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EDITORIAL

It is a great honour to introduce Volume 28(2) of the *Nottingham Law Journal*, continuing the long tradition of serving the academic community for over four decades. It has remained a peer reviewed and indexed publication, enabling scholars with a broad range of perspectives and disciplines to present their work to an international audience.

The edition reflects the eclectic nature of the journal and the broad range of contributors, of which we are justly proud. It is an organ to present some of the research activities of Nottingham Law School, both in terms of its own staff, and also in relation to academics who have attended conferences, symposia and seminars hosted by the School and its centres; but it is also a general interest journal which welcomes submissions from external and internal authors alike. We remain committed to robust academic standards, but endeavour nonetheless to be inclusive in relation to topics welcomed.

All of the above is amply demonstrated in the contents of the current edition. We have a consideration by Sohail Wahedi on the “*Religious Modification of Infants’ Genitalia: On the (un)lawfulness of ritual male and female circumcision.*” This remains a highly topical debate, and any potential routes out of the legal and political quagmire are important subjects for consideration. A further religiously related contribution comes from Elijah Granet: “*Reynolds Revisited: Minority Religions and the Belief/Action Dichotomy.*” This time the author explores how the seminal *Reynolds* case in the nineteenth century United States shaped future judicial approaches in dealing with minority religious practice, and asks some pressing question for and about our own era, on both sides of the Atlantic.

Moving into different, but not unrelated territory, we also present two papers from a Symposium on Syria held in autumn 2018, a context which reminds us all too clearly of the stakes in finding constructive and peaceful means to reconcile conflicting world-views. We have Helen O’Nions paper on “*Crisis Framing and the Syrian Displacement: the threat to European values*” a theme which, tragically, has lost not of its urgency. Its accompanying piece by Nigel White examines “*Peace-making in Syria: Why the Security Council Fails*”. Here, the title speaks for itself in terms of the fundamental theme, and nobody could question the importance of the question, which is insightfully explored.

Finally, Kay Wheat offers “*An examination of the disparity between judicial activity in developing the law in the context of non-statutory terms in employment contracts and in the interpretation of statutory terms*” in a learned discussion which analyses issue of justice in the field of labour law. We also have some further public and private law matters explored in a book review of Yuko Suda’s “*The Politics of Data Transfer: Transatlantic Conflict and Cooperation Over Data Privacy*” offered by Qian Li, and a Case Note on the *Regency Villas Case* (Regency Villas Title Ltd and others (Respondents/ Cross-Appellants) (v Dimond Resorts (Europe) Ltd and others (Appellants/ Cross-Respondents) [2018] UKSC 57) authored by Dorota Galeza.

I am of course indebted to all of these contributors, and enormously grateful to the editorial team, Daniel Gough as Deputy Editor and Linda Mururu as Postgraduate

Associate Editor. In addition the help of our administrative assistant Kerri Gilbert has, as always, been invaluable. I am also grateful for the advice and support offered by previous editors who remain as colleagues, Janice Denicourt, Helen O’Nions and Tom Lewis.

THE REV'D DR HELEN HALL

ARTICLES

The address for submission of articles is given at the beginning of this issue.

RELIGIOUS MODIFICATION OF INFANTS' GENITALIA ON THE (UN) LAWFULNESS OF RITUAL MALE AND FEMALE CIRCUMCISION

SOHAIL WAHEDI*†

ABSTRACT

This article engages in the debate that questions the justification grounds for the different approaches to ritual circumcisions in law and politics. In this regard, it reflects on the implications, the rise of female circumcision on religious grounds outside Africa and the decrease of toleration for infant male circumcision across Western liberal democracies, have for the legal assessment frameworks of both types of circumcision. Thus, it raises more concretely the question as to whether incision and piercing that modify female genitalia less significantly than ritual male circumcision, could be accepted as exemptions in law, like male circumcision and cosmetic surgery. To address the criticism of applying “double standards” in the legal assessment of ritual circumcisions, this article develops a normative framework of liberal rights and analyses how circumcisions affect the security, vulnerability and status of human beings. This liberal perspective rejects convincingly exemptions for female circumcision and accepts ritual male circumcision conditionally and temporarily. This article develops two pragmatic arguments that explain the “double standards” regime. These arguments reject exemptions for female circumcision and accept ritual male circumcision as an exemption in law, for reasons that look beyond the sectarian justification of this practice.

Keywords: female circumcision, female genital mutilation, male circumcision, law and religion

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†This article has appeared (in whole or in parts) in the following publications: Sohail Wahedi, *Female Circumcision as an African Problem: Double Standards or Harsh Reality?*, in M. Christian Green, T. Jeremy Gunn & Mark Hill (Eds.), *Religion, Law And Security in Africa* 385 (2018); Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 *Quinnipiac Health Law Journal* 209 (2019); Sohail Wahedi, *Freedom of Religion and Living Together*, 49 *California Western International Law Journal* 213 (2018–2019). This article was prepared for presentation and discussion at conferences in Bologna (2019); Nottingham (2017); Rabat (2017) and Rotterdam (2017). Many thanks to all who have commented on this article, especially to Yaron Catane; Frank Ravitch, Wibren van der Burg and Jeroen Temperman. Errors remain mine.

INTRODUCTION

The arrest and detention of some members of the *Dawoodi Bohra* sect (part of the Shia Ismaili community that is predominantly present in India) in Detroit, in April and June 2017, caused a broad wave of public indignation over the performance of female circumcision (hereafter “FC”) in the United States (hereafter “US”). In this first federal landmark trial for FC in the US, the defendants have been accused of performing this practice and assisting the circumciser. The most striking charge has been the one against the emergency room physician, Juamana Nagarwala.¹ She has been charged for the circumcision of two minors from Minnesota. In addition, the public prosecutor has accused her of having circumcised a larger number of other girls from across the US over the past twelve years. The defence team has disputed the unlawfulness of what it has called a harmless “benign religious procedure” that consisted of separating the mucous membrane from the genitalia.² As such, the defence team has questioned the applicability of the term “genital mutilation”, which suggests *a priori* the unlawfulness of any medically unnecessary modification of female genitals.³ However, recently, this case has taken a very interesting turn.

Judge Bernard Friedman of the Eastern District of Michigan ruled that the Federal ban on female circumcision is unconstitutional, because the congress had no authority to enact a ban on this issue on Federal level, since, among others, local laws should be in charge of eliminating criminal activities. The Court, citing *United States v. Lopez*, held that Federal authorities have no “plenary police power”.⁴ More specifically, the District Court rejected the authorities’ argument that the Federal ban on FC followed from the obligations under the International Covenant on Civil and Political Rights (hereafter “ICCPR”). In this respect, the authorities referred to Articles three (non-discrimination provision) and 24 (child protection provision). Judge Friedman rejected these arguments on two grounds. First, he held that the non-discrimination provision under ICCPR does not provide a solid base to justify the federal ban on FC, since this provision is meant to ensure and promote gender equality. Second, Judge Friedman held that neither the child protection provision could help the federal government to justify the federal ban on FC. The Court said that “even assuming the treaty and the FGM statute are rationally related, federalism concerns deprive Congress of the power to enact this statute. In adopting the ICCPR, each member state obligated itself to” fulfill the treaty obligation in accordance with its own constitutional tradition, meaning that the Federal government had no authority to enact a federal ban on FC. This should have happened on state level.⁵

Nevertheless, parallel to the public outrage in the US and abroad about infant FC for seemingly religious purposes in metro Detroit, some have criticised the impunity of ritual male infant circumcision (hereafter “MC”). The protesters have raised the question why young boys who are at risk of being circumcised for non-medical reasons are not protected against this practice.⁶ Similarly, in the public discourse some have implicitly pointed to the problem of favouritism. The question is whether authorities

¹ M Cuevas, ‘Michigan doctors charged in first federal genital mutilation case in US’ *CNN* (25 April 2017).

² R Snell, ‘Judge keeps doctor jailed in mutilation case’ *The Detroit News* (19 July 2017).

³ In the United States, FC has explicitly been prohibited since 1997. See: US Code Title 18, Part I, Chapter 7, § 116, which prohibits the medically unnecessary circumcision, excision or infibulation of any part of the genitalia of girls under the age of 18.

⁴ *United States v. Nagarwala*, 350 F.Supp.3d 613 (E.D.Mich., 2018).

⁵ *Ibid.*

⁶ T Baldas, ‘Protesters in Detroit say male circumcision should also be outlawed’ *Detroit Free Press* (17 April 2017).

could make a distinction between comparable religious practices.⁷ The distinction in legal approaches implies here allowing some obviously religious manifestations, such as MC, while outlawing other rites because these are contrary to the norms of civilised societies, like FC, even the variants that are comparable to, or even less drastic than MC.⁸

The 2017 Detroit criminal case of “horrifying acts of brutality” (hereafter “the Detroit case”) fits in two ways the most recent developments the research area of FC faces.⁹ Firstly, the prevalence of this “over there” problem in the US and other countries around the globe fits the growing criticism on considering this practice a major concern of Africa. Secondly, the application of seemingly different legal regimes regarding ritual circumcisions fits the criticism of applying “double standards” in the legal assessment of comparable practices.¹⁰ The close link between religion and the rise of FC around the globe challenges us to reflect on and question the legal assessment framework of this practice. This challenge draws on the question as to whether FC, at least the variants that are comparable to, or less drastic than MC, could be accepted as religious exemptions in law.¹¹ Thus, the need to compare ritual circumcisions in this context justifies the choice to speak in terms of FC instead of genital mutilation.¹² Circumcision excludes any prejudice concerning the (un)lawfulness of this practice and eases as such a mutual comparison between ritual circumcisions and the legal assessment frameworks.¹³

The main aim of this article is to engage in the current debate that questions the justification grounds for the different approaches to ritual circumcisions in law and politics.¹⁴ In this regard, it reflects on the implications that the rise of FC on religious grounds outside Africa and the decrease of toleration for MC in liberal democracies have for the legal assessment frameworks of ritual circumcisions. To this end, part II gives a description of FC and MC. Part III discusses the criticism of “double standards” from a liberal perspective and presents two pragmatic reasons that could explain this regime. This article claims in part IV that the rise and prevalence of the relatively lighter versions of FC outside Africa for religious reasons and the decrease of support for tolerating MC across liberal democracies call upon us to rethink the legal assessment frameworks of ritual circumcisions. Reflecting hereon results in the conclusion that the religious dimension of ritual circumcisions, as such, does not count as an argument to grant exemptions for medically unnecessary interventions that modify human bodies irreversibly. Any liberal justification for exemptions that allow these kinds of interventions in law should rest on ecumenical grounds that are accessible to a broad public regardless of their background in religion, culture or ideology.

⁷ E Volokh, ‘Religious exemptions and the Detroit female genital mutilation prosecution’ *The Washington Post* (23 May 2017).

⁸ S Wahedi and RSB Kool, ‘De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]’ (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

⁹ J Fortin, ‘Michigan Doctor Is Accused of Genital Cutting of 2 Girls’ *The New York Times* (13 April 2017)

¹⁰ M Dustin, ‘Female Genital Mutilation/Cutting in the UK’ (2010) 17 *European Journal of Women’s Studies* 7, 12.

¹¹ E Volokh, ‘Religious exemptions and the Detroit female genital mutilation prosecution’ *The Washington Post* (23 May 2017).

¹² This article does not aim to breach the broad consensus that the modification of female genitalia without any medical need is a problematic practice.

¹³ Cf. also Obiajulu Nnamuchi, ‘Hands off My Pudendum: A Critique of the Human Rights Approach to Female Genital Ritual’, (2011) 15 *Quinnipiac Health Law Journal* 243, 253.

¹⁴ Comp. M Fox and M Thomson ‘Short Changed? The Law and Ethics of Male Circumcision’ (2005) 13 *The International Journal of Children’s Rights* 161.

RITUAL CIRCUMCISIONS

*Female circumcision**Scope*

The World Health Organisation (hereafter “WHO”) has estimated that on a global level, approximately 200 million young girls and women have undergone one of the variants of FC, varying from very serious to relatively light. Moreover, this leading source on the scope of FC has estimated that three million girls are annually at the risk of FC.¹⁵ Over the last decade, in most of the practicing countries, girls and women have been circumcised before the age of five. Research reveals that in some of these countries up to 90% and in some other places even close to 100% of the girls and women have been circumcised. This list of countries in which a large number of girls and women in the age category 15 to 49 years have already undergone one of the variants of FC, has been led by African countries, such as Somalia (98%), Guinea (97%), Djibouti (93%) and Sierra Leone (90%). In other practicing countries, about half of the girls have been circumcised in the period immediately after the birth, but before the age of 15. As such in Gambia (56%), Mauritania (54%), Indonesia (49%) and Guinea (46%) approximately half of the female population has undergone circumcision.¹⁶

Prevalence

International organisations, such as the WHO, initially considered FC a concern of the African continent.¹⁷ Therefore, the measures were designed to help mainly the African countries to combat this practice.¹⁸ Today, the international community uses an entirely different language to discuss this practice. It considers FC “a global concern”.¹⁹ That is not entirely a false alarm. Girls and women have been circumcised in Iran, Iraqi Kurdistan, Indonesia, and Malaysia.²⁰ Furthermore, due to migration from Africa to the United States,²¹ Europe,²² and Australia,²³ also these regions have been confronted with this practice. Hence, the quantitative scale in which FC occurs in a particular area does not say so much about the broader prevalence of FC. Thus, FC is no longer a unique problem of Africa. Indeed, it is no longer an “over there concern”. Rather, it is an omnipresent phenomenon that is practiced from North America to Europe, Asia and Oceania. Hence, the Detroit case is a recent proof of the “global presence” of FC.

¹⁵ WHO, ‘WHO guidelines on the management of health complications from female genital mutilation’ (WHO, 2016) <http://who.int/iris/bitstream/10665/206437/1/9789241549646_eng.pdf> accessed 28 May 2019.

¹⁶ UNICEF, ‘Female genital mutilation/cutting: a global concern’ (UNICEF, 2016). <https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf> accessed 28 May 2019.

¹⁷ Comp. the first WHO publication on programmes meant to combat FC: WHO, ‘Female genital mutilation: programmes to date’ (WHO, 1999) <http://who.int/iris/bitstream/10665/658571/WHO_CHS_WMh_99.5.pdf> accessed 28 May 2019.

¹⁸ Comp. N Berkovitch and K Bradley, ‘The Globalization of Women’s Status: Consensus/Dissensus in the World Polity’ (1999) 42 *Sociological Perspectives* 481, 490.

¹⁹ UNICEF, ‘Female genital mutilation/cutting: a global concern’ (UNICEF, 2016). <https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf> accessed 28 May 2019.

²⁰ S Wahedi and RSB Kool, ‘De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]’ (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

²¹ H Goldberg et al., ‘Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk, 2012’ (2016) 131 *Public Health Reports* 340.

²² S Johnsdotter and RM Mestre i Mestre, ‘Female Genital Mutilation in Europe: An analysis of court cases’ (2015) <http://ec.europa.eu/justice/gender-equality/files/documents/160205_fgm_europe_enege_report_en.pdf> accessed 28 May 2019.

²³ JB Rogers, ‘The First Case Addressing Female Genital Mutilation in Australia’ (2016) 41 *Alternative Law Journal* 235.

Variants

FC, or genital mutilation, concerns *any* non-medical intervention on female genitalia. The literature on this practice categorises FC, in accordance with the classification made by the WHO, into four types: clitoridectomy (Type I), excision (Type II), infibulation (Type III) and a rest category (Type IV). The WHO defines “Type I” as the removal of the clitoris, either partly or completely. It also makes a distinction between the removal of the clitoral hood, which has been called circumcision and the removal of the clitoris and the clitoral hood, which has been defined as clitoridectomy. Type II stands for the removal of the clitoris and the labia minora, either partly or completely and either in combination with or independently of excising the labia majora. The WHO distinguishes type II in three specific interventions. First, the complete removal of the labia minora. Second, the removal of the clitoris in combination with the labia minora, either partly or completely. Third, the removal of the clitoris, the labia minora and majora, either partly or completely.²⁴ Type III is the most severe intervention on female genitalia, as it almost closes the vaginal opening and creates subsequently “a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris”.²⁵ The rest category of FC covers a wide range of interventions, varying from pricking and piercing to incision and cauterization.²⁶ The Detroit case provides probably another appropriate example of Type IV circumcision.

According to estimates that WHO refers to, the vast majority of circumcised girls and women have undergone one of the variants of Type I, II and IV. Only ten percent of circumcision cases concerns Type III.²⁷ However, in some countries, such as Somalia,²⁸ and previously Djibouti and Sudan,²⁹ a large number of girls and women has undergone the most severe circumcision type: infibulation (Type III). The same is true for particular ethnic groups in Eritrea that circumcise girls: almost all circumcision cases within those groups include sewn closure of the vaginal opening.³⁰ However, in a 2013 report, the UNICEF has indicated that infibulation becomes less common among groups that practiced this type of circumcision.³¹ Outside the FC hotspot, e.g. in Iran, Indonesia and Malaysia, girls and women are subjected to the relatively lighter variants of FC, such as Types I and IV. However, in Iraqi Kurdistan both, the relatively lighter and the more severe variants prevail.³²

Justification grounds

There is no *one specific* ground people rely on to justify practicing FC. Therefore, there is no clear explanation for why girls and women still undergo circumcision. Rather a mixture of arguments are mentioned as justifications for the continuation of FC.

²⁴ WHO, ‘WHO guidelines on the management of health complications from female genital mutilation’1–4 (WHO, 2016) <http://who.int/iris/bitstream/10665/206437/1/9789241549646_eng.pdf> accessed 28 May 2019.

²⁵ *Ibid.*, 4.

²⁶ *Ibid.*

²⁷ WHO, ‘Eliminating female genital mutilation: an interagency statement’ (WHO, 2008). <http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf> accessed 28 May 2019.

²⁸ UNICEF, ‘Female Genital Mutilation/Cutting’ (UNICEF, 2013) 47 <http://unicef.org/media/files/UNICEF_FGM_report_July_2013_Hi_res.pdf> accessed 28 May 2019.

²⁹ WHO, ‘Female Genital Mutilation. An overview’ (WHO, 1998)8 <http://who.int/iris/bitstream/10665/42042/1/9241561912_eng.pdf> accessed 28 May 2019.

³⁰ UNICEF, ‘Female Genital Mutilation/Cutting’ (UNICEF, 2013) 48 <http://unicef.org/media/files/UNICEF_FGM_report_July_2013_Hi_res.pdf> accessed 28 May 2019.

³¹ *Ibid.*, 114.

³² S Wahedi and RSB Kool, ‘De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]’ (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

The common factor is that circumcision of girls and women is meant to emphasize femininity, chastity, the transition to adulthood and other cultural expectations about the role and identity of the women in society. Against this backdrop, some have argued that FC concerns a “gendered practice” that occurs within certain traditions because of the female gender. Besides, FC has been practiced on religious grounds within particular Islamic, Jewish and Christian groups. As such, recent studies reveal that in Iran, Malaysia, Indonesia and Iraqi Kurdistan circumcision is mainly justified on religious grounds. However, the high-ranked Islamic Al-Azhar University has repeatedly explained that the relationship between Islam and FC is very complicated. More specifically, in 2016 the Azhar declared that neither the Koran, nor the Hadith support the “violent” practice of FC, despite the fact that some girls and women undergo circumcision within particular Islamic traditions. Jewish and Christian scholars have adopted the same critical approach towards the religious narratives of this practice.³³

The legal response

Today, FC is considered a serious concern of human rights. However, this human rights perspective on FC has been adopted relatively recently. After all, FC in all its variants is considered a violation of human rights since 1994,³⁴ despite earlier international calls to combat all practices that are harmful to women. As such, the Economic and Social Council urged back in 1952, in Resolution 445 (XIV), all its member states to take necessary steps against practices that violate the physical integrity of women. Also, in 1958 it called upon the WHO to provide an overview of harmful practices girls around the globe face and how such acts could be eliminated. Given the sensitivity over traditional practices, like FC, the WHO declined to carry out this research and argued that it lacks competence to map rituals that have a cultural nature, and not a medical one.³⁵ Thus, for a long time, it was not self-evident to consider FC a human rights issue. However, in the aftermath of the 1994 international recognition of FC as a serious violation of fundamental rights, a quick shift was visible towards the adoption of concrete measures to eliminate this practice.³⁶

Today, many countries around the globe, including African states,³⁷ have developed specific laws that explicitly prohibit circumcision of girls and women for non-medical reasons. Moreover, some countries, such as Belgium, have even criminalised circumcision of adults who are able to give their consent about interventions upon their genitals for cultural reasons. This approach has been criticised as applying “double standards”, since cosmetic surgeries and other medically non-necessary interventions are not criminalised equally.³⁸ Countries that have not adopted specific criminal law provisions to combat FC, for instance many European countries, rely on general criminal law

³³ *Ibid.*

³⁴ Economic and Social Council, ‘Plan of action for the Elimination of Harmful Traditional Practices affecting the Health of Women and Children’ (E/CN.4/Sub.2/1994/10/Add.1 1994).

³⁵ N Berkovitch and K Bradley, ‘The Globalization of Women’s Status: Consensus/Dissensus in the World Polity’ (1999) 42 *Sociological Perspectives* 481, 489.

³⁶ RSB Kool and S Wahedi, ‘European Models of Citizenship and the Fight against Female Genital Mutilation’, in SN Romaniuk and M Marlin (eds), *Development and the Politics of Human Rights* (Boca Raton: CRC Press 2015, 205–221).

³⁷ B Shell-Duncan et al, ‘Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal’ (2013) 47 *Law & Society Review* 803, 806.

³⁸ M Dustin, ‘Female Genital Mutilation/Cutting in the UK’ (2010) 17 *European Journal of Women’s Studies* 7, 12. See also Ruth Farrugia, ‘Parental Responsibility and State Intervention’, (2000) 31 *California Western International Law Journal* 127, 132; Hope Lewis & Isabelle R. Gunning, ‘Cleaning Our Own House: Exotic and Familial Human Rights Violations’, (1992) 4 *Buffalo Human Rights Law Review* 123, 132; Isabelle R. Gunning, ‘Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries’, (1992) 23 *Columbia Human Rights Law Review* 189, 213.

provisions that ban serious assault and mistreatment.³⁹ Despite the firm international condemnations of FC and legislation designed accordingly to eliminate and combat this practice, there is some serious concern about the enforcement of laws against FC.⁴⁰

The complexity to enforce criminal law successfully in the fight against FC is caused, amongst others, by a lack of coherence in the criminal law approach towards this practice. In countries that face the consequences of FC on a large scale, such as the African states that have criminalised this practice, the anti-FC laws are not effective enough to eliminate FC.⁴¹

For example, in Mauritania that has criminalised FC, it is not forbidden by law to circumcise girls and women at certified healthcare institutions. In South Africa, FC is not explicitly criminalised in relation to adults.⁴² Another factor that complicates the legal attempts to fight this practice is the large support for circumcision within the practicing groups and the risk of making circumcision an “underground” intervention. Therefore, some argue that criminalising a practice that is so widely supported is not only ineffective, but also problematic as it practically implies criminal liability for the whole nation.⁴³

To date, France is the only country around the globe that has enforced criminal law on a relatively large scale in the fight against FC. There are different factors that explain the “French success” in this regard. First, the French republican model of citizenship that is strongly intertwined with national assimilation policies towards ethnic minorities and “newcomers”. These ethnocentric policies provide hardly any room for minority groups’ practices that are considered contrary to the majoritarian culture. Second, the systematic medical control of children under the age of six years, which also included a control of the genitalia, have brought cases of circumcision before the criminal court.⁴⁴

Ritual male infant circumcision

Scope

The WHO has estimated that one in three males around the globe has been subjected to MC.⁴⁵ Estimates of the WHO shows that a little less than 70% of all males who have been circumcised, are Muslim. Thus, they are by far the largest group who (still) practice MC. As such, over 90% of boys are circumcised in countries with a Muslim majority

³⁹ European Institute for Gender Equality, ‘Female genital mutilation in the European Union and Croatia’ (European Institute for Gender Equality, 2013) <<http://eige.europa.eu/rdc/eige-publications/female-genital-mutilation-european-union-report/>> accessed 28 May 2019.

⁴⁰ S Wahedi and RSB Kool, ‘De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]’ (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

⁴¹ Therefore, some have argued that law is not an appropriate instrument to eliminate FC Governments need to support non-profit organisations in order to bring the concerns about FC under the attention of a broader public. See L Muzima, ‘Towards a Sensitive Approach to Ending Female Genital Mutilation/Cutting in Africa’ (2016) 3 *SOAS Law Journal* 73, 92.

⁴² M Couzens, ‘The Prosecution of Female Genital Mutilation: A Discussion of Its Implications for South Africa in the Light of a Recent Australian Case’ (2017) 134 *South African Law Journal* 116. See also Johan D. Van der Vyver, ‘International Standards for the Promotion and Protection of Children’s Rights: American and South African Dimensions’, (2009) 15 *Buffalo Human Rights Law Review* 81, 105–106 (discussing Children’s Act of South Africa and how this law bans traditional practices that violate human rights, such as ritual circumcisions and proving the virginity. This Act does not ban religious male circumcision, it however prohibits cultural male circumcision for boys under the age of 16).

⁴³ L Muzima, ‘Towards a Sensitive Approach to Ending Female Genital Mutilation/Cutting in Africa’ (2016) 3 *SOAS Law Journal* 73, 91.

⁴⁴ S Wahedi and RSB Kool, ‘De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]’ (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

⁴⁵ WHO, ‘Neonatal and child male circumcision: a global review’ (WHO, 2010) 25 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf/> accessed 28 May 2019.

of the population, like Turkey, the states in the Gulf region and North Africa.⁴⁶ Like Muslims, Jews form another group, who practice MC on a global level. A 2007 study of the WHO indicates that in Israel, the United Kingdom and the United States, up to 99% of Jewish babies have been circumcised.⁴⁷

Prevalence

Circumcision of boys has been performed in among others North America; Europe; the Middle East; Central and Southeast Asia and major parts of Africa.⁴⁸ In some countries, boys have been circumcised by “traditional circumcisers”, such as the *mohel* in Israel, the *motaher* in the Middle East and the *sunnatji* in Turkey.⁴⁹ In other states, like Saudi Arabia, physicians, or at least medically skilled personnel are generally in charge of MC.⁵⁰ The age at which a boy is circumcised varies by region. For example, in Israel, the United Kingdom and the United States,⁵¹ practically all male babies of Jewish parents are circumcised shortly after birth.⁵² Similarly, in some parts of West Africa and the Gulf region male babies are circumcised soon after birth. However, in North Africa and the Middle East,⁵³ and parts of Asia, MC has not been carried out at a particular age.

Variants

MC concerns the (partial) removal of the foreskin.⁵⁴ The literature on MC categorises this practice into four types. The first most common variant is the (partial) removal of the foreskin.⁵⁵ Sub-incision, the second variant of MC, which has been practiced among Bedouins and aborigines, combines simple circumcision with “slitting of the penis to expose the glans”.⁵⁶ The third variant concerns “*salkh*”, which “[flays the skin] from just below the navel to the upper thigh”.⁵⁷ Super-incision that has been practiced in Polynesia,⁵⁸ is the fourth variant of MC and it concerns “longitudinally cutting the preputium from the upper surface and extending the cut to the pubic region”.⁵⁹

Jews generally circumcise in a traditional celebratory setting. During the ceremony, the *mohel* uses instruments that are sterilised to insert the boy’s foreskin into a metal shield in order to protect the glans.⁶⁰ Hereafter, “[a] scalpel is run across the face of the shield, removing the foreskin. The remaining inner foreskin is subsequently pulled

⁴⁶ *Ibid.*, 8.

⁴⁷ WHO, ‘Male circumcision: global trends and determinants of prevalence, safety and acceptability’ (WHO, 2007) 3 <http://data.unaids.org/pub/report/2007/jc1360_male_circumcision_en.pdf> accessed 28 May 2019.

⁴⁸ *Ibid.*, 2–7.

⁴⁹ WHO, ‘Neonatal and child male circumcision: a global review’ (WHO, 2010) 22 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf> accessed 28 May 2019.

⁵⁰ *Ibid.*, 5.

⁵¹ See: The American Academy of Pediatrics, ‘Male Circumcision’ (2012) 130 *Pediatrics* 756, 757.

⁵² WHO, ‘Male circumcision: global trends and determinants of prevalence, safety and acceptability’ (WHO, 2007) 3 <http://data.unaids.org/pub/report/2007/jc1360_male_circumcision_en.pdf> accessed 28 May 2019.

⁵³ With the exception of the Jewish community in Israel and Iran.

⁵⁴ WHO, ‘Neonatal and child male circumcision: a global review’ (WHO, 2010) 22 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf> accessed 28 May 2019.

⁵⁵ AJ Chessler, ‘Justifying the Unjustifiable: Rite v. Wrong’ (1997) 45 *Buffalo Law Review* 555, 564.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ See also WE Brigman, ‘Circumcision as Child Abuse: The Legal and Constitutional Issues’ (1984–85) 23 *Journal of Family Law* 337.

⁵⁹ *Ibid.*

⁶⁰ Comp. also C. Eric Funston, ‘Made Out of Whole Cloth: A Constitutional Analysis of the Clergy Malpractice Concept’, (1983) 19 *California Western Law Review* 507, 513–514 (arguing that within the context of U.S. civil law, a *mohel* who would cause damages because of not carrying out the circumcision in a proper way, would not be protected on the basis of religious freedom).

back away from the glans and excised with small scissors, and the wound is bandaged without the use of stitches”.⁶¹ (Some) Orthodox Jews perform directly after the circumcision ceremony, *metzitzah b'peh*, which implies that the *mohel* (immediately) absorbs through oral suction the blood that is released after circumcision.⁶² This practice is quite controversial as it might cause serious diseases, like herpes.⁶³ In New York, the lawfulness of *metzitzah b'peh* was challenged, after the city had decided to regulate this practice.⁶⁴

Different from the Jewish tradition of circumcision by the *mohel*, Muslims, who form the largest group practicing MC, choose for both the traditional circumciser and medically skilled professionals.⁶⁵ The latter often use the so-called Plastibell to control bleeding after circumcision. The WHO writes that by the use of the Plastibell, bleeding is controlled by using a ligature which acts as a tourniquet, interrupting the blood supply to the foreskin causing it to separate over time. Wound healing is usually complete within a week. A disadvantage of the Plastibell is that the ring and ligature must stay in place for several days before the skin separates. During this time complications can occur related to the retained ring.⁶⁶

Justification grounds

For Jews the practice of MC has a twofold meaning: a religious and a cultural one. In line with the text of Genesis 17, verse ten, according to which Abraham was requested to remove his foreskin,⁶⁷ Jews circumcise (*brit milah* in Hebrew) a boy on the eighth day after birth.⁶⁸ MC has also a cultural dimension for many Jews. It marks their identity and enables the circumcised boy to integrate within the Jewish community.⁶⁹ Unlike Judaism, the practice of MC is not explicitly mentioned in the Quran. Circumcision confirms within the Islamic faith the existence of believers' relationship with God. Circumcision, which is called *tahera* in Arabic, occurs in accordance with the instructions the Muslims' prophet received to continue the Abrahamic tradition and way of life, which among others involve the practice of MC.⁷⁰ Only *Shafi'i* Sunnis consider MC as *wajib*: a religious commitment that must be obeyed. Other Islamic schools of jurisprudence strongly recommend this practice as a prophetic tradition (*Sunna*).⁷¹

Although most of the circumcisions that take place have a religious ground in common,⁷² it appears from various studies that non-religious arguments also play an important role in the continuation of MC. As such, MC is considered a cultural practice

⁶¹ WHO, 'Neonatal and child male circumcision: a global review' (WHO, 2010) 25 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf/> accessed 28 May 2019.

⁶² *Ibid.*

⁶³ H Ben-Yami, 'Circumcision: What should be done?' (2013) 39 *Journal of Medical Ethics* 459.

⁶⁴ Central Rabbinical Congress v. New York City Department of Health & Mental Hygiene [2014] 13-107-cv

⁶⁵ A Ahmad, 'Do Motives Matter in Male Circumcision?' (2014) 28 *Bioethics* 67, 68.

⁶⁶ WHO, 'Neonatal and child male circumcision: a global review' (WHO, 2010) 13 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf/> accessed 28 May 2019.

⁶⁷ Holy Bible Genesis 17:10: 'This is my covenant, which ye shall keep, between me and you and thy seed after thee: every male among you shall be circumcised'.

⁶⁸ There are some exceptions: illness or the presence of other immediate health risks.

⁶⁹ Y Bilu, 'From Milah (Circumcision) to Milah (Word): Male Identity and Rituals of Childhood in the Jewish Ultraorthodox Community' (2003) 31 *Ethos* 172.

⁷⁰ WHO, 'Neonatal and child male circumcision: a global review' (WHO, 2010) 7 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf/> accessed 28 May 2019.

⁷¹ WHO, 'Male circumcision: global trends and determinants of prevalence, safety and acceptability' (WHO, 2007) 3.

⁷² WHO, 'Neonatal and child male circumcision: a global review' (WHO, 2010) 28 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf/> accessed 28 May 2019.

justified for ethnic reasons,⁷³ as a *rite de passage* and a sign of adulthood.⁷⁴ Also, medical reasons are mentioned to practice MC. It is reported that circumcision of boys reduces the risks to get prostate cancer or be infected with the HIV-virus.⁷⁵ However, recently some authors have suggested that further research is necessary to indicate the risks and benefits of this practice in the United States, since most of the results concerning the benefits of this practice are based on studies that are carried out outside North-America.⁷⁶

The legal response

In an unprecedented step, Denmark has recently recognized MC as a human right: the right of the parents to circumcise their child as a manifestation of their religious beliefs.⁷⁷ Other states and regions, such as South Africa,⁷⁸ Sweden,⁷⁹ Germany,⁸⁰ and some states in the United States, such as California,⁸¹ have specific laws concerning the lawfulness of MC.⁸² The case law on MC is a bit more diffuse. In recent years, litigation in courts across Europe and the United States have led to judgments that shed light on the criteria that are decisive for the (un)lawfulness of MC in liberal democracies.⁸³ These litigations involve mainly cases of civil lawsuits (tort actions) and criminal liability.⁸⁴ Next, some cases are born out of the disagreement between parents concerning the circumcision question.⁸⁵ What is apparent from these judgements is that up to date MC, *as such*, has not been forbidden completely.⁸⁶ Although the Dutch Supreme Court was challenged in 2014 to form an opinion about the (un)lawfulness of MC, the judges denied to rule on this matter *in general*.⁸⁷ Against this backdrop, we can say that MC is not completely outlawed by Courts. Neither are parents or those who are in charge

⁷³ EW Gerharz and C Haarmann, 'The first cut is the deepest? Medicolegal aspects of MC' (2000) 86 *BJU International* 332, 332.

⁷⁴ WHO, 'Neonatal and child male circumcision: a global review' (WHO, 2010) 7 <http://who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf/> accessed 28 May 2019.

⁷⁵ BJ Morris et al, 'CDC's Male Circumcision Recommendations Represent a Key Public Health Measure' (2017) 5 *Global Health: Science and Practice* 15.

⁷⁶ Comp. JA Bossio et al., 'A Review of the Current State of the Male Circumcision Literature' (2014) 11 *The Journal of Sexual Medicine* 2847.

⁷⁷ V Carlström, 'Denmark defends circumcision as a human right – even though 75% are against it', *Nordic Business Insider* (16 June 2016).

⁷⁸ J Sloth-Nielsen, 'A Foreskin Too Far: Religious, Medical and Customary Circumcision and the Children's Act 38 of 2005 in the Context of HIV/Aids' (2012) 16 *Law, Democracy and Development* 69, 75.

⁷⁹ KA Greenfield, 'Cutting Away Religious Freedom: The Global and National Debate Surrounding Male Circumcision', 15 *Rutgers Journal of Law and Religion* 353, 362.

⁸⁰ SR Munzer, 'Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy' (2015) 37 *University of Pennsylvania Journal of International Law* 503, 545.

⁸¹ E Rassbach, 'Coming Soon to a Court Near You: Religious Male Circumcision' (2016) 2016 *University of Illinois Law Review* 1347.

⁸² See also Tasmania Law Reform Institute, 'Non-Therapeutic Male Circumcision' (Tasmania Law Reform Institute, 2012) <http://utas.edu.au/_data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf/> accessed 28 May 2019.

⁸³ Critical of these criteria: E Rassbach, 'Coming Soon to a Court Near You: Religious Male Circumcision' (2016) 2016 *University of Illinois Law Review* 1347.

⁸⁴ E Rassbach, 'Coming Soon to a Court Near You: Religious Male Circumcision' (2016) 2016 *University of Illinois Law Review* 1347.

⁸⁵ S Wahedi, 'Het beoordelingskader van rituele jongensbesnijdenis [The assessment framework of ritual male circumcision]' (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 59.

⁸⁶ However, Iceland has designed bill to outlaw ritual male circumcision. See Harriet Sherwood, 'Iceland Law to Outlaw Male Circumcision Sparks Row Over Religious Freedom', *The Guardian*, <www.theguardian.com/society/2018/feb/18/iceland-ban-male-circumcision-first-european-country> accessed 28 May 2019.

⁸⁷ S Wahedi, 'Het beoordelingskader van rituele jongensbesnijdenis [The assessment framework of ritual male circumcision]' (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 59. The court held that the presence or absence of a *proper permission* for circumcision is the decisive factor to prove serious assault in court.

of the custody enjoined from practicing MC, until an age at which the child can decide himself upon the status of his foreskin.⁸⁸

Hence, the existing legal rulings clarify the circumstances under which MC could be carried out legally. These circumstances fit the human rights framework, as embraced by the United Nations and the Council of Europe, which considers properly practiced MC with permission from the parents a legitimate religious manifestation. However, there are also some (overruled) legal rulings that form an exception on this approach.⁸⁹ These “exceptional judgements” fit the growing public calls across Western countries to stop MC. These critical calls, supported by a growing number of people from the medical field, consider the current legal approach to MC as contrary to the best interests of the child. The argument is that given the high health risks of this practice, the non-therapeutic ritual circumcision of boys should be postponed until an age that the child can give his consent for MC.⁹⁰ The most outspoken court ruling that has embraced this line of reasoning is the 2012 German Cologne *Landgericht* ruling.⁹¹ A similar decision was reached a few years before in Finland.⁹²

RETHINKING THE LEGAL FRAMEWORK

What does the current state of art tell us about the lawfulness of ritual circumcisions? International human rights law is clear about the unlawfulness of FC. It condemns all the variants of this “harmful and violent” practice. Furthermore, it requires states as a matter of positive obligation to eliminate this practice. Thus, it is not permitted to practice FC for traditional or religious reasons. Although the lawfulness of MC has been challenged within many jurisdictions, this practice is not banned completely. Instead, courts have clarified under which circumstances parents are allowed to practice MC. Some have criticised the different legal approaches to male and female circumcision as using “double standards” without presenting convincing arguments why MC should receive another treatment than FC.⁹³ This part claims that this criticism of “double standards” arises from the equality ideal that is prominent in liberal democracies.⁹⁴ To address this fundamental criticism on the current legal regime of ritual circumcisions, this part develops a theoretical framework that reassesses the legal admissibility of ritual circumcisions in light of religious freedom, consent and respect for bodily integrity.⁹⁵ The theoretical focus will be on the assessment of the (un)lawfulness of ritual circumcisions in light of a normative framework of basic liberties. We rely on this framework to reflect, in a broader sense, on what implications amending the legal

⁸⁸ *Ibid.* Judges have used the specific circumstances of the case, such as disputes between parents with different cultural backgrounds; no view of return to the parental home where ritual circumcision is a tradition, to rule that the circumcision decision should be postponed for the best interests of the child, given the irreversible nature of the practice.

⁸⁹ Recently, the regional court of Rotterdam ruled that the seriousness of MC appears from the irreversible nature of this practice, despite the religious justification of MC. Therefore, the presence of proper consent is necessary. See: Rb Rotterdam [Regional Court of Rotterdam] 21 September 2016, ECLI:NL:RBROT:2016:7437.

⁹⁰ PW Adler, ‘Is Circumcision Legal’ (2013) 16 Richmond Journal of Law and the Public Interest 439.

⁹¹ The court ruled that parents’ right to religious freedom – in general – do not justify an irreversible practice, like MC, if the intervention is not medically required. The child should have the opportunity to decide himself in freedom upon the status of his foreskin and the religion he wants to adhere. See for a detailed discussion of this ruling: B Fateh-Moghadam, ‘Criminalizing Male Circumcision’ (2012) 13 German Law Journal 1131.

⁹² The Tampere District Court held that religious freedom does not justify the violation of bodily integrity. The court referred to the ban on FC and argued that toleration of MC would result in discrimination. See: H Askola ‘Cut-Off Point? Regulating Male Circumcision in Finland’ (2011) 25 International Journal of Law, Policy and the Family 100.

⁹³ Comp. PW Adler, ‘Is Circumcision Legal’ (2013) 16 Richmond Journal of Law and the Public Interest 439.

⁹⁴ Comp. in this regard B Boyce, ‘Equality and the Free Exercise of Religion’ 57 Cleveland State Law Review 493, 520.

⁹⁵ Comp. also PW Adler, ‘Is Circumcision Legal’ (2013) 16 Richmond Journal of Law and the Public Interest 439, 483.

status quo of ritual circumcisions would have internally (within Western societies) and externally (outward). This is an appropriate method to develop some pragmatic arguments that could explain the current legal regime of “double standards”.

The question we need to answer is whether exemptions for ritual modification of genitals *qua* ritual or religious could be accepted in law. In other words, could the justification grounds people rely on, to circumcise, justify granting exemptions in law? Do religion, culture and possibly conscience justify the creation of exemptions for ritual circumcisions? Considering the limited space we have, we will only focus on the relationship between religion and ritual circumcisions.⁹⁶ Also because some legal regimes have singled out religious male circumcision for a favoured treatment in law *qua* religious.⁹⁷ The question is: does the religious dimension of ritual circumcisions require special legal solicitude within liberal democracies? To answer this question we need to find out whether religion *qua* religion deserves special legal solicitude within the paradigm of liberal political philosophy.⁹⁸ For the answer to this question, we need to focus on liberal theories of religious freedom.

Liberal theories of religious freedom have one important characteristic in common: *abstraction from the religious dimension*. Abstraction stems for two reasons from the nature of a liberal perspective on religious freedom. First, because of its focus on an egalitarian approach to theistic and non-theistic beliefs, practices and choices of life. Second, due to its emphasis on neutrality towards a particular worldview.⁹⁹ Abstraction consists of three main elements. First, it opposes the justification of religious freedom with an appeal to values that are considered religious. This non-sectarian approach to religious freedom rejects religious toleration *qua* religious. Second, and in line with the previous element, free exercise is justified in light of a more general framework of values that are not theistic of nature. The third element of abstraction implies that a liberal justification for religious exemptions needs to be *ecumenical* of nature. Not in the religious meaning of this word, but rather in the sense of being widely accessible to public. Not because of the quality of the beliefs people have, but because of the fact that they are human beings. Thus, the exemption we make for religious people who do not eat pork, should be similarly granted to vegetarians. Granting such exemptions is *not* justified because of the quality of certain beliefs, e.g. theism versus vegetarianism; it is granted because of the liberal commitment to respect human conscience equally.¹⁰⁰ What does the theory of abstraction mean for ritual circumcisions and does it help us to solve the “double standards” problem?

Abstraction clarifies the use of a *religion-empty* language to discuss extant religious manifestations as it opposes to discuss religious exemptions on sectarian grounds. Therefore, the question is whether we could identify liberal grounds that could justify granting exemptions for ritual circumcisions. We start with FC. Through abstraction, meaning thinking about FC in a *religion-empty* way, two aspects of FC emerge that suggest strongly why justifying exemptions for ritual FC is a problematic case within liberal democracies. First, there is a problem of consent if the intervention takes places on the body of young girls. Second, clitoridectomy, excision and infibulation cause

⁹⁶ See for a liberal discussion of ritual circumcisions from a cultural perspective: M Nussbaum, *The New Religious Intolerance* (Cambridge etc.: The belknap Press of Harvard University Press 2012) 125.

⁹⁷ See more on this argument: Sohail Wahedi, ‘The Health Law Implications of Ritual Circumcisions’, (2019) 22 *Quinnipiac Health Law Journal* 209.

⁹⁸ S Wahedi, ‘Abstraction from the religious dimension’, (2017–2018) 24 *Buffalo Human Rights Law Review* 1.

⁹⁹ C Laborde, ‘Liberal Neutrality, Religion, and the Good?’ in JL Cohen and C Laborde (eds), *Religion, Secularism, and Constitutional Democracy* (New York: Columbia University Press 2016) 249.

¹⁰⁰ Comp. J Maclure and Ch. Taylor, *Secularism and freedom of conscience* (Cambridge etc.: Harvard University Press 2011) 77.

serious health problems varying from psychological problems to problems regarding the urination, menstruation and reproduction.¹⁰¹ Therefore, the immediate and long-term health risks, in combination with the lack of proper consent in cases of infant FC,¹⁰² do not justify religious exemptions for these types of FC.¹⁰³ This conclusion gives rise to two questions.

The first question is, can we justify the ban on genital modifications in cases that women themselves want to adjust the status of their body, as is the case with regard to cosmetic surgeries?¹⁰⁴ Liberal theories of religious freedom oppose strongly any preference or dislike of the way people want to live their lives, as long as people's choices do not violate the rights of others.¹⁰⁵ Therefore, it is possible to argue that all women should have equal access to the genital modification services that are provided by the beauty and cosmetic industry.¹⁰⁶ No misunderstanding: this argument does not advocate the acceptance of infibulation and other harmful variants of FC if proper consent is present. The second question is how to deal with the lightest variants of FC, such as incision or the slight cut in the clitoris?¹⁰⁷ Indeed, if it is right that the *Dawoodi Bohra* only separates the membrane, then it is very hard to prove that such a minor intervention would harm gender equality (what about male circumcision?), the right to reproduction (what about cosmetic surgeries?) and the women's capability of sexual pleasure. We will answer these questions related to the "double standards" critique in light of the implications abstraction has for the (un)lawfulness of MC.

Liberal democracies allow MC as a medical treatment if certain criteria are met.¹⁰⁸ This *religion-empty* understanding of MC fits the framework of abstraction and accepting MC as a medical practice has some serious implications for the legal admissibility of this practice on a long-term. In theory, it is possible that an influential organisation, such as the WHO, concludes that MC has no significant health benefits.¹⁰⁹ This would result in the conclusion that MC is a harmful intervention that lacks proper permission and medical need. The attention will be shifted from the presence of parental permission and sterilized conditions for the circumcision to the possibility the child should get to decide upon his foreskin. This conditional and *religion-empty* acceptance of MC has implications for the "double standards" criticism. As such, it suggests why it is justified to keep on banning the most severe types of ritual FC: the immediate risk of harm and the lack of the permission. It also provides an important argument to oppose the lighter

¹⁰¹ S Wahedi and RSB Kool, 'De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]' (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

¹⁰² The European Court of Human Rights considers female circumcision an inhumane act, the lack or presence of consent in this respect, would not lead to another conclusion. See: RSB Kool and S Wahedi, 'European Models of Citizenship and the Fight against Female Genital Mutilation', in SN Romaniuk and M Marlin (eds), *Development and the Politics of Human Rights* (Boca Raton: CRC Press 2015) 205–221.

¹⁰³ See for a liberal rejection of the serious types of FC: M Nussbaum 'Women's Bodies: Violence, Security, Capabilities' (2005) 6 *Journal of Human Development* 167.

¹⁰⁴ Legislation in Belgium and the United Kingdom even prohibit FC of women who are able to give their consent, see: S Wahedi and RSB Kool, 'De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]' (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

¹⁰⁵ See generally Ronald Dworkin, *Religion Without God* (Harvard University Press 2013) 130.

¹⁰⁶ S Wahedi and RSB Kool, 'De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach towards FC: a comparative law perspective]' (2016) 7 *Tijdschrift voor Religie, Recht en Beleid* [The Journal for Religion, Law and Policy] 36.

¹⁰⁷ Comp. also M Nussbaum, *The New Religious Intolerance* (Cambridge etc.: The belknap Press of Harvard University Press 2012) 125.

¹⁰⁸ See section II.

¹⁰⁹ The WHO rejected in the past to study the health implications of FC, today it is the most prominent champion in the rejection of this practice. Thus, a same approach could be adopted towards MC.

versions of FC: no medical advantage to bring a slight cut on the clitoris and the lack of proper permission in case of infant FC.

The liberal framework we have developed rejects convincingly exemptions for FC. It lacks medical need. It is harmful and if practiced on young girls it lacks proper consent. Thus, to protect girls and women, as a vulnerable group and for reasons of security, there is no justification to allow FC. The situation is different regarding MC. Our liberal framework accepts this practice conditionally and probably temporarily. Conditionally, as its allowance depends on the fulfilment of certain criteria (parental consent and sterilized circumcision circumstances). Temporarily, as our framework does not exclude the option to ban this practice, if the medical benefits of this practice would disappear completely. This conclusion gives an unsatisfactory feeling as the ban hangs like a *Damocles sword* above MC. To address the “*Damocles sword*” criticism on the liberal approach to the legal admissibility of MC, we need to develop argumentation patterns that are much closer to reality. That is to say: argumentation patterns that could explain the “double standards” regime. This requires the development of arguments that look beyond the sectarian and liberal justifications of ritual circumcisions and suggest why we should refrain from the acceptance of FC in law, and why we should restrain from the creation of further restrictions upon MC.

How can we develop argumentation patterns that would fit a broad sense of justice when we talk about the legal admissibility of ritual circumcisions? Reflecting on the implications, a potential ban on MC would internally and externally help us to develop the sort of arguments we need to explain the “double standards” regime. Regarding the internal effect, we can say that a total ban on this practice would give Jews and Muslims the impression that they are not anymore full citizens because of their problematic traditions. Liberal democracies must encourage mutual understanding between different groups of citizens. This “anti-alienation” argument helps to maintain the legal status quo of MC, not because of its sectarian nature, rather because a total ban on this practice would potentially (further) alienate (marginalised) minorities that attach great importance to continue MC.¹¹⁰

Next to the anti-alienation argument, we can also think about the external effects of a ban on MC. The question is: what implications does a ban on MC have for the foreign relation policy of liberal democracies. Such policies are among others concerned with the protection of the rights of non-believers, atheists, proselytes and critics of religion in general in countries that lack fundamental rights such as the freedom of speech, conscience and association.¹¹¹ Not to mention in this regard the absence of religious freedom that within the human rights discourse is understood as the right to belief, not to belief, change from religion and be able to criticise religion. Therefore, a complete ban on MC, which has also been practiced in countries that do not have a strong human rights record, would further complicate and narrow down our possibilities to ask attention for the rights of vulnerable groups around the globe.

This “wrong signal” argument accepts that within liberal democracies, religious freedom has no intrinsic liberal value. It understands this freedom as a *religion-empty* concept that provides protection to a wide range of beliefs and practices, without making

¹¹⁰ Comp. ‘Report of the Special Rapporteur on freedom of religion and belief on his mission to Denmark’ <[http://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/442/36/PDF/G1644236.pdf](http://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/442/36/PDF/G1644236.pdf?OpenElement)> accessed 28 May 2019. See on the anti-alienation argument also Yaser Ali, ‘Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America’ (2012) 100 *California Law Review* 1027.

¹¹¹ The European Union has even a Special Envoy, Ján Figel, former Slovak diplomat, who promotes religious freedom as part of the European Union’s foreign policy, see: <https://ec.europa.eu/europeaid/node/117118_es/> accessed 28 May 2019. See also Ján Figel, ‘The European Union and Freedom of Religion or Belief: A New Momentum’, [2017] *BYU Law Review* 895.

a distinction between theistic and non-theistic beliefs people may have. However, and in line with the liberal political commitment to ask attention for the human rights situation of vulnerable groups, e.g. atheists, adherents to new religions and critics of religion, in countries that do not recognize religious freedom, we need freedom of religion to discuss the human rights situation of atheists, non-believers, proselytes and adherents to new religion. These groups face serious danger in countries that do not recognize the right to religious freedom. Therefore, any serious restriction, i.e. a total ban, on important religious practices, such as MC that is so relevant to Muslims and Jews, regardless of where they live, brings the foreign policies of liberal democracies in a complicated situation.¹¹²

The anti-alienation and the wrong signal arguments are *pragmatic* arguments that could at least explain the “double standards” regime. The use of these arguments reveals that acceptance of FC would call for resistance internally and externally. After all, local, national and international efforts are focused on the elimination of this practice. Concerning the legal admissibility of MC, these pragmatic arguments warn us for the implications of a ban internally and externally. As such, they help us to face properly the “Damocles sword” criticism on the dominant liberal approach to MC. Thus, for pragmatic reasons, we could explain the current state of arts: the “double standards” regime. The pragmatic arguments we have developed help us to refrain from the creation of legal exemptions for FC and they impose concrete restraints on a further restriction regime of MC.

CONCLUSION

The rise of FC outside Africa and the decrease of toleration for MC challenge us to reflect on the legal assessment framework of both types of ritual circumcisions. In this regard, the main challenge is to address properly the liberal criticism of “double standards”. This article has developed a normative framework of liberal rights to address this criticism. This liberal perspective rejects convincingly exemptions for FC and it accepts MC conditionally and temporarily. This conclusion gives an unsatisfactory feeling as the ban on MC hangs like a Damocles sword above this ancient practice. To face the “Damocles sword” criticism and to develop argumentation patterns that would fit a broader sense of justice about the legal admissibility of ritual circumcisions, this article has introduced two pragmatic arguments that help us to explain convincingly the “double standards” regime.

¹¹² Comp. Ravi Mahalingam, ‘Women’s Rights and the War on Terror: Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalism’, (2004) 34 California Western International Law Journal 171, 208 (arguing that the U.S. should pay attention to the vulnerable situation in which many).

REYNOLDS REVISITED: MINORITY RELIGIONS AND THE BELIEF/ ACTION DICHOTOMY

ELIJAH ZACHARY GRANET*

INTRODUCTION

Freedom of religion is a polysemic and difficult concept, because it depends on one's understanding of both freedom and religion. One approach—taken by, *inter alia*, the European Court of Human Rights—is to draw a line between belief (or the *forum internum*) and action (or the *forum externum*), with the former entitled to absolute protection, while the latter is subject to state regulation. This distinction, between private and public religion has led to intense controversy, such as in the ECtHR's ruling in *Dahab v. Switzerland*, which held that a teacher could not wear an Islamic headscarf in the classroom.¹ On the one hand, the belief/action dichotomy, with its powerful for an inviolable realm for private matters of conscience, has had a major influence on international human rights norms. Peter G Danchin goes so far as to argue that this distinction “underlies the international human right to religious freedom”, even while acknowledging that there is great debate as to “the universality of this assumption”.² Yet, the conception of religion as a private matter of conscience necessitated by this stark dichotomy is so alien to some religions that Jonatas EM Machado has declared that “[t]he legal protection of religious freedom is incompatible with the dichotomy between belief and action”, because “[s]ometimes an action required from a congregation is so intertwined with convictions that it must be seen as part of the essential nucleus (*kernbereich*) of the right of religious freedom”.³

The controversy, in other words, is one over the very legitimacy of the notion of religious freedom in contemporary human rights law. Yet, despite the weightiness of this issue, it is often hard to separate contemporary jurisprudence on the belief-action distinction from many other intersecting political issues. The aforementioned *Dahlab* case, for example, touched at the heart of political controversies over the place of Islam in Europe, making it often difficult to separate enduring universal legal principle from the politics of immigration. The ECtHR, in *Dahlab* and similar cases, has had to determine if the public manifestation of Islam could be understood to pose a threat to state secularism, religious freedom, and public order.⁴

For this reason, an examination of a historic case of the belief-action dichotomy can be helpful, particularly when the issues of controversy in said case have no contemporary political relevance. In 1878, the landmark United States Supreme Court case of *Reynolds v. United States* held that religious freedom did not preclude the conviction of a polygamist who had claimed a religious imperative to take multiple wives. This case (which still forms the basis of current American constitutional law) provides an instructive focus of study, precisely because the background of the case (polygamy and

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¹ Saba Mahmood and Peter G Danchin, 'Immunity or Regulation?: Antinomies of Religious Freedom' (2014) 113 *The South Atlantic Quarterly* 129, 146.

² Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49 *Harvard International Law Journal* 249, 263–264.

³ Jonatas EM Machado, 'Freedom of Religion: A View From Europe' (2005) 10 *Roger Williams University Law Review* 451, 485.

⁴ Mahmood and Danchin (n 1) 152.

the persecution of Mormons in 19th century America) has lost all political connotation, even as the principles at hand (the belief/action dichotomy as the basis for the jurisprudence of religious freedom) continue to be extremely relevant.

In *Reynolds*, the US Supreme Court reasoned that the law protected religious beliefs while offering no protection for religious actions, particularly if such action risked harms to women's freedom, and even civilisation itself. Yet, this seemingly noble statement of civilisational defence is, in fact, as a close analysis of the case demonstrates, far from a statement of virtuous liberal principle. Instead, *Reynolds* demonstrates, with the clarity of historical hindsight, that the belief/action dichotomy is a reification of a particular Protestant view of religion and its use in jurisprudence serves only to privilege majority norms over the rights of followers of minority religions.

HISTORICAL BACKGROUND

In 1830, in upstate New York, Joseph Smith Jr. organised a church⁵ around the recently published Book of Mormon (which Smith purported to have translated from divinely revealed golden plates), claiming for himself the titles of Prophet and president.⁶ The church rapidly won many converts from a variety of backgrounds, who were eager to take part both in the purportedly restored covenant of the early Church, as well as the new covenant formed by “continuing revelation” given to Smith.⁷ In the context of a time of great American religious upheaval known as the Second Great Awakening, Smith was just one prophet among many; indeed, his new faith shared characteristics (such as temperance, restorationism, and millennialism) with many other emergent religious movements of the time.⁸ The faith's distinctiveness instead derived from the intensity of the violence directed at it; “as fast as converts were made, so were enemies”.⁹ The early faith was fast moving, as it encountered intense resistance virtually everywhere it settled; this violence was frequently state-sanctioned. One of the most infamous cases occurred in Missouri, in 1838, where Governor Lilburn Boggs issued an executive order authorising the extermination of all Mormons within the state's borders.¹⁰ The federal government of the time, then relatively weak compared to today, declined to intervene against even this explicit state-sanctioned prosecution, out of a combination of jurisdictional uncertainty and “the political undesirability of siding with the Mormons”.¹¹

The aetiology of this anti-Mormon violence is complex, but one practice drew particularly intense ire: polygamy, or as Smith variously termed it, “celestial marriage” and “plural marriage”. Smith's first known revelations on marriage occurred in 1843,

⁵ Then formally called the Church of Christ, today known as the Church of Jesus Christ of Latter-Day Saints, and here referred to as the Mormon Church to distinguish it from the many other branches of the broader Latter-Day Saint movement which bear quite similar names.

⁶ Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (The University of North Carolina Press 2002) 19.

⁷ Steven C Harper, ‘Infallible Proofs, Both Human and Divine: The Persuasiveness of Mormonism for Early Converts’ (2000) 10 *Religion and American Culture: A Journal of Interpretation* 99.

⁸ Daniel Walker Howe, ‘Emergent Mormonism in Context’ in Terry L Givens and Philip L Barlow (eds), *The Oxford Handbook of Mormonism* (Oxford University Press 2015).

⁹ Marie H Nelson, ‘Anti-Mormon Mob Violence and the Rhetoric of Law and Order in Early Mormon History’ (1997) 21 *Legal Studies Forum* 353, 358.

¹⁰ Grant Underwood, ‘Millennialism, Persecution, and Violence: The Mormons’ in Catherine Wessinger (ed), *Millennialism, Persecution, and Violence: Historical Cases* (Syracuse University Press 2000) 46.

¹¹ Edwin B Firmage, ‘Religion & the Law: The Mormon Experience in the Nineteenth Century’ (1991) 12 *Cardozo Law Review* 765, 770.

though he claimed to have *actually* received the vision in the 1830s, having supposedly hidden it because he was aware of just how controversial this would prove.¹² Polygamy was not an optional extra; Smith's revelation on the topic makes it explicitly clear that anyone who rejected celestial marriage would face damnation. Mormon soteriology was inextricably tied to entrance into this covenant.¹³ Although the Church tried to keep the practice secret, rumours of it spread, contributing to Smith's murder in 1844 in Illinois. It must be emphasised, that, as Sarah Barringer Gordon puts it, polygamy was "neither unprecedented nor un-Christian" for the time and place;¹⁴ indeed, she goes so far as to argue that "sexual innovation" was a characteristic feature of new religious movements in early nineteenth-century America.¹⁵ However, the sheer scale of the Mormon Church, combined with its aspiration to a separate legal order (Mormon settlers in the early Church invariably formed their own distinct communities) meant that its practices inspired especial revulsion throughout America.¹⁶

After Smith's assassination, Mormons, now under the leadership of the charismatic Brigham Young, fled west to Utah, where they attempted to establish a theocratic statelet called Deseret (though Young would have preferred to call it "theodemocratic").¹⁷ Secure in their new home, the Mormons felt confident enough to publicise to the world the revelations Smith and Young had received on polygamy in 1852.¹⁸

It did not take long for American discourse to pair anti-polygamy with the other great social issue of the age: slavery. By the 1850s, abolitionists had come to make a connection between slavery and sexual exploitation, and, before long, they saw both slavery and polygamy as paradigmatic of the effects of a male libido run rampant. In 1856, the Republican party platform proclaimed that slavery and polygamy were "the twin relics of barbarism". The famed abolitionist Harriet Beecher Stowe (the author of *Uncle Tom's Cabin*) claimed that the "cruel slavery" of polygamy "debases and degrades womanhood, motherhood, and family"; a contemporary politician went so far as to say that polygamy was a crueller form of slavery than that found in the South.¹⁹ These paired discourses demanded moral action in place of legal restriction. While Southern Democrats were wary of the expansion of federal power, and its potential to check slavery, the Republicans said that the law of God himself precluded such barbarism. As one anti-polygamist at the time wrote, the "insult" that polygamy did to "our own wives and our own daughters, and the wives and daughters of our constituents" had to be avenged.²⁰

This rush to protect the women of Utah can seem strange. The National Women's Suffrage Association declined to condemn polygamy, on the basis that all forms of marriage were equally patriarchal. Conversely, the very politicians condemning polygamy as patriarchal vehemently opposed women's suffrage and defended the "traditional family" perhaps the most archetypically patriarchal of institutions. Despite this, the

¹² M Guy Bishop, 'Eternal Marriage in Early Mormon Marital Beliefs' (1990) 53 *The Historian* 76, 81–82.

¹³ Bruce Baum, 'Feminism, Liberalism and Cultural Pluralism: J. S. Mill on Mormon Polygyny' (1997) 5 *Journal of Political Philosophy* 230, 236.

¹⁴ Sarah Barringer Gordon, 'The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America' (2008) 28 *Journal of Supreme Court History* 14, 19.

¹⁵ Sarah Barringer Gordon, 'A War of Words: Revelation and Storytelling in the Campaign against Mormon Polygamy' (2003) 78 *Chicago-Kent Law Review* 739, 746.

¹⁶ Gordon, 'The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America' 15–20.

¹⁷ Patrick Q Mason, 'God and the People: Theodemocracy in Nineteenth-Century Mormonism' (2011) 53 *Journal of Church and State* 349.

¹⁸ Charles A Cannon, 'The Awesome Power of Sex: The Polemical Campaign against Mormon Polygamy' (2012) 43 *Pacific Historical Review* 61.

¹⁹ *Ibid* 76.

²⁰ Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* 14–25.

rhetoric of anti-polygamy was firmly identified grounded in women's rights. Gordon argues that the anti-polygamy discourse "gave legislators a convenient out" by providing a locus of comparison that made the stifling structures of American patriarchy look decidedly liberal.²¹ Marriage, to the anti-polygamy reformers, was a form of restriction on the power of men, who otherwise would be free to follow their baser instincts in subjugating women.

In a twisted way, this is the logical conclusion that follows from the first premise which holds that women are powerless against the advances of men. The anti-polygamists saw themselves as defending the welfare of women, rather than the rights of women, because the discourse of rights requires one to see women as having agency. In their view, a civilised society limited the harm done to women by men, instead of lifting the legal disabilities on women. Thus, we arrive at a consistent if reprehensible legal philosophy that can simultaneously condemn women's suffrage and polygamy. This also allows us to see why the discourse of anti-polygamy was so intimately connected to the discourse of antislavery. The campaigners leading the charge against slavery and polygamy sincerely believed that both institutions were morally wrong, but it does not follow that they believed that people of colour and women were their equals. Working within a patriarchal and racist establishment, the anti-polygamy campaigners sought to tweak this patriarchal and racist system rather than to overthrow it. This attitude is quite well encapsulated by an anti-polygamy editorial in the (non-Mormon, Utah) Salt Lake Tribune in 1885, which postulated that before Christianity, "woman was a slave and beast of burden", but civilisation had exalted women into a revered state as "the most sacred figure in the household".²²

It is within this complicated social and religious context that, in 1862, Congress passed the Morrill Anti-Bigamy Act, which outlawed bigamy in Federal territories (which Utah was at the time). However, Utah had no civil registry of marriages, and, even if it had, there was not a Mormon jury that would convict a man for polygamy.²³ In other circumstances, the federal government might have forcibly imposed its will on Utah by force, but fortunately for the Mormons, the American Civil War kept the military otherwise occupied. After the war, with the antislavery discourse now mercifully no longer needed, it took a single woman's public activism to return polygamy to the spotlight. Ann Eliza Young, the so-called "Rebel of the Harem" had divorced her husband, Brigham, renounced Mormonism, and embarked on a barnstorming lecture tour, decrying polygamy as oppressive and perverted. Republicans took up her cause with gusto, and in 1874, passed the Poland Act (named after a senator, rather than the country) which was designed to facilitate prosecutions of polygamists. It helped that the anti-polygamy discourse was now paired with a new popular discourse: the anti-Catholic discourse. As Noah Feldman observes, many republicans saw the anti-polygamy actions as a test case for "the principle of federal control over local practices that offended their moral sensibility". Indeed, two years after the Poland Act, the House of Representatives passed the Blaine Amendment, which attempted to amend the constitution to prevent state aid to parochial schools (the amendment ultimately failed in the Senate).²⁴

²¹ *Ibid* 53–54.

²² Steve Estes, 'Mormon Manhood and Its Critics: Polygamy and the Construction of Hegemonic Masculinity in the United States' in Pablo Dominguez Andersen and Simon Wendt (eds), *Masculinities and the Nation in the Modern World* (Palgrave Macmillan 2015) 49–50.

²³ Sarah Song, 'Polygamy in Nineteenth-Century America' in Janet Bennion and Lisa Fishbayn Joffe (eds), *The Polygamy Question* (Utah State University Press 2016) 26.

²⁴ Noah Feldman, *Divided by God: America's Church-State Problem— and What We Should Do About It* (Farrar, Straus & Giroux 2005) 100–105.

The Mormon reaction to the actions of the federal government was, surprisingly, to put their trust in the federal government by agreeing to a test case. This optimism was based on the First Amendment to the Constitution's protection of the free exercise of religion. This protection, however, was purely theoretical, because as late as 1874, no free exercise case had ever been litigated before the Supreme Court. The Mormon's legal reasoning was strengthened by religious conviction which viewed the US constitution as a divinely inspired document would protect their right to their unique way of life. It was ultimately agreed that a man named George Reynolds would be charged. Reynolds, who was a British-born convert, was convicted of violating the Morrill Act, and sentenced to two years' hard labour (later reduced to two years' mere imprisonment, of which he served nineteen months). After a series of protracted appeals, the case was eventually heard at the Supreme Court, which in 1879 issued the decision (upholding the law and Reynolds's conviction) that is the focus of this article.²⁵

THE REYNOLDS CASE

Chief Justice Morrison R Waite, a Yale educated jurist who had been a noted antislavery campaigner, wrote the court's decision. On the one hand, the dispute was simple as a matter of law. The Morrill Anti-Bigamy Act barred even the purely religious (i.e. neither civil nor registered) bigamy practiced by Reynolds and his co-religionists. Congress had passed a law, and Reynolds had broken it. On the other hand, Reynolds sincerely believed that the "Law of the Lord" had compelled him to engage in polygamy to "escape condemnation".²⁶ To our modern and multicultural ears, this sort of dilemma is prosaic and common; it arises every time there is a conflict between religion and the law. But in 1879, the still young republic had never considered these kinds of questions. The First Amendment provided for the "free exercise" of religion, but what did that mean? What was religion and how did one exercise it? In his decision in Reynolds²⁷—which, incidentally, is still guiding constitutional precedent, and was invoked by the US Supreme Court as recently as 1990 in *Employment Division v Smith*—Chief Justice Waite was answering these important questions for the first time.

In the trial, Reynolds had attempted to argue that he did not have a *mens rea*, since fulfilling a religious obligation by definition could not reflect evil intent. Waite wrote that the question before him was "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land". As always in American politics, there was no dispute *per se* of the fact of freedom of religion; Waite wrote that "religious freedom is guaranteed everywhere throughout the United States". Instead, the question is, what does religious freedom mean? Or, as Waite put it: "the precise point of the inquiry is, what is the religious freedom which has been guaranteed?"²⁸

The first question Waite asked is one which has bedevilled everyone studying religion: what is religion? Waite quoted Thomas Jefferson, who wrote that religion was "a matter which lies solely between man and his God". Following this, Waite concluded that the constitution left Congress could legislate on "mere opinion", but did have the power to prohibit "actions which were in violation of social duties or subversive of good order".²⁹ The question, then, was: did polygamy fall into this category?

²⁵ Firmage (n 11) 772–776.

²⁶ Elizabeth Harmer-Dionne, 'Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Belief-Action Distinction' (1998) 50 Stanford Law Review 1295, 1325.

²⁷ *Reynolds v. United States*, 98 U.S. 145 (1878).

²⁸ *Ibid* 162.

²⁹ *Ibid* 164.

To answer this, Waite turned to a German political theorist called Francis Lieber, who had argued, on the basis of a racist understanding of the world, that polygamy was the mark of patriarchal despotism (typified by supposed Oriental harems), in contrast to the republican institutions of America. Waite eagerly then claimed that there was a causal relationship between marriage and the form of government, because marriage was the bedrock of the social order.³⁰ If marriage, as the basic unit of society, was so powerful as to change the government, then surely the government could regulate it. Noah Feldman writes that “[t]he thrust of this argument was that the normal marriage practices of the citizens of nonsectarian Christian America were connected to the republican form of government that they enjoyed”.³¹ Waite was unable to conceive of a liberty that is not bound to his own social and cultural background; this leads him to seemingly bizarre causal inferences. Once again, the result is a patriarch’s twisted feminism. In a natural development from the rhetoric epitomised by the notion of the “twin relics of barbarism”, Waite arrived at the idea that men are so powerful, and women so easily victimised, that there needs to be a paternalistic state to prevent men from dragging women into sexual depravity, and hence tyranny.

Moving from this dubious conclusion, Waite then wrote, “This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute”.³² This is the key point of the argument: Waite wrote that “Laws are made for the government of actions”. And, his argument here, at least facially, seems very reasonable. Few people would disagree with the notion should have the power to prevent religiously motivated human sacrifices, for example; there is clearly a limit which must be set by the government. If the limit were decided by the individual believer, Waite argued that that would “permit every citizen to become a law unto himself”.³³ Thus, to prevent anarchy, Waite held that Reynolds was unjustified to violate the law, and upheld his conviction.

THE BELIEF/ACTION DICHOTOMY: A FALSE CHOICE

Waite’s line in the sand puts belief on one side of the law, and action on the other. This reasoning (as opposed to Waite’s flawed premises) might not immediately seem problematic; stripped of its racist and sexist assumptions, it might even seem to be a quite liberal conclusion. It bears more than a little resemblance to JS Mill’s famed harm principle, in which he argued that state intervention occurs to prevent harm to others. Regardless of the *actual* societal harm of polygamy, the basic reasoning here might appear to be a great liberal compromise that accords faith unlimited liberty, but restricts so-called “freedom of action”.

This, however, is not liberalism, and it is certainly not Mill’s harm principle. We can be certain of this because Mill was a contemporary of Waite’s, and happened to write directly on this topic in *On Liberty*. Mill, who was, of course, an avowed feminist (albeit *avant la lettre*), made it very clear that he disapproved of polygamy, but added, “I am not aware that any community has a right to force another to be civilised”.³⁴ Bruce Baum, writing in one of the few analyses of Mill’s view on this issue, notes that Mill would

³⁰ *Ibid.*

³¹ Feldman (n 24) 106.

³² *Reynolds v. United States* (n 27) 166.

³³ *Ibid* 167.

³⁴ John Stuart Mill, *On Liberty and Other Essays* (John Gray ed, Oxford University Press 1991) 102.

agree with Waite that polygamy was a threat to a free society, as well as oppressive to women, but would disagree on the fundamental point that one could extrapolate from the harm caused to the believers to nebulous societal harms.³⁵ So long as the harm was contained within the Mormon community, there was no justification for intervention. In other words, liberalism is not about protected beliefs but protected actions. Voluntary actions ought to be protected, and especially those driven by conscience. As much as it pained Mill to admit it, the women were voluntarily entering into this action, even if he found it repugnant and believed that it harmed them. Baum further claims that Mill took a sophisticated view of the voluntariness of the decision of Mormon women to engage in polygamy, by arguing that Mill agreed with Waite (and Eliza Young) that the oppressive power of religion meant that the “choice” to engage in polygamy was not wholly voluntary.³⁶ However, Mill diverged from Waite in his conclusion that no choice in a liberal society will ever approach the ideal of a truly voluntary choice made by a fully free actor; we are all subject to the dictates of our background and culture, whose influence is often inescapable. Stanley Fish refers to these as “structures of constraint” and argues that it is incorrect to see actions as occurring along a continuum of constraint and freedom, because all actions are fundamentally constrained.³⁷

It is these structural constraints which explain much of Waite’s reasoning. Inexorably (though not necessarily consciously) influenced by the background of mainline American culture, Waite saw polygamy, but not monogamy, as patriarchal; similarly, when Waite ruled that belief, but not action, constitutes religion, he was constrained by Protestantism.

This influence is made all the more evident by the fact that the First Amendment to the US Constitution, unlike say, the ECHR, has no discussion of conscience, or freedom of belief; the operative word here is the free *exercise* of religion. This wording, on the face of it, suggests that religion is not merely an internal state, but rather something which one actively exercises. However, Waite was so constrained by America’s Protestant cultural hegemony that he was unable to see religion as anything other than a matter of internal belief, mediated solely by the individual believer. This is in many ways unsurprising. Even in today’s America, “there is a Protestant hegemony that continues to dominate public debate”, with the result being that “[i]n the courts we see a consistent pattern of preservation of the religious mainstream”.³⁸ It is also apparent from Waite’s reliance on Jefferson for a definition of religion; even the non-Protestant Jefferson could conceive of religion only as a matter of individual belief and conscience. Nor is this problem at all limited to America; rather, it affects all attempts to construe religion a single and stable analytic category, which inherently ignore the complexity and plurality of religion.³⁹ The very act of attempting to delineate a licit sphere of religion axiomatically involves a reductive process, which will inevitably be shaped by “majoritarian presuppositions, ignorance, and indifference”.⁴⁰

This definitional problem takes in the entire history of religion as a discrete legal category. The very idea of “religion” as a restricted and isolatable element of law, as

³⁵ Baum (n 13) 244–247.

³⁶ *Ibid* 239–244.

³⁷ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary & Legal Studies* (Duke University Press 1990) 459.

³⁸ Lori G Beaman, ‘The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada’ (2003) 42 *Journal for the Scientific Study of Religion* 311, 318.

³⁹ Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press 2017) 6–7.

⁴⁰ Michael W McConnell, ‘The Origins and Historical Understanding of Free Exercise of Religion’ (1990) 103 *Harvard Law Review* 1409, 1418.

opposed to a dimension of all aspects of human life, is itself a concept steeped in Protestantism. Helge Årsheim writes that “only with the rise of religion as a generic category following the Protestant Reformation could religion become legally recognized [*sic*] as a standalone, generic category”; this accommodated Protestantism easily, but colonial governments had to redefine local traditions in order to “fit the template”.⁴¹ This framework of colonialism is particularly helpful in the case of the Mormons, because despite the very American nature of the faith and its believers, wider American society was determined to see them as foreign and uncivilised. Not only did popular rhetoric reduce the Mormons to barbarians, but many went so far as to refer to Mormons as “white Indians”, implying that the group needed to be subjected to the same supposedly civilising processes used to destroy the culture and religion of America’s *actual* indigenous peoples.⁴² As noted earlier, polygamy was an essential and inseparable aspect of being a member of the Mormon Church; those who did not practice it were rejecting the new covenant and dooming themselves to damnation. The action/belief distinction that worked so well for Protestants simply did not work in the case of Mormonism (nor would it in the case of many other religions); Waite’s attempt to force Mormonism to fit into this template resulted in sending a man to prison for following his religious beliefs.

In other words, the very idea of a codified legal approach to religion is an expression of a narrow and hegemonic view of faith. This is why it took until 1874 and the rise of the Mormons for there to even *be* an American case on Free Exercise. A “neutral” legal approach to religion is meaningless when the law and religion are both emanating from a view of religion that perfectly fits the dominant culture. Waite’s facially neutral reasoning resulted in a legal framework—still extant in America—that was heavily favourable to Protestants, and highly unfavourable to minority religions and new religious groups. The true test of a system’s tolerance is how it handles a large and vocal minority that did not build the system in the first place. This also lets us see intersection of sexism and religious discrimination: Waite needed to save the women from the barbaric practices of the men, which were barbaric because they are not like his. Reynolds was not protected by the First Amendment because his religious obligation was not like Waite’s religious obligation.

THE CONTINUED RELEVANCE OF *REYNOLDS*

This can all seem moot today, not least because now “Mormons are widely regarded as quintessentially, even hyper, American”.⁴³ Yet, it is precisely because of this historical distance that *Reynolds* is so useful. The very dangerous discourse that led first to the passing of the Morrill Anti Bigamy Act, and then the upholding of its constitutionality, is hard to identify in the present, because it so insidiously plays off our own cultural assumptions; it is far easier to identify the hidden structures of constraint binding those in the past than it is to find, much less question our own problematic assumptions. The anti-polygamy campaigners did sincerely believe what they believed: that they were helping the women of Utah; Waite probably did genuinely think he was upholding

⁴¹ Helge Årsheim, ‘Legal Secularism?—Differing Notions of Religion in International and Norwegian Law’ in Trygve E Wyller, Rosemarie Van Den Breemer and Jose Casanova (eds), *Secular and Sacred? The Scandinavian Case of Religion in Human Rights, Law and Public Space* (Vandenhoeck & Ruprecht 2014) 124–125.

⁴² W Paul Reeve, *Religion of a Different Color: Race and the Mormon Struggle for Whiteness* (Oxford University Press 2015) 75–77.

⁴³ Underwood (n 10) 60.

religious freedom and protecting civilisation. The mainstreaming, de-otherising, and whitening of Mormons means that now, it is other religious minorities who face the brunt of the law's Protestant bias. When the Supreme Court upheld *Reynolds* in 1990, in *Employment Division v Smith*, the minority in question was members of the Native American Church, who used the otherwise controlled substance peyote in their religious rituals.⁴⁴ Once again, the court upheld the belief-action dichotomy, ignoring the fact that for many religions, "to act is to believe".⁴⁵ In that case, Justice Antonin Scalia's opinion not only cited *Reynolds* approvingly, but enthusiastically restated its principles, arguing that "[t]here being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls".⁴⁶ Just as in *Reynolds*, the court attempted to separate religion into the neat lines that worked so well with Protestantism, with the result being that followers of a minority religion faced a constraint on their free exercise not placed on followers of majority ones. (Subsequent legislation curtailed the impact of the *Smith* decision, but as such legislation could be repealed in the future, from an American constitutional perspective, the case is still binding precedent.)

It is certainly true that the question of how the law should deal with religious practice is complex, and defies easy answers. I do not dispute that society requires some legal limit on action, and that sometimes such limits conflict with religious belief and practice. Yet, the hyperbolic claim that legal accommodations for religious practice should be avoided because of the risk that it would lead to legal anarchy, with each believer defining their own law, is without merit. This is precisely the same frightened exaggeration that led many to (sincerely) believe that Mormon polygamy could destroy Western civilisation. It is grounded in a privileging of majority norms and cultures, and an otherising of minorities. The implication of the claim that, for example, allowing polygamy would lead to the collapse of civilisation, or smoking peyote would preclude a functioning society, is that the non-Western, non-white societies where polygamy is practiced, or peyote is traditionally used, are inherently uncivilised and unstable. This is the causal link made by those today who claim that Islamic immigration to Europe would lead to barbarism or that Sikhs carrying the *kirpan* would lead to violence; at its core is the implication, whether conscious or not, that minority religions are so uncivilised and savage that absent the strong presence of the law, public order would collapse. This fear, in turn, is used to justify the vivisection of minority religions into discrete applicable legal categories.

This is especially apparent in Europe, where the European Court of Human Rights has attempted to draw a clear line between possession of religious beliefs and acting on them, particularly when manifestations of belief fall outside more familiar European practices.⁴⁷ The ECtHR's decisions are the inevitable result of the ECHR itself, which (in Article 9) accords the *forum internum* absolute protection, while allowing for manifestations of religion to be restricted by law.⁴⁸

The problematics of the ECHR and the ECtHR arise not from the notion that conscience is deserving of absolute protection, while actions, which have the potential to

⁴⁴ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

⁴⁵ Harmer-Dionne (n 26) 1346.

⁴⁶ *Employment Division, Department of Human Resources of Oregon v. Smith* 882.

⁴⁷ Daniel Barton, 'Is the French Burka Ban Compatible with International Human Rights Law Standards?' (2012) 9 Essex Human Rights Review 1.

⁴⁸ M Todd Parker, 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2006) 17 Duke Journal of Comparative & International Law 91.

cause interference in public life, must necessarily be subject to governing. It is easy to see that, *reductio ad absurdum*, the absence of any governance of religious actions could lead to the breakdown of the legal system— Waite’s spectre of “every man a law unto himself”. Some distinction, therefore, is necessary between belief and praxis, and there is nothing inherently bad about such a distinction. The problem is instead that the implementation of this dichotomy into law is too often done in such a way as to have discriminatory *effect*, because it is too tied to the structures of constraint which see religion from a Protestant perspective.

This can be plainly seen from Silvio Ferrari’s quantitative analysis of ECtHR Article 9 violation cases, which demonstrated that the Court has never once issued a declaration of violation with regards to a Protestant majority country. This leads the author to speculate that this is in part due to “the theological and philosophical presuppositions on which the decisions of the ECtHR are founded”.⁴⁹ The Strasbourg court “seems to rely on a so-called post reformation, almost ‘pietistic’ understanding of religion”, which “gives some indication of why . . . for a long time and freedom of religion .and belief was not the focus of high-profile legal cases”.⁵⁰

The parallels to *Reynolds* are readily evident. A court seeks to apply a principle which is reasonable and neutral in the abstract, yet, in its implementation, directed by Fish’s structures of constraint, reifies a notion of religion that works well for Protestants and poorly for others. Even when the Court believes it is acting in a neutral manner, it encounters “problems in understanding the conceptions of religion which stress the elements of identity and practice over those of a freely chosen belief”.⁵¹ A belief/action dichotomy may work well as a principle for how the law deals with religion. Where it fails utterly is as a principle for how the law *conceives* of religion. If the law is to preserve religion or belief as an analytical category (and there seems little alternative to it doing so), it must make active effort to avoid constructing a notion of religion (and public life) that sees the “typical” religion as identical to the hegemonic religion. If the *a priori* assumptions of any juridical body are discriminatory, it is not at all surprising that the results will be discriminatory. It is entirely possible that, a hundred years from now, the decisions of the ECtHR will appear just as biased and unfair as *Reynolds* does today, because the court is working from the same tired reasoning.

Reynolds again proves instructive in analysing current European political discourse, because, due to the benefit of historic and geographic distance, it highlights the intersection between popular political rhetoric and legal reasoning. Without the well-intentioned and racist civilisational agitation of both politicians and scholars, Waite would have not been able to claim that the prohibition of polygamy was a (to use European terms) proportional response to the threat it posed to women’s rights. It raises the question: where have we (both in the sense of the *demos* generally and the scholarly community specifically) allowed otherwise virtuous reasoning to be shaped by our own cultural assumptions? Is it in the case of the burka, where we are told that veiling is an oppressive patriarchal practice, from which women need to be saved? Or, more provocatively, Sarah Song has argued that the same co-opting of the language of women’s rights that occurred in *Reynolds* is occurring right now in the debates over arranged marriage; she terms this a “diversionary effect”, which serves to shield the majority culture from

⁴⁹ Silvio Ferrari, ‘The Strasbourg Court and Article 9 of the European Convention of Human Rights’ in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff Publishers 2012) 20.

⁵⁰ Pamela Slotte, ‘International Law and Freedom of Religion and Belief: Origins, Presuppositions and Structure of the Protection Framework’ in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 103–118.

⁵¹ Ferrari (n 49) 33.

criticism by diverting people's very real and well-founded concern over, say, women's rights, into the existing channels of power that marginalise minority groups.⁵² This diversionary effect is a mechanism by which neutral and virtuous concern can become discriminatory by structurally directing animus and focus at minorities while excusing majorities, just as a neutral and virtuous legal principle such as the belief/action dichotomy can become discriminatory by structurally obstructing minority religions while aiding majority ones.

Elizabeth Hurd has written about how, especially in places with a Protestant cultural background, it is tempting to look "for normative closure, for a definitive metalanguage".⁵³ In the law and in discourse, it is essential that we resist this temptation to divide and shift religion, and especially religious freedom, into these purportedly discrete categories. The alternative to the *Reynolds* (and ECtHR) reasoning is not another dichotomy, but rather a holistic and flexible approach that takes into account the complexity and diversity of religion. Any attempt to arrive at a single jurisprudential definition of religion will run into the problem that the very idea of religion as a definable category is inextricably tied to a discursive and Christian historical background.⁵⁴ If we are to hold on to any universal conception of human rights, or even a Western conception of human rights that accounts for religious pluralism, then we cannot have a conception of religion that only fits a homogenous post-Reformation Europe.

None of this solves the weighty problem Waite was considering in *Reynolds*: how does one balance the state's compelling interests with religious freedom. The problem is difficult and, to some extent, insoluble. Any attempt to move beyond the belief/action dichotomy will inevitably result in a jumble of rulings that "may seem, at times, unprincipled and even contradictory".⁵⁵ Freedom is a complex balancing act, and there must necessarily be some restrictions on religious freedom to preserve other crucial state interests. Religious pluralism is axiomatically more complex than homogeneity, even without powerful structures of constraint disrupting seemingly neutral approaches. *Reynolds*, does, however, emphasise that religious policy in a pluralistic society cannot be achieved passively. Instead, at every stage, jurists and political actors must actively work to identify and overcome structures of constraint, and to account for the breadth and diversity of religion and religious obligation. This task is so enormous and trying that it may be impossible to create a legal system that can fairly and reliably deal with all the different permutations of religion, and its many intersections with public life. Nonetheless, if Europe wishes to have a legal system that provides protection to minorities as well as majorities, it must try to do better. If it does not actively work to counter its jurisprudential bias with regards to religion, the ECtHR will fall into the same trap as the US Supreme Court, where *Reynolds* remains honoured precedent.

⁵² Sarah Song, 'Majority Norms, Multiculturalism, and Gender Equality' (2005) 99 *The American Political Science Review* 473.

⁵³ Hurd (n 39) 20.

⁵⁴ Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (The Johns Hopkins University Press 1993) 27–54.

⁵⁵ Machado (n 3) 491.

CRISIS FRAMING AND THE SYRIAN DISPLACEMENT: THE 'THREAT' TO EUROPEAN VALUES

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INTRODUCTION

The external displacement of more than six million Syrian nationals since the start of the civil war in 2011 is a humanitarian tragedy. The impact has been most keenly felt in neighbouring countries including Jordan, Iraq, Turkey and Lebanon where Syrian nationals now comprise an estimated one in five of the population. There is a considerable disparity in the global response to Syrian refugees with Europe receiving only 6% of those externally displaced by 2014.¹ Although the number of arrivals in the EU increased significantly in 2015–16, the number of Syrian asylum seekers and refugees in the EU remains less than 0.2% of the European population.² Nevertheless this 'crisis' has repeatedly been described as the biggest, most divisive issue facing the European Union today.³

This article examines the framing of Europe's response to this humanitarian need and the impact of these frames on durable solutions that can protect those most in need. It is suggested, drawing on the successful re-framing of the gay marriage debate, that the way such an event is conceptualised can have a significant impact on political commitments and the response of host communities.⁴ It is argued that the framing of the Syrian displacement, through constant iteration in public discourse, as a migrant 'crisis' to be addressed through burden sharing, containment and compulsory quotas, has hindered durable solutions whilst confirming negative stereotypes that have prejudiced the ability of refugees to receive protection.

The application of a crisis frame could not have come at a worse time for the European institutions as extremist political parties, that have been gaining ground over the last decade, use their own framing narrative to conceptualise the largely Muslim Syrian arrivals as threats to European culture and identity.⁵ Neo-conservative writers, such as Douglas Murray have attempted to give an academic rigour to the 'Islamic threat' perspective by constructing a conflict of values. Yet the nature of European culture and values in such narratives is rarely articulated.⁶ Rather, in a questionable interpretation of European history, it is constructed as entirely oppositional (non-Muslim, non-immigrant). The European values articulated in the Treaty on the European Union (1992) are conspicuously absent:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons

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†I am grateful to the comments of the anonymous reviewer and Dr Mark Chadwick on a previous draft.

¹ Nicole Ostrand 'The Syrian Refugee Crisis: A Comparison Of Responses By German, Sweden, Uk and US' (2015) 3 *Journal of Migration and Human Security*, 225–279.

² According to Eurostat figures, the population of the EU is 508 million and the number of Syrian nationals seeking asylum in the EU since the start of the civil war is estimated by the UNHCR to be in the region of one million (less than 0.2% of the EU population).

³ Dogachan Dagi 'EU Refugee Crisis: From Supranationalism to intergovernmentalism?' (2018) 3 *Journal of Liberty and International Affairs* 3, 12.

⁴ Nat Kendall-Taylor 'To Advance More Humane Refugee Policies We Must Reframe The Debate' *Open Democracy* (28.6.16).

⁵ Leo Cendrowicz 'Refugee Crisis. Why Hungarian Prime Minister Viktor Orban Sticks To His Anti-Muslim Script' *The Independent* (Sept 4th 2016); Dagi supra n3, 13.

⁶ Douglas Murray *The Strange Death of Europe. Immigration, identity, Islam* (Bloomsbury 2017)

belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail⁷

The oppositional narrative has served the new populist parties well as the European project is openly rejected in preference for national solidarity and minimal intergovernmental cooperation. The authority of the European Union is further challenged as established political actors look inwards in an attempt to dilute the popularity of nationalist rhetoric. The ability of the European institutions to exert pressure on Governments that fail in their commitment to European values has been compromised by recent events. The UK's decision to leave the EU has emboldened populist parties on the right and left. Populist MEP Nigel Farage became Hungarian Prime Minister Viktor Orban's biggest defender before the European Parliament's vote of censure. However, it is notable that British conservative MEPs were the only representatives of a ruling government in support for Orban, taking the opportunity to reject European interference in domestic politics.⁸

There is an international right to seek and enjoy asylum provided in Article 14 of the Universal Declaration of Human Rights.⁹ The right has to be exercised outside of the country of origin, thus movement is the first step to realising protection.¹⁰ Most Syrians arriving in Europe are irregular migrants in the sense that they do not have entry visas and are not beneficiaries of UNHCR resettlement programmes. Many will have credible claims for asylum or humanitarian protection once they access an asylum procedure, contradicting suggestions that most are criminals and terrorists.¹¹ Indeed, statistics suggest that 80% of Syrian asylum seekers will be granted some form of protection status in Europe¹². However, their irregular status has meant convoluted and dangerous methods of travel, which has made it easier for them to be grouped together as a collective threat to European culture, security and the economy.

Having identified the framing of Europe's response to the Syrian displacement, it will be argued that constructive, cooperative policy initiatives were stymied by the repeated confirmation of this frame through a public discourse that exploited public anxieties over security and crime. The 'crisis' frame and its associated metaphors resulted in emergency, reactive measures that effectively led to the abdication of human rights and humanitarian obligations.

Furthermore, it is suggested that the crisis frame and its component security narrative, has paradoxically made Europe less secure as many millions of Syrian nationals, who have credible protection claims, are now left in limbo – unable to return home or build a new life in Europe. The EU-Turkey deal has resulted in more than three million Syrians residing in Turkey¹³; some are accommodated in government camps, but the vast majority are living precariously in urban areas. Although they now receive a cash allowance from EU funding that covers accommodation and food, none are able to

⁷ Article 2, *Consolidated version of the Treaty on European Union* OJ C326, 26.10.2012, 13–390.

⁸ Nigel Farage in the European Parliament 'Thank God for Viktor Orban' 12th Sept 2018. Full speech available on Youtube: <https://www.youtube.com/watch?v=BxJdYNEcMmc> [Last accessed 22nd Feb 2019].

⁹ UN General Assembly Resolution 217 A, 10th December 1948.

¹⁰ A refugee is defined by Article 1A of the Refugee Convention 1951 as being, inter alia, outside his country of origin.

¹¹ B Miltner 'The Mediterranean Migration Crisis: A Clash Of The Titans' Obligations?' (2015) XXII *Brown Journal of World Affairs* 1, 213; Jeff Crisp 'Refugees' The Trojan Horse Of Terrorism' *Open Democracy* (June 5th 2017).

¹² Eurostat figures compiled by Phillip Conor 'After record migration, 80% of Syrian asylum applicants approved to stay in Europe' (Pew Research Centre Oct 2nd 2017). The comparative figures from Aug 2017 are 68% for Eritrean nationals, 38% for Somali nationals and 36% for Iraqi and Sudanese nationals.

¹³ European Council 18th March 2016, Available at : <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (last accessed 20th February 2019).

make a claim for refugee status in Turkey. Thousands more who arrived in Greece prior to the deal in March 2016, remain trapped in squalid camps awaiting family reunion or determination of their asylum case. A much smaller number have succeeded in gaining protection as part of the EU resettlement scheme or national schemes, such as the Vulnerable Persons Relocation Scheme in the UK or private sponsorship in Germany.

It will further be argued that despite a significant reduction in new arrivals, the crisis frame continues to dictate European asylum policy and crucially, the repeated affirmation of the frame has normalised policy responses that were previously rejected for their failure to respect human rights and protect the right to seek asylum.

In conclusion it will be argued that there is an urgent need to re-frame the demand for protection to accommodate an empathic focus centred on human rights, tolerance and global cooperation, grounded in international humanitarian obligations that promote peace and security for all.

ANATOMY OF DISPLACEMENT

Since the start of the civil war in 2011 over six million Syrians have sought refuge outside the country. There have been suggestions that external displacement was a deliberate strategy of the Assad government and Iranian allies in an attempt to cleanse the country of critics and non-Sunni Muslims.¹⁴

The majority of those leaving are accommodated in the region of origin with considerable impact on host communities. The resources needed to support both refugees and host communities are far greater than the donations received. There are now over one million Syrian refugees living in Lebanon, three-quarters of whom are recognised as living in extreme poverty.¹⁵ Whilst the EU's Regional MADAD fund has contributed 550 million euros to various projects in Lebanon, the World Bank has estimated the cost at 1.6 billion euros per year.¹⁶ Jordan has received more than 660,000 Syrian refugees, over half of whom are children.¹⁷ This has doubled the size of the Syrian population in Jordan and the pressure on jobs and resources has caused considerable strain on community relations.¹⁸ Last year the UNHCR reported that 94% of required funding to assist the refugee population in Jordan had not been received.¹⁹

Who should offer protection?

Despite the hospitality of the immediate region, there has been criticism of wealthier Gulf states for failing to offer protection. In reply, the Saudi government argues that they have provided hospitality to some 2.5 million Syrian 'guests' since the start of the

¹⁴ Martin Chulov 'Iran Repopulates Syria With Shia Muslims To Help Tighten Regime's Control' *Guardian Online* (14th Jan 2017).

¹⁵ The annual vulnerability assessment of Syrian refugees reveals that 58 per cent of all households are now living in extreme poverty – on less than us \$2.87 per person per day. this is some 5 per cent more than a year ago. 76 per cent of refugee households are living below this level. UNHCR 'Vulnerability assessment of Syrian refugees in Lebanon' (UNHCR Dec 2017). Available at: https://data2.unhcr.org/en/documents/details/61312#_ga=2.195784239.228949351.1537197420-2021353763.1537197420 [last accessed 22nd Feb 2019].

¹⁶ World Bank estimate available at: <http://www.worldbank.org/en/news/press-release/2014/09/12/world-bank-run-trust-fund-targets-municipalities-to-offset-spillovers-of-syrian-crisis> [last accessed 22nd Feb 2019]; Radka Havlova and Krystna Tamchynova 'The Uncertain role of the EU countries in the Syrian refugee Crisis' (2016) 18 *Insight Turkey* 2, 85–106. For current projects operated under the EU Madad Programme see: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/madad_fund_signed_contracts_20_april_2018.pdf.

¹⁷ UNHCR Factsheet Feb 2018. Available at: <https://data2.unhcr.org/en/documents/download/62241> [last accessed 22nd Feb 2019].

¹⁸ Havlova and Tamchynova supra n16. The Jordanian Minister for the Interior described this as equivalent to the United States absorbing the entire population of Canada in Norimitsu Onishi 'As Syrian Refugees Develop Roots, Jordan Grows Wary' *New York Times* (5th Oct 2013).

¹⁹ Onishi *Ibid.*,

war.²⁰ Other estimates put the figure at closer to 500,000 and it is evident that most will have temporary status either as workers or recipients of sponsorship.²¹ Further, the suggestion that hospitality can be a replacement for formal recognition of refugee status is worrying, particularly as Saudi Arabia, Kuwait, Bahrain and the UAE have not ratified the Refugee Convention.

There are of course reasonable arguments for trying to keep refugees in neighbouring countries, particular where those countries share a common language, religion and culture. It will be easier for arrivals to integrate and to establish a life in such circumstances. Yet this can only be argued to the extent that the number of arrivals is manageable and the financial support available from the international community is adequate. Where such support is not available the arrival of large numbers can have a damaging impact on stability as conflicts can quickly escalate to absorb neighbouring countries.

A further argument for greater responsibility outside the region, is the nature of the conflict in Syria and the inability of the UN Security Council to protect civilians from the regime's aggression.²² Indeed, with the direct involvement of countries outside the immediate region, including the US, France, Russia and the UK, the conflict in Syria has become a global conflict. It is argued that there are both moral and legal obligations arising from the foreseeable consequences of this intervention.

Due diligence is a principle of customary international law that requires states to engage in reasonable efforts to prevent harm caused by other states or non-state actors.²³ It is certainly arguable that principles applied in the context of transboundary environmental damage could be used to suggest the emergence of a more general rule. The International Court of Justice has ruled that there is a requirement under international law to undertake an environmental impact assessment when there is a risk of a proposed activity having a "significant adverse impact in a transboundary context".²⁴ This extends the application of an earlier case that applied the same principle to industrial activities, i.e. that where there is a risk of significant adverse impact from a proposed action there is an obligation to undertake a full impact assessment. It could therefore be suggested, applying the surrogacy principle of international refugee law and borrowing from other areas of international law, that all states have a general duty to refrain from actions which will foreseeably cause population displacement.²⁵

In the context of state action or inaction in situations of genocide, the ICJ's decision in *Bosnia v Serbia* found that although the Serbia government were not directly responsible for the massacre of Bosnian civilians at Srebrenica, they had responsibility for manifestly failing to take all measures within their power to prevent genocide.²⁶ Whilst genocide is of course a particular heinous crime under international law, it is at least arguable that this position could be extended to population displacement exacerbated

²⁰ The Saudi Arabia Foreign Ministry: <http://www.arab.news.com/featured/news/805236> [last accessed Dec 31st 2019].

²¹ Sari Hanafi 'Gulf Response To The Syrian Refugee Crisis. Facts, Debates And Fatwas' [2017] 5 *Sociology Of Islam*, 112–137

²² N. White, *Peace-making in Syria: Why the Security Council Fails* Nottingham Law Journal 28(1) (2019), 55.

²³ As confirmed by the International Court of Justice in *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 55–56, para 101. Antal Berkes 'The Standard of 'Due Diligence' as a Result of Interchange between the Law of Armed Conflict and General International Law' [2018] 23 *Journal of Conflict and Security Law*, 3, 433–46.

²⁴ *The Pulp Mills case* [2010] is cited with approval by the ICJ in *Costa Rica v Nicaragua* [2018], para 104. Available at: <https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf> ([last accessed 22nd Feb 2019]).

²⁵ An example of an international obligation to prevent a violation of international law can be found in Article 100 of the International Convention on the Law of the Sea regarding an obligation to cooperate in the repression of piracy, notwithstanding the absence of a clear jurisdictional link. I am very grateful for the comments made by Dr Mark Chadwick on this point.

²⁶ *Bosnia and Herzegovina v Serbia and Montenegro* [2007] ICJ 2

through conflict intervention. Davidovic similarly argues that responsibility is greater where foreseeable displacement is caused in part by one's own action.²⁷

In *Spheres of Justice*, Michael Walzer argues that although the interests of communal self-determination can limit obligations to refugees, there is a specific moral responsibility where displacement is caused by one's own actions. Such a responsibility should not be delimited by arguments concerning costs or numbers.²⁸ He gives the example of Russians displaced in the West and forcibly repatriated after World War II.²⁹

It is well established that an obligation to admit an asylum seeker for the purpose of examining the merits of the case arises at the border of the host state. This obligation is extended by Singer and Singer who argue that there is no obvious moral distinction between refusing someone at the border and failing to resettle a person from a refugee camp.³⁰ They argue that the international community should take active steps to offer protection to refugees living in camps rather than waiting for refugees to arrive at their border.

Leaving aside the difficulty in ascribing state responsibility in the latter situation, there is also a legal distinction between these two positions. Where an asylum seeker arrives at the border and seeks protection, international human rights and refugee law combine to require the state, *de minimis*, to admit them with a view to determining any risk of refoulement should they be returned.³¹

International refugee law is predicated on the surrogacy principle whereby the failure of one state to protect its citizens should be remedied by the actions of other states in the global community.³² The Refugee Convention itself does not guarantee a decent standard of living; rather it seeks primarily to protect refugees from refoulement i.e. serious threats to their life or freedom.³³ It is therefore possible that a refugee camp could be compliant with this obligation. Other material rights listed in the Convention, including access to education, housing and employment, depend largely on existing conditions in the host state. Refugees should not receive 'less favourable' treatment, but where the host population is already impoverished this may not provide much comfort.

For those Syrian refugees in neighbouring countries there is a slim chance of benefitting from a UNHCR resettlement programme. Faced with the insecurity and uncertainty of camp life, many have embarked on the long and dangerous journey to the relative peace and security of Europe. Seen in this light, the decision to migrate beyond the region is both understandable and foreseeable. Yet the response of the European institutions, many Member States and much of the media, suggests otherwise.

THE IMPORTANCE OF THE POLICY FRAME

Frames impose structure on political issues and policies. Winter argues that there is a symbiotic relationship between elite framing rhetoric and public opinion.³⁴ Whilst

²⁷ Jovana Davidovic 'What Do We Owe Refugees: *Jus Ad Bellum*, Duties To Refugees From Armed Conflict Zones And The Right To Asylum' (2016) 12 *Journal Of Global Ethics* 3, 347–364.

²⁸ Michael Walzer *Spheres of Justice* (New York Basic Books 1983), 51

²⁹ Joseph Carens 'Refugees and the Limit of Obligations' (1992) 6 *Public Affairs Quarterly* 1,31.

³⁰ Peter Singer and Renata Singer 'The Ethics of Refugee Policy' in Mark Gibney (ed.) *Open Borders? Closed Societies* (Greenwood, New York 1988) 111–130.

³¹ See Article 33 Refugee Convention 1951. Comparable human rights obligations can be found in Article 3 of the ECHR as applied in *Hirsi Jamaa v Italy* and *MSS v Belgium and Greece*, and Article 3 of the International Convention Against Torture.

³² Guy Goodwin-Gill and Jane McAdam *The Refugee in International Law* (OUP 2007, 3rd edition) 10.

³³ Article 33(2) Refugee Convention 1951, Resolution 2198 (XXI) adopted by the United Nations General Assembly.

³⁴ Nicholas J G Winter *Dangerous Frames: How Ideas About Race And Gender Shape Public Opinion* (University of Chicago Press, 2008).

the frame lends structure to issues, helping to develop a coherent narrative; cognitive schemas structure our understanding of social categories by linking together their various attributes to produce a coherent story. When the frame and the cognitive schema align an analogy is created which drives public opinion.³⁵

The role of the media in establishing and maintaining frames in times of uncertainty is significant.³⁶ Van Dijk goes further in arguing that whilst the mass media can be accused of disseminating potentially prejudiced ideology, it also constructs and reconstructs public attitudes and ‘knowledges’.³⁷

In matters relating to migration the influence of both quality and tabloid media on public attitudes has been well-documented.³⁸ The tendency to prefer stories that are accessible to readers results in an emphasis on ‘conventional understandings of a situation, on accounts that can be quickly and easily portrayed, and on the most plausible explanations’.³⁹ As a consequence, there is an editorial preference for stories that are proximate, large and contain an element of conflict.⁴⁰ For stories involving refugees this translates as crisis coverage where the immediate narrative centres on security, costs and numbers rather than the positive contribution refugees can make to host societies.⁴¹

Although the exceptional nature of a crisis offers an opportunity to disrupt journalistic routines, providing a new frame, the coverage of the ‘refugee crisis’ was dominated by established narratives relating to terrorism, crime and vulnerability.⁴² When these frames are confounded by metaphors emphasising the vast scale and ‘elemental forces’ at play (waves, tides, swarms),⁴³ the humanitarian needs of the refugee are subsumed within a discourse of high drama. It is surprising how often these metaphors find their way into scholarly analysis, thus reaffirming their legitimacy. In an otherwise well-informed analysis of national sovereignty, Dagi refers to a ‘new immigration wave’ and a ‘refugee influx’ that ‘paralyzed’ policy makers.⁴⁴ Not only will this discourse act to prevent a sustainable, managed solution but it can serve to legitimise actions which would otherwise be regarded as deeply unpleasant. This is an argument advanced in the context of the ‘just war’ frame in US public discourse by Butler.⁴⁵

Media coverage of migratory movements also adopts a hierarchy of acceptance. With white, Christian, able-bodied immigrants at one end of the spectrum and racial minority, non-Christian, non-Anglophone/Francophone migrants at the other end⁴⁶.

³⁵ Supra n34, at 146

³⁶ Elizabeth M Perse *Media Effects and Society* (London Routledge, 2001) 81; see also Andrea Lawlor ‘Framing Immigration in the Canadian and British News Media’ (2015) 48 *Canadian Journal of Political Science* 2, 329–355.

³⁷ Teun Van Dijk ‘The Discourse and Knowledge Interface’ in G Weiss and R Wodak (eds.) *Critical Discourse Analysis. Theory and Interdisciplinarity* (Palgrave Macmillan, 2003), 85–109

³⁸ See for example Teun Van Dijk *Racism and the Press; Critical studies in Racism and Migration* (Routledge 1991); Samantha Cooper, Erin Olejniczak, Caroline Lenette and Charlotte Smedley ‘Media Coverage Of Refugees And Asylum Seekers In Regional Australia; A Critical Discourse Analysis’ (2017) 162 *Media International Australia* 1, 78–89; Majid Khosravini ‘The Representation Of Refugees, Asylum Seekers And Immigrants In British Newspapers. A Discourse Analysis’ (2010) 9 *Journal of Language and Politics* 1

³⁹ Andrea Lawlor and Erin Tolley ‘Deciding Who’s Legitimate: News Media Framing of Immigrants and Refugees’ (2017) 11 *International Journal of Communication* 969.

⁴⁰ *Ibid.*,

⁴¹ Supra n38.

⁴² Esther Greussing and Hajo Boomgaarden ‘Shifting The Refugee Narrative? An Automated Frame Analysis Of Europe’s 2015 Refugee Crisis’ (2017) 43 *Journal of Ethnic and Migration Studies* 11, 1750

⁴³ Paul Baker and Tony McEnery ‘A Corpus-Based Approach To Discourses Of Refugees And Asylum Seekers In UN And Newspaper Texts’ (2005) 4 *Journal of Language and Politics* 2, 197–226.

⁴⁴ Dagi, supra n3.

⁴⁵ Michael J Butler *Selling a ‘just’ war. Framing Legitimacy and US Intervention* (Palgrave Macmillan 2012).

⁴⁶ Robert Ford, ‘Acceptable And Unacceptable Immigrants. How Opposition To Immigration In Britain Is Affected By Migrants’ Regions Of Origin’ (2011) 37 *Journal of Ethnic and Migration Studies* 7, 1017–1037

The research on media framing is evidenced in the public discourse on the Syrian displacement. Politicians of the Visegrad⁴⁷ countries used the crisis frame very deliberately to make the strengthening of national borders a priority, arguing 'external border protection must remain the top priority if we are to prevent the 2015 scenario . . . a crisis that questions the very foundations of the European Union'.⁴⁸

On some occasions however, public opinion appears to shift in response to a particular event, disrupting the normative frame and revealing problematic metaphors. Such an event occurred with the publication of images of Syrian toddler Aylan Kurdi, drowned and washed up on a Turkish beach 5km from Greece. The images posted on Twitter on the morning of 2nd September, quickly went viral having been published on the Guardian webpage that afternoon and reproduced in print media the following day.

The emotional detachment that characterised the crisis/burden frames and the 'pity' response was suddenly shaken as the public put pressure on their Governments to take action to protect rather than prevent refugees. D'Orazio analysed social media immediately after the story broke and observed a clear change in tweeting content, from a focus on migrants towards an interest in the plight of refugees.⁴⁹ Opinion polls in France similarly showed a large shift in public opinion towards refugees after the publication of the image.⁵⁰ In the UK the public outcry led Prime Minister David Cameron to change his policy on resettlement, significantly increasing the number of places offered to 20,000.⁵¹ In Canada, where the extended Kurdi family were settled, the outcry is considered to have contributed to the defeat of the Conservative government in the October election.⁵²

This was undoubtedly a time when the public mood shifted towards compassion and empathy and it provided an opportunity for European cooperation that would prioritise protection and fundamental rights. The opportunity was short-lived. As David Cameron stressed the UK's moral credentials,⁵³ a more conservative response soon followed which focussed on the economic costs, the behaviour of other European countries and more specifically, the 'irresponsible' behaviour of the boy's father. Ten days after the photograph was published, the tabloid Daily Express tried to reclaim the established narrative, publishing an exposé claiming that the boy's father was the 'people smuggler' responsible for the death of five people, including his two sons and wife.⁵⁴ This explanation, derived from the defence provided by the men charged with smuggling in Turkey, has never been proven and the case against Aylan's father was dropped.

Winter accepts that explicit elements of a particular frame may be rejected but he argues, it can be more difficult to reject implicit elements on a cognitive level. This is particularly relevant to the 'refugee crisis' frame which has been accepted and repeated by scholars, commentators and policy-makers as an adequate description of the events of 2015–16. It does not appear immediately offensive or problematic but when combined with pre-existing cognitive schema concerning social categories such as race and

⁴⁷ Czech Republic, Hungary Poland, Slovakia

⁴⁸ Cited in Henry Foy 'Central Europe States Keep Migrant Heat On Athens' *Financial Times* (Feb 15th 2016).

⁴⁹ Francesco D'Orazio 'Journey of an Image: From a Beach in Bodrum to Twenty Million Screens Across the World' in Farida Vis and Olga Goriunova (eds.) 'The Iconic Image on Social Media: A Rapid Research Response to the Death of Aylan Kurdi' Visual Social media Lab 2015. Available at: <https://research.gold.ac.uk/14624/1/KURDI%20REPORT.pdf> [last accessed 22nd Feb 2019].

⁵⁰ Brian Love 'French Opinion Rapidly Swings In Favor Of Refugees, Poll Shows *Reuters* (10th Sept 2015).

⁵¹ Nicholas Watt 'David Cameron Says UK Will Take Thousands More Syrian Refugees' *The Guardian* (4th Feb 2015).

⁵² Patrick Kingsley and Safak Timur 'Stories Of 2015: How Alan Kurdi's Death Changed The World' *Guardian Online* (31st Dec 2015).

⁵³ BBC News 'Migrant Crisis: PM Sys UK Will Fulfil Moral Responsibilities' *BBC* (3rd Sept 2015).

⁵⁴ Adrian Lee 'Tragic Aylan Kurdi's Father Was The People Smuggler Driving Doomed Boat, Claimed Survivor' *Daily Express* Sept 15th 2015. Whilst two men were subsequently convicted of trafficking offences in Turkey, the case against the boy's father was dropped for lack of evidence.

religion, as well as public anxieties over security and crime, the impact of the crisis frame on public discourse and policy is far from innocuous.

EUROPE'S ASYLUM FRAMEWORK: MUTUAL TRUST AND DISTRUST

Pursuant to the EU's Common European Asylum System (hereafter CEAS) there has been a number of Directives that aim to establish common standards across the EU 28.⁵⁵ Originally intended to establish minimum standards, the latest phase marked an upgrade to uniformity of protection. In theory an asylum applicant will be able to access equivalent asylum procedures and reception conditions whilst having a comparable opportunity to secure refugee status. As all Member States are deemed safe under the Aznar protocol⁵⁶, there is an expectation, grounded in the Dublin Regulation, that the applicant will make their claim in the first state of arrival and will not thereafter engage in secondary movement. There are some exceptions to this principle, but it is clear that asylum seekers cannot choose their ultimate destination. The absence of choice is supported by Article 31 of the Refugee Convention which provides that states shall not impose penalties on refugees 'coming directly' who enter unlawfully where they have good cause for so doing.

If the exceptions do not apply, the Dublin Regulation operates by transferring asylum seekers who engage in secondary movement to the first European state of arrival. Geography dictates that this will be a country at the border of Europe. That country is then expected to process the application and comply with the obligations set out in the various Directives, the Charter of Fundamental Rights and the European Convention on Human Rights (hereafter 'ECHR').

Human rights obligations in the CEAS

The EU Charter of Fundamental Rights⁵⁷ is applicable to all actions of the European institutions and the actions of Member States when implementing European law, including the Dublin Regulation. Unlike the ECHR it includes specific guarantees for asylum seekers, notably Article 18 the right to asylum⁵⁸, and Article 19(2) which prohibits refoulement. In addition, Article 3 of the ECHR (which has its equivalent in Article 4 of the Charter) has been interpreted to include actions including expulsion or deportation, when there is a real risk that the individual will consequently experience treatment that is inhuman or degrading.⁵⁹ Thus, the onus is on the sending state to ensure that conditions in the receiving state will not breach that threshold. The obligations under both instruments have been tested in cases concerning the operation of the CEAS with the resulting decisions pointing to flaws in the central assumption of European safety.

In *MSS v Belgium and Greece*⁶⁰ both respondent states were responsible for breaches of Article 3 and 13 of the ECHR where an Afghan asylum seeker was returned to Greece under the Dublin II mechanism. The deficiencies in the Greek asylum system were significant and the applicant had already experienced ill-treatment and destitution in

⁵⁵ It should be noted that the UK, Denmark and Ireland are not bound by all instruments under the CEAS having negotiated particular opt-in positions (beyond the scope of this paper). All three are however bound by the Dublin Regulation.

⁵⁶ *Consolidated version of the Treaty on the Functioning of the European Union – Protocol (No 24) on Asylum For Nationals Of Member States Of The European Union* OJ C 115, 9th May 2008, p. 305–30.

⁵⁷ C 364/1 *Official Journal Of The European Communities* 18.12.2000.

⁵⁸ It is interesting that the Charter has not adopted the 'right to seek and enjoy' asylum, as set out in Article 14 of the Universal Declaration of Human Rights 1948. it could be argued that the right to asylum is broader in that it implies a corollary obligation on receiving states.

⁵⁹ See for example *Chahal v UK* (1996) 23 EHRR 413; and *Soering v UK* 161 Eur. Ct. H.R. (ser. A) (1989)

⁶⁰ App. 30696/09.

Greece before being transferred. The Belgium government's reliance on the presumption of European safety, was not considered by the European Court to be a sufficient justification given the extent of evidence concerning the failures of the Greek asylum system.⁶¹

The Court of Justice of the EU (hereafter 'CJEU') applied the EU's Charter of Fundamental Rights in the case of *NS v SSHD*⁶² to a proposed Dublin transfer of another Afghan national to Greece. Although emphasising the principle of mutual trust and the presumption of compliance, the Court established that where substantial grounds existed for believing that there were 'systemic failings' in the asylum system of the receiving state, the transfer should not proceed.

Whilst a great deal of criticism was focussed on the Greek asylum system, cases such as *Tarakhel v Switzerland* suggest that the problems are not confined to Greece. The ECtHR questioned the Italian government's ability to protect the family life of a family of asylum seekers and ruled that the Swiss government would be in breach of Article 3 if they returned them without obtaining guarantees from the Italian authorities.⁶³ The requirement to obtain such guarantees appears to conflict with the presumption of mutual trust but as the number of Dublin challenges before the Strasbourg court increased it became incumbent on sending states to undertake such checks.

In the British case *EM (Eritrea)* the Court of Appeal attempted to align the different European Court approaches by requiring that the applicants, who had experienced significant ill-treatment in Italy, produce evidence of systemic deficiencies in the Italian system. This approach was rejected by the Supreme Court which ruled that the correct legal test was whether there was a real risk of ill-treatment in Italy reaching the degree of severity required under Article 3.⁶⁴

In *Mohamed v Austria*⁶⁵, the Court found a violation of the right to an effective remedy (Article 13) concerning a proposed return to Hungary where the applicant sought to argue that their treatment in Hungary would violate Article 3. Although *Mohamed* was ultimately unsuccessful in the Article 3 challenge, the last two years have seen a notable deterioration in the conditions experienced by asylum seekers in Hungary. The Austrian Federal Administrative Court has ruled that there is no guarantee that a Dublin returnee to Hungary would not be subjected to chain refoulement. Similarly, the Council of State in the Netherlands has prevented return on the basis that there are severe doubts as to whether transfer to Hungary would breach Article 3 of the ECHR and, thus, whether mutual trust could be upheld.⁶⁶ The use of detention in the absence of international requirements of proportionality and good faith has been criticised by NGO's and recognised in the jurisprudence of several national judicial bodies.⁶⁷ Given

⁶¹ Maritime interception and automatic return to Greece was the focus In *Sharifi And Others v Italy And Greece* (App 16643/09) where the court again ruled that the Greek system continued to suffer from multiple failings with a significant risk of onwards refoulement to the country of origin, thus it could not be presumed safe for the purposes of Article 3.

⁶² C 411/10.

⁶³ App. 29217/12.

⁶⁴ *EM (Eritrea) v SSHD* [2014] UKSC 12.

⁶⁵ 6th June 2013.

⁶⁶ Federal Administrative Court, Decision Of 30 December 2015, W185 2110998-1. Council Of State, Judgment Of 26 November 2015, 201507248/1; Council Of State, Judgment Of 26 November 2015, 201507322/1/V3, Available at: [Http:// Bit.Ly/22zuhb6](http://Bit.Ly/22zuhb6); Statements By The President Of The Administrative Jurisdiction Division Of The Council Of State (Department) On September 22 2015 (201506653/2 / V3) And September 23, 2015 (201507322/2 / V3).

⁶⁷ ECRE 'Case Law Fact Sheet: Prevention Of Dublin Transfers To Hungary' 2016 p 9 . Available at: <http://statewatch.org/news/2016/jan/eu-ecre-factsheet-dublin-transfers-to-hungary-1-16.pdf> [last accessed 22nd Feb 2019]; Human Rights Watch 'Hungary: New Border Regime Threatens Asylum Seekers', *HRW Press Release* (19th September 2015); Human Rights Watch 'Hungary: Abysmal Conditions In Border Detention,' *Press Release* (11th September 2015); Hungarian Helsinki Committee, Hungarian Government Reveals Plans To Breach Eu Asylum Law And To Subject Asylum-Seekers To Massive Detention And Immediate Deportation (4 March 2015); Amnesty International, Amnesty International Fenced Out: Hungary's Violations Of The Rights Of Refugees And Migrants *Press Release* (October 2015)

the recent vote of censure in the European Parliament and the unwillingness of the Hungarian government to assist in the EU's resettlement or relocation schemes, it seems unlikely that the fundamental rights of asylum seekers can be guaranteed in Hungary. Of particular concern is the asylum legislation introduced in autumn 2015. It created a legal basis for the construction of a fence on the border between Hungary and Serbia in conjunction with further legislative amendments criminalising irregular entry and damage to the fence.⁶⁸ It has resulted in an extremely hostile environment, violating the international right to seek asylum, the right to effective access to procedures and the non-criminalisation of refugees.

Europe's Commissioner for Human Rights has submitted that current asylum law and practice in Hungary does not comply with international or European human rights standards; concluding that, at the moment, 'virtually nobody can access international protection in Hungary.'⁶⁹ The designation of Serbia as safe meant that all entries through the Serbian border were considered ill-founded despite objections from the UN Committee Against Torture and the Hungarian Supreme Court which had determined the designation to breach the ECHR.⁷⁰ The Hungarian government have stated that the implementation of the safe country designation will have retroactive effect, thereby applying to Dublin transfers.⁷¹ The European Commission has now recognised that this constitutes a clear and persistent breach of human rights and refugee law by the Orban government and finally referred Hungary to the CJEU in July 2018.⁷² The response of the Hungarian government continues to equate migration with a threat to European values and suggests there will be no easy resolution.⁷³

Institutional recognition that the underpinning mutual trust principle was not always appropriate came in the recast Article 3(2) of Dublin Regulation (III):⁷⁴

where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State . . . the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

The CJEU has subsequently stressed the importance of mutual trust whilst acknowledging that exceptional circumstances, such as comparatively poor health care, (not just systemic deficiencies) could prevent a Dublin transfer.⁷⁵ The above judgements give an insight into a system that is far from uniform and a judicial body that is anxious to stress

⁶⁸ Act CXXXVII of 2015.

⁶⁹ Third Party Intervention by The Council Of Europe Commissioner For Human Rights Under Article 36 Of The European Convention On Human Rights Applications No. 44825/15 And No. 44944/15, December 2015, COMMDH (2016) 3. In April 2017 all transfers of asylum seekers to Hungary from Germany were stopped due to these concerns.

⁷⁰ Opinion No. 2/2012 (Xii.10) KMK Of The Supreme Court Of Hungary (Kúria) On certain questions related to the application of the safe third country concept, a policy which was followed by the OIN until august 2015.

⁷¹ The jurisprudence across EU Member States is documented in the Statewatch factsheet Dublin transfers to Hungary 2016. Available At: <http://statewatch.org/news/2016/jan/eu-ecre-factsheet-dublin-transfers-to-hungary-1-16.pdf> [last accessed 22nd Feb 2019].

⁷² European Commission, Migration And Asylum: Commission Takes Further Steps In Infringement Procedures Against Hungary, *Press Release Brussels*, (19th July 2018).

⁷³ EurActiv 'Hungary slams EU legal action over asylum seekers' 25th July 2018. Available at: <https://www.euractiv.com/section/future-eu/news/hungary-slams-eu-legal-action-over-asylum-seekers/> [last accessed 22nd Feb 2019]

⁷⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 *Establishing The Criteria And Mechanisms For Determining The Member State Responsible For Examining An Application For International Protection Lodged In One Of The Member States By A Third-Country National Or A Stateless Person* OJ L 180, 29.6.2013, p. 31–59.

⁷⁵ C.K. And Others, C-578/16. For a commentary see Cecilia Rizcallah 'The Dublin System: The ECJ Squares The Circle Between Mutual Trust And Human Rights Protection' *European Law Analysis* (20th Feb 2017).

solidarity and mutual trust notwithstanding repeated breaches of CEAS provisions on reception and asylum procedures. The EU's Fundamental Rights Agency has recently raised concerns over restricted interpretations of refugee law where humanitarian protection is replaced with temporary residence orders (Italy), restrictions in accessing legal representation from detention centres (Croatia), welfare restrictions (Austria) and the classification of asylum files as secret, thereby preventing an effective judicial review (Poland).⁷⁶ The realisation of the uniform, fair and efficient asylum system promised in the European Council's Tampere summit in 1999, appears further away than ever.

It may be suggested that the problems arising from over-stretched asylum systems in individual border states are no longer isolated. European cooperation in the field of asylum, such as it exists, has moved from a focus on protection to one of containment and deterrence. To understand how this shift has occurred it is necessary to consider the events of 2015–16 and the impact of the crisis frame. This has enabled the tacit endorsement of an unchallenged narrative presenting those displaced as threats to European security, values and culture.

THE APPLICATION AND IMPACT OF THE CRISIS FRAME

The UNHCR labelled 2015 the year of Europe's 'refugee crisis' as an estimated one million irregular migrants, 75% of whom were fleeing conflict or persecution in Syria, Afghanistan or Iraq and therefore had claims for protection, arrived at Europe's borders.⁷⁷ They further estimate that 3,550 lives had been lost at sea during this journey.

Some media sources were keen to dilute the humanitarian dimension of the descriptor, preferring to describe events as a 'migrant' rather than 'refugee' crisis.⁷⁸ The following year was described in similar terms. Within the first 6 months of 2016, the death toll was approaching that of the previous year as thousands continued to drown in the Mediterranean and Aegean seas. It is impossible to be clear about the numbers who did not succeed in reaching Europe as many will have been intercepted, detained and otherwise prevented from travelling onwards by border guards.⁷⁹ The situation was, and continues to remain, dire, despite a reduction in media interest and a relative fall in application numbers.

The application of the crisis frame to describe events which were both foreseeable and manageable is deeply problematic. Frames have been defined as conceptual tools which are relied on by politicians, media and individuals to 'convey, interpret and evaluate information'.⁸⁰ Essentially, they assist people to make sense of events which they are unable to personally verify.

When one thinks of a crisis one immediately conceives of a situation both unexpected and impossible to resolve (therefore out of control). Crisis framing in the migration context supports a security narrative through its characterisation of the situation as

⁷⁶ EU Fundamental Rights Agency 'Migration: Key fundamental rights concerns' 2019 Quarterly Bulletin 1.

⁷⁷ UNHCR statistics, 2015. Available at: <http://tracks.unhcr.org/2015/12/2015-the-year-of-europes-refugee-crisis/> [last accessed 22nd Feb 2019].

⁷⁸ Daily Mail Online, Key developments in Europe's migration crisis (n/d) Available at: <https://www.dailymail.co.uk/news/fb-5866029/Key-developments-Europes-migration-crisis.html> [last accessed 22nd Feb 2019]; Daily Mail Online, It's time to set up migrant processing centres in Africa' (15th June 2018). Available at: <https://www.dailymail.co.uk/news/article-5847875/Macron-Italys-new-PM-meet-migrant-crisis-threatens-rip-Europes-political-order-apart.html> [last accessed 22nd Feb 2019]; Macer Hall EU migrant crisis is 'colossal' British borders face threats from terrorists and smugglers' *Daily Express* (3rd Aug 2016)

⁷⁹ Helen O'Nions, 'Migrant containment at all costs: what is left of European humanity?' *The Globe Post* (Feb 14th 2019).

⁸⁰ W Russell Neuman, Marion R Just and Ann N Crigler *Common Knowledge. News and the Construction of Political Meaning* (Chicago Univ of Chicago Press 1992), 60

uncontrollable and intrinsically threatening, resulting in the dehumanisation of those seeking protection.⁸¹

Yet as has been noted, the scale of the internal displacement, the ongoing nature and severity of the conflict, and instability in regional countries, suggests that the onward migration to Europe was predictable and therefore potentially manageable.

Whilst a proportion of the arrivals are from established countries of origin such as Afghanistan, Iraq and Eritrea, a considerable proportion of asylum seekers are now Syrian. The UN contends that well over half the pre-war population in Syria requires humanitarian assistance.⁸² More than 3.5 million Syrians currently reside in Turkey and 1.2 million are in Lebanon. It cannot therefore be credibly argued that the reception and processing of one million Syrian asylum claims between 28 comparatively wealthy European countries is unmanageable. The European 'refugee crisis' if indeed it exists at all, is not a crisis that should be attributed to refugees. Rather, it is a crisis of European governance which has failed to deliver a workable and fair solution that protects those most in need.

Lessons should have been learned from the significant increase in asylum claims resulting from the dissolution of Yugoslavia, when the political dimension of the European project was in its infancy. The lack of planning is even more alarming given the existence of a specific European directive that covers this very situation.

Lessons from Yugoslavia

The protracted dissolution of Yugoslavia which began in 1990 generated a comparable number of refugees in Europe. This was the first significant spike in asylum applications and, along with the collapse of the Berlin wall, led several governments in Western Europe to focus their attention on specific asylum policies. In the UK for example, the first appeals system was established in 1993 and was soon followed by a proliferation of asylum legislation that has continued to this day. Refugee movements were a foreign policy concern in Europe but the response to the protection demands of over two million Yugoslav refugees was a matter of national competence. Similar arguments over cooperation and responsibility surfaced as Croatia closed its border to Bosnia due to the lack of support from European neighbours. A threat to repeat this decision was made in 2018.⁸³

On the whole the individual state response to the Yugoslav refugees was strikingly similar to that of 2015–16 with Germany taking responsibility for the majority of those displaced, granting protection to over 330,000.⁸⁴ Sweden received 50,000 asylum claims whereas the UK, France and Belgium received less than 10,000 applications each.⁸⁵ Not only are the responses comparable, the numbers are also broadly comparable, with only Germany taking significantly more Syrian than Yugoslav nationals.⁸⁶

The intervening years have seen significant developments in terms of European competence with the establishment of a CEAS in 1999. Yet, surprisingly little has changed on the ground. The same arguments over integration, security and the allocation of responsibility continue to dominate political discussions, delaying effective and prompt response. The urgent humanitarian need for protection is relegated to a secondary

⁸¹ UN *Universal Declaration of Human Rights* 1948 GA Resolution 217A, Article 14.

⁸² UN statistics are available at: <http://www.unocha.org/syria> [last accessed 22nd Feb 2019].

⁸³ Zdravko Ljubas, 'Bosnia Is Worried By EU Suggestions To Close Borders To Refugees Crossing The Balkans' *Deutsche Welle DW.Com* (20th June 2018)

⁸⁴ Michael Barutciski 'EU States And The Refugee Crisis In The Former Yugoslavia' (1994) 14 *Refugee* 3

⁸⁵ *Ibid.*

⁸⁶ Eurostat statistics cited in Barutciski *Ibid.*, compare 1991–1996 and 2011–2016 period.

concern. Nowhere is this more apparent than in the EU-Turkey deal and the worrying signs that extra-territorial processing is back on the European agenda.

Justin Huynh argues that a model for a managed resettlement programme existed following the exodus of 1.6 million Vietnamese in the 1970's. The orderly departure programme, which included an open shore policy in neighbouring countries and resettlement in the US, could have served as a workable model and may well have prevented many of the deaths in the Mediterranean.⁸⁷ Huynh argues that the willingness to accept Vietnamese nationals for resettlement in the US was motivated largely by guilt. By contrast there has been a 'sense of compassionate distance for the plight of Syrian refugees', notwithstanding the increasing globalisation of the conflict.⁸⁸

*The Temporary Protection Directive*⁸⁹

The need to respond quickly and effectively in cases of war, widespread violence and human rights violations, prompted the European institutions to enact a Directive in 2001 with the purpose of providing immediate, temporary protection in cases of mass arrival. The Yugoslav displacement directly informs the preamble. In particular the Commission and Member States are reminded to 'learn the lessons of their response to the Kosovo crisis in order to establish the measures in accordance with the Treaty'⁹⁰.

The Syrian conflict is an obvious case for the implementation of the temporary protection mechanism. The principles it sets out are those that informed the Commission's failed attempts to implement a mandatory quota system in 2016. Had the Council activated the Directive's provisions as soon as the Syrian conflict began to generate a significant number of refugees, there could have been a managed approach grounded in existing obligations. When the number of arrivals increased significantly in 2015, Syrians could have been dispersed according to the responsibility sharing mechanism in a more orderly fashion. It would certainly have been more difficult for the Visegrad group of states to argue against the Commission's competence when setting mandatory quotas.

Instead the European Council struggled to obtain support for its compulsory quota scheme. The CJEU dismissed a challenge by Slovakia and Hungary (supported by Poland) to the Council's competence in setting mandatory quotas to assist with the relocation of Syrians from Greece and Italy.⁹¹ Both states argued that the use of Article 78(3) TFEU was inappropriate as it constituted a binding exception to a legislative act and further they alleged several procedural irregularities, most notably the absence of a unanimous Council vote.⁹² Although the Court dismissed all the arguments, the efficacy of the scheme was seriously undermined. The Czech Republic admitted only 12 of their target of 2691, whereas Slovakia admitted 16 from a quota of 902. Both Hungary and Poland resolutely refused to comply.⁹³ Infringement action was commenced by the

⁸⁷ Justin Huynh 'Tales Of The Boat People: Comparing Refugee Resettlement In The Vietnamese And Syrian Refugee Crises' (2016) 48 *Columb Hr Law Review*, Fall 198. This is also discussed as an example of cooperation by Suhrke supra n100, 405–6.

⁸⁸ *Ibid.*

⁸⁹ Council Directive 2001/55/EC Of 20 July 2001 *On Minimum Standards For Giving Temporary Protection In The Event Of A Mass Influx Of Displaced Persons And On Measures Promoting A Balance Of Efforts Between Member States In Receiving Such Persons And Bearing The Consequences Thereof* OJ L 212, 7.8.2001, p. 12–23.

⁹⁰ *Ibid.*, Para 6.

⁹¹ Council Decision (EU) 2015/1601 of 22 September 2015 *Establishing Provisional Measures In The Area Of International Protection For The Benefit Of Italy And Greece* OJ 2015 L 248, p. 80.

⁹² Joined Cases C-643/15 and C-647/15

⁹³ Aneta Zachová, Edit Zgut, Karolina Zbytniewska, Michał Strzałkowski and Zuzana Gabrizova 'Visegrad Nations United Against Mandatory Relocation Quotas' *EurActiv News* (23rd July 2018).

Commission in 2017 but by this time the mandatory scheme had been replaced with voluntary commitments.

The absence of effective European solidarity is deeply regrettable. It is possible, although admittedly not inevitable, that the use of an established provision in the Temporary Protection Directive might have attracted less objection. The provisions of the Directive are time-limited, both in terms of duration and the protection it offers, but it does provide for principles of family reunion and recognises that recipients may make a claim for refugee status at any point.⁹⁴

The lack of preparedness and crisis mentality left the European Commission on the back foot, appearing disorganised and reactive. Governments that had no intention of offering protection were provided with an excuse which could be used to appeal directly to their electorates. These appeals centred on national identity and security concerns with Viktor Orban stating that allowing entry for refugees means ‘importing terrorism, criminalism, anti-semitism and homophobia’. The Polish interior minister argued that the relocation of refugees was ineffective as it ‘simply attracted more waves of immigration to Europe’.⁹⁵

The Commission’s capacity to enforce compliance was further limited by a growing existential threat to the Union itself. Many of the leaders refusing to abide by humanitarian obligations were also espousing nationalist views and questioning the authority and foundations of the Union. The Italian interior Minister Matteo Salvini and Viktor Orban have now formed an anti-refugee alliance that is directly oppositional to European policies:

Hungary has shown that we can stop migrants on land. Salvini has shown migrants can be stopped at sea. We thank him for protecting Europe’s borders . . . We must send migrants back to their countries. Brussels says we cannot do it. They also had said it was impossible to stop migrants on land, but we did it.⁹⁶

If their rhetoric is to be believed, the European Commission’s capacity to compel states in such a climate would be like Turkey’s voting for Christmas.

The crisis frame has been welcomed by populist and extremist politicians and has helped facilitate and secure a path to power in national governments for previously marginalised far-right figures such as Matteo Salvini in Italy, Alice Weidel in Germany and Jimmie Akesson in Sweden. It has served to consolidate the power of Viktor Orban in Hungary and President Erdogan in Turkey. The fast-growing popularity of the far-right in Europe is, one could argue, the real crisis. It was not widely foreseen and its volatile, populist appeal certainly threatens the values of the European project.

THE BURDEN OF CRISIS AND ITS IMPACT ON COOPERATION

The depiction of the refugee as a burden is common in anti-migrant rhetoric. Yet it also dominates much of the policy pertaining to the CEAS which purports to provide a fair and efficient asylum procedure.⁹⁷ Terms such as ‘venue-shopping’ and ‘burden-sharing’ frame the refugee as a problem to be managed, de-individualising the refugee experience.

⁹⁴ Temporary Protection Directive, Article 17 And 18

⁹⁵ Mariusz Blaszczak, Polish Interior Minister 2017 cited in Patrick Wintour ‘EU Takes Action Against Eastern States For Refusing To Take Refugees’ *The Guardian* (13th Jun 2017)

⁹⁶ Viktor Orban quoted in Lorenzo Tondo ‘Matteo Salvini And Viktor Orbán To Form Anti-Migration Front’ *The Guardian* (August 28th 2018)

⁹⁷ Tampere European Council, Presidency Conclusions 15 And 16 October 1999. Available at: http://www.europarl.europa.eu/summits/tam_en.htm# [last accessed 22nd Feb 2019].

The dissolution of Yugoslavia brought burden-sharing questions to the fore in discussions over how to manage external displacement. The German Presidency Draft Council Resolution on Burden-sharing in July 1994 attempted to allocate reception responsibility and institute a resettlement mechanism based on three equally weighted factors: population size, size of Member State territory and GDP.⁹⁸ Thielemann notes that the proposal was watered down after objection from the British government and French concerns over the rights of refugees.⁹⁹ The resulting agreement was based on soft law and non-binding commitments which were found wanting in the subsequent Kosovo crisis.¹⁰⁰

There are obvious parallels with the Council's decision to introduce a compulsory quota system. Despite continued resistance from the Visegrad group¹⁰¹, the Commission sought to create a more durable plan the following year, including a solidarity compensation mechanism where those states taking higher number of asylum seekers were financially compensated.¹⁰² The idea of refugees being traded in this way may seem distasteful but this did not deter the Commission who recognised that an entirely voluntary scheme was not able to offer an effective solution for the numbers requiring protection.

Burden-sharing also informs the transfer system under the Dublin Regulation which has been the subject of so much criticism. Even if one accepts that burden is a legitimate word to describe refugees, in practice the transfer is not a good example of burden sharing. Many states located away from the borders of Europe, in particular the UK, have been far keener to maintain the Dublin system precisely for this reason. The transfer mechanism has actually constituted a burden in the full definitional sense for countries in South-Eastern Europe. Italy had 42,356 irregular border crossings in two months alone in 2016.¹⁰³ The figures for Greece and Hungary were even greater with 137,000 and 78,472 respectively for the same period.¹⁰⁴ The European Commission commenced infringement proceedings against Hungary after the introduction of its new asylum laws in December 2015 and mounting evidence that refugee law was not being respected. Nevertheless some European states continued to transfer asylum seekers during this period with 1,338 successful transfers to Hungary between January and Nov 2015 (from 39,299 requests).¹⁰⁵

Until the decision of Germany in August 2015 to suspend the Dublin transfer mechanism for Syrian nationals, states of first arrival were expected to manage the overwhelming majority of irregular arrivals along with those transferred. This was less

⁹⁸ Council Document 7773/94 Asim 124; Christina Boswell 'Burden sharing in the EU: lessons from the German and UK Experience' (2003) 16 *Journal of Refugee Studies*, 3.

⁹⁹ Eiko R Thielemann 'Between Interests And Norms: Explaining Burden-Sharing In The European Union (2003) 16 *Journal Of Refugee Studies* 3, 260.

¹⁰⁰ Astrid Suhrke, A 'Burden-Sharing During Refugee Emergencies: The Logic Of Collective Action Versus National Action' (1998) 11 *Journal Of Refugee Studies* 4, 396–415; Thielemann *Ibid*, 261.

¹⁰¹ Hungary, Slovakia, Poland And Czech Republic constitute the Visegrad or V4 Political and Cultural Alliance

¹⁰² European Commission 'Towards A Sustainable And Fair Common European Asylum System' (*Press Release 4th May 2016 IP/16/1620*)

¹⁰³ Jon Simmons 'Contemporary Realities and Dynamics of Migration in Italy', Migration Policy Centre, Florence 2018; European Commission Irregular Migration via the central Mediterranean (2017) European Political Strategy Centre, Strategic Notes 22, (2nd Feb). Available at: https://ec.europa.eu/commission/sites/beta-political/files/irregular-migration-mediterranean-strategic_note_issue_22_0_en.pdf [last accessed 22nd Feb 2019].

¹⁰⁴ UN International Organisation for Migration 'Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079' Press Release, (1st June 2017). Available at: <https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079> [last accessed 22nd Feb 2019].

¹⁰⁵ European Commission, 'Commission Opens Infringement Procedure Against Hungary Concerning Its Asylum Law' (10 December 2015). Available at: <http://bit.ly/lxyj79p>. See above at page 16–17; Third Party Intervention By The Council Of Europe Commissioner For Human Rights Under Article 36 Of The European Convention On Human Rights Applications No. 44825/15 And No. 44944/15, December 2015, COMMDH(2016)3, 9. Available at: <http://bit.ly/lpbwsff> [last accessed 22nd Feb 2019].

about cooperation and sharing responsibility and more about shifting responsibility for refugee management by wealthier northern European states.

Carrera argues that the resulting temporary reforms to the Dublin mechanism failed to fully appreciate that the situation was neither an emergency nor particularly exceptional.¹⁰⁶ An opportunity to re-consider the premise and objectives of the Regulation was therefore missed. Even if one accepts the contested premise that people should remain in the first country of asylum, it is improbable that secondary movement will be prevented whilst asylum procedures and reception conditions in European states are not aligned.¹⁰⁷

It is suggested that framing the refugee as a burden undermines the possibility of their positive contribution to society and contributes to the anti-migrant narrative which focuses exclusively on the threat to national identity, prosperity and safety. The Oxford English dictionary provides three definitions of the noun burden:

- A load, typically a heavy one.
- A duty or misfortune that causes worry, hardship, or distress.
- The main responsibility for achieving a specified aim or task.¹⁰⁸

Whilst the final definition may be in the minds of policy-makers, it is reasonable for a burden to be interpreted using either of the first two definitions, stressing a negative, unwanted obligation that is unlikely to produce a particularly positive outcome.

Rather than emphasising the negative, it is submitted that 'responsibility sharing' would provide a more constructive platform for negotiations between states and the Commission. Whilst certain states may continue to prove reluctant to comply with their humanitarian obligations, it is arguably harder for them to justify renegeing on shared responsibilities (when compared with shared burdens).

THE EUROPEAN RESPONSE TO SYRIAN DISPLACEMENT

The crisis mentality that overtook the European Commission in 2015 characterised a fragmented and reactive response to the Syrian displacement. Its effects continue to be felt today by Syrians stranded in Turkey and Greece, not to mention those returned at European borders who have been denied an opportunity to exercise their right to seek asylum.

Resettlement

For many refugees the ultimate goal is to return home (an understanding typically lost in the anti-refugee narrative found in sections of the European media).¹⁰⁹ The decision to leave is rarely taken lightly (this explains why the number of Syrian refugees remained fairly constant for the first four years of the conflict and why there are still millions of internally displaced Syrians. Yet it is difficult to conceive of return in the foreseeable future as a viable option for Syrians. President Assad has recently legislated to require

¹⁰⁶ Sergio Carrera and Karel Lannoo 'Treat The Root Causes Of The Asylum Crisis, Not The Symptoms' (2015) Centre for Policy Studies, CEPS, Commentary Brussels.

¹⁰⁷ Elspeth Guild, Sergio Carrera, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax 'Enhancing the Common European Asylum System and alternatives to Dublin' (2015) Ceps Paper No 83, Available at: https://www.ceps.eu/system/files/ceps_lse_83_0.pdf. [last accessed 22nd Feb 2019].

¹⁰⁸ Oxford English Dictionary. Available at: <https://en.oxforddictionaries.com/definition/burden> [last accessed 22nd Feb 2019].

¹⁰⁹ UN News Interview with UNHCR spokesperson Melissa Fleming 'All Refugees Want To Go Home Someday' *UN News* (26th May 2017); Giles Duley 'Syrian Refugees: 'We Want To Go Home, That Is Our Dream' *The Guardian* (5th Oct 2014). Available at: <https://www.theguardian.com/world/2014/oct/05/syrian-refugees-we-want-peace-want-to-go-home> [last accessed 22nd Feb 2019].

owners of private property to register their interest within thirty days.¹¹⁰ Those unable or unwilling to do so, which will include millions of internally and externally displaced Syrians, will risk confiscation of their property. Such measures will prevent the return and reintegration of those in exile; suggesting continuing instability for decades to come.

Given the impossibility of return in the short-medium term and the significant costs falling on comparatively poor neighbouring states, the best, durable solution will be resettlement. The scale of the resettlement required is considerable and cannot be achieved absent a global response.

The EU has operated a voluntary resettlement scheme since 2011 and several Member States operate their own schemes which are typically managed by the UNHCR in the region. The UNHCR has urged the EU to increase commitments to receive refugees through sustainable resettlement programmes, endorsing the 2012 campaign led by the International Organisation for Migration (IOM) and five non-governmental organisations active in the field of refugee protection, to resettle 20,000 people every year by 2020.

The need for European coordination in meeting this target seems obvious as recognised by the Commission's Agenda for Migration in 2015.¹¹¹ Many Member States were not offering any resettlement places and surveys of voluntary programmes showed that few states fulfilled their own self-imposed resettlement quotas.¹¹² There are a variety of reasons for this, including failures by the UNHCR to identify appropriate persons, unwillingness of municipalities to partake in resettlement initiatives and the imposition of suitability criteria, such as integration potential, which are potentially discriminatory and difficult for the UNHCR to assess.¹¹³ Additionally, one of the concerns surfacing in resettlement research is the emergence of a two tier asylum system in some European countries which distinguishes between asylum seekers arriving at the border and those resettled from the region of origin. This can prevent a holistic integration strategy which is essential to the sustainability of resettlement.¹¹⁴

After three years of the conflict, the UK had resettled only 143 Syrians under its Vulnerable Persons Relocation Scheme.¹¹⁵ Whilst David Cameron increased the commitment to resettle 20,000 within five years from 2015 there have been accusations that the scheme principally benefits the most vocal rather than the most vulnerable. There are also concerns that the significant resources devoted to Syrians under the scheme could be more equitably shared across the refugee community in the UK. Other resettlement programmes such as the Gateway Protection Programme and the Mandate Refugee Scheme assist those formally identified as Convention refugees but the number of beneficiaries is comparatively small.

The US operates a temporary protected status to allow nationals of specific countries, including Syria, to remain and work for a fixed, renewable period. But the recent removal of several countries from the list and the anti-immigrant rhetoric of President Trump leaves the future of the policy in doubt.

Compared to the UK and the US, Germany has been more active in resettlement with a private sponsorship programme introduced in 2013; a national humanitarian program which focussed on Syrians living in Lebanon and a scheme introduced in January 2017

¹¹⁰ Arwa Ibrahim 'Syria 'Absentees Law' Could See Millions Of Refugees Lose Lands' *AlJazeera.com* (7th April 2018).

¹¹¹ *Supra* n120.

¹¹² Elena Boshki 'Building Knowledge for a concerted and sustainable approach to refugee resettlement in the EU and its Member States' 2013/004 Know RESET Research Report.

¹¹³ *Ibid.*,

¹¹⁴ *Ibid.*,

¹¹⁵ Ostrand *supra* n1.

to resettle 500 persons each month from Turkey.¹¹⁶ Germany also contributes to the European Union resettlement scheme and has committed to 10,200 places over the next two years.

The schemes are to be welcomed but the lack of an effective European strategy has meant that there is a considerable mismatch between demand and response. Amnesty International has reported that many of the most vulnerable remain in neighbouring countries, unable to access essential medical treatment for life-limiting conditions.¹¹⁷ Bokshi recommends EU coordination, the twinning of new and experienced resettlement countries, the development of a media strategy to promote resettlement locally and a clearer focus on integration challenges:

For resettlement to fulfil its functions as a meaningful demonstration of solidarity with countries of 1st asylum and as a useful component of a comprehensive durable solution strategy, resettlement numbers need to be significant and proportional to Europe's prosperity relative to countries of 1st asylum.¹¹⁸

When the number of irregular arrivals started to increase in 2015 the European Commission finally opted for concerted European action and the next two years saw the resettlement of over 25,000 Syrians from neighbouring countries.¹¹⁹ Given the small number and the Commission's view that managed resettlement would help to reduce the number of people engaging in onward irregular migration, one might be forgiven for thinking that cooperation would be easy to secure. The proposed resettlement scheme covered all Member States and used distribution criteria that included GDP, size of population, unemployment rate and past numbers of asylum seekers/ resettled refugees.¹²⁰ It also took account of any voluntary resettlement initiatives applied by Member States. An extra EUR 50 million in 2015/2016 was made available to support the scheme.¹²¹ An EU Regulation was proposed establishing a permanent resettlement framework with a unified procedure and common criteria in July 2016.¹²²

Although the voluntary resettlement scheme has been extended to other nationalities with a target of 50,000 places by October 2019, it is notable that several states have failed to provide any resettlement places and many continue to fall far short of achieving the resettlement target.¹²³

Relocation

In addition to resettlement from the region of origin, the Commission proposed an emergency relocation mechanism for those already present on EU soil to alleviate the

¹¹⁶ The schemes are discussed on the German resettlement website: <https://resettlement.de/en/current-admissions/> [last accessed 22nd Feb 2019].

¹¹⁷ Amnesty International 'Hardship, Hope And Resettlement; Refugees From Syria Tell Their Stories' *Amnesty International* (Feb 2015).

¹¹⁸ Bokshi *supra* n112, 44.

¹¹⁹ UNHCR Deputy Director, Progress Report on Resettlement, Meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme, Geneva, 26–28 2012; European Commission 'Resettlement: Ensuring safe and legal access to protection for refugees', European Commission Nov 2017. Available at : https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_resettlement_ensuring_safe_and_legal_access_to_protection_for_refugees_en.pdf [last accessed 22nd Feb 2019].

¹²⁰ For the precise numbers see *Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions 'A European Agenda On Migration'* (Brussels 13.5.2015) COM(2015) 240 final, annex.

¹²¹ *Ibid.*, 5.

¹²² European Commission *Proposal For A Regulation Of The European Parliament And Of The Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council* (Brussels, 13.7.2016) COM(2016), 468 Final 2016/0225 (COD).

¹²³ Bulgaria, Croatia, Cyprus, Greece, Poland, Slovakia, Slovenia and Hungary had not provided any resettlement places as of Nov 2017.

pressure on Southern border states.¹²⁴ The proposed relocation mechanism activated the 'emergency situation' provision contained in Article 78(3) of the TFEU and constituted a derogation from the Dublin Regulation.¹²⁵

The plan foresaw 160,000 relocation places to be implemented over a two-year period. 66,400 places were for people to be relocated from Greece and 39,000 from Italy to other EU countries. The remaining 54,000 were to be relocated from Hungary but due to their continued rejection of the plan, they were to be allocated at a later stage.¹²⁶ Those eligible needed to come from countries of origin from which there was a 75% asylum success rate.¹²⁷ Whilst pragmatic, the collective assessment of an asylum claimants legitimacy based on nationality is very crude and inevitably leads to a two tier system as many nationalities are excluded from the benefits of relocation despite having credible claims (including Afghans, Iraqis and Eritreans).

Member States would receive 6,600 euros per person to assist with the transfer and could only reject the relocated person after undertaking an assessment, on national security or public order grounds. This was subsequently amended to allow states to notify the Commission and the council of temporary incapacity to participate in the relocation for up to 30% of the assigned applicants, for duly justified reasons.¹²⁸

Whilst devised as an emergency response, there was some consideration given to integration prospects in the subsequent Commission communication. Language factors and family networks should be considered when deciding on the most appropriate state for relocation and where there is additional need for support or specialist health care this factor should be taken into account. However, NGO's and the European Asylum Support Office report that such factors are not regularly considered.¹²⁹ Whilst the durability of the mechanism depends on such factors, it must be recognised that refugees are far more likely to struggle to build a new life in certain states. Interviews with relocated asylum seekers in Romania found that language barriers and low wages made it almost impossible to obtain meaningful employment. Language courses are not readily accessible and refugees are expected to support themselves after 6–12 months of basic state support.¹³⁰ This might help to explain why Romania had only settled 463 from a total of 6,205 during the first year of relocation.

The lamentable resettlement rate and the considerable difficulties experienced by arrivals in some countries, demonstrate the weakness of leadership in the lack of planning and structured support resulting from the 'crisis' mentality that overtook the Commission in 2015. For any relocation mechanism to be sustainable it needs to better match the preferences of refugees with those of Member States. Whilst states can indicate their preferences, they are accused of doing so with the intention of reducing rather

¹²⁴ Communication COM(2015)240 final

¹²⁵ Bruno Nascimbene 'Refugees, The EU And The 'Dublin System'. The Reasons For A Crisis' (2016) 1 European Papers 1, 101–113, 104.

¹²⁶ The 2nd Council Decision on relocation on 29 September 2016 made 54,000 places not yet allocated available for the purpose of legally admitting Syrians from Turkey to the EU.

¹²⁷ Those eligible therefore depend on asylum statistics. Success rates for nationals of Afghanistan and Iraq fell below the 75% figure and therefore were ineligible for relocation. Nationals of Eritrea were originally eligible for relocation but this ended when the success rate fell slightly below the threshold.

¹²⁸ Council Decision (EU) 2015/1601 of 22 September 2015 *Establishing Provisional Measures In The Area Of International Protection For The Benefit Of Italy And Greece*, Art 4(5) OJ L 248, 24.9.2015, p. 80–94. Both Sweden and Austria have sought to rely on this provision, see Nascimbene supra n125, 107.

¹²⁹ Action Aid 'Separated. The Challenges of Relocation and Family Reunification for Refugees Arriving in Greece' (Action Aid, Johannesburg 2017).

¹³⁰ Frederik Johannisson 'Refugees Relocated by EU Struggle to Get by in Romania' *News Deeply* (1st Dec 2006). Available at: <https://www.newsdeeply.com/refugees/articles/2016/12/01/refugees-relocated-by-e-u-struggle-to-get-by-in-romania> [last accessed 22nd Feb 2019].

than enhancing their reception obligations.¹³¹ If refugees are going to be relocated to countries where they will struggle to integrate there needs to be much more financial support and training (perhaps mentoring by states with more successful schemes) for the receiving state to build reception and integration capacity.

A more immediate issue faces an estimated 50,000 migrants stranded in Greece. Some arrived before the EU-Turkey in March 2016 deal and are awaiting relocation under voluntary programmes, others arrived after the EU-Turkey deal took effect and their only way of leaving Greece is family reunion. Family reunion is provided for under the Dublin Regulation.¹³² The transfer should take place before the asylum claim has been assessed so that family life is facilitated with the best interests of the child being a primary consideration.¹³³ Many have credible family reunion claims as family members, including young children separated at borders, are themselves stranded in other EU states. The administrative process for assessing relocation and family reunion has been lengthy and convoluted. Those interviewed by Action Aid were not properly informed about their legal position or given information about the reunion process.¹³⁴ Family reunion figures from 2015 suggested that around three quarters of applications resulted in transfer, but this figure had dropped markedly to 10% a year later.¹³⁵

The reactive starting position of discussions on the Commission's 2015 Agenda for Migration did not bode well. Not only were the Visegrad states vociferous in their opposition to compulsory resettlement, the Agenda itself lacked definitive priorities. This is evidenced by the attention paid to the prevention of smuggling over the need to explore legitimate options for regular migration.¹³⁶ Apetroe argues that a focus on legal migration pathways would have enabled the EU to take some initiative, thus regaining leadership of the debate.¹³⁷ Instead the Commission expended its energy and resources on promoting greater securitisation and interception of smuggling networks; essentially confirming a securitisation narrative that has shaped migration discourse whilst increasing public anxieties over security and terrorism.¹³⁸ Not only are such programmes unlikely to yield significant impact whilst the root causes remain unaddressed, there is also ample evidence from Operation Sophia and Triton that they endanger lives by prioritising security over rescue.¹³⁹

The compulsory relocation mechanism ended in September 2017 falling well short of its target. A move to voluntary relocation resulted in slightly more than half the target being met as of October 2018. This was partly down to problems with registering those eligible, but it was also very apparent that some countries were either unwilling or incapable of properly engaging with the mechanism. The relocation mechanism itself did little to deter irregular migrants. Over 3,000 drowned in the first six months of 2016 with three-quarters of the deaths occurring on the route between Libya and Italy. Conditions for all migrants in Libya are known to be dire. There is no established UNHCR presence

¹³¹ Nascimbene supra n125, 109.

¹³² Dublin Regulation supra n74, Articles 9 and 10.

¹³³ Article 24 EU Charter of Fundamental Rights C 364/1, OJ 18.12.2000; Article 3 UN Convention on the Rights of the Child 1989, Resolution 44/25 20th November 1989

¹³⁴ Action Aid supra n129.

¹³⁵ *Ibid.*, 8.

¹³⁶ Sergio Carrera 'Whose European Agenda on Migration?' (2015) Centre for European Policy Studies 16, Brussels

¹³⁷ Alexandru Apetroe 'The European Migration Crisis. Which Consequences Affecting the Stability of the EU?' (2016) *Studia Europaea* Sept 3rd, 121-143

¹³⁸ Jeff Huysmans 'The European Union and the Securitisation of Migration' (2000) 38 *Journal of Common Market Studies* 5, 751-777; Havlova and Tamchynova supra n16, 106.

¹³⁹ Miltner supra n11

and many migrants are detained in overcrowded, insanitary conditions.¹⁴⁰ One of the most harrowing reports related to a CNN investigation which uncovered migrants being sold in slave markets around Tripoli.¹⁴¹ Notwithstanding accusations from NGO's and the UNHCR that the Libyan government are complicit in crimes against humanity, the EU has recently attempted to persuade the Libyan authorities to build EU funded, migrant processing centres. So far, the Libyan government have rejected the proposal.¹⁴² Meanwhile the EU has assisted in supporting the Libyan coastguard as it continues to intercept and return migrants attempting to cross to Europe whilst actively preventing NGO vessels from engaging in rescue operations.¹⁴³

The Turkish solution

As has been demonstrated, the emergency relocation mechanism had little effect in securing relocation or reducing the number of irregular arrivals in Greece and Italy. Of particular concern was the increasing number of arrivals coming from Turkey to the Greek islands. This led the Commission to devise its controversial 'Plan B', the EU-Turkey deal.¹⁴⁴

The deal saw the outsourcing of refugee protection from Europe to Turkey and constitutes the clearest example to date of the commodification of asylum. The success of the deal depends entirely on perspective. It certainly reduced the number of daily arrivals in Greece from thousands to tens. After only four months, Christine Nikolaidou, from the International Organisation for Migration in Greece, explained that the threat of deportation and detention was working, 'Flows have decreased not just because of the agreement but because of the closure of the borders – refugees and migrants have received the message that the borders are shut.'¹⁴⁵

This is a disturbing observation as it suggests that the obligation of non-refoulement is being routinely ignored. It is difficult to see any significant difference between closing borders and interdicting vessels at sea. In the *Hirsi Jamaa* judgement, the ECtHR ruled that the interception and return of a boat to Libya which contained irregular migrants, including asylum seekers, was a breach of the prohibition on inhuman treatment contrary to Article 3, and collective expulsion contrary to Protocol 4, Article 4 along with the right to an effective remedy in the European Convention¹⁴⁶.

From a human rights perspective the Turkey deal is a truly bad deal. The closure of borders will never solve a humanitarian emergency. Whilst it may have an impact on the numbers of people migrating out of choice, the majority of irregular migrants come from countries where there are serious human rights abuses. It has been well established that absent a viable alternative of return, migrants will search for other, more dangerous routes.¹⁴⁷ In this respect EU policy directly contributes to the unprecedented growth

¹⁴⁰ O'Nions supra n79

¹⁴¹ CNN footage of Libyan migrant slave auctions, People for Sale <https://edition.cnn.com/specials/africa/libya-slave-auctions> [last accessed 23rd Feb 2019]; Human Rights Watch 'No Escape From Hell. EU Policies Contribute To Abuse Of Migrants In Libya' (HRW 2019). Available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya#> [last accessed 22nd Feb 2019]

¹⁴² Patrick Wintour 'Libya Rejects EU Plan For Refugee And Migrant Centres' *The Guardian* (20th July 2018).

¹⁴³ Human Rights Watch supra n141; O'Nions supra n79.

¹⁴⁴ <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf> [Last accessed 22nd Feb 2019] The statement of 18th March 2016 formalised an earlier recommendation for a Voluntary Humanitarian Admission Scheme with Turkey to create solidarity and responsibility sharing with Turkey for the protection of persons displaced by the conflict in Syria to Turkey, 11097/15. 5 C (2015) 3560 final.

¹⁴⁵ Lizzie Dearden 'Refugee Crisis: 2016 On Course To Be Deadliest Year On Record As Thousands Of Asylum Seekers Drown In Mediterranean' *The Independent* (30th July 2016).

¹⁴⁶ *Hirsi Jamaa and Others v Italy* 2012, App 27765/09.

¹⁴⁷ Peter Andreas and Timothy Snyder *The Wall around the West. State Borders and Immigration Controls in North America and Europe* (Rowman and Littlefield, Lanham 2000).

in smuggling and trafficking.¹⁴⁸ A recent analysis of Operation Sophia which operated off the coast of Libya found that irregular migration increased by 19% in the first half of 2017 compared to the same period in 2016. The number of arrivals from Libya and the number of deaths in the central Mediterranean has increased considerably since 2015.¹⁴⁹ Although many migrants taking the Libyan route will be from Sub-Saharan Africa, the UNHCR states that around 11% of arrivals from Libya in 2018 are Syrian nationals.¹⁵⁰ From a geographical perspective this makes little sense. It therefore seems reasonable to conclude that the movement restrictions imposed by the EU-Turkey deal are at least contributory factors.

Put simply the deal states that those whose claims are deemed *inadmissible* in Greece should be returned to Turkey. At the outset, as reported in several press releases, the deal stated that *all* irregular migrants will be returned, which would clearly breach the procedural requirements pursuant to the principle of non-refoulement, as well as the EU Charter and ECHR's prohibition on collective expulsion. The subsequent clarification and the use of the word *inadmissible* rather than *unfounded* is still significant as it suggests that the application has not been assessed on its merits. A claim could be considered inadmissible for example if the applicant had arrived via a safe 3rd country or if Turkey is considered to be a first country of asylum. Following the transfer, the Turkish government commits to relocate one Syrian refugee from Turkey to the EU according to the relocation quota.

The deal was funded at a cost of 6 billion euros paid in instalments to various organisations delivering education and other services on the ground. In return for Turkey's cooperation, the EU promised to relax visa requirements for Turkish nationals and to reopen negotiations towards EU membership. The latter seems unlikely to progress anytime soon as only one of the 35 chapters required under the accession procedure has been successfully closed in a decade of negotiation.

The programme commenced on 20th March 2016 and resulted in a significant reduction in the number of arrivals in Greece. However, return procedures to Turkey have been slow and only 12,489 of an estimated 3.5 million Syrians in Turkey have been resettled in EU countries.¹⁵¹

There are considerable concerns over the legality and morality of the deal.

The question of whether Turkey can be deemed a first country of asylum or a safe country under the Asylum Procedures Directives is crucial when assessing its legitimacy.

The EU Asylum Procedures Directive defines a 'safe third country' as a country where: the people concerned do not have their life or liberty threatened on ground of 'race, religion, nationality, membership of a particular social group or political opinion'; there is 'no risk of serious harm' in the sense of the EU definition of subsidiary protection (death penalty, torture et al, civilian risk in wartime); the people concerned won't be sent to *another* country which is unsafe (the *non-refoulement* rule); and 'the

¹⁴⁸ This has been seen in Niger which was a smuggling hub for routes to North Africa. Since the EU pushed the Niger government to enact legislation to criminalise smuggling, many people's livelihoods have been adversely affected leading to increased migratory pressure resulting in other networks opening up. European Council on Foreign relations 'Migration Through the Mediterranean: Mapping the EU Response', 2017. Available at: https://www.ecfr.eu/specials/mapping_migration [last accessed 22nd Feb 2019].

¹⁴⁹ Italian Ministry of the Interior, Statistical dashboard of 30 June 2017. Available at: http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/cruscotto_statistico_giornaliero_del_30_giugno_2017.pdf [last accessed 22nd Feb 2019]; IOM, 'Recorded deaths in the Mediterranean Sea by route, January 1–July 2, 2017' Available at: <https://missingmigrants.iom.int/Mediterranean> [last accessed 22nd Feb 2019].

¹⁵⁰ UNHCR data. Available at: <https://data2.unhcr.org/en/situations/mediterranean>, July 2018 [last accessed 22nd Feb 2019].

¹⁵¹ As of 2018, Germany took in 4,313, the Netherlands 2,608, France 1,401 and Finland 1,002 Syrian refugees. The EU member states Hungary, Poland, the Czech Republic, Bulgaria and Denmark did not accept any refugees at all. <https://www.dw.com/en/the-eu-turkey-refugee-agreement-a-review/a-43028295> [last accessed 22nd Feb 2019].

possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention'.¹⁵² Turkey could also be considered a first country of asylum if the applicant had received refugee status in Turkey or would otherwise be guaranteed sufficient protection.

Whichever descriptor is preferred, the Commission have unequivocally stated that 'Only asylum seekers that will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement will be returned to Turkey'.¹⁵³ The UNHCR has emphasised the importance of effective protection and the need to examine the practice of states and compliance with the relevant instruments.¹⁵⁴

Herein lies the problem. Turkey does not apply the Refugee Convention to non-European refugees, having not ratified the 1967 optional protocol, and there is little prospect of Syrian refugees in Turkey being able to formalise their temporary status and settle permanently. President Erdoğan recently clarified his position, 'We want our refugee brothers and sisters to return to their land, to their homes. We are not in the position to hide 3.5 million here forever'.¹⁵⁵ Thus the fourth requirement for a country to be deemed 'safe' does not appear satisfied.

There is also a considerable risk of onward refoulement which has been overlooked by the Commission. Recent reports from NGO's on the ground suggest that nine provinces have stopped registering Syrian nationals with the result that they are unable to access healthcare and other basic services.¹⁵⁶ In a letter to the Interior Ministry in February, Human Rights Watch alleged that Turkish border guards have been shooting at Syrians to prevent them crossing the border.¹⁵⁷

As Peers has argued, although the general human rights situation in Turkey is not directly relevant to an assessment of effective protection when returning refugees, it is absolutely crucial to an assessment of whether Turkey can be described as a 'safe country of origin' for Turkish nationals; something that Peers describes as 'utterly preposterous'.¹⁵⁸

The European Commission proposes to include Turkey on a common list of safe countries and plans to replace the Asylum Procedures Directive with a directly applicable European Regulation. This is notwithstanding Eurostat figures indicating that 23% of asylum applications from Turkish nationals are well-founded and the fact that Turkey currently appears on only one national safe country list (that of Bulgaria).¹⁵⁹

¹⁵² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *On Common Procedures For Granting And Withdrawing International Protection*, Art 27 OJ L 180, 29.6.2013, p. 60–95.

¹⁵³ European Commission 'Fact Sheet EU-Turkey statement: Questions and Answers' (Brussels, 19 March 2016).

¹⁵⁴ UN High Commissioner for Refugees *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005; UN High Commissioner for Refugees, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9–10 December 2002), February 2003. Available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html> [last accessed 22nd Feb 2019].

¹⁵⁵ Fevzi Kızılkoyun 'Turkish Government Stops Relocating Syrians To Istanbul' *Hurriyet Daily News* (9th Feb 2018). Available at: <http://www.hurriyetdailynews.com/turkish-government-stops-relocating-syrians-to-istanbul-127084> [last accessed 22nd Feb 2019].

¹⁵⁶ *Ibid.*,

¹⁵⁷ Human Rights Watch News 'Turkey/Syria: Border Guards Shoot, Block Fleeing Syrians' *Human Rights Watch* (Feb 3rd 2018). Other similar incidents have been reported by the Syrian Observatory for Human Rights and European news outlets, see BBC News Syrian refugee: 'Five of my family were shot' at Turkish border *BBC* (19th June 2016); Josie Ensor, 'Turkish Border Guards Kill 11 After 'Firing Indiscriminately' At Syrian Refugees' *The Telegraph* (19th June 2016)

¹⁵⁸ Steve Peers 'The Final EU/Turkey Refugee Deal: A Legal Assessment' *EU Law Analysis* (18th March 2016).

¹⁵⁹ This compares to 7.8% from Albania, 6.3% from Kosovo and 1.8% from Serbia. *Proposal For A Regulation Of The European Parliament And Of The Council Establishing An EU Common List Of Safe Countries Of Origin For The Purposes Of Directive 2013/32/EU Of The European Parliament And Of The Council On Common Procedures For Granting And Withdrawing International Protection, And Amending Directive 2013/32/EU Com/2015/0452 Final*.

The safe country designation allows an accelerated procedure, including border and transit zones, with no minimum time limit under Article 31(8)(b) of the Asylum Procedures Directive. The Commission has emphasised that the fast-track approach should not compromise the obligation to examine individual applications, but this appears more an act of faith than an enforceable commitment. Article 31(9) of the Asylum Procedures Directive requires Member States to set ‘reasonable’ time limits for the first instance decision to be reached, and Article 39(2) leaves Member States discretion to set time limits for applicants to exercise their right to an effective remedy. As expected, the degree of discretion has meant that time frames for accelerated first and second instance asylum procedures vary significantly¹⁶⁰.

The move from a Directive, affording Member States some autonomy in implementation, to a directly applicable Regulation and the controversy concerning the inclusion of Turkey led the Council to suspend negotiations on the common safe country list in April 2017.

For the EU-Turkey deal to stand up to its critics, Turkey must be considered a safe third country. It is not impossible, as Peers notes, for this to be satisfied even if it is not deemed a safe country of origin. However, there are significant arguments that Turkey is not safe in either sense. This illustrates how human rights are being side-lined in European politics.¹⁶¹ To blame this on the ‘refugee crisis’ is myopic and misguided. The marginalisation of human rights by European institutions was visible in the selective application of the political dimension of the Copenhagen criteria during the accession process.¹⁶² It is at least arguable that greater accountability on the political criteria would have required the Visegrad countries to improve their anti-discrimination and human rights legislation, better preparing them to fulfil their resettlement obligations.

RE-FRAMING THE SYRIAN DISPLACEMENT

Strategic framing analysis has been applied in a variety of social policy contexts. Magner and Gerstein Pineau consider how to build support for progressive immigration reform in the United States, arguing that advocates must turn away from ‘us versus them’ framing, towards language that emphasises shared humanity, collective prosperity, and the country’s distinct identity as a ‘nation of immigrants’.¹⁶³ This approach requires a departure from the vulnerable refugee trope which suggests dependency and a lack of agency. Hanafi laments the dominance of a politics of pity over compassion, empathy and justice¹⁶⁴. Whilst vulnerability is used by the UNHCR to push for greater responsibility, many writers argue that it leads to a particular ‘hopeless’ conception of the refugee. It then becomes more difficult for those not fitting this conception to acquire protection as they are dismissed as not deserving or credible.¹⁶⁵

Angela Merkel adopts a benefit perspective which goes beyond national borders, viewing refugee protection as intrinsic to the dignity of mankind, ‘The German constitution

¹⁶⁰ Marcelle Reneman ‘Speedy Asylum Procedures In The EU: Striking A Fair Balance Between The Need To Process Asylum Cases Efficiently And The Asylum Applicant’s EU Right To An Effective Remedy’ (2014) 25 *International Journal Of Refugee Law* 4, 717–748.

¹⁶¹ *Ibid.*, European Commission, *Communication Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe*, COM (2016)0197.

¹⁶² Helen O’Nions ‘Some Europeans Are More Equal Than Others’ (2014) 8 *People, Place and Policy* 1, 4–18.

¹⁶³ Highlighting Shared Humanity and Prosperity To Advance Immigration Solutions *Stanford Social Innovation Review* May 2018. Available At: https://ssir.org/articles/entry/highlighting_shared_humanity_and_prosperity_to_advance_immigration_solution [last accessed 22nd Feb 2019].

¹⁶⁴ Hanafi *supra* n21, 113.

¹⁶⁵ Ruth Judge ‘Refugee Advocacy And The Biopolitics Of Asylum In Britain. The Precarious Position Of Young Male Asylum Seekers And Refugees’ (2010) Working Paper No 60, Refugee Studies Centre University of Oxford.

and European values require the protection of people's dignity. This means not only the dignity of the people in Germany but it also means the global understanding of the dignity of people'.¹⁶⁶

The emphasis on shared experience and common humanity is an attempt to shape public perceptions. Whilst Merkel's compassionate response is still applauded by refugee advocates, she was of course punished by sections of her electorate. This demonstrates both that changing the prevailing narrative is far from straightforward and that the message needs to come from different respected sources to have sustained impact. Merkel's lone voice of compassion became increasingly untenable as other countries closed their borders and sought to avoid any suggestion of moral responsibility.

The domestic consequences of Merkel's lone-voice compassion may be a consequence of the failings of intergovernmental cooperation on refugee protection. Shurke notes that when compared to defence and environmental cooperation, the benefits of refugee cooperation are not immediately obvious to states who may avoid costs by unilateral action.¹⁶⁷

Shurke applies a cost-benefit analysis to international cooperation and burden-sharing.¹⁶⁸ She argues that refugee reception should be considered an international public good which benefits all states, irrespective of which country receives the protection seekers. A full analysis of the benefits are beyond the scope of this paper but she challenges the 'threat' rhetoric of Orban and Salvini, arguing that security is the principal benefit of refugee cooperation, as measures to accommodate and protect will reduce the risk of refugees fuelling and spreading the conflict they are fleeing.¹⁶⁹ There is of course an inherent risk in emphasising the security benefit of cooperation as it may unintentionally reinforce an imperialist, anti-muslim narrative. Walzer's recent essay 'The European Crisis' argues that Europe must take more refugees to avoid waking up to a 'grim day' where liberalism is effectively over.¹⁷⁰

Shurke's analysis further suggests that the security gain is not itself sufficient to encourage cooperation as any security threat to individual states could easily be managed. But cooperation offers other benefits resulting from greater predictability, such as a reduction in costs for both states and refugees. The enormous sums of money spent on securitising Europe's borders has not had any lasting impact on reducing migratory flows.¹⁷¹ The reactive nature of crisis decision-making, such as the decision to end the Mare Nostrum search and rescue mission in the Mediterranean, has wasted money and cost many lives.¹⁷²

CONCLUSION

The marginalisation of European values

The events of summer 2015 should never have been framed as a crisis. They were a foreseeable response to an unsustainable situation in the region of origin. It should not have been beyond the capability of the European institutions to provide an effective,

¹⁶⁶ Stefan Wagstyl 'Angela Merkel's Warm Migrant Rhetoric Belies A Colder Welcome' *Financial Times* (May 12th 2016)

¹⁶⁷ *Supra* n100, 399.

¹⁶⁸ *Ibid.*,

¹⁶⁹ Shurke *supra* n100.

¹⁷⁰ Michael Walzer 'The European Crisis' (*Dissent Sept 11th 2015*). Available at: <https://www.dissentmagazine.org/blog/michael-walzer-european-refugee-crisis>. [last accessed 22nd Feb 2019].

¹⁷¹ El Hassan bin Talal 'Europe And The Future Of International Refugee Policy' (2016), *Forced Migration Review* 51.

¹⁷² Helen O'Nions 'Hundreds Of Refugees Dead In The Mediterranean And Still Europe Won't Act' *The Conversation* (Feb 13th 2015).

durable solution.¹⁷³ The legal mechanism to start this process already existed. The failure to apply the emergency measures of the Temporary Protection Directive is just one example of legal measures being side-lined. One could point to the failure of several states to comply with their reception obligations under the CEAS (deficiencies identified by the European courts going back eight years) and the refusal of some Member States to comply with the compulsory relocation quota. The underpinning values espoused in Article 2 of the Treaty of the EU – freedom, democracy, rule of law and respect for human rights (including those of minorities), are simply not taken seriously in the context of refugee protection. They are, in effect, values reserved for the European citizen.

There is now an urgent need to reclaim these values and re-frame the refugee debate. It necessitates a departure from the ‘toxic narrative’ that has dictated much of European refugee policy.¹⁷⁴ Cooperation centred on a frame of compassion and empathy would help to reinvigorate a European politics that has lost sight of the values underpinning European harmonisation. ‘Orbanisation’ is not confined to European asylum law and it needs to be contained before it dictates the next chapter of European history.¹⁷⁵

After mounting infringement proceedings in 2015 the Commission recently referred Hungary to the CJEU. Members of the European Parliament also voted to trigger Article 7 of the TEU on the basis that the policies and rhetoric of the Hungarian Government are threatening European values. The report prepared by MEP Judith Sargentini detailed many actions by Orban’s government with nine paragraphs devoted to the treatment of refugees and asylum seekers. In addition to the refusal to apply the mandatory quota and new laws on illegal migration and processing of asylum seekers in transit centres, the report refers to the case of Ahmed H, a Syrian national residing in Cyprus, who had tried to bring his family across the Serbia-Hungarian border and was sentenced to 7 years imprisonment for terrorism offences in March this year.¹⁷⁶ Orban defended his record, arguing that the Parliament should have sent a fact-finding mission to Hungary, conveniently omitting to mention that his Fidesz party had previously voted against a proposed mission. This is the first time the Parliament has voted to trigger Article 7, although the Commission has now initiated a censure action against Poland.

The European Parliament’s censure is an important step towards reclaiming the narrative over European values but it remains to be seen whether the censure will have the desired effect. Fidesz MEP, Jozsef Szajer, a close advisor to Orban, has argued that Hungary is being punished by pro-immigration politicians; ‘Hungary and the Hungarian people are being condemned because they proved that migration can be stopped and there is no need for migration’.¹⁷⁷ So far the other Visegrad governments have supported Hungary and it seems unlikely that Orban’s government will respond positively to any decision by the CJEU.

This is a watershed moment for European values. If the Council under the Austrian presidency fails to act following the motion, there will be no effective sanction when a state openly refuses to accept the core values of the Union. Other states are already

¹⁷³ William Lacey Swing, Dir General of International Organisation of Migration ‘The Mediterranean Challenge Within A World Of Humanitarian Crises’ (19th Dec 2015) Podcast.

¹⁷⁴ *Ibid.*,

¹⁷⁵ Steve Peers has described proposed reforms to the Common Asylum System as the Orbanisation of EU asylum law. ‘The Orbanisation Of EU Asylum Law: The Latest EU Asylum Proposals’ *EU Law Analysis*, (6th May 2016).

¹⁷⁶ European Parliament On A Proposal Calling On The Council To Determine, Pursuant To Article 7(1) Of The Treaty On European Union, The Existence Of A Clear Risk Of A Serious Breach By Hungary Of The Values On Which The Union Is Founded (2017/2131(INL)). The full report is available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0250+0+DOC+XML+V0//EN&language=en> [last accessed 22nd Feb 2019].

¹⁷⁷ Eszter Zalan, ‘EP Triggers Sanctions Procedure, Hungary Calls ‘Fraud’ *EU Observer* (12th Sept 2018). Available at: <https://euobserver.com/political/142818> [last accessed 22nd Feb 2019].

following Orban's lead with right wing populists such as Nigel Farage and Matteo Salvini, praising his leadership.

Reclaiming the narrative for refugee protection

It has been argued that framing the Syrian displacement as a crisis has enabled ill-conceived, reactive policies that present refugees as criminals and terrorists; undermining the protection that is their entitlement under international law. The consequences of this frame have reached beyond the refugee context and fed into an unprecedented rise in nationalist politics which threatens to unravel the Union. When democratic values are ringfenced for certain peoples to the exclusion of others, their universality is challenged and they cease to become core values in anything but name.

Walzer argues that community cohesion depends, to a large extent, on the demarcation of strangers from members.¹⁷⁸ Soysal also acknowledges that a cohesive national identity can be more difficult to achieve when there is religious, ethnic and cultural plurality.¹⁷⁹ Nevertheless, freedom of movement for European citizens and their family members has already increased the diversity of most European populations.¹⁸⁰ The arrival of Syrian refugees, when managed with appropriate resources directed towards integration, should not significantly impact national identity in already diverse communities.¹⁸¹ This is not the case for all European countries and allocation of European funds should reflect these additional challenges. A study of resettlement of Syrians in seven countries by the Rand corporation found that notwithstanding barriers, such as qualification alignment and language; integration was effective in countries where political commitment, community engagement and public support for refugees was strongest.¹⁸² This makes the framing of the debate about refugee protection crucial.

The European project has challenged demarcation within its borders through a conception of citizenship that allow freedom of movement for its citizens and their families. But the values that inform this project are now under threat, in part from the actions of some populist European governments, but also from the inability of the European institutions to coordinate an effective protection response to the Syrian displacement.

Whilst the European Commission has expended considerable energy and resources trying to belatedly contain and deflect those refugees that manage to reach Europe, they have been blind to a much bigger threat of their own making. The lives of millions of Syrian refugees are effectively suspended as Europe reinforces its borders and looks inward.

The application of an alternative frame, based on European values, empathy and international humanitarian obligations may have enabled a very different approach that might have exposed and embarrassed, rather than emboldened nationalist politicians. But such an approach necessitates cooperation of Member States under the decisive leadership of the European institutions.

¹⁷⁸ Walzer *supra* n28.

¹⁷⁹ Y N Soysal *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press 1994)

¹⁸⁰ For example, the last census in the UK (2011) found that Polish is now the second most widely spoken language and further that 140,000 people did not speak English at all. Available at: <https://www.independent.co.uk/news/uk/home-news/polish-is-second-most-spoken-language-in-england-as-census-reveals-140000-residents-cannot-speak-8472447.html> [last accessed 22nd Feb 2019].

¹⁸¹ It is worth noting that many educated Syrians speak English and French at a basic level as they are taught routinely at schools.

¹⁸² Ernesto F. L. Amaral, Mahlet Atakilt Woldtsadick and Gabriela Armenta, 'Europe's greatest challenge. Integrating Syrian Refugees' (2018) Georgetown Journal of International Affairs, 4, 20. Available at: <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/4/20/europes-great-challenge-integrating-syrian-refugees> [last accessed 22nd Feb 2019].

Regrettably, the window for deployment of a humanitarian frame may have long since passed. Once the dust settled on the EU-Turkey deal, proposals concerning extra-territorial processing, effectively buried in 2003, resurfaced. Originally proposed by Tony Blair¹⁸³, plans to process asylum claims in camps outside the EU were widely criticised by refugee scholars, human rights organisations and many European governments. Fekete summed up the criticisms:

Britain is proposing a new network of refugee camps – designated areas where those inside have different rights from those outside. To envisage such a plan is to imagine ghettos created by the world’s most peaceful and richest countries in some of the world’s poorest and most unstable regions.¹⁸⁴

In the last five years, the creation of ‘ghettos in the world’s poorest and most unstable regions’ has become a reality by stealth. A concerted effort is needed by European institutions, civil society and moderate political parties, to align refugee protection to the values proclaimed in the TEU; reframing the narrative. To paraphrase Vaclav Havel, when considering his country’s treatment of the Roma minority, the response to Syrian refugees is a litmus test for civil society.¹⁸⁵

¹⁸³ The proposal is contained in a letter from Tony Blair to Costas Simitis. Available at: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> [last accessed 20th February 2019].

¹⁸⁴ Statewatch has compiled many Of The Responses ‘UK asylum plan for “safe havens”: full-text of proposal and reactions’ (Statewatch, 2003). Available at: <http://www.statewatch.org/news/2003/apr/10safe.htm>. [Last accessed 22nd Feb 2019].

¹⁸⁵ Henry Kamm ‘Havel Calls The Gypsies ‘Litmus Test’ *New York Times* (10th Dec 1993).

PEACEMAKING IN SYRIA: WHY THE SECURITY COUNCIL FAILS

NIGEL D. WHITE*

ABSTRACT

The failure of the Security Council to bring peace to Syria after seven years of brutal conflict is examined in terms of the structures and powers of the organ tasked with primary responsibility for international peace and security. The dependency of peacemaking on a body where the permanent members' interests prevail over the threat to collective and human security caused by the Syrian conflict is explored in terms of the normative framework for peacemaking, which has remained undeveloped since the Charter was crafted in 1945 with inter-state disputes in mind. With only limited exceptions, peacemaking efforts within the Security Council are not based on principles of international law and justice, as prescribed in Article 1(1) of the UN Charter, rather on the basis of pragmatism, which has led to the permanent members intervening in Syria for their own purposes thereby preventing them from performing a collective and impartial peacemaking role. The clamour for military intervention – unilateral or UN authorised peace enforcement – as the solution is shown to be misplaced. Without effective peacemaking, which may be supported by peace enforcement or peacekeeping, there can be no lasting peace.

INTRODUCTION

The recent airstrikes on Syria by the US, UK and France in April 2018, in response to an alleged use of chemical weapons by the Assad regime, reflects a spiral of brutal, horrific and existential violence, death and destruction that seems to have excluded any possibility of bringing peace to the country by any other means than total victory for the very regime the airstrikes were directed against.

The bloodbath that ended the long civil war in Sri Lanka in 2009 shows that military victory can bring an end to a civil war but at great cost and then only very rarely and arguably not in a sustainable way. In contrast, recent history shows that such conflicts are normally only ended by peaceful settlement, peace agreements, and a long road to building a stable country based on accountable government and the rule of law (some imperfect examples would be Mozambique and El Salvador in the early 1990s, Northern Ireland starting in 1998, and Columbia with the peace agreement in 2016).

The Security Council's response to the chemical weapons attacks in Douma on 7 April 2018 illustrates the deadlock in that body, which has rendered it arguably complicit in the destruction of Syria, acting as a funnel that might drag outside states further into a globalised conflict.¹ On 10 April three draft resolutions were introduced, one by the US and two by Russia, each with the aim of investigating the attack but none were adopted due to opposition or the veto.² Bearing in mind that this would simply have attempted to establish the facts surrounding one atrocity amongst many, it can be seen

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¹ Chemical weapons have been used on a number of occasions in the Syrian conflict, most of which have been attributed to forces under the control of the Assad regime – see R. Barber, "Uniting for Peace Not Aggression: Responding to Chemical Weapons in Syria Without Breaking the Law" (2019) 24 *Journal of Conflict and Security Law* 71.

² UN Doc S/PV.8228 (2018).

how far the international community is from bringing peace to Syria. Russia introduced a draft resolution on 14 April condemning the airstrikes by the US, UK and France, and this was predictably not adopted.³ The Council chamber is being used to reinforce the policies of the permanent members and not to achieve collective security in Syria and the wider region.

Peacemaking, often followed by peacekeeping and peacebuilding, can work to produce a sustainable peace, as opposed to peace enforcement, which often does not (for example in Libya in 2011),⁴ or at least it only produces a temporary solution (for example Korea in 1953 and Iraq in 1991).⁵ The UN Security Council has a pivotal role in all of these functions as part of its primary responsibility for peace and security. It is certainly not the only security actor but it was placed the centre of the new world order instituted by the UN Charter in 1945 and it has sat there ever since, presiding over a shaky global peace, punctuated by many violent conflicts.

THE MEANING OF PEACEMAKING

“Peacemaking” was defined by the UN Secretary General Boutros Boutros-Ghali in “An Agenda for Peace” (1992) as “action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations”.⁶ Consensual “peacemaking” can be distinguished from coercive “peace enforcement” under Chapter VII, or from newer consensual concepts such as “peacekeeping”, which originated in the first such UN force in 1956,⁷ and “peacebuilding” given momentum by the UN’s Peacebuilding Commission created at the World Summit in 2005.⁸ Although conceptually distinct, there remains the possibility of using peacemaking, peace enforcement, peacekeeping and peacebuilding either in conjunction or successively

In many ways, in contrast to the resources put into the normative and practical development of peacekeeping, peacebuilding and, to a lesser extent peace enforcement, peacemaking seems to have remained firmly rooted in traditional concepts of international law such as sovereign equality, consent and agreement, embodied in Chapter VI of the UN Charter. The lack of attention given to the development and strengthening of peacemaking within the UN system certainly would appear incongruous when peacemaking is arguably the main and most effective method of both preventing conflicts as well as ending them. It is axiomatic that without effective peacemaking there would be no peace, and that peace enforcement, peacekeeping and peacebuilding can only support effective peacemaking.

CHAPTER VI AND THE “PACIFIC SETTLEMENT OF DISPUTES”

A large part of the problem is the institutional design of the UN Security Council, which grants that body a key role in peacemaking, thereby giving the great powers control over peacemaking and also allowing the conceptual and practical conflation of peacemaking with peace enforcement, blurring the boundaries between Chapters VI and VII of the Charter. Chapter VI reinforces the obligation that member states

³ UN Doc S/2018/855 (2018).

⁴ UN Doc S/RES/1973 (2011).

⁵ UN Doc S/RES/687 (1991).

⁶ UNSG, “An Agenda for Peace”, UN Doc A/47/277 (1992) para 20.

⁷ UN Doc A/RES/1000 (1956).

⁸ UN Doc A/RES/60/1 (2005).

have accepted in Article 2(3) of the Charter to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”. Article 33(1) requires states that are parties “to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security” to, first of all, seek a solution using the traditional forms of peaceful settlement: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or resort to regional organisations.

Thereby, Chapter VI is demonstrably based on traditional forms of diplomacy and settlement.⁹ Article 33(2) brings the Security Council into the equation by requiring it, where necessary, to call upon the parties to settle their disputes by such means. Thereafter, Chapter VI emphasises the Security Council’s powers to: investigate the dispute (Article 34); recommend procedures or methods of adjustment to the disputants (Article 36); or, indeed, recommend terms of settlement to them (Article 37). Such powers were used in the immediate post-War period, for instance, to help achieve peaceful settlement in Indonesia,¹⁰ an early example of an armed struggle for independence (in that case from the Netherlands).

By tying the obligation to settle disputes placed on states to the powers of the Security Council, the idea was that the Security Council would, as a third party, help the parties towards a settlement agreement after they had tried and failed to sort out their dispute themselves, although in practice the Security Council has not necessarily waited for this to happen.¹¹ The question remains whether peacemaking is enhanced by involving the Security Council in a function that traditionally, even in periods of institutionalisation under the Concert of Europe and the League of Nations, was within the realms of states. Might it rather be the case that an executive approach to peacemaking through the Security Council will reduce or curtail bilateral diplomacy between the disputants?

Furthermore, peaceful settlement based on sovereign equality is modelled on settling disputes between states, not settling disputes within states, where only the government is normally the recognised international actor. There are exceptions in international law, for example when the armed group represents a people fighting for self-determination, but that is narrowly confined to colonial and similar situations, and does not clearly extend to a people struggling to overthrow an undemocratic regime.¹² Thus two of the problems of peacemaking in Syria are the lack of legal parity between the parties to the conflict, the dependency of any effective peacemaking on the Security Council or the agreement of that body to any settlement proposal, and the practical mixture of these two issues with permanent members intervening on both sides. How can the Security Council be an impartial third party peacemaker when Russia, US, UK and France, each holding a veto, are parties to the conflict or conflicts raging inside Syria?

A FAILED EXECUTIVE APPROACH TO PEACEMAKING

The League of Nations was constructed to address the type of diplomatic, political and legal blunders that led to the First World War, not the sort of deliberate, hegemonic aggression that led to the Second. As a consequence, the UN was borne out of the

⁹ See generally, J.G. Merrills, *International Dispute Settlement* (Cambridge University Press, 6th edn, 2017); L.M. Goodrich, “Pacific Settlement of Disputes” (1945) 39(5) *The American Political Science Review* 956.

¹⁰ UN Doc S/RES/27 (1947); UN Doc S/RES/30 (1947); UN Doc S/RES/31 (1947); UN Doc S/RES/36 (1947); UN Doc S/RES/67 (1949). The latter resolution contained terms of settlement that were finally accepted by the parties, leading to Indonesian independence from the Netherlands in December 1949.

¹¹ C. Tomuschat, “Article 33” in B. Simma et al (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, 3rd edn, 2012) 1072.

¹² J. Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th edn, 2012) 646–7.

alliance that defeated the Axis powers, an executive model with a great deal of centralised peacemaking and sanctioning power put into the hands of the primary organ. The UN Charter appeared more constitutionally and institutionally developed and action-oriented than its predecessor. At San Francisco in 1945, the Soviet delegate stated that one of the characteristics of the Security Council “was that actions should be fast and effective”, pointing to the disastrous “effects of the suddenness of enemy action during the present war”.¹³ Smaller states agreed on the basis that the Council should protect them from aggression and, moreover, “that the interests of great and small powers in peace and security rested fundamentally upon the ability of the great powers to work together”.¹⁴

On 5 March 1945, the US on behalf of itself, China, the USSR and the UK, invited governments that had signed or adhered to the United Nations Declaration of 1 January 1942 and had declared war against Germany or Japan to participate in the United Nations Conference on International Organisation (UNCIO) to be held in San Francisco, beginning on 25 April 1945. At UNCIO, delegates of 50 nations worked on the Dumbarton Oaks proposals agreed in 1944 by the USSR, US and UK to complete the UN Charter. The Dumbarton Oaks proposals embodied the idea of the five permanent members as the world’s police force, while immunising them from any such authority by the veto,¹⁵ which was further refined at the Yalta Conference of February 1945. UNCIO debates included a discussion of the naming of the new organisation, and it was clear that states deliberately chose the name with the wartime alliance in mind.¹⁶ Kelsen wrote that the term “Charter” was more appropriate for the “constitution of the international community” than “Covenant”, which he described as referring to the “contractual form of the contents”.¹⁷

Writing at the beginning of the UN period, and also looking back to its predecessor, Brierly saw the move towards greater constitutionalisation and institutionalisation in the Charter as fraught with problems, not only by the presence of the veto but due to the concentration of all significant powers in the hands of the Security Council.¹⁸ Even in the peaceful settlement of disputes, where the Covenant of the League of Nations gave details on the procedures to be followed by member states contained in Articles 12–15, the Charter pushes a great deal of the responsibility on to the Security Council. The primary responsibility of the Security Council for peaceful settlement was much clearer under the Dumbarton Oaks proposals, but it was at San Francisco that amendments were made to re-assert the obligation of states to settle their disputes, so the resulting text was an uneasy compromise between the powers of the Council and the duties of states.¹⁹

All the references in the Covenant were to the “members of the League” who undertook to act in certain ways except for Article 11(1), which stated that the “League shall take any action that may be deemed wise and effectual to safeguard the peace of nations” – dismissed as a “mere slip in drafting” by Brierly.²⁰ Sovereign equality for member states meant exactly that under the Covenant; while under the UN Charter, the

¹³ 2nd meeting of Committee III/1 (UNCIO Doc 130, III/1/3) 2.

¹⁴ Summary Report of the 5th meeting of Committee III/1 (UNCIO Doc 263, III/1/1) 2.

¹⁵ For the text of the Dumbarton Oaks proposals see UNCIO, vol 3, 2–17.

¹⁶ Report of the Rapporteur, Subcommittee I/1/A, Section 3, to Committee I/1 (UNCIO Doc 785, I/1/27).

¹⁷ H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Praeger, 1950) 3.

¹⁸ J.L. Brierly, “The Covenant and the Charter” (1946) 23 *British Yearbook of International Law* 83 at 85.

¹⁹ R.B. Russell and J.E. Muther, *A History of the United Nations Charter* (Brookings Institute, 1958) 657; L.M. Goodrich, E. Hambro and P.S. Simons, *The Charter of the United Nations* (Columbia University Press, 2nd edn, 1969) 258.

²⁰ Brierly, above note 18, 85.

move was away from a cooperative model of international organisation towards a crude form of world government, which is one of the reasons why the Charter is so much longer than the Covenant (111 articles compared to 26). The Covenant contained the outlines of a constitution, enabling members to adjust the working of the Council and Assembly to suit, whilst the Charter contains details on the powers of each UN organ, in which the power to take action to preserve peace massively outweighs the power to create universal laws. Universal and, if necessary, overriding obligations were to be created by the Security Council under Articles 25 and 103 of the Charter, but with the purpose of tackling threats to or breaches of the peace. During the San Francisco conference the *New York Times* observed that the smaller countries, many of which were devastated by war and concerned with simple survival, “reluctantly accepted the idea of virtual world dictatorship by the great powers” in return for having a “world organization”.²¹

Writing in 1947 Goodrich identified the main difference between the UN and the League as the exceptional powers of the Security Council under Chapter VII. Goodrich admitted that nothing could be done against one of the permanent members and therefore the UN would be no more effective in preventing the Second World War than the League.²² Those exceptional coercive powers operate outside the traditional framework of international law based on consent and cooperation. This is shown in Article 1 of the Charter, which references collective measures for the removal of threats to the peace and the peaceful settlement of disputes, but only the latter should be in “conformity with the principles of justice and international law”. Executive action under Chapter VII was to be untrammelled by international law. Even the limited reference to international law and justice was only inserted in Article 1 at the insistence of the US delegation, specifically Senator Arthur Vandenberg who wanted to leave his mark on the Charter at the San Francisco conference.²³

The first version of the UN Charter – the Dumbarton Oaks proposals of 1944 – was essentially directed at Germany and Japan as continuing to pose the greatest threat, as they were still immensely powerful (at least outwardly) in 1944 – hence the idea of the world’s police forced based on the wartime alliance continued into the post-1945 era. German and Japanese aggression had clearly been planned, rather than stumbled into and, therefore, required executive-style government to prevent it happening again. The consensus at Dumbarton Oaks and San Francisco wrongly assumed that the “wartime unity of purpose among the Great Powers would be a permanent feature of their international relations”.²⁴ Thus, according to Brierly, the “desire for a system of security ready always for immediate action, which was a leading motive behind the substitution of the Charter for the Covenant, has resulted in a system that can be jammed by the opposition of one single Great Power”.²⁵ Further, “instead of limiting the sovereignty of states we have actually extended the sovereignty of the Great Powers, the only states whose sovereignty is still a formidable reality in the modern world”.²⁶

The UN was built on prosecuting a war against powerful states by (even more) powerful states, but the Second World War had fundamentally changed the balance of military powers so that the enemy was no longer the defeated states but would come from within the alliance itself. To settle disputes between the new leviathans would require old fashioned diplomacy rather than executive action; settlements in which

²¹ *New York Times*, 7 May 1945.

²² L.M. Goodrich, “From League of Nations to United Nations” (1947) 1 *International Organization* 3 at 10.

²³ Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations* (Westview Press, 2003) 161.

²⁴ Brierly, above note 18, 91.

²⁵ *Ibid.*, 91.

²⁶ *Ibid.*, 93.

international law would play little or no role. The focus on protecting the sovereignty of the great powers meant that disputes involving them would not be settled by law, only by power or by adjustments to the balance of power. The veto did not simply block “action”, it embodied the recognition that the basic tenets of international law could not be applied to those wielding it. For example, the rules of international law were not determinate in the Cuban Missile Crisis of 1962, which by any objective analysis involved an illegal threat or use of force by the US in the form of the quarantine, while the Soviet supply of nuclear missiles was not a breach of any rule of international law at the time.²⁷ Nevertheless, the situation was a “threat to the peace” (although there was inevitably no Security Council determination to that effect) that could only be solved peacefully between the superpowers by the withdrawal of those missiles from Cuba (and the reciprocal withdrawal of US missiles from Turkey). The UN Secretary-General facilitated this deal but the UN was shown to be a standing forum for diplomacy rather than an instrument of world governance.

The permanent members could, as envisaged by the UN Charter, control the agenda of the most powerful organ, and develop concepts such as threat to the peace in a discretionary way, so that selective enforcement fulfilled their common agenda in ways that could sometimes be categorised as the enforcement of universal laws. For example in the Korean War, the lack of centralisation of the US-led military effort did not prevent the relevant actors, including the Secretary-General from proclaiming the operation as a UN effort to combat lawlessness: “I am conscious of the nobility and surpassing significance of United Nations police action in Korea, in which sixteen Member nations actively have taken part. It has been the first determined stand against international lawlessness and aggression which peace-loving nations of the world have taken”.²⁸ In fact the current consensus in the permanent five has been reduced to a crude ill-defined form of counter-terrorism and preservation of the nuclear hierarchy embodied in the Nuclear Non-Proliferation Treaty (NPT) of 1968, and enforcement action, whether in the form of sanctions or military measures, is largely taken against state and non-state actors (regimes and terrorists) that threaten their common interests.

Essentially collective security based on law was replaced in 1945 by collective security based on power and subjective interpretations on what constitutes a threat to the peace and, moreover, what should be done about such. In Syria, the violence started in 2011 and the Security Council agreed in 2013 that the use of chemical weapons in Syria constituted a threat to the peace,²⁹ but only determined that the general deteriorating humanitarian situation in Syria constituted a threat to international peace and security in the region in 2014.³⁰ Making such determinations within the meaning of Article 39 of the UN Charter opens up the potential for the Security Council to authorise enforcement action under Chapter VII aimed at tackling the threat to the peace. The narrower determination in 2013 would only have enabled the authorisation of enforcement action to combat the use of chemical weapons, whereas the 2014 determination opened up the possibility of broader action to address the humanitarian situation in Syria. However, since 2014 the Council has only been able to agree on limited measures and, while it has also adopted resolutions that attempt peacemaking, the lack of real consensus in the permanent membership has meant that they represent common ground rather than collective purpose.

²⁷ Q. Wright, “The Cuban Quarantine” (1963) 57 *American Journal of International Law* 546.

²⁸ T. Lie, *In the Cause of Peace* (Macmillan, 1954) 366.

²⁹ UN Doc S/RES/2118 (2013).

³⁰ UN Doc S/RES/2165 (2014).

The move in 1945 towards executive-style government stymied both peacemaking and peace enforcement functions of the Security Council as the veto could be applied, and has been applied, indiscriminately to proposals under both Chapters VI and VII, despite the admonition in Article 27(3) that any party to a dispute must abstain from a vote under Chapter VI. Reflecting the precarious balance of power within the Security Council and globally, many conflicts and disputes originating in the Cold War have settled into ongoing stalemates – the Middle East, Korea, Cyprus for example – none of which are clearly inter-state in nature. This, combined with numerous intra-state conflicts breaking out since the end of the Cold War – for example, in Angola, Liberia, Sierra Leone, Somalia, Rwanda, the DR Congo, Darfur, South Sudan, the Central African Republic, and Mali – many of which are on-going, reveals the lack of effective peacemaking by the Security Council and, more broadly, the international community, despite the UN's commitment to peace operations in all of these countries.³¹

THE LACK OF NORMATIVE DEVELOPMENT OF CHAPTER VI

There was little development of peacemaking in the Cold War, beyond a re-iteration of the core obligations on states and the powers of the Security Council and General Assembly in a number of Assembly resolutions.³² A strengthening of the normative framework might have improved both the legitimacy and effectiveness of peacemaking, especially by developing the nexus between the obligations of states, the methods of peaceful settlement, and the powers of the Council.

Meanwhile, the post-Cold War era has been characterised by a focus on unlocking the peace enforcement powers of the Security Council; leading examples are found in *An Agenda for Peace* 1992, the High Level Panel Report of 2004; and the World Summit Outcome Document of 2005.³³ These documents recognise the reality of the UN being faced with threats caused by civil wars, but they do not make any concrete recommendations as regards how to bring the parties to such conflicts to a peaceful solution. Chapter VI is predicated on disputes between states being the subject of recommendatory powers of the Security Council and, although the provisions of Chapter VI can be used by way of analogy to end civil wars and other violent or potentially violent internal disputes, there is the need to develop more expressly a set of peacemaking powers for intra-state conflicts, which now dominate the UN's agenda.

The lack of preparation by the UN for conflicts such as found in Syria is neatly encapsulated in a 2014 Resolution, in which the Security Council recognised that “some of the tools in Chapter VI . . . which can be used for conflict prevention, have not been fully utilized”, but then simply listed the methods that states should use under Article 33, rather than asserting and developing the powers of the Security Council regarding peaceful settlement.³⁴ The Office of Legal Affairs' *Handbook on the Peaceful Settlement of Disputes* of 1992 is primarily confined to the methods and mechanisms available to states and, therefore, provided flesh on the bare bones of the methods listed in Article

³¹ See list of current and past peacekeeping operations at: <https://peacekeeping.un.org/en/where-we-operate> (accessed 19 September 2018).

³² See, for example, UNGA, “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”, UN Doc A/RES/2625 (1970); “Manila Declaration on the Peaceful Settlement of International Disputes”, UN Doc A/RES/37/10 (1982) para II.4.

³³ UNSG, “An Agenda for Peace”, UN Doc A/47/277 (1992) para 20; “A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Changes”, UN Doc A/59/565 (2004) para 84; 2005 World Summit Outcome, UN Doc A/RES/60/1 (2005) paras 73–76.

³⁴ UN Doc S/RES/2171 (2014).

33. The *Handbook* is stated to have been “prepared in strict conformity with the Charter of the United Nations; being descriptive in nature and not a legal instrument”. Further, it is confined to disputes between states, excluding any internal disputes.³⁵ Settlement remains in the hands of the parties, and those parties are primarily states.

THE DOMINANCE OF PRAGMATISM

Brierly’s analysis explains why there has been little development of peacemaking by or for the Security Council – its ability to act in an executive way has been confined to sporadic Chapter VII action, and an expansion of peacekeeping forces often ill-suited to the violent situations to which they are deployed. The link between the obligation of states to settle disputes and the powers of the Security Council under Chapter VI has not been deepened normatively by lawmaking resolutions or by any consistent practice. Thus, apart from one brief period of creativity in the immediate post-Cold War period, the Security Council’s diplomacy and peacemaking functions have been conducted on the basis of pragmatism. For the pragmatist, “no rules will work that do not reflect underlying geopolitical realities”, so that states will continue to judge for themselves what is required to defend their essential interests.³⁶ For the pragmatist the “question is always, what are the probable costs and benefits – the long- and short-term consequences – of the proposed action?”³⁷

The aftermath of the Cold War, provided a brief period of creative peacemaking due to the massive shift in geopolitics allowing for a more normative approach to fleetingly come to the fore. This took the form of UN-supported elections within broader peace operations, producing some successes to bring an end to internationalised civil conflicts in Central America, Cambodia and Africa, as well as failures. This was not, as it turns out, neither the end of history,³⁸ nor the emergence of a right to democracy,³⁹ but a brief opportunity for the UN to fill the space vacated by the global confrontation between the superpowers.

This period also saw the UN authorising peace enforcement to bring an end to an aggression by Iraq in 1991, and even to support democracy in Haiti in 1994. Some of the apparent quick fixes of this period turned out to be temporary in Iraq, Bosnia and Kosovo, even though each of these has been buttressed, at some point or another, by Chapter VII military enforcement action, and further by resolutions that attempt to impose terms on one or more of the parties to the dispute – 687 (Iraq), 1031 (Bosnia – re Dayton) 1244 (Kosovo). The failure to bring sustainable peace to Iraq, Bosnia or Kosovo demonstrated that even when Chapter VII is invoked, it does not guarantee peace.⁴⁰

That post-Cold War period of frenetic activity was only possible because China was looking inward after Tiananmen 1989 and Russia was emerging as a smaller and much weaker power. The turn to democracy turned out to be a temporary one, so that by the time of the Arab Spring in 2010 it would largely go unsupported especially in the Security Council, where a return to pragmatism as the normal behaviour of the permanent members was inevitable. However, whereas democracy is a contested and shrinking

³⁵ UN Doc OLA/COD/2394 (1992) 1, adopted pursuant to UN Doc A/RES/29/79 (1984), UN Doc A/RES/39/88 (1984).

³⁶ M.J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Stanford University Press, 2010) 122–3.

³⁷ *Ibid*, 124.

³⁸ F. Fukuyama, *The End of History and the Last Man* (Penguin, 1993).

³⁹ T.M. Franck, “Legitimacy and the Democratic Entitlement” in G.H. Fox and Brad R. Roth, *Democratic Governance and International Law* (Cambridge University Press, 2000) 25.

⁴⁰ The UN had some success with this approach in East Timor – UN Doc S/RES/1264 (1999).

space within the Security Council, there has been greater traction of more basic forms of human rights protection in the prosecution of peace, mainly in the form of protection of civilians, and the incorporation of gender into its peacemaking agenda.⁴¹ This shift to human rights may represent a more enduring conception of justice than the simple promotion of elections, but there is a danger that the pragmatic hard security agenda of the Security Council may skew the understanding of human rights in peacemaking. The evidence in peace agreements generally is that peace and security are prioritised over justice (including human rights, transitional justice and accountability), gender issues and children's rights.⁴²

"Peace" and "security" are not simply factual concepts but are normative ones. The concept of peace itself can be conceptualised into a myriad of forms and types and, it is argued, the Security Council should be concerned as much with a normative concept of peace as well as achieving a factual condition that can be called peace (the absence of war). The Security Council has concerned itself with certain normative aspects of peace, for example in developing the Women, Peace and Security agenda,⁴³ but it needs to develop this further,⁴⁴ by not only stating that women are to be involved in peace processes and negotiations, but that the peace agreement itself should include strong anti-discrimination and equality provisions that are fundamental, institutionalised and enforceable.

THE FAILURE OF PEACEMAKING IN SYRIA

The above has shown that justice and normative development can be funnelled through the Security Council's peacemaking function – the brief post-Cold War honeymoon with democracy, and more enduringly the Women Peace and Security, and Protection of Civilians,⁴⁵ agendas. However, the narrowing consensus amongst the permanent members that first emerged after 9/11 has led to consistent measures being taken mainly against terrorism. A further narrowing of the consensus occurred after the UN Security Council authorised intervention in Libya in 2011,⁴⁶ which led to a push back against the idea of there being a Responsibility to Protect (R2P), at least one fulfilled by the invocation of Chapter VII of the Charter. Although peace enforcement in Libya was authorised by the Security Council, allegations by Russia and China of an over-interpretation of the mandate by NATO states to the effect that protection of civilians was used as a cover for regime change, meant that the likelihood of coalitions of the willing gaining such mandates in the future were reduced.⁴⁷ This has meant that justice and normative development have again become secondary to pragmatism. There is no avoiding Inis Claude's understanding of the most basic functions of the Security Council as a political peacemaking body;⁴⁸ they continue as long as the UN survives but, as the Security Council's response to Syria shows, they will not necessarily secure peace.

⁴¹ UN Doc S/RES/1325 (2000). C. O'Rourke, "Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions" (2017) 28 *European Journal of International Law* 1019.

⁴² J.S. Easterday, "Peace Agreements as Framework for Jus Post Bellum" in C. Stahn, J.S. Easterday and J. Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press, 2014) 379 at 388–89.

⁴³ UN Doc S/RES/1325 (2000).

⁴⁴ Easterday, above note 42, 406.

⁴⁵ UN Doc S/RES/1674 (2006).

⁴⁶ UN Doc S/RES/1973 (2011).

⁴⁷ N.D. White, "Libya and Lessons from Iraq: International Law and the Use of Force by the United Kingdom" (2011) 42 *Netherlands Yearbook of International Law* 215.

⁴⁸ Inis L. Claude Jr, "The Security Council" in E. Luard (ed), *The Evolution of International Organizations* (Thames and Hudson, 1966) 70.

Despite having had the trust of the international community for over 65 years, the Security Council has shown itself unprepared for bringing peace to a conflict like Syria. Its past successes have been shown to be opportunistic, and did not provide any sort of normative framework within which peacemaking or peace enforcement or a combination of the two could succeed. A brief history of its response to the Syrian conflict shows how the best chances of peace have developed outside that body and even suggest that attempts to secure the endorsement of the Council have ended in a veto, as the perennial dispute about whether peace should be agreed between the parties, or enforced by the Security Council, splits the permanent members.

The Arab Spring, involving popular uprisings against authoritarian rule in North Africa and the Middle East, spread to Syria when, on 26 January 2011, protests against the ruling regime of President Bashar Al-Assad started; by March 2011 security forces were repressing the uprising with force. The Security Council included Syria on its agenda and held a public debate on the situation on 27 April 2011.⁴⁹ The UK, France, Germany and Portugal circulated a draft resolution in May 2011, but this was not put to the vote as some members thought it could imply that enforcement action could be taken under it.⁵⁰ In August 2011, as the violence escalated, the UK circulated a draft resolution that would have imposed targeted sanctions,⁵¹ which was not voted upon, although earlier in the month a Presidential statement was adopted following a debate in which members condemned the widespread violations of human rights and the use of force against civilians by Syrian authorities.

The failure to adopt measures under Chapter VII did not lead the Security Council to consider the situation to be one that required it to respond under Chapter VI of the UN Charter, given that the situation was essentially depicted as an internal one. A Presidential statement of 2011 contained the following paragraph:

The Security Council reaffirms its strong commitment to the sovereignty, independence, and territorial integrity of Syria. It stresses that the only solution to the current crisis in Syria is through an inclusive and Syrian-led political process, with the aim of effectively addressing the legitimate aspirations and concerns of the population which will allow the full exercise of fundamental freedoms for its entire population, including that of expression and peaceful assembly.⁵²

The failure to fully engage diplomacy at this stage, due to antiquated ideas about the limited inter-state role of Chapter VI, was only a small factor in the descent of Syria into brutal warfare.⁵³ However, the choice offered at this stage between Security Council “action” involving measures taken under Chapter VII, or inaction due to the certain veto of such measures or even proposals that advocated a process of political transition of power away from the existing regime,⁵⁴ meant a corporate failure by the Security Council as well as a failure to invoke its fall-back function of providing a diplomatic

⁴⁹ UN Doc S/PV/6254 (2011).

⁵⁰ *Ibid.*

⁵¹ BBC News, “Syria unrest: US and Europe push for UN sanctions”, 24 August 2011: <http://www.bbc.co.uk/news/world-middle-east-14645641> (accessed 19 September 2018).

⁵² UN Doc S/PRST/2011/16.

⁵³ See debate in the Security Council in UN Doc S/PV/6650 (2011).

⁵⁴ The main examples: Russia’s veto of a draft, UN Doc S/2011/612, which condemned the regimes use of force against civilians, on the basis that the draft threatened further measures under Article 41 if the regime did not desist. Vetoes by Russia and China of draft resolution, UN Doc S/2012/77, which supported the Arab League’s decision to facilitate a Syrian-led political transition. Vetoes by China and Russia of a draft resolution, UN Doc S/2014/348, referring Syria to the ICC. Russia’s veto of a draft, UN Doc S/2016/846, demanding an end to military flights over Aleppo. Russia and China’s vetoes of a draft, UN Doc S/2016/1026, which called for a temporary end to all attacks on Aleppo. Russia and China’s vetoes of a draft, UN Doc S/2017/172, which would have imposed targeted sanctions. Russia’s veto of a draft, UN Doc S/2017/315, which would have condemned a chemical weapons attack at Khan Shaykhun.

forum to search for a solution – one that might be embodied in a peace agreement, or a Chapter VI resolution, or both.

The narrow consensus amongst the permanent membership led to the adoption of a number of resolutions aimed at: stopping the violence through the sending of envoys and the temporary deployment of military observers;⁵⁵ requiring the verification and destruction of Syria's chemical weapons arsenal;⁵⁶ demanding that all parties allow humanitarian access across conflict lines;⁵⁷ deciding under Article 25 of the Charter that the UN and its aid partners could cross Syrian borders without government consent;⁵⁸ demanding a cease-fire;⁵⁹ demanding compliance with international humanitarian law;⁶⁰ facilitating the evacuation of civilians from eastern Aleppo;⁶¹ as well as counter-terrorist resolutions directed at ISIL and other non-state armed groups based in Syria.⁶² However, none of these resolutions could be said to represent peacemaking or peace enforcement except in a piecemeal and limited sense.

The resolutions that avoided the vetoes of China and Russia contained attempts to stop the fighting, end the use of chemical weapons, and to secure aid to civilians. These can be categorised only as limited peacemaking efforts by the Security Council that did not form part of a more general framework for a comprehensive peace plan endorsed by the permanent members as well as the parties to the conflict. Despite the adoption of a number of specific resolutions on Syria, the split between the permanent members, into those that support the regime (Russia and China), and those who want its removal (France, UK and US), signified that substantial peacemaking had little chance of gaining traction in the period 2011–15. Furthermore, the failure to engage the Syrian regime in sustained negotiations means that the conflict will not stop while that government, with direct military support from Russia from September 2015, believes it can defeat the opposition. That the opposition is divided into those groups regarded as acceptable to the US, UK, France and Saudi Arabia, and those against whom those states were militarily engaging as terrorists, principally ISIL, only served to strengthen this belief.

In these circumstances effective peacemaking seemed unlikely, although in December 2015 the Security Council did set out a framework for peacemaking in Syria, involving UN-mediated political talks, a national cease-fire, and a two year period to achieve a political transition.⁶³ In a March 2017 press statement, in furtherance of this Resolution (2254), the Security Council: supported the Secretary General's Special Envoy's efforts to facilitate a lasting political settlement of the Syrian crisis "through an inclusive and Syrian-led political process that meets the legitimate aspirations of the Syrian people"; and welcomed the reopening of talks in Geneva, while reaffirming a commitment to the sovereignty, independence, unity and territorial integrity of Syria.⁶⁴ While the adoption of Resolution 2254 (2015), and the fact that the Security Council is persisting with

⁵⁵ UN Doc S/RES/2042 (2012); UN Doc S/RES/2043 (2012); UN Doc S/RES/2059 (2012).

⁵⁶ UN Doc S/RES/2118 (2013). See also UN Doc S/RES/2209 (2015); UN Doc S/RES/2235 (2015); UN Doc S/RES/2319 (2016).

⁵⁷ UN Doc S/RES/2139 (2014).

⁵⁸ UN Doc S/RES/2165 (2014). See also UN Doc S/RES/2191 (2014); UN Doc S/RES/2258 (2015); UN Doc S/RES/2332 (2016).

⁵⁹ UN Doc S/RES/2268 (2016); UN Doc S/RES/2401 (2018).

⁶⁰ UN Doc S/RES/2286 (2016); UN Doc S/RES/2393 (2017); UN Doc S/RES/2332 (2016).

⁶¹ UN Doc S/RES/2328 (2016).

⁶² UN Doc S/RES/2170 (2014); UN Doc S/RES/2199 (2015); UN Doc S/RES/2249 (2015).

⁶³ UN Doc S/RES/2254 (2015).

⁶⁴ UN Doc SC/2749 (2017).

it,⁶⁵ is to be welcomed, the need for a peace agreement on Syria involving the parties, their backers, and other guaranteeing states and organisations, remains all too apparent.⁶⁶

The UN-sponsored talks at Geneva have not progressed to face-to-face negotiations even though there have been eight rounds of talks between the government and opposition, due mainly it appears to the intransigence of the government. The Russian-backed talks held at Sochi in January 2018 did produce an agreement on a new constitution but suffered from the absence of much of the opposition including the Syrian Kurds who were excluded at the insistence of Turkey, as well as Western states.⁶⁷ Fighting continued during these talks and subsequent efforts to bring peace within the framework of Resolution 2254.⁶⁸

CONCLUSION: CAN THE SECURITY COUNCIL ‘MAKE’ PEACE?

The Security Council can only ‘make’ peace in a fully executive way in a limited set of circumstances, principally when it exerts governmental control over a territory. This has only occurred in East Timor and to a lesser degree Kosovo in 1999, which represent tiny pieces in the jig-saw of states, requiring the controversial exercise of sovereign-like powers under Chapter VII,⁶⁹ not Chapter VI where the powers of the Security Council in peacemaking truly lie. The utilisation of Chapter VII to exercise sovereign powers does not produce truly consensual peace agreements, but imposed settlements that may not last without a constant paternalist UN mandated presence.⁷⁰ There has to be effective peacemaking, involving intense negotiations with the various parties, leading to a genuine and inclusive peace process and agreement, which can be backed by peace-keeping, or a more muscular form of peace enforcement, but only in a supportive role.

The failure of the Security Council to develop the peacemaking functions entrusted to it in 1945, the constant push by the US, UK and France to invoke Chapter VII without any strategy to underpin any military action that may result, and the protection of a brutal, criminal regime by Russia (and to a lesser extent China), has led to a wholesale collapse in the Council chamber into pragmatism, which means that we cannot put our faith in the Security Council to end the Syrian conflict.

Although the conflict seems to be heading towards a victory for the Russian-backed Assad regime, a lasting cease-fire remains crucial, behind which intense diplomacy and pressure is needed to create a window for meaningful negotiations. At best the Security Council can help establish a cease-fire, with outside states led by Russia and the US removing their military support from the parties. This is not happening – the most

⁶⁵ UN Doc S/RES/2236 (2016), welcoming mediation by Turkey and Russia. Russia, Turkey and Iran sponsored the “Astana” talks, involving the Syrian government and an opposition delegation, starting in January 2017, and said to be within the framework of Resolution 2254. Debated most recently in the Security Council on 11 September 2018, following a trilateral summit of the three “guarantor” states of the Astana process (Russia, Turkey and Iran) held on 7 September 2018 – UN Doc S/PV.13495 (2018) against the background of the Syrian government’s assault on Idlib.

⁶⁶ See the Geneva Peace talks of 2014, 2016, and 2017. R.S. Ford, “Keeping Out of Syria: The Least Bad Option” (2017) 96(6) *Foreign Affairs* 16 at 18.

⁶⁷ UN Special Envoy for Syria, Staffan de Mistura, attended Sochi as well as Geneva. Follow up talks were held in Geneva in June 2018 – <https://www.aljazeera.com/news/2018/06/syria-constitution-turkey-russia-iran-start-geneva-talks-180619080210924.html> (accessed 19 September 2018).

⁶⁸ See also the continued fighting in Idlib province in September 2018 while the “Astana” process continued – above note 65.

⁶⁹ M.J. Matheson, “United Nations Governance in Postconflict Societies” (2001) 95 *American Journal of International Law* 76.

⁷⁰ See generally R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, 2008).

recent call for a cease-fire coming from the Security Council in Resolution 2401 of 24 February 2018 looked as if the Council was fulfilling its primary responsibility in that it was a binding decision demanding a cease-fire,⁷¹ but it was made at the same time that Russia continued to provide military support to the regime and the US and allies were continuing airstrikes in Syria. For a cease-fire to work, all those involved must immediately stop fighting and stop providing support to those fighting. That cease-fire should be enforced by a limited use of Chapter VII to authorise the enforcement of a no-fly zone over Syria, apart from agreed areas controlled by ISIL. The no-fly zone should be policed by members of the P5 only – Russia, US, France and the UK, bearing in mind that the no-fly zone authorised over Libya was the least controversial part of the mandate given to NATO members.⁷² It would prevent Syrian government planes from wreaking indiscriminate violence in their zero sum pursuit of those it labels “terrorists”, which fails to distinguish between armed opposition and civilians who oppose the regime, and it has a chance of forcing them to the table without that aerial domination and support from Russia. In so doing the Security Council will start to behave as an independent third party peacemaker, rather than being a loose collection of guns for hire. Targeted economic sanctions, against members of the regime or opposition who undermine peace talks, would help push the regime and the opposition towards negotiation.

It must not be forgotten that at the World Summit in 2005 the UN committed itself to protect civilian populations from the commission of international crimes if the government of a state has failed to do so.⁷³ Lawyers may doubt that R2P has a legal basis,⁷⁴ but it remains a moral duty that hinges upon the Security Council, and one that it has failed to fulfil even though a UN Human Rights Council Independent Commission of Inquiry on Syria found that crimes against humanity were being committed in Syria as early as 2011.⁷⁵

Lasting peace cannot be enforced in a brutal way that eventually leads to the extinction of any armed opposition, since that destroys the state itself. Effectively Syria, Russia, Turkey and Iran are engaged in a form of peace enforcement in Syria by systematically crushing the armed opposition but, in so doing, they are destroying Syria, committing international crimes, and thereby sowing the seeds of future cycles of violence. On the other hand, Libya shows that international intervention to remove a brutal regime produces a dystopian space filled with violence. Establishing and enforcing a cease-fire, and pressing for and facilitating a Syrian-led peace plan, should be the aims of the P5 and the Security Council. It may appear that the Assad regime is heading towards military victory but if this comes, in all probability, it will only mark a temporary halt in a cycle of violence that can only be broken by an inclusive peace settlement.

However, given the Security Council, or at least its permanent members, currently acts to fan the flames rather than douse them through unilateral military measures that are escalatory and immensely dangerous (for world peace), initiatives outside that body, through the General Assembly (including the use of the Uniting for Peace Resolution),⁷⁶ the UN Secretary-General, the Arab League, or an ad hoc arrangements, should be

⁷¹ Although the Resolution makes it clear that the cease-fire shall not apply to military operations against ISIL, Al Qaeda and the Al Nusra Front,

⁷² UN Doc S/RES/1973 (2011).

⁷³ UN Doc A/RES/60/1 (2005) paras 138–9.

⁷⁴ C. Focarelli, “The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine” (2008) 13 *Journal of Conflict and Security Law* 191.

⁷⁵ UN Doc A/HRC/S-17/2/Add 1 (2011).

⁷⁶ UN Doc A/RES/377 (1950). See Y. Nahlawi, ‘Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace’ (2019) 24 *Journal of Conflict and Security Law* 111.

supported. Resolution 2254 (2015) does provide some hope that the Security Council still has a peacemaking role, but any peace agreement coming from it or from other initiatives should not require the endorsement of the Security Council although it would be desirable. Agreement should come from representatives of the various groups in Syria, as well as those forced to leave.

Of all the functions of the Security Council, peacemaking is the most fundamental, yet it is the one legally least developed, and the most abused politically. The UN should heed the words of its most dynamic Secretary General, Dag Hammarskjöld, who's vision of the UN was of a "dynamic instrument of Governments through which they . . . should . . . try to develop forms of executive action, undertaken on behalf of all the Members and aiming at forestalling conflicts and resolving them . . . by appropriate diplomatic or political means in a spirit of objectivity and in implementation of the principles and purposes of the Charter".⁷⁷ That represents a good starting point for a normative framework to govern peacemaking by the Security Council in Syria and elsewhere.

⁷⁷ Dag Hammarskjöld, "Introduction to the Annual Report of the Secretary-General on the Work of the Organization", 16 June 1960–15 June 1961, UN Doc A/4800/Add 1 (1961).

AN EXAMINATION OF THE DISPARITY BETWEEN JUDICIAL ACTIVITY IN DEVELOPING THE LAW IN THE CONTEXT OF NON-STATUTORY TERMS IN EMPLOYMENT CONTRACTS AND IN THE INTERPRETATION OF STATUTORY TERMS

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INTRODUCTION

Historically, employment contracts have not been differentiated from other commercial contracts which embrace the concept of “freedom of contract”. However, during the latter part of the 20th century or so there has been considerable judicial activity in the construction of implied terms in the context of employment contracts.

This article will examine this development and its favourable effect upon employees (albeit that it can be used to good effect by employers in certain situations). In other words, this activity has had an overall beneficial effect upon employees. However, judicial interpretation of statutory terms has had the opposite effect. The classic example of this is the approach to the interpretation of section 98(4) of the Employment Rights Act 1996 (ERA), which favours “reasonableness” over “equity”. Essentially this has resulted in a hurdle that is difficult to clear.

In consequence the article will examine the concept of “reasonableness”. Interestingly the concept has not been embraced in a non-statutory context in the way in which it has in statutory interpretation. For example, judicial construction of express terms in the contract of employment has specifically rejected an evaluation on the basis of what is “reasonable”. The article will go on to point out the contradictions in this approach.

It will then argue that a different approach to contracts of employment could resolve this contradiction so that equity/fairness can prevail if social exchange theory and the concept of relational contracts is adopted.

THE CONTRACT OF EMPLOYMENT – COMMON LAW APPROACHES

Common law and equity

Historically, the common law was essentially a form of propositions and rules, developed through the power of the monarchy.¹ However, as was said in the *Earl of Oxford's Case* in 1615 “it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances”.² Although the relationship between common law and equity foundered in a procedural sense,³ we now treat them as functioning together as “the common law” whereby judges use and develop legal principles. The issue under consideration here is the disparity that arises when judges are examining the words of statutes (in our case, ERA). Dworkin’s account of legal principles is such that they apply equally to the common law and to legislation.⁴

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¹ J H Baker, *An Introduction to English Legal History*, (1971, Butterworths) at page 42.

² 1 Chancery Reports 1, 6.

³ *Op. cit.* FN 1 at page 43.

⁴ R.Dworkin, *Taking Rights Seriously*, (1977, Harvard University Press).

Freedom of contract

This is the traditional view of contractual relationships i.e. the concept of “freedom of contract”.⁵ Adam Smith, is well known for his views on natural liberty. In consequence, he placed an emphasis on freedom to pursue one’s self-interested aims and to be free to trade. He also held that natural liberty would only prevail as long as it does not damage society as a whole (presumably by resulting in anarchy).⁶ This is closely related, of course, to the concept of “freedom of contract”.

As we know, there is legislation that restricts terms in employment contracts, for example the National Minimum Wage Act.⁷ However, there has been little *legislative* activity in the area of most contractual terms in the sense of determining their validity, scope and enforceability. The judiciary has, however, tempered the harsh effects of the invocation of some terms, not by saying that they are “unreasonable” which is regarded as outside the realm of judicial interference, but by applying the implied term of mutual trust and confidence.⁸

However, at common law, “freedom of contract” has been rejected in the area of restraint of trade clauses, which is because there is a public interest in the ability to trade, and to earn one’s own living.⁹ The potential conflict with freedom of contract is dealt with by the “blue pencil” rule which does not permit a judicial rewriting of clauses, but only the striking out of severable parts.¹⁰

Interestingly, there have been attempts to argue that the employment contract is a consumer contract under the Unfair Contract Terms 1977 (the content of this in relation of the provision of services is now contained in the Consumer Rights Act 2015)¹¹ and the conclusion of the Court of Appeal in *Commerzbank AG v Keen* was to reject this argument.¹² This is unsurprising, in that in order to succeed, under the terms of the Unfair Contract Terms Act (as were applicable prior to the 2015 Act) the terms of the contract would have had to be “reasonable”.¹³ In addition to this, by making employment contracts subject to the Act, it would also have imported the guidelines on what is reasonable.¹⁴ However under the Consumer Rights Act, employment contracts are specifically excluded from its ambit.¹⁵

Economic theories of law

Economic theories of law lend support to the view that reasonable behaviour is ultimately about self-interest. Legal economists believe in wealth maximisation, not because it is a morally right end, but because they believe, as a matter of fact, that it is the best way for each person to satisfy selfish needs. Further, the economic analysis develops on the basis that people as rational beings who will only take actions which will maximise their pleasures, and choices about the maximisation of pleasure will be decided by what they are willing to pay for it.¹⁶ This gets round the problem raised by traditional

⁵ Treital (as revised by E. Peel), *The Law of Contract*, (2011, Sweet and Maxwell) at 1–004.

⁶ B Sandelin *et al*, *A Short History of Economic Thought*, (2002), SNS, Forlag, Sweden), at pp 28–33 citing the 1979 of An Enquiry into the Nature and Causes of the Wealth of Nations edited by Campbell *et al*, Clarendon Press Oxford.

⁷ 1998.

⁸ *United Bank v Akhtar* [1989] IRLR 507.

⁹ *Mason. V Provident Clothing and Supply Co Ltd* [1913] AC 724, HL.

¹⁰ *Ibid*.

¹¹ Chapter of Consumer Rights Act 2015.

¹² [2007] IRLR 132 (CA), rejecting the approach taken in *Bridgen v American Express Bank Ltd* [2000] IRLR 94.

¹³ Unfair Contract Terms Act 1977 section 11.

¹⁴ Part 2, Consumer Rights Act 2015.

¹⁵ See sections 48 and 61 (2) of the Consumer Rights Act 2015.

¹⁶ R. Posner, *The Problems of Jurisprudence* (1990, Cambridge, Mass: Harvard University Press) p 353.

utilitarian approaches that one cannot measure advantages to one by disadvantages to others.¹⁷

Now it might be argued that a prudent self-interested individual (in our case, the prudent and self-interested employer), will make decisions, on the basis of treating employees fairly because in the long run that will satisfy its interests best, as the workforce will be more stable; will work harder; and will be more co-operative and receptive to change. Posner examines ‘employment at will’, the American expression for the common law convention that employment contracts embody provisions which allow both employer and employee to bring the contract to an end by notice, usually short notice. Posner states:

It might seem that this would leave the employee totally at the employer’s mercy, but this is not true. If the employer gets a reputation for arbitrarily discharging employees he will have to pay new employees a premium. Since the employer thus cannot gain in the long run from a policy of arbitrary discharges – it is not effective predatory behavior – he might as well treat the employee fairly.¹⁸

Posner criticises the US development of the tort of unjust termination on the basis that, in order to comply with it adds costs to the employer, and, if it were optimal then such protection against unjust dismissal would be negotiated voluntarily. If not so negotiated then the cost of dealing with such protection will just be passed on to employees by a reduction in wages. This view looks very much like the statement of Phillips J in *Cook v Linnell*: “It is important that the operation of the legislation in relation to unfair dismissal should not impede employers unreasonably in the efficient management of their business, which must be in the interests of all.”¹⁹ In fact much of the ideological underpinning of employment law policies over the past 25 years or so, has assumed that the erosion of workers’ rights makes industry more profitable and competitive.²⁰ However, as a matter of fact, it is by no means clear that it is empirically the case, and without this being established as fact, then this assumption cannot be used to justify policies on the basis of prudential self-interest. Furthermore, the Posner position, if correct, means that protection from unfair dismissal is incompatible with what is reasonable i.e. morally neutral employer behaviour. Arguably the approach of the English courts has been to endorse this form of economic analysis by paying lip service to the notion of fairness by subsuming it under reasonableness. The other aspect of Posner’s view of the contract of employment is that it is rooted in the concept of “freedom of contract”.

THE DEVELOPMENTS UNDER THE COMMON LAW

Employee status and mutuality of obligation

In order to qualify for a number of employment rights, including unfair dismissal, workers have to show that they are employees and not independent contractors. It is surprising therefore that there is little help from statute in deciding how the criteria should be formulated to decide whether someone satisfies the definition of an employee.

¹⁷ See, for example, J L Mackie, *Ethics: Inventing Right and Wrong*, (1977, Pelican Books), pp 125–129.

¹⁸ R. Posner, *The Economic Analysis of Law* (1998, Aspen, New York), page 358. Arguably this analysis breaks down unless there is something approaching full employment.

¹⁹ [1977] ICR 770 at 776.

²⁰ Examples are the abolition of Wages Councils by the Trade Union Reform and Employment Rights Act 1993, the extension of the qualifying period for claiming unfair dismissal in 1979, and again in 1985, and the introduction of the Wages Act 1986 (now contained within Part II of the Employment Rights Act 1996), the purpose of which was to enable employers to make deductions from wages if they obtained the consent of the workers.

ERA, at section 230, unhelpfully defines an employee as “an individual who has entered into or works under . . . a contract of employment”.

There is a large body of case law on this topic, but for our purposes, it is contended that the development of the concept of mutuality of obligation is instructive as to the nature of the employment relationship.

The position of “home workers” illustrates the concept. In the case of *Airfix Footwear Limited v Cope*,²¹ Mrs Cope had worked from home for seven years and the company had trained her and provided materials and tools. She had worked five days a week but her pay was made without deduction of national insurance and tax. The EAT held that due to the length of the time she had done this work a relationship of employer/employee had developed. The court referred to there being sufficient “mutuality of obligation” where both parties feel obliged to one another, in the provision of work and the provision of labour and this was approved by the Court of Appeal in the case of *Nethermere (Saint Neots) Limited v Gardiner*.²²

Since then the House of Lords’ decision in *Carmichael v National Power plc*²³ has endorsed the test, although, on the facts, there was no mutuality of obligation in the case of casual workers who had refused to work on a number of occasions. There was, therefore, no corresponding obligation on the part of the employer to create the irreducible minimum of available work.

The mutuality of obligation test was considered by the EAT in *Younis v TransGlobal Projects*.²⁴ The worker was engaged to generate sales for a three-year period. He was paid a small retainer, and would also receive commission on actual sales achieved. His contract could be terminated on 60 days’ notice. There was no obligation on him to actually do anything and he also worked for other organizations. However the EAT found that there was an ‘overriding contract’ which meant there was sufficient mutuality of obligation for him to be an employee.

Employee status and personal service

The case of *Express and Echo Publications Ltd v Tanton*²⁵ concerned the right of an employee to provide a substitute. The Court of Appeal held that this right is “inherently inconsistent” with the employment relationship where the element of personal service is essential. There can be instances where a substitute can be provided, but they must be specific, and consistent with the element of personal service.²⁶ In consequence, the concepts of mutuality of obligation and personal service indicate that the employment contract is not the same as other commercial contracts for the sale of goods and services, where the *identity* of the parties is not significant. Again, this is important for the examination of the particularities of the contract of employment.

Implied Terms

Method of implication – the two tests:-

The “officious bystander” test was formulated in the case of *Shirlaw v Southern Foundries Ltd*.²⁷

“prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making

²¹ [1978] ICR 1210.

²² [1984] ICR 612.

²³ [1999] WLR 2042.

²⁴ [2005] UKEAT/0504/05.

²⁵ [1999] IRLR 367.

²⁶ *MacFarlane v Glasgow City Council* [2001] IRLR t.

²⁷ [1939] 2 KB 206, CA, at 227, per McKinnon LJ.

their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common “oh, of course!”.

In the context of the employment contract, an example of this would be an obligation to pay the employee. No one would expect the employee to work for nothing, although it must be said that the level of pay (subject to any statutory minimums in force) is open to negotiation.

The second test provides for the implication of terms that are “necessary in the business sense to give efficacy to the contract” – *Reigate v Union Manufacturing Co Ltd*.²⁸ Those are not terms that the parties themselves would necessarily have thought of, in contrast with the terms implied by the officious bystander test.

An example of this is the mutual obligation of trust and confidence to which we will now turn. It is not immediately obvious that such an obligation should automatically be implied, but only on reflection is its importance realised.

Mutual trust and confidence

This implied term can be of some significance in the contractual relationship. Generally it means that neither employer nor employee will behave in such a way as to destroy the mutual trust and confidence which should exist within the employment relationship. An example of this is the case of *United Bank Ltd v Akhtar*²⁹ where there was an express term in the contract which allowed the employer to move the employee to any branch of the bank in the UK. However, when the employer exercised its right pursuant to this express term and ordered the employee to move from Leeds to Birmingham on only six days notice and refused to give the employee more time when his personal circumstances were explained, the employer was found to have been in breach of this implied term of trust and respect:

“we take it as inherent that there may well be conduct which is either calculated or likely to destroy or seriously damage the relationship of trust and respect between employer and employee . . . we consider that in the field of employment law it is proper to imply an overriding obligation of trust and respect which is independent of, and in addition to, the literal interpretation of the actions which are permitted to the employer under the terms of the contract”³⁰

It is interesting to consider here the notion of “reasonableness” and whether reasonable behaviour should be implied. A number of cases illustrate the tension which has developed between two judicial approaches. The first is the strictly contractual approach adopted by (inter alia) Lord Denning in *Western Excavating (ECC) Ltd v Sharp*³¹ which approach was followed in the subsequent Court of Appeal case of *Courtaulds Northern Spinning Ltd v Gibson*.³² The second is the implication into the employment relationship of the concept of reasonableness. It must be stressed that the courts have not favoured this view, but have attempted to mitigate the harshness of the contractual approach by using the obligation of trust and confidence as exemplified in *Akhtar* above. Similarly, this had been used in the earlier case of *Woods v W M Car Services (Peterborough) Ltd*,³³ where a series of attempts to change the terms of an employee’s contract were held to be in breach of the mutual obligation.

²⁸ [1918] 1 KB 592.

²⁹ *op cit* (FN 9).

³⁰ *Ibid* at 512 (Knox J).

³¹ [1978] QB 761.

³² [1988] ICR 451.

³³ [1982] IRLR 413.

The later case of *White v Reflecting Roadstuds Ltd*³⁴ reflects the earlier view where it was held that an employer had no obligation to be “reasonable” but should not behave in such a way as to prevent the employee from carrying out his obligations under the contract.

In *Malik v BCCI*³⁵ ex-employees of a bank which was associated with corrupt practices claimed ‘stigma damages’ as a result of not being able to find employment because of their former employer’s reputation. It was held by the House of Lords that the corruption on the part of the employer amounted to a breach of the employer’s obligation of trust and confidence.

The related issue is how far it is possible for implied terms to ‘override’ express terms. This was considered by the Court of Appeal as a preliminary point in *Johnstone v Bloomsbury HA*.³⁶ The case considered a junior doctor whose contract stated that his working hours were 48 per week plus ‘up to’ another 40 hours overtime. He alleged that this term should be overridden by the implied term that an employer should care for employees’ health and safety. The application was a preliminary one to establish whether this was, in principle, a valid cause of action. The three Court of Appeal gave very different judgments, but for different reasons the majority said that the claim should not be struck out. The case never came to a full hearing so that issue remains unresolved.

The Court of Appeal has held that the implied term of trust and confidence can also relate to the obligation to confer a positive benefit upon an employee, as opposed to merely not subjecting him/her to any detriment. In *Transco (formerly BG) v O’Brien*,³⁷ it was held that “there may in law be a breach of the implied term of trust and confidence in a decision to refuse to offer an employee a new contract . . . just as in a decision to refuse to offer a variation . . . To single out an employee on capricious grounds and refuse to offer him the same terms as are offered to the rest of the workforce is in my judgment a breach of the implied term of trust and confidence.”³⁸

Fidelity and good faith

There is an implied duty of fidelity on the part of the employee i.e. employees must not behave in such a way as to create a conflict of their own interests with the interests of their employers.³⁹

There has also been some creative litigation on implied terms in relation to an implied duty of good faith, which is wider than the employees’ duty of fidelity and can apply to both employees and employers. This was raised in the cases of *Clark v BET*⁴⁰ and *Adin v Secco Forex*.⁴¹ In the first case, Mr Clark’s contract contained provision for salary increases and bonuses to be paid ‘at the employer’s discretion’. After the termination of his employment he brought an action for damages, claiming (inter alia) sums to cover these. Despite the fact that contractually there was no express term imposing an obligation on the employer to pay, the court found that on the basis of the company’s performance and Mr Clark’s role in that, an employer acting in good faith would have awarded increases. In *Adin* it was held that dismissal of Mr Adin when he became sick

³⁴ [1991] ICR 733.

³⁵ [1997] IRLR 462.

³⁶ [1992] I QB 333.

³⁷ [2002] ICR 721.

³⁸ *Ibid* at parrale, per Pill LJ.

³⁹ *Eccles & Co v Louisville and Nashville Railroad Co* [1912] IKB 135, CA.

⁴⁰ [1997] IRLR 348.

⁴¹ [1997] IRLR 280.

was contrary to ‘good faith’ because it denied him the opportunity to take advantage of sickness benefits available to an employee in his position. This might be significant in the context of unfair dismissal.

As we have seen, restraint of trade clauses can be struck out, in whole or part, in the public interest *Hanover Insurance Brokers Ltd v Schapiro*⁴² concerned a clause prohibiting solicitation of former colleagues. The Court of Appeal refused to uphold such a clause because, first, it applied to all employees regardless of skill or seniority and secondly, as a more general but *obiter* point, as a matter of principle, employees were not like stock in trade, as they were free to work for any employer of their choice. In *Dawney, Day & Co Ltd v De Braconier D’Alphen*⁴³ the Court of Appeal upheld such a clause on the basis that an employer has a legitimate interest in maintaining a stable, trained workforce and therefore was entitled to protect it. However, the clause did prevent the poaching of ‘senior employees’, as to have included all employees would have been too wide, and not capable of being rewritten.

In consequence, it can be seen that within the context of contractual terms, there has been a judicial approach that has generally tried to reach a fair result. However, the judiciary’s approach in the interpretation of statutory terms has not been the same. This is well illustrated by the interpretation of aspects of the law relating to unfair dismissal.

THE STRUCTURE OF UNFAIR DISMISSAL

The current law is contained in the Part X of the Employment Rights Act 1996 (the “Act”). The claim proceeds in the following way. First of all there are eligibility requirements to be met e.g. length of service. If the requirements are satisfied, the employee has to show that there has been a dismissal, and if that is established the employer has to show the reason for dismissal.

Once the reason is established then the tribunal has to decide whether the dismissal is fair and the criteria are set out in section 98(4) ERA. In summary this means that: in order for the dismissal to be fair the employer must have acted reasonably in treating the reason as a justification for dismissal and that this should be determined in accordance with equity and the substantial merits of the case.

With regard to the section 98(4) interpretation, in *W Devis & Sons Ltd v Atkins*, this was considered by Lord Simon:

... the employer must satisfy the tribunal that he acted reasonably in treating “it” ... as a sufficient reason for the dismissal ... The reference to “equity and the substantial merits of the case” merely shows that the word “reasonably” is to be widely construed; but they in no way affect the proposition that what must be shown to be reasonable and sufficient is the employer’s action in treating the reason shown by him (the employer) as the reason for dismissing the employee.⁴⁴

This is, perhaps, the origin of the deficiencies in judicial interpretation of section 98(4) of the Act.

⁴² [1994] IRLR 82, CA.

⁴³ [1997] IRLR 442.

⁴⁴ *W Devis & Sons Ltd v Atkins* [1977] AC 931, at 959.

THE REASON FOR DISMISSAL

Although there are a number of automatically unfair/fair reasons for dismissal, here we are looking at the so-called ‘potentially fair’ reasons. Sub-sections 98 (1) and (2) Act 1996 state that the potentially fair reasons are either the conduct or the capability of the employee; that the employee is redundant; that to continue to employ the employee would be in contravention of statute,⁴⁵ or that there is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.⁴⁶ The classification, therefore, splits between reasons that are about the fault of the employee; and those that are not, such as a redundancy situation where the employee should at least in principle, be compensated, and some other substantial reason dismissals that are usually not ‘fault’ dismissals but nevertheless might not attract any form of compensation.⁴⁷ In the latter case reasons that fall into this category are often due to “business reorganisations”, and it is instructive to examine these and redundancy dismissals i.e. both are “economic dismissals” as they are illustrative of aspects of what might be regarded as the epitome of “reasonable” decision-making in what we will describe as the prudential sense of reasonableness.

Economic dismissals

Economic dismissals are not about the fault of the employee.⁴⁸ A redundancy takes place when the specific requirements of the Employment Rights Act 1996 are satisfied.⁴⁹ There has to be a diminishment in the need for workers to work in a particular place or to do work of a particular kind. There is financial compensation in the case of a redundancy, albeit of a modest nature.⁵⁰ If the definition is satisfied then employees can lose the statutory redundancy payment if they unreasonably refuse suitable alternative employment. It is crucial to note that tribunals do not have to consider the reasonableness of employers in deciding to make redundancies. In the early redundancy cases tribunals were touchingly keen on examining the employer’s motives⁵¹ but in *Moon v Homeworthy Furniture*⁵² the EAT held that it was not part of the tribunal’s remit to enquire into the management’s motives for closure of the factory: “There cannot be any investigation into the rights and wrongs of the declared redundancy.”⁵³ Subject to the reason being “genuine” this was confirmed by the Court of Appeal.⁵⁴ There must, however, be a consultation process and selection for redundancy must be on the basis of objective, and relevant criteria, otherwise there could be an unfair dismissal.⁵⁵ However,

⁴⁵ This is essentially a form of frustration of the contract but is not an automatically fair reason because it may have been possible for the employee to have been given alternative employment.

⁴⁶ For an examination in detail of the classification of potentially fair reasons see H Collins *Justice in Dismissal* (1992, Oxford: Clarendon Press), and for a critical analysis of this: G Pitt, ‘Justice in Dismissal: a Reply to Hugh Collins’ (1993) 22 ILJ 251. Pitt’s view is that Collins’s analysis does not sufficiently differentiate between culpable and non-culpable behaviour.

⁴⁷ See, for example, *Hollister v National Farmers Union* [1979] ICR 542.

⁴⁸ Although selection for dismissal can sometimes raise this, see *Williams v Compare Maxam Ltd* [1982] ICR 156.

⁴⁹ Section 139(1) of the Employment Rights Act 1996 states that dismissal is for redundancy only if it is wholly or mainly attributable to cessation of the business or the part in which the employee is employed or to a diminution in the requirements of the business for the employee to carry out work of a particular kind.

⁵⁰ Redundancy payments are calculated on the basis of age and length of service (section 162(1) ERA 1996) and are the equivalent of the basic award in unfair dismissal. Employees need to have been employed for at least two years and the maximum payment is £15,750 (2019).

⁵¹ E.g. *Costello v United Asphalt Co Ltd* [1975] IRLR 194.

⁵² [1977] IRLR ICR 117.

⁵³ *Ibid.*

⁵⁴ *James w Cook & Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716.

⁵⁵ *Williams v Compar Maxam Ltd* [1982] IRLR 83.

once that has been established then there is little scope for challenging the redundancy; procedural correctness is all.

However, in cases where the dismissal is due to business reasons that fall short of redundancies (where the reason will normally be “some other substantial reason”) the employer is not bound by the terms of the contract at all (save for complying with termination provisions). The employer’s case is that for business or efficiency reasons (unconnected with any personal characteristics of the employees), it is justified in bringing the contract to an end.

Non-redundancy economic dismissals can arise in one of two ways. The employer can present the employee with a revised contract, which contains revisions to the existing terms, for example, longer working hours, or less pay, or a change to shift working, and if the employee refuses to accept the changes, the employer dismisses. The other way is for the employer to implement change, and the employee leaves and claims constructive dismissal i.e. the employer has breached a fundamental term of the contract. For our purposes there is no difference between the two situations.⁵⁶

One of the earliest cases was *Hollister v National Farmers Union*.⁵⁷ Mr Hollister was a group secretary and received a wage and commission on insurance policies sold. The Union reorganised its activities so that insurance sales were no longer dealt with locally. Mr Hollister was given a new contract, excluding the insurance activity (thereby reducing his income) and when he refused to accept it he was dismissed. The Court of Appeal stated that this was dismissal for some other substantial reason, it was fair, and that there was no need to consult with the employee. In *Catamaran Cruisers v Williams*⁵⁸ the Employment Appeal Tribunal allowed the employer’s appeal against the tribunal decision that dismissals were unfair when the employer made contractual changes which some of the employees refused to accept. The tribunal had compared the old and new terms of the contract and had concluded that the new terms were much less favourable to the employees and that the company’s financial position was not sufficiently serious to require the imposition of those terms. The EAT rejected this approach and stated that a tribunal should not look solely at the advantage or disadvantage of the new contracts from the employees’ point of view but should take into account the benefit to the employers in imposing the changes. The court also took the opportunity to examine a number of earlier cases. They rejected the view expressed in *Evans v Elementa Holdings*⁵⁹ that if it was reasonable for the employee to refuse the new terms then it was unreasonable for the employers to dismiss him for such refusal, preferring the comment of Balcombe J. (as he then was) in *Chubb Fire Security Ltd v Harper*:

We must respectfully disagree with that conclusion. It may be perfectly reasonable for an employee to decline to work extra overtime, having regard to his family commitments. Yet from the employment point of view, having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime.⁶⁰

The EAT also approved the statement of Beldam J. (as he then was) in *Richmond Precision Engineering Ltd v Pearce*: “Merely because there are disadvantages to the employee, it does not, by any means, follow that the employer has acted unreasonably

⁵⁶ Interestingly, changes in contracts that might have one time resulted in a successful claim for breach of contract by the employees (e.g. *Burdett-Coutts v Hertfordshire County Council* [1984] IRLR 91) might now be dealt with on a ‘take it or leave’ basis, through a ‘some other substantial reason’ dismissal.

⁵⁷ [1979] ICR 542.

⁵⁸ [1994] IRLR 386.

⁵⁹ [1982] IRLR 143.

⁶⁰ [1983] IRLR 311 at [9].

in treating his failure to accept the terms which they have offered as a reason for dismissal.”⁶¹

The other matter for concern is the unquestioning acceptance of ‘policy’ decisions adopted by the employer. In *Banerjee v City and East London Area Health Authority*, Arnold J said: “If an employer comes and says ‘We have evolved such and such a policy’ . . . it seems to us that it must inevitably follow that this enunciation by the employer of the policy is a matter of importance . . .”⁶² This line of reasoning was followed in *Scott v Richardson* where the EAT overturned a tribunal decision on the basis that it had erroneously expressed its own view as to the commercial decision leading to the business re-organisation.⁶³ So can an employer reduce pay to make more profits, or to prevent a fall in profits? This, would not be an unreasonable course of action, particularly upon the traditional view of company law, where the interests of the shareholders are more important than the interests of the employees. Wedderburn⁶⁴ has argued that the role of employees should be as important as that of shareholders, stressing the point that as a company is independent of its shareholders, it is wrong that it should identify completely with their interests, citing the case of *Parke v Daily News (No 2)*⁶⁵ where it was held that payments to ex-employees who were redundant were not in the best interests of the company. (It should be noted that this was before the introduction of statutory redundancy payments under the Redundancy Payments Act 1965.) Sections 309 and 719 of the 1985 Companies Act provided for directors to have regard to the interests of employees (currently contained in sections 172 and 247 of the Companies Act 2006), but, as Wedderburn points out, this is superficial. The Company Law Review that had considered this proposed change had “proposed the “weakest possible provision” whilst stating that company directors should make decisions that “would be most to promote the success of the company for the benefit of its members as a whole”.⁶⁶

Further, there does not have to be any element of ‘reasonableness’ in the reason itself. In *Willow Oak Developments Ltd (t/a Windsor Recruitment) v Silverwood & Ors*⁶⁷ the Court of Appeal held that a dismissal for refusal to accept a restrictive covenant was a valid substantial reason despite the fact that the covenant itself was unreasonable in the scope of its restriction. It was held that the issue of the unacceptability of the terms of the covenant should be looked at in relation to the reasonableness of the decision to dismiss for this reason.⁶⁸ Finally, for the avoidance of doubt, it should be noted that a fair non-redundancy economic dismissal attracts no compensation whatsoever.⁶⁹

⁶¹ [1985] IRLR 179 at [32]; and see, for example, *Garside & Laycock v Borth* [2011] IRLR 735.

⁶² [1979] IRLR 147.

⁶³ Appeal No. EATS/0074/04. Bowers and Clarke have argued that such dismissals are often treated as fair on the basis that the courts will accept the principle of ‘managerial prerogative’ (see J Bowers and A Clarke, ‘Unfair Dismissal and Managerial Prerogative: A Study of “Other Substantial Reason”’ (1981) 11 ILJ 34.).

⁶⁴ Sections 309 and 719 of the 1985 Companies Act provided for directors to have regard to the interests of employees (currently contained in sections 172 and 247 of the Companies Act 2006). (Lord Wedderburn, ‘Employees, Partnerships and Company Law’ (2002) 3 ILJ 99, at 109.

⁶⁵ [1962] Ch 927.

⁶⁶ *op.cit* (FN 62).

⁶⁷ [2006] IRLR 607.

⁶⁸ The employee was successful nevertheless because of the way in which the covenant had been introduced. However, it is submitted, was not necessary, as there was no need to resort to procedure: if an employer tries to introduce a contractual term that is unreasonable (and we can use that term because it was in the context of restraint of trade), then it is not about procedure).

⁶⁹ Pitt argues that all economic dismissals should be compensated as they are nothing to do with the fault of the employee (G Pitt, ‘Justice in Dismissal: A Reply to Hugh Collins’ (1993) 22 ILJ 251).

Procedural Fairness

It is important to give an account of this inasmuch as we are concerned with fair decision-making. Procedural fairness is treated as an element of the general reasonableness requirement under section 98(4) ERA. There was an earlier attempt to put procedural fairness on to a statutory footing.⁷⁰ However, the procedures were regarded as being overly technical and the DTI, as it then was, commissioned the Gibbons Report⁷¹ which concluded that they had been a failure and the scheme was repealed, so that the position returned to the earlier case law.

Early cases on procedural fairness, notably *British Labour Pump Co Ltd v Byrne*,⁷² took the view that employers did not have to follow a fair, or any, procedure when dismissing if they could show that they would have dismissed the employee regardless of what might have been said or done in the course of the procedure. However, in *Polkey v A. E. Dayton Services Ltd*⁷³ the House of Lords held that to argue thus was suspect because the question of whether it was reasonable to dismiss had to be answered in the light of what did take place and not what might have happened. Some attempt has been made to make inroads into *Polkey*, for example, *Duffy v Yeomans and Partners Ltd*⁷⁴ where the Court of Appeal stated that 'reasonableness' is the key, and that it might be reasonable not to go through a procedure such as consultation. In this case there was no deliberate decision not to consult, and on the facts available at the time it would have made no difference.⁷⁵

This means that, in misconduct dismissals, if a fair procedure has been followed a dismissal can be fair, even though it transpires that the employee was entirely innocent of the misconduct alleged. It might be argued that an emphasis on procedural fairness can work just as easily against the employer as against the employee i.e. if a fair procedure has not been followed the employee will succeed regardless of the substantive issues at stake.⁷⁶ However, militating against this is the fact that a tribunal can make a notional finding of unfair dismissal and then reduce compensation by up to 100%.⁷⁷ Nevertheless, it remains self-evidently wrong that procedural fairness in dismissal may be nothing more than a triumph of form over substance.

In *Ferodo Ltd v Barnes* the EAT said that the tribunal should not have asked 'are we satisfied that the employee committed the offence?', but 'had the employer reasonable grounds for believing that he did?'.⁷⁸ Blanket dismissals have been justified in this way, i.e. when an employer has been found to be reasonable in dismissing a group of employees when there is reasonable belief that one or more of them is guilty of misconduct but there are no grounds for believing precisely who the culprit(s) might be.⁷⁹

It might be thought that procedural fairness ensues fairness on the basis that careful decisions taken after formal process will be better than those taken peremptorily. However, there is no way of gauging actual carefulness, only of assessing whether a

⁷⁰ The regulations pursuant to the Employment Act 2002, were the Employment Act 2002 (Dispute Regulations) 2004.

⁷¹ (Better Dispute Resolution (DTI, March 2007).

⁷² [1979] ICR 347.

⁷³ [1988] AC 344.

⁷⁴ [1994] IRLR 642.

⁷⁵ M Wynn, 'Unfair Dismissal: the Ghost of *Byrne* Resurrected' (1995) ILJ 24 at 272.

⁷⁶ This is also reflected in the rule in *Devis (W) & Sons Ltd v Atkins* [1977] AC 931 which states that after-discovered good reasons for dismissal cannot retrospectively make the earlier dismissal fair because according to statute the fairness of the dismissal must be established 'having regard to the reason shown by the employer' (now section 98(4) Employment Rights Act 1996), and, stated the House of Lords, that reason was the reason at the time of dismissal.

⁷⁷ See *Devis v Atkins (Ibid)* at 955 (Viscount Dilhorne) and see *Shergill v NTL Group Ltd* [2005] IRLR UKEAT 0036_05_1104.

⁷⁸ [1976] ICR 439.

⁷⁹ *Monie v Coral Racing Ltd* [1981] ICR 109.

procedure has been followed. This formalistic procedural justice might be regarded as a tick box exercise, when fairness requires something else.⁸⁰ In consequence for the purposes of an unfair dismissal claim, the employer has been given a set of rules to follow and if these are followed then there will be no procedural unfairness.

In the misconduct case of *British Home Stores v Burchell*⁸¹ the EAT held that the test is threefold: the employer must believe in the guilt of the employee; the belief must be based on reasonable grounds; the employer, in order to establish the first two must carry out as much investigation as is reasonable in all the circumstances. This test was approved by the Court of Appeal in *Weddel and Co Ltd v Tepper*,⁸² and in *Perkin v St George's Healthcare NHS Trust*⁸³ where it was stated by the Court of Appeal that it was not restricted to misconduct cases. The EAT in *Boys and Girls Welfare Society v McDonald*⁸⁴ said that a simplistic application of the *Burchell* test increases the danger of a tribunal falling into error. It was held that even if the employer has failed to satisfy one of the three elements it would not necessarily mean that the dismissal is unfair because the 'range of reasonable responses' test⁸⁵ still has to be satisfied. However, if the *Burchell* test is to have any credence then it cannot be put at the mercy of the range of reasonable responses test; to do so is to emasculate it to the point where it has no role to play at all.

An interesting twist on procedural fairness has been introduced by the EAT in *Ezsias v North Glamorgan NHS Trust*.⁸⁶ It was held that where the dismissal is mainly because of a breakdown in trust and confidence caused by the employee, there is no obligation on the employer to follow its dismissal procedures. However, in such a case, if no consideration should be given to a fair procedure, how is the alleged breakdown in trust and confidence to be established?

The 'reasonableness' test

Arguably this is the most pernicious aspect of unfair dismissal law. Its statutory form is section 98(4) of the ERA which states:

Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

A summary of the concern that this article addresses what is exemplified by the view of Lord Simon in the case of *W Devis & Sons Ltd v Atkins*, cited earlier,⁸⁷ that the reference to "equity and the substantial merits of the case" must be widely construed so as to not impinge upon reasonableness.⁸⁸

⁸⁰ Theories of 'interactional justice', for example, which relate to the perceived fairness of interpersonal treatment, examine the role of things such as respect, see e.g. Mary D Stecher and Joseph G Rosse, 'The distributive side of interactional justice: the effects of interpersonal treatment on emotional arousal', *Journal of Managerial Issues*, summer 2005: <http://www.allbusiness.com/periodicals/article/464516-1.html>.

⁸¹ [1978] IRLR 379.

⁸² [1980] IRLR 96.

⁸³ [2005] IRLR 934.

⁸⁴ [1996] IRLR 129.

⁸⁵ See *Post Office v Foley* [2000] ICR 1283 and further below.

⁸⁶ [2011] IRLR 550.

⁸⁷ *op cit* (N 46).

⁸⁸ *Ibid.*

The development of the range of reasonable responses test as set out below is inextricably linked to the way in which first level tribunal decisions can be appealed. All appeals from the Employment Appeal Tribunal and upwards are on a point of law only. This has been interpreted by the Court of Appeal as meaning that the only two grounds of appeal are cases where the tribunal has misdirected itself as to the applicable law or where the decision is perverse.⁸⁹ When will a tribunal have misdirected itself? It may well be that in the earlier days of unfair dismissal there was a perceived need to keep down the number of appeals to the EAT⁹⁰ and the Court of Appeal would have been keen to stem this tide.⁹¹ Two closely related conclusions emerged: first, that the tribunal should not substitute its own view as to whether the dismissal was unfair, and secondly, almost by way of explanation of the first, that, in order to be fair, the dismissal only has to fall within what has been described as the range of 'reasonable' responses that an employer might make. A tribunal might therefore decide that many employers would not have dismissed the employee in these circumstances, but that, nevertheless, the decision to dismiss fell within the band of reasonable responses.

However, this approach fails to provide for a consideration of alternative responses to the situation, and such responses do not figure largely in the deliberations of tribunals. These are actions short of a dismissal that an employer might take, such as warnings, a condition that the employee undertake training and that failure to do so without good reason may result in dismissal. This points up another flawed aspect of the law of unfair dismissal and is illustrated by the fact that employees who are disciplined without good cause (falling short of dismissal) do not have any recourse against their employer unless they treat it as a breach of the implied duty of mutual trust and confidence⁹² and resign and claim it was an unfair constructive dismissal.

The tribunal's view and the range of reasonable responses test

What has been described as a 'mantra'⁹³ the contention that the tribunal must not substitute its own view is nothing more than the fairly obvious principle that the tribunal must view objectively, the dismissal, its circumstances and potential alternatives.

This was considered by the EAT in *Iceland Frozen Foods Ltd v Jones* where the infamous 'band of reasonable responses' test was formulated thus:

[I]n judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; . . . in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another.⁹⁴

The concept of reasonableness, of course, is also central to the law of judicial review. A decision of an administrative body is amenable to judicial review if it falls into the category of unlawfulness described by Lord Diplock as illegal, irrational or lacking

⁸⁹ See *British Telecommunications plc v Sheridan* [1990] IRLR 27.

⁹⁰ For example in 1983 the number of appeals to the EAT was 953 compared with 327 in 1976 (Judicial statistics). See also The Hon Mr Justice Browne-Wilkinson, 'The Role of the Employment Appeal Tribunal in the 1980s' (1982) 11 ILJ 69.

⁹¹ For example, *Retarded Children's Aid Society Ltd v Day* [1978] ICR 437 CA and *O'Kelly v Trusthouse Forte plc* [1983] ICR 728 (the latter being a particularly bad example of a case which had been decided by the EAT on a perfectly respectable point of law which, nevertheless the CA decision was that there was no justification in interfering with the industrial tribunal decision).

⁹² See e.g. *White v Reflecting Roadstuds Ltd* [1991] ICR 733.

⁹³ *Haddon v Van Den Bergh Foods Ltd* [1999] IRLR 672, at XXX (XXX).

⁹⁴ [1983] ICR 17 at 24.

in procedural propriety.⁹⁵ The decision in *Associated Provincial Picture Houses v Wednesbury Corporation*⁹⁶ set out the definition of reasonableness which (inter alia) stated that a decision would not be amenable to judicial review, unless the conclusion reached was one which no reasonable authority could reach. It will be recalled that in *W Devis & Sons Ltd v Atkins*, Lord Simon stated that the word “reasonably” is to be widely construed.⁹⁷

The resemblance between the view of Lord Simon and the statement in *Vickers Ltd v Smith* is remarkable:

... not only was it necessary to arrive at the conclusion that the decision of the management was wrong, but that it was necessary to go a stage further, if they thought that the management’s decision was wrong, and to ask themselves the question whether it was so wrong, that no sensible or reasonable management could have arrived at the decision reached by the management.⁹⁸

However, in *Iceland Frozen Foods*, it was held that although, as stated, this was entirely accurate in law, it was said to be:

capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section . . . That is not the law. The question in each case is whether the industrial tribunal considers the employer’s conduct to fall within the band of reasonable responses . . .⁹⁹

In the context of unfair dismissal, therefore, the notion that unreasonableness equals perversity has been rejected. How far is this really the case? Freer maintains that, despite protestations to the contrary, the test is still akin to the public law test on the basis that, rightly, the distinction is one of semantics, not of law.¹⁰⁰ Freer represented Mr Haddon in the notorious case of *Haddon v Van Den Bergh Foods Ltd*,¹⁰¹ when at long last the EAT called into question the ‘range of reasonable responses test’. Mr Justice Morison (then outgoing President of the EAT) said that this ‘range’ of responses suggested that a very broad band of decisions would be fair and he concluded that whenever a tribunal finds in favour of the employee it is effectively substituting its own view of what would have been reasonable, or, more accurately, what was unreasonable. He went on to say: ‘It is likely however that what the tribunal itself would have done will often coincide with its judgment as to what a reasonable employer would have done.’¹⁰²

It was argued by Freer in his article, and no doubt before the EAT in *Haddon* that the real test is ‘fairness’. The facts in *Haddon* illustrate the point well. Mr Haddon was invited to a celebration of his 15 years good service which was due to take place half way through his shift and after which he would be expected to return to work. He attended to receive his award, where alcohol was available and left 1.5 hours before his shift was to end. He decided not to go back to work (the company had a policy that stated that no one could work after consumption of alcohol) and was dismissed. The tribunal that heard his complaint had a great deal of sympathy for the applicant but decided the

⁹⁵ See *Council of Civil Service Unions v Minister for the Civil Service* [1984] AC 374 at 410.

⁹⁶ [1948] 1 KB 223 at 233.

⁹⁷ op.cit (N 46).

⁹⁸ [1977] IRLR] 11 at.

⁹⁹ [1983] ICR17, at 25.

¹⁰⁰ A Freer, ‘The Range of Reasonable Responses Test – From Guidelines to Statute’ (1998) ILJ 27 335.

¹⁰¹ [1999] IRLR 672.

¹⁰² *Ibid* at para 24.

decision to dismiss was within the ‘range of reasonable responses’. The EAT reversed this, but found the applicant 25% contributorily to blame for his dismissal.¹⁰³

The Scottish EAT endorsed the Haddon view that the focus should be on ‘fairness’ in the case of *Wilson v Ethican Ltd.*¹⁰⁴ However, in *Madden v Midland Bank plc*¹⁰⁵ a differently constituted EAT stated that the range of reasonable responses test could only be abandoned by the Court of Appeal. Nevertheless the EAT went on to frame a cogent argument against the licence to dismiss which the test had provided. The arguments related to whether the band of reasonable responses test is subjective or objective. It seems to permit subjectivity on the part of employers because different employers can disagree about the decision to dismiss on exactly the same facts, and is only objective in the sense that a tribunal is able to regard a decision as objectively perverse. However, the threefold *BHS v Burchell*¹⁰⁶ test implies objectivity in what the reasonable employer should have done prior to taking the decision to dismiss. In the *Madden* case, it was said that the three-fold test of *BHS v Burchell* should be used to establish the *reason* for the dismissal rather than reasonableness. Because the test is objective the tribunal is free to substitute its own view for the employer in each element of the test (belief in the employee’s wrong-doing, reasonable grounds, reasonable investigation). This neatly avoids the problem of precedent by avoiding section 98 (4) and concentrating on sections 98 (1) and (2) instead i.e. what was the reason for the dismissal. The EAT in *Madden* suggested that, on its approach, Mr Haddon would still have been unfairly dismissed because, by giving him alcohol the employer was revoking (or making unreasonable) the earlier instruction about returning to work because of the ‘no alcohol’ company policy. The reason for his dismissal could not, therefore, have been established as misconduct. This is an interesting approach because it would probably have meant that, on this analysis, Mr Haddon would not have been found to have contributed to his dismissal, as the employer would simply have failed to establish the reason, and any ‘contribution’ to the dismissal by the employee would not have fallen to be considered. The less conservative approach could have also rectified the situation where the employer now has the upper hand in the application of sections 98 (1) and (2) illustrated by the fact that the employee can be dismissed even though there is no breach of contract¹⁰⁷ and the reason for the dismissal is refusal to agree to the imposition of unreasonable terms.¹⁰⁸

The case of *Madden* went to the Court of Appeal where it was heard together with another case on the same point: *HSBC (formerly Midland Bank) v Madden and Post Office v Foley*.¹⁰⁹ The Court of Appeal restored the earlier position by repeating that the band of reasonable responses test is the correct test, and that tribunals must not substitute their own views. Mummery LJ commented upon the range of reasonable responses by citing extreme cases at both ends of the spectrum:

There will be cases in which there is no band or range to consider. If, for example, an employee, without good cause, deliberately sets fire to his employer’s factory and it is burnt to the ground, dismissal is the only reasonable response. If an employee is dismissed

¹⁰³ Although the criticism of the range of reasonable responses test was welcome, as Smith and Baker state, the EAT could have allowed the appeal purely on the ‘perversity’ test (I Smith and A Baker, *Employment Law* (12th edn, 2015 OUP) at 460).

¹⁰⁴ [2000] IRLR 4.

¹⁰⁵ [2000] IRLR 288.

¹⁰⁶ *BHS* (N 85).

¹⁰⁷ *Farrant v The Woodroffe School* [1998] ICR 184.

¹⁰⁸ *Willow Oak Developments Ltd (t/a Windsor Recruitment) v Silverwood & Ors* [2006] IRLR 607.

¹⁰⁹ [2000] IRLR 827.

for politely saying “Good morning” to his line manager, that would be an unreasonable response.¹¹⁰

However, the argument is that in between those extreme cases there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or an unreasonable response. In those cases it is helpful for the tribunal to consider “the range of reasonable responses.”

The fact that the example of an unreasonable employer’s response given by Mummery LJ is so ludicrous, and so unhelpful, speaks volumes, indicating the huge latitude that this test gives to employers.

Furthermore, the Court of Appeal in *Madden* stated that the EAT had erred in considering the adequacy of the evidence against Mr Madden, rather than deciding whether the employer had carried out a reasonable investigation: “The tribunal focused on the insufficiency of the evidence to prove to its satisfaction that Mr Madden was guilty of misconduct rather than on whether the Bank’s investigation into his alleged misconduct was a reasonable investigation.”¹¹¹ However if the evidence was inadequate, then it is irrelevant whether a reasonable investigation has been carried out; it has not elicited sufficient evidence to show on the balance of probabilities that the employee is guilty of the misconduct concerned.

It is hard to reconcile the two parts of the *Iceland/Foley* decisions with the composition of employment tribunals so as to form a sort of ‘industrial jury’.¹¹² First it states that the ‘industrial jury’ must not substitute its own view, and secondly it states that there is little opportunity for appeal as long as the tribunal finds that the decision to dismiss fits into that band of reasonable responses. This effectively gives the industrial jury very little to do. The experience of the wing members is not needed, and the legally qualified chair should be well able to spot a perverse decision to dismiss.

An interesting observation has been made by Patrick Elias to the effect that the band of reasonable responses is a standard-reflecting test rather than a standard-setting test.¹¹³ Parallels can be drawn between this and the infamous ‘*Bolam* test’,¹¹⁴ where the standard of care in medical treatment is measured by reference to ‘accepted practices’ amongst fellow medical practitioners. Indeed in the employment case of *Beedell v West Ferry Printers* the EAT stated:

It seems to us, when formulating the band of reasonable responses test in *British Leyland UK Ltd v Swift* [1981] IRLR 91, Lord Denning MR may have had regard to the *Bolam* test. Just as the question of a doctor’s negligence will depend upon whether a reasonable body of medical practitioners would have accepted the practice which he followed, even if another body of equally reasonable practitioners would have acted differently (a band or range of reasonable responses), so it may be said that the question of whether an employer has acted reasonably in dismissing his employee will depend upon the range of reasonable employers. Some might dismiss; others might not. It is not necessary for the applicant’s

¹¹⁰ *Ibid* at para. 50.

¹¹¹ [2001] ICR 1283 at 1295.

¹¹² The Chairman is legally qualified but the wing members are recruited from employers’ associations and trade unions respectively.

¹¹³ Elias P, ‘Fairness in Unfair Dismissal: Trends and Tensions’ [1981] 10 ILJ 201 at 213: “Instead of setting its own standard of fairness the tribunal sought to hide behind the commonly held opinions of some employers, and the appellate courts would not say they were wrong to do so. This is a dangerous development, for if this kind of argument becomes widely accepted it will result in reasonableness being defined by the attitudes of the most prejudiced body of employers rather than by the tribunal’s perception of how an enlightened employer might behave.”

¹¹⁴ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. The test was slightly modified by the House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232 in that the treatment decision must stand up to logical analysis.

complaint to succeed that the employment tribunal concludes that reasonable employer would have dismissed.¹¹⁵

It is arguable that the purpose of the band of reasonable responses test is to achieve consistency. This could be the case, in the sense that all tribunal decisions will confirm whether the decision to dismiss fell within the band of reasonable responses, but not in the sense that the formulation gives guidance on what is fair i.e consistency is only achieved in form and not in substance. Furthermore, there needs to be a distinction made between internal and external consistency. If the employer's decision to dismiss is consistent with its other decisions this does not mean that the decision is fair; it might be consistently unfair. External consistency means that it is consistent with an objective benchmark; the possibility of this is excluded by the band of reasonable responses test.

THE CONCEPT OF REASONABLENESS – THE GODFATHER WAS A REASONABLE MAN¹¹⁶

Reasonableness and prudence

The case of *Secretary of State for Education v Tameside Metropolitan Borough Council* provides a particularly telling view of the concept of reasonableness.¹¹⁷ Lord Russell stated: 'It is quite unacceptable . . . to proceed from "wrong" to "unreasonable" . . . History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people. In summary, my Lords, "unreasonably" is a very strong word indeed . . .'¹¹⁸

It follows from this that instances of unreasonableness will be rare, at least in a commercial context. Hume said that reason tells us how to attain our desires, not what is right or wrong to seek to attain. As he famously said: "Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger".¹¹⁹ Another way of describing the Humean view is that we decide what is right and then go on to decide how to achieve it i.e. prudential reasonableness.¹²⁰ In deciding on what is right, reasonableness only plays a part in the sense that the arguments as to what is right must have some coherence and that they must be able to withstand logical analysis. In the case of deciding how to achieve one's end, it is entirely about what is reasonable.

Thus, to say that someone is behaving reasonably is not the same as saying that they are doing the right thing. Although there might be an assumption that to describe someone as reasonable is to say something good about them, that is only the case insofar as someone who was unreasonable would often have difficulty in doing the right thing because of lack of ability to reach a decision validly based upon facts. The distinction can be drawn between logically good reasons which explain a decision, and morally good reasons. An employer who stated that he dismissed a worker because he did not like him and no longer wished to keep him on the workforce could not be questioned

¹¹⁵ [2000] ICR 1263 at para. 81.

¹¹⁶ "The Don could always persuade anybody, there was never anyone who could stand up to his reasonableness." Mario Puzo, *The Godfather* (1969 Arrow Book 1998), at 535.

¹¹⁷ [1977] AC 1014.

¹¹⁸ *Ibid* at 1974.

¹¹⁹ D Hume, *A Treatise on Human Nature, Book II, Section 3*, (Oxford, OUP, 2000 edition, Eds: D F Norton and M J Norton).

¹²⁰ This is the traditional view of Hume, but there are those who believe it to be a flawed interpretation. See, for example, Hampton, J., Does Hume have an Instrumental Conception of Practical Reason? (1995) HUME STUDIES, Volume XXL No 1, 57–74.

further about the logic of this decision. However, if an employer stated that he dismissed the worker because it was fair to do so, that employer would be met with the question as to why it was fair, why did it matter whether it was fair and so on.

The concept of self-interest is of relevance here and relates to our earlier discussion of freedom of contract and economic theories of law. In the context of reasonableness, the concept of self-interest might be regarded as the morally neutral aspect of prudential reasonableness, distinguishing between our desires (self-interest) and deciding what should be done to attain them. However, Dewey, who was part of the movement that took a pragmatic approach to law and philosophy known as American Realism,¹²¹ made a distinction between egoism (self-interest) and altruism, and regarded them as a false dichotomy.¹²² Dewey developed a theory of "self interest" that entailed an end goal of something of worth that was not dependent upon the "self". This could be a way of developing the rather out-dated and, perhaps, unsophisticated view of "reasonableness". He concluded that it was wrong to regard them as distinct entities as the concept of "self" is more complex. He posed the question in terms of trying to identify the motive for carrying on a business. If it is altruistic i.e. looking after the welfare of others, both the self-interest and the altruistic reasons are there from the outset but there is no adequate moral criterion *within the business itself*. This is interesting in the context of the early case of *Moon v Homeworthy Furniture*¹²³ and the decision that there could be no looking *behind* the decision to make redundancies.

McMahon has undertaken a comprehensive examination of the concepts of reasonableness and fairness.¹²⁴ He surveyed the history of the morality of reciprocal concern, that avoids engaging "direct concern" which he describes as concern about the well-being of each individual as a reason for action, and which takes no account of the mechanics of a process which must necessarily be of "reciprocal concern", as this should try and avoid conflict between the players, as it is rooted in what is mutual, co-operative, and beneficial.¹²⁵ This echoes the contention of McNeil below¹²⁶ that there is a gap between the players in the contractual relationship.

Rationality

Perhaps it would be more helpful, when considering fairness in dismissals to emphasise rationality¹²⁷ rather than the somewhat tainted concept of reasonableness. Fairness requires rationality in the sense that it will ensure that like cases will be treated alike, and it relates to respect for the individual in the sense that the way in which cases differ between individuals is part of what we think of as fairness. However, this view of justice has its limitations as far as unfair dismissal is concerned as it is reflected in procedural fairness, but not elsewhere. Certainly, tribunals will regard it as unreasonable if like employees are not treated alike (say, for example, a dismissal when history shows that very similar employees in very similar circumstances had not been dismissed),¹²⁸ but if the policy is to dismiss all employees for a trivial offence then a tribunal may be reluctant to intervene to declare this unreasonable. There is an asymmetry here: if it is reasonable for an employer to dismiss for refusal to agree to significant changes in

¹²¹ See, for example, N E Simmonds, *Central Issues in Jurisprudence* (1986, Sweet and Maxwell) pp 86–88).

¹²² J Dewey, *Lectures on Psychological and Political Ethics* (1898) Chapter 6, section 2.

¹²³ *op.cit* (N 54).

¹²⁴ C M McMahon, *Reasonableness and Fairness: A Historical Theory* (2016 Cambridge University Press).

¹²⁵ *Ibid.* Part II, sections 4 and 5.

¹²⁶ R McNeil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980, Yale University Press).

¹²⁷ J Bennett, *Rationality* (1964, Routledge & Kegan Paul), at p. 6.

¹²⁸ But note *MBNA Ltd v Jones* [2015] UKEAT/0120/15/MC where inconsistency of treatment was found to be fair.

the job then any dismissal will be fair; if it is reasonable for the employee to refuse to agree such changes then, again, any dismissal will be fair. The interests of the employer and employee are not treated equally. It can be reasonable of the employer to seek to make more profits by reorganisation, and it can be reasonable of the employee in the context of that reorganisation, to refuse to accept a different job, a wage cut or whatever. However, as there is no need to focus on whether there has been injustice then in those circumstances it is fair to dismiss the employee.¹²⁹

SOCIAL EXCHANGE THEORY AND RELATIONAL CONTRACTS

Social Exchange Theory

It has been argued that freedom of contract presupposes an equality of bargaining power, which rarely applies in an employment case. Although a contract of employment is a commercial contract, it is more complicated than a contract for the sale of goods or the provision of services because there is a personal element to the contract.¹³⁰

Social Exchange Theory dates from the 1920s, for example in the work of Mauss¹³¹ and in the 1950s the theory was applied to employment relationships, but there was still concentration on the financial side of the exchange.¹³² However, further developments saw arguments constructed, where, it was it was said that the exchange goes beyond things such as work and remuneration, and include non-tangible qualities such as trust.¹³³ Pattnaik and Tripathy state: “In short, in an economic exchange the mechanisms of reciprocity are specified formally and have a limited time frame. Social exchange involves unspecified obligations where one party trusts the other and have no predefined time frame.”¹³⁴

Relational Contracts

In the jurisprudential field, there has been an approach to the categorisation of the employment contracts by developing the notion of a “relational contract”. This dates back to the 1970s and the publications of Ian Macneil. He constructed the basis of the contractual theory, concluding that the law should reflect “contracting behaviour” and this is based on social exchange theory.¹³⁵ The relational contract theory describes a continuum from the traditional “contract” theory which encompasses such things as market exchanges, and, relations at the other end of the spectrum, such as marital relations. Employment contracts are close to that other end of the spectrum. It acknowledges the different perspectives of employers and employees and the wider relationships within the undertaking e.g. supervisor and employee, and the social aspects of these relationships in terms of “give and take”.¹³⁶

McNeil also referred to “discrete contracts” which are normally of short duration, and the exchange is confined to easily ascertainable measures such as an agreed price

¹²⁹ *W Devis* (N 46) at 953.

¹³⁰ As we have seen, one of the key distinguishing factors of a contract of employment is the element of personal service. See *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 and *Montgomery v Johnson Underwood Ltd* [2001] IRLR 367.

¹³¹ See N Elias, *The History of Manners: The Civilising Process, Vol 1*, (1978: New York, Pantheon Books).

¹³² See, for example, G Homans, *Social Behavior as Exchange*, *American Journal of Sociology*, (1958) Vol 63, pp 507–606.

¹³³ J A M Coyle-Shapiro and N Conway, *The employment relationship through the lens of social exchange* (2004, Oxford University Press).

¹³⁴ L Pattnaik and S K Tripathy, *The Influence of Perceived Organisational Support on Organisational Commitment: an Empirical Study*, *ASBM Journal of Management*, July 2014.

¹³⁵ *op.cit* N124.

¹³⁶ *op.cit* N131.

and that the goods to be provided should comply with a specifiable standard. On the other hand, relational contracts are of “significant duration”. This is, perhaps, not a very helpful as it might be regarded as being a contract enduring for a long time, whereas “significant” is better interpreted as enduring in terms of commitment, which brings into play the objects of the social exchange, such as loyalty, discretion and initiative.¹³⁷

Section 98(4) – do ‘equity and the substantial merits of the case’ help?

To return to the wording of section 98(4), much has been said about the question as to whether it was reasonable to dismiss, but that is only half of the section’s wording. However, as we have seen, section 98(4) of the ERA requires the tribunal to decide whether the decision to dismiss was reasonable and to determine this in accordance with equity and the substantial merits of the case. In *W Devis & Sons Ltd v Atkins*, with regard to considerations of equity, Viscount Dilhorne stated that: “Paragraph 6(8), (as it then was)¹³⁸ appears to me to direct the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice.”¹³⁹ If the purpose of the legislation was to encourage fair procedures in dismissals then case law has followed this. However, if the purpose was to promote fair treatment then it has failed. An employer who dismisses an employer for an established reason (e.g. because it wishes to reorganise his business in some way), and who follows a fair procedure, does not, according to Viscount Dilhorne, have to *focus his attention* on whether the employee suffers any injustice. However, there have been instances where a balancing of the interests of both parties has been advocated, and it is particularly applicable in cases of economic dismissals.¹⁴⁰ Raphael looks at two ways of approaching justice : merit and desert, and equality and need.¹⁴¹ Merit and desert are concepts that might be relevant to e.g. selection for redundancy, but they play no part in deciding whether to dismiss at all i.e. in economic dismissals a tribunal will not want to know how meritorious the employee(s) are, and, as far as equality and need are concerned equality will only have a general role to play (e.g. all employees were considered), but need will play no part at all. Consider deterrence dismissals such as in the Court of Appeal case of *British Leyland UK Ltd v Swift* where Lord Ackner stated:

An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case.¹⁴²

This is interesting in connection with the ‘moral neutrality’ of reasonableness. The deterrence point is clearly reasonable, but it is nothing to do with justice or fairness to the employee.

In section 98(4), the language refers to “equity” which we can regard as “fairness”. This is surely a compelling way of looking at the employment relationship because it entails so much that is about the nuances of behaviour. Furthermore, as we have seen, the House of Lords has endorsed the concept of “mutuality of obligation” as being

¹³⁷ op. Cit N 133.

¹³⁸ The same wording was then contained within paragraph 6(8) of Schedule 1 to the Trade Union and Labour Relations Act 1974.

¹³⁹ *W Devis* (N 46), at 952.

¹⁴⁰ See *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386.

¹⁴¹ Raphael, D., *Justice and Liberty* (London: The Athlone Press 1980), Chapter 1.

¹⁴² [1981] IRLR 91 at [17].

an essential ingredient in the employment relationship.¹⁴³ Indeed, the long-standing implied term of fidelity and more recently of good faith, reflect precisely the same “relational contract”. These obligations go beyond “reasonable behaviour” in the prudential sense, and beyond the emphasis upon freedom of contract.

SUMMARY

Common Law

In order for a contract of *employment* to exist there has to be mutuality of obligation between the parties, and the element of *personal service* is crucial.

The implied term of trust and confidence necessarily implies co-operation; indeed, it is expressed as being a mutual term. Generally, express terms cannot be removed or rewritten. Historically this has meant that only terms that were illegal or constituted an unlawful restraint of trade could be examined by the courts. However, as has been seen, more recently, when considering non-solicitation restrictive covenants, it was held by the Court of Appeal¹⁴⁴ that employees are not like stock in trade, echoing the International Labour Organisation Declaration, in its founding documentation, that “labour is not a commodity”.¹⁴⁵

Further, the courts have been resistant to the view that express terms have to be reasonable, but have dealt with cases where the application of terms such as mobility clauses has to be considered in the light of the principle that neither party to the contract should behave in such a way so as to prevent the other party from carrying out their part of the contract.

The statutory provisions in the Employment Rights Act relating to relating to unfair dismissal

In arriving at the present position, the courts have been influenced by a number of factors: first, the tradition of freedom of contract, and, save for the case of restraint of trade clauses, courts will not re-write contractual terms; secondly, and this is really a part of the first factor and is what appears to be an emphasis on “managerial prerogative”; thirdly the exporting into interpretation of section 98(4) of public law approaches as in the law of judicial review, and finally, the influence of policy considerations, in terms of restricting opportunities for appealing against the decision of a first-level tribunal.

CONCLUSION

So to go back to our original question: how do we reconcile the respective approaches to the common law and to the requirements of ERA? It could be argued that this is about the use and development of the common law as part of the role of the judiciary, and statutory provisions are created by Parliament, and in that context, the judiciary seems to be reluctant to take a bold approach.

However, given that we are faced with a statutory provision that actually requires the decision as to reasonableness to be decided in accordance with fairness, then it might be said that the answer is contained within the statutory provision itself. However, the judiciary adopted a public law view that is largely concerned with reasonableness, and,

¹⁴³ *Carmichael and Anor v National Power plc* [1999] ICR 1226.

¹⁴⁴ *Hanover Insurance Brokers v Shapiro* [1994] IRLE 82 CA.

¹⁴⁵ International Labour Organisation, Preamble to the Declaration of Philadelphia.

as we have seen, reasonableness is essentially morally neutral. It is only marginally concerned with substantive fairness, as the issue of fairness appears to be dealt with by the emphasis upon procedural fairness, and to take just the example of economic dismissals, these cannot be saved from being unfair by mere procedural issues.

Therefore, we need a different approach to the issue. A fresh look at the nature of the employment contractual relationship is required. If we take an approach based upon social exchange and the relational nature of the employment contract, then this should result in a different perspective for employment tribunals when making decisions based upon fairness, which, after all, and ironically, *is the whole point* of the statute. If we take a relational view of the contract of employment itself, then an emphasis on fairness should resonate with the players in the relationship. If we take a social exchange approach then we should permit employment tribunals to examine the substantial fairness of a decision to dismiss not least because of the common law developments that we have discussed. Furthermore, rather than take a market/reasonableness approach, a social exchange approach recognises that markets are constituted by law and that private interest can be used abusively by private actors. Employers (including those in the public sector), are private actors, not public officials granted power to make decisions, and the legislative process decided that private power actors should be prevented from abusing private power. Indeed, the legislative intervention that attempts to reconstitute the employment contract goes back to the Industrial Relations Act of 1971¹⁴⁶ which was the first iteration of the right not to be unfairly dismissed, and a reflection of the need to restrain the abuse of the position of power held by employers.

¹⁴⁶ Royal Commission on Trade Unions and Employers' Associations was an inquiry into collective UK employment law and its 1968 Report (Cmnd 36 23) is commonly known as the "Donovan Report", as Lord Donovan chaired the inquiry.

BOOK REVIEW

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

STRATEGIES FOR STRIKING A BALANCE BETWEEN DATA PRIVACY AND OTHER INTERESTS

The Politics of Data Transfer: Transatlantic Conflict and Cooperation Over Data Privacy

by YUKO SUDA

Routledge, New York, 2018

1st edition, 151 pages, Paperback, \$ 49.95, ISBN 9781315524856

INTRODUCTION

The Politics of Data Transfer: Transatlantic Conflict and Cooperation Over Data Privacy by Yuko Suda provides a unique insight into the transfer of personal data from the European Union (EU) to the United States. This book concentrates primarily on comparing the Safe Harbor Principles with the Privacy Shield Principles, interpreting the passenger name record (PNR) dispute, and analyzing the Society for Worldwide Interbank Financial Transactions (SWIFT) affair. Despite the fact that it is a slim volume, it is creatively completed and largely satisfied scholars' requirements on their related research. This value includes two sides. On one side, Suda applies the concept of extraterritoriality to elucidating issues over politics of global data flows. This paradigm opens up a fascinating new way to shed light on the relationship between data flow and data privacy. On the other side, Suda offers some useful solutions to specific controversy between the EU and other jurisdictions, prominently the US. These two sides will attract anyone who wishes to access data transfer (data privacy) both academically and practically.

CONTENT

The book has nine chapters:

- The Politics of Data Privacy
- The Politics of Extraterritorial Regulation
- The EU Data Protection Directive
- From Safe Harbor to Privacy Shield
- The PNR Dispute
- The EU PNR Directive
- The SWIFT Affair
- Data Privacy and Free Trade Agreement
- Conclusion

Chapter 1 indicates that in the era of digitalization, where a plethora of data, including personal data and other types of data, is collected and used both domestically and internationally, data privacy is exposed to the external environment. Nevertheless, the essence of data privacy is the intricate task of balancing this concern against other needs.¹ Chapter 2 traces back the logic of extraterritoriality and counter-extraterritoriality. The key point it reveals that in reality it is difficult for one government to harness or regulate transborder flows, especially because the reach of national regulation is incongruent with the scope of what is being regulated.² Chapter 3 focuses on some specific provisions in the EU Data Protection Directive and the General Data Protection Regulation (GDPR).³ The latter is regarded as an advanced version, updating and modernizing the former.⁴ Chapter 4 involves several rounds of EU-US data talks, uncovering how the EU regulates in terms of the Safe Harbor arrangement. Meanwhile, it also addresses the transition from the Safe Harbor to the Privacy Shield under which personal data could legally be transferred from EU territory to the US for commercial purpose, as long as complying with the requirements of EU data protection laws.⁵ Chapter 5 explains why and how the US uses data on air passengers, generating the passenger name record (PNR) agreements.⁶ In contrast to the US, the EU highlights data privacy and firmly adheres to the human rights through the whole disputes. Chapter 6 accounts for the development of the EU's PNR policy and discovers the differences in the EU PNR Directive, such as the scope of its application and the period of data retention and depersonalization.⁷ Chapter 7 refers to financial transactions records held by the Society for Worldwide Interbank Financial Transactions (SWIFT) stemmed from the US government's response to the events of September 11, 2001.⁸ It examines what role the Terrorist Finance Tracking Program (TFTP) in the US play (or could play) related to the EU data protection regime, along with EU's reaction to the over-the-border effect of US counterterrorism. Chapter 8 discusses what would be in the controversial whirlpool in relation to data protection and privacy, intertwining in Free Trade Agreements (FTAs), such as Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) agreement, and the Trade in Services Agreement (TiSA).⁹ Chapter 9 draws the conclusion that the disputes covering a series of cases represent the politics of extraterritoriality as well as the politics of data privacy.¹⁰

One of the most impressive aspects of the work are the intricate and relevant discussions of the GDPR. As readers familiar with the topic will be aware, these went through several phases until their final application on May 25, 2018. The GDPR captured widespread attention by going further than almost any other EU regulatory regime, particularly in specifying a maximum fine of significant magnitude.¹¹ In many respects, this paradigm highlights the frictions between EU-US data transfer typically when they

¹ Yuko Suda, *The Politics of Data Transfer: Transatlantic Conflict and Cooperation Over Data Privacy* (Routledge 2018), 16.

² *Ibid* 19.

³ Regulation (EU) 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.

⁴ *Ibid* 34.

⁵ *Ibid* 38.

⁶ *Ibid* 55.

⁷ *Ibid* 76–77.

⁸ *Ibid* 81.

⁹ *Ibid* 94.

¹⁰ *Ibid* 109.

¹¹ Christopher Hodges, 'Delivering Data Protection: Trust and Ethical Culture' (2018) Vol. 4, Issue 1 *European Data Protection Law Review* 66.

are engaged in cross-border financial transactions. On one hand, if a business entity in the US violates the critical principles of using data, for example, failing to comply with specified, explicit and legitimate purposes, the appropriate scale of restriction on data use will be adopted by the EU authority, depending on the context. In terms of this logic, if the US regime and accompanying practices are deemed “improper” according to EU data protection standards, then business entities in the US will be confronted with serious obstacles when using data from the EU. On the other hand, the extreme emphasis on data protection to some degree does not facilitate the development of the EU’s international trade. Hence, the strategy for striking a balance between data protection and commercial interests is one of the most crucial elements for EU-US data transfer.

Indeed, the intrinsic reason behind the data protection in the US may be rooted in a cultural context in which Americans are far more concerned than most Europeans with limiting the government’s attempts to invade individual privacy.¹² According to this interpretation, the US data protection at the federal level in particular attaches importance to the protection of personal data in specific sectors. Since 1970 in the US, there have been a large number of data protection laws applying only to specific sectors.¹³ Most of them are vital components of regulating and promoting the US international trade, whilst the EU has kept them in a reasonable orbit. But one fundamental question still arises: what measures are available to the EU and the US that would best achieve the goal of reciprocity in trade? It would be worthwhile carrying out more research on this topic, by both theoretical or empirical means. Because the inherent issue of the EU-US trade is not *whether*, but *how*, multi-stakeholder data should be transferred to the US territory in the light of the GDPR.

CONCLUSION

As set out in this work, the potential adverse side effects of the over-the border reach of the EU data protection principles and the US counterterrorism project would both be alleviated by the implementation of the Safe Harbor, PNR and SWIFT agreements. Yet against this understanding, the core theoretical lexicon of the book is the concept of extraterritoriality. Developing this idea, as influenced by the article of Miles Kahler and David A. Lake, the book explicitly illustrates possible responses to the real challenge of striking a balance between data privacy and other interests, as well as finding a strategy for reconciling between the EU data protection and the US counterterrorism. More importantly, it creates a new landscape for researching in the realm of transatlantic conflict and cooperation over data privacy.

If the flaw of this book can be found, it is that it generally neglects the consideration that data is gradually being applied to digital forensics over the EU-US judicial assistance. The volume and scope of data transfer may be dependent upon the course which EU-US cooperation ultimately takes. Nonetheless, this potential gap does not exert a negative impact on the author Suda’s commitment to this book. The volume is highly recommended to anyone intending to gain more knowledge about data transfer (data privacy) between the EU and the US.

QIAN LI*

¹² Shawn Marie Boyne, ‘Data Protection in the United States’ (2018) Vol. 66, Supplement, American Journal of Comparative Law 343.

¹³ The most well-known laws are summarized as the Fair Credit Reporting Act (FCRA), Financial Services Modernization Act (Gramm-Leach-Bliley (GLB) Act), Health Insurance Portability and Accountability Act (HIPAA), The Fair Credit Reporting Act (FCRA), Electronic Communications Privacy Act (ECPA) and The Computer Fraud and Abuse Act (CFAA), etc.

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CASE NOTES

The address for submission of case notes is given at the beginning of this issue

THE REGENCY VILLAS CASE COMMENT¹

ABSTRACT

The Regency Villas deals with a very novel application of the principle of easements to recreational activities. As observed by Lord Carnwath, none of the cases previously considered by the Supreme Court dealt with recreational activities. The balance of principles underpinning the extension of the law of easements to recreational activities, in particular, the burden involved and the potentially dangerous nature of this burden, is evidence that there should be no such extension.

SUMMARY OF FACTS

In the transfer dated 11 November 1981 (the Facilities Grant), Gulf Investment transferred Elham House to an associated company and created an easement for Elham House to use the recreational facilities in Mansion House.

The background to the case was that in 1979 Mansion House and Elham House were acquired by Gulf Investments Ltd and a number of timeshare apartments were created within. However, since the Facilities Grant, the owners of Mansion House had not found the facilities it housed as profitable as before. Eventually, the swimming pool fell into disuse and by 2000 it had been filled in although a new swimming pool was in fact opened subsequently. From time to time, beginning in about 1983, Regency Villas Owners Club that was constituted by the purchasers of timeshare units within the Regency Villas development made voluntary payments on behalf of timeshare owners within the Regency Villas development to the owners and operators of the Mansion Park towards the cost, including upkeep, of the facilities. Although these payments were made under a reservation of rights, they were usually in agreed amounts, at least until the end of 2011.

FIRST INSTANCE

The matter was ruled on by HHJ Purle QC. Regency Villas succeeded in its claims, apart from the recovery of payments for the use of the facilities before 2012.

¹ Regency Villas Title Ltd and others (Respondents/ Cross-Appellants(v Dimond Resorts (Europe) Ltd and others (Appellants/ Cross-Respondents) [2018] UKSC 57.

THE COURT OF APPEAL

Regency Villas was successful in that the Court of Appeal agreed that the Facilities Grant amounted to a grant of an easement. However, the decision by HHJ Purle was reversed as the rights of Regency Villas regarding a new swimming pool constructed in the basement of Mansion House were not covered by an easement which reduced the amount due. The Appellants succeeded in part in their counterclaim for *quantum meruit*.

THE APPEAL TO THE SUPREME COURT

In the Supreme Court, the Appellants sought dismissal of all claims and the Respondents sought restoration of the judge's original order.

JUDGMENT

A majority of the Supreme Court dismissed the appeal and allowed a cross-appeal. Accordingly, the judge's consequential orders, including an order for monetary compensation for the payment under protest for use of facilities in and after 2012, were restored. The majority judgment was given by Lord Briggs – Lady Hale, Lord Kerr and Lord Sumption agreed with it. Lord Carnwath gave a dissenting judgment.

COMMENT

This comment largely supports Lord Carnwath's dissenting judgment.

Both the majority and Lord Carnwath acknowledged the rather unfortunate conveyancing solution devised in this case. Lord Briggs called it at para 31 "*a conveyancing mistake which the court should do nothing to correct, and certainly not by the use of the validating principle of construction.*" Lord Carnwath at para 94 states that "*no-one suggests that the conveyancing technique used in this case is a suitable model for future time-share arrangements of this kind.*" It was argued that the unusual circumstances of the present case, and the fact that such a conveyancing mistake was unlikely to be replicated, called for moderation and restraint.

The extension of the law governing easements does not have a precedent which would mean that the law had to be extended the recreational activities. This is supported by Lord Carnwath where at para 96 he states that:

"Neither principle, nor any of the 70 or so authorities which have been cited to us, ranging over 350 years, and from common law jurisdiction, come near to supporting the submission that a right of that kind can take effect as an easement."

Lord Carnwath lists certain policy reasons why the principle should not be extended to recreational activities. It is my contention that this is against the logical progression of the law as such a course could lead to very onerous and even dangerous situations. As observed by Lord Carnwath, any enjoyment is qualified further by the dominant owner's obligation to contribute to the cost of maintenance. This is also acknowledged by Lord Briggs at para 80. In the same para Lord Briggs comments that "*there is no way in which enforceable obligations of that kind may be imposed upon the servient owners so that the burden of them runs with the servient tenement.*" The majority judgment is

rather vague about what might happen in the event of failure to maintain the property. Lord Carnwath gives an example of similar time-share apartments being built on a theme park, thus offering free access to the various rides in the park. Lord Carnwath comments at para 107 that it is:

“quite clear that the rides and other attractions could not be sensibly and safely enjoyed without active management and supervision of their owner. In theory, no doubt, if the owner defaulted, the dominant tenants could form their own management company and take over the running of the park.”

This to a large extent undermined Lord Briggs’ contention that “the common law should, as far as possible, accommodate itself to new type of property ownership and new ways of enjoying the use of land” [para 76]. The law as envisaged by Lord Briggs could lead to some preposterous results which could be dangerous in terms of health and safety. Equally, the theme park argument does not support the Law Commission’s stance from 2011 that the scope of easements in English law should not be lightly put aside [Lord Briggs at para 1].

The argument by Lord Briggs at para 77 that recreational easements have been widely recognised in the common law world is not a compelling one. Lord Carnwath observed at para 96 that this is a novel application and the examples cited by Lord Briggs are not any more recreational than the garden as given in *In re Ellenborough Park* [1956] Ch 131.

CONCLUSIONS

The case in question deals with a very novel application of the principle of easements to recreational activities. As observed by Lord Carnwath, none of the cases previously considered by the Supreme Court dealt with recreational activities. The balance of principles underpinning the extension of the law of easements to recreational activities, in particular, the burden involved and the potentially dangerous nature of this burden, is evidence that there should be no such extension.