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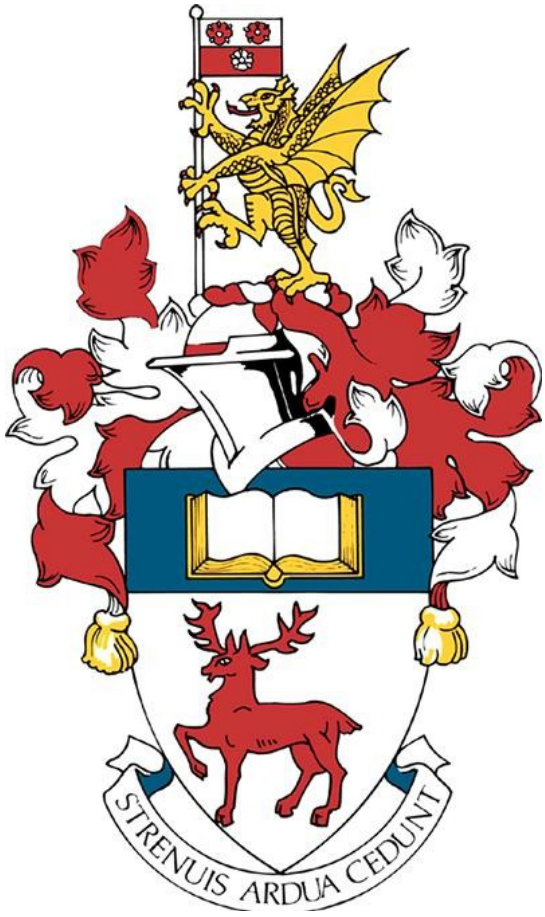

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The Editors also wish to thank all members of Southampton Law School who have aided in the creation of this volume.

Fatima Ozcan and Madison Stevens
Editors-in-chief, Southampton Student Law Review
August 2022

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Foreword

I am delighted and honoured to write the Foreword for the latest edition of the Southampton Student Law Review (SSLR).
The SSLR represents a wonderful means for the dissemination of the scholarly contribution of students; it serves a very important purpose and it makes a prominent contribution to the research environment of the Southampton Law School.
In this edition, the article of Panagiotis Adamos focuses on the intricate and fascinating issues revolving the evolution of crewing warranties in the field of marine insurance.
Isabella Elliot's piece revisits the ever so controversial Nuremberg Trials linking them with the idea of cohesive justice.
Kieran Spellman's contribution revolves around the role of primary legislation within the judiciary context and the judicial tendency to strike down and to refuse to recognise such legislation.
Silvia Alves Felix's article analyses the abuse of dominance within the context of the Big Data industry, by offering comparative reflections between the EU and US systems.
Aishwarya Vydianathan writes about remedies in contract law, with specific reference to the proportionality and certainty of outcome and its linkage with the legal teleological categories of promissory terms (i.e., conditions, warranties, and innominate terms).
Charlie Hayes' article analyses the current regulatory framework for common assault, pointing out a compelling need for reform of the current status quo.
Freya Elizabeth Pattern' piece deals with climate change and the impact of international organisations' initiatives on environmental law.
Amirah Adam' s article proposes some reflections on the adverse effect of British colonialism on the Trinidadian regulatory framework on capital punishment for murder.
Alicia Algeo's contribution deals with arbitration, and the conceptual interaction between two of its core doctrines, i.e the doctrine of Separability and Kompetenz-Kompetenz.
Finally, Lucas Moran's piece advocates for the insulation of penal policy from the political context.

The variety and importance of the themes covered by this issue of the SSLR renders this issue a particularly interesting read; I am sure readers will concur with my postulation and are going to enjoy this latest edition enormously.

Professor Andrea Lista
Professor of Maritime and Commercial Law
Southampton Law School

Weak and Strong-Form Review: The Incurable Judicial Mistake of Striking Down and Refusing to Recognise Primary Legislation

*Kieran Spellman**

Abstract

This paper covers the deplorability of the strong-form version of judicial review, focusing on both the commonwealth and American jurisdictions, engaging a critical analysis of the action of judges striking down or refusing to recognise politically legitimately enacted primary legislation. That perspective is in aid of endorsing its counterpart system, the weak-form version of judicial review, considering a modern political and legal environment rife with issues of judicial overreach and undemocratic political interference. This paper seeks to highlight such issues prevalent within strong-form review and render such a system untenable. Its context will provide an analysis of the incompatibility between judges and policy issues, warning against such political overreach and interference inherent within the act of providing any determination as to the enforcement of primary legislation. Further, this paper locates the democratic deficit prevalent within the judicial usurpation of those political powers from elected representatives and the represented, in the act of striking down or refusing to recognise democratically deliberated and enacted primary legislation. Finally, this paper will conclude on a critical response to the purported claim that commonwealth jurisdictions, as an archetype for the weak-form model, function as strong-form systems in application, preferring the strong-form judicial supremacy towards primary legislation and the blurred separation of powers it entails.

Introduction

It is central to those universal political institutions entrusted with maintaining the principles of legality, that the preservation and defence of constitutional human rights is consistently prioritised and upheld. Such a maxim is best facilitated through the mechanism of judicial review, as it is common for these establishments to entrench individual rights within constitutional instruments and primary legislation, so judges are best poised to interpret and govern the legality of such activity. Although such instruments perform to facilitate the preservation of these rights, there may equally be instances where primary legislation acts to limit the scope of those rights. Judicial review then aids this defence through an interventionist framework to abrogate any active attempts of governmental prejudice against individual rights, embedded within such primary legislation.

Nonetheless, this threatens the untenable situation whereby judges, engaging in the judicial review of such rights-defying primary legislation, face threatening political and democratic friction. These members are ascribed with either respecting political sovereignty, through offering recommendations of legislative amendments, or overreaching into the legislative

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process through refusing to recognise or strike down politically legitimate primary legislation. This spectrum of interventionism manifests between two distinct forms of judicial review – '*Weak-form*' and '*Strong-form*'.

Weak-Form Review

The central characteristic of this less worrisome 'weak-form' strain of judicial legislative review, resonating closely with the paradigm of 'commonwealth constitutionalism',[2] comprises a judicial custom of upholding legislative rights violations, but instead issuing non-final recommendations for amendments against constitutional norms.[3] This in turn 'decouples judicial review from judicial supremacy by empowering the legislature to have the final word'.[4] Incidentally then, the identity of weak-form review fundamentally descends from respective legislative bodies retaining a conclusive, unfettered discretion to either calibrate the contravening instrument with individual rights or refuse those judicial recommendations, endorsed through judges' rectification and application of the instrument.

As a result, weak-form systems 'provide an opportunity for judicial oversight of legislation without displacing the ultimate power of legislatures to determine public policy'.[5] Then displaying a respect for both the separation of powers and sovereignty of the legislating body, as courts 'interpret but do not displace legislation.'[6] Judicial rights interpretations of primary legislation then become merely 'provisional',[7] creating a more 'dialogic',[8] collaborative relationship between the branches towards preserving individual rights but equally striving to preserve those constitutional principles that outline the distribution of powers within political orders.

Strong-Form Review

The problematic counterpart to weak-form, namely, 'strong-form' review, embodies a systematic judicial strike down power to refuse to recognise primary legislation in contravention with individual rights,[9] and allegedly 'appears to be a potent mechanism of civic empowerment in the face of potentially arbitrary governmental decision making'.[10] It closely

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[2] Rosalind Dixon, 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32 OJLS 487, 487.
[3] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1011.
[4] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 am. J. Comp. l, 3.
[5] Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 WFLR 813, 831.
[6] *ibid*, 9.
[7] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1011.
[8] *ibid*, 5.
[9] Normally embodied within a constitutional instrument or Bill of Rights, such as in American Constitutionalism.
[10] Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 UTLJ 591, 591.

resembles the archetypal system of the United States of America,[11] as jurisdictions retaining written constitutions generally remain increasingly susceptible to strong-form judicial review, as the trepidation of violating constitutionalised principles is far greater than abrogating recent legislative enactments. Distinguished as a system 'in which judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities',[12] such courts meticulously scrutinise, refuse to recognise and strike down constitutional rights-violating legislation, narrowing the scope for electoral bodies to enact primary legislation against rights, effectively usurping this political control.

The submission of this article seeks to critique and unveil the universal risks of a 'strong-form' judicial system and endorse 'weak-form' judicial review as a far more politically and democratically sustainable system. Despite the unarguable paramountcy of individual rights, if judges strike down or refuse to recognise primary legislation, this 'curing' is an immoderate price to pay, as it concurrently deprives other rights through its veto-like control, more deplorable than the ones it serves to protect. Strong-form review is then worrisome from a myriad of perspectives, but this article focusses on three specific ones. Following as, (1) that a judicial strike-down power risks judicial encroachment into strictly political issues, enabling them to legalise and interfere with policy decisions; (2) that a democratic deficit inherently exists within strong-form review, as judges usurp and impede upon the elective voting rights of individuals and their political institutional representatives, requiring a weak-form of review to preserve democracy; and (3) a response to the purported claim that commonwealth jurisdictions exercising weak-form review, in reality preferentially practice a strong-form type of judicial review, as the weak-form system lacks stability and sustainability, so leaks into a strong-form one over time.

The Political Encroachment of the Judiciary

The 'over-politicization of the strong-form version'[13] of judicial review remains an intrinsic concern. This is because the 'curing' of primary legislative rights-violations, encapsulated within the striking down and refusal to recognise politically legitimate legislation, facilitates a minority judicial usurpation of strictly political decisions and issues. This is because strong-form review substitutes scrupulous deliberation by politically qualified governmental members within primary legislation for the ulterior political convictions of an incompatible super-minority judiciary. A departure from strong-form systems, which would in turn 'restrict the

[11] Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 WFLR 813, 814.
[12] Mark Tushnet, *Weak Courts, Strong Rights Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 33.
[13] Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 CJTL 285, 311.

rule of law to formal, procedural values',[14] is then necessary for procedural legitimacy, leaning towards weak-form systems, as 'a process-based response is… political legitimacy'.[15] This incidentally 'reduces the risk of leading judges into conflict with politically accountable officials on policy matters',[16] through separating judges from the fate of primary legislation, which minimises friction between the two branches in politically motivated legislative rights-violations with justiciable overlap.

Separation of Powers

This branched criticism borrows from the political sensitivities embedded within the 'separation of powers' debate. Namely, that legislative branches of government are best employed to engage in political discourse surrounding primary legislation, whilst the judiciary best remains apolitical, separate to the legislative process. Unlike its weak-form counterpart, strong-form review threatens judicial subjectivity within legislative application, as there is no real requirement to maintain the objective standards in judicial review. This in turn provides judges scope to replace the objective rights-defying political positions within primary legislation with their own subjective intuitions, not only violating their duty towards the political community, but equally the separation of powers standard.

This validates weak-form review as most compatible with these political dynamics, as it enables the preservation of rights through judicial referrals and recommendations to the political bodies managing legislative procedures, residing the burden with those politically orientated institutions to proportionately balance political necessities against rights-defying legislation. One must only look as far as the 'enemies of the people'[17] treatment of judicial members and the recent overturning of *Roe v Wade*[18] in America,[19] as providing the constitutional importance to divorcing judicial sentiments from politics to avoid blurring the intended distinction between these governmental branches. Detaching judges from politics is not only essential to preserving political legitimacy but also shielding those members from the same subjected political scrutiny of legislative members from the general public and the media. A political, strong-form judiciary, especially in grasp of an unwritten constitution, is a particularly dangerous entity towards political legitimacy but also to itself, as that 'cure' for rights-violations can indeed be far worse than the disease it seeks to remedy.

Academics have warned against endorsing a strong-form system, in that 'again and again, questions that are properly political are legalised, and even speciously constitutionalised',[20]

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[14] David Feldman, 'The Human Rights Act 1998 And Constitutional Principles' (1999) 19 JSLS 165, 195.
[15] Jeremey Waldron, *Political Political Theory, Essays on Institutions* (Harvard University Press 2016) 226.
[16] David Feldman, 'The Human Rights Act 1998 And Constitutional Principles' (1999) 19 JSLS, 165, 195.
[17] James Slack, 'Enemies of the People' *Daily Mail* (London, 4 November 2016) 1.
[18] 410 US 113 (1973).
[19] Martha Kelner, 'Right to abortion overturned by US Supreme Court after nearly 50 years in *Roe v Wade* ruling', (Sky News, 25 June 2022) <https://news.sky.com/story/right-to-abortion-overturned-by-us-supreme-court-after-nearly-50-years-in-roe-v-wade-ruling-12628801> Accessed 26 June 2022.
[20] R. George Wright, 'The Distracting Debate over Judicial Review' (2008) 39 UMLR 47, 62-63.

undemocratically entrenching political agendas of judges into constitutional law. This is especially dangerous in a common-law-based system, as that responsibility to interpret statute and generate case law becomes spoiled, and judges essentially become legislators, not appliers. Further to this, although the preservation of conventional rights is significant, these rights cannot be paramount in an ever-fluctuating universal society, as in the counter of unpredictable, erratic political issues, such crises require concision and precision in political legislative decision making, something judicial capacity cannot manage. This is especially relevant in a world troubled with pandemics, economic crises and war, reiterating the importance of respecting the separation of powers model in discussing strong-form review. It can be dangerous for this wider society generally if political institutions must infinitely scrutinize every corner of individual rights. This is important to avoid risking primary legislation being struck down and political decision-making hindered, having to constantly re-review and re-enact primary legislation, through the minority judicial disagreement with the proportionality endured within rights-violations.

The importance of respecting the separation of powers model further lies within the inherent limited judicial understanding of policy issues contained within primary legislation, as in strong-form systems, these 'courts may design some doctrines to reflect their sense of their own limited abilities, not to reflect directly substantive constitutional values'.[21] Those political doctrines included within legislation become limited by the judiciaries' inherent inability to comprehend and understand their context, resulting in a redesigning of political and constitutional principles within primary legislation to fit with the limited understanding of judicial members and their private perceptions of its value. There remains a complete lack of appetite for these courts and judicial members to have such formal involvement in these political processes for these reasons,[22] as this invites scope for an encroaching judicial veto upon decisions of a political nature to spread constitutional rights thin through their unnecessary overapplication.[23] Such judicial reason-giving 'involves attempts to construct desperate analogies … between the present decision they face and other decisions that happen to have come before them',[24] derivative of the unrelenting judicial will to encompass jurisdictionally external issues into their legal remit, something dangerous amongst a strong-form system that encourages this. These courts are notoriously more concerned with laborious discussions of precedence[25] and justifying their political overreach rather than attempting to properly rectify issues. Hence, although judges appear to be contributing to preserving rights, through striking down 'improper' legislation, they are in fact facilitating another incurable

[21] Mark Tushnet, *Taking The Constitution Away From The Courts* (Princeton University Press 2001) 60.
[22] Alec Walen, 'Judicial review in review: A four-part defense of legal constitutionalism A review essay on Political Constitutionalism' (2009) IJCL 329, 338.
[23] Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 UTLJ 1, 7.
[24] Jeremey Waldron, *Political Political Theory, Essays on Institutions* (Harvard University Press 2016) 223.
[25] *ibid 223*.

'disease' through illegitimately using this retained strong-form power to encroach on strict policy issues.

Judicial inability to foresee political backlash and ramifications

Judicial members retain very little foresight as to the political ramifications and backlash incurred as a result of striking down or refusing to recognise primary legislation. The strong-form judiciaries' flouting of political domination has no place in modern politics, as was reiterated by Lord Nicholls in *Bellinger*,[26] reasoning that politically centric 'issues, whose solution calls for extensive inquiry and the widest public consultation' must reside in the branch most qualified to serve these means - the legislators, as such 'questions of social policy and administrative feasibility … are altogether ill-suited for determination by courts and court procedures'.[27] His conclusions followed that 'they are pre-eminently a matter for Parliament',[28] or weak-form institutions, as issues of such prominent social policy, such as the fate of legislative contraventions of rights, require widespread political consultation, something a panel of judges cannot provide, nor retains the capacity for. It seems oxymoronic that a legislative instrument, subject to extensive debate and constant revision, could be struck down by a minimalistic process, with limited members, sealed consultations and 'apolitical' motivations. Lord Hoffmann extra-judicially endorsed these conclusions surrounding the consequences of the strong-form judicial legislative veto, utilising the cornerstone of the pro-strong-form argument, *Brown v Board of Education*,[29] as endowing the argument against strong-form judicial review.[30] Even in the most significant judicial contribution to the political climate of civil rights equality we enjoy today,[31] these judges nonetheless politically overburdened themselves and adopted responsibilities beyond their capacity, as 'their intervention was not without a constitutional price; deferral judges found themselves running schools and organising transportation of children on buses',[32] administrative political tasks unsuited for judicial members. Regardless of its monumental residual benefits, these were not responsibilities which any judges should be undertaking[33] and it remains politically unattractive to risk delegating such political responsibilities to judges. Due political legitimacy is achieved through judicial weak-form identifications of rights violations, as it 'is not that the courts are reaching the wrong decisions, but that they are ruling on matters which, properly understood, are not their business'.[34] It is procedurally better for judges to offer their legal perspectives to legislative architects on rights-violations to free themselves of the political

[26] [2003] UKHL 21.
[27] *Bellinger v Bellinger* [2003] UKHL 21 [37] (Lord Nicholls).
[28] *Bellinger v Bellinger* [2003] UKHL 21 [37] (Lord Nicholls).
[29] 347 U.S. 483 (1954).
[30] Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62(2) MLR 159, 160.
[31] Alec Walen, 'Judicial review in review: A four-part defense of legal constitutionalism A review essay on Political Constitutionalism' (2009) IJCL 329, 232.
[32] Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62(2) MLR 159, 160.
[33] *ibid.*
[34] Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 UTLJ 1, 4.

burdens intended for elected individuals that they cannot foresee, as it is socially undesirable to encourage a system whereby judges find themselves exercising the responsibilities of their elected government. Thus, that 'final say' on such matters, ought to remain at a governmental level in a weak-form manner, with the foresight and preparedness to deal with the incurred political ramifications.

An absence of rights considerations by legislators?

There remains contention to the legitimacy of this article's conclusions, as academics challenge that judges may be better poised to deal with rights issues because there are 'ample reasons to suspect that members of the legislature are moved by sectarian interests to such a degree that they are not likely even to attempt to establish what rights (some) people have…'.[35] Although judges overstep into politicisms, this might be a proportionate price to pay for blocking rights violations based on partisan rationales. Studies into Congress, for example, suggested that 'high levels of constitutional deliberation' were in fact rare,[36] caring more about 'political and public policy goals than the constitutionality of the laws it passes'.[37] A strong form of judicial review might in fact encourage increased morality and deliberation in political institutions, through allowing judges to fill the gaps that executive bodies omit by striking down where constitutionality has escaped their considerations. Consequently, this then encourages political members to issue more deliberation into balancing legal rights and politically motivated pursuits within legislative decision-making.

Such a position purportedly assumes that all lawmakers are moved by sectarian interests against rights. The argument in favour of strong-form review cannot rest on the minority of institutions that abuse their political privilege, to punish the majority. As Bellamy aptly describes it, these types of judicial 'claims to moral expertise rest on dubious foundations'.[38] Such mechanisms as section 19 of the Human Rights Act 1998,[39] requiring 'statements of rights compatibility' reflect that such claims are unconvincing, and a weak-form governmental body can in fact fully respect convention rights and political accountability. As Lord Bingham in *Anderson*[40] pointed out – to strike down unequivocal Parliamentary expressions of intent encompassed within such valid section 19 justifications, 'would not be judicial interpretation but judicial vandalism'.[41]

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[35] J. Raz, 'Disagreement in Politics' (1998) 43 AJJ 25, 46.
[36] J. Mitchell Pickerill, 'Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System' (Duke University Press 2004) 59; Brett Kaufman, 'Book Review Note - Weak Courts on Steroids: Improving Weak-Form Judicial Review' (2009) 87 TLR 639, 646.
[37] J. Mitchell Pickerill, 'Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System' (Duke University Press 2004) 59; Brett Max Kaufman, 'Book Review Note - Weak Courts on Steroids: Improving Weak-Form Judicial Review' (2009) 87 TLR 639, 646.
[38] Alec Walen, 'Judicial review in review: A four-part defense of legal constitutionalism A review essay on Political Constitutionalism' (2009) IJCL 329, 334.
[39] Human Rights Act 1998, s 19.
[40] [2002] UKHL 46, [2003] 1 AC 837.
[41] *R. (on the application of Anderson) v Secretary of State for the Home Department, R. (on the application of Taylor) v Secretary of State for the Home Department* [2002] UKHL 46 [30] (Lord Bingham).

A Bureaucratic Judiciary - The Argument from Democracy

This argument stipulates that strong-form judicial legislative 'curing' poses a significant threat to widespread social democratic rights,[42] as this form of review inherently lacks democratic credentials. This is because legislation, democratically enacted through elected representatives, is stricken down by minority politically unaccountable, unelected individuals. Bodies closest resembling the public's opinion must prevail in decisions of a legislative nature, ultimately excluding judicial interference, as 'declaring an Act… unconstitutional is a… particularly intrusive action for a nonelected judiciary in an allegedly democratic and primarily majoritarian society'.[43] Any democracy is bound to stand in an uneasy relation to a custom that insists that elected legislatures, and those they act for, are to operate on the sufferance of undemocratically, unelected judges that possess a final strike-down power over their democratically enacted legislative procedures.[44]

Judicial incompatibility with democracy

It is recognised that strong-form review tends be 'a sometime thing',[45] only supportable by the few cherished cases it yields.[46] This incidentally fails to justify why such an extreme system of judicial empowerment can be jurisdictionally endorsed. Waldron outlined the deplorability of this notion, stating his theory that in order to properly grasp why weak-form should prevail, we must first 'boil the flesh off the bones'[47] to remove all emotion from those minority constructive strong-form occasions of success, as a few positive cases cannot justify a more general agenda for strong-form review.[48] He proposed that if we imagine a society with, 'democratic institutions in good working order, including a representative legislature elected on the basis of universal adult suffrage',[49] upholding responsible deliberation and reviewing its practices of legislation,[50] then what is the need for a described 'non-elective process to second-guess and sometimes override the work this legislature has done?'.[51] Undemocratically elected judges, hearing individual lawsuits, settling disputes and upholding the rule of law, should have some influence in the political system to review literature, but their decisions should not be final or

[42] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1019.
[43] Frederick Schauer, 'Ashwander Revisited', (1995) SCR 71, 95.
[44] Jeremey Waldron, *Political Political Theory, Essays on Institutions* (Harvard University Press 2016) 196.
[45] Charles L. Black, *A New Birth of Freedom: Human Rights, Named and Unnamed* (Yale University Press 1997) 109.
[46] *ibid.*
[47] Jeremey Waldron, *Political Political Theory, Essays on Institutions* (Harvard University Press 2016) 198.
[48] *ibid*.
[49] *ibid* 203.
[50] *ibid* 204.
[51] *ibid* 205.

be able to conceal their motions in decision making, as this unnecessarily defies a democratic institute in perfect working order.[52]

To respect the breadth required to manage subjectivity towards rights-sensitive issues, the final say must reside with governmental representatives who can provide the widespread level of legitimate debate that mirrors reached legislative decisions within the will of the nation.[53] This importance was exemplified through the case of *Romer v Evans*[54], a decision split six to three concerning a strong-form constitutional review of a legislative contravention of homosexual rights,[55] a socially delicate rights issue at the time. Such transparent disagreement portrayed that even in the interpretation of a fixed constitution, there can be subjectivity and such a close split evidenced how those personal convictions towards homosexuality, encompassed within judicial decision-making, could misinterpret or reinterpret objective constitutional principles on rights issues. Objective rules require objective constitutional answers, something judges evidentially cannot provide for. It then becomes procedurally sounder to leave these issues in the hands of democratic vote, which can instil legitimacy into widespread subjective attitudes. Democracy transforms the subjective views of the people into an objective answer, upholding these requirements for objectivity in decision-making surrounding rights-sensitive social issues. It is then democratically safer to reside these decisions with governmental representatives, rather than a potentially unreasonable judiciary, minimising the risk of judges failing to separate their own personal subjective convictions from the required objective legal truth. Hypothetically, if six of those judges in *Romer v Evans* represented 80% of the population on pro-homosexual rights, and the remaining three represented the opposing excess 20% against homosexual rights, then how can decisions on rights decided this way be democratically viable and representative? This type of decision-making pushes constitutionalism closer to judicial dictatorship, disempowering large majorities for the convictions of the minority.

Democracy necessitates an institutionally equal weighting of power, especially in the voting process, something strong-form judiciaries consume, apportioning themselves what has been referred to as a 'superior voting weight'.[56] Those judges in strong-form systems, 'claiming a status of superiority over other citizens',[57] do so 'by virtue of the unwarranted assumption that their opinions are more likely to be correct than are those of other citizens'.[58] When judicial decisions are founded on that declared legal omniscience and the circumvention of governmental representatives' decision-making, this facilitates the substitution of their own personal convictions of 'righteousness' for the democratic determination of the legislative proportionality between individual rights and policies. Citizens have their delegated

[52] *ibid* 205.
[53] *ibid* 207.
[54] Romer v. Evans 517 U.S. 620, 116 S. Ct. 1620 (1996).
[55] Alec Walen, 'Judicial review in review: A four-part defense of legal constitutionalism A review essay on Political Constitutionalism' (2009) IJCL 329, 338.
[56] J. Waldron, 'Disagreements on Justice and Rights', (2003) 6 NYUJLPP 5, 6.
[57] Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 UTLJ 591, 595.
[58] *ibid.*

convictions towards policies and voting weight usurped by judges, when their democratically elected representatives, that incarnate their vote, are overruled by these members. They may purportedly believe they are 'curing' rights by striking down improper rights-contravening legislation but in doing so, they are spoiling democracy. It is procedurally better for a democratically formulated rights-violating instrument to survive, than a minority of individuals disregard its democratic viability for pursuing their own altruistic interpretation of the 'good'. This is because the democratic right to an equal voting weight, through elected representatives, is 'a moral right the violation of which cannot be traded off against minimising the violations of other rights'.[59]

Alternatively, weak-form disables this transactive function through establishing a foundation whereby citizens feel that 'no difference of status exists between them and the decision-makers',[60] as the legislative procedure has 'not given more weight to the views of some citizens on the grounds their opinions are likely to be superior to… the rest',[61] like a strong-form judicial system does. It also avoids generating scope for individual parties to challenge democratically enacted primary legislation, as a strong-form system empowers, to override the collective decision-making of their fellow constituent elected representatives. This would mean that individuals alone could accumulate greater clout in democracy than large groups on policy issues. It remains true that improper pieces of legislation might arise from the practice of weak-form review, but these will be the product of democratic choice, in the context of wider society, not rigid constitutional values.

Tyranny within weak-form democracy?

Some weak-form critics have suggested that 'the tyranny of the majority'[62] and excess power of governmental institutions allows them free reign to legislate to their own agendas. This is done regardless of the people's democratic will or rights – being then, the people's trustees, not their proxies.[63] These institutions are accused as being 'merely an oligarch',[64] and not representative of 'the people', any more than the judiciary are not.[65] Such a claim is fallacious and rather on the contrary, with Lord Hoffmann suggesting that strong-form systems actually encourage this type of tyrannous ignorance of individual rights that critics purportedly attribute to weak-form review. This is because politicians become increasingly reluctant to deliberate rights abuses, becoming 'inclined to pass populist measures which plainly contravene constitutional rights, leaving it to the court to incur the odium of thwarting the will of the

[59] Larry Alexander, 'Is Judicial Review Democratic: A Comment on Harel', (2003) 22 LP 277, 279.
[60] Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 UTLJ 591, 595.
[61] *ibid.*
[62] Jeremey Waldron, *Political Political Theory, Essays on Institutions* (Harvard University Press 2016) 233.
[63] Dimitrios Kyritsis, 'Representation And Waldron's Objection To Judicial Review' (2006) 26 OJLS 733, 740.
[64] H. Belloc and G.K. Chesterton, *The Party System* (London: S. Swift 1911) 17; Hanna Pitkin, *The Concept of Representation* (Berkeley: University of California Press 1967) 150.
[65] Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 UTLJ 591, 595.

people'.[66] This is because these subjects become less inclined to abide by rights standards, as their propositions might be stricken down regardless of their consideration for rights principles. It has even been suggested that the court-influenced, not court-centric, nature of weak-form review may be more effective in pushing political institutions and the electorate towards the types of engaged and competitive public discourse about central issues to which democracies are supposed to aspire.[67] Such depoliticization of the courts in weak-form systems may even mean judicial review carries greater effectiveness, because it can respect these democratic credentials and only flex itself where intervention is necessary. Thus, heightening its potency whilst avoiding overreaching into legislation, being invited into discourse only where appropriate to enhance rights within democracy.[68] Such a notion received endorsement from the Canadian Parliament, post-*Seaboyer,*[69] stating that judicial discretion could provide valuable contribution to rights-defying legislation where it was 'relevant, specific in nature, and [had] significant probative value which [was] not substantially outweighed by the danger of prejudice to the administration of justice'.[70] Hence, a weak-form judicial approach enhances judicial interventionism powers by enriching their value, not over-application, upholding democracy alongside constitutional rights, rather than against one another.

Despite this, in defence, it has been suggested that strong-form judges are not making their own decisions about rights, but instead enforcing the decisions of the people embodied in the constitution, which retains democratic credentials in itself.[71] Society has bound itself to certain rights principles and, much like Ulysses' shipmates, judges are simply making sure the ropes remain tied.[72] Although, such a superfluous analogy reflects nothing more than the view of a supermajority at some point in time,[73] and it remains trite that 'the dead hand of the past should not bind the present. Legislatures should always be free to do as they see fit'.[74] Strong-form fails as a process compatible with modern democracy as it contravenes this principle by binding individuals in a modern, democratic society to a series of archaic standards, that these individuals, including their legislative representatives, had little to no input in – preventing them from democratically developing rights into a modern society.

Judges as 'Negative Legislators'.

There is a train of thought that when judges strike down or refuse to recognise primary legislation, they essentially act as a type of undemocratic, negative legislator. Hans Kelsen

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[66] Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62(2) MLR 159, 161.
[67] Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 CJTL 285, 313.
[68] *ibid, 30.*
[69] [1991] 2 S.C.R. 577.
[70] An Act to Amend the Criminal Code (sexual assault), SC 1992, c 38, s 2 ('Bill C-49'); Rosalind Dixon, 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32 OJLS 487, 496-497.
[71] Jeremey Waldron, *Political Political Theory, Essays on Institutions* (Harvard University Press 2016) 232.
[72] Jon Elster, *Ulysses Unbound* (Cambridge University Press 2000) 88–96.
[73] Jeremey Waldron, *Political Political Theory, Essays on Institutions* (Harvard University Press 2016) 232.
[74] *ibid.*

endowed this argument, defining strong-form judges as acting as a form of lawmaker, as 'a court which is competent to abolish laws… functions as a negative law maker'.[75] This is because 'a decision of the constitutional court by which a law is annulled has the same character as a law, which abrogated another law'.[76] So when judges dismember legislative instruments, this reflects the exact power exercised by the legislative branch in enacting new laws that have the effect of repealing conflicting ones. When a court did this, plainly, 'it was legislating, therefore a judgement that effectively invalidates a law… is enough to amount to legislation'[77] in its own domain. This issues a remarkable restriction on democracy as judges extend from rectifying rights violations, to existing as another competing legislative organ,[78] performing the same legislative function as governments, a purpose far beyond their democratic entitlements and constitutional expectations.

It has been argued that law-making authority 'flows downwards in a legal system'[79] and the striking down of primary legislation disrupts this democratic hierarchy of law. When courts retain a final authority, it inevitably, 'becomes a powerful political actor as a veto player', and an undemocratic 'rival of the government'.[80] To this point, even a s.4[81] declaration of incompatibility, providing the authority to submit a weak-form recommendation that primary legislation violates rights to government, has itself been denounced by Lord Nicholls in *Godin-Mendoza*,[82] as a 'quasi-legislative power',[83] lacking some form of democratic credentials. This then speaks volume as to the constitutional impracticability of strong-form judicial review, as if weak-form review tempts encroachment in its respect for governmental legislative sovereignty and democracy through declarations of incompatibility, which are merely suggestive rather than binding, strong-form review goes far beyond this, rendering it intolerable. Strong-form must then be avoided to elude endorsing a competing legislative branch into political institutions.

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[75] *ibid*.
[76] Hans Kelsen, *La Garantie Juridictionnelle De La Constitution* (Revue de Droit Public 1928); Ahmed Oudah Al-Dulaimi, 'From Negative To Positive Legislator? Response To Unconstitutional Legislative Omission As A Case Study In The Changing Roles Of Constitutional Courts' (PhD, Griffith University 2018) 216 – 217.
[77] *ibid*.
[78] Hans Kelsen, *La Garantie Juridictionnelle De La Constitution* (Revue de Droit Public 1928); Ahmed Oudah Al-Dulaimi, 'From Negative To Positive Legislator? Response To Unconstitutional Legislative Omission As A Case Study In The Changing Roles Of Constitutional Courts' (PhD, Griffith University 2018) 25 – 26.
[79] David Feldman, 'The Human Rights Act 1998 And Constitutional Principles', (1999) 19 JSLS 165, 31; Hans Kelsen, Anders Wedberg, 'General Theory of Law and State', (Harvard University Press 1945) 123-124.
[80] Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 CJTL 285, 306.
[81] Human Rights Act 1998, s 4.
[82] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.
[83] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [64] (Lord Nicholls).

Do Commonwealth jurisdictions essentially exercise Strong-form Review?

There is a particular threat to this argument against strong-form review, necessary to discredit to the endorsement of its weak-form counterpart. This obstacle is the speculation as to whether the commonwealth weak-form model, inevitably leaks into functioning as a strong-form system over time in its application. This provides two conclusions to this assumption: either (1) weak-form review is so unsustainable it inevitably adopts strong-form practice over time, or (2) these commonwealth jurisdictions prefer the practice of strong-form, indicating it may be a better approach. These assumed conclusions are both false.

Is 'Weak-form', Strong in disguise?

Within the weak-form system of the United Kingdom as an example, judges are empowered to make a 'Declaration of Incompatibility', by virtue of s.4 Human Rights Act 1998. This mechanism, reserved for primary legislative rights contraventions, flags violations without immediate imposition, providing an opportunity but not obligation for Parliament to amend it.[84] Similarly, s.3 of that Act, enables the judiciary 'to adopt an interpretation'[85] that, 'will include the reading down of express language in a statute'[86] to achieve convention compliance by reading that primary legislation 'in a way which is compatible with the Convention rights'.[87] This outlines a clear distinction between the powers of judicial members and sovereignty of the legislating branch, but this description in rhetoric does not necessarily reflect its reality.

In enacting the Human Rights Act, with a weak-form system in mind, 'there was no political appetite for giving the courts a strike down power',[88] but the suggestion has been that this instrument, over time and application, has become utilised as a blunt legislative strike down tool. When drilling down into how the Act functions, a different picture supposedly emerges, as in the exercise of s.3 and 4 mechanisms, 'judges cure rights-violations with immediate effect'.[89] The commonwealth model then poses something of a 'classificatory challenge'[90] to weak-form review, as it suffers a type of identity crisis. Although in rhetoric it takes the form of a weak-form system, this does not diminish the reality that Parliament, and other weak-form commonwealth institutions, are quick to comply with any such declarations of incompatibility, yielding the same outcomes as a strong-form system. This then sustains those two preliminary conclusions as to whether the weak-form system is either less attractive or strong-form simply functions better. Academics, in support, highlight that weak-form may be vulnerable to instabilities, such that it may degenerate into strong-form review over time, stating that, 'if

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[84] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1009.
[85] *R v A*, [2002] 1 A.C. 45 (HL) [68].
[86] *ibid*.
[87] Human Rights Act 1998, s 3.
[88] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1014.
[89] ibid, 1019.
[90] ibid, 1014.

legislatures routinely accede to court decisions, weak-form review is simply strong-form review in disguise',[91] as even the 'weakest weak-form systems tend to evolve into strong-form ones over time'.[92]

These anxieties gain substantiation from the then Lord Chancellor's declaration that 'we expect that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility'.[93] This is oxymoronic in nature, essentially defining weak-form review in character as strong-form, meaning again, weak-form is either inadequate or subordinate to a more desired strong-form system of review. Further damning evidence to this point comes from Jowell and Cooper's labelling of this as a 'constitutional expectation',[94] completely undermining the attractiveness of weak-form review as a judicial review prototype, posing the greatest problem to its sustainability if it is a system that purportedly declares the virtues of parliamentary sovereignty but exercises judicial dominance. This expectation to concede exemplifies a commonwealth preference to consistently forfeit to judicial strike-downs, and a lack of any attempt to defy such makes it difficult to distinguish this system from a strong-form one. The United Kingdom retains a 'near-perfect rate of compliance with declarations of incompatibility',[95] complying with all 21 s.4 declarations, since the Act came into effect.[96] This has been hailed as presenting the effect of an 'overturning' or 'striking down' of primary legislation, as the difference between a declaration and a strike down power is merely 'a technical distinction',[97] as Members of Parliament perceive such a declaration as 'an authoritative finding, not merely as opinion or advice'.[98] Although judges are not expressly empowered to strike down legislation, they are indirectly doing so, given that government almost certainly wants to change the law as a result.

Although such a will to alter the law following a declaration of incompatibility is borderline automatic, there is an element to this that it derives not from a powerful state of obligation, but through the avoidance of the political backlash incurred by the legislative, if they are seen as publicly defying the judiciary on breaches of rights issues. This means it is not necessarily the prominence of strong-form review that diverts weak-form into its path but instead the publicity and pressure from the political audience to uphold rights within primary legislation.

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[91] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 47.
[92] Brett Kaufman, 'Book Review Note - Weak Courts on Steroids: Improving Weak-Form Judicial Review' (2009) 87 Texas Law Rev 639, 643.
[93] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1025.
[94] Jeffrey Jowell, Jonathan Cooper, *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003); *ibid.*
[95] Alison L. Young, 'Is Dialogue Working under the Human Rights Act 1998?' (2011) 4 PLJ 773, 779.
[96] U.K. Ministry of Justice, Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 44 (Oct. 2013); Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1025.
[97] Lord Hoffmann, 'Human Rights and the House of Lords', (1999) 62(2) MLR 159, 160.
[98] Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012) 192.

Nonetheless, this theme is still common amongst other weak-form commonwealth jurisdictions equally, including New Zealand, whereby parliament has defied only once, out of thirteen declarations of incompatibility,[99] and Canada, where there has been only one parliamentary attempt to override the Supreme Court of Canada's recommendations amongst a plethora of declarations.[100] These jurisdictions pay very little attention to responding to declarations of incompatibility, which suggests that, although as a matter of constitutional design, it supposedly grants the legislature the last word, in practice commonwealth judicial strike downs have a 'normative finality'[101] on rights issues. If commonwealth jurisdictions continue to idly concede to declarations, then propositions surrounding weak-form as an unsustainable, unpreferred approach may carry substance, indicating that in practice strong-form is far more appealing.

There is nothing weak about Weak-form review.

This is not the case. If this has borne into practice, then it is the 'new dynamic between the two branches… which the courts have failed to articulate properly'.[102] Following this principle, Lord Phillips has extra-judicially observed that a s.3 judicial mechanism suited ministers much better, providing that the main thrust of the legislation wasn't impaired, because this allowed legislation to be brought up to human rights standards, rather than issuing s.4 declarations of incompatibility, requiring ministers to publicly defy the judiciary.[103] This depicts the political motivations behind the parliamentary abiding of judicial interventionism, as it is not for facilitating a strong-form system as previously suggested, but in pursuit of avoiding the residual political ramifications incurred from publicly defying convention rights. Governmental bodies prefer intervention that averts any resonation of a strike down power because, any interpretation, as Lord Rodger identified, must 'go with the grain of legislation'[104] and these strike-down-like powers go against exactly that. This is then guilty of impairing the whole function parliament intended to give it rather than preserving its primary effects in line with rights issues, as is the case of s.3 interpretations. It cannot be said that because parliament concedes in some cases it endorses strong-form review, its omission cannot be inferred as acquiescing.

The Supreme Court of Canada openly endorsed that, 'to insist on slavish conformity' by parliament to judicial pronouncements, 'would belie the mutual respect that underpins the relationship'[105] between the state and judiciary. It is not that ministers are slave to these

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[99] Rosalind Dixon, 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32 OJLS 487, 493.
[100] *ibid*, 9.
[101] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 3.
[102] Francesca Klug, Judicial Deference Under the Human Rights Act 1998, 2 European Human Rights Law Review (2003) 125, 127.
[103] Lord Phillips, 'The First Lord Alexander of Weedon Lecture, The Art of the Possible: Statutory Interpretation and Human Rights' (Apr. 22, 2010), 44.
[104] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [33] (Lord Nicholls).
[105] *R v. Mills* [1999] 3 SCR 668 [55].

contestable declarations, it is a lacking will to incur the political backlash that may accompany a defiance, as those 'strike-down' declarations of incompatibility are public 'headline-grabbing declarations'[106] that ministers want to avoid. Van Zyl Smit even suggested their passive approach was not conceding but was 'a crude form of political buck passing which allows Ministers to avoid the blame for unpopular decisions while directing public criticism to the courts'.[107] It is not that the weak-form commonwealth does not retain the political power to respond to a strike-down-like power, there is simply a political advantage to diverting the onus onto the judiciary in sensitive matters involving rights issues, rather than incurring the focus. Thus, weak-form is not so unstable it inevitably transforms into strong-form over time, there are merely ulterior political motives for respecting courts actions in relation to declarations of incompatibilities, such as remaining popular for re-elections and retaining political positions. Parliament has a lot to lose and potentially very little to gain in defying a weak-form declaration of incompatibility.[108] An example of such available power is the infamous *Hirst*[109] case, engaging a declaration of incompatibility on legislation instilling a blanket ban on prisoner voting. Despite the declaration, there was no cross-party friction for allowing prisoner voting and it seemed it incurred no electoral or political cost to defying the judicial advice, since the political elite chimed with popular opinion.[110] This empirically displayed that although the commonwealth's weak-form may appear stronger, it is not and any concede is out of institutional courtesy or ulterior political motives, with the final say on legislation firmly residing with government.

This is an opinion shared equally by the judiciary in the United Kingdom, with Lord Nicholls in *Godin-Mendoza*[111] explaining that for judges to presume any final say or a right to strike down legislation 'would be to cross the constitutional boundary' that the Human Rights Act 1998 'seeks to demarcate and preserve'.[112] Judicial rights under that Act were not intended to empower the courts to strike down legislation to preserve constitutional rights, 'nor can parliament have intended… that courts… make a decision for which they are not equipped. There may be several ways of making a provision convention-compliant, and the choice may involve issues calling for legislative deliberation'.[113] Nicholls conceded that this power is not

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[106] Danny Nicol, 'The Human Rights Act and the Politicians' (2004) 24 JSLS 451, 468-469; Christopher Crawford, 'Dialogue and Rights-Compatible Interpretations Under Section 3 of the Human Rights Act 1998', (2014) 25 KLJ 34, 41.
[107] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1014; Jan Van Zyl Smit, 'Statute Law: Interpretation and Declarations of Incompatibility', in D Hoffman (ed), *The impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011).
[108] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1024.
[109] *Hirst v United Kingdom (No 2)* (2005) ECHR 681.
[110] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of The UK Human Rights Act 1998' (2015) 13 IJCL 1008, 1026.
[111] [2004] UKHL 30.
[112] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [33] (Lord Nicholls).
[113] *ibid.*

one designed for judicial finality and 'section 3 and 4… were carefully crafted to preserve the existing constitutional doctrine [of weak-form review], and any application of the ambit… beyond its proper scope subverts it'.[114] He carried this opinion into *Re S*[115], in which he stated that the 'interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament'.[116] Thus, any deviation from the commonwealth as a weak-form system is a judicial mistake, and any claim that it prefers or practices strong-form is a purported argument to support strong-form review. Thus, as has always been the case, weak-form review is practically a far better, more viable and sustainable approach.

Conclusion

It maintains then that in each political, democratic institution, a strong-form system of judicial review stands in an uneasy relation to the inherent requirements to proportionately balance procedural values and rights. The preliminary conclusion that strong-form review is far too significant a worry, and as a 'cure' creates more constitutional disease that it remedies, with its risks to democracy and political over-interventionism, then persist, with weak-form instead providing a far more attractive mechanism to avoiding this type of undesirable anarchic judicial behaviour. Rights should never be traded off against other rights, and constitutionalism should never endorse a system by which curing rights yields worse violations than it strives to protect. There is then a clear universal agenda for endorsing and pursuing a weak-form system of judicial review as a custom far more compatible with the contemporary political and legal order of developing rights into a modern society.

[114] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [57] (Lord Nicholls).
[115] [2002] 2 AC 291 (HL) 313.
[116] *Re S (Children) (Care Order: Implementation of Care Plan), ReW (Children) (Care Order: Adequacy of Care Plan)* [2002] 2 AC 291 (HL) 313 [39].

Battery Powered? – The need for reform on the law of Common Assault

*Charlie Hayes**

Abstract

The law on common assault and battery remains inexplicably detached from the major offences against the person and indeed requires serious reform to ensure that the law on common assault is suitable as the criminal law evolves over time. This article details the compelling case for legal reform on common assault and why procrastination over change is no longer acceptable. Firstly, the article covers the deficiencies of common assault and battery, including arguments that a minimal statutory definition violates the principle of legality, the concept of imminency inherent to assault is too robust in scope and the willingness of the common law to recognise that omissions constitute a battery needs overhauling. The second section evaluates the Law Commission's suggestions for reforming the law on common assault, alongside a repertoire of academic opinions on how the law could be reformed. The article concludes by focusing on what the future holds for the law in this area.

Introduction

The term '*common assault'* typically refers to the commission of an assault or a battery. Johnathan Herring elucidates that, technically speaking, common assault and battery are two separate offences[1] and this article treats battery and assault as separate and distinct. Under the law of England and Wales, a *common assault* has no statutory definition. Instead, the scope, operation and categorisation fall under the common law. Although assault and battery are intrinsically linked to offences of a non-fatal, non-sexual nature, *common assault* remains separate from these offences as the law does not fall under the Offences Against the Person Act 1861.[2] Where such offences against the person are concerned, there is a hierarchy of offences that are ranked from the least serious as common assault and battery, to the gravest (a charge of grievous bodily harm with intent to inflict such harm). This hierarchy is largely governed by the Offences Against the Person Act 1861 which has been a great servant to advocates dealing with crimes of this nature. Apart from assault and battery which, despite their importance, remain detached from the statute in question.

The detachment of these two offences from their counterparts is baffling and indeed harmful. It is important to remember that to prove the existence of certain graver offences such as actual or grievous bodily harm, then one must first establish that an assault or battery was committed. Within this particular family of offences, ostracising assault and battery from within the statutory remit seem nonsensical given the importance of its role in establishing other aggravating offences.

**B.A (Hons), LLB (University of Southampton).* I would like to thank Dr Harry Annison for his incredibly interesting tutorials on the subject that ultimately served as the inspiration for this article.

[1] Johnathan Herring, '*Criminal Law: Texts, Cases and Materials'* (8th edn, Oxford; OUP 2018) 310.

[2] Offences Against the Person Act 1861.

Before discussing the overall argument and methodology of this article, it needs to be made clear from the outset that this article does not question the importance or necessity of a common law system or challenging the need for reform of such a system. This article instead submits that the law on common assault urgently needs reformation and analyses proposed methods over how this can be achieved. Henceforth, the article is divided into two main sections. The first section covers specific arguments concerning why the law on common assault is deficient, firstly highlighting that a minimal statutory definition violates the principle of legality, secondly, the concept of imminency inherent to assault is too robust in scope and tightening the law would create greater practicality for advocates, judges, and juries. Finally, regarding a battery, the willingness of the common law to recognise that omissions constitute a battery needs reform because Lord Goff elicited that the infliction of an unlawful force is necessary to prove a battery and criminal omissions do not inflict the force.[3]

The second section elucidates the suggestions for reforming the law on common assault, particularly focusing on the Law Commission's Report[4] on the topic, evaluating the merits of their suggestions and proposing that the suggested reforms do not go far enough. The section also addresses a repertoire of academic opinions on how the law could be reformed and concludes by focusing on what the future holds for the law in this area. This article does not aim to be fantastical, nor does it propose that the law should be scrapped altogether. Instead, the article attempts to provide a realistic discussion based on academic, statutory and common law evidence.

1. Why the Law is Deficient?

1.1 Principle of Legality

This article addresses the principle of legality from a broader perspective, arguing that the law on common assault is deficient. Indeed, the lack of a proper statutory definition of common assault violates the principle of legality because the law is not clear, accessible, and intelligible. Peter Westen outlines his view of what the principle of legality entails, writing the following:

> Legality is an exogenous principle by which to assess the justice of a state's positive law. Legality is a principle of justice by which to criticize positive law for falling short of doing what it ought to do and to commend positive law for achieving what it ought to achieve…[5]

Moreover, Douglas Husak and Craig Callender emphasise the importance of the principle of legality within the broader field of criminal law, arguing that:

[3] See footnote 18.
[4] Law Commission, *'Reform of Offences Against the Person'* (Law Com No 361, 2015).
[5] Peter Westen, 'Two Rules of Legality in Criminal Law' (2007) 26 Law and Philosophy 3, 229, 233.

> The principle of legality is fundamental in Anglo-American criminal law…Every theorist pays homage to the importance of these rights and acknowledges the injustice if they are violated.[6]

Both arguments effectively portray the importance of the principle of legality and how it governs the operation of criminal law. To satisfy the principle, the law must be clear, intelligible, and at least capable of being followed properly. Westen's criticism of the state's positive law for falling short of achieving intended goals is crucial here. In legal theory, positive law must emanate from a sovereign power.[7] Although the sovereign power may differ according to the constitution of each state, the United Kingdom constitution is founded on the principle of Parliamentary Sovereignty.[8] Parliament can pass any Act on any matter it wishes but regarding common assault, the law of England and Wales needs regeneration, mostly because there is no sufficient positive law governing common assault.

As already mentioned, common assault and battery are not incorporated into the Offences Against the Person Act 1861, despite their existence being a crucial tool to establish the offences under this Act. Under English and Welsh statutory law, the only legislative reference to common assault and battery is found under Section 39 of the Criminal Justice Act 1988 which states:

> Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine…, to imprisonment for a term not exceeding six months, or to both.[9]

Following Westen's argument on the principle of legality, Section 39 of the Criminal Justice Act 1898 clearly falls below the threshold of conforming to the principle of legality. The statute establishes no clarity regarding the *actus reus* and *mens rea* requirements for the commission of a common assault. The statute merely details the sentencing requirements, and that common assault is a summary offence. Nor is the law capable of being clearly followed. The positive law lays out no guidance of the elements of the offence, nor does it provide sufficiently clear extenuating circumstances through which a defendant may be exonerated. All that is discernible from the statute is a vague idea of the severity of the offences, implied from the minor range of sentencing options that the Act offers. Accessibility is not necessarily a prominent issue here but accessibility to the law only becomes important when the aforementioned law is clear and easily obeyed. Not all individuals are legally erudite and for the law to be accessible and intelligible, the statutory language should ensure that such persons

[6] Douglas Husak, Craig Callender, 'Wilful Ignorance, Knowledge, and the ''Equal Culpability'' Thesis: A Study of the Deeper Significance of the Principles of Legality' (1994) Wis. L. Rev. 29, 30.
[7] For further discussion, see H.L.A Hart, '*The Concept of Law'* (OUP 1961).
[8] See *Pickin v British Railways Board* [1974] AC 765, 789-90 for the conservative position on Parliamentary Sovereignty.
[9] Criminal Justice Act 1988 s 39(1).

clearly understand what is required of them. The positive law on common assault and battery does not follow this logic.

Husak and Callender's submitted that every legal theorist recognises the importance of the principle of legality and appreciates the severity of any violations.[10] It is transparent that there is a blatant disregard of the principle of legality in relation to the law on common assault. If every theorist can recognise the importance of this principle, then the legislature should also understand the consequences. The principle of legality is the central plank of a sound legal system[11] and if its main requirements are not fulfilled by positive law, then criticism is justified and recognition of the severity of a violation should act as a catalyst for reform on such laws. The current positive law on common assault is not fit for purpose as it is not clear and is incapable of being followed properly, highlighting that the law on common assault violates the principle of legality and urgently needs reformation. However, the next part of this article determines whether common law judgements can ameliorate the desire for reform.

1.2 Does the Common Law Alleviate Concerns?

If positive law fails to answer questions over the dire need for reform of the law on common assault, then the alternative option to alleviate these concerns is to turn to the common law and whether judicial dicta can allay these requisite concerns. This article mainly argues that the common law cannot fully achieve this. By delving into the detail of the technical elements necessary to establish a common assault or battery, the purpose of this subsection is to highlight that the courts have struggled to accurately define the threshold of both offences, raising immense practical difficulties for judges, advocates and juries. This article aims to deal with these difficulties in a binary way, firstly dealing with common assault and the concept of imminence and then subsequently with battery and the troubles regarding omission.

1.2.1 Assault and Imminence

Dealing first with assault, the appropriate actus reus elements were established under the case of *Collins v Wilcock* where Lord Justice Goff drew an important distinction between a technical assault and a battery. For the purposes of this subsection, Lord Justice Goff's definition of an assault is as follows:

> An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person.[12]

Both battery and assault share the same *mens rea*, the principles of which are derived from the case of *Venna* where the courts held that there must be either intention or recklessness to cause the victim to apprehend the infliction of unlawful force.[13] This article does not question the

[10] See footnote 6.
[11] Johnathan Herring, '*Criminal Law: Texts, Cases and Materials'* (8th edn, Oxford; OUP 2018) 9.
[12] *Collins v Wilcock* [1984] 1 WLR 1172, [1177] (QBD).
[13] *R v Venna* [1975] QB 421, [428] (CA).

validity of the *mens rea* requirements, instead focusing on the failings of certain actus reus requirements of both offences.

From the *Collins* ruling, the *actus reus* of an assault is defined as the apprehension of the infliction of immediate, unlawful force alongside the necessary factual and legal causation requirements. This article does not divulge into issues over causation. Instead, the article intends to examine the issue of imminence within Lord Justice Goff's definition of assault and the confusing scope it offers. The principal common law judgement available to discuss this issue is the conjoined case of *R v Ireland* and *R v Burstow*. In *Ireland*, the defendant made a series of silent telephone calls to three women after which they suffered psychological harm and was charged under Section 47 of the Offences Against the Person Act 1861. He appealed on the basis that the facts did not amount to an assault. Lord Steyn details the concept of imminency in his judgement, elucidating the following:

> …there is no reason why a telephone caller who says to a woman in a menacing way "I will be at your door in a minute or two" may not be guilty of an assault if he causes his victim to apprehend immediate personal violence…He intends by his silence to cause fear and he is so understood… Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent.[14]

In many ways, both the rulings in *Collins* and Lord Steyn's dicta in *Ireland* do provide some of the requisite clarity missing under the flawed positive law. Lord Steyn dispenses an explanation of the necessary requirements for what circumstances specifically constitutes an assault and due to this, the law is capable of being followed where the public at large broadly understands what the constituent parts of a technical assault are. Further to this, Lord Steyn elaborates on the concept of "*imminent force*" by detailing the scope of this term.

But on the other hand, Lord Steyn makes the scope of imminent force too robust to be practically useful, embodying the crying need for reform to the law on common assault. Lord Steyn's judgement portrays that imminent force extends to threats of being at the victim's door *'within a minute or two'* and, in his view, there is no reason why the defendant should not be found guilty if the victim apprehended imminent personal violence.

This view on imminency is mistaken and it is dangerous to continue following this view. Under the Oxford English Dictionary, '*imminent*' means '*about to happen*'.[15] Following Lord Steyn's remarks, there is no definitive boundary as to where imminency is cut off. It could be after ten minutes, or an hour or maybe longer as long as long as the victim could say that their fear was caused by an apprehension of an imminent force. With no settled quantifiable concept of what imminency means, there is the potential for a floodgate argument, namely that the lack of guidance over imminence allows defendants to appeal their cases more readily due to a robust conceptualisation of what imminence means and no subsequent precedent to correct this. The

[14] *R v Ireland, R v Burstow* [1998] AC 147 (QBD), [162].
[15] Angus Stevenson, Maurice White, '*Oxford English Dictionary'* (12th edn, OUP 2011).

only realistic way to alleviate practical concerns is to have statutory reform to the law on common assault, especially where the statute lays down clear guidelines.

Jeremy Horder attempts to rationalise imminency, suggesting the following definition of imminence:

> The imminence requirement can be justified as follows: V must have to fear that D intended to use unlawful force on him before V can avail himself of any reasonable opportunity to seek escape...[16]

This article argues that Horder fails to capture what imminency should mean. If Horder's approach is compared with the concept of a hypothetical individual threatening that they will be at their door within a minute or two (akin to the approach in *Ireland* and *Burstow*), then this short period of time gives the victim a small window to abscond from the situation, rather than no real chance. "*No chance*" connotes immediacy (something not required for assault) rather than imminency and his explanation does not go far enough to explain the shortcomings of the imminency requirement.

This wide definition of *imminency* causes a threefold dilemma. Firstly, it makes a trial judge's summary of the law to the jury difficult. The judge must summarise the legal issues at the conclusion of presenting evidence but without a clear remit over the scope of imminence, then clear and consistent summary to a jury becomes a challenging issue. Secondly, it makes the work of court advocates difficult. Attempting to present a compelling case to a jury without clear boundaries over the scope of '*imminent*' force is also challenging and without a settled threshold, it makes prosecution evidence harder to present to a sufficient standard of proof. But amongst all this chaos, juries will struggle to grasp the concept. Juries are not legal experts and if these experts cannot formulate a suitable idea of what imminency entails, then there is a diminishing likelihood that juries will understand the concept any better.

This threefold problem only adds further fuel to the fire that there is a desperate case for reforming the law on common assault. The next paragraph will also address problems associated with the law on battery in similar fashion to the discussion on assault.

1.2.2 Battery and Omission

This discourse has presented compelling views concerning the need to reform the law on assault due to the vague and incomprehensive guidance on the concept of imminence. With a larger scope, the article would have offered vehement criticism of other *actus reus* elements, particularly the approach to "*apprehension*". As it is, this article moves on to discuss the offence of committing a battery. A battery differs from an assault as it requires physical contact with another. Implied consent to touching is not considered a battery, most pertinently seen in

[16] Jeremy Horder, 'Reconsidering Psychic Assault' (1998) Crim L.R 392, 394-395.

crowded situations where avoidance of contact with another individual is virtually impossible.[17]

Like an assault, the definition of the *actus reus* and *mens rea* of a battery are detailed in *Collins v Wilcock* where Lord Justice Goff defines a battery, saying 'a battery is the action infliction of unlawful force on another person'.[18] Lord Goff obviates that the *actus reus* requires the offender to inflict an action of unlawful force on another. There are no outstanding issues with Lord Goff's definition of a battery (although why it cannot be contained within a statute has already been questioned). Lord Goff provides a clear, concise definition of a battery. Because of the succinct definition, the law is clear and can be capably followed by an individual of reasonable competence. However, regarding the commission of a battery, the principal concern discussed in this article is the willingness of the common law to categorise omissions as constituting a battery, a willingness in pressing need of reform as Lord Goff made it clear that there must be the infliction of an unlawful force and omissions do not inflict the force. In *Director of Public Prosecutions v Santa-Bermudez,* the courts found a battery where the defendant lied about not having any sharp needles on their person and after a police officer conducted a search of the individual and had their finger pierced by a hypodermic needle. Justice Kay laid down the ratio decidendi of this case, adjudicating the following:

> …where someone (by act or word or a combination of the two) creates a danger and thereby exposes another to a reasonably foreseeable risk of injury which materialises, there is an evidential basis for the *actus reus…*[19]

This appears to respect the *Miller* principle of creating a reasonably foreseeable risk of danger[20] but does not fully complement the requirements for committing a battery. '*Reasonably foreseeable*' risk is different to an actual infliction of unlawful force on another person and the willingness of the courts to respect the *Miller* principle regarding a battery creates a dangerously wide ambit. It is inferable that the courts are open to finding a battery in broad, comprehensive circumstances, creating a potential for greater convictions, many of which could be unjustified due to this robust precedent. The other major question concerns what the defendant's positive action was in regards to inflicting unlawful force on another person. The defendant only lied in regards to whether they were in possession of any sharps and indeed did not inflict any unlawful force through a positive action. Yet the courts questionably found a battery in the circumstances with no positive infliction of unlawful force.

In the earlier case of *Fagan v Metropolitan Police Commissioner,* the courts established a battery where the defendant drove his car onto a policeman's foot and when asked to move, the defendant refused. Although a battery was determined, Justice Bridge dissented to provide the following quote:

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[17] *Collins v Wilcock* [1984] 1 WLR 1172 (QBD).
[18] *Collins v Wilcock* [1984] 1 WLR 1172, [1177] (QBD).
[19] *Director of Public Prosecutions v Santa-Bermudez* [2003] EWHC 2908 (Admin), [11].
[20] *R v Miller* [1983] 2 AC 161, [176] (HL).

> But…I have encountered the inescapable question: after the wheel of the appellant's car had accidentally come to rest on the constable's foot, what was it that the appellant did which constituted the act of assault? However, the question is approached, the answer I feel obliged to give is: precisely nothing…[21]

Justice Bridge poignantly questions the decision to issue a conviction of a battery in the circumstances by referring to the lack of a positive infliction of unlawful force. Imagine a hypothetical individual sitting on a bench and stretched out their legs but failed to retract them whilst a jogger passed and subsequently fell over the outstretched legs, then this would be deemed a reasonably foreseeable risk of injury under the *Santa-Bermudez* precedent and a conviction of battery would be upheld, but this is not a positive act capable of inflicting unlawful force on another. This article therefore submits that Justice Bridge was incapable of finding any reasonable angle to justify how an omission constitutes a battery. The decision of the court was that a battery must be committed by a positive act, but the positive act is not present in this case.

Academic Michael Hirst advances an argument that the law in this area is deficient, suggesting the following:

> The law governing offences against the person is even more deficient than we have generally supposed it to be. Deadly traps, or traps which cause serious injury, may give rise to criminal liability, but those which cause less serious injuries must go unpunished.[22]

To a moderate extent, Hirst's argument is credible. Hirst does not detail what these so-called '*deadly traps'* are but he constructs a logical argument that a battery should be limited solely to the criteria derived from Lord Goff's definition. However, his argument that offenders causing minor injuries should not be held liable is unpalatable. All offenders should face justice, but in line with appropriate standards, something which the incumbent law on battery fails to offer.

As far as the battery is concerned, there is an irrefutable argument for reform. Lord Justice Goff set down a definition of battery as the infliction of unlawful force on another person, but this article has discussed two decisions which contradict this. The decisions of the courts to include omissions as constituting a battery creates a dangerous precedent and will increase convictions, many of which will be unjustified considering how a battery has been defined. If the common law cannot provide an adequate, settled understanding of a battery, then arguments for reform become more prominent. The law on battery would be better understood if it was codified under statutory law rather than subject to constant metamorphosing.

So far, this article has discussed the flaws in the operation and exercise on the law of battery and assault. And the ramifications of these flaws are particularly severe. Imagine offences

[21] *Fagan v Commissioner of the Police of the Metropolis* [1969] QB 439, [446] (DC).
[22] Michael Hirst, 'Assault, Battery and Indirect Violence' (1999) Crim LR 557, 560.

against the person as a large house or mansion. Assault and battery act as both the concrete foundations and construction materials required to erect the property. The subsequent, more grave offences are the furnishings of the house. It is impossible to overlook the importance of common assault and the current state of the law surrounding this area is not fit for purpose and a multitude of academic opinions have tried to highlight the deficiencies of the law on common assault. This article now discusses ways in which the Law Commission and various academics have suggested reform to the law on assault and battery, evaluating how it can be improved.

2. The Case for Reform

The case for reform firstly discusses and evaluates the proposals of the Law Commission in their report calling for change to the law. Alongside the Law Commission's Report, this article looks at the suppositions advanced by Graham Virgo and Matthew Gibson, using their work to reach a judgement over which suggestions are most viable.

2.1 Law Commission Report, Number 361

In 2015, the Law Commission published a report entitled "*Reform of Offences Against the Person"*[23] and recommended a series of changes to make the law clearer and better. To discuss all the key suggestions that were elicited in the report is neither beneficial nor warranted for the scope and purpose of this article. However, two key reforms are analysed and evaluated in this article.

The first reform under Section 3.7(2) of the report recommends the following proposal:

> Each offence should provide a clear and accurate label for the conduct in question and should be defined in language that is easy to understand.[24]

Academic Stavros Demetriou offers a positive outlook on the relabelling of these offences, writing the following:

> For battery, the suggested label is "physical assault" whereas for "assault" the proposed label is one of "threatened assault". Both seem entirely sensible recommendations.[25]

The main features of this proposed reform are that offences must have clear, accurate labelling and defined in accessible language and Stavros Demetriou compellingly argues that these recommendations are sensible. This article similarly submits that the recommendations are logical and effective. The Commission's call for clear and accurate labels for conduct and in language that is easy to comprehend is highly important, allaying the earlier concerns that the current positive law on assault and battery violates the principle of legality. If the offence has

[23] Law Commission, *'Reform of Offences Against the Person'* (Law Com No 361, 2015).
[24] Ibid para 3.7(2).
[25] Stavros Demetriou, 'Not giving up the fight: a review of the Law Commission's scoping report on non-fatal offences against the person' (2016) 80 J.C.L 3, 188-200, 191-192.

a clear and accurate label, the law on common assault takes a step forward to satisfying the principle of legality. Subsequently, if each offence is defined with simplistic and attainable language, then the law is capable of being universally obeyed and followed.

The issue with these recommendations concerns how these changes could be implemented. A Parliamentary statute seems the most obvious and effective reform. Although this is an attractive proposition, statutes do not always accord with the principle of legality. Section 5 of the Public Order Act 1986 is one such example where threatening, abusive or insulting behaviour likely to cause 'harassment, alarm or distress' gives law enforcement officers a wide discretion to arrest individuals for conduct they subjectively felt was wrong.[26] However, to align with the principle of legality, there is no alternative but to codify the law on common assault in accordance with this recommendation. Having a statutory code that lays out clear, accurate labelling and a description of the offence that is capable of being followed would alleviate the serious concerns raised and makes the law fit for its purpose.

The second recommendation under Section 5.4 drafted Clause 4 of a hypothetical Parliamentary Bill to combine the offences of assault and battery into one offence. This clause is detailed below:

> (1) A person is guilty of an offence if—
>
> (a) he intentionally or recklessly applies force to or causes an impact on the body of another, or
>
> (b) he intentionally or recklessly causes the other to believe that any such force or impact is imminent.
>
> (2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.[27]

There are both clear strengths and weaknesses to this clause. Dealing with the strengths first, the *actus reus* elements of assault and battery are codified and merged into one single offence. Also, the requirement for implied consent exonerating liability is codified under subsection 2, requiring that no offence will be committed if the force was not intended to cause injury in the specific circumstances. Regarding the principle of legality, this clause should satisfy the principle as the law is clear to understand, intelligible and capable of being followed and ascertainable.

Yet this clause does not go far enough to solve issues with the law in this area. Firstly, there is no definition of '*imminent*' within the hypothetical clause. This article has discussed the issues surrounding the term and the practical difficulties this uncertainty causes and called for reform

[26] Public Order Act 1986 s 5(1).
[27] Law Commission, *'Reform of Offences Against the Person'* (Law Com No 361, 2015) para 5.4.

to this concept. It is conceivable that there may never be a settled boundary over the meaning of "*imminent*" for assault and battery.

Secondly, there is no subsection detailing the role of omission and whether this can be criminalised within the commission of this conglomerate offence. After elucidating the problems of imminency, this article also analysed the problematic role of omissions being seen as a battery. The role of omissions is set to remain within common law discretion and the Law Commission has done nothing to alleviate this concern.

Interestingly, this clause requires that the new offence must be committed '*on the body of another',* narrowing the scope away from the robust ambit of assault where Lord Steyn argued that a technical assault could be committed by mere speech. There must be a belief that inflicting force is imminent, somewhat reflecting the requirement of apprehension under the current law.

However, academic John Gardner creates a *rule of law* argument where the offences against the person need clarity to conform to the rule of law, stating the following:

'What is needed…, and what the rule of law unequivocally demands, is…textual clarity. The law is textually clear if it is stated in straightforward, unornamented language, avoiding great technicality…'[28]

Gardner's wishes have been fulfilled to a moderate extent as the hypothetical clause creates largely clear and coherent guidelines on what is required to establish an assault or battery. However, sub-clause (2) is lengthy and does not avoid great technicality. Indeed, this sub-clause could be simplified to make the language unornamented.

Overall, the weaknesses of this clause are stronger than the advantages. Although it codifies the law on common assault, there is little evidence that the present issues, particularly relating to imminency of assault and omissions causing a battery have been resolved. In sum, the Law Commission proposals are generally useful but whether they go far enough is questionable.

2.1.2 The work of Graham Virgo

In his work, *'Offences Against the Person. Do-It-Yourself Law Reform',* academic Graham Virgo discussed the case of *Burstow* (conjoined to the case of *Ireland* as discussed earlier). Although *Burstow* was a question of a different offence of grievous bodily harm, Virgo suggested that certainty of statutory reform is required. A simple provision that is read to the jury is needed which should extend to all offences against the person.[29] Virgo's suggestion is appealing as it ameliorates itself with the Law Commission proposals for clear labelling and simple language. As well as fulfilling the principle of legality requirements, it would make a marked practical difference to advocates, judges and juries. Judges would have a simpler task of explaining legal concepts, advocates would have a simpler task of presenting their evidence

[28] John Gardner, Rationality and the Rule of Law in Offences Against the Person (1994) 53 C.L.J 3, 502-523, 514.
[29] Graham Virgo, 'Offences Against the Person. Do-It-Yourself Law Reform' (1997) 56 C.L.J 2 251, 253.

without getting embroiled in disputes over legal terms but most importantly juries would have a simpler task of understanding legal jargon, enabling them to deliver a verdict based around an enhanced understanding of complex legal issues.

Virgo recognised that simplicity of provision was a necessary step forward long before the Law Commission made its recommendations. Jury trials are an important part of criminal evidence and in order for juries to deliver a safer verdict, understanding key legal issues are pivotal. The simplicity of legal language ensures that will happen but questions must be raised as to why it had taken so long to recommend a change to the law.

2.1.3 The Work of Michael Gibson

Long after the suggestion made by Graham Virgo, Michael Gibson provided an analytical commentary of the Law Commission Report. A large part of his article is dominated by the potential changes to the law on actual bodily harm and grievous bodily harm, but Gibson devoted a small section to discuss the reforms to assault and battery. It must be said that Gibson was an avid supporter of the report's manifesto, claiming that it is important that the common law roots of the actus reus elements are not lost and that the different harms portrayed by battery and assault will now be more accurately conveyed to the public as matters of fair warning.[30]

This view is difficult to support to a moderate extent. The common law roots, albeit helpful in detailing the technical elements of assault and battery, have been proven in this article to raise more questions than answers. It would be far more meaningful for any proposed code to detail the meanings of each technical element rather than leaving it to the discretion of judges to embellish terms. The idea of fair warning is the principle of giving enough warning to avoid negative consequences. This is moderately palatable because if the public is readily able to understand the difference between the requirements of assault and battery, then this will better govern the conduct of society where people are aware of the criminal liability imposed by positive law regulating both assault and battery.

Overall, Gibson's unquivering support for the Law Commission's motions is slightly misplaced. The importance of common law roots regarding assault and battery is largely deficient, given the analysis of this work in showing the imminence of assault and batteries being committed through omissions. The matter of fair warning is helpful but does not go far enough to warrant compelling reform. Virgo vehemently backs the proposals of the Law Commissions and although they are useful, the proposals are primitive and rudimentary. More clarification measures are needed to ensure that the law on assault and battery is fit for purpose, exemplified particularly by the need to adopt a simple, clear, statutory definition of key legal terms (such as "*imminent*") to make a notable difference.[31]

[30] Matthew Gibson, 'Getting their act together? Implementing statutory reform of offences against the person' (2016) 9 Crim L.R 597, 612.
[31] See pages 3 to 5 for a full discussion on '*imminence*'.

3. Concluding Thoughts and the Future

In conclusion, this article has assessed the status of the law on common assault, an offence combing the felonies of assault and battery. It has portrayed a subjective view that the law in this field is in dire need of reform, particularly with recourse to the issues of the imminence of assault and the misguided principle that omissions should result in a verdict of battery. The law causes significant difficulties practically and theoretically and retaining the current situation of the governance of assault and battery will lead to further confusion.

Regarding the future, any subsequent change will require sufficient Parliamentary interest in codifying the laws. The main proposals to date do not go sufficiently far to ignite any interest in creating positive law that regulates assault and battery. The disconnect of assault and battery from other offences against the person is concerning. Assault and battery are part of a larger framework and act as a foundation to establish higher forms of liability, so without a diligent root and branch review into how assault and battery can be properly reformed to fit in line with the principle of legality and avoid the continued practical difficulties, then the law on assault and battery will cause problems for criminal lawyers for years to come.

A Review on International Organisations' Actions and Influence on Environmental Law When Addressing an Environmental Problem Case Study – Climate Change

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Abstract

The influence on environmental law is of interest and relevance due to the effects of climate change which is seen throughout the world. It is unclear from research if the organisations which were directly created to tackle climate change, have achieved their aims or influenced environmental legislation and policies globally. Using peer-reviewed journals and government documentation, the literature used in this review evaluates the impact of environmental organisations on the development of environmental legislation. In particular, exploring the history of the two organisations[1], this review will discuss the actions of these organisations, the influence they have had in multiple environmental areas, and the challenges they have faced on the way.

The research from this review may help contribute to knowledge known in the environmental organisations and answer questions relating to the growth and purpose of environmental legislation. It will benefit policymakers and environmental academics to understand how vital these environmental organisations are in shaping environmental legislation and awareness globally.

Introduction

Environmental law bridges policy and action to protect the environment and encourage sustainable development by providing a supportive structure for the system of environmental governance[2]. Environmental awareness is reflected in a growth of environmental laws[3], both in the UK and internationally. The first recorded environmental law appeared in the 14th century with a man executed for burning coal in London which produced excessive smoke[4]. However, only in the 18th century was there evidence showing humans were causing environmental damage – despite this, protective legislation was very slow to appear[5].

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[1] Intergovernmental Panel for Climate Change 'About the IPCC' [2021] < https://www.the IPCC.ch/about/ > accessed on 23rd July 2021; United Nations Framework Convention on Climate Change, 'Process and Meetings' [2021] < https://unfccc.int/process-and-meetings#:2cf7f3b8-5c04-4d8a-95e2-f91ee4e4e85d, > accessed 21st July 2021.

[2] Hakeem Ijaiya, 'The Role of United Nations Environmental Programme (UNEP) to the Development of International Environmental Law' (2017) 3 Journal of Science Sciences 185.

[3] Nadia Rocha and others, 'Handbook of Deep Trade Agreements: Environmental Law Washington World Bank Group' [2020] 553.

[4] Stanley Johnson 'UNEP the First 40 Years A Narrative' [2012] United Nations Environmental Programme Nairobi: UNON < http://www.unep.org/40thanniversary/ >.

[5] David Hensher, *Handbook of Transport and the Environment* (4th edn, Amsterdam Boston Elsevier 2003).

Since the 1960s, there has been growing awareness of environmental movements, which has led to more demand for coordinated international cooperation focusing on the environment[6]. Since the seminal UNEP 1972 Stockholm Declaration, increased awareness has been crucial to ensure legislation is created to address the problem at hand: climate change (CC)[7]. In the modern era, environmental organisations seek to monitor, analyse, and protect the environment against misuse from humans from a local to global scale. The Paris Agreement (2015) and Rio Agreement (1992) are two examples of these organisations' influence on environmental law and awareness. The Intergovernmental Panel for Climate Change (IPCC) and United Nations Framework Convention for Climate Change (UNFCCC) are organisations produced by United Nations Environment Programme (UNEP) and World Meteorological Organisation (WMO) to spread awareness to policymakers on climate disaster[8]. Aided by IPCC assessment reports and Conference of the Parties (COP), these organisations considerably influence environmental awareness.

Most commonly, legislation production is not about the necessity of acts but their popularity and impact on privileged members of society. These organisations have influenced the awareness politicians have on the present danger, not in the sense of scientific clarity, but of corporate survival. The correlation between an increase and improvement in environmental laws and the development of the IPCC and UNFCCC is vital, but is one dependent on the other? This review aims to determine whether these two organisations have made a difference in environmental legislation, critically questioning whether the aforementioned actions have remained the organisation's aims.

History of International Regulatory Organisations

Environmental Awareness addresses all the philosophical and social movement regarding the concerns of the environment, and the protection applied towards it, and includes how people participate and how peoples' behaviours change[9]. Analysing the change in Environmental Awareness is fundamental to determining if the legislation is either being influenced by this change or is causing this change.

[6] Iris Borowy, 'Before UNEP: Who was in charge of the Global Environment? The Struggle for Institutional Responsibility' (2019) 14 Journal of Global History 87.
[7] Maria Ivanova, 'Assessing UNEP as Anchor Institution for the Global Environment: Lessons for the UNEO Debate' [2005] Yale Centre for Environmental Law and Policy Working Paper 05/01 < http://www.yale.edu/envirocenter/UNEO-wp.pdf > accessed 25th July 2021; I. Borowy, 'Before UNEP' (n.6) 87
[8] Jan Oosthoek, 'The IPCC and the Ozone Hole: A Warming from History' (2008) 5 Globalizations 63.
[9] Michiko Lizuka, 'Role of Environmental Awareness in Achieving Sustainable Development' [2016] Prepared for the project Enhancement of citizen's awareness in formulation of pollution control policies in major Latin American Cities Economic Commission for Latin America and the Caribbean (ECLAC) Environment and Human Settlements Division of ECLAC Santiago Chile.

Following the Stockholm Conference in 1972, environmental awareness increased dramatically, contributing to significant environmental legislation development [10]. Environmentalists' main issue was the decline in commitment once CC issues involved the economy and political stances[11]. The WMO, an intergovernmental organisation, significantly influenced the development of environmental organisations and has 193 member states[12]. It aims to establish a network of stations to promote the rapid exchange of meteorological information[13], and worked in unison with UNEP to create the IPCC and UNFCCC. UNEP, a direct result of the Stockholm Convention[14], can be considered the first step to modern environmental legislation and awareness, playing a significant role in developing international environmental law[15]. UNEP aims to "provide leadership by inspiring and informing nations to improve their quality of life without compromising that of future generations"[16]. With seven thematic areas (CC being one), UNEP produces documents and campaigns to increase environmental awareness and hosts conventions like the Bonn Convention and Rio Summit[17]. UNEP also developed the Montevideo Environmental Law Programme, which has been running since 1982, about promoting and implementing environmental law, conducted every ten years[18].

UNEP founded their success with their early work and called for a convention on CC [19]. This work led to international scientific efforts which reached an agreement on CC, in cooperation with WMO, creating the IPCC[20], with proven science and mitigation strategies formally suggested to policymakers as part of the organisation. Scientists volunteer to assess thousands of peer-reviewed journals to summarise knowledge known about the drivers of CC[21]. The IPCC assessments underline negotiations made at UN Conferences, as the IPCC was established to

[10] Derek Osbourn, 'Some Reflections on UK Environmental Policy 1970-1995' (1997) 9 Journal of Environmental Law 3.
[11] Derek Osbourn, 'Reflections on the UK Environmental Policy' (n.10) 3.
[12] World Meteorological Organisation, 'About Us' [2021] < https://public.wmo.int/en/about-us > accessed on: 20th July 2021.
[13] Cyril Gwam, 'World Meteorological Organisation (WMO)' [2012] 21 Yearbook of International Environmental Law 617.
[14] Maria Ivanova, 'Assessing UNEP as Anchor Institution' (n.7).
[15] Jan Petzold and others, 'Indigenous Knowledge on Climate Change Adaptation: A Global Evidence Map of Academic Literature' (2020) 14 Environmental Research Letters 113007.
[16] United Nations Environment Programme, 'About Us' [2021] < https://www.unep.org/about-un-environment > accessed on: 21st July 2021.
[17] United Nations Environment Programme, 'Environmental Rights and Governance' [2021] < https://www.unep.org/explore-topics/environmental-rights-and-governance > accessed on: 21st July 2021; Maria Ivanova, 'UNEP in Global Environmental Governance: Design Leadership Location' (2010) 10 Global Environmental Politics 30.
[18] Bharat Desai 'United Nations Environment Program [UNEP]' (2015) 26 Yearbook of International Environmental Law 609.
[19] Alan Hecht and Dennis Tirpak, 'Framework Agreement on Climate Change: A Scientific and Policy History' (1995) 29 Climatic Change 371; Laurence Mee, 'The Role of UNEP and UNDP in Multilateral Environmental Agreements' (2005) 5 International Environmental Agreements 227.
[20] Laurence Mee, 'The Role of UNEP and UNDP' (n.19) 227.
[21] Intergovernmental Panel for Climate Change, 'Reports' [2021] < https://www.the IPCC.ch/reports/ > accessed on: 23rd July 2021; Alistair Woodward and others, 'Climate Change and Health: On the Latest THE IPCC Report' 383 The Lancet 1185.

provide objective scientific information regarding natural, political, and economic impacts[22]. With three working groups providing insight into impacts, adaptation, and vulnerability respectively[23], the assessments they produce provide a concise summary – with the first assessment aiding the formation of the UNFCCC[24].

Established to combat "dangerous human interference with the climate system ", UNFCCC is the leading international treaty addressing CC, which evolved into the convention it is today[25]. With 154 states signing the treaty in Rio de Janeiro in 1992, it calls for ongoing research and regular meetings, negotiations, and policy agreements[26]. The UNFCCC also produced the annual COP, discussing the treaty's aims and assessing its progress in dealing with CC[27] (UNFCCC, 2020). The evolution of these four organisations has paved the way for environmental development. The focus will be on the IPCC and UNFCCC, essential to modern development.

Actions of the IPCC and UNFCCC

In their 40 active years, the IPCC and UNFCCC have been responsible for many beneficial actions. The First Assessment Report (FAR), published in 1990 by the IPCC, led to the development of the UNFCCC which separately influences environmental legislation[28] . The Second Assessment (SAR) in 1995 provided material for governments to draw from in the run-up to the adoption of the Kyoto Protocol in 1997 and is a prime example of an action that has influenced environmental law [29]. The Kyoto Protocol was agreed by 192 parties, which operationalised the UNFCCC by committing Annex 1 (industrialised) countries and economies to reduce Greenhouse Gas (GHG) emissions as per the agreed targets [30]. This target encompasses the purpose of the UNFCCC, which is to combat negative human impacts on the

[22] Intergovernmental Panel for Climate Change, 'About the IPCC' (n.1); Laurent Drouet and others 'Selection of Climate Policies Under the Uncertainties in the Fifth Assessment Report of the IPCC' (2015) 5 Nature Climate Change 937.
[23] Laurent Drouet, 'Climate Policies' (n.22).
[24] Yun Gao and others, 'The 2°C Global Temperature Target and the Evolution of the Long-Term Goal of Addressing Climate Change- From the United Nations Framework Convention on Climate Change to the Paris Agreement' (2017) 3 Engineering 272.
[25]Jane Leggett, 'The United Nations Framework Convention on Climate Change the Kyoto Protocol and the Paris Agreement: A Summary' [2020] Congressional Research Service.
[26] Miwa Kato, 'Chapter 3: Disaster Risk Reduction under the United Nations Framework Convention on Climate Change' (2010) 4 Community Environment and Disaster Risk Management 47.
[27] United Nations Framework Convention on Climate Change, 'Past Conferences' [2021] < https://unfccc.int/process-and-meetings/conferences/past-conferences/past-conferences-overview > accessed 26th July 2021.
[28] Intergovernmental Panel for Climate Change, 'About the IPCC' (n.1).
[29] Navraj-Singh Ghaleigh, 'Science and Climate Change Law – the Role of the IPCC in International Decision Making' [2017] The Oxford Handbook of International Climate Change Law Oxford UK Oxford University Press 56.
[30] Yoshiki Yamagata and others, 'A Contingency Theory of Policy Innovation: How Different Theories Explain the Ratification of the UNFCCC and Kyoto Protocol' (2013) 13 International Environmental Agreements 251.

environment[31]. In 2001 the Third Assessment (TAR) focused its attention on CC and adaptation needs with more sophisticated modelling [32], and the Fourth Assessment (AR4) in 2007 laid the groundwork for the post-Kyoto agreement [33].

The UNFCC focuses solely on addressing CC in terms of human interference and how its reports changes policy and legislation[34]. Through many established international protocols and conferences, the UNFCCC's aim has been successfully met with annual COP Meetings held [35], which are annually help with the aim of reviewing the national communications and emission inventories submitted by all parties [36]. There have been many influential COPs, resulting in essential policies, legislation, and protocols. The 1997 COP2 resulted in the Kyoto Protocol agreements to reduce GHG emissions in Annex 1 countries after agreeing that emissions at the time were inadequately registered [37]. Annex 1 countries inlcude industrialised countries and countries with economies in transition. They encompass developed countries and countries undergoing to process of transitioning to a market economy. The Kyoto Protocol had two commitment periods, between 2008-2012 and 2013-2020, established in the Doha Agreement [38]. COP21 in 2015 resulted in the adoption of the Paris Agreement, which was the largest gathering of world leaders in history [39]. Now that the Kyoto Protocol period has ended, COP26 in Glasgow in November 2021 is crucial for establishing the next steps[40]. While Paris was the conference of fossil fuels, COP26 is now known to focus on deforestation and agro-industrial land abuse[41] . Not only have all parties agreed to end deforestation by 2030, but they have also pledged to bring CO2 global emissions down by a quarter [42]. Competing with COP25

[31] Raluca Raducu and others, 'Climate Change and Social Campaigns' (2020) 13 Journal of Medicine and Life 454.
[32] Erin Roberts, 'Coming Full Circle: The History of Loss and Damage under the UNFCCC' (2015) 8 International Journal Global Warming 141.
[33] Peter Bosch, Bert Metz, 'Options for Mitigating Climate Change Results of Working Group III of the Fourth Assessment Report of the IPCC' [2011].
[34] United Nations Framework Convention on Climate Change, 'Process and Meetings' (n.1); Raluca Raducu 'Climate Change and Social Campaigns' (n.31).
[35] United Nations Framework Convention on Climate Change, 'Process and Meetings' (n.1).
[36] United Nations Framework Convention on Climate Change, 'Past Conferences' (n.27) ; Navraj-Singh Ghaleigh, 'Science and Climate Change Law' (n.29).
[37] United Nations Framework Convention on Climate Change, 'Kyoto Protocol' [2021] < https://unfccc.int/kyoto_protocol > accessed 26th July 2021; Raluca Raducu, 'Climate Change and Social Campaigns' (n.31).
[38] Anil Gupta, 'Climate Change and Kyoto Protocol: An Overview' [2016] Handbook of Environmental and Sustainable Finance 3-23.
[39] Keith Peterman, 'Introduction: Contentious Journey from Rio to Paris and the Path Beyond' (2019) 9.
[40] John Vogler, 'The International Politics of COP26' (2021) 136 Scottish Geographical Journal 31-35.
[41] United Nations Framework Convention on Climate Change, 'The Paris Agreement' [2021] < https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement > accessed 26th July 2021.
[42] United Nations Framework Convention on Climate Change, 'Pivotal Progress Made on Sustainable Forest Management and Conservation' [2021] < https://unfccc.int/news/cop26-pivotal-progress-made-on-sustainable-forest-management-and-conservation, > accessed 11th November 2021.

being the longest COP on record, the two-week summit has yet to reach an agreed consensus after the passed deadline [43].

Effects of the IPCC and UNFCCC

The IPCC Assessments strongly influence environmental legislation, as demonstrated by the literature explosion occurring in the 1990s [44]. During FAR, there were less than 1500 studies on CC; for the most recent AR5, this has increased to 110,000 [45]. Hence the IPCC reports had more peer-reviewed journals in their assessments [46]. The IPCC has operated successfully at the science-policy interface, with its assessment process becoming a role model in the field of environmental assessments [47].

In the early 1990s, the Green Party won multiple votes in the European Election and prompted British Prime Minister, Mrs Thatcher, to turn her attention to environmental issues [48]– showing that public opinion for environmental concern swayed the political stances at this time. Public opinion encourages policies to be put in place, hence the influence of legislation using this pathway. New policy initiatives were produced [49], establishing Environment Agency in the UK [50]. Although the IPCC and UNFCCC did not directly produce the UK Acts such as Environment Act 1995, the increasing awareness of climate issues and the need for legislation globally helped push the British Government forward. The Convention of Biological Diversity was established at the Rio 1992 Summit, and it has been incorporated into UK and EU legislation [51], clearly influenced by this Convention. Other legislative acts are based on UNEP conventions, such as the Basel Convention on Hazardous Wastes and the Bonn Convention on Conservation of Migratory Species, which then influenced IPCC and UNFCCC actions[52].

The IPCC reports have vital political importance, as they have been instrumental in intergovernmental and national climate policy [53]. The 1996 SAR paved the way for the Kyoto

[43] Daisy Dunne, 'Delegates Anxiously Await a Deal as COP26 Goes into Extra Time' The Independent 12th November [2021] < https://www.independent.co.uk/climate-change/news/cop26-glasgow-final-agreement-climate-b1956846.html > accessed 13th November 2021.
[44] Samuel Fankhauser and others, 'Does International Factors Influence the Passage of Climate Change Legislation' (2016) 16 Climate Policy 318; Jan Minx and others, 'Learning about Climate Change Solutions in the IPCC and Beyond' (2017) 77 Environmental Science and Policy 252.
[45] Jan Minx, 'Learning about Climate Change Solutions' (n.45).
[46] Jan Petzold, 'Indigenous Knowledge on Climate Change Adaptation' (n.15) 113007.
[47] Jan Minx, 'Learning about Climate Change Solutions' (n.45).
[48] Derek Osbourn, 'Reflections on the UK Environmental Policy' (n.10) 3.
[49] Derek Osbourn, 'Reflections on the UK Environmental Policy' (n.10) 3.
[50] Mike Hulme, Martin Mahony, 'Climate Change: What do we know about the IPCC?' (2010) 34 Progress in Physical Geography: Earth and Environment 705 ; Tim Jewell Jan Steele 'UK Regulatory Reform and The Pursuit of 'Sustainable Development: The Environment Act 1995' (1996) 8 Journal of Environmental Law 283.
[51] United Nations, 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992' [1997] < https://www.un.org/en/conferences/environment/rio1992 > accessed: 20th July 2021.
[52] United Nations, 'Conference on Environment and Development' (n.52).
[53] Intergovernmental Panel for Climate Change, 'Reports' (n.21).

Protocol to address GHG concentrations [54]. The Kyoto Protocol, proposed by the UNFCCC COP3 in 1997, required Annex 1 countries to reduce their GHG emissions by 5.2% – 29% cut compared to expected levels in 2010, before the Protocol [55]. At the time of the Kyoto Protocol, there were less than 40 relevant CC laws – and by 2013, this increased to around 500 [56], highlighting a strong correlation between the Kyoto Protocol and an increase in the number of legislations leading to a new wave of international "green policies" [57]. International treaties, such as the Kyoto Protocol, offer a more direct and centralised approach to policy coordination [58]; however, evidence also suggests that there was a period of lower legislative activity prior to the Kyoto Protocol [59]. They were perhaps indicating that the Kyoto Protocol imposed commitments to a few countries, which took longer to materialise into legislation [60]. The IPCC is a compelling actor in predicting policy, as it is proactive in forming recommendations and not just forecasting them [61]. The IPCC can exercise its political power wisely and maintain a possibility for political action and open negotiation [62].

The COP meetings are known to change political dynamics and ease the transition of environmental legislation [63]. Although there is a meeting every year, multiple conferences have failed to impact the production of environmental legislation [64]. For example, the COP15 2009 is regarded as a failure, as world leaders rejected the continuation of any political advice to continue GHG reductions after the Kyoto Protocol [65]. Nevertheless, this set the conditions for the success of the Paris Agreement [66]. The Doha Amendment contained the second commitment period of the Kyoto Protocol from 2013-2020 and the need for the Paris Agreement [67], governing CC reduction measures from 2020 onwards [68]. Vogler (2021) argues that the outlines of Paris were noticeable due to the disappointing outcome of the Copenhagen

[54] Joeri Rogelj, Reto Knutti, 'Geosciences After Paris' (2016) 9 Nature Geoscience 187.
[55] Geoff Levermore, 'A Review of the IPCC Assessment Report 4 Part 1: the IPCC Process and GHG Emission Trends for Buildings Worldwide' (2008) 29 Building Services Engineering Research and Technology 349.
[56] Samuel Fankhauser, 'International Factors Influence on Climate Legislation' (n.45).
[57] V. Ramiah and others, 'Environmental Regulation the Obama Effect and the Stock Market: Some Empirical Results' (2014) 47 Applied Economics 72.
[58] Yoshiki Yamagata, 'How Different Theories Explain UNFCCC Ratification' (n.30).
[59] Samuel Fankhauser, 'International Factors Influence on Climate Legislation' (n 45).
[60] Samuel Fankhauser, 'International Factors Influence on Climate Legislation' (n45).
[61] Candice Howarth, James Painter, 'Exploring the Science-Policy Interface on Climate Change: The Role of the IPCC in Informing Local Decision-Making in the UK' (2016) 2 Palgrave Communications 16058.
[62] Silke Beck, Martin Mahony, 'The IPCC and the New Map of Science and Politics' (2018) 9 Wiley Interdisciplinary Reviews: Climate Change 547.
[63] Samuel Fankhauser, 'International Factors Influence on Climate Legislation' (n45).
[64] Harro Van Asselt and others, 'Understanding the Paradoxes of Multi-Level Governing: Climate Change Policy in the European Union' (2012) 12 Global Environmental Politics 43.
[65] Lisa Vanhala, Cecilie Hestbaek, 'Framing Climate Change Loss and Damage in UNFCCC Negotiations' (2016) 16 Global Environmental Politics 111.
[66] Charles Parker and others, 'Assessing the European Union's Global Climate Change Leadership: From Copenhagen to the Paris Agreement' (2017) 39 Journal of European Integration 239.
[67] Anil Gupta, 'Climate Change and Kyoto Protocol' (n39).
[68] Lukas Hermwille and others, 'UNFCCC Before and After Paris: What's Necessary for an Effective Climate Regime?' (2017) 17 Climate Policy 150.

COP15[69]. As the COP was unable to adopt an agreement [70], the EU worked hard to provide answers leading up to COP21 in Paris [71] – however, some believe that Paris was not a success. Young (2016) argues that reducing the global temperature by 1.5°C is unrealistic and seems ill-defined and weak[72]. Nevertheless, he admits that it holds multiple scenarios with multiple possible outcomes[73].

In contrast with the Kyoto Protocol, the Paris Agreement called for 195 countries' signatories (including non-industrialised), agreeing that wealthier nations should provide finance and technology to aid developing countries to enable them to act against CC[74]. The 2021 COP26, which was postponed for one year due to the COVID-19 pandemic, needs to address the continuation of the Kyoto Protocol, as the Doha Agreement expired in 2020 [75]. COP26 is also the first conference with 'net zero' carbon emission targets [76], with the critical goal to maintain a lower temperature than 1.5 degrees increase compared to pre-industrial levels, in accordance with the IPCC Governmental Report AR4 [77]. The news awareness for COP26 is significantly greater than any other COP due to modern media, which is the deciding factor in environmental knowledge and influence, evident in the contrast of influence in developed and developing countries [78].

The process of policymaking within the UNFCCC has a catalytic function in explaining the physical challenges of CC in socio-economic systems [79], contributing to mitigation which has shaped the structure of socio-economic systems, such as living occupation and education [80]. The UNFCCC has become a forum for society, businesses, and communities, which shows how it has been successful in its aims[81]. It can be argued that it has had a profound impact on the routines of environmental policy as it introduces new ideas which direct to a more source-based and integrated basis for policy[82].

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[69] John Vogler, 'International Politics of COP26' (n.41).
[70] Jane Legget, 'The UNFCCC the Kyoto Protocol and Paris Agreement' (n.25); Harro Van Asselt 'Climate Change Policy in the European Union' (n.65).
[71] Charles Parker and others, 'Assessing the European Union's Global Climate Change Leadership' (n.67).
[72] Oran Young, 'The Paris Agreement: Destined to Succeed or Doomed to Fail?' (2016) 4 Politics and Governance 124.
[73] Oran Young, 'The Paris Agreement' (n.73).
[74] Keith Peterman, 'Journey from Rio to Paris (n.40).
[75] Mark Maslin, 'The Road from Rio to Glasgow: A Short History of the Climate Change Negotiations' (2020) 136 Scottish Geographical Journal 5.
[76] Mark Maslin, 'The Road from Rio to Glasgow' (n.76) 5.
[77] Boris Solier, 'Coping with Climate Crisis. Mitigation Policies and Global Coordination' (2019) 8 Economics of Energy and Environmental Policy; Joeri Rogelj 'Geoscience After Paris' (n.55).
[78] Francisco Magno, 'Media and Environmental Change' (2007) 8 A Journal of Social Justice 41.
[79] Lukas Hermwille, 'UNFCCC Before and After Paris' (n.69).
[80] Christine Wamsler and others, 'Enabling New Mindsets and Transformative Skills for Negotiating and Activating Climate Action: Lessons from UNFCCC Conferences of the Parties' (2020) 112 Environmental Science and Policy 227.
[81] Lukas Hermwille, 'UNFCCC Before and After Paris' (n.69); Lisa Vanhala 'Framing Climate Change Loss and Damage' (n.66).
[82] Andrew Jordan, Timothy O'Riordan, 'The Precautionary Principle in UK Environmental Law and Policy' [1992] UK Environmental Policy in the 1990s 57; Lukas Hermwille, 'UNFCCC Before and After Paris' (n.69).

Challenges Facing the IPCC and UNFCCC

Developing countries have recognised the political power of the IPCC and have suggested the need for fair representation[83], as their participation is crucial to help combat CC[84]. Many developing countries do not trust assessments in which their scientists and policymakers have not participated[85]. There also lacks a UNFCCC 'loss and damage' section[86], which would help developing countries feel secure, with the promise of compensation and rehabilitation for those affected by CC[87].

The IPCC struggled to keep up with the exponential growth in CC literature following the Literature Explosion[88]. However, when the IPCC gained recognition, their employee numbers increased rapidly to address this following the 1992 Earth Summit [89]. There are also concerns over the directness of language in the IPCC assessments and a lack of recognition in terms of the significance of uncertainties referenced regarding the policymakers [90]. For an assessment that is so future-orientated, the inclusion of future research, especially in AR4, was relatively thin [91]. The environmental community relies on science to sway public opinion[92], with efforts to influence political processes being more superficial in the 1980s [93]. The IPCC has been a remarkable success, organising climate science in such a way to show urgency and bring senior decision-makers from national governments to make adaptive legislation and policy[94].

Despite this, there are criticisms about scientists involved in environmental organisations, saying they are "too removed from the real world of politics" and make unrealistic goals for policymakers [95]. Yet without the decision made by science, there is little else to be used. Adelle *et al.* (2020) argues that having scientists involved in policymaking is common sense: scientists can use science to communicate their claims, producing policy from scientific importance and not political bias[96]. Environmental legislation considerations in parliament are frequently tied to economic concerns through vanishing resources and loss of profit in organisations, causing environmental policies to be designed purely to maintain an existing

[83] Silke Beck, 'IPCC and New Map of Science and Politics' (n.63).
[84] Lisa Vanhala, 'Framing Climate Change Loss and Damage' (n.66).
[85] Mike Hulme, 'What do we know about the IPCC?' (n. 51).
[86] Erin Roberts, 'The History of Loss and Damage under the UNFCCC' (n.32); Joeri Rogelj, 'Geoscience After Paris' (n.55).
[87] Yoshiki Yamagata, 'How Different Theories Explain UNFCCC Ratification' (n.30).
[88] Jan Minx, 'Learning about Climate Change Solutions' (n.46).
[89] Shardul Agrawala, "Context and Early Origins of the IPCC" (1996) 39 Climatic Change 605-620.
[90] John Zillman, 'The IPCC: A View from the Inside' (1997) 11 Proceedings of Conference on Countdown to Kyoto Canberra.
[91] Mike Hulme, 'What do we know about the IPCC?' (n. 51).
[92] Richard Pouyat, 'Science and Environmental Policy- Making them Compatible' (1999) 49 BioScience 281.
[93] Richard Pouyat, 'Science and Environmental Policy' (n.93).
[94] Navraj-Singh Ghaleigh, 'Science and Climate Change Law' (n.29).
[95] Richard Pouyat, 'Science and Environmental Policy' (n.93).
[96] Camilla Adelle and others, Making Sense Together: The Role of Scientists in the Coproduction of Knowledge for Policymaking (2020) 47(1) Science and Public Policy 56.

economic system[97]. This produces concern that legislation will not be produced if the economy becomes an affecting factor [98]. The Ozone Depletion is a perfect example, whereby science is discovered to prove an environmental problem. Politicians address the issue rapidly due to the minor economic percussions of banning chlorofluorocarbon. With CC, it is a different matter, as energy supply needs to be adapted; resources need to be replenished and saved – which has clear consequences on the economy[99]. It is seen as too difficult to solve due to expense and economic disrupt, not because it is unfixable. However, with many factors to consider in terms of risk, impacts and country, the economic cost on the continuation of carbon use and fossil fuels is predicted to be higher than the cost of renewable energy alternatives, due to being long-lived and affecting generations[100].

Conclusion

International organisations, in particular the IPCC and UNFCCC, can be seen to have had an influence on environmental law due to the legislation put in place after these organisations published specific reports. In tandem with the IPCC reports, there was an increase in scientific studies on CC, which may not have received the recognition without them. Consequentially, politicians noticed the rise in environmental awareness, causing policy and public opinion to change. Not only has public opinion increased towards environmental issues, but environmental legislation has been developed solely due to the Conventions and Conferences that have occurred due to these two organisations. The 1990 IPCC First Assessment had high influence, leading to the development of the Global Treaty UNFCCC – leading to the Kyoto Protocol, Paris Agreement and Glasgow COP26; three examples of intense CC negotiations which have changed the world, all dependent on Environmental Organisations.

There are many aspects to consider accepting that the organisations have influenced environmental legislation development entirely – but the fact that the public now cares about CC is purely down to the increase in public awareness these organisations raised. As the activities of these organisations increased and gained popularity, so did political awareness on environmental science, particularly CC. As IPCC reports were introduced, peer-reviewed literature addressing CC also increased, raising awareness of environmental concerns. Social and political awareness that arises when these organisations act pushes the Government to

[97] Iris Borowy, 'Before UNEP' (n.6) 87.
[98] Iris Borowy, 'Before UNEP' (n.6) 87; S. Sanneh 'Climate Change Adaption' [2018] Thinking for Sustainable Development Springer Cham 41.
[99] Camilla Agrawala, "Structural and Process History of the Intergovernmental Panel on Climate Change" (1998) 39 Climatic Change 621-642.
[100] Maximilian Auffhammer, 'Quantifying Economic Damages from Climate Change' (2018) 32 Journal of Economic Perspectives 33; Sorana Vatavu and others 'Addressing Oil Price Changes Through Business Profitability in Oil and Gas Industry in the United Kingdom' (2018) 13 PlOs ONE.

produce environmental legislation, thus supporting the statement that international organisations have influenced environmental legislation.

A better politics of crime? A critical analysis of the argument for insulating penal policy from political contestation

*Lucas Moran**

Abstract

Since the end of the 20th century, penal populism has been on the rise. This rise has resulted in most major political parties in western countries adopting a tough approach to crime to maintain their popularity with the electorate. This 'penal arms race' between major parties results in impractical and draconian criminal justice policy, which has the disastrous effect of overcrowding an already financially strained prison system.

In a political environment where being seen as soft on crime is electoral suicide, the argument in favour of insulating and therefore depoliticising penal policy through an independent body is an intriguing one for academics. This paper will examine this argument, drawing on the history of penal populism up to the present day and reasons for its influence in the UK, before looking at the proposition for a National Centre for Criminal Justice Excellence ("NICJE").

When looking at the current state of penal policy in many countries, particularly those in the West such as the UK and the US, the depoliticisation of criminal justice is a tempting proposition. The rise of penal populism at the end of the 20th century, particularly in Western, neo-liberal democracies, has led to massive and unsustainable prison populations in an era of austerity.[1] This in turn has resulted in extremely poor prison conditions and record levels of prisoner violence and self-harm.[2][3] In examining this question, the justifications for insulation from politics will be examined by looking at the culture of control and political economy. Whilst acknowledging that penal populism is causing great issues in how penal policy is developed, it will be concluded that outright insulation through an independent body is not the answer and that instead the democratisation of criminal justice and the encouragement of societal engagement in penal policy is a preferable approach when searching for a better politics of crime.

In the middle part of the 20th century 'penal welfarism' formed part of a 'bipartisan consensus', where all political parties in the UK shared very similar policies in regards to law and order. These policies were largely non-punitive, and were often alternatives to imprisonment, such as

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[1] Roy Walmsley, *'World Prison Population List'* ICPR, 12th ed, [2018].

[2] Gov.UK, 'Safety and Order' (April 2019-March 2020) <https://data.justice.gov.uk/prisons/safety-and-order/> accessed 1st April 2021.

[3] Ministry of Justice, 'Safety in Custody Statistics, England and Wales*'* 2018', 1.

probationary work.[4] However, in the 1970s and onwards, a loss of faith in the power of the state to reform offenders and reduce crime, led to the onset of a decades long trend of increasingly punitive measures.[5] The conservatives won three consecutive elections, whilst portraying themselves as the party of law and order, making use of an antagonistic 'two nations strategy' where the unproductive, criminals, immigrants and unemployed were painted as having blatant "disrespect for the rule of law".[6] Hall referred to this kind of political electioneering as 'authoritarian populism', whereby a party takes part in *"forming public opinion, then, disingenuously, consulting it".*[7]

Events such as the miners strikes in the mid-1980s being painted as issues of law and order as opposed to issues of class struggles can help exemplify this.[8] This was not a solely UK phenomenon. In the US, law and order was a key factor in Bush defeating Dukakis in the 1988 US presidential election, where Bush successfully tapped into many existing prejudices among the populace and successfully portrayed his opponent as being 'soft on crime'.[9]

These trends made it clear that political parties could not be anything less than 'tough on crime', and this resulted in what Newburn termed the 'second bipartisan consensus'.[10] One where every major political party was engaged in a penal 'arms race', where if a party backed down from a tough stance towards penal policy, its popularity with the electorate would suffer dramatically.[11] A consistent factor throughout this was the perpetual portrayal of criminals as being fundamentally bad people. A white paper from 1990 captures this unforgiving perception well: *"Much crime is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad or pathetic lives"*[12]

Penal populism in the UK continued into the 21st century through the advent of new labour, who were successful in outdoing the Conservative party on crime. Under the leadership of Tony Blair, the Labour party took on many policies and types of language that had previously been completely alien to the left wing party. Terms such as the "hardened criminal class, the anti-social lout and the migrant" show that the Labour party was not straying far from its Tory predecessors.[13] It was clear that penal populism had truly arrived. Policies were not adopted because they aligned with a party's ideology, or because they truly believed them to be good

[4] Tim Newburn, *Criminology* (3rd edition, 2017, Abingdon: Routledge), 108.
[5] ibid, 110.
[6] Richard Garside, 'Prisons and Politics' (2020) Prison Service Journal 250, 6.
[7] Stuart Hall, 'Drifting into a Law and Order Society' (1979) London: Cobden Trust, 39.
[8] Richard Garside, 'Prisons and Politics' (2020) Prison Service Journal 250, 6.
[9] Tim Newburn, *Criminology* (3rd edition, 2017, Abingdon: Routledge), 114.
[10] ibid; 117.
[11] ibid, 116.
[12] Home Office, Crime, Justice and Protecting The Public (Cm 965, 1990), 6.
[13] Richard Garside, 'Prisons and Politics' (2020) Prison Service Journal 250, 11.

ideas, but because they would be popular with the electorate and were essentially, non-optional.[14]

Although this fervour for punitive crime policies has made way largely for other policy concerns such as immigration or Brexit, there is still plenty of evidence that a strong stance on law and order is necessary for a successful electoral campaign. David Cameron was immediately slammed in the press (particularly the right wing tabloid press) for suggesting a downsizing of prisons and accompanying reforms for prisoners seeking employment after release.[15] The sun published the headline, "*Hide crimes and misdemeanours:*

PM says lags can lie on CVs".[16]

The extremely successful Conservative 2019 election campaign, behind the primary policy of 'Getting Brexit Done', had a strong message regarding law and order, where large numbers of extra police and tougher sentences for criminals were promised.[17] It is clear that the UK (and other Western countries), is still in an age of penal populism, and open debates about penal policy are often dismissed if they are not sufficiently punitive towards offenders. Considering the lack of success these punitive policies have had, it is consequently understandable that some are frustrated with penal policy coming to an unproductive standstill.[18] Some who hold this view are therefore in favour of radical change which will prevent penal policy going round in circles.

It can be argued that the 'rise of the public voice' which penal populism symbolises, stunts debate around penal policy. This alongside the rising influence of the tabloid press puts too much pressure on policymakers to make impartial and informed decisions.[19] Those such as Lacey argue that criminal policy development has to be 'insulated', by taking it out of the public realm and thereby depoliticising it.[20] These proposals suggest bringing criminal justice policy into the remit of an independent body, such as a Royal Commission or National Institute for Criminal Justice Excellence.[21] This would be part of an effort to exclude the "malleability of public opinion"[22] from policy development, which is too fast changing and emotional for an area of public debate.

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[14] Anthony Bottoms, 'The philosophy and politics of punishment and sentencing' in Clarkson and Morgan, 'The Politics of Sentencing Reform, (1995) Oxford: Oxford University Press.

[15] Chris Greer and Eugene Mclaughlin, 'Breaking Bad News: Penal Populism, Tabloid Adversarialism and Brexit' (2018) The Political Quarterly, 89, 211-212.

[16] ibid, 211.

[17] The Conservative and Unionist Party Manifesto (2019) 17.

[18] Prison Reform Trust, 'Prison: The Facts' (2019).

[19] Harry Annison, *Dangerous Politics* (Oxford: Oxford University Press, 2015) 196.

[20] Nicola Lacey, 'The Prisoners' Dilemma: Political Economy and Punishment' in 'Contemporary Democracies' (2008) Cambridge: Cambridge University Press 181.

[21] Ian Loader, 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice' (2010) Current Legal Problems 73.

[22] Harry Annison, *Dangerous Politics* (Oxford: Oxford University Press, 2015) 198.

Examples of public opinion being shifted quickly are numerous, such as the 'Sarah's Law' campaign by News of the World which led to new laws regarding child sex offenders.[23] A more recent example would be the death of PC Andrew Harper, and the attempts of his family to implement similarly punitive laws against offenders whose actions result in the death of emergency service workers.[24]

One of the key reasons behind the argument of depoliticisation is that penal policy can never be fully independent from external pressures whilst the public opinion is so vital in shaping the actions of policymakers. This was evidenced by what Pratt and Anderson termed a "revolt against uncertainty" [25] , and something David Garland expanded on in his work. David Garland in his book, 'The Culture of Control', explains the changes in penal politics at the beginning of the 21st century as attempts by the state to bring back control, or at least portray themselves as in control.[26] [27] Implementation of law such as Sarah's law serve as examples of this, and are examples of the state 'flexing its muscles' in the realm of law and order, despite their other failings in regards to overall policy.

Garland's work shows how the state's law and order policymaking has become more about managing risk than actually tackling crime. Preventative measures such as security locks and stranger danger campaigns help to reduce crime but also treat it as a routine occurrence. This 'criminology of the self' as Garland terms it, places the impetus on the individual to prevent crime, rather than the ill-equipped state.[28]

Alongside this, however, a 'criminology of the other' still persists, and is resonant of the 'us vs them', 'two nations strategy', discussed earlier. This alternative method of control exists to demonise the criminal and other unwanted groups, in an attempt to manipulate public opinion to support penal measures by the state.[29] This also involves the prominence of victims in the media, with the victims seemingly having to be satisfied with outcomes, predictably leading to more punitive results.[30] These public lashings out towards newly publicised offenders are effectively acting as cover for state failings in controlling crime rates and help push the message of the illusory 'bad guys' who can only be caught through newer and more punitive measures.

In his 1996 paper, Garland highlights the opinions of Nietzsche and Durkheim. This key opinion being that "*strong political regimes have no need to rely upon intensely punitive*

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[23] ibid, 189.

[24] G Laud (2020), 'Andrew's Law - what is it? Petition to jail PC Harper killers for murder reaches 368k '<https://www.express.co.uk/news/uk/1319371/andrews-law-what-is-andrews-law-PC-Andrew-harper-killers-petition>.

[25] John Pratt and Jordan Anderson, *Risk and the Revolt against Uncertainty* (Basingstoke: Palgrave, 2020) 1.

[26] David Garland, 'The Limits of the Sovereign State' (1996) *British Journal of Criminology* 36(4) 445-471.

[27] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: OUP 2002).

[28] David Garland, 'The Limits of the Sovereign State' (1996) *British Journal of Criminology* 36(4) 446.

[29] Ibid.

[30] ibid; 456.

sanctions".[31] Garland's work shows how the current penal strategy lacks any kind of broader goal, other than risk management policies designed to shift the burden onto individuals and organisations, and attempts to blame the perennial 'them'.[32] The assertions of penal sovereignty made by the state lack any goal other than to perpetuate a false sense of control, in stark contrast to the penal welfarism of the mid-20th century, which at least had broader social goals such as reducing inequality and achieving an overall sense of solidarity within communities.[33] Garland's work is highly relevant to the argument of those in favour of insulation, as it shows how in the 21st century, penal policy is lacking any kind of a clear direction, and a strong independent body could provide that.

The work of Nicola Lacey in regard to political economy continues to justify the insulation position, as it helps to show how the culture of control and punitive penal policy in general are seemingly inevitable within the context of a neo-liberal democracy such as the UK.[34] Lacey's studies looked at how different nation states compared in relation to their imprisonment rate and to how their economy was structured generally. Liberal market economies such as the USA, South Africa, New Zealand and England and Wales had significantly higher imprisonment rates in comparison to other nation states with more left leaning market economies.[35] In particular, the Scandinavian countries with their still surviving social democracies, have much lower imprisonment rates.[36] Sweden for example had almost half the rate of England and Wales and 10x less the rate of the USA.[37] These social democracies, whose markets are premised on inclusion of the entire populace, have far more impetus to rehabilitate rather than imprison their population, because not only is it central to their culture of solidarity, but it is also central to their closely coordinated economy.[38]

In contrast, the UK as a liberal market economy has a much less involved government approach to the market, and instead emphasises deregulation and free trade.[39] The country is far more individualistic in nature and emphasises innovation and entrepreneurship over stability.[40] It seems natural, therefore, that this kind of economy would be far more inclined towards an exclusionary and punitive form of penal policy, especially due to the 'surplus of unskilled labour'.[41] This is the basis for Lacey's argument that the neo-liberal economy's disposition for harsh penal policy is a direct by-product of heavily entrenched economic and social factors.

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[31] ibid, 445.
[32] ibid, 466.
[33] Ibid.
[34] Nicola Lacey, 'The Prisoners' Dilemma: Political Economy and Punishment' in 'Contemporary Democracies' (2008) Cambridge: Cambridge University Press 55.
[35] ibid, 60.
[36] ibid, 60.
[37] ibid, 60.
[38] ibid, 88.
[39] ibid, 85.
[40] ibid, 59.
[41] ibid.

Therefore, when left to its own devices, the culture of control and penal populism are inevitable, and as such penal policy debate must be sheltered from such undesirably selfish influences.

The electoral arrangements of the neo-liberal nations are also causative of penal policy punitivity. Governments successfully elected through first past the post, majoritarian systems are effectively the leaders in an 'elective dictatorship' and can therefore largely pursue policy unhindered and without any real debate.[42] For example, the current Conservative government with its large majority, can in theory pass any law it wishes as long as most of its party members vote in favour of it. This will result in a party being able to progress with an agenda as punitive as it pleases.

Meanwhile, most other western countries, in particular the social democracies in Scandinavia and the centrist European countries such the Netherlands and Germany, make use of proportional representation based voting systems.[43] Meaning the governments are often made up of more than one party, this inevitably drags much of successful legislation back towards the centre of the political spectrum, and as such is rarely harsh and exclusionary to the extent of the US or the UK.[44] Single issues parties such as the Greens often find getting a political footing easier in PR systems, whereas in majoritarian systems, 'well-organised single issue pressure groups' are highly prevalent.[45] These can also include those representing victims of crime, such as the aforementioned Sarah's law campaign.[46] In attempts to win over the 'floating, median voters' typical of a majoritarian system, governments will often adhere to the requests of these pressure groups if they believe the policy will win votes. Especially since the process for granting their demands is often simple, such as passing legislation through the parliament they control.

Whilst these kinds of victims' movements are not non-existent in other nations, their capability to influence change is severely hindered because the government is rarely made up of a singular political party. Instead, any kind of change has to go through the inter-party debate typical of a PR coalition government, showing how other nations penal policy is more insulated than that of majoritarian, neo liberal countries.

The neo-liberal market state also has an issue when it comes to working well with bureaucrats. Because of the polarising political environment that is often present in these nations, if a civil servant is not seen as having acted politically neutral or to have not carried out instructions from a minister exactly they are often lamented.[47] In the UK, there is evidently a sense that whatever a minister says, goes.[48] This is less the case in coordinated market economies, where

[42] ibid, 66.
[43] ibid, 65-66.
[44] ibid, 65-66.
[45] ibid, 69.
[46] ibid, 68.
[47] ibid, 72-74.
[48] Harry Annison, *Dangerous Politics* (Oxford: Oxford University Press, 2015) 192.

the coalition governments are far less polarising and political loyalty is not always expected.[49] In neo-liberal market economies, governments have begun appointing their own political advisors and to ignore experienced civil servants when they disagree with government ministers.[50]

This displays the removal of yet another insulator between public opinion and criminal justice, and shows how attempts to look strong in front of the electorate can lead to less informed and under-scrutinised penal policy which employs ever increasing levels of punitiveness. The role of experts in the field is regularly undermined where a government deems it to be to their electoral advantage, they cannot appear to 'not have control'.[51] A group of civil servants drastically changing government policy into something else which is more effective undermines this perception by the public. This coupled with the steady decline of party voters and the rise of the 'floating' voter has resulted in governments acting for their party's political interests ahead of the interests of good policy.[52] This is particularly prevalent in criminal justice because of how much of a 'wedge issue' it can be in elections and because of how easy it is to claim action has been taken.[53] Garland's culture of control can be described as being a direct by-product of a neo-liberal market economy such as the UK or the US.[54]

In contrast, highly coordinated market economies work with their relevant institutions to opt for a relatively inclusionary criminal justice system. Extensive informal social controls, such as the welfare state, tax systems and institutions such as schools, create an environment which underpins the social solidarity typical of such countries.[55] In these kinds of environments by comparison, a harsh approach to punishment is unlikely to be utilised and would be extremely out of place. Due to the nature of the PR electoral system and the coalition governments it produces, voters know that their party cannot go rogue and not be accountable for their promises before the election because they will be restrained by the other coalition parties.[56] Meanwhile in majoritarian systems, governments are hindered only by the loyalty of its own party members. An example of this would be the Labour government in 1997 going back on its election promise to not privatise prisons almost immediately after going into office.[57] Coordinated market economies, in comparison to majoritarian systems, are far more secure, due to their checks on government, to resist the ongoing pressures of penal populism.

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[49] Nicola Lacey, 'The Prisoners' Dilemma: Political Economy and Punishment' in 'Contemporary Democracies' (2008) Cambridge: Cambridge University Press 72.
[50] ibid, 74.
[51] ibid, 75-76.
[52] ibid, 76.
[53] Tim Newburn, *Criminology* (3rd edition, 2017, Abingdon: Routledge), 114.
[54] Nicola Lacey, 'The Prisoners' Dilemma: Political Economy and Punishment' in 'Contemporary Democracies' (2008) Cambridge: Cambridge University Press 72.
[55] ibid, 61.
[56] ibid, 76.
[57] ibid, 77.

The structure of a nation's economy, particularly in neo-liberal market economies, is extremely vital in determining penal policy, and as will be seen is not a positive influence. In a post-Fordist culture where manufacturers have all but been made extinct by the rise of cheap East Asian manufacturing, economic insecurity for the working class is all but inevitable.[58] The entire group has become economically and socially at risk.[59] Not only does this lead to a higher rate of unemployment and therefore crime, but also diminishes the solidarity of the nation-state and emphasises individualistic attitudes within the public eye. These factors serve only to further the 'us vs them' mentality present in penal populism. With the unemployed being portrayed as lazy, and as part of the illusory 'other' spoken about by David Garland.[60] Here, the neo-liberal market structure infinitely produces more justifications for harsh and exclusionary criminal justice measures.

Inherently linked to the structure of the market is how the welfare state is utilised. Coordinated market economies tend to spend a greater proportion of their GDP on welfare, this has the obvious effect of reducing poverty but also correlates directly to how punitive a nation is.[61] Lacey highlights studies by Downes and Hansen which found that countries which spent more on welfare had lower imprisonment rates, something which has also been found in various states in the US.[62] However, neo-liberal countries on the whole, are far less inclusive when it comes to welfare than coordinated market economies, in particular those in Scandinavia, which offer 'cradle to grave' welfare support.[63]

Neo-liberal market economies instead offer very little welfare support so as to incentivise individuals to return to the labour market as soon as possible. This makes more sense in an economy where the workforce has a large array of transferable skills, whereas in the coordinated market economies the workforce is on the whole more specialised and are less able to switch industries.[64] Neo-liberal market economies, such as the United Kingdom, are inevitably extremely vulnerable to the whims of public opinion, and the underlying structures of these countries only accentuate this. It is clear there is a problem, but it must be clarified whether insulation would be appropriate, or if it is the only solution.

One of the primary proposals of the insulation argument is the establishment of the 'NICE' like institution. The National Institute for Health and Clinical Excellence provides guidance and

[58] ibid, 78.
[59] Ibid.
[60] David Garland, 'The Limits of the Sovereign State' (1996) *British Journal of Criminology* 36(4) 446;
[61] Nicola Lacey, 'The Prisoners' Dilemma: Political Economy and Punishment' in 'Contemporary Democracies' (2008) Cambridge: Cambridge University Press 86.
[62]ibid, 86-87.
[63] ibid, 88.
[64] ibid, 89.

develops policy for the health system, and proposals for a similar Criminal Justice institution would have it do many of the same functions but instead for penal policy.[65]

It would relieve elected politicians of smaller decisions and place the power to do so in the hands of experts. Many criminologists in favour of insulation have been in favour of a 'National Institute for Criminal Justice Excellence' ("NICJE") or a similar institution. In the context of the background we have already discussed, an institution such as this would put the reins of penal policy back into the hands of the 'platonic guardians' who were the experts and civil servants responsible for penal policy during the first bipartisan consensus in the mid-20th century.[66] [67] Penal populism has led to the government becoming a 'watchdog in chief' over public opinion on law and order, implementing policy indiscriminately based on public mood.[68] This leads to a constant stream of uncoordinated, unprincipled ideas and policies which attempt to satisfy voters. Ian Loader's review of the proposed NICJE starts off by establishing this and coming to the same conclusion, that the system is indeed broken, and something must change.[69]

The positives of such an institution are relatively obvious, it will help reinsulate penal policy from easily swayed political will of politicians and the public. It will then be free to make use of expert opinions and skills which have been underutilised for decades.[70] Lawrence Sherman has emphasised the benefits greatly, saying that criminologists, having been excluded from much of penal policy formulation for so long, have a much greater pool of knowledge to use as a basis for developing policy than ever before.[71] Loader refers to the examples of restorative justice now being known as very successful in satisfying victims.[72]

NICJE would therefore, be able to apply all this knowledge, experience and empirical evidence to criminal justice policy across England and Wales. Sherman also suggested that not only could the institute create guidelines through specialist committees, but also possibly even decide on resource allocation across the system.[73] However, there are numerous issues in regard to NICJE, however good it sounds in principle. Loader in his examination of the proposal identified several flaws in regard to NICJE.

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[65] Ian Loader, 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice' (2010) Current Legal Problems 73.
[66] ibid, 76-77.
[67] Ian Loader, 'Fall of the 'Platonic Guardians': Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) British Journal of Criminology 46(4) 561-586.
[68] Ian Loader, 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice' (2010) Current Legal Problems 77.
[69] Ibid.
[70] ibid, 78.
[71] Lawrence Sherman, 'Evidence and Liberty: The Promise of Experimental Criminology' (2009) 9(1) Criminology & Criminal Justice 5–28.
[72] Ian Loader, 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice' (2010) Current Legal Problems 79.
[73] ibid, 80.

The first being that criminological research is not comparable to that of medical research and cannot be fully reliable with only minimal scrutinisation of other professionals. The extent of medical trials can't be replicated in criminal justice before developing policy.[74] Also, a 'social science' like criminology can't produce the hard results, the definitive yes or no that clinical, medical trials can. No matter the research put into criminological questions, there can always be a competing argument.[75] Therefore, as Loader points out, NICJE may become the source of what it was designed to stop and will instead simply become political but this time through unelected officials.[76]

It is also unclear, given the contested nature of penal policy debate, whether there would ever be political will to put an institution as extensive as NICJE into place.[77] Even if it did, it seems unlikely that such an institution will be perceived as legitimate by the general public, especially if it is deemed to be failing. If this is the case, the majoritarian UK government could easily just dismantle the institution over fears that if it doesn't, it will suffer in the eyes of the electorate. The establishment of NICJE would require politicians, Loader explains, to acknowledge their own failings as criminal justice policy makers and the damage that has been caused both literally to offenders, victims and the system, and also metaphorically to the relationship between government and penal policy experts.[78] In whatever context the institute comes into existence however, legitimacy will always be an issue. It is difficult to envisage a political environment at the moment where this would be accepted by the public. Loader also states concern that despite its intentions, NICJE would be unable to avoid political scrutiny.[79] Much in the same way judges and the parole board have been heavily examined in the public eye.

Whilst the institution may work perfectly well for science, and arguments in favour discussing its ability to make use of a great deal of knowledge in formulating policy are valid, the proposal for NICJE to be the sole developer of criminal justice policy is not only unrealistic but also a troubling constitutional and moral issue.[80] The argument in favour, as Loader points out, fails to combat any criticisms at this level. There is no real argument to be made in favour of unelected professionals being in charge of how the state 'inflicts pain' upon its population other than blind trust in their expertise. The accountability of well-known elected officials means that poor decisions can be traced back to a specific individual, rather than just a crop of civil servants. This, accompanied with the fact that NICE is by no means the perfect institution,

[74] ibid, 82.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] ibid, 84.

would make it seem as if the proposal of NICJE, whilst a good idea in principle, would not be a sustainable or legitimate method of solving the penal populism crisis.[81]

Loader, in his conclusion regarding NICJE, does not flat out reject the idea of the institution, and instead views its potential as being part of the 'democratisation' of criminal justice as opposed to the all-encompassing insulating antidote.[82] It does seem far more likely that an institution such as this will be a forum that advises the government on criminal justice policy, rather than one which supersedes it. Priorities should be advised in regard to spending, so that instead of large amounts being spent to protect the 'law abiding majority' or 'us' in the 'us vs them' attitude, that resources are delegated where they are needed most.[83] Loader takes a view against that of the insulation argument entirely, stating:

> Given this, we pressingly need to find ways of generating an informed societal debate about how we may live collectively and comfortably with risk without ploughing ever more resources into emotionally compelling but illusory penal solutions to problems of crime. In a post-deferential public culture, it is also vital that this is a conversation, a matter of ongoing public contestation, rather than the exclusive province of scientific experts and policy elites.[84]

Loader therefore concludes by rejecting the exclusionary approach and takes an optimistic view of the public's ability to approach penal debate in a more sensible fashion than has been the case in the past and encourages a politicisation approach rather than an insulatory one.

The benefits and methods of politicisation will now be examined, to determine its viability in bringing about a better penal politics. Currently, whilst penal policy is 'political', it is entirely disconnected from the serious, rational debate that takes place in academia.[85] There is, in a sense, an 'anti-politics of crime'.[86] This is due not only to the lack of shielding the government gets from public will but as already seen also the majoritarian electoral system and neo-liberal economy of the UK.

However, law and order is an issue over which citizens care passionately so it might make sense to utilise this rather than suppress it, as Loader suggested an independent body might do.[87] Dzur agreed with such a sentiment, stating that sealing off the public is risky because it will not "educate, share responsibility or build .. trust, that experts require to do their work".[88]

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[81] ibid, 84-87.
[82] ibid, 90.
[83] ibid, 90-91.
[84] ibid, 91.
[85] Elliot Currie, 'Plain Left Realism: An Appreciation, And Some Thoughts For The Future' (2010) 54 Crime, Law and Social Change 122.
[86] Ian Loader, 'Review Symposium: The anti-politics of crime' (2008) Theoretical Criminology 12: 399–410.
[87] Ian Loader, 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice' (2010) Current Legal Problems 82.
[88] Albert Dzur, 'Participatory Democracy and Criminal Justice' (2012) Criminal Law and Philosophy 6, 30.

He also emphasised that citizen involvement was key in promoting a network of support for non-punitive measures.[89]

The aforementioned NICJE could be used to facilitate more focused and informed debate around penal policy.[90] The insulation argument might hold the condescending view that the public are incapable of such calm discussion, but when given accurate and unbiased information by an independent government body and not a political party, they may "come to their own nuanced, considered position".[91]

The very attempt to facilitate public debate could allay fears of the 'other', as well as help to humanise offenders in the eyes of the public who rarely get to hear accounts from them in the public space.[92] One of the established origins of penal populism is of course uncertainty, and if debate regarding criminal justice policy is well publicised, and the general public educated, then law and order will not be (at least not to the same extent) the scary issue it currently is. Wacquant raises valid issues about the place of any kind of penal debate in the wider context of the neo-liberal market economy in a majoritarian democracy.[93] This is certainly true, if the mechanisms for penal populism still exist, then it will be hard to simply democratise out of it.

Therefore, it is key that the discussion goes beyond and explores the other factors that influence penality, such as the economic, social, and cultural factors that lead into law-and-order debates.[94] Perspectives of all parties, victims and their families, offenders and their families, lawyers, counsellors and others, can all be of value in educating others. Continued debate can lead to justice reinvestment initiatives, even in the US it seems that penal populism has reached the end of the line.[95] With many major political figures such as Hilary Clinton and Attorney General Eric Holder saying that sweeping change is needed and that prison incarceration rates need to fall.[96]

Such enhanced debate can hopefully relieve pressure on ministers and civil servants to the point where bureaucracy can be treated as a useful resource for policy implementation, rather than an obstacle. The political will to address these issues is what has been lacking, and open and informed debate will help to generate the will required to tackle the problem of high prison

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[89] Albert Dzur, 'Participatory Innovation in Criminal Justice: Why, how and how far?' in Farrall et al (eds) (2016) Justice and Penal Reform. Abingdon: Routledge.
[90] Harry Annison, *Dangerous Politics* (Oxford: Oxford University Press, 2015) 200-201.
[91] ibid, 201.
[92] Ibid.
[93] Loic Wacquant, 'From 'Public Criminology' To The Reflexive Sociology of Criminological Production and Consumption: A review of Public Criminology? by Ian Loader and Richard Sparks (London: Routledge, 2010)' (2011) British Journal of Criminology 51: 438–48.
[94] Harry Annison, *Dangerous Politics* (Oxford: Oxford University Press, 2015) 200-201.
[95] David Brown, 'Mass Incarceration' in Carlen and Ayres França (eds) *Alternative Criminologies* (2018) Abingdon: Routledge, 377.
[96] Ibid.

numbers, stationery crime rates, high rates of prisoner violence, with policies such as more lenient prison sentencing.[97]

In conclusion, as established through the works of Garland and Lacey, the current state of penal policy is broken. Inundated by penal populism, the criminal justice system is in a poor state at many levels. However, the outright insulation of criminal justice policy development from the public would be a mistake, and might even further accentuate the fears and uncertainty of the general population. Instead, fully informed and open debate around penal politics must be encouraged in order to educate and to listen to the public. Rather than centralising authority into the hands of the experts, the long-term solution is to open up a forum for discussion so that a route to a truly better penal politics can be found. One that works for everyone, the public, offenders and the government itself.

[97] John Kingdon, *Agendas, Alternatives and Public Policies* (2nd Edition, New York: HarperCollins, 1995).

The Relationship Between Separability and Kompetenz-Kompetenz in Commercial Arbitration

*Alicia Algeo**

Abstract:

This essay will critically discuss the doctrines of separability and Kompetenz-Kompetenz. Firstly, the essay will define the two doctrines and their key authorities. Secondly, it will analyse evidence in favour of the doctrines being completely detached and independent from each other. Finally, the essay will move on to consider arguments contrary to the statement, that suggests the two principles are not completely independent, but instead are linked to each another, albeit physically detached. Overall, the evidence suggests the strongest argument is that the statement is not entirely correct, as the two doctrines are completely detached, as they are two distinct doctrines, yet they are not completely independent, as nowadays they work together in practice.

The doctrine of separability refers to the substantive agreement being separate and distinct from the arbitration agreement,[1] even if they are in the same document. Thus, the doctrine dictates that even if the substantive agreement is found to be invalid or unenforceable, this will not render the arbitration agreement or clause as invalid or unenforceable. Therefore, its validity can be maintained, unless the substantive dispute 'directly impeaches' the arbitration agreement. The common law recognised the doctrine of separability in *Fiona Trust,*[2] where Lord Hoffmann in the House of Lords stated, 'the arbitration agreement must be treated as a 'distinct agreement''.[3] Lord Hoffmann provides further clarity on the doctrine, by stating 'the arbitration agreement can only be void or voidable on grounds which relate directly to the arbitration agreement', thus upholding the idea of 'direct impeachment'.[4]

The doctrine of Kompetenz-Kompetenz establishes the arbitral tribunal has the competence to rule on its own jurisdiction.[5] Unless otherwise agreed by the parties, the tribunal can determine whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters have been submitted to arbitration in accordance with the arbitration agreement.[6] This doctrine, similarly to separability, has also been recognised in English common law in

**B.A (Hons), L.L.B (Soton).*
[1] Arbitration Act 1996, s7.
[2] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.
[3] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 [17] (Lord Hoffmann).
[4] ibid [17] (Lord Hoffmann).
[5] Arbitration Act 1996, s30.
[6] ibid s30.

Dallah.[7] Here, the Supreme Court held that the arbitral tribunal had competence to determine its own competence to determine the validity of the arbitration agreement. However, it was held that the arbitral tribunal when determining this validity had wrongly decided Pakistan had intended to be a party to the arbitration agreement.

The procedural law instruments of the UNCITRAL Model Law and Arbitration Act 1996 seem to provide conflicting support surrounding the statement. In article 16(1) of the UNCITRAL Model Law, the doctrine of separability and Kompetenz-Kompetenz are not detached nor independent, instead they run alongside each other in one section. Thus, suggesting the drafters of the Model Law intended for the two doctrines to be closely connected, not distinct and separate. Therefore, the UNCITRAL Model Law provides support against the statement and suggests the doctrines of separability and Kompetenz-Kompetenz are not completely detached and independent. However, this argument may be weakened, as although the Arbitration Act 1996 is largely based upon the UNCITRAL Model Law, the Model Law was not adopted entirely into English Law.[8] Instead the Arbitration Act 1996 seems to conflict with the intentions of the Model Law, as it provides support that the two doctrines are completely detached and independent. As a result of the recommendations stated by the Departmental Advisory Committee on Arbitration that both separability and Kompetenz-Kompetenz should be kept independent,[9] the Arbitration Act 1996 physically separated the two doctrines. Section 7 of the Act[10] only refers to the doctrine of separability and did not incorporate Kompetenz-Kompetenz. Alternatively, section 30 of the Act[11] only refers to the doctrine of Kompetenz-Kompetenz and did not include separability. Furthermore, the Departmental Advisory Committee on Arbitration elucidated that 'the doctrine of separability is quite distinct from the question of the degree to which the tribunal is entitled to rule on its own jurisdiction'.[12] This could help provide a reason why Parliament separated the doctrines in Arbitration Act 1996. Overall, Parliament's preference to physically split up the two doctrines in the Act,[13] instead of following the perhaps easier guidance laid out by the Model Law, suggests that they were determined to enforce their intention that the two doctrines should be kept completely detached and independent. However, this essay demonstrates that although this created a physical separation between the attachment of the two doctrines, this intended independence was not upheld in practice.

Further support for the statement arises from case law prior to the Arbitration Act 1996. Early case law surrounding the doctrines tend to recognise separability more frequently than Kompetenz-Kompetenz, supporting the notion that the doctrines are completely detached and

[7] *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.
[8] Practical Law Arbitration, 'An Introduction to the English Arbitration Act 1996', Thomson Reuters, 2021.
[9] Departmental Advisory Committee on Arbitration Report (Feb 1996) para 43.
[10] Arbitration Act 1996, s7.
[11] ibid s30.
[12] Departmental Advisory Committee on Arbitration Report (Feb 1996) para 43.
[13] Arbitration Act 1996.

independent. Recognition for the doctrine of separability was established in early case law in *Heyman v Darwins.*[14] Interestingly, in this case, the House of Lords actually denied 'that arbitrators could rule on the existence or legality of an agreement to which an arbitration clause related'.[15] However, they held that the arbitration clause may survive the repudiation of the substantive agreement.[16] Therefore, this case demonstrates the court recognising and validating the existence of the doctrine of separability, however, denying the doctrine of Kompetenz-Kompetenz. Although doubts had emerged to the correctness of this application of separability in *Ashville Investments,*[17] five years later the Court of Appeal in *Harbour Assurance,*[18] upheld Lord Steyn's landmark decision that the doctrine of separability should be upheld and extended to a contract that was argued to be *void ab initio*. Lord Steyn's reasoning in *Harbour Assurance*[19] established the principle of separability; however, he did not recognise nor refer to the doctrine of Kompetenz-Kompetenz. Albeit Gross,[20] has argued English law does not recognise Kompetenz-Kompetenz, this statement is weak as the doctrine has been recognised by early English common law, such as in *Christopher Brown v Genossenschaft.*[21] In this case, Lord Collins held that arbitrators have a competence to rule on their own jurisdiction, even where the jurisdiction is called into question at a preliminary stage. Even though this provides evidence that the doctrine has been recognised in early case law, this recognition has been argued by Tsen-Ta[22] to be in a more limited form, than the recognition of separability. Both academics wrote before the Arbitration Act 1996, thus suggesting the two doctrines were detached and independent prior to the Act.[23] However, the essay shows that more recently the doctrine of Kompetenz-Kompetenz has been increasingly recognised in case law alongside separability, such as by Coleman J in *Networks Ltd,* suggesting the two doctrines are no longer independent from each other.[24]

Additional support for the statement is provided as the two doctrines have different purposes, which apply in different scenarios. The purpose of section 7[25] and the doctrine of separability is to protect the arbitration agreement from any dispute arising against the substantive agreement, as the doctrine keeps the two agreements distinct and separate. This purpose of separability was confirmed by Lord Hoffmann in *Premium Nafta,*[26] where he stated 'the invalidity or rescission of the main contract does not necessarily entail the invalidity or

[14] *Heyman v Darwins Ltd* [1942] AC 356.
[15] Robert Merkin, Arbitration Law (6th edn, Informa Subscriptions 1991) 5.42.
[16] ibid 5.42.
[17] *Ashville Investments Ltd* v. *Elmer Contractors Ltd* [1988] 2 All ER 577.
[18] *Harbour Assurance Co (UK) Ltd* v. *Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455.
[19] *Harbour Assurance Co (UK) Ltd* v. *Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81.
[20] Peter Gross, 'Competence of Competence: An English View' (1992) 8 Arb Int'l 205.
[21] *Christopher Brown v. Genossenschaft Osterreichlischer Waldbesitzer [1954] 1 Q.B. 8*.
[22] Jack Tsen-Ta, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore (1995) Singapore Academy of Law Journal. 7, 421. Research Collection School Of Law, 428.
[23] Arbitration Act 1996.
[24] *Networks Ltd* v. *Econet Wireless International Ltd* [2004] EWHC 2909 (Comm).
[25] Arbitration Act 1996, s7.
[26] *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40.

rescission of the arbitration agreement' and can only be voidable 'on grounds which relate directly to the arbitration agreement'.[27] Therefore, a breach to the validity of the substantive agreement will not automatically result in the arbitration agreement being invalid. Alternatively, the purpose of the doctrine of Kompetenz-Kompetenz is not to protect the arbitration agreement from disputes arising from the substantive agreement, but instead to determine who decides on the validity of the agreement. The doctrine thus enables us to presume the arbitral tribunal has jurisdiction to determine the validity of the arbitration agreement. The different purposes give rise to unique situations where each doctrine will be applied, which was laid out by Colman J in *Networks Ltd.*[28] The situation where the purpose of separability is useful, but Kompetenz-Kompetenz is not, is where the dispute affects the validity of the substantive agreement, but this dispute does not affect the validity of the arbitration clause.[29] Conversely, the purpose of Kompetenz-Kompetenz is useful in situations where the existence of the arbitration clause itself is disputed, rather than where the validity of the substantive agreement is disputed, as here separability is not useful as the issue only concerns jurisdiction.[30] Therefore, this demonstrates how the two doctrines clearly work separately to uphold two different purposes, which are useful in different scenarios. Thus, supporting the statement that the two doctrines are completely detached and independent.

On the other hand, although it was argued the two doctrines are detached and independent as they work to uphold two different purposes, this is a weak argument as both doctrines ultimately share the same aim in ensuring arbitration is able to proceed in practice. Academics, such as Barcelo[31] support this notion that the doctrine of separability and Kompetenz-Kompetenz 'share a common aim'. Barcelo states this common aim 'is to prevent early juridical intervention from obstructing the arbitration process.'[32] His suggestion that there should be as little juridical intervention as possible is important in upholding the nature of arbitration, which is an alternative dispute resolution forum to litigation. Another explanation as to why Barcelo is suggesting the prevention of early juridical intervention is important, may be because this will help ensure disputes are solved quickly and ensures contractual pragmatism in the arbitration process. Therefore, this suggests the two doctrines are not completely independent from one another, as the separate doctrines actually work together to achieve a common goal in favour of the arbitral process.

Further support against the statement can arise from the limitation of separability, which results in separability requiring the doctrine of Kompetenz-Kompetenz to enhance the effective

[27] *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40 [17] (Lord Hoffmann).
[28] *Networks Ltd* v. *Econet Wireless International Ltd* [2004] EWHC 2909 (Comm).
[29] Robert Merkin, Arbitration Law (6th edn, Informa Subscriptions 1991) 9.7.
[30] ibid 9.7.
[31] John Barcelo, 'Who Decides the Arbitrator's Jurisdiction - Separability and Competence - Competence in Transnational Perspective' (2003) 36 Vand J Transnat'l L 1115.
[32] ibid 1115.

operation of the arbitral process.[33] To an extent the doctrine of separability is a limited one, as separability alone does not determine who or what institution decides on whether the arbitration agreement is valid. This limitation of separability results in an issue of circularity,[34] as the arbitral tribunal requires jurisdiction to determine the validity of the arbitration agreement, but the jurisdiction the arbitral tribunal requires, comes from the valid arbitration agreement itself. The doctrine of Kompetenz-Kompetenz cures this issue of circularity, as it provides the arbitral tribunal with the competence to decide on its own competence to determine the validity of the arbitration agreement. Thus, individually the doctrine of separability is limited, and the doctrine of Kompetenz-Kompetenz helps it to overcome this conceptual difficulty. Overall, this provides support that the two doctrines, although physically separate and detached, are not completely independent, but instead, intersect and work in practice alongside each other to cure the conceptual difficulty.

To conclude, this statement, although it may have been correct before the Arbitration Act 1996, is now only partially correct. The section which states the two doctrines are completely detached from each other is correct. This is because they are physically detached in the Arbitration Act 1996 and constitute two separate doctrines which can exist without the other, albeit not as effective. Although, the part of the statement which states the two doctrines are completely independent from each other is not correct. This is because the evidence suggests the doctrines, although detached, intersect functionally and in practice they work together to enhance the effective operation of the arbitral process, thus they are not completely independent.[35]

[33] Ronan Feehily, 'Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine.' *(2018)* Arbitration International, *34*(3), 360.
[34] *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs,Government of Pakistan* [2010] UKSC 46.
[35] Ronan Feehily, 'Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine.' *(2018)* Arbitration International, *34*(3), 360.

A Critical Evaluation on the extent to which 'Certainty of Outcome' and 'Proportionality of Outcome' are Two Conflicting Concepts in the Development of the Three Categories of Promissory Term

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Abstract

This paper explores the conceptional tension between certainty of outcome and proportionality of outcome. One school of thought, hereafter 'traditionalism', argues that both notions are fundamentally conflicting policy objectives - viewed traditionally, certainty refers to the nature of the provision, whereas proportionality focuses on the consequences. The former risks rigid application, the latter is more flexible. This paper rejects this view — the crux of the debate lies in what 'certainty of outcome' means, not whether one objective is more important than another and whether they are conflicting. When viewed as such, it becomes clear that both act symbiotically, upholding one another. There are several demonstrations of this mutuality in contract law, but this paper focuses on promissory terms. Part I identifies the need for such policies. Part II analyses the relationship within a promissory term context. Part III explores commercial and policy ratifications within the promissory and wider contractual context.

Introduction

The conceptual tension at the heart of commercial contract law lies in the simultaneous adoption of two *purportedly* inconsistent policy objectives:

Certainty of outcome — focuses on the nature of the provision broken but risks a rigid and unjust application of the law providing no remedy for contract terms that are neither too important (condition) nor trivial[1] (warranty). Hereafter, 'certainty'.

Proportionality of outcome— focuses on the consequences[2] of the breach resulting in more flexibly tailored remedies but risks an *ad hoc* adoption. Hereafter 'proportionality'

This analysis proposes that the formulation of what 'certainty of outcome' means is at the crux of the debate - not whether one objective is more important than another or whether they are conflicting — both act symbiotically. Note that 'certainty of outcome' is distinct from 'legal certainty', which will, as a fundamental principle underpinning the rule of law, also be referenced. Viewed traditionally, this policy is analogous to 'predictability' - parties' ability to predict the outcome of their dispute. This paper rejects this formulation — although it is

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[1] Sale of Goods Act 1979, s.15A

[2] Qiao Liu,' Termination of contract for fundamental breach 'in Roger Halson, and David Campbell (eds) Research Handbook on Remedies in Private Law, (Edward Elgar Publishing Limited, 2019), 169

important, courts have a greater 'public' agenda of creating legal principles that reflect the mechanism of contract today. Instead, this paper proposes to view certainty as 'mitigating arbitrariness'. This formulation is more flexible as it balances total autocracy with ad hoc application. Accordingly, the sovereignty of proportionality, defined in this paper as 'just, reasonable and fair', upholds 'certainty of outcome' in a symbiosis — the purpose of contract remedies and wide policy corroborate this proposition and cases such as Hong Kong [3] demonstrate that, through the lens of proportionality, parties and courts can be procedurally certain (can predict) that courts will exercise its discretion to apply the law coherently per contractual principles such as party autonomy than rigidly via an 'is or is not' test.

There are several demonstrations of this mutuality in contract law but this paper focuses on promissory terms. Part I identifies the need for such policies. Part II analyses the relationship within a promissory term context. Part III explores commercial and policy ratifications within the promissory and wider contractual context.

Part I: The Need For Certainty & Proportionality

A breach of contract may give rise to two remedies with prospective effect[4]: (i) repudiation; (ii) damages. In determining the approach used to determine whether the breach entitles the innocent party to repudiate, there has been a policy tension between:

Leaving the discretion to the parties to include termination provisions will uphold party autonomy but risks inconsistent application as not every contract was so thoroughly drafted and it became necessary for courts to envisage a default test where there was no such provision.

Giving courts unfettered discretion to determine the existence of a right to terminate also risked inconsistent application. Arguments were made that it also risked unpredictability which resulted in litigation costs[5] and risked a floodgate.

The solution, now orthodox, became to create structured rules that considered holistic factors[6] ensuring that parties knew their rights and courts have discretion to objectively assess party intention, upholding legal certainty. Thus, a breach of:

Condition ***always*** gives an innocent party the right to terminate[7]

Warranty ***never*** gives an innocent party the right to terminate

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[3] Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26; [1962] EWCA Civ 7; [1962] 1 All ER 474

[4] Boston Deep Sea v Ansell (1888) 39 Ch D 339, 365 (Bowen LJ)

[5] Bunge Corporation New York v Tradax Export SA, Panama [1981] 1 WLR 711 (Lord Lowry)

[6] Ibid n.2; Arcos v Ronaasen [1933] AC 470, [7]-[8] (Lord Buckmaster)

[7] The Mihalis Angelos [1971] 1 QB 164, 205 (Megaw LJ)

The Innominate term must be assessed on a case-by-case basis and if sufficiently serious, the innocent party has a right to terminate.

Part II: The Relationship: It's Complicated…

Within The Promissory Term Context

A condition is the most fundamental term of a contract; thus, a breach of condition jeopardises the efficacy of the contract itself.[8] In *Poussard*, since the singer missed the most important performance dictating all the publicity, her absence constituted a breach of condition. Contrastingly, a warranty is a subsidiary term. In *Bettini*[9], as the singer only missed rehearsals and the main performance was the fundamental purpose of the contract, the term was a warranty and gave rise to damages only: *"depends on the true construction of the contract taken as a whole"*.[10]

One may argue that these cases reflect the *traditional* view (predictability) and demonstrate proportionality as a backseat principle: where a term is classified, it will be given effect strictly. However, this belief is mistaken as *Schuler*[11] proves: Clause seven, expressly identified as a condition, obligated Wickman to send a salesman to solicit sales once a week. Having missed some, Schuler repudiated the contract. The courts held the condition to be a mere warranty because, *per* clause eleven, a sixty-day notice would remedy any missed attendances, and only after the sixty days would termination be allowed.[12] The case verifies that for predictability, the court must make a value judgement on the function of the contract to decide whether repudiation is proportional to the purpose of a contract. In fact, in *Poussard*, the fundamentality of attendance justified terminating whereas, in *Bettini*, termination would have been disproportionate since rehearsals were preparatory. Thus, convincing that courts impulsively ruling to achieve 'certainty of outcome' is analogous to making market-changing commercial decisions with their eyes closed - dangerous. Notwithstanding, to do so, would call into question the validity of several well-established contractual principles e.g., party autonomy. Hence, the foundations of the symbiosis argument have already begun.

The innominate formulation in *Hong Kong*, demonstrates the apotheosis for the symbiosis, hereafter referred to as the 'calibrated approach'**.** Repudiation is available where the claimant was 'substantially deprived of the whole benefit of the contract'. Here, a ship was chartered for two years, out of which it was inactive for twenty weeks: this inactivity was not a substantial

[8] Poussard v Spiers [1876] LR 1 QBD 410 (Blackburn J)
[9] Bettini v Gye [1875-76] LR 1 QBD 183 (Blackburn J)
[10] Ibid, at 197 (Blackburn J)
[11] Schuler v Wickman Tools [1974] AC 235 (Lord Reid)
[12] Ibid, (Lord Reid)

deprivation of benefit; thus, the contract was not repudiatory. Upjohn LJ confirmed the proportionality basis for interpreting party intention, stating: *"It is contrary to common sense to suppose that in such circumstances the parties contemplated…[to repudiate] for such trifling breaches".* [13] This case provides a 'calibrated' approach to classifying 'fundamental breaches', [14] building on the cases aforementioned; allowing courts to closely assess the intentions, purpose, and language of the contract: *"The question [of seriousness] is not one of* '*discretion*' *but is* '*fact-sensitive*'*"*.[15] This, as the paper proposes, *mitigates* the *arbitrariness* that arises where a term is unclassified and provides certainty of outcome - hence, it is unsurprising that innominate terms are now the default position.[16]

A counterclaim is that *Hong Kong* has been restrictively used which demonstrates that predictability is more important than proportionality. The essence of this argument is demonstrated by *Bunge*, where the House of Lords held that where the term is stated as a condition, this must be strictly given effect (Lord Roskill), especially where the parties' obligations are 'interdependent' — the sellers could not exercise their right to nominate the port for shipment until a notice was given by the buyers. At each stage of appeal, the courts struggled to map the dichotomy between the rigid certainty application and the calibrated approach**.** The High Court reversed the decision of the trial judge and applied *Hong Kong* but this decision was re-reversed by the Court of Appeal with the House of Lords concurring that the calibrated approach caused (i) too much controversy as parties could not predict their rights; (ii) its application clearly posed a risk of floodgate; thus, that it would only be applied where it was impossible to classify the term. Despite these valid arguments, recall that the symbiosis existed long before *Hong Kong***,** and whilst it is true that the case pioneered in creating a clear test and its restriction *prima facie* purports to be intentional by the courts to promote the *traditional* 'certainty of outcome', as seen in *Schuler*, courts invoke proportionality to make value judgements even where the term is classified in the contract — meaning, *Hong Kong* is not the only lifeblood of proportionality. Thus, even *per* the traditionalist construction of certainty, proportionality upholds both predictability and mitigates arbitrariness.

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[13]Ibid n.4, 62-63 (Upjohn LJ) [emphasis added]

[14] K/S Merc-Scandia XXXXII v Lloyd's Underwriters ['The Mercandian Continent'] [2001] 2 Lloyd's Rep 563, 569; Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61, (2007) 233 CLR 115, 138, [49]

[15] Ibid n.4, [60] (Arden LJ); Ibid n.3 on 'Fundamental Breach And Breach Of An Innominate Term'

[16] Spar Shipping AS [2016] EWCA Civ 982 v Grand China Logistics Holding (Group) Co Ltd [2016] 2 Lloyd's Rep 447, [92] (Hamblen LJ); Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] QB 44, 70-71 (Lord Roskill)

Part III: The Relationship: Through a Commercial Lens

Promissory Term Context & Beyond: Purpose of Contract Law Remedies

The relationship between the policy objectives within a promissory term context can be explained using commerciality. Contracts are made daily and to say that humans are rigid and predictable…is an overstatement — this is reflected in the construction of contracts — some are well-drafted, others poorly. Thus the issue, as Waddams observes when discussing the distinctions between tort 'wrongs' and contractual 'wrongs', is that contractual obligations are unrestricted; *"may turn out to be extremely onerous, even ruinous, to the promisor, and performance [may] very greatly [enrich] the promisee. The exchange of a few words… may easily create an obligation that exceeds the defendant's total wealth"*.[17] Thus, a calibrated approach that tailors remedies based on individual circumstances ensures the innocent party is justly remunerated; moreover, this policy reflects the availability of several dispute resolution methods to guarantee this objective.

But why think commercially at all? A necessary question asked by Mitchell[18] in her discussion on the relationship between commerciality and remedies. Functionally, Mitchell argues that *"[contract law] that proceeds without reference to commercial expectations risks losing its competitive edge in the market"* although she does appreciate the possibility for institutionally, economically and morally sound justification why remedies should not reflect commerciality. This paper concurs and adds that courts solely applying legal principles risks judges ruling as 'platonic guardians'[19]: elitists making judgements through a parochial lens, jeopardising contractual autonomy and even democracy. Thus, perhaps the alternative purpose of contractual remedies is commercially selfish — efficiency — *'oiling the wheels of commerce'*. This is acknowledged by Waddams: *"Breach of contract is often tolerated, as a matter of business morality and in law… to be 'efficient'"*.[20] Accordingly, only where remedies are *proportional* can they be efficient, ie. providing adequate remedies with no need for further litigation and only where efficient, can outcomes be less arbitrary; thus, certain. Notice that through this proposed lens, proportionality and 'certainty of outcome' seem to work merrily together — in fact, the traditional formulation of certainty is also upheld as parties have predictability in knowing that their contract will be subject to a very close inspection to ensure

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[17] Stephen Waddams, 'The Modern History Of Remedies For Breach Of Contract 'by Roger Halson and David Campbell Research Handbook on Remedies in Private Law (Edward Elgar, 2019), 17-32, 26: [emphasis added]

[18] Catherine Mitchell, 'Remedies And Reality In The Law Of Contract' in Roger Halson, and David Campbell (eds) Research Handbook on Remedies in Private Law, (Edward Elgar Publishing Limited, 2019), 69: [emphasis added]

[19] Plato, The Republic Book VI, 360 BCE

[20] Ibid n.18; Delphinium Ltee v 512842 NB Inc 2008 NBCA 56, 296 DLR (4th) 770, [51]; see further Bank of America Canada v Mutual Trust Co [2002] SCC 43, [2002] 2 SCR 601

that the most appropriate interpretation is given effect - another reason why the traditionalist school of thought is incorrect both on *its* formulation of 'certainty' and this papers'.

Finally, proportionality's use in wider contract law ratifies that its sovereignty upholds 'certainty of outcome'. The *Robinson*[21] principle protects expectation interests as the purpose of contract remedies[22]. However, as ***Ruxley***[23] demonstrates, this strict formulation has led to *ad hoc* outcomes[24]: it would be disproportionate to recover all money paid for disappointment when the product is useable. The solution was to formulate more coherent rules that moulded based on circumstances[25] - as Fuller and Perdue propose, the aim of providing damages is "*a means of providing* '*a cure for, and prophylaxis against, reliance losses*' *rather than protection of interests"*[26]; rendering *Robinson* as a mere starting point, nominal damages were awarded. Resultantly, proportionality allows parties to recover expenditure lost pre-contract (reliance)[27] and what was unjustly gained (restitutionary).[28] Additionally, damages may be awarded suggested to be where *"there is an* '*abuse of contract*'[29] *or a* '*cynical*'[30] *breach…"*[31] which proves that proportionality is a fundamental policy objective which the courts are committed to *balancing* with certainty.

An End

This paper submits that the traditionalist school of thought is wholly inaccurate. This analysis has drawn from wider commercial case law, legal and commercial policy objectives to substantiate this view and demonstrate the symbiosis between the two objectives. The symbiosis reflects the need for courts to give effect to contracts insofar as is possible. The courts are uninterested in intervening, let alone terminating, contracts where unnecessary — to

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[21] Robinson v Harman (1848) 1 Ex 850, 855 (Parke B)

[22] Daniel Friedmann, 'The Performance Interest in Contract Damages '(1995) 111 LQR 628, 629–639, 646–650, and 654

[23] Farley v Skinner [2001] UKHL 49, [77]-[80] citing Ruxley Electronics & Constructions Ltd v Forsyth [1996] AC 344

[24] Ruxley Electronics & Constructions Ltd v Forsyth [1996] AC 344, at 357 (Lord Jauncey), citing Tito v Wadell [1977] Ch 106, 132

[25] Ibid, at 360-361 (Lord Mustill)

[26] Lon Luvois Fuller; William R Perdue Jr, 'The Reliance Interest in Contract Damages '(1936) 46 Yale LJ 52, 53–62

[27] Anglia Television v Reed [1972] 1 QB 60, [63]-[65] (Lord Denning MR)

[28] Morris-Garner v One Step (Support) Ltd [2018] UKSC 20, [11] (Lord Reed)

[29] Edward Allan Farnsworth, 'Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract '(1985) 94 Yale LJ 1339

[30] Peter Brian Herrenden Birks QC, 'Restitutionary Damages from Breach of Contract '[1987] Lloyd's M&CLQ 421

[31] Ibid n.18

apply such rigid rules would deter parties from making contracts and would do exactly that — throw a spanner in the wheels of commerce. Thus, whilst predictability is important, courts have a greater 'public' agenda of creating legal principles that reflect the mechanism of contract today - doing so by upholding the proportionality sovereignty whilst respecting the importance of both policy objectives in the *equilibrium* equation.

Dissertations

The following dissertations have not been edited.

Clauses 'Defining the Risk as a Whole' and 'Risk Mitigation' Clauses under Section 11 of the Insurance Act 2015: The Shifting Tide of Crewing Warranties in Marine Insurance

*Panagiotis Adamos**

Abstract

As I was investigating the complexities and ambiguities arising out of Section 11 of the Insurance Act 2015, I did realize that the challenge of identifying which term qualifies as a term "defining the risk as a whole" and as a "risk-mitigation" term, calls for an intensive assessment of the purpose of a clause. I did spot such an intensive assessment also in the construction of crewing warranties. The question then arose itself: What if we could construe a warranty, like the one in *The Resolute*, under Section 11 of the Insurance Act 2015?

This paper tries to envisage a possible answer to this interesting question. After the introduction to the topic under discussion, Chapter 2 refers to the basic characteristics of warranties generally, up to the point of the shift towards the functionality of Section 10 of the Insurance Act 2015. Chapter 3 deals with the construction of crewing warranties prior to the new regime of Section 11, pointing out the rise of the *factual matrix* as a tool of construction. Chapter 4 is then dedicated to the analysis of the scope and the ambiguities arising out of Section 11. Finally, in Chapter 5 we attempt to dive into the challenging quest of finding the future yardstick of interpretation, which will possibly be applied in construing crewing warranties under Section 11 of the Insurance Act 2015.

Introduction

"*How long do we have?*". This was the response of David Hertzell, the lead Law Commissioner on the project which led to the Insurance Act 2015 (in the H.L. Paper 81), when the Chairman of the SPBC[1] asked, how should we identify whether a provision is a warranty.[2] A similar response could be appropriate with another kind of question: How should we construe crewing warranties under Section 11 of the Insurance Act 2015? This is because there is no one-way response, especially in the absence of any qualifications on the Section by the Law Commission and in the absence of case law about the range of Section 11. This paper is an ambitious attempt to envisage a more specific answer to this question. We will dive into constant research for the interpretative tools, which could possibly be applied in the construction process. The many ambiguities arising out of the poorly drafted Section 11 along with the strange nature of crewing warranties turn this research into a process with an uncertain result. But undoubtedly, this is the exact reason why such a decision to undertake this challenging task had to be made. Besides, the inspiring words of the Roman

[1] Special Public Bill Committee.
[2] House of Lords Paper 81, 11 <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf >, last accessed on 1 September 2020.

sceptic Marcus Tullius Cicero underpin this syllogism: *"More is lost by indecision than wrong decision. Indecision is the thief of opportunity. It will steal you blind".* Let us see then where this "opportunity" could lead us.

Chapter 2
Warranties in a nutshell: Moving from form to functionality

When it comes to crewing warranties under the Insurance Act 2015 one thing has to be clear: the reform did not affect how a promissory warranty is defined nor the rule of strict compliance with it.[3] Section 33(1) of the Marine Insurance Act 1906 still provides the definition of a promissory warranty, as a promise undertaken by the assured that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby the assured affirms or negatives the existence of a particular state of facts.

2.1 The draconian nature of warranties

The key nature of a warranty has been long codified through several cases by the judiciary.[4] In the old case of *Bean v Stupart*[5] Lord Mansfield's well-known dictum, which still echoes after so many years, points out that a warranty is "a condition on which the contract is founded". It was one of the starting points which gave the draconian nature to the warranties in English insurance law. The reason why is that in the long history of common law, as far as the assured's contractual duties were concerned, the emphasis had been put on form instead of functionality. The most offensive feature of warranties has always been the remedial response in the event of non-compliance, meaning the automatic discharge of the insurer's liability, precluding recovery for any future loss. The consequences of the assured's failure to comply with a warranty rested "not upon its significance or its nature but on its legal classification, in turn dictating the consequences of breach".[6] As Lord Goff supported in the famous case of *The Good Luck* "discharge of the insurer from liability is automatic…and (if) a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability of the insurer".[7]

2.2 The shift towards functionality

A warranty was meant to be a tool which puts limits on conduct. Over time insurers tried to use it for things unrelated to the risk.[8] In order to ameliorate the harshness of the warranties, the courts tried to take a different road away from the automatic prospective discharge model of *The Good Luck.*[9] A series of cases emerged surrounding two classes of warranties:[10] those

[3] See Gurses O, *Marine Insurance Law* (2nd edn, Routledge 2017) chapter 5.
[4] See *HIH Casualty & General Insurance Co Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735.; *The Good Luck* [1992] 1 AC 233.
[5] [1778] 1 Doug 11, at 14.
[6] Merkin R and Gurses O, 'Insurance contracts after the Insurance Act 2015' [2016] LRQ, p. 1.
[7] *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233, 262-263.
[8] See *Thomson v. Weems* (1884) 9 App.Cas. 671, where it is supported that "in policies of marine insurance any statement of fact bearing upon the risk introduced into the written policy is to be construed as a warranty".
[9] [1992] 1 AC 233.
[10] *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep. 550, 558-559.

which "delimit" or "describe" the risk, breach of which leads to the suspension of liability; and promissory warranties, breach of which leads to the automatic discharge rule. In the Canadian case of *Bamcell II,*[11] the warranty stated, "Warranted that a watchman is stationed on board The Bamcell II each night from 2200 hours to 0600 hours with instructions for shutting down all equipment in an emergency". Such watchman had never been put on board, but the loss occurred during daytime, due to a forgotten open valve. Citing *MacGillivray & Parkington on Insurance Law,*[12] the court decided that the word "warranted" is not conclusive. Despite this wording, the court was prepared to construe the warranty as a suspensory one, on the basis that "that case illustrates the point that there is no magic in the word 'warranted' which is frequently used with considerable ambiguity in policies". English cases[13] were also based on the same passage, recognizing in fact that sometimes it is possible even for the parties not to know exactly to what extent were they prepared to bind themselves. In *Kler Knitwear Ltd v Lombard General Insurance Co Ltd*[14] the requirement for a sprinkler installation to be inspected within 30 days from the renewal of the policy had not been complied with, in fact not earlier than 60 days from the renewal. The later occurred loss was held to be covered, treating the warranty as a suspensive condition, since "there was no authority suggesting that a clause containing a once and for all obligation indicated the existence of a warranty rather than a suspensive condition". The QB, citing the *Bamcell II,*[15] pointed out that "where a breach produces an automatic cancellation of insurance cover, regardless of the cause of the loss, any such intention must be stipulated in clear terms".

The Law Commission was not able to abolish continuing warranties, but it did abolish their most rigid aspect, the automatic discharge.[16] The abovementioned case law is the reason which brought into life the suspensory principle of Section 10(2) of the Insurance Act 2015: breach of a warranty will lead only to the suspension of the insurer's liability, which will be reinstated once the breach has been remedied. Therefore, the construction of crewing warranties, as well as any warranty, under the Insurance Act 2015 will be always intact of the automatic discharge of the insurer's liability as a remedial response to the assured's non-compliance with the warranty.[17]

2.3 A brief comment on the evolution

It cannot be left unnoticed that the attempts by the courts to mitigate the remedial harshness came with a slight blemish. The solutions remained businesslike, but it seems that the alternative the courts provided, raises some questions even on proportionality. As Davey illustrates "the judiciary has destroyed much of the single advantage of the insurance

[11] (1980) 133 DLR (3d) 727, aff'd [1983] 2 SCR 47.
[12] *MacGillivray & Parkington on Insurance Law* (Sweet & Maxwell, 1975), pp. 263–264.
[13] See *Farr v. Motor Traders Mutual* [1920] 3 K.B. 699.
[14] [2000] Lloyd's Rep I.R. 47.
[15] (1980) 133 DLR (3d) 727.
[16] See Merkin R and Gurses O, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 79(6) MLR 1004, 1017.
[17] Of course, this is subject to any contracting out of the applicability of Section 10 of the Insurance Act 2015.

warranty—'legal certainty'—by a range of creative approaches to the non-strict enforcement of such terms".[18] It is a fact which will be illustrated later on. For now, it suffices to observe that the courts[19] have not always been ready to dive into considerations about the relationship, the connection and the nature that co-exists between the risk undertaken, non-compliance and the loss experienced.[20] Nevertheless, this does not mean that the suspensory solution, inserted by Section 10, imposes in any way some form of a causation test.[21] It just gave the opportunity to the assured to enjoy cover after the breach has been remedied. For any loss occurring during the period of the breach the much-criticized Section 11 comes to set the most ambiguous and controversial discussion that the Insurance Act 2015 could possibly create. Putting the already uncertain status quo of the crewing warranties as well into this discussion, the outcome of this challenging legal research could be nothing else but mesmerizing.

[18] See Davey J, 'Remedying the remedies: the shifting shape of insurance contract law' (2013) 4 LMCLQ 476, 481.
[19] See *De Hahn v Hartley* (1786) 1 TR 343.
[20] Sir Bernard Rix, 'Conclusion General reflections on the law reform' in *Insurance Act 2015: A new regime for commercial and marine insurance law* (Informa Law from Routledge, 2016).
[21] See Merkin R and Gurses O, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 79(6) MLR 1004, 1018.

Chapter 3
Construing Crewing Warranties before section 11 of the Insurance Act 2015 – From *literalism* towards the dominance of the *factual matrix*

The remedial response of the courts is of huge importance. And the turning point where the draconian consequences of the breach of a warranty became milder through Section 10 was indeed a much-needed change and the cornerstone of the IA 2015. Yet it is the unprecedented ambiguity of Section 11 which captures our interest in this paper. That is why diving into a lasting search for the scope, the purpose, and the evolution in the construction of crewing warranties, long before the new regime of section 11, will reveal the tools, which will possibly be used as well under future litigation in defining the range of this puzzling section.

The leading cases on crewing warranties are going to be analyzed, since reading through the lines of the judgments will be proved vital in embracing the nature of such terms. For the purposes of the present thesis, it is these warranties which will be put under the spotlight, their interpretation, and construction by the courts. Therefore, any other basis for argument by either side during litigation (e.g. fraudulent claims[22]) falls outside the scope of this paper.

Undoubtedly, none of the old cases gives a straightforward approach to how section 11 of the IA 2015 will be applied on crewing warranties, since the Act alone creates uncertainties. When it comes to the interpretation of insurance contract terms, these uncertainties cannot be clarified, without a delicate observation of the future response by the courts.[23] Yet the old construction by the courts points out step by step a shift from literalism towards the introduction of the "*factual matrix*" doctrine. This mindset proves an evolution in the interpretation of such terms in a marine insurance policy.[24] Therefore, it is these principles deriving from the courts' rationale which, along with the basic rules of construction of terms in English insurance law, can give us "permission" to contemplate and envisage a possible application of Section 11 in future litigation.

3.1 The Milasan

In *The Milasan*,[25] on July 23 1995, a 90 ft. motor yacht sank by the stern in calm water and good weather, while on a voyage from Piraeus to Puerto Cervo. The yacht was under a marine insurance policy, which included the following term: "**Warranted professional skippers and crew in charge at all times**". At the moment of the incident, she had on board a master, an

[22] *The Milasan* [2000] 2 Lloyd's Rep 458.
[23] Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, p. 30-31 < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.
[24] Since marine insurance law is a part of contract law, the rules and principles adopted by general contract law for the construction of contractual terms can also be employed for the construction of marine policies, see Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.13.
[25] *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458.

engineer, and a deckhand. The important thing is that from the time of the renewal of the policy on May 1 1995 to July 1 1995 the yacht had no professional skipper in charge of her.

The nature of the warranty was not disputed, since the claimants accepted that this was a promissory warranty, meaning that "the assured promises that a state of affairs will exist at the time the policy is concluded and will continue to exist so long as the policy is operative"[26]. Since the assured had not employed a "professional skipper" during the specific period of the policy, the defendant insurer claimed that the assured was in breach of this continuing obligation, which led to the automatic discharge of the insurer's liability according to s. 33(3) of the MIA 1906.

Aikens J tried to find the rationale behind the warranty. Before diving into the meaning of every single word in the warranty, he accepted in paragraph 24(1) of his judgement that a practical construction of the terms must be the basis of his syllogism. This would be derived from the scope of the warranty. Therefore, it was clear in his judgment that the purpose of this warranty was for the insurers to ensure that the yacht would be properly looked after all the time, during both winter and summer, wherever she might be, meaning whether she was cruising or she was in a marina for the winter months.[27] This construction gave the continuing nature to the warranty as well. He decided that a "professional skipper" is a person with some professional experience in commanding a vessel of that type, without necessarily having passed any formal examinations. Substance gained supremacy over the form. The "skipper" along with the "crew" to be "in charge" meant to together take care of and manage the vessel. And they should be "in charge" "all the time". The court approached this term literally. It simply meant "the whole time, as opposed to intermittently or at intervals".[28] Thus, the court concluded on this aspect of the litigation, that the assured was in breach of the warranty[29] for this 2-month period since none of those requirements of the warranty was complied with, which were cumulative and thus they should all had been complied with.

3.1.1 Points to be addressed

Evidently, a strict literal construction runs throughout Aikens J's judgement. Consequently, this leads to the conclusion that no ambiguity was found in the way the warranty was drafted. In the clearest of words, "at all times" meant the whole time and it was simply not complied with by the assured. The more practical interpretation of "professional skipper", by not demanding the holding of a certificate or the passing of examinations, reveals an approach more based on business common sense.[30] But still, it was not enough to change the overall literal approach during the construction of this warranty. By this meaning it was actually held that the commercial scope of the warranty is rather broad in its nature: To reassure the insurers that the

[26] *The Milasan* [2000] 2 Lloyd's Rep 458, [21].
[27] *The Milasan* [2000] 2 Lloyd's Rep 458, [24].
[28] Ibid.
[29] Ibid.
[30] Which brings in mind the decision in *Bean v Stupart* (1778) 99 ER 9, where the court did avoid literalism and construed the word "seaman" from a more contextual point of view.

yacht will be always taken care of, under any circumstances, meaning that the crew's responsibilities were of a wide and general nature towards the overall care of the vessel.

Two more issues are crucial here. Firstly, it was commonly accepted by the parties that this was a promissory warranty, rather than a delimiting one. This means that breach of it leads to the automatic discharge of insurers' liability prospectively. Second of all, the Court held that the policy "was clearly not an "All Risks" policy" and that "cl. 9 of the Institute Yacht Clauses (IYC) identified specific perils"[31], meaning that the assured had to prove that the loss was proximately caused by one of these particular risks. There is no legal ground for supporting that where you have "a spectrum of perils that are identified in a policy" then the effect is the same as an "All Risks" policy. An all-risk cover must be clearly obtained by the assured.[32] The importance of the form and the extent of the policy cover in order to construe crewing warranties under section 11 of the IA 2015 will be analyzed afterwards.[33] For now, one should remember that this was a warranty with a rather generic purpose within a not "all-risk" cover policy.

3.2 The Newfoundland Explorer

In *The Newfoundland Explorer,*[34] a yacht was damaged by fire, caused by the overheating of the vessel's starboard side generator. The casualty did not take place during navigation, but while the yacht was laid up alongside a berth in the marina at Fort Lauderdale of USA. The insurance policy of the yacht was incorporating the Institute Time Clauses Hulls Port Risks including Limited Navigation (20/7/87) CL.312. The warranty incorporated in the policy stated "**Warranted fully crewed at all times**". The proposal form also stated that the vessel had one full-time crew member and two occasional crew members. Yet no crew members were on board at the time of the incident and the captain was approximately 15 miles away from the location of the vessel's berth.

The true construction of the express warranty was put under the spotlight as a preliminary issue during this trial.[35] The literal approach to the wording of the warranty by Gross J was again dominant. A vessel would be "crewed" once it has its crew onboard performing such duties as they are required. In his judgement, it is self-evident that when the crew is elsewhere, then the vessel is not "crewed" at all. In order to be "fully crewed" one should take into consideration what is the vessel doing. A navigating vessel requires different kinds of crewing obligations than a vessel moored in a marina. Therefore, Gross J held that for the vessel to be "fully crewed" at least one crew member should be on board.[36] Moving on to the meaning of "at all times", his

[31] *The Milasan* [2000] 2 Lloyd's Rep 458, [15].
[32] *Shell Petroleum Co. Ltd. v. Gibbs (The Salem)* [1981] 2 Lloyd's Rep. 316; per J. Mustill at p. 323.
[33] See Chapter 5.
[34] *GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer)* [2006] Lloyd's Rep IR 704.
[35] A trial of Preliminary Issues was ordered by Aikens J, dated 17 October 2005, before the Court, to determine the meaning of the warranty in issue.
[36] Ibid [31].

interpretation was simply straightforward: "24 hours a day; 'at all times' means what it says — the whole time, not some of the time".[37]

Interestingly, what Gross J characterized as his "first impression" for the literal meaning of "at all times" was later on backed up in his judgement on the basis of a rather contextual approach. The fact that the vessel was a valuable yacht led to the conclusion that it is "in no way surprising" that a crew member should be on board 24 hours a day, "a fortiori if and when machinery was running". Moreover, Gross J applied a commercial approach based on commonsense in order to find two exceptions about when the one crew member could leave the yacht within the range of the warranty. These exceptions were in the event of (i) emergencies rendering his departure necessary or (ii) necessary temporary departures for the purpose of performing his crewing duties or other related activities.[38]

As for the nature of the warranty, it was outside of the questions on the preliminary issue in the trial and it was not considered necessary by the judge to decide whether it was a delimiting or a promissory warranty. This was also underpinned, after his construction of the warranty, by the fact that in any case, no crew member was on board when the casualty took place. Citing *Arnould*[39] about the existence of these two classes of warranties, Gross J was of the view that this warranty would be characterized as a delimiting one, meaning that this was a term breach of which only suspends the cover instead of automatically discharging insurer's liability[40]. After remediation of the breach, the cover reattaches. He could not find any commercial reason why, once the breach is remedied, the assured could not enjoy the cover.

3.2.1 Points to be addressed

Gross J found no ambiguity in the way the warranty was structured. In his judgement the wording of the policy was clear. That practically led to two crucial points.

First of all, the words could be given their ordinary and natural meaning. There was room left for a literal construction of the crewing warranty. He rejected that the focus of the warranty was on the employment of sufficient crew, supporting that the focus was on the location of the crew, simply because that made "good practical sense". And that location is required to be, at least for one crew member, on board the vessel 24 hours per day.

Second of all, it was also evident that the "*contra preferentem*" rule could not be applicable. The benefit of that canon of construction, meaning construing the warranty against the person wanting to get the advantage of it, cannot be enjoyed in the absence of genuine ambiguity.[41] The court did not find that different wording should be used in order for "at all times" not to be

[37] *The Newfoundland Explorer* [2006] Lloyd's Rep IR 704, [16].
[38] *The Newfoundland Explorer* [2006] Lloyd's Rep IR 704, [20].
[39] *Arnould: Law of Marine Insurance and Average* (16th edn, Vol. II, 1981), at para 680.
[40] These clauses are usually referred to as "warranties descriptive of the risk" or "delimiting the risk", see *MacGillivray on Insurance Law* (14th edn, Sweet & Maxwell 2019) at 10-007.
[41] Most commonly it is understood to mean that, in the case of doubt, wording in a contract is to be construed against the party who seeks to rely on it, since it is up to him to make it clear, see Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.28.

interpreted that narrowly, citing Mance LJ observation in *Dodson v Dodson Insurance*[42]: " It is almost always possible to say after the event that the point could have been put beyond doubt, either way, by express words".

Until that point similarities can be found with *The Milasan,*[43] even though Gross J reiterated that this was a different case, with different wording. But the most important difference was that the scope of the warranty was not based solely on a strict literal approach. An effort to calm the harshness of literalism can be detected, on the basis of two principles used for the first time in the course of the construction of crewing warranties.

The judge tried to find the commercial purpose of the warranty by construing the words in the context in which they appear, in order to find the scope of the warranty. The judge used the *factual matrix*, the contextual background, in order to determine the purpose of the warranty[44]. And it is here where the biggest difference with *The Milasan*[45] arises. Gross J noted that the vessel was a valuable yacht. Such a quality indicates that the presence of at least one crew member on board a yacht of value aims at protecting it or safeguarding it against "risks such as vandalism, fire, pollution, the onset of bad weather or theft". Thus, the context was revealing of the commercial purpose of the warranty[46]. The judge, leaving aside at this point the literal meaning of the words, used the factual matrix as the yardstick in interpreting the meaning of the words,[47] And this was the additional need for extra safeguards against very specific risks associated with the insurance of a valuable pleasure yacht.

The second principle which emerged from Gross J's syllogism was the construction of the warranty according to commercial common sense. He did not give up the literal meaning of the wording "at all times", but he did realize that commercial common-sense points to the need of finding some qualification to the literal meaning, which led to the fact that some potential eventualities could give "permission" to the crew leaving the yacht unattended without leading to a breach of the warranty. Such events could be emergencies requiring the immediate evacuation of the vessel or a temporary departure in order to perform crewing duties onshore. It is evident that the judge estimated that unrealistic and uncommercial stances as a result of an unbending literal construction, like in *The Milasan*, should be avoided.[48]

For the sake of construing crewing warranties under section 11 of the IA 2015 later, it has to be pointed out that this was an insurance policy incorporating the Institute Time Clauses Hulls Port Risks including Limited Navigation (20/7/87) CL.312. Therefore, it was not an "all-risk"

[42] [2001] 1 Ll Rep 520, at 531.
[43] [2000] 2 Lloyd's Rep 458.
[44] More on that in Chapter 5.
[45] [2000] 2 Lloyd's Rep 458.
[46] *The Newfoundland Explorer* [2006] Lloyd's Rep IR 704.
[47] The "factual matrix" is a wide concept and extends to anything that would have affected the way in which the language of the document would have been understood by a reasonable man, see Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.18, footnote 41.
[48] Put differently, it was the view of the judge that insisting on a strict literal construction of the words "at all times" would be an unrealistic and uncommercial stance, see Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.22.

cover, but specific risks occurring would be deemed to be covered by the insurers. We will see how this fact could possibly affect the interpretation of the warranty's purpose.[49]

3.3 The Resolute

The shift in construing crewing warranties went a step further in *The Resolute*[50]. A motor fishing trawler became a total loss after fire bursting out of the running generator, while the vessel was moored alongside the quay in North Shields. After a day's fishing, she was moored and left unattended by all four crew members, including the assured who was acting as skipper, with the generator running, when the casualty occurred. Fire was indeed an insured peril. The warranty on the policy stated: **"Warranted Owner and/or Owner's experienced skipper on board and in charge at all times and one experienced crew member"**.

The insurers, practically applying *The Milasan*[51] and *The New Foundland Explorer*,[52] argued that the warranty means what it says, accepting though that some qualifications to the words "at all times" should be found. The High Court limited such qualifications to the very narrow range decided in *The New Foundland Explorer*.[53] The assured claimed that such a construction ignores the fact that the warranty is applicable only when the vessel is navigating, leading thus to "absurd results". It was mutually accepted though that this was a warranty of a delimiting nature, meaning that the cover would be suspended if the fire occurred when the warranty was breached. The High Court ruled in favour of the insurers, but the decision was overruled by the Court of Appeal.

Under the leading judgement of Sir Anthony Clarke MR in the Court of Appeal, an unprecedented evolution occurred in the construction of crewing warranties. His syllogism started with the elaboration on the legal principles applicable. Any term in a contract cannot be approached irrespectively of its context within the contract. Citing Lord Hoffmann's conclusions in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[54] the court pointed out how the background knowledge in a contract would affect the "ascertainment of the meaning" -the interpretation- which the document "would convey to a reasonable person" in possession of such knowledge. Thus, the surrounding circumstances and the "factual matrix" within the insurance policy can lead to a meaning far distant from the ordinary literal meaning of the words used. Because, in the exact words of Sir Anthony Clarke MR, sometimes "the meaning of words is a matter of dictionaries and grammars".[55]

He was troubled with the thought that linguistic mistakes in a contract might be possible, expressing the supremacy of business commonsense when a "detailed semantic and syntactical

[49] See Chapter 5.
[50] *Pratt v Aigaion Insurance Co (The Resolute)* [2009] 1 Lloyd's Rep 225.
[51] [2000] 2 Lloyd's Rep 458.
[52] [2006] Lloyd's Rep IR 704.
[53] [2006] Lloyd's Rep IR 704.
[54] [1998] 1 WLR 896.
[55] *The Resolute* [2009] 1 Lloyd's Rep 225, [9].

analysis" of the words can lead to un-businesslike results[56]. The impetus for the following construction in this case was Lord Steyn's position in *Sirius International Insurance Co v FAI General Insurance Ltd*,[57] that "there has been a shift from literal methods of interpretation towards a more commercial approach". Sir Anthony Clarke MR did acknowledge that the starting point in the construction of a term is still the meaning of the words used,[58] but not to such an extend as leading to unreasonable results, which are unlikely to be intended by the parties, especially in the absence of the clearest of words.[59] Deriving some assistance from *Hussain v Brown*,[60] where the draconian nature of a continuing warranty was challenged unlike in the present case, he concluded that it is always at the hands of the insurers to stipulate their purposes in clear terms. He accepted as well the basic principles of construction of warranties as described in *MacGillivray on Insurance Law*.[61] Such principles were: (i) that "the apparently literal meaning of the words in the warranty must be restricted if they produce a result inconsistent with a reasonable and business-like interpretation of such a warranty", and (ii) that "any ambiguity in the terms of a policy must be construed against the insurer",[62] leading to the application of the "*contra preferentem*" doctrine.

All that Sir Anthony Clarke MR had to do next was to apply this thoroughly expressed legal view on the present facts. Revisiting *The Milasan*[63] and *The New Foundland Explorer*,[64] he distinguished these cases from *The Resolute*,[65] on the basis that both cases contained different kinds of warranties insuring different kinds of vessels. Interpreting the wording, he made clear that the requirement of an experienced skipper to be on board and in charge, indicated that the insurers were seeking protection against such risks, which would be necessary for a skipper to guard against. The requirement also for a crew member just to be on board, pointed out that the main underlying purpose of the warranty was to provide protection against risks occurring when the crew was expected to be on board. Therefore, the principal time was when the vessel was facing navigational hazards or when she was manoeuvring.[66] Dealing then with the long-litigated expression "at all times" he rejected a literal approach, arguing that, since no clear indications existed as to the extent of its qualification, it was a clause rather ambiguous. It should be construed as *"contra preferentem"*, and thus against the insurers. Accordingly, he held that, since the insurer did not stipulate in clear words that the crew's presence on board was required even when the vessel was left moored with the generator running, there was no breach of the warranty.[67]

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[56] *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191, 201, per Lord Diplock.
[57] [2005] Lloyd's Rep IR 294 at para 19.
[58] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at page 384C-D, per Lord Mustill.
[59] *Wickman Machine Tool Sales Ltd v Schuler AG* [1974] AC 235, page 251, per Lord Reid.
[60] [1996] 1 Lloyd's Rep 627, page 630, per Saville LJ.
[61] *MacGillivray on Insurance Law* (11th edn, Sweet & Maxwell 2008) at 10.52-10.55.
[62] *The Resolute* [2009] 1 Lloyd's Rep 225, [14].
[63] [2000] 2 Lloyd's Rep 458.
[64] [2006] Lloyd's Rep IR 704.
[65] [2009] 1 Lloyd's Rep 225.
[66] *The Resolute* [2009] 1 Lloyd's Rep 225, [23].
[67] *The Resolute* [2009] 1 Lloyd's Rep 225, [26].

3.3.1 Points to be addressed

The Resolute[68] is a landmark case in construing crewing warranties. The syllogism of Sir Anthony Clarke MR is not based on a literal approach, trying only afterwards to calm its accepted harshness with the means of qualifications similar to those in *The New Foundland Explorer*.[69] Interestingly, the dominance of the "factual matrix" along with commercial common sense was the starting point of the argument, which runs throughout his judgement.

In contradiction with the two previous cases, the Court of Appeal did find ambiguity in the wording of the warranty. Because it was a wording contradictory to the relevant contextual background. A background which was missing from the previous two cases, regardless of the fact that in any case it would not be much appreciated, based on the literal approach followed:

The Court of Appeal took into account the EU Regulations, which were limiting the days available for a fishing trawler like the Resolute to be at sea fishing to 227 days a year. When the vessel is not used for fishing, it will be usually laid up in a shed ashore, and during that time the skipper and the crew are not expected to live on board, because of the poor accommodation facilities on such vessels. Thus, the much-restricted qualifications of *The New Foundland Explorer*[70] allowing the crew to leave the vessel only in case of emergencies or to perform its obligations on shore can be characterized only as indicative in *The Resolute*[71] and nothing more.

Clause 26.5 of the "Trawler Wording" provided that: "It is warranted that unless the Vessel is manned by at least two persons who are medically fit in all respects to man such a vessel, one of whom shall be competent to be in command, she shall not be navigated". Burton LJ pointed out that "this warranty is virtually otiose if the typed warranty is to be read literally. A more sensible reading is that the typed warranty places a gloss on clause 26.5, requiring the owner or his experienced skipper and one experienced crew member to be on board when the vessel is navigated or in other circumstances where their presence would be appropriate."[72] This Clause clearly tipped the balance in the present case, justifying a different approach than the one in the previous cases.

The Resolute was a trawler, a fishing vessel of a commercial value much lower than the one that the two yachts possessed in *The Milasan*[73] and *The New Foundland Explorer*.[74] In those cases, it was a sensible approach to expect that the insurers wanted to secure the presence of more safeguards in the policies of the more valuable yachts.

Such a context could only lead to contradictions if a literal approach of the crewing warranty was implemented. It was a delimiting warranty. And yet the Court of Appeal referring to the

[68] [2009] 1 Lloyd's Rep 225.
[69] [2006] Lloyd's Rep IR 704.
[70] [2006] Lloyd's Rep IR 704.
[71] [2009] 1 Lloyd's Rep 225.
[72] [2009] 1 Lloyd's Rep 225, [33-34].
[73] [2000] 2 Lloyd's Rep 458.
[74] [2006] Lloyd's Rep IR 704.

example of *Hussain v Brown*[75] tried to make clear that the strict and draconian nature of warranties under the English law leads to the conclusion that, if the warranty intends to provide continuing protection to the insurers then it should be stipulated accordingly[76]. The absence of clear wording along with the already described factual matrix strongly pointed out the need to qualify the words "at all times". The question was what qualification the parties had intended there should be since there was indeed an ambiguity on that matter. In the view of a purposive approach, the qualification would be that required by common sense, without the court going as far as to invent a new bargain for the parties[77]. Eventually, the court ended up with the construction of the warranty *contra preferentem*, meaning against the insurer. Even though, generally, this is very much a last resort of English Law given the "differing, and potentially conflicting, formulations of the principle".[78]

3.4 A brief comment on such evolution

According to Gurses, "When a legal issue is answered as a matter of contractual construction it certainly provides flexibility, which was evidently desired. However, inevitably, it also brings uncertainty to the outcome".[79] From this statement, one could end up with two conclusions. The ever-progressing transition from literalism towards a more purposive approach in construing crewing warranties does provide a much-needed flexibility in the interpretation of the relevant terms, not only for the present but also for future litigation. Nevertheless, even here there are no clear-cut answers as can be seen after the evaluation of the abovementioned cases. The second observation is that the poor drafting of the abovementioned clauses causes this exact uncertainty as well. The vague and generic wording along with the absence of qualification creates an ambiguous scenery.

In *The Milasan*[80] the effort by the Court of Appeal to construe the crewing warranty in a practical manner was mirrored in a strict literalistic approach of the phrase "at all times". It simply meant what is said, which could lead to the assumption that it could be equal to "always". Professional skippers and crew had to look after the vessel the whole time, as opposed to intermittently or at intervals. According to Aikens J judgement, that phrase was quite clear. What the court did was to determine what the parties meant by the language used. As Lord Hoffman has pointed out, in such cases the courts have to "determine the objective meaning that those words convey to a reasonable person".[81] Thus, it follows as a presumption that the words should be given their plain and natural meaning and be interpreted "according to the

[75] [1996] 1 Lloyd's Rep 627.
[76] Georgiou K, 'Crewing warranties' (2009) 9(1) STL 6.
[77] Ibid.
[78] For a thorough analysis of the rule see *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2015) at 7.08.
[79] Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, p. 10 < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.
[80] [2000] 2 Lloyd's Rep 458.
[81] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912–13, per Lord Hoffmann (hereinafter referred to ICS v WBBS).

ordinary meaning of the words used".[82] It can be observed that literalism, as a principle of construction of express warranties in general, has been for too long dominant in English contract law. Even recently, for example, in *Arnold v Britton*[83] the Supreme Court referred to "the eyes of a reasonable reader" through which the court will try to identify what the parties had meant in the course of interpretation of a contractual provision. It was common ground that most obviously the meaning would be derived from the "language of the provision".

In *The New Foundland Explorer*[84] literalism in interpreting "at all times" was also preferred. And yet it was a starting point in the construction of crewing warranties for a tiny shift to a more business-like interpretation. The reason why is that the importance of context and of the facts surrounding the term was unveiled, at least to the point of finding some exemptions to the strict construction of the warranty. In the mind of the author, it was a perfect bridge for the introduction to the "*factual matrix*" and commercial common sense as means of interpretation in *The Resolute.*[85] The flexibility provided by these tools aims to avoid absurd results, to which the draconian nature of warranties can lead. It is a more efficient way to achieve the very object of interpretation: to ascertain the limits of any express warranty with precision. To ascertain its purpose by letting in the influence of the relevant generic contextual background. As Soyer explains, "if express warranties are construed very broadly and against the assured, the function of insurance in seeking to prevent loss supersedes the primary function of loss distribution. Similarly, adopting a narrow construction of express warranties might lead to results that contradict the main principles of insurance".[86] The struggle for such balance has been detected in many cases, where the courts applied a commercial understanding on the phrases and the wordings used. In *Hart v Standard Marine Insurance Co*,[87] the policy on the insured vessel contained the clause "warranted no iron … exceeding the net registered tonnage". The Court of Appeal held that the intention of this term was to exclude a specific class of cargo with certain physical qualities and therefore that "iron" included steel because that is what the ordinary businessman in such a trade would perceive. Thus, the warranty was breached because a quantity of steel in excess of such tonnage was shipped. In another older case on a crewing warranty, in *Bean v Stupart,*[88] there was a requirement for the vessel to carry "30 seamen besides passengers". Only 26 mariners were officially registered though, and the assured reckoned the steward, surgeon, cook and some boys. It was held that "mercantile usage" allows those boys to be included under the term "seamen" since they were generally people employed in navigation and therefore not just passengers.

[82] *Thomson v Weems* (1884) 9 App Cas 671, at 687, per Lord Watson.
[83] [2015] UKSC 36; [2015] A.C. 1619.
[84] [2006] Lloyd's Rep IR 704.
[85] [2009] 1 Lloyd's Rep 225.
[86] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.11.
[87] (1889) 22 Q.B.D. 499.
[88] (1788) 1 Dougl 11.

3.4.1 Construction has no easy ways

Nevertheless, finding such balance through construction is no easy task. It can be observed that English courts, while the business-like construction gains supremacy, tend to construe insurance warranties in a more insured-friendly fashion.[89] *The Resolute*[90] is indeed a perfect example of that. As stipulated in *Arnould*, "a warranty, like every other part of the contract, should be construed according to the understanding of merchants".[91] Citing Lord Esher, the authors point out that the construction has to be made "according to its ordinary acceptance among the class between whom the documents passed". In *The Resolute* it was the class of fishermen who could not predict that their professional insurers would expect the crew always to be on board, especially when in the course of the fishing business that was impossible. But, in the light of future construction under the IA 2015, it would be a mistaken belief to accept that an insured-friendly approach will always be the rule. Since applying the same principles could lead to decisions in favour of the underwriters, such as in *Hart v Standard Mar Ins Co*.[92] Therefore, a "pro-insured" approach, in its generality, cannot be the principle for construction under Section 11 of the IA 2015, a fact which necessitates the activation of more solid tools.

The reason for this uncertainty of the outcome is based on two pillars. First of all, previous decisions by the courts about the interpretation of express warranties usually might have no value as a precedent, when it comes to the construction of another warranty in a different policy. That becomes evident from the illustration of the cases on crewing warranties above. Every contract is a "unique bargain with a unique context, which must be applied to a unique fact situation".[93] Yet they do provide some significant guidance for future construction process by settling the basic legal principles, as will be analyzed below under the puzzling Section 11 of the IA 2015. Secondly, the ascertainment of the will and intention of the parties are always open to multiple meanings.[94] Even the parties sometimes do not know what they intend to mean with the wording they use or to what extent they are prepared to bind themselves. As it has been analyzed above,[95] finding whether an express warranty is a promissory or a delimiting one can be difficult.[96] Thus, if the insurers want the security of a continuing protection, it has to be up to them to stipulate so in clear terms. The demand for clear stipulation by the parties[97] is constant simply because they fail to make their intentions clear by the words they adopt, or because of the inherent ambiguities of the language.[98]

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[89] Wenhao Han, "No easy search" (2008 December) MRI <https://www.i-law.com/ilaw/doc/view.htm?id=174155> accessed 1 September 2020.
[90] [2009] 1 Lloyd's Rep 225.
[91] *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-51.
[92] (1889) 22 Q.B.D. 499.
[93] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.12.
[94] The general observations on principles of construction in the judgment of the Supreme Court in *Rainy Sky Ltd v Kookmin Bank* [2011] 1 W.L.R. 2900, delivered by Lord Clarke, have also to be taken into account here.
[95] *Kler Knitwear Ltd v Lombard General Insurance Co Ltd* [2000] Lloyd's Rep I.R. 47.
[96] Georgiou K, 'Crewing warranties' (2009) 9(1) STL 6.
[97] As was the case in *The Resolute* [2009] 1 Lloyd's Rep 225.
[98] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.10.

3.4.2 Factual matrix, ambiguity and contra preferentem

If there is one thing we should keep in mind for construing crewing warranties in the future, it is the role of the "*factual matrix*" as a yardstick of interpretation. Its importance is better underpinned by a backwards analysis.

In *The Resolute* the CA applied the rule *verba chartarum fortius accipiuntur contra proferentem*, construing a -wholly actually- problematic warranty against the insurer and in favour of the assured. This ruling reflects the tendency to regard the whole policy as the insurer's document for the purposes of this rule.[99] But as *Arnould* stipulates, the rule is not one which has been applied much in marine insurance.[100] In the presence of standard Institute Clauses, it is not always easy to determine who drafted the clause for the whole market,[101] especially when there is mutual consent for that drafting.[102] Also, when the actual drafting is carried out by brokers acting for the assured, which is usually the case, does it mean that ambiguity is to be construed in favour of the insurer? In *The Resolute* the trial judge accepted that brokers assisted the assured. And yet the "unequal bargaining position of the assured", of the fishermen, was finally taken into consideration,[103] leaning the case in favour of the assured. Because that was dictated by the extrinsic facts surrounding the case, the factual matrix.[104]

The necessity of this canon of interpretation is evident when it comes to the search for ambiguity. The *contra preferentem* rule can be applied only in the presence of genuine ambiguity. But sometimes it is not clear whether there is a genuine ambiguity or simply just a difficulty in construction due to a badly and vaguely drafted clause.[105] The importance of being effective in finding the ambiguity in a warranty is paramount, since, as it is stated with precision in *Arnould*, "in the absence of ambiguity, the courts are required to give effect to the words even though they do produce a result which is not commercially sensible: it is not for the court to rewrite the parties' bargain".[106] Thus, the contextual background could assist not only in choosing between two different meanings once ambiguity has been confirmed, but more importantly, it can be of use in concluding whether the parties have used the wrong words or syntax[107] in the first place. As eventually Soyer points out, "liberalizing the use of the factual

[99] A tendency which can be detected both in the UK and in the USA, see *Blackett v Royal Exch Assurance Co* (1832) 2 Cr. & J. 244.
[100] *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 3-39.
[101] This does not mean however that the doctrine is not applicable with standard Institute Clauses. See also *Richard Henry Outhwaite v Commercial Bank of Greece SA (The Sea Breeze)* [1987] Lloyd's Rep 372, at 377.
[102] See *Birrell v Dryer* (1884) 9 App. Cas. 345, where the wording of the warranty was held to be as much that of the assured as that of the insurer.
[103] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.31.
[104] Starting from the time of *Birrell v Dryer* (1884) 9 App. Cas. 345, a movement can be observed towards applying the rule more closely in accordance with the facts of each case, see *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 3-39, ft 224.
[105] Soyer B, Warranties in Marine Insurance, (Routledge 2018) at 2.31.
[106] *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 3-39.
[107] *The Resolute* [2009] 1 Lloyd's Rep 225, [9].

matrix"[108] and turning it into a constant part of the process of the construction of insurance warranties is what practicality and effectiveness demand.

[108] Ibid [99].

Chapter 4
Section 11 of the Insurance Act 2015: Scope and ambiguities arising

The Law Commission did listen to the voices calling for a different remedial response to the breach of warranties. Section 10, as it has already been explained, provides that the liability of the insurer will be suspended for as long as the warranty has been breached, but it will be reinstated when the breach has been remedied by the assured. The Law Commission wanted to go a step further and introduced Section 11. This Section lacks the clarity of the previous one. Its problematic drafting raises numerous questions, because it is the main section which is going to be activated, when it comes to the construction of terms. In order to envisage its possible application, specifically in construing crewing warranties, let us first refer to its background and purpose.

The initial intention of the Law Commission to fill in the gaps has always been to insert a straightforward causation test.[109] Numerous modifications and alterations followed, after a constant refusal by the market to accept a pure causation test. The effort then was to enable a more objective approach, which led to the Consultation Paper No.3 in June 2012, where the Law Commission proposed that the breach of any term "designed" to reduce the risk of loss of a particular type, at a particular time or a particular location should lead to the suspension of insurer's liability only for the loss of that type, at that time or location. What was worded as "designed" to reduce the risk was considered to be difficult to be identified, and therefore it was modified into terms that "tend" to reduce the risk. Still, the Law Commission's Report in July 2014[110] seemed to require a causal link between the loss and the breach itself, which was again met with reactions and was omitted from the Bill. A "causation-free" clause draft, at least as far as the Law Commission's view is concerned, was finally introduced in Section 11 of the Insurance Act 2015, after years of discussion. Now the Section, influenced by the New York code,[111] has the following structure:

> (1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—
>
> (a) loss of a particular kind,
>
> (b) loss at a particular location,
>
> (c) loss at a particular time.

[109] Issues paper 2 (Warranties), November 2006; Consultation Paper on Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured; LC No.182, SLC No.134, July 2007 paras 8.45, 8.48.
[110] *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com. No. 353; Scottish Law Com. No. 238.
[111] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.15].

(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

(4) This section may apply in addition to section 10.

The warranty reforms of Section 10, despite the increased level of protection they provide to the assured, fall short on two specific occasions. When the warranty has been broken but there is no causal link between the warranty breached and the loss occurred, Section 10 cannot be activated to the rescue of the assured. Moreover, apart from warranties, there are other risk-related terms, for which no solution by Section 10 can be given since it applies only to warranties. Thus Section 11 came to strengthen the assured's position, by the following stipulation: The assured will keep his indemnification intact, and the insurer will not be able to exclude his liability, when the loss did occur during a time of non-compliance with a warranty (or any term), if i) according to s.11(1) compliance with the warranty (or any term) would tend to reduce the risk of loss of a particular kind, loss at a particular location or loss at a particular time; and ii) according to ss. 11(2)(3) the assured proves that non-compliance with such a warranty (or any such term) could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.[112] In addition, ss. 11(4) provides that Sections 10 and 11 may apply together, especially when the term is a warranty, since Section 10 applies only to warranties.[113]

By this stipulation the Law Commission wanted to address the problem of "reliance by insurers on breaches of irrelevant warranties", meaning that they understood that it makes no sense to deny a claim when the term breached is clearly irrelevant to the loss occurred, in a way that this specific type of loss actually occurred could not have been prevented even if this warranty had been complied with.[114] The goal, therefore, was for a technical get-out by insurers to be avoided. For example, in the classic case of a warranty of a burglar alarm to be established in a warehouse, if it is not complied with, then the assured, in the absence of Section 11, would lose coverage in case of a loss caused by fire.

Law Commission's efforts improved assured's position even more by making the remit of Section 11 much wider than the one in Section 10. Section 11 applies to any kind of term and not merely warranties. It is a choice of huge significance since terms like suspensory provisions, conditions precedents or exclusion clauses could perform a risk-management function similar

[112] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 5.58.
[113] Explanatory Notes to the Insurance Act 2015 at [97].
[114] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.7].

to insurance warranties.[115] Undoubtedly, this development is a clear and long-needed intention of a "more holistic approach to risk management clauses in English law, discarding technical categorization of contractual terms".[116] It is a way of avoiding arguments on technicality and looking instead at the content of each provision.[117]

It can be observed that through the application of Section 11, the results can provide a pro-insured approach and lead to a more sensible outcome, in contradiction with the unbending nature of breaching a warranty. But is this application an easy one-way solution? Why has the Law Commission accepted that there is a lack of certainty when it comes to the interpretation of the section by the courts?[118] Why is it common ground that this section is the most controversial of all the provisions of the 2015 Act?[119]

The answer lies in a hidden bargain, a twofold difficulty:[120] to identify with certainty the terms caught by the provision and to apply the relevant test -in its ambiguous nature- for a connection between the term and the loss. A case-by-case approach is the only effective way of answering these puzzling thoughts, which will be the scope of our elaboration later on in construing crewing warranties under Section 11. For now, let us clarify the basic ambiguities arising out of this twofold problem.

To begin with, Section 11(1) introduces an objective test of finding the purpose and the scope of each term. It is a test of assessing whether a term "defines the risk as a whole", and falls outside the scope of the section, or it is a "risk mitigation clause", in which case the section will apply. This represents what has been characterized accurately as "the new challenge" for the courts.

4.1 Terms defining the risk as a whole

Section 11(1) excludes "terms defining the risk as a whole". Commentators commonly agree that there is no definite answer to which terms could qualify since no clear set of rules or a coherent rationale exists to provide an answer.[121] Law Commission, in its Stakeholder Note (at [1.8]- [1.10]) proceeded with a poor effort of identifying which kind of terms would define a

[115] Explanatory Notes to the Insurance Act 2015 at [94].
[116] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 5.61.
[117] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.41].
[118] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.49].
[119] See Merkin R and Gurses O, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 79(6) MLR 1004, 1020, where this position is underpinned with certainty, characterizing it interestingly as a "safe bet".
[120] As it is perfectly illustrated in Merkin R and Gurses O, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 79(6) MLR 1004, 1020.
[121] *Arnould: Law of Marine Insurance and Aver*age (19th edn, Sweet & Maxwell 2020) at 19-39. Other commentators point out as well the complexity of his new challenge, see *MacGillivray, Insurance Law* (13th edn Sweet and Maxwell 2016) at para.10.131, and *Colinvaux, Law of Insurance* (11th edn Sweet and Maxwell 2016) at paras. 8-110, 8-113.

risk in its generality.[122] The example came from the New Zealand Law Commission (NZLC) and led to the non-applicability of Section 11 to terms which set out:[123]

(1) the uses to which insured property can be put (e.g., commercial/personal);

(2) the geographical limits of the policy;

(3) the class of ship being insured; or

(4) the minimum age/qualifications/characteristics of a person insured.

The Law Commission characterized those terms as terms that go to the heart of the risk profile,[124] and therefore any breach of them should lead us outside the scope of Section 11 and allow the insurer to avoid liability. These terms have a more general limiting effect, defining the very limits of the risk that the insurer was prepared to undertake, and therefore defining the scope of the whole policy, instead of having a link with a specific risk sector.[125] These examples above seem to make business sense, specifically to the point that such terms affect the overall assessment of the risk.[126] And yet the elusiveness of the distinction between a term "defining the risk as a whole" and one that does not is evident, with no obvious solution besides judicial good sense.[127] Why is that? Taking as an example *HIH Casualty and General Insurance Co v New Hampshire Insurance Co,*[128] the term creating an obligation to make 16 films in two slates, under the scope of a film finance policy, was a term not expressly worded as warranty. But still, it was characterized as a warranty on the grounds that it defines the risk which the underwriter agreed to undertake. Rix L.J. pointed out that the characteristics of a warranty were that it went to the root of the transaction agreed. How could one then identify which warranty does and which does not define the risk as a whole? Moreover, it has to be noticed that a marine seaworthiness warranty seems to define as well the risk as a whole. However, according to the Law Commission, even if a loss is proved to be unconnected to seaworthiness or roadworthiness it should be recoverable, and Section 11 should apply.[129] The ambiguity goes further as the Lloyd's Market Association (L.M.A.) highlights, challenging the Law Commission's arguments.[130] In the example of a policy insuring an oil refinery containing a clause requiring "a qualified fire officer to be on the premises at all time", it was far from obvious whether this

[122] *Arnould* reminds us that "the Commissions' intentions and their views on the likely meaning of s.11 can only properly be treated as a guide to its interpretation to a limited extent", see *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-39.
[123] Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.8], reproduced in H.L. Paper 81, p. 47.
[124] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.34].
[125] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.35]. Here the Law Commission clarifies also that this is not even a proposition to identify and create a list of terms which do not fall within the Section 11.
[126] For an illustration of that matter see *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-40.
[127] Merkin R and Gurses O, 'Insurance contracts after the Insurance Act 2015' [2016] LRQ, p. 11.
[128] [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161.
[129] Ibid [105].
[130] House of Lords Paper 81, 36 <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf > last accessed on 1 September 2020.

term relates to the risk undertaken as a whole or just to the loss caused by fire at a specific part of the refinery.[131] Illustrations like this one will be elaborated further in our effort to construe crewing warranties.

4.2 Risk-mitigation clauses

The core of Section's 11(1) objective test is represented within its range of applicability. The following inquiry raises the challenge: whether compliance with the term in question would usually be expected to tend to reduce the risk of a particular kind of loss or loss at a particular location or time.[132] The sole intention was to activate an "objective assessment of the purpose of the provision".[133] The observer will have to dive into a search for a specification within the purpose and scope of the relevant term in relation to an identifiable risk of loss, and have to decide at the end what kind of loss would probably be less likely to occur if such a term is complied with. The wording is problematic, not so much in its structure because it is rather straightforward, but rather in the results it produces because of the absence of clear directions in the interpretation process by the Law Commission and the absence of case law on Section 11. How narrowly or broadly should the term "particular" be approached? Is it a matter of quantity of the kinds and types of the loss, the place and the time of it? Common sense answers are not always going to be the appropriate approach.[134] For example, cases like *The Bamcell II,*[135] where a warranty requires a night-watchman on commercial premises might be a term tending to reduce the risk of loss at a particular time, and that is not during daytime. But a troubling thought dictates that such clauses are commonly used in policies, reflecting the premium rates.[136] Therefore, it is possible to be considered as a term defining the risk as a whole.

The technicality of construing a warranty, the call for new interpretative tools to be applied and the complexity of the matter are making essential an example-based approach, case by case. A thorough analysis will follow later on, attempting to construe crewing warranties under the new ambiguous regime.

4.3 Non-regulated terms

Crewing warranties do have some bearing on the risk covered, the nature of which is going to be assessed afterwards. Nevertheless, it is useful to mention that there are terms, which are not

[131] House of Lords Paper 81, 37, at para. 12, <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf > last accessed on 1 September 2020.
[132] For a detailed approach see *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-43 to 19-46.
[133] Explanatory Notes to the Insurance Act 2015 at [93].
[134] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.49].
[135] [1986] 2 Lloyd's Rep. 523.
[136] *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-46, ft 192.

risk-management clauses and do not have any kind of bearing on the risk.[137] For example, in the case of a premium warranty,[138] if the payment is not made by the specific date then the cover will be suspended until the breach is rectified and the assured will not be able to apply Section 11 for any loss occurred before such rectification. Claims notification clauses are another example. They all remain unregulated and fall wholly outside the scope of Section 11.[139]

4.4 Causation?

The issue of causation is the last disputed area of interest within Section 11. Once it has been established that the assured failed to comply with a term, with which compliance would tend to reduce the risk of loss of a particular kind, or at a particular location or time, then the insurer will try to exclude, limit or discharge his liability for the loss occurred. According to Section 11(3), the assured then has to raise the "type of loss" issue as a counter-argument[140] and show that his non-compliance with the term in question "could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred". Only if this burden of proof is satisfied, the insurer cannot rely on the assured's non-compliance to exclude, limit or discharge his liability, according to Section 11(2).

The Law Commission was determined to avoid the introduction of a very much criticized causation test. In their view, no causation element is involved. Section 11(3) does not introduce a causal link between the breach itself and the loss occurred.[141] It does not even introduce a causal element about whether compliance with the term would have prevented the loss.[142] The cause of the loss is immaterial, as it is the way in which the loss occurred.[143] The appropriate test is whether non-compliance with that term *could have* increased generally the risk of that loss, in the specific circumstances that loss has been suffered. This poses indeed a functional enquiry: "was this clause incorporated to control this kind of loss?".[144] The Law Commission gave some examples to support this illustration. Non-compliance with the obligation to put a burglar alarm could not have increased the risk of loss by fire. Non-compliance with the requirement of five-lever mortise locks on all doors, could not have increased the risk of loss from thieves breaking in from a window instead.

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[137] For a detailed approach on risk and non-risk clauses check Merkin R and Gurses O, 'Insurance contracts after the Insurance Act 2015' [2016] LRQ, p. 13.
[138] For a case concerning a premium warranty see, *JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret* [1998] Lloyd's Rep. IR 377.
[139] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 5.62.
[140] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.38].
[141] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.5].
[142] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.16].
[143] Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.17].
[144] Davey J, 'The Insurance Act 2015 and Marine Insurance' (2016) presentation paper for The Institute of Maritime Law, page 9.
(2013) 4 LMCLQ 476.

And yet, the elusiveness in the arguments of the Law Commission is evident, as it seems that causation is introduced by the back door.[145] When we ask ourselves, which are the circumstances in which the loss occurred, we basically pose the question of why or how the loss actually happened. This is a causation-based argument, leading to illustrations similar to the one rejected in the *New Zealand Insurance v Harris*,[146] namely the argument by the insurers that if the tractor had not been hired out, a period which was excluded from policy cover, then there might not have been a fire at all. The New Zealand Court of Appeal rejected this argument, on the basis that hiring merely created the scenery in which the loss occurred, but it was not the cause of the loss. Causation though in that way does not represent how Section 11(3) is read. Fears of pure causation are based on the way that this section will be possibly applied. To analyze the circumstances under which the loss occurred and their link with a possible compliance with the breached term, undoubtedly will lead to some factual inquiries much too similar to those of a pure causation test.[147] The L.M.A. in its written evidence to the S.P.B.C.[148] has stated accurately the basic problems that may arise, under the example of a motor policy with a roadworthiness warranty, where there is a defective headlight.[149] If the vehicle skids on black ice in deep darkness and crashes, who is to say with certainty whether the faulty headlight, meaning the non-compliance itself, did actually increase the risk of loss in the circumstances it occurred? What if the assured proves that the darkness was so deep that even with the headlight been working, there was no chance that the black ice would have been visible? How can be determined with precision then whether "this clause was incorporated to control this kind of loss"? This is a matter of proof, and it will be a difficult task for the courts to step on a thin line between applying or not a pure causation test. Potentially this test will also increase transaction and litigation costs.[150] Nevertheless, the present view on the matter has been expressly stated by the L.M.C.:[151]

> The new section 11 therefore appears to be afflicted by precisely the kind of uncertainty which the JLC have, in the past, wished to avoid. Indeed, the JLC have previously stated '…It is clear that a causal connection test is not appropriate for all contract terms, and we think it would generate too much uncertainty to attempt to apply such a test to some terms and not others….' LMC are concerned that the new section 11 would generate too much uncertainty for precisely that reason; it attempts to apply to some terms, but not others.

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[145] See the evidence of the L.M.A., where s. 11 is referred to as introducing "causation by the back door": H.L. Paper 81, p. 36. The L.M.A.'s full evidence can be found at pp. 20 and 35-37.
[146] [1990] 1 N.Z.L.R. 10.
[147] For a thorough elaboration see Merkin R and Gurses O, 'Insurance contracts after the Insurance Act 2015' [2016] LRQ, pp. 15-17.
[148] Special Public Bill Committee.
[149] House of Lords Paper 81, 36 <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf > last accessed on 1 September 2020.
[150] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 5.60.
[151] House of Lords Paper 81, 37, at para. 13, http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf , last accessed on 1 September 2020.

Chapter 5
Construing Crewing Warranties under Section 11 of the Insurance Act 2015: The yardstick of interpretation

If there are any lessons that we should keep in mind from the malfunctions of Section 11, these are: a) Uncertainty is dominant. The gaps in the structure and the wording of this section raise concerns, which even the Law Commission reluctantly accepted;[152] b) No clear-cut solutions are provided by neither the draftsmen of the IA 2015 nor the courts, which have not yet been faced with the task of applying and interpreting Section 11. The result is nevertheless the same. A constant need to find new tools for interpretation and to envisage a possible application. It is here where legal precedents on the construction of crewing warranties along with the basic risk-assessment rules can be of some assistance. Their combination could be the indicator for the methods, which will possibly be used in order to construe crewing warranties under Section 11, proving that the past can become the bridge for the future on the basis of a *de lege ferenda* approach.

The purpose of our test-analysis is to construe the terms as such and envisage the reason why they were put into the contract, irrespective of whether in the end there was a breach of the term or not by the assured. Therefore, the outcome of the cases will be put aside as well as any fact that relates to a possible breach or not. By means of assumption where necessary, we will concentrate on the very nature of the crewing warranties, the context they have been put in and their connection to the risk covered.

5.1 The test commences

As it has been already mentioned each crewing warranty has been construed separately, within the uniqueness of its policy and without overruling the previous cases. Every contract is indeed a "unique bargain with a unique context, which must be applied to a unique fact situation".[153] From the beginning of our test-analysis, we understand that the correlation between the purpose of the term and the context of each case is paramount. But the similarities in the wordings of these crewing warranties are also to be noticed. Trying to draw a simple example of such a warranty in a marine insurance policy, based on the usage of the market so far, that would be one stating **"Warranted crew on board and in charge at all times"**. Nevertheless, the starting point will be the same:

The assured will argue that the warranty in question, meaning the requirement of the crew being on board fulfilling some specific obligations towards a specific outcome during a specified period, is clearly a warranty which tends to reduce the risk of loss of a specific kind, or at a specific place or time. Therefore, it is a safe bet to predict that the assured in most cases would

[152] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.5].
[153] Soyer B, *Warranties in Marine Insurance*, (Routledge 2018) at 2.12.

be tempted to argue that compliance with a crewing warranty would tend to reduce the risk of loss in a narrow fashion, applying a narrow approach, in order to be able to enjoy cover under Section 11(3) even during the period of non-compliance. On the other hand, the insurer will favour a more broad and general interpretation, meaning that the crewing warranty merely defines the risk covered as a whole, trying to set the warranty wholly outside Section 11 and within the application of Section 10, where his liability will be suspended during the breach. One must always remember that it is not certain that the two lists of terms in Section 11(1) are comprehensive.[154]

5.2 The bearing to the risk

What has to be detected is whether crewing warranties do have any kind of bearing on the risk covered. The reason for such a task is that Section 11 -as is the case as well for Insurance Act 2015 as a whole- has not been designed to have any effect on policy terms completely unrelated to the risk. Regardless of whether the policy is for a yacht[155] or a fishing trawler,[156] the illustration of the cases above has pointed out that the requirement for crew to be on board is because of the nature of their obligations each specific period. These obligations intend to protect the vessel from perils insured against, bearing thus to the risk covered -despite the fact that bad drafting of these clauses makes it difficult to envisage afterwards the nature and the extent of the effect of such clauses on the risk. The nature of a crewing warranty as one with a bearing on the risk can be found even in much older cases, like *Bean v Stupart,*[157] where the words in the policy "thirty seamen besides passengers" were found to add a quality element to the characteristics of the crew on board the vessel, that of experience, which bore to the operation of the vessel in a marine environment. The difference from cases like *JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS*[158] is evident, where the clause was ''Warranted each instalment of premium paid to underwriters within 60 days of due dates''. This is a case of a premium warranty, which tries to ensure that payment of the premium is made in a timely manner, which has nothing to do with the risk covered.[159] Non-payment will lead to the suspension of cover under Section 10, until the breach is remedied, when the risk will be resurrected.[160]

[154] Davey J, 'The Insurance Act 2015 and Marine Insurance' (2016) presentation paper for The Institute of Maritime Law, page 8.
[155] *The Newfoundland Explorer* [2006] Lloyd's Rep IR 704.
[156] *The Resolute* [2009] 1 Lloyd's Rep 225.
[157] (1778) 99 ER 9.
[158] [1998] Lloyd's Rep. IR 377.
[159] Clauses of this form have been criticized as extending the principle of warranties far beyond risk-related issues, see Davey J, 'Remedying the remedies: the shifting shape of insurance contract law' (2013) 4 LMCLQ 476, 484.
[160] For detailed approach see Merkin R and Gurses O, 'Insurance contracts after the Insurance Act 2015' [2016] LRQ, p. 13.

5.3 Main or Ancillary terms?

Crewing warranties will fall within the range of Section 11, and so the objective test of finding the scope and purpose of the warranty begins. The basic problem is that all clauses met in *The Milasan,*[161] *The Newfoundland Explorer*[162] and *The Resolute*[163] are wholly badly and vaguely drafted. When we have to deal with a term requiring a fire alarm to be established, it can easily be proved that the sole purpose of such a term is to mitigate the risk of loss by fire. No such an easy task exists when it comes to crewing warranties. The need for an interpretative tool becomes stronger by the fact that it is possible for a term to define the risk as a whole and also to be one compliance with which would tend to reduce the risk of loss since these are not mutually exclusive categories.[164] In this case, as pointed out in *Arnould*, it has to be observed that the words "a term defining the risk as a whole" have been given an overriding effect in Section 11(1).[165] In this already complex application of this section, which would be the first question in the mind of the court?

The relevant question would be whether the requirements inside the crewing warranty are going to be regarded as ancillary to the definition of the risk or are they going to be classified as essential parts of such definition. This distinction has been characterized as the key to distinguishing eventually which terms will fall within or wholly outside Section 11.[166] The risk, which one should investigate whether it is defined as a whole by the warranty, is basically the subject matter insured. The vessel along with the risks -the identified circumstances- insured against in the marine policy is the subject matter insured as a whole. It represents what the insurer was prepared to undertake, which mirrors the scope of the policy. The scope of the policy constitutes its general definition. Thus, it should be considered whether the crewing warranty is an essential part of this definition in order to understand the extent of what has been undertaken by the insurer and explain further the insurer's primary obligation to insure what is actually outlined by the clause.[167] Or it should be examined whether the clause is related to the risk, in a way that, in the absence of it, the risk could possibly increase since the clause is collateral to the object of the contract. Nevertheless, the courts have always been troubling to define warranties, and the outcomes are raising some thoughts for the purposes of our test. For example, in *Dawsons Ltd v Bonnin*[168] the court described the warranty as "an agreement which refers to the subject matter of a contract, but not being an essential part of the contract either

[161] [2000] 2 Lloyd's Rep 458.
[162] [2006] Lloyd's Rep IR 704.
[163] [2009] 1 Lloyd's Rep 225.
[164] See *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-38, where as an example of such a term the editors refer to words of description in a cargo policy referring to the packaging of the insured goods.
[165] Ibid.
[166] Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, p. 12 < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.
[167] For example, see *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] Lloyd's Rep IR 596, in which case the assured's obligation as to "7.23 Productions will produce and make six made-for-TV Films" was surely absolute and closer to be characterized as one of a rather risk-defining nature.
[168] [1922] 2 AC 413.

intrinsically or by agreement, is collateral to the main purpose of such a contract". Now, the methodology which will be the cornerstone of a court's application of Section 11, is the one where construction "aims at identifying in a broad sense, as a matter of substance, what the essential character of the policy is".[169]

Trying to explain this a bit further, in *The Newfoundland Explorer*[170] the insurance policy of the yacht was incorporating the Institute Time Clauses Hulls Port Risks including Limited Navigation (20/7/87) CL.312. These risks described under this cover are the ones that are intended to be covered, accepted and paid for. Identifying the nature and the limits of the risk will probably render the warranty stating "Warranted fully crewed at all times" as essential for the complete definition of the risk undertaken by the insurer or as merely ancillary, thus, fulfilling the purpose of mitigating the already fully defined risk. This proves again that in order to identify the nature of the term, the relationship between the risk and the term cannot be disregarded. And it is here where the test moves from the subject matter of the contract to specifically the subject matter of each term, under the auspices of two interpretative tools: *literalism vs factual matrix*.

5.4 The tool of "literalism"

The issue of identifying the scope of a crewing warranty is one of construction. The exact language used by the parties will have potentially a role to play in the mind of the court. So, what the result would be if literalism would be the dominant interpretative tool for the purposes of Section's 11 application?

In *The Milasan*[171] the warranty was stating **"Warranted professional skippers and crew in charge at all times".** Approaching the clause "according to the ordinary meaning of the words used"[172] will lead to the presumption that the words should be given their plain and natural meaning. This is interpreted plainly as follows: the warranty intends to ensure that the skipper along with the crew is expected to properly take care of, manage and look after the yacht all the time wherever the vessel is or during whichever time period she is in. The crew's responsibilities would prove to be very wide towards the overall protection of the vessel. "At all times" will practically mean "always", as opposed to intermittently or at intervals. Therefore, the commercial scope of the warranty will be broad in its nature. This practically leads to two conclusions:

It does not seem that such a term is intended to reduce the risk of loss of a **particular** kind, or loss at a **particular** location or at a **particular** time. This interpretation does not deal with the need for "specificity" as is described in Section 11(1).

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[169] Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, p. 20 < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.
[170] [2006] Lloyd's Rep IR 704.
[171] [2000] 2 Lloyd's Rep 458.
[172] *Thomson v Weems* (1884) 9 App Cas 671, at 687, per Lord Watson.

Most importantly, the generality in the scope of this clause means that the crewing warranty merely explains further the primary obligation of the insurer. It describes what the insurer has agreed to undertake, meaning to provide the agreed cover always and, when experienced, crew members are looking after the vessel all the time. This warranty is an essential part of the definition[173], and this is why it describes itself as the risk covered as a whole.

A strict literal construction of the term will place the warranty outside Section 11. The result will not differ if literalism will be the tool of interpretation applied in the wording of the crewing warranties that we meet in The *Newfoundland Explorer*[174] and *The Resolute.*[175] This is because a syllogism based solely on the ordinary meaning of the wording of a clause disregards the context into which the term has been incorporated. The background is crucial for a more efficient construction of the terms as has been explained above. Its main asset is the contribution to distinguishing whether ambiguity is inherent in the context of the warranty.[176] It has to be mentioned as well that terminology is not a determining factor in order to establish a risk-defining clause. But some words do have a persuasive role to play when it comes to a clause's nature.[177] For example, the wording "warranted only" gives the definite character to the warranty, meaning that it is only under these circumstances that the insurer has agreed to cover.[178] Thus, it will describe the risk undertaken as a whole. It is far from impossible that the wording "warranted….at all times" -meaning "always"- could be interpreted in a similar definite way in the future.

5.5 The tool of the "factual matrix"

A literal approach is and always will be a starting point, but it cannot be the only one. A more purposive approach in the interpretation of a crewing warranty, based on the contextual background of the policy, will provide flexibility and a deeper investigation instead of an "epidermal" approach. We do not want to scratch the surface. We want to penetrate it.

Sir Anthony Clarke MR proves in *The Resolute*[179] that the factual matrix in each case can be crucial for the construction of a crewing warranty, especially in light of the application of Section 11.[180] In the mind of the author the biggest advantage of this canon of interpretation, for the purposes of this test, is its effectiveness in detecting ambiguity in the words used, in comparison with the relevant context they have been put in. The warranty in *The Resolute*[181] stated: **"Warranted Owner and/or Owner's experienced skipper on board and in charge**

[173] Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, p. 12 < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.
[174] [2006] Lloyd's Rep IR 704.
[175] [2009] 1 Lloyd's Rep 225.
[176] See Chapter 3, at 3.4.
[177] Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, p. 29 < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.
[178] *Roberts v Anglo-Saxon Insurance Association Ltd* (1927) 27 Ll L Rep 313, 315.
[179] [2009] 1 Lloyd's Rep 225.
[180] It is pointed out that the author will try to take the further step of examining The Resolute solely on the basis of whether the *clause itself* would be regarded as one defining the risk as a whole or as a risk-mitigating term.
[181] *Pratt v Aigaion Insurance Co (The Resolute)* [2009] 1 Lloyd's Rep 225.

at all times and one experienced crew member". The background reveals that the policy was on a fishing trawler of a relatively low commercial value and it was agreed upon by merely fishermen. They were prepared to undertake on the basis of the given crewing warranty what the common fishing practice and the nature of the subject matter insured indicated. Meaning the presence of crew members on board the vessel to protect it against risks when such protection is deemed to be necessary and expected. Therefore, the principal time was when the vessel was facing navigational hazards or when she was manoeuvring, apparently for the purposes of fishing. In contradiction, when the fishing trawler was moored such protection would not be deemed necessary, as it was in the present case. And it will be laid up in the marina during the days not available for shipping as the EU Regulations indicate, which is another revealing fact of the factual matrix. And as the commercial common sense of the court pointed out, during that period no member can be expected to live on board a fishing vessel due to the poor accommodation. Then, finally, Clause 26.5 of the "Trawler Wording" made it impossible for the vessel to be navigated, under these periods when at least two crew members could not be on board. This syllogism illustrates efficiently that the factual background is far from a one-way solution in the construction process. Step after step, it does create a tailor-cut approach. If we "liberalize the use of the factual matrix"[182] and follow it for the interpretation of this crewing warranty under the application of Section 11, we will end up with the following assumptions:

There is a hint for a narrow construction of the crewing warranty in relation to the risk covered. The relevant inquiry would be whether compliance with this clause tends to reduce the risk of a particular kind of loss. It seems that the risks threatening a fishing vessel, which an experienced skipper could guard against, could possibly be narrowed down under the given circumstances. Nevertheless, the exact range of the kind of losses remains undefined. It is here where the requirement for a "particular" kind of loss raises questions. In *Arnould* though, it is supported that even if a clause is "perceived as usually being expected to reduce the risk of more than one kind of loss, the term in question can still fairly be regarded as one compliance with which would tend to reduce the risk of loss of a particular kind" since "the singular can include the plural" in the context of Section 11(1)(a).[183] But in the same context, it becomes also evident that if compliance with the term tends to reduce the risk of a relatively large or indefinite number of kinds of losses[184], then it has a much broader impact in order to be considered as a term tending to reduce the risk of a particular kind of loss.[185] It is debatable how the crewing warranty will be read on this part on the basis of commercial common sense.

A much more straightforward approach will arise under the inquiry of whether compliance with this clause tends to reduce the risk of loss at a particular time. It depends on the interpretation of "at all times". The parties did not qualify those words further, in order to provide clearly a

[182] See Soyer B, *Warranties in Marine Insurance* (Routledge 2018).
[183] *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-43.
[184] Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.
[185] For example, the warranty of seaworthiness has this broader impact on perils of the seas, which are "a class of perils of indefinite extent".

continuing protection of the vessel. Since no clear indications existed as to the extent of its qualification, it was a clause rather ambiguous. A literal approach to this ambiguous term would lead to absurd results, especially in light of the needs of a fishing trawler. Therefore, the factual matrix makes clear that this crewing warranty tends to reduce the specific risk of losses due to navigational hazards, only when the fishing vessel was navigating or manoeuvring for the purposes of its business. As such, it can be argued that it is a warranty which tends to reduce the risk of loss at particular certain times and not others -when the vessel is moored in a marina-, falling thus within the application of Section 11(1)(c). This construction is underpinned also by the fact that the "particular time", as a period, "should not need to be specified in the policy, in order for this limb of s.11 to apply, and the singular can include the plural".[186]

A strict literalistic approach in *The Resolute,*[187] disregarding the relevant contextual background, would probably lead to the same result as in *The Milasan,*[188] construing "at all times" as meaning "always" and being thus a term, which defines the risk undertaken by the insurer as a whole. Thus, it becomes evident that the context can be revealing.

But a factual matrix approach would lead to a much more rational and effective syllogism for construing the crewing warranties in *The Milasan*[189] and *The Newfoundland Explorer*[190] under Section 11. In both cases the subject matter insured was a valuable yacht. The nature of this kind of vessel affords ongoing and continuing protection from numerous risks. This notion, which is supported by cases like *The Dora*[191] and *The Milasan,*[192] basically raises the argument that the presence of a skipper and crew members on board a valuable yacht affords protection from more than just a single kind of peril (e.g. navigational hazards). Because the crew along with the skipper, having the overall responsibility of the vessel, they can control the overall risk of loss from several perils that could have arisen at different times and locations. As such, these crewing warranties would probably be much closer to being identified as terms defining the risk as a whole.[193]

It does not matter that the outcome would probably be the same for example in *The Milasan*, whether a literal or a contextual approach is chosen. The point is that a strict, literalistic or "to the letter" interpretation sometimes lacks the deep and thorough legal justification, not reflecting the scenery in which such terms have been placed and the reasons for it. On the other hand, a purposive approach provides the flexibility and the comprehensive legal certainty that,

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[186] *Arnould: Law of Marine Insurance and Average* (19th edn, Sweet & Maxwell 2020) at 19-46.
[187] [2009] 1 Lloyd's Rep 225.
[188] [2000] 2 Lloyd's Rep 458.
[189] Ibid.
[190] [2006] Lloyd's Rep IR 704.
[191] *Inversiones Manria SA v Sphere Drake Insurance Co, Malvern Insurance Co and Niagara Fire Insurance Co (The Dora)* [1989] 1 Lloyd's Rep 69.
[192] [2000] 2 Lloyd's Rep 458.
[193] In *The Newfoundland Explorer* [2006] Lloyd's Rep IR 704, Gross J noted that the crew on board a valuable yacht aims at safeguarding it against "risks such as vandalism, fire, pollution, the onset of bad weather or theft". It could be argued that these are particular kinds of losses which are mitigated by the warranty, falling within Section 11(1)(a). But that is doubtful, since this enumeration of risks does not seem to be exhaustive, but it is used for the purposes of example.

whichever role the context can play in realizing the scope of a warranty, it will be taken into consideration.

5.6 The "element of specification": Connecting the term with the extent of the policy cover

The importance of the form and the extent of the policy cover in order to construe crewing warranties under section 11 of the Insurance Act 2015, as well as any term for that matter, has been pointed out already under Chapter 3 of this paper. It is indeed a part of the contextual background of the contract, but it is so important that it has to be elaborated on separately. But why is that?

The "London Market Carriers" (or LMC)[194] were troubled with the distinction between a "risk mitigation clause" and a term "defining the risk as a whole". Trying to explore their "inherently unclear and uncertain" nature, they referred to the example of a specialized fire insurance policy on an oil refinery, in which the warranty dictates that "a qualified fire officer will be in attendance at all times when the refinery is operational".[195] The LMC could not find a definite answer to the question of whether Section 11 would apply to such a term. They did find arguments tipping the balance in favour of both a positive and a negative answer. Since no clear conclusion could be reached, they turned to the extent of the cover of the policy, stating:[196]

"Whether or not section 11 applies seems to turn on the scope of cover provided: if narrow (i.e. only fire risks) then section 11 would apply, but if broader (such as an all risks policy), the exact same term might not be covered by section 11, because in that context, it would only affect the particular risk of a specific type of loss (as the JLC explain in paragraph 1.10 of their explanatory note)."

What can be understood from this rationale is that, even if an "element of specification" exists in the scope of the crewing warranty -meaning that the role of the crew members on board the vessel is to protect it from specific risks at all times- it is still possible for the court to hesitate to decide on the applicability or not of Section 11, due to uncertainty. It is here where examining the "element of specification" in the scope of the policy cover can provide further assistance. In *The Milasan*[197] the Q.B. held that the policy "was clearly not an "All Risks" policy" and that "cl. 9 of the Institute Yacht Clauses (IYC) identified specific perils". Again, in *The*

[194] The Lloyd's Market Association (LMA) and the International Underwriting Association of London (IUA) were part of the intensive discussion of the Insurance Bill, and they were together referred to as 'London Market Carriers', or LMC in the House of Lords Paper 81, http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf , last accessed on 1 September 2020.
[195] House of Lords Paper 81, 37, at para. 12, http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf , last accessed on 1 September 2020.
[196] House of Lords Paper 81, 37, at para. 12.2, http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf , last accessed on 1 September 2020.
[197] [2000] 2 Lloyd's Rep 458.

Newfoundland Explorer,[198] it was an insurance policy incorporating the Institute Time Clauses Hulls Port Risks including Limited Navigation (20/7/87) CL.312. Therefore, it was not an "all-risk" cover, but specific risks occurring would be deemed to be covered by the insurers. It is at least possible to contemplate that the courts would be tempted to lower the bar of the applicability of Section 11 because of the much narrower scope of the cover provided. In contradiction, according to the example from the LMC, again it could be at least supported that, if the policy cover is broader -as is the case with an "all-risks" cover-, then it is more likely for such terms to fall outside Section 11. And this is because they will merely *"affect"* and not *"mitigate"* a particular risk of a specific type of loss, meaning that such terms would be an *"essential part"* of the much broader and generic definition of the risks covered.[199]

[198] [2006] Lloyd's Rep IR 704.

[199] See Gürses O, 'Risk definition in insurance law: Significance and challenges', CML Working Paper Series, No 18/08, September 2018, p. 11 < http://law.nus.edu.sg/cml/wps.html > accessed 1 September 2020.

Chapter 6
Conclusions

Construction has no easy way. It did not have them before and certainly, it will not have them in the future. Construing crewing warranties is indeed a challenging task, basically because of their poor structure, which raises numerous questions. The new technologies emerging along with the requirements for high standards of safety on board the vessel, underpin the crucial role that a skipper and an experienced crew will have to undertake in the protection of a vessel. But the extent, the nature and the purpose of this role will be in a constant investigation, on a case-by-case basis, as long as the wording of Section 11 of the Insurance Act 2015 remains unqualified. It is not by chance that the LMC noticed that there will be a "tremendous scope of disputes"[200] over which term is going to fall within Section 11.

Of course, the freedom of contract gives the power to the contracting parties of a marine insurance policy to choose whether they will follow the default rules or they will contract out of the provisions of the Insurance Act 2015. Why should we bother then about changing these defaults? The answer is twofold:

First of all, the Law Commission accepts that "there is undoubtedly a degree of uncertainty relating to how the courts will interpret a 'type of loss', a 'loss at a particular place' and 'a loss at a particular time"[201]. Uncertainty in the mind of the Law Commission means uncertainty in the mind of the contracting parties and the court. The shift from form to functionality is evident. The question is how functionality is going to be effectively achieved, what does it try to achieve and where does it stop.

The second reason, as it has been pointed out with precision, is that "defaults have a lingering effect on parties' selection of clauses. If you wish parties to make a genuinely free choice, show them a range of options, and let them select the clause that best fits their specific requirements".[202]

Nevertheless, until a change is made, case law has proven already that it can provide the alternative for the construction of crewing warranties, or any warranties in fact, under the new regime. The rise of the *"factual matrix"* as the yardstick of interpretation will have a paramount role in future litigation and undoubtedly it will produce a challenging legal analysis on the purpose of crewing warranties in combination with the range of Section 11. But this is a *de lege ferenda* approach. It is what we hope. A *de lege lata* approach, for the time being, merely brings

[200] House of Lords Paper 81, 37, at para. 11, http://www.publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf last accessed on 1 September 2020.
[201] *Law Com. No. 353 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.49].
[202] Davey J, 'Remedying the remedies: the shifting shape of insurance contract law' (2013) 4 LMCLQ 476, 494.

to mind for just a moment a paraphrasing of Howard N. Bennett's title of his article:[203] good luck with crewing warranties.

[203] H Bennett, ''Good Luck with Warranties'' [1991] JBL 592.

Transitional Justice: To What Extent Does Trinidadian Law Regarding Capital Punishment for Murder Continue to be Hindered From Progress on Account of British Colonialism, Inciting the Need for Legal Reform?

Amirah Adam[*]

Abstract

This dissertation assesses the extent to which Trinidadian law regarding the mandatory death penalty for murder, section 4 of the Offences Against the Person Act 1925, is impeded from advancing due to the colonial residue that is inculcated in the constitution. Thereafter, the question is prompted whether legal reform is necessary. It argues that on account of the 'savings clause'[1] that is imbued in the legislation, judicial review is inhibited. Thus, an 'Act of Parliament'[2] is needed in order to progress. However, it is contended that the legislature is hindered from interceding due to the executive and public's stance on the retention of the penalty. Thus, it seeks to identify whether the courts may be able to bolster advancement via a counter-majoritarian role.[3] Additionally, it is asserted that due to the state's neglect of the *Pratt and Morgan v Attorney General for Jamaica*[4] ruling and its international human rights law obligations, transitional justice is needed to redress the prolonged human rights abuses. Therefore, this dissertation examines whether legal reform is a suitable course of action that Trinidad and Tobago may undertake in order to rectify the colonial remnants in the system. It is argued that the 'savings clause'[5] could be surmounted with sufficient support from the public, executive, judiciary, and legislature thereby creating an avenue for individualized sentencing. Thenceforth, a scheme may be instituted which assures the absolute nullification of the mandatory death penalty. Consequently, Trinidad and Tobago may no longer be hindered from progress on account of British colonialism, thus achieving transitional justice.

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[*] *LLB (Soton). Dissertation submitted in partial fulfilment of the requirements for the degree of LLB.*

[1] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).

[2] *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433 [3-4] (Lord Hoffman); Roger Hood and Florence Seemungal, 'Public Opinion on the Mandatory Death Penalty In Trinidad' (2011) A report to the Death Penalty Project and the University of the West Indies Faculty of Law 6 <https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/Public-Opinion-on-the-Mandatory-Death-Penalty-in-Trinidad-Report-Final.pdf> accessed 13 November 2020.

[3] Calvin R Massey, Brannon P Denning**,** *American Constitutional Law: Powers and Liberties* (6th Edn, WK 2019) 37.

[4] [1993] UKPC 37, [1994] 2 AC 1.

[5] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).

Introduction

This dissertation is analysed in three parts: it discusses whether the law regarding capital punishment for murder in Trinidad and Tobago is inhibited from advancement due to the colonial baggage ingrained in the Constitution,[6] thus inciting the need for transitional justice and legal reform.

Colonialism: this dissertation illustrates that due to section 4 of the Offences Against the Person Act 1925: 'every person convicted of murder shall suffer death', the colonial remnant: section 2 of the 1842 'Ordinance for Assimilating the laws of the Colony, relating to Offences against the Person, to the laws of England in the like cases' persists in Trinidadian legislation. For the purposes of this dissertation, Privy Council decisions from other jurisdictions are generally regarded as persuasive authority. This dissertation argues that the judiciary is blocked from challenging the mandatory death penalty's constitutionality on account of the 'savings clause' embedded in the Constitution.[7] Thus far, the only way forward is 'by an Act of Parliament'.[8] However, the legislature is impeded from amending the law due to the pressure it bears from the executive. Therefore, in this instance, the Trinidadian judiciary may serve a counter-majoritarian role. Finally, it is argued that there is an irony that exists wherein the creators of the penalty itself, the British legislators, advocate for its amendment whereas the government of Trinidad and Tobago protects it from judicial review. It is contended that the executive perpetuates the penalty due to the public's wishes, 'cultural exceptionalism'[9] and to avoid the 'overlegalization of international obligations'[10] to human rights.

Transitional Justice: the lack of response to the extensive human rights transgressions in the nation is evident from the state's disregard for the *Pratt and Morgan*[11] decision. Consequently, convicts are often on death row for a period surpassing 5 years. Furthermore, it is asserted that Trinidad and Tobago overlook its international commitments, particularly as regards the American Declaration of Human Rights.[12] Thus, transitional justice is arguably needed to restore the nation following colonialism.

Legal Reform: on this basis, this dissertation contends that reform may be required in order to remedy these human rights violations, as endorsed by the judiciary. Furthermore, as it is apparent that the arguments against reform of the mandatory death penalty may be insufficient to justify its existence when paired with the abuses it incites, this suggests that amending the

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[6] The Constitution of the Republic of Trinidad and Tobago 1976.
[7] ibid s 6(1).
[8] *Matthew* (n 2); Roger Hood and Florence Seemungal (n 2).
[9] Roger Hood and Florence Seemungal, 'Sentenced to Death Without Execution: Why capital punishment has not yet been abolished in the Eastern Caribbean and Barbados' (2020) A report to the Death Penalty Project 13 <https://www.deathpenaltyproject.org/wp-content/uploads/2020/04/2809872v1_WSDOCS_-Sentencing-to-Death-Without-Execution-2020.pdf> accessed 12 November 2020.
[10] Laurence R Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 CLR 1832, 1886.
[11] *Pratt and Morgan* (n 4).
[12] American Declaration of the Rights and Duties of Man 1948.

constitution may be the preferable approach for Trinidad and Tobago. Finally, an appropriate plan for Trinidad and Tobago to undertake may be: to circumvent the 'savings clause'[13] with the countenance of all the limbs of the state (the public, judiciary, executive and legislature), the introduction of a discretionary power over the sentence in order to facilitate individualized sentencing and a strategic approach towards the abolition of capital punishment for murder. Thenceforth, Trinidad and Tobago may redress the legacy of human rights violations, realize transitional justice and overcome its colonial baggage as regards capital punishment for murder.

[13] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).

Part I: Colonialism

Setting The Scene – The Mandatory Death Penalty in Trinidad and Tobago

2.1 Introduction

This section illustrates how colonial law was implanted in Trinidadian legislation. It focuses on the statutory sentence for murder: the mandatory death penalty, 'which is saved from constitutional invalidity because it was an existing law preserved at the time when the Constitution was adopted in 1962'.[14] Furthermore, as this dissertation references Privy Council decisions in various countries, there is an explanation of what the current legal position regarding Privy Council decisions in other jurisdictions is in Trinidad and Tobago. Thereafter, it will canvass both sides: firstly, the issues regarding the judiciary's inability to challenge the death penalty's constitutionality due to the 'savings clause'.[15] Secondly, it analyses the failings of the legislature as currently, the only means of progression is via an 'Act of Parliament'.[16] Finally, this part considers the reception of the death penalty in the nation amongst the public and the executive.

2.2 Historical Background

The Transplanting of Colonial Law to Trinidad and Tobago

On his third voyage from Spain, Christopher Columbus 'discovered' Trinidad and Tobago in 1498.[17] The island was already inhabited by a 'multi-ethnic Amerindian population of perhaps 50,000' comprising of the Arawak tribes and Carib tribes, of which 92% had been decimated after 'a century'.[18] Trinidad remained a Spanish colony until 1792, and 'was ceded by Spain in 1802' to Britain.[19] This was the inception of the sugar colony: the 'plantation economy' and 'enslaved population' on the island.[20] Brereton contended that 'African slavery was critical to Trinidad's social and economic development'.[21] This was the genesis of the 'Triangular Trade' whereby England, 'supplied the exports and the ships; Africa the human merchandise; the plantations the colonial raw materials'.[22]

Regarding the rule of law at this time, the planter class ensured 'the survival of the plantation' through standardised control.[23] Though punishments for the enslaved accused of crimes were

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[14] *Lendore v Ors v The Attorney General of Trinidad and Tobago* [2017] UKPC 25, [2017] 1 WLR 3369 [3] (Lord Hughes).
[15] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[16] *Matthew* (n 2); Roger Hood and Florence Seemungal (n 2).
[17] Washington Irving, *History of the Life and Voyages of Christopher Columbus* (Vol 1, CLB 1835) 355.
[18] Nicholas J Saunders, *The Peoples of the Caribbean: An Encyclopaedia of Archaeology and Traditional Culture* (1st Edn, ABC-CLIO 2005) xvii.
[19] Ronald Hyman, *Britain's Imperial Century, 1815-1914: A Study of Empire and Expansion* (2nd Edn, Macmillan Publishers Ltd 1993) 13.
[20] Bridget Brereton, *Adolphus, a Tale* (Vol. 2, The University of the West Indies Press 2003) xviii.
[21] ibid.
[22] Eric Williams, *Capitalism and Slavery* (1st Edn, Chappel Hill: University of North Carolina Press 1944) 51.
[23] George L. Beckford, *The Caribbean Economy* (1st Edn, London: Penguin 1975) 54.

initially specific to: 'prison, chains and the whip',[24] Sir Thomas Picton's 'tyrannical praetorship' endorsed hanging.[25] M'Callum recounts a case of an enslaved man, Bouqui:

suspected of sorcery…and confined in a solitary dungeon for six months previous to his being tried…After Bouqui had been examined…he was conducted to the chapel…baptized by the curate of Port of Spain, then heavily fettered, and taken to the gallows by a guard of soldiers. Here sentence of death was read to him by order of Governor Picton, and he was instantly hanged. After fifteen minutes suspension, he was taken down, and his head cut off. The headless trunk was laid on a stake alongside of Pierre Francois, and consumed in the flames.[26]

For capital offences, the British conducted a system whereby the evidence was offered to a magistrate, a 'Slave Court', wherein 'upon conviction' the sentence would be death.[27]

Antoine delineated that, 'it was imperative that the black masses be kept in subordination, without rights and social mobility, in order to sustain the plantation and its metropolitan base. The law continued to struggle to distance itself from this defining characteristic'.[28] As Antoine elucidated, 'the slave was the premise for the very creation of modern law'.[29] Currently in Trinidad and Tobago, under section 4 of the Offences Against the Person Act 1925, 'every person convicted of murder shall suffer death'.[30] As per Lord Hughes in *Pitman and Hernandez v The State*:[31]

> this has been the law in Trinidad for as long as there has been a law of murder – see for example section 2 of the 1842 "Ordinance for Assimilating the laws of the Colony relating to Offences against the Person to the laws of England in the like cases", which was, so far as material, in identical terms: "shall suffer death".[32]

Therefore, it may be asserted that this colonial legacy persists in Trinidadian legislation.

2.3 Judicial Committee of The Privy Council Decisions: The Legal Position

As this dissertation references Privy Council decisions made in various countries, it is important to consider whether Privy Council decisions held in other jurisdictions are formally binding in Trinidad and Tobago. Antoine contends that:

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[24] VS Naipaul, *The Loss of El Dorado: A Colonial History* (1st Edn, André Deutsch 1969) 131.
[25] Pierre Franc M'Callum, *Travels in Trinidad During the Months of February, March, and April, 1803: In a Series of Letters, Addressed to a Member of the Imperial Parliament of Great Britain* (1st Edn, W. Jones 1805) 187.
[26] ibid 193.
[27] Anthony De V Phillips, 'Doubly Condemned: Adjustments to the Crime and Punishment Regime in the Late Slavery Period in the British Caribbean Colonies' (1996) 18 CLR 710-711.
[28] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd Edn, Routledge-Cavendish 2008) 18.
[29] ibid 19.
[30] Offences Against the Person Act 1925, s 4.
[31] *Lester Pitman (Appellant) v The State (Respondent) (Trinidad and Tobago) Neil Hernandez (Appellant) v The State (Respondent) (Trinidad and Tobago)* [2017] UKPC 6.
[32] *Lester Pitman* (n 31) [32] (Hughes LJ).

> to argue that Privy Council decisions originating from other countries should not be binding might be an exercise in academic abstraction. In practice, it is rare indeed to find a West Indian court deviating from a Privy Council precedent, whatever its origin. Instead West Indian courts seem to console themselves by pointing out that they can, should, or might do so,[33] but they rarely take the plunge.[34]

Strictly, Privy Council decisions are formally binding on Trinidad and Tobago only where it is on appeal from Trinidadian courts. However, in practice, Privy Council decisions in relation to other jurisdictions have persuasive authority, as suggested by Antoine. This is because it is the final Court of Appeal for Trinidad and Tobago and other jurisdictions, especially for murder appeals. Its judgements are sensitive to the individual legal systems across the region, and should be interpreted contextually, in light of each country's constitution.

2.4 Looking at Both Sides: Judiciary vs. Legislature

The Obstacle of the 'Savings Clause'35 Shielding Judicial Review

Firstly, consider the judiciary's inability to challenge the constitutionality of the mandatory death penalty. As per Hood and Seemungal, 'Trinidad and Tobago is one of the dwindling number of countries that retains the death penalty…as the mandatory punishment for murder,[36] even though, as a result of successful legal interventions, executions have been comparatively rare'.[37] Therefore, the constitutionality of capital punishment in Trinidad and Tobago was under scrutiny in the Privy Council[38] and debated in *Roodal v The State*.[39] It is important to consider section 2 of the Constitution of the Republic of Trinidad and Tobago which states that, 'this Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency'.[40] The Privy Council in *Roodal*[41] analysed section 5(2)(b) in light of this, which claims that Parliament may

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[33] *Walker v R* [1984] 42 WIR 84 100 (Sir Alastair Blair-Kerr J) (Bermuda).
[34] Antoine (n 28) 149-150.
[35] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[36] Roger Hood, *The Death Penalty a Worldwide Perspective* (3rd Edn, OUP 2002); United Nations Economic and Social Council, 'Capital Punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' (2005) Seventh Quinquennial Report of the Secretary-General, E\2005\3, 8 <https://undocs.org/E/2005/3> accessed 10 November 2020.
[37] Roger Hood and Florence Seemungal, 'A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago' (2006) A report to the Death Penalty Project, University of Oxford 1 <https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/rep-2006-rare-and-arbitrary-en-1.pdf> accessed 10 November 2020.
[38] Margaret A. Burnham, 'Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean' (2005) 36 UMIALR 264 <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1159&context=umialr> accessed 10 November 2020.
[39] (Trinidad and Tobago) [2003] UKPC 78, [2005] 1 AC 328.
[40] The Constitution of the Republic of Trinidad and Tobago 1976, s 2.
[41] *Roodal* (n 39).

not 'impose or authorise the imposition of cruel and unusual treatment or punishment'[42] and concluded that:

> the real ground for a constitutional challenge to the prescription of a mandatory death sentence for murder is…for the reasons given in *Reyes v The Queen* [2002] 2 AC 235, it offends against the prohibition on cruel and unusual punishment in section 5(2)(b) of the Constitution.[43]

In *Reyes*,[44] the Privy Council assessed the breach of the prohibition on cruel and unusual punishment and, 'held that the imposition of a mandatory death sentence on all those convicted of murder in Belize was "disproportionate"[45] and "inappropriate"[46] and thus inhuman'.[47] On this basis, the mandatory death penalty was held to be unconstitutional and rendered a discretionary sentence.[48]

However, the Privy Council in *Matthew v State of Trinidad and Tobago*[49] explained that this decision did not apply in Trinidad and Tobago. In *Matthew*,[50] The Privy Council held that:

> section 4 of the Offences against the Person Act was an "existing law" for the purposes of the savings clause in section 6(1) of the Constitution and was thus preserved from constitutional challenge; that, therefore, although it infringed the right to life under section 4 of the Constitution and was a cruel and unusual punishment under section 5, it could not be invalidated or rendered void under section 2 to the extent of any inconsistency with the Constitution; and that, accordingly, the mandatory death penalty imposed on the appellant was lawful and valid.[51]

Section 6(1) of the Constitution delineates that, 'nothing in sections 4 and 5 shall invalidate—(a) an existing law'[52] and as per section 6(3), '"existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution'.[53] Therefore, 'section 4 of the 1925 Act[54] cannot be invalidated by reference to

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[42] The Constitution of the Republic of Trinidad and Tobago 1976, s 5(2)(b).
[43] *Roodal* (n 39) [109].
[44] *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235.
[45] ibid [43] (Lord Bingham).
[46] ibid.
[47] Carol S Steiker and Jordan M Steiker, *Comparative Capital Punishment* (1st Edn, EEPL 2019) 295; Edward Fitzgerald QC and Keir Starmer QC, 'A Guide to Sentencing in Capital Cases' (2007) The Death Penalty Project Ltd 1 <https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/A_Guide_to_Sentencing_in_Capital_Cases.pdf> accessed 20 December 2020.
[48] Keir Starmer and Theodora A. Christou, *Human Rights Manual and Sourcebook for Africa* (1st Edn, BIICL 2005) 550.
[49] *Matthew* (n 2).
[50] ibid.
[51] ibid 433.
[52] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[53] ibid s 6(3).
[54] Offences Against the Person Act 1925, s 4.

section 5(2)(b)[55] of the Constitution'[56] despite the express human rights preserved in the Constitution,[57] that is the prohibition of cruel and unusual punishment. As per Lord Hoffman in *Matthew,*[58] 'it stands there protecting the validity of existing laws until such time as Parliament decides to change them'.[59]

O'Brien and Wheatle elucidated that, 'general savings law clauses…afford immunity from constitutional challenge to all laws that were in force at the time of Independence'.[60] Therefore, it may be contended that judges in Trinidad and Tobago have been effectively inhibited from any attempt 'to invoke jurisprudential developments in international human rights law'[61] as well as national law, 'when determining the constitutionality of pre-independence laws',[62] which is evident from *Matthew*.[63]

The Judges' Approach to The Death Penalty

This section will focus on two issues concerning the judges' approach to the death penalty in Trinidad and Tobago: firstly to what extent is the death sentence being passed and secondly, whether it is actually being carried out.

As regards the first issue: there is evidence that death sentences are being passed as recently as January 2020, wherein Justice Devan Rampersad convicted Travis Polo for the murder of his neighbour.[64] However, in relation to the second issue: the country, has 'not carried out an execution for at least'[65] 22 years. The last hanging executed by the state was on 28 July 1999 wherein Anthony Briggs[66] was 'convicted for the murder of a taxi driver, Siewdath Ramkissoon'.[67] Despite the mandatory nature of the death penalty for murder in Trinidad and Tobago, being sentenced to death for murder at the court of first instance does not lead to an

[55] The Constitution of the Republic of Trinidad and Tobago 1976, s 5(2)(b).
[56] Starmer and Christou (n 48) 551.
[57] The Constitution of the Republic of Trinidad and Tobago 1976.
[58] *Matthew* (n 2).
[59] ibid [3] (Lord Hoffman).
[60] Derek O'Brien and Se-shauna Wheatle, 'The Commonwealth Caribbean and the Uses and Abuses of Comparative and Constitutional Law' (*UK Constitutional Law Association*, 22 November 2011) <https://ukconstitutionallaw.org/2011/11/22/derek-obrien-and-se-shauna-wheatle-the-commonwealth-caribbean-and-the-uses-and-abuses-of-comparative-constitutional-law/> accessed 12 November 2020.
[61] ibid.
[62] ibid.
[63] *Matthew* (n 2).
[64] Jada Loutoo, 'Gonzales man convicted of 2008 murder' *Trinidad and Tobago Newsday* (Trinidad and Tobago, 14 January 2020) <https://newsday.co.tt/2020/01/14/gonzales-man-convicted-of-2008-murder/> accessed 12 November 2020.
[65] Roger Hood and Carolyn Hoyle, 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38 CJ 15.
[66] *Briggs v Cipriani Baptiste (Commissioner of Prisons) and Others* [1999] UKPC 47, [2000] 2 AC 40.
[67] 'Wenceslaus James' (*The Death Penalty Project,* 2018) <https://www.deathpenaltyproject.org/story/wenceslaus-james/#:~:text=On%203%20June%201996%2C%20Wenceslaus,murder%20in%20Trinidad%20and%20Tobago.> accessed 12 November 2020.

inevitable hanging. The attrition rate for death sentences is high following the appeal process as tracked in a statistical study of homicides in Trinidad and Tobago.[68]

Nonetheless, Trinidad and Tobago may still be regarded as 'retentionist' as the state voted 'no' to the United Nation's 2018 global 'moratorium on the use of the death penalty: resolution / adopted by the General Assembly'[69] and did so again in December 2020[70]. Furthermore, Trinidad and Tobago fulfils the test for being 'retentionist' outlined by Amnesty International[71] as there is no state policy (established or otherwise) of not carrying out executions.[72] Therefore, although death row prisoners have not been executed in Trinidad and Tobago mainly because of their right of appeal,[73] if all appeals have been exhausted, the Mercy Committee has not given clemency[74] or the courts have not granted commutation, convicts would be awaiting execution.

As regards cases of delay in Trinidad and Tobago, due to the *Pratt and Morgan*[75] ruling: it would be unlawful for the death penalty to be carried out more than 5 years after the death sentence. As Lord Hughes explained in *Lendore*: [76] 'a sentence lawfully passed is retrospectively transformed into an unlawful one when, as a result of subsequent events, here unreasonable delay, it becomes unconstitutional to carry it out'.[77] Nonetheless, the Privy Council is unable to commute the sentence because commutation is a matter for 'the High Court on constitutional motion'[78] or the executive.[79] Section 3.2 engages in a thorough analysis of the effect *Pratt and Morgan*[80] has on Trinidad and Tobago, with a particular focus on its human rights implications.

Notably, automatic commutations to life sentences may attract the same critique as a mandatory death penalty upon a conviction for murder (that is, they lack individualised sentencing). Chief

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[68] Hood and Seemungal (n 37) 55.
[69] Moratorium on the use of the death penalty: resolution / adopted by the General Assembly (17 December 2018) A/RES/73/175.
[70] Moratorium on the use of the death penalty: resolution / adopted by the General Assembly (16 December 2020) A/C.3/75/L.4; Roger Hood and Florence Seemungal, 'Sentenced to Death Without Execution: Why capital punishment has not yet been abolished in the Eastern Caribbean and Barbados' (2020) A report to the Death Penalty Project 16 <https://www.deathpenaltyproject.org/wp-content/uploads/2020/04/2809872v1_WSDOCS_-Sentencing-to-Death-Without-Execution-2020.pdf> accessed 12 November 2020.
[71] 'Amnesty International Global Report Death Sentences and Executions 2018' (*Amnesty International*, 2018) 49 <https://www.amnesty.org/download/Documents/ACT5098702019ENGLISH.PDF> accessed 12 November, 2018.
[72] ibid; 'Abolitionist and Retentionist Countries as of July 2018' (*Amnesty International*, 2018) 2 <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> accessed 12 November 2020.
[73] The Constitution of the Republic of Trinidad and Tobago 1976, s 14.
[74] ibid s 87, s 89.
[75] *Pratt and Morgan* (n 4).
[76] *Lendore* (n 14).
[77] ibid [14] (Lord Hughes).
[78] ibid [33] (Lord Hughes); The Constitution of the Republic of Trinidad and Tobago 1976, s 14(2).
[79] *Hunte and Khan v The State* [2015] UKPC 33 [76] (Lord Neuberger); The Constitution of the Republic of Trinidad and Tobago 1976, s 87.
[80] *Pratt and Morgan* (n 4).

Justice Ivor Archie in *Boodram v The Attorney General of Trinidad and Tobago*[81] addressed individualised sentencing,[82] referred to international human rights norms[83] and appeared to endorse commutations where necessary.[84] Consequently, the unconstitutionality of not providing individualised sentencing was key in a Caribbean Court of Justice (CCJ) judgement *Nervais and Severin v The Queen*[85] which incited changes in Barbados' laws (though it did not abolish, it eroded the mandatory element of the penalty). The CCJ declared that:

> the idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned.[86]

It is evident that Trinidad and Tobago has arguably failed to make such progression in their legal system, as the mandatory nature of the penalty may only be 'repealed by an Act of Parliament',[87] as held in *Matthew*.[88]

The Legislature's Failings

Evidently, it seems as though the courts have been blocked from challenging the constitutionality of capital punishment. However, this begs the question of whether the responsibility now lies with the legislature. In Trinidad and Tobago, it may be argued that Parliament is effectively inhibited from advancement due to lack of support from the executive.[89] In a survey conducted by Hood and Seemungal,[90] it was concluded that the executive has declined to introduce legislation to abolish the mandatory death penalty due to, 'their unwillingness to follow international trends, on the grounds of national sovereignty, cultural exceptionalism, assumptions about the deterrent effect of having the death penalty on the statute book, the strength of public sentiments and concern for maintaining electoral popularity'.[91]

Thus, it may be contended that the penalty's persistence is attributed to its colonial legacy by virtue of the concept: 'cultural exceptionalism'.[92] This echoes the notion of 'judicial

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[81] [2018] CV 2007-04568.
[82] ibid [12].
[83] ibid [45-50].
[84] ibid [47].
[85] [2018] CCJ 19 (AJ).
[86] ibid [58].
[87] Hood and Seemungal (n 2).
[88] *Matthew* (n 2).
[89] Rishard Khan, 'Ramesh: Gov't needs will-power to reinstate death penalty' *Trinidad & Tobago Guardian* (Trinidad and Tobago, 14 January 2020) <https://www.guardian.co.tt/news/ramesh-govt-needs-willpower-to-reinstate-death-penalty-6.2.1029479.3e821fd496> accessed 12 November 2020; Hema Ramkissoon. Telephone Interview with Former Attorney General Lawrence Maharaj (13 January 2020).
[90] Hood and Seemungal (n 9) 16.
[91] ibid 13.
[92] ibid.

imperialism',[93] and materializes as an independent, former colony incontrovertibly protecting 'practices of the past'.[94] According to Burnham, although it is contradictory for an independent state to protect a constitution which emerged from its imperialization, Parliament (supported by the government) is reluctant to abolish capital punishment because: 'why, the argument goes, should all roads for all time lead back to Europe and its conceptions of human rights, and why should the more conservative mores of the former colonies not have purchase, at least in their own lands?'[95] Therefore, this perhaps explains the contemporary legislature's failure to challenge the constitutionality of the mandatory death penalty as the obstacle here is also in part consequent of the colonial legacy.

Nonetheless, it should be noted that there were attempts to modify the possibility of a death sentence: the Offences Against the Person (Amendment) Act 2000 – however, this was not implemented. Respectively, the Constitution (Amendment) (Capital Offences) Bill, 2011 was proposed in Parliament wherein clause 4 also introduced 'the creation of the categories of murder 1, 2 and 3'.[96] 'This required an amendment to the Constitution which needed a three-quarter majority in the House of Representatives and two thirds majority in the Senate. The necessary majority was not achieved so the bill failed'.[97] Thus, subsequently, Dobbs posed the challenge:

> is it not time that the judiciary help[s] galvanise the necessary majority needed to repeal the death penalty by making a case for its abolition, given the anomalies, the fact that nothing has happened since 1999 and given that the Privy Council has declared the death penalty to be cruel and unusual punishment?[98]

Therefore, this may be a domain where the courts, in fact, need to take a lead. As per Massey and Denning, 'a proper counter-majoritarian role of the courts is to enforce a moral vision of the Constitution that may not be shared by the majority of the people'.[99]

Although the courts are inhibited from progression on account of the 'savings clause',[100] it may be contended that Trinidad and Tobago can adopt Barbados' approach to development in spite of its existence, as in *Nervais and Severin*.[101] The CCJ held that 'the mandatory nature of the death penalty…reduces the court's sentencing role to "rubber-stamping" the dictates of the Legislature'.[102] The court recognized that, 'not everyone convicted of murder deserves to be

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[93] Helfer (n 10) 1888.
[94] Margaret A. Burnham, 'Indigenous constitutionalism and the death penalty: The case of the Commonwealth Caribbean' (2005) 3 IJCL 582, 609.
[95] ibid.
[96] The Constitution (Amendment) (Capital Offences) Bill, 2011, clause 4.
[97] Dame Linda Dobbs, DBE, 'Who's afraid of Human Rights? The judges' dilemma' (2015) Judicial Education Institute of Trinidad and Tobago, Fifth Distinguished Jurist Lecture 30 <http://www.ttlawcourts.org/jeibooks/books/DJLDobbs_final.pdf> accessed 20 December 2020.
[98] ibid.
[99] Massey and Denning (n 3).
[100] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[101] *Nervais and Severin* (n 85).
[102] ibid [70].

executed and the courts should be required to consider each case separately and apply a sentence that is proportionate to the individual case'.[103] Although the court admitted that the 'savings clause' [104] could not be disregarded, the CCJ affirmed that by establishing individualized sentencing, 'the laws…are not calcified to reflect the colonial times'.[105] Hence, in this circumstance, the Trinidadian courts may have an important counter-majoritarian role.

2.5 The Reception of The Death Penalty: The Public and The Executive

Simmons contends that the 'vast majority' of individuals in the West Indies 'wish to retain the death penalty and carry it out in appropriate cases'.[106] Furthermore, he explains that research[107] conducted in Trinidad and Tobago and Barbados suggests that more than '80% of the populations in those two States support the death penalty'.[108] This is evident in an interview with Professor David Johnson,[109] conducted by Ezekiel Rediker.[110]

Johnson explains that his hometown, Morvant in Trinidad, is one of the communities deemed to be a 'centre of gun violence'.[111] He claimed that it was common to take a stroll in his district, wherein there would be murmurings from other nationals declaring, 'string them criminals up',[112] alluding to death by hanging.[113] However, Johnson indicates that there is insufficient 'public education about the practice of capital punishment'.[114] Due to the increasing crime rate, Trinidadians often have recourse to the death penalty.[115] However, the administration at the time failed to encourage constructive scrutiny concerning the penalty.[116] Therefore, Johnson declares that instead of conducting unofficial votes on an ad hoc basis, perhaps the 'government should…encourage dialogue',[117] particularly 'the class implications of the death penalty'.[118] In Trinidad and Tobago, the vast majority of cases regarding homicide concern the disadvantaged, underprivileged and oppressed population.[119] As such, Johnson contends that there is a pressing

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[103] ibid [5].
[104] The Constitution of Barbados 1966, s 26.
[105] *Nervais and Severin* (n 85) [65].
[106] David AC Simmons, 'Conflicts of Law and Policy in the Caribbean - Human Rights and the Enforcement of the Death Penalty - Between a Rock and a Hard Place' (2000) 9 JTLP 263, 266.
[107] Leonard Shorey, *The Barbados Advocate* (Barbados, 1996).
[108] Simmons (n 106).
[109] Ezekiel Rediker, Telephone Interview with David Johnson, Professor of History, City College, City University of New York (March 30 2013).
[110] Ezekiel Rediker, 'Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice' (2013) 35 MJIL 213, 238.
[111] ibid; Ezekiel Rediker, Telephone Interview with David Johnson, Professor of History, City College, City University of New York (March 30 2013).
[112] ibid.
[113] ibid.
[114] ibid.
[115] ibid.
[116] ibid.
[117] ibid.
[118] ibid.
[119] ibid.

urgency for politicians to 'step out of the fray'[120] in order to 'address class division, drug crime, and its relation to capital punishment'.[121]

However, 'the popularity of the death penalty also extends beyond class boundaries…making it politically expedient'.[122] As delineated by Helfer, 'governments, legal elites, and the Caribbean public shared a strong preference for capital punishment as a way to deter the region's persistently high violent crime rate'.[123] Due to its popularity with 'political donors',[124] politicians have been disinclined to endorse 'human rights obligations over the state's right to execute criminals'.[125] This is evident as the Former Attorney General of Trinidad and Tobago, Ramesh Lawrence Maharaj, was 'enlisted to advise the current administration on reinstating the penalty early in its tenure'.[126] He acknowledged the question of whether the Trinidad and Tobago Government will exercise its legal power to hang death row inmates who have exhausted all legal relief in a televised telephone interview.[127] He claimed that he is, 'of the firm belief that the death penalty can be implemented in Trinidad and Tobago but it needs the will power'.[128] However, the Prime Minister of Trinidad and Tobago, Dr. Keith Rowley, explained that though there have been petitions for the execution of those on death row in order to deter crime, he claims that a 'cultural hurdle',[129] that is 'the clash between Trinbagonian culture which is calling for the penalty and the British culture which is against it',[130] is delaying its enforcement.

Consequently, there is tension in Trinidad and Tobago due to what is referred to as 'judicial imperialism'.[131] Baroness Hale's dissenting opinion in *Ronald John v The State (Trinidad and Tobago)*[132] propounded:

> it is accepted that the death penalty may be imposed and executed for the crime of murder consistently with the Constitution of Trinidad and Tobago: see *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, where the debate concerned the mandatory imposition of the death penalty in all cases of murder irrespective of the circumstances. It is accepted that our task as the supreme court for Trinidad and Tobago is to uphold the laws of Trinidad and Tobago whether we like them or not.[133]

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[120] ibid.
[121] ibid.
[122] Rediker (n 111).
[123] Helfer (n 10).
[124] Rediker (n 111).
[125] ibid.
[126] Khan (n 89).
[127] Hema Ramkissoon, Telephone Interview with Former Attorney General Lawrence Maharaj (13 January 2020).
[128] Khan (n 89); Hema Ramkissoon, Telephone Interview with Former Attorney General Lawrence Maharaj (13 January 2020).
[129] Khan (n 89).
[130] ibid.
[131] Helfer (n 10) 1888.
[132] [2009] UKPC 12.
[133] ibid [37] (Baroness Hale).

Nevertheless, the Privy Council was dubbed an 'illegitimate legacy of colonialism'.[134] Although the CCJ (which 'serves as the highest court of appeals on civil and criminal matters for the national courts of Barbados, Belize and Guyana')[135] is located in Trinidad and Tobago, it has yet to replace the Privy Council as the final appellate court. It was initially thought that its advantages, that is 'free justice from learned jurists incorruptible by local politicians',[136] superseded its 'status as a vestige of colonial rule'.[137] However, once the court commenced articulating 'norms in conflict with local values'[138] in its judgements regarding the death penalty, such as in *Pratt and Morgan*[139] (see section 3), the Privy Council was deemed to be conducting a type of 'judicial imperialism'[140] by virtue of 'superimposing…Eurocentric notions and values'[141] in the state.[142]

2.6 Summary

Based on the above arguments, it is evident that the 'savings clause'[143] hinders judicial 'jurisprudential developments'.[144] Furthermore, the legislature's failings are perhaps consequent of 'cultural exceptionalism'.[145] Arguably, there is a paradox which underpins the notion that a penalty which was once enforced by British lawmakers is currently vehemently guarded from judicial review by the government in Trinidad and Tobago, whilst the British judiciary advocates for reform. It may be asserted that even though their colonizers have progressed,[146] Trinidad and Tobago still remains fastened to the colonial remnant that is, the mandatory death penalty.

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[134] Helfer (n 10) 1888.
[135] 'Caribbean Court of Justice' (*International Justice Resource Center*) <https://ijrcenter.org/regional-communities/caribbean-court-of-justice/> accessed 11 December 2020.
[136] Helfer (n 10) 1888.
[137] ibid.
[138] ibid.
[139] *Pratt and Morgan* (n 4); Rose-Marie Belle Antoine, 'Opting Out from the Optional Protocol – Is This Inhumane?' (1998) 3 CLB 28, 37.
[140] Antoine (n 139); Helfer (n 10) 1888.
[141] David Simmons, 'Judicial Legislation for the Commonwealth Caribbean: The Death Penalty, Delay and the Judicial Committee of the Privy Council' (1998) 3 CLB 1, 6.
[142] Helfer (n 10) 1888.
[143] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[144] O'Brien and Wheatle (n 60).
[145] Hood and Seemungal (n 9).
[146] The Murder (Abolition of Death Penalty) Act 1965, s 1.

Part II: Transitional Justice - The Human Rights Perspective
Achieving Transitional Justice - A Human Rights Angle

3.1 Introduction

As the state of affairs in Trinidad and Tobago has been established, this part considers the human rights abuses that are perpetuated with a mandatory death penalty. Trinidad and Tobago, although an independent state, endures a legacy of human rights abuses on account of this colonial law.

This section will frame the nation's need for transitional justice in two parts: the first element will focus on the Privy Council decision in the Jamaican case, *Pratt and Morgan*.[147] It is argued that Trinidad and Tobago disregards its commitments to human rights as individuals are kept on death row for a period exceeding 5 years – which is in contravention with the *Pratt and Morgan*[148] ruling.

The second element of this section will focus on an exemplification of Trinidad and Tobago's inability to adhere to its international human rights law obligations: the American Declaration of Human Rights.[149] Thereafter, it is contended that for the nation to transition from the injustices of its colonial past, legal reform may be necessary.

3.2 Judicial Committee of the Privy Council Developments: Pratt and Morgan[150]

As regards the first element: ironically, the Privy Council, has a 'strong and sustained human rights campaign, particularly in Jamaica and Trinidad and Tobago, in favour of the abolition of the death penalty'.[151] This is evident in *Pratt and Morgan*[152] where Lord Griffiths held that, 'in any case in which execution is to take place more than five years after sentence…that the delay is such as to constitute "inhuman or degrading punishment"'.[153] Thus, all such cases are to be referred to the Jamaican Privy Council who 'recommend commutation to life imprisonment'.[154]

Of particular interest is whether this decision is binding in Trinidad and Tobago. As previously deduced, Privy Council decisions would be regarded as persuasive authority. Nonetheless, Lord Hughes in *Lendore v Ors v The Attorney General of Trinidad and Tobago*[155] clarified that, 'the Board was well aware, in giving the judgment which it did, that it would be applicable

[147] *Pratt and Morgan* (n 4).
[148] ibid.
[149] American Declaration of the Rights and Duties of Man 1948.
[150] *Pratt and Morgan* (n 4).
[151] Dennis Morrison, 'The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism' (2006) 30 NLR 404, 407.
[152] *Pratt and Morgan* (n 4).
[153] ibid [35G].
[154] ibid.
[155] *Lendore* (n 14).

also in states other than Jamaica, and that there was likely to be a significant number of prisoners to whom it would apply'.[156] Thus far, the majority of the Commonwealth Caribbean courts which have reviewed successive 'undue delay cases'[157] concluded that they were bound to the decision in *Pratt and Morgan*[158] regardless of its disruption to the current 'system of justice'.[159] Hitherto, there has only been one challenge to the decision in the Belizean case[160] *Adolph Harris v The Attorney General of Belize*[161] wherein the Honourable Abdulai Conteh observed that, 'each case should depend on its own special circumstances and features'.[162] Lord Toulson in *Hunte and Khan v The State*[163] elucidated that, 'it is accepted that the same principle applies under the Constitution of Trinidad and Tobago, which prohibits the imposition or authorisation of cruel and unusual treatment or punishment: section 5(2)(b)'.[164] Moreover, Lady Hale clarified in *Hunte and Khan*[165] that, 'as far as I know, the State of Trinidad and Tobago has never suggested that *Pratt and Morgan*[166] does not apply to them'.[167] This suggests that the Privy Council accepts that *Pratt and Morgan*[168] is applicable to Trinidad and Tobago.

Pratt and Morgan[169] has culminated in an array of 'constitutional questions of what should be considered cruel and inhuman punishment'[170] regarding the death penalty, for instance: the degrading conditions of penitentiaries and the mandatory nature of capital punishment[171] which have been scrutinized by the courts in the region. For these questions to be considered by the courts in Trinidad and Tobago, it may arguably suggest that the judiciary is ostensibly calling into question the feasibility of the Constitution,[172] which is the supreme law of Trinidad and Tobago. Antoine asserted that:

> it seems, however, that the convoluted histories of these constitutional questions had less to do with whether the Privy Council was bound to its previous decision in a case from a different jurisdiction and more to do with attempting to find appropriate answers to hard questions of law.[173]

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[156] ibid [1] (Lord Hughes).
[157] Antoine (n 28) 150.
[158] *Pratt and Morgan* (n 4).
[159] Antoine (n 28) 150-151.
[160] ibid.
[161] [2006] Supreme Court of Belize AD 2006 [33] (The Honourable Abdulai Conteh Chief Justice of Belize).
[162] ibid 30.
[163] *Hunte and Khan* (n 79).
[164] ibid [47] (Lord Toulson); The Constitution of the Republic of Trinidad and Tobago 1976, s 5(2)(b).
[165] *Hunte and Khan* (n 79).
[166] *Pratt and Morgan* (n 4).
[167] *Hunte and Khan* (n 79) [91] (Lady Hale).
[168] *Pratt and Morgan* (n 4).
[169] ibid.
[170] Antoine (n 28) 151.
[171] ibid.
[172] The Constitution of the Republic of Trinidad and Tobago 1976, s 2.
[173] Antoine (n 28) 151.

As the Privy Council often remits cases to local courts for re-sentencing, the myriad of cases following *Pratt and Morgan* [174] depicts the feeble position opted by judges in the Commonwealth Caribbean concerning decisions made by the Privy Council.[175] Hence, it may be argued that they are reluctant to grasp 'their own role in defining their destinies'[176] and thus, this 're-emphasises the traditional dilemma posed by Privy Council decisions'.[177]

Remarkably, the judges allegedly take a 'timid stance'[178] regarding decisions made by the 'old imperial court',[179] whereas the public, executive and legislature argue that the Privy Council has ignored 'the clear meaning and intent of the savings clause'[180] and has 'manipulated and degraded Caribbean constitutional jurisprudence'.[181] Consequently, Trinidad and Tobago has actually withdrawn from international covenants for human rights[182] in order to preclude convicts on death row 'from petitioning',[183] thereby avoiding delays that invoke the *Pratt and Morgan* [184] ruling. Additionally, 'Michael de la Bastide [185] proffered the words of the Calypsonian ''Sugar Aloes'' to convey the popular response of Trinidad and Tobago to the'[186] *Pratt and Morgan* [187] decision. He was the 'traditional spokesman' [188] at the time, and a contestant 'in the 1995 Calypso Monarch competition in Port of Spain'[189] where he sang 'Who's in Charge':[190]

> But if we still have to send quite up in London
>
> to get the okay to hang a criminal in we own land
>
> Then what's the use of having an Independence or Republic holiday?[191]

Therefore, it may be asserted that there is a dichotomy which exists between the judiciary's stance regarding *Pratt and Morgan*[192] and the other limbs of Trinidad and Tobago.

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[174] *Pratt and Morgan* (n 4).
[175] Antoine (n 28) 151.
[176] ibid.
[177] ibid.
[178] ibid.
[179] Burnham (n 94).
[180] ibid 608.
[181] ibid.
[182] First Optional Protocol to the International Covenant on Civil and Political Rights (Human Rights).
[183] Roger Hood, Florence Seemungal, Douglas Mendes, Jeffrey Fagan, 'A Penalty without Legitimacy: The Mandatory Death Penalty in Trinidad and Tobago' (2009) The Death Penalty Project 10 <https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/09.08.10_Trinidad_Publication.pdf> accessed 21 December 2020.
[184] *Pratt and Morgan* (n 4).
[185] Michael de la Bastide, 'Commonwealth Caribbean Jurisprudence and the Privy Council' (1995) 22 Revista IIDH 27, 39.
[186] Burnham (n 94) 608.
[187] *Pratt and Morgan* (n 4).
[188] Bastide (n 185).
[189] ibid.
[190] Sugar Aloes, 'Who's in Charge' (1994) <https://www.youtube.com/watch?v=j2YenCP9O8I> accessed 20 December 2020.
[191] ibid; Bastide (n 185).
[192] *Pratt and Morgan* (n 4).

It is this division of ethos that perhaps contributes to the suppression of improvement in the region. As delineated by Burnham, the conflicting endorsement of Commonwealth Caribbean governments for the mandatory death penalty, 'and their disdain for the judgments of the Privy Council, has hindered the ability of that tribunal to develop a cohesive jurisprudence that fully respects international law for the Commonwealth as a whole'.[193] The logic behind *Pratt and Morgan*[194] was that all appeals were supposed to be completed by the 5-year period. Thereafter, there was to be no execution, but commutation to life imprisonment. However, as Lord Hughes explained in *Lendore*,[195] commutations are a matter for the executive[196] or the High Court,[197] not the board. Thus, as per Lord Neuberger (agreeing with Lord Toulson) in *Hunte and Khan*:[198]

> the mere fact that the Board is seized of a criminal case because it is entertaining an appeal against conviction or sentence does not give it any jurisdiction to order commutation of a lawfully passed sentence of death on the ground that it would be unconstitutional for that sentence to be carried out.[199]

Lord Hughes in *Lendore*[200] acknowledged the paradox that exists in the law as, 'the original sentence of death was lawful. Indeed it was mandatory; the court of trial had no choice. All that has become unlawful is carrying it out after unreasonable delay'.[201] Regardless, this is the state of the law in Trinidad and Tobago. Lady Hale in *Hunte and Khan*[202] dissenting, found that it is:

> a surprising proposition that…the Board is obliged to prolong the "death row" experience of someone who is entitled to commutation of the sentence by holding that the Board's only power to order commutation is on appeal from a constitutional motion and not on an appeal from the criminal court.[203]

Lady Hale argued that, 'such a conclusion is deeply unattractive',[204] thus alluding to the human rights abuses embedded in the Trinidadian legal system.

Lord Hughes highlighted the available legal remedy as per section 14(2) of the Constitution:[205] claimants may seek relief on a constitutional motion if the 'execution has become unlawful by reason of unreasonable delay, so to declare…commutation…an appropriate substitute

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[193] Burnham (n 94).
[194] *Pratt and Morgan* (n 4).
[195] *Lendore* (n 14).
[196] ibid [2] (Lord Hughes); The Constitution of the Republic of Trinidad and Tobago 1976, s 87.
[197] *Lendore* (n 14) [5] (Lord Hughes); The Constitution of the Republic of Trinidad and Tobago 1976, s 14(2).
[198] *Hunte and Khan* (n 79).
[199] ibid [76] (Lord Neuberger).
[200] *Lendore* (n 14).
[201] ibid [11] (Lord Hughes).
[202] *Hunte and Khan* (n 79).
[203] ibid [71] (Lady Hale).
[204] ibid.
[205] The Constitution of the Republic of Trinidad and Tobago 1976, s 14(2).

sentence'[206] per the High Court. However this is 'relatively rare'[207] as he concluded that typically, 'the fixing of substitute sentences will be for the President acting on the advice of the Minister, who will be informed by the views of the Advisory Committee'.[208] However, the appellant's individual circumstances are often overlooked.[209] Thus, the convicts are left with the option of judicial review of the president's decision.[210] However, the board expressed that it does not have the jurisdiction to denote 'what substitute sentences ought to be imposed in these or comparable cases, nor as to whether they will necessarily differ amongst themselves',[211] it is merely a review of the legality of the president's decision.

A fundamental principle which underpins our system of justice demonstrates that 'there must be a proportionate relationship between the punishment meted out to a convicted person and the gravity of the crime that he or she has been found guilty of'.[212] This key notion is a remnant of the Magna Carta. The Honourable Mr. Justice Adrian Saunders highlighted its essence in *Spence and Hughes v The Queen*[213] delineating that, 'it is and has always been considered a vital precept of just penal laws that the punishment should fit the crime'.[214] Furthermore, as per the Privy Council in *Reyes*:[215] 'all killings which satisfy the definition of murder are by no means equally heinous'.[216] This demonstrates the extensive circumstances in which murder may occur. However, a mandatory death penalty inhibits the judiciary of its ability to regard 'the individual circumstances of the offenders in order to determine the appropriate sentence'.[217] Furthermore, the Constitution[218] exasperates this failure 'by allowing the Executive to decide who should live and who should die'.[219]

As per Lord Diplock in *De Freitas v Benny*,[220] 'mercy…begins where legal rights end'.[221] For this reason, currently in Trinidad and Tobago, the vast majority of:

> those convicted of murder are sentenced to death, yet the death penalty is not being carried out. They sit in prison [languishing indefinitely] with this sentence over their head,

[206] *Lendore* (n 14) [35] (Lord Hughes).
[207] ibid [36].
[208] ibid [80].
[209] ibid [76] (Lord Hughes); The Constitution of the Republic of Trinidad and Tobago 1976, s 89(3).
[210] *Lendore* (n 14) [73] (Lord Hughes).
[211] ibid [80].
[212] Hood, Seemungal, Mendes and Fagan (n 183) 5.
[213] *Newton Spence and Peter Hughes v The Queen* [1998] Criminal Appeal No. 20 of 1998, Eastern Caribbean Court of Appeal Judgment (2 April 2001) (St. Vincent and the Grenadines and St. Lucia).
[214] ibid [216] (The Honourable Mr. Justice Adrian Saunders).
[215] Reyes (n 44)
[216] ibid [11].
[217] Hood, Seemungal, Mendes and Fagan (n 183) 7.
[218] The Constitution of the Republic of Trinidad and Tobago 1976.
[219] Hood, Seemungal, Mendes and Fagan (n 183) 7.
[220] *Michael de Freitas v George Ramoutar Benny and Others* [1975] UKPC 12, [1976] AC 239.
[221] ibid 394f (Lord Diplock).

> their time in prison exceeding the period that the case of *Pratt and Morgan*[222] found amounts to inhuman and degrading treatment; moreover, there is no certainty.[223]

Consequently, convicts endure, 'severe mental torment…during their prolonged period on death row, known as… "death row phenomenon"'.[224] This illustrates the crucial need for transitional justice in Trinidad and Tobago as the systemic human rights violations are so dire, that urgent reform may be required to redress the colonial legacy of human rights defects embedded in the legislative framework.

3.3 International Human Rights Law Obligations

In order to further highlight Trinidad and Tobago's struggle to attain transitional justice due to the mandatory death penalty, consider the second element: the violations of its international human rights obligations. When the 1962 Constitution[225] was enacted, the Bill of Rights[226] was held not to 'apply to existing law'.[227] Consequently, it was inconceivable that 'the mandatory death sentence was challengeable on the ground that it violated the human rights provisions in the constitution'.[228] However, it may be argued that capital punishment in Trinidad and Tobago opposes 'basic principles which lie at the core of our legal system, with developments in other countries and in the region, and with our international obligations'.[229]

On 14th March 1967, Trinidad and Tobago acceded to the Organisation of American States and thus, adopted the American Declaration of Human Rights[230] of which Article I provides for the right to life, Article XXVI: 'not to receive cruel…or unusual punishment'[231] and Article XVIII protects the right to a fair trial. It is evident that by virtue of the retention of a mandatory death sentence that the 'preference for capital punishment was strong enough to outweigh the weaker preference for maintaining commitments to constitutional and human rights systems that effectively incorporated abolitionist norms'.[232] Moreover, 'Trinidad and Tobago ratified the Inter-American Convention on Human Rights on 28 May 1991 and simultaneously recognised the compulsory jurisdiction of the Inter-American Court of Human Rights whose judgments are binding'.[233] The Privy Council in *Thomas v Baptiste*[234] affirmed that convicts

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[222] *Pratt and Morgan* (n 4).
[223] Dobbs (n 97) 30.
[224] 'Earl Pratt and Ivan Morgan' (*The Death Penalty Project*) <https://www.deathpenaltyproject.org/story/earl-pratt-and-ivan-morgan/> accessed 21 December 2020.
[225] Trinidad and Tobago (Constitution) Order in Council 1962.
[226] ibid s (2).
[227] Trinidad and Tobago (Constitution) Appendix Order in Council 1962, s 3(1); Hood, Seemungal, Mendes and Fagan (n 183) 1.
[228] Hood, Seemungal, Mendes and Fagan (n 183) 1.
[229] ibid 4.
[230] American Declaration of the Rights and Duties of Man 1948.
[231] ibid Art XXVI.
[232] Helfer (n 10) 1887.
[233] Hood, Seemungal, Mendes and Fagan (n 183) 11.
[234] *Thomas and Haniff Hilaire v Cipriani Baptiste* [1999] UKPC 13, [2000] 2 AC 1 (Trinidad and Tobago).

'who have lodged petitions' [235] to international bodies would be granted a stay of their execution. However, 'the government of Trinidad and Tobago…violated both national and international law by scheduling Anthony Briggs[236] to be hanged on 22 June 1999 while his case [was] still pending before the Inter-American Court on Human Rights'.[237] Lord Nicholls gave a powerful dissent criticising the legislative deficiencies: 'I am not prepared to accept that the law of Trinidad and Tobago is so foreshortened that the courts of Trinidad and Tobago must stand by, powerless to act, while Briggs is executed'.[238] Nonetheless, Briggs was hanged.

The judiciary's approach regarding capital punishment and the international bodies' inability to finalize the cases efficiently prompted the Trinidadian government to withdraw from the American Convention on Human Rights. However, 'Trinidad and Tobago remains a member of the Organisation of American States and the Inter-American Commission has held[239] that the Declaration[240] is binding on members of the OAS, whether or not they have ratified the Convention'. [241] These rulings have established a precedent whereby unincorporated international conventions may be implemented in national law irrespective of whether a nation observes a monist or dualistic approach. Nonetheless, the Commission in *Edwards v The Bahamas*[242] clarified that a mandatory death penalty was in contravention of Article XXVI of the Declaration: the 'right to due process of law',[243] of 'which Trinidad and Tobago is still bound'.[244]

Subsequently, in *Hilaire, Constantine and Benjamin v Trinidad and Tobago*[245] the Inter-American Court held that the mandatory death penalty was contrary to the 'prohibition against the arbitrary depravation of life, in contravention of Article 4(1) and 4(2) [246] of the Convention'.[247] The Court ordered Trinidad and Tobago to implement 'legislative reforms'[248] such as individualized sentencing. However, the country failed to comply with the Court's order. This is inconsistent with what is propounded by the United Nations, whereby, 'the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the death

[235] ibid [51].
[236] *Briggs* (n 66).
[237] 'Trinidad and Tobago: Death Penalty: Anthony Briggs' (*Amnesty International*, 1999) <https://www.amnesty.org/download/Documents/144000/amr490081999en.pdf> accessed 23 December 2020.
[238] *Briggs* (n 66) [49] (Lord Nicholls of Birkenhead).
[239] *White and Potter (Baby Boy) v United States* [1981] Resolution 23/81 Case No. 2141 (United States), 6 March 1981.
[240] American Declaration of the Rights and Duties of Man 1948.
[241] Hood, Seemungal, Mendes and Fagan (n 183) 11.
[242] *Michael Edwards and Others v The Bahamas Report* [2001] No. 48/01 4 April 2001.
[243] American Declaration of the Rights and Duties of Man 1948, Art XXVI.
[244] *Michael Edwards and Others* (n 242) [147]; Hood, Seemungal, Mendes and Fagan (n 183) 12.
[245] *Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago* [2002] Judgment of June 21 2002 (Inter-American Court of Human Rights).
[246] Inter-American Convention on Human Rights, Art 4(1) and Art 4(2).
[247] Hood, Seemungal, Mendes and Fagan (n 183) 12.
[248] *Hilaire* (n 245) [212].

penalty should under no circumstances be mandatory by law'.[249] This further alludes to the executive's disregard for the extensive violations of international treaties and human rights obligations which a mandatory death penalty promotes. As per the Inter-American Court in *Hilaire*:[250]

> it puts at risk the most cherished possession, namely, human life, and is arbitrary according to the terms of Article 4(1) of the Convention[251] [because it] "treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty".[252]

As per Lehrfreund, 'retentionist countries across the Caribbean…[in] law and practice do not provide the protections in capital punishment cases that are required by international human rights law'.[253] This further supports the argument that the death penalty should be abolished as, 'miscarriages of justice and executions of the innocent may occur in every system'.[254]

3.4 Summary

Consequently, it is evident that the rule of law in Trinidad and Tobago has arguably failed to endorse tools of transitional justice.[255] The state's indifference to the *Pratt and Morgan*[256] decision, as well as its international human rights law obligations, evidences that the nation has perpetuated an inhumane punishment which was utilized to maintain control in a plantation society.[257] Therefore, this may pave the path for legal reform.

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[249] 'Death Penalty in the English-Speaking Caribbean A Human Rights Issue' (*Amnesty International*, 2012) 11 <https://www.amnesty.org/download/Documents/20000/amr050012012en.pdf> accessed 20 December 2020.
[250] *Hilaire* (n 245).
[251] ibid [103]; Inter-American Convention on Human Rights, Art 4(1).
[252] *Hilaire* (n 245) [105]; *Woodson v North Carolina*, 428 US 280, 304 [1976] (US Supreme Court) (d).
[253] United Nations Human Rights Office of the High Commissioner, 'Moving Away from the Death Penalty: Arguments, Trends and Perspectives' (*United Nations*, 2014), 23 <https://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf> accessed 26 December 2020.
[254] ibid.
[255] Eric Sottas, 'Transitional Justice and Sanctions' (2008) 90 IRRC 371, 371 <https://international-review.icrc.org/sites/default/files/irrc-870_12.pdf> accessed 22 December 2020.
[256] *Pratt and Morgan* (n 4).
[257] George L. Beckford, *Persistent Poverty: Underdevelopment in Plantation Economies of the Third World* (2nd Edn, TUWIP 1999) 38.

Part III: Legal Reform
Moving Forward

4.1 Introduction

This part analyses whether legal reform is required in order to redress the legacy of human rights abuses in the state. It examines the arguments for and against the reform of the mandatory death penalty. This section will argue that in order to emerge from the colonial vestige that persists within the Trinidadian constitution,[258] reform of the mandatory death penalty is needed. It is contended that with the support of all the branches of the state, the 'savings clause'[259] may be surmounted and individualized sentencing may be introduced. Thereafter, the state may eventually institute a scheme to abolish the mandatory death penalty and overcome this colonial residue.

4.2 Is Legal Reform in Trinidad and Tobago Necessary?

It may be argued that the colonial baggage engraved in the constitution[260] is perhaps repressing Trinidad and Tobago. This assertion would incite the need for legal reform in order for the country to progress. However, the reluctance amongst politicians and the electorate to advocate for its abolition is 'in response to the ever-increasing rate of crime and the unprecedented number of homicides committed in recent years'.[261] However as 'reform can only be obtained through an Act of Parliament',[262] Hood and Seemungal conducted a study 'A Penalty Without Legitimacy',[263] seeking the opinions of judges with 'experience of murder trials' in order to 'aid the debate'.[264]

Firstly, it was considered whether a mandatory death penalty was deemed to be an 'excessive punishment'.[265] Amongst 12 judges, 50% concluded that there would be at least one occasion where it may be excessive, for instance:

> A man who comes home intoxicated…meets wife with baby sleeping in her grasp and who…expresses malice over an alleged extra-marital affair and who proceeds to chop her but kills the child instead and he is convicted of the murder of the child.[266]

The judiciary was keen to emphasize that 'the imposition of the death penalty' may be 'excessive given the facts of the case'.[267] Cases such as joint enterprise, felony murder, crimes

[258] The Constitution of the Republic of Trinidad and Tobago 1976.
[259] ibid s 6(1).
[260] ibid.
[261] Hood, Seemungal, Mendes and Fagan (n 183) v.
[262] ibid 12.
[263] ibid.
[264] ibid.
[265] ibid 14.
[266] ibid 15.
[267] ibid.

of passion, domestic killings, prolonged abuse and self-defence were cited as possible instances wherein it may be excessive.[268]

Secondly, the issue was posed whether the death penalty served as 'a barrier to conviction for murder'.[269] 69% of 13 judges claimed that they encountered proceedings where 'in their judgment, "the jury would have found the person accused of murder guilty of that crime had it not been that the penalty would have been mandatorily death"'.[270] A public prosecutor recalled an instance where:

> a guy went to his girlfriend's house - she left him and was living with her mother - the guy…shot [her] mother and son in the household. He was charged for murder but committed for manslaughter. DPP indicted for murder. Jury came in with manslaughter. Court Marshall later told me that some jurors were of the view that they could not hang a handsome good-looking young man.[271]

The judges observed that jurors tend to convict only when the 'facts are particularly heinous',[272] they are often sympathetic wherein the accused was relatively young, doing their job or even good-looking.[273] On this basis, due to the mandatory nature of the death penalty in Trinidad and Tobago, there are individuals accused of murder, perhaps deserving of a conviction, who are acquitted, with reduced convictions of manslaughter or are granted an appeal.[274] Perhaps there is potential for the public opinion to shift from advocating for the death penalty to its abolition if there is more education on what is actually at stake here – arguably, in the way that jurors understand when they are in the court room.

Thirdly, the judiciary was asked what they thought the 'effect on the conviction rate for murder'[275] might be if the mandatory death penalty was abolished. 64% of 14 judges concluded that 'the conviction rate would increase'.[276] As explained by a prosecutor, 'it would make it easier for jurors to faithfully apply legal principles and facts of a case whether murder or manslaughter'.[277] This suggests that if death by hanging was not the only option available to the jury, they may be more inclined to convict for murder.[278]

Finally, the judges proffered their assessment on what they speculated the 'effects on the murder rate' would be if the mandatory death penalty was dissolved.[279] 77% of 13 judges concluded that there would be no effect: 'murder would not go up or down; there is need for

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[268] ibid 15-17.
[269] ibid 17.
[270] ibid.
[271] ibid 18.
[272] ibid 17.
[273] ibid 18-19.
[274] ibid 19.
[275] ibid 20.
[276] ibid.
[277] ibid.
[278] ibid.
[279] ibid 21.

better policing. In crimes of passion the defendant is not concerned about sentence, death or life imprisonment'.[280] This implies that judges in Trinidad and Tobago are of the opinion that a mandatory death penalty does not serve as an effective deterrent.

Therefore, it is evident from the findings of this study that a significant facet of the judiciary would prefer that the mandatory element of the death penalty be expunged as it 'lacks legitimacy' and is 'regarded as an unfair and ineffective response to all types of murder'.[281] Thus, the government may be able to rely on the countenance of such an 'influential and knowledgeable section of the community in repealing the mandatory death penalty for all murders'.[282] As such a fundamental branch of any legal system - the judiciary, supports the amendment of this colonial law, it may be argued that reform is necessary in Trinidad and Tobago.

4.3 Is Reform the Appropriate Path?

Though there are substantive justifications which reveal that Trinidad and Tobago should consider reform, there are also contentions as to why capital punishment may be essential to our constitution. 'Government responses to crime, including to youth violence and gang crime, have shown an over-reliance on law enforcement and punishment and a reluctance to adopt comprehensive crime prevention strategies'.[283] Emphasis is placed on 'repressing criminal conduct in the belief that being "tough on crime" is the most effective way to deter crime',[284] thus encouraging the population's belief that capital punishment will reduce the crime rate.

However, a United Nations report concluded that: 'research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming'.[285] Furthermore, 'in Trinidad and Tobago, which has a very high homicide rate, academics have not been able to establish any relationship between trends in the execution and murder rates'.[286] Bulkan, concluded that due to the:

> severe problems in the legal system—including failure to assess defendants' mental and psychological status, the poor quality of legal aid for indigent prisoners, and a low clearance rate in murder investigations—combine to make the pattern of death sentences that still do occur tragically arbitrary and useless as a deterrent.[287]

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[280] ibid.
[281] ibid 32.
[282] ibid.
[283] 'Death Penalty in the English-Speaking Caribbean A Human Rights Issue' (*Amnesty International*, 2012), 24 <https://www.amnesty.org/download/Documents/20000/amr050012012en.pdf> accessed 20 December 2020.
[284] ibid.
[285] Implementation of the United Nations safeguards guaranteeing protection of the rights of those facing the death penalty (1998) E/AC.57/1988/CRP.7; ibid 25.
[286] United Nations Human Rights Office of the High Commissioner (n 253) 72.
[287] ibid 86.

Moreover, a recent study 'A Rare and Arbitrary Fate',[288] concluded that, 'the certainty of conviction for murder is so low that a mandatory death penalty cannot be an effective deterrent to murder'.[289] Therefore, 'under the system of criminal justice as it operates in Trinidad and Tobago, there is a great deal of arbitrariness affecting which defendants are convicted of murder and sentenced to death'[290] and thus, 'the existence of a mandatory death penalty may itself be one of the factors affecting the ability of the system to secure convictions for murder'.[291] This perhaps indicates that capital punishment for murder may not have the 'deterrent effect claimed for its retention', particularly given the evidence that the murder conviction rate would increase if it were not the only penalty available.[292] As highlighted by Chief Justice Chaskalson in a landmark case in South Africa, *S v Makwanyane and Another*:[293] 'the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished',[294] not the fear of death.

It may be argued that abolitionists find creative ways to evade the mandatory aspect of the death penalty thus eliminating the need for its complete dissolution. In the study, 'A Penalty Without Legitimacy',[295] one of the prosecutors claimed that, 'mental disorder and youth are already taken into account in mitigating factors….We are in desperate straits, we need the death penalty. There are enough checks and balances in the system to filter out family situations and to filter out murder from manslaughter'.[296] Individuals with mental disabilities are expressly shielded by the law in section 4A(1) of the Offences Against the Person Act. Additionally, *Khan v The State*[297] 'invalidated Trinidad and Tobago's mandatory death sentence for felony murder'.[298] Finally, the mandatory nature of the term 'shall' in section 4 of the Offences Against the Person Act is constrained by Articles 2 and 3 of the Economic and Social Council resolution 1984/50[299] which pardons convicts who are insane, below 18 years, new mothers or pregnant.

However, 'there is clear evidence that safeguards to protect people with mental disabilities from being sentenced to death are inadequate'.[300] Due to 'the lack of mental health assessments' for defendants, 'courts cannot properly assess whether there is a reasonable prospect' of changing

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[288] Hood and Seemungal (n 36).
[289] ibid 77.
[290] ibid.
[291] ibid.
[292] Hood, Seemungal, Mendes and Fagan (n 183) 7.
[293] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, 1995 (6) BCLR 665.
[294] ibid [122] (Chief Justice Arthur Chaskalson).
[295] Hood, Seemungal, Mendes and Fagan (n 183).
[296] ibid 26.
[297] [2003] UKPC 79, [2005] 1 AC 374.
[298] ibid [19] (Lord Bingham); Criminal Law Act 1979, s 2A; Andrew Novak, *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Africa, Asia and the Caribbean* (2nd Edn, R 2016) 68.
[299] Safeguards guaranteeing protection of the rights of those facing the death penalty (25 May 1984) Economic and Social Council resolution 1984/50, Article 2 and 3.
[300] 'Death Penalty in the English-Speaking Caribbean A Human Rights Issue' (*Amnesty International*, 2012), 4 <https://www.amnesty.org/download/Documents/20000/amr050012012en.pdf> accessed 20 December 2020.

the original decision.[301] Furthermore, the common law test of insanity 'seems to be too technical for judges to explain adequately or for jurors to evaluate sensibly, with the result that many convictions are overturned on the basis of incorrect directions'.[302] Additionally, 'the legal test seems to be the archaic understanding of mental illness, and its divergence from what may actually constitute a mental incapacity'.[303] This raises questions about whether the law sufficiently accommodates individuals with mental disorders. This was illustrated in *Stephen Robinson a/c Psycho a/c Tony v The State*[304] where the homeless defendant 'was convicted of the January 2002 murder of a security guard and sentenced to death in 2009. Medical evidence established that he had been diagnosed with schizophrenia since 1984'.[305] Nonetheless, the jury rejected the evidence, 'presumably on the belief that he was experiencing a lucid interval. Thus, the opinion of two experts (one with considerable experience) was discarded in favour of pure speculation'.[306] This highlights the shortcomings of this obsolete insanity test, which is exacerbated by criminal procedure rules that make determining insanity an issue for the jury.[307]

Additionally, in the study, 'Public Opinion on the Mandatory Death Penalty in Trinidad',[308] 87% of the respondents indicated that they supported the retention of the penalty due to retribution: 'emphasising equal treatment for all who murder and thus deserve death, including giving satisfaction to all relatives of the murdered victims'.[309] This was exemplified in a recent case in February 2021 regarding a young woman, Andrea Bharatt, whose body was found in a 'forest'.[310] She was allegedly targeted by 'an organised crime syndicate' for notifying her superiors of 'false deeds' that was 'used as collateral' in a case.[311] This incited outrage in the nation for retributive justice: rallies for women's rights[312] and a national outcry for the resumption of hanging via protests[313] and petitions[314] which over 100,000 people signed.

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[301] ibid 20.
[302] United Nations Human Rights Office of the High Commissioner (n 253) 121.
[303] ibid.
[304] [2009] Cr. App: 12 of 2009.
[305] United Nations Human Rights Office of the High Commissioner (n 253) 121.
[306] ibid.
[307] ibid.
[308] Hood and Seemungal (n 2).
[309] ibid 12.
[310] Carolyn Kissoon, 'They killed Andrea and threw her away' *Trinidad Express* (Trinidad and Tobago, 4 February 2021) <https://trinidadexpress.com/newsextra/they-killed-andrea-and-threw-her-away/article_774e45aa-6728-11eb-a392-b73a8a5ddbd7.html> accessed 4 February 2021.
[311] Darren Bahaw, 'Police probe court link in Bharatt's murder' *Trinidad and Tobago Newsday* (Trinidad and Tobago, 5 February 2021) <https://newsday.co.tt/2021/02/05/police-probe-court-link-in-bharratts-murder/> accessed 5 February 2021.
[312] Sharlene Rampersad, 'We are not going to stop' *Trinidad and Tobago Guardian* (Trinidad and Tobago, 8 February 2021) <https://www.guardian.co.tt/news/we-are-not-going-to-stop-6.2.1286575.edf2077b79> accessed 8 February 2021.
[313] Gail Alexander, 'More protests to end violence today' *Trinidad and Tobago Guardian* (Trinidad and Tobago, 7 February 2021) <https://www.guardian.co.tt/news/more-protests-to-end-violence-today-6.2.1286207.91aee191be> accessed 7 February 2021.
[314] Asha Moosai, 'Protect Our Women in T&T' (*Change.org*) <https://www.change.org/p/minister-of-national-security-protect-our-women-in-t-t?recruiter=1179322922&utm_source=share_petition&utm_campaign=psf_combo_share_initial&utm_medium

Nevertheless, the families of the victims are often, 'strongly convinced that murder cannot be countered with murder…instead of focusing on retribution, they try to set themselves free from their trauma through forgiveness, healing and restoration'. [315] Furthermore, though the interviewees in the study deemed that the penalty was 'a deserved punishment for taking a life',[316] when questioned 'if they would continue to support the death penalty if it were proven that innocent people had in fact been executed, a large proportion said no'.[317] Saul Lehrfreund argues that, 'the risk that innocent people will be executed can never be eliminated' as a perfect justice system does not exist.[318] As per Kirk Bloodsworth, 'if a great country cannot ensure that it won't kill an innocent citizen, it shouldn't kill at all'.[319] Additionally, 'the death penalty is not imposed in a just and equal way. Those sacrificed on the altar of retributive justice are almost always those who are vulnerable because of their poverty, minority status or mental disability'.[320] Thus, in such circumstances, the retributive justification may be futile.

Finally, Martin Martinez, Trinidad and Tobago's former commissioner of prisons claims that, 'we talk about independence, meaning a flag and an anthem, but we need to sever the umbilical cord with the mother country'.[321] 'The fate of those on death row' is determined by the Privy Council in Westminster, 'more than 4,000 miles away'.[322] Though 'the Privy Council has saved lives, the idea of British judges having the final say over former colonial subjects… seem[s] anachronistic'.[323] Thus, it is contended that there are demands for its retention in order to avoid allowing the old sovereign having its say once more – the idea of 'judicial imperialism'.[324]

However, the death penalty is 'one of the few remaining links to Britain colonialism'.[325] 'The history of the death penalty illustrates the absurd results that can occur when independent states are still tethered to colonial laws that have been discarded as unjust by the colonial power itself'.[326] The mandatory death penalty arguably engenders greater harm as opposed to its purpose - rectifying one. Therefore, this suggests that reform may be the appropriate path for Trinidad and Tobago.

=whatsapp&recruited_by_id=98ff6bf0-67c0-11eb-b96a-3b978983e2fd&utm_content=washarecopy_27200205_en-GB%3A4> accessed 1 March 2021.

[315] United Nations Human Rights Office of the High Commissioner (n 253) 16.

[316] Hood and Seemungal (n 2) 34.

[317] ibid.

[318] United Nations Human Rights Office of the High Commissioner (n 253) 48, 65.

[319] ibid 22.

[320] ibid 20.

[321] Maya-Wolfe Robinson and Owen Bowcott, 'The global fight to end capital punishment' *The Guardian* (London, 6 May 2012) <https://www.theguardian.com/world/2012/may/06/global-fight-end-capital-punishment> accessed 3 January 2021.

[322] ibid.

[323] ibid.

[324] Helfer (n 10) 1888.

[325] Robinson and Bowcott (n 321).

[326] Burnham (n 38) 252.

4.4 Legislative Reform: What Should We Do?

Despite the support or lack thereof for the mandatory death penalty, only legislative assistance from the executive can move along the use of a discretionary death penalty as in the Eastern Caribbean, a de facto abolitionist policy or abolition in Trinidad and Tobago. The legislators would first have to address the 'savings clause'[327] in the Constitution of Trinidad and Tobago. In comparison, Barbados and the Eastern Caribbean countries departed from a mandatory death penalty, but appear reluctant to change the law to achieve abolition.[328] Similarly, from 2009 interviews in Trinidad and Tobago on the implementation of the death penalty, 7.8% administrators of justice (state prosecutors, judges and counsel) support the status quo, 15.7% favour abolition, but most favour a discretionary application of the death penalty.[329]

Burnham argues that, 'the savings clause problem could be ameliorated by law reform initiatives to modernize Caribbean statute law'.[330] However, the imperative legislative tools have not been competently marshalled to influence such a reconstruction of the constitution, thus 'many of the states still labour under laws received from England during the colonial period'.[331] Therefore, perhaps Trinidad and Tobago could consider Jamaica's approach wherein the Privy Council in *Watson v R*[332] held that the 'savings clause':[333]

> did not protect Jamaica's mandatory death penalty law from constitutional challenge because Jamaica had amended its Offences Against the Person Act[334] since independence to establish categories of capital and non-capital murder and thereby removed the amended provisions from the scope of the savings clause.[335]

Consequently, the Privy Council found that the penalty in Jamaica could only be enforced via individualized sentencing.[336]

Notably, the Prescott Commission of Enquiry of 1990 recommended that defences to murder, 'namely provocation, diminished responsibility, and self-defence should be introduced, it rejected…that there should be categories of capital and non-capital murder'.[337] However, 10 years later, an agreement had been made 'to limit the scope of the mandatory death penalty to some extent by introducing a classification of murders'.[338] Act No 90 of 2000 An Act to Amend

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[327] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[328] Hood and Seemungal (n 9) 8.
[329] Hood, Seemungal, Mendes and Fagan (n 183) 27.
[330] Burnham (n 38) 252.
[331] ibid.
[332] [2004] UKPC 34, [2005] 1 AC 472 [34].
[333] Jamaica (Constitution) Order in Council 1962, s 26(8).
[334] Offences Against the Person Act of 1992 (Cap. 269) (Jamaica).
[335] Brian D. Tittemore, 'The Mandatory Death Penalty in the Commonwealth Caribbean and the InterAmerican Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections' (2004) 13 W&MBRJ 445, 512 <https://scholarship.law.wm.edu/wmborj/vol13/iss2/7> accessed 4 January 2021.
[336] *Watson* (n 332) [34]; ibid.
[337] Hood, Seemungal, Mendes and Fagan (n 183) 10.
[338] ibid 11.

the Offences Against the Person Act (Ch 11.08) 'limited the mandatory death penalty to "Murder 1"[339] and in certain circumstances "Murder 2".[340] "Murder 3"[341] would cover involuntary homicide – essentially manslaughter – and would not be subject to capital punishment'.[342] Murder 2 and 3 were subject to the discretion of the Director of Public Prosecutions. However, this act was not submitted 'to the President for proclamation' after a change of government.[343]

Seemungal and Hood argue that 'the proposal to create a class of capital murder endorsed by Parliament in Act 90 of 2000 to amend the Offences Against the Person Act…encompassed a too wide and ill-defined range of offences'.[344] The motion to preserve the mandatory death penalty 'on conviction for "Murder 1" and for multiple killing in "Murder 2" would'[345] encounter an identical issue that Jamaica experienced 'under its Offences Against the Person Act of 1992 which had created a distinction between capital and non-capital murder modelled on the defunct and discredited UK Homicide Act of 1957'.[346] However, when the Privy Council in *Watson*[347] held that, 'the death penalty could not be mandatorily applied even to a narrow range of capital murders, and that each person sentenced to death under this law should have a new sentencing hearing to determine the appropriate penalty',[348] only 4 of 45 individuals were re-sentenced to death 'when they appeared before a court with discretionary power over the sentence'.[349] Therefore, it is contended that Trinidad and Tobago should implement a discretionary power.

In the 2009 study,[350] the judiciary's favoured alternative to the death penalty (81.3%) was 'life imprisonment minimum period by judge before release can be considered by Parole Board, including power to order a full life sentence with no possibility of release'.[351] This suggests that there is insufficient support for the abolition of the death penalty presently, 'most likely because of perceptions of what the reaction would be from the general public at a time when the homicide rate is so high'[352] (the Trinidad and Tobago Police Service reported 517 murders in 2018 and 539 in 2019).[353]

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[339] Act No 90 of 2000 An Act to Amend the Offences Against the Person Act (Ch 11.08), s 2(2).
[340] ibid s 4F(a).
[341] ibid s 4F(b).
[342] Hood, Seemungal, Mendes and Fagan (n 183) 11.
[343] ibid.
[344] ibid 32.
[345] ibid.
[346] ibid.
[347] *Watson* (n 332) [34].
[348] Hood, Seemungal, Mendes and Fagan (n 183) 32.
[349] ibid 33.
[350] ibid 29.
[351] ibid.
[352] ibid 32.
[353] 'Trinidad & Tobago 2020 Crime & Safety Report' (*The Overseas Security Advisory Council*, 29 April 2020) <https://www.osac.gov/Country/TrinidadTobago/Content/Detail/Report/e71edbe1-3d87-4d1f-989d-18900d4002c6#:~:text=TTPS%20reports%20539%20murders%20nationwide,represent%20an%20increase%20of%204.3%25.> accessed 4 January 2021.

Thus, by virtue of the conflicting opinions uncovered by this study as to how the mandatory death penalty should be reconstituted, perhaps an appropriate path 'would be for the Government to establish a Commission of Inquiry tasked with bringing a proposal before the legislature'[354] to thwart the 'savings clause'.[355] A system may be implemented, on a case by case basis, that vies to guarantee that the only individuals at the mercy of the death penalty 'pending its final abolition, are those who are truly agreed to be "the worst of the worst"'.[356] Furthermore, this scheme may be established 'in the jurisdiction of the [Trinidadian] Court of Appeal'.[357] Overall, in order to achieve this legislative reform, 'the political will' to engender a new-fangled perspective amongst the public, legislature and judiciary is needed.[358]

Regardless of a potential discretionary power, the question of abolition still lingers. In a 2020 study,[359] respondents concluded that abolition may be attained 'through creating an influential civil society pressure group "Citizens Against the Death Penalty"' or 'by a legal challenge to the constitutionality of the death penalty'.[360] Therefore, perhaps the key to abolishing the mandatory death penalty exists in the public's ability to campaign for it, thus encouraging the executive's support, which may motivate the legislature to revise the constitution. To this end, Amnesty International appeals to the government of Trinidad and Tobago to: cease issuing 'death warrants', propose legislation to Parliament which limits the use of capital punishment, ensure that 'prisoners are given the time and facilities to pursue all avenues of appeal open to them, including appeals to relevant international bodies, as stated in the'[361] *Pratt and Morgan*[362] decision, and finally, commute all of the death sentences.[363] By implementing these steps, Trinidad and Tobago may be able to make strides towards the abolition of capital punishment for murder.

4.5 Summary

'Although capital punishment was abolished in England[364] in 1965',[365] Trinidad and Tobago retained the mandatory death penalty. However, as explained by Mr. Rogers in a capital punishment debate in the House of Commons in the United Kingdom:

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[354] Hood, Seemungal, Mendes and Fagan (n 183) 33.
[355] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[356] Hood, Seemungal, Mendes and Fagan (n 183) 33.
[357] ibid.
[358] ibid.
[359] Hood and Seemungal (n 9) 16.
[360] ibid 37.
[361] 'Trying to execute regardless…' (*Amnesty International*, 1994) 31 <https://www.amnesty.org/download/Documents/184000/amr490011994en.pdf> accessed 7 January 2020.
[362] *Pratt and Morgan* (n 4).
[363] Trying to execute regardless…' (*Amnesty International*, 1994) 33 <https://www.amnesty.org/download/Documents/184000/amr490011994en.pdf> accessed 7 January 2020.
[364] The Murder (Abolition of Death Penalty) Act 1965, s 1.
[365] Burnham (n 38) 252.

> if we can redeem these people before they die, let them have the opportunity to repent of their sins and become useful citizens, then I say that that is better than subjecting them to the ghastly, barbaric, inhuman business of hanging by the neck until they are throttled and their spines are broken, which is a punishment unworthy of a nation which calls itself Christian and civilised.[366]

Therefore, it may be argued that in order to finally overcome this colonial residue entrenched in the Trinidadian legal system, this nation that was once part of an empire may need to effect constitutional reform so as to achieve transitional justice. With support from all the divisions of the nation, individualized sentencing and a plan for the abolition of capital punishment for murder may be implemented. Thereafter, Trinidad and Tobago may be able to emancipate itself from the shackles of its colonial past, at last.

[366] HC Deb 16 February 1956, Vol 548, Col 2596.

Conclusion

This dissertation discussed whether the law concerning capital punishment in Trinidad and Tobago is hindered from progress due to British colonialism, thus inciting the need for transitional justice and reform.

Colonialism: this dissertation argued that on account of the 'savings clause'[367] inscribed in the legislation, judicial review is inhibited. Thus, an 'Act of Parliament'[368] is needed to advance. However, the legislature is perhaps barred from amending the law due to the executive and public's stance on the retention of the penalty. Thus, the courts may be able to advocate for reform via a counter-majoritarian role.[369]

Transitional Justice: it is contended that Trinidad and Tobago's disregard for the *Pratt and Morgan*[370] ruling, as well as its international human rights law obligations indicates a need for transitional justice in the state to rectify the prolonged human rights abuses emanating from the colonial law.

Legal Reform: this dissertation concluded that reform may be a suitable path for Trinidad and Tobago in order to rectify the colonial baggage in the system. It is argued that the 'savings clause'[371] could be circumvented with sufficient support from the public, executive, judiciary and legislature thereby creating an avenue for individualized sentencing. Thenceforth, a plan may be devised which assures the eventual abolition of the mandatory death penalty.

Consequently, Trinidad and Tobago may no longer be hindered from progress on account of British colonialism regarding capital punishment for murder, thus achieving transitional justice.

[367] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).
[368] *Matthew* (n 2); Hood and Seemungal (n 2).
[369] Massey and Denning (n 3).
[370] *Pratt and Morgan* (n 4).
[371] The Constitution of the Republic of Trinidad and Tobago 1976, s 6(1).

Big Tech Companies' Unprecedented Success and The Abuse of Dominance In The EU And The US: A Comparative Analysis

*Sílvia Alves Félix**

Abstract

Tech giants such as Google, Facebook and Amazon are known for acting in an anti-competitive manner in the EU and across the world. Even though they have been heard in court, and consequently, were obliged to pay large sums of money, it has not proven to better their commercial practices substantially. Therefore, I intend to research the abuse of dominance by tech giants within the EU and explore how to make the EU law more efficient in order to ensure competition within the European Market. At the moment, Article 102 TFEU provides a very wide scope of what constitutes an abuse of a dominant position, which does not offer legal certainty or clarity. In this dissertation, I intend to demonstrate how can the EU legislation adapt to the digital age by taking into consideration the EU's most recent proposal: Digital Markets Act. This future Act will seek to limit the power of Big Tech companies on the European market. Finally, I will explore the US legal system as far as monopolisation is concerned in order to offer a comparative analysis between the US and the EU, while resorting to case law to demonstrate the impact of EU Law in the US v Google case, for example.

Introduction

Big tech companies, such as Google, Apple, Facebook, Amazon, and Microsoft, known as GAFAM, have become rapidly relevant and even central in our day-to-day lives. These companies have millions of active users worldwide on their platforms due to their social aspect.[1] They are undoubtedly advantageous to the average consumer or citizen as they facilitate communication, offer easy access to information quickly, create business opportunities, provide access to an increased number of products and services, enable consumers to shop from all over the world and make social interaction possible regardless the distance.[2] Consequently, these companies enjoy an unprecedented form of market power.[3] Given their utility, one could question why their dominance within markets should be problematic, and why

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[1] Statista. "Most popular social networks worldwide as of July 2021, ranked by number of active users" Accessed 30th August, 2021 https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/.

[2] Daniela Eleodor, 'Big tech, big competition problem?' (2019) Quality-Access to Success, 20(3), 49.

[3] Thomas Stuart, 'Too little too late? –An exploration and analysis of the inadequacies of antitrust law when regulating GAFAM data-driven mergers and the potential legal remedies available in the age of Big Data' (2021) European Competition Journal 1, 1.

this dissertation (alongside many academic articles) explores how competition could and should be harnessed to address their market behaviour.

First, these companies have been demonstrating a lack of fair play when acting in the market, for example, by buying out their competitors or by undermining their competitors' success. It is common knowledge that these companies operate in every corner of the world, which should mean they are aware of the rules and would comply with them, but also that they would act as a role model to their competitors as their market power is incomparable and unprecedented. However, recently, big tech companies have been drawing attention to their anti-competitive behaviour in the EU and the US, acting as gatekeepers of important online markets.[4] Tech giants have been accused of anti-competitive behaviour in the EU and elsewhere, for example, Facebook purchased Instagram and WhatsApp, which used to be its biggest competitors. Despite these purchases being allowed by the European Commission[5], they are being investigated by the Federal Trade Commission.

Big tech companies' ability to manipulate the market to their advantage by buying out their competitors has created monopolies, which are detrimental to the consumer but also for future competitors, for which the entrance into the market will be harder. However, the Commission is permitting big tech companies to reach an ultra-dominant position in the market by, for example, allowing Facebook to purchase WhatsApp and Instagram, despite these companies being Facebook's biggest competitors. The Commission does not allow any anti-competitive behaviour but by allowing the practices just mentioned, it is placing dominant big tech companies in a problematic position. Facebook was already considered dominant in a market where 'network effects' dictate the companies' success. The Commission, by allowing Facebook's acquisitions of its competitors, is hindering Facebook's ability to act in a competitive manner and, almost, incentivizing it to act in an abusive manner.

Second, big tech companies advertise their services as free, but their concept of free is controversial.[6] A monopoly, or an abuse of dominant position, allows companies to determine their prices for goods or services, which means consumers will end up paying more for those goods or services because there is not an alternative provider. A competitive market is more advantageous to the consumer because the higher the number of competitors, the more affordable prices will be, increasing consumers' choice of an option.[7] However, in the context of big tech companies, there is not a

[4] Rebecca Haw Allensworth, 'Antitrust's High-Tech Exceptionalism' (2021) The Yale law Journal Forum 588, 589.
[5] Case No COMP/M.7217 - Facebook/ Whatsapp (2014) at [191].
[6] Michal Gal, Daniel Rubinfeld 'The Hidden Costs of Free Goods: Implications for Antitrust Enforcement' (2016) Antitrust Law Journal 80, 521, 525.
[7] Laurine Signoret, 'Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants' (2020) E.C.J 16 (2-3) 221, 227.

traditional monetary exchange between companies and consumers. In fact, big tech companies advertise their platforms as free services that any consumer can join and, maybe, that is why these types of companies are under regulated.[8] But nothing is free. Even though there is not a payment *per se*, the currency is personal data.[9] Big tech companies' consumers disclose their data willingly and subject themselves to have their personal data shared with third parties. This is extremely advantageous for companies because they will be able to target their type of consumer through advertisements. One can also say it is advantageous for consumers because they are offered a personalised list of advertisements. However, one could also question if using big tech platforms is worth the circulation of personal data.

Third, big tech companies use consumers' personal data and competitors' business data in order to improve their own business strategies.[10] It is important to ascertain the nature of platforms and understand if they are infrastructure providers and competitors, simultaneously. For example, Amazon offers a platform to private sellers to do-business, but it has access to private sellers' information as an infrastructure provider. In addition, Amazon also acts as a retailer within its own platform.[11] Should Amazon be allowed to compete with those who use its platforms? Is it fair to have such a competitive advantage? Probably not, but Amazon is offering the widest range of consumers through its platform enabling a smaller business to reach consumers all over the globe. From a third-party seller perspective, one should consider that even though Amazon's large consumer base is highly appealing, Amazon's direct competition is fierce which can hinder the success of a third-party seller using the platform.[12]

Fourth, big tech companies' success is dictated by 'network effects', which refers to the effect that one user has on the value of a product or service to other existing or potential users.[13] This means the higher number of active users, the more successful the online platform will be. However, as noted in the American Microsoft case, a monopoly is not formed just because the majority of consumers use a particular online brand.[14] Within big tech companies' context, users tend to focus on being active on platforms used by their friends, but also their favourite celebrities, as well as platforms that offer

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[8]Kelly Ranttila, 'Social Media and Monopoly' (2020) 46 Ohio NU L Rev 161, 174.
[9] Rebecca Haw Allensworth, 'Antitrust's High-Tech Exceptionalism' (2021) The Yale law Journal Forum 588, 591.
[10] Chris Jay Hoofnagle, Jan Whittington 'Free: Accounting for the Costs of the Internet's Most Popular Price, (2014) UCLA L. REV. 61, 606, 608.
[11] Rebecca Haw Allensworth, 'Antitrust's High-Tech Exceptionalism' (2021) The Yale law Journal Forum 588, 604.
[12] Fen Zhu, Qihong Liu, 'Competing with Complementors: An Empirical Look at Amazon.com' (2018) Com. Strategic Management Journal, 39(10).
[13] Daniela Eleodor, 'BIG TECH, BIG COMPETITION PROBLEM?' (2019) Quality-Access to Success 20(3) New Skills for Managers in a Changing Digital World, 12th IBAB International Conference 49, 51.
[14] Microsoft Corp., 253 F.3d at [54].

news resources, leading to an extremely high number of active users in a few big tech companies.

Fifth, the current competition law and its implementation do not appear to be successful in deterring these companies from acting in an anti-competitive manner despite the size of the fines. Even though they have been heard in court, and consequently, were obliged to pay large sums of money, it has not proven to better their commercial practices substantially as they have not changed their behaviour. For example, Google has just been fined 500 million euros, in France, due to lack of good faith when negotiating licensing deals with publishers and news agencies for the use of copyrighted content.[15] It is intriguing that big tech companies do not seem to be fazed or intimidated by the fines imposed by the Commission. It can probably be explained by, taking for example Google's parent company, Alphabet, having a total of revenues of $182.5 billion, in 2020.[16] For the average person these amounts of money seem immeasurable but for these companies 500 million euros paid in fines is not a high enough amount to deter them, because their profit is much higher. The US law has struggled to be efficient due to the dual enforcement entities that create uncertainty and have not been able to tackle the merger wave initiated by big tech companies.[17] The EU, although attempting to punish anti-competitive behaviour, does not appear to be able to change big tech companies' behaviour in the market.[18]

Sixth, the operation of competition law regimes arguably lacks precision and transparency. The technology sector is constantly changing which interferes with the precision of regulations, which become almost obsolete shortly after they are brought into effect as they are not easily applicable and not up to date.[19] Tech giants have been demonstrating anti-competitive behaviour by disregarding the spirit of the law, which is to ensure that all undertakings are acting in a fair and competitive manner. It is necessary to ensure a competitive market as it offers fairness to all undertakings but also promotes innovation that will be advantageous for consumers and an incentive for competitors to always modernise their products or services.[20]

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[15] CNBC, 'Google hit with record $593 million fine in France in news copyright battle' https://www.cnbc.com/2021/07/13/google-fined-500-million-euros-in-france-over-news-copyright-row.html.
[16] Alphabet, Annual Report 2020 https://abc.xyz/investor/static/pdf/2020_alphabet_annual_report.pdf?cache=8e972d2.
[17] John O McGinnis, Linda Sun, 'Unifying Antitrust Enforcement for the Digital Age' (2021) Wash & Lee L Rev 78 (1) 305, 341.
[18] Frederic Jenny, 'Changing the way we think: Competition, platforms and ecosystems' (2021) Journal of Antitrust Enforcement 1, 1.
[19] Despoina Mantzari, 'Interim Measures in EU Competition Cases: Origins, Evolution, and Implications for Digital Markets' (2020) Journal of European Competition Law & Practice 11(4) 487.
[20] Laurine Signoret, 'Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants' (2020) E.C.J 16 (2-3) 221, 225.

This dissertation will examine and compare EU Competition laws and US Antitrust Laws as these two legal systems have different approaches. EU Competition Law and US Antitrust Law are both focused on protecting the consumer and guaranteeing the best prices, however EU Law is highly interventionist, as it is concerned with ensuring a competitive market, when compared to US Law. Despite most big tech companies being based in the United States, they operate across the globe, which also makes them subject to all countries' jurisdictions where they do operate. However, the EU and the US have been the main jurisdictions to decide on the abuse of dominance and monopoly cases. In these cases, which will be fully explored in chapters 2 and 3, it is evident US courts are usually more lenient than the EU courts when deciding on these matters.

This dissertation will be divided into five chapters. Chapter 1 provides an introduction to the problem in question and demonstrates the writer's obvious tendency for supporting stricter laws to ensure big tech companies start to operate in a competition-friendly manner. Chapter 2 will offer an explanation of the European framework as far as Article 102 of the Treaty on the Functioning of the European Union is concerned, while referring to relevant case law but also demonstrating how can the EU legislation adapt to the digital age by taking into consideration the EU's most recent proposal: Digital Markets Act. Chapter 3 will explore Section 2 of the Sherman Act on the same topics as the European provision, while explaining the US system by using case law as well. Chapter 4 will present the main differences between Article 102 TFEU and Section 2 Sherman Act, a comparison on the application of law in the European Union and the United States as well as an explanation of the impact of EU law in the US legal system as far as big tech companies are concerned. Finally, Chapter 5 will offer a conclusion that summarises what was examined throughout this dissertation.

Chapter 2
EU Law on 'Abuse of Dominant Position'

This chapter explores what constitutes the abuse of dominant position under European Union law, and the exclusionary abuses of such position while referring to relevant case law. It shows the EU's interventionist behaviour and its most recent effort to tackle big tech companies' abusive conduct through the Digital Markets Act. To do so, it examines Art 102 of the Treaty on the Functioning of the EU, its defining elements and its application to Google, Amazon, and Microsoft.

2.1 The Defining Elements of Article 102 of the Treaty on the Functioning of the EU

Although the Treaty of Rome, signed in 1957 by founding Member States of the EU established European Competition policy has gone through remarkable changes,[21] Article 102 TFEU, previously Article 82, which prohibits the abuse of a dominant position, has largely remained unchanged. Article 102 TFEU states that: 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States' and proceeds to identify the types of abuse 'Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'. In the EU, abuse of a dominant position presumes the undertaking has market power and is taking advantage of that. In order to apply article 102 TFEU, there are five elements that have to be satisfied. First, there have to be one or more undertakings. Second, the undertaking has to be in a dominant position. Third, the dominant position must be held within the internal market or a substantial part of it. Fourth, the dominant undertaking has to be abusing its dominant position. Lastly, the undertaking's conduct will have to have had an effect on inter-State trade. These will not be examined.

[21] Christian Ahlborn, 'Competition policy in the new economy: is European competition law up to the challenge?' 2001, 22(5) E.C.L.R. 156.

'The_Market' To understand if an undertaking has market power, it is necessary to define the market first, assess its market share and then ascertain if it is dominant.[22] European competition law has its own methods to ascertain which market is an undertaking acting on. Thus, an undertaking will be considered to be in a certain market if its products are interchangeable or substitutable by the consumer due to the product characteristics, its prices and the intended use.[23] One of the many tests is known as the SSNIP test (Small but Significant Non-transitory Increase in Price). This test determines if customers would switch to another product, if the product they intended to buy had a 5% to 10% increase in price. However, this is only one test, and it is based on the hypothetical small change of price.[24] It is noteworthy that this is a traditional perspective of what constitutes a market. The internet world has been changing the concept of market or what was previously assumed as such. The internet world changed the previous assumptions of what market constitutes as big tech companies act in different markets simultaneously. For example, Amazon is an infrastructure provider and a retailer, actively acting in both markets which were previously completely unconnected.

'Dominance' Once the market is identified and the undertaking is considered to have a high percentage of market power, it will be considered dominant on the market, between 40% and 45%.[25] In the EU, a dominant undertaking has a responsibility to not abuse its dominance.[26] Barriers to entry into a certain market can be high due to brand loyalty to existing companies, consumers' purchasing power and product differentiation, hence why it is important for dominant undertakings to act in a fair manner and ensure competition within the market. In the European Union, the law prohibits the abuse of a dominant position by one or more undertakings, which may affect trade between the Member States, under article 102 of the Treaty on the Functioning of the European Union. It is important to note that a dominant undertaking is not acting illegally, *per se*, if competing on the merits. It would only act illegally if abusing its dominant position by taking advantage of it, hindering competition on the market.[27] A company is competing on the merits when it is dominant because its product is superior to its competitors' products, and it is not abusing its dominant position. However, in the context of the online world, dominance is achieved through

[22] Christian Ahlborn, 'Competition policy in the new economy: is European competition law up to the challenge?' 2001, 22(5) E.C.L.R. 156, 160.
[23] Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law of September 9, 1997 [1997] O.J. C372/05.
[24] Gunnar Niels, 'The SSNIP Test: Some Common Misconceptions' 2004, 3 Competition LJ, 267.
[25] Christian Ahlborn, 'Competition policy in the new economy: is European competition law up to the challenge?' 2001, 22(5) E.C.L.R. 156, 161.
[26] David Mwoni Ndolo, 'EU v the US: an analysis of the laws on refusal to supply essential facilities - the Google case' (2016) 37(10) E.C.L.R. 413.
[27] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009).

strong multi-sided network effects that dictate the companies' success and impede the entry of smaller companies.[28]

Once a platform becomes dominant in the market, the network effects become self-sustaining as users on each side help generate users on the other.[29] Therefore, the traditional approach to dominance does not satisfy the need to address big tech's abusive conduct because there is not a monetary exchange for a product or service and network effects maintain the platforms' dominance.

'Abuse' Article 102 TFEU includes a non-exhaustive list that sets the tone as to the application of EU law on the abuse of a dominant position. Therefore, it is important to define the concept of a dominant position and what constitutes an abuse of a dominant position in order to understand the applicability of this provision. In the *United Brands*[30] case, dominant position was defined as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[31] The concept of abuse of dominant position was established in *Hoffman-La Roche*[32], being determined as 'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through the recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.[33] Therefore a dominant position means that a company is so powerful on the market that it could undermine the success of its competitors by acting in an anti-competitive manner, meaning abusing its dominant position. The abuses that undertakings may commit are divided into three categories: exclusionary, exploitative and discrimination abuses. Exclusionary abuses occur when a dominant undertaking hinders competition on the market and are listed in a non-exhaustive list provided by Article 102 TFEU, discussed further below. Exploitative abuses occur when a dominant undertaking takes advantage of its market power to exploit its customers or suppliers.

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[28] Daniela Eleodor, 'Big tech, big competition problem?' (2019) Quality-Access to Success, 20(3), 49,56

[29] Martin Moore, Damian Tambini, *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (Oxford University Press 2018) 26.

[30] United Brands Co v Commission of the European Communities—Chiquita Bananas (C-27/76) EU:C:1978:22.

[31] United Brands Co v Commission of the European Communities—Chiquita Bananas (C-27/76) EU:C:1978:22 at [189].

[32] Hoffman-La Roche & Co AG v Commission of the European Communities (1979) E.C.R. 597.

[33] Hoffman-La Roche & Co AG v Commission of the European Communities (1979) E.C.R. 597 at [91].

A relevant current example of such misbehaviour could be the digital platform's requirement for consumers to give consent to unclear terms and conditions that allow those undertakings to profit from that.[34] Lastly, discrimination abuses, Article 102 (c) TFEU, occur when the dominant undertaking applies discriminatory prices or conditions to its customers or suppliers. The discussion below focuses only on exclusionary practices as these have assumed the greatest relevance under Article 102, particularly in respect of online abusive practices.

2.2 Exclusionary Abuses

Exclusionary abuses have been subjected to more developments in case law than any other category. Exclusionary abuses consist of different types of abuses such as price fixing, predatory pricing, refusal to deal, margin squeeze, tying and bundling and self-preferencing, being the latest abuse considered a new harm by law academics.[35]

2.2.1 Price fixing

In the EU, price fixing is separately prohibited by article 101 (1) (a) TFEU and occurs when undertakings, which are competitors on the same market, agree either to fix a certain price for a product of service, or agree on conditions on how to settle prices.[36] However, as big tech companies do not usually charge for their platforms nor do they usually sell products or services, this section will not provide any further information. In contrast, in Chapter 3, it will be presented a section regarding price fixing under US law while referring to a specific case: *United States v. Apple, Inc*. (2015).

2.2.2 Predatory Pricing

It occurs when an undertaking sets its prices so low that its competitors cannot match the same level leading competitors to leave the market. According to the *AKZO* test,[37] setting prices lower than the average total cost of a product or service is only considered abuse if the dominant undertaking had the intention to make its competitors leave the market. Nonetheless, if an undertaking sets the price lower than the average variable cost, it will be presumed to be an abuse *per se*.[38] It is important to mention that predatory pricing usually occurs when an undertaking is attempting to be in a dominant

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[34] Laurine Signoret, 'Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants' (2020) E.C.J 16 (2-3) 221, 224.
[35] Gergely Csurgai-Horváth, 'An old concept for an old-new type of abuse of dominance in the digital sector: self-preferencing' 2020, 41(2) E.C.L.R., 68.
[36] Article 101 (1) (a) TFEU; Nicholas Andrew Passaro, 'Exploring if differences in US and EU antitrust law are substantive or superficial by re-trying US cases in the EU' 2018, 11(2) G.C.L.R., 72, 73.
[37] Case 62/86 AKZO Chemie BV v Commission [1991] ECR I-3359.
[38] Christian Ahlborn, 'Competition policy in the new economy: is European competition law up to the challenge?' 2001, 22(5) E.C.L.R. 156, 161.

position, therefore the wording in Article 102 TFEU does not entirely satisfy the purpose of European Competition Law, which is to ensure a competitive single market free from anti-competitive abusive conduct, because it does not refer to the attempt to abuse a dominant position.

Amazon is one of the main companies of e-commerce becoming essential to consumers and businesses.[39] Amazon offers third party retailers a platform through which they can sell their goods to a wider public while identifying which goods are bestsellers which could be extremely advantageous for sellers as, consequently, it increases the number of sold goods.[40] In 2015, the Commission initiated investigations on Amazon's e-book business practices. 'Certain most favoured nation (MFN) clauses or parity clauses ("parity clauses") and similar provisions introduced in agreements between Amazon and E-book Suppliers'[41] which required E-book suppliers to disclose their deals with Amazon's competitors.[42] Amazon would demand E-book suppliers to offer equal or better terms and conditions which would include the price but also very specific details such as an innovative e-book, promotions, or an alternative business model, placing Amazon in an advantageous position.[43] According to Article 102 TFEU, Amazon was abusing its dominant position and hindering the entry of new competitors in the market as they could reluctant to offer the same conditions to Amazon. Amazon's business practices were compromising fairness and competition within the market by reducing e-book suppliers' and competitors' incentives to modernise e-books and distribution services which, ultimately, would lead to higher prices for consumers, less choice, and less innovation.[44] The Commission considered Amazon's Final Commitments sufficient to address the abuse of dominant position and the competition concerns identified. Amazon's Final Commitments offered not to enforce the Parity Clauses or any clauses that could hinder competition including details regarding price, terms and conditions, promotions, alternative or innovative business models to name a few.[45] If Amazon does not comply with the Final Commitments for the five-year period established by the Commission, Amazon could be facing a fine of up to 10% of Amazon's total annual turnover.[46] Therefore, publishers will not have to reveal Amazon's competitors' deals and they will not have to offer Amazon equal or better

[39] Vladya M.K. Reverdin, 'Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU?' (2021) Journal of European Competition Law & Practice 12 (3) 181, 182.
[40] Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710, 773.
[41] E-book MFNs and related matters (Amazon) (COMP AT.40153) [2017] 5 C.M.L.R. 14 para 2.
[42] E-book MFNs and related matters (Amazon) (COMP AT.40153) [2017] 5 C.M.L.R. 14 para 142.
[43] E-book MFNs and related matters (Amazon) (COMP AT.40153) [2017] 5 C.M.L.R. 14 paras 24-25.
[44] E-book MFNs and related matters (Amazon) (COMP AT.40153) [2017] 5 C.M.L.R. 14 para 180.
[45] E-book MFNs and related matters (Amazon) (COMP AT.40153) [2017] 5 C.M.L.R. 14 paras 180-188.
[46] E-book MFNs and related matters (Amazon) (COMP AT.40153) [2017] 5 C.M.L.R. 14 para 193-195.

terms. In addition, publishers will have the chance to innovate by creating new business models, new e-book features and promotions in a competitive market. Furthermore, consumers will be offered more choices, more innovative e-books and, consequently, better, and more competitive prices.[47]

2.2.3 Refusal to Deal

It is another type of abuse, which occurs when a dominant undertaking refuses to provide information that is indispensable for other companies to operate. According to the *Magill*[48], *IMS Health*[49] and *Microsoft*[50] cases, three conditions must be satisfied so that a refusal to deal, or supply, is considered abuse under Article 102. First, there must be a link between the refusal and the product or service indispensable to the exercise of an activity in a neighbouring market. Second, the undertaking, which is refusing to supply, must be doing so in order to eliminate competitors effectively from the neighbouring market. Lastly, the undertaking's conduct, in refusing to supply, must be so evident that it is capable of preventing the appearance of a new product or service. The Commission has defined an essential facility as a "facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means".[51] The essential facilities doctrine consists of the idea that a dominant undertaking is under the obligation to supply a product, service or information that is indispensable for third party undertakings. In the EU, the essential facilities doctrine is assessed within the scope of Article 102 TFEU, being necessary to observe three elements. First, the product being requested by third party undertakings has to be indispensable. Second, the consequence of refusal to provide the requested product is the elimination of the competition. Third, there are no objective justifications that would allow the dominant undertaking to deny the request.[52] Additionally, it is important to contrast with the essential facilities doctrine in US Antitrust law, established by *MCI Communications*[53], where the Seventh Circuit established four necessary elements: '1) control of the essential facility by a monopolist; 2) a competitor's inability practically or reasonably

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[47] European Commission, Press Release, 'Antitrust: Commission accepts commitments from Amazon on e-books'4th May 2017 https://ec.europa.eu/Commission/presscorner/detail/en/IP_17_1223.
[48] Case 241-242/91 RTE & ITP (Magill) v Commission [1995] ECR I-743.
[49] Case 418/01 IMS Health GmbH & Co v NDC Health GmbH & Co KG [2004] ECR I-5039.
[50] Case 201/04 Microsoft v Commission [2007] ECR II-3601.
[51] Christian Ahlborn, 'Competition policy in the new economy: is European competition law up to the challenge?' 2001, 22(5) E.C.L.R. 156, 161.
[52] Liyang Hou, 'The essential facilities doctrine - what was wrong in Microsoft?' 2012, 43(4), IIC, 451.
[53] MCI Communications Corp. v. AT&T. (708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

to duplicate the essential facility; 3) the denial of the use of the facility to a competitor; 4) the feasibility of providing the facility.'[54]

2.2.4 Tying and Bundling

They are also considered exclusionary abuses and despite being discussed as a duo, they are different. Tying abuse occurs when an undertaking is taking advantage of its market power in order to do business in a separate market. In this case, the company will tie two products by imposing a condition on the consumer: the company will sell one product or service, the tying good, if the consumer purchases another product or service, the tied good, from the same company as a requirement to acquire the first product or service. For example, Google was fined by the European Commission for tying Google Search with Google Play Store, which would place them in a more advantageous position that could not be matched by its competitors.[55] Bundling occurs when the consumer is only able to purchase a combination of products or services, which are not available individually.[56]

As mentioned above, Microsoft was investigated due to Sun Microsystems' complaint about refusal to license intellectual property protecting communications protocols, which were needed in order to create products that could communicate and interoperate with Windows desktop computers.[57] Before 2007, Microsoft was definitely dominant in the market with a 90% market share, even though Apple and Linux were competitors.[58] Microsoft's consistent dominance imposed, indirectly, high barriers to entry into the operating system market due to the great cost to develop a new operating system that could compete with existing ones and customer loyalty to Microsoft. At the time, Microsoft was tying its operating system, its primary market, with Microsoft Media Player.[59] Microsoft argued it was not taking advantage of its dominant position and it tied the operating system and the media player for innovation purposes to provide a better product for consumers.[60] In addition, Microsoft was not allowing other companies' products to perform well in its operating system, in spite of an operating system's purpose being to interoperate and to be complemented by other products. This course of action started to be problematic when other media player companies were not given interoperability information by Microsoft, which hindered the good functioning of any other media players that were not a Microsoft product. Microsoft had such large

[54] MCI Communications v AT&T, 708 F.2d 1081 (7th Cir. 1983), 464 US 891 (1983) at [1132-1133].
[55] Google Android (Case AT.40099) Commission decision [2015] OJ C402/19.
[56] Thomas Eilmansberger, 'How to Distinguish Good from Bad Competition Under Article 82 Ec: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses' 2005, 42 C.M.L.R. 129.
[57] Case 201/04 Microsoft v Commission [2007] 5 C.M.L.R. 11, 846 at 867.
[58] Case 201/04 Microsoft v Commission [2007] 5 C.M.L.R. 11, 846 at 870.
[59] Case 201/04 Microsoft v Commission [2007] 5 C.M.L.R. 11, 846 at 873.
[60] Case 201/04 Microsoft v Commission [2007] 5 C.M.L.R. 11, 846 at 1062-1063.

market power, it had the ability, as the owner of the operating system, to make sure other companies' products would not work as well as their one. In the EU, this case started when Microsoft refused Sun Microsystems' request for interoperability of the Windows Operating system, which led Sun Microsystems to bring a claim before the Court. Sun Microsystems needed interoperability with Microsoft PC so that its Work Group Server could work efficiently and be reliable, secure, and fast as expected by consumers. However, Microsoft had the ability to make its Work Group Server faster and more efficient than Sun Microsystems', which was demonstrated and proven at the hearing.

The Commission held Microsoft had a duty to supply information; so, they had to disclose interface information to competitors, explaining, in detail, how Microsoft operating system would communicate with Work Group Servers. The Commission held Microsoft was guilty of two types of abuse: refusal to supply and bundling.[61] Regarding refusal to supply, Microsoft did not supply information that would enable other companies to create products that would be compatible with Microsoft operating system, as explained above. Concerning bundling, Microsoft was bundling Windows Media Player to the Windows operating system, not allowing its consumers to purchase each product individually.[62]

In *Google (Android)* [63], Google was tying Android's app store (Play Store) with Google browser app (Google Chrome) by requiring manufacturers to pre-install Google Chrome in order to ensure Play Store would run smoothly.[64] If manufacturers did not pre-install the Google browser, Play Store would not work on other versions of Android (forks) as they were not approved by Google. In addition, Google made payments to exclusively pre-install the Google Search app on large manufacturers and mobile networks operators' devices.[65] Therefore, Google would offer Google Play Store, the Google Search app, and the Google Chrome browser as a bundle, hindering the access to each product or mobile app on its own, which demonstrates that Google was confident in its dominant position in the market by acting in such abusive manner. The Commission concluded that Google was abusing its dominant position due to '(1) the tying of the Google Search app with the Play Store; (2) the tying of Google Chrome with the Play Store and the Google Search app; (3) the licensing of the Play Store and the Google Search app on condition that hardware manufacturers enter into the anti-

[61] Case 201/04 Microsoft v Commission [2007] 5 C.M.L.R. 11, 846 at 1099.
[62] Case 201/04 Microsoft v Commission [2007] 5 C.M.L.R. 11, 846 at 1099; Thomas Eilmansberger, 'How to Distinguish Good from Bad Competition Under Article 82 Ec: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses' 2005, 42 C.M.L.R. 129.
[63] Google (Android) (COMP.AT.40099) [2019] 5 CMLR 19, 661.
[64] Google (Android) (COMP.AT.40099) [2019] 5 CMLR 19. 661 at 703.
[65] Google (Android) (COMP.AT.40099) [2019] 5 CMLR 19; Francisco Costa-Cabral, 'Future-Mapping the Three Dimensions of EU Competition Law: Legislative Proposals and COVID-19 Framework' (2020) 7 J Int'l & Comp L 307, 316.

fragmentation obligations in the AFAs; and (4) the grant of revenue share payments to OEMs and MNOs on condition that they pre-installed no competing general search service on any device within an agreed portfolio.'[66], obstructing the development and distribution of competing Android operating systems, the 'unapproved' Android forks by Google.[67] Therefore, Google had to change its behaviour but it was not considered enough to correct their anti-competitive behaviour.[68] However, Google was also obliged to pay a fine of more than 4 billion euros due to abusing its dominant position since 2011 given, according to Article 102 TFEU, the gravity of the infringement; and required to cease its behaviour within 90 days from the judgement's date.[69]

2.2.5 Margin Squeeze

It is another type of abuse, which occurs where an undertaking sets its prices at such a low level that its competitors are unable to compete, 'there is such a narrow margin between an integrated provider's price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete.'[70] In *Deutsche Telekom*[71], the European Commission defined margin squeeze as "the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator providing its own retail services on the downstream market."[72] The dominant undertaking will be abusing its dominance and executing a margin squeeze where it either sets a high price for the input or sets a low price for downstream market or a combination of both which will not allow its competitors to operate efficiently.[73] However, in the online context, this abuse has not been found because there is not a price to access big tech's platforms.

2.2.6 Self-Preferencing

It is another form of exclusionary abuse and consists of 'giving preferential treatment to one's own products or services when they are in competition with products and services provided by other entities', which is contrary to Article 102 (c) TFEU that

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[66] Google (Android) (COMP.AT.40099) [2019] 5 CMLR 19, para 1339.
[67]Google (Android) (COMP.AT.40099) [2019] 5 CMLR 19, para 1339.
[68] Google (Android) (COMP.AT.40099) [2019] 5 CMLR 19, para 1473-1474.
[69] Google (Android) (COMP.AT.40099) [2019] 5 CMLR 19, para 1404, 1480.
[70] Marek Krzysztof Kolasiński, 'Google Shopping decision against the background of the EU and US case law' 2020, 41(5) E.C.L.R., 234, 237.
[71] Deutsche Telekom AG [2003]OJ L263/09, para 107.
[72] Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Cases COMP/C-1/37.41 37.578 37.)79 Deutsche Telekom AG [2003]OJ L263/09), para 107.
[73] Gergely Csurgai-Horváth, 'An old concept for an old-new type of abuse of dominance in the digital sector: self-preferencing' 2020, 41(2) E.C.L.R., 68, 69.

states that a dominant undertaking will be abusing its position if it applies 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.[74] This was the case in *Google Search (Shopping)*,[75] where Google was systematically demoting competing undertakings in its search engine results, for example. In this case, the harm flowed from Google's search algorithm that would run by a popularity criteria so 'the most clicked, most searched products and offers are showed in the higher ranks of our results pages'.[76] Companies, that did not have a business relationship with Google, were being placed further down on Google Search pages.[77] Even though Google argued it was not discriminating intentionally, the Commission held Google was responsible. Google, as a search engine, is dominant in the market but Google, as a shopping comparison website, is not. This is due to lack of popularity and inferior quality, when compared to its competitors. However, Google actively demoted their competitors that had better shopping websites. Google found this strategy to attempt to increase its traffic and it was successful.[78] The competing comparison websites were, therefore, at a disadvantage as competing on the merits was not being rewarded. In the EU, the Commission concluded that Google was hindering competition through its practice of self-preferencing, which constituted harm under Article 102 TFEU. Google used its position as an infrastructure provider to put itself in a more advantageous position in a secondary market. The Commission concluded that Goggle conduct's constituted an abuse as it 'diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service; and is capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services'.[79] The Commission did not apply the indispensability like it did in *Maggil*[80] and *IMS Health*[81] because it did not have to prove indispensability as using the Google search engine was not the only way to get traffic in its competitors' websites.[82] Google's conduct did reduce traffic, but it did not eliminate competition. In addition, a Google search was not considered an essential facility, so the Commission did not apply the legal test. But Google's indispensability is questionable because Google has reached a position where saying 'Google it' means 'Search it', which demonstrates its influence in the market (and in consumers). Then, Google did not

[74] Gergely Csurgai-Horváth, 'An Old Concept for An Old-New Type of Abuse of Dominance in The Digital Sector: Self-Preferencing' 2020, 41(2) E.C.L.R., 68, 69.
[75] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12, 748.
[76] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12 Paras 447 (2), 461.
[77] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12 Paras 465-466.
[78] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12 Para 344.
[79] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12 Para 341.
[80] Case 241-242/91 RTE & ITP (Magill) V Commission [1995] Ecr I-743.
[81] Case 418/01 IMS Health Gmbh & Co V Ndc Health Gmbh & Co Kg [2004] Ecr I-5039.
[82] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12 Para 645.

eliminate the competition. But reducing traffic within the online world could lead to the elimination of competition. Regarding objective justifications, the Commission concluded Google did not have any.[83] Online companies need high traffic in order to increase their chances of success.[84]

In addition, it is curious to note that Google offered commitments to the European Commission that were far more generous than it did to the Federal Trade Commission, US competition authority, discussed further below.[85] This reflects Google's awareness of the differences between the European competition law and US Antitrust Law and their repercussions in practice.[86]

To summarise, the European Commission started investigating Google's conduct in 2010, issuing a Statement of Objections in April 2015, stating that Google's systematic conduct in favouring its own comparative shopping search constituted an abuse of dominance.[87] Despite Google's efforts to mitigate the Commission's concerns, the European Commission maintained its position and issued a supplementary Statement of Objections in July 2015. Finally, in 2017, the Commission imposed a fine of 2.42 billion euros on Google due to their abuse of dominant position by placing their shopping platform in a more advantageous position.[88]

2.3 Further Investigations into Big Tech's Abusive Practices

More recently, the Commission has been tackling big tech companies' anti-competitive behaviour by starting investigations in Apple, Amazon, and Facebook. In 2020, the Commission opened investigations into Apple's business practices regarding its rules for app developers, particularly the mandatory use of Apple's in-app purchase system for the distribution of paid digital content and restrictions imposed on developers in informing users of alternative, and, cheaper, purchasing possibilities. If this business practice is confirmed, Apple is acting to the consumers' detriment by hindering access to more choices and lower prices, which infringes Article 102 TFEU, prohibition of abuse of dominant position.[89] The main abuse could be predatory pricing as Apple is

[83] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12 Para 660.
[84] Case At.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12 Para 449 (2).
[85] Joyce Verhaert, 'The Challenges Involved with The Application of Article 102 TFEU To the New Economy A Case Study of Google' 2014, 35(6) E.C.L.R., 265, 267.
[86] Ioannis Kokkoris, 'The Google Case in The Eu: Is There a Case?' 2017, 62(2) The Antitrust Bulletin, 313, 317.
[87] Ioannis Kokkoris, 'The Google Case in the EU: Is There a Case?' 2017, 62(2) The Antitrust Bulletin, 313, 317.
[88] Google Search (Shopping) (COMP.AT.39740) [2018] 4 C.M.L.R. 12 para 754.
[89] European Commission, Press Release 'Antitrust: Commission opens investigations into Apple's App Store rules' 16th June 2020 https://ec.europa.eu/Commission/presscorner/detail/en/ip_20_1073.

allegedly exploiting app developers for excessively charging for services, imposing unfair trading conditions.[90]

In 2021, following a complaint by Spotify on 11th March 2019, the Commission is concerned with Apple's rules imposed on music streaming platforms. Apple requires an in-app purchase system for the distribution of paid digital content, imposing a 30% Commission fee which is, ultimately, paid by the consumers, and imposing 'anti-steering provisions' in order to deny transparent information on alternative purchasing possibilities. If proven, Apple will be infringing Article 102 TFEU for abusing its dominant position in the market for excessive pricing.[91]

In 2017, Amazon was judged on its e-book business practices but reached an agreement with the Commission to cease any practices that could hinder competition within its market, not being imposed a fine.[92] In November 2020, the Commission opened an investigation into Amazon's business practices regarding its use of marketplace seller data. Amazon is a double platform as it sells its own products through its platform while offering the same platform to retailers to sell their products. According to the Commission's press release dated 10th November 2020, Amazon is using retailers' data to its advantage by making strategic business decisions based on that information, placing its competitors at a disadvantage. It is important to add that Amazon not only has access to the number of products ordered and shipped, but also the seller's revenues, number of visits or seller's performance because again it is a dual platform. Therefore, if this alleged business practice is confirmed, Amazon may be abusing its dominant position, infringing Article 102 TFEU, for self-preferencing.[93]

On 4th June 2021, the Commission opened an investigation to assess Facebook's alleged anti-competitive conduct. Facebook, as a social media platform, finances its 'free' services to consumers by selling advertising space and through transactions on Facebook Marketplace. The Commission's concerns lie on whether Facebook uses the information provided by its competitors in advertisements in order to place its Facebook Marketplace in a more advantageous position and if Facebook, as a social media platform, is tying Facebook Marketplace in order to exclude competitors using Facebook's advertisement services. If these alleged business practices are proven,

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[90] Damien Geradin & Dimitrios Katsifis, 'The Antitrust Case Against the Apple App Store' (2021) Journal of Competition Law & Economics17(3), 503.
[91] European Commission, Press Release 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers' 30th April 2021 https://ec.europa.eu/Commission/presscorner/detail/en/ip_21_2061.
[92] Case At.40153 E-Book MFNs and related matters (Amazon) 2017 paras 198-201.
[93] European Commission, Press Release 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' 10th November 2020 https://ec.europa.eu/Commission/presscorner/detail/en/ip_20_2077.

Facebook will be infringing Article 102 TFEU for abusing its dominant position in the market for tying.[94]

2.4 Legislative Developments

Due to big tech companies' anti-competitive behaviour in the market and their tendency to continue such behaviour, the European Commission is developing legislation to tackle abuse of dominance behaviour that hinders competition in the EU, known as the Digital Markets Act.[95] The Digital Markets Act aims to promote fairness and transparency for online consumers by clearly defining and prohibiting unfair practices of online platforms, now designated with the status of 'gatekeeper', and by providing an enforcement mechanism to ensure its efficiency.[96] The DMA will only be applicable to large companies that have a significant role within the market due to their size and their importance as gateways for businesses to reach their consumers.[97] In addition, these large companies will control at least one 'core platform service' which could be search engines, social networking services, certain messaging services, operating systems and online intermediation services, and will have a permanent and significant user base in multiple countries in the EU.[98] A company will be within the scope of the Digital Markets Act if it satisfies the cumulative criteria: a size that impacts the internal market; the control of an important gateway for business users towards final consumers; An (expected) entrenched and durable position. If the company satisfies the criteria, it will be considered a gatekeeper which means that this company will have to observe the DMA provisions by ensuring their business practices are fair, competitive and do not place any barriers to innovation. If the company infringes the rules, the Commission can impose fines of up to 10% of the company's total worldwide annual turnover and periodic penalty payments of up to 5% of the company's total worldwide annual turnover.[99] In addition, the implementation of this new piece of legislation will not compromise the application of Article 101 and 102 TFEU or any national competition rules.

How the DMA will address the abusive practices mentioned above remains to be seen in practice. Notwithstanding, the European Commission has laid out the available solutions to achieve the aim of ensuring the 'proper functioning of the internal market

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[94] European Commission, Press Release 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook' 4th June 2021 https://ec.europa.eu/Commission/presscorner/detail/en/ip_21_2848.
[95] 'Commission proposes new rules for digital platforms' (2021) EU Focus 400 34, 35.
[96] Ingrid Vandenborre, Amaury Sibon 'Antitrust and Fintech M&A' (2021) E.C.L.R 42 (9) 494, 500.
[97] European Commission, Press Release 'Digital Markets Act: Ensuring fair and open digital markets' 15th December 2020 https://ec.europa.eu/Commission/presscorner/detail/en/qanda_20_2349.
[98] European Commission, Press Release 'Digital Markets Act: Ensuring fair and open digital markets' 15th December 2020 https://ec.europa.eu/Commission/presscorner/detail/en/qanda_20_2349.
[99] European Commission, Question and answers, Digital Markets Act: Ensuring fair and open digital markets, 15th December 2020 https://ec.europa.eu/Commission/presscorner/detail/en/qan_20_2349da.

by promoting effective competition in digital markets, in particular, a fair and contestable online platform environment'.[100]

Option 1 is a non-dynamic option with a set of immediately applicable obligations addressing clearly defined unfair practices by gatekeepers designated solely on quantitative thresholds in specific core platform services.[101] Option 1 would provide (a) a closed list of core platform services; (b) designation of providers of core platform services as gatekeepers based solely on the quantitative thresholds; and (c) the whole list of obligations identified would be immediately applicable without any ability of a regulatory dialogue.[102]

Option 2 is a semi-dynamic option, combining a set of immediately applicable obligations with regulatory dialogue, which are more flexible, with an updated mechanism for new practices. This mechanism designates gatekeepers based on a combination of quantitative and qualitative thresholds and includes emerging gatekeepers. [103] Option 2 would provide (a) a closed list of core platform services like Option 1, (b) a combination of quantitative and qualitative criteria to designate providers of core platform services as gatekeepers, (c) the obligations identified would consist of immediately applicable obligations including some obligations where regulatory dialogue may facilitate their effective implementation, and (d) new practices may be added on the basis of a market investigation.[104]

Option 3 is the most flexible as it combines a set of obligations with regulatory dialogue and an updating mechanism for new practices and core platform services. In this option, the designation of gatekeepers is based only on qualitative thresholds.[105] Option 3, as Options 1 and 2 would provide (a) a closed list of core platform services, (b) designation of providers of core platform services as gatekeepers following a purely qualitative assessment, (c) the obligations identified would all be subject to a regulatory dialogue, and (d) new practices and new core services may be added on the basis of a market investigation.[106]

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[100] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 108 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[101] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 180 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[102] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 185 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[103] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 181 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[104] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 200 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[105] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 182 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[106] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 223 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.

The preferred policy option is Option 2 as it provides a timely intervention for the most egregious practices, a certain degree of flexibility, as it is not as strict as Option 1 nor as flexible as Option 3, by a more gradual approach for measures needing further tailoring and specification.[107] It addresses unfair behaviour including new unfair practices and tipping markets, the regulatory fragmentation problems as obligations are applied to both gatekeepers designated on the basis of quantitative and qualitative criteria, including emerging gatekeepers.[108] Option 2, or the Preferred Option, is likely to lead to a positive impact on market contestability, innovation, consumer choice and, very importantly, it will create legal certainty.[109]

[107] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 383 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[108] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 383 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.
[109] European Commission, Impact Assessment of the Digital Markets Act – Part 1, 16th December 2020, para 383 https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.

Chapter 3
US Law on 'Monopoly'

This chapter explores what is considered a monopoly under US Antitrust Law, the main offences under the Sherman Antitrust Act and the application of the law in cases concerning big tech companies. To do so, it examines s.2 of the Sherman Act, its defining elements, and its application to recent investigations into the practices of Google, Amazon, Facebook, Apple, and Microsoft.

3.1 The defining elements of Section 2 of the Sherman Antitrust Act

In the US, competition law is known as antitrust law. The general purpose of s. 2 of Sherman Act 172 TFEU is to ensure fair competition between undertakings by prohibiting monopolisation or abuse of dominant position, respectively.[110] S.2 Sherman Act states 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.'[111]

It refers to monopolisation and to the attempt to monopolise and, for that reason, will be more efficient in cases where the company is attempting to reach a dominant position in the market and is not dominant. EU and US provisions share the same structure as they both have the element of market control, dominant position in the EU and monopoly power in the US, and the anti-competitive behaviour element abuses in the EU, and monopolising conduct in the US.[112] US Antitrust law prohibits monopolisation, attempts to monopolise and conspiracy to monopolise part or the whole market.[113]

The prohibition of monopolisation is applicable to monopolies, so it is important to assess what constitutes a monopoly under US law.[114] An undertaking is considered to be a monopoly if it has substantial market power,[115] which in the US is a market share between 60% and 70%, whereas in the European Union, an undertaking will be

[110] Francisco Marcos, 'The prohibition of single-firm market abuses: US monopolisation versus EU abuse of dominance' 2017, 28(9) I.C.C.L.R., 338.
[111] Section 2 Sherman Act –15 U.S. Code § 2.
[112] Francisco Marcos, 'The prohibition of single-firm market abuses: US monopolisation versus EU abuse of dominance' 2017, 28(9) I.C.C.L.R., 338.
[113] Section 2 Sherman Act –15 U.S. Code § 2; David Mwoni Ndolo, 'EU v the US: an analysis of the laws on refusal to supply essential facilities - the Google case' (2016) 37(10) E.C.L.R. 413.
[114] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64, 68.
[115] Sangin Park, 'Market Power in Competition for the Market' 2009, 5 (3) Journal of Competition Law & Economics 571.

considered dominant if its market share reached 40% to 45%.[116] However, both jurisdictions recognise that companies may be considered dominant with lower market shares, under exceptional circumstances, such as a 50% market share being considered a monopoly in the US, whereas a 25% to 40% market share is considered a dominant position in the EU.[117] Does this mean that the same company may be considered dominant in the EU but 'harmless' in the US? Yes, because each jurisdiction is basing their evidence of market power on different thresholds to determine sufficient dominance to open proceedings against an undertaking, for anti-competitive behaviour. Therefore, companies in the US are able to reach a European threshold of dominance (40% to 45% of market power) without being punished or even considered a threat to a competitive market. In the EU, companies will face a stricter approach which can deter them from doing business in Europe.

According to the definition of monopolisation established in *US v Grinnell*[118], ~~a~~ monopolizing conduct is a 'wilful acquisition or maintenance of (monopoly) power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'.[119] This definition is quite vague, courts develop specialised rules through case law. Thus, the court develops rules tailored to each offence under Antitrust Law, without being limited to what *Grinnell* establishes, to ensure the courts are tackling the actual monopolistic behaviour. [120] Additionally, the undertaking's conduct has to be intentional to monopolise which is not a requirement in EU competition law, as shown in Chapter 2.[121]

It is important to emphasise that reaching a monopoly position is not penalised, unless the undertaking is violating the Sherman Act provisions, which is also the case in the EU.[122] However, large undertakings dominating the market frequently lead to less competition when compared to a market populated by small and medium size companies due to various reasons. First, monopolistic, and oligopolistic market structures facilitate abusive conduct such as price fixing and market division, for example. [123] Second, monopolistic, and oligopolistic companies can use their advantageous position in the market to block entry into the market, acting like gatekeepers. Third, monopolistic and oligopolistic undertakings are in such a powerful

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[116] Christian Ahlborn, 'Competition policy in the new economy: is European competition law up to the challenge?' 2001, 22(5) E.C.L.R. 156, 161.
[117] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64, 68.
[118] United States v. Grinnell Corp., 384 U.S. 563.
[119] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[120] Kenneth L Glazer and Abbot B Lipsky Jr, 'Unilateral Refusals to Deal under Section 2 of the Sherman Act' (1995) 63 Antitrust LJ 749.
[121] United States v. Grinnell Corp., 236 F.Supp. 244 at 251 (1964).
[122] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64, 68.
[123]Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710, 718.

position, enabling them to have influence over consumers, suppliers, and workers, which allows them to increase prices, reduce service quality while remaining profitable.[124] In addition, long-term dominance can be detrimental to consumers as consumer welfare is deeply connected to big tech companies' incentives to innovate which will not be great in the absence of competitors.[125]

Concerning the attempt to monopolise, it has to be demonstrated that there is predatory or anticompetitive conduct, a specific intent to monopolize and a dangerous probability of success.[126] It has been debated whether the attempt to monopolise is still relevant to today's marketplace.[127] The requirement to prove a specific intent and dangerous probability of success is difficult to do in itself and creates uncertainty as to section 2 legal standards due to its subjectivity.[128] In addition, the attempt to monopolise provision has not been used successfully, representing only 2% of complaints, and creates unnecessary litigation costs and doctrinal confusion.[129] If the attempt to monopolise provision were to be repealed, companies with monopolising conduct and, with a 50% market share, would not be penalised, as they had not reached the 60% to 70% market share threshold necessary to be considered a monopoly.[130] Notwithstanding, US courts have been flexible with the percentage of market share in cases of very high barriers to entry in the market and a significant difference between the shares of the company and its competitors.[131] However, this is of lesser interest here as this dissertation is focused on the actual monopolisation and the abusive conduct of monopolies, within big tech companies.

3.2 Offences within Section 2 of the Sherman Act

The types of offences within the scope of s.2 Sherman Act differ from the abuses covered by Article 102 TFEU, discussed in Chapter 2. This section will cover price fixing, predatory pricing, refusal to deal, tying and bundling while providing case law to better understand how the courts interpret the law within the scope of Big Tech companies.

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[124] Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710, 718.
[125] Rebecca Haw Allensworth, 'Antitrust's High-Tech Exceptionalism' (2021) The Yale law Journal Forum 588, 590.
[126] Swift & Co. v. United States, 196 U.S. 375, 396 (1905); Spectrum Sports Inc. v. McQuillan, 506 U.S. 447, 457 (1993).
[127] Barry E Hawk, 'Attempts to Monopolize: An American Anomaly' (2017) 62 Antitrust Bull 815, 817.
[128] Barry E Hawk, 'Attempts to Monopolize: An American Anomaly' (2017) 62 Antitrust Bull 815, 817.
[129] Barry E Hawk, 'Attempts to Monopolize: An American Anomaly' (2017) 62 Antitrust Bull 815, 819.
[130] Barry E Hawk, 'Attempts to Monopolize: An American Anomaly' (2017) 62 Antitrust Bull 815, 82.
[131] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64, 68.

3.2.1 Price Fixing

Price fixing is considered a type of offence, according to s.1 and s.2 of the Sherman Act. This offence occurs when competitors, on the same market, agree to fix prices but section 1 Sherman Act requires proof that there was an agreement between undertakings and its intention was to fix prices in order to monopolise the market, covered by section 2.[132] This type of offense is more frequent in different markets where there is a traditional contract, including offer, acceptance and consideration. Usually, big tech companies do not charge for the access to their platforms advertising them as 'free' as there is no traditional monetary exchange. However, Apple and several publishers were sued by the Department of Justice Antitrust Division in 2012 for price fixing its e-books. Prior to that, in 2007 Amazon had introduced its Amazon Kindle, revolutionising the way consumers read and making reading more affordable as each e-book would cost $9.99.[133] This represented a threat to traditional publishers given that Amazon's Kindle lower prices were appealing to consumers.[134] In 2010, Apple considered the release of the iPad an opportunity to enter the e-book market by introducing the iBookstore.[135] Apple was aware it would need to commit to very low e-book prices in order to have a chance competing against Amazon, so it negotiated with the main US publishers, known as the Big Six (Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster), to ensure content deals for the new e-book platform.[136] Apple and the Big Six agreed to fix prices of e-books depending on their category, for example, New York Times bestsellers could sell for $14.99 if the hardcover was listed above $30.[137] The Court of Appeal, Second Circuit, held Apple 'violated § 1 of the Sherman Act by orchestrating a horizontal conspiracy among the Publisher Defendants to raise e-book prices'.[138] Even though Apple and the Big Six publishers' main goal was to eliminate Amazon's e-book for $9.99 by engaging in horizontal price-fixing, it is striking that the Department of Justice prosecuted undertakings that were not dominant in the market, holding a share of less than 25% within the e-book market.[139] Apple and the Big Six publishers were facing barriers to entry into the e-book market that seemed impossible to overcome. Apple was engaging in illegal conduct, but it is questionable why the Department of Justice was not vigilant

[132] Nicholas Andrew Passaro, 'Exploring if differences in US and EU antitrust law are substantive or superficial by re-trying US cases in the EU' 2018, 11(2) G.C.L.R., 72, 73.
[133] United States v. Apple, Inc., 791 F.3d 290 at 299 (2015).
[134] United States v. Apple, Inc., 791 F.3d 290 at 300 (2015).
[135] United States v. Apple, Inc., 791 F.3d 290 at 301 (2015).
[136] United States v. Apple, Inc., 791 F.3d 290 at 302 (2015).
[137] United States v. Apple, Inc., 791 F.3d 290 at 306 (2015).
[138] United States v. Apple, Inc., 791 F.3d 290 at 339 (2015).
[139] John M Newman, 'Antitrust in Digital Markets' (2019) 72 Vand L Rev 1497, 1549.

of Amazon which was the dominant undertaking holding 90% of market share in 2009 and offering bestsellers e-books for $9.99.[140]

3.2.2 Predatory or Below-Cost Pricing

In the US, predatory pricing is considered an offence under Section 2 Sherman Act as it is used in order to acquire a monopoly, also known as an attempt to monopolise, or to maintain the monopoly.[141] It occurs when a company cuts its price in order to eliminate or push away its competitors, provided the plaintiff proves the alleged predator could recoup its investment in below-cost prices.[142] An undertaking that is driving out or excluding competitors is not competing on the merits.[143] The plaintiff will have to demonstrate the alleged predator will or has taken advantage of reduced competition, which led to higher profits and made the sacrifice to lower the prices worthwhile, which is unlikely. Predatory pricing claims are rarely successful as it is hard to distinguish it from 'vigorous competition', notwithstanding companies are still engaging in such practices to increase their profitability.[144]

The scepticism towards interventions in the market and regulating undertakings' conduct in the market demonstrates the importance of undertakings' freedom and the concern with consumer welfare. The US does not require the undertaking, which is practicing predatory pricing, to be dominant in the relevant but the EU requires it. Nevertheless, the US law requires a standard of the possibility of recoupment whereas the EU law does not.[145] When undertakings engage in predatory pricing, they are aware it will not be an immediately profitable strategy. Companies sacrifice their profit if they believe they will recoup the losses.[146] According to *Brooke Group v. Brown & Williamson Tobacco Corp*, predatory pricing is unlawful when the predator offers below-cost pricing with a 'reasonable prospect of recouping his investment from supercompetitive profits.'[147] Bearing in mind the *Apple E-book* case mentioned above, one might have expected Amazon to be sued by the Department of Justice Antitrust Division for its low e-book prices, for practicing below-cost prices. In 2007, Amazon launched Amazon's Kindle, and a new e-book library, pricing bestsellers at $9.99 and

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[140] United States v. Apple, Inc., 791 F.3d 290, 299 (2015).
[141] Christopher R. Leslie, 'Predatory Pricing and Recoupment' 2013, 113(7) Columbia Law Review 1695, 1698.
[142] C. Scott Hemphill, 'The Role of Recoupment in Predatory Pricing Analyses' 2001, 53 (6) S.L.R. 1581, 1582.
[143] Phillip Areeda, Donald F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 6 J Reprints Antitrust L & Econ 219, 221.
[144] C. Scott Hemphill, 'The Role of Recoupment in Predatory Pricing Analyses' 2001, 53 (6) S.L.R. 1581-1582.
[145] Nicholas Andrew Passaro, 'Exploring if differences in US and EU antitrust law are substantive or superficial by re-trying US cases in the EU' 2018, 11(2) G.C.L.R., 72, 75.
[146] Alden F. Abbott, 'A Brief Overview of American Antitrust Law' (2005), The Competition Law & Policy Guest Lecture Programme, Paper (L) 01/05, 24.
[147] Brooke Group v. Brown & Williamson Tobacco Corp. 113 S.Ct. 2578, 2604 (1993).

by 2009, Amazon was dominant in the e-book market, holding a market share of 90%.[148] However, the Department of Justice did not investigate Amazon until claims arose when the DOJ sued Apple and the Big Six publishers. Therefore, the DOJ investigated Amazon's pricing strategies and found "persuasive evidence lacking" to show that the company had engaged in predatory practices.[149] Even though Amazon was selling e-books below cost,[150] 'from the time of its launch, Amazon's e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles'[151] Therefore, if Amazon was profitable, it cannot be considered to be engaging in predatory pricing as this offence requires the undertaking to be sacrificing its profitability. The fact that Amazon remained lucrative while selling e-books for below cost, choosing to do so, and selling their e-reader devices for also less than their cost is puzzling.

3.2.3 Refusal to Deal

In Antitrust law, refusal to deal is also considered an offence under s.1 and s.2 of the Sherman Act, as long as it is intended to restrain trade. However, the general approach differs from the European approach. In the US, as confirmed in *Trinko*[152], an undertaking is not under any obligation to supply information provided it is not doing so to create or continue a monopoly.[153] Allowing access to other undertakings' innovative developments, would be hindering innovation as a whole.[154] If a company has the option to have access to its competitor's innovation, it may not have the incentive to innovate by itself but, instead, it may focus on acquiring its competitors' developments.[155] In this way, US competition law is concerned with stimulating economic growth, consumer welfare and innovation.[156] Apple was sued, for the first time, for not complying with Antitrust Law, s.2 of the Sherman Act, in *re Apple iPod iTunes* Antitrust Litigation case.[157] In 2003, Apple launched its iTunes music platform, including proprietary systems to protect copyrighted songs available on iTunes,

[148] Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710, 757.
[149] Response of Plaintiff United States to Public Comments on the Proposed Final Judgment at 21, *Apple*, 952 F. Supp. 2d 638 (No. 12-CV-2826-DLC).
[150] Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710, 757.
[151] US v Apple, Inc., No. 1:12-cv-02826-UA (S.D.N.Y. filed Apr. 11, 2012) para 30.
[152] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 at 415 (2004).
[153] United States v Colgate & Co [1919] 250 US 300 at 307.
[154] Francisco Marcos, 'The prohibition of single-firm market abuses: US monopolisation versus EU abuse of dominance' 2017, 28(9) I.C.C.L.R., 338, 343.
[155] David Mwoni Ndolo, 'EU v the US: an analysis of the laws on refusal to supply essential facilities - the Google case' (2016) 37(10) E.C.L.R. 413, 416.
[156] David Mwoni Ndolo, 'EU v the US: an analysis of the laws on refusal to supply essential facilities - the Google case' (2016) 37(10) E.C.L.R. 413, 416.
[157] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137 (N.D.Cal.2011) No. C 05–00037 JW.

FairPlay.[158] In 2004, RealNetworks introduced its Harmony technology that would ensure songs purchased from its music store to be playable on Apple's iPods.[159] In 2006, Apple updated its iTunes software and updated FairPlay in order to prevent RealNetworks from placing music onto the iPod.[160] Apple allegedly 'made technological modifications to its products for the express purpose of maintaining monopoly power'.[161] Apple contended the said update was performed in order to ensure third-party applications could not corrupt the iPod as these applications were modifying the 'iPod by modifying the iPod's internal database and adding foreign files to it'.[162] In addition, Apple argued the update to iTunes would only allow iTunes to 'write to the iPod's internal database'.[163] The District Court (California, San Jose Division) held Apple was not engaging in anticompetitive conduct by refusing to license FairPlay to RealNetworks[164] and there is not a duty to aid one's competitors provided there was not a prior course of dealing, which plaintiffs were not able to prove.[165] This case is particularly striking as it appears that the law is implicitly helping the creation and maintenance of monopolies. It is expected that big tech companies offer resistance regarding sharing their products or services as innovation and uniqueness differentiate them from their competitors, but it should also be expected that the courts would tackle when a monopoly is purposedly hindering their competitors to thrive in the market.

3.2.4 Tying the Sale of Two Products

Tying and bundling are also considered an offence under Sections 1 and 2 Sherman Act, as it can be used as a restraint of trade by means of an agreement, for example (s.1), and it can also be used to acquire or maintain a monopoly (s.2). The tying arrangement will be considered unlawful *per se* if the tying product and the tied product are two

[158] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1140 (N.D.Cal.2011) No. C 05–00037 JW.
[159] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1140 (N.D.Cal.2011) No. C 05–00037 JW.
[160] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1140 (N.D.Cal.2011) No. C 05–00037 JW.
[161] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1141 (N.D.Cal.2011) No. C 05–00037 JW.
[162] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1146 (N.D.Cal.2011) No. C 05–00037 JW.
[163] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1146 (N.D.Cal.2011) No. C 05–00037 JW.
[164] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1144-1145 (N.D.Cal.2011) No. C 05–00037 JW.
[165] The Apple iPod iTunes Antitrust Litigation, 796 F.Supp.2d 1137, 1145 (N.D.Cal.2011) No. C 05–00037 JW.

individual products, which are not components of the same product.[166] In addition, the defendant will sell the tying product under the condition to sell the tied product, the defendant will have to enjoy some kind of advantageous position in the market by tying the two products in the tying product's market and, lastly, the tying of the two products will have to be detrimental to the competition in the tied product's market.[167]

In *Microsoft III*[168], the investigation started due to complaints brought by the States regarding the tying infringement of the Windows operating system with the Internet Explorer browser, whereas in the EU Microsoft was tying Windows operating system with Windows Media Player. [169] The US Court identified characteristics that were unique to the software market such as the fact that most consumers prefer to purchase an operating system that is compatible with a large number of applications and most software developers prefer to design applications to a very well established operating system due to brand loyalty.[170] These characteristics were considered exceptional circumstances and barriers to entry as new companies would find entering the software market almost impossible by the Court of Appeal, District of Columbia Circuit. According to *Microsoft III*, a dominant undertaking can provide a justification for its anti-competitive conduct and, if successful, the plaintiff will have the burden of proof.[171] There was a clear hesitation to rely on the consumer demand test as it would require Microsoft to demonstrate its desire to improve its product and its integration efficiencies. [172] The Court of Appeal decided the case should be assessed under the rule of reason.[173] Therefore, Microsoft was not found guilty of tying as in the EU.[174]

In the EU *Google Shopping* case, discussed in Chapter 2, Google was demoting companies in the Google shopping comparison platform. These companies were providing good quality services and were relevant to consumers' *google searches*. Therefore, Google was found to be discriminating against these companies, in the EU. In contrast with the EU, Google was not sued in the US[175] The Federal Trade Commission investigated Google to ascertain if it was favouring its products or services

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[166] Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 541 (1992); Nicholas Andrew Passaro, 'Exploring if differences in US and EU antitrust law are substantive or superficial by re-trying US cases in the EU' 2018, 11(2) G.C.L.R., 72.
[167] James F. Ponsoldt, Christopher D. David, 'A Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft/ When Should the Bundling of Computer Software be Permitted?' 2007, 27 Northwestern Journal of International Law & Business 421, 426.
[168] United States of America v Microsoft Corporation 253 F. 3d 34 (2001) – *Microsoft III.*
[169] United States of America v Microsoft Corporation 253 F. 3d 34, 52-53 (2001) - *Microsoft III.*
[170] Hedvig Schmidt, 'Article 82: is technology integration checkmated?' 2009, 4 J.B.L., 354.
[171] United States of America v Microsoft Corporation 253 F. 3d 34, 70 (2001) - *Microsoft III.*
[172] James F. Ponsoldt, Christopher D. David, 'A Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft/ When Should the Bundling of Computer Software be Permitted?' 2007, 27 Northwestern Journal of International Law & Business 421, 431.
[173] Hedvig Schmidt, 'Article 82: is technology integration checkmated?' 2009, 4 J.B.L., 354.
[174] United States of America v Microsoft Corporation 253 F. 3d 34, 89-95 (2001) – *Microsoft III.*
[175] Ioannis Kokkoris, 'The Google Case in the EU: Is There a Case?' 2017, 62(2) The Antitrust Bulletin,313, 314.

when presenting search results on its platform.[176] The FTC concluded Google was not acting with the intent to harm its competitors but to provide a better service to its consumers. In addition, the FTC also stated that other competitors adopted similar strategies and consumers were not at a disadvantage as they still had plenty of different websites on the first pages.[177] This decision demonstrates how Section 2 Sherman Act is focused on consumer protection rather than intervening in the market, like it is the case in the European Union. However, one can also assume the FTC would have decided differently if Google's conduct was detrimental to consumers.[178]

3.3 Further Investigations into Big Tech's Abusive Practices

At the end of 2020, the FTC brought proceedings against Facebook for allegedly maintaining a personal social networking monopoly through anticompetitive behaviour for years.[179] The FTC includes Facebook's acquisitions of Instagram and WhatsApp and the imposition of anticompetitive conditions on software developers in order to eliminate competitors from the market. [180] The FTC argued Facebook is violating Section 2 of the Sherman Act as it is using its market power to maintain its monopoly, through the purchase of the companies mentioned above, Instagram and WhatsApp, for example. The FTC requested orders from the District Court of the divestiture or reconstruction of businesses such as Instagram and WhatsApp in order to restore competition and any other equitable relief the court deems necessary to ensure Facebook will not act in an anticompetitive manner.[181] Despite the fact the case is still pending, one can assume, from the documents available, the FTC will not be lenient in suing Facebook. Bearing in mind the scandals in which Facebook has been involved, including the illegal use of personal data of users or the indirect participation in the US 2016 elections, it is expected that the FTC will contest using all its tools to ensure a firm judgement from the US courts.

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[176] FTC, Statement Of The Federal Trade Commission Regarding Google's Search Practices, In The Matter Of Google Inc., FTC File Number:111-0163 (2013) https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcom.pdf.

[177] FTC, Statement Of The Federal Trade Commission Regarding Google's Search Practices, In The Matter Of Google Inc., FTC File Number:111-0163 (2013) https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcom.pdf.

[178] Ioannis Kokkoris, 'The Google Case in the EU: Is There a Case?' 2017, 62(2) The Antitrust Bulletin, 313, 316.

[179] FTC's Press Release, FTC Sues Facebook for Illegal Monopolization - Agency challenges Facebook's multi-year course of unlawful conduct, 9th December 2020 https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

[180] FTC v Facebook, Inc, Case No.: 1:20-cv-03590-JEB (8th September 2021) para 8.

[181] FTC v Facebook, Inc, Case No.: 1:20-cv-03590-JEB (8th September 2021) XI. Prayer For Relief.

Chapter 4
Comparative Conclusions

This chapter provides a direct comparison between the EU and the US law, its enforcement and application. To do so, it returns to Art 102 TFEU and s.2 Sherman Act, their main differences and application to big tech companies such as Microsoft and Google.

4.1 Article 102 TFEU versus Section 2 Sherman Act

Each section was enacted at different times and based on different perspectives. Section 2 Sherman Act was enacted in 1890, with the objective to protect consumers but in a business framework focused on profit maximisation and huge industrial power. The Sherman Act was designed to regulate antitrust in oil and railroad companies, and thus arguably far removed from the anti-competitive behaviour of innovative big tech companies.[182] In contrast, Article 102 Treaty on the Functioning of the European Union was brought into effect in 2009, previously known as Art 82 of the EC Treaty and unchanged, in circumstances subsequent to the initiative of committed Member States to emerge from the Second World War.[183] As it is more recent than the Sherman Act, the EU took into consideration companies' anti-competitive behaviour by including a non-exhaustive list of abuses, for example. The European Union promotes cooperation between the Member States, motivates the good functioning of the internal market and encourages freedom of goods, people, services, and capital, which influences the purpose of competition law. Article 102 TFEU was enacted in a context where the collective purpose was a priority and a necessity in order to overcome the post-war consequences. Thus, the different background conditions influenced the manner in which Article 102 TFEU, and Section 2 Sherman Act were interpreted and applied as the European tend to promote a sense of union, whereas the US encourage companies to make business, from an economic perspective. However, both provisions prohibit unilateral conduct when companies reach a certain degree of economic power.[184] By the wording of this provision, one can assume the EU was aware of the main types of abuse, but it did not want to leave out 'new' types of abuse that could be developed in the future. This shows that the EU was aware of the fast pace of some industries, in particular big tech companies. But it seems like the EU only has an issue with dominant companies.

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[182] Kelly Ranttila, 'Social Media and Monopoly' (2020) 46 Ohio NU L Rev 161, 167.
[183] Francisco Marcos, 'The prohibition of single-firm market abuses: US monopolisation versus EU abuse of dominance' 2017, 28(9) I.C.C.L.R., 338.
[184] Emanuela Arezzo, 'Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared' (2006) 24 J Marshall J Computer & Info L 455,465.

Section 2 of the Sherman Act shows the US was aware that an attempt to monopolise could harm consumers and compromise a competitive market which contrasts with the EU provision. The US is penalising any company whose conduct's sole purpose is to reach a monopoly in the market, whereas the EU is penalising dominant companies' abuse of power.[185] US Antitrust Law focuses on protecting consumers but also rewarding good business by only tackling companies with a high market power which contrasts with the EU competition law, that intervenes with a much lower threshold of what constitutes market power. Even though both provisions appear to promote competition, they have very different attitudes towards the application of competition law, in practice.[186] First, s.2 of the Sherman Act punishes two different kinds of behaviours: monopolisation and attempt to monopolise.[187] By including the attempt to monopolise, it ensures the company will be punished when attempting to create a monopoly, even if the monopoly was not created.[188] It is noteworthy that the attempt to monopolise is extremely hard to prove as every company wants to achieve an advantageous and powerful position in the market.[189] In contrast, Article 102 TFEU punishes only the abuse of the dominant position, which means the company will already be in a more advantageous position when abusing its dominance. Furthermore, the EU does not cover any attempt to reach a dominant position, allowing non-dominant undertakings to act in a non-competitive manner.

Second, s.2 requires a 'specific intent' to monopolise a relevant market and a 'dangerous probability' that will succeed.[190] Contrasting with article 102 that does not take intent into consideration when ascertaining dominance.[191]

Third, when a company's conduct is found abusive, the defence mechanisms are also different under EU and US law. Under Article 102 TFEU, a company can justify its conduct if it can demonstrate that it took 'reasonable steps as it deems appropriate to protect its interests, provided however that the purpose of such behaviour is not to strengthen this dominant position and abuse it'.[192] In addition, an undertaking can also

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[185] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64,66.
[186] Irwin Stelzer, 'Microsoft's transatlantic backwash' 2007/08, 74, Euro.Law, 78, 79.
[187] Emanuela Arezzo, 'Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared' (2006) 24 J Marshall J Computer & Info L 455, 460.
[188] Spectrum Sports Inc. v. McQuillan (1993) 506 US 447, 455.
[189] Emanuela Arezzo, 'Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared' (2006) 24 J Marshall J Computer & Info L 455,460.
[190] Swift & Co. v. United States (1905) 196 US 375, 25 S.Ct. 276; Spectrum Sports Inc. v. McQuillan (1993) 506 US 447,113 S.Ct. 884.
[191] Hoffmann-La Roche v. Commission [1979] ECR 461, 91; Emanuela Arezzo, 'Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared' (2006) 24 J Marshall J Computer & Info L 455,466.
[192] Atlantic Container Line AB and Others v. Commission, Joined cases T-191/98, T212/98 to T-214/98, [2003] ECR 11-3275, 1113.

defend itself if it demonstrates it has been forced to engage in abusive behaviour to minimize losses it would suffer otherwise from its competitors' behaviour. The undertaking's conduct was only abusive in order to defend its own business.[193] Under US law, dominant firms can justify their abusive conduct by demonstrating that specific conduct was advantageous for themselves and consumers, which is not allowed under EU law.[194]

Fourth, the punishment under the Sherman Act could be prison time or payment of a fine, whereas the EU only imposes fines.[195]

Fifth, and lastly, article 102 TFEU provides a non-exhaustive list and s.2 Sherman Act does not. Despite being a non-exhaustive list, it provides a direction as to what is the provision's aim.

In the US, there is a belief that institutions should not interfere in the market by trying to regulate how undertakings act in their relevant market. This is to ensure undertakings are free to deal and to maximise their profit while maintaining a low threshold of competition in the market. Of course, there is always some degree of interference in the market but the US attempts to keep it to the minimum.

In contrast, EU Competition Law is quite interventionist, which is reflected in the number of case law.[196] In the EU, the focus is on promoting the success of the internal market and ensuring consumer welfare. The Commission assessed if undertakings' conduct harms consumers and if undertakings are acting in a way that hinders competition.[197] Furthermore, Article 102 TFEU facilitates an interventionist approach due to its wide scope of application. As Article 102 TFEU provides a non-exhaustive list, the European court is not limited to the types of abuses already stipulated, being able to respond to the newest forms of markets. Article 102 TFEU's wide scope application may be considered an advantage for being able to keep up with the constantly evolving market, but it also has disadvantages. Even though this freedom can reassure consumers because Article 102 TFEU will cover any type of abuse that hinders competition, it also lacks clarity on what can constitute abuse. Article 102 TFEU allows a lot of discretion to the Commission, which is what allows the law to keep being updated, but it hinders law development, simultaneously. One may ask if interpreting a provision depending on the circumstances and manipulating it in such a

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[193] United Brands Company and United Brands Continental BV v. Commission of the European Communities, case 27/ 76, [1978] ECR 207, 189-190.
[194] Atlantic Container Line AB and Others v. Commission, Joined cases T-191/98, T-212/98 to T-214198, [2003] ECR 11-3275,1114.
[195] Kelly Ranttila, 'Social Media and Monopoly' (2020) 46 Ohio NU L Rev 161, 172.
[196] David Mwoni Ndolo, 'EU v the US: an analysis of the laws on refusal to supply essential facilities - the Google case' (2016) 37(10) E.C.L.R. 413.
[197] Christian Ahlborn, 'Competition policy in the new economy: is European competition law up to the challenge?' 2001, 22(5) E.C.L.R. 156, 167.

way that it can be applied, could become problematic and create legal uncertainty as no one would know what it covered. Nevertheless, as the EU's priority is ensuring a fair single market and consumers' welfare, it is preferable to interpret a provision that is flexible to be applied to new markets rather than a strict scope provision that may fall short of the EU's priorities.

But why is dominance or monopoly so detrimental? And to whom? When companies are dominant in the market and abuse such positions, they are so powerful that they can limit consumers' choices. First, if an undertaking has a monopoly, it can impose higher prices for its products or services. It undermines the principle of a market that is self-regulating through competition. If there are more traders in the relevant market, prices tend to be lower as those companies will compete between them. This is detrimental to the consumers as they will have to pay more for the same product or service. Second, if the dominant undertaking is the only one offering a specific product or service, it will not be necessarily interested in introducing more products or services as what they are offering is sufficient to be economically viable. This is detrimental to the consumers as they will be limited to what the company is offering. Third, if a company has a monopoly, it can easily ignore the quality of the products or services offered because it is the only company providing such products or services. This, once again, is detrimental to the consumers because they will not have an alternative to buying better quality goods or services because there are no other companies offering the same goods or services. So, who could benefit from a monopoly? Only the company in a dominant position can take advantage of consumers by practicing higher prices, or by offering just one product or service, or by not investing in the quality of said product or service.

4.2 Comparison of Offences

Even though the EU and US legal systems are different, they consider the same types of anti-competitive practices as offences. Albeit there are exceptions such as self-preferencing in the EU and group boycotts in the US, for example. This section aims to briefly discuss and compare each offence within the scope of EU law and US law.

4.2.1 Price fixing

Price fixing is prohibited under EU law, according to Art 101 of the TFEU, and under US law, according to s.1 Sherman Act. It occurs when companies agree to fix the prices of products or services in the same market. In the EU, 'price competition is so important that it can never be eliminated', according to the European Commission in Metro v Commission.[198] Therefore, any concerted practice to fix prices will be considered

[198] Metro Sb-grossmarkte Gmbh & Co kg v Commission of the European Communities (26/76) [1976] E.C.R. 1353 at [21].

restrictive of competition.199 In the US, it is required proof of the agreement and proof that the purpose was to fix prices. In Socony-Vacuum Oil, major oil companies agreed to hold supplies off the market and to raise and fix prices. Even though they were still practicing reasonable prices artificially, the Supreme Court decided that 'under the Sherman Act, a combination for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se'. 200 In the EU, when referring to the impact of the agreement in the competitive market, article 101 TFEU states the 'object or effect' whereas, in the US, the Sherman act states 'in restraint of trade'.201 In addition, when referring to illegality, article 101 TFEU refers to 'all agreements (…) and concerted practices', whereas the Sherman Act does not mention that mere concerted practices will satisfy it.202

4.2.2 Predatory Pricing

Predatory pricing occurs when an undertaking practices below-cost prices in order to eliminate competition or place barriers to competitors. According to the European Court of Justice, a dominant company would only engage in predatory pricing in order to oust competition.[203] The ECJ has emphasised predatory pricing is illegal even in cases where the dominant firm was not likely to recoup its losses.[204] In contrast in the US 'predatory pricing schemes are rarely tried, and even more rarely successful'.[205] In *Brooke Group,* the US Supreme Court established that the plaintiff must demonstrate the competitor was practicing below costs prices while, also, demonstrating the likelihood of recouping the losses, under the s.2 Sherman Act.[206] The US Supreme Court did not find the plaintiff's competitor had a dangerous probability to recoup the alleged losses.[207] It is confusing that the US includes a monopolistic practice as an abuse under s.2 of the Sherman Act, but it acts as if these abuses do not exist. It is naïve to think that there are no US companies practicing predatory pricing at all. It is even

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[199] Ioannis Iglezakis, 'Competition and antitrust issues with regard to e-books' (2013) 34(5) E.C.L.R. 249, 251.
[200] United States v Socony-Vacuum Oil Co 310 U.S. 150, 223 (1940).
[201] Sherman Act §1; TFEU art.101; Nicholas Andrew Passaro, 'Exploring if differences in US and EU antitrust law are substantive or superficial by re-trying US cases in the EU' 2018, 11(2) G.C.L.R., 72, 73.
[202] Sherman Act §1; TFEU art.101; Nicholas Andrew Passaro, 'Exploring if differences in US and EU antitrust law are substantive or superficial by re-trying US cases in the EU' 2018, 11(2) G.C.L.R., 72, 74
[203] AKZO Chemie (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215 at [71].
[204] Tetra Pak International SA v Commission of the European Communities (C-333/94) (Tetra Pak II) EU:C:1996:436; [1997] 4 C.M.L.R. 662 at [44]; and France Telecom SA v Commission of the European Communities (C-202/07 P) EU:C:2009:214; [2009] 4 C.M.L.R. 25 at [112]–[113].
[205] Brooke Group v Brown & Williamson Tobacco 509 U.S. 209, 226 (1993) (quoting its judgment of 26 March 1986, Matsushita Electric Industrial Co v Zenith Radio Corp 475 U.S. 574, 589 (1986)).
[206] Brooke, 509 U.S. 222.
[207] Brooke, 509 U.S. 222 at 242– 43.

more naïve to think that all companies practicing predatory pricing are located in the EU. This demonstrates that the US is clearly is more lenient than the EU, as far as finding predatory pricing an abuse under Antitrust Law, in particular s. 1 and s.2 of the Sherman Act.

4.2.3 Refusal to Deal

Refusal to deal, or supply, is considered an offence under Art102 TFEU, and also pursuant to s.2 Sherman Act. It occurs when an undertaking refuses to deal with its competitors in order to eliminate or create barriers to competitors' success.

Under EU Law, there is no obligation for dominant companies to deal with their competitors, but if there is a refusal to supply with the sole purpose to eliminate competition, it will be considered an exclusionary abuse. As claims within the scope of article 102 TFEU require a dominant position in order to ascertain abusive conduct, it can be challenging to bring an action against a company that is dominant in a separate but related market.[208] On the other hand, it can also be easier to prove abusive behaviour once dominance is confirmed.

Under US law, there is no obligation to deal with competitors either. Unless there was an agreement, which was unjustifiably terminated by the dominant company.[209] Under US law, a refusal to deal falls under s.2 of the Sherman Act as monopolisation or attempt to monopolise and may constitute evidence of exclusionary conduct.[210] Refusal to deal is presumed to harm competition when it causes an increase in price in the relevant market, or a decrease in overall efficiency in the market that is detrimental to consumers.[211] The US tends to focus its attention exclusively on the market where the conduct under analysis displays its effects.[212] There is a higher chance to successfully file an action when there is not the need to prove the company is holding a degree of monopolistic economic power. It is easier to prove a dangerous possibility of a company becoming a monopoly than to prove that a company has a monopoly, in theory. Yet in practice, demonstrating the undertaking will achieve market power in the relevant market may not be so easy. For example, in *Microsoft*, the District Court for the District of Columbia divided Microsoft's conduct into different anticompetitive behaviours. First, Microsoft's tying practices were considered a violation of section 1 of the Sherman Act. Second, Microsoft's monopolization of its operating system was considered a violation of section 2 of the Sherman Act. Third, Microsoft's attempt to

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[208] Emanuela Arezzo, 'Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared' (2006) 24 J Marshall J Computer & Info L 455,474.
[209] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64,69.
[210] Section 2 Sherman Act –15 U.S. Code § 2.
[211] Sullivan v. National Football League, 34 F.3d 1091, 1097 (1st Cir. 1994).
[212] Spectrum Sports Inc., 506 U.S. at 460.

monopolise the browser market was also considered a violation of section 2 of the Sherman Act.[213] The court dismissed the attempted monopolisation of browser market claim as Microsoft was not dominant in that particular market but affirmed the monopolisation claim.[214]

4.2.4 Tying and Bundling

Tying and bundling occur-when an undertaking imposes the sale of a product or service conditional on the sale of an additional product or service. In the EU, tying arrangements are prohibited under Article 101 (1) (e) and Article 102 and, in the US, tying arrangements are prohibited under s. 1 and s.2 of the Sherman Act. The Microsoft cases discussed in Chapters 2 and 3, demonstrate two different approaches to tying and bundling. There is some consensus in the EU and US that tying by a dominant undertaking may be considered abuse or violation of the prohibition of dominance or monopolisation. However, there was not a consensus between the US and the EU when the Microsoft case was decided in these two jurisdictions, regarding software bundling. Both jurisdictions consider the tying arrangement unlawful provided the defendant has market power in the tying product's market[215] and the tied product are separate products and not components of each other.[216] The difference is that EU law does not require the provider to have market power, or be dominant, in order to violate article 101 TFEU whereas, in the US, s.1 of the Sherman Act requires market power in the tying market.[217]

4.2.5 Margin Squeeze

The US and the EU have very distinct approaches regarding margin squeeze. According to *Deutsche Telekom*[218], margin squeeze is:

> The difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator providing its own retail services on the downstream market.[219]

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[213] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[214] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[215] Section 2 Sherman Act –15 U.S. Code § 2; art.102 TFEU.
[216] Section 2 Sherman Act –15 U.S. Code § 2; art.102 TFEU.
[217] Illinois Tool Works Inc v Independent Ink Inc, 547 U.S. 28, 46.
[218] Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article82 of the EC Treaty (Cases COMP/C-1/37.41 37.578 37.)79 Deutsche Telekom AG [2003]OJ L263/09), para 107.
[219] Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article82 of the EC Treaty (Cases COMP/C-1/37.41 37.578 37.)79 Deutsche Telekom AG [2003]OJ L263/09), para 107.

According to Section 2 Sherman Act, margin squeeze does not constitute an offence, unless it is a constructive refusal to supply.[220] In the US, the margin squeeze does not usually stand even in the case of the margin between the wholesale price and the retail price being so small that would not be advantageous for any competitor, which contrasts with the EU.[221] In the EU, the difference between the wholesale price charged by the dominant undertaking and the retail price charged in the end product market is considered an unified claim.

4.3 Enforcement of Article 102 TFEU and Section 2 Sherman Act

Even though both provisions intend to regulate competition between undertakings, the application of both is rather different. In the EU, the application of Article 102 TFEU is considered, by academia, interventionist and active, whereas, in the US, Section 2 Sherman Act is considered to be less interventionist and not as active as Article 102 TFEU.[222]

The Sherman Act was not prepared to regulate challenging big tech markets as this piece of legislation was developed to tackle commodity cartels in steel, oil, coal and tobacco markets and the existing case law was a mirror of that reality that contrasts with big tech companies.[223] Steel, oil, coal and tobacco markets are quite traditional as there is a clear offer, acceptance and consideration because it deals with physical products, whereas in the big tech market that same exchange of price for the product does not exist, in the most traditional sense, as big tech companies do not charge a pecuniary price for their services (except Amazon, as a seller). In the US, the Antitrust Division of the US Department of Justice and Federal Trade Commission share the authority to enforce the law.[224] The main difference is that the DOJ is the only one who can enforce the Sherman Act and file criminal and civil suits, whereas the FTC can only enforce the FTC Act and file civil suits.[225] As the US system is decentralised, it means that the outcomes may differ as the FTC is focused on Antitrust law and the DOJ deals with all law fields. In the EU, the European Commission on Competition enforces and regulates the law and sets competition policy, cooperating with national competition

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[220] Sherman Act §2.
[221] Verizon Communications v Law Offices of Curtis v Trinko 540 US 398 (2004); Brooke Group v Brown Willianson Tobacco 509 US 209 (1993); Francisco Marcos, 'The prohibition of single-firm market abuses: US monopolisation versus EU abuse of dominance' 2017, 28(9) I.C.C.L.R., 338, 343.
[222] Kelly Ranttila, 'Social Media and Monopoly' (2020) 46 Ohio NU L Rev 161,171-172.
[223] Rebecca Haw Allensworth, 'Antitrust's High-Tech Exceptionalism' (2021) The Yale law Journal Forum 588, 591.
[224] Robert Roulusonis. 'Understanding How and Why the U.S. Competition Law System Is Decentralized' 2015, 63(1) Estudios De Deusto, 157,159.
[225] Antitrust Laws and You, Department of Justice Antitrust Division https://www.justice.gov/atr/antitrust-laws-and-you ;A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, Federal Trade Commission https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority .

authorities.[226] The laws that are applied by the European Commission are usually implemented in the EU Member States, which contributes to consistency and a higher possibility of achieving the same outcome, which contrasts with the decentralised US legal system.

4.4 Application of Article 102 TFEU and Section 2 Sherman Act

Nowadays companies are present in different markets such as the European, American, and Chinese, to name a few. Undertakings are subject to competition laws applicable in those markets. For example, in the US, Google was not found to be monopolising or attempting to monopolise. However, when the same case was judged in European Union, Google was found to be abusing its dominant position. It is important to mention that reaching a different outcome can happen sometimes even where there are the same or similar laws. But, for the purposes of this section, the differences will demonstrate how the EU and the US apply their laws in practice. There are a few cases that clearly illustrate the differences between European Competition Law and US Antitrust Law as the same issue was disputed in both legislations: the *Microsoft* case and *Google Shopping* case, as well as the two pending cases against *Amazon* and *Facebook*.

4.4.1 Microsoft

In *Microsoft*[227], the United States government sued the computer and software giant for violating sections 1 and 2 of the Sherman Act. The D.C. Circuit Court noted that Microsoft made up over eighty percent of the market share for computer operating systems, but that market share alone is not sufficient to establish a monopoly in violation of the Sherman Act. However, the court found Microsoft to be violating s.2 because it created a structure that hindered competition.[228] The Circuit Court upheld the district court's decision that Microsoft was a monopoly due to its economic power in the market enabling them to practice higher prices.[229] The Court ruled that Microsoft was not guilty of tying Microsoft's operating system PC Windows, with Microsoft's web browser, Internet Explorer.[230] In the European Union, this case started when Microsoft refused Sun Microsystems' request for interoperability of the Windows Operating system, needed for efficiency and security purposes. The Commission held Microsoft had a duty to supply information, so they had to disclose interface information to competitors. The Commission held Microsoft was guilty of refusal to supply for not supplying information to its competitors, restricting the creation of

[226] Directorate-General for Competition, European Commission https://ec.europa.eu/info/departments/competition_en#leadership .
[227] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)
[228] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Kelly Ranttila, 'Social Media and Monopoly' (2020) 46 Ohio NU L Rev 161, 167.
[229] U.S. v. Microsoft Corp., 253 F.3d 34 at 57 (D.C. Cir. 2001).
[230] U.S. v. Microsoft Corp., 253 F.3d 34 at 60 (D.C. Cir. 2001).

products by others that would be compatible with Microsoft operating system. The Commission also found Microsoft guilty of tying for conditioning the purchase of Windows Operating system with the purchase of Windows Media Player, not offering its consumers the possibility of purchasing each product separately.[231]

4.4.2 Google Shopping

Google was discriminating against companies that would not deal directly with Google by actively demoting their competitors that had better shopping websites in *google searches*, regardless of the quality and relevance of such companies.[232] In the EU, the Commission concluded that Google was hindering competition through its practice of self-preferencing, which constituted harm under Article 102 TFEU. Google was using its dominant position in its primary market in order to attempt to be dominant in its secondary market.[233] Even though Google argued discrimination was not intentional, the Commission held Google was liable.[234]

In the US, it was sought to ascertain if Google's conduct was an attempt to improve the quality of their search engine or if it was an attempt to eliminate or harm their competitors in light of consumer welfare.[235] The Federal Trade Commission concluded Google was not acting with the intent to harm its competitors but to provide a better service to its consumers.[236] To summarise, Google's conduct under US law was not found to be monopolising or attempting to monopolise as it was concluded it was merely competing on the merits, whereas under EU competition law was found to be an abuse of its dominant position. Furthermore, it is noteworthy that Google offered commitments to the European Commission that were far more generous than it did to the Federal Trade Commission.[237] This reflects Google's awareness of the differences

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[231] Microsoft Corp. v Commission of the European Communities (T-201/04) [2007] 5 C.M.L.R. 11, 846 at 1326-1367; Niamh Grogan, Mark Simpson, 'Microsoft Corp v Commission of the European Communities (T-201/04): abuse of a dominant position - refusals to supply interface information' 2008, 51(Jan) Euro. News, 5.
[232] CASE AT.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12, 748 at 828-829.
[233] Case AT.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12, 748 at 930.
[234] Case AT.39740 Google Search (Shopping) [2018] 4 C.M.L.R. 12, 748 at 931.
[235] FTC, Statement Of The Federal Trade Commission Regarding Google's Search Practices, *In The Matter Of Google Inc*. FTC File Number 111-0163 (2013) https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf; Ioannis Kokkoris, 'The Google Case in the EU: Is There a Case?' 2017, 62(2) The Antitrust Bulletin, 313, 314.
[236] FTC, Statement Of The Federal Trade Commission Regarding Google's Search Practices, *In The Matter Of Google Inc*. FTC File Number 111-0163 (2013) https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf.
[237] Joyce Verhaert, 'The Challenges Involved with the Application of Article 102 TFEU to the New Economy a Case Study of Google' 2014, 35(6) E.C.L.R., 265, 267.

between the European Competition Law and US Antitrust Law, their repercussions in practice as if Google knew what outcome to anticipate or expect.[238]

4.4.3 Amazon

In the EU, the Commission opened an investigation into Amazon's business practices due to its data usage of marketplace's sellers. According to the Commission's press release dated 10th November 2020, Amazon is using taking advantage of the information it acquires through its role as a marketplace platform, in order to *unfairly* improve its practice as a seller of its own platform. If the Commission confirms its suspicions, it will find Amazon to be abusing its dominant position, infringing Article 102 TFEU.[239] In December 2020, in the US, the FTC issued orders to seek information regarding big tech companies' methods of collection and usage of information, including Amazon. [240] Regardless of the outcome of the investigations above, Amazon's position in the market has been debated by academics. It is discussed that it does not constitute a monopoly because it is challenging to ascertain its market power.[241] Amazon operates in cloud computing, e-commerce, and fulfilment. In the US, Amazon Web Services (AWS) competes against Google and Microsoft in the cloud computing market. Regarding the fulfilment market, Amazon Prime competes against United States Postal Service, UPS, and FedEx. In addition, in the e-commerce market, Amazon competes against eBay, Target, Walmart, Best Buy, Alibaba and Rakuten.[242] Therefore, if the market definition is too broad, it may misrepresent Amazon's actual power but, if it is too narrow, it will not consider the excluded competitors which will not offer an accurate representation of Amazon's power in a specific market.[243]

4.4.3 Facebook

Both the European Commission and the Federal Trade Commission have initiated investigations into Facebook. In the EU, the Commission's concerns lie on Facebook's tying its social media platform with its Facebook Marketplace and if Facebook uses competitors' information, acquired through Facebook Marketplace, to place its

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[238] Ioannis Kokkoris, 'The Google Case in the EU: Is There a Case?' 2017, 62(2) The Antitrust Bulletin, 313, 317.
[239] European Commission, Press Release, 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' 10th November 2020 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.
[240] FTC, FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information (2020) https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services.
[241] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64,69.
[242] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64,73.
[243] Angelos Vlazakis and Angeliki Varela, 'Amazon's Antitrust Fair Play, a Transatlantic Evaluation' (2020) 41 N Ill U L Rev 64,69.

products in a better position. If these alleged business practices are proven, Facebook will be infringing Article 102 TFEU for abusing its dominant position in the market.[244] In the US, the FTC brought proceedings against Facebook due to its monopolistic behaviour throughout the years, including the acquisitions of WhatsApp and Instagram.[245] Despite these cases being still pending, it is interesting to witness investigations taking place on the same big tech company and almost simultaneously. In the EU, if Facebook is found guilty, the Commission will likely order a fine payment, in contrast with the US. One possibility, in the US, could be ordering Facebook to give up its smaller social media companies acquired in 2012, Instagram,[246] and in 2014, WhatsApp.[247]

[244] European Commission. Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook, June 2021 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848.
[245] FTC's Press Release, FTC Sues Facebook for Illegal Monopolization - Agency challenges Facebook's multi-year course of unlawful conduct, 9th December 2020 https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization ; FTC v Facebook, Inc, Case No.: 1:20-cv-03590-JEB (8th September 2021) para 8.
[246] Facebook, Welcoming Instagram to Facebook (2012) https://about.fb.com/news/2012/09/welcoming-instagram-to-facebook/.
[247] Facebook, Facebook to Acquire WhatsApp (2014)https://about.fb.com/news/2014/02/facebook-to-acquire-whatsapp/ ; Kelly Ranttila, 'Social Media and Monopoly' (2020) 46 Ohio NU L Rev 161, 177.

Conclusion

In conclusion, despite the similarities between Article 102 TFEU and Section 2 Sherman Act, one can understand the differences between both jurisdictions as far as the abuse of dominance or monopolisation are concerned. The similarities between both jurisdictions are not transposed to practice as it was demonstrated by different court decisions regarding the same case in each jurisdiction. It is clear the EU is far more interventionist than the US, but it is also clear the US protects consumers and competition, not competitors.[248] One wonders that maybe the US agencies are not particularly invested, or interested, for economic reasons, in intervening because big tech companies are based in the US. European antitrust law is stricter than American law regarding prohibiting abuses of dominance of big tech companies, usually through fines.[249]

Article 102 TFEU is more modern concerning its content and its lifetime. Notwithstanding, art 102 TFEU's main characteristic is its flexibility, demonstrated in its wording, the non-exhaustive list of abuses and case law. However, this flexibility has caused uncertainty as to what constitutes ~~an~~ abuse regarding big tech companies and their new system of making business.[250] And, even when big tech companies are found to be abusive of competition law, they are ordered to pay fines that do not seem to intimidate them. In fact, if paying fines is all the Commission can do, it can lead big tech companies to believe they are unbeatable. And even if they do not, art 102 TFEU's flexibility might discourage big tech companies to innovate as they might fear their new practice being considered abusive, but this would compromise their ability to remain competitive.

In contrast, as s.2 Sherman Act was enacted in 1890 making its application more challenging as it was aimed to regulate companies of that time such as oil and steel companies, for example. EU and US antitrust laws share the same goal to ensuring a competitive market while protecting the consumer. The difference between them lies in how interventionist they are, which is clearly the EU.[251] Concerning the application of the law, one can recognise both jurisdictions are becoming firmer by the increase of investigations in big tech companies more recently, for example Facebook and Amazon.

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[248] James F. Ponsoldt, Christopher D. David, 'A Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft/ When Should the Bundling of Computer Software be Permitted?' 2007, 27 Northwestern Journal of International Law & Business 421.
[249] Kelly Ranttila, 'Social Media and Monopoly' (2020) 46 Ohio NU L Rev 161, 172.
[250] Joyce Verhaert, "The challenges involved with the application of article 102 TFEU to the new economy: a case study of Google" [2014] E.C.L.R. 265; Sean Fernandes, 'Should Have Scolded Your Kids: Holding Foreign-Parent Corporations Responsible for Their Subsidiaries' Price-Fixing Behaviour in the United States, Canada, and the European Union' (2016) 34 Wis Int'l LJ 144, 156.
[251] Yi Heng Alvin Sng, 'Tying conduct under article 102 TFEU: can intervention against Google be justified?' E.C.L.R. 2016, 37(10), 406-412.

Choosing one of the jurisdictions as better than the other is debatable as they both have advantages and disadvantages. The EU is far more interventionist which means big tech companies will be judged for their abusive conduct but how interventionist is too much? Does it make the market more competitive? The US does not intervene in the market and even when it brings proceedings against big tech companies, it either does not order a dramatic punishment or it will not find them to be abusing antitrust law. To conclude, both jurisdictions have weaknesses but they both demonstrate a determination to regulate abuses of big tech companies' unprecedented success.

A Necessary Piece of Judicial Theatre? Challenges Facing the Architects of the Nuremberg Trials in Creating a Cohesive Ideal of Justice

*Isabella Elliott**

Abstract

In October of 1945, the chief prosecutors of the International Military Tribunal in Nuremberg indicted 24 leading Nazi officials with three crimes as defined in the Nuremberg Charter: Crimes against peace, war crimes, and crimes against humanity. This paper explores the legality and moral legitimacy of the trials at the International Military Tribunal, in conjunction with the insurmountable challenges faced by the Allied powers, such as reliance upon *ex post facto* law and the lack of previous juridical context. Creating a cohesive ideal of justice was almost impossible as global authority was rendered moot in the face of state sovereignty. The trials, however, engendered a legal and political compromise and were a pragmatic attempt to consign the atrocities to history and did wield aspects of utility.

Introduction

The legality and moral legitimacy of the Nuremberg Trials presented numerous challenges for the Allied Powers, not least because no outcome could ever adequately redress the atrocities committed by the Third Reich. This dissertation will primarily focus on the International Military Tribunal (IMT) (1945-1946) rather than the subsequent Nuremberg Proceedings (1946-1949). For the purpose of this paper, a cohesive ideal of justice can be defined as a conception of moral and legal justice that is enshrined in international law and accepted by all parties. The victorious Allies failed to establish this cohesive ideal of justice and, in the words of British historian Geoffrey Best, 'state sovereignty and regional alliances reasserted themselves where collective responsibility and global authority had been intended to take over.'[1] The International Military Tribunal presented a pragmatic way for the victorious Allies to consign the atrocities committed under the Third Reich to history, as well as providing an opportunity to portray themselves as judicial entities above scrutiny and partisan national interests. With this in mind, the trials were successful as a piece of judicial theatre because they demonstrated a stark contrast between the criminality of the defeated regime and the apparent moral and ethical virtue of the victors.[2]

From the beginning, architects of the trials were presented with a multitude of legal issues and moral contradictions. Each chapter focuses on a different and interlinking challenge. Chapter One explores the lacunae in the corpus of international law before 1945 through an empirical

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[1]Geoffrey Best, The Stenton Lecture: *Nuremberg and After the Contenting History of War Crimes and Crimes Against Humanity* (University of Reading 1984) 5.

[2]Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (1st edn, Oxford University Press 2008) 601.

lens. In the words of Telford Taylor, despite all the flaws in the proceedings, they were instrumental in 'the establishment of world order under the rule of law.'[3] Chapter Two highlights that, in the absence of political will, national interests took precedence over the administration of justice, something which was already on unsteady ground due to the different British, American and Soviet justice systems. Although Chapter One focuses particularly on war crimes and crimes against humanity, Chapter Three analyses the practical complications of the legal mechanics presented in all aspects of the indictments and the ultimate necessity of a compromise.

According to German historian Kim Priemel, 'a lawyer's legal history and historians' legal history coexist peacefully, but in a state of mutual ignorance.'[4] As international law is based on precedent and not statute, this dissertation seeks to look at the legal history insofar as international law is concerned. Synthesising both approaches will produce an interdisciplinary response which in turn will provide a more cogent examination of the topic. The idea that the exercise of justice is performative is not commonly explored - especially on an international scale. Thus, it is valuable to examine the concept of the trials at the IMT as theatre with a performative element that was designed in part to address disparate concerns of the Allies.

Various methodologies can be used when approaching historical sources such as linguistic analysis and comparative studies. This paper primarily analyses the legal underpinning of the prosecution's argument on all four counts using qualitative analysis to form a judgement on the challenges and validity of the process of the IMT and its wider implications. The fact of the verdicts remains intact and is not of specific importance here; what is of interest are the challenges and processes of the trials themselves whilst addressing the outcome that the prosecuting nations hoped to achieve. Yale Law School's Avalon Project digitally archived all the relevant conventions and legal proceedings. This was particularly helpful for the first and last chapters as the prosecution's argument could be examined through the counts presented in the indictments and it was easily accessible as the proceedings and conference minutes were primarily in English. However, due to the sheer volume of legal documentation on this subject, assessing for relevance was key and it was not possible to examine every individual proceeding in equal depth. As well as the works written by contemporary lawyers, prosecutors and psychologists at Nuremberg, the *Manchester Guardian* and the *Economist*, although influenced by national interests, provided useful insights into orthodox public opinion on the trials. Hansard was also invaluable in conveying British political perspectives through the debates in the Allied Court and House of Commons.

As to be expected, historical and legal interest in the Nuremberg Trials has fluctuated as a result of national perspective and global politics. The same can be said for the corpus and

[3]Michael Marrus in Alexa Stiller and Kim Priemel, *Reassessing the Nuremberg Military Tribunals* (1st edn, Berghahn Books 2014) xii.
[4]Kim Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (1st edn, Oxford University Press 2016) 11.

understanding of international law which has progressed over time. For instance, Polish-American criminologist Sheldon Glueck's *The Nuremberg Trial and Aggressive War* (1946) was one of the first books on the juridical problems surrounding the trials. One of the core issues he explored was that prosecuting Nazi malefactors for the 'crime' of waging aggressive war was not as sound as 'violations of the recognized laws and customs of legitimate warfare.'[5] Considering the Treaty of Versailles, Glueck asserts that one of the principal deliberations which limited the victorious Allies was 'the fear of later reprisal.'[6] Another Allied legal shortcoming was presented in 1947 by Austrian-American lawyer Leo Gross in *The Criminality of Aggressive War,* in which he articulated that the substantive law and charges applied 'stirred a new wave of sharp criticism of the moral and legal foundations of the Nuremberg Trial.'[7] Not only was *ex post facto* law widely applied, but Gross also implied that the Allies made no attempt to try war criminals from their nations. Although a much later publication, examination of the trials from a legal perspective was adopted by Canadian historian Michael Marrus. In his 1997 documentary history *The Nuremberg War Crimes Trial 1945-46* Marrus examined the indictments presented to the 22 Nazi leaders at the IMT through the critical analysis of legal documents such as the Kellogg-Briand Pact of 1928 and evidence from both defendants and prosecution. He further asserted that although the trials did not present a calamity, the crimes that required punishment were 'unprecedented.'[8] This is significant in that although rejected by natural law theorists, Western legal positivists deemed certain aspects of the indictment, crimes against humanity in particular, retroactive and thus inapplicable.

According to American historian Bradley Smith, 'twenty years after the end of the trial, professional historians had relegated Nuremberg to oblivion.'[9] However, his 1977 book *Reaching Judgement at Nuremberg* led to a revival of historiography on the topic. Smith stated that not only did Nuremberg present an opportunity for the Allies to '[discredit] the Third Reich,' but it 'appeared to be merely a ritual performance [...] for the gratification of the victors.'[10] In conjunction with this, British historian Geoffrey Best's Stenton Lecture 'Nuremberg and After' (1984), takes a political standpoint on the trials and the challenges they presented. He argues that state sovereignty took precedence over collective responsibility.[11] Indeed, according to contemporary German historians Daniel Hedinger and Daniel Siemens in their article 'The Legal Moment in International History' the trials further legitimised 'the

[5]Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (1st edn, Alfred A. Knopf 1946) 7.
[6]Ibid. 8.
[7]Leo Gross, 'The Criminality of Aggressive War' (1947) The American Political Science Review 205.
[8]Michael Marrus in Alexa Stiller and Kim Priemel (eds), *Reassessing the Nuremberg Military Tribunals* (Berghahn Books 2014) 1.
[9]Bradley Smith, *Reaching Judgement at Nuremberg* (1st edn, Basic Books Inc 1977) xvi.
[10]Ibid. 301.
[11]Geoffrey Best, The Stenton Lecture: *Nuremberg and After the Contenting History of War Crimes and Crimes Against Humanity,* 5.

hegemonic discourse of the West in general.'[12] Comparably, in his book *The Nuremberg Trials* (2007) American jurist Norbert Ehrenfreund also considered the political complications that arose in the prelude to the trials.[13] Ehrenfreund utilised Smith's earlier research regarding Allied opposition to the trials to convey that the pursuit of justice presented the Allies with a multitude of competing options.

It is important to have a synthesis of both legal and political standpoints to understand the sheer scope of the challenges the Allies faced in creating a cohesive ideal of justice. Ultimately these challenges proved too great to overcome, but the value of attempting them, or at least appearing to do so, remained significant.

[12]Daniel Hedinger and Daniel Siemens, 'The Legal Moment in International History: Global Perspectives on Doing Law and Writing History in Nuremberg and Tokyo, 1945–1948' (2016) *Journal of Modern European History* 492, 494.
[13]Norbert Ehrenfreund, *The Nuremberg Legacy* (1st edn, Palgrave Macmillan 2007) 7.

Chapter One
The Juridical Context of Nuremberg and the Concept of Justice

> *The Nazi Crimes explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough [...] this guilt, in contrast to all criminal guilt, oversteps and shatters all legal systems. The viewpoint of our legal institutions and moral standards of judgement cannot deal with this new type of criminal.*
>
> **-Hannah Arendt, November 1945**[14]

The definition of justice within scenarios of war has long prompted controversy. As Hannah Arendt stated above, the events of the Second World War, in particular those conducted under the Third Reich, shattered previous standards of justice. The IMT (1945-1946) provided ample opportunity to address these omissions in international law. Regardless of whether a definition of justice is enshrined in international law, the concept laid out might not be agreed unanimously by national governments, and therefore presents a number of conceptual and practical difficulties. Currently, the term 'mass atrocity crimes' refers to the three legally defined international crimes of genocide, war crimes and crimes against humanity.[15] However, in order to assess whether the Nuremberg Trials were constructed by the victorious Allies to serve a cohesive ideal of justice, it is necessary to understand the corpus of international law as it stood in 1945.

Early theories of justice can be traced back to Plato and Aristotle through works such as *The Republic*[16] and *Nicomachean Ethics*.[17] Charles Kegley and Eugene Wittkopf assert that 'many people are confused by international law because it both prohibits and justifies the use of force.'[18] This confusion derives from the 'Just War' tradition in Christian realism, in which the rules of war can be considered theologically based. In general, this tradition lays the foundations for the debate about the rights and wrongs of laws, a development reflected in modern international law.[19] As a concept of international relations, this theory has been so repeatedly violated throughout history that it can almost be considered meaningless and therefore more secular principles were required. Despite this, Geoffrey Best contended that

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[14]Hannah Arendt and Karl Jaspers, *Correspondence: 1926-1969* (2nd edn, Saunders College Publishing 1993) 54.
[15]United Nations, *Framework of Analysis of Atrocity Crimes: A Tool for Prevention* (1st edn, New York, 2014) https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf accessed 20 February 2021.
[16]Benjamin Jowett, *The Republic of Plato* (2nd edn, Clarendon Press 1881).
[17]Robert William, *The Nicomachean Ethics of Aristotle* (1st edn, George Bell & Sons 1895).
[18]Charles W Kegley and Eugene R Wittkopf, *World Politics* (4th edn, St Martin's Press 1993) 506.
[19]Richard Norman, Ethics Killing and War (1st edn, Cambridge University Press, 1995) 117.

elements of 'Just War' Theory remained relevant,[20] insofar as in the preamble to the 1899 Hague Convention (II) that dealt with the laws for war on land formulated three interlinking sources of international law: 'the usages established between civilised nations, the laws of humanity, and the requirements of the public conscience.'[21] This attempt to draw up legal principles to be applied to the conduct of, and between nations began to set a precedent, and continued throughout the early twentieth century.

Kegley and Wittkopf define public international law as 'rules that govern the conduct of states in their relations with another.'[22] Such a definition has not altered since 1945. There are parallel tracks in international relations. Firstly, there is the rule of law which all nations agree to observe through treaties and other agreements. Secondly, there is its practical application, or *Realpolitik*, which sometimes ignores international law when expedient to do so. Although international law in 1945 was not codified, it is more than a collection of theoretical principles; rather, it can be considered (as Justice Jackson defined it) 'an outgrowth of treaties or agreements between nations and of accepted customs.'[23] Thus, it is impossible to refer to a body of statute law for specific legal definitions for every individual case. There remained a difficulty in finding a unified ideal of justice and when, in 1945, such a cohesive understanding was imperative, further clarification was required.

John Morgan, legal adviser to the UN War Crimes Commission at Nuremberg, contended that 'international law, can be considered a roguish thing so far as the text-books of jurists are concerned, only too apt to vary accordingly to the opinions of the writers of them.'[24] Morgan's statement may be considered in the light of the Marquess of Salisbury's statement in 1887, following the Berlin Conference in 1885, that 'international law generally depends upon the prejudices of the writers.'[25] The Nuremberg Trials show the extempore nature of international law, and how the prosecution wielded power even whilst it was constrained in its judicial authority. In this way, Nuremberg provided an opportunity to form a new basis for international law, one which would deal with war crimes and the attendant crimes against humanity.

One of the drawbacks of international law is that it is not based on statute but on a series of treaties, conventions, and memoranda. Thus, there is no individual entity to be dealt with. Instead, international courts are dealing with a nation state or polity comprising multiple agents,

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[20]Geoffrey Best, The Stenton Lecture*: Nuremberg and After-The Contenting History of War Crimes and Crimes Against Humanity*, 14.

[21]Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy <https://avalon.law.yale.edu/19th_century/hague02.asp> accessed 20 February 2021.

[22]Charles W Kegley and Eugene R Wittkopf, *World Politics* (4th edn, St Martin's Press 1993) 499.

[23]Justice Jackson, report of June 7, 1945, quoted in Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (1st edn, Alfred A. Knopf 1946) 6.

[24]John Morgan, *The Great Assize: An Examination of the Law of the Nuremberg Trials* (1st edn, John Murray 1948) 14.

[25]International Arbitration Volume 317: Debated on Monday 25 July 1887, *UK Parliament* < https://hansard.parliament.uk/Lords/1887-07-25/debates/a41575f3-db2a-413e-a086-f7e93e8b4a47/InternationalArbitration> accessed 21 February 2021.

which presents a much more complex legal entity. Pragmatically speaking, it is not possible to try a whole nation, and therefore certain individuals are bound to be singled out as being the most egregious offenders. In 1946, Sheldon Glueck aptly conveyed this through his statement that 'before the Nuremberg tribunal, the law of nations could not be applied directly to individuals.'[26] However, it was never the purpose of international law to simply identify guilty organisations, and so a new body of legal definitions was created at Nuremberg to allow individuals to be charged with new offences. The body of law that governs nations rapidly changed in response to international politics.[27]

This shift in judicial precedent is embodied by the shift from *collective guilt* enforced on Germany in the Treaty of Versailles in 1919 to the *individual guilt* declared at Nuremberg some two decades later. However, the crimes of conspiracy and the membership of criminal organisations also imply *collective guilt* by association. The harsh reparations and the war guilt clause in the Treaty of Versailles had disastrous consequences and provided fertile ground for political campaigning from the *Nationalsozialistische Deutsche Arbeiterpartei.*[28] In recognition of the failure of Versailles, this retroactive punishment of a whole nation could not be repeated as it faced a multitude of fragmented legal and moral pitfalls. Alternatively, certain perpetrators were brought to justice, and this in itself laid the foundations for what purported to be a cohesive ideal of justice. On 22 November 1945, Douglas Clifton Brown, Speaker of the House of Commons, stated that 'since the Allied Court now in session at Nuremberg is a tribunal of a totally unprecedented character... [it] cannot draw any support from precedent, but must in itself form a new precedent.'[29] Clifton Brown's statement clearly shows the new foundation of the extemporaneous creation of non-statute international law that would be established at Nuremberg. This is closely intertwined with George Ginsburg's and Vladimir Nikolaevich Kudriavtsev's affirmation that 'the Nuremberg Trial was the first historical precedent for bringing to trial and punishing the most dangerous war criminals.'[30] Recognition of the need for a new international standard of morality was identified by Arendt years prior. In the wake of the mass atrocity crimes committed during the Second World War, the current international law was both implausible in theory and inapplicable in practice.

Sheldon Glueck stated in 1946 that: 'most States, including Germany, have long provided for various appropriate punishments of individual violators of the laws and customs of war.'[31]

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[26]Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (1st edn, Alfred A. Knopf 1946) 60.
[27]Morton Kaplan and Nicholas Katzenbach, *The Political Foundations of International Law* (1st edn, John Wiley & Sons 1961) 1.
[28]Sally Marks, Mistakes and Myths: 'The Allies, Germany, and The Versailles Treaty, 1918–1921' (2013) *The Journal of Modern History* 632.
[29]Allied Court, Nuremberg (References by Members) Volume 416: Debated on Thursday 22 November 1945, *UK Parliament* <https://hansard.parliament.uk/Commons/1945-11-22/debates/4124a06a-6513-4e39-8e86-205787c267d6/AlliedCourtNuremberg(ReferencesByMembers)> accessed 21 February 2021.
[30]George Ginsburg and Vladimir Nikolaevich Kudriavtsev, *The Nuremberg Trial and International Law*, (1st edn, Martinus Nijhoff Publishers 1990) 4.
[31]Sheldon Glueck in Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (1st edn, Oxford University Press 2008) 102.

These 'appropriate punishments' are defined through the many treaties passed from The Hague Conventions of 1899 onwards. In Article 50 of the 1899 Hague *Laws and Customs of War on Land* it is written that 'no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.'[32] On initial examination, this appears to be a slightly redundant theory of punishment and, in the light of Versailles, decreed obsolete the international rules of warfare as laid out here. Nations will bypass certain clauses of international law when convenient to do so, even if this does lead to collective punishment in the absence of identifiable guilty parties. This is refuted by British jurist Sir Thomas Holland in the 1908 *Laws Of War On Land*. He stated that 'individuals offending against the laws of war are liable to such punishment as is prescribed by the military code of the belligerent into whose hands they may fall, or, in default of such code, then to such punishment as may be ordered in accordance with the laws and usages of war, by a military court.'[33] This statement is contentious in that, when crimes are committed during war, an individual implicated in the regime can be put on trial by a military court of their enemy. This begs the ethical question of whether victors' justice conforms to a cohesive ideal of justice, as an enemy can never truly be impartial. However, the implication was that every nation ought to treat one another within a judicial framework, and that international affairs would always be regulated by the law.

In theory, nearly all nations had accepted The Hague Conventions of 1899 and 1907, but Germany's withdrawal from the League of Nations in 1933 arguably afforded the nation a degree of impunity. Similar to the 'Just War' Theory in the past, the relevant Hague Conventions in the wake of mass atrocity crimes did not seem to administer justice adequately, but instead were open to violations from nations. The same assertion can be made from the unratified 1924 Geneva Protocol and the Kellogg-Briand Pact of 1928, both of which condemned war as an instrument of state policy. As Kim Priemel states, both the Geneva Protocol and the Kellogg-Briand Pact can be considered 'milestones on a path to banning aggressive war.'[34] However, they ultimately had no mechanism for enforcing punishment for violation of their terms by either national courts or international tribunals.[35] Notwithstanding this, the Kellogg-Briand Pact was supposed to lay the foundation for a rules-based international order, but such plans were derailed by a series of international events, the most significant of which was the economic depression of the 1930s. The subsequent rise of totalitarianism demonstrates how, in the early twentieth century, there was a symbiotic, albeit fluctuating, relationship between law and international affairs. The poisonous atmosphere by 1939 attests to the frail foundations of supranational justice and emphasises the lack of stratified formal

[32]Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy <https://avalon.law.yale.edu/19th_century/hague02.asp> accessed 20 February 2021.
[33]Thomas Erskine Holland, *The Laws of War on Land* (1st edn, The Clarendon Press 1908) 45.
[34]Kim Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (1st edn, Oxford University Press 2016) 33.
[35]Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (1st edn, Alfred A. Knopf 1946) 17.

jurisdiction in the wake of mass atrocity crimes. This is a problem that would be presented at the outset of the Nuremberg Trials.

War crimes had been committed long before 1939, such as the use of poisonous weapons and gas in the First World War. However, no adequate war crimes trials had taken place before 1945. In the Nuremberg proceedings, Count Three of the Volume One Indictment labelled war criminals as 'all the defendants, acting in concert with others, formulated and executed a Common Plan or Conspiracy to commit War Crimes as defined in Article 6 (b) of the Charter.'[36] John Morgan's 1948 interpretation was that war crimes are offences against the customs and laws of war, 'whether the war be aggressive or not, have been, as we have seen, long ago established in international law including the categories of such offences laid down in the Hague Conventions of 1899 and 1907.'[37] In Article 6(b) of the War Crime Indictment at Nuremberg it was written that 'these methods and crimes constituted violations of international conventions, of internal penal laws and of the general principles of criminal law as derived from the criminal law of all civilised nations, and were involved in and part of a systematic course of conduct.'[38] This statement is disputable, as after the end of World War One, in conjunction with the Treaty of Versailles, in 1919 the Allies established the Commission of Responsibility of the Authors of the War and on Enforcement of Penalties. This commission relied upon the principles of the 1907 Hague Convention, and its sole purpose was to investigate the war crimes committed by German senior command. [39] However, like that of the aforementioned convention, there was no mechanism for effective investigation, let alone punishment.

Up until April 1944, the British *Manual of Military Law* stated that 'it is important to note that members of the armed forces who commit violations of the recognised rules of warfare such as are ordered by their government, or by their commanders, are not war criminals and cannot therefore be punished by the enemy.'[40] This directly refuted the article in the 1899 Hague Convention that states: 'individuals offending against the laws of war are liable to such punishment.'[41] As was emphasised in the discussion of the earlier justiciary theories and treaties, such contradictory directives and lack of supranational enforcement were present even

[36]Nuremberg Trial Proceedings Vol. 1 Indictment: Count Three; October 6, 1945 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy < https://avalon.law.yale.edu/imt/count3.asp> accessed 20 February 2021.
[37]John Morgan, *The Great Assize: An Examination of the Law of the Nuremberg Trials* (1st edn, John Murray 1948) 10.
[38]Nuremberg Trial Proceedings Vol. 1 Indictment: Count Three; October 6, 1945 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy < https://avalon.law.yale.edu/imt/count3.asp> accessed 20 February 2021.
[39]Cambridge University Press, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities (1920) *The American Journal of International Law* 95.
[40]John Morgan, *The Great Assize: An Examination of the Law of the Nuremberg Trials* (1st edn, John Murray 1948) 12.
[41]Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy <https://avalon.law.yale.edu/19th_century/hague02.asp> accessed 20 February 2021.

in the light of war crimes. A statement of this nature attests to the fact that Morgan, along with many others at the time, were fuelled by anti-German sentiment and a dogmatic belief that the Germans had a different moral code. Moreover, Morgan recognised that this controversial statement was indeed present and adapted from the German Military Code (*Militarstrafgesetzbuch*). This apparent cultural difference, as conveyed through the *Militarstrafgesetzbuch,* would seem not to adhere to a unified ideal of justice.

Although the term 'crimes against humanity' only entered positive international law in 1945, it had originated in the 1907 Hague Convention preamble, though the definition and understanding of such a term was vastly different at that time. Initially, the term was based on 'existing state practices that derived from those values and principles deemed to constitute the "laws of humanity," as reflected throughout history in different cultures.'[42] However, such a definition is ambiguous in that it is impossible to define the 'laws of humanity'. With this in mind, the possibility of a cohesive ideal of justice is questionable. Despite this confusion about the term, as with the aforementioned Commission of Responsibility, 'both the Birkenhead Committee advising the British government in 1919 and the Inter-Allied Commission advising the Peace Conference in Paris in 1919 recommended that crimes against humanity should constitute a specific charge to be brought against the German "war criminals" by the military courts of the Allied Powers envisaged by the Treaty of Versailles.'[43] This suggestion was rendered void by American representatives who had deemed that 'the laws and customs of war are a standard certain, and to be found in books of authority and the practice of nations,' whereas 'the laws and principles of humanity vary with the individual.'[44]

One of the key principles of international law is internal sovereignty.[45] An issue that arises from this is that international law and supranational bodies have been unable to deal with punishment associated with national genocide and crimes against humanity. During the Nuremberg proceedings, as stated in the statement of offence in Count Four of the indictment, 'all the defendants committed crimes against humanity during a period of years preceding 8 May 1945.'[46] Although the Nuremberg Charter did not use the term genocide, as Diane Forentlicher states 'its definition of crimes against humanity overlapped with Raphaël Lemkin's concept of genocide.'[47] In 1944, Lemkin defined genocide as 'signif[ying] a coordinated place of different actions aiming at the destruction of essential foundations of the

[42]Mahmoud Cherif, Bassiouni in Roy Gutman and David Rieff, *Crimes of War* (1st edn, W. W. Norton & Company 1999) 107.
[43]John Morgan, *The Great Assize: An Examination of the Law of the Nuremberg Trials* (1st edn, John Murray 1948) 12.
[44]Ibid. 19-20.
[45]Charles W Kegley and Eugene R Wittkopf, *World Politics* (4th edn, St Martin's Press 1993) 506.
[46]Nuremberg Trial Proceedings Vol. 1 Indictment: Count Four; 6 October 1945 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy < https://avalon.law.yale.edu/imt/count4.asp> accessed 22 February 2021.
[47]Diane Forentlicher in Roy Gutman and David Rieff, *Crimes of War* (1st edn, W. W. Norton & Company 1999) 155.

life of national groups.'[48] Thus, the genocide that took place under the Third Reich, namely the Holocaust, was sponsored by the apparatus of the state. There was no precedent for this, as it was 'a genocide not only instigated by fanaticism, but also a cold, calculated bid for power,' committing all the aforementioned mass atrocity crimes. [49] In the light of such horrific crimes, one of the many novel problems presented to the prosecutors at Nuremberg was the necessity for more precisely defined international laws to be established in order to achieve any form of justice.

In the wake of mass atrocity crimes, particularly war crimes and crimes against humanity, and despite further attempts to develop and codify adequate punishments, international law by 1945 did not provide the mechanisms nor the authority to demand or achieve cohesive ideals of justice. Such international law as existed by 1945, whether derived from conventions, treaties or even dated theological ideals, was merely unfinished. It had clearly been open to unfathomable manipulation and provided no sound basis for proper trials to take place in the way that was required after the Second World War and the defeat of Germany. As Kim Priemel states, 'the interwar discussion on the juridification of international politics and the outlawing of war between sovereign states, marked a high point of [...] liberal internationalism and its belief in the rule of law.'[50] However, the progress of international jurisprudence had been derailed by international events especially in the 1930s. In light of this failure, it can be argued that the juridical principles and due process that took place at Nuremberg were created to address these previous shortcomings and ultimately enforce cohesive justice. Historically, cohesive ideals of justice in international law had been difficult to demand and achieve. However, by 1945, there was a need for at least a perception of such a unitary understanding of justice on the world stage. In order to fully assess how successfully this call was answered, the competing Allied objectives and attitudes towards justice in the prelude to Nuremberg need to be scrutinised in more detail.

[48]Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress* (1st edn, Carnegie Endowment for International Peace 1944) 82-89.
[49]Simon Deeley and Matthew Hinchcliffe, *Hitler's Circle of Evil* (United Kingdom: Head Gear Films, 2018).
[50]Kim Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (1st edn, Oxford University Press 2016) 33.

Chapter Two
The Competing Allied Attitudes and Objectives in the Prelude to Nuremberg

The lacunae in international law before 1945 exacerbated the problems that faced the Allies at the outset of the IMT. The problems were only further complicated by the underlying explicit and implicit political objectives of the United States, the United Kingdom and the Soviet Union. By 1944, there was a consensus between the Allies that retribution should be sought in order to deter the Nazis from committing further atrocities.[51] However, the individual Allied nations had vastly different interpretations of both justice and punishment. To understand these competing ideals, it is essential first to examine the geopolitical and ideological tensions that compromised a coherent ideal of justice and how this affected the Allied attitudes towards justice and prosecution.

According to the former Supreme Court Judge of California, Norbert Ehrenfreund, 'the Nuremberg Trials almost did not happen.'[52] The Allies' ambivalence in the prelude to the trials was the fundamental cause for this. With the war in full swing, a preliminary decision was made on 13 January 1942 in the St James Declaration that signalled intention to bring German criminals to book legally. Despite this decision, at the Moscow Conference in October 1943, Churchill, Stalin and Roosevelt emotively declared that the Nazis would pay.[53] 'Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.'[54] The announcement could be seen as a theatrical piece of rhetoric which, despite disparate Allied positions, sought to demonstrate a cohesive policy. However, despite the grandeur and power of this statement, delivered in somewhat quasi-religious terms, none of the powers could agree on what was even being put on trial or how justice would be delivered. Moreover, there were vastly different understandings of what constituted Nazi Germany. For the Soviets, it was a capitalist dictatorship, a conspiracy between big business and the right-wing in Germany, whereas the United States regarded Nazism as a by-product of individual pathology, resulting from the hijacking of the state by a criminal clique. Furthermore, the principle of the separation of powers and an independent judiciary seems natural in Britain and the United States. However, as implied by American legal scholar Harold Berman, like all other government institutions in the Soviet Union from 1936 onwards, the judiciary was officially subordinated

[51]Bradley Smith, *Reaching Judgement at Nuremberg* (1st edn, Basic Books Inc, 1977) 21.
[52]Norbert Ehrenfreund, *The Nuremberg Legacy* (1st edn, Palgrave Macmillan 2007) 7.
[53]Michael Burleigh, *Moral Combat: A History of World War II* (2nd edn, Harper Perennial 2011) 543.
[54]The Moscow Conference: Statement on Atrocities, October 1943 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project < https://avalon.law.yale.edu/wwii/moscow.asp> accessed 20 March 2021.

to the legislature.[55] Thus, to exacerbate an already complex situation, there was a fundamental difference in the understanding of the nature and function of the judiciary.

Towards the end of the Second World War, there was strong opposition to war-crimes trials on both sides of the Atlantic.[56] Following the Luftwaffe's coordinated aerial attacks on England, Ehrenfreund asserts that 'Churchill was hesitant to grant the Germans a trial as it might only give them the opportunity to spout their propaganda, and that after the atrocities that they had committed, they had forfeited such a right.'[57] Canadian historian Michael Marrus commented that 'it took a considerable amount of time for Nazi Germany to be stigmatised by the United States as a criminal enemy and an opponent whose conduct was outside of the bounds of civilised behaviour.'[58] While this view may be attributed to the United States' isolationist policy and late entry to the war in 1942, there was also a large German diaspora that lived in America, some of whom had fled German oppression, and others who had settled but remained sympathetic to their former homeland or that of their ancestors.[59] Thus, anti-German sentiment was never as prevalent as it was in Europe.

In Washington, the question of Nazi punishment generated a bitter dispute between two camps.[60] On the one side was the United States Secretary of the Treasury, and advisor to President Roosevelt, Henry Morgenthau Jr. He not only envisioned the execution of the Nazi leaders, but sought to cripple Germany economically, 'the people want revenge, not a long, drawn out legal proceeding.'[61] Seemingly, Morgenthau ignored the lessons of Versailles. The retributive justice shown to Germany only two decades prior had had disastrous global consequences. On the other side of the discussion was the United States War Department and Secretary of War, Henry Stimson, who believed such retribution as advocated by Morgenthau would only spark another war and provoke German revenge against Allied prisoners of war.[62] Thus, the United States had conflicting ideas of how to prosecute these war criminals; there was no coherent or uniform national justice system, let alone an international one. The decision made by Churchill and Roosevelt on the punishment of captured Nazi leaders at the second Quebec Conference (Octagon) of 12 - 16 September 1944 further highlights the Western Allies' sudden irrationality.[63] Despite Stimson's argument that, without a chance to defend themselves,

[55]Harold Berman, 'The Challenge of Soviet Law' (1948) *Harvard Law Review* 220.
[56]Norbert Ehrenfreund, *The Nuremberg Legacy* (1st edn, Palgrave Macmillan 2007) 7.

[57]Ibid. 7.
[58]Michael Marrus, *The Nuremberg War Crimes Trial 1945-46: a documentary history* (Bedford Books 1997) 18.
[59]Willi Paul Adams, Lavern Rippley and Eberhard Reichmann, *The German-Americans: An Ethnic Experience* (2nd edn, Max Kade German-American Center 1993).
[60]Norbert Ehrenfreund, *The Nuremberg Legacy* (1st edn, Palgrave Macmillan 2007) 7.

[61]Ibid. 7.
[62]Arieh Kochavi, 'Discord Within the Roosevelt Administration Over a Policy Toward War Criminals' (1995) *Diplomatic History* 617.
[63]Department of Defense, *The Octagon Conference: Papers and Minutes of Meeting* (United States of America: Office, U S. Secretary of the Combined Chiefs of Staff, 1944) 81-91. <https://www.jcs.mil/Portals/36/Documents/History/WWII/Octagon3.pdf> accessed 21 March 2021.

summary execution would be similar to what the Nazis were inflicting on their victims and was a 'crime against civilisation,' the preliminary decision was made that there would be no trial.[64]

In 2005, the *German Federal Agency for Civic Education,* an institution provided for in the German constitution by the United States after the Second World War, published an article by Professor Dr Wolfgang Benz in which he stated that 'long before the end of the Second World War, the Allies agreed that those responsible for National Socialist rule should be brought before an international court of law.'[65] This would seem fair in light of Churchill's statement in the House of Commons on 8 September 1942, that 'those who are guilty of the Nazi crimes will have to stand up before tribunals in every land where their atrocities have been committed in order that an indelible warning may be given to future ages.'[66] Paradoxically, the official 21st century German version declared authoritatively by Benz depicting a planned series of trials, is seemingly at odds with the proceedings of the Quebec Conference and the true situation in 1944. One of the principal reasons for this was the Allies' constant vacillation on the question of prosecution. Indeed, at first, Britain and the United States had a much more punitive approach, and Western expectations of justice in light of their democratic principles were undermined.

The punitive decision to execute all Nazi war criminals as declared at Quebec directly refutes the contemporary official German thesis of the situation conveyed in the *German Federal Agency for Civic Education* that a trial was long planned for. However, in later months, due to Stimson's persistence and tenacity, the idea of summary execution and Morgenthau's plan was short-lived and replaced in favour of an international military tribunal. Despite the overwhelming desire of the American State Department to avoid a complex entanglement in unprecedented war crimes trials, it was prudent for Roosevelt, who had led America into the war, to have a coherent plan for the war's end - including war crimes trials for the defeated Axis powers.[67] There is clearly an implicit correlation between electoral success and self-interest, which is evidenced by American businesses that thrived during the Second World War. For instance, Chase National Bank had assisted in the sale of Nazi War Bonds to German Americans.[68] Therefore, reneging on a summary execution in favour of a trial for the Nazi leaders was a judicious decision, as this would also mean American businesses would not be

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[64]Norbert Ehrenfreund, *The Nuremberg Legacy* (1st edn, Palgrave Macmillan 2007) 8.

[65]Professor Dr Wolfgang Benz, Bestrafung Der Schuldigen, *Bundeszentrale Für Politische Bildung*, 2005 'Lange vor dem Ende des Zweiten Weltkriegs waren die Alliierten einig, dass die Verantwortlichen für die nationalsozialistische Herrschaft vor einem internationalen Gerichtshof.' <https://www.bpb.de/geschichte/nationalsozialismus/dossier-nationalsozialismus/39603/bestrafung-der-schuldigen> accessed 20 March 2021.

[66]Winston Churchill, In *War Situation* (Hansard, 1942) <https://hansard.parliament.uk/Commons/1942-09-08/debates/b7ccb905-c8f0-4780-b548-e100956da6c3/WarSituation?highlight=those%20guilty%20nazi%20crimes#contribution-f4e7c5f0-e4a9-41c8-ba0b-cb7ebd3fa7a1> accessed 21 March 2021.

[67]Arieh Kochavi, 'Discord Within the Roosevelt Administration Over a Policy Toward War Criminals' (1995) *Diplomatic History* 617.

[68]Richard Breitman and others, *U.S. Intelligence and The Nazis* (1st edn, Cambridge University Press 2005) 173–202.

comprised. This American equivocation and subsequent decision feeds into the notion that those responsible for the crimes committed by the Third Reich were only a specific group of malevolent individuals. This was a narrative that would serve American interests and lead to the prosecution of a limited number of defendants.

Despite this turnaround, London and Washington remained eager to publicise the atrocities committed under the Third Reich. However, they did so with caution. In the light of Versailles, they feared German resentment in the event of an overly harsh policy against war criminals.[69] On 21 March 1945, an article in *The Manchester Guardian* stated that: 'it is not merely a question about revenge. It is something much deeper. It arises from the sense that justice should be vindicated.'[70] This example of 'white' propaganda, although candid, was unequivocally designed to console the German population. This represented a subtle attempt to demonstrate how, as a nation entrenched in democratic principles, Britain would uphold the Rule of Law. Therefore, the Nuremberg Trials provided a considerable opportunity for Britain and the United States to exhibit liberal democracy, not only to Germany, but most importantly, in the face of the Soviet Union. Ultimately, these ulterior motives distracted from the administration of a cohesive ideal of justice.

The Soviet government had denounced 'the barbaric violation by the German government of the elementary rules of international law.'[71] However, Francine Hirsch asserts that the Soviets had long advocated for an international trial for Nazi leaders anchored in the concept of 'criminal conspiracy.'[72] Despite its authoritarian nature, due to its unmatched sacrifice during the war, the Soviets wanted a strengthened claim for reparations — something that would have been more challenging if there were just summary executions. While the Western Allies assumed that the Soviet government was using the Nuremberg Trials 'for its own devious purposes,'[73] the Soviet government 'thought that the Western Allies were being too indulgent to former Nazis, too disposed to permit Germans who had served in the government under Hitler to remain in local government positions, and were allowing the groups that had controlled German industry under Hitler to retain their wealth and power.'[74] Although condemnatory, the Soviet assertion was to a significant degree correct. From May 1945, the American post-war intelligence program 'Operation Paperclip' was set in motion. This involved scientists that had once aided the Third Reich in waging aggressive war, allowing them to escape the justice system in order to continue their weapons-related work for the American government.[75] With this ideal of selective prosecution in mind, despite their revised

[69]Michael Marrus, *The Nuremberg War Crimes Trial 1945-46: a documentary history* (Bedford Books 1997) 19.
[70]*The Manchester Guardian* (1901-1959), 'Punishment of War Criminals Not Question of Revenge', 1945 <https://search.proquest.com/historical-newspapers/punishment-war-criminals-not-question-revenge/docview/478513226/se-2?accountid=13963> accessed 22 March 2021.
[71]Michael Marrus, *The Nuremberg War Crimes Trial 1945-46: a documentary history* (Bedford Books 1997) 20.
[72]Francine Hirsch, *Soviet Judgement at Nuremberg* (1st edn, Oxford University Press 2020) 38.
[73]Herbert Feis, *Between War and Peace* (1st edn, Princeton University Press 1960) 240.
[74]Ibid. 240.
[75]Annie Jacobsen, *Operation Paperclip: The Secret Intelligence Program That Brought Nazi Scientists to America* (1st edn, Little, Brown and Company 2014) 1-5.

common understanding that there needed to be some sort of international tribunal and organised justice, the Allies remained uncertain about how to proceed with Axis criminality, particularly how to proceed together.[76] At the outset of the Nuremberg Trials, Soviet lawyers were undoubtedly pivotal in aiding various legal innovations, 'such as the notion that those complicit in a conspiracy were guilty for actions committed by any of its members.'[77] Yet, as Andrew Moravcsik states, 'once the trials started, the roles reversed, with Western lawyers seeking to stage a high-minded fair trial and the Soviets, under tight leadership from Moscow, looking to stage a didactic show trial.'[78] This would seem plausible in light of American historian Francine Hirsch's statement that 'most English-language accounts describe Soviet participation in Nuremberg as the Achilles heel of the trials.'[79] This view, however, reinforces the classic Western narrative of Nuremberg, whilst the Soviet approach is rarely explored in popular works.

On 17 July 1945, *The Manchester Guardian* stated that 'if Britain, Russia and the United States and France [...] cannot agree on a common policy for Germany, they will not be able to agree on a common policy anywhere.'[80] This lack of common policy began to manifest itself as the alliance between the powers broke down. *The Manchester Guardian* further stated that the Allies' inability to agree on policy had grasped the attention of the defeated: 'even in Germany, they doubt whether we mean business because of our slowness in punishing the Nazi war criminals.'[81] The mistrust that was rife at Potsdam would only worsen as the Allies paved the way to Nuremberg.

The multi-faceted and conflicting attitudes of the Allies were already evident during the Potsdam Conference 17 July to 2 August 1945, where the main objective was to 'devise a system that would facilitate agreement among the major powers.'[82] However, as *The Manchester Guardian* stated on the first day of the conference 'the obstacles to a common policy are plain enough, and can be summed up in the words mutual suspicion.'[83] Prime Minister Winston Churchill's statement prior to Potsdam reinforces this view: 'I hardly like to consider dismembering Germany until my doubts about Russian intentions have cleared

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[76]Michael Marrus, *The Nuremberg War Crimes Trial 1945-46: a documentary history* (Bedford Books 1997) 19.
[77]Andrew Moravcsik, Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II, *Foreign Affairs*, 2020 <https://www.foreignaffairs.com/reviews/capsule-review/2020-08-11/soviet-judgment-nuremberg-new-history-international-military> accessed 20 March 2021.
[78]Ibid.
[79]Francine Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Post-war Order', (2008) *The American Historical Review* 701.
[80]*The Manchester Guardian*, 'Potsdam', 1945, 1-3. <http://www.cvce.eu/obj/potsdam_from_the_guardian_17_july_1945-en-385df4bd-93b6-48f3-93ef-5f2c623aae10.html> accessed 18 March 2021.

[81]Ibid.

[82]Redvers Opie, *The Search for Peace Settlements* (1st edn, The Brookings Institution 1951) 72.
[83]*The Manchester Guardian*, 'Potsdam', 1945, 1-3 <http://www.cvce.eu/obj/potsdam_from_the_guardian_17_july_1945-en-385df4bd-93b6-48f3-93ef-5f2c623aae10.html> accessed 18 March 2021.

away.'[84] However, in hindsight, it could be argued that Churchill was fully aware of Soviet intentions and had cooperated in return for increased Russian effort on the Eastern Front.[85] Redvers Opie rightly states that 'throughout history, victorious coalitions have shown a tendency to break apart, with profound consequences for the peace-making process.'[86] The disagreements at Potsdam highlighted the fragmentation of post-war relations and also threatened to derail the process of delivering justice for Nazi war crimes.

At Potsdam, the difficulties that arose were partially due to the complexity, scope and character of the Second World War, but the characters of the participating leaders were also contributory factors. Roosevelt's death in April 1945, and his replacement by Truman at Potsdam, added to the increasing mistrust between the Allies and the difficulty in crafting a cohesive policy at the end of the war. Prompted by this mistrust, American historian Charles Mee Jr asserts that Stalin 'devised sets of diplomatic ploys to test whether the Americans were naïve, or determined ideological crusaders, or had some ulterior motive.'[87] On 11 August 1945, British magazine *The Economist* reinforced anti-Soviet sentiment by stating 'we can at least disclaim responsibility for [the Russian's determination to loot Germany] and what is left of Germany can be given the prospect in the fullness of time, of achieving liberty, equality and prosperity.'[88] However, when considered in retrospect, this statement is contentious. Not only was there no concrete evidence for the assertion, but it failed to acknowledge that if such unsavoury ideals were true, the Soviets had legitimate cause. Indeed, Charles Mee Jr refutes *The Economist's* stance by implying that the Soviets did not seek retribution, rather 'what Stalin wanted from Potsdam above all were concrete, tangible things.'[89] At the London Agreement of 8 August 1945 the Big Three decreed that Nazi war criminals would face trial by an international court later that year.[90] Yet, *The Economist's* revelation only three days later attests to how geopolitical issues and disagreements continued to take precedence over the adequate administration of justice.

Apprehension reached a new high only four days after the Potsdam Conference when, without warning, the United States detonated the atomic bomb on Hiroshima. Accordingly, the global situation had become unstable, and clearly national geopolitical interests had taken precedence over the administration of justice by the two great powers. Truman's robust attitude towards the Soviet Union was intended to demonstrate that the occupation of Western European nations by the Red Army and the installation of pro-Soviet regimes would not be entertained. The

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[84]Winston Churchill, *The Second World War: Volume VI Triumph and Tragedy* (1st edn, Cassell & Co Ltd 1954) 443.
[85]Martin Gilbert, *The Second World War: A Complete History* (1st edn, Orion Books 2009) 704.
[86]Redvers Opie, *The Search for Peace Settlements* (1st edn, The Brookings Institution 1951) 1.
[87]Charles Mee Jr, *Meeting at Potsdam* (1st edn, André Deutsch 1975) 65.
[88]*The Economist*, 'Press on Potsdam', 1945 <https://www.nationalarchives.gov.uk/education/resources/cold-war-on-file/press-on-potsdam/> accessed 18 March 2021.
[89]Charles Mee Jr, *Meeting at Potsdam* (1st edn, André Deutsch 1975) 67.
[90]Nuremberg Trial Proceedings Vol. 1: London Agreement of August 8th, 1945 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project <https://avalon.law.yale.edu/imt/imtchart.asp> accessed 18 March 2021.

London Agreement of 8 August 1945 appeared to be a breakthrough, as it finalised the prosecution of the European Axis' major war criminals.[91] In retrospect, however, it provided an opportunity for Truman to make the Soviet Union aware that any continuation of brutality would now be classed as a matter for international prosecution. In this way, Truman's overbearing attitude towards the Soviets signifies how the pursuit of justice became distracted by the burden of conflicting political objectives.

On 22 November 1945, during a debate in the House of Commons, Labour MP John McGovern questioned the motive behind the Nuremberg Trials, 'May I ask, Mr. Speaker, if you have fully considered whether this court is really a judicial tribunal, or a political tribunal?'[92] McGovern's uncertainty attests to how, driven by competing post-war political objectives, the IMT cannot be considered as adhering to a cohesive ideal of justice, because the acrimonious debate between the Big Three had failed to settle many vital issues. The intervening months between Potsdam and the beginning of the trials (regardless of the collective decision made in the London Agreement) not only highlighted the conflicting political objectives at play, but also provided ample ground for grave disagreements on the motives behind the pursuit of justice and the exact prosecution of war criminals at Nuremberg.

The prelude to Nuremberg was convoluted and evidenced the 'miserable course of endless quarrels over the enforcement of the unenforceable and the justification of the unjust.'[93] Both the United States and the Soviet Union had very specific objectives in staging the Nuremberg trials, due to different understandings of justice and what they wanted it to achieve. Alongside domestic political considerations and increased divisions between the victorious Allied powers, the creation of a cohesive ideal of justice was difficult, and so prompted a position that held aspects of a theatrical 'Show Trial' — created to seemingly address divergent standpoints and allay mistrust. The competing Allied attitudes, although divergent, are indistinguishable in their mutual desire for the trials to serve national interests as opposed to some higher moral purpose. These interests filtered into the design of the proceedings at Nuremberg. Therefore, the practical complications and conception of due process that took place at the IMT have to be further examined to make an assessment of the extent to which the trials can be described as 'judicial theatre'.

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[91]Ibid.

[92]John McGovern, In *Allied Court, Nuremberg*, (Hansard, 1945) <https://hansard.parliament.uk/commons/1945-11-22/debates/4124a06a-6513-4e39-8e86-205787c267d6/AlliedCourtNuremberg(ReferencesByMembers)> accessed 19 March 2021.

[93]*The Economist*, 'Press on Potsdam', 1945 <https://www.nationalarchives.gov.uk/education/resources/cold-war-on-file/press-on-potsdam/> accessed 18 March 2021.

Chapter Three
The Practical Complication and Conception of Due Process at Nuremberg

In his personal record of the IMT, Airey Neave affirmed that American judge Francis Biddle and his colleagues remained 'determined to [...] ensure a fair trial for the defendants.'[94] However, each of the presiding nations had a different concept of what constitutes a fair trial. According to Michael Biddiss the 22 defendants 'had been selected largely to represent the major administrative groupings within the Third Reich.'[95] As the eventual victors, the Allies had the responsibility of codifying the basis on which they were going to try the guilty parties, which would directly entail creating a binding system of international law. This would necessarily be a symbolic piece of judicial theatre since the legal foundation of the IMT was built on shaky ground.[96] In fact, there were difficulties in establishing the basis for the prosecution and proving guilt beyond reasonable doubt. American legal scholar and prosecutor at the Nuremberg Trials Bernard Meltzer selects the various objections to the legal proceedings which he believed threatened to dismantle the 'great traditions of Anglo-American justice,' due to 'novelty and confusion' surrounding the construction of the trials.[97] The practical complications undoubtedly challenged the concept of due process, leading to the necessity of an ultimate compromise. For this reason, this chapter will discuss the practical challenges that the architects of the trials faced, as well as complications of the legal mechanics, in creating a cohesive ideal of justice.

According to Robert Jackson's advisor Quincy Wright, 'the major objection to the decisions and sentences of the IMT concerns the application and interpretation of the charge of conspiracy.'[98] This constituted the formulation and execution of a common plan to undertake aggressive war for the purpose of expansion, referred to as Count One of the indictment.[99] Count One illustrated the difficulty of ascertaining whom should be tried, since it stated the inclusion of 'all the defendants, with divers other persons, during a period of years preceding 8 May 1945, [who] participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit […] crimes against peace,

[94]Airey Neave, *Nuremberg*, (1st edn, London: Grafton Books, 1978) 268.
[95]Michael Biddiss in Michael Richard Foot and Ian Dear, *The Oxford Companion to The Second World War* (2nd edn, Oxford University Press 2001) 824.
[96]Professor Dr Wolfgang Benz, Bestrafung Der Schuldigen, *Bundeszentrale Für Politische Bildung*, 2005 'das juristische Fundament des ganzen Hauptkriegsverbrecherprozesses auf schwankendem Grund erbaut sei.'<https://www.bpb.de/geschichte/nationalsozialismus/dossier-nationalsozialismus/39603/bestrafung-der-schuldigen> accessed 20 March 2021.
[97]Bernard Meltzer, 'A Note on The Nuremberg Debate' (1947) University of Chicago Law Review 455.
[98]Quincy Wright, 'The Law of the Nuremberg Trial' (1947) American Journal of International Law 38, 43.
[99]Joseph Brunner, 'American Involvement in The War Crimes Trial Process' (2002) University of Michigan Journal of History 1.

war crimes, and crimes against humanity.'[100] A further practical complication is expressed by Dutch Professor of Criminal Law Lachezar Yanev, who asserts that 'it is still uncertain whether the construct of Count One was defined and applied strictly as an independent crime, and as such is inherently different from joint criminal enterprise (JCE), which is a mode of liability, or whether it was also used to impute responsibility for substantive crimes.'[101] In 1997 the United Nations International Residual Mechanism for Criminal Tribunals confirmed that the notion has three criteria, generally labelled as the 'basic' (JCE I), the 'systemic' (JCE II) and the 'extended' (JCE III).[102] Therefore in order to be indicted, the defendants needed to be guilty of all three of the requirements, which is possible in light of the sheer scale and institutionalisation of the atrocities. Indeed, at the Wannsee Conference 20 January 1942, high ranking Nazi officials gathered to discuss the implementation of the Final Solution to what they deemed to be the Jewish Question. 'Under proper guidance, in the course of the final solution the Jews are to be allocated for appropriate labour in the East.'[103] This was of course a euphemism for an extermination policy.

Count One assumes intentionalism, although such a view was not recognised at the time of the tribunal. British historian Ian Kershaw contended that both structure and intention are integral elements of the explanation behind the Third Reich and that they 'should only be considered in synthesis.'[104] As previously discussed in Chapter Two, it was convenient for the American foreign policy agenda to exonerate the majority of Germans and place the blame for the atrocities committed under the Third Reich on a restricted group of malevolent individuals. This particular element of the indictment was led by the American prosecution.[105] This concept of conspiracy was derived from the 1930s American federal justice system, and according to Michael Burleigh, 'the American legal team favoured the charge of criminal conspiracy, as they had done with stock exchange prosecution.'[106] Proof of supporting a conspiracy was sufficient to prosecute defendants for a whole series of crimes committed by others. Such a charge is contentious, not least because it exaggerated the coherence and structure of the Nazi Party's government before and during the war. The IMT 'explicitly declined to rely on joint criminal enterprise or anything similar in order to convict war crimes or crimes against

[100]Nuremberg Trial Proceedings Vol. 1 Indictment: Count One; October 6, 1945 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy <https://avalon.law.yale.edu/imt/count1.asp> accessed 2 April 2021.
[101]Lachezar Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy Vis-A`-Vis the Notion of Joint Criminal Enterprise' (2015) Criminal Law Forum 419, 420.
[102]Joint Criminal Enterprise, *United Nations International Residual Mechanism for Criminal Tribunals*, 2021 <https://cld.irmct.org/notions/show/488/joint-criminal-enterprise#> accessed 2 April 2021.
[103]The Wannsee Conference January 20, 1942, Holocaust Survivor Oral History Archive < http://holocaust.umd.umich.edu/news/uploads/WanseeProtocols.pdf> accessed 2 April 2021.
[104]Richard Bessel, 'Functionalists Vs. Intentionalists: The Debate Twenty Years on or Whatever Happened to Functionalism and Intentionalism?' (2003) German Studies Review 15.
[105]Michael Richard Foot and Ian Dear, *The Oxford Companion to The Second World War* (2nd edn, Oxford University Press 2001).
[106]Michael Burleigh, *Moral Combat: A History of World War II* (2nd edn, Harper Perennial 2011) 544.

humanity.'[107] The judges considered it necessary to find the defendants guilty or not guilty of each count separately, and although this made the convictions more sound, it presented a practical challenge of time and scope.

Count Two of the indictments followed directly on from the allegation of conspiracy. Crimes against peace was more challenging to prove than the previous count, not least because it relied on the flimsy deliberations of the League of Nations Resolution of 1921. It alleged that all the defendants participated in the 'planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.'[108] Articles I and II of the 1928 Kellogg-Briand Pact clearly 'condemn recourse to war for the solution of international controversies.'[109] Weimar Germany had freely and unconditionally accepted this. However, Soviet jurist Aron Naumovich Trainin stated that the 'Hitlerite government perfidiously broke it.'[110] Although it was signed by most nations, a breach of this declaration was not deemed criminal, and there were no consequences against the offending nation in international law.[111] To exacerbate this, Count Two was reliant on proof that Germany's foreign policy was criminal, and as Glueck asserts, while violation of the Kellogg-Briand Pact may be regarded as illegal, it cannot be considered criminal.[112] However, supporters of the legality of the trial undertook the task of proving that by 1939 a customary rule of international law had developed, making the initiation and waging of aggressive war not merely illegal but also a criminal act. Although this did not manifest properly, according to Austrian-American lawyer Leo Gross 'the criminality of aggressive war and of individual responsibility formed part of positive international law at the time of the German attack on Poland on September 1, 1939.'[113] In general, the prosecution regarded the Kellogg-Briand Pact to be absolutely fundamental to world order and thus, a linchpin in their case against the defendants. Indeed, Gross further asserted that Mr. Justice Jackson deemed aggressive and unjustifiable war 'a crime upon the basis of, and in reliance upon, the Kellogg- Briand Pact.'[114]

One of the main challenges presented through the Kellogg-Briand Pact was that it was created to govern the actions of sovereign states, not individuals. Moreover, selectively apportioning blame of crimes against peace to Germany caused some to postulate whether justice was done at the IMT because 'vanquished war criminals only were brought before the Tribunal and no

[107]Lachezar Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy Vis-A`-Vis the Notion of Joint Criminal Enterprise' (2015) Criminal Law Forum 419, 420.
[108]Nuremberg Trial Proceedings Vol. 1 Indictment: Count Two; October 6, 1945 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy < https://avalon.law.yale.edu/imt/count2.asp > accessed 2 April 2021.
[109]Kim Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (1st edn, Oxford University Press 2016) 33.
[110]Aron Naumovich Trainin, *Hitlerite Responsibility Under Criminal Law* (2nd edn, Hutchinson & Co Ltd 1948) 44.
[111]Leo Gross, 'The Criminality of Aggressive War' (1947) The American Political Science Review 205, 206.
[112]Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (1st edn, Alfred A. Knopf 1946) 21.
[113]Leo Gross, 'The Criminality of Aggressive War' (1947) The American Political Science Review 205, 206.
[114]Ibid. 208.

attempt was made to try alleged war criminals of the victorious nations.'[115] Indeed, as part of his defence Alfred Rosenberg, one of the most influential Nazi intellectuals and Reich Minister for the Occupied Eastern Territories (found guilty of all four counts of the indictments), questioned this: 'did you ever pay attention to the Russian Crimes against Christianity.'[116] The Soviets had, after all, cooperated with the Nazis under the Molotov-Ribbentrop non-aggression pact of 1939. Meltzer contended that there was Allied collusion in crimes against peace, therefore their authority was not legitimate. Rather, Count Two and the Nuremberg Trials as a whole demonstrate 'the power of the victors masquerading as law.'[117] However, it was bound to be this way — the trials were successful in cloaking the concept of victor's justice in judicial robes. As stated by Sir Hersch Lauterpacht, 'in the existing state of international law it is probably unavoidable that the right of punishing war criminals should be unilaterally assumed by the victor.'[118] The purpose of this performative justice was not merely vengeance on the leading Nazi figureheads, but it was for the longer term to lay down precedents and principles that might deter potential conflict.

Unlike Count Two that charged a political crime, the count of war crimes was far less contentious, although it did also present similar practical complications. The war crimes committed by Germany during the Second World War were considered by Lauterpacht to be 'so unprecedented in their pre-meditation and ruthless as to warrant a departure from accepted forms and principles of international law.'[119] The Geneva Convention of 1929 was supposed to remedy the lacunae in The Hague Conventions of 1899 and 1907. In its attempts to further codify conduct of war, Article Two stated that '[prisoners of war] must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited.'[120] The statement of offence for Count Three reads 'this plan involved, among other things, the practice of "total war" including methods of combat and of military occupation in direct conflict with the laws and customs of wars.'[121] This is significant in that Germany had been a signatory of the Geneva Convention, yet just over a decade later the Nazis had egregiously broken such principles. The Soviet Union, on the other hand, did not sign or ratify the Geneva Convention, which provided some of the defendants

[115]Ibid. 206.
[116] Gustav Mark Gilbert, *Nuremberg Diary* (1st edn, Eyre & Spottiswoode 1948) 24.
[117]Bernard Meltzer, 'A Note on The Nuremberg Debate' (1947) University of Chicago Law Review 455.
[118]Hersch Lauterpacht in Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (1st edn, Oxford University Press 2008) 14.
[119]Hersch Lauterpacht in Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (1st edn, Oxford University Press 2008) 16.
[120]Convention Between the United States of America and Other Powers, Relating to Prisoners of War; July 27, 1929 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy https://avalon.law.yale.edu/20th_century/geneva02.asp accessed 2 April 2021.
[121]Nuremberg Trial Proceedings Vol. 1 Indictment: Count Three; October 6, 1945 (Online, 2008), Yale Law School: Lillian Goldman Law Library, The Avalon Project: Documents in Law, History and Diplomacy < https://avalon.law.yale.edu/imt/count3.asp> accessed 20 February 2021.

with sufficient justification to have kept the Soviet Prisoners of War in abominable conditions.[122]

Although Polish historians Tadeusz Cyprian and Jerzy Sawicki state that 'the Tribunal was not bound by technical rules of evidence',[123] it was easier to achieve a guilty verdict on Count Three as there was substantial evidence for war crimes. Thus, superficially, due process could be achieved. Similarly, 'the German military penal code, as well as the respective judicature, demanded from the soldier that he should refuse to carry out an order which might clearly lead to the perpetration of a crime.'[124] This statement rendered *de jure* the general Nuremberg defence of acting under orders void. However, complexities arose within this segment of the indictment. The Allies were also guilty of wanton destruction of civilian targets, such as the British bombing campaign against Germany, and the execution of prisoners by the Soviets at Katyn Wood. However, not only were neither of these acts referred to, but as Burleigh states 'all Allies in advance agreed a list of subjects [...] that the defence was prohibited from raising in court.'[125] Lauterpacht claimed that 'the very effectiveness of the attempt to punish war crimes depends to a large extent on the preservation of the essential requirements of a fair and impartial judicial process.'[126] The failure to consider Allied war crimes clearly demonstrates a lack of impartiality and morality. In actuality, from 1943 the United Nations War Crimes Commission began compiling evidence and investigating possible suspects, and according to Burleigh 'that included 36,529 named suspects.'[127] This begs the ethical question of the selection of just 22 defendants to answer for the crimes of the Third Reich, despite the subsequent proceedings. In this way, although this performance was a necessity to demonstrate globally how future war crimes would be dealt with in an international court, the trials also pushed the narrative that the Western Allies wanted to portray: of the supremacy of liberal democracy.

The legal precedent already in existence for war crimes was insufficient for prosecution on Count Four. The main challenge established in Chapter One was that the corpus of international law as it stood in 1945 failed to provide a general template of how to prosecute Nazi war criminals. This was particularly evident with regard to crimes against humanity. The whole category of this count had to be codified by the Allied prosecution for the purposes of the trials. They were in uncharted territory. On 22 November 1945, at the outset of the IMT, Speaker of the House of Commons Douglas Clifton-Brown postulated that 'since the Allied Court now in session at Nuremberg is a tribunal of a totally unprecedented character, any ruling which I give

[122]Boyd Van Dijk, 'The Great Humanitarian: The Soviet Union, The International Committee of the Red Cross, and the Geneva Conventions Of 1949' (2019) Law and History Review 209.
[123]Taseusz Cyprian and Jerzy Sawicki, *Nuremberg In Retrospect: People and Issues of The Trial* (1st edn, Western Press Agency 1967) 37.
[124]Ibid. 37.
[125]Michael Burleigh, *Moral Combat: A History of World War II* (2nd edn, Harper Perennial 2011) 544.
[126]Hersch Lauterpacht in Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (1st edn, Oxford University Press 2008)15.
[127]Michael Burleigh, *Moral Combat: A History of World War II* (2nd edn, Harper Perennial 2011) 544.

as to its status, [...] cannot draw any support from precedent, but must in itself form a new precedent.'[128] The creation of this statute meant that such an offence only first entered positive international law in 1945. However, due to its serious nature, it was to supersede and overrule any previous local and national jurisdiction. The counsel for the defence urged the point that as there was no international penal law in existence which could have a commonly binding force, Count Four was retroactive.[129] In light of this, Western legal positivists have generally deemed the trials invalid. According to former American chief judge Charles Wyzanski, 'virtually every constitutional government has some prohibition of *ex post facto* legislation,' whether it be the Magna Carta or the United States Constitution.[130] This use of *ex post facto* legislation begs the question of why the imposition of retroactive law was deemed just for another nation. Wyzanski continued by stating that to allow for this type of legislation would in turn not only 'disparage the principle of constitutional limitation, but it abandons what is seen to be an essential value of democratic faith.'[131] Wyzanski's assessment seems apt when considering Cyprian and Sawicki's statement that the Nuremberg principles 'have undermined the fundamental laws of the United States… and that in these proceedings, we adopted the Soviet concepts of justice.'[132]

This Western legal positivist position, however, has been rejected by pragmatic natural law theorists, on the grounds that the trials were necessary to combat such unprecedented criminality.[133] Procedural retroactivity was also denied by the Tribunal by virtue of 'relying upon the precedent of the Hague Convention of 1907 respecting the Laws and Customs of War on Land.'[134] Sir Hartley Shawcross, chief British prosecutor, argued that 'there is no substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law, upon its actual perpetrators.'[135] It appeared as if the Western Allied powers were in agreement on this issue. Robert Jackson, who had helped draft the London Charter of the IMT and was to later become Chief U.S prosecutor at Nuremberg stated that 'unless we are prepared to abandon every principle of growth from

[128]Douglas Clifton Brown, In *Allied Court, Nuremberg*, Hansard, 1945 <https://hansard.parliament.uk/commons/1945-11-22/debates/4124a06a-6513-4e39-8e86-205787c267d6/AlliedCourtNuremberg(ReferencesByMembers)> accessed 2 April 2021.
[129]Tadeusz Cyprian and Jerzy Sawicki, *Nuremberg In Retrospect: People and Issues of The Trial* (1st edn, Western Press Agency 1967) 156.
[130]The Atlantic, *Nuremberg: A Fair Trial? A Dangerous Precedent*, 1946 <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/> accessed 2 April 2021.
[131]The Atlantic, *Nuremberg: A Fair Trial? A Dangerous Precedent*, 1946 <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/> accessed 2 April 2021.
[132]Tadeusz Cyprian and Jerzy Sawicki, *Nuremberg In Retrospect: People and Issues of The Trial* (1st edn, Western Press Agency 1967) 156.
[133]Robert Gellately, *The Nuremberg Interviews: Conversations with The Defendants and Witnesses Conducted by Leon Goldensohn* (2nd edn, Pimlico 2007) xxviii.
[134]Leo Gross, 'The Criminality of Aggressive War' (1947) The American Political Science Review 205, 206.
[135]Ibid.

international law, we cannot deny that our day had its right to institute customs.'[136] Count Four was inherently performative, as it was designed to send a message. By citing crimes against humanity, the prosecution demonstrated that the Nazis had deliberately employed unparalleled levels of brutality, including systematic persecution on racial and religious grounds.

The construction and application of due process at the IMT was ultimately a compromise between pragmatism and legal positivism. The prosecution had to appear to uphold a cohesive ideal of justice even if all four counts of the indictments had practical complications such as the ideas of victor's justice or *ex post facto* law. Although the trials might not appear to be cohesive in terms of jurisprudence, they were successful in achieving the objectives that the Allied powers wanted, in that justice would be seen to be done.

[136]Library of Congress, *Report of Robert. H Jackson United States Representative to The International Conference on Military Trials* (London: Division of Publications Office of Public Affairs, 1945) < https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf> accessed 2 April 2021.

Conclusion

The judicial, political, and philosophical challenges presented at Nuremberg were numerous. From a purely legal point of view, as demonstrated in Chapter One and Three, the proceedings that took place were incomplete and rather unsatisfactory. Not only was there limited previous juridical context, but the corpus of international law, as it stood in 1945, did not have the mechanisms to punish such atrocities. To make matters worse, the United States, United Kingdom and the Soviet Union had competing objectives and envisaged different concepts of justice — common law versus continental law, as shown in Chapter Two. Similarly, not all four counts of the indictments can be considered to uphold a cohesive ideal of justice, not least because the IMT directly compromised the defence by prohibiting the mention of any actions by the victorious powers and relied upon *ex post facto* law for prosecution.

As a political statement by the victorious powers however, the trials achieved their objective. The Western Allies wished to portray a particular narrative of the Nazi regime, which held that only some high-ranking miscreants were ultimately responsible, but this was not a fair representation of guilt —it merely allowed for selective prosecution. This selectivity was a pragmatic necessity given the impracticality of putting on trial all those who were complicit. The trials were needed to reinforce the values for which the war was ostensibly fought, and to demonstrate that there was a purpose behind the grievous losses the Allies suffered. In the words of Conor Cruise O'Brien: 'as theatre, it was simple and effective […] in that guilt was buried with the captives.'[137] The IMT was also an opportunity to publicly denounce Nazi policy and declare their atrocities outside of the law, even if to do so required codifying new international law. Such a purpose was inherently theatrical, as it was designed to convey a message to the wider world. Given brewing geopolitical tensions, this was the only plausible option for the Allied Powers.

As a result of all these underlying factors, creating a cohesive ideal of justice was almost impossible, although the trials did have a degree of utility. Ultimately, the trials were a pragmatic attempt to consign the atrocities to history. The trials were a success in that they set the groundwork for the creation of the International Criminal Court, and instituted crimes against humanity as a justiciable concept. The continuing relevance of the institutions and ideas established by the IMT points to its competency in creating the image of a cohesive ideal of justice, even if the functioning of international law remains limited by practical political concerns and narrow national interests. Although the architects might have failed to create this cohesive ideal of justice beyond any doubt, they managed to demonstrate to many that they had, and to this extent the trials achieved their goals despite the challenges. The objectives of

[137]Conor Cruise O'Brian, *The United Nations: Sacred Drama* (1st edn, Simon & Schuster 1968) 281-282 quoted in Best, The Stenton Lecture: *Nuremberg and After the Contenting History of War Crimes and Crimes Against Humanity*, 5.

the trials were achieved through a legal and political compromise that made them a necessary, and influential, piece of judicial theatre.

List of Appendices

Appendices

Appendix A

The Nuremberg IMT: Defendants, charges, verdicts, and sentences

This listing of defendants follows the order of the indictment. G = Guilty; NG = Not Guilty.

Defendant	*Count 1*	*Count 2*	*Count 3*	*Count 4*	*Sentence*
Hermann Göring	G	G	G	G	Hanging
Rudolf Hess	G	G	NG	NG	Life
Joachim von Ribbentrop	G	G	G	G	Hanging
Wilhelm Keitel	G	G	G	G	Hanging
Ernst Kaltenbrunner	NG	—	G	G	Hanging
Alfred Rosenberg	G	G	G	G	Hanging
Hans Frank	NG	—	G	G	Hanging
Wilhelm Frick	NG	G	G	G	Hanging
Julius Streicher	NG	—	—	G	Hanging
Walther Funk	NG	G	G	G	Life
Hjalmar Schacht	NG	NG	—	—	Acquitted
Karl Dönitz	NG	G	G	—	10 Years
Erich Raeder	G	G	G	—	Life
Baldur von Schirach	NG	—	—	G	20 Years
Fritz Sauckel	NG	NG	G	G	Hanging
Alfred Jodl	G	G	G	G	Hanging
Martin Bormann	NG	—	G	G	Hanging
Franz von Papen	NG	NG	—	—	Acquitted
Artur Seyss-Inquart	NG	G	G	G	Hanging
Albert Speer	NG	NG	G	G	20 Years
Konstantin von Neurath	G	G	G	G	15 Years
Hans Fritzsche	NG	—	NG	NG	Acquitted
TOTAL GUILTY	8	12	16	16	
TOTAL NOT GUILTY	14	4	2	2	

Source: Contributor.