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Introductory Note

The Aberystwyth University Student Law and Criminology Journal (AUSLCJ) is proud to present its first volume, showcasing articles written and reviewed primarily by students. Our journal provides students with the unique opportunity to participate in academic discourse and to contribute to the knowledge base in both Law and Criminology. AUSLCJ also aims to promote the use of Welsh language and embed Welsh language into the academic life of the University and beyond.

The Journal is the brainchild of Dr Ola Olusanya, a lecturer at Aberystwyth University, however it is run primarily by students. It is open to all students of Law and Criminology, allowing for the cross-fertilisation of ideas between not only undergraduate and postgraduate students but also the disciplines of both Law and Criminology. This first edition includes a wide breadth of subjects, incorporating both long and short essays, dissertations and book reviews and is a clear testament to Aberystwyth University and its students.

In putting this inaugural issue together we wanted to ensure that we published the best possible selection of articles. Common themes do emerge in a number of articles. For example, human rights issues are discussed in Ilonka Boltze's article entitled: '*The Human Right to Food as a Key Element of a Right to an Adequate standard of Living*' and in Hannaley Palmer's article entitled: '*Rights and Responsibilities towards Children*'. Whilst the two Criminology pieces entitled: '*Stalking or what may explain this 'one-sided craving for contact*' and '*A short review and Analysis of the Article: Smart, Carol (1979) "The New*

Female Criminal: Reality or Myth”, written by Violeta Kunovska and Linda Thompson respectively, increase the breadth of perspectives on issues of contemporary concerns. The three book reviews widen the range of topics and approaches even further, allowing the reader to grasp the main ideas, theories, key themes and arguments in each book with thought-provoking ease.

On behalf of the Editorial board, we would like to thank the many people who helped us from the early stages of establishing this journal to the publication of this very issue. We would like to give special thanks to Fay Hollick, Mary-Jane Horgan and Dr Ola Olusanya for their continued support, encouragement and ideas.

We sincerely hope you enjoy the inaugural issue of the Aberystwyth University Student Law and Criminology Journal (AUSLCJ) and that you are inspired to write for the forthcoming second issue.

Ern Nian Yaw, Rachel Williams, and Gesa Bukowski

The Editors-in-Chief

Dedication – Ern Nian Yaw

It is with deep sorrow that we announce the publication of our very first edition following the tragic news of Ern Nian's passing. Ern Nian was one of the Journal's Editors-in-Chief and contributed greatly to its formation and publication. Ern Nian first studied at Aberystwyth in 2012 as he completed his last year of study towards an LLB. He returned in 2013 as a master's student, enrolling on the Human Rights and Humanitarian Law Masters programme.

Ern Nian's passion for human rights and international law was clear to all who met him, and is available for you to see also in his paper *The Use of Nuclear Weapons: An International Humanitarian Law Perspective*, available to read on page 10 His passion was not however without direction and Ern Nian was very much a focused individual. In June this year he returned to his native Malaysia where he planned to finish his dissertation and to take up a placement with the United Nations Human Rights Commission. His commitment and ability were evident even on the day of his death when he managed to secure the release of forty refugees from a detention centre in Malacca. In the words of Professor John Williams, Head of the Department of Law and Criminology at Aberystwyth University, "*Ern was destined to be a great campaigner for human rights. He would have made a difference – he would have worked to shape a fairer and more just society.*"

He brought that same drive and ability to the Journal and was constantly striving to help ensure this first edition was as strong as possible. Ern Nian's contribution to this first

edition was a great one, playing a key role in the early stages of planning, ensuring we kept on target and being very thorough when undertaking his editorial duties. For all of this I and all within the Journal would like to state on record our gratitude for his work.

It is mainly through working together to produce this first edition that I have come to know Ern Nian. When I first met Ern Nian it was immediately evident that he was not only a very capable individual, but also a very happy and warm one. He took a genuine interest in those around him and was also more than happy to help out. Beyond this bubbly and caring exterior however lurked a steely determination which became evident in his activities in the Journal and beyond. His work ethic and organisational ability were outstanding.

For all of these reasons and more we are extremely proud to announce that this first edition is to be published in Ern Nian's honour. It is our hope that its content can inspire others in the way he has inspired us.

Andy Hall

Managing Editor

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The Use of Nuclear Weapons: An International Humanitarian Law Perspective

Ern Nian Yaw

Introduction

In the international legal system, the use of nuclear weapons has always been subject to intense debate. This is because the issue is of crucial importance in relation to humanity.

Whilst politics and morality are closely related in any attempt to analyse the use of nuclear weapons, it is not the concern of this article to do so. That is to say questions of whether or not the possession of nuclear weapons is politically or economically wise, or whether or not the use of nuclear weapons are morally justifiable, are not at issue here.

Instead, this article will give particular focus on the use of nuclear weapons in international humanitarian law, more commonly termed the law of armed conflict, with reference and discussion from the perspective of international law as a whole and drawing particular attention to several important judicial decisions.

Nuclear Weapons

Before attempting to analyse the use of nuclear weapons in the context of the law of armed conflict, it is essential to begin by asking: What is a nuclear weapon?

Indeed, the term "nuclear weapon" does not sound Greek. In simple English, a nuclear weapon is a weapon of mass destruction, empowered by nuclear reaction - either from nuclear fission or nuclear fusion - which consequently produces a destructive force. The different types of nuclear weapons include fission bombs, fusion bombs, hydrogen bombs and atomic bombs.¹

To date, it is recorded that two nuclear weapons have been used in the course of warfare, both times by the United States towards the end of World War II. On 6th August 1945, the first atomic bomb (code-named "Little Boy") was dropped on Hiroshima. It was followed three days later by a second bomb (code-named "Fat Man") being dropped on Nagasaki which resulted in the deaths of approximately 20,000 people.² Such a catastrophic effect of nuclear weapons raises important questions about their legality, and in particular about the weapons' compatibility with international humanitarian law.

Are Nuclear Weapons prohibited?

No. To avoid confusion, it is worth pointing out that the use of nuclear weapons as such is not banned by any international treaty in the context of international law.

¹ For more information on the nuclear fission and nuclear fusion, see http://www.bbc.co.uk/schools/gcsebitesize/science/add_aqa_pre_2011/radiation/nuclearfissionrev1.shtml accessed 28 December 2013

² —'1945: US drops atomic bomb on Hiroshima' *BBC News* http://news.bbc.co.uk/onthisday/hi/dates/stories/august/6/newsid_3602000/3602189.stm > accessed

Notably, the International Court of Justice (ICJ) in its advisory opinion on the ***Legality of the Threat of Use of Nuclear Weapons*** opined that "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."³ It is also noted that the ICJ stated unanimously that the international legal system contains no "specific authorisation of the threat or use of nuclear weapons."⁴

In particular, the ICJ replied that it cannot conclude in a definitive statement as to whether the use of nuclear weapons would be lawful, or unlawful, in extreme situations where the survival of a State would be at stake because all States are entitled to the inherent right to self-defence under Article 51 of the Charter of the United Nations.⁵

If one takes an in-depth analysis on the advisory opinion by the ICJ, one would easily realise that the ICJ employed the concept of *non liquet*, meaning that there is no applicable law. Essentially, if one embraces the ***Lotus*** approach which provides that in the absence of explicit prohibition in an aspect under international law, sovereign States are entitled to act in any way they wish.⁶ This would mean that since there is not an explicit prohibition on the use of nuclear weapons, States should be allowed to use such weapons, especially for self-defence. Nevertheless, the fact that the ICJ expressly stated that there is no specific authorisation means that embracing of the Lotus approach is rather too simplistic.

³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 266 <<http://www.icj-cij.org/docket/files/95/7495.pdf>> accessed 3 January 2014

⁴ *ibid*

⁵ (n 3) 263 at [96]

⁶ *The Case of the S.S Lotus (France v Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

Nuclear Weapons from a Humanitarian Perspective

In order to answer to the question put forward by the United Nations General Assembly, the ICJ had to consider the legality of using nuclear weapons with reference to the international humanitarian law, which will be the focus of this article.

As mentioned, international humanitarian law, or the law of war, or law of armed conflict, is a branch of international law which regulates the conduct of armed conflicts. Once again it must be clarified that the law of war does not specifically prohibit the use of nuclear weapons. In spite of this fact, their use in armed conflict is intensively regulated by the general principles of international humanitarian law, in particular by restraining how weapons may be used, as well as outlining the measures which must be taken to limit their impact on civilians and civilian areas.

Principles of International Humanitarian Law

1. Rule prohibiting indiscriminate attack

It is noted that the preamble to the St Petersburg Declaration emphasises that in the course of warfare, the only legitimate object which States should endeavour is to weaken the military forces of the enemy.⁷

⁷ See St. Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles

This is essentially the concept of 'military necessity' noted in the Nuremberg Trials which prohibits the killing of innocent inhabitants for the purpose of revenge, or the satisfaction of a lust to kill.⁸ In other words, international humanitarian law prohibits indiscriminate attacks by emphasising a strict distinction at all times between members of the civilian population and those who take an active participation in hostilities.

According to Article 51(4) of the 1977 Additional Protocol I, it is noted that attacks are considered 'indiscriminate' where they are not directed at military objectives, including any method or means of combat which cannot be directed at a specific military objective.⁹ Obviously, the use of nuclear weapons will always violate international humanitarian law, at least to the extent that it falls under this definition for not being able to discriminate between civilians and combatants.

The bombings of Hiroshima and Nagasaki for instance, carried no military necessity and resulted in no military advantage whatsoever as the two bombs were not targeted at military objectives. In fact, it is recorded that the bombings have resulted in the deaths of approximately 200,000 people, mostly civilians. Moreover, it is argued that those were not

<<http://www.amdro.org.uk/SiteCollectionDocuments/Learning/Nat%20Curr%207%20-%2014/History/Curr%20Links/WW1%20Documents/St.%20Petersburg%20Declaration.pdf>> accessed 10 January 2014

⁸ I Pogany (ed), *Nuclear Weapons and International Law* (Avebury 1987) 5

⁹ Protocol I Additional to the Geneva Conventions (Adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3

the means that brought the Second World War to an end; it was the Soviet declaration of war on Japan that left the Japanese with no choice.

The ICJ pointed out in its advisory opinion that this is a principle aimed at the protection of civilian population. Therefore, it is submitted that “States must never make civilians the object of attack and consequently must never use weapons that are incapable of distinguishing between civilians and military targets.”¹⁰ Judge Bedjaoui considered this rule as *jus cogens*¹¹ and Judge Guillaume¹² pointed out that this rule was absolute.

By equating the use of indiscriminate weapons with a deliberate attack on civilians means that any weapon, including nuclear weapons, if tested and found to be falling foul of this principle, would be declared prohibited without there being a need for State practice or special treaty. As this opinion was given in the context which concerned the legality of the use of nuclear weapons, it is able to conclude that the use of nuclear weapons which are unable to distinguish between civilian population and military objectives would always be prohibited because they conflict with fundamental principles of international humanitarian law. In addition, following the court's logic, the following prohibition against deliberate attacks on civilian population found in Additional Protocol II¹³

¹⁰ (n 3) at [78]

¹¹ Declaration of Judge Bedjaoui, President at [21]

<<http://www.icj-cij.org/docket/files/95/7499.pdf>> accessed 15 January 2014

¹² Separate Opinion of Judge Guillaume at [5]

<<http://www.icj-cij.org/docket/files/95/7509.pdf>> accessed 17 January 2014

¹³ Protocol II Additional to the Geneva Convention (Adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609

automatically means that the use of indiscriminate weapons such as nuclear weapons is also prohibited in non-international armed conflicts to which the Protocol applies.

Nevertheless, the two Protocols appear to have another possibility. It can be argued that the use of nuclear weapons will not always violate international humanitarian law if they can be aimed at a specific military objective. Notably, three judges seem to have come to the conclusion that the use of nuclear weapons is not necessarily indiscriminate in nature if one refers to the accuracy of the delivery system by solely targeting on a specific military objective. On the other hand, it appears that only Judge Higgins attempted to define indiscriminate weapons in her dissenting opinion which reads:

"It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs"¹⁴

Applying this reasoning to the context of nuclear weapons, she went on to say:

"Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in their

¹⁴ Dissenting Opinion of Judge Higgins at [24]
<<http://www.icj-cij.org/docket/files/95/7525.pdf>> accessed 14 January 2014

effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful"¹⁵

I must say that I could not agree more with Judge Higgins. In fact, it is submitted that even if nuclear weapons are used discriminately by targeting at military objectives, there can still be no discriminate effect as a hydrogen nuclear bomb weighing approximately 1,100 kg can even produce an explosive force comparable to detonation of more than 1.2million of TNT. Such amount of energy is enough to devastate an entire city by fire, blast and radiation. As noted in the case of *Shimoda et al. v The State*, the Tokyo District Council pronounced that:

"... It is proper to conclude that the bombings in Hiroshima and Nagasaki were an illegal act of hostilities... as an indiscriminate bombardment of undefended cities. This is so since aerial bombardments with an atomic bomb, even if its target is confined to a military objective, brings about the same result as blind aerial bombardment because of the tremendous destructive power of the bomb."¹⁶

Indeed, the International Committee of the Red Cross also doubted the legality of this new weapon of mass destruction. As pointed out in an appeal launched in the year of 1950:

¹⁵ ibid

¹⁶ Shimoda (1963), Chisai Tokyo, 335 Hanji, pp. 17 *et seq*; trans. in [1964] 8 Japanese Yearbook of International Law 212

“Within the radius affected by the atomic bomb, protection is no longer feasible... with atomic bombs and non-directed missiles, discrimination becomes impossible.”¹⁷

In furtherance of this argument, reference is also made to one of the judges involved in that 1996 Advisory Opinion of 1996, namely Judge Mohammed Bedjaoui. Judge Mohammed in his separate declaration wrote that:

"By its very nature the nuclear weapon, a blind weapon... has a destabilising effect on humanitarian law, the law of discrimination which regulates discernment in the use of weapons."¹⁸

The fact that a nuclear weapon was referred to as ‘blind weapon’ indicates its incapability to achieve a distinction between combatants and civilians. Judge Mohammed went on to say that nuclear weapons are the ultimate evil and its existence constitutes a major challenge to the current international humanitarian law. Certainly, if nuclear weapons are instruments of terror by definition and have posed a serious threat to the law of war, there is no way that their use can be in compliance. In other words, this indicates that the right of the parties in an armed conflict to choose methods or means of warfare is not unlimited.

¹⁷ M Huber, ‘La fin des hostilités et les taches futures de la Croix-Rouge’ [1945] 321 IRRC 657

¹⁸ (n 11) at [20]

In addition, the principle of prohibition against indiscriminate attacks is also supported by Judge Gez Herezegh which stressed that international humanitarian law does not recognise any exception to any of its principle.¹⁹ Hence, the use of nuclear weapons will always violate international humanitarian law, despite the fact that the law of war contains no specific ban.

2. Rule Prohibiting Unnecessary Suffering or Superfluous Injury

As mentioned earlier, the only legitimate object which States should endeavour is to weaken the military forces of enemy. Therefore, it is for this purpose that the preambles of St Petersburg Declaration of 1868 bans the explosive projectiles of less than 400g weight as such objects would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled people or render their death inevitable.²⁰ This is closely related to the first principle, both of which form the most widely discussed rules of the international humanitarian law in the context of the use of nuclear weapons.

In relation to the actual interpretation of the rule, the ICJ in its advisory opinion provides that it is "accordingly prohibited to use weapons causing such harm or uselessly aggravating their suffering..."²¹ Furthermore, Article 23(e) of the Hague Regulations of 1907 expressly prohibits the employment of arms, projectiles or material which is calculated to cause

¹⁹ Declaration of Judge Herczegh at page 275

<<http://www.icj-cij.org/docket/files/95/7501.pdf>> accessed 15 January 2014

²⁰ (n 8) 3

²¹ (n 3) 257 at [78]

unnecessary suffering.²² In this context, it appears that the destructive force, the thermal, blast and radiation effects of nuclear weapons, as well as the wide areas over which they occur, have raised serious questions as to whether such weapons can be directed at a specific military objective without causing unnecessary suffering. This is because even if the weapons are directed at a specific military objective, its radioactive effects would uselessly aggravate the suffering of the survived combatants as well as the civilians within its radius.

In fact, unlike conventional weapons, nuclear weapons release ionising radiation which kills cells, damages organs and leads to cancer and genetic mutation. The extreme heat released by nuclear weapons could even cause people in underground shelters to die from lack of oxygen and carbon monoxide poisoning. As pointed out by the court, nuclear weapons could cause congenital deformities, mental retardation and genetic damage for generations.²³ In other words, this means that people living within the radius of nuclear weapons are left to face two consequences: to die, or to live and suffer the pain of the effects of radiation. Hence judging from this perspective, it is submitted that nuclear weapons would cause suffering because of their long-term effects and thus violate international humanitarian law. In particular, the long-term radiation effects would prevent recovery from otherwise non-lethal injuries as radiation suppresses the body's ability to heal, causing superfluous injury or unnecessary suffering.

²² Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (entered into force 26 January 1910)

²³ (n 3) at [35]

Notably, the most frequently quoted example by the commentators is the ‘Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons’,²⁴ which states *inter alia* that the use of nuclear weapons is a “direct violation of the UN Charter, contrary to the rule of international law and to the laws of humanity (humanitarian law) as well as crime against mankind and civilisation.” It must be emphasised that in the international legal system, resolutions of the UN General Assembly are merely ‘soft law’ which is recommendatory in nature and with no binding force. Equally important, is the fact that resolutions often incorporate, or rely on, existing customary international norms that by definition create legal obligations; herein lies its strength in indicating that the use of nuclear weapons will always violate, among others, the law of armed conflict.

In addition, although the Opinion also made reference to the Hague Declaration of 1899, Article 23(a) of the 1899 and 1907 Hague Regulations and the Geneva Gas Protocol, the ICJ opined that these did not cover nuclear weapons because State practice showed that these treaties covered weapons whose exclusive effect was to poison and asphyxiate. Nevertheless, it is submitted that this is inaccurate because poison-tipped bullets or arrows are included in such prohibition, even though the poison is not the main wounding mechanism. Unfortunately, the ICJ dealt with the prohibition of poison only in the context of treaty law. Had the court considered the prohibition in light of customary international law (namely that poison prevents the possible recovery of wounded soldiers)

²⁴ Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons’ (adopted 24 November 1961) UNGA Res 1653 (XVI)

²⁵ such consideration would certainly carry great relevance in assessing the legality of the use of nuclear weapons in the context of international humanitarian law.

On the facts, only Judge Weeramantry²⁶ and Judge Koroma²⁷ decided in their dissenting opinions that nuclear weapons are prohibited because one of their major effects is poison, which would inevitably cause unnecessary suffering both to the combatants and to the civilian population. As the ICJ did not rule in majority, if one reads in this context one could almost certainly come to the conclusion that, despite the catastrophic effects, the use of nuclear weapons may not always violate the law of armed conflict.

The extent of this principle has always been controversial. In particular, the problem lies in a rather wide interpretation as to what does the term "unnecessary suffering" actually mean. If one takes the meaning of the term in its manifest literal sense where so much would be covered, it would cease to have any practical value.

The principle of unnecessary suffering was discussed by the Conference of Experts which declared that this concept "involved some sort of equation between, on the one hand, the degree of injury, or suffering inflicted (the humanitarian aspect) and on the other, the

²⁵ L Doswald-Beck, 'International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons' 316 IRRC under "The prohibition of poison"

²⁶ Dissenting Opinion of Judge Weeramantry
<<http://www.icj-cij.org/docket/files/95/7521.pdf>> accessed 17 January 2014

²⁷ Dissenting Opinion of Judge Koroma
<<http://www.icj-cij.org/docket/files/95/7523.pdf>> accessed 17 January 2014

degree of necessity underlying the choice of a particular weapon (the military aspect)."²⁸

The determination of such equation, however, is an uphill task. In particular the United States Department of the Air Force noted that the critical factor in relation to the principle of prohibition against unnecessary suffering is "whether the suffering is needless, or disproportionate, to the military advantages secured by the weapon."²⁹ Thus if one adheres to such interpretation, the fact that the use of nuclear weapons could inflict needless suffering on combatants and civilians does not of itself violate such rule under international humanitarian law.

As it is difficult to interpret textually, the interpretation must now turn to the actual state practice. More specifically, it is submitted that state practice has determined that it is *per se* illegal to use of any substance that would unnecessarily inflame or aggravate the wound they cause. This is essentially the approach advocated in the US and UK manuals of military law, which stress that only state practice, can demonstrate what is or is not calculated to cause unnecessary suffering or superfluous injury. This means that for every weapon and method of warfare which includes the use of nuclear weapons, state practice is necessary to weigh military advantage against humanitarian demands. For instance, it is commonly accepted that should there be two means of achieving the same military advantage, the one which would subsequently involve the greater suffering must therefore be rejected.

Applying this in the context of the use of nuclear weapons, this means that whether or not their use would violate international humanitarian law must be assessed by state practice

²⁸ (n 8) 4

²⁹ *ibid*

and be considered on case by case basis. However, this does not automatically mean that the use of nuclear weapons would always violate the law of war.

Having discussed the two most relevant and significant principles, I will now move on to what I would regard as the supplementary principles namely the principle of neutrality, rule of proportionality and protection of environment, all of which are relevant and significant, but are not as widely and critically discussed as the two principles stated above. I will begin with the principle of neutrality.

3. Principle of Neutrality

It is noteworthy that The Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land clearly emphasises that ‘the territory of neutral powers is inviolable’.³⁰ This carries great relevance in the context of the use of nuclear weapons owing to the fact that the effects of a nuclear explosion may well affect neighbouring states that are neutral.

Notably, in Para 88 and 89 of the Advisory Opinion, the ICK opined that in the cases of the principles of humanitarian law applicable in armed conflict, international law leaves no

³⁰ Hague Convention (V) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (entered into force 26 January 1910)

doubt that the principle of neutrality, whatever its content, is applicable to all international armed conflict regardless of the type of weapons might be used.³¹

For instance, suppose there are two belligerent states firing nuclear bombs at each other. Neutral states that are not in the least concerned with the conflict could potentially be irretrievably damaged. Nevertheless, such a principle applies in a hypothetical situation. In other words, not all uses would necessarily affect another neutral state. Hence, it is not possible to reach the conclusion that the use of nuclear weapons will always violate the law of war.

4. Rule of Proportionality

The concept of proportionality, alongside the rule of distinction as discussed above, form the important factors in assessing military necessity.

In general, the concept of proportionality means that any measure taken must be reasonable, necessary and suitable in achieving the aim so as to be proportionate. In the context of international humanitarian law, the concept of proportionality can be assessed in two ways:

1. Has a military objective been targeted?

³¹ (n 3) at [88] and [89]

2. Is the collateral damaged likely to be excessive in relation to the value of target?

Thus the harm caused to the civilian population and any property must be proportionate, and not excessive with regards to the concrete and direct military advantage anticipated by an attack on a military objective.

It is however strange to find that the ICJ in its advisory opinion did not make any specific or direct reference. Nonetheless, several judges such as Judge Higgins, Judge Schwebel and Judge Guillaume did affirm its customary nature. In particular, Judge Higgins took a restrictive approach and held that the damage caused by nuclear weapons was so destructive, to the extent that only in extreme circumstances could the military objective be important enough for the collateral damage not to be excessive. Indeed, by using the word "only in extreme circumstances" it is implied that there are times where the use of nuclear weapons will not be regarded as going against the law of war. In relation to the question as to what are "extreme circumstances," Judge Higgins held that:

"The military advantage must indeed be one related to the very survival state of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of

vast and severe suffering on its own population; and that no other method of eliminating this military target be available."³²

It is only partially correct if one was to say that the use of nuclear weapons will always violate international humanitarian law as its use in a situation where the survival of a state is at stake (as pointed out by Judge Higgins) is in fact proportionate; hence being in line, rather than violating such rule under the law of war.

Judge Schwebel, on the other hand, also acknowledged that although there may be specific cases where the use of nuclear weapons would not violate the rule of proportionality, but in most cases its use would not be in conformity.³³ In spite of this fact, this does not mean that its use will always violate international humanitarian law. Instead, what can be inferred from Judge Schwebel's opinion is that the use of nuclear weapons would mostly, but not always, go against the law of war - at least in relation to the principle of proportionality.

The bombings of Hiroshima and Nagasaki for instance, can be regarded as proportionate towards achieving an objective; to contribute in bringing the World War II to an end.

For instance, in Truman's 1955 Memoirs, he states that "...the atomic bomb probably saved half a million US lives — anticipated casualties in an Allied invasion of Japan planned for

³² (n 14) at [21]

³³ Dissenting Opinion of Vice President Schwebel at [23] and [24]

<<http://www.icj-cij.org/docket/files/95/7515.pdf>> accessed 17 January 2014

November.”³⁴ Stimson subsequently talked of saving one million US casualties, and Churchill of saving one million American, and half that number of British lives.³⁵ Scholars have pointed out various alternatives which could have ended the war just as quickly without an invasion, but these alternatives could have resulted in the deaths of many more Japanese. In this context, it can therefore be submitted that the use of nuclear weapons in such situation may not appear to be violating international humanitarian law.

5. Protection of the Environment

It is also noteworthy that the increasing concern with the protection of the environment has attracted significant international attention in attempting to interpret the rules in the context of the use of nuclear weapons. Importantly, the ICJ in its advisory opinion also found the existence of customary environmental law:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”³⁶

Notably, the study conducted by the International Committee of the Red Cross also pointed out that there is a customary norm that methods of warfare causing ‘widespread long-term

³⁴ Kyoko and M Selden (ed), *The Atomic Bomb: Voices from Hiroshima and Nagasaki* (M.E. Sharpe, 1989) xxx - xxxi

³⁵ *ibid*

³⁶ (n 3) at [29]

and severe' damage to the natural environment is prohibited, and destruction of the environment should not be used as weapon.³⁷ Not surprisingly, the threshold criteria for violation of Article I of the ENMOD Convention are either 'widespread, long-lasting or severe'. The same prohibitions are listed in Articles 35(3) and 55 of Additional Protocol I. Those three criteria were also reflected in the Rome Statute of the International Criminal Court.

In particular, Article 35(3) of Protocol I which states that it is prohibited to employ methods or means of warfare which may be expected or which are intended to cause widespread, long term and severe damage to the natural environment. The ICJ went on to opine that environmental law treaties could not have intended to deprive States of their exercise of their right to self-defence. Nevertheless, "State must take environmental consideration into account when assessing what is necessary and proportionate in the pursuit of legitimate military objective"³⁸ [my emphasis added].

Applying it in the context of the use of nuclear weapons, it indicates that with the obligation to take such consideration being imposed on States as per the word "must", one cannot simply argue that the rule of proportionality is not violated with the basis on the sole fact that the nuclear weapons are only used to target in an area that has little or no human population. In fact, the Court also cited with approval of the General Assembly resolution

³⁷ See 'Customary IHL - Practice Relating to Rule 45. Causing Serious Damage to the Natural Environment' <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule45_sectionb> accessed 18 January 2014

³⁸ (n 3) at [30]

47/37 on the Protection of the Environment in Times of Armed Conflict, stating that it affirms “the general view... destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law”³⁹ Nevertheless, it is only when the use of nuclear weapons are not justified by military necessity and therefore caused massive destruction to the environment would their use be considered as violating the law of war. This means that if there is such military necessity to use nuclear weapons, it would therefore be permissible and that their use will not always violate this rule of international humanitarian law.

Jus ad bellum vs. Jus in bello

As discussed in the previous section, there seem to be situations where the use of nuclear weapons may appear to be proportionate and thus will not always violate the law of war. Indeed, I would like to discuss in this section with reference to “an extreme circumstance of self-defence” as established in paragraph 105, 2E of the Advisory Opinion.⁴⁰ Whilst I am aware that the question focuses the use of such weapon in the context of the law of war (*jus in bello*) it is also important address the relationship between the two where the some judges in the advisory opinion have seemed to suggest that priority should be given to *jus ad bellum*.

³⁹ Protection of the Environment in Times of Armed Conflict (adopted 25 November 1992) UNGA A/RES/47/37
⁴⁰ (n 3) at [105]

Jus ad bellum, Latin for right to war, is a set of criteria which must be assessed before engaging in a war. *Jus in bello* on the other hand, means international humanitarian law which sets out wartime conduct. Judge Fleischhauer in paragraph 2 of his separate opinion first stated that the use of nuclear weapons is the negation of the law of armed conflict.⁴¹ However, he went on to argue that if the use of nuclear weapons is denied as a last option in self-defence, then this would give priority to international humanitarian law over the right to self-defence which, he said, cannot be acceptable because all legal systems allow the right of self-defence. Judge Fleischhauer essentially acknowledges that the use of nuclear weapons will always violate the law of armed conflict. Nonetheless, he is clear that such a violation should be allowed because international humanitarian law should not trump the international law of the right to self-defence. This is a dangerous statement as it is implying that there is no need to assess whether the use of nuclear weapons would violate the law of war as when there is a clash between *jus ad bellum* and *jus in bello*, the former shall prevail.

Fortunately, in paragraph 42 of the Opinion, the ICJ made an important and correct statement:

“...a use of force that is proportionate under the law of self-defence must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which compromise in particular the principles and rules of humanitarian law”.⁴²

⁴¹ Separate Opinion of Judge Fleischhauer at [2]
<<http://www.icj-cij.org/docket/files/95/7513.pdf>> accessed 19 January 2014

⁴² (n 3) at [42]

Indeed, this is a balanced approach as it indicates that in order the use of nuclear weapons to be lawful, not only must the conditions of self-defence such as necessity and proportionality be respected but also the rules of international humanitarian law. It is not one or the other.

Conclusion

Having analysed the conformity of the use of nuclear weapons in the context of international humanitarian law with each of its principles, we should now consider the discussion as a whole.

In summary, it has already been discussed that many of the principles can be viewed from different perspectives, and from these it may be possible to reach a conclusion that is similar to the ICJ in its nuclear weapons advisory opinion in which the use of nuclear weapons would generally but not always be incompatible with the law of armed conflict. In spite of this fact, the use of nuclear weapons cannot be compatible with the rule of distinction. In other words, there is no way in which their use is able to discriminate between combatants and civilian population - even if targeted specifically against a military objective. As such, it is my conclusion that the use of nuclear weapons will always violate international humanitarian law, though not necessarily so in relation to other principles (as discussed above), but at least to the rule of distinction.

Of course, if one decides not to be over legalistic in discussing this topic by including the issue of morality, one may easily come to the conclusion that the use of nuclear weapons will always violate all the principles of the law of war. Nonetheless, as clarified at the very beginning of this essay, it is my aim in attempting to discuss this issue in a strict legal sense. Thus it is only the first principle (rule prohibiting indiscriminate attack) that clearly illustrates the use of nuclear weapons as violating international humanitarian law.

It is noted that State parties are under the obligation stated under Article 36 of Additional Protocol I to ensure that the employment of new weapons, means or methods of warfare complies with the rules of international law, and in particular, to include the rules of international humanitarian law. As such, this has seemed to become a promising way to check the lawfulness of weapons prior to their actual use. The time has come for all States to come together with the involvement of the scientific community to engage in the processes of assessment and review of the legality of the use of nuclear weapons in order for future adoption of an international treaty that concerns its use.

The Syrian Conflict and International Humanitarian Law

Andrew Hall

The current situation in Syria is well documented. There is little doubt that a threshold of sustained violence has been reached and that civil unrest has spiraled into civil war⁴³. This threshold is of critical importance from a legal viewpoint as it signals the commencement of international humanitarian law's (IHL) jurisdiction. As such, obligations and duties are imposed on all parties to the conflict. In spite of this, tragic events with devastating consequences are frequently reported and it is apparent that questions of legality are being ignored.

The history of the conflicting parties is complex and understanding is not easily found. Nevertheless it is clear that, for the main part, the conflict consists of various forces combatting the combined forces of President Assad's Governmental military and other pro-government bodies (both referred to as Government, or Governmental, forces). This portrayal in itself is however far too simplistic. There are two main opposition groups. The group which has received most attention by Western media outlets is the Syrian National Coalition (SNC). The SNC is an attempted merger of various smaller groups and appears far from settled with internal political strife apparent and doubt as to the difference this settlement has made on the front line⁴⁴. The second opposition group is the Kurdish Supreme Council (KSC). The Kurdish leadership has seized control of the region in the north east of the State and it seems to be their intent to maintain this position and resist the

⁴³ As concluded by the International Committee of the Red Cross's *Annual Report*, 2012, page 443

⁴⁴ Updated report on the work of the United Nation's Human Rights Council in their updated report on the work of the *Commission of Inquiry on the situation in the Syrian Arab Republic*, A/HRC/24/46, 16 August 2013, paragraph 16

influence of others in the surrounding regions. Even though the situation is complex, a constant theme remains throughout which appears to be, at least partially, fuelling the conflict; sectarian division.

In relying upon the above summary it is necessary to establish the actions of each party in order to assess their liabilities. It is, sadly, immediately clear that all three groups are reportedly responsible for the commissioning of horrific and often vile acts. Governmental forces have been accredited responsibility for acts of torture, unlawful killing of civilians, failing to distinguish between military and civilian personnel and objectives, attacking numerous hospitals, arbitrary arrests, kidnapping, sexual violence against women, and have also been accused of using chemical weapons. Similarly, the SNC forces are alleged to have perpetrated extrajudicial and quasi-judicial executions apparently for sectarian reasons, arbitrary arrest and illegal detentions, hostage taking, isolated incidents of torture of those in their custody, indiscriminate attacks, operating in civilian areas, attacking a hospital, and other acts. Finally KSC forces have been accused of shooting protestors including children, some arbitrary arrests and abductions, treating prisoners in a cruel and inhumane manner and using children as young as 12 years old as soldiers⁴⁵.

While the above actions are undoubtedly horrendous and immoral, this in itself does not render the actions illegal. In order to establish this it is essential to ascertain which laws are applicable to each party and their actions in the conflict. This is not necessarily a straightforward assessment as the situation in Syria is a non-international conflict. The applicable laws in this scenario are, unfortunately, of a far more limited scope than those of

⁴⁵Ibid, all of the acts listed are identified throughout the report.

an international nature. This a consequence of the law developing in a manner consistent with Rousseau's maxim which stipulates that war is a relationship between State and State rather than man and man⁴⁶. The consequence of this maxim is that it instils a high level of respect for the principle of State sovereignty which has been difficult to overcome.

Nonetheless this maxim has been challenged in a number of significant ways, particularly since the conclusion of the Second World War. One such challenge is posed by the 1949 Geneva Conventions. Article 3, common to all four Conventions, is the most prevalent regulation of non-international conflicts. These regulations were subsequently supplemented by the 1977 Second Additional Protocol to the Geneva Conventions and later by the Rome Statute 1998. However caution is required because although Syria has both signed and ratified the Geneva Conventions, it has only signed the Rome Statute, and has done neither for the Second Additional Protocol. Accordingly, these latter regulations do not directly apply to the actions of the Syrian State. Nonetheless the Second Additional Protocol did, for the most part, codify customary law⁴⁷ and therefore may still bind Syria, as customary law generally does. Furthermore Syrians may still be brought before the International Criminal Court for acts under their jurisdiction, if a particular case is referred to the Court by the United Nations Security Council⁴⁸.

Common Article 3 imposes a minimum set of rules governing all parties' conduct in armed conflicts not of an international character⁴⁹. In relation to the acts mentioned above it is

⁴⁶ Antonio Cassese, *International Law*, 2nd Edition, Oxford University Press, 2005, page 400-402

⁴⁷ ICRC, *'Increasing respect for international humanitarian law in non-international armed conflicts'*, 2008, page 9

⁴⁸ Rome Statute of the International Criminal Court, 1998, Article 13(b)

⁴⁹ *Military and Paramilitary Activities In and Against Nicaragua*, 1986 I.C.J. Reports, paragraph 218

clear many of them are covered by the Article. Specifically 3(1) sets out that *“Persons taking no active part in the hostilities... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”* and goes on to list the following acts as accordingly prohibited *“violence to life and person, in particular murder... and torture”, “taking of hostages”, “outrages upon personal dignity, in particular humiliating and degrading treatment”, and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”*. Thus it is plain that the acts of murder, torture, extrajudicial executions, rape⁵⁰, hostage taking and mistreatment of prisoners are all prohibited.

Furthermore, common Article 3 also states that *“impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”* and while this has been allowed to happen, the International Committee of the Red Cross (ICRC) has not always been treated with the respect necessitated by the law. The ICRC reported that on 13th October 2013 six of their staff members and one volunteer from the Syrian Arab Red Crescent organisation had been abducted by unknown assailants while travelling in clearly marked vehicles⁵¹.

⁵⁰ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25th January 2005, paragraphs 357-359

⁵¹ Syria: ICRC and Syrian Arab Red Crescent team abducted in Idlib, News Release, 16/10/2013, accessed on 01/04/13 via <http://www.icrc.org/eng/resources/documents/news-release/2013/10-13-syria-team-abducted-idlib.htm>

With regards to the other acts listed above customary international law makes it clear that even in non-international conflicts parties must attempt to distinguish between civilians and combatants⁵². This should also ensure liability arises for the attacks on hospitals; however this would usually be covered by Articles 9 to 12 of the Second Additional Protocol. This itself however is also based on customary international law and therefore is applicable anyway⁵³. Additionally the use of child soldiers is similarly prohibited⁵⁴. Finally the use of chemical weapons is governed in a number of ways, including treaties⁵⁵, but would most simply fail in terms of legality on the basis that these weapons fail to distinguish between civilian and military objects and the reported use of such weapons were in civilian areas⁵⁶.

Thus it has been demonstrated that the acts mentioned above are indeed illegal under IHL. Therefore the last aspect in considering the law itself is its applicability to actors other than the Syrian State, which is obviously bound. This is not immediately apparent as customary law would usually bind only States and certain other bodies with international legal personality, for example the UN⁵⁷. These rules do not recognise individuals as subject to it, and the conceptual difficulty accordingly lies within this nature of international law's application. However a general exception is made and non-State actors are deemed bound to Article 3, as it applies to "*each Party to the Conflict*"⁵⁸. This may be explained by reference to notable international lawyer Antonio Cassese, who argues that once a rebel

⁵² Prosecutor v Pavlestrugar 2005, IT-01-42-T, paragraph 283

⁵³ Op cit, n.47, at page 9

⁵⁴ Prosecutor v Thoma Lubanga Dyilo 2012, No. ICC-01/04-01/06, paragraph 542

⁵⁵ Syria is now a signatory of the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* as of 14/09/2013

⁵⁶ 'Clear and convincing' evidence of chemical weapons use in Syria, UN team reports, 16/09/2013, accessed 01/04/03 via <http://www.un.org/apps/news/story.asp?NewsID=45856#.U1q8xvldWSo>

⁵⁷ Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Reports 1949

⁵⁸ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 2006, Oxford University Press, at page 275

group succeed “*in controlling a modicum of territory*” and are “*capable of wielding authority over the individuals living there*” then “*some measure of recognition as an international subject*” is conferred⁵⁹. It would appear logical to infer therefore that international personhood, and therefore liability, is established on the basis that a party to such a conflict is attempting to carry out State-like functions.

The benefits of this finding are numerous. First of all the laws ability to bind both sides to the conflict promotes a States compliance with IHL. It has this effect by ensuring the opposing side cannot act with impunity with regards to means and method of warfare, thus preventing a potential military advantage. This in turn protects both sides as it counters the temptation for either side responding like-for-like with prohibited actions⁶⁰.

While there is more debate as to the application of basic customary provisions, it is likely that at least the most basic, such as those discussed above, would also bind the opposition groups⁶¹. Accordingly, for the vast majority of the above acts, IHL ensures all parties incur liability for these actions.

Thus it would appear the law is generally adequate in the sense that the horrific actions of all the parties involved are covered therein and all may be held accountable, in theory at least. Although there are frequent breaches of the IHL occurring in Syria this does not, in itself, necessary mean the law is inadequate. To illustrate this point consider the illegality of

⁵⁹ Op cit, n.46, at page 124

⁶⁰ M. Sassòli, A. Bouvier and A. Quentin, *How Does Law Protect in War? Volume 1*, 3rd Edition, 2011, ICRC, page 347

⁶¹ Op cit, n47.

murder or rape in any domestic legal system and then also the sadly numerous instances in which it still occurs.

This therefore suggests that rather than considering the law inadequate, there is a lack of satisfactory enforcement mechanisms, or knowledge of IHL, or both. Conversely, perhaps it is too early to yet conclude that IHL has in some respect failed. Along this line of thought is evidence in the form of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. These ad-hoc trials may not have delivered justice in the swift manner hoped for, but it is certainly justice they have pursued. A potential alternative to a similar form of ad-hoc justice remains via the possibility that the International Criminal Court may still hold Syrian's accountable to IHL following a reference from the United Nations Security Council. Accordingly, hope of justice should not yet be forgone.

The issue of legal personality within the modern international legal system

Sunniva Samdal

Within the contemporary international legal system, there are two main areas of uncertainty in determining the range of legal persons or subjects. Firstly, although States remain the main type of legal person, it is unclear whether an entity qualifies as a State for the purposes of international law. Secondly, during the 20th century other entities have received legal personality, giving rise to greater uncertainty as to what degree of personality such non-State entities possess. This essay will investigate the issue of statehood in the modern international legal system, followed by an examination of how and to what degree non-State entities possess legal personality.

International legal personality gives an entity legal rights and duties which can be enforced before an international or municipal tribunal.⁶² The classical era of international law⁶³ was dominated by the positivist view that States were the exclusive legitimate legal persons on the international plane.⁶⁴ This system is said to date back to the Treaty of Westphalia in 1648 and the shift to a system of sovereign states regulating their relations with each other.⁶⁵ States, as the principal legal person of international law, have original personality as

⁶² O'Brien, J (2001) *International Law* (Cavendish Publishing Limited), p.138.

⁶³ Normally the classical period is considered by writers to be the period prior to 1914; O'Brien, J (2001) *International Law* (Cavendish Publishing Limited), p. 137.

⁶⁴ O'Brien, J (2001) *International Law* (Cavendish Publishing Limited), p. 137.

⁶⁵ The Treaty of Westphalia of 1648 brought the Thirty Years' War to an end. It is broadly accepted that the Treaty defined the principles of state sovereignty, exclusive territoriality, legal equality, non-intervention, standing diplomacy and international law. Thus, establishing the early modern system of states; Teschke, B, 'Theorizing the Westphalian System of States: International Relations from Absolutism to Capitalism' (2002) *European Journal of International Relations*, Vol. 8, p. 6; Bordonni, C, A Crisis of the State? The End of the Post-

an inherent attribute of statehood. This means that they have absolute competence and total rights and duties recognised by international law. However, what is considered to be a state is not as clear.

The essential criteria of statehood, and the general starting point, are laid out in Article 1 of the Montevideo Convention.⁶⁶ It provides that: *‘the state as a person of international law should possess the following qualifications: (a) a permanent population⁶⁷; (b) a defined territory⁶⁸; (c) government⁶⁹; and (d) a capacity to enter into relations with other states.’⁷⁰*

The fourth point requires that the ‘state’ must have legal independence, implying the need for territorial sovereignty.⁷¹ However, other criteria based on pragmatic and political considerations are also taken into account. Thus the Montevideo criteria are not sufficient on their own to establish statehood, making the issue of statehood far more complex.

Westphalian Model (12/02/13), *Social Europe Journal*, accessed on 26/11/13 through: <http://www.social-europe.eu/2013/02/a-crisis-of-the-state-the-end-of-post-westphalian-model/>

⁶⁶ Montevideo Convention on Rights and Duties of States 1933.

⁶⁷ The territory must contain a population regarded as that territory’s inhabitants.

⁶⁸ A defined territory means that the entity must have a physical existence in a geographical area. This does not mean that a precise border is needed without any opposing disputes. Thus, Israel and Palestine are considered to be states even though Israel refuses to limit their claim on the territory of Palestine.

⁶⁹ It must be shown that the territory has an effective government. This means a government who is independent from any other authority, controls the affairs of the state and ensures social and legal order. However, if a state ceases to have an effective government this does not automatically remove that state of its statehood. For example, Syria remains a State even though there is no effective government over the entire population and territory due to civil war; Dixon, M (2010) *“Textbook on International Law”* (7th ed.)(Oxford University Press), p. 120.

⁷⁰ Whether a state exercises their legal capacity to enter into relations with other states is not relevant to whether they qualify as a state. An entity will be regarded as a state even though it is under direct or indirect control of another state; Dixon, M (2010) *“Textbook on International Law”* (7th ed.)(Oxford University Press), p. 120.

⁷¹ Thus, Hong Kong will not be considered a State under international law, even though it has a territory, population and government, because it is under the lawful sovereign authority of China.

One of the most important ways in which principle can give way to pragmatism is through recognition. This means that a State recognises the other entity as entitled to exercise all the capacities of statehood. There are two theories in relation to the consequence of recognition. One is the declarative theory which sees recognition as affirmation of statehood when the legal criteria have already been fulfilled.⁷² This view was codified in Article 3 of the Montevideo Convention which states that: '*The political existence of the state is independent of recognition by the other states.*' Thus, an entity may have a political existence without being recognised as a sovereign authority. The constitutive theory on the other hand, defines a state as a subject of international law only if it is recognised as a sovereign state.⁷³ In reality, there is reason to believe that this theory is the strongest theory as it is next to impossible for a state to survive without recognition.⁷⁴ This is owing to the fact that non-recognition of a potential "State" prevents the entity from exercising a capacity to enter into legal relations with other states since they decline to do so. One way in which this can occur is if the entity has attained legal independence unlawfully. For instance, The Turkish Federated State of Northern Cyprus has been denied statehood by the Security Council⁷⁵ due to its independence flowing from the illegal invasion of Northern Cyprus by Turkish troops in 1974.⁷⁶ Even though the entity has a permanent population, defined territory and an effective government, the illegal attainment of factual independence prevents a legal capacity from arising. Thus it becomes clear that the

⁷² Recognition is not what creates the State; Wallace, R, Martin-Ortega, O (2013) "International Law" (7th ed.) (Sweet & Maxwell), p.76.

⁷³ Klabbers, J (2013) *International Law* (Cambridge University Press), p. 73.

⁷⁴ An example of this is Biafra, who proclaimed independence from Nigeria in 1967. However, it was not collectively recognized by other States and became a part of Nigeria again in 1970; Klabbers, J (2013) *International Law* (Cambridge University Press), p. 73.

⁷⁵ SC Res 541 (1983); SC Res 550 (1984).

⁷⁶ The occupation and acquisition of territory through the use of force is contrary to Article 2 (4) of the UN Charter which states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Montevideo criteria are not sufficient on its own to establish statehood. However, the significance of non-recognition is disputed, making the issue as to whether a state exists or not, highly contentious.

Since the inception of the United Nations (UN) and the end of the Second World War, the scope of international legal personality has expanded to 'non-State entities.' Since the *Reparations for Injuries case*⁷⁷, it has been well established that non-state entities may possess international legal personality, separate from that of its members. The International Court of Justice (ICJ) found that the UN had a derived legal personality implied by the UN Charter and the organisation's given functions, and not merely because it was recognised by Member States alone. Legal personality must have been intended; otherwise the UN would not be able to carry out its purposes as intended by its founding members. This point was confirmed in the *Advisory Opinion concerning the Legality of the Use of Nuclear Weapons*⁷⁸ where the ICJ stressed that the legal competence of non-State entities was governed by the 'principle of speciality', meaning that the States can award them with powers limited to their function.⁷⁹ Hence, whilst states have original personality allowing them a general competence and equal capacity under international law, non-state entities only have personality to the degree necessary for the achievement of their roles within the

⁷⁷ *Reparations for Injuries Suffered in the Service of the United Nations* I.C.J. Rep. 1949. The case concerned whether the UN could bring a claim for reparations for injuries suffered by its agents while in service. In order to reach a decision it had to be established whether the UN had legal personality within the international legal system.

⁷⁸ *Advisory Opinion concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* I.C.J. Rep. 1996.

⁷⁹ Hence, the ICJ found that The World Health Organisation, as an international organisation under the United Nations, and specialized in the area of international public 'health', would not be awarded the competences of other parts of the United Nations system.

international legal system. Thus, the approach taken in relation to legal personality of non-State entities is functional rather than territorial.

Whether an Intergovernmental Organisation (IGOs) has international legal personality, and to what degree, seems to be relatively clear. These organisations are set up with the task of realising a common goal. In order to exercise their function they are awarded certain autonomy by the Member States, often expressly provided for in the relevant Treaty.⁸⁰ For instance, in Article 47 of the Treaty on European Union it is stated that: '*The (European) Union shall have legal personality.*' What degree of legal personality that they possess, however, is dependent upon the states which are affected.

In relation to other types of non-State entities, matters are not as clear. These non-state actors extend their activities trans-nationally but have their legal origin and basis within national legal systems. The Red Cross in particular, has a hybrid nature. The organisation is formed under Swiss law but has the capacity to enter into relations with states and has been given specific competences through the 1949 Geneva Conventions.⁸¹ However, most non-State entities do not have their competences expressly laid out in a treaty or constituent document. The Holy See is such an entity, without defined aims and objectives,⁸² and its

⁸⁰ In rare cases personality may only be implied (such as in the case of *Reparations for Injuries Suffered in the Service of the United Nations* I.C.J. Rep. 1949) or expressly denied (i.e. Art.4 of the Statute of the International Hydrographic Organisation); Wallace, R, Martin-Ortega, O (2013) "International Law" (7th ed.) (Sweet & Maxwell), p. 89.

⁸¹ Under Article 9 and 10 of the Geneva Convention Relative to the Treatment of Prisoners of War the Red Cross has been given certain tasks in relation to the protection of prisoners of war; Klabbers, J (2013) *International Law* (Cambridge University Press), p. 88.

⁸² Maluwa, T, 'the Holy See and the Concept of International Legal Personality: Some Reflections', (1986) *The Comparative and International Law Journal of Southern Africa*, Vol. 26, p. 23.

functions are exclusively religious. It has derived legal personality akin to that of statehood⁸³ because of States' willingness to enter into international relations with it.⁸⁴ Thus, it has a legal capacity due to State recognition of it as having competences on the international legal arena, even though it is under the territorial sovereign authority of the Vatican City State. Hence, whether a non-State entity has legal personality, and to what degree, is highly ambiguous. This is because of the dependence on recognition by States and the fact that they may possess this capacity regardless of being under the lawful sovereign authority of a State.

The functional approach and 'principle of speciality' further confuses the issue of legal personality of non-state entities, as each has a different degree of legal competence. Though it would create greater certainty, it does not seem to be a workable option that non-State entities should be subject to a general legal regime.⁸⁵ This argument is based on their invariable nature specific to their purpose. Therefore a generalisation cannot be made and requires each to be examined separately. This shows a need for an alternative approach to international legal personality that reflects the modern changes in the international community.⁸⁶ One argument is that international law needs to depart from the Westphalian model and rather ask which political actors shape the legal processes and how they do so in

⁸³ The Holy See enjoys sovereign privileges and immunities, the ability of recognizing new states and governments, participation in international conferences, membership in international organisations and a treaty-making capacity; Maluwa p. 23-24.

⁸⁴ Wallace, R, Martin-Ortega, O (2013) "International Law" (7th ed.) (Sweet & Maxwell), p 99.

⁸⁵ Hlavkova, M: *Meeting summary: Legal responsibility of International organisations in International Law* (10/1-/11, Law Discussion Group at Chatham), p. 5.

⁸⁶ C Harding and C L Lim: *Renegotiation Westphalia* (1999, Martinus Nijhoff Publishers) p. 10.

order to establish whether they are subjects of international law.⁸⁷ At present however, the approach to legal personality is clearly not satisfactorily transparent.

To conclude, there has been a clear move away from the Westphalian system of States and the classical era as States are no longer the exclusive subjects of international law.

Nonetheless, they remain the main type of legal persons due to their absolute competence as an inherent attribute of statehood and power of recognition of other subjects of international law. Whether an entity qualifies as a state is ambiguous due to the lack of definite formal criteria that is not confused by political and pragmatic considerations. This matter is further disordered by the uncertainty of the significance of these considerations.

The issue of international legal personality has been further complicated through the extension of legal personality to non-State entities. Their legal capacity is subject to a functional limitation, dependent upon the recognition by states making it difficult to establish whether, and to what degree, they have legal personality unless it is expressly provided for in a treaty or constituent document.

⁸⁷ Ibid.

The development of devolution in Wales and its impact on healthcare

Manon Chirgwin

This article will look primarily at the development of devolution in Wales from 1998 until 2011 and how it has differed from the devolution in Northern Ireland and Scotland. This will be done by looking at the Government of Wales Act 1998 and comparing it to the Devolution Acts at the time for Northern Ireland and Scotland. The article will move on to look at the Government of Wales Act 2006 as enacted and after the 2011 referendum. Further, it will be discovered whether there are still differences to how powers have been devolved between all three countries. The article will then go on to discuss healthcare and how devolution has had an impact on the way the healthcare system is structured in Wales, Northern Ireland, Scotland and England.

Devolution “...involves the transfer of power from the Westminster Parliament to a subordinate legislature”⁸⁸ and this is what has happened with Wales, Scotland and Northern Ireland. However, in order to devolve we must first have a union. In 1536 the Act of Union between Wales and England was passed by the English Government. This meant that any law passed in Westminster now became law in Wales. This was very different to the 1707 Act of Union with Scotland which was passed by both governments and allowed Scotland to keep its own legal system. The union with Ireland⁸⁹ was a little different. The Act of Union was passed in 1800 but in the 1920s, the Government of Ireland Act was passed which proposed home rule for the whole of Ireland.

⁸⁸ Parpworth, Neil (2012) *Constitutional & Administrative Law* (7th Ed.) (Oxford University Press), p. 160.

⁸⁹ At the time of the union the Ireland was a single entity.

Calls for devolution grew over time and by 1973 the Royal Commission on the Constitution⁹⁰ was set up and their subsequent report on devolution led to the 1974 White Paper 'Democracy and Devolution: Proposals for Scotland and Wales'. In 1978 the Wales Act and the Scotland Act were passed by the Labour government with the hope of devolving powers to Wales and Scotland. It was said that: *"...the Scotland Act 1978 and Wales Act 1978 were presented to the Commons...as: 'a great constitutional change...There will be a new settlement among the nations that constitute the United Kingdom. We shall be moving away from the highly centralised state that has characterised our system for over two and a half centuries."*⁹¹ Nevertheless, both Acts needed to be approved by a referendum and neither gathered the majority that was needed, leading to the Acts being repealed by the incoming Conservative government. Devolution was not part of the political agenda again until the next Labour government.

Devolution in 1998

The Government of Wales Act 1998 was the first Act to devolve powers to Wales.⁹² It created the Welsh Assembly, with Schedule 2 of the Act designating powers as 'fields' of authority to the Assembly, including powers for the provision of health services. However these were not legislative powers, but a power to enact policy through transfers of authority from the Secretary of State, meaning that the Assembly could only make

⁹⁰ Also known as the Kilbrandon Committee.

⁹¹ Loveland, Ian (2012) *Constitutional law, Administrative law, and Human Rights a Critical Introduction* (6th Ed.) (Oxford University Press), p. 422.

⁹² The Government of Wales Act 1998 is now revoked.

subordinate legislation. Thus the Assembly could only use powers that were previously exercised by the Secretary of State and, if they wanted to acquire more powers, Parliament would have to enact new legislation.

Under this Act there was no separate executive for Wales. The powers that Parliament granted went to the Assembly as an institution and it was then an internal matter for the Assembly to decide what to do with those powers. What would usually happen is that they would be given to the First Minister, who would then give the powers to the cabinet.

Devolution was granted to Scotland through the Scotland Act 1998. This was very different to the Government of Wales Act 1998 as it created a legislature and a separate executive.

Section 28 of the Act granted legislative powers to the Scottish Parliament. This gave the Parliament the power to make any laws except on matters that are reserved under schedule 5. A reserved matter means that only Westminster can legislate in that area. When passed, legislation of the Scottish Parliament is known as Acts of the Scottish Parliament, but they still require royal assent to become legislation. Whilst the Scottish Parliament has wide discretionary powers to enact legislation, section 28 (7) states that the UK Parliament still has the power to legislate over Scotland, but Devolution Guidance Note 10 states that, if they were to do this, they are required to ask for the consent of the Scottish Parliament.

Section 44 of the 1998 Act established the Scottish Government, referred to as the Scottish Executive in the Act. The Scottish Government is responsible for most of the day-to-day issues concerning the people of Scotland, much like the responsibilities of the UK government.

Devolution in Northern Ireland has also been different to that which has happened in Wales and Scotland, caused by the ethno-nationalist *conflict* in Northern Ireland to which legislation has responded. After the Good Friday Agreement in 1998, powers were devolved to Northern Ireland under the Northern Ireland Act 1998 which created a legislature and an executive. Since this time the Northern Ireland Assembly has been suspended and reinstated many times. The Assembly term that ended in 2011 was the first to run its full course without being suspended. The Assembly created under the Act is a large one so as to allow smaller political parties an opportunity of gaining seats and be involved, thereby ensuring varied representation in the Assembly. This is one of the measures created as a response to the conflict.

The Act created three types of matters: excepted⁹³, reserved⁹⁴ and devolved. Excepted matters are the issues that only UK Parliament can legislate upon, the same as reserved matters in Scotland. Reserved matters in this Act however are matters that the Northern Ireland Assembly needs the consent of the Secretary of State to legislate on. All other matters are devolved. Legislation passed by the Assembly is known as Acts of the Northern

⁹³ Northern Ireland Act 1998, Schedule 2.

⁹⁴ Northern Ireland Act 1998, Schedule 3.

Ireland Assembly and requires Royal Assent to become legislation. Whilst the Northern Ireland Assembly also has wide discretionary powers to enact legislation, section 5 (6) of the 1998 Act states that the UK Parliament still has the power to legislate over Scotland. Nonetheless, Devolution Guidance Note 8 states that to do this the consent of the Northern Ireland Assembly is required.

The Act further created the Northern Ireland Executive which is led by a First Minister and a Deputy First Minister. This is another arrangement that demonstrates how the terms of the Act are influenced by the conflict as the First Minister is chosen by the largest party of the Assembly and the deputy First Minister is chosen by the second largest party of the Assembly.

In 2002 the National Assembly for Wales established the Richard Commission to examine the powers of the Welsh Assembly. In 2004 the Commission produced a report with recommendations for the future of the Assembly. One of the recommendations was a *“transformation of the National Assembly into a full-fledged legislative assembly with primary legislative powers on all matters not explicitly reserved to Westminster.”*⁹⁵ The proposals were mostly welcomed by the UK government, leading to the White Paper ‘Better Governance for Wales’ in 2005. It set out proposals to create a separate legislature and executive, and sets out three stages for the process of additional devolution to Wales. Firstly, that without any change, the UK government could adopt an approach that was more positive.

⁹⁵ “The Report of the Richard Commission: An Evaluation”, Briefing No.12 June 2004.

Secondly, they could enhance the legislative powers of the Welsh Assembly.

And lastly, they could grant the Assembly with a greater level of legislative devolution. This later stage would only take place after a referendum of the people of Wales. These recommendations then in turn led to the Government of Wales Act 2006 which fulfilled the second stage of the process.

The Government of Wales Act 2006

The Government of Wales Act 2006 was a step forward in devolution for Wales as it granted further legislature powers and created a separate executive. When the Act was enacted, part 3 gave the Assembly the power to make Assembly Measures, and schedule 5 listed the issues that could be legislated upon.

To legislate, the Assembly had to have competence in an area, and to have competence, they had to be able to point to a 'matter' in the Act. Schedule 5 of the Act was shared into 'fields' and within these fields is the 'matters' that gives the Assembly competence⁹⁶.

Therefore it was not possible for the Assembly to legislate on an issue unless there was a matter in the relevant field.

When the Government of Wales Act was originally enacted, schedule 5 only featured powers to do with the National Assembly for Wales⁹⁷. The only way to acquire further matters was to amend schedule 5. Amendments could only be achieved by an Act of Parliament, or by an Order in Council, known as a Legislative Consent Order. There was a

⁹⁶ For instance, field 5 concerns education and training, and matter 5.1 is "*provision about the categories of school that may be maintained by [local authorities]*"; Government of Wales Act 2006, Schedule 5, Field 5, Matter 5.1.

⁹⁷ Government of Wales Act 2006, Schedule 5, Field 13.

preference to Acts of Parliament as the Secretary of State could refuse to put a Legislative Consent Order before Parliament. This arrangement meant that passing legislation was a lengthy process for Wales, and still very different to Scotland and Northern Ireland.

The other development in this Act was the creation of a separate executive by Section 45.

The executive is known as the Welsh Assembly Government. The role of the Welsh Assembly Government is to make decisions, develop and implement policy, exercise executive functions and make secondary legislation, much like the UK government.

In 2011 a referendum was held regarding extending the legislative powers of the Welsh Assembly. The referendum was successful in getting a 'Yes' vote and therefore, part 3 and schedule 5 of the Act ceased to have effect while part 4 and schedule 7 came into effect. This meant that the Welsh Assembly could now make Acts of the Assembly and the third stage of the devolution process, as set out by the Richard Commission, was completed. The difference between part 3 and 4 is which issues can be legislated upon. Previously, measures were restricted because of the limited matters and, as seen above, an Act of Parliament had to be passed to insert a new matter into schedule 5. However, under schedule 7 all the matters were filled within the fields and the Assembly had full competence. Acts of the Assembly still require Royal Assent to become legislation and section 107 (5) states that the UK Parliament can still make laws for Wales.

One difference that still exists between devolution for Wales and devolution for Scotland and Northern Ireland is the competence of the UK Parliament to legislate over the country. As mentioned above, the Scottish Parliament and the Northern Ireland Assembly must give consent for the UK Parliament to legislate for them. Nevertheless, Devolution Guidance Note 9 states that the UK Parliament would not legislate for Wales without at least the consent of Welsh Ministers, but there is no mention of needing the Welsh Assembly to consent. The referendum had no effect on the executive.

The Government of Wales Act 2006 and subsequent reform has taken leaps in making devolution in Wales more equal to Northern Ireland and Scotland. In 1998 the biggest difference was how many powers had been devolved to Wales as compared to Northern Ireland and Scotland. Since the referendum, the only difference is how the powers have been devolved. Under the Scotland Act 1998 and Northern Ireland Act 1998, the reserved and excepted matters are listed and all other matters devolved. Under both Government of Wales Acts it was the opposite; the matters that Wales had competence to legislate on were listed and everything else reserved. However, one of the areas that Wales, Northern Ireland and Scotland do have competence to legislate upon is healthcare.

Healthcare

The National Health Service (NHS) was established in 1948 by Aneurin Bevan, and the idea behind it was to ensure that everybody could have equal access to healthcare. The power to legislate over healthcare has since devolved to Wales, Northern Ireland and Scotland.

In 1999 the National Assembly for Wales (Transfer of Functions) Order transferred power to the Assembly over Acts that affected Wales, including the National Health Service Act 1977. The first Welsh White Paper on health that the Assembly produced was 'NHS Wales: Putting Patients First' in 1998. This paper was the basis of the planned reforms and a 10 year plan which set out four new levels of care. The paper also set out three important themes for healthcare: that it would be people centred, based on partnerships, and concentrate on prevention. The Welsh Assembly based their decisions and arrangements on health on these themes, and in the end: *"Wales...bet on localism. This means integrating health and local government in order to coordinate care and focus on determinants of health rather than treating the sick. It tries to use localism as the lever to make the NHS into a national health service rather than a national sickness service."*⁹⁸

Further changes were seen when the Assembly produced the paper 'Improving Health in Wales – A Plan for the NHS with its Partners' in 2001. With this paper the Assembly disbanded the five health authorities that were in existence and built a new structure for the NHS which included 21 Local Health Boards.⁹⁹ These Local Health Boards include the Betsi Cadwaladr University Health Board that covers North Wales, and Hywel Dda Health Board that Aberystwyth is a part of. The purpose of the Local Health Boards is corporate and clinical governance, and providing all the health care services in that area.

⁹⁸ Greer, Scott L., "Four Way Bet: How Devolution Has Led to Four Different Models for the NHS", February 2004, *The Constitution Unit*, p. 4.

⁹⁹ Which has now decreased to 7.

Another level to the structure is the three NHS Trusts¹⁰⁰: the Welsh Ambulance Services, Velindre NHS and Public Health Wales. The Assembly has continued to legislate with regards to the NHS but the themes remain the same.

The process of devolving powers on healthcare was much the same for Scotland and Northern Ireland, but the main difference is how they have used those powers. Whilst Wales concentrated on local services, Scotland has favoured professionalism, meaning the role of professionals has been increased in the allocation of rationing and resources.

Northern Ireland on the other hand has focused on permissive managerialism. This system focuses on making sure that services keep going in tough conditions, which produces little overall policy. This shows how Northern Ireland responds to the conflict, and is using its powers to make sure that basic services run no matter what. As a result of devolution, England also has a separate NHS structure, and has gone for a market based system where competition, management and regulation are key factors.

As we see in the news, none of the systems is perfect, all having their individual problems. One of the biggest problems is the so-called a 'postcode lottery'. That is where people in one part of the UK are more, or less, likely to get access to a drug than in another part of the UK. For example, where patients have a rare disease and patients in Scotland or Wales are more likely to get treatment than a patient in England.¹⁰¹

¹⁰⁰ Originally 13.

¹⁰¹ Campbell, Denis: "Patients with rare conditions face postcode lottery", *The Guardian*, 20 October 2012, at <http://www.guardian.co.uk/society/2012/oct/20/patients-rare-conditions-postcode-lottery> [accessed 10-4-13]

The development of devolution in Wales has been a long one compared to Scotland and Northern Ireland. It took until 2011 for the Assembly's legislative powers to catch up to what Scotland and Ireland were granted in 1998. Devolution may still develop in the future and it is impossible to know at the present moment what will happen, as is seen with Scotland's debate on becoming independent. However, devolution has not had an adverse impact on healthcare in any of the countries. It is true that there has been an impact in that there are four different NHS systems within the UK, but each country is able to cope with the demands of their system: *"Northern Ireland, Scotland and Wales proved more than able to make decisions that change life for their populations and more than willing to do so."*¹⁰²

¹⁰² Greer, Scott L., "Four Way Bet: How Devolution Has Led to Four Different Models for the NHS", February 2004, *The Constitution Unit*, p. 5.

Subsistence and Welfare Rights:
**The human right to food as a key element of the right to an adequate
standard of living – law and policy in
the Federal Republic of Germany**

Ilonka Boltze

1. Introduction

As an answer to the global food crisis, with more than 1 billion undernourished people worldwide, the right to food remains topical. According to the Food and Agriculture Organisation of the United Nations (FAO), at the beginning of the century ‘a *paradigm shift from an anti-hunger approach centred on food security to one based on the right to food*’ was invoked by the international community.¹⁰³ In 2002 during the World food summit, 179 states reaffirmed the right to food. Voluntary ‘right to food guidelines’ in the context of national food security strategies were adopted by the FAO Council in 2004.¹⁰⁴ Access to justice was recognised as a crucial component of the guidelines.

In December 2008 the Optional Protocol (OP) to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted so that the states also enshrined the principle by which all victims of a violation of human rights – no matter if it relates to civil, political, economic, social or cultural rights – are guaranteed the right of access to justice.

¹⁰³ Golay, *The right to food and access to justice*, FAO, *Right to Food Study*, 2009, 7, referring to Eide, ‘From Food Security to the Right to Food’ in Barth Eide, W, Kract, U (eds), 2005, 67-97.

¹⁰⁴ FAO, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, adopted by the 127th Session of the FAO Council, November 2004, available at: <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm> [accessed 6 February 2014].

On 5th of May 2013 the OP of the ICESCR entered into force. Germany is not yet one of the signatory parties.

The ICESCR provides two interrelated rights – the ‘right to adequate food’ (art 11(1)) and the ‘right to be free from hunger’ (art 11(2)). The latter opens the perspective to needs and duties beyond domestic affairs only, *‘taking into account the problems of both food-importing and food exporting countries, to ensure an equitable distribution of world food supplies (...)’*.¹⁰⁵ As both rights are included in one article and are closely linked to each other, they shall be discussed together under the name of ‘right to food’ in this essay.

In the following sections I shall first look at the substance of the right to food, before the law and policy in Germany related to the enforcement of the right to food is analysed.

2. Substance of the right to food

2.1. Art 11 ICESCR - the right to adequate food and to be free from hunger

The right to food has a history of more than 60 years – it was first recognised by the Universal Declaration of Human Rights (UDHR) of 1948. Article 25 UDHR provides:

‘(Everyone) has the right to a standard of living adequate for the health and well-being of himself and his family, including food (...)’.¹⁰⁶ This expression was further elaborated within

¹⁰⁵UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 8 February 2014]. Article 11.

¹⁰⁶ Universal Declaration of Human Rights [UDHR] art. 25(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 December 1948).

the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 with the right to adequate food (art 11 (1)) and the fundamental right to be free from hunger (art 11 (2)).¹⁰⁷

The right to adequate food is embedded in the concept of the right to an adequate standard of living which is described as an aimed process of continuous improvement, which needs appropriate steps by states to ensure the realisation of this right. The right against hunger is described as fundamental – the only right within the ICESCR which is labelled as such. It requires State Parties to take immediate action *‘to mitigate and alleviate hunger (...) in*

¹⁰⁷ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, *ibid.*

Article 11 ICESCR says:

‘1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will

take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.’

times of natural or other disasters'.¹⁰⁸ Since 2010 the right to water is also acknowledged as part of the right to an adequate standard of living.¹⁰⁹

During the World Food Summit in 1996 and the formulation of the Millennium Development Goals (MDG) to halve the number of undernourished people by 2015, the states called for a clarification of their obligations arising from the right to food.¹¹⁰ In 1999, the Economic and Social Council (ECOSOC) reacted with General Comment 12. Three key requirements for the right to food were set, i.e. to be available, accessible and adequate.¹¹¹ It held that state

¹⁰⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, Normative content of article 11, paragraphs 1 and 2, available at: <http://www.refworld.org/docid/4538838c11.html> [accessed 6 February 2014].

¹⁰⁹ UN General Assembly, *The human right to water and sanitation: resolution / adopted by the General Assembly*, 3 August 2010, A/RES/64/292, available at: <http://www.refworld.org/docid/4cc926b02.html> [accessed 6 February 2014].

¹¹⁰ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 34, *The Right to Adequate Food*, April 2010, No. 34, 1, available at: <http://www.refworld.org/docid/4ca460b02.html> [accessed 6 February 2014]

¹¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food*, *ibid*, para 6, available at: <http://www.refworld.org/docid/4538838c11.html> [accessed 6 February 2014].

The CESCR clarified:

'8. (...) the core content of the right to adequate food implies: The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

9. Dietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. (...)

10. Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; (...)

11. Cultural or consumer acceptability implies the need also to take into account (...) perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

12. Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food (...) to where it is needed in accordance with demand.

13. (...) Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs

parties are obliged to ensure *'physical and economic access at all times to adequate food or means for its procurement'* and clarified that this obligation is *'inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.'*¹¹² The obligations further on imply that the supply of food must be sustainable, i.e. that it will be *'accessible for both present and future generations.'*¹¹³

The obligations can be categorised in the obligations to respect, to protect and to fulfil (meaning *to facilitate* but also *to provide*).¹¹⁴ The FAO offered further clarifications how this could work in reality, first with regard to the term 'respect': *'(...) denying food assistance to political opponents is prohibited. States cannot suspend legislation or policies that give people access to food (e.g. social welfare legislation, nutrition-related programmes), unless fully justified. States should ensure public institutions (...) do not undermine people's access to food by, for example, (...) destroying farmland or through forced evictions. States should*

are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, (...). Victims of natural disasters (...)'s and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.'

¹¹² Ibid, para 10.

¹¹³ Ibid, para 7.

¹¹⁴ Ibid, para 15 .

*also regularly review their national policies and programmes related to food to ensure that they effectively respect the equal right of everyone to food.'*¹¹⁵

The 'obligation to protect' refers against violations by third parties, which includes groups, but also private enterprises. E.g. *'(...) States should prevent third parties from destroying sources of food by, (...) polluting land, water and air with hazardous industrial or agricultural products or destroying the ancestral lands of indigenous peoples to clear the way for mines, dams, highways or industrial agriculture.'*¹¹⁶

For the 'obligation to fulfil' states should pro-actively work on food security and strengthen people's access to resources and means to ensure their livelihood. *'Typical measures include the implementation of agrarian reform programmes or minimum income regulations. When adopting food policies, Governments would also need to balance carefully investment in cash crops for export and support for domestic food crops.'*¹¹⁷

2.2. Justiciability and legal remedies

The development of services and policies to implement the ESC rights certainly are a task for the political field. For decades there was a passionate debate as to whether litigation and judicial interpretation should be another means through which ESC rights should be

¹¹⁵ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 34, The Right to Adequate Food*, *ibid*, 18.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*. 19.

advanced.¹¹⁸ Arts 16 and 17 ICESCR regulate the duty of state parties to submit reports to the CESCR informing about the adopted measures and the progress made in respecting, protecting and fulfilling the rights of the ESCR. However, a complaint mechanism was not part of the ICESCR. In 2000, appointed by the Human Rights Council, a special rapporteur on the right to food was established. His function is to examine and report on 'a country's situation, or a specific human rights theme'.¹¹⁹ The special rapporteurs Ziegler, Eide and de Schutter all have published on the right to food and certainly contributed to more public awareness for the topic.

In 1998 ECOSOC presented a General Comment on the domestic application of the ICESCR. A differentiation was made between norms which are self-executing (*'capable of being applied by courts without further elaboration'*) and justiciability (*'which refers to those matters (...) resolved by the courts'*).¹²⁰

Since 5th of May 2013 the OP has formally entered into force. However, many countries, including Germany, have not yet ratified it. The OP provides a complaint mechanism and gives groups and individuals the opportunity to bring cases to the CESCR for violation of their ESC rights when access to justice is denied or not available in their own countries.

¹¹⁸ Curtis, The Right to Food as a Justiciable Right: Challenges and Strategies, *Max Planck Yearbook of United Nations Law* 11 (2007), 318-319

¹¹⁹ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 27*, available at: <http://www.ohchr.org/Documents/Publications/FactSheet27en.pdf> [accessed 6 February 2014]

¹²⁰ CESCR General Comment No.9, The domestic application of the Covenant: 03/12/98. E/C.12/1998/24, available at:

<http://www.unhcr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument>, [accessed 6 February 2014]

Courtis and Golay both have analysed the current and potential justiciability of the right to food.¹²¹ They both criticise the often raised argument that ESC rights are different by their nature from civil and political rights and as such are not suitable as subjects for judicial enforcement. Both hint at empirical evidence through comparative case law, however, there are only a few cases. Golay points to the fact that in most regional and domestic systems the right to food as part of the ESC rights is not granted a complaint mechanism, such as those the jurisdictions of the European and the Inter-American Courts of Human Rights reflect; furthermore, the doctrine of non-justiciability of ESC rights is still prevalent among judges.¹²²

Nevertheless, here again are signals of change. It has to be mentioned that in some countries the right to food is acknowledged by national case law (Famine Code of 1962 and landmark judgments in India; Supreme Court-interim order in 2008 for food aid in Nepal) and by constitutional recognition in South Africa (1996).¹²³

For many years protection of the right to food has mainly been channelled through its interconnection with civil and political rights, or through general human rights regimes – such as the prohibition of discrimination.¹²⁴ Until 2013 only three treaties offered quasi-judicial functions and mechanisms to receive individual communications, launch inquiries

¹²¹ Golay, *ibid.*, and Courtis, *ibid.*, 317-337.

¹²² Courtis, *ibid.*, 328.

¹²³ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 34, The Right to Adequate Food*, *ibid.*, 32.

¹²⁴ Other related human are e.g. the right to life (art 6), the right of detained (art 10), the right to work (art 6) and to social security (art 9)), the right of minorities to their own culture (art 27), the right to non-discrimination (art 26) and freedom from torture, cruel, inhuman or degrading treatment (art 7).¹²⁴ The right to food is also recognized implicitly through other rights guaranteed by the ICCPR (i.e. the protection of the right to life requires States to adopt positive measures, such as measures to eliminate malnutrition).

and initiate urgent action processes: the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Discrimination against Women (CEDAW) through their Optional Protocols;¹²⁵ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) through art. 14.¹²⁶

Owing to the limited options, the Human Rights Committee has issued opinions on only a few right to food cases, limited to such groups as prisoners and indigenous people.¹²⁷ As to the interstate complaints before the International Court of Justice (ICJ), the FAO states that jurisprudence on the right to food is 'extremely limited'.¹²⁸ In 2004, with the issuing of an Advisory Opinion on the legal consequences of the construction of the wall in the Occupied Palestinian territory, for the first time the ICJ ruled on the violation of the right to food and its justiciability.¹²⁹ Although the Advisory Opinion produced limited domestic action, the recognition of the right to food for the victims of that case was considered '*an important step forward in international law*'.¹³⁰

¹²⁵ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3bf0.html> [accessed 9 February 2014] and UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 6 October 1999, United Nations, Treaty Series, vol. 2131, p. 83, available at: <http://www.refworld.org/docid/3ae6b3a7c.html> [accessed 9 February 2014]

¹²⁶ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 6 February 2014].

¹²⁷ Golay, *ibid*, 34.

¹²⁸ Golay, *ibid*, 33.

¹²⁹ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, available at: <http://www.refworld.org/docid/414ad9a719.html> [accessed 6 February 2014].

¹³⁰ Golay, *ibid*, 25, citing Scheinin, 'Justiciability and the Interdependence of Human Rights' in, 2005.

The European Social Charter as a further regional framework does not mention the right to food, but rather interdependent rights, such as the right to social security, to social assistance, and to protection against poverty and social exclusion, along with aims at special protection of vulnerable groups.¹³¹ In 1998 a collective complaints system was established. The Protocol gives the European Committee on Social Rights the competence to examine complaints by social partners and NGOs. Procedural aspects have been criticised, particularly the lack of remedial powers and the significant role played by the committee of Ministers.¹³²

2.3. Private actors and extraterritorial duties related to the right to food

Two issues that have caused a longstanding debate in IHRL are highly relevant for many ESC rights - the role of private actors and the question of extraterritorial applicability. In many countries multinational corporations hold control over the production, processing and distribution of food. Privatisation of public goods in some places has resulted in private control of resources, such as water supply.¹³³ Ganesh has analysed the right to food and trade law such as competition law. Within their obligation to protect, the states should regulate the interface of human rights law and competition law: *'States must intervene where acts committed by private parties, whether individuals, groups or legal persons,*

¹³¹ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <http://www.refworld.org/docid/3ae6b3678.html> [accessed 6 February 2014].

¹³² The authority of European committee on Social Rights is limited as they must submit its reports to the Committee of Ministers of the Council of Europe, which *'then renders a decision on whether to present the recommendations to the State in question'*, see Golay, *ibid*, 40. For a comprehensive analysis see Cullen, H. (2009) 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', *Human Rights Law Review* 9(1), 61-93.

¹³³ Marks and Clapham, *International Human Rights Lexicon* (Oxford University Press, 2005), 172.

*threaten to violate those rights.*¹³⁴ Concerning the role of the business sector the CESCR in 1999 reaffirmed that *'[as] part of their obligations to protect people's resource base for food, State parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food'*.¹³⁵

Concerning the question of extraterritorial applicability, for a long time action only within the jurisdiction of states was emphasised. The CESCR stipulated that *'(e)very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger.'* In 2000 a further suggestion was made that responsibility for violations of ICESCR *'are in principle imputable to the state within whose jurisdiction they occur'* and it was recommended to extend jurisdiction to foreign territory over which the state exercises *'effective control'*.¹³⁶

In 2008, the 'UN-Framework for Business and Human Rights' was presented which suggests regulation of extraterritorial duties of states and third parties and clearly states that also private actors have an obligation to *'respect'* the right to food, which means they must ensure, with due diligence, that their actions do not actively harm other individuals'

¹³⁴ Ganesh, 'The Right to Food and Buyer Power', CRIDHO Working Paper Series, 2010/02, 1201, available at: http://works.bepress.com/aravind_ganesh/1, [accessed 6 February 2014] citing De Schutter, International Human Rights Law. Cases, Materials, Commentary, (Cambridge University Press, 2010), 365.

¹³⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food, *ibid* para 27.

¹³⁶ International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, available at: <http://www.refworld.org/docid/48abd5730.html> [accessed 6 February 2014].

rights.¹³⁷ Three years later, in 2011, the Framework was elaborated further into UN-Guiding principles which stated the need for change: *'At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. (...) Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.'*¹³⁸ The UN-Guiding principles were followed by the OECD Guidelines for Multinational Enterprises which aims at supporting the framework in developed countries.¹³⁹

3. Law and policy concerning the right to food in Germany

3.1. Human dignity, welfare and responsibility for the future – Constitutional principles related to the right to food in Germany

The right to adequate food or the right to freedom from hunger is not directly mentioned in the German 'Basic Law' (GG) of 1949. However, human rights play a fundamental role in the GG.

According to art. 1(1) human dignity is the unalterable foundation of the constitutional order, the

¹³⁷ UN Human Rights Council, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5, available at: <http://www.refworld.org/docid/484d2d5f2.html> [accessed 6 February 2014]

¹³⁸ UN Human Rights Council, *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises*, 9 April 2010, A/HRC/14/27, available at: <http://www.refworld.org/docid/4c0759832.html> [accessed 6 February 2014].

¹³⁹ Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27 June 2000, available at: <http://www.refworld.org/docid/425bd34c4.html> [accessed 9 February 2014]

fundamental rights have legally binding force; moreover, the binding effect of all human rights is expressly extended to the legislature by art. 1(3).¹⁴⁰

The acceptance of the inviolability of human dignity can be understood as a response against the Nazi Regime and its misuse of legal powers. Therefore *'the state is not only obliged to respect, but also to protect human dignity'*.¹⁴¹ Furthermore, art. 19(2) regulates an ultimate limit to legislative measures to keep the essence of human dignity (Wesensgehaltsgarantie).¹⁴²

The 'Existenzminimum' (existential minimum) is a constitutional principle of welfare, comprising access to food, housing and social assistance to persons in need.¹⁴³ The corresponding law on social benefits is part of the Second Book of the German Code of Social Law, and is based on the 'fundamental right to the guarantee of a subsistence

¹⁴⁰ Germany: Basic Law for the Federal Republic of Germany [Germany], 23 May 1949, available at: <http://www.refworld.org/docid/4e64d9a02.html> [accessed 6 February 2014].

Article 1 and 3:

Article 1 [Human dignity]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(...) (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.'

¹⁴¹ Limbach, How a constitution can safeguard a Democracy: The German Experience, **29 January 2003**, available at: <http://www.law.hku.hk/ccpl/Docs/JuttaLimbach.pdf>, [accessed 6 February 2014]

¹⁴² Germany: Basic Law for the Federal Republic of Germany [Germany], *ibid.*

¹⁴³ Courts referring to different cases for example, German Federal Constitutional Court (BVerfG) and German Federal Administrative Court (BVerwG), BVerfGE 1, 97 (104 et seq.); BVerwGE 1, 159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (134); BVerfGE 45, 187 (229)

minimum' which derived from the declaration of human dignity in art 1(1) GG and art 20(1) ('social state principle') GG.

Art 20a GG further on specifies the responsibility towards future generations as, '*Mindful (...) of its responsibility (...) the state shall protect the natural basis of life by legislation and, in accordance with law and justice (...)*'.¹⁴⁴

Whereas the federal states are generally responsible for legislation, articles on refugees (art 74(6)), public welfare (art (74(7)) and 'labour law, including social security (art 74(12)) fall under the concurrent legislation. The Federal Constitutional Court (FCC) is endowed with the power of judicial review, and decides on the interpretation and application of the federal constitution with final binding force.¹⁴⁵

The concept of welfare finds many examples in the German legislation and policy. German Chancellor Otto von Bismarck in the 1840s created the first concept of modern welfare.¹⁴⁶ Following his concept, a pension system was created as well as insurance and medical care. After WW II, German social policy has been substantially transformed. What started as

¹⁴⁴ Germany: Basic Law for the Federal Republic of Germany [Germany], *ibid.*

¹⁴⁵ Germany: Basic Law for the Federal Republic of Germany [Germany], *ibid.*, interpreted by Limbach, *ibid.*

¹⁴⁶ Leisering, *The Welfare State in Postwar Germany – Institutions, Politics and Social Change*, April 2000, available at: <http://www.uni-bielefeld.de/soz/pdf/welfare.pdf> [accessed 6 February 2014].

social insurance for limited groups of workers, and with low benefits, gradually grew into a comprehensive network of social services based on the principle of equality.¹⁴⁷

In terms of case law related to adequate standard of living, different cases were related to the claim and recognition of basic income, and the adequacy of this income in terms of its sufficiency to cover food requirements.¹⁴⁸ In some of these cases the discussion concerned the maintenance of a certain level of income necessary to cover, inter alia, food needs, against degradation caused by factors such as the increase of the cost of living. In several cases the courts held that *'the state tax power cannot extend to the material means necessary to cover the 'existential minimum' which includes food needs. Thus, the legislature has a duty to respect the means for basic livelihood, and cannot impose taxes beyond these limits'*.¹⁴⁹

In the 1990s, owing to the financial crisis, a number of cuts were made within the welfare sector; the unemployment benefits and the social allowance as 'standard benefits' paid to secure one's livelihood level were lowered. The so called 'Hartz IV legislation' lowered the calculated existential minimum and affected 6.7 million people who received social support. In 2010, the GCC issued a ruling on the so-called 'Hartz IV legislation' declaring the German system of social benefits to be unconstitutional. The main reasoning was that the Court

¹⁴⁷ Current key features of the welfare provision in Germany are e.g. social insurance (financed by contributions from employers and employees), for the old-age-insurance supplemented from general taxation, health and employment insurance, employment insurance and well as need-based benefits, such as benefits for all those in need, including working poor (excluding refugees), asylum seekers benefit – reduced social assistance for refugees, social assistance (special needs support), cash and kind for the disabled, housing benefit – help with rent or maintenance of own home, educational benefit and other.

¹⁴⁸ E.g. German Federal Constitutional Court, BVerfGE 82, 60 ('Steuerfreies Existenzminimum') (85), BVerfGE 87, 153 ('Grundfreibetrag').

¹⁴⁹ Courtis, *ibid*, 331.

found the procedure used to determine the subsistence minimum to be in violation of the GG.¹⁵⁰

In the case of asylum seekers, the existential minimum and the social support in practice was lower than the social support through Hartz IV. In 2012 GCC ruled that the amounts granted to asylum seekers were insufficient to guarantee a dignified minimum existence.¹⁵¹

The Court explicitly placed the right to a dignified minimum existence in the context of IHRL by pointing to the ICESCR: *'Migration-policy considerations of keeping benefits paid to asylum seekers and refugees low to avoid incentives for migration [...] may generally not justify any reduction of benefits below the physical and socio-cultural existential minimum. Human dignity may not be relativized by migration-policy considerations.'*¹⁵²

Other laws show that the question of 'adequacy and affordability' of food plays an important role in Germany e.g. the tax reduction for basic food stuffs which also refer to art

¹⁵⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 Feb. 2010 (*Hartz IV*), 125 Entscheidungen des Bundesverfassungsgerichts, [BVERFGE] 175, 1 BvL 1/09, para. 1–220, 2010 (Ger.), available at: http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html [accessed 6 February 2014].

¹⁵¹ Bundesverfassungsgericht [BVerfG], 18 July 2012, 1 BvL 10/10, 1 BvL 2/11, Shortened and translated version: Constitutional Court Press Release no. 56/2012 of 18 July 2012, available at: <http://www.bundesverfassungsgericht.de/en/press/bvg12-056en.html> [accessed 6 February 2014].

This finding referred to section 3 paragraph 2 of the Asylum Seekers Benefit Act and was based on the fact that the cash benefits according to the law had not been increased since 1993, even though the cost of living in Germany went up by at least 30% in that time. As a result, the relevant provisions of the Asylum Seekers Benefit Act were declared unconstitutional. Basic benefits under the Asylum Seekers Benefits Act must now be calculated based on general provisions applicable to all persons who receive social benefits.

¹⁵² *Ibid.*

2(2) and art 20(1) GG.¹⁵³ The question of adequacy of food is regulated in German and European consumer law and the Common Agricultural Policy (CAP) of the EU. Genetically Modified Organism (GMO) food production must be authorised by the EU, and all food which contains greater than 0.9% of approved GMOs must be labelled. In 2009 Germany announced an immediate halt to cultivation and marketing of genetically modified maize under the safeguard clause.¹⁵⁴

3.2. Compliance with IHRL and the role of CESCR reporting for the government and Non-Governmental Organisations (NGOs) in Germany

The Federal Republic of Germany ratified the ICESCR (in 1973) as well as other relevant treaties, such as the ICCPR, CAT, CEDAW, CERD, however not yet the OP of the ICESCR.¹⁵⁵ In 2000 Germany, in its state parties report to the CESCR, underlined that in general *‘the availability of individual complaints procedures is an apt way of strengthening the legal status of those involved, as well as their awareness of their rights, and of encouraging the State parties to implement their obligations’*. However Germany added that it is primarily the task of states to guarantee that international law obligations are fulfilled.¹⁵⁶ In 2001 the

¹⁵³ Bundesministerium für Justiz und Verbraucherschutz, BGBl. I 2006, 2897 - 2901; 2 UStG Liste der dem ermäßigten Steuersatz unterliegenden Gegenstände, available at: http://www.gesetze-im-internet.de/ustg_1980/anlage_2_83.html, [accessed 6 February 2014].

¹⁵⁴ Severin and Hogan, ‘Germany to ban cultivation of GMO maize’, Reuters, 14 April 2009, available at: <http://www.reuters.com/article/2009/04/14/grain-germany-gmo-idUSLE16356920090414>, [accessed 6 February 2014].

¹⁵⁵ Acceptance of individual complaints procedures for Germany include CAT, art.22, CCPR-OP1, CCPR-OP1, CEDAW-OP, CERD, art.14, CRC-OP-IC, see http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN, [accessed 6 February 2014].

¹⁵⁶ UN Committee on Economic, Social and Cultural Rights, E/C.12/Q/GER/2, List of Issues, Substantive session of 2000, Implementation of the international Covenant on Economic, Social and Cultural Rights, Fourth periodic report submitted by States parties under articles 16 and 17 of the Covenant, Addendum,

German National Institute for Human Rights (DIMR) was established; albeit, it has no mandate to deal with human rights violations on an individual level.

Direct implications of the ratification of ICESCR concerning the right to food are hard to trace. For the immediate action needed to secure the right to be free from hunger Germany might have considered that this is not relevant for a developed state and therefore no constitutional change or law regulating that is needed. However, in the case of *'Mundraub'* (*'stealing by mouth'*) the opposite development was the case.¹⁵⁷ In 1975 the penal law, which until then had categorised stealing food for immediate consumption in the case of emergencies as a minor crime, was changed towards stricter legislation.¹⁵⁸

For progressive improvement related to the right to adequate standard of living the list of issues raised by CESCR and the periodic state reports answering to the CESCR are a meaningful source of information. Related to art 11 the CESCR addresses concerns and encouraged improvements. Examples of the sessions in 2001 are how Germany justifies their overall reduction in official development assistance (ODA); how social assistance to young victims of domestic violence is assured; and how a poverty threshold is defined in order to provide reports in fulfilment of obligations under article 11.¹⁵⁹

available at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN,b [accessed 6 February 2014].

¹⁵⁷ See also *'Verbrauchsmittelentwendung'*, (§ 370 (1) Nr. 5 StGB a.F.). The fine for *'Mundraub'* was 500 DM or 6 weeks arrest.

¹⁵⁸ *Ibid.*

¹⁵⁹ UN Committee on Economic, Social and Cultural Rights, E/ C.12/2001/SR.49, Summary Records and E/C.12/1/Add.68, Concluding observations, available at:

The responses come seven years later, with a two-year delay. Related to art 11 ICESCR the fifth periodic report of Germany explains its commitment related to housing and homeless and gives a definition of the concept of poverty and the issue of social benefits. In many parts, compliance with international law, the European Social Charter and other measures are stressed; observations and suggestions of the CESCR are discussed but hardly really considered for policy change. The way that Germany reports on its current ODA commitment shows that Germany considers itself an important player in development cooperation and poverty eradication worldwide.¹⁶⁰

It can be deduced from the profoundly increased number of parallel reports, that German NGOs perceive the reporting to ICESCR as important leverage against their own government. The question of whether art 20(1) social state principle and the concept of a minimum standard of living really offer a framework for the right to an adequate standard of living, including adequate food, is increasingly questioned by NGOS.

FIAN Germany lists examples for the evidence of the '*return of food insecurity in Germany*' such as the growing dependence of people on food banks, which offer the left-overs from

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN, [accessed 6 February 2014].

¹⁶⁰ UN Committee on Economic, Social and Cultural Rights , E/C.12/DEU/Q/5/ADD.1, Replies by the Government of Germany to the list of issues (E/C.12/DEU/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Germany (E/C.12/DEU/5)' 5 April 2011, available at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN [accessed 6 February 2014].

supermarkets, providing 1.5 million people with food.¹⁶¹ Further on, FIAN criticises social security benefits for children as being insufficient for well-balanced nutrition and not correctly adjusted after the Hartz-IV ruling of the FCC in 2010.¹⁶² The third example refers to the above mentioned Asylum Seekers Benefits Act.¹⁶³ FIAN also criticises the fact that the legislative authority decides whether the 'dignified minimum existence' is guaranteed in cash, or in kind – the latter obviously in breach of the definition of ECOSOC that adequate food should be culturally acceptable.¹⁶⁴ FIAN ends its report with strong recommendations: it calls on the German government to implement a comprehensive anti-poverty programme as suggested earlier by the CESCR; calls for a new calculation of the basic income benefits; and finally, recommends abolishing the Asylum Seekers Benefit Act.

Germany has not yet responded to the recommendation to develop a comprehensive anti-poverty programme, nor to the suggestions made by NGOs. It fits into this line that Germany so far has shown no great interest in expanding the complaint system as foreseen through the OP of the ICESCR.

¹⁶¹ FIAN Germany, NGO Submission, UPR on the Federal Republic of Germany, October 2012, available at: http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/UN-Dokumente/UPR_zu_Deutschland/UPR2013_germany_FIAN_en.pdf, [accessed 6 February 2014].

¹⁶² Ibid.

¹⁶³ *Bundesministerium für Justiz und Verbraucherschutz, Asylbewerberleistungsgesetz, AsylbLG*, available at: <http://www.gesetze-im-internet.de/asylblg/> [accessed 6 February 2014].

¹⁶⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 12, *ibid.*

3.3. The policy of Germany concerning international obligations to ensure the right to food

The Common Agricultural Policy of the European Union (CAP) and the European Social Charter influence the German legislation and policy making process. Subsidies and market regulating mechanisms are key elements of the CAP; nevertheless criticism remains that a significant number of small cooperatives are allegedly driven out of the market, leading to food supply dependency and instability of food security within importing countries.

In 2011 a German NGO coalition presented the first parallel report on extraterritorial state obligations of Germany.¹⁶⁵ The coalition emphasises that the CAP supports dumping strategies; this is one of the main factors for developing countries to become net food importers.¹⁶⁶ Subsequently, in April 2013, German NGOs presented a petition calling on the EU to enshrine the Right to Food in its policies.¹⁶⁷ The petition calls for the EU to draft a new independent article in its Common Agricultural Policy on the Right to Food. So far neither the German Government, nor other EU-members strongly supported the idea and agricultural subsidies remain an important part of the CAP.

Meanwhile, the German government took a clear position against extraterritorial jurisdiction. In 2012 in the case of *Kiobel v. Royal Dutch Petroleum* Germany, without being

¹⁶⁵ FIAN Germany, Parallel report in response to the 5th Periodic Report of the Federal Republic of Germany on the International Covenant on Economic, Social and Cultural Rights, Extraterritorial State Obligations, submitted by Brot für die Welt, FIAN Deutschland et al, FIAN, March 2011, available at: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/DEU/INT_CESCR_NGO_DEU_46_8542_E.pdf [accessed 6 February 2014].

¹⁶⁶ Ibid.

¹⁶⁷ GCAP Germany: 'The Right to Food should not be a game of chance', 19 Apr 2013, available at: <http://www.whiteband.org/en/news/gcap-germany-right-to-food>, [accessed 6 February 2014].

involved in the case, wrote an *Amicus Curiae* brief to the US Court of Appeals in support of the respondents.¹⁶⁸ In this case, Royal Dutch Petroleum was accused of supporting the torture and execution of environmental activists who protested against oil exploration in the Niger Delta. In its statement, Germany mainly criticised the extraterritorial reach of the American Tort Claim Act (ATCA). It emphasised: *'...Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil. ... Germany believes that overbroad exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts with other countries.'*¹⁶⁹

Thus it is no surprise that it remains difficult to hold enterprises accountable for human rights violations caused abroad – this is also true for the case of German enterprises, or even development aid agencies. For example, in 2010 a complaint was filed against employees of the German company Lahmeyer at the public prosecution in Frankfurt. Lahmeyer constructed the Merowe dam in Northern Sudan. The criminal complaint accused the two employees of displacing over 4,700 families by flooding 30 villages and destroying their livelihood. The NGO ECCHR considers the case a

¹⁶⁸ Brief of the Federal Republic of Germany as in support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*,

132 S.C.t. 1738 (2012), No. 10-1419,

available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondentamicufederalrepublicofgermany.authcheckdam.pdf [accessed 6 February 2014].

¹⁶⁹ *Ibid.*

violation of the IHRL, including art 11 ICERSC.¹⁷⁰ However, the criminal liability referred only to the German Criminal Code and consequently individuals, and not the company itself, was accused.¹⁷¹

A second example is Germany's role in a land titling project in Cambodia. FIAN in additional information to the CESCR, criticised the German government for their development aid having a negative effect on tenure security, access to land and natural resources, with special regards to the most vulnerable groups.¹⁷²

With the new government there are signs of change, at least concerning the right to food. The coalition agreement of the newly elected German Government emphasises world food security and the right to food - the FAO Voluntary Guidelines on the Responsible Governance of Tenure¹⁷³ will be implemented, speculation on food prices will be curbed (which most recently have been regulated by the EU)¹⁷⁴ and development cooperation in the field of rural areas will be intensified.

¹⁷⁰European Center for Constitutional and Human Rights (ECCHR), Deutsche Ingenieursarbeit ohne Rücksicht auf Verluste, 3 Juni 2013, available at: <http://www.ecchr.de/index.php/lahmeyer.html> [accessed 6 February 2014].

¹⁷¹ Ibid.

¹⁷² FIAN Germany, Additional information presented by FIAN Germany to the Committee on Economic, Social and Cultural Rights, 46th session, May 2nd 2011 Germany's Human Rights Obligations in Development Cooperation Access to Land and Natural Resources and Germany's support of the Land Sector in Cambodia, available at: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/DEU/INT_CESCR_NGO_DEU_46_8544_E.pdf [accessed 6 February 2014].

¹⁷³ Koalitionsvertrag zwischen CDU, CSU und SPD, Deutschlands Zukunft gestalten, 18. Legislaturperiode, available at: <http://www.tagesschau.de/inland/koalitionsvertrag136.pdf> [accessed 6 February 2014].

¹⁷⁴ EURACTIV, press release 'EU moves Curb food price bets by traders', 17. Januar 2014, available at: <http://www.euractiv.com/development-policy/eu-moves-curb-food-price-bets-tr-news-532857>, [accessed 6 February 2014].

Finally, the parties demand more responsibility of private actors for social, cultural and ecological rights. In order to strengthen the efforts of the German business sector in foreign countries the government promises to strive for the application of the OECD Guidelines for Multinational Enterprises.¹⁷⁵

4. Conclusion

As it has been shown, the right to food is interrelated with many other rights and treaties. The ICESCR and its reporting mechanisms are actively used by the CESCR and NGOs to encourage progression and adjustments in German law and practice. No complaint is made that German constitutional law does not respect the human right to food. Some criticism remains in terms of protection and fulfilment of the right concerning social aid schemes, especially for vulnerable groups.

It has been shown that the prevalent discussion concerning the right to food from the perspective of German policy makers is, to a lesser extent, a need to fulfil international obligations towards domestic citizens; but to a much wider extent a challenge which tackles questions of extraterritorial rights and duties of subjects of international law. In the case of access to markets for farmers of developing countries, food subsidies, impact of infrastructure projects, development aid and other matter, Germany does not comply with

¹⁷⁵ Koalitionsvertrag zwischen CDU, CSU und SPD, *ibid*, 16.

the criteria to respect, protect and fulfil the right to food as it is defined in CESCR Comment No 12.¹⁷⁶

It can only be hoped that the German Government will stick to its commitments of the coalition agreement related to rules for multinational actors. But also the OP to the ICESCR could have a crucial influence on the right to food in German policy and law: *'If the Committee recognizes the justiciability of the right to food in terms similar to those developed in the first part, specifically the justiciability of the totality of violations of the right to food, its contribution to protecting the right to food could be extraordinary....'*¹⁷⁷

Here Germany is less progressive than many other countries. For NGOs the task will remain to continue lobbying for the signature under the OP, for the right to food as part of the Common Agricultural Policy (CAP) and as part of a global strategy to combat hunger and poverty worldwide.

¹⁷⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food*, *ibid.*, for analysis see chapter 2.

¹⁷⁷ Golay, *ibid.*, 34.

The current challenges faced by the law relating to intellectual property and consumer protection in the sphere of internet commerce

Andrius Mazeika

‘Commerce’ is a notion well established within the law, with many facets covering the various aspects that the “buying and selling of goods, especially on a large scale...”¹⁷⁸ entails. The advent of the internet has established ‘cyber-space’ existing alongside the physical world, in which economic transactions occur on a daily basis, the regulation of which are just as important as those concluded in the physical world. Although the position of the law is established in relation to transactions concluded in the physical world; the move to cyber-space poses many challenges which the courts and legislature have sought to remedy. It is the aim of this essay to examine the problems posed by cyber-space, look at the law that has developed to remedy them and analyse whether the law fulfils the objectives of fairness and certainty. These three processes will be conducted in relation to the law of: online presence and Intellectual Property and Consumer Protection; two vital spheres of internet commerce.

A fundamental issue which a move to the internet experienced related to intellectual property (IP)¹⁷⁹. Of the many facets of intellectual property law, the least significant shall be dispensed with first; the law of copyright and patents, followed by the bulk of this section, relating to the issues and solutions brought about by the Domain Name System.

¹⁷⁸ “The activity of buying and selling, especially on a large scale...” (Oxford dictionaries <http://www.oxforddictionaries.com/definition/english/commerce?q=Commerce>)

¹⁷⁹ Pearson, H. E. ‘*Intellectual Property and the Internet*’ The journal of world intellectual property 1998 vol.1(5) page 835

Moving on to the crux of the IP problems faced by the law, the challenge of domain name disputes shall now be considered. A domain name is the part of a Universal Resource Locator that identifies the website of an individual from others¹⁸⁰, and has become the centre of widespread disputes since commercial entities discovered the value of a domain name as a marketing tool¹⁸¹. This discovery compounded on the first-come-first-served basis of name allocation¹⁸², and the national nature of trademark protection¹⁸³, which resulted in people registering well known company names as domain names in the hopes of selling them on with profit, or benefitting from the online traffic they attract (commonly known as Cybersquatting)¹⁸⁴. These disputes are regulated under a patchwork series of initiatives that involve domestic law and international prerogatives. The logical starting point to examine these measures is the law of trademarks of England and Wales, which will be discussed in relation to its applicability to domain names.

There are several two main principles under which a domain name may be retrieved: trade mark infringement under the Trade Marks Act (TMA) 1994¹⁸⁵, or a claim under the principle of passing-off¹⁸⁶¹⁸⁷. First to be addressed is a claim under s10 of the TMA¹⁸⁸. This position seems to be less

¹⁸⁰ Or distinguishes an email hosting service from others (Black, W. 'The Domain Name System' *Law and the Internet: a Framework for Electronic Commerce*, 2nd Edition, (Heart Publishing Oxford: England Portland: Oregon) (2002) page 125

¹⁸¹ By registering their trademarks as domain names to allow customers to more easily navigate to their web pages (Emerson, C. D. 'Wasting Time in Cyberspace: The UDRP's Inefficient Approach Towards Arbitrating Domain Name Disputes on the Internet' 34 U. Balt. L. Review 161 (2004) page 166

¹⁸² Davidson, A. 'The law and internet Commerce' 2009 Port Melbourne, Vic : Cambridge University Press, page 143

¹⁸³ Compared to the global nature of domain names (Pearson, H. E. 'Intellectual Property and the Internet' The journal of world intellectual property 1998 vol.1(5) page 833

¹⁸⁴ Waelde, C. 'Trade Marks and Domain Names' *Law and the Internet: a Framework for Electronic Commerce*, 2nd Edition, (Heart Publishing Oxford: England Portland: Oregon) (2002) page 135

¹⁸⁵ Trade Marks Act 1994 (legislation.gov.uk) (<http://www.legislation.gov.uk/ukpga/1994/26>)

¹⁸⁶ Per the case of *British Telecommunications Plc and Another v One in a Million Ltd and Others; and other actions* (1998) 4 All ER 476

relevant in relation to domain names, as shown in the cursory analysis of a claim under the TMA¹⁸⁹ in the leading case of *One in a Million (OIAM)*¹⁹⁰, wherein the court preferred an amended version of the Tort principle of passing-off¹⁹¹. Undoubtedly, this willingness of the courts to find a remedy¹⁹² is indicative of a level of certainty and fairness, entitling victims of cybersquatting to obtain a remedy.

In addition to these remedies, there exists an international domain name resolution process which takes the form of the Universal Dispute Resolution Procedure (UDRP), established by the Internet Corporation for Assigned Names and Numbers (ICANN)¹⁹³. Although at the core a good idea created to combat the expense and ineffectiveness of court proceedings¹⁹⁴, it is actually hamstrung by its own provisions¹⁹⁵. The most significant of which is the ability of a party to apply for a court remedy during the UDRP process¹⁹⁶. Compounding on this is the position outlined in the WIPO final report, that the courts should take a *de novo* review¹⁹⁷ of any finding by the panel¹⁹⁸. Combined, these allow

¹⁸⁷ Intellectual Property Office website (<http://www.ipo.gov.uk/types/tm/t-other/t-infringe.htm>)

¹⁸⁸ Which requires: use of a mark that is similar to another and causes confusion or similarity to a well known mark whose reputation is damaged or taken advantage of (Intellectual Property Office 'Infringement' 'What is Trademark Infringement' (<http://www.ipo.gov.uk/types/tm/t-other/t-infringe.htm>))

¹⁸⁹ Specifically S10(3) (Waelde C. 'Trade Marks and Domain Names' *Law and the Internet: a Framework for Electronic Commerce*, 2nd Edition, (Heart Publishing Oxford: England Portland: Oregon) (2002) page 147)

¹⁹⁰ *British Telecommunications Plc and Another v One in a Million Ltd and Others; and other actions* (1998) 4 All ER 476

¹⁹¹ Under which Cybersquatters are charged with creating an instrument of deception where a nefarious act has been committed (Waelde C. 'Trade Marks and Domain Names' *Law and the Internet: a Framework for Electronic Commerce*, 2nd Edition, (Heart Publishing, Oxford: England, Portland: Oregon) (2002) page 147)

¹⁹² Scrumpton DJ expanded the principles of passing off far beyond previously contemplated (Davidson, A. 'The Law of Electronic Commerce' (2009) (Port Melbourne, Vic: Cambridge Press) Page 153)

¹⁹³ Based partly on a report compiled by the World Intellectual Property Organisation (Waelde, C. 'Trade Marks and Domain Names' *Law and the Internet: a Framework for Electronic Commerce*, 2nd Edition, (Heart Publishing Oxford: England Portland: Oregon) (2002) page 160)

¹⁹⁴ The Management of Internet Names and Addresses: Intellectual Property Issues 'Final Report of the Internet Domain Name Process' (1999) (<http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>)

¹⁹⁵ Emerson, C. D. 'Wasting Time in Cyberspace: The UDRP's Inefficient Approach Towards Arbitrating Domain Name Disputes on the Internet' 34 U. Balt. L. Review 161 (2004) page 171

¹⁹⁶ Emerson, C. D. 'Wasting Time in Cyberspace: The UDRP's Inefficient Approach Towards Arbitrating Domain Name Disputes on the Internet' 34 U. Balt. L. Review 161 (2004) page 173

¹⁹⁷ That is to say, a decision is made with no deference to previous decisions, as if considering the issues for the first time (Cornell University Law School, *Legal Information Institute*) (http://www.law.cornell.edu/wex/de_novo)

any unwanted decision to be circumvented by initiating a court proceeding, the subsequent decision of which would take no account of the UDRP decision¹⁹⁹. Although other flaws exist²⁰⁰, these two constitute the most crippling provisions of the UDRP. Understanding the reasoning behind these provisions can be gleaned from the WIPO final report²⁰¹, wherein the consequences of a universal and binding international arbitration system were unknown²⁰². Although this was stated as the position in the “...first stage...”²⁰³ retaining an implication that in future, binding arbitration may be appropriate²⁰⁴. However, the current position of the UDRP is such that its own provisions serve to prevent it from achieving the objectives of a cheap and rapid arbitration process²⁰⁵, further they prevent any possibility of fairness or consistency that a claimant could attain from a decision. The impact of these provisions is illustrated in the case law, notably in the case of Parisi²⁰⁶; which, although a US decision, illustrates the flaws in the UDRP process²⁰⁷.

¹⁹⁸ The Management of Internet Names and Addresses: Intellectual Property Issues *‘Final Report of the Internet Domain Name Process’* (1999) page 60 para196 (ii) and (v) (<http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>)

¹⁹⁹ Emerson, C. D. *‘Wasting Time in Cyberspace: The UDRP’s Inefficient Approach Towards Arbitrating Domain Name Disputes on the Internet’* 34 U. Balt. L. Review 161 (2004) page 174

²⁰⁰ Such as the ability to file unlimited supplementary filings of unlimited length (Emerson C. D. *‘Wasting Time in Cyberspace: The UDRP’s Inefficient Approach Towards Arbitrating Domain Name Disputes on the Internet’* 34 U. Balt. L. Review 161 (2004) page 182-3

²⁰¹ The Management of Internet Names and Addresses: Intellectual Property Issues *‘Final Report of the Internet Domain Name Process’* (1999) (<http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>)

²⁰² Resulting in a cautious approach in an attempt to not create domestic problems (The Management of Internet Names and Addresses: Intellectual Property Issues *‘Final Report of the Internet Domain Name Process’*) (1999) page 44 paragraph 133 (<http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>)

²⁰³ “There has been, in consequence, in some quarters, a reluctance to abandon all possibilities of resort to litigation as a result of the adoption of new procedures, at least in the first stage before the experience of the new system” The Management of Internet Names and Addresses: Intellectual Property Issues *‘Final Report of the Internet Domain Name Process’* (1999) page 44 para 133 (<http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>)

²⁰⁴ Management of Internet Names and Addresses: Intellectual Property Issues *‘Final Report of the Internet Domain Name Process’* (1999) (<http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>)

²⁰⁵ Emerson C. D. *‘Wasting Time in Cyberspace: The UDRP’s Inefficient Approach Towards Arbitrating Domain Name Disputes on the Internet’* 34 U. Balt. L. Review 161 (2004) page 175-176

²⁰⁶ Parisi v Netlearning Inc., 139 F. Supp 2d 743 (ed. Va. 2001)

²⁰⁷ Namely that the claimant would have been better served skipping UDRP and going straight to the courts for a remedy (Emerson C. D. *‘Wasting Time in Cyberspace: The UDRP’s Inefficient Approach Towards Arbitrating Domain Name Disputes on the Internet’* 34 U. Balt. L. Review 161 (2004) page 184)

Attention must now be given to the category of consumer protection in relation to the internet. This category shall be the focus of the next section of this essay, and shall be sub-divided into: economic consumer protection in both the domestic²⁰⁸ and EU context, and specific EU legislation relating to data protection²⁰⁹. The former of which shall be dealt with first, in order to provide a backdrop under which to consider the latter.

The current state of consumer protection consists of various facets of domestic and EU law, the latter of which developed from humble beginnings as a form of indirect regulation through a series of 'soft law' initiatives²¹⁰. This development was fuelled by a desire for greater harmonisation of national consumer policy laws²¹¹ and was facilitated by the granting of EU legislative competence to consumer protection under the Maastricht Treaty²¹², which has resulted in their current position as a patchwork series of directives²¹³. Although "...embroidering the patchwork..."²¹⁴ was attempted, in the form of the Directive on Consumer Rights (2011/83)²¹⁵, the 2008 Draft upon which it is based is 'dead'²¹⁶, due to both academic disdain, and the lack of enthusiasm by member-states to embrace full harmonisation²¹⁷. As a result, the ambitious goal of amending eight directives fell to only two²¹⁸,

²⁰⁸ Which unfortunately revolves around the format of delivery of the software !!!!!

²⁰⁹ Such as the EU Consumer Directive 1999/44/EC (Eide, E. *'Is the Consumer Directive Advantageous for the Consumers'* Eur. J. Law Econ. Vol 28 Issue 3 page 291)

²¹⁰ Weatherill, S. *'EU Consumer law and Policy'* (2005) (Cheltenham: UK Northampton, MA : Edward Elgar) (Expanded ed) page 4

²¹¹ Among other factors such as improving consistency in interpretation (Weatherill, S. *'The European Consumer Directive: How and Why a quest for "Coherence" has (Largely) Failed'* (2012) Common Law Market Review vol 49 page 1283)

²¹² Weatherill, S. *'EU Consumer law and Policy'* (2005) (Cheltenham: UK Northampton, MA : Edward Elgar) (Expanded ed) page 15

²¹³ Weatherill, S. *'The European Consumer Directive: How and Why a quest for "Coherence" has (Largely) Failed'* (2012) Common Law Market Review vol 49 page 1283

²¹⁴ Weatherill, S. *'The European Consumer Directive: How and Why a quest for "Coherence" has (Largely) Failed'* (2012) Common Law Market Review vol 49 page 1283

²¹⁵ Directive 2011/83/EU of the European Parliament and The Council on Consumer Rights...', Official Journal of The European Union (22/11/2011)

²¹⁶ Weatherill, S. *'The European Consumer Directive: How and Why a quest for "Coherence" has (Largely) Failed'* (2012) Common Law Market Review vol 49 page 1288

²¹⁷ Weatherill, S. *'The European Consumer Directive: How and Why a quest for "Coherence" has (Largely) Failed'* (2012) Common Law Market Review vol 49 page 1288

and full harmonisation was abandoned in lieu of ‘...full targeted harmonisation...’²¹⁹ Furthermore, article 3(2) serves to undermine the whole aim of the Directive by giving precedence to previous enacted Union Acts in the case of a conflict²²⁰. Despite these glaring problems, this directive retains a few notable Articles²²¹, for example; Article 6, which requires distance and off-premises sellers to provide key information to the consumer regarding the transaction²²². Although criticisms have been levelled against it²²³, it can be seen as fair and allowing more rights to the consumer.

Having established this generic position, this essay shall move onto the law relating to data protection.

One fundamental aspect of data protection; is the law relating to online behavioural advertising (OBA). OBA is facilitated by the use of cookies, and constitutes an organisation gathering an online footprint of websites which individuals visit²²⁴. This practice establishes a number of problems²²⁵. The EU has reacted to these problems with Directive 2009/136, the most significant provision of

²¹⁸ Namely Directives 85/577 and 97/7, with selective amendments to two others (Directive 93/13 and 1999/44) (Weatherill, S. ‘*The European Consumer Directive: How and Why a quest for “Coherence” has (Largely) Failed*’ (2012) *Common Law Market Review* vol 49 page 1279)

²¹⁹ Weatherill, S. ‘*The European Consumer Directive: How and Why a quest for “Coherence” has (Largely) Failed*’ (2012) *Common Law Market Review* vol 49 page 1286

²²⁰ Article 3(2) Directive 2011/83/EU of the European Parliament and the council on Consumer Rights (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>)

²²¹ Weatherill, S. ‘*The European Consumer Directive: How and Why a quest for “Coherence” has (Largely) Failed*’ (2012) *Common Law Market Review* vol 49 page 1292

²²² Including provision for digital products Weatherill, S. ‘*The European Consumer Directive: How and Why a quest for “Coherence” has (Largely) Failed*’ (2012) *Common Law Market Review* vol 49 page 1293

²²³ Such as the argument forwarded by Weatherill that: “...consumers readily and rationally choose not to absorb all information on offer” (Weatherill, S. ‘*The European Consumer Directive: How and Why a quest for “Coherence” has (Largely) Failed*’ (2012) *Common Law Market Review* vol 49 page 1294)

²²⁴ Which is then used to tailor advertisements seen by the individual according to their browsing history (Lynksey, O. ‘*Trak[ing] changes: An Examination of the EU Regulation of Online Behavioural Advertising Through a Data Protection Lens*’ (2011) *European Law Review* Issue 36(6) page 875)

²²⁵ Such as: the invasion of individuals’ privacy, inaccurate profiling, profile disclosure, lack of transparency (Lynksey, O. ‘*Trak[ing] changes: An Examination of the EU Regulation of Online Behavioural Advertising Through a Data Protection Lens*’ (2011) *European Law Review* Issue 36(6) pages 879 (first two) 880 and 881)

which is the creation of an opt-in scheme to cookies²²⁶. As outlined by Lynksey, this Directive deals with the problems, but does so in a way that is too onerous²²⁷. Despite this criticism, the aim of this essay must be adhered to, and although the problems can be dealt with in a less onerous or more effective way²²⁸, the solution still introduces fairness in the form of a redressing of the balance towards the weaker-positioned consumer in online transactions. Furthermore, the requirement of opt-in illustrates a level of certainty that the law possesses, in its allowance of control to the consumer as to who may possess their browsing data.

In conclusion, it is evident that the internet has complicated the law relating to commerce immensely, by creating a global platform for economic transactions, with new and unregulated commercial practices. The regulation of these practices has generally failed to achieve the aims they sought, and in most cases have not provided certainty and fairness to users, although there are a few grains of success in several measures. A notable failure is that of the UDRP set up by ICANN, which is undermined by its own provisions; invalidating its purpose and providing neither fairness nor certainty. However, this is offset by the willingness of the courts to interpret the law in such a way as to find a remedy in the context of domain name disputes, as shown in the OIAM case; which illustrates the laws fairness and certainty. The position relating to consumer protection holds many similarities notably, the general economic protection provided has been too watered down, encompassing only two previous Directives and doing little to develop coherence in the patchwork of current laws, although fairness can be found. In contrast to this is the position of data protection under the E-Privacy Directive, the provisions of which grant fairness and certainty through the

²²⁶ Lynksey, O. 'Trak[ing] changes: An Examination of the EU Regulation of Online Behavioural Advertising Through a Data Protection Lens' (2011) European Law Review Issue 36(6) page 877

²²⁷ In three of the four categories that Lynksey established to evaluate the effects of the Directive (Lynksey, O. 'Trak[ing] changes: An Examination of the EU Regulation of Online Behavioural Advertising Through a Data Protection Lens' (2011) European Law Review Issue 36(6) page 885)

²²⁸ Lynksey, O. 'Trak[ing] changes: An Examination of the EU Regulation of Online Behavioural Advertising Through a Data Protection Lens' (2011) European Law Review Issue 36(6) page 885

establishment of an opt-in to data collection techniques. Hence, it is clear that although some areas of internet commerce are successfully regulated, others are in dire need of reform.

Rights and Responsibilities Towards Children:

Does the current law do enough to ensure that unmarried fathers can access parental responsibility?

Hannaley Palmer

Abstract

This dissertation analyses the current law in regard to parental responsibility, with particular emphasis being placed on the standing of the unmarried father. There is a detailed discussion into the suggestion that all fathers should be automatically awarded parental responsibility of their child, regardless of whether they were married to the mother at the time of birth or not. An alternative to this suggestion is that the law should make joint registration of a child's birth compulsory in England and Wales. This would have the equivalent effect of automatically awarding parental responsibility to all fathers, based on the fact that those who are registered on a child's birth certificate after the 1st of December 2003 are awarded parental responsibility as a direct result²²⁹. Whilst there is a possibility that any unmarried father who acquires parental responsibility in this way could have it removed by the court if it is deemed necessary²³⁰, previous case law demonstrates that the courts are reluctant to remove parental responsibility, unless there are serious justifications for doing so²³¹. In addition, this dissertation contains a comparative review of other jurisdictions which employ different methods to establish parental responsibility.

²²⁹ *Section 4 of the Children Act 1989*, as amended by the *Section 111 of the Adoption and Children Act 2002*

²³⁰ *Section 4 (3) of the Children Act 1989*

²³¹ Such as causing physical harm to the child as in *Re P (Terminating Parental Responsibility)* [1995] 3 FCR 753; [1995] 1 FLR 1048; [1995] Fam Law 471, or emotional harm as in *CW v SG* [2013] EWHC 854 (Fam)

Introduction

The term 'parent' is one which is used constantly within society, and yet there is no clear, single definition as to who qualifies as a 'parent'²³². The traditional approach, and the one which is most commonly referred to, is that a parent is the mother or the father who cares for and raises the child, the general presumption being that they genetically produced the child. This view, however, is not applicable to all modern families, as the dynamics of family life have developed over time. One such example of where there has been a major change is in regards to the increase of the 'step-parent', whereby an adult who is unrelated to the child genetically but married to a genetic parent, treats the child as their own and practically acts as a parent. It would therefore be unjust to say that these individuals, who act as parents and care for the child, are entirely removed from that status. It is for reasons such as this that the law has distinguished between different types of parenthood²³³, establishing that there is *parentage*, *parenthood* and *parental responsibility*²³⁴. *Parentage* refers to the male and female who are the genetic parents of the child. This includes situations such as where there is a donor of gametes, who will only usually possess this type of being a parent. *Parenthood* is the title which is given to those who are considered the child's parents by law. Usually this is the genetic parents of a child, with the exceptions being where there was the use of a registered sperm donor or where the child has been adopted. *Parental Responsibility* is generally considered to be the most important aspect of being a parent as it refers to those who have rights and responsibilities in respect of the child, and is considered

²³² Section 576 of the Education Act 1996 defines a parent as not only the natural parents (the biological mother and father) but also to include anyone who may have responsibility for a child or care of a child. It is not, however, a straight forward and definitive definition

²³³ Eekelaar made a distinction between the legal, genetic and social aspects of parenthood in Eekelaar, J. 'Parental Responsibility: State of Nature or Nature of the State?' (1991) 13 Journal of Social Welfare and Family Law 37

²³⁴ Bainham, A. 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' (1999) as cited in Herring, J. (2011) *Family Law: Fifth Edition*

crucial to be able to effectively act as a parent. This does not mean that only those who are a legal parent can have parental responsibility for a child, but instead it can be awarded to those who act as a 'social parent', such as a step-parent. It is this final level of being a 'parent' which is the focus of this dissertation.

Parental Responsibility is defined by section 3 (1) of the Children Act 1989 as being “*all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*”²³⁵. This definition demonstrates that the only way in which a person is capable of properly exercising any form of authority over a child is to be in the possession of parental responsibility, thus is a critical concept in regards to the relationship between children and their parents. This is however, somewhat problematic due to the fact that not all parents are automatically conveyed parental responsibility and it can be quite difficult to establish whether they are entitled to be a holder of parental responsibility. This refers to the position of the unmarried father. It is the birth mother (i.e., the woman who carries and gives birth to the child), and the father who was married to the mother at the time of the child's birth, who are automatically awarded parental responsibility. This has been argued to cause inequality both based on gender, and between the different categories of fathers.

This dissertation will analyse the current law regarding parental responsibility to establish whether it does enough to ensure that parents are able to access these responsibilities. The main area of focus will be on the position of the unmarried father, compared to mothers and married fathers, concluding whether enough is being done by the law to ensure that unmarried fathers are able to exercise the responsibilities which, by the course of nature,

²³⁵ *Section 3 (1) of the Children Act 1989*

should belong to them. One suggestion which has been put forward is, to try and create greater equality between the various parties, and give unmarried fathers automatic responsibility in the same way that married fathers have²³⁶. This, however, has had considerable opposition²³⁷ as, it was believed that giving all unmarried fathers automatic parental responsibility could potentially jeopardise both the welfare of the child and the rights of the mother. Those who oppose automatic parental responsibility believe there are sufficient ways in which a 'meritorious' father can gain parental responsibility²³⁸, and it would be pointless conveying parental responsibility upon those who do not want it²³⁹.

Another suggestion is to make the joint registration of a child's birth compulsory²⁴⁰. This would mean that wherever possible and practical, a child would have both a mother and father listed on their birth certificate. Part of the argument in favour of this is that having both names on the birth certificate would be highly beneficial to the child's welfare, boosting their self-esteem and would allow them to have a better understanding of their biological identity²⁴¹. However, this has been countered by the argument that this, along with the idea of automatic parental responsibility for unmarried fathers, could have a

²³⁶ Suggestions of awarding parental responsibility automatically to all fathers was demonstrated by the Lord Chancellor's Department in their Consultation Paper *'The Procedures for the Determination of Paternity and on the Law on Parental Responsibility for Unmarried Fathers'* (1998) A Lord Chancellor's Department Consultation Paper accessed via

<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/patfr.htm> (07/11/2013)

²³⁷ Particularly from organisations such as Rights of Woman and Women's Aid

²³⁸ Outlined in *Section 4 of the Children Act 1989*

²³⁹ This point was considered by the Law Commission in their report *'Review of Child Law: Guardianship'* [1988] EWLC 172, paragraph 2.17 who believed that there were good reasons why some unmarried fathers should not be granted parental responsibility. See also Pickford, R. *'Unmarried Fathers and the Law'* in Bainham, A., Day Sclater, S. & Richards, M. eds. (1999) *What is a Parent? A Socio-Legal Analysis* at page 145

²⁴⁰ Department for Work and Pensions' White Paper *'Joint Birth Registration: Recording Responsibility'* June 2008 Cm. 7293 at paragraph 25 – this has been somewhat implemented in *Schedule 6 of the Welfare Reform Act 2009*

²⁴¹ Department for Work and Pensions' White Paper *'Joint Birth Registration: Recording Responsibility'* June 2008 Cm. 7293 at paragraph 23. See also Bainham, A. *'What is the Point of Birth Registration?'* (2008) 20 Child & Fam. L. Q. 449 at page 459

negative effect on children's welfare²⁴². The main reason for this is that, if made compulsory, those who registered the birth of a child would have parental responsibility conveyed to them by the simple fact that their name appears on the birth certificate²⁴³, which would be similar to granting parental responsibility automatically. It is therefore necessary to analyse the balance of the father's rights, the child's welfare and the wishes of the mother, to conclude whether this reform would be desirable and practical.

Current law on parental responsibility

The current law regarding parental responsibility is the result of constant development, whereby the law is trying to ensure that it reflects society wherever possible. One of the first major changes to the law was the removal of the distinction between legitimate and illegitimate children²⁴⁴. This was necessary due to the shift in society, whereby more and more children were being born 'out of wedlock', largely due to the shift in attitude whereby it is no longer essential to marry before having children. The number of births which occur outside of marriage are still steadily increasing, as was found by Pickford; the number of births outside of marriage in 1971, accounted for only 8 per cent of all live births²⁴⁵, but by 1996 this had increased to 36 per cent and "by 2010, just under 47 per cent of births occurred outside of marriage"²⁴⁶. These statistics are crucial as they show that there is a shift in attitude as to whether it was necessary to marry before starting a family, and suggest that within the next 20 years the majority of births will be to unmarried mothers.

²⁴² Herring, J. (2011) *Family Law: Fifth Edition* at page 330

²⁴³ Section 4 of the Children Act 1989 as amended by Section 111 of the Adoption and Children Act 2002 – applies only to those whose name appears on a certificate registered after December 1st, 2003

²⁴⁴ The Family Law Reform Acts of 1969 and 1987 set out to remove the legal disadvantages of illegitimacy

²⁴⁵ Pickford, R. 'Unmarried Fathers and the Law' in Bainham, A., Day Sclater, S. & Richards, M. eds. (1999) *What is a Parent? A Socio-Legal Analysis* at page 143

²⁴⁶ Probert, R. (2012) *Cretney and Probert's Family Law: Eighth Edition* at page 16

The main problem with the change in society is that the primary way of establishing paternity, and parental responsibility, in England and Wales is through the institute of marriage. Currently, the only people who are automatically awarded parental responsibility are the birth mothers²⁴⁷ of the child²⁴⁸, (regardless of whether they are married or not), and those fathers who were married to the mother at the time of the child's birth²⁴⁹. As the law currently stands, there is no automatic presumption of parental responsibility for unmarried fathers, and instead they must acquire it through one of the prescribed methods described within section 4 of the Children Act 1989. The primary method in which an unmarried father is able to gain parental responsibility is by being named on the child's birth certificate. However, this only applies to those who have registered, or re-registered, the birth after the 1st of December 2003²⁵⁰. For those unmarried fathers who were registered before this date, there are two ways in which they can be granted parental responsibility. It is either through cooperation with the mother in regards to a Parental Responsibility Agreement (PRA)²⁵¹ or, where there can be no agreement between the parents, by applying for a Parental Responsibility Order (PRO)²⁵² from the court²⁵³. Alternative methods of indirectly obtaining parental responsibility is to subsequently marry the mother of the child²⁵⁴, by obtaining a residence order (whereby, if a father does not already have parental responsibility, it will be awarded to him²⁵⁵) or by being appointed as the child's guardian²⁵⁶.

²⁴⁷ Meaning the woman who carries and births the child

²⁴⁸ *Section 2 (1) and 2 (2) of the Children Act 1989*

²⁴⁹ *Section 2 (1) of the Children Act 1989*

²⁵⁰ *Section 4 of the Children Act 1989 as amended by the Adoption and Children Act 2002*

²⁵¹ *Section 4 (1) (b) of the Children Act 1989*

²⁵² *Section 4 (1) (c) of the Children Act 1989*

²⁵³ Walsh, E. & Geddes, G. (2010) *Working in the Family Justice System – The Official Handbook of the Family Justice Council: Third Edition* at page 246

²⁵⁴ *Section 2 (3) of the Children Act 1989 with reference to Section 1 of the Family Law Reform Act 1987 – this only applies to the father of the child and not other men who consequently marry the mother (step-parents)*

²⁵⁵ *Section 12 (1) of the Children Act 1989*

²⁵⁶ *Section 5 (6) of the Children Act 1989*

With any order which is given by the court, the primary consideration is the best interests of the child²⁵⁷. It is for this reason that the courts must consider whether an unmarried father is committed enough to the child before they grant parental responsibility. In the case of *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]*²⁵⁸, the court stated that for an unmarried father to be granted parental responsibility the court must consider; “(1) the degree of commitment which the father has shown towards the child; (2) the degree of attachment which exists between the father and the child; and (3) the reasons of the father for applying for the order”²⁵⁹. This could prove problematic for those fathers who have been denied access to their child by the mother, as it would be difficult to prove commitment to a child who has never been in your presence. This demonstrates that while in theory the PRO might be a good idea, it does not offer a clear solution for the unmarried father to gain parental responsibility.

In addition to awarding parental responsibility, another issue arises in regards to the removal of parental responsibility. Parental responsibility usually ends when a child turns 18, and otherwise cannot generally be removed unless the child is given up for adoption²⁶⁰. However, unmarried fathers can have their parental responsibility removed by a court order²⁶¹, if the court feels that it is necessary to do so. Generally, the courts do not use this ability to remove parental responsibility as it can go against the best interests of the child to deprive them of a fully responsible father. There are however, two identifiable cases where

²⁵⁷ Article 2 of the United Nations Convention on the Rights of the Child (1989) and Section 1 of the Children Act 1989

²⁵⁸ *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]* Fam 151; [1991] 2 All ER 185

²⁵⁹ *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]* as quoted from Harris, P. & George, R. ‘Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations’ (2010) 22 Child & Fam. L. Q. 151 at page 158

²⁶⁰ Hoggett, B. (1993) *Parents and Children: Fourth Edition* at page 34

²⁶¹ Section 4 (3) of the Children Act 1989

this has happened. In *Re P (Terminating Parental Responsibility) [1995]*²⁶², the judge allowed the application by the mother to terminate the unmarried father's parental responsibility due to the fact that he had forfeited his responsibility by causing physical harm to the child. It was stated in this case that whilst it is possible for unmarried fathers to have their parental responsibility revoked, this "*should not become a weapon in the hands of the dissatisfied mother of a non-marital child*"²⁶³ and instead should only be granted on the basis that the child's welfare is of paramount consideration. This was supported by the recent case of *CW v SG [2013]*²⁶⁴, where it was accepted that although it is important for the child to know his origins, and where possible, have a relationship with each biological parent, consideration must also be given to the effect that interference by the father might have on the child's family life. In this particular case there was a need for emotional security above all else, which would have been jeopardised if the father continued to have an involvement in the child's life. The court acknowledged that there needs to be consideration given in regards to both the father's and child's rights under article 8²⁶⁵, but the rights of the child outweigh those of the father and as such, parental responsibility must be terminated. Article 8 provides that everyone has the right to respect for his private and family life, so by balancing the rights of both the child and the father, it is more important for the child to have a private life without interference so that they can grow up properly. This can seem unfair on the father, particularly considering parental responsibility could not have been removed if the father had been married to the mother at the time of birth but, it is the best interests of the child which must be of paramount importance in every decision. Other than the above examples where parental responsibility was removed in the best interests of the

²⁶² *Re P (Terminating Parental Responsibility) [1995] 3 FCR 753; [1995] 1 FLR 1048; [1995] Fam Law 471*

²⁶³ *Re P (Terminating Parental Responsibility) [1995] 3 FCR 753 at page 753*

²⁶⁴ *CW v SG [2013] EWHC 854 (Fam)*

²⁶⁵ *Article 8 of the European Convention on Human Rights 1950*

child, it is possible for parental responsibility or residency to be awarded to an unmarried father where it is thought to be beneficial to the child. One example of this is the case of *Re A (Custody)* [1991]²⁶⁶ where the father of a young child was awarded custody of his daughter due to the fact that it was in her best interests to stay where she was and not be moved to live with her mother, from whom she had been separated from for some time. The courts will also take into consideration the child's wishes and feelings in particular circumstances, especially in cases of older children, as this might influence the courts as to what they believe is in their best interests²⁶⁷.

Therefore, as the law in this area stands, automatic parental responsibility is only granted to the birth mother of the child and to the father who was married to the mother at the time of birth. While unmarried fathers do not qualify for parental responsibility automatically, they can acquire it in a number of ways, either with or without the cooperation of the mother. If the mother does not cooperate in awarding the unmarried father parental responsibility, then he must prove to the courts that he is committed to his child and as such deserves to have parental responsibility. The only category of persons with parentage whom can have their parental responsibility revoked, without having the child adopted, are unmarried fathers, the argument being that it will only be revoked where it is of the utmost importance for the child's welfare. The courts have demonstrated their reluctance to removing parental responsibility by only applying it in two cases where there were direct conflicts between the child's rights and their fathers.

²⁶⁶ *Re A (Custody)* [1991] 2 FLR 394

²⁶⁷ Such as in the case of *Williamson v Williamson* [1986] 2 FLR 146 where the children's reasons for wanting to stay with their father were paramount in deciding which parent should have custody and in *M v M (Custody Appeal)* [1987] 1 WLR 404 where the appeal was allowed due to the fact that the judge had failed to take account of the child's adamant opposition to her mother having custody

The present law regarding parental responsibility is unsatisfactory

It is generally accepted that the position of the law in regards to parental responsibility has been adapted to better reflect the changes in society, however it does not appear that these changes have been substantial enough and have in fact, only made a small amount of progress²⁶⁸. The percentage of children who are born outside of marriage has been steadily increasing since the 1970s, to the point where nearly half of all children born are to unwed mothers. Yet the law still does not treat married and unmarried fathers in the same way. The main point of grievance is the fact that the only category of legal parent who are not automatically awarded parental responsibility is that of unmarried fathers. Instead, the unmarried father must establish his parental responsibility as per the provisions set out in section 4 of the Children Act 1989. Owing to the nature of the provisions, the only way in which an unmarried father can gain parental responsibility is to have the cooperation of a third party; either the mother who consents to the father's name appearing on the birth certificate, or the father being awarded parental responsibility through a PRA, or, where there is no agreement between the mother and father, applying to the courts to gain a PRO. The other major problem with the current law is that the only category of people who can have parental responsibility removed by order of the court is unmarried fathers²⁶⁹. Whilst some believe it is necessary to ensure that the best interests of the child are maintained, it has been argued to be discriminatory and thus should apply to all categories of parent equally²⁷⁰. A suggestion for reform which has been made²⁷¹ is to award all fathers,

²⁶⁸ Macmillan Moon, R. *'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context'* (2010) 6 (1) CSLR 259 at page 261

²⁶⁹ And all others who are not the legal parents of a child and gain parental responsibility by way of an order

²⁷⁰ Nigel Lowe conducted a study for the Committee of Experts on Family Law and ultimately proposed that all parents should have parental responsibility – as cited in Macmillan Moon, R. *'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context'* (2010) 6 (1) CSLR 259 at page 266

²⁷¹ Such as by the Scottish Law Commission in their report, No. 135 *'Report on Family Law'* (1992)

regardless of whether they are married or not, with automatic parental responsibility. This would mean that all parents would be treated equally and any changes could include provisions to revoke parental responsibility, from any parent, not just the unmarried father. As will be discussed, there are multiple reasons why the current law is unsatisfactory, and although suggestions for reform have been made, and the Welfare Reform Act 2009 has made some improvements, there has not been sufficient movement in this area.

The primary element of parental responsibility which is unsatisfactory is the distinction which still exists between the positions of mothers and married/ unmarried fathers. It is an area which has been greatly debated, largely due to the fact that many consider it to be gender discrimination towards unmarried fathers. It has been argued by some, such as Beeson²⁷² and Booth²⁷³, that such discrimination breaches articles 8 (which gives everyone the right to respect for his private life²⁷⁴) and 14 (which prohibits discrimination on any grounds²⁷⁵) of the European Convention on Human Rights. This is because all parents should, be entitled to exercise parental responsibility under the protection for family life, but this right is not being protected, arguably owing to their gender/ status of marriage. This argument was rejected by the European Court in the case of *McMichael v UK [1995]*²⁷⁶, where it was found to be necessary to restrict the automatic presumption of parental responsibility to all fathers based on the impact which it would have on the child's welfare. The main arguments raised in the case included the fact that unmarried fathers had, in most cases, no legal custody or responsibility for their children, which is the opposite situation for

²⁷² Beeson, S. 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 International Journal of Law, Policy and Family 137

²⁷³ Booth, P. 'Parental Responsibility – What Changes?' (2004) 34 Family Law 353 at page 355

²⁷⁴ Article 8 of the European Convention on Human Rights 1950

²⁷⁵ Article 14 of the European Convention on Human Rights 1950

²⁷⁶ *McMichael v UK* 16424/ 90 [1995] ECHR 8 (24 February 1995)

mothers and married fathers. It was found that there was no breach of either article 8 or 14 rights under the European Convention on Human Rights. The main justification for this conclusion was based on the fact that the English and Welsh legal system offers alternatives (which are outlined in section 4 of the Children Act 1989) so that unmarried fathers can gain parental responsibility of a child.

The introduction of PRAs and PROs in 1990 was the first major move which enabled unmarried fathers to take a step towards having input in their child's life; at the time however, they were not widely used. About 3,000 parental responsibility agreements are registered each year, which is a tiny percentage of the children whom are born to unmarried parents²⁷⁷. The primary reason for the early lack of take up of PRAs and PROs was that many fathers were unaware what was required of them to ensure that they had parental responsibility²⁷⁸, with many believing that by being named on the birth certificate of their child was sufficient in conferring all the necessary rights and responsibilities of parenthood²⁷⁹. The introduction of parental responsibility being linked to the naming of a father on the birth certificate was a step in the right direction, as it placed the law on the same footing as general public assumption. There are however, still problems in cases where the mother does not consent to including the father's name on the birth certificate (for whatever reasoning), thus he must instead apply to the court for a parental responsibility order. The formalities which are required to gain an order through the court lack appeal to most fathers²⁸⁰ with, stringent requirements that must be satisfied before an

²⁷⁷ Herring, J. (2011) *Family Law: Fifth Edition* at page 356

²⁷⁸ Pickford, R. 'Unmarried Fathers and the Law' in Bainham, A., Day Sclater, S. & Richards, M. eds. (1999) *What is a Parent? A Socio- Legal Analysis* at page 145

²⁷⁹ This is obviously the situation in regards to those registered after the 1st of December 2003 by the implementation of the *Adoption and Children Act 2002*

²⁸⁰ Macmillan Moon, R. 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context' (2010) 6 (1) CSLR 259 at page 261

order will be made. As already stated, in *Re H (Minors) (Local Authority: Parental Rights) [1991]*²⁸¹, there are three principles which must be considered before an order can be made for an unmarried father to have parental responsibility: commitment, attachment and reason for the application. This is obviously problematic when the father has been unable to fulfil one of these requirements due to a third party's actions, such as the mother of the child. This interference means that a father may not be able to show the necessary commitment or attachment to the child, although this is usually implied in part by the application to the court. However, in *Re S (Contact: Promoting Relationship with Absent Parent) [2004]*²⁸², it was stated that no parent is perfect, and as such, those parents who can prove that they will have a positive impact on the child's life should be allowed to try. There is, however, another criterion which must be satisfied, although it is not explicitly referred to, which is the need for capacity to be able to exercise parental responsibility. In *Re JM (A Child) (Parental Responsibility [1999])*²⁸³, although the father was devoted to his child and there was a high level of attachment between them, it was felt that awarding him parental responsibility would be inappropriate as he could not understand the concept of parental responsibility and the repercussions which might occur if it was to be misused. This decision was however, not considered fair and is one of the crucial reasons as to why the law on parental responsibility for unmarried fathers was reformed.

The introduction of automatic parental responsibility for all parents who were registered on a child's birth certificate was a bold move for the legislature, and came after much consideration on the subject. When reviewing the law at the time, the Lord Chancellor's Department suggested in its consultation paper, *Procedures for the Determination of*

²⁸¹ *Re H (Minors) (Local Authority: Parental Rights) (No. 3)* [1991] Fam 151; [1991] 2 All ER 185

²⁸² *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18; [2004] 1 FLR 1279

²⁸³ *Re JM (A Child) (Parental Responsibility)* [1999] sub nom *M v M* [1999] 2 FLR 737; Times, May 25, 1999

Paternity, that there were three different methods which could be implemented to make it easier for unmarried fathers to be awarded parental responsibility: (1) automatically giving parental responsibility to all fathers; (2) to all those who were registered on the birth registration; or (3) to those fathers who are cohabiting with the mother at the time of birth²⁸⁴. From this, it was decided by Parliament that the best solution was to give all parents who were registered on the birth certificate automatic parental responsibility, regardless of any marital status. The reason for this choice was based on the fact that there would be a legal document which could confirm who had parental responsibility of a child easily, much in the same way that the marriage certificate or parental responsibility orders/ agreements had provided in the past. It was felt that although this would leave a small group of fathers without responsibility, in such cases where the mother registered the birth of the child on her own²⁸⁵, this was the most desirable approach as it still allowed for a degree of certainty as to who had parental responsibility for a child. In contrast to this, it was felt that the introduction of parental responsibility being awarded to those who were registered on the child's birth certificate was little more than a parental responsibility agreement/ order²⁸⁶ without the need for the extra formalities which would normally be required for the separate application. There is, for instance, still the need for the father to rely on the mother of the child to convey parental responsibility to the father, which some

²⁸⁴ Lord Chancellor's Department *'The Procedures for the Determination of Paternity and on the Law on Parental Responsibility for Unmarried Fathers'* (1998)) A Lord Chancellor's Department Consultation Paper accessed via <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/patfr.htm> (07/11/2013)

²⁸⁵ Which accounts for around 45,000 births a year – Macmillan Moon, R. *'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context'* (2010) 6 (1) CSLR 259 at page 266

²⁸⁶ Herring, J. (2011) *Family Law: Fifth Edition* at page 356

feel is not sufficient for the equality of the parents²⁸⁷. It is for this reason that many have supported other ideas for reform so that unmarried fathers can gain parental responsibility in the same way as married fathers and similar to that of the child's birth mother.

Another unsatisfactory aspect of the law is that only the unmarried fathers can have their parental responsibility removed without having to give the child up for adoption²⁸⁸. The application to have parental responsibility removed from the unmarried father can be done by any person who has parental responsibility for that child²⁸⁹, including the unmarried father himself, and the court will decide whether to revoke the responsibility. The courts will, however, only revoke the responsibility where it is in the best interests of the child's welfare to do so. In the case of *Re M (A Minor) (Care Order: Threshold Conditions) [1994]*²⁹⁰, it was found that it was in the best interests of the child that the father, who was in prison for having killed the child's mother, retained his parental responsibility. This demonstrates that the courts are unwilling to remove parental responsibility unless it is absolutely necessary²⁹¹. As has already been stated, there are only two cases which have actively been reported to have removed parental responsibility from the unmarried father²⁹² demonstrating that although there is the possibility of this occurring, the courts do not feel that it is necessary. It is perceived as being unfair and unjust that unmarried fathers could potentially be threatened with the removal of parental responsibility, whilst both mothers

²⁸⁷ Gilmore, S. 'Parental Responsibility and the Unmarried Father – A New Dimension to the Debate' (2003) 15 Child & Fam. L. Q. 21 at page 38

²⁸⁸ This obviously applies to all legal parents of the child – parental responsibility can also be removed from those who were awarded it through something such as a residence order, where they are not the legal parent of a child i.e. the child's grandparents

²⁸⁹ Section 4 (3) of the Children Act 1989

²⁹⁰ *Re M (A Minor) (Care Order: Threshold Conditions) [1994]* 2 FLR 577; [1994] 2 FCR 871

²⁹¹ Although, it should be noted, that just because someone has parental responsibility for a child, this does not mean that they have contact with the child. This could cause other issues if it were the case

²⁹² Firstly, *Re P (Terminating Parental Responsibility) [1995]*, and then *CW v SG [2013]*

and married fathers are secure in knowing that they will never lose parental responsibility unless they voluntarily free a child for adoption.

One of the main justifications for introducing automatic parental responsibility is the understanding of what it actually means to have parental responsibility. Traditionally, parental responsibility was thought to be the term which separated the idea of being the biological parent from the act of actually raising the child and acting as a parent²⁹³.

However, this view has now changed so that parental responsibility no longer has the same practical importance it once had. In *Re P (Parental Responsibility Order) [1997]*²⁹⁴, the judge distinguished between the concepts of parental responsibility and the ability to 'interfere' with the life of the child, where the mother had been worried that the unmarried father of her child would be able to disturb everyday family life if he was to be granted parental responsibility. There are varying degrees of contact which can be had with a child and it is crucial to distinguish between parental responsibility²⁹⁵, which gives certain rights such as being able to choose the school which the child attends, a residence order²⁹⁶ (which automatically confers parental responsibility), whereby the parent with this has the power to adapt the child's everyday life and the contact order²⁹⁷, which allows a parent to exercise certain responsibilities over a child while they are in their care. One case which demonstrates well the differences between parental responsibility and actually having control of a child's life is the case of *Re D (Contact and Parental Responsibility) (No. 2) [2006]*²⁹⁸. In this case, a lesbian couple sought the help of a friend to conceive a child, with

²⁹³ Harris, P & George, R. 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Parliamentary Interpretations' (2010) 22 Child & Fam. L. Q. 151 at page 161

²⁹⁴ *Re P (Parental Responsibility Order) [1997]* 2 FLR 722; Times, 24th April 1997

²⁹⁵ Section 3 of the Children Act 1989

²⁹⁶ Section 8 of the Children Act 1989

²⁹⁷ Section 8 of the Children Act 1989

²⁹⁸ *Re D (Contact and Parental Responsibility) (No. 2) [2006]* EWHC 2 (Fam)

the understanding that the couple would be the child's parents but there would be an ongoing relationship with the father. However, a disagreement in the early stages as to the degree of the relationship ensued. The court held that the father should continue to have contact with his child on a restricted basis, and would be granted parental responsibility on the basis that he would be granted a status, but "*stripped of practical effect*"²⁹⁹. It is for reasons such as these, where the granting of parental responsibility is awarded without giving consideration to the involvement that a father will have in their child's life, that it is impossible to see parental responsibility as having any measurable significance in its application. Therefore, if it was to be automatically awarded to all fathers, married to the mother or not, there would not necessarily be any change in the way in which families function because parental responsibility is not a right to interfere in the day-to-day life of the child.

The most common suggestion for reform of parental responsibility is to give all fathers, regardless of their marital status in respect of the mother, automatic parental responsibility. This was one of the suggestions which was contained within the Lord Chancellor's Consultation Paper in 1998³⁰⁰ and has also been suggested in other areas, such as by the Scottish Law Commission in 1992³⁰¹ for a reform of the law in Scotland. There has not been any sufficient movement to legislate this particular reform, which means that unmarried fathers are still, in effect, treated as a lower-level parent than those who automatically qualify for parental responsibility. The idea of conveying parental responsibility is no longer

²⁹⁹ Harris, P & George, R. *Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations* (2010) 22 Child & Fam. L. Q. 151 at page 163

³⁰⁰ Lord Chancellor's Department *The Procedures for the Determination of Paternity and on the Law on Parental Responsibility for Unmarried Fathers* (1998)) A Lord Chancellor's Department Consultation Paper accessed via <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/patfr.htm> (07/11/2013)

³⁰¹ Scottish Law Commission, No. 135 *Report on Family Law* (1992)

considered to be the ability to interfere with the life of the child, but rather to “confer on the natural father that status of fatherhood which a father would have when married to the mother”³⁰² as stated in *W (Children)* [2013]. The differentiation between awarding parental responsibility and the right to interfere in the day-to-day life of the child was made in *Re P (Parental Responsibility Order)* [1997]³⁰³, where the judge reassured the mother that granting parental responsibility to the father would not undermine her authority on matters concerned with the child’s “day-to-day management”³⁰⁴. It is therefore considered that parental responsibility is not the same as contact with the child, so the law should do everything within its power to confer parental responsibility on the child’s father as a mark of “approval”³⁰⁵, in order that the child can have a better understanding of their genetic origins. Should it not, therefore, be in the best interests of the child that an unmarried father is able to register his name on the birth certificate, separately to that of the mother if necessary, and be granted parental responsibility so that they can be consulted on major issues of their child’s life, but not necessarily be able to interfere with the child’s day-to-day life style? Due to the lack of development³⁰⁶, it would appear that the answer to this is currently no. However, automatic parental responsibility is an idea which has been a recurring topic in discussions regarding any reforms to the law in this particular area for some time. The idea of reforming the law pertaining to unmarried fathers could be desirable, if the correct balance could be found, such as being able to remove parental

³⁰² *W (Children)* [2013] EWCA Civ 335

³⁰³ *Re P (Parental Responsibility Order)* [1997] 2 FLR 722; Times, 24th April 1997

³⁰⁴ Gilmore, S. ‘Parental Responsibility and the Unmarried Father – A New Dimension to the Debate’ (2003) 15 Child & Fam. L. Q. 21 at page 31

³⁰⁵ Ward LJ in *Re C & V (Parental Responsibility)* [1998] 1 FLR 392; supported by *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 FLR 75

³⁰⁶ See the *Welfare Reform Act 2009*

responsibility from those parents who do not act in the best interests of the child and not just the unmarried father.

Reasoning behind not automatically awarding parental responsibility to unmarried fathers

There are many arguments for not automatically awarding unmarried fathers parental responsibility, which would otherwise put them on the same standing of those who were married to the mother at the time of birth. The most prominent reason is based on the concept of commitment towards the child. There are already a number of ways, prescribed by section 4 of the Children Act 1989, which allow unmarried fathers to acquire parental responsibility either through the consent of the mother or by way of an order from the court. These methods however, only apply to those fathers who want to have parental responsibility, those who are arguably the only unmarried fathers who deserve parental responsibility. The courts are already willing to accept that in most circumstances, granting parental responsibility is in the best interests of the child's welfare, which is always of paramount concern, and as such are willing to grant parental responsibility³⁰⁷. To extend this further, to those fathers who might be considered "*unmeritorious*"³⁰⁸ this would mean that a higher percentage of absent fathers would be enabled to have some impact on their child's life, even though they may not even wish to be connected to the child. There would be difficulty in establishing who is to hold parental responsibility as there would be no official documentation which could be used to demonstrate that a father had parental

³⁰⁷ Demonstrated in cases such as in *Re W (Direct Contact)* [2013] 1 FLR 494 where, despite the difficulties, it was felt that the child would benefit from having a full relationship with both parents; and *Re G (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 504 where it was felt that the father could contribute to the promotion of his daughter's life, but did not have to give a residence or contact order to promote her welfare

³⁰⁸ Law Commission in their report '*Review of Child Law: Guardianship*' [1988] EWLC 172, paragraph 2.17

responsibility³⁰⁹. Without the use of DNA testing, there would be uncertainty as to how and when an unmarried father could be said to hold parental responsibility, which would be highly undesirable for all relevant parties involved. This demonstrates that the practicality of applying automatic parental responsibility would be too difficult and outweighs the current issues which are said to be discriminatory and therefore it is undesirable to suggest that all fathers should be conveyed parental responsibility automatically.

In the case of *B v UK [2000]*³¹⁰, which was heard by the European Court of Human Rights, it was stated that while it might appear to be discrimination to allow married fathers to automatically gain parental responsibility, whilst restricting unmarried fathers from this same right, there are reasons to justify this. The level of commitment which an unmarried father demonstrates, as a general group is highly varied in the fact that *“the relationship between unmarried fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family- based unit”*³¹¹. This is the main justification for not awarding parental responsibility to unmarried fathers automatically because, although it would be correct for those fathers who wanted to be a part of their child’s life, those who are completely detached from their child would be given parental responsibility even though they may not want or appreciate it. If every father was to be awarded parental responsibility automatically, without consideration being given to the commitment of the father to the child or the child’s welfare, then this could jeopardise the private lives and best interests of both the child and the mother³¹². If parental responsibility was to be automatically granted, issues would occur such as that in *Re M*

³⁰⁹ Currently this can be shown by a valid marriage certificate, being named on the birth register after December 2003 or by having a valid PRO/ PRA or residence order

³¹⁰ *B v UK [2000] 1 FLR 1; [2000] 1 FCR 289; [2000] Fam Law 88 ECtHR*

³¹¹ *B v UK [2000] 1 FLR 1; [2000] 1 FCR 289; [2000] Fam Law 88 ECtHR*

³¹² Such as cases where there is domestic abuse or would have been too stressful for the mother

(Contact: Parental Responsibility) [2001]³¹³, where it was felt that awarding parental responsibility to the unmarried father of a severely disabled child would not be suitable, owing to the fact that the situation would have been too stressful for the mother and undermined her ability to care for the child. Owing to the actions and accusations which the father made about the mother's new partner, it was also felt that he would misuse his parental responsibility thus it was refused. Whilst this is an exception to the generally accepted rule that a child would benefit from both parents holding parental responsibility, and having contact with both, it demonstrates perfectly the reason why parental responsibility should not be granted automatically to those fathers who have shown no other commitment to either the mother or the child. The fact that parental responsibility could be removed in certain circumstances where the father was deemed 'unmeritorious' would be insufficient, based on the fact that the courts are currently resistant to removing responsibility which has already been awarded to the father, based largely on the distinction between parental responsibility and contact with the child. One major issue which has arisen from the idea of automatic parental responsibility is in regards to the child who is conceived through rape as it would be unfair to expect the mother to cooperate with him and in most cases would be in the best interests of the child to not be connected to their father. However, this has always been an exception to the usual rules of parental responsibility and would not change with the change in the law³¹⁴. The paramount concern in any case regarding parental responsibility should be the welfare of the child, which would be undermined if there was no court which reviewed the situation, and instead the burden would be on the mother to have the parental responsibility removed.

³¹³ *Re M (Contact: Parental Responsibility)* [2001] 2 FLR 342

³¹⁴ It has never really been suggested that the rapist father should be capable of receiving parental responsibility

In contrast to this, there is no need for the unmarried fathers to be granted automatic parental responsibility as it can be accessed in a variety of other ways. Some argue, including Hoggett³¹⁵, that the best way to ensure that it is worthwhile for a child to have their father in their life is to either, demonstrate to the mother that they would be a 'good' father so that she will consent to putting his name on the birth certificate, or by proving to the court that they meet all of the requirements which were set out in *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]*³¹⁶. The courts have shown that they are willing to award parental responsibility to any unmarried father, provided that they will not damage the welfare of the child, whenever it is possible to do so. The main focus is whether the father might damage the child in the future, such as the risk to further injury being caused to the child in *Re H (Parental Responsibility) [1998]*³¹⁷, where the father had sadistically injured the child, or where the father was in possession of obscene photographs of children as in *Re P (Parental Responsibility) [1998]*³¹⁸. In both of these cases, parental responsibility for the unmarried father was refused on the basis that it would not be in the child's best interest for him to have any responsibility, particularly considering that there were fears that he might misuse those responsibilities to interfere with the child's home life. It would therefore be undesirable to automatically award all father with parental responsibility as it might disrupt the principle of the child's welfare being paramount where the father would not have a positive impact on their life.

The main argument for automatically granting parental responsibility to all fathers is that, without this reform, English and Welsh law is breaching the European law on non-

³¹⁵ Hoggett, B. (1993) *Parents and Children: Fourth Edition* at page 32

³¹⁶ *Re H (Minors) (Local Authority: Parental Rights) (No. 3) [1991]* Fam 151; [1991] 2 All ER 185

³¹⁷ *Re H (Parental Responsibility) [1998]* 1 FLR 855

³¹⁸ *Re P (Parental Responsibility) [1998]* 2 FLR 96; [1998] 3 FCR 98

discrimination; however this has already been rejected by the European Court of Human Rights. Article 8 of the ECHR³¹⁹ states that there is a right to respect for family life and there have been various cases³²⁰ where the unmarried fathers have suggested that the restricting of their right to automatic parental responsibility was in breach of article 8. This must be viewed alongside Article 14 which states that there must not be discrimination against any person, including on the basis of their gender or marital status. The leading case in this area is *McMichael v UK [1995]*³²¹ where the court considered whether there were any reasonable justifications which enabled the English legal system to restrict the ability of unmarried fathers to gain parental responsibility. It was found that due to the nature of the varying degrees of relationship which could be had between an unmarried father and their child, the fact that unmarried fathers are excluded from automatic parental responsibility did not breach articles 8 or 14. The justification for this decision was that the UK offers reasonable alternatives to unmarried fathers so that they can be awarded parental responsibility if they so wish and if it is in the child's best interest to do so. This shows that under European law, restricting those fathers who were not married to the mother at the time of birth from automatically gaining parental responsibility does not breach any rights under either articles 8 or 14.

It can therefore be concluded that awarding automatic parental responsibility to unmarried fathers would be undesirable and as such, should not be legislated into the legal system of England and Wales. To award all fathers parental responsibility automatically would cause many problems, particularly in regards to the quality of father who may now receive

³¹⁹ *European Convention on Human Rights 1950*

³²⁰ Including *B v UK [2000] 1 FLR 1* and *McMichael v UK 16424/90 [1995] ECHR 8*

³²¹ *McMichael v UK 16424/90 [1995] ECHR 8 (24th February 1995)*

parental responsibility. It has been noted³²² that the current law offers multiple opportunities for unmarried fathers to acquire parental responsibility, based on their ability to demonstrate commitment and attachment to the child. Generally, it has been accepted that if a father cannot demonstrate that he satisfies these criteria, then it is probably not in the best interests of the child to award parental responsibility, however he might be conveyed it automatically if the law were to be reformed, causing controversy.

Alternatives to automatically awarding parental responsibility

With the current law being deemed unsatisfactory, and automatic parental responsibility for all fathers undesirable, alternative suggestions for reform need to be made. A key suggestion, which would alter the law in regards to parental responsibility indirectly, would be to introduce a scheme of joint registration of births, whereby it would be compulsory for both parents, whether they are married or not, to register their names in the birth register. The law would be adapted so that, wherever possible, the name of the father would have to be included in the birth register for the purpose of allowing the child to know who their father is. If implemented it would remove the need for the unmarried father to rely on the mother in order to be registered on the birth certificate³²³ as they would be able to bring a paternity claim and be named on the birth certificate, even in cases where the mother may not agree³²⁴. This would be a preferable solution to automatically awarding all fathers parental responsibility automatically as there would be a legal document which confirms

³²² Most notably in *B v UK* [2000] 1 FLR 1

³²³ The mother is required even in cases where the unmarried father believed that they were legally married, see *A v H (Registrar General for England and Wales and another intervening)* [2009] 3 FCR 95

³²⁴ Although the paternity would have to be proven – which could be legitimately inferred if the mother refuses a DNA test of the child. See *Re A (Paternity: Refusal of Blood Test)* [1994] 2 FLR 463 for a similar example

whether the father has parental responsibility and the mother still retains the ability to avoid naming the father on the birth certificate if it is in the best interests of the child.

Of all births which are to unmarried mothers, around eighty per cent are registered by both the mother and the father³²⁵. There are however, around 45,000 births each year where the child is registered solely in the mother's name with no indication as to the identity of the child's father³²⁶. The number of children who only have one parent listed on their birth certificate has been decreasing over recent years, mainly due to the number of people who are choosing to cohabit and have children, as opposed to marrying first³²⁷. Another reason for the increase in joint registration can be related to the introduction of automatic parental responsibility for all those who are named on the child's birth certificate after the 1st of December 2003. There are however, still those children who do not have a father named on their birth certificate because of the mother not wishing for them to appear³²⁸. Not a desirable position as every child has the right to know both parents. As demonstrated in the case of *Re H & A (Paternity Tests) [2002]*³²⁹, there are very few cases in which the suppression of the truth would be considered to be in the best interests of the child and thus, including the use of science, the law should try to ensure that the child knows their true identity. It is therefore crucial that the law does more to ensure that all children are easily able to access the information identifying both their biological parents. Joint registration would better achieve this, whilst still allowing the mother and courts to decide

³²⁵ Herring, J. (2011) *Family Law: Fifth Edition* at page 356

³²⁶ Department for Work and Pensions' White Paper '*Joint Birth Registration: Recording Responsibility*' June 2008 Cm. 7293 at page 4, paragraph 3

³²⁷ Department for Work and Pensions' Green Paper '*Joint Registration: Promoting Parental Responsibility*' June 2007 Cm. 7160 at page 10, paragraph 39

³²⁸ Obviously this applies to those fathers who may not know that they are a father – unmarried fathers are able to apply for an order from the court to establish paternity through a DNA test which can lead to the father being named on the birth certificate

³²⁹ *Re H & A (Paternity Tests) [2002]* EWCA Civ 383; [2002] 2 FCR 469; [2002] 1 FLR 1145

when a child should not have a father listed on their birth certificate, as well as awarding parental responsibility to those fathers who were listed on the birth register.

The possibility of incorporating compulsory joint registration is one which has been debated a great deal in recent years, with many being in favour of a possible change to the current law. It is for this reason that in June 2008, the Department for Work and Pensions published a White Paper, *Joint Birth Registration: Recording Responsibility*³³⁰, which suggests that all parents should be under an obligation to register their child's birth, and not only the mother where the parents are not married³³¹. The White Paper sets out that it was to become a legal requirement for unmarried fathers to register their name on a child's birth certificate, unless the registrar considers joint registration to be "*impossible, impracticable or unreasonable*"³³². The implementation of this into law would have meant that, unless there was an agreeable reason as to why the father of the child should not be contained within the birth register, the mother would be required to provide sufficient information about the father much more than is currently prescribed³³³ so the registrar could contact him to confirm whether he is the child's father. The intention behind this was to promote the child's welfare, parental responsibility for the unmarried father and the right of every child to know who his parents are³³⁴. A by-product of this change in the law would have been that all fathers who were registered on the birth certificate would be awarded automatic parental responsibility, as is already given to those registered since 1 December 2003. This

³³⁰ Department for Work and Pensions *Joint Birth Registration: Recording Responsibility* June 2008 Cm. 7293

³³¹ Married parents are already under an obligation to register the child's birth and can do so independently of each other – *Section 2 of the Births and Registrations Act 1953*

³³² *Joint Birth Registration: Recording Responsibility* June 2008 at page 9 in Macmillan Moon, R. 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context' (2010) 6 (1) CSLR 259 at page 268

³³³ Sheldon, S. 'From 'Absent Objects of Blame' to 'Fathers Who Want Responsibility': Reforming Birth Registration Law' (2009) 31 *Journal of Social Welfare and Family Law* 4

³³⁴ Bainham, A. 'What is the Point of Birth Registration?' (2008) 20 *Child & Fam. L. Q.* 449

would therefore have indirectly afforded parental responsibility to those who were now under an obligation to register their name on the birth certificate of their child, thus promoting the right of the child to know who their parents are.

There were however, problems with the way in which these changes in the law were presented. For instance, some opposed the change for the same reasons they thought automatic parental responsibility was undesirable³³⁵, namely for the fact that it could jeopardise the general welfare of both the child and the mother. To combat this, there was an inclusion within the paper to say that the joint registration would not be necessary if the mother could prove to the registrar that it was either *'impossible, impracticable or unreasonable'* for the father to be identified. The problem here is that whilst it would protect those who needed it, such as children who were conceived as a result of rape, it could mean that the mother would still have control over the child's relationship with the father by stating simply that she did not know who the father was. It would be difficult for the registrar to establish whether she is lying about knowing the identity of the father or not. It could be argued that it would be possible for the suspected father to bring a claim to the registrar, in most cases where the parents are not likely to cooperate, he may not know of the child's existence. Therefore, it can be concluded that the practicability of this change would be inappropriate until further classification and clarity could be made as to how joint birth registration should ideally be achieved. This was demonstrated by the fact that the provisions were contained within the White Paper, but by the time that the Welfare Reform Act 2009³³⁶ was passed³³⁷, there was no specification as to joint registration. However,

³³⁵ Such as Women's Aid in their *'Response to: Joint Birth Registration: Promoting Parents Responsibility'* for the Attention of the Department for Work and Pensions (September 2007) accessed via www.womensaid.org.uk/core/core_picker/download.asp?id=1442 (20/12/2013)

³³⁶ *Welfare Reform Act 2009*

there was classification as to some of the requirements which a mother should provide when registering the birth of a child alone. It would therefore appear that joint registration would be highly beneficial to all parties involved with the birth of a child, but better clarification needs to be made before the changes can be implemented efficiently into the law.

Unmarried fathers and parental responsibility in other jurisdictions

When considering possible reforms which could be implemented into the English and Welsh legal system to improve the current law, it is crucial to examine the way in which other jurisdictions approach this particular issue. The way in which unmarried fathers may appropriate parental responsibility is one issue which has been approached in a variety of ways, with some countries encouraging joint registration of a child's birth which will be the way in which parental responsibility will be appointed, whilst others employ a system whereby there is a government body which actively seeks the identity of the father of the child. It is therefore critical to analyse the systems which are used by foreign jurisdictions to establish whether these are a more desirable way to ensure that the welfare of the child is upheld.

Automatic parental responsibility for unmarried fathers is a concept which has been reviewed in many nations, but which has not had much success when it comes to implementation³³⁷. The main reason for this is that the law would be highly uncertain as to who holds parental responsibility if there was no obligation to have proof of that responsibility. Under the current law in England and Wales, proof of parental responsibility can be demonstrated by presenting a valid marriage certificate, birth certificate, parental

³³⁷ It should be noted that it is not all yet in force

³³⁸ Including Scotland in the Scottish Law Commission, No. 135 *'Report on Family Law'* (1992)

responsibility agreement or parental responsibility order. Without one of these documents, unless DNA tests were conducted to ensure that the father was biologically related to the child, it would be nearly impossible to establish whether a man was entitled to parental responsibility automatically by virtue of being the unmarried father of the child³³⁹. There are however, certain jurisdictions which have adapted their laws to encompass this element of trying to ensure that unmarried fathers are able to access parental responsibility.

Joint birth registration is the main focus for establishing parental responsibility in other jurisdictions, as opposed to the English and Welsh system, which focuses primarily on the institute of marriage in order to establish whether a father is connected to the child and should be afforded parental responsibility, therefore retaining a distinction between the married and unmarried fathers³⁴⁰. The proposals for joint registration in England and Wales, which were not subsequently legislated, were based upon the measures which are implemented within the Australian legal system. In July 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*³⁴¹ came into force, making dramatic changes to Australia's child custody law, including the rights of the child to have a "meaningful relationship with both of [their] parents"³⁴². Under the new legislation, the matrimonial status of the parents is irrelevant due to the fact that both parents, whether married or not, are required to register the birth of their child. Where only one parent signs the birth register, there must be a formal attachment as to why the other has not, which might need to be investigated further by the Registrar if they are not satisfied with the explanation

³³⁹ Herring, J. (2011) *Family Law: Fifth Edition* at page 366

³⁴⁰ Reference to the Scottish Law Commissions' statement in Macmillan Moon, R. 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context' (2010) 6 (1) CSLR 259 at page 270

³⁴¹ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Australian Legislation)

³⁴² *Section 60CC (2) (a) of the Family Law Amendment (Shared Parental Responsibility) Act 2006* (Australian Legislation)

which is given by the parent³⁴³. This means that either parent can register their name on the birth certificate of the child, and this can be verified in some circumstances by conducting a DNA test of the child and the disputed parent, without the consent or agreement of the other. When one parent does register the child solely, they must provide details of the other so that the registrar may enquire as to whether the other consents to having their name contained within the birth register. This has the effect of automatically conferring parental responsibility on the unmarried father, and has had since 1975³⁴⁴ when Australia introduced parental responsibility for all whose names appeared on the birth certificate of a child³⁴⁵.

The system in Sweden goes further still; there is an active investigation into every birth as to who a child's parents are. Swedish legislation encourages parents to jointly register the birth of their child so that the child can easily recognise their 'biological identity'. Sweden, like England and Wales, recognises the presumption that the man, who is married to the mother at the time of the child's birth, is the father of the child. However, in the case of unmarried mothers, Sweden does more to ensure that the father can be identified. Where an unmarried mother gives birth to a child, there is an active investigation undertaken to identify the issue of paternity by the Social Welfare Committee³⁴⁶. It is the task of this committee to follow up on any claim of paternity and where necessary, to issue court proceedings to ensure that the child has a recognised father. There are however, certain circumstances in which the Social Welfare Committee is capable of deciding not to pursue court proceedings where it is in the best interests of the child that their father is not

³⁴³ Macmillan Moon, R. *'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context'* (2010) 6 (1) CSLR 259 at page 271

³⁴⁴ *Family Law Act 1975* (Australian Legislation)

³⁴⁵ Fatherhood Institute *'Joint Birth Registration: A Fatherhood Institute Analysis'* (16 June 2008) accessed via <http://www.fatherhoodinstitute.org/2008/joint-birth-registration-a-fatherhood-institute-analysis/> (13/10/2013)

³⁴⁶ Hamilton, C. & Perry, A. eds. (2002) *Family Law in Europe: Second Edition* at page 646

identified³⁴⁷. This demonstrates that, while the English and Welsh system might feel that requiring registrars to seek further information about the father and then follow this up would be too much, it can be done by way of a third party who would be responsible for the enquiry. The system which is employed in Sweden better promotes the ideal situation whereby the father would be identified to the child and awarded some form of responsibility, without necessarily having to be given contact.

These are just two examples where other jurisdictions have implemented a better resolution to promoting parental responsibility to the unmarried fathers in regards to their children, but these are in no way perfect systems. It is critical that England and Wales look at the systems which are being used in other areas and see how well they work, to be able to eventually have the best situation for both the welfare of the child and the rights of the parents.

Conclusion

The law regarding parental responsibility in the English and Welsh legal system has been repeatedly criticised as not doing enough to promote the position of the unmarried father³⁴⁸. In some ways, it has been criticised as breaching Article 14 of the European Convention because it differentiates between the mother and father, therefore discrimination on the basis of gender, as well as the married and unmarried father, which is discrimination on the basis of marital status. Whilst this can be seen as being actively discriminatory, this view has been rejected in a number of cases which have been heard by the European Court of Human Rights³⁴⁹. One of the main justifications which has been made

³⁴⁷ Such as where the conception was due to rape

³⁴⁸ Particularly groups such as Fathers4Justice and Families Need Fathers

³⁴⁹ Such as in *McMichael v UK* 16424/90 [1995] and then *B v UK* [2000]

so that a state can differentiate between various categories of parents is that the definition of who is to be considered an unmarried father is too unclear³⁵⁰. Whilst it is generally accepted that the committed father who makes the effort to have a positive impact on their child's life should have parental responsibility conveyed automatically as if he had been married to the mother at the time of birth, it does not seem fair to award the same responsibility to those fathers who will not promote the child's welfare. Automatic parental responsibility therefore, could be potentially damaging to the welfare of the child, and also to the mother, which would be highly undesirable.

The concept of the unmarried father needing to be recognised more readily prompted Parliament to introduce automatic parental responsibility to all fathers who were named on the birth certificate, or subsequently re-registered, after 1 December 2003. This was a major step forward as it now conveys on unmarried fathers, the same rights and responsibility which were awarded to the married father automatically, without having to fill in additional forms (namely the Parental Responsibility Agreement) or have to apply to the courts for a Parental Responsibility Order. Whilst this was a big improvement on the law at the time, as it meant that children were more likely to have two parents with parental responsibility, there are still a number of births each year which are not registered with the father's name at all. This means that the child does not know the identity of their biological father, as well as the fact that the father has no parental responsibility towards the child.

³⁵⁰ *Re H (Minors) (Local Authority: Parental Rights) (No. 3)* [1991] Fam 151; [1991] 2 All ER 185

Suggestions have been made, such as those by the Department of Work and Pensions³⁵¹, that a system of compulsory joint birth registration should be placed on all parents, whereby both the mother and father, regardless of whether they are married, would be able to register their name on the birth certificate of a child without any consideration from the other. It is obvious that where there is a dispute as to whether a man really is the child's biological father, then it would be necessary for proof to be provided. There is no longer the need for presumptions now that DNA tests can easily be conducted and in most cases are indisputable. This system has already been implemented in Australia, with positive results being seen as those who registered gain parental responsibility over their biological child, in a fashion similar to automatic parental responsibility, without any specification as to the mother's marital status. The benefit of this system, compared to simply awarding all fathers automatic parental responsibility without any need for formalities, is that in certain circumstances the mother is able to collaborate with the courts to ensure that a father who would sacrifice the welfare of the child, would not be awarded parental responsibility. This therefore, is arguably the best way to ensure that both the rights of the father to know and be known by their child are upheld, whilst also ensuring that the child's welfare is the paramount concern in all decisions.

It can therefore be concluded that the current law regarding parental responsibility and the unmarried father in England and Wales is unsatisfactory and in need of reform. It is however, accepted that this should not be done until a stable alternative to the current system can be established. The current state of the law allows unmarried fathers, who

³⁵¹ Such as in the Department for Work and Pensions' Green Paper *'Joint Registration: Promoting Parental Responsibility'* June 2007 Cm. 7160 and Department for Work and Pensions' White Paper *'Joint Birth Registration: Recording Responsibility'* June 2008 Cm. 7293

would promote a child's life, to gain parental responsibility easily, either with or without the mother's consent, but it is more difficult for those who have been unable to have a positive impact on their child's life. There is now a common distinction between parental responsibility and actually being able to interfere with the child's day-to-day life thus it seems more understandable that every father, where possible, practicable and fair to do so, should be given parental responsibility over their biological child. Thus, the law needs to be reformed in an efficient way to better provide for unmarried fathers.

Gydag adnoddau ac arian yn brin, a cheir dogni ar sail oedran yn y

GIG?

Ema Meleri Roberts

Ym mhapur gwyn 1998 fe ddywedir “Y bydd y GIG yn parhau yn wasanaeth gwirioneddol wladol sydd ar gael i bawb ar sail angen.”³⁵² Datganiad sydd yn ymddangos yn gynhwysol i bawb ond mewn gwirionedd sydd ddim yn wir. Rhaid cydnabod bod y galw am adnoddau yn fwy na’r cyflenwad sydd ar gael. Oherwydd nifer o ffactorau megis y ffaith bod y boblogaeth yn heneiddio a’r amrywiaeth eang o driniaethau sydd bellach ar gael, mae’n anorfod i’r Llywodraeth ddogni darpariaeth gofal iechyd, oherwydd nad oes digon o arian ar gyfer popeth. Golyga hyn nad yw holl fanteision y gwasanaeth ar gael i bawb. Mae Erthygl 12 o’r Cyfamod Rhyngwladol ar Hawliau Economaidd, Cymdeithasol a Diwylliannol yn cydnabod bod gan bawb yr “Hawl i iechyd corfforol a meddyliol o’r safon gyraeddadwy uchaf”³⁵³ ond yn amlwg mae dogni yn atal rhai rhag cyrraedd y safon yma. Bydd y traethawd hwn yn trafod yr heriau sydd yn wynebu’r GIG, gan ystyried enghreifftiau penodol o ddogni gofal iechyd i’r henoed.

Yn ôl Hunter gellir diffinio dogni mewn tair ffordd gwahanol. Fe all y GIG atal darparu math penodol o wasanaeth neu driniaeth, fe all symud adnoddau o un gwasanaeth i’r llall, neu gyfyngu’r mynediad at wasanaeth gan gyfeirio at nodweddion y darpar gleifion³⁵⁴ e.e.

³⁵² Papur Gwyn: GIG Rhoi Cleifion yn gyntaf, 1998, Par. 1.2

³⁵³ Cyfamod Rhyngwladol ar Hawliau Economaidd, Cymdeithasol a Diwylliannol (1976), Erth. 12

³⁵⁴ Hunter yn cyfeirio at dystiolaeth Cymdeithas Cynghorau Iechyd Cymunedol Cymru a Lloegr i Bwyllgor Iechyd Tŷ'r Cyffredin yn ei lyfr: Hunter, D. J. (1977) *Desperately Seeking Solutions: Rationing Health Care*, Harlow: Addison Wesley Longman, Tud. 8

oedran. Yn wir mae'r henoed yn gweld effaith y cyfyngiadau yma. Dywed Hunter hefyd bod yna bum categori o fecanweithiau dogni sef ataliaeth, oedi, gwyrriad, gwanhad a nacâd.³⁵⁵

Mae'n ffaith bod datblygiadau mewn technoleg feddygol ac ati wedi cynyddu disgwyliad oes; erbyn hyn yng Nghymru mae merched yn byw tan yn tua 82 mlwydd oed ar gyfartaledd, a dynion tan yn tua 78³⁵⁶. Y broblem yw bod pobl hŷn yn fwy tebygol o ddioddef afiechydon cronig. Nid oes gwellhad i'r afiechydon hyn sydd yn golygu bod y cleifion angen gofal a thriniaeth tan ddiwedd eu hoes. Mae hyn yn gostus, ac yn sgil y rhagwelediad y bydd y nifer o bobl rhwng 60 a 74 mlwydd oed yn cynyddu 43% o 1991 i 2031, a'r boblogaeth rhwng 75 a 84 mlwydd oed yn cynyddu 138%,³⁵⁷ mae'r straen ar adnoddau'r GIG yn debygol o barhau a chynyddu.

Mae dogni ar sail oedran yn gydnabyddedig. Dadleuir yn berswadiol gan Klein, Day a Redmayne bod oedran "Yn gweithredu fel peilot awtomatig hwylus ar gyfer meddygon sydd yn symleiddio'u penbleth ac yn osgoi'r gwewyr o orfod dewis rhwng gwahanol fywydau."³⁵⁸

Mae oed yn gyfyngiad ar safon y gofal gall unigolyn ei dderbyn, gan fod meddygon yn llai parod i ddarparu gofal digonol i berson sydd dros oedran penodol. Mae'r fformiwlâu a ddefnyddir ar gyfer dogni yn profi hyn, megis QALY³⁵⁹. Dywed Newdick "The theory favours treatments which achieve the greatest in quality of life over the longest period for the least

³⁵⁵ Ibid, Tud. 9

³⁵⁶ Gwefan Llywodraeth Cymru- <<http://wales.gov.uk/statistics-and-research/life-expectancy/?lang=en>> [mynediad ar 17/07/14]

³⁵⁷ *The Health of the U.K's Elderly People* (Y Cyngor Ymchwil Meddygol, 1994), Tud. 17

³⁵⁸ Klein, Day a Redmayne (1996:87) a gyfeirir ato yn Hunter, D. J. (1997) *Desperately Seeking Solutions: Rationing Health Care*, Harlow: Addison Wesley Longman, Tud. 11

³⁵⁹ Quality Adjusted Life Years

cost.”³⁶⁰ Amlyga hyn y gwahaniaethu’n erbyn yr oedrannus. Yn ogystal mae fformiwla ‘Fair Innings’ hefyd yn hybu gwahaniaethu gan ei fod o’r farn y dylid cyfeirio adnoddau cyfyngedig at bobl ifanc yn unig, oherwydd wedi i unigolyn gyrraedd 70 mlwydd oed maent wedi cael byw bywyd digon hir ac mae unrhyw gyfnod tu hwnt i hynny yn fonws. Gwelir enghraifft o’r gwahaniaethu’n erbyn oedran mewn achosion o ACS³⁶¹. Yn ôl y Myocardial Ischemia National Audit Project Registry for England and Wales, yr oedd cleifion 85 mlwydd oed a hŷn yn 75% llai tebygol o dderbyn triniaeth o’u cymharu â phobl iau na 55 mlwydd oed. Roeddynt hefyd yn llai tebygol o dderbyn meddygaeth atal eilraddol wrth gael eu rhyddhau o’r ysbyty.³⁶² Mae hyn yn esiampl amlwg o drydydd diffiniad Hunter sef cyfyngu’r mynediad at wasanaeth gan gyfeirio at nodweddion y darpar gleifion, ond nid dyma’r unig esiampl.

Gwelir esiampl arall wrth ystyried bod 150,000 o bobl yn cael strôc yng Nghymru a Lloegr bob blwyddyn³⁶³. Mae’r risg o ddiodef strôc yn cynyddu wedi i unigolyn gyrraedd 65 mlwydd oed³⁶⁴. Er hyn, fe welwn ddogni yn digwydd ar sail oedran. Yn ôl erthygl Rudd *et al*³⁶⁵ mae cleifion hŷn yn llai tebygol o gael eu trin mewn uned strôc na rhai iau. Dim ond 51% o gleifion dros 85 sydd yn derbyn sgan mewn 24 awr o gymharu â 71% o gleifion o dan 65. Mae gwahaniaeth amlwg i’w weld yma³⁶⁶. Felly y cleifion sydd fwyaf tebygol o ddiodef

³⁶⁰ Newdick, C. (1995) *Who Should We Treat?: law, patients and resources in the NHS*, Oxford: Clarendon Press, Tud. 22

³⁶¹ Acute coronary syndromes

³⁶² Simms, A.D. *et al.* (2012) Review: Acute Coronary Syndromes; an old age problem, *Journal of Geriatric Cardiology* 9: 192-196

³⁶³ NHS encyclopaedia <<http://www.nhsdirect.wales.nhs.uk/Encyclopaedia/s/article/stroke/>> [mynediad ar: 21/11/12]

³⁶⁴ Ibid

³⁶⁵ Rudd, A.G. *et al* (2007) Access to Stroke Care in England, Wales and Northern Ireland: The effect of age, gender and weekend admission, *Age and Ageing*, 36: 247-255

³⁶⁶ Ibid

sydd lleiaf tebygol o dderbyn triniaeth. Y peth gwaethaf yw ni ellir mynnu triniaeth chwaith fel y penderfynwyd yn achos *Glass*.³⁶⁷

Esiampl arall sydd yn amlygu dogni yn y maes yma yw'r ffaith bod y GIG yn dogni triniaethau ataliol i'r oedrannus. Er enghraifft mae'r GIG yn gwahodd merched dros 50 i gael eu sgrinio am gancr y fron am ddim bob tair blynedd³⁶⁸. Ond erbyn i'r ddynes gyrraedd 70 mae'r gwahoddiadau hyn yn darfod. Nid yw hyn yn golygu bod merched dros yr oed yma yn cael eu gwrthod pe gofynnant am famogram, ond y broblem yma yw'r ffaith os nad yw merched sydd eisoes dros 70 mlwydd oed erioed wedi cael gwahoddiad, yna mae'n debygol nad ydynt yn ymwybodol y byddent yn gallu cael un pe byddent yn gofyn. Mae dogni yn digwydd yma drwy beidio hysbysu'r henoed am yr opsiynau sydd ar gael.

Cymru sydd â'r canran uchaf o hen bobl yn y DU, erbyn 2015 bydd 8.8% o'n poblogaeth ni dros 75 mlwydd oed (14% yn uwch na Lloegr)³⁶⁹. Mae hyn yn rhoi straen ar ein GIG. Ym mhapur Gwyn 1998³⁷⁰ penderfynwyd y dylid darparu gofal ar bedwar lefel³⁷¹. Mae'r pedwerydd lefel, sef gofal yn y gymuned yn dangos sut mae dogni yn digwydd. Y syniad yw y dylai'r henoed dderbyn gofal yn y gymuned yn hytrach na defnyddio gwelyau ysbytai am dymor hir. Gellir gweld hyn fel rhywbeth positif, maent yn cael aros mewn awyrgylch gartrefol ac mae'r GIG yn arbed arian. Er hyn, rhoddodd Ddeddf 1990³⁷² ddiwedd ar nawdd

³⁶⁷ *R v Portsmouth Hospital NHS Trust (a.k.a. Glass)* [1999] Lloyds Law Rep Med 367

³⁶⁸ NHS Cancer Screening Programs <<http://cancerscreening.nhs.uk/breastscreen/screening-programme.html>> [Mynediad ar:21/11/12]

³⁶⁹ Papur Gwyn: GIG Cymru Rhoi Cleifion yn Gyntaf, 1998, Par. 1.2

³⁷⁰ Ibid

³⁷¹ Gofal sylfaenol, gofal eilaidd, gofal trydyddol a gofal yn y gymuned

³⁷² Deddf GIG a Gofal yn y Gymuned 1990

gwladwriaethol i breswylwyr cartrefi preifat a gwirfoddol, felly'r awdurdodau lleol neu'r cleifion eu hunain sydd yn gorfod talu, yn ddibynol ar brawf modd. Mae'r GIG yn manteisio fel hyn ond nid yw'r claf. Mae twf wedi bod mewn lleoedd cartrefi preswyl tra bod nifer o welyau arhosiad hir y GIG wedi lleihau³⁷³. Yn ôl erthygl yn y British Medical Journal (BMJ) mae yna debygolrwydd o 1/5 y bydd dynion dros 65 angen gofal breswyl tra bod yna debygolrwydd o 1/3 i ferched. Rhaid i bobol â chynilion dalu am eu gofal eu hunain, sydd yn aml yn swm enfawr. Dywed yr erthygl y byddai angen i bâr priod gynilo £85,000 yr un i gwrdd â chost cyfartalog y gofal hyn³⁷⁴. Roedd hyn yn digwydd yn Lloegr hefyd, gwelwn achos o Leeds³⁷⁵ ble y gwnaethpwyd cwyn i'r ombwdsman ar ran dyn oedrannus a gafodd ei ryddhau o ysbyty i ofal cartref preswyl a gorfod talu'r costau ei hun. Y gwahaniaeth yw bod adran 49 o Ddeddf Iechyd a Gofal Cymdeithasol³⁷⁶, sydd yn dweud dylai gofal nyrsio/personol fod yn rhad ac am ddim, yn gymwys i Loegr, heb ei fabwysiadu yn Nghymru. Dangosa hyn bod yr henoed yn dioddef mwy yng Nghymru nac yn Lloegr.

Mae dogni cudd megis pellter a thrwy gymhlethdod hefyd yn effeithio ar yr henoed mwy na neb arall. Maent yn fwy tebygol o beidio allu gyrru, ac os ydynt yn byw yn y wlad mae hyn yn creu hyd yn oed mwy o broblem oherwydd y byddai'n anoddach iddynt gyrraedd meddygfa. Yn ogystal â hyn, byddai llenwi ffurflenni cymhleth yn broblem i'r rhai sydd wedi colli hyder

³⁷³ Erthyglau Golygyddol, Heath, I. (2000) Esgeuluso Dyletswydd Mewn Cymdeithas Oedraniaethol, *BMJ* 320:1422 (27 Mai)

³⁷⁴ Ibid

³⁷⁵ Comisiynydd y Gwasanaeth Iechyd, Failure to provide long term NHS care for a brain-damaged patient (Leeds case)-second report for session 1993/94/ Llundain: Llyfrau Ei Mawrhydi, 1994, sydd yn cael ei drafod yn: Harrison, A. a Dixon, J. (2000) *The NHS: facing the future*. Cavendish Square, Llundain: King's Fund Publishing. Pennod 3, Gwasanaeth Sy'n Newid, Tud. 7

³⁷⁶ Adran 49 Deddf Iechyd a Gofal Cymdeithasol 2001

yn eu hunain. Gall hyn olygu y byddent yn llai parod i ofyn am ofal a bod y GIG yn arbed arian.

Yn 2006 crëwyd y swydd o Gomisiynydd ar gyfer pobl hŷn yng Nghymru³⁷⁷. Ei swydd, yn ogystal â phethau eraill yw, hyrwyddo dileu gwahaniaethu yn erbyn pobl hŷn a dylanwadu ar bolisi. Mae'r ffaith bod angen Comisiynydd i gael gwared ar wahaniaethu ar sail oed, yn profi bod y Llywodraeth yn sylweddoli ar y dogni annheg o ofal i'r henoed, a hynny oherwydd gwahaniaethu oedran.

Ni chredaf ei fod yn iawn bod gofal iechyd yn cael ei ddogni yn y maes yma. Mae rhai yn trio cyfiawnhau yr annhegwch drwy ddweud ei fod "o fudd i bob dinesydd trwy gydol eu hoes pe bai'r cyllid a ddefnyddir yn awr i ymestyn bywydau ar eu diwedd yn cael ei ailgyfeirio i gyfnodau bywyd cynharach."³⁷⁸ Anghytunaf, mae fel petaent yn dweud bod y bobl hyn wedi cyrraedd oedran teg ac y dylent nawr aberthu eu bywydau fel bod pobl ieuengach yn cael eu cyfran nhw o adnoddau. Golyga hyn bod pobl oedrannus yn gorfod dibynnu ar eu cynilion neu ar deulu i'w helpu yn y cyfnod o'u bywydau pan maent angen y mwyaf o ofal gan y GIG. Sut all gwahaniaethu oherwydd oed ddigwydd yn y GIG pan mae'n anghyfreithlon yn ôl Deddf Cydraddoldeb 2010³⁷⁹?

³⁷⁷ Cafodd y swydd ei greu gan Ddeddf Comisiynydd ar Gyfer Pobl Hŷn (Cymru) 2006

³⁷⁸ Hunter, D. J. (1977) *Desperately Seeking Solutions: Rationing Health Care*, Harlow: Addison Wesley Longman, Tud. 8

³⁷⁹ Mae oedran yn un o'r nodweddion gwarchoddedig yn ôl Adran 4 Deddf Cydraddoldeb 2010

Yn ôl 'Gwasanaeth Sy'n Newid' amcan y GIG erioed yw yr "Hyn a ddylai benderfynu ar fynediad iddo yw angen, ac nid y gallu i dalu, ynghyd ag yr ymrwymiad i gydraddoldeb ac i wasanaeth o safon."³⁸⁰ Fel sydd eisoes wedi'i brofi yn y traethawd hwn, nid angen sydd yn penderfynu, ond oedran. Yn ôl Wenger, pobl sâl nid hen bobl sydd yn dreth ar adnoddau³⁸¹. Cytunaf, fe all rhai hen bobl fod wedi byw bywydau iach ond eu bod angen rhywfaint o ofal erbyn diwedd eu hoes, tra ar y llaw arall, gall rhai pobl ifanc ddioddef iechyd gwael, gan ddibynnu ar dderbyn triniaeth trwy gydol eu hoes. Ymhellach, rydym ni erbyn hyn yn fwy tebygol o gwyno a hawlio triniaeth am unrhyw beth (yn enwedig ers i Ddeddf Hawliau Dynol³⁸² ddod i rym), mae cymdeithas wedi newid oherwydd ni ddigwyddai hyn ers talwm, byddai hen bobl wedi bod yn fwy amharod i ymweld â doctor yn eu ieuenctid, ond nawr pan y maent wirioneddol angen gofal, maent yn cael eu gwrthod neu'n derbyn gofal o safon is.

Deallaf nad oes hawl absoliwt i driniaeth o dan Erthygl 2 o'r Confensiwn Ewropeaidd ar lawnderau Dynol 1950.³⁸³ Mae llawer o achosion wedi profi hyn e.e. fe benderfynwyd i beidio a rhoi triniaeth i ferch a oedd yn marw o gancr³⁸⁴, fe aeth ei thad i'r llys ond fe fethodd y ddadl bod hyn yn erbyn Erthygl 2, oherwydd ni all llysoedd roi barn ar benderfyniadau awdurdodau iechyd. Yn ogystal, nid oes hawl absoliwt o dan Erthyglau 3 nac 8 chwaith³⁸⁵ fel y gwelwyd yn achos *A, D & G*³⁸⁶ lle penderfynwyd nad oedd Erthygl 8 yn

³⁸⁰ Harrison, A. a Dixon, J. (2000) *The NHS: facing the future*. Cavendish Square, Llundain: King's Fund Publishing, Pennod 3, Gwasanaeth Sy'n Newid, Tud. 1

³⁸¹ Wenger, C. "Successful ageing" AGENDA Hydref 2001, Tud. 16

³⁸² Deddf Hawliau Dynol 1998

³⁸³ Fel sydd yn weithredol drwy Ddeddf Hawliau Dynol 1998

³⁸⁴ *R v Cambridge District Health Authority ex parte B (A minor)* [1995] 1 FLR 1055

³⁸⁵ Erthygl 3- gwahardd arteithio, ac Erthygl 8- hawl i fywyd teuluol

³⁸⁶ *North West Lancashire Health Authority v. A, D, & G* [1999] Lloyd's Rep. Med. 399

gosod rhwymedigaeth pendant i driniaeth³⁸⁷. Deallaf hefyd mai dyletswydd yr Ysgrifennydd Gwladol dros iechyd “yw parhau’r hyrwyddo yn Lloegr a Chymru o blaid gwasanaeth iechyd cynhwysfawr a luniwyd i sicrhau gwelliant–

(a) yn iechyd corfforol a meddyliol y bobl yn y gwledydd hynny, ac

(b) o ran atal, diagnosio a thrin afiechyd ...”³⁸⁸

Ac y dylai ddarparu “i’r fath raddau ag y tŷb ef sydd yn angenrheidiol i gwrdd â phob gofyniad rhesymol.”³⁸⁹ Golyga hyn felly nad oes ganddo dyletswydd absoliwt i ddarparu gofal iechyd cynhwysfawr, ac felly fe all gyfiawnhau dogni. Ond mae achos *Coughlan*³⁹⁰ yn dangos ei bod yn bosib i’r llys newid penderfyniad os ydyw wedi mynd yn erbyn disgwyliad cyfreithlon e.e. drwy dorri addewid.

Y ddadl pwysicaf i’w phwysleisio yw nad yw’n deg mai hen bobl yw prif ddiodefwr y dogni yma. Ymddengys mai’r oedrannus yw un o’r carfannau sydd angen y mwyaf o ofal ac ni ddylid eu cosbi oherwydd hyn. Gan ystyried newidiadau cymdeithasol trawiadol, dadleuir eu bod angen hyd yn oed mwy o ofal gan y GIG, oherwydd mae’r traddodiad o ferched y teulu yn gofalu ar ôl yr oedrannus yn diflannu, a hynny oherwydd eu bod yn gweithio eu hunain a bod teuluoedd yn symud i ffwrdd. Problem arall yw’r ffaith bod y rhai sydd yn gofalu am aelodau hŷn eu teuluoedd yn heneiddio eu hunain, golyga hyn bod pobl a ddylai

³⁸⁷ Roedd y cleifion yn dadlau bod gwrthod ariannu triniaeth newid rhyw yn ymyrraeth ar yr hawl i fywyd teuluol

³⁸⁸ Adran 1 Deddf GIG 1977

³⁸⁹ Adran 3 Deddf GIG 1977

³⁹⁰ *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)* [2000] 3 All ER 850

fod wedi cyrraedd rhan o'u bywydau lle gallent ymlacio yn dal i orfod gwneud y gwaith caled o ofalu ar ôl rhieni sydd yn dirywio.

I gloi, cydnabyddir bod dogni yn anochel a hynny oherwydd nid oes digon o arian i wneud y cyfan. Er hyn, dadleuir nad yw hi'n deg gwahaniaethu'n erbyn yr oedrannus. Mae'r dystiolaeth a gyflwynwyd yn y traethawd hwn yn profi mai nhw yw'r garfan o bobl sydd yn dioddef fwyaf o rhai afiechydon ond sydd yn derbyn y lleiaf o ofal. Yn y mwyafrif o achosion nhw sydd hefyd yn gorfod talu am eu gofal eu hunain, neu mae'r baich yn disgyn ar eu teuluoedd. Nid yw hyn yn cyd-fynd â'r cysyniad gwreiddiol tu ôl i'r GIG, felly mae angen gweithredu i sicrhau nad yw hen bobl yn dioddef mwy o ddogni na phobl eraill yn y gymuned.

Stalking or what may explain this 'one-sided craving for contact'

Violeta Kunovska

Stalking is a complex social problem involving a “one-sided craving for contact” (Hirtenlehner et al., 2012:207). The definitions of stalking are numerous in both legal and psychological context (Ravensberg & Miller, 2003). One definition of the phenomenon is that stalking is “the course of conduct, by which one person repeatedly inflicts on another, unwanted intrusions to such an extent that the recipient fears for his or her safety” (Purcell et al., 2004:157). However, other researchers chose to not use the term “stalking”, substituting it with “obsessional following” i.e. long-term harassment directed toward a specific individual (Meloy & Gothard, 1995) – or obsessional harassment, showing that stalkers may not follow their victims, but employ other forms of pursuit such as sending messages/letters (Rosenfeld, 2000). Research has defined some stalking behaviours from which most common are telephone calls, visiting work places or residences, letter writing, following, buying gifts (Meloy, 1997). The unpredictability of the stalker makes him/her look threatening (Hirtenlehner et al., 2012). The degree of threat is difficult to predict as many behaviours associated with stalking are not illegal - and even welcomed under different circumstances, which makes stalking very subjective and highly problematic to define (Fox et al., 2011). The popular perception is that stalkers are underachieving, middle-aged loners with persistent social awkwardness (Morrison cited in Fox et al., 2011). Surveys also suggest that more often, it is younger people who are victims of stalking (Björklund et al., 2010).

Much research has been carried out that considers the psychological side of stalking. Researchers who study what may predict stalking concluded that it could be from insecure attachment, or many other psychological abnormalities and disorders (Ménard & Pincus, 2012). Stalkers are frequently associated with violent behaviour (Spitzberg & Cadiz, 2002). They have included parts of all perspectives of psychology, including evolutionary psychology. An interesting theory from social psychology that has been considered is the 'just world' theory (Sheridan et al., 2003). Significant research showed that ex-partners are prevalent as stalkers (Weller et al., 2013) and the just world hypothesis suggests that victims are to be blamed as well (Sheridan et al., 2003). However, the research on this topic does have its limitations regarding methodology, samples, and definitions of the phenomenon, which suggests that further research is needed for better understanding and testing of the theories (Fox et al., 2011).

Studies on stalking are mainly based in the US (70%) with just 8% from UK (Spitzberg & Cupach, 2007). In the US stalking has been criminalised since 1996 in the Violence Against Women Act (Ravensberg & Miller, 2003). In UK, although the first anti-stalking legislation was in 1997 – The Protection of Harassment Act following the media attention on some celebrity stalking cases and the consequent public concern, a legal definition of stalking had not been provided (Sheridan et al., 2001). The scope was broad and could have been applied to a wide range of situations such as neighbourhood nuisance, bullying and so on, where the purpose was intervention before actual harm could take place. However, on 25 November 2012 two new specific offences of stalking were introduced. This was in answer to the lack of confidence in the criminal justice system, particularly in relation to victims of

stalking (Strickland, 2013). The term stalking however, has not been clearly defined which is problematic for those who wish to study this area (Fox et al., 2011). Researchers cannot develop an inclusive operationalisation. Stalking is a combination of behaviours which makes it much harder to be measured than many other crimes (Fox et al., 2011). Many researchers chose not to refer to the phenomenon as 'stalking' because assessed behaviours do not always meet the legal standards for stalking (Dutton & Winstead, 2006). Moreover, there is a hypothesis that stalking is as a result of the termination of a violent relationship, yet the findings on the connection between domestic violence and stalking are rare (O'Connor & Rosenfeld, 2004). Fox and his colleagues (2011) criticised much of the data on the topic, saying that the use of varying definitions has led researchers to use differing approaches when measuring it, which may even lead to questioning whether the researchers are observing the same phenomenon.

Research supports the idea that stalking evolves from some form of pathological attachment (MacKenzie, 2008). This theory is one of the earliest and one of the most vigorously promoted (MacKenzie et al., 2008). Attachment is a bond that endures overtime and focuses on the quality of the relational tie (Ainsworth et al. cited in Wilson et al. (2006)). Wilson and her colleagues stated that a secure attachment meant that people can detach from others and recognise that other people have their own personal beliefs and expectations. It is insecure attachment however, that is most commonly associated with this type of criminal behaviour (Ménard & Pincus, 2012). The stalkers are believed to be 'a unique subgroup of insecurely attached individuals' (Wilson et al. 2006:143). It was also said that insecure attachment could lead to attention-seeking behaviours such as dramatic

displays of emotion (crying, anger), enhanced proximity (clinging), or pursuit behaviour. An insecure attachment style impairs the ability to manage relationships in adulthood (MacKenzie et al., 2008). Primary reasons for insecure attachment are found to be parental abuse, separation and loss of the primary caregiver (Langhinrichsen-Rohling, 2000) and overprotective fathers (Tonin, 2004). In MacKenzie et al.'s study (2008) stalkers reported significantly less caring and more emotionally neglectful parents. When testing the attachment bonds of stalkers, researchers apply the Bartholomew and Horowitz model suggesting that there are four attachment styles – secure, preoccupied, dismissing and fearful (1991). Bartholomew and Horowitz (1991) stated that individuals with fearful attachment style are characterised with negative model of self and of others, and the preoccupied – negative model of others and positive one of others. Both styles are dependent on other people's approval and may avoid intimacy in order not to be rejected. Some researchers such as MacKenzie et al (2008) found that stalkers are more likely to identify themselves with having an insecure attachment style (more specifically the fearful style) and to look at themselves more negatively. But others such as Dutton and Winstead (2006) found that people with preoccupied attachment styles are engaging in most pursuits. Moreover, their study found that different stalker types view their fathers in a different way. For example, motivational types view them as less controlling, while the resentful group, whose behaviour is viewed as a response to injustice, view them as more controlling. Results for the latter group also support the perspective of overprotective parents; it cannot reflect the majority of stalkers' feelings to their fathers. Nevertheless, researchers have found that attachment may have direct or indirect effect on stalking. Some researchers combine attachment, need for control, responses to break-up and psychological abuse in the relationship in order to investigate whether they could be predictors of stalking (Davis et

al., 2000). They found that attachment results in stalking indirectly through anger or jealousy. Their findings are supported by Dye and Davis's (2003). They found out that insecure attachment predicted need for control, break-up anger, or jealousy, which directly resulted in unwanted pursuit. However, in Dutton and Winstead's study (2006) insecure attachment could be a direct predictor of pursuit.

Researchers also looked at the connection between psychological disorders and stalking. Stereotypically, people often see stalking as evolving from mental illnesses (Spitzberg & Cadiz, 2002). Mullen et al. (2001) suggest that every stalker whose behaviour has become overly intrusive has a mental disorder. Research is done mostly on forensic or clinical samples of stalkers (Ménard & Pincus, 2011). The most frequently reported disorders are antisocial, borderline, histrionic and narcissistic, which are part of DSM Axis II Cluster B (Ménard & Pincus, 2011). Stalkers also show a fairly broad representation of Axis I disorders (Douglas & Dutton, 2001). Some of the disorders are schizophrenia, mood disorders, major depression, or bipolar disorder - however research is controversial. Douglas and Dutton (2001) review some research whose findings suggest that stalkers could have these disorders, but they are not prevalent in comparison to other people with the same disorders. Their conclusion from the data is that stalkers may be slightly more psychologically maladjusted compared to other offenders because they have higher scores on several items, including anxiety, depression, and grandiosity. Evidence suggests that approximately 50% of stalkers have a personality disorder (Douglas & Dutton, 2001). Narcissism is one of the most researched disorders associated with stalking (Menard & Pincus, 2011). Narcissists focus on what cost them in terms of lost time, spent resources and

personal humiliation (Mullen et al., 2001). Rosenfeld (2003) looked at mental disorders and reoffending and whether there is a connection between them. His research shows that Cluster B diagnosis is substantially more likely to reoffend than other personality disorder diagnosis. He added that people with other personality disorders are not at substantially greater risk of reoffending compared to offenders without a personality disorder.

Rosenfeld's study shows also that an interaction between substance abuse and psychosis (particularly delusional disorder) do not influence reoffending - although the combination of a personality disorder and a history of substance abuse leads to a rise in reoffending.

Moreover, mental disorders are linked to violence (Miller, 2012). It is suggested that personality disorders are associated with high risk of violence, while psychotic illness decreases violence risk. A plausible explanation for this data is that psychotic offenders are more likely to receive aggressive psychiatric treatment, such as hospitalization and treatment with medication (Rosenfeld, 2003).

Stalking is also associated with violence (Spitzberg & Cadiz, 2002). Although most of the stalkers do not become inter-personally violent data indicates that between 30 and 60% of the victims are threatened with violence and between 25 and 50% of them are actually physically attacked (Miller, 2012). He also suggests that violence correlates positively with the length of the stalking. Miller (2012) says that serious physical injuries are rare; grabbing, choking, pulling, shaking, slapping and etc. are the usual acts of violence. Moreover, weapons such as handguns, knives and cars are used mostly to intimidate and control the victim - but rarely to injure. Data shows that weapons are actually used in less than a third of cases. Violence is more often used when stalking prior-intimate victims (Miller, 2012).

Other factors that may result in violence are obsession with the victim, humiliation and anger. A study revealed that women who were stalked by their partners were also abused in some way - sexually, physically, emotionally - by those partners (Mechanic et al., 2000). Stalking has been considered a subtype of psychological abuse (Basile & Hall, 2011). Mechanic et al. stated that through emotional abuse stalkers show their power and are able to instil fear in their victims. Although this has been recognised as an important part in intimate partner relationships, researchers have difficulty reaching a consensus on whether stalking should be a distinct component of violence against women. Violence is associated with alcohol use among stalkers (Melton, 2007).

Researchers hypothesised that stalking may be explained through evolutionary theory (Miller, 2012). Evolutionary theory suggests people seek to maximise their chances of reproduction through enhancing physical attractiveness (females), or maximising image of strength and status (males) (Miller, 2012). Some researchers such as Spitzberg and Cupach (2007) see stalking as an extension of normal interpersonal courtship. Nevertheless, a combination between stalking and psychosis, anger, jealousy and impulsivity, the pursuit may turn into a dangerous stalking, which could be connected to evolutionary theory through characteristics such as skills of stealth, patience, surveillance, cognitive strategising and physical prowess - which are all traits of successful hunting (Miller, 2012). This theory is actually seen as favourable to women, who are searching for a high-status in order to be more secure. However, this is a theory that cannot be tested.

Stalking is viewed from another perspective as well. The Lerner's just world hypothesis states that people want to live in a fair world where everyone gets what they deserve in order to have a stable and orderly environment (Lerner & Miller, 1978). This hypothesis fits the stalking as many people could perceive victims as deserving and to deny their right of being the victim (Weller et al., 2013). Sheridan et al. (2003) suggest that ex-intimate stalkers are seen as entitled to stalk their victims because of something negative that the victim has done. They also suggest that strangers do not have this entitlement because there is no history between them and the victim. This hypothesis is connected to the fundamental attribution error because when people's perception of a just world is threatened, they produce dispositional explanations (Weller et al., 2013). Although ex-intimate victims are most likely to seek help from the police and other legal authorities, they are also the group which is being helped the least (Sheridan et al., 2003). They explain these findings through the just world hypothesis. In a just world, there is no need for police to intervene in domestic disputes – the way ex-intimate stalking is seen – and both perpetrator and victim should deal with the situation on their own (Sheridan et al., 2003). This explains the finding that ex-intimate stalkers are less likely to be arrested or convicted than stranger stalkers (Scott et al., 2013).

On the other hand, the research on attachment theory has many limitations. One of them is that most of the data is not general to all stalkers (Tonin, 2004). Tonin's findings, for example, are representative samples only for stalkers detained under the Mental Health Act (1983). MacKenzie and her colleagues stated (2008) that one of the biggest problems with most research about stalking is that stalkers have been studied as a single homogeneous

group, when in reality, as a complex social problem, stalking can be driven by many different motives. This means that stalkers with different drivers may not share the same characteristics and their behaviour can be considered from different perspectives. Other limitations are that most of the data is taken from self-reports and it is based on retrospective reinterpretation (Dutton & Winstead, 2006). Dye and Davis (2003) suggest that some of the data could be emotionally coloured by anger and jealousy. Self-reports are also criticised by people who believe it is not a valid way of assessing adult attachment as it is an unconscious and automatic process (Carlson et al., cited in Tonin, 2004). Moreover, some respondents may not share important information, or may change other information to look good (Dutton & Winstead, 2006). However, Bartholomew and Moretti (2002) believe that self-reports are predictive of dynamic processes that are related to attachment - although they acknowledge that self-reports may work when assessing samples from the normative population. Clinical samples though are characterised with insecurity, which may distort the quality of self-reports. When talking about mental health issues and whether stalkers have some psychological disorders, a big limitation is that little research is done on nonclinical stalkers (Ménard & Pincus, 2011). This focuses the research on one particular group of people which eventually is one of its limits. The early research on stalking was psychologically biased as many of the typologies depended heavily upon DSM (Spitzberg & Cupach, 2007). The other topic broadly discussed when talking about stalking is violence. Studies on this mainly include forensic samples, which are considered a highly selective sample where certain characteristics are more often than in non-forensic samples (Roberts, 2005). A forensic sample usually includes individuals who are considered by courts to be more violent, to have more extensive criminal histories, and to have been violent while stalking (Roberts, 2005). This limits the sample and predicts the prevalence of particular

characteristics. Another important limitation is related to methodologies used in studies. Rosenfield (2004) suggests that most of the researchers use such methodologies that prevent them from comparing their studies with others.

British Home Office defines stalking as “a course of conduct involving two or more events of harassment causing fear, alarm or distress, of three types: phone calls or letters; loitering outside home or work; damaged property” (Walby & Allen, 2004: 4). However, definitions of stalking vary throughout different legislations and studies, which makes it confusing where their findings can be juxtaposed to one another (Fox et al., 2011). Insecure attachment and mental disorders can result in stalking behaviours (Spitzberg & Cadiz, 2002). Violence is also associated with stalking. Moreover, there are two hypothesis which are difficult to test – evolutionary perspective of stalking (Miller, 2012) and the just world hypothesis (Weller et al., 2013). However, all the perspectives and theories have many limitations and all the ideas need far greater research for a better understanding on the topic (Fox et al., 2011).

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A short review and analysis of the article: Smart, Carol. (1979) "The New Female Criminal: Reality or Myth", British Journal of Criminology 19(1): 50-59

Linda Thompson

Female crime and female emancipation is not new to criminology, but the debates for why it happens and how it is controlled can be interesting, albeit controversial.

This article reviews Carol Smart's "The New Female Criminal" to demonstrate its efficiency in addressing some of the reasons for female crime occurring and why it is different from male crime. For any new researcher, student or interested reader, it suggests areas of expansion that Carol has not discussed in her own article, or areas that have been developed after 1979 and provides an insight into the importance of good methodology.

Key words: Female Crime, female liberation, methodology

Throughout the article Smart is engaging as well as convincing. Her analysis and evaluation of female crime and liberation is fascinating both due to the theories she discusses, the methodology she uses (and its analysis) and also her examples.

The journal's main aim and thesis is whether there is a relationship between the rise in female crime and the rise in female liberation; and it is this which is discussed. Smart does

not give a final conclusion on the matter and allows the reader to come to their own conclusion, although her detailed exploration throughout the article provides the reader with sound evidence to enable them to make their own judgment. She does so by giving the reader a balanced evaluation of the theories for, and against, female liberation as a cause for the rise of female crime. An example, she uses Adler's theory; women adopting male characteristics and abandoning the traditional female role. She criticises Adler's theory immensely; statistics, comparing different countries, distinction between crime and deviancy and the ambiguity of who is turning to more masculine forms of crime - existing female criminals, or non-criminal females. Despite her wide criticisms, her viewpoints are valid and useful in understanding the complexities in the theory, and unlike some occasionally found in literature, are not an attack on the theorists themselves. Nonetheless she realises Adler's difficulty in establishing her research owing to the limited amount of studies prior to her own work. She also acknowledges the insight Adler provides into a relatively unexplored (at that time) area. The question nonetheless arises whether Smart undermines her own argument by overemphasising the flaws within Adler's research, yet still uses it for her own argument.

Smart also adopts other concepts aside from female liberation. This could be surprising to some readers due to a 'particular interest she has in feminist approaches especially those of the family, marriage and divorce' (SPIG, 1998). She talks briefly of these topics in her journal but does not say too much on them. Although a brief discussion would be useful to understand why more women might commit crimes post-female liberation movement compared to previous years, she does well to focus on her title. When looking at marriage

she speaks only of Adler's theory and women removing themselves from a traditional female role, (that of living at home and being a well-respected house-wife). The other side of the argument is because of changes in the law, (Theft Act 1968 and the Criminal Damage Act 1971 are examples she uses) and police reporting. Smart could also at this point, have looked at the theory of the underclass and how women behave or are treated in the underclass to examine a potentially new reason for the rise in female crime.

Smart also acknowledges the arguments associated around males such as Lombroso and Ferrero (1968) who give biological explanations as a result of female crime. They believe that the female offender is biologically abnormal because she holds too many male characteristics due to a hormonal imbalance. A theory likely to anger Smart due to her background. Nonetheless she demonstrates a well-balanced argument and also develops it further to acknowledge male behaviour towards females within the courtroom. It has been argued that males tend to be gentler on sentencing female offenders (Blackburn, 2001: 50-51), which may be due to the traditional female image over portrayed in the courtroom, or another explanation, sexual appeal. Lombroso's theory on the appearance of offenders could have some relevance as there is evidence that more attractive people receive lighter sentences, inspiring Kurtzberg et al., (1978), to conduct a study on plastic surgery and sentencing. He found there was a significant reduction in recidivism although Smart has not mentioned any of this in her journal article. It must however be noted that owing to the passage of time, Smart may have already begun the publishing process when Kutzberg et al., published their findings.

Smart takes another methodology to emphasise the validity of her argument. She looks at self-report studies, all stating that the true official gender ratio for juvenile offenders is about 2:1, not 7:1 as suggested. Instead of proposing the importance of these new statistics, Smart starts to immediately criticise the research, undermining the study from the start. An added criticism to Smart's argument is this continuous and scattered criticism throughout her article towards the use of statistics. It ruins the flow of her argument, making it appear disorganised and confusing but remaining as a constant reminder of the limitations of her research and of other researchers. One or two acknowledgments for the reader should have sufficed.

Smart takes other considerations into account to further improve the validity of her argument. She explains part of the study in terms of women committing the same amount of crime as men where 'age crimes' are concerned such as under-age drinking, sex, gambling and smoking. She also states that women are more likely to lie about committing violent acts or other masculine offences, such as theft, indicating further reason to look at the above research. All of which ultimately strengthen Smart's argument and makes the reader aware of outside influences that could also affect the amount of crime committed.

The concept of 'hidden' crime would therefore also have expanded her current argument and thus an examination into Campbell's study on hidden female crime would have added further value (Campbell, 1977). As an active researcher in this area, Smart should have been aware of the "hidden" crime theory especially as it is relevant to other research she has also

discussed. Factors such as Adler's theory are very influential in the "hidden" crime aspect and new ideas such as girl gangs, the new ladette culture, education and the criminal justice system are all considered in Campbell's case study. Including a case study also helps to encourage the reader to trust the result because it can be examined and re-tested by other researchers.

A further potential weakness within Smart's article is the use of graphs which provide an easier understanding of statistics. Despite the problems with statistics she criticised so intensely throughout her article, she still uses them in her own study. As a result of her previous criticisms, her article would have benefitted from some form of justification for using them, plus the benefit for her research as well as their use for other researcher's work. Her tables are also slightly misleading owing to their modification in 1973 but for the purpose of the journal she has used the previous classification. This modification could have had an effect on the result; nonetheless it is understandable why she had to do so for the purpose of applying the data effectively.

At some stages in the journal she also weakens her argument by comparing male and female crime together, which can be misleading. For example, "between 1965 and 1975 there has been an increase of 500% in murder by women; the absolute figure for 1965 was one and for 1975 it was five". However, the case studies all compare the sex juvenile ratio, once again undermining her previous argument or her argument towards her own research. Nonetheless, the reader can gain useful insight from the later example.

The main criticism towards Smart's article is that she does not explain the theories sufficiently and as a consequence misses points that would have further strengthened her argument. For example on page 56 she mentions McRobbie and Garber (1976) when discussing property and violent crimes, then later she brings up the idea of opportunity. McRobbie and Garber's theory on 'bedroom culture' would have fitted well: the theory that girls tend to stay indoors, whilst boys are out on the street, thereby proving that there is more opportunity for the males to commit crime, especially in the cases of property or violent crimes. By failing to explain all the theories has also meant that some important issues are potentially excluded.

Nonetheless the importance and insight of the journal should not be underrated. The article would be useful to many academics and students across a range of disciplines because it explores a wide variety of issues and explanations for patterns of behaviour linked to society. The article demonstrates how interdisciplinary research can benefit the wider research spectrum and why other researchers should also be directed towards inter or multi-disciplinary research. The well balanced argument is also a wise decision by Smart as it allows readers to understand the whole concept of female crime and come to their own conclusions. Overall, this journal is generally well written and engaging owing to the considerable range of ideas, theorists and the evidence it provides. The transparency she presents on the theories and the methodologies used alongside a critique, allows the reader to make a balanced judgment and expands their awareness of such complex issues in research.

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**Employability Skills for Law Students; Emily Finch and Stefan Fafinski;
Oxford; Oxford University Press; 2014; 376pp; ISBN 9780199663231;**

£27.99

Book Review

Siet Chi Liew

Employability Skills for Law Students is an impressive book that is unique in its kind. It is specifically written by two experienced authors, Emily Finch and Stefan Fafinski and provides comprehensive information to develop employability skills that are necessary for law students.

The book is written in a well-structured manner by beginning with the chapter on understanding basic employability skills and slowly leading to focusing and demonstrating those skills. Finch and Fafinski place great emphasis on the importance of skills being as crucial for law students as legal knowledge. This is evidenced in page 3 which begins the first chapter with the quote from Donna Dunning:

“In an uncertain job market, skills are your best security.”

In this short chapter, Finch and Fafinski provided an explanation on the different types of employability skills such as, but not limited to, self-management, team work and problem solving - all of which are what employers in general are looking for. In assisting law students to identify their

skills, the authors provide examples on doing a skills audit.

The next chapter focuses on the planning stage by commencing with a key question which all law students must answer: To practise or not to practise? Thereafter, the authors introduce the routes to both the practise and non-practise pathways. Despite the brief description on the two different professions, Finch and Fafinski provided detailed explanation on the routes to those qualifications. The chapter ends with the guidance on Personal Development Planning (PDP).

Chapter 3 marks the beginning of Part II of this book. In particular, Finch and Fafinski high-light various academic skills which include *inter alia* essay writing, legal research and time management. It would have been perfect if the authors could have provided a more in-depth explanation on dissertation. for example by including a sub-section on research methodology, as well as the structure, both of which are crucial for producing a good dissertation.

The following chapter is probably the most informative chapter of all. The authors look at the three main practical legal skills encountered by all law students: mooting, client interviewing and negotiations. Each is dealt with in detail in separate sections. The effort of the authors is much appreciated as each section demonstrates an outline of opportunities for students to further develop their skills.

Part III which includes Chapter 5, 6 and 7 are closely related and flag up that in a competitive employment market, results do not define who you are. It is the combination of academic

performance and practical legal skills that count. This is precisely the essence of these chapters in which Finch and Fafinski explore various activities for students to develop their skills portfolio. For instance, the authors suggest in Chapter 5 that students could sharpen their writing skills by contributing to a student journal. They also cover different aspects of work experience available to all law students such as mini-pupillages and pro bono work. More specifically, this book contains useful information by providing examples as to what information should be included in a speculative letter.

Part IV of this book is a shift from understanding and building employability skills to focusing on those acquired at law school. Chapter 8, for instance, is extremely helpful for students who wish to practise, either as a solicitor or a barrister. The chapter gives a clear explanation about training contracts for solicitors as well as pupillage for barristers. However, whilst it contains useful information such as the funding opportunities and the amount awarded, it fails to address the actual application procedure which is also important for students, although as this procedure is soon to change it is perhaps understandable.

For students who are uncertain as whether or not to go into practise upon graduating from a law school, Chapter 9 and Chapter 10 might serve as useful guidance in aiding them to make a decision. Chapter 9 specifically addresses law job apart from the traditional work of barristers and solicitors. Finch and Fafinski give a general outline on the working environment of careers such as paralegal, legal assistant, research assistant and licensed conveyancers.

Chapter 10, on the other hand, explores a range of alternative non-law career paths. Despite outlining the possibility of undertaking a postgraduate qualification, it may have been more useful for Finch and Fafinski to move this section into a separate chapter so as to provide a more detailed

discussion on the importance of postgraduate qualifications. In light of a competitive market where universities are producing thousands of graduates every year, this book could highlight that the demand for postgraduate qualifications is growing owing to the unique skills which cannot be obtained at undergraduate level. Moreover, it would also be wise to point out that Employability Skills for Law Students should also draw the attention to the fact that certain international organisations such as the United Nations do not accept anything lower than a master's degree.

The final part of this book explains the practical aspect to assist students in demonstrating those employability skills they have acquired. In summary, it places particular emphasis in submitting accurate, proper and good CVs and covering letters. Finch and Fafinski also emphasise the importance of handling interviews so as to create good first impressions.

The book ends with a list of appendices showing information about vacation schemes. By and large, this is a user-friendly book which is indeed useful for law students. However, several improvements could be made in the next edition based on the suggestions mentioned throughout this review.

International Law; Jan Klabbers; Cambridge; Cambridge University

Press; 2013; xxv + 350; pbk, £29.99

Book Review

Carrie Fox

Jan Klabbers, Professor of International Law at Helsinki University, has contributed many articles on a variety of topics within the field of international legal studies. He has authored or edited over a dozen books (for a full list of his publications as of October 2012, see his university webpage at <http://www.helsinki.fi/eci/Staff/Klabbers.html>). *International Law* is his first general textbook.

The book is divided into three parts: 'The Structure of International Law'; 'The Substance of International Law', and 'The Surroundings of International Law'. The first two sections make up the bulk of the book and they are those one might expect to find in an International Law textbook, covering such content in the first section as the law of treaties, subjects of international law and international courts and tribunals, and in the second section, substantive topics such as the law of armed conflict and the law of the sea.

Part III, on the other hand, alerts the prospective reader that this textbook comes at international law from a different angle than most. Professor Klabbers has worked closely with Martti Koskenniemi, who is *inter alia* a Professor of International Law at Helsinki University. Klabbers subscribes to Koskenniemi's theory that international law is the 'continuation of politics' (see p. 13 of the textbook). The third section then is intended to describe the context of international law, and the idea that it 'does not exist in a vacuum' but is related to politics, ethics, global governance and national legal systems (see Preface, p. xxi). Though necessarily shorter than the other two sections

(the book is, after all, a textbook on international law) it includes reflections on all these topics and their relation to international law.

That the emphasis in this textbook is a bit different from the standard approach can be seen even in the first two sections. In Chapter 1 the reader is given 'The Setting of International Law' and introduced to the ideas that are discussed more thoroughly in Part III, as well as to Koskenniemi's theory concerning the structure of international law. This, in Klabbers' words, is the idea that international law is 'constantly in search of a compromise between the naturalist and the positivist traditions' (p. 13). Klabbers' substitution of 'naturalist and positivist traditions' for Koskenniemi's more nuanced 'ascending arguments based on concreteness' and 'descending arguments based on normativity' (see Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* reissue with new epilogue, CUP, 2005, chapter 1 *et seq*) is unfortunate as it appears to oversimplify Koskenniemi's thesis considerably. Despite this quibble, and the fact that this reviewer is not entirely convinced of the accuracy of Koskenniemi's theory, the different approach to the textbook does provide a much more accessible introduction to some of the theoretical disputes in international law than any other work to date.

Klabbers warns the reader that all he intends to provide is a framework to the rules of international law, rather than the rules themselves, and for the most part this approach is successful. Particularly where the topic is one that Klabbers has spent a fair amount of time discussing elsewhere, the reader finds certain areas of international law illuminated quickly in a way that previously took many hours of study to reach. Perhaps if this reviewer had had access to Klabbers' discussion on what is a treaty (Chapter 3) available to her three years ago, she would have found preparing for her international law exam a far less onerous task! In other places however, this approach does at times

risk confusing the student. For example, after discussing the sources of international law as embodied in Article 38 of the Statute of the International Court of Justice (ICJ) (Chapter 2), Klabbers then moves on to 'other possible sources'. This is essentially a discussion of soft law, but as he does not like that term (as he has explained elsewhere 'The Redundancy of Soft Law' (1996) 65 *NJIL* 167) he instead considers whether international law needs a new criterion for distinguishing between law and non-law. Or rather, he states that international law 'lacks a proper criterion' for doing such – a statement that in and of itself might be considered a bit controversial in some international law circles. He gives this discussion nearly as much space as he does his discussion on customary law a few pages earlier. A student new to the study of international law might not realise that s/he was now moving in the grounds of critical discussion rather than simply a 'framework' to the accepted rules, particularly if s/he was relying too heavily on the one textbook.

There are also points in the book where Klabbers' desire not to be simply reciting a list of rules and to split his text up into three neat parts means that he has included material in places where one would not normally expect to see it discussed. This also could lead to confusion on the part of the undergraduate. For example, in his chapter on the subjects of international law (Chapter 4), under his discussion of states as one of the main players in international law, he includes a subsection on the acquisition of territory. States' acquisition of territory, however, is not normally considered part of the discussion of their status as subjects of international law, and its placement in the section is jarring. Should acquisition of territory show up in an undergraduate essay on the subjects of international law, it is doubtful whether the marker of that essay would be too impressed.

Overall, this volume provides an interesting addition to the field of International Law textbooks. It offers a good introduction to the more theoretical approaches to international law, and is written in

an easily accessible style. The footnotes are abundant, and include references to works by authors from many countries and in several languages, far more than one finds in any other introductory textbook on international law. However, students using this book should note the fact that Klabbers' easy writing style does not mean that the ideas he is presenting are easy. They should probably heed Klabbers' own advice to be aware of the more thorough textbooks available (such as those suggested by Klabbers – Crawford, *Brownlie's Principles of Public International Law*, 8th edn, OUP, 2012; Evans (ed.), *International Law*, 3rd edn, OUP, 2010; Shaw, *International Law*, 6th edn, CUP, 2008), and that 'the interested reader could do worse than to pick one of these to read alongside the present book' (Preface, pp xx- xxi).

Undergraduates may be delighted to find such a slim textbook available, and it is, indeed, very instructive in places, but they should still be prepared to rely on more substantial textbooks in order to be sure they understand which parts of international law are reasonably settled and which are contested.

**Autonomy, Informed Consent and Medical Law: A Relational
Challenge; Alasdair Maclean; Cambridge; Cambridge University Press;
2013; xvii + 296 pp; Hardback; £25.99**

Book Review

Ellen Ball

Consent is an area of both law and politics which is a topic of ongoing ethical debate as well as of weighty academic study. It is a difficult and contentious issue, one which Maclean attempts to tackle within this book. The issue of consent will always be a cause for concern, but especially within medical litigation. Maclean analyses the ethical basis for consent to medical treatment, providing an extensive consideration of the ethical issues as well as a detailed examination of current English law and how today's position was arrived at.

Analysis is focused around the healthcare professional-patient relationship and the development of Maclean's relational model balancing these two parties and their obligations. Further, this model is used to critique the current legal regulation of consent and to consider the future development of law; more specifically contrasting with Mason and O'Neill's recent proposal for a model of genuine consent. Maclean takes the position that there are serious flaws with the current law and position taken on consent; flaws that may not be rectified by a change in law alone but a change in position. He argues for his relational model over such a genuine consent model as the one from Mason and O'Neill.

The Introduction sets out the idea of healthcare practice needing to have patients at the centre of the service, with partnership required between professionals and patients. Maclean's aim is to construct a model of consent that reflects the value of autonomy, with the model able to expose the deficiencies in the legal regulation of consent and provide some suggestions as to how to remedy these. The Introduction also considers the Bristol Royal Infirmary's Inquiry and current Government proposals into consent under medical law and recommendations in care. There is a consistent balance of critique, descriptions and definitions so as to fulfil Maclean's aim of "exposing the flaws of the current legal regulation of consent and to suggest how the deficiencies might be addressed" (p260).

The first part of the book entitled 'An Ethical Model' examines the moral basis of consent and includes chapters 1 to 4.

Chapter 1, 'Autonomy' starts the discussion off by exploring the meaning and importance of autonomy through its nature, value and limits. This is then followed with an examination of the nature of the connection between consent and autonomy.

Chapter 2 examines other moral principles and approaches to consent, focussing on beneficence, justice and virtue, which may be relevant to how the law should regulate consent within medical treatment. Maclean also considers the relevance of these principles in their ability to help shape the extent of the duty of the healthcare professional to respect the patient's autonomy.

The healthcare professional-patient relationship is discussed in Chapter 3, setting the context for consent. Through examining the relationship itself, the rights and the obligations of the two parties can be seen. This chapter then discusses the obligations of both professional and patient.

Chapter 4 considers the concept of consent "what it is and what it isn't" (title) determining the underlying theory and important attributes, as well as limits of the concept of consent. Maclean

deconstructs consent to find the relevant attributes that reflect the different aspects of consent to healthcare interventions allowing him to develop his model of consent. There is a spectrum of approaches noted and various elements of consent considered.

The Conclusion and addendum at the end of Part I is a very useful and helpful, acting as clarification of what has been covered to this point.

Part II: Consent and the Law examines the laws approach to consent, analysing the law chronologically to highlight the problems faced in trying to develop an ethically appropriate standard through the courts

Chapter 5 examines the legal regulation of consent, specifically under battery law and the law of negligence. The chapter looks at the rules that the courts have developed, with formal and detailed examination of the leading cases.

Following on from this Chapter 6 rationalises the law and ethics of consent by comparing the legal model of consent with the relational model developed in Part I of the book. There is also a brief consideration of whether weaknesses and flaws found with the current law could be corrected through professional regulation or legislation and likelihood of this.

Finally, Chapter 7 considers where the law could go in the future with a closing comparison of consent models.

In his conclusion, Maclean offers a summary of the book and what he has covered in each chapter.

The book overall is detailed and coherent. Each chapter is well structured with individual introductions and conclusions summarising clearly and in a consolidating manner the matters being discussed. This is a substantial book owing to the complexity of the topic, but through its structure,

and starting from the basics, Maclean is able to break down each important topic enabling the reader to build up knowledge as they progress. There is a lot of case law used throughout the book, but only where appropriate and useful. This is all listed, along with figures, at the beginning of the book for ease. The cases are of course effective in highlighting the material within the book and the same goes for Maclean's own illustrative examples. For these reasons, the book is a great tool for undergraduate students in helping to solidify their basic knowledge of consent, and allowing them to leave with an extensive and comprehensive knowledge of this area of law and the issues involved. Although taking a focus around Maclean's own relational model, there are many references and consideration of other academic opinions. This partnered with just how much Maclean covers also makes this book appealing to academics.