UNIVERSITY OF LIVERPOOL

School of Law and Social Justice

UNIVERSITY OF LIVERPOOL LAW REVIEW

VOLUME 5

UNIVERSITY OF LIVERPOOL LAW REVIEW
Published by the University of Liverpool Law Review
Eleanor Rathbone Building
Bedford Street South, Liverpool L69 7ZA

Supported by the Liverpool Law School, University of Liverpool

Volume 5 (October 2019)

Contents

Editorial Board 2018/19

Academic Advisory Board

Foreword

Now in its fourth year, the University of Liverpool Law Review continues to reflect the excellent legal scholarship written by students at all levels of study at Liverpool Law School. This year has been no exception with more submissions received than ever before and a grand total of 10 papers published in this volume.

As in previous years, the content of this volume is of high quality and reflects a number of the most pressing legal issues at home and abroad. On the international scene, our students provide critical analyses of the constitutional crisis in Poland (Julia Michalczyk), reservations to the Convention on the Elimination of Discrimination Against Women (Kebirungi Destiny Mugasha); the hierarchy of norms in international law (Caitlin L Evans); the legality of US military intervention against ISIS (Joe Drake); unilateral humanitarian intervention in international law (Connor Logue); the prohibition against the use of military force and the right to self-defence (Thomas Jenkins) and the principle of supremacy of EU law over conflicting Member States' legislation (Ronan Cain). On the domestic front, our students offer thoughtful reflections on EU and UK copyright laws (Shahab Al Bulushi); abortion law (Samantha Dulieu) and the medical ethical principle of 'Do No Harm' in the context of cosmetic surgery (Zena Hamad).

The Editorial Board should be congratulated for their hard work and dedication in bringing together this fine collection of essays. I would also like to thank academic colleagues who kindly agreed to provide comments to the authors to help bring their papers to publication standard.

Dr Laurène Soubise

Lecturer in Law, University of Liverpool

The constitutional crisis in Poland: a critical analysis of the changes to the judiciary based on the rule of law principle

Julia Michalczyk

Abstract

The laws adopted by Poland in 2015–2018 fundamentally changed the structures of the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court. The purpose of this article is to critically analyse these changes in regard to the principle of the rule of law, with a focus on legal certainty and the independence of the judiciary. There are analogies between the changes to the judiciary introduced by Poland and those by Hungary which resulted in triggering the Article 7 procedures against both of these countries. There is no universal definition of the rule of law within the European Union, and therefore there are huge ambiguities as to what constitutes a rule of law violation under Article 2 of the Treaty on the European Union. The outcomes of this case study suggest that the formal concept of the rule of law is an insufficient tool to protect constitutional values and thus the substantive concept should be applied.

Introduction

This article will present a case study of the changes to the judiciary that have been taking place in Poland since 2015. The first part of the article focuses on the legal implications of the laws on the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court. I will explain the historical background and specifics of the Polish legal system which derive from the concept of a state governed by law. The second part will analyse the rule of law issues and difficulties with providing its universal definition.

I conclude that changes to the judiciary have breached the Polish Constitution and have thus violated the rule of law principle, both in its formal and substantive concept. I draw analogies between these changes to the judiciary and those introduced in Hungary, and the response of the European Union (EU) to such events, to argue that the formal concept of the rule of law does not sufficiently protect the principle within the EU.

Legal challenges in Poland

It is crucial to understand the reasons behind the particular structure of Central and Eastern European (CEE) democracies and the constitutional moment in which they were established. The emergence of new constitutions followed the transition from non-democratic systems. The peculiar legal change manifested in the new institutions that the CEE states have built,[1] such as the constitutional courts. As a result of overcoming the authoritarian regime, CEE states usually have a more substantive sense of what it means to have a democracy, which is reflected in the way the courts monitor the legitimacy of power-holders' activities. The success of the new democracies is not judged on whether they can catch up to the Western history of democratic institutions however,[2] rather how their comprehensive approach corresponds with universal objectives such as democracy justice, fairness and the rule of law.

Due to the centuries-long instability of the political situation of the CEE states, democratic institutions were not developed gradually over time as they were in Western democracies, but instead had to be constructed from scratch. In Poland, the development of a political system which could be considered in any way capable of evolving into a democracy was terminated by the partitions of the Kingdom conducted by Russia, Prussia and Austria in the 18th century, resulting in the suppression of sovereign Poland for 123 years. Upon regaining independence, Poland introduced free elections in 1918. However, the years 1918-1939 were troublesome with it being impossible to create a

[1] Kim Lane Scheppele, 'Democracy by Judiciary. Or, Why Courts Can be More Democratic than Parliaments' in Adam Czarnota et al (eds), *Rethinking the rule of law after communism* (Central European University Press 2005), 30.
[2] Kathryn Hendley, *Trying to Make Law Matter* (Ann Arbor: University of Michigan Press 1996).

stable Government in such a divided nation.[3] The Second World War halted further political and constitutional development in Poland. The reintroduction of communism in the aftermath again deprived the state of the opportunity to rebuild the concept of democracy.

As a result of the constant lack of long-term opportunity for democracy to evolve in Poland, the political system that emerged in 1989 reflected a conceptualisation of a democracy that comes from longing rather than from having historical experience as such.[4] The concept of the rule of law adopted by Poland is centred on the idea of a state governed by law,[5] a legal concept characteristic of Continental Europe.[6] This derives from the doctrine of *Rechtsstaat*,[7] originating in German jurisprudence, which has its roots in the legal theories of Immanuel Kant.[8] In this doctrine, the state is based on the supremacy of the national constitution that ensures safety and constitutional rights of its citizens[9] and separation of powers ensured by checks and balances.[10] Therefore, as a way of departing from communism, many policy choices were taken out of the hands of the political institutions and lodged instead in a higher law, that is, the Constitution.[11]

In order to prevent the abuse of power by the rulers and to ensure the legality of the laws, the role of judicial review was expanded, and the institution of the Constitutional Tribunal was introduced, a body separate to the Supreme Court, following a continental model of constitutional review.[12] The purpose of a constitution, in short, is to operate as an instrument of state strategy that represents a broad societal and political consensus

[3] Poland in 1918-1939 consisted of areas on different economic, industrial and social levels of development. The community consisted of a high percentage of ethnic minorities (30 per cent).
[4] Scheppele (n 1), 37.
[5] Constitution of the Republic of Poland 1997, Art 2.
[6] Leo Strauss and Joseph Cropsey, *History of Political Philosophy* (Chicago: University Press 1987), 581-2 & 603.
[7] English translation: "legal state" or "state of law".
[8] Dietmar von der Pfordten, 'On the Foundations of the Rule of Law and the Principle of the Legal State/Rechtsstaat' in James Silkenat et al (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014).
[9] Paul Tiedemann, 'The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now' in James Silkenat et al (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014).
[10] Dietmar (n 8).
[11] Scheppele (n 1), 38.
[12] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe* (Springer 2014), [2.3].

enabling society to resolve future conflicts, protect values and fulfil expectations.[13] The concepts of universality and supremacy of the constitution mean that this legal document is difficult to change. The supremacy of the constitution confers upon it the highest authority of the legal system. Subsequently, all constitutional provisions should be universally protected. The Constitution of Poland may only be amended by two-thirds Parliamentary majority[14] and some provisions may require a general referendum.[15] All the laws referred to below were by contrast enacted by a simple majority in the Parliament, bringing into question their constitutionality.

Changes to the Constitutional Tribunal (CT) were the first in a chain of events that led to the current constitutional crisis in Poland. It should be noted that the CT was an important symbol of Poland's departure from communism, an indication that the new political order was to be very different from the old one. The CT's primary function is to adjudicate on whether the legislation passed in the Parliament conforms with the Constitution, as well as the ratification of international agreements[16] such as the EU Treaties, Regulations and Directives. Thus, its expertise is in constitutional judicial review. The CT judgments have an immediate effect unless the CT orders otherwise[17] and are final without opportunity for appeal.[18] The CT consists of fifteen judges appointed by the Sejm (the lower house of the Parliament) for a term of office of nine years.[19] The appointees must make a vow to the President to finalise the procedure.[20]

In June 2015, just a few months before the general election, the Parliament enacted a law that would allow the 7th Sejm to fill five seats in the CT that were to become vacant by the end of 2015.[21] The statute extended the 7th Sejm's competence as the term of office of only three judges was due to expire during this Sejm's term of office, and therefore the other two judges would otherwise be appointed after the general election by the 8th Sejm. The President refused to take a vow from these appointees, claiming that their

[13] Grażyna Skąpska, *From 'Civil Society" to 'Europe': A Sociological Study on Constitutionalism After Communism* (Koninklijke Brill 2011), 51-52.
[14] Constitution (n 5), Art 235(4).
[15] ibid, Art 235(6).
[16] ibid, Art 188.
[17] ibid, Art 190(3).
[18] ibid, Art 190(1).
[19] ibid, Art 194(1).
[20] Constitutional Tribunal Act 1997 (Dz. U. 1997 nr 102 poz. 643), Art 5(5).
[21] Constitutional Tribunal Act 2015 (Dz. U. 2015 poz. 1064), Art 137.

appointment was unconstitutional. The law was referred to the CT, the only authority which possesses the competence to decide about its constitutionality. The President's refusal sparked a debate on whether the President had a duty or a discretionary power to take a vow from the appointees. The vast majority of the legal profession was more convinced by the latter, taking into account that the Constitution did not secure this power but was perceived more as a symbolic custom established in the ordinary legislation.[22]

Considering the appointment of all five judges was constitutionally uncertain, such a reaction of the President could be justified if the reason behind his refusal was that he was waiting for the CT to decide on this legal dilemma. However, the President's refusal was followed by the 8th Sejm appointing its own judges, revoking the appointments made by the 7th Sejm. The President agreed to take a vow from the 8th Sejm's judges, which strongly suggests that the President's decision not to take a vow from the judges appointed by the 7th Sejm was not done in good faith but was instead politically motivated. The politicians were aware that the law had been referred to the CT which was expected to deliver its judgment the next day. The next morning, the CT confirmed that the 7th Sejm had overstepped its constitutional rights as it only had the right to appoint the judges whose term of office was to expire upon their own departure.[23] Nevertheless, three judges appointed by the 7th Sejm were appointed lawfully, and the President had a duty to take a vow from them. He made a decision not to on the ground that all fifteen seats in the CT were already occupied by the judges appointed by the 8th Sejm. Since the CT's decisions are binding and non-reviewable, the President's disobedience was a clear breach of the Constitution and overuse of power. In addition, the fact that the 8th Sejm appointed its own judges showed disrespect for the authority of the CT. Such an arbitrary act represents a threat to the values protected by the Constitution.

The impartiality of the judges elected by the 8th Sejm has been contested, considering their readiness to be accomplices to a breach of the Constitution and the substantial

[22] Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' [2018] Hague Journal on the Rule of Law ‹doi.org/10.1007/s40803-018-0078-1› accessed 31 December 2018, 6; Constitutional Tribunal Act 1997 (n 20), Art 5(5).
[23] K 34/15 Constitutional Tribunal decision 3 December 2015.

promotions granted to them by the Government. At present, one third of the CT judges are alleged to have political connections to the governing party, which is in conflict with the independence of the judiciary, the principle at heart of both the rule of law and Polish Constitution. Having control over the CT allowed the Parliament to change another judicial institution, namely the National Council of the Judiciary (the NCJ), whose task is to safeguard the independence of courts and judges.[24] Its central role is to appoint new judges, including the Supreme Court judges, and make decisions regarding the promotion of those currently serving.[25]

The Constitution defines the composition of the NCJ. Out of twenty-five members, fifteen of them should be chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts. The other ten are lay members: six are members of the Sejm and the Senate elected by these institutions themselves, one is appointed by the President, and three are sitting in the NCJ *ex officio*.[26] Although the Constitution does not clarify who should appoint the judicial representatives, it is explicit about the separation of powers[27] and judicial independence.[28]

Members of the NCJ used to be appointed by the judges themselves through the general assemblies of particular courts.[29] In 2017, the CT panel consisting of the judges elected by the 8th Sejm ruled that the judges of the lower courts were underrepresented in the NCJ because the judges of the higher courts were favoured in the process.[30] The Parliament interpreted this decision as permission to take forward changes to the NCJ which transferred the power of appointing the NCJ members to the politicians.[31] The Government argued that the Constitution does not explicitly make it unlawful for the NCJ members to be appointed by the Parliament and therefore the law is not in breach of the Constitution. As argued by a constitutional expert in Poland, Professor Marcin Matczak, the CT's political dependency on the ruling party had become a tool to justify the laws enacted by the Parliament in place of their duty to protect the conformity of

[24] Constitution (n 5), Art 186(1).
[25] National Council of the Judiciary Act 2011 (Dz. U. nr 126 poz. 714), Art 3(1)(1).
[26] Constitution (n 5), Art 187(1).
[27] ibid, Art 10.
[28] ibid, Art 173.
[29] ibid, Art 11.
[30] K/5/17 Constitutional Tribunal decision 20 June 2017.
[31] Amendment on the National Council of the Judiciary Act 2011 (Dz. U 2018 poz. 3), Art 1(2).

those laws with the Constitution.[32] Matczak compares the Government's use of the CT to a thief who regularly requests a court to confirm that he has not stolen anything, an accurate analogy to the implications of the constitutional changes in Poland.

The Venice Commission has expressed its concerns[33] over the way the NCJ members were to be chosen according to the new law, arguing that "the substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself."[34] Its position was supported by the fact that judicial members have no strong political affiliation if elected by other judges.[35] When comparing the way the councils of the judiciary are structured in Europe, the standard in Poland has become very distant from that typically found on the continent. Among the twenty-two European judicial councils in 2016, in eighteen of them, half of the judicial members or more were elected, appointed or proposed by their peers.[36] In 2018, among the twenty European judicial councils, members in fifteen of them were proposed, elected or selected by judges themselves, and Poland was the only country where the judges had no input in appointing their representatives.[37] It should be noted that it is entirely for the EU Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary at all. Nevertheless, if a Council for the Judiciary has been established by a Member State, the independence of the Council must be guaranteed in line with European standards.[38] The Venice Commission highlighted that changes to the NCJ introduced in Poland are at odds with European standards of the rule of law.[39]

The last aspect of the Polish constitutional crisis that will be outlined in this article is the new law on the Supreme Court (SC). The SC makes decisions in judicial review

[32] Marcin Matczak, 'Lecture transcript: Poland: From Paradigm to Pariah? Polish Constitutional Crisis - Facts and Interpretations' (Oxford University, 8 March 2018) ‹archiwumosiatynskiego.pl/wpis-w-debacie-en/poland-from-paradigm-pariah-polish-constitutional-crisis-facts-and-interpretations/› accessed 2 January 2019.
[33] Commission, 'Opinion No. 904/2017 European Commission for Democracy Through Law: Poland' (December 2017) CDL-AD(2017)031.
[34] Commission, 'Study No. 711/2013 European Commission for Democracy Through Law: Rule of Law Checklist' (March 2016) CDL-AD(2016)007.
[35] Opinion No. 904/2017 (n 33), [18].
[36] 2016 EU Justice Scoreboard ‹ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf› accessed 30 December 2018, 38.
[37] 2018 EU Justice Scoreboard ‹ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf› accessed 30 December 2018, 49.
[38] ibid.
[39] Commission Opinion No. 904/2017 (n 33), [24].

proceedings against the lower courts' judgments. It is a body separate to the CT with a different scope of expertise. In December 2017 the Parliament reduced the retirement age of Supreme Court judges from 70 to 65.[40] The President was granted a right (but no duty) to reappoint particular judges on their request and allow them to adjudicate over the age of 65.[41] The President's decision is non-reviewable and allows him to extend the mandate of judges of his choosing and refuse a request without explanation.[42] This provision risks the President having excessive influence over those judges who are approaching the retirement age.[43] What is more, such a request could only be made "not sooner than twelve months and not later than six months before attaining the retirement age"[44] thereby excluding judges who, at the time this law came into force, were already outside of the scope of this provision.

Although the Constitution provides that "judges shall not be removable",[45] the new law altered the length of the current judges' term of office, shortening it for 40 per cent of them. When the law came into force in July 2018, several judges were already set to retire. Among the judges who were over the age of 65 was the President of the Supreme Court, whose term of office lasts six years and is explicitly ensured by the Constitution.[46] Her term of office was due to last until April 2020, but the new statute did not appear to treat her any differently than the other judges who were over the new retirement age.

As explained in the White Paper issued by the Government on the request of the European Commission, the reform of the SC was motivated by the lack of public trust in the judiciary;[47] prolonged dispute resolution in the courts and insufficiency of proceedings;[48] the alleged supreme power of the judiciary that causes an imbalance of powers;[49] and finally, by the fact that the judges who still adjudicate in the common and,

[40] Supreme Court Act 2017 (Dz. U 2018 poz. 5), Art 37(1).
[41] ibid.
[42] *Baka v Hungary* [GC] no. 20261/12, ECHR 2016 concerned the early dismissal of the President of the Hungarian Supreme Court and held that the absence of any judicial remedy against the decision was in breach of Article 6 of the Convention (the right to access the court).
[43] Opinion No. 904/2017 (n 33), [51].
[44] Supreme Court Act 2017 (n 40), Art 37(1).
[45] Constitution (n 5), Art 180(1).
[46] ibid (n 5), Art 185.
[47] White Paper on the Reform of the Polish Judiciary (The Chancellery of the Prime Minister, 7 March 2018) ‹www.premier.gov.pl/files/files/white_paper_en_full.pdf› accessed 30 December 2018, 1-3.
[48] ibid, 4-9.
[49] ibid, 25-32.

most importantly, in the higher courts have never been held accountable for the judgments they delivered during the time of communist regime, in particular, when adjudicating in line with the martial law.[50] In a country so directly affected by communism, society is particularly receptive to the narrative of "getting rid of communists", and thus the end is generally accepted by citizens as justifying the means.

The biggest independent judicial organisation, the Association of the Polish Judges Iustitia, drafted a response to the White Paper providing proof that the evidence the Government used was false and that their arguments were manipulative. In 1990, 81 per cent of the SC judges were replaced.[51] In 1990-200 the NCJ refused 511 applications to adjudicate above the retirement age.[52] As a result of the so-called 'Lustration Act',[53] 42 judges and 21 deceased judges' family members had their pensions revoked because they were adjudicating in courts and repressive public bodies.[54] Therefore, to say that the new law on the SC allows the replacing of "judges who were directly and shamefully involved with the communist system"[55] was incredibly misleading. The Government implied that as a result of the reform, most senior judges, many of whom had served under the previous regime, would retire. The Venice Commission stated that such an explanation was unacceptable and suggest the existing disciplinary procedures should apply instead if the authorities doubt the loyalty of some judges.[56]

As explained by the Polish Ombudsman, Adam Bodnar, to the Committee on Civil Liberties, Justice and Home Affairs (LIBE), lowering the retirement age of judges is just one part of a very complicated situation.[57] He highlighted that the rule of law crisis is about respect for institutional values that provide protection against arbitrary power[58]

[50] ibid, 10-24.
[51] 'Response to the White Paper Compendium on the Reforms of the Polish Justice System Presented by the Government of the Republic of Poland to the European Commission' *Iustitia* (Warsaw, 16 March 2018) ‹www.iustitia.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-Government-of-the-republic-of-poland-to-the-european-commission› accessed 30 December 2018.
[52] ibid.
[53] The Lustration Act 1997 (Dz. U. 2006 Nr 218 poz. 1592).
[54] Response to the White Paper (n 51).
[55] White Paper (n 47), [10].
[56] Opinion No. 904/2017 (n 33), [47].
[57] 'The Situation of the Rule of Law in Poland, in Particular as Regard the Independence of the Judiciary' (The Committee on Civil Liberties, Justice and Home Affairs Public Hearing 20 November 2018) ‹www.rpo.gov.pl/en/content/adam-bodnar-public-hearing-%E2%80%9C-situation-rule-law-poland-particular-regards-independence-judiciary%E2%80%9D› accessed 02 January 2018.
[58] ibid.

that is lacking in Poland. The Constitution was once a symbol of departure from the communist regime, proudly introducing the principle of the rule of law, judicial independence and democracy to the Polish legal system. Lack of respect and consideration for these values when introducing legislative changes signifies that the state is no longer governed by law. The Government's authoritarian tendency poses a significant threat to Poland's democratic future.

The rule of law analysis

The scope of the rule of law is a highly contested issue. The rule of law is widely acknowledged, but there are different ideas as to what it practically entails.[59] The way in which it is applied often depends on national approaches to legal philosophy and legal theory. Polish jurisprudence is comprised of influences from continental Europe, some elements characteristic for the CEE states as well as its own legal culture. However, despite the differences in interpretations, there are some crucial elements of the rule of law that are universal for all democracies.

One of the indisputable principles of the rule of law is the independence of the judiciary.[60] To achieve it, the appointment of the judges must not be dependent on politicians in any way. However, the level of influence that the Government has on the way judges are selected in Poland is shocking for a democratic state. Having political appointees in the NCJ results in politicians indirectly selecting all the judges in Poland. Such a procedure creates a risk that only individuals with political views favouring the ruling party would be chosen to serve as the judges of not only higher courts but the lower courts as well. It is also alarming that it depends solely on the President's will whether a judge would be allowed to adjudicate above the retirement age. This may result in a judge who is soon approaching retirement age making politically influenced rather than impartial decisions. In addition, it could cause newly appointed judges to interpret the law in the way they perceive the ruling party would expect them to, as they may be in fear that

[59] Brian Tamanaha, *On the Rule of Law* (CUP 2012), 3.
[60] Tom Bingham, *The Rule of Law* (Penguin Books 2010), 91.

politicians will manipulate the system to revoke their term of office later in their careers if they disobey.

Political influence is apparent in the decisions of the new CT. The panel of judges elected by the 8th Sejm revoked the K 34/15 judgment (which affirmed the constitutionality of the three judges appointed by the 7th Sejm)[61] and legitimised the appointment of all the judges elected by the 8th Sejm.[62] The fact that the judges appointed by the 8th Sejm were adjudicating on whether their appointment was in line with the Constitution breached the fundamental principle known in civil law as *nemo iudex in causa sua*,[63] similar to the common law rule against bias.[64]

Changes to the judiciary had become an indirect cause of limiting the judges' freedom of expression. As reported by the Polish Ombudsman, explanatory disciplinary proceedings were initiated against many judges.[65] The proceedings were mainly aimed at judges who made a preliminary reference to the ECJ, or those who commented in media on the situation concerning Polish judiciary and reforms undertaken by the Government. In a bizarre turn of events, some judges were required to explain why they used the judicial gown and chain during the simulation of a mock trial. What the singled-out judges have in common is that they have all been vocal about the protection of the Constitution, the rule of law and judicial independence. This rightly raises an important question; whether the judges' involvement in the current dispute and these disciplinary proceedings is coincidental, or whether they were a well-thought through measure intended to silence those views which did not sit well with the Government. Depriving judges of the right to freely express their views and critique the changes made to the Polish legal system risks having dire consequences for their impartiality.

Another core element of the rule of law principle is legal certainty.[66] Laws must be accessible and, so far as possible, intelligible, clear and predictable.[67] All the new laws in

[61] K 1/17 Constitutional Tribunal Decision 3 February 2017.
[62] Sadurski (n 22), 5.
[63] Lat. *No one should be a judge in his own case.*
[64] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] UKHL 1.
[65] Response to White Paper (n 51).
[66] James R Maxeiner, 'Some Realism About Legal Certainty in the Globalization of the Rule of Law' in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (Springer 2010).
[67] Bingham (n 60), 37.

Poland are easy to access on the Government's website, although some delays have arisen.[68] However, the unintelligibility of the law in Poland became apparent as the changes to the judiciary progressed. Judicial decisions, especially those issued by the CT, are written in formalistic language that is difficult to understand even for lawyers, let alone a layperson.[69] Therefore, the gravity of these changes could only be appreciated by the legal profession, as the complexity of the problem is difficult to grasp without in-depth knowledge and understanding of Polish constitutional law.

Clarity of the law could be achieved in part by following the codified Constitution. With regard to the appropriate interpretation of the Constitution itself, current lawmakers propagate the so-called "isolated interpretation" approach, which considers all its provisions separately, allowing them to mould it to suit their interests. It has been heavily criticised by the legal profession with Professor Jerzy Zajadło describing it as "hostile towards the Constitution".[70] It has been established in Polish legal culture that the Constitution should be read comprehensively, as a whole,[71] to ensure consistency in its application. For example, while judges should not be removable,[72] a mandatory retirement age should be provided for in statute. If we were to read the Article 180(4) literally, it would be entirely lawful to tactically alter the term of office of sitting judges and force them into retiring earlier. On the other hand, such an interpretation contradicts Article 180(1) – which provides that *judges shall not be removeable* - and therefore breach the Constitution. To give another example, a literal interpretation of Article 187 of the Constitution supports the Government's contention that it is not explicitly unlawful for politicians to appoint members of the NCJ. However, the independence of the judiciary secured by Article 187 renders such an interpretation inconsistent with the Constitution taken as a whole. In short, logic requires that the Constitution cannot be interpreted in breach of any of its provisions. These illustrations demonstrate how a proper

[68] The President signed the statute referred to in footnote n 63 on the 17th December 2018, but it was published in the Journal of Laws on the 31st December that year.
[69] Adam Czarnota, 'The Polish Constitutional Crisis and Institutional Self-Defense' (*Verfassungsblog on Matters Constitutiona*\, 3 January 2017) ‹verfassungsblog.de/the-constitutional-tribunal/› accessed 29 December 2018.
[70] 'Interpretatio constitutionis hostilis' (2017) Iustitia No 4.
[71] Tomasz Stawecki and Jan Winczorek, *Wykładnia konstytucji. Inspiracje, teorie, argumenty* (Wolters Kluwer Polska 2015).
[72] Constitution (n 5), Art 180(4).

interpretation of the Constitution requires a comprehensive approach, rather than reading provisions in isolation from one another.

The changes proposed in 2015-2018 are disproportionate, unpredictable and alter the legal system dramatically. The legal framework manifested by the current Government is characterised by the principle of supremacy of the Parliament, contrary to the earlier norm of constitutional review.[73] Although Polish legal philosophy focuses more on constitutionalism than on the concepts of the rule of law, the court's role in ensuring that the Parliament functions within its limit may suggest that the Polish legal system is leaning more towards the substantive concept of the rule of law. The Polish Constitution puts a great emphasis on both protection of individual rights and morality of the law, rather than just formality of the law-making process. The power in Poland is explicitly separated by the Constitution into executive for the President and the Council of Ministers, legislative for the Parliament and judicative for the courts.[74] All the branches are considered equal, and none of them retain supreme power. Unless this provision is changed, it must be followed. Current legal reforms manifest extreme disrespect towards the Constitution and should be regarded intolerable in a democratic state.

The rule of law in the European context

While remaining a core constitutional value of a democratic society, the rule of law has become a cornerstone of the European Union[75] and is protected against severe breach by the procedures contained in Article 7 TEU. However, there is no universal interpretation of the rule of law within the EU, and as has been observed in the case of Poland, conflict arises if these varying interpretations are inconsistent with each other. Considering the supremacy of EU law, Article 2 TEU read together with Article 7 TEU confers the power to determine such issues on EU institutions, the Court of Justice of the European Union (CJEU) being the final adjudicator. As argued by Bingham, a state's compliance with its obligations in international law is an element of the rule of law. [76] Therefore, compliance

[73] Czarnota (n 69).
[74] Constitution (n 5), Art 10.
[75] Treaty of the European Union (TEU), Art 2.
[76] Bingham (n 60), 110-114.

with the principle of the rule of law is not only a matter of constitutionality and legality domestically, but at the EU level too.

The law on the SC triggered the opening of an investigation into Poland's observance of the rule of law, making Poland the first Member State to face an Article 7 TEU referral.[77] The EU agreed that the country's reforms posed "a clear risk of a serious breach [...] of the values referred to in Article 2 [TEU]."[78] However, in order to take further punitive measures against Poland such as the suspension of voting rights, the Council of the European Union must determine unanimously that Poland's breach is 'serious and persistent'. [79] This threshold is substantially higher than that applicable to Article 7(1) TEU.[80] Hungary has vowed to veto sanctions against Poland[81] which would deem Article 7 TEU ineffective in its present form. In addition to triggering the Article 7 TEU procedures, the European Commission referred Poland to the CJEU over perceived violations of the principle of judicial independence created by the legal reforms of the SC. The CJEU had acted promptly and issued an interim order to suspend the new law,[82] leading to Poland altering the law on the SC resulting in the judges forcibly retired due to their age being accepted back into the court.[83]

The CJEU will deliver the final judgment on the substance of this case at a later date, and it is highlighted in the case report that interim measures are ordered without prejudice to the outcome of the main proceedings. The Treaty does not specify what constitutes a breach of the rule of law; the CJEU's judgment could, therefore, set a precedent. Academics at the European University Institute described three characteristics of such a breach: "unconstitutional constitutionalism", whereby power is abused through perfectly legal means; a dismantling of the liberal democratic state; and systemic

[77] 'Press Release: Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court" *European Commission* (Brussels, 24 September 2018) ‹europa.eu/rapid/press-release_IP-18-5830_en.htm› accessed 14 January 2019.
[78] TEU, Art 7(1).
[79] ibid, Art 7(2).
[80] Hermann-Josef Blanke and Steli Mangiameli, 'The Principles of the Federal Coercion' in Hermann-Josef Blanke and Steli Mangiameli (eds), *Treaty on European Union (TEU): A Commentary* (Springer 2013), 352-353.
[81] Lidia Kelly, 'Poland Will Not Yield to EU Over Court Reforms - Kaczynski' *Reuters* (London, 26 January 2018) ‹uk.reuters.com/article/uk-poland-judiciary-kaczynski/poland-will-not-yield-to-eu-over-court-reforms-kaczynski-idUKKBN1FF13X?il=0› accessed 27 December 2018.
[82] Case C-619/18 *R Commission v Poland*.
[83] Amendment on the Supreme Court Act 2017 (Dz. U. 2018 poz. 2507).

corruption.[84] The first two characteristics seem to be present in the current constitutional crisis in Poland.

Judicial independence seems to be at the heart of the rule of law concept in its European form. In *ASJP*[85] the CJEU held that Article 19(1) TEU which reads that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law," thereby gives concrete expression to the value of the rule of law in Article 2 TEU. The CJEU stated that every Member State is obliged to ensure that the bodies which come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection, including judicial independence. Following this judgment, the Advocate General Tanchev published his opinion on the 11th of April 2019 in which it was proposed that the CJEU should declare that the Republic of Poland had failed to fulfil its obligations under Article 19(1) TEU.[86]

The European Commission intervened when a similar reform was introduced in Hungary in 2010. The CJEU ruled that sudden lowering of the retirement age for judges in Hungary violates European equal treatment rules.[87] The difference between the cases of Hungary and Poland is that the Hungarian law was referred to the CJEU on the discrimination grounds[88] rather than Article 2 TEU in relation to independence of the judiciary. In Hungary at the time, the ruling party (Fidesz) had a constitutional majority in the Parliament which allowed them to change the Constitution prior to adopting a new law.[89] Although it could successfully be argued that changes in Hungary put the independence of the judiciary at risk, the EU was seemingly reluctant to apply Article 2 TEU, raising important questions regarding the EU's definition of the rule of law.

---

[84] Carlos Closa et al, 'Reinforcing Rule of Law Oversight in the European Union' Robert Schuman Centre for Advanced Studies Working Paper 25/2014 ‹cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3› accessed 03 January 2019, 4.
[85] Case C-64/16.
[86] 'Press Release: Advocate General's Opinion in Case C-619/18 Commission v Poland' *Court of Justice of the European Union* (Luxembourg, 11 April 2019) ‹curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190048en.pdf› accessed 10 June 2019.
[87] Case C-286/12 *Commission v Hungary*.
[88] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Arts 2 and 6(1).
[89] Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) Sydney Law School Legal Studies Research Paper 1/2018 ‹ssrn.com/abstract=3103491› accessed 03 January 2019, 13.

The Checklist issued by the Venice Commission[90] in its inclusiveness presents a particularly substantive approach to the rule of law. In contrast, and perhaps surprisingly, the EU seems to represent the formal approach, the concept that is very much focused on legality rather than morality of the law. The EU's actions imply that the situation in Poland had been considered worse because the changes to the judiciary constituted a literal breach of the Constitution, in comparison to the complex and deceptive reforms in Hungary. This demonstrates both the EU's indecisiveness over the working definition of the rule of law, as well as the weakness of the formal approach to the principle.

Different reactions towards legal changes in Poland and Hungary suggest that a breach of the rule of law in its formal understanding is considered more severe. However, as the dismantling of the judiciary in Hungary progressed it became apparent that the formal concept of the rule of law is insufficient to protect Europe from the authoritarian tendency of the far-right governments. The EU eventually triggered Article 7 procedures against Hungary. [91] If the changes in Poland had been made in line with the Constitution, the laws on the judiciary would have been lawfully enacted, but nevertheless unjust. Whether an unjust law may be considered law is the subject of fierce academic debate amongst scholars,[92] although this is outside the scope of this article. Nevertheless, as the above examples of Poland and Hungary show, the way in which legislation may breach the rule of law often involves a complex evaluation. Therefore, even changes made in line with the Constitution can pose a threat to the independence and impartiality of the judiciary and therefore be a violation of the rule of law principle.

The triggering of Article 7 TEU against Poland resulted in the Irish High Court's refusal to extradite a suspected drug trafficker to Poland under the European Arrest Warrant (EAW). On reference to the CJEU,[93] the subject of the arrest warrant argued that he

[90] Study No. 711/2013 (n 34).
[91] 'Press Release: Rule of Law in Hungary: Parliament Calls on the EU to Act' *European Parliament* (Brussels, 12 September 2018) ‹www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act› accessed 02 January 2019.
[92] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467.
[93] Christian Davies, 'Ireland Refuses Extradition Over Concerns at Polish Justice Reforms' *The Guardian* (London, 13 March 2018) ‹www.theguardian.com/world/2018/mar/13/ireland-refuses-artur-celmer-extradition-poland-justice-reforms-ecj› accessed 21 December 2019.

would not get a fair trial on return to Poland. [94] In a rather vague and unsatisfactory judgment on the matter, the CJEU held that the State "must refrain from giving effect to an EAW if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal."[95] In fact, the judgment did not bring anything new to the debate on the rule of law in Poland. It only confirmed what was already clear from the EU law,[96] that a State may, in exceptional circumstances and having performed a strict assessment,[97] refuse an extradition for such reasons. In the end, the Irish High Court ordered the surrender of the Polish man[98] and his appeal is expected to be decided by the Supreme Court later this year.[99] It is highly unlikely that the systemic changes will be held to amount to a real risk to the applicant's right to a fair trial and therefore he will most likely be returned to Poland.

It is apparent that the CJEU was reluctant to rely on a principle of such significant magnitude as the rule of law. One could argue that the CJEU's silence as to whether the rule of law has been breached may suggest that this principle has more rhetorical than practical use. Time will tell whether the CJEU will be more specific when making a decision on the lowering of the retirement age in the SC or whether the ambiguities as to what constitutes a rule of law violation under EU law will be clarified.

Conclusion

The rule of law crisis in Poland is a complex issue with nuances in the legal, political and social spheres. Taking into account the circumstances in which the 1997 Constitution was drafted, especially the departure from communism, the abuse of power in 2019 poses a threat of shifting back towards authoritarianism. The unprecedented crisis has

[94] The Charter of Fundamental Rights, Art 47; European Convention on Human Rights, Art 6(1).
[95] Case C-216/18 *PPU Minister for Justice and Equality v LM (Deficiencies in the system of justice)*, [79].
[96] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Arts 8, 10 and 15(1)-(2).
[97] Case C-216/18 (n 95), [74]-[76].
[98] Ruaidhri Giblin, 'Court Orders Surrender of Polish Man After Concerns Over Fair Trial' *The Irish Times* (Dublin, 19 November 2018) ‹www.irishtimes.com/news/crime-and-law/courts/high-court/court-orders-surrender-of-polish-man-after-concerns-over-fair-trial-1.3702875› accessed 02 January 2019.
[99] Ruaidhri Giblin, 'Supreme Court to Decide on Extradition of Wanted Polish Man' *The Irish Times* (Dublin, 10 December 2018) ‹www.irishtimes.com/news/crime-and-law/courts/supreme-court-to-decide-on-extradition-of-wanted-polish-man-1.3726503› accessed 02 January 2019.

manifested in a number of ways, going beyond the national level. The Polish Government has since faced challenge by the EU over its respect for the rule of law, particularly in relation to independence of the judiciary. The CJEU's judgment on the issue of the Article 7 TEU infringement procedure is expected later this year. Subsequently, some European countries refused to follow through with the EAW which has severe consequences on the cross-border judicial surrender procedures.

Constitutional changes adopted in 2015-18 were introduced with no respect or consideration to the Constitution and its principles. The manipulative narrative of the Government caused this misconception, and the lack of understanding of the severity of the problem is a primary reason why the changes are not widely contested outside the legal profession and their representatives.

Considering the various rule of law principles, violations of the Constitution are evident and therefore in breach of the principle, regardless of whether a formal or substantive concept is applied. As has been argued in the case of Hungary, formal concepts such as those manifested by Dicey[100] and Raz[101] seem insufficient when addressing the rule of law challenges in the EU. There is a thin line between those particularly conservative governments and authoritarianism, and the transition does not occur through a new law, decision or transformation.[102] A formal approach to the rule of law seems too lenient when dealing with acts of unfairness and injustice and therefore a substantive approach should be adopted by the EU. No legal concept should justify backsliding into authoritarianism.

[100] A. V. Dicey, *The Law of the Constitution* (10th edn, Macmillan 1959).
[101] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195.
[102] Sadurski (n 89), 5.

Reservations to the Convention on the Elimination of Discrimination Against Women: A threat to ending gender inequality?

Kebirungi Destiny Mugasha

Abstract

The Convention on the Elimination of Discrimination Against Women (CEDAW Convention) was formed with the principal aim of protecting women's rights worldwide. It is, however, one of the main human rights treaties of the United Nations (UN) that has faced the highest number of reservations by State Parties that are signatories to the Convention. Although State Parties are obligated to make necessary reforms envisioned by the CEDAW Convention, they can also exempt themselves from their obligations by making an authorised reservation under the Convention. This has led to many reservations being made which are incompatible with core provisions of the CEDAW Convention. Such reservations undermine and pose a threat to the progress of ending gender discrimination and protecting women's rights.

Introduction

The CEDAW Convention has been the most significant instrument in protecting women's rights worldwide.[1] More recently, the "#MeToo" movement has brought

[1] Marijke De Pauw, 'Women's Rights: From Bad to Worse? Assessing the Evolution of Incompatible Reservations to the Cedaw Conventions' (2013) 29 (77) Utrecht Journal International and European Law 51, 52.

women together from around the world. Consequently, women feel more empowered to speak about the sexual violence and gender inequality that they face. Human rights experts have hailed this movement as a tipping point for women's rights, and have consequently offered their full support.[2]

This article will begin with a brief history of how the CEDAW Convention was formed. It will discuss the rhetorical incorporation of the CEDAW Convention in international human rights law and will argue that the Convention is indeed necessary to protect women against discrimination. It will also assess the work of the International Law Commission (ILC) on reservations, particularly those reservations which are incompatible with the object and purpose of a human rights treaty. Finally, it will examine how states have used the reservations mechanism to effectively circumvent their obligations and it will argue that some of the reservations are in fact incompatible with the objectives of the CEDAW Convention.

Incorporation of the CEDAW Convention in international human rights law

The first steps towards the creation of the CEDAW Convention were taken in 1963, when despite increased awareness about the significance of women in society, discriminating on the basis of sex was still an issue.[3] The United Nations General Assembly (UNGA) adopted a Resolution[4] and requested the Economic and Social Council to invite the Commission on the Status of Women (CSW) to prepare a draft declaration articulating the equal rights of men and women. Through this declaration, the UNGA aimed to implement the relevant provisions of the UN Charter which provide for the equal rights of all persons regardless of their sex. In 1972, the CSW undertook the drafting of a binding treaty which would give normative strength to the provisions of the

[2] '#MeToo: "A Transformative Movement, Liberating and Empowering"' *United Nations: Human Rights Office of the High Commissioner* (Geneva, 8 March 2018) ‹www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22767&LangID=E › accessed 16 April 2019.
[3] Pauw (n 1), 57.
[4] UNGA Res 1921 (XVII) (5 December 1963).

declaration.[5] Following its adoption by the UNGA in December 1979 - notably faster than the adoption of any other human rights treaty at that time[6] - the CEDAW Convention came into force in September 1981, after ratification by the twentieth State Party.

Article 17 of the CEDAW Convention established the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) which commenced work in 1982.[7] It was entrusted with monitoring the progress made in the implementation of the CEDAW Convention.[8] The role of the CEDAW Committee is to continually observe the behaviour and performance of State Parties.[9] The Committee consists of 23 experts on women's rights from around the world and it reports annually to the UNGA on its activities via the Economic and Social Council. Based on its examination of reports and information received from State Parties, the Committee may make suggestions and general recommendations to the UNGA.[10] Initially, the Committee differed from other UN treaty bodies since it held its meetings in New York and was serviced by the Division for the Advancement of Women, rather than being serviced by the Office of the High Commissioner for Human Rights (OHCHR). It was not until 2008 that the CEDAW Committee moved to Geneva where it now falls under the remit of the OHCHR.[11]

The UNGA adopted the Optional Protocol to the CEDAW Convention (OP-CEDAW) which came into force on 22 December 2000.[12] In order to address violations of the CEDAW Convention, the OP-CEDAW created a communications and inquiries procedure. The communications procedure allows groups or individuals to submit individual claims to the CEDAW Committee concerning violations of rights protected under the CEDAW Convention. The purpose of the inquiry procedure is to enable the

[5] Pauw (n 1), 57.
[6] Rebecca J Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 Virginia Journal of International Law Association 643.
[7] Andrew C Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' (1989) 14(1) Yale Journal of International Law 1, 2.
[8] Pauw (n 1), 57.
[9] Cook (n 6), 647.
[10] Pauw (n 1), 57.
[11] Hanna Beate Schöpp-Schilling, 'Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination Against Women' (2007) 7(1) Human Rights Law Review 201, 219.
[12] Economic and Social Commission for Asia and the Pacific, *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices* (United Nations Publications 2003), 219.

CEDAW Committee to initiate inquiries into grave or systematic violations of women's rights.[13]

The function of the CEDAW Convention is stated in Article 2:

> [To] condemn discrimination against women in all its forms, to pursue by all appropriate means and without delay a policy of elimination of discrimination against women.[14]

The CEDAW Convention defines discrimination against women as:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on basis of equality of men and women, of human rights and fundamental freedoms.[15]

The primary aim of the CEDAW Convention is directed towards the achievement of gender equality.[17] Cusack and Pusey note that the rights to non-discrimination and equality are the backbone of the CEDAW Convention as they guide its overarching object and purpose.[16] Although equality is not defined in the CEDAW Convention, Cusack and Pusey note that a close reading of the text of the Convention unearths different conceptualisations of equality: formal, substantive and transformative equality.[18]

With regards to formal equality, also known as *de jure* equality, the CEDAW Convention asserts that as equals, women and men should be treated the same. This conceptualisation lives in numerous provisions of the Convention. For example, Article 7(a) requires State Parties to ensure that women have voting rights which align with those of men. Further, Article 9 requires States to guarantee women equal rights to

[13] Pauw (n 1), 57.
[14] CEDAW 1979.
[15] ibid, Art 1.
[17] General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004) ‹www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf› accessed 8 January 2019.
[16] Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-discrimination and Equality' (2013) 14(1) Melbourne Journal of International Law 54, 57.
[18] Cusack and Pusey (n 16), 63.

acquire, change or retain their nationality. Cusack and Pusey note that although formal equality is essential, it is not sufficient for the complete implementation of the CEDAW Convention.[19]

With regards to substantive equality, the CEDAW Convention requires State Parties to take all appropriate measures to ensure *de facto* equality between women and men.[20] This means that not only must State Parties guarantee the identical treatment of men and women, but they must also provide an environment conducive to female empowerment.[21] Articles 3 and 24, for example, require measures to be taken to ensure the full development and advancement of women, in addition to the full realisation of rights contained in the CEDAW Convention.

The CEDAW Committee further requires State Parties to address the underlying causes and structures of gender inequality, known as transformative equality.[22] The principle of transformative equality underpins several provisions of the CEDAW Convention. For instance, Articles 2(f) and 5 require State Parties to address prevailing gender relations and the persistence of gender-based stereotypes. The CEDAW Committee's approach to transformative equality has centred on two distinct but interrelated categories of obligations: the first category concerns the transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality; the second category concerns the modification or transformation of harmful norms, prejudices and stereotypes.[23]

The CEDAW Committee's practice, evidenced most clearly in its *General Recommendation No. 25* and *General Recommendation No. 28*,[24] has been to interpret the right to equality

[19] ibid.
[20] ibid, 64.
[21] ibid.
[22] ibid.
[23] Simone Cusack, 'Mechanisms for Advancing Women's Human Rights: A Guide to Using the Optional Protocol to CEDAW and Other International Complaint Mechanisms' (Australian Human Rights Commission, 2011), 25–31.
[24] General Recommendation No. 28, on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (2010) ‹www2.ohchr.org/english/bodies/cedaw/docs/cedaw-c-2010-47-gc2.pdf› accessed 8 January 2019.

generously and to treat each of its three conceptualisations as essential and complementary to the overarching object and purpose of the Convention.[25]

Assessment of the International Law Commission on reservations

Since the CEDAW Convention does not provide a distinct definition of its object and purpose, it is difficult to determine when a reservation can be made, as highlighted by Salem.[26] As a result, the ILC adopted the *Guide to Practice on Reservations to Treaties*[27] ('the Guide') in 2011, with the sole purpose of clarifying circumstances involving reservations.[28] Reservations to human rights treaties have been challenged on the basis that they form an obstacle to the complete implementation of human rights.[29] Moloney even goes as far as claiming that reservations have "eroded the basis for modern human rights protection."[30] Although not a binding source of law, the Guide provides legal guidance to the international community and addresses the many problems surrounding reservations, particularly those made to human rights treaties.[31] However, it should be noted that nowhere in the Guide are human rights treaties explicitly referred to, so it must therefore be presumed that it applies to human rights treaties in the same way as any other treaty.

Section 3.1.5.1 of the Guide states:

> The object and purpose of the treaty is to be determined in good faith, taking into account the terms of the treaty in their context, in particular, the title and the preamble of the treaty.

[25] Cusack and Pusey (n 16), 63.
[26] Nora Salem, *The Impact of the Convention on the Elimination of All Forms of Discrimination against Women on the Domestic Legislation in Egypt* (Brill 2017), 30.
[27] ILC, 'Guide to Practice on Reservations to Treaties' (United Nations, 2011) ‹legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf› accessed 8 January 2019.
[28] Salem (n 26), 30.
[29] Tanya Monforte et al, 'Broad Strokes and Bright Lines, A Reconsideration to Sharia Based Reservations' (2017) 35(1) Columbia Journal of Gender and Law 1, 9.
[30] Roslyn Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent' (2004) 5 Melbourne Journal of International Law 155, 156.
[31] Monforte et al (n 29).

From this, Salem deduces that recourse may be had to the preparatory work of the treaty in question and the circumstances of its conclusion and, where appropriate, the subsequent practice of parties to the treaty.[32] The Guide thus stipulates that in order to assess the compatibility of a reservation with the object and purpose of a treaty which contains numerous rights and obligations, account shall be taken of the interdependence and importance of the provision to which the reservation relates.[33]

The Guidelines adopted by the ILC confirm that the 1969 Vienna Convention on the Law of Treaties (VCLT) did not rule out that bodies other than State Parties themselves could assess the permissibility of reservations. This had simply not been envisaged at the time of drafting the VCLT, thus it can hardly be considered that the approach taken by various human rights treaty bodies contradicted the VCLT by doing so.[35] Nevertheless, the ILC encourages states and international organisations to specify, where appropriate, the nature and limits of treaty monitoring bodies to assess the permissibility of reservations.[36] In the view of the ILC, it is the parties to a multilateral treaty who will ultimately decide whether a particular reservation is acceptable or not and what weight to give to the views expressed by treaty monitoring bodies.[37]

According to Ziemele and Liede, one of the greatest achievements of the ILC's work on reservations to treaties concerns the consequences of making invalid and impermissible reservations.[38] Issues concerning reservations are dealt with in several guidelines. Firstly, Guideline 3.3.16 clarifies that impermissible reservations are those which are incompatible with the object and purpose of the treaty. In contrast, invalid reservations are those which are incompatible with the obligations contained in Article 19 of the VCLT, reproduced in Guideline 3.1. In this respect, compliance with the object and purpose of the treaty is no more or less important than compliance with express or implied treaty requirements concerning reservations.[39]

[32] Salem (n 26), 30.
[33] Ineta Ziemele and Laīsma Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24(4) European Journal of International Law 1135, 1149.
[35] ibid.
[36] Oliver De Schutter, *International Human Rights Law: Cases, Material, Commentary* (2nd edn, CUP 2014), 142.
[37] ibid, 143.
[38] Ziemele and Liede (n 33), 1149.
[39] ibid, 1149-1150.

Secondly, Guideline 3.3.3 provides that the permissibility of a reservation does not depend on the *ex post facto* will of states by raising no objections, but rather on their initial will as expressed in the treaty itself. The argument put forward by the Swiss Government before the European Court of Human Rights in *Belilos*[40] was to the effect that its reservations were tacitly accepted, and hence did not offend the object and purpose of the treaty. However, under the European Convention on Human Rights (ECHR) only specific reservations are allowed.[41] If a reservation does not comply with established criteria, even in the absence of objections from other states, it will be deemed impermissible.

However, Guideline 3.3.2 sets out that the formulation of an impermissible reservation does not engage the international responsibility of the state which formulated it.[42] Ziemele and Liede note that the Guide merely draws a distinction between primary and secondary rules of international law, that is, the obligations themselves and the consequences of a breach of any such obligation. This means that for state responsibility to arise, a breach of a primary rule has to be established, which in this case would be a rule established under the law of treaties.[43]

Overall, the ILC offers a middle ground solution based on a rebuttable presumption that ultimately, parties to a treaty are to be bound by it unless it is clearly stated otherwise.[44] Where a reservation is found to be invalid or impermissible, Guideline 4.5.1 states that such reservations are null and void of any legal effect.[45]

Incompatibility of reservations with the objectives of the CEDAW Convention

Although the CEDAW Convention envisages that State Parties shall move progressively towards the elimination of all forms of discrimination against women to ensure equality,

[40] *Belilos v Switzerland* App no 10328/83 (ECtHR, 29 April 1988).
[41] ILC (n 27).
[42] ibid.
[43] Ziemele and Liede (n 33), 1150.
[44] ibid.
[45] ILC (n 27).

it is one of the main UN human rights treaties to which the highest number of reservations have been made.[46] Under Article 2 of the Convention, State Parties are obligated to make the necessary reforms envisioned by the Convention. However, they can exempt themselves from doing so under Article 28. Buenger notes that the degree to which the CEDAW Convention authorises reservations is a major shortcoming[47] as it undermines and threatens the process of ending gender discrimination.[48] Consequently, the issue of reservations to the CEDAW Convention has been the subject of great academic research and debate. Significantly, scholars have demonstrated that a large number of reservations to the CEDAW Convention are either incompatible, of unlimited scope or of undefined character, and often relate to one of the core provisions of the Convention.[49] In addition, the CEDAW Committee has expressed concern for many reservations, particularly those relating to Articles 2 and 16.[50]

Article 2 requires State Parties "to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women."[51] Since February 1990, several State Parties have reserved their obligations under Article 2, in addition to more general provisions of the CEDAW Convention.[52] For instance, New Zealand, on behalf of the Cook Islands, made reservations on the basis that the provisions concerned were inconsistent with certain customs of the Cook Islands.[53] In particular, it made reservations to Article 2(f) and Article 5(a) which require the elimination of social and cultural patterns of conduct, as well as stereotypes which concern gender roles that are detrimental to women. Cook notes that reservations which prevent the amendment of national laws and culture in order to eliminate discrimination against women are highly contestable as such reservations hinder compliance with the object and purpose of the Convention.[54]

---

[46] Pauw (n 1), 52.
[47] Michael L Buenger, 'Human Rights Conventions and Reservations: An Examination of a Critical Deficit in the CEDAW' (2014) 20 Buffalo Human Rights Law Review 67, 81.
[48] Cook (n 6), 648.
[49] Pauw (n 1), 52.
[50] Linda M Keller, 'The Impact of States Parties Reservations to the Conventions and the Elimination of All Forms of Discrimination Against Women' [2014] Michigan State Law Review 309, 312.
[51] CEDAW 1979.
[52] Cook (n 6), 688.
[53] Elizabeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff Publishers 1995), 352.
[54] Cook (n 6), 689.

In the *Lovelace Case*,[55] it was held that any restrictions to an individual's enjoyment of his or her culture "must have both a reasonable and objective justification" under the CEDAW Convention. Cook notes that this judgment highlights that reservations made in an attempt to preserve the cultural values of a nation must be shown as necessary through meeting objective criteria.[56]

Cook further argues that the preservation of cultural practices may be suspect when they are hostile to women's equality.[57] Article 5(2) of the CEDAW Convention provides that "all appropriate measures" be taken to "'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on... stereotyped roles for men and women." An example of such a measure being taken can be seen in the case of *LC v Peru*.[58] After recognising that therapeutic abortion can preserve a woman's life and health, it was found to be necessary for Peru to adopt an appropriate legal framework to allow women to exercise their right to abortion under conditions that guarantee the necessary legal security, both for women who access abortion and for the health professionals who perform it.

Article 16 of the CEDAW Convention requires State Parties to eliminate discrimination against women in matters affecting marriage and family relations. However, it is the most heavily reserved Article of the Convention.[59] Cook argues that a State Party whom proposes not to be bound by this article would leave its women in jeopardy by exposing them to discrimination and suffering in the most personal and pervasive aspects of their lives. Bangladesh, for instance, does not consider itself bound by Article 16.1(c) and (f) because they conflict with the Holy Quran and Sunna. This reservation thus implies that Islamic law takes precedence in Bangladesh and is used to justify discrimination against women.[60]

[55] *Sandra Lovelace v Canada* Communication No. R.6/24.
[56] Cook (n 6), 689.
[57] ibid.
[58] *L.C v Peru* Communication No. 22/2009, UN Doc. CCPR/C/13/D/24/1977.
[59] Cook (n 6), 702.
[60] ibid, 703.

In addition, despite the fact that Egypt has a reservation to Article 16, it presents Sharia law in a way that is more sympathetic to women by maintaining that women are separate but equal.[61] Cook questions whether Egypt's reservation to Article 16 is aimed at equal rights or at identical rights. He argues that this form of reservation reflects a patriarchal model of society that preserves gender-role stereotyping and is therefore contrary to Article 5(a) of the CEDAW Convention.[62]

When domestic laws maintain inequality within a marriage, women risk suffering the exact discrimination which the CEDAW Convention is trying to overcome.[63] For instance, in *Cecilia Kell v Canada*,[64] Cecilia Kell argued that Canada, as a State Party, had contravened Article 16(1(h) of the CEDAW Convention since the Canadian legal system failed to ensure that she was afforded the same property rights as her partner. The CEDAW Committee concluded that Kell had been subjected to intersectional discrimination as a result of her identity as a woman.

Article 7 prohibits discrimination against women in public life. An example of a reservation to this Article can be found in Thailand, after the Government of Thailand reserved the right to apply Article 7 in all matters which concern national security; maintenance of public order and service; and employment in the military or Parliamentary forces.[65] However, any reservation to this Article is incompatible with the objectives of the CEDAW Convention. Cook notes that, for instance, it may not be immediately apparent that the exclusion of women from service in the armed forces is a significant form of discrimination against women, contrary to Article 7. However, she argues that this form of discrimination should not be overlooked as women have few prospects of equality with men where they are legally excluded from military careers or advancement.[66]

Article 9 of the CEDAW Convention requires that State Parties grant women equal rights with men to acquire, change or retain their nationality, in addition to equal rights

[61] ibid, 104.
[62] ibid.
[63] ibid.
[64] Communication No. 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014).
[65] Lijnzaad (n 53), 353.
[66] Cook (n 6), 692.

in relation to the nationality of their children. In the case of *Aumeeruddy Cziffra*[67] it was held that a Mauritian woman's inability to transmit her nationality to her children, when a Mauritian man could do so, constituted sex discrimination in the field of family life and could not be justified on grounds of national security. Cook highlights that a reservation to Article 9 can allow a husband to impose his alien nationality on his wife, which causes the withdrawal of the wife's own nationality of the country in which she and her family have lived, and in which she intends to raise her children. This results in a comprehensive withdrawal of legal rights and capacities of the sort which the Convention is designed to prevent, thus undermining the object and purpose of the CEDAW Convention.[68]

Article 11 concerns state responsibilities towards women in employment and addresses rights to equal remuneration as well as rights to equal promotion opportunities and job security that men enjoy. Some reservations to the CEDAW Convention are designed to preclude women from night work in a manner consistent with the 1919 Convention Concerning the Employment of Women During the Night that was prepared by the International Labour Organization.[69] However, Cook argues that following the rise of modern feminist sensitivity in reaction to the historic protection of women, such instruments, although originally designed as protective measures, are now considered discriminatory.[70] Furthermore, Williams argues that protectionist labour laws can have a negative impact on women and instead proposes more gender neutral labour laws.[71] Cook argues that denying women access to employment on health grounds is no longer convincing. He adds that the modern approach will only tolerate exclusions if alternative work which offers equal renumeration is available.[72]

Finally, Article 15 obliges State Parties to guarantee women equal rights to men in relation to civil matters such as contractual capacity, control of property, and the right to choose a residence and domicile. A number of State Parties have entered reservations to Article 15, while others have limited the scope of Article 15 through reservations to

[67] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. 35/1978 (1981).
[68] Cook (n 6), 696.
[69] ibid, 697.
[70] ibid, 698.
[71] Wendy W Williams, 'Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate' (1985) 13 New York University Review of Law and Social Change 325.
[72] Cook (n 6), 698.

Articles 2 and 7.[73] Evidence shows that in many parts of the world, prevailing legal orders continue to deny women independent capacities, specifically the ability to engage in market interactions and acquire services that are essential for self-realisation, such as educational and health services.[74] A number of legal systems require the authorisation of a husband, for instance, for the provision of reproductive health services to wives. Similarly, vestiges of women's commercial dependency on husbands or fathers remain in many countries, although they are slowly being challenged.[75] In objecting to the Thai, Brazilian and Tunisian reservations to Article 15, Sweden contends that a reservation to this Article, if put into practice, will inevitably result in the discrimination against women on the basis of sex, which ultimately contradicts what the CEDAW Convention stands for.[76]

Conclusion

The above examples demonstrate just some of the ways in which State Parties have used the reservation mechanism to effectively avoid their formal obligations under the CEDAW Convention. I agree with Buenger who notes that if the CEDAW Convention is to be more than a mere "window dressing", the entire reservation process must evolve from an exclusively political assessment by State Parties to a true legal process whereby the compatibility of a reservation can be objectively assessed in a neutral forum.[77] Addressing the validity of reservations necessitates a balancing of concerns for national sovereignty against concerns arising out of a State's treaty obligations. However, he argues that the balance cannot be solely weighted in favour of the former concerns as they are largely political and are often in conflict with vital human rights.[78] If the CEDAW Convention is to have a far reaching and substantive impact, subjecting uncertainties regarding state reservations to judicial scrutiny is a means of rebalancing the equation.

[73] ibid, 699.
[74] ibid.
[75] ibid, 700.
[76] ibid.
[77] Buenger (n 47), 89.
[78] ibid, 90.

The relationship between originality and infringement in UK and EU copyright: When will the law reflect new realities?

Shahab Al Bulushi

Abstract

In the age of the internet and social media, and in a time of rapid technological change, creating and distributing works has taken different forms. Consequently, a pertinent question over whether the current copyright laws within the European Union (EU) and the United Kingdom (UK) can protect contents created by artificial intelligence (AI), selfies taken by animals and online user-generated contents. The scope of the current copyright provisions and case law are coming under close scrutiny, with many doubting their applicability to these modern-day examples. Can copyright law be reconciled with these creative realities, and offer protection to the works technology creates? The current measures seem to take a narrow approach in dealing with this issue.

Introduction

This paper discusses the relationship between the requirements of originality and infringement related to copyright in the European Union (EU) and the United Kingdom (UK). Recent developments and technologies have highlighted how these two requirements are becoming more difficult to reconcile and, in many ways, ambivalent. As a consequence, many works are left unprotected and may be exploited without threat of infringement proceedings. For instance, works of AI where an AI system comprising of

programming instructions able to learn and develop on a function or task creates an original work such as pictures by itself with no direct human interaction. A similar issue arises when it comes to animal produced works as it was in the infamous *Naruto v Slater* case. Despite UK copyright law potentially being broad enough to absorb some of these contemporary issues, attempts by the European Court of Justice (CJEU) to harmonise copyright laws across the EU raised the UK copyright subsistence standards.

Finally, 'user-generated works', which are online contents created by users that use an original work with adding their creativity to it such as memes, are currently under threat of Article 17. The contentious provision, which is on the verge of enactment by the EU, may encourage creativity by providing additional protection to copyright owners, but it would also somewhat paradoxically threaten most 'user-generated content'. This analysis demonstrates that Article 17 was foreseeable from the way EU laws were established and interpreted. But can the UK avoid EU laws and have more leeway in this area following Brexit? Despite the continuing uncertainties over Brexit, the UK may decide to follow EU precedents to achieve consistency in the law.

The requirement of originality in the UK and EU

In order for a work to be protected from infringement, it must meet the originality standard. Thus, establishing originality is necessary for copyright to subsist in a work,[1] and in *Infopaq*[2] the CJEU harmonised the originality test and explained the scope of infringement with regard to reproduction for literary works covered by Directive (EC) 2001/29 (InfoSoc Directive).[3] The CJEU held that an original work must be the author's intellectual creation,[4] adopting the same test from earlier provisions[5]. This, however, might prove to be inflexible, since the test was originally formulated in reference to

[1] Copyright, Designs and Patents Act 1988 (CDPA 1988), s 1.
[2] Case C-5/08 *Infopaq International A/S v Danske DagbladesForening* EU:C:2009:465 [2009] ECR I-6569.
[3] Directive (EC) 2001/29 of 22 June 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 ('InfoSoc Directive'), Art 2.
[4] *Infopaq* (n 2), [37].
[5] Directive (EC) 2009/24 of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, ('Computer Programs Directive') Art 1(3).

works of a specific nature.[6] Harmonising originality is problematic in the UK, because the UK judiciary had more leeway in this area than that afforded in continental Europe.[7] UK courts have used terms such as skill, labour and judgment interchangeably in different situations.[8] The CJEU in *Painer*[9] explained 'intellectual creation' as something which reflects the author's individuality and must have an element of his personal creativity.[10] The UK courts have already used the traditional skill and judgment test in a manner compatible with *Infopaq*.[11] But since 'intellectual creation', or 'originality' or 'creative choice' are not defined, determining whether the threshold has been met is likely to prove challenging.[12] As such, Rosati argues that originality will not be easy to establish.[13] This even more difficult to apply to new forms of works such as an AI produced work in the absence of a human 'intellectual creation'.

Copyright infringement

Only after establishing the difficult originality standard, the work can be protected from any infringement. In interpreting 'reproduction in part' under Article 2 of Directive (EC) 2001/29 (InfoSoc Directive),[14] the CJEU said that any partial reproduction of the original work constitutes an infringement.[15] The Court justified this broad interpretation as recognising authors' intellectual creativity.[16] Derclaye argues that this is the same position which the UK courts applied in interpreting 'substantial taking' under Sections 16(3) and 17 of the Copyright, Designs and Patents Act (CDPA) 1988.[17] But it is clear that

[6] Eleonora Rosati, 'Originality in a Work, or a Work of Originality: The Effects of the *Infopaq* Decision' (2010) 58 J Copyright Society USA 795, 797.
[7] Deming Liu, 'Of Originality: Originality in English Copyright Law: Past and Present' (2014) 36 EIPR 376.
[8] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.
[9] Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* EU:C:2011:798, [2011] ECR I-12533.
[10] ibid, [92].
[11] *Mei Fields Designs Ltd v Saffron Cards and Gifts Ltd* [2018] EWHC 1332 (IPEC), [2018] 6 WLUK 50.
[12] Andreas Rahmatian, 'European Copyright Inside or Outside the EU: Pluralism of Copyright Laws and the 'Herderian Paradox'' (2016) 47 ICC 912, 928.
[13] Eleonora Rosati, 'Originality in Copyright: A Meaningless Requirement?' (*The IPKat*, 9 May 2018) ‹ipkitten.blogspot.com/2018/05/originality-in-copyright-meaningless.html › accessed 2 January 2019.
[14] InfoSoc Directive (n 3).
[15] *Infopaq* (n 2) [37]-[39].
[16] ibid [40].
[17] Estelle Derclaye, '*Infopaq International A/S v Danske DagbladesForening*(C-5/08): Wonderful or Worrisome? The Impact of the ECJ Ruling in *Infopaq* on UK Copyright Law' (2010) 32 CIPR 247, 250.

this was a matter of degree and fact for the courts under the traditional UK approach, and sometimes it involved qualitative rather than quantitative elements.[18] Contrary to the UK approach, the EU interpretation disregards how substantial the reproduced part to the original work as a whole.[19] Yet the threshold for determining whether there is an infringement is left to the national courts.[20] A very broad interpretation, however, of 'substantial taking', such as that which Proudman J adopted in *Meltwater*,[21] can be problematic because this would adversely affect the fair balance between the right-holders and users which Recital 31 of the InfoSoc Directive sought to protect. The UK courts should be more flexible in assessing a 'substantial taking' of an original work, which would better align with the EU approach which is more in favour of right-holders.[22] Recently in *Martin v Kogan*,[23] Hackon J said the test in determining a 'substantial part' is both quantitative and qualitative.[24] Overall, it is clear that the CJEU and the UK courts have been inconsistent in determining what amounts to an infringement.

Copyright law has recognised the need to adapt to technological changes. For example, computer programs with a direct human interaction are protected under Directive (EC) 2009/24 (Computer Directive)[25] provided they are the author's intellectual creation. Issues mainly therefore arise in computer-generated works where there is no human author.[26] The CDPA 1988 recognises the person who made the necessary arrangements for creating the work or the person who puts his creativity in making the arrangements as the author.[27] Even though the EU does not have an equivalent provision, the requirement of author's intellectual creation clearly entails a human element.[28] The UK is one of the few countries which has such an instrument protecting computer-generated

[18] *IPC Media Ltd v Highbury Leisure Publishing Ltd (No.2)* [2004] EWHC 2985 (Ch).
[19] Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33 OJLS 767, 787-788.
[20] *Infopaq* (n 2), [51].
[21] *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890.
[22] Yin Han Lee, 'The Persistence of the Text: The Concept of the Work in Copyright Law - Part 2' (2018) 2 IPQ 107, 135-136.
[23] [2017] EWHC 2927 (IPEC).
[24] ibid, [54].
[25] Computer Programs Directive (n 5).
[26] CDPA, s 178.
[27] CDPA, s 9(3).
[28] Christian Handig, 'The Copyright Term "Work" - European Harmonisation at an Unknown Level' (2009) 40 IIC 665, 668.

works. As such, providing this protection may seem reasonable because someone has directly used his intellectual creation in creating a work.[29] As Whitford J explained in *Express Newspapers Plc v Liverpool Daily Post and Echo*,[30] the computer is considered the tool used by a human author to create something.[31] The presence of 'human' in the creation of the work was therefore deemed necessary for protection in copyright law.

Nonetheless, the CDPA 1988 was established over thirty years ago and technology has developed significantly since that time.[32] There is not a precise definition as to what constitutes AI, but Surden describes these as comprising of programming algorithms and instructions giving them the ability to learn and develop on a particular function or task.[33] Machines are now able to create works such as drawings, speeches and even music, illustrating the sophistication of AI today.[34] Lambert questions who owns a work, such as a photo, created by a robot.[35] Under Section 9 of CDPA 1988 it could be the person who created the AI in the first place, but is this human intellectual creation too far removed when the AI takes a photo?

Nova Productions Ltd v Mazooma Games Ltd[36] is a modern example of such a case involving an AI produced work of a video game driven by a computer system. Importantly, the Court held that a screenshot in a video game was owned by the creators of the game. This conclusion might seem reasonable in terms of a video game where there is mere skill and judgment in playing the game with no creativity.[37] However, this decision would also mean that even where a person used his intellectual creation in training the AI, they would not be considered as making the necessary arrangements in creating the final work produced.[38]

---

[29] Pratap Devarapalli, 'Machine Learning to Machine Owning: Redefining the Copyright Ownership from the Perspective of Australian, US, UK and EU Law' (2018) 40 EIPR 722, 727.
[30] [1985] 1 WLR 1089, [1985] FSR 306.
[31] ibid.
[32] Julia Dickinson et al, 'Creative Machines: Ownership of Copyright in Content Created by Artificial Intelligence Applications' (2017) 39 EIPR 457.
[33] Harry Surden, 'Machine Learning and Law' (2014) 89 Wash L Rev 87, 89.
[34] ibid.
[35] Paul Lambert, 'Computer Generated Works and Copyright: Selfies, Traps, Robots, AI and Machine Learning' (2017) 39 EIPR 12, 16.
[36] [2007] EWCA Civ 219, [2007] EMLR 14.
[37] Andres Guadamuz, 'Do Androids Dream of Electric Copyright' (2017) 2 IPQ 169, 177.
[38] Toby Bond and Katharine Stephens, 'Artificial Intelligence - Navigating the IP Challenges' [2018] PLC 39, 41.

There is a possibility that Section 9 CDPA 1988 might be interpreted to protect some works created by the machine.[39] This would require the courts to define what is meant by "arrangements necessary". The courts were prepared to establish this for a person who developed the AI in the case of *Nova*. But this interpretation would seem too remote in some cases involving a high level of machine learning, where the AI may develop and teach itself a particular task leading to the creation of a work.[40] This would clearly lack the element of human creativity. It is also difficult to derive the creativity requirement in the final work from the person who clicked a button or asked the AI to create the content. These are difficult copyright issues, and the law does not seem to be able to absorb them. The importance of these considerations seems to be with the commercial value of such contents, and what should happen in case of any infringements.[41] Intellectual creation in a work requires a human element, and if a robot created a work without a direct human intervention then it would unlikely be afforded copyright protection. Assume for example the robot belongs to a company, and it takes photos for the company website while other users take the photos and use them without authorisation. With the way in which the law is currently operating, an infringement claim seems unlikely to succeed.

In 2018, the UK government recognised that AI is becoming increasingly prominent in the modern world, and stressed the importance of investing in this area and the need to improve data protection.[42] Yet, issues related to intellectual property (IP) were oddly absent from the policy paper. In contrast, in announcing its intention to present measures related to AI, the European Commission discussed the importance of addressing IP issues which might arise.[43] The European Commission paper is a positive initial step in recognising the difficulties in this area. Sooner or later, the UK and the EU will have to tackle IP issues associated with these new advanced technologies, and policymakers will have to implement more effective copyright protection. Birdy argues that lawmakers have always recognised these rapid changes but nevertheless failed to

[39] Lambert (n 35), 17; Guadamuz (n 37), 186.
[40] Bond and Stephens (n 38), 43-44.
[41] ibid, 40.
[42] Department for Business, Energy & Industrial Strategy and Department for Digital, Culture, Media & Sport, 'Industry Strategy: Artificial Intelligence Sector Deal' (Policy Paper, 26 April 2018) ‹assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702810/180425_BEIS_AI_Sector_Deal__4_.pdf› accessed 5 July 2019.
[43] Commission, 'Artificial Intelligence for Europe' COM (2018) 237 final.

take any action in response to them.[44] These postponements may allow policymakers to offer more updated copyright protection to absorb all the developments. Such measures, however, must be flexible in order to reflect the rapid technological changes and adapt to future realities.

Naruto v Slater: Animal involvement

A similar difficulty in determining authorship where there is no direct human intervention in creating an original work arose in the US case of *Naruto v Slater*.[45] This occurred when the plaintiff, a photographer named David Slater placed his camera amongst a group of monkeys, and one took a selfie. The pictures quickly spread across the internet, and subsequently was published on the Wikimedia site. The photographer brought an infringement claim arguing that he was the owner of the photos by virtue of being the camera owner. His claim was refused because the US Copyright Office Copyright Compendium § 202.02(b) requires that the work must entail a human characteristic before the Office will register it for copyright protection. The case has opened up discussion around the relationship between legal authorship and a human intellectual creation,[46] and reaffirms the difficulties of copyright protection against infringements of works created in the absence of direct human intervention.

But what if the monkey selfie case was brought under EU or UK jurisdiction? The *Infopaq* test requires a human intellectual creation in creating the work,[47] and so an infringement claim seems unlikely under EU law. Yet, such a claim under UK law might be possible if Section 9 of the CDPA 1988 was construed as if the camera was the computer and the photo the generated work.[48] It may be argued there is still not enough human creativity in the photo as in *Infopaq*, since it resulted from the monkey accidentally clicking the button. Copyright subsistence therefore seems to rest on whether Slater made the necessary arrangements for the photo to be taken as in Section 9(3) of the CDPA 1988.

[44] Annemarie Bridy, 'Coding Creativity: Copyright and the Artificially Intelligent Author' [2012] Stanford Tech L Rev 5, 27.
[45] *Naruto v David John Slater and others* Case No. 16-15469 (2016).
[46] Aislinn O'Connell, 'Monkeys do not have Standing Under US Copyright Act' (2018) 13 JIPLP 607.
[47] Handig (n 28).
[48] Lambert (n 35), 15.

But merely providing the camera is unlikely to suffice as intellectual creativity and so is therefore unlikely to meet the *Infopaq* threshold. However, Guadamuz suggests it was important in the monkey selfie case that the photographer continuously argued he intended for the monkeys to use the camera when he placed it next to them.[49] He followed the monkeys and had to make sure the camera was convenient enough for them to engage with it. Furthermore, there were hundreds of photos taken by the monkeys, many of which were blurred, and Slater had to choose between them which to upload online. All of these factors might be interpreted as Slater having used his intellect (*Infopaq*) in making the arrangements necessary for creating the work (Section 9(3) CDPA 1988). Therefore, if such an argument was accepted and Section 9(3) was interpreted more broadly, Slater may have succeeded in an infringement claim under UK copyright law.

Alternatives to protect works

Since it is limited and its extent is uncertain, it is important to discuss some alternatives for protection when Section 9 CDPA 1988 is unlikely to apply. First, the law may offer protection to the user of the AI.[50] For example, a company owning the AI would be the author own copyright in any works created by it. The law might, in this case, provide an exception in establishing the ambiguous and difficult 'intellectual creativity' to such types of works. For example, in *Naruto v Slater*, Slater, as the owner of the camera, would be entitled copyright protection because he arranged and made the final work possible.[51]

Alternatively, the AI could be regarded as the owner of the work it creates. Provided there is creativity, the work may suffice as original and can be protected. The difficulties pertinent to infringement may arise in such situations, and so the law needs to be prepared to provide more consistent answers. However, whether the AI is being creative or simply adapting to be creative is up for dispute. Irrespective of whether it is

[49] Andres Guadamuz, 'The Monkey Selfie: Copyright Lessons for Originality in Photographs and Internet Jurisdiction' (2016) 5(1) IPR ‹policyreview.info/articles/analysis/monkey-selfie-copyright-lessons-originality-photographs-and-internet-jurisdiction› accessed 6 January 2018.
[50] Devarapalli (n 29), 727-728.
[51] Deming Liu, 'Forget the Monkey Copyright Nonsense for Goodness Sake, Dude!' (2018) 40 EIPR 61, 64.

programmed or self-programmed, Wagner questions whether an AI will understand the meaning behind the work it creates and therefore be capable of assessing the work before creating it.[52] Either way, Abbott contends that copyright protection of works created by an AI system needs to be more clear,[53] otherwise such works might be undervalued because of the difficulties in applying copyright law.

Online user-generated contents

Another challenge in this area of copyright law is what Lee refers to as 'user-generated content' such as online videos that uses an original and protected work.[54] These have largely increased since the emergence of platforms such as Facebook, Twitter and YouTube. The reality of social media requires the law to adapt to recognition of the works produced by everyday internet users, particularly in terms of their originality and creativity. Kawashima notes that 'mini-creators' take an existing work and add their own creativity to it by criticising or reviewing it.[55] She argues that it is important to acknowledge mini-creators and protect them as derivative works, and 'memes' are a popular example of such works. For instance, image macros memes, pictures where users add a humorous textual commentary to an existing picture,[56] may arise out of the author's intellectual creation, and thereby potentially meet the originality requirement set out in *Infopaq*. But any partial reproduction of the original work is considered as an infringement, and memes are likely to infringe an original work and fail the *Infopaq* test.[57] In the US, memes are protected against infringement proceedings under the broad fair use defence.[58] However, EU copyright laws in this area[59] were by contrast drafted far

[52] James Wagner, 'Rise of the Artificial Intelligence' (2017) 75 Advocate (Vancouver) 527, 531.
[53] Ryan Abbott, 'Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom' (2017) Research Handbook on Intellectual Property and Digital Technologies ‹ssrn.com/abstract=3064213› accessed 8 January 2019.
[54] Edward Lee, 'Warming Up to User-Generated Content' (2008) 5 U of Illinois L Rev 1459.
[55] Nubuko Kawashima, 'The Rise of User Creativity - Web 2.0 and a New Challenge for Copyright Law and Cultural Policy' (2009) 16 Int J Cult Pol 337.
[56] Marta Dynel, '"I Has Seen Image Macros!" Advice Animal Memes as Visual-verbal Jokes' [2016] IJCLP 660.
[57] *Infopaq* (n 2), [37]-[39].
[58] *Matt Hosseinzadeh v. Ethan Klein and Hila Klein* No.16-CV-3081 (2017).
[59] InfoSoc Directive, Arts 2 & 3(1).

more in favour of right-holders.[60] This may indicate that a fair use argument in defence of a meme would be less likely to succeed under EU law.

Article 13: The end of the internet meme?

Internet memes are in many ways analogous to parodies which are recognised as an exception to the exclusive rights of reproduction and communication to the public under Article 5(3)(k) of the InfoSoc Directive. This exception was adopted in the UK in 2014 as a fair dealing defence under Section 30A(1) of CDPA 1988,[61] and shortly after the CJEU set out two requirements for the definition of a parody in *Deckmyn.*[62] Firstly, the CJEU said that the parody must be an expression of humour based on an existing work, and secondly that there must be noticeable difference between the two works.[63] In terms of the first requirement, it is still unclear who is to determine whether this standard has been met.[64] Jacques alternatively argues that this first test should focus on the intent of the author, with an intention to provoke humour capturing memes.[65] However, the second requirement of 'noticeable difference' is likely to cause the most problems because memes use an existing work. For example, in the case of image macro memes, it would be difficult to find a noticeable difference other than the written text. This was the same conclusion reached in *Deckmyn* where it was found that the two works only had small differences, and therefore the exception was held not to apply. Thus, a meme is likely to constitute an infringement under current EU and UK copyright law. Regardless, Lee points out that copyright owners are yet to legally challenge anyone using their works in this nature, the flipside of this being that internet users therefore assume that posting memes does not constitute infringement because of how widespread it is. [66]

---

[60] *Infopaq* (n 2), [41].
[61] UK Intellectual Property Office, 'Exceptions to Copyright: Guidance for Creators and Copyright Owners' (UK Government, 2018) ‹assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf› accessed 5 July 2019.
[62] Case C-201/13 *Deckmyn v Vandersteen* EU:C:2014:2132.
[63] ibid, [20].
[64] Sabine Jacques, 'Are National Courts Required to Have a European Sense of Humour?' (2015) 37 EIPR 134, 136.
[65] ibid.
[66] Lee (n 54), 1460.

Nonetheless, the discussions around user-generated content are becoming more prominent as a result of the Directive (EU) 2019/790 on Copyright in the Digital Single Market.[67] Article 17 of the provision would have the effect of obliging websites to take down any infringing user-generated content. The EU Parliament voted to adopt this proposal in 2018, and it is in the final stages of enactment.[68] The provision also means that online platforms such as Twitter will be required to implement automated solutions to achieve meet these obligations, and will be considered to have control over any unauthorised use of an existing work for the purpose of copyright proceedings. Otherwise, these platforms will face liability for the content uploaded to their platforms. One criticism is that platforms are arguably only acting as intermediaries, and to avoid liability may take extreme measures to remove any content which they consider as an infringement on their website, being overcautious and stunting therefore stunting distribution of legitimate content.[69] The intended scope of this covers illegal online streaming and any copy of an existing work,[70] but such automated monitoring systems may capture fair use of such works, for example, the sharing of parodies. Still, users who feel they did not infringe can file a complaint.

Article 17 seems to provide further protection for right-holders, and it might be justified on the basis of recognising their creativity.[71] However, the price of this may turn out to be the end of user-generated content, including internet memes. From the perspective of copyright owners, despite the creativity in these derivative works, there is still a 'substantial' taking. In June 2018, more than seventy prominent technology figures wrote in a joint letter to the EU Commission asking them to reconsider this proposal.[72] They argued that it does not reflect the reality of how content is used and distributed on the internet. One can observe that Article 17 was foreseeable from the way EU law was

[67] Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17.
[68] Julia Reda, 'Article 13 is Almost Finished – And it Will Change the Internet as we Know It' (*Julia Reda*, 10 January 2019) ‹juliareda.eu/2019/01/article-13-almost-finished/› accessed 12 January 2019.
[69] Sabine Jacques et al, 'Automated Anti-piracy Systems as Copyright Enforcement Mechanism: A Need to Consider Cultural Diversity' (2018) 40 EIPR 218, 224-229.
[70] Art 17(1).
[71] *Infopaq* (n 2), [40].
[72] 'Joint letter to European politicians on Article 13 of Directive on Copyright in the Digital Single Market' (*Electronic Frontier Foundation*, June 2018) ‹www.eff.org/document/joint-letter-european-politicians-article-13-directive-copyright-digital-single-market?› accessed 12 January 2019.

drafted[73] and interpreted by the CJEU. Nevertheless, despite urges to recognise this new type of user-generated content as a new form of creativity,[74] the EU appears to have a different opinion.

The ramifications of Brexit

Can the UK avoid adopting Article 17 into its national law? In 2016, the UK voted to leave the EU in what has been the most contentious constitutional issue in the country's modern history,[75] and the final deal is yet to be agreed on.[76] Therefore, it is still uncertain if Article 17 will take effect in the UK because it depends on whether the UK decides to remain in the digital single market.[77] Since the UK had incorporated some of the EU's digital laws into domestic law, such as the General Data Protection Regulation,[78] it may choose to adopt Article 17 as part of the Brexit deal.

More broadly on Brexit and EU copyright laws, Rahmatian argues that this will have little implication on copyright directives that are already incorporated into UK legislation.[79] There might be a piecemeal approach to amending such law, but these are unlikely to be major changes, especially in consideration of the transnational nature of the internet in an increasingly globalised world.[80] Dinwoodie and Dreyfuss argue that even though UK courts can depart from *Infopaq* and the test of 'author's intellectual creation' following Brexit,[81] this might be difficult because the UK courts have already

[73] InfoSoc Directive, Recital 21.
[74] Kawashima (n 55).
[75] Garvan Walshe, 'Brexit Is Destroying Britain's Constitution' (*Foreign Policy*, 18 December 2019) ‹foreignpolicy.com/2018/12/18/brexit-is-destroying-britains-constitution/› accessed 12 January 2019.
[76] ibid.
[77] Eleonora Rosati, 'UK Copyright in a No-Deal Brexit Scenario: What Will Happen?' (*The IPKat*, 24 September 2018) ‹ipkitten.blogspot.com/2018/09/uk-copyright-in-no-deal-brexit-scenario.html› accessed 13 January 2019.
[78] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, mirrored in the Data Protection Act 2018.
[79] Rahmatian (n 12), 939.
[80] ibid.
[81] Graeme B Dinwoodie and Rochelle Cooper Dreyfuss, 'Brexit and IP: The Great Unravelling' (2018) 39 Cardozo L Rev 967, 971.

interpreted the test in line with the traditional originality standard. Departing from Infopaq may therefore lead to inconsistency in UK case law.[82]

Concluding remarks

In conclusion, the current copyright laws regarding originality and infringement have proved to be mostly inflexible and difficult. The CJEU in *Infopaq* has set out a vague test which may prove to be problematic when it comes to its application to works which are the result of emerging forms of creativity. UK lawmakers have long recognised computer-generated works as deserving of copyright protection, and the UK courts generally have therefore been more flexible in protecting them. As such, UK courts may decide to depart from EU precedents after Brexit. But, similarly to the EU, even the current UK copyright provisions might prove to be inapplicable to modern day works. However, the European Commission has recognised the potential copyright implications which might arise with AI and this might be the first step to improve protection in this area. But until that time, the current laws will not suffice.

More controversially, the introduction of Article 17 is the latest example of how lawmakers are refusing to recognise the reality of how contents are created and reproduced in a rapidly changing digital world. This would adversely affect the commercial investments in social media which heavily depend on user-generated content. Even if measures were implemented to recognise these new types of works, a fair balance must be maintained between right-holders and users. This balance is important to encourage creativity whilst permitting fair use of such works. Restricting use and refusing to protect different types of works would ultimately discourage investments, or, worse yet, stunt creativity itself.

[82] ibid, 990-991.

Characterising jus cogens in practice: sovereign immunities and the challenge to hierarchically superior peremptory norms

Caitlin L Evans

Abstract

Peremptory norms of jus cogens are regarded as representing the core values of the international community. The consensus among states, backed by recent international judicial practice, has been to recognise certain fundamental principles of human rights law broadly construed, such as the prohibition against torture, as constituting norms to which no derogation can be permitted. However, despite international instruments and an extensive range of jurisprudence showing the overriding authority of jus cogens norms and their elevated position in the international hierarchy, the exact scope and influence of these peremptory prohibitions remains controversial and open-ended. As this article seeks to demonstrate, the ability of states to successfully rely on ordinary rules of customary law in order to escape liability in cases where they conflict with peremptory norms has only operated to dilute the symbolic impact of jus cogens in practice.

Introduction

Jus cogens, regarded as a subset of norms of customary international law which are deemed to be non-derogable, find their roots in the Vienna Convention on the Law of Treaties (VCLT) 1969. Article 53 of the Convention establishes that '[a] treaty is void if,

at the time of its conclusion, it conflicts with a peremptory norm of general international law', defining this latter phrase as being 'a norm accepted and recognised by the international community of States as a whole' and 'a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[1] The non-derogability of jus cogens norms has the effect that, should an existing treaty conflict with such norms, that treaty will become void and will terminate.[2] With changing attitudes and beliefs across a range of different states, however, establishing a definitive set of concepts which fall within the category of peremptory norms remains difficult.

This article is split into the following parts: The first part seeks to demonstrate the progress in the recognition of certain principles as having jus cogens character by both national and international courts. It is noted that challenges in determining what states consider to be core values within the international legal order nevertheless remain, partially due to the idea having only really been acknowledged recently in a string of cases and a select few international instruments. The second part sets out the overriding authority of jus cogens and their elevated position in the hierarchy of international norms, as emphasised by the VCLT itself and the extensive range of jurisprudence in this area. However, it puts forth the argument that despite such recognition, a dichotomy between the doctrine of jus cogens and its actual application in practice continues to exist, imposing challenges to the hierarchical structure. The focus here is on the primacy given to conflicting norms of customary law over norms of jus cogens in practice, in particular, the immunity of states from foreign jurisdiction. This article concludes with the argument that states' ability to successfully rely on such rules to escape liability in cases of conflict with peremptory norms has operated to dilute the symbolic impact of jus cogens in practice.

[1] Vienna Convention on the Law of Treaties (adopted 22 May 1969) 1155 UNTS 331.
[2] VCLT 1969, Art 64.

Core values of the international community

The principal foundation of peremptory rules was considered to be the fact that they served the interests of the whole international community, not the need of individual states.[3] Jus cogens norms are, at least in theory, intended to uphold fundamental values of the international community, and the growing support of states for a universally-binding category of norms in international law culminated in its adoption following the VCLT negotiations.[4] The reference in the VCLT to peremptory norms being 'accepted and recognised by the international community of States as a whole', however, raises some issues. For instance, how does the international community decide on its core values? Further, what exactly are these values and who should be entrusted to define them?[5]

Many feel that in a heterogeneous international society, consisting of nation states with different interests and varying social value systems, it is extremely difficult to obtain a genuine consensus of the content and ranking of community norms.[6] The recognition of norms viewed as falling within this jus cogens category will differ depending on different states and their cultures, one concern being that the ideals of the developed countries in the West may be emphasised. The negotiations of the VCLT show that different states put forward somewhat inevitably diverging examples of what should be classed as a rule of jus cogens. Since each state's suggestions will reflect their own preferences, what might be perceived as jus cogens for one state may not necessarily be considered jus cogens by another.[7]

Nevertheless, it is clear that general community interests and moral values cannot be regarded as part of law, let alone part of this 'higher' law, without some form of approval within the recognised normative processes.[8] For instance, by collective assent from the international community for the embodiment of such concepts in international

[3] Gennady M Danilenko, 'International Jus Cogens: Issues of Law-Making' (1991) 2 EJIL 42, 45.
[4] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens', (2008) 19 EJIL 491, 492.
[5] Ekaterina Y Krivenko, 'The ICJ and Jus Cogens Through the Lens of Feminist Legal Methods' (2017) 28(3) EJIL 959, 971-972.
[6] Danilenko (n 3), 45-46.
[7] ibid, 46.
[8] ibid.

instruments.[9] There was a danger, however, that if no efforts were made to establish objective criteria for identification of norms reflecting the fundamental interests of the international community,[10] then this could encourage an artificial interpretation of the concept by states.[11] This could result in the threshold for recognition being considerably higher than that of ordinary custom,[12] with the result that less values may fall within the category of norms, which could therefore have negative consequences for those seeking to obtain relief by relying on such norms.

Neither the adoption of the VCLT itself nor other legal instruments have brought about an explicit list of jus cogens norms, instead leaving it up to the judiciary to determine what kinds of practices will be deemed non-derogable. For instance, the Inter-American Court of Human Rights has been willing to recognise a number of fundamental rights, such as the principles of equality and non-discrimination, as norms of jus cogens.[13] In contrast, their European counterparts have been more cautious in limiting their analysis to more traditional and widely-accepted ideas such as the prohibition of torture. Only a fairly narrow set of norms have been deemed to be part of this 'jus cogens' category since its formal establishment in 1969, consisting mainly of certain fundamental principles of human rights law, broadly construed. As there is an almost intrinsic relationship between peremptory norms and human rights, it is hard to deny the inclusion of the latter within the detailed inventory of Article 53 peremptory norms.[14] Indicative of this, most of the case law in which the concept of jus cogens has been invoked involves the application of human rights.[15]

The International Court of Justice (ICJ), however, has been quite reluctant to recognise the notion of jus cogens. It wasn't until the *Armed Activities* case[16] in 2006 that the Court openly referred to the concept in its ruling. Here, express recognition was given to the

[9] ibid.
[10] ibid.
[11] Erika De Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law' [2004] EJIL 97, 120.
[12] ibid.
[13] Advisory Opinion OC-18 *Juridical Condition and Rights of the Undocumented Migrants*, Inter-American Court of Human Rights Series A No. 18 (17 September 2003), [101].
[14] Bianchi (n 4), 491.
[15] ibid.
[16] *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda* (2006) ICGJ 14.

peremptory nature of the prohibition of genocide, with the court noting that this was to be included in the jus cogens category under Article 53.[17] According to Judge Dugard, peremptory norms are a blend of principles and enjoy hierarchical superiority vis-à-vis other norms of customary law, as they 'give legal form to the most fundamental policies and goals of the international community'.[18] Similarly, judicial pronouncements have deemed torture both illegal and contrary to jus cogens. For instance, in the *Furundžija* case,[19] the International Criminal Tribunal for the Former Yugoslavia confirmed the status of the prohibition of torture as a peremptory norm, clarifying that jus cogens serves internationally to delegitimise any legislative, administrative or judicial act authorising torture.[20] The court explained that due to the norm enjoying a higher position in the international hierarchy, an obvious consequence of this is that the principle cannot be derogated from by states through general customary rules not endowed with the same normative force.[21] Likewise, in *Belgium v Senegal*, the Court noted that the prohibition of torture 'is grounded in a widespread international practice and on the opinio juris of States' and 'acts of torture are regularly denounced within national and international fora',[22] further reflecting the rule's peremptory status.

Challenges to jus cogens' hierarchical position by conflicting customary norms: State immunity from foreign jurisdiction

The notion of international crimes and the system of aggravated responsibility which results for serious violations of norms of particular importance to the international community seems to bring about a restructuring of the international legal order on a set of common values.[23] It appears that jus cogens provides, at least potentially, a proper

[17] ibid, [64]; Bianchi (n 4), 502.
[18] *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda* (2006) (Separate Opinion of Judge ad hoc Dugard), [10]; Bianchi (n 4), 503.
[19] *Lašva Valley, Prosecutor v Furundžija (Anto)* [1998] ICTY 3.
[20] Bianchi (n 4), 504.
[21] *Furundžija* (n 19), [153].
[22] *Questions Relating to the Obligation to Prosecute or Extradite, Belgium v Senegal* (20 July 2012) ICJ GL No. 144 437, [99].
[23] Bianchi (n 4), 494.

ordering, by advancing the supremacy of certain rules and their underlying values.[24] International legal scholarship has laid down the theoretical foundations of a world order based on a priority of values reflecting a hierarchy of norms,[25] with jus cogens being at the top of this hierarchical order - at least in principle. Looking at general judicial practice, this idea of jus cogens as a body of 'higher law' with overriding importance for the international community is steadily gaining ground,[26] with the concept being acknowledged as producing a mechanism for organising general customary international law. However, in practice, challenges to this hierarchical structure have emerged as a result of conflicting norms of customary law being treated with primacy over jus cogens norms, a main example being the customary law on the immunity of states from foreign jurisdiction.

In *Princz v Federal Republic of Germany*,[27] the US District Court of Columbia concluded that jus cogens violations had to be recognised as constituting an implied waiver of sovereign immunity in accordance with the state's national legislation on immunity.[28] However, on appeal, the Court held that there was no implicit exception to the legislation, upholding state immunity over human rights concerns here. Dissenting, Judge Wald argued that there could be no state immunity for acts which were contrary to jus cogens, following the lower court's approach in interpreting the legislation as an implicit waiver of immunity when it comes to serious abuses of this nature.[29] The reluctance of the Court to grant overriding effect to the prohibition of torture over the national legislation on sovereign immunity, however, did not appear to result from a rejection of the hierarchical superiority of the peremptory prohibition of torture, but rather was related to its limited scope, which at the time did not include an obligation to grant torture victims the right to claim compensation.[30]

This position stands in contrast to the *Distomo* case,[31] where the Court waived legislation regulating the sovereign immunity of Germany on the basis that a sovereign state cannot

[24] ibid.
[25] ibid.
[26] Danilenko (n 3), 42.
[27] *Princz v Federal Republic of Germany* (1992) F Supp 22 813.
[28] De Wet (n 11), 105.
[29] *Princz v Federal Republic of Germany* [1994] 26 F3d 1166.
[30] De Wet (n 11), 112.
[31] Case 137/1997 *Prefecture of Voiotia v Federal Republic of Germany* (1998) 92 AJIL 765.

reasonably expect to receive immunity for grave violations of international law which also amount to violations of peremptory norms.[32] The Court claimed the existence of a new rule of ordinary customary international law, in accordance with which states could not rely on sovereign immunity for violations of international law which its institutions committed whilst present in the territory of another state.[33] Here, the court seemed to rely on the existence of a customary international exception to sovereign immunity, rather than on the hierarchical nature and scope of the peremptory prohibition against torture.[34] The Court's reliance on ordinary customary law rather than on jus cogens norms to waive national legislation on sovereign immunity here illustrates that it may be unnecessary to resort to the hierarchically superior quality of the peremptory prohibition of torture for this purpose.[35] In other words, although jus cogens has been acknowledged by the judiciary, the reluctance by courts to uphold such peremptory norms over other conflicting values, instead resorting to other methods such as ordinary customary international law, perhaps indicates that, despite supposedly representing the core values of the international community, such norms do not receive preferential treatment by state judicial bodies.

Although it is beyond doubt that the prohibition of torture is included within the category of jus cogens norms, it still remains highly disputed whether this includes the obligation to grant torture victims the right to claim compensation against the state which committed or condoned the atrocity.[36] In *Al-Adsani v UK*,[37] the victim of torture claimed damages against the Government of Kuwait on the basis that this was in violation of a norm of jus cogens and that upholding state immunity would amount to a denial of access to justice. The European Court of Human Rights (ECtHR) acknowledged that whilst torture is prohibited under customary law,[38] this does not mean that it can lead to the lifting of the immunity of states in civil proceedings. Although the qualification of the prohibition of torture as a norm of jus cogens was not questioned, the majority held that there was no firm basis for concluding that a foreign state could

[32] De Wet (n 11), 106.
[33] ibid, 108-109.
[34] ibid.
[35] ibid, 114.
[36] ibid, 118.
[37] *Al-Adsani v The United Kingdom* [2001] ECHR 761.
[38] ibid [61].

be deprived of the immunity it enjoys under international law before the domestic courts of another state when facing accusations of torture.[39] In essence, the ECtHR reasoned that the jus cogens nature of the prohibition of torture could not trump the rule on state immunity, despite its recognised hierarchically higher status. The Court did not 'find it established that there is … acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State'.[40]

Conversely, the dissenting judges argued that there was little point in recognising the prohibition of torture as a norm of jus cogens if access to justice could be denied to victims on the basis that state immunity prevailed. The minority contended that the prohibition of torture lifts the jurisdictional bar of state immunity by reason of its non-derogable character, signalling its higher position in the hierarchy of rules of international law.[41] They noted that 'the rules on State immunity … have never been considered by the international community as rules with a hierarchically higher status', emphasising the fact that 'States have, through their own initiative, waived their rights of immunity' by renouncing or contracting out of them.[42] They contrasted this with the position of jus cogens rules which 'cannot be subject to unilateral or contractual forms of derogation from their imperative contents'.[43] Nevertheless, the majority distinguished this case from instances involving individual criminal liability in which immunity could be lifted,[44] arguing that rules of jus cogens have overriding power to deprive the rules on sovereign immunity of their legal consequences, compared to in civil proceedings, where they consider that the same conclusion cannot be drawn.[45]

However, the dissenting minority criticised the majority's ill-conceived distinction between criminal and civil proceedings,[46] explaining that:

[39] Bianchi (n 4), 501; *Al-Adsani* (n 37), [61].
[40] *Al-Adsani* (n 37), [66].
[41] Bing Bing Jia, 'The Immunity of State Officials for International Crimes Revisited' (2012) 10 JICJ 1303, 1315.
[42] *Al-Adsani* (n 37), [2] (Joint Dissenting Opinion of Judges Rozakis and Caflisch).
[43] ibid.
[44] Bianchi (n 4), 500.
[45] *Al-Adsani* (n 37), [61].
[46] Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18(5) EJIL 955, 965.

> It is not the nature of the proceedings which determines the effects that a jus cogens rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of jus cogens, … deprives the rule of sovereign immunity of all its legal effects in [the international] sphere. The criminal or civil nature of the domestic proceedings is immaterial.[47]

Thus, the dissenting judges were clearly motivated by the hierarchically superior character of the prohibition against torture,[48] arguing that not enough attention was given by the majority to the jus cogens nature of this concept which, in the interests of logical clarity, calls for a focus on the underlying act rather than the nature of the claim.[49]

Some commentators have observed, however, that the alleged conflict of principles, which ought to be decided in favour of the higher jus cogens norm is not a conflict at all. The rule of customary international law on state immunity is procedural and is therefore placed on a different plane to the substantive norms of international law, thereby making a hierarchical ordering of the two nonsensical.[50] This line of reasoning finds itself within the opinions of the courts themselves, with the Court in *Kosovo*[51] stating that no such conflict exists between the rules on state immunities and the relevant jus cogens norms, since the former address procedural issues, whilst the latter are substantive in nature.[52] In the Court's opinion, affording immunities to states and thus preventing proceedings from being initiated does not create a conflict with jus cogens norms because it has no bearing on the evaluation of the legality of state actions.[53]

This argument was swiftly followed in the *Jones* case,[54] where the House of Lords upheld immunity for the Kingdom of Saudi Arabia regarding acts of torture committed by state officials, asserting that 'state immunity is an absolute preliminary bar' and is not

[47] *Al-Adsani* (n 37), [4] (dissenting).
[48] De Wet (n 11), 107.
[49] Matthew Saul, 'Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges' (2015) 5 Asian JIL 26, 36.
[50] Andrea Gattini, 'The Dispute on Jurisdictional Immunities of the State Before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 LJIL 173, 178.
[51] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion) (22 July 2010) ICJ 141.
[52] Krivenko (n 5), 970.
[53] ibid.
[54] *Jones v Ministry of Interior for the Kingdom of Saudi Arabia and Others* [2006] UKHL 26.

impacted upon by the normative hierarchy.[55] In dealing with the jus cogens exception to state immunity, their Lordships asserted that the peremptory prohibition of torture does not automatically override all other rules of international law.[56] However, the House's treatment of the hierarchy of norms falls short of addressing the impact of peremptory norms, instead following the inconsistent reasoning of previous judicial decisions, and failing to resolve its logical flaws.[57] In particular, it reiterates the ill-conceived distinction between substantive peremptory rules and the procedural rule of state immunity,[58] which look to the jurisdiction of a national court,[59] stating that 'there is no substantive content in the procedural plea of state immunity upon which a jus cogens mandate can bite'.[60] However, in the *Ferrini* case which the House sought to rely on,[61] the Court, in lifting the immunity of Germany, expressly referred to the normative primacy of jus cogens over state immunity in civil proceedings as a matter within the hierarchy of norms.[62] Considering the case made reference to the fact that state immunity, as a customary norm of international law, must yield to the superior hierarchical position of the prohibition of the violation of certain fundamental human rights,[63] this renders the House of Lords' interpretation of the decision in *Jones* rather questionable.[64] It seems, therefore, that the Court's reasoning in *Ferrini* did not attract the support of other judges, with subsequent cases continuing to uphold state immunity despite the prohibition of torture having peremptory status.

In *Germany v Italy*,[65] the ICJ reaffirmed the view that state immunity is not affected by jus cogens as the two sets of rules address different matters, explaining that the nature of the latter norm itself does not impact on the merits of the case and is not enough for the immunity which states enjoy to be lifted in civil proceedings.[66] The court clarified that the procedural rules 'which determine the scope and extent of jurisdiction and when that

[55] ibid, [33]; Orakhlashvili (n 46), 956.
[56] ibid, 967.
[57] ibid, 968 & 970.
[58] ibid, 968.
[59] *Jones* (n 54), [43]-[45].
[60] ibid.
[61] *Ferrini v Federal Republic of Germany* (2004) Cass sez un 5044/04.
[62] Orakhlashvili (n 46), 968.
[63] Gattini (n 50), 178.
[64] Orakhlashvili (n 46), 968.
[65] *Jurisdictional Immunities of the State, Germany v Italy* (3 February 2012) ICGJ 434.
[66] Jia (n 41), 1317.

jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status'.[67]

It is clear from the discussion of the jurisprudence above that both national and international courts recognise the hierarchically dominant nature of peremptory norms. However, actual practice has shown that courts in the vast majority of decisions have sided with the wrongdoing state in upholding immunity as a matter of customary law, and in doing so have avoided addressing the issue of conflicting priority of jus cogens over other norms. The different ways in which the courts have introduced technical nuances in order to avoid directly examining the impact of the hierarchy of norms on state immunity has led to an unfortunate thread of decisions which consistently uphold the impunity of the perpetrators of torture, whilst denying victims their only available remedy.[68] This raises numerous concerns as, by granting immunity to states that have violated rules of jus cogens, this sends a message to perpetrators of such acts that the international community is turning a blind eye to continued and future transgressions and recognising as lawful the situation produced by breaches of peremptory norms.[69] The approach of the courts in prioritising state immunity over jus cogens principles in practice arguably dilutes the established idea of the latter being afforded higher status. Thus, despite the judiciaries' acknowledgement of the overriding effects of peremptory norms, the actual practice of courts has been to place state immunity on a higher level to other rules of international law.[70]

Whilst jus cogens norms have been incorporated into positive international law, their potential impact in this area, in operating as higher-ranked rules, continues to be weakened in practice, with the concept's highly symbolic effect almost never materialising in concrete practical application.[71] The difficulty in relying on the non-derogable character of peremptory norms to 'sweep away' conflicting lower-ranking rules of international law has turned into an overall failure to give effect to the primacy of jus cogens, which risks them being perceived as a rhetorical tool of dubious utility and

[67] *Germany v Italy* (n 65), [95].
[68] Orakhelshvili (n 46), 955.
[69] De Wet (n 11), 106; Orakhelashvili (n 46), 970.
[70] Jia (n 41), 1303.
[71] Krivenko (n 5), 968.

of little practical impact.[72] When it comes to the application of peremptory norms in disputes, often the courts have been more at ease with using the concept to reinforce arguments, rather than applying such norms to settle the case at hand through adjudication. The rigidity introduced by the non-derogable character of jus cogens has also caused a great deal of reluctance by domestic and international courts to draw mechanical conclusions from the hierarchical superiority of peremptory norms over other rules of international law.[73] Thus, the exact scope and hierarchical impact of the peremptory prohibitions remains controversial and open-ended.[74] This may be partly due to there being no single comprehensive institutional structure which defines the specific ranking of each set of norms, with some authors going as far as suggesting that no such hierarchy between rules of state immunity and peremptory norms exists at all.[75]

Conclusion

The willingness of states to raise the jus cogens status of norms as relevant factors in proceedings demonstrates the concept's prominence within the international community. As we have seen, jus cogens norms have often been associated with certain areas of human rights law broadly construed, such as the principle proscribing torture, articulating the notion that this has now become one of the fundamental standards of the international community.[76] However, despite extensive scholarly attention and an increased willingness of courts to recognise jus cogens norms, the exact scope and influence of these peremptory norms remains controversial and open-ended. Little progress has been made in establishing a method for identifying such norms, with both the justification for the status and the method for determining whether a norm is ascribed it remaining unclear.[77] As a result, states have become no more forthcoming in

[72] Bianchi (n 4), 501.
[73] ibid.
[74] De Wet (n 11), 118.
[75] Jia (n 41), 1319.
[76] *Furundžija* (n 19), [154].
[77] ibid, 52.

their explanation of what constitute jus cogens norms than they were in the debates leading up to the adoption of Article 53 VCLT.[78]

Whilst there has been judicial acceptance that jus cogens rules constitute the highest hierarchical category of norms within the international community in theory, the reality is that the very actors who emphasise the overriding nature of peremptory norms simultaneously allow universally-accepted lower-ranking norms to take priority in cases of conflict. This is usually on the basis of a misconceived distinction between procedural and substantive characteristics, which is said to make this idea of a conflict purely fictional as a result. Nevertheless, the unentrenched nature of the category of jus cogens norms means that there is certainly scope for both states and courts to include currently unrecognised norms into this class in future. Perhaps over time, recognition of the supremacy of jus cogens norms over conflicting customary international law may enable the category to fulfil its position at the top of the international hierarchy in a practical sense. Putting an end to the ability of states to escape liability in cases of conflict with hierarchically superior peremptory norms would certainly be an advantage of this recognition.

[78] Saul (n 49), 30.

Assessing the legality of US military intervention against ISIS in Syria under international law

Joe Drake

Abstract

In the wake of the Arab Spring in 2010 and the Syrian Civil War the following year, the Islamic State terror group quickly rose to prominence in Northern Syria and Iraq, rapidly establishing itself as the dominant power in the region. Following numerous acts of brutality against civilian and military hostages, and numerous terrorist attacks attributed to the group, the United States pushed for an international military response, leading the vanguard with Operation Inherent Resolve. The US has offered several justifications in attempting to provide a legal basis for the operation, including the doctrine of humanitarian intervention, invitation to intervene, and the right to individual and collective self-defence. This article examines the relevant justifications for the use of force against ISIS in Syria, and argues that the recent rise in terror attacks by non-state actors has led to a 'Grotian Moment' causing a rapid shift in the law, incorporating the US 'unwilling or unable' doctrine into the international law of self-defence and the use of force against non-state actors.

Introduction

This article will assess the validity of the legal justifications for the United States' military operations against the Islamic State in Iraq and Syria, codenamed 'Operation Inherent Resolve'. The article will first explain the background necessary for contextualising the issues being discussed, before explaining why military involvement

in Iraq is less problematic in law, due to Iraq's official request for aid. Next, the legal issues posed by the airstrikes in Syria shall be explored, with particular reference to the unique nature of conflicts involving non-state actors operating within and across international borders. The bulk of this article will be devoted to assessing the justifications for the use of force and their applicability to the situation in Syria, with a specific focus on the exceptions to the prohibition of the use of force in the United Nations Charter, as well as under customary international law. This article shall conclude that whilst there may be some merit in the several potential justifications for Operation Inherent Resolve, we are seeing a rapidly emerging norm in international law which enables the international community to address the threats posed by non-state actors, largely through the incorporation of the United States' unwilling and unable doctrine.

Context

Around 2006, numerous pre-existing groups of extremist Sunni jihadists collectivised to form the Islamic State of Iraq (ISI), largely recognised as a splinter group from Al-Qaeda in Iraq, and declared an Islamic State or Caliphate in Iraq.[1] This is largely due to their allegiance to the group, and the fact that a large portion of their membership were former Al-Qaeda fighters. The group remained in relative obscurity due to the suppression of jihadist factions during the US occupation, but rose to prominence in 2013 during the Syrian Civil War following the Arab Spring uprisings. Mirroring the pre-conditions for the Western-backed Libyan revolution that successfully overthrew Muammar Gaddafi, numerous anti-government militias formed with varying aims in Syria in response to widespread suppression and use of state violence against protestors protesting Syrian President, Bashar al-Assad. These groups ranged from Syrian Arab Army defectors who went on to form the Free Syrian Army, the Democratic Federation of Northern Syria, the Kurdish backed faction commonly known as Rojava, and numerous other smaller factions. These fragmented and often conflicting groups left large swathes of northern Syria free from any effective government or military protection, allowing ISI to rapidly

[1] Tricia Bacon and Elizabeth Grimm Arsenault, 'Al Qaeda and the Islamic State's Break: Strategic Strife or Lackluster Leadership' (2019) 42(3) Studies in Conflict & Terrorism 229, 241.

advance and expand its power base, evolving into the Islamic State of Iraq and the Levant (ISIL). Throughout 2014, the lack of any coalition of factions capable of challenging the growing might of ISIL led to further territorial gains for the group, including key cities of Mosul, Raqqa, and Fallujah, the latter being less than 65km from Baghdad. Following this, a global Islamic caliphate known as the Islamic State of Iraq and Syria (ISIS) was declared, eventually leading to pledges of allegiance by other Jihadist factions, such as Boko-Haram in Nigeria.[2]

In May 2014, the US State Department designated ISIS as a foreign terrorist organisation,[3] with US President Barack Obama launching 'Operation Inherent Resolve' in August, with targeted coalition airstrikes on ISIS positions in Iraq following a formal request by the Iraqi Government for support.[4] The United Kingdom initially joined the coalition's attacks in Iraq but withheld support for military action in Syria with numerous MPs expressing concerns over the legality of such action. This position changed in 2015 following the bombing of Metrojet Flight 9268 and the Bataclan attack in France, with the UK Parliament voting in favour of taking action against ISIS in Syria. The intensity of the bombing campaign increased rapidly in 2016, and even more so in 2017/18 with President Trump promising to obliterate ISIS. Along with pressure against ISIS forces by Assad loyalists in the south, the Yekîneyên Parastina Gel (YPG) and Yekîneyên Parastina Jin (YPJ) of the Peshmerga in the north, and the resurgence of Iraqi governmental forces, ISIS has now lost around 95 per cent of the land it held at its peak, with only a few remaining strongholds at the time of writing.

[2] Lucy Rodgers et al, 'Syria: The Story of the Conflict' *BBC* (London, 11 March 2016) ‹www.bbc.co.uk/news/world-middle-east-26116868› accessed 7 January 2019; 'Syria's Civil War Explained from the Beginning' *Al Jazeera* (Doha, 14 April 2018) ‹www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html› accessed 7 January 2019. See also Cameron Glenn et al, 'Timeline: The Rise, Spread and Fall of the Islamic State' (Wilson Center, 29 March 2019) ‹www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state› accessed 21 April 2019.

[3] Gregory A Wagner, 'Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL' (2015) 46 U Memphis L Rev 235, 236.

[4] Ranj Alaaldin and Bilal Khan, 'Airstrikes on ISIS in Syria and Iraq are Legal Under International Law' (*London School of Economics*, 1 October 2014) ‹www.blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/› accessed 7 January 2019.

Mt. Sinjar airstrikes First US involvement

Prior to Operation Inherent Resolve, the US was involved in targeted strikes in and around Mt. Sinjar in northern Iraq to protect thousands of Yazidi refugees fleeing genocide at the hands of ISIS. Due to the bombing campaign and ground support from the Kurdish Peshmerga, most were saved, though a significant number were brutally massacred. The US justified these strikes under the doctrine of humanitarian intervention, on the basis that there was a pressing and imminent need for action to prevent a massacre. The doctrine is somewhat contested but has precedent from NATO operations in and around Kosovo in 1999, which has led to the emergence of the 'Responsibility to Protect' (RTP) Doctrine.[5] Widespread acceptance of these doctrines is based on United Nations Security Council (UNSC) authorisation, which is why the justification was satisfactory for this isolated operation following Resolution 2170,[6] but has not been offered as a legal basis for Operation Inherent Resolve, of which these strikes were not a part of.[7]

The prohibition of the use of force

The prohibition of the use of force in international law is the 'cornerstone' of the United Nations Charter ('the Charter').[8] As an indisputable rule of customary international law,[9] some have described it as a 'cardinal principle'.[10] This prohibition may also enjoy *jus cogens* status;[11] the scope of any *jus cogens* norm is debatable,[12] and as interesting as this contention is, it is not relevant for the purposes of this article. However, the

[5] UNGA Res UN Doc A/RES/60/1 (24 October 2005).
[6] UNSC Res UN Doc S/RES/2170 (15 August 2014).
[7] Michael P Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 Case Western Reserve J Intl L 16, 48.
[8] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, [148].
[9] International Court of Justice Statute, Art 38(1)(b).
[10] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, [190].
[11] Vienna Convention on the Law of Treaties, Art 53.
[12] James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32(2) Michigan J International L 215, 230.

intersectionality of the Charter and customary international law must not be misstated, and will be discussed in more detail later on.

Article 2(4) prohibits the use of force against the territorial integrity or political independence of any state, or in any purpose inconsistent with the Charter.[13] This prohibition is, however, not without exceptions, notably the right to request military assistance in domestic conflicts,[14] the authorisation of the use of force by the UNSC,[15] and the right to self-defence.[16] These exceptions shall now be explored in turn.

UNSC authorisation

By far the most authoritative legal basis for the use of force is express authorisation by the UNSC, as it is the only body with such powers under the auspices of the UN. The problem with using such a justification as a legal basis for Operation Inherent Resolve is that the UNSC Resolutions relating to Syria are widely thought to lack the express authorisation of the use of force under Chapter VII, despite crucial wording of 'all necessary measures' being present.[17] Resolution 2249 lacks the words 'authorize' and 'decides' which are widely accepted as the code-words that the UNSC uses to authorise the use of force, as it copies the language from Chapter VII and has precedent from previous authorisations.[18] That being said, Resolution 2249 in November 2015 gave added impetus to the ongoing airstrikes, and played a part in swinging the UK Parliamentary vote in favour of airstrikes in Syria. This is despite government publications stating that Resolution 2249 gave no new authorisation for the use of force,[19] and academic support for this proposition.[20] Some scholars conclude that the wording of Resolution 2249 renders it more of a political encouragement of previous

[13] United Nations Charter, Art 2(4).
[14] *Nicaragua v United States* (n 10), [246].
[15] United Nations Charter (n 13), Art 42 & Ch VII.
[16] ibid, Art 51.
[17] UNSC Res UN Doc S/RES/2249 (20 November 2015).
[18] C.f. UNSC Res UN Doc S/RES/678 (29 November 1990).
[19] Arabella Lang, 'Legal Basis for UK Military Action in Syria' (HC 7404, 1 December 2015), 3.
[20] Marc Weller, 'UN Resolution on IS 'Extraordinary Step'' *BBC* (London, 24 November 2015) ‹www.bbc.co.uk/news/world-europe-34900384› accessed 27 December 2018.

strikes and ongoing action against ISIS, without providing any express legal basis.[21] Therefore, whilst a justification for Operation Inherent Resolve based on authorisation from the UNSC is plausible, it is unsatisfactory, due to the lacking of the traditional elements and wording used in the Security Council's Resolutions that authorisation usually comprises.

Invitation to intervene

Another way that the use of force can be authorised is in cases where a state requests military assistance from another state or the UN to deal with domestic insurrection they cannot defeat themselves. In September 2014, the Iraqi Representative to the UN addressed such a letter to the UNSC requesting the help of the US in leading the international community in defeating the constant threat that ISIL posed to the people and security of Iraq.[22] This request clearly gave the US authority to conduct military operations within Iraq in accordance with the request. However, the applicability of this justification to the whole of Operation Inherent Resolve is easily disputed as the use of force must be restricted to the scope of the request in terms of aims and territory.[23] Furthermore, justification for the whole operation on this basis would essentially constitute Iraq consenting to US strikes in Syria, setting the inconceivable precedent of one sovereign state superseding the sovereignty of another by consenting to military actions in the latter's territory – a proposition entirely incompatible with the Charter.[24] The efficacy of this justification is further undermined by the fact that there has been no similar request for the US to utilise armed force in Syria. Nevertheless, there is tentative academic support for the proposition that the Syrian government has provided implied consent to US airstrikes in Syria, despite the fact that Syrian officials have stated that

[21] Oren Gross, 'Unresolved Legal Questions Concerning Operation Inherent Resolve' (2017) 52(2) Texas Intl L J 11.
[22] Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the United Nations Security Council, UN Doc, S/2014/691 (20 September 2014).
[23] *Democratic Republic of the Congo v Uganda* (n 8), [52].
[24] United Nations Charter, Art 2(1).

any use of force by the US in Syria without consent would be perceived by them to constitute an act of aggression.[25]

The theory is loosely based around the idea that whilst the Syrian government has complained to the UN about Turkish and Israeli military action within their borders, no such complaints have been made against the US. That being the case, the theory is highly contentious and has far from widespread acceptance, largely in part due to the loopholes that it could create, in particular the lack of freedom a state can be said to be exercising in giving implied consent.[26] There have been further attempts by the US to make justifications along these lines, including the doctrine of hot pursuit.[27] However, whilst this is a settled principle of international maritime law, its use in land warfare is widely rejected. In any case, this should not apply to ISIS fighters fleeing Iraq to Syria, as they have entered another sovereign territory, not international waters.[28] Therefore, whilst the Iraqi request for US intervention provides sound legal justification for any action against ISIS in Iraq, it is wholly insufficient as a justification for Operation Inherent Resolve in its entirety.

Article 51 self-defence

Perhaps the strongest legal justification for Operation Inherent Resolve is the right to individual and collective self-defence under Article 51 of the Charter. The provision states that nothing within the Charter shall prevent the long-standing right to self-defence following an armed attack,[29] which also exists as a *jus cogens* rule of customary international law, and that all measures under Chapter VII shall focus on collective responses.[30] There is debate around what actually constitutes an armed attack, with the International Court of Justice stating that the mere support of insurgents is insufficient.[31]

[25] Seina Karam, 'Syria Warns U.S. Against Bombing ISIS Without Permission' *National Post* (Ontario, 25 August 2014) ‹www.nationalpost.com/news/syria-warns-u-s-against-bombing-isis-without-permission› accessed 27 December 2018.
[26] Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements' (2011) 29 Boston U Intl L J 337, 349-50.
[27] United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), Art 111.
[28] ibid.
[29] United Nations Charter, Art 51.
[30] ibid, Ch VII.
[31] *Nicaragua v United States* (n 8), [181].

However, the overtly military nature of ISIS's activity renders discussion of the minutia of what constitutes an armed attack unnecessary to our core discussion. Assuming *arguendo* that ISIS are committing armed attacks, the question is whether or not these acts allow for invocation of Article 51.

The US has shown support for various 'first-strike' doctrines justified under Article 51, such as the less criticised pre-emptive strike against a credible imminent threat, requiring a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation',[32] and the so-called 'Bush Doctrine' of preventative war.[33] The Bush Doctrine is of questionable legality, and a diplomatically impossible justification for the use of force in the Middle East due to persisting tensions arising out of the invasion of Iraq and its aftermath, the destabilisation of the region undeniably part of the reason ISIS rose so quickly. The problem with the applicability of the pre-emptive strike justification is that it requires an imminent threat. As of yet, there have no credible attacks or threats to the US homeland from ISIS, the exception being a few isolated shootings with the perpetrators claiming allegiance to the group. Therefore, the US cannot simply rely on its own right to self-defence under the Charter, as it has not been attacked itself, and in any case, the attack cannot be attributed to Syria; this link to host-state control is crucial under the traditional conception of Article 51.[34] Therefore, the US must base any justification under Article 51 within the scope of collective self-defence, as requested by the Iraqi government.[35] The issue lies in the fact that the majority of the threat to Iraq stemmed from areas in and around the Iraq-Syria border, meaning that many militarily valid targets resided in a state which had not requested US assistance. Whilst initial strikes were limited to training camps and crossing points in the border regions, these have since been expanded into areas that are indisputably Syrian.[36]

[32] Note of US Secretary of State Daniel Webster on the Caroline Case (24 April 1841) ‹avalon.law.yale.edu/19th_century/br-1842d.asp› accessed 19 September 2019.
[33] 'National Security Strategy' (United Nations Security Council, 2002) ‹www.state.gov/documents/organization/63562.pdf› accessed 29 December 2018.
[34] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Art 8; Scharf (n 7), 3-4.
[35] *Nicaragua v United States* (n 8), [192]-[201].
[36] Samantha A Sliney, 'Right to Act: United States Legal Basis Under the Law of Armed Conflict to Pursue the Islamic State in Syria' (2015) 6 U Miami National Security & Armed Conflict L Rev 1, 12-14.

The US justification on this ground therefore hinges on the 'unwilling or unable' doctrine, the controversial practice of taking military action against non-state actors (NSAs) where the host state is either unwilling or unable to deal with the threat, even when there is no state control of the NSA.[37] It is submitted that it would be a fallacy to suggest that Assad's Syrian Arab Army (SAA) was unwilling to deal with the threat as they have been perpetually engaged in combat with ISIS forces. However, their inaction in the northern regions where Kurdish forces provide the main opposition to ISIS, and their request to Russia for air support would suggest that they are unable to deal with ISIS. Although the unwilling and unable doctrine is a contentious point of international law,[38] it is a settled part of the US's foreign policy, having served as the justification for the operation to kill Osama Bin Laden in Pakistan, without prior notification to the Pakistani authorities,[39] as well as in justifying action in Syria.[40] One caveat is that whilst the SAA has been waging war against ISIS for several years, Bin Laden's compound was less than one mile from a Pakistani military base. Due diligence requires states to take reasonable measures against a known threat from NSAs.[41] However, whilst there is an argument to be made that Pakistan was not exercising due diligence regarding Bin Laden, such an argument is impossible to make against Syria, as the full resources of the SAA have been deployed against ISIS.

Another complexity is that the use of force against NSAs is a contested principle, as nearly all cases, and indeed the Charter, are focused primarily on the use of force between sovereign states (hence the 'territorial integrity' and 'political independence' provisions within Article 2(4)). This opens the gap for the potential argument that US airstrikes in Syria are against NSAs as they are not interfering with the territorial integrity of Syria. This poses further problems with regard to other US airstrikes supporting anti-Assad forces such as the Free Syrian Army. However, as all targets under Operation Inherent Resolve have been ISIS units, these issues are not present with the campaign being

[37] Scharf (n 7), 30-32.
[38] Gross (n 21), 25.
[39] Harold Koh, 'The Lawfulness of the U.S. Operation Against Osama Bin Laden' (*Opinio Juris*, 2011) ‹opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/› accessed 20 September 2019.
[40] Letter from the Permanent Representative of the United States of America to the United Nations addressed to the United Nations Secretary-General, UN Doc S/2014/695 (23 September 2014).
[41] Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor – Birth of the "Unable or Unwilling" Standard?' (2015) 75 Heidelberg J of Intl L 455, 480.

discussed. That being said, the traditional view is that simply losing control of a region does not mean that the region is lost, a somewhat paradoxical conceptualisation which has the potential to create undesirable loopholes in the law.[42]

The combination of Iraq's request for assistance and the evidence that the Syrian government was unable to deal with the threat of ISIS within its own borders has led some academics to argue that, if the unwilling and unable doctrine is accepted, there are strong legal grounds on the basis of collective self-defence for US strikes against ISIS in Syria, on the provision that those strikes are directly necessary and proportional to protecting Iraq.[43] The problem with this justification lies in the previously mentioned expansion of US airstrikes deeper into Syria, in attacks that were not directly tied to the collective self-defence of Iraq. Sliney argues that the lack of any real condemnation of this expanded campaign gives legitimacy to the strikes, and opines that if challenged, the US would likely have a good argument of collective self-defence under the Charter.[44] Whilst this may be true, the fact that the US may avoid repercussions with such a justification does not necessarily mean that it is legally correct, nor the most satisfactory explanation; one questionable justification does not a legal doctrine make.

Customary international law

Although the unwilling and unable doctrine lies beyond the realms of the Charter, perhaps the most satisfactory justification does as well, and can be found within customary international law: the requirement of sufficient state practice and *opinio juris*.[45] Whilst Article 51 provides a right to self-defence under the Charter, this essentially codified the pre-existing right to do so under customary international law, with the added requirement of notifying the UNSC whenever invoked (not necessary under the rule in customary law) as evidenced by the lack of its discussion in the *Nicaragua* case.[46]

[42] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37 Columbia J Transnational L 403, 435.
[43] Sliney (n 36), 21.
[44] ibid, 22.
[45] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 44, 77.
[46] *Nicaragua v United States* (n 8).

Scharf argues that the rapid rise of terrorism and the prevalence of NSAs in modern conflicts have led to a 'Grotian Moment', a "paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance." leading to rapid developments in customary international law.[47] These moments occur due to the pressing nature of the issue at hand, or a new, unforeseen area of law arises, creating rapidly changing or emerging customs, with several occurrences in the last century.[48] Scharf argues that the Grotian Moment regarding terrorist actions began in the aftermath of 9/11, with the UNSC unanimously passing Resolutions 1368 and 1373, essentially accepting the legality of invoking self-defence in response to terrorist attacks.[49] He continues that this Grotian Moment reached its peak (particularly in regard to action in Syria) in 2015 following the ISIS attacks on Metrojet Flight 9268 and the Paris terror attacks, proving that ISIS was no longer merely a regional threat.[50] Scharf goes on to reiterate that whilst Resolution 2249 did not provide any new legal basis for military strikes in Syria, it nevertheless confirms that such action is permissible.[51] The French Representative to the UNSC postulated that the Resolution now enabled collective self-defence measures to be taken under Chapter VII,[52] despite the Resolution failing to mention the Chapter at all. Scharf argues that this will play a crucial role in "crystallizing the new rule of customary international law regarding use of force in self-defense against non-state actors".[53]

Scharf concludes that the changing nature of warfare; the aftermath of terrorist attacks by Al-Qaeda and ISIS and subsequent UNSC approval of the 2001 invasion of Afghanistan to dislodge Al-Qaeda;[54] and the lack of protest over drone strikes against Al-Qaeda all support the argument that international law is rapidly adopting the unwilling and unable doctrine. Scharf argues that despite the heavily criticised *Congo* case setting

[47] Michael P Scharf, 'Seizing the "Grotian Moment": Accelerated Formulation of Customary International Law in Times of Fundamental Change' (2010) 43(3) Cornell International Law Journal 439, 440.
[48] Scharf (n 7), 17-20.
[49] UNSC Res UN Doc S/RES/1368 (12 September 2001); UNSC Res UN Doc S/RES/1373 (28 September 2001).
[50] Scharf (n 7), 50-51.
[51] ibid.
[52] 'Press Release: Security Council "Unequivocally" Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses "Unprecedented" Threat' (United Nations, 20 November 2015).
[53] Scharf (n 7), 51.
[54] UNSC Res UN DOC S/RES/1386 (20 December 2001).

back these developments,[55] the recent developments, and indeed Resolution 2249, will be seen as bringing this Grotian Moment to fruition.[56] If accepted, this would essentially mean that the unwilling and unable doctrine has been brought into the fray of customary international law with regard to the use of force against NSAs, where the host state(s) have no control over the targeted group. However, it is worth noting that as previously mentioned, there is little to suggest that Syria is unwilling to defeat ISIS, it is simply unable to. The true conceptualisation of the new emerging norm is perhaps therefore more focused on the host state being unable, rather than unwilling.

Conclusion

This article has looked at the numerous potential justifications for Operation Inherent Resolve under international law and has shown that each is not without issue. Authorisation by the UNSC may be implied from several Resolutions and the responses of states. However, the absence of the traditional terminology of 'all' necessary measures, as mentioned under Chapter VII of the Charter, in Resolution 2249 render this justification unsatisfactory, and would potentially bring an undesirably wide scope to their interpretation. Iraq's official request for support in fighting ISIS provides a clear legal basis for airstrikes in Iraq, and potentially for those strikes in Syria where they are strictly limited to complying with the Iraqi request for protection from the threat of ISIS, but remains problematic when considering the expansion of Operation Inherent Resolve into Syria. Finally, the theory that the rapid rise of NSAs operating within and across borders has led to a Grotian Moment which has created a new rule of customary international law, if accepted, could rectify the problems of legal justification for military action against NSAs under the Charter.

This article agrees that while Operation Inherent Resolve is potentially justifiable under the Charter, the current regime struggles to provide legal bases for dealing with such groups. Therefore, it fails to ensure due care, and could potentially set dangerous precedents that could result in much more questionable uses of force against NSAs, in

[55] *Democratic Republic of Congo v Uganda* (n 8).
[56] Scharf (n 7), 53.

spite of the desirability for providing legal justification for strikes against NSA terrorist groups as evidenced by the political support for the use of force in Resolution 2249. This article supports the 'Grotian Moment' theory to a certain extent, as it provides the most satisfactory explanation for the law as reconciled with our reality.[57] However, even with this proposed Grotian Moment, time will tell whether it gains widespread acceptance, and care must be taken to ensure that the new emerging law is not misused. It appears, therefore, that it would be more appropriate for the United Nations to create a new legal regime that deals with the use of force against NSAs. However, as reforming and negotiating treaties is notoriously complex, such a solution may perhaps be necessary, but unlikely. Thus, acceptance of this new custom could prove to be the most convenient way forward.

[57] Sondre Helmersen, 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations.' (2014) 61(2) Netherlands Intl Law Review 167, 180.

Unilateral humanitarian intervention in international law: Does and should such a right exist?

Conor Logue

Abstract

There are three bases commonly offered as granting recognition of a right to resort to unilateral humanitarian intervention (hereafter 'UHI') under international law. These bases are the United Nations Charter, state practice subsequent to the Charter, and the emergence of the 'responsibility to protect' doctrine in the early 2000s. This article reviews each of these bases in turn, ultimately finding that none of them provides an adequate basis for conferring recognition upon a right of UHI. In addition, while the moral reasons behind recognising a right of UHI are compelling, balanced consideration of the merits and risks of UHI leads to the conclusion that such recognition would entail dangerous potential consequences for international peace and security.

Introduction

This article shall discuss and critically evaluate the concept of a freestanding right of unilateral humanitarian intervention (hereafter 'UHI'). For the purposes of this article, the term refers to interventions 'by one or more states on the territory of a third state by using... armed force, in reaction to massive and gross violations of human rights and

fundamental freedoms, without a Security Council mandate.'[1] A 'freestanding right' to UHI shall be understood as referring to any potential or actual capability to execute a UHI in its own right, and not the right to execute a UHI only as an exception to certain circumstances. Case studies of historical and current affairs will be utilised to scrutinise each of the legal bases in their giving rise to an existing right to UHI. However, this article will conclude that no such right, in fact, does exist in international law. Finally, it is suggested that owing to the possibility of exploitation of such a doctrine, international legal recognition of UHI would ultimately be an unwelcome change to the international legal system.

The United Nations Charter

The Charter of the United Nations[2] ('the Charter') founded the intergovernmental organisation of the United Nations (UN) in the aftermath of World War II with the intention of saving 'succeeding generations from the scourge of war'[3] and maintaining 'international peace and security.'[4] The Charter, according to US President Truman, would allow the world to 'look forward to the time when all worthy human beings may be permitted to live decently as free people.'[5] For present purposes, it naturally follows that 'any analysis of the lawfulness… of the unilateral use of force for humanitarian purposes must begin' with an interpretation of this instrument.[6]

Chapter IX of the Charter provides that in the promotion 'of universal respect for, and observance of, human rights and fundamental freedoms for all,'[7] member states must endeavour to take joint and separate action in co-operation with the UN.[8] Some

[1] Steven Blockmans, 'Moving into UNchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?' (1999) 12(4) Leiden Journal of International Law 759, 763. Critical analysis of the definition itself is beyond the purview of this article.
[2] United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ('The Charter').
[3] ibid, Preamble.
[4] ibid, Art 1(1).
[5] Harry Truman, 'Address in San Francisco at the Closing Session of the United Nations Conference' (*The American Presidency Project*, 26 June 1945) ‹www.presidency.ucsb.edu/documents/address-san-francisco-the-closing-session-the-united-nations-conference› accessed 20 April 2019.
[6] Anders Henriksen and Marc Schack, 'The Crisis in Syria and Humanitarian Intervention' (2014) 1(1) Journal on the Use of Force and International Law 122, 124.
[7] The Charter (n 2), Art 55(c).
[8] ibid, Art 56.

proponents of the existence of a freestanding legal right of UHI argue that these provisions impose a positive obligation on member states to initiate action on this basis.[9] They reason that the use of force, when taken in response to the urgent protection of human rights, is lawful in much the same way as other forms of self-help are justified under the Charter,[10] because of the international community's recognition of the common interest shared in their preservation.[11]

This school of thought would appear to find support in the case law of the International Court of Justice, which has declared on numerous occasions that all states can be considered to hold a legal interest in the protection of human rights by virtue of their significance.[12] In turn, it follows that since UHI is not an act of war, it may be justified as protecting basic human rights.[13]

However, it is submitted that a freestanding right of UHI cannot be inferred from these provisions when read with reference to the rest of the Charter, especially with respect to Article 2(4) of the Charter which expressly prohibits the violation of territorial integrity or political independence with the use of *any* armed force. Although unambiguous in its nature and scope, Article 2(4) itself has been considered by some academics as being the source for an existing freestanding right of UHI. Proponents of this viewpoint argue that any armed force that does not target territorial integrity or political independence will fall outside the parameters of the UN collective security framework,[14] including force used in order to execute a UHI.[15] Therefore, it is arguable that if unilateral armed force is employed for a legitimate purpose, such as the halting of human rights atrocities, the fundamental principles of the Charter are adhered to in this regard.[16]

---

[9] Nikolai Krylov, 'Humanitarian Intervention: Pros and Cons' (1995) 17(2) Loyola of Los Angeles International and Comparative Law Journal 365, 381.
[10] One example of self-help in the present context would be proactive measures taken in the pursuit of the 'inherent right' of self-defence under Article 51.
[11] Michael Reisman and Myres McDougal, 'Humanitarian Intervention to Protect the Ibos' in Richard Lillich (ed), *Humanitarian Intervention and the United Nations* (University of Virginia Press 1973), 172.
[12] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3, 32.
[13] Krylov (n 9), 382.
[14] Gregory Travalio, 'Terrorism, International Law and the Use of Military Force' (2000) 18(1) Wisconsin International Law Journal 145, 166.
[15] Henriksen and Schack (n 6), 124.
[16] Reisman and McDougal (n 11), 177.

Nevertheless, it is readily apparent that the text of Article 2(4) envisions a comprehensive ban of all types of force,[17] including those with humanitarian motivations. The preparatory work of the Charter is indicative of this approach, with the common understanding in academia that the references to 'territorial integrity' and 'political independence' were added not in order to limit the prohibition, but rather were added in an effort to strengthen it.[18] Moreover, the details of the collective security framework in the Charter make it clear that the UN Security Council (UNSC) holds the primary responsibility for the maintenance of international peace and security.[19] As such, approving the use of any armed force is its prerogative, with the inherent right of self-defence being the only exception to this, as articulated in Article 51. Therefore, UHI would clearly violate the terms of the Charter as it presently exists.

In conclusion, many advocates of UHI argue that the provisions contained in the preamble of the Charter, in addition to Articles 55 and 56, create a 'positive obligation for member states' action defending human rights.'[20]

This argument is proffered on the basis that these positive obligations would serve to empower the UN in fulfilling its central roles, including the maintenance of international peace and security per Article 1(1), and achieving 'international co-operation in solving international problems' per Article 1(3). However, a textual analysis of the Charter by this article leads to the definitive conclusion that it provides no legal basis for a freestanding right to UHI.

State practice subsequent to the Charter

State practice is crucially important in regard to treaty interpretation since it exhibits a common understanding of the relevant parties as to the meaning of the relevant instrument.[21] For present purposes, this means that a freestanding right to UHI may be

[17] Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, CUP 2017), 90.
[18] Michael Akehurst, 'Humanitarian Intervention' in Hedley Bull (ed), *Intervention in World Politics* (Clarendon Press 1986), 95.
[19] The Charter (n 2), Art 24(1).
[20] Krylov (n 9), 381.
[21] International Law Commission, 'Part II - Report of the International Law Commission on the Work of its 18th Session' (4 May - 19 July 1966) UN Doc A/6309/Rev.l, 221.

said to exist even if it was not necessarily originally conceived by the UN, if parties apply the Charter in such a manner.[22]

Those examples from the Cold War era most commonly cited in support of this legal basis are the 1971 intervention in East Bengal by India, the 1979 overthrow of the Amin Government in Uganda by Tanzania, and the Vietnamese use of force against the Pol Pot regime in Cambodia.[23] However, on closer analysis of each of these situations and the reactions of the international community thereto, it cannot be said that these occasions offer unequivocal support for the notion that a freestanding right UHI has emerged by virtue of state practice. This is true irrespective of the alleviation of civilian suffering that did occur as a result of these interventions.[24]

This is because the primary justifications made by India, Tanzania and Vietnam in support of each of their unilateral interventions did not derive from humanitarian principles, but were instead rooted in threats to national security,[25] self-defence[26] and national boundaries[27] respectively. Moreover, there was strong condemnation from the international community at the UN Level in respect of the actions of India[28] and Vietnam,[29] with the interesting exception of Tanzania.[30] It is therefore clear that the weight of Cold War-era evidence proffered in support of the view that state practice has accorded legal authority to UHI is highly tenuous and must be rebutted.

However, the end of the Cold War in 1991 brought this question back to the forefront of international diplomacy.[31] The strongest evidence of this era is Operation Allied Force - the 1999 unilateral intervention in, and bombing of, Kosovo by NATO. However, any clear legal justification for Operation Allied Force was initially absent,[32] reflecting the

[22] ibid, 236.
[23] Christopher Greenwood, 'Humanitarian Intervention: The Case of Kosovo' (1999) 10 Finnish Yearbook on International Law 141, 163.
[24] Henriksen and Schack (n 6), 134.
[25] UNSC, 'Report of the Secretary-General' (3 December 1971) UN Doc S/10410, 8.
[26] Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000), 126.
[27] UNSC, '2108th Meeting' (11 January 1979) UN Doc S/PV.2108, 12.
[28] UNGA, 'Report of the Secretary-General on the Work of the Organisation' (15 June 1972) UN Doc A/8701, 72.
[29] UNSC, '2110th Meeting' (13 January 1979) UN Doc S/PV.2110, 6.
[30] Jens Elo Rytter, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond' (2001) 70(1-2) Nordic Journal of International Law 121, 139.
[31] Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018), 34.
[32] 'Statement by the North Atlantic Council on Kosovo' (*NATO*, 30 January 1999) ‹www.nato.int/docu/pr/1999/p99-012e.htm› accessed 12 December 2018.

fundamental divisions in respect of its lawfulness.[33] Since it is inherently difficult to 'ascribe to States legal views which they do not themselves advance,'[34] it cannot simply be argued that a freestanding right of UHI has emerged in the aftermath of this Operation, as conceded by the UK[35] who had initially opined otherwise.[36]

Furthermore, state practice with respect to the most recent internationally significant conflicts, in particular Libya and Syria, is also testament to the fact that no positive trend towards a freestanding legal right of UHI has emerged in international law. Although multilateral action in Libya was authorised by the UNSC in 2011,[37] it is relevant for present purposes to appreciate that the weight of state practice, especially in non-Western nations, demonstrated steadfast opposition to the concept of intervening unilaterally for humanitarian reasons. For example, the Russian Foreign Minister, Sergey Lavrov, declared that '[f]oreign military intervention should be ruled out,'[38] while the African Union released a statement to the same effect.[39] This opposition has endured and is especially apparent with respect to the ongoing crisis in Syria - indeed, Henriksen and Schack identify various major countries that have officially expressed their opposition to UHI in Syria, including Russia, China, and India.[40]

It is in consideration of the prevalent opposition to UHI operations among many major non-Western states that this section concludes that the past and ongoing state practice does not demonstrate that a right to UHI has emerged within the framework of the UN Charter.[41]

The 'Responsibility to Protect' doctrine

[33] Gray (n 31), 50.
[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 109.
[35] Foreign Affairs Committee, *Fourth Report – Kosovo* (HC 1999-2000, 28-I), para 138.
[36] UNSC, '3988th Meeting' (24 March 1999) UN Doc S/PV.3988, 12.
[37] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.
[38] 'Russia Opposes Foreign Military Intervention in Libya' (*Sputnik News*, 12 March 2011) ‹www.sputniknews.com/russia/20110312162965407/› accessed 12 December 2018.
[39] African Union (Peace and Security Council), 'Communique of the 265th Meeting of the Peace and Security Council' (AU Addis Ababa 10 March 2011) PSC/PR/COMM.2(CCLXV), 1.
[40] Henriksen and Schack (n 6), 141-42.
[41] ibid.

There are some scholars who are of the opinion that the jus cogens, or peremptory, nature of certain norms (including the prohibition of UHI) is such that efforts to change this status quo would be virtually impossible from the outset.[42] However, this article proffers that this is not the case with respect to UHI specifically.

This is because there is nothing that would prevent the possible emergence of a 'subsequent norm of general international law having the same character'[43] vis-à-vis UHI. Indeed, only when particularly 'abhorrent practices'[44] such as 'apartheid or genocide'[45] are present could the jus cogens character of a certain norm be said to complicate any changes in the status quo.

Therefore, it can confidently be deduced that since UHI is not an abhorrent practice, it is always possible that the existing status quo surrounding it can indeed be changed. Whether it has in fact changed is the focus of the following discussion.

Although the Charter itself and state practice provide no legal basis for a freestanding right to UHI, it is always possible that any 'subsequent agreement'[46] to the Charter can emerge, so as to accord legal recognition of such a right. As Henriksen and Schack note:

> The interpretation of a treaty such as the Charter is… never frozen in time, but takes account of developments subsequent to its creation. So while it may very well be the case that humanitarian interventions were incompatible with the Charter in 1945, subsequent events may have changed that.[47]

The relevant 'subsequent agreement' for present purposes concerns the World Summit Outcome Document,[48] (hereafter 'WSOD') which officially endorsed the 'Responsibility to Protect' doctrine (hereafter 'the 'R2P' doctrine). The Millennium Report of 2000, authored by the then Secretary-General, Kofi Annan, stated that 'without protecting the

[42] Anthony D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens' (1990) 6(1) Connecticut Journal of International Law 1, 5-6.
[43] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Art 53.
[44] Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) American Journal of International Law 191, 213.
[45] ibid, 214.
[46] VCLT (n 43), Art 31(3)(a).
[47] Henriksen and Schack (n 6), 128.
[48] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 (WSOD).

vulnerable, our peace initiatives will be both fragile and illusory.'[49] In light of this report, the International Commission on Intervention and State Sovereignty (ICISS) was founded by the Canadian government in 2001, which published a document entitled 'Responsibility to Protect'[50] stating that the 'R2P' doctrine establishes a responsibility for the international community 'to react to situations of compelling need for human protection.'[51]

The WSOD leads some to argue that since it is an authoritative interpretation of, and subsequent agreement to, the Charter, there is now no longer a question of whether a state has a *right* to unilaterally intervene in another state for humanitarian reasons; on the contrary, they conclude that a *responsibility* to take such action has emerged from the agreement.[52] While the 'R2P' doctrine certainly does enjoy substantial rhetorical support, most notably from the United Kingdom,[53] this article contends that it nevertheless does not constitute a legal basis for UHI. The reason for this is that the UN framework on the use of force retains its primacy. Further, in a 2009 Report of the Secretary-General it was stated that, irrespective of any moral or legal responsibility to protect, it was imperative that any armed force stayed:

> in conformity with the provisions, purposes and principles of the Charter of the United Nations. In that regard, the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.[54]

It was hoped by the ICISS that the 'R2P' doctrine would provide a valid freestanding legal basis on which any state could unilaterally intervene in another state to halt human rights violations whenever the latter was 'unwilling or unable to do so themselves.'[55] It

[49] Report of the Secretary-General, 'We the Peoples: The Role of the United Nations in the 21st Century' (2000) UN Doc A/54/2000, 47.
[50] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (IDRC 2001).
[51] ibid, 29.
[52] Henriksen and Schack (n 6), 129.
[53] Foreign and Commonwealth Office, 'UK fully committed to implementing the Responsibility to Protect' (*UK Government*, 11 September 2013) ‹www.gov.uk/government/speeches/uk-fully-committed-to-implementing-the-responsibility-to-protect› accessed 11 December 2018.
[54] Report of the Secretary-General: Implementing the Responsibility to Protect' (2009) UN Doc A/63/677, 5.
[55] ICISS (n 50), 69.

is, however, quite clear that the crystallisation of the 'R2P' doctrine into hard law remains precarious,[56] especially in consideration of existing state practice, as outlined above. Therefore, this section concludes by asserting that the 'R2P' doctrine has not conferred legal recognition upon any freestanding right to UHI, and so it remains in 'the realm of political rhetoric.'[57]

Should a freestanding right of UHI be recognised in international law?

The *status* of the law with respect to UHI is a different question from what the law *ought to be*. This article will now go on to explain how, in consideration of the modern geopolitical landscape, *legal* recognition of this right would be a dangerous development.

The case for UHI in the modern era was made in 1948, when it was suggested that, were the preservation of human life to be impeded by the inability of the UN to act collectively, then unilateral measures would be an acceptable substitute for collective action.[58] It follows that whenever opposing interests on the UNSC render authorisation of armed force to halt human rights abuses impossible, it may be 'necessary for a state or organisation to unilaterally intervene with military force to prevent a massive loss of human life.'[59] Furthermore, while UHI is undeniably an affront to the sovereignty of a state, some advocates of granting it legal status believe that sovereignty itself can 'only be justified as long as the basic right to life is preserved.'[60] Fernando Tesón elaborates on this point, writing:

> [T]he ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists

[56] Anne Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20(3) European Journal of International Law 513, 524.
[57] Heidarali Teimouri and Surya Subedi, 'Responsibility to Protect and the International Military Intervention in Libya in International Law: What Went Wrong and What Lessons Could Be Learnt from It' (2018) 23(1) Journal of Conflict and Security Law 3.
[58] Philip Jessup, *A Modern Law of Nations* (first published 1948, Read Books 2007), 170.
[59] John Merriam, 'Kosovo and the Law of Humanitarian Intervention' (2001) 33(1) Case Western Reserve Journal of International Law 111, 115.
[60] ibid, 116.

> and so forfeits not only its domestic legitimacy, but its international legitimacy as well.[61]

While this article accepts that the moral rationale behind conferring legal recognition upon a freestanding right of UHI may be highly compelling and often unquestionable,[62] it warns that the unforeseen consequences involved in granting this recognition outweigh the potential benefits of halting egregious human rights violations. The reason for this is that any change from centralised control over decisions to use force will lead to the ability of states to independently and subjectively assess the moral justifications for unilateral intervention. This would be an undesirable change because, while such assessments would ideally be characterised entirely by genuine benevolence and concern for the human rights violations in the target state, and in no way motivated by vested interests such as political or foreign policy objectives, the unfortunate reality is that such a right would be highly susceptible to exploitation by opportunistic parties. Its recognition would open the possibility for manipulation by states to use it as a tool for interfering in the affairs of their (likely less powerful) neighbours.[63]

A recent illustration of illegal state behaviour that was ostensibly motivated by humanitarian considerations is the occupation and annexation of the Crimean Peninsula by Russia in 2014. At the height of civil unrest in Ukraine at the time, coupled with the overthrow of the pro-Russian President Viktor Yanukovych, Russian President Vladimir Putin asserted that:

> those who opposed the coup were immediately threatened with repression. Naturally, the first in line here was Crimea… In view of this, the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives.[64]

---

[61] Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, Transnational Publishers 1997), 15-16.
[62] Merriam (n 59), 116.
[63] Chris O'Meara, 'Should International Law Recognise a Right of Humanitarian Intervention?' (2017) 66(2) International and Comparative Law Quarterly 441, 464.
[64] Vladimir Putin, 'Address by the President of the Russian Federation' (*President of Russia*, 18 March 2014) ‹en.kremlin.ru/events/president/news/20603› accessed 2 January 2019.

Although President Putin advocated for the defence of Russians in Crimea, even drawing on the alleged precedent set by Operation Allied Force in so doing,[65] it is quite readily apparent that he exploited the doctrine of humanitarian intervention for his own political purposes by annexing Crimea,[66] since the consequences of this action naturally entailed enthusiastic approval from Russian nationalists.[67]

Although advocates of a right to UHI may consider that some cases of human rights violations are so morally compelling that the necessity of intervening to halt such violations would be overwhelmingly recognised by states,[68] this article submits that actions such as those of Russia in Crimea exemplify the dangerous potential consequences of permitting states to decide when and how to use force on their own terms.[69] Moreover, as Reeves noted in reference to the annexation of the Sudetenland region of Czechoslovakia by Nazi Germany in 1938, false arguments about the moral righteousness of an intervention for humanitarian purposes, in combination with the prerogative to threaten or wage war, was one of the main reasons for prohibition of unilateral armed force by states contained in the UN Charter in the first place.[70]

In consideration of this analysis, the perilous consequences which legal recognition of a freestanding right of UHI may lead to renders any such recognition an undesirable change to the international legal system, and such a change should therefore not occur.

[65] 'Transcript: Putin defends Russian Intervention in Ukraine' *Washington Post* (Washington, 4 March 2014) ‹www.washingtonpost.com/gdpr-consent/?destination=%2fworld%2ftranscript-putin-defends-russian-intervention-in-ukraine%2f2014%2f03%2f04%2f9cadcd1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html%3f› accessed 2 January 2019.
[66] Shane Reeves, 'To Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened the Door for an Invasion of the Ukraine' (2014) 23(1) Michigan State International Law Review 199, 227.
[67] Pål Kolstø, 'Crimea vs. Donbas: How Putin Won Russian Nationalist Support—and Lost it Again' (2016) 75(3) Slavic Review 702.
[68] Reeves (n 66), 226.
[69] ibid, 227.
[70] ibid, 226.

Conclusion

With regard to the two express exceptions of authorisation from the UNSC[71] and the inherent right of self-defence,[72] the prohibition of the use of force under Article 2(4) of the UN Charter is absolute, and so any use of force occurring outside of these parameters is without legal authority. It is therefore clear that UHI is prohibited under the Charter. It has also been shown by this article that since the Charter is not 'frozen in time';[73] state practice and agreements subsequent to its 1945 inauguration (especially the emergence of the 'R2P' theory) are factors that have afforded states some room to posit that UHI could be validly authorised. However, in balanced consideration of both historical and current affairs, it is quite apparent that state practice in the contemporary world is indicative of resolute and enduring opposition to the emergence of a legal right of unilateral intervention on humanitarian grounds, and thus a legal basis cannot be said to exist in light of this.

Independent of the legal status of UHI, this article accepts that its moral rationale is highly compelling; the right of people not to be killed or persecuted should not be contingent upon 'whether the state of which they are citizens is in a position to protect them, wants to protect them, or is itself the source of the danger.'[74] Indeed, Thomas Franck and Nigel Rodley postulate that the concept of UHI 'belongs in the realm not of law but of moral choice, which nations, like individuals, must sometimes make.'[75] However, it has been shown by this article that any unilateral decision to launch a humanitarian mission would, perhaps counterintuitively, pose a serious threat to international peace and security[76] by reason of the fact that any freestanding legal right of UHI may serve as a façade, masking unlawful and aggressive behaviour,[77] with the Russian annexation of Crimea being a pertinent case in point.

[71] The Charter (n 2), Art 24(1).
[72] ibid, Art 51.
[73] Henriksen and Schack (n 6), 128.
[74] Malvina Halberstam, 'The Legality of Humanitarian Intervention' (1995) 3(1) Cardozo Journal of International and Comparative Law 1, 2.
[75] Thomas Franck and Nigel Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67(2) American Journal of International Law 275, 304.
[76] O'Meara (n 63), 446.
[77] ibid, 465.

Therefore, it is concluded that while a lawful use of force may be motivated by humanitarian considerations, the status of international law is such that it does not recognise a freestanding right of UHI. Furthermore, the geopolitical landscape of the contemporary world is such that conferring international legal recognition upon a freestanding right of UHI is fraught with peril, and thus should be avoided.

Between Artificiality and Malleability: Can an 'Inherent' Right to Self-Defence Harmoniously Co-exist with an Absolute Prohibition against the Use of Force?

Thomas Jenkins

Abstract

It may be argued that, in such a politically fractured world, it has never been so important for the global community to have access to a crystalized and codified body of rules dictating the parameters of the use of military force (the jus ad bellum). However, it may simultaneously be suggested that the prohibition against the use of force is becoming increasingly unstable and incoherent. Although to some extent paradoxical, it may be argued that Article 2(4) of the United Nations Charter sits both ambiguously and supremely at the nucleus of the jus ad bellum. Whilst historically considered the cornerstone of a universally recognised prohibition against the use of force, this paper will isolate Article 2(4) from within the overarching framework of the jus ad bellum, offsetting it against the inherent right to self-defence which is prescribed within the same Treaty. By juxtaposing Article 2(4) with Article 51 of the United Nations Charter, this paper will critically demonstrate that Article 2(4) merely prescribes an artificial law against war, as Article 2(4) is moulded by the legal and political manipulation of Article 51. This paper will highlight the necessity of re-formulating and re-defining Article 2(4).

Introduction

An uncomfortable tension festers at the crux of the United Nations (UN) Charter. The awkward interaction between Article 2(4),[1] the overarching international legal framework and the politics which lace the UN Security Council injects malleability and instability into the prohibition against the use of force. Whilst exploring the relationship between Article 2(4) and Article 51, this paper will also reflect upon the ramifications which this relationship has for the concept of formal equality within the framework of the UN Charter. This paper will demonstrate that Article 2(4) is merely a tokenistic provision. Subsequently, this paper will also demonstrate that the UN Charter does not, in isolation, prescribe an absolute prohibition against the use of force. Although the legal landscape dictating the prohibition against the use of force extends beyond the UN Charter, throughout this paper Article 2(4) and Article 51 of the UN Charter will provide the telescope for scrutinising the lacunas and the pockets of tension which litter the *jus ad bellum*. The author will frame his argument through the principles of artificiality, formal equality and justice. The author will also dissect facets of the UN Charter whilst simultaneously reflecting upon the legal and political tension which lurks beneath the UN Charter.

Article 2(4) of the UN Charter: An Artificial Central Organising Provision

It may be argued that Article 2(4)[2] constitutes an overarching and multi-faceted framework which prescribes a broad prohibition against the use of force within the sphere of international law. The provision is erected upon a foundation which is provided by the concepts of "territorial integrity"[3] and "political independence".[4] When considered in confluence with Article 2(1) of the UN Charter, it is clear that state sovereignty sits comfortably and supremely at the crux of Article 2(4). Whilst this

[1] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI
[2] UN Charter (n 1)
[3] Ibid, art 2(4)
[4] Ibid

reflects overtones of equality, the International Court of Justice (ICJ)[5] has affirmed the significance which the provision attributes to sovereign equality by positioning Article 2(4)[6] at the apex of the international legal framework. Through the vehicle of the *Nicaragua* case, the ICJ tacitly recognises Article 2(4)[7] as a norm of jus cogens,[8] which is significant because it implies that a prohibition against the use of force exists concurrently and supremely within the realms of Treaty law, and customary international law.[9]

Doctrinally, it is universally recognised that norms of jus cogens[10] are absolute and supreme. However, the doctrine is widely criticised. Their definition is fragmented and multi-layered. Whilst Article 53 of the Vienna Convention (VCLT) reflects a regime of partial conventional codification,[11] Orakhelashvili outlines a critical and theoretical definition of jus cogens which alludes to the interaction between natural law and legal positivism,[12] whilst simultaneously highlighting the significance of non-derogation.

Placing the abstract definition of norms of jus cogens into the context of the use of force, Judge Elaraby suggests that a jus cogens norm is "a peremptory norm from which no derogation is permitted".[13] The reconcilable thread of consistency underpinning the acutely distinguishable variations of these definitions of jus cogens is the idea of 'non-derogation'. Significantly, labelling Article 2(4)[14] a norm of jus cogens would therefore imply that the prohibition against the use of force is absolute.

However, consistent with Butchard's argument that "the prohibition of force is not a blanket ban on force",[15] it may be argued that Article 2(4)[16] does not inherently constitute a norm of jus cogens. This is because, significantly, the UN Charter is littered with legal

[5] *Nicaragua Case* (Merits) [1986] I.C.J. Rep 14, 190
[6] UN Charter (n 1)
[7] UN Charter (n 1)
[8] United Nations, Statute of the International Court of Justice, 18 April 1946, 15 UNICO 355, art 38 (1) (c)
[9] United Nations, Statute of the International Court of Justice, 18 April 1946, 15 UNICO 355, art 38 (1) (b)
[10] United Nations (n 8)
[11] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331
[12] Alexander Orakhelashvili, Peremptory Norms in International Law (1st edn, OUP 2008) 37 - 45
[13] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] I.C.J. 136, 254 (Separate Opinion of Judge Elaraby)
[14] UN Charter (n 1)
[15] Patrick M. Butchard, 'Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter' (2018) 23 (2) Journal of Conflict & Security Law 229 - 267, 246
[16] UN Charter (n 1)

qualifications which amount to exceptions to the prohibition against the use of force. Whilst this reflects a jarring clash against the concept of non-derogation, the exceptions to Article 2(4)[17] are also palpable within the nebulous organism of customary international law.[18] It may be argued that the tension which this grappling creates is perpetuated by the "ambiguity and mystery"[19] which surround the provision. Significantly, it may be argued that the "ambiguities and complexities"[20] which skirt around the "misleadingly simple"[21] provision exacerbate the tensions which fester beneath the viability and efficacy of Article 2(4).[22] Despite Henkin suggesting that Article 2(4)'s[23] death certificate has been ascribed prematurely,[24] it may be argued that Franck[25] provides a more compelling assessment of the relationship between Article 2(4)[26] and the prohibition against the use of force. Congruent with Franck's argument,[27] it may be argued that Article 2(4)[28] has been rendered partially obsolete by Article 51.[29]

Article 51: An Inherent Right To Self Defence?

It may be argued that the semantic construction of Article 51[30] provides an explicit exception to the *jus ad bellum*. Whilst the Security Council interact with, and constrain, the "inherent right of individual or collective self-defence",[31] Franck argues that "the operation of Article 51 is effectively and dangerously unlimited",[32] as the definition of self-defence is susceptible to manipulation. Professor Glennon compounds this idea by

[17] Ibid
[18] United Nations (n 9)
[19] Butchard (n 15), 229
[20] Thomas M Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809 - 837, 822
[21] Ibid
[22] UN Charter (n 1)
[23] Ibid
[24] Louis Henkin, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated' (1971) 65(3) AJIL 544 - 548, 544
[25] Franck (n 20)
[26] UN Charter (n 1)
[27] Franck (n 20), 811
[28] UN Charter (n 1)
[29] Ibid
[30] Ibid
[31] Ibid, art 51
[32] Franck (n 20)

highlighting that "what is self-defence to one state is aggression, armed reprisal, armed attack, intervention, or forcible countermeasures to another".[33]

In in the absence of "a system for objective fact finding",[34] it may be argued that there is scope for politicisation to cut through the right to self-defence and distort the paradigm which lies beneath Article 51.[35] In other words, it may be argued that political factors partially mould and shape the operation of the right to self-defence. This is an idea which is neatly synthesised by Franck, who argues that "self-defence remains a convenient shield for self-serving and aggressive conduct".[36] It may be argued that there are undercurrents of Franck's argument in the Security Council Resolution[37] which authorized the use of force exerted by the US against Afghanistan following 9/11. Resolution 1368 is unsatisfactorily and ambiguously worded. The Resolution refers to the unequivocal condemnation of "horrifying terrorist attacks",[38] whilst merely referring to self-defence once. The Resolution also re-affirms the inherence which underpins Article 51.[39] It also fails to mention or isolate a state. Afghanistan is not mentioned at all.

As noted by Orebech, "terrorist attack is not a widely recognized and well-defined concept of war. In international law, only an 'armed attack' triggers the right of self-defence".[40] When considering from a contemporary perspective the absence of a rigid legal definition of 'terrorist attack', as Orebrech also recognises, it is clear that "political reasons"[41] plugged the gaps in the legally deficient US justification for exercising force against Afghanistan. Orebrech's argument may be aligned with Stahn's suggestion that "military force is exercised in a grey area situated somewhere in between Chapter VII and Article 51".[42]

[33] MJ Glennon, 'The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2002) 25 Harv JL & Pub Poly 539, 541
[34] Franck (n 20)
[35] UN Charter (n 1), art 51
[36] Franck (n 20)
[37] UN Security Council, Security Council resolution 1368 (2001) 12 September 2001, S/RES/1368 (2001)
[38] Ibid, paragraph 1
[39] UN Charter (n 1)
[40] Peter Orebech, 'UN Charter Article 51 and the Right to 'Anticipatory Self-defense': Validity of the US Preventive War Doctrine against Al Qaeda' (2014) 23 Middle East Critique 53 – 72, 70
[41] Ibid, 71
[42] Carsten Stahn, 'Terrorist Acts as Armed Attack: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism' (2003) 27 Fletcher F. World Aff 35 – 54, 40

It may be argued that Article 51's blurry boundary is demonstrated by Resolution 1368.[43] Although ambiguity skirted around contemporary legal understandings of the concept of terrorism, particularly from the perspective of attribution, as the concept was being dynamically re-shaped by the sheer scale, directness and methodologies which underpinned the attacks which civilian and western societies were being increasingly subjected to, the Resolution explicitly re-affirmed the inherent nature of self-defence within the context of terrorism. As recognised by Rostow, the Resolution "implied that the attacks triggered the right even if, at the time of adoption, the UN Security Council knew almost nothing about who or what had launched them".[44]

Significantly however, Dill argues that the intrinsic stability of morality provides a consistent and rigid "standard by which to judge law".[45] When offsetting Franck's interpretation of Article 51[46] against Dill's conception of the significance of the interaction between morality and the law, despite Kelsen's argument that Article 51[47] derives from and is underpinned by natural law,[48] it may be argued that Article 51[49] is an unscrupulous and politically malleable provision which grapples with the moral basis upon which Article 2(4)[50] is predicated. The tension between Article 51[51] and Article 2(4)[52] is underlined by an inconsistent respect for the concept of state sovereignty. Article 51's[53] prescription of an inherent right to self-defence is underpinned by the significance which is attached to protecting and maintaining sovereignty. Article 2(4)[54] attributes concurrent supremacy to the concepts of equality and sovereignty. However, although both provisions are underlined by achieving equality, it may be argued that Article 51's[55] inherence[56] reflects a lacuna within the prohibition against the use of force.

[43] UN Security Council (n 37)
[44] Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism Since September 11th' (2002) 35 Cornell int'l L.J 475 – 490, 481
[45] Janina Dill, 'Should International Law Ensure The Moral Acceptability of War?' (2013) LJIL 253 - 269, 266
[46] UN Charter (n 1)
[47] Ibid
[48] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens 1950) 791
[49] UN Charter (n 1)
[50] UN Charter (n 1)
[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid
[55] Ibid
[56] Ibid, art 51

There is an uncomfortable tension between qualifying unilateral uses of force upon the basis of self-interest through the vehicle of Article 51,[57] and the sheer supremacy which Article 2(4)[58] allocates to equality and state sovereignty. The tension which lurks beneath this contrast is considerably exacerbated by the centrality of political interaction within the regulation of Article 51.[59] When examining the prohibition against the use of force through a prism of the inherence which characterises Article 51,[60] and offsetting it against it's scope for political manipulation, consistent with the ideas of Green, it may be argued that the "prohibition of the use of force is a rule from which derogation is *explicitly* and *uncontrovertibly* permitted".[61]

The concepts of proportionality and necessity constitute two customary legal instruments which operate in confluence to negate and balance this tension. By expounding a quasi-threshold which defines the parameters of using 'force', these facets of the international legal framework reflect additional mechanisms which guide and control the contexts within which Article 51[62] may undermine Article 2(4).[63] However, emerging customary trends are partially eroding and grating against the efficacy of these established customary and regulatory prongs. When considering the breadth of Article 51 through the lens of anticipatory self-defence and pre-emptive self-defence, custom has, to some extent, began to extend Article 51.[64]

Consistent with the inherence which underpins Article 51,[65] Corten notes that "states have implicitly reserved the hypothesis of preventive self-defence".[66] Furthermore, arising out of the context of the Caroline case study, Daniel Webster[67] prescribes an overarching criteria which harmoniously subsumes anticipatory self-defence into Article 51.[68] Webster's criteria is constructed upon a basis comprised by immediacy, gravity and

[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid
[61] James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 Michigan Journal of International Law. 215 – 257, 229 (emphasis added)
[62] UN Charter (n 1)
[63] Ibid
[64] Ibid
[65] Ibid
[66] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 412
[67] United States Secretary of State Daniel Webster, letter dated 24 April
[68] UN Charter (n 1)

necessity. A number of significant actors upon the international legal platform endorse widening the scope of Article 51. For example, Gray recognises that the UK "supports anticipatory self-defence".[69]

The difficulty of codifying and reconciling state practice and *opinio juris* to clearly identify an established rule of customary international law provides scope for acutely contrasting interpretations of customary international legal rules to manifest. Accordingly, an interpretation of pre-emptive self-defence from the perspective of customary international law sits at the nucleus of the contention which surrounds Article 51.[70]

The concept of pre-emptive self-defence derives from President Bush's refusal to procure a "permission slip"[71] from the UN to exercise force. The concept has been coined the 'Bush doctrine'. As noted by Gray, "Israel have openly supported pre-emptive self-defence".[72] However, the Non Aligned Movement have provided resistance to the emergence of an increasingly expansive interpretation of Article 51 of the UN Charter.[73] This reflects the grappling between powerful states, less powerful states and the boundaries which dictate the parameters of the prohibition against the use of force. It also reflects the subjectivity which underpins the concepts of justice and equality.

Forst describes the concept of justice as "a diamond that shines in different colours depending on the plurality of comprehensive views directed at it".[74] However, significantly, he highlights that "its intrinsic worth does not depend on the light shone on it by the comprehensive views".[75] Forst arguably strips back the concept of justice to highlight an objective concept. Forst's argument can be reconciled with Rawls' Veil of Ignorance.[76] Rawls recognises the relationship between justice, equality and subjectivity. His Veil of Ignorance suggests that diluting the significance of socioeconomic status within society would manufacture an objective, universally applicable standard of

[69] Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) ICLQ 157 - 170, 161
[70] UN Charter (n 1)
[71] State of the Union Address, 20 Jan 2004, ‹http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html›
[72] Gray (n 69)
[73] Ibid, 163
[74] Rainer Forst, 'Political Liberalism: A Kantian View' (2017) 128 (1) Ethics An International Journal of Social, Political, and Legal Philosophy 123 - 144, 143
[75] Ibid
[76] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 137

equality. However Rawls' Veil of Ignorance is inherently flawed. It assumes a consistent and universally applicable societal moral compass. Potanah argues that "such an abstract idea of justice is not particularly useful in addressing real-world inequality".[77] The clash between subjectivity and objectivity as it pertains to equality and justice aligns itself with the clash between Article 51,[78] and the *jus ad bellum*.

Pursuant to the aforementioned catalogue of international responses to increasingly expansive interpretations of Article 51,[79] it may be argued that the relationship between customary international law and Article 51[80] is becoming increasingly uncertain. It may be argued that the willingness of 'powerful' states to stretch and manipulate the definition of "inherent"[81] reflects an awkward clash with Article 2(4)'s[82] characterisation and status as a norm of jus cogens. Article 53 Vienna Convention on the Law of Treaties tacitly acknowledges that the definition jus cogens norms turn upon an axis which is constructed by universal acceptance and recognition of the principle of non-derogation. However, whilst Article 51[83] may be interpreted as a mere exception to Article 2(4)[84] as opposed to an inherent derogation, it may be argued that as interpretations of Article 51[85] are being increasingly stretched by actors within the international community, that simultaneously, the gaps which lace the prohibition against the use of force are also being stretched. In turn, if Article 51[86] is interpreted as a mere exception to Article 2(4),[87] it may be queried, at what point does an exception become a derogation? When considering the increasingly expansive and elastic nature of interpretations of Article 51,[88] in confluence with the sheer scope which the provision subliminally prescribes to political manipulation, the author submits that Article 51[89] is being rendered increasingly awkward to reconcile and re-align with the concept of non-derogation. The author

[77] Annabelle Potanah, 'Rawls' Justice as Fairness: Should We Run a State by It' (2016) 5 Manchester Review of Law, Crime and Ethics 120 - 128, 124
[78] UN Charter (n 1)
[79] Ibid
[80] Ibid
[81] UN Charter (n 1), art. 51
[82] UN Charter (n 1)
[83] Ibid
[84] Ibid
[85] Ibid
[86] Ibid
[87] Ibid
[88] Ibid
[89] Ibid

submits that the significance of the nuanced distinction between the composition of an exception and a derogation, further crystalizes the artificiality which laces the UN Charter's prohibition against the use of force.

It may be argued that the relationship between Article 2(4)[90] and Article 51[91] operates upon a continuum which is underpinned by the subjectivity of justice, equality and political interaction. Considered through Fuller's lens,[92] it may be argued that the *de lege ferenda* demands that the primacy of justice and equality be elevated, as this would create an increasingly respected legal landscape, by negating the UN Charter's susceptibility to manipulation. Namely, the law as it *should be*, demands an increased harmonisation between the concepts of self-defence and non-derogation.

Article 18 VCLT: An Enigmatic Instrument of Interpretation

Furthermore, it may be argued that the "enigmatic"[93] Article 18 VCLT[94] creates an additional layer of tension and complexity between Article 2(4) and Article 51, of the UN Charter. Article 18 VCLT[95] attributes primacy to the overarching objective of Treaties, by codifying a purposive approach to Treaty provision interpretation.[96] It provides a vehicle, and a tool of navigation, in relation to the interpretation of Treaty provisions. By placing Article 18[97] into the context of the international legal framework, Charme neatly synthesises the significance of Article 18 VCLT, highlighting that "the flexible and resilient nature of the international legal system, coupled with its normative underpinnings, promotes, to the greatest extent possible, realization of the true intent and purpose of article 18 of the Vienna Convention on the Law of Treaties".[98]

[90] Ibid
[91] Ibid
[92] Pavlos Eleftheriadis, 'Legality and Reciprocity: A Discussion of Lon Fuller's The Morality of Law' (2014) 10 (1) Jerusalem Review of Legal Studies 1 - 174
[93] Joni S. Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo. Wash. J. Int'l L. & Econ. 71 - 114, 73
[94] Vienna Convention (n 11)
[95] Ibid
[96] Charme (n 93), 77
[97] Vienna Convention (n 11)
[98] Charme (n 93), 114

Offsetting Article 18 VCLT against Article 1(1) of the UN Charter, which determines that the purpose of the UN Charter is to "maintain international peace and security", it is clear that a purposive interpretation of the relationship between Article 2(4)[99] and Article 51[100] checks and restrains arbitrary and increasingly expansive interpretations of the inherence which defines Article 51.[101] A purposive reading of the UN Charter's prohibition against the use of force, pursuant to Article 18 VCLT, aligns Article 51[102] with a "restrictive"[103] interpretation of a right to self-defence.

However, as recognised by Baker, it may be argued that the emergence of "low-intensity warfare",[104] a new strain of warfare which "does not readily lend itself to the international law terms of the UN Charter",[105] provides a foundation upon which an expansive interpretation of Article 51[106] may be predicated. It may be argued that the evolution of contemporary warfare is warping interpretations of the central, organising terminology of Article 51, namely "inherent"[107] and "armed-attack".[108] Placed into the context of drone and cyber warfare, it may be argued that the threshold which underpins Article 51[109] is in urgent need of reconstruction.

Advocating an expansive interpretation of Article 51, Baker concludes that "a broadened interpretation of Article 51 should not be condemned simply because it gives more power to nations who have the potential to abuse that power. The threat posed by low-intensity warfare is certainly legitimate and is a formidable menace that must recognized".[110] Whilst the author partially concurs with Baker, it cannot be disputed that Article 2(4)'s[111] artificial prohibition against the use of force is being rendered increasingly obsolete and out-dated.

---

[99] UN Charter (n 1)
[100] UN Charter (n 1)
[101] Ibid
[102] Ibid
[103] Norman Menachem Feder, 'Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack' (1987) 19 N.Y.U. J. INT'L L. & POL. 395, 404
[104] Stuart G. Baker, 'Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51' (1994) 24 Ga. J. Int'l & Comp. L. 99 – 116, 108
[105] Ibid, 108
[106] UN Charter (n 1)
[107] Ibid, art 51
[108] Ibid
[109] UN Charter (n 1)
[110] Baker (n 104), 116
[111] UN Charter (n 1)

Conclusion: What Next?

It may be argued that the grappling between Article 2(4)[112] and Article 51[113] manifests itself in an artificial prohibition against the use of force. Whilst Green argues that "the fact that the prohibition of the use of force has agreed exceptions does not necessarily bar the norm from peremptory status as long as one is willing to see the rule in more expansive terms than it appears in Article 2(4)",[114] the author suggests that in order to reconcile Article 2(4)[115] with the principle of non-derogation, Article 2(4) must be significantly reinterpreted. It may be argued that extending Article 2(4)[116] to such an extent compounds the artificial characterisation of the UN Charter's prohibition against the use of force.

Whilst explicitly reflected by the sheer number of wars which taint the historical development of attempts to construct and enforce a *jus ad bellum*, from a contemporary perspective, it may be argued that Article 2(4)[117] is merely a tokenistic and symbolic formulation of a prohibition against the use of force. The tension which laces the UN Charter is politically manipulated, as powerful states pick holes in the prohibition against the use of force.

[112] UN Charter (n 1)
[113] Ibid
[114] Green (n 61), 230
[115] UN Charter (n 1)
[116] Ibid
[117] Ibid

Absolute supremacy in an evolving European Union: possible reconciliation of Member State conflict with a retreat from CJEU orthodoxy

Ronan Cain

Abstract

This article discusses the principle of supremacy of EU law over conflicting legislation in national legal orders of Member States. The article discusses the conflicting views of the principle of supremacy of the Court of Justice of the European Union and Member States, with the former viewing the principle as absolute and a number of Member States preferring an approach that maximises their sovereignty. The discussion focuses first on the principle at Union level, then on three individual Member States and the approach taken in each legal order, covering possible alternative views of the principle as suggested by various commentators, and examining how the differing approaches at Union and domestic levels can be reconciled. The United Kingdom's withdrawal from the EU shall also be discussed in relation to the principle of supremacy, with particular focus on the orthodox view of the CJEU which, arguably, helped fuel the argument to leave, heightening political tensions.

Introduction

The doctrine of supremacy is one of the four pillars of decentralised enforcement of European Union law, ensuring enforcement and uniform application of Union law in Member States. The doctrine was recognised by the Court of Justice in *Costa v ENEL*, a landmark ruling which has really (re)shaped the legal order of the European Union, the

significance of which is still seen today. In this case, the Court stated that *'the Member States have limited their sovereign rights... and have thus created a body of law which binds both their nationals and themselves... the law stemming from the Treaty... could not... be overridden by domestic legal provisions.'*[1] The full implications were clarified in *Simmenthal*: supremacy renders automatically inapplicable any conflicting provisions of national law and precludes the adoption of new, incompatible national legislative measures.[2] There is an obligation on national courts to set aside conflicting provisions of national law,[3] but disapplication of incompatible national rules does not imply their validity nor their disapplication in situations falling outside the scope of Union law.[4] Although the Court of Justice takes the idealistic view of a concession of sovereignty from the Member States according complete supremacy of Union law, in reality this is not the case. There are limits at both Union and national levels, and theoretical limits even in Member States where supremacy is absolutely observed. Furthermore, the ability of Member States to withdraw from the Union prevents the principle of supremacy from being absolute, as demonstrated by the clear statements from some national constitutional courts, indicating their retention of sovereignty, and reinforced further by the recent decision of the United Kingdom to withdraw from the EU. However, these limits do not prevent the enforcement and uniform application of Union law – it may instead be necessary to create a dialogue between the Court of Justice and the Constitutional Courts of the Member States in order to provide legislation that effectively protects the rights of all Union citizens.

Dougan's Competing Visions of Supremacy

Academic commentators have proposed alternative views of the doctrine of supremacy. One prime example is Dougan, who presents two competing visions for the principle of supremacy in his article: the 'primacy' model and the 'trigger' model.[5] The 'primacy'

[1] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585 P.3
[2] Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629 P.17
[3] *Ibid*, [21]
[4] Cases C-10/97 and C-22/97 *Ministero delle Finanze v INCOGE* [1998] ECR I-6307
[5] Michael Dougan, *'When Worlds Collide: Competing Visions of the Relationship Between Direct Effect and Supremacy'* (2007) Common Market Law Review 44

model regards supremacy as a 'constitutional fundamental'. It dictates that supremacy is capable, in and of itself, of creating 'exclusionary effects' within national legal orders – the setting aside of conflicting provisions of national rules in favour of Union law. This model thus creates a view of absolute supremacy, providing the CJEU complete authority for the judicial review of the validity of national law in any area of conflict. In an alternative view, the 'trigger' model is the use of the doctrine of supremacy as a remedy to be employed in national courts in the event of conflicting provisions of domestic and Union law, rather than a constitutional fundamental principle. This model adopts the fundamental assumption that the Union and national orders retain their identity as separate legal systems, seeking to reconcile them via this adaption of supremacy as a remedial action for domestic legal orders.[6] These contrasting models will be used to gauge the differing viewpoints of the Court of Justice and Member States on the principle of supremacy. By viewing the distinct viewpoints through these models, it is easier to examine where the conflict lies regarding the principle of supremacy, and how this conflict could either be reconciled or, failing this, which model should take precedence over the other to create a more harmonised employment of Union law.

Supremacy as Viewed by the Court of Justice

The Court of Justice takes the rather extreme view that '*The transfer by the states... carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.*'[7] Coupled with *Simmenthal* this implies absolute supremacy, requiring national courts to fully accept and adhere to the outright supremacy of Union law, with supremacy over all conflicting types of national law; the type of national provision which conflicts is irrelevant.[8] The CJEU's view is that a new legal order has been created and that Union law is entirely supreme over the national law of Member States as they have surrendered a portion of their sovereignty. However, this could be considered somewhat idealistic – the Member States designated

[6] *Ibid*, [931-963]
[7] *Costa* (n 621)
[8] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; C-224/97 *Erich Ciola v Land Vorarlberg* [1999] ECR I-2517

power to the European Union, therefore it follows that they retain discretion of some form.[9] Many Member States maintain that they are sovereign, hence are capable of rejecting supremacy if it conflicts with fundamental principles. The CJEU maintains its belief that the principle is absolute, hence making it clear that the Court views supremacy as a 'constitutional fundamental' of the EU, permeating all relations between national and Union law – described by Dougan as a 'primacy model'.[10]

Despite the strict view of the CJEU, the Court has placed limits to the doctrine at Union level, thus rendering it impossible for it to be absolute. A conflicting primary rule of EU law must be balanced against the doctrine of supremacy, and a persisting example of such a limitation has been the general principle of legal certainty. Sowery suggests that *Association France Environment* is an example of the CJEU being willing to (temporarily) authorise limitations to the enforcement of Union law where the interests in tension are two general Union principles.[11] Sowery argues that by exploring the relationship between supremacy and other values the EU has interest in protecting, the Court confirms there is a possibility for national courts to moderate the application of supremacy in specific cases, which would prevent the principle of supremacy from being absolute. Similarly, in *Asda Stores* the general principle of legal certainty prevailed over supremacy because the Union law concerned did not provide that those subject to it knew the exact extent of their obligations,[12] which demonstrated a clear limitation on the doctrine of supremacy. The doctrine is still effective in the enforcement of Union law as the court did not disregard supremacy – it merely made clear that a balance had to be found between supremacy and other primary general principles of Union law. It could therefore be possible to consider the doctrine of supremacy not as a 'primacy model', as the strict interpretation of the CJEU would imply, but as a 'trigger model', using supremacy as a remedy to be administered by the domestic courts in the resolution of disputes involving Union law.[13] This would accommodate the necessary limitations of

[9] This is the 'Master of the Treaties' argument, defended by commentators such as De Witte. See: Bruno De Witte, *'Direct Effect, Primacy and the Nature of the Legal Order'* in P Craig and G De Búrca (eds), *'The Evolution of EU Law'* (2011) 2nd Edition, Oxford University Press 323-362

[10] *MD* (n 625) [932]

[11] Kate Sowery, *'Reconciling primacy and environmental protection: Association France Nature Environment'* (2017) Common Market Law Review 54, 1157-1178

[12] Case C-108/01 *Asda Stores* [2003] ECR I-5121

[13] *MD* (n 625) [934]

supremacy regarding other general principles of Union law, whilst still ensuring the uniform application of Union law in the event of conflict with domestic legislation, despite the doctrine not being absolute.

Supremacy in Italy

Italy has conditionally accepted the supremacy of Union law (with some strong limits), despite doing so through a different theory to that of the CJEU. Whilst the CJEU and many Member States follow a monist tradition, Italy, like Germany,[14] takes a dualist view of the relationship with Union law (as the dualist tradition is embedded within constitutional law in those countries), considering the two legal systems as separate autonomous bodies.[15] Due to Italy's interpretation of the Treaties through the Constitution, Italy's Constitutional Court initially demanded that it be the sole power for declaring national law unconstitutional in order to instead apply Union law.[16] However, in the case of *Simmenthal* the CJEU viewed the Constitutional Court's position as a 'procedural bottleneck' blocking effective application of Union law,[17] and in the subsequent case of *Granital* the Italian Constitutional Court determined that questions regarding the applicability of Union law did not require reference to the Constitutional Court and ordinary courts could employ Union law over national law.[18] This clearly respects the doctrine of supremacy and demonstrates that although the doctrine may not be absolute in theory, in practice it has been applied in a capacity that ensures the uniform application and enforcement of Union law. Union law is applied because the Constitutional Court has interpreted constitutional principles as indicative that the Italian legal order does not impede application of Union law, not because Italian domestic law is subordinate to that of the Union.[19] Despite this, it is foreseeable that if the EU were to pass legislation that directly conflicted with fundamental rights

[14] Andreas Greifeld, *Requirements of the German Constitution for the Installation of Supranational Authority*' (1983) 20 Common Market Law Review 87
[15] Antonio La Pergola and Patrick Del Duca, '*Community Law, International Law and the Italian Constitution*' (1985) The American Journal of Law Vol.79 No.3 598-621, at 601
[16] *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372
[17] *Simmenthal* (n 622)
[18] *Granital S.p.A. v Amministrazione delle Finanze dello Stato* [1984] 21 CMLR 756
[19] *AP, PD* (n 635) [615]

contained in the Italian constitution, the Italian Constitutional Court could still exercise their discretion and declare such legislation unconstitutional. One could thus argue that potential future conflict cannot be precluded, and the doctrine cannot be viewed as entirely absolute as it is still possible in theory for it to be violated or limited.

Supremacy in Germany

In the cases of *Solange I* and *Solange II* the German Federal Constitutional Court determined that in the event of conflict between Community law and fundamental rights contained within the German constitution the national rule would prevail,[20] unless the law ensures a genuine protection of fundamental human rights that is substantially similar to the level guaranteed under German law.[21] *Brunner* confirmed that the supremacy of Union law within the German legal system is not absolute: the European Union and CJEU remain subordinate to the German constitution. Supremacy of Union law is only accepted because Germany, as a sovereign state, has allowed it to be supreme.[22] The doctrine of supremacy is clearly not absolute, yet the enforcement of Union law is still effective, therefore the Court is perhaps using reasoning based on the 'trigger' model suggested by Dougan in order to resolve conflicts, rather than using supremacy as the fundamental principle.[23] In *Bananas* the Court reserved for itself the right to ensure the EU neither abuses the limits of its own competencies, nor exercises those powers in a way that compromises the fundamental constitutional identity of the German state, outlining the concept of kompetenz-kompetenz.[24] The Court could be attempting to establish a proportionate balance between fundamental constitutional rights and supremacy – although the principle may not be absolute, the Court is still employing sincere co-operation[25] to ensure effective enforcement. However, in *Honeywell*, the German Court argued that competencies of EU institutions were dependent upon conferral by the Member States, therefore it should retain control to review *ultra vires*

[20] *Solange I* [1974] 2 CMLR 540
[21] *Solange II* [1987] 3 CMLR 225
[22] *Brunner* [1994] 1 CMLR 57
[23] *MD* (n 625) [934]
[24] *Bananas* (2000) 21 HRLJ 251
[25] Treaty on the European Union Article 4(3)

acts, again compromising the integrity of the principle of supremacy. It set two conditions for *ultra vires* review: (1) the CJEU must have had the opportunity to rule under the preliminary reference procedure first; and (2) there must be a sufficiently serious breach of competencies by an EU institution.[26] These criteria were met in *Gauweiler*,[27] but after a preliminary reference the CJEU found the action to be legal, thus creating a direct conflict between the CJEU and the German Constitutional Court, who thought the action to be *ultra vires.* The German Court backed down, finding the action to not be a sufficiently serious breach to satisfy the criteria. Although this is evidently an area of high conflict, it could encourage proper 'judicial dialogues'[28] and sincere co-operation in finding a proportional balance between the constitutional rights and the requirement of supremacy of Union law. As Albi describes, '*there appears to be ample room for such engagement on the part of the Court to go further in making the judicial 'dialogues' a genuine bi-directional exchange rather than unilateral self-restraint by the national constitutional courts.*'[29]

Through recent case-law,[30] German courts have turned their focus from fundamental constitutional rights to 'national identity', as described in Article 2(4) Treaty of the European Union[31] and since embedded in CJEU case-law.[32] Some have suggested that this recognition of national identity in the Treaty could permit national courts to limit supremacy in certain circumstances due to the protection of 'national identity' and the fundamental rights so contained, but considering the extreme view of the CJEU on the doctrine of supremacy this is highly unlikely. Everling has previously suggested that the CJEU may need to 'reconsider its attitude':[33] 'As a real Constitutional Court, it has to ensure a balanced equilibrium between the competences, rights and functions of the institutions, Member States and citizens.'[34] Although this argument may predate the

[26] *Honeywell Judgement* (BVerfGE Judgement of 26 August 2010)
[27] Case C-62/14 *Gauweiler and Others v Deutsher Bundestag* [2015] EU:C:2015:400
[28] Alec Stone Sweet, *'Constitutional Dialogues in the European Community*', in A.M. Slaughter, A. Sweet Stone and J.H.H. Weiler (eds), *'The European Court and National Courts' Doctrine and Jurisprudence: Legal Change in Its Social Context* (1998) Oxford, Hart Publishing 325-326
[29] Anneli Albi, *'Supremacy of EC Law in the New Member States*' (2007) European Constitutional Law Review 25-67, at 64
[30] *Constitutionality of the Lisbon Treaty* (BVerfGE Judgement of 30 June 2009)
[31] Treaty on the European Union 2007 Article 2(4)
[32] Case C-208/09 *Sayn-Wittgenstein* (2010) ECR I-13693
[33] Ulrich Everling, *'Will Europe Slip on Bananas? The Bananas Judgement of the Court of Justice and National Courts*' (1996) Common Market Law Review 32, at 435
[34] *Ibid*, [436]

more recent discussion of national identity, it is clear that it is a prevailing issue and is an argument that continues to have prevailing relevance. At a minimum, national identity provides a focal point for the meeting of limitations of supremacy and the invocation of constitutional rights in exceptional cases of conflict.[35] Although supremacy prevails, Article 2(4) forces a balance to be struck between the two, therefore although the doctrine of supremacy is not absolute it is still entirely relevant for the enforcement of EU law, and it further encourages the principle of sincere co-operation.

Supremacy in the United Kingdom and Withdrawal from the EU

The doctrine of supremacy of Union law in the UK co-exists with the doctrine of parliamentary sovereignty. UK Courts have established that Union law is only supreme pursuant to the national law that has granted Union law this status, thus Parliament remains sovereign. As established in *Factortame (No.2)* through the invention of the 'implied supremacy clause', the supremacy of Union law derives from the exercise of parliamentary sovereignty and thus takes effect subject to limits imposed by Parliament.[36] The intention to join the European Community in 1973 and the intention for Union law to be supreme is implied in the European Communities Act 1972 and every subsequent Act of Parliament. However, because Parliament remains sovereign, if the legislature were to enact an express derogation from the Treaty, the Courts would have to apply domestic rather than Union provisions. As Lord Mance explained in *Pham*, 'we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed.'[37]

Supremacy is granted to the EU by Member States and can therefore be removed at any time. Although a drastic expression of sovereignty, the ultimate proof of this is through withdrawal from the Union, the act of which could supposedly render the principle of supremacy no longer relevant, theoretically demonstrating that it is impossible for the

[35] Armin Von Bogdandy and Stephan Schill, '*Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*' (2011) Common Market Law Review 48, 1417-1454, at 1440

[36] *Factortame Ltd and others v Secretary of State for Transport (No.2)* [1991] All ER 70. This has since been reinforced by European Union Act 2011 S.18

[37] *Pham v Secretary of State for the Home Department (Open Society Justice Initiative Intervening)* [2015] 1 WLR 1591

doctrine to be absolute. The European Union (Withdrawal) Act 2018 states that the principle of supremacy will cease to apply on the date the UK leaves the European Union.[38] There is no issue to be resolved between the conflicting EU and domestic provisions of law as the former cease to apply, therefore the doctrine of supremacy is no longer needed to reconcile the two. However, this does not render the doctrine irrelevant – it is still forecast at the time of writing to be used by the UK to reconcile law during the transition period before exiting the Union (presuming this route of exit with a trade agreement is used). Its employment in this regard as such would sit comfortably with the 'trigger' model as discussed by Dougan,[39] once again demonstrating the effectivity of the principle of supremacy as a pillar of enforcement of EU law, despite not being absolute. In the recent case of *Wightman*,[40] the CJEU employed reasoning based on similar theories of sovereignty to those used by the UK and Germany in their employment of the principle of supremacy.[41] It is possible that this case demonstrates a move away from the CJEU's orthodox and strict view of supremacy as a constitutional fundamental toward viewing it as a resolve. Once again, this supports the theory of a 'trigger' model, and reflects Everling's suggestion of a reconsideration of attitude.[42] This change of approach or attitude could be a welcome relief. The supposed 'supremacy' of Union law was widely used as a political footing for the 2016 UK referendum on, and continued reason to withdraw from, the European Union. It is possible that this tension could be alleviated if the CJEU continues the move toward judicial dialogues and a 'trigger' model. The judgement of *Wightman*[43] seems to suggest this is possible, thus providing the potential to help resolve some political tensions between the EU and member states.

Conclusion

Although there are clear limits to the principle of supremacy at both Union and national levels preventing it being absolute, '[t]he principle of supremacy remains essentially

[38] European Union (Withdrawal) Act 2018 S.5
[39] *MD* (n 625) [934]
[40] Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999
[41] *Brunner* (n 642); *Factortame* (n 656)
[42] *UE* (n 653)
[43] *Wightman* (n 660)

"two-dimensional", it is a complex, layered reality of dialogue and persuasion.'[44] Due to this complexity it is impossible to employ the principle of supremacy as the orthodox absolute vision of the CJEU has previously dictated, requiring complete, unrestricted supremacy. The CJEU attempts to impose an idealistic view of supremacy on Member States, and although this view is not shared by all national (constitutional) courts, this does not prevent the proper enforcement of Union law. It is therefore arguable that the orthodox view of supremacy, as held by the CJEU, is no longer required and could instead be an outdated vision. The small areas of leeway for reservation permitted by the CJEU, as discussed above, have demonstrated that an orthodox view is not appropriate for the employment of the doctrine of supremacy. A consistent refusal to further compromise could alienate both national courts and citizens, and this potential to further heighten political tensions following the 2016 UK referendum could demonstrate that the orthodox view is now ill-suited to the current political climate of the EU. Fundamentally, the principle is more aptly applied via the 'trigger' model as a method of reconciling conflicting laws,[45] and the strict view of the CJEU is likely obsolescent. The recent *Wightman* case has demonstrated a different perspective of the Court that is more closely aligned to that of the Member States' constitutional courts.[46] It could therefore be argued that the 'judicial dialogues'[47] created by the conflicts between domestic and Union courts are encouraging the CJEU to be more willing to accept reservations and take a more progressive stance on the doctrine of supremacy.

[44] Monica Claes, '*The National Courts' Mandate in the European Constitution*' (2006) Oxford, Hart Publishing 207
[45] *MD* (n 625) [934]
[46] *Wightman* (n 660)
[47] *AS* (n 648)

An Essay to Explore the Ethical Principle of 'Do No Harm' in the Context of Cosmetic Surgery and to Consider the potential Role of Legislation to Protect Patients

Zena Hamad

Introduction

Beauchamp and Childress in their widely accepted framework for medical ethics outlined four prima facie principles (respect for autonomy, beneficence, non-maleficence and justice) which serve to guide decision making in medicine.[1]

At first glance, the principle of non-maleficence is easily interpreted. The most simplistic presentation of 'harm' in medicine is negligent harm or malpractice, or poor conduct that otherwise results in direct harm in terms of physical pain, failure of surgery or iatrogenic damage.[2] These forms of harm are often addressed through the tort law system. With reference to tests of breach of duty, causation and recognised harm, tort offers a legal remedy to those who have been wronged.[3] Tort law's assessment of the claim draws

[1] T Beauchamp & J Childress, Principles of Biomedical Ethics, (7th edition OUP 2013).
2 James Summers, 'Principles of Healthcare Ethics' in Eileen E Morrison and John F Monocle (eds), 'Health Care Ethics: Critical Issues for the 21St Century', (Jones & Bartlett Learning 2008).
3 Beauchamp & Childress (n1) 155.

heavily from professional medical opinion (via the *Bolam* test) whilst also allowing for judicial input and assessment (via the *Bolitho* test).[4]

In this essay, I will examine a more specific notion of harm arising from the discipline of cosmetic surgery. In contrast to other fields of medicine, where harm is largely limited to instances of poor practice, many academics have argued that it is the entire practice of cosmetic surgery itself which embodies harm - that it is a peripheral field of practice inconsistent with the core purposes of medicine.[5] I aim to demonstrate how the concept of harm is indeed subjective and how the tension and conflict between the principles of 'do no harm' and 'respect for autonomy' have led to an unclear outcome for health professionals and judges.

> It could be argued that the decision to undergo cosmetic surgery is uncontentious and where a patient has validly consented to such a procedure no further interference is warranted. However the infamous case of *R v Brown* highlights that consent is not a 'trump card' that can be used to justify inflicting harm and prevent it from being a criminal offence;
>
> 'First, one would construct a continuous spectrum of the infliction of bodily harm, with killing at one end and a trifling touch at the other. Next, one would identify the point on this spectrum at which consent ordinarily ceases to be an answer to a prosecution for inflicting harm. This could be called "the critical level." [6]

Does cosmetic surgery surpass this 'critical level'? Ethics alone has not held the cosmetic surgery industry adequately to account. I will explore both the direct and indirect harms that arise from cosmetic surgery and I will refer to and agree with the recommendations of the Review of the Regulation of Cosmetic Interventions by the Department of Health which aims to encourage a new legislative framework.

Furthermore, legislation in the UK criminalises female genital mutilation.[7] It is unclear whether the scope of legislation includes female genital cosmetic surgery and I will

4 [1957] 1 WLR 582; [1998] AC 232.
5 D. Griffiths and A. Mullock, 'The Medical Exception and Cosmetic Surgery' in '*The Legitimacy of Medical Treatment: What Role for the Medical Exception*?' (Routledge, 2015).
6 *R v Brown* [1994] 1 A.C 212, 258 per Lord Mustill; Griffiths (n5) 122.
7 Female Genital Mutilation Act 2003 c.31, s.1 (1) -(5) and s.6 (1).

briefly consider the criticisms of the law in this area. I will conclude by evaluating the most extreme stance on cosmetic surgery which calls for the practice to be criminalised, thereby aiming to give an emphatic answer to whether cosmetic surgery is ethical or legal.

Cosmetic Surgery

Chung et al set out to survey the available literature on the ethical issues relating to the field of plastic and reconstructive surgery by carrying out a systematic review.[8] The review did not exclusively consider cosmetic surgery, but this was explicitly considered by the authors.[9] The intention was to test the hypothesis that ethical issues are underrepresented in the literature. Perhaps predictably, the most discussed principle was respect for autonomy, but even so, ethical discussion accounted for a relatively minute proportion of the overall literature ('out of a total library search of >100,000 plastic surgery oriented articles, only 110 clearly focused on ethical principles')[10] More significantly for the purposes of this essay, only 19 per cent of the sources considered the principle of non-maleficence.[11]

Miller succinctly summarises the dichotomy between conventional medicine and cosmetic surgery as follows;

> "Cosmetic surgery is a most unusual medical practice. Invasive surgical operations performed on healthy bodies for the sake of improving appearance lie far outside the core domain of medicine as a profession dedicated to saving lives, healing, and promoting health. These cosmetic procedures are not

[8] Kevin C. Chung, Allison G Pushman & Lillian T Bellfi, 'A Systematic Review of Ethical Principles in the Plastic Surgery Literature', (2009) 124 (5) Plast Reconstr Surg 1711.
[9] ibid "plastic surgeons are faced with ethical dilemmas about whether to perform operations on patients to enhance what is normal rather than restoring health to the diseased or disfigured'.
[10] ibid.
[11] ibid 1714.

> medically indicated for a diagnosable medical condition. Yet they pose risks, cause side effects, and are subject to complications…"[12]

A plethora of procedures are available to consumer patients which range from those that are non-surgical, minimally invasive (though not harmless) such as dermal fillers which entail minimal recovery time; and on the other hand, invasive surgical procedures such as breast augmentation, liposuction and labiaplasty. The variety of procedures is extensive, and novel procedures such as 'dimpleplasty' are devised where a new trend arises.[13]

The pioneering and performance of techniques for non-therapeutic purposes are ethically questionable. Should any complications arise, the doctor may have difficulty demonstrating competence if the procedure has not been used frequently enough to give rise to proficiency.[14]

Harm

The most obvious starting point when specifying the possible harmful outcomes is to consider the term 'surgery' itself. The general anaesthetic required as a prerequisite for most of surgical procedures to be carried out, itself involves a small but not insignificant risk of death.[15]

Once under a state of controlled unconsciousness, the patient is subjected to the next stage of risk; pain, infection, nerve damage and so on.[16] Beyond these generic risks of harm, each individual procedure imposes further risks which need not be listed in their entirety for the purposes of this essay.

---

[12] Franklin G. Miller, Howard Brody and Kevin C. Chung, 'Cosmetic Surgery and the Internal Morality of Medicine' (2000) 9 Camb Q Healthcare Ethics 353.
[13] Review of the Regulation of Cosmetic Interventions (DoH, 2013) para 5.4.
[14] ibid para 3.4, 5.4; D. Dickenson, 'Aesthetic/Cosmetic Procedures' (Nuffield Council on Bioethics, 2013) para 27; c.f to situations where extending treatment beyond what is proven into the 'experimental realm' is allowable legally.
[15] NHS Choices, General Anaesthesia , ‹https://www.nhs.uk/conditions/general-anaesthesia/#complications-and-risks› accessed 24 December 2017.
[16] DoH (n13) 353.

Additionally there is the risk of not achieving the desired result, that is, not meeting the patient's expectations and consequently the risk of becoming addicted to surgery, where 'the only contraindication to repeat surgery is poverty of funds or tissue'.[17] This cannot be described as the action of an ethical professional yet it is not uncommon for the cycle of dissatisfaction and further treatment to continue seemingly indefinitely.

These harmful events have not escaped media attention and a number of high profile individuals have suffered and eventually died as a result of surgery.[18] As with other areas of medicine, often the impetus for investigation is a highly publicised scandal that becomes an 'unstoppable imperative for reform'.[19] For cosmetic surgery, the 'PIP' scandal was the catalyst for scrutinising the cosmetic surgery industry, a process led by Professor Sir Bruce Keogh.[20] (I will refer to hereafter as 'The Keogh Review').

Thousands of women worldwide had PIP breast implants fitted which were manufactured in France using unapproved non-medical grade silicone.[21] The PIP implants were more likely to rupture and although scientific research failed to establish any link to cancer even if leakage of the silicone gel into the surrounding tissues did occur, the implants were withdrawn from the UK in 2010.[22] Some patients suffered unpleasant symptoms following the rupture of these implants and there was widespread anxiety amongst patients, many of whom elected to have the implants removed as a precautionary measure.[23]

---

[17] David A. Hyman, 'Aesthetics and Ethics: The Implications of Cosmetic Surgery' (1990) 33 (2) Perspect. Biol. Med 190, 192, 194, 201.

[18] Jerome Taylor, 'Ex-football Star's Wife Dies After Botched Plastic Surgery' The Independent (London, 10 July 2009) ‹http://www.independent.co.uk/life-style/health-and-families/health-news/ex-football-stars-wife-dies-after-botched-plastic-surgery-1741493.html› accessed 24 December 2017

[19] Mary Dixon-Woods, Karen Yeung and Charles Bosk, 'Why is UK Medicine No Longer a Self-Regulating Profession? The Role of Scandals Involving "Bad Apple" Doctors' 2011 (73) 10 Social Science and Medicine 1452, 1454.

[20] DoH (n13) 1.1.

[21] NHS, 'PIP Breast Implants' ‹https://www.nhs.uk/conditions/pip-implants/› accessed 18 April 2019.
The implants are frequently referred to as 'PIP" implants which refers to the name of the French company they were manufactured by; 'Poly Implant Prostheses'.

[22] BBC,'Q&A: PIP Breast Implants Health Scare' ‹http://www.bbc.co.uk/news/health-16391522› accessed 24 December 2017.

[23] Poly Implant Prothese (PIP) Breast Implants: Final Report of the Working Group (DoH 2012) para 19.

Remote Harm

The harms are not restricted to the individuals concerned and the wider impact should not be underestimated. As Hyman states, 'such medical judgments have moral consequences for distributive justice'.[24] The impact of the PIP scandal was not limited to the UK and each country made its own decision regarding how to handle the aftermath following their individual investigations and conclusions.[25] In the UK, those affected were entitled to have restorative treatment (within limits) to be carried out by the NHS.[26] It could be argued that this action itself redirects NHS resources and results in indirect harm by consuming limited NHS resources.[27]

Patients may perceive any methods of limiting access to surgery as paternalistic and patronising. There is already a large proportion who elect to have surgery abroad - according to a British Association of Aesthetic Plastic Surgeons press release from 2013, nearly 1 in 10 of patients who have opted for surgery outside the UK will subsequently require some form of assistance from the NHS post-surgery.[28] At present, the motivation to pursue surgery abroad appears to be cost driven however if restrictions are imposed it is possible that this will persuade more patients to consider travelling for surgery.[29]

Social Pressures

There are many more alarming niches catered to by the cosmetic surgery industry.[30] Durham draws attention to the trend in South Korea for teenagers (supported by their parents) to undergo surgery (commonly blepharoplasty) with the aim of achieving a more Caucasian appearance and in doing so, diminishing their natural racial features.

---

[24] Hyman (n17) 192.
[25] BBC (22) accessed 24 December 2017.
[26] Dickenson (n14) para 9.
[27] Griffiths (n5) 110; DoH (n13) paras 3.21-3.23.
[28] BAAPS, 'Sun. Sea and Sepsis' ‹https://www.baaps.org.uk/media/press_releases/1396/sun_sea_and_sepsis› accessed 24 December 2017; Dickenson (n14) para 4.
[29] This could be described as analogous to the situation where Irish and Northern Irish females have travel to the UK to have abortions carried out. M Brazier and E Cave, *Medicine, Patients and the Law* (6th Edn Manchester University Press 2016) 743-745; DoH (n13) para 6.8.
[30] M G Durham, *The Lolita Effect* (Duckworth 2007) 106; Hyman (n17) 197, 201.

This strays far from the realm of medicine and most definitely blurs the line between physician and beautician and in doing so reflects negatively on physicians who contribute to and exacerbate the stigmatising of certain ethnic groups reinforcing false perceptions of inferiority or inadequacy.[31]

It is not just racial features which cosmetic surgery has a role in erasing. Age and disability have not escaped the surgeon's attention. The parameters of acceptable and desirable appearance are narrowing further and further and it appears that no request will be denied, creating a situation whereby surgeons are fabricating 'blatantly bogus' indications and justifications for the surgery they agree to perform.[32] One example is parents seeking surgery for their child who has Down's syndrome. These issues are too complex to blame surgeons alone for, but it could be argued that by agreeing to such requests they are complicit in reinforcing the notion that these harmless to health physical features warrant surgical intervention. Suziedelis questions whether this type of cosmetic intervention is appropriate from an ethical point of view because it diminishes society's responsibility to be tolerant towards others and instead compels those with a disability to subject themselves to harm, risk and danger to gain acceptance and inclusion.[33]

Finally, another facet of harm to consider is whether the increasing prevalence of cosmetic surgery will stratify and divide society, separating those who have the resources to fund cosmetic surgery and those who do not. This may also feed into the desirability of such surgery, creating more pressures which may encourage people to succumb to finance options that could create financial difficulty and misery.[34] Much more appalling is the use of demeaning websites to raise funds for such surgery, which was described by the former president of the BAAPS as 'degrading'.[35]

---

[31] Miller (n12) 357.
[32] Miller (n12) 359.
[33] Ann Suziedelis, 'Adding Burden to Burden: Cosmetic Surgery for Children with Down Syndrome' (2006) 8 (8) AMA J Ethics 538, 539.
[34] S. Rufai and C. Davies, 'Aesthetic Surgery and Google: Ubiquitous, Unregulated and Enticing Websites for Patients Considering Cosmetic Surgery.' (2014) Journal of Plastic, Reconstructive & Aesthetic Surgery 640, 642.
[35] BAAPS, 'Outrage Over 'degrading' Breast Augmentation Website: Women Post Photos Online and Men Donate Money for their Surgery' ‹https://www.baaps.org.uk/about/news/1308/outrage_over_degrading_breast_augmentation_website›

Baker rightly points out that some of these remote harms are more appropriately dealt with 'via non criminal state responses' such as government campaigns to 'increase resilience to low body image'.[36] 'Celebrity worship' and society's attitudes and intolerances may instigate these harms but health professionals are not doing enough to combat or question these influences on patient motivation and willingness to take risks.

In the next section, I will consider some of the recommendations of the Keogh Review which aim to reduce the risk of harm posed by the cosmetic surgery industry for example by introducing psychological pre-assessment. I will also comment on how the conflict between the ethical principles of 'do no harm' and respect for patient 'autonomy' may be negotiated by health professionals to arrive at a more ethically defensible outcome on whether or not to agree to perform such surgery. I will also argue that all forms of advertising for cosmetic surgery should be banned and explain why such a hard line approach should be taken despite taking into account the counterarguments which suggest such an approach is paternalistic and disempowering.

Beautician or Physician?

To avoid the accusation of inflicting unnecessary harm; it is suggested that the surgeon should have robust patient selection criteria. The selection criteria can be based upon the NHS criteria (which for funding reasons are more stringent) and this must then be combined with a compulsory psychological pre-assessment.[37] The NHS criteria emphasise the need to exhaust all possible non-surgical alternatives and surgery is only considered as a last resort. Where possible the criteria are quantifiable so as to make the assessment for eligibility as objective as possible. For each procedure the term 'may be considered on an exceptional basis' reinforces the fact that a high threshold must be met before invasive treatment is considered a potential option.[38] In my opinion, in the absence

accessed 27 December 2017. 'I thought I could no longer be appalled by the circus-like atmosphere surrounding plastic surgery - but this is really quite shocking'.

[36] D. Baker, 'Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery Be Criminalised?' (2014) 17(4) New Criminal Law Review 587, 590; Department of Health, *Government Response to the Review of the Regulation of Cosmetic Interventions* (London, 2014), 2.

[37] Clare Freeman, 'Commissioning Guidelines; Specialist Plastic Surgery Procedures' (NHS Doncaster Clinical Commissioning Group, 2016).

[38] ibid

of a suitable legal framework to scrutinise each individual decision made by each physician, an alternative approach would be to increase accountability by requiring compulsory psychological pre-assessment which will mandate engagement in the ethics of each particular decision. It is unlikely that upon diagnosis of an underlying psychological condition that is not treatable surgically; that an ethical physician would progress with surgery.

Far from questioning patients underlying motives; the industry has normalised the conflation of health and beauty as observed by Hyman; 'If we intend to conflate beauty with health, most of us are seriously ill. But wherein lies our defect? The lack of beauty does not cause excess morbidity or mortality.'[39]

Psychological Assessment

According to the 'The Keogh Review'; only a minority (approximately one third) of providers engage in concrete assessment of a patient's claim that they are suffering psychologically.[40]

Psychological pre-assessment is fundamental as it will provide a basis for rejecting those who are more likely to be harmed (psychologically) and therefore less likely to benefit overall.[41] This would also assist practitioners in having an open discussion with patients as to why they do not to deem it appropriate to perform surgery and thereby help reverse the seeming acceptability of targeting those groups.

It is beyond the scope of this essay to discuss all the possible psychological conditions that would preclude cosmetic surgery, but I draw attention to some of the characteristics highlighted by Ericksen and Billick. They warn against the treatment of those who are 'perpetually unhappy', those in the midst of a life crisis as well as those suffering from anxiety, depression or of Body Dysmorphic Disorder.[42] The authors are mindful to point

[39] Hyman (n17) 193.
[40] DoH (n13) para 5.13.
[41] William Ericksen and Stephen Billick, 'Psychiatric Issues in Cosmetic Plastic Surgery' (2012) 83 Psychiatric Quarterly 343, 347.
[42] ibid 344, 346, 350.

out that these are not absolute contraindications, but that the surgeon should be alert to the transient nature of some of these motivating factors, such as a crisis which may resolve in time without the need to risk one's physical health. Redirecting a patient to a more appropriate health care professional, such as a counsellor, is the least that can be expected from an ethical point of view. The Keogh review specifically recommends psychological assessment to screen those with BDD and with regard to those seeking cosmetic genital surgery.[43] Prospective patients requesting cosmetic genital surgery can pose a challenge in that they may have 'misguided assumptions' about what is 'normal'.[44] General practitioners wanting to avoid 'trivialising' the patient's concerns have referred them to a specialist, often so that the patient can be reassured that no abnormality exists.[45] This may be sufficient to alleviate the concerns of some women but may be ineffectual if 'the overt or covert social pressure to conform to certain physical ideals' overrides any reassurances offered.[46]

Treating those with BDD may give the illusion of having addressed their presenting complaint but this may not be the case. Ericksen argues that though they may be content with the individual procedure, they do go on to suffer a 'higher level of handicap after a surgical intervention' and they may go on to become fixated and preoccupied with another objectively normal feature.[47]

Balancing and Specification

Beauchamp and Childress define criteria which would guide ethicists and doctors to reach decisions in cases where two prima facie principles compete, without falling foul of the accusation of basing the judgement on 'intuition, impartiality and arbitrariness'.[48]

[43] DoH (n13) 5.12 and 5.15.
[44] Lih Mei Lao and Sarah Creighton, 'Requests for cosmetic genitoplasty: how should healthcare providers respond?' (2007) 334 BMJ 1090.
[45] ibid 1092.
[46] Sally Sheldon and Stephen Wilkinson, 'Female Genital Mutilation and Cosmetic Surgery: Regulating Non Therapeutic Body Modification' (1998) Bioethics 12 (4) 263, 272.
[47] Ericksen (n41) 350.
[48] Beauchamp & Childress (n1) 17-24.

This delicate skill of balancing and specification does not intend to rank the principles but to allow a meaningful case by case approach to decision making.

I draw attention in particular to the criteria which state that, 'the moral objective justifying the infringement has a realistic prospect of achievement', 'no morally preferable alternative actions are available' and 'the lowest level of infringement, commensurate with achieving the primary goal of the action has been selected.'[49]

Without psychological assessment and if necessary, referral for non-surgical therapy such as counselling, an ethical physician cannot satisfy the above criteria. Only once these first-line treatments have been exhausted will it be ethically justifiable to escalate treatment to the more invasive level.

The Business of Healthcare and a Conflict of Interest

Patients approaching providers of cosmetic surgery do so on a private basis, which inevitably raises the question of whether this will influence the consultation process - perhaps the clinician is motivated by factors other than the patient's best interest and may be less objective and impartial in accepting or rejecting a patient's request for treatment.[50]

The principle of beneficence reminds doctors that they must not treat patients 'as a means to an end'.[51] In such a context, an entirely different dynamic exists between the 'patient' and 'doctor', more akin to a business relationship; consumer and provider. In light of this non-fiduciary type relationship, it is unsurprising that 'A person having a non-surgical cosmetic intervention has no more protection and redress than someone buying a ballpoint pen or a toothbrush'. The temptation may be for the principle of 'putting a patient's best interest first' to be subordinated when the nature of the doctor-patient relationship has altered in this setting. This statement starkly demonstrates the

[49] Beauchamp & Childress (n1) 23.
[50] Beauchamp & Childress (n1) 328.
[51] Baker (n36) 589.

vulnerability of patients having non-surgical interventions and brings to mind the wholly inappropriate principle of 'caveat emptor' or 'let the buyer beware'.[52]

Another reason why a business type relationship is undesirable is more apparent when considering the non-surgical portion of the industry. By allowing non-medical professionals to carry out harmful procedures is in the words of the Keogh report a 'crisis waiting to happen'.[53] This essay questions the ethics of health professionals, but where procedures are carried out by non-professionals there may be absolutely no consideration whatsoever besides profit making. 'There are no legal requirements for provider organisations to indemnify against patient claims. There is nothing to stop a provider who is facing claims from dissolving their business, thereby abdicating responsibilities to those patients'.[54]

Ethics and Advertising: 'A Bustline for the Shoreline'

France has taken a firm stance on advertising where 'all forms and methods of publicity and advertising, direct or indirect, in whatever form, including the Internet, are forbidden'.[55] I believe that efforts to ameliorate the effect of normalising and commodifying cosmetic surgery by banning advertising are commendable and worthwhile objectives to pursue in the UK.

Current advertising unscrupulously goes beyond the function of informing patients and dives into the territory of 'demand-stimulating advertising,' fuelling feelings of inadequacy and nudging those who may be undecided.[56]

Research carried out by Rufai and Davis has demonstrated the flawed and unethical approaches taken by healthcare professionals or by companies and franchises representing surgeons.[57] Of particular concern is the deployment of sales tactics which

[52] Virginia A Sharpe, 'Why "Do No Harm"?' (1997) 18 Theoretical Medicine 197, 208.
[53] DoH (n13) 5.
[54] DoH (n13) 7.4, 7.10.
[55] Alain Fogli, "France Sets Standards for Practice of Aesthetic Surgery' (2009) 15 (6) Clinical Risk 224, 225.
[56] Miller (n12) 362.
[57] Rufai (n34) 640, 642.

should have no place in any field of health care, for example, time-limited offers, and 'refer a friend' discounts. Taber argues in the BMJ that advertising is a 'legitimate and reasonable business practice' and that to ban advertising would be 'regressive'.[58] Taber suggests that it is not the advertising itself that is problematic but the lack of regulation that poses the risk. Unfortunately, her arguments fail to convince as it transpires that her concerns centre more on the avoidance of 'monopolies that deform the market'.

Taber's solution of inviting providers to voluntarily register with IHAS (Independent Healthcare Advisory Service) which works in conjunction with the ASA (Advertising Standards Authority) has already been regarded a failed attempt at self-regulation by 'The Keogh Review'.[59] Taber, in fact uses several examples of poor practice in advertising which serves only to support the argument that a total ban would be more sensible. IHAS and the ASA have very little power to enforce their voluntary code and once again 'The Keogh Review' has alluded to the futility of their attempts as they operate reactively by which time the harm caused by the dissemination of unethical advertising has already been done.[60]

On the other hand, Fateh asserts that advertising should be banned.[61] He touches upon patient's vulnerabilities which are directly and unashamedly targeted in these adverts. Baker considered vulnerable subjects to be those who lack maturity and are more susceptible to peer pressure. However, Fateh also considers those adults who, due to their circumstances, may be temporarily vulnerable - for example, new mothers and newly divorced women. These adverts follow the lead of advertising in non-medical contexts, they seek to persuade, create a 'need' and therefore demand. Whilst we accept this form of influence and persuasion with regard to material objects and possessions, it is shocking that we accept the creation of insecurity which will lead to patients subjecting themselves to physical harm, pain and risk to achieve the current aesthetic ideal.

[58] S. Taber, 'Should All Advertising of Cosmetic Surgery Be Banned? No' (2012) 345 BMJ 7489.
[59] DoH (n13) para 1.15.
[60] DoH (n13) para 6.4.
[61] F. Fatah, 'Should All Advertising of Cosmetic Surgery Be Banned? Yes' (2012) 345 BMJ 7508.

In my opinion, cosmetic surgery has gained a bad reputation for exploiting the vulnerable, advertising recklessly, a nonchalant attitude to any adverse outcomes, (leaving the NHS to 'pick up the pieces') and arguably compromising their professional integrity by valuing profit making ahead of maintaining a true loyalty towards the 'internal morality of medicine'.[62] There is no justification for aggressive advertising.

Vulnerable or Empowered?

Fineman extensively analyses the concept of vulnerability and widens the scope of the definition beyond the typical associations with 'victimhood, deprivation, dependency'. The conception of vulnerability, when focussing specifically on those inclined to pursue cosmetic surgery, can conjure up an entirely different subject that does not accord with many of the stereotypes of vulnerability. On the contrary, they may consider cosmetic surgery an aspirational pursuit, an endeavour that will improve their career and social prospects, 'a strategic act'.[63]

There is no doubt that there will be many patients who perceive the outcome of surgery to have resulted in a net benefit. However, some authors have argued that the autonomous choice to undergo surgery is not truly autonomous and, viewed from a feminist perspective, is not a genuine manifestation of freedom and empowerment - instead it merely reflects submission and conformity to the 'idealised versions of the female body' and considers these women to be 'passively capitulating to their own sexual objectification'.[64]

In almost any encounter with a healthcare professional, there will be an imbalance of power that stems from an expected imbalance in knowledge and experience.[65] Sharpe discusses this imbalance and explains how this should encourage a 'fiduciary' relationship.[66] It is arguable that this is what patients may assume already exists as

[62] Miller (n12) 354.
[63] Jacqueline S Taylor, 'Fake Breasts and Power: Gender, Class and Cosmetic Surgery' (2012) 35 Women's Studies International Forum 458, 460, 464. See also Hyman (n17) 190, 'beautiful people get ahead—in life, love, and business'.
[64] Taylor (n63) 459.
[65] Miller (n12) 355.
[66] Sharpe (n52) 199.

mentioned in 'The Keogh Review'; patients 'take their safety as a given and assume regulation is already in place to protect them'.[67]

The exploration of vulnerability relates largely to subjects of research, but similar principles apply in this context. 'The Keogh Review' points out that those seeking cosmetic surgery 'may have a tendency to underplay the risk', making it imperative that the risks are emphasised to these patients.[68] This could be described as similar to the idea of 'therapeutic misestimation' whereby research subjects overestimate the benefits of clinical trials.[69]

'Paternalism is out of fashion'[70]

One suggestion is that a more appropriate pathway would be for a patient to attend their general medical practitioner as their first point of contact and discuss their concerns. This would act as a 'buffer' between potentially vulnerable patients and the direct access to harmful surgery by introducing an impartial third party. This method of 'gatekeeping' could be interpreted as paternalistic or as depriving patients of making an autonomous decision to alter their image. However, it should be noted that respect for autonomy does not entitle a patient to have their active request for treatment to be acceded to. As Brazier puts it, 'autonomy is not the only god in the ethical, or indeed the legal, pantheon'.[71] This distinction is also emphasised by Gillon, whereby respect for patient autonomy does not equate to a duty to meet demands for treatment.[72] In fact, Fineman when considering vulnerability more broadly, also promotes this approach as a 'more responsive to and

[67] DoH (n13) page 6.
[68] DoH (n13) para 5.5.
[69] Horng S and Grady C, 'Misunderstanding in Clinical Research: Distinguishing Therapeutic Misconception, Therapeutic Misestimation, & Therapeutic Optimism' (2003) (25) 1 IRB: Ethics & Human Research, 11.
[70] Brazier and Cave (n29) 64.
[71] M. Brazier, 'Do No Harm: Do Patients Have Responsibilities Too?' (2006) 65 (2) CLJ 397, 398.
[72] Brazier (n71) 400; Beauchamp (n1) 225; R. Gillon, 'Defending the Four Principles Approach as a Good Basis for Good Medical Practice and therefore for Good Medical Ethics' (2015) 41 J. Med. Ethics 111,114; Brazier and Cave (n29) 71.

responsible for the vulnerable subject', elevating this approach above the 'one-dimensional liberal subject approach' which favours autonomy.[73]

Female Genital Mutilation & Female Genital Cosmetic Surgery

Both Female Genital Mutilation (FGM) and Female Genital Cosmetic Surgery (FGCS) vary in extent and severity and the consequent risk of harm.[74] Many academics have questioned where the distinction lies between FGM and FGCS. From an ethical point of view, it could be argued that a line could be drawn by permitting the procedure for those over 18 who can consent to such a serious procedure but making the practice unlawful for under 18's, as is the position taken in other jurisdictions such as the USA and Canada.[75] If this argument is to be accepted as the underlying rationale for making FGM unlawful then this could also raise questions regarding the legality and ethical position regarding infant male circumcision.[76]

However, if the distinction between FGM and FGCS is to be made based on the intention behind the procedures it appears that the argument is inconsistent at present. I strongly agree with Sheldon, Kelly and Foster and also Earp in that there is little difference in the underlying pressure of those from African countries to meet cultural expectations and the pressures of females in Western societies to meet aesthetic expectations, albeit differently motivated.[77] The drive for FGCS often being a desire to maintain youth, conform to ideals of beauty or due to a perceived abnormality, is no less oppressive than FGM carried out for cultural reasons.[78] Some academics have gone as far as to describe the distinction as 'moral relativism', 'cultural imperialism' and outright 'hypocrisy' and

[73] Fineman M, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 YJLF 1, 2, 12.
[74] Sheldon (n46) 266.
[75] Sheldon (n46) 269.
[76] Marie Fox and Michael Thomson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice' (2017) 44 (4) J.Law&Soc 503-504, 506.
[77] B Kelly and C Foster, 'Should Female Genital Cosmetic Surgery and Genital Piercing Be Regarded Ethically and Legally as Female Genital Mutilation?' (2012) 119 (4) BJOG 389, 273-274; D Earp, 'Between Moral Relativism and Moral Hypocrisy: Reframing the Debate on "FGM"' , (2016) Kennedy Institute of Ethics Journal 26 (2) 105, 107; Sheldon (n46) 273-274.
[78] Kelly & Foster (n77) 390.

'inconsistency.[79] Urgent reconsideration is required to justify the prohibition of FGM whilst continuing to tolerate FGCS. FGCS is no less 'brutal' or 'sexist' than FGCS particularly when undertaken on under 18's who are under the false impression that they are somehow 'abnormal'.

Criminalising Cosmetic Surgery

In this section, I will turn to consider the arguments in favour radically criminalising cosmetic surgery. I will examine whether there is any implicit legal support for the notion that medical intervention outside the boundaries of conventional treatment is illegitimate and unjustifiable. I will draw on the arguments presented by Baker which hinge on the fact that consent cannot provide blanket protection to those who knowingly inflict harm, even if this harm is precipitated in a medical setting. I will also consider whether the normalisation of, and mainstream acceptance of cosmetic surgery has made it more difficult for it to be recognised as straying far from the obligation to 'do no harm'.

Baker has proposed that non-therapeutic cosmetic surgery should be criminalised. Baker presents a logical and forceful argument premised on the fact that consent 'cannot annul the wrongness of unnecessary harm'.[80] Griffiths and Mullock also consider whether this 'highly lucrative, consumer driven industry' actually operates safely within boundaries of the 'medical exception' to the criminal law.[81] The difficulty which Griffiths and Mullock highlight is that the line between what is therapeutic and what is not; in medicine generally, is sometimes difficult to articulate. For example the authors widen the scope of the argument and consider, whether, if Baker's argument is taken literally; contraceptive sterilisation, driven by 'socio-cultural' factors, rather than intending to directly 'promote health' would be acceptable.[82]

[79] Earp (n77) 107, 144.
[80] Baker (n36) 588.
[81] Griffiths (n5) 105.
[82] Griffiths (n5) 113.

R v Brown is noteworthy due to multiple references by their Lordships when circumscribing the limits of harm that do not contravene the law. The 'lack of recourse to the criminal courts' in carrying out surgery is by merit of the 'obviously good reasons' for carrying out the surgery and not some 'illogicality of approach'.[83] The medical profession must not violate the trust placed in them to act ethically otherwise non-therapeutic cosmetic surgery may be difficult to distinguish legally from other unlawful acts which result in harm such as in this case; consensual sadomasochistic acts.

Legal Implications

The harm of cosmetic surgery is so contested and subjective that this has in reality and in practice lead to no meaningful guidance for professionals or judges. As Cave points out; 'translating an ethical obligation into a legal principle is tricky'.[84] In the case of respect for autonomy, this has been achieved in law via principles governing consent to treatment which as Cave describes 'clothes the moral principle of autonomy in legal reality'.[85] However, approaching 'do no harm' is not as straightforward. That is not to say that some aspects of the industry should be left untouched and unregulated but this is in my opinion is likely to be as far as the law will dictate on the matter.

When investigating other scandals; Kennedy expressed cynicism towards the benefits to be gained by 'simply re-emphasising doctors' ethical responsibilities' and I would agree that this alone will not suffice.[86] Legislation is urgently needed to ban advertising, make psychological pre-assessment compulsory, and clarify the reasoning behind permitting female cosmetic genital surgery.

[83] *R v Brown* (n6) 229.
[84] Brazier and Cave (n29) 508.
[85] ibid 508.
[86] Dixon-Woods (n19) 1457.

The Future

Cosmetic surgery has become mainstream, 'previously undertaken discretely, now people will admit to having had procedures and even celebrate them'.[87] In this essay I have attempted to describe the different ways in which cosmetic surgery can be linked to harm, in both the literal and perceptible sense of posing a risk to health, through the pain of recovery from these procedures, to the risk of dissatisfaction and subsequent quest for 'perfection'. It is possible to envisage legislative change to ban advertising of cosmetic procedures which would be a small but not insignificant shift towards reducing potential harm. However, tackling the harm caused by society exerting pressure on individuals to conform to an ever narrowing definition of 'normal' is a much more challenging and delicate issue to address. This may be beyond the remit of legislation to affect but nevertheless there is scope for further stringency surrounding the decision to perform these procedures on patients and for raising the threshold higher than it currently stands.

As Sharpe summarises, 'do no harm' should be understood broadly as a 'warning against the abuse of authority and expertise possessed by the healer'. So, in the inevitable void between what is ethical and what is lawful; doctors must not undermine or underestimate the relationship of 'dependence, reliance, discretionary authority and trust'.[88]

[87] DoH (n13) para 1.4.
[88] Sharpe (n52) 204.

Domestic Abortion Law in its Current Context: Fit for Purpose 50 Years on or a Statute Ripe for Reform?

Samantha Dulieu

"The best abortion law would be a blank sheet of paper."[1]

Abstract

It has been widely perceived that the Abortion Act 1967 served to legalise abortion in the United Kingdom. However, this was not the case. The Act, passed in direct response to a growing number of unsafe 'back-street abortions', served instead to protect doctors from prosecution when performing terminations for a prescribed medico-social objective. The Act's fiftieth anniversary in 2017 was marked by the recognition that legislation could now go much further in guaranteeing women's reproductive freedom and liberating these rights from a technologically and socially outdated model. These voices of criticism have been amplified by the emergence of a distinct pro-choice movement in the Republic of Ireland where abortion was banned by the country's constitution. The repeal of the Irish Constitution's eighth amendment was signed into law in September 2018. The success of this campaign and subsequent removal of the constitutional ban on abortion invited further criticism of existing legislation in England and Wales and the extent to which it actually affords women their full entitlement to reproductive freedom.

[1] Zoe Williams, 'Interview: Why, 50 years after the Abortion Act, it's time to abolish the law altogether' *The Guardian* (London, 25th October 2017) https://www.theguardian.com/world/2017/oct/25/abortion-act-law-50-years-terminations-criminal-stigmatised (Accessed 6th April 2018)

Introduction

The Abortion Act 1967, the product of a Private Member's Bill introduced by Liberal MP David Steel, was passed by Harold Wilson's government alongside a collection of other liberalising reforms. These reforms signalled the emergence into legislation of the shifting attitudes of the decade.[2] The passage of the Abortion Act was a welcome change to the draconian statute of the Offences against the Persons Act 1861 which previously held sway over this procedure. However Sheldon, as well as other scholars and activists, have warned against viewing this period as part of a linear progression towards greater liberalisation and permissiveness.[3] The Abortion Act intended to stop the dangers of attending 'back-street' abortionists, and did so by making an exception to the 1861 Act whereby a woman could access an abortion performed by a medical professional with the consent of two doctors in good faith. Although this was perceived to be liberal in the 1960s, the fact remains that even since the passage of the Act, a termination without medical intervention is punishable by law.[4] This fact has become more acute with the emergence of early medical abortions (EMAs), the taking of two tablets before 9 weeks gestation that could take place in the comfort of a woman's home with little or no medical oversight. Though undoubtedly an improvement from the pre-1967 situation, this essay will examine the extent to which the Abortion Act has progressed women's reproductive rights, before discussing the extent to which it applies in a robust way over half a century after its passage. I will analyse this in the context of arguments for enhanced female autonomy, greater autonomy in healthcare decision-making, and the unnecessary predominance of a criminal law in a common and safe medical procedure.

Abortion law before 1967: "Inhuman and obsolete"[5]

Prior to 1967, abortion was illegal under sections 58 and 59 of the Offences against the Person Act 1861, which determined that attempts to "procure an abortion" were

[2] Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto Press 1997) 12

[3] Ibid 11

[4] Offences Against the Person Act 1861

[5] Ibid 24

punishable by up to a lifetime's penal servitude.[6] A progression from Lord Ellenborough's 'Wounding and Maiming Bill' of 1803, it was in 1861 that a woman could first be "designated as criminal for any interference in their own pregnancy".[7] The 1929 Infant Life Preservation Act built on the efforts of Sections 58 and 59 by legislating against the destruction of an infant who was "capable of being born alive", and placed this threshold 28 weeks into pregnancy.[8] Pre-war legislation on abortion therefore criminalised the act of terminating an unwanted pregnancy whether undertaken by the woman herself (voluntary), or another individual (involuntary).[9] The criminalisation of abortion to such an extent led to the deaths of, on average, thirty women per year, with a further thirty thousand needing treatment in hospital following the administering of medication or a physical procedure.[10] Of course, these figures are notwithstanding the many more women whose mental and physical wellbeing were blighted by the trauma of carrying to term an unwanted pregnancy. The severity of the 1861 Act imbued upon the termination of pregnancy a singular status among other medical procedures, as the only one to be criminalised except in the strictest of circumstances.

After 1929, various cases concerning abortion set legal precedent and served to further elucidate the 1861 legislation. The case of *R v Bourne* concerned the trial and acquittal of a doctor who performed an abortion on a fourteen year old girl who had been gang raped by a group of soldiers.[11] Dr Bourne notified the police of his intentions, then closely monitored the girl for several days. After establishing that "there was nothing of the cold indifference of the prostitute", he agreed to perform the procedure on the basis that abortion should be justified where continuing the pregnancy is likely to make the woman a "physical and mental wreck".[12] He considered this a situation in which the woman's life being in danger and her health being in danger could be considered interchangeable.[13]

[6] Offences Against the Person Act 1861

[7] Barbara Brookes, *Abortion in England 1900-1967* (Croom Helm 1988) 26

[8] Ibid 27

[9] Offences Against the Person Act 1861

[10] Keith Hindell & Madeleine Simms, *Abortion Law Reformed* (Peter Owen 1971) 70

[11] *R v Bourne* [1938] 3 All ER 615

[12] Ibid

[13] Ibid 71

Bourne also (rather effectively) argued that the presence of the word "unlawful" in the 1929 statute insinuated that there existed situations in which abortion could therefore be lawful. In establishing the health grounds for therapeutic abortion, the Bourne case provided clarification of the 1861 legislation and a defence to doctors in certain circumstances. It is significant that even as early as the 1930s, the opinions of "medical men" provided the most fertile ground for political debate, before the notion of medicalisation was officially introduced.[14]

In the first half on the twentieth century when health statistics were improving, but maternal mortality was still comparably high, the need for legal reform was widely accepted, especially considering that the law in its current form was not deterring women from becoming "*de facto* law-breakers" when they needed a termination.[15] However, open calls for legislative change only became prevalent when "fertility control became a widely accepted social goal" based on medical, social and political considerations.[16] Further to this, changes to the law in the 1960s were no doubt in part motivated by the fact that the existing legislation was passed when "our society was only on the brink of the beginnings of the modern world".[17] In order to evaluate the extent to which the 1967 Act advanced women's reproductive autonomy, one must take into account the process of the passage of the legislation, the motivations for reforming the law, and contemporary perceptions of the status of this medical procedure.

The passage of the Abortion Act: Mass illegality to medical control

The consequences of the prohibition of abortion prior to 1967 were "generally undesirable and often appalling".[18] The results of denying women access to a termination are numerous: the deaths of women who are denied abortions on medical grounds; the

[14] Ibid 12

[15] Ibid 29

[16] Brookes (n6) iii

[17] Sally Sheldon, "The Decriminalisation of Abortion: An Argument for Modernisation", Oxford Journal of legal Studies 36, 2 (2016) 334.

[18] Hindell & Simms (n8) 25

birth of severely disabled children whose lives are often short and fraught with suffering; the injury and death of women at the hands of illegal abortionists and the births of countless unwanted children. Those who had fought for legal abortion up until the mid-twentieth century (against the moral, ethical and religious standpoint on the sanctity of unborn life that was propagated by religious and conservative elements within society) came to the conclusion long before parliament that these consequences were deplorable for women and society at large.[19] Motivations for regulating abortion included combating a relatively high rate of maternal mortality, the recent experience of the births of thousands of children born with disabilities caused by thalidomide in the early 1960s and the control of reproduction becoming a socially accepted goal.[20] As well as this, legislators were concerned by common disregard for the law on abortion that seemed not to restrict its prevalence. Sheldon describes this as a "dark mass of unknowable female criminality" that threatened the existing social and legal order.[21] Parliament was therefore keen to combat this perceived social ill and to replace the divergently interpreted legislation that had led to varied medical interpretations of the law. This effectively comprised bringing abortion under medical control.

As aforementioned, the context of the passage of the Act was one of increased permissiveness, but it would be wrong to place the 1967 legislation too firmly within this trend. Sheldon presents several motivations for the introduction of the Act, with the desire to grant women increased reproductive freedom representing only a limited, even subsidiary, benefit.[22] Firstly, it was plain that the law in its current form was not operating as it should. Law enforcement efforts were only able to detect and prosecute small numbers of those performing the tens of thousands of abortions that took place per year. Further, terminations were available within the private sector for those who could afford them, with Francome estimating that in 1966 15,000 abortions were performed by a doctor for a fee, with varying levels of legality.[23] Although by the 1940s and 1950s mortality as a result of termination was drastically reduced, consistent flouting of the

[19] See the work of The Society for the Protection of Unborn Children, https://www.spuc.org.uk/history

[20] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford and Portland 2001) 77

[21] Sheldon (n2) 29

[22] Ibid 26-7

[23] Ibid 19

law was considered by some to be reason enough for reform. Despite widespread knowledge that terminations were accessible from various sources, there were only on average 50 prosecutions for illegal abortions per year leading up to 1967.[24] This was a result of women who had had terminations being unwilling to testify against the abortionist, doctors closing ranks when one of their own was in danger of prosecution, and the fact that when successful, it can feasibly be considered a victimless crime.

For parliamentarians and the medical profession, bringing the procedure under medical control had attractive consequences. To ensure that a woman seeking a termination first attended her GP guaranteed medical professionals unparalleled access to this previously private sphere. Further, framing legal abortion within this context led to the establishment of a registered medical professional as the "gatekeeper" of termination who would only allow them when the established criteria have been met, thereby protecting doctors from prosecution when they could prove a procedure had been performed in good faith.[25] The medicalisation of abortion was also a result of developments in the procedure. Prior to 1900, doctors could cite the law as their reason for refusing to perform a dangerous operation. By the 1920s and 1930s the procedure carried little risk, and practitioners were free to perform terminations with comparably minimal risk of legal retribution. It was also widely accepted that by bringing abortion within the medical sphere, and encouraging women to make their doctor their first port of call on discovering they are in need of a termination, the doctor would be able to use this encounter to encourage the woman to carry her pregnancy to term. This argument was presented to the House of Commons in July 1966 by David Steel during a debate on the forthcoming Abortion Act.[26] The limitations to reproductive freedom are self-evident in this argument, and represent entrenched misconceptions about the situations in which women may require a termination. This argument also propounded the widely accepted image of the woman seeking an abortion as hysterical, rather than having made a rational decision based on various factors. By extension, it was considered that in certain situations a doctor may be better placed to "manage" a woman's pregnancy than

[24] Ibid 20

[25] Sheldon (n2) 30

[26] HC Deb 22 July 1966 vol 732 cc1067-165

the woman herself.[27] The fact that the author of the Bill, that brought abortion reform to parliament, wanted to decrease the instances of abortion as one of his overall aims arguably did not bode well for the emancipatory potential of the legislation. The full extent of the impact of bringing abortion under the discretion of doctors, rather than the woman herself, will be discussed in the context of the suitability of the legislation for twenty first century social attitudes and clinical practice. However, the notion that the Abortion Act was a significant advancement for women's reproductive rights is undoubtedly challenged by this significant motivation for its enactment.

Prior to 1967, legislation focused mainly on the social and familial concerns surrounding abortion, but the passage of the Act refocused abortion centrally within the medical sphere. The consequences of this have been analysed at length by those who contend that the Abortion Act did not significantly advance women's reproductive rights. Sheldon contends that viewing the Act as permissive only forms a "partial view".[28] The deployment of various kinds of medical control over women seeking abortions in the context of the Abortion Act, she believes, limits its permissiveness.[29] However, I will analyse the extent to which the Abortion Act enhanced women's reproductive rights through Madeleine Simm's conception of the Act as a "halfway house" towards women's emancipation.

Liberalising reform or "halfway house"?

It is my contention that the medicalisation of abortion has provided the greatest constraint on the Act's emancipatory potential. This can be ascertained from the substance of the 1967 legislation, analysis of the resulting doctor-patient relationship when a woman requires a termination and engagement with the deployment of medical power over this procedure.

Firstly, women are at the periphery of the legislation. Section 1 of the Act states that:

[27] Sheldon (n2) 26

[28] Ibid

[29] Ibid 14

Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith

(a) that the continuance of the pregnancy would involve risk to the life of the, pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to "be seriously handicapped.[30]

These are ostensibly the grounds under which a woman's doctor cannot be prosecuted for performing a termination. The law ensures that the termination is carried out by a doctor, only when two doctors have formed the opinion in good faith that the procedure complies with the necessary conditions. Within the parliamentary debates the doctor was a constant figure on both sides. Thomson has described the installation of the doctor as "father and judge, family and law" in his position as the "gatekeeper" of safe and legal abortion.[31] Sheldon posits that this allows the doctor to become a "parallel judge", whereby he can sanction a termination when he deems the criteria are met, or punish the woman by forcing her to continue with the unwanted pregnancy.[32] The legislation currently states that only if the doctor deems the woman's situation suitably acute can an abortion be sanctioned under the so-called 'social ground'.[33] However, it is not "self-evident" that doctors are well-qualified to decide whether a pregnancy should be terminated or not. As Jackson argues, it is difficult to imagine a situation in which a doctor's "clinical judgement" could offer an adequate reason to refuse a request for a termination.[34] Put another way, the legislation simply does not make any reference to rights and freedoms for women who want to terminate a pregnancy.[35] The legislation in

[30] The Abortion Act 1967

[31] Michael Thomson, *Reproducing Narrative: Gender, Reproduction and Law* (University of Michigan 2009) 102

[32] Sheldon (n2) 30

[33] Ibid 29

[34] Jackson (n17) 80

[35] Ellie Lee, "Tensions in the Regulation of Abortion in Britain", Journal of Law and Society 30, 4 (2003) 533

its current form, therefore, does not grant emancipatory rights to women, rather, it secures the rights of the doctor not to be prosecuted for performing an abortion.[36] Arguably the decision to frame the legislation in this way was a pragmatic way of neutralising opposition to the Bill; undoubtedly even radically minded reformers tempered their calls for abortion on demand in order to get the Bill through parliament.[37]

It is in this vein that Sheldon has analysed the various types of power that are exercised over women in this situation. Prior to the passage of the Act, advances in medical technology ensured the doctor was the best placed to protect the life of a foetus, knowledgeable as he was about previously invisible processes within the female body.[38] Section 1 of the Abortion Act provides that a "registered medical practitioner" will not be guilty of procuring an abortion when an opinion was formed "in good faith" that the requirement for a termination satisfied the necessary criteria.[39] The role assigned to the doctor in this situation is therefore twofold, to provide a safe abortion, and to scrutinise various medical, social and economic factors (including the woman's "actual and reasonably foreseeable environment") in order to decide whether a termination is justified under the Act.[40] Sheldon asserts that this aspect of the medicalisation of abortion has led to the deployment of technical control, decisional control, paternalistic control and normalising control over women seeking terminations.[41] It is on the basis of these four categorisations that Sheldon asserts that the relationship between a doctor and a woman requiring a termination is "pervaded with power".[42] Jackson posits that the centrality of the role of the doctor in the existing legislation forces women to present their circumstances in the worst possible light, and this undermines the doctor-patient relationship.[43] It is near impossible to imagine a situation in which carrying an unwanted pregnancy to term may advance the physical or mental health of a pregnant woman, and

[36] Ibid 42

[37] Jackson (n17) 81

[38] Sheldon (n2) 52

[39] Abortion Act 1967

[40] Sheldon (n15) 193

[41] Ibid 56-68

[42] Ibid 73

[43] Jackson (n17) 80

therefore the absolute control of two doctors over this decision is "always unjustifiably paternalistic".[44] This focal aspect of the legislation clearly does not advance women's reproductive rights, and in the context of enhanced gender parity and a modernised doctor-patient relationship is arguably no longer fit for purpose. It is on this basis that twenty first century reformers have advocated for abortion on demand, without the need for doctors as the judges of non-clinical circumstances.

A further way that the rights of the doctor were guaranteed as opposed to those of woman seeking an abortion was the inclusion of Section 4 of the Act, that doctors have the right to "conscientious objection to participation in treatment".[45] Dickens addresses a discrepancy in the relationship between this statutory right to conscientious objection in the context of abortion and Article 18 of the Universal Declaration of Human Rights of 1948 that guaranteed the right to "freedom of thought, conscience and religion".[46] He explores that Article 18(3) limits the right to manifest one's religion or beliefs in order to protect public safety, order, health or morals or the fundamental rights and freedoms of others. The right of doctors to conscientiously object to performing a termination therefore has negative consequences for the rights of the woman seeking a termination. Firstly, it frames women as uninformed of their decision to abort, simultaneously denying them agency as conscientious decision-makers and establishing the doctor as the *de facto* conscientious decision-maker on her behalf. Secondly, this right consigns abortion to the periphery of medicine by setting it apart from other procedures as the singular operation from which doctors can conscientiously object.[47] Thirdly, in more practical terms it can lead to the stigmatisation of women seeking abortions, lead to delays in their treatment whereby they must attend multiple practitioners, travel further afield, or attend a private clinic in order to have their wishes met. Clearly, then, the right of doctors to conscientiously object to performing terminations does little to advance women's reproductive rights, and may contribute to stigma within the medical profession and society in general.

[44] Ibid 86

[45] Abortion Act 1967

[46] Universal Declaration of Human Rights 1948

[47] Arguably other than procedures for assisted conception under the HFEA 1990

A longer study would also assess Sheldon and Thomson's arguments relating to the ways in which the medicalisation of abortion has limited our understanding of reproductive choices, and ensured all future debates take place within a rigid medical framework. In any case, the central role of the doctor within the Abortion Act, the right to conscientiously object to performing the procedure and the subsidiary role of the woman being treated contribute to a view of the legislation as a 'halfway house' towards full emancipation. Therefore, while the medical framework has ensured access to safe and legal abortion, the further entrenchment of medical control stands in the way of any initiative to "claim decisional control for women".[48] It follows therefore that this statute may no longer be fit for purpose.

A statute ripe for reform: Scientific advance, patient autonomy and women's rights

Analysis of the 1967 legislation reveals a great deal about the motivations for regulating abortion at this time, and how these motivations allowed for a limited expansion of women's reproductive rights within a medical framework. The legislation no doubt crystallises within it the social attitudes, political motives and widespread misconceptions of its era.[49] More than fifty years on, developments in law, medical science and feminist discourse therefore indicate that the Abortion Act is no longer fit for purpose. Firstly, the Act was passed in order to regulate a complex surgical procedure, whereas advances in clinical medicine have led to the widespread use of two tablets to induce an EMA. Further, a medical relationship evolving towards a model of partnership between doctor and patient is incompatible with legislation that installs doctors as "gatekeepers", charged with deciding whether a termination is suitable on behalf of the woman.[50] It must then be considered how gendered discourses have deemed

[48] Sheldon (n2)122

[49] Jackson (n17)110

[50] Sally Sheldon, "The Medical Framework and Early Medical Abortion in the UK: How Can a State Control Swallowing?" in Rebecca Crook, Joanna Erdman, Bernard Dickens (eds), *Abortion Law in Transnational Perspective* (University of Pennsylvania Press 2014) 209

the Act irreconcilable with twenty first century attitudes towards the rights women must be afforded in an equal society.

EMA was developed as a method of terminating early pregnancies in the 1990s. It involves taking two pills, mifepristone and misoprostol, up to 2 days apart in order to induce uterine contractions and expel the contents of the womb. The licensing of this technique around the world has led to changes in the way that we conceptualise abortion.[51] Indeed, one of the lead scientists in the development of mifepristone had this as his goal, to "diffuse the strength of the word 'abortion'" and actively blur the boundary between termination and contraception.[52] This has had a profound impact on the interpretation of UK abortion law. Advocates of EMA have asserted that it offers to "demystify" abortion, and as a consequence of its relative safety, it could lead to the uncoupling of calls for 'safe' and 'legal' abortion.[53] Despite this clear advancement, EMA was licensed in the UK on the condition that it was to be provided only within the existing legal framework, with the practical restrictions on who may perform a termination and where, still in place. BPAS (British Pregnancy Advisory Service) launched an unsuccessful campaign to liberalise abortion law in the face of medical advances in 2011, arguing that the law needed to change to reflect "scientific progress and shifting standards in clinical best practice."[54] It was their main assertion that a statute written in the 1960s was not best placed to legislate on abortion pills, when fifty years ago they would have seemed like "futuristic science fiction".[55] Sheldon argues that the failure of this case constitutes one (of many) "clinically unsupported decisions" on abortion provision that pervade a system of tight medical control.[56] In 2016 61% of the 190,000 terminations performed in England and Wales constituted an EMA, and their

[51] Ibid 192

[52] Ibid 193

[53] Ibid

[54] Ibid 201

[55] Ibid

[56] Ibid

prevalence is increasing.[57] In 2017, 66% of all terminations were medically induced.[58] This clearly represents a possible motivation for the modernisation of abortion law in line with changes in clinical practice. The All-Party Parliamentary Group on Population, Development and Reproductive Health are in agreement. Their 2018 study was in part motivated by technological advances in the provision of abortion and it was their explicit recommendation that women should be allowed to take these two pills at home, as has been declared safe by the World Health Organisation.[59] In terms of the law itself, Sheldon writes that its wording is based on rarely used surgical techniques that have since been replaced by a reliance on EMA. It is therefore impossible for a judge to "give effect to the ordinary meaning of words" when the legislation needs to be applied in the context of medical practice "unimaginable to its architects".[60]

Another consequence of the provision of EMA is the decentralising of the role of doctors in the termination of pregnancy. It can be argued that the central role of doctors is no longer legally or medically justified. Not only clinical advances, but developments in medical ethics have come to support this view. Medical law is now informed by the notion of patient self-determination, which in the context of abortion would stipulate placing greater weight on the woman's decision to terminate a pregnancy, and less on the opinion of two doctors as to whether this is justifiable. Sheldon has described this as a move away from "doctor knows best paternalism" towards a "model of partnership", the gendered aspect of the former plain to see.[61] Timken's commentary on the report of the Lane Committee of 1972 is scathing of the reaffirmation of the central role of doctors in the decision-making process. She describes the committee, and by consequence the

[57] Denis Campbell, "Make access to abortion easier, UK's top gynaecologist demands" *The Guardian* (5 October 2017) https://www.theguardian.com/world/2017/oct/05/make-access-to-abortion-easier-uks-top-obstetrician-demands accessed 17 February 2018

[58] Department of Health & Social Care, *Abortion Statistics, England and Wales: 2017 Summary information from the abortion notification forms returned to the Chief Medical Officers of England and Wales*, 7th June 2018 (https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2017) Accessed 18th April 2019.

[59] Who Decides? We trust women: Abortion in the developing world and the UK", Report by the UK All-Party Parliamentary Group on Population, Development and Reproductive Health (March 2018). It is legal to take the second abortion pill at home in Scotland, and debates are underway in Wales.

[60] Sheldon (n18) 364

[61] Ibid 209

existing legislation, as "manifestly sceptical of the notion that women are or ought to be treated as autonomous, responsible and equal".[62] The notion of patient autonomy is therefore undeniably at odds with the existing legislation.

The extent to which current abortion legislation can be considered fit for purpose can also be examined in terms of actual clinical practice and the enforceability of the law. The existence of single-purpose abortion clinics, like those run by Marie Stopes and BPAS, and the generally liberal application of the Abortion Act are evidence that abortion provisions may be more accessible than the limitations in the Act would suggest. Lee states that "*de facto* abortion provision is in conflict with the legal rules that seek to regulate it", however various factors have contributed to an atmosphere of relative liberalisation.[63] Firstly it can be considered that some doctors interpret the legislation liberally, and despite their central role in the legislation follow more up to date clinical guidelines relating to the importance of patient autonomy and self-determination. Sheldon cites the instances of doctors stating simply that "pregnancy" was the reason for the termination on their clinical forms without recourse to the law as evidence for this.[64] Lee also provides evidence for the legislative guidelines being undermined internally within the medical profession. She writes that "abortion providers and policy makers themselves, implicitly at least, have accepted that the assumptions on which the statute rest are outdated".[65] Certainly in the context of a consistently liberal interpretation of the law, the need for two doctors' signatures serves no obvious broader purpose.[66] The requirement for doctors to perform all abortion procedures has also warranted criticism. In 1980 the Royal College of Nursing launched a legal challenge regarding the provision for doctors to complete the whole procedure, but the existing legislation was held to be satisfactory.[67] More recently, Professor Lesley Regan, in her capacity as the president of

[62]Jennifer Temkin, "The Lane Committee Report on the Abortion Act" Modern Law Review 37, 6 (1974) 659

[63] Lee (n33) 534

[64] Sheldon (n2) 103

[65] Lee (n33) 552

[66] Sheldon (n50) 345

[67] *The Royal College of Nursing of The United Kingdom v The Department of Health and Social Security* [1980] 1980 WL 265553

the Royal College of Obstetricians and Gynaecologists, has asserted that nurses are already able to complete the procedure, as they must when faced with a woman miscarrying her pregnancy.[68] For these reasons it can therefore be considered that abortion provision, at least in early pregnancy, may have outpaced the legislation.

The enforceability of the law is a question that has re-emerged in the context of the accessibility of abortion pills online, especially in countries where access to abortion is limited by law. It remains significant that while there is widespread availability of legal abortion in Britain, those that take place outside the strict medical framework may be subject to a severe criminal sanction, as was shown in the case of *R v Catt*[69] where the accused received a harsh criminal sanction under the 1861 legislation for procuring an abortion.[70] It can therefore be deduced that clinical advances, a consistently liberal interpretation of existing law, changes in attitudes towards gender differences inherent in a modernised doctor-patient relationship and the limited enforceability of existing law have contributed to the perceived outdatedness of the Abortion Act. Sheldon has summarised this by saying that abortion law in the United Kingdom as currently interpreted "fails to fulfil any demonstrable modern purpose", as can be proven by the suggested changes made by the All-Party Parliamentary Group on Population, Development and Reproductive Health, which offered complete decriminalisation as the favoured option for reform.[71]

Conclusions

The parliamentary debates preceding the Abortion Act and the substance of the Act itself show that the legislation did not have extending women's reproductive rights as a considerable motivation, nor did this occur as an unintended consequence. While it granted some women access to safe and legal abortion, it created a doctor-patient

[68] Campbell, "Make access to abortion easier, UK's top gynaecologist demands" *The Guardian* (5 October 2017)

[69] *R v Catt* [2013] EWCA Crim 1187

[70] Sheldon (n50) 206

[71] "Who Decides? We trust women (March 2018)

relationship that was sustainable only through the deployment of paternalistic power over women seeking terminations. This relationship is now at odds with accepted medical ethics and modern clinical practice. The practice of terminating pregnancy has also changed drastically in the last half century, as the availability of two pills to induce a miscarriage has introduced less of a need for the presence of a doctor and has "demystified" the procedure.[72] The final section of this paper, treating the extent to which this statute may be ripe for reform, followed the arguments laid out in the "Who Decides? We Trust Women" report produced by the UK All-Party Parliamentary group on Population, Development and Reproductive health. They posited that "patient autonomy and respect for women to make their own decisions is now seen as more important than in 1967" and that "paternalistic frameworks are no longer relevant in current UK healthcare".[73] This report concludes that decriminalisation would benefit women seeking terminations to a great extent, but more than this it would reflect best clinical practice (and the NICE guidelines) in procedures of this kind. Like many of the scholars of abortion law I believe the medicalisation of abortion must be approached critically, not only due to the negative consequences for women who require terminations, but also because of how popular debate surrounding abortion can become lodged in a medical framework with no consideration of the broader issues.[74]

In the future, human rights arguments like those set out by the All-Party Parliamentary Group may take precedent. CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women) have asserted that failure to provide gender-specific medical care is "discriminatory" and the special rapporteur on torture has recently established that forcing women to continue unwanted pregnancies "may constitute ill-treatment or torture".[75] Therefore the right of a woman seeking a termination to health, to a private and family life, and to freedom from discrimination forms the basis of many current arguments for decriminalisation. However, the limit of the law in considering rights-based arguments must be considered, as the establishment of fundamental rights for one group can lead to the emergence of contesting rights for another group (for

[72] Sheldon (n50) 192

[73] Ibid

[74] Sheldon (n2) 122

[75] Who Decides? We trust women (March 2018)

example the women's rights versus those of the foetus or the potential father). The fact that law is essentially a site of struggle can therefore limit its ability to administer reproductive justice. In any case, a critical approach to the successes and failures of the existing legislation proves instructive in any debate about the future of British abortion law.

SHAPING SOCIAL JUSTICE

2019