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Preface from the Head of the University of Manchester Law School

I am pleased to write a preface for the 8th edition of Manchester Review of Law, Crime and Ethics. The review has steadily emerged as a forum for great intellectual exchanges with limitless geographical boundary. This is thanks to the determination and ingenuity of the editor in chief of the review and all those students who have invested in it over the last eight years. To all of them and the contributors, I say a big congratulations.

This eighth edition is coming at a time when the University of Manchester Law School has merged with the School of Social Sciences (SOSS) to create an even more vibrant academic and student's community. Surely, the larger SOSS only strengthens the case for a more robust and academically minded journal like Manchester Review of Law, Crime and Ethics.

The contributions in this 8th edition demonstrates the interest in our community to explore key legal issues of our time. As a top Russell Group Law School that carries out world-leading research from a plurality of perspective, our core intellectual agenda is how to employ law in its different facets to respond to social, economics and political challenges both nationally and internationally. Whether in the field of environmental law, medical law, European Union law, criminal law, constitutional law, international law, contract law, our underlining agenda is on how to address legal problems with global importance. I am therefore, pleased to acknowledge that the different topics covered in this edition is also a reflection of the intellectual agenda of the University of Manchester Law School. I hope the

readers will find this volume as stimulating as the previous ones. I look forward to reading more volumes in years to come.

Professor Yenkong Ngangjoh-Hodu,

October 2019

Preface from the Editor-in-Chief

It is a pleasure to introduce Volume XIII of the Manchester Review of Law, Crime and Ethics. This edition is a testament to the hard work of all the listed authors and to the entire Editorial Board. It has been an exciting year for the Review, and that confirms that out student journal continues to go from strength to strength. This year we received an amazing number of high-quality submissions and saw increasing interest from readers of this journal. How much interest is generated by some of our published articles is an incredible achievement for a student journal that is only eight years old.

I am incredibly grateful to have been appointed Editor-in-Chief of the Review by my predecessor, Kevin Patel. The Review has been such an important part of my experience at Manchester as both a masters and PhD Student. I have previously had the opportunity to publish work in Volume VI and I was an editor for Volume VII. As a result, this publication has a special place in my heart, and I feel incredibly lucky to have the opportunity to serve as the Editor-in-Chief of this edition before I complete my studies at Manchester.

I would whole-heartedly recommend getting involved with the Review to all Manchester students at any stage of your studies. It is a great opportunity to read some of the best pieces of work produced by your peers and to meet and work with some wonderful people.

I am very thankful for the continued support of both the Department of Law, and individual academics within the Department who were kind enough to give up their time to

review the pieces that feature in this edition. I would also like to thank all the members of the Editorial Board for their tenacity, enthusiasm and hard work. In particular, it has been an absolute privilege to work closely with Daniel Markanday, the Deputy Editor-in-Chief, throughout this year.

Finally, I am excited to introduce my successor, Simpreet Kaur, who will be the Editor-in-Chief of Volume IX. I have no doubt that she will do an exceptional job and continue to facilitate the growth of the Review.

Thank you for picking up your copy of the Review!

Elizabeth Chloe Romanis

September 2019

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Parliament, People and the Executive: The Eternal Love/Hate Triangle

Dr Javier Oliva Garica[1]

I. Why do we have a Constitution?

From the age when we start squabbling in the sandpit for the most desirable bucket, or negotiating our turn with the toy-trolley, we quickly learn that cooperating with other people may be challenging. Even so, it can be immensely rewarding, because we can achieve goals collectively that we could never hope to attain as a solo venture, and as *homo sapiens* are social animals, we tend to find pleasure in shared experiences and joint enterprises. Yet the stark truth remains that human communities examined on any scale, from nursery upwards to nation state, are fraught with power-struggles, factionalism and battles for dominance.

The same observation could be made in respect of Chimpanzee groups, which have similar intrigue and rivalry, with alliances being made and leaders overthrown. Yet it is still the case that human societies tend to be larger and more complex than chimp-troops. Added to which, most cultures are now dependent on technology and agriculture for their day-to-day survival and are also faced with a situation where they and their neighbours have access to a wide assortment of highly effective and destructive weapons. This means that they have a pressing incentive to reign in their aggressive tendencies and provide themselves with widely accepted (and enforced) means of ordering their collective life and resolving their disputes

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without recourse to violence. Humans who fail to do this, or stop doing it effectively, have a very bleak future.

This explains the existence of Constitutions, or in other words, systems of rules that regulate our collective decision-making, and why they are subject to reform, and even revolution. There is a complicated trade-off between the pragmatic need for collaboration on the one hand, and the innate drive for some different groups to want to promote their voice, agenda and influence. The famously pessimistic political philosopher Hobbes notably observed in his great work *Leviathan*, that without Government, life is apt to be "*nasty, brutish and short."* Whilst there is scope for disagreement about many of his tenets, this particular principle is difficult to reject, but at the same time, most people desire to see a Government that is functioning in accordance with their personal interests, views and priorities. Constitutions indeed provide a framework within which power can be both exercised and restrained.

Having set out the uniting, overarching rationale behind Constitutions, it is worth noting that beyond this, there is considerable variety in form. They may, for example, be democratic, theocratic, autocratic, republican or monarchical, and different interests in the population may be grouped together and represented in a variety of ways. In the British context, we have had an executive (Government, represented by the Monarch and his or her ministers), a legislature (Parliament, consisting of the House of Lords and the House of Commons) and a judiciary (system of courts and judges) since at least the Early Modern period. Notwithstanding this, at the risk of stating the obvious, it has always been the case that the majority of the population does not belong to any of those three groups.

Consequently, there have always been questions about the extent to which those making and enforcing the rules were inclined to listen to "the People" as a whole. Of course, for

many centuries the executive and Parliament have clashed, both as institutions and factions, but what is happening at present over the Brexit saga is, at one level, the latest chapter in an epic series of power struggles between the executive, Parliament and the People. On the one hand, we have the result of the Referendum, which came down narrowly but unequivocally on the side of leaving the European Union. On the other, we have the strong numerical preference amongst parliamentarians to remain within it, although with a substantial number of hard-core Leavers with a vociferous presence. Added into the mix we have a rather weak and vacillating Government, arguing that in pursuing Brexit and desiring to control the process, it is seeking to implement the will of the People, which in itself raises the question of whether, or to what extent, the result of the Referendum might or might not reflect the true and present wishes of British citizens as a whole.

This short piece is not so ambitious as to attempt to propose a way to climb out of the current quagmire, but it does attempt to give it some context, and highlights some of the dilemmas which it poses for those in the field of Public Law and Political Science. We begin our discussion with the formative and explosive events of the seventeenth century, as this is the crucible in which our Constitution was forged and is essential if we are to understand it, as well as the tangle in which we are no enmeshed. We will then look at how Parliament finally emerged from this turbulent era as the dominant actor on the constitutional stage, and how modern Parliamentary Sovereignty came into being as a result. Following on from this, we will examine how the population of the United Kingdom as a whole, or "the People" have interacted with this supreme constitutional organ, before finally arriving back in the present moment, to conclude with some reflections on how all of this relates to the dramatic events played out over our proposed departure from the European Union.

II. Roundheads and Cavaliers

Therefore, we begin our discussion with some consideration of the Civil Wars and their aftermath. Speaking extra-judicially, the President of the Supreme Court (Baroness Brenda Hale) emphasized the importance of understanding the seventeenth century in order to get to grips with contemporary debates. Whilst this might seem counter-intuitive to some, it is a claim that I would support. Certainly, we are still living in legal and political terms with the legacy of the bloody conflict which ensued when Parliament, the executive and the People came to literal blows on the battlefields, and metaphorical ones in churches and palaces, almost five hundred years ago.

Compressing a lot of informational protein into a small nutshell, the Civil War happened because King Charles I, the functional executive at the time, believed himself to be appointed by God and wanted to rule without restraint or interference from anyone else. He regarded Parliament as simply existing to give him advice, which he might or might not choose to heed, according to his gracious and divinely granted pleasure. Not surprisingly, this was not a universally popular approach, particularly with the legislature. Then, as now, there were two houses, and in the seventeenth century Westminster, the aristocracy and religious elite composed the Upper Chamber, and middle class and gentry representatives sat in the Commons.

Cutting a long story short, Charles made himself unpopular by trying to levy taxes and impose forms of religious worship that were out of sync with the inclinations of the majority of his subjects, especially in Scotland (even though his father James had been James VI of Scotland since his infancy and long before he became James I of England, his son showed spectacular insensitivity towards the Scottish Kirk). Charles had ruled without Parliament for some years, after quarrelling with them. He then got into a head-on confronted when he

finally recalled the Lords and MPs, needing their help to raise tax, and this exploded into a Civil War that Charles managed to lose, *twice*. This is significant for our purposes, as a conflict which had begun as a tussle between Parliament and the King (executive), in due course became a conflict between Parliament and the People.

Charles lost militarily and negotiated peace as a prisoner, but at this stage, was treated honourably and everyone expected to go back to a modified form of business as usual. The assumption by the leading parliamentarians was that there would be a new constitutional system, in which the Monarch would have to respect the views of Parliament but would continue to rule. Unfortunately, for everyone concerned, Charles had no intention of keeping any of his promises. He escaped and started the war again, although in mitigation, he probably genuinely believed that he was simply staying faithful to his sacred Coronation Oath. Whatever drove his actions, it remains the case that he lost spectacularly once again, and when he was prisoned for the second time, parliamentarians were faced with the nightmare problem of what to do.

A number of the leading members of the legislature wanted to give the King another chance, and in fact, could see no viable alternative to this. Yet this was not a universal opinion, and some others took a very different view, particularly the New Model Army, a fighting force which had been raised for Parliament, and consisted of men who saw themselves not as mercenary soldiers in it for their pay-packets, but individuals fighting for their deeply held beliefs. The idea of being given their overdue wages and being sent home, having changed nothing, seemed like a huge betrayal and a disappointment. After challenging royal authority, and fighting for their religious freedom, many people had begun to dream of a very different kind of a world from the one in which they had grown up, and there were those men who even put forward the (then) radical idea that having a say in the Government, and a role in

the Constitution, should not depend upon having property. Thomas Rainborow famously stated:

"The poorest he that is in England hath a life to live as the greatest he … I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under."

Much to his surprise and annoyance, Charles I was put on trial and executed, although Parliament ended up falling as well as the King. When they refused to listen to the voices of the army and also failed to agree on any sort of coherent policy or plan, there was a military coup and Oliver Cromwell emerged as ruler. For some years there was a Republic, with Cromwell at the helm as Lord Protector, and it was clear that the country was not yet ready for any form of functioning democracy as we would recognize it. Strikingly, although Cromwell was expressly *not* King, when he finally died, his surviving son Richard briefly took over, but he was not really cut out for leadership, and in the turmoil that ensued, Charles II (son of the executed King) returned and took power.

It is important to note that despite having been remembered as "the Merry Monarch" or as *Horrible Histories* put it, a King who liked to party, Charles II was actually a repressive and vindictive ruler. Although the fun things which had been banned by the austere, Puritan regime during the Republic (e.g. Christmas) were restored, he was ruthless with political enemies, and the Restoration could never be described as a time of religious or political freedom. In spite of this, everybody knew (although did not say) that the balance of power had shifted. It was now clear that Kings reigned with the consent of Parliament, and in practical terms, Monarchs had lost any credible claim to absolute rule. This was dramatically demonstrated when Charles II died (having had children with

several women but not his wife) and his younger brother James came to the Throne. James was openly Catholic, and when his wife gave birth to a boy who would be a Catholic heir, this was seen as intolerable by the Church of England social elite. Consequently, Parliament wrote a polite letter to William of Orange, inviting him to invade and take over as Monarch. Despite being both nephew *and* son in law to James, William didn't let family loyalty hold him back and sailed over with an army. James capitulated and fled, signalling the beginning of a new era. It is to that horizon which we now turn, as we explore what the legacy of this events has been, in terms of the Parliament it creates, and the niche which is carved (or perhaps more accurately, blasted with canon-balls) in our constitutional structure.

III. Parliamentary Sovereignty

Arguably, these events marked the beginning of Parliamentary Sovereignty, as it would be later described by commentators like A V Dicey in the nineteenth century. Although it took some time to crystallize, and the powers of the Monarchy faded slowly, rather than expiring in a sudden flash, it became increasingly evident that the legislature was the body which held ultimate sway in the British constitutional system. For example, King George III was successful in blocking Catholic emancipation in the very early nineteenth century, but several decades later, a young Queen Victoria could not prevent Lord Melbourne losing office as Prime Minister when the Whig Party lost an election. It did not matter that she preferred him to the serious and socially awkward Robert Peel, because his party no longer controlled Parliament. There was no escaping that the legislature was the sun around which the British Constitution now revolved.

Given the importance of Parliament from this time onwards, it is, without doubt, crucial to understand it as an institution. As already stated, the House of Lords was composed of aristocratic men, who had either inherited their titles from the ancestors or been awarded them as a political or financial favour, and the Church of England bishops. In contrast, the House of Commons was comprised of elected representatives, but the right to vote depended on a property qualification. Note that at this time, women were not formally excluded, they were just far less likely to be eligible to vote by virtue of independently owning property. This is a good example of how, even in historical terms, Public and Private law have been inextricably linked in the United Kingdom system, and Constitutional law has never occupied a separate legal and imaginative space from Family or Property Law, as all aspects of the juridical framework are interdependent. In short, the right to have a say in who would sit in Parliament, and therefore control the dominant organ of the Constitution, depended upon owning a "stake" in the Kingdom. The thinking went that poor people had no vested interest, and therefore no reason to be responsible (and in any case, it was assumed that they were intellectually, educationally and morally inferior by nature).

Interestingly, the flip side of this coin proved to be problematic, so much so that it led to the American War of Independence and ultimately the USA. The colonists in Britain's North American territories made the argument that if they were contributing financially to Britain and paying tax, then they ought to be able to have some say in the Government levying that tax, and the popular slogan "no taxation without representation" encapsulates this argument. It also echoed the complaints of Parliament in the time of Charles I, and the ire caused by a King who wanted money from his subjects but was not prepared to grant them a voice in government. Whilst the right to vote in England was contingent upon owning land, rather than paying tax, the underlying idea was the same. If

people are contributing to society in material terms, then they have a right to representation in the way in which it is being run. Needless to say, this is a world away from our contemporary idea that human rights are innate, whilst they cannot be lost, they do not need to be acquired and certainly are not for sale.

Nonetheless, even allowing that electors had a right to representation, people disagreed with what this meant in practical terms. In sending an MP Parliament, were the voters appointing someone to represent their views, or were they choosing an individual person to exercise his own judgement and act in accordance with it? The Tory MP Edmund Burke was famously, and staunchly of the view that it was the latter. In the eighteenth century, he stated: *"Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion."* In other words, an MP is betraying the electorate if he does what they want, instead of what he believes to be for the best. Not surprisingly, Burke also thought that it was not his job to be popular: *"When leaders choose to make themselves bidders at an auction of popularity, their talents in the construction of the state will be of no service. They will become flatters instead of legislators; the instruments not the guides of the people."*

How do we react to this perspective in the twenty-first century? At one level, it feels as though it is a sentiment which very much belongs to an era of carriages and great houses, with a rigid social hierarchy and an unshakeable sense of entitlement to rule on the part of the governing classes. In contemporary Britain, a politician publicly expressing the view that, effectively, he or she knows best, would be an act of career-suicide, as it runs counter to our cultural assumptions about equality and respect. And yet at the same time, we are left with the uncomfortable question about what an MP should do, if he or she believes that leaving the EU is disastrous for the national interest, and his or her constituents have voted to Leave. It is a

stark choice between following the Burkian line of regarding their own analysis as superior (the get out clause that the electorate did not properly understand, and therefore did not really mean it, will not wash in this instance, as it is still predicated on the idea that the voting population are insufficiently sophisticated to make appropriate decisions), or colluding with something which they believe is deeply harmful to society.

Significantly, the dilemma about a clash between an MP's conscience and the electorate's stated will has not gone away in the past two centuries or so. If anything, it has become more of an acute problem, as we have moved closer towards regarding Parliament as the representative organ of the whole adult population, not just those privileged enough to have a demonstrable material stake in it. This was a gradual process: in 1832 middle-class men received the vote with the enactment of the Great Reform Act, and the chaotic and ancient electorate system was generally tidied up (meaning that a few women and poor men who had happened to have the franchise prior to this legislation actually lost out). In the course of the nineteenth and early twentieth century, more and more male adults were slowly given the right to vote, but it should be remembered that it was not until 1918 that Britain saw Universal Male Suffrage. We rightly celebrated the victory of the suffragettes (a predominantly middle and upper-class movement for women) last year but forgot the significance of the anniversary for economic equality. Regrettably, the truth is that a significant number of men were sufficiently part of British society to fight in the trenches of the First World War, and be machine-gunned and gassed for the British Empire, but at the time they went, were not deemed appropriate people to vote in General Elections.

Equally, as is better known, but no more palatable, women were excluded by legislation from voting in Parliamentary elections until 1918 and did not receive the right to vote on the

same terms as men until the Representation of the People Act 1928. It is a sobering thought that this is still (just about) within living memory. Without diminishing this in any way, we should not fall into the trap of thinking that universal adult suffrage means that the will of Parliament and the will of the People (in the sense of the adult population of the United Kingdom) can be coterminous. Even if we reject Edmund Burke's rather stark assessment, there is no pretence that the United Kingdom has a direct democracy. It is simply not possible for 66 million people to decide upon all of the questions facing the State, and representative democracy is a necessary solution in running a Western State in the twenty-first century, even though this leaves us with the issue of the divide between Parliament and the People. In light of this, we now turn to ask, how can the voice of the population at large make itself heard within our system?

IV. The Voice of the People

Aside from voting in General Elections, how can "the People" make their voice heard in the democratic process? There are a variety of ways, one of which is to lobby Parliament. This can still, of course, be done by contacting MPs directly, as the constituency system means that everyone living in Britain (whether or not they are a citizen) has a member of Parliament with a remit for the geographical area in which they live and the concerns of its residents. Collective and organized lobbying is also a possibility, through a variety of means. For instance, petitions have been a popular vehicle in a tradition which stretches back to the Middle Ages and continues now with the aid of the internet and social devices.

The media also have their part to play, both in keeping the population in general informed about the debate, and in giving voices outside of the legislature a medium in which to air their views, but it should not be underestimated that journalists are

almost invariably employed by businesses, newspapers and other companies which need to make a profit, and may also be influenced by the ideological bias of their financial backers.

Furthermore, some groups in society may find it easier to access mainstream media than others. The most vulnerable individuals are often those most likely to be overlooked if their problems or perspectives might raise uncomfortable concerns for vested interest groups. Anyone who has read reports of how long it took for journalists to act upon stories around, for example, the widespread sexual abuse of Jimmy Saville, will be acutely aware that a free press is a necessary, but not sufficient in the battle to bring the concerns of the oppressed and marginalized to light.

Popular protest in all of its many forms is another avenue which people may take, and as we have seen during the Brexit debates, this often involves marches and demonstrations. This is not only an exercise of some of the fundamental rights enshrined in the European Convention on Human Rights (e.g. Article 10 Freedom of Expression and Article 11 Freedom of Assembly and Association) but also a powerful means of participating in the debate, and for those who are not members of Parliament to make their voices heard in the future of the nation. Balanced against this, it is also the case that protests often carry with them the risk of spilling over into violence, which can be the result of the behaviour of participants or at least opportunistic individuals who jump on the bandwagon and take the opportunity to indulge in violence or looting, such as England witnessed in 2011. Tragedies may also occur following authorities mishandling volatile situations, something of which those of us living in Manchester should be acutely aware as we commemorate the anniversary of the Peterloo Massacre.

Of course, at the very most extreme end of the spectrum of popular protest lies violence which is non-accidental,

coordinated and leads to civil war or revolution, the ultimate possibility when those who hold power in a constitutional regime do so in a way which is intolerable to a critical mass of the population. The United Kingdom has not seen such a cataclysm since the seventeenth century, but it would be foolish to assume that such a nightmare scenario could *never* occur, triggering off such events. Thankfully, painful though the Brexit saga has been, we are nowhere near such a point.

So, surveying the scene which we have set before us, it now remains to consider how this constitutional landscape relates to the eternal triangle which we have observed. What is the balance of power between Parliament, the People and the executive?

V. The Eternal Triangle

In most circumstances, the relationship between Parliament and the Government is extremely close in the British context. The system of restraint and control within the system to prevent abuses is based on checks and balances, rather than a rigid separation of powers of the type witnessed in the United States of America or in some continental European jurisdictions. Consequently, people have been inclined to question to what extent the executive is really answerable to the legislature in any meaningful way.

Regardless, as the Brexit process has played out, it has become apparent that when it wishes to do so, Parliament can, and will exercise, meaningful control over the Prime Minister and governmental action. Sometimes this has been achieved through legal action, albeit not instigated by the legislature. For example, in the *Miller* case, when the Supreme Court ruled that the United Kingdom could not withdraw from the European Union without an Act of Parliament, and it was not open to Theresa May to simply issue a formal notice to the Council of

the EU. This would have been done in compliance with the process laid down in Article 50 of the Treaty of Lisbon, whilst using executive powers in respect of international treaty making. At other times, this parliamentary control has been achieved through direct action of the House of Commons, managed via the Speaker. Either way though, the position is clear. When Parliament chooses to assert its authority, it is without all doubt supreme in constitutional terms, as ultimately it is the body which steers the ship of State, and has done so since at least 1688, and arguably 1649.

Having said which, where does that leave us when the legislature is itself seemingly irredeemably divided? There are now so many competing agendas, that it is difficult to imagine how the impasse might be resolved. One possibility would be to try to gain enough MPs willing to tug the wheel in one direction, by means of cross-party collaboration. Although this has looked hopeful for a while, at the time of writing it seems on the verge of plunging over a cliff edge. Another possibility would be a further referendum, but it is not clear where this would take us, and it is still possible to imagine returning once again to a divided and fractious Parliament, with the losing side demanding another vote, and accusations flying around the Chamber.

The problem was, to an extent, that unlike other States, the United Kingdom has no strong tradition of referenda, and they are advisory only. In many countries, referenda are required for various forms of legal change, and the population are accustomed to participating in them, but this is not the case in British soil. Our sovereign Parliament is free to ask the People what they think if it is inclined to do so, but equally free, in legal terms, to ignore their expressed opinion.

Yet it must be stressed that the "in legal terms" is extremely important, as pragmatically speaking, these are debates which cannot be solved by lawyers alone. It is undeniable that

Constitutional Law sits close to the borderland between legal studies and political science, and the doctrine of Parliamentary Sovereignty has been described a *political* reality which jurists recognize, rather than a pure creature of law. It may or may not be the case that a General Election will occur before Brexit does, but two things are certain in constitutional terms. Firstly, that ultimately, the body within the State which will determine the outcome will be Parliament; and secondly, members of that Parliament will be driven by political considerations in the pathway which they ultimately take.

To put this another way, for as long as events are being determined by legal process and moving according to constitutional principles, Parliament will have the final say in all decisions. Despite its traditional primacy under ordinary circumstances, the executive is bound to lose in any direct confrontation with the legislature, as has been proven time and again in the seemingly never-ending story of Brexit. That is an outcome which should surprise nobody, given that its dominance has been axiomatic for generations of legal scholars. However, the eternal triangle does not only involve legal bodies within the Constitution, and "the People" must also be considered.

It may be true that there is no concept of "the People" articulated in the manner of most codified Constitutions, and indeed in strictly theoretical terms, the population of Britain are subjects rather than citizens, but the fact remains that without the goodwill and cooperation of non-parliamentarians, the Sovereignty of Parliament would be a mere legal fiction. The *consent* of the People to our Constitutional system is the fuel which powers the engine of State, and if those within Westminster were to behave in such a way as to cause that fuel-tank to leak, the engine would start to splutter and eventually stop. Even in a representative democracy, there must be sufficient ideological buy-in for the system to function, without the stalling of civil disobedience, or even violence and rioting.

Therefore, it should be remembered that calling Parliament Sovereign and Supreme, does not equate to suggesting, strictly speaking, that it is unaccountable.

Cases of conflict as to the best medical treatment for children- is the welfare of the child really being protected?

Bryony Moore[2]

Currently, in cases of conflict surrounding the best course of medical treatment for a child, it is the courts that are tasked with making independent and impartial decisions about what course of action best protects the welfare of the child. However, the judicial deference shown to medical professionals, and the conflation of parents and/or doctors' opinions with what is in the best interest of the child means that many decisions are being made contrary to this welfare principle. Many have argued reform of the legal system is the way forward in improving best interest decision making; however, it is argued that inherent aspects of a court-based arbitration system, such as the time-consuming nature of litigation and skewed evidentiary basis of decision making in an adversarial legal system, mean that judicial decisions can never truly be in the best interests of a child.

I. Introduction

The 'Golden Thread'[3] of English family and child law is that the welfare of the child should be the paramount consideration when determining issues in relation to children. The aim of this principle is to ensure that the welfare of the child is protected and promoted above all else. This article seeks to explore whether, in cases of conflict surrounding appropriate medical treatment of children, the UK has succeeded in creating a legal system that protects the interests of the child in line with this principle. Discussion will be limited to conflicts between doctors and parents of infants, as the "silent invisibility" of young children[4] makes these decisions the ultimate test of the

[2] LLB Candidate, The University of Manchester, Department of Law.

[3] HL Deb 31January 2007, vol 689, col 236 (Lord Fawsley).

[4] Johnathon Herring, 'Farewell Welfare?' (2005) 27 Journal of Social Welfare and Family Law 159, 168.

law's ability to protect the welfare of the child. This article will be split into two sections. Firstly, it will explore whether the UK's current legal system is fit for purpose i.e. whether the current law is achieving its aim of promoting the welfare of the child. It will conclude that it is not. Secondly, in light of this, this article will consider whether reform of the specific legal system is desirable, or if there are innate features of the judicial system, such as its adversarial nature, which mean the welfare of the child can never properly be protected, making the law a lost cause.

II. Is the Current Legal System Fit for Purpose?

Not all decisions about a child's medical treatment are subject to the jurisdiction of the courts. In the UK, we recognise that a person in a position of parental authority has certain rights in relation to their child that are necessary for them to fulfil their obligation of providing adequate care.[5] This includes the right to consent to or reject medical treatment. However, this right is limited such that any decision taken must be in the best interests of the child. If there is a disagreement, between parents and medical professionals for example, then the courts may be asked to intervene.[6] There are two procedural mechanisms by which this can be done: an application can be made for the court to exercise its inherent jurisdiction, or, alternatively, a court order can be sought under section 8 Children Act 1989. Regardless of which mechanism is used to invoke the court's jurisdiction, it is under the same obligation to make decisions that promote the objective best interests of the child[7]. To do this the courts employ a balancing exercise of

[5] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016) 449.

[6] *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, 432 (Lord Templeman).

[7] 'Best interests' can be considered synonymous with 'welfare': *Re B (a minor) (wardship: jurisdiction)* [1988] AC 199, 202 (Lord Hailsham LC).

several objective factors, better known as the 'best interests test'.

The concept of a 'balancing exercise' was first articulated in the case of *Re B.*[8] Here a baby's parents refused to give their consent to life saving treatment for an intestinal blockage, as they believed God had given their daughter, who also suffered from Down's Syndrome, "a way out."[9] The parents argued they had the right for their views as reasonable and caring parents to be respected; however, the court disagreed with those views. The Court stated that, whilst views expressed by parents and medical professionals should be a consideration, its ultimate duty was to protect the welfare of the child. The question, therefore, should be whether, taking into account a range of factors, the baby's life would be so demonstrably awful that she should be condemned to death.[10] Over the years the courts have developed the law to give a fuller picture of what factors should be considered in this balancing exercise;[11] however, *Re B*[12] has been confirmed as good law.[13] Lord Justice Waite has stated that it is no longer the case that the courts will blindly weigh up between the clinical advice of doctors and the reasonable views of parents, choosing which should prevail.[14] However, when one analyses the case law in this area it is questionable whether Lord Justice Waite's comments are entirely true, leading some academics to criticise the test as little more than an empty mantra.[15] This can be evidenced by the fact that there is only

[8] *Re B (a Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421.

[9] ibid, 1424 (Dunn LJ).

[10] ibid, 1424 (Templeman LJ).

[11] *An NHS Foundation Trust v AB* [2014] EWHC 1031, [19].

[12] *Re B* (n 8).

[13] *Re J (a minor) (wardship: medical treatment)* [1990] 3 All ER 93 CA (Lord Donaldson).

[14] *Re T (a minor) (wardship: medical treatment)* [1997] 1 WLR 242, 254 (LJ Waite).

[15] Margot Brazier, 'Commentary – An Intractable Dispute: When Parents and Professionals Disagree' (2005) 13 (3) Medical Law Review 412, 415.

one recorded case, *An NHS Trust v AB*[16] (henceforth AB), where a decision has been made which supported neither the medical nor parental view; and as we will see in later analysis, this might not be the paradigm example of 'best interests' which some academics purport it to be.

Great deference has always been shown to medical professionals across numerous areas of the law, leading certain academics to postulate that, "the…role of the law has been to sustain the respect for the clinical autonomy which doctors [have] grown to expect."[17] Despite the mantra of objective best interests this is arguably still the case when resolving disputes about children's healthcare.

Take for example the case of AB.[18] Despite concluding that the infant's doctors had clearly overlooked crucial evidence that contradicted their point of view in this case; Theis J offered a compromise between the position of the parents and doctors, clearly illustrating judicial deference to medical opinion regardless of accuracy.[19] For some, it might be hard to see how giving priority to a medical professional's point of view could be contrary to a child's welfare. However, it must be remembered that the medical evidence of what is in a child's best interests will usually only be directed to a child's *medical* best interests, and thus only a partial assessment of the child's interests as a whole.[20] There is a danger that the priority given to medical opinion, often to the exclusion of other non-medical considerations such as emotional and other welfare issues or

[16] *An NHS Trust v AB* [2014] EWHC 1031.

[17] V Harpwood, 'The Manipulation of Medical Practice', in Michael Freeman and Andrew Lewis (eds), *Law and Medicine, Current Legal Issues volume 3* (OUP 2000) 47, 59.

[18] *NHS v AB* (n 16).

[19] Giles Birchley and Richard Huxtable, 'Critical decisions for critically ill infants: Principles, processes, problems' in Catherine Stanton, Sarah Devaney, Anne-Maree Farrell and others (eds), Pioneering Healthcare Law: Essays in Honour of Margot Brazier (Routledge 2016), 118.

[20] Andrew Grubb, 'Medical Treatment (Child): Parental Refusal and the Role of the Court – Re T (A minor) (Wardship: Medical Treatment) (1996) 4 Medical Law Review 315, 317.

parental opinion, means that we run the risk that 'best interests' becomes nothing more than a label,[21]or 'empty mantra',[22] as we fail to look at the whole picture. We must also remember that doctors are not always correct, a fact which can be evidenced by the Charlotte Wyatt case.[23] Doctors did not believe that Charlotte could survive past infancy and sought a declaration, against her parent's wishes, that should she go into respiratory failure, it would be lawful not to resuscitate her. The declaration was granted; however, her parents, who vehemently believed that Charlotte could survive, appealed the decision several times and the declaration was lifted. Despite her dire clinical prognosis Charlotte is still alive today[24], which, had the opinion of her doctors been allowed to prevail, she might not be, an outcome arguably contrary to her welfare.

Some academics have argued that there has been what they have termed a 'de-Bolamisation'[25] of judicial decision-making in relation to children's medical treatment. However, the widening of best interests and the reassertion of judicial authority has wrested control from medical professionals only to the extent that judges are now also prepared to give weight to the evidence of families.[26] This is again arguably contrary to the best interests of children. In recent years there has certainly been evidence to suggest that the courts are more willing to allow the views of parents to influence their decisions. In the case of Re T[27] a boy was in need of a life-saving liver

[21] Anne Morris, 'Selective Treatment of Irreversibly Impaired Infants: Decision-Making at the Threshold' (2009) 17 Medical Law Review 347, 368.

[22] Brazier (n 15), 415.

[23] Re Wyatt (A Child) (Medical Treatment: Parent's Consent) [2004] E.W.H.C. 2247.

[24] Paul Gallagher, 'Charlie Gard Case: Whatever Happened to Baby Charlotte Who Was Also Expected to Die' (*iNews* 21 July 2017) <https://inews.co.uk/essentials/news/health/charlie-gard-case-charlotte-wyatt-high-court/> accessed 9 November 2017.

[25] Brazier (n 15), 415. See also Richard Nichols, 'In the Family's Best Interests' (1997) *Hastings Centre Report*, 4.

[26] Morris (n 21), 358.

[27] *Re T* (n 14).

transplant, though his parents withheld their consent citing the pain of the operation and the constant need to take anti-rejection drugs as the reason for refusal. The boy's doctors disagreed and asked the courts to override the parent's refusal. This request was refused on the basis that the welfare of the child depends on the actions of the mother, and it was unfair to expect a parent, who wholeheartedly disagreed with a course of action for their child, to be able to look after them to the best of their ability. This inability would affect their welfare.[28]

For some, this recognition of the dependency of children on their caregivers was long over-due.[29] Others feel this line of reasoning is a slippery slope. Taken to the extreme it could be argued that parents should always be kept happy lest children lose the parental support necessary to ensure their best interests.[30] It must also not be overlooked that parents can have their own interests in decisions on life-saving treatment and are therefore not always impartial advocates for their children.[31] Whilst most parents respond to their child's plight with passionate commitment, others, like those in *Re B*,[32] may respond with horror and disgust. It would most certainly have been contrary to the child's welfare in this case to be condemned to death essentially because her parents did not want to raise a child with Down's syndrome.

III. Is the Law A Lost Cause?

It is clear from this brief analysis of some case law that despite purporting to protect the objective best interests of the child the

[28] ibid, 251.

[29] Herring (n 4), 166; Sabine Michalowski, 'Is it in the Best Interest of a Child to Have a Life-saving Liver Transplantation? *Re T (Wardship: Medical Treatment)*' (1997) 9 Child and Family Law Quarterly 179, 186.

[30] Michalowski (n 29), 186.

[31] ibid, 182.

[32] *Re B* (n 8), 1424 (Templeman LJ).

courts tend to substitute the views of either the parents or doctors as to what the best interests of the child are. This is instead of looking at all the evidence and making an impartial decision about the way forward, which can often be detrimental to the child's welfare. It is therefore understandable why academics have called for reform of the law; however, this article will go one step further and argue that there are certain aspects of the legal system more generally which mean the welfare of the child can never truly be protected no matter what laws are in place.

(i) Adversarial Nature of the Law

A court case can only go so far in resolving a dispute between parents and doctors. Though it will provide a definitive answer to the issue in question, "the confrontational nature of a legal case often fails to resolve the issues which precipitated it,"[33] and arguably maintains, if not escalates, any conflict due to a perception that there are winners and losers.[34] This can lead to high levels of tension and dissatisfaction that can have far reaching consequences for a child's welfare. These consequences could potentially extend way beyond the court's involvement. For example, regardless of the outcome of a hearing doctors and parents will still have to co-operate with each other regarding continual treatment, or non-treatment, of the child in question. If a hearing creates or exacerbates a climate of hostility between parents and medical professionals it is possible that future decisions about a child's healthcare, which have not been the subject of legal action, could be compromised with parents becoming uncooperative with medical practitioners out of spite rather than genuine concern about their treatment decisions. This fact has been recognised

[33] Simon Mellor and Sarah Barclay, 'Mediation: An Approach to Intractable Disputes Between Parents and Paediatricians' (2011) 96 Archives of Diseases in Children 619.

[34] Birchley and Huxtable (n 19), 123. See also Brazier (n 15).

by doctors with one noting that involving the courts only "risks more confrontation between the family and yourself, and you've still got to look after this child."[35] An alternative method of resolving disputes about medical treatment might be mediation, a flexible process in which a neutral person actively assists the parties in working towards a negotiated agreement, with the parties in ultimate control of the decision and the terms of resolution.[36] By allowing the parties to come to a mutually agreeable decision, problems such as dissatisfaction of outcome and residual hostility may be avoided and in turn the impact on the child's future welfare may be lessened. Arguably, however, a child's welfare is just as much at risk of falling between the cracks with this method of dispute resolution. This is because the parties to the mediation would not necessarily be agreeing as to what is in the child's best interests, as they would inevitably both retain their positions on this issue. Instead they would agree on to what extent those best interests should be pursued, which could still lead to decisions being made contrary to the child's welfare.

(ii) Time-consuming nature of litigation

Not only can it take a long time for case to be heard, but the possibility of appeal can mean the legal process is dragged out over months, maybe even years. The case of Charlie Gard is a perfect example of this. The High Court originally ruled in April 2017 against the wishes of Charlie's parents for him to undergo experimental nucleoside treatment, instead ruling that it was in his best interests for ventilation to be withdrawn. This decision was subject to no less than three appeals, and a further hearing before a consensus was reached in mid-July of the same

[35] Birchley and Huxtable (n 19), 122.

[36] Nuffield Council on Bioethics, *Critical Care Decisions in Fetal and Neonatal Medicine: Ethical Issues* (2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 2 July 2019, para 8.57.

year between the doctors and parents, who came to accept the futility of the experimental treatment. The protracted nature of the litigation was recognised as being contrary to Charlie's best interests by Lady Justice Hale who, when asked to facilitate an appeal to the European Court of Justice, said, "by granting a stay, even of short duration, we would in some sense be complicit in directing a course of action which is contrary to Charlie's best interests,"[37] adding further, "every day since 11 April 2017 the stays have obliged the hospital to take a course which, as is now clear beyond doubt or challenge, is not in the best interests of Charlie."[38] Again, a method of dispute resolution which is able to manifest a mutually satisfactory outcome would eliminate the need for re-adjudication of the matter, lessening the impact of the decision making process on a child's welfare.

(iii) Skewed Evidentiary Basis of Decisions

In her article, 'An Intractable Dispute – When Parents and Professionals Disagree', whilst considering the role of the courts in medical decision making, Margot Brazier suggests that, "[t]he courts inevitably receive only a limited picture of the context of medical decision[s]"[39] The Court hears evidence from clinical teams [and parents], but this evidence is very much skewed to whichever purpose the legal team wants to drive things, and there are inherent interests maintained.[40] This problem is exacerbated by the fact that in an adversarial, as opposed to an inquisitorial, legal system the judge cannot carry out their own research and is left only with warped evidence from parents and doctors to make their decision. One

[37] Clare Dyer, 'Law, Ethics and Emotion: The Charlie Gard Case' (2017) 358 British Medical Journal 3152, 3153.

[38] ibid, 3153.

[39] Brazier (n 15), 417.

[40] Birchley and Huxtable (n 19), 124.

suggestion has been to adopt the approach of North America and make it common practice to utilise Amicus Curiae briefs,[41] which would allow for interested parties to inform the judicial decision-making process, thus expanding the judges understanding of the impact their decision will have on the child and their welfare. However, this would not resolve any of the issues caused by conducting these decisions within a legal framework. It has also been suggested that clinical ethics committees (CECs) may be the way forward.[42] CECs would be free from any restrictions to investigate the matter and could therefore gain objective evidence to better inform their decision. Comprised of practitioners from multiple disciplines, such as legal and health care professionals, they would also be better positioned to scrutinise medical evidence than a judge who (likely) has limited clinical knowledge, a fact which some argue is a reason for judges' blind acceptance of medical evidence.[43]

IV. Conclusion

This article has analysed, by looking at case law, the courts application of the best interest test. It has shown that, despite claiming to be carrying out an objective assessment of what is in a child's best interests, the law seems to struggle to have regard for the child in abstraction from the interests/perspectives of others such as family and doctors.[44] This article has also demonstrated just how detrimental this approach can be to a child's welfare. It is therefore concluded that the current law is not fit for purpose, failing to achieve its

[41] Marie Fox and Jean McHale, 'In Whose Best Interests?' (1997) 60 Modern Law Review 700, 709.

[42] Birchley and Huxtable (n 19).

[43] Jo Bridgeman, 'The Provision of Healthcare to Young and Dependent Children: The Principles, Concepts and Utility of the Children Act 1989' (2017) 25 Medical Law Review 363, 374.

[44] Fox and McHale (n 41) 709.

purported aim of protecting a child's objective best interests. In light of this conclusion it was prudent to analyse whether reform of the law would improve the courts ability to protect the welfare of the child; however, it was concluded that certain aspects of the legal system generally prevent the law from truly protecting a child's welfare. Courts are not the correct forum for settling disputes about children's healthcare.

Contemporary Use of Force with an Emphasis on South Ossetia and Abkhazia

Ivaylo Dimitrov[45]

Abstract: The sudden potential increase in traction of international law following the end of the Cold War began a race among the more ambitious States to assert their dominance in this new era of international relations. From the plethora of purposes and instruments of the field, the one that drew the most immediate attention was the legal parameters of the 'use of force'. The United States and allies would begin an expansionist campaign within years through conflicts such as The Gulf War and Kosovo intervention to allow themselves a looser, more self-serving application of the law. Meanwhile, Russia would insist on proper channels and procedure as well as more reserved attitudes toward statehood recognition. Efforts to mould the legal use of force continue in the 21st Century on part of western powers with the 2003 Invasion of Iraq but in 2008 the Russian Federation in a complete reversal of its position during the late 20th century took part in a conflict with the republic of Georgia. The justifications for resorting to armed force mirrored those used by the US previously while also opposing their own stance on statehood recognition. This precedent, combined with the increased complexity of conflicts involving non-state actors, may point to a turbulent future for the law on the use of force. The following paper aims to analyse the evolution of the law on the use of force to its current form and evaluate how its application has been reflected and affected by these contemporary conflicts.

I. Introduction

The law on the use of force has experienced considerable scrutiny since its evolution from the Covenant of the League of Nations after the Second World War up until the present. The sources of this pursuit have been varied and the motivations even more so, but a trend can be isolated that is markedly expansionist in nature and largely sought by states wielding considerable political and diplomatic power. It is in this context

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that the current condition of the law on the use of force will be examined through multiple perspectives.

A clear understanding of the direction in which the law has developed from its historical background is essential for analysing contemporary employment of the use of force doctrine. Therefore, the first section of this paper examines sources for the use of force doctrine, their history and progress post-WWII and throughout the Cold War.

The second section of the paper then moves on to look at contemporary mechanisms that factor into the use of force by States post-Cold War. Instead of providing a general overview, however, the focus will be on the United States of America's attempts to expand the scope of the use of force doctrine in international law. The main analysis of this section focuses on the 2003 invasion of Iraq and U.S. intervention in the 1999 Kosovo conflict as particularly suitable case studies for examining contemporary U.S. application of the law regarding the use of force.[46] With regards to the Kosovo case study, it is worth noting that the spotlight will be on the conflict itself and the lack of United Nations Security Council authorisation rather than the "humanitarian intervention" argument. While this article will briefly remark on this argument, due to its relevance to the situation both at the time and to the case of the conflict in South Ossetia, the topic is substantially contentious and a comprehensive engagement with it is beyond the scope of this work.[47]

Thirdly, the analysis of the contemporary law regarding the use of force will be applied to the context of the armed conflict in South Ossetia from 2008. To aid navigation of the complex issues pertaining to the conflict, this section will first provide a concise historical background to the hostilities. The analysis

[46] Christian Henderson, *The Persistent Advocate and the Use of Force*, (Routledge 2016), 2.

[47] Olivier Corten, *The Law Against War*, (Hart Publishing 2010), 495.

will concern itself with the legality of the conflict between the Russian Federation and Georgia, as well as their approach to justify their use of armed force from the perspective of international law. There also exists a simultaneous conflict between the autonomous regions South Ossetia and Abkhazia, and Georgia that brings its own difficulties of interpretation.[48] It is through this context that the section will attempt to evaluate how the expansionist philosophy of the U.S. and others, with regard to the use of force, has influenced more States in their pursuit of justification for armed force. Furthermore, this section will engage with the law regarding the use of force as it applies to conflicts involving non-state actors and peacekeeping forces, along with the difficulties presented by the scope of this law. Overall the goal of this article will be to evaluate the state of the law on the use of force within a contemporary setting via an analysis of some of the events most relevant to its development in recent history.

II. Inception of the Contemporary Law on the Use of Force

While the primary concern of this work lies with the contemporary developments in international law regarding the use of armed force post-1990s, it cannot proceed without first laying out the foundation and historical evolution of the field and relevant law. However, an exhaustive recollection of the field of international law is beyond the scope of this article. Thus, this section will focus on the aspects that directly apply to the law on the use of force and will examine events in more detail as the argument progresses chronologically and becomes more relevant to the overall topic.

[48] Philip Leach, 'South Ossetia (2008)' in Elizabeth Wilmshurst (ed), *International and the Classification of Conflicts* (OUP 2012) 317- 318.

The tragic events of the First World War shook the international community. The conflict's impact was such that there was a concerted effort to reform the international legal order in a manner that would make war considerably less favourable and possible as a tool of inter-state relations, particularly wars of conquest. To accomplish this, the League of Nations was established, with the League Covenant as its central regulatory document. It strongly reflected the "just war" theory of prior generations of thinkers, especially in its collective sanctions that were levied against states that breached the relevant provisions. In Article 10, for example, the States party to the Covenant would agree to protect the territory and sovereignty of the other members.[49] Interestingly, the Covenant never specified if or how the League of Nations could authorise the implementation of these sanctions. What was clear, however, was that actions taken as a necessity would not amount to a 'state of war'.[50] The Covenant's narrow focus on restricting war inadvertently led to states beginning to favour other measures short of war, such as interventions, forcible reprisals and acts of necessity, for instance self-defence and aggression scenarios.[51] What is more, the trend for states to characterise their acts of aggression as something other than war grew exponentially, something that would become a trend in rules that govern the use of force.[52] Due to the non-participation of major countries, including the U.S and later the Soviet Union, and the League's failure to curb the growing aggression of what would later be the Axis Powers during WWII, the League ceased to function at the onset of the war. It was dissolved immediately after, and its impact on preventing large-scale conflict had arguably been minimal. Examples of

[49] The Avalon Project, 'The Covenant of the League of Nations' <http://avalon.law.yale.edu/20th_century/leagcov.asp> accessed 15 April 2018, art 10.

[50] Stephen C. Neff, *War and the Law of Nations*, (OUP 2005), 290.

[51] ibid, 279.

[52] ibid, 280.

these failures are the Italian aggression in Abyssinia in 1930 and the Japanese forceful acquisition of the Manchuria region in 1931. Both of these incidents were not met with an adequate reaction from the League. Both events shone a light on the inability of the League of Nations to manage these situations, despite them directly signalling the escalation of hostilities on the part of the later Axis Powers.

Between the two World Wars a further central instrument of international law with regard to the use of force, namely the General Treaty for the Renunciation of War, or the Kellogg-Briand Pact, came into effect. In 1928 it was signed by 65 states and is considered to still be in effect and is given substantial weight with regard to the prohibition of war.[53] While some exaggerated its importance at the time, going as far as stating it had outlawed war completely, it is undeniable that it has had a lasting effect on the law pertaining to the use of armed force, principally when it comes to self-defence.[54] The chief aim of the pact was to create a blanket restriction on war where the Covenant fell short, by focusing on more procedural aspects.[55] To be exact, Article 2 of the 1928 Treaty makes the resort to war impermissible even after the "cooling off" procedures laid out by the League Covenant in Article 12.[56] The pact had considerable support from large states such as the U.S., and was invoked on occasions where annexation of territory had occurred, such as the Italian aggression in Abyssinia in 1930 and the Japanese forceful acquisition of the Manchuria region in 1931.[57] The manner in which the Paris Treaty renounced war could be seen as creating a distinction between a righteous and

[53] Belinda Helmke, Under Attack: Challenges to the Rules Governing the International Use of Force (Routledge 2010), 15.

[54] Ian Brownlie, 'International Law and the Use of Force by States Revisited.' (2002) 1 Chinese Journal of International Law 1, 4.

[55] Neff (n50), 294.

[56] Avalon (n49), art 12.

[57] Helmke (n53), 32.

illegal war, but seeing as the terminology would become out-dated in the context of modern international law, the term "war of aggression" became the contemporary equivalent of illegitimate war.[58]

The Pact had a substantial impact on the concept of self-defence, and how it was perceived at the time would influence the notion of self-defence in future iterations of the law. The reason for this came to be during the drafting process when France suggested the addition of an article that would exclude the resort to self-defence out of necessity from the renunciation of war. The American representative who was also co-patron of the Treaty, Mr. Kellogg, insisted that the inclusion of this article within the text was wholly unnecessary because it could potentially allow parties to justify aggression under the guise of self-defence on one hand[59], and because the right to self-defence was seen as intrinsic to sovereign states' personality on the other.[60] An extension of this can be seen in Article 51 of the UN Charter, which describes the provision regarding self-defence. Overall, the Treaty expands the movement towards a collective security system, rather than unilateral acts of aggression under the pretence of self-defence.[61]

Overall the lack of major support for the League of Nations by some of the most influential states at the time caused it to be ineffectual when it came to preventing large-scale conflict. Even through additional, more categorical instruments such as the Kellogg-Briand pact, the barely existent enforcement ability of the League, combined with its unnecessarily narrow focus on preventing all-out war, meant it would be unable to prevent the Second World War.

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[58] ibid, 32.

[59] Neff (n50), 304.

[60] James T Shotwell, 'What Is "War as an Instrument of National Policy"?' (1929) 13 Proceedings of the Academy of Political Science 25, 27.

[61] Helmke (n53), 36.

III. The UN Charter and the Use of Force

Following the Second World War and the dissolution of the League of Nations, a new organisation was created to regulate the Use of Force - the United Nations (UN), with the UN Charter as its guiding document. The focus of this paper will be on the provisions on the use of force within the UN Charter, primarily Article 2(4) which contains the basic prohibition on the use of force:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[62]

The Article is considered to be customary law as recognised by the ICJ in the *Nicaragua* case.[63] Other Articles in Chapter 1 will be looked at in conjunction with Article 2 (4), as well as the ones outlining enforcement measures and exceptions with regard to self-defence in Article 51, which is of equal importance.

At this stage it is important to note that there has been considerable debate regarding the parameters of the concept of 'force', and whether or not economic, diplomatic and political pressure/coercion can be given the designation.[64] While an important discussion in its own right, from this point on 'force' will be used interchangeably with 'military force' with regards to the topic of the text. To analyse Article 2(4), it helps to first contrast what the UN as an organisation wanted to accomplish

[62] United Nations, 'Charter of the United Nations', *1 UNTS XVI* (24 October 1945), <http://www.un.org/en/charter-united-nations/> accessed 16 April 2018, art 2(4).

[63] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, para 187.

[64] Corten (n47), 50.

with the previous attempts of the League of Nations and the Kellogg-Briand Pact to regulate the use of force. The League Covenant and the Kellogg-Briand Pact both concern themselves almost exclusively with the resort to 'war' as the subject that needs to be controlled and avoided. In comparison, the Charter uses a much broader term, 'force', the logic behind this decision being to remove the possibility of certain measures short of war from being used frivolously.[65] The further restrictions on States' right to wage war, barring self-defence cases, was to be compensated for by a collective security model.[66] Concerning the question of authority to determine whether or not force was legally used, the UN offered specific answers as well. The Security Council technically has the authority to allow the use of force, through its five permanent members and ten non-permanent ones. At the time of its inception the Security Council was seen as the final judge of the legality of UN, multinational coalition, and, in varying degrees, even state use of force.[67] An exception to this would be General Assembly Resolution 377 A that allows the GA to make recommendations to members, regarding collective measures to maintain peace, whenever a lack of unanimity within the UNSC would lead to international security being threatened.[68]

The secondary aspect of the Article, focusing on the idea of 'threat' to use force, has been ambiguous. The lack of state practice has not helped the definition and generally the argument made by the ICJ in the Nicaragua case as well as the Nuclear Weapons Advisory Opinion has been consequential in

[65] Corten (n47), 51.

[66] Helmke (n53), 42.

[67] ibid, 47.

[68] UNGA Resolution 377 A (1950) A/RES/377 A.

nature i.e. if the alleged use of force is unlawful then the threat to use said force is equally unlawful.[69]

An important term that was carried over and reinforced from the inter-war period in the Charter is 'aggression'. It is seen incorporated into Chapter 1, Article 1(1) but the General Assembly was aware of the vagueness of the concept, and many pushed for a more focused definition in order to avoid exploitation on part of states. The UN General Assembly (UNGA) requested that the International Law Commission (ILC) attempt to codify and define 'aggression' shortly after the term's inception, however it was not until 1974 that a definition was adopted officially with GA Resolution 3314.[70] The Resolution reaffirmed certain preconceptions, such as aggression being one of the gravest threats to international peace[71], as well as noting that it does not change the parameters of the Charter, particularly the instances of a use of force being lawful.[72] Of particular significance in this respect is the lack of mention of 'aggression' in Article 51, concerning self-defence.

As mentioned previously, the main exception to Article 2(4) and the restriction on the use of force in the UN Charter is in the case of self-defence, contained in Article 51. It states:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under

[69] Yoram Dinstein, *War, Aggression and Self-Defence*, (5th edn., CUP 2011), 89.

[70] Helmke (n53), 52.

[71] UNGA Resolution 3314 (1974) A/RES/3314, art.5(2).

[72] ibid, art 6.

the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[73]

Self-defence has been the centre of an incredibly polarising argument in international law. The controversy lies not with the existence of the right itself, as it is prescribed in Article 51, but with the disagreement of States as to the extent of the right.[74] Before considering the difficulties that arise from interpreting the scope of the law, it will be useful to analyse the central terminology and those aspects which are largely held as unambiguous. Starting with the concept of 'inherent right' it is important to recognise that the term does not refer to the area of natural law, as the French translation of the Article would partially imply. This is more likely an antiquated, residual connotation than a serious object of inquiry, due to the positive nature of current international law.[75] Instead, a more compelling interpretation of the meaning was offered by the ICJ during the *Nicaragua* case, where it was confirmed that the right to self-defence was considered customary international law in tandem with and as the exception to the prohibition to use force. This also applied the law to not only the Members of the UN but to all states.[76] Moving on to the idea of 'armed attack', it is useful to view it in conjunction with Article 2(4)'s prohibition on the 'use of force' and the threat thereof to understand the parameters of 'armed attack'. There is case law, particularly from the *Nicaragua* case[77], *Oil Platforms* case[78] and the *Partial award of the Eritrea-Ethiopia Claims*

[73] United Nations (n62), art 51.

[74] Corten (n47), 402.

[75] Dinstein (n69) 191.

[76] *Nicaragua* case (n63), [190].

[77] ibid, [191].

[78] *Case Concerning Oil Platforms (Iran v United States of America)* [2003] ICJ Rep 161, para 51.

Commission[79], where the courts have focused on the distinction between the two concepts. The conclusions of these cases can be summarised in two complementary lines of argument. Firstly, there are two different planes on which 'use of force' and threats operate as opposed to 'armed attack', the latter being much more severe and pronounced. Thus, not all violations of Article 2(4) would give rise to a right to self-defence.[80] Secondly, to refine the distinction further, the use of force needs to be of sufficient weight to warrant military self-defence. For example, border skirmishes, even those resulting in death, while incurring responsibility, do not entail the victim to military self-defence actions barring Security Council authorisation.[81]

Another aspect of Article 51 that is central to the contemporary understanding of use of force is the 'individual and collective' facet of the right. This addition to the wording of the Article was pushed for by the U.S. during the drafting process, largely to ensure relatively free and unobstructed operation of regional security agreements in which they were involved.[82] While some scholars, such as Ian Brownlie in 1963, called for a narrow interpretation of the wording, lest it allow States to use the vague scope to serve their own agendas, others wanted to push the boundaries of the concepts.[83] There were repercussions of the lack of definition of many important terms during the 1960's and 70's, which led to their abuse. The U.S., in its war in Vietnam in 1965, attempted to justify its actions through 'collective self-defence', just as did the Soviet Union in Afghanistan in 1979.[84] This was largely rectified with the

[79] *Eritrea/Ethiopia, Partial Award, Jus Ad Bellum Ethiopia's Claims 1–8* (2005) XXVI 458.

[80] Corten (n47), 403.

[81] *Ethiopia's Claims* (n79), [11].

[82] Dinstein (n 69) 189.

[83] Helmke (n53), 53.

[84] ibid, 54.

developments in case law in the 1980s and further definitions pushed for by the General Assembly in the 1970s as discussed. There have also been attempts to expand the scope of self-defence to include so called 'preventive self-defence'. Other concepts can be placed under the same umbrella term, due to ambiguous nomenclature, including preventive and anticipatory self-defence. Even though it has had vocal proponents and substantially varied debate surrounding it, the concept has been rejected largely by the international community as a whole.[85] Going into the specifics, while interesting, lies beyond the scope of this article, but it is relevant to the overall argument to mention its existence and will be called upon in the case studies to follow.

The purpose of the above paragraphs has been to trace the origins of the UN as an organisation and its framework. It is not meant to be an exhaustive look into the myriad evolutions and intricacies of how the individual concepts have developed as well as the controversies that inadvertently surround most of them. During the Cold-War period the UN Security Council was largely paralysed due to the veto power, allowing nothing to pass without a unanimous vote. The obvious contention bred by having the Soviet Union and the U.S. both on the Council as permanent members made that impossible.[86] Despite this, international law, through the work of the ICJ and other international courts, as well as the General Assembly, has met with more than moderate success in clarifying and restricting the scope of the use of force. This has been accomplished through engaging with the vague terminology and defining it to the best of the abilities of the relevant authorities. Also, the input of the courts has been invaluable with regard to the parameters of use of force, armed attack and self-defence thus far. That being said, this progress has seemingly been in

[85] Corten (n47), 435.

[86] Neff (n50), 324.

reaction to the attempts of powerful states to expand and define for themselves, both doctrinally and within the legal framework, the permissibility of aggression. As such, it is reasonable to expect this pattern to continue moving forward on the part of large states. The UN has shown itself considerably more resilient and adequate at mediating between major states, even during times of conflict, which can be contrasted with the previous attempt at creating such an organisation and framework, while also building on what was functional about them.

IV. Post Cold-War Use of Force Dynamics

With the end of the Cold War and the dissolution of the Soviet Union, there was renewed hope for the ability of the UN to function and control the use of force through its collective security apparatus. A 'New World Order' was declared by the then-President of the US George H.W. Bush and the first challenge would come soon in the face of the 1990 Iraqi annexation of Kuwait.[87] To understand how the rules that govern international use of force were developed and challenged in the end of the 20th century and in the beginning of the 21st, there is a need to evaluate a number of events. The aim is not to recollect the entire past 30 years but to reflect on the cases which have produced an outcome relevant to shedding light on the South Ossetia conflict. Of particular interest will be the U.S. and its allies and the instances where they have played a substantial role in attempting to expand the application of force. The first event examined will be the annexation of Kuwait, in order to analyse the so called 'authorisation technique' and its development.[88] Following that, my analysis of the NATO-led use of force in Kosovo in

[87] Henderson (n46), 38.

[88] ibid, 4.

1999 will form a point of comparison with the previous 'authorisation'-based approach and finally, looking at the 2003 U.S. invasion of Iraq will illustrate a further development in the attempt to change the rules on use of force through reviving past UNSC resolutions. The specific subject of enquiry will be authorisation and the push for implied-authorisation recognition.

On August 2 1990, Iraq invaded Kuwait under the pretence that the territory belonged to Iraq pre-colonially and was therefore not in violation of Article 2(4). The legal justification was aimed at avoiding the 'international relations' aspect and, through that, the implied inter-state prohibition on the use of force.[89] This proved to be a thinly veiled attempt on the part of Iraq to mask its aggression, since its actions were in disaccord with the provision in the Charter which stipulates that all disputes should be resolved through peaceful means.[90] The invasion was universally condemned and the Security Council issued several Resolutions that became instrumental in defining the UN SC effectiveness and methodology with regard to regulating the use of force. Each of them could be a topic in its own right, thus here they will be discussed in conjunction with their repercussions, and as reflections of the predispositions of Western States regarding the use of force.

The initial Resolution passed was Resolution 660 that called for immediate Iraqi withdrawal and opening of negotiations with Kuwait.[91] When this was met with non-compliance, Resolution 661 was adopted, applying economic sanctions under Chapter VII of the UN Charter.[92] Shortly following the

[89] Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm Evans (ed.) *International Law* (4th edn., OUP 2014), 620.

[90] United Nations (n 17), art 2(3).

[91] UNSC Resolution 660 (1990) S/RES/660, para 1-2.

[92] Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', (1992) 55 The Modern Law Review, 153, 159.

initial invasion the US and UK sent forces to Kuwait under the pretext that there was a need to contain the Iraqi military in Kuwait and prevent further aggression against surrounding states, although this was largely speculation.[93] It was argued by both states that there was no need to wait for a resolution from the Security Council to use force since the principle of collective self-defence would be sufficient. This shows an expansionist, wide interpretation of the rules concerning use of force and foreshadows the propensity of the U.S. and its allies to push the boundaries. While the argument was met with large scale disagreement both locally and internationally, the adoption of UNSC Resolution 678 rendered the argument irrelevant in the then-current context.[94]

At the incitement of the U.S., Resolution 678 was adopted to ensure the implementation of Resolution 660 but with the inclusion of the phrase 'by all means necessary'.[95] Through various means of enticement, the United States ensured that states supported its interpretation of the concept to mean or include the use of military force although that was largely the shared feeling among the international community regarding the interpretation of the wording.[96] The consequent actions amounted to the infamous Operation "Desert Storm" which is seen as a precedent in international law and signalling the start of a trend in the UN to delegate enforcement action to Member States.[97] Subsequently Resolution 687 would be adopted to insist upon a permanent ceasefire and Iraqi disarmament, pertaining to its chemical and biological weapons.[98] While

[93] ibid, 163.

[94] ibid.

[95] Henderson (n46) 43.

[96] Christine Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq', (2002) 13 European Journal of International Law 1, 1.

[97] ibid, 3.

[98] UNSC Resolution 687 (1991) S/RES/687.

seemingly less eventful on the surface, this resolution, together with Resolution 688 condemning the oppression of local minorities, would become the cornerstone of later so-called revivals of authorisation in the case of the U.S. and U.K. interventions in Iraq in the 1990s and into the 21st Century.[99] These actions were largely opposed, particularly by Russia, pointing to a unilateral assumption of global policing power on part of America with little legal justification.[100]

Another case relevant to authorisation being argued as implied and armed action being taken under this pretext came in 1999. A combined force of NATO assets, with the U.S. and U.K. at the helm once again, undertook military action against the Former Yugoslavia.[101] A number of Resolutions adopted by the Security Council addressing the events of Kosovo were considered by NATO as implying an authorisation to use force at the time. Following the campaign, however, there was a parallel argumentation on behalf of the participating states. The Resolutions were passed under Chapter VII of the UN Charter, recognising the conflict as a valid threat to international peace and security. NATO member states thus argued that their actions in Kosovo were a response to these Resolutions. [102] Either way, the central aspect of the intervention is the lack of any express UNSC authorisation and despite this, there have been various attempts on behalf of the participating states to attribute silent consent to the Security Council in various forms.[103]

The most distinct and even coarse utilisation of the perceived authorisation concept as justifying use of force comes from the 2003 invasion of Iraq. The coalition leaders, those being in part

[99] Christine Gray, *International Law and The Use of Force*, (4th edn., OUP 2018), 361.

[100] ibid, 364.

[101] ibid, 365.

[102] ibid, 366.

[103] Corten (n47), 357.

the U.S., U.K. and Australia, launched operation Iraqi Freedom in March 2003 and promptly addressed the Security Council to justify the armed attack. Following the Gulf War and the previously discussed resolutions pertaining to the conflict, there was a series of further attacks on Iraq by the U.S. and U.K. in relation to the disarmament obligations set out in Resolution 687 and Iraq's breach of its obligations.[104] In 2002 a final Resolution was passed, 1441, by the UNSC that was invoked in the letters by the coalition states that argue the legal basis for the 2003 invasion. Excluding the most recent Resolution 1441, the correspondence bore striking similarity with the ones that were submitted following the interventions in Iraq at the end of the 20th century.[105] It provided Iraq with a 'final opportunity' to disclose and comply with an inspection regime.[106] The context shows that while a military action can be perceived in the wording, the primary point of reference is the inspection regime and the upholding of previous Resolutions by the Security Council itself and not through a unilateral use of force. Thus, the UN SC does not forfeit its authorising function or export it to member states in this situation when there is a further breach of Resolution 1441.[107] It is worth mentioning that the majority of member states were extremely opposed to military action in Iraq.[108] While Iraq had breached its obligations under SC Resolution 1441, the overall effectiveness of the weapons inspection regime had been deemed satisfactory and no evidence of WMDs had been uncovered, despite the arguments from the U.S. and the U.K. stating otherwise. It is important to note that this opposition

[104] Gray (n99), 368.

[105] Corten (n47), 366.

[106] UNSC Resolution 1441 (2002) S/RES/1441, para 2.

[107] Corten (n47), 367.

[108] Sia Spiliopoulou Watermark, 'Storms, Foxes, and Nebulous Legal Arguments: Twelve Years of Force against Iraq, 1991-2003,' (2005) 54 The International and Comparative Law Quarterly 221, 224.

signifies an overall rejection of the implied authorisation practice by the international Community of States as a whole.[109]

Since the end of the Cold War and the perceived rejuvenation of the United Nations, in particular the functioning of the Security Council, there have been certain trends that can be isolated with regard to the rules on the use of force. The dissolution of the Soviet Union left a relative power vacuum that was seized upon by the U.S. and U.K. among others in an attempt to extend their ability to determine the right to use force. This was not achieved through arbitrary means but by meticulously attempting to expand the scope of collective security on one hand and doing so within the parameters of the existing international legal system on the other. In particular, ignoring previous dissent concerning the revival of authorisation based on prior Security Council Resolutions, and using it to circumvent the existing system shows deliberation.[110] The motivation behind these actions is for the realm of political speculation and therefore is not considered here, since this article concerns itself with the repercussion of these actions in the field of international law. That aspect aside, there are a number of possible repercussions for the field itself. It is not impossible to imagine how bypassing the UNSC as the supposed authority on the use of force in international law can undermine its control and its credibility when it comes to enforcement. As it stands, the UNSC has shown itself as a relevant actor in the sphere of regulating the use of force post-Cold War and State practice supports its authority, and what it stands for. The problematic actions and rationalisations that have been covered are doctrinal in nature and as such do not represent actionable changes in direction for the actual law.

[109] ibid, 235.

[110] ibid, 234.

However, they have shown to be enduring and above all effective in achieving short-term goals with significant international impact. As such they pose a threat in the long-term and also could be seen as an example to be emulated by other powerful states that are on the rise and looking to put their foot in the door.[111]

V. South Ossetia, Russia and Georgia

The conflict in South Ossetia is a long-standing one, but its escalation into a state of war with the 2008 invasion of Georgia by the Russian Federation raised questions regarding the use of force in a number of ways. The situation was in fact such a cause for concern that the European Union, for the first time, according to the "Independent International Fact-Finding Mission on the Conflict in Georgia" report, resorted to active involvement in a substantial armed conflict.[112] The report and analyses of the South Ossetia conflict will be referenced to determine the legitimacy and extent of the force used. The various aspects of the conflict and how it mirrors or differs from other contemporary examples of use of force can be confusing if taken on all at once so the following argument will follow a three-step approach. Firstly, the background of the conflict in South Ossetia itself needs to be concisely established in terms of origin, evolution and to trace the factors that culminated in the situation in 2008. Following that, the Russo-Georgian aspect of the conflict will be analysed. This will include how Russia attempted to justify the use of force and where its arguments fall within the larger sphere of the law and State practice, as well as the scope of those arguments' legitimacy. It is worth noting that one aspect of the Russian

[111] Henderson (n46), 3.

[112] Heidi Tagliavini (ed), *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia Vol.1*, (2009) <https://www.mpil.de/files/pdf4/IIFFMCG_Volume_I2.pdf> accessed 1 July 2019, 2.

argument will be mentioned only in passing, namely the idea of 'humanitarian intervention'. As mentioned before, the topic is too controversial, and the lack of consensus makes it a moot point. That being said, it will be invoked as a point of comparison with previously discussed cases. The final part of this section then analyses the role played by South Ossetia for the most part and Abkhazia to a lesser degree and more specifically the implications of their involvement, considering their status as non-state entities.[113] The IIFFMCG report referred to them as "an entity short of statehood"[114] and "a state-like entity"[115] respectively. This particular part will require a look into the nature of the conflict between the two regions and Georgia as a recognised state. The application of rules on the use of force in situations where a conflict is intrastate, and features arguable self-determination aspects, will also be an avenue for discussion.[116]

(i) A Brief History of Conflict

The Georgian Soviet Socialist Republic (the Georgian SSR) began its existence as part of the greater Soviet Union, with South Ossetia as an autonomous region within its territory.[117] Following the end of the Cold War, the Georgian SSR announced its independence from the Soviet Union in April 1991, but in September of the previous year South Ossetia declared its independence from the Georgian SSR, which was summarily rejected soon after by the president of Georgia, who

[113] Christian Henderson and James A Green, 'The *Jus ad Bellum* and Entities short of Statehood in the report on the conflict in Georgia,' (2010) 59 International and Comparative Law Quarterly 129, 1.

[114] Heidi Tagliavini (ed), *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia Vol.2*, (2009) <https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf> accessed 1 July 2019, 239.

[115] ibid, 291.

[116] Leach (n48), 317.

[117] ibid, 318.

also stripped the region of its autonomous status.[118] This led to a severe armed conflict between them and, in 1991, with the expulsion of the last Georgian troops, South Ossetia was under the practical if not legal authority of a separatist government.[119] In 1992, a ceasefire was brokered by Russia called the Sochi Agreement.[120] The agreement included tenets outlining the creation of a peacekeeping force that would supervise the implementation of the objectives.[121] This peacekeeping force, however, was primarily composed of Russian and South Ossetian forces, which could be construed as biased by some. This led to dissent within Georgia and an attempt at dismantling the Sochi Agreement with the idea of implementing a neutral peacekeeping force.[122] Before moving on, it is valuable to note that Russian forces arrived in Georgia in 1993 and the Security Council was hesitant to insert UN peacekeeping units to oversee the ceasefire.[123] Because of this the Commonwealth of Independent States (CIS) created the above-mentioned force to the dismay of the Georgians and Security Council authorisation was given post-factum.[124] This was a minor incident of moving ahead without the approval of the Security Council with respect to the use of force, but still a worthy mention because it implies Russian interest in expediting the process through acting first and asking for permission after.

Moving on to the summer of 2008, on the 7th of August that year, Georgian military commenced shelling the South Ossetian capital of Tskhinvali in response to violence allegedly

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[118] ibid.

[119] ibid.

[120] Alexander Lott, 'The Tagliavini Report Revisited: Jus ad Bellum and the Legality of the Russian Intervention in Georgia,' (2012) 28 Utrecht Journal of International and European Law 4, 6.

[121] Agreement on Principles of Settlement of the Georgian-Ossetian Conflict (Sochi Agreement) (24 June 1992), art.3, para 3-5.

[122] Lott (n120) 6.

[123] Corten (n47), 382.

[124] UNSC Resolution (1993) S/RES/858, para 6.

committed by the South Ossetian armed forces against Georgian villages along the border.[125] By midnight on August 8 the Russian Federation launched a counter attack for of a number of reasons, to be discussed in the following paragraphs. This offensive included assaulting targets on the territory of Georgia, as well as later occupying parts of it.[126] An EU Ceasefire plan was signed by both parties (Russia and Georgia) on the 16th of August 2008. Later that month Russia recognised South Ossetia and Abkhazia as sovereign states.[127]

(ii) The Russian Perspective

The Russian Federation presented a number of legal justifications for its armed actions against Georgia during and after the hostilities had ceased. Before embarking on an evaluation of the different claims, it is worth establishing the overall position held by Russia regarding the use of force in the international arena before the 2008 conflict.

Russia has consistently objected to the use of military intervention by other members of the Security Council such as the U.S. and the U.K., and has done so consistently throughout the controversial episodes of the past 20 years.[128] Specific instances include the circumvention of Security Council authorisation by the U.S. in its invasion of Iraq, with which Russia took great issue, as well as the 1999 NATO-led Operation Allied Force in Kosovo, that Russia alleged to be completely illegal.[129] Another paradoxical position was the one held in relation to Kosovo's almost universal recognition as a

[125] Leach (n48), 321.

[126] ibid, 320.

[127] ibid, 322.

[128] Roy Allison, 'The Russian case for military intervention in Georgia: international law, norms and political calculation,' (2009) 18 European Security, 173, 174.

[129] ibid, 175.

state by the international community. Russia's vehement opposition to both the support Kosovo received and the damage its recognition could allegedly do to the concept of territorial integrity, as part of the doctrine of statehood, was in sharp contrast to its position with regard to South Ossetia and Abkhazia.[130] With respect to the reasons behind such drastic changes in direction, the most likely argument is that Russia's intention was to add its own efforts to the expansionist endeavours of other powerful states by adopting their stances and applying it to where they themselves have an interest.

Russia justified its initial counter attack on the basis of its right to self-defence under Article 51 of the UN Charter.[131] The general consensus is that there are no grounds to invoke the right to individual self-defence since it specifically applies to armed attacks against the territory of a State and the conflict occurred on the territory of Georgia.[132] It is equally difficult to justify the right to collective self-defence due to South Ossetia's status as a non-state entity.[133] There are two possible interpretations of the decision to invoke Article 51 on the part of Russia. On one hand, it can be seen as an impulsive reaction, a poorly thought-out argument intended to occupy critics while more legitimate reasons were constructed. For a capable and powerful international actor like Russia, it seems highly unlikely that such a hasty solution would have been implemented. On the other hand, it can be argued that putting forward Article 51 was not only a diversion, but also an attempt on Russia's part to show expansionist tendencies. The second argument is particularly in line with the overall shift in the Russian approach to 'military intervention', as well as the

[130] ibid, 176.

[131] Leach (n48), 320.

[132] Lott (n120), 13.

[133] Henderson and Green (n113), 137.

global push for expanded reading of the UN Charter Articles concerning use of force.

Following the initial self-defence justification, Russia put forward four arguments for its use of force - an invitation by South Ossetia's de facto government, protection of its peacekeepers, protection of its citizens and a humanitarian intervention argument.[134] Beginning at the invitation argument, there are already some issues present. While a genuine request sent with the consent of the State to have foreign forces on its territory is considered part of customary law, it hardly applies to the situation.[135] The most glaring issue is that while South Ossetia exercised governmental functions over the region, it did not have legitimate power as a sovereign State. At the time even Russia did not recognise South Ossetia as a State. The recognition came a number of weeks following the end of the conflict. Looking past this, there is also a technical issue present. South Ossetia issued its formal request for aid from Russia following the commencement of attacks against Georgia by Russia, therefore making the claim invalid.[136]

With respect to the argument regarding protecting its own peacekeepers, there are mixed views regarding the exact nature of this stage of the conflict. Each side insists the other opened fire first so this point can be taken as moot until (or if ever) the situation clarifies itself.[137] Hypothetically speaking, if there was an incident in which the Russian peacekeepers were attacked, under the command of a Russian military commander, they would be in the right to use force in self-defence of the forces under attack.[138] The next argument with regard to protection of its own citizens did not fare much better

[134] Lott (n120), 12.

[135] ibid, 13.

[136] IIFFMCG vol 2 (n114), 281.

[137] Lott (n120) 16.

[138] Gray (n99), 322.

for Russia. While domestic law under the Russian Constitution does have a provision addressing the protection of citizens abroad, this is in complete disagreement with the functioning of international law in accordance with the merits of the *Nottebohm* case where it was stated that only international law can determine if a state can exercise protection, not domestic law.[139] This is supported by the overall consensus regarding the matter, even by proponents of extra-territorial protection of nationals, which is to say that there exists no such inherent right of protection of nationals outside the boundaries of their nation state under international law.[140] Finally, the humanitarian argument, as stated previously, is highly controversial. It is worth mentioning, however, in this specific instance that the civilian casualty numbers presented by Russia to support this particular claim were grossly inflated from 162 to 2000.[141] At the same time the very claims to 'humanitarian intervention' on part of NATO forces in 1999 were summarily dismissed by Russia as obfuscating the real motivations for the campaign with diplomatic, vague language.[142]

In terms of the Russo-Georgian aspect of the conflict, the reasons given by the State itself to justify its actions shed some light on the changing way in which Russia as a superpower wants to operate and be seen in the international arena. The arguments put forth are nearly all weak or ambiguous at best and, while their nature bears average to minimal weight on the rules on the use of force directly (hence the superficial engagement), as a sum they show an attempt at mimicking Western expansionary practice. Overall the use of force on the part of Russia against Georgia was conducted in a

[139] International Court of Justice, 'Judgements' (1955) ICJ Report 4, 21.

[140] Lott (n120) 14.

[141] IIFFMCG vol 1 (n112), 21.

[142] Allison (n128), 182.

disproportionate manner without proper authorisation and considerably past the boundaries of the pretext of self-defence.

(iii) South Ossetia and Georgia's Perspective

The conflict between South Ossetia and Abkhazia, and Georgia is difficult to classify and therefore presents unique challenges to the rules governing the use of force. It is best viewed through the two main Articles on the use of force and their applicability to the situation. The central issue will be the lack of recognition of statehood for the two autonomous regions and how Georgia's escalation of the conflict caused it to breach the prohibition on the use of force.

Article 2(4) applies to inter-state conflicts and is not considered to be relevant in cases where a State is acting internally to quash conflict to a certain degree. Georgia was initially in a position to deal with the conflict without needing to address the point, however, a series of events changed the feasibility of this response. Due to the constancy of the conflict and activity of the South Ossetian forces, the Georgian offensive on the South Ossetian capital Tskhinvali was immediate and adequate, with respect to police measures which they are authorised to exercise on their own territory.[143] However the intensity of the conflict and tools utilised by the Georgians as well as their choice of targets proved to be excessive and disproportionate.[144] Article 2(4) is considered customary international law and entities that are practically governing an area in a stable fashion are widely considered to fall under the protection of Article 2(4).[145] However, notable thinkers such as Yoram Dinstein have disagreed strongly with this proposition.

[143] Lott (n120), 7.

[144] ibid.

[145] ibid, 8.

[146] The consensus seems to be that the acceptability of applying Article 2(4) to entities short of statehood is entirely reliant on the manner in which one engages with the scope of application of the UN Charter and its purposes. On one hand it is understandable to attempt to contain the Articles on the use of force within the realm of inter-state relations, due to the wording and even origin of the Charter, which, as outlined before, was created by States to govern inter-state relations. On the other hand, dismissing a conflict as internal and therefore not bound by the rules on the use of force can be dangerous, considering entities such as South Ossetia possess armed capability and exercise a substantial degree of control over a territory. Of course, this line of inquiry would invite its own criticisms such as diluting the rule or empowering territories that threaten international peace without any positive rule of law.[147]

Article 51 presents a further challenge to the position of non-state entities in relation to the rules on the use of force. Of particular importance in this respect is the ICJ advisory opinion in the *Palestinian Wall.* It reached the conclusion that an 'armed attack' under Article 51 cannot come from any other source other than States, adding that non-State actions need to be attributable to States in order to qualify.[148] However, the IIFFMCG report did not align itself with this interpretation and broadly interpreted the attacks prior to the 8th August on Georgian villages as being equivalent to an attack on the territory of another State.[149] In conjunction with a lack of mention of 'States' as the necessary agents for an 'armed attack' in the original text of the Article, the ICJ has been

[146] Dinstein (n69), 85.

[147] Henderson and Green (n113), 135.

[148] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, para 139.

[149] IIFFMCG vol 2 (n114), 244.

criticised for this advisory opinion. Since 9/11, and the extension of the scope of Article 51 to apply to non-state actors, the report's findings are grounded in the current, if contentious, interpretation of the law.[150] On the other hand, the case of South Ossetia differs in that the non-state entity was launching its attacks from within the legal boundary of the territory of Georgia towards itself. The topic is controversial and it is not possible to discern currently whether a non-state actor can mount an armed attack within a territory in self-defence or if a State can claim self-defence under Article 51 against a non-state actor within its own borders.[151] In terms of the narrow approach to understanding the scope of the law, its limitations are quite clear, however there are examples of broad attempts at interpreting the law in the IIFFMCG report as well as the wider community.

VI. Conclusion

This article has followed the past one hundred years of development of the rules of international use of force to attempt to discern patterns and a general direction for the law. From the very first attempts at limiting State's ability to resort to war, there have been courses of action taken by States to justify their own self-serving reasons for pursuing conflict as a tool of international relations. As wars became more deadly, the desire increased to control them through outright prohibition on not just war, but the resort to any use of force. The stalemate of the Cold War saw the United Nations Security Council unable to engage with the use of force due to the polarised global power struggle. However, the UN itself and related international organs made gradual and effectual progress in curbing unintended interpretation of the rules. The end of the Cold War

[150] Lott (n120), 9.

[151] Henderson and Green (n113). 138.

saw a shift in power to the U.S. and U.K., among others, which were quick to seize the opportunity to establish themselves on a global scale with respect to the use of force. Through persistent advocacy and later revivalist campaigns, they have won short-term victories, however the regime on the use of force continues to be reaffirmed by the majority of the international community, which has largely condemned the expansionist encroachment. However, looking at the conflict in South Ossetia might point to a change in the wind, with rising former condemners following in the footsteps of the ones they lambasted. The situation that occurred in 2008 between Russia and Georgia particularly highlights the increasing role played by non-State actors. This issue requires considerable consolidation with the law on the use of force, due to the obvious risk of such entities becoming vehicles for larger scale conflict and obfuscating the boundaries of an armed conflict.

Evaluating Rafter's contention that rape is a 'key means of achieving genocide'.

Patrick Shortis[152]

In her 2016 book *The Crime of all Crimes: Toward a Criminology of Genocide,* Nicole Rafter argues that international law has not done enough to recognise that rape can be 'a key means of achieving genocide'. In this paper, Rafter's contention shall be evaluated by examining whether rape meets the legal definitions of both the intention to commit genocide and the acts of genocide as defined under Article II of the UN Convention on the Prevention and Punishment of the Crime of Genocide. The definition of rape chosen for this paper shall be the innovatively broad definition put forward by the International Criminal Tribunal for Rwanda in *Prosecutor v. Jean-Paul Akayesu*. The paper then examines scholarship, case studies and international law concerning genocides in Rwanda, Bosnia, Darfur and East Pakistan, and shows that rape can be carried out with genocidal intent. The resulting analysis also shows that rape can be both physically destructive, through injury to the bodies of the targeted group, and psychologically destructive to both individuals and collectives within the target group. The psychological impact can have interactive and multiplicative effects, creating isolation and shame for survivors and the families of victims. Further discussion of children born as a result of rape in Rwanda and Bosnia highlights that the damage is intergenerational and lasting. Overall, the paper finds ample evidence to support Rafter's contention; urgent changes in international law are needed so that rape and sexual violence can be prosecuted as a genocidal act.

Over the latter half of the twentieth century rape has been made a war crime in international law, and important legal precedents have been set, ruling that rape can be considered both a constituent act of genocide, and a genocidal act in itself. These precedents emerged partially in response to harrowing events in conflicts, such as the 1971 Bangladeshi war for independence, during which an estimated 200,000 – 400,000 women were raped; the 1992 Bosnian war in which and

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estimated 10,000 – 60,000 woman were raped; and the 1994 Rwandan genocide, during which 250,000 – 500,000 women were estimated to have been raped.[153] Rafter contends that international law under the Rome Statute should be updated to reflect that rape is 'a key means of achieving genocide'[154] and this paper finds strong evidence to support that contention. It will be argued that legal arguments made under international law and case studies of theatres of genocide show that rape can be carried out with genocidal intent and meets the various definitions for genocidal acts under the UN Convention on the Prevention and Punishment of the Crime of Genocide.[155] To make this case, the paper examines the legal definition of genocide and establishes both the *mens rea* (intention) and *actus rea* (acts) for the crime. It also examines how rape is currently defined in international case law to highlight that legal cases already show support for Rafter's contention. Rape is shown to be instrumental to the physical destruction of a group through murder, injury and preventing births. Rape is also considered in terms of the psychological destruction of a group, first through the damage to the individual, which has interactive effects leading to damage for the collective and future generations of the targeted group. The paper concludes by reviewing the evidence and assessing that it provides overwhelming support for Rafter's contention. Throughout the paper, examples will be given from cases and survivor[156]

[153] Lisa Sharlach, 'Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda,' (2000) 22 New Political Science 89.

[154] Nicole Rafter, *The Crime of All Crimes: Toward a Criminology of Genocide, (*New York University Press 2016), 179.

[155] Convention on the Prevention and Punishment of the Crime of Genocide (1951) 78 UNTS 277, art 2.

[156] This paper will refer to individuals who have been raped and lived as 'survivors' and those that have died as 'victims' following practices set out by feminist scholars in the literature. Allison Ruby Reid-Cunningham, 'Rape as a Weapon of Genocide,' (2008) 3 Genocide Studies and Prevention 279.

testimony from genocidal rape in Rwanda, Darfur, East Pakistan, and Bosnia.

To assess Rafter's argument, we must first consider a definition of genocide before we can evaluate rape as a means of achievement. Definitional arguments regarding what constitutes genocide abound in the literature, but for the scope of this paper we shall consider the definition that was included under Article II of the UN Convention on the Prevention and Punishment of the Crime of Genocide and attributed to the work of Raphael Lemkin.[157] Genocide is 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[158] This definition is not without controversy, as scholars have argued that narrowly defining groups along the lines of nationality, ethnicity, race and religion leaves out other kinds of group characteristics which might be targeted such as gender, class or political affiliations, however a rigorous analysis of this debate is beyond the scope of this paper.[159] Therefore, for the purposes of this paper, the Convention provides the *mens rea* for what constitutes genocide. It then goes on to define the acts, which include:

…killing members of that group; causing serious bodily or mental harm to members of that group; deliberately inflicting… conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.[160]

These are the *actus rei* for genocide. Therefore, for rape to be a key means for achieving genocide, it must be proven that it can be carried out with the intention to destroy a group, and that

[157] Adam Jones, *Genocide: A Comprehensive Introduction*, (3rd edn, Routledge 2006).

[158] Genocide Convention (n155), art 2.

[159] Daniel Feierstien, *Genocide as Social Practice: Reorganizing Society under the Nazis and Argentina's Military Juntas*, (Rutgers University Press 2014).

[160] Genocide Convention (n155), art 2.

it achieves the same effect as at least one of the acts listed above.

Similarly, a conceptual understanding and legal definition of rape is needed to examine its potential for meeting the legal definition of genocide. Rape is often framed in public discourse as a crime of sex, but academics disagree and frame it as a crime of violence.[161] Rape is about power, control and domination over another human being, not an 'aggressive expression of sexuality, but a sexual expression of aggression.'[162] Rape is a gendered crime in that, in the majority of cases, it is carried out by men and against women.[163]

In conventional international law, rape has been implicitly prohibited such as in Article 46 of the Fourth Hague Convention[164] and Common Article III of the Geneva conventions.[165] The language of these prohibitions has talked about the act as an attack on 'family honour', 'cruel treatment' or 'outrages on personal dignity', however Russell-Brown argues that they do not consider rape to be a 'crime against humanity' or a 'grave breach' of international law.[166] That was only achieved in conventional law with the Rome Statute of 1998, due to successes in international customary law by the

[161] Ruth Seifert, 'War and Rape: Analytical Approaches,' (2018) Women's International League for Peace and Freedom <http://ec.europa.eu/justice/grants/results/daphne-toolkit/file/1688/download_en?token=MbtSDOTn> accessed 3 July 2019; Sherrie L. Russell-Brown, 'Rape as an Act of Genocide,' (2003) 21 Berkeley Journal of International Law 350.

[162] Seifert (n161), 1.

[163] Sharlach (n153).

[164] Although rape is not specifically mentioned, Article 46 states 'Family honour and rights… must be respected', and so legal scholars have argued that rape could be considered a violation of this article. Convention respecting the Laws and Customs of War on Land (Oct. 18, 1907) (Hague Convention IV) art. 46; Jeremiah Harrelson, 'Genocide and the Rape of Armenia,' (2010) 4 University of St. Thomas Journal of Law & Public Policy 163, 165.

[165] In particular, points 1 (a) which prohibits 'violence to life and person…murder, cruel treatment and torture' and (c) 'outrages on personal dignity, in particular humiliating and degrading treatment.' Geneva Convention relative to the Treatment of Prisoners of War (1950) 75 UNTS 135, art 3.

[166] Russell-Brown (n161), 359.

International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[167] The former had established rape as a crime against humanity in Article 5 of its Statute, in recognition of the role that systematic rape played in war crimes in the former Yugoslavia.[168] The ICTR went further in the case of *Prosecutor v. Jean-Paul Akayesu* to establishing rape as a means of genocide used by Hutus against the Tutsis.[169] This landmark ruling was based on a novel definition of rape:

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[170]

This definition, and the similarly broad definition given for sexual violence, differs from previous judgments in international law. It does not hinge on forcible penetration in terms of body parts and orifices. If the act is physically invasive and of a sexual nature, then it can be considered rape. It also recognises that survivors of sexual violence may not be physically assaulted themselves, but can be victimised through being forced to watch rape take place.[171] Finally, there is no mention of 'consent' on the part of the victim, which has been argued to be a difficult legal standard to prove given the complex duress victims face in situations of mass violence. Instead the Trial Chamber stipulated the perpetrator-focused 'coercion', which is easier to prove in the horrific conditions of

[167] Rafter (n154); William Schabas, *Genocide in International Law,* (2nd edn, CUP 2009).

[168] Harrelson (n164).

[169] *The Prosecutor v. Jean-Paul Akayesu* (September 1998), ICTR-96-4-T.

[170] ibid.

[171] Joshua Kaiser and John Hagan, 'Gendered Genocide: The Socially Destructive Process of Genocidal Rape, Killing and Displacement in Darfur,' (2015) 49 Law & Society Review 69.

genocide.[172] Given the importance of this case in framing the debate around rape as a means of genocide, this shall be the definition of rape in the scope of this paper.

Rafter's argument finds support in the fact that rape can be carried out with genocidal intent. At first this may not seem clear as genocide is generally thought of as an act with a collective victim, whereas rape is generally considered as an act against a single individual.[173] In *Prosecutor v. Kunarac et al* Serb leaders were prosecuted for the mass rape of Bosnian-Muslims. The ICTY argued that while rape could be considered a war crime, it was still an act committed against an individual's 'sexual autonomy'.[174] This individual-focus was reflected in commentary on the case and some scholars were cautious of linking concepts of genocide and rape as 'genocidal rape'. One of the arguments put forward by Rhonda Copelon was that there is no difference between 'genocidal rape… and rape as booty' because the *outcome* of rape as an effect on individual women is the same.[175] Focusing on the collective crime risked making invisible the serious nature of the individual crime and the gendered nature with which it is carried out.

However, both international law and survivor testimony shows us that in specific cases of mass rape, the *intention behind the act* is the destruction of an ethnic group 'in whole or in part'. Rape is a gendered crime, but so too is rape as genocide. Perpetrators use rape to recruit men, by normalising the

[172] Harrelson (n 164).

[173] Daniela De Vito, 'Rape as Genocide: The Group/Individual Schism,' (2007) 9 Human Rights Law Review 361.

[174] *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T (22 February 2001), para. 457.

[175] One wonders if this same argument could be made about any act of genocide. Both "civilian casualties" and genocidal murder have the same effect for the victim, yet there are clearly differences. Rhonda Copelon, 'Women and War Crimes' (1994) 69 St. John's Law Review 61, 67.

destruction of the female as 'enemy' through violent 'displays of machismo'.[176] These displays are aimed not only at the women, but at the entire target group.[177] Therefore, the Rwandan genocide was foreshadowed by sexualised rhetoric aimed at Tutsi women, and in both Rwanda and Darfur rapists refer to their targets in terms of ethnic hate.[178] Survivor testimonies from Bosnia include soldiers telling them that they had been instructed to rape them by their superiors.[179] The rape is undertaken to break the bodies and identities of the community, through the bodies of the community's women. Therefore, it is a 'two-pronged interplay, a violation against the group and… individual.'[180] In the case of *Prosecutor vs. Akayesu* the ICTR ruled that the rape of Tutsi women had been undertaken as part of a method to 'destroy the Tutsi group while inflicting acute suffering on its members in the process.'[181] This judgement was based in part on evidence of men specifically targeting women for their ethnicity, and in some cases not raping if they were unable to discern ethnicity.[182] Therefore, international law shows that rape can be used with the *mens rea* of genocidal intent, and this point will be confirmed as we consider how the act of rape can be instrumental in achieving the acts of genocide.

Rape can be instrumental to the physical destruction of a group in several ways, and the first of these is in 'serious bodily harm'

[176] Reid-Cunningham (n156), 282.

[177] Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (Pluto Books 2004).

[178] William Schabas (n 167).

[179] Siobhan K Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide,' (1996) 46 Duke Law Journal 91.

[180] Daniela De Vito and others, 'Rape Characterised as Genocide,' (2009) 6 Sur International Journal on Human Rights 28, 33.

[181] *Prosecutor v. Akayesu* (n169), [733].

[182] Schabas (n167).

or 'murder'. It has already been established that rape is an act of violence and in the cases of genocide in Rwanda, the Bosnian war, the East Pakistan war and the current conflict in Darfur, women have been raped to death. The damage inflicted by rape causes bleeding, infections, fistulas, and life-threatening injuries and in many cases the act is accompanied with genital mutilation.[183] All cited cases include instances of women being penetrated with blades, sticks and other foreign objects, or having their breasts cut off.[184] Rape has also been used to transmit diseases in Rwanda, where the Hutu perpetrators released AIDs-infected patients from hospitals with the sole purpose of infecting Tutsi women with the disease.[185] It is estimated that of the 25,000 members of the Rwandan genocide widows association AVEGA, 70% have contracted HIV/AIDS.[186] It is hard to say how many of those infections were intentional due to the mass nature of these crimes, and it is likely that many perpetrators and bystanders were also infected as a result. These points highlight that rape can indeed be used as a method for murder in genocide.

Rape has also been used in genocidal theatres as a measure to both cause and 'prevent' births within the target group. In Bosnia, survivors reported being taken to 'rape camps' where they were repeatedly raped with the intention of impregnating them.[187] The women were then kept for six months or longer before being sent home, so that the pregnancy passed the 24-week limit for safe abortion. The survivors were consistently

[183] Reid-Cunningham (n156).

[184] Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia,* (University of Minnesota Press 1993); Sharlach (n153).

[185] Sharlach (n153); Russell-Brown (n161).

[186] Lindsey Hilsum, 'Rwandan Genocide Survivors Denied Aids Treatment,' (2004) 328 British Medical Journal 913.

[187] Beverly Allen (n184).

told that they were being impregnated with 'Serb babies' and were sent home in buses 'painted with cynical comments about the babies'.[188] In Darfur Sudanese soldiers told Nuba women who they raped '…you Nuba are all Black, but we want to make Red babies', again highlighting ethnicity as a specific targeting criterion.[189] In East Pakistan where an estimated 200,000 Bengali women were raped systematically, some suspected that this too was done to 'dilute' the Bengali ethnicity.[190] Perpetrator's intentions to forcibly impregnate their victims are therefore evident in all these cases.

Siobhan Fisher argues that rape in the context of Bosnia would constitute a genocide because soldiers were instructed to forcibly impregnate people. This causes 'serious injury' to persons because of the instability of health care in war zones, and damage to the reproductive capacity of girls who are too young to give birth.[191] For Fisher, penetrative rape is '"just" rape', for genocidal intent it must be hinged on impregnation and carried out systematically.[192] However, Fisher seemingly ignores an important point with this narrow definition of genocidal rape, which is that Bosnian survivors are unlikely to be able to have children again due to social stigma. In Pakistan, Rwanda, Darfur, Bosnia and many patriarchal societies, a woman's virtue is inextricably linked to her sexual chastity and the collective 'honour' of the individual woman is tied to the honour of the whole ethnic group. The social stigma they experience as rape survivors means that women are unable

[188] Seifert (n161), 3.

[189] Kaiser and Hagan (n171), 88; John Hagan and Jaime Morse, 'State Rape and the Crime of Genocide' in Rosemary Gartner and Bill McCarthy (eds), *The Oxford Handbook of Gender, Sex and Crime*, (OUP 2014), 697.

[190] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Ballantine Books 1993), 85. This statistic is at the lower end of estimates, see Lisa Sharlach, (n153).

[191] Fisher (n179), 121-123.

[192] ibid, 125.

often unable to remarry and have more children.[193] The perpetrators of these crimes are aware of this and so rape, regardless of pregnancy, can certainly be an effective tool for preventing births.

Aside from being physically destructive, rape is also psychologically destructive, and not just to the individual. Survivors of sexual assault make up the biggest group of those diagnosed with post-traumatic stress disorder (PTSD), and it is highly likely that survivors of genocidal rape will have similar problems.[194] Survivor testimony from Rwanda indicates that women feel a 'loss of dignity and respect' from the humiliating and violent experiences of their rape.[195] These feelings have psychosocial impacts such as withdrawal, difficulty making and maintaining new relationships and severe mood swings which damage social bonds of the group. Because rapes in genocide are often intentionally public, the survivor's family and wider community may have witnessed the act, and those that survive are also likely to have experienced severe trauma.[196]

Compounding this trauma is the social isolation that survivors experience, and a key part of this is to do with the gendered nature of both genocide and rape. Men are usually killed in genocide, however women who are raped may be left alive to serve a different purpose. In patriarchal societies where women are the 'symbols of honour and vessels of culture' for the collective, that honour is symbolically destroyed through her

[193] Sharlach (n153); Russell-Brown (n161); Donatilla Mukamana and Petra Brysiewicz, 'The Lived Experience of Genocide Rape Survivors in Rwanda,' (2008) 40 Journal of Nursing Scholarship 379.

[194] Reid-Cunningham (n156); Jemma Hogwood, Christine Mushashi, Stuart Jones and others, '"I Learned Who I Am": Young People Born From Genocide Rape in Rwanda and Their Experiences of Disclosure,' (2017) 33 Journal of Adolescent Research 549.

[195] Mukamana and Brysiewicz (n193), 381.

[196] Reid-Cunningham (n156).

rape, and visual reminders of this are left by trauma, mutilation, or impregnation.[197] Perpetrators know this and target women for rape because of it. Thus, the significance of writing messages on the buses of pregnant women sent back to their families in Bosnia. The messages are not for the women but are a public display to the rest of her community, especially the remaining men in the group, who have not been able to protect 'their' women.[198] Survivor testimony from all cited cases include accounts of perpetrators raping women in front of their husbands and families intentionally. The targeted group live with a deep shame and trauma as a result of witnessing what was done to their collective honour through the rape of their women. Rape in this way is an effective tool for the destruction of a group's collective identity.

The psychological damage of the act of rape interacts with other stressors, such as the shame felt by the community or the geographic location of where the act took place. Many individuals may choose to leave their homes, and perpetrators of rape often tell the women to do so.[199] Bengali survivors of the war in East Pakistan fled to the west where they would not be recognised, and many women in the cases cited have been driven to suicide.[200] These cases show that the rape experience is interacting with multiple stressors for the survivor and group and causes new ones, so a loss of dignity may lead to a loss of family, or the shame of being rejected by family may lead to the loss of home or life, and the individual losses result in a

[197] Sharlach (n153), 90; Reid-Cunningham (n156).

[198] Reid-Cunningham (n156), 280.

[199] One Masaleit woman from Darfur describes Sudanese soldiers raping her whilst yelling: 'If you like this, stay in Sudan—if you don't, go to Chad.' Kaiser and Hagan (n171), 89.

[200] Human Rights Watch Africa, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath,' (*Human Rights Watch*, 1996), <https://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf> accessed 20 April 2018; Allen (n184); Sharlach (n153); Courtney McCauseland, 'From Tolerance to Tactic: Understanding Rape in Armed Conflict and Genocide,' (2017) 25 Michigan State International Law Review 149.

more unstable group. The psychological trauma of the act of rape then is not additive, but multiplicative.

A final point on how rape can lead to the destruction of group identity is that it has intergenerational impacts, especially in the cases of children of rape. There are 2000-10,000[201] children born of rape during the genocide in Rwanda faced with multiple problems in their childhood. Evidence suggests that their relationships with their mothers can be strained by her traumatic experience, and if the circumstances of their birth are known they can be isolated from their community. In many cases, the children do not know the circumstances themselves, and the overall effect damages their identity formation during adolescence.[202] Mothers are faced with the difficult problem of having to explain to their children who their fathers are, and in some cases these men may still be living locally.[203] Testimony from children who have been told the truth include phrases like '…I am Interahamwe, I feel like I am not a human being' and 'I feel like I came into this world hated' which illustrates the deep feelings of conflict.[204] There is evidence too of gendered differences in these feelings, with daughters more likely to report a willingness to forgive their fathers than sons.[205]

A study of children born of rape in Bosnia provides similar accounts to that of Rwanda, and in the testimony, children discuss being called 'Serbs' or 'Chetniks' by others in their community. These children face consistent social isolation, and

[201] This is contested. The official figure from the government of Rwanda is 2,000-5,000. Survivor groups state it is more likely to be 10,000 to 25,000. The number cited is the most conservative estimates from both sources. Hogwood, Mushashi, Jones and others (n194).

[202] Hogwood, Mushashi, Jones and others (n194).

[203] For many this conversation is an eventual requirement. In Rwanda, an identity card is required by all citizens when they reach the age of 18, and it must carry the name of both mother and father. Hogwood and others (n194); Mukamana and Brysiewicz (n193).

[204] Hogwood, Mushashi, Jones and others (n194), 10-11.

[205] ibid.

some have even been physically harmed.[206] As stated before, this is exactly what their mother's rapists identified them as when they impregnated them. This act has been misunderstood by Beverly Allen who criticised it as 'stupid' on the basis that the logical ethnicity of these children would be Bosnian-Muslim, and they would be brought up with mothers in these communities.[207] However, the lived experience of these girls proves otherwise, and they have been socially rejected based on the perception of their 'enemy' ethnicity. This shows the lasting psychological and physical damage of rape as means for genocide, the damage wrought extends beyond generations, and children in both groups report suicidal thoughts, or mothers who have committed suicide out of shame.[208] As Rafter points out, this forces us to rethink how we count the victims of genocide beyond those who have been killed, to include the generational effects felt by children of rape.[209]

The cases that have been examined provide strong evidence to support Rafter's contention that rape is 'a key means' for achieving genocide. The definitions for genocide and rape were made clear so that we could compare cases of the latter with the *mens rea* and *actus rea* of the former. The intention to use rape as a tool for genocide was highlighted through survivor testimony and international case law, allowing us to dismiss the idea that genocidal rape is no different from 'rape as booty'. Additional evidence for the intention of rape was given at various points in the paper that shows that women were being targeted for rape, either to kill, impregnate or displace them based on their ethnicity. The instrumentality of rape as a physically destructive act has been proven. Rape has been used

[206] Karmen Erjavec and Zala Volčič, 'Living With the Sins of Their Fathers: An Analysis of Self-Representation of Adolescents Born of War Rape,' (2010) 25 Journal of Adolescent Research 259.

[207] Allen (n184), 97; Harrelson (n164), 170.

[208] Erjavec and Volčič (n206). Hogwood, Mushashi, Jones and others (n194).

[209] Nicole Rafter (n154), 166.

as a strategy to kill individuals en masse and inflicts serious bodily harms. These harms go beyond just injuries, as in the case of Rwanda where rape was used to purposefully infect the Tutsi population with HIV. Rape has also been shown to physically and psychologically prevent births in the target group, either through forced impregnation that can cause injury or reproductive complications, or through secondary psychological effects that damage the survivor's status as a woman in the community. Similarly, rape has been shown as an effective tool for dealing 'serious mental harm' to a group, and these impacts are felt at several different units of analysis. At the individual level the survivors experience PTSD, loss of dignity and isolation, and the interplay of these stressors was shown to have multiplicative effects. At the community level, rape can traumatise the families of survivors or community members that witness the act, and the act can be designed to communicate to men that they are unable to look after 'their' women in patriarchal societies. At the generational level, the children of rape grow up with multiple sources of stigma, which impacts their identity formation and can lead to suicidal thoughts. The evidence supporting Rafter's claim is therefore overwhelming. Genocidal rape is not a theoretical construct, it is a documented fact, and the evidence presented shows that the judgments like that of the ICTR in *Prosecutor vs. Akayesu* are setting much-needed precedents in customary international law. These precedents laid the foundations for UN Resolution 1820 that, in 2008, recognised rape as a "constitutive act" of genocide,[210] yet recent events have illustrated the fragility of this progress. In April 2019, the Trump administration threatened to veto a UN resolution aimed at preventing the use of rape as a weapon of war in order to appease domestic Republican concerns about "promot[ing] abortion",[211] and the

[210] United Nations Security Council Resolution 1820 (2008) UN Doc S/RES/1820.

[211] Robbie Gramer and Colum Lynch, 'How a U.N. Bid to Prevent Sexual Violence Turned Into a Spat Over Abortion' (*ForeignPolicy*, 23 Apil 2019) <https://foreignpolicy.com/2019/04/23/united-

use of sexual violence with genocidal intent in the Democratic Republic of the Congo continues unabated to this day.[212] Further work is urgently needed from Member States to consolidate and improve these nascent legal frameworks and to develop effective methods of enforcement, lest these important gains in international law are made impotent in the face of *realpolitik.*

nations-bid-end-sexual-violence-rape-support-survivors-spat-trump-administration-sexual-reproductive-health-dispute-abortion-internal-state-department-cable/> accessed 2 June 2019.

[212] Stephanie Nebehay, 'Conflict in Congo's Kasai could be prelude to genocide, U.N. expert warns,' (Reuters, 4 July 2018) <https://www.reuters.com/article/us-congo-violence-un/conflict-in-congos-kasai-could-be-prelude-to-genocide-u-n-expert-warns-idUSKBN1JU1XO> accessed 2 June 2019.

Can the case for legalised Physician Assisted Dying withstand objections based on Sanctity of Life and the Doctor-Patient Relationship?

Anna Nelson[213]

The debate around physician assisted dying (PAD) is a long running one, and those who oppose it do so for wide range of reasons. This paper will focus on two of the most commonly voiced objections; that it would mean abandoning the essential sanctity of life principle and that it would threaten the doctor/patient relationship of trust and beneficence. Following an examination of the law's current relationship with the sanctity of life principle it will be concluded while sanctity of life remains essential in the eyes of the law, it is not absolute. Rather, in reaching any decision this principle must be balanced against other essential principles, especially autonomy. Thus, PAD could be legalised without the need to 'abandon' this principle. As such, that this argument alone is insufficient to preclude the legalisation of PAD. It will then be argued that while maintaining the doctor/patient relationship of trust and beneficence is clearly an essential goal, legalising PAD would likely strengthen, rather than undermine this relationship as it would promote a culture of openness, honesty and trust.

I. Introduction

Whilst physician assisted dying (PAD), used here to refer both to euthanasia and assisted suicide, currently remains unlawful in the UK: "medicine's capacity to extend life…coupled with a public increasingly demanding respect for their own choices, has raised the profile of end-of-life decisions as never before."214 However, every attempt to change the law on PAD has met great opposition. A wide range of objections have been voiced against the legalisation of PAD; however, this article

[213] LLM Healthcare Ethics and Law Candidate, University of Manchester, Department of Law.

[214] Sheila McLean and Derek Morgan, 'Choosing Death or Life: Law, Medicine & Patients' Rights,' (2009) 2 *The Juridicial Review* 129, 129

will focus only on the fear that legalisation would mean 'abandoning the essential sanctity of life principle' and 'threaten the doctor/patient relationship of trust and beneficence.' This article establishes, through reference to a number of other end-of-life situations (including suicide and the withdrawal of life support), that while the sanctity of life (SoL) principle - which dictates that life is an inherent good which must be protected - remains an essential legal principle, it is only one of a number of such principles that must be balanced. By considering how the courts have addressed these balancing acts in other situations, it will be concluded that it would be possible to legalise PAD without abandoning the law's current approach to the sanctity of life. Whilst it is acknowledged that much of the recent litigation on PAD has made liberal reference to human rights, discussion of this expansive topic would add little to the conclusion of this article. Therefore, it will be excluded to allow for more in-depth analysis of the most pressing matters. This article will demonstrate that rather than undermining trust and beneficence, legalising PAD may actually bolster these, given the reality of the doctor's role in death in modern medicine. Finally, it will be briefly established why attempting to distinguish between euthanasia and assisted suicide would be unhelpful.

II. Sanctity of Life

The SoL is a "fundamental" common law principle,215 which renders the "intentional ending of life" morally wrong. 216 At its core is the belief that "life is a basic, intrinsic good".217

[215] John Keown, The Law and Ethics of Medicine: Essays on the Inviolability of Human Life (OUP 2012), 3.

[216] David Gurnham, 'The Ethics of Side Effects: Sanctity of Life & the Doctrine of Double Effect as Political Rhetoric,' (2007) 2 Asian Journal of WTO & International Health Law and Policy 141, 144.

[217] Keown (n215), 5.

However, unlike vitalism,218 it does not demand that life be preserved "at all costs."219 With reference to a number of end of life situations, it will be demonstrated that rather than deploying the SoL as a "wholesale prohibition" on ending life, the law recognises its role as one of a number of important principles. 220 This means while it must always be a weighty consideration when balancing competing interests, it need not always be the prevailing principle and therefore it is theoretically possible to both continue this respect for SoL and allow the legalisation of PAD.

III. The Law and the Sanctity of Life

Currently, PAD is unlawful in both its forms. Since one cannot consent to the intentional taking of one's own life by another, euthanasia amounts to murder;[221] for which compassion is no defence.[222] Assisted suicide is a statutory crime, introduced in 1961 when suicide was decriminalised,[223] and updated in 2009.[224] This renders it illegal to perform: "an act capable of encouraging or assisting the suicide or attempted suicide of another person".[225] Unusually, permission of the Director of Public Prosecutions (DPP) is required before a prosecution can be brought.[226] Following a legal challenge by Debbie Purdy,[227]

[218] Abdul-Rasheed Rabiu and Kapil Sugand, 'Has the sanctity of life law 'gone too far'?: analysis of the sanctity of life doctrine and English case law shows that the sanctity of life law has not 'gone too far,'' (2014) 9 Philosophy, Ethics, and Humanities in Medicine 1, 5.

[219] Keown (n215), 4.

[220] Gurnham (n216), 144.

[221] ibid.

[222] *R v Inglis* [2011] 1 WLR 1110, [37] (Justice CJ)

[223] The Suicide Act 1961, s2(1).

[224] Coroners and Justice Act 2009, s59 & Sch.12.

[225] The Suicide Act 1961, s2(1).

[226] ibid, s2(4).

[227] *R (on the application of Purdy) v the Director of Public Prosecutions* [2009] UKHL 44.

the DPP guidance set out what factors would tend towards and against prosecution.[228] Crucially, one of the factors in favour of prosecution is that "the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional."[229] There have been numerous attempts to change the law, both legislatively[230] and through case law,[231] but none have been successful. From this superficial consideration of the law on PAD one may forgivably assume that SoL is indeed supreme.

This assumption is immediately challenged when one considers situations in which individuals with capacity seek to end their own lives, either through suicide or the refusal of life-saving treatment; in both situations the law upholds autonomy/the principle of self-determination[232] at the expense of the SoL.

The decriminalisation of suicide is inherently problematic for the claim that the law necessarily and fully supports the SoL.[233] According to Hoffman LJ decriminalisation represented: "recognition that the principle of self-determination should in that case prevail over the sanctity of life."[234] Indeed, if it is "lawful for the person whose life it is to end it"[235], that renders the claim that life must always be treated as sacred unsustainable.

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[228] The Director of Public Prosecutions, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide,' (2014) <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> accessed: 7 May 2018, paras 43 and 45.

[229] ibid, para 43.14.

[230] E.g. Assisted Dying for the Terminally Ill Bill [HL] 2005; Assisted Dying (No. 2) Bill 2015-16

[231] R (on the application of Nicklinson and another) v Ministry of Justice [2014] UKSC 38

[232] The principle of self-determination is the principle that states that we have the right to make autonomous decisions about what happens to our body and in our lives, free from external interference.

[233] The Suicide Act 1961, s1

[234] *Airedale N.H.S. Trust v Bland* [1993] A.C. 789, [827A] (Hoffman LT)

[235] *Nicklinson* (n231), [90] (Lord Neuberger)

Finnis attempts to rebut this, arguing that the sponsors of the act "repudiated rather than recognised the 'principle of self-determination'."[236] However, he is attempting to support a logical inconsistency; to legalise the autonomous taking of one's own life necessarily expresses a message regarding the place of self-determination irrespective of whether this was the initial intention of the drafters. The law on suicide demonstrates that while the SoL is an important principle in British law it is not an absolute one, especially when balanced against autonomy, and thus legalising PAD may not represent any novel, or necessarily problematic 'abandonment' of this. Indeed, in *Nicklinson* it was judicially acknowledged, that if the SoL: "cannot justify a ban on suicide by the able-bodied, it is difficult to see how it can justify prohibiting a physically incapable person from seeking assistance to bring about the end of their life."[237]

Furthermore, the application of the law on assisted suicide is not as clear in its commitment to the SoL as its 'black letter' reading suggests. The broad drafting of the s2(1) offence,[238] encapsulating even relatively benign assistance such as information provision, seems indicative of strong legal support for the SoL. However, the requirement to obtain permission of the DPP before bringing a prosecution[239] has allowed for a more nuanced approach to the balancing of competing principles the legislation initially suggests. This is exemplified by the case of Daniel James, a young, paralysed ex-rugby player who took his life at Dignitas. [240] Unequivocal evidence

[236] John Finnis, 'Bland: Crossing the Rubicon,' (1993) 109 Law Quarterly Review 329, 337.

[237] *Nicklinson* (n231), [358] (Lord Kerr).

[238] The Suicide Act 1961, s2(1).

[239] ibid, s2(4).

[240] Richard Edwards, 'Assisted suicide: parents of Daniel James will not face charges,' *The Telegraph* (London 9 December 2008) <https://www.telegraph.co.uk/news/worldnews/europe/switzerland/3690874/Assisted-suicide-parents-of-Daniel-James-will-not-face-charges.html> Accessed 24 April 2018; Director of Public

established that his parents had assisted him, yet the DPP held that prosecution would not be in the public interest.[241] Indeed the position against prosecution in cases of benevolent, peer-assisted travel to Dignitas-style clinics[242] is so well entrenched that the Lords saw fit to recognise this in the *Nicklinson* case.[243] Toulson LJ acknowledged that if *Nicklinson's* wife was willing to help him travel she would be "unlikely" to face prosecution under the DPP.[244]

This appears to demonstrate that the courts are "prepared to concede that some lives are not worth living".[245] If the law is willing to accept that autonomy should prevail over the SoL when adults with the physical capacity to do so wish to end their lives, surely it is possible that this law could also accommodate the legalisation of PAD?

A further challenge to the claim that PAD cannot be legalised is the fact that a competent adult has an "absolute right" to refuse medical treatment for any, or no, reason "even where that decision may lead to his or her own death."[246] This demonstrates that the principle of autonomy can "trump" the SoL,[247] or else: "we would seek to prevent competent persons from refusing life-saving medical treatment".[248] In end-of-life situations where competent, capable adults wish to die, autonomy is considered sufficient to outweigh the SoL. Surely it is at least plausible that the same could be said for situations

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Prosecutions *'Decision on Prosecution – The Death by Suicide of Daniel James'* (2008) (no longer available online).

[241] *ibid.*

[242] DPP Policy (n228), para 43.

[243] *Nicklinson* (n231).

[244] *ibid.* [5] (Toulson LJ).

[245] McLean and Morgan (214), 148.

[246] *Re MB (Medical Treatment)* [1997] 2 FLR 426.

[247] Gurnham (n216), 146.

[248] House of Lords Select Committee 'Report on the Assisted Dying for the Terminally Ill Bill' (TSO, 2005), 24.

in which the only difference is that the person lacks the physical capacity to take their own life, or the "window of opportunity"[249] to refuse treatment? Indeed, this discrepancy forms part of the basis for Noel Conway's legal battle for the legalization of assisted suicide.[250] Though the case was initially rejected,[251] Conway has successfully petitioned for appeal.[252] This has yet to be held, however the fact the courts were willing to grant the appeal is itself indicative of their willingness to accept that autonomy has the potential to outweigh SoL in this scenario also.

The fact that law recognizes the importance of SoL, but does not demand unequivocal commitment to it in all circumstances is further evidenced by the judgment in the seminal *Bland* case.[253] This concerned a young man who had been in a permanent vegetative state for three years following the Hillsborough disaster, and who had not executed an advance directive.[254] The hospital sought assurance that it would be lawful to withdraw/withhold his life sustaining treatment.[255] While there was concerted judicial effort in *Bland* to emphasise the law's "profound respect" for the SoL, it was also acknowledged that a "universal" commitment to this was inappropriate, and that exceptions to it *already* existed in English law.[256] It was acknowledged that the possibility of other principles to outweighing SoL concerns is neither novel nor necessarily unacceptable in the law. Hoffman LJ observed

[249] Jenny Kitzinger and Celia Kitzinger 'The 'window of opportunity' for death after severe brain injury: family experiences,' (2013) 35 Sociology of Health & Illness 1095, 1095.

[250] *R (Conway) v Secretary of State for Justice* [2017] EWCA Civ 275, [6] (Ryder P)

251 ibid.

[252] ibid.

[253] *Bland* (n234).

[254] ibid, [795C] (Brown P).

[255] ibid, [796D] (Brown P).

[256] ibid, [820G] (Butler-Sloss LJ).

that the SoL was only "one of a cluster of ethical principles",[257] illustrating the need for this to be weighed against other considerations, rather than taken as absolute. Again, we see that legalising PAD would not necessarily mean 'abandoning' the principle of SoL; rather it could simply be another instance where, having conducted a careful balancing exercise, the SoL was outweighed by other essential principles.

The final issue to consider is the 'doctrine of double effect.' Doctors are permitted by law to administer painkillers, even when palliative care specialists will know that the dosage is such that "incidental effect" will "be to abbreviate the patient's life."[258] The key to this doctrine is intent; death must be "a mere side effect"[259] rather than being the purpose of administration. Since the SoL principle only prohibits intentional killing, subscribers to the validity of this doctrine are able to circumvent what may be considered an uncomfortable intersection between the provision of palliative care and respect for the SoL. However, the doctrine is vulnerable to the critique that it represents a legal falsehood, created to allow doctors to continue their jobs while maintaining a "symbolic",[260] although superficial, 'commitment' to the SoL. The focus on 'intent' can be accused of untenable simplification; simply because a doctor "directs his mind towards the question of the benefits and burdens of treatment" does not preclude death *also* being an intended consequence. [261] Alternatively, if one is persuaded that the 'intention distinction' can render the doctrine "consistent" with

[257] ibid, [826F] (Hoffman LJ).

[258] ibid, [867] (Lord Goff).

[259] Gurnham (n216), 145.

[260] Emily Jackson, 'Whose Death is it Anyway?: Euthanasia and the Medical Profession,' (2004) 57 *Current Legal Problems* 415, 433.

[261] Gurnham (n216), 147.

the SoL, then PAD can be considered similarly consistent.[262] Arguably, the requirement that death be a mere consequence, is met "where a request for assisted death is acceded to in good faith" as the intention here is "to respect a patient's wish to autonomously determine the manner and quality his death."[263] Either way, it is apparent that this doctrine signifies a legal acceptance that in some situations, the SoL must be superseded by the need to prevent suffering. Therefore, the examination of the doctrine of double effect allows us to conclude that the courts approach to the SoL principle could theoretically support legalised PAD.

The position which clearly emerges from the examination of these end of life situations is that the while the law continues to support the SoL, this is only one of a number of essential principles. Thus it is inaccurate to claim that it is 'essential' in a way which makes overruling it inherently unacceptable, as recognised by the Lords in *Bland*:[264] "the principle of the sanctity of life, while important, [is] not absolute".[265] Additionally, and seemingly paradoxically, it is possible that legalizing PAD may help prolong some lives. Currently, the legally tolerated means of ending one's own life require physical capacity. The result is that those whose illnesses will eventually rob them of this may end their lives more prematurely than they desire, simply to ensure they are able to. Additionally, in Oregon, where assisted dying is legal, only 60% of those who get a "lethal" prescription actually use it.[266] For many simply knowing they have the *option* to choose death

[262] ibid, 156.

[263] ibid, 157.

[264] *Bland* (n234).

[265] Emily Jackson, '*Medical Law: Texts, Cases and Materials,'*(4th edn, OUP 2016), 998.

[266] Raymond Tallis and John Saunders, 'The Assisted Dying for the Terminally Ill Bill, 2004' (2004) 4 Clinical Medicine 534, 537.

if the suffering gets too much, is sufficient to relieve distress and suffering; [267] they view the lethal prescription as an "insurance policy", in case their pain does indeed become "unbearable."[268] Thus, under the present system people who may never actually reach this level of suffering are ending their lives as an unnecessary, pre-emptive measure. As a result, the prohibition on PAD may threaten the SoL in some circumstances.

Finally, the suggestion that legalising PAD would mean 'abandoning' the SoL is *semantically* inappropriate. 'Abandonment' brings to mind the casting aside of something with little consideration or recognition of its value. This fails to reflect the careful weighing of competing principles which occurs when the law is asked to address matters pertaining the end of life. Where PAD is autonomously desired by someone wishing to avoid the kind of painful and undignified death that many fear,[269] an appeal to the SoL principle alone is insufficient to preclude the legalisation PAD. Further reasons are necessary to demonstrate why the balance should tip in favour of the SoL, rather than autonomy and dignity. One attempt to provide such reasons is the claim that permitting PAD would threaten the doctor/patient relationship of trust and beneficence. Though interconnected, trust and beneficence will be dealt with separately as each gives rise to its own issues and arguments; however, it will be demonstrated that neither relationship would be harmed were PAD legalised.

[267] ibid.

[268] Gurnham (n216), 156.

[269] See *Nicklinson* (n231) and *Purdy* (n227).

IV. The Doctor-Patient Relationship

(i) Trust

The necessity of maintaining trust between patient and doctor is uncontroversial. Trust is the 'cornerstone[270] of the doctor-patient relationship, without which, proper medical care is impossible. In Conway[271] it was claimed that allowing sick people to choose death would undermine this 'cornerstone;' this objection will be critically explored, and it will be demonstrated that arguments against legalisation fail and instead legalisation may actually enhance trust.

Some argue that permitting doctors to take active measures to end lives would "fundamentally alter" their role[272] in a way which would "undermine" trust. Doctors require patients to permit them to administer drugs and perform procedures that have the potential to be harmful, even lethal.[273] For this reason, only where the medical profession is perceived as 'honourable', and doctors as people who adhere to a 'strict ethical code', will trust be fostered.[274] More controversially, some claim that as part of this code it is necessary to maintain a "complete prohibition of medicalised killing",[275] in order to allay fears of abuse.[276] This has been 'justified' by reference to other conduct-based principles: "like the principle of patient confidentiality…the absolute prohibition on active euthanasia protects the medical profession's image of itself as an

[270] British Medical Association, 'End-of-life care and physician-assisted dying report: Volume 2,' (2016) <https://www.bma.org.uk/collective-voice/policy-and-research/ethics/end-of-life-care> accessed 2 July 2019.

[271] *Nicklinson* (n231), [133] (Sales LJ).

[272] The Commission on Assisted Dying. 'The Current Legal Status of Assisted Dying is Inadequate and Incoherent,' (Demos 2011), 48.

[273] Jackson (n260), 432.

[274] ibid.

[275] ibid.

[276] ibid.

essentially ethical profession, and this in turn fosters patients' trust."[277]However, this argument is flawed.

Firstly, the absolute nature of other ethical principles is a misguided assertion. Generally, most principles permit exceptions in some circumstances, particularly where "countervailing considerations outweigh the benefits of adhering to the rule".[278] For example, confidentiality can be breached in order to prevent crime or harm to others.[279] Arguably, the benefits of assisted dying (for example, relieving suffering and respecting autonomy), outweigh the general ethical principle that precludes doctors from taking an active role in ending life. Secondly, the claim that there is in fact an absolute prohibition on killing is disingenuous. The foregoing discussion of SoL has illustrated that medical involvement with death regularly occurs. This is not rooted in lack of respect for patients or abandonment of ethics, but rather the changing nature of medicine, which now has the ability to prolong life well beyond when it may 'naturally' end.[280]

Resultantly, it is inaccurate to suggest that doctors face a complete prohibition on bringing about patient deaths; "a significant proportion" of deaths are "preceded by a decision taken by a doctor which, when acted upon, will end the patient's life."[281] For example, it is acknowledged that in many instances doctors will provide patients with doses of medication with the primary intention of providing comfort and pain relief, but which they also know will result in the shortening of that patient's life. If doctors fail to acknowledge their awareness of the inevitable outcome of such decisions this will undermine trust, harming the reputation of the medical profession as

[277] ibid, 437.

[278] ibid, 432.

[279] General Medical Council (GMC) 'Confidentiality' 2009 [36] – [39]

[280] McLean and Morgan (n214), 129.

[281] Jackson (n260), 415.

honest and honourable. Thus, I concur that maintaining the prohibition on PAD: "makes no practical sense in the light of our willingness to accept the medical profession's extensive and routine involvement in the shortening of patients' lives."[282]

Another way in which PAD may undermine trust is that it could lead to fear of coercion or of misuse of the practice by doctors, as a resource efficient alternative to providing quality end-of-life care. Gormally suggests legalised PAD may be viewed as a "convenient 'solution'" to "heavy demands on care";[283] which would be both problematic in its own right, and because medicine would be "robbed of the incentive to find genuinely compassionate solutions" to these patient's difficulties.[284] Clearly, if there is a perception that doctors possess this kind of "ulterior motive" it would "negatively impact patient trust".[285] This fear infiltrates the current system. Even though a blind eye is turned on peer-assisted suicide,[286] the involvement of a medical professional is one of the factors that makes a prosecution more likely in any given case.[287]

However, this concern pertains to the drafting of legislation, rather than striking at the heart of the permissibility of PAD. Whilst drafting sufficient safeguards to alleviate fears about abuse has proven difficult in the past (this was a factor in the rejection of Nicklinson[288]), it is nonetheless theoretically possible for legislation to "employ robust upfront

[282] ibid, 436.

[283] Luke Gormally, 'Euthanasia and Assisted Suicide: 7 Reasons Why They Should Not Be Legalized' in Donna Dickenson and others (eds) *Death, Dying and Bereavement*, (2nd edn, Sage 2000), 289.

[284] ibid, 289.

[285] Thomas Frost, Devan Sinha and Barnabas Gilbert, 'Should Assisted Dying be Legalised' (2014) 9 Philosophy, Ethics, and Humanities in Medicine 1, 4.

[286] E.g. – Daniel James. See (n240).

[287] DPP Policy (n228), [43.14].

[288] *Nicklinson* (n231).

safeguards.[289] This is supported by the experience in other jurisdictions, such as Oregon and the Netherlands. In both of these jurisdictions empirical evidence suggests that abuse has not increased following legalisation.[290] Consequently, the relationship of trust need not be harmed by these fears.

On the contrary, the legalization of PAD may actually enhance trust. A 2015 survey found that 87% of respondents felt their trust in doctors would either remain the same or increase if assisted dying were legalised, while only 12% said it would impact it negatively.[291] If individuals feel able to talk openly about their desires regarding death, and feel that doctors are legally able to provide honest information, one can see how trust may be built; especially where doctors are seen to respect patients by carrying out autonomously expressed preferences.

Any remaining "symbolic resonance"[292] of prohibiting physician assistance in death, is undermined by the negative impact this is likely to have on doctor-patient trust. Increasingly, patients expect, and are entitled, to be informed and autonomous consumers of medicine. As a result, trust in the medical profession requires openness and honesty. Maintaining a false prohibition on medicalised killing, whilst actually allowing doctors to make decisions that have the result of bringing about death, is surely detrimental to this. Thus, the attack on the legalisation of PAD on the basis of the doctor-patient relationship fails; if anything, legalisation would enhance the relationship, so long as regulation was drafted in a sufficiently robust manner.

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[289] The Commission on Assisted Dying (n272), 25.

[290] Margaret Battin, Agnes van der Heide, Linda Ganzini and others, 'Legal physician-assisted dying in Oregon and the Netherlands: evidence concerning the impact on patients in "vulnerable" groups.' (2007) 37 Journal of Medical Ethics 591.

[291] Campaign for Dying in Dignity, 'Press Release: Patients Would Trust Doctors More if Assisted Dying Was Legal' (1 June 2015) <https://www.dignityindying.org.uk/news/patients-trust-doctors-assisted-dying/> accessed 31 March 2018.

[292] Jackson (n260), 436.

(ii) Beneficence

The second concern relating to the doctor-patient relationship is that "acting with the primary intention to hasten a patient's death" is difficult to reconcile with the principle of "beneficence."[293] This principle dictates that doctors should seek to benefit patients and prevent harm.[294] Not only is this important in its own right, but it is also a necessary element of maintaining a trusting relationship. While the importance of beneficence is uncontroversial, the claim that legalising PAD would undermine beneficence is not. This will be illustrated by exploring the importance of autonomy and individuals' reasons for seeking PAD, as well as considering the system in the Netherlands, where legalisation of euthanasia was inherently linked to the doctors' duty to act beneficently. It will be concluded that beneficence is likely to be served, rather than undermined by the legalization of PAD.

Autonomy plays a central role in contemporary medico-legal jurisprudence.[295] As such, it can be argued that no good comes from prolonging a life that an autonomous agent no longer wishes to live. If an individual feels their life is not worthwhile, due to the burdens of pain and indignity, demanding they prolong this may actually be a harmful, rather than a beneficent, act. Thus, it is arguably incompatible with the principle of beneficence to refuse autonomous requests to end this suffering. This issue needs to be understood in the context of

[293] House of Lords Select Committee (n248), 47 [108].

[294] See: Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 6th Ed. (6th edn, OUP 2008).

[295] Margaret Brazier, 'Do No Harm – Do Patients Have Responsibilities Too?' (2006) 65 The Cambridge Law Journal 397, 397.

modern medicine in which there is "vastly increased capacity" to prolong life without "providing any real benefit" to health.[296]

Some argue that what beneficence demands is the provision of quality palliative care which minimises suffering sufficiently, so that the patient need not request death.[297] However, this overlooks the fact that not all suffering is the result of physical harm. For some the primary fear is of "a more existential form of suffering" such as loss of independence, control and dignity.[298] Research from Oregon highlights that indeed many of the 'harms' people seek to avoid via assisted dying go beyond the physical.[299]

It can also be argued that rather than repudiate legalised PAD, beneficence demands this because legalisation would allow doctors to facilitate the avoidance of protracted, painful deaths. This stance is reflected in the Dutch experience, where the legalisation of euthanasia actually relied on an appeal to its beneficence. Though euthanasia was unlawful under the penal code, a doctor in 1984 successfully argued that an act amounting to euthanasia was lawful on the basis of necessity, due to a conflict between; "the duty towards the patient to alleviate hopeless suffering and the duty towards the law to preserve the patient's life."[300] Often, the individuals seeking to use PAD know that the alternative is a prolonged and painful

[296] Raanan Gillon, 'Sanctity of Life Law Has Gone Too Far' (2012) 345 British Medical Journal e4637.

[297] See: Care Not Killing "The Only Humane Approach" (December 2013) <http://www.carenotkilling.org.uk/palliative-care/> Accessed: 12th May 2012

[298] House of Lords Select Committee Report (n248), 49.

[299] Linda Ganzini and others, 'Why Oregon patients request assisted death: family members' views,' (2008) 23 Journal of General Internal Medicine 154, 157.

[300] Sjef Gevers 'Euthanasia: Law and Practice in the Netherlands' (1996) 52 British Medical Bulletin 326, 328.

experience at the end of their lives[301]. Withdrawal of ANH, which is legal, leaves a person to starve and dehydrate to death; failing to treat infections can be equally as unpleasant. This concern was acknowledged, although not satisfactorily addressed, in Bland.[302] For example Lord Goff recognised that people may question why doctors are entitled to "let patient's die in a drawn out manner following treatment withdrawal, not to put him out of his misery straight away, in a more humane manner."[303]

Drawing a 'bright line' between enabling death to 'take its natural course' and actively assisting may have "symbolic resonance,"[304] however when the practical implications are considered, I concur that it is a "morally indefensible distinction"[305] that "makes very little sense."[306] Rather, permitting PAD would allow for "a compassionate response to human suffering."[307] If the medical profession's ultimate aim is to relieve suffering and benefit the patient, it makes little sense to maintain a situation in which lawful means of "hastening" death are often "less humane than the unlawful means."[308] Where the alternative to PAD is "a protracted and potentially extremely distressing death,"[309] surely beneficence demands the former. Thus, the claim that legalising PAD would threaten the doctor-patient relationship of beneficence is incredibly unconvincing. Instead, as with the relationship of

[301] E.g. *Conway* (n.250), [4] (Ryder P).

[302] *Bland* (n234).

[303] ibid, [865H] (Lord Goff)

[304] Jackson (n260), 436.

[305] ibid, 442.

[306] ibid, 433.

[307] The Commission on Assisted Dying (n272), 78.

[308] Jackson (n260), 433.

[309] ibid, 436.

trust, the legalisation of PAD may actually enhance this aspect of the doctor-patient relationship.

V. Euthanasia and Assisted Suicide: A Helpful Distinction?

The issue of the distinction between euthanasia and assisted suicide is incredibly expansive. The intention here is to briefly rebut the unconvincing suggestion that legalising *only* PAD would be a useful 'middle ground' in the debate about medically assisted death. Firstly, each offends an absolutist commitment to SoL to the same extent. Secondly, it would still require that persons have the physical capacity to carry out the final act for themselves and this would undermine any good that such a provision would offer. Those who are arguably in the most need, individuals like Tony Nicklinson, would remain unable to avow themselves of the protections and opportunities offered to the rest of the population. Thus, making such a distinction would likely deepen harm to the relationship of trust and beneficence, rather than diminishing any fears of this. Therefore, in the context of this discussion the usefulness of making a distinction between assisted suicide and euthanasia is wholeheartedly rejected.

VI. Conclusion

Through critical exploration of the legal approach to a wide range of end-of-life matters, it has been demonstrated that although the SoL remains essential, it is not absolute. Rather, it must be balanced against other essential principles, especially autonomy. As a result, it is inaccurate to suggest that in order to legalise PAD we would need to 'abandon' the SoL; this could be supported within the current legal approach. Additionally, this article disproved the claim that allowing very sick individuals to choose to die would threaten the doctor-patient relationship of trust and beneficence. If anything, it is

likely the legalised PAD would facilitate greater openness and respect between the doctor and patient, which would only serve to bolster the relationship of trust and beneficence.

Reconsidering consideration – an evaluation of *Williams v Roffey Brothers* thirty years on

Kevin Patel[310]

1989 was a major turning point in modern history. The collapse of socialist governments across Eastern Europe marked the end of the Cold War between the USA and the USSR. Denmark became the first nation in the world to legalise civil unions in same-sex relationships. In China, a lone man standing in front of a column of tanks following the Tiananmen Square protests became immortalised in Western media. Meanwhile, in the UK, whilst the media's attention was focused on revolutions and radical change occurring across the world, a dispute over money between a carpenter and a building contractor in the Royal Courts of Justice in London would cause a revolution of its own – the practical benefit principle. This principle has shaken up the doctrine of consideration within contract law, and its effects continue to be felt and debated 30 years on – not just in England and Wales, but additionally in other common law jurisdictions. In England and Wales, "practical benefit" remains undefined despite the general majority of judicial decisions concerning the practical benefit principle being positive. In addition, neither the UK Supreme Court nor its predecessor the House of Lords have taken it upon themselves to define the practical benefit principle and settle the uncertainty concerning the principle once and for all. The aim of this essay is to trace the development of the practical benefit principle over the past 30 years and analyse the various arguments both for and against the principle in the hope of settling the debate.

I. Introduction

The concept of consideration – one of the cornerstones of contract law in England and Wales – has been in a state of disarray since 1989. This is due to the landmark decision of the Court of Appeal of England and Wales in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd* (hereafter referred to as

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"*Williams v Roffey Brothers*"),[311] which introduced the so-called "practical benefit" principle into the doctrine of consideration. This principle allows for the consideration requirement to be satisfied as long as a "practical benefit" to the promisor can be identified by the court.

However, in the 30 years since the practical benefit principle was established, no individual has attempted to define precisely what a "practical benefit" to a promisor actually means. Likewise, academics and jurists remain split over the implications that the principle has had on the wider doctrine of consideration. In particular, it is still uncertain as to whether the practical benefit principle in any way compromises the traditional formulation of consideration.

These are the questions that academics believed would have finally been answered by the Supreme Court of the United Kingdom in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*.[312] Unfortunately, to their disappointment, the Supreme Court declined to evaluate *Williams v Roffey Brothers* or its effect on the wider doctrine of consideration in any detail. The Supreme Court believed that these questions instead 'should be before an enlarged panel of the court and in a case where the decision would be more than *obiter dictum*.'[313] As a consequence, when the decision in *Williams v Roffey Brothers* celebrates its 30th Birthday on 23rd November 2019, academics and jurists will be just as clueless as to the true implications of *Williams v Roffey Brothers* as they were on the same day back in 1989.

The aim of this article is to revisit the case that generated 30 years of debate and confusion over the doctrine of consideration and evaluate its judgment. This is in order to

[311] [1991] 1 QB 1 (CA).

[312] [2018] UKSC 24, [2019] AC 119.

[313] ibid, [18] (Lord Sumption SCJ).

establish once and for all whether *Williams v Roffey Brothers* deserves either praise for promoting healthy reform of the doctrine of consideration that is compliant with precedent, or that it deserves criticism for incorrectly interpreting precedent, allowing for the once-certain doctrine of consideration to become uncertain as to what now constitutes sufficient consideration. This article holds the view that the Court of Appeal in *Williams v Roffey Brothers* was wrong to rule in favour of the Claimant owing to the facts surrounding his cause of action. However, whilst it is accepted that there are genuine criticisms of the practical benefit principle which should be addressed, overall, this article contends that the practical benefit principle should be welcomed. This is on the grounds that the principle is a necessary tool of the courts to ensure that consideration remains in tandem with the reality of commercial dealings in the 21st Century. As such, if a court takes it upon itself to properly define "practical benefit," and establishes robust limitations on the application of the practical benefit principle, then this article is confident that the vast majority of current criticisms of the practical benefit principle will be resolved.

In order to achieve this aim, this article shall first provide a summary of the case facts and judgment, including the decision and the *ratio decidendi*. This article shall then examine the implications of the judgment on the doctrine of consideration, notably on the rule that performance of an existing legal duty does not suffice as sufficient consideration, as well as on the traditional view as to what generally constitutes sufficient consideration. The legal developments subsequent to *Williams v Roffey Brothers* will then be considered, examining the various reactions that the courts have had towards the judgment in that case. This shall include extensive commentary on the judgment of the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising*

Ltd,[314] on the grounds that this judgment marks the most significant and controversial extension of the practical benefit principle since it was established. This shall additionally include commentary on the Supreme Court's judgment in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, as well as examining the reactions that other common law jurisdictions have had towards *Williams v Roffey Brothers* for the purposes of comparative analysis. Finally, this article shall analyse and evaluate the judgment in *Williams v Roffey Brothers*, which will be divided into four sections – (1) whether practical benefit amounts to sufficient consideration, (2) whether the practical benefit principle amounts to an abandonment of contractual formalities, (3) whether the practical benefit principle allows for the law to be more attuned to commercial reality, and (4) whether the doctrines of good faith and promissory estoppel can offer solutions to resolve the debates over the practical benefit principle.

II. A summary of the case facts and judgment

The Defendants, building contractors trading under the name 'Roffey Brothers & Nicholls (Contractors) Ltd' ("Roffey Bros"), were contracted by Shepherds Bush Housing Association Ltd to refurbish a block of 27 flats.[315] Roffey Bros hired the Claimant, a carpenter named Mr Lester Williams ("Williams"), to complete the carpentry work for £20,000.00. After four months, Williams incurred financial difficulties because 'the agreed price…was too low to…operate satisfactory and at a profit,'[316] and Williams was negligent in failing to adequately supervise his workmen. Given the time penalty clause in the original contract, Roffey Bros became

[314] [2016] EWCA Civ 553, [2017] 1 QB 604.

[315] *Williams v Roffey Brothers* (n311), 5[G] (Glidewell LJ).

[316] ibid, [6C] (Glidewell LJ).

worried that Williams was financially unable to complete the work on time. Consequently, by oral agreement, Roffey Bros agreed to pay Williams an additional sum of £10,300.00 at a rate of £575.00 per flat completed. Williams and his workmen continued working on the flats for two months, then ceased because Roffey Bros had only made one further payment of £1,500.00. Williams subsequently sued Roffey Bros for the remaining balance and succeeded before the judge for Kingston-upon-Thames County Court. Roffey Bros appealed this decision.

The Court of Appeal unanimously dismissed Roffey Bros' appeal, holding that the oral agreement constituted sufficient consideration. Relying on the decisions in *Ward v Byham*[317] and *Williams v Williams*,[318] the court felt that Roffey Bros obtained a practical benefit from their promise to pay Williams an extra £10,300.00, as the carpentry work could be completed on time.[319] Therefore, Roffey Bros was legally bound by their promise and, therefore, forced to pay Williams a revised balance of £3,500.00,[320] as the judge at first instance recognised the necessity of 'some small deduction for defective and incomplete items'[321] given that Williams had not completed all of the flats.

The *ratio decidendi* which has since sparked numerous debates is that a promisee's continued performance of their existing duties, in the absence of fraud or duress, could suffice as sufficient consideration for the promisor's new promise if there's a "practical benefit" to the promisor. Additionally,

[317] [1956] 1 WLR 496 (CA), 498 (Denning LJ); 498–499 (Morris LJ); 499 (Parker LJ).

[318] [1957] 1 WLR 148 (CA), 151 (Denning LJ).

[319] *Williams v Roffey Brothers* (n311), 15[G]; 16[A] – [G] (Glidewell LJ).

[320] Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010), 99.

[321] *Williams v Roffey Brothers* (n311), 7[F] (Glidewell LJ).

through relying on *Hoenig v Isaacs*,[322] Glidewell LJ and Russell LJ regarded that substantial completion of the flats did entitle the Claimant to payment.[323]

III. Implications of the judgment

Williams v Roffey Brothers established the practical benefit principle. The first implication of the practical benefit principle is that it *prima facie* casts doubt on the 210-year-old *Stilk v Myrick*[324] principle that 'the promise to perform, or the actual performance of, an existing legal duty does not suffice as consideration to vary a contract.'[325] This is one of the fundamental rules of the doctrine of consideration, which *Williams v Roffey Brothers* 'refine[d], and limit[ed]'[326] to cases where 'there is no factual benefit to the promisor in making the alteration promise.'[327] Moreover, *Williams v Roffey Brothers* reclassified *Stilk v Myrick* as an early case concerning economic duress.[328][329] As a result, Carter, Phang and Poole argue that *Stilk v Myrick* is now 'irreconcilable with *Williams v Roffey*, and…for all practical purposes, been rendered moribund.'[330]

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[322] [1952] 2 All ER 176 (CA), 179[F] – [G] (Somervell LJ); 180[H] – 181[D] (Denning LJ); 182[D] –183[A] (Romer LJ).

[323] *Williams v Roffey Brothers* (n311), 10[D] (Glidewell LJ), 17[A] – [B] (Russell LJ).

[324] (1809) 2 Camp 317, 319–320; 170 ER 1168, 1169 (Lord Ellenborough CJ).

[325] Mark Giancaspro, 'Practical Benefit: an English Anomaly or a Growing Force in Contract Law?' (2013) 30 Journal of Contract Law 12, 13.

[326] *Williams v Roffey Brothers* (n311), 16[B] (Glidewell LJ).

[327] John W Carter, Andrew Phang and Jill Poole, 'Reactions to *Williams v Roffey*' (1995) 8 Journal of Contract Law 248, 253.

[328] John Adams and Roger Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 Modern Law Review 536, 539.

[329] Janet O'Sullivan, 'In Defence of *Foakes v Beer*' (1996) 55 Cambridge Law Journal 219, 220.

[330] Carter, Phang and Poole (n327), 253.

In addition, the practical benefit principle creates uncertainty as to whether the traditional formulation of consideration is ripe for reform. The traditional view was famously expressed by Lush J in *Currie v Misa*,[331] who explained that 'valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.'[332] This is widely cited as the 'benefit/detriment requirement' in academic circles,[333] and it runs in tandem with the so-called 'bargain requirement.'[334] This is the requirement that whatever is exchanged between the contractual parties has to be bargained for, as it 'is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.'[335]

In other words, the courts have historically approached consideration on the basis that it must be sufficient but need not be adequate.[336] Whilst this is still the case, *Williams v Roffey Brothers* established that 'the courts nowadays should be more ready to find its existence so as to reflect the [true] intention of the parties.'[337] As such, the courts may now be 'guided less by technical questions of consideration than by questions of fairness, reasonableness and commercial utility.'[338] If this is true, then this raises questions as to how compatible the

[331] (1874-75) LR 10 Ex 153.

[332] *Currie v Misa* (n332), 162 (Lush J).

[333] Giancaspro (n325), 13.

[334] ibid.

[335] *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847 (HL), 855 (Lord Dunedin), citing verbatim: Sir Frederick Pollock, *Pollock on Contracts* (8th edn, Stevens & Sons 1911) 175.

[336] *Haigh v Brooks* (1839) 10 Ad & E 309, 320; 113 ER 119, 123 (Lord Denman CJ).

[337] *Williams v Roffey Brothers* (n311), 18[H] (Russell LJ).

[338] Adams and Brownsword (n328), 537.

overarching doctrine of consideration is for concluding contracts in the 21st Century.

IV. Subsequent legal developments

(i) England and Wales

Just six months after *Williams v Roffey Brothers* established the practical benefit principle, the High Court of England and Wales reaffirmed this new principle in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2).*[339] In addition, the High Court repeatedly agreed with the Court of Appeal in regarding practical benefit as sufficient consideration in *Lee v GEC Plessey Telecommunications*,[340] *Simon Container Machinery Ltd v Emba Machinery AB,*[341] and in *Adam Opel GmbH v Mitras Automotive (UK) Ltd.*[342] Moreover, Giancaspro notes that the application of the practical benefit principle has expanded in the 30 years since *Williams v Roffey Brothers*.[343] For example, *Davis v Giladi*[344] established that a continuing relationship between contracting parties could constitute practical benefit if there was an advantage derived from it. Likewise, *Gribbon v Lutton*[345] determined that the attendance of a third party in tripartite agreements could constitute sufficient consideration if such attendance was of practical benefit to a party's promises.

However, the attempt to extend the practical benefit principle to cases of part-payment of debt was initially met with

[339] [1990] 2 Lloyd's Rep 526 (QB), 545 (Hirst J).

[340] [1993] IRLR 383 (QB), [116] – [118] (Connell J).

[341] [1998] 2 Lloyd's Rep 429 (QB), 434–435 (Raymond Jack QC).

[342] [2008] EWHC 3205 (QB), [2008] Bus LR D55 [40] – [43] (David Donaldson QC).

[343] Giancaspro (n325), 25.

[344] (QB, 10 July 2000) 15–16 (John Mitting QC).

[345] [2001] EWCA Civ 1956, [2002] QB 902, [81] (Pill LJ).

extreme opposition. The first attempt on this was quashed by a differently constituted Court of Appeal in *Re Selectmove Ltd*,[346] which involved a company attempting to pay off their arrears to the Inland Revenue via monthly instalments. The Court of Appeal viewed that they were bound by the long-established principle in *Pinnel's Case*[347] – upheld by the House of Lords of the United Kingdom in *Foakes v Beer*[348] – that part payment of debt does not constitute sufficient consideration to discharge the whole debt. The ruling in *Re Selectmove Ltd* was followed in *Re C (A Debtor)*[349] and *Re Sutton*,[350] which thereby prevented the practical benefit principle from encroaching upon the doctrine of part performance. This hostility towards extending the practical benefit principle to cases of part-payment of debt was accompanied by instances of judicial criticism towards the reasoning in *Williams v Roffey Brothers*. Most notably, in *South Caribbean Trading Ltd v Trafigura Beheer BV*,[351] Colman J expressed the view that the practical benefit principle is 'inconsistent with the long-standing rule that consideration, being the price of the promise sued upon, must move from the promisee.'[352] Unsurprisingly, Colman J maintained that '[b]ut for the fact that *Williams v Roffey Bros Ltd*…was a decision of the Court of Appeal, I would not have followed it.'[353]

Nevertheless, despite the determination of the High Court and Court of Appeal to limit the practical benefit

[346] [1995] 1 WLR 474 (CA), [481C] (Peter Gibson LJ).

[347] (1602) 5 Co Rep 117a, 117a; 77 ER 237, 237 (Lord Coke LC).

[348] (1884) 9 App Cas 605 (HL), 611–614 (Earl of Selborne LC); 623–624 (Lord Watson); 630 (Lord Fitzgerald).

[349] (CA, 11 May 1994), 4 (Sir Thomas Bingham MR).

[350] [2012] All ER (D) 388 (Jul) (Ch), [12] – [14] (Mr Registrar Baister).

[351] [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep 128.

[352] ibid [108] (Colman J).

[353] ibid.

principle, another differently constituted Court of Appeal in 2016 made a breakthrough in attempting to reconcile *Williams v Roffey Brothers* with the doctrine of part performance. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*, the Court of Appeal not only reaffirmed the practical benefit principle as amounting to good consideration,[354] but additionally held that it is possible for the part-payment of debt to constitute sufficient consideration where there exists a practical benefit to the promisor.[355] The rationale for this took inspiration from Lord Blackburn in *Foakes v Beer* where, whilst not outright dissenting, he nevertheless felt at unease at the conclusion of the House of Lords. Lord Blackburn was of the view that:

> 'all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.'[356]

Noting that the Law Revision Committee had in 1937 'expressed the opinion that Lord Blackburn's view remained as valid as it was some 50 years earlier and recommended that legislation should be passed to give effect to it,'[357] Kitchin LJ

[354] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (n314), [42] (Kitchin LJ); [78] (Arden LJ).

[355] ibid, [47] - [49] (Kitchin LJ); [82] – [86] (Arden LJ).

[356] *Foakes v Beer* (n348), 622 (Lord Blackburn).

[357] MWB Business Exchange Centres Ltd v Rock Advertising Ltd (n312) [40] (Kitchin LJ).

believed that 'the rule in *Pinnel's Case* is confined.'[358] This was on the grounds that whilst part-payment of debt cannot constitute consideration from a debtor to a creditor, 'the performance by the debtor of some other act he was not bound by the contract to perform may constitute good consideration.'[359] This view was concurred by Arden LJ, who believed that if a promisee's continued performance of their existing duties could amount to sufficient consideration for a promisor's new promise should there be a "practical benefit" to the promisor, then this principle would logically apply to all contracts, regardless of the nature of the contract.[360] As such, if a practical benefit could constitute sufficient consideration for a promise to pay more, as was the case in *Williams v Roffey Brothers*, then, logically, it would additionally satisfy the consideration requirement for a promise to pay less, such as in a part-payment of a debt situation.[361]

In addition, the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* distinguished the facts of the case from *Re Selectmove Ltd.* This was on the basis that MWB acquired two benefits from agreeing to receive payments of a lesser sum than they were contractually owed by Rock Advertising for a specified period of time. The first was that 'MWB would recover some of the arrears [that Rock owed to them] immediately and would have some hope of recovering them all in due course'[362] and, secondly, 'Rock would remain a licensee [of MWB's property] and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB.'[363] Consequently,

[358] ibid [41] (Kitchin LJ).

[359] ibid.

[360] ibid, [79] (Arden LJ).

[361] ibid.

[362] ibid, [47] (Kitchin LJ).

[363] ibid.

'Kitchin LJ considered there was a "commercial advantage" for each party in agreeing the revised payment schedule,'[364] that crucially involved MWB deriving 'a practical benefit which went beyond the advantage of receiving a prompt payment of a part of the arrears and a promise that it would be paid the balance of the arrears and any deferred licence fees over the course of the forthcoming months.'[365] As a result, the practical benefit matched the type of practical benefits acquired in *Williams v Roffey Brothers* as MWB arguably acquired something *more* than what they were entitled to under their original contract with Rock Advertising, thereby amounting to good consideration. In contrast, Arden LJ highlighted that in *Re Selectmove Ltd* 'there was no finding by the trial judge that there was any extra benefit to the Inland Revenue in having an instalment agreement with the taxpayer.'[366] As such, the practical benefit to the Inland Revenue 'amounted to no more than the promise to pay part of the debt, which, being what the debtor was already bound to do, could not be valid consideration,'[367] and it was precisely this that Peter Gibson LJ had rejected as good consideration in *Re Selectmove Ltd*;[368] the same situation that the House of Lords encountered in *Foakes v Beer*. Indeed, Arden LJ commented that 'Peter Gibson LJ could not reject the general principle that, where there was other consideration, which the law recognised was sufficient to support a contract, that was good consideration for a promise.'[369] This distinction thus enabled the Court of Appeal

[364] Adam Shaw-Mellors, 'Contractual Variations and Promises to Accept Less: Pragmatism in the Court of Appeal' (2016) 8 Journal of Business Law 696, 701.

[365] MWB Business Exchange Centres Ltd v Rock Advertising Ltd (n314), [48] (Kitchin LJ).

[366] ibid, [84] (Arden LJ).

[367] Shaw-Mellors (n364), 702.

[368] *Re Selectmove Ltd* (n346), 480[H] – 481[D] (Peter Gibson LJ).

[369] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (n314), [84] (Arden LJ).

to extend the practical benefit principle to part-payment of debt cases.

Furthermore, this distinction of *Foakes v Beer* and *Re Selectmove Ltd* from the facts in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* allows for some guidance as to how the practical benefit principle is to be applied to part-payment of debt cases. It appears that practical benefit can only constitute sufficient consideration in such cases where 'there exists the prospect of a continuing commercial relationship with the debtor.'[370] In addition, Arden LJ offered some guidance on where practical benefit would not constitute sufficient consideration. Importantly, practical benefit would not qualify as sufficient consideration where it merely had the effect of 'accommodating the debtor and not having to enforce payment of the debt.' Such guidance arguably 'should serve to restrict any potential arbitrariness in its use and development.'[371]

Two years after this landmark extension of the practical benefit principle to cases of part-payment of debt, the Supreme Court handed down its judgment on MWB's appeal of the Court of Appeal's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*. This was the decision that legal commentators had been waiting for ever since the practical benefit principle first came into being. It was hoped that the Supreme Court could finally review the judgment in *Williams v Roffey Brothers* and settle the debate as to whether the Court of Appeal was correct in establishing the practical benefit principle, and whether the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* was right to extend the principle to part-payment of debt cases. However, to their disappointment, the Supreme Court declined

[370] Daniel M Collins, 'Part-payment of Debt: A Variation on a Theme?' (2017) 28 International Company and Commercial Law Review 253, 256.

[371] ibid, 256.

to examine the consideration issue in any depth, and instead allowed MWB's appeal on the basis that the oral contractual variation did not follow the formalities for contractual variation prescribed by clause 7.6 in the contract between MWB and Rock Advertising.[372] Allowing the appeal on that point of law made 'it unnecessary to deal with consideration,'[373] although, Lord Sumption SCJ acknowledged that the decision in *Foakes v Beer*, in light of *Williams v Roffey Brothers, Re Selectmove Ltd* and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*, 'is probably ripe for re-examination.'[374] Nevertheless, it is true that 'in declining to rule on the consideration point or provide *obiter* guidance, the court has missed an opportunity.'[375]

As such, whilst the practical benefit principle has been greatly expanded since its inception in *Williams v Roffey Brothers*, its application and compatibility with the rule in *Pinnel's Case* and *Foakes v Beer* remains as a matter of contention until the Supreme Court fully re-examines *Williams v Roffey Brothers* and *Foakes v Beer*.

(ii) International Developments

Australia, Canada, Hong Kong, Ireland, New Zealand, and Singapore have all affirmed the practical benefit principle in *Williams v Roffey Brothers* as good consideration. However, each of these jurisdictions diverges as to the extent to which the practical benefit principle has been applied and followed.

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[372] *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* (n312), [17] (Lord Sumption SCJ); [20] (Lord Briggs SCJ).

[373] ibid, [18] (Lord Sumption SCJ).

[374] ibid.

[375] Jeanette Ashton and Juliet Turner, 'Between a Rock and a Hard Place? No Consideration from the Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*,' (2018) 29 International Company and Commercial Law Review 593, 594.

For example, Ireland has remained steadfast in refusing to extend the practical benefit principle to the doctrine of part-performance, mirroring the treatment of the practical benefit principle by the courts of England and Wales prior to *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*. The High Court of Ireland in *Truck & Machinery Sales Ltd v Marubeni Komatsu Ltd*[376] concluded that the rule in *Pinnel's Case* 'has been settled law [in Ireland] since…*Foakes v Beer*,'[377] with Keane J being unwilling to depart from *Re Selectmove Ltd*.[378] More recently, Laffoy J in *Barge Inn Ltd v Quinn Hospitality Ireland Operations 3 Ltd*[379] reiterated that 'the rule in *Pinnel's Case* still represents the law in Ireland and this court is bound by it.'[380] Consequently, it appears that the practical benefit principle shall not amount to sufficient consideration in part-payment of debt cases in Ireland anytime soon. However, it remains to be seen as to whether *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* shall have any persuasive effect on Irish courts in the future.

Whereas, although Hong Kong has largely applied *Williams v Roffey Brothers* and the practical benefit principle in a conservative manner, recent developments seem to evidence that Hong Kong has liberalised its treatment of both. The most significant case for almost 20 years was *UBC (Construction) Ltd v Sung Foo Kee Ltd*.[381] In this case, Kaplan J reviewed the principal arguments in *Williams v Roffey Brothers*, albeit through citing a secondary authority,[382] before concluding that the facts of the case were similar to *Williams v*

[376] [1996] 1 IR 12.

[377] ibid, 28 (Keane J).

[378] ibid, 29 (Keane J).

[379] [2013] IEHC 387.

[380] ibid, [62] (Laffoy J).

[381] [1993] 2 HKLR 207.

[382] Anthony May (ed), *Keating on Building Contracts* (5th edn, Sweet & Maxwell 1991) 90.

Roffey Brothers and, as such, the judgment in that case should be followed.[383] Although the High Court of Hong Kong had affirmed *Williams v Roffey Brothers* and the practical benefit principle as good law, the judgment of Kaplan J attracted much academic criticism for adopting the practical benefit principle without adequately analysing *Williams v Roffey Brothers* and the academic discourse surrounding the case.[384] Nevertheless, in *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd*,[385] Andrew Cheung J emphasised that the 'law must not depart from the reality of everyday life for no good reason'[386] and that, based on the facts of the case, 'it would take very compelling reasons for the Court to hold that what were regarded as contractual by the parties actually had no contractual force in law for want of consideration.'[387] According to Chng and Goh, this passage demonstrates that the Court of Appeal of Hong Kong has 'evinced a preference for flexibility in the doctrine of consideration in order to align the law with commercial realities.'[388]

Likewise, whilst Singapore was initially slow in its application of *Williams v Roffey Brothers*, recent decisions appear to demonstrate judicial willingness in Singapore to not only increasingly find practical benefit and regard it as good consideration, but even extend the practical benefit principle to part-payment of debt cases. The practical benefit principal was initially met with hesitation by the Court of Appeal of Singapore in *Sea-Land Service Inc v Cheong Fook Chee*

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[383] *UBC (Construction) Ltd v Sung Foo Kee Ltd* (n381), 227–229 (Kaplan J).

[384] Michael Fisher and Desmond Greenwood, *Contract Law in Hong Kong*, (2nd edn, Hong Kong University Press 2011), 104–105.

[385] [2010] HKEC 1748.

[386] ibid, [51] (Andrew Cheung J).

[387] *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd* (n385), [51] (Andrew Cheung J).

[388] Kenny Chng and Yihan Goh, 'A renewed consideration of consideration: *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553' (2016) 16 Oxford University Commonwealth Law Journal 323, 329.

Vincent.[389] Although the Court of Appeal of Singapore applied *Williams v Roffey Brothers* to the facts, they refused to allow the Claimant to rely on it on the grounds that any practical benefit supplied to the defendant would have been quite minimal.[390] In addition, *Williams v Roffey Brothers* was referred to twice as embodying a 'limited exception,'[391] yet at the same time, the Court of Appeal of Singapore seemed to additionally view *Williams v Roffey Brothers* as 'embodying a broad approach towards consideration.'[392] Moreover, the High Court of Singapore was quite critical of the practical benefit principle in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*,[393] where it held the view that 'it is all too easy to find that a practical benefit exists.'[394] Andrew Phang Boon Leong J expressed his view that *Williams v Roffey Brothers* renders 'the requirement of consideration otiose or redundant, at least for the most part'[395] due to the ease of finding a practical benefit.

Nevertheless, Andrew Phang Boon Leong J demonstrated frustration towards 'the somewhat inconsistent approaches adopted' between enforcing promises to pay more (*Williams v Roffey Brothers*) and enforcing promises to pay less (*Foakes v Beer*).[396] Two years later, the High Court of Singapore in *Teo Seng Kee Bob v Arianecorp Ltd*[397] expressed

[389] [1994] 3 SLR 631, 635 (Yong Pung How CJ).

[390] ibid.

[391] ibid 634, 635 (Yong Pung How CJ).

[392] Carter, Phang and Poole (n327), 263.

[393] [2006] SGHC 222.

[394] Dilan Thampapillai, 'Practical benefits and promises to pay lesser sums: reconsidering the relationship between the rule in *Foakes v Beer* and the rule in *Williams v Roffey*,' (2015) 34 University of Queensland Law Journal 301, 308.

[395] *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* (n393), [30] (Andrew Phang Boon Leong J).

[396] ibid, [29] (Andrew Phang Boon Leong J).

[397] [2008] 3 SLR 1114.

the view that the 'modern approach [to consideration]…is encapsulated in the judgment of Glidewell LJ in *Williams v Roffey Bros*.'[398] However, the most significant development occurred in *Gay Choon Ing v Loh Sze Ti Terence Peter*,[399] where the Court of Appeal of Singapore not only reaffirmed the practical benefit principle's place in the law of Singapore,[400] but additionally commented that it 'would in fact have required no great leap of logic – let alone faith – to have extended the holding in *Williams* to a *Foakes v Beer* situation.'[401] Although the Court of Appeal of Singapore 'stopped short of deciding the point as it was not argued before the court,'[402] it nonetheless demonstrates that Singapore is increasingly welcoming the practical benefit principle as an integral part of the doctrine of consideration, and may soon follow England and Wales, Australia, and New Zealand in extending the practical benefit principle to cases of part-payment of debt.

On this point, whilst fully endorsing *Williams v Roffey Brothers*, Australia became the first jurisdiction in the world to expand the practical benefit principle to situations involving the part-payment of debt. Although Australia initially applied the practical benefit principle in the unreported case of *Ajax Cooke Pty Ltd v Nugent*,[403] the most significant judgment was delivered by the Supreme Court of New South Wales in *Musumeci v Winadell Pty Ltd*.[404] Here, Santow J held that as long as any potential remedy against the promisee is worth less to the promisor than actual performance by the promisee, then the practical benefits derived from the promisee's continued

[398] ibid, 1135–1136 (Lai Siu Chiu J).

[399] [2009] SGCA 3.

[400] ibid [70], [92], [101] – [110] (Andrew Phang Boon Leong JA).

[401] ibid, [103] (Andrew Phang Boon Leong JA).

[402] Chng and Goh (n388), 329.

[403] (SC (Vic), 29 November 1993), 10–11 (Phillips J).

[404] (1994) 34 NSWLR 723.

performance of their existing contractual obligations will suffice as good consideration.[405] However, Santow J went further and opinioned that the practical benefit principle should apply to cases where the promisor had agreed to accept less, rather than pay more, for the promisee's continued performance.[406] This was quite remarkable given how England and Wales took the opposite view in *Re Selectmove Ltd* one year later. This demonstrates that Australian courts were more prepared than other common law jurisdictions at the time to modify the existing precedents of *Pinnel's Case* and *Foakes v Beer* to ensure that consideration remained in step with commercial reality. This view is reaffirmed by how several other cases at both the federal and state level in Australia have since endorsed the practical benefit principle. For example, the Supreme Court of Queensland firmly approved and applied the practical benefit principle in *Mitchell v Pacific Dawn Pty Ltd*,[407] where Ambrose J accepted that the practical benefit principle as expressed in *Musumeci v Winadell Pty Ltd* as 'a correct statement of the law at this stage of its development.'[408]

Likewise, the practical benefit principle was expressly endorsed by Court of Appeal of New South Wales in *Tinyow v Lee*[409] and received further endorsement by the Supreme Court of New South Wales in *Silver v Dome Resources NL*[410] and in *Vella v Ayshan*.[411] Moreover, the Federal Court of Australia cited the practical benefit principle with approval in *Francis v South Sydney District Rugby League Football Club Ltd*[412] and

[405] ibid 745, 747 (Santow J).

[406] ibid, 747 (Santow J).

[407] [2003] QSC 86.

[408] ibid, [37] (Ambrose J).

[409] [2006] NSWCA 80, [61] (Santow JA).

[410] (2007) 62 ACSR 539, 572 (Hamilton J).

[411] [2008] NSWSC 84, [18] (White J).

[412] [2002] FCA 1306, [241] (Lindgren J).

Evans Deakin Pty Ltd v Sebel Furniture Ltd.[413] Recently, the practical benefit principle appears to have been regarded as an established feature of Australian contract law by the Supreme Court of Victoria,[414] the Supreme Court[415] and Court of Appeal of New South Wales,[416] and the Federal Court of Australia.[417] Although the High Court of Australia has not yet given an authoritative approval of the practical benefit principle, at least two High Court judges 'have tentatively indicated their acceptance of the concept of practical benefit as valid consideration'[418] in *DPP (Vic) v Le*.[419] According to Giancaspro, the aforementioned authorities and *dicta* in the High Court of Australia 'supports the view that the practical benefit principle has been received into Australian contract law or, at the very least, is close to being so.'[420] Express approval of the practical benefit principle by the High Court of Australia would confirm Giancaspro's view and solidify the principle's place in Australian contract law.

Across the Tasman Sea, New Zealand first welcomed the practical benefit principle in *Newmans Tours Ltd v Ranier Investments Ltd*[421] where the High Court of New Zealand expressly followed *Williams v Roffey Brothers*.[422] In addition, New Zealand followed their Australian neighbour in extending

[413] [2003] FCA 171, [594] (Allsop J).

[414] *MP Investments Nominees Pty Ltd v Western Bank of Australia* [2012] VSC 43, [107] – [115] (Judd J); *Wolfe v Permanent Custodians Ltd* [2012] VSC 275, [113] (Zammit AsJ).

[415] *W & K Holdings (NSW) Pty Ltd v Mayo* [2013] NSWSC 1063, [164]– [166]

(Sackar J).

[416] *Schwartz v Hadid* [2013] NSWCA 89, [117]– [119] (Meagher JA).

[417] *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071, [144] – [147] (Flick J).

[418] Mark Giancaspro, 'For Your Consideration: Old Rules, Practical Benefit and a New Approach to Contractual Variation' (PhD thesis, University of Adelaide 2014), 101.

[419] (2007) 232 CLR 562, 566–567 (Gummow and Hayne JJ).

[420] Giancaspro (n325), 102.

[421] [1992] 2 NZLR 68.

[422] ibid, 80 (Fisher J).

the practical benefit principle to cases of part-payment of debt in *Machirus Properties Ltd v Power Sports World (1987) Ltd*.[423] Here, the High Court of New Zealand held that a landlord had obtained practical benefits from a revised payment schedule, owing to the fact that the payments of rent were with interest and these payments would have continued after the property lease had expired, as well as how the commercial relationship between the parties would have been maintained.[424] As such, the High Court of New Zealand found that *Foakes v Beer* and *Re Selectmove Ltd* were without application,[425] and stressed that *Re Selectmove Ltd* and *Williams v Roffey Brothers* were not inconsistent.[426] It is interesting how these arguments would later repeat themselves in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* where the Court of Appeal of England and Wales finally extended the practical benefit principle to cases concerning the part-payment of debt. As such, not only does this decision demonstrate the strong degree of acceptance of the practical benefit principle by New Zealander courts, but also that judicial thinking on consideration in New Zealand mirrors that of Australia. The readiness of the Privy Council of the United Kingdom to utilise the practical benefit principle to find consideration in *R v Attorney General for England and Wales*,[427] which concerned an appeal from the Court of Appeal of New Zealand, stands as a testament to this.

Finally, Canada first addressed *Williams v Roffey Brothers* in *Chahal v Khalsa Community School*,[428] where the Superior Court of Justice of Ontario appeared to support the

[423] [2000] ANZ ConvR 435.

[424] ibid, 437–438 (Gendall J).

[425] ibid, 438 (Gendall J).

[426] ibid.

[427] [2003] UKPC 22, [2004] 2 NZLR 577, [32] (Lord Hoffman).

[428] (2000) 2 CCEL (3d), 120.

practical benefit principle *obiter dictum.*[429] However, express judicial endorsement came eight years later when the Court of Appeal of New Brunswick approved the practical benefit principle in *NAV Canada v Greater Fredericton Airport Authority Inc*.[430] The following year, the Supreme Court of British Columbia in *River Wind Ventures Ltd v British Columbia*[431] 'indicated express approval of the reasoning in that decision and its effect in softening the rigid doctrine of consideration in the context of contractual renegotiation.'[432] However, what makes the Canadian approach arguably the most radical in the common law world is the fact that the courts in both decisions utilised *Williams v Roffey Brothers* to modify Canadian contact law 'by dispensing…the need for consideration in contractual modifications provided that they were not procured by duress.'[433] Consequently, it appears that the practical benefit principle has shaken Canadian contract law to the point that the doctrine of consideration has been eroded where there are contractual modifications. The treatment of this development by the Supreme Court of Canada, however, remains to be seen.

V. An evaluation of *Williams v Roffey Brothers*

Williams v Roffey Brothers has been subject both widespread criticism and praise by various commentators ranging from academics to judges. The crucial arguments both in favour of and against the Court of Appeal's judgment in *Williams v*

[429] ibid, [76]– [78] (Mandel J).

[430] (2008) 290 DLR (4th) 405, 422–426 (Robertson JA).

[431] 2009 BCSC 589, [32] (Meiklem J).

[432] Giancaspro (n325) 113.

[433] ibid, 113–114; *NAV Canada v Greater Fredericton Airport Authority Inc (n430), 423–424 (Robertson JA); River Wind Ventures Ltd v British Columbia* (n431), [30] – [32] (Meiklem J).

Roffey Brothers, especially the contrasting views on the practical benefit principle, shall now be evaluated in turn.

(i) Practical benefit – sufficient consideration?

The first criticism is that *Williams v Roffey Brothers* is 'a classic *Stilk v Myrick* case.'[434] Just as how the sailors in *Stilk v Myrick* continued to perform their existing duties (return their ship safely) in return for a promise of extra wages, Williams continued to perform his existing duties in return for a promise of an additional £10,300.00. Moreover, Knight has criticised the decision to reclassify *Stilk v Myrick* as an early duress case because 'the…pact was concluded on land rather than the high seas and the master of the ship made no complaint of any pressure being put upon him.'[435] Therefore, the case does not fall into the *Harris v Watson*[436] principle that variations of sailors' wages under dangerous circumstances whilst at sea would be nullified by duress.[437] Unsurprisingly, Hooley concluded that it is 'difficult to see how [Williams could have] succeeded.'[438]

This leads on to the problems with the practical benefit principle. It is argued that Roffey Bros obtained five benefits from Williams' continued performance. McKendrick highlights that the first three – avoidance of contractual breach; Roffey Bros was spared from finding another carpenter, and the parties avoided breaching the time penalty clause – are quite controversial.[439] This is because all three were benefits that Roffey Bros was entitled to under the original contract. The

[434] *Williams v Roffey Brothers* (n311), 23[A] (Purchas LJ).

[435] Chris Knight, 'A plea for (re)consideration,' (2006) 2 Cambridge Student Law Review 17, 18.

[436] (1791) Peake 102, 170 ER 94.

[437] ibid, 103; 94 (Lord Kenyon).

[438] Richard Hooley, 'Consideration and the existing duty' (1991) Journal of Business Law 19, 20.

[439] Ewan McKendrick, *Contract Law* (11th edn, Palgrave Macmillan 2015) 77.

third benefit, in particular, is problematic because, if the work had not been completed on time, Roffey Bros could have just sued Williams for damages on the grounds that he breached his obligations under the contract. Therefore, Roffey Bros arguably had no obligation to pay Williams a higher amount.

However, given Williams' financial difficulties, it is arguable that this would have prevented Williams from paying Roffey Bros damages for contractual breach. Thus, arguably, a promise of higher wages was beneficial to Roffey Bros in order to ensure that they would not lose money as a consequence of a likely penalty from not completing the work on time.

Likewise, the fourth and fifth benefits – that the original 'haphazard method of payment'[440] was replaced by a formalised scheme of £575.00 per flat completed, and that, consequently, Roffey Bros 'was able to direct their other trades to do work in the completed flats'[441] – could be regarded as sufficient consideration if Williams actually did 'accept a new obligation to complete the flats one by one.'[442] Strangely, the Court of Appeal did not touch upon this argument at all. The court certainly should have as, if there was sufficient legal benefit to constitute consideration, then there would have been no necessity upon the court to interpret past judgments on consideration in such a way as to formally confirm the existence of a practical benefit principle within existing law. Consequently, because Williams undertook a duty which he was not already bound to do in return for an additional sum, then this arguably does constitute the consideration necessary to enforce Williams' claim for the remaining £3,500.00.

[440] *Williams v Roffey Brothers* (n311), 19[B] (Russell LJ).

[441] ibid, 20[C] (Purchas LJ).

[442] McKendrick (n439), 77.

(ii) Defining what constitutes "practical benefit" – an abandonment of contractual formalities?

Giancaspro has criticised practical benefit on the grounds that it 'lowers the bar…satisfying the consideration requirement when modifying a contract.'[443] This is because 'the Court of Appeal has…failed to identify practical benefit with sufficient precision.'[444] Knight has noticed that no court in England and Wales has yet defined what constitutes 'sufficient practical benefit,' and as a result, this seriously undermines the doctrine of consideration.[445] This is on the grounds that 'an effective doctrine of consideration protects parties against casual promises,'[446] and to classify practical benefit as sufficient consideration would mean that the courts would have to infer intentions that simply did not exist at the time that the parties entered into their contract.[447] As a consequence, '[a]ny motive or desire of the promisor is capable of being turned into a practical benefit,'[448] and thus what constitutes sufficient consideration becomes less certain. Thus, this diminishes one of the many strengths of English contract law – the necessity of 'objective criteria for predicting whether a promise is enforceable or not.'[449]

Furthermore, the argument that laymen typically accept 'that a promise made seriously is binding on them,'[450] is largely because they lack proper legal advice. Therefore, had both Williams and Roffey Bros sought proper legal advice before

[443] Giancaspro (n 325), 30.

[444] McKendrick (n439), 77.

[445] Knight (n435), 17.

[446] ibid, 18.

[447] ibid.

[448] Mindy Chen-Wishart, 'Consideration, Practical Benefit and the Emperor's New Clothes' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law*, (OUP 1997), 139.

[449] O'Sullivan (n329), 226.

[450] O'Sullivan (n329), 226.

their oral variation of the original contract, then they would have been able to complete the formalities necessary to ensure clear evidence of consideration. As a result, the parties would have avoided the situation that they found themselves in before the court, where any evidence of consideration in their oral contractual variation was so difficult to establish that even the Court of Appeal failed to derive consideration from the fourth and fifth benefits. Even if Williams had given Roffey Bros, for the sake of the argument, a handful of chocolate wrappers – as had occurred in *Chappell & Co Ltd v Nestlé Co Ltd*[451] – this would have constituted sufficient consideration because Williams would nonetheless have been doing something that he was legally not bound to do.[452] Therefore, the vagueness of practical benefit has meant that now, even 'a well advised promisor will not know in advance whether his promise binds him.'[453]

Notwithstanding, practical benefit raises the issue of abuse to make an unreasonable profit. For example, it is plausible that Williams deliberately agreed for the price to be £3,780.00 less than the actual value of the work to either claim a greater amount later through financial difficulty, or, failing that, possibly plead economic duress to get out of his obligations. Given that Williams' financial difficulties were partly caused by his own inadequate supervision of his workforce and how he 'had been paid for more than 80 per cent of the work but had not completed anything like this percentage,'[454] it is plausible that parties could exploit practical benefit for their own personal gain.

[451] [1960] AC 87 (HL).

[452] ibid, 108–109 (Lord Reid); 111–112 (Lord Tucker); 114–115 (Lord Somervell).

[453] O'Sullivan (n329), 226.

[454] *Williams v Roffey Brothers* (n311), 19[G] (Purchas LJ).

(i) Practical benefit and commercial reality

In light of the ambiguity of what constitutes 'sufficient practical benefit,' it is important to highlight that the United Kingdom has traditionally been an attractive place for commerce. This is arguably best evidenced by how London is one of the world's leading global financial centres – it was ranked second best in the world in March 2019, with New York placed first.[455] A key reason as to why the United Kingdom is such an attractive place for global business is because of the legal system of England and Wales, in particular, contract law. To illustrate, England and Wales is the jurisdiction of choice for the majority of the world's international commercial contracts, with 'a staggering 80% of cases' in the Commercial Court of the High Court involving at least one foreign party.[456]

Therefore, given that commercial practices continuously change – especially in light of globalisation, as well as the rapid growth and incorporation of Information Technology and Artificial Intelligence into ordinary business practices – the courts need to continuously acknowledge (and remain wary of) present commercial reality to ensure that the British market remains competitive on a global scale and attractive to foreign investors. With commercial reality in mind, the reason why Williams did not hand Roffey Bros some chocolate wrappers, for example, is because the primary concern of businesspersons is to save time and money. In other words, efficiency is fundamental to any business. Consequently, in seeking proper legal advice, both Williams and Roffey Bros would have wasted valuable time and money in trying to adhere to the

[455] Mark Yeandle and Mike Wardle, 'The Global Financial Centres Index 25' (Z/Yen, 2019) <https://www.longfinance.net/media/documents/GFCI_25_Report.pdf> accessed 31 March 2019, 4.

[456] The Law Society of England and Wales, 'England and Wales: The jurisdiction of choice' (undated) <https://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf> accessed 1 April 2019, 5.

formalities of consideration. Thus, from a commercial standpoint, practical benefit is arguably necessary to allow businesses to make small variations to contracts quickly in order to adapt to changing circumstances. This was an important point made in *Williams v Williams*,[457] which was relied on as authority in *Williams v Roffey Brothers*,[458] and arguably a powerful one given how crucial it is for the British economy that businesses can be responsive and competitive.

On the other hand, it is conceded that 'commercial parties value certainty in contractual transactions.'[459] Certainty reduces the risk generated from entering into a transaction, as each commercial party knows precisely what they are receiving in return for adhering to legally binding obligations. In contrast, uncertainty increases the risk because either one or both commercial parties do not know what they may obtain in return. As such, O'Sullivan emphasises that 'certainty must be found in clear default rules in the general law, and many parties seek additionally to guard against residual uncertainty by their expressly agreed terms.'[460] Therefore, 'the courts should be particularly reluctant to undermine either source of transactional certainty.'[461] One of the effects of the practical benefit principle is that it promotes uncertainty, as the promisor may not always realise what benefits might be obtained through the promisee's continued performance. Consequently, whilst the practical benefit principle certainly strengthens freedom of contract, this comes at a price for contractual certainty which, in turn, could do more harm than good to commercial parties.

[457] *Williams v Williams* (n318), 153 (Hodson LJ).

[458] *Williams v Roffey Brothers* (n311), 13[B] – [E] (Glidewell LJ).

[459] Janet O'Sullivan, 'Unconsidered Modifications' (2017) 133 Law Quarterly Review 191, 191.

[460] ibid, 191–192.

[461] ibid, 192.

Nevertheless, it must be recognised that any development in contract law which advances freedom of contract will inevitably undermine contractual certainty – at least to some extent – and vice versa. Thus, it is arguable that the onus should be on refining the practical benefit principle so as to limit its negative effects on contractual certainty, as opposed to simply abandoning the principle in its entirety. Moreover, this necessity for businesspersons being able to quickly make minor alterations to their contracts was most recently recognised in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* whereby Kitchin LJ stressed the importance of party autonomy.[462] In doing so, Kitchin LJ cited the words of Cardozo J in the New York Court of Appeals: '[t]hose who make a contract, may unmake it.'[463] Exactly 100 years later, that statement remains just as important. The almost instantaneous nature of commercial dealings in the 21st Century requires the law to acknowledge that party autonomy will often involve parties to a contract making minor and quick alterations to their contract when circumstances necessitate them doing so. The practical benefit principle thereby enables this to occur by fulfilling the consideration requirement for each alteration.

Consequently, 'while the dictum that "payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole" offered considerable public policy benefits in the early 17th century, this now appears anachronistic in the face of commercial reality.'[464]

(ii) Good faith and promissory estoppel

Now that the arguments both for and against the decision in *Williams v Roffey Brothers* and the practical benefit principle

[462] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (n314), [34] (Kitchin LJ).

[463] *Beatty v Guggenheim Exploration Co*, 225 NY 380, 387 (NY 1919) (Cardozo J).

[464] *Collins* (n370), 253.

have been considered, two potential alternatives to the practical benefit principle shall now be evaluated. These alternatives are a general doctrine of good faith and an extension of the doctrine of promissory estoppel. Both alternatives generate extensive and highly technical arguments as to their application, desirability, effectiveness, and compatibility with the doctrine of consideration that are beyond the scope of this paper. As such, these alternative doctrines shall be evaluated in brief for comparative purposes and to ensure that all possible academic dimensions to *Williams v Roffey Brothers* and the practical benefit principle are covered by this paper.

Hooley suggests that abuse of practical benefit could be circumvented if the courts of England and Wales recognise a general doctrine of good faith in the negotiation and performance of contracts, which would penalise parties who seek to exploit the practical benefit principle.[465] A general doctrine of good faith – as applied to the negotiation and performance of contracts – has been defined by Leggatt J as 'honesty in…performance'[466] of contracts and 'fidelity to the parties' bargain.'[467] Numerous jurisdictions across the world employ a general doctrine of good faith. For example, in Europe, every civil law jurisdiction features a general doctrine of good faith as intrinsic to all commercial dealings. The most cited examples include France[468] and Germany.[469] Likewise, in the common law world, the United States has long recognised a general doctrine of good faith and has codified the duty into the United States Uniform Commercial Code.[470] In addition,

[465] Hooley (n438), 27; 33–35.

[466] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [137] (Leggatt J).

[467] ibid, [139] (Leggatt J).

[468] French Civil Code (consolidated version of 2 March 2017), art 1104.

[469] German Civil Code BGB, art 242.

[470] United States Uniform Commercial Code, ss 1-201(20) and 2-103(1)(b); United States Restatement (Second) of Contracts (American Law Institute, 1981), s 205.

the Supreme Court of Canada has recently reviewed several authorities and determined that the doctrines and duties which form the pillars of Canadian contract law are, in effect, based on an "organising principle" of good faith.[471]

On the other hand, the contemporary legal status in England and Wales is that 'there is no general doctrine of "good faith."'[472] The courts of England and Wales have traditionally been quite hostile to recognising any doctrine of good faith as, according to Lord Ackner, 'good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations'.[473] Instead, the law of England and Wales 'has developed piecemeal solutions in response to demonstrated problems of unfairness.'[474]

Nevertheless, Hooley contends that one of these "piecemeal solutions" is the doctrine of consideration, which 'has made flexibility the victim of certainty.'[475] This is on the grounds that the argument claiming the doctrine of consideration allows for 'the parties to a contract [to] know where they stand…[t]hey can expressly allocate risk and insure accordingly' does not actually occur in many contracts.[476] Hooley argues that the doctrine of consideration creates 'protracted negotiation and extensive contractual documentation can prove costly and time consuming,'[477] which has the potential to damage commercial relationships at their early stages. In an effort to find an alternative to the

[471] *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494, [42] – [56], [62] – [66], [69] – [71], [92] – [93] (Cromwell J).

[472] *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid-Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] BLR 265, [105] (Jackson LJ).

[473] *Walford v Miles* [1992] 2 AC 128 (HL) 138 [D] – [E] (Lord Ackner).

[474] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 (CA), 439 [F] (Bingham LJ).

[475] Hooley (n438), 34.

[476] ibid.

[477] ibid.

"harshness" of consideration, Hooley examines how courts in the United States have utilised a general doctrine of good faith to develop a solution that achieves the same outcomes as the practical benefit principle but does not feature the same criticisms.[478] This solution is that 'the courts generally sustain the consideration for the new promise, based upon standards of honesty and fair dealing and affording adequate protection against unjust or coercive exactions.'[479]

Whilst Hooley does offer arguments that deserve to be considered, the debate on whether England and Wales should adopt a general doctrine of good faith is beyond the scope of this paper. Although, it must be highlighted that the High Court,[480] Court of Appeal,[481] and Supreme Court[482] have all recently demonstrated increased willingness to imply and enforce duties of good faith in limited contractual circumstances. As such, should England and Wales one day explicitly give effect to Lord Mansfield's proposition that good faith is '[t]he governing principle…applicable to all contracts and dealings,'[483] then this would without a doubt have a profound effect upon the practical benefit principle, arguably rendering the principle moribund.

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[478] Hooley (n438), 27–28.

[479] *Pittsburgh Testing Laboratory v Farnsworth & Chambers Co Inc*, 251 F 2d 77, 77 (10th Cir 1958) (Murrah J).

[480] Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch), [2007] 3 EGLR 101 [141] (Morgan J); CPC Group Ltd v Qatari Diar Real Estate Investment Co [2010] EWHC 1535 (Ch), [2010] All ER (D) 222 (Jun) [246] (Vos J); Bristol Groundschool Ltd v Intelligent Data Capture Ltd [2014] EWHC 2145 (Ch), [2014] All ER (D) 117 (Jul) [196] (Richard Spearman QC); D&G Cars Ltd v Essex Police Authority [2015] EWHC 226 (QB), [2015] All ER (D) 85 (Mar), [175]–[176] (Dove J).

[481] *Petromec Inc. v Petroleo Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121, [116] (Longmore LJ); *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All ER (Comm) 601, [68] (Beatson LJ).

[482] *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] 4 All ER 907 [37] (Lord Sumption SCJ); *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661, [21]– [30] (Lady Hale DP).

[483] *Carter v Boehm* (1766) 3 Burr 1905, 1910; 92 ER 1162, 1164 (Lord Mansfield).

Conversely, there remains an alternative to the legal earthquake that would be generated by the law expressly recognising a general doctrine of good faith. Blair and Hird argue that both the practical benefit principle and a general doctrine of good faith are unnecessary if the doctrine of promissory estoppel is extended.[484] Promissory estoppel is an equitable doctrine which dictates that where one party makes a promise or a representation to another party, and this second party reasonably relies on this promise/representation to their detriment, then the first party is prevented ("estopped") from refusing to make good on their promise/representation.[485] It is difficult for a party to abuse this doctrine because of the equitable maxim that "one must come to court with clean hands." A famous example of this was seen in *D & C Builders Ltd v Rees*,[486] where the Court of Appeal barred the defendant from relying on promissory estoppel owing to the fact that his wife 'held the creditor to ransom,'[487] and thus did not "come to court with clean hands."

In *Williams v Roffey Brothers*, the Court of Appeal could have granted Williams the £3,500.00 through the Claimant relying on promissory estoppel. However, Glidewell LJ rejected that argument because the doctrine had not yet, at the time of the judgment, been fully developed to apply to the context.[488] Most importantly, promissory estoppel can only 'be used as a shield and not as a sword.'[489] In other words, promissory estoppel 'does not create new causes of action where none existed before. It only prevents a party from

[484] Ann Blair and Norma Hird, 'Minding your own business – *Williams v Roffey* re-visited: consideration re-considered' (1996) Journal of Business Law 254, 255.

[485] *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL), 448 (Lord Cairns LC); *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 (KB), 133–136 (Denning J).

[486] [1966] 2 QB 617 (CA).

[487] ibid, 625C (Lord Denning MR).

[488] *Williams v Roffey Brothers* (n311), 13[F] (Glidewell LJ).

[489] *Combe v Combe* [1951] 2 KB 215 (CA), 224 (Birkett LJ).

insisting upon his strict legal rights…when it would be unjust to allow him to enforce them.'[490] Therefore, Williams would not have been able to base his cause of action upon promissory estoppel, as the doctrine would have only been available to him in order to prevent Roffey Bros from going back on their promise to pay Williams the additional sum.

Although, Blair and Hird assert that extending the doctrine of promissory estoppel so that it could constitute an independent cause of action 'where legal relations do exist' would have the same effects as the practical benefit principle but would avoid the possibility of being abused by a claimant.[491] To elaborate, where legal relations exist between parties to a contract that gives rise to enforceable rights by both parties, promissory estoppel 'could be used to increase those rights where the other party has acted unconscionably.'[492] The rationale is that an extension of promissory estoppel would develop 'the importance of the idea of a continuing legal relationship and suggests that in these situations equitable relief may be more appropriate because the parties are no longer dealing at arm's length.'[493] This argument maintained some force in *Re Selectmove Ltd* where the Court of Appeal rejected the estoppel argument advanced by the Appellant on the basis that 'it was not inequitable or unfair for the [Inland Revenue]…to demand payment of all the arrears.'[494]

Consequently, imagine applying the aforementioned extension of promissory estoppel to the facts of *Williams v Roffey Brothers*. Although Williams arguably placed detrimental reliance on Roffey Bros' oral promise to liberate

[490]iIbid, 219 (Denning LJ).

[491] Blair and Hird (n484), 262.

[492] ibid.

[493] ibid.

[494] *Re Selectmove Ltd* (n346), 481[H] (Peter Gibson LJ).

him from financial difficulty, it would be doubtful that Williams would have been allowed to rely on the doctrine of promissory estoppel as a cause of action, due to his negligence and plausible bad conduct. Whilst it is conceded that this is a more desirable outcome than the actual decision in *Williams v Roffey Brothers*, this paper argues that such an extension of promissory estoppel requires greater academic and judicial consideration in order to clarify its practical application. Such consideration is beyond the scope of this paper. However, should the doctrine of promissory estoppel be extended in such a manner, this would no doubt have an impact upon the practical benefit principle.

However, in concluding this discussion, it could be argued that neither a general doctrine of good faith nor an extension of the doctrine of promissory estoppel are necessary if the doctrine of economic duress were to be expanded upon. The doctrine of economic duress encompasses the situation where a party unlawfully uses economic pressure and/or threats to intentionally overcome another party's free will, thereby coercing them into involuntarily agreeing to something that they would not otherwise agree to. For something to amount to economic duress, there must be a 'coercion of [a party's] will so as to vitiate [their] consent.'[495] This was expanded upon in *The Universe Sentinel*,[496] where the House of Lords established two elements necessary for the finding of economic duress: 1) there must be a compulsion of the will through the absence of choice, and 2) the pressure exerted must be illegitimate.[497] As such, Halson argues that 'it is the presence or absence of duress which will ultimately determine the enforceability of a

[495] *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293 (QB), 336 (Kerr J).

[496] *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366 (HL).

[497] ibid, 400[B] (Lord Scarman).

modification.'[498] Therefore, it is contended that both a general doctrine of good faith and an extension of the doctrine of promissory estoppel are unnecessary should the courts be prepared to actively police the practical benefit principle with the doctrine of economic duress. Doing so would largely eliminate the fear of a promisee attempting to abuse the doctrine to extort the promisor, as the doctrine of economic duress would render the contract between the parties voidable.[499] However, this approach would not require a legal earthquake that would be generated by establishing a general doctrine of good faith or extending the doctrine of promissory estoppel, as economic duress is a doctrine that has already been developed by the courts over the past few decades. Thus, it is reasonable to conclude that the 'principles of economic duress offer a more sophisticated means of distinguishing extorted and non-extorted modifications'[500] to contracts. Nevertheless, the doctrine of economic duress lies beyond the scope of this paper and, consequently, further discussion requires a paper of its own.

VI. Concluding remarks

Overall, this paper has demonstrated that *Williams v Roffey Brothers* has generated confusion and uncertainty within the doctrine of consideration over the past 30 years. The greatest area of contention is the compatibility of the practical benefit principle with the doctrine of performance of an existing contractual duty *Stilk v Myrick* and the doctrine of part-performance in *Pinnel's Case* and *Foakes v Beer*. What generates the most uncertainty is the fact the High Court and

[498] Roger Halson, 'Sailors, sub-contractors and consideration' (1990) 106 Law Quarterly Review 183, 184.

[499] *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] 1 QB 705 (QB), 720[A] (Mocatta J).

[500] Halson (n498), 184.

Court of Appeal have repeatedly approved, applied and extended the practical benefit principle despite the amount of academic and judicial criticism of the ruling in *Williams v Roffey Brothers*. The fact that there remains no ruling by the Supreme Court on the practical benefit principle only exaggerates the debate. As such, after analysing the various arguments both for and against the practical benefit principle, as well as the treatment of the principle both in England and Wales and in other common law jurisdictions, this paper maintains the view that the Court of Appeal erred in ruling in favour of Williams given that his financial difficulty was partially due to his own negligence. However, whilst practical benefit certainly has several criticisms, which this paper has highlighted, it is nevertheless contended that once the doctrine has been clearly defined and has proper limitations on its application, it will be a necessary tool to ensure that consideration remains in tandem with commercial reality.

Furthermore, whilst this paper recognises that an extension of the doctrine of promissory estoppel and/or the adoption of a general doctrine of good faith by the judiciary of England and Wales could definitely maintain the same positive effects of the practical benefit principle, minus the criticisms of the principle, these two doctrines are beyond the scope of this paper and deserve greater academic and judicial consideration. The same can be said for the doctrine of economic duress, which would allow the courts to effectively police the practical benefit principle in order to prevent extortion. The doctrine of economic duress has the advantage that it is already an established doctrine. Therefore, it would not encounter the legal hurdles that would need to be overcome to either establish a general doctrine of good faith or extend the doctrine of promissory estoppel. However, this doctrine is, once again, beyond the scope of this paper and deserves further discussion.

Protection or protectionism: A critical analysis of Article 102 TFEU

"The successful competitor, having been urged to compete, must not be turned upon when he wins."

Judge Learned Hand

Tanja Bashor[501]

Following a series of judgments, the effectiveness of Article 102 Treaty on the Functioning of the European Union as a tool to preserve competition within the marketplace has been questioned. Criticism has been prolific as to the provision's focus upon competitor protectionism, rather than protection of the competitive process, per se. This article will explore such criticisms, considering specifically the goals and methods of enforcement, with particular regard to the US jurisdiction. It concludes that whilst the goal of Article 102 is, rightly, that of the preservation of consumer welfare, methods employed invariably result in the protection of weaker firms at the expense of those more dominant. This conveys weight to critics' claims. Absent more consistent methods of enforcement, such criticisms seem only to gain further traction, manifest in the sustained imbalance of treatment between dominant firms and weaker rivals, and likely continued polarity between US and EU judgments.

I. Introduction

Article 102 of the Treaty on the Functioning of the European Union (TFEU)[502] aims to prevent dominant companies from abusing their market power and restricting competition within the internal market, where it is harmful to consumer welfare. However, criticism is frequently levied that the Article's ambiguity, particularly its goals and methods of enforcement,

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[502] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 (26 October 2012), art 102 TFEU.

result in the protectionism of inefficient companies. Thus, safeguarding *competitors*, not competition. This article makes two assertions: first, that the underlying goal of Article 102 *is* consumer welfare, and thus it is consistent with protection of the competitive process; second, despite this, the methods employed invariably result in competitor 'protectionism', a consequence collateral to the Article's inconsistent enforcement. Thus, its effect, despite its purpose, attributes *some* weight to the 'competitor-claim'.

II. Theory of Competition Law

According to the UK Government: 'Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs, and providing incentives for the efficient organisation of production.'[503] Consequently, competition provides greater choice, and benefits, for consumers.[504] Thus, the notion of consumer welfare within competition policy is unmistakable. However, whether consumer welfare is rightly the ultimate *(or only)* goal of competition law is not easily discernible. Further, competition law is inherently paradoxical. 'Competition' means a contention for superiority, striving for business within the marketplace.[505] Yet, the very purpose of competition policy is to prevent the dominant from asserting power over rivals.

At its core, Article 102 holds that any abuse by one or more undertakings of a dominant position within the internal market, or in a substantial part of it, shall be prohibited as incompatible

[503] Department of Trade and Industry, 'Productivity and Enterprise: A World Class Competition Regime,' (White paper, Cm 5233, 2011), para 1.1.

[504] Richard Whish and David Bailey, *Competition Law*, (7th edn, OUP 2015), 19.

[505] ibid, 4.

with the internal market in so far as it may affect trade between Member States.[506] Thus competition law strikes balance between healthy and harmful competition, permitting dominance only on *just* terms. An associated question, then, is whether pursuance of economic equity compromises economic efficiency, threatening consumer welfare.

III. Goals

(i) Consumer Welfare

Bork proposed the idea that, underpinned by economic efficiency, the original intent, and only goal of antitrust, is consumer welfare. Bork advocated that whilst monopolistic practices are rightly prohibited, exclusionary practices that do not harm consumers, should be permitted.[507] Consequently, where legal intervention protects inefficient competitors, it is contrary to antitrust's purpose.[508] Bork's lasting influence upon US antitrust is potentially indicative of the markedly divergent views of US and EU authorities in cases involving Microsoft,[509] Intel,[510] and Google.[511]In these cases, US commentators took a polar view to the EU's findings of abuse. Within Article 102, the notion of consumer welfare is not entirely settled; other than pursuance of competition, there is vagueness as to its true purpose. Whilst the Commission's 2009 Guidance refers to consumer welfare,[512] this is not consistently considered when

[506] Treaty on the Functioning of the European Union (n502), art 102.

[507] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself*, (The Free Press 1978).

[508] ibid.

[509] Case T-201/04 *Microsoft Corp v Commission* [2004] ECR II-03601.

[510] Case C-413/14 *Intel v Commission* [2014] ECLI:EU:C:2017:808.

[511] Case T-612/17 *Google and Alphabet v Commission* [2017] (OJC 30 October 2017).

[512] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings: Information from European Union Institutions and Bodies (2009) OJ C C 45/07 (24 February 2009).

establishing abuse within case law,[513]as consumer harm has often not been evidenced.

That consumer welfare is antitrust's only goal is worth consideration, but within parameters. Bork believes that other goals confuse the enforcement process, resulting in easy protection of competitors.[514] If his assertion is correct, where Article 102 considers factors in addition to consumer harm, the 'competitor-claim' holds weight. However, whilst antitrust ought not pursue other goals where efficiency is impaired, this does not imply the complete suppression of other goals.[515] Therefore, perhaps Bork's theory is too rigid. One view is that where other goals exist, antitrust may discriminate between these goals.[516] Further, it is not claimed that efficiency is unimportant; only that if efficiency is valued but sacrificed, it is undesirable.[517] However, where efficiency is maintained despite pursuit of other goals, it is not contrary to consumer welfare. Consequently, Bork's theory applies where non-efficiency goals are assigned zero weighting and where they are permissible as trade-offs with other goals.[518] In this respect, Article 102 is not adverse to protecting consumer welfare, invalidating the 'competitor-claim'.

Furthermore, there is no consensus to Bork's view. EU and US authorities do not assert that economic efficiency is the only

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[513] Case C-95/04 *British Airways v Commission* [2007] EC I-2331; *Corp v Commission* (n509). – neither case refers to consumer harm in determining abuse.

[514] Bork (n507).

[515] Oliver Williamson, 'Review The Antitrust Paradox: A Policy at War with Itself. Robert H. Bork,' (1978) 46 *University of Chicago Law Review* 526.

[516] ibid.

[517] ibid.

[518] ibid.

goal, as achieving acceptable income distribution also bears significance.[519] Traditionally, antitrust promoted democratic stability by preventing economic concentration. This is supported in the US by the Robinson-Pactman Act,[520] enacted in response to the threat to democracy through the disappearance of smaller entrepreneurs as consequence of larger enterprises.[521] Recent judgments, including Google[522] and GE/Honeywell,[523] demonstrate the equivalent perspective of the EU. Thus, within the goal of consumer harm also lie political goals. Where antitrust pursues democracy without sacrifice to efficiency, there is no harm to consumer welfare. Economists distinguish between efficiency and equity in trade-offs, holding that economic welfare is maximised only when the two factors are balanced.[524] Williamson and Elzinga categorise antitrust's goals as (1) economic development – protecting efficiency by ensuring competition, maximising total output; and (2) political democracy – protecting equity by preventing concentrated wealth, ensuring level playing-fields for firms.[525] Thus, together, they underlie antitrust, with the balance between them being crucial. Only where (2) is prioritised over (1), would the 'competitor-claim' hold weight; equally, where (1) is prioritised over (2), there is dominant-firm focus. Thus, equilibrium of (1) and (2) lies at the crux of consumer welfare, and competition.

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[519] Tay-Cheng Ma, 'Antitrust and Democracy: Perspectives from Efficiency and Equity,' (2016) 12 *Journal of Competition Law & Economics* 223.

[520] Robinson-Pactman Act 1938 (United States).

[521] Ma (n519).

[522] Case T-612/17 Google and Alphabet v Commission [2017] OJ C 369 (30 October 2017).

[523] Case T-210/01 General Electric v Commission [2001] OJ C 331 (24 November 2011).

[524] Ma (n519).

[525] Oliver Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoff,' (1968) 58 The American Economic Review 18; Kenneth G Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?' (1977) 125 University of Pennsylvania Law Review 1191.

(ii) Efficiency versus Equity

It is also proposed that equity is merely a subset of consumer welfare, where it focuses on political democracy in preventing consumer harm. Antitrust can improve income distribution by preventing monopolisation, by subverting concentration of business in the hands of few; thus, income is evenly distributed.[526] Dahl proposes that income inequality is unfavourable to democracy because it leads to public resentment.[527] Thus, in improving income distribution, antitrust strengthens democracy,[528] further securing consumer welfare. A complementary view purports that antitrust's ultimate goal is protecting consumers from paying higher prices to ensure equity in the marketplace; thus, antitrust ensures that consumer surplus belongs to consumers, not cartels.[529] This results not in efficiency analysis, but economic analysis. [530] Here, antitrust awards this property right to purchasers, preventing monopolies from recouping it themselves. Consequently, an antitrust state, evident in most countries, is based on political equity, not efficiency. [531] Therefore, by focusing on democracy, Article 102 still safeguards consumer welfare. Democratic protection of smaller competitors through equity is embedded within the goal of consumer welfare. This effect is, however, arguably negligible. Moreover, there are many redistribution policies, such as progressive taxation, that lead to the same outcome.[532] This supports Bork's approach, that antitrust is better suited to promoting allocative efficiency rather than

[526] Ma (n519).

[527] Robert Dahl, Polyarchy: *Participation and Opposition*, (Yale University Press 1971), 82

[528] Ma (n519).

[529] John Kirkwood and Robert Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers Not Increasing Efficiency,' (2008) 84 Notre Dame Law Review 191.

[530] ibid.

[531] ibid.

[532] Ma (n519).

reducing income inequality,[533] by focusing on regulating hardcore cartels.[534] Whilst these assertions hold weight, ultimately they lead to the same outcome – that income distribution is necessary for consumer welfare – thus it is only the point of remedy that, in reality, is in contention. It seems counter-intuitive to propose a remedy for equitable distribution, such as taxation, at a later stage, that could be remedied at an earlier stage through antitrust; that is the aim of Article 102.

IV. Methods

(i) Form versus Effect

A significant contention in Article 102 is the inconsistency of determining, the existence of abuse ab initio, and when in protecting its interests, a firm may have acted proportionately. This first point has resulted in widespread litigation for Article 102 disputes.[535] Vickers highlights that litigation neglects the normative dimension of controlling dominance, stating that: 'abuse of dominance could become a set of ad hoc and unpredictable rules that are consistent neither with each other nor with the policy goals of the law'.[536] Further, using litigation for controlling abuse of a dominant position extends Article 102 beyond its wording to include changes to the market structure.[537] This goes beyond the primary aim of Article 102, supporting Bork's view, that legal intervention then becomes contrary to antitrust's purpose.

[533] ibid.

[534] Williamson (n525).

[535] Erika Szyszczak, 'Controlling Dominance in European Markets,' (2011) 33 Fordham International Law Journal 1738.

[536] John Vickers, 'Abuse of Market Power,' (2005) 115 The Economic Journal F244,

[537] Szyszczak (n535).

There is also the question of when Article 102 should be used. The Commission takes a formal approach, determining abuse by its effects on the competitive structure of the market, rather than on its actual effects on consumers.[538] In contrast, the US Sherman Act[539] does not prohibit legitimate monopoly power. Competitive success is permissible, since it is the use of antitrust to protect consumer welfare and efficiency which is of primary concern.[540] Thus, this circles us back to Bork's consumer welfare argument. Whilst in theory, Article 102 aims to protect consumer welfare, in reality, the notion of consumer welfare rarely emerges. Few issues of individual consumer harm have been discussed in Article 102 cases with respect to consumers claiming compensation for harm suffered due to abuse of a dominant position.[541] Thus, despite the Guidelines, Article 102's lack of clarity endures in its enforcement. Further, Article 102 evolved to address modern competition issues by considering new concepts. Whilst these concepts broaden the regulation of dominant firms in response to wider changes, they add little to the surety of regulation from the dominant firm's perspective.[542] This inconsistency remains a point of contention in the 'competitor-claim', and one that seems fruitful when the rules of the game are constantly evolving.

Additionally, Akman highlights the limitation of the Guidelines with respect to its reference to exclusionary, rather than exploitative abuse. Given the objective of Article 82 EC in enhancing 'consumer welfare', it is then illogical not to

[538] ibid.

[539] The Sherman Antitrust Act 1980.

[540] Szyszczak (n535).

[541] ibid.

[542] ibid.

assess 'exploitative' abuses since these are directly harmful to consumers.[543] Further, European courts have not taken an effects-based approach that focuses upon consumer welfare as its guide. Where, per the Guidelines, Article 102's goal is consumer welfare, it seems illogical that its application does not follow suit. Szyszczak refers to the cases of Telecomms,[544] and British Airways, [545] in which it was respectively held that a lack of harm to consumers did not prevent abuse of a dominant position. Further, these cases established that where anticompetitive practices that harm the effective competitive structure of a market may be indirectly detrimental to consumers, there is then no requirement to prove direct harm to consumers for Article 102 to be enforceable.[546] A similar conclusion was reached in Microsoft,[547] in which it was found that it was not necessary to show direct effects on consumers stemming from the abuse of the dominant position. This further casts doubt on Article 102 and its ability to ensure the enforcement of consumer welfare in practice, further substantiating the 'competitor-claim'.

The key contention of the second point, when a dominant firm is able to argue it has acted proportionately despite 'abuse' of its dominant position, surrounds the wording 'competition on the merits', referenced in the Commission's Guidelines. The OECD states that, despite the repeated use of this phrase in distinguishing between conduct that harms competition from that which advances it, the term itself has never been determinately defined. This has led to conflicting case law and

[543] Pinar Akman, 'The Role of Exploitation in Abuse under 82 EC,' (2009) 11 Cambridge Yearbook of European Legal Studies 165.

[544] Case T-340/03 Telecoms v Commission [2003] EC II-117.

[545] *British Airways v Commission* (n513).

[546] Szyszczak (n525).

[547] *Microsoft Corp v Commission* (n509).

unpredictable results.[548] This effectively means that it is the dominant firm that is responsible for determining whether its practices are contrary to Article 102. Mossoff proposes that in subordinating a business' use of its property rights to indeterminate notions of consumer harm in protecting competition, antitrust violates individual rights; furthermore, in rendering the language indeterminate, the government uses force arbitrarily and without justification.[549] Mossoff explains that individual rights provide a baseline for determining their violation, with the government appropriately serving as defender of citizens' rights. Conversely, when a standard other than individual rights guides government force, the result is coercion against innocent individuals.[550] Whilst this view may seem disproportionate to the issue in contention, the basis upon which it is formed bears weight, particularly when companies cannot easily determine their accountability.

(ii) Special Responsibility

A significant difference between the rationale in the US and EU is the idea that a special responsibility is placed upon dominant firms, and that this goes beyond pure competition law principles, where duty is placed upon private undertakings to exercise self-restraint that would usually be associated with public duties. [551] This implies that there should be certainty to the scope of Article 102, yet the content of the special

[548] Organisation for Economic Co-operation and Development, 'What is Competition on the Merits?' *Policy Brief*, June 2016, <http://www.oecd.org/competition/mergers/37082099.pdf> accessed 16 September 2019.

[549] Adam Mossoff, 'The Antitrust Laws Require the Government to Initiate Force Against Innocent Citizens,' *Capitalism Magazine*, (1 March 2001) <http://capitalismmagazine.com/2001/03/the-antitrust-laws-require-the-government-to-initiate-force-against-innocent-citizens/> accessed 16 September 2019.

[550] ibid.

[551] Szyszczak (n535).

responsibility duty is vague.[552] This is problematic when an undertaking is found to be in a dominant position under unusual circumstances, or where low market share is used to identify market dominance.[553] This implication questions Article 102's intent. Firstly, because it places unspecified burden on the dominant firm itself. Secondly, because it suggests that sanction is accorded retroactively, where a potential dominant company either was unaware that it was the dominant firm, or where, despite knowing that it was dominant, it was unaware that its practices were abusive, and thus contrary to Article 102. Article 102, therefore, changes the rules of the game incrementally.

Further, there is a lacuna in law in the scope and reach of Article 102 that Article 101[554] does not evoke, where non-dominant firms are able to exercise power over other firms, despite this being detrimental to consumers, or where competitors are in a weaker bargaining position.[555] Thus, the question is whether this approach for treating dominant firms enhances efficiency and consumer welfare. Where it does not, it cannot be in the interests of consumer welfare, and thus the 'competitor-claim' holds greater weight. Under Article 101, the 'de minimis rule' and 'appreciability' apply to manage situations where there is an agreement between undertakings where market share is low. The absence of such provision within Article 102 is surely detrimental to dominant firms, strengthening the arsenal of the 'competitor-claim', specifically that inefficient firms are treated favourably. Article

[552] ibid.

[553] ibid.

[554] Treaty on the Functioning of the European Union (n502), art 101.

[555] Erika Szyszczak, 'Controlling Dominance in European Markets,' (2011) 33 Fordham International Law Journal 1738.

102, in reality, seems to be purely 'objects' focused. When a dominant undertaking implements measures that are conceived to be abusive, it can be deemed contrary to the Article; but its effects are not adequately measured with respect to its impact upon consumer harm. Comparatively, Article 101 permits both 'objects' and 'effects' in determining whether an agreement between undertakings is anticompetitive. The lack of a similar approach in Article 102, implies then, that the focus is wholly on competitors, not competition. Until this disparity is remedied, it is likely that the 'competitor-claim' will gain further merit.

V. Conclusion

Article 102 is not without its critics. In comparison to Article 101, and as discussed, it is considered the more contentious of the two provisions with respect to its implications for competition law. Further intensifying this view, is its discord with the US equivalent (the Sherman Act), largely resulting in polarised views with respect to recent litigation. The imprecision of Article 102 has led to two assertions from critics. The first is that its goal of consumer welfare is unclear. It appears to focus more upon the dominance of firms. The second is that indefinable methods of enforcement in the Article further proliferate the 'competitor-claim'. It seems that the multifaceted approach underlying Article 102 does not substantiate the competitor-claim, for consumer welfare remains the ultimate aim, and additional goals of economic equity and income distribution serve only as an internal category of consumer welfare. However, where its methods do not concord with these aims, the competitor-claim carries much greater weight, particularly where companies are uncertain as to what conduct constitutes abuse. Until Article 102's enforcement becomes more determinable, it seems probable

that the ‘competitor-claim’ will only continue, and perhaps at greater pace.

Slaughtered at the Altar of Free Trade: are WTO rules hindering the progression of animal welfare standards in agriculture?

Victoria. E. Hooton[556]

This article analyses the WTO legal framework to determine whether trade liberalisation, particularly through the definition of 'like products', and the exceptions to free trade rules found in GATT Article XX, are accommodating enough to permit advancements in animal welfare legislation. Sovereign legislatures have taken steps to promote higher standards for animal welfare within their territories. The European Union in particular is a frontrunner for promoting high animal welfare regulation, in order to provide safer products, greater human health and consumer-friendly regimes. The steps that have already been taken, domestically and in bilateral trade agreements, may be seen as a move towards an international recognition that animal welfare is an important factor in the production of food from agriculture. It is therefore important for WTO law to accommodate for the increasing concern around animal welfare. This article argues that the current framework does not accommodate for these concerns, and may in fact prove to be a strong deterrent against import bans and other trade restrictions that would prevent low animal welfare goods being imported and marketed in territories with otherwise very strong animal welfare values.

I. Introduction

In light of the increasing focus on farming culture and practices, and their impact on the environment and animal welfare,[557] this article will review the current World Trade

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[557] Kate Rawls, 'Sustainable Development and Animal Welfare: the Neglected Dimension,' in Joyce D'Silva and Jacky Turner, *Animal, Ethics and Trade: The Challenge of Animal Sentience* (Taylor & Francis 2012).

Organisation (WTO) free trade framework and determine whether it could hinder progression towards better international standards in farming. Firstly, this article suggests that there is an increasing international recognition for the importance of animal welfare, which creates a fundamental issue for the WTO, if its rules do not allow for growth of legislation in this area. Secondly, an analysis of the problematic relationship between animal welfare and international trade laws is presented, which in turn assesses the effects of the relationship on future farm animal welfare progression.

The scope of this article is confined to the General Agreement on Tariffs and Trade (GATT)-embedded provisions that affect animal welfare – Articles I, III and the permitted exceptions in Article XX; although it should be noted that other areas of WTO law may affect animal welfare measures, such as the Technical Barriers to Trade Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures, which are outside the scope of this article. As the European Union (EU) is a key player in the recognition and implementation of important animal welfare standards, this article will utilise the EU as an example of how domestic regulators can face difficulties regulating their farmed product markets within the WTO framework.

II. The International Movement Relating to Animal Welfare

The WTO should be aware and considerate of increasing animal welfare standards in the production and trade of farmed food products, due to the internationalisation of animal welfare as a concept. The WTO is a large international body comprised of 160 members, it is in the best interests of the WTO and the contracting parties that it keeps up to date with shifting perceptions regarding agricultural trade.

There are a few indications that animal welfare is an emerging international concept, something which international trade lawyers have been debating for some years.[558] On a plainly rhetorical basis, there is the fact that advocates of animal welfare standards are apparently 'international'. Sykes[559] notes that the two main bodies campaigning against seal hunting in a WTO dispute against the EU were both international organisations: Humane Society *International* and the *International* Fund for Animal Welfare, both of which campaign on establishing shared global norms about the treatment of animals. There is also the World Organisation for Animal Health (OIE) that provides guidelines for farm animal welfare. The OIE is concerned with informing practice, based on scientific evidence, on the slaughter of animals, animal transport and the keeping of livestock. While there is no international treaty concerning farmed animal welfare as of yet, there is the conservation treaty CITES,[560] which places emphasis on the welfare of the individual species it covers. There is a European treaty on animal welfare, drafted by the council of Europe,[561] which focuses on five basic guarantees for farmed animals that are identical to those of importance in the EU: freedom from discomfort, freedom from hunger and thirst, freedom from fear and distress, freedom from pain, injury and disease and freedom to express natural behaviour.[562] These freedoms are formed on the basis that the States within

[558] See Michael Bowman (ed), *Lyster's International Wildlife Law* (CUP 2010); Robert Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values,' (2012) 37 Yale Journal of International Law 367; and contra Laura Nielsen, *The WTO, Animals and PPMs*, (Martinus Nijhoff 2007).

[559] Katie Sykes, 'Sealing animal welfare into GATT exceptions: the international dimension of animal welfare in WTO disputes,' (2014) 13 World Trade Review 471.

[560] Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).

[561] European Convention for the Protection of Animals kept for Farming Purposes Strasbourg, 10.III.1976.

[562] See the European Commission's page on the Convention and EU legislation based upon it <https://ec.europa.eu/food/animals/welfare_en> accessed 1 August 2019.

the Council of Europe consider "*that it is desirable to adopt common provisions for the protection of animals kept for farming purposes, particularly in modern intensive stock-farming systems*."[563]

The main centre of animal welfare legislation is in the EU, which is heavily invested in the idea of increased animal welfare at the regional and international level, and was the subject of one of the very few animal welfare related WTO disputes to date.[564] The EU legal framework is pioneering the debate around animal welfare and ethics, by recognising animals as sentient beings[565] and developing welfare legislation[566] with the potential to affect the production and transportation of animals and animal-related products throughout the world. The EU has created standards on battery cages for laying hens,[567] stunning standards for humane slaughter of animals,[568] and has banned gestation crates for pregnant sows.[569] Moreover, less relevant to farming and welfare, the EU has banned cosmetic testing on animals,[570] increased standards of care for animals used in scientific testing[571] and has increased standards for transported

[563] European Convention for the Protection of Animals (n561).

[564] DS401: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products 2014.

[565] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 (26 October 2012), art 13.

[566] Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes OJ L 221.

[567] Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens OJ L 203 (3 August 1999).

[568] Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing OJ L 303 (18 November 2009).

[569] Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs OJ L 47 (18 February 2009).

[570] Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products OJ L 342 (22 December 2009).

[571] Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes OJ L 276 (20 October 2010).

animals.[572] The farming standards introduced at the EU level have been adopted in other jurisdictions; the poultry legislation particularly has been impactful: "*The EU legislation, rather than solely EU consumer attitudes, has been a major factor in this world-wide change, which is accelerating*."[573]

The EU's attention to animal welfare standards will continue to internationalise the issue, particularly through trade agreements with third parties. Article 89 of the EU-Chile trade agreement[574] includes animal welfare provisions, and a commitment to develop standards in line with the OIE's scientific guidance. The agreement's reference to animal welfare revolved around stunning and slaughter of animals, and the creation of a Committee to develop other animal welfare standards that are of importance to the EU and Chile. The EU gives technical assistance and guidance on how to make the practice of slaughter more humane.[575] The EU's recently concluded trade deal with Japan also contains an animal welfare provision, in Article 18.17,[576] which specifically requires *'a focus on farmed animals'* and the ability to establish a working group on animal welfare for the purposes of information and expertise exchange.

Animal welfare was also a moot point in the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and USA, before their breakdown. There is an undeniable dichotomy between the standards of livestock

[572] Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations OJ L 3 (5 January 2005).

[573] European Parliament, Study on Animal Welfare in the European Union, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs PE 583.114, 31.

[574] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, 2002.

[575] European Commission, 'Slaughter and Stunning,' <https://ec.europa.eu/food/animals/welfare/practice/slaughter_en> accessed on 1 August 2019.

[576] Agreement Between the European Union and Japan for an Economic Partnership, 2019.

treatment in the US and the EU,[577] the latter including in its textual proposal on regulatory cooperation a high level of protection for animal welfare as central to the negotiation.[578] The European Free Trade Association's (EFTA) agreement with the EU, the European Economic Agreement (EEA), also concerns itself with animal welfare.[579] It is clear that animal welfare will be an issue in all EU bilateral trade agreements, as noted by the EU Commission.[580] If the provisions of regional trade agreements are 'stepping stones' for international trade norms, it would be wise for the WTO to recognise the emerging importance of animal welfare concerns and uphold that importance within the multilateral framework.

The EU in 1999 drafted proposals for the WTO to consider addressing the issue of animal welfare.[581] Swinbank[582] notes the unpopularity of the paper, especially amongst developing countries more concerned with decreasing poverty than the welfare aspects of their food.[583] This article does not dispute that animal welfare standards will be highly divergent across the members of the WTO; even the Member States of the EU appear to have differing views on the necessity of animal

[577] See Pig World: The Voice of the British Pig Industry <http://www.pig-world.co.uk/news/highlighting-the-differences-how-uk-welfare-standards-compare-with-our-competitors.html> accessed 1 August 2019.

[578] TTIP-EU proposal for Chapter: Regulatory Cooperation <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf> accessed 1 August 2019, Article X1.

[579] See Joint Declaration 29 on Animal Welfare, Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States, OJ L 1 (4 January 2003).

[580] Report from the Commission to the European Parliament and the Council: On the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world COM (2018) 42 final (26 January 2018).

[581] Preparations for The 1999 Ministerial Conference, EC Approach on Agriculture, Communication from the European Communities WT/GC/W/273.

[582] Alan Swinbank, 'Like Products, Animal Welfare and the World Trade Organization,' (2006) 40 Journal of World Trade 687.

[583] ibid, 690.

welfare standards imposed at the transnational level.[584] However, support for animal welfare of some level, however divergent, has consistently grown since 1999 and developing countries have also concerned themselves with animal welfare. Countries such as Peru, Costa Rica, Thailand and the Philippines have implemented animal welfare legislation.[585] Developing countries may also gain technical assistance from the OIE in relation to implementing the farm animal welfare standards.

International principles are generally derived from domestic laws, taking into consideration that almost all the world's domestic legal systems…include some kind of broad legal prohibition on unnecessary cruelty to animals including some constitutions; Sykes argues that it is wholly possible that an international principle of animal welfare is emerging.[586] If such a principle is emerging, then as per the rules of the Vienna Convention, the WTO dispute organs will need to take it into consideration when considering trade disputes.[587] This does not necessarily mean that the WTO dispute settlement bodies would need to give precedence to the concept of animal welfare, but it would not be wise for the WTO to ignore any internationally recognised principle for they reflect shared values, so accommodating them gives a legitimacy to dispute settlement and ignoring them may do the opposite and create an isolated regime that permits states to evade their

[584] See European Court of Auditors, Special Report No.31 2018: Animal welfare in the EU: closing the gap between ambitious goals and practical implementation, 41-46; also Compassion in World Farming: <https://www.ciwf.org.uk/news/2014/06/greece-continues-to-flout-eu-law> accessed 1 August 2019.

[585] Kate Cook and David Bowles, 'Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules,' (2010) 19 Review of European Community & International Law 227, 228.

[586] Sykes (n559), 481.

[587] ibid, 474.

international obligations and hinders increased animal welfare protection.

III. The relationship between animal welfare and international trade

(i) Why does increased farm animal welfare conflict with international trade?

The fundamental reason that animal welfare concerns and conflicts with international trade law is the fact that animal welfare regulations will restrict trade, and the ultimate goal for international trade and the WTO is to liberalise free trade and reduce trade barriers globally. Farmed animals are a huge commodity in the area of agriculture. Any policy or legislation intended to prevent any unnecessary suffering of animals used for food production, is likely to slow down the production process and reduce profits.[588] Animals that are intended for food production are therefore likely to be exposed to harm, cruelty and suffering due to the perception that low animal welfare production methods are cheaper and therefore yield greater profits than a process geared to ensuring animals' comfort and health. The EU parliamentary study notes that intensive farming can "lead to aberrant behaviour in laying hens such as feather pecking and cannibalism, aggression and tail biting in pigs and aggression in calves. To control this undesirable behaviour, it is common practice to perform painful physical alterations on animals, in particular beak trimming, tail docking, castration and teeth clipping."[589] EU law sets out measures to prohibit this treatment of animals, but in turn those measures reduce the intensity of farming and therefore its profitability. EU measures on humane

[588] EU Parliamentary Report (n573).

[589] ibid.

slaughtering also may reduce the speed at which animals can be processed, which also reduces the economy of slaughter.[590]

As a result of these processes affecting the economies of scale in food production there is a perception that high animal welfare standards, without the requirement of equal standards for imports and exports, carries the risk of reduction in competitiveness or even loss of businesses to countries where production is more profitable due to lower standards.[591] Whether such business affects occur is uncertain,[592] but in order to equalise the market for national or regional businesses adhering to higher animal welfare standards, animal welfare policies and guidelines should also be required for all imported products.

A further reason for regional or national legislators requiring equal animal welfare standards for products that are imported, exported and national is that regional economies must respond to market demands for farmed products that accommodate for animal welfare concerns in their processing standards. There has been an increased demand for free-range eggs and meat and increased public support for animal welfare regulation.[593] The harmful processes mentioned above are likely to be ill-favoured by consumers, who wish to see higher animal welfare standards. Not only is there a concern around the morality of these practices, but a concern about the food safety of products with lower animal welfare standards.[594]

[590] ibid.

[591] EU Commission Report (n584),7.

[592] ibid.

[593] Eurobarometer shows that an overwhelming majority of Europeans consider farmed animal welfare to be important, and that stronger protections should be in place: Special Eurobarometer 442 '*Attitudes of Europeans towards Animal Welfare*,' <https://data.europa.eu/euodp/en/data/dataset/S2096_84_4_442_ENG> accessed 1 August 2019.

[594] EU Parliamentary (n573).

There may be an argument that the market will regulate itself where animal welfare standards are concerned, as consumer concerns will decrease purchase of products with bad practices. However, this would be an insufficient answer to the animal welfare question. Firstly, it would require mandatory labelling for goods with low welfare, in order for markets to make an informed choice, and the following section will show that such a practice may be a barrier to trade. Furthermore, if there is an international recognition that high animal welfare in agriculture is desirable, market preference is not enough to deliver higher standards. Lastly, market regulation does not stop the practices that consumers find harmful, it would merely work as a deterrent against them if market trends were clear enough to show that low animal welfare causes a fall in demand. Mishan notes that "compulsory labelling and the spread of consumer information can only go so far in checking these repugnant commercial practices. In view of the financial temptations, the strictest government controls will always be necessary if a significant deterrent to cruel and inhumane treatment of farm and domesticated animals is to prevail."[595]

Swinbank opines that consumer demand may turn into an expectation that every product available on the market has the same production method and animal welfare standards.[596] Due to the current fragmentation of animal welfare standards globally, this may not always be the case. States can only accommodate for consumer expectations by legislating to ensure that informed choices can be made on product standards (i.e. mandatory labelling systems for imports), or by altogether banning the import and marketing of a product that does not meet the expected threshold of animal welfare standards. These

[595] Ezra Joshua Mishan, 'Economists versus the Greens: an exposition and a critique,' (1993) 64 The Political Quarterly 222.

[596] Swinbank (n582), 695-696.

types of regulations will be the focus of this article; when such legislation is drafted, a conflict in the WTO may arise.[597]

(ii) WTO provisions that may hinder animal welfare progression

The following section of this article will discuss how WTO law could be hindering increased farmed animal welfare and better agricultural practices. Most importantly, the article discusses Articles I, III and XX of GATT 1994. The following sections show how animal welfare standards imposed on imports will generally conflict with the WTO framework, as the prohibition of protectionism and discrimination under WTO law precludes contracting parties from banning products with low animal welfare standards or subjecting them to different rules on labelling. This is exacerbated by the framework on exceptions to the general principles of free trade, which does not appear to accommodate for the farmed animal welfare concerns of contracting parties.

GATT Articles I, III, and the definition of 'like products'

All farmed animal welfare legislation will most likely conflict with the fundamental rules of the multilateral trading system, which are contained in GATT[598] Article I of GATT ensures that trade liberalisation is equal amongst the contracting parties, it contains the 'most favoured nation' principle (MFN). If any WTO Member offers favourable duties, import taxes or regulation of trade to another member for certain products, then all WTO members must be extended the same treatment for like products. The way that any one member treats all other members, is the same way it treats its 'most favoured nation.'

[597] ibid.

[598] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

Article III of GATT is the main source of conflict where animal welfare and international trade meet, because it lays down the principle of national treatment. This prohibits contracting parties from imposing taxes, rules and regulations that afford protection to national products; it states: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to **like products** of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[599]

Swinbank notes that the identification of 'like products' is paramount when considering the compatibility of certain domestic regulation with international trade laws, which poses difficulties for members of the WTO wanting to impose animal welfare standards that importers would also have to adhere to. WTO law, as per the dispute settlement panels, defines 'like products' as having no regard to process or production methods, meaning a product cannot be treated differently simply because, for example, its process is more environmentally destructive or more concerned with animal welfare. If the end products have no physical difference, they should be treated equally. Animal welfare standards are therefore not a reason for product differentiation, as they are non-product related, and do not alter the physical make-up of the end product. This definition applies regardless of the value that can be asserted about the processing technique, as the following two cases illustrate.

In the US – Tuna I[600] dispute, a US measure banned imports from countries which did not use comparable fishing methods to the US or had a dolphin death rate of more than 1.25 times the average of the US. Mexico lodged a complaint under GATT

[599] GATT 1994 (n598), Article III (4).

[600] United States – Restriction on Imports of Tuna DS21/R - 39S/155 (Tuna I).

1947, which revealed the issue of process-ignorance in the definition of 'like products'. The panel in this dispute applied GATT Article III and the national treatment principle, and found the US embargo to be incompatible with GATT because (inter alia) the repeated use of the word 'product' in GATT emphasises the importance of the end physical product, and not the process in which it is made. Kelch[601] notes how this definition leads to a regime where a country could regulate the size of eggs but not how they were made; it could impose restrictions on eggs of a physicality but not on those that had been produced in an inherently cruel and inhumane manner. The US – Shrimp[602] dispute concerned a US import ban that aimed to protect sea turtles that would be accidentally caught and killed by fishing methods that did not use a turtle excluder device. India, Malaysia, Pakistan and Thailand raised a dispute under GATT due to the measure affecting their fishing practices, requiring them to use turtle excluder devices during all fishing, which would increase costs, as well as constituting the US forcing their environmental policies on countries wishing to trade in their territory. The WTO decision that this was incompatible with GATT Article XI (prohibition on import restrictions) was not contested by the US at all.

The definition of like products creates the problem that animal welfare provisions imposed on imports could become a barrier to trade. For instance, mandatory labelling would be required to allow consumers to make informed choices about the food products they are buying. If the EU, or any other WTO member, were to impose mandatory labelling on imports of eggs or meat products, this may constitute those products not being treated the same as 'like' products in the domestic

[601] Thomas G Kelch, Globalization and Animal Law: Comparative Law, International Law and International Trade (Kluwer 2011).

[602] United States - Import Prohibition of Certain Shrimp and Shrimp Products - Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body WT/DS58/23 (US-Shrimp).

market. If the legislature banned the import of eggs or meat produced through inhumane processes, this would certainly constitute a restriction on trade, because the eggs and meat imported from elsewhere would have the same physical characteristics as those made with animal welfare measures in place.

This will hinder progression by deterring legislatures from imposing animal welfare standards on imports, or from imposing them at all. It will also deter compliance for producers, in order to remain competitive and creates a race to the bottom for animal welfare standards. Furthermore, the definition of like products and its effect on animal welfare development imposes unequal treatment on domestic products with good agricultural practices, which seems to be against the entire logic of Article III GATT. These issues will be discussed in detail in the following paragraphs.

The current definition of 'like products' could deter legislatures, through fear of an expensive WTO dispute, from adopting measures that would adequately protect consumers from inhumane products and businesses from competition from products that do not adhere to welfare standards. For instance, during the debate on banning battery cages in egg production, the possibility of this causing a WTO challenge was raised.[603] There was also some backlash against the ban, because some felt that "the European Union is putting its own producers at a competitive disadvantage by specifying stricter rules for them than those it applies to external suppliers for imports."[604] This sentiment has been repeated in other agricultural debates regarding high animal welfare standards, with Member State

[603] European Parliament, Welfare of laying hens (debate) 2010/2979(RSP) see submission by John Stuart Agnew.

[604] ibid, see submission by Csaba Sándor Tabajdi (S&D).

representatives feeling the EU is hypocritical,[605] and disadvantaging their farmers by not seeking international compliance.[606] The European Union, although leading the development of animal welfare, does not currently extend its values and practices to imports. Instead, the EU focuses on being a 'lighthouse' for other jurisdictions and raising awareness of animal welfare standards.[607] Whilst it cannot be categorically proven that the looming threat of an expensive WTO dispute is at the heart of the EU decision to defer from imposing import restrictions, there is no doubt that the deterrence factor of WTO law would be incredibly strong for agricultural measures, because of the huge volume of imports and exports of meat and livestock globally, increasing the likelihood that a conflict will arise. Presently, national and regional legislatures have to choose between adopting regulations that promote good agricultural practice but forcing businesses to compete with products that do not do this, or imposing trade restrictions on products without comparable processes and facing a WTO dispute, or not introducing animal welfare standards in agricultural processes at all. As long as these restrictive choices prevail, international standards for animal welfare in agriculture will be slow to develop.

Furthermore, the dilution of animal welfare legislation that occurs out of fear of a WTO dispute means that animal welfare will remain segmented in different domestic jurisdictions, meaning it will take much longer to reach an international cohesion if members will only regulate their domestic producers and will not enforce import bans or product requirements against each other. The bad animal welfare practices of certain states will remain in place because there

[605] European Parliament, Agricultural product quality schemes (debate), 2010/0353(COD), see submission by Diane Dodds.

[606] European Parliament, Agricultural product quality policy: what strategy to follow? (debate) 2009/2105(INI), see submission by Janusz Wojciechowski (ECR).

[607] EU Commission Report (n584), 9.

will be no incentive for change. The current framework promulgates a race to the bottom of animal welfare standards, as States are in the best position when they are not increasing animal welfare.[608] Certain states therefore may choose to keep their animal welfare as low as possible to exploit a market that is being more conscientious about the welfare of animals. Kelch notes how the WTO basically imposes on states 'the worst possible environmental and animal welfare legislation' in order to remain competitive.[609] This creates a lack of cohesion between the WTO approach to animal welfare and the increase of animal welfare concern internationally. At the general international level animal welfare is important and increasingly desirable, but its importance is drastically undermined if the multilateral trading throws into question the legitimacy of animal welfare measures, by effectively rewarding bad animal welfare practice.

For producers of agricultural goods, even if there are domestic welfare standards imposed, there is a lack of incentive to meet these obligations if products with low animal welfare standards can still be imported into the market. As noted above, Member States of the EU are discontent with the rising animal welfare standards, from a point of international trade. During the process of debating and implementing the battery cage ban, many Member States were reluctant to invest in changing their farming processes, despite the agreement that battery cages were an unnecessary and cruel farming practice.[610] The EU's latest animal welfare strategy is also proving to lack fully effective compliance,[611] in some instances the Member State felt that EU measures on developing and implementing animal

[608] See contra, EU Commission Report (n584), 7.

[609] Kelch (n601).

[610] Welfare of laying hens (debate) (n603).

[611] See European Court of Auditors (n584), 7.

welfare may hinder the competitiveness of the national market.[612]

Lastly, there is the issue of the competitive inequality caused by Article III GATT. Where producers do comply with animal welfare measures that a legislature has put into place, they can face market punishment as a direct result of Article III GATT. Stevenson[613] notes that EU producers feared they would be driven out of the European market by importers who could still produce eggs cheaply using battery cages, because GATT would not permit import restrictions on those products. Whilst it is impossible to concretely predict any trade outcomes, it is clear that Article III overreaches its proper role and function in regard to animal welfare measures. Article III protects WTO members from having their trade liberalisation suffer from national protectionism, it promotes trade equality and fair competition between goods. Thus, it is not entirely rational that standards and process requirements imposed on all products at the national level, could be conceived as protectionist when also applied to products from outside the territory. If such requirements were not applied at the national level already, that would certainly create an unfair advantage for national producers. To reverse this, so that domestic suppliers must adhere to regulations that importers do not, creates reverse protectionism for imports. True equality and fair competition would entail treating free range eggs alike and battery eggs alike etc. Therefore, free range eggs would enjoy the same treatment as domestic eggs and battery eggs would be banned the same as in the domestic market. What essentially occurs currently is punishment of a member who is being morally conscientious, and an advantage is possibly given to states that

[612] See Poland's response on Measure 14, European Court of Auditors (n584).

[613] Peter Stevenson, 'The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare,' (2002) 8 Animal Law, 107, 109.

are willing to let animals suffer undeniable harm and cruel treatment.

The previous section has shown that GATT, particularly Article III, creates problems for domestic legislatures who wish to increase their standards on farmed animal welfare. As a rule, product requirements in the form of mandatory labelling or import bans will prima facie breach GATT and could result in a WTO dispute. The following section will show that even when legislatures take the risk and intend to fight their animal welfare cause in front of a WTO panel, there is little in the GATT exceptions that would enable them to justify breaching the multilateral trading framework.

Article XX: GATT Exceptions for Farmed Animal Welfare Measures:

Article XX of GATT allows for policy concerns to override GATT, with the ten general exceptions.[614] There are three exceptions that could apply to animal welfare legislation are: (a) in relation to public morals, (b) in relation to protection of animal health and life and (g) in relation to the preservation of exhaustible natural resources. Any state wishing to invoke an exception needs to successfully argue for the specific exception itself and then successfully argue that the legislation or measure in question does not infringe the general provision of Article XX, the chapeau, which may prove difficult.

Article XX (b) is the most obvious exception for a state wishing to justify a farm animal welfare measure would be that of animal health and life as it expressly refers to animal. However, it does not expressly refer to animal welfare. A measure may be justified under this exception if it can be proven that the policy objective is to protect human, animal or plant life or health and that this specific measure is necessary to achieve that policy objective. Prima facie, states could argue that animal

[614] GATT (n598), Article XX (a) to (j).

welfare legislation is intended to increase farm animal health, as obviously decreasing mental and physical suffering of the animals involved will have positive health impacts. A state could even argue that animal welfare legislation protects human health and life under Art XX (b) because lower animal welfare standards can lead to the spread of infectious diseases.[615] However, this would require a rather wide reading of Art. XX (b), and considering the WTO panels already exhibit a tendency to interpret exceptions restrictively,[616] it is unlikely to actually aid Members who wish to impose animal welfare standards. The greatest problem with using Article XX (b) to justify animal welfare restrictions on trade is that Members would essentially be arguing that their measures are intended to protect the life and health of animals that are not within their territory, or their jurisdiction. Stevenson[617] notes how this was a bar to the US using XX(g) in Tuna-Dolphin I and II. By requiring fishing methods that protected the life and welfare of dolphins, and imposing this on imports, the US was attempting to protect dolphins that were not within its own territory. The WTO dispute settlement panel did not accept that it was possible for a Member to so heavily impose policies on another Member's territory.[618]

On top of the aforementioned difficulties, any member arguing for farm animal welfare measures under this exception would need to show it was necessary to protect animal or human health, under the general principles of Article XX.[619] This would mean the measure itself could not have been any less trade restrictive. The most effective way for domestic

[615] See European Food Safety Authority, <https://www.efsa.europa.eu/en/topics/topic/animal-welfare> accessed 6 August 2019.

[616] Stevenson (n613), 112.

[617] ibid.

[618] US – Tuna I & II (n600).

[619] See GATT (n598), Chapeau of Article XX.

legislatures to protect their markets from products that fall below animal welfare standards, is to place import bans on products that do not adhere to those standards. It will be hard to prove the 'necessity' of this, as such measures will be highly restrictive. The necessity would also require any Member to show that animal welfare is imperative for human health (a strained interpretation for most countries), or that it is imperative for animal health in agriculture. The problem with this is that agriculture itself is not good for animal health, especially meat production where the end result is slaughter. Any measures to protect animal health are so stunted in terms of longevity, that their necessity could be easily called into question by the very nature of food trade.

It is clear that this exception is uncertain at best and it seemingly would not be easy for any member to use it to claim legitimacy for their farm-animal welfare measures. Therefore, in practice, what appeared the most obvious exception to argue for animal welfare measures would actually be ruled out of much use. A state would either have to argue that farmed animal welfare was an issue of public morals or an issue of preservation, which is also problematic in the context of farmed animal welfare.

The applicability of Article XX (g) (concerning preservation) to farmed animal welfare is also somewhat dubious. The appellate body in US – Shrimp[620] confirmed that Art. XX (g) will apply to living resources, due to the commitment of the international community at preserving living things as well as non-living. This decision was a step forward in terms of conservation and animal welfare, but the same outcome is unlikely to be arrived at in relation to farmed animals. The protected animal in the US-Shrimp dispute was turtles, which are internationally recognised as being endangered under

[620] US – Shrimp (n602).

CITES.[621] Chaudhri[622] notes that although livestock numbers are finite, there is no conservation involved in protecting animals from harm when they are going to be slaughtered and consumed anyway. Chaudhri states that certain conserved animals are still consumed (such as tuna) but their numbers are not controllable by humans, unlike the amount of cattle sent for slaughter.[623] The simple matter is that animal welfare has no impact on the number of farmed animals killed. This would mean that the last two exceptions that at first looked like a possible justification for a state imposing farm animal welfare measure, would be ruled out due to the technicalities of their wording. Therefore, a member would have to succeed in justifying their measure under the public morals exception, or have it deemed incompatible with WTO law.

So, we must turn to the morality exception in Article XX (a). Cook and Bowles[624] argue that it would be easiest for a WTO member to prove necessity from a moral perspective, because the ethics of animal welfare issues dictate that certain products should not be available to consumers at all. If this were to be a successful justification, the disputing Member could not argue that a labelling system or some other less restrictive measure would be adequate in place of an import ban.

There are compelling arguments to suggest that animal welfare legislation would fit within the scheme of the 'public morals' exception. This is confirmed by the EC-Seals[625] panel decision. This dispute concerned a measure that banned imports of seal

[621] Convention on International Trade in Endangered Species of Wild Fauna and Flora (n559), Appendix I.

[622] Radhika Chaudhri, 'Animal Welfare and the WTO: The Legality and Implications of Live Export Restrictions under International Trade Law,' (2014) 42 Federal Law Review 279.

[623] ibid.

[624] Cook and Bowles (n585).

[625] *EC-Seals* (n564).

products into the EU unless they satisfied strict exceptions.[626] Canada and Norway raised objections to the ban, and this became the first WTO dispute based on moralistic (rather than environmental) animal welfare concerns and restrictions on trade.[627] The preamble of the regime implemented by the EU referenced the animal welfare concerns of the public about the pain, distress and fear of seals that were hunted.[628] The measure was found to be inconsistent with the most favoured nation principle, because it did not accord the same treatment to Norway and Canada as it did to Greenland.[629] It was also found that the overall measure (and not the specific, discriminatory exceptions) would be justifiable under Article XX (a)[630] due to its policy objective of public morals and the genuine public concern about the hunting methods of seals. However, it was held that the regime did not meet the requirements of the chapeau[631] because the measure was discriminatory, due to the exceptions in the regulation giving favourable treatment to Greenland.[632]

Although this decision is a step in the right direction because it evidences a dispute settlement panel recognising the importance of animal welfare in international trade, there is still a long way to go before agricultural developments in farmed animal welfare are accepted and desired. A state wanting to successfully justify an import ban for agricultural items with low animal welfare would have to prove the policy objective

[626] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, of 16 September 2009 on trade in seal products OJ L 286 (31 October 2009).

[627] Sykes (n559), 471.

[628] Declaration (1) to (5), Preamble to Regulation 1007/2009 (n626).

[629] *EC- Seals* (n564); WT/DS400/R and WT/DS401/R Panel report, para 8.9(a); para 8.3.

[630] ibid, para 7.631-7.632 and 8.8(b).

[631] Measures subject to exceptions must not be arbitrarily discriminatory and must not be a 'disguised restriction on trade', as per the wording of the first paragraph under GATT 1994, Article XX.

[632] ibid, para 8.9(c).

was to protect public morals, and also that it was necessary to do so and would have to satisfy the chapeau of Article XX. There are a number of reasons why this may be difficult in terms of more intensively farmed goods, such as regular meat or egg products.

Public morality is the most forgiving exception for trade restrictions, because there is a large degree of deference given to Members to recognise and regulate the morality of their territories.[633] However, this deference is not unqualified and even after public morality is established, a careful balancing act that considers the necessity of import restrictions to protect those morals is undertaken.[634]

Firstly, public support for the EC-Seals regime was evidenced with a large amount of petitions, letters and general public outrage, and although there is evidence (particularly in the EU) that consumers do care about the welfare of farmed animals, the same amount of public involvement may not exist towards farmed animals that are widely consumed. However, there should not be a need for extremity and external pressure before the WTO recognises an issue as one of morality, especially in relation to something like animal welfare that can be seen as an international good. Sykes notes that the international developments regarding the recognition of the value of animal welfare may make it easier for a panel to find that certain trade restrictions are necessary to meet the objective of protecting public morals.[635] It is therefore possible that, especially after EC-Seals, a WTO dispute settlement panel will recognise the general importance of animal welfare for the protection of consumers and the public in general.

[633] Cook and Bowles (n585), 232-233; Sykes (n559), 473.

[634] See Appellate Body Report, Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R; Appellate Body Report, Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161, 169/AB/R; Stevenson (n612), 126.

[635] Sykes (n559), 495.

Secondly, the necessity of restrictions will have to be balanced against the general interests of trade. This means that, firstly a Member will have to show that their measure was necessary to protect public morals and that there are no viable alternatives that are less trade restrictive.[636] If the complaining Member offers an alternative, it is up to the responding Member to prove why that was not a viable option. Cook and Bowles[637] suggest that in these circumstances, any Member trying to justify an animal welfare restriction would have to show that the process of certain production methods is inherently inhumane, rather than simply under-regulated, in order to legitimise preventing the marketing of the end product within their territory. This is likely to prove incredibly difficult, particularly in relation to animals that intended for and will eventually be slaughtered, as the end practice is ultimately the same across most manufacturers. Secondly, exactly how restrictive on trade a measure is likely to be will ultimately determine overall how necessary it is. Stevenson notes that "there is a feeling that, when it comes to animal protection measures, the panels and Appellate Body will always rule in favour of trade liberalisation. Indeed, when a measure designed to save a species from extinction (as in Shrimp-Turtle) cannot survive a WTO challenge, it is hard to believe that any animal protection laws will ever be held to satisfy the GATT rules."[638]

Thirdly, the extra-territoriality of the issue would have to be discussed. As with Article XX(b) and (g), there may be an assertion by any disputing Member that domestic or regional animal welfare standards should not be imposed on animals outside that territory. This was raised during the EC-Seals dispute by the panel, but since the complaining parties

[636] See Report of the Panel in United States – Section 337 of the Tariff Act of 1930, BISD 36S/386; Report of the Panel in Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, BISD 37S/200.

[637] Cook and Bowles (n585), 235.

[638] Stevenson (n613), 126.

themselves did not raise the issue, it was not taken into consideration or deliberated upon. Whilst this will be a barrier to any successful justification of animal welfare restrictions on trade, Stevenson provides an insightful argument against the extra-territoriality. He argues that Members should be able to recognise and regulate the morality of products within their own territories, and to properly do so Members have to be able to fully exclude products with immoral (i.e. low animal welfare) qualities from their territory.[639] Animal welfare restrictions are not an issue of Members pushing their standards into extra-territorial jurisdiction, but are more about comprehensively regulating the morality of markets within their own. Whether the WTO would accept such an argument is debatable, but at present the framework created by Articles I, III and XX ensures that Members are reluctant to test import bans at a dispute panel.

To summarise, although it is prima facie possible for an animal welfare restriction on trade to fall under the GATT exceptions, it is de facto impossible to assume that the restriction is justifiable. The intensity of farming practices and the volume of international trade in agricultural farmed products makes it unlikely that there will not be some finding against a Member regarding the necessity of their restrictions, or their evidence of public morality.

IV. Conclusion

International recognition of animal welfare as a common value is expanding. At present, the WTO legal framework does not accommodate for developments in farming standards the way that it should. There is evidence that legislatures are interested in developing better agricultural practices that reduce

[639] ibid, 121.

unnecessary suffering and harm of farmed animals, in line with consumer tastes and preferences.

However, the definition of like products, which does not take process into account when determining the comparability of products for trade liberalisation, will effectively deter legislatures from setting the same standards on import of meat and food products in agricultural trade. Although article III of GATT is intended to protect WTO Members from protectionist measures, it makes it difficult for states to treat products that are comparable in the eyes of consumers and manufacturers equally. Instead, reverse discrimination is a likely outcome of animal welfare developments in regional and domestic laws. This will keep animal welfare from developing internationally, with better farming practices remaining fragmented and subject to mutual agreements among Members of the WTO. Were Article III to recognise the importance of process for animal welfare and take into consideration cruel and inhumane production methods during the comparing of products, greater international standards of trade may result.

Although there is scope to suggest that the WTO framework balances the non-recognition of product processes (and heightened trade liberalisation), with domestic concerns in the Article XX(a) exception regarding protection of public morals, this is not enough. The force of Article III's deterrence is self-evident, domestic legislatures across the globe have concerned themselves with farmed animal welfare standards without risking imposing the same requirements on imports. This is specifically a problem for intensively farmed agricultural products, because the sheer volume of global trade in food products will undoubtedly lead to a WTO dispute in the event of import bans. The deterrent effect opens the market to abuse by those who would continue inhumane farming practices, regardless of public and consumer opinion. The overall effect of the WTO trading system, and its relationship with animal welfare, is to reward bad practice that is increasingly outdated.

In turn, this makes domestic and regional relationships with animal welfare practice fraught, as markets can become saturated with less morally conscientious products.

As the WTO framework is built to liberalise trade, to ensure equality and to recognise the ability of sovereign legislatures to regulate consumer choices and preferences, the current scheme is flawed. Trade liberalisation is still possible with high animal welfare standards, as is equal treatment of products that should be comparable. Currently, it is difficult for sovereign Members to regulate their markets and protect their consumers. This is not an issue of trade protectionism for national products, but over-protective trading practices for international products with low welfare compliance. This article has shown that WTO law is not only hindering progress in international animal welfare standards but doing so against the premise of its own role and function.

Is the test of 'gross negligence' sufficiently robust in determining criminal liability for healthcare professionals who have caused the death of a patient? An analysis of gross negligence manslaughter and medical mishaps.

Sophie Walmsley[640]

This article will consider cases in which medical professionals, through negligent conduct, cause the death of a patient. The legal framework, at present, allows the punishment of this conduct in both civil litigation, via clinical negligence, and criminal litigation by recognising this conduct as being criminally culpable. It has been argued that criminal law is not the appropriate avenue of punishment for healthcare professionals who make a gross error. As a result of growing dissatisfaction with medical paternalism, as indicated by recent newspaper headlines and public scepticism of the medical profession, there has been a manifestation of distrust in medical professionals. This is evidenced by an increased number of clinical claims and negligence actions. In this article it will be argued that the 'gross negligence' test is vague, resulting in broad discretion for judges and juries if the matter is brought to the criminal courts. The 'gross negligence' test as established in case law is circular, difficult to interpret and therefore difficult to apply in a consistent manner. Thus, there are grounds to question whether gross negligence manslaughter is an appropriate form of recourse in the healthcare context.

I. Introduction

Gross negligence manslaughter ('GNM') is an offence which has gained widespread media attention, attracting public and academic interest. One such example being the case of Dr

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Hadiza Bawa-Garba who was found guilty of gross negligence manslaughter of a young boy.[641] GNM is an offence in which the death of an individual is the result of the responsible professional falling far below the standard expected.[642] It is crucial to note that GNM is not an offence which is exclusive to healthcare professionals – the offence can apply equally to a school teacher or an electrician.[643] Due to the risk-laden nature of working within healthcare, doctors and healthcare professionals are often responsible for the lives and wellbeing of their patients, their decisions can have catastrophic and disastrous consequences if a mistake is made. This is unlike other professions, such as the legal profession, where the individual concerned may find themselves subject to professional negligence proceedings but whose negligent acts rarely result in death.[644] Therefore, this article will focus on the potential implications the law at present has on healthcare practice and assess whether the law of GNM, as it has been developed, is fit for purpose.

Ferner and McDowell argue that in the last decade there has been a reported increase in doctors being charged with the offence of GNM. The rate of such an increase is a matter of academic dispute, with Ferner and McDowell reporting a dramatic increase[645], and Griffiths and Sanders arguing that there remains insufficient data to assess the rate of how

[641] BBC News, 'Dr Hadiza Bawa-Garba: Struck-off doctor can return to work' *BBC* (London, 9 April 2019) <https://www.bbc.co.uk/news/uk-england-leicestershire-47859826> accessed 26 June 2019.

[642] *R v Bateman* [1925] 19 Cr.App.R 8.

[643] Margaret Brazier and Neil Allen, 'Criminalizing Medical Malpractice' in C Erin and S Ost (eds), *The Criminal Justice System and Health Care*, (OUP 2007), 26.

[644] Margaret Brazier and Amel Alghrani, 'Fatal Medical Malpractice and Criminal Liability' (2009) 25 Journal of Professional Negligence 51, 53.

[645] Robin E Ferner and Sarah E McDowell, 'Doctors charged with manslaughter in the course of medical practice, 1795-2005: a literature review' (2006) 99 Journal of the Royal Society of Medicine 309.

prosecutions have increased.[646] There has not been an accurate collection of data by the CPS, or the police as to the rate of prosecution for GNM. Therefore, it is impossible to provide an accurate comparison of prosecutions for GNM today and how they have changed or increased in the last decade. The Williams Report, published in 2018, recognised that prosecutions for GNM overall are infrequent, with data about these prosecutions not routinely collected. The CPS, as part of the review into GNM, provided data for the report that had been collected since 2013 and rates of prosecutions following the *Adomako* case in 1994. At that time 47 healthcare professionals have been prosecuted for GNM, 23 of which were convicted, and 4 prosecutions were overturned on appeal. This data indicated that from 2013 15 healthcare professionals have been prosecuted for GNM resulting in 6 convictions with 2 of those overturned on appeal.[647] There has been a decline in conviction rates. Seemingly, therefore, prosecutions for GNM remain rare and only a small number of prosecutions that are pursued result in a conviction.[648]

Although it is at present impossible to determine the rate of increase in prosecutions,, the existence of a greater willingness to prosecute for GNM is evident.[649] Despite the increase of prosecutions, it has been noted that the rate of convictions remains relatively low for the category of offence, estimated to

[646] Danielle Griffiths and Andrew Sanders, 'The road to the dock: prosecution decision-making in medical manslaughter cases' in Danielle Griffiths and Andrew Sanders (eds), *Bioethics, Medicine and the Criminal Law: Volume 2 Medicine, Crime and Society*, (CUP 2012).

[647] Norman Williams, 'Gross Negligence Manslaughter in Healthcare: The report of a rapid policy review,' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717946/Williams_Report.pdf> accessed 26 June 2019.

[648] ibid.

[649] Oliver Quick, 'Prosecuting 'Gross' Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 Journal of Law and Society 421.

be around 30%.[650] Studies into cases brought by the CPS have indicated that non-white healthcare professionals may be more susceptible to charges of gross negligence, however, this cannot be accurately substantiated and it is posited this is possibly due to a high portion of non-white practitioners.[651] The vulnerability of healthcare professionals to grave errors and subsequent criminal liability, particularly in an era of growing scepticism in the healthcare system is disconcerting. Due to the increase in charges being brought against healthcare professionals, it is of growing importance that the law is clear and consistent so that a uniform approach is taken, thus allowing those involved in the process to understand the approach to be taken and how the law will be enforced.

This article is divided into three parts. The first part of the article will discuss the test of 'gross negligence' including how the offence has been developed and the elements of the offence as established in *R v Adomako (John Asare)*[652]. Secondly, this article will discuss whether this test can be considered "robust". It will be argued that the test of 'gross negligence' is circular and lacks sufficient certainty by analysing case law and academic criticism of the law in practice. It will be posited that the offence requires a radical overhaul, as at present the law remains unsatisfactory despite recent developments and attempts by the Court of Appeal to provide clarity. Finally, this article will consider whether criminal liability is appropriate for the healthcare professional who makes a grave error – considering whether it would be appropriate to extend the current offence and the scope of corporate manslaughter.

[650] Ferner and McDowell (n645).

[651] *ibid;* Quick (n649), 449.

[652] R v Adomako (John Asare) [1995] 1 AC 171.

II. The emergence of 'gross negligence'

The offence of GNM has a long and unclear history, however, the nineteenth century saw the establishment and development of gross negligence as a criminal matter and one to be determined by a jury.[653] Gross negligence has been incrementally developed via common law.[654] One of the primary authorities which formulated the test of liability for GNM is that of *R v Bateman.*[655] In this case the Court determined that for an act to be considered 'grossly negligent', the defendant must show "*such disregard for the life and safety of others as to amount to a crime against the estate and conduct deserving of punishment.*"[656] This became the 'classic direction' on gross negligence.[657] This test was later approved by the House of Lords in *Andrews v DPP* [1937] AC 576, and a framework for gross negligence was established. There must be a duty of care to be owed by the defendant to the patient with a subsequent breach of that duty which caused the death of the patient. The breach of duty must be considered to be 'gross' in that it showed such a disregard for the life and safety of others such that it amounts to a criminal act. The elements of this offence have created difficulty as the remit and operation of the final limb to the test (that of 'grossness') was determined to be 'uncertain'.[658] The test in *R v Bateman* was based on a juries' subjective assessment of whether, on the individual facts of any particular case, they believe the defendant's conduct to be criminal as opposed to incompetent.[659]

[653] Quick (n649), 424.

[654] Karl Laird, 'The evolution of gross negligence manslaughter' (2018) 1 Archbold Review 6.

[655] *Bateman* (n642).

[656] Bateman (n642), 10-12 (Hewart CJ).

[657] Law Commission, Criminal Law Involuntary Manslaughter: A Consultation Paper, (Law Comm No 135, 1994), 35.

[658] ibid, 36.

[659] Brazier and Alghrani (n644), 54.

Over the years, the courts have failed to explain how gross negligence compared to recklessness. The so-called "Caldwell Lacuna" highlighted the uncertainty between the degree of negligence required in order to be considered 'gross' and the relationship with subjective recklessness.[660] The courts often used the terms 'gross negligence' and 'recklessness' interchangeably due to terminological imprecision and judicial misunderstanding of the distinction between recklessness and manslaughter[661], despite gross negligence being more encompassing than 'recklessness'.[662] This uncertainty was discussed in the subsequent appeal case of *R v Adomako.*[663]

III. The *Adomako* Test

The House of Lords (as it then was) attempted to clarify the residual uncertainty of case law relating to GNM in the case of *R v Adomako*[664]. Dr Adomako was a junior anaesthetist who failed to recognise the patient's ventilation tube had become dislodged during surgery, causing the patient's death. Dr Adomako was convicted and later brought a conjoined appeal against his conviction (with Doctors Prentice and Sullman[665]) which was heard both in the Court of Appeal and House of Lords. His conviction was upheld.

[660] Barry Mitchell, 'Being really stupid: the meaning and place of gross negligence in English criminal law' (2002) Coventry Law Journal 12.

[661] Alexander McCall Smith, "Criminal Negligence and the Incompetent Doctor" (1993) 1 Medical Law Review 336, 339.

[662] Mitchell (n660).

[663] *Adomako* (n652).

[664] ibid.

[665] R v Sullman & Prentice [1994] QB 302

The Court of Appeal in *Adomako* established a four-stage test to assist in determining gross negligence. Generally, the principles of the offence remained similar to those established in Tort, namely:

There was a duty of care between the defendant and the deceased. In establishing the existence of a duty, the courts should look to the cases of *Donoghue v Stevenson* (1932) AC 582 and *Caparo Industries PLC v Dickman* [1990] UKHL 2 considering: foreseeability, proximity, justice and reasonableness. Simply being a doctor or nurse in a hospital will not necessarily mean there is a duty of care to a specific patient.[666]

Breach of that duty of care. This is established via an objective test based on the defendant's position at the time of the death; the defendant's conduct needs to fall far below the reasonable standard imposed on him. It is also to be noted that a person will be judged to the general standard despite experience or expertise, thus, a junior doctor is held to the same standard as non-junior practitioners.

The breach causes, or significantly contributes to, the death of the victim; and

The breach should be characterised as 'gross negligence' and therefore a crime. This is a question for the jury to consider and they should be invited to consider all the relevant circumstances surrounding the offence.

The House of Lords considered the test as laid out in the Court of Appeal. The Lords did not comment on the suitability of the test but emphasised that it is for the jury to determine if the defendant's conduct fell so far below the standard of care

[666]The Crown Prosecution Service, 'Homicide: Murder and Manslaughter' <https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter> accessed 26 June 2019.

incumbent on him that it ought to be considered criminal.[667] *Adomako* determined that the difference between civil and criminal liability can be identified by the gap in the standard of care.[668] The standard to be applied is that of, "practice accepted as proper by a responsible body of medical men skilled in that art". Quirk has argued that when the courts considered the issue of liability it was alluded that there is no need to show disregard for patient welfare, nor that the doctor was doing his or her best.[669] It has also been established by the court that recklessness is not to be considered synonymous with 'gross negligence'.

In assessing if the defendant's conduct was grossly negligent, the jury is asked to consider whether there was an 'obvious' and 'serious' risk of death at the time of the breach.[670] The risk is to be present, clear and unambiguous and such that the reasonably prudent person would have foreseen not merely risk of serious injury, but of death.[671] The court in *Adomako* further clarified that there is no requirement of *mens rea* for gross negligence, although *mens rea* may be capable of being established by reference to the defendant's conduct. Thus, there is no criminal test of the defendant's 'badness' to be considered; it was recognised in a case of medical manslaughter that the accused were "far from being bad men".[672]

[667] Brazier and Alghrani (n644), 55.

[668] ibid.

[669] Hannah Quirk, 'Sentencing white coat crime: the need for guidance in medical manslaughter cases' (2013) 11 Criminal Law Review 871.

[670] Tony Storey, 'Whether "obvious and serious" risk of death in cases of gross negligence manslaughter to be determined both objectively and prospectively,' (2017) 81 The Journal of Criminal Law 343.

[671] ibid.

[672] ibid.

The Law Commission also recognised that a potential impact of *Adomako* is that this may have altered the criminal law regarding omissions, by equating it with the civil tort of negligence. The Law Commission argues that the law is so unclear that it is not possible to ascertain if Lord Mackay intended for this potential change in the law or considered the implication of such a change. The Law Commission state that the civil terminology often used in tort such as "duty of care" and "negligence" ought to be avoided in criminal proceedings as they can cause uncertainty and confusion.[673] The Law Commission prefer the terminology of "carelessness" which they consider to be what is meant by "negligence" in this context.[674]

Following the decision in *Adomako,* the law surrounding gross negligence reached a period of relative stability with few changes.[675] However, the law has now been subject to development by the Court of Appeal. The impact of recent cases has been to affirm the test laid down in *Adomako* and to raise the threshold of the elements of the offence.[676] The Court of Appeal has particularly developed two areas of 'gross negligence'[677], the first with relation to the standard of care and the second regarding the extent of the risks involved, these developments will be considered later in this article.

[673] Law Commission, *Legislating the Criminal Code Involuntary Manslaughter*, (Law Com No 237, 1996), paras 3.7 to 3.13.

[674] ibid.

[675] Laird (n654), 1.

[676] ibid.

[677] See *R v Honey Rose* [2017] EWCA Crim 1168; *R v Sellu (David)* [2016] EWCA Crim 1716.

IV. A 'robust' test?

There is a plethora of criticism of the test for 'gross negligence' raised by academics, legal professionals and the Law Commission. Firstly, it is widely recognised that the test in *Adomako* is circular; juries are being directed to convict a defendant of a crime if they believe a crime has been committed.[678] Lord Mackay accepted the circularity of the test and lack of precision in his judgment in *Adomako*[679]. It is this circularity that has given rise to the arguments that the test lacks sufficient certainty. In particular, there is no guidance given to juries to help determine if conduct has been 'grossly negligent.' The only indication given is that 'grossly negligent conduct' falls far below the expected standard of care. However, it appears there is inconsistency in applying this principle. The conduct of Doctors Sullman and Prentice was considered "merely inadvertent" whereas the conduct of Doctor Adomako was "dreadfully incompetent" despite both cases involving the doctors falling far below the respected standards expected of them.[680] Historically, there has been a high standard of negligence required for a medical professional to be criminally charged in England and Scotland. The courts have pointed to behaviour that is "glaring, flagrant and monstrous" and "wickedness" that indicates the defendant possessed a punishable mental state.[681] It is precisely this language that has caused ambiguity and confusion as judgments have repeatedly indicated that the *mens rea* of the accused is not central to a conviction. Yet the question as to how far below the standard an accused is to fall for it to be considered criminal, has no concrete or consistent answer.

[678] Brazier and Alghrani (n643).

[679] *Adomako* (n652), [369]); and lack of precision of the test at [381].

[680] Margaret Brazier and Neil Allen, 'Criminalizing Medical Malpractice' in C Erin and S Ost (eds), *The Criminal Justice System and Health Care*, (OUP 2007).

[681] McCall Smith (n660).

In *R v Misra (Amit)*[682] the court was asked to consider whether sufficient clarity existed following *Adomako* as to the test for what conduct could be considered 'criminal'. It was argued that due to a lack of sufficient clarity and certainty, the law was not compliant with Article 7 of the European Convention on Human Rights ('ECHR'). This challenge ultimately failed. The court stated that the elements of the offence were clearly established in *Adomako* and that the question for the jury was one of fact as they are asked to consider if the behaviour was grossly negligent and consequently criminal, not additionally criminal.[683] It was further emphasised that the jury is often asked to consider difficult concepts of fact, for example: self-defence, oblique intent and the *Ghosh* test for criminal dishonesty.[684] Despite the attempt to overturn the test for 'gross negligence', *Adomako* remains good law despite its inherent uncertainty.[685] The decision in *Misra and Srivistava* is nonsensical by stating that there is no uncertainty as to the definition of the law as this was established in *Adomako* – the uncertainty that exists is the decision-making process for those interpreting the law.

The test for GNM is one subject to academic criticism for its circular and vague nature that inevitably leaves a great deal of scope for prosecutorial discretion in charging individuals. Due to the *Adomako* test, there is a large amount of discretion to all involved from the prosecutor, to the judge, jury and lawyers.

[682] *R v Misra (Amit)* [2004] EWCA Crim 2375.

[683] Clare Barsby and David C Ormerod, 'Manslaughter: manslaughter through gross negligence – whether sufficient certainty as to ingredients of offence' (2005) Criminal Law Review 234.

[684] Ben Fitzpatrick, 'Gross negligence manslaughter: compatibility with European Convention on Human Rights, Article 7', (2005) 69 Journal of Criminal Law 126.

[685] Guy Pomphrey, 'Neglect: Prosecuting healthcare professionals who harm patients,' (2015) Lexology <https://www.lexology.com/library/detail.aspx?g=1dcc8c45-7312-41ac-8d48-b80a3130c874> accessed 26 June 2019.

This concern is matched by those in practice and fears are raised regarding how the CPS is exercising its discretion. In particular, there is concern that the CPS is exercising discretion for prosecution too readily. However, some argue the contrary, claiming that the CPS are reluctant to prosecute without evidence of 'badness'.[686] Statistics obtained over 1975 to 2005 indicate that prosecution investigations for GNM have increased in frequency with 44 purported investigations between 1996 and 2005 compared to 44 prosecutions between 1975 and 2005.[687] Yet there has been little reflection on the reasons for the increase. It could be the CPS threshold for deciding whether to continue with prosecutions i.e. 'realistic prospect of success' (an evidential test).[688] Prosecutors often struggle in interpreting the test believing it to be "inherently vague".[689] Quick argues that the test is "too broad and uncertain".[690] As a result, prosecutors have described their work as being "difficult, dynamic and prone to delay" and evidence suggests they will ask at least two experts prior to making a decision to prosecute. Ultimately, the question of gross negligence is handed over to medical experts, both when considering bringing a prosecution and during trials, which is arguably inappropriate as it is a legal test.[691] Prosecutors have applied a higher standard of recklessness for gross negligence than other offences to determine whether a charge for GNM is appropriate.[692] GNM lacks definitional power and leaves defendants and prosecutors bereft of points of reference to

[686] Margot Brazier, Sarah Devaney, Danielle Griffiths and others, 'Improving healthcare through the use of 'medical manslaughter'? Facts, fears and the future,' (2013) 22 Clinical Risk 88.

[687] Pomphrey (n685).

[688] Quick (n649), 427; see also Crown Prosecution Service (n656).

[689] Oliver Quick, 'Medical manslaughter – time for a rethink?' (2017) 85 Medico-Legal Journal 173.

[690] ibid.

[691] Quick (n649).

[692] ibid.

assess conduct: there are no clear rules for prosecutors and defendants to apply in comparison to other violent offences.[693] Due to the vague nature of the current test for gross negligence, it is posited that prosecutorial guidance is required to provide the certainty that is currently lacking. The argument has been raised that there is increased clarity as the CPS now publishes guidance on its website, yet the published guidance acknowledges great scope for individual discretion and is at best a short summary. However, despite online indications on the factors the CPS will consider, little quantitative data exists which shows how many cases are discontinued and why.[694] However, the Williams Report (2018) has indicated the 85 of the recent 151 cases of suspected GNM were discontinued following CPS advice and a further 43 were discontinued once the full case was submitted for a charging decision.[695] Furthermore, there is a concern that prosecutors work within a climate of increased suspicion of professionals that is likely to impact them when exercising their discretion. This could also be exacerbated by the public pressure they experience to give victims justice.[696] Whilst some discretion is required, and arguments can be made that discretion is the backbone to the criminal justice system, it is argued that the current level of discretion is too high. There is little to no accountability for prosecutors aside from that of judicial review. [697]

Judicial discretion also plays a significant part in assessing GNM at trial, particularly when giving directions to the jury. The wording used by the trial judge is vital and could ultimately determine whether the result is a conviction or acquittal, or

[693] ibid, 441.

[694] ibid.

[695] Williams Report (n647).

[696] ibid, 429.

[697] ibid, 431.

whether an appeal of a conviction will be allowed. The Court of Appeal has not hesitated to quash a conviction on the basis the judge used inadequate language when directing the jury. In the recent case of *R v Hadiza Bawa- Garba*[698] the judge referred to the need to establish a "truly exceptional degree of negligence". Quick argues that it is odd that a persons' fate falls on whether a judge used a synonym for gross negligence. We are reliant on judges to refine the definition of gross negligence, even the term "exceptionally bad negligence" is preferable but the definitional issues do not go away.[699]

The recent cases *of R v Sellu (David)* [2016] EWCA Crime 1716 and *R v Rose (Honey Maria)* [2017] EWCA Crim 1168 brought to the forefront issues over 'gross negligence'.[700] *Sellu* emphasised the importance of the judge's direction to the jury; notably that the judge should emphasise the difference between a serious error and gross negligence. It was further highlighted that the defendant's state of knowledge is not entirely indicative as to his/her criminal liability. The case of *R v Rudling*[701] highlights further concerns in relation to the requirement of reasonable foreseeability for gross negligence manslaughter cases. This case concerned a doctor that failed to conduct a physical assessment of a young patient who had presented with unusually dark genitalia amongst other medical concerns. Following the prosecution's case, the defence successfully made a submission of no case to answer as causation could not be established. They argued that it was unclear whether the unusual presentation of the genitalia was life-threatening at the stage the patient presented and that the

[698] *R v Hadiza Bawa- Garba* [2016] EWCA Crim 1841.

[699] Quick (n689).

[700] Anne Lodge, 'Gross negligence manslaughter on the cusp: the unprincipled privileging of harm over culpability' (2017) 81 Journal of Criminal Law 125.

[701] *R v Rudling* (2016) EWCA Crim 741.

prosecution's evidence was tenuous in nature. It has been argued that this case is a good example of a just result following the correct interpretation of the law and careful examination of the evidence. It is essential that there is a risk of death not merely serious illness or injury.[702]

This judgment was subject to scrutiny in *Rose*.[703] In this case an optometrist was convicted (later quashed) for GNM after failing to recognise a patient's life-threatening condition that would have been detectable during a routine eye examination because they did not undertake the examination. The conviction set a dangerous precedent, in that it implied that a defendant can avoid liability if they fall 'too far' below the reasonable standard of care, in this case, for example because the doctor does not conduct an examination. The result of the appeal in this case was that medical and other professionals may be protected from criminal liability if they have not foreseen a serious or obvious risk of death, however, the decision does not condone negligence at a high standard, merely that such mistakes may fall short of the offence of gross negligence manslaughter.[704] Laird considers the wider implications of this judgment if it were applied to a non-healthcare professional, for example, a train conductor. Laird concludes that a train conductor who had failed to inspect the platform before setting off causing the death of a passenger ought to be charged with GNM but that this would not be the case following *R v Rose* (2017). The perverse application in *R v Rose* means that such a risk of GNM would only arise if the conductor had checked the platform.[705] It is argued that this position is far-fetched, the courts would certainly not find that

[702] ibid.

[703] *R v Honey Rose* (n677).
[704] ibid.

[705] Laird (n654).

a doctor who did not perform the examination less liable than one who did but failed.

V. Dealing with the uncertainty of gross negligence

Lodge argues that the lack of clarity and certainty of GNM is "unsustainable" and too broad as it captures diverging degrees of fault. The offence boundaries need to be re-drawn to ensure precision and ensure that only those whose behaviour is deserving of punishment are prosecuted. It is argued that only a person who has consciously chosen to harm or risk harm is deserving of penal sanction and having their liberty restricted.[706] Critics, in particular, Quick and Smith argue that due to the nature of the offence it ought to be abolished as it is too discretionary which makes it unfair in nature.[707] Brazier et al argue that the offence should be extended to include gross negligence causing serious injury – an extension of wilful neglect.[708] The basis for this argument is that at present the offence of GNM depends on the 'moral luck' of the individual – the doctor who causes death by negligence may find himself at the mercy of the criminal law, whereas, the doctor who performs negligent treatment but the patient survives will escape the remit of criminal liability.[709] It is posited that both doctors are equally morally culpable and thus ought to be subject to the same consequences. Smith argues, however, that to extend the offence to include criminal liability for non-fatal injuries, would be counterintuitive to the purpose of the criminal law.[710] Further concerns exist about whether the

[706] Lodge (n700).

[707] Quick (n649).

[708] Amel Alghrani, Margaret Brazier, Anne-Maree Farrell and others, 'Healthcare scandals in the NHS: crime and punishment,' (2011) 37 Journal of Medical Ethics 230.

[709] Brazier and Allen (n680); John C Smith, 'The Element of chance in Criminal Liability,' (1971) Criminal Law Review 63.

[710] Smith (n709).

offence of GNM encourages doctors to practice 'defensive' medicine due to physicians' concerns of prosecution and that it may inhibit the duty of candour – an extension of GNM will only exacerbate these present concerns and present new ones.[711] Abolishing the offence also seems an unfavourable solution; few dispute that a deliberately harmful doctor, i.e. the one who is drunk and performs surgery causing death ought to be subject to the criminal law. Allen proposes that a more palatable and obvious solution is to prosecute the NHS Trust for corporate manslaughter, yet this is not without difficulty and can be equally difficult to prove.[712] Allen and Brazier, as well as other notable academics such as Laird, argue that the law at present is insufficient for a variety of reasons. There needs to be an overhaul of the principle of gross negligence manslaughter in order to remedy the present defects in the law.

It is also posited that the test for GNM should be that which was previously applied under subjective recklessness – as a subjective assessment allows the jury to more appropriately consider if the doctor's conduct ought to be considered as criminal.[713] It is argued that a subjective assessment is more appropriate for gross negligence when compared to the objective test currently deployed by the courts. However, it is to be emphasised that subjective reckless is an equally difficult concept. In addition, it may cause juries to hold doctors to an impossible or unreasonable standard based on what they ought to have known as opposed to what reasonable knowledge would be.

[711] Brazier, Devaney, Griffiths and others (n686). See also: Haroon Siddique, 'Doctors avoiding risky operations due to prosecution threat, survey finds), *The Guardian*, (London, 30 January 2016) <https://www.theguardian.com/society/2016/jan/29/doctors-avoiding-risky-operations-due-to-prosecution-threat-survey-finds> accessed 26 June 2019.

[712] Neil Allen, 'Medical or Managerial Manslaughter?' in C Erin and S Ost (eds), *The Criminal Justice System and Health Care*, (OUP 2007).

[713] Laird (n654).

Guidance and clarity on what constitutes gross negligence is lacklustre. It is argued that cases following *Adomako* have done little to clarify the ambiguous legal and procedural issues. It would be beneficial for the Supreme Court to reconsider the test in *Adomako*[714], particularly in light of proceeding case law such as *Misra* and *Rose*. The Supreme Court may be able to provide an appropriate and fleshed out test of how to assess gross negligence both at the investigatory stage and at trial. Prosecutorial guidance, or more detailed guidance, ought to be published much like guidance that is published for other offences which will curtail some of the prosecutors' flexibility and provide greater assurance for doctors of the case to meet. In addition, Laird argues that the way to proceed is by having Parliament re-assess the necessity of the offence and provide a statutory test to be applied[715] – thereby ensuring consistency in application.

The Law Commission published its proposals for reform in Consultation Paper No. 135 which targets those who are "very seriously at fault". The provisional proposal stated that the accused ought to be aware of a *significant* risk of death or serious injury, and the conduct to fall *seriously* and *significantly* below what would be reasonably demanded of him to prevent the risk from occurring.[716] The Law Commission likened their proposal to the test of "dangerousness" in road traffic offences, a test which is familiar, and without criticism. The Law Commission proposed that an important element of the offence ought to be if the risk is "obvious", meaning "glaring" as opposed to 'foreseeable' as this concept is easier to grasp. The jury would also be required to limit the test to the knowledge which the accused had at the

[714] ibid.

[715] ibid.

[716] Law Commission (n673), para 5.17.

time in question, and that the accused could appreciate the risk at the time.[717]

The Williams Report (2018) identified that in order to improve the law surrounding gross negligence manslaughter an agreed and clear understanding of the offence needs to be developed as a starting point. A common understanding of what constitutes gross negligence manslaughter would seek to provide assurance to healthcare professionals that the action only results from exceptionally bad breaches of the duty of care. Such a shared understanding ought to be disseminated to healthcare professionals, victim's families, police and coroners. It is also recommended expert opinions be central to prosecutions and that the quality and assurances of such a report need to be accurately defined and provided. Whilst the rate of prosecution remains low, around 30 investigations resulting in 1 prosecution per year healthcare professionals remain uneasy about recent prosecutions for gross negligence manslaughter. Further measures are required to resolve the residual uncertainty such as building on the roles of the coroners and clarity regarding police investigations.

VI. Conclusion

In conclusion, having considered the test for gross negligence in *Adomako* and developments, it is argued that it is not 'robust'; it is vague, circular and difficult to apply. There have been many proposed ways to reform the test, from introducing a test of subjective recklessness to total abolition. Due to the complex history of this offence, the most appropriate avenue of clarification will be either by Parliament or the Supreme Court. However, there is no indication of reform on the horizon which leaves the law in a state of disarray for healthcare professionals, prosecutors, judges and juries. It remains evident that many are

[717] ibid, paras 5.38 and 5.29.

of the opinion the law should not be used to prosecute those who by pure misfortune cause death as a result of negligence in a clinical setting; evidence suggests this is counterproductive. As time has progressed and more cases heard, it is clear the elements of the offence and the test of gross negligence has become increasingly muddled.