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Elizabeth Redrup and Matthew Watkins

Southampton Student Law Review, Editors-in-Chief

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Table of Contents

Foreword

This edition of the Southampton Student Law Review comprises a selection of papers from current and former students that, as ever, present a wide spectrum of topics and approaches across a variety of different fields. Perspectives engage not only analytical and theoretical questions relating to law, legitimate authority and democracy, but also historical and doctrinal questions in relation to the principle of supremacy of EU Law. Moreover, they range from commercial interests and the uncertainties over obligations and expectations of contracting parties, through to healthcare law questions over the relationship between mental capacity and patient autonomy in refusal of treatment cases and the protection of vulnerable patients, to issues that trace the rise and fall of medical paternalism in English law, to a comment on reasoning in trust law cases that illustrates the ongoing tensions that characterise the continuing relation between common law and equity.

Today, the media is burgeoning with reports, opinions and comments on events and debates that reflect very real concerns over, for example, the future of the National Health Service, relations between constituent parts of the United Kingdom, the long-term economic and constitutional arrangements between the United Kingdom and its partners in continental Europe and further afield. At a time, therefore, when political and constitutional uncertainties seem to have become something of the order of the day, with 'big' questions forever setting the agenda both domestically and internationally, it is perhaps fitting that this edition of the Southampton Student Law Review should itself offer, and deliver, an interrogative and reflective attitude and stance, quizzing and probing and pointing.

It is commendable that Southampton Law School students are encouraged through their ongoing conversations with each other and with their tutors and instructors not simply to accept but also to challenge received wisdom and the assumptions and ideas underpinning accepted thought and practice. As this edition amply demonstrates, freedom of thought and expression is a characteristic feature of academic life at Southampton Law School, among its students, graduates, and staff, both individually and collectively, and the editors must be applauded and thanked for ensuring that an impressive collection of articles is provided once more this year to showcase this work and talent.

Dr James MacLean

PhD Programme Director

July 2017

Does Joseph Raz's Account of 'Law as a Legitimate Authority' Run the Risk of Being Overly Authoritarian and Individualistic?

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Abstract

This article presents Joseph Raz's account of 'law as a legitimate authority.' This signifies that law must, firstly, be presented to the subjects as the view of the legislator on how the former must behave, and secondly, the existence and the content of the legal rules must be established by reference to their source in empirically discoverable historical facts, such as legislation or judicial decisions, and not with reference to moral considerations. Furthermore, the article discusses whether such an account tends to be authoritarian and individualistic. It is advanced here that many aspects of Raz's account - particularly those dealing with the normal justification thesis - render his approach inadequate to justify a legitimate political authority and, subsequently, create the danger of his service conception thesis turning into an authoritarian and individualistic one.

Introduction

Joseph Raz states that "the notion of authority is one of the most controversial concepts found in the armoury of legal and political philosophy," [1] since it is fundamental in any discussion dealing with legitimate forms of social organisations. Historically, great theorists such as John Locke and Thomas Hobbes agree that consent to political authority forms the basis of legitimacy and thus the subjects of such authorities are under an unconditional obligation to obey the law.[2] Raz, however, holds that the issue of consent to authority is only "marginal and secondary"[3] and authorities, in fact, get their legitimacy from their service to a person's autonomy. What follows from that statement, is that subjects are not obliged to obey the law unless it serves their autonomy. The aim of this article is to examine the extent to which such an account of law as a 'legitimate authority' risks being too authoritative and too individualistic. The article consists of four sections. Section one describes the account Raz provides about authority. Section two discusses his account of 'law as a legitimate authority'. Section three discusses whether this account can be too authoritarian and too individualistic. Finally, section four concludes.

[1] Joseph Raz, *The Authority of Law* (2nd edition OUP 2009), 3.
[2] See for example, Thomas Hobbes, *Leviathan* (Penguin Classics 1985) and John Locke, *Second Treatise on Government* (Hackett, 1980).
[3] Joseph Raz, 'Government by Consent', in his (eds.) *Ethics in the Public Domain*: *Essays in the Morality of Law and Politics* (OUP, 1994), 339.

Raz on Authority

In *Autonomy, Law and Morality* Raz claims that there are two kinds of authorities- *de jure* (meaning authority 'by right', legitimate authority) and *de facto* authorities. He suggests that *de facto* authority, even if it is not legitimate, can still be able to claim authority, probably due to the fact that many of its subjects are ready to accept its legitimacy.[4] Legitimate authority, on the other hand, can be divided into two according to Raz: practical one (directives of which are reasons for actions for its subjects) and theoretical one (directives of which are reasons for belief "for those regarding whom that person or institution has authority")[5]. Therefore, theoretical authorities "do not normally impose duties on others, although they might give advice on what a person's duty is."[6] In his essay, Raz deals with practical legitimate authority rather than theoretical and moves forward by distinguishing an authoritative directive from a general one, suggesting that the former must possess "a peremptory status."[7] This peremptory status suggests that, the acceptance of an authority involves the surrender of one's judgement to that authority and thus, this acceptance "is the denial of one's moral autonomy."[8] Hence we are left with the question of "whether authority involves a surrender of judgment such that acceptance of authority is inconsistent with one's status as an autonomous moral agent."[9]

In order to answer that question, Raz gives an example of an arbitrator, which at this point I will explain with my own example. Suppose that my flatmate and I have a dispute. He invites friends at home every Friday night and they chat until late. On the other hand, I want to go to bed early, but because of the noise, I cannot sleep. We both have good reasons to support our arguments. I am tired after a long week at the university and I want to take a good rest, while he feels that after a long week at the university, he needs to have a good time with friends. Nobody is willing to step back so we both, voluntarily decide that the dispute needs to be resolved by a third person acting as an arbitrator. The role of the arbitrator is to weigh and assess both of our arguments and reach a decision on what has to be done. My flatmate and I will follow his decision because we voluntarily agreed that we are bound by it. Hence, the arbitrator's decision is a reason for action for my flatmate and I. In such scenario, Raz suggests that the arbitrator's reason is meant to be based on reasons which apply to the subjects of those directives in the circumstances covered by the directive. Thus, the arbitrator's decision must be based on our reasons, to sum them up and to reflect them in the outcome of his decision- Raz calls these reasons "dependent reasons" and the arbitrator's decision is a dependent reason for us, the disputing parties.[10]

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[4] Joseph Raz, 'Authority, Law and Morality,' in *supra note 3* 194, 195.
[5] ibid.
[6] Thomas Christiano, 'Authority,' *The Stanford Encyclopedia of Philosophy* (Spring 2013 Edition), E.N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2013/entries/authority>, accessed 25 December 2015.
[7] Raz (n 4) 196.
[8] ibid.
[9] David Dyzenhaus, 'Consent, Legitimacy and Foundation of Political and Legal Authority, in J. Webber and C. M. *Macleod* (eds.) *Between Consenting Peoples: Political Community and the Meaning of Consent,* (UBC Press 2011), 163, 170.
[10] Raz (n 4) 196.

It must be noted that, despite the fact that the arbitrator's decision should reflect our reasons, it does not have to do so, since the decision replaces our reasons. This is what Raz calls the "pre-emptive reason."[11] The two reasons, dependence and pre-emptiness are connected, because the parties in dispute cannot rely on reasons that formed the basis of the arbitrator's decision. If they do so, "they defeat the very point and purpose of the arbitration."[12]The example of arbitrator leads to the following question: Can the principles, which apply to this example, also be applied as to the other forms of contentious environments? While it seems that the example shares many similarities with adjudicative authorities, its guiding principles do not seem applicable to legislative authorities. This is because it can be argued that legislative authorities create new reasons for their subjects to follow. However, Raz disagrees and states that legislative authorities only legislate pre-existing duties that apply to their subjects. At this point he introduces the "normal justification thesis."[13] The thesis suggests that the normal way to establish that someone or something is an authority over its subjects, is to be able to show that the subjects are in a better position if they follow the directives of that authority rather than by trying to weigh, assess and decide upon the available set of reasons themselves.

The dependence and normal justification theses form, what Raz calls, the "service conception of authority."[14] According to the service conception, the main function of an authority is to mediate between people (in the previous example, between me and my flatmate) and the reasons that apply to them in order to decide what these people have to or do not have to do. Consequently, these people take the guidance of the authority and they replace their reasons with the reason of the authority. Hence, at this point we have the pre-emption thesis. Raz suggests that the "mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions, instead of by the reasons on which they are supposed to depend."[15] However, he continues by stressing that the approach discussed above does not imply by any mean "blind obedience to authority".[16] The acceptance of authority must be justified and it normally does so by following the conditions set out by 'normal justifications thesis'. Hence, in order for an authority to be a legitimate one, it must meet the conditions of the normal justification thesis, since only in such case will it be possible for its subjects to be in a better position by following its directives. The subsequent section will discuss how Raz understands law as a legitimate authority through the lenses of the so far summarised perspective.

Authority and the Law

Raz claims that the account of authority, as described in the previous section, applies to legal authority. He starts his argument by assuming that all legal systems hold *de facto* authority. Hence, they claim legitimate authority, even if they lack it completely *de jure*. He continues by saying that if law is able to claim authority, then it has

[11] ibid.
[12] ibid.
[13] ibid 198.
[14] ibid.
[15] ibid 198-199.
[16] ibid.

authority and he gives two possibilities that render the claim of authority of something void.

> 'One is that the moral or normative conditions for one's directives being authoritative are absent. Typically, this will be either because the normal justification, explained above, is unavailable, or because, though available, it is insufficient to outweigh the conflicting reasons which obtain in this particular case. The second kind of reason for not having authority is that one lacks some of the other, non-moral or non-normative, prerequisites of authority, for example, that one cannot communicate with others.'[17]

Hence if law is able to satisfy the above reasons, it is also able to have authority. In the first possibility, we can see that law must satisfy the normal justification thesis in order to have authority. If we accept that we will be better off by following the directives of the law, then it can be argued that law satisfies the first condition for claiming authority. As for the second part, things are more straightforward, since law communicates with the subjects by issuing its directives. Therefore, it is established that law has authority.

Having demonstrated why law, according to Raz, is able to claim authority, we have to examine how it can be possible for law to claim legitimate authority. Raz argues that it is in the nature of law to claim to possess legitimate authority.[18] He argues that law must be able to assist us in order to guide us to act with the right reason. In order to possess legitimate authority, legal rules must satisfy two conditions. Firstly, they must be presented to the subjects as the view of the legislator on how the former must behave, and secondly, the existence and the content of the legal rules must be established by reference to their source in empirically discoverable historical facts, such as legislation or judicial decisions and not with reference to moral considerations.[19] Even if it is established that law has legitimate authority, Raz suggests that there is no obligation to obey. He states that:

> "The state can and often does make judgments that interfere with one's autonomy. Consent to the state's authority has to be limited to be consistent with autonomy. The state's authority will be legitimate only when it is exercised in such a way as to serve our interest in having the best decisions - the first condition of legitimacy - and a further interest in having control over decision where it is more important for one to make them and be wrong than for another to make them and be right - the second condition of legitimacy. But a state that meets the two conditions is legitimate so a theory of legitimacy does not need to rely on the idea of consent, except as a second source of strengthening the bond between the subject and government."[20]

Hence, the subjects have no obligation to obey the law[21] and they ought to obey it only if it serves their autonomy, in other words, if it is compatible with the normal

[17] ibid 200.
[18] ibid 215.
[19] ibid 218.
[20] Raz (n 3) 350-351.
[21] See Jospeh Raz, 'The Obligation to Obey: Revision and Tradition' (2014), 1 Notre Dame Journal of Law Ethics and Public Policy, 139, 150-155, where Raz suggests that one does not obey the law, involuntary, as a matter of 'fairness' (the idea that one has to provide her fair share to sustain the

justification thesis. The following section will discuss whether this account of law risks of being too authoritarian and too individualistic.

Is Raz's Account of Law too Authoritarian and too Individualistic?

The first part of this section will discuss critiques that argue that Raz's account of law is too authoritative. The second part will discuss whether his account is too individualistic. As it was discussed in the previous section, Raz supports the idea that in the situation where the subjects have a good reason to obey a legitimate authority such as the law, they have to do so. While it seems paradoxical, he supports that surrendering to an authority does not necessarily mean that the subjects lose their autonomy; in fact, surrendering to "an expert" may be of great assistance to the subjects' autonomy. In order to explain how that is possible, Raz uses pharmaceutical regulations as an example. He states that:

> "I can best avoid endangering myself and others by conforming to the law regarding the dispensation and use of pharmaceutical products. I can rely on the experts whose advice it reflects to know what is dangerous in these matters better than I can judge for myself, a fact that is reinforced by my reliance on other people's conformity to the law, which enables me to act with safety in ways that otherwise I could not."[22]

Hence, we can draw an analogy with political authorities and argue that their directives serve the autonomy of the subjects because as Raz puts it, 'the primary arguments in support of political authority rely on its expertise (that of its policy making advisers) and on its ability to secure social coordination.'[23] In other words, the government's directives serve the main purpose of the normal justification thesis, because the subjects' compliance with the directives will ensure that they will be in a better situation and thus, they will have more autonomy.

This understanding clashes with the views of philosophical anarchists, such as Robert Paul Wolff, who states that legitimate authority and moral autonomy are logically incompatible.[24] In order to understand this proposition, we have to examine how Wolff understands that someone possesses authority and can be autonomous. For him, having legitimate authority means that you have the right to be obeyed, while an autonomous individual is someone who is responsible for his/her actions. Therefore, it is impossible for an autonomous individual to obey an authority. However, Wolff

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polity (e.g. by paying taxes), or because of her sense of 'belonging' in a community (associative theory). He suggests that "if there is a general obey to obey the law, it exists because it was voluntarily undertaken." Hence, in our case only our voluntary submission to it, as in the example of the arbitrator, can bind us with an obligation to obey.

[22] Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception,' (2006), 90 Minnesota Law Review, 1003, 1014.

[23] Joseph Raz, *Authority: Readings in Social and Political Theory,* (New York University Press 1990), 6.

[24] See Robert Paul Wolff, *In Defence of Anarchism,* (1970), <http://theanarchistlibrary.org/library/robert-paul-wolff-in-defense-of-anarchism#toc2>, last accessed 29 December 2015.

suggests that this does not mean that an autonomous individual has to disobey an authority.[25] As Scott Shapiro notes:

> "If the autonomous agent thinks there are good moral reasons to pay taxes, then he will believe that he should pay his taxes. But that person does not accept the obligation because the law requires him to pay his taxes. He believes that he should pay his taxes because he believes this to be the right thing to do independently of the law's demands."[26]

If we say that Wolff's definition of autonomy is the proper one, then Raz's account of law can be considered as authoritarian, since the obedience of any kind to the authority's directives means the automatic surrender of one's autonomy. I disagree with Wolff because his theory puts too much trust on an individual's moral reasons, which I consider 'utopian'. On the other hand, Raz's understanding of autonomy seems more 'pragmatic'. As it was discussed, for Raz, an individual does not lose her authority when she gives the permission to a representative, who may be considered an expert, to decide for her on an issue (remember the example of the arbitrator). In that sense, the government's directives do not deprive us from our autonomy – conversely, they help us to maximise it.

That being said, what is problematic with Raz's account is that he attaches too much significance to the efficiency of the directives and to the result they produce and by doing so he undermines the other functions of political authorities and the many key issues of democratic societies (such as dialogue and participation). Consider again the normal justification thesis: if an authority satisfies the conditions of the thesis, it is automatically legitimate for Raz, and also binds its subjects since its directives may indeed serve the subjects' autonomy. However, if this is the case the normal justification thesis, in some situation, may violate our natural right to freedom and thus make an authority, as Raz understands it, too authoritarian. In speaking about natural rights, H.L.A. Hart observes that:

> "In the absence of certain special conditions which are consistent with the right being an equal right, any adult human being capable of choice, firstly has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and secondly is at liberty to do (i.e. is under no obligation to abstain from) any action which is not one coercing or restraining or designed to persons."[27]

That is to say, a situation where an authority may be justified under the normal justification thesis but it violates the natural right of freedom of a subject and, as a result of that, it becomes authoritarian. Indeed, consider the situation where a government issues directives that only aim at the good of its subjects and serve their autonomy. The authority of the government is thus compatible with the normal justification thesis. Since the authority is justified the subjects have to obey it. Suppose that this government, recognising the benefits of eating fish once a week, issues a directive and demands from its subjects to buy fish from the market once a week. The subjects have a good reason to do so (i.e. it is healthy). Then, suppose that an

[25] ibid.
[26] Scott. J Shapiro, 'Authority', (2000), Cardozo Law School, 9.
[27] H.L.A. Hart, 'Are There Any Natural Rights,' (1955), 64 (2) The Philosophical Review, 175, 175.

individual in that society prefers to go fishing, instead of buying her fish from the market. The individual has her own reasons for doing so (e.g. personal satisfaction, relaxation or enjoying a hobby). The problem is that Raz's theory does not recognise these reasons as valid. For Raz, "reasons are facts in virtue of which [...] actions are good in some respect and to some degree."[28] I would argue that the preference of the individual in our fishing example cannot be considered as a "fact."[29] Therefore, while her preference to go fishing instead of buying fish from the market is thoroughly compatible with the individual's natural right to freedom, it is against the legitimate authority and its directive. Consequently, the individual has to either quit her natural right of freedom or go against the will of the government and disobey the normal justification thesis. As a result, the individual will eventually be forced to give up her right to freedom and thus automatically suggests that the government becomes authoritarian.

Another issue that emerges relates to the so-called expertise of the government. As is observed by Adam Tucker "as long as the government can harness sufficient expertise it can tell us what to do."[30] This is problematic since it can be implied that the normal justification thesis is the only limit to the legitimate authority. In that sense, an authority can demand from its subjects to follow its directives, only because that particular authority is considered as an expert. Kenneth Himma criticises this situation by showing his discontent at the title of his article, "Just 'cause you're smarter than me doesn't give you a right to tell me what to do." In the article, Himma examines and criticises the normal justification thesis. He claims that the fact that the thesis is "construed as a sufficient condition for legitimacy, implies that there are no other limits of legitimate authority."[31] If Himma's proposition is 'correct' it will have devastating consequences for Raz's theory. It is true that an interpretation of the normal justification thesis, may suggest the two following premises. Firstly, it could be argued that, as long as a legal authority can be considered as an expert, it knows how to act, in certain situations, better than its subjects. Secondly, if that authority provides its services to ensure the subjects' autonomy, it is, automatically, legitimate. As a consequence, this authority will be able to reach and control every aspect of the life of its subjects. In other words, it becomes a dictatorship. However, Himma's criticism appears to be misleading because Raz clearly states that the normal justification thesis applies only in situations where it is more important to act in order to do the right thing, rather than acting independently.[32] He notes in this respect that "[s]o far as this [meaning the decision taken] is done where improving the outcome is more important than deciding for oneself this acceptance of authority [...] [it] is in fact the most rational course and the right way to discharge one's responsibilities."[33] He also considers the above situation as an important exception to the normal justification thesis. In the book *Authority,* he claims that his idea

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[28] Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (OUP 2002), 23.
[29] Reilly Wilson, 'A Justification to Authority, a Response to Raz', (2013), Honors Theses (University of Richmond) Paper 5, 20.
[30] Adam Tucker, 'Beyond the Normal Justification Thesis: Jurisdiction in the Service Conception of Authority', <http://www.trinitinture.com/documents/tucker.pdf > last accessed 31 December 2015, 7.
[31] Kenneth E. Himma, 'Just 'Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis, (2007), 27 (1) Oxford J Legal Studies, 121, 141.
[32] Tucker (n 30) 9.
[33] Joseph Raz, *Morality of Freedom* (OUP, 1986), 69 emphasis added.

> '…is based on the thought that whereas normally there is a case for an authority where compliance with its directives would lead its subjects better to comply with reason than if they were not to be guided in their action by that authority, this general rule has an important exception. It consists of all those matters regarding which is more important to act independently than to succeed in doing the best.'[34]

While the exception presented by Raz shows the flaws in Himma's proposition, it can still be argued that this exception gives limited protection to the subjects' independent reasons against a legitimate authority's authoritarianism.

The final issue that may deem Raz's theory authoritarian deals with democratic values. It seems that by giving too much value to the concept of a service conception of authority, he ignores the procedural aspects of the authority. If we analyse the meaning of the word 'democracy' it reflects the idea of 'rule by the people' and thus envisages a system opposing a rule by one or few and so forth. In democratic societies, the opinions of the subjects have equal value. It is argued that a decision reached through a democratic procedure will be better, because democratic procedures can improve the substance of our decisions.[35] In addition, the democratic procedure helps to promote respect and express the status of the subjects as "political equals."[36] Therefore, a democratic political authority tends to allow its subjects to influence policies of the government and it accepts the voters' decision during fair electoral procedures. In that sense, a democratic political authority enjoys greater legitimate authority than a dictatorship even in cases where the latter might take wiser decisions for its subjects.[37] In contrast, normal justification thesis considers only the result, namely if the authority directives provide a better result for its subject, and in that way, it completely ignores the democratic procedures. Additionally, the normal justification thesis fails to give an explanation on the difference between a democratic authority and a dictatorship, instead it appears to "legitimise" a dictatorship cases where its directives provide better service to the autonomy of its subjects.

Having analysed the problems that may render Raz's account of law too authoritarian, the rest of the section will focus on the problems which may lead his account to be considered too individualistic. These problems arise with Raz's argument that there is no obligation to obey the law and we are doing so, only in the scenario that it will be for our own benefit. He states that there is a paradox in the claim that we have to obey, even in a just society. For Raz, a sufficient ground obligation arises from the content of the law and not because something is law.[38] Thus we can say that the normal justification thesis is agent specific, because it is dependent on the service the directives provide to the subjects of the authority, with something that depends on the subjects' expertise and on their different skills.[39] In that sense Raz's theory can be considered individualistic because every individual is not equal under the law. If, for example, someone is more expert on something than the political authority, it can be argued that according to the normal justification thesis she is not forced to obey that

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[34] Raz (n 22) 13.
[35] Scott Hershovitz, 'Legitimacy, Democracy and Razian Authority,' (2003) 9 Legal Theory, 201, 213.
[36] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press 1998), 18.
[37] H. Hauksson, 'A few Words on Authority, (2006), 6(2), Nordicum-Mediterraneum, Icelandic E-Journal of Nordic and Mediterranean Studies, <http://nome.unak.is/nm-marzo-2012/6-2/32-conference-paper/104-a-few-words-on-authority> accessed 31 December 2015.
[38] Joseph Raz, 'Obligation to Obey', in *supra note 3*, 325.
[39] Hauksson (n 37).

particular directive, because it does not serve her better. Also, in the practical sense, a situation where the law applies differently to each individual seems inadequate. In reality governments, or other authorities have the authority in a much more general sense.[40] For example, it seems odd to suggest that by issuing a directive a legislator has in mind that it will apply differently to each individual. Furthermore, the above discussed exception to the normal justification thesis may lead the subjects to act individualistically. According to the exception, if the normal justification thesis does not serve the subject in the best possible way, then the subject can act independently. However, this is problematic because it gives a certain amount of power to individuals to claim that the legitimate authority does not serve their purposes. Since for Raz there is no moral obligation to obey the law, the subject is entitled to decide according to her conscience, which may even lead her to act as she likes in certain situations and thus disregard the law.

Conclusion

Raz presents a detailed account of authority, which in my opinion is stronger and more practical than the one presented by the movement of philosophical anarchists. Nevertheless, many aspects of his account remain problematic in justifying a legitimate authority. As a consequence, his service conception account tends, in many cases, to be authoritarian and individualistic. This is mainly because it fails to give adequate value to democratic procedures, while it gives excessive value to the efficiency of the authoritative directives in serving the subjects' autonomy. Furthermore, it seems that it also fails to consider the subjects as equals under the law. This is because an individual, according to Raz, is not morally bound to obey the law, but she does so only if the latter serves her autonomy. Consequently, we face a complex situation where we have to examine - in a case by case scenario - if an authoritative directive applies to an individual or not. In that regard, it can be argued that his theory distinguishes the subjects into classes according to their skills and expertise, rather than considering them equal under the law.

[40] Tucker (n 30) 5.

Escape From Uncertainty: Article 4(3) Rome I Regulation

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Abstract

The Rome I Regulation is a European Union (EU) conflict of laws regime that provides the rules for determining which national law should govern contractual obligations in civil and commercial matters. This article will consider how the escape clause contained in Article 4(3) Rome I Regulation should be interpreted in the absence of any clear guidance on this issue from the Court of Justice of the European Union (CJEU). It will argue that the CJEU will need to clarify three main points if the scope of the escape clause in Article 4(3) Rome I Regulation is ever to be clear. The second part of this article will argue that a flexible approach to the exception contained in Article 4(3) should be adopted in order to best serve commercial efficacy and the expectations of contracting parties.

Introduction

The Rome I Regulation[41] is a European Union (EU) conflict of laws regime that provides the rules for determining which national law should govern contractual obligations in civil and commercial matters. [42] The Rome I Regulation replaces[43] the Rome Convention[44] (hereinafter the "Convention") and applies to all contracts concluded after 17 December 2009.[45] Article 4 Rome I provides the procedure for establishing the applicable law of the contract when the parties to the contract have not chosen the law that is to govern the contract. Article 4(3) Rome I, provides an escape clause which is an exception to the rules contained in Article 4(1) and 4(2) Rome I. It states, "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of the country" which is most closely connected shall apply instead.[46]

After examining the case law and academic writings in relation to both the Convention and Rome I, prior to and after the decision of the Court of Justice of the European

[41] Rome I Regulation (Regulation (EC) No 593/2008 on the law applicable to contractual obligations).
[42] Article 1(1) Rome I Regulation 2008.
[43] Article 24 Rome I Regulation 2008.
[44] Convention on the law applicable to contractual obligations 1980 (Rome Convention).
[45] Article 28 Rome I Regulation 2008.
[46] Article 4(3) Rome I Regulation 2008.

Union (CJEU) in *Intercontainer Interfrigo SC v Balkenende Oosthuizen BV*,[47] the first part of this article will argue that despite there being some indication, it is impossible to say with certainty how the escape clause should be interpreted. Consequently, the scope of the exception contained in Article 4(3) Rome I remains unclear and will continue to do so until the CJEU gives a ruling as to its correct interpretation. The second part of this article will argue that the CJEU should adopt a flexible approach, similar to the one taken in *Intercontainer*, to the exception contained in Article 4(3) Rome I, in order to best serve commercial efficacy and the expectations of contracting parties.

Scope of Article 4(3) Rome I

Threshold for Displacement

In order to determine whether the scope of Article 4(3) Rome I is clear, it is necessary to consider under what circumstances the escape clause in Article 4(3) may be invoked, and to understand the threshold that must be met before the law of the country identified in Article 4(1) or 4(2) can be disregarded, and the law of another country applied. Article 4(3) states that the law of the country identified by Article 4(1) or 4(2) will not apply "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected" with a different country. In such circumstances, the law of the more closely connected country shall apply.[48]

It is clear from a literal interpretation of Article 4(3) Rome I, that "displacement is not permitted merely because another law is more closely connected".[49] Although, it has been recognised that "Article 4(3) deliberately places a high hurdle in the way of a party seeking to displace the primary rule"[50] outlined in Article 4(1) Rome I, no guidance has been provided in Rome I as to what constitutes a 'manifestly' closer connection,[51] and also whether the close connection test is, as Fentiman puts it, "one of inferior or superior connection".[52] In other words, it is unclear from reading Article 4 Rome I whether displacement is permitted only if the country identified as the applicable law in Article 4(1) or 4(2) has no genuine connection with the contract, or alternatively, whether displacement may occur even if the law of the country identified by Article 4(1) or 4(2) has a connection, whenever another country is more closely connected.[53]

In order to determine the appropriate interpretation and scope of the escape clause in Rome I, it is arguably "appropriate to use the case law from the Rome Convention".[54] This is because Article 4(5) Convention also features an escape clause and it has been suggested that there are "striking similarities"[55] between the escape clauses found in

[47] C-133/08 *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV* [2009] ECR I-9687.
[48] Article 4(3) Rome I Regulation.
[49] Richard Fentiman, *International Commercial Litigation* (OUP, Oxford 2010) 221.
[50] *BNP Paribas SA* v *Anchorange Capital Europe LLP* [2013] EWHC 3073 (Comm) [64].
[51] Zeng Sophia Tang, 'Law Applicable in the Absence of Choice – The New Article 4 of the Rome I Regulation' (2008) MLR 785, 798.
[52] ibid.
[53] Fentiman, *International Commercial Litigation* (n 49) 221.
[54] Chukwuma S.A. Okoli & Gabriel O. Arishe, 'The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation' [2012] JPIL 513, 531.
[55] ibid.

Rome I and the Convention. Article 4(5) Convention provides an escape clause that is also based upon a close connection test; it states that the law of the country identified by the presumptions in Articles 4(2) to 4(4) Convention, "shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country".

Similarly, no guidance was provided as to how Article 4(5) Convention should be properly interpreted and has faced criticism on the basis that the "application and importance of the escape clause is uncertain".[56] The true interpretation of the escape clause in Article 4(5) Convention, and its relationship with the presumptions "vexed"[57] both courts and commentators. This resulted in various models containing different thresholds for displacement being adopted by the courts and academics. Examining these different models may provide an indication as to how the escape clause in Article 4(3) Rome I should be interpreted.

The Dutch Supreme Court adopted a narrow reading of the Convention's escape clause,[58] and (to use Fentiman's term) adopted an "inferior connection"[59] test. This approach has commonly been referred to as the "strong presumption approach".[60] The Dutch Supreme Court held that deviation from the presumptions would only be permitted when the country identified by the presumption "has no real significance".[61] This approach has been said to promote the EU's objectives of legal certainty and predictability,[62] and has found support from the Scottish Court of Session,[63] and from Advocate-General Bot.[64] Alternatively in *Credit Lyonnais,*[65] the Court of Appeal held that the presumptions in Article 4 Convention were "very weak",[66] and may be displaced if the court concludes that it would not be "appropriate"[67] to apply the presumption. The weak presumption approach has found support in other jurisdictions[68] such as with the Cour d' Appel de Versailles.[69]

Fentiman has suggested an alternative approach known as the commercial expectation theory;[70] he argues that the escape clause should be used if the result of applying the escape clause in Article 4(5) Convention would identify a country that is consistent with the commercial expectations of the parties.[71]

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[56] Tang (n 51) 786.
[57] Pippa Rogerson, *Collier's Conflict of Laws* (4th Edn, CUP, Cambridge 2013) 312.
[58] Société Nouvelle des Papéteries v Machinefabriek (Hoge Raad, 25 September 1992) NJ 750.
[59] Fentiman, *International Commercial Litigation* (n 49) 221.
[60] Okoli & Arishe (n 54) 519.
[61] Société Nouvelle des Papéteries v Machinefabriek (Hoge Raad, 25 September 1992) NJ 750.
[62] C-133/08 *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV* [2009] ECR I-9687.
[63] *Caledonia Subsea Ltd* v *Microperi SRL* 2003 SC 70, 85.
[64] C-133/08 *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV* [2009] ECR I-9687 [77].
[65] *Credit Lyonnais* v *New Hampshire Insurance* [1997] CLC 909 (CA).
[66] *Credit Lyonnais* v *New Hampshire Insurance* [1997] CLC 909 (CA) 914.
[67] ibid.
[68] Simon Atrill, 'Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw?' (2004) ICLQ 549, 555.
[69] *Bloch* v *Lima* [1992] JCP 29172.
[70] Richard Fentiman, 'Commercial Expectations and the Rome Convention' (2002) 61 CLJ 50.
[71] Atrill (n 68) 555.

Fortunately, some of the uncertainty that has surrounded the interpretation of Article 4 Convention has been resolved following the CJEU's decision in *Intercontainer*.[72] Here the CJEU rejected the strong presumption approach and instead adopted an intermediary approach, holding that a court should apply the escape clause and disregard the presumptions contained in Articles 4(2) to 4(4) Convention "where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis" of the presumptions.[73] This approach was also favoured by Lord President Cullen in *Caledonia*. [74] The intermediary approach provides a middle ground between the strong and weak presumption approaches and focuses on achieving legal certainty and predictability, whilst also ensuring that the law is flexible enough to achieve a just result.[75] Such an approach adopts the literal meaning of the escape clause in Article 4(5) Convention and is said to have "textual legitimacy with the Rome Convention".[76]

Arguably, an intermediary approach should also be adopted when interpreting the escape clause in Article 4(3) Rome I.[77] This is because Articles 4(1) and 4(2) Rome I are aimed at promoting legal certainty and foreseeability between contracting parties, whilst Article 4(3) retains a degree of discretion allowing the law to operate flexibly to ensure that the law of the country that is most closely connected will be applied.[78] Recital 16 Rome I stresses the importance of achieving a balance between certainty and flexibility, and it is arguable that this balance would be best achieved by adopting an intermediary approach, as the primary aim of this approach is to strike such a balance.[79]

An adoption of the strong presumption approach, instead, would heavily restrict a court's ability to use the escape clause in Article 4(3) Rome I and would prevent the balance referred to in Recital 16 from being attained. This is because it will be very rare that the countries identified by Articles 4(1) and 4(2) Rome I will have "no real significance"[80] with the contract, meaning that a court would "barely have a chance to use the escape clause".[81] Although, it should be noted that Recital 16 merely states that the courts should retain "a degree" of discretion to determine the law that is most closely connected, it does not state how much discretion should be retained, and thus it is arguable that the strong presumption approach is still compatible with Recital 16.

Adopting the weak presumption approach would mean that the rules contained in Articles 4(1) and 4(2) Rome I would have little significance, as the court would be quick to disregard them in favour of using the escape clause. Such an approach would undermine legal certainty, [82] and represent a return to the English common law

[72] C-133/08 *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV* [2009] ECR I-9687.
[73] C-133/08 *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV* [2009] ECR I-9687 [64].
[74] *Caledonia Subsea Ltd* v *Microperi SRL* 2003 SC 70.
[75] Okoli & Arishe (n 54) 522.
[76] ibid.
[77] ibid 532.
[78] ibid.
[79] C-133/08 *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV* [2009] ECR I-9687 [59]-[63].
[80] Société Nouvelle des Papéteries v Machinefabriek (Hoge Raad, 25 September 1992) NJ 750.
[81] Tang (n 54) 798.
[82] Okoli & Arishe (n 54) 518.

approach of ascertaining the 'proper law' [83] which was also "criticised for being uncertain and unpredictable".[84] However, it may be "unwise to rely too heavily"[85] on the decisions based on the Convention, when trying to determine the correct interpretation and scope of Article 4(3) Rome I. This is because although the escape clauses in Rome I and the Convention appear to be similar, it has been suggested that "the text and architecture of Article 4 Rome I is very different from that of the Convention".[86] For example the addition of the requirement for a "manifestly" closer connection as opposed to a merely closer connection as required by the Convention may suggest that the escape clause in Rome I is to apply in more exceptional circumstances than before.[87] It also makes the escape clause even more uncertain, as no definition of "manifestly" has been provided in Rome I. Popplewell J has suggested that the escape clause will only apply if the weight of factors connecting the contract to another country "clearly and decisively"[88] outweigh the law that has been identified by Article 4(1) or 4(2) Rome I. However, the words "clearly and decisively" are also capable of being interpreted differently by judges and are thus of little help.

Additionally, Articles 4(1) and 4(2) Rome I are not said to contain "presumptions" as was the case with Articles 4(2) to 4(4) Convention. Instead, Recital 19 Rome I refers to Article 4(1) as a "rule" that determines the applicable law for a particular type of contract. The "elevation of criteria in Articles 4(1) and 4(2)" [89] Rome I arguably suggests that there is a "higher threshold"[90] that must be met before the escape clause in Article 4(3) Rome I can be deployed.

Although, the differences between the two provisions in Rome I and the Convention are only "one of degree",[91] they are "by no means unimportant".[92] It is possible that these changes are substantial enough for the CJEU to justify the adoption of a different approach in relation to the Regulation's escape clause than they had previously adopted for the Convention's escape clause in *Intercontainer*. Okoli and Arishe have submitted that the strong presumption approach is more appropriate for deploying the Regulation's escape clause,[93] as such an approach recognises that the escape clause "is an exceptional remedy that is to be rarely utilised" [94] when determining the applicable law of a contract. However, as previously mentioned, the adoption of a strong presumption approach would mean that the escape clause could only be used in extremely rare circumstances, and thus would have the effect of making the escape clause practically futile. Considering that the Rome I legislators have expressed the

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[83] *Definitely Maybe (Touring) Ltd* v *Marek Lieberberg Konzertagentur GmbH* [2001] 1 WLR 1745 [7].
[84] Rogerson (n 57) 312.
[85] ibid.
[86] *Molton Street Capital LLP* v *Shooters Hill Capital Partners LLP & Odeon Capital Group LLC* [2015] EWHC 3419 (Comm) [94].
[87] ibid.
[88] *Molton Street Capital LLP* v *Shooters Hill Capital Partners LLP & Odeon Capital Group LLC* [2015] EWHC 3419 (Comm) [94].
[89] ibid.
[90] *Molton Street Capital LLP* v *Shooters Hill Capital Partners LLP & Odeon Capital Group LLC* [2015] EWHC 3419 (Comm), [94].
[91] Ulrich Magnus, 'Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice' in Ferrari & Leible, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (European Law Publishers 2009) 30.
[92] ibid.
[93] Okoli & Arishe (n 54) 514.
[94] ibid 533.

need for flexibility in Recital 16 and have deliberately included an escape clause in Rome I, after the Commission had originally proposed to "abolish the exception clause",[95] it is argued that the strong presumption approach should not be adopted, and that an intermediary approach would be more suitable.

In the absence of a CJEU ruling on the interpretation of Article 4(3) Rome I, it is impossible to predict with certainty under what circumstances the escape clause should be deployed, and which model for displacement should be adopted. The CJEU must clarify this issue as they did with the Convention in *Intercontainer,* if some of the uncertainty surrounding the scope of Article 4(3) Rome I is to be resolved. However, clarification of this issue alone will not make the scope of Article 4(3) completely clear.

Relevant Factors

The scope of Article 4(3) Rome I is also unclear, due to the fact that little guidance has been provided in the Regulation as to what factors will be relevant when a court is determining whether a contract is "manifestly more closely connected with a country" other than the one indicated in Article 4(1) or 4(2) Rome I. Recitals 20 and 21 Rome I state that account should be taken "*inter alia* of whether the contract in question has a very close relationship with another contract". The recitals do not provide any guidance as to what constitutes a "very close relationship with another contract", nor any examples of other factors that can be taken into account when determining whether the escape clause in Article 4(3) should be deployed.

Unfortunately, no guidance on this issue can be found in the text of the Convention or in *Intercontainer*. Blair J did, however, state that "the court is not precluded from taking into account any particular type of factor when applying Article 4(5)" [96] Convention; a statement that was supported by Judge Mackie Q.C.[97] This has arguably settled the controversy among English judges that had "survived"[98] *Intercontainer* as to whether the factors used to determine the existence of an implied choice of law under Article 3(1) Convention could be used to invoke the escape clause. Although, the High Court dicta is not as authoritative as a decision from the CJEU and is a case based on the Convention's escape clause, it provides a useful indication of the scope of the escape clause in Rome I. Examples of the factors that courts have previously taken into account when considering whether a contract is more closely connected with another country include *inter alia*: the place of performance of the contract,[99] the place of payment,[100] and the currency of payment.[101] Given that both escape clauses are based on a close connection test, it is likely that the same factors that were relevant under

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[95] Commission of the European Communities, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I),' COM (2005), 650.
[96] *British Arab Commercial Bank PLC* v *Bank of Communications & Commercial Bank of Syria* [2011] EWHC 281 (Comm), [2011] 1 Lloyd's Rep 664 [34].
[97] *Lawlor* v *Sandvik Mining and Construction Mobile Crushers and Screens Ltd* [2012] EWHC 1188 (QB), [2012] ILPR 31 [16], [54], [60].
[98] Okoli & Arishe (n 54) 524.
[99] *Definitely Maybe (Touring) Ltd* v *Marek Lieberberg Konzertagentur GmbH* [2001] 1 WLR 1745 [8].
[100] *Samcrete Egypt Engineers & Contractors SAE* v *Land Rover Exports Ltd* [2001] EWCA Civ 2019, [2002] CLC 533, [47].
[101] *Apple Corps Ltd* v *Apple Computer Inc* [2004] EWHC 768 (Ch), [2004] 2 CLC 720 [62].

the Convention will also be relevant in relation to Rome I. Consequently, in order to minimise any confusion and to clarify the scope of Article 4(3) Rome I, a ruling from the CJEU on this issue is needed.

Significance of Factors

It is clear from Article 4(3) Rome I that there must be some "evaluation of the weight to be attached to each factor"[102] and that certain factors will be more significant than others when assessing whether the contract is more closely connected with one country than another. Potter LJ stated that "determining the strength of the connecting factors"[103] that are to be taken into account when applying the escape clause was a "practical difficulty"[104] that the court faced. However, "neither the Convention nor the Regulation offers explicit guidance as to the criteria for assessing the significance of factors connecting a contract with a given country".[105]

An indication of the significance of factors may be deduced from the cases and commentary relating to the Convention. For example, the English court in *Samcrete*[106] placed great significance on the place of performance of the contract. However, this was later criticised by Lord President Cullen who argued that "if the framers of Article 4 had intended to attach such significance to the place of performance"[107] they would have explicitly indicated it; the fact that they did not mention the place of performance suggests a "movement away from"[108] such an approach. It is possible that the English court was influenced by the fact that the place of performance was a significant factor when determining the "proper law"[109] of a contract under the old common law.[110] Factors that were considered but given little weight by the English courts included: the place of contracting,[111] the currency of payments[112] and the use of English in the contract.[113]

Fentiman argues that the objective of the close connection test is to ensure "commercial effectiveness",[114] and thus "the significance of the relevant connecting factors should be assessed in commercial terms".[115] This means that factors should be given weight depending on their "practical importance".[116] For example, Fentiman states that the place of performance of the contract may have commercial significance, whereas the language of the contract and the place of negotiation are unlikely to be

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[102] Rogerson (n 57) 315.
[103] *Samcrete Egypt Engineers & Contractors SAE* v *Land Rover Exports Ltd* [2001] EWCA Civ 2019, [2002] CLC 533, [40].
[104] ibid.
[105] Fentiman, *International Commercial Litigation* (n 49) 216.
[106] *Samcrete Egypt Engineers & Contractors SAE* v *Land Rover Exports Ltd* [2001] EWCA Civ 2019, [2002] CLC 533.
[107] *Caledonia Subsea Ltd* v *Microperi SRL* 2003 SC 70, [41].
[108] ibid.
[109] *Amin Rasheed Corp* v *Kuwait Insurance Co* [1984] AC 50 (HL) 60.
[110] *Amin Rasheed Corp* v *Kuwait Insurance Co* [1984] AC 50 (HL) 53.
[111] *Apple Corps Ltd* v *Apple Computer Inc* [2004] EWHC 768 (Ch), [2004] 2 CLC 720 [62].
[112] ibid.
[113] *Samcrete Egypt Engineers & Contractors SAE* v *Land Rover Exports Ltd* [2001] EWCA Civ 2019, [2002] CLC 533 [46].
[114] Fentiman, *International Commercial Litigation* (n 49) 216.
[115] ibid 217.
[116] ibid.

commercially significant.[117] Although, this provides one suggestion as to how the weight of the factors should be assessed, it is also likely to create uncertainty and confusion,[118] as it may be difficult to determine the commercial significance of a factor, and judges' opinions on how commercially significant a factor is will vary depending upon the judge and the facts of the case.

It will be necessary for the CJEU to rule on this issue in order for the scope of Article 4(3) Rome I to be clear. However, stating clearly how much weight each connecting factor should have, or how the significance of a factor should be assessed, will be a burdensome task, especially given the fact that methods of commerce and commercial relations are constantly evolving, and this may mean that the significance of certain factors are likely to change. For instance, the place of contracting was of great importance; however, it is now merely one of the many factors that should be taken into account when determining the country with the closest connection to the contract.[119]

The fact that the true interpretation of Article 4(3) is unclear and that the intermediary approach, which would seem the most appropriate choice, is "susceptible to manipulation"[120] by advocates of both the strong and weak presumption approaches allows the courts of member states to interpret Article 4(3) Rome I in the way that they prefer.[121] Consequently, member states will have little incentive to make an Article 267 TFEU[122] referral to the CJEU, as this may result in the adoption of an approach that is unfavourable with some member states. This may mean that it will be some time before a referral is made, and even then, the high volume of cases that are lodged with the CJEU has meant that in some cases "four years have elapsed between the question being asked and its answer".[123]

Brexit

The UK Government has now triggered Article 50 TEU[124] on 29 March 2017.[125] It is likely that even if the CJEU does rule on the proper interpretation of Article 4(3) Rome I, parties will still not be able to confidently predict how the English court will apply the escape clause, and, which law will govern the contract in the absence of a governing law clause. This is because even though the UK is still currently a member state and remains subject to the jurisdiction of the CJEU, English judges may undermine the CJEU and interpret the escape clause as they see fit. This uncertainty may mean that many commercial parties who would usually settle their disputes in the English courts

[117] Fentiman, *International Commercial Litigation* (n 49) 217.
[118] Okoli & Arishe (n 54) 522.
[119] Rogerson (n 57) 291-292.
[120] Okoli & Arishe (n 54) 523.
[121] ibid.
[122] Article 267 Treaty on the Functioning of the European Union (TFEU) 2007.
[123] Tony Storey & Chris Turner, *Unlocking EU Law* (3rd Edn, Routledge, 2011) 108.
[124] Article 50 Treaty on European Union (TEU) 1992.
[125] Jack Simson Caird, Legislating for Brexit: The Great Repeal Bill, House of Commons Briefing Paper 7793 (May 2017).

may decide to use a court in another country where the outcome to preliminary issues such as applicable law may be easier to predict.

The situation may become even more uncertain when the UK finally withdraws from the EU. This is because, despite plans to introduce a "Great Repeal Bill" which will incorporate EU law into English domestic law where practical,[126] it is not clear whether this bill will ever become an act of parliament and whether the Rome I Regulation will be incorporated into domestic law. Even if the Rome I Regulation is incorporated into domestic law, this does not mean that CJEU judgments on how Article 4(3) should be interpreted will be incorporated. As a result, uncertainty surrounding the application of the escape clause will likely continue after the UK has left the EU regardless of whether the CJEU clarifies the issues that have been discussed in this section.

The next section will consider whether the CJEU should adopt an inflexible or flexible approach to the exception, in order to best serve commercial efficacy and the expectations of contracting parties.

Inflexible or Flexible Approach?

Adopting an inflexible approach to the Article 4(3) Rome I exception, similar to the strong presumption approach, limits judicial discretion, despite simplifying the law.[127] Restricting judicial discretion arguably promotes the objectives of legal certainty, predictability and uniformity.[128] If uniformity is achieved through an inflexible approach to Article 4(3) Rome I, this may reduce the incentive for parties to forum-shop,[129] as parties will not spend time searching for the court that will give the most favourable result on this point, if they know that all courts will provide a uniform decision. This will serve business efficacy because there will be less of a delay between a dispute arising and the parties going to court, meaning that parties will be in a position to resume business sooner.

However, it is arguable that achieving uniformity of result across the EU is unrealistic, even if an inflexible approach to Article 4(3) is adopted. This is because even if all member states select the same governing law in any scenario, the way in which the designated law is applied will differ across member states. The English adversarial approach to the proof of foreign law is likely to make uniformity of result unachievable.[130] A court will establish foreign law only in accordance with evidence provided by the parties which means "to a large degree the foreign law which an English court applies is not therefore foreign law *per se*, but the court's version of foreign law".[131] As the application of law is likely to differ amongst member states, it is unlikely that an inflexible approach, or a flexible one either, will reduce forum shopping.

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[126] ibid 4.
[127] *Caledonia Subsea Ltd* v *Microperi SRL* 2003 SC 70 [4] per Lord Marnoch.
[128] C-281/02 *Owusu* v *Jackson* [2005] QB 801 [38], [41], [43].
[129] Richard Fentiman, 'Choice of Law in Europe: Uniformity and Integration' [2008] Tulane LR 2021, 2029.
[130] ibid 2032.
[131] Richard Fentiman, 'Foreign Law in English Courts' [1992] LQR 142, 146.

Adopting an inflexible approach, that restricts judicial discretion, will mean that judges will almost always apply the fixed rules in Article 4(1) and 4(2) Rome I to determine the applicable law in the absence of choice, instead of assessing the significance of connecting factors to see whether they constitute a "manifestly" closer connection. Consequently, preliminary issues such as the applicable law could be dealt with swiftly, and business efficacy will be served, as parties will spend less time in court and less money on legal fees. However, if the fixed rules designate a law that is different to the forum, especially in England, where an adversarial approach is taken, then extra time and money will be spent on employing expert witnesses and determining the substance of the foreign law.[132]

An inflexible approach may make the court's decision as to the applicable law predictable, however this is not necessarily the same as serving the expectations of parties. Determining the expectation of parties may in fact prove difficult where none has been expressly stated in the contract. However, it is likely that the parties may expect the contract to be governed by the law that has the strongest connection with the contract. Adopting a flexible approach that retains a degree of discretion is necessary to ensure that the contract is governed by the law of the country that is most closely connected with the contract,[133] as adoption of an inflexible approach will only result in the designation of the law of the most closely connected country, if the law identified by the fixed rules has "no real significance".[134]

Thus, it is argued that a flexible approach to Article 4(3), similar to that taken in *Intercontainer*, which retains a degree of judicial discretion is more appropriate for serving commercial efficacy and the expectations of parties. This is because in most cases the fixed rules will apply; as a result, parties can make a reasonable prediction as to the outcome of litigation. Business efficacy will be served as parties will be able to make an informed decision as to whether commencing litigation is beneficial. If litigation is commenced, in most cases the application of the fixed rules will ensure that the preliminary issue of applicable law is resolved efficiently, minimising legal costs and time spent in court. However, the degree of flexibility ensures that important factors such as "whether the contract in question has a very close relationship with another contract" [135] are considered. Only by taking a flexible approach can "commercially detrimental"[136] results (such as related contracts being governed by different laws) be avoided.[137]

However, flexibility and judicial discretion must not be unfettered, as it is under the weak presumption approach. Too much discretion makes the law unpredictable[138] and will hinder business efficacy, as it will make it difficult for parties to predict the outcome of litigation. Extra time and money may also be spent on litigating preliminary issues if courts can disregard the fixed rules easily and choose to apply the escape clause's close connection test in all cases.

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[132] ibid 150.
[133] Recital 16 Rome I Regulation.
[134] Société Nouvelle des Papéteries v Machinefabriek (Hoge Raad, 25 September 1992) NJ 750.
[135] Recital 20 and 21 Rome I Regulation.
[136] Richard Fentiman, "The Significance of Close Connection", in J Ahern and W Binchy (eds), The Rome II Regulation on the Law Applicable to Non-Contractual- Obligations: A New International Litigation Regime (Martinus Nijhoff, 2009) 95.
[137] ibid.
[138] Richard Fentiman, 'Foreign Law in English Courts' (n 131).

Conclusion

Although there is some indication as to how Article 4(3) Rome I should be interpreted, it is impossible to predict with certainty the circumstances in which the escape clause should be applied. Consequently, the scope of the exception in Article 4(3) remains unclear even after the *Intercontainer* decision. The CJEU must clarify the issues highlighted in the first section of this article if the scope of Article 4(3) Rome I is ever to be clear. However, in light of Brexit, it is likely that uncertainty surrounding this issue will continue even after a decision from the CJEU. It is argued that the CJEU should adopt a flexible approach, similar to the intermediary approach adopted in *Intercontainer*, if commercial efficacy and the expectations of parties are to be best served. Contracting parties should, however, make an express choice of law if business efficacy is to be maximised and their expectations upheld.

The elusive cause and the extensive effect of the principle of supremacy of EU law

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Abstract

This paper explores the emergence and impact of the principle of supremacy of European Union (EU) law. The first part focuses on its origins. It suggests that the historic-political context in which supremacy emerged seemingly supports the contention that the principle resulted from judicial activism. However, it also highlights, and I argue, the purpose and autonomous nature of EU legislation proves that Member States, rather than activist judges, triggered the supremacy of EU law. The second part discusses the impact of the principle. It perceives it as two-fold: supremacy both equipped EU law with constitutional effect and strengthened concerns over EU law's lack of essential constitutional characteristics. These concerns prompted the EU legislature and judiciary to bolster the EU's democratic legitimacy and enter the non-mercantile field of protection of human rights. Thus, it is concluded that supremacy engendered the remarkable transformation of EU law into what now resembles a fully-fledged Constitution.

Introduction

From the remnants of war and terror, the European Union was associated with the notions of equality, human dignity and democracy. Notably, the significant growth and prosperity of what is today known as the European Union ("EU") are largely owed to the emergence of the principle of supremacy of EU law.[139] On the one hand, the EU ensured the attainment of the main purpose underpinning the Treaties - the creation of a common market.[140] On the other hand, it brought about the introduction of new objectives onto the European agenda, extending the Treaties' initially narrow focus exclusively on economic integration[141] to fields of promotion of human rights and democracy. Thus, but for supremacy, the Community established in 1957 would probably not have evolved into anything similar to what it is today. This article will attempt to explore the true meaning and significance of the principle by

[139] Paul Craig, Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (OUP, 6th edn, 2015) p. 4.
[140] Consolidated Version of the Treaty Establishing the European Economic Community (2002) OJ C 325 33-184, Art 2.
[141] Craig and Burca, (n 139) 4. The authors link the initial focus on the economic, rather than the political, to the demise of more ambitious projects preceding the EEC, such as the European Defence Community and the European Political Community. They also note that, although the EEC initially confined its focus to the economic, '[t]he underlying, long-term objective may well have been political'.

determining the actual triggers of its emergence and evaluating its impact on the development of the EU.

Emergence

The principle of supremacy was established in *Costa* v *ENEL.*[142] Controversially, a principle of such importance to EU law has no explicit foundation in the text of the Treaties. Its pronouncement in *Costa* is therefore often attributed to judicial activism.[143] Academic commentary has contended that in creating the principle the Court of Justice for the European Union ("CJEU") was acting *ultra vires* - going beyond the powers conferred upon it to interpret, and not make, legal rules.[144]

Yet challenges to the legitimacy of the reasoning employed by the CJEU in establishing supremacy are usually balanced against the "good outcome" it produced.[145] This essay argues that the CJEU was justified in overstepping its authority by encroaching on the law-making power reserved for political, not legal actors, for two reasons:

(i) First, the mid-1960s, when *Costa* was decided, witnessed a diminution of the initial enthusiasm for European integration.[146] At the time the primary political actor capable of deepening it - the Community - had lost its influence with the strengthening of national interests.[147] As the CJEU has exclusive jurisdiction to give a *de facto* valid interpretation of EU law,[148] it has been contended that by equipping it with primacy over national laws it made a conscious political choice to "promote the integration process by judicial means".[149]

(ii) Secondly, supremacy was needed to prevent the unequal application of EU rules throughout member states ("MS") the principle of direct effect[150] would have produced on its own.[151] This view was expressed by the Commission in *Van Gend en Loos*.[152] Furthermore, the Advocate General

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[142] Case C-6/64 *Costa* v *E.N.E.L.* ECLI:EU:C:1964: 66.

[143] Fiona Jayne Campbell, 'Power sharing in the European Union: has Court of Justice activism changed the balance?' (2013) NELR 109, 111-113.

[144] Consolidated Version of the Treaty on European Union [2012] OJ C 326 (TEU), Art 19. See, *inter alia*, Fiona Jayne Campbell, 'Power sharing in the European Union: has Court of Justice activism changed the balance?' (2013) NELR 109, 111-113.

[145] Joseph Halevi Horrowitz Weiler '*Van Gend en Loos*: The individual as subject and object and the dilemma of European legitimacy' (2014) 12(1) Int J Constitutional Law 94, 103.

[146] Anna Katherina Mangold, '*Costa v ENEL (1964): On the Importance of Contemporary Legal History*' (2011) AV Akademikerverlag 220, 222.

[147] ibid.

[148] Weiler (n 145) 99.

[149] Mangold (n 146) 227.

[150] The principle of direct effect dictates that provisions of EU law that are "clear, negative, unconditional, containing no reservation on the part of the Member State and not dependent on any national implementing measure" must be interpreted as creating individual rights which national courts must protect. See Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1 Craig and De Burca (n 141) 190.

[151] Had it not been for supremacy, EU rights would have received unequal protection at national level, as they would have taken precedence over national legislation in some, but not all, Member States. See Weiler (n 145) 96.

[152] *Van Gend en Loos* (n 150).

> opposed the establishment of the principle of direct effect in that case precisely on the basis of absence of supremacy.[153] As the court proceeded to establish, it was left with no choice but to subsequently introduce supremacy, if the uniform interpretation of the Treaty in *Van Gend* was to be preserved.

If the argument that the reasoning of the CJEU was questionable but needed, is to be accepted, the aforementioned factors are key to explicating the emergence of supremacy, as but for them, the CJEU would not have felt justified to go beyond its power in establishing the principle. The "timing" of *Costa* supports this view. The case was decided in 1964,[154] in times of weakened enthusiasm for European integration and just a year after direct effect was established in *Van Gen den Loos* in 1963.[155]

However, the historic-political background against which the judgment in *Costa* was delivered should be considered, bearing in mind that the mid-1960s were also the early years of the Community, meaning that *Costa* provided the CJEU with one of the first opportunities to adjudicate on the nature of the legal order established by the 1957 Treaty of Rome.[156] In doing so, the CJEU paid due regard to both the text and objectives of that Treaty. Notably, the method of interpretation it employed was not unorthodox, but strictly compliant with the most fundamental rule of international Treaty interpretation- that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose".[157] Thus, in this author's view, the fact that the CJEU delivered a well-reasoned judgment founded upon conventional interpretative principles is capable of defeating any contention that supremacy is the product of judicial creativity aimed at meeting political needs.

Therefore, although the emergence of supremacy did solve the challenges mentioned in (i) and (ii) above, this author is not persuaded by the view that the introduction of supremacy was a pre-composed solution to the problems faced by European integration conveniently disguised as a legal problem that the CJEU had to decide. On the contrary, it was a conclusion bound to be reached whenever an issue requiring the determination of the nature of EU law arose. This is due to two distinctive Treaty characteristics which will be discussed in turn.

(1) Underpinning Purpose:

> The desirability of the purpose underpinning the Treaty - the establishment of a Common Market, is indisputable: it stretches from steady economic growth to preservation of peace by the pooling of resources.[158] However, as the CJEU in *Costa* noted, MS's obligations in relation to this purpose "would not be unconditional, but merely contingent" if EU law did not take precedence over their legislative acts.[159] Arguably, this would have seriously threatened its

[153] Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1962:42, Opinion of AG Roemer
[154] *Costa* (n 141) [3].
[155] *Van Gend en Loos* (n 150).
[156] Stephen Weatherill, *Cases and Materials on EU law* (OUP, 11th edn, 2014).
[157] Vienna Convention on the Law of Treaties 1969, Art 31.
[158] Treaty Establishing the European Economic Community (n 139) Preamble.
[159] *Costa* (n 142), [10].

attainment, as the early years of the Community, during which MS were not bound by a superior body of law to observe it, witnessed it being compromised in the name of national interests.[160]

Yet the CJEU did not accord precedence to EU law merely out of determination to save its purpose. It was guided by the text of the Treaty, which at no point discloses any stipulation that the purpose of establishing common market was "merely contingent". [161] Namely, because MS had declared that they are "determined", "resolved" and "affirming as [their] essential objective" to "guarantee" and "ensure economic and social progress" in it.[162] Furthermore, they had agreed to make derogations from Treaty obligations possible only where provided for in the Treaty, [163] subject to special authorisation procedures.[164]

(2) Autonomy:

By vesting part of their sovereign powers in the Union, MS have enabled its institutions to adopt secondary legislation independently of their governments in areas of conferred competence. Among these sources of secondary legislation, regulations undisputedly have the most adverse effect as they "shall be binding and directly applicable".[165] Although, there are other international bodies with objectives similar to those underpinning the Treaties, *e.g.* the World Trade Organisation, none of them are vested with legislative power, let alone authority to introduce measures binding and directly applicable in signatory States. Hence the institutional structure MS envisaged in the Treaty created a new, unprecedented and autonomous legal order.

This legal order is directly effective in MS. [166] MS's law, however, is just as autonomous.[167] Thus, domestically, courts can apply to the same people two distinct legal orders, which may on occasion produce different results. As "the rule of law demands for a single legal solution in every individual case",[168] the question of primacy was bound to arise. Since a provision as crucial to the functioning of the unprecedented organisation MS contemplated in the Treaty, as that of enabling EU institutions to adopt regulations, would be "quite meaningless" if its effects could be nullified by inconsistent domestic legislation,[169] the answer to this question also seems to have been inevitable.

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[160] Mangold (n 146), 222-3.
[161] *Costa* (n 142), [10].
[162] Treaty Establishing the European Economic Community (n 140) preamble (emphasis added).
[163] ibid (The Establishment of a Common Market).
[164] *Costa* (n 142), [10].
[165] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 47-199 (TFEU), Art 288.
[166] *Van Gend en Loos* (n 150).
[167] Ingolf Pernice, 'The Autonomy of the EU Legal Order — Fifty Years After *Van Gend*' (50th Anniversary of the Judgment of *Van Gend en Loos*: Conference Proceedings, Luxemburg, 13 May 2013) 50-81, 60.
[168] ibid, 61.
[169] *Costa* (n 142), [11].

As MS have unanimously agreed to equip the Treaty with the aforementioned features, they were the ones who triggered the creation of a supreme legal system and not the ongoing pressures at the time.

Impact: The Constitutionalisation of EU Law[170]

Constitutional Effect

Following *Costa,* the CJEU confirmed that uniformity and efficacy of EU law required that the principle of supremacy should apply to national rules adopted both prior and subsequently to EU law[171] and even domestic laws of constitutional character.[172] A clear hierarchy of norms was therefore established.[173]

Hence, the relationship between EU and national law displayed "a tension between the whole and the parts" akin to that of federal constitutional models.[174] Moreover, as the CJEU insisted on the "immediacy of supremacy" in the case of *Simmenthal*[175] it prohibited the application of national procedural rules as to courts that can review legislation, which did not contradict supremacy directly, but meant that its effect may be delayed.[176] By stating that national courts must not await the setting aside of a EU-incompatible measure by relevant authorities but disapply it themselves,[177] the CJEU vested in them what arguably has the practical effect of a "strike down" power, which is usually possessed by domestic courts in relation to measures conflicting with the Constitution of a State.[178]

Thus, the principle of supremacy arguably bestowed EU law with effect comparable to that of a supranational constitution and placed the "ultimate arbiter" on it- the CJEU, "amongst the most powerful of supranational courts".[179] This extensive grant of power to the EU legislature and judiciary did not go unnoticed by MS. Indeed, it was proclaimed to be one of the "best reasons"[180] for the United Kingdom (UK) to leave the EU. Ultimately, the establishing of a principle that would equip EU law with constitutional effect was not uncontroversial, given that at that time supremacy emerged the EU legal order lacked the essential constitutional features- values of fundamental nature that underpin and penetrate the institutions and functioning of a state.[181] These values are usually expressed in terms of human rights and democracy.[182]

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[170] Christiaan Timmermans, 'The Constitutionalization of the EU', (2002) 21(1) YEL 1.
[171] Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49, [21].
[172] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, [3].
[173] Joseph Halevi Horrowitz Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) 1(1) YEL 267, 274.
[174] ibid, 268.
[175] *Simmenthal* (n 171).
[176] Weiler (n 173) 275.
[177] *Simmenthal* (n 171), [24].
[178] ibid.
[179] Department for Exiting the European Union, The United Kingdom's exit from, and new partnership with, the European Union (White Paper, Cm 9417, 2017).
[180] Daniel Hannan, 'The six best reasons to vote Leave', *The Spectator* (London, 11 June 2016) <https://www.spectator.co.uk/2016/06/six-best-reasons-vote-leave/> accessed 5 June 2017.
[181]Timmermans (n 170) 2.
[182] ibid.

Constitutional Values

Realising the enhanced effect of EU law on their national legal systems post-*Costa,* it was not long before MS spotted the aforementioned problem and required its solution if they were to observe the principle of supremacy. As its operation is necessarily "bi-dimensional" - it depends upon both its application by the CJEU and its affirmation by MS's courts,[183] the CJEU committed to meeting MS's requirement by equipping EU law with the following essential constitutional values:

(a) Protection of Human Rights

Initially, the CJEU adopted a "narrow formalistic approach" when asked to review Community measures allegedly violating human rights constitutionally entrenched in MS.[184] as no obligation to protect such rights had been imposed upon it under the early Treaties.[185] Not coincidentally, it fundamentally changed this approach after MS made it explicitly clear that their compliance with the principle of supremacy depends on EU law's compatibility with rights enshrined in their constitutions.[186] This induced CJEU's commitment to developing a body of case law that would clearly exhibit EU law's sensitivity to human rights. Thus it declared fundamental rights "an integral part" of EU law, "the observance of which it ensures", [187] and pronounced measures incompatible with these rights "unacceptable in the Community".[188]

In incorporating the protection of rights in the EU legal order, the CJEU was viewed as "venturing beyond its territory" as no such protection was envisaged by the Treaties at the time.[189] Yet its bold move proved so influential that it was in fact followed by the inclusion of protection of human rights on the Treaty agenda.[190] It was the CJEU's response to MS's conditions in relation to their acceptance of supremacy that prepared the ground for the development of a more socially legitimate Union, which nowadays fully endorses the concept of citizenship, treats the EU Charter of Human Rights[191] as equal to its Treaties and has the principle of protection of human rights enshrined in its legal order.

(b) Democratic Legitimacy

The author argues that the emergence of supremacy significantly increased the impact of EU law not only on MS, but also on their citizens. Quite problematically however, this was not accompanied by a boost of the Union's democratic legitimacy, which was weak at the time as its two essential features- people representation and accountability

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[183] Weiler (n 173) 275.
[184] ibid 284.
[185] ibid (citing Case 1/58 *Friedrich Stork & Cie* v *High Authority of the European Coal and Steel Community* ECLI:EU:C:1959:4, at para 7).
[186]*Internationale Handelsgesellschaft* v *Einfuhr und Vorratstelle fur Futtermittel und Getreide* [1974] 2 CMLR 40, *Frontini* v *Ministero delle Finanze* [1974] 2 CMLR 372.
[187] Case C-4/73 *Nold KG* v *Commission* ECLI:EU:C:1974: 51, [13].
[188] Case C-44/79 *Hauer* v *Rheinald Pflaz* ECLI: EU: C: 1979: 254, [15].
[189] M. H. Mendelson, 'The European Court of Justice and Human Rights', (1981) 1(1) YEL 125, 127.
[190] ibid.
[191] Charter of Fundamental Rights of the European Union [2000] OJ C 364.

- were lacking.[192] Thus a CJEU judge himself expressed the view that EU law was the result of the work of "numberless, faceless and unaccountable committees".[193] This called into question the desirability of a principle that renders EU law - which was described as "undemocratic" by the very judge that had to apply it - supreme over the national values of MS.[194] Hence the boosted impact of EU law introduced concerns regarding its democratic deficit on the European political agenda, notably addressed in the Leaken Declaration.[195] Thus, democratic representation of EU citizens at Union level has been significantly boosted since the early years of supremacy, with the development of the EU Parliament from an assembly of appointed members to a democratically elected body, accompanied by a continuous increase of its powers.[196]

Yet, the question of whether the Union has adequate democratic legitimacy corresponding to the impact of its exercise of public power subsisted.[197] Moreover, in Germany, where democracy is "unalterably anchored" in the Constitution,[198] it was answered in the negative.[199] The German Constitutional Court did not discern any primary source of legitimisation at EU level.[200] Thus, it held that the Union can be legitimised only at national level, provided the transfer of sovereignty to it from MS was clearly defined.[201] Subsequent attempts to meet this requirement included the convenient laying down of the Union's competences, which were previously spread through the Treaties,[202] in Part One of the Lisbon Treaty.[203] There has also been national judicial reluctance to allow a broad interpretation of the "flexibility clauses"[204] under which Union's institutions can adopt measures outside the powers specifically conferred upon them.[205] Therefore, the principle did not constitute a unilateral grant of power to the EU legislature and judiciary. Rather, it required them to pay the price of continuously developing the EU into a more socially and democratically legitimate supranational body.

Hence, the principle of supremacy, which was referred to as one of "the best reasons" for the UK to leave the EU,[206] paradoxically turns out to also be one of the best reasons to stay, given its potential to urge EU legislators and judges to endeavour to define the EU in more socially desirable terms. The UK should have utilised this potential to cause the emergence of an ever more democratic Union. Consequently, in the search for

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[192] Ulrich Everling, 'The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union', (1994) 14(1) YEL 1, 5.
[193] Giuseppe Federico Mancini, 'Europe: The Case for Statehood' (1998) 4(1) Eur. L.J. 29, 40.
[194] Weiler (n 173) 102.
[195] The Leaken Declaration [2001] SN 300/1/01 REV 1, 19-21. <www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf> accessed 6 January 2016.
[196] ibid.
[197] Ulrich (n 192), 4-5.
[198] ibid.
[199] Case 2134/92, *Brunner v. The European Union Treaty* [1994] 1 CMLR 57.
[200] H. Hauser, A. Müller, *'Legitimacy: the missing link for explaining EU institution building'*, (1995) Aussenwirtschaft 50: 17–42, 30 (referred to in Weatherill (n 16) 590).
[201] ibid.
[202] Weatherill (n 156) 29.
[203] TEU (n 139), Arts 2-6.
[204] TFEU (n 165), Arts 352 and 114.
[205] In terms of TFEU (n 25), Art 326: Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:1996:140, [29]-[30]; and TFEU (n 25), Art 144; Case C-376/98 *Germany v Parliament and Council* ECLI:EU:C:2000:544, [83]-[6].
[206] See Hannan (n 180).

reasons to leave, it scrutinised supremacy in isolation from the price paid by the EU for MS's acceptance of the principle.

Conclusion

By establishing a Community with mutually beneficial obligations and perhaps unprecedented autonomous legislative powers to fulfil them, MS rendered the realisation of supremacy inescapable. It was inevitable that the Union's legislative legitimacy would have to by founded on the delegated power granted upon it by MS in the TEU. Yet it seems that MS had not foreseen the effect and extent the principle would have on MS and their nationals in the establishing Treaty. They had envisaged a model deficient in democracy and protection of human rights. Realising this, MS made their acceptance of a supreme EU legal order conditional upon the balancing of its constitutional effect against the essential values of a constitution. Determined to satisfy this condition, the EU has significantly developed supremacy, through significant cases, since the early years of the Union. Therefore, it can be argued that the legal order and the social and democratic legitimacy of the Union has been boosted as a result of its continual development and 'reinterpretation' in the cases. Perhaps, it can even be confidently compared to a fully-fledged Constitution, although the Treaty Establishing the Constitution of Europe never came into being.

Medical Paternalism: Still Alive in English law?

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Abstract

Issues surrounding medical paternalism, and whether, and to what extent, such an approach exists in the law of England and Wales, will be considered in this article. Cases including *Bolam*,[207] *Sidaway*[208] and *Mongomery*[209] will be analysed in order to illustrate where and when medical paternalism has a place in English law.

Introduction

Dworkin defines paternalism as the interference with a person's liberty of action, justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced. [210] Accordingly, I suggest that medical paternalism, based on Dworkin's definition, includes an approach to patients that fails to obtain informed patient consent. As a result, a patient's liberty may be interfered with and their well-being may be compromised. In such circumstances, there is an issue whether such an approach has a place in English law.

This essay will be divided into two parts, the first part will consider case law which has led to the development of medical paternalism in England and Wales followed by a case that arguably marked a shift leading away from medical paternalism. The second part will then explore cases where medical paternalism still is prevalent. I suggest that although a paternalistic approach to medical patients may in some circumstances have receded, particularly in relation to adults considered to be mentally capable, for others such as children and adults considered to be mentally incapable, a paternalistic approach may still exist.[211]

[207] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583 (QB).
[208] *Sidaway v Board of Governors of the Bethlem Royal Hospital and Maudsley Hospital and others* [1985] AC 871 (HL).
[209] *Montgomery v Lanarkshire Health Board (General Medical Council Intervening)* [2015] UKSC 11; [2015] AC 1430.
[210] Gerald Dworkin, 'Paternalism' (1972) 56 The Monist 64.
[211] A similar line of argument was put forth in Margaret Brazier and Jose Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8 Med L Rev 85.

Paternalism in English Law

The first case to be considered is *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582*,* which established a test for assessing the appropriate standard of reasonable care in medical negligence. For a court to determine that negligence has occurred, there are four requirements which must all be met: (1) there was a duty of care owed to the claimant; (2) a breach of that duty of care has occurred through the defendant's actions; (3) this breach of duty has caused damage to the claimant; and (4) the damage caused was not too remote.

The facts of *Bolam* are that the claimant was being voluntarily treated for his depression with electro convulsive therapy (ECT). The doctor who was treating the claimant did not provide him with any relaxant drugs and during treatment the claimant sustained serious fractures. The medical field was divided whether relaxants should always be prescribed, because if the relaxant is provided, there is a small risk of death. If relaxants are not given, however, there is a small risk of fractures. The claimant argued that the defendant had breached his duty by not prescribing the relaxant. The House of Lords held however that the doctor did not breach the duty of care owed to the claimant because the doctor 'acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art… a man is not negligent, if he is acting in accordance with such as practice, merely because there is a body of opinion who would take a contrary view.'[212] This ruling established the *Bolam* test, which was subsequently used to identify when a breach of duty may have occurred as a result of a doctor's actions.

The *Bolam* test states that a doctor is not breaching his duty to the patient if he 'acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art'.[213] Hence it is not enough to only find a view that would run contrary to this particular doctor's actions. Unless actions are so far from contemporary accepted standards of medical practice, individual medical practitioners may be considered to be unduly protected by the law, or even I would argue, they enjoy a degree of immunity from legal censure.

Brazier and Miola argue that medical litigation, unlike other professional areas in which *Bolam* applies, has given rise to the idea that all that is required is another medical expert to testify that they would have 'followed the same course of management of the patient-plaintiff as did the defendant (medical staff in question).'[214] If such a testimony is provided, neither they nor the defendant will be required to explain the method used, which in turn is problematic because the threshold of the test is very high due to the possibility that doctors may have differing professional opinions on how to treat the same medical problem.[215]

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[212] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 587 (McNair J).
[213] ibid.
[214] Margaret Brazier and Jose Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8 Med L Rev 85, 88.
[215] ibid.

Therefore, the decision in *Bolam,* I would argue, appears to be protective both of medical opinion and the possible range of opinions that may be held, including the concept of medical paternalism. The decision in *Bolam* has suggested that the medical profession are best placed to determine which risks they deemed to be significant in the best interests of the patient. The patient in *Bolam* was neither informed nor consulted about the risks that might arise if a relaxant was or was not prescribed during electro convulsive therapy. The doctor instead decided that since there was a small risk of death by providing relaxants and a small risk of fractures without the relaxant, the procedure should take place without the relaxant in order to avoid the risk of death.

The second case to be considered, *Sidaway*, [216] concerned the duty of medical professionals to inform patients about the potential risks of a particular operation. Amy Sidaway, the claimant, was suffering from recurrent pain in her neck, right shoulder and arm. She underwent surgery which, even if performed to the highest standard, had a 1-2% chance of her becoming paraplegic. After the surgery, the claimant became paraplegic and as a result, sought damages for not being told about the risks of the surgery. The surgeon claimed that he told her about the risk of a potential disruption to the nerve root and its consequences; however, from the facts of the case, he appeared not to have disclosed the issue of potential danger to the spinal cord.[217] The medical custom of refraining from disclosing all potential risks to patients was an accepted practice within the medical profession as identified by the House of Lords in 1974.[218] The requirements of the *Bolam* test were thus met, and no breach of duty from the doctor to the patient was found.

A trend supporting medical paternalism during this period is evidenced in a statement by Lord Diplock. 'The only effect that mention of risks can have on the patient's mind, if it has any at all, can be in the direction of deterring the patient from undergoing the treatment which in the expert opinion of the doctor it is in the patient's interest to undergo'.[219] Lord Diplock indicated that in his view, informing a patient about the risks of treatment might put the patient off having necessary procedures, which might otherwise be in their own interests.

Lord Scarman dissenting, was, however, critical of the decision in *Bolam*. Lord Scarman criticised the *Bolam* test in its application to notifying risks to patients. He stated '…the *Bolam* test of duty and breach of duty does not avail the appellant because the evidence does not enable her to prove that Mr. Falconer was in breach of his duty when he omitted the warning…the law in my view, recognises the right of a patient of sound understanding to be warned of material risks.'[220] Lord Scarman argued that medical professionals have a duty to inform patients of all 'material risks'[221] and the choices open to the patient regarding treatment. A 'material risk' was defined as '…material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.'[222] But significantly,

[216] *Sidaway* (n 208).
[217] *Sidaway* (n 208) 880 (Scarman HLJJ).
[218] ibid 872.
[219] ibid 895 (Diplock HLJJ).
[220] ibid 889 (Lord Scarman HLJJ).
[221] ibid (Scarman HLJJ) in reference to the term used in US case *Cantebury v Spence* (464 F.2d 772, 780) 1972.
[222] *Sidaway* (n 208) 887 (Scarman HLJJ).

Lord Scarman suggested that even if the risk was considered to be a material risk, a practitioner might not be found liable for breach of duty, if prior assessment of the patient had indicated that risk disclosure would have been psychologically detrimental to the patient's health.[223] Thus Lord Scarman distinguished his reasoning from that of Lord Diplock and the majority judges, by separating the medical treatment tasks from those of informing patients of material risks. Nevertheless, I suggest, because therapeutic privilege was maintained, the judgment still supported a paternalistic approach by medical practitioners.[224]

The third case to be considered in this first section *Montgomery*[225], concerns a pregnant mother. The court's judgment in this case indicates a different judicial approach to the medical paternalistic approach seen in *Sidaway* and *Bolam*. The claimant, a diabetic and a woman of small stature, was expecting her first child and this was predicted to be a high-risk pregnancy. The baby was anticipated to be larger than usual and this led to the doctor's concerns about vaginal delivery. The doctor did not notify her that there was a 9-10% risk of shoulder dystocia if she underwent a vaginal delivery. The doctor considered this risk to be minor and realised that if she notified the patient of this risk, the patient may have opted to have a caesarean section – which the doctor deemed was not in the patient's best interest. Upon delivery there were complications as a result of shoulder dystocia, which resulted in severe disabilities for the child. The patient brought an action on behalf of her son, claiming that her son's injuries were caused by the doctor's failure to disclose the risk of shoulder dystocia, and to suggest or discuss alternative methods of delivery such as caesarean section to avoid this risk.

The Supreme Court ruled in favour of the claimant and the judgment refers to Lord Scarman's reasoning in *Sidaway*, but distinguishes the two cases. Lord Kerr and Lord Reed stated in *Montgomery* that:

> "[S]ince Sidaway's case, however, it has become increasingly clear that the paradigm of the doctor-patient relationship implicit in the speeches in that case has ceased to reflect the reality and complexity of the way in which healthcare services are provided…patients are now widely regarded as persons holding rights, rather than passive recipients of the care of the medical profession."[226]

The reasoning in this part of the judgment, identifies that although medical paternalism has been part of medical practice, a shift in approach has occurred in the expectations of medical practitioners to disclose risks to patients.[227] This shift, I would argue, was developed out of Lord Scarman's approach in *Sidaway*. Patients, as mentally capable adults, should be able to determine – based on the disclosure of the risks provided to them by doctors – what treatments or medical procedures they want to undergo. However, former barrister Charles Lewis suggests that in addition to departing from *Sidaway*, *Montgomery* also ensures that the '*Bolam* test' need not apply in relation to full disclosure of information in medical procedures.[228] According

[223] ibid 890 (Scarman HLJJ).
[224] *Sidaway* (n 208).
[225] *Montgomery* (n 209).
[226] *Montgomery* (n 209) 1459 [75] (Kerr SCJJ and Reed SCJJ).
[227] ibid.
[228] Charles Lewis, 'Consent to Treatment: Supreme Court Discards Bolam Principle' (2015) 83(2) Medico-Legal Journal 59, 60.

to Lewis therefore, patients may have the right to refuse the full disclosure of risks, in which case the doctor is not obliged to discuss them, and perhaps such non-disclosure falls outside the scope of medical paternalism.

It is understandable why a medical practitioner would want to avoid the risk of a patient's death and that a medical practitioner is a more qualified person to determine what is necessary to ensure the survival of the patient because of their professional judgement and prior experience, however, one can also identify that through the acceptance of their credentials there is a lack of respect for the patient's individual autonomy. When a patient is uninformed about the risks of a particular treatment, I would argue that he or she is not making a fully informed decision about whether or not to proceed with the treatment. Chairman of the Institute of Medical Ethics, Raanan Gillon, agrees that doctors are more knowledgeable in the field, but at the same time they must understand that their ethical or moral skills cannot be considered better than those of the patient.[229] I concur with Gillon in that all individuals have their own set of morals and ethics; therefore, it is unreasonable to assume that a doctor is capable of meeting the patient's moral and ethical views.

Is medical paternalism still trending?

In this second section, several further cases will be explored in order to demonstrate that in certain circumstances, a medical paternalistic approach may still have a place in English law. Cases such as *Re: A, Re: MB* and *Bland* took place before *Montgomery* and I outline their circumstances. I will argue that if cases with similar circumstances were to arise in the future medical paternalism could return.

For example, in *Re: A,* doctors were able to carry out a surgery on conjoined twins despite the refusal of consent from their parents. The surgery would save the life of one of the twins at the cost of the other twin.[230] In *Re: MB,* doctors carried out a caesarean section on a patient who consented to the method of delivery but refused the anaesthesia because of a fear of needles. The hospital obtained a declaration that doctors could carry out the delivery and administer the anaesthesia using a needle.[231] Furthermore, in *Bland* the patient was above the age of 18 and in a persistent vegetative state – and thus unable to consent – for three years as a result of the Hillsborough Disaster. He was being kept alive by life support machines. With the consent of his parents, the hospital sought a declaration which would allow doctors to turn off of life-support. The House of Lords held that there was no duty to treat him if treatment was not in his best interest.[232]

In all three cases, the patients were not required to give consent to the treatment, or the removal of treatment. Komrad, from a philosophical perspective, argues that

[229] Raanan Gillon, 'Paternalism and Medical Ethics' (1985) 290 Philosophical Medical Ethics 1971.
[230] *Re: A (Conjoined Twins)* [2001] 2 WLR 480 (CA).
[231] *Re: MB (Caesarean Section)* [1997] EWCA Civ 1361; [1997] 2 FLR 426 (CA).
[232] *Airedale NHS Trust v Bland* [1992] UKHL 5; [1993] AC 789, 799 (Brown HLJJ).

individual autonomy is not granted to mentally ill or handicapped individuals because illnesses, and the individual's handicaps, result in a loss of his or her individual autonomy.[233] Autonomy, in brief, entails an individual's ability to be independent and free to make his or her own choices as they wish. For some individuals, such as children or individuals with illnesses which impact their capacity to consent, the medical profession, as exemplified by case law, has intervened and made decisions for the patient who lacks autonomy. Komrad defends this point as he argues that it is vital to the doctor-patient relationship for the doctor to fill the lacuna in autonomy for these types of individuals because they lack the ability to make these decisions in a free and informed manner.[234] In *Montgomery* it is stated in the judgment that 'unless the patient is unconscious, or incompetent, or otherwise demonstrably incapable of ratiocination, the doctor has no right or duty to make that decision for his patient.'[235] This statement affirms Komrad's assertion that medical paternalism is required for filling the holes in autonomy, as determined by society, for patients that lack the ability to consent. As a requirement to fulfil the void in patient autonomy in the case of people with illnesses and disabilities, I argue medical paternalism is not completely abolished from English law and is necessary.

Conclusion

In conclusion, when considering the issues surrounding whether medical paternalism is still alive in English law, the support shown by the courts for medical paternalism in the aforementioned cases is significant. Nevertheless, judicial reasoning has debated developed the scope of the principle over time. Medical paternalism was favoured and shielded by English law – as indicated by *Bolam* and *Sidaway*. The case of *Montgomery,* however, has taken a significant step forward, moving the law from the traditional approach of *Sidaway* and disapplying the *Bolam* test. Regardless of the advancements in *Montgomery,* there are circumstances in which medical paternalism still has a potential role in English law. These circumstances include providing treatment for patients who are '…unconscious, or incompetent, or otherwise demonstrably incapable of ratiocination'[236].

[233] Mark S Komrad, 'A Defence of Medical Paternalism: Maximising Patients' Autonomy' (1983) 9(1) Journal of Medical Ethics 38, 41.
[234] ibid 42.
[235] *Montgomery* (n 209) 1436 (Kerr SCJJ and Reed SCJJ).
[236] ibid.

Comment on the Decision of the House of Lords in T*arget Holdings Ltd v Redferns* [1996] 1 AC 421

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Abstract

This case note and comment addresses the academic literature following the House of Lords' decision in the 1995 case of *Target Holdings Ltd v Redferns*. It will be argued that the leading judgment delivered by Lord Browne-Wilkinson did not establish a "false step"; rather, it constituted a necessary departure from orthodox principles. This approach was taken in order to consolidate the lacuna in the law of trusts with regard to misapplied trust property. The discussion will also highlight tensions in the continuing debate on whether conceptual boundaries between common law and equity should be merged. An analysis of *AIB Group (UK) plc v Mark Redler & Co Solicitors* illustrates that the debate remains unresolved and affirms Lord Brown-Wilkinson's "inapt causation" to achieve a commercially sensible outcome.

Introduction

The outcome in *Target Holdings Ltd v Redferns*[237] is generally welcomed, yet, it is Lord Browne-Wilkinson's reasoning regarding misapplied trust property in the leading House of Lords judgment which has evoked controversy[238]. It departs from orthodox principles of trust law and adopts common law remedies to achieve a commercially practical solution. His Lordship's supposed "inapt causation"[239] has been regarded unnecessary and unorthodox.[240] The Supreme Court was recently granted the opportunity to revisit *Target* in *AIB Group (UK) plc v Mark Redler & Co Solicitors*.[241] The alleged "false step"[242] taken by Lord Browne-Wilkinson has resulted in an indication that substitutive performance claims, in regard to misapplied trust property, no longer operate in English law.[243] This article will discuss the seminal case of *Target* (notably reaffirmed in *AIB Group*) which has attempted to flesh out the problems indicated by academics regarding the distinction of trusts, causation and

[237] *Target Holdings Ltd v Redferns* [1996] 1 AC 421, referred to hereafter as *Target*.
[238] Steven B Elliott, *Compensation Claims Against Trustees* (DPhil Thesis, University of Oxford 2002), 143.
[239] Charles Mitchell, 'Stewardship of Property and Liability to Account' (2014) 3 Conv 215, 226.
[240] Peter J Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Lawbook Co 2005), 311.
[241] *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, referred to hereafter as *AIB Group*.
[242] Mitchell (n 239) 227.
[243] Andreas Televantos and Lorenzo Maniscalco, 'Stay on Target: Compensation and Causation in Breach of Trust Claims' (2015) 4 Conv 348, 351.

equitable compensation. The ongoing debate regarding the fusion of equity and common law will be explored briefly; uncovering the House of Lords' necessity to adjudicate on matters beyond the remit of orthodox legal precedent.

Foundation

a. Pre- Target Holdings

Customarily, a beneficiary of a trust could oblige a trustee to reconstitute trust property that had been misapplied, without the need to demonstrate causation of the loss, by pursuing substitutive performance of the trustee's primary responsibility to deliver the trust property.[244] Where an account would display the trustee's misapplication of trust estate, and the beneficiary subsequently refused to adopt the disbursement of funds,[245] the beneficiary was able to falsify the transaction. Consequently, the trustee was personally liable to reconstitute the trust estate.[246] In this case, the beneficiary was pursuing the substitutive performance of the trustee's primary duty to deliver the trust estate,[247] thus not seeking a reparative claim for compensation of harm or injury suffered.[248]

b. Target Holdings Ltd v Redferns

This traditional approach was reformed in *Target* by Lord Browne-Wilkinson; the only equity lawyer sitting on the appeal. *Target* concerned a classic mortgage fraud in which a third party sought to inflate the price of a property artificially. The claimant, unaware of the fraudulent scheme, approved the highly overestimated loan. The mortgage money was then paid into Redferns' client account, pending completion. The defendant subsequently released the money prematurely, before the execution of the documents, in breach of trust. His Lordship held that in this case, the beneficiary would be unable to have the trust estate restored. Firstly, in terms of causation; the loss had not evolved directly from the breach of trust committed by the trustee.[249] Secondly, to impose such an obligation would "fl[y] in the face of common sense";[250] once a commercial conveyancing transaction has been completed, the trust fund ceases to exist, thus implying the need for equitable compensation, comparable to the common law concept of damages.[251]

[244] Ruo Yu Tan, 'Substitutive Performance Claims for Breach of Trust: Final Nail in the Coffin?' (2015) 21(5) Trusts & Trustees 565, 565.
[245] *Thornton v Stokill* (1855) 1 Jur (NS) 751.
[246] *Knott v Cottee* (1852) 16 Beav 77.
[247] Peter J Millet, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214, 225.
[248] *Target* (n 237) 1098.
[249] ibid 431.
[250] ibid 436.
[251] ibid 439.

Distinguishing the Trusts

Lord Browne-Wilkinson sought to distinguish traditional and commercial trusts by declaring that the established law did not necessarily apply to a bare trust in a commercial context. The author argues that this distinction is essential in deciphering Lord Browne-Wilkinson's analysis, though speculation arises as to his purpose in doing so. Lord Millett (writing extra-judicially) is particularly critical, he noted: "Is it seriously to be supposed that the result in *Target Holdings Ltd v Redferns* would have been different if the trust in question had been a traditional trust?"[252]

Therefore, Lord Millet emphasises that the distinction between bare commercial and traditional trusts are unhelpful. Prior to the Supreme Court ruling in *AIB Group*, this distinction may have been perceived as though beneficiaries under these two heads of trusts had differing rights and remedies;[253] in doing so, it caused controversy and divided academics.[254]

The bare trust is utilised to fulfil the purpose of a commercial transaction, which arises in the larger form of a contract.[255] Once this transaction has been completed it is arguably unreasonable to reconstitute the trust, as the trust estate ceases to exist.[256] In such a case, beneficiaries enjoy individual and immediate rights. Therefore, the correct remedy is the payment of compensation, granted by court order to be directly given to the beneficiary.[257] Lord Toulson in *AIB Group*, asserted that Lord Browne-Wilkinson did not suggest that the principles of equity alter in accordance with the nature of the trust, but simply alluded that the purpose and scope of the trust must be taken into consideration, in order to pinpoint the appropriate remedy, should a breach occur.[258] Under this analysis, the sole merit in distinguishing the two trusts is to answer the consequential question; to whom ought the monetary compensation be disbursed to?[259]

Causation and Remoteness

It has been reasoned that the common law rules of causation and remoteness do not apply in Equity,[260] yet it does not follow to regard causation as irrelevant.[261] To deem a trustee liable for every loss suffered by a trust fund, even if the breach committed by the trustee was unrelated to the loss, would be regarded as severe.[262] Thus, it is only fitting to consider the 'but for' test for causation; but for the breach committed by the trustee, the loss to the trust estate would not have occurred.[263] Lord Millett, commenting extra-judicially, highlights this contradictory analysis, stating that Lord

[252] Millet (n 247) 224.
[253] Richard Nolan, 'A Targeted Degree of Liability' (1996) LMCLQ 161, 162.
[254] For example, compare Millet's analysis with Mitchell (n 239) and Millet (n 240).
[255] *AIB Group* (n 241) [71].
[256] *Target* (n 237) 436.
[257] *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 151, 545.
[258] *AIB Group* (n 241) 70.
[259] ibid [100].
[260] *Target* (n 237) 434.
[261] ibid [424].
[262] *AIB Group* (n 241) [64].
[263] *Target* (n 237) 434.

Browne-Wilkinson "proceeds to speak exclusively in terms of causation, introducing the 'but for' test while at the same time rejecting other tests of causation and remoteness of damage which have been adopted by the common law."[264] His Lordship goes further, arguing that the outcome of *Target* ought to be reconciled with orthodox principles of trust accounting. His alternative analysis is as follows: when Redferns released the funds without having obtained the mortgage, this was an unauthorised disbursement of the trust funds, which would have permitted Target to falsify the account. However, when the mortgage was later obtained, it restored the trust estate to its initial position.[265] This complementary evaluation has been preferred by the courts and leading academics.[266]

Lord Reed rejected this criticism in *AIB*,[267] asserting Lord Browne-Wilkinson's lack of intention for departing from orthodox principle. His lordship states, the obligation arising from a breach of trust is to restore the trust fund to the position it would have been in, but for the breach and therefore concludes, that the extent of compensation should be measured on that basis.[268] In his judgment, Lord Reed left no doubt that equitable compensation for breach of trust is to be limited by a causal link between the loss suffered by the beneficiary and the breach of the trustee.[269] However, two observations ought to be exposed. First, his Lordship sought to rely upon McLachlin J's minority judgment in *Canson Enterprises Ltd v Boughton & Co [1991] 3 SCR 534* that had been adopted in *Target*. Akin to Lord Browne-Wilkinson, this judgment has been accused of blurring the distinction between substitutive and reparative claims.[270] Secondly, Lord Reed referred to the High Court of Australia's decision in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[271] concluding the case to be consistent with *Target*, despite the fact the court adopted Lord Millett's analysis[272] as stated above. From this alleged erroneous blurring of equity and common law boundaries, it may be considered that the true concern of the Supreme Court's decision in *AIB Group*, is achieving commercially sensible outcomes – regardless of altering the principles of equity.

Stevenson J in *Canson* declares: "I greatly fear that talk of fusing law and equity only results in confusing and confounding the law",[273] endeavouring to explain the inapt approach adopted by the House of Lords and consequently the Supreme Court. However, one may argue that the concept of loss necessarily involves the principle of causation which inevitably leads to the connection between the breach of trust and the loss suffered by the trust estate.[274] Structural parallels exist between equitable

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[264] Millet (n 247) 225.
[265] Adam Shaw-Mellors, 'Equitable Compensation for Breach of Trust: Still Missing the Target?' (2015) 2 JBL 165, 169.
[266] *Bairstow v Queen's Moat Houses plc* [2001] EWCA Civ 712; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 196 ALR 482.
[267] *AIB Group* (n 241) [116].
[268] ibid.
[269] ibid at paras [105], [107], [116], [135], [136], [140].
[270] James Edelman & Steven B Elliott, 'Money Remedies Against Trustees' (2004) 18 TLI 116, 122-5.
[271] *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] HCA 15. 212 CLR 484.
[272] Millett (n 247) 311.
[273] *Canson Enterprises LTD V Boughton and Co* [1991] 3 SCR 534, 543.
[274] *AIB Group* (n 241) [136].

compensation and the common law damages, although this does not infer the rules are identical.[275]

Equitable Compensation

The concept of equitable compensation, particularly its proper use in terms of a breach of trust, has become subject to controversy since the decision in *Target*. The decision of *AIB Group* makes no alterations to the current law, simply highlighting that a fundamental change occurred in *Target*.[276]

Lord Millett's restatement of the accounting procedure in the Hong Kong Court of Final Appeal[277] distinguishes the two heads of liability. First, substitutive performance: through which the falsification of an unauthorised disbursement, voids the transaction. The trustee is consequently obliged to make good this deficit, either in specie or the payment of money,[278] however, the monetary award is not compensation for the loss but a restitutionary remedy. Second, reparative compensation: whereby the surcharge of an account will enforce the primary duty of a trustee; to maximise the worth of the trust fund. If the trust fund had consequently suffered due to the trustee's negligence,[279] the trustee is required to surcharge the account to elevate it to the appropriate value. Mitchell notes, that it would be tempting, although mistaken,[280] to believe the two types of liability for breach of trust work in a similar manner.[281]

As depicted above, many academics agree that Lord Browne-Wilkinson confused the two forms of equitable compensation. Lord Toulson contended that his Lordship treated the distinction in an overly generic fashion.[282] It is the failure to grasp this division that caused Lord Browne-Wilkinson to take a wrong turn in *Target*,[283] albeit offering an appealing approach to the remedy of equitable compensation. Although attractive, his Lordship's wider agenda of harmonisation is disclosed in his judgement: "… In many ways equity approaches liability for making good a breach of trust from a different starting point, […] those two principles are applicable as much in equity as at common law."[284] Lord Browne-Wilkinson is evidently attempting to cohere equitable compensation to common law damages, hence causing confusion.[285]

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[275] ibid [137].
[276] Matthew E. Carn, 'Distinguishing Traditional from Commercial Trusts: A Dangerous Precedent or Necessary Complication?' (2015) 21(8) Trusts & Trustees 868, 870.
[277] *Libertarian Investments Ltd v Thomas Hall* [2013] HKCFA 94.
[278] ibid [168].
[279] Millet (n 247) 226.
[280] ibid 225.
[281] Mitchell (n 239) 223.
[282] Michael Furness & Judith Bryant, 'Equitable Compensation – Clarity at Last?' (2015) 21(9) Trusts & Trustees 1027, 1032.
[283] Shaw-Mellors (n 265) 169.
[284] *Target* (n 237) 432 (emphasis added).
[285] David Wright, 'Another Wrong Step: Equitable Compensation Following a Breach of Trust' (2015) 21(7) Trusts & Trustees 825, 833.

Fusion?

Lord Millett, writing extra-judicially, provides a thorough critique of *Target*, yet many of his arguments are simply assertions with no legal authority.[286] His Lordship's highly critical approach may be attributable to his disdain towards the fusion of equity and common law.[287] Lord Toulson in *AIB Group*, instantly notes the problematic stitching together of equity and the common law in his opening statement,[288] exemplifying his acknowledgement of Lord Browne-Wilkinson's underlying attempt at merging the two in *Target*. As a result, the decision in *Target* was a step away from the traditional rules of equity and from the case law in the Commonwealth.[289]

The majority in the Court of Appeal in *Target* argued the lack of necessity in invoking complex concepts such as equitable compensation. Peter Gibson LJ stated: "The remedy afforded to the beneficiary by equity is compensation in the form of restitution of that which has been lost to the trust estate, not damages."[290] Traditionally, equity does not utilise the language of damages, Elliott notes: "the expression compensation for breach of trust is what linguists call a false friend" [...] "there are such elementary differences between this type of claim and a claim for damages at law that the attempt to bring the two together is misconceived."[291] Thus, the continuous debate between the fusion of equity and common law persists as an underlying theme throughout both *Target* and *AIB Group*.

It is essential, however, to note the difference between harmonisation and fusion. Fusion would suggest that the laws are inseparable, whereas harmonisation allows both the common law and equity to operate individually, running parallel. Lord Toulson, adopting the view of Professor Hayton, regards the bare trust as part of the machinery[292] to complete an over-arching contract, implying that the measure of damages should depend on contractual common law principles.[293]

[286] Elliott (n 238) 144.
[287] Millett (n 240) 309-311.
[288] *AIB Group* (n 241) [1].
[289] Wright (n 285) 838.
[290] *Target* (n 237) 1101.
[291] Elliott (n 238) 170.
[292] *AIB Group* (n 241) [71].
[293] David Hayton, 'Unique Rules for the Unique Institution, The Trust' in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Lawbook Co 2005), 306.

Conclusion

Prior to the Supreme Court decision,[294] it was expected that subsequent courts restricted the principle in *Target* within narrow bounds.[295] The reaffirmation of *Target* in *AIB Group* may lead to the ten-year period of avoidance finally drawing to a close. Lord Browne-Wilkinson's reasoning is now entrenched within the law of trusts;[296] the judgment in *AIB Group* has established the final nail in the coffin for substitutive performance claims, in regard to misapplied trust property.[297] It is difficult to understand why it would be correct to oblige a trustee to restore the full value of the misapplied trust fund without reviewing the circumstances.[298] Lord Toulson was correct in stating that the requirement to create fairy tales[299] depicts a lacuna in the law; deeming it necessary for Lord Browne-Wilkinson to depart from orthodox principles.

[294] *AIB Group* (n 241).
[295] Elliott (n 238) 171.
[296] Peter G Turner, 'The New Fundamental Norm of Recovery for Losses to Express Trusts' (2015) 74(2) CLJ 188, 189.
[297] Tan (n 244) 570.
[298] *AIB Group* (n 241) [62]-[63].
[299] ibid [69].

Capacity and Patient Autonomy in Refusal of Treatment Cases: Paving the Way for a New Test?

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Introduction

Patient autonomy and the extent to which courts should allow the refusal of treatment in cases of anorexic patients presents a dilemma: on the one hand, if, the Mental Capacity Act 2005 (MCA) is applied to anorexic patients the perception of their capacity is questioned, leading to the potential for their autonomy to be overruled. On the other hand, if an anorexic patient is deemed capable, the law cannot ensure she is protected against the consequences of her own vulnerability, no matter how irrational the reason for her refusal of treatment may be perceived.[300]

Per section 4 of the MCA, it is only in the case of patients who are perceived by medical practitioners or the courts to lack capacity that the law can make decisions for them, such decisions ought to be in their best interests.[301] Section 4 confirms that in determining what is in a person's best interests,

> 'the person making the determination must not make it merely on the basis of…the person's age or appearance, or a condition…or aspect of [her] behaviour, which might lead others to make unjustified assumptions about what might be in his best interests'.[302]

Courts must therefore balance the stated wishes and interests of the individual with the need to protect and care for members of the community. If a stringent application of patient autonomy pervades then 'inappropriate infringements on personal liberty'[303] are inevitable, however, an overly broad application will result in the failure to protect the individual.

An NHS Foundation Trust v Ms X[304] and Re *E (Medical Treatment Anorexia)* [305], in comparison to *Re T (Adult Refusal of Treatment),* [306] demonstrate a pattern of

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[300] See *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 102. See also *Airedale NHS Trust v Bland* [1993] 1 All E.R. 821 [860].
[301] See Mental Capacity Act 2005, s4.
[302] ibid.
[303] Jillian Craigie, 'Introduction: Mental Capacity and Value Neutrality' (2013) 9 (1) International Journal of Law in Context 1, 1.
[304] *An NHS Foundation Trust v Ms X (By Her Litigation Friend, the Official Solicitor)* [2014] EWCH 35 (COP)
[305] *Re E (Medical Treatment Anorexia)* [2012] EWHC 1639.
[306] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95.

inconsistent findings of incapacity in refusal of treatment cases. The law should not immediately judge that a patient is unable make decisions about her welfare because she is anorexic as psychiatric analysis has confirmed that anorexic individuals are likely to have capacity if capacity is understood as their ability to reason logically.[307] Anorexic patients should, due to harm they are causing their health, nevertheless be understood as vulnerable patients under Munby J's formulation, as patients who are 'unable to protect [themselves] against significant harm'.[308]

This paper advances a two-stage test as the basis upon which courts should allow patient choices to be overruled specifically in the context of suspected psychiatric illnesses. Unlike the cognitively impaired, such as dementia sufferers, where 'capacity assessment may be straightforward',[309] in a psychiatric setting, cognitive impairments may not be as obvious and therefore a more rigorous test to the MCA is required. The first-stage to the test questions whether the rationale behind the refusal of treatment pertains to what this paper will refer to as recognisable reasons. The second-stage questions whether the refusal of treatment relates to what this paper will refer to as personal and relational values. The test seeks to address the inadequacies of the MCA and allows for more weight to be given to the choices of those who suffer from anorexia, whilst also seeking to protect those most vulnerable in society.

The following sections will examine the MCA, analysing specific aspects including capacity and refusal of treatment, in order to demonstrate that the alternative test proposed by this paper may be a more helpful means of assisting courts and avoiding undue reliance upon value judgements.

Incapacity and Anorexic Patients

The Mental Capacity Act 2005

Per *Re T*, capacity is presumed as an 'absolute right'[310] unless proven to the contrary under the MCA. According to the MCA, providing that a patient's reasoning is not impaired,[311] and the patient is not refusing medical treatment for the mental disorder from which they are suffering,[312] the patient's choice must be respected and cannot be overridden. A patient lacks capacity where she is unable to 'understand the information relevant to the decision';[313] 'retain that information';[314] 'use or weight that information as part of the process of making the decision';[315] or 'communicate [the] decision'.[316] The MCA therefore assesses capacity via a procedural, as opposed to a substantive test.

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[307] Yuval Melamed, Roberto Meester, Jacob Margolin and Moshe Kalian 'Involuntary Treatment of Anorexia Nervosa' (2003) 26 (6) International Journal of Law and Psychiatry 617, 621.
[308] *Re SA* [2005] EWHC 2942 (Fam) [131] (Munby J).
[309] Natalie Banner, 'Can Procedural and Substantive Elements of Decision-Making be Reconciled in Assessments of Mental Capacity' (2013) 9 (1) International Journal of Law in Context 71, 73.
[310] *Re T (*n 306) 102.
[311] Per the tests of the Mental Capacity Act 2005, s3.
[312] Mental Health Act 1983, s 63.
[313] Mental Capacity Act 2005, s3 (1)(a).
[314] Mental Capacity Act 2005, s3 (1)(b).
[315] Mental Capacity Act 2005, s3 (1)(c).
[316] Mental Capacity Act 2005, s3 (1)(d).

Accordingly, a patient may be deemed capable of refusing treatment by reference to the process which is taken in formulating the decision, not the grounds for the decision.

> "What matters is [the patient's] ability to carry out the process involved in making the decision – and not the outcome."[317]

However, this does not reflect the realities of health care in practice.

The Law Commission, observed a substantive approach to be more common in practice 'since the decisions' outcomes sometimes affects the clinician's judgement of capacity'.[318] This is true of the anorexic. Doctors will be alerted to the vulnerable state of the anorexic patient due to her 'actual behaviour'.[319] Thus there is a tension between the legislative intent to ensure a procedural test for demonstrating capacity and the reality of a medical professional's lived experience. The procedural approach however has a clear purpose: to ensure that medical paternalism does not threaten the autonomy of the individual merely because clinicians disagree about the right course of action for a patient. Within healthcare practice, this paper suggests that individual autonomy in cases such as anorexia may be threatened by courts seeking to determine capacity using the legislative procedural approach, which effectively may result in an unfair outcome.

The Law in Practice

By virtue of the infliction of anorexia and the belief of the anorexic that she is larger than she is, in some instances courts have concluded that patients fail to weigh the information regarding their illness as part of their decision making process.[320] This self-fulfilling prophecy has not gone unnoticed, per Jackson J: 'a person with severe anorexia may be in a Catch 22 situation regarding capacity: namely, that by deciding not to eat, she proves that she lacks capacity to decide to eat at all'.[321]

A capable patient's choice to refuse potentially life-saving treatment cannot be overruled simply because such a choice appears 'irrational, unknown or even non-existent'[322] or that the patient's choice is 'contrary to be expected of the vast majority of adults',[323] per Lord Donaldson. Thus, deciding what is in the best interests of the patient may only be exercised where a patient can be shown to lack capacity.[324] Despite evidence alluding to the difficulty in assessing the capacity of *X*[325] and *E*[326], such cases witnessed the subversion of Lord Donaldson's principle. It is argued that the *Re E* decision indicates that less weight is given to the substantive reasoning of anorexic

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[317] Mental Capacity Act 2005. Mental Capacity Act Code of Practice 2007. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224660/Mental_Capacity_Act_code_of_practice.pdf> accessed 12 December 2015.
[318] Law Commission, *Mental Incapacity* (Law Com 231 1995) para 3.4.
[319] See Yuval Melamed, Roberto Meester, Jacob Margolin and Moshe Kalian (n 307) 621.
[320] *Re E (n 305)* 49.
[321] ibid 53.
[322] *Re T (*n 306) 113.
[323] ibid.
[324] See Mental Capacity Act 2005, s4
[325] *Ms X (n 304) 33.*
[326] *Re E (n 305) 53.*

patients who refuse life-saving treatment compared to patients whose substantive reasoning is based, for example, on their religious values. Per *Re T*, it was accepted that if *T* had substantiated that she was a practicing Jehovah's Witness (free from undue influence)[327] she would have the right to refuse a blood transfusion even if she died through lack of treatment.[328] Arguably, the author submits that *Re T* therefore provided that the content of the beliefs of the patient which contribute to their decision-making is an influencing factor regarding their capacity.[329] *Re E (A Minor)*[330] is however distinguishable from this line of argument on the basis that *E* was only 15 years old, and therefore did not meet the threshold of 16 that the MCA requires for the refusal of treatment.[331] *Re C (Adult Refusal of Treatment)*[332] is also distinguished on the basis of Maclean's argument. *Re C* concerned C's decision to refuse to have his gangrenous leg amputated, despite this decision resulting in his death.[333] This is despite factors pointing to his incapacity – he was a paranoid schizophrenic and believed he was a doctor[334]. Per MacLean, due to C being a dangerous criminal, he was a burden to society and therefore, the courts found little need to ensure he was kept alive.[335] It is the contention of this paper that this stance paints a very sad picture of the bias plaguing English law. Whilst it is acknowledged that this assertion of bias is arguable and indeed likely to be contested, it is not an unfounded contention. Prior to his death in May of 2017, Ian Brady, the notorious moors murderer, was held incapable after he refused food,[336] despite other lesser known prisons refusal to eat not vitiating their capacity.[337] Brady was kept alive to ensure he served his sentence for his 'heinous'[338] crimes.

The author argues that as C was of no professed notoriety and was demonstrably an individual whose death caused no public intrigue; C was deemed to have the necessary capacity to choose to refuse the amputation of his leg despite the clear factors pointing to the contrary. Conversely, Brady, a perpetrator of one of the most infamous set of crimes to affect modern Britain, and a figure notable for his deceit and intent to tease the family of his victims even from the confines of prisons and hospitals, was deemed to lack the necessary capacity which would have allowed him to refuse food. Thus, it is contended that the 'discrimination' in refusal of treatment cases in English law, when comparing the similar cases of *Re C* and Brady's, is demonstrated in the courts judgment to keep Brady alive which ensured his continued punishment.

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[327] *Re T* (n 306) 120.
[328] ibid 117.
[329] As per the differing stances in *Re E (n 305)* and *Ms X (n 304)* in comparison to *Re T* (n 306). See also *Jehovah's Witnesses of Moscow v Russia* (2011) 53 EHRR 4 for the recognition and approval of the Jehovah's Witness faith.
[330] *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386.
[331] Mental Capacity Act 2005, s2 (6).
[332] Re C (Adult Refusal of Treatment) [1994]1 WLR 290.
[333] Per the facts, ibid 291.
[334] ibid.
[335] Alastair Maclean, 'Advance Directives and the Rocky Waters of Anticipatory Decision-Making' (2008) 16 Medical Law Review 1, 6.
[336] See *R v Collins, ex P Brady* (2000) 58 BMLR 173.
[337] See *Secretary of State for the Home Department v Robb* [1995] 2 WLR 722.
[338] Maclean (n 335) 6.

The Capacity of Anorexic Patients

Tan *et al,* in their study of the reasoning ability of anorexic patients, argue that sufferers usually have an 'excellent understanding'[339] of their affliction and intact reasoning abilities and therefore should be deemed capable to refuse treatment. However, under the application of the MCA, this reasoning is denied. Patients may fail to comprehend any other pursuit than that of the slim figure, in the eyes of the MCA this may demonstrate their lack of ability to weigh information regarding their decision-making process. Patient attitudes to 'death and disability'[340] across the study prompted grave concern, thus enabling the conclusion that 'treatment refusal may occur, not because the patient wishes to die, but because of the relative unimportance the patient places on death and disability'[341] as compared to anorexia.

However, anorexia could be categorised as a belief system. Sufferers of anorexia may often feel powerless to the illness and compelled to under-eat. Such a compulsion of the will is also to be noted in those who adhere to strong held faiths. A belief in the Jehovah's Witness faith, for example, compels believers to act, to the extent that 'there is no choice in how to act'.[342] The normative effect that a religious belief system has upon the believer enforces decisions and actions upon them which may be deemed irrational in the eyes of a non-believer, such as the refusal of a life-saving blood transfusion. Religion commands the respect of the law[343] to the extent that the freedom of religion is 'considered [as an] important feature of most liberal democracies'.[344] No such protection is afforded to the anorexic patient that refuses treatment. The same 'unimportance' is placed on death by the anorexic patient and the Jehovah's Witness, one patient does so as a result of pursuing weight-loss, and the other does so in pursuit of their faith. The cases referenced by this paper demonstrate that courts are willing to hold some values over other. It is therefore questionable whether the courts are upholding the aims of the MCA which states: 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision',[345] thus evincing the laws purported commitment value-neutrality.

If the proposition that the courts seek to make value free decisions is supported, then a consideration of Frankfurt's theory and arguments and applying them to the issue of the anorexic patient's capacity to make decisions ought to be examined.[346] Frankfurt's philosophy of 'second-order' [347] desires strengthens the contention that the refusal of treatment of the anorexic patient should be given equal value to the refusal of

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[339] Jacinta Tan, Tony Hope, Anne Stewart and Raymond Fitzpatrick, 'Competence to Refuse Treatment in Anorexia Nervosa' (2003) 26 (6) International Journal of Law and Psychiatry 697, 698.
[340] ibid.
[341] ibid.
[342] See Margaret Brazier and Sheelagh McGuinness, 'Respecting the Living Means Respecting the Dead too' (2008) 28 (2) Oxford Journal of Legal Studies 297, 306.
[343] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 2.
[344] Brazier & McGuinness (n 342) 302.
[345] Mental Capacity Act 2005, s 1(4).
[346] Harry Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 (1) The Journal of Philosophy 5, 6
[347] ibid.

treatment advanced by the Jehovah's Witness. Both refusals resemble what Frankfurt describes as the 'first-order desires' [348] of the patient, which are secondary to their will to live. The 'essential difference'[349] between persons and other creatures, Frankfurt suggests, is to be found in the structure of a person's will",[350] with the peculiar characteristics of humans, being their ability to form 'second-order desires'.[351] People are capable of 'wanting to be different…from what they are'.[352] The heroin addict, wishes he could give up, however, he is moved more greatly by his addiction to the substance and therefore goes to whatever means necessary to achieve his fix, thereby giving effect to his 'first-order desires'.[353] However, this will is not coextensive of what the addict intends to, that is, to give up heroin. His desire to give up 'proves to be weaker or less effective'[354] than his conflicting desire to quit the habit. The same is true of the anorexic patient who is conquered by the powerful desire to remain thin (her 'first order desire'[355]) and thereby refuses any treatment that will inhibit her from maintaining a low weight, despite the fact she will die. Her desire to live, her 'second-order desire'[356] is then superseded by her 'first-order desire'[357] and she will die if the courts fail to overrule her autonomy. This is true of Jehovah's Witness, they may want to live, but their 'first-order desires'[358] (their will to follow their religious maxims) compels them to act alternatively to their 'second-order desire'[359].

Such analysis of the will of the patient questions whether, in the refusal of treatment, patients are acting autonomously if they are so heavily influenced by their want for protruding bones or to appease their deity. Nevertheless, such inclinations, especially in the case of those who suffer from body dysmorphia such as the anorexic patient or those who hold fixed beliefs in the overriding will of a deity, contribute so vastly to the identity of the individual that it is difficult to disentangle where the true identity of the individual ends and the rationale for refusing treatment begins. This quandary, alongside Frankfurt's philosophy and the findings of Tan *el al* therefore pave the way for the two-stage test as coined by this paper.

The Test

The two-stage test prescribes how the law should address patient autonomy in the context of refusal of treatment cases. The law should not continue to protect the values of some patients, whilst discriminating against others. The test intends to replace the aspects of the MCA which refer to the analysis of capacity. There are some patients who may be considered inherently incapable, but anorexic patients who refuse life-saving treatment to gain weight and Jehovah's Witnesses who refuse a life-saving blood transfusion present a grey area within the law. Such patients cannot routinely be held to be capable of making decisions concerning their welfare because they are so

[348] ibid.
[349] ibid.
[350] ibid.
[351] ibid.
[352] ibid 7.
[353] ibid 6.
[354] ibid.
[355] ibid.
[356] ibid.
[357] ibid.
[358] ibid.
[359] ibid.

powerless to their values, nevertheless, they should not be deemed automatically incapable and have their autonomy sacrificed to the law.

Accordingly, the first-stage of the test advances recognisable reasoning. In order to analyse capacity in psychiatric illnesses, the law must look to whether the patient's rationale for the refusal of treatment is reasonable, meaning one which is relevant to the decision made. Thus, enforcing clinicians and courts to engage in a rigorous analysis into the way in which the patient makes decisions pertaining to the refusal of treatment. The importance of the scrutiny of the reasoning ability of the individual is the most appropriate test that courts should turn to on the basis that it incorporates both procedural and substantive elements. Analysing the patient's decision might therefore evidence that it is grounded in the means by which the patient came to make the decision – their ability to rationalise would still be considered, as per the MCA. The substantive element of the test would be revealed in whether the patient's reasoning for the decision is grounded in objective reality. By virtue of such a test, clinicians and courts would be able to gain a deeper understanding of the rationale governing the mentality of the individual to a greater extent than the MCA which refuses to engage in the substantive grounds of a decision. A patient who fails the recognisable reasons test, fails to demonstrate that their decision results from a legitimate reasoning process.

To be clear, this aspect of the test is then grounded in logic 'I refuse X because of Y'. 'Y' must be substantiated by the refusal affirmed; 'X' and the repercussions of the refusal (potentially death) must be part of such a decision. For example, in the context of the anorexic (A): 'I refuse to be force-fed because I will get fat'. Providing an anorexic is able to articulate her reasoning for the refusal of treatment and comprehend this refusal may result in death, she may pass the first test because her ability to reason logically is not impaired. The statement of the capable anorexic would then mirror the following: 'I refuse to be force-fed because I do not want to put on weight and I would rather die than do so'.

If the anorexic patient advanced the following however (B), 'I refuse to be force-fed because the number 4 bus has just driven passed', no such logical connection occurs. Consuming additional calories does prompt weight gain, this is an empirical truth. The passing of the number 4 bus makes no such link. It is likely that in applying the first stage of the test to anorexia, the patient's capacity would be satisfied, as the patient may well conceive that life-saving treatment requires the ingestion of calories. If the Jehovah's Witness refuses a blood transfusion (X) because they are a Jehovah's Witness (Y), the test is failed. There is no logical connection between the refusal and the rationale. By affirming that following a religion does not inherently dictate the reasoning for the refusal. Thus, this test cannot be purely satisfactory of itself. The charge issued at any value-based test, is that it has the ability to discriminate against patients whose values are misunderstood, unknown or differ to that of societal norms. Suppose the number 4 bus was significant to the 'Number 4 Cult', a minority religious organisation that held the number 4 as their deity. Western medicine and law are not *au fait* with such a cult and therefore may not recognise the logical significance of the number 4 bus pertaining to the refusal of treatment. Thus, this paper further proposes the second-stage of the test, personal and relational values, that takes into account a consideration of such personally held values.

The personal and relational value test, acts in a manner akin to relational autonomy[360] in so far as it takes into consideration the circumstances of the patient, including the preferences of their family and friends around them. B was brought up in the Number 4 Cult, generations before him respected the importance of *4* and to go against such a fundamental doctrine would be tantamount to disregarding his whole identity. Such a test therefore recognises that multitude of actors that operate in the sphere of bio-sociality.[361] Deciding how to treat a patient is no longer simply within the remit of the state or doctors. As identified by Foster and Miola, health care law has witnessed a shift in the last 30 years to a concern for the interests and prioritisation of the patient.[362] A patient's own values, that of their families, friends and communities, also contributes to determining their identity.[363]

It is suggested that patients be permitted to refuse treatment on the grounds of personal and relational values such as religion and beliefs, as these values are what form the psychological identity of the individual.[364] To overrule such values and enforce treatment upon a patient would be for the courts to deny the patient's recognition of self. Clinicians and courts must however be rigorous in assuring themselves that this potentially baffling refusal for treatment does indeed pertain to personal and relational values. This certainty will only be achieved by analysing who the patient is, their desires and goals, their upbringing and the feelings of the friends and their family. The key component of the second stage is to ensure that their professed values are entrenched in the life of the individual. If on the balance of probabilities,[365] the clinician or court is unsatisfied that such values are entrenched, then the individual fails the second stage, thus the test is failed conclusively and the patient should be deemed to lack capacity. Although Harris contends that some values could be 'scarcely rationale'[366], this does not matter. Vital to the application of the personal and relational values stage of the test is the extent to which the value constitutes the person. If clinicians and/or courts are not satisfied that the anorexic patient has passed the first-stage, she too may be analysed under the lens of the second-stage. The law should look at whether the value constitutes the identity of the individual, whilst giving heed to whether the values are also present in the lives of the relations of the patient. In practice, Independent Mental Capacity Advocates[367] that are

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[360] See Roy Gilbar, 'Asset or Burden? Informed Consent and the Role of the Family: Law and Practice' (2012)32 (4) Legal Studies 525, for a discussion of the incorporation of family in bioethics.

[361] See Paul Rainbow and Nikolas Rose, *The Essential Foucault: Selections from the Essential Works of Foucault, 1954-1984* (New Press, 2003) 25.

[362] See Charles Foster and José Miola, 'Who's in Charge? The Relationship Between Medical Law, Medical Ethics and Medical Morality?' (2014) University of Leicester School of Law Research Paper N. 14-28. See also *Chester v Afshar [*2004] UKHL 41.

[363] As acknowledged with regards to incapable patients by the General Medical Council, *Consent: Patients and Doctors Making Decisions Together* (2008) Para 76, <http://www.gmc-uk.org/static/documents/content/Consent_-_English_1015.pdf> accessed 1 January 2016.

[364] For further discussion of familial relationships contributing to the identity of the individual see Farhat Moazam, 'Families, Patients and Physicians in Medical Decision making: A Pakistani Perspective' (2000) 30(6) Hastings Center Rep 28.

[365] A weighing tool already employed by the Mental Capacity Act 2005, s2(4).

[366] John Harris, 'Law and Regulation of Retained Organs: The Ethical Issues' (2006) 22 (4) Legal Studies 527.

[367]Office of the Public Guardian, 'Making Decisions: The Independent Mental Capacity Advocate (IMCA) Service' (2007) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/365629/making-decisions-opg606-1207.pdf > accessed 5 January 2016.

already utilised in the assessment of an individual's capacity and what the best interests of an individual are could undertake such an assessment.

This paper now turns to considering the limitations of the proposed test.

As with any theory positing a new means of defining and/or conceptualising patient autonomy, the test should be subjected to close scrutiny, to ensure the balance between the rights of the autonomous patient and the protection of the vulnerable patient is achieved.

The strength of the MCA's procedural analysis of patient capacity is found in its purportedly egalitarian application. If clinicians are unfamiliar with the value the patient holds that causes them to refuse treatment then this may prompt the clinician to perceive the individual to lack capacity. Nevertheless, the application of the test would assist in ensuring that no such discrimination occurs. If recognisable reason is not fulfilled, then the clinician must turn to the prior existing personal and relational values test, thus ensuring that the values of a patient are not overlooked simply because the doctor does not understand or agree to them. In this respect, the test recognises 'cultural pluralism',[368] which Coggon suggests is a 'positive good'[369] which contributes to the 'desirable'[370] treatment of people. The test's commitment to pluralist liberalism ensures that it is a means of defining the best interests of a patient, by reference to the 'specific patient under construction'.[371]

The test posited by this paper is advocated over the application of relational autonomy, despite their similarities. According to Gilbar and Miola relational autonomy fails to respond to cultural backgrounds that sit outside Western norms[372] and to ensure that a patient's choice is truly representative of their own free will as the nature of the family may coerce them in their decision-making. [373] The test is not susceptible to such criticism. The second-stage ensures that even if the values of the patient and their family are contradictory to Western conceptions of best interests they must still be respected. The patient of the 'Number 4 Clan' who refuses treatment because the number 4 bus has driven past will still command the same respect as the orthodox Jew who refuses to have any treatment on *Shabbat*, so long as the belief constitutes their identity. As long as the substantive rationale behind the refusal of treatment pertains to the personal and relational values, courts cannot override the patient's choice.

Furthermore, the test aims to ensure that the family are less likely to be able to coerce the patient. Clinicians and/or courts must scrupulously look to the extent to which the value professed by the patient is distributed throughout their life. For example, this may entail interviews with the colleagues of the patient or relations unknown to the family. The family does not take priority as the only contributing factor to the patient's identity. A study as comprehensive as possible of the patient's life is to be undertaken.

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[368] John Coggon, 'Best Interests, Public Interest, and the Power of the Medical Profession' (2008) 16 Health Care Analysis 219, 221.
[369] ibid.
[370] ibid.
[371] ibid 222.
[372] See Roy Gilbar and José Miola, 'One Size Fits All? On Patient Autonomy, Medical Decision Making, and the Impact of Culture' (2014) 23 (3) Med L Rev 375, 375.
[373] See Nancy Chodorow, *The Reproduction of Mothering* (University of California Press, 1978).

Ensuring proper respect for autonomy is the greatest challenge to the test. Autonomy sits as the core of health care law and 'much argument within medical law boils down to the disputes about the proper meaning of respect for patient autonomy'.[374] Courts have claimed that no single principle within health care law reigns supreme, however, cases are littered with synonyms for autonomy such as 'self-determination or the right to govern bodily integrity' [375] thus emphasising the courts' willingness to apply autonomy as a fundamental, if not *the* fundamental tenet of English health care law.

Brazier critiques the value-based approach to determining the bases upon which patient autonomy should be overruled as this would amount to a violation of autonomy[376] as the individual has been 'robbed of the choice'.[377] Coggon, in tandem, voices that 'it would be a profound insult to personal autonomy if a decision based on a settled value system were overruled'. [378]

The proposed test, in light of these objections can be justified by reconceptualising 'autonomy'. The effect of utilising the test to overrule patient choices marks a step away from equating autonomy with personhood. To be autonomous should not be understood as existing outside of cultural perspectives, but as encompassed within them.[379] Bowman argues that there is too much emphasis placed on the Western manifestations of the concept of individualism as being a central tenet to an autonomous being.[380] The 'self' should be understood to be a construct of our own beliefs, sense of dignity and personal sovereignty, as well as being contributed to by our 'interconnectedness'[381] with others.

[374] John Coggon, 'Anorexia Nervosa, Best Interests, and the Patient's Human Right to 'a Wholesale Overwhelming of her Autonomy'' (2014) 22 (1) Med L Rev 119, 119.
[375] See John Coggon, 'Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?' (2007) 15 Health Care Analysis 235, 236.
[376] Brazier (n 342) 300.
[377] ibid.
[378] Coggon (n 368) 131.
[379] See Kerry Bowman, 'What are the Limits of Bioethics in Culturally Pluralistic Society?' (2004) 32(4) The Journal of Law, Medicine and Ethics 664, 666 for further discussions relating to the focus of bioethics on individual autonomy.
[380] ibid.
[381] ibid 78.

CONCLUSION

It is therefore suggested that current legislation and its interpretation by the courts may fail to truly protect anorexic patients by deeming their incapacity as inherent to their illness, thus rendering sufferers immediately incapable of formulating decisions regarding their right to refuse treatment. This also prompts an inherent denial of their right to autonomy.

Anorexic patients should not be held as lacking in capacity by virtue of being anorexic, just as Jehovah's Witnesses do not lack capacity because of their religion. Therefore, it is argued that the MCA thus provides poor guidelines for determining capability for anorexic patients.

The proposed test should be applied in refusal of treatment cases and to assess whether patient choices can be overruled. This would provide clinicians/courts with a clearer and more transparent means of assessing the capacity of an individual by reference to their recognisable reasoning and their personal and relational values. It is concluded that the proposed test may provide a viable alternative to the MCA for the bases upon which the law should overrule patient choices because it takes greater care in analysing the capacity of the patient. Furthermore, the test ensures that the autonomous choice of the individual will be upheld; if individuals are deemed to have capacity, their autonomy is conceived as all the components which make up their identify and sense of self. Consequently, the proposed test balances the protection of the autonomy of the individual, while ensuring that the law protects those who are vulnerable.