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The Manchester Review of Law, Crime & Ethics

Preface from Jones Day

In preparing this forward, I have had the privilege of reading drafts of the papers forming this volume. As a commercial and technology lawyer who has spent her entire career in an international law firm, you might wonder if I come across the issues tackled in this volume in my every day work. It may surprise some that the answer to this question is "Yes". A commercial lawyer who sits cloistered away from the world, oblivious to the great issues of the day, is likely to be of little assistance to a global client who experiences these issues in one way or another, day in and day out. This is the case whether we are discussing building religious respect in secular or highly religious societies, or the peace framework for Northern Ireland, or the governance of the United Kingdom, or a secure information society; or indeed whether we are debating the historic issues of war and peace which have challenged civilisations throughout the ages. And it is the clients of a global law firm, many of whom are the engines of the world's economy, who are challenged by all of us to create workplaces that accommodate and promote diversity.

At their heart, each of the papers in this volume challenge us to consider how the rule of law can be the fulcrum of our local and global society in the years to come, and it is particularly poignant to review these issues as we mark the 100th anniversary of the events of the First World War. As Stephen J. Brogan, Managing Partner of Jones Day, passionately tells partners and young lawyers alike, "If globalisation is to be the force for human development that we all hope it will be, the advancement of the rule of law must be at the centre." The issues that these papers tackle will be at the forefront of discussions on the role and rule of law for decades to come. And they will be issues to be considered by commercial and technology lawyers too.

The contributors to this volume are to be commended for their hard work, dedication and originality and for their commitment to legal scholarship. Thank you for inviting Jones Day to sponsor this volume and for allowing me to write this foreword.

Elizabeth Robertson
Partner at Jones Day

July 2015

Preface from the Head of the School of Law

It is my pleasure to welcome the fourth edition of this review. What started out as an idea from the student body has now become a feature of the Law School. It covers the full range of areas of our work and involves students on all programmes.

The papers show the keen interest of our community in exploring cutting-edge issues and reflect the intellectual diversity and interdisciplinarity that is a distinctive feature of the scholarship within the School. I hope all readers find something to reflect upon and many in our community are encouraged to contribute in the future.

The authors are to be congratulated, as is the editorial team who have put in many hours of work. This has been my first year as Head of School and I am very pleased and proud that this review is continuing to develop and thrive. I look forward to reading many more future volumes.

Toby Seddon

July 2015

Preface from the Editor-in-Chief

The *Manchester Review of Law, Crime and Ethics* endeavours to present the finest work from students at both undergraduate and postgraduate levels within the School of Law; encompassing not only law but criminology and medical ethics also. In addition to showcasing student erudition, the Review illustrates the dedicated culture of the university's young lawyers. This fourth edition presents a vast array of papers; spanning from issues concerning environment law under the European Emissions Trading Scheme, to detention of the mentally ill. The publication encapsulates traditional debates regarding retention of the monarchy, to the more modern legal issues within transgender rights; highlighting the Review's continued devotion in displaying the diversity of scholarship within the School of Law. Consequently, I trust that such papers will offer enjoyable reading.

I am grateful to all those who have contributed their time and efforts in creating this issue. To begin, all of the members on the editorial team, student writers and members of faculty who have offered direction, all deserve immense recognition in dedicating their time to this project. Additionally, support and assistance from both Dinah Crystal OBE and Maureen Barlow is greatly appreciated. The Review is fortunate to have received collaborative pieces from esteemed academics and practising solicitors, including Charles Garraway, Franklin Sinclair and Elizabeth Robertson. Finally, we thank our sponsors, Jones Day, for providing their continued financial support, without which the Review would not have been possible. In particular, it has been a pleasure to work with the graduate recruitment team at Jones Day in achieving conclusion of the Review.

At last, next year's Review will be edited by Jerry Lin and Matthew Lowry. Both Jerry and Matt have made an exceptional contribution to this year's issue and I eagerly anticipate the fifth volume.

Amelia McGrath

July 2015

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Critically analyse whether the existence of an established church is compatible with a modern democracy in the 21st century

Dominika Belesova

Abstract

The Church of England has long been recognised as the manifestation of an established religion in the country. The question of whether such a model can coexist with democracy has been answered to the affirmative by the ECtHR, provided the individual's right to freedom of religion is safeguarded. The question that has yet to be answered is whether the Church of England conforms to that definition and is fit for purpose in the 21st century. With democracy enter new parameters of elected representation, holding power on a temporal basis, female participation in state affairs and respect for plurality in worship. For the purposes of the thesis these will serve as the benchmark that the Church should aim to satisfy. This article will focus on the challenges that face the standing of Anglicanism in modern times, analysing the most contentious links of establishment concerning the monarch, prime minister, Lords Spiritual and the general public. Much has been accomplished in the past 400 years and modernisation should advance along this trajectory, paying respect to the institution that has shaped the country long before the state, in order to achieve religious equality. In concluding that compatibility can be achieved through the incremental reinterpretation of the religious constitution, the paper proposes reinventing obsolete primary legislation, modifying the monarch's titles and allowing for appointment of bishops on the merits as a means to further endorse democratic principles, while not jeopardising establishment.

I. Introduction

The terminology of 'established church' is peculiar to the UK, articulating the relationship between public authorities and religious bodies. Unlike other traditional State-Church systems featuring a state church, as can be seen in Denmark

or Greece,[1] the Church of England (Church) is not regulated and controlled by the state. This essay will adopt the definition laid down by Lord Roger[2] claiming establishment to mean the Church to have links with the state through legislative recognition, Anglicanism being professed as the official faith, but that does not make it a department of the state.[3] Therefore, the focus of the analysis will be on the English model by reason of it being undoubtedly established, unlike its milder Scottish counterpart or the Church in Wales.[4] In applying the above definition of establishment, the Church of Scotland can arguably be of a merely national character, owing to the absence of an express statutory provision to that effect.[5] In many respects the Church of England is more controversial in comparison, displaying traits that are not common to the far more independent Scottish Church.[6] The essay will begin by defining democracy for the purposes of the analysis and proceed to examine its compatibility in respect of four contentious dimensions of establishment. These are separated out into subheadings and focused on the monarch, prime minister, presence of bishops in the Upper House of Parliament and the Church's pervasive influence in the lives of the public at large.

II. Democracy

Rights talk is particularly indispensable to modern democracies, most notably enabling a religiously pluralistic

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[1] Morris RM, *Church and State in 21st Century Britain: The Future of Church Establishment* (Palgrave-Macmillan 2009) 127.

[2] *Aston Cantlow v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546, 597.

[3] The essay does not dispute that there are multiple meanings to the term 'establishment', but for the sake of clarity it will adopt the judicial definition.

[4] Disestablished since 1920 under the Welsh Church Act 1914.

[5] CR Munro, 'Does Scotland have an established church?' (1997) Ecclesiastical Law Journal 639.

[6] JG Oliva, 'Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?' (2010) Public Law 482, 497-499.

and multi-cultural society. Article 2 of the Treaty states that "the Union is founded on the values of respect for [...] freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities."[7] Furthermore, the principles of pluralism, non-discrimination and equality between women and men must prevail. There is also the notion of majority rule and the state acting in accordance with popular choice. Combined, a modern democracy would mandate that the Christian majority does not prejudice the views of other religious denominations, by not giving them sufficient recognition. There are three aspects to democracy of relevance here, namely the requirement of representatives to be elected by popular choice, holding power on a temporal basis, as well as facilitating women to be participants in the social and political arena. [8] Of utmost importance is the prerogative of religious freedom, providing for equal treatment in recognising other faiths.[9] According to the ECtHR,[10] State-Church models per se do not infringe Article 9, provided the individual's freedom of religion is protected.[11] Hence, unless the model of establishment is found to be discriminatory or too oppressive it will be compatible with democratic principles.[12] Therefore, the topical parameters of democracy can be summarised as thus, mandating the election of representatives by popular choice; them holding power on a temporal basis; facilitating the participation of women, and; safeguarding the individuals right to religious freedom. This definition of democracy will be the lens through which the links of establishment will be assessed.

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[7] Treaty on European Union [2010] OJ 2010 C83/01.

[8] '*What is democracy?*' (Stanford University, 21 January 2004) <http://www.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm > accessed 2 March 14.

[9] European Convention on Human Rights (1950) Article 9.

[10] European Court of Human Rights (1950).

[11] *Darby v Sweden* (1991) 13 EHRR 774.

[12] R Sandberg, *Law and Religion* (Cambridge University Press 2011) 67.

III. Church – Monarch and Prime Minister

The monarchy has been linked to the Church ever since Henry VIII severed the countries relationship with Rome,[13] and reaffirmed through the English Reformation when Elizabeth I took on the title of 'Supreme Governor of the Church of England'.[14] This strong legal bond has enticed some to claim a "hereditary monarch without an established church is inexplicable".[15] This undoubtedly places the Church in a privileged position and raises the following issues in relation to democratic compatibility.

Firstly, the title of 'Supreme Governor' is exclusionary of other denominations and discriminatory against the monarch's religious identity.[16] Having the national symbol and role model be deprived of the right to religious freedom seems plainly wrong. Coupled with the requirement of being qualified by primogeniture descent, the Crown is subject to promoting Protestantism at the expense of endorsing anti-Catholic vestiges in the highest social strata.[17] The title not only affects the reigning sovereign, but extends to the eleventh in line to the throne, subjecting all heirs to openly condemning Roman Catholicism.[18] The remedy of abdication seems a weak and disproportionate countering to holding such restrictions disadvantageous and an infringement of Article 9.[19] Despite the emancipation of Catholics within the public, this statute sends mixed messages about religious tolerance and its impact resonates beyond the Queen.[20] Its removal would inevitably lead to a secular monarchy, one more in tune with the demands of a modern

[13] Act of Supremacy 1534.
[14] Act of Supremacy 1559.
[15] I Leigh, 'By law established? The Crown, constitutional reform and the Church of England' (2004) Public Law 266, 269.
[16] Act of Settlement 1701.
[17] Act of Settlement 1701, s3; Coronation Oath Act 1688.
[18] Morris (n 1) 200.
[19] European Convention on Human Rights (1950), Article 9.
[20] Roman Catholic Relief Act 1829.

democracy.[21] Secularisation would involve a breach with the historical origins[22] albeit not being fatal to the Church itself.[23] Were the Act[24] repealed, opting for a radical form of pluralism, "the sovereign could arrange for a non-religious enthronement ceremony, touching the Crown symbolically".[25] Alternatively, more faiths could be embraced by way of addressing the new monarch as 'Privileged Bodies'.[26] The proposed removal of the religious discrimination in relation to the succession of the throne[27] would further endorse a democratic framework into the UK constitution.[28]

Secondly, although not a direct feature of establishment,[29] the title of 'Defender of the Faith' is unfounded in a pluralistic Britain. The Prince of Wales has expressed his sentiments to reinventing the term as 'Defender of Faiths', which was held not to constitute a constitutional impossibility.[30] Nevertheless, in 2007 the current Archbishop of Canterbury stressed that the wording does permit an appreciation of having the meaning include the duty to speak on behalf of faiths in general.[31] Regardless, a modification of the title seems a straightforward expression of inclusiveness, while not endangering establishment.

Lastly, the Crown has absolute power in appointing the

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[21] Vernon Bogdanor, 'The Monarchy and the Constitution' (Oxford University Press, 1995: 239.

[22] ibid 239.

[23] Morris (n 1) 197.

[24] Act of Settlement 1701.

[25] Morris (n 1) 209.

[26] ibid.

[27] Succession to the Crown Act 2013.

[28] F Cranmer, 'Church State relations in the United Kingdom, a Westminster view' (2001) Ecclesiastical Law Journal 111, 116.

[29] Due to being bestowed upon Henry VIII by the Holy Father before the Act of Supremacy 1534; see JG Oliva, 'Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?' [2010] Public Law 482, 486.

[30] Morris (n 1) 201.

[31] Morris (n 1) 207.

leaders of the Anglican Church, subject to the Prime Ministers advice.[32] The word 'appoint' in itself allows for great secrecy[33] and places the Prime Minister under a religious test, qualifying the exercise of his duty. Despite the Roman Catholic Relief Act 1829, in exercising those functions they would be acting unlawfully and prone to disqualification from office.[34] Past practice allowed for the PM's active participation in the selection process, filtering the names put forth by the Crown Nominations Commission. Considering the recent developments set in motion by Gordon Brown this conundrum would become idle.[35] Since the release of the Government green paper in 2007 the Prime Minister will simply endorse the name of the Commission's preferred candidate.[36] Such reinterpretation of the convention would be in line with modern democracy, while not exposing the monarch to vulnerability."[37]

IV. Church - Parliament

Bishops have been present in the House of Lords since the 14th Century[38] and therefore, are not a crucial pillar upholding the legal architecture of establishment.[39] However, their

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[32] Appointment of Bishops Act 1533.

[33] PW Edge and P Cumper, 'First Amongst Equals: The English State and the Anglican Church in the 21st Century' (2008) 83 University of Detroit Mercy Law Review 601, 618.

[34] ibid.

[35] J F McEldowney, Public Law 78-81, 265 (Sweet & Maxwell 2002)

[36] '*Outline of procedures for appointment of an Archbishop of Canterbury*' (The Church of England, 16 March 2012) <https://www.churchofengland.org/media-centre/news/2012/03/outline-of-procedures-for-appointment-of-an-archbishop-of-canterbury.aspx> accessed 08 March 15.

[37] Morris (n 1) 222.

[38] C Smith, 'The place of representatives of religion in the reformed second chamber' (2003) Public Law 674, 676. See also <http://www.churchofengland.org/our-views/the-church-in-parliament/bishops-in-the-house-of-lords.aspx> [accessed 10 March 14].

[39] A Harlow, F Cranmer and N Doe, 'Bishops in the House of Lords: A Critical Analysis' (2008) Public Law 490, 493; and JG Oliva, 'Church, State

presence exemplifies the pre-eminence of Anglicanism, demarking the UK parliament as anomalous for having explicit religious representation,[40] vesting real and symbolic power with the Church.[41] As mentioned, the bishops are appointed by virtue of seniority as formal representatives of their faith communities.[42] Other denominations are embraced under the Life Peerages Act 1958, but this does not provide for equality in treatment or title.[43] A desperately awaited change transpired in November 2014 when the Church enacted a measure allowing for women to be ordained as bishops.[44] It is anticipated that the historically first female bishop will embrace her duties as the Bishop of Stockport. This revolutionary legislation demonstrates the ability of an established church to conform with democratic principles relating to gender equality. Acknowledging the obstruction that seniority presents the Lords Spiritual (Women) Bill has been drafted to ameliorate the situation. The proposal, giving female bishops a decade of priority in occupying vacancies, is currently being championed through Parliament.[45]

The retainment of the Lords Spiritual is argued on the following grounds. The first notion of the government being accountable to a higher entity conflicts with modern

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and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?' (2010) Public Law 482, 493.

[40] Morris (n 1) 45.

[41] PW Edge and P Cumper (n 33) 620.

[42] C Smith, 'The place of representatives of religion in the reformed second chamber' (2003) Public Law 674, 675.

[43] Examples include Methodist peer Lord Soper and Rabbi Lord Sacks. See R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 61.

[44] '*Legislation on Women Bishops Becomes Law at General Synod*' (The Church of England, 17 November 2014) <https://www.churchofengland.org/media-centre/news/2014/11/legislation-on-women-bishops-becomes-law-at-general-synod.aspx> accessed 08 March 15.

[45] '*MPs back law fast-tracking female bishops into Lords'* (BBC, 20 January 2015) <http://www.bbc.com/news/uk-politics-30884956> accessed 08 March 15.

democracy vesting power in the electorate and so cannot serve as a justification.

The second advancement relates to their ability to introduce social and religious views, drawing attention to faith sensitivities, and speaking more freely on controversial reform than secular peers, who are bound by the interests of their constituencies.[46] Despite the undeniable appeal of this argument, the Church does not have a "monopoly on all things moral",[47] nor do secular peers divest themselves of their religious views upon becoming Lords.[48] The Lords Spiritual potential is limited to the matters of their concern and expertise. However, the areas in which they feel knowledgeable, which can be narrowed down to environment, ethics, health and society,[49] are rarely subject to legislation.[50] Furthermore, bishops are under no legal obligation of participation,[51] which results in poor attendance seeing as the vast majority prioritise diocesan responsibilities.[52] It follows that bishops, despite their entitlement to 26 seats in the Upper House of Parliament,[53] are engaged by their ecclesiastical mission, severely hampering the scope of their beneficial influence. Studies have shown that while their position allows them to relay a broad spectrum of religious opinion, only half interacted with other faith leaders.[54] There is disagreement even amongst the bishops themselves, as to their retainment of this prerogative, leading some to declare their presence merely decorative.[55] While the idea of the Lords Spiritual is a worthy one, it fails

[46] C Smith (n 42) 680.
[47] C Smith (n 42) 681.
[48] C Smith (n 42) 675.
[49] A Harlow, F Cranmer and N Doe, 'Bishops in the House of Lords: A Critical Analysis' (2008) Public Law 490, 500.
[50] ibid 507.
[51] ibid 491.
[52] ibid.
[53] Manchester Bishopric Act 1847.
[54] A Harlow, F Cranmer and N Doe (n 49) 501.
[55] A Harlow, F Cranmer and N Doe (n 49) 503.

to transpire into reality for they remain overburdened by their parish duties and do not act as the voice of faiths in general.[56] An interesting view has been advanced by Elizabeth Wicks, claiming that the religious presence has a stifling effect on legislative developments in medical law. Bishops distract and obscure a complex ethical debate on the matter of assisted dying by narrow and damaging perceptions.[57]

Thirdly, they avow to speak for the nation, and the deprived sectors of society.[58] Their presence serving to protect against fragmenting peoples' lives into secular and sacred.[59] This assertion is antiquated and unfounded in light of current statistics and religious plurality found in the United Kingdom. Christianity continues to decrease in popularity, enjoying a bare majority of 59.3 per cent in 2011,[60] where Anglicanism is but one denomination of the Protestant branch. Clearly, this negates the composition of the Lords being a true reflection of present demographics. As to the latter, the bishops are no longer a symbol of inclusiveness, but a cause for segregation amongst dual citizens into those professing the official faith and other denominations. Nevertheless, some denominational group leaders prefer having Anglican delegates to no religious representation at all.[61] Disestablishment not being the appropriate response

[56] A Harlow, F Cranmer and N Doe (n 49) 507.

[57] E Wicks, 'Religion, Law and Medicine: Legislating on Birth and Death in a Christian State' (2009) Medical Law Review 410, 435-436.

[58] See JG Oliva, 'Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?' (2010) Public Law 482, 493; and P. W. Edge and P. Cumper, 'First Amongst Equals: The English State and the Anglican Church in the 21st Century' (2008) 83 University of Detroit Mercy Law Review 601, 621.

[59] C Smith (n 42) 684.

[60] '*Religion in England and Wales 2011*' (Office for National Statistics 11 December 2012) <http://www.ons.gov.uk/ons/search/index.html?pageSize=50&sortBy=none&sortDirection=none&newquery=Religion+in+England+and+Wales+2011+-+11+December+2012> accessed 28 February 14.

[61] Morris (n 1) 213.

finds support within the claim that minorities would feel ostracised in a fully secular state.[62]

Stripping the Lords Spiritual of their inherent right to sit in the House of Lords, would mean losing a link with British history.[63] However, Parliament has evolved away from its exclusively Anglican composition,[64] hence the lingering remnants of such monistic past are "indefensible and anachronistic".[65] The Wakeham report[66] emphasises the difficulties in reconciling the maintenance of bishops and accommodating minorities.[67] Such suggestions provoked the enigma of identifying leaders, having the potential of spurring inter faith rivalries for vacancies.[68] Ultimately, a change in the constitutional framework might be necessary in order to bring it in line with democracy by enabling wider religious and gender representation, elected on the merits, to achieve a true expression of modern society.

Lastly, while the Church's power to legislate autonomously,[69] through the General Synod,[70] is an incident of establishment falling under the Parliamentary link, it does not upset democracy due to affecting predominantly ecclesiastical affairs.[71] It is a privileged position, granting Measures[72] equivalent standing to primary legislation, while being subject to the same strict procedure. Their independence is constrained by the requirement of Parliamentary approval and attainment of Royal Assent. In summary, unlike other religious bodies their internal rules

[62] I Leigh, 'By law established? The Crown, constitutional reform and the Church of England' (2004) Public Law 266, 273.
[63] PW Edge and P. Cumper (n 33) 621.
[64] Morris (n 1) 18.
[65] Morris (n 1) 239.
[66] Royal Commission on the Reform of the House of Lords, *A House for the Future* (2000).
[67] C Smith (n 42) 687.
[68] PW Edge and P Cumper (n 33) 620-621.
[69] Church of England Assembly (Powers) Act 1919.
[70] Synodical Government Measure 1969.
[71] R Sandberg, *Law and Religion* (Cambridge University Press 2011) 63.
[72] Church of England Assembly (Powers) Act 1919 s4.

are accorded the force of state rules, making them immune from judicial review, albeit equally open to public scrutiny.[73]

V. Church - People

This section explores how the above-discussed political dimension of high establishment precipitates into the lives of ordinary citizens, and questions if such manifestations of the official faith discriminate against people on grounds of religion. The focus will be on the interplay between democratic parameters and religion in education.

The presence of the Church can be traced through the Anglican chaplaincies in hospitals, military and prisons.[74] However, the most significant link between the Church and people is to be found in state schools providing religious education, which has been the case since 1870.[75] While on the whole religious education seems harmless, it is questionable to what degree is it informative and inclusive. The Local Education Authority (LEA) is in charge of assembling the Standing Advisory Council on Religious Education (SACRE), which in turn determines the schools' syllabus. Notwithstanding the religious views of the territory or the composition of the LEA, a Church of England representative has a legal right to be present on the SACRE. Similar issues can be raised here as applicable to the representativeness of the Lords Spiritual in absence of express provisions for other faith groups. This mechanism seems to contravene the democratic principle mandating that representatives be a reflection of the will of the electorate. The composition of the SACRE is significant given that "[t]They have full geographic coverage to inform the religious awareness of children."[76] Nevertheless, the aim is for members to appropriately reflect the local religious traditions. Hence, the syllabus will be strongly informed by a

[73] PW Edge and P Cumper (n 33) 609.
[74] Morris (n 1) 198.
[75] JG Oliva (n 6) 495.
[76] JG Oliva (n 6) 495.

Christian ethos, while taking into account other denominations present in the UK.[77] Furthermore, Christian faith schools enjoy public funding unless made subject to patronage by the independent.[78] Now, more denominational faith schools have had funding approved, but again this is granted upon application.[79]

VI. Conclusion

As this essay has highlighted, the established Church in England does display features which are borderline problematic in a democratic state, committed to celebrating plurality of religion. However, disestablishment is not synonymous for a British republic, or a tool for selectively removing incompatible incidents.[80] The more appropriate response would be to reinterpret the religious constitution, especially in respect to the monarchy, Prime Minister and Lords Spiritual. *Much has been accomplished in removing the PM from active participation in the episcopal appointment process and ordaining the historically first female bishop.* Modernisation should advance along this trajectory, paying respect to the institution that has shaped the country long before the state, in order to achieve religious equality.[81] The introduction of a secular enthronement ceremony, modifying obsolete primary legislation and allowing for appointment of bishops on the merits would endorse democratic principles. Such change can occur incrementally and indeed establishment has undergone considerable refinement during the last 400 years.[82] The Church of England has survived this long due to its ability to

[77] ibid.

[78] <http://m.transforminglives.org.uk/thinking-of-teaching/types-of-school/christian-schools-in-the-uk> accessed 28 February 14.

[79] Morris (n 1) 26.

[80] Morris (n 1) 193.

[81] Morris (n 1) 211.

[82] P Avis, *Church, State and Establishment* (London: SPCK 2001) 34.

respond to social progression[83] and hence is capable of being made compatible with a modern democracy in the 21st Century.

[83] F Cranmer, 'Church State relations in the United Kingdom, a Westminster view' (2001) Ecclesiastical Law Journal 120.

Deconstructing The Devolution Process in Northern Ireland: One small step towards uncertainty

Anna Chestnut

Abstract

Devolution in Northern Ireland provided a quick fix, short-term solution. This is irreconcilable with a number of long-term problems in Northern Ireland. This discussion analyses the weaknesses in the Northern Ireland Assembly, which have become apparent since 1998 and suggests areas for improvement. Further, it alludes to potential problems in the future if the flaws in the Northern Ireland Assembly are not addressed. Interrogating the strength of the Northern Irish Assembly is imperative. It is a key aspect of the Constitutional structure of the United Kingdom. It is essential to explore its flaws to better understand the Constitutional future of the United Kingdom. The discussion firstly demonstrates the structure and processes of the Northern Ireland Assembly. The overall structure, procedures and methods of election are explained. In turn, important and significant problems are exposed. Suggestions are then made to remedy these defects, as demonstrated by anecdotal evidence. The wider academic and constitutional importance is supported by academic commentary. The study concludes that, although devolution was a significant constitutional change, its execution has been deficient in a number of ways. It should be a priority of the United Kingdom Government to explore the problems in the Northern Irish legislature to bring about effective change. Otherwise, the Constitutional structure of the United Kingdom could be irrevocably challenged.

I. Introduction

In 1998, the UK government gave legislative weight to the impetus of national politics in the United Kingdom; allowing devolved legislatures in Scotland, Wales and Northern Ireland.[1] This remarkable change has irrevocably altered the

[1] Scotland Act 1998; Northern Ireland Act 1998; Government of Wales Act 1998.

territorial structure and Constitution of the United Kingdom. The legislation itself, however, was "piecemeal, with little regard to an overall plan or consistency."[2] The most noteworthy example of this remains the Northern Ireland Assembly.[3]

The devolution of power to the Northern Irish Assembly was a change celebrated by key politicians at the time. Bill Clinton, the US President, embraced the legislative change, identifying a new "springtime of peace."[4] Congratulations were awarded to Tony Blair, the architect of the legislation.[5]

Devolution in Northern Ireland aimed to create a strong, stable and legitimate Assembly in a Province with a tricky political history. A leading commentator explains that, "The devolution statutes have answered—at least for the time being—many long-standing queries."[6] The purpose of this essay is to evaluate this statement. I will assert that deficiencies in the current set up indicate that reform is needed. In modern times the efficiency of the Northern Ireland Act and relevance of this piece of legislation is rarely analysed. The Coalition government dedicated merely one line of its thirty-six page programme for government[7] on the Northern Ireland question, stating, "The Government fully supports the devolution of powers to Northern Ireland;"[8] a wholesale endorsement of a sixteen year old piece of

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[2] See: Michael Keating and Howard Elcock, 'Introduction: Devolution and the UK State' in Michael Keating and Howard Elcock (eds), *Remaking the Union: Devolution and British Politics in the 1990s* (1st edn, Frank Cass & Co 1998).

[3] The Northern Ireland Act 1998.

"Good Friday Agreement' (*BBC*) <http://www.bbc.co.uk/history/events/good_friday_agreement#p017ky6g> accessed 24 February 2015.

[5] John Tomaney, 'End of the Empire State? New Labour and Devolution in the United Kingdom' [2000] International Journal of Urban and Regional Research 675, 682.

[6] Rodney Brazier, *Constitutional Reform* (3rd edn, OUP 2008), 228.

[7] Cabinet Office, *The Coalition: Our Programme For Government* (Policy Paper, 2010).

[8] ibid 35.

legislation. There is currently no parliamentary intention to further consider the Northern Ireland question.

There are key aspects of the Northern Ireland Assembly, which reveal the innate democratic deficiencies in the legislature. I will evaluate the formal system of law making and the system of voting to assess if any valuable changes could be made to redress the inadequacies. I will analyse the difficulties, which linger over the Assembly in a socio-economic context. Finally, I will consider the Northern Ireland question in light of the recent national conversation over Scotland's political future.[9] Devolution was a significant legislative step; this essay will question if it went far enough.

II. The System of Law Making

The legislative procedure in Northern Ireland was designed to meet the needs of its constituents. Members of the Legislative Assembly (MLAs) are elected to advocate on their behalf on local issues, representing the five main political parties.[10] Ministers in the Executive Committee are in charge of the government departments; its membership is proportionate to how many seats a party holds in the Assembly. The MLAs have a mandate to hold members of the Executive to account;[11] yet it isn't entirely clear how this procedure works. Externally, Northern Irish MPs are elected to sit in Westminster. I will now explore the profound issues, which exist in this system.

Despite the provision of more legislative power to Northern Ireland, it is seldom on Westminster's agenda. This creates a democratic deficit and throws into question the efficiency of devolution. The argument for devolution is that it gives constituent states more power. Sir Merrick Cockell mistakenly argued "People in ... Northern Ireland already

[9] Cf Steven Tierney, 'Legal Issues the Referendum on Independence for Scotland' (2013) European Constitutional Law 359, 361.

[10] The Democratic Unionist Party, Sinn Fein, The Ulster Unionist Party, The Social Democratic and Labour Party and the Alliance Party.

[11] Northern Ireland (Miscellaneous Provisions) Act 2014.

have much greater say over everything."[12] This argument only holds some relevance.

As it stands, Northern Ireland has eighteen MPs in Westminster, split between the five main parties. Their impact on legislation, however, is severely restricted. Firstly, none of the Northern Irish Parties formally affiliate themselves with the main parties at Westminster[13] so they can't initiate legislation through the coalition government or the opposition, unlike MPs who represent Scottish and Welsh constituencies.

Northern Irish MPs can only influence legislation through a Private Member's Bill. Northern Irish legislation is often adopted by chance under uncertain procedures such as the 'Ten Minute Rule.'[14] This is not an adequate system to ensure that the needs of Northern Ireland are considered by the highest echelons of government. Sinn Fein is an abstentionist party so their voters in Northern Ireland have been silenced in Westminster.[15]

A solution to this issue is difficult to propose. Attempts to establish a formal tie to the main Westminster parties have, thus far, been fruitless. In 2012 the partnership between the Ulster Unionist Party (UUP) and the Conservative Party ended, having lost their only MP.[16] The main reason for this was that, even within the UUP, there are left leaning and right leaning factions. This trend is true for all of the Northern Irish parties. Evans and Duffy have concluded that in Northern Ireland, "left-right ideology has no significant

[12] Sir Merrick Cockell, 'Rewiring Public Services' (Local Government Association Conference, Manchester, July 2013).

[13] There was an electoral alliance between the Conservative Party and the Ulster Unionist party in 2009 (UCUNF) but this was short lived. The alliance was formally disbanded in 2012.

[14] The Victims and Survivors (Northern Ireland) Bill 2013-2014 is an example of legislation adopted under the ten minute rule this year.

[15] Agnes Mailliot, *New Sinn Fein: Irish Republicanism in the Twenty First Century* (1st edn, Routledge 2005) 8.

[16] Sylvia Hermon, MP for North Down.

impact on partisanship"[17] and suggest that if there was more consideration of left-right politics, this would cut through the deep divisions created by wider constitutional issues. The solution, therefore, lies in engaging with Northern Irish parties on how they can integrate more easily with the parties at Westminster; declaring their interests on the more conventional political spectrum.

In the Northern Ireland Assembly, there are defects that prevent efficient and well-considered law making. Although the five main political parties[18] are represented in the Northern Irish Assembly, the vast majority of legislation is created through Executive Bills.[19] The procedure, which exists to hold the Executive to account, is not effective. Entire departments are driven by the ulterior partisan motives of its Minister. Cynical as this may seem, there are pertinent examples, which demonstrate the flaws in this system.

In 2010, Catriona Ruane, the Education Minister, abolished the 11+ examinations through a regulation, as opposed to legislation, due to staunch opposition in Stormont.[20] The consequences are telling of a crack in the Assembly's foundation. A lack of consensus on the issue of secondary education means school leavers now sit multiple exams,[21] precisely the opposite of the intended result of Ms Ruane. The issue remains in limbo with no route of

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[17] Gregory Evans and Mary Duffy, 'Beyond the Sectarian Divide: The Social Bases and Political Consequences of Nationalist and Unionist Party Competition in Northern Ireland' (1997) British Journal of Political Science 47, 72.

[18] The Democratic Unionist Party (DUP), Sinn Fein (SF), The Ulster Unionist Party (UUP), The Social Democratic and Labour Party (SDLP) and the Alliance Party (AP).

[19] 'Assembly Legislation', (*Northern Ireland Assembly*) <http://www.niassembly.gov.uk/Assembly-Business/Legislation/> accessed 24 February 2015.

[20] Christopher McCrudden, 'Religion and Education in Northern Ireland: Voluntary Segregation reflecting Historical Divisions' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (1st edn, Ashgate 2011).

[21] ibid 143.

resolution; an example of what Horgan and Gray[22] call the "silo mentality"[23] of Northern Irish politicians. Fundamental notions of polarised political parties drive Northern Irish legislation; there are no regulatory mechanisms to prevent this.

There should be a process in Northern Ireland whereby legislation is 'thrown out' if it is too closely aligned to the partisan views of the Minister. A system analogous to the negative resolution procedure[24] in Westminster could be implemented, when legislation is thrown out if there is no consensus after 40 days. Further, there should not be a back door policy of passing regulations as opposed to legislation, as was the case with Catriona Ruane.[25] Select Committees in Stormont should carefully consider the legislation to determine if it reflects the standpoint of the entire department. Departments in Northern Ireland contain representatives of each party,[26] so their agenda should not reflect the interests of one party. Five party coalitions cannot work through a system, which indulges specific partisan beliefs. The result is legislation, which has not been adequately researched to ensure it meets the needs of Northern Irish citizens.

Another startling example of the defects in legislation is the issue of abortion in Northern Ireland. A key problem identified by Fegan and Rebouche[27] is that the issue of abortion is only considered through the guise of religion, essentially the mission statement of Unionism and

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[22] Goretti Horgan and Anne Marie Gray, 'Devolution in Northern Ireland: A lost opportunity?' [2012] Critical Social Policy 467.

[23] ibid 470.

[24] House of Commons Information Office, *Statutory Instruments* (Legislative Series Factsheet 2008).

[25] The then Minister for Education.

[26] 'Now at the Assembly' (*Northern Ireland Assembly*) <www.niassembly.gov.uk> accessed 24 February 2015.

[27] Eileen Fegan and Rachel Rebouche, 'Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency' (2003) Feminist Legal Studies 221, 222.

Nationalism.[28] The Abortion Act 1967[29] has not been implemented by Stormont, so women who seek an abortion must travel elsewhere in the UK. The Health Minister Jim Wells recently proposed a legislative amendment[30], which would include a penalty of ten years for anyone obtaining or assisting an abortion in Northern Ireland; a worrying change to laws which are already "appallingly restrictive."[31]

David Ford,[32] one of only two ministers not affiliated with a Unionist or Nationalist party, is researching current abortion laws,[33] aiming to deliver progressive change for Northern Irish citizens. This exercise cannot be achieved by the Unionist or Nationalist parties, affected by religious views.

There needs to be change to the system of law making to prevent the current stagnation of legislation that occurs in Northern Ireland. Westminster has developed a protocol for what happens in the event of a hung parliament in the Cabinet Manual.[34] A procedure exists to prevent political deadlock, ensuring government runs smoothly. Evidently, some similar procedure needs to be developed in Northern Ireland to determine the fate of legislation, which remains in bureaucratic limbo. If Members of the Legislative Assembly cannot reach a consensus, there should be statutory mechanism to deal with this.

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[28] Claire Mitchell, *Religion Identity and Politics in Northern Ireland* (1st edn, Ashgate 2006) 42.

[29] Abortion Act 1967.

[30] Legal Aid and Coroners' Courts Bill 2014.

[31] 'Northern Ireland: Women and health workers face 10 years in jail if abortion law change is successful' (*Amnesty International*, 26 November 2014) <http://www.amnesty.org.uk/press-releases/northern-ireland-women-and-health-workers-face-10-years-jail-if-abortion-law-change > accessed 24 February 2015.

[32] David Ford of the Alliance party was appointed as the first Justice Minister of Northern Ireland as a condition of the St Andrew's Agreement 2007.

[33] Interview with Stephen Nolan, BBC Radio Ulster Presenter (Belfast, 5 December 2013).

[34] Cabinet Office, *Cabinet Manual* (Corporate Report 2011).

III. The Single Transferrable Vote

Northern Ireland elections operate using a Single Transferable Vote system, the d'Hondt system.[35] Voters have as many preferences as there are candidates, with the ability to number their preferences. This has significant advantages over a First Past The Post system as seats are rewarded proportionate to the number of votes cast. The result in Northern Ireland has been a mandatory coalition, as Unionists and Nationalists share the legislative control.

Despite a representative and fairly elected Assembly, the political situation in Northern Ireland is a breeding ground for tactical voting. Those who would like their interests protected do not necessarily vote for the party they support. Rather, they back the party likely to obtain the most seats and hold the balance of power.

A worrying voting tactic is to prevent the 'other side' gaining control. Mitchell, O'Leary and Evans correctly identify "fear of losing seats to ethnic rivals is one of the classic motivators in such segmented party systems."[36] This results in a general neglect for the merit of the policies of each party. If a party stands on a particular side of the Northern Ireland question, they will be guaranteed substantial voting numbers.

The Northern Ireland Life and Times Survey asked in 2012 "which political party do you feel closest to?" The most popular result, with 24 per cent was unsurprisingly "none of these."[37] Political apathy in Northern Ireland is rife; those who support the middle ground Alliance party abstain from voting. Those who most enthusiastically vote are those who

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[35] Independent Commission on the Voting System, *Voting Systems: The Jenkins Report* (HC 98/112) 79.

[36] Paul Mitchell, Brendan O'Leary and Geoffrey Evans, 'Northern Ireland: Flanking Extremists Bite the Moderates and Emerge in Their Clothes' (2001) Parliamentary Affairs 725, 735.

[37] 'Northern Ireland Life and Times Survey 2012' (*Northern Ireland Life and Times*) <http://www.ark.ac.uk/nilt/2012/Political_Attitudes/POLPART2.html> accessed 24 February 2015.

are represented by the polarised parties. It is difficult to defend such a state of affairs in a democracy.

Mitchell, O'Leary and Evans explain that the historic policy in Northern Ireland was to isolate the extremist parties and find a 'moderate centre ground' from which a power sharing arrangement could be agreed.[38] In 1998, David Trimble and Seamus Mallon spearheaded the Good Friday Agreement,[39] leading the first devolved Assembly as the First and Deputy First Minster respectively. Their parties, the Ulster Unionist Party and the Social Democratic and Labour Party, represent relatively moderate views.

Since 1998, however, with each election in the Province, more extreme parties are gaining support. The Democratic Unionist Party (DUP), whose rallying cry "no surrender" provided the backdrop for the 1998 negotiations and Sinn Fein, which literally translates to "ourselves alone", now hold the balance of power in the Northern Ireland Assembly.[40] Political parties, which, to this day, have affiliations with paramilitary organisations,[41] control the Assembly.

A leading journal on political science identifies that when polarised parties exist, this affects the judgement of voters.[42] When parties are polarised, voters act based on their ideological beliefs rather than a careful and rational examination of specific policies. The mere existence of the DUP and Sinn Fein encourages votes. They make bold ideological claims which resonate with the voters. Voting, therefore, is not based on the merit of each party's policies.

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[38] Mitchell, O'Leary and Evans (n 36) 725.

[39] The Good Friday Agreement also known as the Belfast Agreement signed on 10th April 1998.

[40] Richard Wilford, 'Northern Ireland: the Politics of Constraint' [2010] Parliamentary Affairs 134, 136.

[41] Henry McDonald, 'IRA victim's brother says Martin McGuinness has blood on his hands' (*Guardian*, 12 October 2011) <http://www.theguardian.com/politics/2011/oct/12/ira-relative-martin-mcguinness-blood> accessed 24 February 2015.

[42] Romain Lachat, 'The Impact of Party Polarization on Ideological Voting' [2008] Electoral Studies 687, 693.

This means Northern Ireland is out of step with the rest of the United Kingdom as voting stems from a visceral belief in the state of affairs of Northern Ireland, neglecting wider political issues. The solution lies in encouraging education in a wide range of policies and discouraging support for extremism.

IV. Love Bombs

A reality that the Westminster government cannot escape is that Northern Ireland is becoming politically 'greener'. In 1998, the Northern Ireland Assembly was formed on the basis that the majority of the population in Northern Ireland was Unionist; if the converse were true, there would be a referendum on the political future of Northern Ireland.[43] Since 1998, the population of Northern Ireland has changed, the 2011 census[44] revealed that 48 per cent of the Northern Irish population is protestant; a drop of 5% from the last census. Conversely, the Catholic population had increased to 45%. The margins are narrowing. Shirlow comments that it is not uncommon to hear Irish Republicans talk of Irish reunification being achieved through "love bombs", a high Catholic birth rate.

This state of affairs is coupled with a phenomenon known in Northern Ireland as the "brain drain", whereby children of Protestant and Unionist families tend to undertake higher education in England, most of who remain in Great Britain.[45] It is not mere speculation to suggest that, in the near future, a Nationalist majority in Northern Ireland will compel Westminster to revisit the Northern Ireland question. It is a legal requirement under the devolution legislation. The

[43] Northern Ireland Act 1998, s 1(2).

[44] 'Census 2011 - Key Statistics' (*Northern Ireland Statistics & Research Agency*, 25 September 2014) <http://www.nisra.gov.uk/Census/2011_results_key_statistics.html> accessed 24 February 2015.

[45] David Cairns and Jim Smyth, 'I wouldn't mind moving actually: Exploring Student Mobility in Northern Ireland' (2011) 49(2) International Migration 135, 140.

mistaken belief that the political tensions Northern Ireland are settled will be irrevocably challenged.

There is evidence to suggest that voting patterns are driven by religion in Northern Ireland. To this day, Protestantism readily aligns itself with Unionism and the Roman Catholic Church is deeply sympathetic to the case for Irish reunification,[46] though it has not made an official statement to this effect. The social phenomena in Northern Ireland, therefore, will lead to a shift in the political landscape.

V. The Flower of Scotland

On 18th September this year, the Scottish people were given the opportunity to decide if they should be independent. Although the answer was "no",[47] Alex Salmond rightly contended in his resignation speech as First Minister, "Scotland is the most energised, empowered and informed electorate"[48] post referendum. The Scottish electorate has been invigorated in the knowledge that their constitutional position has been positively affirmed by the majority of citizens.

This referendum was facilitated by the Coalition government.[49] It is evident that the constitutional position of Scotland has been treated as a priority. I contend that this is short sighted, as it represents a piecemeal approach to devolution. Jeffrey rightly identifies that devolution raises questions over the future political character of a community.[50] This is true of all three devolved institutions. Constitutional questions such as devolution require constant review to

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[46] McCrudden (n 20).

[47] 'Scotland Decides' (*BBC*) <http://www.bbc.co.uk/news/events/scotland-decides/results> accessed 24 February 2015.

[48] 'Alex Salmond's resignation speech predicts change for Scotland' (*BBC*) <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-30080314> accessed 24 February 2015.

[49] Scottish Independence Referendum Bill 2013.

[50] Charlie Jeffrey, 'Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change' (2009) Publius 289, 290.

ensure the interests of constituent states are being adequately represented. Neglecting the efficiency of the Northern Ireland Assembly for almost sixteen years is not a sign of a responsible government.

Though there was no mention of Northern Ireland in the 670 page white paper on Scottish independence,[51] it would be naive to assume the Scottish independence debate had no impact on its Northern Irish neighbours.[52] Irish unity, the endgame for Nationalist parties in Northern Ireland, has been given impetus by the focus on Scottish independence. It proved that independence from the United Kingdom is achievable. The day after the "no" vote, deputy First Minister Martin McGuinness explained:

"It showed that it is possible to discuss important constitutional issues in a spirit of respect for all sides",[53] arguing a border poll could be the next step for the people of Northern Ireland. The argument that Northern Ireland could exist as an independent state was also boosted by enhanced attention to Scotland.[54]

Bogdanor writes of the "persistence and depth of the Irish problem"[55] which has lingered over Northern Ireland for decades. The argument that Ireland should be reunified has been reignited. It is an encouraging fact that Westminster was indeed prepared to review with the constitutional status of

[51] The Scottish Government, *Your Scotland, Your Voice: A National Conversation* (White Paper, B61368, 2009).

[52] Arthur Aughey 'Faraway, so close: Scotland from Northern Ireland' in Gerry Hassan and James Mitchell (eds), *After Independence* (Luath Press 2013) 224-234.

[53] 'Scottish referendum: Sinn Fein's Martin McGuinness calls for Northern Ireland border poll following Scotland result' (*Belfast Telegraph*, 19 September 2014) <http://www.belfasttelegraph.co.uk/news/scotland-independence-vote/scottish-referendum-sinn-feins-martin-mcguinness-calls-for-northern-ireland-border-poll-following-scotland-result-30600629.html> accessed 24 February 2015.

[54] The NI21 Party was formed by Basil McCrea and John McCallister in June 2013 focused on a common Northern Irish identity.

[55] Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 56.

one of the devolved legislatures in Scotland. A similar opportunity should be afforded to Northern Ireland.

The referendum on Scottish independence is just one example of the historical trend of Westminster to give in to Scottish Nationalist demands.[56] The debate over Scotland allowed its citizens to engage with devolution and assess if it meets their needs. This is an important investigative exercise for any devolved society. Denying Northern Ireland an analogous opportunity allows the current problems to fester. The mainstream parties in Westminster must give careful consideration to the democratic asymmetry created by the enhanced attention to Scotland, in ignorance of the other devolved institutions. The Northern Ireland question requires careful reconsideration.

VI. The Longevity of Devolution

An inescapable fact remains; the Northern Ireland Assembly has been suspended for a total of five years since its creation. The sticky issue of an IRA ceasefire[57] forced a return to Direct Rule in October 2002 and the devolved Assembly was not restored until the St Andrews Agreement in 2007.[58] The Northern Ireland Secretary Peter Hain reflected:

"It's going to stick, I believe, because the DUP and Sinn Féin...these are the two most polarised forces in Northern Ireland's politics, they have done the deal."[59] Political forces in Westminster should not be satisfied that the political

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[56] Paul Cairney 'A crisis of the Union' in David Richards, Martin Smith and Colin Hay (eds) *Institutional Crisis in 21st Century Britain* (Palgrave Macmillan 2014) 151.

[57] 'Direct rule returns to NI' (*BBC*) <http://news.bbc.co.uk/1/hi/northern_ireland/2328321.stm> accessed 24 February 2015.

[58] Northern Ireland (St Andrews Agreement) Act 2006.

[59] 'Timeline: Northern Ireland Assembly' (*BBC*) <http://news.bbc.co.uk/1/hi/northern_ireland/2952997.stm> accessed 24 February 2015.

future of Northern Ireland is safe in the hands of such polarised forces.

The system should be systematically reviewed by way of a Royal Commission, with Northern Irish representatives at the helm, to prevent future collapse. I propose membership analogous to those who sat around the table at the Belfast Agreement in 1998; a consociation group,[60] with representatives from the unionist and nationalist persuasion. Moreover, in the interest of progressive politics, there should also be "other" representatives who do not fall neatly into these categories.

Bulmer explains the choice of a chairman is crucial.[61] The chairperson needs a meaningful understanding of the unique political tensions in the Province. Constitutional Law Professor, Christine Bell, who was instrumental in the creation of the Northern Ireland Human Rights Commission in 1997, would be an ideal candidate. A former Northern Irish politician may also be a worthy candidate. Conversely Richard Haas, a former American diplomat with no anecdotal experience of Northern Irish politics, recently chaired talks in over the legacy of the Troubles. They did not achieve a viable conclusion.[62] This scenario best exemplifies the problem with selecting the wrong chairperson.

A Royal Commission should be given clear terms of reference to investigate whether the current setup is meeting peoples' needs, or whether it is merely a breeding ground for extremism. The Commission should also consider how to better integrate Northern Irish MPs into the Westminster Legislature. This is an essential exercise in scrutiny for any responsible government with devolved institutions.

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[60] Rupert Taylor 'The Belfast Agreement and the Politics of Consociationalism: A Critique' [2006] Political Quarterly 217.

[61] Martin Bulmer, 'Increasing the Effectiveness of Royal Commissions: A Comment' [1983] Pub Adm 436, 438.

[62] 'Richard Haass warns NI violence could re-emerge without progress' (*BBC*) <http://www.bbc.co.uk/news/uk-northern-ireland-26535987> accessed 24 February 2015.

Alternatively, Brazier has proposed a standing Royal Commission on the Constitution, which is a meritorious concept.[63] If this was created, the constitutional status of Northern Ireland should be a top priority. I contend in the not too distant future, the current ambivalence to the question of devolution in Northern Ireland will be seriously threatened. A Constitutional Commission must be ready to cope with this.

VII. Conclusion

Devolution in Northern Ireland may appear functional to the UK government, but there are profound cracks in the system. It is imperative that the Northern Irish Assembly be reviewed. If current problems are allowed to fester with no formal review process, the pride the United Kingdom takes in this devolved legislature could be seriously tested.

[63] Brazier (n 6) 3.

"The restraint of war is the beginning of peace"[1]

Faisal Al-Brumy

Abstract

Though a relatively recent phenomenon, cyber attacks have rapidly become a prominent concern for organisations across the world. With reference to China, and other relevant global events, this paper explores cyber attacks as a modern emerging threat to peace and security, and whether or not they should prompt any military response. The study throughout notes the difficulty in marrying cyber attacks with existing principles of the laws on international warfare due to their integral differences to traditional kinetic attacks. In particular, the definition of 'force', attribution of the attacks, and their visibility are scrutinised. With reference to the possibility of escalation and a lack of discrimination in the targets that cyber attacks may affect, the paper ultimately concludes that the primary approach to such events should be one of restraint.

I. Introduction

China and the West are in a hidden invisible war. With global dependence on cyber infrastructures growing, the issue of cyber attacks is becoming ever more prevalent, and the possibility of these attacks prompting a physical military response is becoming a reality. This essay will first seek to define and clarify what is meant by a 'cyber attack'. Then, I shall move on to analyse the relationship between cyber attacks and principles in international law, and note the difficulties in reconciling the two. Finally, I shall consider the consequences of an automatic justification for war and launching an attack in response, highlighting the issues created.

[1] Michael Walzer *Just and Unjust Wars* (4th edition, New York, Basic Books 2006) 355.

II. Clarifying Cyber Attacks

a) Defining 'Cyber Attack'

Before any discussion of the legal or moral implications of a cyber attack, a crucial starting point is in its definition. Difficulty immediately arises here, as there is no internationally accepted definition. Scholars have provided varying definitions, though consensus seems to agree upon some destructive or seriously disruptive quality. [2] Some international consensus on cyber attacks was attempted in the Tallinn Manual, published in 2013. Though the manual is non-binding, it offers a specific requirement that an incident must have reasonable expectation to cause death, damage or destruction in order to be considered a cyber attack.[3] This damaging quality is what distinguishes cyber attacks from various other (often interchangeably used) terms, such as 'cyber operations', 'cyber espionage', or the all-encompassing 'cyber war'. Though they may include surreptitious elements, they lack the necessary harm that defines a cyber attack.

b) Government and Business Targets

It is worth noting here that for the purposes of this essay I shall not distinguish between Western business and government targets, as the means and methods employed by cyber attackers often do not distinguish them. For example, malware and worms move through government and civilian networks indiscriminately.[4] This is illustrated by the incidents following the Stuxnet worm.[5] Speculation suggests it was

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[2] "*A cyber-attack consists of any action taken to undermine the functions of a computer network for a political or national security purpose.*" Oona A Hathaway et al., 'The Law of Cyber-Attack' (2012) Calif. L. Rev. 817, 827.

[3] Michael N Schmitt *Tallinn Manual on The International Law Applicable To Cyber Warfare* (Cambridge University Press 2013) rule 30.

[4] Reese Nguyen 'Navigating Jus ad Bellum in the Age of Cyber Warfare' (2013) 101 Cal. L. Rev 1079, 1094-1101.

[5] William J Broad and David E Sanger, 'Worm was perfect for sabotaging centrifuges' *New York Times* (November 18 2010).

designed by the United States (US)[6] to attack Iran's nuclear programme, though Finnish and US companies have complained of its consequences.[7] For example, Chevron, a US based non-governmental organisation, discovered the worm had infiltrated their IT systems. As the intended target was Iranian nuclear facilities, it is clear that the Chevron example illustrates the potential proliferation of malicious attacks throughout networks due to its physical and electronic distance from the Iranian nuclear programme. Furthermore, attacking a business rather than government or state targets can have equally serious consequences. An attack on the NHS in the UK may disrupt ambulance services, causing loss of life, but equally a disruption to a US pharmaceutical company's production line may alter ingredient proportions to lethal levels.[8] It does not appear plausible to consider one more serious than the other.

III. Cyber Attacks and International Law

The justification for war has long been governed by the principle of *'jus ad bellum'*, the right to war. Walzer notes that the peace and liberty of society can only exist in the absence of aggression, thus fighting is sometimes the morally preferable choice.[9] Since 1945, the principle has been administered by the UN Charter, which provides the legal basis for when wars are just and unjust. Cyber Warfare poses new challenges to these existing principles, and any attempt to justify a response to a cyber attack poses new challenges to

[6] Broad and Sanger (n 5), Glenn Greenwald and Ewen Macaskill 'Obama orders us to draw up overseas target list for cyber attacks' *The Guardian* (7 June 2013).

[7] Broad and Sanger (n 5), Rachel King 'Stuxnet Infected Chevron's IT Network' http://blogs.wsj.com/cio/2012/11/08/stuxnet-infected-chevrons-it-network/.

[8] Charles Jaeger, 'Cyberterrorism and Information Security', Hossein Bidgoli *Global Perspectives on Information Security: Legal, Social, and International Issues* (John Wiley & Sons 2008) 130-131.

[9] Walzer (n 1) 51.

our understandings of these rules. I shall now explore some approaches to this.

a) Establishing force and armed attack

In order to justify an armed response in any circumstances, the West must seek to act in accordance with the international legal framework. The UN Charter provides a prohibition of any 'use of force' not in accordance with the Charter.[10] The notable exception to this prohibition is the right to self-defence, which arises upon the victim state suffering an 'armed attack',[11] which is encompassed by, but goes beyond, a use of force.

In assessing a 'use of force', the Charter does not prohibit economic or political coercion, but of course draws the line at physical military force.[12] Where then do cyber attacks fit? The difficulty is that they do not fit neatly into the remits of the Charter because they are not forceful in the sense that they do not directly (but may indirectly) cause kinetic force. However, this does not exclude them from perhaps modifying our contemporary interpretation of force. Analogies of cyber attacks being insufficiently 'war like' to constitute force can be drawn with the historic interpretations of naval blockades.[13] As one critic notes, blockades were once considered incapable of constituting an armed attack, as they did not immediately cause physical injury or destruction. However, unauthorised uses of blockades are now considered uses of force, and can rise to an armed attack

[10] Article 2(4).

[11] Article 51. The other accepted mode being authorisation by the Security Council. However, as a permanent member of the Security Council, we can assume that China would use its veto power against any motion to attack itself. Thus, as was the case in the Cold War, the Security Council will be relegated to a fairly useless institution in these circumstances.

[12] Michael Schmitt, 'Cyber operations and Jus ad Bellum revisited' (2011) 56 VLLR 569, 573.

[13] Sheng Li 'When Does Internet Denial Trigger The Right of Armed Self Defence' (2013) 38 Yale J. Int'l L. 179, 193-194.

depending on their scale and effect.[14] This is significant, as it illustrates how our definition of force and armed attack can change with the methods of warfare most prominently used.

Three leading approaches have been undertaken in an attempt to properly assess whether a cyber attack can be classified as an armed attack. The first, an instrument-based approach, focuses on the form of weapons used to attack. The second, a target-based approach, focuses on the victim of the attacks. Finally, the 'effects-based' approach considers the overall effect of the attack on the victim state. It is generally the latter that is deemed the most appropriate and widely accepted.[15] Thus, I shall focus my analysis upon it, and suggest that whilst it is a strong approach, it could be improved.

Schmitt's effects-based approach recognises seven criteria for establishing cyber attacks as a use of force: severity, directness, invasiveness, measurability, legitimacy and responsibility.[16] He argues states may use this approach to balance these factors in determining whether or not it has suffered a use of force via a cyber attack. He expands, arguing this can be a point of reference when determining the character of an armed attack, and the need to defend oneself.[17] Clearly an approach with merit, it allows states to engage in a subjective analysis of the attack, and thus respond appropriately.

However, when contextualising this approach against real situations, it is clear that the subjectivity of his approach weakens it greatly.[18] One critic notes that Schmitt's own

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[14] Definition of Aggression, G.A. Res. 29/3314, Annex, art. 3(c), U.N. Doc. A/RES/29/3314 (Dec. 14, 1974) (enumerating naval blockade as an "act of aggression" under Article 3.

[15]Oona A Hathaway et al., 'The Law of Cyber-Attack' (2012) Calif. L. Rev. 817, 847.

[16] Schmitt (n 12) 576.

[17] Schmitt (n 12) 594.

[18] Daniel B. Silver, 'Computer Network Attack as a Use of Force Under Article 2(4) of the United Nations Charter' (2002) Computer Network

application of his criteria on the 2007 attacks on Estonia can be manipulated all too easily.[19] Though his method would have found the attacks to be a use of force, Nguyen critiques his method. She argues that whilst the attacks were on the one hand severe because they seriously disrupted the economy and government functions, on the other hand, they were not very severe as they did not physically injure anybody and no physical property was damaged. The conflict in the application of Schmitt's approach gives scope for potential abuse. Considering one US military official has rather heavy-handedly stated 'shut down our power grid, maybe we will put a missile down one of your smokestacks' to the prospect of suffering a cyber attack, the reality of the approach being used to hastily justify an armed response seems not so inconceivable.[20]

b) Attribution and Visibility

Attribution in cyber attacks presents two difficult and interlinked issues. In order for attacks to be unlawful under the Charter they must be attributable to another member state[21] and, unlike conventional warfare, cyber attacks are highly elusive; to the public eye they come from nowhere.

A substantive part of the modern discussion on cyber attacks is with reference to China, as it has often been implicated in allegations of attacks. However Chinese officials repeatedly deny any involvement in cyber attacks targeting the West, and the argument in response must therefore seek to attribute the attacks to the state.[22] In the

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Attack and International Law 74, 89. Also see Hathaway et al, (ibid 11) at 847-48.

[19] Nguyen (n 4) 1123.

[20] Alex Spillius, 'US could respond to cyber-attack with conventional weapons' *The Telegraph* (1 Jun 2011).

[21] Article 2(4).

[22] William Wan, 'China continues to deny carrying out cyber attacks against U.S.' 29 May 2013 <http://www.washingtonpost.com/world/asia_pacific/china-continues-to-deny-us-cyber-attack-accusations/2013/05/29/a131780e-c85e-11e2-9245-

Nicaragua decision, the International Court of Justice (ICJ) set a markedly high threshold for determining whether a state had 'effective control' over a non-state group, requiring all operations at every stage of the conflict be wholly devised by the offending state.[23] Allan notes the difficulty in applying Nicaragua to a cyber attack, as it would require significant amounts of evidence proving the requisite connections.[24] Further to that argument, in using this evidence to justify an armed response, the Western military would likely be required to make the knowledge public in order to politically legitimise the response. This would have the possible by-effect of releasing compromising material on the extent of Western cyber capabilities, and the explicit declaration of state cyber operations against China.

Similarly, this issue would arise in applying the 'overall control' test set down in the *Tadic* case. This new test lessened the threshold for evidence for those organised in a 'military structure', giving the offending state a higher degree of responsibility.[25] Though it lowered the test to a provable level, some argue all states should bear the responsibility for attacks from their country, or for providing a sanctuary for attackers.[26] Nguyen analogises this with the justification of the invasion of Afghanistan following 9/11. Here it was argued by the US that Taliban-controlled Afghanistan was harbouring the militant group Al-Qaeda and therefore their invasion was

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773c0123c027_story.html>, BBC 'China rejects claims of cyber attacks on Google' *BBC News* 24 January 2010 http://news.bbc.co.uk/1/hi/8478005.stm.

[23] *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 119, 108.

[24] Collin Allan, 'Attribution Issues in Cyberspace' (2013) Chicago-Kent Journal of International And Comparative Law 55, 73-76.

[25] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) 137.

[26] David E Graham, 'Cyber Threats and the Law of War' (2010) 4 J. Nat'l Security L. & Pol'y 87, 92-93 (seeking to impute responsibility to states for attacks originating from that state's territory); Scott J. Shackelford, 'From Nuclear War to Net War: Analogizing Cyber Attacks in International Law' (2009) 27 Berkeley J. Int'l L. 192, 231-34.

justified. However, I doubt whether the analogy with 9/11 would realistically work. Support for an armed response post-9/11 was so enormously high because of the dramatic visibility of the attacks, and the uncovering of Al-Qaeda's endorsement of the attack.[27] Unless a cyber attack reached an equally catastrophic scale, with some open acknowledgement of orchestration, I find it doubtful that the Western public would be convinced that an armed response would be appropriate. Schmitt agrees here, recognising that following 9/11 the international community lowered the normative bar of attribution measurably.[28]

IV. The Consequences of an Armed Response

Let's imagine everyone decides that a cyber attack, whatever its nature, prompts an armed response. A crucial question is should we accept such an automatic allowance for the justification of war? I argue we should not. Using consequentialist moral reasoning, we must consider the full consequences of launching an armed response on China.

a) Escalation

First, regardless of what military commanders say[29] current state practice is that cyber attacks do not warrant an armed response. With China also claiming to be the victim of their 'biggest-ever' attacks as recently as last year, do we want an aggressive response policy to become customary law?[30] Given

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[27] David W Moore, 'Eight of 10 Americans Support Ground War in Afghanistan' 1 November 2001 http://www.gallup.com/poll/5029/eight-americans-support-ground-war-afghanistan.aspx and 'Bin Laden on tape: Attacks 'benefited Islam greatly' 14 December 2001.

[28] Schmitt (n 12) 599.

[29] Head of US Strategic Command Gen. Kevin P. Chilton stated "why would we constrain ourselves", David E Sanger 'Pentagon to Consider Cyberattacks Acts of War', May 31 2011 NY Times http://www.nytimes.com/2011/06/01/us/politics/01cyber.html?_r=0.

[30] BBC 'China hit by 'biggest ever' cyber-attack' http://www.bbc.co.uk/news/technology-23851041_27 August 2013, Jacob Davidson, 'China Accuses U.S. of Hypocrisy on Cyberattacks' 1 July 2013

the scope for disagreement of the perceived severity discussed above, as well a lack of any specific international agreements on cyber-war, could it not also be perceivable that China could just as readily prompt a military response on the West. Indeed, the subsequent potential for escalation to a volatile relationship is clear. If we readily accept that we have the justification for a response, we must also accept responsibility for our own attacks, and the response they prompt.

A further problem with using force in conjunction with cyber attacks can be demonstrated by examining the Georgia-Russia conflict in 2008. In a fierce display of patriotism, individual civilian attackers within Russia, or 'hacktivists' launched crippling cyber attacks upon the outbreak of conventional warfare.[31] Launching a visible attack on China would presumably do the same, giving Chinese hacktivists an explicit reason to launch attacks. It is plausible that if the Chinese state is launching attacks, it is showing restraint as to not cause an escalation in tensions. However, individual Russian hacktivists demonstrated that they launched the most aggressive and disruptive attacks, with or without any central command.[32] The riling effect that open physical warfare has is distinguished in cyber attacks because of certain inherent features. They do not require military training, cost is minimal and attacks can be launched on the opposing state from anywhere in the world, whereas a civilian response via conventional warfare is limited by these factors.

b) A new regime?

Perhaps then the only justifiable response is that of a cyber attack in retaliation. If the aim of war should only ever

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http://world.time.com/2013/07/01/china-accuses-u-s-of-hypocrisy-on-cyberattacks/.

[31] Paulo Shakarian, 'The 2008 Russian Cyber Campaign Against Georgia' (2011) 91 Military Law Review. 63, 63.

[32] Allan (n 24) 62-3.

to be to discourage war,[33] responding with cyber attacks does not seem to be meeting this aim. Thousands of attacks are launched to and from China every day, and if this remains the case it seems inevitable that eventually an attack will cause some intolerable harm. However as I have discussed, it seems almost totally inconceivable to imagine a situation in which a cyber attack would meet the level of an armed attack and justify a military response.

The most significant viable option left seems to be the suggestion of a new regime.[34] Debate and guidance on this option has been discussed, and there is appetite for an international tribunal which would hold states responsible for both their own cyber attacks, as well as attacks from individuals within their jurisdiction.[35] Though states have vast disagreements on what should and should not be regulated,[36] an attempt to reconcile and clarify what is largely an unregulated phenomenon is a more sensible and justified approach. Regulating attacks by punishing individual states will construct a framework that places an emphasis on their global responsibility, thus prompting them to take measures to avoid harbouring cyber attackers. As I noted in my discussion of attribution, Afghanistan was condemned for harbouring terrorists by the international community. Perhaps if we create an equivalent offence for harbouring cyber attackers, the same scorn and discouragement will provide an incentive for states to actively reduce cyber attacks from within.

The reality is that in all but the most extreme circumstances, where public opinion agrees and all other avenues have been exhausted, will the consequences of escalating to kinetic warfare be legitimate. In order to avoid

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[33] Walzer (n 1) 329.

[34] See Tallinn Manual (ibid 3), Rex Hughes, 'A Treaty For Cyberspace' (2010) 86 International Affairs 523, 535-541, and European Security Review, *Regulation of Cyber warfare: Interpretation versus Creation* (2013)

[35] Allan (n 24) 80-82.

[36] John Markoff and Andrew E. Kramer, 'U.S. and Russia Differ on Treaty for Cyberspace', *NY Times,* 28 Jun 2009.

future casualties and discourage war, leaders must exercise a calm level of control, as ultimately restraint in war is the beginning of peace.[37]

[37] Walzer (n 1) 355.

Coercion, risk and defensive practice in mental health

Jonathan Fisk

Abstract

Detention of the mentally ill is permitted under Article 5.1(e) of the Human Rights Act but should be avoided if at all possible, according to the latest Mental Health Act Code of Practice. It should therefore be a matter of professional and public concern that admissions and recalls to mental health units increase annually. Plausible reasons for this increase are the fewer safeguards in the Mental Health Act 2007 and a rapid decrease in mental health beds, which has resulted in a bed 'crisis'. Professionals seem to have responded to the paucity of beds by detaining patients simply to ensure their admission. Some people with mental illness are a danger to others but this risk is much exaggerated. However because the risk cannot be accurately estimated professionals are inclined to practice defensively – that is, to detain especially those with personality disorder – so that they cannot be blamed for failing to prevent a crime. On the other hand, the risk of suicide by people with mental illness seems to be under-estimated by professionals and tragic deaths could be prevented if they detained more people who are suicidal than they do presently.

I. Introduction

This essay attempts to answer briefly three related questions.

First, why are increasing numbers of people detained under the Mental Health Acts? The use of the law to compel the admission or treatment of a patient should be a matter of concern to the public and to professionals. Coercion is distressing to patients and their families;[1] an important erosion of autonomy and to be avoided if possible,

1Monahan J et al, 'Coercion and commitment: Understanding involuntary mental hospital admission' (1995) International Journal of Law and Psychiatry 18 (3) 249-263.

according to the Code of Practice.[2] It will be suggested that changes in the law may be in part responsible for this increase but changes in professional practice and in society may also be causative factors.

Second, are too many people detained on psychiatric units because they are seen as risky to the public? A common justification for detention is the risk of serious harm by those in the care of the mental health service but this has been much exaggerated[3] without foundation[4] and it is suggested that the law in part reflects the public's fear of the mentally ill.[5] This fear is exacerbated by health professionals' obvious inability to assess dangerousness to others accurately.[6]

Third, are people at risk to themselves because of their mental illness detained sufficiently often to prevent them from coming to harm? Professionals are more proficient in the assessment of the risk of self harm[7] and recent case law[8]

2Department of Health (2015) 'Mental Health Act 1983: Code of Practice.' London. The Stationery Office (in effect from 1 April 2015). At 1.2 'Where it is possible to treat a patient safely and lawfully without detaining them under the Act, the patient should not be detained'.

3 The Sun (7 October 2013) '1,200 killed by mental patients. Shock 10-year toll exposes care crisis.' Online at <http://www.thesun.co.uk/sol/homepage/news/5183994/1200-killed-by-mental-patients-in-shock-10-year-toll.html> accessed 15 January 2014.

4 Appleby L. et al. (2013) 'The National Confidential Inquiry into Suicide and Homicide by People with Mental Illness. Annual Report.' University of Manchester. Online at <http://www.bbmh.manchester.ac.uk/cmhr/centreforsuicideprevention/nci/reports/NCIAnnualReport2013V2.pdf> last accessed 15 January 2014.

5 Crisp A.H. et al., 'Stigmatisation of people with mental illnesses' (2000) British Journal of Psychiatry 177, 4-7.

6 For example: HJ Steadman (2000) 'From dangerousness to risk assessment of community violence: taking stock at the turn of the century.' J Am Acad Psychiatry Law 28.(3) 265-271.

7 For example: M Goldacre & K Hawton, 'Suicide after discharge from psychiatric inpatient care' (1993) The Lancet 342, 283–286.

8 As examples: Savage v South Essex Partnership NHS Foundation Trust [2008] UKHL 74. Rabone and another v Pennine Care NHS Foundation Trust [2012] UKSC 2.

should encourage professionals to use the law more extensively to save patients lives by preventing them from harming themselves.

II. Why are compulsory admissions to mental health units increasing?

Official statistics show an increase in detention under the Mental Health Acts. In the decade 1998-2008 admissions under Part II increased by 5.1% but declined between 1998-2003 by 2.4% and then rose again.[9] There was a greater (17.5%) increase in the numbers detained between 2008 and 2012[10] following the implementation of the Mental Health Act 2007(MHA07).[11] In 2013/14 23,531 patients were detained under MHA07, a 6% increase on the previous year.[12]

The Mental Health Act 1983 (MHA83)[13] was implemented in late 1983. The Mental Health (Patients in the Community) Act 1995 (MHA95)[14] added Supervised Discharge provisions to MHA83; and these Acts were extensively revised by MHA07, in force from late 2008.

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9 The Health and Social Care Information Centre (2009) 'In-patients formally detained in hospitals under the Mental Health Act 1983 and patients subject to supervised community treatment: 1998-99 to 2008-09' www.ic.nhs.uk (last accessed 10 December 2013).

10Community and Mental Health Team. Health and Social Care Information Centre, 'Inpatients formally detained in hospitals under the Mental Health Act 1983, and patients subject to supervised community treatment. Annual report, England.' (2013) HMSO, Table 2: <www.hscic.gov.uk> last accessed 10 December 2012.

11Mental Health Act 1983 (MHA 83), ch 12.

12Health & Social Care Information Centre, 'Inpatients Formally Detained in Hospitals Under the Mental Health Act 1983 and Patients Subject to Supervised Community Treatment, England - 2013-2014, Annual figures. Key facts' (2014): <http://www.hscic.gov.uk/article/2021/Website-Search?productid=16329&q=mental+health+act+admissions&sort=Relevance&size=10&page=1&area=both#top> accessed 2 March 2015.

13 MHA 83, ch 20.

14 Mental Health (Patients in the Community) Act 1995 (MHA 95), ch 52.

MHA83[15] defined 'mental disorder' as "...mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind"; This definition was simplified to "any disorder or disability of the mind' in MHA07,[16] which had the effect of removing restrictions on the detention of those diagnosed with psychopathy as this disorder no longer had to be associated with "abnormally aggressive or seriously irresponsible conduct..."[17] to allow detention.

Under MHA83 courts had the power to order the long-term detention in hospital of someone with psychopathy after they had committed an offence if "appropriate medical treatment is available for him".[18] MHA07 removed this requirement[19] so making hospital detention a simple alternative to prison. Also in the MHA07 two barriers to collusion in the admission procedure appear weaker, so safeguarding people against unnecessary admission less well.

First, the provisions regarding conflicts of interests have been changed so that in MHA83 the medical practitioners could not be normally employed by the same organisation,[20] they must now not work for the same team.[21] Second, the usual applicant for admission becomes the Approved Mental Health Professional (AMHP)[22] who replaces the Approved Social Worker (ASW). Although training courses are specified[23], a Trust seeking to save money may employ, for

15 MHA83 at 1(2).
16 Mental Health Act 2007 (MHA 07) at 1(2) and (3).
17 MHA83 at Part I. 1.(2).
18 MHA83 at 37(2)(a)(i).
19 MHA07 at 4.5).
20 MHA83 at 12(3) - (5).
21 The Mental Health (Conflicts of Interest) (England) Regulations 2008. para 6 (1)(b)(i) 'Potential conflict of interest for professional reasons'. <http://www.legislation.gov.uk/uksi/2008/1205/regulation/6/made> accessed 14 December 2013.
22 MHA07 at 18.
23 MHA07 at 4(5).

example, junior nurses as AMHP's.[24] Conflict of interest regulations do not forbid the AMHP from working on the same unit (even though not on the same clinical team) as the medical practitioners, so making independent judgment and advocacy in line with the least restriction principle'[25] harder to pursue. The law now permits detained patients to be discharged from hospital but subject to the MHA indefinitely.

Section 17 of MHA83 permits leave for the remaining length of the detaining section under "...such conditions (if any) as that officer considers necessary in the interests of the patient or for the protection of other persons". The patient can be recalled to hospital if the conditions are not adhered to. In order to prevent patients with chronic illnesses being admitted, treated, relapsing in the community because of non compliance with medication and being re-admitted, MHA95 introduced Supervised Discharge. Supervised Discharge is replaced by Supervised Community Treatment[26] (usually called a Community Treatment Order (CTO)) under MHA07 which allows doctors to impose any treatment they consider necessary outside hospital, potentially indefinitely. There are no national statistics on Supervised Discharge which does not appear to have been much used[27] but CTO's have been used increasingly frequently since their introduction in November 2008.[28] By their nature CTO's will not always be successful because patients may not agree to

24The Mental Health (Approved Mental Health Professionals) (Approval) (England) Regulations 2008, sch 1.

25 Department of Health, *'Code of Practice. Mental Health Act 1983* (2008) The Stationery Office, 1.13.

26 MHA07 at Chapter 4.

27 Franklin D et al.(2000) 'Consultant psychiatrists' experiences of using supervised discharge: Results of a national survey.' Psychiatric Bulletin 24, 412-415.

28 Health and Social Care Information Centre, 'Inpatients Formally Detained in Hospitals Under the Mental Health Act 1983 and Patients Subject to Supervised Community Treatment' (England, Annual Report 2013) At 22. Table 4: <http://www.hscic.gov.uk/catalogue/PUB12503/inp-det-m-h-a-1983-sup-com-eng-12-13-rep.pdf> accessed 15 January 2014.

the treatment plan or their illnesses may worsen; and they need to be recalled to hospital. These recalls now contribute to the increasing number of patients detained in hospital, so that in 2008/9 there were 207 recalls but 2316 by 2013/14.[29]

In two respects then - the rise in compulsory admissions following the implementation of MHA07 and the increased use of CTO's - it appears that changes to the legal framework are associated with an increase in the numbers of detained patients in hospital.

There are however other plausible explanations for this increase. First, it seems logical that the rates of compulsory admission for mental disorder will rise if the rate of severe mental illness increases. The rate of mental illness and particularly that of suicide rises in times of economic decline, as Durkheim showed a century ago when he found a correlation between suicide and bankruptcy rates;[30] and this has been confirmed many times since.[31] Although the UK GDP continues to rise annually,[32] this prosperity is not evenly spread, so that a recent study of economic well being shows that many people feel economically disadvantaged;[33] and this

29 Community and Mental Health Team. Health and Social Care Information Centre (2014) 'Inpatients formally detained in hospitals under the Mental Health Act 1983, and patients subject to supervised community treatment: Annual report, England, 2013/14.' Table 8: 'Uses of Community Treatment Orders; 2008/09 - 2013/14'.

30 Durkheim É, 'Le Suicide. Étude De Sociologie' (1897) Félix Alcan. Chapitre V: <http://www.gutenberg.org/files/40489/40489-0.txt> accessed 11 December 2013.

31 For example: Draughon M, (1975) 'The relationship between economic decline and mental hospital admissions continues to be significant' (1975) Psychological Reports 36, 88; Jin L, Shah C.P. & Svoboda T.J, 'The impact of unemployment on health: a review of the evidence' (1995) CMAJ. 153(5), 529–540; Ruhm C.J, 'Are Recessions Good For Your Health?' (2000) Quarterly Journal Of Economics 115 (2), 617- 650.

32 World Bank, 'GDP per capita (current US$)' (2013): <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> accessed 11 Decmber 2013.

33 Hawksworth J, Jones NC & Ussher K, 'Good Growth. A Demos and PWC report on economic wellbeing' (2011) Demos, Figs 2 and 3, 19-20.

may predict an increased rate of suicidal thinking and so compulsory hospital admission.

Second, excess alcohol and recreational drug use are associated with an increase in the rates of severe mental illness. Per capita alcohol consumption has probably declined between 2005 and 2011[34] but recreational drug use increased by 40% between 2004/5 and 2008/9.[35] Although drug use as such cannot be a criterion for admission,[36] the consequent psychoses warrant admission and by their severity often demand compulsion.[37]

Third, there has been a dramatic annual decrease in the numbers of hospital places for mental health. In 1961 Enoch Powell declared "...in 15 years time there may well be needed not more than half as many places in hospitals for mental illness as there are today..."[38] His expectations were exceeded so that by 1987 there were 67122 available beds[39]; by 1997 there were 36601; by 2002 there were 32753[40]; and

34 Office for National Statistics, 'General Lifestyle Survey 2011. Chapter 2 - Drinking (General Lifestyle Survey Overview - a report on the 2011 General Lifestyle Survey) (2012): <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-289713> accessed 11 Decmber 2013.

35 R Chaplin, J Flatley & K Smith, 'Crime in England and Wales 2010/11. Findings from the British Crime Survey and police recorded crime' (2011) Home Office, 34.

36 MHA83 op. cit. At Part I.1.(3).

37Verdoux H et al, 'Suicidality and substance misuse in first-admitted subjects with psychotic disorder.' Acta Psychiatrica Scandinavica (1999) 100(5), 389–395.

38E. Powell 'Water Tower speech' (1961): <http://studymore.org.uk/xpowell.htm> accessed 11 Decmber 2013.

39 'Beds' are used as shorthand within mental health services to indicate hospital places for in-patients.

40 NHS England, 'Average daily number of available beds, by sector, England, 1987-88 to 2009-10' (2011) Department of Health form KH03. Bed Availability and Occupancy Data – Overnight' <http://www.england.nhs.uk/statistics/statistical-work-areas/bed-availability-and-occupancy/bed-data-overnight/> accessed 9 December 2013.

by the third quarter of 2014/15 there were 21446 beds.[41] This decline has been associated with an increase in average bed occupancy, which now stands at 89%[42] and has been declared 'a crisis'.[43][44][45]

If a patient requires admission but a bed is hard to obtain, it seems plausible that they will be detained, for then a bed must be made available. Failure to find a bed even for an informal patient who is suicidal can result in tragedy.[46] Holding a mentally ill person in a police cell whilst seeking a bed for them can breach their Article 3 rights.[47] The pressure on beds can be inferred from the increasing admissions of NHS detained patients to private psychiatric beds. Thus whilst admissions under Part II between 2008-9 and 2012-13 to NHS beds rose from 23768 to 27413 (15% increase),

41NHS England, 'Bed Availability and Occupancy Data – Overnight.' 'Average Daily Available and Occupied Timeseries. Q1 2010/11 to Q3 2014/15' (2105) <http://www.england.nhs.uk/statistics/statistical-work-areas/bed-availability-and-occupancy/bed-data-overnight/> accessed 3 March 2015.

42 NHS England, 'Average daily number of available beds, by sector, England, 1987-88 to 2009-10' (2011) Department of Health form KH03. Bed Availability and Occupancy Data – Overnight' <http://www.england.nhs.uk/statistics/statistical-work-areas/bed-availability-and-occupancy/bed-data-overnight/> accessed 9 December 2013.

43 'NHS mental health care in 'crisis' due to lack of beds, leading psychiatrist warn.' *Independent* (16 October 2013) <http://www.independent.co.uk/news/uk/home-news/nhs-mental-health-care-in-crisis-due-to-lack-of-beds-leading-psychiatrist-warn-8883339.html> last accessed 11 December 2013.

44 A. McNicoll, '10 ways the mental health beds crisis is hitting patient care. How patients are being impacted by problems accessing beds and how NHS Trusts respond' (2013) Online at <http://www.communitycare.co.uk/2013/10/16/10-ways-the-mental-health-beds-crisis-is-hitting-patient-care/#.UqiQp6U7Tnk?> accessed 11 December 2013.

45 Care Quality Commission, 'Monitoring the Mental Health Act in 2010/11' (2011) CQC, 47.

46 North East Essex Partnership NHS Trust, 'Amanda Peck statement' (2013) <http://www.nepft.nhs.uk/media/view-news/amanda-peck-statement/> accessed 12 December 2013.

47 MS v United Kingdom (24527/08) (2012) 55 E.H.R.R. 23.

admissions to private hospitals rose from 1986 to 2840 (43% increase).[48]

Correlation does not prove cause and the relationship between admissions and beds has been closely examined by Keown and colleagues[49] who compared the rate of involuntary admissions to the rate of reduction in mental illness beds between 1988 and 2008. They found a mean correlation of – 0.6 between bed numbers and admission rates, which was stronger if a delay of a year is introduced. So it seems that it is the experience of bed shortage that leads professionals to detain more patients.

III. Compulsory admission for dangerousness

In the 1990's seven murders by three people with serious mental disorder - Beverly Allitt (1991), Christopher Clunis (1992) and Michael Stone (1996) caught the public's attention.[50] The Government responded to the subsequent inquiries[51][52][53] and the campaign for better community care by

48 Health and Social Care Information Centre (2013) Community and Mental Health Team. 'Inpatients formally detained in hospitals under the Mental Health Act 1983, and patients subject to supervised community treatment.' Annual report, England, 2013.Table 2, 12, <https://catalogue.ic.nhs.uk/publications/mental-health/legislation/inp-det-m-h-a-1983-sup-com-eng-12-13/inp-det-m-h-a-1983-sup-com-eng-12-13-rep.pdf> accessed 11 December 2013).

49 Keown, P et al, 'Association between provision of mental illness beds and rate of involuntary admissions in the NHS in England 1988-2008: ecological study' (2011) British Medical Journal 343, 1-8.

50 BBC 'Health Community Care Failures'. (December 8, 1998) <http://news.bbc.co.uk/1/hi/health/230179.stm> accessed 16 December 2013.

51 Clothier C, 'The Allitt inquiry: independent inquiry relating to deaths and injuries on the children's ward at Grantham and Kesteven General Hospital during the period February to April 1991' (1994) London: HMSO.

52 J Ritchie, D Dick, & R Lingham, 'The report of the inquiry into the care and treatment of Christopher Clunis' (1994) HMSO.

53 R Francis, J Higgins & E Cassam, 'Independent Inquiry Into The Care And Treatment Of Michael Stone' (2000) Kent Social Services, Kent

the Jonathan Zito Trust[54] in two White Papers; the Mental Health (Patients in the Community) Act 1995 (MHA95);[55] and by re-establishing the National Confidential Inquiry into Suicide and Homicide by People with Mental Illness (NCISH).[56]

The Inquiries established that some very ill people do not appear to have any consistent professional supervision or social support in the community. MHA95 specified the aftercare requirement of section 117 of MHA83 and required, for every patient who had been detained under Section 3, a professional care coordinator; a regular system of clinical review; and the requirements to reside at a specific place, to attend for medical treatment and to allow professionals access.[57] A regional survey[58] later showed that aftercare even for offenders was severely hampered by shortage of staff skills and community resources, so it seems unlikely that this coercive legislation reduced risk to the community.

Consistent with this finding a very recent report[59] by the NCISH has shown, as have previous surveys, that only 5% of serious violent offenders had been in recent contact with mental health services. They emphasise, as before, that

Probation Service: <http://www.jamestrueman.com/documents/mha/PD-DSPD/MS-Report-21.09.06.pdf> accessed 16 December 2013.

54 http://www.zitotrust.co.uk. Closed in 2009 after MHA07 became law. See: <http://www.theguardian.com/society/2009/may/17/jayne-zito-trust-charity-schizophrenia-clunis> accessed 16 December 2013.

55 Mental Health (Patients in the Community) Act 1995, ch 52.

56 L Appleby, J Shaw & T Amos, 'National Confidential Inquiry into Suicide and Homicide by People with Mental Illness' (1997) BJ Psychiatry 170, 101-102.

57 Ibid at 25D.

58 PJ Vaughan, N Pullen & M Kelly, 'Services for mentally disordered offenders in community psychiatry teams' (2000) The Journal of Forensic Psychiatry 11(3) 571-586.

59 S Flynn, 'Serious Violence by People With Mental Illness: National Clinical Survey' (2013) Journal of Interpersonal Violence. XX(X) 1–21 (pre-publication) <http://jiv.sagepub.com/content/early/2013/12/03/0886260513507133> accessed 13 December 2013.

"high-risk patients require closer supervision, and regular inquiry about changing delusional beliefs, thoughts of violence, and weapon carriage".

In 1999 the Home Office (HO) and the Department of Health (DH) published in 1999 'Managing Dangerous People With Severe Personality Disorder. Proposals For Policy Development.'[60] Their proposals for the management for this (hypothesised) group were either to "strengthen existing legislation so that dangerous severely personality disordered people would not be released from prison or hospital whilst they continued to present a risk to the public"; or "to provide powers for the indeterminate detention of dangerous severely personality disordered people in both criminal and civil proceedings...based on the risk that the person represented and their therapeutic needs rather than whether they had been convicted of an offence".[61] In the face of the combined opposition from psychiatrists, who showed that it was not possible to identify those who would go on to commit a serious offence;[62][63] and from lawyers who argued the potential human rights violations, the Government did not pursue this course further but their contemplation of the indefinite detention of people living in the community who had committed no offence gives an indication of the public mood.

In 2000 the DH and the HO published, again to

60 Home Office & Department of Health, 'Managing Dangerous People With Severe Personality Disorder. Proposals For Policy Development' (1999) London. HMSO: <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/CPD/dang12.htm> accessed 16 December 2013.

61 op.cit. Introduction.

62 P Mullen, 'Dangerous people with severe personality disorder. British proposals for managing them are glaringly wrong - and unethical' (1999) BMJ 319, 1146–7.

63 A Buchanan & M Leese, 'Detention of people with dangerous severe personality disorders: a systematic review'(2001) Lancet 358, 1955 – 1959.

professional alarm,[64] the White Paper 'Reforming the Mental Health Act'[65] where they say "... public confidence in care in the community has been undermined by failures in services and failures in the law... In particular, existing legislation has also failed to provide adequate public protection from those whose risk to others arises from a severe personality disorder".

It is clear that MHA07 was passed in a climate of anxiety about the potential for violence by those with mental illness so, unsurprisingly, there are changes to MHA83 which have made detention more likely.

The criteria for admission have been widened so that those with psychopathy can be admitted without evidence of "abnormally aggressive or seriously irresponsible conduct...:.[66] This change seems likely to increase admissions since those with severe personality disorder or psychopathy are seen as being at high risk.[67] Admission, though, may appear futile since evidence suggests, and the courts accept, that psychopathy is untreatable.[68] The MHA07 has replaced "treatment is likely to alleviate or prevent a deterioration of his condition"[69] by "appropriate medical treatment is available for him".[70] The courts have found that a patient is not improperly detained even when treatment consists of a program with which the patient refuses to cooperate, so gaining no therapeutic benefit from their detention.[71]

Hospital detention of a psychopath in the implausible

64 G Szmukler, 'A new mental health (and public protection) act. Risk wins in the balance between providing care and controlling risk. (2001) BMJ. 322. (7277) 2–3.

65 Department of Health, 'Reforming The Mental Health Act' (Cmnd 5016-I-II) (2000) London. The Stationary Office. Summary, 3.

66 MHA83 at 1.(2). Cf MHA07 Part 1. Chapter 1. 1.(3)(c).

67 For example: Davison S.E., 'Principles of managing patients with personality disorder' (2002) Advances in Psychiatric Treatment 8, 1-9.

68 Ruddle v Secretary of State for Scotland [1999] G.W.D. 29-1395

69 MHA83 at 3(2)(b).

70 MHA07 at 4(2)(d).

71 R. v Canons Park Mental Health Review Tribunal Ex p. A [1994] 2 All E.R. 659/

hope of benefit from 'the milieu' has been accepted by the court;[72] and the ECHR[73] has ruled that detention of those with psychopathy on the ground of risk to others (regardless of the requirements of any Mental Health Act) does not violate Article 5.[74]

Admission criteria have been widened to include sexual disorder. Since MHA83 no patient could be admitted 'by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.'[75] In MHA07 the exception remains for alcohol and drugs but is removed for 'sexual deviancy', thereby making it possible for the first time since 1890[76] to detain people as mentally ill because they show sexual behaviour of which the majority do not approve. It seems plausible that this power will be used, as the Joint Committee on Human Rights[77] have commented 'The Government's intention is to ensure that paedophiles can be subject to indeterminate detention under the Mental Health Act 1983, without the need for any other accompanying mental disorder.'

Section 118 of MHA83 required the production of a Code of Practice, first published by the Mental Health Act Commission in 1985 which the courts have emphasised "...is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons

72 MD v Nottinghamshire Health Care NHS Trust [2010] UKUT 59 (AAC).

73 Hutchison Reid v United Kingdom (50272/99) (2003) 37 E.H.R.R. 9

74 Council of Europe (1950) 'Convention for the Protection of Human Rights and Fundamental Freedoms.' Article 5 – Right to liberty and security: <http://conventions.coe.int/treaty/en/treaties/html/005.htm> accessed 4 March 2015.

75 MHA83 op.cit. At 1(3).

76 SG Lushington. 'Lunacy Act 1890' (1890) The County and Local Government Magazine 3. (XVII) 294-305.

77 House of Lords. House of Commons (2007) Joint Committee on Human Rights. Legislative Scrutiny: Mental Health Bill. Fourth Report of Session 2006-07. London. HMSO, 2.10

for doing so".[78] At least from 1999[79] onward the Code considers both patient welfare and risk to others and in MHA07 the principles informing the Code were set out in greater detail.[80] It is of course the relative weight accorded to patient autonomy and welfare or public safety that will determine the readiness of professionals to use detention when there is risk. The Code is strengthened by the instruction to professionals to 'have regard to the code.'[81] But it is hard to see how this 'regard' could be manifest, given the conflict between the principles, so a strengthened Code offers no increased protection for patients' rights and will not prevent patients perceived as risky being detained.

IV. Compulsory admission of the suicidal patient[82]

Defensive practice can be seen when a healthcare professional sets their own professional success above the interests of their patient. So, for example, they may insist on the admission of a patient whose risk to themselves is small, lest the patient subsequently comes to harm and the professional is held to blame. In R v East London[83] psychiatrists tried to re-detain a man whom the MHRT had discharged a few days previously, without any evidence of change in his clinical state. The court ruled that the MHRT opinion must prevail, so here, we may guess, defensive practice was set aside.

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78 R. (on the application of Munjaz) v Mersey Care NHS Trust, R. (on the application of S) v Airedale NHS Trust (Appeal) [2005] UKHL 58. At 21.

79 Department of Health and Welsh Office (1999) '*Code Of Practice. Mental Health Act 1983*.' London: The Stationery Office. At 2.9 & 3.11(d).

80 MHA07 op.cit. at 8.

81 ibid at 8 (2D).

82 With regret, constraints of space prevent consideration of those who are at risk to themselves because of mental incapacity such as the elderly with dementia and the learning disabled; and of course children.

83 R. (on the application of von Brandenburg) v East London and the City Mental Health NHS Trust [2001] EWCA Civ 239.

Brazier and Cave[84] call medical defensive practice 'appalling' because beneficence and patient autonomy are paid so little regard. Doctors fear though that if they do little they may be considered negligent by their employer[85], the GMC[86] or the courts[87] [88] [89]; but must not be over-zealous and so override patient rights, including their rights under the Human Rights Act (HRA).[90]

It is well established that psychiatrists, like all doctors, have a duty of care to their patients.[91] The standard of medical care was established in Bolam[92] when it was found that "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men..."[93] Subsequently Bolitho[94]

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84 Brazier M. & Cave E. (2011) 'Medicine, Patients and the Law.' (Fifth Ed.) London. Penguin. At 8.19.

85 NHS Employers, 'Maintaining High Professional Standards In The Modern NHS' (2013): <http://www.nhsemployers.org/sitecollectiondocuments/mhps%20framework%20bc310713.pdf> accessed 5 December 2013.

86 For example: General Medical Council 'Fitness to Practise Rules 2004': <http://www.gmc-uk.org/about/legislation/ftp_legislation.asp> accessed 5 December 2013.

87 For example: Hanson v Airedale Hospital NHS Trust. [2003] C.L.Y. 2989.

88 For example: R. v Misra (Amit), R. v Srivastava (Rajeev) [2004] EWCA Crim 2375.

89 G. Goulier'Politique et psychiatrie, quelle place dans la formation?' , (2013) L'information Psychiatrique. 89(8), 685-693 (On the prosecution for manslaughter of psychiatrist Dr Danielle Canarelli after a murder by one of her patients).

90 Human Rights Act 1998, ch 42.

91 For example: General Medical Council (2004) 'Council of Heads of Medical Schools. Guiding Principles For The Admission Of Medical Students.' at 8.'The primary duty of care is to patients.' Online at http://www.gmc-uk.org/CHMS_Revised_Adm_principles_291104.pdf_25397121.pdf (last accessed 18 December 2013)

92 Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582.

93 ibid 582.

94 Bolitho (Deceased) v City and Hackney HA [1998] A.C. 232

set the higher standard that evidence was required that the accepted practice had a scientific basis.

In mental health services accepted practice varies widely. As Baroness Hale comments (in the context of the diagnosis of personality disorder) "...psychiatry is not an exact science. Diagnosis is not easy or clear cut. As this and many other cases show, a number of different diagnoses may be reached by the same or different clinicians over the years".[95] Unsurprisingly, then, mis-diagnosis in mental health has not been held to be negligent.[96]

All mental health professionals have a duty to carry out a proper assessment. So healthcare professionals working for the police,[97] the prison authorities[98] and hospital trusts[99] have been considered negligent when they failed to ascertain that a detainee, prisoner or patient respectively is suicidal or failed to take appropriate precautions to prevent suicide, which should have included warning others of the risk of suicide. Manchester Police were found negligent because they failed to tell the prison authorities about the risk of suicide of a detainee was transferred from police cells to a remand centre and who killed himself shortly after the transfer.[100] However the prison medical staff were held not liable for a young man who was known to be at risk and killed himself in a prison cell, as their duty of care was less than that of the NHS.[101]

Having assessed risk, healthcare professionals have a duty of care to provide an environment suitable to the patient's

95 R v Ashworth Hospital Authority and Another [2005] UKHL 20. At 31.

96 S v South West London and St George's NHS Mental Health Trust [2011] EWHC 1325 (QB).

97 Reeves v Commissioner of Police of the Metropolis [2000] 1 A.C. 360.

98 Keenan v United Kingdom (27229/95) [2001] 33 E.H.R.R. 38.

99 Selfe v Ilford and District Hospital Management Committee [1970] 114 S.J. 935.

100 Kirkham v Chief Constable of Greater Manchester [1989] 3 All E.R. 882.

101 Knight v Home Office [1990] 3 All E.R. 237.

needs. A trust was held to be negligent when a young man who had been hearing voices ordering him to kill himself was placed in a local authority mental health unit. Although he had been assessed earlier as being a low suicide risk, he died a few hours later after breaking a window and falling from his sixth-floor room.[102]

Once admitted to a mental health unit, the courts that considered Carol Savage's death[103] [104] [105] [106] established that mental health units owed a duty of care to prevent patients committing suicide even when they are not on the hospital premises. Mrs Savage had suffered from schizophrenia for many years and was detained in hospital under section 3 of the MHA. She removed herself from the ward and committed suicide by jumping in front of a train.

There was argument about the applicability of HRA Article 2[107] to health authorities but the court concluded "...article 2 imposes a further 'operational' obligation on health authorities and their hospital staff... (this) obligation arises only if members of staff know or ought to know that a particular patient presents a "real and immediate" risk of suicide. In these circumstances Article 2 requires them to do all that can reasonably be expected to prevent the patient from committing suicide. If they fail to do this, not only will they and the health authorities be liable in negligence, but there will also be a violation of the operational obligation under Article 2 to protect the patient's life".[108]

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102 Reynolds v United Kingdom. (2694/08) [2012] 55 E.H.R.R. 35

103 Anna Savage v South Essex Partnership NHS Foundation Trust [2006] EWHC 3562 (QB).

104 Anna Savage v South Essex Partnership NHS Foundation Trust [2007] EWCA Civ 1375.

105 Savage v South Essex Partnership NHS Foundation Trust [2008] UKHL 74; 2008 WL 5130219.

106 Savage v South Essex Partnership NHS Foundation Trust [2010] EWHC 865 (QB).

107 HRA op.cit. Schedule 1. Part 1. Article 2. 'Right to life. Everyone's right to life shall be protected by law...'.

108 Savage [2008] op.cit. at 72.

Citing Osman,[109] the court also found that it was not necessary that the negligence shown by the trust and its staff should be 'gross'[110] (that is, liable to criminal prosecution) for the trust to fail in its obligations under the HRA.

It was argued subsequently in Rabone[111] [112] [113] that the difference between detained and informal patients is legal not clinical – that is, detention depends on the patients compliance not their degree of illness. Moreover, an informal but severely ill patient is effectively under the same degree of absolute control by hospital staff as a detained patient - for if they attempt to leave the ward they will likely be detained for their own safety.

Melanie Rabone hanged herself whilst on leave from the ward where she was an informal patient. Though staff knew that she was at significant risk of suicide and her father had repeatedly expressed his concern, her leave was agreed by a consultant who had just returned to work.[114] Dyson LJ comments[115] "...it was common ground that the decision to allow Melanie two days home leave was one that no reasonable psychiatric practitioner would have made... The trust failed to do all that could reasonably have been expected to prevent the real and immediate risk of Melanie's suicide".

It is clear now that professionals cannot ignore their responsibility for detained or informal patients who are clearly at risk even when they are not on hospital premises.

109 Osman v United Kingdom (23452/94) 29 E.H.R.R. 245, 116.

110 See R.v Adomako (John Asare) [1995] 1 A.C. 171.

111 Richard Rabone (in his own right & as Personal Representative of the Estate of Melanie Rabone) v Gillian Rabone (in her own right) and Pennine Care NHS Trust [2009] EWHC 1827 (QB).

112 Richard Rabone (In his own Right & as Personal Representative of the Estate of Melanie Rabone, Deceased), Gillian Rabone (In her own Right) v Pennine Care NHS Trust [2010] EWCA Civ 698.

113 Rabone and another v Pennine Care NHS Foundation Trust [2012] UKSC 2.

114 Rabone and another v Pennine Care NHS Foundation Trust [2012] UKSC 2, 4,5,6.

115 ibid at 43.

As Brennan comments, "The next point on the spectrum of vulnerability will most probably be the patient who is subject to a Community Treatment Order ... Should the psychiatric services fail to adequately monitor such a patient, thereby not noticing a lack of adherence to their treatment regime, and leading to a consequential fatal outcome, on what grounds would their case be differentiated from Rabone".[116]

On the other hand, authorities do not generally have a duty to attempt to prevent foreseeable self harm. A young man with a history of self harm continued this behaviour when detained in a young offenders institution. The court ruled that his Article 2 rights were not engaged as his life had not been in danger. His Article 3 rights were not engaged as he had not been detained on premises that were inappropriate for his mental state.[117] Similarly, in a recent case[118] although a doctor and a nurse were found to be negligent because they had not carried out a proper mental health assessment on a young man detained in an immigration removal centre who injured himself severely shortly after the assessment, they were not negligent for failing to prevent this act.

Professionals who try to prevent risky behaviour have been held to be officious. So a Trust in Northern Ireland should not have used a Guardianship order to prevent an alcoholic brain damaged woman from further physical abuse by her husband.[119] The court said there was no analysis of the applicant's situation "through the prism of the European Convention"[120] and that the trust had infringed her article 8 and article 12 rights, even though "Mrs Connor would be unlikely to survive for very long, should she return to her

116 C Brennan, 'One more step in the expansion of "the right to life"' (2012) Professional Negligence, 28 (2), 149-154, 154.

117 R. (on the application of P) v Secretary of State for Justice [2009] EWCA Civ 701

118 Nyang v G4S Care & Justice Services Ltd [2013] EWHC 3946 (QB)

119 In the Matter of an Application by Jennifer Connor for Judicial Review KERF5153 [2004] NICA 45.

120 ibid 19.

previous circumstance, as she lacks the capacity to protect herself from serious physical harm".[121]

It is not surprising that the courts have found professionals negligent in failing to care properly for patients at high risk of suicide, arguably the core of psychiatric practice, although it is surprising that they have found that professionals do not have a duty to prevent self-harm. Cases where professionals have overridden patients' autonomy and acted defensively seem to be of much less significance than those where they have been adjudged to have taken insufficient responsibility for those at risk of suicide.

V. Conclusion

The rate of compulsory admissions increased after MHA07 perhaps because the safeguards against compulsion are weaker and there has been more extensive use of CTO's. However the striking change in the pattern of service over the last 50 years has been the decrease in beds and the study by Keown showed that it seemed to be the experience of bed shortages that precipitated a greater use of compulsory admission. MHA07 has made it easier to detain patients and to monitor them in the community but will have little impact on serious crime committed by people with mental illness until the prediction of dangerousness improves. Although the rate of homicide by patients has decreased, patient suicides have increased even by those in close contact with services,[122] and it appears appropriate that mental health services accept the responsibility to monitor more patients more closely both in hospital and in the community than at present, not to protect the professionals from error, but to save their patients lives.

121 ibid 8.

122 L Appleby, J Shaw & T Amos op cit, at 6.

Between the pillars of liberalism and capitalism: A comparison of theories of exploitation

James Gale

Abstract

This article considers the theory of exploitation forwarded by Mark Reiff, comparing and contrasting it with the older theories of exploitation offered by Karl Marx and A. C. Pigou. The theories of Reiff and Marx are revealed as being fundamentally different in both their purpose and nature, exemplified by their diametric adoption of the internal and external perspectives respectively. This fundamental difference renders them largely incommensurable. The theory of A. C. Pigou is akin to that of Reiff's in its adoption of the internal perspective, making comparison between these theories more appropriate. Throughout this analysis comparisons between these theories are made where appropriate and difficulties inherent to the theories themselves are considered.

I. Introduction

Mark Reiff's theory of exploitation offers a convincing means by which we might identify and regulate occurrences of economic injustice within a liberal capitalist state. This theory will be distinguished from the theory of exploitation forwarded by Karl Marx, which is entirely unsuited to this task as it is fundamentally different in both purpose and nature. In order to illustrate this, the first part will be dedicated to briefly explaining the theories of Marx and Reiff and the second part to comparing them. It will ultimately be shown that Marx's theory is primarily aimed at elucidating the ideology of a perfectionist society, whereas Reiff's theory is aimed at telling us how we may achieve economic justice in a liberal capitalist state.[1] The differing perspectives and

[1] Reiff, Mark R. *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 24.

objectives adopted by these theories makes it difficult to view them as being in direct competition. Not withstanding this, a few of the major strengths and weaknesses of the two approaches will be discussed, and an attempt will be made to decide which offers the more convincing account. The third part of this essay will introduce and compare a theory of exploitation that may be more appropriately compared with that of Reiff's, this being that argued by Arthur C. Pigou. This theory will be dealt with in less depth, as it will be shown to suffer from a number of flaws and so unworthy of lengthy consideration. Finally, it will briefly be considered which of these theories offers the best account as a theory of exploitation. This article concludes with a commendation for Reiff's novel approach, but restates the author's doubts as concerns the calculation of externalities.

II. Karl Marx's Theory of Exploitation

Marx's theory of exploitation reads, "The worker is exploited to the extent that produced value exceeds variable capital."[2] Marx defines the value of a commodity as the socially necessary labour time required to reproduce the good.[3] This is in turn determined by the social necessary labour time required to reproduce the means of the worker's subsistence, for "a man's labour power is produced if and only if he is produced."[4] This is known as the labour theory of value, and there has been considerable debate as to its interpretation and its supposed role in Marx's theory of exploitation.[5] Cohen offers a convincing argument that the labour theory of value is irrelevant to Marx's imputation of exploitation.[6]

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[2] ibid 28.

[3] Marx, Karl, *Capital: a critique of political economy. Volume III. Moscow, USSR* (Progress Publishers 1887)

[4] Cohen, G. A., "The Labor Theory of Value and the Concept of Exploitation." Philosophy & Public Affairs 8.4 (1979): ##. Print.

[5] See Keen, Steve. 'Use-value, exchange value, and the demise of Marx's labor theory of value' (1993) Journal of the History of Economic Thought 15, no. 01, 107-121.

[6] ibid 340.

Instead it is enough that labour creates what has value, and that some of this value goes to the capitalist.[7] A concept of value is still needed however, and Marx provides no answer to this question. Returning to the above definition, the variable capital is understood to mean the wages paid to the worker in exchange for the value that he has produced.[8] Any value for which the capitalist pays no equivalent is "expropriated" from the worker as "surplus value".[9] The wage-relation is thus central to Marxist exploitation. However, the term expropriation, and its pejorative connotation, is used hesitantly as it is unclear whether Marx viewed such surplus value as rightfully belonging to the worker.[10] There is significant controversy surrounding the role of justice and morality in Marx's theory.[11] For example, Cohen argues that the Marxian concept of exploitation is seemingly scientific only and without moral condemnation or criticism.[12] I will consider whether Marx viewed capitalism as unjust in greater detail when comparing his theory with that of Reiff's in the second part.

III. Mark Reiff's Theory of Exploitation

The theory of exploitation forwarded by Reiff is that "exploitation is the [intolerably] unjust extraction of value from another through a voluntary exchange transaction not otherwise prohibited by law".[13] Reiff forgoes reliance upon the labour theory of value, and instead presupposes the

[7] ibid 359.

[8] ibid 341.

[9] See: Marx, Karl, and Eleanor Marx Aveling. *Value, price and profit* (New York: International Publishers 1935).

[10] Marx, Capital: Volume I, 301 "is a piece of good luck for the buyer, but by no means an injustice towards the seller" Discussed below.

[11] See: Wood, Allen W., "Exploitation" (1995) Social Philosophy and Policy 12.02, 136-158 and Print. & Geras, Norman 'The Controversy About Marx and Justice' (1985) New Left Review, 150, 47-85.

[12] GA Cohen, "The Labor Theory of Value and the Concept of Exploitation" (1979) Philosophy & Public Affairs 8.4, 341.

[13] Reiff, Mark R., *Exploitation and economic justice in the liberal capitalist state.* (Oxford: Oxford University Press 2013) 27.

justness of a capitalist society's pre-existing theory of value.[14] He argues that this theory of value can be found in the legal concept of 'consideration' as it features in Anglo-American contract law,[15] and is to be expressed in terms of units of money.[16] An extraction of value from an "exchange transaction" is limited to where, "each participating party contributes value with the intention of receiving value in return",[17] i.e. a sales transaction as opposed to a gift.[18] The reference to "voluntary" is taken to be equivalent with one that is "voluntary under existing law."[19] The qualifying words "unjust" and "intolerably" will also be dealt with there, as these qualifications represent some of the most important differences between the theories of exploitation offered by Reiff and Marx.

IV. A Comparison of Reiff & Marx

The most important divergence between the theories of exploitation of Marx and Reiff pertains directly to the central aim of these theories and the perspectives adopted to further these aims. On the one hand, Reiff adopts the internal perspective with the stated aim of telling us "how to achieve economic justice in a liberal capitalist state."[20] Conversely, Marx adopts the external perspective, in order to facilitate his critique of the capitalist economic structure and other systems.[21] Adopting this perspective allows Marx's theory to be applied to a large variety of political economic systems, in

[14] ibid 95 – 96.
[15] ibid 99.
[16] ibid 100.
[17] ibid 80.
[18] ibid 100.
[19] ibid See: 83. Hence the reference to not prohibited by law. Reiff presumes exploitation to have occurred where the transaction is illegal.
[20] ibid 24.
[21] Indeed, Reiff himself notes this "function *within* an existing liberal capitalist society rather than *above* all existing systems as Marx's conception of exploitation is..." ibid 30 -31.

a way that Reiff's simply cannot.[22] Conversely, without a "pre-existing commitment to a specific economic system",[23] Marx's theory is necessarily silent on the question of justice. This argument takes the form of: (i) Marx is unable to provide guidance as to what constitutes injustice; (ii) therefore he is unable to provide guidance as to how to achieve economic justice in a liberal capitalist state. This argument will be examined, and comparison will be made to Reiff's theory throughout.

Allen Wood offers one of the most convincing articulations of the argument that the Marxist conception of exploitation is devoid of moral complexion. He argues that while capitalism is "perhaps the most exploitative [social order] the world has ever known",[24] this is quite a different question as to whether "capital's pervasive exploitation of labour is just or unjust."[25] This is because a moralised account of exploitation, which presupposes the wrongfulness or injustice of the act, must independently justify said wrongfulness.[26] Yet in his works Marx never explicitly denounces exploitation as unjust much less offer any justification for such a claim.[27] The absence of any such denunciation leads Wood to conclude that "the attainment of justice does not, in itself, play a significant role in Marxian theory".[28]

Such a conclusion recalls the aforementioned claim of Cohen that Marx's finding of exploitation is seemingly scientific only.[29] However, Cohen's argument diverges from

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[22] ibid.

[23] ibid 29.

[24] W Allen, "Exploitation" (1995) Social Philosophy and Policy 12.02 ,157.

[25] ibid 155.

[26] W Allen, "Exploitation" (1995) Social Philosophy and Policy 12.02, 140.

[27] ibid 244.

[28] W Allen, "The Marxian Critique of Justice" (1972) Philosophy and Public Affairs 1.3, 245.

[29] ibid 27.

that of Wood and does so upon the caveat of ostensibility. Cohen argues that while Marx's theory appears to lack moral condemnation, this can be implied from elsewhere in his work.[30] In other words, Cohen contends that Marx simply did not have perfect knowledge of his own mind and it is for this reason that he fails to explicitly label exploitation as unjust. Notwithstanding this, Cohen contends that this can be imputed to Marx's theory of exploitation.

With respect to Cohen, this argument is unconvincing for two reasons. Firstly, Marx's controversial statement that the surplus value created for the capitalist "is a piece of good luck for the buyer, but by no means an injustice towards the seller"[31] appears to explicitly contradict any such imputation. Secondly, it is difficult to see how such an imputation could be justified in light of Marx's adoption of the external perspective, which clearly indicates his desire to avoid moral philosophy.[32]

While Cohen's argument can be commended for its subtlety, it fails to convince. A clear reading of Marx's work supports the conclusion that the "Marx's definition of exploitation is purely descriptive" in nature.[33] As Reiff points out, "Marx simply thought that economics came before justice".[34]

The approach of Marx is to be contrasted with Reiff's own, wherein the relationship between justice and exploitation is presupposed,[35] hence the inclusion of the word

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[30] Ga Cohen, "Exploitation in Marx: what makes it unjust?", Self-Ownership, Freedom, and Equality. 1st ed. Cambridge: Cambridge University Press, 1995. 195-208. Cambridge Books Online. Web. 27 May 2014. & See Reiff's commentary: Reiff, Mark R.. Exploitation and economic justice in the liberal capitalist state. Oxford: Oxford University Press, 2013. 30. Print.

[31] Marx, Karl. Capital: a critique of political economy. Moscow, USSR: Progress Publishers, 1887. 301.

[32] MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 30 - 31.

[33] ibid.

[34] ibid 29.

[35] ibid 31.

"unjust" within his definition. An extraction of value is not unjust where a just price is paid.[36] A price is only just "when it is equivalent to the average total social cost of the good at issue, i.e. the average total cost of producing whatever good is at issue, plus the cost of [negative] externalities."[37] As with Marx, Reiff's theory is cost-of-production-based, and Reiff argues that Marx's theory similarly makes use of a conception of the just price.[38] He predicates this claim upon what he terms "the principle of reciprocity" and infers this from where Marx writes that an equal distribution entails that a "given amount of labour in one form is exchanged for an equal amount of labour in another form".[39] Thus in Marx's perfectionist society, and in Reiff's guidance as to a liberal capitalist society, a conception of the just price is similarly employed.

Where Reiff's theory is to be commended, or perhaps questioned, is in his inclusion of negative externalities in his calculation of the just price. Can such a thing be accurately calculated? While Reiff makes reference to a new study that offers a novel means by which pollution may be calculated by industry,[40] this method relies upon the calculation of industry averages, which Reiff himself admits is liable to being morally arbitrary.[41] Further, it remains doubtful whether it is plausible to calculate *every* externality involved in production. For example, how does one calculate costs associated with sea oil pollution? How would an event like the 2010 Deepwater

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[36] ibid 76 – 79.

[37] ibid 109.

[38] ibid 73 – 74.

[39] Marx, Karl, Friedrich Engels, Vladimir Illich Lenin, and CP Dutt. *"Part ."*(New York: International Publishers 1938) 529.

[40] See: Muller, Nicholas ., Robert Mendelsohn and William Nordhaus, "Environmental Accounting for Pollution in the United States Economy" (2011) American Economic Review, 101(5): 1649-75.

[41] See: MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 38: Reiff discredits the attribution of average net production as oppose to actual net individual net production.

Horizon oil spill affect such calculations? Such a calculation must be sufficiently precise, and externalities must be properly attributed if their inclusion is to be just. A failure to do so would itself amount to an injustice. Reiff's theory can be commended on his attempt to include externalities, as any cost-of-production-based theory should seek to do, but it is unclear that this can provide meaningful guidance as to the morality of exchange transactions without addressing its calculative difficulties.

Even if Marx's theory is to be accepted as denouncing exploitation as unjust, there is another reason why his theory is unable to provide meaningful guidance as to what justice demands in the way Reiff's may. If Marx denounces exploitation as unjust, then all economic systems must be "comprised of widespread acts of exploitation without exception".[42] In a liberal capitalist society, this would amount to a denouncement of the entire system. Reiff's theory by contrast, presupposes the justness of a liberal capitalist state,[43] and thus acknowledges that:

(i) liberal societies tolerate some injustice, i.e. "the principle of toleration"; [44] (ii) capitalist societies presuppose the necessity of incentives for maximum productivity.[45] Thus Reiff's concept of exploitation, unlike Marx's, allows for a "reasonable profit",[46] and therefore allows one to "sort unjust exchange transactions from just ones in a liberal capitalist society".[47] Thus Reiff's theory is superior to Marx's in that it is able to identify occurrences of injustice in the liberal capitalist state, while Marx's lacks this precision.

Conversely, one way Marx's theory seems superior to Reiff's is in its universal application to existing systems. This is not to Reiff's discredit, as he never intended his theory to

[42] ibid 31.
[43] ibid 23 – 24.
[44] ibid 154.
[45] MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 164 – 165.
[46] ibid.
[47] ibid 31.

be used as a way of identifying exploitation in other systems. Similarly, Marx's theory was never intended to provide guidance as to what may constitute economic justice. Thus these theories are fundamentally different in nature. However, Marx's theory of exploitation suffers heavily from failing to provide a definition of value. Reiff's approach is more comprehensive, and is to be partially commended for its novel cost-of-production-based approach. Unfortunately, while Reiff's inclusion of externalities into his calculations is admirable in theory, it is less clear that this is feasible in practice. In light of the fundamentally different purposes of these theories, an attempt to identify the more superior of the two would be inappropriate. What is needed for fair comparison is a theory of exploitation that is similar in both purpose and perspective to that of Reiff's and the best to hand is A. C. Pigou's theory of exploitation.

V. AC Pigou's Theory of Exploitation

The greatest similarity between the theories of exploitation advocated by Reiff and Pigou regards their fundamental aim, that being to identify occurrences of exploitation while seeking to maintain the justness of the liberal capitalist state. It is for this reason that a comparison between the two is more appropriate. However, as will be shown, Reiff's theory is clearly superior in meeting this goal.

Under Pigou's theory of exploitation, workers are exploited whenever they are paid "less than the value their marginal net product has to the firms employing them";[48] i.e. less than the amount the last worker hired adds to the value of the total output of the firm.[49] As with Reiff's theory, value is not defined by the cost of production, but rather as "simply

[48] Pigou, Arthur C, 'The Economics of Welfare' (1932) Library of Economics and Liberty, Chapter XIV, see <http://www.econlib.org/library/NPDBooks/Pigou/pgEW47.html>.

[49] See MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 33.

the sum of money which the marginal net product is worth in the market",[50] i.e. the actual revenue that labour can generate and produce under the law of supply and demand and current economic conditions.[51] Pigou's theory, like Reiff's presupposes the justness of capitalism and similarly relies upon the incentivising effect of profit. It is upon this reliance that Pigou bases his claim of economic efficiency, this being that "When workers receive high wages, this produces positive efficiency effects and hence, all other things being equal, increases the value of the marginal net product."[52] He argues that this loss of efficiency will reduce the net output of the economy ("the national dividend"),[53] thus lowering the aggregate economic welfare of individuals.[54] It is for this reason that exploitation is said to be morally wrong, and this reasoning is clearly consequentialist in nature. As with Reiff the link between justice and exploitation is argued for, but unlike Reiff, Pigou employs a very different means of proving this. As will be shown, Pigou's approach is very problematic in light of a number of seemingly insurmountable problems, the first in the fundamentals of his theory, and the second in his approach to proving the injustice of exploitation.

It is not clear that the marginal product created by a factor can be accurately accounted for. As Reiff rightly points out, "It is not always or even often possible to vary just one factor while holding all others constant."[55] While one might point out that neither is it always or even often possible to calculate

[50] Pigou, Arthur C, 'The Economics of Welfare' (1932) Library of Economics and Liberty, Part II, Chapter II, see <http://www.econlib.org/library/NPDBooks/Pigou/pgEW47.html>.

[51] See MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 33.

[52] Paul Flatau, 'Some Reflections On the "Pigou-Robinson" Theory of Exploitation' (2001) History of Economics Review, 5.

[53] Pigou, Arthur C, The Economics of Welfare (1932) Library of Economics and Liberty, Part I, Chapter III, see <http://www.econlib.org/library/NPDBooks/Pigou/pgEW47.html>.

[54] See MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 34.

[55] ibid 36.

all externalities, this objection nonetheless holds true. If one cannot determine the contribution of each factor of production, then one is unable to determine when and where exploitation has in fact occurred. Furthermore, as Wisckell points out: "the scale on which an enterprise operates nearly always has some influence on its average product."[56] In other words, economies or diseconomies of the production process will almost always vary output, leaving surplus value "over- or underdetermined"[57]. It is unclear how such a remainder or shortfall is to be distributed among the many factors of production. Any recourse to average marginal net product is too morally arbitrary for consideration.[58]

Furthermore the link between increased economic efficiency and general welfare is also open to question. Indeed, Reiff asks why we should assume any such link.[59] It is not clear that a greater output of production will translate into greater aggregate welfare. For instance, would the greater output of weapons, while more economically efficient, improve general welfare? The link between economic efficiency and general welfare remains to be proved, and thus the consequentialist argument upon which Pigou basis his claim of injustice must necessarily fail.

While Pigou centres his claim on the issue of efficiency, his theory is not silent on the question of the demands of justice. As Reiff himself notes: "Exploitation and justice are related if the particular conception of exploitation we have in mind expresses some form of distributional concern and would have society-wide distributional effects."[60] By regulating individual instances of exploitation throughout the capitalist structure Pigou seeks to do just that. Unfortunately, Pigou is

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[56] Knut Wickselland E Classen, *Lectures on political economy* (London: Routledge and Kegan Paul Ltd 1934) 129.

[57] See MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 37.

[58] Reiff makes this very point, see ibid 38.

[59] MR Reiff, *Exploitation and economic justice in the liberal capitalist state* (Oxford: Oxford University Press 2013) 38.

[60] ibid 25.

unable to overcome the fatal flaw regarding the calculation of the marginal net product, and thus his theory must necessarily fail. Furthermore, the link between injustice and efficiency is weak.

VI. Conclusion

This author has considered the theories of exploitation of Reiff, Marx and Pigou. It has been shown that the differing perspectives adopted by the theories of Reiff and Marx lends them their own respective advantages and disadvantages. However these differing perspectives only reflect the differing purposes for which these theories of exploitation were first formulated. As with Pigou, but unlike Marx, Reiff seeks to provide a theory of exploitation that can identify and regulate occurrences of economic injustice without abandoning the twin pillars of capitalism and liberalism that uphold our society. In light of such it is difficult to view the theories of Reiff and Marx as being in direct competition. While the theory of A. C. Pigou is more commensurable, hopes of a worthy contender are dashed upon considering the numerous flaws inherent to Pigou's argument. Reiff should be commended for his superior approach to Pigou, but should take heed of the latter's calculative difficulties when next considering the practical doubts expressed surrounding externalities. At least in theory, Reiff's approach remains sound.

A critical evaluation of radical feminism's approach to trans* people and their rights

Hannah Farrington

Abstract

Feminism and trans* issues are inherently linked through their shared focus on gender. The author critically evaluates the radical feminist approach to trans* people and their rights. The opinions of Janice Raymond and Sheila Jeffreys are explored and contrasted with other feminist perspectives including Ralph Sandland and Andrew Sharpe. Though Janice Raymond provides an important starting point to exploring radical feminist perspective, her view no longer plays as significant role as it once did. The author analyses the development of the radical feminist perspective as it responds to societal and political changes to trans* people, with particular attention to Sheila Jeffreys's criticism of the Gender Recognition Act 2004, as well as other academic commentary. The author explores the radical feminist approach that legislation which facilitates trans* issues is inherently anti-feminist, and supports critics of this view such as Judith Butler and Peter Tatchell.

I. Introduction

Transgender is an umbrella term, which encompasses people whose gender identity and/or gender expression does not match the social expectations of the sex they were assigned at birth, and includes (but is not limited to) people who identify as transsexual, bi-gender, gender queer and drag queens and kings. Feminism and trans* issues are unavoidably linked by a focus on gender, and thus there are a variety of feminist positions on trans* people and their rights in law. At their extremes these range from the traditional radical view that transgender people and politics are inherently anti-feminist and are detrimental to the feminist cause, to the more postmodern notion that transgender people challenge gender norms positively and so not only are trans* people and politics compatible with feminism, they can help further it. This paper will critically evaluate the radical feminist approach to trans* people and their rights,

focusing on the opinions and literature of noted radical feminists, including Janice Raymond and Sheila Jeffreys, and contrasting them with alternate views, including other feminist perspectives and views derived from trans* politics.

II. The radical feminist perspective

Janice Raymond's *The Transsexual Empire*[1], first published in 1979, is often viewed as the most significant starting point of the radical feminist perspective. It uses extremely powerful language and is widely held to be transphobic[2] in its critique of the concept of transsexuality, for example claiming "all transsexuals rape women's bodies by reducing the real female form to an artefact, appropriating this body for themselves... Rape, although it is usually done by force, can also be accomplished by deception".[3] Focusing on male-to-female transsexuals (or as she terms them 'male-to-constructed-female'), Raymond maintains that transsexuality reinforces traditional gender stereotypes, that trans* women can never be 'real' women as they are not "encumbered by the scars of patriarchy",[4] and is especially critical of trans* women being involved in women's groups, and of psychological and surgical approaches to transsexuality.

Raymond concludes that the ultimate 'solution' to the 'problem' of transsexuality would be "morally mandating it out of existence".[5] With regards to legal rights, she takes a slightly more gentle approach and explicitly does not support a total legislative ban on 'transsexual treatment and surgery' in order to achieve her proposed moral mandate. That is not to say that she is supportive of any trans*-positive law,

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[1] Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (Teachers College Press 1994).

[2] Katrina Rose, 'The Man Who Would be Janice Raymond' (2004) Transgender Tapestry 104 <http://www.ifge.org/?q=node/237> accessed 29 December 2013.

[3] Raymond (n 1) 104.

[4] ibid 103.

[5] ibid 178.

however. She instead proposes legislation that limits access to surgery and "other legislation that lessens the support given to sex-role stereotyping".[6] For instance she advocates legislation, which would target what she recognises as the source of the 'transsexual empire' and the causes of transsexuality, including medical institutions, and favours "restricting the number of hospitals and centres where transsexual surgery could be performed".[7] Raymond succeeded in part by conducting research that aided the exclusion of 'transsexual surgery' from Medicare programmes in the US.[8]

Problematically for Raymond's argument, her society-follows-law approach could only achieve her ultimate aim if it is assumed that her concepts of the 'causes' of transsexuality, in particular that it is a product of the sex stereotyping of patriarchy, are correct. Carol Riddel suggests that it is only due to Raymond's determinism that she does not accept other "feasible causes of transsexualism"[9], for example Raymond does not consider any biological, psychological or existential causal evidence.

The 1994 reissue of *The Transsexual Empire* is prefaced with a new introduction, in which Raymond briefly discusses her arguments in the more recently developed context of transgender, rather than focussing exclusively on transsexuals. Her argument remains very much unchanged however; she still refuses to accept that trans* people transgress any gender boundaries, but submits that they merely "repackage old

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[6] Raymond (n 1) 178.

[7] ibid 180.

[8] Centers for Medicare & Medicaid Services, *Medicare National Coverage Determinations Manual*, ch 1 140.3 <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/ncd103c1_Part2.pdf> accessed 9 January 2014.

[9] Carol Riddel, 'Divided Sisterhood: A Critical Review of Janice Raymond's *The Transsexual Empire*' in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Routledge 2006) 144, 150.

gender roles"[10], and agrees with Kathy Miriam that while 'transgenderism' foregrounds the reality that femininity is a male construct, it does so by *preserving* sex difference, i.e. the heterosexual institution... in contrast to being a strategy of *disempowering* (politically destroying) the social system which generates the category.[11,12] This disagreement, whether transgenderism promotes conformity into gender roles thereby legitimising these roles, or transgresses gender boundaries in a positive way, is the core of the feminist debate surrounding trans* people and how they affect feminism.

In the UK the predominant legislation relevant to trans* people and their legal rights is the Gender Recognition Act[13] (hereafter GRA). The GRA is heralded as the most progressive piece of legislation of its kind,[14] going above and beyond other jurisdictions and the requirements of the ECHR with its non-requirement of any surgical or hormonal intervention in order to obtain a Gender Recognition Certificate (GRC) and thereby legally change gender. Whilst the GRA is not without its limits, particularly for those who do not wish to conform to the binary system of gender, it makes the UK particularly significant in modern discussions of trans* rights.

In *They Know It When They See It,*[15] Sheila Jeffreys provides a detailed radical feminist critique of the GRA, articulating many controversial opinions. As a radical feminist, Jeffreys does not support the GRA in any capacity.

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[10] Raymond (n 1) xxix.

[11] ibid xxvii.

[12] Kathy Miriam, 'From Rage to All the Rage: Lesbian-Feminism, Sadomasochism and the Politics of Memory' in Irene Reti (ed), *Unleashing Feminism: a Collection of Radical Feminist Writings* (Herbooks 1993) 116.

[13] Gender Recognition Act 2004.

[14] Andrew Sharpe, 'A Critique of the Gender Recognition Act 2004' (2007) Bioethical Enquiry 33, 33.

[15] Sheila Jeffreys, 'They Know It When They See It: The UK Gender Recognition Act 2004' (2008) BJPIR, 328.

The crux of the article echoes concerns voiced by Raymond about transsexuality reinforcing gender stereotypes, but frames them in a legal context. Jeffreys concludes that the GRA "inscribes patriarchal notions of correct gender roles into law and regulation by the state".[16] She takes issue with the fact that, despite gender being a feminist "political stamping ground"[17] no feminist submissions were made in the lead up to the Act, yet supports the input of conservative peers in the House of Lords who made what could be constructed as radical feminist arguments, but clearly from a very different political standpoint. She expresses praise in particular for the opinions of Lord Tebbit, whose previous controversial views have included grave concern about the dangers of legal same sex marriage creating the potential for a lesbian Queen.[18] Although Jeffreys recognises the irony of these shared views, her willingness to support them is unsettling given that they are derived from such different political ideologies. Most recently, Jeffreys has consolidated her views and arguments on the subject of 'transgenderism' and its politics as a whole in a new book *Gender Hurts.*[19]

III. Criticisms of the radical feminist perspective

As with any feminist issue, there are views and theories which conflict with the radical position, but what makes this issue particularly contentious is that it directly affects another

[16] ibid 342.

[17] ibid 238.

[18] Sam Delaney, 'Lord Tebbit: Gay Marriage, A Lesbian Queen – Full Interview' *Big Issue* (30 May 2013) <http://www.bigissue.com/features/interviews/2438/lord-tebbit-gay-marriage-lesbian-queen-full-interview#> accessed 7 January 2014.

[19] Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge 2014); the book raises three main points which build on and reiterate her earlier work: women are oppressed and concepts of gender and gender identity perpetuate this oppression; 'transgenderism' was created by a medical system seeking to enforce the gender roles which perpetuate this oppression and seeks to make money from it; and 'transgenderism' allows 'male-bodied transgenders' to infiltrate female and feminist spaces.

group besides women. Consequently radical feminism is met not only with opposing postmodern feminist views, but also by trans* politics and queer theory.[20]

Commenting on *The Transsexual Empire*, Stephen Whittle,[21] a trans* man, professor, former lesbian separatist and co-founder of the transactivist group Press For Change, summarises three commonly voiced criticisms. Firstly it "promotes radical separatism as the only viable alternative to the patriarchal hegemony",[22] secondly it "supports the notion of separatism in that it sanctions an, 'invisible' oppression of transsexual people by women",[23] and thirdly it "assumes that biology is destiny".[24]

One particularly significant criticism of Raymond's views from a trans* persons perspective is put by Sandy Stone in *The Empire Strikes Back,*[25] a response to a personal attack by Raymond in *The Transsexual Empire*. She suggests that rather than allow Raymond's notion that male-to-female transsexuals 'divide women' to continue as a monistic discourse under Raymond, it should become a force to "multiplicatively divide the old binary discourses of gender".[26] Stephen Whittle and Susan Stryker[27] note that crucially, Stone's rebuttal is in no way anti-feminist nor is it a counterattack on Raymond, but instead is an alternative,

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[20] A full discussion of queer theory and its relationship with transgenderism is outside the scope of this paper, but it should be noted that the work of Judith Butler is influential in queer theory.

[21] Stephen Whittle, 'Where did we go wrong? Feminism and trans theory - two teams on the same side?' (Speech at the True Spirit Conference, Alexandria, VA, February 2000) <http://my.execpc.com/~dmmunson/tsc2k/StephenWhittle.htm> accessed 23 December 2013.

[22] ibid.

[23] ibid.

[24] ibid.

[25] Sandy Stone, 'The Empire Strikes Back: A Posttranssexual Manifesto' (1992) 29 Camera Obscura 150.

[26] ibid 165.

[27] Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Routledge 2006).

poststructuralist analysis of gender which "undermines the foundationalist assumptions that support Raymond's narrower concept of womanhood".[28] This collaboration of feminist and transgender centred thinking is one of the earliest examples of what is now termed transfeminism.[29]

The Empire Strikes Back echoes some of the arguments by Carol Riddel[30] in an earlier critique of *The Transsexual Empire*. Like Stone, Riddel takes issue with Raymond's claim that male-to-female transsexuals 'divide women', and suggests that it is actually Raymond who is more guilty of causing such divide by making the inclusion of transgender people in women's groups an issue. She points out that, significantly, it was never the women who worked with or even knew Sandy Stone who opposed her inclusion in Olivia Records, but those, like Raymond, who completely separated personal feelings from factual presentation, and "see transsexualism as an abstract problem which they can abstractly regard as an extension of patriarchy".[31] She is also critical of Raymond's methods in that they make a logical counter argument impossible in many ways, for example "since, by definition, transsexual women are not women, and transsexual men are not men, our arguments, which are based on the fact that we *are* women or men, are invalidated from the start".[32] This rigidity and dogmatism is, Riddel proposes, damaging for the women's movement as a whole. Furthermore, she points out apparent inconsistencies with Raymond's arguments, particularly that she "attacks the sex researchers for assuming that biology and socialization are destiny, but she assumes just that herself [by saying] 'it is biologically impossible to change chromosomal sex, and thus the transsexual is not really transsexed'".[33] Raymond furiously

[28] ibid 221.
[29] Transfeminism will be discussed in paragraph 15.
[30] Riddel (n 9).
[31] ibid 150.
[32] ibid 150.
[33] ibid 150.

denies this accusation of essentialism in the introduction to the 1994 edition of *The Transsexual Empire*, and clarifies that she apparently did not mean that chromosomal sex defines gender, but "female biology shapes female history".[34] Nevertheless this appears to be a somewhat feeble rewording of the same point that being female is defined by XX chromosomes. Thus, Riddel's opposition to this essentialism remains valid, as does her pursuit of the abandonment of this thinking in order to broaden the scope of discussion on the subject of transgender.

Exploration of this idea is provided in the work of Judith Butler, a pioneering postmodern feminist scholar who regards *The Transsexual Empire* as, "part of a homophobic radical feminism [which] can only understand gender trespass and gender transitivity as appropriation".[35] Butler questions "what is 'sex' anyway? Is it natural, anatomical, chromosomal, or hormonal?"[36], and rather than viewing chromosomal sex in the same rigid manner as Raymond, Butler sees sex to be itself "a gendered category" and "as culturally constructed as gender".[37] By this logic, the side of Raymond's two-pronged argument that transsexual women are not real women which is grounded in the aforementioned notion that being female is defined by XX chromosomes, is redundant. If sex is socially constructed, surely this means that anyone, regardless of their chromosomal make-up, can be either (or neither) of the constructed binary sexes. Butler incorporates transgender into her discourse by suggesting that "practices of parody"[38], for example the practice of drag, can work towards the effect of "proliferating gender

[34] Raymond (n 1) xx.

[35] Kate More, 'Never Mind the Bollocks: 2. Judith Butler on Transsexuality, an interview by Kate More' in Kate More and Stephen Whittle (eds), *Reclaiming Genders* (Cassell 1999) 285, 294.

[36] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 6.

[37] ibid 7.

[38] ibid 146.

configurations [and] destabilizing substantive identity"[39] thus significantly blurring the lines between gender norms. She also frames these 'parodies' positively by noting that "the parodic repetition of gender exposes the illusion of gender identity as an intractable depth and inner substance".[40] Put more simply, Butler regards transgender as in many ways essential in the deconstruction of gender and sex and thus essential to the feminist cause.

The other half of Raymond's previously mentioned 'real woman' argument is based around the notion that trans* women can never be 'real' women as they are not "encumbered by the scars of patriarchy".[41] Raymond, particularly when discussing the 'transsexually constructed lesbian feminist', is militant in her view that trans* women are men and therefore are not oppressed like women are. She does not consider the fact that if a trans* woman displays physical characteristics stereotypical of women and 'passes' as a woman she is just as likely to suffer the same oppression as a cis-woman, regardless of whether or not she has experienced male privilege earlier in her life. She also does not acknowledge that trans* people and trans* women experience oppression and violence as groups in their own right, the recent murders of Domonique Newburn[42] and Islan Nettles[43] being exemplary of this.

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[39] ibid 146.

[40] ibid 146.

[41] Raymond (n 1) 103.

[42] Joshua Gardner, 'Transgender YouTube star brutally murdered in her own home and the killer 'stole her car to get away'' *The Daily Mail* (22 August 2013) <http://www.dailymail.co.uk/news/article-2400007/Domonique-Newburn-murder-transgender-Youtube-star-dead-home.html> accessed 7 January 2014.

[43] Daily Mail Reporter, 'Transgender woman dies after being savagely beaten by a Facebook friend who learned she was born a man' *The Daily Mail* (24 August 2013) <http://www.dailymail.co.uk/news/article-2401349/Islan-Nettles-dies-Transgender-woman-dies-savagely-beaten-friend.html> accessed 7 January 2014.

Transfeminism[44] is a relatively recently developed category of feminism which advances on the work of Sandy Stone and applies trans* discourses to feminist discourses, thereby integrating feminist theory with trans* experience. Transfeminism recognises that trans* women have experiences of oppression that are different from those of cis-women, in the same way that women of colour, lower class women and disabled women have different experiences from middle class, white, able-bodied women, and that these are not always fully catered to by mainstream feminism and in particular tend to be excluded by radical feminism. Transfeminism offers a "new perspective on seeing gender as a social construct, the possibility of creating new meanings of gender".[45] The first book on transfeminism, *Trans/Forming Feminisms*[46] includes a range of personal narratives and experiences which would likely be dismissed by radical feminists set on separating personal feelings and experience from theory, but demonstrates the point made by Butler and others that trans* politics and feminism are compatible, and in fact each is necessary for the other to be fully progressive.

In her radical critique of the GRA, Sheila Jeffreys states "it is precisely [the] idea, that certain distinct behaviours are appropriate for males and females that underlies feminist criticism of the phenomenon of 'transgenderism'".[47] Whilst she does take into account the fact that many trans* activists and other feminists have similar issues relating to gender

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[44] Emi Koyama, 'The Transfeminist Manifesto' in Rory Dicker and Alison Piepmeir (eds), *Catching A Wave: Reclaiming Feminism for the Twenty-First Century* (Northeastern University Press 2003).

[45] Ryn Gluckman and Mina Trudeau, 'Trans-itioning feminism: The politics of transgender in the reproductive rights movement' *The Fight for Reproductive Freedom: A Newsletter for Student and Community Activists* (2002) 7 <http://clpp.hampshire.edu/sites/default/files/content_files/ReproFreedom_02_Fall.pdf> accessed 8 January 2014.

[46] Krista Scott-Dixon (ed), *Trans/Forming Feminisms: Transfeminist Voices Speak Out* (Sumach Press 2006).

[47] Jeffreys (n 15) 332.

roles with the Act itself, she agrees with them only in a very isolated capacity. In her words, she agrees "strongly with the postmodern / queer critique of the GRA for its dependence on binary notions of gender"[48], but does not "share the enthusiasm... for the potentially revolutionary possibilities offered by the Act".[49] Jeffreys uses her criticisms of the GRA as a tool in her radical feminist argument that transgenderism should be rejected as it "requires the acceptance of 'gender' as a useful category"[50], and expands on them in *Gender Hurts.* Conversely, postmodern feminism and queer / trans* politics generally view the binarism of the GRA as one limit to an otherwise positive piece of legislation. Their issues with the Act are derived from the idea that the GRA does not successfully give legal effect the full potential that transgender people have to deny binarism. Ralph Sandland puts this succinctly: the GRA "attempts to deny the threat transsexualism poses to the binary system of gender, by instigating a system to formally 'recognise' only men and / or women".[51] Whilst radical feminism maintains that transgenderism is the problem, opponents argue that the issue in the UK lies with the legislation which does not effectively capture the gender fluidity which is indispensable for feminist arguments and trans* people alike.

Andrew Sharpe provides further analysis of the limits of the GRA[52] in the context that it is overall a positive piece of legislation, thus providing a form of critique of the radical construction of these criticisms of the Act as put by Jeffreys. Sharpe mentions a variety of limits of the GRA that are particularly problematic, including the perpetuation of a mental illness mode and the legal insistence on gender binarism. One element of the GRA, which proved

[48] ibid 338.
[49] ibid 338.
[50] ibid 338.
[51] Ralph Sandland, 'Feminism and the Gender Recognition Act' (2005) Feminist Legal Studies 43, 43.
[52] Sharpe (n 14).

problematic for both Sharpe and Jeffreys, is the diagnosis of gender identity disorder (GID) based on notions of gender appropriate behaviour and conforming to stereotypes associated with one particular gender. Jeffreys is critical of the way in which GID is diagnosed, in that it "follows old-fashioned notions of what constitutes appropriate behaviour for those assigned to the sex classes of male and female".[53] This is a valid point for concern but one which could be addressed by, as Sharpe suggests, a move away from the mental illness model which disproportionately strips transgender people "of their rationality and therefore their autonomy"[54], rather than by a rejection of transgenderism. Throughout his article Sharpe suggests alternatives and improvements like this which could serve as solutions the problems which both he and Jeffreys share with the Act, but which also cater to the rights of transgender people, thus somewhat undermining Jeffreys's implied notion that any form of trans* positive legislation has to be a cause for concern for feminists.

IV. Conclusion

Janice Raymond's *The Transsexual Empire* no longer shapes the general academic feminist position on trans* people as significantly as it did in the first decade of its publishing. However the radical feminist perspective remains somewhat unchanged and is in fact developing as it responds to a growing societal and political acceptance of trans* people and recognition of their rights, evidenced by Sheila Jeffreys' severe criticism of the Gender Recognition Act 2004 as an anti-feminist piece of legislation and affirmation of Raymond's views in *Gender Hurts*. Although there is perhaps some validity in many of the radical feminist concerns about gender roles and binarism being enshrined into legislation like the GRA, these criticisms are much more

[53] Jeffreys (n 15) 332.
[54] Sharpe (n 14) 38.

coherently put in a trans* positive context by scholars such as Ralph Sandland and Andrew Sharpe.

The crux of the radical argument is that transgender people, and therefore any legislation, which facilitates trans* issues, promote conformity into gender roles and thus are inherently anti-feminist. Critics, most notably Judith Butler, argue that this position relies on a primitive understanding of gender as non-transferable property when in fact "gender doesn't belong to anyone"[55] and an ignorance of trans* experiences. At its most intrinsic level radical feminism is undoubtedly guilty of manipulating and using trans* rights as a means to their own end; as Peter Tatchell puts it, "putting gender theory and ideology before the happiness of individual human beings who feel out of place and unhappy in their birth sex".[56]

[55] More (n 34) 294.

[56] Peter Tatchell, 'Transsexualism – Bindel condemns, Tatchell defends' (*Peter Tatchell*, 3 August 2007) <http://www.petertatchell.net/lgbt_rights/transgender/transsexualismbindelcondemns.htm> accessed 8 January 2014.

Emissions trading is undoubtedly a powerful regulatory tool that has the potential to help achieve dramatic reductions in greenhouse gas emissions. But the European Emissions Trading Scheme is, quite simply, unfit for purpose

Ammar Lulla

Abstract

This paper considers the dangers of greenhouse gases (GHG) and the damaging impact such GHG emissions have had on the planet, while assessing the assertion that the European Union's Emissions Trading System (EUETS) is in urgent need of reform. It is charged that while the EUETS in theory delivers the benefits it has promised, there is little evidence to support any major reductions in GHG emissions. Therefore, albeit there are now further proposals that have been released by the European Commission, action should be taken sooner than the proposed schedule for change.

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As environmentalist Paul Hawken noted, "We are stealing the future, selling it to the present and calling it Gross Domestic Product"[1], a reflection of industry unsustainably pursuing present economic growth, disregarding the negative repercussions future generations will endure. A notable example is the historic reckless disregard for greenhouse gases (GHG) emitted as a by-product of industry, causing global warming. In assessing the posed statement, this essay begins by examining the underlying need for dramatic reductions in GHG emissions in order to mitigate the potentially catastrophic effects of future climate change as

[1]University of Portland, *Paul Hawken's 2009 Commencement Address* (2009) <http://www.up.edu/commencement/default.aspx?cid=9456>.

emphasised by the Intergovernmental Panel on Climate Change (IPCC).[2] This essay will demonstrate that there is a radical need for change and an analysis of emissions trading will then be undertaken and conclusion reached that it represents a powerful regulatory tool to achieve this. Emissions trading offers a way to implement carbon pricing with predictability and certainty of outcome in achieving dramatic emission reductions if combined with strict monitoring and ambitious caps. The assertion that the European Union's Emissions Trading System (EUETS), by far the largest emissions trading scheme, is unfit for purpose will then be addressed by brief introduction, followed by an examination of its purposes and a charting of its sequential and adaptive development. This will be undertaken along with discussion of the various criticisms levied against it, finding that a credit surplus poses the largest obstacle in achieving its various purposes, including its effectiveness at achieving reductions in GHG emissions. Noting the dearth of academic commentary on the current performance of the EUETS, effort has been made to ensure this article is as updated as possible, ending with proposed reforms and an argument that the European Commission (EC) should act now to achieve dramatic reductions made necessary by IPCC revelations.

The IPCC, having previously found[3] GHG emissions responsible for many negative climate change effects, has highlighted in its April 2013 report the need for collective and significant global action to reduce GHG emissions by 40-70% below 2010 emission levels before 2050. Reaching near-zero emission levels in 2100 is critical in order to limit temperature rises below 2 degrees Celsius (°C),[4] the agreed

[2] Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change – Summary for Policymakers* (2014).

[3] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis* (2013).

[4] Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change – Summary for Policymakers* (2014) 15.

limit to avoid catastrophic climate change.[5] IPCC estimates that with immediate action, mitigation costs may only reduce economic growth by 0.06% per year but delays will incur extreme costs and difficulties in the long run.[6] This clearly shows the need for radical action to be taken now to dramatically reduce GHG emissions to mitigate climate change.

Emission Trading Systems (ETS) may represent the most effective regulatory tool to achieve this dramatic reduction. This analysis will be undertaken by reference to the European experience with environmental regulatory tools. Carbon taxes represent the Pigouvian tax on a unit of emissions.[7] Command-and-control (CAC) regimes, which traditionally dominated European environmental policies[8], basically encapsulate governmental regulation representing the 'command' of set emission targets and 'control' in ensuring compliance.[9] These regulatory tools all serve to establish a carbon price, which the influential Stern Review outlined as essential policy for climate change mitigation.[10] This addresses the underlying problem in that, economically, GHG emissions represent an externality where polluters contribute to climate change and its negative effects without bearing any consequences. In this way they privatize profits and publicize costs. Trucost highlights the extent of these publicized costs, calculating that none of the top industrial

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[5] Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation and Vulnerability – Summary for Policymakers (2014).*

[6] Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change – Summary for Policymakers* (2014) at 16.

[7] R Calel, 'Carbon markets: a historical overview' (2013) 4(2) Wiley Interdisciplinary Reviews: Climate Change 107.

[8] M Wråke, D Burtraw, A Löfgren and L Zetterberg, 'What Have We Learnt from the European Union's Emissions Trading System?' (2012) 41 Ambio 12, 12.

[9] R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, 2011).

[10] Stern Review, *The Economics of Climate Change* (HM Treasury, 2006).

sectors would remain profitable if they paid for their environmental impacts,[11] substantiating Hawken's assertion above. Carbon pricing therefore corrects this by imposing a financial value on produced emissions, thus forcing firms to internalize their contribution to climate change in the present, respecting the 'polluter pays' principle, which holds that the party responsible for pollution bears its costs.[12] This increased cost encourages reduced emissions by either demand-side mitigation where consumers are incentivised to move towards low-carbon products[13] or where firms are compelled to factor in the cost of emission pollution at the highest decision-making level.

Emissions trading in the EU follows the 'cap-and-trade' approach where a fixed number of permits are created and each allows a specific unit of emission. These allowances are then allocated or auctioned to firms, who may then trade them on the open market, conditional on having to surrender the equivalent number of permits for their actual emissions.[14] Emissions trading offers significant benefits over its alternatives. Theoretically, ETS is the most cost-effective tool to meet environmental goals by ensuring that the carbon price is equal to the lowest marginal abatement cost (MAC) amongst all covered emitters.[15] Unlike flat command regimes, ETS is dynamic, harnessing market forces to obtain the cheapest way to reduce emissions. Firms who face low costs for abatement are incentivised to reduce their emissions and

[11] Trucost, *Natural Capital At Risk: The Top 100 Externalities Of Business* (2013) 15.

[12] Institute for Research on the Economics of Taxation, *The Polluter Pays Principle: A Proper Guide for Environmental Policy* (2001).

[13] K Neuhoff, *Tackling Carbon: How to Price Carbon for Climate Policy* (Climate Strategies Report, 2008).

[14] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008.

[15] S Soleille, 'Greenhouse gas emission trading schemes: a new tool for the environmental regulator's kit' (2006) 34 Energy Policy 1473 c.f. C Egenhofer, 'The Making of the EU Emissions Trading Scheme' (2007) 25(6) European Management Journal 453.

sell their excess allowances to firms who face high abatement costs. Thus, trading ensures the carbon price is always equal to the lowest MAC. ETS consequently offers a flexible scheme whereby operators may adjust their trading behaviour to address their emissions by choosing the most cost-effective combination between the options of investing in more efficient technology, shifting to less carbon-intensive energy sources or purchasing more allowances.[16] They also have the flexibility to undertake investment projects only when the benefits outweigh the costs, ensuring that abatement is always cost-effective. These market-based mechanisms of ETS were endorsed by various economists in evaluating it as the most feasible proposal for combating climate change.[17]

Therefore, ETS can be a significant driver for innovation in clean technologies and low-carbon solutions as firms will look for cost-effective ways to abate emissions and thus create demand for novel technologies or processes, which in turn incentivises investment into research and development for abatement strategies to meet this demand.[18] A key ETS advantage is its political acceptability compared to alternative regulatory tools, explicable in the EUETS emerging from failed efforts to establish a carbon tax in Europe in the 1990s and resistance to stringent environmental regulations.[19] However, Baldwin highlights that acceptability tends to involve 'grandfathering' existing operators by awarding free allocations based on their historic emissions, a violation of

[16] European Commission, *The EU Emissions Trading System (EU ETS) Factsheet* (2013).

[17] D Dudek and A LeBlanc, 'Offsetting New CO2 Emissions: A Rational First Greenhouse Policy Step' (1990) Contemporary Economic Policy 8(3), 29-42.

[18] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008 at 12.

[19] T Laing, M Sato, M Grubb and C Comberti, 'Assessing the Effectiveness of the EU Emissions Trading System' (2013) Working Paper No. 126.

the 'polluter pays' principle.[20] Whereas results from taxation is contingent on industry response to the system, the cap on emissions provides predictability and certainty of outcome as there is only a pre-determined amount of permits usable.[21] Inferentially, to be successful ETS requires strict monitoring and enforcement to ensure compliance as failure will undermine the value of trading and cause emission caps to be meaningless.[22] The political ambition to set targets with ambitious decreases in the cap is also crucial to cap-and-trades successively spurring actual reductions in emissions.[23] Accordingly, it is demonstrable that an ETS with an ambitious cap that is progressively tightened and accompanied with strict monitoring and enforcement presents a powerful regulatory tool to virtually guarantee achievement of dramatic reductions in GHG emissions.

Following Directive 2009/29 the EUETS became the first multinational ETS, currently encompassing over 11,500 installations across 31 nations covering 45% of total EU GHG emissions. [24] Participation is mandatory for installations operating in covered sectors. Being a cap-and-trade system, a fixed number of EU allowances (EUAs) are created yearly, subject to a tightening EU-wide cap, each allowing one tonne of Carbon Dioxide or its equivalent (t/CO2e) in GHG emissions.[25] Firms may receive some EUAs for free and have to purchase the rest at auction or on the open market. At least 50% of auction revenues must be earmarked by states for carbon mitigation measures.[26] Following recent changes,

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[20] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008 at 17.

[21] (n 15) c.f. (n 14).

[22] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008 at 16.

[23] *Soleille* (n 15).

[24] (n 16).

[25] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008.

[26] Centre For European Studies, *The EU Emissions Trading Scheme As A Driver For Future Carbon Markets* (2012) at 9.

firms may also draw on reserves of past allowances or use limited credits generated from emission-saving projects worldwide.[27] Installations must then surrender equivalent EUAs for actual emissions that year with non-compliance resulting in heavy penalties.[28] The EUETS serves as the cornerstone of the EU's efforts to mitigate human-driven climate change. Article 1 of its Directive reflects its purpose to establish an ETS, which is cost-effective and economically efficient in reducing GHG emissions in order to meet commitments to at least 20% reduction by 2020, and any further levels of reduction considered scientifically necessary.[29] The EU Directive also implies that it should incentivise long-term investments and innovation in low-carbon technologies.[30]

Following the adoption of the Kyoto Protocol (KP) in 1997, the EU was collectively required as a signatory to show 'demonstrable' progress in reducing emissions by 2005 and reduce annual emissions by 8% from 1990 levels during 2008-2012.[31] In light of these targets, the EUETS was established in a sequential and adaptive design that has been central to its development and enabled vast improvements over Phases.[32] The EUETS has been severely criticised mainly owing to problems of a large oversupply of allowances, windfall profits and questions regarding achievement of its purpose, which will be discussed below.

Whilst developing Phase I (2005-2007), regarded as a 'learning by doing' pilot phase, the EU faced problems of political opposition to a centralized approach and a lack of historical emission data on industry emissions.[33] As a

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[27] (n 16).

[28] S Perdan and A Azapagic, 'Carbon trading: Current schemes and future developments' (2011) 39 Energy Policy 6040.

[29] Directive 2003/87/EC as amended by Directive 2009/29/EC.

[30] International Center for Climate Governance, The State of the EU Carbon Market (Reflection No. 14/2013) at 2.

[31] (n 8).

[32] (n 19).

[33] (n 7).

compromise, it allowed member states to submit National Allocation Plans (NAPs) which established caps state-wide and for each individual installation, effectively resulting in an ETS for every state. Each state applied different rules for the allocations[34] and a tight implementation timescale meant that regulators had little time to verify representations from industry.[35] Over-allocation occurred[36] and while Ellerman[37] found few cases of fraudulent submissions, Betz suggests that inflation of baselines occurred by over-optimistic economic growth assumptions[38] fuelled by intense lobbying across the EU by incumbent enterprises with self-serving interests.[39] Although the EC was tasked with ensuring scarcity and subsequently reviewed each NAP, revising 14 out of 25 proposed NAPs and approximately reducing the proposals by 5% or 100 million t/CO2e in total, this was not enough to remedy the oversupply.[40]

As mentioned, political acceptability of ETS usually involves 'grandfathering' incumbent operators and political compromise to gain acceptance led to free allocation of at least 95% of estimated emissions.[41] As these resalable allocations were based on inflated past emissions, they basically represented a transfer of wealth from the allowance

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[34] Environmental Defense Fund, The EU Emissions Trading System: Results and Lessons Learned (2012) at vii.

[35] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008 at 9.

[36] (n 8) 13.

[37] D Ellerman and B Buchner, 'The European Union Emissions Trading Scheme: Origins, Allocation and Early Results' (2007) 1 Review of Environmental Economics and Policy 66.

[38] R Betz and M Sato, 'Emissions Trading: Lessons Learnt from the 1st Phase of the EU ETS and Prospects for the 2nd Phase' (2006) 6 Climate Policy at 354.

[39] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) LSE Law, Society and Economy Working Papers 3/2008 at 9.

[40] J Siikamäki, C Munnings and J Ferris, "The European Union Emissions Trading System" (2012) Resources for the Future at 9.

[41] (n 8) 13.

issuer every time they received free allocation.[42] Besides being able to sell excess EUAs, there is compelling empirical evidence to support the existence of costs passed through to consumers representing the lost opportunity cost of using freely allocated allowances to cover their emissions, especially in markets where demand is inelastic.[43] This is a clear violation of the 'polluter pays' principle and instead highly rewarded the biggest polluters and resulted in widespread criticisms of the "windfall profits" generated for them, with Sandbag estimating over €14 billion made by European power generators[44] enabled by high EUA prices of around €30 in early 2006.[45] However, when information was published in April 2006 showing market over-allocation, prices fell dramatically reaching near-zero levels by mid-2007[46] with EUA non-transferability to Phase II contributing to lack of demand.

The market started afresh in Phase II (2008-2012), largely unchanged from Phase I, representing EU efforts in the Kyoto Protocol first commitment period. Unlike the pilot phase, Phase II was able to use verified emission data obtained in 2005 as a baseline and caps were tightened by 6%. However, Sandbag found that Phase I was over-allocated by 7% meaning Phase II actually represented 1% growth against 2005 emissions, a clear representation of the problems of over-allocation.[47] Furthermore, Phase II allowed limited usage of credits from flexible mechanisms defined

[42] J Kruger, W Oates and W Pizer, 'Decentralization in the EU Emissions Trading Scheme and Lessons For Global Policy' (2007) 1 Environmental Economics and Policy 114.

[43] T Laing, M Sato, M Grubb & C Comberti, 'The Effects and side-effects of the EU emissions trading scheme' (2014) Wiley Interdisciplinary Reviews: Climate Change (advanced review) <http://onlinelibrary.wiley.com/doi/10.1002/wcc.283/full> accessed 5 May 2014, 6.

[44] Sandbag, 'Cap or Trap? How the EU ETS risks locking-in carbon emissions' (2010) 34.

[45] (n 8) at 14.

[46] ibid.

[47] (n 44) 7.

under the Kyoto Protocol, such as the Clean Development Mechanism (CDM). These mechanisms were aimed at offsetting emissions covered under the EUETS, encouraging investment of low-carbon technology and infrastructure in developing countries.[48] However, CDM projects were widely discredited with revelations of highly fraudulent Indian CDM projects[49] and generation of substantial credits from non-innovative cheap destruction of gases.[50] It is arguable that offset credits should never have been allowed in the first place, being emission reductions generated outside Europe were beyond its monitoring and control. This compromised a closed economy of fixed permits with installations rushing to exploit the much cheaper offset credits, surrendering 1.058 billion credits in Phase II.[51] The EUETS was further discredited by Sandbag revelations of 'carbon fat cats' of ten of the most over-allocated companies, who in 2009 held 119 million EUAs, representing a quarter of the entire EUETS surplus[52] thus dominating the market and being competitively advantaged against overseas competitors.

Despite problems in Phase I, the market showed much optimism and prices returned to high levels of €30 t/CO2e in mid-2008.[53] However, such prices were never seen again as the recession end-2008 sparked a price freefall due to a marked decrease in production and thus emissions allowances. Excess EUAs unconsumed by decreased production meant most installations had spare EUAs in later years, compounded with problems of oversupply. The

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[48] (n 37) 84.

[49] Q Schiermeier, *"Clean-energy credits tarnished"* (*Nature,* 27 September 2011): <http://www.nature.com/news/2011/110927/full/477517a.html> accessed 10 May 2014.

[50] (n 7) 114.

[51] European Commission, 'Number of international credits exchanged totals 132.8 million' (European Commission 2014) <http://ec.europa.eu/clima/news/articles/news_20140502O1_en.htm> accessed 9 May 2014.

[52] (n 44) 36.

[53] (n 30).

financial crisis in 2012 dropped prices even lower to sustained levels of around €8 t/CO2e.[54]

Phase III (2013-2020) had numerous changes passed in 2009. Key modifications were the centralisation of an EU-wide cap, reducing risks associated with member state NAPs.[55] This cap tightens yearly by 1.74% to meet 20% targets by 2020. Sandbag has argued that rates of 2.4% are needed instead.[56] Another central change was to free allocations, with power generators receiving none and other sectors having to purchase at auction or via markets 20% of allowances in 2013, 70% in 2020 "with a view to reaching 100% in 2027".[57] However, fears of carbon leakage, which is the transfer of production to countries with laxer constraints,[58] has the EC recently proposing free allocations for 175 sectors from 2015-2019.[59] Offset usage from Kyoto mechanisms has been limited to an 11% maximum of an installations allocation.[60] More sectors were included, notably the highly polluting aviation industry, resulting in international controversy forcing the EU to compromise and exempt international flights until 2016, awaiting an international agreement.[61] Banking of surplus allowances from Phase II, meant to provide certainty and avoid complete devaluation as in Phase I was highly criticised as the EC itself estimated surpluses up to 2 billion EUAs.[62] Clearly, efforts were made to resolve past issues but political compromise has undermined the strength of reforms.

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[54] (n 40).
[55] (n 8) 19.
[56] (n 44) 16.
[57] (n 55).
[58] (n 16) 4.
[59] B Garside, *EU proposes giving most heavy industries free carbon permits* (Reuters May 2014).
[60] Commission Regulation (EU) No. 1123/2013.
[61] G Carr, *'EU ETS leaves airlines playing cameo role'* (2014) <http://www.risk.net/energy-risk/news/2341662/eu-ets-decision-leaves-airlines-playing-cameo-role> accessed 10 May 2014.
[62] European Commission, *The State of the EU Carbon Market in 2012* (2012) at 5.

Knowledge of recessional effects on EUA consumption and vast surpluses redeemable in Phase III leads to logical conclusions of the price devaluation being sustained in the long-term following the market-based theory of the EUETS. This has severely undermined EUETS efforts. There is credible evidence that the carbon price imposed needs to be sufficiently high in order to obtain emission reductions and incentivise investment into low-carbon technology where decisions are made on the timescale of decades.[63] The power sector is illustrative of this, highly relevant as the source of the largest emissions and consequently abatement under the EUETS.[64] Coal burning is the single biggest environmental impact in the world[65] and the EUETS was incentivising fuel-switching to lower-polluting gas. However, Grubb found that low EUA prices have made gas-powered stations unprofitable, evidenced by the influx of investment into building and re-opening coal-fired stations,[66] a clear retrogression of the EUETS. Being a market-based instrument, EUA prices reflect the equilibrium between supply and demand of emissions, marking the clear need to address EUA oversupply to reflect the true social cost of pollution as discussed by Wråke.[67]

The EC has acknowledged EUA oversupply as posing challenges for the EUETS[68] and to this end has instituted 'back-loading' to postpone auctioning of 400 million allowances for 2014.[69] However, Sandbag has argued that at least 1.7 billion EUAs should be permanently removed from

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[63] (n 43) 4.

[64] ibid.

[65] (n 11).

[66] M Grubb, 'Emissions trading: Cap and trade finds new energy' (2012) 491 Nature 666 at 666.

[67] (n 8) 15.

[68] (n 16) 5.

[69] European Commission, 'Back-loading: 2014 auction volume reduced by 400 million allowances' (*European Commission* 2014) <http://ec.europa.eu/clima/news/articles/news_2014022701_en.htm> accessed 11 May 2014.

auctions[70] instead of postponement, a credible figure considering EC's surplus admission above.

In assessing the effectiveness of the EUETS, the barometers of actual emission reduction achieved cost-effectively whilst stimulating investment and innovation in line with its purposes will be used. Determining actual emission reductions poses numerous difficulties primarily due to insufficient data and the recession as highlighted by Laing[71] who, after competent marshalling of numerous studies and attempting to separate the recessional impact on emissions, found attributable annual average emission of 2-4% of total capped emissions, suggesting non-trivial EUETS impact on emissions.[72] This is confirmed by latest EC estimations of at least 3% emission reductions last year despite problems faced of oversupply.[73] These reductions occurred despite steady GDP growth, evidence of a successful decoupling of emissions from economic growth.

Evidence shows impacts on marginal decision-making on investments and innovation, primarily by carbon pricing being considered in the realm of boardroom decision-makers.[74] Further evidence shows increased patenting activities in low-carbon technology during 2005-2009 for firms regulated by the EUETS.[75] The cost-effectiveness of the EUETS in achieving emissions reduction is self-evident in the low EUA prices, as if expensive innovation was required for abatement then demand for EUAs and subsequently

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[70] Sandbag, *Drifting Toward Disaster: The ETS Adrift in Europe's Climate Efforts* (2013) 46.

[71] (n 43) 2.

[72] (n 43) 3.

[73] European Commission, *'EU ETS emissions estimated down at least 3% in 2013'* (*European Commission,* 14 May 2014) <http://ec.europa.eu/clima/news/articles/news_2014051401_en.htm> accessed 14 May 2014.

[74] (n 43) 4.

[75] R Calel and A Dechezleprêtre, 'Environmental Policy and Directed Technological Change: Evidence From The European Carbon Market' [2012] Working Paper no. 75.

prices would be high. Grubb confirmed this for pre-recessional prices, finding that by 2009 the EUETS was able to achieve its objectives at costs significantly below 1% of EU GDP.[76]

Notwithstanding positive reports above, Laing asserts there is an 'overwhelming general consensus' that the impact of the EUETS is fractional to what is necessary to deliver the kind of projects to meet long-term EU targets.[77] Although it has been shown that the EUETS has delivered on the theoretical benefits that ETS promises and is therefore 'fit for purpose', it has yet to show real evidence of dramatic reductions on GHG emissions made necessary by IPCC reports. This is largely due to problems of vast EUA surpluses and low prices disincentivising investment into the real large capital projects that will deliver novel innovative low-carbon technologies to make the changes needed to move into an era where future near-zero GHG emissions is made possible. The EC has recognised this and earlier this year presented proposals for Phase IV running 2021-2030 to reduce GHG emissions by 40% below 1990 levels by 2030 and increase its annual linear reduction factor to 2.2%. It also proposes to build a market stability reserve for EUAs to address EUA surpluses and provide resilience to major demand changes.[78] However, an argument may be made that in order to truly signal to the world its earnestness in dramatically achieving GHG emissions made necessary by IPCC revelations, in advance of Paris talks to replace the Kyoto Protocol, the EU should have the strong political will to act now to ex-post implement proposed changes in Phase

[76] M Grubb, T Brewer, M Sato, R Heilmayr and D Fazekas, *Climate Policy and Industrial Competitiveness: Ten Insights from Europe on the EU Emissions Trading System* (2009) 3.

[77] (n 43) 4.

[78] European Commission, "Commission launches second step to reform the EU ETS" (2014) <http://ec.europa.eu/clima/news/articles/news_2014012201_en.htm> accessed 12 May 2014.

III whilst still in the early stages to address all concerns outlined above.

Is the Moral Approach of the West to Chemical Weapons Justified, or Morally Inconsistent?

Liam Whitworth

Abstract

This essay examines the legal and moral issues surrounding the use of chemical weapons, with particular focus on their use in the Middle East, and whether Western powers approach the use of chemical weapons with an inconsistent application of moral values. By first examining the origins of the moral and legal opposition to chemical weapons, from the Chemical Weapons Convention to chemical weapon use in conflicts such as World War Two, it is shown that Western powers modify their stance to suit their political and economic goals. By examining in detail the Western enablement of chemical weapon use in the Middle East it is not only shown that the West assisted in the production and use of chemical weapons in Iraq and Syria but that this later acted to their detriment. A further direct comparison with the indiscriminate use of conventional weapons by the West adds weight to the argument that inherent fallacies exist in the approach adopted by states such as the United States of America. The traditional view that chemical weapons and conventional weapons are both drastically different is challenged and drone warfare is examined to show how conventional weapons are incorrectly deemed to hold a higher moral ground. Finally it is concluded that the stance of the West is morally inconsistent and that their own actions in both the present day and past intervention in the Middle East violate the very moral principles that are used to denounce chemical weapon use.

I. Introduction

The use of chemical weapons in Syria sparked a worldwide response and led to Western powers such as the United States and the United Kingdom to decree the act as a "moral

obscenity".[1] More recently the issue of chemical weapons has again been thrust into the forefront of the public domain in Britain with recent calls for the Iraq war inquiry, the Chilcot Report, to be published. The report is highly anticipated as fear of weapons of mass destruction, possibly in the form of chemical weapons, was a reason championed for the legitimate invasion of Iraq in 2003. However, it will be shown that chemical weapons themselves may not be inherently *obscene* and that the Western stance on chemical weapons based on a moral platform is built on weak foundations. This is evident when examining the historical use of chemical weapons and more recently by Western-approved or -sponsored programs. Furthermore, the moral ground is blurred when chemical weapons are compared to the destructive capabilities of conventional weapons. By examining the moral values and reasoning surrounding the use and responses to chemical weapons, in addition to examination of the use of more immoral conventional weapons, a Western moral inconsistency is evident.

II. Chemical Weapons and the Moral Implications of Chemical Warfare

The Chemical Weapons Convention[2] (CWC) governs the control and use of chemical weapons: signatories must not use or stockpile chemical weapons, with the Convention also seeking global disarmament.[3] The CWC offers similar provisions to the Nuclear Non-Proliferation Treaty[4] and as such it can be observed that they are perceived to be of a similar global danger. Historically, chemical weapons have been viewed as being underhand to the extent that chemical weapons were not used on the major fields of battle in World

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[1] John Kerry, 'Remarks on Syria' (2013) <http://www.state.gov/secretary/remarks/2013/08/213503.htm> accessed 22/03/2014.

[2] Chemical Weapons Convention 1993.

[3] ibid Art IV.

[4] Treaty on the Non-Proliferation of Nuclear Weapons 1970.

War II[5], a conflict in which few other restraints were observed and, indeed, in which most existing prohibitions were violated[6]. This attitude can be explained by the wide regard of chemical weapons as a dirty weapon and being of "womanly deception"[7], which Price explains as being the "taboo"[8] of chemical weaponry. In the 20th century the advances in international law were substantial; to date, only four states are not signatories to the Convention.[9] Thus it can be ascertained that there is a united global anti-chemical weapons outlook and that only a minority of nations do not share this view. Immediately we can see that in contravention to the view presented there is not just Western disapproval, but global disapproval regarding chemical weapons; this raises the question of whether moral inconsistency surrounding chemical weapons, as is often claimed, is confined to the West.

The first prevailing piece of evidence that chemical weapons are morally wrong is the vast amount of legal conventions and war crime tribunals that have resulted through their use. War crime prosecutions for the use of chemical weapons occurred as early as 1936 with the Italian use of mustard gas[10] and later post-World War II with the prosecution of Japan's infamous Unit 731 for violating the Geneva Convention.[11] In both instances, especially the latter, the use of chemical weapons is viewed as being morally wrong due to the horrific and inhumane consequences of chemical warfare, involving the increased suffering of victims

[5] With the exception of isolated use by Japan.

[6] Richard Price, 'A Geneology of the Chemical Weapons Taboo' (1995) International Organization 49(1) 73-103.

[7] ibid 81.

[8] ibid 74.

[9] Organisation for the Prohibition of Chemical Weapons (OPCW 2014) <http://www.opcw.org/about-opcw/non-member-states/> accessed 23/3/14.

[10] IRC, *'Ethiopia 1935-36: mustard gas attacks'* (IRC, 12 Aug 2003) <http://www.icrc.org/eng/resources/documents/misc/5ruhgm.htm> accessed 02/04/2014.

[11] Geneva Convention 1925.

(often civilians) and prolonged deaths. These instances beckon two lines of reasoning, either the use of chemical weapons is morally wrong and therefore is a crime (enabled by international treaties), or that the use of chemical weapons is a crime and therefore morally wrong. Furthermore we must ask why, if they indeed are, morally wrong.

The use of chemical weapons therefore must be examined to understand why they are perceived as being morally wrong. Walzer discussed the use of chemical weapons citing Karl Von Clausewitz's view that "war is an act of force...which theoretically can have no limits"[12]; if we subscribe to this view, then the use of chemical weapons is perfectly acceptable as "each of the adversaries forces the hand of the other"[13] and therefore chemical weapons are just another weapon in the arsenal to be utilised at times of war (in accordance with Just War theory). However, this view is flawed because while Von Clausewitz correctly identifies that in war the aggressor escalates the conflict and therefore heightens the level of force, he does not account for moral codes of conduct that Walzer outlines as being "the war convention".[14] Walzer accounts for Henry Sigdwick's view of proportionality and the prevention of excessive harm[15]. The key component here is preventing excessive harm. Proponents of banning chemical weapons from warfare argue that it is the excessive harm caused by chemical weapons, which makes them so morally wrong. We can see from this, and in addition to Walzer's additional point that "moral arguments everywhere accompany the practice of war"[16], that the unnecessary suffering caused by chemical weapons is morally wrong as they inflict prolonged suffering upon the

[12] Michael Walzer, *Just and Unjust Wars*, (first published in 1977, 4th ed, Basic Books 2006) 23.
[13] ibid 23.
[14] ibid 44.
[15] ibid 128.
[16] ibid 44.

recipient and because they are instruments of suffering, they are morally objectionable.

A further criticism that is very relevant when examining the use of chemical weapons in the Middle East is the indiscriminate nature of chemical weapons. JJ Goldberg argues against the moral damnation of chemical weapons and elucidates a moral fallacy of the West which illustrates that opponents of chemical weapons, such as Western powers, do not "explain why chemical weapons killing 1,429 people is worse than standard munitions killing 100,000".[17] What can be ascertained from this is that defending the moral high ground on the basis of chemical weapons being weapons of mass destruction is not valid, as, on a purely statistical basis, they achieve no more or no less than conventional weapons. However, Goldberg does highlight the distinguishing factor of chemical weapons that "chemical weapons make killing unconscionably easy and thorough".[18] The ease of killing and wide effect radius of many chemical weapons means that it involves a lot less involvement than conventional weapons. If using a machine gun against a camp full of soldiers, there is a chance of escaping unharmed or injured, however, if using chemical weapons, even slight exposure can result in eventual death. Therefore, chemical warfare is more efficient on the battleground than conventional weapons, and under a utilitarian approach, the most effective weapon is that which causes the most damage with least risk and effort. The point to be recognised is that chemical weapons allow ease of killing and are more effective than most conventional weapons. Furthermore, the environmental damage caused by chemical warfare is another factor that distinguishes them from conventional weapons. An opponent of this view may highlight the use of drone technology and this will be discussed in due course.

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[17] JJ Goldberg, *'Chemical weapons are different: here's why'*<http://blogs.forward.com/jj-goldberg/183584/chemical-weapons-are-different-heres-why/ <accessed 25/03/13>.

[18] ibid.

APV Rogers provides a stark contrast to Goldberg. He cites Szasz's view that chemical weapons should not be classed as causing long-term environmental damage due to the "short term effects in a given area".[19] Rogers and Szasz's views as experts in the field of law on the battlefield result in scrutiny being drawn to Goldberg's argument and lend favour to the view that chemical weapons are not drastically different from conventional weapons. The impact of this is that we must look solely at the impact of the weapon upon the target and not hold a marred view of it because of its potential to cause long-term damage to the area.

III. The Use and Enablement of Chemical Weapons by the West

The moral stance of the West could be seen to act as a main driving force in the prohibition of chemical weapons but it is a stance that is open to criticism, especially due to the history of Western powers. If the moral authority of the West is to be challenged then it is necessary to examine in recent years how the West has handled and even assisted the use and manufacture of chemical weapons. A salient example, which bolsters the view that the West is inconsistent with its moral views, is the case of Iraq in the 1980s. In an attempt to shore up relations and allow free access to the oil in the Persian Gulf (among other geo-political reasons), the United States and other Western powers supported Iraq logistically. In particular, the United States supplied Iraq with "US manufactured items that were used to further Iraq's chemical...weapons development".[20] We can immediately find support for the view posed in the question, that the approach of the West is morally inconsistent, as the US appears to have acted in violation of the only existing chemical weapons treaty of the time, the Geneva Convention

[19] APV Rogers, *Law on the Battlefield* (first published 1996, Manchester 2012) 224.

[20] Riegle Report (25 May 1994) 4.

Gas Protocol.[21] Whilst it can be argued that the Protocol only outlaws the use of said weapons, the US enabled Iraq to use them in the attacks during the Iran-Iraq[22] war and later in the Kurdish uprising[23] and therefore, as Fredman outlines, "Washington declined to punish Iraq for its chemical weapons use and shielded Baghdad from condemnation at the United Nations".[24] As the Riegle Report shows, despite being in direct contravention of the moralistic stance the USA takes on chemical weapons, it also had the unexpected effect of causing health problems for US soldiers who served in the Gulf War[25]—a result which has occurred in many cases of the West arming countries in the Middle East. The US repeatedly refused to sanction Iraq despite their continued use of chemical weapons and academics such as Fredman criticise US policy for only intervening due to the uncovering of another supply scandal, the Iran-Contra Affair.[26] What can be seen in the case of Iraq is that the moral rules which are touted to the public by high ranking Western politicians such as John Kerry, the US Secretary of State who had served in the American Senate during the Iran-Contra Affair and both Gulf wars, are not utilised in a pragmatic manner and this has caused repercussions and public embarrassment for the US. Furthermore, one reason for the invasion of Iraq in 2003 was to eliminate Iraq's weapons of mass destruction, which included chemical weapons. In a 2002 speech President Bush stated that Iraq "possesses and produces chemical and

[21] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare 1928.

[22] Zach Fredman, 'Shoring Up Iraq, 1983 to 1990: Washington and the Chemical Weapons Controversy' (2012) Diplomacy & Statecraft 23(3) 553-554.

[23] ibid 533.

[24] ibid 534.

[25] Riegle (n 19).

[26] Fredman (n 21) 534.

biological weapons"[27], however, he omitted to mention that the US previously supplied the necessary material and technology to develop chemical weaponry during the Iran-Iraq war. The 2003 Iraq war is generally regarded as an unjust war, but what is clear is that the US was basing its invasion on its own past moral errors; this situation illustrates the moral inconsistency of the West and demonstrates that *morals* have been flexibly utilised by Western powers.

An additional controversy that demonstrates the moral inconsistency of the West is the disclosure in May 1996 in the German magazine *Stern* that "German experts were helping Syria build a chemical weapons factory in Aleppo".[28] Whilst it was not illegal at the time, the 1997 CWC had already been drafted and signed since 1993. This shows how, despite a global agreement, chemical weapons were actively produced up until the treaty was effective. As suggested by Fredman, it does appear that the West are only morally opposed to the production and use of chemical weapons when it concerns a nation with which they have no interest or alliance with. What has been shown so far is that the chemical weapons themselves are globally agreed to be morally wrong and states publicly express their opposition to their use, however behind closed doors this is not the case and chemical weapons have been used to advance Western interests and therefore we can agree that a moral inconsistency does exist.

An explanation which is encountered multiple times when researching why chemical weapons are possessed and used in the Middle East is the position of Israel. A highly criticised approach by Western powers is the refusal to allow any potentially hostile nation to develop their nuclear program. This impacts heavily upon the Middle East where Israel is

[27] BBC, *Full Text of Bush Speech'* (BBC, 8 October 2002) <http://news.bbc.co.uk/1/hi/world/americas/2309049.stm> accessed 26/03/14.

[28] Avigdor Haselllkprn, *The Continuing Storm: Iraq, Poisonous Weapons and Deterrence* (Yale University Press 1999) 334.

one of the few nations to possess nuclear weapon technology and has perceived itself to be under perpetual threat. Due to previous tensions and warfare between Arab states and Israel, and the prevention of nuclear development, states such as Syria have relied on the development of chemical weapons to act as a deterrent from attack and through its inconsistent approach to the matter the West inadvertently assists in the chemical weapons dilemma.

IV. Conventional Weapons: A Comparison

In order to fully analyse the situation it is necessary to challenge the view that chemical weapons use differs from conventional weapon use and that it is the content and not the application, which is morally objectionable. Primarily, the focus lies on the targeting process and modern weapons such as drones which we will see face a similar level of moral objection as chemical weapons, yet their use increases.[29] By challenging the use that chemical weapons hold a higher moral fallibility than conventional weapons it can be shown that the West is inconsistent in its approach.

The targeting of conventional weapons is crucial to the examination of the matter at hand. If conventional weapons are used against soldiers then it is seen as a necessary consequence of war, and to a degree, this logic was employed to justify the use of chemical weapons in both World Wars against soldiers by the Japanese. However, it is submitted that the target of the weapon is the main cause of a moral reaction rather than the weapon itself. In Syria and Iraq, where chemical weapons were used against civilians, we can infer that it is this targeted use against civilians rather than combatants that is the cause of moral outrage rather than the use of chemical weapons alone. We can see that the use of lethal force against civilians is generally regarded as morally

[29] Matt Sledge, *'The Toll of 5 Years of Drone Strikes: 2,400 dead' Huffington Post* (23/01/2014) <http://www.huffingtonpost.com/2014/01/23/obama-drone-program-anniversary_n_4654825.html> accessed 26/03/14.

obscene, and regardless of the delivery the outcome will always result in public outcry. Goldberg highlights that it is relatively easy to kill using chemical weapons and this factor can be linked to its use in civilian atrocities: chemical weapons are used because of their effectiveness. Therefore, rather than the weapons themselves, moral objection arises because they are used against civilians.

A relatively new method of warfare is the use of drone technology, which has been utilised extensively by the US administration but has been heavily criticised for causing civilian deaths. The Bureau of Investigative Journalism estimate there have been between 584 to 1,159 civilian drone deaths in Pakistan alone between 2004-12, out of a total 2,2296-3,718 estimated deaths.[30] What again can be seen here is that a large percentage of drone strikes (around 45% at the higher end of the estimation) have caused civilian deaths and it is proposed that this is the cause of the outrage rather than the fact that drones have been used. Therefore, we can see there is a case for arguing that moral outrage is not caused by the chemical weapons themselves, but rather by the killing of civilians with them, supporting moral inconsistency as the US has killed similar amounts of civilians with their drone technology as were killed by chemical weapons in Syria.[31]

V. Concluding Thoughts

What has been shown from this analysis is that there is indeed a large degree of moral inconsistency exhibited by the West, especially by the US. It is debated that chemical weapons themselves are not inherently morally obscene as Kerry would claim but instead, just like any weapon, the

[30]Bureau of Investigative Journalism, *'Drone strikes in Pakistan'* <http://www.thebureauinvestigates.com/category/projects/drones/drones-pakistan/> accessed 26/03/14.

[31]BBC, *'Syria chemical attack: What we know'* <http://www.bbc.co.uk/news/world-middle-east-23927399> accessed 24/03/2015.

target and use of the weapon is what rightly causes outrage. Any final thoughts on the matter should be based around how the use of chemical weapons will pan out in the future. We would hope that, for the sake of both combatants and non-combatants alike, chemical weapons will no longer be used by 2017, nearly twenty years after the CWC's entry into force. However, with tensions in the Middle East not showing any sign of easing, we must not rule out the possibility of future use and question whether the moral inconsistencies of the past will affect the future.

United Kingdom: Should we move towards a Republic?

Kerry Corrigan

Abstract

The British monarchy has long been celebrated and admired as a representation of our country's vivid history. But the glamorisation of the Royal Family through recent events is only hiding the anti-democratic sentiments bubbling away beneath the surface. The hypocrisy of our constitution lies in the fact that our ruling figurehead is an unelected member of the elite classes who possesses and exercises real political influence. Queen Elizabeth's passive personality may keep the waters calm enough for now. But the nation is already divided over our next hereditary monarch, Prince Charles. Do we show support for the monarchy by accepting Prince Charles as our opinionated, politically driven King? Or do we call for the abdication of Prince of Wales in favour of the 'Nation's Prince', Prince William? Only time will tell. Nevertheless, the public leaning towards the latter can be interpreted as a lack of support for the monarchy and demonstrate a nascent support for Republican ideas.

I. Introduction

This essay proposes that the United Kingdom's constitutional monarchy be reformed into a Republic. The basis of this proposal is that the existence of the monarchy undermines British democracy. The discussion presented in this paper will be divided into two parts. In the first section, the essay analyses and refutes two monarchist arguments: i) the view that the role of the monarch is entirely symbolic and thus reform is unnecessary, and ii) the perception that the monarch does serve a useful, constitutional purpose. Against this background, the argument is made that public support for the *institution* of the monarchy is parasitic upon such support for the *particular* monarch of the day. Moreover, certain controversies involving Prince Charles will be argued

as having revealed—the undemocratic nature of the constitutional monarchy system.

II. Britain: A Paradigm Democracy?

In 2013 when it was said that Britain is 'just a small island', Prime Minister David Cameron responded: 'When the world wanted rights, who wrote Magna Carta? When they wanted representation, who built the first Parliament? ... When they searched for equality, who gave women the vote?'[1]

The Prime Minister's statement celebrates the United Kingdom as the paradigm of modern democracy, built upon a foundation of democratic rights and equality. However, the robustness of that statement is questionable in light of the continued existence of the British monarchy; as it will be demonstrated in this essay the British monarchy still retains a significant role in the governance of the nation.

In defining what constitutes a legitimate democracy, Waldron and Dworkin both emphasise the importance of equality. Waldron's concept of a legitimate democracy focuses on the democratic process: he propounds that everyone in a society has the right to participate on equal terms in the resolution of a disagreement. Therefore, even if the outcome of the decision making process is *undemocratic*, at least it is the people that make 'their own mistake about democracy' as opposed to having 'someone else's mistake foisted upon them.'[2] Dworkin, on the other hand, focuses on the outcome of the decision made which must satisfy the democratic conditions of affording equal concern and respect

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[1] David Cameron 'Speech to the Conservative Party Conference' (Conservative Party 2013): <http://www.conservativepartyconference.org.uk/Speeches/2013_David_Cameron.aspx> accessed 27 July 2015.

[2] See J Waldron, 'The Constitutional Conception of Democracy' (2002) *Democracy* 51, 52: <http://philosophyfaculty.ucsd.edu/faculty/rarneson/WaldronConstritutional.pdf> at page 43.

to the majority of citizens.[3] Dworkin asserts that as long as the outcome of that process respects these democratic conditions, the society is entirely democratic.

In application of these theories to the modern constitutional structure of the United Kingdom, the process of appointing a government can be said to be entirely democratic by both standards. The voting system incorporates equal participation, and decisions made in the House of Commons can be said to treat citizens with equal concern and respect as, although elected by the majority, the House of Commons represents the interests of the entire nation.

However, the constitutional position of the monarchy percolates anti-democratic notions throughout an otherwise sound democracy. The nature of the hereditary system means that succession to the Crown relies entirely on the accident of birth; in this context, public participation is antithetical to the nature of monarchism. As for any decisions that might be made by the monarch, there is no meaningful sense in which it can be justified that an unelected, unaccountable individual, empowered as a result of mere genealogy, can fairly represent an entire nation.

III. The Republican Solution

Around the world, modern republics see democracy flow through 'to the pinnacle of the state'[4] as *the people* vote and elect each tier of their governmental structure. In the federal republic of the United States of America (US), the people elect representatives at both the party candidacy stage and then in the final presidential election. Thus it can be said that in a republic, the 'power is held by its citizens'[5] as it is the

[3] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996)

[4] Rodney Brazier, *Constitutional Reform: Reshaping the British Political System* (3rd edition, Oxford University Press 2008) 95.

[5] Rodney Brazier, 'A British Republic' (2002) CLJ 351, 364.

electorate that bestows office upon the Head of State, in accordance with Waldron's thesis. The icing on the democratic cake is that the people have the power to reverse it all if necessary at the next election of the Head of State, which provides accountability. Again, the Queen is sovereign by virtue of no such democratic process, and she holds 'powers that cannot be challenged in a court of law';[6] this will remain so until the Queen is dead, and, then, long live the King. The President of the U.S. can be impeached and thus removed from office[7]: in fact, two presidents, President Johnson and President Clinton, have been judged through impeachment proceedings for their actions whilst in office. This process does not apply to the British monarchy, as the British public are expected to accept the monarch, the power resting at the top, with no legal means to change the status quo. Republicanism resolves such issues and in comparing the British monarchy to the US system, it is clear that an *elected* Head of State 'personifies the democratic ideal.'[8]

IV. Two Monarchist Arguments

i) Symbolism

A monarchist's response might be to argue that a modern monarchy does not hold the same constitutional power as a president of a republic[9] and thus an electoral or accountability mechanism is superfluous.

Yet if the monarch is not a source of power in government, what is its purpose? Bagehot sees the role of a

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[6] Graham Smith, 'Why UK should abolish its 'failed' monarchy' *CNN* (London, 1 June 2012) <http://edition.cnn.com/2012/05/30/world/europe/uk-jubilee-republicans/index.html> accessed 27 July 2015.

[7] Rodney Brazier, *Constitutional Reform: Reshaping the British Political System* (n 4) 157.

[8] ibid.

[9] "In the modern world, constitutional monarchs, deprived of power, rest essentially upon opinion." See Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford University Press 1995) 11.

monarchy as being symbolic, representing the 'personification' of the country in 'the eyes of the nation's own citizens.'[10] If then, by this view, the Queen is merely a figurehead, surely those whom the monarch is said to represent should have a say in whomever 'personifies' them. Brazier makes the point that strikes at the very core of a republic - only by choosing an individual, can a nation be satisfied that their representative is best placed to exemplify the values it apparently stands to represent.[11] Whilst the monarchy is a symbol of British history,[12] itself a cause for celebration, the removal of a powerless figurehead will not detach us from our history.

In the quote above, David Cameron celebrates the leadership and innovation of the United Kingdom in recognising the demand for modernisation; however, the United Kingdom remains stifled by the monarchy and is unable to mature democratically as long as it continues to revel in the glory of the past, whilst 'failing to...anticipate the future.[13] By holding onto the sentimental value of our monarch, we fall behind in the modern world as other countries either demand modernisation through revolution (such as in Egypt, in 1952, and Iran in 1979) or by expressing such demand through a referendum (as was the case in Italy, in 1946, and Greece in 1974). Our sentimental attachment to the monarchy is rooted in tradition, and tradition means 'giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead.'[14] This is not an attack on tradition *per se*, but rather an attack on tradition for the sake

[10] Colin Pilkington, *Representative Democracy in Britain Today* (Manchester University Press 1997) 232.
[11] Rodney Brazier, *A British Republic* (n 5) 364.
[12] "The association of the monarchy with so much of British history, as already noted, has built up a store of support for an institution simply because it has been with the nation through good times and bad." See Rodney Brazier, *A British Republic* (n 5) 371.
[13] Vernon Bogdanor, *The Monarchy and the Constitution* (n 9) 3.
[14] Gilbert K Chesterton, *Orthodoxy* (CreateSpace Independent Publishing Platform 1908).

of tradition. Democracy requires, at the very least, that the people decide whether or not to modernise and dispose of the monarchy by referendum.

Further, in personifying national identity in one individual and believing it to be the best way to celebrate our history, we do the country a grave injustice. This can perhaps be drawn out explicitly in comparing the American people's pledge to 'God bless America' – which exhibits pride in the country itself – with the British counterpart of 'God save the Queen'. Not only is our country's abundant history – a product of collective contribution – linked solely to one individual, but such phrases do not appreciate modern day achievements, for which we should be equally proud. Indeed the architecture of the entire British constitution takes this form: the oath of allegiance and the official oath[15] taken by the Prime Minister,[16] Members of Parliament, and members of the Judiciary swears allegiance and service to 'Her Majesty Queen [Elizabeth]',[17] without any mention of 'the people".

American patriotism, famous in its extremity and passion, manifests itself entirely differently to British patriotism. This distinction stems from the fact that the American model 'endows power to the people' who in turn 'lend some of it to the government'[18] whereas the United Kingdom, with its hereditary sovereign, allows power to flow 'from the top down'[19]: the Queen-in-Parliament is supreme.[20] Letting go of the formal role of the monarch does not entail abandonment of our history, nor would it even result in the loss of a valuable tourist attraction, as it is often contended. The

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[15] Promissory Oaths Act 1868, ss. 2-4.
[16] Acting in his capacity as First Lord of the Treasury, *The Cabinet Manual* 2011. See Promissory Oaths Act 1868, s.5 and Schedule of the Act.
[17] Whoever is the current sovereign. See Promissory Oaths Act (n 15) s.10.
[18] Jonathan Freedland, *Bring Home the Revolution: The case for a British Republic* (Fourth Estate Limited 1998) 20.
[19] ibid 22.
[20] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan Education 1987).

French First Republic[21] was founded in 1792 after the abolition of the French monarchy.[22] The Palace of Versailles is empty and the monarchy no longer exists, but the French have not lost their history. In fact 'more people visit the Petit Trianon... every year than visit Windsor castle and Buckingham palace all together.'[23] Thus it is conceivable that if the monarchy was no longer in formal constitutional existence, Buckingham Palace could be opened up to the public to celebrate British history and could generate even more income from tourism. If anything, the abolition of the monarchy might make room for a new social order, whereby the United Kingdom is able to direct its sentimental value and admiration into the country itself, rather than into one individual.

ii) More Than Symbolism

It might be said that the Queen has constitutional powers that should not be assumed to be unused or unimportant.[24] One can refer to two important conventions to support this view. For instance, the *cardinal convention* stipulates that royal action will only take place on ministerial advice while the *tripartite convention* institutionalises the right of the sovereign to be consulted, to advise and to warn ministers.[25]

But if that is the case, monarchists have the far more difficult task of explaining why an undemocratic, unelected figure possesses important constitutional powers. Even if the Queen is free from party ties, [26] and is politically neutral to the outside world, it does not mean that she is *actually* politically neutral. At regular meetings with the Sovereign, the Prime Minister informs the Queen of the general business of

[21] Eventually the fifth French Republic was established in 1958.
[22] Sophie Boyron, 'France' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study,* (Hart Publishing 2011) 116.
[23] Ben Summerskill, *'The future of the monarchy'* (2001) 148 RSA 12, 14.
[24] Rodney Brazier, 'The 2013 Harry Street Lecture: The Queen and the Constitution (and Me)' (Manchester, 2013) 9.
[25] ibid 5.
[26] Vernon Bogdanor, *The Monarchy and the Constitution* (n 9) 10.

the government.[27] The advice the Queen can offer in these meetings is in itself not objectionable, provided that the advice is taken without undue influence. However, there is evidence to suggest that in the past she has not always stayed out of politics and has had significant influence on the Prime Minister, despite initial objection. In 1979, at the commencement of Thatcher's time in government, the Queen and the Prime Minister had differing opinions over attendance of a Commonwealth Conference in Lusaka, which had at the top of its agenda the status of rebel Rhodesia. Thatcher did not want herself nor the Queen to attend.[28] But in the end, Thatcher 'bowed to her sovereign's judgement.'[29] Furthermore, the Queen has also been said to have influenced President Kenneth Kaunda in Lusaka, a clear example of direct and important intervention by the Queen.[30] Thus it is certainly not a fiction that the political opinions of a monarch can have influence in national and even international spheres. But of real concern is the possibility that even a Prime Minister of such renowned robust personality as Thatcher, can be subservient to the wishes of the monarch, which undermines the entire system of democracy that exists within the United Kingdom.

Whether the role of the monarch is symbolic or more than symbolic, an unelected head of state that claims to be either is nonetheless undemocratic. Further, if the United Kingdom adopted republicanism, deciphering the precise role of the Queen would be unnecessary, as a new Head of State would mean a 'fresh statutory formulation of the powers of that office.'[31] Accordingly, a new political system

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[27] The Cabinet Manual (n 16) 21 para 3.5.

[28] A Carley, 'Queen, Thatcher May Clash Over Rhodesia Conference', *The Daily News* (London, 19 July 1979) 13.

[29] Robert Lacey, *Monarch: The Life and Reign of Elizabeth II* (Little, Brown and Company 2002) 261.

[30] With regards to removing controversial aspects of his speech. See A Carley, 'Queen, Thatcher May Clash Over Rhodesia Conference' (n 28).

[31] Rodney Brazier, *Constitutional Reform: Reshaping the British Political System* (n 4).

would rectify the vagueness, uncertainty or undue influence currently observed under the British monarchy system.

V. Public Support: Institution or Individual?

i) The Institution

Republicans cannot deny the existence of public support for Queen Elizabeth II. Yet support for the monarchy seems to fluctuate according to the public behaviour of individuals in the royal family. It cannot be said that there is unconditional support for the *institution* of a constitutional monarchy, but rather its support is dependent on the likeability of individual personalities. The Queen's popularity may result from the fact that '...citizens have no idea what the Queen personally thinks...'[32] and thus the public have no basis for dislike. The Queen has political opinions, of course, but by not publicising her views she enhances the perception that she is above party politics.[33]

Recent events[34] have also contributed to the popularity of the monarchy, particularly the marriage of Prince William and Catherine (2011) and the Queen's Diamond Jubilee (2012), with 57% of Britons saying they are proud of the royal family.[35]Arguably, such support does not constitute unconditional support for an institution, but displays the influence of particular events on public perception of the royal family. This cuts both ways: the Queen's public response to the tragic death of Princess Diana, so loved and

[32] Rodney Brazier, `The 2013 Harry Street Lecture: The Queen and the Constitution (and Me)' (n 24) 7.
[33] ibid 8.
[34] The birth of Prince George Alexander Louis on the 22nd July 2013, for example.
[35] Bonnie Gardner, Hannah Thompson and Giovanna Clark, 'Polls: The Diamond Jubilee' *YouGov* (London, 31 May 2012) <http://yougov.co.uk/news/2012/05/31/polls-diamond-jubilee/> accessed 27 July 2015.

admired by the public, caused much anger and resentment.[36] Tony Blair, who was Prime Minister at the time, acknowledged the general feeling of anger 'directed at the establishment.'[37] Consequently, the monarch acceded to 'public demands to acknowledge Diana.'[38] This shows the importance of the public's opinion 'in the future of any constitutional institution'[39], but it also demonstrates how capricious public support can be.

ii) The Individual

For Prince Charles, succession will not entail an '...automatic transfer of [the Queen's] personal popularity to her successor'[40], and he does not appear to command independent public support–this is perhaps a symptom of his failure to remain politically neutral. The *Evans* case[41] is illustrative: following the decision of the Upper Tribunal[42] that correspondence between Prince Charles and various Government departments ought to be disclosed in the public interest, the Attorney General issued a veto,[43] effectively overriding that decision. The exercise of this veto is widely considered to be a 'highly unusual'[44] move. On appeal from

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[36] Nicholas Witchell, 'Monarchy changed by Diana's death' *BBC News* (London, 31 August 2007) <http://news.bbc.co.uk/1/hi/uk/6968583.stm> accessed 27 July 2015.

[37] Huma Khan, 'Tony Blair: Meeting with the Queen 'difficult' After Princess Diana's Death', *ABC News* (London, 1 September 2010) <http://abcnews.go.com/Politics/tony-blair-meeting-queen-difficult-princess-diana-death/story?id=11533202> accessed 27 July 2015.

[38] David Craig, 'The crowned republic? Monarchy and anti-monarchy in Britain, 1760-1901' (2003) 46 The Historical Journal 46, 167.

[39] Rodney Brazier (n 5) 352.

[40] Rodney Brazier (n 7) 157.

[41] *R (Evans) v HM Attorney General* [2014] EWCA Civ 254.

[42] *Evans v Information Commissioner* [2012] UKUT 313.

[43] Freedom of Information Act 2000, s.53.

[44] Christopher Knight, 'Prince Charles, the Guardian and the Unreasonable Veto' *Panopticon* (London, 18 March 2015) <http://www.panopticonblog.com/2014/03/18/prince-charles-the-guardian-and-the-unreasonable-veto/> accessed 27 July 2015.

the Divisional Court, the veto was successfully overturned.[45] The letters were recently published in May 2015, and despite concerns about the public's response to their content, the letters caused far less controversy than expected. Whilst his opinions may not necessarily be extreme, the Evans case still raises the issue of Government transparency. For many, it highlighted the lack of political neutrality, where unelected figures can potentially "bend the ear" of public officials, and try to use the law to cover their tracks.[46]

Further, whilst some polls might at first appear to provide support for the monarchy, when the answers to particular questions are considered, fractures in public support for the *institution* of monarchy may be exposed. Public attitudes vary considerably depending upon 'the exact nature of the question put to them.'[47] In 2012, 47% of people thought Prince William would be the best ambassador for Britain whilst 7% thought Prince Charles would be.[48] In 2013, when asked who they prefer to be the future monarch, 44% supported William, 37% supported Charles and 13% thought that the monarchy should end post-Elizabeth II.[49] Prince Charles, future heir to the throne, does not command public confidence, whilst Prince William does. These polls suggest that 60% of people support either a disruption in the natural rules of succession or an end to the monarchy altogether. Crucially, popular support for the succession of Prince William over Prince Charles, does *not* indicate support for the *institution* of monarchy, rather, if the natural succession were to be disrupted by popular demand, we would be in the

[45] But permission has been granted to appeal to the Supreme Court, so this is not the final word on the matter.

[46] The Guardian, 'Charles's letters and the democratic process' *The Guardian* (London, 14 May 2015) <http://www.theguardian.com/uk-news/commentisfree/2015/may/14/charles-letters-democratic-process> accessed 27 July 2015.

[47] Clive Bean, 'Public attitudes on the monarchy-republic issue' (1993) 28 AUSJPS 190, 192.

[48] YouGov 8th-9th March 2012.

[49] YouGov poll 24th-25th May 2012.

realms of *democracy*–thus public opinion supports a republican *democratic* ideal. A republican system could easily result in the election of a member of the Royal family as the Head of State, and could satisfy any public demand for favouring Prince William over Prince Charles.

VI. Conclusion

As a hereditary lottery, the British monarchy is entirely undemocratic and a move towards a republic would be the democratic ideal. Citizens should, at the very least, be empowered via referendum to decide on future political institutional changes. Careful consideration needs to be given to the precise question asked, as it can reveal a lack of public support for the *institution.* Ultimately we can only wait: if modernisation is to occur, it is likely to be when succession becomes a reality.

The Indian Army in Mesopotamia: Forgotten Prisoner, Forgotten Army, Forgotten War

Charles Garraway[1]

Abstract

I am not a historian, far less an authority on the First World War, but I do have a family interest in both the Indian Army and the Mesopotamia campaign, as may become apparent. Inevitably, I will need to undertake a historical review covering both India and the campaign itself, but I hope that those of you with a legal bent will be prepared to wait for the lessons that I seek to draw at the end, as they are as true today as they were then. At a dinner recently, I read from the diary of an officer in the 82nd Punjabis of the British Indian Army, who later married my aunt, and who had written an A to Z of Mesopotamia in 1916. Those who served in Iraq in the 21st century recognised many of the sentiments expressed back then, to which I will return later.

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Those of us who had the privilege of visiting the Tower of London in the latter part of last year could not help but be moved by the poignant display of poppies filling the moat, 888,246 of them, each representing a death in World War I. The 'Tower of London Remembers' website states "[e]ach poppy represented a British military fatality during the war". This is incorrect and may illustrate one of the weaknesses of the commemorative programme dealing with World War I. To many, the very mention of the words 'World War I' brings back memories of British Tommies fighting in Flanders Fields where poppies grow. But the war involved much more than that. It was truly a 'World War'. The British Empire was close to its zenith and many other European powers—on both sides—had colonies spread across

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the world, particularly in Africa and Asia. Fighting took place in both those continents and indeed, it should be recalled that there was even a battle of the Falkland Islands in 1914.

I want to talk tonight about part of that greater conflict and indeed the part played by one of those 'colonial' forces: the Indian Army. A large number of the poppies displayed in the Tower of London reflected that Army, with The Commonwealth War Graves Commission figure for Indian war dead amounting to 73,895. This included British officers, part of the Indian Army. On 5 November last year at the Tower, I stood in silence listening to the Last Post holding a photograph of my uncle, Lieutenant Wilfred Garraway of the 82nd Punjabis, scholar of Bedford School and Sword of Honour winner at the Royal Military Academy Sandhurst, who had died in Mesopotamia on 5 November 1916, 98 years before to the day, aged 20.

But the story does not begin in 1916, or even 1914. The origins of the Indian Army go back to the first colonial settlements in India and the founding of the East India Company, which received its Royal Charter in 1600. It was formed to pursue trade with the East Indies but ended up trading mainly with the Indian subcontinent, Qing Dynasty China, the North-West Frontier Province and Balochistan. In an early family connection, Sir Henry Garraway, Lord Mayor of London in 1640, was a Director of the East India Company from 1614 to 1643 and Governor for the last two years, before he lost all his positions for backing the wrong horse in the English Civil Wars.

Be that as it may, the Company established itself at Calcutta, Bombay and Madras whilst vying with its rival the Dutch East India Company. During the 17th and the first half of the 18th centuries, the Company contented itself with trading with the Mughal Empire established in the Indian sub-continent. It was not until the end of the 18th century that the Company began to interfere in regional politics. As the Mughal Empire was disintegrating, the French, latecomers to the Indian market, made a bid for power. Both sides formed private armies and sought to ensure that their favoured

princelings were in power in the various states. This was the period when Robert Clive, at the Battle of Plassey, ensured control of Bengal for the Company. Further south, the Madras Army was formed first to protect the Company's assets from the depredations of the French (who had indeed captured Madras in 1756) and then later to ensure control of the Deccan Plateau and much of Southern India. My uncle's regiment, in which my father was to serve under its later nomenclature of the 5/1st Punjab Regiment, was formed in 1759 in Madras as the 'Coast Sepoys'. These units consisted of local troops, commanded by British Company officers.

The East India Company gradually gained influence throughout India, controlling whole states, supported by their own armed forces and where necessary by regular British Army units. Leaders like Warren Hastings, first Governor-General of Bengal, wanted to maintain Indian structures, merely imposing an additional—and superior—layer of bureaucracy. However, by now, missionary zeal was influencing decisions of the Company and the early habits of Company officials adopting Indian dress and Indian customs were frowned upon. British rule was required and imposed—where necessary by military force. In the first half of the nineteenth century, led initially by Richard Wellesley, brother of the Iron Duke of Wellington (who himself served with distinction in India from 1796 to 1805), the British seized control of much of India.

This new policy of conquest, whilst militarily successful in that the Company's authority now extended over the full Indian subcontinent—from the Afghan mountains to Burma—led to an inevitable backlash. In 1857 there occurred the Indian mutiny, beginning in the Northern city of Meerut and spreading like wildfire across the Company's dominions in central India. Although the mutiny was limited in geographic scope, its effect was massive, with the British Government forced to intervene by despatching regular units from Crimea. It was the end of the Company's rule of India and indeed of the Company itself.

In 1858, the Government of India Act placed the British Crown in direct control of India and the Company itself was dissolved in 1874. The Company armies were subsumed into a new force, manned by locals but officered by the British. However these units were still split into the three "Presidency" Armies—Bengal, Madras and Bombay—that had operated under the Company. Within India, there was thus a mixture of local regiments and British Army Regiments. These latter units became known as the British Army in India to separate it from the local forces, after Lord Kitchener, Commander in Chief in India from 1902-1909, merged the three Presidency Armies into a single force: the Indian Army. These were no ceremonial forces either. The Indian Army was on almost continual operations, particularly on the North West frontier, and as such attracted the cream of the Sandhurst intake as officers. Prior to the outbreak of the First World War, the Indian Army consisted of 155,000 men rising to 573,000 by 1918. 140,000 soldiers saw active service on the Western Front in France and Belgium—90,000 in the front-line Indian Corps, and some 50,000 in auxiliary battalions. Nearly 700,000 served in the Middle East, fighting against the Turks in the Mesopotamian campaign. In total, the Indian Army won 12 Victoria Crosses, with Khudadad Khan of the 129th Duke of Connaught's Own Baluchis becoming the first Indian Victoria Cross winner on 31 October 1914, at Hollebeke in Belgium. In addition to this total, some 21,000 'Imperial Service Troops', raised from the semi-autonomous Princely States, also took part, mainly in Sinai and Palestine.

To look at the Indian Army as a whole during World War I would be a massive operation. I intend therefore to narrow the field down and look specifically at the Mesopotamia campaign. This is obviously of particular interest to me for family reasons but it is also interesting from the point of view of international law. Whilst the war on the Western Front was seen, regardless of the actors, as a European war, Mesopotamia was different. Turkey, in the form then of the Ottoman Empire, had signed the Fourth

Hague Convention of 1907 Respecting the Laws and Customs of War on Land but had not ratified it. It had, however, ratified the earlier 1899 Second Hague Convention on the Laws and Customs of War on Land and the two Declarations of 1899 on Asphyxiating Gases and Expanding Bullets, ironically all in 1907. Turkey was thus acquainted with, and indeed within the circle of countries involved in, the treaty consolidation of the laws and customs of war. This was also, if you prefer, the first oil war. The British, through the Anglo-Persian Oil Company, controlled oil production throughout the Persian Empire. Mesopotamia, modern day Iraq, controlled fitfully since the 16th century by the Ottoman Empire, obviously threatened both that control and also access routes. The Ottoman Empire had signed a secret alliance with Germany in August 1914 and was fully involved in the war by the end of that year. Whilst much of the history of World War I involving the Ottoman Empire deals with the Turkish Straits and in particular Gallipoli, Mesopotamia was no side show. It involved over half a million men with substantial casualties on both sides.

Soon after the European war had started, the 6th (Poona) Division of the British Indian Army was sent from India to Abadan. This Division consisted of a mixture of British Army units, including the Dorsets, the Norfolks and the Oxfordshire and Buckinghamshire Light Infantry, together with Indian units including the 22nd Punjabis. Hostilities commenced in November 1914 when the Division advanced up the Shatt-al-Arab waterway towards Basra. As an aside, Kuwait at this time sought to throw off the Ottoman yoke and was officially declared an "independent government under British protection". Basra was occupied on 22 November and by the close of the year, the British controlled the oil fields and much of the territory that they would later control some 90 years later under Operation Telic.

In 1915, the Ottoman forces attacked at Shaiba and were driven back. The British decided to "reinforce success" and General Townsend, in command of the 6th Indian Division, was ordered to advance up the Tigris river with the objective

to capture Kut and, if possible, to advance to Baghdad. Although the military thought that Baghdad was "a bridge too far", Lord Grey, the Foreign Secretary, and other political leaders pushed for this objective. The Turks, however, had by now realised that they had underestimated the importance of Mesopotamia and massive reinforcements began to pour into theatre. On 22 November, the forces met at the Battle of Ctesiphon, 25 miles south of Baghdad. Although the battle itself was inconclusive, the British had stretched their supply lines too far and General Townsend ordered a retreat to Kut. They were followed by the Turkish forces, who sealed off the town, beginning a siege on 2 December. Three attempts were made in December 1915 by the British to break through to Kut, but they were unsuccessful. These attempts continued into 1916 but the siege held, despite the first attempt at air supply in military history, and eventually on 29 April 1916, General Townsend surrendered. 13,164 soldiers became captives. The captives included members of the 66th and 76th Punjabis. During the siege, the 66th had suffered casualties of 37 killed, 27 dead of disease and 65 wounded from a battalion strength of 538. The 76th had suffered 54 killed, 18 dead of disease and 99 wounded from a strength of 341 across all ranks. However, 70% of the British and 50% of the Indian troops taken captive died of disease or at the hands of their Ottoman guards during that captivity. The 76th Punjabis had 102 dead and only a quarter of those who had marched into captivity with the 66th Punjabis survived. Amongst the troops attempting to relieve Kut were the 62nd Punjabis (including Major Claude Auchinleck who received the Distinguished Service Order) and the 82nd Punjabis (my uncle's regiment).

Some of the Indian prisoners of war from Kut later came to join the Ottoman Indian Volunteer Corps. These soldiers, along with those recruited from the prisoners from the European Battlefields, fought alongside Ottoman forces on a number of fronts in anticipation of the later Indian National Army under Subhas Chandra Bose that would fight against the British on behalf of the Japanese in World War II.

Indian nationalism was alive and kicking even in 1916 but the vast majority of Indian Army troops stayed loyal despite the appalling deprivations. It is fair to point out that the majority of Indian Army troops in Mesopotamia (and certainly from the Punjabi regiments) were Muslim.

The fall of Kut was a major embarrassment to the British (and Indian) Governments. Heads rolled and a new General was given command, General Frederick Stanley Maude. The British Military Headquarters in the Baghdad Green Zone in 2003/4 was subsequently named Maude House after the General. Maude was given extra reinforcements and there were vast improvements made to the logistical supply chain, including opening up the port of Basra and building a railway line north from Basra. Maude was told to forget for the moment the political imperative of Baghdad and so had time to rebuild his forces and train them. My uncle, serving with the 82nd Punjabis, was drowned in the Tigris on 5 November 1916 whilst training for operations behind enemy lines.

In December 1916, Maude began an advance up both banks of the Tigris, facing weakened Turkish opposition. Kut was retaken in February 1917 and Maude found himself on the outskirts of Baghdad by March. The city fell on 11 March and 15,000 Ottoman soldiers were taken prisoner. On the 19th March, Maude issued the Proclamation of Baghdad. Amongst other things this said:

> Our military operations have as their object the defeat of the enemy, and the driving of him from these territories. In order to complete this task, I am charged with absolute and supreme control of all regions in which British troops operate; but our armies do not come into your cities and lands as conquerors or enemies, but as liberators.

As Groucho Marx would say: "déjà vu all over again"!

The Turks retreated to Mosul but Maude wisely decided not to extend his supply lines any further. He therefore halted the advance. He himself was unable to enjoy the fruits

of victory, dying of cholera in Baghdad in November 1917; he is buried in the Baghdad War Cemetery.

This was the effective end of the Mesopotamia campaign. There was further fighting in 1918 but the emphasis had now switched to Palestine and Syria. Negotiations for an armistice began in October and the Armistice of Mudros was signed on 30 October with both parties accepting their current positions. However "perfidious Albion" struck again and despite Turkish protests, General Alexander Cobbe marched unopposed into Mosul on 14 November. The oilfields of Mosul were now in British hands! As Mesopotamia had been mainly an Indian Army campaign, it was then civil servants from India who were imported to run the new "colonial" administration. The seeds were now sown for the conflicts that were to take place almost 100 years later over the same ground.

World War I saw the start of international criminal justice, though the emphasis was again on the Western Front with the Treaty of Versailles and the subsequent Leipzig trials. In so far as the Ottoman Empire was concerned, concentration then—and now—was on the alleged genocide conducted against the Armenian population between 1915 and 1917. Few have remarked on the suffering of prisoners of war. I have already commented on the fate of many of the prisoners captured at the surrender of Kut. Their treatment was appalling. The Turks paraded the British prisoners through the streets of Baghdad and other towns in the empire, where their subjects could revile, stone and spit on the hated English. One account, written in relation to a British regiment, states:

> For the British and Indian troops the nightmare began. On 6 May 1916, the Turks began the 1,200-mile forced march of the British and Indian prisoners across the Syrian Desert from Kut. Mounted Arab and Kurdish guards prodded over 2,500 British soldiers with rifle butts and whips on the long death march. Starvation, thirst, disease,

and exhaustion thinned out the British column, and only 837 soldiers survived the march and the years in captivity. Turkish treatment of the Indian troops was better, as the Ottomans attempted to attract fellow Muslims to their cause. During the siege, the Turks had attempted to inspire mutiny among the Indian forces in Kut by leaving bundles of propaganda pamphlets along the barbed-wire front lines calling on the Indians to murder their British officers and join the Sultan's forces. While the British attempted to intercept these pamphlets, some did get through and led to a number of desertions. But when the garrison fell, 9,300 Indian troops and non-combatants joined the death march. In general, the Turks did not follow Western rules and regulations in dealing with war prisoners. The Western press described in detail the atrocities faced by Allied (especially British) POWs. Captured soldiers were herded like sheep by mounted Arab troopers, who freely used sticks and whips to keep stragglers marching. Food was very scarce, and the POWs rarely had access to fresh water. The desert climate where most of the campaigning took place had a debilitating impact on prisoners, especially the heat and dust. Often Turkish troops and guards relieved captives of their water bottles, boots, and uniforms, leaving the POWs in an assortment of rags—Ottoman officers exercised very little control over their men. When prisoners collapsed exhausted, starved, or ill, many were left to fend for themselves in hovels. These mud-walled 'shelters' were often filled with vermin, and soldiers had to resort to begging from passing Arabs for scraps of food. Many of these invalids were robbed, stripped of their last clothing, and left to die. After marching across the desert, the remaining POWs entered prison camps where

> they received insufficient food and faced epidemics of dysentery, cholera, and malaria. Many prisoners were simply incarcerated in regular jails with common criminals, without regard for rank or status. Prisoners sat in bare cells filled with vermin, few washing facilities, and no physical exercise.

The Regimental History of the 1st Punjab Regiment in describing the fate of members of the 76th Punjabis states:

> On the surrender of Kut al Amara, the 76th proceeded by steamer to the Turkish camp at Shumran, where it bivouacked on the bank of the river. The men were in the last stages of exhaustion, and more than fifty per cent were suffering from an acute form of diarrhoea. Very little food was available in this camp, and what there was consisted almost entirely of hard Turkish emergency biscuits. Many men died of starvation or enteritis. Twenty-three men were passed unfit to march by the Turkish doctors [their fate is not recorded]. The officers were separated from the men, and the Battalion marched off for Baghdad on the 6th [May] with the remainder of the Indian prisoners of war. Many terrible exhausting marches were to follow. Officers and men, split in separate parties, were moved from camp to camp... Of the rank and file 101 died in captivity. Many of those who returned at the end of the war were unfit for further service. Some had been injured in accidents with explosives while working on enemy fortifications in the Taurus Mountains.

Public Interest Lawyers would have a field day!

The emphasis of International humanitarian law today is on civilians, but we should not forget that the genesis of Geneva law lay in the protection of sick and wounded combatants on the battlefield of Solferino, subsequently spreading through prisoners of war to civilians. The suffering of the prisoners of Kut shows that, despite the efforts of the international community to alleviate such suffering by

regulation prior to World War I, that regulation was of limited effect outside the Western Front. Similar privations were suffered by prisoners in the Far East in World War II where Japan, although party to the 1899 and 1907 Hague Conventions on the Laws and Customs of War on Land, was not party to the 1929 Geneva Convention on Prisoners of War. The fate of prisoners of war and detainees continues to be of concern, whether in the wars in the Former Yugoslavia or subsequently in Iraq and Afghanistan. I'm not sure that I would like to be in the shoes of any Coalition pilot captured by Islamic State, particularly after the fate of the unfortunate Jordanian captive, or of any prisoner taken in the various conflicts in Africa.

Whilst we rightly castigate States for their failure to protect civilians, let us not forget that prisoners are also victims of war. How we handle prisoners may well be critical in winning any subsequent peace. The fate of the 15,000 Ottoman prisoners who fell into the hands of General Maude on the fall of Bagdad in 1917 is not recorded. That perhaps is good news and it may be that the inference that they were treated correctly contributed to the subsequent Western orientation of the Turkish governments that took over from the Ottoman Empire.We have seen the effect on the Muslim world of the treatment of detainees at Guantanamo and Bagram in Afghanistan.

Dealing with prisoners is not "sexy" in military terms. The Commander of the Prisoner of War Guard Force in the 1991 Iraq War would have much preferred his three battalions to have an active fighting role. But his role, and that of his force, was absolutely crucial to the overall success of the campaign. Had Iraqi prisoners been mistreated, the Coalition would have fallen apart and the Arab world would have been in uproar.

We forget at our peril that all wars end. Winning a war is the easy part; it is winning the subsequent peace that is difficult. How one conducts the war, and in particular, how one treats one's prisoners, is a critical element of winning the peace.

Criminal Legal Aid in the Balance

Franklin Sinclair[1]

Abstract

Criminal Practitioners have withstood a barrage of fee cuts and changes to the structure of payments over a prolonged period of over 7 years. This article will look at whether it is possible, under both the current system and with the latest Government proposals, to maintain a network of criminal defence firms providing nationwide coverage whilst complying with their obligations to the other partners of the Criminal Justice System and still being able to provide a reasonable quality of service to their clients. The writer has been at the coal face in Criminal defence for over 30 years.

I. Introduction

There is little doubt that, if a new legal aid regime for criminal cases were to be developed from a blank piece of paper, the result would bear no resemblance to the dysfunctional state we now find ourselves struggling in. The Duty Solicitor scheme must bear a large part of the responsibility for this. Rotas of Duty Solicitors are drawn up in a local area and anybody qualified is able to go on a rota if they are attached to a firm. This has led to firms paying premiums for Duty Solicitors that they can ill afford in order to get more slots on the rota and hence more cases. This has led to widespread abuse with a new persona the *'Ghost Duty Solicitor'* being created where Duty Solicitors who may have retired, are too ill to work or even live abroad still have a slot on the rota. Neither the Government nor the Legal Aid Agency has taken any action to curtail this. The first thing that needs to be done to help firms is to put all the slots into the names of firms rather than specific Duty Solicitors as it is now. This is easily achievable in practice and should be based on the percentage of cases completed at police stations

[1] Senior Partner at Tuckers Solicitors; was President of Manchester Law Society in 2007 and Chairman of CLSA 1999 – 2001.

and Magistrates' Court work the firm has covered in the preceding year.

II. The current system

Not only have legal aid fees been systematically cut in a direct manner but the payment structure for cases has also changed from billing on an hourly rate basis for work done to a fixed fee payment system regardless of the time spent conducting the case. Inevitably, this has resulted in a dumbing down of the quality of defence work. How can a fixed fee be considered fair for police station attendances if there is no real 'escape' clause to pay for attending on the most serious of indictable cases? To put it brutally, the same fixed fee is paid, of approximately £160, for an attendance of an hour at the police station on a minor Theft offence as it is for an attendance for say 6 hours on a Murder investigation. Although the Legal Services Commission defend that it is a *"swings and roundabouts"* system, there is a perceived nonsense upon practitioners about these payments. However, the differences are more acute when one considers cases heard in the Crown Court. In this scenario the defence are paid on a multiplier of the category of the case (for instance, its level of seriousness) and the number of papers of evidence served by the prosecution upon the defence. There is no actual requirement to do any work whatsoever other than to fulfil basic standards of client care. This has led to the position where the firms who tend to prepare cases properly and thoroughly undertake in some cases hundreds of hours of preparatory work whilst other firms, often those with few caseworkers employed, simply send the papers to Counsel who, in their desperation for work, are happy to do most of the preparation and the entire advocacy. This crazy system encourages firms to do as little as possible to be more profitable.

The current coalition Government recognised immediately that the criminal defence market needed consolidation although for only one reason; they wanted to impose more legal aid cuts and recognised that any more cuts

could only be delivered if there was significant consolidation of the market[2]. The very chequered history of how they set about achieving this has caused huge uncertainty to the profession. Indeed, this for me is one of the biggest problems; constant changes and still no end in sight. They first proposed *Price Competitive Tendering* in April 2013 with fewer than 500 firms to be granted a contract (there are 1600 firms presently doing criminal legal aid work) and client choice of representation abolished by a simple alphabetical allocation process so the solicitor an accused person received would be unknown to him and could be 30 miles away from his home area. Such was the universal hostility to this plan that it was withdrawn and replaced with the current proposal that was initially consulted on in Spring 2014. This has been dogged by legal challenges from the Law Society and various representative bodies[3]culminating in a final defeat on March 25th this year in the Court of Appeal. Despite the Labour party stating that they would abandon this scheme if they win the general election, Lord Chancellor Grayling (aka Failing Grayling!) opened the tender process on Friday 27th March, the last day possible before election purdah. The position at the time of writing this article is that firms have to expend huge amounts of time putting together tenders, which may never come to fruition. The proposed new scheme provides for an unlimited number of Own Client Contracts and only 527 Duty Provider Contracts, which are the subject of the tender. I do not propose to delve into the myriad of complexities of these proposals or the huge practical problems associated with them. The key point in their introduction is the rationale that the Government is using to impose a 17.5% fee cut across the board[4]. The simple explanation proffered is that if firms receive larger volumes

[2] See, Transforming Legal Aid: The next steps September (2013), 3.2.

[3] For instance the Criminal Law Solicitors Association and London Criminal Courts Solicitors Association.

[4] It should be noted that an 8.75% fee reduction was already introduced in March 2014.

of work then they can achieve economies of scale and work on lower prices. However, the proposals will result in some firms receiving less work (perversely as these firms have a large share of work in their area already and the new Contracts provide for equal shares for each firm chosen) and the price is already so low it is uncertain whether there is any leeway to lower it further.

The present position is that there are too many firms chasing too little work at too low a price (noteworthy that crime rates have fallen for the last 3 consecutive years). The proposals, in my view, do not go far enough. They discriminate against smaller firms who are unlikely to succeed in a tender process but also against the larger firms who will not benefit from the *'Economies of Scale'* that is the justification for the cut. As Senior Partner of the largest criminal law firm in England, Tuckers Solicitors, we will be faced with less Duty work than we have now whilst being forced to operate in a much wider area[5] at a further decrease in price. This is unsustainable. The present system has favoured small firms with a low cost base. In truth, those firms contribute very little to the Criminal Justice System, they very rarely have any Trainee Solicitors and they have not embraced new technology being used by the Courts and prosecuting authorities. The larger firms have to withstand not only cuts to their own fees but also cuts to advocates fees as most of these firms employ Higher Court Advocates.

III. The Future?

So is there a solution? I believe so. The Government has to decide whether they want a quality supplier base with infrastructures, investment in IT and providers who can employ the best lawyers or, whether they want to continue with the present dysfunctional system with far too many firms doing the work and as a result hardly any firms being

[5] Greater Manchester rather than Central Manchester.

profitable and therefore failing to provide a sustainable future.

If it desires the former then they must act now and bring in a radical scheme with far fewer firms being given a contract. They have attempted to do this with the latest tender but it has many flaws, not least that it can't work in the rural areas and in the urban areas there is a possibility that it will become a lottery especially in Greater London with 32 areas to cover and each area having an average of 7 contracts. There is nothing to stop firms bidding in every area.

The required changes can be done fairly by setting much higher standards for the awarding of contracts to do Criminal Legal aid work. If they do not, then there is a real danger that the firms they need will simply give up and what will remain will be thousands of solicitors working from their front room or their motor vehicle. With only high quality firms remaining perhaps we can see a better future for Law Graduates who want to work in this area but have so far been deterred from doing so by the unattractive salaries and lack of any proper career structure.

Case comments

Yam Seng v International Trade Corporation – An Interim Report on the Implied Duty of Good Faith

Elizabeth Robertson[1]

> "I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent it still persists, is misplaced." Leggatt J, in Yam Seng Pte Limited v International Trade Corporation Limited.[2]

In *Yam Seng*, Leggatt J found that a duty of good faith could be implied into contracts as a matter of English law. Indeed, the judge's reasoning suggests that such a duty should be implied into many if not all commercial contracts.

The case related to a distribution agreement for Manchester United branded fragrances, deodorants and other toiletries pursuant to which International Trade Corporation ('ITC') granted certain distribution rights to Yam Seng, primarily in relation to 42 duty-free centres across Asia. Following a breakdown in the relationship, Yam Seng terminated the agreement and brought breach of contract and misrepresentation claims in the English High Court.

Yam Seng claimed, amongst other things, that ITC had breached an implied term that the parties would deal with each other in good faith. Yam Seng claimed that ITC had done so, by providing Yam Seng with false information on which ITC knew Yam Seng would rely in marketing the products and by authorising sales by third parties in the domestic markets of territories covered by the distribution agreement at a lower retail price than the agreed duty-free retail price.

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[1] Note: These comments are the author's own, and are not to be taken as representing the views of Jones Day.

[2] [2013] EWHC 111.

Less than a month after it was handed down, Leggatt J's decision in *Yam Seng* was referred to in the Court of Appeal decision in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd.*[3] While the Court of Appeal cited *Yam Seng*, the Court of Appeal did not base its decision on the principles stated in *Yam Seng* and did not imply a duty of good faith into the contract it was considering. Therefore, while the Court of Appeal took note of the decision in *Yam Seng*, any indication that it approved the broad principle stated in *Yam Seng* should be treated with caution.

In the near term, the decision in *Yam Seng* seems to have three legacies: First, it is now common to make an argument in contract dispute cases that one of the parties breached an implied duty of good faith. This can be seen in the wide variety of contract disputes, in which *Yam Seng* has been cited, from distribution agreements to ISDA agreements, to building services agreements, to arbitration agreements, to franchise agreements.[4]

Second, the courts have been at pains to emphasize that the implication of an implied duty of good faith into a contract is subject to the same rules as the implication of any

[3] [2013] EWCA Civ 200.

[4] See Greenclose Ltd v National Westminster Bank Plc [2014] EWHC 1156 (Ch) (ISDA derivatives contract) ; Bristol Groundschool Ltd v Intelligent Data Capture Ltd & Ors [2014] EWHC 2145 (Ch) (development agreement); Carewatch Care Services Ltd v Focus Caring Services Ltd & Ors [2014] EWHC 2313 (Ch) (franchise agreement); Myers & Anor v Kestrel Acquisitions Ltd & Ors [2015] EWHC 916 (Ch) (loan notes); Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm) (arbitation agreement); Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) & Anor v Boots UK Ltd [2013] EWHC 3251 (Pat) (distribution arrangement); Camurat v Thurrock Borough Council [2014] EWHC 2482 (QB) (employment relationship/compromise agreement); Acer Investment Management Ltd & Anor v The Mansion Group Ltd [2014] EWHC 3011 (QB) (financial services agency relationship); D&G Cars Ltd v Essex Police Authority [2015] EWHC 226 (QB) (vehicle recovery contract); TSG Building Services Plc v South Anglia Housing Ltd [2013] EWHC 1151 (TCC) (building services contract).

other term into a contract. *Yam Seng* might have been read as indicating that the implied duty of good faith existed as a default duty in all commercial agreements. Subsequent cases indicate that a party must establish the existence of the duty in each particular case. Almost all cases citing *Yam Seng* refer to the Privy Council's judgment in *Attorney General of Belize v Belize Telecom Ltd.*[5] This is the base of a line of cases that confirms that a contractual term will only be implied if it is necessary to do so in order to make the contract work. While the courts may not be hostile to the implication of a duty of good faith, they have not made the benchmark for implication any easier for this term than it is for any other contractual term.

An interesting example of this is the decision of Henderson J in *Carewatch Care Services Ltd v Focus Caring Services Ltd & Ors.*[6] This case concerned franchise arrangements for the operation of care homes. In the early 2000s, the business model of Carewatch was to use a franchise model for the operation of its care home business. It then changed its business model, moving gradually to be a direct operator of homes rather than a franchisor, in many cases by allowing existing franchise agreements to expire without renewal. In this particular case, Carewatch sought to terminate the franchise contracts held by the defendants for breach because the defendants had operated a competing care home. This was a breach of an express term of the historic franchise agreements. The defendants argued that Carewatch was in breach of its duty of good faith to them because by expanding its direct ownership of homes and competing against its franchisees, Carewatch had diminished the investment the defendants had made in their franchises. The franchise agreements contained no prohibition on Carewatch opening up its own homes or competing with its franchisees.

The franchisees might have thought the court would look

[5] [2009] UK PC 10

[6] 2014] EWHC 2313 (Ch).

to find the conduct of Carewatch as being commercially unacceptable by reasonable and honest people, which was suggested by Legatt J as an indicia of the breach of the duty of good faith in *Yam Seng*. Instead, the court treated the franchisees as arguing that the contract included an implied provision prohibiting Carewatch from operating against them. In considering whether such a term should be implied, Henderson J wrote:

> "I am wholly unpersuaded that any such obligations would pass the stringent test of necessity, and if pushed to their logical conclusion they would seem to entail the extreme result that Carewatch is obliged either to remain in franchising indefinitely or to give reasonable notice (of unspecified duration) if it wishes to scale down its franchise business in any material respect. It seems clear to me that any obligation of that nature would have to be stipulated expressly, and that in the absence of such stipulation Carewatch is free to have regard to its own commercial interests in deciding how to run its franchisee business."

This case is a reminder that implying a duty of good faith can have a fundamental impact on how the contractual relationship operates, and it appears the courts remain cautious about reworking the agreement of the parties unless it is necessary to do so. It may also be an indication that any party seeking to imply a duty of good faith into the contractual relationship must itself come to the table with clean hands.

The third legacy is that litigants should be careful about confusing the implied duty of good faith talked about in *Yam Seng* with the similar sounding established fiduciary duty of good faith and fair dealing. The court's decision in *Acer Investment Management Ltd & Anor v The Mansion Group Ltd* [7](financial services agency relationship) reminded

[7] [2014] EWHC 3011 (QB).

contract parties that these duties are very different. Laing J noted that all fiduciaries are subject to a prohibition on profiting from their position. This prohibition does not apply in the context of standard commercial agreements, where both parties are each seeking to make commercial gain. In other words, consistent with *Carewatch*, the implied duty of good faith does not mean that parties are restricted from operating for their own commercial advantage, even though this may cause significant disadvantage to the other party.

Bananas and the European Commission: A Comment on Case C-286/13 P Dole Food Company Inc., and Dole Fresh Fruit Europe v European Commission

Sonam Cheema

I. Introduction

One of the first things students of European competition law learn is the bizarre role bananas have had in the development of competition law—*United Brands v Commission* established the banana as a "privileged fruit"[1], whose unique and distinctive features differentiated it from other fruit markets[2] and allowed it to "satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick".[3] Although United Brands was decided in 1978, bananas are once again at the forefront of European competition law, with the Court of Justice deciding Case C-286/13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v European Commission* in March 2015 where it held that pre-pricing communications between Dole Food Company Inc., and Dole Fresh Fruit Europe's (together, 'Dole'[4]) and its competitors, violated Article 101(1) TFEU. In this case, the exchange of information, which allowed Europe's largest banana traders to reduce uncertainty through collusive coordination, was upheld to be a restriction of competition by object.

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[1] Case 27/76 *United Brands v Commission* [1978] ECR 207 paragraph 25.

[2] ibid, paragraph 22.

[3] Case 27/76 *United Brands v Commission* [1978] ECR 207 paragraph 31.

[4] Dole Food is an American producer of fresh fruit and vegetables, pre-packed and frozen fruits, while Dole Fresh Fruit Europe (formerly known as Dole Germany OHG) is its subsidiary.

II. Background

Case C-286/13 P was an appeal of the General Court's judgment in *Dole Food and Dole Germany v Commission*, where the Court dismissed Dole's application to annul Commission Decision C(2008) 5955 of 15 October 2008, which found that pre-pricing communications between banana traders where pricing strategies were discussed entailed a concerted practice under Article 101(1) TFEU (ex Article 81 EC).[5]

In May 2005, Chiquita Brands International Inc., was granted conditional immunity from fines under the Commission's Leniency Notice, which allows participant undertakings who report and provide sufficient information on illegal cartel activity to the Commission to receive full or partial immunity from any resulting sanctions, following an application in April. In 2007, the Commission sent a statement of objections to the undertakings it investigated following the application, including Chiquita, Fresh Del Monte Produce Inc., Internationale Fruchtimport Gesellschaft Weichert & Co. KG, and Dole, and the following year, it delivered it adopted Commission Decision C(2008) 5955. The Decision found that the undertakings addressed in the statement of objections participated in a concerted practice (a violation of Article 101(1) TFEU) by coordinating quotation prices for bananas sold in several Member States of the European Union in northern Europe, including the Netherlands and Germany between 1 January 2000 and 31 December 2002.

The Court, in its judgment, noted that the "banana business distinguishes three levels of banana brands: premium Chiquita brand bananas, second-tier bananas (Dole and Del Monte brands) and third-tier bananas, which include a number of other banana brands".[6] Chiquita, Dole and Weichert would set and announce their quotation prices

[5] Case COMP/39188 – Bananas.

[6] Case C-286-13 P *Dole Food Company Inc v Commission* paragraph 9.

every Thursday morning, with one price for 'green' bananas and an additional surcharge for ripe 'yellow' bananas. The actual prices that were paid by retailers and distributors were either the result of negotiations that would take place weekly on Thursday afternoons or supply contracts with either fixed prices or prices that were linked to other quotation prices.[7] In its Decision, the Commission determined that on Wednesdays during the material time the recipient undertakings not only discussed banana quotation price-setting factors for the forthcoming week in pre-pricing communications, but that they also either disclosed price trends or gave indications of their prices to one another.[8] Specifically, Dole engaged in bilateral communications with Chiquita and Weichert, but Chiquita was "aware or at least foresaw that Dole Foods had pre-pricing communications with Weichert"[9], with the intention that these communications reduced uncertainty for quotation prices on Thursday mornings–in other words, they reduced undistorted competition between the undertakings. To monitor and enforce compliance with their pre-pricing communications (and reinforce cooperation, a necessity of any operational cartel), the undertakings would share their quotation prices after they had been set on Thursdays with each other.

The Commission found that these prices served as "market signals"[10] for the actual prices that would be obtained on Thursdays: both Dole and Chiquita admitted that they considered the information exchanged amongst their competitors when determining their market conduct. The

[7] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission* paragraph 13. The Court notes that from mid-2002, 'the Aldi price' increasingly began to be used as an indicator for pricing. The retail chain would receive offers from its suppliers every Thursday morning, with negotiations leading to 'the Aldi price', the price Aldi paid its suppliers, to be set by 2 PM every Thursday afternoon.

[8] ibid, paragraph 14.

[9] ibid, paragraph 15.

[10] ibid, paragraph 18.

Commission concluded that the bilateral communications between Dole and its competitors influenced pricing to a degree that amounted to a concerted practice, and that the collusion, on the whole, amounted to "a single and continuous infringement having as its object the restriction of competition within the European community within the meaning of Article 81 EC"[11], which had an appreciable effect on trade between several northern European Member States (a substantial part of the EU).

Chiquita and Dole were held responsible for the infringement as a whole, while Weichert was responsible only for communicating with Dole. The Commission subsequently reduced the fine by 60% for all of the undertakings involved, while Chiquita was granted immunity under the Leniency Notice. Dole was fined €45.6 million for its actions. In 2008, Dole brought an action to firstly annul the Commission Decision and secondly, to annul or reduce the fines imposed, which the General Court dismissed; the Court of Justice similarly dismissed Dole's subsequent appeal in 2015.

III. The Decision

Dole challenged the General Court's decision to uphold the Commission Decision, and on 19 March 2015, the Second Chamber upheld the General Court's decision, finding that the Court had not erred in its decision. Dole raised four grounds in its appeal, arguing that negligible discussions on pricing trends did not have the capacity to reduce uncertainty and so could not, inter alia, automatically harm competition by their very nature.

The third ground specifically raised challenges to the exchange of information as a restriction of competition by object. Dole argued that the Commission failed to adequately address the parameters for information exchanges where they constitute a restriction of competition by object, and that the

[11] ibid, paragraph 21.

General Court erred in allowing this. Dole argued that the Commission Decision was too general in its assessment of the pre-pricing communications and did not detail the activities constituting the infringement, and that this not only made the Commission's judgment difficult to assess but that it also made it difficult to determine future market activity with certainty. It was argued that the General Court had erred by concluding that the Commission set out the infringement with precision in the absence of an exhaustive list, and thus "failed to have regard to the fact that not all discussions concerning factors that might be relevant to price-setting are sufficiently deleterious to merit classification as a restriction of competition by object".[12] Dole also indicated there was inconsistency regarding the substance of exchanges, as the Commission assessed that exchanges of information relating to volume were part of the infringement while the General Court did not. It was also argued that it remained unclear whether general industry exchanges also formed the infringement as the General Court ignored this subject.

The Court noted that case law has established that the statement of reasons must unequivocally disclose the Commission's reasoning to its conclusions with the intent that the affected bodies understand it so that they can ascertain whether any errors exist to challenge the validity of that decision as per *Ziegler v Commission* C-439/11 P.[13] However, this does not mean that every individual legal point and fact must be addressed, but rather, that the reasoning is appropriate under the rules of Article 253 EC. As such, the General Court did not err in law in deciding that the Commission had rightly discharged its duty to state reasons, as they "had identified the improper conduct with sufficient precision"[14], and that the Commission was not required

[12] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission,* paragraph 87.

[13] ibid, paragraph 93.

[14] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission*, paragraph 99.

under Article 253 EC to provide an "exhaustive list of factors that could not form the subject-matter of an exchange of information between competitors".[15]

The final part of Dole's third ground of appeal specifically argued that the General Court erred in finding the subject-matter of the pre-pricing communications harmful as, Dole argued, the information exchanged could not be "regarded as capable of removing uncertainty as to the intended conduct of the participating undertakings as regards the setting of actual prices".[16] Dole argued this was because the communications were between employees who ultimately had no authority to set prices and as they concerned quotation prices, they were not capable of removing uncertainty regarding the actual prices (Dole noted that the other participants agreed that actual prices were measurably removed from the quotation prices). It was also alleged that the General Court incorrectly placed the burden of proving the incapacity of the exchange of information to remove uncertainty on Dole, when it was for the Commission to prove that it was unlawful; Dole argued that settled case-law suggested "that the mere fact that an exchange of information might have a certain influence on prices is not sufficient to establish the existence of a restriction of competition by object".[17] Dole argued that the General Court, in doing so by relying on statements made by another participant, failed to uphold the principle of the presumption of innocence. With regard to the pre-pricing communications themselves, Dole contended that the General Court had itself "concluded that the exchanges concerning the industry in general were innocuous, that the contested decision did not include information on volume as part of the infringement and that the General Court took the view that weather conditions constituted public information that could be obtained from

[15] ibid, paragraph 100.
[16] ibid, paragraph 105.
[17] ibid, paragraph 107.

other sources".[18] Dole proposed that general communications in the industry of subject matter like the weather could not be a restriction of competition by object, as they simply were not capable of reducing uncertainty regarding prices.

The Court recalled that Article 101(1) TFEU required "as [its] object or effect the prevent, restriction or distortion of competition in the internal market"[19], and that its own case-law established that "certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects"[20] as per *CB v Commission* C-67/13 P. According to the Court, negative effects are so likely with some types of coordination (such as horizontal price-fixing), that "it may be considered redundant, for the purposes of applying [Article 101(1) TFEU] to prove that they have actual effects on the market"[21]; instead, "experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers".[22] Case-law establishes that a concerted practice exists where the level of coordination between undertakings violates the "notion inherent in the Treaty provision [that] each economic operator must determine independently the policy which he intends to adopt on the common market"[23] as per *T-Mobile Netherlands and Others* C8/08, which, the Court recalled, established that information exchanges between competitors are likely incompatible with European competition law where

[18] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission*, paragraph 109.
[19] ibid, paragraph 112.
[20] ibid, paragraph 113.
[21] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission,* paragraph 115.
[22] ibid.
[23] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission,* paragraph 119.

uncertainty is reduced, particularly those regarding the "timing, extent and details of the modifications to be adopted... in their conduct on the market must be regarded as pursuing an anticompetitive object".[24] In fact, *T-Mobile* establishes that "a concerted practice may have an anticompetitive object even though there is no direct connection between that practice and consumer prices".[25]

The Court further noted that *T-Mobile* established that concerted practices carry a presumption that participants consider the information that has been exchanged when "determining their conduct on the market [and] in particular, the Court has concluded that such a concerted practice is caught by [Article 101(1) TFEU], even in the absence of anticompetitive effects on the market".[26] Where Dole was concerned, the Advocate General, in her Opinion, concluded that the General Court's findings established that the bilateral pre-pricing communications between the undertakings in the cartel did disclose quotation prices and price trends (Dole did not contest this), which allowed for the development of actual prices to be inferred and, contrary to Dole's allegations, there were connections between quotation and actual prices in several instances.

Importantly, the General Court's findings relied on statements by Dole and other participants, which Dole did not contest, and while the employees involved may not ultimately have set prices, the General Court's findings established that they were involved with internal meetings that established quotation and actual prices. The Court concluded that the evidence demonstrated the presumption that participants do consider the information exchanged with their competitors when determining their conduct, and that Dole's allegations the General Court failed to uphold the principle of the presumption of innocence or incorrectly

[24] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission*, paragraph 122.
[25] ibid, paragraph 123.
[26] ibid, paragraph 127.

reversed the burden were thus unfounded. The General Court, therefore, did not err in deciding that the Commission was correct to conclude that "as they made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors, the pre-pricing communications had the object of creating conditions of competition that do not correspond to the normal conditions on the market and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of [Article 101(1) TFEU]".[27]

IV. Comment

The Court's decision initially raised concerns that the status of information exchanges in competition law 'had gone bananas' due to the 'innocuous' subject-matter of the pre-pricing communications between Dole and its competitors. However, this judgment follows the Commission's approach of protecting the structure of the market itself to produce healthy competition. Some argue that the broadness of the decision reduces certainty for businesses as they do not know what specific subject-matter is liable to raise competition concerns, but the Court, more than anything, has delivered a clear position on communications that could reduce uncertainty, even if they only vaguely relate to actual pricing: they are incompatible with European competition law.

The Court confirmed the view established in *T-Mobile* that an exchange can raise concerns under Article 101(1) TFEU where the subject-matter allows undertakings the ability to reduce or remove uncertainty with regard to their conduct on the marketplace, and that some types of exchanges, by the Court's experience, harm competition by their very nature such that their negative effects are presumable without further examination, whether they materialise or not. This is in line with the Commission's preventative strategy, whereby the protection of the market

[27] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission*, paragraph 134.

structure itself prevents harmful activity—a generalised approach to exchanges may be the easiest way to pre-empt the possibility of collusive information sharing occurring. However, the decision that the Commission was not obliged to provide an exhaustive list regarding subject-matter creates a degree of uncertainty for businesses, wherein seemingly any vague communication concerning pricing could amount to collusive coordination, whether this is their intention or not. For undertakings the result is that industry communications, as 'innocuous'—to borrow the words of the Court—as they may be, have the potential to raise flags for the Commission, and to manage risk, the best strategy is to avoid communications that could reduce competitive uncertainty, inter alia, amongst competitors, whether they relate to pricing strategies or other factors.

This does not mean that undertakings are "[deprived]... of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors"[28], but rather, that any contact that "may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question"[29] is prohibited. *Dole* rightly confirms that the spirit of the competition rules is that economic operators must independently determine their individual conduct on the marketplace, and that the best way to achieve the EU's highly-competitive social market economy is through little to no interaction between competitors beyond the Commission's own exemptions for collaboration promoting consumer welfare.

As per *T-Mobile*, it is unnecessary for any connection to exist between the exchange of information and actual conduct (*immediate* consumer welfare is not the priority, but

[28] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission* paragraph 120.

[29] ibid.

rather, preserving the market structure to enhance consumer welfare), and while intention may be considered, it remains that exchanges that *could* reduce uncertainty are sufficient to violate the rules—any undertaking in a similar situation would face an uphill battle in light of the presumption of harmful effects to prove that their communications are not capable of restricting competition by their nature. Unfortunately for Dole, the Court's evidence demonstrated direct connections between quotation prices and actual prices for several transactions.

Dole was unequivocally found to be engaging in communications that provided their competitors with as much detail as was necessary to predict their pricing strategy short of revealing their actual prices (as they were negotiated to a degree). Nonetheless, the subject-matter allowed firms to predict one another's eventual conduct, and this was sufficient to reduce uncertainty as they served no other purpose than creating a base-line price. Consumers thus negotiated under a handicap, as any form of competition between their suppliers was effectively reduced, and rather than negotiate for the best price, as one would in a competitive market, consumers were forced to negotiate a price that could not shift greatly from the baseline quotation price. Not only did Dole and its competitors act in a way that harmed consumer welfare, they also created a classic cartel system whereby they could monitor one another's eventual conduct by sharing their quotes to ensure they each cooperated with the pricing trajectory that could be extrapolated from their communications. Unfortunately for Dole, they also could not avoid the eventual outcome of such a cartel, particularly in the context of the Commission's leniency regime, and they were ultimately betrayed by their top-tier competitor, Chiquita, who got the best deal possible: immunity from all sanctions.

As an aside, the success of the contested Decision also confirms the force of the Commission's leniency approach, whereby reporting cartel activity, even if you are a participant, pays off with immunity from fines as was the case with

Chiquita. However, this raises inherent problems with the leniency approach and high recidivism within the EU for Article 101(1) TFEU infringements. Undertakings have the ability to participate within cartels that lead to their best financial outcome short of a monopoly, as long as they, when the time is right, are the first ones to disclose this activity to the Commission; in fact, they do not even need to be the first ones, but simply must not be the last ones. While the Commission considers repeat offending an aggravating circumstance when calculating fines[30], their maximum fine for any single undertaking is limited to 10% of that firm's annual turnover: for many undertakings, playing the odds of detection greatly minimises the punishment that figure is meant to represent. In *Dole*, Dole, Del Monte and Weichert were fined a total of €60.3 million; considering that the retail value of the banana market in the affected Member States totalled €2.5 billion in 2002, it is difficult to understand the fine's punitive value. Had Chiquita not gained immunity, its fine would have totalled €83.2 million.

Dole also reiterated several procedural issues. As discussed earlier, the General Court is not obligated to "respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise"[31], and there is no obligation to produce an exhaustive list of what subject-matter qualifies as giving rise to a concerted practice.[32] The Court may also consider the intention of the parties, but it is not a prerequisite in determining restrictive coordination under Article 101(1) TFEU[33]; similarly, the Article is not restricted to cases where

[30] This strategy, however, has not achieved the intended effect of eliminating repeat offending, with several cartels fined in the last decade by the Commission often involving the same players (e.g., ENI, Akzo Nobel, Saint Gobain and Arkema, among others).

[31] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission,* paragraph 83.

[32] Case C-286-13 P *Dole Food Company Inc., and Dole Fresh Fruit Europe v Commission*, paragraph 117.

[33] ibid, paragraph 118.

direct effects are demonstrated, rather, violations can occur where no direct connection is observed between the information shared and eventual prices paid by consumers.[34] *Dole* also suggests there is no prerequisite level of authority for the actions of employees engaging in uncertainty-reducing information sharing to be attributable to the undertaking. In *Dole*, the employees who participated in the pre-pricing communications might not have had the 'ultimate authority' to set prices, but they participated within Dole's internal pricing meetings, which sufficed for the Court.

Ultimately, *Dole* confirms the view that the European competition rules are not limited to protecting immediate harm to consumer welfare, but rather work to preserve the integrity of the EU's highly competitive social market economy: protecting the structure of a competitive marketplace is the most efficient way to promote consumer welfare. As such, direct connections between the information that was shared and the prices paid by consumers were considered to be unnecessary by the Court—the fact that a communication could reduce uncertainty sufficed for it to have as its object the restriction of competition[35]. Through *Dole* the Commission and the Court's approach to Article 101(1) TFEU infringements can be seen to be the promotion of an inherent objective of the competition rules—that "each economic operator must determine independently the policy which he intends to adopt on the common market".[36] While businesses may argue their ability to communicate within their industries with certainty is greatly reduced, *Dole* ultimately clearly confirms that there is no room for communications that exist to coordinate certainty between competitors. After all, as Adam Smith said, "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against

[34] ibid, paragraph 123.
[35] ibid, paragraph 125.
[36] ibid, paragraph 119.

the public, or in some contrivance to raise prices"[37], and the banana market, as privileged as it is within European competition law, is no exception.

[37] Adam Smith, *The Wealth of Nations*: Book IV, chapter VIII (England, Penguin 1982) 145.