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Preface:

I would like to extend my deepest thanks to everyone involved in the production of this year's edition of the *University of Liverpool Law Review*. It has been a long and challenging journey, but despite the obstacles that have come our way over the past year, the unwavering dedication and commitment of the Editorial Board have shone through. Together, we have successfully brought another volume of the Review to life, and I could not be prouder of the outcome.

As in previous years, we were fortunate to receive a wealth of outstanding submissions, each showcasing the breadth and depth of legal scholarship undertaken across the Liverpool Law School. The research submitted by our student body was nothing short of impressive. I extend my sincere gratitude not only to the authors whose work was selected for publication, but also to everyone who contributed submissions for consideration. On behalf of the entire Editorial Board, I can say that reading these works has been an enriching experience, offering us fresh perspectives on a variety of critical legal issues.

This edition of the Review reflects the high standards of academic rigor at Liverpool Law School and presents a diverse selection of articles tackling contemporary social, political, and legal challenges. Through these works, we hope to inspire meaningful discussions and foster a deeper understanding of the issues that shape our world today.

Finally, I would like to express my gratitude to this year's Editorial Board. It has been a true privilege to work alongside such a dedicated, hardworking, and resilient group of fellow

students. Your commitment to upholding the quality and reputation of the Review has been constant, even in the face of uncertainty. Thank you for your patience, your perseverance, and for putting up with me through it all!

Florence Gibbs
Editor-in-Chief, University of Liverpool Law Review 2023-24

Foreword

I am honoured and glad to write this foreword to the nineth edition of the University of Liverpool Law Review. The Law Review is run by our talented students to showcase the best work their fellow students do. That it is now in its nineth edition is a testimony to the ability of our students and their commitment to the deeper academic values that Liverpool Law School has sought to promote since its founding. To a teacher, few things give more joy than the intellectual achievements of one's students, especially in further developing the knowledge discussed in university courses.

Contributions to this nineth volume display the breadth of intellectual interests shown by students at the University of Liverpool for contemporary social justice issues. They include topics such as the medical law and ethical question of whether the patient ought always to be involved in the decision-making process (Adesh Ajmani), the regulation of the activity of charities in public discourse and policy advocacy under charity law (Julia Andrusiak), the legacy of slave trade in Liverpool's history in the light of modern slavery (Rachel Christie), the ethical justification of elective amputation of a limb of individuals suffering with Body Integrity Identity Disorder (Tamanna Zaman), the implementation of a point-based immigration system adopted by the UK's conservative government in 2023 (Carrera Parchment), the application of soft law in the field of international environmental law (Neeki Kaivan Arkian), the preservation and sustainment of patriarchal values within the law (Maddy Cartwright), as well as the decline of the relevance of the law governing the use of interstate force (*jus ad bellum*) in the 21st century (Olivia Mitchell). I am sincerely thankful to the authors for their submissions and academic work throughout the past academic year, together with the Editorial Board.

The 2023/24 Editorial Board can be proud of this new issue and of all their hard work in putting it together. I would also like to thank academic colleagues, including doctoral candidates, who kindly agreed to provide comments to the authors to help bring their papers to publication standard. This issue would not have been possible without their contribution.

Dr Antal Berkes
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Doctor, Should We Talk About Saving My Life? Is It Ethically Justifiable to Decide on a 'Do Not Resuscitate' Order Without Consulting the Patient?

Adesh Ajmani

Abstract

'Do not attempt cardiopulmonary resuscitation' (DNACPR)[1] exists when clinicians make a decision not to perform cardiopulmonary resuscitation (CPR).[2] 'Deciding when to withhold CPR is a delicate issue, as is the question of whether the patient ought always to be involved in the decision-making process.'[3] However, at times it may be ethically justifiable to decide for DNACPR, without discussing with the patient, an argument which will be illustrated in this article. This paper seeks to address this debate by initially reviewing the role of paternalism juxtaposed against autonomy, before then moving to consider the doctors role of beneficence and non-maleficence, and finally concluding on justice and the notion of therapeutic privilege.

Introduction

DNACPR is a contentious issue at the intersection of medical ethics, law, and clinical practice. The current literature available primarily focuses on the reasons in favour of discussing DNACPR with patients and reports clearer guidance and support is needed to facilitate healthcare professionals with these discussions.[4] There is some research into the arguments not to discuss DNACPR with patients, albeit limited. The four principles have been used to address this argument because they are universally applied.[5] A limitation of the four principles is that it is not designed to give an answer or lead to a decision and instead highlights issues.[6] Despite this, utilising the four principles approach can be helpful in supporting practical decision-making by providing a framework, and enables this debate to be

[1] British Medical Association, Resuscitation Council (UK) and Royal College of Nursing, 'Decisions Relating to Cardiopulmonary Resuscitation' (3rd edn, BMA, 2016) 10.
[2] ibid 7.
[3] Kristoffer Mauritzson, 'Communicating DNACPR Discussions' (2016) 4 Journal of Medical Law and Ethics 85.
[4] Gareth Iacobucci, 'Covid-19: Government to Issue New Guidance on DNAR Orders After Legal Challenge' [2020] BMJ Online <http://doi.org/10.1136/bmj.m2848> accessed 22 November 2022; David Oliver, 'Improving DNACPR Discussions, Decisions, and Documentation' [2021] BMJ Online <www.bmj.com/content/372/bmj.n772> accessed 20 December 2022; Angelica Sharma and Arun Sharma, 'Discussion of DNACPR Processes in Medical Education Would Improve Practice' [2021] BMJ Online <www.bmj.com/content/373/bmj.n1045> accessed 20 December 2022.
[5] Raanan Gillon, 'Defending the Four Principles Approach as a Good Basis for Good Medical Practice and Therefore for Good Medical Ethics' (2015) 41 Journal of Medical Ethics 111.
[6] ibid 114.

analysed from different ethical interpretations.[7] Ultimately, this paper argues in favour of the ethical argument for not discussing DNACPR with patients depending on context.

Autonomy and paternalism

Paternalism[8] reflects a more traditional approach to medical decision making where there is a removal of patient involvement in the decision-making process,[9] promoting a 'doctor knows best'[10] approach. Mill 'defines paternalism as limiting the freedom of action of patients and acting for their benefit against their will'.[11] 'Research conducted in 2009 suggested that non-involvement of patients in DNACPR decisions was very common, with patients being consulted in less than a third of the cases.'[12] Gill believes paternalism is 'anachronistic'[13] and a further concern is that it 'is the cost of autonomy'.[14] Medical ethics has shifted from this generation to a more progressive approach of heavily involving patients in their care.[15] There is this now an expectation to involve competent patients in DNACPR decisions and 'there needs to be convincing reasons not to involve the patient'.[16] Many critiques are in favour of this movement and the literature suggests a majority consensus that paternalism has no place in modern medical decision making.[17]

Whilst it is recognised paternalism limits a patient's autonomy, a key argument is that DNACPR is a clinical decision,[18] and inherently paternalistic in its nature, which therefore challenges the role of patient autonomy. It is one of the very few remaining paternalistic decisions in medical practice to date.[19] 'There are situations in a clinical context where CPR

[7] Raanan Gillon, 'Ethics Needs Principles – Four Can Encompass the Rest – and Respect for Autonomy Should be "First Among Equals"' (2003) 29 Journal of Medical Ethics 310.
[8] Daniel Groll, 'Medical Paternalism – Part 1' (2014) 9 Philosophy Compass 186.
[9] Katherine Brown, 'Can Medical Paternalism be Justified?' (1985) 133 Canadian Medical Association Journal 678.
[10] Dylan Mirek Popowicz, '"Doctor Knows Best": On the Epistemic Authority of the Medical Practitioner' (2021) 2 Philosophy of Medicine 1.
[11] *Brown* (n 9).
[12] *Mauritzson* (n 3) 88.
[13] Robin Gill, 'Decisions Relating to Cardiopulmonary Resuscitation: Commentary 1: CPR and the Cost of Autonomy' (2001) 27 Journal of Medical Ethics 318.
[14] ibid.
[15] Daniel Groll, 'Medical Paternalism – Part 2' (2014) 9 Philosophy Compass 195.
[16] *Mauritzson* (n 3) 93.
[17] *Brown* (n 9); *Gill* (n 13).
[18] *Mauritzson* (n 3) 89.
[19] Fiona MA MacCormick and others, 'Resuscitation Decisions at the End of Life: Medical Views and the Juridification of Practice' (2018) 44 Journal of Medical Ethics 376.

is deemed inappropriate'[20] and whatever the patient's wishes, CPR cannot be demanded.[21] Consequently, this challenges the importance placed on exploring patient autonomy in these DNACPR decisions. Ultimately, if a clinician believes CPR is 'futile or not in the best interests of the patient', irrespective of the patient's personal views, it is unlikely to change the overall outcome of the decision.[22] On the contrary, there is a concern that 'clinicians are not to avoid patient involvement simply on the grounds that CPR is judged to be not in the best interests of the patient.'[23] Additionally, it is still important to have DNACPR discussions with patients to address their 'wishes and preferences'[24] to ensure doctors are 'respecting the dignity of the patient as a rational and autonomous person.'[25] Arguably, this assertion could be questioned.

At the expense of 'respecting their dignity' and autonomy, it could be said that having these DNACPR discussions 'may interfere with patients' hope.'[26] Illness can undermine authenticity of patients' decision due to vulnerability and they may change their fundamental beliefs over time (especially during stress) and believe the purpose of medicine is to preserve life at any cost.[27] Therefore, these conversations can often be confusing for patients and may blur the line of the common goal between patient and clinicians for a dignified death. It is acknowledged clinicians are not expected to discuss DNACPR with every one of their patients. Yet rightly so, Dr McCartney raises concern whether clinicians should 'ensure that at every patient whom we think is near death…understands in gritty detail that they will not be offered CPR even though it would be useless'.[28] This presents the notion at a time when DNACPR discussions are 'sensitive',[29] 'the old paternalism was undoubtedly comforting for many…'[30] and therefore offers justification for when paternalism may be ethically acceptable.

[20] Mauritzson (n 3).
[21] Dean Blackburn, 'DNACPR Decisions' (2020) 20 Clinical Medicine Journal 133.
[22] 'Cardiopulmonary resuscitation (CPR)' [2022] General Medical Council <www.gmc-uk.org/ethical-guidance/ethicalguidance-for-doctors/treatment-and-care-towards-the-end-of-life/cardiopulmonary-resuscitation-cpr> accessed 22 November 2022.
[23] *Mauritzson* (n 3) 91.
[24] *Blackburn* (n 21) 133.
[25] *Mauritzson* (n 3) 91.
[26] ibid 92.
[27] *Brown* (n 9) 679.
[28] Margaret McCartney, 'Is Discussing Futile Treatments Really Best for Dying Patients?' 2014 BMJ Online <www.bmj.com/content/348/bmj.g4180> accessed 23 December 2022.
[29] Fiona Wilson and Joanne Bird, 'Getting DNACPR Discussions Right' (2022) 37 Nursing standard 59.
[30] *Gill* (n 13).

Furthermore, these contentious DNACPR discussions can cause breakdown and misunderstandings between doctors and relatives, impacting upon trust and rapport.[31] Relatives may have a misconception that if doctors are having this conversation, it insinuates there is possibility and options to treat right until the end. Alternatively, they may misinterpret that implementation of a DNACPR is an attempt to hasten the patient's death.[32] By taking a paternalistic approach, it may seem doctors are hiding information and Groll believes to act paternalistically is 'impermissible'.[33] Yet it has 'some benefits for both doctors and their patients.'[34] This may reduce tensions between patients, their relatives, and the medical team.

Whilst family points of view are important to consider, they will never be binding, as reiterated in the professional guidance.[35] This is similarly resonated in legislation, for example under the Mental Capacity Act Code of Practice whereby 'family members and close friends may be able to provide valuable background information… but their personal views and wishes about what they would want for the person must not influence the assessment'.[36] There are other areas of case law which sees how families wishes are not binding.[37] Yet, Blake J outlines in *Winspear v City Hospitals Sunderland NHS Foundation Trust*[38] that implementing DNACPR without informing the next of kin when the patient lacks capacity interferes with Article 8.[39] Respectfully, this decision does not consider the rights of the patient[40] and fails to recognise the time critical factors associated when a DNACPR decision needs to be made quickly in the best interest of the patient. McCartney states that 'in the real world however, patients present semiconscious and with recent terminal diagnoses; families disagree; and imparting and checking the understanding of information may require days when there are only hours left'[41] Similarly, Buchanan 'emphasizes the importance of weighing out consequence on balance through his prevention of harm argument'.[42] Despite all the discussions, eventually the act of CPR is futile, dangerous and undignified. This reminds us to consider the purpose of these discussions at such a pivotal, emotional, and

[31] *Mauritzson* (n 3) 89.
[32] ibid.
[33] *Groll* (n 15) 194.
[34] *Gill* (n 13) 317.
[35] *General Medical Council* (n 22).
[36] Department of Constitutional Affairs, (2007) *Mental Capacity Act: Code of practice* (London: HMSO).
[37] [2020] EWHC 1606 Fam; *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164.
[38] [2015] EWHC 3250 QB.
[39] European Convention on Human Rights 1950.
[40] David Benbow, 'An Analysis of Charlie's Law and Alfie's Law' (2019) 28 MLR 236.
[41] *McCartney* (n 28).
[42] *Brown* (n 9).

finite time and reiterates the justification for a paternalistic approach in DNACPR discussions.

Beneficence and non-maleficence - Is it more harmful to tell them?

The symbiosis of beneficence and non-maleficence in the decision not to discuss DNACPR with the patient is also relevant. Harm could be interpreted as psychological or mental, physical, or a combination; these conversations may cause the patient distress.[43] The patient may have a phobia of death or alternatively are fearful of death and subjecting them to these 'sensitive and complex'[44] discussions is harmful. Moreover, it may cause physical distress and exacerbate their symptoms which may result in a premature death. Mauritzson emphasises that 'clinicians may sincerely believe that it is not in the best interests of the patient to discuss CPR, due to anxiety or a severely weakened state.'[45] This reinforces the notion that not discussing DNACPR would avoid causing the patient distress and 'this enjoins clinicians to act good for their patients.'[46] When patients are already in a vulnerable state physically and mentally, there bears no convincing reason to subject them to these conversations, and thus, justifiable not to discuss DNACPR with them at certain times.

Contrastingly to Mauritzson's viewpoint, Blackburn states that 'distress alone would be insufficient, rather requiring a significantly higher threshold of psychological or physical harm'[47] in order not to discuss DNACPRR with the patient. However, it is arguable this assumption is oversimplified. Determining what constitutes 'significantly higher threshold of psychological or physical harm'[48] is subjective, vague and Blackburn offers no definition to provide clarity on his statement. As Mauritzson asserts, 'when a DNACPR decision is made, the patient should be notified about such a crucial decision'[49] with the caveat that 'this does not put their well-being at risk'.[50] In light of this, there is a more persuasive argument that the main concern should be prioritising the patient's 'well-being'[51] and avoid them suffering any form of distress or harm, regardless of whether it is of 'significantly higher threshold'. This is similar to the legal position following *R (Tracy) v Cambridge University Teaching*

[43] *Gill* (n 13) 317.
[44] ibid.
[45] *Mauritzson* (n 3) 89.
[46] *Groll* (n 15) 194.
[47] *Blackburn* (n 21).
[48] ibid.
[49] *Mauritzson* (n 3) 90.
[50] ibid.
[51] ibid.

Hospitals.[52] DNACPR discussion should involve the patients and there should be 'convincing reasons not to involve them.'[53] If the clinician feels it would cause 'physical or psychological harm'[54] then it is inappropriate for them to involve the patient. This illustrates alignment between the law and ethical debates.

Having deliberated the arguments surrounding distress and harm inflicted upon patients through having these discussions, a further concern is the act of CPR itself. This involves invasive interventions to restart the heart when an individual has a cardiac or respiratory arrest.[55] It is traumatic for patients, relatives, and clinicians. For a clinician to 'find themselves administering violent and intrusive measures that they know are futile'[56] would be contradicting their 'fundamental professional requirement not to harm.'[57] Professional guidance for doctors is provided by the General Medical Council which outlines DNACPR decisions should be discussed with the patient and those closest to them.[58] However, this could be deemed as problematic because there is no professional obligations for clinicians to provide CPR if they do not feel it is in the best interest of the patient.[59] This discrepancy contributes to the tensions and often conflicts involved in the conversations, thus making them more challenging for doctors to have. It is noted that similar concerns have been raised by Dr Pitcher who is chairman of the Resuscitation Council.[60] He claims that by consulting patients will lead to an 'increase in inappropriate and unsuccessful attempts at CPR.'[61] This highlights another limitation of DNACPR discussion and reinforces the argument it is ethically justifiable not to always discuss this with patients as it may cause more harm than good.

At this point it is necessary to address societies expectation of resuscitation. Their perception is distorted because the 'media portrayals tend to encourage many patients to overestimate the success rate and underestimate the invasiveness of CPR.'[62] It is common for people to

[52] *R (Tracey) v. Cambridge University Hospitals NHS Trust* [2014] EWCA Civ 822.
[53] ibid 53.
[54] ibid 54.
[55] *British Medical Association* (n 1) 10.
[56] *Mauritzson* (n 3) 90.
[57] *Blackburn* (n 21).
[58] *General Medical Council* (n 22).
[59] 'DNACPR Notices: Understanding When Consent is Needed' (2022) Nursing Standard <http://journalsrcni-com.liverpool.idm.oclc.org/doi/full/10.7748/ns.37.11.54.s22> accessed 22 November 2022.
[60] *Mauritzson* (n 3) 89.
[61] ibid.
[62] *Gill* (n 13).

recognise defibrillators in most public places, and many have training in CPR. Nevertheless, the challenges faced upon clinicians to navigate these 'delicate issues'[63] are not helped by the demands of the public for resuscitation. As McCartney states 'CPR is becoming fetished.'[64] It makes it harder for clinicians to have these conversations with patients and are 'forced to impart information in a brusque way.'[65] This reiterates that by having these discussions, it could be more harmful to tell patients and relatives. Perhaps to circumvent this issue, public health education is needed to enlighten the realities of CPR and its outcomes. This may offer wider benefits, not just to individuals but to families and doctors. Nonetheless, it is recognised that there are limitations on how this would be executed because some people may not wish to be made aware.

Therapeutic privilege and justice

Doctors withholding information where they believe its disclosure could cause harm to the patient and result in their 'condition deteriorating' is known as 'therapeutic privilege'.[66] Admittedly, therapeutic privilege remains controversial;[67] there are concerns with reference to its morality and clinicians exploiting its use in DNACPR decision making.[68] It is recognised therapeutic privilege should not be used in every case. Notwithstanding, if clinicians determine disclosure would 'pose a serious threat of psychological detriment to the patient' after an assessment, this would excuse them from informing the patient.[69] This denotes a key argument that clinicians using therapeutic privilege in DNACPR discussions is important and necessary depending on the context. 'The risk of upsetting the patient or causing anxiety at the prospect of not being brought back to life in the event of a crisis'[70] would be seen as 'inconsiderate or insensitive behaviour on the part of clinicians.'[71] Accordingly, clinicians appropriately using therapeutic privilege, when loss of life is near, echoes a compassionate manner. Gelhaus affirms the notion that 'if patients do not feel humiliated…it is certainly good and helpful to have compassionate doctors and nurses,

[63] *Mauritzson* (n 3).
[64] *McCartney* (n 28).
[65] *Mauritzson* (n 3) 90.
[66] ibid.
[67] *Mauritzson* (n 3) 91.
[68] ibid.
[69] ibid.
[70] ibid.
[71] ibid.

and…the treatment of the patients is better if a compassionate attitude is involved.'[72] Whilst it may appear unkind to conceal information from patients and relatives, simultaneously it is not compassionate to cause discomfort and force them to endure such an uncomfortable conversation in their last moments of life.

Meanwhile, therapeutic privilege cannot be analysed in isolation to the other four principles. Cave states that therapeutic privilege is not compatible with 'trust and autonomy' but is 'compatible with beneficence'.[73] Whilst there is some grounding to her argument, it is challenging to justify how maintaining patients' autonomy should be at the expense of inflicting harm upon them. Despite her merit, Cave offers contradicting arguments. She suggests that 'trust' is not compatible with therapeutic privilege. Yet, she acknowledges that doctor-patient relationship is founded on the basis patients put trust in medical professionals,[74] thereby arguing therapeutic privilege is at the heart of trust. Doctors deciding for DNACPR and acting in the best interests of the patient encapsulates this trust, with further evidence found in the literature which supports justification of the use of therapeutic privilege.

Cave and Mulheron cogently asserts if, for example, a patient has hypertension or underlying cardiac problems, disclosure of information could result in harm such as heart attack.[75] Additionally, Mulheron also suggests should a patient be 'unstable' or 'severely depressed', disclosure of specific information could 'jeopardize the recovery'.[76] It is submitted when patients are being cared for by doctors, they are in essence, in a position of vulnerability.[77] This notion of therapeutic privilege could therefore be seen as a way to protect patients and not expose their vulnerability.

Further, the concept of therapeutic privilege is complemented by the principle of justice in the context of DNACPR discussion. Clinicians are expected to provide equality in their care

[72] Petra Gelhaus, 'The Desired Moral Attitude of the Physician: (II) Compassion' (2012) 15 Medicine Health Care and Philosophy 401.
[73] Emma Cave, 'The Ill-informed: Consent to Medical Treatment and the Therapeutic Exception' (2017) 46 Common Law World Review 158.
[74] ibid 149.
[75] ibid 159; Rachael Mulheron, 'Has Montgomery Administered the Last Rites to Therapeutic Privilege? A Diagnosis and a Prognosis' (2017) 70 Current Legal Problems 163.
[76] ibid 152.
[77] Emily Jackson, 'Challenging the Comparison in Montgomery Between Patients and 'Consumers Exercising Choices'' (2021) 29 MLR 599.

between patients. There could be this assumption that the use of therapeutic privilege should have equity. It may be seen as unjust to discuss DNACPR with some patients and not with others; everyone should be treated the same and have the same experience. Whilst theoretically it would be ideal to ensure therapeutic privilege was offered to all or none, there may not be opportunity for 'premature discussions of DNACPR…' and 'postponing the discussion may add to the agony of patients and relatives in the dying process.'[78] This highlights difficulty for doctors in clinical practice to apply therapeutic privilege equally. Likewise, it is not fair to make patients suffer emotionally from the discussions, nor fair to make the suffer physically from the damages caused by CPR.

The Liverpool Care Pathway[79] was established with the aim to provide a standardised, equal approach to end of life care across various health care settings. However, in practice it received much criticism for several reasons including communication issues, whereby people were not aware they were on the pathway, lack of training, and misunderstanding and concerns over deliberate hasting of death. In reality, the experience of end-of-life care is different which makes it harder to enforce a consistent, standardised and uniform approach. Hence, clinicians need to consider on a case-by-case basis when therapeutic privilege would be most appropriate in DNACRP discussion and ethically justified.[80]

On a similar note, the notion of distributive justice needs to be considered with regards to resource allocation. With limited staff and increasing pressures on the NHS,[81] it could be said it is unfair for clinicians to spend time performing CPR which is useless and will not prolong life.[82] Whilst the duration of performing CPR has not been defined in the literature,[83] in practice this can be anywhere from a few minutes to several hours depending on the clinical situation. The utilisation of resources needs to be maximised in an already strained and broken system. Perhaps it would be more appropriate for clinicians to focus on more urgent clinical priorities. Whilst this is rather direct, it does offer a pragmatic argument for the justification of therapeutic privilege. To discuss and disclose resource allocation and resource

[78] *Mauritzson* (n 3) 92.
[79] Anthony Wrigley, 'Ethics and end of life care: the Liverpool Care Pathway and the Neuberger Review' (2015) 41 Journal of Medical Ethics 639.
[80] *Cave* (n 73) 144.
[81] Hugh Alderwick, 'Is the NHS Overwhelmed?' (2022) BMJ Online <www.bmj.com/content/376/bmj.o51> accessed 05 January 2023
[82] Tom Walker, 'Ageing, Justice and Resource Allocation' (2016) 42 Journal of Medical Ethics 351.
[83] Alexei A. Birkun, 'The 'Absolute Futility' isn't Absolute: Concerning the Necessity of Reconsideration of Existing Time-Based Criterion for Stopping Resuscitation Attempt' (2020) 16 General Reanimatology 4.

limitations with patients could be considered insensitive and unnecessary. Regrettably, this is the reality of the current UK healthcare system and while it is difficult to change the system, the approach of clinicians in clinical practice can improve resources by not pointlessly discussing DNACPR.

Conclusion

Preserving self-determination over one's own bodily integrity, considers the autonomous patient and their position in detail. Yet through a fundamentally medical decision, the traditional paternalistic approach may be justifiable as it avoids misconceptions of CPR from relatives and patients and offers comfort. Furthermore, the principles of beneficence and non-maleficence have highlighted that perhaps it does more harm than good to patients. Exposing them to these difficult and emotional conversations at a concluding time and informing them of the specific details of CPR is futile, as is the act of CPR itself. Even though the media idealises CPR, it does not mean it is ethically justifiable to perform it.

Although the notion of therapeutic privilege is controversial, its application in relation to DNACPR offers compassion towards the patient and relatives. Also, it denotes preservation to the patient's health if the disclosure could be detrimental. It is acknowledged the treatment and end of life care patients receive should be equal and fair as much as possible. However, the reality is that justice cannot be demonstrated in such a way because of the various circumstances in which patients present, as well as the resources available in an underfunded public healthcare system.

Whether it is ethically justifiable to implement a decision for DNACPR without discussion with the patient remains disputable and contentious. However, this article has endeavoured to provide further clarity on this academic discussion. It is my assertion that there are times when it is acceptable to implement a decision for DNACPR without discussion with the patient and it is ethically justified. The primary motivations for clinicians would be to acknowledge perceptions of harm, avoid causing any form of distress, and adopt a justified paternalistic approach with moral intention. This paper has highlighted these arguments through the standpoint of the four principles as they are universal issues and applicable internationally. Having looked at this, it would also be important to review this argument from different cultural perspectives in further detail. Equity in healthcare is variable internationally in its approach towards DNACPR. Literature from other countries

demonstrates in well developed countries such as USA and Europe,[84] which hold similar professional guidelines and resources to the UK, whereby it is encouraged to discuss with patients. However, countries such as South Africa, Middle East and South America which culturally adopt the viewpoint of doctor knows best and is paternalistic 'rarely' discuss DNACPR with patients.[85] It would be interesting to evaluate the perspective of other countries, and this needs additional analysis.

[84] 'Medical Ethical Guidelines: Decisions on Cardiopulmonary Resuscitation' (Swiss Academy of Medical Sciences 2021) <www.samw.ch/en/Ethics/Topics-A-to-Z/Decisions-on-cardiopulmonary-resuscitation.html> accessed 05 January 2023.
[85] Alexander JO Gibbs, Alexandra C Malyon and Zoe BM Fritz, 'Themes and Variations: An Exploratory International Investigation into Resuscitation Decision-Making.' (2016) 103 Resuscitation 75.

Beyond The Nexus: Empowering Charitable Advocacy Within Legal Boundaries

Julia Andrusiak

Abstract

Charities play a pivotal role in advocating for social change, yet they navigate a complex landscape of legal and regulatory frameworks that both empower and restrict their activities. This paper critically examines the current constraints and opportunities within charity law, focusing on the dual challenges of political activity and donor influence. Despite the essential role of advocacy in fulfilling charitable missions, legal restrictions, as embodied in the Charity Commission's CC9 guidance and the Lobbying Act,[1] create a restrictive environment that often leads to self-censorship among charities. Additionally, the influence of donors, particularly the alignment of their intentions with public benefit, presents a nuanced challenge. The cy-près doctrine's application in adjusting charitable purposes to evolving societal needs is discussed as a mechanism to reconcile donor intent with contemporary social imperatives. Through an analysis of landmark legal cases and legislation, this paper proposes reforms to redefine 'political activity' in charity law, enabling more robust advocacy aligned with charitable missions. It suggests that clarifying legal guidelines and reforming donor influence frameworks could significantly enhance the effectiveness of charities in serving public needs and advocating for policy changes. By addressing these challenges, the paper advocates for a legal and regulatory environment that not only respects but also empowers the critical voice of charities in public discourse and policy advocacy.

Introduction

In the realm of social welfare and public benefit, charities play a fundamental role in addressing pressing societal needs and advocating for positive change. However, the current regulatory and legal framework often poses significant obstacles to their effective functioning, particularly during times of crisis. Ambiguities surrounding political activities and donor intentions further complicate matters, impeding charities' ability to exercise their roles and responsibilities. As we confront the challenges of today's world, such as the ongoing cost-of-living crisis, it becomes increasingly apparent that a more enabling

[1] The Charity Commission, 'Campaigning and Political Activity Guidance for Charities (CC9)' (*The Charity Commission,* Updated 7 November 2022) <www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities> accessed 14 April 2024.

environment is essential for charities to fulfil their missions effectively. This necessitates striking a delicate balance between donors' interests and the pursuit of public benefit, while also embracing a more flexible application of legal principles like the cy-près doctrine. Moreover, it calls for collaborative efforts among policymakers, the public, and the charitable sector to shape a legal and regulatory landscape that empowers charities to be proactive, vocal, and impactful in their efforts. In this context, it is imperative not only to envision but to actively craft a more supportive environment for charities, one that enables them to thrive and contribute meaningfully to the betterment of society.

Political and legal restrictions

Understanding the relationship between charities, campaigning, and political constraints is vital, particularly in navigating the regulatory landscape. The Charity Commission's guidance – CC9,[2] serves as a regulatory cornerstone. Charities play a pivotal role in advocating for societal change, a fact underscored by the SMK Campaigner Survey 2021,[3] where 90% of charities deem campaigning essential for their mission.[4] However, legal limitations pose significant hurdles. Thus, delving into the specifics of CC9 within the broader context of regulatory challenges faced by charities becomes imperative to evaluate its impact on their ability to fulfil their missions effectively**.**

Campaigning lies at the heart of charitable work. Section 3(1) Charities Act 2011 requires UK charities to serve a charitable purpose. However, as expressed in *Bowman v Secular Society Ltd*,[5] a charity cannot be founded with a primary political objective. The current framework allows charities to engage in campaigning and political activities provided they align with their purpose and are reasonable in impact and cost.[6] The case of *McGovern v Attorney General*,[7] has further explained the limitations placed on charities in terms of political activities, meaning to be any activity seeking to alter the laws or persuading a country's

[2] ibid.
[3] Sheila McKechnie Foundation, 'SMK Campaigner Survey 2021: results' (*Sheila McKechnie Foundation*, 18 December 2021) <smk.org.uk/wp-content/uploads/2022/02/SMK-Campaigner-Survey-2021-full-results.pdf> accessed 20 March 2023.
[4] ibid 4.
[5] [1917] A.C. 406, 442.
[6] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.
[7] [1982] Ch 321, 338.

government to alter its policies or administrative decisions.[8] However, Slade J acknowledges an important nuance: charities can use political means to advance their charitable purpose.[9]

Impact of legal restrictions on addressing public crises

The ongoing cost-of-living crisis has led to an increased public reliance on charities,[10] highlighting the importance of an enabling, rather than a disabling, the legal and regulatory framework for these organisations. Recession made charities leaders face new challenges such as risk of financial instability, less donations ultimately fearing for charities dependents.[11] Charities, due to their close work with beneficiaries, are uniquely positioned to understand and highlight policy shortcomings that could be addressed to mitigate social challenges, such as dealing with cost-of-living crisis. Currently, the ambiguity of the CC9 guidance and the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (hereafter the Lobbying Act), create an environment that is arguably more disabling than enabling. It's also crucial to note that the mere 17 reported breaches don't account for the charities that self-censor due to their trustees' decisions.[12] Some organisations may choose to allocate resources away from campaigning to avoid the necessity for legal advice, thus indirectly silencing themselves. The Lobbying Act, regulating charities' engagement in pre-election dialogues, has faced significant critique due to its 'gag effect',[13] which further impedes charities' ability to express their concerns. The act imposes restrictions that might require some charities to register with the Electoral Commission, a year before the elections or referendums, a condition that could frequently ensnare charities given today's volatile political landscape. A review conducted by Lord Hodgson highlights widespread concerns about the act's potential to have a 'chilling effect' on campaigning.[14] It necessitates charities to divert significant resources towards ensuring compliance, rather than focusing

[8] ibid 340.
[9] *McGovern* (n 7) 340.
[10] Charity Link, 'Cost of Living Crisis and the Impact on UK Charities' (*Charity Link*, 11 May 2023) <www.charitylink.net/blog/cost-of-living-crisis-impact-uk-charities> accessed 21 May 2023.
[11] ICAEW Insights, 'Cost-of-living Crisis Hits Charity Sector Hard' (*Institute of Chartered Accountants in England and Wales*, 1 September 2023) <www.icaew.com/insights/viewpoints-on-the-news/2022/sept-2022/costofliving-crisis-hits-charity-sector-hard> accessed 15 April 2024.
[12] Debra Morris, 'Legal Limits on Political Campaigning by Charities: Drawing the Line' (2016) 7(1) Voluntary Sector Review 109, 111.
[13] Anushka Asthana, 'Charities Say 'Gag Law' Stops Them Speaking Out on Tory Social Care Plans' *The Guardian* (London, 29 May 2017) <www.theguardian.com/politics/2017/may/29/charities-gag-law-stops-them-speaking-out-tory-social-care-plans> accessed 15 April 2024.
[14] Lord Hodgson of Astley Abbotts CBE, *Third Party Election Campaigning – Getting the Balance Right: Review of the Operation of the Third Party Campaigning Rules at the 2015 General Election* (Cm 9205, 2016) 6.

entirely on their mission to provide relief in times of crisis. Yet, the existing regulations restrict their ability to do so, pushing them into a reactive role rather than a preventive one.

Ambiguity and the impact of CC9 guidance

The Charity Commission's publication CC9: Guidance on Campaigning and Political Activity provides the most up-to-date guidance on this matter. While the CC9 guidance initially appears to be empowering for charities, its complexity and lack of clarity can create uncertainty. Despite no changes to charity law, charities must carefully evaluate their activities to avoid supporting or being perceived to support political party. The blurred lines between definitions of campaigning and political activity, like 'raising public support for a change',[15] can create confusion. The ambiguity in guidance can make it challenging for charities to raise awareness on pressing issues like the rising cost of food and utilities due to the cost-of-living crisis, without inadvertently straying into the realm of political activity. As there is a degree of overlap between what may be understood as 'charitable' and 'political', adhering to CC9 may prove to be challenging.[16] This problem was clearly evident during the discussions about Oxfam's 'perfect Storm' tweet.[17] Despite Oxfam's intention to highlight UK poverty issues, the Commission concluded that it should have taken extra measures to avoid perceived political bias. Charities must balance their non-political intent with clear messaging to avoid public misinterpretation.

Given that public perception of what is political can vary widely, charities face an additional burden of considering potential public interpretations when conducting campaigns. In theory, the CC9 guidance empowers charities to engage in discussions around political issues. However, the reality is that this often draws criticism from government officials who view

[15] The Charity Commission, 'Speaking Out: Guidance on Campaigning and Political Activity by Charities' (*The Charity Commission*, March 2008), <www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9> accessed 22 May 2023.
[16] Alison Dunn, 'Charity Law as a Political Option for the Poor' (1999) 50(3) Northern Ireland Legal Quarterly 298.
[17] Rob Williams, 'Oxfam 'Perfect Storm' Poster Attacked as 'Shameful' by Conservative Politicians' *The Independent*, (London, 11 June 2014) <www.independent.co.uk/news/uk/home-news/oxfam-perfect-storm-poster-attacked-as-shameful-by-conservative-politicians-9526661.html> accessed 15 April 2024.

charities' political commentary as unnecessary and divisive, and they should instead 'stick to their knitting'.[18]

Additional controversies were displayed when attempt were made to address controversial social-political issues, such as historic slavery ties[19] and white privileges.[20] Charities like The National Trust and Barnardo's were subject to the filing of complaints by the backbench Common Sense Group of Tory MPs,[21] who argued that their blogs were 'ideological dogma'.[22] Although the Charity Commission affirmed their actions were within the legal boundaries,[23] the negative public response might have broader implications, and may give rise to what psychologists call the 'halo effect':[24] a cognitive bias in impression formation whereby the general evaluation of individuals' attributes is based on the evaluation of a single attribute. The 'feared' negative 'halo effect', may might deter charities from fully exercising their rights to further their charitable purpose. These examples highlight the difficulties charities encounter when navigating socio-political discourse, even when it is relevant to their mission. This caution limits their ability to highlight key policy shortcomings that could potentially benefit their beneficiaries.

Charities at a crossroads: Navigating regulatory challenges

Despite the overwhelming consensus among charities regarding the importance of advocacy, regulatory constraints persist. This is evidenced by findings from the SMK Campaigner

[18] Rowena Mason, 'Charities Should Stick to Knitting and Keep Out of Politics, Says MP' *The Guardian* (London, 3 September 2014) <www.theguardian.com/society/2014/sep/03/charities-knitting-politics-brook-newmark> accessed 21 May 2023.
[19] National Trust, 'Interim Report on the Connections between Colonialism and Properties now in the Care of the National Trust, Including Links with Historic Slavery' (National Trust, September 2020) <http://nt.global.ssl.fastly.net/binaries/content/assets/website/national/pdf/colonialism-and-historic-slavery-report.pdf> accessed 15 April 2024.
[20] Barnardo's, 'How Systemic Racism Affects Young People in the UK' (*Barnardo's*, 21 July 2020) <www.barnardos.org.uk/blog/white-privilege-guide-for-parents> accessed 21 May 2023
[21] Tim Bale, 'The Tory 'War on Woke' has a Manifesto – and its Targets are Crushingly Familiar' *The Guardian* (London, 25 May 2021) <www.theguardian.com/commentisfree/2021/may/25/tory-war-on-woke-manifesto-common-sense-group> accessed 15 April 2024.
[22] Molly Blackall, 'Barnardo's hits back at Tory MPs upset by talk of 'white privilege' *The Guardian* (London, 5 December 2020) <www.theguardian.com/world/2020/dec/05/barnardos-hits-back-at-tory-mps-upset-by-talk-of-white-privilege> accessed 15 April 2024.
[23] Patrick Butler, 'National Trust Report on Slavery Links Did Not Break Charity Law, Regulator Says' *The Guardian* (London, 11 March 2021) <www.theguardian.com/uk-news/2021/mar/11/national-trust-report-uk-slavery-links-did-not-break-charity-law-regulator-says> accessed 21 May 2023.
[24] Richard E. Nisbett and Timothy D. Wilson, 'The Halo effect: Evidence for Unconscious Alteration of Judgments' (1977) 35(4) Journal of Personality and Social Psychology 250.

Survey 2021,[25] which revealed that 90%[26] of charities view campaigning as vital for their mission, and 98%[27] believe they should be able to advocate for changes in policy, law, and societal attitudes. Harding's examination of the Australian case *Aid/Watch Inc. v. Commissioner of Taxation*,[28] underscores the public good inherent in a culture of free political expression and democracy,[29] highlighting the necessity of reassessing doctrines against political purposes, given its shaky foundation and its potential to stifle necessary dialogue.[30] Despite scholarly perspectives, the legal and regulatory framework for charities has remained unchanged, contributing to a prevailing sentiment expressed by 96% of respondents[31] – that there are formal or informal threats to the freedom to organise, speak out, or protest, effectively creating a 'gag' on charities. The potential repercussions of engaging in politically relevant issues, even when aligned with their charitable purpose, are exemplified by cases like the National Trust and Barnardo's. These organisations faced negative media backlash and risked a potential loss of donations due to perceived political motivations. This loss of public support, particularly during the cost-of-living crisis, intensifies charities' concerns for both their beneficiaries and their own financial stability. Even a slight risk of losing public support or risking a public relations crisis can have real consequences. With 58% of charity leaders expressing worry about financial sustainability,[32] the reluctance to engage in active campaigning is exacerbated, further impeding their effectiveness in addressing pressing societal issues.

While regulations are necessary to prevent undue influence, the current regulatory framework appears to stifle necessary dialogue more than it prevents potential abuses. Therefore, it's imperative to reassess the foundations of the political purpose doctrine and advocate for necessary modifications. Charities may find themselves unable to advocate for the beneficiaries they represent due to stifling regulations, relegating them to a reactive role rather than being proactive agents in addressing and preventing societal challenges. The shift towards a remedial role for charities may result in unprecedented pressure, potentially leading to tragic consequences such as the inability to assist beneficiaries. There is

[25] *Sheila McKechnie Foundation* (n 3).
[26] ibid.
[27] ibid.
[28] [2010] HCA 42 (HC Aus).
[29] Matthew Harding, 'Political Purposes' in Charity Law and the Liberal State (Cambridge University Press 2014) 191.
[30] Matthew Harding, 'An Antipodean View of Political Purposes and Charity Law' (2015) 131 LQR 181.
[31] *Sheila McKechnie Foundation* (n 3) 5.
[32] *Charity Link* (n 10).

data to support this concern, revealing in February 2023 that 57%[33] of respondents reported increased demand for services in comparison to the previous year. Notably, 12%[34] of respondents admitted to turning claimants away, and 41%[35] were forced to direct service users to other struggling organisations. These findings highlight the urgent need for modifications to the political purposes doctrine and emphasise the potentially tragic consequences of maintaining the status quo. Persistence in this trend poses significant risks, such as the creation of a generation of people who have nowhere to turn for assistance.

The current framework silencing charitable voices not only undermines their mission but also hinders progress in addressing critical societal challenges. Therefore, it is crucial to enable charities to effectively serve the public through both relief provision and policy advocacy by creating a framework where not only charities feel empowered to advocate without fear of reprisal but are also empowered to directly engage with policymakers, drawing upon their invaluable frontline experience to represent the most vulnerable. By providing firsthand insights into the consequences of current public policy, they can effectively advocate for their beneficiaries. Therefore, it's time to reassess the foundations of the political purposes doctrine and suggest necessary modifications.[36]

Redirecting charitable advocacy away from semantic debates

To truly advance beyond Slade J's delineation of political activity as outlined in *McGovern v Attorney General*, we need to move beyond the inclination to get caught up in semantic arguments that divert attention from acknowledging the fundamental principles of human rights law. This fixation on defining the limits of political involvement often results in a weakening of Human Rights core principles, as demonstrated throughout history by debates surrounding issues like banning child labour,[37] the suffrage movement,[38] and slavery

[33] Charities Aid Foundation, 'Charity Resilience Index' (*Charities Aid Foundation*, February 2023) <www.cafonline.org/insights/research/charity-resilience-index> accessed 15 April 2024.
[34] Charities Aid Foundation, 'Charities Forced to Turn People Away Due to Entrenched Financial Challenges' (*Charities Aid Foundation*, 9 October 2023) <www.cafonline.org/about-us/press-office/charities-forced-to-turn-people-away-due-to-entrenched-financial-challenges> accessed 15 April 2024.
[35] ibid.
[36] Hilary Biehler, 'The Political Purposes Exception: Is There a Future for a Doctrine Built on Foundations of Sand?' (2015) 3(1) Trust Law International 97.
[37] Nuno Ferreira, 'Working Children in England and Wales: Waking Up from Inertia' (2017) 28(3) King's Law Journal 381.
[38] Julia Bush, 'The Women's National Anti-Suffrage League' in *Women Against the Vote: Female Anti-Suffragism in Britain* (OUP, 2017).

abolition.[39] Rather than concentrating on immediately stopping exploitative practices or acknowledging inherent human dignity, conversations frequently deteriorate into moral debates or economic justifications, thus avoiding the essential principles at stake. Such an effort at deflection is often conspicuously self-serving and serves as a prime example of 'the last refuge of repression'.[40] The repression experienced by charities manifested through mechanisms like the gag reflex and lack of advocacy, ultimately stifles the voices of struggling ordinary citizens. These restrictions serve as a clear example of how the government's actions inhibit the crucial work of these organisations, impeding their ability to advocate for and address pressing societal issues.

In our aspiration an inclusive society, it's essential to remember Karl Popper's paradox[41]: tolerance cannot accommodate those seeking to undermine it. This includes recognising that while human rights grant freedoms to all, we must steadfastly uphold their universal application without engaging in debates that risk eroding their foundational principles. This entails allowing charities to openly advocate for the advancement and implementation of human rights, shifting the responsibility from mere silence to the obligation of MPs and governments to uphold human rights as per ratified declarations.

Pragmatic Reform: Enhancing Charitable Advocacy within Existing Legal Frameworks

Oxfam's 'Perfect Storm'[42] tweet serves as a compelling illustration of the challenges charities face, especially concerning addressing social issues. Oxfam's tweet originally intended to draw attention to the causes of poverty in British society, however, still was deemed to be political by MP Conor Burns.[43] This situation highlights the consequences of the failure to include significant legal developments in CC9 Guidance, such as the clarification offered in *Human Dignity Trust (HDT) v Charity Commission,*[44] despite the most recent CC9 update being dated November 2022. This case established the charities' ability for constitutional litigation aimed at challenging legislation incompatible with previously ratified international Human rights treaties. Consecutive UK governments have continuously signed and ratified

[39] Srividhya Swaminathan, 'Adam Smith's Moral Economy and the Debate to Abolish the Slave Trade' (2017) 37(4) Rhetoric Society Quarterly 481, 493.
[40] Michael J. Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters' (1997) 19(3) Human Rights Quarterly 461, 494.
[41] Karl Popper, 'Notes to Volume I' in *The Open Society and Its Enemies* (Princeton University Press 2021) 514, 582.
[42] *Williams* (n 17).
[43] ibid.
[44] [2015] WTLR 789, paras 112-113.

many various international human rights conventions, most notably the Universal Declaration of Human Rights (UDHR)[45] and the International Covenant on Economic, Social and Cultural Rights,[46] recognising and upholding the right to social security. The date of entry into force of UDHR dating back to 1953, further signifies the importance of legal adherence to the treaties.

Advocating for social security aligns with both foundational values and legal obligations underpinning the UK's legal order. Therefore, the current landscape is astounding, knowing that charities' rights were extended and given the ability to challenge legislation, however, Oxfam has been scrutinised for demonstrating the impact of policy on the most vulnerable.[47] However, pursuing legal action to recognise and enforce principles introduced in *HDT* presents challenges, particularly regarding the allocation of resources and potential ramifications. While nationwide charities may possess the capacity, diverting resources towards legal battles risks detracting from direct assistance to beneficiaries and sparking public debate about charities' priorities. Moreover, lengthy legal proceedings further complicate matters and delay potential outcomes.

The urgency of advocacy for vulnerable populations is exacerbated by external pressures such as the pandemic and socioeconomic crises. The role of charities in filling gaps left by the dismantling of the welfare state underscores the need for proactive engagement in legal and advocacy efforts. However, due to the severity of the current crisis and the increased social reliance on the third sector, the charitable sector may be reluctant to undertake action, due to prioritising their commitment to help the most vulnerable. Resulting in leaving charities trapped in a cycle of increasing demand and limited powers to fully exercise their campaigning rights. Addressing this dilemma requires a re-evaluation of the definition of political activity within the charitable framework. Charities would gain transparency and the ability to pursue their missions without concern for consequences, if there were advertised clarity that advocating for human rights within the bounds of ratified treaties does not equate to political activity.

[45] (adopted 10 December 1948) Res 217 A(III) (UNGA) art 22.
[46] (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR), art.9.
[47] James Chapman and Matt Chorley, 'Oxfam Criticised for Advert Attacking the Government for Creating 'Perfect Storm' to Force More People into Poverty.' (*Daily Mail*, 11 June 2014) <www.dailymail.co.uk/news/article-2653971/Oxfam-criticised-advert-attacking-government-creating-Perfect-Storm-force-people-poverty.html> accessed 17 April 2024.

Ultimately, supplementing CC9 with the latest developments of *HDT*,[48] with explicit recognition of the non-political nature of advocating for ratified human rights treaties, would facilitate meaningful change. By embracing this approach, the third sector can navigate legal constraints while advocating for the long-term well-being of those whom they serve, leaving the 'remedial' role behind, ensuring the full ability to exercise all legal means to meaningfully further their charitable purpose.

Donor influence and the need for balance

In today's charitable landscape, donors wield significant influence in shaping philanthropic endeavours. Everyday donors contribute altruistically to existing charities, providing vital resources to address societal needs. Meanwhile, wealthy individuals, through substantial gifts and the establishment of their own charities, not only contribute resources but also shape the purposes and missions of their philanthropic endeavours. However, regardless of the donor's status, all are bound to follow the charitable purpose of their contributions, even as circumstances evolve. Thus, while both every day and wealthy donors play crucial roles in advancing societal welfare, the latter's ability to establish charities adds complexity to balancing donors' intentions with the broader public benefit. Consequently, there arises a compelling necessity for a broader application of the cy-près doctrine, enabling courts to adapt charitable purposes to ensure optimal utilisation of funds while respecting donors' wishes.

Within the realm of charitable giving, donors come in two distinct forms: ordinary individuals who contribute to existing charities, and wealthy benefactors who, through the creation of charitable trusts, tie their donations to purposes they see fit, thereby establishing enduring legacies. The perpetual existence of charitable trusts[49] creates a dichotomy within legal structures, as they are distinct in their capacity to endure indefinitely compared to most other entities. On one hand, it facilitates the preservation of longstanding organisations like The Henry Smith Charity,[50] which have broad aims that remain relevant over time. On the other hand, it could be deduced that the current framework of these trusts is inherently

[48] *Human Dignity Trust* (n 44).
[49] *Re Faraker* [1912] 2 Ch 488.
[50] Henry Smith Charity, 'About Us' (*Henry Smith Charity*) <www.henrysmithcharity.org.uk/about-us/> accessed 22 May 2023.

designed to enable the deeply rooted desire of donors to project their character and values into the future,[51] often taking precedence over the charities primary objective: serving the public.

The complexities of donor-imposed conditions

This state of perpetuity has begun to raise policy questions, underlining the inefficiency of the rigid framework in place. Report of the Committee on the Law and Practice relating to Charitable Trusts[52] brought up the necessity for change, emphasising the balancing act between efficiency and honouring donors' wishes. This dichotomy raises an important question: where are the boundaries of respect for donors' wishes when considering the overarching aim of creating a charity that benefits society? While it's true that donors should retain some discretion over their wealth and its posthumous use, excessive emphasis on this aspect could potentially lead to counterproductive outcomes. Respect to honour post-mortem wishes is necessary as it ensures that donors do not get discouraged, whether they decide to donate.[53] Nevertheless, 'charity' does not 'refer to a warm mushy feeling' but instead derives from sacrificial action.[54] Despite this, judges had been carrying the donor's intention into the effect,[55] despite it being "of the most useless description"[56]. Some donors might stipulate highly specific[57] or even discriminatory conditions,[58] limiting the pool of beneficiaries and the broader social impact. Despite well-intentioned donors, the power to direct vast wealth towards personal causes challenges democratic values.[59] Lacking public spending accountability and susceptible to biases stemming from the negative halo effect, coupled with a limited understanding of systemic needs, this approach frequently results in inefficiency.[60]

Balancing donor intentions with public benefit

[51] John Picton, 'Regulating Egoism in Perpetuity' in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart 2020) 53.
[52] *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmd 8710, 1951).
[53] *Picton* (n 51).
[54] Ben III Witherington, 'John's Wisdom, A Commentary of the Fourth Gospel' (The Lutterworth Press 1995) 247-248.
[55] *Attorney General v Zedra Fiduciary Services Ltd* (UK) [2020] EWHC 2988 (Ch).
[56] *Philpott v Saint George's Hospital* (1859) 27 Beav 107, 112.
[57] *Peggs v Lamb* [1994] Ch 172.
[58] *Re Dominion Students' Hall Trust* [1947] Ch 183.
[59] John Picton, 'Forget Mark Zuckerberg's Charity – We Need Corporate Tax Reform' (*The Conversation*, 11 December 2017) <http://theconversation.com/forget-mark-zuckerbergs-charity-we-need-corporate-tax-reform-88804> accessed 22 May 2023.
[60] ibid.

Charitable giving, aside from ensuring post-mortem remembrance, has also become a commodity and social attraction. PO Lawrence J pointed out that a donor might purchase a ticket to support a cause or simply to attend an event or compete for a prize.[61] Arguably law accommodated that exchange of goods – a charity for donors' pleasure. As seen in rulings by PO Lawrence J[62] and Lord Denning,[63] judges have also interpreted charitable giving in a less altruistic sense. This reframes charity from selfless giving to self-serving consumerism, challenging traditional understandings of charity. While there is a tendency to respect donors, legislation works to curb related inefficiencies. Section 62 and 67 of CA 2011 were introduced to empower judges in broadening charitable purposes, aiming to prevent the inefficient use of the resources.

Reform proposal: Enhancing efficiency of charitable trusts

Considering the judicial tendency to uphold donors' preferences, there's an opportunity for supplementary guidance to promote a broader interpretation of charitable purposes. This could lead to a more efficient application of cy-près doctrine and the optimal utilisation of resources. As proposed by Mill,[64] a balance could be struck between donors' self-centred interests and the requirements of those in need, allowing charitable trusts to serve donors' wishes for a limited time before revising the purpose for better fund efficiency. Such an approach would prevent resources from becoming indefinitely tied up in narrowly defined trusts, enabling redirection towards urgent matters like improving the lives of the most vulnerable affected by the cost-of-living crisis.

The cy-près scheme allows courts to alter the charitable purpose to ensure the donated funds are used efficiently, while still taking the donor's wishes into account.[65] Despite the leeway to modify the purposes, the scheme is still not liberal enough to prevent inefficient use of resources. This issue is evident in cases like *Zedra,*[66] which concerned the National Fund, a charity set up in 1928 by a donor of £500,000 with the aim of investing and accumulating the income of the fund until it, together with other hoped-for donations, would be large enough to discharge the National Debt. Following the cy-près guidelines in the CA 2011, the donor's

[61] *Re Welsh Hospital (Netley) Fund* [1921] 1 Ch 655, 660.
[62] ibid.
[63] *Re Hillier's Trusts* [1954] 1 WLR 700, 714 (CA).
[64] John Mill, 'Endowments' in John M. Robson (ed), *The Collected Works of John Stuart Mill Volume IV: Essays on Economics and Society Part II* (The University of Toronto Press 1824) 615.
[65] Charities Act 2011, s 62(2)(a-b).
[66] *Zedra* (n 55).

wishes were fully respected, even though accumulated £500 million is still a tiny fraction of the National Debt. Nonetheless, courts have altered the charitable purposes when they deemed it appropriate.[67] The combination of perpetuity and court decisions to uphold donors wishes, even when benefiting a limited public, restricts resources that could address current urgent faced by the public. The ongoing crisis has resulted in an increased reliance on the third sector,[68] necessitating a flexible application of the cy-près scheme to optimise resource distribution. Many of these legacy trusts were created when wealth was concentrated in the hands of beneficiaries of colonialism[69] and early unregulated capitalism, which have since generated substantial profit.

These funds, however, remain locked into furthering the wishes of long-deceased individuals who bear no relation to our current society. Even as timeless challenges like poverty persist, the dynamic landscape of a globalised and digitalised society introduces novel hurdles. The charitable purpose limitations of legacy trusts, however, hinder their efficacy in dealing with challenges unique to current times. However, if cy-près would become too flexible, there's a danger of overconcentration of resources towards a single crisis, resulting in other causes to lack funds. Introduction of new guidelines available to judiciary, could prevent funds from being indefinitely tied up in narrowly defined trusts and allow for resources to be redirected to address pressing issues.

Conclusion

In navigating the complexities of the charitable sector's regulatory landscape, it becomes apparent that significant reform is necessary to empower charities to fulfil their crucial roles effectively. From grappling with political restrictions, donor influence, and ambiguities in legal guidance to addressing the inefficiencies of charitable trusts and doctrines like cy-près and political purposes, numerous challenges hinder the sector's ability to address pressing societal needs. The influence of wealthy benefactors further complicates matters, necessitating a re-evaluation of existing legal frameworks.

[67] *Re Welsh Hospital* (n 61); *Varsani v Jesani* [1999] Ch 219.
[68] *Charity Link* (n 10).
[69] Rhodes Trust, 'Legacy, Equity and Inclusion', (*Rhodes House*) <www.rhodeshouse.ox.ac.uk/impact-legacy/legacy-equity-inclusion/> accessed 22 May 2023.

By reassessing doctrines, promoting pragmatic legal reforms, and shifting focus towards fundamental principles of human rights law, the sector can navigate these obstacles and advocate for meaningful change. Enhancing the efficiency of charitable trusts by promoting a broader interpretation of charitable purposes and adapting the cy-près doctrine are integral steps towards ensuring optimal resource utilisation and adaptability to current societal needs. Essentially, the need for reform echoes throughout these discussions, emphasising the crucial importance of establishing a regulatory framework that enables charities to flourish and make substantial contributions to societal advancement. Incorporating reforms in the current climate is paramount, enabling charities to advocate for the most vulnerable and empowering courts to broaden charitable purposes, thus allowing the ‘helping hands’ of the third sector to assist those most in need.

Liverpool's Legacy: Role, Abolition and Prevention of Slavery

Rachel Christie

Abstract

To the superficial eye, the city of Liverpool is a hub of culture, art, and rich history. Named the European Capital of Culture in 2008, just years after achieving UNESCO World Heritage Site Status, Liverpool has undergone a notable the cultural renaissance in recent years.[1] However, over 200 years since its abolition, the Transatlantic slave trade leaves a dark stain on Liverpool's extraordinary history. The slave trade involved the capture and forcible transportation of individuals from across West Africa to the Americas, where they were enslaved. By the late 18th century, Britain was the biggest slave trading nation, with ships from Liverpool forming an important part of the slave routes as a port city. As will also be explored, the more subtle forms of modern slavery today usually involve exploitation, coercion and a loss of freedom. These often manifest through human trafficking, forced labour in domestic industry, forced marriage and sexual objectification (particularly of young women and children).[2] Although the slave trade is far removed from modern slavery persisting today, this article will contend that accountability and education are necessary as we remember our colonial pasts and work towards a society where modern slavery cannot exist.

Introduction

As a noteworthy port city, it was estimated that the city of Liverpool was responsible for the transportation of over 300,000 African people into slavery. Additionally, one of Liverpool's own Mayors, William Gregson, was a leading figure contributing to the death of over 9,000 enslaved people in the Zong Massacre, 1781, where people were thrown overboard a ship in a deliberate mass killing.[3] This article will consider the role of Liverpool in the slave trade from a socio-legal perspective, drawing upon Liverpool's ensuing contribution to abolition. Focus will be placed upon Liverpool's links to the Zong litigation, its populational reliance upon slavery, and its ongoing visible links to the slave trade as seen in remaining street names, statues and as evidenced in the Slavery Museum. Subsequent analysis will focus on

[1] Tamara West, 'Liverpool's European Capital of Culture legacy narrative: a selective heritage?' (2022) 30(3) European Planning Studies 534.
[2] Anti-Slavery International, 'What is Modern Slavery?' (*Anti-Slavery Org*, 1 September 2022) <www.antislavery.org/slavery-today/modern-slavery/> accessed 21 February 2024.
[3] James Walvin, *The Zong: A Massacre, The Law, and The End of Slavery* (Yale University Press 2011) 56.

the contemporary laws on modern slavery, such as that of the Modern Slavery Act, ultimately proposing that policy changes and raising of public awareness is needed to preclude the recurrence of colonial oppression of any form.

Liverpool's reliance on slavery as a means of profit

By the late 18th century and as a result of the slave trade, Liverpool's ports were infused with shipments full of commodities such as coffee, cotton, rice, tobacco, sugar, and timber.[4] These goods, acting as sustenance for Liverpool's residents, marked only the remnant, end product of the brutal hours of slave labour undertaken by those who were enslaved. 'Enslaved people' or 'slaves', however, are reductive terms. To summarise the exploitation of mothers, fathers, husbands, wives and loved ones to such a label, strips them of their rightful identities. However, ironically, as recognised by Lord CJ Mansfield in a trial following the Zong massacre, the enslaved men, women and children did not have legal personhood.[5] Mansfield equated enslaved individuals to cargo in how they were treated, drawing an analogy to horses. This deprived them of basic legal rights such as entering contracts, holding obligations, and enjoying certain legal competences. Following the trial, an insurance company was found liable for damages due to the loss of 'cargo' resulting from the massacre. A notable sticking point for survivors of the slave ship 'Amistad' was the absence of legal personhood – "All we want is to make us free".[6]

Whilst it has been attested that activity regarding the Slave Trade first began in Portugal, [7] Wallace J recognised Liverpool's population contributed substantially to the Trade, stating that by 1795, "Almost every man in Liverpool [was] a merchant, and he who cannot send a bale will send a band-box… almost every order of people [were] interested in a Guinea cargo".[8] This emphasised the true sense of dependence that Liverpool had on the slave trade, a key component in the industrialisation of Britain over the 17-19th centuries. In fact,

[4] Daniel Pratt Mannix, *Black cargoes; a history of the Atlantic slave trade* (9th edn, Viking Press 1962).
[5] Catherine Baksi, 'The Story of The Zong Slave Ship: A Mass Murder Masquerading as an Insurance Claim' (*The Guardian*, 19 January 2021) <www.theguardian.com/law/2021/jan/19/the-story-of-the-zong-slave-ship-a-mass-masquerading-as-an-insurance-claim> accessed 28 September 2023.
[6] Benjamin Lawrence, 'The Voyage of Amistad's Children Through the Worlds of the Illegal Slave Trade' (*National Museums Liverpool*, 1 January 2009) <www.liverpoolmuseums.org.uk/transcript-of-all-we-want-make-us-free> accessed 29 September 2023.
[7] David Evans, 'The Chocolate Makers and the "Abyss of Hell": Race, Empire and the Role of Visual Propaganda in the Anglo-Portuguese Controversy surrounding Labour Coercion in the "Cocoa Islands" (1901 - 1917)' (2014) 41(1) British Historical Society of Portugal Annual Report.
[8] Brian Howman, 'Abolitionism in Liverpool' in David Richardson, Suzanne Schwarz and Anthony Tibbles (eds), *Liverpool and Transatlantic Slavery* (Liverpool University Press, 2007) 277.

Liverpool continued to prosper from its profits long after cutting its ties to slavery in the Slave Trade Act 1807.

Incremental change: from pamphlets to papers

Given the various benefits to the city of Liverpool, the realisation that legal action was needed to address the slave trade did not gain significant momentum until the latter half of the 18th century. A notable event was the formation of the 'Society for the Purpose of Effecting the Abolition of the Slave Trade', formed in May 1787, which had prominent members in Liverpool.[9] Composed of radical middle-class idealists, the Society set out to campaign for the abolition of the Slave Trade in Britain. Both its Quaker and non-quaker members worked towards raising Parliamentary awareness by gathering evidence of atrocities and lobbying for the enactment of legislation to abolish such conduct.

However, in the approach to the much-awaited primary legislation that would declare the slave trade an act of piracy that is punishable by death, we must also not forget the prominent campaigners in Liverpool whose insistence slowly began to shift *public opinion* over the decades.[10] Working tirelessly in their efforts to change the law as to slavery, it was the works of early abolitionists such as William Roscoe, who wrote poetry and pamphlets whilst supporting the 1807 Act of Parliament which would abolish the slave trade on which the prosperity of Liverpool was so strongly reliant. It was also Roscoe who backed William Wilberforce's formal motion to withdraw from the trade, following Roscoe's brief election as a Member of Parliament (1806). It is in this way that the 'superficial eye', as aforementioned, would neglect to realise the depth of legal history looming in Liverpool's streets (such as Roscoe Street, as it was fittingly named).

However, whilst Liverpool 'spearheaded' Parliamentary campaigns to the Commons and Lords (sending exactly 50 more petitions than London's merchants),[11] it seems that Liverpudlians did so to realign their views with the rest of Britain in order to restore cultural relations. It was through the active and passive resistance of people of colour, societal campaigns, and the works of formerly enslaved people, that led to the socio-legal change with

[9] GM Ditchfield, 'Society for the Purpose of Effecting the Abolition of the Slave Trade' *The Oxford Dictionary of National Biography* (2007) <http://doi.org/10.1093/ref:odnb/92867> accessed 22 November 2023.
[10] The Slave Trade Act 1824.
[11] FE Sanderson, Liverpool and the Slave Trade: A guide to Sources (1989) Liverpool Slave Trade 196.

regards to slavery. The museum of Liverpool has documented the writings of Frederick Douglas, a key campaigner who escaped from slavery himself and travelled around Britain and Europe to share his story.[12]

It is clear therefore that the Transatlantic slave trade remains embedded within the city's architecture, many of its street names, and previously Liverpool University's own halls of residence in Greenbank being named after a Prime Minister with a strong slave-holding ideology.[13] Whilst most would know Liverpool's Bold Street for its vibrant and bustling atmosphere, its sombre history remains largely unknown to the general populace.

Laws on slavery today

Fast-forwarding to the present day, the legacy of the abolitionist struggle has left an indelible mark on current laws pertaining to slavery in the UK today. Modern law holds a strong position as to anti-slavery; ECHR Article 4 prohibits slavery and forced labour as an unqualified right. However, in spite of the existence of criminal and human rights law outlawing slavery, merely making slavery illegal does not eradicate it in its entirety. The Government's 2021 UK Annual Report on Modern Slavery noted that in 2020, the National Referral Mechanism identified 10,613 potential victims of modern slavery.[14] Whilst this is a figure very similar to previous years, the lack of increase is primarily thought to be a result of the COVID-19 pandemic and its national-scale restrictions on contact and travel. The report's shocking conclusions would suggest that although Liverpool, much like the rest of the UK, has overtly cut its ties to the slave trade, slavery is still an underlying problem in our society. The legacy of the slave trade has meant that slavery presents differently in modern Liverpudlian society, such as physical and sexual exploitation, despite being 'abolished' and denounced by law.

However, the Transatlantic slave trade can be distinguished from modern slavery, given that the former was involved with chattel slavery – where slavers legally enjoyed full ownership of enslaved people. Since then, society has progressed, and the denunciation of such conduct

[12] National Museums Liverpool, 'Abolition of the Transatlantic Slave Trade' (*National Museums Liverpool*, 2012) <www.liverpoolmuseums.org.uk/history-of-slavery/abolition> accessed 29 September 2023.
[13] Max Clements, 'University Will Rename Student Halls Named After Former Prime Minister William Gladstone' (*Liverpool Echo*, 9 June 2020) <www.liverpoolecho.co.uk/news/liverpool-news/university-rename-student-halls-named-18387566> accessed 1 December 2022.
[14] Home Office, *UK Annual Report on Modern Slavery* (2021) <www.gov.uk/government/publications/2021-uk-annual-report-on-modern-slavery> accessed 1 October 2023.

is now well established in contemporary society, as modern slavery in any form is now illegal, as outlined in recent law. Presently, many are born into slavery, whilst others have been lured into human trafficking (where a "person arranges or facilitates the travel of another person (V) with the view to V being exploited", regardless of V's consent to the travel).[15] Further, whilst victims of slavery can be of all genders, ethnicities and nationalities, recent UK Government reports suggest that it is more prevalent among minority groups (such as people of colour, as was the case in the Transatlantic slave trade).[16] This could suggest that the law is inadequate in its protection of people of colour, creating the need for awareness to be raised; Liverpool's historical foundation is intricately linked to the Transatlantic slave trade, meaning the enduring echoes of these distressing events persist in the fabric of our streets today.

Consequently, there exists a critical imperative to raise public awareness of this history. One pivotal strategy could involve extending a duty of care on all businesses to implement policies to eliminate modern slavery, with a focus particularly on denouncing labour exploitation as a primary legal safeguard. In tandem with these legal reforms, a comprehensive strategy for raising more awareness is essential. Embedding historical context into the city's landscape, such as affixing plaques to street signs, would serve as a tangible means to inform citizens of Liverpool's shocking legal history. This measure not only fosters accountability but also ensures remembrance of those who suffered at the hands of such despicable events.

The Modern Slavery Act

Liverpool Council's formal apology for the city's role in the trade in 1999, and the enactment of the Modern Slavery Act 2015, have demonstrated the UK's efforts, and have set a practical example to which other jurisdictions around the world may aspire. The Act has been praised for its increased number of potential victims being identified and protected, its increased awareness on the topic raised for both judicial actors and for society, and for its contribution to increasing the number of police investigations as a reactive and proactive tool to tackling slavery. However, following the implementation of the Act, several academics have likened

[15] Modern Slavery Act 2015, ss 2(1) and 2(2).
[16] Home Office, 'What is Modern Slavery?' (*ModernSlavery.Co.Uk*, 2014) <assets.publishing.service.gov.uk/media/5a821c2ae5274a2e87dc1317/What_is_Modern_Slavery_NCA_v1.pdf> accessed 1 October 2023.

the ending of governmental support via the National Referral Mechanism (NRM) for the victims of modern slavery as similar to 'falling off a cliff'[17] – many are left uncertain as to how/if their needs will be sustainably supported. Whilst those identified as potential victims under the current system are allocated safe-housing, in addition to a 45-day 'reflection and recovery period'[18] under the NRM, following this period, victims may be assisted to return to their home countries, casting doubt on the NRM's ability to protect victims as they are not guaranteed leave to remain in the UK.

Another initiative to reform contemporary slavery legislation involves the creation of an independent Anti-slavery Commissioner, tasked with the role of prevention and prosecution of modern victims. This seemingly places the UK on better footing in its commitment to ending slavery. However, the array of recent measures may neglect the importance of *protecting* victims of slavery, as they tend to prioritise the prosecution of exploitative crimes over the safety of those who have been enslaved.

Conclusions

Liverpool's illustrious history has been shadowed by its deep-rooted connection to the Transatlantic slave trade. Whilst the city and its notable inhabitants have made substantial progress towards eradicating slavery (whilst ensuring accountability for the appalling events of the slave trade), it argues that there is much to do to address the largely forgotten legacy left behind by slavery.[19] With a focus on practical creation of policies and enhancing public awareness, this article has highlighted that it is essential as a university and as a city, that we must continue to educate ourselves and younger generations as to the dangers of modern slavery, remembering our ancestors' pasts whilst ensuring that our colonial history cannot repeat itself.

[17] Christine Beddoe, Lara Bundock and Tatiana Jardan, 'Life Beyond the Safe House for Survivors of Modern Slavery in London: Gaps and Options Review Report' (*Human Trafficking Foundation*, 2015) 22-23 <www.humantraffickingfoundation.org/s/Life-Beyond-the-Safe-House.pdf> accessed 2 October 2023.
[18] Home Office, *National Referral Mechanism Guidance: Adult (England and Wales)* (Updated May 2024) <www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales> accessed 17 September 2024.
[19] Paul Coslett, 'Liverpool's Slavery Apology' *BBC* (Liverpool, 15 February 2007) <www.bbc.co.uk/liverpool/content/articles/2007/02/15/abolition_liverpool_apology_feature.shtml> accessed 22 November 2023.

Going Out on A Limb for Body Integrity Identity Disorder (BIID) Individuals: Is It Ethically Justifiable to Provide an Individual with BIID Elective Limb Amputation?

Tamanna Zaman

Abstract

The desire to amputate a seemingly healthy limb is a concept that is inherently 'bizarre' but one that in reality is experienced by individuals suffering with Body Integrity Identity Disorder (BIID). While the pathophysiology of the condition is unclear, its management with requests by BIID sufferers for therapeutic amputations in particular has garnered considerable controversy. The notion of elective amputation as a method of treatment raises moral discomfort given its irreversible disabling nature yet, it is evident that ultimately, the issues are one of perception. As such, through the utilisation of Beauchamp and Childress' four principles framework,[1] this essay will refute the misconceptions that are primarily associated with the condition in order to disrupt the reluctance that elective amputation is faced with. In doing so, the negative narrative of this 'bizarre' desire will be reversed with the proposition that the provision of elective amputation of a limb albeit healthy can be ethically justified in circumstances of BIID where it is in the individual's best interests.

Introduction

Body Integrity Identity Disorder (BIID), characterised by an 'intense and persistent desire to become physically disabled in a significant way'[2] is a condition whereby an individual seeks to 'address a non-delusional incongruity between their body image and their physical embodiment'.[3] This is attributable to the emotional discomfort that is experienced towards a particular aspect of an individual's physical embodiment, generally a limb[4] albeit openly acknowledged as healthy and 'perfectly normal'[5] due to failing to 'correspond with their self-

[1] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (7th edn, OUP 2013) 12.
[2] World Health Organisation, '6C21 Body Integrity Dysphoria' *International Classification of Diseases 11th Revision* (2022) <http://icd.who.int/browse/2024-01/mms/en#256572629> accessed 18 November 2022.
[3] Richard Gibson, 'Elective Impairment Minus Elective Disability: The Social Model of Disability and Body Integrity Identity Disorder' (2020) 17(1) Journal of Bioethical Inquiry 145.
[4] Richard Gibson, 'No Harm, No Foul? Body Integrity Identity Disorder and the Metaphysics of Grievous Bodily Harm' (2020) 20(1) Medical Law International 73, 79.
[5] Christopher Ryan, Tarra Shaw and Anthony Harris, 'Body Integrity Identity Disorder: Response to Patrone' (2010) 36(3) Journal of Medical Ethics 189.

perceived identity'.[6] Consequently, in order to 'resolve the mismatch'[7] and feel 'complete,'[8] individuals will attempt to resolve the incongruity via the elective amputation of a healthy limb, a procedure that had initially been performed by Robert Smith in 1997 and 1999 that transformed the lives of two patients.[9] Yet, it is this particular method of treatment that has attracted considerable controversy not only due to it being an irreversible measure but also due to the absence of an 'underlying physiological reason for the removal of healthy tissue'[10] to correct an underlying 'neurological problem'.[11]

However, it will be argued that despite the vast availability of less invasive alternative treatments like cognitive behavioural therapy or psychotropic medication, these treatments have nonetheless had 'little effect on the desire for amputation',[12] or in alleviating the considerable suffering that is experienced by individuals with BIID. In actuality, the method of treatment for BIID with the 'most evidence of efficacy'[13] is the therapeutic elective amputation of a healthy limb. On this basis, it can be questioned whether it may be ethically justifiable for individuals to undergo such a procedure when found in their best interest and provided a diagnosis of BIID is made. To argue this, the four principles of biomedical ethics proposed by Beauchamp and Childress will be utilised[14] by which a reasoned conclusion will be reached, guided by the framework to illustrate the ways in which elective amputation can be ethically justified in the circumstances of BIID. While it is recognised that the framework is not without its limits since it has been deemed as 'incoherent,' 'unreasonable' and 'inconsistent',[15] drawing upon these principles can nonetheless be justified through the

[6] *Gibson* (n 4).
[7] ibid 80.
[8] V.S Ramachandran and Paul McGeoch, 'Can Vestibular Caloric Stimulation Be Used to Treat Apotemnophilia?' (2007) 69(2) Medical Hypotheses 250.
[9] Robert Song, 'Body Integrity Identity Disorder and the Ethics of Mutilation' (2013) 26(4) Studies in Christian Ethics 487, 488.
[10] Mitchell Travis, 'Non-Normative Bodies, Rationality, and Legal Personhood' (2014) 22(4) Medical Law Review 526, 527.
[11] Sabine Müller, 'Body Integrity Identity Disorder (BIID) – Is the Amputation of Healthy Limbs Ethically Justified?' (2009) 9(1) The American Journal of Bioethics 36, 39.
[12] ibid 39.
[13] Christopher Ryan, 'Out on a Limb: The Ethical Management of Body Integrity Identity Disorder' (2009) 2(1) Neuroethics 21, 26.
[14] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (7th edn, OUP 2013).
[15] Rosamond Rhodes, 'Good and Not So Good Medical Ethics' (2015) 41(1) Journal of Medical Ethics 71, 72.

provision of a 'universalizable set of prima facie moral commitments'[16] and a 'simple, accessible and culturally neutral approach' to ethical issues in healthcare.[17]

Firstly, the principle of autonomy will be scrutinised. A parallel will be drawn between cosmetic surgery, deemed as an autonomous decision and the disorder of BIID in an attempt to rationalise the condition. Following this, both the principles of non-maleficence and beneficence will be dealt with simultaneously due to being inextricably linked where it will be contended that the intended benefits of providing elective amputation outweigh the risks that are associated with the procedure. Lastly, the principle of justice will be considered, particularly focusing on the just allocation of resources and the implications for the wider society as a consequence of permitting the procedure, all of which will be rebutted to justify the elective amputation of a healthy limb.

Desiring the undesirable – an autonomous decision

The principle of autonomy is underpinned by the 'idea of self-determination'.[18] An individual is autonomous when she has the 'capacity to govern herself, to make choices…unimpeded' by others[19] and is thus often 'in the best position to determine what would be good and bad' for her.[20] In the context of healthcare decision making, respecting autonomy involves the requirement of obtaining informed consent through making relevant information available and non-interference in decision making, both of which are necessary to secure the individual's free and autonomous choice.[21]

Although, where individuals with BIID are concerned, there is undoubtedly a 'moral discomfort' that is prevalent specifically at the notion of elective amputation of a healthy limb.[22] This is due to the disbelief over an individual desiring disability that will render them

[16] Raanan Gillon, 'Defending the Four Principles Approach as a Good Basis for Good Medical Practice and therefore for Good Medical Ethics' (2015) 41(1) Journal of Medical Ethics 111, 115.
[17] Raanan Gillon, 'Medical Ethics: Four Principles Plus Attention to Scope' (1994) 309(6948) British Medical Journal 184.
[18] Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000) 5.
[19] Natalie Stoljar, 'Informed Consent and Relational Conceptions of Autonomy' (2011) 36 (4) Journal of Medicine and Philosophy 375.
[20] Jukka Varelius, 'The Value of Autonomy in Medical Ethics' (2006) 9(3) Medicine, Health Care and Philosophy 377.
[21] *Stoljar* (n 19) 375-376.
[22] Emma Barrow and Femi Oyebode, 'Body Integrity Identity Disorder: Clinical Features and Ethical Dimensions' (2019) 25(3) BJ Psych Advances 187, 193.

less normalised[23] so is typically viewed as undesirable. As a result, an individual's autonomy is arguably almost instinctively questioned as a consequence of this irrational and unjustifiable 'desire to maim and disable'.[24] It is accepted that autonomy and capacity ought to be approached with care and on a case-by-case basis,[25] but this does not mean that it is appropriate for a generalised conclusion to be made automatically that such individuals cannot be autonomous simply by virtue of rupturing 'heteronormative understandings of the body'.[26] It is for this reason that these individuals are misconceived as unable to properly weigh information due to suffering from BIID, temporarily suspending their autonomy since it is a 'bizarre, irrational and obsessional' decision[27] potentially arising from the disorder and due to the link that is established between the desire for disability and 'madness'.[28]

However, BIID demands are unjustifiably denied when taking into consideration the ability to consent to similar unnecessary and irrational demands for surgical interventions that are deemed autonomous and remain unproblematic.[29] An analogy can be drawn to the widely accepted practice of cosmetic surgery to demonstrate this, where surgical alteration for the sake of improving an aspect of an individual's healthy body perceived as an imperfection is accepted,[30] notwithstanding the recognition that this body image was formed under 'pressure of non-rational considerations'.[31] Despite Patrone arguing that such an analogy is untenable as a result of the dissimilarities in likely harms,[32] it effectively illustrates that requests for even bizarre body modifications will be respected[33] in order to serve the wishes of a competent patient.[34] The difference between cosmetic surgery and BIID demands for

[23] *Travis* (n 10) 537.
[24] Daniel Patrone, 'Disfigured Anatomies and Imperfective Analogies: Body Integrity Identity Disorder and the Supposed Right to Self-demanded Amputation of Healthy Body Parts' (2009) 35(9) Journal of Medical Ethics 541, 545.
[25] Aimee Bryant, 'Consent, Autonomy, and the Benefits of Healthy Limb Amputation: Examining the Legality of Surgically Managing Body Integrity Identity Disorder in New Zealand' (2011) 8(3) Journal of Bioethical Inquiry 281, 286.
[26] T*ravis* (n 10) 547.
[27] Tracey Elliott, 'Body Dysmporphic Disorder, Radical Surgery and the Limits of Consent' (2009) 17 Medical Law Review 149, 159.
[28] John Arras, Elizabeth Fenton and Rebecca Kukla, *The Routledge Companion to Bioethics* (1st edn, Routledge 2014) 585.
[29] *Ryan, Shaw and Harris* (n 5).
[30] Mauro Piras and others, 'Cosmetic surgery: medicolegal considerations' (2016) 11(1) Open Medicine 327.
[31] Tim Bayne and Neil Levy, 'Amputees by Choice: Body Integrity Identity Disorder and the Ethics of Amputation' (2005) 22(1) Journal of Applied Philosophy 75, 81.
[32] *Patrone* (n 24) 544.
[33] *Ryan, Shaw and Harris* (n 5).
[34] David Hyman, 'Aesthetics and Ethics: The Implications of Cosmetic Surgery' (1990) 33(2) Perspectives in Biology and Medicine 190, 191.

amputation lies in the fact the former fits within 'normative conceptions of the body'[35] to be held as an autonomous choice and it is against this background that individuals opting for these procedures are not posited as irrational.

The claims that BIID sufferers lack capacity and the ability to make autonomous choices merely because of their outrageous beliefs is dubious. Ultimately, there is no reason to limit a BIID sufferer's autonomy because while they accept their autonomous choice is undesirable and may have been arrived at irrationally, it is an informed decision that has been made with appreciation of the consequences, having spent their lives grappling with it[36] but also the alleviation of mental anguish in mind and is therefore, arguably rational.[37] It is indicative that these individuals are mentally competent in recognising the implications associated with amputation[38] which is a price worth paying[39] and are aware of these unnatural feelings so are neither psychotic nor delusional.[40] Regardless of amputation not fitting readily into the 'traditional body improvement schemas'[41] within society as cosmetic surgery does, this does not permit it from being seen any differently and ought to be justified.

The abled to disabled – a balancing of intended benefits and associated harms

Both the principles of non-maleficence and beneficence can be seen to mirror one another and while the former refers to the negative duty to 'do no harm,'[42] the latter is the positive obligation of clinicians to work towards and promote a patient's best interests.[43] In accordance with the principle of non-maleficence, the provision of elective amputation of a limb albeit one that is healthy with the absence of any physiological problems has been argued to breach the principle. This is attributable to the procedure 'mutilating'[44] and rendering an abled individual into one that is ultimately disabled alongside the severe medical

[35] *Travis* (n 10) 545.
[36] *Ryan, Shaw and Harris* (n 5) 190.
[37] *Bayne and Levy* (n 31) 80.
[38] Rianne Blom, Valeria Guglielmi and Damiaan Denys, 'Elective Amputation of a 'Healthy Limb' (2016) 21(5) CNS Spectrums 360.
[39] Christopher Ryan, 'Out on a Limb' (2009) 30(3) Australasian Science 32, 33.
[40] *Ramachandran and McGeoch* (n 8) 251.
[41] John Jordan, 'The Rhetorical Limits of the 'Plastic Body'' (2004) 90(3) Quarterly Journal of Speech 327, 346.
[42] Sheila McLean, *First Do No Harm: Law, Ethics and Healthcare* (Ashgate 2006) 513.
[43] Johan Bester, 'Beneficence, Interests, and Wellbeing in Medicine: What it Means to Provide Benefit to Patients' (2020) 20(3) The American Journal of Bioethics 53.
[44] Richard Gibson, 'Body Integrity Identity Disorder and Cyborgs: An Exploration of the Ethics of Elective Amputation and Enhancement Technologies' (PhD thesis, University of Manchester 2021) 56.

risks associated with amputation including 'infections, thromboses, paralyses, necrosis or phantom pain'.[45]

However, while these common concerns can be accepted and there is no doubt that elective amputation is not without its risks, many therapeutic interventions cause at least some harm as it is unavoidable and forms part of the consent process within healthcare with the hope that, on balance, the 'greater overall good for the patient' will result.[46] In spite of this, there is an apparent difference in the way elective limb amputation is treated in comparison to other procedures that are also associated with some measure of disability and involve the removal of healthy tissue.[47] Where there is a likelihood of disease such as a high risk of breast cancer, mastectomies to remove healthy breasts are deemed acceptable circumstances to disfigure the body since the outcome is for the overall benefit of lessening a risk.[48] This can also be seen in gender reassignment surgery, facelifts, breast reductions or augmentations and penile implants,[49] all of which are acceded to despite the disproportionate harm resulting particularly in the absence of an underlying disease or therapeutic benefit. Therefore, logically amputation ought to be justified for the alleviation of suffering and significant distress resulting from BIID since the limb in question is not as 'healthy' as it might appear to be.[50]

Equally, the underlying assumption and contention surrounding the prospect of disability arising from amputation can be rebutted. It is precisely the notion of 'transableism' and the choice to become dependent[51] that is considered as 'intrinsically harmful' to the individual[52] thus violating the principle of non-maleficence since such a suggestion appears to contradict 'every tenet of cultural body logic'.[53] As such, this widely shared understanding within society essentially disrupts the ability to appreciate that therapeutic amputation is in the best interest for an individual with BIID due to interpreting any abnormality as creating disorder.[54]

[45] *Müller* (n 11) 41.
[46] Curt Tribble and Walker Julliard, 'First, We Do Harm: Obtaining Informed Consent for Surgical Procedures' (2019) 22(5) The Heart Surgery Forum 423.
[47] *Ryan, Shaw and Harris* (n 5).
[48] *Ryan* (n 39) 33.
[49] *Ryan, Shaw and Harris* (n 5).
[50] *Bayne and Levy* (n 31) 85.
[51] Robin Mackenzie and Stephen Cox, 'Transableism, Disability and Paternalism in Public Health Ethics: Taxonomies, Identity Disorders and Persistent Unexplained Physical Symptoms' (2007) 2(4) 363.
[52] Richard Gibson, 'Elective Amputation and Neuroprosthetic Limbs' (2021) 27(1) The New Bioethics 30, 33.
[53] *Jordan* (n 41) 341.
[54] ibid 343.

However, as Gibson convincingly proposed through the disentangling of the concept of disability and impairment, elective limb amputation can nevertheless be justified.[55] By viewing the procedure as imparting an impairment would indicate that disability does not necessarily arise.[56] Rather, the impairment acts as a form of 'liberation and positive becoming'[57] for BIID sufferers. This can be viewed as distinct from the origin of disability which lies in the 'unjust external limitations' including society's failure to accommodate an individual's needs resulting from their impairment that in effect, act as barriers in comparison.[58] Therefore, the nuanced definition of disability that is employed by Gibson enables amputation despite the creation of an impairment, effectively shifting the shared perception of disability away from inflicting unnecessary harm and violating the principle of non-maleficence.

The irreversible nature of the procedure has been deemed as justificatory for the denial of amputation as a method of managing psychological distress. Additionally, there is a suggestion that elective limb amputation should be considered as a 'last resort'[59] particularly when accounting for the absence of the underlying pathogenesis of BIID. Instead, to correct the neurological problem, alternatives can be employed including but not limited to cognitive behavioural therapy, psychotherapy to reduce psychological strain,[60] psychotropic medication including selective serotonin reuptake inhibitors,[61] adapting the body image by movement therapy or elective stimulation of the brain[62] and vestibular caloric stimulation.[63] Although, while these treatments may alleviate the distress arising from BIID, this is merely on a temporary basis.[64] Such alternatives have proven largely unsuccessful[65] and has been evidenced by the findings of First who reported that out of the 65% of participants who had undergone psychotherapy, none had experienced a reduction in the intensity of the desire for amputation and out of the 40% of participants that had taken psychotropic medication, there was no appreciable effect.[66] Inevitably, the real harm lies in refusal of amputation as these

[55] *Gibson* (n 52) 35.
[56] *Gibson* (n 3) 146.
[57] *Gibson* (n 52) 35.
[58] ibid 34.
[59] *Elliott* (n 27) 162.
[60] Katharina Kröger, Thomas Schnell and Erich Kasten, 'Effects of Psychotherapy on Patients Suffering from Body Integrity Identity Disorder (BIID)' (2014) 3(5) American Journal of Applied Psychology 110.
[61] Michael First, 'Desire for Amputation of a Limb: Paraphilia, Psychosis, or a New Type of Identity Disorder' (2005) 35(6) Psychological Medicine 919, 926.
[62] *Müller* (n 11).
[63] *Ramachandran and McGeoch* (n 8).
[64] *Barrow and Oyebode* (n 22) 191.
[65] *Mackenzie and Cox* (n 51) 369.
[66] *First* (n 61) 925-926.

alternative methods of treatment further perpetuate the psychological torment an individual suffering with BIID experiences, driving them to actualise their desired disability[67] by resorting to self-mutilation[68] as a means of managing the distress caused by the continued presence of their 'healthy' limb.[69] On this basis, amputation indicates a consistent therapeutic effect[70] and remains the most effective long-term treatment for BIID since individuals have no regrets[71] due to amputation allowing an individual to successfully reidentify with their body,[72] resulting in relief.[73]

In summary, in accordance with the principle of beneficence, amputation despite being a drastic measure promotes an individual's best interests.[74] When the risks associated with the procedure, the existence of alternative treatment and disability are weighed and balanced against amputation 'providing benefit in all circumstances'[75] through providing 'proper medical treatment under appropriate supervision'[76] and acting as a safeguard against self-mutilations, the intended benefits outweigh the harms. The appropriate response lies in amputation to allow for improved function of BIID sufferers,[77] highlighting that in actuality, amputation is a medically 'necessary cure'.[78] This evidently reinforces Smith's argumentation that the alleviation of distress suffered by BIID individuals can be framed as a therapeutic aim thus elective amputation is the 'correct thing' for such patients.[79]

Rebutting the unjust societal burdening inflicted by amputation

The principle of justice relates to a collection of obligations which can be separated into distributive, rights-based and legal justice.[80] In the context of elective amputation as a method of treating individuals with BIID, the principle has been employed to refuse such a procedure, focusing on the aspect of distributive justice and resource allocation with the

[67] Michael First and Carl Fisher, 'Body Integrity Identity Disorder: The Persistent Desire to Acquire a Physical Disability' (2012) 45(1) Psychopathology 3.
[68] *Barrow and Oyebode* (n 22) 190.
[69] *Ryan* (n 39) 33.
[70] *Gibson* (n 4) 80.
[71] *Blom, Guglielmi and Denys* (n 38).
[72] Jenny Slatman and Guy Widdershoven, 'Being Whole After Amputation' (2009) 9(1) The American Journal of Bioethics 48.
[73] *Gibson* (n 4) 73.
[74] *Bester* (n 43) 53.
[75] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (5th edn, OUP 2001) 115.
[76] *Barrow and Oyebode* (n 22) 192.
[77] Deanna Quon and others, 'A Qualitative Study of Factors Influencing the Decision to Have an Elective Amputation' (2011) 93(22) Journal of Bone and Joint Surgery 2087, 2092.
[78] *Jordan* (n 41) 343.
[79] Clare Dyer, 'Surgeon Amputated Healthy Legs' (2000) British Medical Journal 320.
[80] Daniel Sokol, *Doing Clinical Ethics: A Hands-on Guide for Clinicians and Others* (Springer 2012) 10.

wider impact on society in mind and concerns over the socio-economic ramifications that result.[81] The societal economic burdens arising from acceding to BIID demands is considerable given the finite resources available in a healthcare system such as the NHS. There are high costs associated with the provision of amputation which is comprised of the procedure itself but also rehabilitation and lifelong follow-up costs.[82] Furthermore, it has been argued an unnecessary financial burden is placed at the expense of the community by electively disabled individuals[83] such as the requirement of adapted housing, prosthetic fitting, support for loss of income, early retirement, help with transport all of which arise through the individual becoming dependent.[84] The main argument that is brought up in the debates surrounding resource allocation is that amputation is not only an optional non-life saving procedure for individuals with BIID but is one of many options available as already discussed above. The limited medical resources that are allocated for surgical amputation of a healthy limb is diverted away from more deserving procedures and patients with legitimate needs for them which can be held as inherently unjust.[85]

The arguments concerning the financial ramifications on society by elective limb amputation contravening with the principle of distributive justice are not disputed although somewhat overexaggerated and can be criticised. The high costs that are thought to arise from amputation can be refuted since elective operations have been proven to have better outcomes, lower costs and a shorter recuperation period[86] when compared with the same procedure that is performed emergently.[87] This means refusal of amputations leading individuals to take matters into their own hands would in fact increase the financial burden on society. Amputations are thus the cost-effective method for managing BIID since the costs associated with the long-term treatment of depression arising from the disorder can be exorbitant[88] yet this and other 'reactive psychiatric problems' are resolved through amputation removing the need of psychiatric resources entirely.[89]

[81] *Müller* (n 11).
[82] ibid.
[83] *Blom, Guglielmi and Denys* (n 38).
[84] Robert Smith, 'Body Integrity Identity Disorder: A Problem of Perception?' in Amel Alghrani and others (eds), *Bioethics, Medicine, and the Criminal Law*, vol 1, *The Criminal Law and Bioethical Conflict: Walking the Tightrope* (CUP, 2012) 79.
[85] *Patrone* (n 24) 543.
[86] *Gibson* (n 44) 64.
[87] Adil Haider and others, 'Incremental Cost of Emergency Versus Elective Surgery' (2015) 262(2) Annals of Surgery 260.
[88] *Blom, Guglielmi and Denys* (n 38).
[89] *Smith* (n 84).

Additionally, the distributive justice position can be countered by the adoption of a rights-based approach, focusing on and appreciating the 'rights' of the BIID sufferer which as a result, offers a way in which elective limb amputation can be justified.[90] When due consideration is given to a BIID sufferer's right to self-determination allowing for amputation, they are able to function to the best of their capability[91] within society following the restoration to normality.[92] This is contrary to the assumption of amputation providing a means by which individuals can depend upon governmental assistance and benefits that can be collected for loss of income since transabled people have been portrayed as 'thieves' who 'exploit the State and obtain resources to which they are not entitled'.[93] It is clear the distributive justice perspective 'presupposes a normative conception of body integrity' by making assumptions as to the extent amputation will impact on an individual's lifestyle and the wider implications for society.[94] Therefore, the idea that amputation will render individuals less off and result in significant economic costs and undue stress placed upon the community at large can be rebutted to reveal that these concerns are almost entirely baseless and not as intense as anticipated. In reality, individuals are able to increase their earnings through the increase in productivity and happiness that amputation allows, effectively becoming contributing members of the community and rising to the challenge of the disability.[95] Ultimately, respecting an individual's wishes for elective limb amputation is justifiable.

Conclusions

To conclude, it is evident that BIID is yet to be fully understood particularly given the fact that the aetiology remains contentious, but this does not mean that an individual's choices should be invalidated merely on this basis. Ultimately, for individuals suffering from the condition, it must be appreciated that the limb in question is not as healthy as it might appear in reality and therefore, the appropriate response lies in elective amputation since it remains the medically necessary cure in comparison to the alternative treatments that are available.

[90] Anahita Dua, 'Apotemnophilia: Ethical Considerations of Amputating a Healthy Limb' (2010) 36(2) Journal of Medical Ethics 75, 77.
[91] *Arras, Fenton and Kukla* (n 28) 589.
[92] *Dua* (n 90).
[93] Alexandre Baril, 'How Dare You Pretend to Be Disabled?' The Discounting of Transabled People and Their Claims in Disability Movements and Studies' (2015) 30(5) Disability & Society 689, 693.
[94] *Bryant* (n 25) 285.
[95] *Smith* (n 84) 79.

The main underlying cause behind the considerable controversy that elective limb amputation attracts, leading to a reluctance to justify the provision of such a procedure is its failure to conform with societal norms which undoubtedly causes discomfort. Unfortunately, the narrative that emerges as a result is one that depicts individuals with BIID negatively simply by virtue of the condition, thus arguably impacting the ability for BIID demands to be seen as autonomous and worthy of acceding to due to the view that the infliction of irreversible harm via amputation would burden society with regards to the allocation of resources and the potential costs attached to disability. However, an attempt has been made to disrupt these underlying assumptions to illustrate that when taking into consideration the intended benefits associated with amputation namely, the reported alleviation of significant pain that would persist without the procedure, this should be the guiding principle in justifying elective amputation as it outweighs the risks associated with the procedure and the resultant harm of disability. It is therefore demonstrated (particularly through Beauchamp and Childress' four principles framework), that it is ethically justifiable to provide an individual with a clinical diagnosis of BIID elective limb amputation when it is in their best interest, in order to resolve the mismatch that is created by the condition.

To What Extent Has Priti Patel's Points-Based Immigration System Prioritised Skills and Talent Over an Individual's Country of Origin?

Carrera Parchment

Abstract

The question of immigration is on the forefront of the political mind. Never has there been a discussion so divisive than that of the movement of people. A cornerstone in the Brexit debates, a mainstay in election material, and the subject of ever-changing legislature, it is easy to see why people can have such varied opinions on a topic so broad. Yet, following the adoption of a point-based immigration system by the conservative government in 2023, the cabinet had hoped to appease the masses, and lay this argument to rest once and for all. But how can we assess this? Has the implementation of a point-based immigration system fostered the skill and talent of the nation? Has it fallen flat on its face in the wake of a global pandemic? Or perhaps is it simply too early to say? These are but a few of the question the following article seeks to engage with.

Introduction

In early 2021, in order to 'fulfil their commitment to the British public and take back control of UK borders'[1] the government introduced a points-based immigration system (PBS.) This system assesses individuals seeking a visa to enter the UK's territories for purposes of work against specific point accruing criteria. Such individuals are assigned points for specific skills, qualifications, salaries, or professions, with individuals accruing a total of 70 points being awarded a visa.[2]

In the aftermath of the introduction of the PBS, Priti Patel, (the then Home Secretary), expressed the following as justification for its implementation: *'At the start of the year we delivered one of the biggest shifts in our approach for decades, implementing a new Points Based immigration system. Now we can prioritise skills and talent over where someone comes from, we know that high-skilled migration helps foster innovation'.*[3]

[1] Secretary of State for the Home Department, *The UK's Points-Based Immigration System Policy Statement* (CP No 220, 2020).
[2] Home Office News Team, 'Home Office in the Media, Points-Based immigration system: Latest Information' (*Home Office in the Media,* 19 February 2020) <homeofficemedia.blog.gov.uk/2020/02/19/points-based-immigration-system-latest-information/> accessed 20 Nov 2023.
[3] Priti Patel, 'Home Secretary Priti Patel Speech on Immigration' (London, 24 May 2021) <www.gov.uk/government/speeches/home-secretary-priti-patel-speech-on-immigration> accessed 20 Nov 2023.

This article will therefore discuss a brief history of migration into the UK, followed by an analysis of recent significant changes to UK migration laws and a discussion surrounding proposals for future change. The possibility that the PBS is influencing the number of workers in both high and low skill job roles in the UK will then be discussed. Followed by a discussion on how rigid immigration controls foster the perfect environment for illegal migration to take place. Finally, how the Covid-19 pandemic and its impacts on the measurability of immigration numbers flowing in and out of the UK, has made it increasingly hard to make a true judgement as to the impact of the PBS.

History of migration into the UK

Over the past 100 years the UK immigration system has been subjected to numerous changes, particularly in relation to the freedom of entry into the UK without the requirement of a visa. Prior to the 1971 Immigration Act migrants from Commonwealth countries were the only people allowed into the UK, visa free. Upon the implementation of this Act, however, and the UK's joining of the then European Economic Community, now European Union (EU) Visa free access to the UK from individuals arriving from Commonwealth countries was stopped. Per Contra, Europeans passing from other EU countries gained the privilege of visa free access to the UK. Nevertheless, it should be noted that individuals from countries outside the EU and pre, Immigration Act 1971, have always needed to obtain a visa to enter the UK, a requirement still in existence today.

Historically speaking, the UK has always been a safe, democratic, and tolerant nation for migrants. Over time, the appeal of the UK's world class universities, the charm of living in London and the status of English as the world's language[4] are factors which have contributed towards an influx of migrations into the territory. As a result, net migration numbers reached an all-time high of 333,000 by June 2016.[5] June 2016 was undeniably a turning point in UK migration as the UK voted, to leave the EU with one of the major driving forces being the topic of migration.[6] Consequently, from 1st January 2020, free movement of EU citizens, into the UK ceased to have effect. As a result, citizens from EU countries are no longer able to

[4] Jonathan Portes, 'Immigration and the Economy after Brexit' 38 (2022) Oxford Review of Economic Policy 82.
[5] ibid.
[6] The Migration Observatory, 'Migration and Brexit', (*The Migration Observatory at the University of Oxford*) <http://migrationobservatory.ox.ac.uk/projects/migration-and-brexit/> accessed 1 May 2023.

migrate to the UK without a visa beforehand. This pivotal moment in UK migration laws acted as a catalyst for the UK government to introduce new immigration legislation aimed at addressing the end of free movement. As a result, the government introduced a newer version of a PBS and as of 2023, no group, other than Irish nationals are entitled to visa free entry into the UK. The legal basis behind the introduction of the new PBS is the Immigration and Social Security Co-ordination EU Withdrawal Act 2020. This legislation, aimed at addressing migration concerns was introduced to assert control over UK borders and decrease overall migration.[7] However, prior to this newer system, the UK was operating on a 'rigid' and 'overly complicated'[8] PBS which from 2008-2012 focused on specific tiers for which individuals had to meet specific criteria, to accrue points for their place in the UK. The starkest different between the old PBS of migration and the newer PBS appears to be in the treating of migrants, from all over the world, to the same standard therefore, it can be challenging to argue that this is one of the most significant shifts to the UK migration system in decades. One could argue that the PBS is somewhat a continuation of the pre-existing tiered system. Instead of establishing a clear departure from its predecessor, the PBS has instead created a tiered structure within society which distinguishes between those who are eligible to enter the UK and those who are not. Consequently, one may contend that the PBS, whilst presenting itself as radically different, remains cloaked in the remanence of past legislation.

Recent changes to UK immigration

One of the main changes from the old system of immigration control has been the introduction of the skilled worker route. To secure a work visa via this route, given the points-based structure of the system applicants must accrue a total of 70 points. 50 of these points are obtained through mandatory criteria including: having a job offer from an approved sponsor (20 points) which is at the right skill level (20 points) speaking English at the required level (10 points). The remaining 20 points can be accrued in several ways including salary threshold, education, and jobs on the shortage occupation list. Applicants with job offers with a salary of 26,200 and above earn 20 tradable points, those not earning enough to accumulate salary points, may obtain education points, with PhD applicants receiving an extra 10 or 20 points, based on the PhD Subject. As Portes suggests, this PBS

[7] *Secretary of State for the Home Department* (n 1).
[8] *Alvi v SSHD* [2012] UKSC 33.

system implies a substantial increase in the regulation of EU migration compared to its predecessor free movement.[9] Therefore, it could be argued, that the end of free movement has shifted the focus away from the migrant's origins to the specific skills that they bring to the UK, which was undoubtedly the motivation behind the introduction of this system.

Proposals for future change

The dismissal of Suella Braverman as Home Secretary in November 2023 and subsequent appointment of James Cleverly who has expressed his 'absolute commitment to stopping the boats'[10] fostered the perfect environment for the introduction of new immigration policies.

Consequently, British Prime Minister Rishi Sunak has proposed a new Rwanda Bill, namely the Safety of Rwanda (Asylum and Immigration) Bill, which is aimed at 'stopping the boats'.[11] This Bill comes as a an attempt to support the treaty that the UK government entered into with Rwanda to support the asylum partnership between the two nations.[12] At the time of writing, the Bill is currently being discussed in the House of Lords, however there is every possibility that the Bill will become legislation this year. With that being said, the Bill itself is not without criticisms, in fact, the UK Supreme Court has ruled that the government's plan to send 'illegal migrants' to Rwanda is unlawful.[13] Furthermore, Law Society Chief Executive Ian Jeffrey reports numerous issues with the Bill including its attempt to place the government above the rule of law by creating a statutory obligation that the courts treat Rwanda as a safe country, despite its poor human rights record.[14] Jeffrey goes further by stating that, the measures taken in the Bill itself 'demonstrate a profound lack of respect for the rule of law and balance of powers'. Such criticisms suggest that the Bill may have implications that go beyond the immigration sphere and effect the core principles which underpin the UK's democratic system and legal structure. This is of extreme concern for the function of the UK democratic society. Perhaps, therefore, as we steer closer to the next general election, the topic of immigration will prevail as a highly contentious and debated issue in the landscape of UK politics. It may therefore be expected that each political party

[9] *Portes* (n 4).
[10] James Cleverly, 'BBC News' (BBC One, 13 November 2023) <www.bbc.com/news/av/uk-politics-67403090> accessed 18 September 2024.
[11] Safety of Rwanda (Asylum and Immigration) HL Bill (2023-24) [41].
[12] The Law Society, 'Safety of Rwanda Bill Corrodes the Rule of Law and Access to Justice.' (*The Law Society,* 29 January 2024) <www.lawsociety.org.uk/topics/immigration/our-view-on-safety-of-rwanda-bill> accessed 27 February 2024.
[13] *R (on the application of SAA (Sudan)) v Secretary of State for the Home Department* [2023] UKSC 42 [149].
[14] ibid.

will endeavour to persuade the public that they possess the most effective policies on this matter.

Having said that, Sumption has suggested that migration policies for purposes of work and study, are the most amenable to policy changes,[15] it therefore comes as no surprise that in December 2023, the UK government, headed by Home Secretary, James Cleverly, unveiled a new 5-point immigration plan as an endeavour to reduce overall net migration to the UK. The PBS will remain in place; however, its requirements will undergo significant modification. From spring 2024, the current salary requirement threshold of £26,200 will be increased to £38,700.[16] This comes as an initiative from the UK government to place pressure on UK Business to look to British talent before those from outside the UK, restrict overall net migration number and reduce the recent strain that we have seen on public services in the UK.[17] In addition to the increasing salary threshold, the government proposes to stop overseas care workers from bringing family dependants to the UK. This adjustment is in response to reports indicating that around 120,00 dependants accompanied 101,000 care workers and senior care workers to the UK in the year ending September 2023.[18] However, Sumption has addressed concerns that increasing the salary threshold is likely to have a significant impact on individuals such as 'lower income British Citizens and women and younger people who tend to earn lower wages'.[19] This is because they may no longer be able to access the support of their partners and other family members that they so rely on, due to the proposed restrictions that family dependants are expected to encounter.[20]

In addition, Cleverly has proposed to increase the annual immigration health surcharge by 66% which he believes will help generate 1.3 billion every year for reinvestment into the NHS. Cleverly also plans to end the 20% going rate salary discount for shortage occupations and reforming the shortage occupation list.[21] The primary objective of these changes appears

[15] Tessa Hall, Alan Manning & Madeline Sumption, 'Why are the Latest Net Migration Figures Not a Reliable Guide for Future Trends? (*The Migration Observatory at the University of Oxford*, 9 September 2024) <http://migrationobservatory.ox.ac.uk/resources/reports/why-are-the-latest-net-migration-figures-not-a-reliable-guide-to-future-trends/> accessed 25 November 2023.
[16] Joshua Nevett and Paul Seddon, 'Tougher Visa Rules Unveiled in Plan to Cut Migration' *BBC News* (London, 5 December 2023) <www.bbc.co.uk/news/uk-politics-67612106> accessed 27 February 2024.
[17] Home Office, 'Home Secretary Unveils Plan to Cut Net Migration' *GOV.UK* (London, 4 December 2023) <www.gov.uk/government/news/home-secretary-unveils-plan-to-cut-net-migration> accessed 7 December 2023.
[18] ibid.
[19] *Nevett and Seddon* (n 16).
[20] ibid.
[21] HC Deb 4 December 2023, vol 742, cols 41-58.

to be a reduction in the influx of people coming to the UK, aiming to bring the overall number down by 300,000, considering the substantial figure of 745,000 reported in 2022.[22] Certainly, one may contend that such modifications to the PBS may yield remarkably distinct results compared to the system Priti Patel implemented, as we know the implementation of such policies are often affected by other influences such as was in Patel's case the Covid-19 Pandemic.

Now, however, the UK faces different challenges such as: the impact of the cost-of-living crisis and the present condition of the NHS in the in the aftermath of the pandemic. Arguably, these challenges may impact the allocation of government time, money and energy, which could cause a diversion of attention away from migration issues, potentially affecting the overall effectiveness of these policies. However, without the ability to see into the future, the extent to which Cleverly's new proposals succeed as to his objectives and bring about changes to UK migration, is therefore something that may only become apparent as time unfolds.

Highly skilled workers

Nevertheless, staying on the topic of the PBS as it is currently, while Priti Patel suggested that PBS would help to foster innovation and greater levels of migration from persons classed as highly skilled, Czaika and Parsons have found in their research that countries requiring visa applicants to have a valid job offer to obtain their work visas, attract a lower influx of skilled migrants.[23] Sumption goes further to suggests that this is based on the increased bureaucracy that such requirements add to the visa application process, which works as a deterrence for both prospective employers and migrants themselves.[24] Conversely, according to data released by the Home Office, the majority of work visas issued since January 2021 have primarily been granted to 'skilled workers'[25] Furthermore, according to the

[22] *Hall* (n 15).
[23] Mathias Czaika and Christopher Parsons, 'The Gravity of High-Skilled Migration Policies' (Working Paper, 2017) 603.
[24] Madeline Sumption and Mariña Fernandez-Reino, 'Exploiting the Opportunity? Low-skilled Migration After Brexit' (*The Migration Observatory at the University of Oxford*, 30 August 2018) <www.compas.ox.ac.uk/wp-content/uploads/Exploiting-the-Opportunity-Low-Skilled-Work-Migration-After-Brexit-1.pdf> accessed 5 May 2023.
[25] CIPD, 'Migrant Workers and Skills Shortages in the UK: Role of Immigration in Tackling Post-Brexit Skills Challenges' (London: Chartered Institute of Personnel and Development, 23 May 2023) <www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/2023-pdfs/2023-migrant-workers-skills-shortages-uk-report.pdf> accessed 19 September 2024.

Organisation for Economic Cooperation and Development, the UK has become more attractive to highly qualified individuals hoping to migrate for work purposes. This is due to the PBS giving preference to individuals classed as highly skilled, thereby establishing a pathway for international migrants falling within this category to enter the UK.[26] This therefore suggest that, perhaps the PBS may have indeed achieved the desired outcome of increasing the influx of highly skilled workers into the UK, as envisioned by Priti Patel when she introduced the legislation.

Rigidity blocking 'low skilled applicants'

Per contra to the perceived increase in highly skilled workers, the sheer rigidity of the PBS appears to be a cause for concern. In fact, there are great concerns surrounding the prerequisite of a job offer with a salary of £26,200 per year or more (due to be increased to £38,700 from spring 2024). This requirement is a direct blockage of low skilled applicants and as such the UK immigration system has seen an explicit absence of any possibility to obtain a visa for work labelled as 'low skilled'. Many individuals working within these 'low skilled' sectors contributes heavily towards the economy and play vital roles in society. The salary threshold of £26,200, has therefore meant that cleaners, cooks, and restaurant staff from other countries have very little to no chance of obtaining a visa, subsequently creating gaps within the UK labour market. More specifically, focusing primarily on Indian Takeaway businesses, there has been a serious drop in the past 16 years of 3,500 restaurants as a direct result of harsher immigration controls, including the visa salary requirements and the requirement to speak English at a certain level.[27] Therefore, since the introduction of the PBS, jobs classified as low skilled are ineligible for sponsored work visas, with the exception of the scheme for seasonal agricultural workers.[28] This is undoubtedly an issue, having fewer people in so called 'low-skilled' job has led to the need to introduce various short-term emergency visas, for example to recruit HGV drivers. Whilst in theory, this aligns with the concept that the PBS is both flexible and adaptable, such measures are an insufficient solution to longer term, labour shortage and potential economic problems. Short-term visas not only place the immigration status of many migrants in the UK in extremely vulnerable

[26] OECD, 'Indicators of Talent Attractiveness' (*Organisation for Economic Cooperation and Development*) <www.oecd.org/migration/talent-attractiveness/> accessed 15 November 2023.
[27] Samir Jeraj, 'Is it Last Orders for the Great British Curry House?' *New Statesman* (London, 8 February 2023) <www.newstatesman.com/spotlight/economic-growth/skills/2023/02/is-it-last-orders-for-the-great-british-curry-house> accessed 19 September 2024.
[28] Madeline Sumption, 'Shortages, high-demand occupations, and the Post-Brexit UK Immigration System' (2022) 38(1) Oxford Review of Economic Policy 97.

positions, but they do not go far enough to rectify levels of labour shortages in various sectors, that the PBS has caused. Once these visas expire, the UK will cease to have enough workers and revert to experiencing shortages in skills, which therefore suggests that these short terms visas are not a suitable way of correcting the original skills shortage issues. The UK government must, therefore, seek to implement a more suitable, long-term methods which seeks to properly address labour shortages.

The impact of Covid-19 on UK migration

The onset of the covid-19 pandemic in 2020 led to a drastic disruption in the influx of migration into the UK. Given that the PBS was introduced in 2021, in this midst of the pandemic, it could be argued that it could not have been implemented at a worse time. While people were tasked with staying at home during the pandemic, it became increasingly difficult, if not impossible to both collect and interpret migration data, meaning that any numbers that have been published as Portes puts it, 'could be out by hundreds of thousands in either direction'.[29] As a result, the number of individuals migrating to the UK for work, under the PBS during its crucial starting phase is to an extent, unknown. It would, therefore, not be viable to conclude that the PBS had done as the government had hoped, during its earliest years, and 'fostered invasion' simply because we cannot be certain, whether the migration of individuals deemed 'high-skilled' had in fact taken place. However, having said that, in the post pandemic era, the recording of migration in and out of the UK has indeed been possible, allowing the UK government to release figures for the years 2022 and 2023. In particular, in the year ending September 2023, 3,383,446 visas were granted,[30] an increase by 30% of the number of visas granted in the year ending September 2022, of which, 335,447 were work visas.[31] While one might anticipate that a surge in migration would correspond to the success of the PBS in bringing 'highly skilled workers' into the UK workforce, government figures indicate that there has only been a mere 9% increase in the number of 'skilled worker' visas from 2022-2023. Therefore, while there the overall numbers surrounding UK migration are high, very few of those individuals migrating into UK territory are from the 'highly skilled' backgrounds. This suggests that there has been a deviation away from the main goal of

[29] *Portes* (n 4).
[30] Home Office and Office for National Statistics, 'How many people come to the UK each year (including visitors)?' (*GOV.UK*, 7 December 2023) <www.gov.uk/government/statistics/immigration-system-statistics-year-ending-september-2023/how-many-people-come-to-the-uk-each-year-including-visitors> accessed 19 September 2024.
[31] ibid.

inciting the best and brightest into the UK labour force subsequently creating a setback in the PBS from its initial objectives.

Per contra, during the pandemic under the Coronavirus Act 2020 a number of healthcare workers from other countries, were 'fast-tracked' into the UK, a scheme which the government carried out which allowed individuals with the skills and expertise, in the healthcare sector to enter the UK and help in the fight against covid 19. This scheme was undoubtedly an attempt by the government to highlight the value of healthcare workers in the UK. This integrated into the narrative that the UK was placing greater emphasis on prioritising skills and talent, rather than where someone came from. In a similar light, thousands of health care professionals and their families were also given automatic visa extension throughout the pandemic.[32] This government response signified a recognition of the contribution of migrant healthcare workers, across the UK and the prioritisation of those deemed to be highly skilled. Consequently, one could argue that this evolved into an effective method for the government of the time to demonstrate their dedicated to a PBS that prioritises the skillsets that individuals bring the UK, rather than their country of origin. Nevertheless, the effect of the Covid-19 pandemic on the ability to record migration numbers, particularly in 2020 and 2021 has limited the strength of the argument that the PBS has facilitated high-skilled migration.

Since the introduction of Patel's PBS, the British public have seen previous Home Secretary Braverman and now Cleverly aim to adopt systems which aligns with contemporary legal and political movements, which at presents appears to be focused around the 'stopping of the boats'.[33] One could contend that the requirement for Cleverly and the government to introduce substantial changes to the current PBS implies that the system has not fulfilled all the objectives Patel initially envisioned for it. The rapid and significant changes in the migration landscape within such a short period of time highlight the sheer magnitude of the challenge that comes with attempting to address migration matter. The government may therefore be afforded some light sympathy in the fact that, they are trying to produce a perfect

[32] Home Office, 'Thousands More Health Workers to Benefit from Visa Extensions' (*GOV.UK*, 20 November 2020) <www.gov.uk/government/news/thousands-more-health-workers-to-benefit-from-visa-extensions> accessed 12 May 2023.
[33] *Cleverly* (n 10).

solution to an extremely contentious area of law which causes a great division of public opinion.[34]

Conclusion

The end of free movement in the aftermath of Brexit and the introduction of the PBS has undeniably placed less emphasis on where someone comes from. Now, all migrants wishing to enter UK territory for purposes of work and study must obtain a visa in advance of doing so. However, to argue that the PBS has instead placed an emphasis on the parasitisation of high skilled workers would be premature. This is due to several factors, however, perhaps most pertinent being the covid the covid-19 pandemic which had an unprecedented effect on the ability to conduct investigations into the actual number of migrants flowing in and out of the UK therefore for much of the pandemic, migration numbers, including the number of skilled migrants entering the UK, is unknown. The eradication of the low skilled migration route also appears to have had more drastic consequence on both the safety of migrants and the economy of the UK. Conversely, it has been argued that the PBS not only creates challenges for those individuals with jobs classed as 'low skilled' but also 'highly skilled workers' due to rigorous steps that must be adhered to before a visa is granted.

The future of UK migration is undoubtedly in a precarious position, from one perspective, if Cleverly's policies work, the UK may have access to more resources which could be beneficial for recovering the economy in the aftermath of Covid-19, provided that the funds recovered as part of his new immigration policies are distributed accordingly. However, as we can learn from Patel, the sheer willingness of a government to implement policy changes does not necessarily mean that they will be effective. External factors, political stances, and legal perspectives work in tangent to influence the success of governmental policies. Nevertheless, regardless of the proposed changes, ultimately the stance argued here regarding UK migration remains unchanged in that migration helps to foster a culturally rich society. The diverse perspectives and ideas from individuals of varied cultures is ultimately what fosters innovation and assists in refining the innate talents that individuals already possess.

[34] Lindsay Richards, Mariña Fernández-Reino and Scott Blinder, 'UK Public Opinion Towards Immigration: Overall Attitudes and Level of Concern' (*The Migration Observatory at the University of Oxford*, 28 September 2023) <http://migrationobservatory.ox.ac.uk/resources/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-of-concern/> accessed 28 Feb 2024.

The Implications of Soft Law: Internationally Ineffective Environmental Law

Neeki Kaivan Arkian

Abstract

The increasing environmental issues facing our world require strong legal structures to guarantee the preservation of the global ecosystem. International Environmental Law (IEL) has emerged as a major discipline and legal framework in these endeavours, offering a system of legal regulations and principles, such as the principle of sustainable development[1] requiring states to take action to preserve the environment and advance sustainable development. The prevalence of soft law, which consists of non-binding instruments which lack enforceability, greatly undermines the effectiveness of IEL notwithstanding its ambitions. This article explores the difficulties that arise from the application of soft law in the field of IEL and the resulting lack of responsibility of powerful states. Evidence will contend that the prevalence of soft law not only obstructs the achievement of environmental objectives but also enables influential nations to avoid their obligations, thereby weakening global environmental governance. A review of the case law and literature supports this analysis.

This article examines the fundamental limits of soft law, such as its voluntary character and the lack of enforcement tools, to emphasise the insufficiency of present techniques in tackling urgent environmental concerns. Additionally, it examines the possibility of converting non-binding agreements into legally binding ones, in order to increase the responsibility of nations and guarantee the efficacy of IEL in protecting the environment. Further examination of existing international environmental regulations will outline ways in which IEL might adapt to effectively tackle increasing global environmental risks.

Introduction to international environmental law

The necessity for strong legal structures to protect our planet becomes more essential as the globe faces growing environmental dangers, such as climate change, global warming, pollution, loss of biodiversity and deforestation just to name a few. IEL has emerged as a proactive response to the growing concern that human activities are impacting the

[1] UNGA, 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro, 3-14 June 1992) (12 August 1992) UN Doc A/CONF.151/26/Rev.1 (vol. 1), Principle 1.

environment by creating a framework of legal rules and concepts that control how states interact with their surroundings. The United Nations Conference on the Human Environment 1972,[2] was the first major international conference held on environmental issues and highlights IEL's ripe spotlight in the international arena, having only been a topic of discussion for less than fifty years. Nevertheless, this area of law is developing at an unprecedented rate, with the European Court on Human Rights recognising the right to a clean environment as a human right in *Lopez Ostra v Spain*,[3] which was later developed to understand the right to a 'clean, healthy and sustainable environment'[4] as a universal human right under United Nations General Assembly (UNGA) Resolution of the 76th Session.
As a crucial instrument for encouraging environmental preservation, IEL supports sustainable growth, and resolving environmental issues on a worldwide scale and includes a wide range of legal instruments that try to address environmental concerns of international importance, such as treaties, agreements, protocols, and customary international law. However, UNGA Resolution of the 76th Session,[5] like many other instruments in IEL, uses vague language and is ultimately soft law which does not ensure states take action to protect the environment. IEL's main goal is to create laws, regulations, and requirements that require state conduct and advance environmental protection, natural resource sustainability, and conservation. Therefore, since there is a threshold for how much damage the earth's environment can take before it is irreversible, there is an imminent need for IEL to employ more effective methods than soft law to create legally binding obligations on states and allow for states to be held accountable when breaching such obligations, otherwise, the legal framework governing IEL will remain ineffective in ensuring the protection of our planet's environment and result in the damage being too far gone.

Various commentators argue that states do not agree to ratify a legally binding treaty because of 'non-compliance and the consequences'[6] warranting penal/legal actions against the state. Therefore, under this perspective, introducing a legally binding mechanism in IEL would fail to address the environmental crises and would instead cause a stalemate whereby any development made so far in producing soft regulations will be completely halted, ultimately,

[2] UNGA, 'Report of the United Nations Conference on the Human Environment' (Stockholm 5-16 July 1972) (25 June 1995) UN Doc A/CONF.48/14/Rev.1.
[3] App no 16798/90 (ECtHR, 9 December 1994).
[4] UNGA Res 76 (26 July 2022) UN Doc A/76/L.75.
[5] ibid.
[6] Phillipe Sands, Jacqueline Peel and Adriana Fabra, *Principles of International Environmental Law* (3rd edn, CUP 2012) 274.

stopping the development of IEL. However, this perspective fails to take into consideration that environmental concerns cut across international borders and demand teamwork and cooperation. Therefore, a well-balanced strategy for addressing concerns about potential penalties or legal repercussions includes introducing effective compliance mechanisms in treaties; the integration of flexibility mechanisms, such as gradual adoption, assistance in enhancing capabilities for poorer nations, and allowances for the transfer of technology. The effectiveness of treaties that employ a blend of incentives, assistance in adhering to the terms, and non-punitive actions to tackle non-compliance diminish apprehension about penalties.

IEL provides states with a forum for discussion and collaboration on common environmental problems, such as climate change, to create multilateral environment agreements, such as The Montreal Protocol on Substances that Deplete the Ozone Layer 1987,[7] and Conferences of the Parties – such as COP28,[8] promoting a shared appreciation of the value of environmental preservation and sustainable development. Key principles and frameworks 'are crafted to ensure the effective implementation of IEL'.[9] For example, the principle of common but differentiated responsibilities, as highlighted under the Rio Declaration on Environment and Development (1992),[10] guides the implementation of IEL by recognising that states differ in their environmental impact and historical contributions. According to this notion, more developed states should take the initiative in tackling environmental issues such as climate change and allow for underdeveloped states to contribute less to the cause. Additionally, the precautionary principle is essential to IEL's implementation since it emphasises the importance of taking preventative measures to safeguard the environment in the face of 'scientific uncertainty'.[11] This philosophy promotes proactive steps to reduce risks and acknowledges that waiting for irrefutable proof of harm may result in irreparable harm. States voluntarily enter into treaties and conventions, taking on the legal responsibility to adhere to the established standards and norms, and therefore, IEL creates a framework of legal requirements and principles to guide states towards adopting effective measures to safeguard the environment and advance sustainable development. Nevertheless, despite these guidelines

[7] The Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) (Protocol) 2637 UNTS 188.
[8] UNFCCC, 'Report of the Conference of the Parties on its twenty-eighth session, held in the United Arab Emirates (COP28)' (30 November to 13 December 2023) UN Doc FCCC/CP/2023/11.
[9] *Sands, Peel and Fabra* (n 6) 136.
[10] UN Conference Report (n 1) Principle 7.
[11] *Sands, Peel and Fabra* (n 6) 6.

and structures, IEL continues to be ineffectual since soft law is so common and as a result, major states are only held partially accountable.

Soft law: The benefits and shortcomings within international environmental law

The prominence of soft law principles and the limited accountability of powerful states have raised questions about the efficacy of IEL. Soft law is the term used to describe 'nonbinding instruments – which lack the specific form…and sources of international law but nevertheless, have behavioural effects'.[12] Soft law, therefore, refers to non-binding instruments or norms, such as recommendations or guidelines, which are a form of quasi-legal instruments lacking enforceable obligations under International Law. Instead, soft law instruments merely offer direction, establishing standards, and encouraging nations to freely embrace habits or practises. Contrastingly, treaties and customary international law create legally binding obligations upon states. Although soft law instruments play a significant role in establishing norms and encouraging collaboration, their voluntary character raises questions about their ability to affect real change. Soft law principles frequently lack the necessary teeth to ensure compliance with IEL, and international attempts to address environmental problems are less effective as a result. Additionally, IEL faces considerable obstacles due to the limited accountability of major states; large governments play a crucial role in determining international environmental regulations because of their considerable economic and political sway; however, they frequently work within a framework that gives them more control over how they fulfil their environmental obligations. This can lead to weak enforcement measures and a lack of significant penalties for non-compliance, allowing powerful states to put their own interests ahead of those of the environment. Therefore, there is a discrepancy between the intention and actual implementation of IEL as a result of soft law allowing limited accountability for large states. The global response to environmental concerns continues to be insufficient despite the existence of multiple international agreements, treaties, and conventions. Ecosystems on the earth, such as the Amazon Rainforest, despite being referred to as the 'Earth's green lung',[13] are still under severe environmental threat from deforestation, biodiversity loss, pollution, and the worsening

[12] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013) 2.
[13] Markus Müller, Daniel Sacco and Afif Chowdhury, 'Rainforests: The Earth's green lung' (CIO Nature Series, Deutsche Bank 2 August 2023) <www.deutsche-bank.it/files/documents/cio-week-up-front/CIO-Nature-Series-Rainforests-the-Earths-green-lung.pdf> accessed 19 September 2024.

effects of climate change. The urgency of the situation necessitates a critical analysis of the elements causing IEL to be ineffective.

It is important to understand that IEL frequently uses soft law instruments for several beneficial reasons; firstly, soft law provides the 'flexibility and adaptability'[14] that are frequently needed in IEL due to the complex and interdisciplinary character of environmental challenges. Enabling prompt action without the need for protracted treaty talks in response to newly emerging environmental concerns. Secondly, soft law provides a platform 'to build consensus by all states'[15] with diverse interests and priorities. Therefore, permitting different stakeholders to be included in the creation of environmental norms and standards, encourages collaboration and group action by facilitating communication, knowledge sharing, and capacity building. However, soft law's shortcomings make it less effective at accomplishing environmental goals. The absence of enforceable and legally binding duties is a fundamental constraint. Soft law instruments, such as the Rio Declaration on Environment and Development,[16] do not impose legally binding obligations, allowing nations to choose to disregard them without facing any repercussions. Because of this 'lack of transparency and accountability'[17] nations are less motivated to fully abide by the established norms and standards. Also, Soft law's 'voluntary character'[18] can result in inconsistent application and selective adherence because, depending on their national interests or inclinations, states may pick and choose various soft law instruments to adopt or implement.

The Paris Agreement, ratified in 2015, exemplifies a paradigmatic instance of a soft law mechanism that showcases the inherent advantages and constraints of soft law within the environmental sphere. In contrast to hard law treaties, characterised by stringent legal responsibilities and enforcement procedures, the Paris Agreement predominantly depends on nationally determined contributions (NDCs) from its participating nations to address and reduce greenhouse gas emissions. The NDCs, or Nationally Determined Contributions, represent commitments made by each country to attain precise objectives in decreasing emissions, strengthening adaptation initiatives, and mobilising financial resources to combat climate change. The non-binding nature of NDCs under the Paris Agreement represents the

[14] *Friedrich* (n 12) 126.
[15] ibid, 48.
[16] *UN Conference Report* (n 1).
[17] *Friedrich* (n 12) 54.
[18] ibid, 443.

adaptable and flexible qualities of informal regulations, enabling a customised strategy that acknowledges the varied economic, social, and environmental circumstances of the countries that have agreed to it. This strategy promotes wider involvement by allowing governments with different capacities and stages of development to engage in climate action in a way that is consistent with their national interests and capabilities. For example, a well-developed nation with substantial technological and financial capabilities such as the Netherlands may commit to more ambitious goals for reducing emissions in a shorter period of time. In contrast, a developing nation such as Saudi Arabia may prioritise measures to adapt to climate change and request international assistance in implementing these measures. Nevertheless, this adaptability also highlights the intrinsic constraints of non-binding legal instruments. The lack of enforceable commitments implies that adherence to NDCs relies mostly on political determination and national agendas. For instance, State A may want to actively pursue its NDCs, by incorporating climate action into its domestic policies and laws, thus showcasing its leadership and dedication towards achieving global climate objectives. On the other hand, State B, because of financial limitations, political factors, or different objectives, may choose a less ambitious strategy, which could weaken the joint endeavour to effectively tackle climate change. The usefulness of soft law in encouraging a cohesive response to environmental concerns is undermined by this selective approach. The uneven acceptance and execution of the principles of the Paris Agreement underscore the difficulties that arise from the non-binding nature of soft law. Although it promotes diversity and adaptability, it also leads to differing degrees of commitment and action among governments. This inconsistency can impede the global community's capacity to accomplish the long-term goals of the Paris Agreement, specifically in restricting global warming to a level much below 2 degrees Celsius, preferable to 1.5 degrees Celsius, in comparison to pre-industrial levels.

Moreover, the effectiveness of soft law is further weakened by the 'lack of enforcement measures'[19] and monitoring measures. The dependence on non-binding legal instruments such as the Paris Agreement gives rise to concerns regarding responsibility and openness. Without enforceable obligations, the task of monitoring progress and guaranteeing compliance with governments' pledges becomes increasingly difficult. The efficacy of soft law depends on the establishment of strong systems for reporting, evaluation, and

[19] ibid 451.

improvement of NDCs, together with international collaboration and assistance to promote adherence and ambition. Therefore, despite the fact that soft law mechanisms are important in IEL, their shortcomings make it difficult to achieve environmental goals.

Major States' limited accountability

The involvement of major states such as United States of America (USA) and China in IEL poses challenges to its effectiveness, particularly regarding accountability. Large states frequently have a considerable influence on international environmental talks and decision-making processes due to their economic, political, and technological capacities. Their capacity to set agendas, provide alternative strategies, and gather resources contributes to their influence over the creation and execution of international environmental agreements. Therefore, IEL can be understood to be hegemonic in nature because major states make 'their preference seem like the universal preference'.[20] Therefore, major states' non-compliance or insufficient implementation of international environmental protection and sustainable development can have serious repercussions.

The current enforcement tools for holding powerful states accountable for upholding their environmental duties frequently fall short or fail to hold powerful states accountable because the power imbalance in the global system makes it difficult. Large governments, like USA, may use their economic clout and political sway to reduce environmental obligations, placing domestic priorities ahead of global environmental issues, or postpone taking action. This harms the international communities efforts to handle urgent environmental concerns collectively, and there are numerous instances of major states' actions or policies undermining IEL, for example; China's air pollution and carbon emissions contribute to '27% of the worlds greenhouse gasses',[21] therefore, despite the EU's efforts to reduce emissions by thirty percent by 2030 during the Conference of the Parties to the Convention on Biological Diversity (COP15),[22] China's actions directly undermine this crucial convention in IEL because the EU cannot account for China's damage to the environment. As major states, China, USA and Russia possess a level of leveraging power in the international arena due to their influence on different trade markets. Therefore, these major states are powerful enough

[20] Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17(2), Cambridge Review of International Affairs 197, 199.
[21] 'Report: China Emissions Exceed All Developed Nations Combined' (*BBC News,* 7 May 2021) <www.bbc.com/news/world-asia-57018837> accessed 20 September 2024.
[22] UN Environment Programme 'Conference of the Parties to the Convention on Biological Diversity (COP15)' (7-19 December 2022 and 19-20 October 2023) UN Doc CDB/COP/15/17.

to undermine the efforts of IEL without being held accountable for their actions by the international community, because that very same international community is reliant upon these major states in playing a key role in the international arena of trade and economy. Major states can abuse this limited accountability. Whereas smaller states like Poland, which merely contributes to 1.7% of the world's carbon emissions,[23] are more likely to abide by the rules of IEL, despite it not being legally binding. This is because if Poland damaged their international relations as a result of breaching their environmental impacts, then the international community would have no problem challenging Poland due to its limited influence in relation to the international arena of trade markets. Ostracising Poland for non-compliance and denying it access to world markets would have little impact on other states compared to the effects of sanctioning a major state. This highlights the shortcoming of IEL; China contributes to almost a third of the world's greenhouse gases but cannot be held accountable. Poland does not even contribute to a 20th of the world's CO2 emissions but can be held accountable with limited economic costs to international trade. The current framework of IEL, with its heavy reliance on soft law, is therefore not effective in holding powerful states accountable, and, unfortunately, those powerful states make up the majority of the environmental impact across the globe, IEL cannot effectively effect real change to attain environmental goals until it creates binding obligations on those same powerful states. Soft law's voluntary nature raises further questions about how committed states—especially larger states—will be to carrying out their environmental duties. Powerful nations have even backed out of international environmental treaties, for example, the USA exiting the Paris Agreement[24] in 2017. This is because states are less likely to act decisively to solve environmental issues when there are no legal repercussions for non-compliance or poor implementation. As a result, efforts to reduce climate change or conserve biodiversity may not make as much progress as they could otherwise. This undermines other states' commitment and trust by indicating that they are not obliged by the agreements made. The failure of major nations, such as the USA, China, and Russia, to establish efficient climate change mitigation strategies or reach their emission reduction objectives casts doubt on their commitment to international environmental duties. Their unwillingness to make significant changes may impede international efforts to mitigate the effects of climate change. Additionally, the impact of those same powerful states' governments on the development of

[23] 'Report: Each Country's Share of CO2 Emissions' (*Union of Concerned Scientists*, 12 July 2023) <www.ucsusa.org/resources/each-countrys-share-co2-emissions> accessed 20 September 2024.
[24] UNFCCC 'The Paris Agreement (COP21)' (12 December 2015) UN Doc FCCC/CP/2015/10/Add.1.

international environmental legislation can occasionally result in norms that are weakened or compromised.

The ineffectiveness of IEL is further exacerbated by major states' ability to lobby for favourable conditions or exemptions, unequal distribution of environmental liabilities may emerge when large states are not held responsible for their actions or policies that violate environmental requirements. Smaller or developing states may be more responsible for the environmental effects, whereas larger states with more power and resources may not be subject to the same scrutiny or punishment for their activities. Furthermore, the international community's efforts to collectively solve global environmental concerns are undermined by major states' inadequate accountability. This undermines IEL's legitimacy and erodes state trust in one another. Major states are given the impression that they can behave without repercussions when there are no substantial penalties for non-compliance, which impedes efforts to achieve environmental sustainability.

If law is defined as 'a set of rules which govern society',[25] as per Vinogradoff, then IEL should be construed as the set of rules which govern the international society on environmental matters. However, if IEL is not able to govern the most influential states in the international society; (e.g. USA, China, Russia), then how can it possibly govern international environmental issues in an effective manner?

Navigating the Complexities of State Sovereignty

The notion of state sovereignty is a central tenet of International Law, acting as a fundamental principle that regulates the interactions among states. Sovereignty bestows states the power to administer their territories without any external intervention, encompassing the entitlement to devise and execute policies within their own borders. This idea, although fundamental to the self-governance and sovereignty of nations, poses a considerable obstacle within the framework of international environmental law (IEL). The worldwide scope of environmental concerns, particularly climate change and pollution, prompts the question: How much authority does a nation possess to influence the global environment within the bounds of its sovereignty? Environmental issues are not limited by political borders; the consequences of a nation's actions can have extensive repercussions, transcending frontiers and impacting the

[25] Paul Vinogradoff, *Outlines of Historical Jurisprudence,* vol 2 (OUP 1922).

global shared resources. The interdependence of environmental problems requires a reassessment of conventional concepts of sovereignty in view of the shared obligation to safeguard the global ecosystem.

The concept of state sovereignty is codified in the United Nations Charter and serves as a fundamental pillar of the global legal framework. Nevertheless, the growing acknowledgment of environmental degradation and climate change as fundamental risks to humanity has prompted a rethink of the traditional view of state sovereignty. This perspective recognises that the authority of states to control their own affairs is accompanied by the obligation to guarantee that their activities do not negatively impact other states or the global environment. This notion is exemplified by the principle of 'no harm', which mandates governments to take measures to prevent, mitigate, and manage the potential for environmental damage to other states or places that are not within their authority. The difficulty, however, is in finding a way to balance the rights of individual states with the necessity for collaborative efforts on environmental matters. The cross-border nature of environmental issues necessitates collaboration and synchronisation that surpasses the limitations imposed by conventional state sovereignty. This is apparent in the context of carbon emissions, where actions occurring within the territorial boundaries of a particular nation can have a significant impact on the phenomenon of global warming and climate change, thus influencing the entire world.
A states carbon emissions have a direct impact on its local environment, but also have broader effects on global atmospheric conditions. These emissions have a global influence, affecting climate patterns, sea levels, and ecosystems in distant locations outside national borders. The global impact emphasises the interdependence of nations' environmental strategies and the need for a unified strategy to tackle environmental issues. The concept of 'common but differentiated responsibilities', emphasised in multiple international environmental agreements, recognises the interdependence among nations and their differing abilities to tackle environmental challenges. It acknowledges that, although all nations have a collective responsibility for the environment, wealthier countries have a stronger duty to take the lead in tackling these issues.

The conflict between the authority of individual states and the worldwide scope of environmental issues necessitates a sophisticated strategy that upholds national independence while fostering global collaboration. This strategy entails the creation of legislative

frameworks and institutions that enable collaborative efforts while considering the varying situations and capacities of different governments. An effective approach is to enhance international environmental agreements by increasing their legal power and enforceability, so guaranteeing that states comply with their obligations. This would entail improving surveillance, documentation, and validation systems, while also implementing explicit penalties for failure to adhere. Moreover, it is imperative for international law to progress in acknowledging the global atmosphere and other shared resources as common goods that necessitate collective guardianship. This progression may entail the establishment of principles and norms that clearly restrict the degree to which the sovereignty of a state permits it to harm global natural resources.

Future Directions and Potential Solutions

Potential remedies and future approaches are crucial to address the present ineffectiveness of IEL. One potential solution derived from Shelton work is to transform 'soft (law) to hard law'[26] by establishing legally binding obligations and stronger enforcement mechanisms. Shelton suggests this would be problematic where 'ongoing flexibility is required',[27] however, hard law creates legally binding obligations on states and includes 'conventions...custom(s)…[and] general principles'.[28] Therefore, states would be required to abide by environmental standards and take significant action to solve environmental problems if voluntary commitments were transformed into legally enforceable responsibilities. This change would bring more clarity and certainty, ensuring that states are held responsible for their deeds or failure to comply.

Additionally, strengthening 'accountability mechanisms for states'[29] is crucial to improve the effectiveness of IEL, particularly with regard to major states such as the US and China which get away with not fulfilling their environmental obligations due to their influence on the international trade markets. Again, this is, despite states like China being responsible for causing an unproportionate amount of environmental damage. This transformation in the enforcement of IEL can be accomplished by making environmental decision-making

[26] Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2003) 31.
[27] ibid.
[28] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) UNTS, ch 2, art 38(1).
[29] Daniel Bodansky and Harro van Asselt, *The Art and Craft of International Environmental Law* (2nd edn, OUP 2024).

processes more transparent. By making the acts and policies of powerful states more transparent, this encourages accountability and deters actions that harm environmental goals. Major states can be held responsible for their environmental promises through the use of transparency measures such as stakeholder engagement, public reporting, and disclosure of environmental data.

But there is scope to go further still. In International Criminal Law, the International Criminal Court can hold individuals accountable through the principle of 'individual criminal responsibility'.[30] The employment of individual criminal accountability in IEL would develop a more effective framework for the enforcement and implementation of IEL. State officials would be more hesitant to dismiss IEL if they could face individual consequences later down the line. This is a crucial element in the improvement of IEL's application because the current framework fails to hold states accountable, and the issue remains, how can you hold states accountable? There exist concepts like the 'no harm principle',[31] 'state responsibility',[32] and 'responsibility to protect'[33] which scholars argue may be instrumental in holding a state accountable, however, these concepts have consistently proven to fail in practice in relation to environmental harm.

The Chernobyl 1986 nuclear tragedy serves as a dramatic illustration of the inability to prevent the spread of environmental damage across borders. The detonation dispersed radioactive substances over Europe, resulting in significant health and environmental consequences. The disaster emphasised the significance of the 'no harm' principle, but the Soviet Union's failure to promptly and openly communicate, along with the lack of strong international mechanisms to deal with the cross-border impacts of the disaster, revealed the limitations of the principle. Similarly, the Fukushima Daiichi Nuclear Disaster in 2011 brought up important concerns regarding the efficiency of the 'no harm' approach in handling and averting cross-border environmental damage caused by nuclear accidents. Although there have been improvements in global environmental management, the difficulties in

[30] 'Rome Statute of the International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June-17 July 1998) (17 July 1998) UN Doc A/CONF183/9, art 25.
[31] *UN Conference Report* (n 2) Principle 21.
[32] *UN Conference Report* (n 1) Principle 2.
[33] UNGA, '2005 World Summit Outcome' Res 60/1 (16 September 2005) UN Doc A/RES/60/1, paras 138-139.

implementing the ‘no harm’ principle were apparent in the struggle to control nuclear contamination and mitigate its extensive effects on the marine ecosystem and beyond.

The Deepwater Horizon Oil Spill in 2010 serves as a prime example of the difficulties in enforcing state responsibility and holding both states and corporations accountable. The USA government and BP have reached settlements to address the environmental damage caused by the incident. This incident has brought attention to the complexities of international state responsibility, especially when it comes to the actions of multinational corporations. It has also highlighted the limitations of national jurisdictions in fully compensating for environmental harm that crosses borders. Furthermore, the continuous destruction of the Amazon rainforest poses a situation in which the concept of governmental accountability encounters substantial obstacles. Despite widespread international criticism and the evident cross-border consequences of deforestation, such as the loss of biodiversity and its contribution to climate change, it remains challenging to hold individual countries responsible for their failure to prevent environmental damage. This difficulty highlights the constraints of international law when it comes to addressing environmental degradation within the borders of sovereign nations.

Some researchers suggest that the R2P, which is mostly used to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, should also be applied to address serious environmental degradation and climate change. Nevertheless, its implementation in this particular setting has demonstrated restricted practical use and efficacy. Climate change poses existential concerns to small island developing states (SIDS). To address this issue, there have been proposals to apply the Responsibility to Protect (R2P) principle in order to impose action against big greenhouse gas emitters. However, these proposals have not been effectively implemented. The ineffectiveness of the concept in mobilising substantial international engagement against governments that have a disproportionate impact on climate change highlights its shortcomings in safeguarding the environment.

Warnings of a Western-Centric Approach

At the core of implementing hard law in IEL and strengthening the framework and enforcement mechanisms in IEL lies a fundamental issue: Are we, as advocates of IEL,

addressing the topic from a Western-centric perspective? Throughout history, Europe and USA have pursued development plans that have caused substantial damage to the environment. The Industrial Revolution, marked by extensive air and water pollution, serves as evidence of the environmental impact incurred in the quest for economic advancement. In a similar vein, European colonial powers actively participated in the extraction of resources throughout extensive regions, hence intensifying ecological deterioration. However, while Western nations have enjoyed the advantages of industrialisation and economic expansion, they increasingly exert control over the environmental regulations of developing countries. This division between two contrasting ideas brings up significant ethical and moral inquiries regarding the fair allocation of environmental hardships and obligations. Why should countries that have experienced the most severe consequences of past environmental plunder be subjected to limitations on their progress, while those who have previously benefited from such exploitation claim a moral superiority?

When examining the case of Saudi Arabia and its planned development initiatives, including the Line project, ‘a 170-kilometre city’ under development in the desert. Western countries, which are frequently leading in environmental activism, voice serious concerns regarding the possible ecological consequences of building such measures. Nevertheless, their position exhibits blatant hypocrisy when compared to their own past of exploiting the environment. Saudi Arabia, akin to numerous other emerging countries, aims to attain economic success and modernisation by means of industrialisation and infrastructure development. However, Western powers simply overlook their own previous wrongdoings and instead criticise and urge for self-control. This raises the question: do Western nations possess any ethical legitimacy to prescribe the growth trajectories of other less developed states, considering that they have readily pursued their own interests at the detriment of the environment in order to develop into first-world countries?

It is crucial to acknowledge that the endeavour to achieve sustainable development cannot be separated from the factors of fairness and equality. To make significant advancements in the field of IEL, it is crucial to give priority to the ideas of common but differentiated responsibility and respective capabilities (CBDR-RC) in environmental justice. Despite this proving to be counterproductive by allowing states, like India and Brazil to join the top twenty GHG emitters as developing states could emit without restriction under the Kyoto

Protocol.[34] This strategy involves recognising past injustices and ensuring that the responsibility for environmental preservation is distributed fairly among countries, regardless of their level of development. Moreover, it requires a shift away from the universal approach supported by Western-centric viewpoints. Instead of enforcing inflexible laws and limitations on developing nations, there should be a collaborative endeavour to aid and enable the creation of sustainable development routes that are specifically designed to fit their distinct socio-economic circumstances.

Conclusion

The prevalence of soft law mechanisms and the limited responsibility for major states are responsible for IEL's inefficacy in tackling global environmental concerns. The voluntary nature of soft legislation and the absence of enforcement measures reduce its efficacy in attaining environmental goals. Furthermore, the lack of accountability on the part of powerful states can result in an unfair allocation of environmental costs and the undermining of international environmental objectives. There is a need for stronger legal frameworks through the use of hard law which creates enforceable obligations and as a result, improved accountability systems for major states that abuse their influence in the international arena to avoid fulfilling their obligations to protect the environment. Viable future approaches are available, but also necessary, in order to solve the shortcomings of international environmental legislation. It would be clearer, more certain, and easier to administer and enforce IEL if it were more heavily converted into hard law. This transfer from soft to hard law would strengthen accountability mechanisms for major states and ensure that they are held responsible for their environmental commitments by establishing legally binding obligations that apply equally to all states, regardless of their influential power in the international arena, and as a result, provide mechanisms for the enforcement of IEL. As a result, the employment of more hard law would transform IEL's predominantly hegemonic nature into a multipolarity system which distributed power equally between states to ensure IEL promotes fairness, equality, and efficiency in environmental management. In summary, a multifaceted strategy is needed to remedy the shortcomings of IEL, employing both soft law – to start conversations regarding certain developing issues, as well as developing hard law – creating binding commitments for urgent issues that need resolving immediately and allowing

[34] Kirsten Davies and Thomas Ridell, 'The Warming War: How Climate Change Is Creating Threats to International Peace and Security' (2017) 30 Georgetown Environmental L Rev 47,48.

for improved accountability systems for inactive involvement from any parties. Putting these measures into practice allows for a more solid and accountable framework for addressing global environmental concerns and attaining sustainable development.

How the Law Reflects and Sustains the Patriarchy: A Deliberate Mechanism, not a Natural Occurrence

Maddy Cartwright

Abstract

This article seeks to discuss the intentionally sustained patriarchal values within the law. In essence, this is the idea that the law can be seen to both reflect and preserve the patriarchy through its framework and practical applications. Sustaining such values is a dangerous reality, as it significantly undermines women in intellectual capacities and raises concern as to their bodily autonomy. The detriment this causes women therefore proves a necessary examination of the law to unpick where these issues are present and consider how best they can be resolved.

Exploring different areas of society that impact women through the sustained preservation of the patriarchy, ultimately evidences detriments suffered by women in their workplaces, courtrooms and desire to exercise their autonomy. Dissecting these issues to consider how the patriarchy can affect different women in various manners, is of upmost importance, as to comment that all women fit under a blanket experience from the patriarchy is both unjust and ill-founded. Ultimately, by critically discussing the ways in which women are affected and considering how their experiences may differ from one another, underpinning the law as a system that reflects and preserves the patriarchy is an apparent conclusion. 1

Introduction

Defined by Walby as 'a system of social structures and practices in which men dominate, oppress and exploit women', the patriarchy has been sustained within law to the detriment of women when conversely law should serve to protect women against it.[1] Feminist jurisprudence has criticised the law for failing to be objective and instead adopting patriarchal tendencies that have negatively impacted women such as evident prejudice within the workplace and an inability to adequately protect women who experience sexual violence. Upon an exploration of key issues such as those above, the harmful implications of endorsing patriarchal ideas are highlighted and it becomes evident that adopting a radical feminist approach is necessary to expose the law for preserving the patriarchy and ultimately

[1] Sylvia Walby, *Theorising Patriarchy* (Blackwell 1990).

sustaining it with intent. A radical feminist approach can unveil the mechanisms the law upholds to both control and objectify women into a category, seen as inferior. It is essential to also adopt an intersectional feminist perspective to discuss the varying impact the patriarchy has on different women as there is no universal experience shared and this oversimplifies the issue. Therefore, through both a radical and intersectional feminist critique of law, it becomes clear that substantial changes in attitudes and power structures are required to overcome the inherent flaw of law, that it intentionally sustains the patriarchy.

The Damage the Patriarchy causes within the Workplace: The Gender Pay Gap and the Inability to Balance the Public and Private Realms

To consider a scholarly definition of feminism, MacKinnon argues 'feminism is a theory of power and its distribution, offering an account of how social arrangements of patterned display can be internally rational yet unjust' and through the problems women encounter in the workplace, both with their pay and treatment, it is evident how prejudices are complied with instead of substantively overturned.[2]

The issue of the Gender Pay Gap is 'an equality measure that shows the difference in average earnings between women and men' and is significant when exploring the prejudices women experience in the workplace as it is a literal representation of the differing treatments men and women encounter.[3] Rhode comments that recognising and reflecting on patriarchal biases that formed the wage setting process is necessary to avoid the dismissal of this issue and these biases are exposed in the consistent undervaluation of women's work such as 'a female nurse earning less than a male tree trimmer and a female schoolteacher earning less than a state liquor store clerk'.[4] Overcoming this discrimination is hindered through what Ciminelli, Schwellnus and Standler describe as 'glass ceilings' and 'sticky floors', the prior representing the obstacles preventing women from advancing their career and the latter being the disadvantages faced by women within the workplace.[5] Therefore, within employment, the

[2] Catherine MacKinnon 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7(3) Signs: Journal of Women in Culture and Society 515.
[3] Government Equalities Office, 'UK gender pay gap' (*GOV.UK*, 17 November 2016) <www.gov.uk/government/news/uk-gender-pay-gap> accessed 29 April 2023.
[4] Deborah Rhode, *Speaking of Sex: The Denial of Gender Inequality* (Harvard University Press 1997).
[5] Gabriele Ciminelli, Cyrille Schwellnus and Balazs Stadler, 'Sticky floors of Glass Ceilings? The role of human Capital, Working Time Flexibility and Discrimination in the Gender Wage Gap' (2021) OECD Economic Department Working Papers No. 1668 <www.oecd-ilibrary.org/economics/sticky-floors-or-glass-ceilings-the-role-of-human-capital-working-time-flexibility-and-discrimination-in-the-gender-wage-gap_02ef3235-en> accessed 28 April 2023.

patriarchal influence begins to become apparent in negatively impacting women as their work is undervalued and consequently receives a lower payment. Considering how the law has preserved the patriarchy within discussion of the Gender Pay Gap draws relevance to the excuses given as to why solving the gap would be more problematic, with accusations that it could 'increase inflation, worsen unemployment and distort labour supply and demand'.[6] However, resolving pay inequality would help push the needed reform in the right direction and this substantive change that radical feminists fight for, would only be beneficial by 'promoting progress for these subordinate groups'.[7]

Considering an intersectional feminist perspective on the damage the patriarchy causes within the workplace

It is important to note that the effects of the patriarchy are not synonymous between all women, as doing so would be ignorant of the further challenges women of different races and sexualities experience within the workplace. One pay gap barrier that McElhaney and Smith recognise is that of 'discrimination and unconscious bias', which expose the influence cultural stereotypes have on forming 'automatic mental short-cuts in processing information'.[8] Rhode notes these disparities in the workplace are even greater for women of different races, establishing the importance of considering the true extent of implementing patriarchal values and not stopping where the detriment ends for white women.[9] Therefore, the law sustaining the patriarchy is also clear within the worsened experience women of different races endure in the unresolved gender pay gap issue.

With MacKinnon commenting that within the private realm 'women have distinctively experienced the politics of their subordination on the basis of sex', the inability of employment law at balancing both the private and public realms arises as a serious issue stemming from the law intentionally sustaining patriarchal values.[10] Seeking harmony between career interests and family life has manifested into maternity leave, flexible working and ensuring childcare but these fall short of what is needed as the judgement surrounding

[6] *Rhode* (n 4) 172.
[7] ibid 175.
[8] Kellie McElhaney and Genevieve Smith, 'An Exploration of Gender Equity, Equal Pay and A Company that is Leading the Way' (International Centre for Research on Women, January 2017) <icrw.org/wp-content/uploads/2017/11/Eliminating-the-Pay-Gap-Kellie-McElhaney-and-Genevieve-Smith.pdf > accessed 30 April 2023.
[9] Deborah Rhode, 'Gender and Professional Roles' (1994) 63(1) Fordham Law Review 39.
[10] *MacKinnon* (n 2).

those who rely on these concepts counteracts the progress they were designed to achieve. For example, Jacobs explored the consequences of employees who utilise maternity leave and found that they failed to receive both raises and promotions, which questions the value of these concepts if they in fact regress a woman's career in a different way.[11]

The inadequate balance between these two realms ultimately reinforces traditional gender roles as defined by the male standard and as Rhode comments, the 'inequalities in work reflect the inequalities at home'.[12] There are noticeable influences of sustaining patriarchal values in the private realm as taking on domestic burdens significantly hinders a woman's career progression and despite women continuously sacrificing their own success to fulfil private life obligations, it is failed to be considered 'noteworthy' but instead a standard.[13] Furthermore, these obligations are failed to be placed upon men when it is commonly considered that it is natural and therefore rational for women to assume more roles relating to childcare and house needs.[14] Traditionally the patriarchy asserts the role of earning income solely upon men and neglects a recognition about the importance of paternity leave for a family, removing a financial incentive for men to take leave for their private life and further pushing women to assume domestic roles.

Discussing the damage the patriarchy causes within the workplace as evidenced within the public sphere

This issue is also present within the public realm as disregarding family-related benefits within jobs has discouraged equal parental roles.[15] The choice women make between excelling their career or prioritising their family receives criticisms from the public realm regardless of their decision, as the patriarchy exhibits dissatisfaction through either option. This illustrates the way in which women are controlled and oppressed to its benefit. Therefore, it becomes clear that employment law fails to adequately balance the competing interests of both the private and public realms and for where it fails to resolve this issue,

[11] Deborah Jacobs, 'Should the Way Back from the Mommy Track Be Smoother?' *New York Times* (New York, 30 October 1994) <www.nytimes.com/1994/10/30/business/l-should-the-way-back-from-the-mommy-track-be-smoother-678198.html> accessed 27 April 2023.
[12] *Rhode* (n 4) 142.
[13] ibid 151.
[14] ibid.
[15] Josie Cox, 'Paternity Leave: The Hidden Barriers Keeping Men at Work' (*BBC News*, 13 July 2021) <www.bbc.com/worklife/article/20210712-paternity-leave-the-hidden-barriers-keeping-men-at-work accessed> 26 April 2023.

women suffer the consequences as they are shamed for either being selfish with their career decisions or pushed into domestic work to satisfy traditional patriarchal views.
Ultimately through an exploration of the Gender Pay Gap and the failure at balancing the private and public realms, it is clear that the law intentionally sustains the patriarchy through reinforcing heteronormative ideas and failing to act where substantive change such as promoting greater gender equity in workplace opportunities and encouraging both sexes to combine their work and family responsibilities is necessary.[16]

The Inability of the Law at Combatting Sexual Violence Issues: A Process of Clear Patriarchal Domination

Reflecting on other domains in which the impact of the law sustaining the patriarchy inevitably leads to discussions around the issues women encounter when seeking to combat sexual violence. Legal systems have failed to satisfactorily solve issues stemming from sexual violence suffered by women such as shaming women in courtrooms, invalidating accounts of rape and blaming women for their perpetrator's decision to falsely assume consent has been given. Rhode asserts that these issues relate to the underlying influence of adopting patriarchal views, 'even those who acknowledge that sexual abuse is a serious problem often fail to see its connection to broader patterns of sexual inequality'.[17] Failing to address the attitudes that underpin the constant disbelief in women and encourage protection for the perpetrators, allows patriarchal views to continue oppressing and detrimentally affecting women.

Defined in the Sexual Offences Act 2003, the offence of rape is where the perpetrator intentionally penetrates an orifice without the consent of the victim and does not reasonably believe that the victim consents.[18] With statistics stating 85,000 women experience rape or sexual violence a year, it is clear that the crime is not sufficiently reprimanded.[19] Estrich notes that the idea of 'real rape' has invalidated many women's experiences of sexual violence by suggesting where the perpetrator is known or the action is not physically violent, it does not align with its statutory description and is instead 'simple rape'.[20] With Roiphe

[16] *Rhode* (n 4) 175.
[17] ibid 95.
[18] Sexual Offences Act 2003, s 1.
[19] Criminal Injuries Helpline, 'Sexual Abuse - 2023 Data' (*Criminal Injuries Helpline*, 8 January 2023) <http://criminalinjurieshelpline.co.uk/blog/sexual-abuse-data-stats/> accessed 2 May 2023.
[20] Janet Findlater, 'Re-examining the Law of Rape' (1988) 86(6) Mich.L.Review 1356.

asserting those who speak up are 'wallowing in their own "victimisation"', it is clear that holding those who commit this crime accountable for their actions is not straight forward as it should be.[21] These attitudes reflect the denial of rape as a serious issue as women are seen as the problem, not their perpetrators which therefore exhibits the influence of patriarchal values in contributing to the belittlement of women and entrenching sexist stereotypes. This is frequently seen within judicial settings as Rhode identifies both juror Lea Haller's comment 'attractive males don't have to resort to violence' and the success of a 'boys will be boys' argument to dismiss a rape accusation.[22] Therefore, the law sustaining the patriarchy has detrimentally invalidated many women's accounts of rape and is currently failing to substantively change the law accordingly.

MacKinnon treating consent as the 'mark of women's autonomy and freedom' reflects the importance of discussing the matter when considering how the law sustains the patriarchy to the detriment of women.[23] The issue stemming from consent is the consistent removal of men's responsibilities in committing acts of sexual violence to shift the blame of women's injuries upon the victims themselves, evidenced through the 'boys will be boys' mentality and the 'she asked for it' defence.[24] Too often judges and the public exemplify ignorance towards sexual violence and utilise a double standard where 'intoxication makes men less culpable and women more so'.[25] This continuous shift of responsibility from men on to women results from the law sustaining patriarchal values. Perhaps it is easier to deny than accept our supposed protectors are actually the ones women should be protected from?

A significant issue where the law avails to fail combatting sexual violence to sustain the patriarchy occurs in courtrooms. Judicial conduct belittles women, and the outcomes often leave women at a loss, regardless of their trial result. The treatment of victims within the courtroom reflects the patriarchal legal procedures by assuming a woman invites her own abuse as women who are considered 'abrasive, antagonistic, seductive, flirtatious' are seen as 'deserving' of the sexual violence endured.[26] Often the trial focuses too narrowly on

[21] Jennifer Gonnerman, 'The Selling of Katie Roiphe' (*The Baffler*, December 1994) <http://thebaffler.com/salvos/the-selling-of-katie-roiphe#> accessed 1 May 2023.
[22] *Rhode* (n 4) 121.
[23] *MacKinnon* (n 2).
[24] Alli Smalley, 'The Problem With "Boys Will Be Boys"' (*Power to Fly*, 26 April 2022) <http://powertofly.com/up/boys-will-be-boys> accessed 4 May 2023.
[25] *Rhode* (n 4) 127.
[26] ibid 102.

assessing the woman's character as supposed to her perpetrator's, suggesting a denial of male responsibility and reflecting the implications of sustaining patriarchal values within a legal system. The rape shield statute implemented to protect women from such humiliating interrogation fails to be successful as attorneys intrusively seek to gather facts about their character that would suggest welcoming the sexual misconduct.[27] The consequences women endure post-trial are also unsatisfactory as 41% of victims said there were no consequences for their perpetrator, therefore reiterating this issue of removing responsibility for the sexual violence from men and easily finding women to blame.[28]

Infusing intersectional feminism within radical feminism's arguments in relation to sexual violence issues highlights how even the law of rape was created with the purpose of protecting white women, which Crenshaw notes has created a 'distinct set of issues confronting black women'.[29] If radical feminism only goes so far in protecting women of other races as their 'experiences coincide' with white women's, the approach is insufficient and should be reworked to ensure the detrimental effects sustaining the patriarchy has on every person is overcome.[30] This issue demonstrates the flaws of adopting a one size fits all 'grand theory' to women's oppression as it is clearly inadequate at representing the varying effects of the patriarchy because of its ignorance towards different challenges different women face.[31] Therefore, the failure of the law for sustaining the patriarchy is also clear through its failure to recognise the difficulties women of different races endure through sexual violence.

Ultimately through an exploration of the implications stemming from a flawed approach to tackling sexual violence, the law has prevailed to be inadequate at resolving these issues as it upholds patriarchal values and establishes an acceptance for the wrongful domination of women by men. It is only through addressing the flaws that adopting patriarchal values has created that successful substantive change be achieved, as Rhode comments 'we cannot

[27] Alan Travis, 'MP Proposes UK Rape Shield to Protect Victims in Court' *The Guardian* (London, 8 February 2017) <www.theguardian.com/society/2017/feb/08/mp-proposes-uk-shield-law-to-protect-victims-in-court> accessed 1 May 2023.
[28] Government Equalities Office, '2020 Sexual Harassment Survey' (*GOV.UK*, 2020) <http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002873/2021-07-12_Sexual_Harassment_Report_FINAL.pdf > accessed 4 May 2023.
[29] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Colour' (1991) 43(6) Stanford Law Review 1241.
[30] ibid.
[31] Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

respond adequately to sexual harassment without also responding to the institutional structures that perpetuate it'.[32]

How the Law Uses Gender Differences to Shape and Control Women's Bodily Rights: Prohibiting Abortions but Tolerating FGM?

A third way in which the law has evidently sustained the patriarchy is apparent through the objectification of women to be reduced into their differing anatomy from men and subsequently controlled through this distinction, illustrated in the restrictions on abortion and failures at terminating female genital mutilation (FGM).

The decision in the United States to overturn *Roe v Wade* and assert choosing abortion is not a constitutional right has significantly regressed the progress women have made in establishing bodily autonomy and a right to choose.[33] This control has escalated even further within Texas as the Supreme Court has granted citizens the ability to pursue action against women seeking an abortion.[34] The detrimental effects of the law sustaining the patriarchy are made apparent through states controlling women's right to choose and shaming them for where it has been possible to do so, clearly demonstrating a failure of the law at being objective and neutral. Therefore, preserving patriarchal values restricts the ability of the law at serving justice as it instead appears to serve to the benefit of those who seek to control women's bodily rights through their gender differences over women themselves.

With the bodily harm caused by FGM and the World Health Organisation stating that its practise is 'recognised internationally as a violation of human rights', it draws serious questions as to why the law has failed to sufficiently prohibit the procedure.[35] With no health benefits, FGM simply serves as a means in which young girls and women can be further controlled by the patriarchy. The purpose of control is established through the cultural and social factors that encourage the procedure, arguing it as a necessary way in which women can be prepared for marriage.[36] Looking at the issue from an intersectional feminist

[32] *Rhode* (n 4) 107.
[33] *Roe v Wade* 410 U.S. 113 (1973).
[34] Reese Oxner, 'U.S. Supreme Court Lets Enforcement of Texas Abortion Law Continue but Allows Legal Challenges to Proceed' (*The Texas Tribune*, 10 December 2021) <www.texastribune.org/2021/11/05/texas-abortion-law-supreme-court/> accessed 1 May 2023.
[35] World Health Organisation, 'Female Genital Mutilation' (WHO, 5 February 2024) <www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> accessed 2 May 2023.
[36] ibid.

perspective highlights how the topic is disregarded in discussions of bodily autonomy as abortion takes precedent, suggesting that the fight for substantive change ends where white Western women's suffering ends as FGM is predominantly present within African and Southeast Asian countries. Therefore, the failure of the law to adequately combat FGM highlights how sustaining patriarchal values detrimentally impacts women. As Saini comments, 'there is no biological basis for entrenched inequality between the sexes' and thus by failing to overturn the control over women's bodily rights, the law sustains unjust patriarchal values.[37]

Conclusion

Ultimately the law has preserved the patriarchy and sustained it intentionally as where substantive change is needed; it is too often avoided. Evidenced through inadequate solutions to resolving issues stemming from sexual violence as the blame for such crimes is continuously placed upon the victims, hindering women's career progression and controlling women through their differing anatomy, the patriarchy has persisted at being detrimental for women. As noticed by adopting intersectional feminism within critical discussions of the patriarchy, the effects of sustaining it are not universal between women and numerous factors such as class and race can shape their experiences differently. Whilst there are differences in how the patriarchy affects different women, the effects are ultimately detrimental to women and through the law sustaining it, it fails to be objective and neutral which consequently obscures its purpose of serving justice and protecting women from prejudices. Therefore, seeking to overcome the sustainment of patriarchal values within the law is of upmost importance and requires an urgent resolution to cease the prejudices women unnecessarily suffer.

[37] Angela Saini, *The Patriarchs: How Men Came to Rule* (Harper Collins 2023).

War 1, Law 0: The 21st Century Decline of Legal Restraint Against War

Olivia Mitchell

Abstract

This paper investigates the decline of the relevance of *jus ad bellum*, or the law governing the right to war, in the 21st century. Despite its foundational role in international law, *jus ad bellum* presents a complex and discordant framework, exacerbated by conflicting state practices and institutional limitations. Drawing on historical insights and contemporary examples, the paper highlights the ambiguities surrounding key concepts such as anticipatory self-defence and humanitarian intervention, illustrating the tension between established legal norms and the actions of states. The case of the 2003 Iraq War serves as a focal point, exposing the erosion of legal standards as powerful nations prioritise self-interest over compliance with international law.

Additionally, the dysfunctionality of the United Nations Security Council, particularly its gridlock caused by the veto power of its permanent members, underscores the challenges facing the enforcement of jus ad bellum. Ultimately, this paper argues for a critical re-evaluation and reform of the legal frameworks governing the use of force, emphasising the necessity to align legal principles with the realities of international relations in order to promote justice, accountability, and global stability.

Introduction

Jus ad bellum, literally translating from Latin as ‘the right to war’, refers to the set of rules that govern the circumstances under which states may resort to war, providing justifications for the use of force. In this way, it contrasts with the broader ‘law against war’, which generally prohibits armed conflict. These rules are derived from a variety of international sources, as outlined in the Statute of the International Court of Justice, including international conventions, customary international law, general principles of law, and judicial decisions.[1] Since its inception centuries ago, *jus ad bellum* has evolved throughout history into the complex and wide-ranging body of law that governs the use of force today, with the United Nations Charter serving as its cornerstone.[2]

[1] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) UNTS, ch 2, art 38(1).
[2] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

However, in the midst of ongoing conflicts in Ukraine and Palestine, it becomes clear that international law is failing to provide the security and justice people around the world seek. Although the regime of *jus ad bellum* is foundational to global order and has in some form existed for centuries, it is a complex and discordant concept. As one scholar aptly states, 'international law has consequently no alternative but to accept war, independently of the justice of its origin'.[3] This highlights the inherent challenges in applying jus ad bellum in contemporary contexts. This essay will explore the development of the model over time; analyse the impact it has had on the global community and discuss the different elements that have made the concept what it is today. This paper will also argue that the right to war is a flawed and frictional notion and will highlight examples of its acrimoniousness in operation. It will also discuss controversial and disputed areas of international law and what this means for *jus ad bellum*.

***Jus ad bellum*: Historical insights for today's context**

Jus ad bellum is an enigma: it derives from many dissimilar sources which makes it difficult to define and understand. The foundations of modern recourses to war stem from Hugo Grotius. In 1625, his principles on the justice of war, maintained that war is justifiable only if the state faces imminent danger, and the use of force is proportionate and necessary.[4] The cracks in *jus ad bellum* began to show with the failed League of Nations period (1919-1928) and the Kellogg-Briand Pact (1928–1939): While both were widely ratified, they highlighted early signs of discord and ambiguity in the concept. The League of Nations did not prohibit war outright, and the Kellogg-Briand Pact only renounced war when used as an instrument of national policy – leaving open the possibility that war for other reasons could be permissible.[5] Crucially, both doctrines failed to prevent the Second World War, and the interpretation of permissible self-defence remained unclear. Following this, the UNC was drafted in 1945, and it is here that many of the rules regarding the right to go to war can be found.

(UNC).

[3] William Edward Hall, *International Law* (Clarendon Press 1880) 52.

[4] Hugo Grotius, *The Rights of War and Peace*, vol 1 (Jean Barbeyrac and Richard Tuck eds, Indianapolis: Liberty Fund, 2005).

[5] General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (adopted 27 August 1928, entered into force 24 July 1949) 94 LNTS 57-63, art 1.

Incoherence and discordance in international norms: The case of anticipatory self-defence

Some norms on the use of force are more settled than others. For instance, Article 2(4) of the Charter is a 'law against the use of force', used to ensure that no unnecessary threat or force is being used 'against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations'.[6] This norm has been supported since its inception, and violations against it have been widely treated as such. However, it is subject to two exceptions – collective security as authorised by the Security Council (UNSC),[7] and self-defence.[8] It is within these exceptions that there are higher levels of controversy.

Armed attack threshold:

One condition for states to use defensive force is based on an 'armed attack threshold', which comes from the Resolution on the Definition of Aggression, wherein an incursion must pass a certain level of violence to be deemed an armed attack.[9] This has been supported by other institutional bodies like the International Court of Justice (ICJ), who adopted the threshold in *Military and Paramilitary Activities in and against Nicaragua*,[10] and again later in *Oil Platforms.*[11] However, some states have taken a much more lenient approach to the threshold for using defensive force and make no reference to an armed attack threshold, as explained by Hakimi and Cogan.[12] For example, in 2012 when Türkiye responded with armed force to stray Syrian mortar shells killing Turkish citizens,[13] some states encouraged Türkiye to exercise restraint,[14] but others wholeheartedly agreed and supported their right to defensive force.[15] The policy that states endorse in these circumstances is entirely in conflict with that of the UN, hence representing a clear example of the incoherence of *jus ad bellum* and

[6] *UNC* (n 2), art 2(4).
[7] ibid art 24(1).
[8] ibid art 51.
[9] UNGA Res 3314 (XXIX) (14 December 1974).
[10] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 1.
[11] *(Iran v. United States)* [2003] ICJ Rep 161.
[12] Monica Hakimi and Jacob Katz Cogan, 'The Two Codes on the Use of Force' (2016) 27(2) European Journal of International Law 292.
[13] Martin Chulov, 'Turkey Strikes Syrian Targets after Cross-Border Mortar Bomb Kills Five' *The Guardian* (London, 3 October 2012) <www.theguardian.com/world/2012/oct/03/turkey-syrian-mortar-bomb> accessed 18 January 2022.
[14] UNSC (15 October 2012) UN Doc. S/PV.6847, 18-19.
[15] Matthew Weaver and Brian Whitaker, 'Turkey-Syria Border Tension' *The Guardian* (London, 4 October 2012) <www.theguardian.com/world/2012/oct/04/turkey-syria-threat-security-live> accessed 17 January 2022.

support for Hakimi and Cogan's 'Two Codes' theory.[16] Within their article, they continue in stating that 'although the institutions insist that the armed-attack threshold is law, they have never provided sufficient guidance on the level or kind of violence that satisfies that threshold. Rather, they have preserved considerable ambiguity when the armed-attack threshold is met'.[17] This again demonstrates such discordance, as international institutions which develop policies do not provide clear guidance on the policies themselves. Furthermore, the article highlights that when, in the same conflict, stray weapon fire crossed from Syria into Israel and caused damage to an Israeli military vehicle, 'Israel's forcible response was met with near silence'.[18] This shows further inconsistency with how these policies are treated, even horizontally between the states that engage with them against the will of the institutions.

Anticipatory self-defence:

Another controversial area of international law lies in the concept of anticipatory self-defence. Despite Article 51 theoretically requiring actual occurrence of an armed attack before a state can respond, in practice the nature and scope of this right has been interpreted with much wider meaning. In reality, it has become customary for states to enforce self-defence prior to an attack, the argument being that it would be 'absurd and unreasonable' for states to wait for their own demise with a 'suicide pact'.[19] Justification for anticipatory self-defence therefore lies in the idea that states would be digging their own grave in waiting to be attacked first, as it would be impossible to determine if they could maintain the military and financial resources to conduct a response. This was the approach also taken by the failed and highly controversial Bush Doctrine,[20] where the US were ready strike first despite no imminent threat, and regardless of uncertainty remaining as to the time and place of a feared attack. The doctrine disregarded uncertainties regarding the time and place of a feared attack, pushing the boundaries of anticipatory self-defence. This shift challenges both the wording of Article 51 of the UN Charter and the precedent set in the *Caroline* incident,[21] which was resolved through an exchange of diplomatic notes. In the *Caroline* case, it was established

[16] *Hakimi and Katz Cogan* (n 12).
[17] ibid 271.
[18] ibid.
[19] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 412.
[20] The White House, 'The National Security Strategy of the United States of America: Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction' (September 2002) <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html> accessed 17 January 2022.
[21] *The Caroline v. United States* 11 U.S. 7 Cranch 496 (1813).

that self-defence must meet strict criteria: the necessity must be 'instant, overwhelming, with no moment for deliberation and leaving no other choice'. Moreover, anticipatory self-defence opens several questions surrounding justice and opens the door to abuse of the doctrine – where is the line? How far in advance can it be anticipated? How could this function without violating Article 2(4), as well as notions of justice and peace? The answer to these questions is unclear and leaves self-defence open to various interpretations, which in turn weakens *jus ad bellum*.

Although the UN and other institutions are highly sceptical of any claims regarding the expansion into anticipatory self-defence,[22] particularly considering the Armed Activities judgment that has called its legality into question,[23] some states continue to openly challenge this restrictive position. A study by Reisman and Armstrong,[24] showed that several states have expressly claimed a right to anticipatory self-defence – without limiting that right to imminent attacks. This again highlights a potentially dangerous, frictional discordance in the law.

The integration of humanitarian intervention into *jus ad bellum*

The increasing acceptance of humanitarian intervention as an exception to Article 2(4) represents another contentious area that highlights the ambiguity and lack of consensus surrounding current legal rules among states. As defined by Holzgrefe: humanitarian intervention is 'the threat or use of force…aimed at preventing/ending widespread violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied'.[25] This action would also be without the permission of the UNSC, such as actions carried out by Vietnam in Cambodia in 1979, and actions taken by the US in response to Iraq's invasion in Kuwait in 1991. The main issue surrounding humanitarian intervention, however, is that it poses a great dissension with Article 2(4), and it is difficult to find legal justification for the protection of fundamental rights.

[22] *Hakimi and Katz Cogan* (n 12) 283.
[23] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 168.
[24] Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense', (2006) 100 AJIL 525.
[25] J Holzgrefe and Robert Keohane, *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 18.

Intervention in another State, without the approval of the Security Council, principally goes against both collective measures and international peace and security, and therefore is not consistent with the purposes of the United Nations. While some supporters have tried to argue that humanitarian intervention is not actually aimed at violating the 'territorial integrity or political independence of a State', and so should be lawful, these justifications have been explicitly rejected cases like *Corfu Channel*,[26] and *Nicaragua*.[27] Consequently, humanitarian intervention has been dismissed as a valid ground for the use of force.

Despite this, state practice often reflects a clear defiance of these established laws. For instance, during the Kosovo intervention in 1999, very few states that participated in the bombing of Serbia relied on humanitarian grounds to justify their actions; the pleadings in *Serbia v. NATO members,*[28] illustrates the complexities and differing legal positions of the states involved, although the case did not reach the merits stage. This dissonance between the theoretical framework of international law and the practical realities of state behaviour underscores the weaknesses inherent in *jus ad bellum* and highlights its status as a fractured enigma.

The great divide between paper and practice

As earlier referenced, the 'Two Codes' theory',[29] provides us with a clear explanation of the discordance in our international law. In their article, Hakimi and Cogan distinguish between an 'institutional code' and a 'state code' and illuminate the imbalance and inconsistency extant between the two. While the former 'institutional code' represents the rules and emissions from institutional bodies, the latter comprises of the rules emitting from states themselves and how they play out in practice – of course, the two rarely correlate. The reason for this is that 'each code lacks a key attribute that the other retains',[30] and so neither one nor the other can prevail. It is this battle between the institutional code and state code, or alternately 'legal rules' and 'customary rules', that is the foundational cause of such disunity in our international law. The accuracy of this theory can further be supported by an illumination of some recent high-profile conflicts.

[26] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4.
[27] *Nicaragua* (n 10).
[28] *Legality of Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections, Judgment) [2004] ICJ Rep 279.
[29] *Hakimi and Katz Cogan* (n 12) 257.
[30] ibid 258.

The 2003 Iraq War is a key example of unlawful action, and an illumination of the neorealist readiness of states to diverge from *jus ad bellum* when it best fits their vies for power and self-interest. In this instance, self-defence had been cited as a primary justification for the attack, on the grounds that Iraq had posed the conjoined threats of mass destruction weapons and terrorism under the leadership of Saddam Hussein. However, such justification is apocryphal. Bush and Blair went ahead with their attack in clear defiance of the law and other states, as they had no authorisation from the Security Council, and they did not wait for weapons inspectors in Iraq to verifiably confirm that Saddam posed such a threat. France, for example, had made it clear that they saw 'no justification for a decision to resort to war',[31] and the Iraq Inquiry has also confirmed that there was no legal basis for the attack, fundamentally undermining the UN.[32] This transnational violation of *jus ad bellum* opens up a key question- if powerhouse states like the US and UK choose to ignore the doctrine, what does that say for its effectiveness? How can it be deemed a concordant doctrine if this is true? And what does this spell for the future of international law?

Further, discordance within the United Nations Security Council itself is another telling example of the issues within our international legal system. Due to the five permanent members on the Council, who hold the most power and influence along with a veto power, it is near impossible for resolutions to pass effectively. There is the frequent use of politically motivated vetoes, especially by the US and Russia, and there is often a gridlock position between the key institutions when deciding to intervene in other nations: though this is a prison of our own making that was inevitable with the way the Council, and the UN, was formulated. Today, this can be seen in Palestine, as well as Ukraine, as the Russian veto has left the Security Council in 'deadlock',[33] and unable to assist the Ukrainians against obvious war crimes. This inherent power imbalance entrenched within the very system crafted to aid nations truly encapsulates the status of our international law and *jus ad bellum* – fragile, bleak, and ineffective. How can justice ever be achieved for Ukraine when it is their aggressors who are dictating the very system who could help them?

[31] 'Threats and Responses; Chirac's View, 'A Heavy Responsibility'' *New York Times* (New York, 19 March 2003) A14 <www.nytimes.com/2003/03/19/world/threats-and-responses-chirac-s-view-a-heavy-responsibility.html> accessed 24 September 2024.
[32] HC Deb 6 July 2016, vol 612, cols 883-885.
[33] Devika Hovell, 'Council at War: Russia, Ukraine and the UN Security Council' (*EJIL: Talk!*, 25 February 2022) <www.ejiltalk.org/council-at-war-russia-ukraine-and-the-un-security-council/> accessed 24 September 2024.

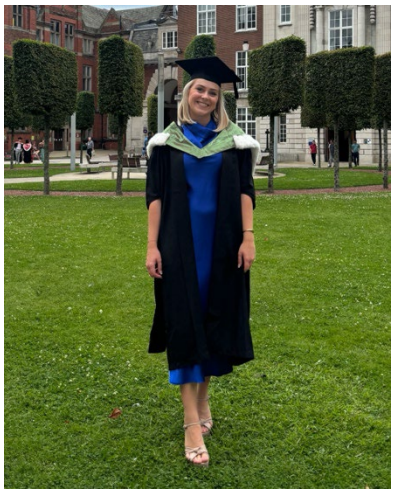
Conclusion

Jus ad bellum serves as a foundational element of international law and the regulation of military force. However, this paper has demonstrated that it is a complex, fractured, and discordant doctrine that struggles to maintain its relevance in contemporary geopolitical contexts. Some norms are heavily disputed, and there is much discrepancy in the reactions of states to uses of force – this is particularly visible in the exceptions to Article 2(4) of the UN Charter, as self-defence is a contested concept, and the UNSC are frequently gridlocked due to political tactics by its five permanent members.

Much of *jus ad bellum* is controversial, such as the notion of humanitarian intervention and pre-emptive self-defence, and differing opinions and actions by states have created inharmonious laws, norms and rules, as has been shown by several examples from international law – as exampled through the willingness of states to act pre-emptively, like in the 2003 Iraq War, erodes established legal norms and raises critical questions about the legitimacy of their actions. Furthermore, the disconnect between the 'two codes' of institutional rules and state practices creates a dissonance that diminishes the credibility of the legal framework.

As we move further into the 21st century, it is crucial to reconsider the enigma of rules making up the frameworks governing the right to war. The complexities and contradictions of *jus ad bellum* signal an urgent need for reform that aligns legal principles with the realities of international relations. By bridging the gap between theory and practice, we can work toward a more coherent legal standard that upholds justice, accountability, and respect for human rights, ultimately fostering a more stable and peaceful global order.

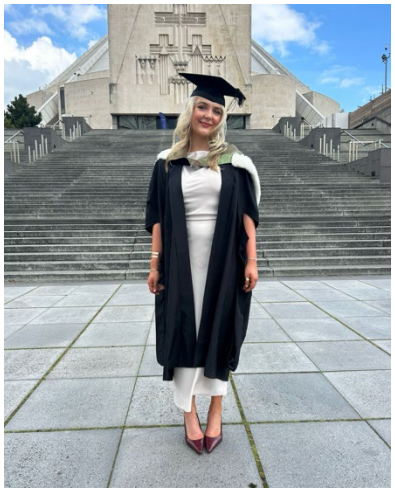
Editorial Board 2023-24



Florence Gibbs

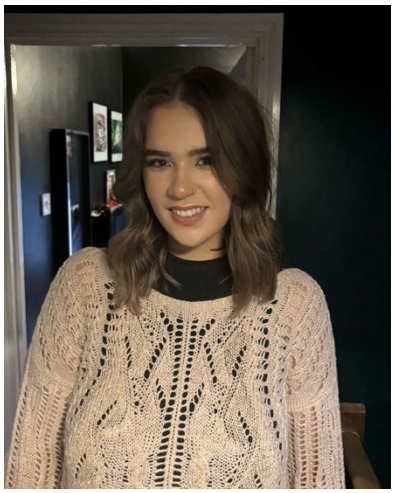
Having recently graduated with a first-class law degree in July, Florence will be spending the winter season as a Chalet Host in Morzine, France.

Florence is eager to pursue a career as a solicitor in the commercial law sector upon returning to the UK.



Annika Ferguson

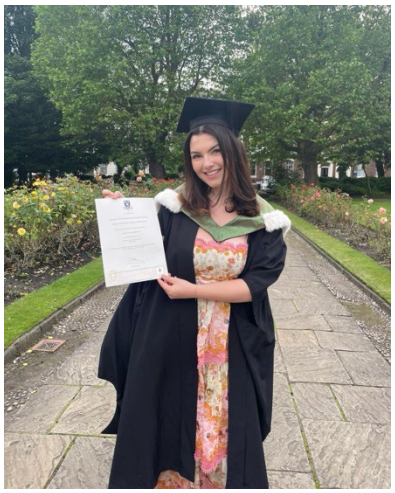
After graduating with a first-class law degree in July 2024, Annika has since started a master's degree in Maritime Law in Rotterdam, Netherlands.



Ruby Barwell

Ruby is in her third year of her law degree at university. Ruby aims to pursue a career as a solicitor in the commercial sector upon qualification.

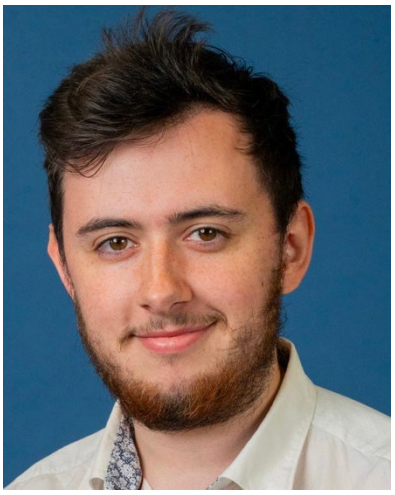
Ruby also represents the university as a careers coach and will continue to do so for the remainder of her final year.



Summer Allen-Janes

Summer graduated with a first-class law degree in July and has since started constructing her future career in international law and development.

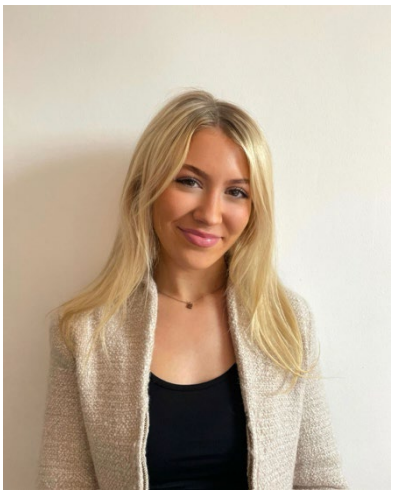
Summer is currently at the University of Edinburgh studying her master's degree in international law with a focus on human rights, humanitarian and conflict resolution, and development aid.



Fraser Palmer

Fraser is currently in his third year of studies. He is aiming to become a public law barrister upon graduating.

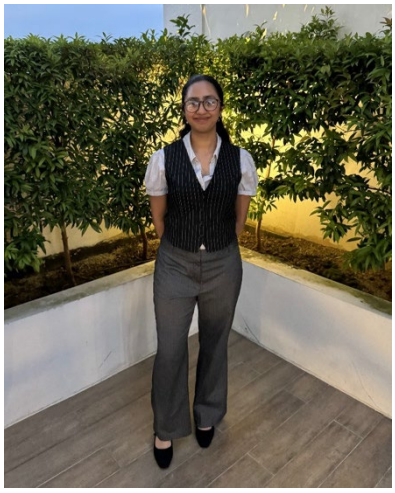
Fraser also represents The University of Liverpool for the 2025 Jessup Mooting Competition.



Abi Billingham

Abi is a third-year student with an interest in the contentious side of law, hoping to work in litigation/dispute resolution.

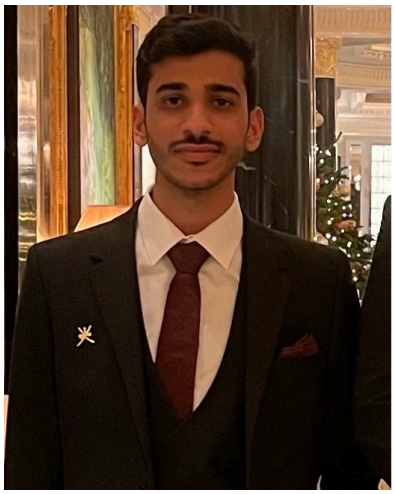
Abi completed a successful vacation scheme and has been offered a Training contract at the firm Trowers and Hamlins, starting in 2026.



Lynet Francis

Lynet is in her third year of university and is currently studying abroad at Taylor's University in Malaysia. During her year abroad, she aims not only to create lasting memories but also to deepen her understanding of the legal system on a global scale.

Lynet hopes to refine and decide her choice of specialisation within the legal field before graduating next year.



Amjad Al Yahya'Ei

Amjad graduated from Liverpool in July with a first-class law degree.

Amjad is keen to pursue a career in the legal sector and has recently completed a legal internship in Oman where he gained valuable practical experience and insights into the legal profession.

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