

Editorial

Welcome to the IALS Student Law Review

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Welcome to the Autumn 2021 Issue of the Institute of Advanced Legal Studies' Student Law Review (ISLRev).

The last few months have been marked by intense public debate on climate change, sustainability, development of technology such as the Artificial Intelligence (AI) and the role of state of law, while the ferocious pandemic is still sweeping the globe and threatening lives. Added to this is the spread of disinformation and misinformation about the pandemic, a decade of rising populism or "my country first"-global politics in recent years and likewise the declining faith in experts.

However, John F Kennedy already referred to chances during crises with his famous speech in 1959: "When written in Chinese, the word 'crisis' is composed of two characters – one represents danger and one represents opportunity." (although today it is widely recognised that this is not the correct interpretation of the Chinese characters, the reference to opportunities remains unique). The bottom line is that the ongoing crises and the extreme threats can be used for directing individuals, a country or even the world to a solution and a better place. This edition of ISLRev has very fascinating articles which, inter alia, provide practical and useful problem-solving approaches that will be introduced below.

First, we would like to congratulate Mohammed Subhan Hussain Sheikh for becoming our new Associate Editor:

Mohammed Subhan Hussain Sheikh is a PhD candidate at IALS specialising in International Human Rights Law, South Asian Laws, Comparative Law, Jurisprudence and Legal Theory, Gender and Law, Company Law, UK and International White-Collar Crime, Civil Fraud, and Parallel Proceedings.

We also would like to thank Professor Anton Cooray from the City Law School, University of London, for acting as the Academic Editor of the ISLRev.

The new Editorial Board of the ISLRev is aiming to offer a wide range of interdisciplinary services such as academic webinars with professors/practitioners specialising in their field of publication. Additionally, we are planning to conduct online and physical events where academics, practitioners and students will have the chance to meet and discuss various legal and economic topics around the journey of pursuing a PhD, publishing in peer-reviewed journals, writing books, etc.

Finally, for each issue of the ISLRev going forward, the Editor-in-Chief will alternate writing an editorial opinion piece. These will give a broad overview of the relevant legal topics alongside the articles included in the respective issue.

Hence, we are delighted to introduce the following articles of this ISLRev-edition:

Shreevana Gurung discusses the simplification to the Immigration Rules and its effects as the Immigration Rules hold paramount importance in controlling and monitoring the UK borders and non-British population. These rules expansively dictate the boundaries and movements of every non-British citizen; hence, they are relied upon widely by public bodies and the judiciary. The Immigration Act 1971 was initially passed to control the UK immigration system. However, the law under this statute has been developed on an ad hoc basis which has resulted in a convoluted set of laws being established. The difficulties concerning the current Immigration Rules have led the Law Commission in its 13th Programme of Law Reform to propose the idea that the Immigration Rules need urgently a simplification.

Reem Kabour explores what effect the enlightened shareholder value (ESV) principle in the Companies Act 2006 (CA 2006) has on the corporate objective of UK companies. The Organisation for Economic Co-operation and Development defines the corporate governance as the system by which companies are directed and controlled, and through which a company's objectives are set. To assess whether section 172(1) of the CA 2006 has modernised the shareholder value (SV) model established in the

pre-2006 case law, this article explores the impact of the legislation on subsequent corporate governance practices in the country, specifically regarding the reporting requirements found in later statutory instruments. Finally, it is concluded that despite legislators omitting to profoundly expand on the case law preceding the ESV provisions, rebranding SV with an 'enlightened' streak creates a margin for more fundamental changes, both legal and normative in nature in the future of the doctrine, should this be required.

Alreem Kamal discusses the right of non-refoulement which dictates that no refugee or asylum seeker is to be returned to any territory where he or she may face persecution, torture or other ill-treatment. This fundamental obligation is both of a customary nature and enshrined in numerous instruments, the most pertinent of which for the purposes of refugees being the Convention Relating to the Status of Refugees (known as the 1951 Refugee Convention or the Geneva Convention of 28 July 1951). Despite this, an alarming trend has emerged in the practice of states in direct contravention thereto. Several states have sought to curb refugee movement and intake through, inter alia, bilateral agreements and forcible repatriation. Considering this, the article undertakes a critical examination of the principle of non-refoulement, with a view to demonstrating its patent inviolability.

Jacqueline Lee provides a case comment on Case C-343/19 Verein für Konsumenteninformation v Volkswagen AG which is an EU jurisdictional dispute about an Austrian consumer claim concerning vehicles that were defectively manufactured by a German company. The resulting decision by the Court of the Justice of the European Union (CJEU) granted jurisdiction for Austrian courts to hear the case. This case comment will proceed in five steps. Firstly, it provides a summary of the facts. Secondly, it lays down the jurisdictional rules per Brussels I Regulation 2012 (Brussels I) and the precedence surrounding Article 7(2) Brussels I on alternative jurisdiction for torts. Thirdly, it agrees with the CJEU that the place of final purchase before the scandal (ie, Austria) is the place of the initial damage. Fourth, it criticises the CJEU's characterisation of the case as one involving material damage rather than pure financial loss, while using reasoning from pure financial loss case to justify granting alternative jurisdiction in the present dispute. Finally, this comment laments that the CJEU failed to (i) clarify alternative jurisdiction rules for when the place of purchase and place of marketing are different and (ii) flesh out substantive criteria for what 'other specific circumstances' are required to grant Article 7(2) alternative jurisdiction.

Luigi Pecorella provides a critical overview of the existing legal rules concerning the subordination of shareholder loans and, in doing so, examines what function the Insolvency Law should assist when dealing with it. In financially distressed companies, shareholders have the tendency recorded throughout all the major jurisdictions to provide finance by way of loans for purposes of accomplishing a better position in the prospective insolvency proceedings to the detriment of the external creditors while "gambling" on the company's resurrection. Against such practice, the Insolvency Law seeks to intervene by subordinating this type of shareholder loans to the claims of the other creditors, thus upholding its nature of 'creditor protection law'. Moreover, the author analyses the development of the US Bankruptcy Law and the German Insolvency Law in this regard.

Harleen Roop discusses whether the definition of 'mental disorder' under the Mental Health Act 1983 (MHA) should encompass autism for the purpose of the compulsory detention. To be sectioned under the MHA, an individual must meet the definition of 'mental disorder' as per Sec 1(2). Despite the scarcity in academic scholarship concerning autism within the scope of the Act, the 'mental disorder' definition has been considered incredibly broad. This article seeks to highlight that the inclusion of autism under the MHA results in discriminatory detention based on autism-related behaviour; therefore, the removal of autism from the MHA is necessary. The author also analyses the legislative framework concerning compulsory detention as per Sec 2 of MHA and criticises the current safeguards as well as the relevant government and the legislative reports.

Eeman Talha examines whether the French law restricting the religious practice of the Islamic full-face veil amount to persecution within the remit of International Refugee Law, or whether it is a legitimate distinction under International Human Rights Law. Muslim women who wear an Islamic veil do so as a

badge of honour – one that is liberating, empowering, and brings solace because it is worn solely as a religious act of compliance to God. Such face coverings are a valid form of manifestation of freedom of religion; a freedom enshrined as a non-derogable right under International Human Rights Law. Yet, Muslim women have been severely deprived of such a right since the enforcement of Loi 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public – Law 2010-1192 as of 11 October 2010 on the Prohibition of Concealing the Face in Public Space. This law has allowed for the nationwide marginalisation of a group of women simply trying to live in the comfort of their faith. The author contends that such a profane law is not only a clear form of indirect discrimination under International Human Rights Law through the state's illegitimate justifications, but also that the law amounts to persecution on cumulative grounds under the 1951 Refugee Convention.

Finally, we are hugely thankful to our authors for their submissions. We would like to encourage any postgraduate student, practitioner and academic who intend to submit an article to get in touch with us. The details for submission can be found below:

<https://ials.sas.ac.uk/digital/ials-open-access-journals/ials-student-law-review>

We look forward to hearing from prospective contributors. Until then, please enjoy the latest issue of the ISLRev!

Tuğçe Yalçın & the ISLRev Editorial Board.

Simplification to the Immigration Rules and its effects

Shreevana Gurung

Introduction

The Immigration Rules hold paramount importance in controlling and monitoring the UK borders and non-British population. These rules expansively dictate the boundaries and movements of every non-British citizen; hence, they are relied upon widely by public bodies and the judiciary. The Immigration Act 1971¹ was initially passed to control the UK immigration system. However, the law under this statute has been developed on an ad hoc basis,² which has resulted in a convoluted set of laws being established.

The complexity of these laws stems predominantly from statutory provisions being continuously updated or amended and subjective judicial interpretations of the Immigration Rules being mostly inconsistent. These issues are exacerbated further by the ever-evolving social change surrounding immigration. These difficulties concerning the current Immigration Rules have led the Law Commission in its 13th programme of law reform to propose the idea that Immigration Rules need simplification urgently.

The current Immigration Rules

The existing Immigration Rules have faced heavy scrutiny and criticism over recent years for being excessively convoluted. Most noticeably, the Law Commission has criticised the rules and expressed that such criticism 'is widely acknowledged'.³ This criticism is perhaps unsurprising due to the expansiveness of immigration law and the constant need to continuously update the Immigration Rules.

It is perhaps therefore unsurprising that the present-day simplicity of the Immigration Rules continues to be the subject of dispute and controversy, receiving heavy criticism from notable sources. Judges have repeatedly made negative comments on the current structure and complexity of these Immigration Rules. Lord Lloyd-Jones, for example, avowed that the Immigration Rules have "achieved a degree of complexity which even the Byzantine emperors would have envied".⁴ Other members of the judiciary, such as Lord Carnwath, have gone further to encapsulate the rules as "an impenetrable jungle of intertwined statutory provisions and judicial reasoning".⁵ These common resonations have resulted in applicants receiving sympathy for their attempts to navigate the UK's immigration "maze"⁶ in even the highest court in the land.⁷

Therefore, it appears to be evident that the existing Immigration Rules are poorly drafted, uncodified and often incoherent⁸. This is not surprising given that the current Immigration Rules amount to a total of 1033 pages – this content has quadrupled since 2010. The constant updates to these rules have been inserted using a numbering and alphabetical system in an attempt to aid navigation. However, the reality is that it remains challenging to update the law at such a rapid rate coherently. The new rules which are given numbers and alphabetical letters do not always fall within a strict chronological framework due to inconsistencies. This results in an original structure effectively being destroyed and any sense of an ascending order being severely disrupted. Therefore, Lord Justice Beatson's famous encapsulation of the development of the rules appears accurate, as his Lordship claims that the

¹ Immigration Act 1971.

² Browne K, *Immigration Law 2019* (College of Law Publishing 2019), page 22-40.

³ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7g/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf accessed March 17, 2020.

⁴ *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568.

⁵ *Patel v SS for Home Department* [2013] UKSC 72.

⁶ *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 424.

⁷ *Robinson v Secretary of State for the Home Department* [2019] UKSC 11.

⁸ "Simplification of the Immigration Rules Consultation - The Law Society Response" (The Law Society January 28, 2020) <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/simplification-of-the-immigration-rules/#> accessed March 15, 2020.

structuring resembles the buildings of “some shanty towns”, rather than “the grand design of Lutyen’s Delhi or Haussman’s Paris”.⁹ Whilst this is a common analogy, this comparison rightfully confirms the lack of quality and depth of the existing Immigration Rules.

Grave criticisms surrounding the incoherent, inconsistent and ineffective nature of the Immigration Rules reveals the extensive feeling of disquiet shared amongst academics and prominent members of the judiciary. This feeling of worry and distrust can be damning for the entire legal system. First, there is immense struggle experienced by both practitioners and vulnerable clients when relying upon these rules because they are overly complicated. This complexity of the Immigration Rules arguably threatens fundamental constitutional principles such as the rule of law. This principle dictates that all laws must ensure accountability, openness and provide access to justice.¹⁰ All of these factors reveal the current issues with the Immigration Rules, issues which appear to have gradually been exacerbated by adverse court rulings against the government. This is because in the majority of these cases lay clients have had no choice but to represent themselves as litigants-in-person. The complexity of the Rules, coupled with the fact that many clients who seek to rely upon the Rules have a limited understanding of the English language, ensures that access to justice remains restricted. Elias LJ perhaps recognised this issue most noticeably in *R (Iqbal) v SS for Home Departments*,¹¹ as his Lordship acclaimed there was an ‘overwhelming’ need for a simplification of the rules on this basis.

Potential simplification to the Immigration Rules

The Law Commission is an independent body whose aim is to ensure that ‘the law is as fair, modern, simple and cost-effective as possible’.¹² The board seeks the approval from the Lord Chancellor as required under the Law Commissions Act 1965 before undertaking new projects. The board of the Law Commission reflects the serious work it indulges in and therefore is occupied by highly experienced judges, barristers, solicitors, law scholars, the Head of Legal Services and the Head of Corporate Services. In its 13th programme of Law Reform, the report outlined the need for precisely 41 official recommendations to be able to simplify the Immigration Rules and continue towards achieving the Commission’s aim. Some of the significant changes proposed and the potential effects are as follows:

1. Changing the purpose of definitions by not including requirements in them and alerting all persons through an online platform which can be accessed by all regarding the pending alterations to the provisions. This will ultimately make it easier for practitioners and especially non-expert applicants to apply the rules accurately¹³.
2. Giving each paragraph a number only, rather than a confusing blend of letters and numbers with letters only being used for sub-paragraphs.¹⁴ This would be coupled with other measures in order to make the content more manageable. These include having a table of contents before every significant Part of the Rules and as per Recommendation 14, ensure that the numbering restart at the beginning of every section. As a result, the numbering system should be more understandable.
3. Furthermore, the new drafting guide in Appendix 6¹⁵ of the report advises on how the Laws should ideally “get straight to the point”, “use simple, everyday English” and avoid inserting words that have

⁹ *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 424 .

¹⁰ Bingham T, *The Rule Of Law* (1st edn, Penguin Books 2011), page 110–127.

¹¹ *R (Iqbal) v SS for Home Department* [2015] EWCA Civ 838.

¹² ‘About Us’ (Law Commission- Reforming the Law, 2020) <https://www.lawcom.gov.uk/about/> accessed 23 April 2020.

¹³ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf page 101, accessed March 20, 2020.

¹⁴ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf accessed March 20, 2020.

¹⁵ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf page 214, accessed March 20, 2020.

alternative meanings. Although this guidance is not legally binding for the officials to follow, it aims to be the desired new standard while drafting UK's Immigration Laws.

4. Creation of an advisory committee that will review the Rules at regular intervals will eliminate any fear of sanctions or pressure to oblige to a legal command as its role will be to advise only. The Bar Council echoed "strong support"¹⁶ for this idea which indicates a positive acceptance from the judiciary. Since the task to overlook such a vast set of Rules can be demanding and time-consuming, the committee members would be individuals from all sectors, including Employment, Law, Business and Academia. This committee can ensure that the Rules stay aligned with the aims when they were first drafted.
5. Another improvement recommended is to produce the Immigration Rules online in the format of "booklets" that apply to each visa category¹⁷. In order to make the navigation of these Rules easier, Recommendation 39 states that hyperlinks would be used to guide a general user to the correct set of rules for them. This task has been given to the Home Office who are responsible for deciding whether to grant visas and passports¹⁸.
6. Instructions have been given to take a "less prescriptive approach to evidential requirements" which will allow officials to apply the Rules with a common-sense approach¹⁹. Subsequently, the aim is to make Rules more flexible where the Home Office has the option to ask for missing documents or eradicate their doubts and question why certain requirements have not been met. These actions will make the application process cost-effective by restricting the instances of appeals and long-winded cases. Another advantage of a less prescriptive approach is that fewer amendments to the Rules will be needed as officials can navigate less rigidly.
7. Moreover, Recommendation 25²⁰ attempts to further the prevention of constant additions to the Immigration Rules. The agenda is to only have two official declarations of modifications to the Rules annually, unless "an urgent need for additional change" is recognised.

The challenges

There is a consistent pattern in all recommendations to make the Immigration Rules less rigid, complicated and more verbose. However, it would be naïve to believe that these recommendations would be a permanent solution, as a single judgment cannot realistically obligate the government to make lengthy additions, up to 300 pages²¹ overnight. It must surely be understood that the simplification of these Rules will require consistent effort.

The *Alvi*²² principle set in 2012 made a monumental ruling, which has since had a significant, binding effect on the immigration system. The verdict in favour of Mr Alvi concluded that the government would have to include all of its requirements in the actual Rules, meaning Appendixes or subsidiary documents cannot become a part of the Immigration Rules. The reason being that this secondary information was not produced before Parliament under section 3(2) of the Immigration Act 1971. As a result, this

¹⁶ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf page 119, accessed March 20, 2020.

¹⁷ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf page 97, accessed March 20, 2020.

¹⁸ "About Us" (GOV.UK June 19, 2018) <https://www.gov.uk/government/organisations/home-office/about> accessed April 24, 2020.

¹⁹ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf page 119, accessed March 20, 2020.

²⁰ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf page 159, accessed March 20, 2020.

²¹ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf accessed April 23, 2020.

²² *Alvi v Secretary of State for the Home Department* [2012] 1 WLR 2208.

significantly complicated the drafters' battle in keeping a balance between inserting all the requirements to simplify the Rules. The judiciary has clearly illustrated through *Alvi* that they will not hesitate to follow the law despite all its complications. In other words, judges are prepared to leave little avenue for a compromise of the idea to allow the government to make reasonable adjustments to simplify their task at the expense of making a layperson's attempt to follow the requirements considerably challenging. This unwavering approach can be supported by the Commission's recommendation for simplification, as this does not suggest the creation of gaps in the Rules. Instead, it opts to prioritise constitutional principles and the integrity of the rule of law.

Potential effects of the reform

If amendment to the Immigration Rules is successful with the inclusion of the Commission's Recommendations, the reform will give rise to possible positive impacts in several ways. With the modification expected to face some sort of criticism from challengers, these encouraging impacts will undoubtedly play a unique role in justifying the changes.

Firstly, there are notable claims from the Home Office that the simplification of the Rules is economically fruitful. Adapting the changes recommended by the Law Commission would save an estimated "£70m over the next 10 years."²³ Although finances are not the utmost priority in Immigration Law, it cannot be disregarded that the endless immigration appeals, judicial reviews and all the resources required in these procedures cost the Government and judicial system millions annually. This, in turn, undoubtedly places a strain on access to justice, which threatens the rule of law. A saving of £70 million per year could help to effectively curb this threat, by being utilised for the betterment of the legal system and more general immigration support. This potential saving and reallocation of resources provides the government with an opportunity to showcase its ability to function efficiently and indirectly earn the trust of taxpayers and non-British citizens for future endeavours.

Secondly, the judiciary will further be able to promote a system which is "easier and cheaper",²⁴ making the legal system somewhat fairer for everyone. The reason being, some clients face financial burden in hiring barristers or solicitors, which forces many to act as litigants-in-person. This places them at a significant disadvantage. The agenda of easier measures and overall practicality will allow for broader access to justice and a more streamlined society. The overbearing onus currently placed upon the judicial system and local charities seeking to help vulnerable clients will be significantly relieved. The action of simplification will raise the confidence of a non-expert upon the Immigration Laws, as they will be able to more easily navigate the rules or rely upon professionals if they cannot.²⁵

Thirdly, the availability of the updated Rules on an online platform reflects the legal system's effort to engage with modern society. Although the foundations of the system should remain unshaken, the laws must be reflective of the rapidly changing modern world including its ever-evolving relationship with technology. This reform will be beneficial in changing the ancient image of the UK's legal system and helping it to become more practically accessible. It will undoubtedly improve the transparency of the Immigration Rules and accessibility for laymen, who have little legal knowledge but a firm grasp of technology.

Fourthly, it is commendable that the Law Commission, while making the recommendations for a simplification of the Immigration Rules, has evaluated how it can prevent a decline in the Rules' standards. The stoppage of degradation is a crucial factor in ensuring that the Rules provide long-term stability. The acknowledgement for the need of maintenance to these Rules is an honest admission

²³ Bowcott O, "UK Immigration Rules Are Unworkable, Says Law Commission" (The Guardian January 14, 2020) <https://www.theguardian.com/uk-news/2020/jan/14/uk-immigration-rules-unworkable-law-commission> accessed March 19, 2020.

²⁴ Bowcott O, "UK Immigration Rules Are Unworkable, Says Law Commission" (The Guardian January 14, 2020) <https://www.theguardian.com/uk-news/2020/jan/14/uk-immigration-rules-unworkable-law-commission> accessed March 19, 2020.

²⁵ Green LJ and others, Thirteenth Programme of Law Reform (Open Government Licence 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7g/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf accessed March 20, 2020.

from the Commission. This approach from the Law Commission is highly encouraging for all those who are dependent on these Rules as they will be able to trust and rely on them confidently.

Simplification in practice

The Law Commission's report is heartening, however its true impact will only be felt when it is successfully transferred into action. The consultation of the released report sets out two main possible methods:

1. The first one proposes for "common provisions" to be described as 'key provisions' at the start of the Rules, which will apply to different Immigration issues. The information in conjunction with these 'key provisions' will be detailed under the sub-heading of 'key information'. This measure will result in a clear and understandable structure to these Rules, which ultimately coherently simplifies them and reduces the need for repetition elsewhere. The use of 'key information' to provide all the necessary information for each 'key provision' will make it easier for the concerned to follow the Rules; one must remember that the ideology of the Rules should never be to make it difficult for the individual to understand the Law. For the Law to be applied to all involved parties equally, they must first be able to understand the Laws that bind them.
2. The alternative method suggested was to have all the Rules which applies to an Immigration issue under one heading and repeat this pattern throughout. As previously mentioned, this has been titled as the 'booklet' approach. This non-presumptive approach does well not to assume that everyone will rely on only 'key' provisions; they can also rely on other provisions without fear of a hierarchal structure being imposed on provisions. Furthermore, with its accessibility extended online, the technique would connect the centuries-old legal system with the modern-day way of life.

Although the Law Commission's report does not hold authoritative power on introducing these changes or deciding which route will be taken, it does rightfully present reasonings for its comprehensive suggestions. There is a visible lean towards the 'common provision' structure. However, the Commission recognises that there is a need for an "audit" of what determines a 'common' and 'key' provision to diminish accusations of vagueness. The review will also accurately distinguish the provisions which directly correlate with how a user will follow these requirements. Additionally, there is an intention for the 'booklets' containing Rules for each category to function as an appendix with the purpose of additional guidance. Thus, there is a clarification that these booklets will not likely have the equivalent status of 'Immigration Rules'. Regardless of the selected method, the success of either suggestion will depend on the government's ability to maintain the consistency of upkeeping the reform. There is always a risk of regression leading to ambiguity and complexity.

For a vulnerable client, the second method will sound familiar and perhaps will be easier to comprehend for they are likely to be experienced with following booklets. On the contrary, one could argue that the first method has the potential to guide the individual accurately and concisely without the repetition of legal jargon. Both methods can be effective and appropriate for many provided they are designed precisely. Still, the first method has the potential to meet the Commission's proposition to abridge the Rules, especially the length.

Statute or Case Law?

Case Law arguably can change laws unexpectedly or obligate the government to update statutes or, in this context, Immigration Rules, overnight. This reflects the unwritten constitution of our system, and some would argue that the constant changing of the legal system is for the betterment of the country as it attempts to keep the law up to date with modern immigration issues. However, this can also be problematic as influential figures, like Lord Carnwath, feel that it is the judiciary who are mostly to blame for the current mess.²⁶ The view that his Lordship and many others share consists of believing that such judicial interventions in immigration laws are only contributing further to the negative ad hoc developments in this area of Law.

²⁶ *Patel v SS for Home Department* [2013] UKSC 72.

Therefore, a viable argument is that statutes are ideally a direct pathway in which laws should seek reform. Any drastic alteration to the statute will allow for MPs to have their say, which in retrospect is the involvement of the nation, as each one of them represents their constituency. With the exception of emergency laws, the usual process calls for debates allowing opinions to be heard and could contribute towards passing laws which give satisfaction to the majority. Updated statutes and subsequently the Rules remain as the stepping stone for Immigration Law, subsequently providing stability until a need for further change is acknowledged.

Response from the Government

It is unsurprising that the Home Office's response to the Law Commission's report has been optimistic because all the recommendations have been met with either a partial or full acceptance²⁷. It would have been politically damaging especially with voters' confidence if the government did not agree with the recommendations reflecting the need for better accessibility and understanding of the law, as these updates are essential in upholding the rule of law. Moreover, this ideology is not new, as many key figures of influence have spoken positively for it, including Lord Neuberger, former President of the Supreme Court who expressed:

*"One access aspect of the rule of law which is sometimes overlooked is access to the law itself...access to statutes, secondary legislation and case law. It is of course a fundamental requirement of the rule of law that laws are clearly expressed and easily accessible... people should know, or at least be able to find out, what the law is."*²⁸

Therefore, the Home Office, in its response, has made an effort to provide examples of the coming reforms which look to reflect a much-needed simplification. For instance:

"Finding the right application form"

"Example: Ruby wants to make an application to stay in the UK. She knows what route she wants but does not know which application form to use."

NOW

Ruby searches online and finds several possible application forms which might fit her circumstances, but some of the names are unclear, including acronyms she does not understand (what does FLR stand for?). She thinks she has found the right form but while completing it, realises the questions don't seem to fit her circumstances. She is worried that she is applying on the wrong form but can't identify the right form. If she applies on the wrong form, her application will be rejected and will not be considered.

AFTER SIMPLIFICATION

Ruby looks at the Rules and sees that each route states what the relevant form is for that route."²⁹

In addition to these hopeful examples, the recommendation to create a simplification review committee is an indication that the government wishes to remain consistent in its agenda of simplifying the Rules. It has acknowledged the need for active monitoring of the Rules and hence aims to create a specialised

²⁷Simplifying the Immigration Rules (Open Government Licence 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875205/24-03-2020_-_Response_to_Law_Commission_for_publication.pdf accessed May 7, 2020 .

²⁸ Neuberger L (July 3, 2017) <https://www.supremecourt.uk/docs/speech-170703.pdf> accessed May 7, 2020.

²⁹ Simplifying the Immigration Rules (Open Government Licence 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875205/24-03-2020_-_Response_to_Law_Commission_for_publication.pdf accessed May 7, 2020.

dedicated committee. This saves time and diminishes the possibility of incoherency as the Committee's sole task is to ensure the simplification of the Rules. Thus, eradicating the "vicious circle" of complexity and making sure that the Home Office does not "repeat this pattern."

With this overwhelming positive response geared into action in January 2021, one must remain cautious and attentive to see whether these words will be fulfilled or not in the long term. Immigration Law can be volatile with each coming day. Hence, the benefit of the doubt cannot be given to the Government on this instance until a positive effect of the amendments is witnessed, especially considering this is not the first time a Government has set a target for betterment.

With the end of free movement between the EU and the United Kingdom, the reformed Immigration system gives the usual procedures a drastic alteration by introducing the globally recognised points-based system. Points will be assigned for specific skills, qualifications, salaries and professions. Therefore, an individual's visa application must have a certain amount of points³⁰ in order to qualify to enter the UK. This new Immigration Bill is monumental and historic as it marks the government getting "full control of UK borders for the first time in four decades",³¹ subsequently marking an end to its communal Immigration system with the EU.

Although the new reform has been presented to the UK's population as the ideal simplification in our Immigration system, there are waves of worries across various sectors. Even though the government has made calming re-assurances by extending visas for key workers, the concerns have amplified due to the continuous economic havoc caused by Covid-19. The much-anticipated simplification of the Immigration system post-Brexit, a points-based system allegedly designed to fit all, actually excludes many. The financial threshold for workers has been set at £25,600; an amount that does not cover 'low skilled', yet vital, workers across various sectors, especially Health and Social Care. There are grave concerns on how the Health sector will survive if a significant number of their workers do not qualify under the new system despite their need being visible during this pandemic. These unsettling times give rise to uncertainty on whether the simplified reform will achieve its aim as "new immigration rules are simply being ignored by the vast majority of employers...while they are fighting to stay afloat."³² Moreover, the havoc of Covid-19 is still continuing and has been since the introduction of the new immigration system; there is no data since its implementation till now that has not been tampered by the effects of the pandemic.

The increasing apprehension related to the pandemic contributes to the already existing concerns for the reform's impact, especially on small and medium-sized businesses who rely on workers that do not meet the earning threshold. Business owners, Directors and Union executives, have been notably vocal of their negative review with the director-general of the British Chambers of Commerce (BCC), controversially commenting on the need for the new Rules to be further "radically simplified"³³.

All the above reiterates the volatility of social context with unforeseen events occurring. Immigration laws, therefore, have to go through vast layers of considerations and amendments before the Rules are officially enrolled; it is vital to achieve a balance between political agendas and the demand from the economy.

Political interpretation

³⁰ Fouzder M, "Immigration Rules Simplification: Plan to Be Published 'Shortly'" (the Law Society Gazette February 19, 2020) <https://www.lawgazette.co.uk/news/immigration-rules-simplification-plan-to-be-published-shortly/5103145.article> accessed March 17, 2020.

³¹ Office H, "Landmark Immigration Bill to End Free Movement Introduced to Parliament" (GOV.UK March 5, 2020) <https://www.gov.uk/government/news/landmark-immigration-bill-to-end-free-movement-introduced-to-parliament> accessed April 16, 2020.

³² Staton B and Foster P, "Business Bridles at Rollout of Points-Based Immigration System" (Financial Times April 9, 2020) <https://www.ft.com/content/e93c8cb0-4878-46a3-875f-cac3d557896b> accessed May 7, 2020 .

³³ Inman P and Topham G, "New Immigration Rules: Where Will UK Find Its Drivers and Pickers?" (The Guardian February 18, 2020) <https://www.theguardian.com/uk-news/2020/feb/18/new-immigration-rules-where-will-uk-find-its-drivers-and-pickers> accessed May 10, 2020.

It is incredibly crucial to understand that 'simplification' of the Immigration system can have a varied interpretation when viewed from a political stance. Apart from the recognisable need for structural amendments and online accessibility, the government argues that the points-based system reflects the Law Commission's advice by describing it as "simple, effective and flexible³⁴." There is a repeated reminder of the equality that the new system promises to deliver with applications based on what "a person has to offer, not where they come from."³⁵ The Government's intention to "create a high wage, high-skill, high productivity economy",³⁶ showcases the party's political schema. Unfortunately, this raises concerns for abuse of political power as these Immigration policies are not the current reality of the UK economy; 'low skilled' workers from various sectors including Health, Hospitality and Retail make a significant contribution to the economy which cannot be undermined by political agendas. As a result, it can be argued that the points-based system can either be a straight-forward 'box-ticking' scheme or have an adverse effect to simplification with non-qualifying individuals possibly applying through non-conventional routes to enter the UK. This could leave Home Office officials in ambiguity and give rise to Appeals. Although there are reports of the points-based system working somewhat smoothly in Australia and Canada, one has to remember that the UK's economy has a different set of requirements and for decades had the advantage of EU workers to balance the ageing population which is no longer an option.

Conclusion

To recapitulate, there is minimal doubt that a need for simplification of the Immigration Rules has risen, a political need due to Brexit and a general need for the betterment of the Immigration system. Given that social and political factors influence the Immigration system, the 'need of the hour' reform could and has already experienced unexpected challenges from the change of Prime Ministers and their outlooks to a ravaging global pandemic. The current Rules and several Immigration Acts are evidence of the continuous effort to keep the Laws updated; however, the constant amendment has made it beyond comprehensible for an individual. The common ground of dissatisfaction is shared amongst judges, influential persons from the business world and the Law Commission itself.

The Commission's report rightfully highlights all the necessary amendments which contribute to more structured, fathomable and accessible information. The recommendations are justified and appropriate to guide the government in a path that will ultimately keep our rule of law intact, which is the prime objective. The government being in agreement with the Commission's report and pledging to simplify the Rules is an encouraging sign for many. Its effectiveness, however, lies solely on the correct implementation and maintenance by the Home Office which comes with minimal guarantee due to the possibility of volatility from case law and changing political leadership.

Nevertheless, when the highly debated modifications are activated for all, there should be regular monitoring from the Simplification Review Committee as promised. Additionally, the government has to ensure that their political aims of shifting the nation's economic structure by decreasing the number of low-skilled workers do not cause collateral damage to countless businesses. Finally, one must understand that the United Kingdom's Immigration System has experienced changes for decades and will continue to do so in the future; the Law Commission accepts that amendments are inevitable. Today we must make sure, with the availability of recourse to technology and sheer experience, that the laws

³⁴ "The UK's Points-Based Immigration System: Policy Statement" (GOV.UK February 19, 2020) <https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement> accessed May 10, 2020 .

³⁵ "The UK's Points-Based Immigration System: Policy Statement" (GOV.UK February 19, 2020) <https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement> accessed May 10, 2020 .

³⁶ "The UK's Points-Based Immigration System: Policy Statement" (GOV.UK February 19, 2020) <https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement>, accessed May 11, 2020 .

are simplified for the betterment of its users. The rule of law must remain as the epicentre of the Immigration system, for volatility is not an excuse to lose integrity and faith in the eyes of the public.

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What effect does the enlightened shareholder value principle in the Companies Act 2006 have on the corporate objective of UK companies?

Reem Kabour

The Organisation for Economic Co-operation and Development defines corporate governance as the system by which companies are directed and controlled, and through which a company's objectives are set.¹ Corporate governance theories are closely linked to those of corporate objectives, as the interests that directors have a duty to promote must be determined in order for one to consider issues of corporate governance.² This relationship is demonstrated in the UK Corporate Governance Code's postulation that a company should be managed efficiently to return long-term profits to the shareholders.³ Corporate objective debates are commonly divided between the shareholder value (SV) theory and the stakeholder theory. This dichotomy remains evident in section 172(1) of the Companies Act (CA) 2006's stipulation that directors have a duty to act in a way which they consider, in good faith, to promote the success of the company for the benefit of its members, or its shareholders, as a whole. This is similar to the fiduciary duty, such as the duty to act *bona fide* in the best interests of the company, owed at common law antecedent to the CA 2006. It continues to require directors, when fulfilling the aforementioned duty, to have regards to the non-exhaustive list of long-term consequences alongside employee interests, fostering business relationships, impact on the community and environment, maintaining an upright reputation, and acting fairly between the company's members.⁴ This paper begins by outlining modern discussions on the shareholder-stakeholder paradigm leading up to the codification of directors' duties in the CA 2006, and the underlying political and legal pressures that led to the Company Law Review Steering Group (CLRSG) recommendation to develop the longstanding principle of SV into enlightened shareholder value (ESV) in section 172(1) of the CA 2006. To assess whether section 172(1) of the CA 2006 has modernised the SV model established in the pre-2006 case law, this paper explores the impact of the legislation on subsequent corporate governance practices in the country, specifically in regard to the reporting requirements found in later statutory instruments. Finally, it is concluded that despite legislators omitting to profoundly expand on the case law preceding the ESV provisions, rebranding SV with an 'enlightened' streak creates a margin for more fundamental changes, both legal and normative in nature, in the future of the doctrine, should this be required.

1 Enlightened shareholder value: a revisited approach to the shareholder-stakeholder dichotomy

1.1 Developments leading to the enlightened shareholder value principle

The perennial discussion of corporate objectives gained attention due to a divergence of opinions between Berle and Dodd, wherein Berle defined the currently accepted SV view, that the sole corporate objective is to prioritise shareholder interest by generating shareholder wealth.⁵ SV has been popular in Anglo-American corporate governance since the 1970s as a result of the rise of the law and economics movement and prominence of takeover culture.⁶ Most notably, Friedman advocated for the

¹ OECD, 'G20/OECD Principles of Corporate Governance' (OECD Publishing, Paris, 2015), <<http://dx.doi.org/10.1787/9789264236882-en>> accessed 1 August 2018.

² Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 14.

³ FRC, 'The UK Corporate Governance Code' (London, April 2016) <<https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf>> accessed 1 August 2018.

⁴ CA 2006, s 172(1).

⁵ Adolf Berle, 'Corporate Powers as Powers in Trust' (1931) 44 HLR 1049; Edwin Dodd, 'For Whom are Corporate Managers Trustees?' (1932) 45 HLR 1145; Adolf Berle, 'For Whom Managers are Trustees: A Note' (1932) 45 HLR 1365.

⁶ Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 SLR 577, 596.

traditional model of SV, stating that directors placing non-shareholder interests ahead of shareholders is equivalent to theft on the part of said directors.⁷ Such views have gained traction mainly due to the “globalisation of capital markets, the rise of institutional investors, greater shareholder activism and the increasing importance of corporate governance issues.”⁸ On the other end of the spectrum lies the stakeholder theory, or the idea that directors must run the company for the benefit of all its stakeholders and so are accountable to such stakeholders as they also contribute to the company’s success.⁹ Mirroring Dodd’s original proposal, Dean explains the efficiency of this method, as opposed to SV, to be in “all parties [working] together for a common goal and obtain shared benefit”.¹⁰ Academics such as Freeman have pushed for stakeholder control in decision-making,¹¹ whilst less drastic analyses of the theory have advocated for mere consideration of stakeholder groups. The exact categorisation of ‘stakeholder’ remains unclear – a study carried out by Fassin recently revealed over one hundred variations of stakeholder groups in legal literature.¹² Stakeholders have been referred to as “those groups without whose support [company] would cease to exist”.¹³ Freeman categorised stakeholder as “any group...who can affect or is affected by the...[organisation’s] objective”.¹⁴ This may be attributed to the rapid increase in globalisation, allowing stakeholders to be anyone or anywhere, which contributed to the theory’s decline in the 1980s as such an abstract categorisation of the parties served by corporate interest was found to be insufficient.¹⁵ The stakeholder theory was finally rejected by the CLRSG in the making of the CA 2006. Its admirable theoretical foundations are “outweighed by...problems that are caused by endeavouring to strike a balance between [all stakeholder] interests.”¹⁶

Before the CA 2006, SV was not statutorily mandated. Directors owed a duty to act in good faith vis-à-vis the way in which the directors, and not the court, consider to be in the best interests of the company, per *Re Smith & Fawcett Ltd*.¹⁷ *Regentcrest* confirmed the directors’ good faith obligation as one that is subjectively determined, relative to the director’s state of mind.¹⁸ As the scope of the company’s interests was never clearly defined,¹⁹ it was unclear as to whether the interests to be promoted were limited to shareholders or included other stakeholders. Nonetheless, since 1878 SV has been the predominant interpretation of the corporate objective, at which point it was indicated that “directors are trustees for the shareholders”.²⁰ This was confirmed in later cases,²¹ but there remained some judicial diffidence on the principle. Some subsequent cases directed that the “interests of the company as a whole” meant “the incorporators as a general body.”²² A later exploration of the corporate objective question concluded that “the best interests of the company...are not exclusively those of its shareholders but may include those of its creditors.”²³ Cases such as *Fulham Football Club* have similarly raised the notion that “the duties owed by the directors are to the company and the company

⁷ Milton Friedman, ‘The Social Responsibility of Business Is to Increase Its Profits’ *NY Times* (New York, 13 September 1970) 32.

⁸ Mohammed Omran, Peter Atrill, and John Pointon, ‘Shareholders Verses Stakeholders: Corporate Mission Statements and Investor Returns’ (2002) 11 *Business Ethics: A European Review* 318, 318. .

⁹ Kent Greenfield, ‘Saving the World With Corporate Law’ (2008) 57 *Emory Law Journal* 947, 975.

¹⁰ Janice Dean, *Directing Public Companies* (Cavendish 2001) 94.

¹¹ Robert Edward Freeman, ‘The Politics of Stakeholder Theory: Some Future Directions’ (1994) 4 *Business Ethics Quarterly* 409. .

¹² Yves Fassin, ‘The Stakeholder Model Refined’ (2009) 84 *JBE* 113, 120.

¹³ Robert Edward Freeman and David Reed, ‘Stockholders and Stakeholders: A New Perspective on Corporate Governance’ (1983) 25 *California Management Rev* 88, 89.

¹⁴ Robert Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman/Balinger 1984) 246.

¹⁵ Andrew Campbell, ‘Stakeholders: the Case in Favour’ (1997) 30(3) *LRP* 446, 448.

¹⁶ Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 53.

¹⁷ *Re Smith & Fawcett Ltd* [1942] CH 304.

¹⁸ *Regentcrest Pls v Cohen* [2001] 2 BCLC 80.

¹⁹ *Brady v Brady* [1987] 3 BCC 535.

²⁰ *Re Wincham Shipbuilding, Boiler & Salt Co v Hallmark* (1878) LR 9 Ch D 322, 328.

²¹ *Hutton v West Cork Railway Co* (1883) 23 Ch D 654. .

²² *Greenhalgh v Ardenne Cinemas* [1951] Ch 286, 291.

²³ *Lornho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627, 634.

is more than...its members”,²⁴ and that directors do not in fact owe a fiduciary duty to their shareholders, except in special circumstances.²⁵

Most of the substantive rules defining the corporate objectives contained in the CA 1862 and surrounding case law remained true to their original form. Accordingly, the Department of Trade and Industry commissioned a review for company law reform in 1998, to be overseen by a new body of specialists, the CLRSG. The review aimed to spark further discussion on corporate objectives in UK companies. The first wave of consultations targeted the scope of interest that should be promoted and noted that the corporate objective is fundamentally rooted in companies being formed and managed for the benefit of shareholders.²⁶ In response to criticism of SV prevalent in common law principles, the CLRSG characterised SV’s flaws as those of implementation, as company law can achieve its goal of “overall prosperity and welfare” if the ideologies of SV are efficiently applied.²⁷ The second wave of the review addressed the clear support for a shareholder-oriented model but within a more ‘inclusive’ model embracing long-termism.²⁸ That is, a director must “exercise his powers...in good faith...taking account of both the short and the long term consequences...to promote the success of the company for the benefit of its members as a whole.”²⁹ The third step of the review denied any support for pluralism, a variant of stakeholderism, due to its abstract scope of interests.³⁰ The CLRSG’s Final Report drafted general principles introducing ESV: directors must act in good faith to promote the success of the company for the benefit of its members as a whole and must take into account, in good faith, all material factors in deciding what is most likely to promote the success of the company.³¹ Following the CLRSG’s reform review, three White Papers were published by the government which confirmed the CLRSG’s approach and additionally proposed an annual report be published by directors detailing their ESV duty compliance.³² From there, the Government introduced the Company Law Reform Bill 2005, which eventually brought ESV into the legislative sphere in sections 172 and 417 in the CA 2006. This review and the subsequent Act “[preserved] the substance of the existing law where it worked as well as to incorporate improvements in the light of the review process”.³³

1.2 The continuity of shareholder value in the new law: is enlightened shareholder value rooted in outdated notions for a 21st century corporate governance model?

Academics commonly explain the dominance hitherto of SV in UK corporate governance as being founded in shareholders’ sole claim to the residual returns of the company. Since SV enhances overall economic performance, neoclassical economists find that residual returns act as rewards for shareholders’ critical economic functions and as a cushion for bearing risk without any contractual guarantee.³⁴ Critics argue that this is outmoded as shareholders do not take any risk, but merely estimate the chance of shares increasing in value without actually contributing to managerial efforts.³⁵ Keynes regards shareholders as ‘functionless investors’ distinct from risk-taking corporate owners,³⁶ and similar to this argument’s is Berle’s social ethics perspective that shareholders toil not to earn reward, but are simply beneficiaries by position.³⁷ Other academics contend that shareholders cannot

²⁴ *Fulham Football Club Ltd v Cabra* [1994] 1 BCLC 363, 379.

²⁵ *Dawson International plc v Coats Paton plc* [1989] BCLC 1247.

²⁶ DTI, *Modern Company Law for a Competitive Economy: Strategic Framework* (CLR, 1999).

²⁷ *ibid* para 5.

²⁸ DTI, *Modern Company Law for a Competitive Economy: Developing the Framework* (CLR, 2000) para 2.

²⁹ *ibid* para 3.

³⁰ DTI, *Modern Company Law for a Competitive Economy: Completing the Structure* (CLR, 2000) para 3.

³¹ DTI, *Modern Company Law for a Competitive Economy: Final Report* (CLR, 2001).

³² DTI, *Modernising Company Law* (White Paper, Cm 5553, 2002) para 3.

³³ Philip Bovey, ‘A Damn Close Run Thing – The Companies Act 2006’ (2008) 29(1) *Statute L Rev* 11, 25.

³⁴ Mary O’Sullivan, *Contests for Corporate Control: Corporate Governance and Economic Performance in the United States and Germany* (OUP 2000) 43.

³⁵ *ibid* 48.

³⁶ John Maynard Keynes, ‘The General Theory of Employment, Interest, and Money’ in *Collected Writings* (vol 7, Macmillans 1973) 376.

³⁷ Mary O’Sullivan, *Contests for Corporate Control: Corporate Governance and Economic Performance in the United States and Germany* (OUP 2000) 48.

be the sole residual claimants as other constituent interests are affected by company managers' decisions *ex post facto*.³⁸ Contractarianism, whereby a company is visualised as a 'nexus of contracts',³⁹ may be employed to debunk this claim. In this model, shareholders cannot be considered the sole residual claimants, as all corporate participants contribute to the nexus of contracts that constitutes the corporation itself, and thus all stakeholders fall under the scope of residual claimants. Instead, shareholders' ownership only pertains to their input and not to the corporation. Bainbridge has opposed this view on the grounds that shareholders enjoy a special protective status due to their sole negotiating power being to withhold capital, as juxtaposed by the representation afforded to others within a company by politically powerful interest groups such as unions.⁴⁰ While other stakeholder groups can also withhold their input, some firms can go years without equity investment, making stakeholders more relied upon for continuous value generation and ultimately furnishing them with a stronger negotiating position to influence management decisions. This is especially the case as voluntary stakeholders are additionally protected by contract and involuntary stakeholders are protected by tort. Consequently, shareholders' exit voice is arguably one way they retain power in the company.⁴¹ Nonetheless, with increased popularity of institutional investors and shareholder activism, the case for prioritising shareholder protection is weakened.⁴²

The corporate ownership debate is commonly discussed in terms of which parties are entitled to the company's residual returns. In the 1930s, Berle and Means noted that modern corporate structure "destroyed the unity that we commonly call property" arguably due to enlarged corporations and scattered shareholders unable to scrutinise directors, leading to the shareholders' residual ownership of 'passive' property.⁴³ Consequently, shareholders surrendering wealth also means surrendering the right that a company be run in their sole interests. Despite this, stakeholderism has been furthered pursuant to fairness principles, requiring that stakeholders providing resources to the company are entitled to residual returns based on their contributions.⁴⁴ Blair similarly agrees that shareholders are not the sole recipient of residual returns in a corporate structure of creditors, employees, and suppliers making firm-specific investments relying on the firm's success and subsequently affecting the company's value.⁴⁵ By way of example, Becker's human capital theory rationalises employees as a stakeholder group entitled to residual returns because they invest human capital in the company, placing themselves in a precarious position as a result.⁴⁶ Other contractarian scholars have however contended that aiding stakeholders without any contractual leverage at the cost of shareholders contradicts the fairness that stakeholder theorists hold to be paramount.⁴⁷ Tung explored the option of drafting a contract between shareholders and directors to eradicate the perceived vulnerability of the former, only to find that such a contract would be incomplete due to the inability to specify an exhaustive list of directors' decision-making obligations to shareholders in the context of a developing commercial world.⁴⁸ Easterbrook and Fischel explain this phenomenon as one that can be supplemented by SV filling in the gaps in the corporate contract.⁴⁹

A similar financial justification for SV is that it is reducing the agency costs of a corporation. Jensen and Meckling have conceived of agency costs as including monitoring expenditures by principals and

³⁸ Gerald Garvey and Peter Swan, 'The Economics of Corporate Governance: Beyond the Marshallian Firm' (1994) 1 JCF 139, 140.

³⁹ Frank Easterbrook and Daniel Fischel, 'The Corporate Contract' (1989) 89 Colum L Rev 1416, 1426.

⁴⁰ Stephen Bainbridge, 'In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green' (1993) 50(3) Washington and Lee L Rev 1423, 1443.

⁴¹ Albert Hirschman, *Exit, Voice, and Loyalty* (HUP 1970).

⁴² Virginia Ho, 'Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 JCL 59, 104.

⁴³ Adolf Berle and Gardiner Means, *The Modern Corporation & Private Property* (Transaction 1932).

⁴⁴ Robert Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman/Ballinger 1984) 52.

⁴⁵ Margaret Blair and Lynn Stout, 'Director Accountability and the Mediating Role of the Corporate Board' (2001) 79 Washington Univ L Q 403, 418.

⁴⁶ Gary Becker, *Human Capital: A Theoretical and Empirical Analysis with Special Reference to Education* (3rd edn, Univ of Chicago Press 1964).

⁴⁷ David Millon, 'Communitarianism in Corporate Law: Foundations and Law Reform Strategies' in Lawrence Mitchell (ed), *Progressive Corporate Law* (Westview 1995) 4.

⁴⁸ Fred Tung, 'The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors' (2008) 45 Emory L J 809, 813.

⁴⁹ Frank Easterbrook and Daniel Fischel, *The Economic Structure of Company Law* (HUP 1991) 90.

bonding expenditures by agents.⁵⁰ In an agency relationship such as that which exists between directors and shareholders, both parties are utility maximisers and thus the agents, or the directors in this case, may not always act in the best interests of the principal, or the shareholders. Yet, the agency theory also provides that directors, constrained by the fiduciary duties owed, act as agents to the shareholders in running the company in the interests of the latter. In return, shareholders can hold directors accountable when discharging their duties. Seeking to maximise shareholder wealth, SV aims at minimising expenditure. A single-focused corporate objective enables such efficiency via a clear system of resource allocation.⁵¹ This can be attributed to the certainty of implementation attached to a shareholder-focused model, which allows for the stock market to be the objective assessor of management performance in most cases.⁵² SV's singular focus on shareholders allows for the most efficient corporate objective system by boosting share price, which has traditionally been argued to be a measure of performance. Proponents of this theory have argued that requiring directors to run the company for the benefit of its shareholders incentivises the latter to monitor directorial decisions, enhancing overall social capital.⁵³ Lee has even proposed the notion that stakeholders are in fact in a better position accepting SV than accepting stakeholderist or pluralist approaches, as their benefits are improved under a selective and efficient regime.⁵⁴

SV has generally benefited shareholders at the cost of using negative externalities and unchecked social costs, for instance, poor working conditions for employees. However, while the theory fails at complete efficiency, insofar as it may lead to externalising costs to retain wealth for shareholders at an unchecked social cost, departing from SV would simply shift the encumbrance to an increase in agency costs and a decrease in social wealth. Maintaining the agency theory as a rationalisation for the CLRS's ongoing support of shareholder-oriented models is disputed as directors certainly have no express and arguably no implied contract with the company's shareholders as investors usually make their share purchase from another shareholder, or from the company.⁵⁵ The agency theory fails on the grounds stipulated in sections 170(1) and 994,⁵⁶ and previously the CA 1948,⁵⁷ *Lornho*,⁵⁸ and *Scottish Cooperative Wholesale Society*,⁵⁹ stipulating that directors owe their fiduciary duty to the company and to particular shareholders. Furthermore, section 33 renders shareholders and the company as bound to one another, but does not establish contractual links between shareholders and directors.⁶⁰ Shareholders may therefore rely on the expectation that directors fulfil the goal of shareholder wealth maximisation solely as designated in the company's constitution and section 172(1). In addition to financial guarantees, the lack of certainty for those falling within the ambit of directors' duties creates 'standard less discretion' with no one objective for directors to focus on.⁶¹ The consequence of this is that much room is left for director opportunism as they are "able to defend any allegation of misconduct with the retort that they balanced interests...and the assertion may not...be challenged as the decision...might well have benefited one or more stakeholders."⁶² Since managers care about their jobs, power, and prestige, they have an incentive to accommodate the demands of significant current and potential shareholders, a fact which suggests that the corporate objective is formed, at least in part, by managers promoting their own interests subject to the demands of large shareholders. This view is, however, objectionable as CA 2006⁶³ codified the rule established by *Aberdeen Railway* that the

⁵⁰ Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) JFE 305.

⁵¹ Robert Hessen, 'A New Concept of Corporations: A Contractual and Private Property Model' (1979) 30 Hastings L J 1327, 1346.

⁵² Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 19.

⁵³ *ibid* 24.

⁵⁴ Ian Lee, 'Efficiency and Ethics in the Debate About Shareholder Primacy' (2006) 31 DJCL 533, 538.

⁵⁵ John Boatright, 'Fiduciary Duties and the Shareholder-Management Relation: Or, What's Special About Shareholders?' (1994) 4 Business Ethics Quarterly 393, 397.

⁵⁶ CA 2006.

⁵⁷ S 210.

⁵⁸ *Lornho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627, 634.

⁵⁹ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 367.

⁶⁰ CA 2006.

⁶¹ Michael Jensen, 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 7 EFM 297, 301.

⁶² Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 46.

⁶³ S 177.

fiduciary duty of loyalty prohibits self-dealing.⁶⁴ Competitive markets may pressure directors into narrowing their targets, simply covering costs in the short-term. On the other hand, management may only care for larger shareholders since they are arguably the only ones that can threaten the job security of the former.

Whilst SV is driven by the benefit of a single constituency, Hansmann and Kraakman have argued that a corresponding regime increases overall social wealth through efficient resource allocation.⁶⁵ In 1995, a study conducted revealed that maximising SV does not conflict with the long-term interests of other stakeholders, making shareholders the only constituency who maximise others' value while maximising their own.⁶⁶ Lee explains this collective stakeholder relationship under SV as one of compromise – non-shareholding stakeholders' sacrifice is balanced by the subsequent increase in wealth generated by SV. In order for this hypothesis to be a reality, however, directors must have a long-term focus on shareholder wealth maximisation without externalisation leading to value being moved to shareholders and away from stakeholders. While the legislative shift to long-termism does not guarantee an increase in social welfare, it does provide for a more efficient allocation of scarce resources. Proponents of a shareholder-oriented model are well aware of the doctrinal uncertainties and practical complexities attached to the theory but maintain that the second-best approach is the best the law can establish in the meantime.⁶⁷ Irrespective of this, SV has gained and retained its popularity mainly due to its doctrinal clarity and practical certainty, “a single valued metric that is also observable and measurable”.⁶⁸

Despite SV being praised for its certainty, its implementation has been slow to take effect in the absence of a systematically accepted denotation. The theory's supposed certainty has tended to face scrutiny due to its lack of a clear time frame in which the objective is intended to be achieved. O'Kelly regards SV to be much less certain than advertised – “a single value...[does] not float free of decisions as to what strategies will count as enhancing shareholder value”.⁶⁹ This is evident in the common law preceding 2006,⁷⁰ and in the CLRS not clarifying the exact scope of directors' duties under the ESV regime. SV's approach towards corporate governance may not be objective – directors have been seen to contort the malleable theory by “manipulating either the test of profit maximisation or the ‘facts’ to which the test is applied”.⁷¹ While section 172(1) requires directors to consider the “likely consequences of any decision in the long term,”⁷² it has failed to assist company lawyers in reaching a consensus on how long exactly short-term and long-term periods are,⁷³ and to quantify the threshold for a certain action to be adjudged as being in the best interests of shareholders.⁷⁴ While the issue of juggling different interests is commonly used as an argument against stakeholder theory, this complication may well arise in the case of SV too. Different shareholder constituencies may have varying interests such as different investment goals and time scales. Doctrinal uncertainties of this kind have led to a clear lack of guidelines with which courts can determine whether or not directors have in fact achieved the objective of SV.⁷⁵ SV aims to exclusively serve a constituent element of a company that cannot have a singular interest and, even if it does, cannot usually deliver such purpose proposals to directors. In *Mills*, it was held that different classes of shareholder interests all have to be equally endorsed.⁷⁶ In this regard, Keay begs the questions:

⁶⁴ *Aberdeen Railway Co v Blaikie Brothers* (1854) 17 D (HL) 20.

⁶⁵ Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 GLJ 439, 441.

⁶⁶ Tom Copeland, Tim Koller, and Jack Murrin, *Valuation, Measuring and Managing* (John Wiley 1995) 22.

⁶⁷ Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 28.

⁶⁸ Anant Sundaram and Andrew Inkpen, 'The Corporate Objective Revisited' (2004) 15 *Organization Science* 350, 355.

⁶⁹ Ciaran O'Kelly, 'History Begins: Shareholder Value, Accountability and the Virtuous State' (2009) 60(1) *NILQ* 35, 45.

⁷⁰ *Brady v Brady* [1987] 3 BCC 535.

⁷¹ Gerald Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 *HLR* 1276, 1311.

⁷² CA 2006, s 172(1)(a).

⁷³ Einer Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 *NYU L Rev* 733, 756.

⁷⁴ Jonathan Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' (1991) 21 *Stetson L Rev* 23, 25.

⁷⁵ Einer Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 *NYU L Rev* 733, 739.

⁷⁶ *Mills v Mills* [1938] 60 *CLR* 150, 164.

Are directors to aim to take action that will also benefit only the current shareholder...? If they are to consider the future shareholders, how do managers balance what they do between the interests of the current and future shareholders? Does the theory focus on what the majority shareholders want? But how do you know what they want?⁷⁷

2 Enlightened shareholder value: cementing or modernising shareholder value?

2.1 Section 172(1): codifying the antecedent common law with new terms

The shareholder-stakeholder debate was reignited in the wake of the 2008 financial crisis, during which section 172, amongst others, covering directors' duties became operative. In the build-up to the financial crisis, there was an increased emphasis on the directorial management of risk. In light of this, the CLRSG's review updated the SV model in an attempt to raise efficiency and productivity by stressing the importance and benefits of fostering the full potential of all contributors.⁷⁸ In advancing ESV in the Final Report, the CLRSG hoped to achieve wealth maximisation and competitiveness, pursuant to SV, but also encouraged directors, while acting in the collective best interests of shareholders, to build long-term relationships.⁷⁹ When deciding whether ESV or pluralist theory, could establish a better corporate objective in corporate governance, ESV was preferred because it could accomplish the aims of a plural approach without the need for a radical, unsupported overthrow of the entire directors' duties regime.⁸⁰ This is evident in the CLRSG's view that ESV promotes "the ultimate objective of companies as currently enshrined in law... [because it] is in principle the best means also of securing overall prosperity and welfare".⁸¹ Lord Avebury, in addressing whether ESV is the compromise that was needed amidst the shareholder-stakeholder split, "[recognised] that there is unanimity of approval for this principle on all sides."⁸² However, stakeholder theorists like Freeman find this approach to be outdated and far too shallow in the complex context of the modern business world.⁸³ Despite such views, the stakeholder theory was rejected by the CLRSG because the "distributive economic role on directors....would be uncontrolled if left to directors in the form of...discretion".⁸⁴ The prevalence of a shareholder-driven model in the updated corporate governance framework came into question nonetheless. Referred to as "one of the most overrated doctrines in corporate law",⁸⁵ its failure to expand on corporate social responsibility ('CSR') concerns, becoming more pronounced in the wake of the fading 1980s' free market attitudes, was condemned.⁸⁶ Prior to ESV's enactment, SV had been interpreted to require a manager "to use income solely for the [benefit] of the stockholder, to disclaim any responsibility in the community, to finagle the lowest possible price from his vendors regardless of its effect on them."⁸⁷ ESV does not appear to be the radical change required in the 21st century CSR movement. *West Coast Capital* confirmed this legislative stagnation: "[there] there was no equivalent in the earlier Companies Acts, but these sections appear to be little more than set out the pre-existing law on the subject."⁸⁸

The impact of ESV was intended to encourage the management of companies for the long-term by deterring boards from exclusively focusing on short-term returns and incentivising them to building long-term relationships with stakeholders.⁸⁹ This was to be achieved by codifying the previous common law principles, and clarifying it, most notably by introducing the term 'success' in the legislation for the first

⁷⁷ Andrew Keay, 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' (2010) 7 ECFLR 369, 388.

⁷⁸ Andrew Keay, *The Corporate Objective* (Edward Elgar 2011) 117.

⁷⁹ Andrew Keay, 'Tackling the Issue the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'' (2011) 29 SLR 577, 590.

⁸⁰ DTI, *Modern Company Law for a Competitive Economy: Strategic Framework* (CLR, 1999) para 5.

⁸¹ *ibid* para 5.

⁸² HL Deb 6 February 2006, vol 678, col 265.

⁸³ Robert Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman/Ballinger 1984).

⁸⁴ DTI, *Modern Company Law for a Competitive Economy: Developing the Framework* (CLR, 2000) para 2.

⁸⁵ D Gordon Smith, 'The Shareholder Primacy Norm' (1998) 23 JCL 277, 323.

⁸⁶ Bob Tricker, *Corporate Governance* (3rd edn, OUP 2015) 70.

⁸⁷ Robert Anthony, 'The Trouble with Profit Maximisation' (1960) HBR 126, 132.

⁸⁸ *West Coast Capital (Lios) Ltd* [2008] CSOH 72 [21].

⁸⁹ DTI, *Modern Company Law for a Competitive Economy: Developing the Framework* (CLR, 2000) para 2.

time.⁹⁰ Previously, the SV as a theory did not specify whether the increase of shareholder value was in the long or short term and was subsequently deployed to justify short-termism.⁹¹ Section 172(1)(a) creates the duty, when promoting the success of the company, to have regard for “the likely consequences of any decision in the long term”.⁹² Therefore, there was “no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value”.⁹³ The 2002 draft Bill, in an attempt to address the case law dispute defining the success of the company, stipulated that directors must account for ‘all material factors’. These were said to be all likely short-term and long-term consequences of the directors’ actions that a person of care and skill would consider relevant. However, this stipulation was subsequently omitted in the passing of the act. Instead, it has been advised that directors continue to comply with their common law duty to exercise reasonable care, skill and diligence in considering the consequences of their actions.⁹⁴ ESV thus carried on a criticism of SV – failing to define what ‘success’ is for the purposes of the legislation. Such reproach mirrors the judicially upheld non-interventionist policy of ‘internal management’ where the “Court is not required on every Occasion to take the management of every Playhouse and Brewhouse in the Kingdom”,⁹⁵ leaving the methods in which the success of the company is to be promoted to the director’s good faith judgement.⁹⁶ Good faith has traditionally been interpreted to connote honesty and propriety.⁹⁷ Summers has argued that the expression “has no general meaning of its own...but...serves to exclude many heterogenous forms of bad faith”.⁹⁸ As for what bad faith entails, it has been understood to be an intentional departure from a duty.⁹⁹ Before this, Pennycuik J in *Charterbridge* asked whether an intelligent and honest man in the position of a director of the relevant company, in the given circumstances, would have reasonably believed that the decision was for the benefit of the company.¹⁰⁰ These objective guidelines were not explicitly transplanted into section 172(1) and so it has been argued that the pre-CA common law principles be employed as guidance to supplement section 172(1),¹⁰¹ instead of solely relying on the provision’s subjective test. This view is supported by section 170(3) and 170(4)’s statement that general duties are based on common law rules and equitable principles.¹⁰²

The inclusion of ‘success’ in the provision, while a small part of the CA 2006, could have a substantial impact on how UK corporations are run, if it is interpreted to mean a long-term increase in value.¹⁰³ Furthermore in the Guidance on Key Clauses to the Company Law Reform Bill,¹⁰⁴ the test determining whether directors have met the threshold of success as per section 172(1) was whether or not the directors considered, in good faith, that their course of action would be mostly likely adopted for the purposes of promoting the company’s success, for the members as a whole. While the term ‘success’ lacks precedent, cases following the enforcement of the CA 2006 have proven the likeliness of courts relying on precursor common law duties such as that of the *bona fide* duty in determining what ‘success’ means to their company.¹⁰⁵ Lord Goldsmith also responded to questions surrounding the meaning of ‘success’ in section 172 –

⁹⁰ CA 2006, s 172. .

⁹¹ Herbert Simon, ‘Theories of Decision-Making in Economics and Behavioral Science’ (1959) 49 AER 253, 262.

⁹² CA 2006.

⁹³ Henry Hansmann and Reinier Kraakman, ‘The End of History for Corporate Law’ (2001) 89 GLJ 439, 440.

⁹⁴ Andrew Keay, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s Enlightened Shareholder Value Approach’ (2007) 29 SLR 577, 580.

⁹⁵ *Carlen v Drury* (1812) 1 Ves & B 154.

⁹⁶ *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598.

⁹⁷ *Olifent v Australian Wine Industries Ltd* (1996) 14 ACLC 510, 515.

⁹⁸ Robert Summers, ‘Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code’ (1954) 54 VLR 195, 196.

⁹⁹ *Re Walt Disney Co Derivative Litigation* (2006) 906 A 2d 27 (Del, S Ct).

¹⁰⁰ *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1969] 3 All ER 1185, 1194.

¹⁰¹ Sarah Worthington, ‘Reforming Directors’ Duties’ (2001) 64 MLR 439, 456.

¹⁰² CA 2006.

¹⁰³ Patrick Beale, ‘Directors Beware’ (2007) 157 NLJ 1033.

¹⁰⁴ DTI, *Guidance on Key Clauses to the Company Law Reform Bill* (2005).

¹⁰⁵ *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch).

“it is essentially for the members of the company to define the objective they wish to achieve. Success means what the members collectively want the company to achieve.”¹⁰⁶

The Bank of England has evinced the practice of short-termism in UK corporations: the holding period of shares went down from an average of five years in the 1960s, to less than eight months in 2007.¹⁰⁷ This did not go unnoticed, as the CLRSO later highlighted the support that it received for its initial proposal to include a long-term requirement in the legislation.¹⁰⁸

Before the scrutiny that followed the financial crisis of 2008, directors have generally favoured short-term returns, which resulted in SV facing objections for allegedly promoting short-termism.¹⁰⁹ Despite section 172(1)(a) requiring directors to have regard to the likely consequences of any decision in the long term, there continues to be a “concomitant fixation on the quarterly earnings of corporations and...share value”.¹¹⁰ For example, post-ESV, the Department of Business, Innovation and Skills issued a consultation document demonstrating that short-termism still exists in equity markets.¹¹¹ Evidently, ESV’s implementation has lagged in improving self-serving directors as “planning for the long term could make the performance of...managers look decidedly average, as the share price might not increase and higher dividends would not be paid as quickly as if short-term plans were implemented.”¹¹² Arguably, for ESV to enhance its goal of social wealth, a long-term approach requiring indefinite capital commitment to the company and long-term capital growth of the company is needed. Elhauge explains that ESV has disregarded a specific quantification of ‘long-term’ as it is an imprecise concept that is difficult to provide a monotonal definition for.¹¹³ In omitting to denote this however, the *Gaiman* view stands on meaning both present and future shareholders for the purposes of ensuring directors focus not only on the short-term.¹¹⁴ Similarly, ‘members as a whole’ may be interpreted in light of *Provident International Corp* previously construing long-term objectives as ones that benefit both current and future shareholders.¹¹⁵ This was similarly tested in the Australian High Court, where it was held that the requirement be completely removed from the duty.¹¹⁶ However, the CLRSO felt that the test was too deeply rooted in UK company law to follow in these footsteps.¹¹⁷

Former Minister for Industry and Regions, Margaret Hodge, stated that section 172(1) “[codifies]...for the first time duties around corporate social responsibility...one of the key issues is how we marry the commercial success of...companies and the resulting benefits to...the economy, with sustainability and social justice.”¹¹⁸ This is displayed in the section 172(1) requirement that directors ‘have regard to’ other stakeholder groups when promoting the success of the company. Here, a novel procedure is created whereby “action otherwise than in good faith, which will now, but does not at common law, include the failure to consider the various factors listed...will be treated as a breach of trust”.¹¹⁹ Still, there is no exhaustive list of what parties are entitled to such consideration and no explanation as to the meaning of such a duty or how it should be carried out. Prior to section 172, there were no restrictions on directors to account for non-shareholding stakeholders’ interests so long as they act in good faith in the best interests of the company as a whole. Now, the theoretical and procedural backgrounds of the ESV principle seem to indicate that directors are only to consider stakeholder interests insofar as they

¹⁰⁶ HL Deb 6 February 2006, vol 678, col 255.

¹⁰⁷ Andrew Haldane, ‘Patience and Finance’ (Oxford China Business Forum, Beijing, 2 September 2010) <<https://www.bis.org/review/r100909e.pdf>> accessed 22 July 2018.

¹⁰⁸ DTI, *Modern Company Law for a Competitive Economy: Completing the Structure* (CLR, 2000) para 3.

¹⁰⁹ David Millon, ‘Why is Corporate Management Obsessed with Quarterly Earnings And What Should Be Done About It?’ (2002) 70 *George Washington L Rev* 980.

¹¹⁰ Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 30.

¹¹¹ BIS, ‘A Long Term Focus for Corporate Britain: A Summary of Responses’ (London, March 2011)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207536/11-797-summary-responses-long-term-focus-corporate-britain.pdf> accessed 10 August 2018.

¹¹² Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 40.

¹¹³ Einer Elhauge, ‘Sacrificing Corporate Profits in the Public Interest’ (2005) 80 *NYU L Rev* 733, 756.

¹¹⁴ *Gaiman v The National Association for Mental Health* [1971] Ch 317.

¹¹⁵ *Provident International Corp v International Leasing Corp Ltd* [1969] NSWR 424, 440.

¹¹⁶ *Gambotto v WCP Ltd* (1995) 182 CLR 432.

¹¹⁷ DTI, *Modern Company Law for a Competitive Economy: Completing the Structure* (CLR, 2000) para 5.

¹¹⁸ HC Deb, 11 July 2006, vol 448, col 559.

¹¹⁹ John Lowry, ‘The Duty of Loyalty of Company Directors Bridging the Accountability Gap through Efficient Disclosure’ (2009) 68(3) *CLJ* 607, 622.

endorse SV – “a purely instrumental concern with constituency interests”.¹²⁰ Critics have signified that ESV does not differ from SV in failing to designate how much consideration is to be given to the relevant stakeholders, or what action to take when faced with balancing conflicting interests.¹²¹ Equally, Benjamin has argued that the new legislation actually constrains directors to a narrower duty,¹²² as the former case law provided unfettered directorial discretion to act in a way which they consider most likely to promote the success of the company for the benefit of its members.¹²³ Contrariwise, Jensen argues the section created a situation where directors are less accountable for the stewardship of their company’s resources.¹²⁴ This gives rise to the ‘two masters’ argument and Sternberg’s dual legitimacy query,¹²⁵ in that directors are stewards that must have one preference and that preference is arguably to shareholders’ interests.¹²⁶ Nonetheless, Lord Goldsmith defended the ESV principle as it “resolves any confusion in the mind of directors as to what the interests of the company are, and prevents any inclination to identify those interests with their own. It also prevents confusion between the interests of [shareholders and of stakeholders].”¹²⁷

Critics advocating for further stakeholder voice in interpreting section 172(1) may perhaps find respite outside the provision. For instance, employees are specifically protected by section 247 of the CA 2006, which allows directors to override their section 172 duty to provide for employees upon the cessation or transfer of the company’s business. Creditors are safeguarded by the Insolvency Act 1986,¹²⁸ while the environment is safeguarded by the Environment Protection Act 1990. As ESV possibly only emanates a real impact when the company is experiencing financial duress, section 172(3) clearly guides directors to act in favour of the interests of creditors, which creates a balancing act in that it excludes all stakeholders, including shareholders. While protection outside the CA 2006 is commonly used to debunk stakeholderism, Tricker explains that the same free market and regulatory instruments may be employed to mediate conflicting interests in a stakeholder or a more enlightened shareholder value model.¹²⁹ Similarly, Shepherd addressed the factors listed in section 172(1) in indicating that a director is within his duty to balance different interests if they are conflicted.¹³⁰ Still, Hansmann and Kraakman justified shareholder favouritism by their vulnerability.¹³¹ That is, other stakeholders can protect themselves by contract they have with the company, while shareholders lack this protection. This arguably makes shareholders “the only constituency whose relationship with the corporation does not come up for periodic renewal...[other constituencies] have opportunities to renegotiate terms when contracts are renewed.”¹³²

2.2 Enlightened shareholder value applied: the business review and the strategic report

The ESV principle lacks much procedural guidance from the legislation and supporting instruments on its implementation. Within the limited judicial consideration of section 172(1), Warren J in *Cobden Investments* held that “it is accepted that a breach will have occurred if it is established that the relevant exercise of power is one which could not be considered by any reasonable director to be in the interests of the company”.¹³³ In discharging their section 172(1) duty, directors continue to be bound to exercise reasonable care, skill, and diligence.¹³⁴ Initially, this was ensured by the Operating and Financial Review

¹²⁰ Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 129.

¹²¹ *ibid* 27.

¹²² Lisa Benjamin, ‘The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?’ (2016) 5(2) *TE Law* 353, 358.

¹²³ *Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil NL* (1968) 121 CLR 483, 493.

¹²⁴ Michael Jensen, ‘Value Maximisation, Stakeholder Theory and the Corporate Objective Function’ (2001) 7(3) *EFM* 297, 305.

¹²⁵ Elaine Sternberg, ‘The Defects of Stakeholder Theory’ (1997) 5(1) *Corporate Governance* 3, 4.

¹²⁶ Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP 2008) 66.

¹²⁷ HL Deb 6 February 2006, vol 678, col 255.

¹²⁸ S 214.

¹²⁹ Bob Tricker, *Corporate Governance* (3rd edn, OUP 2015) 66.

¹³⁰ *Shepherd v Williamson* [2010] EWHC 2375 (Ch).

¹³¹ Henry Hansmann and Reinier Kraakman, ‘The End of History for Corporate Law’ (2001) 89 *Georgetown L J* 439, 449.

¹³² Oliver Williamson, *The Economic Institution of Capitalism* (Free Press 1985) 304.

¹³³ *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 [53].

¹³⁴ CA 2006, s 174.

(‘OFR’), aimed at establishing corporate governance objectives via disclosure and transparency. The repeal of the OFR can be seen as another instance of corporate deregulation, which may have led to reinstating most of the OFR’s requirements in the BR, such as those of reporting on key performance indicators and principal risks. However, the BR does not require companies to explain the market context and strategy of the company as its predecessor has done. The EU Accounts Modernisation Directive, which was effective in section 417, ensured a balanced analysis of the company’s performance to identify principal risks using non-financial indicators.¹³⁵ The BR was supplementary to section 172 as it required companies to report, *inter alia*, how directors have operated their section 172 duty. While Section 417 reporting requirements were enacted to assist achieving a sustainable ESV model, empirical evidence has highlighted a dissatisfaction with the preparation of BRs, mainly due to companies engaging in boiler plating the contents.¹³⁶ This has caused much advocacy for clearer guidance in completing BRs to guarantee ESV’S goal of overall prosperity and establish the BR’s purpose of “[providing] the shareholders with the information they needed to exercise effective control...enabling shareholders to assess past performance as well as the directors’ view on the company’s future prospects”.¹³⁷ Resultant of much denunciation, section 417’s BR has now been replaced by the requirement to produce a Strategic Report, pursuant to section 414C(1).¹³⁸ This new obligation similarly requires the preparation of an annual report that assists shareholders in assessing how their company’s directors have performed their duties under section 172. Most markedly, the Strategic Report envelopes some of the criticisms that arose when ESV was initially introduced in the CA 2006, such as requiring quoted companies to quantify and disclose on their greenhouse gas emissions.

While ESV does in fact not detach itself too far from SV, it did arguably create a new approach to the stewardship theory in reporting requirements to explain directors’ actions and decisions to stakeholders who are not necessarily shareholders. The traditional stewardship theory reflects the views of the corporation as directors being accountable to just the shareholders. Under the new ESV framework, the stewardship theory recognises the need to identify stakeholder interests, while also maintaining their primary duty to shareholders.¹³⁹ These updates may still not suffice in modern business practice as corporate bodies continue to increase in size, leading complex corporate structures to lack sufficient transparency and direct accountability directly to the shareholders. Hodge explained that “[for] most directors, who are...[putting] the interests of their company before their own, there will be no need to change their behaviour.”¹⁴⁰ The CLRSG did envisage further steps than previous practice in that directors take a balanced approach addressing all stakeholder interests but this has been criticised as an “inherently subjective process”.¹⁴¹ This leaves the legislative standpoint being that none of the stakeholder constituencies provided in section 172(1) have the right to bring forth action against directors in breach of the provision’s duty. The second limb of ESV, presented in section 417 and later section 414C(1), similarly does not promise achieving sustainable development in the face of appraisal for its alleged inclusion of stakeholderist concerns.

¹³⁵ Council Directive 2003/51/EC of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings [2003] OJ L178/16.

¹³⁶ Charlotte Villiers, ‘Narrative Reporting and Enlightened Shareholder Value under the Companies Act 2006’ in Joan Loughrey (ed), *Directors’ Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar 2012).

¹³⁷ *ibid* 705.

¹³⁸ CA 2006 (Strategic Report and Directors’ Report) Regulations 2013, SI 2013/1970.

¹³⁹ Bob Tricker, *Corporate Governance* (3rd edn, OUP 2015) 66.

¹⁴⁰ DTI, ‘Companies Act 2006: Duties of company directors’ (Ministerial Statement, London, June 2007)

<<http://webarchive.nationalarchives.gov.uk/20090609024504/http://www.berr.gov.uk/files/file40139.pdf>> accessed 15 August 2018. .

¹⁴¹ John Parkinson, ‘Models of the Company and the Employment Relationship’ (2003) 41 BJIR 481, 498. .

3 The future of corporate objectives in UK companies

3.1 Is the new 'enlightened' facet of the principle an element of stakeholderism?

The factors listed in section 172(1) mark a departure from the more conservative approach of the CA 1985, where reference was made to employees only.¹⁴² The requirement of having regard to such factors “highlights areas of particular importance which reflect wider expectations of responsible business behaviour”,¹⁴³ which enshrines the ‘enlightened’ feature of ESV. This new legislative element stirred much controversy,¹⁴⁴ especially as the CA 2006, guidance on Key Clauses issued with the draft Bill in the March 2005 White Paper, and the explanatory notes omitted to issue further direction on this. The general lack of guidance in and around the provision is concerning, specifically in the case of conflicting interests in trying to implement ESV. Three conclusions were arrived at in a study conducted by the Association of Chartered Certified Accountants on the impact of the legislation.¹⁴⁵ First, ESV made neither legal nor practical alterations to the pre-CA 2006 corporate governance model as most UK boards were already adopting similar practices. Second, if this was not the case, directors did not feel pressured to adopt ESV measures as they are not enforceable. Concerns raised over increased litigation in the wake of section 172(1) are misplaced as floodgate mechanisms were implemented since the rule in *Foss v Harbottle*.¹⁴⁶ Finally, directors failed to implement an ESV-friendly decision-making process as they did not have enough guidance to do so, which was an explanation supported by empirical evidence indicating substantial directorial confusion on how to satisfy section 172 compliance.

Whether the CA made any substantive changes to the previous legal position is questionable, and whether codifying legislation was the appropriate measure in modern corporate governance is even more so. To this end, Lord Hodgson has confirmed that the legislation only codifies the preceding common law principles, and in a form that makes no alteration to the existing legal position.¹⁴⁷ ESV's new duty was proposed to drive corporate objective models to “not quite pluralist...but rather a...European model where there are a group of stakeholders...involved”.¹⁴⁸ Years after its enactment, such optimism has simmered down to modestly viewing the provision as a start in a movement towards a more stakeholder-conscious corporate governance. This has been explained as ESV acting as a middle ground between the two opposing theories of SV and stakeholderism by discriminating between competing constituency interests, unlike the preceding SV regime. Nonetheless, SV proponents have jumped out to differentiate between SV, promoting long-termism and promoting stakeholderism, as the latter displaces SV altogether.¹⁴⁹ The Government has previously indicated a stakeholder approach to be fostered upon the provision's implementation in asserting that “companies [are] to create wealth while respecting the environment and exercising responsibility towards society and the local communities in which they operate.”¹⁵⁰ While further formal support for a more pluralist approach has been limited since, there remains hope for more stakeholder inclusion in the UK amidst national non-governmental organisations, such as CARE International, advocating for the cause. Alternatively, it may also be argued that due to the long-standing shareholder-focused corporate governance model of the UK, it will prove difficult to go any further than ESV in the meantime.

¹⁴² S 309.

¹⁴³ Explanatory Notes to the Companies Act 2006, para 326.

¹⁴⁴ HL Deb 6 February 2006, vol 678, col 263.

¹⁴⁵ Samantha Fettiplace and Rebecca Addis, ‘Evaluation of the Companies Act 2006’ (Case Study 7, London, 2 August 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31655/10-1360-evaluation-companies-act-2006-volume-1.pdf> accessed 25 June 2018.

¹⁴⁶ (1843) 67 ER 189.

¹⁴⁷ HL Deb 9 May 2006, ser 5, col 169.

¹⁴⁸ *ibid.*

¹⁴⁹ Michael Jensen, ‘Value Maximisation, Stakeholder Theory, and the Corporate Objective Function’ (2001) 7 EFM 297.

¹⁵⁰ DTI, *Draft Regulations on the Operating and Financial Review and Directors’ Report: A Consultation Document* (London, 2005).

A similar approach to the UK's ESV framework is present in the US,¹⁵¹ whereby the Delaware judiciary have consistently held that directors are within their duties to have regard to other stakeholder interests besides shareholders' given that such consideration will assist the generation of wealth for the shareholders.¹⁵² Similarly, the jurisdiction's 'constituency statutes', or stakeholder statutes, allow directors to consider non-shareholder interests in making decisions within their capacity as directors. Ironically, their similarity to the UK's ESV is also evident in that both have received criticism for not being a substantive development in their respective corporate laws, as they serve as mere educational value.¹⁵³ In relation to further example for the UK model in the future, there is a real concern that corporate directors will use stakeholders' interests as a cloak for decisions advancing their own interests. There have been instances of managers hypocritically lobbying legislators in favour of constituency statutes in the US but who have also opposed other work protection laws for employees.¹⁵⁴ As the principle's counterparts are just as vague in other constituencies such as Canada and the US, it is unlikely that a respective procedural transplant in the UK would make much difference. Conversely, the approaches of continental Europe's more rigid civil law systems on corporate objectives have long been codified to include less protection to shareholders than in Anglo-American jurisdictions.¹⁵⁵

Jurisdictions in continental Europe, such as Germany, recognise the corporation as a public body encompassing a wide range of stakeholder groups, which ultimately separates the corporate body from its shareholders and stakeholders. Kay has called for the adoption of the German conception of the company as "a community in itself and an organisation in turn embedded in a community" where directors are trustees of the company's assets, which include stakeholder groups.¹⁵⁶ This would permit the UK corporation to be "an organic model of corporate behaviour which gives to the corporation life independent from its shareholders or stakeholders....[as] an end in itself".¹⁵⁷ Correspondingly, Parkinson proposed the adoption of a two-tier board similar to that in Germany to represent stakeholder groups.¹⁵⁸ Hansmann and Kraakman have found faults in advocating for a more continental European-like stakeholder system, where evidence has surfaced that could indicate that those systems are beginning to lean towards a more Anglo-American one sustained within SV.¹⁵⁹ However, this stood before the 21st century Anglo-American financial scandals, such as the downfall of Northern Rock in the UK and the Lehman Bros in the US, and has since been compromised by the more interventionist regulations that followed. Such downfalls similarly resulted in further questioning of Anglo-American corporate governance systems.

A fundamental change in corporate governance is unlikely, as the UK's long-standing SV approach is deeply rooted in the corporate governance traditions of the jurisdiction. These include the economic function of the separate entity rule, the political function of promoting competitive practices, and the market for corporate control.¹⁶⁰ For ESV, to make a substantial dent in the consolidated law, Keay and Zhang propose that derivative proceedings be allowed for non-shareholding stakeholders as well.¹⁶¹ Here, the applicant could argue that the directors failed to have regard to one or more of the factors in section 172(1). It is noted that "each case would have to be considered on its merits, in due course a clear line of reasoning is likely to develop."¹⁶² Inopportunistly, the accountability flaw was also evident in previous company legislation,¹⁶³ and such a pattern indicates that it is unlikely that the UK is ready to

¹⁵¹ *Dodge v Ford Motor Co* 204 Mich 459, 170 NW 668 (Mich 1919).

¹⁵² *Revlon Inc v MacAndrews & Forbes Holdings Inc* 506 A 2d 173 (Del 1986).

¹⁵³ Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 201.

¹⁵⁴ Stephen Bainbridge, 'In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green' (1993) 50(3) *Washington and Lee L Rev* 1423, 1445.

¹⁵⁵ Bob Tricker, *Corporate Governance* (3rd edn, OUP 2015) 66.

¹⁵⁶ John Kay and Aubrey Silberston, 'Corporate Governance' (1995) 153(1) *National Institute Econ Rev* 84, 86. .

¹⁵⁷ *ibid* 91.

¹⁵⁸ John Parkinson, 'Company Law and Stakeholder Governance' in Gavin Kelly, Dominic Kelly, and Andrew Gamble (eds), *Stakeholder Capitalism* (Macmillan 1997). .

¹⁵⁹ Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *GLJ* 439. .

¹⁶⁰ Anant Sundaram and Andrew Inkpen, 'The Corporate Objective Revisited' (2004) 15 *Organization Science* 350, 352.

¹⁶¹ Andrew Keay and Hao Zhang, 'An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law' (2011) 4 *ECFR* 445, 469.

¹⁶² *ibid* 474.

¹⁶³ CA 1985, s 309. .

introduce rights to initiate derivative actions to non-shareholders. While stakeholderism has long been viewed as a political intervention rather than an economic theory,¹⁶⁴ Blair's economic adoption of stakeholderism can be employed towards a more enlightened outlook on stakeholder interests.¹⁶⁵ Her paper, published in 1995, becomes even more relevant in the argument that the current model of corporate governance is made on broad assumptions about how wealth is created, captured, and distributed in business enterprises. Similar to ESV, this argument accepts shareholders as principals and subsequent residual claimants of a fiduciary relationship with directors as they invest in productive assets and bear the risk of the company's success, but also accepts residual claims for non-shareholders as they too make investments affecting the value of the company.

3.2 Rebranding SV as ESV: the first of many updates?

In its conception, ESV received mixed reviews from company lawyers, and general disappointment from the NGO community.¹⁶⁶ For instance, Amnesty International and Friends of the Earth have proposed an alternative framework.¹⁶⁷ Similar to ESV, the proposal does not displace SV but provides stakeholder interests with a higher priority by enforcing stronger disclosure rules and clearer enforcement provisions. An alternative analysis of the impact of ESV's operation is the one seen from the perspective of Bainbridge's 'director primacy' principle.¹⁶⁸ That is, directors are not a mere agent of the shareholders but guardians serving the various contracts that make up the corporation.¹⁶⁹ ESV may have arguably driven UK corporate governance as director-centric rather than shareholder-centric. That is, directors have always been able to consider stakeholder interests and the CA 2006 now expressly provides a wide discretion in their decision-making. The majority, however, have argued that ESV "merely constitutes a rebranding of shareholder primacy, which has often been seen as a harsh aspect of capitalism and...devoid of any moral basis...to make it...more palatable to those who adhere to stakeholderism."¹⁷⁰ The new law obligates directors to implement an ESV regime, where they must simultaneously continue to uphold SV by promoting the success of their company for the benefit of the members as a whole and ensure they have regards to section 172(1)'s listed factors to demonstrate enlightenment. The CA 2006 aimed to enshrine ESV as prevalent in preceding common law where no restriction was imposed on directors to consider interests outside of those of shareholders. This is evident in the Supreme Court of Canada's holding that directors have a duty to act in the best interests of the corporation, with the best interests of the company explicitly explained as maximising the value of the corporation by acting in the best interests of all constituencies.¹⁷¹ Others have viewed ESV more positively in that it has curated the path towards a more stakeholder-centric construct of UK corporate governance. While it does not add much to what was already there, ESV does warrant a statutory footing for the consideration of stakeholder interests in their explicit mention in the legislation for the first time.

Pistor and Xu's modernised approach to the incomplete law theory can explain the provisions of ESV as a residual 'law making and law enforcement powers', with the preceding common law acting as the 'original' law, that is a means of interpretation adapting to changing circumstances which would allow the new legislation to extend to a varied and large number of cases in a consistent manner over a prolonged period of time.¹⁷² Keay and Zhang interpret such laws to use "non-specific wording and [produce] a lack of clarity as to...boundaries...[and are] based on the theory of incomplete contracts."¹⁷³ Section 172(1) is incomplete law in the sense that legislators have established a general, 'catch-all' principle, that is the principle of due consideration for stakeholder interests, to sanction unforeseeable

¹⁶⁴ Gavin Kelly, Dominic Kelly, and Andrew Gamble, *Stakeholder Capitalism* (Macmillan 1997).

¹⁶⁵ Margaret Blair, 'Rethinking Assumptions Behind Corporate Governance' (1995) 38(6) *Challenge* 12, 15.

¹⁶⁶ Alan Dignam and John Lowry, *Company Law* (9th edn, OUP 2016) 410.

¹⁶⁷ Corporate Responsibility HC Bill (2003) [129].

¹⁶⁸ Stephen Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97(2) *Nw U L Rev* 547.

¹⁶⁹ *ibid* 605.

¹⁷⁰ Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 278.

¹⁷¹ *People's Department Stores v Wise* [2004] SCC 68.

¹⁷² Katharina Pistor and Chenggang Xu, 'Incomplete Law' (2003) 35 *NYU J Intl L and Pol* 931.

¹⁷³ Andrew Keay and Hao Zhang, 'An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law' (2011) 4 *ECFR* 445, 474.

actions that result in an outcome that the law is aiming to prevent. The 'enlightened' element of requiring directors to have regard to other factors besides shareholder interests has been reframed as the principle of due consideration for the interests of stakeholders which introduced a debatably new concept into UK company law, warranting more caution than if the legislation was merely codifying.¹⁷⁴ However, this created the problem of uncertainty in "that the law will not deter sufficiently or at all the commission of the action that is not sanctioned, or it will not sufficiently set out what action is prescribed", such as what directors and shareholders are to do in having regard to stakeholder interests.¹⁷⁵ Alternatively, incomplete prescriptions of the principle of due consideration may result "in *ex post* stakeholder-opportunism against the shareholders".¹⁷⁶ While legislators could have captured more contingencies by extending their list, that would not be a realistic reflection of the complex and varied nature of modern business relationships. Thus, the incomplete law, that is, section 172(1) will be made more complete with gradual trial and error by the courts.¹⁷⁷ The legislation has been tested in courts,¹⁷⁸ and merely confirmed the pre-existing position in "effectively [succeeding] the duty at common law that the director had to act in good faith in the best interests of the company."¹⁷⁹ The CLRSG itself has agreed that section 172 would not make an immediately substantial impact on the law, as it was simply intended to "influence...the climate of decision making".¹⁸⁰ However, this did not suffice for contenders for a more inclusive approach.

A few years after the enactment of the CA 2006, Keay and Adamopoulou examined the published documents of 50 of the 100 FTSE companies in order to ascertain whether SV remains a proponent in their corporate governance.¹⁸¹ The results of this empirical study were tripartite. Thirty-six percent of the companies in question upheld the SV model, while also stressing the importance of CSR and maintaining good relations with their non-shareholding stakeholders.¹⁸² The extent and impact of such stakeholder consideration could not be pinpointed in the documents and therefore the authors could not ascertain whether it was rhetoric or actual. Nonetheless, as large, listed companies are usually scrutinised by various entities, Keay and Adamopoulou argue that such statements cannot be pure rhetoric as "it is unlikely that these companies would be as successful as they are or that their statements would remain unchallenged in public."¹⁸³ All in all, the first partite appears to be aligned with the value set out in section 172(1). The second group, constituting twenty percent of the companies in the study, set out in the research, outlined their corporate purpose as for the benefit of all their stakeholders, thus embracing varieties of stakeholderism.¹⁸⁴ The final group of companies, constituting forty-four percent of the total studied, did not sustain SV nor stakeholderism in not setting any constituency's interests as their objective.¹⁸⁵ Instead, there was an emphasis on growth, leadership, development, or profit.¹⁸⁶ Nonetheless, the study noted that this group of corporations must still adhere to section 172 to avoid shareholders bringing forth derivative action against the directors on the basis of breach of duty.¹⁸⁷ Evidently, the majority of the companies in the study embrace a SV oriented model, and more interestingly, "have some corporate objective other than either of the predominant theories that define the objective of companies."¹⁸⁸ Perhaps this is indicative of a reality where SV remains

¹⁷⁴ *ibid* 446.

¹⁷⁵ *ibid* 460.

¹⁷⁶ *ibid*.

¹⁷⁷ *ibid* 461.

¹⁷⁸ *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch).

¹⁷⁹ Andrew Keay and Hao Zhang, 'An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law' (2011) 4 ECFR 445, 462.

¹⁸⁰ DTI, *Modern Company Law for a Competitive Economy: Developing the Framework* (CLR, 2000) para 5.

¹⁸¹ Andrew Keay and Rodoula Adamopoulou, 'Shareholder Value and UK Companies: A Positivist Inquiry' (2012) 13 EBOR 1.

¹⁸² *ibid* 16.

¹⁸³ *ibid* 24.

¹⁸⁴ *ibid* 16.

¹⁸⁵ *ibid* 17.

¹⁸⁶ *ibid*.

¹⁸⁷ CA 2006, ss 260-263.

¹⁸⁸ Andrew Keay and Rodoula Adamopoulou, 'Shareholder Value and UK Companies: A Positivist Inquiry' (2012) 13 EBOR 1, 25.

influential in the twenty-first century, but not as powerful an influence as neo-classical literature from the 1980s and 1990s indicate.¹⁸⁹

On 11 June 2018, the Government proposed draft regulations to introduce new reporting requirements on how directors satisfied their section 172(1) duty to have regard to a larger constituency of stakeholders.¹⁹⁰ This falls in line with previous efforts, including the Stewardship Code, to increase long-term perspectives amongst shareholders and directors. The regulations apply to financial years of companies beginning on or after 1 January 2019 and are allied with the 2017 proposals set out by the Department for Business, Energy and Industrial Strategy Committee's ('BEIS') Response Paper¹⁹¹ to its 2016 Green Paper discussing options for reform.¹⁹² The Green Paper encouraged enhanced reporting on stakeholder engagement amongst its options for reform, which stimulated further debate on the wording in section 172. The subsequent Response Paper found that there was mass agreement on this point as it would optimise the operation of section 172, which was reminiscent of the 2018 draft regulations' requirements. However, this did not imply that the Government was ready to amend the CA 2006 but did stress the importance of further guidance for all UK-incorporated companies of all sizes on how the ESV move should operate in practice. One of the actions set out in the Response Paper is that companies need to explain how their directors comply with their section 172 duties of having regard to employee interests and fostering business relationships with suppliers, customers, and other stakeholder groups. In the same year, the Financial Reporting Council published a consultation draft of its Guidance on the Strategic Report on how to enhance the relationship between the strategic report and the section 172 duty.¹⁹³

The Government, in addition to its own efforts, has sponsored industry initiatives supporting similar goals, such as the Institute of Chartered Secretaries and Administrators and the Investment Association 2017 initiative to boards to guarantee a better comprehension of stakeholder needs, as set out in section 172(1), and how they should be engaged into corporate decision making.¹⁹⁴ Likewise, the BEIS Parliamentary Select Committee published a report reviewing the UK's corporate governance framework, also advocating for a more narrative reporting on stakeholder corporate engagement. These directions have been reinforced in court, with the High Court holding that section 172(1) may be modified by section 172(2) in cases of companies having objects that extend beyond promoting shareholder benefit.¹⁹⁵ Such varied guidance from both Government and industry bodies is suggestive of a steady movement towards a more comprehensive ESV framework for UK companies.

Conclusion

Prima facie, ESV resembles traditional Anglo-American corporate governance, as even the name suggests it is founded upon a SV paradigm.¹⁹⁶ Upon further assessment, it is clear that ESV aims to propitiate economic and political pressure groups seeking to adopt a more inclusive model of corporate governance in the UK, and has been referred to as an 'intermediate strategy', being pluralist in objective but traditionalist in substance.¹⁹⁷ Whether this can truly be seen as a disruption to the status quo of traditional SV is debatable however, as the legislation has only gone beyond the borders of common law principles to include the new 'enlightened' feature, which, while lacking sufficient precedent, could be nothing more than a formality in the meantime. Thus, the current situation necessitates nothing more

¹⁸⁹ Mary O'Sullivan, *Contests for Corporate Control: Corporate Governance and Economic Performance in the United States and Germany* (OUP 2000) 41.

¹⁹⁰ Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/528.

¹⁹¹ BEIS, *Corporate Governance Reform: The Government response to the green paper consultation* (2017).

¹⁹² BEIS, *Corporate Governance Reform* (Green Paper, 2016).

¹⁹³ FRC, 'FRC Consults on Non-Financial Reporting Guidance' (Press Release PN 42/17, London, 5 August 2017) <<https://www.frc.org.uk/news/august-2017/frc-consults-on-non-financial-reporting-guidance>> accessed 2 August 2018.

¹⁹⁴ IA and ICSA, 'Investors and Companies Unite to Help Boards Take Account of Employee and Other Stakeholder Views' (News release, London, 13 January 2017) <<https://www.icsa.org.uk/about-us/press-office/news-releases/investors-and-companies-unite-to-help-boards-take-account-of-employee-and-other-stakeholder-views>> accessed 10 August 2018.

¹⁹⁵ *Stimpson v Southern Private Landlords Association* [2009] EWHC 2072.

¹⁹⁶ Virginia Ho, 'Enlightened Shareholder Value': Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 JCL 59, 60.

¹⁹⁷ Sarah Worthington, 'Reforming Directors' Duties' (2001) 64(3) MLR 439, 445.

than mere consideration of stakeholder interests, rather than going so far as to require a type of accountability. The judiciary must do more than rely on ESV provisions if they wish to direct UK companies towards a European inclusive system, as there is no 'quick fix' in corporate law for something as deep-seated as SV. Much apprehension does remain although, regarding directors' duties. Diluting these from purely shareholder-oriented to a model of accountability to other stakeholders is seen to be risky due to it fundamentally modifying the contractual and legal basis of the UK corporate sphere. This paper outlines the key points raised in the shareholder-stakeholder paradigm to clarify the underlying pressures that contributed to legislating a common corporate objective in the UK, as enshrined mainly in section 172(1) of the CA 2006. In examining whether ESV's 'enlightened' aspect has challenged any of the boundaries of the case-law grounded SV doctrine, it has been found that a large portion of UK companies adhere to ESV-like corporate objectives in promoting shareholder wealth maximisation as well as in upholding long-term business relationships. This paper maintains that despite legislators' omissions to formulate a more innovative, elaborate, and enforceable model of corporate governance, ESV has provided an enshrined normative function within legal changes in this sphere, the effect of which has been the beginning of the promotion of long-termism over short-termism.

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The limits of refugee protection in mass influx situations: Are there exceptions to non-refoulement?

Alreem Kamal

Introduction

This decade has witnessed a staggering, unprecedented rise in the number of forcibly displaced persons worldwide, with a current record high of over 70 million people on the whole.¹ Among this group are almost 30 million refugees, the majority of whom hail from countries² where exceptionally high levels of persecution are rife. Millions are in search of a haven in which they can enjoy an abundance of rights conferred on them by international law. One of these rights is that of *non-refoulement*, which dictates, in general terms, that no refugee or asylum seeker is to be returned to any territory where he or she may face persecution, torture, or other ill-treatment.³ This fundamental obligation of a customary nature⁴ is enshrined in numerous instruments⁵, the foremost of which for the purposes of refugees being in Article 33 (1) of the 1951 Convention Relating to the Status of Refugees (1951 Convention).⁶ Affirmations of the significance of this principle are contained in a plethora of United Nations High Commissioner for Refugees (UNHCR) Executive Committee Conclusions and other reports.⁷ A substantial body of international human rights law (IHRL) jurisprudence⁸ further solidifies the doctrine's indispensable nature. Despite the fact that states, since the inception of the 1951 Convention, have expressed an acceptance of the non-refoulement obligation⁹, a sharp disparity has perceptibly emerged between their respective statements and actions.

As displacement worldwide has been developing predominantly in a mass-flow manner, the mass exoduses from some countries have naturally resulted in a mass influx into others. While it is not a legal term of art, a mass influx situation may be understood as one in which states are faced with a suddenness of arrival¹⁰ of individuals on a large-scale, and includes the situations of states 'which host large refugee populations over many years'.¹¹ It is in these direst of times that states have been flagrantly acting in breach of their *non-refoulement* obligations, imperiling countless lives in consequence. While never explicitly expressing non-acceptance of the rule, the apparent theme among states is a refusal to admit or permit the prolonged stay of asylum seekers for an array of indefensible reasons.

¹ UNHCR 'Global Trends: Forced Displacement in 2018' available at <<https://www.unhcr.org/5d08d7ee7.pdf>>.

² Ibid 3.

³ Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 201.

⁴ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN doc. HCR/MMSP/2001/09 (2002) [4] in UNHCR, 'Agenda for Protection' (2003).

⁵ European Convention on Human Rights (3 September 1953) art 3; Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45, art 2 (3); American Convention on Human Rights (22 November 1969), art 22 (8); International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171, art 7; Cartagena Declaration on Refugees of (22 November 1984) Conclusion III (5); Council Directive 2011/95/EU of 13 December 2011 for a uniform status for refugees or for persons eligible for subsidiary protection [2011] OJ L 337/9, Chapter VII, art 21; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

⁶ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 33.

⁷ See, e.g., UNHCR Executive Committee Conclusion No. 6, 'Non-Refoulement' (1977); UNHCR Executive Committee Conclusion No. 22, 'Protection of Asylum Seekers in Large-Scale Influx' (1981); UNHCR, 'The scope of international protection in mass influx: The scope of international protection in mass influx', EC/1995/SCP/CRP.3 (1995); UNHCR Executive Committee Conclusion No. 79 (XLVII), 'General Conclusion on International Protection' (1996); UNHCR Executive Committee Conclusion No. 85, 'Conclusion on International Protection' (1998).

⁸ See, e.g., *Ireland v UK* (1978) 2 EHRR 25; *Soering v UK* (1989) 11 EHRR 439; *Chahal v UK* (1996) 23 EHRR 413; *Selmouni v France* (2000) 29 EHRR 403; *MSS v Belgium & Greece* (2011) 53 EHRR 28.

⁹ See Declaration on Territorial Asylum UNGA Res 2312 (XXII) (14 December 1967); UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/ST/CSDHA/12 (1991); Declaration on the Protection of All Persons from Enforced Disappearance UNGA Res 47/133 (18 December 1992).

¹⁰ Jean-Francois Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4, 17.

¹¹ UNHCR, 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations' (2001) UN Doc EC/GC/01/7.

Whether the influx of refugees poses a burden on the host state or a severe strain on its resources by the prospect or fact of their admittance into the territory is immaterial. It is submitted that there can be no viable grounds on which to derogate from the cornerstone of refugee protection¹² owing to its foundational, imperative nature. *Non-refoulement* is of paramount significance to the 1951 Convention and complementary forms of protection. Its non-derogable nature in the Convention aside, any exceptions to the cardinal rule could foreseeably lead to its complete depreciation and consequent disintegration of the entire protection framework. Since *non-refoulement* extends through time¹³, even when a state has no capacity to provide the asylum seekers with a durable solution, it must grant them, at minimum, temporary protection. Where some writers¹⁴ have peculiarly argued for a derogation regime in times of mass influx, this article seeks to illustrate the centrality of the principle to the refugee protection framework, thereafter assessing the implications of exempting states from observing the obligation in times of large-scale refugee movements.

The centrality of *non-refoulement* to the international legal framework for the protection of refugees

The 1951 Convention: A Mass Influx Instrument

To examine whether there can be exceptions to *non-refoulement* in mass influx situations, one must first consider the historical context in which the 1951 Convention was drafted. In the aftermath of World War II, millions of people had been displaced as a result of one of the greatest tragedies in history. Prompted by a sense of both moral and practical urgency, the United Nations General Assembly (UNGA) resolved¹⁵ to convene to draft what is now the 1951 Convention. The influx of millions, rather than individuals in limited numbers, served as the impetus for the creation of such a multilateral treaty. It is thus argued that the 1951 Convention sought to deal primarily with mass influx situations and envisioned this circumstance as the one in which it would most likely be activated.

Moreover, despite the individual dimension to the refugee definition in Article 1(A)(2)¹⁶, most of the grounds on which one could establish a well-founded fear of being persecuted are evidently of a group composition; namely, race, religion, nationality, and membership of a particular social group.¹⁷ As Durieux¹⁸ highlights, the *travaux préparatoires* reveal an understanding of refugeehood as one that is intrinsic to belonging to a category of peoples.¹⁹ If it is indeed these precise conditions that the drafters of the 1951 Convention envisaged as predominantly triggering the application of the protection regime, and it is in these circumstances that states are in quest of a circumvention of the customary rule, one would naturally question the consequent utility of the Convention as a whole.

Furthermore, it is important to recall what a mass influx situation is typically indicative of. In the mid-20th century, it was patent that the large-scale movement of peoples was a response to systematic persecutions and mass atrocity crimes. The exigencies of those fleeing clearly required an immediate and sufficient response, which entailed the prohibition of their return or rejection. Similarly, 54% of refugees today have fled from a mere three countries²⁰, but ones in which persecution is rampant. The term 'mass influx' necessarily suggests a situation where there is a heightened risk of persecution and a necessity for at least preliminary protection, and therefore the expulsion of individuals from putative

¹² UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the [1951 Convention] and its 1967 Protocol' (2007).

¹³ Durieux and McAdam (n 10) 4.

¹⁴ *Ibid* (see n 69).

¹⁵ UNGA Res 429 (V) (14 December 1950).

¹⁶ 1951 Convention (n 6).

¹⁷ See Ivor Jackson, *The Refugee Concept in Group Situations* (The Hague 1999) 464-465. .

¹⁸ Durieux and McAdam (n 10) 9.

¹⁹ *Ad Hoc* Committee on Statelessness and Related Problems, 'Summary Record of the 18th Meeting' (31 January 1950) UN Doc E/AC.32/SR.

²⁰ UNHCR (n 1).

host states would directly contradict the purposes of the 1951 Convention, for this is the very backdrop against which international refugee law was developed.²¹

Non-Refoulement as a Jus Cogens Norm

Since the conception of the 1951 Convention, strong support has emerged for the classification of the *non-refoulement* obligation as one belonging to the realm of *jus cogens*; a peremptory norm of international law from which no derogation is permitted.²² To determine whether the rule has attained such a status, one must consider relevant state practice and a dual *opinio juris*²³, comprising both the belief in a legal obligation not to *refouler* and that this obligation is of a *jus cogens* nature.

First, it is well-established that *non-refoulement* has crystallized into a rule of customary international law²⁴, signifying that evidence of both state practice and the first of the *opinio juris* elements has been satisfied. As for the second, exploring the Conclusions adopted by the UNHCR Executive Committee is key. The Conclusions, while having no binding force, are of considerable importance in that they express the opinions and consensus of states, thus contributing to the formulation of *opinio juris*.²⁵ The first contention of *non-refoulement* as a norm of *jus cogens* appeared in Conclusion No. 25 of 1982, in which members of the Committee described the principle as one which 'was progressively acquiring the character of a peremptory rule of international law'.²⁶ Many Conclusions thereafter²⁷, in light of frequent breaches of the rule, reiterated this position. Notably, the view of *non-refoulement* as having *jus cogens* status was confirmed in the 1996 Conclusion, which stated that 'the principle of *non-refoulement* is not subject to derogation'.²⁸ Further evidence of *opinio juris* appears in the 1984 Cartagena Declaration, which, significantly, propounds that the principle 'should be acknowledged and observed as a rule of *jus cogens*'.²⁹

Furthermore, what *non-refoulement* seeks to preclude, namely, torture and other forms of ill-treatment, is proscribed in a number of international legal instruments that supplement the 1951 Convention, further underscoring the weight of the rule. The core principle in relation to torture and ill-treatment finds expression in, *inter alia*, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁰, Article 3 of the European Convention for Human Rights (ECHR)³¹, Article 7 of the International Covenant on Civil and Political Rights (ICCPR)³², and Articles 15 (b) and 21 of the European Union (EU)'s Qualification Directive.³³ More importantly in this regard, the prohibition of torture is a peremptory norm.³⁴ Arguably, challenging the notion of *non-refoulement* as *jus cogens* risks leaving the peremptory norm prohibiting torture open to repudiation accordingly.

Further support for the recognition of *non-refoulement* as a *jus cogens* norm stems from its non-derogable nature in the 1951 Convention. The absolute prohibition on torture in the ECHR aside³⁵, Article 33 allows for no reservations.³⁶ According to Orakhelashvili, the non-derogability of a right serves

²¹ See Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller et. al, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 119.

²² Vienna Convention on the Law of Treaties (23 May 1969) 115 UNTS 331, art 53.

²³ Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 IJRL 533, 538.

²⁴ Declaration of States Parties (n 4).

²⁵ Allain (n 23) 539.

²⁶ UNHCR Executive Committee Conclusion No. 25, 'General Conclusion on International Protection' (1982).

²⁷ (n 7).

²⁸ Ibid.

²⁹ (n 5).

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ *Prosecutor v Furundžija* (Judgment) ICTY-95-17-T Ch (10 December 1998) [153].

³⁵ ECHR (n 5) art 15 (3).

³⁶ 1951 Convention (n 6) art 42 (1).

to substantiate its belonging to the *jus cogens* realm.³⁷ While the fact of a provision's non-derogability is not dispositive of the question of its *jus cogens* status, it provides support.

Today, a departure from the entrenched rule is manifest in the practice of states. With inter-state deals to 'manage' migratory trajectories and the forcible deportations of refugees to so-called 'safe zones'³⁸, one might impugn the *jus cogens* nature of *non-refoulement*. What is important for the purposes of ascertaining its peremptory status is the question of whether these acts are treated as breaches rather than indications of an emergence of a new rule.³⁹ As the International Court of Justice in the *Nicaragua* case elaborated, when a state resorts to justifications for its conduct that is ostensibly inconsistent with a recognized rule, that may in fact act to strengthen the rule.⁴⁰ Accordingly, states seeking to justify their conduct that is incompatible with *non-refoulement* may serve to confirm its peremptory character.⁴¹

Finally, it is critical that the *jus cogens* status of *non-refoulement* is insisted upon, as Allain contends⁴², for in so doing states and international entities alike are precluded from implementing policies contrary to the essential rule. Additionally, the implication of a norm being a peremptory one is that it automatically establishes *erga omnes* obligations. All states have a duty to prevent breaches of *jus cogens* norms, a duty which entails cooperation on the multilateral level to bring the serious breaches to an end and the exercise of domestic, and perhaps even universal⁴³, jurisdiction over them.⁴⁴

Public emergencies & national security

States may wish to derogate from the obligation not to turn away refugees on two ostensible grounds: a) that the arrival of refugees *en masse* will cause a public emergency⁴⁵ and b) that the mass inflow will pose a threat to national security. Invoking either of these grounds to depart from *non-refoulement* is demonstrably untenable.

In considering the possibility that a mass inflow situation could *precipitate* a public emergency, one must first decipher the meaning of such a subjective concept. In the ECHR, for instance, the phrase is followed by '...threatening the life of a nation'.⁴⁶ To Fitzpatrick, such an emergency 'must imperil some fundamental element of statehood' such as the functioning of, for instance, the legislature or judiciary.⁴⁷ To propose that a sudden and large-scale arrival of refugees could provoke such detriment is unsustainable.

As regards national security concerns, the 1951 Convention allows for derogation in 'exceptional circumstances' in the interests of national security.⁴⁸ However, nothing in the instrument suggests the applicability of such a *stricto sensu* derogation⁴⁹ to the inviolable rule of *non-refoulement*. In fact, perhaps owing to the essentially subjective nature of determining what constitutes a threat to national security and the propensity for its frequent abuse, the drafters of the 1951 Convention rejected the inclusion of a general derogation clause.⁵⁰

³⁷ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 59.

³⁸ See section III, part B.

³⁹ *Military and Paramilitary Activities in and against Nicaragua* (27 June 1986) (merits) ICJ Reports 1986 [186].

⁴⁰ *Ibid.*

⁴¹ Allain (n 23) 541.

⁴² *Ibid.*

⁴³ (n 34) [156].

⁴⁴ See ILC, 'Report of the International Law Commission on the Work of its 70th session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10.

⁴⁵ See Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 MJIL 1, 35.

⁴⁶ (n 35).

⁴⁷ Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Pennsylvania 1994) 56.

⁴⁸ 1951 Convention (n 6) art 9.

⁴⁹ See Rosalyn Higgins, 'Derogations under Human Rights Treaties' (1976) 48 BYBIL 281.

⁵⁰ James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 261.

In the interest of self-preservation, states may desire to rely on *Salus populi suprema lex esto*, which Cheng contends constitutes a general principle of international law.⁵¹ The maxim, found in Cicero's *De Legibus*⁵², proclaims that the 'welfare of the people should be the supreme law', which, in this context, would imply that refugee inflows would be prejudicial to the people of the putative host state. In contemporary international law, this rationale must be interpreted with regard to the normative framework in which it exists. Since the mid-20th century, the world has witnessed a revolutionary endeavour to foster appreciation for human rights, resulting in the establishment of various multilateral treaties affirming their inalienability. Within these instruments, provisions categorically prohibiting the breach of the most vital of rights⁵³, the most notable of which for refugee protection being *non-refoulement*, were included. IHRL prohibits *refoulement* to ill-treatment in all circumstances. As discussed above, this norm rose to the top of the hierarchy, overriding treaty, custom, and general principles of international law like that of *Salus populi suprema lex esto*.

Coping mechanisms

Owing to the centrality of *non-refoulement*, and considering the pressure exerted on states, coping mechanisms have been developed which enable host countries to adequately respond to mass-inflows comprising refugees entitled to international protection without having to deprive them of the very core right thereof, while maintaining the efficiency of asylum procedures. The first of these devices is the customary international norm⁵⁴ of temporary protection, which the UNHCR characterizes as:

a means, in situations of mass outflow, for providing refuge to groups...of persons recognized to be in need of international protection...since it is conceived as an emergency protection measure of hopefully short duration, a more limited range of rights [are] offered in the initial stage than would customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol.⁵⁵

The doctrine was later elaborated by the UNHCR as a 'a practical device for meeting urgent protection needs in situations of mass influx...ensuring protection from *refoulement*'.⁵⁶ The concept has both been endorsed by the UNGA⁵⁷ and in Executive Committee Conclusions, No. 22 of which states explicitly that in situations of large-scale influx, states with which the asylum seekers first made contact should admit them at minimum on a temporary basis in scrupulous observance of *non-refoulement*.⁵⁸ It follows that, despite the colossal demands intrinsic to a mass influx situation, states may only have the discretion, subject to certain conditions, to grant temporary protection, implicit in which is the requirement to honour *non-refoulement*.

Goodwin-Gill describes this practice as a 'trade-off'⁵⁹, whereby states withhold 'all but the most immediate and compelling protections provided by the [1951] Convention'.⁶⁰ The range of rights that would typically be accorded to an asylum seeker under the 1951 Convention are 'sacrificed'⁶¹ to the apodictic *non-refoulement* obligation. Edwards posits that Articles 8 and 9 serve as the legal basis for

⁵¹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953) 25.

⁵² Marcus Tullius Cicero, *De Legibus* (Heidelberg, Kerle 1963 (originally written circa 60 BC)).

⁵³ ICCPR (n 5) art 6, 7; (n 36).

⁵⁴ Joan Fitzpatrick Hartman, 'The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict' in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff 1988) 87.

⁵⁵ UNHCR, 'Note on International Protection' (1994) UN Doc A/AC.96/830, [46].

⁵⁶ UNHCR, '*Global Consultations*' UN Doc EC/GC/01/4, [13].

⁵⁷ See Report of the United Nations High Commissioner for Refugees, UN Doc A/RES/37/195 [4]; Office of the United Nations High Commissioner for Refugees, UN Doc A/RES/44/137 [3]; Office of the United Nations High Commissioner for Refugees, UN Doc A/RES/49/169 [7].

⁵⁸ (n 7) Conclusion II.

⁵⁹ Goodwin-Gill and McAdam (n 3) 336.

⁶⁰ Durieux and McAdam (n 10) 13.

⁶¹ *Ibid.*

such derogation of other rights, although within strict confines.⁶² Not only must the derogations be of an 'exceptional and temporary nature'⁶³ only lasting for the duration of the emergency, but the large-scale influx too must reach a certain threshold so as to legitimize the invocation of 'exceptional measures'.⁶⁴ An additional legal basis exists, according to Edwards, in the form of an implied derogation clause resulting from subsequent agreements between states with respect to mass influx circumstances.⁶⁵

The second mechanism originating from the need to meet high standards of protection is that of *prima facie* recognition of refugee status. While normally the determination process by which an asylum seeker is accorded refugee status is one which is conducted on an individual basis, the conceivable impracticality of employing this method in the face of mass influxes has led States to adopt different approaches.⁶⁶ The UNHCR Handbook affirms states' recourse to 'group determination' whereby each individual member of the group is considered *prima facie* a refugee.⁶⁷ An individualized assessment of the subjective fear of persecution in this context would be redundant given the normally apparent factors triggering the mass displacement.⁶⁸ In this sense, the device serves as a means of alleviating the burden of asylum procedures to cope with the large-scale arrival of refugees.

Permitting exemptions from *non-refoulement* in mass influx situations: The implications

Durieux and McAdam have argued for the creation of a derogation regime authorizing states confronted by a mass inflow to depart from *non-refoulement*.⁶⁹ One of the rationales provided in support of such an arrangement is that it will allow limitations to the rule only within a strictly regulated framework, which, in their view, is preferable to the *ad hoc* mechanisms resorted to by states today that result in setting aside the 1951 Convention.⁷⁰ Some of the probable consequences of this proposition will be examined in this section.

The disintegration of the protection regime

To derogate from a law has been defined as to 'destroy and impair the force and effect of...' it.⁷¹ A derogation from substantive protection rights relays that it is 'necessary...and *lawful*'⁷² to do so. One must sequentially contemplate the result of this if applied to *non-refoulement*.

Waldron, who compellingly sets out a demonstration of the effects of tampering with the absolute prohibition of torture, presents a reversed 'slippery slope' argument where the core value is at the bottom, above which lie other, less fundamental ones.⁷³ The assertion is that rights of lesser centrality are built on top of what rests at the bottom, being of a most consequential nature, which also informs us of the importance of these other rights.⁷⁴ Applying this logic to *non-refoulement*, undermining its rudimentary nature risks unravelling the entire international protection regime. *Non-refoulement* has been described as the cornerstone of refugee protection⁷⁵, without which the protection framework

⁶² Edwards (n 45).

⁶³ Ibid, citing 'General Comment 29', UN Doc CCPR/C/21/Rev.1/Add.11, [2].

⁶⁴ Edwards (n 45) 35.

⁶⁵ Ibid 30.

⁶⁶ See Durieux and McAdam (n 10) on the practices of the OAU and Austria.

⁶⁷ UNHCR, *Handbook for Emergencies* (3rd edn 2007).

⁶⁸ UNHCR (n 56) [18].

⁶⁹ Durieux and McAdam (n 10).

⁷⁰ Ibid 23.

⁷¹ Orakhelashvili (n 37) 73.

⁷² Emilie Hafner-Burton, Laurence Helfer, and Christopher Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 IO 673 (emphasis added).

⁷³ Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 CLR 1681, 1734.

⁷⁴ Ibid.

⁷⁵ UNHCR (n 12).

ostensibly would cease to exist. States would have no obligation to shelter asylum seekers against ill-treatment, let alone grant them other rights accruing by the fact of their refugeehood. Considering audacious attempts to circumvent this obligation, Allain asserts that *non-refoulement* 'must act as the final bulwark of international protection'.⁷⁶ If this final bulwark were to corrode, the entire regime would arguably crumble. This is especially due to the fact that rights of contestably lesser importance are perched atop the foundational block. The block over which they rest is the very basis for their subsistence. One must ponder what would become of the rights of asylum seekers pertaining to, *inter alia*, access to the courts, welfare, and employment⁷⁷ if *non-refoulement* is presented as amenable. The right to temporary protection would too be deprived of any meaning without corroborative *non-refoulement* protection. Whether these rights would retain any relevance is questionable, given that their underlying rationales are informed by *non-refoulement*'s significance. There is less confidence in these rights of lesser importance as is. In this sense, the foundational rule serves as a 'point of reference for sustaining these other...beliefs.'⁷⁸

Since *non-refoulement* appears not in its most robust form in the 1951 Convention, one must also consider the repercussions on IHRL of undermining the pivotal rule. This field's jurisprudence demonstrates an equivocal commitment to upholding the absolute nature of the prohibition on torture. In addition to the above discussed legal instruments that outlaw *refoulement*, the European Court of Human Rights (ECtHR) has stressed on many occasions that, notwithstanding the circumstances, there are no exceptions to torture or inhuman or degrading treatment or punishment.⁷⁹ No individual can ever lawfully be subjected to any of these acts. Evidently, asylum seekers who have their *non-refoulement* rights violated are at risk of facing all or any of these persecutory measures. The effects of derogating in international refugee law could potentially render the peremptory prohibition of torture susceptible to pliability, ultimately undermining the entire international human rights framework so painstakingly developed⁸⁰ since the end of the Second World War.

In essence, an exception such as the one Durieux and McAdam⁸¹ have suggested licenses states to dispose of asylum seekers' right not to be exposed to ill-treatment when their movement coincides with many others in a similar situation. To argue to the contrary would be to invalidate the humanity of refugees arriving *en masse*. It is vital to recall that respect for human dignity underpins *non-refoulement*, and it is this very concept on which the entire framework is built.

State Compliance?

The proposition that a system enabling states to discard *non-refoulement*, albeit in a monitored manner, would supposedly enhance refugee protection is predicated entirely on the assumption that states would exhibit compliance. Given that states today through their actions have demonstrated a brazen unwillingness to honour *non-refoulement*, it is implausible that a derogation regime sanctioning limitations to the rule would improve compliance in any manner whatsoever.

Turkey, which hosts the largest refugee population worldwide⁸², has of late been accused of forcibly repatriating refugees to Syria, where mass atrocity crimes have plagued the country for almost a decade. According to Human Rights Watch and Amnesty International, Turkish authorities have arbitrarily detained in immigration removal centres⁸³ and consequently deported hundreds of refugees

⁷⁶ Allain (n 23) 533.

⁷⁷ 1951 Convention (n 6) Chapters II, III, IV.

⁷⁸ Waldron (n 73) 1735.

⁷⁹ See (n 8).

⁸⁰ See generally Paul Hoffman, 'Human Rights and Terrorism' (2004) 26 HRQ 932.

⁸¹ Durieux and McAdam (n 10).

⁸² UNHCR (n 1) 3.

⁸³ Gerry Simpson, "'Repatriation' of Syrians in Turkey Needs EU Action" (HRW, 7 November 2019) <<https://www.hrw.org/news/2019/11/07/repatriation-syrians-turkey-needs-eu-action>>.

back to Syria.⁸⁴ In these centres, Syrian refugees were violently coerced to sign ‘voluntary repatriation’ forms.⁸⁵ Despite the testimonies of Syrians⁸⁶, Turkey maintains that all returns are voluntary and that it is committed to observing *non-refoulement*.⁸⁷ The refugees have been deported to so-called ‘safe zones’ that Turkey claims it has established in northern Syrian cities.⁸⁸ This geographical region, however, is the site of continuous, widespread violence; as of April 2019, over 1,000 civilians have been killed in Idlib alone.⁸⁹ Even the creation of safe zones would not constitute a lawful basis on which to return refugees.⁹⁰ Indeed, ‘refugees’ are by definition ‘unrepatriable’.⁹¹ Bangladesh and India have engaged in similar conduct vis-à-vis Rohingya refugees,⁹² whom face a genocidal onslaught if returned.

Another example of a stark failure to observe the international obligation is manifested in the deal between the EU and Turkey which aims to limit the influx of refugees into the former’s territory by ‘redirecting’ asylum seekers who arrive at the Greek islands irregularly to Turkey. The deal, which results in collective expulsion⁹³, plainly violates *non-refoulement* in many respects. First, the agreement necessarily entails the retention of refugees on the Greek islands pending their transfer to Turkey, where the conditions of the camps are the very embodiment of ill-treatment. In Lesbos, where Moria camp has exceeded its hosting capacity, refugees live in egregious conditions.⁹⁴ A harrowing report from Médecins Sans Frontières (MSF) revealed that its mental health clinic on the island is overwhelmed with cases of depression, anxiety, and trauma, including those resulting in self-harm.⁹⁵ These individuals are then sent back to the same bleak tents and containers they have been forced to inhabit.⁹⁶

Second, the deal operates on the basis that Turkey satisfies the notion of a ‘safe’ third country where, *inter alia*, an asylum seeker’s right to *non-refoulement* and freedom from torture and cruel, inhuman or degrading treatment is fully respected.⁹⁷ As discussed, Turkey has committed itself to a new policy whereby refugees are directly returned to the very reason for their flight. Accordingly, Syrian asylum seekers taken from Greece to Turkey and subsequently sent to Syria would be victims of indirect *refoulement* at the hands of the EU.⁹⁸ As the ECtHR has emphasized, it is incumbent upon the state sending a refugee elsewhere to seek credible assurances relating to the safeguarding against ill-treatment.⁹⁹

The deal between Italy and Libya, under which the Libyan coastguard intercepts boats carrying refugees and returns them to the North African state, is an equally alarming deviation from the *jus cogens* norm.

⁸⁴ ‘Turkey: Syrians illegally deported into war ahead of anticipated ‘safe zone’ (Amnesty International, 25 October 2019) <<https://www.amnesty.org/en/latest/news/2019/10/turkey-syrians-illegally-deported-into-war-ahead-of-anticipated-safe-zone/>>.

⁸⁵ Ibid.

⁸⁶ Dorian Jones, ‘Many Syrian Refugees in Turkey Want to Stay, Despite Erdogan Plan to Force Their Return’ (VOA, 31 October 2019) <<https://www.voanews.com/europe/many-syrian-refugees-turkey-want-stay-despite-erdogan-plan-force-their-return>>.

⁸⁷ Simpson (n 83).

⁸⁸ Ibid.

⁸⁹ ‘Turkey: Syrians Being Deported to Danger’ (HRW, 24 October 2019) <<https://www.hrw.org/news/2019/10/24/turkey-syrians-being-deported-danger>>.

⁹⁰ See Hathaway (n 50) 917-953.

⁹¹ Aman Vijayaraghavan and Hamsa Vijayaraghavan, ‘The Illusion of Consent – Voluntary Repatriation or Refoulement?’ (International Law Blog, 25 September 2019) <<https://internationallaw.blog/2019/09/25/the-illusion-of-consent-voluntary-repatriation-or-refoulement/>>.

⁹² Srihari Gopal, ‘Rohingyan Repatriation and the Principle of Non-Refoulement’ (OHRH, 18 August 2018)

<<https://ohrh.law.ox.ac.uk/rohingyan-repatriation-and-the-principle-of-non-refoulement/>>.

⁹³ ECHR (n 5) Protocol 4, art 4.

⁹⁴ See Holly Young, ‘Desperate refugees face up to closure of Moria Camp’ (Aljazeera, 27 November 2019) <<https://www.aljazeera.com/news/2019/11/desperate-refugees-face-closure-moria-camp-191127125846160.html>>.

⁹⁵ MSF, ‘Two years on, EU-Turkey deal creates misery and desperation for those stuck on Greek Islands’ (19 March 2018) <<https://reliefweb.int/report/greece/two-years-eu-turkey-deal-creates-misery-and-desperation-those-stuck-greek-islands>>.

⁹⁶ Ibid.

⁹⁷ Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/8, art 38 (1).

⁹⁸ *Hirsi v Italy* (2012) (Application no. 27765/09) [146].

⁹⁹ See, e.g., *Chahal* (n 8); *Saadi v Italy* (2008) 47 EHRR 17; *Othman v UK* (2012) 55 EHRR 1.

Libya, far from satisfying the criteria of a 'safe third country'¹⁰⁰, is a failing state ravaged by armed conflict. The Libyan authorities adhere to a perpetual policy of detaining asylum seekers in the most deplorable conditions which has led to multiple deaths.¹⁰¹ Many asylum seekers in the non-signatory state have been victims of torture, rape, forced labour, slavery, and human trafficking.¹⁰² Like the EU-Turkey deal, this is a case of collective expulsion through which *non-refoulement* is breached. As was held in *Hirsi*, *non-refoulement* may be violated indirectly in the case of collective expulsions where no proper examination of asylum applications is undertaken, which increase the risk of *refoulement*.¹⁰³ Here, *refoulement* has fully materialized. Italy is turning away refugees and empowering former militiamen¹⁰⁴ to subject them to the most heinous of acts.

It can thus be deduced that any proposal to enable states to derogate from their *non-refoulement* obligations would not only be utterly futile, but also a blatant endorsement of putting refugees' lives in grave risk. Clearly, states are in no need of any newly formed legal mechanisms through which they may act reprehensibly at the detriment of those entitled to international protection.

Conclusion

With the global refugee population having expanded extraordinarily, certain states have demonstrated a strong disinclination to embrace those arriving *en masse* considering the concomitant economic, social, and political implications thereof. Questions as to whether *non-refoulement*, the cornerstone of the international protection regime, is subject to any limits in mass influx situations have been raised.

This article has sought to demonstrate, however, the integral nature of the principle to the legal regime. In examining its centrality to the international legal framework for refugee protection, firstly, it established that the 1951 Convention envisaged mass influx situations as the paradigmatic circumstance in which the instrument's application would be activated, as evinced by the historical context in which it was adopted, the 'group' dimension to the grounds of persecution, and the ultimate purposes of the Convention. Second, a wealth of evidence supporting the categorization of *non-refoulement* as a peremptory norm is discernible, which would automatically establish the non-derogability of the principle. Third, mass influx situations could neither justify the invocation of public emergency nor national security concerns as derogation grounds, as their respective meanings do not plausibly encompass any potential risks connected with the arrival of refugees in such fashion. Lastly, given the seemingly credible concerns of nations faced with large-scale refugee inflows, lawful mechanisms through which states may cope with such situations were birthed out of the imperative to respect the fundamental obligation rather than as attempts to circumvent it. These devices include temporary protection and *prima facie* recognition of refugee status.

The proposition to allow states to derogate from their *non-refoulement* obligations within prescribed confines would accordingly be redundant, as the end result would be parallel to that of an *ad hoc* process by states through which the obligation is breached: the undermining of an indispensable right. To propose any exceptions to the essential right not to be returned to persecution or other ill-treatment is antithetical not only to the provisions in international refugee law and IHRL, but also to the precise purpose of these legal frameworks as they relate to asylum seekers. This article therefore outlined how *non-refoulement* constitutes the very basis on which all other refugee rights rest, without which the protection framework would ultimately deteriorate. In seeking to refute the presumption that states would comply with a monitored *refoulement* system, examples of flagrant violations of the cardinal rule

¹⁰⁰ (n 97).

¹⁰¹ Sally Hayden, 'The U.N. is Leaving Migrants to Die in Libya' (*FP*, 10 October 2019) <<https://foreignpolicy.com/2019/10/10/libya-migrants-un-iom-refugees-die-detention-center-civil-war/>>.

¹⁰² *Ibid.*

¹⁰³ (n 98).

¹⁰⁴ Cecilia Butini, 'There's Still No Plan to Deal with Migrants in the Mediterranean' (*The National*, 1 November 2019) <<https://www.thenation.com/article/migrant-mediterranean-salvini-rescue/>>.

by a range of states were highlighted, with a view to underscoring the proposition's intrinsic incongruence with the legal regime. It is thus in mass influx situations that the operation of and respect for *non-refoulement* is of utmost importance, and cannot be forsaken.

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Pop goes the diesel! A Case comment on Case C-343/19 *Verein fur Konsumenteninformation v Volkswagen AG*

Jacqueline Lee

Facts of the present case

Austrian consumer protection association *Verein fur Konsumenteninformation* (VKI) brought a claim in Austria against German car manufacturer *Volkswagen AG*. VKI represents 574 consumers who had purchased Volkswagen diesel vehicles in Austria, before Volkswagen was revealed to have manipulated data regarding exhaust gas emissions from those vehicles, which was a contravention of EU legislation. This resulted in a large drop in the defective vehicles' market value. VKI alleges that had the consumers been aware of such data manipulation, they would either have not purchased the vehicle, or purchased it at a price reduced by at least 30%, and therefore claims on a tort basis, the difference between the purchase price and market value¹. The present CJEU decision stems from Volkswagen contesting the jurisdiction of the Austrian courts to hear the case.

Applicable legal rules

As the CJEU notes, the default position is that jurisdiction 'is generally based on the defendant's domicile', per Article 4 of the Brussels I Regulation. However, apart from the defendant's domicile, alternative jurisdiction may be found where there is a 'close connection'² between the court and the action. Article 7(2) of Brussels I provides that for matters of tort, alternative jurisdiction can be established 'in the courts for the place where the harmful event occurred or may occur'.³ Furthermore, the CJEU in *Zuid-Chemie* confirmed that the 'place where the harmful event occurred' covers both the place where the damage occurred and the place of the event giving rise to it,⁴ and that the defendant may be sued at either place.⁵ It is undisputed that the 'place of the event giving rise to [damage]' is Germany - the place where the problematic vehicles were 'equipped with software that manipulates data relating to exhaust gas emissions'.⁶ The overarching legal question in this case is therefore whether Austria is the 'place where the damage occurred'. The CJEU ruled that the Austrian court has jurisdiction to hear the case. Two key factors considered were that (1) the damage is 'initial damage', and that (2) the damage is not purely financial, which will be discussed respectively below.

The damage in question is 'initial damage'

The CJEU previously established in *Marinari* that the 'place where the harmful event occurred' cannot include 'every place where the adverse consequences of an event...can be felt'⁷. This is because recognition of consequential loss as a valid basis for jurisdiction would effectively afford the claimant a carte blanche to sue in his jurisdiction of choice (often his domicile), contravening the policy of Brussels I that 'rules of the jurisdiction should be highly predictable' for the *defendant*.⁸

At first sight, *Volkswagen* seems to factually align with *Marinari*. In *Marinari*,⁹ the Italian claimant suffered from loss of promissory notes and reputational damage, inter alia, in London. He subsequently brought a claim in Italy, claiming that though the 'harmful event' occurred in England, the 'damage' occurred in Italy, where he could no longer use the money. Jurisdiction for Italian courts was rejected

¹ n.1, [9].

² Recital 16, Regulation No. 1215/2012.

³ Article 7(2), Regulation No. 1215/2012.

⁴ C-189/08, *Zuid-Chemie*, [23].

⁵ C-21/76, *Bier v Mines de Potasse*.

⁶ n.1, [24].

⁷ Case C-364/93 *Marinari v Lloyds Bank*.

⁸ Recital 15, Regulation No.1215/2012.

⁹ n.9.

on the basis that the initial damage was suffered in England; any damage that occurred in Italy was consequential financial damage built upon the initial damage that happened in England. Applying this to *Volkswagen*, the manufacturing defect in Germany could be construed as initial damage, with the drop in market value experienced in Austria construed as consequential financial loss. Under this interpretation, the Austrian courts would not have jurisdiction.

However, in the present case, the court determined that the damage suffered was initial damage, on the basis that the reduction of market value 'did not exist before the purchase of the vehicle by the final purchaser'. The court's reasoning is inspired by the Opinion of Attorney-General Sanchez-Bordona (AG),¹⁰ which notes that the market value of the vehicles 'did not become a reality' until the diesel scandal was exposed. Intuitively, this is a reasonable conclusion: when the defective cars were manufactured, the diesel scandal had not been revealed, and therefore the market price had not dropped - there is no 'damage' yet. Therefore, since loss of value 'did not become a reality'¹¹ until the public scandal, this damage is direct for the final purchaser before the scandal. Further, only the final purchaser is a *direct* victim, because any previous buyers would not have experienced any damage in the form of lower market value when buying/selling the car, as the scandal had not affected the valuation of the car yet. It is therefore reasonable for the CJEU to conclude that Austria (place of final purchase pre-scandal) was the place of initial damage.

The damage in question is not purely financial

The CJEU emphasises that the damage at hand is 'material', as opposed to 'purely financial'.¹² This distinction is crucial because *Löber*¹³ establishes that in cases of pure financial loss, alternative jurisdiction is only found where 'other specific circumstances' require jurisdiction to be attributed to that court (in addition to the requirement that the damage alleged must occur in the claimant's bank account held in that jurisdiction). This additional criteria of 'other specific circumstances' requires the court to engage in a fact-specific exercise of whether alternative jurisdiction should be granted on the basis of 'proximity' and 'predictability'. *Löber*, however, only involved financial loss from financial assets. The CJEU therefore circumvented the need to fulfill the 'other specific circumstances' criteria by distinguishing the present case from *Löber* on the basis that there are 'tangible assets' (the defective vehicles) involved in this case. However, the CJEU appears to substitute a fine-grained analysis of whether the damage itself was financial with a simplistic consideration of whether the case factually only involved financial instruments or not. This comment contends that the CJEU provides an incorrect interpretation of Brussels I, which requires an examination of the *nature of the damage itself*. In any case, this comment agrees with the AG, as well as the referring Austrian court, that the present case involves pure financial loss. Comparing the physical characteristics of the car before and after the public scandal, there was no physical change to the cars; the only difference was the lower market value. As such, the loss was purely financial.

Despite characterising the present case as 'material damage', the CJEU peculiarly used reasoning from purely financial loss cases to justify alternative jurisdiction based on 'proximity' and 'predictability'. The referring Austrian courts had argued that establishing Austrian jurisdiction on the basis of 'place of purchase' 'jeopardises the ability of the defendant to foresee which court will have jurisdiction', as there were second hand purchases involved, which Volkswagen may not have foreseen. In response, the AG cryptically notes that 'a vehicle manufacturer like Volkswagen is in a position to foresee with ease'¹⁴ that its vehicles will be sold in Austria, and this satisfies the 'other specific circumstances' criteria in this case. The most realistic interpretation of the AG's phrase is that as a multinational corporation, Volkswagen marketed its cars in Austria, and therefore can foresee 'with ease' that vehicles will be sold there. The CJEU, however, offers a more tenuous argument that 'by knowingly contravening statutory

¹⁰ Opinion, C-343/19 Verein für Konsumenteninformation v Volkswagen AG.

¹¹ *Ibid.*

¹² n.1, [34].

¹³ Case C-304/17 Löber, [36].

¹⁴ n.12.

requirements'¹⁵, Volkswagen must 'anticipate that damage will occur at the place'¹⁶ where the vehicle is purchased by a customer who reasonably expects it to be compliant with statutory requirements - in this case, Austria. This idea of putting a defendant who flouts the law on constructive notice of foreseeability echoes *Kolassa*, where the court granted alternative jurisdiction on the basis that a bank which issues an unlawful, substandard prospectus in a jurisdiction is deemed to 'anticipate' that investors may as a result suffer from financial damage in that jurisdiction. Such constructive notice is rationalised as deterrence of unlawful conduct in order to 'strengthen the legal protection'¹⁷ of EU citizens. If the CJEU has indeed taken inspiration from *Kolassa* in the present case, its reasoning is questionable on two grounds. Firstly, the CJEU conflates deterring unlawful conduct with satisfying the threshold of reasonable foreseeability - it is neither appropriate nor justifiable to grant alternative jurisdiction on a punitive basis. Crucially, unlike in *Kolassa* where the defendant failed to meet Austria-specific regulations, Volkswagen failed an EU-wide regulation. In *Kolassa*, by failing Austria-specific regulations, the defendant could reasonably anticipate that *Austrian* customers would suffer from harm as a result of substandard prospectuses. However, in the present case, flouting an EU-wide regulation does not allow Volkswagen to reasonably foresee that Austrian consumers would suffer harm. This exacerbates the punitive nature of alternative jurisdiction in the present case compared to *Kolassa*, and goes against the fundamental objective of the Brussels I Regulation to safeguard reasonable foreseeability for defendants regarding which jurisdiction a claim can be brought against them in. Secondly, *Kolassa* is a pure financial loss case, a characterisation which the CJEU took great lengths to distinguish this case from.

Though questioning the appropriateness of granting jurisdiction based on deterrence, this comment argues that if the CJEU were to insist on a *Kolassa*-type pure financial loss reasoning on the unlawful conduct of Volkswagen, the court ought to have followed the AG's characterisation of the case as purely financial. An even better approach would have been for the CJEU to adopt the AG's proposal that damage occurs at the place of purchase, provided that there are 'other circumstances' (per *Lober*) that support alternative jurisdiction, and those other circumstances must enable Volkswagen to reasonably foresee civil liability action. The CJEU might have been able to construe the unlawful conduct as 'other circumstances' that confirm alternative jurisdiction, alongside other factors like marketing within Austria (as strongly suggested by the AG), which would ensure that jurisdiction is properly granted where reasonably foreseeable, rather than as a remedy to deter unlawful conduct.

Remaining ambiguities

In the present case, CJEU does not adequately address the referring courts' concern about foreseeability regarding second hand purchases. If the defective vehicles were to be sold to an ordinary consumer in country X, where it did not engage in marketing/advertising (thus the sale was not reasonably foreseeable), the Austrian courts would suggest that alternative jurisdiction in country X cannot be established on principles of proximity and foreseeability. However, the CJEU, through *Kolassa* and the present case, seems to suggest that because unlawful conduct was present, Volkswagen ought to have anticipated to be sued in country X, despite the lack of advertising, to defend the public policy of protecting EU citizens' legal rights. This reasoning ventures on constructing alternative jurisdiction punitively - although this deters unlawful conduct, the CJEU risks unfairness to the defendant by broadening the scope of when the place of damage is truly 'reasonably anticipated'. In the present case, Austria was both the place of marketing and the place of purchase, so the aforementioned hypothetical issue does not arise. However, the CJEU has yet to tackle the issue of foreseeability for the defendant where these two places are different.¹⁸

A second remaining ambiguity is that the *Lober* criteria, requires 'other specific circumstances' are needed to grant alternative jurisdiction to the Austrian courts; the mere purchase of vehicles in Austria

¹⁵ n.1, [37].

¹⁶ *ibid.*

¹⁷ C 375/13, *Kolassa*, [56].

¹⁸ Lehmann, Remaining Questions About CJEU Judgment in *VKI v Volkswagen* (2020).

cannot itself satisfy the ‘place where the damage occurred’ criteria. However, the Attorney-General notes that there are no ‘guidelines for conducting the overall analysis’¹⁹ of the ‘other specific circumstances’ test, which ‘creates the risk of non-uniform application’ of Article 7(2). Regrettably, the CJEU shied away from an opportunity to clarify what ‘other specific circumstances’ consists of, as it circumvented the entire issue by concluding that the present case did not concern pure financial loss.

Concluding remarks

It is unclear why the CJEU insisted on characterising the present case as ‘material damage’, yet utilised logic from pure financial loss cases to respond to the referring court’s concerns on ‘proximity’ and ‘predictability’; notably, the CJEU justifies the ‘proximity’ requirement for alternative jurisdiction based on public policy of deterring unlawful conduct. Simultaneously, by characterising the case as ‘material damage’, CJEU cleverly avoids the need to define ‘other specific circumstances’ to establish alternative jurisdiction. It appears that the CJEU is trying to apply reasoning from pure financial loss cases, while avoiding clarification of what the extra ‘other specific circumstances’ requirement means. This renders the distinction between legal principles applied to material and pure financial loss cases blurry.

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¹⁹ n.12.

Subordination of Shareholder Loans between Creditor Protection and Rescue Culture: An Escapable Tension?

Luigi Pecorella

Introduction

This paper provides a critical overview of the different legislative frameworks which have been traditionally regarded as the most comprehensive models addressing the widespread practice of loans granted by shareholders to their company in the vicinity of insolvency. Rather than having its scope solely narrowed to what could be purely defined as a “comparative overview”¹, this paper revolves around the underlying foundational issues that an unregulated practice of shareholder loans may bring about, especially, having regard to the harm it invariably causes to claims of the external creditors of the company in the context of its insolvency. To this extent, the legislative models should be conceived, primarily, as specific attempts to cope with such issues in a particular jurisdiction. In this respect, the solution generally envisaged is ultimately branded in the rule commanding the subordination of shareholder loans to the debt provided by external creditors, if not, as it will be outlined, in the outright recharacterization of such loans into equity, with all the practical consequences such a treatment entails.

Against this backdrop, this paper argues that an unselective subordination of shareholder loans should not be considered as the “panacea” to all the issues a company invariably suffers from as it gets closer to its end. On the contrary, more room should be left in the legal analysis to the arguments which focus on the valuable part shareholder loans could perform in rescuing the company.

For purposes of adequately carrying out such a wide-ranging analysis and understanding what is at stake beneath the different rules, it is essential to “set the scene” by outlining the distinct roles that debtholders, or creditors, and shareholders accomplish within the company, and the respective legal functions debt and equity have in relation to its capital structure, in what has been effectively described as “the battle for value in financially distressed firms”.² As set out in Section 2, the focus is on the different entitlements shareholders and creditors have on insolvency with respect to the different kinds of investment they make in relation to the company and the corresponding economic expectations of return they can legitimately claim in consequence. Following these footsteps, the universally accepted rule of corporate finance and corporate law in the context of the failure of the company is referred to as “equity is wiped out first”.³ Having this rule as a background will allow the opportunity to appreciate the shareholders’ tendency of dressing their investment to the company in the form of a loan rather than as a contribution to capital. Further, it will also make it possible to explore the underpinning function of Insolvency Law, which has typically been described as “creditor law”⁴. The distortion to such function is as a result of the reckless acceptance of the practice of shareholder loans, the fundamental part that the rule of subordination serves in restoring it.

As a follow-up to these essential premises, Section 3 delivers an assessment of the legislative models which functionally stand as two different means to regulate the practice of shareholder loans: US law and German law. While the statutory provisions of German Insolvency Law in this area were subject to fundamental reform in 2008,⁵ the US rules still consistently date back to the case-law of the Supreme

¹ For a comparative overview, M Gelter and J Roth, “Subordination of Shareholder Loans from a Legal and Economic Perspective” (2007) Harvard Law and Economics Discussion Paper No. 13, Journal for Institutional Comparisons, Vol. 5, No. 2, 40-47; U. Huber and M. Habersack, “Special Rules for Shareholder Loans: Which Consequences Would Arise for Shareholder if the System of Legal Capital Should Be Abolished?” (2006), Legal Capital in Europe 308-321.

² RJ de Weijs, “Harmonization of European Insolvency Law: Preventing Insolvency Law from Turning against Creditors by Upholding the Debt–Equity Divide” (2018) 15 European Company and Financial Law Review 405.

³ RJ de Weijs, “Harmonization of European Insolvency Law: Preventing Insolvency Law from Turning against Creditors by Upholding the Debt–Equity Divide” (n 2) 414.

⁴ Ibid 414.

⁵ Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG — Act to Modernize the Law Governing Private Limited Companies and to Combat Abuses)

<http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl108s2026.pdf> (accessed 3 June 2019).

Court and set out a marked distinction between the Doctrine of Equitable Subordination and the Doctrine of Recharacterization with respect to purported loans in the context of insolvency.

Having explored the underlying corporate law tensions and the rules provided by the most assertive legal frameworks, Section 4 raises the question as to the possible connection which may be established between the existing economic models on the subject and the legal rules in order to make the point that shareholder loans could efficiently serve as an essential medium to rescue the company in the vicinity of its insolvency.⁶ Finally, Section 5 concludes.

Debt and Equity: the “battle for value” between shareholders and creditors and the lost function of Insolvency Law

Money is not just money: the struggle for creditors

As a matter of fact, companies need finance in order to engage in business activities and, at the outset, it could be obtained either in the form of equity contributed by shareholders or debt provided by creditors, *tertium non datur*. From a corporate finance perspective, if one were to argue about the criterion companies should adopt to choose between these two mediums of finance to manage its financial structure, it would be necessary to fall back, at least as a starting point, on the Modigliani and Miller's classic article on the cost of capital. In their “Irrelevance Theorem”, Modigliani and Miller stated that the value of a firm does not depend on the composition of its financial structure, assuming that capital markets are efficient and competitive and that there are no taxes and bankruptcy costs.⁷ In other words, under these conditions, once finance, either in the form of debt or equity, is injected into the company, the value of the company only depends on the value of the assets in question, that is to say, that, after all, money is just money and nothing more.⁸

While it is not the intention of this paper to debate this model, it is indispensable to clarify that a corporate law perspective should also and primarily be adopted to address the topic at stake, whereby it could paradoxically, and maybe pretentiously, be affirmed that money is not just money once channelled into the capital structure of the company.⁹ From this perspective, alongside the traditional distinction in finance between debt and equity, there is also the sharp distinction in law between the duties a corporation owes to its creditors and shareholders and vice-versa. Accordingly, it shall be established that the provisions of finance provided by each of these categories stand as something more than just money being granted to the company, but as a convoluted tangle of liabilities and corresponding economic expectations to which their investment is ultimately grounded.

Generally speaking, the most important characteristic of the money lent by creditors is a return independent of the success of the company, usually in the form of a fixed interest rate, while, on the other hand, the return on equity for the shareholders is dependent on the success of the company.¹⁰ Consequently, this relational framework submits that if the company makes a profit it goes to the shareholders either by way of dividends or by the increase of the share value, whereas, in the case of failure of the company, shareholders are last in the insolvency's line.¹¹ As already mentioned, from the shareholders' perspective, this latter principle is usually referred to as “equity is wiped out first”.

⁶ J Armour, G Hertig and H Kanda, “Transactions with Creditors” (2009), in Kraakman RH, Armour J, Davies P et al (eds) *The anatomy of corporate law: a comparative and functional approach*, Oxford University Press 115-151.

⁷ F Modigliani and MH Miller, “The Cost of Capital, Corporation Finance and the Theory of Investment” (1958) 48 *The American Economic Review* 261-297.

⁸ RC Clark, “Corporate Law” (1986) Little Brown, Boston, 67-70.

⁹ RJ de Weijts, “Harmonization of European Insolvency Law: Preventing Insolvency Law from Turning against Creditors by Upholding the Debt–Equity Divide” (n 2) 422.

¹⁰ CP Normandin; with discussion by RT Peters and RE Scott, “The Changing Nature of Debt and Equity: A Legal Perspective” (1989) Conference Series, Federal Reserve Bank of Boston, vol. 33, 50.

¹¹ RJ de Weijts and M Good, “Shareholders' and creditors' entitlements on insolvency: who wins where?” (2015) *Butterworths Journal of International Banking and Financial Law* 642.

Conversely, from the creditors' perspective, a fixed rate of return is agreed upon for a priority right to payment over shareholders on insolvency or liquidation of the company. Ultimately, this "battle for value" between creditors and shareholders is indeed capable of affecting the choice as to how to invest in the company at a given point in time of its life cycle, having regard to the trade-offs with the company that each form of investment entails.

As it has been suggested, for purposes of dealing with this twofold relational network within a corporation, all the relevant rules regulating the legal position of creditors and shareholders could be usefully understood through a "contractual approach".¹² From this perspective, a distinction could be drawn between two different contractual paradigms: complete contingent contracts, or discrete contracts, and relational contracts. On the one hand, one could describe debt contracts as discrete contracts where, at the time of contracting, the parties are assumed capable of agreeing on all the relevant terms governing their relationship. In this context, the law assists the contracting parties by providing them with default rules which are deemed as applicable unless explicitly opted out by them. On the other hand, the relationship between shareholders and the company can be viewed as a relational contract where conditions of uncertainty prevent the parties from drafting in detail all the relevant terms at the time of contracting.¹³ This is due to the complexity that characterises the equity claims as ongoing relationships, whereby it is not feasible for the parties to anticipate all future contingencies and assign the corresponding risks. In this context, the law assists the shareholders by imposing, as a default rule, a general fiduciary obligation to the directors of the company according to which they must act so as to promote the success of the company and thus maximise the interests of both contracting parties.

Additionally, the position of creditors can also be evaluated efficiently in light of the notion of "non-exclusivity"¹⁴, which in turn gives the opportunity to introduce the issue creditors invariably struggle with every time the company contracts a new form of debt. More specifically, "non-exclusivity" refers to the circumstance that a borrower, such as the company, may theoretically be able to borrow from a second set of creditors without having obtained the consent of the first set of creditors. As new debt gets piled onto the old one, the old creditors' expected payoff is affected since the probability of default increases and the recovery value of old debts in the event of a default reduces.¹⁵ Ultimately, "non-exclusivity" turns out to be one of the major concerns creditors try to protect themselves from in insolvency or liquidation and, therefore, it tends to play a crucial part also in the context of loans being provided by the shareholders.

Attraction for debt financing in the shareholders' perspective

As previously mentioned, a company's capital structure may consist of a mix of debt and equity respectively financed by creditors and shareholders, which are normally conceived as separate persons. Both from a corporate finance and legal perspective, the traditional distinction between these two categories and their respective relationship with the company seems to get blurred if a shareholder goes beyond his role as an equity provider and becomes a creditor of the company.¹⁶ While it is undeniable that the crucial question looms as to how such loans should be treated in an insolvency of the company, it is preliminarily worth looking at the legal and economic reasons whereby a shareholder may be attracted by the expectation of structuring its investment to the company as debt financing. From a legal viewpoint, while, on the one hand, the shareholder, as an equity provider, is subject to the core rule according to which "equity is wiped out first", on the other hand, as a debt provider by way of a loan, it escapes such rule and grants itself a more favourable position in the insolvency line together with the external creditors. Moreover, this dynamic is exacerbated in the event the shareholder attains to

¹² CP Normandin, "The Changing Nature of Debt and Equity: A Legal Perspective" (n 10) 75.

¹³ CP Normandin, "The Changing Nature of Debt and Equity: A Legal Perspective" (n 10) 76.

¹⁴ P Bolton, "Corporate Finance, Incomplete Contracts, and Corporate Control" (2014) 64 *Journal of Law, Economics and Organizations* 74 <https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/6023/Bolton_corporate.pdf> .

¹⁵ DS Bizer and PM De Marzo, "Sequential Banking" (1992), 100 *Journal of Political Economy* 41–61.

¹⁶ RJ de Weijts and M Good, "Shareholders' and creditors' entitlements on insolvency: who wins where?" (n 11) 642.

structure its loan as a secured loan: on such an occurrence, whether the security is designed as a pledge, a mortgage, or a floating charge on the company's real estate and inventory, the shareholder, in the context of an insolvency or liquidation, could always invoke its security rights and thus receive back the whole of its investment ahead of other unsecured creditors.¹⁷ In other words, as it has been effectively defined, the security enables the shareholders to "have their cake and eat it too"¹⁸.

In the end, both in the case of an unsecured and secured loan, the economic advantage the shareholder acquires is significant, since, in the event of a downside scenario for the company, it would be able to present itself as a creditor and thus actively participate in the insolvency or liquidation distribution, whilst, in the case of a favourable scenario, it would still be entitled to profits, either in the form of dividends or shares, having also invested risk-bearing capital. In conclusion, it is convenient to categorise the behaviour of the shareholders and their tendency towards debt finance within the bigger picture of the above-mentioned "battle for value" against creditors in financially distressed companies as shareholders try to gain the upper hand acting as creditors rather than equity providers upon an insolvency proceeding.¹⁹

Against this backdrop, which aims to elucidate on the shareholders' position in this area, it is even more important to scrutinize the function that Insolvency Law should maintain when dealing with the practice of shareholder loans. In this respect, the focus is on whether Insolvency Law is, by itself, capable of upholding the principles upon which it is grounded, especially having regard to the position of creditors. Following this approach, a light on what the proper function of Insolvency Law should be is excellently shed by Thomas J. Jackson as he emphasizes that, upon insolvency, the primacy of shareholders, which transpires from the rule of limited liability, is replaced by that of creditors, and, consequently, "Bankruptcy Law" shall be presented as a kind of expropriation of the shareholders for the benefits of creditors.²⁰

In Jackson's words:

In bankruptcy, the unsecured creditors of an insolvent debtor can be viewed as the new equity owners of the debtor and hence entitled to what the debtor was entitled to outside of bankruptcy.²¹

In light of the above, there is a manifest distortion caused by the practice of shareholder loans to the role of Insolvency Law. Once again, the point shall be stressed that the corporate finance and law distinction between debt and equity is not merely descriptive and Insolvency Law shall therefore be capable of upholding such partition. Ultimately, in this area, the foundations of Insolvency Law appear to be disregarded as much as the presumption that shareholders are the ones to be entitled to profits because they have invested in risk-bearing capital. As a radical outcome, it could also be claimed that such distortion casts a long shadow on the corporate form of limited liability, for it is grounded on the presumption that shareholders have, at least, some "skin in the game" as they invest in the company.²²

The final question that results out of this picture is why a shareholder, having originally contributed equity to the company, should keep on being an equity contributor when it could be accorded the same rights and economic expectations in insolvency as an external creditor by way of simply lending to the company. In other words, it doesn't seem unfitting to emphasize that Insolvency Law would completely

¹⁷ RJ de Weijts, "Harmonization of European Insolvency Law: Preventing Insolvency Law from Turning against Creditors by Upholding the Debt–Equity Divide" (n 2) 418.

¹⁸ DA Skeel and G Krause-Vilmar, "Recharacterisation and the Nonhindrance of Creditors" (2006), 7 *European Business Organization Law Review* 283.

¹⁹ RJ de Weijts, "Harmonization of European Insolvency Law: Preventing Insolvency Law from Turning against Creditors by Upholding the Debt–Equity Divide" (n 2) 405.

²⁰ *Ibid* 414.

²¹ TH Jackson, "The Logic and Limits of Bankruptcy Law" (1986), Harvard University Press, Cambridge, 21.

²² FH Easterbrook and DR Fischel, "The economic structure of corporate law" (1991), Harvard University Press, Cambridge, 67-70.

misplace its foundational function as debt-collection law, and thus as creditor-law, in the event the shareholders were entitled to stand in such a “win-win” state of affairs with no limitations whatsoever.

Why fretting over the subordination rule?

Having presented the matter which could be hereafter referred to as the “lost function of Insolvency Law” in the context of shareholder loans, it is now time to introduce the rule that has long been claimed as the most effective medium to restore it: the principle of subordination of shareholder loans in insolvency proceedings. While a detailed assessment and description of this rule and its applicability is subject to the comparative legal analysis referred to in Section 3, it is preliminarily worth back-tracking to ask the simple question: why should a jurisdiction fret over such rule? Or, in other words, does the principle of subordination of shareholder loans *really* make a difference in the way companies are financed by their investors? Since such an evaluation necessarily involves an empirical analysis, the answer must be a firm “yes” given the impact shareholder loans regularly have on the stage of distribution. In particular, a reference shall be made to the extensive work carried out by Professor R.J. de Weijs on the topic²³. Following the examination of several insolvency proceedings in many jurisdictions, he ultimately concluded that, in all the cases, companies are financed by shareholder loans rather than by capital, as shareholder loans amount to more than 50% of the outstanding debt. As a follow-up to such considerations, he was eventually able to show the difference that the application of the rule of subordination makes to the pay-out percentage ordinary creditors would be entitled to compared to that, lower one, they would be entitled to if shareholder loans were treated as ordinary external debt.

In conclusion, a detailed regulation under Insolvency Law of the practice of shareholder loans is capable of substantially affecting the way companies are financed. In particular, there is a strong preference toward the capitalisation of the companies by way of equity provided by the shareholders and it, notably, suggests a clear-cut emphasis on the function of Insolvency Law as “creditor law”, thus upholding the debt and equity divide. From this perspective, the legal disciplines hereafter assessed shall be conceived as particular ways of tackling the problem, having regard to the different corporate policy choices that each jurisdiction aims to pursue, and which are reflected in the legal norms.

Shareholder loans under US and German law: the long-claimed lever of creditor protection

The capital versus loan question

Having presented the issue of “the lost function of Insolvency Law”, one cannot leave aside the following question: do we call an advance made by a shareholder a loan rather than a capital contribution? Such enquiry is pivotal to introduce the topic at stake and understand the material implications that the application of the different rules infers.

As a mere example, there is a sharp distinction between the US and the German rules commanding the subordination of shareholder loans. On one side, the US Doctrine of Recharacterization, on the other, the conditions required by the respective courts for their applicability. In particular, while the first sets of rules require the subordination of the loan granted by a shareholder to the claims of external creditors without questioning the legal qualification of the advance made by the shareholder, i.e. a loan, the Doctrine of Recharacterization involves a process whereby an advance apparently presented as a loan by a shareholder is subsequently treated as equity (with all the substantial consequences such a qualification implies) thus determining whether a debt actually exists.²⁴

²³ RJ de Weijs and M Good, “Shareholders’ and creditors’ entitlements on insolvency: who wins where?” (n 11) 642-643.

²⁴ Sprayregen, Friedland, Brighton, Bianca, “Recharacterization of Debt to Equity: An Overview, Update, and Practical Guide to an Evolving Doctrine” (2004) Annual Survey of Bankruptcy Law 2.

Accordingly, as much as the loan versus capital question is concerned, the touchstone for many of the cases²⁵ is undoubtedly *Pepper v. Litton*.²⁶ Although there are several other cases that deserve to be considered in this area²⁷, this one stands amongst all because of its famous dictum²⁸ stating that a shareholder loan's claim may be treated as capital investment and thus disallowed.²⁹ Furthermore, this judgment was also the first one to encompass the combination of the terms "equity" and "subordination", infusing a huge influence amongst the bankruptcy courts in the years that followed.³⁰ Above all, this judgment provided the bankruptcy courts with a criteria that could be applied to detect which debt advanced by a shareholder could be treated as equity. Always bearing in mind that different decisions consider and stress different criteria, depending on the facts of the case, it could be stated that a decisive criterion in answering the capital versus loan question often lies in the circumstances of a corporation especially where a corporation is undercapitalised.

In turn, the undercapitalisation of the corporation is usually spotted considering the ratio of the shareholder loans to their invested capital, whereby high ratios of debt to equity have usually resulted in decisions that the advances made by the shareholders were capital.³¹

Alongside the undercapitalisation criterion, the practice of shareholder loans tends to stand on another crucial and factual circumstance: whether the shareholder was a controlling member capable of exploiting the information it could possess as an "insider" when granting a loan instead of a capital contribution. As it has been mentioned in Section 2, a shareholder of this status is capable of masking its intention to the company as a debt to avoid the "equity is wiped out first" rule, circumventing the principle Insolvency Law stands to uphold. While such circumstances could indeed trigger and fall foul of the Doctrine of Equitable Subordination. It could also be regarded as an "inequitable conduct", as it is explored in Section 3.2. This was illustrated in the landmark case of *Taylor v. Standard Gas & Electric Co.*³¹ The case dealt with a parent company (the Parent) that had completely dominated the affairs of its subsidiary (Deep Rock) managing its business at the Parent's own advantage and interest and having no regard to the good concern of the subsidiary and its creditors.³² Crucially, the Court stated that Deep Rock had found itself in financial difficulty because of the Parent's mismanagement determined by the large sums the latter had advanced to the subsidiary and because of which it had requested the approval of a compromise in a reorganisation proceeding against Deep Rock. Consequently, the Court announced what came to be known as the "Deep Rock Doctrine",³³ rejecting the reorganization plan and condemning both the undercapitalisation of Deep Rock and the mismanagement which both resulted from the domination by the Parent. Finally, this judgment is key for one more thing. While before the announcement of the "Deep Rock Doctrine", in analogous circumstances, the courts had sought to totally exclude the claim of a parent company in the proceedings against one of its subsidiaries, after the judgment they began, more simply, to subordinate such claim to the other unsecured claims. Importantly, this goal was not achieved by way of piercing the parent's veil as had been done previously, but by proving the domination and the mismanagement of the parent toward the subsidiary.³⁴

²⁵ JS Cohen, "Shareholder Advances: Capital or Loans" (1978) 52 Am. Bankr. L.J. 259-275.

²⁶ *Pepper v. Litton*, 308 U.S. 295 (1939).

²⁷ E Everett, "Subordinated Debt – Nature and Enforcement" (1965), *The Business Lawyer* 20, no. 4, 953- 987 <https://www.jstor.org/stable/40684025?seq=1#page_scan_tab_contents>.

²⁸ "And so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholder not only in the foregoing types of situations, but also where the paid-in capital is purely nominal, the capital necessary for the scope and magnitude of the operations being furnished by the stockholder as a loan".

²⁹ JS Cohen, "Shareholder Advances: Capital or Loans" (n 25) 259.

³⁰ DG Carlson, "The Logical Structure of Fraudulent Conveyances and Equitable Subordination" (2002) *Cardozo Law School*, 50 Working Paper Series 24.

³¹ *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307 (1939).

³² JS Cohen, "Shareholder Advances: Capital or Loans" (n 25) 260.

³³ "No plan ought to be approved which does not accord the preferred stockholders a right of participation in the equity in the debtor's assets prior to that of the inequitable parent/creditor, and at least equal voice with the parent/creditor in the management".

³⁴ A.S. Herzog, J.B. Zweibel, "The Equitable Subordination of Claims in Bankruptcy" (1961) 15 *Vand. L. Rev.* 105.

The Doctrine of Equitable Subordination

Following the landmark decisions of the bankruptcy courts concerning the issue of capital versus loans, the landmark Doctrine of Equitable Subordination will now be approached. As has been pointed out above, as a starting point in an equitable subordination analysis a court may examine whether a legitimate creditor is engaged in inequitable conduct. If this is the case, the remedy which has been developed consists of the subordination of that creditor's claim to that of the other creditors, but only to the extent necessary to remedy the inequitable conduct. This is exactly the conclusion reached in the landmark case *Benjamin v. Diamond (In re Mobile Steel Co.)*,³⁵ which brought clarification to the Doctrine. Hence, at the outset, courts developed the doctrine by applying their equitable powers in order to ensure that a claimant in a bankruptcy proceeding, who had engaged in "unfair or fraudulent conduct" to the detriment of the debtor or other creditors, was sanctioned in a just and fair manner.³⁶

Following from the *Mobile Steel Co* decision, the Doctrine was finally endowed with a test capable of marking the limits and the conditions for its applicability. Essentially, the application of the Doctrine depended on three essential conditions which have been left unchanged ever since: (1) the existence of inequitable conduct on part of the creditor/claimant; (2) a causal link between such conduct and the detriment suffered by other creditors or, alternatively, unjust enrichment or advantage on the creditor/claimant; and (3) that the subordination of the claim by way of equity was not inconsistent with the provisions of the Bankruptcy Code. Moreover, as an equitable remedy, the subordination could only operate to compensate the prejudice suffered by the other creditors,³⁷ with the burden of the proof with respect to the existence of such conditions being imposed on the plaintiff.

With respect to the third condition, it is now possible to state that it does not constitute an effective restriction to be evaluated anymore, since the introduction of § 510(c) of the U.S Bankruptcy Code in 1978 which ultimately codified the power of the bankruptcy courts to subordinate claims on grounds of "principles of equitable subordination". As a matter of fact, the confirmation of such power in the Bankruptcy Code, although completely leaving the task to shape the principles in question to the established and forthcoming case law, at least resulted in the self-evident consistency of equitable subordination with the provisions of the Bankruptcy Code.³⁸

Notwithstanding the "new order" established by *Mobile Steel Co.* and the coeval introduction of § 510(c) in the Bankruptcy Code, the Doctrine was still left with a lot of uncertainty. Specifically, there were still many doubts surrounding the definition of "inequitable conduct of the creditor", which, in turn, made the enforceability of the Doctrine itself very nebulous. Since the Code had been left silent with respect to the criteria to be used to define what inequitable conduct could be, it was once again up to the courts to provide the Doctrine with the right tools to operate effectively. It is thus now reasonable to draw the connection between the findings referred to in Section 3.1 and the doctrine at stake. In particular, amongst the criteria mostly used, the undercapitalisation of the debtor corporation has always been critical.

Accordingly, in cases where the controlling shareholder or the parent company granted a loan, their debt could be subordinated if the corporation which benefited from the loan proved to be manifestly undercapitalised at the time the loan was granted, having regard to its corporate objectives. The same outcome would result when, at the time the loan was advanced, a well-informed external creditor would have not contributed the same amount of debt.³⁹ Despite the elaboration of certain criteria to determine the extent necessary for the undercapitalisation to qualify a loan being granted as an inequitable

³⁵ *Matter of Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977).

³⁶ Sprayregen, Friedland, Brighton, Bianca, "Recharacterization of Debt to Equity: An Overview, Update, and Practical Guide to an Evolving Doctrine" (n 24) 4-5.

³⁷ RC Clark, "Corporate Law" (n 8) 61.

³⁸ JW Dickens, "Equitable Subordination and Analogous Theories of Lender Liability: Towards a New Model of "Control" (1987) 65 Texas L. Rev 814.

³⁹ D Vattermoli, "La Subordinazione "Equitativa" (*Equitable Subordination*)" (2009) 6 *Rivista delle Società* 1408.

conduct, such as the debt-to-equity ratios referred to in Section 3.1., there has never been a commonly accepted standard. Consequently, such circumstances have always infused the judges with a high degree of discretion when deciding on the existence of inequitable conduct.⁴⁰

On the other hand, one issue seems not to be controversial: the existence of inequitable conduct consisting of the behaviour of shareholders granting loans instead of capital contributions is not dependent on the subjective will of the lender. In other words, where the corporation is undercapitalised, the debt in question will be subordinated both in the case the shareholder truly intended to grant a loan and in the case where the shareholder sought to camouflage a capital contribution as debt.⁴¹

However, despite its relevance, it is the opinion of the majority of the scholars,⁴² as much as of the bankruptcy courts, that the sole undercapitalisation of the debtor corporation is insufficient to constitute the ground for the subordination, thus requiring the coexistence of other inequitable conducts. As it is set out in Section 3.3., this feature, concerning the weight undercapitalisation has in the analysis the courts carry out in this area, is essential to study the differences and the interactions between the Doctrine of Equitable Subordination and the Doctrine of Recharacterization. In a recharacterization analysis, unlike in an equitable subordination one, undercapitalisation may be enough to prompt the recharacterization of debt into equity, without the need to spot any other inequitable elements. Likewise, it is feasible to envision the occurrence of an inequitable conduct in the absence of an undercapitalisation's situation, especially in the context of corporate groups, where the conduct resulting from the domination of the parent over its subsidiaries could be regarded as inequitable *per se*.⁴³

Moving on to the second condition required for the applicability of the Doctrine of Equitable Subordination, namely the detriment suffered by other creditors or, alternatively, an unjust enrichment or advantage on the creditor-claimant, there seems to be less confusion. Generally, this condition is satisfied when the competing creditors receive less out of the bankruptcy proceedings than what they would have received if the inequitable conduct had not taken place. Notably, the correct assessment and measurement of this damage suffered by the creditors is essential to determine those ones to whom the debt of the claimant will be subordinated, as much as the exact amount of the claim that will need to be subordinated to remedy the inequitable conduct. Ultimately, it is thus correct to state that equitable subordination is subject to a "double limitation", both with respect to which competing creditors and the maximum amount of the claim to be subordinated.⁴⁴

The Doctrine of Recharacterization

When delving into recharacterization in the context of the capital versus loan, it is common sense to think of the situation of debt being recharacterized into equity, and consequently being treated as such upon a bankruptcy proceeding. From this perspective, it is correct to introduce the Doctrine of Recharacterization as a judicial development whereby a bankruptcy court causes debt that has been granted to a corporation, or at least something the parties to the transaction characterised as such, to be converted into equity.⁴⁵ While it is fundamental to understand the consequences such doctrine determines toward a given bankruptcy claim and appreciate its relationship with the Doctrine of Equitable Subordination, it is preliminarily worth looking at its origins.

At the outset, the Doctrine originated from some bankruptcy courts which started subordinating claims by way of recharacterizing purported debt transactions as equity contributions by using their general

⁴⁰ R Schlesinger, "Acceptable Capital Structures: How Thin Is Too Thin?" (1952) 5 Florida L. Rev. 355 ss.

⁴¹ Note, "Subordination of Stockholder Loans on the Ground of Corporate Undercapitalization" (1963) 23 Md. L. Rev. 260 ss.

⁴² R Posner, "The Rights of Creditors of Affiliated Corporations" (1976), 43 U. Chi. L. Rev. 518; M. Nozemak, "Making Sense Out of Bankruptcy Courts' Recharacterization of Claims: Why Not Use § 510

(c) Equitable Subordination?" (1999) 56 Wash. & Lee L. Rev. 700.

⁴³ JM Landers, "A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy" (1975), 42 U. Chi. L. Rev. 622 ss.

⁴⁴ D Vattermoli, "La Subordinazione "Equitativa" (*Equitable Subordination*)" (n 40) 1410.

⁴⁵ Sprayregen, Friedland, Brighton, Bianca, "Recharacterization of Debt to Equity: An Overview, Update, and Practical Guide to an Evolving Doctrine" (n 24) 2.

equitable powers.⁴⁶ This time, unlike equitable subordination which had been expressly codified in §510(c), the courts were not bestowed with the power to recharacterize by a specific provision of the Bankruptcy Code, but they derived it indirectly from §105, which grants bankruptcy courts the authority to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions” of the Code.⁴⁷ It is the lack of a specific code provision on the recharacterization of bankruptcy claims that has always fuelled the debate amongst the courts with respect to the factors to consider for the application of the Doctrine.

In this context, the landmark case is *AutoStyle Plastics*.⁴⁸ This case, beyond settling the debate with respect to the authority to recharacterize claims in favour of those courts that had derived such power from § 105, is mostly cited for the adoption of an eleven-factor test for the applicability of the Doctrine. Although it is not the purpose of this paper to analyse each of these factors in detail, since such scrutiny would inevitably overlap with those carried out by leading and way more exhaustive papers on the topic,⁴⁹ it shall be pointed out that no one factor is decisive alone and that their assessment is fact-sensitive on the circumstances of the case.

Against this background, once again, a connection should be established between the discussion referred to in Section 3.1 and 3.2 with respect to the undercapitalisation factor. In fact, it is submitted that the occurrence of an undercapitalisation situation constitutes the ideal playing field to draw a comparison between the doctrine at stake and the doctrine of equitable subordination. Generally, it has been reported⁵⁰ that courts scrutinise the undercapitalisation question in a recharacterization analysis just as they would normally do in the context of equitable subordination. This means, building on the criteria referred to in Section 3.1., that the courts would look at the amount of capital in the debtor corporation at the time of the transaction as much as to the amount of control shareholders exercise.

Nevertheless, as pointed out in Section 3.2, undercapitalisation, without inequitable conduct, is usually regarded as insufficient to justify equitable subordination, whereas, it may be sufficient to cause the recharacterization of a purported loan into an equity claim. This is due to the consideration that, notwithstanding the similarities as to their effect, debt recharacterization and equitable subordination amount to two distinct causes of action, whereby they could be regarded as mutually exclusive. Accordingly, it is important to remember that recharacterization cases focus on whether a debt actually exists, whereas equitable subordination cases deal with legitimate creditors and focus on whether an inequitable conduct has occurred. The difference is prominent since the result of the recharacterization of a claim in debt into a claim in equity is that the claimant is not satisfied until the bankruptcy estate pays all other creditors in full, in accordance with the pivotal “equity is wiped out first” rule. On the contrary, as pointed out in Section 3.2, in an equitable subordination’s type of judgment, a debt gets subordinated to other creditors’ claims subject to the abovementioned “double limitation” with respect to both the number of creditors to whom the claim will be subordinated (in accordance with the second condition of the Mobile Steel Co’s “test of applicability”) and the maximum amount of the claim that will need to be subordinated (due to the principle that the subordination must operate only to the extent it affords a remedy to an inequitable conduct).

In conclusion, one could truly state that the application of the Doctrine of Recharacterization tends to be way more severe from the standpoint of the claimant that has granted an alleged loan to a company. This ultimately results from the considerations that the analysis carried out by a court to recharacterize such claim does not need to prove the occurrence of inequitable conduct together with the circumstance

46 M Nozemak, “Making Sense Out of Bankruptcy Courts’ Recharacterization of Claims: Why Not Use § 510 (c) Equitable Subordination?” (n 43) 690.

47 11 U.S.C § 105(a).

48 In re Autostyle Plastics, Inc., 269 F.3d 726 (6th Cir. 2001).

49 D Skeel, Jr and G Krause-Vilmar, “Recharacterization and the Nonhindrance of Creditors” (2006) (n 18) 277-279; Sprayregen, Friedland, Brighton, Bianca, “Recharacterization of Debt to Equity: An Overview, Update, and Practical Guide to an Evolving Doctrine” (n 24) 14-18.

50 M Nozemak, “Making Sense Out of Bankruptcy Courts’ Recharacterization of Claims: Why Not Use § 510 (c) Equitable Subordination?” (n 43) 710-711.

that the recharacterization into equity brings automatically the claimant to the very last level of the insolvency line.

For the sake of completeness, it is also important to focus the analysis on the position expressed by those courts situated at the opposite side of the spectrum with respect to the positive affirmation of the power to recharacterize debt. The reference shall thus be made to the decision of the United States Court of Appeals for the Ninth Circuit Bankruptcy Appellate Panel's (B.A.P.) in *Unsecured Creditors' Committees of Pacific Express, Inc. v Pioneer Commercial Finding Corp. (In re Pacific Express, Inc.)*.⁵¹

This judgment stated that bankruptcy courts do not have the authority to recharacterize debt into equity, since this was not envisioned by the Code. In particular, such a conclusion was due to the refusal by the B.A.P. to adopt the analysis to distinguish between a loan or a capital contribution, which had originally been used by the tax courts and subsequently deemed by many bankruptcy courts as the one to implement also in a recharacterization scenario. As a drastic consequence, the B.A.P. thus ruled that all the actions resulting in the subordination of claims in bankruptcy proceedings necessarily had to be governed by § 510(c) and nothing else.⁵² Such restrictive interpretation in relation to the courts' power to subordinate claims is revealing with respect to the underlying policy choice to the decision. In this respect, the tendency of the courts toward an easily realisable subordination of claims sends a clear signal to those insider creditors ready to make a loan to their troubled companies. As a matter of fact, those insiders, knowing that their claims could be subordinated regardless of the occurrence of an inequitable conduct on their part, would inevitably refrain from granting a loan, with the consequence that their troubled companies would potentially miss a great chance to resurrect.⁵³ Additionally, this dynamic is exacerbated by the fact that insider creditors are usually the only source of finance available to companies in the vicinity of insolvency.

Against this background, the decision projected in *Pacific Express* has the merit to reassure all lenders that their claims could not be subordinated where no inequitable conduct has occurred in accordance with § 510(c) of the Bankruptcy Code.⁵⁴

Shareholder loans under German Insolvency Law

The argument relating to the legal treatment of shareholder loans under German Insolvency Law requires a preliminary admonition which is revealing of the underlying object of this paper. First of all, the following analysis, rather than being an outline of the German legislative framework on the subject, will serve as a significant point of comparison with the US one. Secondly, and as a consequence, the discussion will build upon the premise to introduce the topic referred to in Section 4 concerning the impact that policy choices made by the legislators may have on the practice of shareholder loans. Therefore, the German rules are here presented having been reformed in late 2008 by the Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (*MoMiG*) also known as the law on the Modernisation of the German Limited liability Company law.⁵⁵

As a starting point, the core of the *MoMiG* consists of the extension of the rule of subordination to almost every kind of shareholder loan.⁵⁶ In order to appreciate the impact of such extension, it is important to recall the old law on the subject. Under the old law, commonly referred to as "law of equity substitution",⁵⁷ a shareholder loan could be subordinated if it was deemed to "substitute for equity" in

⁵¹ *In re Pacific Express, Inc.*, 69 B.R. 112 (B.A.P. 9th Cir. 1986).

⁵² M Nozemak, "Making Sense Out of Bankruptcy Courts' Recharacterization of Claims: Why Not Use § 510 (c) Equitable Subordination?" (n 43) 691-692.

⁵³ M Gelter and J. Roth, "Subordination of Shareholder Loans from a Legal and Economic Perspective" (n 1) 9.

⁵⁴ M Nozemak, "Making Sense Out of Bankruptcy Courts' Recharacterization of Claims: Why Not Use § 510 (c) Equitable Subordination?" (n 43) 715.

⁵⁵ Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (*MoMiG* — Act to Modernize the Law Governing Private Limited Companies and to Combat Abuses) (n 4).

⁵⁶ There are two exceptions laid down by InsO § 39, which already existed under the old rules.

⁵⁷ M Gelter, "The Subordination of Shareholder Loans in Bankruptcy" (2006) JM Olin Center for Law, Economics, and Business Fellows' Discussion Paper Series, Harvard, Discussion Paper No 4, 3.

the case it was granted to a financially distressed company (in “crisis”). To the same extent, the rule of subordination was commanded in the case of a shareholder loan granted before the appearance of any indicator of the “crisis” if the shareholder did not withdraw the loan at its occurrence.⁵⁸ Under this framework, the “crisis” of the company was set out by reference to a standard of “unworthiness”, whereby the company was deemed to be in “crisis” if a third party would have not granted the loan given by the shareholder at the same conditions. Against this background, the new rules didn’t take the distinction between equity substituting loans and “normal” loans by the shareholders into account anymore, but were intended to apply automatically to all shareholder loans.⁵⁹ As a consequence, such generalisation implies that, since 1 November 2008, no enquiry has to be made to determine whether or not the company is in “crisis” at the time the loan is granted by the shareholder, since subordination applies anyway.⁶⁰

It has been argued that the new rules have not substantially brought about the results that the old ones had already envisioned, at least as far as the applicability of the subordination rule is concerned.⁶¹ In particular, it could be stated that both the old and the new rules substantially subordinate shareholder loans granted upon an imminent insolvency of the company.

Notwithstanding the considerations concerning the impact brought about by the new rules, this new approach deserves to be scrutinized with respect to its theoretical basis. In the first place, a flavour of it can be detected by comparing the newly reformed German rules with the US ones referred to in the previous paragraphs. Within such comparison, there transpires a marked difference between the kind of subordination envisioned in *MoMiG* and the Doctrine of Equitable Subordination, since the former does not require any inequitable conduct of the shareholder. Likewise, with respect to the Doctrine of Recharacterization, the German rule is different for it is not centred on whether or not the shareholder wanted to provide capital, with the consequence that subordination applies also in the case it is explicit that both the shareholder and the company genuinely wanted to contract a loan. Ultimately, it could be observed that the new German rules tend to bring the sanction of subordination one step further than the one reached by the Doctrine of Recharacterization, given its automatic applicability to all shareholder loans.

The final considerations concerning the comparison between the US and the German rules on shareholder loans, in turn, draw attention to the theoretical basis of the German rules from a closer perspective. Above all, building on the argument referred to at the end of Section 3.3, it is important to judge the rules from the shareholder’s standpoint. It seems thus clear that the German rules seek to sanction to the maximum extent the shareholder who decides to provide finance while the company is in “crisis”.⁶² This is due to the configuration of the new rules which do not accord the shareholder any instrument to “justify” his decision to finance the company. By contrast, under the US rules, there is a getaway available to the shareholder both under the Doctrine of Equitable Subordination and the Doctrine of Recharacterization. As a matter of fact, under the former, the shareholder is always “excused” if the plaintiff is not able to provide the proof of the occurrence of an inequitable conduct, as much as of the other requirements laid down by the *Mobile Steel Co.’s* test, i.e. unfair advantage and

<http://www.law.harvard.edu/Programs/olin_center> (accessed 7 August 2019).

⁵⁸ DA Verse, “Shareholder Loans in Corporate Insolvency – A New Approach to an Old Problem” (2008) 9 *German Law Journal* 1111.

⁵⁹ H Tschauner and C Ede, “Shareholder Loans under German Insolvency Law” (2014), *Financier Worldwide Magazine* 5. <<https://www.financierworldwide.com/shareholder-loans-under-german-insolvency-law>> (accessed 7 August 2019).

⁶⁰ DA Verse, “Shareholder Loans in Corporate Insolvency – A New Approach to an Old Problem” (2008) (n 59) 1112.

⁶¹ *Ibid* 1118-1221, according to which, while it is affirmed that the results of the new rules on subordination is not different from those under the old law, it is emphasized that the reform has substantially altered the previous restrictions on the repayment of shareholder loans. Under the new rules, subject to two exceptions left unchanged, the repayment of all shareholder loans is subject to avoidance if they were made within a one-year period prior to, or after the filing for insolvency, in accordance with InsO § 135.

⁶² *Ibid* 1115.

injury to other creditors. Similarly, under the latter, the shareholder loan is never recharacterized if it is unambiguous that the shareholder and the company genuinely wanted to agree on a loan.

However, it seems incorrect to describe the essence of the German rules as a “sanction”, since subordination may apply also to those shareholders that have granted a loan before the crisis occurred. Consequently, it is more appropriate to conceive the German rules on subordination as an attempt to generate a preventive and deterrent effect toward shareholders every time they are about to provide finance to their company. In the shareholder’s perspective, such effect is intensified also by the automatic application of the subordination rule, with no discretion exercisable by the German courts with respect to subordinating loans that squarely fall within the domain of the rules of German Insolvency Law.⁶³

These conclusions prompt a final reflection. As a result of the application of the subordination rule under German Insolvency Law, shareholders are inevitably deterred to grant finance, by way of loans, even when it would be the most efficient medium to rescue the company. In this view, subordination turns out to be counterproductive and transcending the object to contrast excessive risk-taking by shareholders at the expenses of the creditors.⁶⁴ Accordingly, as it is further explored in Section 4, the argument has been made that shareholder loans should be subordinated only to the extent they fail an “efficiency test” aimed to predict those financial solutions that have a positive present value, and that the legislators should take the results of such test into account when framing the legal rules.⁶⁵

Subordination of shareholder loans under the “rescue culture”: an unescapable tension?

Corporate rescue beyond creditor protection

The legal models that have been assessed stand as regulatory responses to the issue that the unrestricted practice of shareholder loans would invariably bring about, and which has been labelled, in this paper, as the “lost function of Insolvency Law”. In other words, the legal rules, despite their diversity depending on the legal system, all seek to safeguard the “equity is wiped out first” principle and the *par condicio creditorum*, thus upholding the nature of Insolvency Law as “creditor law”, i.e., they are aimed at protecting the creditors.

Having said that, one is left with the question of whether “creditor protection” truly is the unique and ultimate goal Insolvency Law should pursue. Upon closer inspection, as estimated in Section 3, the principle of subordination embedded in the legal rules seems to leave no room at all for nearly any shareholder loan handed on the eve of insolvency, thus deterring those loans which could represent an indispensable source of finance for the company to avert its failure. This tension has been effectively described by Martin Gelter’s words:

*Thus, policymakers in the countries discussed here and elsewhere have to face the trade-off between creditor protection and the desirability of potentially successful rescue attempts in firms on a trajectory towards insolvency.*⁶⁶

Therefore, it is critical to include the rescue of the company within the objectives of Insolvency Law and understand whether it could proficiently coexist with the long- claimed “creditor protection” objective. For these purposes, the meaning of “corporate rescue” needs to be outlined. Firstly, it should be clarified that “corporate rescue” does not necessarily stand at odds with the liquidation of the company, meaning

63 A Cahn, “Equitable Subordination of Shareholder Loans?” (2006) 7 European Business Organization Law Review 292.

64 DA Verse, “Shareholder Loans in Corporate Insolvency – A New Approach to an Old Problem” (n 59) 1115.

65 M Gelter, “The Subordination of Shareholder Loans in Bankruptcy” (2006) (n 58); PO Müller, “A Synthetic View of Different Concepts of Credit Protection, or: A High-Level Framework for Corporate Creditor Protection” (2006) 357 European Business Organization Law Review 397-399.

66 M Gelter, “The Subordination of Shareholder Loans in Bankruptcy” (n 58), 8.

that a rescue outcome could also be attained through a liquidation procedure.⁶⁷ This latter is designed for the winding-up of the company and involves ceasing its activities, realising its assets, and paying off debts and liabilities out of it.⁶⁸ Actually, in this process, when assets are being realised, a rescue could thus be achieved by selling the company's assets by way of a takeover or a bulk sale of the assets.⁶⁹ However, for the purposes of this paper, it is more relevant to consider the hypothesis of a corporate rescue which may be achieved as an alternative to a liquidation procedure. In fact, such an alternative could be the option of shareholder loans which could be granted for purposes of making the company better off, thus exceeding the sole benefit of creditors, which, by contrast, could also simply be accomplished by a rescue outcome attained through a liquidation procedure. In this perspective, the concept of "corporate rescue" is here intentionally restricted to the preservation of the distressed company itself.⁷⁰

In light of the foregoing, the argument is made that "creditor protection" shall not be an "absolute imperative"⁷¹ to be pursued up to the point that it is made inefficiently by neglecting other possible advantages, meaning that policymakers should not aprioristically discourage shareholders from investing into a failing business with the attempt to turn it around.⁷²

An "efficiency test" for shareholder loans: is it too much for the courts?

The question concerning what standard should be used to select those shareholder loans which should not be subordinated has been studied by a few scholars⁷³, although no legislative model has been promulgated pursuant to them so far, neither in Europe nor in the US. At its core, the criterion developed consists of an "efficiency test"⁷⁴ entirely based on an economic model, whose analysis goes way beyond the purpose of this paper. Suffice to say, by way of a simplification, using Martin Gelter's words: "rescues financed by shareholder loans should not be penalized where the benefits to shareholders exceed the costs to creditors".⁷⁵

For what it is worth, one should ask the question whether courts could potentially be well-suited to adopt such a test when deciding upon the subordination of shareholder loans.⁷⁶ In this respect, the answer to this question must necessarily be led by the introduction of legal standards capable of translating the results of the economic models available into enforceable rules. In doing so, policymakers would prompt discussion on the topic, which, in turn, may stimulate the courts to provide themselves with greater expertise when dealing with the practice of shareholder loans. From this perspective, it seems valuable to recall the US law's development with respect to the strong influence the case law elaborated by the bankruptcy court has always exerted on the legislation and vice-versa, which is still ongoing if one thinks about the debate on the factors required for triggering the recharacterization of debt into equity.

67 B Xie, "Corporate Rescue – The New Orientation of Insolvency Law" (2006) *Comparative Insolvency Law* 5 <<https://doi.org/10.4337/9781781007389.00008>> (accessed 8 August 2019).

68 G McCormack, "Corporate Rescue Law: An Anglo-American Perspective" (2008) 3.

69 J Armour, "The Law and Economics of Corporate Insolvency: A Review" (2001) ESRC Centre for Business Research, University of Cambridge, Working Paper No. 197, 4 <http://www.econ.jku.at/members/Buchegger/files/Juristen/armour_2001_corporate%20insolvency.pdf> (accessed 8 August 2019).

70 B Xie, "Corporate Rescue – The New Orientation of Insolvency Law" (n 68) 5.

71 M Gelter, "The Subordination of Shareholder Loans in Bankruptcy" (n 58) 9.

72 A Cahn, "Equitable Subordination of Shareholder Loans?" (n 64) 294.

73 M Gelter, "The Subordination of Shareholder Loans in Bankruptcy" (n 58) 10-30; in the same vein SA Muro, "Economic Reasons for the Nonhindrance of Creditors Per Se Rule? A Reply" (2007) 8 *European Business Organization Review* 401-411.

74 According to Gelter (n 74), "A shareholder loan would fail the test when the expected value of total assets after rescue attempt results in a reduction vis-à-vis the hypothetical liquidation value at the time when the loan was made. If an increase in the going concern value after the rescue was to be expected, the shareholder-creditor should be treated like a third-party creditor bankruptcy. Otherwise, if the creditor is punished in bad states of the world, even where the rescue attempt was desirable, an inefficient disincentive is the result".

75 *Ibid* 32.

76 *Ibid* 33.

Conclusion

This paper proposes a critical view on the existing legal rules regulating the widespread practice of loans granted by shareholders to their company in the vicinity of insolvency. At the core of this paper lies the intention to raise the question as to what function Insolvency Law should try to attain when dealing with such practice. As has been outlined in Section 2, the foundation of such analysis stands on a contradiction underlying the practice of shareholder loans, according to which, shareholders, despite the deterioration of the financial conditions of their company, are willing to finance losses, damaging the position of the external creditors, such as the banks. From this perspective, the function of Insolvency Law to be restored is that of “creditor protection”, which, at the outset, is accomplished by introducing the principle of subordination.

Following the overview of the legal rules in Section 3, it can be reasonably affirmed that, at the “frontstage”, Insolvency Law succeeds in attaining its “creditor protection” function, but, at the “backstage”, it is somewhat overreaching, since, in doing so, it almost completely neglects to safeguard the non-opportunistic behaviour of those shareholders, which could efficiently provide debt finance with the intention of saving the company. In this respect, the function of Insolvency Law should be reconsidered as to encompass the rescue of the company before the formal opening of any liquidation procedure.

In light of the foregoing, the contemplation of the “battle for value” between creditors and shareholders in financially distressed companies as the core criterion for the interpretation of the legal rules should be disavowed. By contrast, the rules should be conceived on the outcome that “creditor protection” is not necessarily the “panacea” to all the issues instigated by the practice of shareholder loans. Accordingly, policymakers should start to consider the results which have been contributed by the economic models, where it is envisaged that the subordination of shareholder loans shall work “efficiently” for the interest of all the parties involved. Such change of direction in the legal rules could only be accomplished within a legal framework which would start embracing the attitude of the “rescue culture” when dealing with distressed companies.

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Should the definition of 'mental disorder' under the Mental Health Act 1983 encompass autism, for the purpose of compulsory detention?

Harleen Roop

To be sectioned under the Mental Health Act 1983 (MHA), an individual must meet the definition of 'mental disorder' as per s.1(2). Despite the scarcity in academic scholarship concerning autism within the scope of the Act¹, the 'mental disorder' definition has been considered ludicrously broad². This paper seeks to highlight that the inclusion of autism under the MHA, results in discriminatory detention based on autism-related behaviour; therefore, the removal of autism from the MHA is necessary. My approach is based on a personal familiarity in understanding autism while emphasising the need for autism awareness. First; a distinction between autism and mental health is provided, second; I analyse the legislative framework concerning compulsory detention as per s.2 of the Act, third; I critique the current safeguards in place bearing in mind disability law and finally; critique of relevant government and legislative reports is provided. All of which shape my thesis; autism should not encompass the definition of mental disorder under the MHA.

Mental health or Autism?

The World Health Organisation defines 'good mental health' as a state in which an individual has mental and psychological well-being³. Leading mental health support service Mind compiles a list⁴ of mental health issues (which autism is absent from) stating conditions such as depression and anxiety being common⁵. By contrast, autism, medically referred to as autistic spectrum disorder (ASD)⁶, is a lifelong developmental disability, namely, affecting an individual's social interactions and behavioural patterns⁷. There is no 'cure'⁸ nor medical justification for autism, however it is known to operate on a spectrum⁹; thus, individuals' experiences and needs remain distinct from one another. Having personally witnessed the difficulties arising for those with ASD, factors particularly affected include; the ability to cope with change, levels of understanding, and decision making.

The National Autistic Society (NAS) explicitly states autism is not a mental health condition¹⁰; with mental health carrying social stigma and subsequent discrimination¹¹, using 'mental health' and 'autism' interchangeably attaches further stigma to both.

The detention of individuals with ASD has been a long-standing concern with the NAS recording a 24% increase of autistic individuals at inpatient units in 2015¹². Recent statistics reveal that 3,390 people with learning disabilities and/or autism were detained in a hospital during 2019; 1,420 of whom were in

¹ A focus on criminal prosecutions of autistic individuals under the MHA has been noted as opposed to the removal of autism from the Act's scope entirely.

² Stephen S. Barlow, 'The Government's Proposals to Reform the Mental Health Act' (2001) 25 *Psychiatric Bulletin* 237 .

³ World Health Organisation 'Mental health' <https://www.who.int/mental_health/en/> accessed 7 March 2020.

⁴ Mind, 'Types of mental health problems' <<https://www.mind.org.uk/information-support/types-of-mental-health-problems/>> accessed 24 Feb 2020 .

⁵ Mind, 'Mental health problems – an introduction' <<https://www.mind.org.uk/information-support/types-of-mental-health-problems/mental-health-problems-introduction/about-mental-health-problems/>> accessed 24 Feb 2020 .

⁶ NHS, 'What is Autism' (18 April 2019) <<https://www.nhs.uk/conditions/autism/what-is-autism/>> accessed 21 February 2020.

⁷ National Autistic Society, 'Autism' (8 June 2016) <<https://www.autism.org.uk/about/what-is/asd.aspx>> accessed 21 February 2020.

⁸ *ibid.*

⁹ Department of Health, *Think Autism* (April 2014) p 4, para 1.3 .

¹⁰ National Autistic Society, 'The Mental Health Act' <<https://www.autism.org.uk/get-involved/campaign/mental-health-act.aspx>> accessed 19 March 2020 .

¹¹ Mental Health Foundation 'Stigma and discrimination' (November 2015) <<https://www.mentalhealth.org.uk/a-to-z/s/stigma-and-discrimination>> accessed 21 February 2020 .

¹² Tim Nicholls, 'Transforming Care: our stories' (National Autistic Society, September 2017) <<https://www.autism.org.uk/~media/nas/get-involved/campaign/transforming%20care%20our%20stories.ashx?la=en-gb>> accessed 21 February 2020.

an adult mental health ward¹³ rather than a specialised ASD ward. Unspecialised wards are likely to cause severe distress to autistic individuals with sensory triggers including light, noise or crowded environments; the need to remove autism from the MHA is heightened.

Public demand for the MHA's reform was initiated by a petition to remove autism from its scope, which gained 2657 signatures¹⁴. Taking action further, two families in partnership with Irwin Mitchell, joined forces in a crowd-funding appeal¹⁵ to legally challenge the MHA with the hopes of removing autism from encompassing the scope of the Act¹⁶. The NAS branded the detention of autistic individuals as a "national scandal" with over 17,000 signatures on their open letter calling on the Government to set up an Independent Review into the treatment of autistic people under the Act¹⁷.

Legislative scope

Despite a clear distinction between mental health and autism, the MHA provides the right to section autistic individuals. Under s.1(2) a 'mental disorder' constitutes "any disorder or disability of the mind"¹⁸; attracting criticism for being uncertain¹⁹, likely due to its broad scope. Dawson cites Fanning's assertion by which the expansive scope of the definition provides wide discretion to mental health professionals to determine what a mental health disorder is and whether or not the individual has one²⁰. However, in my view, the definition should be approached with apprehension as mental health professionals may have extensive knowledge of mental health, yet, this is unlikely to equate to a sufficient understanding of autism. As recently noted by Baroness Browning, there is a lack of psychiatrists who have a sufficient understanding of autism and therefore they are unable to differentiate between autism-related behaviour and what they believe to be psychotic behaviour²¹.

The 2007 amendment of the MHA attempted to clarify the s.1(2) definition as per s.2A; an individual with a learning disability shall not be considered to suffer from a mental disorder or requiring hospital treatment "unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part"²². This exemption applies only to s.3 MHA²³ concerning detention for treatment and there is no such additional requirement for those with autism. In 2007, the NAS urged for s.2A to be applied to those with autism too²⁴; however, I question how effective such inclusion would be as the threshold and the definition of 'abnormally aggressive or seriously irresponsible conduct' is yet to be clarified. The Code of Practice (Code) states that "bizarre or unusual behaviour is not the same as abnormally aggressive or seriously irresponsible behaviour"²⁵ however, the Code lacks clear provision solely for detaining autistic individuals. Hollins notes a complete removal of autism from the MHA is

¹³ NHS Digital, 'Learning Disability Services Monthly Statistics' (February 2019) <<https://digital.nhs.uk/data-and-information/publications/statistical/learning-disability-services-statistics/provisional-statistics-at-february-2019-mhsds-december-2018-final>> accessed 21 February 2020 .

¹⁴ Petitions, 'Remove Autism from the definition of Mental Disorder in the Mental Health Act' (UK Government and Parliament Petition submitted during 2017-2019) <<https://petition.parliament.uk/archived/petitions/260656>> accessed 21 February 2020.

¹⁵ Crowd Justice, 'Scandal: Detention of People with Autism & Learning Disabilities' <<http://www.crowdjustice.com/draft/3932/r/LWKI5qCxQAydxoRXDXcS7A/>> accessed 22 February 2020 .

¹⁶ Mental Health Today, 'Families launch legal fight to end MHA detentions of people with learning disabilities and autism' (23 May 2019) <<https://www.mentalhealthtoday.co.uk/families-launch-legal-fight-to-end-mha-detentions-of-people-with-learning-disabilities-and-autism>> accessed 22 February 2020.

¹⁷ National Autistic Society, 'Over 17,000 tell the Government that national scandal must end' (19 March 2019) <<https://www.autism.org.uk/get-involved/media-centre/news/2019-03-19-national-scandal-mental-health-act.aspx>> accessed 17 March 2020 .

¹⁸ Mental Health Act 1983, s 1.

¹⁹ SJ Wood, 'Reform of the Mental Health Act 1983: An Effective Tribunal System' (1993) 162 British Journal of Psychiatry 14 .

²⁰ John B Dawson, Book Review (2019) 27 MLR 705 .

²¹ HL Deb 5 November 2019, vol 800, cols 1157-58.

²² Explanatory Notes to the Mental Health Act 2007, s 2A.

²³ ibid.

²⁴ National Autistic Society Memorandum, (Parliament, 2007)

<<https://publications.parliament.uk/pa/cm200607/cmpublic/mental/memos/uc4702.htm>> accessed 16 March 2020.

²⁵ Department of Health, Code of Practice (2015).

appropriate²⁶; with which I wholly agree, as the current safeguarding guidance fails to account for factors arising from autism.

It should be noted that the MHA does not require the medical profession to consider external factors²⁷; raising further concern as autistic individuals are likely to be affected by external factors. The lack of consideration for such external factors may result in misinformed detentions against autistic individuals.

The detention criteria

Section 2 MHA allows an application for admission for assessment to be made if an individual is suffering from a mental disorder of a nature or degree which warrants the detention for assessment, and if they ought to be detained for their health or safety or to protect other persons²⁸. The MHA fails to define 'nature' and 'degree'. *R v MHRT for the South Thames Region ex p. Smith*²⁹ established that 'nature' indicates the mental disorder the individual is suffering from, its chronicity, its prognosis, and the individual's previous response to receiving treatment for the disorder³⁰. With autism being an untreatable lifelong developmental disability, the 'nature' element does not align with the condition of autism.

Furthermore, 'degree' was construed as the current manifestation of the individual's disorder³¹; as autism operates on a spectrum, knowing the 'degree' of an autistic individual is extremely tough to clarify. An autistic individual's 'current manifestation' is equally challenging to construe; as autistic people may struggle to cope with unexpected change, however minor it may be³². Therefore, what may seem a minor inconvenience to abled individuals, may become an incredibly cumbersome burden to some autistic individuals; possibly resulting in behavioural outbreaks. Yet again, insufficient clarification fails to be implemented; and the 'nature' and 'degree' elements of the detention criteria under s.2 fail to account for the experiences of autistic individuals. The absence of clear criteria applicable to autistic individuals, is highly problematic; reinforcing apprehension and discrimination³³.

Despite the lack of consideration for autistic individuals, the 'nature' and 'degree' definitions are reaffirmed³⁴ within the Code which states s.2 should only be enacted if "the full extent of the nature and degree of the patient's condition is unclear"³⁵. This 'clarification' is deeply troubling as it relies on the assumption of being "unclear"; therefore, preserving the right to detain autistic individuals in situations where their behaviour is simply misunderstood.

Additionally, the s.2 provision notes public safety concerns; in situations where an individual expresses outward violence towards others, detention *may* be justifiable. However, given the lack of suitable guidance relating to individuals with ASD, there is a major gap in protection which allows discriminatory detention, based on autism-related behaviour, to occur. Interestingly, Szmukler and Holloway note that discrimination of individuals with mental disorders increases stigma which results in the individual avoiding relevant services; leading to less public protection as opposed to more.³⁶ Iqbal supports their argument by highlighting that reservations concerning the MHA reform have stemmed from a public safety perspective rather than patient care³⁷. Such arguments are relevant as public safety concerns

²⁶ Sheila Hollins, Keri-Michele Lodge, and Paul Lomax, "The Case for Removing Intellectual Disability and Autism from the Mental Health Act – ERRATUM" (2019) 215 British Journal of Psychiatry 691 .

²⁷ Simone Aspis, (National Survivor User Network) <<https://www.nsun.org.uk/mental-health-and-disabled-people-with-learning-difficulties-ld-and-autism-asc>> accessed 16 March 2020.

²⁸ Mental Health Act 1983, s 2(2).

²⁹ *R v Mental Health Review Tribunal for the South Thames Region ex p. Smith* [1999] C.O.D. 148 .

³⁰ Explanatory Notes to the Mental Health Act 2007, s 4.

³¹ *ibid*.

³² National Autistic Society, 'Obsessions, repetitive behaviour and routines' (Oct 2016) <<https://www.autism.org.uk/about/behaviour/obsessions-repetitive-routines.aspx##routines>> accessed 7 March 2020.

³³ Nicholas Chown, "Do you have any difficulties that I may not be aware of? A study of autism awareness and understanding in the UK police service" (2009) 12 International Journal of Police Science & Management 256 .

³⁴ Department of Health, Code of Practice (2015) p 114, para 14.6 .

³⁵ *ibid* para 14.27, 118.

³⁶ George Szmukler and Frank Holloway, 'Reform of the Mental Health Act: Health or Safety?' (2000) 177 British Journal of Psychiatry 196.

³⁷ Iqbal F, 'Concerns over Reform of the Mental Health Act' (2000) 177 British Journal of Psychiatry 563.

appear to be a reservation for removing autism from the MHA, as opposed to the patient's perspective. Alternatively, one may suggest autism should be removed from civil proceedings as opposed to criminal proceedings³⁸ for a matter of safety. Although such assertions would be an incredible step forward for the rights of individuals with autism, as *R (Hall) v Secretary of State for Justice* addressed, inadequate training is provided to prison staff on how to manage an autistic prisoner³⁹. The lack of autism awareness throughout the legal system is a major issue, one which can only be remedied through the education of autism; beginning with understanding autism is not a mental health condition, therefore, it should not be legally considered as such.

Invisible disability, invisible safeguards

Prior to the UN Convention on the Rights of Persons with Disabilities (CRPD), international human rights law rendered the detention of those with mental disorders and disabilities as lawful⁴⁰. The UK was among the first signatories to the CRPD; ratifying its Option Protocol in 2009⁴¹. The CRPD aims to promote, protect and ensure the full and equal enjoyment of human rights and fundamental freedoms by all persons with disabilities⁴², yet the inclusion of autism under the MHA demonstrates the contrary. Graham previously predicted the CRPD's impact on the UK to be minimal⁴³, proving correct as Lady Hale noted the preservation of the MHA has a strong standing as the CRPD's rights have not been turned into directly enforceable rights under domestic law⁴⁴. Thus, through the MHA's inclusion of autism, the UK fails to wholly implement the CRPD as the detention of those with autism is rendered lawful, contrary to international human rights standards.

Safeguarding attempts were made through the MHA's 2007 amendment; the Deprivation of Liberty Safeguards (DoLS), implemented within the Mental Capacity Act (MCA) 2005 which came into force in 2009⁴⁵. The DoLS were a result of the 2004 ECtHR decision in *HL v UK*⁴⁶; as the realisation of the 'Bournemouth Gap' identified the absence of procedures for detaining persons of unsound mind⁴⁷. However, the reality of closing the Bournemouth Gap by the DoLS has been criticised; as Pearce and Jackson highlight the case law demonstrates a significant number of individuals who lack capacity fall outside the provisions⁴⁸. Whether the DoLS apply is a convoluted task in itself, as deciding whether to rely on the MHA or MCA becomes a difficult task⁴⁹; nonetheless, if an individual meets the s.2 MHA criteria and *actively* objects to assessment, the MHA should be used⁵⁰. This affords a gap in protection for those with ASD who are nonverbal or struggle with communication generally; lack of objection appears to indicate that the DoLS apply.

³⁸ Holly Bridden, 'Amending the Mental Health Act: Part 5 – Amendments to affect people with learning disabilities and/or autism?' <https://www.rlb-law.com/briefings/mental-health-law/amending-the-mental-health-act-part-5-amendments-to-affect-people-with-learning-disabilities-and-or-autism/#_ftn1> accessed 8 May 2020 .

³⁹ *R (Hall) v SSJ* [2018] EWHC 1905 (Admin) at [121].

⁴⁰ United Nations General Assembly, 'Thematic Study by the Office of the High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities' A/HRC/10/48, (26 January 2009) p 15, para 48.

⁴¹ Office for Disability Issues, 'UK Initial Report On the UN Convention on the Rights of Persons with Disabilities' (May 2011) .

⁴² UN Convention on the Rights of Persons with Disabilities, Article 1 .

⁴³ James Graham, *Autism, Discrimination and the Law: A Quick Guide for Parents, Educators and Employers*, (Jessica Kingsley Publishers 2008) .

⁴⁴ Lady Hale, 'Is it time for yet another Mental Health Act?' (Royal College of Psychiatrists Annual Conference, Birmingham, 24 June 2018) <<https://www.supremecourt.uk/news/speeches.html>> accessed 10 March 2020 .

⁴⁵ Ruth Cairns, Genevra Richardson and Matthew Hotopf, "Deprivation of Liberty: Mental Capacity Act Safeguards versus the Mental Health Act" (2010) 34 *The Psychiatrist* 246.

⁴⁶ *H.L v United Kingdom* app no. 45508/99 .

⁴⁷ Jon Holbrook, 'A distorted view' (2014) 164/7605 *NLJ* <[https://www.newLawjournal.co.uk/issuearticles/7605](https://www.newlawjournal.co.uk/issuearticles/7605)> accessed 10 March 2020.

⁴⁸ Nasreen Pearce and Sue Jackson, 'The Deprivation of Liberty Safeguards Part 7: has the UK bridged the Bournemouth gap?' (2012) 42 *Family Law*, 1123.

⁴⁹ Nick Brindle and Tim Branton, "Interface between the Mental Health Act and Mental Capacity Act: Deprivation of Liberty Safeguards" (2010) 16 *Advances in Psychiatric Treatment* 430 .

⁵⁰ Ruth Cairns, Genevra Richardson and Matthew Hotopf, (n 43) .

The DoLS have attracted criticism due to the lack of a clear definition; confusing practitioners in determining a threshold level⁵¹. With the Joint Committee on Human Rights (JCHR) rendering the DoLS scheme as “broken”⁵² calling for its reform in 2019; evidently, the current safeguard mechanisms in place do not offer sufficient protection for those with autism. The absence of adequate safeguards in place for autistic individuals exemplifies the necessity to remove autism from the MHA entirely.

The Code of Practice

Prior to its 2015 revision⁵³, the Department of Health (DoH) revealed the Code acknowledged autistic individuals could meet the detention criteria “without having any other form of mental disorder, even if autism is not associated with abnormally aggressive or seriously irresponsible behaviour”⁵⁴. Having been revised, the Code was given effect through s.188 MHA depending on an individual’s role⁵⁵; however, concerns arise as the Code’s optimistic safeguarding intentions fail to carry substantive legal obligations.

The Code explicitly states that where the terminology “*must*” is used, legal obligations are inferred; applying to doctors, approved professionals, local authorities, and staff⁵⁶. However, where “*should*” is the chosen terminology, a departure from the Code is permitted, provided it is recorded and documented. Therefore, commissioners of health services, the police, ambulance and others in social services are *not* legally bound by the Code and should merely assist the Care Quality Commission (CQC) and people involved in visiting or dealing with the care of detained patients⁵⁷. The Code is incapable of effectively providing safeguarding protection as it fails to infer persistent legal obligations to the detriment of autistic individuals. The CQC recommended the Code give clear guidance to improve its usability⁵⁸; yet, these recommendations are essentially futile if the Code fails to infer legal duties upon *all* individuals involved in detention.

Yes, it is time for yet another MHA⁵⁹

The 2012 Winterbourne View scandal exposed harrowing levels of abuse suffered by autistic individuals in care homes⁶⁰, exemplifying the lack of procedural safeguards. The DoH addressed concerns that despite initiatives being launched to safeguard autistic individuals, the issue of detention and length of stay persists⁶¹. Thus, the NHS’ 2017 Transforming Care programme aimed to reduce inappropriate hospital admissions and length of stay⁶²; pledging to make a minimum 35% reduction of detention rates concerning individuals with learning disabilities and autism by March 2019⁶³. Recent data reveals at least 2260 individuals with learning disability and/or autism being detained in April 2019⁶⁴; demonstrating the failure to meet the previous target set by the government in 2015⁶⁵, with detention

⁵¹ Ajit Shah and Chris Heginbotham, “Newly Introduced Deprivation of Liberty Safeguards: Anomalies and Concerns” (2010) 34 *The Psychiatrist* 243.

⁵² Joint Committee on Human Rights, *The Rights to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards* (seventh report, 2017-2019 HL 161 HC 890) .

⁵³ Mind, ‘Revised Code of Practice for the Mental Health Act published’ (Jan 2015) <<https://www.mind.org.uk/news-campaigns/news/revised-code-of-practice-for-the-mental-health-act-published/>> accessed 10 March 2020.

⁵⁴ Department of Health, *Stronger Code: Better Care* (July 2014) para 20.19.

⁵⁵ *R (Munjaz) v Ashworth Hospital Authority* [2005] UKHL 58.

⁵⁶ Department of Health (n 54) figure (i), 12.

⁵⁷ *ibid* figure (ii), 13.

⁵⁸ Care Quality Commission, *Mental Health Act Code of Practice 2015* (2019) 4 .

⁵⁹ Lady Hale (n 44) .

⁶⁰ BBC News, ‘Winterbourne View: Autism Society wants punch probe’ (Oct 2012) <<https://www.bbc.co.uk/news/uk-england-bristol-20040935>> accessed 7 April 2020.

⁶¹ Department of Health, *No voice unheard, no right ignored* (March 2015) 3 .

⁶² NHS England, *Transforming Care* (Jan 2017) 6 .

⁶³ NHS England, *Building the right support* (Oct 2015) para 3.18, 27.

⁶⁴ NHS Digital (April 2019), ‘Learning disability services monthly statistics’ <<https://digital.nhs.uk/data-and-information/publications/statistical/learning-disability-services-statistics/provisional-statistics-at-march-2019-mhds-january-2019-final>> accessed 17 March 2020.

⁶⁵ NHS England (n 62) .

rates reducing by a mere 19%⁶⁶. The need for reform of the Act and tailored support services for individuals with ASD is heightened as targets have failed dramatically.

The Equality and Human Rights Commission addressed the government's March 2019 target failure⁶⁷; recommending that the new MHA contain a clear statutory duty on providers to inform patients of their rights under the Act, the Equality Act 2010 and the Human Rights Act 1998⁶⁸. The Commission highlighted detention continues despite concerns that the individual does not require such detention⁶⁹ while calling for a legal duty to be placed onto local authorities to ensure sufficient community services and to have budgets in place to provide care services for individuals with autism⁷⁰. Although such recommendations are welcomed, little attention has been paid to the complete removal of autism from the MHA entirely or introducing specific provisions for those with ASD.

Families remain concerned with the lack of local support made available to autistic individuals⁷¹; and the government felt those with ASD were being detained due to their autism-associated behaviour despite being aware that no appropriate medical treatment was available⁷². However, little has been done to remedy this issue; the NAS recommended strengthening the law concerning the rights of individuals in, or at risk of, inpatient care and for professionals to listen to individuals and their families in implementing decisions⁷³. Although this may facilitate current safeguarding mechanisms, the exclusion of autism from the s.1(2) MHA 'mental disorder' definition altogether would prevent admission at the very first instance. Additionally, as discussed prior, the current safeguarding mechanisms like the Code and DoLS are not nearly as effective as they should be.

Set up in 2017, the Independent Review of the MHA (IRMHA) aimed to address rising detention and concerns regarding human rights and dignity⁷⁴; familial concerns were addressed, that placing autistic individuals in a system which is not designed to cater for their specific needs causes mental health issues rather than provide support or aid⁷⁵. Further acknowledgement of professionals in care who "do not understand the specific needs of a person with autism"⁷⁶ was made; evidencing the lack of knowledge, awareness and mindfulness of autism, likely to contribute to the unsettling lack of protection afforded to autistic individuals. Among other recommendations, the Code's amendment was suggested, to clarify the best practice for individuals with autism⁷⁷. However, given the legality of the Code as previously discussed, I approach such recommendations with caution.

Alternatively, amending the detention criteria to create a 'substantial risk' or 'significant harm' element⁷⁸ has been suggested. Yet, such propositions fail to address that individuals with ASD feel restricted due to being detained for an increasing amount of time and unsupported by staff who simply do not understand the nature of autism⁷⁹. The recognition of reduced support services is not a satisfactory

⁶⁶ Mencap, 'Government fails to transform care for people with a learning disability and/or Autism' (18 April 2019) <<https://www.mencap.org.uk/press-release/government-fails-transform-care-people-learning-disabilities-and-or-autism>> accessed 6 March 2020 .

⁶⁷ Equality and Human Rights Commission, *Our advice to parliament: reforming the Mental Health Act* (July 2019) .

⁶⁸ *ibid* at 7.

⁶⁹ *ibid*.

⁷⁰ *ibid* at pp 18, para 49.

⁷¹ National Autistic Society, 'New report says what needs to change to make Transforming Care work for autistic people' (26 September 2017) <<https://www.autism.org.uk/get-involved/media-centre/news/2017-09-26-transforming-care.aspx>> accessed 27 February 2020.

⁷² Hollins, Lodge, and Lomax, (n 26) .

⁷³ Nicholls (n 12).

⁷⁴ Mind, 'Mental Health Act Review' <<https://www.mind.org.uk/about-us/our-policy-work/mental-health-act-review/>> accessed 27 February 2020 .

⁷⁵ Independent Review of the Mental Health Act 1983, *Modernising the Mental Health Act* (Dec 2018) 184 .

⁷⁶ *ibid*.

⁷⁷ *ibid* at 190 .

⁷⁸ Tim Nicholls, 'What does the Independent Review of the MHA mean for autistic people?' (Mental Health Today, Dec 2018) <<https://www.mentalhealthtoday.co.uk/blog/what-does-the-independent-review-of-the-mental-health-act-mean-for-autistic-people>> accessed 27 February 2020.

⁷⁹ National Autistic Society (n 10) .

excuse to legally detain autistic individuals, if the definition were to be changed the destination could be changed from the outset⁸⁰.

The JCHR acknowledged that autistic individuals can be sectioned without having a treatable mental health condition⁸¹ whilst agreeing that autistic individuals need stronger legal rights. It was recommended that there be a legal duty on local authorities to ensure sufficient community-based services and hold effective budgets to implement care services for autistic individuals⁸². Further suggestions to narrow the MHA criteria to situations where treatment is necessary, unavailable in the community (as a last resort), to the benefit of the individual or where a risk of significant harm to others is present⁸³ were made. Although such recommendations may mildly alleviate the discriminatory detention of autistic individuals, the Act would still allow for the “human right to liberty to be overridden because of a lack of services”⁸⁴.

With recent evidence exemplifying the lack of resources available to local authorities, particularly relating to sufficient care⁸⁵; autistic individuals must not be allowed to fall through such gaps in protection. As opposed to the JCHR’s recommendations, Scotland’s Independent Review of Learning Disability and Autism in the Mental Health Act (IRMHA) recommended removal of autism from the definition of mental disorder⁸⁶. The basis for such removal was rooted in the CRPD and acknowledgement that behaviour which “causes serious harm to others is not ‘mental illness’”⁸⁷. These recommendations adequately account for the lived experiences of individuals with ASD, representing the necessary step forward for human rights and anti-discrimination against disabled individuals.

Uncertainty should not warrant detention

The inclusion of autism in the MHA facilitates disability discrimination; disregarding the specific needs and behaviours arising from autism. The Government has long-acknowledged the issue of detention of autistic individuals, yet efforts have failed to address the fundamental issue; autism is not a mental illness, therefore, should not be governed by law as such. Through the inclusion of autism under the s.1 definition of mental disorder under the MHA, a conflated understanding of autism and mental health conditions is generated. Thus, current mental health law perpetuates confusion, misunderstanding and discrimination against autistic individuals. The detention criteria in s.2 MHA ironically includes, yet excludes, those with autism; as the very language of the criteria render it virtually impossible for sufficient consideration of autistic individuals to be noted. Supplementary protections are flawed, as the Code fails to infer substantive legal obligations on those responsible for initial detention and care, presenting a clear safeguarding gap of protection. Therefore, the MHA is in urgent need of reform, to remove autism from its scope so the MHA aligns with international human rights law as opposed to permitting (un)lawful detention.

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⁸⁰ *ibid.*

⁸¹ Joint Committee on Human Rights, *The detention of young people with learning disabilities and/or autism (second report)*; (2019, HL 10, HC 121) .

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ Nicholls (n 12).

⁸⁵ *Dorset Council v A Mother* [2019] EWFC 62.

⁸⁶ The Independent Review of Learning Disability and Autism in the MHA, Final report (Dec 2019) <<https://www.irmha.scot/>> accessed 7 April 2020.

⁸⁷ *ibid.*

Does the French law restricting the religious practice of the Islamic full-face veil amount to persecution within the remit of International Refugee Law, or is it a legitimate distinction under International Human Rights Law?

Eeman Talha

Section One: The fundamental right to freedom of thought, conscience and religion

The right to freedom of thought, conscience and religion is enshrined internationally under the Universal Declaration of Human Rights (UDHR) and the binding International Covenant of Cultural and Political Rights (ICCPR). At the European level, it is enshrined under the European Convention of Human Rights (ECHR). Article 18 of the UDHR and ICCPR states 'Everyone shall have the right to freedom of thought, conscience and religion', to adopt a religion or belief of his choice as well as the freedom of manifesting it.¹ Although Article 18 (3) of the ICCPR underlines the limitations to the manifestation of this right, such limitations can only be 'prescribed by law, and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.² This signifies the high threshold needed to secure a strictly interpreted and proportionate limitation on the manifestation of the right.³ The non-derogable status of Article 18 adds to this by cementing the indispensable nature of the right to not be interfered with under International Law.⁴ Further, the United Nations Human Rights Committee (UNHRC) interpreted the scope of Article 18 (1) to include particular actions of practising one's religion; of which one was the custom of distinctive clothing or head coverings.⁵ Article 9 of the ECHR encompasses the same right to freedom of religion.⁶ This is also subject to justified limitations identical to Article 18 (3) under Article 9 (2).⁷ Although not a non-derogable right, Article 9 is a right under which discrimination is always prohibited.⁸

Despite France being a party to the ECHR and ICCPR, its continuous violation and indirect discrimination of the right to freedom of religion is evident. This is obvious under its blanket ban of the full-face veil which targets Niqab-wearing Muslim women.

Section Two: Proving the ban's discriminatory nature

This section will scrutinise the sweeping ban introduced in 2011 under Act No 2010-1192 (the 'Act').⁹ This will encompass a threefold argument in which the legitimate purpose, proportionality, and the consequent principle of legality of the Act will be contested. It will be argued that this supposed 'general' ban indirectly discriminates against those Muslim women who choose to wear the Niqab or any other face covering for religious and customary reasons. In turn, it will be proven that this Act violates the right to manifest an individual's freedom of religion under article 9 ECHR and the equivalent non-derogable right under article 18 ICCPR.¹⁰ Such a conclusion will prompt the argument in section three

¹ Article 18 UDHR 1948; Article 18 (1) ICCPR 1976.

² Article 18 (3) ICCPR.

³ 'CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)' (1993) CCPR/C/21/Rev.1/Add.4.

⁴ Article 4 ICCPR.

⁵ Ibid 6; Article 18 (1993) UN Doc HRI/ GEN/1/ Rev. 5 Apr.26.2001. .

⁶ Article 9 (1) ECHR.

⁷ Article 9 (2); limitations ECHR.

⁸ Article 14 ECHR; protection from discrimination, Article 15 (2) ECHR; non-derogation.

⁹ Ibid 3.

¹⁰ Ibid 2.

which focuses on; why and how such illegitimate discrimination under International Human Rights Law can enter the realm of persecution in International Refugee Law.

In line with the pillars of proportionality and legitimate purpose, we must examine the ban's proportionality in relation to the aims of the legislation and ask; *is this ban proportionate to the aims of the legislation?*

Article 1 of the Act states that '*No one shall, in any public space, wear clothing designed to conceal the face*'.¹¹ The pursued aims of Article 1 are explained by the French Government in *S.A.S v France* as follows: '*1. equality between men and women, 2. respect for compliance with the minimal requirements of life in society, and 3. the protection of public order*'.¹² It is clear from the onset that such vague and abstract objectives cannot warrant a direct infringement of the right to manifest one's religion in the context of a blanket ban.

The State has tried to justify these aims through each of them serving a legitimate purpose. Indeed, the first two aims are recognised as fundamental pillars of the functioning of France's secularist Republic. Secularism is upheld by the notion of '*le vivre ensemble*' or 'living together' in which an open society is required, and the full-face veil allegedly curbs such a requirement. The French government argues that public spaces are the main place in which social interactions take place.¹³ This means that every individual's face *must* be identifiable in such environments for the sake of the minimum degree of trust to be manifested between individuals, and for others not to be allowed to unfairly conceal themselves and impair interactions. In this section, it will be argued that the State's justifications are ambiguous and illogical. One example of the above is the rationalization of upholding gender equality, which is infringed on by the State's law which has the aim and effect of depriving a certain group of women of the right to manifest their core religious beliefs, from which they gain their individual sense of freedom and equality.

Theoretically, the protection of gender equality and human dignity could be a legitimate aim under Article 9 ECHR due to language regarding 'the protection of the rights and freedoms of others.'¹⁴ The State has demonstrated that gender equality is not a justified reason for the ban by making assumptions on behalf of 2000 French women that wear it out of choice.¹⁵ Evidence of such misinformed assumptions is inherent in the report of the French Constitutional Council, which was given authority by the Senate to declare if the Act was compliant with the French Constitution.¹⁶ The Council affirmed compliance with the Constitution, by stating that section 1 of the Act, which affirms that the purpose of the Act is 'to protect the Muslim women who were placed in a situation of exclusion and inferiority (by wearing the Niqab)... is compatible with the constitutional principles of liberty and equality'.¹⁷ It can be granted that some women are forced to wear the Niqab against their will and the State may wish to aid them through protective measures. Yet, the contextual problem is that the State is assuming that **all** Muslim women, who wear face coverings such as the Niqab, are under duress rather than accepting that many are expressing themselves out of free choice.¹⁸ The State is subjectively associating 'equality' to how much an individual covers their body and face, the Niqab being a signpost for inequality in modern society.

¹¹ Article 1 *ibid* 13.

¹² *S.A.S. v. France* [2014] ECHR 695, French Government Submissions, page 48, para 116, App. No. 43835/11 (Eur. Ct. H.R. filed July 31, 2013).

¹³ Public spaces are listed under Article 2 of *Act No 2010-1192* as; For the application of Section 1, the public space shall be composed of the public highway and premises open to the public or used for the provision of a public service. 'France: Law Prohibiting The Wearing Of Clothing Concealing One's Face In Public Spaces Found Constitutional | Global Legal Monitor' (*Loc.gov*, 2020) <<https://www.loc.gov/law/foreign-news/article/france-law-prohibiting-the-wearing-of-clothing-concealing-ones-face-in-public-spaces-found-constitutional/>> accessed 12 December 2019. .

¹⁴ Article 9 (2) ECHR; Eva Brems, 'Face Veil Bans in The European Court of Human Rights: The Importance of Empirical Findings' [2014] Ghent University <<https://www.researchgate.net/publication/294291849>> accessed 10 December 2019.

¹⁵ <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2591&context=ilj> page 1017.

¹⁶ Specific Constitutional principles under Article 4 (liberty) and 5 (equality) of the Declaration of the Rights of Man and the Citizen of 1789.

¹⁷ Act no 2010 1192 Section 1: Constitutional council in *S.A.S. v France* page 11.

¹⁸ In the interviews conducted, a significant number of women who wear a face veil showed that it was the result of an autonomous choice; A Moors, 'Face Veiling in The Netherlands: Public Debates and Women's Narratives.' (2014) Cambridge: Cambridge University Press. In E. Brems (Ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge Studies in Law and Society).

With such a sweeping ban, there lies a deeper discriminatory intention that drives more towards subjugation than a solution. This is even more dangerous where violations of religious beliefs are considered lawful. In their report, the Council did not see that the ban contradicts the constitutional principle which states: 'No one shall be harassed on account of his opinions and beliefs, even religious, on condition that their manifestation does not disturb public order as determined by law'.¹⁹ The danger here is that the Niqab is considered a hindrance to the maintenance of public order which supposedly makes the ban necessary. The discriminatory aims and realities of the criminal nature that the ban possesses are glossed over in the name of such 'legitimate purposes'.

However, case law does not find gender equality to serve a legitimate purpose. The European Court of Human Rights in *S.A.S. v France* rejected the State's gender equality argument by stating that a State Party cannot invoke gender equality to ban a practice that is defended by women.²⁰ This is seemingly against the very notion of gender equality and does not equate to a valid limitation of the freedom of religion through any of the requirements.²¹ Despite this, the State has still attempted to put forth a questionable argument under the second aim of the ban; that there are apparent rights of the society which are being inflicted by the public wearing of the full-face veil.

The French State has alleged, on numerous occasions, that the notion of living together which calls for 'the observance of the minimum requirements of life in society', justifies a limitation of Article 9 (1) and Article 18 (1) due to the competing rights and freedoms of others.²² These competing rights have been claimed by the State as the right to interact with any individual and the right to not be disturbed by others wearing full-face veils.²³ France contends that living together in an open society, underpinned by the above-competing rights, is regarded as 'touching upon several rights' such as the right to respect for private life (Article 8 ECHR/ 17 ICCPR) and the right not to be discriminated against (Article 14 ECHR/ 26 ICCPR).²⁴ Assuming that this could be considered a legitimate objective under Articles 9 (2) and 18 (3), these competing rights would be valid only where they fulfil the requirement of being a justified limitation.²⁵

Firstly, although implied in the very general concept of living together, the rights to 'basic interaction' or 'non-disturbance' do not fall directly under any of the fundamental rights and freedoms within the ECHR or the ICCPR. These rights, which are speculative in nature, are rooted loosely in the concept of 'Secularism' and are far from affecting individuals concealing their faces in public spaces.

Further, under Article 36 of the Siracusa principles, where a conflict between a fundamental Covenant right and an unrecognised right exists, recognition is always given to the Covenant which seeks to protect the most fundamental rights and freedoms.²⁶ This directly means that the interference of these rights is in no way valid within the fundamental right to freedom of religion, especially under its internationally non-derogable nature.

Secondly, contextually speaking, what essentially is a right to interaction? Or a right to not be disturbed? In the *S.A.S. v France* judgment, Judges Nussberger and Jaderblom correctly asserted that; in line with the supposed right to interaction, there is no right to not be shocked or provoked by the different models of religious identity, even those that are very distant from the traditional French lifestyle.²⁷ In essence, this means that the Convention not only protects those manifestations that are 'favourably received as

¹⁹ Article 10, 'France: Declaration Of The Right Of Man And The Citizen' (1789) <<https://www.refworld.org/docid/3ae6b52410.html>> .

²⁰ Ibid 15, page 48 para 119.

²¹ Ibid, para 119; requirements under Art 9 (2) and 18 (3).

²² *Yaker v France, Hebbadt v France* ICCPR Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016; 'OHCHR | France: Banning The Niqab Violated Two Muslim Women'S Freedom Of Religion - UN Experts' (*Ohchr.org*, 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23750&LangID=E>>.

²³ Ibid; Rights were claimed by the State in the case of *Yaker v France* 'Consideration of the merits' page 11 para 8.10.

²⁴ Article 8 ECHR, Article 17 ICCPR; Article 14 ECHR, Article 26 ICCPR.

²⁵ Ibid 5.

²⁶ Article 36 under section B. Interpretative Principles Relating to Specific Limitation Clauses. 'The Siracusa Principles on The Limitation and Derogation Provisions in The International Covenant on Civil and Political Rights' (1984) <<https://www.refworld.org/docid/4672bc122.html>> .

²⁷ Ibid 15 Page 62 para 7.

inoffensive but also those that offend, shock or disturb'. The same is true for dress codes demonstrating apparent radical opinions.²⁸ Hence, for France to achieve a true definition of an 'open society', it must accept that pluralism, tolerance, and broadmindedness are all facets of such a democratic and secular state.²⁹

Concerning the State's link to the right to private life, it can hardly be argued that an individual has a right to enter into contact with others in public places, against their will.³⁰ Otherwise, such a right would have to be accompanied by a corresponding obligation and this would be incompatible with the spirit of the Convention. Again, the dissenting judges contended that while communication is admittedly essential for life in society, the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places. Virtually, the right to be an outsider.³¹ Although the majority court did not agree with the differing views presented above, I find only the dissenting judges' arguments to be of substance in the decision. The majority upheld the ban to be non-discriminatory under limited arguments underpinned by the margin of appreciation given to France.³² It must be noted here that in the European Court of Human Rights, a feeling of danger can only serve as a legitimate ground for the restriction of human rights if there is an objective foundation for such a feeling. Thus, a religious practice cannot be prohibited merely on account that a part of the population finds it offensive or even alarming.³³

Moreover, the second aim asserted by the State raises serious proportionality issues. Article 2 (II) of the Act broadly exempts clothing that is worn for health reasons, on professional grounds, or that is part of sporting, artistic or traditional festivities or events, including religious processions, or clothing that is authorized by legislative or regulatory provisions.³⁴ The Human Rights Council rightly contended in *Yaker v France* that the State failed to justify why such competing rights would be 'unfairly obstructed by those wearing the Niqab as a full-face veil, but not by those covering their face in public through the numerous other forms of face veil exempted by the Act'.³⁵ An individual covering their face with a balaclava has the same effect of concealment as a woman covering her face with a Niqab; then how is one accepted as an exception but the other becomes a disturbance that needs to be permanently removed in public? There are no essential or core rights of a democratic society being upheld in this instance and this aim is not necessary nor proportionate within Article 18 (3). What is surprising is that the State knew this reality before the Act was passed. Even despite the National Advisory Commission on Human Rights advice to the State that it does not have the capacity to determine or limit, whether or not a given matter falls within the realm of religion; the French National Assembly paid no heed to this and stated it was necessary for the State, 'to release women from the subservience of the full face veil'.³⁶ At the same time, the State continues to claim that 'the general prohibition is not based on a religious connotation of clothes'.³⁷ The unjustified and uninformed unproportionate aims of the ban pursued by the State have exceeded their margin of appreciation. It is clear that *'the legislative history of the law demonstrates that the intent was to regulate the burqa and niqab, which were specifically identified as the target of the ban'*.³⁸

²⁸ Ibid.

²⁹ *Authority of Mouvement raélien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012, and *Stoll v. Switzerland* [GC], no. 69698/01, § 101, ECHR 2007-V in which this principle of democracy was affirmed. .

³⁰ Ibid 30, para 8.

³¹ Ibid 15, page 63 para 8.

³² Ibid 28 Para 144-159 The majority asserted that the notion of living together can be pursued as a necessary aim to achieve a democratic society and justify a restriction to the right to freedom of religion. .

³³ *Vajnai v. Hungary*, 2008 Eur. Ct. H.R., para. 57, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87404>. .

³⁴ Article 2 (II) Act No 2010-1192.

³⁵ Ibid 28 page 12 para 8.10.

³⁶ Ibid 15 Commission nationale consultative des droits de l'homme – CNCD. page 5; Resolution of the National Assembly 'on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices' page 7 para 24. .

³⁷ Ibid 28; *State party's response* page 9 para 7.9.

³⁸ Written Comments of the Open Society Justice Initiative, *S.A.S. v. France*, App. No. 43835/11, (Eur. Ct. H.R. filed May 7, 2012), available at <http://www.liberty-human-rights.org.uk/about/legal/interventions/s.a.s.-vfrance-european-court-of-human-rights-2012.pdf>. .

Respectively, the last aim of the ban centres on 'Public safety'. It is explicitly mentioned in Article 9(2) as a legitimate aim that may justify proportionate restrictions of religious freedom.³⁹ The State has misused the claim of upholding public order in trying to justify the full-face veil ban in several cases.⁴⁰ They have contended that 'it must be possible to identify all individuals when necessary, to avert threats to the security of persons... and to combat identity fraud'.⁴¹ Several issues arise here. Firstly, the act is not limited to the contexts the State mentions. The permanency of the ban applying at all times in public and not just 'when necessary' has not been justified. Secondly, the State has failed to demonstrate that the wearing of the face veil has previously amounted to, or amounts to, such a threat to public safety that would validate an absolute prohibition - it being a 'general threat' does not suffice. The HRC highlighted this point in *Yaker* by inquiring to the State why there is no mention of threats as a basis for an objective in the statement of purpose of *Act No. 2010* or in the National Assembly resolution, which preceded the adoption of the Act.⁴²

The so-called lawful interferences under Articles 8 (2) and 9 (2) of the ECHR and 18 (3) ICCPR of the ban have been considered proportional to the legitimate purposes.⁴³ Yet, the existence of previous legislation providing for the uncovering of one's face in public spaces questions the necessity of *Act no 2010*.⁴⁴ In the previous law, public spaces providing for uncovering one's face for specific purposes or at specific times, such as security checks and identity checks, or in specific locations, such as schools and hospitals were required.⁴⁵ Where such law was already present, the State failed to explain in which ways this was not adequate and why an absolute ban had to be introduced. Proportionality wise, the dissenting committee members in *Yaker v France* claimed that the absolute ban was 'necessary due to the several terrorist attacks since the S.A.S. judgment', so the need to quickly identify 'suspects' who travel in Niqabs was now essential.⁴⁶ The State upheld this argument. The fact that an individual wearing a Niqab may be automatically deemed a terrorist suspect till her face is revealed is a form of Islamophobia, effectively terrorizing a piece of clothing.⁴⁷ The legitimate purpose of the ban begins to heavily conflict here. Above, the gender equality aim is said to be protecting Muslim women from being oppressed by their Niqab, yet here the public order aim is protecting everyone else from a Niqab-wearing Muslim woman.⁴⁸ However, when we focus on the Niqab-wearing Muslim woman we realise that this ban obliges her, if she does not wish to risk a criminal penalty, to refrain from wearing the full-face veil in public, while for her doing so is a religious duty. The only way for her to wear the veil is to avoid moving about in public. Consequently, this is an infringement of her right to respect for her private life and expression where she is now expressly prohibited from dressing as she chooses in public.⁴⁹ In turn, this then violates her right to movement to go into public and associate with others.⁵⁰

Such laws run counter to the intended goals of an 'open society' by further marginalising an already subjugated minority. The HRC in *Yaker* agreed with this, contending that more respectful and dignifying measures could have easily been taken to fulfil the public order aim; such as education, awareness-raising against the negative implications of the veil, and enacting a limited ban enforced through appropriate non-criminal sanctions in specific social contexts.⁵¹ However, the reality is that the absoluteness of the ban is in force. With this unqualified nature, the ban is wholly counterproductive

³⁹ Art 9 (2) ECHR.

⁴⁰ Take *Yaker* and *Hebbadt v France* and *SAS v France* for the most relevant examples.

⁴¹ *Yaker v France* Issues and proceedings before the Committee para 8.7.

⁴² Ibid, National Assembly Resolution of 11 May 2010.

⁴³ Article 8 (2) ECHR; Ibid 5 and 10.

⁴⁴ As contended by concurring Committee members Ilze Brands Kehris and Sarah Cleveland in *Yaker v France* page 16'.

⁴⁵ Ibid.

⁴⁶ Dissent of Judges Manuel and Santo Paos in *Yaker v France* Page 20 Annexe IV, para 12. In the SAS judgment, the majority court had rejected the State's public safety argument. .

⁴⁷ Ibid 18; page 517.

⁴⁸ *Leyla Sahin v Turkey* (2004) ECHR 299 (Fourth Section), para 101; see also *Leyla Sahin v Turkey* (2005) ECHR 819, para 108.

⁴⁹ Article 8 ECHR, Article 17 ICCPR; right to respect of private life, Article 10 ECHR, Article 19 (2) ICCPR right to freedom of expression.

⁵⁰ Article 11 ECHR, Article 21 ICCPR; freedom of assembly and association, Article 2 of *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 12 ICCPR; freedom of movement.

⁵¹ Ibid 28 Joint opinion of Committee members Ilze Brands Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany (concurring) page 15 para 3.

from the perspective of the targeted Muslim women and the aims it stated by restricting women's rights instead of furthering them and reducing social interaction.⁵²

The Committee in *Yaker* held that the ban was disproportionate and underlined that it 'confined women to their homes, impeding their access to public services... and developed a negative stereotype through criminalizing an innocent form of lawful expression'.⁵³ *Brems* furthers this and rightly contends that at least under the previous legislation, women wearing a face veil were interacting in numerous ordinary ways with society at large. It became evident from her findings that since the ban, this group of women's social interactions has decreased. They are afraid of an encounter with the police as well as the harassment and aggression by strangers.⁵⁴ Hence, instead of an environment of open and increased social interaction, the effect of the ban on this group is a 'deterioration of their social life, their interactions with society at large, and their mobility'.⁵⁵ In turn, Article 14 of the ECHR is severely compromised.⁵⁶

This violation is increased by the criminal sanctions placed upon the ban. Article 3 of the Act underlines the criminal sanction; 'Failure to comply with the prohibition outlined in Article 1 shall be punishable by the fine envisaged for offences of the second category'.⁵⁷ Instantly, this approach treats a face-veiled woman more as a perpetrator of a serious offence rather than a French citizen or victim of abuse who has been forced to wear the Niqab. The argument of the ban protecting women who are being oppressed to wear the veil becomes even more doubtful. This is due to the fact that one year after the ban was implemented, the French Ministry of Interior reported that 299 women had received a fine or warning for wearing the full-face veil, yet there was no mention of any application to men - where the fine is for the protection of those women forced to wear the veil, there is no evidence that such warnings or fines are used to help women who might be victims of abuse.⁵⁸ Hence, the idea of protecting women against the imposition of a face veil cannot justify a face-covering ban under Article 9 or 18.⁵⁹

Lastly, the principle of legality under customary IHRL must be discussed briefly. The ECtHR held in the leading *The Sunday Times v United Kingdom* case that two requirements flow from the expression 'prescribed by law'.⁶⁰ First, 'the law must be adequately accessible'; and second, 'a norm cannot be regarded as "law"'. It is evident that the ban under *Act no 2010* is by no means necessary nor reasonable by criminalising a face veil, neither through its legitimate purposes or its proportionality. The ECtHR recognizes that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory'.⁶¹ Where this ban has had repressive rather than inclusive measures, ostracizing a group in society, it can be rebutted to be 'prescribed by law'.⁶²

It seems the ban is achieving exactly the opposite of what it intended to achieve. The Committee in *Yaker* noted that fewer than 2,000 women wear the full-face veil in France and that the vast majority of checks under the Act have been performed on women wearing the full-face veil.⁶³ This, along with the evidence presented in this section highlights that the French legislators were not concerned with the impact on women who wear a face veil, but instead with the effect on people who are confronted with women wearing the face veil. People for whom the sight of a face veil is an affront to women's dignity, who do not want to interact with a woman wearing a face veil in shops or on the street, and who feel unsafe when they come across a face veil because they associate it with terrorism and fundamentalist Islam; it is those people whom the ban seeks to protect. With such inherent violations of the rights

⁵² Ibid 18, page 550.

⁵³ HRC in *Yaker* page 13 para 8.16/7; again violations of articles 11 and 12 ECHR come into question. .

⁵⁴ Ibid 18; Such fears have become reality- for recounts on the abuse Niqab wearing Muslim women have faced see pages 524 and 540. .

⁵⁵ Ibid 18; page 540.

⁵⁶ Article 14 ECHR; prohibition from discrimination (esp. On the basis of religion and sex).

⁵⁷ Ibid 3 Article 3.

⁵⁸ *The Sunday Times v United Kingdom* ECHR April 26, 1979.

⁵⁹ Ibid 18; page 545.

⁶⁰ Ibid 62; para 47.

⁶¹ *D.H. v the Czech Republic*, App. No. 57325/00, 2007-IV Eur. Ct. H.R., para. 175, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256> ECtHR. .

⁶² Ibid 18; page 541.

⁶³ Ibid 28 page 10 para 8.2.

mentioned, specifically Articles 9 and 18 in question, it was not about the visibility of faces in general but specifically the Islamic face veil; 'this is a case where the "indirect" discriminatory treatment comes very close to direct discrimination'.⁶⁴

Section Three: How such discrimination can amount to persecution

It has been proved that *Act no 2010* does not simply qualify as a legitimate distinction under IHRL but amounts to indirect discrimination. This section will demonstrate how such discrimination can enter into the realm of persecution under International Refugee Law. There is evidence of direct discrimination as mentioned above but this will not be discussed in the scope of this paper.⁶⁵

Firstly, it is important to identify what persecution is on the European and International level, respectively relating this to religion-based refugee claims. Particularly relevant to the discriminated group discussed, the 1951 Refugee Convention states that the term 'refugee' shall apply to any person who: 'owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion... is unwilling to avail himself of the protection of that country'.⁶⁶ Under IHRL, specifically in the 1951 Convention, the concept of persecution is not defined.⁶⁷ The UNHCR has stated that the core concept of persecution was deliberately not defined, suggesting that the drafters intended it to be interpreted flexibly so as to encompass the changing forms of persecution - it encompasses human rights abuses or serious harm but not always within a repetitive element. From Article 33 of the 1951 Convention⁶⁸, it can be inferred that a threat to life or physical freedom constitutes persecution, as would other serious violations of basic human rights. 'Serious violations' and 'basic human rights' are neither defined nor identified under IHRL.⁶⁹ IHRL does not help greatly in determining persecution and there is consequently much difficulty with establishing a violation that amounts to persecution on the basis of religion under International law. However, it is understood that any violation of an absolute right would constitute persecution, Article 18 ICCPR being an absolute right.⁷⁰ Also, the freedom of religion exercised by Niqab wearing Muslim Women enters the scope of the internationally 'protected interests' of Article 1A (2) of the Convention. In *Kassatkine v Canada*, the Federal Court stated that 'a law which requires a minority of citizens to breach the principles of their religion is patently persecutory under Article 1 A (2)'.⁷¹ It must be noted that the threshold of persecution under Article 1A (2) of the Convention is very difficult to attain, and not every violation of the right to manifest one's religion or belief will be sufficient to warrant recognition of refugee status.⁷² Yet, discrimination can constitute persecution if there has been a persistent pattern of it which in itself constitutes a: 'severe violation of the prohibition of non-discrimination'⁷³, by seriously restricting the applicant's enjoyment of other human rights - such as the right to practise his or her religion'.⁷⁴ This is known as persecution on 'cumulative grounds' and is the most relevant form of persecution that can be proven in this instance. Being compelled to forsake or conceal one's religious belief, identity, or way of life where this is

⁶⁴ Ibid 15; Final Observations Discrimination on the basis of religion and sex. .

⁶⁵ Ibid.

⁶⁶ Article 1A (2), UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> .

⁶⁷ Ibid.

⁶⁸ 'Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees' (2011) HCR/1P/4/ENG/REV. 3., para 51. .

⁶⁹ John Tobin, 'Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution Within Refugee Law' (2012) 44 *Journal of International Law and Politics* 447, 484. .

⁷⁰ 'UNHCR Statement On Religious Persecution And The Interpretation Of Article 9(1) Of The EU Qualification Directive' (2011) C-71/11 & C-99/11 <<https://www.refworld.org/docid/4dfb7a082.html>> accessed 10 December 2019; page 8 para 4.12; Absolute rights are those that can't be restricted or derogated from in times of emergency. .

⁷¹ *Kassatkine v Canada* (1996) 119 FTR 127.

⁷² Article 1A (2) Refugee Convention, UNHCR Handbook para 51; *Fosu v Canada (Minister of Employment & Immigration)* [1994] 90 FTR 182 para 5; *Iripuge v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14764 FC para 44,46,50-51 and 55. .

⁷³ Article 7 ICCPR; prohibition of discrimination; 'Guidelines On International Protection: Religion-Based Refugee Claims Under Article 1A(2) Of The 1951 Convention And/Or The 1967 Protocol Relating To The Status Of Refugees HCR/GIP/04/0628 April 2004' (2004) 16 *International Journal of Refugee Law*. .

⁷⁴ Ibid 73; paras 53 and 55. .

instigated by the State may itself be a pattern of measures that cumulatively amount to persecution.⁷⁵ The collective forms of ill and degrading treatment under *Act no 2010* can amount to persecution from seriously violating several human rights of full-face veiled Muslim women, and this is specifically true for those rights that are not non-derogable under the ECHR and ICCPR.⁷⁶

In the European Union, member states have agreed on a human rights approach to defining persecution with the adoption of the Qualification Directive (QD).⁷⁷ The wording of Article 9 of the QD leads to a similar interpretation as Article 33 ICCPR above. Article 9 (1) states that acts of persecution must be sufficiently serious to serve as a severe violation of basic human rights or (2) *be an accumulation of various measures... which are as severe*.⁷⁸ It expressly accepts persecution on cumulative grounds and further lists that acts of persecution can take the form of *legal, administrative, police, and/or judicial measures which are in themselves discriminatory or implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory*.⁷⁹ The blanket ban satisfies the form of legal persecution and disproportionate prosecution through the discriminatory effects of its legal measures and imbalanced criminal sanctions.

Article 4 (3) (c) of the QD also provides other provisions that are relevant in determining whether an act amounts to persecution; *'the individual position and personal circumstances of the applicant'* are to be taken into account.⁸⁰ A significant factor within this is the individual and personal practice of the religion when determining the seriousness of a violation. The 'core area' of an individual's right to freedom of religion cannot be determined objectively but is self-determined and context specific. Wearing a full-face veil for women is not central to the Islamic religion but is a significant part of Islam **for** the individual women who wear it. This could therefore still constitute persecution on the basis of her individual belief being stripped from her.⁸¹ The UNHCR further states that where a prohibited or punishable behaviour forms part of an applicant's religion, it's likely a well-founded fear of persecution can be confirmed.⁸²

In detail, persecution can be reached through the violation of Articles 9 and 18 from the ban not being necessary under Articles 18 (3) and 9 (2) to protect public order or the rights of others living in France. As a non-derogable right, any threat to Article 18 is presumptively within the ambit of a risk of 'being persecuted' since no justification for the breach is acceptable. Second, the flexibility within the limitations of the right does not mean that the French government can *carte blanche* violate rights allegedly in the name of 'broader interests'.⁸³ The broader interests under the baseless name of 'competing rights' as outlined in section 2 have been severely violating the fundamental rights to privacy, freedom of expression, movement, and assembly of Niqab-wearing Muslim Women.⁸⁴ Essentially rendering a woman confined to her own home because she will be prosecuted if she walks outside, strips her of the basic rights of a citizen's freedom within a State. The applicant in *SAS v France* stated *'...as a result of the implementation of Loi no. 2010- 1192 I now live under the threat of both State prosecution and public persecution... I am now vilified and attacked on the streets of the Republic I live, effectively reduced to house arrest, virtually ostracized from public life and marginalized'*.⁸⁵ If this does not highlight the clear infringements of the basic rights above then the violation of each clause in Article 18 (1) ICCPR will magnify them; *'This right shall include freedom to... either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance'*.⁸⁶ This

⁷⁵ J. M. Lehmann, 'Persecution, Concealment And The Limits Of A Human Rights Approach In (European) Asylum Law - The Case Of Germany V Y And Z In The Court Of Justice Of The European Union' (2014) 26 International Journal of Refugee Law.

⁷⁶ Ibid, para 4.15; rights such as those mentioned in section 2 see *ibid* 56 and 57.

⁷⁷ Council Directive 2004/83/EC Of 29 April 2004 On Minimum Standards For The Qualification And Status Of Third Country Nationals Or Stateless Persons As Refugees Or As Persons Who Otherwise Need International Protection And The Content Of The Protection Granted' (2004) <<https://www.refworld.org/docid/4908758d2.html>> .

⁷⁸ Article 9 (1) (a) and (b) Chapter 3 of the Qualification Directive, Directive 2004/83/EC of 29 April 2004.

⁷⁹ Ibid art 9 (2) (a) (b) (c).

⁸⁰ Ibid 78 para 4.16.

⁸¹ Ibid 78 para 4.2.7.

⁸² Ibid 78 para 4.3.2.

⁸³ *Liu v MIMA* 2001 FCA 257 Aust.Fed.Ct.

⁸⁴ Ibid 53 and 53.

⁸⁵ Ibid 18 Page 524.

⁸⁶ Ibid 4.

underlines that the rights to freedom of movement, assembly, and expression are enshrined within the manifestation of religion, yet still ignored and further derogated by the State. This derogation is furthered by the Niqab being the only form of full-face veil which has no exceptions under the *Act*. The State has an intention to discriminate against Muslim women by essentially erasing the observance of a Niqab in the French Republic. This is a clear form of degrading treatment under the principles of prohibition of torture.

In *ex parte Khan*, the court found that the claim of two Pakistani men who were committed Christian preachers, who had consequently incurred the displeasure of Muslim employers and physical attacks from Muslim locals, did not amount to persecution on the basis of religion as they did not have a well-founded fear.⁸⁷ The judges held that the two men could 'avoid the risk of persecution' by finding internal protection and moving to another region in Pakistan.⁸⁸ What the court failed to see here is that this position is surely at odds with a central purpose of Refugee law, namely to make it possible for persons within the ambit of a protected interest (religion) to avoid the 'prisoner's dilemma' of either renouncing their identity or facing persecution.⁸⁹ In the same way, France has forced such a dilemma upon Muslim women. The fact that a Muslim woman has no other option but to renounce a fundamental characteristic of her character to 'avoid the risk of persecution' or wear it and face abuse from society or be confined to her home, does not equate to protection. Moreover, the court in *Re Woudneh* held: 'the mere fact of the necessity to conceal your faith would amount to support for the proposition that the applicant had a well-founded fear of persecution on religious grounds'.⁹⁰ To further prove that the ban equates to persecution, we apply the 'reasonable test' as laid out in *LSLS v MIMA*.⁹¹ Within this, it was only reasonable for an applicant to avoid the risk of persecution where the concealment of their faith would not require them to retreat from the *physically identifying features* of the group to which they belonged.⁹² Here, the ban is objectively *requiring* Muslim women to remove their greatest fundamental identity with the threat of being prosecuted if not: this fully establishes an objective well-founded fear.

Conclusion

It has been made clear that the ban is infringing on the most fundamental elements of Niqab-wearing Muslim women's identity, marginalising them to the confinement of their own home. Under the claims of gender equality, protection of others in society, and public order, the State has been able to carefully restrict and criminalise the manifestation of the freedom of religion exercised by Muslim women. Evidentially, through discussions under the Refugee Convention and the QD, it has been argued such forms of degrading treatment prove that this law is not simply an act of legitimate distinction but a specific target to the derogation of the freedom of religion exercised by Muslim women.

It falls within the powers of the State to provide a secure environment in which individuals can freely live together in their diversity. This is a pillar of a democratic and secular republic like France. The ban profusely vows to better the view of 'living together', but it seems that it has taken undemocratic and sectarian steps to achieve its goal of 'living without the disturbing sight of the otherness of the minority'.⁹³

To conclude, this severe subjugation and ill-treatment of an innocent group are painfully encapsulated by the applicant in *SAS v France*; '*...criminalisation, or rather the political scaremongering that preceded it, has incited the public to openly abuse and attack me whenever I drive wearing my veil. Pedestrians and other drivers routinely now spit on my car and shout sexual obscenities and religious bigotry. I now feel like a prisoner in my own Republic, as I no longer feel able to leave my house, unless it is essential.*

⁸⁷ *Ex parte Khan* Eng. Dec. No. CO/3988/99 (Eng. QBD) 2000.

⁸⁸ *Ibid* para 67.

⁸⁹ Rodger PG Haines, James C Hathaway, and Michelle Foster, 'Claims to Refugee Status Based On Voluntary But Protected Actions: Discussion Paper No. 1 Advanced Refugee Law Workshop International Association Of Refugee Law Judges Auckland, New Zealand, October 2002' (2002) 15 *International Journal of Refugee Law*. page 434.

⁹⁰ *Re Woudneh and MILGEA* Dec No G86 of 1988, Australian Federal Court. .

⁹¹ *LSLS V MIMA* 2000 FCA 211 Australian Federal Court.

⁹² *Ibid* para 59.

⁹³ Eva Brems, 'The European Court of Human Rights and Face Veil Bans' (*E-International Relations*, 2020) <<https://www.e-ir.info/2018/02/21/the-european-court-of-human-rights-and-face-veil-bans/>> accessed 12 December 2019. .

I leave the house less frequently as a result. I wear my veil with even less frequency when out in public as a result. Indeed, I also feel immense guilt that I am forced to no longer remain faithful to my core religious values.⁹⁴

With the sorrowful reality that veiled Muslim women have been reduced to, it is clear that the French law restricting the religious practice of the Islamic full-face veil amounts to persecution on cumulative grounds.

Eeman Talha

Eeman Talha has completed an LL.B (Honours) from the University of Aberdeen and LL.M (Distinction) specialising in Human Rights Law from Queen Mary University of London. Her areas of focus are international refugee law, international human rights law and international humanitarian law. She completed an internship with AMERA International, where she worked to secure better protection of refugee rights by reforming the legal resources for legal aid providers and refugees, globally. Eeman is currently a researcher at Restless Beings, an international human rights organisation, where she monitors genocidal regimes and xenophobic landscapes, particularly within South Asia. Her LL.M thesis focused on exploring the State-led persecution of Muslims within India and Indian occupied Jammu Kashmir. She is working at Liberty Human Rights, an advocacy group promoting human rights and protecting civil liberties within the UK.

⁹⁴ Witness Statement of the Applicant, Annex 1 to Final Observations, 1–2, S.A.S. v. France, Eur. Ct. H.R. (App. No. 43835/11).

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