route of challenge would be through judicial review of the public authority's decision to seek repossession under *Wednesbury* [48] reasonableness principles. [49] Significantly, neither route directly provides for the type of proportionality assessment that Strasbourg envisaged in *Connors* since neither would entail consideration of the occupant's individual circumstances. Judicial review, for example, is only of assistance where the eviction is *ultra vires* as opposed to where the eviction is, facutally, a disproportionate interference with the tenant's right to respect for their home.

It has been argued in this section that the managerialist approach adopted by the House of Lords lacked proper engagement with the substantive content of Article 8 and the need for interferences to be proportionate; yet despite *Connors*, the appellate committee provided no more than 'clarification' of *Qazi* in its *Kay* judgment.[50] It is arguable that the *obiter* remarks in *Connors* should have been construed more broadly. The ECtHR, for example, commented on the inadequacies of judicial review

[38] *Blecic v Croatia* (2006) 43 EHRR 48
[39] *Kay* (n 8)
[40] *Kay* (n 8) at para. 24
[41] *Ibid.*, at para. 31
[42] *Ibid.*, at para. 44
[43] *Ibid.*, at para. 31
[44] *Qazi* (n 18) at para. 78
[45] *Kay* (n 8) at para. 110
[46] HRA 1998, Section 3
[47] HRA 1998, Section 4
[48] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1
[49] *Kay* (n 8) at para.114
[50] *Kay* (n 8) at para. 113

as a means of reviewing the eviction; it noted that the applicant was denied permission for judicial review because his principal objection was not the failure of the local authority to comply with its duties, but the fact that he was contesting responsibility for the nuisances.[51] This *dictum* suggests that the Court felt judicial review was, in general, not a satisfactory procedural safeguard for Article 8 and certainly not a replacement for a review of the proportionality of any eviction. The House of Lords' narrow construal of the case, therefore, was arguably erroneous.

McCann and *Doherty*: the courts start digging trenches

That the highest court in the UK may have "misunderstood substantially Article 8's requirements in the context of possession proceedings"[52] was made clear in *McCann v UK*.[53] *McCann* involved joint tenants of a local authority property, a husband and wife. When their marriage broke down Mr McCann was required to leave by court order and Mrs McCann would remain. However, after being allegedly assaulted by her former husband, Mrs McCann left the property and asked the council to be re-housed; Mr McCann then moved back in to the empty property. When the local authority realised that the property was not empty they sought a notice to quit from Mrs McCann, which would also end Mr McCann's right to reside in the house. They did not advise her, however, of the implications of doing so and she had no idea that signing the notice to quit would also end his tenancy. Mr McCann defended against the local authority's possession proceedings and applied to the ECtHR on the basis of Article 8.

Strasbourg stressed the fact that even though the eviction was in accordance with the law and served a legitimate aim, the question of proportionality still had to be addressed. Unlike the managerial approach taken by the House of Lords, Strasbourg laid emphasis on the need also to assess whether that lawful interference was "necessary in a democratic society" [54] (or in other words, proportionate). The Court thereby emphasised the individual as a right-holder rather than focussing solely on the impact on a public authority's allocation duties. Furthermore, they held that the ruling in *Connors* was not to be confined to cases involving gypsies or challenges to the law itself.[55] On the contrary, in light of the "magnitude" of the loss of one's home, an individual "should in principle be able to have the proportionality of the measure determined by an independent tribunal."[56]

The question of justifying the interference, the Court held, "raises a question of procedure as well as one of substance";[57] comparing the situations in which a local authority sought an eviction according to the statutory scheme[58] and the present case

[51] *Connors* (n 35) at para. 92
[52] Ian Loveland, 'Time for a rethink on possession proceedings and Article 8' (2008) Legal Action 26
[53] [2008] 2 FLR 899 (ECHR)
[54] *Ibid.,* at para. 49
[55] *Ibid.,* at para. 50
[56] *McCann* (n 53) at para. 50
[57] Ibid.
[58] *Ibid.*, at para. 51

where they had chosen to "bypass" that framework by requesting the wife to sign the notice to quit.[59] The effect of the latter meant the court had no jurisdiction to assess the occupant's personal circumstances and thus no opportunity for proportionality to be assessed. Furthermore, judicial review was held to be an inadequate safeguard that is "not well adapted for the resolution of sensitive factual questions";[60] this echoes the ECtHR's view in *Connors* where judicial review had not availed the occupant of any opportunity to challenge the proportionality of his eviction.

Strasbourg concluded that regardless of whether the tenant knew of the intended effects of signing a notice to quit or not, the other joint tenant's Article 8 right would be interfered with due to the lack of procedural safeguards.[61] The Court did not wish to suggest that proportionality would normally succeed as a defence, rather, only in very exceptional cases would there actually be a seriously arguable case.[62] However, the facts had revealed an objectionable situation wherein Mr McCann had had no opportunity whatsoever to have the proportionality of his eviction considered.

Applying the *Qazi* and *Kay* reasoning to Mr McCann's predicament, it is clear that he would not have benefited from any proportionality review; after all, his property law rights had been terminated by his former wife's notice to quit. The balance drawn by the ECtHR therefore, represents a fairer compromise between individual and public interests by insisting that tenants have a basic safeguard available to them, and only encroaching on public authorities' decision-making in exceptional cases. The *McCann* ruling, however, was not received with open arms by the House of Lords in the following case of *Doherty v Birmingham CC*.[63] The appellate committee, in spite of the rather clear weight attached by Strasbourg to the procedural protection of Article 8, reiterated its managerial arguments.

One of the major difficulties perceived by their Lordships about the *McCann* ruling was that it did not lay down "any firm objective criterion by which a judgment can be made as to which cases will achieve [the] standard and which will not".[64] Lord Hope therefore restated and refined his earlier views as developed in *Kay*.[65] He underlined the fact that Strasboug may not have appreciated the "very real problems that are likely to be caused"[66] if the *Kay* decision were to be departed from. Lord Scott went slightly further in considering that Strasbourg had actually misinterpreted English law in its decision.[67] It was held that where it is not possible to read down legislation, effect must be given to the incompatible view due to Parliamentary sovereignty.[68]

[59] *Ibid.*, at para. 52
[60] *Ibid.*, at para. 53
[61] *Ibid.*, at para. 55
[62] *Ibid.*, at para. 54
[63] *Doherty* (n 6)
[64] *Ibid., at para. 20*
[65] *Ibid.*
[66] Ibid.
[67] *Ibid.*, at para. 82
[68] *Ibid.*, at para. 21

The awareness that protection for individual tenants was insufficient was at least implicit in that view. Whilst extensive guidance was not provided in *McCann* on the exceptional circumstances, the need for a procedural mechanism to assess proportionality was now quite beyond doubt and the ECtHR reiterated this view in *Kay v UK*.[69]

Pinnock*: an overdue rebalancing of managerial and individual interests or a mere gloss on *Kay?

The Supreme Court in *Pinnock v Manchester CC*[70] might be viewed as a *volte face*[71] on the application of Article 8 in housing cases, in that the clear and consistent message of Strasbourg jurisprudence was finally acknowledged.[72] Lord Neuberger MR, delivering a single judgment, recognised the need for county courts to be able to deal with the issue of proportionality in repossession proceedings, bringing "much-needed clarity"[73] to this area of law. In that case Mr Pinnock, a demoted tenant, sought to resist the local authority's application for possession. The local authority was seeking eviction after acts of serious anti-social behaviour had been committed by Mr Pinnock's partner and son. Under the Housing Act 1996, a landlord's application for possession must be upheld by the court provided the landlord followed the statutory procedure to inform the tenant of the reasons and make an internal review of the decision if requested by the tenant. Critically, however, Mr Pinnock did not have an opportunity for the merits of his eviction to be independently reviewed.

Whilst the Supreme Court held that the eviction was proportionate on the facts, the recognition that courts must have a jurisdiction to review the proportionality was a significant concession. As to when it would be appropriate for the court to carry out that assessment, Lord Neuberger questioned the usefulness of the much-criticised proposition "only in very highly exceptional cases".[74] Previous minority House of Lords opinions and Strasbourg had both referred to exceptionality, yet, as Baroness Hale had pointed out, "exceptionality is an outcome…not a guide."[75] The correct position, according to the Supreme Court, would be to assess the proportionality based on "whether the eviction is a proportionate means of achieving a legitimate aim"[76] as per Strasbourg's jurisprudence. The local authority's decision to evict will be proportionate only if it has ownership rights and the repossession enables it to

[69] [2010] ECHR 1322, para. 74
[70] [2010] UKSC 45
[71] Rachael Walsh, 'Stability and predictability in English property law - the impact of article 8 of the European Convention on Human Rights reassessed' (2015) LQR, 131(Oct), 585-609, p. 591
[72] *Pinnock* (n 70) at para. 45
[73] Amy Goymour, 'Possession proceedings and human rights - the final word?' (2011) 70(1) CLJ 9, p. 12
[74] *Pinnock* (n 70) at para. 51
[75] *Pinnock* (n 70) at para. 51
[76] *Ibid*., at para. 52

comply with its duties of management and allocation of the housing stock.[77] Additional "cogent reasons" may support the proportionality of the application, "such as the need to remove a source of nuisance to neighbours"[78] (as in the facts of *Pinnock*).

Their lordships were, however, mindful of the fact that requiring local authorities to routinely justify repossessions would be "burdensome and futile".[79] It was therefore stressed that where the tenant has no legal right to occupy and the authority is entitled to possession then "there will be a very strong case for saying that making an order for possession would be proportionate."[80] The occupant must raise Article 8 themselves and, even then, the court will only consider it summarily[81] at first, dismissing it if satisfied that it would not succeed. In many ways then, the managerial concerns of the House of Lords, evident in previous cases, continued to pervade the reasoning of the Supreme Court. It is therefore open to debate whether *Pinnock* really represented a re-balancing of individual rights and managerial concerns or whether it amounts to a mere gloss on earlier judgments.

Lord Neuberger did not expand on what factors might sway the balance, preferring to trust the decision to the "good sense and experience of judges sitting in the county court."[82] However, he did indicate that proportionality is "more likely to be a relevant issue"[83] if the occupant had a particular vulnerability (for example, mental illness, learning disability or poor health). On the facts of *Pinnock*, Lord Neuberger pointed to the fact that Mr Pinnock had already had the opportunity for consideration of his situation by the court when the demotion order was made itself.[84] It was, after all, at that point when the tenant's security of tenure was removed. The whole set of proceedings must be viewed together,[85] rather than allow the same merits assessment to be repeated in making the demotion order. This is evident in that Mr Pinnock had attempted to argue that the property had been his and his family's home for 30 years and that Mr Pinnock himself was not actually responsible for the anti-social behaviour or nuisances. Walsh notes with surprise that the Supreme Court appeared to give very little weight to this fact,[86] with Lord Neuberger concluding that there was no need even to remit the case to determine the question of proportionality.[87] The fact that the crimes and nuisances caused by his family had been prolific in the period leading up to 2007 and that there had already been a

[77] Ibid.
[78] Ibid.
[79] *Ibid.*, at para. 53
[80] *Ibid.*, at para. 54
[81] *Ibid.*, at para. 61
[82] *Ibid.*, at para. 57
[83] *Pinnock* (n 70) at para. 64
[84] *Ibid.*, at para. 107
[85] Ibid.
[86] Walsh (n 71), at p. 606
[87] *Pinnock* (n 70) at para. 131

hearing on the demotion order, was deemed sufficient justification, echoing the *a priori* reasoning of *Qazi*.

Pinnock arguably does not represent the paradigm shift that was anticipated. Loveland supports this view, arguing that *Pinnock* was something of an 'empty chalice': [88] "while the abstract principle was clearly accepted, the practical implications of the principle remained…very uncertain" and "the principle will not count for very much" if it's meaning amounts to little more than *Wednesbury* irationality.[89] The court, he notes, failed to clarify the linkage between the civil procedure rules for possession claims[90] and Lord Neuberger's formula[91] for Article 8 cases.[92] *Pinnock* therefore was more of a superficial victory for the tenant and as will be argued in the next section, the proportionality jurisdiction was subsequently construed very narrowly.

II. Discussion

The case for managerialism

When the Supreme Court confirmed that the reasoning in *Pinnock* applies to other forms of non-secure tenancy in *Hounslow LBC v Powell,*[93] it also stressed that the case must be "seriously arguable";[94] thus, it took the opportunity to again "emphasise the limits of this new jurisdiction".[95] This restrictiveness does not appear to have been ameliorated in light of post-*Pinnock* case law either. Cowan and Hunter view the proportionality jurisdiction as offering "little more (perhaps only a scintilla) than the "old" gateway (b) jurisdiction";[96] an argument which is affirmed by Loveland who comments that the "impact of art.8 on what would otherwise be hopeless defences is proving rather slight."[97] The Court's attempts to reign in the impact of Article 8 on the social housing system, however, cannot lightly be dismissed and the theoretical underpinnings of the English Courts' approach should be reviewed.

The social and economic realities of social housing of course mean that allowing Article 8 to impact too widely could have deleterious implications for the budgets of public housing authorities across the country. The Convention right, it is to be

[88] Ian Loveland, 'The holy grail as an empty chalice? Proportionality review in possession proceedings after Pinnock and Powell' (2013) JPL, 6, 622-631
[89] *Ibid*., at p. 622
[90] Civil Procedure Rules, 55.8
[91] *Pinnock* (n 70) at para. 61
[92] Loveland (n 88), at p. 624
[93] [2011] UKSC 8
[94] *Ibid.,* at para. 41
[95] D Cowan and C Hunter, '"Yeah but, no but", or just "no"? Life after Pinnock and Powell' (2012) 15(3) JHL 58, p. 58
[96] Cowan and Hunter (n 95), at p. 58
[97] Loveland (n 88), at p. 624

remembered, does not provide for a right *to a home*[98] (though see Article 11(1) of the UN Convention on Economic, Social and Cultural Rights). Rather it requires the state to *respect* the individual's home, which nonetheless entails economic considerations, and can impose restrictions upon allocation decisions. Baroness Hale touched upon this issue in *Kay* where she said: "to refuse to allow a landowner to recover possession of the dwelling…is to impose upon him a positive obligation to continue to make those premises available to the occupier."[99] The courts therefore have to ensure the Human Right to respect for the home does not undermine the budgets and efficiency of housing authorities to the detriment of the public as a whole. Proportionality assessments must therefore take account of "the strong public interest in favour of granting possession to a local authority landlord with scarce housing resources".[100]

Additionally, the courts have also been conscious of ensuring some measure of legal certainty to maintain the balance of property rights which have been gradually developed over the centuries.[101] Lord Bingham in *Kay* reflected on the importance of the "compromises inherent in our property law"[102] and Lord Scott in *Qazi* discussed the fact that there is already in place a very complex statutory framework for determining the appropriateness of evictions. The courts are seldom keen to ignore the expressly designed will of Parliament to avoid being seen to be playing the role of legislator. Parliament and precedent,[103] it could be argued, are a better source for the rules of entitlement to occupation of property than ambiguous Human Rights values. Indeed, inviting such values to play a crucial role in property law could even introduce legal uncertainty, a point that Walsh makes regarding the proportionality analysis developed in *Pinnock:* "[b]y favouring opaque proportionality reasoning, perhaps out of a sense of institutional sensitivity, or a discomfort with the unfamiliar nature of the values protected by art.8, the courts are in fact heightening the risk of destablisation through unpredictable proportionality balancing in property law."[104]

These arguments do give some force to the public authority bias of the English courts but they also seem to corroborate Latham's "managerialist" critique in their complete disregard of extraneous individual factors. In his view there has been a "failure to engage adequately with any rights-based analysis"[105] at all. The Supreme Court in *Pinnock*, for example, did not "analyse the situation from the point of view of the occupier as rights-bearer"[106] because it was presumed that the local authority's aim in recovering property is a given[107] and the demoted tenancy regime itself was not

[98] *Chapman v UK* (2001) 33 EHRR 399, at para. 99
[99] *Kay* (n 8), at para. 192
[100] *Southend-on-Sea BC v Armour* [2012] EWHC 3361 (QB), at para. 15
[101] *Kay* (n 8), at para. 33
[102] *Ibid.*, at para. 31
[103] *Ibid.*, at para. 42
[104] Walsh (n 71), at p. 608
[105] Latham (n 17), at p. 733
[106] *Ibid.*, at p. 740
[107] *Pinnock* (n 70) at para. 53

scrutinised.[108] Indeed, the legal uncertainty introduced by *Pinnock* as noted above by Walsh, is arguably more symptomatic of the 'institutional sensitivity' of the courts to Human Rights values than it is of any uncertainty inherent to Human Rights themselves. The solution, Walsh elaborates, is for the courts to engage more with the values on *"both* sides of the proportionality scales"[109] (emphasis her own) and furthermore to make more effort in articulating exemplars that would help to show when the proportionality jurisdiction comes into play.

It follows that the approach of the English courts, even though founded on clear public policy rationales, begins with managerial presumptions that arguably should not automatically tip the balance in favour of the public body. Using the case of *Pinnock* as an example, Lord Neuberger analysed the problem in terms of whether sufficient procedural safeguards were in place, but considered that it was a demoted tenancy for a reason and that no further scrutiny should be requried. However, as Walsh pointed out, the Court gave little weight to the fact that this property was the home of Mr Pinnock for 30 years, a man who was in fact innocent of causing any of the crimes. Walsh concludes quite pertinently that "[w]hile the risk to the efficient administration of public housing is expounded at length in the English possession decisions, the risks to the evictee receive relatively little attention."[110] Latham's managerial thesis is therefore evident even in the very decision that purported to introduce proportionality. It is concluded, regarding the case for managerialism, that the courts need to grapple more with "home" values[111] and positively include these *alongside* the very real managerial concerns noted above.

Post-*Pinnock* jurisprudence: small steps towards a more robust defence

In the joined appeals of *West Kent Housing Association v Haycraft* and *Corby BC v Scott*[112] the Court of Appeal emphasised just how exceptional the circumstances must be to reach the threshold for *Pinnock* to apply. In *Haycraft*, the tenant had a starter tenancy that was due to become a fully assured tenancy, but following allegations of indecent exposure, noise nusiance and verbal abuse he was served with notice. He was suffering from liver and kidney problems at the time and, if evicted, would be rendered homeless. These facts, however, were not considered to meet the high threshold for proportionality to succeed,[113] even though his behaviour subsequently improved.

In the *Scott* appeal, the tenant had an introductory tenancy but faced eviction after her rent payments fell into arrears. Ms Scott claimed exceptional circumstances after being the victim of a murderous assault and the fact that the arrears had been paid

[108] Latham (n 17), at p. 740
[109] Walsh (n 71), at p. 608
[110] Walsh (n 71), at p. 607
[111] Ibid.
[112] [2012] EWCA Civ 276
[113] *Ibid.,* at para. 35

for by the date of the hearing. The Court of Appeal held that, even though the attack was a shocking experience, it had nothing to do with her defence to repossession under Article 8[114] and therefore did not render it disproportionate. The court stressed that the jurisdiction exercised by the judge at first instance should only take into account "relevant matters"[115] and not allow "understandable sympathy"[116] to sway the decision.

Those judgments leave little doubt as to how limited the proportionality jurisdiction of *Pinnock* was, seeming to add "another nail into the great Article 8 defence coffin."[117] However, in the more recent decision of *Southend-on-Sea BC v Armour*,[118] the Court of Appeal allowed an appeal by an introductory tenant who suffered Asperger's syndrome based upon Article 8. Eviction proceedings began after the tenant had verbally abused electricians who were contracted to do repairs at his home (allegedly also causing one of them to have an electric shock). Southend-on-Sea BC wanted to evict Mr Armour following these incidents but in the time following the notice until the date of the trial his behaviour had improved. The court, for that reason, upheld the lower court's decision. It was held to be disproportionate to evict as the "the strong public interest in favour of granting possession to a local authority landlord with scarce housing resources" should also be counterbalanced by "the personal circumstances of the tenant."[119] Ramshaw comments that *Amour* represents a development *towards* a balance[120] from the more one-sided analysis of earlier decisions. Although it is problematic that the Supreme Court has not had the opportunity to review the post-*Pinnock* case law and provide a definitive ruling.

The *Armour* case demonstrates, first of all, how the combination of a vulnerability (a mental illness) and subsequent improvement of behaviour might sway a decision on the proportionality of an eviction. Furthermore, and perhaps more importantly, it suggests that the higher courts should normally defer to the findings of the lower court on proportionality giving "the encouragement certain district judges [might] need to uphold some of the Article 8 defences."[121] Sergides and Buchanan express some reservation about the decision. Firstly, the fact that improvement of behaviour was a relevant factor at all in the assessment of proportionality was more to do with the fact that the case regarded an introductory tenancy and the whole point of these

[114] *Ibid.,* at para. 24
[115] *Ibid.,* at para. 35
[116] Ibid.
[117] 'S', 'Nothing ever really changes, does it?' (*Nearly Legal*, 20 March 2012) <http://nearlylegal.co.uk/blog/2012/03/nothing-ever-really-changes-does-it/> accessed 11 April 2015
[118] [2014] EWCA Civ 231
[119] *Ibid.,* at para. 15
[120] Adam Ramshaw, 'Southend-on-Sea v Armour: proportionality revisited' (2014) JHL, 17(5), 98-102
[121] 'S', 'So Article 8 isn't always useless then?' (*Nearly Legal*, 13 March 2014) <http://nearlylegal.co.uk/blog/2014/03/so-article-8-isnt-always-useless-then/> accessed 14 April 2015

is to test the tenant's behaviour over a one year period.[122] Moreover, whilst the decision could be seen as a victory for tenants, the judgement does "cut both ways", they argue, since "the reluctance expressed at interfering with the value judgment of the trial judge will no doubt be invoked to support decisions making a possession order as well as decisions refusing them."[123]

Further development of the Article 8 defence may be hoped for in the important issue[124] of whether it is to have a horizontal effect; Lord Neuberger preferred to leave the issue in *Pinnock*[125] but it was later considered in *Malik v Fassenfelt*[126] and then finally ruled upon in *McDonald v McDonald.*[127] The Court of Appeal held that there was no clear strasbourg jurisprudence to show that the Article 8 proportionality test should be applied to a private landlord.[128] The ECtHR decision of *Buckland v United Kingdom*[129] *was referred to, in which it had been doubted that proportionality could be a defence against a private landlord. Again, much like the case with Armour, Sergides and Buchanan highlight the lingering uncertainty in this area as "[d]oubt still remains regarding the contrary opinion expressed by Sir Alan Ward in Malik" making the issue "ripe for determination by the Supreme Court."*[130] *Although the logic of maintaining a strict boundary between public and private evictions is bound to come into question, particularly when quasi-public bodies or large private housing provides evict on statutorily mandatory grounds.*[131] *The challenge of Article 8 may be more properly seen as a challenge against the legislation itself rather than the evicting body. T*he decision of the First Section of the ECtHR, *Zehentner v Austria*,[132] and the House of Lords in *Ghaidan v Godin-Mendoza*[133] show that a horizontal impact is legitimate in some Human Rights cases.

In the recent county court case of *Southern Pacific Mortgage Ltd v V,*[134] however, Mrs V was the owner of a property with a £96,000 repayment mortgage to Southern Pacific. She became unemployed and was subsequently diagnosed with depression. When her insurance ran out, Southern Pacific commenced possession proceedings for the property despite being aware of her disability. Mrs V defended on Human Rights and disability discrimination grounds. The court, however, was bound by

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[122] M Sergides and T Buchanan, 'Article 8 and disability discrimination: where are we now?' (2014) L & T Review 2014, 18(6), 210-214, p. 211
[123] *Ibid*., at p. 211
[124] Goymour (n 73), at p. 12
[125] *Pinnock* (n 70) at para. 50
[126] [2013] EWCA Civ 798;
[127] *McDonald v McDonald* [2014] EWCA Civ 1049, para. 42
[128] Ibid.
[129] (40060/08) (2013) 56 EHRR 16
[130] Sergides and Buchanan (n 122), at p. 212
[131] See *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363 on the definition of Public Authority for the purposes of the HRA 1998. In effect, the *Weaver* decision looked at multiple factors including the receipt of public funding, extent of regulation by the government, etc. For an example of the criteria applied see *Lawal & Anor v Circle 33 Housing Trust* [2014] EWCA Civ 1514;
[132] (2009) 52 EHRR 739
[133] [2004] UKHL 30
[134] [2015] EW Misc B42 (CC)

McDonald so that no horizontal claim was possible. The court, in any event, adopted a very managerialist reading of *Pinnock*:

> '…the House of Lords held that a local authority's right to possession could be taken as read without any need to plead particular facts; I think that the same applies to mortgage companies. The need for a properly regulated, but at the same time widely available, mortgage market, needs no spelling out…'[135]

A parallel can clearly be seen in the courts desire to protect a robust mortgage market and the managerial approach of protecting public authorities. It is interesting to note that even though the court had ordered possession, at the same time it expressed strong disapproval of the 'poor conduct'[136] of the mortgage company, and the lack of any kind of internal review of Mrs V's personal circumstances. The discomfort the judge had in ordering possession highlights the irrationality of excluding Article 8 completely from horizontal cases.[137]

Article 8: a missed opportunity?

English housing law has proven to be particularly resistant to the introduction of Human Rights values, which Walsh notes are "unfamiliar"[138] to the normal rhetoric of property law. Although it could be argued that Civil Rights values are already intrinsic to the rules of property law; consider, for instance, the classic example of *Entick v Carrington*,[139] that an Englishman's home is inviolable. This authority, however, is focussed on the occupant as owner of property[140] rather than the occupant as a home-owner, and thus would assist the public authority more as the legally entitled party than the tenant. The law itself may be said to embody that protective value system as Hughes and Davis point out, housing law is and remains the "bastion of the rights of freeholders." [141] The language of Strasbourg jurisprudence, however, has only become directly relevant in comparatively recent times with the implementation of the HRA 1998 and the duty to take account[142] of ECtHR caselaw. The Convention emodies values that focus on individuals as right

[135] *Ibid.,* at para. 45
[136] *Ibid.,* at para. 38
[137] See also the recent case of *Macleod, R (on the application of) v The Governors of the Peabody Trust* [2016] EWHC 737 (Admin) for a further example of the absurdities caused by maintaining the vertical/horizontal distinction; for comment see: Giles Peaker, 'Private Parts.' *Nearly Legal* <http://nearlylegal.co.uk/2016/04/private-parts/?utm_source=wysija&utm_medium=email&utm_campaign=mail+updates> Accessed 13 April 2016
[138] Walsh (n 71), at p. 607
[139] *Entick* (n 2)
[140] *Ibid*, per Lord Camden: "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances…"
[141] D Hughes and M Davis, 'Human rights and the triumph of property: the marginalisation of the European Convention on Human Rights in housing law' (2006) Conv 526-552, at p. 550
[142] HRA 1998, Section 3

holders and, in general, provide for results, rather than the specific procedures for attaining those results. For example, Article 8 provides for the result of respect for an individual's private life and home; it does not provide for the procedural basis of ensuring proprietary or implied contractual rights to the same. In that sense, taking account of the Article 8 saga detailed above, there has been a real failure on the part of the English courts to recognise that result intended by the Convention purely because of difficulties in manipulating national procedure. Lord Scott's dissent in *Qazi*, being the quintessential example of this, with the argument that since Article 8 vested no rights *in rem* or *in personam*[143] to the occupant to remain, there would be no protection for him. It will therefore be argued in this section, that Article 8 is a missed opportunity to introduce a critical shaping voice to property law that could redress certain imbalances produced by the strictness of its rules, statutory or common law.

A prominent example of English property law's failure to achieve the result intended by Article 8 is the rule in *Hammersmith and Fulham LBC v Monk*.[144] The court held in that case that a joint tenancy can be unilaterally ended by one tenant serving notice to quit on the landlord. The local authority in *McCann* had exploited this very rule in order to evict Mr McCann from his home, and it is striking that the ECtHR had ruled that it was an interference with his Article 8 right yet the *Monk* rule continues to be good law. In *Sims v Dacorum BC*,[145] the Supreme Court upheld that rule,[146] noting that even though it is harsh, it would be just as harsh, if not more so, to the other tenant were it not so. Thompson supports the view that there would be real difficulties if Article 8 were used to modify the *Monk* rule.[147] Even though joint tenants are jointly and severally liable for the rent, the leaving tenant would in effect be absolved of their liability and this would "in effect, substitute a new individual lease in favour of the remaining tenant to replace the original joint tenancy."[148] However, plainly the inadequacy of the law is that it could potentially allow a local authority to 'bypass' the protection afforded to a tenant leading to interference with his home life and breaching the result intended by Article 8. As Davis and Hughes argue, this is unsatisfactory because there is the 'inherent danger'[149] that "one joint tenant has the capacity unilaterally, and without any safeguards or constraints, to remove the legal rights of the remainder."[150] Article 8 has therefore been a missed opportunity to provide for a basic layer of proportionality whenever such an instance has occurred; limiting the jurisdiction to situations where the landlord is a local authority and has shown an intention to bypass the statutory protection of the remaining tenant.

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[143] *Qazi* (n 18), at para. 144
[144] [1992] 1 AC 478
[145] [2014] UKSC 63
[146] *Ibid.*, at para. 23
[147] Mark P Thompson, 'Possession actions and human rights' (2011) 5 Conv 421, p. 438
[148] *Ibid.*, at p. 437-438
[149] M Davis and D Hughes, 'Gateways or barriers? Joint tenants, possession claims and article 8' (2010) 1 Conv 57, p. 60
[150] Davis and Hughes, 'Gateways or barriers?' (n 149), at p. 60

Another problematic aspect of housing law is the phenomenon of 'retaliatory evictions'[151] whereby a landlord, in effect, penalises the tenant for exercising one of their statutory rights (i.e. in requiring certain repairs) by serving notice to quit on the tenant. The position in English law under *Chapman v Honig*[152] is that the motive for serving notice is irrelevant,[153] reflecting the judicial preference for a literal interpretation of contractual and proprietary entitlement. Provided it were lawfully made the court will uphold it. The highly restrictive attitude of the courts towards application of Article 8 to private repossession cases[154] suggests that this is an imbalance of rights that is unlikely to be redressed by the Convention right (being more of a private tenancy issue). It is concluded therefore that the failure in the English Courts' approach to engage with Human Rights values has been a missed opportunity to critically refine property law and respond to disproportionate interferences with tenant's rights.

Conclusion

This paper has explored the combined English and Strasbourg case law on Article 8 housing eviction cases with reference to the managerial thesis of Latham. It was found that although *Pinnock* acknoweldged the clear message from the ECtHR that a proportionality safeguard must be available when there is an interference with Article 8, the jurisdiction that that case had created proved to be far too narrow to avail tenants any measure of real protection. This was highglighted by *Haycraft* and *Scott*. The inadequacies of the previous gateways A and B expounded by Lord Hope were inappropriate alternatives to a proportionality assessment as *McCann* had shown yet the *Pinnock* proportionality jurisdiction barely offered a 'scintalla' of more protection. The challenges that could be posed by a wider reading of Article 8 are, of course, pertinent to bear in mind. A local authority that must routinely justify repossessions would become more burdened and Baroness Hale's point that to refuse an order for possession is, in effect, to impose a positive obligation to continue making that property available to the tenant. There are also the 'compromises inherent in our property law' that Lord Bingham was keen to emphasise and the fear of the court being seen as legislator in an area already heavily legislated.

These considertations, however pertinent, do not take account of the fact that the tenant has an Article 8 right to respect for his or her home; the majority judgments invairably made an *a priori* conclusion that since the local authority was the legally entitled party, and the eviction was in accordance with the correct legal procedure, it

[151] A Arden and J Bates, 'Retaliatory Eviction' (*LAG Housing Law*, 13 August 2012) <http://laghousinglaw.com/2012/08/13/retaliatory-eviction/> accessed 21 April 2015
[152] [1963] 2 QB 502
[153] *Ibid*., at para. 520
[154] See *McDonald* (n 127)

was *ipso facto* justified. This shows, as Walsh commented, a lack of engagement with "home" values and consequently Article 8 became a missed opportunity for English law to accommodate a critical shaping voice to improve the sometimes harsh circumstances of evictions, e.g. under the *Monk* rule, retaliatory evictions or in circumstances such as *Haycraft*/*Scott*. The case of *Armour* gives some hope for the proportionality jurisdiction but may be merely the exception that proves the rule; after all *Armour* did concern an introductory tenancy where the court is bound to take into account improvements in the tenant's behvaiour in any event. The cases of *Sims* and *Southern Pacific* further show that the courts are still persuaded more by managerialist concerns. With the possibility of a British Bill of Rights due to be fast-tracked into law this year,[155] we may be unlikely to see any overhaul of this position before the Human Rights reigme changes.

[155] Mark Leftly, 'British Bill of Rights to be fast-tracked into law by next summer' *The Independent* <http://www.independent.co.uk/news/uk/politics/british-bill-of-rights-to-be-fast-tracked-into-law-by-next-summer-a6698261.html> accessed 4 April 2016

Should Corporate Tax Avoidance Be Criminalised?

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Introduction

This article seeks to discuss whether corporate tax avoidance schemes should be criminalised. This project has been influenced by the increased media attention on the amount of tax paid by multi-national companies and the 2015 scandal linking HSBC Bank with tax evasion. HSBC has since been accused of assisting its wealthy clients with tax evasion[1] and 'aggressive tax avoidance',[2] with former Director of Public Prosecutions, Lord Ken Macdonald accusing HSBC of engaging in "a systematic and profitable collusion in serious criminal activity".[3] Following this recent development, George Osborne, British Conservative party politician and Chancellor of the Exchequer, in his first Parliamentary response to the HSBC scandal, stated that new financial and civil penalties for bankers and accountants who aid and abet tax evasion and 'aggressive tax avoidance' were expected to be included in the 2015 budget.[4] Two measures have since been announced. Firstly, legislation[5] will be introduced to impose tougher measures for 'serial avoiders' and General Anti-Abuse Rule (GAAR) penalties.[6] While considering measures to stop corporate tax avoidance, the question of the possible role of the criminal law continues to be a live issue.

This article focuses specifically on tax avoidance by large multinational corporations, through the use of tax havens,[7] transfer pricing[8] and other artificial schemes. The purpose of criminalisation is briefly discussed through the application of principles

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[1] Robert Peston, 'UK Uncut Protests Over Starbucks 'Tax Avoidance'' (BBC UK News, 8 December 2012) <www.bbc.co.uk/news/uk-20650945> accessed 26 February 2015.
[2] James Ball and others, 'Revealed: Swiss Account Secret of HSBC Chief Stuart Gulliver' *The Guardian* (London, 23 February 2015) <www.theguardian.com/business/2015/feb/22/swiss-account-secret-of-hsbc-chief-stuart-gulliver-revealed> accessed 26 February 2015.
[3] Oliver Wright, 'HSBC Accused of 'Engaging a Systematic and Profitable Collusion in Serious Criminal Activity'' *The Independent* (London, 22 February 2015) <www.independent.co.uk/news/uk/home-news/hsbc-accused-of-engaging-a-systematic-and-profitable-collusion-in-serious-criminal-activity-10062838.html> accessed 26 February 2015.
[4] Nicholas Watt, 'HSBC Scandal: George Osborne Signals New Tax Evasion Measures' *The Guardian* (London, 23 February 2015) <www.theguardian.com/politics/2015/feb/23/hsbc-scandal-george-osborne-tax-measures> accessed 26 February 2015.
[5] HM Treasury. *Summer Budget 2015*. Crown copyright. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443232/50325_Summer_Budget_15_Web_Accessible.pdf accessed 4 April 2016.
[6] HM Revenue & Custom. Tax avoidance: General Anti-Abuse Rule. (2016) https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules accessed 4 April 2016.
[7] Examples of tax havens include Panama, British Virgin Islands and Cayman Islands.
[8] A transfer price is a price adopted for book-keeping purposes that is used to value transactions between affiliated enterprises integrated under the same management at artificially high or low levels, in order to effect an unspecified income payment or capital transfer between those enterprises.

commonly used to justify the criminalisation of an act. These principles include Mill's harm principle,[9] Feinberg's offense principle[10] and the principles of individual autonomy, social welfare and morality. In discussing morality, the debate between legal positivism and natural law is analysed so as to place the role of morality as a justification in a wider context, where there is much debate on whether or not morality has a place in law. These principles, for example the harm principle or offense principle, are subsequently applied to corporate tax avoidance to assess whether it satisfies the principles and/or the morality test. Arguments against criminalising tax avoidance, such as the difficulty in regulating it and the possible impact on the commercial attractiveness of England and Wales, are discussed.

Although tax avoidance is legal, in recent years there has been great public outcry on this issue of tax avoidance, with some commentators referring to this practice as 'aggressive tax avoidance', sometimes even mistakenly confusing it with tax evasion, or simply calling the act immoral. This topic remains relevant today as there has been growing tension between the public and companies accused of not paying their fair share of taxes. Recent cases of tax avoidance protests have been reported at Starbucks cafes [11] and Barclays bank branches [12] across the UK. The public's dissatisfaction could be as a result of, *inter alia*, the difficult global economic times at present, which place a greater strain on the lower classes. It could also be as a result of the greater dissemination of information through the media, for example the April 2016 'Panama Papers' leak which accused at least 12 national leaders of using offshore tax regimes to reduce their taxes,[13] which makes the issue of tax avoidance and evasion a relevant one. Nevertheless, this article seeks to determine whether criminalising corporate tax avoidance can be objectively justified.

2. TAX AVOIDANCE vs. TAX EVASION

The most crucial distinction between tax evasion and tax avoidance is that the former is illegal while the latter is legal. It is important to acknowledge that all forms of avoidance, whether termed as aggressive, acceptable or unacceptable, are legal.[14] Evasion involves non-disclosure, concealment and fraud. There has been some uncertainty about whether evasion necessarily involved fraud[15] but former Director

[9] John Stuart Mill, On Liberty (John W. Parker and Son 1859) 134.
[10] Joel Feinberg, "'Harmless Immoralities' and Offensive Nuisances" in Issues in Law and Morality (Norman S. Care and Thomas K. Trelogan (eds), Case Western Reserve University Press I973).
[11] Robert Peston, 'UK Uncut Protests Over Starbucks 'Tax Avoidance'' (BBC UK News, 8 December 2012) <www.bbc.co.uk/news/uk-20650945> accessed 26 February 2015.
[12] David Batty, 'Barclays Branches Targeted in Protests Against Tax Avoidance' *The Guardian* (London, 19 February 2011) <http://www.theguardian.com/uk/2011/feb/19/barclays-ban-protests-tax-avoidance> accessed 3 March 2015.
[13] Luke Harding, 'What are the Panama Papers? A guide to history's biggest data leak' *The Guardian (London,* 5 April 2016) <http://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers > accessed 15 April 2016.
[14] Judith Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] BTR 332, 336.
[15] Michael P Devereux, Judith Freedman and John Vella, 'Tax Avoidance' [2012] Oxford University Centre for Business Taxation 1, 4 <www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 18 December 2014.

of Public Prosecutions, Keir Starmer QC, has confirmed that tax evasion is necessarily fraudulent.[16]

TAX EVASION

Tax evasion is the illegal reduction of tax payments through failure to declare assets or attempting to offset an expense one did not incur.[17] As such, tax evasion involves dishonesty and fraud, i.e. the wilful violation of applicable tax law in order to minimise or escape tax liability.[18]

TAX AVOIDANCE

It has been suggested that tax avoidance practices seek to accomplish at least one of the following: payment of less tax than might be required on a reasonable interpretation of the law; payment of tax on profits declared in a country other than where they were actually earned; or tax payment that occurs later than the profits were earned.[19] Tax avoidance has no fixed legal meaning, but courts have on a number of occasions sought to define it. In fact, one of the most repeated definitions of tax avoidance was given by Lord Nolan in *IRC v Willoughby*,[20] where he stated that the hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability.[21]

An example of the application of this definition is seen in *Ramsay (WT) v IRC*[22] where the taxpaying company entered into a series of transactions that generated an artificial capital loss to set against a large capital gain, to avoid capital gains tax. The House of Lords held that where a transaction serves no commercial purpose other than to avoid tax, the preferred approach is to tax the effect of the entire transaction. In this case the taxpaying company attempted to reduce its taxes without suffering the economic consequences Parliament intended, as the company was in the exact financial position it had been in before entering the transactions.

Lord Nolan in *IRC v Willoughby*[23] stated further that tax mitigation is where the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation and genuinely suffers the economic consequences that Parliament intended.[24] An example of tax mitigation would be the entering into a deed of family arrangement, effecting changes to a will following the death of a testator, with a view to minimising inheritance tax and passing assets through generations as provided for in section 142 of the Inheritance Tax Act 1984. This is in accordance with Parliament's intention.

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[16] 'Tax evasion: Criminal Crackdown to Accelerate' (BBC Business News, 21 January 2013) <http://www.bbc.co.uk/news/business-21121840> accessed 24 February 2015.
[17] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010) 4.
[18] *Black's Law Dictionary* (9th edn, 2009).
[19] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010) 10.
[20] *IRC v Willoughby* [1997] 1 WLR 1071 (HL).
[21] *ibid.*
[22] *Ramsay (WT) v IRC* [1982] AC 300 (HL).
[23] *IRC v Willoughby* [1997] 1 WLR 1071 (HL).
[24] [1997] 1 WLR 1071 (HL),1076.

Tax avoidance has also been categorised as either 'exogenous tax avoidance', which refers to avoidance of tax by resorting to transactions and structures that are independent of other economic activity of the taxpayer, or 'endogenous tax avoidance', which refers to avoidance that is effected by adjusting transactions that were already planned or entered into.[25] In this article, tax avoidance is categorised into three subsections. This categorisation is by no means exhaustive or mutually exclusive, but is convenient for structuring the critical analysis and highlighting the corporate tax avoidance category, which is the focus of this article.

INEFFECTIVE AVOIDANCE

Ineffective avoidance occurs when the enacted legislation and treaties are effective to prevent the avoidance scheme from saving tax, thus rendering the tax avoidance scheme ineffective.[26] However, given case law, tax avoidance schemes deemed ineffective cannot always be predicted with great certainty, particularly in what is termed 'borderline' cases.[27] This is contrary to Fuller's 'internal morality of law', examined below in section 5, where law must be predictable, which means tax advisers must be able to know in advance what the law is and whether an avoidance scheme is legitimate prospectively.

EFFECTIVE AVOIDANCE

Effective avoidance may arise due to 'loopholes' in the legislation or other failure in the way the legislation is written that cannot be corrected by a purposive interpretation.[28] It has been argued that such a scheme that complies with Parliament's intention is not tax avoidance at all, yet some have still referred to this as avoidance.[29] They argue that these taxpayers are not paying their fair share of taxes. Of course, putting a numerical value on what is a fair share may prove to be an impossible task. Lord Hoffman has stated extra-judicially that tax avoidance in the sense of transactions successfully structured to avoid a tax Parliament intended to impose should be a contradiction in terms.[30]

USING LEGISLATION OR THE INTERNATIONAL TAX SYSTEM TO ONE'S ADVANTAGE

This category will include some companies that have a high turnover in the UK but pay little or no tax there because they make payments for interest, licenses and royalties in other jurisdictions. These may include the likes of Starbucks and Amazon

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[25] Zoe M Prebble and John Prebble, 'The Morality of Tax Avoidance' (2010) 43 Creighton Law Review 693, 698.
[26] Michael P Devereux, Judith Freedman and John Vella, 'Tax Avoidance' [2012] Oxford University Centre for Business Taxation 1, 3 <www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 18 December 2014.
[27] *Tower MCashbook LLP 1 v Revenue & Customs Commissioners* [2011] UKSC 19 compared to *Mayes v HM Revenue & Customs Commissioners* [2011] EWCA Civ 407.
[28] Michael P Devereux, Judith Freedman and John Vella, 'Tax Avoidance' [2012] Oxford University Centre for Business Taxation 1, 3 <www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 18 December 2014, 5.
[29] i*bid.*
[30] Lord Hoffmann, 'Tax Avoidance' [2005] BTR 197, 206.

or the hundreds of persons accused of using secretive off-shore tax regimes in connection with the 2016 'Panama Papers' leak, including six members of the House of Lords, three former Conservative MPs and dozens of donors to British political parties.[31] These activities have been described by some as avoidance and immoral.[32] This should be contrasted with the use of these offshore accounts to hide one's assets either through the use of shell companies or other schemes, thereby committing tax evasion. However, the fact that little or no tax is paid does not mean it is avoidance under either effective or ineffective avoidance. In some of these cases, these companies are simply operating in accordance with incentives created by the international tax system and by domestic governments trying to attract economic activity into their jurisdiction.[33] This may be done as an incentive for companies to set up in certain countries because of the benefits to the country through job creation, wealth generation and transfer of expertise. According to Lord Nolan's definition of tax avoidance, the use of incentives would not, strictly speaking, amount to tax avoidance as the provision of incentives for the company's use was the intention of Parliament.

It can be argued that companies have gone far beyond the use of these incentives for avoiding tax. Some companies make use of international tax structures and international laws to avoid taxes. This article is focused on corporate tax avoidance, as it is assumed companies have greater resources to avoid tax and make use of the tax avoidance industry, which can provide wholesale tax avoidance schemes inclusive of shell companies.

3. HOW DO CORPORATIONS AVOID TAX?

This section seeks to briefly discuss the use of legislation and other statutory instruments by large corporations- specifically multi-national companies- to avoid taxes, Multi-national companies avoid taxes in tax havens primarily through transfer pricing.[34] A transfer price is a price adopted for book-keeping purposes, to value transactions between affiliated enterprises integrated under the same management at artificially high or low levels, in order to effect an unspecified income payment or capital transfer between those enterprises.[35] Transfer pricing is a legitimate practice, provided the corporation abides by the 'arm's length principle' which requires these

[31] Juliette Garside, Holly Watt and David Pegg, 'What are the Panama Papers? A guide to history's biggest data leak' *The Guardian (London, 3* April 2016) <http://www.theguardian.com/news/2016/apr/03/the-panama-papers-how-the-worlds-rich-and-famous-hide-their-money-offshore > accessed 15 April 2016.

[32] Andrew Goodall, 'MPs urged to probe international tax avoidance' (Tax Journal, 26 October 2012).

[33]Michael P Devereux, Judith Freedman and John Vella, 'Tax Avoidance' [2012] Oxford University Centre for Business Taxation 1, 3 <www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 18 December 2014, 7.

[34] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010) 4.

[35] Organization for Economic Co-operation and Development, 'Glossary of Statistical Terms' (Organisation For Economic Co-operation and Development 2007) <http://stats.oecd.org/glossary/detail.asp?ID=2757> accessed 26 February 2015.

companies with subsidiaries in a number of countries to value transactions as if they had been carried out by unrelated parties, each acting in its own interest.[36]

Transfer pricing can be used to artificially shift profits away from a high to low-tax jurisdiction, by maximising expenses in the high tax regions and maximising profits in the low tax regions.[37] This process has been widely abused, particularly in cases where there are few comparative markets available, such as intellectual property.[38] Unfortunately, the use of transfer pricing for tax avoidance tends to be difficult and expensive for regulatory authorities to detect.[39]

Furthermore, businesses establish dummy companies and adjust their transfer pricing to ensure their profits are all in these tax havens.[40] The term 'tax havens' generally refers to a jurisdiction that imposes little or no tax on the profits from transactions carried on there or on persons resident there.[41] Some of the more popular tax havens include Ireland, Luxembourg, Switzerland, Panama, Bermuda, Turks and Caicos and Cayman Islands.[42]

Another method of shifting profits from a high tax jurisdiction to a low one is to borrow more in the high tax jurisdiction and less in the low tax one; this shift of debt can be achieved without changing the total debt of the firm. Jane Gravelle refers to a 'check-the-box' provision and the use of hybrid entities, where an entity can be recognised as a separate corporation in one jurisdiction but not in another. She provides the example of a US Parent's subsidiary located in a low-tax country lending to its subsidiary in a high-tax country, with the interest being deductible, because the high-tax country recognises the firm as a separate corporation. However, under check-the-box rules, the high-tax corporation can elect to be disregarded as a separate entity, so there would be no interest income paid, as the two are the same entity.[43]

Enron, a US energy company, is an example of a company that uses tax havens for the purpose of tax avoidance. Evidence suggests that this company created 3,500 domestic and foreign subsidiaries and affiliates and through transfer pricing policies, was able to shift its income to tax havens. This enabled Enron to book fees in tax havens which would otherwise have been tax-deductive expenses in other locations.

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[36] Organization for Economic Co-operation and Development, 'Conducting Business in Weak Governance Zones - 2006 Annual Report on the Guidelines for Multinational Enterprises' (Organization for Economic Co-operation and Development 2006) 176.
[37] Prem Sikka and Hugh Willmott, 'The Dark Side of Transfer Pricing: It's Role in Tax Avoidance and Wealth Retentiveness' (2010) 21 Critical Perspectives on Accounting 342, 344.
[38] Jasmine M Fisher, 'Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility' (2014) 94 Boston University Law Review 337, 345.
[39] Prem Sikka and Hugh Willmott, 'The Dark Side of Transfer Pricing: It's Role in Tax Avoidance and Wealth Retentiveness' (2010) 21 Critical Perspectives on Accounting 342, 343.
[40] Standard Schaefer, 'An Interview with Michael Hudson: An Insider Spills the Beans on Offshore Banking Centers' *Counterpunch* (Petrolia CA, 25 March 2004) <http://www.counterpunch.org/schaefer03252004.html> accessed 3rd March 2015.
[41] *Black's Law Dictionary* (9th edn, 2009).
[42] Jane G Gravelle, 'Tax Havens: International Tax Avoidance and Evasion' (Congressional Research Service 2015) <http://fas.org/sgp/crs/misc/R40623.pdf> Accessed 28 February 2015, 4.
[43] ibid 14.

Enron's profits of US$1.785 billion from 1996 to 2000 attracted no taxes. Enron also avoided taxes in some developing countries.[44]

Following stories in the media that some high-profile multinational businesses have been avoiding tax, Her Majesty's Revenue and Customs (HMRC, hereafter) released a statement explaining how the corporate tax structure works.[45] The statement provides that companies are required to pay corporation tax in the country where they carry on the economic activity that generates their profits, not where their customers are located. Furthermore, a company not resident in the UK does not have to pay UK corporation tax on its trading profits, unless it is trading through a branch in the UK. For example, Google makes almost all of its sales from its Irish office, therefore its profits are not taxed in the UK. This is simply not tax avoidance. However, while maintaining that they have done nothing wrong and have complied with tax laws around the world, Google has agreed to pay £130m in back taxes to the British government and bear a greater tax burden in future.[46]

4. COURT'S APPROACH TO TAX AVOIDANCE

Generally, tax avoidance schemes involve the use of available exemptions and reliefs that are provided in all tax legislation. However, the tax planning industry utilises far more complex schemes which usually include finding loopholes in domestic and international law.[47] HMRC is essentially responsible for the collection of tax and in order to tackle tax avoidance they rely on legislation, disclosure rules and judicial intervention.[48] This section focuses on the Court's approach to tax avoidance schemes. The Court has maintained that an intention to avoid tax is not enough to prevent a taxpayer from relying on a statute.[49]

LITERAL APPROACH VERSUS PURPOSIVE APPROACH

There has been an evident shift away from a literal interpretation to a more purpose approach, the traditional interpretation of tax statutes. In *Partington v Attorney General*,[50] Lord Cairns stated that a person sought to be taxed must come within the letter of the law regardless of whether this was against the spirit of the law.[51] In *Cape Brandy Syndicate v IRC*,[52] Rowlatt J reiterated this point, stating that clear words are necessary in order to tax a subject and that nothing must be implied.[53] However,

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[44] Prem Sikka and Hugh Willmott, 'The Dark Side of Transfer Pricing: It's Role in Tax Avoidance and Wealth Retentiveness' (2010) 21 Critical Perspectives on Accounting 342, 349.
[45] HM Revenue and Customs, 'Taxing the Profits of Multinational Businesses' <http://webarchive.nationalarchives.gov.uk/20121030115810/http://www.hmrc.gov.uk/about/briefings/profits-multinationals.pdf> accessed 26 February 2015.
[46] K Rawlinson, 'Google agrees to pay British authorities £130m in back taxes' The Guardian (London, 23 January 2016) < https://www.theguardian.com/technology/2016/jan/22/google-agrees-to-pay-hmrc-130m-in-back-taxes > accessed 6 April 2016.
[47] Natalie Lee (ed), *Revenue Law: Principles and Practice* (29th edn Bloomsbury 2011) 15.
[48] ibid 15.
[49] Michael P Devereux, Judith Freedman and John Vella, 'Tax Avoidance' [2012] Oxford University Centre for Business Taxation 1, 3 <www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 18 December 2014, 9.
[50] *Partington v Attorney General* (1869) L.R. 4 H.L. 100, 122.
[51] ibid 122.
[52] *Cape Brandy Syndicate v IRC* [1921] 1 KB 64.
[53] ibid 71.

according to Lord Reid in *Stenhouse Holdings v IRC,*[54] this strict interpretation has sometimes led to results which could not have been realistically intended and that the object of statutory interpretation must be to determine the intention of legislation.[55]

In *Sutherland v Gustar,*[56] Sir Donald Nicholls, giving the judgment on behalf of the Court, stated that legislation is to be interpreted so as to give effect to Parliament's presumed intention, so long as this is clear and that the language of the statute fairly admits how it should be interpreted.[57] This at the time represented a gradual shift from literal interpretation to a more purposive approach.

Cases such as *Ramsay v IRC, Eilbeck v Rawling,*[58] *IRC v Burmah Oil*[59] and *Furniss v Dawson*[60] developed the Ramsay principle which has served to temper the decision in *Duke v Westminster*[61] which affirmed the literal view of tax law.[62] Following on from these cases, there was some concern that this *Ramsay* principle (as it has come to be known as) was an infringement of the Bill of Rights of 1688, which established that there should be no taxation without representation.[63] However, Lord Oliver in *Craven v White*[64] stated that the *Ramsay* principle was merely an exercise in statutory construction.

In *IRC v McGuckian,*[65] which involved numerous transactions in an attempt to avoid a possible wealth tax on its shareholders, Lord Steyn stated that the *Ramsay* principle, which was applied in this case, is one of purposive statutory interpretation.[66] It has been suggested that the *Ramsay* principle has developed to the point where the question to be answered is whether or not the relevant statutory provisions construed purposively were intended to realistically apply to the transaction. [67]

Using a purposive approach to the interpretation of statutes is not always straightforward as it is sometimes unclear in determining the true purpose of the statute.[68] Furthermore, the more detailed and complex a statute is, the more difficult it is to interpret purposively.[69] *Mayes v HMRC*[70] provides an example of where the purposive approach did not prevent the use of avoidance schemes. Despite their

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[54] *Stenhouse Holdings v IRC* 46 TC 670 (HL).
[55] ibid 682.
[56] *Sutherland v Gustar* [1994] EWCA Civ J0222-6.
[57] ibid 311.
[58] *Ramsay v IRC* [1981] UKHL 1.
[59] *IRC v Burmah Oil* [1982] SC (HL) 114 (Scottish Case).
[60] *Furniss v Dawson* [1984] AC 474 (HL).
[61] *IRC v Duke of Westminster* [1936] A.C. 1 (HL).
[62] ibid 19-20.
[63] Natalie Lee (ed), *Revenue Law: Principles and Practice* (29th edn Bloomsbury 2011) 19.
[64] *Craven v White* [1989] AC 398 (HL).
[65] *IRC v McGuckian* [1997] 1 WLR 991 (HL) (Northern Ireland).
[66] ibid 999.
[67] *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51 at [26] - [36].
[68] *BP Oil Development Ltd v IRC* 64 TC 498 (HL), 523B-D (Slaughton).
[69] Michael P Devereux, Judith Freedman and John Vella, 'Tax Avoidance' [2012] Oxford University Centre for Business Taxation 1, 3 <www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 18 December 2014, 13.
[70] *Mayes v HM Revenue & Customs Commissioners* [2011] EWCA Civ 407.

dissatisfaction with the result, the Court of Appeal, with Mummery LJ giving the leading judgment, were reluctant to stretch the language of the statute to produce a result seemingly compatible with its purpose.[71] Thomas LJ acknowledged the unfairness of such a scheme, as the higher rate taxpayer is able to attain benefits that are surely inconsistent with Parliament's intentions, while other taxpayers would have to pay for it.[72] Toulson LJ also agreed with Mummery LJ but felt that the result will be unattractive to other taxpayers and the rest of society and could not possibly be what the statute had intended.[73]

Successful tax avoidance schemes work with the precise wording of the statute and comply with it precisely, which makes it difficult to contest them.[74] Firstly, there is concern whether there can ever be such a thing as 'parliamentary intention' in a statute, i.e. whether all members of Parliament can have a shared mental state of mind.[75] Secondly, it is not always feasible to determine the objective intention of a statute provision. In *BP Oil Development Ltd v CIR*,[76] Slaughton LJ stated that in coming to his conclusion, he did not use purposive construction, as he was unsure of the purpose of the specific provision.[77] Lord Hoffmann suggests that the only way it could be dealt with is if Parliament clearly expresses its intention to impose tax and the courts are trusted to give effect to this intention. Furthermore, he suggests that any other approach will lead to unpredictability in the law.[78]

AIDS TO INTERPRETATION

Lord Browne–Wilkinson stated in *Pepper v Hart*[79] that Hansard could be used for guidance in interpreting legislation that is either ambiguous or obscure, provided the material relied on consists of one or more statements by a minister or other promoter of the Bill and the statements relied on are clear.[80] However, Inland Revenue Press Releases (now HMRC press releases) cannot be used as an aid to statutory interpretation[81] and Parliamentary Debates of 1936 added no value in the case of *IRC v Willoughby*.[82] In practice, the Revenue operates a system of extra-statutory concessions (ESCs) and publishes Statements of Practice (SPs) and interpretations (RI). ESCs give taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law; in contrast an SP explains the Revenue's interpretation of legislation and the way in which it is applied in practice.[83]

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[71] Michael P Devereux, Judith Freedman and John Vella, 'Tax Avoidance' [2012] Oxford University Centre for Business Taxation 1, 3 <www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 18 December 2014, 14.
[72] *Mayes v HM Revenue & Customs Commissioners* [2011] EWCA Civ 407.
[73] ibid [101] – [108].
[74] Judith Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament' [2007] LQR 53.
[75] Natalie Lee, 'A Purposive Approach to the Intepretation of Tax Statutes' [1999] SLR 124, 136.
[76] ibid 136.
[77] ibid 137.
[78] Lord Hoffmann, 'Tax Avoidance' [2005] BTR 197, 203.
[79] *Pepper v Hart* [1993] AC 593 (HL).
[80] ibid 634.
[81] *Elf Enterprise Caledonia Ltd v IRC* (1994) 68 TC 328 (Ch).
[82] *IRC v Willoughby* [1997] 1 WLR 1071 [HL]; Natalie Lee (ed), *Revenue Law: Principles and Practice* (29th edn Bloomsbury 2011).
[83] Natalie Lee (ed), *Revenue Law: Principles and Practice* (29th edn Bloomsbury 2011) 11.

GENERAL ANTI ABUSE RULE (GAAR)

The government, as a result of the Aaronson study,[84] which aims to deter and prevent artificial and abusive tax avoidance schemes, introduced a GAAR.[85] This GAAR aims to reduce the risk of stretched interpretation and uncertainty in tax law by defining what tax arrangements are abusive. Freedman argues that UK case law has failed to provide coherent guidance for dealing with tax avoidance and that any attempts to clarify this position only raises fresh doubts, as was seen in *Barclays Mercantile Business Finance Ltd v Mawson*.[86] She recognises that Parliamentary intention can only be given effect through the text of statute and that the best way to give effect to its intention will be to express policy clearly in the specific legislation and to have a coherent underlying framework for the tax system.[87]

However, large companies who avoid tax through the use of tax havens, transfer pricing and corporate structures remain unaffected by the GAAR or HMRC. The companies unaffected are of course limited to those that satisfy all the surrounding rules and comply with any controlled foreign company rules.[88]

This section focused on the Court's approach to tax avoidance and highlighted the gradual approach towards a more purposive interpretation and the limitation with this approach. The following section discusses criminalisation and the different principles used to justify the criminalisation of an action.

5. CRIMINALISATION AND ITS APPLICATION TO CORPORATE TAX AVOIDANCE

Criminalisation of one's conduct is a pronouncement by society, through law, that a particular conduct is a public wrong that should not be done and which is enforced by sanctions. These sanctions, illustrating the relationship between law and force, provide a pragmatic reason for not doing an activity, and to condemn those who nevertheless do it. [89] In the Wolfenden Report,[90] the Committee identified the function of the criminal law, ergo, the criminalisation of an act as preservation of public order and decency, protection of other citizens from offensive behaviour and provision of safeguards against exploitation and corruption. It further states that the purpose of criminal law is not to moderate behaviour in such a way that it denies an individual's freedom of choice and action in matters of private morality.[91] The criminalisation of conduct may be seen as an invasion of a person's individual autonomy, and as such, it must be adequately justified and controlled to ensure

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[84] Graham Aaronson, GAAR Study. (2011) http://webarchive.nationalarchives.gov.uk/20130321041222/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 28 February, 2015.
[85] HM Revenue and Customs, HM Treasury and David Gauke, 'Reducing Tax Evasion and Avoidance' <www.gov.uk/government/policies/reducing-tax-evasion-and-avoidance> accessed 28 February 2015.
[86] *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51.
[87] Judith Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament' [2007] LQR 53, 90.
[88] Natalie Lee (ed), *Revenue Law: Principles and Practice* (29th edn Bloomsbury 2011) 19-20.
[89] Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2006).
[90] Wolfden Report refers to the Report of the Departmental Committee of Homosexual Offences and Prostitution published on 4th September 1957.
[91] Patrick Devlin, *The Enforcement of Morals* (OUP 1969) 2.

protection of an individual's rights. It is the author's opinion that it is preferable for policymakers and lawmakers to justify criminalising an action through the use of objective criteria.

Some of the principles used to justify the criminalisation of an act includes Mill's harm principle, Feinberg's offense principle and principles of social welfare, individual autonomy and morality, and are highlighted below. It has been accepted by some legal theorists that it is impossible to derive the content of the criminal law from a single principle; rather it is stated that this debate must be informed by different principles and values and viewed as a whole.[92] With a changing society, it becomes necessary for new crimes to be introduced and justifications re-evaluated.

HARM PRINCIPLE

Arguably, the most used and authoritative justification for criminalisation of an act stems from the 'harm principle'[93] as postulated by John Stuart Mill. He states that power can only rightfully be used over an individual, against his will, to prevent harm to others.[94] He however fails to define 'harm'. Subsequently, Feinberg defined harm as "the thwarting, setting back or defeating of an interest" and a wrongdoing of another through indefensible conduct that violates the other's rights. [95] This definition suggests that the harm principle cannot justify the prohibition of consensual activities, despite the fact that it may harm the interest of the parties, such as voluntary euthanasia or drug abuse.[96] Therefore the ratio in *R v Brown*[97] as mentioned below under the sub-heading 'Welfare Principle', cannot be justified by the harm principle.

CORPORATE TAX AVOIDANCE AND HARM PRINCIPLE

Harm has been viewed as the direct object of the criminal law.[98] Feinberg argues that harm represents only setbacks of interests that are wrongs, and wrongs that are setbacks to interests.[99] He refers to these interests, specifically welfare interests, as the "basic requisites of a man's well-being".[100] As such, the harm principle involves the setback of a person's welfare interest. The issue with tax avoidance is identifying whose interest is actually set back by the act. A failure to identify specific victims is a common denominator in most white-collar crimes already criminalised, such as price fixing and bribery, so this should not necessarily be a limitation for tax avoidance. However, it is noted that an argument by analogy is not necessarily the most convincing approach.

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[92] Douglas Husak, 'Limitations on Criminalization and the General Part of Criminal Law' in *Criminal Law Theory: Doctrines of the General Part* (Stephen Shute and Andrew P Simester (eds), OUP 2002).
[93] Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2006), 27.
[94] John Stuart Mill, *On Liberty* (John W. Parker and Son 1859) 134.
[95] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (OUP 1986) 31-64. (Feinberg, *Harm to Self*).
[96] ibid 36.
[97] *R v Brown* [1994] 1 AC 212 (HL).
[98] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (OUP 1984) 31. (Feinberg, *Harm to Others*)
[99] ibid 36
[100] ibid 37.

Perhaps, the more convincing approach is to argue that tax avoidance harms the public's interest as a whole. Feinberg defines a public interest as a resultant interest shared by everybody without exception. It derives its considerable weight from social reinforcement.[101] Tax avoidance cannot easily be dismissed as victimless due to a lack of individually identifiable victims, as failure to identify specific individuals does not mean no one is affected by the conduct; rather, the harm is diffused. Tax avoidance may involve small harms to a large number of victims and become significant if done on a large scale. This is usually the case with white-collar crimes.[102] For instance, if only one company avoids paying a tax of £1 million, this may not have a serious effect on a country whose GDP is £2.5 trillion. However if all companies avoid paying tax in the UK, it is more likely capable of being termed a 'harm' to the public interest. An act that to a small extent sets back a shared net interest, for instance increasing the tax on the middle class by 10% to compensate for the net loss to the Treasury due to tax avoidance, may be viewed as a small harm to each individual, but it causes some harm to a large majority of the population. This seemingly small impact is then multiplied in significance.[103]

It has been stated that there is no economic distinction between tax avoidance and tax evasion as they both aim to minimise tax liability.[104] Despite obvious difficulties in determining the actual amount of revenue lost to tax avoidance schemes, it has been estimated that the sum lost in the UK runs to tens of billions of pounds every year.[105] Prebble and Prebble argue that tax avoidance is harmful because, in essence, it is a taxpayer achieving a tax benefit by activity that is non-beneficial, as opposed to more beneficial activity such as donations to charities. They further state that tax avoidance also undermines government revenues and policies. In turn, this places a greater burden on other members of society to fill that gap.[106]

HMRC defines the tax gap simply as "the difference between tax collected and the tax that should be collected"; this difference may be for a variety of reasons, from taxpayers simply not taking enough care with their tax returns to criminal attacks on the tax system.[107] Moreover, HMRC defines tax that should be collected as the tax that would be paid if all individuals and companies complied with both the letter of the law and the spirit of the law.[108] The courts take a purposive approach to interpreting tax statutes, commonly referred as the *Ramsay* principle (see above).[109] There may be a slight difference in the way the courts and HMRC interpret the

[101] ibid 224-225.
[102] Stuart P Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame Journal of Law, Ethics and Public Policy 501, 509.
[103]Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (OUP 1984) 225. (Feinberg, *Harm to Others*) (my own example was added).
[104] Zoe M Prebble and John Prebble, 'The Morality of Tax Avoidance' (2010) 43 Creighton Law Review 693, 714.
[105] ibid 714.
[106] ibid 714.
[107] HM Revenue and Customs, 'Measuring tax gaps 2015 edition' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470540/HMRC-measuring-tax-gaps-2015-1.pdf accessed 7 April 2016, 3.
[108] Judith Freedman and John Vella, 'The Tax Gap for Corporations' [2012] Oxford University Centre for Business Taxation 1.
[109] IRC v McGuckian [1997] 1 WLR 991 (HL) (Northern Ireland), 999, per Lord Steyn.

intention of Parliament[110] as it cannot always be easily attained, especially when considering tax statutes which are usually very complex and detailed.

In particular, the corporation tax gap estimate for large businesses is derived from two methodologies, namely an established methodology for Large Business Service businesses and an experimental method for HMRC's Large and Complex unit businesses.[111] The estimated total net tax gap for Corporation Tax was £3 billion in 2013-14 which accounts for 6.7% of the overall tax gap. According to HMRC, in 2013-14 the Corporation Tax gap for large businesses, was estimated to be 7% of large business Corporation Tax liabilities.[112] HMRC's estimate for the corporation tax gap for Small and Medium-sized Enterprises (SMEs) is through the use of surveys and the results are extrapolated to the population.[113] The tax gap for SME was roughly £1.4 billion each according to projections for 2013-14.

Based on the above, it can be surmised that tax avoidance does in fact harm the economy and is likely to set back the public's interest as a whole. A tax gap of £3 billion means there is less money available for allocation to health care, education, security or any other common goal of the society. This sets back the government's plans for development and in a wider sense, the goals of the entire society. More so, tax avoidance undermines public confidence in the tax system, which may encourage further tax avoidance.

Although it is uncertain how much of the £3 billion tax gap is as a result of tax evasion or tax avoidance, Prebble and Prebble argue that tax evasion is more likely to be carried out on a smaller scale than tax avoidance,[114] as a result of the illegality of tax evasion. In light of the lack of empirical data to suggest whether tax evasion being a criminal offence has resulted in a reduction in tax evasion cases, it can only be assumed that tax avoidance accounts for a greater proportion of the tax gap than tax evasion.

Consequently, it is likely that corporate tax avoidance would satisfy the harm principle as it sets back the public interests as a whole, in a similar way to tax evasion.

OFFENSE PRINCIPLE

The offense principle often supplements the harm principle, and it cites the need to prevent some people from wrongfully offending others as a reason for criminalisation.[115] In order to satisfy this principle, the offence must be a reaction that could reasonably be expected from any person chosen at random, it must not be reasonably avoidable, must not be the result of abnormal susceptibility and the

[110] ibid 5.
[111] HM Revenue and Customs, 'Measuring tax gaps 2015 edition' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470540/HMRC-measuring-tax-gaps-2015-1.pdf> accessed 7 April 2016, 60.
[112] ibid 16.
[113] Judith Freedman and John Vella, 'The Tax Gap for Corporations' [2012] Oxford University Centre for Business Taxation 7.
[114] Zoe M Prebble and John Prebble, 'The Morality of Tax Avoidance' (2010) 43 Creighton Law Review 693, 726.
[115] Joel Feinberg, "'Harmless Immoralities' and Offensive Nuisances" in *Issues in Law and Morality* (Norman S. Care and Thomas K. Trelogan (eds), Case Western Reserve University Press I973).

person restrained from offensive behaviour must be granted an allowable alternative outlet or mode of expression.[116] A number of public order offences as enacted in the Public Order Act 1986, such as section 23 (possession of racially inflammatory material) and section 5 (harassment, alarm or distress) may be adequately explained by the offense principle. However, there are arguments that suggest that the offense principle is a subsection of the harm principle.

CORPORATE TAX AVOIDANCE AND OFFENSE PRINCIPLE

It is quite unlikely that tax avoidance would satisfy the conditions required under the offense principle, as these acts would take place under a cloak of secrecy and could not accurately be described as offensive, even within the widest interpretation.

MORALITY

For centuries, legal theorists, philosophers and historians have attempted to define 'law' and its relationship with morality. Morality, in the normative sense, can be described as a code of social behaviour; "it is something which is both within the individual and which also encapsulates him by virtue of his membership of society".[117] It may be seen as unrealistic to treat 'morality' in isolation from other determinants of political or judicial behaviour.[118] Lord Devlin states that the morals of society are those standards of conduct the reasonable man approves of.[119] Common morality depends upon the collective wisdom of reasonable men.[120]

LAW AND MORALITY

There is an on-going debate on whether morality should play a role in law in general, with one school of thought arguing that there is a necessary connection between law and morality, while other theorists argue the opposite view. This article will briefly discuss the relationship between law and morality in order to place the issue of morality when considering criminalising an act, into a broader context. In assessing whether corporate tax avoidance should be criminalised, the role of morality will be discussed.

Natural Law

Classical natural law theorists, such as Cicero see moral validity as a precondition for legal validity, insisting that nothing can be law that is not moral.[121] St. Augustine wrote '*Lex iniusta non est lex'* which, translated literally, means "an unjust law is not a law". Aquinas refers to natural law as the rational creature's participation of the eternal law. Law, which deflects from the law of nature, is not binding in conscience except to avoid disturbance.[122] Hugo Grotius stated that natural law would still

[116] Anthony Ellis, 'Offense and the Liberal Conception of the Law' [1984] Philosophy & Public Affairs 3, 20.
[117] L Bloom-Cooper and G Drewry (eds), *Law and Morality* (Gerald Duckworth 1976) xii
[118] Ibid.
[119] Patrick Devlin, 'Morals and the Criminal Law' (Maccabaean Lecture 1957).
[120] L Bloom-Cooper and G Drewry (eds), *Law and Morality* (Gerald Duckworth 1976) 3.
[121] Cicero, *De Republica De Legibus,* (Keyes, CW (tr), William Heinemann Ltd; Harvard University Press 1928).
[122]Aquinas, *Summa Theologica* (Benziger Brothers (tr), Benziger Bros 1947).

maintain its validity even if God did not exist.[123] In *Oppenheimer v Cattermole,*[124] the majority in the House of Lords indicated that the House would refuse to recognise a Nazi law which deprived Jewish citizens of German nationality, because it was morally unjust. This was decided despite the fact that the Nazi law met all the standard criteria of legal validity in terms of English legal rules.

John Finnis, a contemporary natural law theorist, distinguishes the focal meaning of law from its secondary meaning.[125] The focal point of law is an ideal form of law to which actual law is merely an approximation. Finnis describes law in the communal sense, therefore when law is used in its focal sense it describes rules which secure the common good by coordinating the different goods of individuals. The seven aspects of common good Finnis refers to are life, knowledge, play, religion, sociability, aesthetic experience and reasonableness.[126] He describes the security of the common good as the true purpose of law and states that unjust laws are not laws in the focal sense. He is not saying that unjust law is not law at all, but rather, that it is not true law. His definition of law seems to express more about what law should be but does not actually state with any degree of specificity or certainty what form sound law will or should take.[127] Hart agrees with Finnis that at some moments we may be called to disobey unjust law but he disagrees that just law is the central case of law. The idea that what is morally legitimate is orientated towards the common good may seek to justify the evil use of law for oppression.[128]

Lon Fuller states that law is the enterprise of subjecting human conduct to the governance of rules.[129] Lon Fuller's 'internal morality of law' focuses on the procedural aspect of law and what is necessary to ensure that law is capable of governing human conduct. Law must be general, public, clear, possible to obey, relatively constant and prospective. He states that the nature of law cannot be described without recourse to moral concepts.[130] Classical natural law theorists would argue that Fuller's internal morality of law does not prevent morally repugnant laws from satisfying these requirements. It does little to protect against unjust laws. This was seen in the aforementioned case of *Oppenheimer v Cattermole*[131] where the Nazi law satisfied these conditions, as stated by Fuller. Fuller in turn states that if legislators respect the procedural ideas they are more likely to pass good laws.[132]

Ronald Dworkin, a contemporary natural law theorist, states that judges often resort to moral principles which do not have a pedigree to resolve legal disputes. The correct legal principle is that which makes law the moral best it can be. The legal authority of a binding principle derives from the contribution it makes to the best moral justification for a society's legal practices considered as a whole.[133]

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[123] Hugo Grotius, *De Jure Belli ac Pacis*, (Kelsey, Francis W (tr), Bobbs-Merrill 1925).
[124] *Oppenheimer v Cattermole* [1976] AC 249.
[125] John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980).
[126] ibid 39.
[127] Lloyd L Weinreb, *Natural Law and Justice* (Harvard University Press 1987).
[128] HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983).
[129] Lon L Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969).
[130] Lon L Fuller, 'Positivism and Fidelity to Law – A reply to Professor Hart' (1958) 71 Harvard Law Review 630.
[131] *Oppenheimer v Cattermole* [1976] AC 249.
[132] Lon L Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969), 636.
[133] Ronald Dworkin, *Law's Empire* (Belknap Press 1986).

A number of issues arise when attempting to apply the various natural law theories in today's society. A reoccurring issue in natural law theory is the identification of what is just or moral. It assumes that all persons in a society would share the same moral values. However, this can lead to a situation where minorities are victimised and forced to accept the law of the majority. This becomes important when considering the role of morality in corporate tax law. It is critical to ensure that the views of the majority are not allowed to encroach on the rights of those in the minority. Also, the question of what the source of law is remains uncertain. Is it the universe, society, God or another supernatural being? Legal positivists attempt to answer these questions.

LEGAL POSITIVISM

Legal positivists, such as Austin, Kelsen and Hart, unlike natural law theorists, argue that there is no necessary connection between law and morality, and therefore adhere to what is commonly referred to as the 'separability thesis'. The legal validity of law is a function of certain social facts, not its merits. Inclusive positivists, such as Hart, Jules Coleman and WJ Waluchow, state that the rule of recognition is whatever rule happens to be accepted by judges in a particular society as setting out the criteria of legality.[134] Therefore, the rule of recognition may specify that laws must conform to certain moral criteria. In contrast, exclusive positivists such as Kelsen, state that morality is not a condition of legality. This means morality of a norm cannot be a condition of its legality, moral criteria of legal validity being conceptually impossible.[135]

Joseph Raz, a pupil of Hart, is arguably the most influential contemporary defender of the exclusive positivist theory. Raz takes the view that moral tests for identifying the content of the law and determining its existence are inconsistent with the nature of law. If law possesses legitimate authority, it must be capable of assisting humans to act in accordance with right reason. Therefore, rules must be presented as the law makers' view of how their subjects ought to behave and the existence and content of the rules must be established by reference to their sources in empirically discoverable historical facts such as legislation and judicial decisions, and therefore without reference to moral argument.[136] Dworkin fears that Raz's understanding of law encourages blind allegiance to the law. Raz thinks that law cannot be authoritative unless those who accept it never use their own convictions to decide what it requires.[137]

Despite uncertainty as to whether morality forms a necessary component of law, morality continues to provide a persuasive argument for the criminalisation of an act, which will be considered with reference to corporate tax avoidance.

CORPORATE TAX AVOIDANCE AND MORALITY

[134] Denise Meyerson, *Understanding Jurisprudence* (Routledge-Cavendish 2007) 49-50.
[135] ibid 51.
[136] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979).
[137]Ronald Dworkin, *Law's Empire* (Belknap Press 1986).

Notwithstanding arguments that morality is not necessary in determining the law, morality has continued to play an important role in the development of the criminal legal system as it exists today. Lord Devlin argues that a simple way of testing the role of morality in criminal law is by considering the attitude adopted towards consent, as a person cannot consent to certain acts, for example being murdered. He suggests that if the law existed only for the protection of an individual, there would be no reason for such restriction.[138] Lord Devlin refers to a society as a community of ideas and that shared morals, politics and ethics are essential to such a society.[139] He further states that immorality is what every right-minded person is presumed to consider to be immoral, and this immorality is capable of affecting society injuriously.[140] This seems a bit of an over-generalisation, as certainly not all persons share the same morals and in most cases, the dominant morality prevails. Nevertheless, in an attempt to ascertain whether tax avoidance is immoral, the public perception of corporate tax avoidance will be discussed.

According to a poll commissioned by ComRes in 2014, on behalf of Christian Aid and ActionAid, of 2,052 British adults, 85% of those surveyed agreed that tax avoidance by corporations is morally wrong.[141] It is accepted that these figures may not be the true representation of the wider population and are subject to inevitable limitations.

Tony Honoré links morality with legality, therefore he would argue that tax evasion is immoral while tax avoidance is moral. He states that morality on its own is incomplete and cannot provide a viable guide to what we are required to do in particular situations. Moreover, there are some moral conflicts that morality cannot on its own resolve. For moral thinking to guide the conduct of people living in communities and belonging to political entities, as we all do, it needs to be filled out by various means, including formal institutions, the main formal institutions being laws and legal systems.[142]

He further states that there is no way to determine the right course of action without a legal component.[143] This seems even more convincing when considering tax law; it is difficult for any individual to determine what tax they should be paying. According to most people's moral outlook, members of a community should contribute to meeting collective goals, through taxes. He states that this obligation is incomplete or inchoate without the law, and what is required is a coordinated scheme which can be defended as fair. He argues that taxpayers are entitled to their pre-tax income, so there is no moral obligation to pay any tax. The obligation arises through the law despite an appreciation for the importance of contributing to the welfare of the society. [144] However, it may be argued that corporate tax avoiders are going beyond paying their legal share of taxes as they invest significant resources (time and/or financial) in finding ways of avoiding taxes whether through the corporate tax

[138] Patrick Devlin, *The Enforcement of Morals* (OUP 1969) 7.
[139] ibid 10.
[140] ibid.
[141] ComRes, 'Christian Aid and ActionAid – Tax Avoidance Poll' <www.actionaid.org.uk/sites/default/files/tax_avoidance_14th_nov_2014.pdf.pdf> accessed 27 February 2015
[142] Tony Honore, 'The Dependence of Morality on Law' (1993) 13 OJLS 1, 2.
[143] ibid.
[144] ibid 5.

structure, without experiencing the intended burden associated with that incentive, or through more complicated schemes.

Applying Tony Honoré's rationale,[145] Starbucks' decision in December 2012 to pay UK tax authorities roughly £10 million more in taxes than it was required to pay would be seen as an act of generosity. However, it could be argued that this was done to counteract the negative publicity about its almost non-existent tax bill.[146] As Matthew McClearn notes, Starbucks' troubles began when Reuters published a news report stating that Starbucks' UK division continues to report losses for tax purposes but executives regularly told investors it was profitable and performing well. This led to a Parliamentary investigation by the Public Accounts Committee led by Margaret Hodge MP.[147] It is unrealistic to think Starbucks' action was simply an act of generosity. If this were the case, they would not have attempted to avoid their taxes in the first place. The more plausible explanation is that the negative judgment on corporations who avoid tax acts as a deterrent against tax avoidance. As Fisher explains, the news of a corporation's engagement in tax avoidance practices is likely to have an increasingly detrimental effect on its reputation.[148] This inadvertently acknowledges the negative view on corporate companies who avoid tax, perhaps because it is seen as unfair or unjust.

INDIVIDUAL AUTONOMY

The factual element of the principle of individual autonomy is that individuals generally have the capacity and sufficient free will to make decisions about their life and to govern their life without interference from the State. The normative element acknowledges that individuals should be respected and treated as being capable of choosing their acts and omissions.[149] This doctrine emphasises the need for the protection of positive freedom, the duty of the state to promote this freedom, and that one may pursue any goal by means which do not infringe people's autonomy.[150]

WELFARE PRINCIPLE

The welfare principle considers the collective goals of society, such as the provision of basic amenities to all individuals inclusive of health care, education and security.[151] This principle emphasises the importance of 'collective goals' within a community. The inevitable difficulty with this principle is the conflict with the personal autonomy doctrine. In certain cases, it appears that the personal autonomy of an individual takes precedence over social welfare ideals.

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[145] ibid 6.
[146] Bruce Bartlett, 'Can Publicity Curb Corporate Tax Avoidance?' *Financial Times* (London, 31 January 2013); 'Corporate Taxation: Wake up and Smell the Coffee' (The Economist, 15 December 2012) 66.
[147] Matthew McClearn, 'How to Pay Less Tax' (2012/13) 85 Canadian Business 11-12.
[148] Jasmine M Fisher, 'Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility' (2014) 94 Boston University Law Review 337, 345.
[149] Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2006), 24.

[150] Joseph Raz, *The Morality of Freedom* (OUP 1986) 425.

[151] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (OUP 1986) 37-47. (Feinberg, *Harm to Self*)

This was seen in *A and others v Secretary of State for the Home Department*,[152] involving the Anti-terrorism, Crime and Security Act 2001 which provided for the detention of non-nationals if the Home Secretary suspected that they were terrorist who, for safety reasons, could not be deported. Section 23 of this Act only allowed for the detention of non-British suspected terrorists, contravening article 14 of the European Convention on Human Rights, which prohibits discrimination. Furthermore, this Act impacted on the detainees' right to personal liberty guaranteed by article 5(1) of the Convention, as scheduled to the Human Rights Act 1998. Article 15 of the Convention allows for derogation from its obligations in the case of emergencies. Although the House of Lords accepted that the need to ensure public safety was a political matter, they took the view that the right to personal liberty was one of the most fundamental rights and close scrutiny of section 23 of the Anti-terrorism, Crime and Security Act 2001 was required. There was no available derogation for article 14, and the Court concluded, *inter alia*, that the measure unjustifiably discriminated against persons on grounds of their nationality and that such treatment was inconsistent with the UK's international human rights treaty obligations to afford equality before the law. This could be viewed as an argument in favour of personal autonomy where the rights of the detainees were enforced. The purpose of section 23 was to protect the UK from the risk of terrorist attacks, but it sought to do so in a way that was discriminatory on the basis of nationality. This section has since been repealed.

On the other hand, *R v Brown*[153] involved consensual sado-masochistic homosexual encounters, which resulted in actual bodily harm (ABH). The House of Lords held that consent was not a defence to an assault occasioning actual bodily harm under s 47 and s 20 of the Offences Against the Person Act 1861. In this case, Lord Lory stated that sadomasochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.[154] This shows Lord Lory was in favour of protecting the welfare of society over the rights of the individuals to private life and personal autonomy. This case also presents an example of morality playing a role in the judicial process, as Lord Templeman refers to the act of inflicting pain for pleasure as an 'evil thing'.[155]

It is therefore necessary to achieve a balance between these two principles or accept a trade off at times, by acknowledging certain rights that should take priority over the rights of the community, for example those outlined in the Human Rights Act 1998.

CORPORATE TAX AVOIDANCE AND SOCIAL WELFARE

The social welfare argument is closely linked to the issue of morality. The determination of the common good or interests is a matter for democratic decision-making which would inevitably favour a majoritarian perspective. With corporate tax avoidance, there is the issue that companies who avoid paying tax may put a greater strain on other individuals to compensate the Treasury. However, governments also need to consider the possible impact on the economy if corporate tax laws were too

[152] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[153] *R v Brown* [1994] 1 AC 212 (HL).
[154] ibid 255 per Lord Lory.
[155] ibid 237 per Lord Templeman.

strict, which may result in the UK becoming less commercially attractive; corporations may refuse to do business in the UK, resulting in reduced revenue for the nation.

Summary of Criminalisation and its application to Corporate Tax Avoidance

Given the above mentioned analysis of the principles used to justify criminalisation and their application to corporate tax avoidance, a decision to criminalise tax avoidance is admittedly not an easy one for any Government to make. It must consider the larger issues of enforceability of such a law, the requirement for international involvement and whether on balance, the anticipated benefits will redound to the overall welfare of the society and not become a deterrent to investor opportunity. However, it is suggested that corporate tax avoidance is likely to satisfy the harm principle as it harms the public's interest as a whole. It is clear that corporate tax avoidance does not satisfy the offense principle, however it remains debatable whether corporate tax avoidance satisfies the morality and social welfare tests, due to the uncertainty in determining whether an act is immoral and determining the true impact of criminalising it on the welfare interest of the public.

6. ARGUMENTS AGAINST CRIMINALISATION

There are several arguments against criminalising any conduct because of the possible grave infringement of an individual's rights. It has been the practice of legislators to reach for the criminal law when social problems emerge. Many theorists express concern that the liberal society is suffering a crisis of over-criminalisation.[156] It is the author's opinion that punishment should be limited to serious offences and acts worthy of condemnation. There is also a practicality argument to be considered. Although there may be some people who may think corporate tax avoidance is immoral or unjust, is it sensible to criminalise it and can it be monitored practically? Is tax avoidance worthy of being treated in a similar manner to tax evasion?

Despite arguments that tax evasion and avoidance share the same culpability element, as they both have the same causes and motivation,[157] tax evasion involves fraud, which is a criminal offence on its own, whether fraud by false representation, abuse of power or prejudicing someone's rights for personal gain.[158] The root of tax evasion is a criminal offence while tax avoidance can be described as merely arranging one's affairs in order to avoid tax. When considering whether tax avoidance satisfies the harm principle, it is difficult to determine the actual effect or the harm it causes on society. The tax gap estimates may not represent true figures as

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[156] William Wilson, *Criminal Law Theory: Doctrine and Theory* (3rd edn, Pearson Education 2008) 45.

[157] Zoe M Prebble and John Prebble, 'The Morality of Tax Avoidance' (2010) 43 Creighton Law Review 693, 698.

[158] Serious Fraud Office, 'What is fraud?' <www.sfo.gov.uk/fraud/what-is-fraud.aspx> accessed 27 February 2015.

tax avoidance is usually difficult to detect and HMRC's definition of the tax gap seems to assume Parliament's intention.

The difficulty with an argument in favour of criminalisation based on morality is the determination of whose morality should take precedent. Even if it is accepted from the ComRes[159] survey that majority of British nationals view corporate tax avoidance as immoral, is this sufficient to infringe on the rights of a company or its directors to their pre-tax income? It has been the assumption for years immemorial that individuals are free to arrange their affairs in such a manner to limit their taxes.[160] Based on this premise only, it is difficult to condemn corporate tax avoidance even as immoral. Furthermore, due to a lack of empirical statistics, it is difficult to determine with great certainty, the public's opinion on whether corporate tax avoidance is immoral.

EFFICACY ARGUMENT

Firstly, if only corporate tax avoidance- as opposed to all tax avoidance- is criminalised, this may lead to an even more complicated tax system where companies could transfer shares to company owners or board members on trust for the purpose of avoiding tax. This additional step may only serve to make this process more cumbersome and may do very little in terms of reducing the tax gap. However, if corporate tax avoidance is criminalised, attempts to circumvent the law through any means may also result in criminal sanctions, making attempted corporate tax avoidance and conspiracy to commit tax avoidance chargeable. A speculative argument is that criminalising avoidance will deter lawyers and financial institutions from devising avoidance structures, because of the grave consequences of doing so. However, given recent allegations made against HSBC for tax evasion, a criminal offence, its true effect as a deterrent is questionable.

Furthermore corporate tax avoidance is already difficult to detect and it is likely that this law would remain virtually unenforceable, which may result in additional resources being wasted trying to enforce this law. The context in which white-collar crime occurs is often complex and it is difficult to determine when a defendant has violated a given criminal provision. Also within a corporation, there usually is a diffusion of responsibility for decision-making and implementation which usually makes it difficult to attribute blame on any individual character.[161] This makes it harder to convict individuals.

IMPORTANCE OF CERTAINTY

According to Rawls, certainty is vital to liberty and if a man cannot know the law, he cannot know the boundaries of his liberty.[162] Fuller also talks about the importance of certainty of law when discussing the 'internal morality' of law. There is difficulty in defining the boundaries of corporate tax avoidance, which may cause a problem

[159] ComRes, 'Christian Aid and ActionAid – Tax Avoidance Poll' <www.actionaid.org.uk/sites/default/files/tax_avoidance_14th_nov_2014.pdf.pdf> accessed 27 February 2015

[160] *IRC v Duke of Westminster* [1936] A.C. 1 (HL), 19-20. Per Lord Tomlin.

[161] Stuart P Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame Journal of Law, Ethics and Public Policy 501, 511.

[162] John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press 1971).

when trying to enforce the law due to the inevitable uncertainty in the law. For instance, transfer pricing may be good in one sense but criminal in another sense, which seems a bit arbitrary. As a result, corporations would not be able to know what taxes are legally required if corporate tax avoidance is criminalised, unlike tax evasion whose core is centred on fraud and dishonesty which is more straightforward to identify.

COMMERCIAL ATTRACTIVENESS

It is suggested that making corporate tax avoidance a criminal offence would affect the commercial attractiveness of the UK. The 'Doing Business' report[163] looks at 11 indicators inclusive of 'Starting a Business', which includes the time taken to register for PAYE and VAT respectively, and Paying Taxes. It measures the regulations that enhance business activity and those that constrain it. The 'Paying Taxes' indicator considers the total tax rate, time to prepare and file tax and the number of payments a business has to make each year to the tax authorities. Companies, in an attempt to increase profitability, would consider the available incentives and other ways of mitigating loss, for example tax avoidance. Making corporate tax avoidance illegal may deter potential investors and companies from starting a business here. While these companies appreciate the importance of paying capital gains taxes, they prefer markets with lower tax burdens as this means higher profit margins.[164] As taxes increase, transaction costs for firms, the impact of the uncertainty of a nation's tax policy is likely to deter firms from doing business here. Criminalising corporate tax avoidance may even lead companies already set up in UK to transfer their business to a different jurisdiction with less harsh tax regimes.

The importance of maintaining the commercial attractiveness of the UK as a place for doing business was crucial in the development of the GAAR report conducted by Graham Aaronson QC, mentioned above.

ASSISTANCE OF OTHER TERRITORIES

In order for the criminalisation of tax avoidance to have any meaningful impact on multi-national companies, the assistance of other territories is essential, as companies can refrain from setting up subsidiaries in the UK and instead choose to conduct all their transactions from another jurisdiction. This would allow them to legally avoid capital gains tax in the UK. The involvement of the wider global community in criminalising corporate tax avoidance appears to be a difficult task.

7. CONCLUSION

[163] World Bank. 2016. Doing Business 2016: Measuring Regulatory Quality and Efficiency. (Washington, DC: World Bank, 2016). http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Chapters/DB16-Mini-Book.pdf retrieved 10 April 2016.

[164] R Hoffman, J Munemo and S Watson, 'Business Climate and International Franchise Expansion' (Doing Business 2014) <http://www.doingbusiness.org/special-features/conference/~/media/GIAWB/Doing%20Business/Documents/Miscellaneous/Conference2014/S4-1.pdf> accessed 26 February 2015.

This article sought to determine whether or not criminalisation of tax avoidance can be justified as a public wrong that should be condemned through the enforcement of criminal sanctions. Central to this discussion is an examination of the role of law itself in a civilised society, which Fuller argues is the subjecting of human conduct to the governance of rules.[165] The question therefore arises as to what gives validity to law and how far should the law go in regulating human conduct, before it becomes an invasion of a person's autonomy or in what circumstances such a breach would be justified. For example, the law draws a fine distinction between 'tax evasion' and 'tax avoidance', the purposes of which are the same; that is to reduce taxes, with only a dishonest intention separating the former from the latter. At what point does a supposedly legal action become illegal? According to Lord Nolan in *IRC v Willoughby*,[166] the latter is the act of the taxpayer reducing his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. Tax evasion is the illegal reduction of tax payments through failure to declare assets or attempting to offset an expense that one did not incur.[167]

Criminalisation, as a means of sanctioning undesirable conduct and limiting a person's autonomy, can only be adequately justified by the use of objective criteria. The most commonly used principles are Mill's harm principle, Feinberg's offense principle and the principles of individual autonomy, social welfare and morality, which have been applied above, albeit not very successfully, as a yardstick to measure the validity of a law which would make 'tax avoidance' an offence punishable by criminal sanctions. It was argued that corporate tax avoidance is likely to satisfy the harm principle, as the public's interest as a whole is setback by this act and not simply the welfare interest of an identifiable individual. Tax avoidance does in fact harm the economy and a tax gap of £3 billion in 2013-14 for example, means there is less money available to be allocated to health care, education, security or any other common goal of the society. The harm principle provides the most compelling argument for justifying the criminalisation of an act; therefore satisfaction of this principle provides a strong argument in favour of criminalising corporate tax avoidance.

The role of morality in determining whether to criminalise corporate tax avoidance proved less straightforward, due to the subjective nature of morality and the difficulty in defining or identifying a common standard of morality accepted by society as a whole. There has been growing national pressure from interest groups for the Government to tackle corporate tax avoidance. ComRes' poll suggests that 85% of British people deem tax avoidance by corporations as morally wrong.[168] Despite this, it remains difficult to determine with great certainty the general consensus on whether an action is moral or not.

This can best be determined by the Government adopting a mandate from the public. The argument of social welfare is closely linked to the issue of morality, as it focuses

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[165] Lon L Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969).
[166] *IRC v Willoughby* [1997] 1 WLR 1071 [HL].
[167] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010) 177.
[168] ComRes, 'Christian Aid and ActionAid – Tax Avoidance Poll' <http://www.actionaid.org.uk/sites/default/files/tax_avoidance_14th_nov_2014.pdf.pdf> accessed 27 February 2015.

on the collective goals of the society. With corporate tax avoidance, there is an issue that companies who avoid paying tax may put a greater strain on the Treasury and on majority of the public.

There are certain other weighty considerations, more political and economic in nature, which must necessarily be taken into account in making a decision to criminalise tax avoidance. Ultimately, a decision to criminalise tax avoidance is as much economic as it is legal or regulatory. Policy and lawmakers would take into consideration whether the gains in tax revenue by criminalising corporate tax avoidance is outweighed by the possible losses due to reduced investor interest. As a result of this need to find a balance, it is suggested that criminalisation of corporate tax avoidance is not a viable option for addressing concerns of the loss in revenue to the HRMC and the tax gap for a number of reasons.

Firstly, criminalisation threatens to greatly hamper the commercial attractiveness of the UK. Despite the country's high reputation as a place for doing business and its highly respected legal institution and financial services, criminalising corporate tax avoidance may serve to reduce its commercial attractiveness, as it increases the cost of doing business for companies. This could result in a greater financial loss to the Revenue. Unfortunately, it is difficult to predict the true effect of criminalising corporate tax avoidance on the commercial attractiveness of the UK due to the lack of empirical statistics. It would be interesting to see the effect of the UK government's decision on 11 April 2016, following the 'Panama Papers' fiasco, to bring forward plans to introduce a criminal offence for corporations who fail to stop their staff facilitating tax evasion.[169] This begs the question whether this step will affect the commercial attractiveness of the UK to companies, despite the fact that tax evasion is already a criminal offence.

Secondly, there is unavoidable difficulty in regulating corporate tax avoidance because of the problems in defining its boundaries and the possible inability to actually address the issue. It is suggested that any attempts to make a meaningful contribution to tackling the issue of corporate tax avoidance must be done at the international level, as companies make use of low tax jurisdictions and the international tax norms to avoid their taxes.

Other means of tackling corporate tax avoidance such as the proposed Anti-Tax Dodging Bill supported by a number of bodies such as Actionaid, Oxfam, Christian Aid and the Equality Trust, may provide a more suitable means of tackling corporate tax avoidance.[170] This proposed Bill seeks to make it more difficult for big companies to avoid tax and ensure greater transparency on tax dodging. Given the inadequacy of law and the imperfect nature of the medium in which it is expressed to plug loopholes on tax avoidance, is law adequate by itself as a tool for regulating tax avoidance?
This provides an area for future research into a viable option for tackling corporate tax avoidance. As such, it is suggested that criminalising corporate tax avoidance is

[169] HM Revenue and Customs. 'PM: Companies to be liable for employees who facilitate tax cheating' <https://www.gov.uk/government/news/pm-companies-to-be-liable-for-employees-who-facilitate-tax-cheating> accessed 15 April 2016.
[170] Christianaid, 'The Tax Dodging Bill - What it is and why we need it?' (Christianaidorguk, 1 January 2015) <http://www.christianaid.org.uk/images/the-tax-dodging-bill-what-it-is-january-2015.pdf> accessed 6 April 2016.

not currently a viable option for tackling this issue, as this will only result in hampering the commercial attractiveness of the UK as a place for doing business and the inevitable difficulties in its regulation.