



LSE Law Review  
**2019**  
Volume IV



LSE Law Review  
Volume IV

# LSE Law Review

## Editorial Board 2018/19

*Editor-in-Chief*

Shukri Shahizam

*Deputy Editor-in-Chief*

Gloria Schiavo

### *Editorial Section*

#### *Articles Editors*

Ayelet Carmeli  
Thomas Devine  
Isabel Hahn  
Victoria Heinen  
Jarren Koh

#### *Notes Editors*

Mahmoud Serewel  
William Wong  
Thomas Yeon

### *Management Section*

#### *Liaison Officers*

Austin Chan  
Quin Pau

#### *Publication Officers*

Siobhan Leung  
Marcus Liang

#### *Seminars Officers*

Sanziana Ciobanu-Dordea  
Kanika Jamwal  
Kelly Sim

#### *IT Officer*

Gustav Fritzon

### *Junior Editors*

Magnus Chisholm  
Ines Chu  
Michelle Ma  
Mythili Mishra

Vasiliki Poula  
Nikki Wong  
Antonio Zorzolan

# LSE Law Review



---

Volume IV

---

*The London School of Economics Law Review (LSELR) seeks to publish the best student legal scholarship. The LSELR is generously supported by the London School of Economics Department of Law, the London School of Economics Student Union and LSESU Law Society.*

The views expressed by the contributors are not necessarily those of the LSE Law Review Editorial Board. While every effort has been made to ensure the accuracy and completeness of information contained in this journal, the Editorial Board cannot assume responsibility for any errors, inaccuracies, omissions, or inconsistencies contained herein.

No part of this publication may be reproduced, transmitted, in any form or by any means, electronic, mechanical, recording or otherwise, or stored in any retrieval system of any nature, without the prior, express written permission of the LSE Law Review. The authors who submitted their work to the LSE Law Review retain all rights to their work. Within the UK, exceptions are allowed in respect of any fair dealing for the purpose of research of private study, or criticism or review, as permitted under the Copyrights, Designs and Patents Act, 1988. Enquiries concerning reproducing outside these terms and in other countries should be sent to the Editor-in-Chief.

The LSE Law Review uses the Fourth Edition of Oxford University Standard for Citation of Legal Authorities (OSCOLA).

Published in the United Kingdom by the LSE Law Review  
LSE Student Union Law Society  
1 Sheffield Street, London WC2A 2EY  
Email: [lselawreview@gmail.com](mailto:lselawreview@gmail.com)

In affiliation with the London School of Economics Department of Law.

© LSE Law Review Volume IV, 2019. All rights reserved.

Proudly Sponsored by:

*Gold Corporate Sponsor*



*Prize Sponsor*



Francis Taylor Building

---

# Table of Contents

---

**i**

Letter from the Editor

**1**

*The European Court of Human Rights and Austerity Measures in the Eurozone: An Ally Against Human Rights Violations or Merely a Bystander?*

(*Francis Taylor Building Prize for Best Overall Submission 2019*)

By Ifigeneia Intzipeoglou

**29**

*The Role of Adverse Possession in Modern Land Law*

(*3VB Prize for Best Letter to the Editor 2019*)

By Yui Nga Natalie Tsang

**33**

*English Choice of Law in Contract Under the Rome I Regime: Is Flexibility Giving Way to Predictability?*

(*LSE Law Review Prize for Best Blog Post 2019*)

By Lora Izvorova

**39**

*The Mutual Agreement Procedure: Coordinating the Global Tax Orchestra*

By Konstantinos Taramountas

**63**

*The Separability of Law and Morality as an Intriguing Conundrum  
within Legal Positivism: Lessons from The Concept of Law*

By Thomas Yeon

**74**

*Women, Peace, and Security and Nationality Laws in the Syrian  
Conflict*

By María del Rosario Grimà Algora

**104**

*The Collapse of Carillion: Regulatory Failure in the Contract State*

By Karen Wong

**122**

*A Directly-Elected House of Lords: A Proposal for Reform*

By See Hyun Park

---

## Letter from the Editor

---

On behalf of the Editorial Board, I am proud to present the fourth volume of the LSE Law Review.

Now in our fourth year of publication, the LSE Law Review has come far from its origins. The 2018/19 academic year has seen significant changes to the way the Review is run and published. Building on the solid foundations laid by past editors, we have been able dedicate the year to broader issues relating to the Review's place within its community. To further our aims of accessibility and inclusivity, we began both the LSE Law Review Blog and seminars programme. Similarly, in order to improve the consistency of our output, we moved to a bi-annual publication schedule, with issues published digitally during the winter and in print during the spring.

For the first time, we also had a Summer Editorial Board which allowed for students interested in joining the term-time Board to wade their feet in a more relaxed environment. It proved to be a huge success, with almost all summer Board members continuing into the academic year and becoming vital members of their respective teams.

Of course, this was only possible due to the efforts and accumulated knowledge of past boards. Student-run law journals are peculiar in many senses, but the most significant when it comes to year-to-year administration is the transience of the body running it. This year, we made a conscious effort to increase our long-term sustainability that regard by increasing the number of Junior Editors on the Board to give more first-year students the opportunity to participate in the Review's work.

As always, we extend our eternal gratitude to the LSE Department of Law, especially Professor Niamh Moloney and Ms. Sarah Lee for their continued support and enthusiasm for this project. I would also like to thank Emeritus Professor Carol Harlow QC FBA for graciously accepting our invitation to join us at the fourth annual Launch Night as our honorary guest speaker.

We also would like to thank our Gold Corporate Sponsor and Prize Sponsor for Best Letter to the Editor, 3 Verulam Buildings, and Prize Sponsor for Best Overall Submission, Francis Taylor Building, for their continued generous support. Likewise, we are deeply appreciative of the LSESU Law Society's unconditional backing of the breadth of new initiatives taken by the Review over the past months.

To our authors, we thank you for selecting us as where you shared your work, and for diligently responding to each and every late-night editorial email. We all look forward to following your future careers, whether in academia or elsewhere.

Finally, I would like to personally thank the dedicated editors of this year's Board: Antonio, Austin, Ayelet, Gloria, Gustav, Ines, Isabel, Jarren, Kanika, Kelly, Magnus, Mahmoud, Marcus, Michelle, Mythili, Nikki, Quin, Sanzi, Siobhan, Thomas (Devine), Thomas (Yeon), Vasiliki, Victoria, and William. None of this would have been possible without your hard work. It was my honour and pleasure to work with all of you. I am extremely proud of our accomplishments as a Board which, hopefully, will pale in comparison to what we each have coming for us in times to come.

I am confident that we are leaving the Review in good hands, and look forward to its continued success.

Shukri Shahizam  
Editor-in-Chief 2018/19  
LSE Law Review Editorial Board



Francis Taylor Building

**Francis Taylor Building is delighted to sponsor**

## **Best Overall Submission**

FTB is a barristers' chambers with a leading reputation for planning, environment, infrastructure, licensing, compulsory purchase and land valuation, rating, local government, ecclesiastical and religious liberty, regulatory crime and associated aspects of EU law.

Each year we seek to recruit two pupils. Information about the requirements and applications process can be found on our website <https://www.ftbchambers.co.uk/recruitment/twelve-monthpupillage>

Francis Taylor Building Inner Temple London EC4Y 7BY **T** 020 7353 8415  
**F** 020 7353 7622 **E** clerks@ftbchambers.co.uk [www.ftbchambers.co.uk](http://www.ftbchambers.co.uk)

# The European Court of Human Rights and austerity measures in the Eurozone: an ally against human rights violations or merely a bystander?

Ifigeneia Intzipeoglou\*

---

## ABSTRACT

*The 2008 financial crisis created a domino effect that affected national economies around the globe, forcing many to adopt severe austerity measures. This paper, using four Eurozone countries (Greece, Ireland, Portugal, the Netherlands) as examples, will attempt to evaluate the mediocre response of ECtHR to violations of the right to property and due process caused by austerity, and subsequently try to explain the ECtHR's stance on the matter by analysing the doctrines of margin of appreciation, subsidiarity and legitimacy. A brief comparison of the responses of the other regional institutions in similar cases, especially the European Committee of Social Rights (ECSR) and the Court of Justice of the European Union (CJEU) will follow before exploring possible implications for the future based on the attitude of the Court towards other crises and the development of its jurisprudence regarding socio-economic rights.*

## INTRODUCTION

Approximately ten years ago, the international community was shaken by a key event: the global financial crisis, kicked off by the American sub-prime mortgage collapse. It was promptly followed by an economic crisis which went beyond the financial system alone and affected the so-called ‘real economy’. This included recessions brought about by housing bubble collapses, retrenchment in banks as well as sovereign debt crises<sup>1</sup>. Although in the beginning the European

---

\* LLB (Thessaloniki) '15, LLM (LSE) '18. Policy Intern at the EU Delegation to the United Nations in Geneva and member of the Athens Bar Association.

<sup>1</sup> Aoife Nolan, ‘Not fit for purpose? Human rights in times of financial and economic crisis’ (2015) 4 EHRLR 360.

Union (EU) and the Eurozone seemed immune, it was soon evident that its monetary and financial architecture was not prepared to cope with such massive setbacks. In 2010, a financial assistance mechanism was put in place by the Council of the EU to support the economically weakest Eurozone countries, but even the countries with more robust economies implemented austerity measures.<sup>2</sup> Those measures included *inter alia* tax increases, public spending cuts, reduction of pensions and freezing of salaries, and had a devastating effect on the exercise of human rights in Europe. Social and economic rights were particularly affected, but civil and political rights did not escape unscathed. At the same time, regional judicial bodies have been criticized for their hesitation to challenge state fiscal policies that have been detrimental to human rights, prompting some scholars to countenance the ‘endtimes of human rights’.<sup>3</sup>

Based on these developments, this paper will attempt to examine the response of the European Court of Human Rights (ECtHR) to the measures adopted in the wake of the global financial and economic crisis in the Eurozone. Using Greece, Portugal, Ireland and the Netherlands as examples, it will first present how the ECtHR handled cases concerning alleged violations of the right to property in Art. 1 Prot. 1 and due process in Art. 6 in relating to the austerity measures. An analysis of the trends observed in this case-law will follow focusing on the Court’s apathy towards the measures with specific references to the margin of appreciation, subsidiarity and legitimacy issues. Subsequently, the responses of the ECtHR will be compared with those of other regional institutions in similar cases, especially the European Committee of Social Rights (ECSR) and the Court of Justice of the European Union (CJEU) in order to identify if the Court was the right place to address those questions. The essay will conclude by suggesting what the ECtHR could do differently in the future, drawing from its own experience in dealing with terrorism and socio-economic rights.

---

<sup>2</sup> Margot Salomon, ‘Of Austerity, Human Rights and International Institutions’ (2015) 21(4) ILJ 521.

<sup>3</sup> Conor Gearty, ‘Is the human rights era drawing to a close?’ (2017) 5 EHRLR 425.

## 1. AUSTERITY MEASURES BEFORE THE ECTHR

On 15 September 2008, Lehman Brothers, an American investment bank heavily involved in mortgage origination, declared the largest bankruptcy in the history of the United States. The American economy suffered its deepest decline since the 9/11 attacks which quickly turned into a financial crisis comparable to the likes of the Great Depression of 1929. The interconnectedness of the banking sector meant that the collapse of the American banks left banks worldwide susceptible to toxic bonds. The European banking sector, as the USA's close collaborator, suffered a major hit. Given assurances that the deposits of the savers are safe, the EU launched the European Economic Recovery Program to rescue the banking sector and help boost growth in the late fall of 2008.<sup>4</sup> Mounting national debts, an excess of initial optimism, the collapse of the Greek economy and the risk of contagion across the eurozone soon provoked a turn towards austerity. Fiscal consolidation to reduce budget deficits and avoid inflation led Eurozone Member States to embark on a series of fiscal retrenchment strategies to stabilize their public finances. Despite quantitative easing by the European Central Bank,<sup>5</sup> most Eurozone countries – especially those under the auspices of Troika –<sup>6</sup> have not reversed their policies after almost 10 years since the onset of the economic crisis, leaving a lasting mark on European society.

In general, austerity measures, defined as a combination of economic, policy, and legal tools to reduce debt and control public spending in an attempt to bring the crisis into order fell into four types: regressive taxation measures, labour market reforms, structural reforms to pension plans and public budget

---

<sup>4</sup> Aymone Lamborelle et al, 'Timeline of a crisis: Europe's economic strategy from 2008 to today', (Euractiv, 25 May 2016) <<https://www.euractiv.com/section/euro-finance/infographic/timeline-of-a-crisis-europe-s-economic-strategy-from-2008-to-today/>> accessed 11 July 2018.

<sup>5</sup> Jana Randow et al, 'When Will the ECB Pull Its Trillions From the Markets?', (Bloomberg, 20 July 2017) <<https://www.bloomberg.com/graphics/2017/ecb-monetary-stimulus-exit-tracker/>> accessed 11 July 2018.

<sup>6</sup> A decision group formed by the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF) that negotiated, credited and monitored the implementation of financial measures during the post 2010 bailouts in Greece, Ireland, Portugal, Spain and Cyprus.

contractions affecting social spending.<sup>7</sup> Human rights were not taken into consideration, allegedly due to the urgency to avoid a potential catastrophe. Socio-economic rights relating to work, education, healthcare and housing were among the first victims, but those of access to justice, freedom of expression, information and assembly, traditional civil and political rights, suffered as well. Fiscal consolidation had a direct negative effect on the poorest segments of society, including children and the elderly.<sup>8</sup> Public social protection systems were weakened in the relevant countries, unemployment increased to unprecedented heights for the continent, and household incomes were adversely impacted<sup>9</sup>. Protests staged as a reaction to those measures were subject to interventions and judicial systems also underwent reforms and budget cuts.<sup>10</sup> On the whole, the everyday life and fundamental rights of 350 million citizens were substantially changed.

In an attempt to react to what was perceived by many as an attack on the European way of life and the relevant states' organisational tradition, people inevitably turned to the courts. The national courts were the first to address the violations of rights but when they failed to bring the desired results for the applicants or have an effect on the executive branch, the ECtHR was called to the task. A majority of the cases concerned the right to property as taxation measures and labour law modifications fall under its scope. Significant case-law was also formed regarding due process rights. Amendments to existing judicial structures or the admissibility criteria of national courts aiming to facilitate the collection of outstanding public debts by minimizing the time of the proceedings or to discourage the applicants from pursuing their cases further were also brought under scrutiny.<sup>11</sup> Unsurprisingly, the countries that suffered most under the sovereign debt crisis were the ones more frequently represented. Yet, even those

---

<sup>7</sup> CoE Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis', (2013) 16.

<sup>8</sup> See: UNICEF, '2.6 million More Children Plunged into Poverty in Rich Countries during Great Recession', (2014)

<sup>9</sup> Directorate general for Internal Policies, 'Austerity and Poverty in the European Union', (2014) 9

<sup>10</sup> CoE Commissioner for Human Rights, (n 7) 20

<sup>11</sup> CoE, Steering Committee for Human Rights (CDDH), 'The impact of the economic crisis and austerity measures on human rights in Europe – Feasibility Study' (2015) 22

that were considered strong and disciplined failed to protect their citizens' rights whilst simultaneously aiding the banking sector.

Before examining individual cases in Greece, Portugal, Ireland and the Netherlands, it would be useful to briefly define the two rights in discussion as they had been formed by the ECtHR prior to the eurozone crisis. A right to peaceful enjoyment of possessions is included in Article 1 of Protocol 1 to the Convention. The term 'possessions' has an autonomous meaning in the Convention context, extending beyond physical goods and covering a wide range of rights and interests which include salary, pensions, and social security benefits.<sup>12</sup> Despite initial ambiguity in its case-law, the Grand Chamber accepted in the *Stec* case<sup>13</sup> that whenever persons can assert a right to a welfare benefit under national law, Art. 1 Prot. 1 applies, promoting an interpretation that renders the rights in the Convention practical and effective. A distinction was drawn between salaries and pensions in the sense that the latter arise from already established rights, have a compensatory character and, thus, a stricter threshold concerning possible interferences is to be applied.<sup>14</sup> The deprivation of property must be in accordance with national law, the general principles of international law and in the public interest. However, the definition of 'public interest' is very wide and there is almost a presumption that a national measure always qualifies as such. The Court has reiterated that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will dispute determinations as to what is 'in the public interest' only if they are manifestly unfounded.<sup>15</sup> A fair balance must be struck between the demands of the general interest of the community and the individual's property rights since the latter cannot be expected to bear an individual and excessive burden.

Enshrined in Art. 6 ECHR, the right to fair trial is a cornerstone of the rule of law and the most frequently invoked by applicants before the Strasbourg court.<sup>16</sup> It contains specific safeguards relating to the fair administration of justice,

---

<sup>12</sup> Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (7<sup>th</sup> edition, Oxford University Press 2017) 554

<sup>13</sup> *Stec a.o. v. UK* App nos. 65731/01, 65900/01 (ECtHR, GC, 12 April 2006)

<sup>14</sup> *Aziznas v Cyprus* App no 56679/00, (ECtHR, 28 April 2004), para 44

<sup>15</sup> *James v UK* App no 8793/79, (ECtHR, 21 February 1986)

<sup>16</sup> Rainey et al, (n 10) 274

such as the effectiveness and promptness of the proceedings protecting the individual concerned from living too long under the stress of uncertainty. The reasonableness of the length of proceedings is assessed in light of all of the case's circumstances,<sup>17</sup> and the Court supports judicial reforms to prevent delays.<sup>18</sup> The non-execution of judgements in cases where the State is the judgment debtor has been a long-standing problem, but the court has reiterated that the State cannot justify non-execution of a judgement by claiming a lack of funds or other resources.<sup>19</sup> Also included in Art. 6 is the concept of procedural and adversarial equality, as the fair balance between the parties to present their case without suffering a substantial disadvantage vis-à-vis the other side. Nevertheless, the States may impose restrictions on would-be litigants, as long as they pursue a legitimate aim and leave the essence of the right intact. There is no right to an appeal as such but where an appeal procedure is provided by national law, it must comply with Art. 6 and access to it must not be blocked disproportionately or unfairly.

Greece has been the Eurozone country at the forefront of the economic crisis due to an exorbitant intake of sovereign debt that made it impossible for the country to compete in the international financial markets. It was the first one to request and receive financial assistance from the Eurozone Member States along with the IMF before the launch of the European Stability Mechanism (ESM) in 2012. Currently implementing the fourth package of austerity adjustments, the crisis has profoundly shaped the Greek reality, affecting national politics and disrupting social cohesion. Support for Greece from the Troika was conditional on reductions in public spending, drastic labour market reform, and 'a welfare state retrenchment unprecedented in the post-war period'.<sup>20</sup> The impact of the measures on jobs, pay, conditions and services has been extensive and according

---

<sup>17</sup> Having regard in particular to the complexity of the issues before the national courts, the conduct of the parties to the dispute and of the relevant authorities and what was at stake for the applicant – see *Frydlender v. France* App no 30979/96, (ECtHR, GC, 27 June 2000), para 43

<sup>18</sup> *Scordino v. Italy (No. 1)* App no. 36813/97, (ECtHR, 29 March 2006), paras 182-9

<sup>19</sup> *Burdov v. Russia (no. 2)* App no 33509/04, (ECtHR, 15 January 2009), para 70; *Société de Gestion du Port de Campoloro and Société fermière de Campoloro v. France*, App no 57516/00, (ECtHR, 26 September 2006), para 60

<sup>20</sup> Aristea Koukiadaki, Lefteris Kretos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41(3) ILJ 276

to an IMF's report on Greece in 2013, 'the burden of adjustment was not shared evenly across society'.<sup>21</sup>

Human rights challenges to the measures have produced seminal decisions regarding the repercussions of the economic crisis for the protection of human rights which have been employed as a guide for subsequent petitions regarding austerity measures taken by other Council of Europe member states. *Konfuki c/s ADEDY*<sup>22</sup> refers to petitions filed against the arbitrary reduction in remuneration, benefits, bonuses, and pensions of public servants enforced in compliance with the state's obligations under the Memorandum of Understanding (MoU) which were allegedly detrimental for the quality of life of those affected. The Strasbourg Court declared the applications inadmissible as manifestly ill-founded because the measures were justified by the exceptional crisis calling for an immediate reduction in public spending. Reiterating that the legislature has a wide margin of appreciation in implementing social and economic policies, the Court accepted that the aims of the measures were in the public interest and in that of the Eurozone member States, whose obligation was to observe budgetary discipline and preserve the stability of the zone. Another major development concerned a 2012 law ordering the obligatory exchange of Greek State bonds belonging to private holders for securities nominally worth 50% less. The applicants in *Mamatas a.o.*<sup>23</sup> complained of *de facto* expropriation of their property but the Court found no violation of Art 1 of Protocol 1. Though there has been an interference with the applicant's rights to property, it pursued the public-interest aim of preserving economic stability and restructuring the national debt, at a time when Greece was engulfed in a serious economic crisis. No special or excessive burden was suffered by the applicants given the States' wide margin of appreciation in that sphere and the risk associated with the vagaries of the financial market. The Court came to the same conclusion in the identical case of *Kyrkos a.o.*<sup>24</sup>

---

<sup>21</sup> IMF, 'Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement' (Country Report) IMF (2013) 13/156, para. 47.

<sup>22</sup> App nos 57665/12, 57657/12 (ECtHR, 7 May 2013).

<sup>23</sup> App nos 63066/14, 64297/14, 66106/14..., (ECtHR, 21 July 2016).

<sup>24</sup> App nos 64058/14 64282/14 64336/14..., (ECtHR, 16 January 2018).

In parallel, the Court reversed its established jurisprudence<sup>25</sup> regarding state procedural privileges in the Greek legal order and the equality of arms principle in the case of *Giavi*.<sup>26</sup> The applicant complaint about the divergence between the State and its public servants when initiating procedures against each other which was five and two years respectively. Although the judgement should have been a routine one, it implicitly accepted the argumentation of the Greek Government that preferential treatment was necessary to protect public property. For this reason, they argued that the clearance of public servants' claims in due time was advised given the large number of similar cases pending, in combination with the adverse fiscal situation of Greece.<sup>27</sup> In finding so, the judgement equated the public interest with the fiscal interests of the public sector and further expanded the state's margin of appreciation in relation to Art 1 Prot 1 and Art 6 ECHR. Additionally, under the first MoU, Greece was obliged, as a condition for receiving financial support, to adopt legislation that would streamline the administrative tax dispute and judicial appeal processes.<sup>28</sup> One of those reforms concerned the introduction of the new prerequisite of the absence of existing opposite jurisprudence when appealing a decision before the Supreme Administrative Court. Despite fierce criticism that the provision imported into the Greek legal order the common-law institution of 'legal precedent' and thus disproportionately restricted the right to access a court, the ECtHR found that it was within the discretion of the national authorities to take measures that aimed at the swifter administration of justice and consequently no violation of Article 6 ECHR occurred in the case of *Papaioannou*.<sup>29</sup>

Ireland was strongly affected by the crisis with the collapse of a housing price bubble causing a deep recession and budgetary instability, soliciting extensive policy interventions between 2008 and 2011.<sup>30</sup> The IMF and the EU provided financial support to prevent a meltdown in public finances when rating

<sup>25</sup> *Zouboulidis v Greece (no 2)* App no 36963/06, (ECtHR, 25 June 2009), paras 30-35.

<sup>26</sup> App no 25816/09, (ECtHR, 03 October 2013).

<sup>27</sup> Ioanna Pervou, 'Human rights in times of crisis: the Greek cases before the ECtHR, or the polarisation of a democratic society' (2016) 5(1) CJCL 113

<sup>28</sup> IMF, 'Greece: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding' (IMF, 28 February 2011)

<sup>29</sup> App no 18880/15, (ECtHR, 02 June 2016)

<sup>30</sup> Bas van Arle, Joris Tielens and Jan Van Hove "The financial crisis and its aftermath: the case of Ireland", (2015) 12 *Int Econ Policy* 393

agencies downgraded Irish government bonds to junk status in December 2010. Both public sector pay and pensions in Ireland were reduced substantially, the minimum wage was lowered, and the scope of the ‘inability to pay’ clause widened.<sup>31</sup> The country was the first to graduate from the Troika mechanism in 2014 and the cuts have not produced any litigation before the ECtHR to date. In parallel, a constitutional amendment for the creation of an Appeals Court that would lessen the backlog of the Supreme Court was approved by referendum on October 2013, and came into operation a few weeks later. The ECtHR had a chance to review its creation in the case of *P.H.*<sup>32</sup> concerning the legality of protracted proceedings under Art 6 ECHR. There, a patient’s claim against their doctor for negligence commenced in January 2009 and was only concluded after over seven years despite the fact that the case was not particularly complex. The Court, reversing its previous rulings relating to Ireland,<sup>33</sup> dismissed the case as inadmissible<sup>34</sup> given that the country had in the meantime taken effective steps to solve its structural problem of delayed proceedings by creating a new Appellate Court.

Portugal, the third Eurozone country to face the risk of bankruptcy, signed an economic adjustment program with the Troika in April 2011. The Portuguese economy suffered a downturn since the early 2000s, but in November 2010 risk premiums on Portuguese bonds hit Euro lifetime highs as investors and creditors worried that the country would fail to rein in its budget deficit and rising debt.<sup>35</sup> The wages of public servants were drastically reduced, resulting in an average wage cut of 20%. The ECHR was given the chance to review the legitimacy of those cuts in the cases of *Da Conceição Matens and Santos Januário*<sup>36</sup> and *da Siha Carvalho Rio*,<sup>37</sup> but rejected both as inadmissible. In light of the exceptional financial problems which Portugal faced at the time and given the limited and temporary nature of the reductions in pension payments, the Court found that

---

<sup>31</sup> Jim Stewart, “New development: Public sector pay and pensions in Ireland and the financial crisis” (2011) 31(3) *Public Money & Management* 223

<sup>32</sup> App no 45046/16, (ECtHR, 10 October 2017)

<sup>33</sup> *McFarlane v. Ireland*, App no 31333/06, (ECtHR, GC, 10 September 2010), para 93

<sup>34</sup> even though it recognized that the case was not particularly complex to require so much time

<sup>35</sup> João Ferreira Do Amaral, João Carlos Lopes, ‘Forecasting errors by the Troika in the economic adjustment program for Portugal’ (2017) 41(4) *Cambridge J Econ* 1021

<sup>36</sup> App nos 62235/12, 57725/12, (ECtHR, 08 October 2013)

<sup>37</sup> App no 13341/14, (ECtHR, 1 September 2015)

the measures had been proportionate to the legitimate aim of achieving medium-term economic recovery. The Court further deemed itself incompetent to decide whether alternative measures could have been envisaged in order to reduce the State budget deficit and overcome the financial crisis given the State's wide margin of appreciation to decide on general measures of economic and social policy. Another part of the 'MoU on specific economic policy conditionality' agreed by Portugal were reforms of the judicial system to increase efficiency.<sup>38</sup> Although they have been heavily criticized, no case has yet reached the ECtHR.<sup>39</sup>

As mentioned before, even Eurozone countries that were considered to be relatively unharmed thanks to traditionally organized economic management did not fully escape the perils of the economic crisis. The Netherlands is a prime example. Although it amply contributed to the saving of the so-called 'PIIGS',<sup>40</sup> it nonetheless passed its own set of austerity measures after a short period of political instability in the spring of 2012. With the aim of reaching the 3% deficit limit, it contained government program cuts, tax increases and labor market reforms.<sup>41</sup> The Court had a chance to review the additional tax which employers had to pay on salaries above 150,000 euros in *P. Plaisier B.V. a.o.*.<sup>42</sup> Once again, it declared the applications inadmissible as being manifestly ill-founded, for not going beyond the limit of the discretion allowed to authorities in questions of taxation and respecting balance between the general interest and the protection of the companies' individual rights. The Court noted in particular that it had accepted various countries' austerity measures and that the steps taken by the Netherlands had been part of the country's goal to meet obligations under European Union budget rules.

---

<sup>38</sup> Commission, 'Portugal; Memorandum of understanding on specific economic policy conditionality' (EC, 17 May 2011)

<sup>39</sup> Andrei Khalip, 'Portugal's judicial makeover: the reform that flattered to deceive?', (Reuters, 22 November 2016) <<https://www.reuters.com/article/us-portugal-judiciary-insight-idUSKBN13H0GI>> accessed 13 July 2018

<sup>40</sup> During the European debt crisis, the term was used derogatorily to refer to the economies of Portugal, Ireland, Italy, Greece, and Spain, Eurozone member states unable to refinance their government debt or to bail out over-indebted banks on their own.

<sup>41</sup> 'From the ashes, a budget: Dutch politics', (The Economist Online, 27 April 2012) <<https://www.economist.com/newsbook/2012/04/27/from-the-ashes-a-budget>> accessed 15 July 2018

<sup>42</sup> App nos 46184/16, 47789/16, 19958/17, (ECtHR, 14 November 2017)

The Strasbourg court had previously kept the same line in another Dutch case concerning Art 6 ECHR. Amidst the ongoing collapse of the international banking sector in 2008, the Dutch Government decided to protect the domestic banking industry and customers' savings by nationalizing the banking and insurance conglomerate SNS Reaal. At the same time, it allowed only ten days for bond holders to challenge the lawfulness of the expropriation of their assets through accelerated proceedings, which they complained prevented them from fully exercising their rights. Again, the Court rejected the *Adorisio a.o.*<sup>43</sup> case as inadmissible, as the restrictions had neither averted the applicants from bringing an effective appeal nor placed them in a particular disadvantage. Concerning in particular the ten-day time-limit, the Court accepted that the Dutch Government had needed to intervene in SNS Reaal as a matter of urgency in order to prevent serious harm to the national economy.<sup>44</sup>

## 2.HESITATION AND DEFERENCE

The Strasbourg Court was extremely reserved in reacting to the plight of Eurozone citizens affected by the economic crisis and subsequent austerity measures. In all the cases, it directly or indirectly implemented a proportionality analysis that enabled it to determine whether those measures were legal, legitimate and necessary. Indeed, it ruled that the austerity measures were legal as part of national law; they pursued a legitimate aim of assisting the national economies in a state of emergency; and they met the test of *stricto sensu* proportionality as the means employed to achieve the desired aim of rescuing the national economies from bankruptcy were considered to be reasonable. As part of the proportionality assessment, the Court concluded that the authorities of the Member States balanced the relevant public and private interests properly and refused to elaborate on whether there were less intrusive means of achieving the same results. A wide room of discretion was given to the national authorities to implement the legislative measures they deemed necessary as the most capable of diagnosing the situation on the ground and acting accordingly. Consequently, a question is posed as to why the Court that prides itself as being the conscience of

---

<sup>43</sup> App no 47315/13, (ECtHR, 17 March 2015)

<sup>44</sup> App no 47315/13, paras 98-101

Europe remained idle to ‘massive violations of human rights instituted by the governance of the global financial crisis in the EU’.<sup>45</sup>

Before delving into the reasons that led the Court to maintain such a position, it is essential to further examine the tools it used in its decisions, namely proportionality and the margin of appreciation. The proportionality test is one of the most common reasoning techniques used by the ECtHR when assessing competing rights and interests. In applying a proportionality analysis, the Court does not ask whether the optimal balance has been struck but only whether a proportionate balance has been found. This analysis is preferred by the Court because it creates an analytical framework that facilitates an element of transparency and foreseeability, adding to the consistency of its rulings.<sup>46</sup> At the same time, it represents the efforts of the Court to account for difference in the weighing attributed to the various relevant factors during the process. Its utility notwithstanding, it has also been criticized as merely providing a façade of objectivity while concealing discretionary and *ad hoc* reasoning of varying degrees of strictness.<sup>47</sup> Especially when combined with a reference to the margin of appreciation enjoyed by the national authorities, it gives a perfect excuse for the Court to avoid dealing in depth with contentious and delicate issues. Based on the Court’s jurisprudence, the wider the margin of appreciation on the national level, the milder the proportionality test would be which more often than not leads to the rejection of the case.<sup>48</sup>

The notion of a margin of appreciation is not defined in the ECHR itself. The ECtHR, even though it employs it often,<sup>49</sup> has neither provided a clear definition for it nor has it designated its boundaries.<sup>50</sup> According to legal theorists,

---

<sup>45</sup> Salomon, (n 2)

<sup>46</sup> Fiona de Londras and Kanstantsin Dzehtsiarov, *Great Debates on the European Convention on Human Rights* (Macmillan Publishers 2018) 103

<sup>47</sup> Filippo Fontanelli, ‘The Mythology of Proportionality in Judgements of the Court of Justice of the European Union on Internet and Fundamental Rights’ (2016) 36 OJLS 630

<sup>48</sup> Rainey et al, (n 10) 360

<sup>49</sup> Per a systematic survey after the Brighton Declaration, its usage has increased in case-law; see Mikael Rask Madsen, ‘Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?’ [2017] *Journal of International Dispute Settlement* 1

<sup>50</sup> Lord Lester famously called it ‘slippery and elusive as an eel’

the margin of appreciation is the latitude allowed to the Contracting Parties in their observance of the Convention,<sup>51</sup> the room for error manoeuvre which the Strasbourg organs allow national legislation, executive, administrative and judicial bodies before they are prepared to declare a violation of the Convention.<sup>52</sup> It is deployed by the Court when considering whether the state has rightly interfered with personal rights in order to protect collective goals such as public order or public health or morals, and reflects the need for institutional deference of the Court to the national authorities.<sup>53</sup> In this sense, it is coupled with the notion of subsidiarity, which suggests that the national authorities are generally better placed to solve human rights questions as they arise because they have the expertise of being exposed to the national dynamics, debates and contexts.<sup>54</sup> The doctrines of the margin of appreciation and the principle of subsidiarity have gained prominence among the Court and the Contracting Parties during the reform process initiated in the second decade of the 21<sup>st</sup> century and after the introduction of Protocol 15 they will be embedded in the Convention's Preamble.

The focus given to the margin of appreciation by the Court has its supporters but has equally been heavily criticized. On the one hand, it has been argued that the margin of appreciation might work as an incentive for national judges to implement directly the Convention, devolving to the domestic level a feeling of collective responsibility for ensuring observance of human rights.<sup>55</sup> In such circumstances, the ECtHR's task is to supervise the review conducted by the domestic courts, focusing more on the process followed rather than the substantive decision-making.<sup>56</sup> On the other hand, for some commenters, the margin of appreciation is simply a legal construct for abdicating judicial responsibility and results in a denial of justice, leaving often marginalised people or at least those not favoured by domestic authorities to the mercy of adverse

---

<sup>51</sup> Thomas A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 HRQ 474

<sup>52</sup> Howard Yourrow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Springer 1995) 13

<sup>53</sup> George Letsas, 'Two concepts of the Margin of Appreciation' (2006) 26 OJLS 705

<sup>54</sup> *Handyside v UK*, App no 5493/72, (ECtHR, 7 December 1976), para 48

<sup>55</sup> Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 CLP 49

<sup>56</sup> Dominic McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' (2016) 65(1) ICLQ 21

decisions unless they are unanswerably disproportionate.<sup>57</sup> Consequently, it exempts certain groups of the Court's relief simply because the rights, topics or contexts are those where the Court prefers to avoid making a decisions. Simultaneously, the universal character of human rights and the rule of law are undermined by introducing varying standards of human rights protection. So, why would the Court, which has established arguably the most ground-breaking and uniquely influential international mechanism for protecting the individual, choose to distance itself from some issues – in the present analysis that of austerity?

The reasons may be found in practical concerns, doctrinal theories about the nature of rights in the ECHR and, of course, political considerations about the Court's legitimacy and its future role in the region. Since the beginning of the new millennium, the ECtHR has been in an alarming state that threatens its very existence due to a steady increase of the number of individual cases it receives. The individual complaint system that was created by Protocol 11, the enlargement of the Council of Europe (CoE) member states and the widening of the scope of the Convention rights by the 'living instrument' interpretation contributed to the case load of the Court surpassing the disturbing 100,000 benchmark in 2009.<sup>58</sup> At the same time, Member States have grown more reluctant in implementing the Court's judgements. The number of judgments ignored by the member states and pending implementation before the Committee of Ministers (CM) is approximately 11,000.<sup>59</sup> For a system like the ECtHR that relies on Member States to act as the guarantors of the Convention,<sup>60</sup> their denial to follow its judgements can be destructive to the Courts legitimacy and function.

To an extent, it can be argued that the Contracting Parties are unwilling to accept recommendations by a supranational body lacking in democratic legitimacy and distant from their national realities. In their perspective, the ECtHR as a subsidiary supranational court should allow disputes about compliance with the Convention to be first dealt with at the national level. In their

---

<sup>57</sup> Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1993) JILP 843; Ronald St. J. McDonald, 'The Margin of Appreciation' in R McDonald et al (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993)

<sup>58</sup> Dominic Grieve, 'Is the European Convention working?' (2015) 6 EHRLR 584

<sup>59</sup> Steven Greer, Faith Wylde, 'Has the European Court of Human Rights become a "small claims tribunal" and why, if at all, does it matter?' (2017) 2 EHRLR 145

<sup>60</sup> Article 1 ECHR.

view, only national authorities have the prerequisite expertise and direct knowledge of the domestic situation, law, politics and risks needed to provide the appropriate solutions and, for this reason, an international court located in Strasbourg should refrain from taking decisions about the substance of the cases. Furthermore, they feel that the ambit of the Court's judgements has expanded so much that it no longer reflects the original content of the ECHR to which they have consented and, thus, constitutes an illegitimate interference with their sovereign power.<sup>61</sup> The States' discontent is especially palpable when they are required to follow specific socio-economic policies or when they are asked to incur considerable expenses to alleviate violations of their positive obligations to fulfil certain rights.<sup>62</sup> For them, the original intent of the ECHR, when drafted in the 1950s, was to primarily be a document containing civil and political rights that would protect Europe from totalitarian oppression through restraining Member States' power. Therefore, they insist for the Court to refrain completely from giving its opinion on some matters of policy not, in their mind, clearly regulated by the Convention and to avoid innovative interpretations by not abiding decisions with they do not agree. A particularly infamous example is that of *Hirst v. UK (No. 2)*<sup>63</sup> in which prisoners in the UK were still deprived of their voting rights for twelve years after an adverse ECtHR ruling against the state.

These have been the conditions since the High-Level Conference in Interlaken took place in 2010 that initiated a reform process to enhance the effective application of the Convention.<sup>64</sup> Since then, Protocol 14 came into force strengthening the exhaustion of domestic remedies, introducing the flexible single-judge formation and enhancing the CM's monitoring role. The following Conferences on the future of the Court held in Izmir, Brighton and Brussels introduced two new protocols to the Convention system, No. 15 and No. 16, emphasized the subsidiary role of the Court and promoted a less hierarchical relation among the Court, the national courts and member States. The latest High Conference in Copenhagen continued to the same direction. The internal Rules of the Court were also amended to create a prioritization system advancing the

---

<sup>61</sup> Londras, Dzehtsiarou, (n 43) 3

<sup>62</sup> Ingrid Leiten, *Core Socio-economic Rights and the European Convention on Human Rights* (Cambridge University Press 2018) 25

<sup>63</sup> App no 74025/01, (ECtHR, 6 October 2005)

<sup>64</sup> Rainey et al, (n 10) 17

examination of cases concerning core rights and a pilot judgement proceeding to combat systemic violations. These reforms signalled a transitional period for the Court that would eventually lead to ‘a new procedural embedding phase’<sup>65</sup> where the centre of gravity of the Convention system would be lower than it is today. Judge Spano argued that the ECtHR, having infused the Convention principles into the legal systems of Member States, could now focus its resources on guiding the national authorities on implementing the ECHR and should intervene only when it becomes apparent that the domestic processes have failed to take the Convention rights under consideration. Thus, the Court seems to reorient itself towards a more constitutional role,<sup>66</sup> where it would choose its cases and direct its attention more to the procedures followed than in their outcomes.

As a result, the hesitation of the Court to intervene in the cases concerning austerity measures in the Eurozone affecting human rights can be perfectly understood. Austerity measures concern socio-economic policy that the Contracting Parties consider to be solely for them to decide even when affecting rights that can be characterized as civil. In most cases, the measures adopted have been the result of long deliberations with other expert international institutions (e.g. the EC, IMF, ECB), and the Member States would have found it completely unacceptable for a supranational human rights court to meddle with their decisions. In addition, they considered the economic recovery as an urgent yet complex matter that affected their survival which permitted them to effectively derogate from their usual international obligations and that no international tribunal was in a better position to understand. Indeed, the Court needed to navigate within a very narrow corridor between doing too much and not doing enough. It seems that in the austerity related cases the Court was not ready to overstep the ‘legitimacy wall’,<sup>67</sup> an imaginary boundary beyond which it could not go, fearing serious backlash from the Member States. Instead, it chose to accommodate the concerns of the Member States and defer the substantive decision-making to them.

---

<sup>65</sup> Robert Spano, ‘The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law’ (2018) HRLR 1

<sup>66</sup> Rainey et al, (n 10) 673

<sup>67</sup> Londras, Dzehtsiarou, (n 43) 34

### 3. COMPARISON WITH OTHER EUROPEAN INSTITUTIONS

Given the unwillingness of the Court to challenge the human rights violations deriving from the recent economic crisis, it has been suggested that perhaps the ECtHR was not the right place for Eurozone citizens to address those claims. Instead, other bodies of the CoE were more suitable for those advocating for a renewed commitment to advocacy and political processes that can prevent rather than react to human rights violations.<sup>68</sup> Undoubtedly, the other instruments of the CoE have not remained silent but have taken action according to their mandates. The Parliamentary Assembly of the Council of Europe had already expressed its concerns in a resolution in 2012<sup>69</sup> and pointed out that ‘the restrictive approaches currently pursued [...] risk further deepening the crisis and undermining social rights as they mainly affect lower income classes and the most vulnerable categories of the population’. Last year, it urged its members to ‘strengthen the pan-European dialogue on social rights and the co-ordination of legal and political action with other European institutions’ as part of the Turin process.<sup>70</sup> Likewise, the previous as well as the current CoE Commissioner for Human Rights has been vocal about the adverse effects of the crisis to the enjoyment of human rights through a plethora of reports,<sup>71</sup> comments<sup>72</sup> and country visits,<sup>73</sup> sometimes in cooperation with the CM.<sup>74</sup>

Another body proposed was the ECSR given the socio-economic nature of the majority of the rights violated. In 1961, the European Social Charter was introduced to protect socio-economic rights, creating a separate but parallel structure to the Convention. Since 1995, the government reporting process has been complemented by a system of collective complaints addressed to the ECSR.

---

<sup>68</sup> Nolan, (n 1).

<sup>69</sup> PACE, Resolution 1884 (26 June 2012)

<sup>70</sup> PACE, Resolution 2180 (30 June 2017)

<sup>71</sup> Among others: CoE CommDH, (n 7)

<sup>72</sup> For instance: CoE Commissioner for Human Rights, ‘Youth human rights at risk during the crisis’ (CommDH, 3 June 2014)

<sup>73</sup> Inter alia: CoE CommDH, ‘Greece: immediate action needed to protect human rights of migrants’ (Commissioner for Human Rights, 29 June 2018); CoE Commissioner for Human Rights, *Report by Nils Muižnieks on his visit to Portugal* (7-9 May 2012), CommDH(2012)22

<sup>74</sup> CoE, CDDH, (n 11)

Specific organisations registered in a list for every Member State can bring an application alleging violations of the Charter in an attempt to include more actors in assessing compliance and increase its effectiveness. So far, the response of the ECSR to austerity cases has been tremendous. Multiple Greek trade unions have brought cases before the Committee complaining about the worsening working conditions, pay cuts and pension system restructuring and they have all been vindicated.<sup>75</sup> For instance, in *GENOP-DEI and ADEDY v Greece*,<sup>76</sup> a cut of the minimum wage for workers under the age of 25 was ruled to be disproportionate to the objective of getting younger people into the labour market at a time of economic crisis, even though it was required by the bail-out conditions. Similarly, Ireland was found to be in breach of its obligations to ensure the right to housing of an adequate standard for families living in local authority housing due to budget restrictions in *FIDH v Ireland*.<sup>77</sup> Sadly, none of the above-mentioned decisions have produced any results on the national level to date, leaving the legislative measures that caused the violations intact. Therefore, it can be safely assumed that despite the undeniable educational and guiding value of the actions of the other organs of the CoE, they cannot provide relief for those individuals looking for practical ways to enforce their rights against the state.

Alternatively, another appropriate regional forum to challenge the austerity measures could be the CJEU. As a supranational court, the ECJ is less vulnerable than the ECtHR, since its judgements have direct effect in the legal order of the Member States of the EU and it can be more assertive when dealing with sensitive issues. Furthermore, it can reply to preliminary questions posed by the national courts and guide their decision accordingly, a procedure which is less intrusive in their sensitive sphere of sovereignty. In excess, many of the austerity measures were adopted following the signing of Memoranda of Understanding with organs of the Union. Some scholars, including Advocates General,<sup>78</sup> have indeed argued that for this reason they constitute part of EU law, falling under

---

<sup>75</sup> *GSEE v. Greece* CC no. 111/2014, (ECSR, 23 March 2017); *IKA-ETAM v. Greece* CC No 76/2012, (ECSR, 7 December 2012) and another 4 complaints; *FPP-OTE v. Greece* CC no 156/2017, (ECSR, 22 March 2018).

<sup>76</sup> CC no 65/2011, (ECSR, 23 May 2012)

<sup>77</sup> CC no 110/2014, (ECSR, 12 May 2017)

<sup>78</sup> Case C-105/15 *Mallis and Malli v Commission and ECB* (ECJ, 20 September 2016), Opinion of AG Wathelet, para 132

the competency of CJEU to review the legality of their actions. Moreover, although the CJEU started as a court that dealt mainly with business provisions of the single market, it has developed a sizeable human rights case-law inspired by the ECtHR which is set to grow more after the adoption of the Charter of Fundamental Rights that refers explicitly to socio-economic rights contrary to the ECHR.

Yet, efforts by litigants to find an effective remedy to the violations of their rights in the CJEU have so far been unsuccessful. The CJEU has positively assessed the legality of the response mechanisms to the Eurozone crisis finding the creation of the ESM and the Outright Monetary Transactions program of the ECB to be in accordance with the Treaties in *Pringle*<sup>79</sup> and *Gauweiler*<sup>80</sup> respectively. In the former, it also liberated the EC and the ECB from producing legally binding decisions when acting within the ESM's framework and the Eurogroup, meaning that MoU could not be annulled before the court. A second category of cases concerned the direct challenging of measures adopted by Member States based on the financial adjustment programs in Portugal, Greece and Cyprus. The preliminary questions concerning the bailout of Portugal<sup>81</sup> were rejected as inadmissible due to a lack of link between the national measures and EU law. *ADEDY a.o. v Council*<sup>82</sup> was dismissed for a lack of standing because of the wide discretion left to the Hellenic Republic to choose the means to reduce the country's excessive deficit, while efforts by bond holders to attribute liability to ECB for their losses after the 'voluntary' reduction of the nominal value of Greek bonds failed to persuade the CJEU, which held the Greek government as the sole responsible for the decision.<sup>83</sup>

Regarding the 'haircut' of savings in Cyprus, the CJEU once again rejected the recent cases but this time it deliberated the substance of one of them regarding a right to damages, before finding a lack of causal link between the

---

<sup>79</sup> Case C-370/12 (ECJ, 27 November 2012)

<sup>80</sup> Case C-62/14 (ECJ, 16 June 2015)

<sup>81</sup> Case C-128/12 *Sindicato dos Bancários do Norte v BPN* (ECJ, 7 March 2013); Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins* (ECJ, 26 June 2014); Case C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins* (ECJ, 21 October 2014)

<sup>82</sup> Case T-541/10, (GC, 27 November 2012)

<sup>83</sup> Case T-79/13 *Accorinti and Others v ECB* (GC, 7 October 2015); Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB* (ECJ, 4 June 2015)

actions of the EU organs and the losses suffered by the applicants.<sup>84</sup> This year in a new preliminary question from Portugal concerning the reduction in the remuneration paid to judges and the subsequent infringement of ‘the principle of judicial independence’, the CJEU overcame the admissibility stage because it found that it was relevant to EU law.<sup>85</sup> Nonetheless, the salary-reduction measures at issue were not considered to impair the independence of the judiciary. The CJEU, as the ECtHR before, either endorsed the structural reforms in the EU or ‘dodged the bullet’ of needing to take a substantive decision by presenting formalistic procedural excuses.<sup>86</sup> Therefore, despite its limitations, the ECtHR still appears, at least in theory, to be the most relevant setting for citizens to productively combat breaches to their fundamental rights by their governments: it is sufficiently distant from both national parliaments and the EU, it is solely concerned with human rights claims, it can be relatively easily reached by individual and its decisions remain binding for the Member States.

#### 4. FUTURE CONSIDERATIONS

The ECtHR could still materialize the expectations of those who believe in its potential by drawing inspiration from its attitude in other crises. The Court has faced crises in its jurisdiction before,<sup>87</sup> ranging from the influx of refugee to the Mediterranean to the armed conflicts in the Balkans and Eastern Europe. While its success in handling some of them can be debated, it has undoubtedly produced well-developed and innovative case-law in its review of the counter-terrorism measures taken in Europe after the 9/11 attacks. The current economic crisis has been compared to the previous security one<sup>88</sup> and the argument of the “fiscal interest” of the State has become almost analogous to that of ‘a threat to

---

<sup>84</sup> Case C-105/15 *Mallis and Malli v Commission and ECB*; Case C-8/15 *Ledra Advertising v Commission and ECB* (ECJ, 20 September 2016)

<sup>85</sup> Case C-64/16 *Associação Sindical dos Juízes Portugueses* (ECJ, 27 February 2018)

<sup>86</sup> Stéphanie Laulhé Shaelou, Anastasia Karatzia, ‘Some preliminary thoughts on the Cyprus bail-in litigation: a commentary on Mallis and Ledra’ (2018) 43(2) EL Rev 249

<sup>87</sup> Linos-Alexandre Sicilianos, ‘The European Court of Human Rights at a time of crisis in Europe’ (2016) 2 EHRLR 121

<sup>88</sup> For example, Gearty describes them as “two of the devastating viruses that have eaten away not only at the physical health but also at the soul of Europe” in Conor Gearty, ‘The state of freedom in Europe’ (2015) 21(6) EJL 706

national security' in the last decade. Hence, a closer look to the Court's attitude, particularly towards the UN sanctions system, can offer valuable insights. As with the global financial and economic crisis, an international state of emergency was unofficially declared when the 'war on terror' broke out. The UN Security Council called for all states to work together urgently to prevent and suppress terrorist acts<sup>89</sup> and created the Counter-Terrorism Committee, a new international bureaucracy to drive the titular agenda.<sup>90</sup> The latter was the main enforcer of targeted sanctions, a system of blacklisting of individuals and entities designated as being associated with international terrorist groups. Although sanctions were implemented before, the range of those included in this regime broadened and the level of UN oversight of their enforcement deepened<sup>91</sup> without the possibility to refute them.

The first decision of the ECtHR about UN sanctions and their application on national level came in 2005 in the case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*<sup>92</sup> concerning the trade embargo against the Federal Republic of Yugoslavia. The application was brought by a Turkish airline charter company claiming its right to property has been violated when its leased Yugoslavian aircraft was seized by Irish authorities. The ECtHR rejected the application finding the measure proportionate to the interest of international cooperation, given that the Irish authorities had no discretion when implementing supranational law and assuming that the protection of human rights in the EU was equivalent. Alas, at the time there was no process to react to the sanctions on UN or EU level, so the applicant faced a *de facto* denial of justice. In its second encounter, this time with the renewed targeted-sanctions framework, the Court was more assertive. Yousef Nada was an elderly banker living in a tiny commune in Switzerland who found himself prevented from leaving his home area and unable to access his financial accounting when he was blacklisted for supposed ties to the Moslem Brotherhood. Unable to instigate criminal proceedings before the national courts due to a lack of evidence, he addressed the ECtHR which

---

<sup>89</sup> UNSC Res 1368 'Condemnation of 11 September attacks against US' (12 September 2001)

<sup>90</sup> UNSC Res 1373 'On threats to international peace and security caused by terrorist acts' (28 September 2001)

<sup>91</sup> Conor Gearty, *Liberty & Security* (Polity Press 2013) 30

<sup>92</sup> App no 45036/98, (ECtHR, GC, 30 June 2005)

confirmed the violation of his private life and the lack of an effective remedy<sup>93</sup> domestically or supranationally. At around the same time, other important decisions came out challenging indefinite detention,<sup>94</sup> deportation orders due to suspected terrorist activity,<sup>95</sup> ill-treatment in secret sites<sup>96</sup> and other derogations from standard criminal proceedings<sup>97</sup> which severely restricted European residents' liberty.

This trajectory indicates that in the immediate aftermath of 9/11, the Court was lenient in its review of counter-terrorism measures, but it gradually found its voice and produced some of its most influential cases. In this regard, the ECtHR has not acted differently from national, even constitutional courts, in crises. Critical situations provide a perfect excuse for the executive branch of government to increase its power and release itself from the constraints provided by law. Although an unprincipled and exorbitant executive response usually leads to abuses, in emergencies, the courts are always more prepared to defer to the executive<sup>98</sup> than in times of peace citing as reasons their own lack of expertise and accountability to the electorate. The Court has been seen to be equally eager to defer to the national authorities with the excuse of its subsidiary role and the lack of popular support, which usually leads to a primary role for the executive. However, while the courts, be it domestic or international, must take into account their own limitations, they must never surrender the duties placed on them. In their attempts to find the balance between the well-being of the community and individual rights, 'they should guard against a presumption that matters of public interest are outside their competence and be ever aware that they are the ultimate arbiters of the necessary qualities of a democracy in which the popular will is no longer always expected to prevail'.<sup>99</sup> The ECtHR should act as a leading example

---

<sup>93</sup> *Nada v. Switzerland* App no 10593/08, (ECtHR, 12 September 2012)

<sup>94</sup> *A. and Others v. UK* App no 3455/05, (ECtHR, GC, 19 February 2009)

<sup>95</sup> *Daoudi v. France* App no 19576/08 (ECtHR, 3 December 2009); *Omar Othman v. UK* App no 8139/09, (ECtHR, 17 January 2012)

<sup>96</sup> *Husayn (Abu Zubaydah) v. Poland* App no 7511/13, (ECtHR, 24 July 2014); *Al Nashiri v. Poland* App no 28761/11 (ECtHR, 24 July 2014)

<sup>97</sup> *EI Haskei v. Belgium* App no 649/08 (ECtHR, 25 September 2012); *M.S. v. Belgium* App no 50012/08, (ECtHR, 31 January 2012); *Gillan and Quinton v. UK* App no 4158/05 (ECtHR, 12 January 2010)

<sup>98</sup> Johan Steyn, 'Guantanamo Bay: The legal black hole' (2004) 53 ICLQ 1

<sup>99</sup> Jeffrey Jowell, 'Judicial deference: servility, civility or institutional capacity?' (2003) PL 592

for national courts and demonstrate that when gross violations of human rights occur, they have a duty to upkeep the imperatives of a rights-based democracy.

Especially when it comes to economic emergencies, Greene has presented additional reasons as to why judicial deference should not be called for.<sup>100</sup> Contrary to security emergencies where national governments of the advantage of handling sensitive or specialist data, when dealing with economic crises information is publicly available, depriving the state from arguing in favour of secrecy. Additionally, due to the ‘polycentric’ nature of economic disputes, a convergence in political opinion is lacking which undermines the objectivity of the ‘necessity’ of decisions made. The courts should be even more careful since economic crises encourage transformative rather than temporary responses that leave permanent change, with restoration of the status quo either perpetually suspended or rejected as a goal. These are all elements that the ECtHR should take under consideration when reviewing cases related to austerity measures to rebut the arguments of the Member States that they are in an expert position to deal with the economic crisis. If ‘necessity’ and ‘urgency’ are also abolished given the permanent character of the emergency, the Court could lower the threshold in its proportionality test and facilitate the diagnosis of violations in line with the recommendations of the UN Committee on Economic, Social and Cultural Rights for the non-retrogression of rights.<sup>101</sup>

Moreover, the fear from tensions with the Contracting Parties should not discourage the ECtHR from expanding the protection of the Convention as it has done before. Letsas has argued that though pragmatic considerations such as the reluctance of States to execute the Court’s judgement endangering its legitimacy should not be entirely ignored, they should not be determinative.<sup>102</sup> The moral value of human rights should pave the way for a careful and reasonable

---

<sup>100</sup> Alan Greene, ‘Questioning executive supremacy in an economic state of emergency’ (2015) 35(4) LS 594.

<sup>101</sup> In 2012, the UN CESCR released an open letter laying a specific non-retrogression test for the states that wanted to adopt austerity measures leading to the deterioration of socio-economic rights: such policies should be temporary, necessary and proportionate. For further information see: Ben T.C. Warwick, ‘Socio-economic rights during economic crises: a changed approach to non-retrogression’ (2016) 65(1) ICLQ 249

<sup>102</sup> George Letsas, *A theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007)

evolutive interpretation where it seems normatively acceptable to undertake it. Therefore, there are three arguments in favour of the inclusion of socio-economic interests under the scope of the Convention given its dynamic status. Firstly, human rights are indivisible, interdependent and interrelated meaning that setbacks concerning economic and social rights would eventually infringe upon the enjoyment of civil and political rights, so they should not be ignored.<sup>103</sup> Secondly, it is widely accepted and recognized by the Court that States do not have only negative obligations to abstain from violating rights but must also take positive steps to ensure their fulfillment, bringing policy considerations under the scope of human rights protection.

Most importantly, an argument that the purpose of the Convention has evolved since the 1950s to encompass more than just the protection against tyranny and oppression can be articulated. The state parties to the Convention increasingly protect some kind of economic and social rights by constitution or legislation and in their majority have ratified the International Covenant on Economic, Social and Cultural rights (ICESCR). This fact, as O'Cinnéide has convincingly shown,<sup>104</sup> proves that there is consensus among them that social constitutionalism as part of the European legal heritage exists albeit in a vague and embryonic state. So, if the Convention truly reflects a 'common heritage of political traditions, ideals, freedom and the rule of law'<sup>105</sup> of its signatories and the limited protection of socio-economic goods is contained in it, then there is no reason why the Convention cannot cover it as well. Thus, the ECHR can be transformed into a document that would strive to both preserve the rule of law in the continent and support human flourishing through the protection of fundamental rights.<sup>106</sup>

In other respects, expanding the protection available under the Convention to address situations of material need in cases where the state has

---

<sup>103</sup> The ECtHR has famously found "that an interpretation of the Convention may extend into the sphere of social and economic rights" because "[t]here is no watertight division separating that sphere from the field of civil and political rights covered by the Convention" in *Budina v. Russia* App no 45603/05 (ECtHR, 18 June 2009)

<sup>104</sup> Colm O'Cinneide, 'European Social Constitutionalism' in K. Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2018)

<sup>105</sup> ECtHR, Preamble

<sup>106</sup> Londras and Dzehtsiarou (n 43) 147

failed to provide basic necessities for the realization of the protected right will not be a significant jurisprudential leap. Indeed, the Court has already produced similar case-law under a variety of rights. The ECtHR has accepted in what is now a well-established principle that extreme poverty can activate the protection against inhuman and degrading treatment of Art. 3 ECHR.<sup>107</sup> Although to date it has been modest in diagnosing violations only for members of particularly vulnerable groups dependant on state support,<sup>108</sup> in the case of *Budina v Russia*,<sup>109</sup> it has left leeway for its application to the general population when ‘the level of pension and social benefits are insufficient to protect from damage to physical or mental health or from a situation of degradation incompatible with human dignity’. Nevertheless, given the high threshold needed to apply Art 3 ECHR, breaches of corporal and mental integrity attributed to austerity measures could be accommodate under Art 8 ECHR as in the case of *McDonald v UK*<sup>110</sup> concerning the reduction of weekly care to an elderly, disabled lady. Similarly, breaches of Art 6 ECHR are possible in relation to socio-economic rights as in *Tchokontio Happi v France*<sup>111</sup> and the lack of enforcement of a public housing decision.

Finally, the ECtHR has made noteworthy progress in developing jurisprudence under Art 1 Prot 1 ECHR. Returning to its previous case-law, the Court found a violation of the right to property by the imposition of a 98% tax on the severance pay of a civil servant in Hungary as a disproportionate means to the aim of protecting the public purse.<sup>112</sup> Moreover, in an unprecedented judgement, the Grand Chamber severely limited the margin of appreciation of States to make changes to social benefits and impose conditions. In *Bélánc Nagy v Hungary*,<sup>113</sup> a legislative change in to the contributions necessary for a disability pension deprived the applicant from receiving it entirely, which was deemed to be unjustifiably incompatible with her legitimate expectation to have access in the

<sup>107</sup> Lutz Oette, ‘Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?’ (2015) 15(4) HRLR 669SS

<sup>108</sup> *Inter alia: M.S.S. v. Belgium and Greece* App no 30696/09 (ECtHR, GC, 21 January 2011)

<sup>109</sup> [2008] ECHR 184.

<sup>110</sup> App no 4241/12, (ECtHR, 20 May 2014)

<sup>111</sup> App no 65829/12 (ECtHR, 9 April 2015)

<sup>112</sup> *N.K.M. v. Hungary* App no 66529/11 (ECtHR, 14 May 2013)

<sup>113</sup> App no 53080/13 (ECtHR, GC, 13 December 2016)

future based on her previous entitlements. Two cases against Italy concerning the same legislative amendment but produced in course of three years provide a further sign that the ECtHR might become more engaged in dealing with socio-economic rights. In *Maggio a.o.*,<sup>114</sup> the Court limited its examination to the percentage of reduction in pensions to reject the claim finding that 25% was not enough to create a disproportionate burden for the applicants. But, in *Stefanetti a.o.*,<sup>115</sup> it took under consideration both the substantial decrease of the pension and its negative effect in the way of life of the applicants to confirm a violation, setting as a criterion the poverty level following the ECSR example in similar cases.

## CONCLUSION

In conclusion, the ECtHR has so far been at best hesitant to safeguard Eurozone citizens against a regression of their fundamental rights due to the economic crisis and subsequent austerity measures. Using the constructs of margin of appreciation and subsidiarity, it has allowed the Eurozone countries to retain the principal authority in designing their socioeconomic policy in order to salvage public finances. Notwithstanding this, given that the austerity measures are not revoked even after the end of the Troika supervision and their adverse effects are perpetuated, there is reserved optimism that the Court might react. By drawing from experience in other crises, avoiding judicial deference, refuting arguments of urgency and necessity, and implementing a moderate evolutive interpretation, the Court can become instrumental in counterbalancing state arbitrariness and expanding the protection of the Convention to ensure the prosperity of millions of individuals. Although it missed the momentum to take action in the wake of austerity, it can be imagined that by reversing some of its judgments or accepting arguments under different articles for the same factual situations, the Court can hinder the establishment of a permanent state of emergency impeding the progressive realization of socioeconomic rights in Europe

---

<sup>114</sup> App no 46286/09, 52851/08, 53727/08... (ECtHR, 31 May 2011)

<sup>115</sup> App nos 21838/10, 21849/10, 21852/10... (ECtHR, 15 April 2014)





3 VERULAM BUILDINGS  
B A R R I S T E R S

**3 Verulam Buildings is delighted to sponsor  
the LSE Law Review.**

3VB is one of the foremost sets of barristers' chambers in the UK dealing in commercial law. Recognised by the principal legal directories across a wide variety of the fields that make up modern commercial practice, we have over 70 barristers practising nationally and internationally, appearing in courts and arbitration proceedings worldwide:

|                              |                           |             |
|------------------------------|---------------------------|-------------|
| Commercial Litigation        | Banking and Finance       | Civil Fraud |
| Energy and Natural Resources | Financial Services        |             |
| Insolvency and Restructuring | Insurance and Reinsurance |             |
| International Arbitration    | IT and Telecoms           |             |
| Media and Entertainment      | Professional Negligence   |             |

We recognise that our continued success is dependent upon our recruiting the brightest and the best candidates and investing in their future. We now offer up to four pupillages each year and, most importantly, our pupils have a real opportunity to secure tenancy with us; while our standards are high, we aim to recruit all pupils who meet them. Seven pupils, out of eight, have gained tenancy at 3VB in the last three years.

3 Verulam Buildings  
Gray's Inn  
London  
WC1R 5NT

Tel: +44 (0)20 7831 8441  
Email: [pupillage@3vb.com](mailto:pupillage@3vb.com)

[www.3vb.com/pupillage](http://www.3vb.com/pupillage)



## The Role of Adverse Possession in Modern Land Law

Yui Nga Natalie Tsang\*

---

Dear Editor,

The law of adverse possession has now seemingly been prevented from serving a relevant and useful function in modern society, largely due to legislative reforms made by the Land Registration Act 2002 ('LRA'). Developed from ancient Roman origins, the concept of adverse possession now struggles to justify how a possessor of land can completely oust a registered landowner in a civilised and organised society. Parliament has clearly conveyed this message through the LRA, as Schedule 6 now ensures that landowners are notified of adverse possession claims and are further given 65 business days to challenge any applications.<sup>1</sup> This has made it notoriously difficult for adverse possessors to successfully acquire title to land, as it can only be achieved if the owner fails to evict the possessor after defeating their claim within two years,<sup>2</sup> or if the landowners are prevented from challenging the application under the exceptions found in Paragraph 5 of Schedule 6 LRA.<sup>3</sup> Therefore, whilst these reforms provide a statutory footing for adverse possession, the statutory framework fails to protect the lenient attitude historically shown towards adverse possessors.<sup>4</sup>

Schedule 6 permits exceptions from this reformed process under the LRA, which prevent landowners from automatically defeating the possessor's claims immediately after being notified by the Land Registry. These exceptions remain paramount, as they ensure adverse possession claims still receive a fair review and remain relevant in modern law. The first exception<sup>5</sup> prevents landowners from challenging an adverse possession claim if it is 'unconscionable'<sup>6</sup>

---

<sup>1</sup> Land Registration Act 2002, Sch 6 para 2.

<sup>2</sup> Ibid, para 6(6).

<sup>3</sup> Ibid, para 5.

<sup>4</sup> *J A Pye (Oxford) Ltd v Graham* [2003] UKHL 30, [2002] 3 WLR 22; adverse possessors acquired property reputedly worth £10 million.

<sup>5</sup> Land Registration Act 2002, Sch 6, para 5(1).

<sup>6</sup> Ibid para 5(2).

to do so. This exception appears to provide an equitable defence to possessors and has, in recent cases such as *King*<sup>7</sup> and *Best*,<sup>8</sup> been upheld fairly in practice. However, without specific guidance on what comprises ‘conscientability’, the statutory wording remains subject to a broad range of interpretations. Therefore, whilst a protective interpretation was upheld in these recent cases, a continuing acceptance of this interpretation is dependent on judicial attitudes which remain subject to change over time. I therefore do not view this exception as a reliable means of guaranteeing the survival of adverse possession in modern law.

The second exception<sup>9</sup> allows possessors to acquire title if they are entitled to the land. Although this exception clearly includes scenarios such as receiving land through inheritance, it still appears vague and is only likely to apply in rare circumstances.

The final exception protects possessors who have used land adjacent to their own property, believing that such property belongs to them due to physical barriers being erected in the incorrect location along the boundary line.<sup>10</sup> This exception appears to be the most applicable, as detailed and specific guidance is given as to when this exception will be engaged. This stringent approach explains why the courts in both *Zarb v Parry*<sup>11</sup> and *LAM Group v Chowdry*,<sup>12</sup> two cases concerning this exception, were able to reach a fair conclusion.

Yet, I do not believe that these exceptions alone provide adequate protection for possessors. I wholly concur with the traditional view, associated with John Locke, that adverse possessors must be protected so that they can continue to effectively carry out a practical function.<sup>13</sup> Adverse possession prioritises “the useful labourer to the slattern”<sup>14</sup> which, in turn, effectively discourages landowners from neglecting their property. Both Auchmuty<sup>15</sup> and

---

<sup>7</sup> *King v Suffolk CC* [2015] UKFTT 0867 (PC), [2017] PLSCS 19.

<sup>8</sup> *Best v Curtis* [2015] UKFTT 0130 (PC), [2017] PLSCS 41.

<sup>9</sup> Land Registration Act 2002 Sch 6 para 5(3).

<sup>10</sup> *Ibid*, para 5(4).

<sup>11</sup> *Zarb v Parry* [2011] EWCA Civ 1306, [2012] 1 WLR 1240.

<sup>12</sup> *LAM Group v Chowdry* [2012] EWCA Civ 505.

<sup>13</sup> John Locke, *Second Treatise on Government* (1<sup>st</sup> Edn, Oxford: Blackwell, 1966) 47.

<sup>14</sup> *Ibid* 336.

<sup>15</sup> Rosemary Auchmuty, *Not just a Good Children’s Story: A Tribute to Adverse Possession* [2004] Conv 293, 296.

Netter<sup>16</sup> accurately encapsulate the practical benefits of ensuring land is not neglected, arguing that adverse possession maintains economic efficiency, is justified by moral utilitarianism, and fulfils a genuine housing need for individuals and families. Therefore, even in a modern world where the majority of land across the UK is registered and maintained in theory, adverse possession still ensures that such land is not neglected in practice.

However, the recent decision in *Baxter v Mannion*<sup>17</sup> has threatened the survival of adverse possession, as it has confirmed that lenient statutory protection is no longer to be afforded to possessors. In this judgement, the residual statutory protection safeguarding possessors was creatively ‘subverted’,<sup>18</sup> as although the landowner, Mr Mannion, failed to challenge the adverse possession claim within the statutory 65-day time limit, he was able to maintain ownership of his land. In reaching this decision, the Court of Appeal held that the Schedule 6 rules protecting possessors are not absolute, as, after the title was acquired by the possessor, it was quickly ‘rectified’ on the register and returned to Mr Mannion. The Court justified this radical circumvention of the statutory protection by concluding that Parliament could not have possibly intended for landowners to lose their property due to the late submission of a form. This decision consequently demonstrates that not only does Schedule 6 make it difficult for possessors to acquire title, but that it also does not even guarantee effective protection for newly-established titles following a successful adverse possession application.

Therefore, the law of adverse possession in its current form requires stringent clarification and reform, though it remains difficult to determine which direction the law should now proceed in. I would argue – in line with Dixon – that it remains best to view adverse possession as a concept of ‘incontrovertible logic’.<sup>19</sup> It serves a practical and important function in reducing land neglect, an issue that is not resolved by increasing the incidence of land registration. However, to ensure that adverse possession remains both relevant and practically applicable in modern law, the provisions under Schedule 6 regarding the

---

<sup>16</sup> Jeffry Netter, *An Economic Analysis of Adverse Possession Statutes* (1986) 6 Int'l Rev L & Econ 217, 220.

<sup>17</sup> *Baxter v Mannion* [2010] EWCA Civ 120, [2011] 1 WLR 1594.

<sup>18</sup> Neil Cobb and Lorna Fox, *Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002* (2007) 27(2) LS 256.

<sup>19</sup> Martin Dixon, *Adverse Possession and Human Rights* [2005] Conv 345, 347.

application process and exceptions from this procedure must be upheld more rigidly.

I am aware that other academics, such as Gray and Gray,<sup>20</sup> consider it ‘increasingly strange’ that adverse possession still has relevance in a modern society.<sup>21</sup> I am further conscious that this viewpoint, essentially advocating an abolishment of adverse possession, appears to have been bolstered by parliament following the introduction of section 144(7) LASPO Act, which makes squatting whilst trespassing a criminal offence.<sup>22</sup> This confuses the law regarding adverse possession, since most possessors initially enter as trespassers. However, the recent decision in *Best*<sup>23</sup> has demonstrated that section 144(7) did not impliedly repeal or circumvent the law on adverse possession. This comes as a relief, as a decision to the contrary decision could have resulted in adverse possession being abolished indirectly.

Overall, it remains clear that the LRA reforms have severely limited the statutory protection afforded to adverse possession, making it a vulnerable concept within modern land law. Therefore, both adverse possession as a concept and adverse possessors as individuals require stronger statutory protection, to ensure that the doctrine can continue to serve a practical and useful function. If legislators were to focus more attention on improving and utilising the law of adverse possession, as opposed to diminishing or abolishing it, a more effective law could soon be established.

Yours faithfully,  
Yui Nga Natalie Tsang

---

<sup>20</sup> Kevin Gray & Susan Francis Gray, *Elements of Land Law* (5th Edn, Oxford University Press, 2008) 24.

<sup>21</sup> Ibid 377.

<sup>22</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, s144(7).

<sup>23</sup> R (*Best*) v Chief Land Registrar [2015] EWCA Civ 17, [2016] QB 23.

# English Choice of Law in Contract Under the Rome I Regime: Is Flexibility Giving Way to Predictability?

Lora Izvorova\*

---

## Introduction

The Rome I Regulation (593/2008/EC) is the EU regulation which governs the choice of law applicable to contractual obligations in civil and commercial matters. It replaces the 1980 Rome Convention and effects important structural changes to the rules for determining the applicable law, as well as the exceptions to those rules (the ‘choice of law gateways’). The English courts’ application of the gateways in the Rome Convention has been criticised as excessively flexible. While this view may be justified in relation to earlier cases decided on the Convention, there has been a gradual movement towards a more cautious judicial approach to both implied choice (Article 3) and the escape clause (Article 4), which was partly crystallised and partly precipitated by the changed architecture of these two provisions in the Rome I Regulation.

## I. Implied choice - Article 3 Rome I

Article 3(1) Rome I stipulates that where the parties have not made an express choice of law, courts may imply such a choice if it is ‘clearly demonstrated by the terms of the contract or the circumstances of the case. This is a notable change from Article 3 of the Convention which only required that a real choice be ‘demonstrated with reasonable certainty’.

### **(a) ‘Terms of the contract’**

The most compelling evidence of a real but unexpress choice is the inclusion of a jurisdiction or arbitration clause as a contractual term. Jonathan Hill notes that in such cases, English courts imply a choice of the law of the forum ‘almost as a

matter of course'.<sup>1</sup> Yet judges are arguably not abusing their discretion in doing so because (a) such an approach is sanctioned by Recital 12 of Rome I, and (b) other EU Member States do the same (notably Germany). Furthermore, an exclusive jurisdiction clause is arguably most indicative – out of all the factors which a court may consider – that the parties intended to make a choice of law, namely the law of the chosen forum. Therefore, in this respect, English judges' use of the implied choice gateway is consistent with Article 3 and the overarching principle of the Rome regime: party autonomy.

Nevertheless, English courts' propensity to find implied choice of law on the basis of factors other than choice of forum clauses has sometimes been unwarranted. A notable example is the House of Lords' judgment in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1983] 3 WLR 241. Admittedly, Lord Diplock's reasoning that contracts cannot exist in a 'legal vacuum' was founded on impeccable legal logic. However, the House of Lords' decision to imply a choice of English law because the contract was based on the Lloyds marine policy standard form – which had to be interpreted by reference to the Marine Insurance Act 1906 and the English case law on it – was a stretch too far. Lord Diplock noted (quoting Bingham J, as he then was, in an earlier case) that the Lloyds policy was so widely used that it had become a 'common currency' for the international insurance business. Contrary to his view, however, precisely because it is so widely used it cannot realistically be presumed that all private parties in the world who choose the Lloyds form as their insurance policy also intend to choose English law to apply to their contractual disputes, if nothing else in the terms of the contract or the circumstances of the case indicates such a choice.

### (b) 'Circumstances of the case'

When applying this second discretionary limb of the implied choice gateway, English courts have shown more restraint. While Potter LJ in *Aeolian Shipping SA v ISS Machinery Services Ltd* [2001] EWCA Civ 1162 reasoned that a wider range of factors could be considered under Article 3 than under the traditional common

---

\* LLB (LSE) '18, LLM (Cantab) '19.

<sup>1</sup> Jonathan Hill, 'Choice of Law in Contract Under the Rome Convention: The Approach of the UK Courts' (2004) 53 ICLQ 325, 329.

law approach to implication of terms, Mance LJ in *American Motorists Insurance Co v Cellstar Corporation* [2003] EWCA Civ 206 disagreed and formulated the ‘so obvious that it went without saying’ test. Its application in subsequent cases allowed English judges to remain within the boundaries of implication of a real choice, and not stray into the proscribed waters of imputation of a choice which was clearly not made but would have been reasonable. In light of this, the English courts’ approach to Article 3 has been overall satisfactory and there has not been overindulgence in search for an implied choice. This relatively strict approach of the English judges was crystallised by the new architecture of Rome I, whose emphasis on the objectives of certainty and predictability necessitates the curbing of interpretative flexibility. Therefore, it is unlikely that there will be a major change in the English courts’ current application of the implied choice gateway.

## **II. ‘Manifestly more closely connected law’- Article 4 Rome I**

In contrast to their measured approach to Article 3, English courts have adopted too malleable an interpretation of Article 4, which applies when the parties have not made a choice of law. This is reflected in the higher threshold for the activation of the choice of law gateway in Rome I. First, the presumption in Article 4(2) of the Rome Convention that the law of the country where the characteristic performer habitually resides shall govern the contract has been raised to a *rule* in Rome I. And second, the escape clause in Article 4(5) of the Rome Convention, which enabled the displacement of the presumption in favour of another more closely connected law, has been reduced to a narrow *exception* in Article 4(3) Rome I.

In the early Article 4 cases, English courts tended to find that the place of performance of the obligations characterising the contract was a more important localising factor than the place of habitual residence of the party performing it, and to conclude that the contract was more closely connected with the law of the former. In *Samcrete Egypt Engineers & Contractors SAE v Land Rover Exports Ltd* [2001] EWCA Civ 2019, the Court of Appeal found that English law rather than Egyptian law (where the characteristic performer had their habitual residence) governed the contract because the place of delivery and payment was England. Yet apart from these two connecting elements, there was nothing else linking the disputed contract to England. Indeed, as Hill argues, the court attached so little weight to the country of habitual residence of the characteristic performer

that it can almost be said that it was presuming – contrary to the letter of the Convention – that the place of performance was the best indicator of the closest connection between law and contract.<sup>2</sup>

The judgment of Morison J in *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 1 WLR 1745 was an attempt to mediate between the weak and strong versions of the presumption. His strictly textual approach to construction led him to hold that Article 4(2) was intended to operate as a ‘normal rule’ which would be ‘simple to apply’ and would apply in the majority of cases, thereby bringing the English approach to Article 4 closer to the strong theory. Nevertheless, in judging that the presumption could be disregarded in cases where the factors connecting the contract to another country overwhelmingly prevail, he went on to do just that (interestingly, with the effect of stripping English courts of jurisdiction). In light of this judgment, and in line with Hill’s view, it appears that while English judges are speaking the language of the strong version of the presumption, in practice they would disregard it whenever the country of the habitual residence of the characteristic performer differs from the country where the characteristic performance actually takes place.<sup>3</sup>

The most contentious scenario to which the escape clause has been applied (indeed, excessively flexibly) by English courts is when the contract at issue is part of a larger chain of transactions between multiple parties and jurisdictions. *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87 concerned letters of credit which characteristically involve four parties – the issuing bank, confirming bank, beneficiary and debtor – each having individual bilateral contracts among themselves. As a matter of policy, it is preferable that they are all governed by the same law. Guided by this line of reasoning, Mance J displaced the Article 4(2) presumption as regards the contract between the beneficiary and the issuing bank, finding that the contract was more closely connected with England than India because the letter was issued through National Westminster Bank in London.

---

<sup>2</sup> *ibid*, 342.

<sup>3</sup> *ibid*, 343.

Manuel Penadés Fons has defended the English judges' approach in such chains of contracts scenarios, arguing that they are merely responding to commercial realities and aiming to give commercially sound decisions.<sup>4</sup> In support, he refers to Recitals 20 and 21 of Rome I and Article 4(1)(h) which recognise the practicality of there being a single law governing all contracts within the same complex multilateral transaction.<sup>5</sup> Thus, English courts' approach to Article 4 is in his view 'nuanced' and context-dependent in a way which does not contravene the Rome Convention, and will not contravene the Rome I Regulation.<sup>6</sup> Although the added qualifier 'manifestly' in Article 4(3) Rome I suggests an intention to limit the opportunistic exercise of judicial discretion, context will always be everything when there is no definitive guidance on the application of the escape clause.<sup>7</sup>

However, there remains a conceptual difficulty in determining which contractual relationship to examine first in the search for a single applicable law. The arbitrariness of this choice was evident in *Bank of Baroda* where the court began its analysis from the contract between the issuing bank and the confirming bank which pointed to England. As Hill suggests in his evaluation of Mance J's reasoning, it is in fact the contract between the issuing bank and the beneficiary which should be considered first since the beneficiary's acceptance of it sets in motion the chain of all subsequent transactions.<sup>8</sup> The Commercial Court in *Molton Street Capital LLP v Shooters Hill Capital Partners LLP* [2015] EWHC 3419 - the first English case on Article 4 Rome I - seems to have recognised this when it reasoned that the contracts above and below a contract for the sale of junk bonds were not connecting factors strong enough to displace the Article 4(2) presumption. This most recent English judgement is in line with the new wording of Article 4(3) Rome I in that it reflects the principle of exceptionality enshrined in the word 'manifestly'. It remains to be seen whether or not it will mark the start of a stricter usage of the escape clause by English judges.

---

<sup>4</sup> Manuel Penadés Fons, 'Commercial Choice of Law in Context: Looking Beyond Rome' (2015) 78(2) MLR 241.

<sup>5</sup> *ibid*, 256.

<sup>6</sup> *ibid*, 243.

<sup>7</sup> *ibid*, 246, 274-276.

<sup>8</sup> Hill (n 1) 341

### **Conclusion**

The architectural changes effected by the Rome I Regulation to the European rules for choice of law in contract place an enhanced emphasis on the goal of predictability at the expense of flexibility. English courts - although having often been excessively opportunistic in their use of the choice of law gateways under the Rome Convention - have recently started exhibiting a trend of restraint more in line with the new Rome I provisions, and exercising their discretion more sparingly and conscientiously. Whether this trend will continue is the subject of speculation.

# The Mutual Agreement Procedure: Coordinating the Global Tax Orchestra

Konstantinos Taramountas\*

---

## ABSTRACT

*The OECD and G20, via the Base-Erosion and Profit Shifting (BEPS) project, have recently taken measures under Action 14 to improve tax dispute resolution mechanisms by promoting the timely resolution of treaty-related disputes via the Mutual Agreement Procedure (MAP). The purpose of this article is to understand how the existing tax dispute resolution mechanism works in the context of the MAP and to evaluate its suitability, effectiveness and efficiency. In this context, this article examines whether the emergence of new legal technology could complement the MAP and supplementary arbitration, and proposes both theoretical and practical solutions aimed at making the tax dispute resolution mechanism more effective by speeding up resolution, attracting both developed and developing countries, as well as coordinating competent authorities.*

---

## INTRODUCTION

By analogy to an orchestra, the Articles under the OECD Model Tax Convention (MTC) constitute the instruments which the various treaty partners are called to use in order to eliminate double taxation and further develop their economic relations. The Mutual Agreement Procedure (MAP) under Article 25, however, enjoys a special attribute, as it is, instead, the baton which has provided a medium for competent authorities to communicate their concerns on the divergent interpretations and applications of their bilateral treaties, since the foundation of the international tax regime.<sup>1</sup> As a result, it ensures the proper

---

\* LLB (Reading) (First Class) '17, LLM in Taxation (LSE) (Distinction) '18, Winner of the Pump Court Tax Chambers Prize in Taxation '18. Trainee Lawyer at Elias Neocleous & Co LLC, Cyprus. The author can be contacted at [ktaramountas@gmail.com](mailto:ktaramountas@gmail.com).

<sup>1</sup> League of Nations, *Committee of Experts on Double Taxation and Tax Evasion, Double Taxation and Tax Evasion* (Publications of the League of Nations C. 216. M. 85. 1927) <[http://biblio-archive.unog.ch/Dateien/CouncilMSD/C-216-M-85-1927-II\\_EN.pdf](http://biblio-archive.unog.ch/Dateien/CouncilMSD/C-216-M-85-1927-II_EN.pdf)> accessed 15 May 2018, 12;

functioning of the treaties and safeguards that taxpayers are subject to taxation in accordance with it.<sup>2</sup>

Its significance was not overlooked by the OECD Base Erosion and Profit shifting (BEPS) project, endorsed by the G20, at their first attempt to revamp the international tax regime since its establishment by the League of Nations.<sup>3</sup> Action 14 does not directly assist with countering BEPS but, as the OECD mentions, is essential to finding ways to improve the effectiveness of the dispute resolution mechanism, in order to ensure that the transition to the new international tax *aquis* is as smooth as possible.<sup>4</sup> However, a successful performance requires the conductor to coordinate the plays of the different players. Accordingly, this paper argues that mediators play a vital role in this novel global tax orchestra. They can successfully act as the conductors who will coordinate the behaviour of treaty partners in order to find a common ground to enforce new treaty provisions in accordance with their agreement and, therefore, produce a coherent tax policy ‘melody’.

Having said that, the persistence of rich countries in promoting mandatory arbitration under Action 14 is at odds with the OECD’s attempt to make the dispute resolution mechanism more effective.<sup>5</sup> If some countries lack experience in using MAPs and are hostile towards the existence of a third party adjudicator, then one may legitimately wonder how an arbitration clause can become a mandatory Alternative Dispute Resolution (ADR) mechanism and enjoy uniform consensus among countries in its application. Regardless of whether fiscal sovereignty issues are not well grounded from a theoretical perspective, from a political point of view, they cannot suddenly disappear.

---

For example, under Article 13 of the League of Nations MTC 1927 needed to ‘confer together and take the measures required in accordance with the spirit of this Convention’.

<sup>2</sup> JS Wilkie, ‘Article 25: Mutual Agreement Procedure’ in Richard Vann (eds) *Global Tax Treaty Commentaries* (Amsterdam IBFD 2017) 48.

<sup>3</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013) <<https://www.oecd.org/ctp/BEPSActionPlan.pdf>> accessed 15 May 2018.

<sup>4</sup> *ibid* 23.

<sup>5</sup> OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report* (OECD Publishing 2015) <<http://dx.doi.org/10.1787/9789264241633-en>> [hereafter Action 14] accessed 15 May 2018.

In this regard, it is argued that mediation does not clash with any political issues that might be raised by aggrieved parties and can provide the means for a collaborative forum where countries' issues can be identified with the view of increasing the likelihood of compromise. Further, mediation can be seen as an intermediary step towards making countries more familiar with the idea of having a third party involved in their tax disputes and encourage their use of arbitration in the long run.

## 1. MUTUAL AGREEMENT PROCEDURE: STATUS QUO

### Lack of Finality: issues of double taxation

The OECD has long acknowledged that the MAP mechanism is not a panacea and 'is in certain respects a less than perfect instrument'.<sup>6</sup> One of the major drawbacks of the procedure is that Article 25(2) does not impose any obligation on the treaty partners to reach an agreement or ensure a congruous application of the treaty provisions. Instead, treaty partners are only expected to 'endeavour' to resolve such issues, meaning that competent authorities carry the 'duty merely to use their best endeavours *and not to achieve a result*'.<sup>7</sup> This stance is well illustrated in the leading case of *DA 11/2013*, where the 2nd Circuit Court on Administrative Matters of Mexico held that the Mexican competent authorities were not obliged to find an agreement with the Swiss competent authorities via MAP, and, therefore, the taxpayer's rights were not infringed when the competent authorities failed to find a final solution to the issue.<sup>8</sup>

Taxpayers enjoy some flexibility in addressing their issues, since they can simultaneously have access to both the MAP and domestic remedies.<sup>9</sup> Nevertheless, unilateral domestic remedies do not adequately eliminate double

---

<sup>6</sup> OECD, *Transfer Pricing and Multinational Enterprises: Three Taxation Issues* (OECD Publishing 1984) <[http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/transfer-pricing-and-multinational-enterprises\\_9789264167803-en#page12](http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/transfer-pricing-and-multinational-enterprises_9789264167803-en#page12)> accessed 15 May 2018, para 39.

<sup>7</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version* 2014, (OECD Publishing 2014) <[http://dx.doi.org/10.1787/mtc\\_cond-2014-en](http://dx.doi.org/10.1787/mtc_cond-2014-en)> accessed 15 May 2018, [hereafter OECD MTC 2014] Commentary on Article 25, para 37.

<sup>8</sup> Oscar Echenique Quintana and Jorge Correa Cervera, 'Tax Treaty Disputes in Mexico' in Eduardo Baistrocchi (eds) *A Global Analysis of Tax Treaty Disputes* (CUP 2017) 515.

<sup>9</sup> *Visakhapatnam Port Trust* [1983] 144 ITR 146 (SC).

taxation. As seen in *Pierre Boulez v. Commissioner*, a case dealing with income characterisation, Boulez's income from performances in the United States were ultimately subject to double taxation after the US and German competent authorities were unable to reach an agreement via MAP.<sup>10</sup> This was because the domestic legal remedies involve only the domestic competent authority and the taxpayer, whereas the other treaty partner, who is not a party to the dispute, is still entitled to follow its domestic legal provisions and tax accordingly.

Despite Article 25 traditionally being subject to various criticisms for lacking finality,<sup>11</sup> Altman's historical analysis demonstrates great reluctance from the OECD to make any substantial changes to address this problem.<sup>12</sup> One of the main attempts of the OECD to improve the procedure comes from an online manual (MEMAP) which comprises of twenty-five 'best practices' of how states can administer MAPs.<sup>13</sup> Unfortunately, the term 'best practices' is a 'bogus' label, because, as the OECD supports, sometimes what is described as 'best practice', "is not necessarily the 'best' approach to resolving a problem or issue in a particular case."<sup>14</sup> Thus, it is not surprising that these practices were not generally followed by the competent authorities, leaving taxpayers subject to double taxation.<sup>15</sup>

In the 1900s, when the early spill-over effects of globalisation started to reveal the weaknesses of existing international tax technology, 'both the volume and the complexity of the cases with which the MAP has to deal' with increased.<sup>16</sup> As a result, the OECD launched a report<sup>17</sup> to contribute and finally crystallise the

---

<sup>10</sup> (1984) 83 TC 584.

<sup>11</sup> see Michelle Markham, 'Seeking New Directions in Dispute Resolution Mechanisms: Do we Need a Revised Mutual Agreement Procedure?' (2016) Bulletin for International Taxation 82.

<sup>12</sup> Zvi D Altman, *Dispute Resolution under Tax Treaties* (2005 Doctoral Series Academic Council) 37-66.

<sup>13</sup> OECD, 'Manual on Effective Mutual Agreement Procedures (MEMAP)', <<https://www.oecd.org/ctp/38061910.pdf>> accessed 15 May 2018 [hereafter MEMAP].

<sup>14</sup> *ibid* 5.

<sup>15</sup> Marlies de Ruiter and Edward Barret, 'OECD Work on the Resolution of International Tax Disputes' (2012) W.C.R <[http://www.worldcommercereview.com/publications/article\\_pdf/629](http://www.worldcommercereview.com/publications/article_pdf/629)> accessed 15 May 2018.

<sup>16</sup> OECD, 'Improving the Process for Resolving International Tax Disputes' (OECD 2004) <[www.oecd.org/tax/treaties/33629447.pdf](http://www.oecd.org/tax/treaties/33629447.pdf)> accessed 15 May 2018, 4-5.

<sup>17</sup> OECD, 'Improving the Resolution of Tax Treaty Disputes', <<https://www.oecd.org/ctp/dispute/38055311.pdf>> accessed 15 May 2018.

arbitration provision into the OECD MTC (2008) under Article 25(5), as a supplementary measure to the unresolved intergovernmental tax disputes via MAP.

The fact that the OECD regarded arbitration as a suitable measure under Article 25 does not imply that states have been enthusiastic to include it in their double tax treaties. In particular, despite its inclusion in the MTC since 2008, Wijnen's and Goede's research on over 1,811 double tax treaties from 1997 to 2013 reveals that only 127 include an arbitration provision.<sup>18</sup> More accurately, Pit shows that after 2008, an arbitration provision could only be identified in 72 double tax treaties.<sup>19</sup> This data has forced the OECD under the Public Discussion Draft on BEPS Action 14 to support that the 'adoption of MAP arbitration has not been as broad as expected'.<sup>20</sup> That said, the inclusion of the footnote under Article 25 which allowed states to reserve their rights not to adopt arbitration (given some undisclosed 'national law, policy or administrative considerations') indicates that the OECD has acknowledged from the start that it would lack a uniform application.<sup>21</sup>

### **The structural issues of MAP and tax arbitration**

One of the main deficiencies of the MAP procedure is that the taxpayer's rights under the treaty at stake become an object at the hands of the tax officials who are granted much discretionary power to decide to what extent, if at all, the taxpayer's concerns are justified. The tax authority's controlling power over the taxpayer's right is somewhat unquestionable, as seen in *Yamaha Motor Corp v. United States*, and the taxpayer cannot compel the tax authorities to initiate a MAP with their partner after they decline the taxpayer's request.<sup>22</sup> As a result, some countries such as Germany usually take this advantage to induce taxpayers to enter into audit settlements with them – whereby the latter agrees to waive its rights

---

<sup>18</sup> Wim Wijnen and Jan de Goede, 'The UN Model in Practice 1997–2013' (2014) Bulletin for International Tax 118, 142.

<sup>19</sup> H M Pit 'Arbitration under the OECD Model Convention: Follow-up under DTCs: An Evaluation' (2014) 42 Intertax 6/7 445, 466.

<sup>20</sup> OECD, 'Public Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective' <<http://www.oecd.org/ctp/dispute/discussion-draft-action-14-make-dispute-resolution-mechanisms-more-effective.pdf>> accessed 15 May 2018.

<sup>21</sup> OECD MTC 2014 (n 7) Article 25.

<sup>22</sup> 779 F. Supp 610 (D.D.C. Cir., 1991).

over MAP as a trade off from escaping penalties.<sup>23</sup> This strategy compels taxpayers to settle rather than struggle with MAPs, even if that means that they may ultimately become subject to double taxation without even notifying the other treaty partner of the improper application of the treaty.

Consequently, as the arbitration clause is only available as an extension to the MAP rather than as a self-standing measure,<sup>24</sup> the competent authorities can also ultimately control the taxpayer's access to it.<sup>25</sup> This so-called blocking method may render the arbitration clause obsolete since tax authorities can indirectly control whether the taxpayer would have access to arbitration by maneuvering taxpayers' access to the MAP.<sup>26</sup>

## **2. ACTION 14: MAKING DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE**

### **Introductory remarks**

The seventeen minimum standards, supported by eleven 'best practices' developed under Action 14 of the BEPS project, constitute the latest attempt of the OECD to further improve the effectiveness of MAPs.<sup>27</sup> Since 'not all OECD and G20 countries [were] willing to commit to them', these 'practices' simply act as guidance to the states and are neither binding nor subject to the peer review mechanism under the FTA MAP forum, as is the case for the minimum standards.<sup>28</sup>

Action 14 aims to address the aforementioned obstacles and encourage the resolution of disputes in order to 'ensure certainty and predictability' for businesses.<sup>29</sup> Accordingly, the main pillars of the minimum standards sought to ensure that treaty obligations will be performed in good faith and in a timely

---

<sup>23</sup> Michelle Markham (n 11) 89.

<sup>24</sup> OECD MTC 2014 (n 7) Commentary on Article 25, paras 63-64.

<sup>25</sup> Gerrit Groen, 'Arbitration in Bilateral Tax Treaties' (2002) 30 (1) *Intertax* 3, 19.

<sup>26</sup> Ehab Farah, 'Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem' (2009). 9(8) *Florida Tax Review* 705, 734-736.

<sup>27</sup> Action 14 (n 5).

<sup>28</sup> ibid 12, 16 (element 1.6).

<sup>29</sup> ibid 11.

manner, promote the prevention and timely resolution of treaty-related disputes, and ensure that the taxpayers who meet the procedural requirements have access to the MAP.<sup>30</sup>

### The Impact of Action 14

That said, all signatory countries under the Multilateral Instrument (MLI) must therefore first and foremost implement Article 25(1)-(3) into all of their tax treaties via Article 16, subject to some minor reservations and alternatives.<sup>31</sup> As exemplified, this means that they will need to ensure that the MAP mechanism is in place and any agreement will be implemented notwithstanding (1) ‘any time limits in the domestic law’,<sup>32</sup> (2) whether the application of any ‘treaty anti abuse provisions have been met’,<sup>33</sup> and (3) any audit settlement between tax authorities and the taxpayer which in the past precluded access to the MAP.<sup>34</sup> Given that countries shall now publish detailed guidance on how a taxpayer can have access to the MAP,<sup>35</sup> the procedural access requirements are becoming more transparent, thereby diminishing the discretionary power of the competent authorities to block them.

Furthermore, special attention must be drawn to the element 3.1, as it changes the wording of Article 25(1) of the OECD MTC and enables the taxpayer to initiate MAP in ‘either contracting state’ rather than only ‘to the competent authority of the Contracting State of which he is a resident’.<sup>36</sup> From an economic perspective, it is a win-win situation for both taxpayers and states, as the issue will be addressed directly to the relevant authority which can resolve the matter unilaterally at the initial stage, in an efficient and timely manner, and by avoiding

---

<sup>30</sup> ibid 12.

<sup>31</sup> ibid 13 (element 1.1); OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (2016) Treaties IBFD [hereafter MLI]; OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (2017 OECD Publishing)

<[http://dx.doi.org/10.1787/mtc\\_cond-2017-en](http://dx.doi.org/10.1787/mtc_cond-2017-en)> accessed 15 May 2018 [hereafter OECD MTC 2017].

<sup>32</sup> ibid 26 (element 3.3).

<sup>33</sup> ibid 14 (element 1.2).

<sup>34</sup> ibid 19 (element 2.6).

<sup>35</sup> ibid 18 (element 2.1), 26 (element 3.2).

<sup>36</sup> ibid 22.

any unnecessary costs of bilateral negotiations.<sup>37</sup> From a policy perspective, the above changes together can immensely impact how MAPs will be administered in the future. Namely, the power to initiate a MAP is gradually shifting towards the taxpayers, who can now address the issue to the contracting state that is usually more sympathetic to MAPs.

Whilst the abovementioned steps point to the right direction, the proposals do not adequately address the fact that the treaty partners are not yet compelled to resolve MAPs. Instead, according to element 1.3, accompanied by a change in the commentaries on Article 25 para 5.1,<sup>38</sup> countries shall only ‘seek to resolve their MAP cases’<sup>39</sup> based on some vague and general criteria which are generally not expected to compel the parties to find a solution. In particular, as the procedure remains substantially opaque behind the closed doors of the two competent authorities, they can still deviate without any substantial justification. As the BEPS Monitoring Group has correctly highlighted, this minimum standard will be lessened from a political commitment to an ‘empty’ and ‘hollow’ promise.<sup>40</sup>

### **‘Mandatory’ binding arbitration**

In respect to mandatory ‘binding’ arbitration, the final report outlines that, once again, it has not found a consensus amongst the participants of the BEPS project. Therefore, it is only part of the MLI as an optional measure to the signatories,<sup>41</sup> and the taxpayers can legitimately wonder whether the label ‘mandatory binding arbitration’ binds states to resolve their matters via arbitration.

The removal of the footnote under Article 25(5) as a minimum standard may indeed increase transparency regarding countries’ positions on tax

---

<sup>37</sup> J.S. Wilkie (n 2) 19.

<sup>38</sup> OECD MTC 2017 (n 31) Commentary on Article 25 para 5.1.

<sup>39</sup> *ibid.*

<sup>40</sup> BEPS Monitoring Group, ‘Comments on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective’ <<https://bepsmonitoringgroup.files.wordpress.com/2015/01/ap-14-dispute-resolution.pdf>> accessed 15 May 2018.

<sup>41</sup> Action 14 (n 5) 41.

arbitration, but is nevertheless not enough to overcome the sovereignty issues posed by some of them.<sup>42</sup>

### **3. CAN MEDIATION PROVIDE AN ALTERNATIVE MEANS FOR IMPROVING MAPS?**

#### **Introductory remarks**

While one can notice that Action 14 is substantially based on MEMAP's best practices, Dalton criticises that mediation, which was also included in the MEMAP, has been 'entirely overlooked'.<sup>43</sup> Kahneman's view based on prospect theory, cited by Van Hout, argues that less powerful parties are more willing to settle, while more powerful parties prefer an independent adjudicator.<sup>44</sup> By analogy, as arbitration is mainly promoted by the rich members of the OECD, it may explain why it is the only alternative to the dispute resolution mechanism, while also indicating that mediation can be a more attractive choice to the less powerful, developing countries.

Based on Van Hout's comparative analysis on the use of tax mediation in the United States, the Netherlands, Belgium and Canada, it is said that approximately 85% of tax disputes end with an agreement in a timely manner.<sup>45</sup> Further, from the developing countries, mediation requests via the Mexican ombudsman, who is an independent third party represented by PRODECÓN, have ended with 75% partial or total agreement between the tax authorities and the taxpayer.<sup>46</sup>

On the one hand, the data demonstrates that regardless of whether the mediator is an independent third party, part of the tax authorities, or comes from

---

<sup>42</sup> *ibid* 17 (element 1.7).

<sup>43</sup> Joe Dalton, 'Unlocking MAP disputes: Is mediation the Key?' (2013) *International Tax Review* 14, 14.

<sup>44</sup> Diana Van Hout, 'Is Mediation the Panacea to the Profusion of Tax Disputes?' (2018) 10 (1) *World Tax Journal* IBFD 19.

<sup>45</sup> *ibid*.

<sup>46</sup> Edson Uribe, 'Tax Mediation, Administrative and Judicial appeals in Mexico: A quick overview' <<https://taxpayerrightsconference.com/abstracts-papers/tax-mediation-administrative-and-judicial-appeals-in-mexico-a-quick-overview/>> accessed 15 May 2018.

the developing or developed world, they can ensure a smoother interaction between the taxpayer and the local tax authorities, as well as facilitate the effectiveness of resolution of disputes and address the excessive and increasing volume of litigation. On the other hand, however, these numbers alone do not encapsulate whether, and to what extent, mediation can be better utilised in practice. For example, mediation is not used in the international tax context, even though the Commentaries on Article 25 of the OECD MTC already contemplate ADR techniques other than arbitration ‘on an ad hoc basis as part of the [MAP]’<sup>47</sup>. Tax mediation has therefore been very successful in the abovementioned countries, not only because it exists as an option in their domestic law, but because it is *the taxpayer’s legal right to request it*, with Belgium counting more than 4,000 requests in 2016.<sup>48</sup>

Therefore, though mediation opportunities exist in the international context, some changes from the OECD are necessary to enjoy the fruits of its labour. As Nias comments, mediation needs to be promoted sufficiently by a respectable organisation, such as the OECD.<sup>49</sup> Otherwise, the status quo is unlikely to change, and the benefits of mediation ‘are likely to pass...by’.<sup>50</sup>

### Sovereignty- control- experience

The OECD has long recognised that the effectiveness of MAP is crucial for the proper functioning of the international tax regime. At the same time, though, the OECD held that mandatory arbitration, ‘would represent an unacceptable surrender of fiscal sovereignty’.<sup>51</sup> Today, however, some academics reject any sovereignty issues in the strict sense, as ‘states after all, exercise their sovereignty in entering into tax treaties’.<sup>52</sup> Also ‘an arbitration provision to resolve tax disputes

---

<sup>47</sup> OECD MTC 2017(n 31) Commentary on Article 25 para 86.

<sup>48</sup> Diana Van Hout, (n 44) 20.

<sup>49</sup> Peter Nias, ‘International tax dispute resolution: Breaking the impasse’ (2016) International Tax Review 2, 2.

<sup>50</sup> *ibid*.

<sup>51</sup> OECD, (n 3) paras 115-117.

<sup>52</sup> Patricia A Brown, ‘Enhancing the Mutual Agreement Procedure by Adopting Appropriate Arbitration Provisions’ (DRAFT) <[https://webcache.googleusercontent.com/search?q=cache:LNm19g1E32wJ:https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU\\_Global\\_Tax\\_Policy\\_Center/Arbitration/patricia\\_brown\\_on\\_current\\_trends\\_in\\_map.docx+&cd=1&hl=en&ct=clnk&gl=uk](https://webcache.googleusercontent.com/search?q=cache:LNm19g1E32wJ:https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU_Global_Tax_Policy_Center/Arbitration/patricia_brown_on_current_trends_in_map.docx+&cd=1&hl=en&ct=clnk&gl=uk)> accessed 15 May 2018.

is no doubt desirable as a theoretical matter [to]... ensure that cases are in fact resolved'.<sup>53</sup> Further, as the US experience has demonstrated, arbitration pressures competent authorities to find a solution in the MAP rather than to settle disputes with an independent adjudication.<sup>54</sup> Hence, sovereignty issues, if any, are very minor. This was also the main argument that persuaded the OECD to change its attitude about the suitability of arbitration, thereby inducing most of its members to opt in to an arbitration clause in their double tax treaties.

Moreover, the United Nations Committee of Experts on International Cooperation in Tax Matters still appreciates the reluctance of some states to give up their sovereignty to private third-party experts, but raises questions regarding whether such issues are in line with the countries' national interests.<sup>55</sup> In any case, some main players in the international tax regime consistently raise sovereignty issues by indicating that any further compromise beyond the agreed standards under the BEPS project will inevitably cross the line.<sup>56</sup> Therefore, one may argue that the constitutional issues are merely being used by tax administrators as an excuse to prevent loss of control over their tax affairs.

However, this is not entirely justified, as there are various issues that induce countries to legitimately step back from mandatory arbitration. Firstly, Hearson highlights that some developing countries have limited exposure to MAPs either because they have limited bilateral tax treaties or less bargaining power in comparison with their developed treaty partners.<sup>57</sup> This phenomenon is

---

<sup>53</sup> *ibid.*

<sup>54</sup> SMU-TA CET, 'Tax disputes and the role of MAP and Arbitration'

<<https://accountancy.smu.edu.sg/cet/tax-disputes-and-role-map-and-arbitration>> accessed 24 May 2018.

<sup>55</sup> United Nations, 'Report by the Subcommittee on Dispute Resolution: Arbitration as an Additional Mechanism to improve the mutual Agreement Procedure'

<[http://www.un.org/esa/ffd/tax/sixthsession/Report\\_DisputeResolution.pdf](http://www.un.org/esa/ffd/tax/sixthsession/Report_DisputeResolution.pdf)> accessed 15 May 2018, paras. 21-22.

<sup>56</sup> See for example India; OECD, 'BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents' <[www.oecd.org/tax/beps/beps- action-14-on-more-effective-dispute-resolution-mechanisms-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps- action-14-on-more-effective-dispute-resolution-mechanisms-peer-review-documents.pdf)> accessed 15 May 2018, 24.

<sup>57</sup> Martin Hearson, 'The tax treaty arbitrators cometh'

<<https://martinhearson.wordpress.com/2015/09/21/the-tax-treaty-arbitrators-cometh/>> accessed 15 May 2018.

visible in most Asian countries<sup>58</sup>, and in BRICS (most prominently Brazil), which had no official report indicating that a MAP was ever concluded until 2015.<sup>59</sup> Second, developing countries usually lack technical tax expertise. Their tax treaties are mostly politically driven, without thoughtful consideration of their content, and they have relatively low bargaining power when negotiating with a developed partner. Therefore, Hearson persuasively points that mandatory binding arbitration ‘enhances the negative impacts of negotiation oversights’, since its very existence leaves no room for those countries to subsequently tailor the treaty in the analogous context of the time.<sup>60</sup>

The advantage of adopting mediation is that it can make the dispute resolution mechanism more effective by avoiding these political issues from ever surfacing. Although mediation lacks a general definition because of its form and application techniques vary from country to country, in general terms the techniques can be divided into two broad categories: facilitative and evaluative. Both techniques aim to resolve the parties’ conflict by respecting their autonomy, with the latter being more directive than the former.<sup>61</sup> Nonetheless, the facilitative method is more suitable in an international context. It would allow competent authorities to retain control over their tax affairs in accordance with the principle of ‘self-determination’, whereby the parties involved are expected to remain in control and voluntarily decide on the outcome. Further, it avoids issues of sovereignty and enhances the confidence of the less experienced countries into the MAP procedure, thus making them more familiar with the presence of a third party in their disputes.<sup>62</sup>

### **The issue of impartiality**

The impartiality and independence of the mediator is an indisputable means to providing mutual trust to the parties involved. As expert arbitrators

---

<sup>58</sup> Luis Coronado and Jerome van Staden ‘Critical Evaluation of Action 14 Recommendations and the Suggested Way Forward for Singapore’ (2017) 5(2) School of Accountancy Research Paper Series No. 2017-S-62 <<https://ssrn.com/abstract=2993468>> accessed 15 May 2018.

<sup>59</sup> Phelippe T.P. de Oliveira, ‘Action 14 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Making Dispute Resolution More Effective- Did Action 14 “Piggyback” on the initiative?’ (2017) 71(1) Bulletin for International Taxation, 5.

<sup>60</sup> Martin Hearson (n 57) *ibid*.

<sup>61</sup> Diana Van Hout, (n 44) 11, 12.

<sup>62</sup> *ibid* 26.

come from developed countries, there is a presumption among developing countries that arbitrators are biased. The United Nations Committee of Experts has highlighted the need for an independent impartial arbitrator with experience in taxation and the ability to understand the needs of the countries.<sup>63</sup>

Regarding the independency of arbitrators, Langford *et al.* demonstrate that in the field of investment arbitration, the practice is dominated by the ‘most powerful and influential arbitrators’, almost half of which simultaneously act as legal counsels.<sup>64</sup> Although the existence of ‘double hatting’ does not automatically suggest that arbitrators are biased, they pose the respective dilemma taken from Sands: ‘Can a lawyer that spends a morning drafting an arbitral award that addresses a contentious legal issue divorce themselves as a counsel in a different case?; and even if it is assumed that the arbitrator is indeed impartial, they correctly point out that ‘the perception of bias or conflict remains’.<sup>65</sup>

Fortunately, in mediation, utilising ombudsmen can provide the key to avoiding ‘double hatting’ issues and effectively find a sufficient number of unbiased, independent and experienced mediators who are specialised in the field.<sup>66</sup> First, the ombudsman’s office in the domestic context is usually assimilated with the local tax authorities, and thus, they already have the necessary experience and knowledge in tax, with no issue of ‘double hatting’ arising. While empirical evidence on the effectiveness of mediation has not demonstrated that mediators must have the relevant tax skills and knowledge, it might be inefficient if the mediator lacks tax knowledge and obstructs the communication of the parties or does not recognise whether they have reasonable positions.<sup>67</sup> Second, the ombudsmen have also been introduced in developing countries and can be utilised accordingly to avoid the issues posed by them.<sup>68</sup>

---

<sup>63</sup> United Nations (n 55) paras 60-61.

<sup>64</sup> Malcolm Langford et. al. ‘The Ethics and Empirics of Double Hatting’ (2017) 6(7) ESIL Reflection <<https://ssrn.com/abstract=3008643>> accessed 15 May 2018, 5.

<sup>65</sup> *ibid* 8-10.

<sup>66</sup> Katerina Perrou, ‘The Ombudsman and the Process of Resolution of International Tax Disputes-Protecting the ‘Invisible Party’ to the MAP’ (2018) 10(1) *WTJ*.

<sup>67</sup> Diana Van Hout (n 44) 30.

<sup>68</sup> P. Baker & P. Pistone, ‘The practical protection of taxpayers’ fundamental rights – General Report, in IFA Cahiers 2015’ (2015). <[http://www.cfe-eutax.org/sites/default/files/Session%20II\\_IFA%20General%20Report%202015%C2%20Baker%20Report.pdf](http://www.cfe-eutax.org/sites/default/files/Session%20II_IFA%20General%20Report%202015%C2%20Baker%20Report.pdf)>

According to Perrou's arguments, the concept of ombudsmen can directly be transplanted into the international context and can act as the 'invisible party' in the MAP as part of the competent authorities, with only minor, if at all, legal modifications.<sup>69</sup> It is nevertheless unclear how sovereignty concerns would be alleviated when the ombudsman would come from one of the contracting states, as she suggests. This would be contrary to the principle of independency and impartiality, making it questionable whether it would enhance the trust of the parties in the procedure. Thus, the use of a third party national would be more suitable to overcoming sovereignty issues and inducing countries to utilise mediation techniques efficiently.

Following Belgium's approach noted above in utilising mediation as ADR when the MAP fails would inevitably require some promulgation costs due to the need to change current provisions and make mediation accessible at the taxpayer's discretion. From an economic perspective, such potential promulgation costs would be outweighed due to the foreshadowed frequency of the MAPs in the post-BEPS era.<sup>70</sup> Therefore, by utilising an existing position, mediation procedure will come with low enforcement costs for the aggrieved parties.

### **Game theory perspective**

Based on game theory, when individuals interact, their strategic behaviour depends on what their partner is expected to do.<sup>71</sup> Game theory contains many tools which try to encapsulate cooperation problems, with the most dominant example being the prisoner's dilemma. The gist of this paradigm is that without knowing each partner's move, the 'dominant strategy' for each player is to 'defect' rather than to 'cooperate'.<sup>72</sup> Even though the parties are both 'better off' when cooperating, none of them will risk cooperating blindly on the

---

<sup>69</sup> Pistone%2C%20The%20practical%20protection%20of%20taxpayers%20fundamental%20rights.pdf> p. 90-99 accessed 15 May 2018, (some examples are Greece, Poland, Turkey, Chinese Taipei)

<sup>70</sup> ibid.

<sup>71</sup> David Weisbach, 'Formalism in the Tax Law' (1999) 66 (3) The University of Chicago Law Review.

<sup>72</sup> Douglas G. Baird et al., *Game Theory and the Law* (1994 Harvard University press).

<sup>73</sup> Eduardo Baistrocchi, 'The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications' (2008) 4 B.T.R. 352, see the figure and the detailed explanation at 363- 364.

assumption that the other party has the chance to defect, thereby putting themselves into the worst position.

As Baistrocchi supports, countries are engaged in this dilemma and they enter into harmful tax competition by giving up much of their tax rights (thereby ‘defecting’) in order to attract the highest possible volume of foreign direct investments, which ultimately leads them to the so-called race to the bottom.<sup>73</sup> While the seriousness or existence of the ‘race to the bottom’ is debatable among academics, it is generally accepted that, due to globalisation and the increasing mobility of capital, jurisdictions face the far-reaching problem of how to divide their tax bases and allocate tax revenues.<sup>74</sup> As the international tax regime now stands, the countries are involved in a ‘co-opetition’. They co-operate with their treaty partner by adopting the standard OECD’s provisions rather than choosing a competing legal technology, such the UN model provisions, whilst channelling competition in areas that cannot be regulated by the OECD.<sup>75</sup>

One area where the OECD cannot reach and regulate sufficiently, and therefore incentivises countries to act strategically, is in how treaty partners interpret and accordingly implement the regulatory framework set by the OECD. Upon closer analysis, the OECD MTC is in essence moving towards standard-based provisions with the characteristic of lacking a clear *ex-ante* meaning. This grants substantial discretionary power to the local tax authorities on their interpretation and the scope of their application.<sup>76</sup> In this setting, states must unilaterally interpret the provisions and allocate their tax revenues without knowing how the other contracting state will interpret the respective provision, i.e. an instance of the so-called simultaneous decision making with imperfect information.<sup>77</sup> In line with Meadow’s arguments, since the MAP is usually

---

<sup>73</sup> ibid.

<sup>74</sup> Ian Roxan, ‘Limits to globalization: some implication for taxation, tax policy, and the developing world’ (2012) LSE Law Society and Economy Working paper Series, 3/2012, 28-31.  
<[http://eprints.lse.ac.uk/46768/1/Limits%20to%20globalisation%20\(lsero\).pdf](http://eprints.lse.ac.uk/46768/1/Limits%20to%20globalisation%20(lsero).pdf)> accessed 15 May 2018.

<sup>75</sup> Eduardo Baistrocchi (n 72) 359.

<sup>76</sup> Timothy Endicott, ‘The Value of Vagueness’ in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 12.

<sup>77</sup> Douglas G. Baird et al., (n 71) 10.

informal and conducted via emails or telephone,<sup>78</sup> the competent authorities are ‘still subject to a host of strategic problems...[such as] the giving and getting of information’.<sup>79</sup> Thus, given the high political pressure in the post-BEPS era, tax administrations are not predicted to be passive umpires. Collecting the maximum possible revenue will become their top priority.<sup>80</sup> As a result, in cases where national interests pose obstacles to the states in interpreting and/or applying a respective provision, and subsequently struggle to find a solution via the MAP, double taxation opportunities may be created. This will consequently disincentivise cross border investments and create collective action problems.

According to the OECD, however, the mandatory arbitration clause is expected to relinquish countries’ strategic interactions and effectively act as an external authority to regulate the behaviour of the parties and solve the prisoner’s dilemma. Specifically, they note that 90% of MAP cases up to 2013 included one of the twenty countries<sup>81</sup> which have opted in for an arbitration clause under the MLI.<sup>82</sup> However, as the arbitration clause will only be included if both parties involved have opted for it to apply, these numbers are misleading. Instead, the MLI has paved the way for countries, especially developing countries, to act strategically and reserve their right to an arbitration clause. Therefore, to date, only 26 states have opted for an arbitration clause, which, according to Pit (and by taking into account potential reservation and choices) indicates that only 148 more tax treaties will potentially include it.<sup>83</sup> That said, some arbitration clauses also deviate from OECD standards. For example, under the MLI, France, Spain and Sweden reserved the right to exclude arbitration when both competent authorities agree that the case is not suitable.<sup>84</sup> This renders the taxpayer’s access

---

<sup>78</sup> MEMAP (n 13) 27.

<sup>79</sup> Carrie Menkel-Meadow ‘From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context’ (2004) 54 *J Legal Educ* 4, 23.

<sup>80</sup> Jeffrey Owens, ‘The Role of Tax Administrations in the Current Political Climate’ (2013) *Bulletin for International Tax*.

<sup>81</sup> at the time of publishing, in 2015.

<sup>82</sup> Action 14 (n 5) 41.

<sup>83</sup> H M Pit, ‘Arbitration under the OECD Multilateral Instrument: Reservations, Options and Choices’ (2017) *Bulletin for International Taxation* 568, 588.

<sup>84</sup> Gerrit Groen, ‘The Nature and Scope of the Mandatory Arbitration Provision in the OECD Multilateral Convention (2016)’ (2017) *Bulletin for International Taxation* 607, 612.

to arbitration subject to either, or both, of the contracting states' consent, an element which in substance diminishes the relevance of this clause.<sup>85</sup>

Further, as the MLI counts 78 signatories,<sup>86</sup> and these, according to the minimum standards of Action 14, are expected at least to have the MAP in place, it is correctly stated by some tax experts that future disputes via MAP 'are much likely to be with less developed countries' which have not opted for arbitration.<sup>87</sup>

### Iterated prisoner's dilemma

Beyond the existence of an external authority, the prisoner's dilemma is solved, and cooperation emerges when the game is played repeatedly. The increasing possibility that the treaty partners will meet again can make their relationship more durable, as the choices made today will also affect their later choices.<sup>88</sup> Accordingly, if the relationship is, firstly, very durable and, secondly, based on reciprocity, then cooperation can be developed even between enemies, which is similar to the 'live and let live system' during World War I, where the parties engaged in *de facto* cooperation, since they 'knew that their interactions would continue because no one was going anywhere'.<sup>89</sup> Thirdly, for cooperation to be stable and for the 'tit-for-tat' to emerge, the parties need to recognise the other player's past actions and remember them.<sup>90</sup>

After Action 14, procedural requirements to access the MAP are becoming more transparent and blocking methods less effective. This makes the relationships between states more durable, since it increases the chances of future interaction between treaty partners, thereby increasing their possibility to cooperate. Further, the ability of the states to recognise when the other state

---

<sup>85</sup> Lucas de Heer, 'In for a Penny, in for a Pound: Anti-Tax Avoidance Initiatives and Dispute Resolution' European Taxation 328, 329.

<sup>86</sup> 'Signatories and Parties to the Multilateral Convention to implement tax treaty related measures to prevent Base Erosion and Profit Shifting' <<http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>> accessed 23 May 2018.

<sup>87</sup> OECD, 'OECD: countries commit to minimum standards on international tax dispute resolution' <<https://www.out-law.com/en/articles/2015/october/oecd-countries-commit-to-minimum-standards-on-international-tax-dispute-resolution/>> accessed 15 May 2018.

<sup>88</sup> Robert M Axelrod, *The Evolution of Co-operation* (Basic Books 1984).

<sup>89</sup> *ibid* 129.

<sup>90</sup> *ibid* 174.

'defects' is expanded since audit settlements are effectively tackled as a minimum standard under Action 14.

Nevertheless, not all treaties are based on reciprocity – or, per Dagan, not all the treaties are symmetrical – since the cross-border investments between them are asymmetrical. This is especially true in tax treaties between developed and developing countries, where the former is mainly a capital exporter and the latter mainly a capital importer.<sup>91</sup> Accordingly, as the OECD MTC grants more power to the country of residence to tax – thereby limiting the level of taxation in the source state – it becomes more difficult to attain cooperation in the context of the MAP when negotiation between the treaty partners is not based on common interpretation, but rather on 'horse-trading' types of discussions.<sup>92</sup>

Even in durable relationships based on reciprocity, such as those between developed countries – assuming that the investments in both countries are symmetrical – and even if states can recognise when the other state 'defects', solving a prisoner's dilemma and establishing cooperation with blind processes 'can take very long'.<sup>93</sup> It is also difficult to expect countries to cooperate in the international framework because their behaviour is unstable and influenced by the context of the time and place.<sup>94</sup> For example, in Argentina, in times of political instability, tax officials enjoy greater freedom to engage in rent-seeking strategies, and therefore, are only incentivised to maximise their own rent by maximising tax assessments irrespective of the outcome of the case.<sup>95</sup>

### **Beyond Cooperation: Iterated Prisoner's dilemma and embedded coordination games**

Yet solving the prisoner's dilemma would be more complicated than establishing cooperation. What would also be needed, according to game theory,

---

<sup>91</sup> Tsilly Dagan, 'The Tax Treaties Myth' (2000) 32 NYU Journal of International Law and Politics 939; Eduardo Baistrocchi (n 72) 353.

<sup>92</sup> Kees van Raad, 'International Coordination of Tax Treaty Interpretation and Application' (2001) Intertax, 29 (6-7) 212, 213.

<sup>93</sup> Robert M. Axelrod (n 88) 188.

<sup>94</sup> Eduardo Baistrocchi (n 72) 371.

<sup>95</sup> Eduardo Baistrocchi, 'Tax Disputes under Institutional Instability: Theory and Implications' (2012) 75(4) Modern Law Review 547.

is coordination.<sup>96</sup> In such case, if the parties start cooperating – in the context of the MAP – it is likely that one state would engage in behaviour which it perceives as cooperative but which is viewed by another state as non-cooperative.<sup>97</sup> This is likely, as the BEPS project grants much discretion to the parties to infer their own interpretation of the relevant provisions and has not taken into account the cultural diversity which may directly affect such interpretations.<sup>98</sup> Consequently, since there is no external authority to monitor and guarantee uniform interpretation, international tax disputes are expected to rise dramatically even in the absence of a ‘genuine’ defection.

An example of the above arguments can be seen in Actions 8-10 of the BEPS project, according to which the new transfer pricing guidelines are ‘inevitably subjective rather than objective’, so that the aggrieved parties can offer their own interpretation without necessarily going beyond their legitimate interpretative boundaries.<sup>99</sup> Therefore, it would come as no surprise if, for example, given the different role of countries in the economy, the United States argued that ‘value’ is created via Intellectual Property development, but, at the other end of the spectrum, China placed more emphasis on human capital factors.<sup>100</sup>

The ‘game’, therefore, is now more difficult; but in its simplest form, there are two alternatives to establish cooperation via iteration, since there are now two cooperative equilibria: A/A and B/B, highlighted in bold.

---

<sup>96</sup> Richard H. McAdams, ‘Beyond The prisoner’s dilemma: coordination, game theory and the law’ John M. Olin Law & Economics Working Paper No. 437 <<https://ssrn.com/abstract=1287846>> accessed 15 May 2018.

<sup>97</sup> ibid.

<sup>98</sup> Arkadiusz Myszkowski, ‘Mind the Gap: The Role of Politics and the Impact of Cultural Differences on the OECD BEPS Project’ (2016) IBFD.

<sup>99</sup> Eduardo Baistrocchi, ‘Article 9: Associated Enterprises’ (2017) IBFD <<https://ssrn.com/abstract=3012202>> accessed 15 May 2018.

<sup>100</sup> Mindy Herzfeld, ‘The Case against BEPS – Lessons for Coordination?’(2017): <<https://ssrn.com/abstract=2985752>> accessed, 24 May 2018, 19.

## China

| United States                    | Cooperation A:<br>IP development | Cooperation B:<br>Human Capital | Defect |
|----------------------------------|----------------------------------|---------------------------------|--------|
| Cooperation A:<br>IP development | <b>6, 4</b>                      | 2, 2                            | 0,8    |
| Cooperation B:<br>Human Capital  | 2, 2                             | <b>4, 6</b>                     | 0,8    |
| Defect                           | 8, 0                             | 8, 0                            | 2, 2   |

Although, again, the predominant strategy is for both the US and China to ‘defect’ (with a payback of 8), if the game is played repeatedly, the parties can achieve an equilibrium, either at A/A or B/B. The only chance to achieve cooperation, however, is for them to use the *same form of cooperation, either A/A or B/B, and this would require the parties to coordinate*. Otherwise, each party views each other’s move as a defection ‘requiring retaliatory defection’, therefore causing any cooperative endeavour to fail.<sup>101</sup>

---

<sup>101</sup> ibid 23.

Even if, for example, China and the US agreed to cooperate at ‘Cooperation A’, where Intellectual Property development has taken place, thereby offering unequal payoffs and leaving China with less than the US, this reasoning is better suited in law, since such an outcome might be desirable to correct injustices.<sup>102</sup> In other words, it is assumed that if justice requires taxation in accordance with the treaty, then it would require one of the parties to cooperate and coordinate its behaviour even if that means agreeing on unequal payoffs.

### The role of the mediator in establishing cooperation and coordination

Therefore, it is argued that the role of the mediator in dispute resolution might be crucial in speeding up the process of establishing reciprocity and promoting cooperation between states. Moreover, mediators can coordinate states’ strategic behaviour in order to avoid unnecessary misunderstandings. According to a recent empirical study undertaken by Sigman and Ariely on examining how groups reach decisions, they find that small group communication can foster cooperation between the parties and help them reach consensus.<sup>103</sup>

As Van Hout argues, however, mediation is not a ‘panacea’, and as such, cannot be utilised when the parties in the dispute are not willing to cooperate by any means.<sup>104</sup> As Sigman’s and Ariely’s research reveals, the difference between groups that have reached a consensus and those who have not is that the members of the latter group had extreme opinions, which increased their confidence therein and leads them to overlook the legitimacy of the other party’s arguments<sup>105</sup>. Therefore, one way of promoting cooperation is, according to Axelrod, ‘to teach people to care about the welfare of others’.<sup>106</sup> For example, in society, it would be easier to achieve cooperation if adults shape their children’s behaviour in such a way that ‘new citizens’ would not only consider their own position but also the position of others.<sup>107</sup> The parties should not be expected to act altruistically, but

---

<sup>102</sup> ibid.

<sup>103</sup> Mariano Sigman and Dan Ariely, ‘How can groups make good decisions?’ <<https://youtu.be/JrRvqgYgT0>> accessed 15 May 2018.

<sup>104</sup> Diana Van Hout (n 44) 15.

<sup>105</sup> Mariano Sigman and Dan Ariely (n 103).

<sup>106</sup> Robert M. Axelrod (n 88) 134.

<sup>107</sup> ibid 135.

understanding the position of others creates an obligation to cooperate.<sup>108</sup> Following mediation techniques, the mediators can guide parties to view their position in a more neutral and objective way, rather than to ‘see what they want to see’.<sup>109</sup> As the commentary on Article 25 has already appreciated, the mediator can communicate ‘the strengths and weaknesses of each side’ in order for the competent authority ‘to better understand its own position and that of the other party’.<sup>110</sup> Similar to Axelrod’s observation, it is not implied that mediation would rebut the presumption that states are self-interest maximisers and would thus start behaving altruistically. Rather, it is argued that mediation would change the way in which they ‘experience justice’ by enhancing ‘procedural justice’.<sup>111</sup> This would achieve the effect of indirectly enhancing the need to cooperate and achieve substantive solutions. Further, in Shelling’s opinion, communication is sometimes necessary to establish coordination.<sup>112</sup> Although he cautions that talk is not a substitute for action, he supports that the participation of a third party can be a way of establishing coordination.<sup>113</sup> The mediator can facilitate an efficient outcome and influence communication through his control, even though ‘his directions have only power of suggestion’.<sup>114</sup>

Therefore, the advantage of utilising mediation as an ADR in establishing coordination is that it can not only improve the effectiveness of the MAP by teaching the parties to care about the others (and thereby increasing chances of cooperation), but also, prevent future disputes. As Sander puts it, ‘[mediation] … gets at the underlying concerns and it teaches the parties how to resolve disputes more effectively by themselves in the future’.<sup>115</sup> Mediators should not be considered as replacing arbitrators in all cases, since the chance of not reaching a decision is still present. Nevertheless, they can add value in improving

---

<sup>108</sup> ibid.

<sup>109</sup> Diana Van Hout (n 44) 13.

<sup>110</sup> ibid 20.

<sup>111</sup> ibid.

<sup>112</sup> Thomas C. Schelling, *The strategy of Conflict* (1960 Harvard University Press) 60.

<sup>113</sup> ibid.

<sup>114</sup> ibid 144.

<sup>115</sup> Frank E A Sander, ‘The Future of ADR - The Earl F. Nelson Memorial Lecture’ (2000) 1(5) Journal of Dispute Resolution 3, 6.

– but not perfecting – the effectiveness of MAPs whilst also avoiding future disputes from arising in the first place.

#### 4. CONCLUSION

Overall, the above discussion suggests that the post-BEPS era, a time which carries ‘the most fundamental changes to international tax rules in almost a century’,<sup>116</sup> would require an alternative approach to avoiding the uncontrolled inventory of unresolved MAP cases from arising. While Action 14 was not an essential component to counter BEPS, the importance of avoiding double taxation still carries the same political significance and deserves some minimum political commitments. These commitments help to gain greater access to MAP, but fail to ensure a positive outcome once the parties have entered into it, as they are yet to have tangible incentives to cooperate.

Of course, in the same way King Midas’ touch turned worthless objects into solid gold, arbitration’s magic touch can turn worthless negotiations of competent authorities into final binding decisions. Although this is undoubtedly correct from a theoretical perspective, Altman’s big picture approach encloses the crux of the problem in four lines:

‘while it would seem that most practitioners and scholars today regard international tax arbitration as the preferred method for resolving international tax disputes...its political science and international relations costs... are substantial enough to prevent the general use of arbitration in international tax disputes for over 100 years’.<sup>117</sup>

Therefore, even if in theory it may be easy to design a golden MAP resolution mechanism, in the reality of the international tax regime, any reform must also be politically attainable. Mediation, of course, lacks Midas’ touch as it

---

<sup>116</sup> OECD, ‘Centre for Tax Policy and Administration, OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers meeting’, <<http://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm>> accessed 15 May 2018.

<sup>117</sup> Zvi Altman (n 12) 94.

does not mandate a resolution to the dispute and should, therefore, not be considered a replacement for arbitration.

Alternatively, mediation can become an extra tool in the taxpayers' dispute resolution toolbox, which they should have the right to request when competent authorities fail to reach an agreement within a standard period of time in the context of MAP. A standard period should be set by the OECD in order to guarantee a clear *ex-ante* threshold for the availability of this right, whilst also ensuring that the role of the MAP as a quasi-diplomatic mechanism, enabling direct communication between competent authorities in an efficient and inexpensive way, is not frustrated. As highlighted, mediation would be unnecessary when parties can resolve their disputes effectively by themselves, and, as a matter of coordination, would not be necessary once the parties have reached a 'focal point'.

In the short term, mediation respects a better balance between the political issues of the states and the stakeholder demands for a better mechanism. The presence of a mediator in intergovernmental disputes can increase cooperation and coordination between the states, facilitate improvement of the settlement of cases in a timely manner, while also helping to reduce future disputes from arising in the first place. At the same time, states can retain control over their tax affairs and, additionally, utilise existing domestic mechanisms of tax ombudsmen to provide an inexpensive, efficient and impartial ADR for them.

Lastly, mediation techniques would enhance trust in the system, induce less experienced, developing countries to use MAPs and weaken any present resistance to any anecdotal arguments for loss of sovereignty. Once developing countries get the necessary experience and familiarity with the procedure, the way would be paved for countries to use arbitration to further improve, and even perfect, the mechanism in the future.

# The Separability of Law and Morality as an Intriguing Conundrum within Legal Positivism: Lessons from *The Concept of Law*

Thomas Yeon\*

---

## ABSTRACT

*This essay critically examines HLA Hart's conception of the relationship between law and morality as delineated in his most famous work, *The Concept of Law*. In evaluating his contention that there is no necessary conceptual connection between law and morality, Hart's conceptions of the 'minimum content of natural law' and difference between legal and moral obligations will be analysed. It will also examine the moral implications of his account of 'internal point of view', which is the view of individuals who see rules as standards of appraisal of their own and others' behaviour. This essay seeks to reveal the problematic nature of Hart's contention on both normative and methodological grounds. It will, however, also defend that his contention remains a jurisprudential conundrum in understanding the role of law in the social context.*

---

## INTRODUCTION

As one of the most prominent jurists of the twentieth century, Hart made an undeniable contribution to the philosophical clarification and development of legal positivism.<sup>1</sup> The aim of this essay, however, is not merely to sketch his account of legal positivism and the arguments against it. It focuses on his 'separability thesis'<sup>2</sup> (hereinafter, Hart's thesis) that 'it is in no sense a necessary

---

\* LLB (Durham) '18, LLM in Human Rights Law (LSE) '19. Many thanks to Professor William Lucy for his insightful comments and guidance during the writing process. Any errors or omissions remain my own.

<sup>1</sup> Klaus Füßer, 'Farewell to Legal Positivism' in Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (OUP 1999) 119.

<sup>2</sup> Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 NYULR 1035, 1041. Hereafter, 'ST.'

truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so'.<sup>3</sup> More specifically, it seeks to analyse the claim on the general lack of necessary conceptual connection between law and morality. While Hart's account has gained considerable prominence in jurisprudence, it has been criticised for over-simplifying the institutional, political, and historical foundations of law.<sup>4</sup> This essay argues that Hart's thesis is unsustainable and provides an inadequate account in articulating the relationship between law and morality. Three arguments will be made. Firstly, by analysing the relationship between law and morality from a normative perspective, this paper will argue that his thesis fails to articulate adequately the role of morality in shaping law as a social instrument and its role in generating obligations. Secondly, this paper will explore the thesis from the perspective of a participant in a legal system, arguing that Hart's methodology of providing an account of adherence to rules from such perspective displays a necessary connection between law and morality. Thirdly, by discussing the nature of Hart's thesis as a platform to accommodate potential theoretical disagreements as to the nature of legal norms and social behaviour, this paper will defend the idea that the thesis still and should remain a central conundrum in contemporary legal philosophy. It will conclude that while it fails to recognise the necessary roles of morality in shaping legal norms and explaining people's adherence to rules, Hart's thesis still remains a central conundrum in contemporary jurisprudence and its value as a descriptive instrument should not be ignored in light of the criticisms raised against it.

### **The normative inadequacy of the separability thesis in explaining the relationship between law and morality**

Throughout *The Concept of Law*, Hart has maintained that while there are numerous *contingent* connections between law and morality, there are no *necessary* conceptual connections between law and morality.<sup>5</sup> For example, the claim that a law is legitimately passed by the legislature has no necessary conceptual connection with the requirement for laws to pursue particular moral ideals. The

---

<sup>3</sup> HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, OUP 2012) 185-186.

<sup>4</sup> Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (OUP 2006) 232.

<sup>5</sup> Hart (n 3) 259, 268.

point of Hart's thesis is to emphasise that there are no necessary *substantive* moral constraints on a theory of law, and what content it may include. Hart contrasts this with the 'teleological conception of nature',<sup>6</sup> which suggests that what generally occurs can both be explained and evaluated as good or what ought to occur. He criticises that such conception minimises 'the differences between statements of what regularly happens and statements of what ought to happen'.<sup>7</sup> In the legal context, this means minimising the differences between statements of what law is and what law ought to be. What is necessary is the need to resist the inference from legality to legitimacy.<sup>8</sup>

While Hart subscribes to neither an ontological separation of law and morals nor a necessary conceptual connection between them, he admits that there must be a 'minimum content of natural law'<sup>9</sup> in a legal system which has 'survival'<sup>10</sup> as its minimum purpose. Without a specific content which both law and morals cater to, it would be impossible for both to forward the minimum purpose of survival. Such connection, Hart contends, is a 'natural necessity'.<sup>11</sup> While this claim *prima facie* contradicts Hart's thesis, such a view rests on a misunderstanding of the thesis itself. The minimum content maintained concerns the necessity in upholding the integrity of a legal *system*; and without such necessity, it would be impossible to ensure that the system operates in an orderly manner. They are unchangeable conditions which a legal system must cater to. Above this minimum content, however, Hart argues that any connection between law and morality is only a *contingent* matter. This gives rise to a 'two-system picture',<sup>12</sup> where law and morality are seen as separable systems that do not necessarily merge with one another.

Against the 'two-system picture,' Ronald Dworkin argues that it provides no neutral standpoint from which connections between law and morality

---

<sup>6</sup> *ibid* 189.

<sup>7</sup> *ibid* 190.

<sup>8</sup> Jules Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence' (2007) 27(4) OJLS 581, 585.

<sup>9</sup> Hart (n 3) 193.

<sup>10</sup> *ibid*.

<sup>11</sup> *ibid* 199.

<sup>12</sup> Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 402.

can be adjudicated.<sup>13</sup> An argument answering the question of whether positivism or interpretivism provides a better account of the relationship between the systems will be circular. By treating it as a legal question, one would have to first decide what role morality plays in fixing the law; by treating it as a moral question, one would have to assume the best theory of law depends on moral issues.<sup>14</sup> Dworkin's criticism is crucial to the debate over the relationship between law and morality as it shows that questions regarding the legal and moral contents of a legal rule, and in general a legal system, cannot be separated; there is a unified system of values. In insisting on the separability of law and morals when giving an account of law, Hart's picture is normatively inadequate. It fails to acknowledge that legal rules develop their content and normative values from the social concerns they respond to and the moral values which matter to members of the political community as human beings. A legal system is a constitutive element of the community it belongs to. The normative force of law, in reflecting the wider context of social concerns legal rules stem from, must be tangled with questions of acquisition of rights and duties. For example, it would be futile to construct an account of human rights and duties without considering the wider political context the account is situated in and the values underpinning such context. It would be very difficult to explain the role a legal rule plays in a political community if it can be construed in abstract without reference to any moral values or the political context. In treating legal theory as a 'political theory',<sup>15</sup> Dworkin successfully demonstrates that an account of law has to include moral values in order to appeal to the nature of law as responding to its wider social context. Answers to questions about the content of legal rules necessarily include the network of political and moral values the account belongs to.

This is not to say, however, that the one-system picture is without critics. Robert Rodes argues that the question of the part played by moral considerations in legal *decision-making* is a legal question, while the question of what moral obligations are created by legal *dispositions* is a moral question.<sup>16</sup> Separating the two questions would not prevent one from accepting Dworkin's view of the unity of values. It is submitted, however, that such a separation of questions is artificial.

---

<sup>13</sup> *ibid* 403.

<sup>14</sup> *ibid*.

<sup>15</sup> Dworkin (n 12) 406.

<sup>16</sup> Robert Rodes, 'Justice for Hedgehogs' (2011) 56 Am J Juris 215, 221.

While moral considerations and obligations may play different roles in shaping the normative force of a legal rule, they are both manifested by the legal rule which its addressees are subject to. Morality is a necessary component of the normative force of a legal rule. Given the enactment of laws *itself* responds to wider social concerns of political rights and duties, which in turn shape people's behaviour, it would be unrealistic for an account of law to articulate its content without reflecting the concerns of its addressees and metaphysical moral values which may shape their behaviour.

The preceding analysis suggests that law must have recourse to moral considerations in elucidating its content. This gives rise to the question of the *manner* in which law conceives of its addressees. In particular, the question concerns the notion of 'obligation,' and whether it displays any necessary connection between law and morality. Hart recognises that compliance with moral and legal rules of obligation is regarded as the 'minimum contribution to social life.'<sup>17</sup> They recur constantly throughout social life. Immediately, however, he qualifies the claim by suggesting that morality can be distinguished from legal rules.<sup>18</sup> The difference can be reflected by the 'externality' of legal rules and 'internality' of morality, with the former focusing on the behaviour of their addressees only.<sup>19</sup> Such separability of moral and legal obligations is reflective of and central to Hart's thesis. However, this account misunderstands the role of morality in delineating legal obligations. Legal rules respond to the necessity to shape people's behaviour and *encourage* them to develop a sense of obligation towards rules. In doing so, legal rules shape their addressees' beliefs on moral values<sup>20</sup> by generating a sense of moral obligation in adhering to rules, eventually contributing to the well-being of the political community they belong to. Leslie Green suggests that even if the aim of collective survival is not prioritised in some legal systems, all legal systems share a common intent — they regulate things the community takes to be 'highly-stakes matters of social morality'.<sup>21</sup> It is submitted that this is an important observation in showing a necessary connection between law and morality, and that the connection focuses on *positive* morality in the sense

---

<sup>17</sup> Hart (n 3) 172.

<sup>18</sup> ibid 173.

<sup>19</sup> ibid.

<sup>20</sup> John Finnis, 'The Truth in Legal Positivism' in (n 1) 204.

<sup>21</sup> Green (n 2) 1048.

that it contributes to the moral well-being of a political community. The connection does not only depend on social facts. It is the nature of law to respond to and reflect moral concerns which a political community considers to be important for its well-being. The obligations thus generated ensure that their addressees' behaviour contributes to the well-being of the community itself. In articulating the nature of obligations, however, Hart's thesis fails to recognise the importance of law in addressing concerns of social morality: it allows legal obligations to be detached from the political and moral concerns which may shape an individual's behaviour. To generate a *sense* of obligation on the part of its addressees, it is necessary for the obligations to accord with the wider contributions it makes to the well-being of the community as a whole. Without a comprehensive normative account of obligations based on political and moral concerns, a legal system cannot respond to the respective wider political context and its underlying moral values.

A theory of law which seeks to move beyond mere lexicography must draw upon at least some of the considerations of values which are the subject matter of 'ethics'.<sup>22</sup> Tony Honoré accurately recognises that while 'moral rights' and 'moral obligations' can exist independently, their meanings are parasitic on the legal model from which they are historically derived.<sup>23</sup> Without a necessary connection between law and morality, it would be difficult for moral rights and obligations to materialise in an individual's account of behaviour and influence his attitude to rules. Such connection is important as it is necessary to appeal to moral values that are *understandable* for the law's addressees, that they can understand as members of the political community they belong to. The norms underpinning the obligations which members of the community adhere to are permeated by the moral and philosophical values of the community.<sup>24</sup> At this point, it is clear that Hart's insistence on a lack of necessary conceptual connection between law and morality is unsustainable. It lacks a final authorising origin for the reasoning about binding humanly posited norms and rules.<sup>25</sup>

---

<sup>22</sup> John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 358.

<sup>23</sup> Tony Honoré, 'The Necessary Connection between Law and Morality' (2002) 22(3) OJLS 489, 491.

<sup>24</sup> Finnis (n 22).

<sup>25</sup> William Conklin, *The Invisible Origins of Legal Positivism* (Kluwer Academic 2001), 313.

### The inability of the separability thesis to explain the construction of the point of view of participants in a legal system

So far it has been discussed that as a normative issue, Hart's thesis is inadequate in reflecting the complexities of the relationship between law and morality. This section changes the focus to the point of view of a participant in a legal system. In particular, it analyses Hart's conception of the 'internal point of view.' For Hart, the internal point of view is a methodological injunction to 'capture the way in which that action, practice or institution is understood by those whose patterns of behaviour and thought constitute that action, practice or institution.'<sup>26</sup> No explanation of human behaviour which omits subjective reasons for which it is performed can be an adequate one.<sup>27</sup> Such explanation would fail to explain the adherence to rules from the addressee's perspective. In the following analysis, it is argued that the selection of the internal point of view exemplifies a necessary conceptual connection between law and morality. In particular, John Finnis' criticism of the account deserves attention as it argues that the selection is a matter of moral evaluation, which clashes against Hart's thesis' claim that law and morality are separable.

Hart defines the internal point of view as 'the view of those who do not merely record and predict their behaviour conforming to rules but see the rules as standards for the appraisal of their own and others' behaviour'.<sup>28</sup> It is a 'hermeneutic concept'<sup>29</sup> in understanding people's behaviour and the reasons for their adherence to rules. There can be, Hart acknowledges, a wide variety of reasons as to why one decides to adopt the authority of a system; it is not a dichotomy of acceptance based on coercive power or moral reasons.<sup>30</sup> In order to attribute a central role to some particular feature in the description of a legal rule, it would be necessary to select a particular point of view. On Hart's account of the separability of law and morals, this appears logical; there can be both moral and non-moral considerations in people's adherence to a rule. However, Hart failed to elucidate the methodology and reason(s) in selecting a particular

<sup>26</sup> William Lucy, *Philosophy of Private Law* (OUP 2006) 272.

<sup>27</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP 1994) 6.

<sup>28</sup> Hart (n 3) 98.

<sup>29</sup> Brian Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' (2003) 48 Am J Juris 17, 41.

<sup>30</sup> Hart (n 3) 203.

viewpoint. Finnis argues that Hart does not attribute significance to the differences that any participant would count as practically significant; his focus on the selected viewpoint is ‘arbitrary’.<sup>31</sup> This reveals an important problem within the account: the selection of viewpoint is an *evaluative* exercise. The fact that a theorist chooses a particular viewpoint over another suggests that the former matters more than the latter. This threatens the moral neutrality Hart believes his account can sustain as it is possible for the evaluation to be based only on moral grounds.

However, the flaw of the internal point of view runs deeper than an issue of arbitrariness. The fundamental problem with the account is that the *methodology* of selection displays a necessary conceptual connection between law and morality. Finnis, in criticising Hart for failing to clarify the basis of selection of the internal point of view, argues that the central case viewpoint a legal theorist adopts necessarily treats legal obligation as ‘presumptively a moral obligation’.<sup>32</sup> The selection of *the* viewpoint is necessarily a kind of moral evaluation. The viewpoint of participants of ‘practical reasonableness’<sup>33</sup> should be adopted in constructing a *central viewpoint* and case of adherence to a legal rule. The central viewpoint is, together with practical reasonableness, also the viewpoint of those that are practically reasonable: people who are attentive to ‘all aspects of human opportunity and flourishing, and aware of their limited commensurability’.<sup>34</sup> This criticism is detrimental to the sustainability of Hart’s thesis as Hart’s construction of the internal point of view is not meant to be morally evaluative. If we select a viewpoint that does not matter to human practice, it would make no sense for a legal theorist to provide such account in the first place. In articulating an account of adherence to a rule, it is necessary to ensure its integrity by selecting *the* viewpoint which relates to its enactment in the first place. For example, it would make no sense for a theorist to explain a driver’s attitude in stopping in front of a red traffic light by using the viewpoint ‘because I like the colour red and therefore, I stop my vehicle to appreciate it’. In order to provide an adequate account of people’s adherence to a legal rule in a political community, the theorist

---

<sup>31</sup> Finnis (n 22) 13.

<sup>32</sup> ibid 14.

<sup>33</sup> Finnis (n 22) 11. ‘Practical reasonableness’ is defined by Finnis as: ‘Reasonableness in deciding, in adopting commitments, in choosing and executing projects, and general in acting.’

<sup>34</sup> ibid 15.

would select an account that is relevant to the original intention of the rule, for example ‘because if I drive through the red light, I might harm other road users’. This attitude is different from the former because it displays respect from one to another in adhering to rules. This is, of course, only one of the many moral reasons a theorist may select. If a rule, as Hart believes, is to govern people’s behaviour, the viewpoint selected should reflect the reasons why the rule exists in the first place. The reasons themselves, moreover, have to be reasons that *matter*. The selection of the viewpoint, in light of the given context of the rule and its nature, is thus a moral approval of attitude.

While Finnis’ methodological criticism of Hart’s account reveals that the formation of the internal point of view is moral evaluation in disguise, it is challengeable whether it is a matter of judgement in the first place. Following that, it is also questionable whether law and morals are necessarily connected in the aforementioned selection process. In dissecting Finnis’ challenge against Hart’s methodological account, Julie Dickson argues that a proposition concerning law, for example ‘X is an important feature of the law’<sup>35</sup> does not necessarily have to engage in moral evaluation in marking out an issue as morally good or bad. It is only ‘indirectly evaluative’ of the law.<sup>36</sup> A legal theorist is only ‘picking out’<sup>37</sup> the existence of the law’s claim, *as perceived by its addressees*, as important. Dickson’s indirectly evaluative theory thus seeks a ‘conceptual space’<sup>38</sup> between Hart’s and Finnis’ methodological accounts. However, Dickson failed to recognise that in ‘picking out’ the existence of such a claim and labelling it as ‘important’ to a rule, the legal theorist is refusing to acknowledge that non-selected claims about other features of law may also be important. In Dickson’s account, the theorist is also not providing any reason as to why such a claim is ‘important’ and is thus selected. Thus, her account suffers from a similar mistake which Hart is accused of: the ‘picking out’ of a claim about law as important is an evaluative, but not descriptive, exercise.

More problematically, Dickson’s account also displays a necessary conceptual connection between law and morality. This is caused by her selection of a claim,

---

<sup>35</sup> Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) 53.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid* 55.

<sup>38</sup> Leiter (n 29) 43.

as perceived by participants when explaining their adherence to a legal rule, as ‘important.’ The selection of a claim about a feature of the rule in question as ‘important’ implies that the legal theorist is choosing that claim, together with the reason(s) underlying it, as material for giving an account of people’s adherence towards the rule. It is because it would be futile for the legal theorist to pick a view arbitrarily and claim it is ‘important.’ The selected point of view is suggestive of what constitutes as ‘important’ reason(s) to the rule’s addressees when they adhere towards it. The selected feature of the rule is thus important, as perceived by the participants and *approved* by the legal theorist, to the participants’ political community in terms of its well-being. The theorist’s account is representative of the material reason from which people justify their adherence to the rule in question. Therefore, Dickson’s methodology is only moral evaluation in disguise. In providing an adequate account of attitude to rules based on participants’ point of view, the methodological process necessarily involves moral approval in selecting an ‘important’ viewpoint. It selects the feature that matters to the rule’s addressees as participants of the legal system and the wider political community. The selection of the point of view which is constitutive of the account of adherence to the rule thus displays a necessary conceptual connection between law and morality.

### **Why the separability thesis is still important**

While Hart’s thesis is inadequate in both normative and methodological aspects, any judgements as to its wholesale invalidity would be ‘premature.’<sup>39</sup> Questions surrounding law are not necessarily always associated with morality. In light of the criticisms above, one question remains: is Hart’s thesis still a central conundrum of contemporary legal philosophy? Yes, it is, and it should be. Hart’s thesis allows legal theorists to explore the scope of potential theoretical disagreement about, *inter alia*, the nature and source of legal obligation, and the nature of legal norms as illustrated by descriptive jurisprudence. Such flexibility is important because jurisprudence, as a branch of social science, should allow legal theorists to uncover and provide accounts of patterns of social behaviour and normative forces underlying the operation of a legal system. It is not necessarily true that one can only defend a descriptive jurisprudence if he has a view about

---

<sup>39</sup> Füßer (n 1) 118.

law that is morally neutral or indifferent.

As a matter of engaging in ‘descriptive sociology’,<sup>40</sup> a legal theorist can understand more about people’s adherence to rules and the variety of concerns they may have. It also allows one to explore the potential non-moral concerns a political community may have in maintaining its existence and well-being, and the law’s responses to them. The background of a descriptive theory about the nature of law, for example a moral or political background emphasising the need to uphold moral values, while assisting a theorist to get a better sense of the content of the theory, does not necessarily bear on its truth.<sup>41</sup> In order to provide a fecund conceptual space where law can freely engage with different social and philosophical concerns, it is desirable for legal philosophy to maintain law as an independent philosophical enterprise. Hart’s thesis, it is submitted, provides such a platform. To completely disavow the thesis would mean ignoring its appeal in succinctly treating law as a self-contained and logical discipline.<sup>42</sup>

### Conclusion

Although a comprehensive review of the criticisms against Hart’s separability thesis cannot be carried out in the limited space of this essay, it has shown that the thesis is erroneous on both normative and methodological grounds regarding the relationship between law and morality. In claiming there is no necessary conceptual connection between law and morality beyond the ‘minimum content of natural law,’ the thesis has failed to recognise the nature of law as an instrument for shaping people’s conduct and responding to social and political concerns. It also fails to recognise the necessary connection between law and morality when a theorist gives an account of people’s behaviour under a legal rule from their perspective. That being said, one should not deny completely its importance in contemporary jurisprudence. As a matter of elucidating the relationship between law and different social and philosophical concerns, Hart’s thesis remains a fecund concept in understanding people’s behaviour in adherence to rules and the norms of a legal system.

---

<sup>40</sup> Hart (n 3) vi.

<sup>41</sup> Andrei Marmor, ‘Legal Positivism: Still Descriptive and Morally Neutral’ (2006) 26(4) OJLS 683, 692.

<sup>42</sup> (n 4) 352.

# Women, Peace, and Security and Nationality Laws in the Syrian Conflict

María del Rosario Grimà Algora\*

---

## ABSTRACT

*The right to nationality is enshrined in the Universal Declaration of Human Rights and various international and regional human rights treaties, including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the European Convention on Nationality. Nationality provides a link to a specific state, and, more importantly, it constitutes the condition sine qua non for the deployment of an array of human rights. Yet, states are unwilling to fully defer to international law the determination of the right to a nationality. This, in combination with gender-based discrimination in nationality laws, can strip individuals their right to a nationality. In the case of Syria, women cannot pass on their nationality to their children born in exile, creating a generation of stateless children. This paper analyses how the Women, Peace and Security (WPS) agenda of the Security Council offers a solution to this problem and to challenge Syrian nationality laws. WPS provides a gender perspective and a human rights approach to conflict and post-conflict situations, including displacement. Nationality rights are only merely tackled in the WPS resolutions. Nonetheless, WPS is a strong tool to address the issue of statelessness created by the intersection of gender discriminatory laws, displacement, and an incomplete human rights framework.*

## INTRODUCTION

“As a woman, I have no country. As a woman I want no country.

As a woman my country is the whole world”<sup>1</sup>

The Syrian conflict has recently passed its seventh year. After several rounds of peace negotiations, it has been impossible to reach an agreement, intensifying the scepticism as to how to solve this conflict in the shortcoming future. This conflict

---

\* LLM in Human Rights Law (LSE) ‘17. I would like to thank Louise Arimatsu for her feedback on an earlier draft.

<sup>1</sup> Virginia Woolf, *Three Guineas* (Blackwell Publishing 2001) 99.

has forced over 5.6 million people to flee the country and seek refuge, mostly in neighbouring states.<sup>2</sup> It is estimated that around 6.6 million Syrians are internally displaced,<sup>3</sup> making Syria both the country with the largest internally displaced population in the world<sup>4</sup> and the principal country emitting refugees.<sup>5</sup> The massive exodus of Syrians has exacerbated the creation of statelessness. The intersection between gender discriminatory Syrian nationality laws that do not grant equal rights to men and women in transferring their nationality to their children and massive international displacement is creating a generation of stateless children born in exile.<sup>6</sup> This poses additional problems to the conflict that must be addressed in a pertinent peace agreement.

Since 2011, over 300,000 Syrian children have been born in exile.<sup>7</sup> Due to the high casualty rate and forcible separation, the UN estimates that around a quarter of Syrian refugees are female-headed households.<sup>8</sup> Discriminatory gender nationality laws exacerbate the creation of statelessness, especially when taken in conjunction with the existing difficulties in registering the birth of children in host countries; the lack of marriage certificates that some countries require for determining the identity of the child's legal father or, more generally, the difficulty in documenting the connection of a child with a Syrian father.<sup>9</sup>

---

<sup>2</sup> UNHCR, 'Syria Emergency' <<http://www.unhcr.org/uk/syria-emergency.html>> accessed 30 December 2018.

<sup>3</sup> *ibid*.

<sup>4</sup> UNHCR, 'Syria. Internally Displaced People' <<http://www.unhcr.org/sy/29-internally-displaced-people.html>> accessed 30 December 2018.

<sup>5</sup> UNHCR, 'Figures at a Glance' <<http://www.unhcr.org/figures-at-a-glance.html>> accessed 30 December 2018.

<sup>6</sup> Louise Osborne and Ruby Russell, 'Refugee crisis creates 'stateless generation' of children in limbo' *The Guardian* (Berlin and Antakya, 27 December 2015)

<<https://www.theguardian.com/world/2015/dec/27/refugee-crisis-creating-stateless-generation-children-experts-warn>> accessed 15 June 2017.

<sup>7</sup> Zahra Albarazi and Laura van Waas, 'Understanding statelessness in the Syria refugee context' (2016) Norwegian Refugee Council <<http://www.syrianationality.org/pdf/report.pdf>> accessed 30 December 2018.

<sup>8</sup> Radhika Coomaraswamy, 'Preventing Conflict, Transforming Justice, Securing Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325' (*UN Women* 2015) 84 <[http://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20\(1\).pdf](http://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20(1).pdf)> accessed 20 January 2017.

<sup>9</sup> Albarazi and van Waas (n 7) 7.

The existing human rights framework seems to be unable to adequately solve this problem. Although there are two Conventions on Statelessness, and various international and regional treaties that provide for the right to nationality, states are unwilling to fully defer the determination of peoples' nationality to international law. There is a recognition of the human right to a nationality, but not to any nationality in particular. There is an obligation to avoid statelessness, but few guidelines for its fulfilment. There is the principle of gender equality, but it is easily avoided through reservations. The new generation of Syrian stateless children are enclosed in this limbo. The United Nations High Commissioner for Refugees (UNHCR) has clearly stated that '[e]nsuring gender equality in nationality laws can mitigate the risk of statelessness'.<sup>10</sup> The reforms to incorporate gender equality can often be achieved merely through small changes to the formulation of the laws.<sup>11</sup> However, political will is needed in order to adequately address this problem. For this reason, it is paramount to turn to other frameworks.

The Women, Peace and Security (WPS) agenda of the UN Security Council (UNSC) provides a promising opportunity to address the lack of political will and to challenge Syrian nationality laws. WPS provides a platform to include women's issues in peace and security. With regards to peace-building, it calls attention to women's oppression and marginalisation and includes 'gender-aware and women-empowering political, social, economic and human rights'.<sup>12</sup> It also encourages the promotion of equality, justice and human rights to achieve a sustainable peace.<sup>13</sup>

Therefore, this paper seeks to address the current problem of statelessness caused by gender discriminatory nationality laws through the lens of the WPS agenda. I argue that an adequate implementation of this agenda calls for the inclusion of a clause in a pertinent peace agreement compelling Syria to modify its current nationality laws. By supporting this, the international community will

---

<sup>10</sup> UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness' (2016) <<http://www.refworld.org/docid/56de83ca4.html>> accessed 10 June 2017.

<sup>11</sup> ibid.

<sup>12</sup> Susan McKay, 'Women, Human Security, and Peace-building: A Feminist Analysis' in Shinoda Hideaki and How-Won Jeong (eds), *Conflict and Human Security: A Search for New Approaches of Peace Building* (Hiroshima University-IPSHU 2004) 167.

<sup>13</sup> ibid.

meet its international obligation of reducing statelessness, while, at the same time, fulfilling the goals of the WPS. In Part II, this paper focuses on the philosophical and moral aspects of the right to a nationality. In Part III, this contribution analyses the legal framework of statelessness and the right to a nationality. Finally, in Part IV, this paper examines how the WPS agenda can contribute to advance Syrian women's right to pass their nationality to their children by advocating for the inclusion of this right in the forthcoming Syrian peace agreement.

## II. THE PARADOX OF HUMAN RIGHTS

The fundamental premise underlying human rights law is that human rights apply universally to every individual, without distinction of any kind. Nationality constitutes one of the non-discriminatory grounds enumerated in Article 2 of the Universal Declaration of Human Rights (UDHR).<sup>14</sup> Yet, the legal bound to a specific state is still conceived as the essential prerequisite for an effective enjoyment and protection of the full range of human rights.<sup>15</sup> Nationality is thus a 'gateway to other rights'.<sup>16</sup> Ironically, nationality also serves as a means of exclusion from these 'universal' human rights. Aliens or non-citizens are not entitled to the same rights as nationals. Despite the tendency towards the 'denationalisation' of human rights, aliens are still considered second-class individuals who do not have the full capability of enjoying the same rights and freedoms as nationals.

### The current dependence on nationality

Hannah Arendt, in *The Origins of Totalitarianism*, wrote about the plights of the stateless population, describing them as 'rightless', following the mass denaturalisations which took place in the inter-war period and the Nazi era. Human rights, allegedly inalienable, were stripped from these people at the same moment as their nationality was taken away from them.<sup>17</sup> She criticised the

---

<sup>14</sup> Universal Declaration of Human Rights, UNGA res 217A (III), 10 Dec 1948.

<sup>15</sup> Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27(3) Refugee Survey Quarterly 93, 94.

<sup>16</sup> Matthew Gibney, 'Statelessness and the right to citizenship' (2009) 32 Forced Migration Review 50.

<sup>17</sup> Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanich College Pub 1973) 295-296.

inconsistency between the inalienable nature of human rights and, at the same time, their dependency upon a person having a link with a community.<sup>18</sup> The paradox involved in the loss of human rights is that:

such loss coincides with the instant when a person becomes a human being in general – without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself – and different in general, representing nothing by his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.<sup>19</sup>

In essence, human rights ‘are held and protected by virtue of membership to a political community’.<sup>20</sup> Therefore, the subject of the rights becomes the national or the citizen rather than the human and leaves in an extremely vulnerable situation those who lack a link with a sovereign state: they are *rightless*. This inconsistency is grounded in the fact that the human rights framework has determined the state as the community where human rights are to be enjoyed and protected, making human rights dependent on, rather than independent from, the government.<sup>21</sup> As a consequence, Arendt concluded on the existence of a ‘right to have rights’ (to live, in the framework of a community) and a right to belong to some kind of organised community.<sup>22</sup> She compared the deprivation of nationality with the expulsion of that person from humanity. The loss of nationality entailed, in all instances, the loss of human rights and, conversely, the fact that human rights could only be achieved through the restoration of or the establishment of nationality rights.<sup>23</sup>

This criticism is paramount to understanding the contradictions in the human rights framework created by the principle of universality and the protection of the territorial sovereignty of states.<sup>24</sup> Arendt considered that the morality underpinning the obligations that humans owe to each other is the

---

<sup>18</sup> ibid 299.

<sup>19</sup> ibid 302.

<sup>20</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (OUP 2012) 90.

<sup>21</sup> ibid 55.

<sup>22</sup> Arendt (n 17) 296.

<sup>23</sup> ibid 299.

<sup>24</sup> Seyla Benhabib, *Los Derechos de los Otros. Extranjeros, Residentes y Ciudadanos* (Gedisa 2004) 19-20.

obligation not to deny membership to a community.<sup>25</sup> Yet, this is incompatible with the idea of a nation-state and their sovereignty to determine the members belonging to its community. For this reason, international law has always been very cautious of intervening in issues of citizenship and the ways in which states determine the boundaries of their membership.<sup>26</sup>

On another note, Benhabib highlights that the same act of inclusion will always generate exclusion.<sup>27</sup> The systems of nation-states will always carry the injustice of domestic exclusion and aggression of the foreigner.<sup>28</sup> She considers that it is not possible to get around this paradox of membership. Human rights are thus intrinsically exclusive due to their dependency on a nation. Arendt tried to resolve this problem by proposing the idea of a civic and not an ethnic membership. In contemporary terms, this would mean a broader acceptance of *jus soli* as a means for the acquisition of nationality.<sup>29</sup>

The influence that national borders have in securing rights, while at the same time excluding people from those rights, has led some scholars to reflect upon them and advocate for a world of open borders. For instance, Gibney notes that nationality does not always secure people the protection of their rights: the country into which a person is born into citizenship is sometimes almost as important as having citizenship. For this reason, he calls to imagine a world without borders.<sup>30</sup> Nonetheless, others, such as Arendt and Benhabib are more sceptical on the possibility of a global government.<sup>31</sup> The paradox between universal human rights and national sovereignty seems irreconcilable but, at the same time, the eradication of borders is not conceived as a genuine solution.

---

<sup>25</sup> *ibid* 50–51.

<sup>26</sup> Peter Spiro, ‘A New International Law of Citizenship’ (2011) 105 *American Journal of International Law* 694.

<sup>27</sup> Benhabib (n 24) 57.

<sup>28</sup> *ibid* 53.

<sup>29</sup> *ibid* 52–53.

<sup>30</sup> Mathew Gibney, ‘Statelessness and Citizenship in Ethical and Political Perspective’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014).

<sup>31</sup> Benhabib (n 24) 53, 156.

## Towards the denationalisation of human rights?

In the ensuing years, Arendt's concept of the 'right to have rights' has been framed in terms of the right to a nationality.<sup>32</sup> The context within which she wrote has significantly changed, with the development of international human rights laws and the widening of rights to non-nationals. International human rights law has changed the position of the individual in international law and, with the inclusion of the right to a nationality in the UDHR, the idea of the power to determine nationality as being a state's absolute right has shifted. Similarly, globalisation and supranational institutions have created an international project that has influenced the traditional concepts of nationality.<sup>33</sup> For instance, the European Union (EU) constitutes an example of 'post-national citizenship', where European citizenship is no longer circumscribed to a nation-state but is defined by its transnational character.<sup>34</sup> EU citizenship blurs or transcends nationality, although it is limited to EU nationals and does not apply to non-EU residents, which consequently reinforces the logic of nationality as an allocative principle.<sup>35</sup> As Rubenstein concludes, 'in the post-national world, nationality maintains its relevance but the (...) superiority of nationality (...) should be and is being challenged'.<sup>36</sup>

The changes to the idea of citizenship have been paired with the denationalisation of human rights. This trend was underscored by Judge Cançado Trindade in a separate opinion in the case *Yean and Bosico v Dominican Republic*, where he noted that:

With the passage of time, it became evident that the nationality regime was not always sufficient to provide protection under any of stateless persons). Throughout the twentieth century and to date, international human rights law has sought to remedy this deficiency or vacuum, by

---

<sup>32</sup> Kesby (n 20) 40.

<sup>33</sup> Saskia Sassen, 'Towards Post-National and Denationalized Citizenship' in Egin Isin and Bryan Turner (eds) *Handbook of Citizenship Studies* (SAGE 2002).

<sup>34</sup> *ibid* 282.

<sup>35</sup> Gerald Neuman, 'The resilience of Nationality' (2007) American Society of International Law 97.

<sup>36</sup> Kim Rubenstein, 'Rethinking Nationality in International Law' (2007) American Society of International Law 99, 102.

denationalising the protection (and thus including every individual, even stateless persons).<sup>37</sup>

However, the denationalisation of the protection is not yet complete.<sup>38</sup> Human rights still permit the differentiation in treatment between citizens and non-citizens. This is visible in some rights, such as the right to vote, which is limited to ‘every citizen’ in contrast to ‘every person’; or other rights associated with a nationality such as the right to leave one’s ‘own country’ or the right to reside in the territory of one’s nationality. Today, the possession of a nationality is almost always necessary for ensuring an adequate protection of human rights in the contemporary world.<sup>39</sup> The Committee of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has noted that ‘while human rights are to be enjoyed by everyone, regardless of nationality status, in practice nationality is frequently a prerequisite for the enjoyment of basic human rights’.<sup>40</sup>

The universality of human rights appears only once the individual has fulfilled the requirement of acquiring a nationality. Therefore, ‘[t]he national subsumes the human such that to cease to be a national is to cease to hold human rights: the national is the subject of rights’.<sup>41</sup> Nationality is still critical to ensure the full participation in society.<sup>42</sup> This makes people without a nationality, the stateless, extremely vulnerable and politically, socially and culturally marginalised.

In sum, the deployment of human rights has been linked to the existence of a nationality. The state was only responsible for ensuring and protecting its own nationals. Despite a movement towards the de-nationalization of human rights, notably through the extension of the ‘universality’ of human rights to

---

<sup>37</sup> Inter-American Court of Human Rights (IACtHR) Series C no 130 (8 Sept 2005).

<sup>38</sup> Mark Manly and Laura van Waas, ‘The Value of the Human Security Framework in Addressing Statelessness’ in Alice Edwards and Carla Ferstman (eds) *Human Security and Non-Citizens. Law, Policy and International Affairs* 67.

<sup>39</sup> Gibney (n 30) 62.

<sup>40</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), ‘General Recommendation No 32 on the Gender-related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women’, UN doc CEDAW/C/GC/32, 5 Nov 2014 para 51.

<sup>41</sup> Kesby (n 20) 66.

<sup>42</sup> CEDAW, ‘General Recommendation No 21 on Equality in Marriage and Family Relations’, UN Doc A/49/38, Thirteenth Session 1994.

protect aliens and stateless in some cases, statelessness continues to put individuals in an extremely vulnerable position. Nationality, the 'right to have rights', is still paramount. Therefore, ensuring that individuals have a nationality through legal and political actions is essential for the full enjoyment of a range of human rights.

### III. THE LEGAL FRAMEWORK

#### Nationality as a domestic issue

Nationality, as an international law concept, is described as the link between an individual and a sovereign state through which the individual is afforded international protection by that state in relation to other sovereign states.<sup>43</sup> Initially, nationality was conceived as a prerogative of the state: it is the state's right to determine which citizens will be afforded its nationality. With the development of human rights law, limits have been posed to the discretion of states on this issue. Yet, it remains a fundamental bastion of state sovereignty.

In the Advisory Opinion of *Nationality Decrees in Tunis and Morocco*, the Permanent Court of International Justice determined that nationality is a domain reserved to municipal law but it 'depends upon the developments of international relations'.<sup>44</sup> Therefore, it was left open the possibility of international law imposing limits on nationality matters.<sup>45</sup> The International Court of Justice (ICJ), in *Nottebohm*, further reiterated this idea: 'international law leaves it to each State to lay down the rules governing the grant of its own nationality'.<sup>46</sup>

The rise of human rights has managed to erode state's sovereignty on this issue.<sup>47</sup> In 1984, in the Advisory Opinion on *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, the Inter-American Court of

---

<sup>43</sup> Beate Rudolf, Marsha Freeman and Christine Chinkin, *The UN Convention on the Elimination of all Forms of Discrimination Against Women: a Commentary* (OUP 2012) 233.

<sup>44</sup> Advisory Opinion [1923] PCIJ Series B No 4 [24].

<sup>45</sup> Anne Bayefsky (ed) *Statelessness, Human Rights and Gender. Irregular Migrant Workers from Burma in Thailand* (Koninklijke Brill NV 2005) 22.

<sup>46</sup> Judgment [1955] ICJ Rep 1955, 4.

<sup>47</sup> Bayefsky (n 45).

Human Rights elaborated on the limits of state's sovereignty from a human rights perspective. It held that nationality is 'an inherent right of all human beings' and that 'despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits' and that the 'powers of the state are also circumscribed by their obligations to ensure the full protection of human rights'.<sup>48</sup>

### The UN Conventions on Statelessness

Following the mass denaturalisations and expulsions following the Second World War, states were forced to develop principles to avoid statelessness.<sup>49</sup> Hence, the 1954 Convention Relating to the Status of Stateless Persons<sup>50</sup> and the 1961 Convention on the Reduction of Statelessness<sup>51</sup> were created. These constitute the foundation of the international legal framework to address statelessness.<sup>52</sup> Unfortunately, both are poorly ratified: the 1954 Convention has 89 states parties<sup>53</sup> and the 1961 Convention only 68.<sup>54</sup>

The 1954 Convention's aim is to guarantee the enjoyment by stateless persons of a minimum set of civil, economic, political and cultural rights. Article 1 defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. This definition has been recognised as part of customary international law.<sup>55</sup> A person fulfilling this definition is referred

---

<sup>48</sup> Advisory Opinion OC-4/84, IACtHR (19 January 1984) [32].

<sup>49</sup> Bayefsky (n 45) 20.

<sup>50</sup> Convention Relating to the Status of Stateless Persons (adopted 28 Sept 1954, entered into force 6 June 1960) 189 UNTS 175.

<sup>51</sup> Convention on the Reduction of Stateless Persons (adopted 30 August 1961, entered into force 13 Dec 1975) 989 UNTS 175.

<sup>52</sup> Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 8(4) International Journal of Refugee Law 564, 566.

<sup>53</sup> UN Treaty Collection. 1954 Convention

<[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V3&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V3&chapter=5&Temp=mtdsg2&clang=_en)> accessed 15 June 2017.

<sup>54</sup> UN Treaty Collection. 1961 Convention

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=V-4&chapter=5&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en)> accessed 15 June 2017.

<sup>55</sup> International Law Commission, 'Report of the International Law Commission: Fifty-Eight Session', UN doc A/61/10, 1 Oct 2006, 48-49.

to as *de jure* stateless. The concept of *de facto* stateless has also emerged to describe a situation where, although a person formally holds a nationality, the nationality lacks effectiveness. However, there is no international consensus on the definition of *de facto* statelessness, nor a treaty addressing this issue.<sup>56</sup> Importantly, the Convention does not require state parties to grant their nationality to stateless persons, although it contains a weak provision that solely calls to facilitate ‘as far as possible the naturalisation of stateless persons’.<sup>57</sup>

The 1961 Convention addresses the principal causes of statelessness. It provides safeguards with respect to three broad contexts: a) the acquisition of an original nationality at birth, including foundling (Articles 1 to 4); b) loss, deprivation or renunciation of nationality later in life (Articles 5 to 9); and c) in relation to state succession (Article 10).<sup>58</sup> It exemplifies the unwillingness of states to defer their sovereignty in relation to nationality matters: they solely agreed on ‘reducing’ statelessness, rather than ‘eradicating’ or ‘eliminating’ it. As van Waas notes, it falls short of prescribing obligations that would decisively eliminate statelessness in all circumstances.<sup>59</sup> In other words, it does not recognise a general right of an individual to a nationality.<sup>60</sup>

Nevertheless, it constitutes an important step as it imposes positive obligations on states to grant nationality in certain circumstances (in contrast with the negative obligations of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Law).<sup>61</sup> Article 1 provides that nationality shall be granted to a person born in the state’s territory who would otherwise be stateless (therefore, the obligation is only for new-borns and not for those who are already stateless). However, this obligation is immediately limited by provisos contained in the article’s subparagraphs. Thus, states are allowed to determine whether the acquisition of nationality is *ex lege* or based on an application. In the latter scenario, states can further reduce their obligation by imposing the conditions (of

<sup>56</sup> Sophie Nonnenmacher and Ryszard Cholewinski, ‘The nexus between statelessness and migration’ in Edwards, *Nationality* (n 30) 249.

<sup>57</sup> 1954 Convention, art 32.

<sup>58</sup> Laura van Waas, ‘The UN Statelessness Conventions’ in Edwards, *Nationality* (n 30) 74–75.

<sup>59</sup> *ibid.*

<sup>60</sup> Foster (n 53) 567.

<sup>61</sup> Guy Goodwin-Gill, ‘Convention on the Reduction of Statelessness’ (UN Audio-visual Library of International Law 2011) <[http://legal.un.org/avl/pdf/ha/crs\\_e.pdf](http://legal.un.org/avl/pdf/ha/crs_e.pdf)> accessed 10 June 2017.

exhaustive character) listed in Article 1(2) such as age, habitual residence, criminal conviction and that the person concerned ‘has always been stateless’.

### **Human rights treaties**

The UN Conventions on Statelessness are poorly ratified and lack adequate implementation and enforcement mechanisms.<sup>62</sup> This leaves a vast number of stateless persons unprotected in countries that have not ratified the conventions.<sup>63</sup> It is here where other human rights treaties step in to address these deficiencies. The principal tools to deal with statelessness in human rights law are the right to a nationality, the prohibition of discrimination, the right of registration at birth and the prohibition of arbitrary deprivation of nationality.<sup>64</sup> This paper only focuses on the first two tools.

#### *The right to a nationality*

The Human Rights Council (HRC) has reiterated in numerous occasions that the right to a nationality is a fundamental right.<sup>65</sup> However, this assertion cannot be viewed as a statement of customary international law.<sup>66</sup> International human rights law does not explicitly impose a positive obligation on states to grant their nationality to stateless persons. Article 15 of the UDHR enshrines the right to a nationality. Yet it is a weak provision, as it does not ‘indicate which nationality a person may have a right to, nor which state has the obligation to grant it’.<sup>67</sup> The same weakness is present in other binding documents. Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) recognises the right of every child to acquire a nationality.<sup>68</sup> This article distances itself from the

---

<sup>62</sup> Foster (n 52) 567.

<sup>63</sup> Paul Weiss, ‘The Convention Relating to the Status of Stateless Persons’ (1961) 10 International and Comparative Law Quarterly 255, 264.

<sup>64</sup> Manly and van Waas (n 38) 60.

<sup>65</sup> See for instance UNHRC, ‘Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General’, UN doc A/HRC/25/28, 19 Dec 2013.

<sup>66</sup> Christine Chinkin and Karen Knop, ‘Remembering Chrystal Macmillan: Women’s Equality and Nationality in International Law’ (2000-20001) 22 Michigan Journal of International Law 523, 563.

<sup>67</sup> Gerard-René de Groot, ‘Children, their Right to a Nationality and Child Statelessness’ in Edwards, *Nationality* (n 30) 145.

<sup>68</sup> International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171.

general assertion of the right to nationality of the UDHR and, ‘[d]ue to “complexities” of the issues involved’, it was circumscribed to children.<sup>69</sup> Article 7(1) of the Convention of the Rights of the Child (CRC) determines that children ‘shall be registered immediately after birth’ and recognises their right to acquire a nationality.<sup>70</sup> Article 7(2) contains an important safeguard against child statelessness. Thus, these treaties articulate the right of a child to a nationality and impose a positive obligation on states to implement the provisions before the child has reached the age of majority. Read in conjunction with the obligation to register every child after birth provided by Article 24(2) CRC, it means that early conferral of nationality is expected.<sup>71</sup> However, neither the ICCPR nor the CRC establish an unqualified obligation: they do not indicate which nationality a child may have right to, nor do they guarantee that the nationality is acquired at birth.<sup>72</sup>

There have also been regional initiatives on the law of statelessness. The American Convention on Human Rights imposes the obligation on states to grant nationality on the basis of *jus soli* to children that would otherwise be stateless.<sup>73</sup> The Covenant on the Rights of the Child in Islam also establishes that every child shall have his/her nationality determined from birth.<sup>74</sup> The African Charter on the Rights and Welfare of the Child enshrines the right of a child to a nationality and obliges states to grant nationality based on *jus soli* to children that would otherwise be stateless.<sup>75</sup> A similar provision is found in the European Convention on Nationality (ECN), although the granting of nationality may be conditioned by a lawful and habitual residence.<sup>76</sup> The ECN imposes that nationality has to be given to a child otherwise stateless within a period of five years (limiting the period of 18 years given by the 1961 Convention). Furthermore, it does not permit the

---

<sup>69</sup> Kesby (n 20) 48.

<sup>70</sup> Convention on the Rights of the Child (adopted 20 Nov 1989, entered into force 2 Sept 1990) 1577 UNTS 3.

<sup>71</sup> Groot (n 67) 145.

<sup>72</sup> *ibid* 146.

<sup>73</sup> American Convention on Human Rights (adopted 22 Nov 1969, entered into force 18 July 1978) 1144 UNTS 144, art 20.

<sup>74</sup> Covenant on the Rights of the Child in Islam (adopted June 2005) OIC/9-IGGE/HRI/2004/Rep.Final, art 7(1).

<sup>75</sup> African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, into force 29 Nov 1999) OAU Doc. CAB/LEG/24.9.49, art 6(4).

<sup>76</sup> European Convention on Nationality (adopted 6 Nov 1997, entered into force 1 Mar 2000) ETS 166, art 6(2).

denegation of nationality on the basis of some specific crimes. In conclusion, the regional conventions are stricter than the 1961 Convention, reflecting on the development of the prohibition of statelessness under international law.<sup>77</sup>

*Principle of non-discrimination*

The UN Stateless Conventions do not contain a special protection with regard to discrimination based on gender or sex. Yet, international and regional human rights treaties contain the principle of non-discrimination. In the first place, Article 2 of the UDHR prohibits discrimination on the basis of sex. Read in conjunction with Article 15, it could be argued that it prohibits discrimination based on sex in nationality laws.<sup>78</sup> The ICCPR provides that states should ensure the equal enjoyment of civil and political rights to men and women (Article 3). It also establishes the principle of equality before the law, without discrimination on grounds of sex, and imposes the obligation to guarantee to every person an equal and effective protection against discrimination (Article 26). The HRC has explained that Article 26 constitutes an autonomous right to equality and it is not limited to the rights enshrined in the ICCPR.<sup>79</sup> It also determined that a discriminatory intention is not necessary to breach this article and that discrimination can be both direct and indirect.<sup>80</sup> Finally, it established that equality does not always mean identical treatment.<sup>81</sup> Furthermore, the provisions of the right to nationality (Articles 7 and 8), non-discrimination (Article 2) and best-interest of the child (Article 3(1)) of the CRC have to be read in conjunction in order to conclude that the child should have equal access to the nationality of his/her mother and father.<sup>82</sup>

---

<sup>77</sup> Groot (n 67) 155.

<sup>78</sup> Chinkin and Knop (n 66) 579.

<sup>79</sup> UNHRC, General Comment No 8: Article 9 (Right to Liberty and Security of Persons) UN Doc. CCPR/C/21/Rev.1/Add. 1, 21 Nov 1989.

<sup>80</sup> ibid.

<sup>81</sup> ibid.

<sup>82</sup> Groot (n 67) 147.

The most specific and complete treaty regarding the principle of non-discrimination on the grounds of sex is the CEDAW,<sup>83</sup> which complements and reinforces the international protection regimes relating to stateless.<sup>84</sup> It is an anti-discrimination treaty which contains a broader definition of discrimination than other treaties, covering formal equality, i.e. equality of opportunity, and equality of outcome or substantive equality, i.e. *de facto* equality.<sup>85</sup> Article 9 of the Convention further reinforces the principle of equality in regards to the right to a nationality.

Despite CEDAW being the second most ratified international human rights treaty,<sup>86</sup> its practical effects have not been as revolutionary as its ideals.<sup>87</sup> This is due to its relatively weak language, for example with many positive obligations limited to requiring states parties to take 'all appropriate measures',<sup>88</sup> the limited authority and power of its Committee,<sup>89</sup> and the vast number of reservations, many of which are premised on cultural relativism.<sup>90</sup>

In sum, although it has been recognised that nationality is a human right and that statelessness is unacceptable,<sup>91</sup> treaties do not impose a general obligation on states to grant nationality to stateless persons. The broad recognition of the right of a child to acquire a nationality and the right of registration at birth, provide widely accepted safeguards against statelessness at birth which complement the 1961 Convention.<sup>92</sup> Nevertheless, this obligation is weak, as treaties provide a very

---

<sup>83</sup>Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 Dec 1979, entered into force 3 Sept 1981) 1249 UNTS 13.

<sup>84</sup> Alice Edwards, 'Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination against Women' (2009) UNHCR.

<sup>85</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law. A Feminist Analysis* (Manchester University Press 2000) 217.

<sup>86</sup> 189 states have ratified it, only behind the CRC.

<sup>87</sup> Julie A. Minor 'An Analysis of Structural Weakness in the Convention of Elimination of All Forms of Discrimination against Women' (1994) 24 Georgia Journal of International and Comparative Law 137.

<sup>88</sup> Charlesworth and Chinkin (n 85) 220-221.

<sup>89</sup> Minor (n 87) 148-150.

<sup>90</sup> Hilary Charlesworth, 'Two Steps Forward, One Step Back? The Field of Women's Human Rights' (2014) European Human Rights Law Review 560, 564.

<sup>91</sup> Manly (n 38) 61.

<sup>92</sup> *ibid.*

limited guidance on how the right has to be exercised.<sup>93</sup> As the HRC has explained, the right of a child to acquire a nationality:

‘does not necessarily make it an obligation for states to give their nationality to every child born in their territory. However, states are required to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that every child has a nationality when he [or she] is born’<sup>94</sup>

The international human rights framework has managed to mould the obligations imposed by the UN Conventions on Statelessness. Firstly, it has included the prohibition of non-discrimination on the basis of sex. Secondly, it has reduced the ambiguous situations created by the 1961 Convention where children could be stateless for years, by emphasising the right of every child, from birth, to be registered and to obtain a nationality. Thirdly, regional human rights treaties have expanded the obligations of states, some of them even imposing the principle of *jus soli* to avoid statelessness, whereas others have contributed in reducing the state’s discretion permitted in the 1961 Convention. Moreover, it has managed to impose limitations to the states’ prerogative through the prohibition of arbitrary deprivation of nationality and the duty to avoid statelessness.<sup>95</sup>

### Nationality: androcentric?

Chinkin and Charlesworth note that human rights are androcentric,<sup>96</sup> and nationality laws are no exception to the rule. There are two modes of acquisition of nationality: *jus sanguinis*, i.e. where nationality is transmitted through descent, and *jus soli*, i.e. where nationality is determined by the geographical location of birth. States either follow one or a combination of both. Nationality can also be obtained through *jus domicili*, where it is granted on the basis of residence or personal ties to a state. All these forms have been criticised for perpetuating patriarchal conception of the family. The *jus sanguinis* principle was initially limited to paternal lineage based on the Roman concept of *patria potestas*

---

<sup>93</sup> Groot (n 67) 146.

<sup>94</sup> UNHRC, ‘General Comment No 17: Article 24 (Rights of the Child)’, 7 Apr 1989, para 8.

<sup>95</sup> Alice Edwards, ‘The Meaning of Nationality in International Law in the Era of Human Rights’ in Edwards, *Nationality* (n 30) 25–28.

<sup>96</sup> Charlesworth and Chinkin (n 85) 231.

(i.e. power of the father) or on the common law idea of dependent nationality. The *jus soli* principle indirectly discriminates women, as they are more likely to live in the country of their foreign husband and thus will not be able to pass their nationality to their children. Finally, *jus domicili* also indirectly discriminates women as the conditions imposed to fulfil the requirements for naturalisation often suppose a bigger hurdle for women. For instance, women are less likely to work and thus will have more difficulties in passing a language or knowledge test.<sup>97</sup>

Sixty years ago, the majority of states did not provide equal rights to women in nationality laws.<sup>98</sup> This became an early concern of the feminist movement. Chinkin and Knop distinguish three generations of women's struggle for equality in nationality law.<sup>99</sup> The first generation achieved the modification of the principle of dependent nationality which virtually all countries had. This principle defended the idea that a whole family unit should have the same nationality and, following the patriarchal understanding of the family, women, upon marriage, would automatically acquire the nationality of their husbands.<sup>100</sup> The fight to eradicate this is crystallised in Article 9(1) CEDAW.

The second-generation fought for the right of women to pass their nationality to their children, which is now prescribed by article 9(2) CEDAW and implied in the CRC.<sup>101</sup> The third generation is derived from the consequences of the elimination of dependent nationality, which left the family unit less legally secure. This contributed to the creation of statelessness when nationality laws conflicted and also rendered the non-national spouse without the entitlement and benefits that are traditionally attached to nationality.<sup>102</sup> For this reason, Chinkin and Knop consider that it is paramount that either national laws extend the protection to non-nationals or permit the acquisition of dual nationality.<sup>103</sup>

The CEDAW has had a tremendous impact on nationality laws, yet the high number of reservations testifies that some aspects of patriarchy still persist

---

<sup>97</sup> Rudolf (n 43) 238.

<sup>98</sup> UNHCR (n 10).

<sup>99</sup> Chinkin and Knop (n 66).

<sup>100</sup> ibid 544-546.

<sup>101</sup> ibid 546.

<sup>102</sup> ibid 550-556.

<sup>103</sup> ibid.

and, moreover, states without reservations frequently have discriminatory laws.<sup>104</sup> The HRC is also pressuring states to implement their nationality laws in accordance with the principle of gender equality, ‘with a view to preventing and reducing statelessness’<sup>105</sup> and to reform nationality laws that do not permit women to pass their nationality to their children.<sup>106</sup> Finally, the UNHCR has clearly stated that ‘[e]nsuring gender equality in nationality laws can mitigate the risk of statelessness’.<sup>107</sup> However, today, over 60 countries do not allow women to acquire, change or retain their nationality equally with men<sup>108</sup> and 27 countries do not grant equality between men and women relating to the conferral of nationality to their children.<sup>109</sup>

### Syrian nationality law

The 2012 Syrian Constitution enshrines the principle of non-discrimination on the grounds of sex.<sup>110</sup> The acquisition of nationality in Syria is regulated in the Syrian Nationality Law Legislative Decree No. 276 of 1969. Under Article 3 (A) a child born to a Syrian man acquires *ipso facto* the nationality, whether he or she is born in Syria or abroad. It provides some safeguards in order to prevent statelessness, including the principle of *jus soli*, or by enabling Syrian Arab mothers to pass their nationality to their child born in Syria, when the relationship with the child’s father has not been established (Article 3).

---

<sup>104</sup> Rudolf (n 43) 127.

<sup>105</sup> UNHRC, ‘Resolution 32/7: The Right to a Nationality: Women’s Equal Nationality Rights in Law and in Practice’ UN doc A/HRC/32/L.12, 18 July 2016 para 3.

<sup>106</sup> *ibid* para 5.

<sup>107</sup> UNHCR (n 10).

<sup>108</sup> UNHCR, ‘Ending Gender Discrimination in Nationality Laws’ (18 June 2015) <<http://www.unhcr.org/news/press/2014/6/53a15cc56/ending-gender-discrimination-nationality-laws.html>> accessed 15 June 2017.

<sup>109</sup> UNHCR, ‘Background’ (n 10). These countries are: Bahamas, Bahrain, Barbados, Brunei Darussalam, Burundi, Iran, Iraq, Jordan, Kiribati, Kuwait, Lebanon, Liberia, Libya, Madagascar, Malaysia, Mauritania, Nepal, Oman, Qatar, Saudi Arabia, Sierra Leone, Somalia, Sudan, Swaziland, Syria, Togo and United Arab Emirates.

<sup>110</sup> Art 33(3).

These exceptions are rarely enforced<sup>111</sup> and fail to mitigate statelessness when the child of a Syrian mother, whose linkage with a father has not been determined, is born abroad. Moreover, the gender discrimination in the law is also present in Article 8 which denies Syrian women the right to transfer their nationality to their foreign spouse on an equal basis as Syrian men.

Syria is not a party to the UN Conventions on Statelessness. However, it is a party to various international and regional treaties that recognise the right to a nationality and the principle of non-discrimination: CRC; ICCPR; the Arab Charter on Human Rights and the Covenant on the Rights of the Child in Islam. It is also a party to CEDAW, although it has a specific reservation on Article 9.<sup>112</sup> The current status of Syrian nationality law thus clearly contradicts the obligations enshrined in all these treaties.

In sum, there is no international obligation for states to give their nationality to any children born in their territory. The determination of which individuals are granted nationality of a given state is still considered to be domestic issue. The emergence of human rights has set some boundaries to this discretion of states, namely by enshrining the right to a nationality and through the principle of non-discrimination. Therefore, Syrian children born in exile need to have a Syrian nationality, as it is their strongest, if not only, claim to one. Unfortunately, Syria's reservation to CEDAW permits for an exception to the principle of gender equality in nationality laws. The human rights framework is unable to adequately address the new generation of stateless children born in exile. Thus, there is a need to resort to other instruments, such as the WPS agenda to tackle this.

---

<sup>111</sup> Institute on Statelessness and Inclusion and the Global Campaign for Equal Nationality Rights, 'Submission to the Human Rights Council at the 26th Session UPR, Syrian Arab Republic', (2016) para 17.

<sup>112</sup>UN Women, 'Declarations, Reservations and Objections to CEDAW' <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>> 18 June 2017.

#### IV. THE POLITICAL FRAMEWORK

##### Peace and security: general ideas

Although international human rights law provides tools for preventing statelessness, little progress has been made. This is due to problems in the implementation and enforcement; the low number of ratifications of the UN Conventions on Statelessness and the fact that very little guidance and principles are given to assign responsibility to a particular state to grant nationality to an individual.<sup>113</sup> These problems are exacerbated in relation to women's human rights, as it is hard to pressure states to withdraw from their reservations, notably when they use the concept of 'culture' as a shield. Thus, Manly and van Waas propose turning to the human security framework to complement human rights law and fulfil its gaps.<sup>114</sup> The human security framework constitutes an added value to human rights law and will provide the political will that is needed at the international level to solve statelessness.<sup>115</sup> Nonetheless, in the case of the Syrian conflict, WPS could offer a more pertinent framework to create political will. While human security and WPS overlap in their focus on security from the perspective of the people, the former does not pay enough attention to gender.<sup>116</sup> The gendered approach of WPS makes it the best framework to deal with the consequences of conflict-induced displacement and pre-existing gender discriminatory laws.

The notion of security has changed dramatically since the end of the Cold War. Its traditional concept was state-centred, and its goal was to protect state's national interest. This perception of security has been left behind in favour of the notion of human security. The latter is people-centred and is linked to human development.<sup>117</sup> It highlights the need to uphold human rights and respect human dignity.<sup>118</sup> Similarly, peace is no longer conceived as the 'absence of

---

<sup>113</sup> Adjami (n 15) 104.

<sup>114</sup> Manly (n 38).

<sup>115</sup> *ibid.*

<sup>116</sup> Annick Wibben, 'The search for lasting peace: Critical perspectives on gender-responsive human security' (2015) 23(2) *Gender and Development* 385.

<sup>117</sup> Anuradha Chenoy, 'A plea for endangering human security' (2005) 42(2) *International Studies* 167, 174.

<sup>118</sup> Commission of Human Security, *Human Security Now* (New York, 2003) 5.

violence', but rather implies 'an inclusive political process, a commitment to human rights in the post-war period and an attempt to deal with issues of justice and reconciliation'.<sup>119</sup> Based on the principles of justice, inclusivity and the universality of human rights, peace must include women's human rights.

Feminist discourse has also managed to find a niche into these concepts due to the transformation in the global security environment.<sup>120</sup> Since the 1990s, feminist scholars such as Tickner and Enloe have criticised the prevailing realist discourse in international relations, denounced the absence of women in this area and drew attention to how security, militarism and conflict impacted men and women differently.<sup>121</sup> Thus, feminist security theories appeared. These are built on the recognition of the effects of the existing structural violence on women; on the awareness of the connection between women's everyday experience and security and on a special focus on inequality and emancipation.<sup>122</sup> Some of these feminist ideas have been incorporated into the WPS agenda: a revolutionary agenda that is transforming the ways of understanding how peace and security are conceived, protected and enforced.<sup>123</sup> For all these developments, women are no longer invisible.

## **WPS**

On October 2000, the UNSC unanimously adopted a ground-breaking resolution: UNSCR 1325.<sup>124</sup> After tremendous efforts of the civil society, women and girls' issues and their human rights finally managed to permeate the walls of the SC. Until that moment, the SC had only dealt superficially with women, who were categorised as a vulnerable group or as victims. This resolution

---

<sup>119</sup> Coomaraswamy (n 8) 24.

<sup>120</sup> Susan Willet, 'Introduction: Security Council Resolution 1325: Assessing the Impact on Women, Peace and Security' (2010) 17(2) International Peacekeeping 142,146.

<sup>121</sup> *ibid* 144.

<sup>122</sup> Eric Blanchard, 'Gender, international relations and development of feminist security theory' (2003) 28(4) *Journal of Women in Culture and Society* 1289,1298.

<sup>123</sup> Carol Cohn, Helen Kinsella and Sheri Gibbings, 'Women, Peace and Security Resolution 1325' (2004) 6(1) *International Feminist Journal of Politics*, 130.

<sup>124</sup> UN Security Council Resolution (UNSCR) 1325, UN doc S/RES/1325, 31 Oct 2000.

acknowledges the idea of women's agency<sup>125</sup> and comprises two main themes: a) gender mainstreaming in the areas of peace and security, traditionally dominated by a male perspective and b) ensuring a gender balance, through women's participation, at all processes and decision-making levels of peace-building.<sup>126</sup> UNSCR 1325 issues women's rights and empowerment language in the context of peace-building.<sup>127</sup> Furthermore, it calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective including '[t]he special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction' and 'measures that ensure the protection of and respect for human rights of women and girls'.<sup>128</sup>

UNSCR 1325 is followed by seven other resolutions<sup>129</sup> that consolidate the four pillars of the agenda: participation, protection, prevention, and relief (peace-building) and recovery.<sup>130</sup> WPS is essentially a human rights mandate, rooted in the principles of gender equality and non-discrimination of the CEDAW.<sup>131</sup> Hence, it reaffirms the need to implement international humanitarian and human rights laws which protect women and girls during and after armed conflict. The main focus of these resolutions is on the protection of women from violence in the conflict area (specially from sexual violence)<sup>132</sup> and on participation.<sup>133</sup> While gender-based violence is notably the most visible aspect in a conflict (and has thus had an 'over-focus' in WPS), other situations also exacerbate women's vulnerability. For this reason, the Committee of the CEDAW has underscored that an adequate implementation of WPS must cover all rights

---

<sup>125</sup>Torunn Tryggestad, 'Trick or treat? The UN and implementation of Security Council Resolution 1315 on Women, Peace and Security' (2009) 15(4) *Global Governance* 539, 540.

<sup>126</sup>Hilary Charlesworth and Christine Chinkin, 'Building Women into Peace: the International Legal Framework' (2006) 27(5) *Third World Quarterly* 937, 939.

<sup>127</sup>Hilary Charlesworth, 'The Women Question in International Law' (2011) 1 *Asian Journal of International Law* 33, 37.

<sup>128</sup>UNSCR 1325 (n 124) para 8.

<sup>129</sup>UNSCR 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013) and 2242 (2015).

<sup>130</sup>Coomaraswamy (n 8) 28.

<sup>131</sup>Melissa Labonte and Gaynel Curry, 'Women, Peace and Security: Are we there yet?' (2016) 22 *Global Governance* 311, 312.

<sup>132</sup>See UNSCR 1820 (2008), 1888 (2009), 1960 (2010) and 2106 (2013).

<sup>133</sup>See UNSCR 1325 (2000), 1889 (2009) and 2122 (2013).

enshrined in the Convention.<sup>134</sup> One of the rights that is protected in the CEDAW is the right of women to pass their nationality to their children on an equal basis with men (Article 9(2)). Thus, this right must also be promoted during times of conflict and post-conflict.

The impact of war on women is compounded by pre-existing gender inequalities and discrimination.<sup>135</sup> For this reason, it is essential to analyse the background and local context in order to achieve an adequate peace-agreement. Women's experience during a conflict is likely to influence their post-conflict needs and priorities.<sup>136</sup> Moreover, attention should be given to intersectional discrimination.<sup>137</sup> UNSCR 1889 urges states to guarantee gender mainstreaming in peace-building processes; to ensure that women's empowerment is taken into account and, in consultation with the civil society, to detail women's needs and priorities.<sup>138</sup> The contemporary understanding of peace and the conception of WPS as a human rights mandate implies that ensuring a non-violent and a physically secure environment for women in a post-conflict setting is not enough. In that way, UNSCR 1889 calls for the inclusion of better socio-economic conditions in post-conflict settings.<sup>139</sup> Nonetheless, a stronger emphasis should also be put on other rights that go beyond the traditional idea of security but that are needed for a sustainable peace, such as nationality rights.

The issue of statelessness and citizenship laws has been mentioned as aggravating the situation of women and girls in conflict. UNSCR 2122 (2013) provides a greater emphasis on encouraging relief and recovery, and expresses its concern:

---

<sup>134</sup> CEDAW, 'General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations' UN doc CEDAW/C/GC/30, 1 Nov 2013, para 25.

<sup>135</sup> Coomaraswamy (n 8) 68.

<sup>136</sup> Christine Chinkin, 'Peace Agreements as a Mean for Promoting Gender Equality and Ensuring Participation of Women' (2003) UN Division for the Advancement of Women 9 <<http://www.un.org/womenwatch/daw/egm/peace2003/reports/BPChinkin.PDF>> accessed 17 June 2017.

<sup>137</sup> In the Syrian conflict, special attention has to be given to Kurdish women.

<sup>138</sup> UNSCR 1889, UN doc S/RES/1889, 5 Oct 2009, paras 8-10.

<sup>139</sup> *ibid* para 10.

'at women's exacerbated vulnerability in armed conflict and post-conflict situations particularly in relation to forced displacement as a result of unequal citizenship rights, gender-biased application of asylum laws, and obstacles to registering and accessing identity documents which occur in many situations'.<sup>140</sup>

Following this resolution, the SC reiterated that statelessness can arise when women's experience in the conflict intersects with discriminatory nationality laws, such as the inability to pass on their nationality to their children.<sup>141</sup> Similarly, the former Secretary General of the United Nations, Ban Ki-moon, emphasised the need to eliminate statelessness and underscored that nationality laws that do not grant women the ability to pass their nationality to their children cause statelessness, 'a problem that has an impact on at least 10 million people worldwide'<sup>142</sup>. He concluded that the key action for avoiding statelessness is 'the removal of nationality laws that directly or indirectly discriminate against women and girls'.<sup>143</sup> Finally, in the last Open Debate of the WPS, the Global Campaign for Equal Nationality Rights<sup>144</sup> and a NGO coalition called on states to provide an update of the actions taken to reform gender discriminatory nationality laws, as a means of addressing humanitarian crises through a gender lens.<sup>145</sup>

### **WPS as an advocacy tool for changing the law**

---

<sup>140</sup> UNSCR 2122, UN doc S/RES/2122, 18 October 2013, Preamble.

<sup>141</sup> An issue reiterated during the UNSC Open Debate on WPS: 'Displaced Women and Girls: Leaders and Survivors', 7289th session, UN doc S/PV.7289, 28 Oct 2014 and see UNSC, 'Letter from the Permanent Representative of Argentina to the UN addressed to the SG', UN doc S/2014/731 10 Oct 2014.

<sup>142</sup> UNCS, 'Report of the Secretary-General on Women, Peace and Security' UN doc S/2015/716, 16 Sept 2015, para 46.

<sup>143</sup> *ibid.*

<sup>144</sup> Composed by Equality Now, Equal Rights Trust, the Institution on Statelessness and Inclusion, Women's Refugee Commission and UNHCR.

<sup>145</sup> NGO Working Group on WPS, 'Open Letter to Permanent Representatives to the UN: Recommendations on the Security Council Open Debate' (2016)

<<http://equalnationalityrights.org/images/zdocs/pdf-CSO-OpenLetter-WPS-OpenDebate-Oct2016.pdf>> accessed 18 July 2017.

The Syrian peace agreement will, hopefully, cover the issue of building conditions for the safe and voluntary return of refugees.<sup>146</sup> Amongst these refugees, the stateless need particular attention due to the devastating consequences that the conflict has had on them. Recent post-conflict periods have provided women with new platforms and opportunities to change societies.<sup>147</sup> The WPS can thus be used as a tool to advocate for this change, based on the model of gender equality enshrined in CEDAW.<sup>148</sup> Coomaraswamy has recalled that ‘to fully realize the human rights obligations of the WPS agenda, all intergovernmental bodies and human rights mechanisms must act in synergy to protect and promote women’s and girls’ rights at all times, including in conflict and post-conflict situations’.<sup>149</sup> Therefore, all actors involved should ensure that ‘the women question’ is being asked in order to ensure an adequate implementation of the WPS.<sup>150</sup>

Henceforth, the WPS can serve as a tool for achieving transformational outcomes.<sup>151</sup> The Syrian peace talks present a significant opportunity to modify existing gender discriminatory nationality laws. It will further need to provide a remedy for currently stateless children, through their nationalisation. By advocating the inclusion in the peace-agreement of a clause that modifies the current citizenship laws, the international community will fulfil its obligation of reducing stateless (which has to be done through international cooperation) whilst, at the same time, complying with the WPS mandate.

#### *Why Syrian nationality?*

International law recognises the right to a nationality but provides little guidance on what nationality a person should have. There is no widely ratified international treaty determining the criteria to grant nationality, thus *Nottebohm* is

---

<sup>146</sup> UNSCR 2254, UN doc S/RES/2254, 18 Dec 2015 para 14.

<sup>147</sup> Julie Arostegui, ‘Gender, Conflict and Peace-Building: how Conflict can Catalyse Positive Change for Women’ (2013) 21(3) *Gender and Development* 533.

<sup>148</sup> Coomaraswamy (n 8).

<sup>149</sup> *ibid* 350.

<sup>150</sup> Chinkin (n 136) 8.

<sup>151</sup> Niamh Reilly, ‘Seeking Gender Justice in Post-conflict Transitions: Towards a Transformative Women’s Human Rights Approach’ (2007) 2(3) *International Journal of Law in Context* 155.

the only case that provides some guidance.<sup>152</sup> There, the ICJ established the principle of ‘genuine and effective connection’ which is emerging as a principle guiding state practice in granting nationality.<sup>153</sup> This doctrine determines that there should be a substantial connection or genuine link with the state conferring nationality.<sup>154</sup> This should be determined on a factual basis, such as the habitual residence, the centre of the person’s interests, family ties of attachment to a given country.<sup>155</sup> This idea is also contained in the principles of *jus soli* and *jus sanguinis* as being born on a certain territory or from a certain lineage are conceived as reasons that amount to a sufficient connection with a state to acquire the nationality.<sup>156</sup> It is clear that providing nationality of the host state on the basis of *jus soli* will superficially alleviate the problem of statelessness of Syrian children, yet there is no meaningful connection between them and the state: their family has Syrian nationality, and their home is Syria.

This same conclusion is reached in case a rights-based approach is followed. Vlieks and others analyse the meaning of the right to enter to ‘one’s own country’ in Article 12 ICCPR and conclude that this concept is defined in relation to the special ties of a person to a country.<sup>157</sup> Hence, the most appropriate nationality is the one of the persons’ own country.<sup>158</sup> Again, this approach leads to the same conclusion as the principle set forth in *Nottebohm*: the most viable solution for the stateless children is not to give them any nationality, but the one of their ‘own country’: Syria.

#### *WPS: towards a transformation*

The WPS agenda is a promising mechanism for ensuring that a gender perspective is added to peace agreements and that existing structural inequalities

---

<sup>152</sup> Adjami (n 15) 106.

<sup>153</sup> *ibid.*

<sup>154</sup> David Weissbrodt and Clay Collins, ‘The human rights of stateless persons’ (2006) 28 Human Rights Quarterly 245, 276.

<sup>155</sup> Nottebohm (n 46) para 22.

<sup>156</sup> Caia Vlieks, Ernts Ballo and María José Recalde Vela, ‘Solving Statelessness: Interpreting the Right to Nationality’ (2017) Netherlands Quarterly of Human Rights 1, 8.

<sup>157</sup> *ibid* 11.

<sup>158</sup> *ibid* 12.

are addressed. Thus, it links societal transformation to gender-specific human rights issues. Peace agreements drafted in accordance with the WPS must be designed in such a way that they contain provisions that reflect the particular status and situation of women, always in compliance with CEDAW. This means that they should include gender-neutral as well as gender-specific provisions (directed explicitly to women).

The agenda provides an ideal platform for the international community and different concerned actors to advocate and pressure Syria to modify its nationality law in accordance with the principle of gender equality. In doing so, the international community will comply with two main obligations.

First, it will fulfil its obligation to reduce and avoid future cases of statelessness. Stateless is increasingly framed in terms of security and the Commission of Human Security has even described it as a potential threat to international peace and security.<sup>159</sup> Likewise, the UNHCR has highlighted the importance of addressing statelessness for promoting a successful return of refugees and for contributing to post-conflict peace building.<sup>160</sup> The peace agreement should further include a remedy for these stateless children, such as in the form of a new retroactive nationality law or through a nationalisation process.

Second, the international community will fulfil the obligations set forth in WPS with respect to gender mainstreaming and women's rights. An adequate Syrian peace agreement will necessarily imply the modification of nationality laws: women's rights must be upheld and pre-existing inequalities should be eradicated in order to ensure an appropriate gender approach and a durable peace. Although guaranteeing citizenship rights is not an essential part of the WPS, UNSCR 2122 has already planted the seeds towards its fulfilment. Moreover, as a human rights mandate, the WPS requires compliance with all international obligations related to nationality rights; notably, the right of women to pass their nationality to their child and the right of a child to acquire the nationality from his or her mother on an equal basis as the father. Maintaining old patriarchal societies

---

<sup>159</sup> Commission of Human Security (n 118) 7.

<sup>160</sup> UNHCR, 'Statelessness and Citizenship' in *The State of the World's Refugees – A Humanitarian Agenda*, (OUP 1997).

and laws will entail a lack of implementation of WPS and a breach of the peremptory norm of non-discrimination on the ground of sex.

In advocating for such a clause, the international community will be supporting initiatives of national women's organisations and civil society. The support and promotion of local initiatives and inclusion of women's national organisations constitutes the cornerstone of the participation pillar of the WPS.<sup>161</sup> In Syria, there is already a national initiative led by the Syrian Women's League that seeks to change the legislative *status quo*.<sup>162</sup> Furthermore, there is international pressure from the Global Campaign to End Discrimination in Nationality Laws, an initiative mostly-led by civil society. Thus, a further aspect of the agenda will be fulfilled.

In conclusion, women's human rights need to be upheld and promoted before, during and after conflicts. The WPS agenda has established an on-going legal basis for equal treatment through all these periods.<sup>163</sup> Despite the devastating consequences of any conflict, the transition into peace offers an extraordinary opportunity for recasting and transforming pre-existing power relations – social, economic, cultural and political- especially for those that had previously been denied human rights.<sup>164</sup> Peace agreements can provide a new framework of human rights, such as in the form of a specific right, like gender equality in nationality laws. Advocating for the inclusion of a provision in the future peace agreement that obliges Syria to amend its legislation in accordance with the principle of gender equality and Article 9 of the CEDAW will not only ensure the correct application of the WPS but will also serve to avoid future cases of statelessness. If the peace agreement does not contain a clause relating to this issue, it will perpetuate the marginalisation of women from the political sphere.

---

<sup>161</sup> UNSCR 1325 (n 128) para 8; 1889 (n 138) para 9 and 2122 (n 140) para 11.

<sup>162</sup> See Institute (n 113) para 14.

<sup>163</sup> Bell (n 160) 5.

<sup>164</sup> Reilly (n 151) 164.

## CONCLUSION

The right to nationality has long been referred to as ‘the right to have rights’. Without a nationality, people become ‘rightless’ and find themselves in the no-man’s land. This carries devastating consequences as stateless are left in an extremely vulnerable situation being denied their most basic rights and protection while it also poses great difficulties in maintaining the international order.<sup>165</sup> The existence of gender discriminatory nationality laws is intrinsically linked to statelessness. In the case of the Syrian conflict, the inability of Syrian mothers to pass their nationality to their children born in exile is creating a ‘stateless generation’.

This paper has suggested that the way of solving this problem is not by giving these children any nationality, but the one with which they have a ‘genuine and effective connection’ and special ties to: the Syrian nationality. As it stands, the international human rights framework is unable to provide an adequate solution. However, the gendered dimension of this issue opens the door for addressing statelessness and nationality laws through the lens of the WPS agenda. Conceived as a human rights mandate, the WPS needs to be interpreted within the broader human rights framework, in particular the principle of gender equality. It provides the necessary tools for advancing women’s rights and gender equality in post-conflict environment.<sup>166</sup>

The WPS agenda mainly focuses on the participation of women in peace processes and on their protection from sexual violence. With respect to post-conflict settings, it emphasises the need to end impunity in relation to these crimes and promote women’s empowerment, mainly through socio-economic rights. Despite those being the most elaborated pillars, it is paramount not to forget the ideals behind its creation: upholding women’s human rights and pacifism. The CEDAW Committee has reiterated its link with the WPS and recalled that all the rights enshrined in the CEDAW need to be upheld before, during and after

---

<sup>165</sup> Gibney (n 30) 53.

<sup>166</sup> Jacqui True, ‘Women, Peace and Security in Post-conflict and Peacebuilding Contexts’ (2013). NOREF

<[http://www.peacewomen.org/sites/default/files/true\\_noref\\_unscr1325\\_feb\\_2013\\_final\\_0.pdf](http://www.peacewomen.org/sites/default/files/true_noref_unscr1325_feb_2013_final_0.pdf)> accessed 18 June 2017.

conflict. Not protecting all these rights implies that the WPS is not being adequately implemented.

Nationality rights are only superficially mentioned in the WPS. However, the Syrian conflict has shown the importance of addressing them, as gender inequality in national laws has created an extremely vulnerable group of refugees – the stateless. For this reason, this paper has suggested that a specific clause conducting the abolition of gender-biased nationality laws needs to be included in the future Syrian peace agreement. In doing so, the international community will meet its obligation of reducing and avoiding statelessness and promoting gender equality in post-conflict settings, while at the same time supporting local and international initiatives of the civil society. The opportunities that this agenda presents cannot be overlooked and need to be adequately used to ensure that all laws, policies and actions that negatively affect women are challenged.

# The Collapse of Carillion: Regulatory Failure in the Contract State

Karen Wong\*

---

## ABSTRACT

*The rise of the contract state in the UK heralded an era of harnessing the private sector for public purposes. However, the collapse of Carillion, one of the largest contractors with the UK public sector, in 2018 epitomises its failure. Focusing on ex-ante regulatory failure, this essay analyses Carillion's collapse from three perspectives: contract formation in tendering shows that inherent relationality in contracting may lead to an undesirable use of discretion, yet current hard and soft law are unable to structure and confine such discretion; Carillion as a Strategic Supplier shows that the Cabinet Office's design of said programme may fail to monitor participating companies; the management of individual contracts shows both government and companies may be stuck within 'deal-making' and fail to manage risks beyond the contract. It is argued that these perspectives indicate medium to long-term regulatory and institutional failure in government policy-making and enforcement, as well as concerning flaws in Carillion's self-regulation. The sufficiency of ex-post accountability from the executive and legislature is then considered, with Parliament more likely to bring Carillion to account despite the executive often acting as the contractual party. Recommendations are offered, including a public law framework for contracts and common ethical standards.*

## INTRODUCTION

The rise of the contract state from Margaret Thatcher's 'New Right' government in the 1980s heralded an era of contracting out the delivery of public services. There was the extensive use of market relations, along with market-mimicking techniques such as privatisation and quasi-privatisation.<sup>2</sup> Such techniques aimed to harness the private sector for public purposes by raising the

---

\* LLB (LSE) '19.

<sup>2</sup> Christopher Hood, 'A public management for all seasons' (1991) 69 Pub Admin 3.

level of competition and bringing in resources and expertise from the private sector. A ‘contract culture’ hence emerged, denoting the shift to an administrative model mirroring private-sector management, where the relationship between government and private bodies is structured through contracts as opposed to regulations<sup>3</sup>. However, there were also those who foresaw the failure of this seemingly all-pervasive culture. Potential problems include the corrosion of ‘voluntary sector values’ such as the provision of socially-beneficial services for non-financial gain, as well as declining service quality and excessive complexity due to increased bureaucracy and legalism.<sup>4</sup> The collapse of Carillion in 2018, one of the largest contractors with the UK public sector, epitomises such failure.

There is an urgent need to evaluate to what extent Carillion’s problems arose particularly to its context or are due to inherent flaws of ‘contracting out’. This is mainly due to the ‘pyramids’<sup>5</sup> and ‘cascades’<sup>6</sup> of contract still embedded in the current public/private landscape, with systemic contractual governance at both macro- and micro-levels, spanning from government departments and agencies to private contractors and subcontractors. Given this high level of interconnectivity, Carillion’s collapse may have knock-on effects or highlight potential problems with similar contracting processes and contracts concluded with other companies, hence timely analysis is needed to prevent further failures.

Focusing on *ex-ante* regulatory failure, this essay offers analysis on the failure of Carillion from three perspectives: contract formation in tendering shows that inherent relationality in contracting may lead to an undesirable use of discretion, yet current hard and soft law are unable to structure and confine such discretion; Carillion as a Strategic Supplier shows that the Cabinet Office’s design of said programme may fail to monitor participating companies; the management of individual contracts shows both government and companies may be stuck within ‘deal-making’ and hence fail to manage risks beyond the contract. It is argued that these perspectives indicate medium to long-term regulatory and

<sup>3</sup> C Harlow and R Rawlings, *Law and Administration* (3<sup>rd</sup> edn, CUP 2009) 57.

<sup>4</sup> K Walsh (et al), *Contracting for Change* (OUP 1997) 1.

<sup>5</sup> M Freedland and D King, ‘Contractual governance and illiberal contracts: Some problems of contractualism as an instrument of behaviour management by agencies of government’ (2003) 27 Camb J Econ 465.

<sup>6</sup> J Boston, ‘The use of contracting in the public sector: Recent New Zealand experience’ (1996) 55 AJPA 105.

institutional failure in terms of government policy-making and enforcement, while also concerning flaws in Carillion's self-regulation. The sufficiency of *ex-post* accountability from the executive and legislature is then considered, with Parliament more likely to bring Carillion to account despite the executive often acting as the contractual party. This essay comes to the conclusion that recommendations, including a public law framework for contracts and common ethical standards, can address such problems.

## THE COLLAPSE OF CARILLION

On 15 January 2018, Carillion, the second-largest construction company in the UK, went into liquidation. The company's share price fell rapidly after issuing a profit warning in July 2016, and this along with an accumulated debt of £1.5 billion led to its collapse.<sup>7</sup> Carillion held about 450 government contracts involving transport, justice, education and defence, representing £2 billion (38%) of its 2016 reported revenue.<sup>8</sup> Its financial problems stemmed from cost overruns on 3 public sector construction projects – building the Aberdeen bypass, Midland Metropolitan Hospital, and Royal Liverpool Hospital. Carillion was also highly active in the private sector with operations in Canada, the Caribbean, and the Middle East. It employed around 43,000 staff worldwide, 20,000 of whom were in the UK. With its liquidation, 2,332 job losses have been announced as of 7 June 2018,<sup>9</sup> and £2 billion is yet to be paid to 30,000 suppliers, sub-contractors and other short-term creditors<sup>10</sup>.

---

<sup>7</sup> 'Carillion collapse raises job fears' (*BBC News*, 15 January 2018) <<http://www.bbc.co.uk/news/business-42687032>> accessed 8 April 2018.

<sup>8</sup> Federico Mor and others, 'The collapse of Carillion' (House of Commons Library Briefing Paper, No. 8206, 2018)

<sup>9</sup> 'Carillion collapse to cost taxpayers £148m' (*BBC News*, 7 June 2018) <<https://www.bbc.co.uk/news/business-44383224>> accessed 9 March 2019.

<sup>10</sup> 'Further 97 Carillion workers lose jobs' (*BBC News*, 3 April 2018) <<http://www.bbc.co.uk/news/topics/cewrlqejqdt/carillion>> accessed 8 April 2018.

## EX-ANTE REGULATORY FAILURE

### Contract formation – the tendering of Carillion contracts

To understand why Carillion failed to fulfil its contractual obligations, it must first be analysed why government contracts were awarded to the company in the first place. The tendering of contracts over a certain value is governed by the EU procurement regime. The rest are under domestic law where the tendering process is largely controlled by principles-based regulation and formal law plays a relatively limited role. It is argued that despite the EU's best efforts to structure and confine discretion, relational elements still seeped through to influence the awarding of contracts to Carillion. This was further exacerbated by the UK government's use of soft law and focus on 'value for money' ('VFM').

Responding to Carillion's collapse, Bernard Jenkin, the Conservative chairman of the House of Commons Public Administrative Committee, commented that 'Whitehall tends to award contracts to companies it regularly does business with'.<sup>11</sup> This failure is highly relevant with Macneil's relational contract theory, which suggests that every single transaction is embedded in complex relations, including those of trust and cooperation.<sup>12</sup> Further elaboration comes from Bradach and Eccles, who argue that decisions on procurement are made less by considering price and more by the construction of relationships through bargaining in networks of social actors.<sup>13</sup> Linking this back to Whitehall, when successful transactions are regularly carried out between government and a private company, reliability and smooth interactions arise through knowledge of the standards and norms of the other party, creating a positive relationship. This illustrates a protectionist approach, in which Government protects companies with which it has a relationship of trust and confidence. Therefore, in terms of Carillion, with its numerous pre-existing public sector contracts, the awarding of new contracts can be seen as an extension of such protectionist approach.

---

<sup>11</sup> BBC News (n 7).

<sup>12</sup> Ian R Macneil, 'Relational contract theory: challenges and queries' (2000) 94 NWULR 877.

<sup>13</sup> See Jeffrey L Bradach and Robert G Eccles, 'Price, authority and trust: from ideal types to plural forms' in Grahame Thompson and others (eds), *Markets, hierarchies and networks: The coordination of social life* (Sage Publications 1991).

The EU procurement regime aims to ameliorate such a problem, and its application to contracts of higher value allows regulation to be directed precisely to transactions of greater economic importance. In the UK, the 2014 EU Procurement Directives<sup>14</sup> are incorporated into domestic law through the Public Contracts Regulations 2015 ('PCR'). Rule-making thus shifts tendering from Macneil's relational model to a discrete one clearly confined by law and formal communication.<sup>15</sup> This model serves Davis' two purposes of administrative law: structuring and confining discretion.<sup>16</sup>

The structuring of discretion can be seen in PCR section 67(3) on contract award criteria which notes that:

- (3) Such criteria may comprise, for example—
- a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
  - b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
  - c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

[...]

The confining of discretion can be found in subsections 9 to 11 on weighting:

"(9) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria

---

<sup>14</sup> Including the Public Contracts Directive 2014, the Concessions Contracts Directive 2014, and the Utilities Directive 2014.

<sup>15</sup> Macneil (n 12).

<sup>16</sup> See KC Davis, *Discretionary Justice* (Greenwood Press 1969).

chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

However, it is questionable whether rule-making is effective in practice. Given Carillion's size, its largest contracts were often secured under the EU regime, which included the 3 contracts mentioned above: the Aberdeen bypass worth £745 million, the Midland Metropolitan Hospital worth £350 million, and the Royal Liverpool Hospital worth £335 million. Nonetheless, all three suffered from major delays and cost overruns. Moreover, a £280,000 fine was issued on the Aberdeen bypass project for environmental pollution.<sup>17</sup> It is clear from this empirical observation that rule-making alone was insufficient in structuring and confining discretion, and this is also recognised by Goodin – ‘rules cannot, at least without substantial costs in other respects, prevent arbitrariness and other vices; for much the same reasons that discretionary decisions display those attributes, rule-based decisions *can*, and probably *will*.’<sup>18</sup>

Moreover, failure was further hastened by the use of soft law and focus on VFM in the domestic context. For local government, the Local Government Transparency Code 2015 sets out minimum standards for data publishing, while central government mainly relies on policy commitments and the Transparency Principles. The use of codes, commitments and principles-based regulation in itself assumes a high degree of trust on those being regulated, and trust was already previously established to beget protectionism. However, a discrete model incurs high transaction costs with the need for balancing, notification and justification, and the government’s focus on VFM over competition compounds its aversion towards the model. As stated by Davies, through the lens of VFM, any savings made by competition are small, and are potentially outweighed by the costs of

---

<sup>17</sup> 'Where did it go wrong for Carillion?' (BBC News, 15 January 2018) <<http://www.bbc.co.uk/news/business-42666275>> accessed 8 April 2018.

<sup>18</sup> Robert E Goodin, 'Welfare, rights and discretion' (1986) 6(2) OJLS 259.

holding the competition in the first place.<sup>19</sup> At the same time, Sako proposes that trust reduces transaction costs by ‘economis[ing] on the costs of bargaining, monitoring, insurance and dispute settlement’.<sup>20</sup> Therefore, in terms of Carillion, the existing 450 contracts with the government themselves convince Whitehall of its competence, so contracts could be ‘safely’ awarded without going through lengthy processes.

To conclude, the tendering of Carillion contracts appears to be a systemic regulatory failure. The use of discretion is varied between different procurement processes, yet inappropriate relationality between contractual parties was still able to influence the outcome.

### **Contract formation and management – Carillion as a Strategic Supplier**

A group of multinational companies – numbering 30 as of January 2019 – with significant contractual relations with the government are named as Strategic Suppliers. They are assigned Crown Representatives (‘CRs’) who manage their relationships with the Cabinet Office and assess their performance, and are governed by the Strategic Supplier Risk Management Policy.

Before its liquidation, Carillion was a Strategic Supplier. One week after issuing a profit warning in July 2016 – its third in 5 months – Carillion announced that its joint ventures had been awarded contracts on the HS2 railway project worth £1.4 billion and two further facilities management contracts worth £158 million with the Ministry of Defence.<sup>21</sup> According to the Risk Management Policy:

3.4 Strategic Suppliers tend by their nature to be large and complex businesses which may operate through or otherwise depend upon a number of trading arms and/or group companies. The Cabinet Office will therefore also monitor publicly available sources for financial information relating to each Strategic Supplier and its group, including in particular information about ‘trigger events’ that could potentially lead to

---

<sup>19</sup> ACL Davies, *The Public Law of Government Contracts* (OUP 2008) 164.

<sup>20</sup> See Mari Sako, *Price, Quality and Trust* (CUP 1992).

<sup>21</sup> ‘Carillion in ‘high-risk’ contracts row’ (*The Times*, 21 November 2017) <<https://www.thetimes.co.uk/article/carillion-in-high-risk-contracts-row-l2rvv29hz>> accessed 8 April 2018.

the invocation of financial distress measures in Government contracts. These include:

3.4.3 the issue by the Strategic Supplier or any guarantor of its obligations of a *profits warning* to a stock exchange; [emphasis added]

[...]

5.1 A Strategic Supplier may be designated as ‘High Risk’ on the basis that:

[...]

5.1.2 one or more of the triggers for financial distress listed in paragraph 3.4 above have occurred.

[...]

6.2 Designation as a “High Risk” Strategic Supplier on the grounds of under-performance will have the following additional consequences for the period of the designation:

[...]

6.2.4 In-Scope Organisations should reduce where possible the extent to which the Strategic Supplier is given additional work under the terms of an existing contract (by, for example the exercise of any option or change requests) so as to contain the risk to the taxpayer.

Given such provisions, it is submitted that Carillion should not have been awarded new contracts after issuing multiple profit warnings; given its status as a Strategic Supplier, it should have been monitored more closely for the management of existing contracts as well. Three issues related to the administrative law ‘TAP values’ – transparency, accountability, participation –<sup>22</sup> have been identified as leading to the failure, including the lack of transparency in

---

<sup>22</sup> Carol Harlow (2017), ‘TAP values’. Lecture retrieved from <http://moodle.lse.ac.uk>.

designating Strategic Suppliers as ‘High Risk’, CRs’ potential conflicts of interest, and the lack of participation of interested parties outside government.

Firstly, there is a lack of transparency on the decision-making process. As noted in paragraph 5.1 of the Risk Management Policy, a Strategic Supplier ‘may’ be designated as High Risk if one or more triggers have occurred, while ‘all the relevant circumstances’ should be considered, including public service delivery, financial and reputational consequences for the government. From paragraph 7.1, the main decision-maker is the Commercial Relationships Board, which considers whether grounds exist for recommending to the Minister for the Cabinet Office that the Strategic Supplier be designated as ‘High Risk’. If so, a dialogue ensues between the Board, Strategic Supplier and Minister, with the Strategic Supplier having the chance to make written representations before the final decision is made. The criteria for consideration are rather vague, and the whole process is limited to the government and the Strategic Supplier – there are no provisions on having the decision reviewed by a third party, or having the reasons for designating ‘High Risk’ (or not) published. As a result, transparency and accountability are sorely lacking. This is particularly problematic given that any consideration of ‘High Risk’ entails that large companies are facing financial troubles or are at the brink of collapse.

Secondly, there is the potential conflict of interest of CRs themselves. CRs are responsible for initiating the process of ‘High Risk’ designation, conducting quarterly reviews, and determining whether a recommendation should be made to the Commercial Relationships Board. However, they are often chosen from the same industry as the Strategic Supplier. This can lead to problems of back-scratching: Labour Party research shows that several CRs hold external directorships.<sup>23</sup> As it was presented by an opposition party, the research and its conclusions must be considered relatively cautiously, but their potential truthfulness should not be denied. Therefore, there is again a lack of transparency on how CRs are chosen and subsequently monitored, considering their

---

<sup>23</sup> ‘Labour alleges conflict of interest in oversight of private suppliers’ (*The Guardian*, 21 January 2018) <<https://www.theguardian.com/business/2018/jan/21/conflict-of-interests-rampant-in-firms-such-as-carillion-warns-labour>> accessed 8 April 2018.

importance in the day-to-day interactions between government and Strategic Suppliers.

Finally, there is a lack of participation of interested parties from outside government. The determination of ‘High Risk’ status is a matter only between the Cabinet Office and Strategic Supplier. Under paragraph 6.4 of the Risk Management Policy, the decision to designate ‘High Risk’ is not disclosed to the public, but only to CRs and In-Scope Organisations, which includes departments, executive agencies and relevant Non-Departmental Public Bodies. With the former, interested but excluded parties such as subcontractors were unable to inform the government of Carillion’s potential risks, for example increasing payment terms from 30 to 120 days to help with cashflow.<sup>24</sup> With the latter, the parties themselves were also uninformed about the full extent of Carillion’s problems; this resulted in a failure to reduce or stop doing business with Carillion, thus increasing the current amount owed to them. Therefore, a lack of participation may have led to poor decision-making by both the government and outside parties.

To conclude, despite the status of Strategic Supplier bringing the expectation of greater scrutiny, such a relationship with the Cabinet Office may actually have allowed more problems to slip through the cracks, thus there would appear to be an institutional failure.

### **Contract management – individual contracts**

According to ‘A Short Guide to Commercial Relationships’ published by the National Audit Office, government institutions retain responsibility for the services they contract out, and the contract is the principal mechanism for them to ensure that standards expected of public services are met.<sup>25</sup> However, other factors beyond government contracts can also affect service provision and quality, and the failure to take three of such factors into account and manage them effectively led to Carillion’s collapse. They include projects beyond those with the UK government, corporate culture, and secrecy of individual contract details. This argument is based on the problem of ‘deal-making’ identified by Johns when

---

<sup>24</sup> ‘Carillion ‘aggressively managed’ accounts, report says’ (*BBC News*, 4 March 2018) <<http://www.bbc.co.uk/news/business-43275605>> accessed 8 April 2018.

<sup>25</sup> National Audit Office, ‘A Short Guide to Commercial Relationships’ (NAO 2017).

financing is used as a method of governance – the deal becomes standalone, set apart from its wider considerations and circumstances.<sup>26</sup>

Firstly, Carillion's work was not limited to public sector projects with the UK government. It had large private projects within the UK such as the Liverpool FC Anfield Stadium expansion, as well as overseas projects in Canada, the Caribbean and the Middle East. Its collapse was partly caused by taking on too many risky projects which proved unprofitable, particularly those in the Middle East, with which it faced significant payment delays.<sup>27</sup> From Carillion's 2016 annual report, 15% of total group revenue originated from the Middle East and North Africa, totalling £786 million.<sup>28</sup> Therefore, the success or failure of Carillion's numerous other projects could easily have affected the performance of its government contracts in terms of cashflow, manpower and materials, and thus should have been constantly monitored.

Secondly, Carillion's corporate culture outside its relationship with the government was also highly influential to decision-making, and yet was not adequately monitored. One aspect is excessive executive remuneration. For example, former CEO Richard Howson, who left Carillion in July 2017, would have continued to receive a £660,000 salary and £28,000 in benefits until October 2018, despite the company issuing multiple profit warnings during his tenure.<sup>29</sup> A relaxation of clawback conditions on executive pay was also instituted in 2016.<sup>30</sup> Although the UK government has announced that none of Carillion's directors and members of senior management would be receiving any bonuses or severance payments,<sup>31</sup> it is submitted that such rewards independent of performance would have influenced their behaviour prior to the company's collapse. This behaviour included taking on further debt to compensate for a failure to turn reported

---

<sup>26</sup> Fleur Johns, 'Financing as governance' (2011) 31(2) OJLS 391.

<sup>27</sup> BBC News, 'Where did it go wrong for Carillion?' (n 17).

<sup>28</sup> Carillion plc, 'Annual Report and Accounts 2016' (Carillion 2016).

<sup>29</sup> 'Carillion: Six charts that explain what happened' (BBC News, 19 January 2018) <<http://www.bbc.co.uk/news/uk-42731762>> accessed 8 April 2018.

<sup>30</sup> 'Carillion bosses face inquiry after protecting "exorbitant" £4 million bonuses ahead of collapse' (Independent, 15 January 2018)

<<https://www.independent.co.uk/news/uk/politics/carillion-collapse-bonuses-investigation-inquiry-liquidation-government-outsourcing-a8160946.html>> accessed 8 April 2018.

<sup>31</sup> Ibid.

profits into cash, and aggressively managing the company's balance sheet to enhance reported profitability and net debt position.<sup>32</sup> The lack of government monitoring of such a culture can be seen through the National Audit Office's 'Good Practice Contract Management Framework', which provides good practice standards in eleven areas for the management of service contracts by central government.<sup>33</sup> In the 'people' area, standards are limited to ensuring the capability of those working in government and the relationship between the government and the contracted company, without also scrutinising the company's employees and internal processes.

Finally, the secrecy of individual contract details also hinders contract management, albeit from the different perspective of third-party scrutiny. As contracts often list detailed spending commitments and objectives, publishing such details would allow interested external parties to assist in maintaining service provision standards through public pressure and share price movement. The National Audit Office expects all government contracts to be publicly available as legal and policy commitments, but observes that most are either unpublished or severely redacted.<sup>34</sup> It is submitted that a balance needs to be struck between these two positions. A certain extent of redaction is necessary in practice, as much of the content within the contracts would be commercially sensitive from the tenders and negotiations made. However, budgets, objectives, and deadlines of Carillion contracts could have been published for external reference and scrutiny, and the failure to do so again exacerbated the fallout from its collapse.

To conclude, the inability to anticipate and manage problems specific to a company but outside of government contracts appears to be a failure of both government policy-making and enforcement, as well as Carillion's self-regulation.

---

<sup>32</sup> BBC News, 'Carillion "aggressively managed" accounts, report says' (n 24).

<sup>33</sup> National Audit Office, 'Good Practice Contract Management Framework' (NAO 2016).

<sup>34</sup> National Audit Office, 'A Short Guide' (n 25).

## SUFFICIENCY OF EX-POST ACCOUNTABILITY

### Executive

Despite Carillion's size and number of employees, the government did not feel it was 'too big to fail', declining to step in and save the company. Cabinet Office Minister David Lidington defended that 'taxpayers cannot be expected to bail out a private sector company...or allow rewards for failure', and that Carillion's shareholders and lenders would bear the 'brunt of the losses'.<sup>35</sup> This response, along with denying payments to Carillion's senior officers, seem ostensibly in line with the 'Macrory penalties principles', with the former aiming to deter future poor behaviour by other firms, and the latter eliminating any financial gain or benefit from current poor behaviour.<sup>36</sup> However, one must note that awarding new contracts to Carillion when it was already in dire financial straits could also be seen as another form of attempting to bail the company out. According to industry sources, had the company not been awarded the new HS2 and Ministry of Defence contracts in July 2017, Carillion would have gone into liquidation months earlier.<sup>37</sup>

Moreover, on 3 February 2018, the government announced it would provide funding to maintain Carillion's public sector projects in the wake of its collapse, and government-backed loans totalling £100 million would be available to suppliers and sub-contractors affected.<sup>38</sup> This suggests that in the end, the cost of public sector projects is still borne by the public. This can be reflected from a comment in the Transport Committee's report on passenger rail franchising – another debacle which suffered from overwhelming complexity, cost overruns and poor service. '[The government] wants risk to be transferred from the public to the private sector, and yet risk cannot be transferred in anything other than

---

<sup>35</sup> 'Carillion collapse: Cabinet Office minister David Lidington says "vital services" will be kept afloat - but this is no bail out' (*City AM*, 15 January 2018) <<http://www.cityam.com/278815/carillion-collapse-cabinet-office-minister-david-lidington>> accessed 8 April 2018.

<sup>36</sup> Richard B Macrory, 'Regulatory Justice: Making Sanctions Effective' (Cabinet Office 2006) (Macrory Report).

<sup>37</sup> BBC News, 'Carillion collapse raises job fears' (n 5).

<sup>38</sup> 'Carillion collapse: UK puts up £100m to back Carillion contractor loans' (*BBC News*, 3 February 2018)<<http://www.bbc.co.uk/news/business-42925155>> accessed 8 April 2018.

name because, as everyone knows, no Government could afford to let the railways go bust.<sup>39</sup> Therefore, the original purpose of contracting out as the transfer of risks and costs from government to companies is turned on its head. Financial accountability from Carillion which can be demanded by the executive appears limited.

### Legislature

On 24 January 2018, the Work and Pensions Committee and Business Energy and Industrial Strategy Committee announced a joint inquiry into the collapse of Carillion. By 6 February 2018, the co-chairs of the Work and Pensions Committee had issued a joint statement reprimanding former Carillion directors for passing the blame during oral evidence sessions.<sup>40</sup> Assessing such action by the Howe criteria,<sup>41</sup> the prompt response by Parliament and the strong criticism of Carillion management arguably achieve three objectives. Firstly, to provide catharsis for stakeholders (Howe Criterion 3); secondly, to reassure the public that the government was taking the matter seriously (Howe Criterion 4); and, thirdly, to serve the political interests of government by blaming Carillion from the start (Howe Criterion 6), thus shifting the focus away from the fact that the government the counterparty of many of Carillion's contracts and had probably failed to carry out effective contract management themselves, as argued above.

Moreover, by 4 March 2018, the Select Committees had published a series of findings indicating 'pervasive institutional failings'.<sup>42</sup> They include how Carillion's accounts were found to be irregular by the new Chief Financial Officer who started in September 2017, how a presentation had been made to Carillion executives by audit firm Ernst & Young commenting on the culture of non-compliance and a lack of professionalism and expertise, and an independent business review commissioned in 2017 which Carillion had refused to publish as

---

<sup>39</sup> Transport Committee, *Passenger Rail Franchising* (HC 2005-06, HC 1354), 7.

<sup>40</sup> 'Carillion: Ex-chairman Philip Green takes blame for collapse' (*BBC News*, 6 February 2018) <<http://www.bbc.co.uk/news/business-42958507>> accessed 8 April 2018.

<sup>41</sup> See Geoffrey Howe, 'The management of public inquiries' (1999) 70 Pol Q 294. The six criteria will be cited hereafter as Howe Criterions 1 through 6.

<sup>42</sup> 'Carillion board papers reveal "pervasive institutional failings"' (*UK Parliament*, 2 March 2018) <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2017/carillion-board-papers-17-19/>> accessed 8 April 2018.

it was deemed to be ‘too harsh’.<sup>43</sup> Put together, these serve to establish the facts of Carillion’s medium to long-term failure (Howe Criterion 1). However, with the inquiry still in early stages, it is too early to examine whether it has allowed different parties to learn from events (Howe Criterion 2), or whether people and organizations will be made accountable (Howe Criterion 5). Therefore, whether political accountability from Carillion will be sufficient is yet to be determined. It is ironic to note that Parliament may do better than the executive at bringing Carillion to account, despite the fact that it was the latter which entered into the contracts in the first place.

## **REFORM PROPOSALS**

With regulatory failure including Carillion-specific problems and also problems inherent to contracting out, recommendations made should be able to address both. Two recommendations will be submitted below. Firstly, modelling on Davies’ *Accountability: A Public Law Analysis of Government by Contract*, a public law normative framework for contracts should be created.<sup>44</sup> Secondly, building on proposals from the Committee on Standards in Public Life, common ethical standards for service providers should be established.<sup>45</sup>

### **Public law normative framework for external contracts**

In her book, Davies proposes a ‘public law of internal contracts’, where non-legally binding agreements between public bodies are used as mechanisms of accountability with the introduction of new norms.<sup>46</sup> Such a proposal can possibly be extended to external contracts with private firms as well, which was mentioned by her as a concluding thought and will be explored here.

Davies sees contractualisation itself as a success, with a public law normative framework further enhancing its positive effects for internal

---

<sup>43</sup> BBC News, ‘Carillion “aggressively managed” accounts, report says’ (n 24).

<sup>44</sup> Anne Davies, *Accountability: A Public Law Analysis of Government by Contract* (OUP 2001).

<sup>45</sup> Sheila Drew Smith, ‘The Collapse of Carillion - a Failure of Ethical Standards?’ (Committee on Standards in Public Life, 1 February 2018).

<sup>46</sup> Davies (n 44).

contracts.<sup>47</sup> It is argued that this view is compatible with the analysis of external contracts previously made by this essay. First, despite fixed-price contract bidding being seen as sub-optimal as it fundamentally awards low bidders at the possible expense of service quality,<sup>48</sup> statistics from the Smith Institute show that in reality contracts are almost always fulfilled to a satisfactory degree.<sup>49</sup> Thus, contracting out is still a desirable tool for the state, and the introduction of new norms can potentially improve the process by reducing the inherent flaws found in contract formation and management. For example, relevant norms include debating the practicalities of achieving particular targets,<sup>50</sup> which tackles the problem of firms submitting overly low bids and government focus on VFM at the procurement stage. Another norm involves the purchaser considering the interaction between its contract and other accountability processes applicable to the provider,<sup>51</sup> which reduces the problem of ‘deal-making’. Therefore, if successful, this solution may reduce the flaws in the tendering of Carillion contracts and the management of individual contracts.

### Common ethical standards for service providers

Following Carillion’s collapse, the Committee on Standards in Public Life proposed a code of conduct delineating common ethical standards for all companies providing public services.<sup>52</sup> Revolving around the ‘Nolan principles’ of selflessness, integrity, objectivity, accountability, openness, honesty and leadership,<sup>53</sup> such a code of conduct would also be a form of principles-based regulation, the use of which was criticised above as problematic. However, as Black has observed, principles-based regulation is not necessarily undesirable in itself,<sup>54</sup> but simply ‘does not work with people who have no principles’.<sup>55</sup>

---

<sup>47</sup> Ibid.

<sup>48</sup> Peter Vincent-Jones, *The New Public Contracting* (OUP 2006) 194.

<sup>49</sup> Denise Chevin (ed), *Public Sector Procurement and the Public Interest* (Smith Institute 2005)

<sup>50</sup> Davies (n 44).

<sup>51</sup> Ibid.

<sup>52</sup> Smith, ‘The Collapse of Carillion’ (n 45).

<sup>53</sup> Cabinet Office, *First Report of the Committee on Standards in Public Life* (Cm 2850-I, 1995) (Nolan Report).

<sup>54</sup> Julia Black, ‘Paradoxes and Failures: ‘New Governance’ Techniques and the Financial Crisis’ (2012) 75(6) MLR 1037.

<sup>55</sup> Hector Sants, ‘Delivering Intensive Supervision and Credible Deterrence’ (Reuters Newsmakers, London, 12 Mar 2009).

Therefore, the Nolan principles bring an additional difference of changing fundamental workplace culture to instil respect for principles, which is argued by Goodin as giving the best chances of bringing true administrative change.<sup>56</sup> This solves the discrepancy between Davis' theory of structuring and confining discretion, and the reality of poor decision-making in the tendering of Carillion contracts.

Such standards can also be applied to reduce the problems in Carillion's status as a Strategic Supplier. The aggressive management of Carillion's accounts and concealment of negative independent reports indicate a disregard of integrity and honesty across the firm. Similarly, excessive executive pay and relaxed clawback conditions reduced accountability at Carillion's management level. Moreover, the avoidance of responsibility by directors post-collapse shows a lack of leadership and selflessness. To address such inadequacies, per the Committee's 2014 report on Ethical Standards for Public Service Providers, a strategic programme can be adopted by the Cabinet Office, requiring CRs to maintain high ethical standards in their relationships with Strategic Suppliers.<sup>57</sup> Therefore, common ethical standards also allow the Strategic Supplier programme to bring more benefits than harms.

In the larger context, the contract state is most likely here to stay for the near future, given the UK's ongoing austerity programme and the current administration's small-government approach maintaining the need to delegate public services to third parties. However, from the two aforementioned recommendations it is clear that a complete overhaul of the system is unnecessary, and instilling fundamental mentalities within the existing structure can be equally effective. Ultimately, the goal is to achieve a balance between regulation and discretion, and consistency and individuation. Too much flexibility may sanction excessive discretion and creative compliance, but too much regulation may deter small businesses from participating, which can cause a lack of competition. Such a goal can arguably be met through continuing the distinction between the use of more stringent regulations with larger contracts, where stakes are relatively

---

<sup>56</sup> Peter Hupe and Michael Hill, 'Street-level bureaucracy and public accountability' (2007) 85 *Pub Admin* 279.

<sup>57</sup> Committee on Standards in Public Life, *Ethical Standards for Public Service Providers* (Cabinet Office 2014).

higher, and soft law and principles-based regulation with smaller deals. Where hard rules are imposed, there should be less reluctance to punish poor performance or non-compliance for the sake of maintaining a good relationship with the supplier, with the ‘balance to be struck between partnering and contract management and enforcement’<sup>58</sup> leaning more towards regulation and consistency. When soft law is used, the greater degree of discretion and individuation can be tempered by stressing the importance of good practice and ingraining norms into the workplace culture. Therefore, such changes in mentality through the recommendations offered may lead to less failures and greater accountability in the broader public/private landscape.

## CONCLUSION

This essay has identified and analysed the main regulatory flaws leading to the collapse of Carillion. From relationality affecting contract formation, to the absence of TAP values in the management of Strategic Suppliers, to wilful blindness in the deal-making mindset, it is submitted that such flaws are a mixture of those inherent to the contracting out process and those specific to Carillion’s situation. As accountability mechanisms have yet to run their course, it is unclear whether Carillion, in the form of its management, will ultimately bear its proportionate responsibilities. Nonetheless, further steps should still be taken. Recommendations include a public law of external contracts, and common ethical standards for service providers, both of which target the three flaws mentioned above and have greater implications in achieving a balance between rules and discretion within the larger context. With further research on how these recommendations can be properly incorporated, one company’s collapse may bring the future reinforcement of the contract state framework.

---

<sup>58</sup> HM Treasury, *PFI: Strengthening long-term partnerships* (HM Treasury 2006).

# A Directly-Elected House of Lords: A Proposal for Reform

See Hyun Park\*

---

## ABSTRACT

*This article proposes a possible reform of the House of Lords, namely to its composition and functions. By examining previous reform attempts as well as the current criticisms and issues facing the United Kingdom's upper chamber, the article contends that the House of Lords is necessary due to the benefits of a bicameral legislature that it offers to the United Kingdom. The article provides arguments in favour of the implementation of direct elections and addresses criticisms of this scheme. Subsequently, this article argues in favour of a system of party-list proportional representation; it reviews other electoral systems, examines the merits of party-list proportional representation and offers successful examples of its current implementation by other states. Finally, the article offers a prediction of the overall effects on the relationship between the House of Commons and the House of Lords if direct elections are implemented.*

## INTRODUCTION

Reforming the House of Lords (henceforth “the Lords”) – an unelected body of Parliament composed of hereditary peers, life peers as well as archbishops and bishops – has been considered a legal quagmire. Prior to the 20th century, the Liberals and the Conservatives, the two main political parties of the 19th century,<sup>1</sup> had debated a possible curb on the Lords’ political and legislative powers.<sup>2</sup> Subsequent to the debate, the Parliament Act 1911 was adopted, concluding the

---

\* BA in Jurisprudence ‘21 (Oxon). I would like to thank Dr. Thomas Adams and Joshua Wang for their advice on an earlier draft.

<sup>1</sup> Peter Dorey and Alexandra Kelso, *House of Lords Reform Since 1911: Must the Lords Go?* (Palgrave Macmillan UK, 2011) 16.

<sup>2</sup> ibid 10.

most significant period of change from 1906 to 1911 in the Lords.<sup>3</sup> The Act imposed several restrictions on and removed certain rights from the Lords, such as its absolute power of veto on legislation.

As an important preliminary step in the process of reforming the Lords,<sup>4</sup> the 1911 Act was later supplemented by the Parliament Act 1949, which imposed further limitations on the upper house's power.<sup>5</sup> This period also saw the manifestation of the so-called 'Salisbury Convention' in 1945, originating from when Lord Salisbury led an initiative in which the Lords would refrain from voting down or opposing the second reading of legislation promised in the government's election manifesto.<sup>6</sup> Subsequent to the Peerage Act 1963, however, there had been little real progress until 1997 due to a failure to agree on what further reforms ought to be made.<sup>7</sup> Even with further reforms enacted after 1997, touched upon later in this article, the Lords, faced with criticisms of its functions and overall purpose, has not been completely reformed. This article considers the issues that the Lords currently faces and proposes a plan for its reform. It will argue for a directly-elected Lords, with single fifteen-year terms through a proportionally-representative system in staggered elections, so that only a third of the members are elected every five years, in contrast to the first-past-the-post system used for the House of Commons (henceforth "the Commons").

Section I of this article focuses on the current status of the Lords, namely its functions, previous reforms, and the problems and criticisms that it faces today. Section II argues for maintaining a bicameral legislature rather than abolishing the Lords. It also contends that a second chamber could legitimise the practices of Parliament as a whole. Section III argues that direct elections would allow the Lords to better serve the public interest and analyses how the Lords could maintain its relative independence from party politics. It also contends that direct elections would not necessarily mean a loss of wisdom or stability. Finally, section IV looks into possible means through which direct elections could be implemented and argues that the Lords could represent the people's interest more

---

<sup>3</sup> Lord Longford, *A History of the House of Lords* (New ed, Sutton Publishing 1999).

<sup>4</sup> Meg Russell, *Reforming the House of Lords: Lessons from Overseas* (OUP 2000) 12.

<sup>5</sup> *ibid* 12. An example is the limitation of the House of Lords' delaying power.

<sup>6</sup> *ibid* 13.

<sup>7</sup> *ibid* 14.

effectively through party-list proportional representation (henceforth “party-list PR”). It also looks into the current use of party-list PR, which has been successfully implemented in the second chambers of other nations, and asserts that the future relationship between the two Houses would not be necessarily different from that between the two Houses today. It is with this proposal that the Lords may become an improved representative institution that serves the modern interests of the people and works in an enhanced manner with the Commons.

## CURRENT STATUS OF THE HOUSE OF LORDS

### The Current Functions of the House of Lords

The exact nature of the Lords’ powers should be defined prior to the discussion of whether the Lords ought to be reformed and, if so, in what manner. As such, this section examines the current role the Lords plays in the UK’s constitutional makeup. Archer lists three constitutional justifications for the Lord’s existence: its role as a scrutiniser and drafter of legislation;<sup>8</sup> its role as a mechanism of preventing the Commons from becoming despotic; and its ability to reflect on legislation for an extended period of time.<sup>9</sup> More generally, Bagehot argues that there are two functions of the Lords: the power to delay legislation and propose revision.<sup>10</sup>

With the Parliament Act 1911, the Lords’ power to veto was replaced by a power to delay a bill by up to two years.<sup>11</sup> The Parliament 1949 Act reduced this time period to just one year. As an example, the Lords delayed the Hunting Bill 2004,<sup>12</sup> which banned the hunting of wild mammals with dogs in England.<sup>13</sup>

---

<sup>8</sup> An exception is legislation relating to financial matters.

<sup>9</sup> Peter Archer, ‘The House of Lords, Past, Present and Future’ (2000) 70 PQ 396, 396–397.

<sup>10</sup> Adam Tomkins, ‘What is Parliament For?’ in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 55, 56.

<sup>11</sup> The removal of a veto does not apply to all legislation. For instance, the Lords may veto a bill extending the term of the current Parliament.

<sup>12</sup> Later passed into law as the Hunting Act 2004.

<sup>13</sup> Ben Russell and Colin Brown, ‘Day of chaos ends with fox-hunting ban forced into law’ *The Independent* (London, 19 November 2004).

Though the Commons invoked the Parliament Acts to overrule the delay – making the Hunting Act 2004 the seventh statute since 1911 to be enacted through such a procedure –<sup>14</sup> it nonetheless demonstrates the power of review that the Lords holds with this power to delay; it is able to ensure that the Commons thoroughly reviews a bill’s political implications, even though the ultimate decision lies with the it. Such a power could be a de facto veto in certain circumstances: for instance, where there is an upcoming general election<sup>15</sup> and the current government does not have the confidence of the majority of the populace, the subsequent government, perhaps of a different political party, may not wish to pass the delayed bill. However, in most cases, the Lords invokes the right to delay in order to allow the Commons to reconsider a bill. While such a right may not be a direct form of control over the Commons, it is effective in that it forces re-examination of a bill’s issues. The Commons cannot regularly circumvent the Lords’ authority in such a way, lest it undermine the political legitimacy of its legislation. Although *Jackson* concluded the question of whether Acts made under the Parliament Acts’ procedure were validly enacted,<sup>16</sup> the Commons has an interest in adhering to the standard legislative procedure.

The power of revision, according to Bagehot, refers to the Lords’ ability to scrutinise legislation, though it is limited by the previously-explained Salisbury Convention.<sup>17</sup> Oliver suggests that the Lords can be construed as a constitutional watchdog through its work in select committees.<sup>18</sup> Through calling experts and demanding information from the government, the committees report on certain topics and bills to which the government is obligated to respond.<sup>19</sup> Having recently been reformed following the ‘Wright Report’ of 2009,<sup>20</sup> the five committees of the Lords have the responsibility of overseeing general areas of

---

<sup>14</sup> HL Deb 8 April 2010, vol 718, col WA463.

<sup>15</sup> The election would have to be in less than a year but in more than a month from the point where the bill was delayed.

<sup>16</sup> R (*Jackson*) v Attorney General [2005] UKHL 56, [2006] 1 AC 262.

<sup>17</sup> Jowell and Oliver, *The Changing Constitution* (7th ed, OUP 2011) 169.

<sup>18</sup> *ibid* 181.

<sup>19</sup> *ibid* 174.

<sup>20</sup> *ibid* 175. One recommendations was for the election of committee members by secret ballot within the parties.

government,<sup>21</sup> contrasted with the Commons' thematic and departmental select committees. Bagehot also contends that the Lords has an important symbolic value: its imposition of the value of nobility on the common masses and preventing them from experiencing worse forms of rule that would replace the nobility if it did not exist, such as the rule of wealth, of rank, and so on.<sup>22</sup> While this may not be seen as a benefit, as nobility normally arises from the confluence of wealth and rank, the symbolism of the Lords as an independent entity, apart from ordinary political turbulence, can legitimise Parliament's legislation, an idea explored later in this article.

### **Several Criticisms of the House of Lords Today**

Numerous proposals for reforms have either failed to be enacted or have been enacted without significantly changing the Lords. Jeremy Bentham argued that if the second chamber offers nothing different from the first, then it is redundant and a 'net loss'.<sup>23</sup> Emmanuel Siéyes concurred, asserting that 'if second chamber dissents from first, it is mischievous; if it agrees, it is superfluous'.<sup>24</sup> However, such an argument can be dismissed in considering the Lords' practical and symbolic advantages, such as its ability to review legislation and legitimise Parliament; without the Lords, the authority and functionality of Parliament could suffer.

While some concede that a second chamber is necessary, they criticise the Lords' unrepresentative nature. The Lords' current composition<sup>25</sup> is significantly different from that of the Commons<sup>26</sup> and from the percentage of

---

<sup>21</sup> The five Select Committees of the Lords are European Union Committee, the Constitution Committee, the Economic Affairs Committee, the Science and Technology Committee, and the Communications Committee.

<sup>22</sup> Tomkins (n 9) 56.

<sup>23</sup> Waldron, 'Bicameralism and the Separation of Powers' in (2012) 65 CLP 31, 35-36.

<sup>24</sup> *ibid* 37.

<sup>25</sup> See 'Lords by party, type of peerage, and gender' (UK Parliament)

<<https://www.parliament.uk/mps-lords-and-offices/lords/composition-of-the-lords/>> accessed 2 January 2019. As of 2019, the Lords currently consists of 676 life peers and 90 hereditary peers, with 26 bishops, 249 Conservative peers, 186 Labour peers, 185 crossbench peers, 98 Liberal Democrats peers, and 31 non-affiliated peers.

<sup>26</sup> See 'Current State of the Parties' (UK Parliament) <<https://www.parliament.uk/mps-lords-and-offices/mps/current-state-of-the-parties/>> accessed 2 January 2019.

votes gained by each party in the 2017 general election.<sup>27</sup> These serve as a point of comparison between the general ideology of the populace and that of the Lords, which can be inferred to be significantly different. In addition, despite the Peerage Act 1963 permitting female peers to sit in the Lords,<sup>28</sup> there are currently only 208 female peers compared to their 584 male counterparts.<sup>29</sup> Therefore, the Lords may not effectively represent the interests of the populace, with its agenda out of line with the people's wishes.

The membership of hereditary peers, who gain their position by virtue of birth rather than merit or work, is also criticised. Reform was attempted with the House of Lords Act 1999, which removed all but ninety-two hereditary peers.<sup>30</sup> The significance of this Act was to allow, for the first time, life peers to form the majority of the Lords.<sup>31</sup> Yet, criticism persisted due to the continued membership of hereditary peers and bishops. The Royal Commission on the Reform of the House of Lords recommended that hereditary members be removed altogether and that the number of bishops be reduced to sixteen.<sup>32</sup> It also recommended that the Prime Minister ought not to have the right to appoint the members of the second chamber and that the Lords move towards gender and ethnic balance.<sup>33</sup> However, such reforms have not been implemented, as, according to Russell and Cornes, the report failed to adequately address the impacts and potential efficacy of a redeveloped Lords and its new composition on the constitution more broadly.<sup>34</sup>

Another criticism of the Lords is that, although unelected, it has immense authority, which seems to conflict with the UK's democratic principles, which generally stipulate that the rulers, the government, ought to be accountable to the ruled, the people. Although the House of Lords Reform Bill 2012, which

---

<sup>27</sup> See Vyara Apostolova and others, *General Election: Results and Analysis* (House of Commons Library Briefing Paper, 2nd ed, CBP 7979, 2018).

<sup>28</sup> See s 6 Peerage Act 1963.

<sup>29</sup> See 'Lords by party, type of peerage, and gender' (n 25).

<sup>30</sup> S 1 and s 2(2) House of Lords Act 1999.

<sup>31</sup> Richard Cracknell, *Lords Reform: The interim House – background statistics; Research Paper 00/61*. (House of Commons Library Research Paper, No 00/61, 2000).

<sup>32</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000).

<sup>33</sup> *ibid.*

<sup>34</sup> Meg Russell and Richard Cornes, "The Royal Commission on Reform for the House of Lords: A House for the Future?" (2001) 64(1) MLR 82.

would have made the Lords mostly elected, attempted to change the manner with which the Lords was comprised,<sup>35</sup> it was abandoned due to opposition from Conservative backbench members of Parliament.<sup>36</sup> Subsequent to the Bill's failure, there have been no serious proposals to alter the Lords' composition. This represents a clear structural issue since, due to the Lords' composition of unelected members who may not accurately represent the people, it is difficult to contend that the Lords can speak on behalf of the people.

## THE NEED FOR A BICAMERAL LEGISLATURE

### A Check on the House of Commons

Despite its issues, the absence of the Lords as an upper chamber would cause more problems than it would solve. The upper house's role as a check on the Commons is essential for the proper and legal functioning of Parliament. This subsection argues why reform would be a better option than abolition.

As mentioned in the previous section, critics such as Bentham and Siéyes have questioned the need for the Lords, arguing that it adds no substantial value. Yet, without a second chamber to review the activities of the first, the Commons would be a virtually unchecked power, such as with the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (DTCR).<sup>37</sup> If the Lords were not required to affirm the instrument, the Commons could have passed the DTGR without waiting for an independent, second review,<sup>38</sup> thereby avoiding proper scrutiny.

Parliament currently enjoys the doctrine of parliamentary sovereignty, which holds that Parliament has absolute authority and is supreme over all other government institutions. Although the courts had initially argued that the common law did not unquestioningly accept the binding authority of

---

<sup>35</sup> See House of Lords Reform Bill 2012.

<sup>36</sup> 'Nick Clegg confirms House of Lords reform plan is officially scrapped' *Evening Standard* (London, 3 September 2012).

<sup>37</sup> 'Tax credits: Lords vote to delay controversial cuts' *BBC* (London, 26 October 2015).

<sup>38</sup> *ibid.*

Parliament,<sup>39</sup> they now formally recognise the doctrine of parliamentary sovereignty by bestowing upon Acts of Parliament a legal status higher than that of judge-made law.<sup>40</sup> Even the Supreme Court, formed in 2009 to replace the Lord's previous judiciary role as the final port-of-call for cases, cannot override Parliament, but may only interpret and develop the law when necessary.<sup>41</sup> Despite recent legislation which have qualified the broad doctrine – such as, but not limited to, the European Communities Act 1972, Human Rights Act 1998, and the Scotland Act 1998 – it has nonetheless persisted and remained relatively unchanged in recent history;<sup>42</sup> today, Parliament can make laws concerning anything, and an Act's validity cannot be questioned by the courts.

The Lords is vital in this consideration and contributes by examining and revising bills brought by the Commons, acting as a forum for a free discussion of important general questions of policy, and delaying a bill's passage to allow all opinions of it to be expressed and be responded to.<sup>43</sup> Without a second chamber, it would be difficult to ensure that more concerns regarding the Commons' legislation are addressed and that Acts passed are well-justified and do not contain any significant issues. Indeed, Mill opined that, as a majority in a single assembly is always assured of attaining victory, it could become despotic without a second chamber to review its legislation.<sup>44</sup> Hence, an independent point of view through the Lords is vital to ensure that the majority does not oppress the minority.

Yet, it would seem illogical that those who scrutinise the legislation of the Commons would themselves be unaccountable to the people that they claim to represent and benefit. As the scrutiny is meant to prevent the Commons from becoming despotic, the Lords ought not to become unaccountable themselves by not being representative of the people. As such, reforming the Lords to ensure

---

<sup>39</sup> See *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 107. Lord Coke CJ: 'When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'.

<sup>40</sup> Adam Tomkins, *Public Law* (OUP 2003) 104.

<sup>41</sup> *ibid* 18.

<sup>42</sup> Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 54.

<sup>43</sup> Paul Carmichael and Brice Dickson (eds), *The House of Lords: Its Parliamentary and Judicial Roles* (Hart 1999) 38. Examples include examining bills brought from the Commons, acting as a forum for free discussion, and delaying a bill's passage.

<sup>44</sup> Waldron, 'Bicameralism and the Separation of Powers' (n 23) 42-43.

that it can more accurately reflect the desires of the populace without compromising its regulatory functions is essential, which can be done through a proportionally-representative electoral system, as is argued in section IV.

### Maintaining the Legitimacy of Parliament

Despite the current restrictions upon the Lords, its abolition would considerably diminish the legitimacy of Parliament's actions. As such, this subsection contends that the Lords legitimises the actions of Parliament as a whole.

If Parliament is unicameral, a party or a coalition with a majority in the Commons would have little difficulty in ensuring that its legislation is passed. This exacerbated by the use of party whips in the Commons; a member of Parliament who opposes the whip's directives would face severe political consequences.<sup>45</sup> Those who are not represented by the majority would find their concerns unheard and, consequently, have their faith in the current government reduced. This issue is compounded by the fact that the often political-partisan scrutiny of legislation in the Commons is not completed with any set criteria but at-large,<sup>46</sup> which could further undermine Parliament's legitimacy. While it may seem as though an elected Lords would result in greater tyranny of the majority, it would not be so in an electoral system different from that used by the Commons as the Lords' composition could be significantly different from that of the Commons, allowing the Lords majority to set their own agenda, an idea later explored in section IV.

As a result, the Lords' role as the scrutiniser of the Commons is a means to counteract the potential lack of faith in a government. Democratic elections do not mean that checks and balances are unnecessary; for example, control is exerted by the judiciary, which, for example, regulate executive action,<sup>47</sup> or interpret Acts of Parliament as compatible with fundamental common law rights.<sup>48</sup> The Lords' significant contribution to checks and balances within the Westminster system is through its review of legislation passed by the Commons from a viewpoint, and against a standard, independent from those who proposed

---

<sup>45</sup> *ibid* 46-47. An example would be expulsion from the party or potential deselection in elections.

<sup>46</sup> Jowell and Oliver (n 17) 173.

<sup>47</sup> See *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

<sup>48</sup> See *R (Simms) v Secretary of State for the Home Department* [1999] UKHL 33.

the measures.<sup>49</sup> By calling experts on relevant matters and pressing for information from Parliament, the Lords can allow relevant opinions about the justification and consequences of a certain Bill to be addressed. Even by delaying the enactment of a bill, the Lords can compel the Commons to re-examine any problem that may arise from its passing which it deems significant but overlooked. Yet, to ensure that the Lords itself does not lose the confidence of the people, it must not be completely detached from the latter's desires. A democratic House of Lords, elected through a proportionally-representative system, would be best able to reinforce Parliament's popular legitimacy. With this scrutiny, people from the entire political spectrum, even if they disagree with an Act, can be assured that Parliament has carefully considered whether it has the justification necessary to be passed, whether it would infringe upon anybody's fundamental rights, and what consequences could arise.

With the Lords, Parliament can generally function with the support of the people. Yet, reform is necessary to ensure that Parliament's legitimacy is strengthened. Overall, the Lords' complete abolition would not be advisable, and reform would allow the criticisms of the Lords to be addressed while retaining the benefits that it currently confers on Parliament.

## THE CASE FOR A DIRECTLY- ELECTED HOUSE OF LORDS

### The Representative Nature of Direct Elections

Ultimately, direct elections would best represent the interests of the people and increase Parliament's legitimacy. This subsection will look at other proposals for reform and assert as to why they cannot be as representative as direct elections.

Proposals for a more representative Lords have been made throughout the past century, as can be seen in the previous sections. The Wakeham Report argued for a combination of an elected and appointed Lords, which is constituted through selections by an independent Honours and Appointments Commission

---

<sup>49</sup> David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] PL 323.

and proportionally-representative elections.<sup>50</sup> A 2007 white paper also called for a House composed of elected members and members appointed by a new Statutory Appointments Commission, which would direct select non-party-political appointees, whereas party-political appointees would be nominated by party leaders in the Commons and vetted by the Commission.<sup>51</sup> Yet, this recommendation was never implemented, as the Wakeham Report was criticised for remaining ambiguous on several critical issues.<sup>52</sup> For example, its proposals may have created two separate classes of members who may not be able to work with one another in an effective manner<sup>53</sup>; the elected members may have greater legitimacy, by being directly chosen by the people, than those appointed. For instance, if legislation, supported by elected members, is blocked due to opposition from the appointed members, it could undermine the people's faith in the Lords. Thus, with the lack of synergy that could occur as a result of such a combination, the Lords ought to be formed through a single process, which ought to be direct elections rather than another means, such as appointment or indirect elections.<sup>54</sup>

The main, and perhaps most obvious advantage of direct elections are its adherence to democratic principles, thereby making the Lords more able to translate the people's support into a democratic mandate.<sup>55</sup> Although appointment by an independent commission would improve the Lords' overall legitimacy as compared to the current arrangement, it would not do so as much as direct elections would. Whilst the people, in the case of direct elections, would have a direct say in the process of deciding who would represent them in the second chamber – thereby allowing them to believe that they are making their opinions heard – the people, an appointments process, may lead people to question whether any selection was truly representative of the people's wishes. This was the case in the Canadian Senate, which, although wholly appointed, suffers from legitimacy issues that prevent it from effectively challenging the

---

<sup>50</sup> See Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000).

<sup>51</sup> See Jack Straw, *The House of Lords: Reform* (Cm 7027, 2007).

<sup>52</sup> Jeremy Mitchell, 'Review of "Reforming the House of Lords: Lessons from Overseas" by Meg Russell' (2000) 71(3) PQ 375–377.

<sup>53</sup> 'Wakeham is not the answer' BBC (London, 20 January 2000).

<sup>54</sup> Meg Russell, *Reforming the House of Lords* (n 4) 316.

<sup>55</sup> ibid 317.

lower house.<sup>56</sup> There may even be questions regarding the independence of the commission itself, such as whether it was acting in the public interests. With the Lords, these questions are likely to keep persisting as the current arrangement in the Lords is facing issues related to its institutional legitimacy. Indirect elections, such as those through selections by elected party leaders, could also face legitimacy issues as the people would not have a direct say as to whether they are being represented. While it partly adheres to democratic principles (as the people can elect those who would vote for the members of the Lords), this method would be seen as less reflective of the people's opinion. However, such questions would be less likely to arise with direct elections.<sup>57</sup>

Such an advantage may seem to undermine existing checks and balances as the Lords could be seen to gain much power. However, democratic control can also, and perhaps better, function as regulatory oversight over Parliament.<sup>58</sup> As Parliament would be directly accountable to the people, it would be able to ensure that it does not act in a manner that harms the public wellbeing. This would be beneficial to the Lords' efficacy, allowing better and more stringent oversight over what the Commons proposes whilst simultaneously being seen as acting in the people's interest, rather than contrary to it.

Hence, direct elections are a viable alternative to the current system of appointment of members. Many other nations have directly-elected second chambers, distinct from the first in their electoral system, which the government noted in 1998 while considering different methods through which the upper house could be created.<sup>59</sup> For example, Australia and Ireland use the single transferable vote (proportional representation) and the United States uses a first-past-the-post (single-member constituency) model. The Lords could adopt direct elections for its own use to ensure that it is seen as both stable and legitimate, which is explored further in section IV.

---

<sup>56</sup> *ibid* 327.

<sup>57</sup> *ibid* 328.

<sup>58</sup> Eric Barendt, 'Separation of powers and constitutional government' [1995] *PL* 559, 603.

<sup>59</sup> See HMSO, *Modernising Parliament, Reforming the House of Lords* (Cm 4183, 1998) 34.

## Maintaining Independence from Party Politics

Despite the important advantages of direct elections, there has been fear of introducing political chaos into a supposedly stable second chamber. This subsection discusses how the independence of the Lords from the politics of the Commons could still be maintained.

One of the main fears of a directly-elected Lords is the possible loss of an independent non-party element. It could succumb to political strife, with members vying for power, unlike the current Lords, whose members are unlikely to seek either support or favour from political parties.<sup>60</sup> Through a carefully designed electoral system, however, the influence of politics on the Lords can be considerably diminished.

The need to seek re-election is one of the main reasons as to why members of the Commons are loyal to their parties, who provide both directly, with campaign support, and indirectly, by not supporting a candidate opposed to their nomination. Furthermore, there are many rewards available to those with a long history of support,<sup>61</sup> such as being appointed by the Prime Minister to select posts and building popularity so that, one day, they may become the Prime Minister themselves. To avoid this, prospective members of the Lords ought to serve single fifteen-year terms, as proposed in 2012.<sup>62</sup> The Political and Constitutional Reform Committee reported that fixed-terms, albeit through appointments, may be desirable for long-term reform<sup>63</sup>. This could be extended to direct elections as the Committee reported that long terms would afford stability and allow for new members to flow in.<sup>64</sup> Members ought also to be prohibited from seeking political office after their terms in order to ensure that, once elected, they have a degree of independence from their political parties. Without the need to seek re-election or the desire to reach higher office, these members can objectively judge the bills proposed by the Commons and avoid the

---

<sup>60</sup> Thomas Bingham, 'The House of Lords: Its Future?' [2010] PL 261, 267.

<sup>61</sup> Fergal F Davis 'Political Rights Review and Political Party Cohesion' (2016) 69(2) Parl Aff 213–229.

<sup>62</sup> House of Lords Reform Bill 2012.

<sup>63</sup> Political and Constitutional Reform Committee, *House of Lords reform: what next?* (HC 251, 2013) 3, 19.

<sup>64</sup> ibid 18.

influence of a politically-motivated agenda as they are no longer bound to the party's whims. In this regard, direct elections could preserve the independence of the Lords, while allowing its composition to better respond to the people's needs.

This is not to say that members of the Lords would be running as complete independents; such a system is infeasible as forcing people to run solely as independents would create an imbalance due to a host of factors, such as the expenses involved in running a campaign (which would create a Lords dominated by more affluent members). Support by political parties may be necessary, though its influence can be severely limited by making sure that those elected to the Lords are independent from party politics through the use of single lengthy terms. Through this, political parties, while motivated to run such a campaign to allow members who have a similar political ideology to theirs to represent the people in the Lords, would not be able to influence the members' decisions by allowing for rewards, such as a promise of a political office after their term is completed, or sanctions, such as deselection in later elections. As such, the members of the Lords would be more able to stay above the chaos of ordinary party politics.

Furthermore, while there may be concern that those elected to the Lords would be partial to agreeing, and even negotiating, with those in the Commons who are of the same party, this would not necessarily be the case. Currently, the two Houses maintain relative independence from each other; each has an exclusive right to manage its own affairs without interference from the other House or outside Parliament.<sup>65</sup> For instance, convention dictates that the Prime Minister and members of Cabinet are to be selected from members of the Commons, rather than the Lords.<sup>66</sup> By preserving such a principle in a directly-elected Lords, the two Houses can remain distant in terms of their influence over the other House's functions. In addition, contacts relating to political matters could be limited between the members of each House to further discourage the introduction of political discord and favouritism to the Lords. Consequently, the Lords can ensure that it remains impartial and focuses on reviewing the legislation from the Commons without the lower house actively pressuring members of the Lords to vote in a particular manner.

---

<sup>65</sup> See *R v Chaytor* [2010] UKSC 52, [2012] WLR 311 [63] (Lord Phillips).

<sup>66</sup> Waldron, 'Bicameralism and the Separation of Powers' (n 22) 45–46. See also Lucinda Maer, *Ministers in the House of Lords* (House of Commons Library Briefing Paper, No 5226, 2017).

## Preserving Wisdom and Stability in the House of Lords

With direct elections, however, there is concern regarding the motivations of those who are elected to the Lords and whether the current expertise currently found in the Lords could be preserved. It may be also questioned whether an upper house subject to the whims of its electorate can truly remain stable. This subsection argues that a directly-elected Lords would still be able to retain its wisdom and remain stable.

Critics of direct elections maintain that loss of expertise could occur, as members with expert knowledge and experience, such as retired servicepersons, diplomats, doctors, and lawyers, are replaced with younger politicians.<sup>67</sup> As a result, a directly-elected Lords, critics claim, could lose a significant advantage since, unlike the Commons, the Lords currently has members with years of highly-specialised experience.

Such a fear, however, is unfounded because the Lords has the power to call experts for select committees and debates concerning important national issues.<sup>68</sup> Contrasted with the Common's thematic and departmental Select Committees, the five committees of the Lords, following the "Wright Report of 2009", have the responsibility of overseeing general areas of government, as mentioned in Section I. The advantage is that the Lords can call in a broader range of opinions, perhaps not considered by the lower House, in order to develop a better sense of the impact of legislation. As the select committees have the power to appoint outside specialist advisers, often academics, those advisers can provide the knowledge and reasoning required when examining a certain issue.<sup>69</sup> While some more experienced members may no longer be part of the Lords, this power to call experts ensures that such knowledge would not be lost entirely. It also arguable that with the lengthier terms for the Lords, members would possess comparable amounts of experience to present, and thus would be able to review legislation as effectively. With the staggering of elections, this expertise will not be excessively cyclical. Furthermore, though there are expert peers in the Lords

---

<sup>67</sup> Bingham, 'The House of Lords' (n 60) 268.

<sup>68</sup> Mark Elliott and Robert Thomas, *Public Law* (3rd ed, OUP 2017) 436.

<sup>69</sup> See 'Select Committees' (UK Parliament)

<<https://www.parliament.uk/about/how/committees/select/>> accessed 4 January 2019.

presently, the vast majority are still political appointees.<sup>70</sup> As such, reforming the Lords to introduce direct elections would not be as detrimental to its expertise as it may initially seem.

It may be arguable that such procedures do not necessarily ensure the retention of accumulated knowledge and experience. For instance, the members of the Senate of the United States serve six years compared to those of the House of Representatives, who serve two years. However, it does not necessarily appear as though the upper chamber possesses an advantage in expertise over the latter. As such, it may be difficult to see how the use of direct elections for the Lords would yield any benefits. However, unlike the US Senate, which is far less independent of whims of each political party, the Lords' strong symbolic value works to stabilise it and it put it above the politics of the commons.<sup>71</sup> While also retaining the expertise it needs to review legislation, the Lords can add legitimacy to the legislation passed through its unique institutional competencies.

It is also important that the Lords remain stable. In other words, the implementation of direct elections has to avoid allowing the chaos of ordinary politics from entering the upper chamber. Its composition ought not to change too frequently to preserve its stability, but not too infrequently to allow for the consideration of new ideas over time. A method through which the Lords could remain stable, in addition to using single lengthy terms, is to stagger elections so that not all members' terms are concurrent. For example, the US Senate holds elections every two years in which a third of members are up for re-election, with each member serving at least six years. A similar principle can be applied to the Lords, where a third of members can be elected every five years, for example, with each member serving fifteen-year terms. Indeed, it could reduce the effect of swings in public opinion and allow the Lords to be more stable,<sup>72</sup> while becoming more representative of the people's wishes compared to the present arrangement. By not constantly changing its members, the Lords can deliberate measures over time and reduce the chances that its composition changes too

---

<sup>70</sup> See Darren Hughes, 'House of Lords: Fact vs Fiction' (Electoral Reform Society) <https://www.electoral-reform.org.uk/latest-news-and-research/publications/house-of-lords-fact-vs-fiction/> accessed 8 March 2019.

<sup>71</sup> Tomkins (n 10) 56.

<sup>72</sup> See HMSO, *Modernising Parliament, Reforming the House of Lords* (Cm 4183, 1998) 34.

radically. At the same time, elections would allow ideas to flow into the Lords and prevent it from falling too far behind the times. Thus, by enabling new members to represent their constituency while retaining the Lords' current stability, staggering elections could be an effective feature of a directly-elected Lords.

## THE PRACTICALITY OF DIRECT ELECTIONS

### Possible Systems of Voting

This subsection observes certain possible forms of voting and argues in favour of a proportionally-representative system, with party-list PR being the optimal manifestation of this electoral system. It also argues as to why a different electoral system from that of the Commons is necessary to differentiate the two Houses.

Considering the advantages brought by direct elections, there are several systems through which the Lords could be elected. Examples include plurality voting, where the candidate with the highest amount of votes wins (such as first-past-the-post), majoritarian voting, where candidates have to receive a majority of the votes (such as the two-round system), proportional representation, where the electorate vote for a list of candidates proposed by a party (such as party-list PR, which will be the focus of this subsection), and a mixed system, which combines two or all three of the voting systems previously mentioned (such as parallel voting).

Yet, a plurality voting system ought to be eliminated from consideration because it is already used by the Commons. If the Lords uses a similar system, it could undermine the very need for a second house. One of Lords' main advantages, as previously mentioned in section II, is its ability to view certain issues from a different perspective so that it can act as a constitutional check and balance, preventing tyranny of the majority.<sup>73</sup> Without its unique perspective from a different electoral system, it would not adequately perform this duty as its members would likely have identical biases and

---

<sup>73</sup> Mark Ryan, 'The Royal Commission on the reform of the second chamber: a case of constitutional evolution rather than revolution' (2000) 5(1) Cov LJ 27, 29.

backgrounds compared with those of the Commons. Hence, there is a virtue in having two separate bases for legislative representation,<sup>74</sup> since any issue or bill could be debated in two different ways, by two different forms of representation.

This is strengthened by the fact that there can be no perfect method with which to represent ‘the people’. Waldron contends that there is no such thing as a single entity which can be called ‘the people’ because society is composed of a diverse group of thoughts, backgrounds, expertise, etc.<sup>75</sup> Simply using plurality voting, which tends to overrepresent a few political parties at the expense of others, thereby creating a two-party Parliament, may not be the best option for it does not represent the entirety of the population. As a candidate in an election in the form of plurality voting only needs to win the most votes amongst the candidates, rather than the majority, he or she may only represent a minority of opinions and backgrounds within a constituency. This method, as previously mentioned, is already used for the Commons through its first-past-the-post system. Simply reforming the electoral system of the Commons, however, would not be enough for any electoral system would have its issues due to the inherent difficulty in representing a diverse group of people such as that of the UK’s population.

Applying a separate electoral system for the Lords which complements the Commons’ system would enhance Parliament’s democratic legitimacy as a whole. Proportional representation can allow for better representation of the people’s wishes by proportionally allocating seats to each party. For instance, if a party wins 30% of votes, it receives 30% of the seats. In doing so, it enables a multitude of differing ideologies to be represented in the Lords and provides the opportunity for those who may not be represented in the Commons to have a say in the Lords. As an example, while UKIP received 1.84% of the vote share in 2017 general election, the fifth largest out of all parties, it does not hold seats in the Commons whereas the Green party, despite having received 1.63%, does hold a seat.<sup>76</sup> Such a scenario would be less likely to occur in the case of

---

<sup>74</sup> Waldron, ‘Bicameralism and the Separation of Powers’ (n 22) 38.

<sup>75</sup> ibid 40.

<sup>76</sup> See Vyara Apostolova and others (n 27).

proportional representation, as each party would gain seats as dictated by their vote-share.

Notwithstanding these precautions, an elected Lords may be less able to check on the tyranny of the majority compared to the status quo as, despite the longer terms and staggered elections, popularity will ultimately determine composition. Indeed, there is some concern that the introduction of politics to the Lords would introduce bias as the appointment of members simply becomes a political election.<sup>77</sup> However, by using a different voting system from that of the Commons, the Lords, made up of a different ‘majority’ owing to the different electoral system, would still be able to offer an important second perspective. As it is extremely difficult to ensure that the entire population’s concerns are adequately met with just one electoral system, another may encourage a broader variety of opinions to be represented within the legislature.<sup>78</sup> Furthermore, it has already been argued that many of the political elements of elections to the Lords can be removed by introducing single lengthy terms and staggered elections. As such, the Lords can perform their functions without much loss in efficacy due to the implementation of direct elections, whilst reaping the benefits offered, such as increased legitimacy through being more representative of its electorate.

### **Examining Party-List Proportional Representation**

Out of the numerous forms of proportional representation, party-list PR, could be the most effective means of doing so. It entails parties drawing up a list of candidates, each of which is then voted on, with parties receiving seats in proportion to their overall share of the vote and candidates taking seats in the order they were in on the list.<sup>79</sup> It is relatively simple compared to other proportionally-representative systems like the single transferable vote. In this sense, party-list PR is the most conducive to public understanding, which is necessary to the Lords’ popular legitimacy. Though electoral methods other than

---

<sup>77</sup> Oliver Rieche ‘Reassessing the House of Lords: Why the Lords Should Remain Unelected’ [2011] 3(11) Inquiries J <<http://www.inquiriesjournal.com/articles/594/reassessing-the-house-of-lords-why-the-lords-should-remain-unelected>> accessed 8 March 2019.

<sup>78</sup> Waldron, ‘Bicameralism and the Separation of Powers’ (n 23) 38.

<sup>79</sup> International Foundation for Electoral Systems, ‘Proportional Representation Open List Electoral Systems in Europe’ (Election Issues, Paper 1, 2009).

party-list PR may be used elsewhere, using party-list PR for an institution as vital as the Lords would allow for a method that is easy to understand, which is necessary when making a drastic change to such a significant institution, and results in a more varied representation of the people, which is crucial to the legitimacy of the Lords as a whole. Furthermore, this system is likely to represent a wide variety of parties, especially those with representatives of minority groups; accordingly, each party would have to work together, compromise, scrutinise over legislation and debate regarding certain issues.

However, party-list PR is not devoid of its issues, such as how party leaders can reward loyalty by adding candidates to the top of their list. Naturally, this would undermine a voter's ability to vote for those who would represent them best. Yet, such an issue occurs mainly with a closed list system, in which only active members of a party and public officials determine the order of candidates, which would offer, according to Ritchie, only an imperfect form of democracy.<sup>80</sup> In contrast, an open list system allows voters to have at least some influence on the order through a preference vote. In the Netherlands, voters can either express support for the party in general or for a specific candidate in the party. Even if the party presents a list of candidates, the people in an open-list party PR system can ensure that the candidate they feel can best protect their interests is elected.<sup>81</sup>

Another potential disadvantage is the possible need for members to be part of a party in order to be elected. As party-list PR relies on voters voting on particular parties, it may result in a disadvantage for independent candidates.<sup>82</sup> However, voters are still able to decide whether they wish to elect those candidates. Additionally, the overall purpose of implementing party-list PR is not to eliminate every single issue of the Lords. Rather, it is to ensure that the

---

<sup>80</sup> Ken Ritchie, 'Which electoral procedures seem appropriate for a multi-level policy?' (Committee on Constitutional Affairs, European Parliament 2008)

<[http://www.europarl.europa.eu/RegData/etudes/note/join/2008/408297/IPOL-AFCO\\_NT\(2008\)408297\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2008/408297/IPOL-AFCO_NT(2008)408297_EN.pdf)> accessed 8 March 2019.

<sup>81</sup> ibid.

<sup>82</sup> See Piret Ehin and others, *Independent candidates in national and European elections* (European Commission Directorate-General for Internal Policies 2013). Retrieved <[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO\\_ET\(2013\)493008\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO_ET(2013)493008_EN.pdf)>.

Lords is more representative of the people and is able to view certain issues from a different perspective than that of the Commons. Party-list PR can accomplish this by formulating a new method with which the people are represented; the people can, compared to under the current system, directly have a say in how the Lords is organised. The advantages offered by party-list PR could allow the system to be effectively implemented in a directly elected Lords.

### **The Current Use of Party-List Proportional Representation in Second Chambers**

Several upper chambers around the world today have already partially or fully implemented versions of party-list PR, such as Bolivia, Paraguay, Japan, the Netherlands, and Costa Rica. This subsection focuses on two states, namely Chile and Colombia, and how the Lords could be reformed based on these successful examples.

An example of how party-list PR was used in order to add democratic legitimacy to a system of government, the Chilean Senate attempted to become more democratic, transitioning away from Augusto Pinochet's regime.<sup>83</sup> Until 2005, the Senate comprised of both non-directly elected and directly elected senators. However, with an amendment approved by both houses of Congress in 2005, the entire upper house became directly elected;<sup>84</sup> in 2017, the previous electoral system was replaced by open-list party-list PR.<sup>85</sup> Party-list PR was expected to increase the government's legitimacy, especially as the previous system normally resulted in two dominating coalitions (the New Majority and the Alliance) winning nearly all the seats, with minority parties having little independent representation.<sup>86</sup> By ending this imbalance, which had supposedly

---

<sup>83</sup> Cristóbal Bellolio, 'Will the People of Chile Succeed in Rewriting their 'Dictatorship Constitution' (The Foundation for Law, Justice and Society, 2016). <<http://www.fljs.org/content/will-people-chile-succeed-rewriting-their-%E2%80%98dictatorship-constitution%E2%80%99>> accessed 6 December 2018.

<sup>84</sup> See Article 49 of 'Chile's Constitution of 1980 with Amendments through 2012'. Retrieved <[https://www.constituteproject.org/constitution/Chile\\_2012.pdf](https://www.constituteproject.org/constitution/Chile_2012.pdf)>.

<sup>85</sup> Fabián Riquelme, Pablo Gonzalez-Cantergiani, Gabriel Godoy 'Voting power of political parties in the Senate of Chile during the whole binomial system period: 1990-2017' (2018) arXiv:1808.07854 [econ.GN].

<sup>86</sup> ibid.

bred mistrust among voter and corruption, the use of party-list PR brought ideological diversity.<sup>87</sup> While some have criticised this democratic method for potentially causing political chaos by breaking up the relatively stable relationship between the two coalitions,<sup>88</sup> it would ultimately result in the best reflection of the people's ideology by allowing candidates to run independently, gain votes, and compromise to create the most representative Senate possible. Furthermore, to retain some stability in the chamber, not all members would be elected at the same time; half of the body is elected every four years with each senator serving eight-year terms. As a result, the Chilean legislature was able to move past its unrepresentative history towards a more democratic system.

Colombia, replacing the single non-transferable vote with party-list PR in 2003, had also desired to improve collective accountability, as the previous representatives were viewed as "purveyors of local favours and nothing else", as stated in 1998 by Andrés Pastrana, then-President of Colombia.<sup>89</sup> One of the main issues that Colombia faced was that parties with small vote shares could gain seats at the expense of those with larger vote shares; as party-list PR required candidates to gain more votes than in the single non-transferable vote,<sup>90</sup> it increased the government's legitimacy, as voters felt that their opinions were being better considered by each party. With an optional preference vote, where a voter can indicate a party vote even if the list the party has presented is open,<sup>91</sup> party-list PR also had the effect of increasing the representation of parties, especially in smaller districts.<sup>92</sup> By changing from a system in which parties could tactically put forth candidates in a manner that subverted voters' expectations to one in which the people could have a direct say in whom they wanted, the government was able to better represent its constituents and to become accountable.

An important commonality among all three upper chambers is that they have similar general functions. Although one chamber may possess a few

---

<sup>87</sup> 'Tie Breaker' *The Economist* (Santiago, 12 February 2015).

<sup>88</sup> *ibid.*

<sup>89</sup> Steven L Taylor and Matthew S Shugart 'Electoral Systems in Context: Colombia' in Erik S Herron and others (eds), *The Oxford Handbook of Electoral Systems* (OUP 2017) 872, 886.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*

powers that another does not, all three have the purpose of reviewing legislation. Furthermore, both the Chilean and Colombian legislatures implemented this reform to tackle issues that are currently facing the Lords, namely lack of legitimacy and public mistrust. As it is evident that the use of party-list PR in both Chile and Colombia did not negatively affect that legislative capabilities of each nations' legislature but rather enhanced them, it may be concluded that the Lords could adopt this electoral system to solve its own issues, such as being viewed as illegitimate and unrepresentative of the people's wishes, which the abovementioned states had successfully addressed.

### **The Future Relationship Between the Two Houses**

If direct elections are implemented, it is necessary to analyse the potential future relationship between the Lords and the Commons. Though not intended to be a comprehensive review, this subsection outlines some concerns with said relationship but contends that there would not necessarily be much change in the relationship between the two Houses.

As discussed, the Lords is currently limited in its powers and oversight over the Commons, partly due to the unelected nature of the Lords;<sup>93</sup> there was concern that an unelected Lords could decide differently to the elected Commons, which could contravene democratic principles that the legislature be held electorally accountable to the people.<sup>94</sup> In contrast, if the Lords becomes directly-elected, such a concern may become unwarranted.

However, if the upper house becomes more powerful than the lower one,<sup>95</sup> by wielding the democratic mandate and the associated privilege that comes with the Lords, the upper house could conceivably demand more powers, including the right to veto, by asserting it is representing those who were overlooked in the Commons. However, such a power may frustrate the passage of legislation, since a party who holds a majority or a coalition in the Lords may deny passage of an opposing party's legislation in the Commons

---

<sup>93</sup> See HL Deb 19th January 2001, col 1307

<sup>94</sup> Vernon Bogdanor in *Political Insight*: 'Because it (the House of Lords) lacks democratic legitimacy, it cannot act as a rival to the House of Commons or an alternative legislative chamber'.

<sup>95</sup> Ian Cruse, 'Possible Implications of House of Lords Reform' (House of Commons Library Note, LLN 2010/014, 2010).

simply due to political beliefs, unrelated to constitutionalism. Yet, mechanisms that deal with legislative gridlock already exist in other nations; the Australian government uses the procedure of double dissolution<sup>96</sup> and, if the procedure is unsuccessful, calls for a joint-sitting of the Houses. Furthermore, there are already various safeguards built into second chambers of other nations so that they neither challenge the legitimacy of the lower houses nor threaten the relationship between the two Houses, such as having longer terms for elected members of the upper house, only electing a portion of the members at the time, and prohibiting ministers from sitting in the upper house to emphasise the government's stronger link with the lower house.<sup>97</sup>

In addition, although there may be some gridlock, it is not necessarily a disadvantage. Ethridge contends that gridlock can dampen the negative effects of self-interested political action and reduce social inequality by limiting the influence of lobbyists or specific political groups.<sup>98</sup> Nevertheless, it is also equally important to ensure that gridlock does not become so large an issue that it is impossible to pass legislation. As a result, there ought to be a balanced relationship between the Lords and the Commons not dissimilar to the relationship that is currently in place to prevent legislative gridlock from becoming out of control.

At this point, we could also examine the Salisbury Convention, one of the most important conventions that regulates the relationship between the two Houses.<sup>99</sup> A democratic Lords with its own governing party or parties could believe this convention to be less justified as the upper house would have the democratic mandate to oppose any bills. Yet, this concern is irrelevant when contrasting the roles of the Commons and the Lords; while the former, politically charged and having its own agenda, would legislate in accordance with its political beliefs, the latter, independent and functioning as a check and

---

<sup>96</sup> For more on double dissolution, see Barwick of the High Court of Australia in *Cormack v Cope* [1974] HCA 28, (1974) 131 CLR 432.

<sup>97</sup> Robert Hazell, 'Commentary on the white paper: The House of Lords -- Completing the Reform' (The Constitution Unit 2002) 9.

<sup>98</sup> Marcus E. Ethridge, 'The Case for Gridlock' (Lexington Books 2011).

<sup>99</sup> To learn more regarding the conventions on this matter, see See Lucinda Maer, 'Conventions on the relationship between the Commons and the Lords' (House of Commons Briefing Paper, Number 5996, 2016).

balance, must not succumb to opposing such legislation simply due to its political beliefs. As stated previously, various checks, such as the implementation of single fifteen-year terms and the staggering of elections, would enable members of the Lords to become relatively independent from party politics; with this reduction in bias, it would be better able to review legislation from more politically-charged Commons from a different perspective. The Salisbury Convention, while possibly becoming more flexible, perhaps by allowing the Lords to reject legislation on broader bases than it currently does,<sup>100</sup> could be allowed to remain in place to minimise the extent to which politics plays into the Lords' scrutinising powers. In order to provide it greater political force, it could be codified, such as how the Sewel Convention was included as s28(8) of the Scotland Act 1998. While the Sewel Convention is somewhat qualified by the language used to describe the convention by using the phrase "will not normally legislate",<sup>101</sup> a possible statute, reforming the Lords, could phrase the Salisbury Convention with firmer language. In doing so, the relationship between the Commons and the Lords could remain relatively unchanged while gaining the benefits of direct elections in the Lords.

This is evidently desirable, as indicated by the Ministry of Justice in 2010, which stated that the government believed that the relationship between the two Houses, as stated in the Parliament Acts 1911 and 1949, should continue if the Lords is reformed.<sup>102</sup> The maintenance of the basic relationship between the two Houses is crucial for two reasons. First, it would allow for the least amount of disruption during the period of constitutional acclimation if the Lords is reformed. Second, and more importantly, the current arrangement is criticised mainly due to its undemocratic nature; maintaining the basic relationship after implanting direct elections would allow for minimal gridlock while retaining the regulatory function the Lords currently performs.

What ought to be noted is that a codification of the Salisbury Convention would likely be politically-binding rather than legally-binding.

---

<sup>100</sup> See Parliament Act 1911 s2. Currently, the House of Lords may reject a bill extending the life of Parliament or a bill for confirming a provisional order. Furthermore, the Act does not affect private bills, delegated legislation, or bills introduced in the House.

<sup>101</sup> See Scotland Act 1998 s28(8).

<sup>102</sup> HL Hansard, 24 June 2010, col 205WA.

Conventions themselves are not generally legally enforced by the courts, as confirmed in cases such as *Madzimbamuto v Lardner-Burke*<sup>103</sup> and *Reference Re Resolution to amend the Constitution*.<sup>104</sup> Even when included in statutes such as the Scotland Act, courts may decline to police the “scope and the manner of its [a convention’s] operation”.<sup>105</sup> Yet, it is possible to say that the Lords would follow a codified Salisbury convention by being politically bound to do so. The absolute authority of Parliament, contained in the notion of parliamentary sovereignty, in itself, can be considered as a political fact as according to Dicey.<sup>106</sup> Its authority is unable to come from a legal source; it cannot be a common law rule, for then it means that Parliament could enact a statute to overturn or amend parliamentary sovereignty itself. Parliament also cannot legislate on parliamentary sovereignty itself through primary legislation for it would inevitably cause circularity: Parliament’s authority would derive from a statute that derives its authority from itself. As such, parliamentary sovereignty can be seen as above the law as a political fact, which the judges recognise to authoritatively apply the law. Similarly, according to Loughlin and Tierney, Parliament has recognised that, in certain areas, it may be politically bound to respect the popular will of the people.<sup>107</sup> For instance, in devolution, Parliament has recognised it cannot unilaterally halt or reverse the process by parliamentary fiat.<sup>108</sup> This recognition can be extended to a codified Salisbury convention, which would, in effect, politically bind the Lords to follow the convention once legislation passes through the Commons. Rather than the courts themselves enforcing the convention, political pressure and popular will would bind the Lords to respect the convention.

Focusing on the exact power balance between the Houses, it is possible that there would be no significant change in any case. Donald Shell contends that the question of conflict between the two Houses is, in fact, a misleading one and that the real conflict is between Parliament as a whole and

---

<sup>103</sup> [1968] UKPC 18.

<sup>104</sup> [1981] 1 SCR 753.

<sup>105</sup> R (*Miller and another*) v Secretary of State for Exiting the European Union [2017] UKSC 5 [151]

<sup>106</sup> Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81(6) MLR 989, 991.

<sup>107</sup> ibid, 1013-1014.

<sup>108</sup> ibid.

the government.<sup>109</sup> While this may be true in some sense, it is still important to consider what the relationship between the two Houses will become. The fact that the Lords is unelected is not the only reason for its limited powers. Rather than being a body focused on the tabling of legislation, the Lords' role is more to be a scrutiniser, as evidenced by the convention preventing it from introducing money bills. Its function as a body providing meaningful oversight could enable some powers to be limited to ensure that, while it is to scrutinise legislation passed by Commons, it cannot excessively frustrate the passage of legislation through Parliament. Simply reforming the Lords to be directly-elected would give the upper house more legitimacy but would not necessitate a change in its functions or powers, such as that to delay a bill. A change to implement more radical procedures, such as reintroducing the veto, could cause inefficiency in passing legislation without gaining many benefits. Rather, powers such as that to delay would allow for a smoother and less frustrating passage of legislation while also having the regulatory oversight that the Lords currently possesses. By being more representative of the people, the Lords can better review legislation and government action in the public interest, though having more power could overstep its legitimate functions as a check and balance within government. As such, the future relationship between an elected Lords and Commons must remain as similar as possible to the one they have today.

## CONCLUSION

This article has sought to argue that, in the interest of conforming to democratic principles and allowing the Lords to better represent the people and further legitimise Parliament's practices, direct elections would preserve much of the advantages already possessed by the Lords whilst adding new benefits. The Lords ought not to be abolished due to, first, the Lords' constitutional function as a check and balance on the legislation of the Commons and, second, the practical advantages offered by preserving a second chamber.

In terms of direct elections, this article has analysed several criticisms of applying such a system to the Lords and offered both counter-arguments and

---

<sup>109</sup> Donald Shell, *The House of Lords* (Manchester University Press 2007) 169-170.

potential solutions to said criticisms. Furthermore, by examining several possible electoral systems, this article contended that proportional representation, specifically party-list PR, would be best suited for the purposes of electing members of the Lords. While no electoral system is perfect, a different electoral system from that of the Commons should to be used. Party-list PR would allow voters to better appoint representatives of their interests, backgrounds, and needs to the Lords and thus offer a much-needed second perspective to the legislation passed by the Commons. This claim has been supplemented using successful examples of second chambers currently using party-list PR to elect its members, which demonstrate how the use of this electoral system can feasibly be implemented in the UK. The examples of Chile and Colombia demonstrate how these nations moved from a relatively-undemocratic upper house to one more representative of the people, suggesting that the UK, which faces a similar issue, can do the same.

Finally, this article has analysed the possible future relationship between the Commons and the Lords and has argued that, although there may be several minor changes, the relationship should remain similar to that which is already in place. Noting several concerns regarding the possible changes that direct elections could bring, the article has proposed multiple solutions that could alleviate some of the issues brought up, such as staggering elections and using single, lengthy terms to maintain the independence of the members of the Lords and the upper chamber's stability. While direct elections may have some issues, it would be the optimal method through which the Lords could be reformed, so as to allow Parliament to better fulfil its constitutional functions.





© LSE Law Review Volume 4, 2019  
Cover Design by Wong Sum Yi Nikki  
Cover Photo by Wong Sum Yi Nikki