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LIVE AND LET DIE: BRINGING PHYSICIAN-ASSISTED SUICIDE TO THE UK

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ABSTRACT As of February 2010, s. 2 of Suicide Act 1961 to assist or encourage one's suicide was amended. In relation to acts done prior to this date, such offences should be charged under the Criminal Attempts Act 1981. The current act stipulates that, for a prosecution to take place, the Full Code Test must be satisfied. This involves overcoming an evidential stage, and more critically, a public interest stage. A prosecution will usually take place unless public interest concerns outweigh it. Certain factors are outlined when making such an assessment, such as the voluntary nature of the suicide request, compassionate grounds for suicide, malicious motives by others who would gain from the suicide, pressure or encouragement to perform the deed, and prior attempts to do so. In light of this non-exhaustive list of factors which a prosecutor must analyse, the notions of patient autonomy and human rights remain. As each case must be considered on its own facts, the argument to legalise physician-assisted suicide remains just as strong before this legislative amendment. It is emphasised that no case is ever alike and each will be judged upon its individual facts. Nonetheless, where the level of deference to the medical profession is often fragile at times, doctors and nurses will benefit from an image of openness and credibility rather than suspicion. Although the current law does not resolve the inconsistency which plagued the legislation before it, it is argued that the guidance that the legislation gives will reduce the discretion courts have when deciding the fault of doctors in PAS cases. Moreover, the non-exhaustive list of concerns that the statute describes will help to ensure just results. Further steps to legalise euthanasia in the UK are required, however, and we must look to Parliament to meet this need.

1. Physician-Assisted Suicide and The Law

The recent moral and legal debate surrounding euthanasia and physician-assisted suicide must be considered in light of the social and philosophical backdrop of the latter half of the twentieth century, during which society became increasingly secularised. As a result, religious perspectives dominating discussions of life, death, and human reproduction were replaced by ideas that man was the master of his biological fate. Control over both our entry into life, through contraception and reproductive technologies, as well as our exit from life were now under our control. As the theocratic attitude of human life was discarded, liberal individualism dominated, and the rights-oriented public culture of North America became universally attractive. This led to the promotion of the concept of autonomy, meaning the individual was entitled to make all relevant choices over his personal life, rejecting the vision of others if necessary. The influence of this new outlook is predominant in approaches towards sexuality and reproduction, where a gradual retreat from the law in favour of individual, autonomous decision making has taken place. In the realm of medical law, the debate over what one is able to do with one's body arose, bringing in issues of consent and informed decisions to the forefront.

It is of no surprise that this emphasis on autonomy has entered the realm of decisions related to dying, where we should be given the same room for self-determination. By 1961, the implementation of the Suicide Act illustrated the removal of the law from the criminalisation of suicide, which laid the groundwork for the battle to legalise euthanasia and physician-assisted suicide. Both, however, must be considered in light of the criminal law of killing in general, as making assisted-death a special case risks destabilising the law of homicide. One must keep in mind that several factors must be considered in each individual case of physician-assisted suicide. Reasons for the legalisation of PAS will be submitted, including a critique of Oregon's Death with Dignity Act and reasons why it is the best model for the United Kingdom to adopt. Such an approach is ideal to maximise the autonomous choice and dignity of the dying, and follows logically from policies currently observed in the medical field.

Physician-assisted suicide is defined as making a means of suicide available to a patient who is otherwise physically capable and subsequently acts on his own. Voluntary euthanasia, on the other hand, is where the physician acts as the actual agent of death.¹ With PAS, the balance of power between doctor and patient is more equal, reducing the risk of coercion from doctors or others caring for the patient. The same cannot be said for euthanasia, where the doctor carries out the final act of death, increasing the risk of coercion or abuse. Hence, it is the legalisation of physician-assisted suicide that is argued for, and not voluntary euthanasia.

2. Arguments in Favor of Physician-Assisted Suicide

2.1 *The Prevalence of Physician-assisted Suicide*

The first argument put forth in support of physician-assisted suicide is simply that it occurs at any rate, so it should be legalised as regulating it will minimize abuse. In 1996, the BBC Scotland revealed that 12 per cent of 1,000 health professionals surveyed personally knew a clinician who had assisted suicide, with 4 per cent claiming they themselves had administered PAS. Although this may not demonstrate that PAS is common, these statistics do signify that PAS is currently occurring behind closed doors. As John Keown claims, "while

1 Michael Uhlmann, *Last Rights: Assisted Suicide and Euthanasia Debated* (1998) 327

the law ostensibly sets its face against PAS, it nevertheless winks at it.”²

From the distinction between murder and manslaughter in the realm of criminal law, it can be seen that intentional killing may be treated with relative leniency if the accused's circumstances trigger sufficient sympathy on the part of the jury, and is treated as a mitigating circumstance. In particular, voluntary manslaughter leads to recognition of a lower level of culpability in those who kill under provocation or in a state of diminished responsibility. Euthanasia would be treated as manslaughter where there is a finding of diminished responsibility, which is most prevalent in “domestic euthanasia” cases. This occurs where the accused is a close friend or family member of the victim.³ Such a finding is less likely, however, when a medical professional performs an act of euthanasia on a patient. By legalising physician-assisted suicide, we can eliminate this disparity, as well as rendering such discretion by the jury unnecessary. Maintaining this discretion introduces an element of subjectivity and uncertainty in the law. Moreover, it is not enough to state that a lesser offence is appropriate where our sympathy is evoked. The law has established criteria concerning establishing intention and it must be adhered to. Does this mean, though, that intent to end one's life must always be followed with a charge of murder? Prosecutors have little choice in the matter, as occurred in *R v Cox*⁴ where the accused injected potassium chloride into a patient suffering from extreme pain and whom he believed could not be helped by painkillers. Dr. Cox was convicted, although not sentenced. In the case of *R v Adams*⁵, Devlin J stated that “The doctor is entitled to relieve pain and suffering even if measures he takes may incidentally shorten life.”⁶ Although the reality of a successful prosecution for a doctor who has compassionately assisted a terminally ill patient to die is remote, the risk of an expensive and publicised litigation process is a deterrent for most physicians, helping keep the practice concealed for those who participate. It will further be discussed that if the hastening of death has become legal, the act of immediate physician-assisted suicide should be as well. These cases simply illustrate that PAS does take place regardless of what laws are in place, and we should legalise it in order to regulate it sufficiently.

2.2 Maintaining Patient Autonomy

One of the most compelling reasons put forth to legalise physician-assisted suicide is that the autonomy and self-determination of the patient must be respected in end-of-life decisions. Humans should have the right to die and how they want to so long as they are competent and their intent is clear. Behind this lies the idea that humans are independent biological entities with the right to carry out decisions about themselves. This is related to the idea of human dignity, described as “a descriptive and value laden quality encompassing self-determination and the ability to make autonomous choices, and implies a quality of life consistent with the ability to exercise self-determined choices.”⁷ These reflect a central theme in modern medical practice, suggesting that all patients have the right to exercise self-determination in respect of their medical care. The law of consent further gives legal expression to individual autonomy, allowing a competent adult absolute sovereignty to withhold consent even if death may result.⁸ Respect for an individual's autonomously made decision endures even after he or she loses the mental capacity to participate in decision-making. This right, however, does not

2 John Keown, *The Law and Practice of Euthanasia in the Netherlands* (1992) 52

3 Alexander Smith, *Euthanasia: The Strengths of the Middle Ground*, (1999) 198

4 [1992] 12 BMLR 38

5 [1957] Crim LR 365

6 Devlin P., *Easing the Passing: The Trial of Dr. John Bodk in Adams* (1985) 82

7 H Biggs, *Euthanasia, Death with Dignity and the Law* (2002) 26

8 *ibid*, 44

extend to requesting that a physician assist a patient to die by performing an act that defies professional ethics or could lead to a criminal prosecution. Ian Kennedy and Andrew Grubb argue that a rational clinical judgment cannot be overridden by the law⁹; previous case law supports this view that respecting a patient's autonomy does not entitle patients to demand treatments not clinically necessary.

Circumstances will arise, however, where doctors feel an ethical compulsion to comply with a patient's request to die. Arguably, Dr. Nigel Cox felt such an obligation when he succumbed to his patient Lillian Boyes' repeated requests to be relieved of her pain by hastening her death. Although the doctor's legal and ethical duty is to act in his patient's best interests, this concept questions what exactly that includes. The patient, and his or her relatives, may feel that the immediate ending of suffering through assisted death may represent his or her best interests. Conflicts are most likely to arise where the clinician believes the patient's best interests are to continue treatment, whereas the patient and his family disagree. These problems are intensified when the patient cannot speak for himself. The views of the patient's family are of paramount importance, yet cannot be decisive. In this case, the dilemma ultimately lies in balancing respect for the family's wishes with proper legal and ethical standards of care. Research shows that feared loss of dignity is the most frequently cited reason people seek an earlier death.¹⁰ As Hazel Biggs maintains, the concept of dignity is vital in practice and established in modern bioethics. It is not, however, a concept that is presently recognized by the law. When considering whether PAS can provide a dignified death, one must consider the patient's circumstances, the position the doctor is in, and the wider implications for society as a whole. Previous case law illustrates that active euthanasia exposes medical professionals to the indignity of criminal prosecution, whereas passive euthanasia, through non-treatment, can preserve the dignity of the doctor yet at the expense of the patient's dignity. It is submitted that such a fragile balancing act is avoided with the legalisation of physician-assisted suicide. Compromises are often required to maximise the right of the individual to choice and bodily integrity, and the present legal position in the United Kingdom fails to offer either the doctor, patient, or his or her family the protection to which they are entitled, ultimately leading to a loss of dignity for all.

2.3 PAS as a Human Right

The cases of *Pretty v United Kingdom*¹¹ and *R (Purdy) v DPP*¹² involved human rights appeals to the European Court of Human Rights and House of Lords respectively in regards of Articles 2, 3, 8, 9, and 14 of the European Convention of Human Rights. These correspond to the rights to life, the prohibition of torture and degrading treatment, to respect for private and family life, to freedom of thought and to protection from discrimination. The following discussion will relate to those rights given the most consideration, namely Articles 2, 3, and 8.

2.3.1 Articles 2 and 3

Article 2 of the Convention protects a person's "right to life", which is held to be absolute and requires a positive obligation on the part of the State to protect it. Both the domestic courts and the ECHR in Strasbourg refused to read into this a "right to die." In *Pretty*, the European Court held:

[Article 2] is unconcerned with issues to do with the quality of living

9 Carl Schneider, *Law at the End of Life* (2000), 103

10 Keown (n 2) 58

11 [2002] 35 EHRR 1

12 [2009] UKHL 45

or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.¹³

This narrow interpretation of Article 2 must be viewed in light of the intentions and circumstances behind the drafting of the Convention which occurred in the aftermath of the Second World War. The focus was not upon issues such as euthanasia and physician-assisted suicide. The Convention's scope, however, has broadened since its inception. The Strasbourg court claimed in *Pretty* that "the very essence of the Convention is respect for human dignity and human freedom."¹⁴ The right to life, however, conflicts with the sanctity of life doctrine. Professor of Philosophy Anthony Grayling claims that religious lobbyists believe prolonged suffering is acceptable because a supposedly "merciful deity is in charge – as if the sanctity of life embraced the sanctity of pain, suffocation, and the indignities of soiling oneself incontinently."¹⁵ This intimate link between the right to die and the right to be free from inhumane and degrading treatment suggests that the latter is subordinate, and can be contravened in pursuit of the former.

Several respond to the religious objection to euthanasia by claiming that as God's creatures, our responsibilities over the end of life in the face of modern technology is not eliminated. We are partners with God when it comes to the processes of the beginning and end of human life. As regards the argument that euthanasia and PAS trespass with nature, theologian Harry Kuitert responds that this is not the moral problem to which objections to euthanasia can rest. Nature, he contends, is sometimes a friend and sometimes a foe. We intervene at times, such as executing abortions upon a mother's request. The natural process of birth cannot be stopped, but it can be softened with the use of medical technology. The same can be said for the dying process.

2.3.2 Article 8

Article 8, which is the right to respect for private and family life, has been interpreted broadly by the courts and notably when respecting an individual's autonomy. The right acknowledges that social conditions help to form one's identity and personality, developing the potential for autonomy.¹⁶ In relation to PAS, a divergence exists between the House of Lords and the European Court of Human Rights. In *Pretty*, Lord Bingham declared that nothing in Article 8 suggests that one has the choice to end his life, as it only applies while individuals are living their lives. Lord Hope took the opposite view, contending that the right applies to the way a person lives, which involves the way one chooses to pass the closing moments of one's life. This view was endorsed by the Strasbourg court, who noted that in an era of longer life expectancies due to advanced medical technology, several people believe they should not be forced to linger on in old age or when suffering an illness which conflict

13 *Pretty* (n 11) 1

14 *ibid*, 43

15 A. C. Grayling, *Ideas that Matter* (2009) 134

16 Jill Marshall, 'A Right to Personal Autonomy at the European Court of Human Rights' [2008] EHRLR 336

with strongly held ideas of personal identity. Although such an approach by the court is admirable, it is submitted that such reasoning leaves the potential for abuse of PAS wide open. For instance, PAS and euthanasia should not be considered an option for those in old age, or for those who wish to terminate their life for a reason other than unbearable physical pain and suffering resulting from a terminal illness. This concern is curtailed, however, by the application of Article 8(2), which leaves a wide “margin of appreciation” available to the member state when accommodating the demands of the Convention. Baroness Hale claims it is this provision that justifies a society insisting we value someone’s life, even if they do not.

2.4 The Doctrine of Double Effect

Devlin J’s statement in *Adams* that physicians are entitled to hasten death by relieving pain and suffering has been approved in *Cox and Airedale NHS Trust v Bland*¹⁷, where Lord Goff discussed his “established rule” that a doctor may lawfully administer painkilling drugs despite the fact he knows they will abbreviate the patient’s life.¹⁸ As it will be in the patient’s best interests, this practice, referred to as the doctrine of double effect, will be lawful. Such flexibility is required in this field, as has already been observed with the distinction between active killing and letting die. There is no valid moral objection to the hastening of death through non-treatment; to imply that life must be sustained at all costs is absurd.¹⁹ Judges have explained that limits do exist in patient treatment that are set by the patient’s best interests and a proportionately assessment. Painkillers are acceptable as long as their dosage does not bring about rapid death. In *Bland*, the House of Lords justified their decision by using the best interests test, inadvertently stating that refraining from treatment does not compromise the sanctity of life.

It is submitted that the medical field should not continue to make the distinction between “killing” and “letting die” because, as previous case-law has indicated, the moral distinction between the two is disputable, and the paramount consideration in all cases fall to the question of the patient’s best interests. As Lord Browne-Wilkinson acknowledges in *Bland*, the act/omission distinction appears irrational and has no moral basis. The courts use the distinction to avoid holding doctors liable. Health professionals are simply carrying out their medical duty to alleviate pain and suffering. The criminal law makes the distinction between act and omission because it appreciates that moral obligations have natural limits; it identifies that to equate act and omission liability would impose an unreasonable burden on the public. Although such a distinction may serve useful in other areas of the law, it holds no ground in the medical field. By allowing those whose lives are being brought to an end by an illness to withhold treatment and accelerate the dying process, we are not detracting from the moral force of the law on homicide. The legal prohibition on killing is preserved; however, lives can be ended by omission. The courts have been adept at using this separation, as well as the defence of necessity and the best interests test, to reduce liability for doctors. These practices would become unnecessary with the legalisation of physician-assisted suicide, where all the parties involved can follow a strict set of guidelines to know when PAS is appropriate and how it should be carried out legally. It is submitted that failing to take this step signifies a failure to carry matters to a logical conclusion: if the refusal of treatment which hastens death is seen as the right thing to do, then assisting those who seek their own death in certain circumstances should be as well. Such a system would correspond with the vision of philosophers such as Bernard Williams and Owen Flanagan, who indicate that any system

17 [1993] AC 789 (HL)

18 *Airedale NHS Trust v Bland* [1993] All E.R. 821

19 Smith (n 3) 200

of morality must include room to pursue our reasonable personal projects as well as being psychologically realistic.²⁰

2.4.1 Defence of Necessity

Under the principle of double effect, administering medication necessary to relieve a patient's pain is justified even if such administration hastens the patient's death. It relies on the ethical distinction between "intention" and "foresight". In the medical context, this refers to the distinction between administering morphine to alleviate pain, foreseeing that death will be hastened, and injecting potassium chloride with the purpose of ending the patient's life. This distinction has been reaffirmed by the U.S. Supreme Court, the World Medical Association, and the House of Lords Select Committee on Medical Ethics (1994)²¹. For Professor of Law and Criminology at Aberystwyth University Glenys Williams, such a distinction is unpalatable; instead, the courts should allow an exception to the law of murder for doctors on the basis of double effect.²² This falls hand-in-hand with the defence of necessity, which has been used in the medical law context before in the case of *Re A (Children) (Conjoined twins)*²³ to alleviate the doctors involved of any criminal liability. Williams' issue with the current position is that, in the medical context of doctors who foresee a patient's death as virtually certain, the courts implement a narrow definition of intention. This results in a contradiction with criminal law, where Law Lords conflated the concepts of foresight and intention.²⁴ In other words, doctors who assist in a patient's suicide are liable for murder according to the current state of the law. As such, creating an exception for doctors in this regard should be put in place. Although we can claim that doctors who administer life-ending treatment are responsible for the consequences of their actions, it cannot follow that they are blameworthy. There is an obvious moral difference between aiming to kill the patient's pain and aiming to kill the patient which should be reflected by the law. Although it can be argued that such an approach would allow for doctors with malevolent motives to escape criminal liability, it will be addressed below how such concerns are unwarranted. It is submitted, however, that the law should take the step to legalise PAS as this removes the need to create a defence by the courts which may be applied inconsistently, eliminating any uncertainty in this area of the law. If there is support to offer the defence of necessity to physicians, or even to create an exception to murder for doctors, one can argue that legalising PAS is simply more efficient.

2.5 The Distribution of Scarce Resources

Physician-assisted suicide may be justified by the promotion of the fair distribution of scarce health resources. To illustrate, imagine the situation of a patient in a permanent vegetative state who is permanently unconscious but may be kept alive by receiving proper nutrition and hydration. Withholding life-prolonging treatment (LPT) has the moral advantage of releasing scarce resources for those who may benefit, an advantage in distributive justice. LPTs are not what the patient needs, but rather comfort care to meet their needs as they approach death. This is why hospice care rarely provides LPTs, as they do not avert the pain of a medical condition.²⁵ Although vitalists who believe in life for life's sake may claim

20 Bernard Williams, *Moral Luck: Philosophical Papers* (1981) 93

21 Marshall (n 12) 338

22 Glenys Williams, *Intention and Causation in Medical Non-killing* (2007) 185

23 [2001] 2 WLR 480

24 *R v Woollin* [1998] 4 All ER 103

25 Raanan Gillon, *Intending or Permitting Death in Order to Conserve Resources* (1996) 204

that staying alive for as long as possible is beneficial, devoting the community's medical resources for this purpose is senseless. If such care cost very little to maintain, then respect for the patient's autonomy may justify its provision. To those who argue that while there is life, hope remains, it is contended that such hope is simply too low to justify allocating expensive and scarce medical health-care resources to preserve life. Ultimately, electors in a democratic system are the ones who decide how much to contribute to healthcare and how such a contribution should be distributed. Indirectly, autonomy for those who provide health care resources must be respected; a moral factor that can override the provision of LPTs for those who need them.

It is stressed that a request for PAS must be made by the free will of the patient after careful consideration. They should not be coerced in any fashion by health care workers who wish to use resources elsewhere, presumably for those with a higher likelihood of recovery. It is simply a fact that, by allowing those who do wish to end their own life to do so, resources will inevitably be available sooner to be used for the care of other patients.

3 The Slippery Slope

One of the strongest arguments against legalising PAS is that, by doing so, some acts of mercy killing would inevitably allow doctors with less benevolent motives to end patients' lives, allowing for involuntary euthanasia to take place.²⁶ It is necessary to examine a number of viewpoints on the dangers of falling down this slippery slope. Advocates of this position propose that it would be near impossible to provide adequate safeguards to prevent malicious doctors from taking such decisions into their own hands. Although such a stance is not without its merits, it is submitted that sufficient regulations can be put into place to counteract any morally unacceptable methods of ending patients' lives.

John Keown asserts that the Dutch are sliding down the slippery slope, that PAS cannot be distinguished from death intentionally caused by abstinence or pain relief, and that the prevalence of medical behaviour that deliberately shortens life is higher than reported in the Netherlands. Discrepancy in reporting may exist, however, in geographical differences reflecting different philosophies. Due to the cosmopolitan and secular nature of Amsterdam, a high degree of reporting may occur, as compared to the southern part of the country where a large Catholic population may contribute to under-reporting.²⁷ This begs the question of the physician's true motives and whether or not the patient explicitly requested death. If so, the Dutch position confirms the fear of the slippery slope from legalisation of euthanasia to non-voluntary termination of life. To confirm this, Keown must show that the total amount of non-voluntary termination of life has increased after euthanasia became legal, and subsequently demonstrate that a causal relationship exists between the legalisation and increased frequency of non-voluntary termination of life. An international comparison showing that such an increase does not occur in other jurisdictions that have not legalised euthanasia would be necessary. This, however, has not been possible; Keown's fear of a slippery slope is unsupported by evidence. Dan W. Brock has even stated that several good consequences have resulted from the ODDA, including improvements in end-of-life care and several averted suicides or homicides.²⁸ Nevertheless, such a fear is warranted. Trials have existed where health care workers were charged and sentenced with ignoring guidelines of prudent clinical judgment. Several opponents of the Dutch euthanasia policy use this as evidence that the liberalisation

26 Keown (n 2) 56

27 *ibid*, 58

28 Hastings Centre Report, Voluntary Active Euthanasia (1992) 10

of euthanasia can run out of control. As Harry Kuitert observes, however, this should be taken as evidence that it is not easy to deceive laws and regulations; in fact, it serves to show that appropriate safeguards do work to regulate PAS practices.²⁹ This is why the Oregon model, specifically with its requirement that two separate physicians observe the patient to form their independent assessments, is better suited as a model the United Kingdom should follow when implementing legislation to legalise physician-assisted suicide. It is also submitted that a mandatory psychological assessment be carried out with the patient to further ensure that the decision for death is ultimately the patient's and not the doctor's. After examining different accounts of the slippery slope, Emily Jackson's viewpoint that a blanket ban on the practice is unrealistic prevails. A ban ignores the reality that patients do have genuine reasons to request PAS and do deserve a dignified death; implementing safeguards which can ensure that access to PAS is only given to those whose conditions "lie at the top of the moral slope"³⁰ is the most appropriate way forward for the law in the United Kingdom.

An objection arises that permitting PAS will lead to physicians and society becoming inured to the act. If it were to become legal, a moral block that emphasises respect for human life would no longer exist. Such a fear, however, is misplaced. Research indicates that people believe euthanasia is a moral activity, especially in a technological and estranged society.³¹ Further, very few of the dying request death; only 6 per cent of dying cancer patients in the Netherlands do so.³² Many are attempts for assurance that their suffering will be ameliorated should it become intolerable. In a study by Gerrit van der Wal, it was found that doctors are not accustomed to speaking with patients about their end-of-life decision-making.³³ He proposes that if doctors and patients were to assume a greater responsibility in formulating advance directives, several deaths without request could be eliminated. This shines light on Oregon's Death with Dignity Act, where safeguards such as mandatory consultation with a second physician are put in place. Further, guidelines maintain that a psychologist should be utilized, especially because doctors are not always adept at knowing when a patient suffers from depression, which can be treated. The absence of guidelines as well as a monitoring system in the Dutch position fails to address the medical reality of doctors who assist in patients' suicides. The move by legislature from a position of less control to more control is actually an attempt to minimise the opportunity of a slippery slope. However, it remains farfetched to claim that accepting euthanasia leads to a break-down in respect for human life. Although abuses may occur in individual cases, this is not a logical inevitability. It will be each society's obligation, however, to ensure that the exception to the sanction against the taking of another's life occurs only within criteria agreeable to that community.

4. Safeguards of the Oregon Death with Dignity Act

In the early 1990s, proposals to decriminalize physician-assisted suicide were defeated by voters in Washington and California. In 1994, however, the State of Oregon approved the Oregon Death with Dignity Act (ODDA) by a narrow margin of 51% to 49%.³⁴ Surviving judicial challenges and a repeal effort, it became effective in 1998, making Oregon the first State to legalise PAS. Doctors were now able to prescribe life-ending treatment when requested to by terminally ill patients. The Act provides:

29 Keown (n 2) 64

30 Emily Jackson, *Medical Law: Text, Cases, and Materials* (2006) 959

31 T. Quill, M. Battin, *Physician-Assisted Dying: The Case for Patient Choice* (2004) 178

32 John Griffiths, Heleen Weyers, Maurice Adams, *Euthanasia and Law in Europe* (2009) 64

33 Gillon (n 25) 204

34 Oregon Department of Human Services, *Tenth Annual Report on Oregon's Death with Dignity Act*, (2007)

“An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner.”³⁵

It is necessary to compare this Act with those of other jurisdictions with a similar stance on euthanasia and physician-assisted suicide. Oregon's position is limited as it only allows for the latter. The Dutch Act, in contrast, allows for both PAS and active voluntary euthanasia, the latter being quite prevalent. These differences are what most likely account for the statistical disparities observed: in 2007, 85 prescriptions for lethal medication were written under the ODDA³⁶, with only 46 actually being administered. In the Netherlands, 1815 cases were reported in 2003.³⁷ Although the ODDA has been in place for over 10 years, its restrictiveness is illustrated by the fairly small number of prescriptions issued annually.

The Death with Dignity Act stipulates that the patient must be suffering from a terminal illness in the expert opinion of both the attending and a consulting physician. Such an illness is defined as one where death should naturally occur within 6 months. Neither the Dutch nor Belgium position utilises the same high threshold, leaving it open for non-terminal patients to seek PAS or voluntary active euthanasia. As aforementioned, unbearable suffering is the only requirement necessary, and this does not require a terminal or even somatic illness.³⁸ The Dutch policy takes this a step further by requiring a lack of prospect of improvement of the patient's condition. The ODDA takes a more precise stance than the Netherlands' position. More specifically, physicians in Oregon can only participate in assisting suicide when a request has been made by a competent adult over the age of 18.³⁹ To ensure the patient is fully informed, the doctor must notify them of their medical diagnosis, their prognosis, the potential risks associated with taking medication, the probable result of taking the medication, and any practicable alternatives. Although it is not compulsive for a third medical opinion to be sought when dealing with a patient's request, Section 3.03 does require that a psychologist should be called upon where the patient is suffering from a psychological or psychiatric disorder causing impaired judgment. It is submitted, however, that this requirement should be necessary. Talking to a psychologist may enable them to feel better about their position and understand possible alternatives in regards to palliative care, and they may change their mind about the suicide. This safeguard ensures the patient is sure about his or her decision whilst also assisting in protecting against a fall down the slippery slope.

Additional safeguards are found in Section 3.08, specifying that no less than 15 days shall elapse between the patient's initial request and the writing of a medical prescription and that no less than 48 hours shall elapse between the patient's written request and the writing of a medical prescription.⁴⁰ These safeguards, which are absent from other jurisdictions, further provide insurance that no rash or misinformed requests to die are validated. Again, these regulations should be implemented in the UK as further assurance against ill-advised demands for PAS and as protection against the slippery slope. Finally, the request for suicide

35 The Death with Dignity Act 1998, s. 2.01

36 Christine O'Brien, Gerald Madek, Gerald Ferrera, Oregon's Guidelines for Physician Assisted Suicide, 5

37 Francis Pakes, [2005] 'The legalisation of euthanasia and assisted suicide: A tale of two scenarios' *International Journal of the Sociology of Law* 71, 75

38 John Griffiths, "Assisted Suicide in the Netherlands: The Chabot Case" (1995) 58 *Medical Law Review*, 232

39 Death with Dignity Act 1998, s. 1.01

40 *ibid* s. 3(1)

needs to be in writing and signed in the presence of two witnesses, one of whom cannot be related to the patient, be a benefactor in his or her will or stand to benefit by law.⁴¹ The ODDA does not allow for any deviation as the Act specifies exactly the form of the written request required. As Dr. Francis Pakes submits, it is the ODDA's restrictiveness that allows it to combat the fears of the slippery slope adequately.⁴²

In addition to these regulations, the *Task Force to Improve the Care of Terminally Ill Oregonians* published a guidebook for health care professionals designed "to promote excellent care of the dying and to address the ethical and clinical issues posed by the enactment of the Act."⁴³ In contrast with the Act, these guidelines are extremely broad in their scope and deal with more issues than simply the request for physician-assisted suicide, including open communication with the dying, universal access to hospice care, comfort care, and respect for different views of suffering and death.⁴⁴ The doctor is responsible for ensuring the patient's request is genuine; a thorough analysis of discussions with the patient is necessary to determine, for instance, whether financial motives are behind their request. On occasion, elderly patients who are dependent on a son or daughter for costly medical care may wish to end their life to reduce this financial burden on their child. Research has indicated, however, that the patients that have requested PAS in Oregon are, on average, younger than most terminally ill patients.⁴⁵ They do not request PAS due to lack of access to medical care and social support mechanisms, or from any sense of being a financial or emotional burden.⁴⁶

Further evidence also reveals that an overwhelmingly majority of patients who seek PAS are middle class, well educated, and have health insurance access. In fact, one study concluded that 92 per cent of the patients seeking PAS were already enrolled in hospice care.⁴⁷ Furthermore, the quality of palliative care has actually improved in Oregon since the ODDA came into force.⁴⁸ In a study of those eligible to prescribe drugs under the Act, a 30 per cent increase was seen in referrals to hospice care.⁴⁹

One central recommendation of Oregon's guidelines is to ensure that hospital care is available to all terminally ill Oregonians, even the uninsured. Physicians have an ethical obligation to secure comfort for their patients.⁵⁰ From this, we can infer that comfort care should be the normal course for all terminally ill patients, and that assisted suicide will in turn be a rare request. Furthermore, the guidelines stress that it is the patient who is the ultimate decision-maker regarding his or her health. The patient has the right to receive information about his alternatives to come to an informed decision; social and counselling services should be made available to help the patient with this decision. Again we observe the importance of full and open discussion with the patient, respecting the values of autonomy and self-determination when reaching a decision.

It is proposed that the crucial distinguishing feature that can help eliminate many of the problems observed in the Dutch and Belgian models is a mandatory consultation between a psychologist and patient. Chapter 7 of the Oregon guidebook suggests a consulting physician from outside the practice of the attending physician be brought in as well as having a clinical psychologist brought in to determine if the patient suffers from any mental

41 *ibid* s. 3(2)

42 Pakes (n 37) 67

43 Task Force to Improve the Care of Terminally Ill Oregonians Guidebook, at s. 3

44 *ibid*, 5

45 Jackson (n 30) 917

46 L.L. Miller et al, Attitudes and Experiences of Oregon Hospice Nurses and Social Workers Regarding Assisted Suicide (2004) 685

47 E Dahl and N Levy, The Case for Physician Assisted Suicide: How Can it Possibly be Proven? (2006) 335

48 *ibid*, 336

49 Linda Ganzini et al., Oregon Physician Attitudes About and Experiences with End of Life Care (2001) 2363

50 Gillon (n 25) 206

health problems. This is because most attending doctors do not have the requisite expertise to spot such conditions.⁵¹ Although one study indicated that 69 per cent of physicians attempted to improve their familiarity of psychiatric disorders⁵², it is held that a qualified clinical psychologist should be employed. Treating depression, for instance, can remove the desire for suicide. As Christine O'Brien, Gerald Madek, and Gerald Ferrera contend, several patients will be found incompetent to make the decision for PAS after a consultation with a psychologist. This will eliminate those who would ultimately die if being cared for in another jurisdiction, once again illustrating the efficiency of Oregon's legal stance on PAS.

The guidelines place a significant responsibility on the attending physician; not only is he responsible for the logistics of PAS, but also the follow-up of the patient's death. Despite the voluntary nature of these guidelines, failing to adhere to them can give rise to liability and a subsequent finding of negligent practice on the part of the doctor. As a result, it is submitted these guidelines, briefly spelled out in eight pages, are a critical safeguard taken in conjunction with the Death with Dignity Act.

5. Criticisms of the Death with Dignity Act

Oregon's Death with Dignity Act is not without its critics. John Keown submits that the Act is extremely ambiguous and vague in certain respects, which can in turn lead to involuntary euthanasia.⁵³ Specifically, the manner in which the Act classifies notions such as how much suffering is required before a patient can request PAS, and who should be qualified to administer it, are considered. A number of these critiques are evaluated and it will be demonstrated that such concerns are pessimistic in their scope and hence unwarranted.

Keown asserts that the ODDA is vague when defining an Oregon resident, as anyone who flies into the state with a view to seek a lethal medical prescription may theoretically do so. Such a concern is easily alleviated, however, if the common sense notion of a resident is used as someone whose primary home is Oregon and who intends to remain there.⁵⁴ He further claims that the manner in which the ODDA defines the consulting physician as "Anyone who is qualified by specialty or experience to make a professional diagnosis and prognosis regarding the patient's disease", allows for any doctor to be qualified. With medical breakthroughs increasing, it is not conceivable for every doctor to be up to speed with technological advancements for certain conditions. It is asserted that for the United Kingdom to legalise PAS, a stricter definition of who is qualified to perform such a procedure be used. This would mean that a doctor specialising in the patient's condition must be the attending physician. For instance, a patient suffering from leukaemia would require an oncologist. Establishing this as a legal rule will help to ensure that the patient is fully aware of his or her alternatives to PAS enabling an informed decision to be made, as the most knowledgeable source will be the attending physician. The guidelines advocated by the Task Force strongly suggest that an independent psychologist or psychiatrist be brought in to make a determination as to the competency of the patient. This only helps the situation moderately though, as a psychologist may not be well-informed in respect of *medical* alternatives available for treating the patient.

Furthermore, Keown criticizes that the Act is unclear when defining "terminal disease." Such a critique is substantiated: does the term refer to a disease which causes death within six months with or without treatment? If the latter interpretation is understood, a patient with diabetes who is simply depressed can fall within such a distinction. It is contended that,

51 Ganzini (n 49) 2365

52 *ibid*, 2364

53 John Keown, *Euthanasia, Ethics and Public Policy*, 171

54 O'Brien, et al. (n 36) 10

by once again utilising a reasonable interpretation of the statute, the act refers to terminal diseases which cause death within six months with treatment. A prudent physician would not consider any condition that is treatable for several years as warranting PAS. If treated effectively, for instance, a diabetic patient will live a healthy and active life for years to come.

One notable difference in Oregon's legislation when compared to Belgium and the Netherlands statutes is that the patient need not be "suffering unbearably" for PAS to be administered. In fact, the ODDA does not stipulate that the patient even be suffering at all. One must question, however, if such a requirement is even necessary, as anyone who experiences a terminal illness can be considered to be suffering either mentally or physically. Take the example of an Olympic gold medallist who has lost all mobility in his legs due to an auto accident. Although he may not be suffering any physical pain, the mental anguish and emotional distress which can follow such a tragedy entitles him to PAS under the Oregon definition. It is contended that the UK adopt a stricter test, one of "unbearable physical suffering" in the opinion of health professionals, as this can be regulated objectively. Together with the requirement of a terminal illness that shall cause death within 6 months, such safeguards will reduce the possibility of abuse entering the system.

Finally, the ODDA allows for a patient experiencing depression to be given a lethal prescription provided he or she does not suffer from "impaired judgment." It is submitted, however, that anyone suffering from a terminal illness would understandably have their judgment distorted, especially at the thought of impending death. By nature of its illness, all patients can be rendered incompetent by virtue of "impaired judgment." The causal factor behind depression should be examined; if it is found that one is simply reacting to the anticipation of death, then he or she should not be found incompetent. Once again, the value of an independent psychologist attending to the patient is observed. As aforementioned, Chapter 7 of the Oregon guidebook suggests that the consulting physician and psychologist be brought in from another practice, eliminating the possibility of any conflict of interest.

6. The Way Forward for the United Kingdom

There is an argument that the courts should be excluded from the euthanasia debate completely. The question is a moral one that is best addressed by legislators, not judges. The United Kingdom position on abortion, for instance, has been decided by Parliament. The issue cannot be isolated from the broader law on homicide though, which inevitably makes the debate a legal one. No matter how strict the regulations that are put in place may be, the opportunity for abuse will always exist. The discussions regarding medical treatment are made in the privacy of the doctor-patient relationship. If we base a statute on the premise that the criterion hands on the issue of doctor self-regulation, then the Oregon statute, regardless of its safeguards, will fall short of protecting patients. It remains, however, the best model yet, especially if it were to add a mandatory consultation with an independent psychologist to ensure outside pressures have no role, that no impaired judgment exists, and that the patient is fully informed and competent to make the decision to terminate his or her own life.

The present system of case review is thought by some to be a formality, with some concerned that judicial review is in danger of become routine, with no real possibility to analyze the details of an individual case. Others, however, support judicial review because of the uniqueness of PAS. They support checks and balances being put in place. Many physicians feel state intrusion in a particularly personal and family event is inappropriate, overstepping the boundaries between public and private morality. They maintain that a doctor's duty is not only to heal, but also to help others die with dignity, a purely private act between a doctor

and his patient. In spite of this, there are ample reasons that reporting is a practice to be maintained. Socially, where the lack of trust between the public and the profession is fragile, the medical profession is well-served to have an image of openness and credibility than one of suspicion and distrust. Further, the grieving process for families involved is enhanced where reporting does occur, where sorrow can be discussed openly.

The act of choosing one's death is purely a private matter; however, public ramifications come with the territory. Although the rise of self-determination has brought with it many benefits of individual liberation, the sharpening of the private/public distinction has occurred simultaneously. English law has adjusted accordingly to the convictions made by the majority of the medical profession. Specifically, courts have recognised the right of a patient to reject treatment, and to make advance directives as to their future medical care. It is regretful that such a progressive attitude falls short of the legalisation of assisted suicide. The current law is criticised for this inconsistency, as well as for the moral elbow room given to the courts when deciding the blameworthiness of doctors in individual cases. The practice of distinguishing between act and omissions, as well as stretching the definition of intention, to allow doctors who hasten one's death to avoid criminal liability can be eliminated by simply legalising physician-assisted suicide and rejecting the middle-ground position the UK currently holds.

We now have the duty to take responsibility for our own health for no better reason than that we are able to do so. As a liberal society where self-governance subsists, by not allowing for the legalisation of physician-assisted suicide, we fail to respect the autonomous decisions of patients even when we have control over the situation. We have the tools and ability to protect ourselves, yet instead place our health into the hands of others. Our moral values and health policies should reflect the peculiarities of medical conditions within the reality of our societal make-up. Such a social responsibility plays a significant role for implementing PAS legislation, and it must be identified that in order to make a truly autonomous choice, we "must use observation to see, reasoning and judgment to foresee, activity to gather materials for the decision, discrimination to decide..."⁵⁵

THE POWER OF PARTY: A CRITICAL EXAMINATION OF POLITICAL PARTY INFLUENCE IN THE HOUSE OF COMMONS AND THE CONSTITUENCY

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ABSTRACT The democratic power in the United Kingdom is held by Members of Parliament elected for a maximum of five years, who represent the people of their constituency in the House of Commons. This system has remained the same for over a century, but today there is growing concern in some quarters that the system is very much in need of reform. It is important to isolate the reasons as to why people find themselves growing ever more distant from their MPs and come to a conclusion as to how the system might be altered for the better. This piece is split into two sections. The first will analyse how party whips and select committees contribute to our democracy and whether these elements make for a better House of Commons. Meanwhile, the second part will investigate how the selection of Parliamentary candidates by political parties influences the decision making capabilities of the general electorate. In the round this piece will critically examine what role political parties have in the House of Commons and the constituency in order to come to a conclusion as to what steps can be taken to renew peoples' faith in politics using simple, evolutionary solutions.

1. Introduction

The 2009 “Expenses Scandal” exposed politicians as being out of touch with the ordinary person, with pollsters registering huge public dissatisfaction with the whole political system. The aim of this dissertation is to look at how the rising power of party has had a role in this growing distaste for politics. At a time when political parties have become more a barrier to change than a force for it, the question is how to ensure accountability at every level of our democracy. With a hung Parliament and anger at politicians running high, we finally have a climate in which reform is very much achievable. In this dissertation it is impossible to examine the power of party in every area of our constitution – particularly with devolution now firmly in place – so the Commons and the Constituency have been chosen as the best places in which to start that examination. With the two main political parties – Labour and the Conservatives – providing our examples.

2. Voting in the House of Commons

2.1 Introduction

“[T]he proper office of a representative assembly is to watch and control the government”¹. Hence, our House of Commons should provide a democratic and independent forum in which there can be true accountability of government. Of late, with the rise of political parties, there has been an increasing erosion of this power to hold government to account. Party leaderships have flexed their political muscle to ensure that they control the Commons through their system of whips. It cannot be overstated enough that these whips have a dominant and domineering position when it comes to voting in the Commons. It is vital that any threat to the independence of the Commons be eliminated. After all, “the independency of Parliament is the key-stone that keeps the whole [constitution] together. If this be shaken, our constitution totters. If it be quite removed, our constitution falls into ruin”². Whilst party power should not be removed entirely, the role of whips is a side effect of political party that is neither welcome nor necessary in a 21st Century parliamentary democracy.

2.2 The power of the whips

The whips principal role is to keep the party leadership in contact with the ordinary MPs in the Commons. They keep MPs informed of business and indicate the importance of votes by use of the whipping system³. Where there is disagreement between the party leadership and the ordinary Members, “whips will seek to persuade back-bench Members not to oppose the leadership”⁴. Having been selected in most cases by the party leadership, the whips hold significant power over appointment. The Committee of Selection puts select committees together from lists compiled by the whips of each of the main parties, whilst the Government Chief Whip is often influential in the appointment and promotion of ministers.

In practice, the influence of whips is even more intense. The Power Report claimed that, “promotions, places on committees, foreign ‘fact-finding’ trips, decent rooms and other benefits are controlled by party whips”⁵. The Report went on to state that they had

1 John Stuart Mill, *Representative Government* (1861), ch.5

2 David Armitage, *Bolingbroke: Political Writings* (1997), 94

3 Erskine May, *Parliamentary Practice* (2004), 250

4 Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament* (2002), 4-021

5 ‘Power Report’ (2006), 143

found substantial evidence showing whips blocking not only promotions, but any form of advancement. Thus whips have very powerful “levers of persuasion”⁶.

2.3 Dissent

Voting in the Commons often gives a good indication as to what is going on behind the scenes, particularly when there are high levels of intra-party dissent. Cowley suggests that dissent has increased in recent times, particularly during the New Labour administration⁷. Whilst this may be true, it detracts from the real story that the levels of dissent have not yet reached the heights necessary to indicate a restoration of power to the Commons. Most rebellions have been both weak and ineffective, posing no real threat to the authority of the governing party leadership. With the aid of Cowley’s research, two bills will be examined – that of the Higher Education Bill 2004 (HEB) and the Human Fertilisation & Embryology Bill 2007 (HFEB) – to see the effect of party power through the whips.

The HEB probably presented the first real threat to Tony Blair’s premiership, with his whips predicting a defeat by almost 80 votes⁸. However, the Government won on a vote of 316 to 311, with 72 Labour MPs voting against the Bill. With 200 Labour MPs signing Early Day Motions against the top-up fees proposed in the Bill, how did the Government win? Cowley claims that the win was due to a mixture of the rebels feeling uneasy that they might actually succeed, the inability of the rebels to co-ordinate themselves, meetings between backbenchers and Ministers, and minor concessions to win over the less radical rebels. Cowley makes the error of concluding that, “[t]op up fees can be chalked down as an example of backbench influence”⁹. He claims that the subsequent concessions made represented the true reason for the win. However, the two key “concessions” were to promise not to raise the fees further unless Parliament agreed and to increase the maintenance grant. It is questionable whether the Government could have raised the fees further without going back to Parliament anyway, whilst the raise in maintenance grants was a measly £500 over two years. The aim of the Government was primarily to make a set of promises, without giving any real concessions at all¹⁰.

Far more influential to the result was pressure from the whips and a failure by rebels to concentrate their forces. This failure by the rebels resulted for two reasons. Firstly, the “one rule on which whips in both parties insist is that they should be informed in advance by a Member who intends to vote against his party or to abstain”¹¹. Such a rule ensures that whips can target individual Members ahead of a vote to “persuade” them to tow the party line. Nick Brown, one of the rebel leaders, made a sudden conversion and supported the Government hours before the vote. Although individual conversions have a limited effect, if it is to be believed that “eight or so MPs followed his lead”¹², then it is not difficult to see how converting just a handful of MPs could turn a defeat into a tight victory. Secondly, the Labour Party explicitly – and other parties implicitly – state that no organised group is allowed unless approved in writing by the chief whip¹³. Hence, if organised groupings cannot form to oppose unwanted legislation, then rebels have a tough job combining into anything

6 Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament* (2002), 4-024

7 Philip Cowley, *Revolts and Rebellions: Parliamentary Voting Under Blair* (2003), 231

8 Philip Cowley and Mark Stuart, ‘Parliament: Hunting for Votes’ (2005) 58(2) *Parliamentary Affairs* 258, 259

9 *ibid.*, 271

10 Robin Cook, *The Times*, 9th January 2004 indicated that “attempts to defuse the rebellion are...fundamentally flawed as they rely on concessions at the margins, while preserving intact the very issue of principle that has provoked the rebellion”

11 Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament* (2002), 4-024

12 Philip Cowley and Mark Stuart, ‘Parliament: Hunting for Votes’ (2005) 58(2) *Parliamentary Affairs* 258, 25

13 Appendix to the Standing Orders of the Parliamentary Labour Party (2000). For further information see R.K. Alderman, ‘The Conscience Clause of the Parliamentary Labour Party’ (1965) 19 *Parliamentary Affairs* 224

like an opposition force.

Perhaps the strongest “lever of persuasion” however, is to scare rebels into thinking that their dissenting might prove successful and result in a defeat for the Government. Rather than see their party face humiliation if defeated, rebellious MPs will often decide to vote with the Government. This issue raises the question as to whether MPs would in most cases continue voting with their leadership even if the whips were removed and all votes were free votes. In the early stages of the HFEB, the Government planned to whip the issue. Not long before the vote, the Government removed the whip, with commentators arguing that they were only prepared to do so when it became clear that they had sufficient numbers to win anyway¹⁴. Cowley makes a very interesting observation about this Bill, he says that “even on an issue like abortion – the archetypical women’s issue – the gender dimension came a poor second to the strength of party in determining the outcome”¹⁵. Perhaps this should not be a surprise given that the very reason we have parties is due to similarities in ideology. If that is the case, and there seems a strong argument for it, then why do we need whips at all?

2.4 The road towards Parliamentary empowerment

Instead of a system whereby MPs hold the Government to account; we have a system where MPs – particularly within the Governing party – seem to be accountable to the party leadership. At every level of politics there must be proper accountability, particularly so when that power is not directly vested in the hands of the electorate.

Parties do have an important role to play, so instead of removing their causes we should seek to remove the negative effects they have¹⁶. Some still maintain that the party system is working, because of increasing levels of dissent¹⁷, whilst others claim that we must do more to encourage the type of MPs who can “see beyond the limited horizons of short-term party advantage”¹⁸. Dissent has indeed risen over the past forty years but, as we have seen, this rise has not been sufficient to pose any real threat to the Government. The largest rebellion in the 2001-2005 Parliament was on the HEB, where 17.4% of Government MPs dissented. The only other major rebellion was over the issue of smacking in the Children’s Bill, where just 11.9% of Government MPs dissented. That meant over 80% of Labour MPs in both cases voted with the Government. If that is proof of a parliamentary system working, then that is most depressing indeed.

What is proposed here is that whips be removed completely and for free votes on every issue to ensue. It may seem radical on the face of it, but such a reform is the most obvious step towards the re-empowerment of the Commons. Even on the morally contentious issue of abortion in the HFEB, where free votes were allowed, each of the main political parties’ MPs followed their party leadership. Members are unlikely to go against their leadership unless they have a real reason for doing so and as such the role of the whip in such a situation is useless. Some might question what would replace the important role of the whips as a point of contact between the party leadership and the ordinary MPs. Instead, democratically elected representatives of each party’s backbenchers would be a far more effective method of ensuring that the contact between backbenchers and the leadership was as direct as possible.

Some will further argue that whips have a part to play in the appointment of Ministers and

14 Philip Cowley and Mark Stuart, ‘Party Rules OK: Voting in the House of Commons on the HFEB’ (2010) 63(1) *Parliamentary Affairs* 173, 181

15 *ibid*, 180

16 James Madison, *Federalist No.10* (1787) referred to in Adam Tomkins, ‘Professor Tomkins’ House of Mavericks: a reply’ (2007) *Public Law* 33, 34

17 Danny Nicol, ‘Professor Tomkins’ House of Mavericks’ (2006) *Public Law* 467

18 Adam Tomkins, *Public Law* (2003), 168-169

Shadow Ministers, as well as committee members, and also in the organisation of timetabling in the Commons. However, party leaders should be more in touch with their Members to ensure that they have the best people on their leadership team – not simply rely on whips in a worryingly “Francis Urquhart” type manner¹⁹. As for the issue of timetabling, such matters could better be dealt with by prominent bipartisans such as the Speaker, with input from the party leadership and backbench teams. The unnecessary and unwanted role of the whips in select committee appointments will be examined in the next section.

In conclusion, it has been seen that the role of the whip is not only essentially wrong, but also quite redundant in most cases. The reforms posed above would better ensure that we better maintain accountability of government. As will be seen in the rest of this essay, accountability is the key to a good democracy.

3. Select Committees

3.1 Introduction

Accountability of the Government is arguably best secured within the Commons through select committees. As Tomkins writes, “[t]hrough the dedicated work of a number of key select committees Parliament has been made fully aware of the importance and centrality of its task with regard to holding the executive to account”²⁰. Outside of debate and voting, it is the one forum in which otherwise unknown backbench MPs can come to the fore in pushing for reforms or alterations to Government policy. It is thus necessary to ensure that the impartiality and efficiency of select committees are maximised and any roadblocks to their proper functioning removed.

3.2 The story of select committees so far

The powerful position that select committees had held in the 19th Century gradually deteriorated over the years as debate over policy and lawmaking transferred to government departments and also the emerging partisan coalitions of MPs. It was not until 1978 that reform began to re-empower the select committee system, with the Select Committee on Procedure issuing a recommendation that sought to reorganise select committees so that they were better structured and better able to scrutinise government²¹. These recommendations were adopted²² and can now be found within the Commons Standing Orders²³. Further reforms did not then begin until 2000 when the Commons Liaison Committee²⁴ published a paper entitled ‘Shifting the Balance: Select Committees and the Executive’²⁵. Whilst acknowledging that “the 1979 select committee system had been a success”²⁶, it wanted further empowerment of committees by: taking appointment powers out of the hands of party whips; giving select committee chairs better remuneration; ensuring committees followed up their recommendations; and giving committees greater resources. After a further report from the Hansard Society²⁷ and the appointment of reformer Robin Cook as Leader

19 Michael Dobbs, *House of Cards* (1989)

20 Adam Tomkins, *Public Law* (2003), 168

21 HC Paper 588-1 (1977-1978), chs. 5-7

22 HC Debates (Hansard), 19 and 20 February 1979, cols 44, 276-386 (esp. 284)

23 HC Standing Orders 121-52C

24 Committee made up of the Chairmen of each of the Select Committees

25 HC Paper 300 (1999-2000)

26 *ibid*, paras. 4-6

27 Hansard Society, *The Challenge for Parliament: Making Government Accountable* (2001)

of the Commons, the proposals of the Liaison Committee were finally put forward²⁸. In May 2002 most of the reforms were passed by the Commons, except noticeably those referring to taking nomination and appointment powers out of the hands of the party whips. Not a surprise given the power that we have seen the party whips hold over their MPs. Hence, whilst the lesser proposals were somewhat met, the main issue of central party influence over select committee nominations and appointments was not addressed.

3.3 Identifying the current problems with select committees

Bogdanor believes the reforms outlined above have made the Commons “a more professional and more assertive body than ever it has been in the past”²⁹. He would say that the select committees’ powers to call witnesses, including the Prime Minister, make them able to limit “the powers of a previously omniscient government”. However, Bogdanor portrays an idealised situation and overlooks the true workings of the Commons.

If we take the example of a school, nobody would suggest that a headteacher accountable to a small group of teachers selected by him was practicable. The very impartiality and independence of the group would be in question. Hence, a headteacher is accountable to a Board of Governors, comprised of parent and teacher representatives, as well as independent members. So whilst it is good that Ministers be accountable to select committees, what is the point of such a system if the committee members are appointed – via whips – by the party leaderships? It would seem that Bogdanor’s arguments do not translate into the real world as well as he anticipates.

The best case study that highlights central party interference involves the events following the 2001 General Election. Government whips, most probably in reaction to the sudden explosion of activity by the Liaison Committee³⁰, sought to make a series of adjustments to the select committees. Of particular intrigue was the failure by whips to renominate Labour MPs Gwyneth Dunwoody and Donald Anderson to be chairs of the Transport and Foreign Affairs Select Committees. The whips had greatly misjudged the situation and faced a barrage of rebellious Labour MPs who ensured that the Government’s proposed membership for the Committees was voted down³¹. In a total about face the whips were forced to renominate both.

Three other Labour committee chairs were lost in 2001, with Robert Sheldon, Robin Corbett and Giles Radice all receiving life peerages. It is interesting that at a time when Labour whips were trying to rid themselves of troublesome committee chairs and faced with an overly enthusiastic Liaison Committee, three powerful backbench figures decided to bow out and earned life peerages. It certainly seems that a cull of vocal Government critics took place in 2001. Derek Foster, chair of the active employment sub-committee, saw his committee abolished; whilst other committee members who were vocal critics of the Government also failed to see themselves renominated³². This whole episode, whilst highlighting how the Commons could rise up against an overbearing government, perhaps also brings to the fore a serious attempt by Labour whips to quieten over-zealous parliamentary reformers. It should not be a surprise then that the Liaison Committee’s 2000 report did not come to full fruition in the reforms of 2002.

It is also worth considering Bogdanor’s argument that select committees have the power

28 HC Paper 224 (2001-2002) from Modernisation Committee

29 Vernon Bogdanor, *The New British Constitution* (2009), 283-284

30 The Liaison Committee is made up of the chairs of each of the Select Committees

31 Adam Tomkins, *Public Law* (2003), 163

32 <<http://www.guardian.co.uk/politics/2001/jul/12/uk.houseofcommons>> accessed 16 January 2011

to call Ministers and the Prime Minister before them as witnesses. As Oliver observes, “committees do not have the power to compel the attendance of witnesses or the production of documents if the government is unwilling”³³. Oliver’s claim is supported by the Commons Standing Orders³⁴ themselves and also a publication by the Information Office which states, “committees have the power to call for persons, papers or records, though these powers do not in general apply to Ministers and their departments”³⁵. Further, the Prime Minister’s agreement to meet the Liaison Committee twice a year is just that, an agreement. It is not in fact a legal requirement for him to do so and could not yet be said to be a convention.

The investigations into the Iraq War provide a fascinating comparison between the accomplishments of select committees and that of independent inquiries. The Commons Defence Committee’s 2005 report on the Iraq war³⁶ focused on post-conflict issues, with the highest profile figure to attend being Geoff Hoon, the Secretary of State for Defence. Compare that to the independent ‘Iraq Inquiry’ now being carried out by Sir John Chilcott. Those to attend have included Tony Blair, Gordon Brown, Alastair Campbell, Jack Straw and Sir John Scarlett³⁷, as well as every Secretary of State for Defence since 1999. Perhaps it is right that such serious issues go before an independent inquiry. However, had the Defence Committee held a similar inquiry and been able to compel persons to come before it, there is very little doubt that the facts to materialise would have been much the same as those in the ‘Iraq Inquiry’.

A final point to consider is that committee chairs will ultimately determine the success of a committee. For that reason alone it is crucial that those appointed are ready to serve and are not simply chosen by whips for their loyalty to the relevant party. Tony Wright’s Public Administration Select Committee has made great strides in addressing problems such as the use of ‘spin doctors’³⁸, the public appointments procedure³⁹ and the accountability of quangos⁴⁰. As Oliver glumly points out, “other...select committees have been less energetic and it cannot be said that there has been systemic improvements of committee work in the House of Commons”⁴¹.

3.4 The need for reform

We thus have a system whereby committees are unable to properly hold the government to account. A redesign of the select committee system is appropriate – firstly, to ensure that the appointments procedure is impartial so that the Executive does not control the body that holds them accountable; and secondly, to ensure they are effective in the roles they carry out.

Much of the work to deal with the first issue has been carried out by the Committee on Reform of the House of Commons in their recent report, carried out in response to the “Expenses Scandal”⁴². They propose that committee chairs be elected by the Commons, followed by each party electing their proportion of the members of those committees by secret ballot. They conclude that such a system would “more effectively...hold the executive to account”, “give more authority to the scrutiny function of Parliament” and “preserve the

33 Dawn Oliver, ‘The Modernisation of the UK Parliament’ from Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (2007), 171

34 SO 135(1)

35 <<http://www.parliament.uk/documents/upload/p02.pdf>> 4-5 accessed 16 January 2011

36 ‘Iraq: An Initial Assessment of Post-Conflict Operations’, House of Commons Paper 65 (2004-2005)

37 Chair of the Joint Intelligence Committee at the time of the Iraq war and now the Head of SIS (MI6)

38 HC Paper 263 (2001-2002)

39 HC Paper 165 (2002-2003)

40 HC Paper 209 (1998-1999)

41 Dawn Oliver, ‘The Modernisation of the UK Parliament’ from Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (2007), 170

42 ‘Rebuilding the House’ (2008-2009), paras. 1-2

effective functioning of select committees”⁴³. As Robin Cook noted, MPs are defensive of the tribal system in the Commons⁴⁴, so parties should not be discarded altogether. If committees are appointed by MPs without the direct interference of their respective party leaderships, there is a far greater likelihood that members can work across party divisions to carry out their main task of monitoring the government and its departments. Committee chairs would be answerable directly to the Commons as a whole and thus responsible for guaranteeing its integrity.

The effectiveness of select committees remains a major issue. Oliver has raised the problem that many have failed to take on scrutiny of draft Bills, claiming that MPs are perhaps “not interested in performing this often technical function” and “may not have the time or skill to do so”⁴⁵. It is indeed true that a mixture of clerks and other advisers carry out much of the work of committees. Oliver’s answer is to institutionalise these experts into specialist advisory committees, which would advise Parliament and select committees on the scrutiny of government⁴⁶. However, putting power in the hands of a group of unelected and unaccountable individuals does nothing for the standing of MPs and democracy as a whole⁴⁷. Bringing the example of a secondary school’s Board of Governors back into focus, the composition of these boards is usually a mix of parent and teacher representatives, as well as persons brought in for their individual knowledge. In a similar way there could be some method by which a small group of independent advisers were chosen to sit permanently on committees. For example in a select committee of eleven, there could be seven party appointments, one chairperson and three independent advisers. That would ensure that whilst no individual party would have an absolute majority, the elected representatives would still hold a majority. Meanwhile, the independent appointees could aid the work of the committee and even help set the pace if committees got sluggish.

The method outlined above would ensure that nearly three-quarters of committee members were MPs, thus leaving much of the job to them. Further, whilst the members of the oft-praised ‘Iraq Inquiry’ were appointed by the Prime Minister⁴⁸, the independent members could be chosen through recommendations from MPs, universities and business leaders via the Appointments Commission⁴⁹. Such a scheme would bring much needed specialist thinking to select committees, better enabling them to scrutinise government.

Whilst the recommendations from the Reform of the House of Commons Committee are much welcomed, further reforms must be made to ensure that the Commons recaptures its respected position at the pinnacle of our democracy. That result does not come from outsourcing scrutiny of government, but by bringing advisers onto select committees to guarantee they do not get stuck into a cycle of party division. Pushing party whips out and getting independent modernisers in, will keep the positives of party whilst minimising its negatives.

43 *ibid*, para. 80

44 Hansard Society, *Parliament and the People: Modernisation of the House of Commons* (2002)

45 Dawn Oliver, ‘The Modernisation of the UK Parliament’ from Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (2007), 170

46 Dawn Oliver, ‘Improving the scrutiny of bills: the case for standards and checklists’ (2006) *Public Law* 219, 234-235

47 Richard Bellamy, *Political Constitutionalism* (2007) for an overview

48 <<http://www.iraqinquiry.org.uk/faq.aspx#103>> accessed 16 January 2011

49 provides “an independent and transparent appointment process for public appointments, based on the principle of selection on merit” – <<https://www.appointments.org.uk/Home/AboutUs/Background>> accessed 16 January 2011

4. The Power of Party in the Constituency

4.1 Introduction

To have reached the House of Commons in the first place MPs must, in most cases, have gone through a political party selection process within the constituency and then have been elected by the electorate in a General Election. Hence selection is the first major step towards becoming an MP.

Rush claimed in 1969 that in many cases “selection is tantamount to election”⁵⁰. This is particularly worrying given the fact that the number of seats that change hands at parliamentary elections is very small indeed⁵¹. New Labour’s landslide election of 1997 saw just 195 of the 659 seats up for grabs change hands⁵². Hence, over seventy percent of constituencies saw no change in the party it elected, despite the Conservative incumbents share of the vote being slashed to their lowest result since 1918⁵³. So too, in the Conservative landslide of 1979 just twelve percent of seats changed hands⁵⁴.

Such results are indicative of a consistent problem in British politics – that the vast majority of seats in the House of Commons are “safe” seats, insofar as the party that controls them is unlikely to lose control. In fact, since 1970 just half of constituency seats have ever changed their political colours⁵⁵. Thus in nearly forty years the political landscape has seen little change, and what it has seen has been at a very slow pace indeed. With so many “safe” seats the decision as to who a political party selects as their prospective parliamentary candidate can have very wide-reaching implications. In the majority of cases, the party in control will, in effect, be directly deciding who the next MP of that constituency will be.

4.2 Independent Candidates

Without a party behind them, a candidate has a difficult job getting elected. In 1997 just one independent MP was elected – Martin Bell⁵⁶, the BBC foreign affairs correspondent and two time RTS ‘Reporter of the Year’. Standing against the sleaze-embroiled sitting Conservative MP Neil Hamilton, Bell had the advantage that both the Liberal Democrat and Labour Parties withdrew their candidates allowing the well-known Bell to win with a majority of 11,077. Although surely a fantastic result, it was perhaps no real surprise given the high-profile nature of the campaign. In 2001 Dr. Richard Taylor won as an independent MP in Kidderminster, with the aim of restoring the casualty unit at the local hospital. Given the locally driven campaign and the lack of being a nationally recognized figure, Dr. Taylor is perhaps the most successful independent elected of late. The most independents elected in recent times was in 2005 when three were put into the Commons. Dr. Taylor retained his seat, whilst George Galloway and his Respect Party beat Labour in Bethnal Green & Bow on an anti-war ticket, and Peter Law won in Blaenau Gwent on an anti-all-women-shortlist ticket. Both Galloway and Law had been relatively high-profile members of the Labour Party previously and effectively ran as ‘alternative Labour’ candidates in steadfastly Labour constituencies.

The fact that in the last three elections the number of independent MPs elected has never

50 M. Rush, *The Selection of Parliamentary Candidates* (1969), 4

51 H.F. Rawlings, *Law and the Electoral Process* (1988), 125

52 <<http://www.parliament.uk/commons/lib/research/rp2001/rp01-038.pdf>> 24-37 accessed 16 January 2011

53 <<http://www.parliament.uk/commons/lib/research/rp2004/rp04-061.pdf>> 8

54 <<http://www.politicsresources.net/area/uk/ge79/ge79index.htm>> accessed 16 January 2011

55 <<http://www.libdemvoice.org/29-of-seats-have-not-changed-hands-since-1945-16029.html>> accessed 16 January 2011

56 <<http://www.guardian.co.uk/politics/constituency/1360/tatton>> accessed 16 January 2011

risen above three stands in stark contrast to the fact that in the first half of the 20th Century it was not unusual for twenty independents to be elected. Even so, such numbers are still minuscule when one considers that the total number of MPs elected is usually around 650. Thus we have a situation in which independents are a limited threat to incumbent parties in safe seats.

4.3 The Nature of Selection Procedures

In 1976 the Hansard Commission on Electoral Reform proposed that strict legislation be enacted for political party selection procedures. Constituency party members would vote in secret postal ballots with the funds being provided from the public purse. The idea was to formalise and authenticate a system that was seen by many as out of date and undemocratic. Unfortunately the proposals were thrown straight into the ever-growing waste paper basket of failed reform theories. As Rawlings wrote at the time “These matters seem best left for the parties to work out for themselves; it is reasonable to assume that if they do not take sufficient steps locally to involve their members in party affairs, they will simply lose those members”⁵⁷. Whilst Rawlings certainly has a point in maintaining the liberal tradition that “voluntary associations should be free to choose whatever form of internal organisation they prefer”⁵⁸, the continuing problem of plummeting party membership ensures that power to select candidates is now in the hands of the few. All three of the main parties still use informal selection procedures involving small meetings of local members. In an environment where “differences of opinion can give rise to some extremely heated and acrimonious meetings”⁵⁹, pressures can be exerted and results are not always as expected.

Although block voting by trade unions was officially stopped within the Labour Party⁶⁰, the recent case involving East Lothian MP Anne Moffat signals that such practices are not dead. In 2007 local party activists sought to remove her but she survived deselection due to the block vote of trade unionists supporters⁶¹. Not long after, a further vote to deselect her was knocked down by Labour Party Headquarters who deemed it unconstitutional. After revelations emerged about her during the expenses scandal of 2009, the local party again attempted to deselect her. This time they succeeded by a vote of 25 to 5, however police were called after 25 people were denied access to the meeting at the Labour Club⁶².

When a political party is deciding whether to support a candidate, it is seen as crucial that votes are held and decisions made by the local party membership⁶³. The issue here is whether the out-dated procedures used really provide a democratic forum for debate, or whether the Hansard Report of 1976 provides us with a template for what should, and still could, be. As seen by the thirty who voted in Ms. Moffat’s deselection, these processes do not attract huge numbers of participants. It is perhaps not a surprise given the huge decline in membership of political parties. Labour has seen its membership fall in the pasty fifty years from over a million to 150,000; whilst the Conservatives have just 10% of the 2.8 million members they boasted of in the 1950s. Today then, political party membership is nearer 1 in 88 than the 1

57 H.F. Rawlings, *Law and the Electoral Process* (1988), 129

58 A.H. Birch, *The Theory and Practice of Modern British Democracy* in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (1985), 88

59 Robert Blackburn, *The Electoral System in Britain* (1995), *The Political Parties’ Selection of Candidates*

60 *ibid*

61 <<http://news.scotsman.com/politics/Labour-ruling-on-Anne-Moffat.6098891.jp>> accessed 16 January 2011

62 <<http://www.heraldscotland.com/news/politics/mp-moffat-s-fate-to-be-decided-by-nec-next-week-1.1008916>> accessed 16 January 2011

63 fn.58 above, quotes Conservative MP Julian Crichtley saying: “The choice of a candidate is for the constituency party worker the reward of many years of hard, unglamorous work”

in 11 of the 1950s⁶⁴.

Three key problems have arisen. Firstly, local “town hall” style meetings are open to being controlled by organised and determined factions who can exert pressure, particularly when they are groups that make substantial donations to the local party. Secondly, local party members are themselves often unaware of party rules on selection matters which means that simple errors in procedure can lead to oddball results. Whilst thirdly, there should be question marks over whether a process which can involve some thirty people deciding the fate of a sitting MP is truly democratic or in the interests of the constituency at all.

5. Pressure from the Party Leadership

5.1 Introduction

In recent years the real problem with the selection of prospective parliamentary candidates (PPCs) has become less about the selection procedure itself, and more about whether the power wielded by central party leaderships in these local decisions is too intense. Blackburn claims that local party associations “bitterly resent any heavy-handed interference from the central party headquarters”⁶⁵. In some circumstances this is true, with the local party decisively rejecting outside influences. For example, in the 1997 Uxbridge By-election, many local Labour supporters blamed their failure to win what had become a marginal seat for the Conservatives on the replacement of their local candidate by the Blair-backed Andrew Slaughter⁶⁶.

Furthermore, the recent Labour Party selection process in the “safe” Labour seat of Erith and Thamesmead led to massive rows between local party members and the central party machine. Candidate Georgia Gould – daughter of Tony Blair’s former strategist Philip Gould – had backing from figures such as Alastair Campbell and Baroness McDonagh, a former general secretary of the party. Ms. Gould also had Cabinet Minister Tessa Jowell make a speech in the constituency supporting her, without notifying the sitting MP – seen by Labour activists as a break from traditional practice⁶⁷. Ripped up ballot papers and concern over vote-rigging led the central Labour Party to take over proceedings and the results led to local-based Teresa Pearce being selected⁶⁸.

Despite these well-publicised failures, the rise of the “heavy-handed” central party machine has continued. Andrew Slaughter, who lost in Uxbridge, was selected and then elected as the MP for Ealing, Acton & Shepherd’s Bush in 2005, whilst 22-year-old Georgia Gould has plenty of time to make use of her central Labour Party contacts in the years to come.

5.2 The rise of the “heavy-handed” party machine

In the last few years David Cameron and the Conservative Party have led an unprecedented campaign to transform their party, predominantly by interfering in local party associations. The argument for this seems to be that they have “broadened the base of Conservative candidates,

64 Vernon Bogdanor, *The New British Constitution* (2009), 292

65 Robert Blackburn, *The Electoral System in Britain* (1995), *The Political Parties’ Selection of Candidates*

66 At the time Labour led the Conservatives by 57% to 23% in national opinion polls <<http://www.independent.co.uk/news/boost-for-hague-as-tories-take-uxbridge-1243086.html>> accessed 16 January 2011

67 <<http://www.telegraph.co.uk/news/newstopping/politics/labour/5182555/Labour-investigate-ballot-box-tampering-in-Georgia-Gould-contest.html>>&<<http://www.london-student.net/2009/04/27/campaign-for-lse-labour-candidate-gould-stalls/>> accessed 16 January 2011

68 <<http://teresapearce.co.uk/>> accessed 16 January 2011

attracting highly talented people from a diverse range of backgrounds”⁶⁹. Nevertheless, the now infamous “A-List” has caused controversy after controversy – with greater numbers of local party activists speaking out against attempts to force centrally-approved candidates upon them.

All of the major parties have centrally-compiled lists of potential candidates from which local associations can choose, with candidates who are not on these lists needing to be approved by the central party⁷⁰. For the Labour Party, any person selected has to have his or her name placed before the National Executive Committee⁷¹; whilst in the Conservative Party any selection must be approved by the Committee on Candidates⁷², which holds a power of veto. As such, these small and close-knit groups indirectly control the vast majority of selections throughout the country.

Whilst this may not seem overly restrictive, it is recent changes within the Conservative Party that should cause questions to be asked. The issue centres on the adoption by the Conservatives of an “A-List” system whereby these approved lists of potential candidates are whittled down to a small number of “priority” candidates. This process for the 2010 General Election began in April 2006, with a handful of Conservatives gathering together to cut down an approved list of over 500 to just 150⁷³. With 140 marginal-seats targeted by the Conservatives at the 2010 Election, it would seem that Central Office aimed to control the selection of those candidates in seats which they had a good chance of winning at the next election.

5.3 The “A-List” in action

Disgruntlement amongst local party associations has led to articles being published in all of the major newspapers identifying constituencies where “A-List” candidates have been parachuted⁷⁴. The following cases show an unusually high level of interference from CCHQ (Conservative Central Headquarters) in local party affairs, with “A-List” candidates staying despite obvious local resistance.

In the “safe” seat of East Surrey there was anger from some local party members who had a choice of six “A-listers” at their selection meeting. Beverley Connolly, a local councillor said, “these people have been parachuted in from out of the area...It’s not about what’s best for the Party in Surrey East, it’s about what the Party wants”⁷⁵. In such instances it is clear that the local association really has no choice as to whom it selects, when all the candidates campaigning before them are not locally recognised figures.

There have also been alarming interventions by the central party after selection. In November 2009 Elizabeth Truss, PPC for the “safe” seat of Norfolk South West faced deselection after news of her extramarital affair with a Conservative MP were discovered⁷⁶. There was much local infighting, which resulted in intervention by the Conservative leadership and Ms. Truss surviving deselection.

Another case involved that of Joanne Cash, the PPC for Westminster North (and now

69 <<http://www.telegraph.co.uk/news/newstoppers/politics/david-cameron/6063431/Ann-Widdecombe-criticises-David-Camersons-candidate-selection-process.html>> accessed 16 January 2011

70 Robert Blackburn, *The Electoral System in Britain* (1995), *The Political Parties’ Selection of Candidates*

71 33 member committee that includes representatives from the party leadership

72 small group from the upper echelons of the Party, including the Chair and Vice Chairs, as well as representatives from other groupings

73 <<http://www.guardian.co.uk/politics/2006/apr/19/uk.conservatives>> accessed 16 January 2011

74 <<http://www.guardian.co.uk/politics/2010/feb/21/tory-anger-cameron-candidates-stratford>> accessed 16 January 2011

75 <<http://www.telegraph.co.uk/news/election-2010/7230771/David-Cameron-in-row-over-black-and-gay-candidates.html>> accessed 16 January 2011

76 <<http://www.timesonline.co.uk/tol/news/politics/article6907859.ece>> accessed 16 January 2011

its MP), who resigned after clashing with local members over the election of a new local Party President. The new President swiftly resigned and Ms. Cash was reinstated saying, “I did resign. Assoc did not accept. CCHQ has resolved specific issue so I am not leaving. It’s official DC has changed the party!”⁷⁷. Reporters claimed figures such as Andy Coulson (Mr. Cameron’s Communications Chief) and Sir Simon Milton (Former leader of Westminster Council and Boris Johnson’s Chief of Staff), as well as Mr. Cameron himself, all came to the aid of Ms. Cash during the height of the resignation crisis⁷⁸.

5.4 Conclusion

The sheer scale of interference in local affairs by CCHQ in recent years is worrying. Although it has been carried out with some good intentions⁷⁹, the constitutional implications are frightening. The number of people in control of deciding who represents the British people in the House of Commons is growing ever smaller. Not only is selection by a local party in a “safe” seat tantamount to election, but those deciding who the candidates should be is often decided by the upper echelons of the central party. Local associations could challenge such mechanisms if they thought them unfair, but it is unlikely such action would ever be taken due to the media hype that would no doubt ensue about “party divisions”.

6. Need for Reform?

Surely this means that more power must be put back in the hands of the majority and not a minority of party officials. Some argue that increased participation may not be effective as people do not wish to participate and it is not actually possible to achieve full participation in an advanced and complex industrial society⁸⁰. But as Bellamy claims, the issue is serious because party identities are “freezing out others in the process”⁸¹. Bogdanor accepts that times have changed and that the objections traditionally spouted are no longer as valid⁸². Recent polling shows that the average person on the street is also concerned about the interference of party. In 2006, 24% agreed that British political parties were open and transparent, whilst 62% said they disagreed with such a statement⁸³. When asked in 2001 whether they trusted certain institutions, just 16% said they trusted political parties and 76% said they did not. This put “parties”, as an institution, bottom of a list that included television, big companies and the press⁸⁴. Of particular interest is a more recent poll which questioned people on the motivations of politicians. The result was that 21% believed they acted in the interests of their political party, 62% that they had their own interests at heart and just 7% thought they worked in the interests of their constituency⁸⁵. As such, there is mounting demand from ordinary people for some sort of reform.

77 <<http://www.guardian.co.uk/politics/2010/feb/10/my-part-in-downfall-of-joanna-cash>> accessed 16 January 2011

78 <<http://www.thisislondon.co.uk/standard/article-23804261-triumph-of-the-cameron-cutie-in-battle-with-local-tory-bigwig.do>> accessed 16 January 2011

79 <<http://www.telegraph.co.uk/news/newstoppers/politics/david-cameron/6063431/Ann-Widdecombe-criticises-David-Camersons-candidate-selection-process.html>> accessed 16 January 2011

80 Vernon Bogdanor, *The New British Constitution* (2009), 300

81 Richard Bellamy, *Political Constitutionalism* (2007), 237

82 Vernon Bogdanor, *The New British Constitution* (2009), 301

83 <<http://www.ipsos-mori.com/researchpublications/researcharchive/poll.aspx?oItemId=407>> accessed 16 January 2011

84 <<http://www.ipsos-mori.com/newsevents/ca/ca.aspx?oItemId=292>> accessed 16 January 2011

85 <<http://www.ipsos-mori.com/newsevents/ca/ca.aspx?oItemId=31>> accessed 16 January 2011

7. Reform in the Constituency

7.1 Introduction

Such disillusionment has not gone unnoticed by the political parties. The Labour Government's "Governance of Britain" Green Paper devoted a large section to methods by which direct democracy could be implemented, with ideas such as petitions, and increased local participation⁸⁶, whilst the Conservative reform plans were not far behind⁸⁷. However, far more can be done. The following will deal with a package of reform ideas including primary elections, powers of recall and also local referenda, which would better remedy the negative effects of party power in the constituency.

7.2 Primary Elections

"Primary election" encompasses a wide array of theories as to how selection in constituencies can be opened up so that they are seen as more democratic, just, and official⁸⁸. More conservative reformists believe that closed primaries would be sufficient to democratise the system⁸⁹, whilst liberal academics see open primaries as a way of bringing the whole of the electorate into the selection process⁹⁰.

Closed primaries would ensure that many of the basic issues raised in this essay could be dealt with. Party selection "behind closed doors" would give way to "a secret ballot conducted by post in which every registered and paid-up member of the constituency party has an equal vote"⁹¹. More people are now used to voting by post⁹², and within trade unions postal balloting has long since replaced the informal meetings of the past⁹³. Brazier proposes that this method be extended to cover reselection procedures, thus stopping the lucky primary winners in "safe" seats being "rewarded with leases for life"⁹⁴. The financial implications of such a scheme would not be unduly burdensome and allowances could be made for smaller parties and for those standing as independent candidates.

Open primaries offer a more radical approach. The perceived problem of tactical voting in party selections by opposition constituents seems not to have occurred in practice⁹⁵. Whether it be the selection of Boris Johnson as the Conservative candidate for Mayor of London in 2007 through an open primary, or Sarah Wollaston as the Conservative PPC for Totnes in 2009; the idea seems to have encouraged local voters to get more involved. Even so, the Totnes process was alleged to cost £40,000 which, replicated on a national scale, would have cost the Conservatives £26 million – their entire General Election budget⁹⁶. Furthermore, local party members will feel disillusioned with a process that reduces their vote to that of every other constituent. PPCs rely upon their local party to canvass and leaflet with them, a sometimes tiresome job that is counteracted by the prestige that is associated with being one of the few to select the local candidate. Open primaries could lead to the total breakdown of political activism and thus, somewhat ironically, lead to voters knowing less about their

86 'Governance of Britain' (2007), paras. 157-179

87 Conservative Democracy Task Force, 'Power to the People' (2008)

88 William Wade, *Constitutional Fundamentals* (1980), 23-24

89 Rodney Brazier, *Constitutional Reform* (2008), 51-52

90 Vernon Bogdanor, *The New British Constitution* (2009), 302

91 Rodney Brazier, *Constitutional Reform* (2008), 52

92 12.1% voted by post in 2005 – <<http://www.electoral-reform.org.uk/article.php?id=44>> accessed 16 January 2011

93 Trade Union and Labour Relations (Consolidation) Act 1992, ss. 226-235

94 Rodney Brazier, *Constitutional Reform* (2008), 52

95 Vernon Bogdanor, *The New British Constitution* (2009), 302

96 <<http://www.guardian.co.uk/politics/2009/aug/04/tories-totnes-mp>> accessed 16 January 2011

constituency candidates as the message is not relayed to them by activists on the ground. The only message to get through would then be that of each party's national central office – localism could therefore be lost.

7.3 Powers of Recall

It would seem Brazier's closed primary would be both politically and economically more favourable. However, whilst it democratises the selection process, it fails to deal with the problem of constituent involvement. The answer to this could be a power of recall. Cowley has condemned such a power, saying that for the few cases where it might be necessary it "may not be worth doing"⁹⁷. However, Cowley simply examines its use when MPs defect to another party without holding a by-election⁹⁸. There is a whole raft of situations in which such a power could be used.

The potential of a power of recall is best highlighted in relation to the recent scandal involving MPs expenses. The scandal occurred in mid-2009, but constituents did not have a chance to get rid of MPs who they felt had acted inappropriately until June 2010 – giving them an extra year's salary, expenses and pension. Powers of recall may also be required in situations where the local MP has failed to recognise issues of interest to local constituents⁹⁹. Weir, co-founder of the constitutional reform pressure group "Charter 88", commented that such issues could include "did they vote for this outrageous war, or did they fail to campaign for a local hospital, have they reneged on an election promise, are they for or against a referendum on the European Constitution"¹⁰⁰. Brazier recognises that recall is not without its problems, but questions about voter thresholds can be addressed by looking to other countries where such procedures work.

Another problem is whether people want yet more elections? As Brazier comments: "Governments fear elections...I believe that participatory democracy requires more elections"¹⁰¹. Surely if people feel so out of touch with politics then giving them more opportunity to engage in the political process will address flaws in our party system. A power of recall would probably see minimal use; but the effect it would have on the mentality of parties would be crucial in ensuring that MPs represent the majority.

7.4. Local Referenda

Under the Local Government Act 1972, it is possible for a small group of local people to initiate a referendum in their local government area on any issue of their liking. Expanding such a little-known political process to cover whole constituencies would ensure that MPs listened to all constituents and not simply their party. It would work by requiring that if a certain level of support was shown for a particular issue, then the constituents would be issued with ballot papers and asked to vote on it.

Such a system need not be seen as a hindrance to MPs however, and could include a power for a local referendum to be initiated by MPs themselves to gauge local opinion. Such referenda would only serve an advisory role, but could eventually lead constituents to recall MPs who totally ignored local public opinion. Such a process would be expensive but this could perhaps be remedied by limiting a constituency to one referendum per term of

97 Philip Cowley, 'Crossing the floor: representative theory and practice in Britain' (1996) Public Law 214, 224

98 His claim fails to identify the fact that MPs represent the nation on behalf of their constituents.

99 Rodney Brazier, *Constitutional Reform* (2008), 53

100 <<http://www.opendemocracy.net/blog/ourkingdom-theme/stuart-weir/2009/06/01/we-need-local-power-of-recall>> accessed 16 January 2011

101 Rodney Brazier, *Constitutional Reform* (2008), 54

Parliament for example.

8. Conclusion

This investigation into the power of party in the House of Commons and the constituency highlights two key problems in the UK's democratic framework. In the Commons government accountability is severely weakened by party leadership control over Parliament via their whips. Scrapping whips and allowing free votes on every issue, whilst having elected select committees with independent advisers would ensure more honest voting and an effective scrutiny of the Government. Meanwhile, as very few seats change their political colours at each election, a small group of the dominant party's members effectively elect an MP when they select their PPC. Furthermore, local party power has been curtailed in recent years by the increasing intervention of party leaderships. By introducing closed primaries, a power of recall for constituents and local referenda so this deviation from true representative democracy can be better remedied.

The aim in this dissertation has not been to provide a rallying cry for the systematic destruction of the party system, but instead to present a means by which the problems analysed can be addressed. Taken as a bundle, these mechanisms offer a progressive approach to altering our constitutional framework for the better. It is only by rebuilding peoples' trust in politicians that the slide into apathy can be remedied and the political future secured.

AN EVALUATION OF SURROGACY LAW AND ITS POTENTIAL DEVELOPMENT IN THE UK; IS THERE A CLEAR WAY FORWARD?

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ABSTRACT Creating a comprehensive and effective system of surrogacy regulation is no easy task. There is clearly a need to protect the surrogate child, and the interests of all the parties involved must be finely balanced. Surrogacy arrangements in the UK currently fall under the Surrogacy Arrangements Act 1985, as amended by the Human Fertilisation and Embryology Act 1990. This legislation is a dangerous mix of non-enforceable contracts and awkwardly applied rules on legal parentage. Many commentators, and indeed the courts have been highly critical of this; their judgements highlight that the current law is characterised mainly by the lack of any coherent regulatory system. This paper will give a complete overview of UK surrogacy legislation, examining its origins and to what extent it regulates surrogacy arrangements. I will then evaluate both the philosophy upon which it is based, and the practical implications of the legislation itself, acknowledging the many academic works and judicial writings on the matter. After the significant shortcomings of the present state of surrogacy legislation have been clearly shown, I will indicate a number of ways in which the law could be changed. These will range from the most prohibitive such as a criminalisation of surrogacy, through to the more relaxed prohibition of only commercial surrogacy, and making surrogacy contracts enforceable but subject to an extensive regulatory regime. This paper will then examine the surrogacy law of Israel to see if a foreign jurisdiction can offer an indication on how best to change UK surrogacy law. Israel is unique in that it is one of the first countries in the world to have adopted a comprehensive regulatory regime for approving surrogacy arrangements which involves enforceable surrogacy contracts. One of the major appeals of such a system is that all parties are guided through the surrogacy process by objective professionals and clear regulations, thus successfully avoiding many of the risks associated with surrogacy in the UK. This paper concludes that surrogacy law in the UK must change, no longer should it be characterised by a lack of regulation, but instead should be replaced by an effective and comprehensive regulatory system.

1. Introduction

Few medical procedures aimed at aiding fertilization have proved quite as controversial as surrogacy. It generates significant debate over often ambiguous moral issues, and produces no shortage of problems for the legislature and the courts. Surrogacy in this context entails one woman, who is known as the surrogate mother, agreeing to become pregnant and deliver a child for another party, namely the commissioning parent or parents. While this is the basic surrogacy arrangement, there are several distinct forms that it takes in practice. ‘Partial’ surrogacy involves the insemination of the surrogate mother with the commissioning father’s sperm. Alternatively, ‘full’ surrogacy involves the creation of an embryo using (usually) both the egg and sperm of the commissioning couple; this takes place *in vitro* before being transferred to the uterus of the surrogate mother.

Surrogacy agreements in the UK currently fall under the Surrogacy Arrangements Act 1985, as amended by the Human Fertilisation and Embryology Act 1990. While it is by no means straightforward how far and in what way the law should be involved, it is apparent that the law in its present state leaves much to be desired. While the number of surrogacy arrangements per year are few (put at between 100 and 180 by Brazier¹) and consequently the number of disputes between surrogate mothers and commissioning couples even fewer (estimates by Brazier of only one or two per year), the potential harm to the parties involved requires at least a comprehensive investigation by the legislature and the courts on what role they should play in protecting all parties involved.

In this essay I will give a brief history of surrogacy law in the UK. I will consider how and why it has come about, acknowledging the significance of early cases such as the “Baby Cotton” case², and how the ensuing “moral panic”³ led to legislation that was criticised by many as “Neither... rationally constructed or properly thought through.”⁴ After I have shown how it is lacking with regards to the practical implications and the philosophy upon which it is based, I will sketch a number of possible ways surrogacy law can develop, analysing the wide range of legislative options from complete prohibition to a wholly laissez-faire approach. I will also examine whether a foreign jurisdiction (Israel) can offer an indication of how to proceed, before returning to the question at hand and concluding on the best way forward for the UK.

2. Contemporary UK Surrogacy Legislation

2.1 Arrangement of Surrogacy

The principle pieces of legislation governing surrogacy in the UK are the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 1990. The law does not make it an offence to enter into surrogacy arrangements, but instead makes all agreements unenforceable. This is provided in Section 1A of the Surrogacy Arrangements Act 1985, inserted by Section 36 of the Human Fertilisation and Embryology Act 1990.

The effect of this non-enforceability is to remove any binding obligations from the parties involved in a surrogacy arrangement. The commissioning parents can neither sue for the

1 Known as the Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements For Payments and Regulation* (Cm. 4068) (Department of Health, 1998)

2 [1985] F.L.R. 846. Kim Cotton’s story is told in K Cotton and D Winn, *Baby Cotton For Love and Money* (Dorling Kindersley 1985)

3 See Stanley Cohen, *Folk Devils and Moral Panics* (London: MacGibbon and Kee 1992)

4 See Michael Freeman, *Does Surrogacy Have a Future After Brazier?* (7 Medical Law Review 1-20 1999)

surrogate refusing to transfer the baby, nor can the surrogate sue for non-payment. While this is individually significant, the main intention of the Surrogacy Arrangements Act 1985 was to prevent the development of commercial agencies, the main anti-agency measures being contained within Section 2(1). Section 3 compounds this by introducing anti-advertising provisions. While *prima facie* this amounts to a total criminalisation of paid surrogacy, the Act is more concerned with the prevention of surrogacy agencies profiting from any arrangements, as shown in Section 2(2) which exempts commissioning parents and surrogates.

The ban on advertising still applies, providing a considerable obstacle to the creation of surrogacy arrangements. Non-profit organisations such as COTS (Childlessness Overcome Through Surrogacy) attempt to alleviate this by bringing potential surrogates and commissioning parents together. Their cause has recently been helped with an amendment by the Human Fertilisation and Embryology Act 2008 permitting non-profit organisations to charge a reasonable fee to recoup their costs.

2.2 Status of Child

At present the surrogate mother is always the child's legal mother from birth⁵, irrespective of possible genetic parentage of the commissioning mother. Furthermore, there is the common law presumption of legitimacy within marriage which means that the surrogate mother's husband (if she has one) will be the legal father of the child. There is also an additional rebuttable presumption that the man registered on the birth certificate is the child's father. The Human Fertilisation and Embryology Act 1990 and 2008 created a series of rules governing conception using sperm donation; while not specifically designed for surrogacy they are nevertheless applicable, trumping the common law rules. Consequently the husband of the surrogate is the legal father of the child unless a lack of consent to her treatment can be shown on his part⁶.

The legal status of a surrogate child, with regards to its legal parentage and the transferral thereof was an issue unaddressed in the Surrogacy Arrangements Act 1985, forcing all parents (including genetic parents) to go through a lengthy adoption procedure. The Human Fertilisation and Embryology Act 1990 attempted to combat this through the creation of parental orders⁷. Parental orders, upon successful application, enable the Registrar General to re-register the child's birth in favour of the commissioning parents. This was further amended by the Human Fertilisation and Embryology Act 2008 Section 54 which opened the availability of parental orders from solely husband and wife to civil partners and two persons living together as partners in an enduring family relationship⁸. While much simpler than adoption, there are still a number of conditions which must be met for a parental order to be available.

Within the Act there are provisions which regulate the involvement of local authorities, social services and Guardian *ad litem*, aiming to safeguard the welfare of the child. Informed dual consent is mandatory; if one party withholds its consent the requirement is unsatisfied. One of the applicants must be genetically related to the child, conception cannot have taken place through natural intercourse, and the child must be currently living with the applicants. Finally, reflecting the aforementioned provisions prohibiting commercial surrogacy, there is a restriction in Section 8 on the making of payments to surrogates (such payments preclude

5 Human Fertilisation and Embryology Act 2008 Section 33, furthermore section 47 makes it more unequivocal stating that egg donation does not lead to becoming a parent

6 Human Fertilisation and Embryology Act 1990, s 28, 2008 s 38

7 Human Fertilisation and Embryology Act 1990, s 30

8 Human Fertilisation and Embryology Act 2008, s 54 (2)

the availability of a parental order). While *prima facie* this appears forceful, in practice it is not quite the case, as explored below.

Another significant feature of this Act is that the courts have the child's welfare as their 'paramount consideration'⁹, which consequently will impact on many cases. Returning to the restriction on payments, the courts' ability to authorise them gives them considerable scope to act as they see fit with their primary concern being the welfare of the child, as opposed to the financial transactions of the parties involved. As it is necessary for the child to be living with the applicants, it is rarely the case that the removal of the child from its settled home will promote its welfare. With this in mind, the courts are reluctant to refuse a parental order even in the face of Section 8 contravention. Brazier was unable to find a single case where a parental order had been refused on the grounds of an unacceptably large payment. The courts' ability to authorise payments other than expenses reasonably incurred was used in *Re C (Application by Mr and Mrs X under s 30 of the Human Fertilisation and Embryology Act 1990)*¹⁰. Here, despite finding that the applicants had made an unlawful payment of £12,000 for 'loss of earnings', a parental order was made as it was judged that it would be in the child's best interests. The more recent case of *Re X & Y (Foreign Surrogacy)*¹¹ again illustrates the unwillingness of the courts to refuse a parental order: Hedley J judged that although there were "two competing and potentially irreconcilably conflicting concepts," the welfare of the child must prevail, despite how uncomfortable it may be to authorise a payment.

It may be the case that the application for a parental order can be quite simple. However the commissioning couple may be unable to apply for a parental order. It might be that the surrogate mother refuses to consent, that they fail to apply within the six month time limit, that the gametes of neither of the commissioning couple were used or many other reasons. Here the sole option is to acquire legal parentage through adoption (or to forgo it entirely and opt for an informal transfer.) While the law regulating adoption does not strictly fall within the scope of this essay, the fact that it can become the only course of action available to commissioning parents makes it worthy of discussion.

The key element for us to consider is that, as with parental orders, the adoption process largely turns on what is in the child's best interests. Also of significance is the time-consuming nature of the application; the Adoption and Children Act 2002 sets out many criteria and involves a significant assessment by the local authority and social services over a prolonged period of time to assess the applicants' suitability. Thirdly, what makes it a valuable alternative to those commissioning parents in the unfortunate situation where the surrogate mother does not wish to give up the child, is that the child's welfare can dispense with the surrogate mother's consent.

So, as with parental orders, the best interests of the child are inextricably linked to where the child is living and avoiding disrupting their life. When the child is already settled with the commissioning couple, the courts may disregard the consent of a surrogate mother who has since changed her mind. This issue arose in the case of *Re MW (Adoption: Surrogacy)*¹² It was found here that withholding consent when the child was already settled with the commissioning couple, was described by Callman J as "not what a reasonably objective parent would want to do for her child." However, this does work both ways. In *Re P (Minors) (Wardship: Surrogacy)*¹³ the child being settled with the surrogate mother significantly decided the case in her favour, despite evidence showing that it would be beneficial for the

9 Children Act 1989, s 1 (1)(a)

10 [2002] EWHC 157 (Fam)

11 [2008] EWHC 3030 (Fam)

12 [1995] 2 FLR 789

13 [1987] 2 FLR 421

child to be brought up by the commissioning parents. With this case law in mind, it seems that commissioning couples will have little chance of achieving either a parental order or a successful adoption should the child be living with the surrogate mother. Latey J in *Re C (A Minor) (Wardship: Surrogacy)*¹⁴ summarised the situation as follows, “All that matters is what is best for her [the baby] now that she is here and not how she arrived”. Clearly the court is not here to ‘punish’ parents by taking the child away.

Payments made to surrogate mothers are equally important to applications for adoption as they are to parental orders. It remains possible for the court to authorise these payments, but once again, rather than being judged purely on the payment itself, the child’s welfare is very important. Nevertheless, it is not the case that all illegal payments are automatically authorised, and the courts may look beyond the child being in a settled home should one party intend to deceive the other as per *Re C (A Minor) (Adoption Application)*¹⁵, and *Re N (A Child)*¹⁶.

The legal status of the child is a very complex issue, particularly where one of the parties to the arrangement is a foreign national. There is no opportunity for foreign commissioning couples to apply for a parental order and the procedure for foreign nationals adopting British children is incredibly restrictive. Also, where the surrogate mother is a foreign national and the commissioning couple British, problems of varying degrees are encountered. There may be immigration difficulties or the country of the surrogate mother has a conflicting legal position. This arose in the cases *Re G (Surrogacy: Foreign Domicile)*¹⁷, and *Re X & Y (Foreign Surrogacy)*¹⁸, where the court had to reconcile the legal problems with an outcome which is best for the child’s welfare.

This is the extent of the current law governing surrogacy in the UK. It is necessary to also mention that while formal parental orders and adoption are the ideal, this invariably does not mean that every surrogate birth results in an application for either. It is entirely possible that a child may be handed over by the surrogate mother without any legal formalities, an obviously perilous situation where the surrogate mother would continue to have parental responsibility despite having little or no contact with the child.

3. Evaluation of Contemporary UK Surrogacy Legislation

The origin of UK surrogacy law can be traced to the 1984 Warnock Report¹⁹. This was commissioned with a view to confronting early concerns about the new techniques in assisted reproduction, particularly that of IVF. The report offered a striking review of surrogacy, at odds with the surrounding reasoning and analysis²⁰. The recommendations were incredibly hostile towards surrogacy, in contrast with the pro-autonomy stance of other methods of assisted reproduction, advocating anti-surrogacy legislation²¹. The report was not the only encouragement to government legislation on surrogacy. Commentators maintain that the subsequent Acts, rather than being well reasoned, were a reaction to moral panic of a series of sensationalised cases, particularly the “Baby Cotton” affair²². Freeman called the legislation “an ill-considered and largely irrelevant panic measure”, further stating that “there are few

14 [1985] FLR 846

15 [1993] 1 FLR 87

16 [2007] EWCA Civ 1053

17 [2007] EWHC 2814 (Fam)

18 [2008] EWHC 3030 (Fam)

19 *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314) (London: HMSO, 1984)

20 M.D.A Freeman, “After Warnock – Whither The Law?” (1986) 39 *Current Legal Problems* 33-5

21 See especially sections 8.18 and 8.19 of Warnock

22 M. Freeman, ‘Does surrogacy have a future after Brazier?’, *Medical Law Review* 7, 1999, pp. 1-20

better modern examples of morally panicked legislation than the 1985 Act²³.

These early influences were clearly hostile towards surrogacy and as such subsequent legislation was inevitably restrictive, discouraging surrogacy. The unenforceability of contracts coupled with strong anti-commercialisation provisions (particularly the prohibition of advertising) provides significant obstacles to any surrogacy arrangement. Brazier believed that such restrictions would lead surrogacy to “wither on the vine.”²⁴ However, this has not happened; one need only look at the existence of current cases, to see that it has not disappeared and that it remains a pressing issue. Contrary to expectations, statistics suggest that surrogacy arrangements and the subsequent births are on the increase²⁵.

It is not necessary to criticise the reasoning present in the Warnock Report. That has been done, particularly by Freeman who described it as ‘increasingly recognised as incoherent and philosophy muddled’²⁶. The law is easily criticised as a ‘knee jerk reaction,’ as it is obvious due to the sensitive nature of surrogacy arrangements, that any attempt to legislate needs to be carefully thought out. It is also no longer considered, as per Warnock, that surrogacy is totally unethical. Brazier concedes this point and moves the debate on to at what point does surrogacy become an ‘acceptable alternative’²⁷ so that the broad ethical issue remains the danger of exploitation.

The non-enforceability provision undoubtedly leaves surrogacy arrangements in a precarious position. With none of the parties bound by any agreement there is a large degree of risk, both of non-payment to the surrogate mother, or of the child, possibly created using the gametes of the commissioning parents, not being handed over. However, making the contracts enforceable may seem to be equally undesirable. Tong²⁸ argues it would be unconscionable for a surrogate mother to be forced to hand over ‘her’ child. As will be discussed later, it is currently sufficient to criticise this surrogacy legislation for not properly considering this issue, as it uses non-enforceability as a tool to discourage surrogacy rather than to protect the surrogate mother’s right to change her mind.

The anti-commercialisation provisions of the 1985 Act, amended by the 2008 Act, have the primary aim of preventing any commercial involvement in the negotiation and setting up of surrogacy arrangements. These provisions successfully prevent commercial third parties from profiting from surrogacy arrangements, but also make it very difficult for willing surrogate mothers and commissioning parents to contact each other. Furthermore, it significantly restricts access to professional expertise, particularly legal advice.

While third parties are effectively excluded, surrogacy arrangements do sometimes still have a commercial element. This is due to the courts’ ability to authorise payments, meaning it remains possible to be a paid surrogate mother, provided that the surrogate child’s best interests require it. This is necessary to safeguard the welfare of the child, but is nonetheless problematic.

The 1990 Act’s provisions on parentage are problematic. They were designed to ensure that the legal mother of a child conceived through assisted conception is the gestational mother. In addition to this, should the surrogate mother be married, her husband, irrespective of who the sperm donor is, will be the legal father. Gamble is particularly critical of the present situation, stating that “surrogacy arrangements get the raw end of the deal from laws which

23 M. Freeman, ‘Is surrogacy exploitative?’, in Sheila McLean (ed.), *Legal Issues in Human Reproduction*, Aldershot, Dartmouth, 1989, p. 165

24 *ibid* n 1, para. 3.44.

25 *ibid* para. 1.27

26 *ibid* n 20

27 *ibid* n 1, para. 4.7

28 ‘Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus’ In J Callahan (ed.), *Reproduction, Ethics and the Law: Feminist Responses* (Indiana UP: Bloomington and Indianapolis 1995) 55-79

were designed to protect parents conceiving with egg and sperm donors.”²⁹ She highlights the worrying consequence that “If the surrogate mother is married, neither intended parent will have any legal relationship with the child at birth, even if the arrangement is a host surrogacy in which both are biological parents.”³⁰

The availability of parental orders does attempt to rectify this problem but these are by no means simple. There can be no doubt that the inadequacies and complexities of the rules discourage people from acquiring the legal parenthood of ‘their’ child. This is most certainly not a desired consequence. Problems stem from the awkward application of rules governing assisted conception being used to regulate surrogacy, particularly the lack of recognition of the intended parents as the legal parents at birth. Due to the restrictive nature of surrogacy legislation in the UK, many potential commissioning parents may be forced to look to countries which have a more permissive approach. In these international arrangements worrying difficulties can arise. The recent case of *Re X & Y (Foreign Surrogacy)*³¹ highlighted such problems as the surrogate baby was left potentially parentless and stateless. Due to some foreign jurisdictions allowing commercial surrogacy, the UK court might be unable to grant either a parental or adoption order.

Brazier highlights the general problem of poor regulation, aptly calling it a ‘policy vacuum’, lacking a ‘coherent policy’.³² The courts have recognised this problem and have been critical in their judgments of the present system. McFarlane J in the case of *Re G (Surrogacy: Foreign Domicile)*³³ condemned the absence of ‘any statutory or regulatory umbrella’ which leaves the role of facilitating surrogacy arrangements to ‘groups of well meaning amateurs.’

As explained, the present UK surrogacy law is largely ineffective and potentially dangerous. Rules prohibiting commercialization coupled with awkwardly transplanted rules from assisted conception, govern the legal parentage of the child. This leaves surrogacy arrangements significantly unregulated, and parties involved with no professional help or guidance, in stark contrast to the intensive regulatory procedures found in other assisted conception services.

4. Potential Ways Forward

It is established that UK surrogacy law needs reform, but upon what philosophical and ethical basis should it be founded, and what changes would be appropriate to make it for purpose must be clarified. There are a wide range of legislative options available; I will briefly outline them in order of restrictiveness, before analysing them in greater depth, and looking at comparative surrogacy law from Israel to establish a potential way forward for UK surrogacy law.

1. Complete prohibition of surrogacy – this could take the form of criminal legislation banning surrogacy arrangements.
2. Prohibition of commercial surrogacy – as per Brazier, prohibition of payments to surrogate mothers, other than for reasonable expenses. Also making it illegal to act as a paid intermediary.
3. No criminalisation of commercial surrogacy, however surrogacy contracts remain unenforceable (In practice similar to the present UK situation) – this will not be looked at singularly as the merits of commercial surrogacy

29 Natalie Gamble ‘Why UK Surrogacy Law Needs an Urgent Review’ Bionews 28 April 2008, available at <www.bionews.org.uk>

30 *ibid*

31 [2008] EWHC 3030 (Fam.)

32 *ibid* n 1, para. 3

33 [2007] EWHC 2814 (Fam)

- are discussed in option 2.
4. Surrogacy contracts to be enforceable, but only subject to an extensive statutory and regulatory regime.
 5. Allowing surrogacy contracts to be enforceable and governed by more general principles from contract law and other relevant areas. This effective normalisation won't be considered due to the clear dangers of exploitation arising from leaving surrogacy arrangements solely in the hands of two private parties.

4.1 Complete prohibition

A complete prohibition of surrogacy could stem from the moral argument over the acceptability of surrogacy. A basis for this can be found in the Kantian imperative that you cannot treat someone solely as a means to an end³⁴. This seems to form the basis for many of the arguments that claim surrogacy is exploitative. It can be argued that the commissioning couple are treating the surrogate mother solely as a means, as Anderson adds “the application of commercial norms to women’s labour reduces the surrogate mothers from persons worthy of respect and consideration to objects of mere use.”³⁵ However this can be countered by ensuring that the surrogate mother is treated as a person in her own right, so there would be no conflict with the Kantian imperative.

Wilkinson provides a good overview of other potential problem of exploitation in surrogacy, not focusing on the Kantian imperative, but looking at the very nature of the arrangements.³⁶ Arguments about the potential exploitation arising from surrogacy arrangements state that the economical imbalance of the commissioning couple being generally richer than the surrogate mother, and her being offered money to bear a child, creates too great risk of exploitation. There is a general argument that the disparity of value between the benefit each party receives makes the arrangements exploitative. This argument as outlined by Wilkinson³⁷ is based on the following points: being a surrogate is inherently risky and dangerous, commissioning couples benefit substantially (typically getting a child), and relative to this, the level of payment is too low. There are several problems with this argument; firstly we must assume that fair payment is impossible and secondly that one cannot differentiate paid from unpaid surrogacy. For this to be valid there must be something about commercial surrogacy that makes it more exploitative than unpaid surrogacy. As I have just illustrated it cannot be the level payment, so it must be the effect payment has on the consent of the surrogate mother.³⁸

In addition to the importance of consent in whether surrogacy is exploitative, there are also many arguments against surrogacy based on consent alone. The first consent argument is rather general, stating that no surrogacy arrangement can be properly consensual, as a woman can never be sure of the risks involved (both emotional and physical), and as such cannot provide adequate consent. However, as Arneson contests, this is not a strong argument. It is overly paternalistic, and unjustly restricts the choices available to those who already have too few because of an elitist idea that they are too incompetent to make their own decisions³⁹. Further problems are highlighted by Wilkinson who effectively argues that, provided there is sufficient guidance and information available, there is no reason to presume that a surrogate

34 I. Kant, *Groundwork of the Metaphysics of Morals* (1785)

35 Elizabeth Anderson ‘Is Women’s Labour a Commodity?’ (1990) 19 *Philosophy and Public Affairs* 71-92

36 Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge: London, 2003) ch8

37 *ibid* section 8.4

38 *ibid*

39 Richard Arneson ‘Commodification and Commercial Surrogacy’ (1992) 21 *Philosophy and Public Affairs* 132-64

mother may be incapable of consenting⁴⁰.

The second consent based argument suggested by Brazier⁴¹ proposes that the payment invalidates the surrogate mother's consent. However, this does not suffice as our capitalist economy is based upon financial influence which is not seen to prevent free and informed consent.⁴² There is also an argument maintaining that payment for surrogacy attracts poor women who are, in essence, forced in to it by their economic situation⁴³. The problem with this type of argument is that it could equally apply to all sorts of work, such as factory labour, and there is nothing to preclude valid consent in these situations, particularly as then one would be unable to consent to life saving medical treatments.⁴⁴ Interesting points on this issue are made by Nussbaum in her work on the morality of prostitution.⁴⁵ Her insight on prostitution can be equally transplanted to surrogacy. She argues that there is nothing wrong with surrogacy per se, and that what is important is to minimize exploitation, not through the removal of options, but through regulation and legislation. Taking this into account, there is no compelling argument based on consent to justify a prohibition of surrogacy or indeed commercial surrogacy.

Other arguments against surrogacy maintain that there are too many problematic consequences; Anderson proposes that the child may come to feel undervalued and abandoned at discovering that their birth mother gave them away, or that the surrogate mother's children may be traumatised seeing their mother give away a child she has born. These theories can only be speculative since there is far too little evidence to either refute or support them. There may also be equally persuasive arguments to counter these. It is by no means clear why a child should feel undervalued as he is going to a loving family whose desire for a child cannot be doubted. These common sense arguments for surrogacy also lead us to believe that due to the intentional nature of the surrogacy arrangement, and therefore the intentional creation of the child, children born of surrogacy have reason to feel above averagely 'wanted'⁴⁶.

One final point on the philosophical base for a prohibition of surrogacy is that, if children born of surrogacy may be psychologically harmed, would this justify a prohibition. Wilkinson addresses this point admirably. He points out that if we were to adopt surrogacy legislation with a view to minimising harm to future children by preventing their birth, this could inevitably apply to all children, giving an effective argument for the discontinuation of the species.⁴⁷

Should the prohibition of surrogacy be justified (which it seems a long way from), in practice it would have to take the form of a prohibition by the criminal law. Neither Warnock nor Brazier advocate the criminalisation of surrogacy as both are eager to avoid surrogate babies being born "subject to the taint of criminality"⁴⁸. Furthermore, Brazier adds that it would constitute a violation of an assumed 'procreative liberty'⁴⁹, and it would be incapable of being effectively policed.⁵⁰ While this is accurate, it should be noted that criminal legislation is not solely about prosecution, it can also be seen to set moral standards;⁵¹ as Freeman states

40 *ibid* n 36, section 8.4

41 *ibid* n 1, para 5.15

42 *ibid* n 36, section 8.5

43 B. Brecher, 'Surrogacy, liberal individualism and the moral climate', in J. Evans (ed.), *Moral Philosophy and Contemporary Problems*, Cambridge University Press, 1987

44 *ibid* n 36, section 8.5

45 Martha Nussbaum "Whether from Reason or Prejudice: Taking Money for Bodily Services" *The Journal of Legal Studies*, Vol. 27, No. 2, Social Norms, Social Meaning, and the Economic Analysis of Law (Jun., 1998), pp. 693-724

46 *ibid*

47 *ibid* n 36

48 *ibid* n 18, para. 8.19

49 On which see J.A. Robertson, *Children of Choice* (Princeton University Press 1994)

50 *ibid* n 1, para. 4.38

51 See the arguments of Karl Olivecrona in the first edition of *Law As Fact* (Einar Munksgaard 1939), at 150-161

that an inability to police something does not make it unsuitable for criminalisation⁵². One final criticism of the criminal prohibition of surrogacy is that it could cause more harm than good. Indeed, “a crime tariff⁵³ could be created where the price of surrogacy would go up, as the quality of the service went down.”⁵⁴

It is very difficult to make a wholly convincing argument for complete prohibition either philosophically or morally, as to how it would work and what potentially harmful consequences may arise. This was the most restrictive of the proposed ways forward and it is not surprising that on such a divided issue it would be an inadequate solution.

4.2 Prohibition of Commercial Surrogacy

Brazier recommends a new Surrogacy Act which among other things would define what constitutes a lawful payment. This would include legitimate expenses associated with the pregnancy⁵⁵ (a list of permissible expenses is provided)⁵⁶ as well as recompense for loss of earnings (taking the form of the disparity between the mother’s usual earnings and state benefits.)⁵⁷ All other payments, commercial activity and the involvement of any commercial agencies should be banned. This is our starting point in looking at the prohibition of commercial surrogacy as a potential way forward. Brazier outlines a few arguments as to why this should be the case.

One follows that surrogacy should be ‘a fully informed and free act of giving’.⁵⁸ By making it so, it would be brought into line with policies relating to blood, organ,⁵⁹ sperm and egg donations which do not allow for payments, stating that these could only be acceptable if made within a ‘gift relationship’.⁶⁰ This argument is difficult in that it treats law and policy in these areas as decided and unproblematic, which it is not. There are strong arguments both for and against whether payment is acceptable in these areas.⁶¹ While putting surrogacy payments in line with other areas of the law could be desirable or indeed appropriate (as a ‘simple donation’ and a nine month pregnancy have marked differences and risks), the problematic nature of the other laws and the policy upon which they are based requires that this issue be thoroughly considered.

The mainstay of Brazier’s argument against commercial surrogacy is that it commodifies children and women. Turning first to the commodification of women, an argument of this type, as outlined by Andrews, would be that commercial surrogacy treats women as human incubators, foetal containers, and thus a commodity in the reproductive marketplace.⁶² This is extended by Anderson, who states that by applying commercial norms, surrogate mothers are stripped of respect.⁶³ This is a rather weak argument, as it fails to explain why it is impossible to respect the surrogate mother as a person in her own right. As McLachlan and Swales point out, if some are not treated with the dignity and respect due, this indicates a problem about

52 *ibid* n 22

53 See H. Parker, *The Limits of the Criminal Sanction* (Stanford University Press 1969), at 277-82

54 *ibid* n 22

55 *ibid* n 1, para. 5.24

56 *ibid*, para. 5.25

57 *ibid*, para. 5.26

58 *ibid* n 51

59 See European Convention for the Protection of Human Rights and Dignity of the Human Being With Regard To The Application of Biology and Medicine (1996), Article 21

60 Richard M Titmuss, *Gift Relationship: From Human Blood to Social policy* (Allen & Unwin: London, 1971)

61 See L.R. Cohen, “Increasing The Supply of Transplant Organs: The Virtues of a Future Market” (1980) 91 *Ethics* 63-71; and G. Crespi, “Overcoming the Legal Obstacles To The Creation of a Futures Market in Bodily Organs”, (1994) 55 *Ohio State Law Journal* 1-77

62 Andrews, ‘Surrogate motherhood: the challenge for feminists’, 16 *L. Med. & Health Care* 72 (1988)

63 E. Anderson, ‘Is Women’s labour a commodity?’, *Philosophy and Public Affairs*, 1990, vol. 19 p.80

those particular people, not surrogacy.⁶⁴ Wilkinson rightly concludes on this point that there is nothing in the nature of surrogacy itself preventing surrogate mothers from being properly respected.⁶⁵

With regards to the commodification of children, this argument rests on the premise that commercial surrogacy is baby selling. Whether paid surrogacy is indeed baby selling is far from clear; one of the key questions here is what exactly paid surrogates are selling: gestational services, a baby or something else.⁶⁶ Some opponents of commercial surrogacy simply argue that it is impossible to distinguish between baby selling and gestational services.⁶⁷ Yet, as Wilkinson highlights, there is no reason given as to why this is the case, and as such need not concern us.⁶⁸ The main reason put forth by Brazier that commercial surrogacy is baby selling, is that surrogacy contracts must contain a 'hand over the baby' clause and that in order to get paid the surrogate mother must give the baby to the commissioning couple. The validity of this claim is assessed in depth and found wanting by Wilkinson, as it demonstrably misrepresents the contractual relationship.⁶⁹ Instead, as suggested by Kornegay, it can be thought of as a service contract with a success clause; the surrogate mother only gets paid for the service of gestation and childbirth if there is a baby for the commissioning couple to rear as a result.⁷⁰ Further objections profess that a child is not owned by anyone, and consequently cannot be sold by anyone.⁷¹ This makes sense, as parental rights are limited in a number of ways; they cannot abuse their children, must educate them and certainly cannot sell them. In addition, the child is not put on the open market, but transferred to the commissioning parents. Finally their claim to the baby is grounded in genetics and as such is *prima facie* as strong as that of the surrogate mother's claim founded in gestation.⁷²

There is also a fourth argument here, relating to the welfare of the child and how they may be psychologically harmed by perceiving themselves as having been bought and sold. This has been adequately dealt with in the arguments on child welfare discussed earlier, and as such it is not necessary to add anymore on this issue.

The arguments regarding commercial surrogacy as commodification of children are unconvincing. Neither are arguments based on child welfare, on the validity of surrogate mothers' consent, or on the potential for exploitation. Wilkinson rightly concludes that none of these arguments are sufficient to justify a prohibition of commercial surrogacy.⁷³ Were such a prohibition on commercial surrogacy to come into force, the consequence in practice would also be problematic, as withdrawing remuneration may succeed in only driving people away from regulated surrogacy arrangements, creating dangers for those involved.⁷⁴

4.3 Enforceable Surrogacy Contracts Subject to Regulatory Regime

A good example of how this would work is the system currently operating in Israel, examined in more detail later. Most importantly, regulation is without a doubt the best means to balance the interests of all parties involved. The initial resistance towards regulation came from a view that it would encourage surrogacy, and that surrogacy was not desirable as

64 McLachlan and Swales, 'Babies child bearers, and commodification', *Health Care Analysis* 8: 1-18. (2000) Springer Netherlands p.7

65 *ibid* n 37, section 8.6

66 *ibid* n. 36

67 *ibid* n 1, para. 5.11

68 *ibid* n 36, section 8.5

69 *ibid*

70 R Kornegay, 'Is commercial surrogacy baby selling?', *Journal of Applied Philosophy*, vol. 7 (1990) p.49

71 *ibid* n. 36

72 *ibid* n 37, section 8.5

73 *ibid* n 37, section 8.7

74 *ibid*

per Warnock. This view is now widely dismissed, particularly considering Brazier's argument that it is far riskier to not have a regulatory framework.⁷⁵ The exact form these regulations would take and to what extent they operate is far too broad a field to properly address in this essay, however, I suggest the Israeli model may well prove useful in this respect.

A stringent regulatory regime will undoubtedly make enforcing surrogacy contracts a more tenable option; parties will enter into them fully aware as the regulations will create legitimate expectations, removing uncertainty and ensuring neither party reneges on the agreement. Irrespective of this, there are strong arguments for both sides of the enforceability debate. Bartlett argues that forcing a surrogate mother to give up the child after birth is unconscionable.⁷⁶ This view is shared by Tong who argues from a feminist perspective that it is imperative that a woman be allowed to have a 'change of heart' in such a sensitive arrangement.⁷⁷ Such arguments maintain that specific performance would be oppressive, however, this need not be the case. Should one party fail to perform its obligation perhaps a remedy of damages would be more appropriate. Just because specific performance is oppressive does not provide sufficient grounds for unenforceability; similarly as contract law does not force an actor to go on stage, it need not force a surrogate mother to hand over the baby.⁷⁸

While it may be avoidable, some argue that specific performance is essential and also appropriate. One main proponent of this view is Shultz who argues that allowing surrogate mothers to change their minds reinforces stereotypes of women as unstable, vulnerable to emotions and hormones, and lacking in conviction. She also realises a potential great loss sustained by the commissioning couple in the failure to realise their expectations. Promises made within these arrangements are about as serious and intense as they can be, meaning that specific performance must be available.⁷⁹

The final reason for enforcement comes from the current uncertainty and insecurity. Complete freedom for the surrogate mother may lead her to fail to fully appreciate what she is to do. Furthermore there is a risk of the surrogate mother extorting more money from the commissioning couple under pain of an abortion or keeping the baby. Surrogacy arrangements are often made with no pre-existing relationship between the parties, this lack of trust or professional relationship, taken with the fact that the commissioning couple enter into these arrangements due to an overwhelming desire for a baby means that the law must protect them. Such risks are removed in Israel by their regulatory regime. Schulz attributes the complete absence of any surrogate mother wishing to keep the child to this certain, fully regulated regime.⁸⁰

4.4 Comparative Surrogacy Legislation

4.4.1 Israel

Israeli surrogacy law takes the form of a comprehensive regulatory regime for approving surrogacy arrangements.⁸¹ It is one of the first countries in the world to do so, by looking at how it has fared we may gain an insight as to what may be the best way forward in the UK.

75 *ibid* n 23, para. 6.6

76 Katharine T Bartlett 'Re-expressing Parenthood' (1998) 98 *Yale Law Journal* 293, 333

77 Rosemarie Tong 'Feminist Perspectives and Gestational Motherhood: the Search for a Unified Legal Focus' in J Callahan (ed.), *Reproduction, Ethics and the Law: Feminist Responses* (Indiana UP: Bloomington and Indianapolis, 1995)

78 Emily Jackson, *Medical Law* 6th ed. (Oxford University Press 2010) p. 852

79 Marjorie Shultz 'Reproductive Technology and Intention-based Parenthood: An Opportunity for Gender Neutrality' (1990) *Wisconsin Law Review* 297-398

80 Rhona Schulz, 'Surrogacy in Israel: An Analysis of the Law in Practice' in *Surrogate motherhood*: edited by Rachel Cook and Shelley Day Sclater with Felicity Kaganas (Hart Publishing, 2003)

81 *Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756-1996*

Were we to fit the Israeli approach into one of the possible ways forward outlined earlier, it would be option 4. Surrogacy contracts would be enforceable, but subject to an extensive statutory and regulatory regime. Before having a detailed look at the Israeli approach, we must first note that only full surrogacy is permitted, which means that the pregnancy is dependent on IVF.

The suitability of the surrogate mother is crucial to the Israeli system. This suitability is not to be judged by the surrogate mother herself, or the commissioning couple, but by professional assessment (both medical and psychological) and the Approvals Committee. There are various restrictions introduced by the Approvals Committee which reflect its general views on suitability; a surrogate mother must be older than 22 and younger than 40, have not given birth more than five times, and while not officially published, it is expected that she has given birth at least once (and will not be allowed to serve as a surrogate more than once.) A further restriction is that relatives of the intended parents are not allowed to serve as surrogate mothers. Once deemed suitable, the surrogate mother is fully informed of all the risks and the nature of the commitment, and must seek independent legal advice. Physical health is examined and provisions for mental health are also made available throughout the entire process to ensure that the real danger to the mental health of the surrogate mother is addressed.

Israeli law does not regulate payments for surrogacy arrangements, there are no maximum or minimum payments and the Approvals Committee does not recommend any specific sums. However, while these payments are left to the parties involved, the financial protection of the surrogate mother is ensured through guidelines which outline what expenses must be covered by the commissioning couple; namely all medical, legal and counselling expenses, an insurance policy to cover against injury or death and also inability to work during pregnancy. A sum sufficient to cover all of this for the duration of the pregnancy is required to be deposited with a lawyer or trustee before the arrangement is approved.

The protection afforded to the commissioning couple is much simpler; the law simply denies the surrogate mother the right to renege on the arrangement unless circumstances have substantially changed or the welfare of the child is at serious risk. This makes the surrogacy arrangement enforceable and protects the most important interest of the commissioning couple. That there have not been any reported cases of the surrogate mother requesting to keep the child seems to suggest that the regulatory regime is effective in screening birth mothers and protecting the interests of the parties involved.⁸² Finally, an integral aspect of the Israeli law is the formal handing over of the baby from the surrogate mother to the commissioning couple in the presence of a welfare officer. An application for a parentage order must then be made within seven days, after which the intended parents become the sole guardians of the child. Schulz reports that, as far as we are aware, these orders are consistently unproblematic and are made in every case.⁸³ The Israeli approach couples extensive rules and regulations with objectivity, injected by the Approvals Committee and professional assessments, successfully avoiding many of the risks associated with surrogacy in the UK.

5. Conclusion

Given the complex interplay of rights and interests, coupled with very real emotional and physical risks, as well as the sensitivity involved in reproduction, surrogacy will continue to be a divisive issue. With this in mind, the present surrogacy law in the UK must be clearly

⁸² *ibid* n 80

⁸³ *ibid*

and rationally revised. With the general shift toward a rights-based society, and the move away from paternalism, people need protection in exercising their autonomy. In this instance, providing protection and guidance should they choose to make a surrogacy arrangement. The need for a new act is apparent, but what should be changed is a difficult question.

Criminalisation of surrogacy or contractual ordering, is simply not feasible; as mentioned earlier, it is morally unsound, impractical and very dangerous. Regulation of surrogacy is essential. On this particular issue I think that the Israeli system with regards to providing objectivity in assessment, help, support and certainty is to be commended. The focus is rightly on the welfare of the children and the parties involved, which must be maintained. The paternalistic views of previous reports, the legislator, and their attempts to discourage through ambivalence what they perceived to be morally wrong, are lamentable at best and very irresponsible and dangerous at worst.

Other contentious issues here include whether commercial surrogacy can be prohibited and if such contracts should be enforceable. Turning firstly to enforceability, I believe that a comprehensive regulatory system makes this a really viable option. Should none of the surrogate mothers change their minds, the issue of enforceability is moot, and proper regulations encourage just this type of situation. Through having enforceable surrogacy arrangements, parties are fully aware of the gravity and risk of the undertaking. Furthermore, the involvement of social services in providing counselling and assistance ensures that risks to all parties are kept to an absolute minimum. The reliance on well meaning amateurs must be removed and replaced with professionals within a structured regime.

The acceptability of commercial surrogacy is in my opinion the most difficult of the issues. I do not think that the involvement of commercial agencies need be seriously considered, making money from surrogacy is not too dissimilar from making money from organ selling; it is too sensitive and private an issue to be opened up to commercial agencies. But the difficult question here is, should the surrogate mothers be paid for their services, and if so, how much. My analysis earlier seemed to indicate that there is no sufficient justification for a prohibition of surrogacy. I believe this to be correct; payment does not increase the risk of exploitation and is certainly not tantamount to baby selling. Proper regulation, with all payments being subject to court approval would ensure that any risks to the parties involved are reduced. Indeed, the Israeli system operates such a way, setting neither a maximum nor minimum for payments, but requiring them to be authorised by the court.

In my opinion the way forward for the UK should be to follow the example set by Israel. The rules must be adapted and modified to fit British law, particularly as in Israel they only allow full surrogacy; as such it would require significant reworking to incorporate partial surrogacy, same sex couples, and new parentage orders which in Israel are done in accordance with Jewish law. Surrogacy contracts should be enforceable, commercial surrogacy should be permitted (although to what extent is unclear) and the whole arrangement should take place under a comprehensive regulatory umbrella. One final change must be to replace parental orders. Surrogacy regulation cannot be left to the incidental effect of another act, and deserves a new statute which would enable a much more expedient and simple allocation of parental rights following surrogacy. Surrogacy is not going to go away, and as such it is important that steps are taken to protect the vulnerable parties involved. Gone must be the early legislation characterised by ambivalence, and in its place a well thought out and reasoned attempt at tackling the many problems and risks currently faced alone by those entering into surrogacy arrangements.

AN ANALYSIS OF THE TAKEOVER CODE'S TREATMENT OF AN ACQUIRING COMPANY'S SHAREHOLDERS; STEALING FROM THE RICH TO GIVE TO THE ALREADY WEALTHY?

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ABSTRACT In the wake of a number of high profile takeovers in the UK, such as the Kraft bid for Cadbury, intense debate has arisen concerning potential reform of the Takeover Code. One aspect of the Code that has been placed under particular scrutiny is its treatment of shareholders and whether such treatment is as balanced as was once thought. Previous discourse concerning the role of shareholders in the takeover process has tended to focus on the needs of target shareholders while neglecting those of acquiring shareholders. The article attempts to address this gap in the discourse by drawing upon both economic analysis and theory to demonstrate how the shareholders of an acquiring company are disproportionately affected by a takeover in comparison to the shareholders of the target company. Given this disparity between shareholders, the article then goes on to examine how the Takeover Code responds to the needs of acquiring shareholders. It finds that not only does the Takeover Code fail to respond in any meaningful way to the plight of acquiring shareholders, but that it actually institutionalises the protection of target shareholders at the cost of acquiring shareholders. Furthermore, the article demonstrates how the theoretical justifications used to warrant this protection of target shareholders apply equally to acquiring shareholders. Finally, the article examines methods of restoring balance to the Takeover Code through the adoption of greater shareholder voting power, up to and including the power to veto a proposed acquisition, and the imposition of a non-auction rule.

1. Introduction

The theoretical justification for takeovers is, on the face of it, an attractive one. On one hand, the target's shareholders profit from the premium on control that is paid to acquire the target. On the other hand, the acquirer's shareholders benefit from the resulting increased share price which is due to the synergy generated from any increased economies of scale, tax savings and/or market power. This rose tinted view, however, does not always reflect the reality of the situation. Study after study has shown that in the majority of cases target shareholders prosper from an acquisition, while acquiring shareholders lose out in a number of ways. This is due, in part, to the disparate vested interests that exist between a company's management and its ownership. Although these interests generally coalesce in the desire to maximise a company's profitability and share value, the prospect of an acquisition may throw this alignment out of balance entirely, as the decision to engage in an acquisition rests solely with the management of the offeror while the shareholders are offered little opportunity to express any concerns that they may have regarding the acquisition. Warren Buffet best expressed the associated problems of such disparate interests when he wrote:

Many managers were apparently overexposed in impressionable childhood years to the story in which the imprisoned handsome prince is released from the toad's body by a kiss from the beautiful princess. Consequently they are certain that the managerial kiss will do wonders for the profitability of [a] target company. Such optimism is essential. Absent that rosy view why else should the shareholders of Company A want to own an interest in B at a takeover cost that is two times the market price they'd pay if they made direct purchases on their own? In other words, investors can always buy toads at the going price for toads. If investors instead bankroll princesses who wish to pay double for the right to kiss the toad, those kisses better pack some real dynamite. We've observed many kisses, but very few miracles. Nevertheless, many managerial princesses remain serenely confident about the future potency of their kisses, even after their corporate backyards are knee-deep in unresponsive toads.¹

This essay seeks to examine whether the Takeover Code responds to the needs of acquiring shareholders when faced with a potentially ruinous takeover. Chapter Two looks at how the background to the formation of the Code influenced the development of its theoretical framework. Chapter Three examines the Code's justifications for the preferential treatment of target shareholders. Chapter Four analyses the Code's structure to determine whether its 'equal treatment' principle serves only to protect target shareholders at the expense of acquiring shareholders. Finally, Chapter Five proposes a number of measures that would strengthen the position of acquiring shareholders and serve as potential solutions to the problems identified above.

1 Warren Buffett, Berkshire Hathaway Annual Report [1981] 1, 2

2. Origins

2.1 The Emergence Of The Takeover

The first takeover in Britain was the acquisition of J. Sears & Co by Charles Clore in 1953.² Johnston notes that the emergence of the takeover at this point in British corporate history was due to a number of factors including inter alia, the end of paper rationing, the increased disclosure requirements of the Companies Act 1948 and a sharp 32% decrease in the amount of gross trading profit being distributed to shareholders.³ These factors meant that the necessary means, the access to information and the shareholder incentives to sell were present to trigger what was termed a ‘boardroom revolution’.⁴

2.2 Towards Self-Regulation

By 1959 the takeover had become an established business practice. However, there was a growing sense of unease with the conduct of takeovers. Johnston notes ‘in a number of cases, the shareholder did not seem to be getting a square deal, particularly the unsophisticated shareholder with a relatively small holding.’⁵ For example, the 1959 takeover of Harrods resulted in its preference shareholders receiving less consideration than its ordinary shareholders.⁶ Even where the bid was a ‘square deal’, the defensive measures adopted by a target’s management to deter potential bids were denying the target shareholders the opportunity to decide on the merits of the takeover. The Savoy Hotel affair is but one example of where, through the use of shell companies, the target’s management sought to put assets out of the reach of both its own shareholders and any potential bidders in order to deter hostile takeovers.⁷

In response to calls for the regulation of takeovers, the Governor of the Bank of England convened a meeting of what became the City Working Party to consider a voluntary code of conduct to regulate bids. This resulted in the ‘Notes on Amalgamations of British Businesses’ (Notes), the City’s first attempt at self-regulation. The Notes endorsed the virtues of takeovers and stated that there should be ‘no interference with the free market in shares and securities of companies’,⁸ that shareholders should decide whether or not to sell their shares and, to aid that decision, ‘it is the duty of the Board of [the] company to make every effort to ensure that such information is provided and to give [shareholders] their advice.’⁹

Johnston argues that the Notes were solely concerned with the methods by which takeover bids were effected and that the encouragement, or otherwise, of takeovers as a business practice is a matter of public policy for Parliament.¹⁰ However, it must be noted that the makeup of the City Working Party drew heavily from those most involved in the takeover process, including the Issuing Houses Association, the Association of Investment Trusts and the British Insurance Association.¹¹ As the ones who stood to gain most from a permissive takeover regime, their influence was clearly felt in the regime that emerged and the plight of

2 Richard Roberts, ‘Regulatory Responses to the Rise of the Market for Corporate Control in Britain in the 1950s’ (1992) 34 *Business History* 183, 185-7

3 Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 *CLJ* 422, 427

4 *ibid* 428

5 Alexander Johnston, *The City Take-Over Code* (Oxford University Press, New York 1980) 18

6 *ibid* 17

7 Johnston (n 3) 429

8 Johnston (n 5) 20

9 *ibid*

10 Johnston (n 5) 8

11 Johnston (n 5) 19

the ‘unsophisticated shareholder’ was largely forgotten.¹²

2.3 The Creation Of The Takeover Code

The 1960s saw continued growth in the number of acquisitions, with between 600 to 1,000 acquisitions by quoted companies each year.¹³ However, the Notes lacked an effective enforcement mechanism and were increasingly flouted.¹⁴ To preempt calls for statutory regulation, the City Working Party was reconvened in 1967 and published a draft of the City Code on Takeovers and Mergers (Code) in 1968. The Code consisted of 10 General Principles and 35 Rules and built on the pro-merger/target shareholder principles established by the Notes. The Code was backed by an informal enforcement regime whereby sanctions would be imposed upon those in breach of the Code by the trade associations represented in the Working Party. It required the similar treatment of shareholders of the same class, the provision of equal information to all shareholders, that the target board provide its opinion of a proposed takeover, and that the target board be prohibited from frustrating a bid without shareholder approval. The Code also prohibited the use of partial offers, raised the acceptance condition to 50% plus and created a timetable for the conduct of bids. The pro-target shareholder stance taken by the Code was further institutionalised by the introduction of the 30% mandatory bid rule in 1974 to ensure that any premium for control would be shared equally amongst shareholders. By the end of this process what had emerged was a self-regulating Code that reflected the capacity of UK institutional shareholders to lobby for the continued maintenance of a regulatory regime which operated in their favour.¹⁵

3. Theoretical Justifications

The dominant theoretical view of the Code is that it is both a method of ensuring managerial accountability to shareholders and a regulatory solution to the market’s failure to ensure that minority shareholders partake in the premium for control.¹⁶

However, what is largely forgotten is that the problems the Code aims to address are not unique to target shareholders but also impact heavily on acquiring shareholders. Furthermore, the solutions that the Code adopts create negative externalities for acquiring shareholders in and of themselves.

3.1 ‘Agency Costs’

3.1.1 Protecting Target Shareholders

Berle and Means identified the problem with managerial accountability in their seminal work, ‘The Modern Corporation and Private Property’,¹⁷ as a divide between the management and shareholders of a company such that ‘the owners of passive property, by

12 Simon Deakin and Giles Slinger, ‘Hostile takeovers, corporate law and the theory of the firm’ (1997) 24 *Journal of Law and Society* 124-150; Simon Deakin and others, ‘Implicit contracts and corporate governance: in the shadow of the City Code’ in David Campbell, Hugh Collins and John Wightman (eds.), *Implicit Dimensions of Contracts* (Hart Publishing, Oxford 2003)

13 Johnston (n 5) 30

14 Dan D Prentice, ‘Takeover Bids – The City Code on Takeovers and Mergers’ (1972) 18 *McGill Law Journal* 385, 387

15 Simon Deakin and Ajit Singh, ‘The Stock Market, the Market for Corporate Control and the Theory of the Firm: Legal and Economic Perspectives and Implications for Public Policy’ [2008] Centre for Business Research University of Cambridge Working Paper No. 365, 10 and available at: <<http://www.cbr.cam.ac.uk/pdf/WP365.pdf>> accessed 12 May 2010

16 Johnston (n 3) 448-9

17 Adolf A Berle and Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers, New York 1991)

surrendering control and responsibility over the active property, have surrendered the right that the corporation be operated in their sole interest ...'¹⁸ This divide allows management to impose 'agency costs' on their shareholders, ie decisions that operate contrary to shareholder's interests and represent a loss in value to the company.

'Agency costs' are particularly apparent in takeovers as it involves an alternative management team competing for the right to manage corporate resources in a more efficient way. The incentive for target shareholders to accept the bid can be found in the premium offered by the bidder for control of the company. The target's management, however, have no such incentive to welcome a bid as they stand to lose their positions and, thus, may act to protect them through such defensive measures as 'poison pills', staggered boards etc. The 'agency cost' results from the target's management's attempts to frustrate a bid and to deny the target shareholders of the opportunity to decide on the bid's merits. While shareholders may attempt to remove the management, the dispersed nature of shareholdings mitigates against collective action. Institutional shareholders such as investment funds who are best suited to act against management, have previously been loathe to do so due to the cost and free rider problems involved. Thus, the Code intervenes to protect target shareholders through a strict prohibition on the frustration of bids as per the Code's General Principle 3 and Rule 21.

3.1.2 A Unique Phenomenon?

'Agency costs' are not a phenomenon unique to the target shareholders. Koulouridas provides three explanations as to why not all takeovers pursued by management are beneficial to the acquiring company nor necessarily in the best interests of its shareholders. Firstly, managers may engage in empire building due to the increases in prestige, compensation or opportunities for further employment as acquisition specialists that may come about as a result.¹⁹ Bebchuck agrees that 'the expansion motive is consistent with both the economic theory of the firm and the existing empirical evidence.'²⁰ Secondly, Koulouridas outlines Jensen's theory that a company's free cash flows, ie its operating profit after tax and positive investment opportunities, will be invested by managers who prefer growth rather than distributing profits amongst the shareholders.²¹ This free cash flow will be invested, by definition, in sub-optimal investments including acquisitions. Not only does this constitute an asset substitution for shareholders but it also negatively affects share prices due to the inefficient use of resources, thus causing a double loss to acquiring shareholders.²² Lastly, management may engage in acquisitions as a defensive mechanism. The larger the firm the harder it is to acquire due to the corresponding increases in expenses, complications and likelihood of competition issues. Cosh and Hughes analysed five decades of studies aimed at predicting possible target companies and found that "[a]ll the studies considered report that size is negatively related to the probability of takeover. The incidence of takeover declines with the size of the firm."²³ Such acquisitions do not fall foul of Rule 21 so long as they are undertaken to prevent any bid from appearing, rather than to frustrate a particular bid.

Despite facing similar 'agency costs', the Code contains no provisions that protect acquiring shareholders in the same manner as target shareholders. The Code's introduction states that it 'is not concerned with the financial or commercial advantages or disadvantages of a takeover.' While true of individual takeovers, the Code's structure ensures that target

18 *ibid* 312

19 Athanasios Koulouridas, *The Law and Economics of Takeovers* (Hart, Oregon 2008) 11-12

20 Lucian A Bebchuck 'The Case for Facilitating Competing Tender Offers' (1982) 95 Harv L Rev 1028, 1033.

21 Micheal C Jensen, 'Agency Costs of Free Cash Flow' (1986) 76(2) American Economic Review 323

22 Koulouridas (n 19) 12-13

23 Andy Cosh and Alan Hughes, 'Takeovers After Takeovers' [2008] Centre for Business Research University of Cambridge Working Paper No. 363, 11 and available at; <<http://www.cbr.cam.ac.uk/pdf/WP363.pdf>> accessed 12 May 2010

shareholders benefit from a takeover, often at the expense of acquiring shareholders. The sole opportunity given to acquiring shareholders to not only voice their disapproval of a takeover but also to prevent it, is when the acquisition comes under the UK Listing Authority's Listing Rules. The Listing Rules require the acquirer's shareholders' approval of a takeover where; the takeover is classified as a Class 1 transaction²⁴; the takeover is considered to take place with a related party²⁵; or where it is a reverse takeover.²⁶ The vast majority of transactions, however, do not fall within the above criteria. For example, Stapledon's analysis of the 100 largest listed UK companies in 1993 showed that any of the top 20 companies could have taken over the 81st ranked company without requiring the approval of the acquiring company's shareholders under the class tests.²⁷

3.1.3 *The Economics Of The Final Period*

Kouloridas argues that the major difference between the sets of shareholders justifying their different treatment is that target shareholders face a final period problem. The economics of the final period suggest that when a transaction is the last in a given series, the incentive to cheat increases because the cheater cannot be punished once the transaction has been completed.²⁸ Hence, the necessity of regulation to protect target shareholders as once they have sold their shares, they have no recourse available to them where it later comes to light that they have been cheated out of a higher share price by their management.²⁹ However, this is an argument for the general regulation of management in the takeover context rather than the Code's adoption of a specific structure. Acquiring shareholders face a similar problem in that they have little ability to prevent management from engaging in an ill advised takeover due to the time constraints imposed by the Code's timetable together with the difficulty in organising effective shareholder opposition. However, as the acquiring company's management will continue to remain accountable to its shareholders, the Code places its trust in the market for corporate control to protect acquiring shareholders and to control errant boards. The question begs itself, however, whether this trust is justified.

3.1.4 *The Myth Of The Market For Corporate Control*

Manne first advanced the idea of the market for corporate control in 1965 when he argued that not only do capital markets exercise a warning function to shareholders through a declining share price, but that they also allow the market to correct this downward slide through the use of a takeover.³⁰ Fundamental to this analysis is the premise that there is a 'high correlation between corporate managerial efficiency and the market price of shares of that company.'³¹ The market operates on the principle that a company's share price reflects the totality of information available to it. Where an acquisition is perceived to have been carried out against the interests of the acquiring company's shareholders, eg due to the 'agency costs' explanations above, the market will penalise the bidder by decreasing the market price of its shares.³² Share price also reflects the potential capital gain inherent in the company with more efficient management. Thus, a lowered share price post acquisition reflects the market's

24 LR 10.2 defines a Class 1 transaction as one that generates a percentage ratio of 25% or more after comparing the target's gross assets, profit or gross capital to those of the bidder or, alternatively, comparing the consideration offered to the value of the ordinary share capital of the bidder

25 LR 11.1

26 LR 10.6.1

27 Geof P Stapledon, *Institutional Shareholders and Corporate Governance* (Clarendon Press, Oxford 1996) 290

28 Kouloridas (n 19) 27

29 r 16.4

30 Henry G Manne, 'Mergers and the Market for Corporate Control' (1965) 73 *Journal of Political Economy* 110

31 *ibid* 112

32 Kouloridas (n 19) 32

disapproval of the incumbent management and highlights the potential capital gains to be made through a takeover while also facilitating it by reducing the associated cost.

Empirical evidence of the market for corporate control is divided. Koulouridas points to a number of studies which both prove and disprove the theory.³³ Assuming that at least some takeovers result from the market for corporate control, it is important to point out the problems that exist with it operating as the acquiring shareholders' sole protection against 'agency costs'. Firstly, the takeover is both the problem and the solution. The market cannot guarantee that the disciplinary takeover is generated by the market for corporate control and not by the same 'agency costs' that caused the initial value reducing takeover. Secondly, by the time that the market does act, the damage to the acquiring company's share price has already been done. There is no guarantee that the disciplinary takeover will restore this lost value. Thirdly, the market for corporate control may cause management to engage in empire building, increasing the number of ill advised takeovers that require disciplinary action. Thus, the market provides little to no protection for acquiring shareholders from a management that insists on engaging in value reducing takeovers.

3.2 Minority Shareholders

3.2.1 Paying The Premium For Control

The reality is that in order to control a company a bidder need only acquire 50% + 1 of the voting equity. However, given the dispersed nature of UK shareholdings together with the ability to block special resolutions with 25% of the voting equity, the Code established that 30% control of the voting equity gives de facto control of the company.³⁴ Thus, without the Code, all a potential bidder would need to gain control is to offer a high enough premium, known as the premium for control, to a number of shareholders who collectively hold over 30% of the company's equity. Where control transfers in this manner, minority shareholders lose twice over. Firstly, they will not gain from the premium of control that the bidder was willing to pay: Jensen noted in 1988 that hostile takeovers generate premiums exceeding 30% on average.³⁵ Secondly, inherent within the price of a share is the possibility of garnering control of the company. If a bidder has already acquired effective control then the value of the remaining shares decrease automatically as they can no longer be used to gain control. Furthermore, the acquirer has no incentive to purchase the remainder.

The Code protects minority shareholders from such an occurrence through both the mandatory bid rule and the 'equal treatment' principle.³⁶ Firstly, the mandatory bid rule requires any party who reaches a 30% stake within a target to make a bid for the rest of the target, ensuring equal access to any premium for control that has been paid. Secondly, the equal treatment principle preserves the share value of all shareholders by ensuring that they will have an equal opportunity to tender their shares, through the prohibition on the use of partial offers,³⁷ and that shareholders of the same class will be treated equally, both in respect of the price³⁸ and type of consideration offered.³⁹

3.2.2 Negative Returns On Acquisitions

33 *ibid* 35-38

34 *r* 9.1

35 Micheal C Jensen, 'Takeovers: Their Causes and Consequences' (1988) 2 *Journal of Economic Perspectives* 21, 22

36 *GP* 1

37 *r* 14

38 *r* 6

39 *r* 11

Management would have its shareholders believe that they can only benefit from engaging in acquisitions. Empirical studies tell us differently. Koulouridas compiles a number of British and American studies which measure the performance of an acquirers' stock price in the months pre and post the announcement and completion of an acquisition.⁴⁰ The empirical evidence suggests, overwhelmingly, that while the shareholders of target companies will receive large premiums on the market price of their shares, the acquiring shareholders will experience a sharp reduction in share value. Koulouridas points to one major study conducted by Gregory⁴¹ based on all successful takeovers conducted in Britain from 1984-92 with a bid value of over £10m. It found, irrespective of the benchmark employed, that the post-takeover share performance of UK companies undertaking large domestic transactions is predominantly negative in the long-term. Moreover, not only do acquiring shareholders suffer a loss due to the acquisition, they are locked into the company until the share price recovers. This limits the function of the market for corporate control, and the protections to acquiring shareholders that supposedly come with it, as shareholders are unwilling to sell their shares in a market that will return a loss on their investment.

4. Negative Externalities

As we can see, there is a certain similarity between minority shareholders in a target company and an acquiring company's shareholders as they are both powerless to prevent a loss being inflicted on them by a more powerful party. The major difference between the two sets of shareholders is that the Code's very structure operates to protect minority shareholders while at the same time creating negative externalities for acquiring shareholders. This Chapter demonstrates these negative externalities by examining how the Code's 'equal treatment' principle and, in particular, the auction process, results in increased costs to acquiring companies, and hence shareholders, and asks whether these increased costs are justified.

4.1. Inherent Costs

4.1.1 Sunk Costs

Once a decision has been made to expand by acquisition, a variety of costs emerge solely connected with the process of preparing the bid itself. Koulouridas notes the pre-offer costs of a takeover include preparing the takeover documents, engaging in the due diligence process, paying finder's fees to an investment bank for identifying the target etc. A takeover is by no means a cheap process to engage in. For example, looking to the recent Cadburys bid by Kraft, the cost of advisers on both sides of the deal was reportedly in the region of \$400 million.⁴² In the recent Prudential debacle, the break fees alone were worth a reported £153 million.⁴³ These are 'sunk costs' which must be met regardless of the outcome of the takeover and can, in some circumstances, provide reason enough to go ahead with an acquisition, even where it is not value maximising, rather than incur such expense for no return.⁴⁴ While these costs may form part and parcel of doing business the world over, the Code adds additional

40 Koulouridas (n 19) 2-5

41 Alan Gregory, 'An Examination of the Long Run Performance of UK Acquiring Firms' (1997) 24(7) and (8) *Journal of Business Finance and Accounting* 971

42 Richard Lambert, 'Britain must decide whether to welcome allcomers' *Times* (London 3 March 2010) available at: <<http://business.timesonline.co.uk/tol/business/columnists/article7047271.ece>> accessed 11 May 2010

43 Graeme Evans, 'Prudential's takeover of AIG Asian arm on brink of collapse' *The Independent on Sunday* (London 1 June 2010) available at: <<http://www.independent.co.uk/news/business/news/prudentials-takeover-of-aig-asian-arm-on-brink-of-collapse-1988209.html>> accessed 26 December 2010

44 Koulouridas (n 19) 120

costs as a direct result of its preferential treatment of target shareholders.

4.1.2 The Costs Of Doing Business

Although the Code provides for a minimum acceptance condition of 50%,⁴⁵ the effect of the protections for minority shareholders outlined above is that a bidder must make a bid for the target's entire share capital. Firstly, the prohibition on partial offers prevents a bidder from only extending the bid to a select number of shareholders whose acceptance would grant de facto control of the company.⁴⁶ Secondly, the mandatory bid rule provides that on assuming 30% control of the equity, the bidder is obliged to make a bid for the rest of the company's shares.⁴⁷ Finally, even when the minimum acceptance condition of 50% has been reached, the offer must remain open for a further two weeks to allow latecomers to tender their shares.⁴⁸

Additionally, the Code contains detailed requirements regarding the consideration to be offered. As Koulouridas points out, cash offers are associated with high underwriting and servicing costs,⁴⁹ particularly where a competitor increases the length of the bid,⁵⁰ while share offers result in diluting the shareholdings of acquiring shareholders.⁵¹ Given the impact that the method of providing consideration may have on an acquirer, it ought to be entitled to choose one form over another. Depending on the specific circumstances, a bidder may be required to offer either a cash or equity offer, or, in some circumstances, both.⁵² Moreover, due to Rule 2.5, the bidder must ensure that it has the necessary underwriting arrangements in place to satisfy full acceptance before an announcement is made. Where the bidder is forced to offer both forms of consideration, the bidder does not know how many shareholders will elect to receive cash and must maintain the necessary underwriting agreement for the duration of the bid, thus increasing the cost of making the bid in the first place.

4.2 Auctions

4.2.1 Facilitating Auctions

These costs may be justified as protecting minority shareholders from 'abuse'. What cannot be justified, however, are the methods by which the Code facilitates an auction process to ensure that target shareholders receive the highest price. The Code promotes the development of an auction in two ways. Firstly, an offer must remain open for a minimum 21 days from the posting of the offer documents⁵³ which has the negative externality that it facilitates the emergence of competitors. Secondly, the 'equal treatment' principle also extends to rival bidders.⁵⁴ The rationale is that the equal provision of information to rivals facilitates auctions and increases the probability of receiving a competing offer.⁵⁵ While there is no general obligation on the target to disclose already revealed information to the second bidder, except when specifically requested to do so, bidders have developed extensive questionnaire forms to

45 r 10

46 r 36.1

47 r 9

48 r 31.4

49 Koulouridas (n 19) 221

50 r 36.6(a)(i)

51 Koulouridas (n 19) 223

52 r 11

53 r 31.1

54 r 20.2

55 The Panel on Takeovers and Mergers PCP3 'Consultation Paper Issued by the Code Committee of the Panel: Equality of Information to Competing Offerors. Revision Proposals Relating to Rule 20.2 of the Takeover Code (September 2001) [2.1.1] and available at <<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/pcp3.pdf>> accessed 13 May 2010

circumvent the limitation.

4.2.2 *The Problems With Auctions*

There are four problems associated with the promotion of auctions by the Code; the negative impact that auctions have on the market for corporate control, the promotion of the 'winners curse', the artificial increase of bid premia, and the way that the Code governs the auction process.

4.2.2.1 *Limiting The Market For Corporate Control*

An initial bidder incurs a great deal of cost in identifying a target for acquisition as investment banks charge fees for the provision of information, there are opportunity costs to the acquirer's management etc. Easterbrook and Fischel outline that these are but some of the 'sunk costs' that will accrue regardless of the bidders' success or failure.⁵⁶ These 'sunk costs' also create a free rider problem as the act of bidding releases valuable information to the market about the target's real value, allowing rivals to capitalise on the initial bidders expense thus reducing its ability to bid competitively.⁵⁷ Moreover, the amount of search that bidders are willing to engage in reduces as a result of this competition. Bebchuck⁵⁸ argues the costs of searching are not substantial enough to deter bidders but, as Easterbrook and Fischel note, disclosure requirements reduce the initial bidder's opportunity to recoup their investment in searching and, thus, reduces the likelihood that it engages in the optimal amount of search.⁵⁹ Reducing the amount of search undertaken also means a reduction in the ability of the market to effectively monitor management activity. As the US Supreme Court held, 'obstructions to initial offers hinder the reallocation of economic resources to their highest valued use' and also reduce 'the incentive [that] the tender offer mechanism provides incumbent management to perform well.'⁶⁰ Thus, once again we see that not only does the Code fail to provide adequate protection for acquiring shareholders, but that it actively undermines what little protections exist.

4.2.2.2 *The 'Winner's Curse'*

The 'winner's curse' occurs in auctions of assets with uncertain values. Even if a bidder accurately estimates a target's value, they ensure that they win the auction by overestimating the target's value and, thus, overpay on average. Empirical research suggests that multiple bidders in an auction results in returns of over 40% to the target shareholders, as opposed to returns of 30% with single bidders.⁶¹ According to basic game theory, in order to avoid this 'winner's curse' bidders must offer substantially less than they think an asset is worth and be willing to have fewer bids succeed as a result. Firstly, the sunk costs associated with searching mitigate against an acquisitions policy based on fewer bids succeeding. Secondly, Black notes that management are unable to learn from previous mistakes as success, or failure, may not become obvious for a number of years. Further mistakes may be made in the intervening period or new management may be appointed, requiring the learning process to begin anew.⁶²

56 Frank H Easterbrook and Daniel R Fischel, 'Auctions and Sunk Costs in Tender Offers' (1982) 35(1) *Stan L Rev* 1, 1

57 Frank H Easterbrook and Daniel R Fischel, 'The Proper Role of a Target's Management in Responding to a Tender Offer' (1981) 94(6) *Harv L Rev* 1161, 1179

58 Bebchuck (n 20) 1036

59 Easterbrook (n 56) 5

60 *Edgar v MITE Corp* 457 US 624 636, 102 S.Ct 2629 2642 (1982)

61 Julian R Franks and Robert S Harris 'Shareholder Wealth Effects of Corporate Takeovers: The UK Experience 1955-1965' in S Peck and P Temple (eds) *Mergers and Acquisitions: Critical Perspectives on Business Management* (Routledge, London 2002) 117, 130

62 Bernard S Black, 'Bidder Overpayment in Takeovers' (1989) 41 *Stan L Rev* 597, 625-626

Furthermore, failure to complete and win a bid can result in a loss of face that few CEOs are willing to risk, as exemplified in Burrough and Helyar's analysis of the 1988 takeover battle for RJR Nabisco.⁶³ Investment bankers, given their consistent involvement in takeovers, have better opportunities to develop strategies to counter the 'winner's curse'. However, investment bankers are usually only paid fees for completed transactions and are unlikely to recommend a 'low ball' strategy that, although the best strategy for the acquiring company in the long-term, is unlikely to succeed in the short-term. As Lord Mandelson noted in a speech to the City of London, "[T]he open secret of the last two decades is that mergers too often fail to create any long-term value at all, except perhaps for the advisers and those who arbitrage the share price of a company in play. A lot of M&A advisers must be sleeping badly in that knowledge. Or maybe not."⁶⁴

4.2.2.3 The Artificial Increase Of Bid Premia

Studies of takeovers show that uniformly large premia are paid to target shareholders, averaging 30-35% in tender offers and 20% in mergers.⁶⁵ 'Winner's curse' theory goes some way to explaining how these premia become inflated due to the occurrence of an auction. However, the same large premia are paid to target shareholders outside of an auction as within it.⁶⁶ Due to the Code's promotion of auctions, initial bidders will bid much higher than their estimation of the target's value in order to deter potential bidders in the hopes of avoiding an auction, but in the process of doing so they are creating an implicit auction.⁶⁷ Bidders realise that a high initial bid, which successfully deters rival bidders, will be more value maximising than a drawn out auction process.⁶⁸

4.2.2.4 The Auction Process

The desire to ensure the highest price possible, by encouraging rival bids, conflicts with the Code's concern that target companies should not be subject to an excessive period of siege.⁶⁹ Once a takeover commences, a target company is restricted in what actions it may take.⁷⁰ Encouraging competitive bidding prolongs the period that the target is frozen. For example, Rule 32.5 requires that any final revisions to offers be announced by Day 46 following the posting of a competing offer before an auction commences. By this stage it is possible that the initial bidder will have had an offer open for nearly four months. The Code Committee considered a number of ways of restructuring the auction process and determined that an 'open auction' was the best procedure to adopt.⁷¹ After Day 46, each offeror has one day to respond to the latest revision put forward by its competitor, otherwise the auction ends. While an improvement on the previous sealed bid system, which used formulae to determine the highest bidder, an open auction system still results in the 'winner's curse' because of its fast-paced and intensive bidding system which is likely to lead to acquirers overbidding.

63 Bryan Burrough and John Helyar, *Barbarians At The Gate*, (4th edn, Arrow Books, London, 2010).

64 Secretary of State for Business, Innovation and Skills *Mansion House Speech* Press Release (1 March 2010) and available at: <<http://webarchive.nationalarchives.gov.uk/20100407022214/http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=411720&NewsAreaID=2>> accessed 12 May 2010

65 Black (n 62) 601

66 Bebchuck (n 20) 1041

67 Black (n 62) 625

68 Bebchuck (n 20) 1041

69 The Panel on Takeovers and Mergers PCP7 'Consultation Paper Issued by the Code Committee of the Panel: Resolution of Competitive Situations. Revisions Proposals relating to Rules 31.6, 32 and 35 of the Takeover Code' (October 2001) [4.3] and available at: <<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/pcp7.pdf>> accessed 27 June 2010

70 r 21

71 The Panel on Takeovers and Mergers (n 69) [8.5]

5. Solutions

This Chapter seeks to identify what potential solutions exist to address the problems of ‘agency costs’ and the auction process identified in previous Chapters. The first would allow acquiring shareholders the right to vote on proposed acquisitions while the second considers the imposition of a non-auction rule and its effects.

5.1. Increasing Shareholder Power

5.1.1 The Shareholder’s Dilemma

Chapter Three showed that while the Code protects target shareholders from ‘agency costs’, no such protection is afforded to acquiring shareholders. Indeed, the entire focus of the Code seems to be on protecting target shareholders rather than maximising value-creating takeovers. An acquiring shareholder faced with a proposed value-reducing acquisition is left with three options. Firstly, they may seek to sell their shareholding. However, if the market reacts negatively to an ill-advised takeover, they may make a loss on their investment. Secondly, they may seek to challenge the board. However, it is unlikely that, due to the strict timetable of the Code, an activist shareholder will succeed in removing an incumbent board in time to prevent the acquisition. Moreover, Bebchuck notes that in the American experience: ‘Under existing arrangements, shareholder power to replace directors is largely a myth; outside the takeover contest, electoral challenges to incumbent directors are rare.’⁷² While UK shareholders have the right to remove the directors of a company through a simple ordinary resolution,⁷³ the problem lies in exercising this power given the dispersed nature of UK shareholdings. The third option is to trust in the market for corporate control to discipline the management. However, this also results in shareholders making a loss for the reasons outlined above. Moreover, the present economic climate mitigates against the functioning of the market for corporate control. Davies noted, concerning the early 1990’s recession, that;

The deep recession [that] simultaneously revealed the managerial misjudgments of the preceding boom, made it unattractive to shareholders to sell their holdings in the market and removed any realistic prospect of a takeover bid to get the shareholders out of their difficulties.⁷⁴

This is borne out by the Takeover Panel’s Annual Report for year ended 31 March 2009 which reported a decline of nearly 23% in the number of acquisitions carried out that year.⁷⁵

5.1.2 Requiring Approval

To allow for greater shareholder intervention, it is proposed that either the Code should include a provision requiring acquiring shareholders to approve transactions or that the Listing Rules Class 1 triggers be reduced to 15%. The effect of either would increase shareholder oversight by providing an automatic mechanism requiring acquiring companies to consult, and to receive the support of, its shareholders regarding a potential acquisition. However,

⁷² Lucian A Bebchuck, ‘Letting Shareholders Set the Rules’ (2006) 119(6) Harv L Rev 1784

⁷³ Companies Act 2006 s.168

⁷⁴ Philip Davies, ‘Institutional Investors in the UK’ in Dan D Prentice and Peter RJ Holland (eds), *Contemporary Issues in Corporate Governance* (Clarendon Press, Oxford 1993) 69, 91

⁷⁵ The Panel on Takeovers and Mergers, Annual Report for the Year Ended 31 March 2009 and available at: <<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/report2009.pdf>> accessed 31 August 2009

both proposals are limited as the Listing Rules only apply to companies listed in the UK while the Code only applies depending on the nationality of the target. Regardless, this outcome was suggested by the Company Law Review Steering Committee when it proposed that the Listing Rules be strengthened so that a wider range of transactions would be referred to shareholders of the acquiring company.⁷⁶ This proposed reform, though not the exact percentage, has also received the endorsement of many influential business leaders including Lord Mandelson, former Secretary of State for Business, Innovation and Skills, Miles Templeman, Director General of the Institute of Directors and Richard Lambert, Director General of the Confederation of British Industry.⁷⁷

5.1.3 A Shareholder's Right To Choose

Previous attempts at promoting better corporate governance, such as the Cadbury Committee (1992), the Hampel Committee (1997), the Combined Code (2006) and the Walker Review (2009), have focused almost exclusively on the make-up of a company's board of management. However, Armour writes that these successive reports have not engendered any discernible shift in directors' attitudes but have only led to the development of a culture of box-ticking.⁷⁸ It is only recently that regulators have realised the largely untapped potential for monitoring that shareholders, particularly institutional shareholders, possess, as can be seen from the recent launch of a consultation process by the Financial Reporting Council with a view to creating a 'Stewardship Code' for institutional investors.⁷⁹ Company law has long recognised that shares confer not just purely personal rights but also a collective proprietary interest in the company, as a share's value reflects the company's actions.⁸⁰ However, the law protects management's day to day decisions that may result in a loss of share value from shareholder scrutiny, so long as they were made in good faith. The law distinguishes between the loss of a company and the mere resulting loss in share value ie the 'business judgment rule'. Lin argues 'to eradicate the distinction would mean that every action by a shareholder for the infringement of his personal rights could then form the basis of a derivative action, which is an untenable position.'⁸¹

Decisions concerning acquisitions, however, should fall outside of the protected remit of the 'business judgment' rule on the basis that they are 'game changing' decisions, a distinction already accepted in English company law through the Listing Rule's shareholder approval requirements. Gower believes that:

... the thought behind the provision [requiring shareholder approval] seems to be that a big transaction is as much like an investment decision as a management decision, and so the shareholders are to be involved in the taking of the decision, along with management.⁸²

Target shareholders determine acceptance or rejection of a takeover partially on the

76 Company Law Review Steering Committee Final Report, 2001, 140-141

77 Secretary of State for Business (n 62); Institute of Directors, 'Takeover Rules Need Reform' (22 April 2010) and available at: <<http://press.iod.com/2010/04/22/takeover-rules-need-reform-says-iod/>> accessed 12 May 2010; Lambert (n 41)

78 John Armour, Simon Deakin and Suzanne J Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' [2003] Centre for Business Research University of Cambridge Working Paper No. 266, 10 and available at: <<http://www.cbr.cam.ac.uk/pdf/WP266.pdf>> accessed 13 May 2010

79 Financial Reporting Council, FRC Consults on Stewardship Code for Institutional Investors (19 February 2010) Press Release and available at: <<http://www.frc.org.uk/press/pub2216.html>> accessed 27 June 2010

80 Laurence CB Gower and Paul Davies (ed), *Principles of Modern Company Law* (8th edn, Sweet and Maxwell, London 2008) 616

81 Joyce LS Lin, 'Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle' (2007) 66(3) CLJ 537, 548

82 Gower (n 80) 377

basis that it will radically alter the company that they invested in. As demonstrated above, acquisitions also have the ability to alter the value of an acquiring company, for better or worse, to the degree that acquiring shareholders ought to have the same right. Moreover, even those acquisitions whose potential effect does not represent a 'game changing' decision still retain the ability to negatively affect the company's share value in such a way that shareholders ought to be able to act to protect their capital investment.

5.1.4 Increasing Monitoring

According to the 2006 Report on Share Ownership,⁸³ institutional shareholders accounted for 41.1% of UK share ownership. This does not include the 40% foreign shareholdings, also mostly held by institutions.⁸⁴ In 2007, a random sample of 50 FTSE 100 companies was conducted to determine institutional shareholder power, in which Cosh found that the median number of institutional shareholders was three with an average stake of 17.9%.⁸⁵ However, the Myners Report on Institutional Investment described institutional shareholders as unnecessarily reluctant to take an activist stance in relation to corporate underperformance.⁸⁶ Goergen argues institutional shareholders have a lack of monitoring experience.⁸⁷ However, the best way for a fund manager to outperform the market is to identify mispriced shares through the careful analysis of a company's short and longer-term prospects. Stapledon argues that the real lack of experience is in running a campaign against incumbent management, something that comes with time and practice.⁸⁸ This is borne out by the experience of the Hermes UK Focus Fund, a fund dedicated to investing in under-performing companies and to using investor activism to reform and return them to profitability. Measured by both annual raw returns net of fees of 8.2% and abnormal returns net of fees of 4.9% a year against the FTSE All-Share Index over the period 1998-2004, the HUKFF has been very successful in generating returns for its investors, with Becht estimating that around 90% of such fund returns were due to activist outcomes.⁸⁹ Goergen also argues that institutional shareholders are reluctant to involve themselves in monitoring in order to maintain the liquidity of their investments due to insider trading restrictions. Stapledon criticises this as being too simplistic.⁹⁰ The vast majority of institutions insist on being warned in advance if a company wishes to make them an 'insider'. Moreover, institutions are able to place limits on the period of time that they will be considered 'insiders' through liaising with the FSA.

Stapledon argues the real issue is the free rider problem, as positive effects from monitoring are enjoyed by all shareholders regardless of their participation.⁹¹ A recent sea change has occurred in the willingness of institutional shareholders to engage in monitoring. One example of this is the successful shareholder revolt against Prudential's proposed purchase

83 National Office of Statistics and available at <http://www.statistics.gov.uk/downloads/theme_economy/Share_Ownership_2006.pdf> accessed 31 August 2009

84 Andy Cosh, Paul Guest and Alan Hughes, 'UK Corporate Governance and Takeover Performance' [2007] Centre for Business Research University of Cambridge 16 and available at <<http://www.cbr.cam.ac.uk/pdf/wp357.pdf>> accessed 30 August 2009

85 *ibid* 17

86 Myners Report on Institutional Investment (6 March 2001) and available at <<http://webarchive.nationalarchives.gov.uk/&http://www.hm-treasury.gov.uk/media/1/6/31.pdf>> accessed 31 August 2009

87 Marc Goergen, Luc Renneboog and Chendi Zhang, 'Do UK Institutional Shareholders Monitor their Investee Firms?' (2008) 8 *The Journal of Corporate Law Studies* 39, 45

88 Stapledon (n 27) 266

89 Marco Becht and others, 'Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund' (2008) ECGI - Finance Working Paper No. 138/2006; London Business School Finance Working Paper No. FIN462 and available at SSRN: <<http://ssrn.com/abstract=934712>> accessed 12 May 2010

90 (Stapledon n 27) 244

91 (Stapledon n 27) 255

of AIA.⁹² The increase in institutional share ownership since the 1960s has led to a greater concentration of shareholdings, which has made it more difficult for institutional shareholders to simply sell their shares on the market when faced with sub-standard management. The greater the concentration of shares the more rational monitoring becomes. Greater concentrations increase the benefits accrued from monitoring, as well as lowering the cost. Furthermore, free riding becomes less of a problem and selling-out becomes comparatively less attractive compared to monitoring.⁹³ Armour argues that the increasing concentration of share ownership in institutional shareholders, who tend to have holdings in a broad cross section of listed companies, has resulted in the creation of a category of 'universal owners'. These 'universal owners' do not benefit from short-term gains resulting from the operation of the market for corporate control, as they are likely to own stakes in both sets of firms. Rather, given their diverse holdings, they have an interest in the well-being of the economy as a whole and, hence, in the promotion of increased corporate governance to protect their interests.⁹⁴

5.1.5 A Regulatory Aid To Watchfulness

Within the Companies Act 2006, s1277 allows for the power to force institutional investors to reveal their voting record to promote corporate governance. However, to avoid statutory regulation, institutional shareholders are increasingly developing voluntary monitoring policies as institutional shareholders generally prefer to work behind closed doors through one to one meetings, rather than to take centre stage in General Meetings to remove an entire board.⁹⁵ One example is the Institutional Shareholders Committee, a representative body for the largest institutional shareholders in the UK, which states that active involvement by institutional shareholders and the formation of policies 'do not constitute an obligation to micromanage the affairs of investee companies, but rather relate to procedures designed to ensure that shareholders derive value from their investments by dealing effectively with concerns over under-performance.'⁹⁶ The Institutional Shareholders Committee's Statement of Principles has now become the basis of a review by the Financial Reporting Council into the creation of a Stewardship Code for institutional investors, encouraging them to play a larger role in monitoring companies.

Despite the increased willingness by institutional shareholders to engage in monitoring, a more effective mechanism is required due to the nature of the fundamental power divide between management and shareholders. While institutional shareholders are able to influence policy to a certain degree from behind the scenes, it is a glacial process such that they lack an effective enforcement mechanism when faced with a board that refuses to listen to reason, other than those limited protections provided by the Listing Rules. Ultimately, this proposal allows institutional shareholders the right to take proactive steps to protect their investments as 'a rational shareholder will expend the effort necessary to make informed decisions only if the expected benefits outweigh the costs.'⁹⁷ As boards must now justify their acquisitions policy at virtually no cost to shareholders, institutional shareholders have every incentive to engage in the monitoring of their investment and to promote the development of a takeover

92 Julia Kollwe and Graeme Wearden, 'Prudential chiefs to face shareholder fury after refusing to quit over AIA deal' *Guardian* (London 4 June 2010) <<http://www.guardian.co.uk/business/2010/jun/04/prudential-chairman-says-no-resignations>> accessed 27 June 2010

93 Stapledon (n 27) 256

94 Armour (n 78) 17-18

95 Stapledon (n 27) 128

96 Institutional Shareholders Committee 'The Responsibilities of Institutional Shareholders and Agents – Statement of Principles' (2002) 2 and available at <<http://institutionalshareholderscommittee.org.uk/sitebuildercontent/sitebuilderfiles/ISCStatementofPrinciplesJun07.pdf>> accessed 30 August 2009

97 Stephen Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119(6) *Harv L Rev* 1735, 1745

culture based on maximising value.

5.2. The Non-Auction Rule

Easterbrook and Fischel first argued for a non-auction rule in 1981, when they argued that it was necessary to maximise the effect of the market for corporate control by preventing target management from soliciting white knight bids as a defensive measure.⁹⁸ However, their arguments also apply to a more general application of a non-auction rule in order to vindicate the rights of acquiring shareholders. A system that promotes competitive auction bidding increases costs for acquiring companies and creates a negative externality by reducing the amount of search carried out by potential acquirers. In eliminating the auction created phenomenon of the ‘winner’s curse’, the introduction of a non-auction rule would allow for real valuations to be made of target companies.

5.2.1 Encouraging Investment

The introduction of a non-auction rule would allow for the fair valuation of a company through negotiation, rather than an artificial one determined by auction. By eliminating the increased costs associated with an auction process and the ‘winner’s curse’, a non-auction rule allows acquiring companies to invest the resulting savings in the target, the acquiring company itself or to distribute the savings amongst its shareholders and, thus, offset any loss in share value that may result from the acquisition. In this manner, returns are maximised for both acquiring and target stakeholders.

The starting point of Bebchuck’s criticism of the non-auction rule, is that large premia are required as an ‘optimal level of investment in potential targets requires that targets’ shareholders receive the social gains resulting from their investment.’⁹⁹ Firstly, this implies that there is no incentive to invest in the capital markets without the large premia generated by the auction process. While the premia returned will be lower than present averages, that is not to say that they will be so low as to remove all incentive to invest in the first place. Bidders must still offer an inducement to shareholders to tender their shares. There is still incentive to accept a return which, although lower than present bid premia, will generate a higher return than other sources of investment. If a bid does not represent a target’s true value, however, then the target shareholders are still free to reject the bid in the hope of receiving a more accurate valuation. Secondly, Bebchuck also implies that large premia are deserved on the basis that the potential gains from acquiring the target would not have come about without the initial decision to invest in the target. As Easterbrook and Fischel point out, at the initial stage of investment it is impossible to identify which company becomes a potential target and receives these levels of premia.¹⁰⁰ This is also borne out by empirical research conducted by Cosh and Hughes.¹⁰¹ Thus, large premia can have no ex-ante effect on a shareholder’s motivations for investing in a company as shareholders invest in the hope of great reward, but not necessarily the expectation. Furthermore, the original investors in a company often do not remain as shareholders, but sell their initial stake once it becomes profitable. This negates Bebchuck’s idea of shareholders ‘deserving’ premia as it is impossible to quantify who ‘deserves’ what.

98 Easterbrook (n 57).

99 Bebchuck (n 20) 1049

100 Easterbrook (n 56) 12

101 Cosh (n 23) 10

5.2.2 Allocating Resources

Bebchuck then argues that the benefit of the auction process is in allocating resources to the highest valuing user.¹⁰² However, that an acquirer is willing to pay a higher price for a target's resources does not necessarily mean that those resources will be put to better use. Regardless of the argument's merits, Easterbrook and Fischel maintain that a non-auction rule would continue to allocate resources to the highest valuing user, as rational acquirers will sell divisions of the target that would be more profitable to sell than to put to use. A series of sales would occur until the resources end up with their highest valuing user. This occurs under the status quo and is borne out by empirical evidence.¹⁰³ Given that auctions increase the costs associated with searching and initiating a bid, thus making bids less likely, the allocational benefit of auctions seems small in comparison to the costs incurred.

5.2.3 Free Rider Costs

Kouloridas argues a non-auction rule will fail to protect an initial bidder from the free rider costs identified in Chapter Three, as it is the identification of the target rather than the disclosure of information which creates the free rider problem.¹⁰⁴ Thus, a non-auction rule fails to eliminate competitive bidding as auctions will still exist in an implicit form, where the initial bidder must compete against unidentified potential bidders. Kouloridas fails to recognise that this already occurs under the status quo. A non-auction rule, which prohibits speculative announcements by rival bidders, actually eliminates the necessity of initial bidders engaging in an implicit auction. Moreover, it forces target shareholders to consider the merits of the bid before them rather than holding out for an offer 'around the corner'.¹⁰⁵

Kouloridas then argues that a non-auction rule would be unable to prevent speculation from distorting the market. He notes that, under the status quo, the Code is able to prevent undue speculation from affecting the market through the use of the 'put up or shut up' mechanism, which would be unavailable under a non-auction rule.¹⁰⁶ However, any distortion of the market in the manner outlined by Kouloridas could come under the regime created by the Market Abuse Directive and related legislation¹⁰⁷, which has been effective in combating market abuse since its inception.

6. Conclusion

Regrettably, there is a dearth of writing on what impact the Code's introduction has had on the merger market. Of what little that does exist, Prentice notes that 'its weakness is that it makes no serious attempt to analyse the overall design of the engine or, for that matter, whether there is any need for the engine at all.'¹⁰⁸ What this article has attempted to do is draw upon financial and economic analysis to elicit the true legal function and purpose of the Code. The results clearly show that, on average, takeovers generate negative returns for acquiring shareholders while at the same time delivering massive returns to target shareholders. In this, the Code is very much a product of its time as an attempt to prevent the wholesale abuse of minority shareholders at the hands of the market. However, it is my belief that the Code has

102 Bebhuck (n 20) 1048

103 Easterbrook (n 56) 14

104 Kouloridas (n 19) 125

105 *ibid* 126

106 *r* 2.2

107 Council Directive (EC) 2003/6/EC of 28 January 2003 on insider dealing and market manipulation [2003] OJ L96; Financial Services and Markets Act 2000

108 Dan D Prentice, 'Takeover Bids and the System of Self Regulation' [1981] OJLS 406

swung too far in favour of target shareholders at the cost of acquiring shareholders. Not only does the Code fail to address the inequalities highlighted by the above economic analysis, but it structurally supports measures whose sole purpose is to benefit target shareholders at the cost of acquiring shareholders. This is in spite of the Takeover Panel's professed belief that '[I]t is important that the framework within which takeovers are conducted does not operate in a way that unduly favours the interests of a particular party (or parties) to a takeover'.¹⁰⁹

In June 2010 the Takeover Panel launched a public consultation process to review certain aspects of the Code, including a proposal to address 'whether some protections similar to those afforded to offeree company shareholders should be afforded to shareholders in an offeror company'¹¹⁰. Sadly, on the strength of the responses received, the Panel has declined to amend the Code to provide protection for acquiring shareholders, citing such problems as expanding the regulatory role of the Panel and issues such as the possible unlawful extraterritorial application of the Code in the case of offerors incorporated in foreign jurisdictions, amongst others.¹¹¹ It is not to be denied that problems will exist with any such reform of the Code, but it is this author's opinion that the failure of the Panel's Code Committee to act in this instance is a missed opportunity to bring some much needed balance to the Code.

109 The Takeover Panel, Review of Certain Aspects of the Regulation of Takeover Bids' 21 October 2010 Panel Statement 2010/22, 5 and available at; <<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2009/12/2010-221.pdf>> accessed 6 January 2010

110 The Takeover Panel, 'Review of Certain Aspects of the Regulation of Takeover Bids' 1 June 2010 Panel Statement 2010/16, 2 and available at; <<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2009/12/2010-16pdf.pdf>> accessed 27 June 2010

111 Takeover Panel (n 109) 8

HOW RELEVANT IS CARL SCHMITT'S WORK TODAY?

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ABSTRACT This essay seeks to show that the relevance of Carl Schmitt is in the attempt to build a theory of liberalism which can withstand pertinent observations against it. Accordingly, this essay discusses the work of Carl Schmitt and how it acts as a critique on liberalism. Schmitt's work is considered through two critiques: an external and an internal. The external critique essentially concedes to the tenets of liberalism. It is shown how Schmitt takes liberalism's principles to their logical outcome and in doing so reveals the self-effacing nature of liberalism. The internal critique is Schmitt's attempt to show how a fundamental aspect of liberalism – the rule of law – is ultimately flawed and nonsensical. Schmitt's assertion, here, is that if this fundamental aspect is inherently flawed then so must liberalism as a political theory. The internal critique encroaches the external at the point where the flaw in the rule of law builds the principles on which liberalism rests.

Throughout this essay arguments posed by Schmitt are highlighted and the possible avenues which may lead to counter-arguments are shown. It is submitted that it is the development of these counter-arguments which will lead to a more robust theory of modern liberalism.

‘When the President does it; it is not illegal.’¹

While in the context of 1933 Germany this would not be a wholly unexpected remark it becomes a little disturbing and certainly more unexpected if one is told these are the words of a leader of a great Western liberal democracy in the 1970s.

It is absolutely clear that Schmitt allied himself with the most conservative parties of political Weimar. He provided the theoretical basis for a highly centralised dictatorial solution to the problems Germany faced and expressed support and praise for the most extreme right-wing figures during that time.² Further, he argued that the problems of the liberal pluralistic society could only be solved by the elimination of pluralism and the nonsensical concept of liberal democracy. For Schmitt, a true democratic leader won the acclaim of the people through his unifying vision. That leader would end the chaos through the sovereign decision, distinguishing clearly between friend and enemy. Take for example, ‘The Fuhrer guards the Law’, where his praise for Hitler was based on the fact that he had done everything positively required by a leader.

In spite of his moral flaws, Schmitt is an important political thinker for the basic reason that he helps to strengthen the conceptions behind liberalism’s institutions. Rebutting the critics of liberalism is especially important as globalisation takes hold and calls for a transnational citizenry are mooted.

Schmitt was a fervent critic of liberalism and wrote numerous articles in relation to this subject. However, Schmitt was not a systematic writer. His work did not follow a strict underlying theory, although at times he did allude to one. His work can be seen as a scattershot attack on liberalism from all sides. To discuss the entire breadth of his work is outside the scope of this essay. This essay is divided into two parts – the first deals with what is essentially an external critique of liberalism: Schmitt’s work on the inherent tension between liberalism and democracy, where one negates the other, and his assertion that liberalism is powerless will be discussed. The second part of the essay attempts to elucidate his internal critique.

The second part of this essay is essentially a discussion regarding the relationship between legality and legitimacy. Schmitt’s arguments assert that the Rule of Law is illusory or a façade at best and he evokes the state of exception and the decision as concepts undermining the Rule of Law. Contemporary jurisprudential debate circulates around the positivist model of law which divides law into a ‘core’ and a ‘penumbra’ of indeterminacy, resolved by the values the judges happen to hold.³ The element of discretion in this very argument turns back on itself in that the indeterminacy of the penumbra means the excrescence of the penumbra into the core. The problem which positivists acknowledged as occurring at only the margins of legal order now appears throughout.⁴ The problem stems from the fact that none of these theories seem capable of answering the ultimate questions satisfactorily. The paradox is how Man manages to claim authority over himself. Man creates, authorises and then projects law over and above him to form a binding normative system, which turns back on itself and authorises the actions of Man. Phrased in another formulation, the central question is where does the authority of law come from and is this source legitimate?

The concerns of modern day jurisprudence have not managed to alleviate the problems

1 The Guardian, ‘Great Interviews of the 20th Century. “I Have Impeached Myself”: Edited Transcript of David Frost’s Interview with Richard Nixon Broadcast in May 1977’ (7 September 2007) <<http://www.guardian.co.uk/theguardian/2007/sep/07/greatinterviews1>> accessed 22 February 2011.

2 David Dyzenhaus, ‘Introduction: Why Carl Schmitt?’ in David Dyzenhaus (ed), *Law as Politics: Carl Schmitt’s Critique of Liberalism* (Duke University Press Books 1998) 2.

3 HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997).

4 Dyzenhaus (n 2) 4.

tracing back to Thomas Hobbes: the state of exception, the emergence of the sovereign, the sovereign decision, the nature and accountability of the sovereign and his legitimacy. It shall be shown that the dialectical movement of the interplay between varying theories relating to sovereignty and the state uncover a powerful and more complete conception of sovereignty and may give insight to the justification of the legitimacy of authority haunting many academics today.

The author clearly does not pretend to provide a solution to the critiques here, but this piece attempts to reflect on some of these ideas.

1. The External Critique

1.1 The Self-Effacing Nature of Liberal Democracy

Liberalism postulates that every person is, as a person, inherently equal to every other person.

Democracy is the rule of the people, the sovereignty of their will.

For the people to rule it becomes necessary to determine who is counted among the people. Without criteria for determining who are the bearers of democratic rights, the will of the people cannot take shape. For Schmitt this demarcation is the friend/foe distinction. Following this it can be seen that democracy is created through homogeneity and that homogeneity destroys any heterogeneity because of the need for the unity of the demos and the sovereignty of its will. 'Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity.'⁵

The democratic conception requires the possibility of distinguishing who belongs to the demos and who is excluded. But liberalism, in its all encompassing equality, is unable to conceptualise such criteria. Therefore liberalism threatens to undo everything democracy has established. It is this articulation between liberalism and democracy, which Schmitt presents, that makes liberal democracy a non-viable regime.

Schmitt's argument is that democracy requires a conception of equality as substance and cannot satisfy itself with an abstract conception like the liberal one since 'equality is only interesting and invaluable politically so long as it has substance, and for that reason at least the possibility and the risk of inequality.'⁶

It is important to note that the friend/foe distinction, the political unity of the people, is a matter of fact for Schmitt and that it can arise through any and every sphere of life. All that is needed is a sufficient level of intensity. If a state attempted to realise the universal equality of individuals in the political realm without concern for national or any other form of homogeneity it would only be superficial. According to Schmitt, this would in no way mean the disappearance of substantive inequalities, 'they would shift in another sphere, perhaps separated from the political and concentrated in the economic, leaving this area to take on a new, disproportionately decisive importance. Under the conditions of superficial political equality, another sphere in which substantial inequalities prevail will dominate politics.'⁷

Essentially Schmitt presents the reader with the following dilemma: establish the unity of the people by expelling the other outside the demos or consider some forms of division legitimate inside the demos and negate the political unity and the very existence of the people.

5 Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press 1985) 9.

6 *ibid.*

7 *ibid.* 12.

However, there are three pertinent counter arguments to this.

Firstly, Schmitt asserts that the unity of the state and the identity of the people are factually given; it is merely a recognition of borders that already exist. This position is, in fact, ultimately contradictory.⁸ On the one hand he seriously considers liberalism dissolving the unity of the state. If that dissolution is, however, a distinctive political possibility, then the unity of the state and liberalism must be on the same plane – that of political articulation. On the other hand, the unity is presented as a fact whose obviousness should then be able to ignore the political conditions of its environment.

Secondly, there is no reason to share Schmitt's pessimistic view that the tension will negate both sides of the equation. The view could be taken that the articulation with liberal logic will constantly challenge the forms of exclusion that are necessarily inscribed in the political practice of instituting rights and of defining 'the people.'⁹ However, it should be kept in mind that no final equilibrium is possible between these two conflicting logics and there can only be temporary, pragmatic, unstable and precarious negotiations of their tension.

Thirdly, the reality is that the unity of the people is the result of a political process of hegemonic articulation. It is important to note that this is not merely the acknowledgement of political differences as that would simply entail an aggregate of interests. This assertion is exactly what Schmitt said the unity of the people was not.

It would be illusory to consider democratic politics to consist of the moment when a fully constituted people exercises its rule. The exercise of rule cannot be dissociated from the inherent tension in every person about the definition of the people, about the constitution of its identity. Such an identity can never be fully constituted and it can only exist through multiple and competing forms of identifications. It is precisely this fact that pluralism recognises and articulates. It is the articulation of competing interests in a way which is in accordance with this constitutive gap between the people and its various identifications. Without a plurality of competing forces that attempt to define the common good and aim to fix a community identity, the political manifestation of the demos could not take place. For these observations, it seems there are pertinent reasons for following this route to its logical conclusions.

1.2 The Impotence of Liberalism

As discussed in the preceding section: liberalism holds us all to be equal. We are equal because we have equal reasoning power and therefore the state chooses to remain neutral in decision-making. Schmitt argues that this essentially neuters the liberal state. Liberalism is weak against a determined enemy because neutrality disarms the state. Liberal states resort to neutral procedural rules; setting up inquiries¹⁰. The state takes far too long to reach a decision and it can no longer ascertain when and which side, whether it is internal or external, to defend. This indecisiveness leaves the state an easy target for a determined enemy.

Some academics argue that the Kantian idea of neutrality would solve this problem.¹¹ This idea stems from Kant's normativity, which is the respect for every human as being morally autonomous. Kant extends this idea to include that, if you are a morally autonomous being, you have an inner command to legislate on moral norms. This self-legislation brings him to his categorical imperative. The categorical imperatives, essentially, recognise the

8 Chantal Mouffe 'Carl Schmitt and the Paradox of Liberal Democracy' in David Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press Books 1998) 171.

9 *ibid* 165.

10 Carl Schmitt, *On Dictatorship* (Duncker & Humblot GmbH 1994) 134.

11 Heiner Bielefeldt, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Counter-criticism' in David Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press Books 1998) 30.

freedom and participation of every human being. Therefore there must be equal freedom and participation in order to incorporate everyone, and this must then be expressed in politics. Within this framework of equality, the principle of neutrality becomes workable if one looks at the idea of being neutral between races and therefore upholding non-discrimination. This identifies the conceptual distinction found in the German constitutional debate of *weltanschauungsneutralitat*, which is neutrality between peoples' religious beliefs or philosophical ideas, therefore akin to non-discrimination, and *wertneutralitat*, which is general neutrality. From this definition one can see that general neutrality is not being endorsed and that it is general neutrality which falls victim to Schmitt's critique. Neutrality between races means an enforcement of some kind. The liberal state, in declaring an ideal of non-discrimination, has set up a task which needs active commitment. In this way liberalism is envisaged to be a self-critical reflection which has the ability to articulate new experiences of oppression and discrimination¹².

However, one cannot be too sanguine about this. The categorical imperative is the recognition of freedom and this therefore must also encompass the freedom to choose right and wrong. One society's right may be another society's wrong. Therefore under the newly articulated liberalism, where neutrality is an active measure, both societies must actively uphold their beliefs. Therefore all that has happened is that liberalism has lost its valued claim in recognising the freedom and participation of every human being and instead advocates the eradication of the opposing belief.

2. The Internal Critique

The Rule of Law is, essentially, the primacy of abstract normative principles over concrete political positions and decisions. Schmitt asserts that the Rule of Law is illusory as during *ausnahmezustand*, the state of exception, the factual primacy of the 'rule of man' over the 'rule of law' is realised. Schmitt points out that during this state of exception there is no question of the Rule of Law; it has been suspended. The sovereign reigns supreme and unbound. These abstract legal norms cannot account for this position because, by definition, they are unable to determine the scope of political power needed to deal with the situation. This then signifies that in order for the rule of law to exist it depends on the political will of a sovereign authority to establish, defend and, when necessary, suspend it. The sovereign acts through the decision. These concepts shall now be unpacked and discussed in turn.

2.1 Existence Of The State Of Exception

'Sovereign is he who decides on the state of exception.'¹³ From this the state of exception must first be elucidated and then the being who actuates this state can be deciphered.

The starting point recognises law from its application, 'the rule must, precisely insofar as it is general, be valid independent of the individual case'¹⁴. There is no inherent nexus between law and its application in that it is not logically consequential that because law exists it applies; rather, it is the case that it must be applied via some act. Law and application are analogous to linguistic activity in that 'linguistic activity becomes intelligible precisely through the presupposition of something like a language, so is the norm able to refer to the normal situation through the suspension of its application.'¹⁵ Language presupposes the existence of

12 *ibid* 31.

13 Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (n 10) 5.

14 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford UP 1998) 20.

15 Giorgio Agamben, *State of Exception* (University of Chicago Press 2005) 36.

that which once was not covered by language. Implicitly, then, language maintains itself in potentiality so that that which has not yet been denoted may be in actual speech. Language, in withdrawing itself, divides the linguistic from the non-linguistic and therefore, paradoxically, in creating this zone of non-language, allows the creation of meaningful denotation in speech. Analogously, the law presupposes the non-judicial in the fact that law refers to an individual case meaning that it once must have maintained itself as 'pure potentiality in the suspension of every actual reference.'¹⁶ 'The state of exception separates the norm from its application in order to make its application possible.'¹⁷

The state of exception can be thought of as running alongside the law and the paradoxical position emerges where the state of exception is at the same time outside and inside the law. This concept can be elucidated by thinking of the relation between an example and the exception to that example. Imagine a set of blue pens. The example of a blue pen within this set must suspend its own meaning and take itself outside the set in order to define the set. This cannot be done within the set as the example would be indistinguishable from the very set it is showing itself to be an example of. The exception, on the other hand, cannot show itself to be an exception from outside the set. Imagine one red pen. This red pen must be placed within the set of blue pens in order to show itself as the exception. Exceptions are inherently related to the norm and so the exception is contained within the norm, 'what the example shows is its belonging to a class, but for this very reason it steps outside of its class in the very moment in which it exhibits and delimits it.'¹⁸ It is submitted that this is how Schmitt's assertion that the exception is contained within law should be understood.

It is, now, not problematic to conceive of one defining the other however, one *existing in actuality, at the same time*. Schmitt is at pains to assert, 'the constitution can be suspended without ceasing to be valid, since the suspension only signifies a concrete exception.'¹⁹ This idea of suspension without ceasing to be valid can be understood by considering the concept of necessity and how necessity makes a 'concrete exception.' Necessity has been attributed the power to render the illicit licit by many academics.²⁰ In its capacity of necessity it merely releases the individual with regard to a particular case from the application of the norm it would normally be subsumed under. If one looks at law, even religious law, the 'law' of necessity can be seen to be at work. Imagine a Muslim starving of hunger who is offered pork to eat, eating of which constitutes a sin and therefore a transgression of Islamic divine law, however, the Muslim, in eating the pork to stave off death commits no sin. It is submitted that this highlights the paradoxical interpretation of the Latin adage, '*necessitas legem non habet* – necessity has no law' where necessity recognises no law and at the same time creates its own law. Islamic divine law is not nullified but rather for that specific factual situation a concrete exception has been made for the starving Muslim. From this analogy it can also be seen that necessity itself cannot be subsumed under a norm as that would go against the very definition of necessity. Analogously an exception cannot be subsumed, as then it would no longer be an exception, 'state of exception cannot be defined... Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm.'²¹

16 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (n 14) 20.

17 Giorgio Agamben, *State of Exception* (n 15) 36.

18 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (n 14) 22.

19 Carl Schmitt, *On Dictatorship* (Duncker & Humblot GmbH 1994) 134.

20 Gratian, *Decretum: Glossa Ordinaria Pars I. Dist. 48*. See also Agamben, *State of Exception* (n 15) 24.

21 Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (n 10) 6.

2.2 The Emergence Of The Sovereign

‘It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty’.²² It is submitted that this connection finds itself through the dynamics of the relationship between the sovereign and Man who finds himself in the state of exception. The sacrality of life and where it originates is found in the factual capacity to be killed.

The sacrality of Man is discussed by Giorgio Agamben who uses the conception of *Homo Sacer* for whom, ‘it is not permitted to sacrifice this man, yet he who kills him will not be condemned of homicide.’²³

The first part to this adage, sacrality, can be understood through *Homo Sacer* in that the aim of sacrifice is to give to the gods but in being sacred *Homo Sacer* already belongs to the gods and so an act cannot be performed giving to whom he already belongs. The one to whom a man’s life belongs has the right of death over this man; another cannot sacrifice him in order to give him over as he already belongs to the one you are trying to sacrifice to. Ancient Roman law recognised ‘*vitae necisque potestas* – right over life and death’. The *vitae necisque potestas* attaches itself to every free male citizen from birth and thus, for the Romans, the sacrality of life ensued.

It is submitted that the second part of the above adage, the way in which the killing of the sacred man is legitimised, is purely factual. An analogy to Kafka’s ‘Before the Law’ works well to illustrate the form of law in the state of exception. Kafka’s legend tells of a man who cannot pass through the door of the Law because it is already open. Imagine a town where the entire perimeter is a gate. If this gate were to be opened then the gate to the town would cease to exist. In being open, there would be nothing to go through. The point is that the gate is the representation of law – in being too open it suspends itself, it remains in potential and must be actualised through some act. In holding itself in suspension all content of law seems to have been removed and one arrives at the Kantian notion where the law is ‘being in force without significance’. Law, which is in force without signifying, neither prescribes nor forbids any determinate end; it is simply the empty shell of the concept of ‘law’. Life under a law that is in force without signifying resembles life in the state of exception where law becomes life and life becomes law; it is where bare life, the originary source of the recognition to life and politics, is unearthed. In the state of exception, the law being ‘too open’ to enter, Man is held in Law’s potential to actualise over him, being abandoned by law in its very essence. In being abandoned, Man is taken outside the realm of law and so the legitimacy, and thus the threat, of pure violence or the capacity to be killed ensues.

It is here that the sovereign, in making the decision to close the gate, to apply the law, brings bare life within the bounds of law. Man who finds himself abandoned by law has bare life, the capacity to be killed. In this state, however, Man belongs to the sovereign as the sovereign holds the *vitae necisque potestas* in being the bearer of the decision. The origin of the right to life can be seen to come from the very power of the sovereign, ‘for a long time, one of the characteristic privileges of sovereign power was the right to decide life and death.’²⁴

It is this right to decide life and death which correlates to the decision to open and close the gate, which is the law. The decision to apply and to suspend the law can then be seen to be the decision over life and death itself. In contemporary life this power has already been seen. During the Holocaust, Hitler announced that the Jews were to be killed, ‘as lice.’ Hitler realised the full power of the sovereign in taking the Jews outside the law, in opening the gate,

22 *ibid.*

23 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (n 14) 71.

24 Michel Foucault, *History of Sexuality: The Will to Knowledge* (Vol 1, Robert Hurley tr, Penguin 1998) 119.

therefore their death did not constitute murder as it was merely their capacity to be killed which was left in their abandonment.

2.3 The Sovereign Decision

The problem with the concept of decision is that it can be split into the mere power to decide and the application or realisation of deciding. This is precisely what Walter Benjamin does in separating sovereign power from the exercise of sovereign power, throwing Schmitt's assertion of some sort of order into doubt.

It should be remembered that this decision is not deciding which is illicit and licit but merely the spheres of reference. It is nothing but a causal link, an actuating source, between the law and its application. If this is the case then the problem can be overcome if one looks to Aristotle and his work on potentiality and act, *dynamis* and *energeia*.

The problem with potentiality is that it has an inherent tendency to disappear immediately into actuality. However, it is conceivable that potentiality does not pass over just as the musician has the potential to play music even when not playing. In this sense then potentiality must maintain itself against actuality, it must be constitutively the potentiality not to do or be. This potentiality maintains itself in relation to actuality in the form of its suspension; it remains capable of the act because it is not realising it.

Aristotle connects the severed link between potentiality and actuality, in 'Metaphysics', as when 'potential is realised... there will be nothing able not to be.'²⁵ What is potential can pass over into actuality at the point at which it sets aside its own potential not to be. This does not mean to destroy potentiality but rather, as Aristotle states in 'De Anima,' 'as a preservation.'²⁶

Benjamin's world was that of potentiality in the state of exception where 'pure violence' ensued because there was no nexus between potentiality and actuality of law. Schmitt's response was to bring the concept of the decision as the causal link for potentiality into actuality. The problem posed by throwing Schmitt back by splitting the decision into the power (or potential) to decide and the application of that power was overcome by the factual necessity to decide, and in the sovereign setting aside (or preserving) his potential to decide, his power actualises and order (albeit not in the juridical sense) is achieved. From chaos it is how 'authority proves that to produce law it need not be based on law.'²⁷

At this juncture there is a further argument which can be levied against Schmitt regarding the decision.²⁸ Critical Legal Studies posit that legal norms are not the predominant factors in determining legal decisions and that it is in fact political values which underlie this process. As Oliver Wendell Holmes Jr. explains:

'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law...cannot be dealt with as if it contained only the axioms and corollaries of a book of

25 Aristotle, *The Metaphysics* 1047a 24-26; Giorgio Agamben, *Potentialities: Collected Essays in Philosophy* (Daniel Heller-Roazen tr, Stanford UP 1999) 16.

26 Aristotle, *De Anima* 417b 2-16; Giorgio Agamben, *Potentialities: Collected Essays in Philosophy* (Daniel Heller-Roazen tr, Stanford UP 1999) 17.

27 Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (n 10) 13.

28 Julian Torres Etchegoyen, 'Schmitt' (manuscript, 2008).

mathematics.²⁹

Here, the claim that judicial decisions are the application of identifiable and relevant legal rules in a specific and logical manner is refuted. Therefore, if the true nature of law is political, in that the legal decision is not based on law, then the state of exception is not really an exception at all. If it is the case that the process of decision is practically identical within both the normal and exceptional cases then the assertion that the constitution requires temporary suspension to protect itself due to its inability to function during times of political siege is nonsensical. Unfortunately it is beyond the scope of this essay to untangle the Gordian Knot that is Critical Legal Studies and follow this route to its logical conclusions. For now it will have to suffice to simply assert that to claim every legal and political decision alike is based on the arbitrary whim of the person making the decision is an exercise in pure nihilism and does not uncover anything of value.

2.4 The Nature And Accountability Of The Sovereign

It would be logical to assume that the most reliable check upon the sovereign would be the constitution, but following the above discussion on necessity and the state of exception the sovereign (by his nature grounded in exception) cannot be subsumed under a norm. 'The most guidance the constitution can provide is to indicate who can act in such a case,³⁰ and this leads to his conception of the commissarial dictator.

The commissarial dictator, being commissioned, has a purpose to fulfil. Schmitt expounds the nature of a legal officer from the commissary, 'the former has a legally circumscribed, and thus general and pre-determined, content.'³¹ Whereas the legal officer is bound to the law and the decision which actuates his power, the commissary is not, he is given the power to decide over the facts by the constitution or statute. The purpose for which the commission has been given takes precedent over everything else and can be seen as the source or legitimacy of the authority of the commissary. 'In the interest of the achievement of the end the dictator is given the mandate to suspend legal barriers and, if necessary, to interfere with rights of individuals.'³² The power of the commissary, although bound by the purpose, is limitless in being grounded in the same purpose in that the commissary can do whatever to attain that purpose. The fact that the constitution can be suspended, in order to save the constitution, shows the difficulty in controlling the commissary. 'The distinction between commissarial dictatorship and sovereign dictatorship is not of nature but of degree.'³³ This sliding slope towards sovereignty, intensified in cases of exception and emergency, espouses the need for a decision outside the bounds or scope of commissary power.

At the point of most intensity, where the commissary makes law but has no power and the dictator has the power but cannot make law 'powerless law and lawless power becomes so extreme that it has to switch.'³⁴ This switch, 'a dictatorial legislator and a constitutive dictator,'³⁵ is better conceived of as a fusion of the two elements.

The sovereign dictator needs to be supreme yet constituted: 'the connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty.'³⁶ In

29 Oliver Wendell Holmes, *The Common Law* (Little Brown & Co 1881) 5.

30 Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (n 10) 7.

31 Schmitt, *On Dictatorship* (n 19) 38.

32 *ibid.*

33 Giorgio Agamben, *State of Exception* (n 15) 9.

34 Schmitt, *On Dictatorship* (n 19) 126.

35 *ibid.*

36 Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (n 10) 18.

turn, this entails the constitution by that which constitutes but which itself is not constituted. This constituting power can confer validity and therefore supremacy to the sovereign entailing the final stage in the emergence of the sovereign who is capable of making the decisions in absolute.

The sovereign dictator 'does not suspend the existing constitution by virtue of law which is to be found in that very constitution... but... in order to make possible a constitution, which it takes to be the true constitution.'³⁷ The distinction between the commissarial dictator and the sovereign dictator is that the former suspends law and in doing so keeps it in force whereas the latter applies law which is not yet in force. The sovereign dictator, empowered by a forceless constitution, aims at creating a state of affairs where it becomes possible to impose this new constitution. The distinction between the commissarial and the sovereign dictator is crucial and designed to uncover the constituting power, the *pouvoir constituant*.

2.5 The Legitimacy Of The Sovereign Dictator

It is because the commissarial's power does not suffice in all scenarios that the sovereign appeared. But whereas the commissarial had grounded his legitimacy in the constitution, the sovereign does so in the power which constitutes.

Schmitt makes references to Rousseau's *volonté générale* when he discusses the *pouvoir constituant* in distinguishing it from any particular will. The *pouvoir constituant* is the general will and therefore analogous to the power of God; 'what he wants is always good and all that is good is what he actually wants.'³⁸ In that the general is always right, by definition it must be because it essentially constitutes the idea of right in the profane or it is right in the sense that what it wants is right.

Schmitt's idea of constituent power is that of a power which constitutes but is not constituted. A power which is the foundation, or at least connected to, every constitution. Because it constitutes, it cannot be negated by that which it constitutes as it is the originary source, '... and for this reason it cannot be negated even if the constitution negates it.'³⁹

This position of legitimising, authorizing, founding power can do whatever it desires as it is, by definition, unlimited. Although from this position it follows that its will is actualized instantaneously, it must remain in potential as that which actuates. The *pouvoir constituant* does not solidify, it is not within its nature to do so, 'in truth the will must not be precise, since as soon as it forms itself in any way, it ceases to be constitutive and becomes constituted itself.'⁴⁰ In holding itself in potentiality and in being supreme the *pouvoir constituant* is always present as that which authorizes.

2.6 Conclusion

It is submitted that Schmitt's work is highly relevant in understanding the concept of sovereignty, not necessarily because he alleviates the paradoxes within this concept, but because he allows better understanding and insight. It is the nature of the dialectic not to be solved but to be transcended, which is Schmitt's aim. In founding his thesis on the *pouvoir constituant* Schmitt has given modernity a formidably intuitive model to legitimise the concept of sovereignty.

This paper highlights the weaknesses of contemporary liberal discourse with a view to

37 Schmitt, *On Dictatorship* (n 19) 133.

38 Schmitt, *On Dictatorship* (n 19) 118.

39 *ibid* 137.

40 *ibid* 141.

strengthening a concept which has much to commend itself. It was outside the scope of this paper to explore all avenues to their full outcomes; for example the work of Gramsci and the Critical Legal Studies movement.

A point of further reflection would be to analyse this area through a Foucaultian lens. Schmitt's conception of sovereignty would fall under the 'juridical'⁴¹. However, as Foucault discusses, the juridical is an archaic conception of power: vertical and rigid. For Foucault, power is diffuse and the disciplines are of far greater importance and consequence. It is through this that we see the emergence of biopower and governmentality. This discussion is of importance because the disciplines are not susceptible to the decision of the sovereign in the same way as the law/constitution; they cannot be suspended or destroyed. In fact, the disciplines could possibly take on a greater role of importance in a state of chaos where they go unchecked by the parameters of law. The importance of this work is widely recognised and discussed by many⁴².

Finally, during the course of this essay an attempt has been made to show that Schmitt's theories can be seen as a way of explaining how contemporary societal development appear to leave many people outside of the protection of legal norms, for example, enemy combatants, suspected terrorists and suspect airline passengers. The argument is often made that executive control over peoples' lives is an ever increasing phenomenon. This is undoubtedly the case; one need only look at recent, non-judicially controlled, surveillance and detention methods. The frequent use of 'mission statements' by presidents of the United States are further evidence of the executive branch controlling life without, or perhaps despite, the juridical norm. It is hoped that studying this area of jurisprudence will strengthen legal theory in its practical implementation and not simply be an exercise in academia.

41 Foucault, *History of Sexuality: The Will to Knowledge* (n 24) 92-4.

42 See Agamben, *Homo Sacer: Sovereign Power and Bare Life* (n 14) and *State of Exception* (n 15). See also, Peter Gratton, 'A "Retro-version" of Power: Agamben via Foucault on Sovereignty' (2006) 9(3) *The Critical Review of International Social and Political Philosophy* 445.

WHAT IS AT STAKE IN THE DEBATE ON INTERNATIONAL DEVELOPMENT?

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ABSTRACT Since shaking the conceptual foundations of human rights many years ago, the right to development and its accompanying academic commentary has diversified and grown in sophistication. Yet the aim of this article is to invoke a period of renewed intellectual vigour, to present the issue in an alternative light. It is divided along two broad lines. First, several contemporary readings are explored, in particular ones which innovative - Feminist, "Asian Values" and Cosmopolitan interpretations. While this is useful in offering an indication of the intellectual zeitgeist, it also endows us with the techniques to look at the right to development in a more structural way. Second, proceeding in a deconstructionist and ideological manner, the article examines the wider implications of these analyses – how they work within the paradigm of modernity. Taking law to be built upon the tension between emancipation and regulation, it adopts a more theoretical approach and uses these readings to indicate that the right to development indicates the collapse of this tension. It shows modernity as outmoded and offers some clues as to what direction a new paradigm might develop in.

1. Introduction

Writing in 1988, Philip Alston decries the lack of depth in development and human rights scholarship, with “the select few repetitiously citing one another and the same materials, completely outside the main stream of diplomacy and international law”.¹ The field has since diversified and many silences within the law have been unmasked. Yet despite these advances, international development discourse has once again reached a period of stagnancy. The aim of this essay is to explore the wider implications of the right to development – to invoke a period of renewed intellectual vigour by looking at the right to development through the lens of modernity. The following questions will be addressed through the course of the essay: To what extent does the right to development expose the final strains of the outgoing paradigm of modernity? To what extent can law still be emancipatory?

The essay will be split up into three substantive sections. Section II will review the current state of the debate on the right to development. This is important for two reasons: first, to illustrate the core issues that this topic encompasses and why a move away from them is important; second, far from abandoning these arguments, this essay will adopt a novel approach and use different current interpretations (Feminism, Asian Values and Cosmopolitanism) beyond their intentions – to expose the limits of modernity and hint at the possible emergence of a new paradigm. This thematic approach means that the central issue, international trade, will be dealt with in Section III, later than a linear narrative arc would dictate. Section III will look at the exhaustion of the paradigm of modernity using these sub-paradigmatic techniques. Section IV, despite being sensitive to the difficulties in talking with any certainty in relation to paradigmatic transitions, will offer some directions in which a new paradigm might develop.

2. The Current State of the Debate on International Development

2.1 Defining the debate and its trajectory

2.1.1 Definition

“Development” first emerged in 1949 after the United States President Harry Truman announced a program of development to make “the benefits of our scientific advances and industrial progress available for the improvement and growth of under-developed areas”.² After several decades of development, the gap between rich and poor is not closing but widening. As Arturo Escobar explains, “underdevelopment became the subject of political technologies that sought to erase it from the face of the Earth, but ended up multiplying it to infinity”.³ Given the moral austerity of its commitment to non-discrimination and equality, the human rights project was embraced as the obvious legal panacea.

2.1.2 From Theory to Realism

Early academic debate can be characterised as one centred on theory: the right to development was said to belie the received character of traditional human rights. Interestingly, the resistance movement focused on two issues by using two diametrically opposite

1 Philip Alston, ‘Making Space for New Human Rights: The Case for the Right to development’ [1998] Harvard Human Rights Yearbook 8

2 Marks and Clapham, *International Human Rights Lexicon* (1st edn, Oxford University Press 2005) 92

3 *ibid* n 91

undercurrents.

First, development was said to almost heretically debase the conventional subject of human rights (the individual) by introducing a *collective dimension*. Article 1 of the United Nations Declaration on the Right to Development⁴ talks about an “inalienable right” that “all peoples are entitled to”. In the United Nations General Assembly in 1987, the Swedish delegate said he could not accept the phrase “human rights of peoples”; the West-German delegate argued that human rights could only be exercised within the relationship between the individual and the state.⁵ Donnelly sees development as challenging the *raison d’être* of the Universal Declaration of Human Rights, “in which human rights are clearly and unambiguously conceptualised as being inherent to humans and not the product of social cooperation”.⁶ Second, the right was thought to be *non-justiciable*, incapable of enforcement. Running along similar vectors to economic and social rights, it has been argued that human rights imply corresponding obligations of implementation, which owing to the vagueness of the right to development, can never be fulfilled.

Both issues resist change but do so from opposite perspectives. The inherent right of the individual has its foundations in *natural law theory*. Running parallel to this is the issue of non-justiciability based on *legal positivism*. One of the founding fathers of positivism, Jeremy Bentham, argues that rights and obligations must be juxtaposed, while Kelsen argues that the very existence of a right is dependent upon its justiciability.⁷

2.2 Contemporary issues

The shift in recent times from formalism to realism has been a welcome one. Discussion is less calibrated around theoretical difficulties and more sensitive to the beneficiaries of the right to development. Several reasons underlie this shift, one notably being that an abundance of collective rights are now universally recognised: indigenous peoples’ rights being a prime example. As Jane Ansah makes clear, the right to development is also now a fully justiciable right in Malawi.⁸ Perhaps the greatest reason underlying this shift though, is the growing realisation that international law is not merely failing to act, but that it is complicit in the growing inequality between the world’s rich and poor. A detailed analysis of the international economic system will follow in Section III. This section is split by the dual priorities of illustrating the current debate, and focusing on the perspectives that can be used as analytical tools in tracing the wider paradigmatic shift. Accordingly, three specific themes and interpretations have been identified for review in greater detail: Asian values, Feminism and Cosmopolitanism.

2.2.1. Asian values

In *The Analects*, Confucius writes, “the man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to be enlarged himself, he seeks also to enlarge others”.⁹ For Confucius, humans were to be judged not solely by their own achievements but in a web with one another, allowing individual demands to be subordinated for the greater good of the community. At the 1993 World Conference on Human Rights, the concept of ‘Asian values’ was raised. Commenting on proceedings, Marks and Clapham write,

4 United Nations General Assembly Declaration on the Right to Development 41/128

5 Alston (n 1) 25

6 Quoted in Alston (n 1) 26

7 Alston (n 1) 26

8 See Jane Ansah, ‘The Right to Development as applied in National Law’, in Baderin and McCorquodale, *Economic, Social and Cultural Rights in Action* (Oxford online 2007)

9 Patrick Hayden, *The Philosophy of Human Rights* (2nd edn Paragon House 2001) 273

“while human rights promote individualism and glorify freedom, in Asia the interests of the community come first”.¹⁰ Despite the right to development’s collective dimension, the Asian values concept has sparked a backlash among Western intellectuals. How then does this impinge upon the subject of development?

To some critics it is “simply a cynical attempt on the part of certain governments and their supporters to justify repressive measures”.¹¹ However, a more sophisticated examination is called for. Before the late twentieth century, Western institutions were not so incongruent with Asian values as they now attest. Alston shows that at the time of his article, international institutions such as the International Monetary Foundation (IMF) and World Bank insisted on the strict separation of economics and human rights on the grounds that human rights would “require modes of analysis less rigorous than the traditional economic framework”.¹² Two proponents of the Asian values thesis are singled in Marks and Clapham’s *International Human Rights Lexicon*: Bilahari Kausikan and Kishore Mahbubani. Bilahari Kausikan sees “order and stability as preconditions for economic growth, and growth as the necessary foundation of any political order that claims to advance human dignity”.¹³ This view allows for the temporary suspension of a wide range of human rights to concentrate on the growth of the community. Kishore Mahbubani claims that human rights advocates are pursuing their goals in a logically inverse way. He talks about the need to put the “horse before the cart”, by “promoting economic development through good government before promoting democracy” and human rights.¹⁴ Asian values are thus seen as a commitment to economic values over other human rights values.

In exposing the non-Western and oft-forgotten origins of the right to development, Ansah asserts that the right was first formulated by Keba M’baye but popularised by Karel Vasak.¹⁵ Vasak wrote of development as a “third generation” right: a view not entirely complementary with M’baye’s. He argued that the right to development was not a new right and claims that it is “implied in several international instruments, including the United Nations (UN) Charter, the UDHR, the two International Covenants and, also, the Charter of Economic Rights and Duties of States”.¹⁶ This formulation of the right alludes to a very important quality: that development is not simply an economic development but it strikes at the heart of human rights.

Amartya Sen elaborates upon this point further. In *Development as Freedom*, he explains that to ask the question of whether human rights is conducive to development is to misinterpret the causal relationship between development and economic growth. Indicators of economic growth, such as Gross National Product (GNP), may indicate an overall growth in monetary terms of the state. However, these figures represent an *aggregative* increase but not a more equitable *distribution*. While economic appraisals may be an indicator of development, they are by no means its end-station. For Sen, the scourge of poverty is not simply a matter of low-incomes but of a deprivation of capabilities. It is here the overwhelming overlap between the two disciplines comes into focus. He thus proposes that development should be conceived of as a “process of expanding the real freedoms that people enjoy”.¹⁷ In this light, human rights have both a “constitutive role” and an “instrumental role”: they are both the means and the ends of development. There is ample philosophical reinforcement for this view. Focusing on

10 Marks and Clapham (n 2) 37

11 *ibid* n 38

12 Alston (n 1) 18

13 Marks and Clapham (n 2) 95

14 *ibid* n 96

15 Ansah (n 8) 423

16 *ibid* n 421

17 Marks and Clapham (n 2) 96

the economic growth of a nation as a whole is utilitarian in its logic. By doing this, it implies that so long as the majority benefit and grow, the needs of the minority can be overlooked. This directly contravenes one of the most basic precepts of all law: the moral equality of all human beings.

2.2.2 Feminism

Feminist perspectives of international law further illuminate the topic of development. These views are useful in not only highlighting the hardships endured by women, but in indicating the disproportionately adverse effects that the neo-liberal agenda of development has on minorities generally. Two main trends, dealt with in tandem, will be brought into focus: *privatisation* and concurrent *deregulation*. However, it is worth mentioning at the outset that the negative effects of development have not been universally acknowledged: firstly, even thinkers such as John Rawls ascribe the failings of a nation due to the “public political culture and the religious and philosophical traditions that underlie its institutions”;¹⁸ second, there are some authors who view trade liberalisation as an unconditional positive. Regarding the latter point, Judith Bello, for example, argues that it “can be part of a solution for many of [the world’s problems]”. She accentuates the potential it has in the *creation of jobs* in developed and developing countries, “thereby reducing the pressure on both illegal immigration and illicit drug trafficking”.¹⁹

It is precisely this phenomenon, the creation of jobs, that has been roundly condemned by feminist literature.²⁰ Development championed by international institutions such as the World Bank or the IMF, has demanded that countries in receipt of aid adjust their ideologies to conform with a neo-liberal agenda.²¹ While internal markets are opened up to the global economy, the involvement of the state in policy formulation simultaneously withers away. In the context of employment, the state’s capacity to comply with “human rights obligations, particularly economic, social, and cultural rights, such as trade union freedoms, the right to work and the right to social security”.²²

Several related characteristics are worth drawing out. First, the growth in the informal sector, ushered in by a period of deregulation, unfairly targets women. As Shelton makes clear, foreign “investors have demonstrated a preference for women in the ‘soft’ industries such as apparel, shoe- and toy-making, data-processing... that require unskilled to semi-skilled labour, leading women to bear the disproportionate weight of the constraints introduced by globalisation”.²³ Second, states are put under considerable pressure to ease labour standards in order to attract foreign investment. Human rights priorities are superseded by the concern of being “business friendly”,²⁴ in a perpetually worsening phenomenon called “the race to the bottom”.²⁵ Third, the burgeoning informal sector of employment has resulted in a shift from hiring permanent employees with job and security benefits, to the use of contingent or temporary workers without health care, pensions or owing to a lack of organisation, any leverage in deciding their own conditions. Export Production Zones (EPZs) are the most concentrated embodiment of these trends; with shocking conditions, derisory pay and long

18 John Rawls quoted in Thomas Pogge, ‘Recognised and Violated by International Law: Human Rights of the Global Poor’ [2006] *Leiden Journal of International Law* 6

19 Dinah Shelton, ‘Protecting Human Rights in a Globalised World’ [2008] 25 *BC international law review* 20

20 See Chinkin and Charlesworth, *The Boundaries of International Law – A feminist Analysis* (1st edn Manchester University Press 2000)

21 Jacqueline Mowbray, ‘The Right to Food and the International Economic System: an Assessment of the Rights-based Approach to World Hunger’ [2007] *Leiden Journal of International Law* 554

22 Shelton (n 19) 22

23 *ibid* n 23

24 Avery Kolers, ‘The Territorial State in Cosmopolitan Justice’ [2008] 28 *Social Theory and Practice* 42

25 *ibid* n 43

working days. Lin Lean Lim notes, EPZs increased from twenty-four in 1976 to ninety-three in 2000, with 80% of the workforce being female.²⁶

2.2.3 Cosmopolitanism

The current intellectual edifice on international law's right to development is rendered complete by cosmopolitanism. The interrelated forces of neo-liberal development and globalisation have undoubtedly signalled a new era in the exercise of state sovereignty. In her article '*Legal Cosmopolitanism and the Normative Contributions of the Right to Development*',²⁷ Margaret Salomon considers the cosmopolitan value in the United Nations General Assembly Declaration on the Right to Development. For her, it challenges the classic model of international law which assigned only the most tenuous responsibility for fulfilling human rights beyond the borders of one's nation-state. Development, with globalisation in its wings, has brought with the idea of what Kenichi Ohmae's calls a "borderless world".²⁸ Structural adjustment programmes imposed on developing countries by the world's financial institutions has led to an increasing number of liberal democracies around the world. The parallels between these developments and a text like Kant's *Perpetual Peace*, which advocates a world with similar political ideologies, seems to allow some commentators a real cause for optimism. It is worth noting that there are basic points of intersection between the *prima facie* antagonistic movements of human rights and trade liberalisation brought about by development. First, both possess the quality of universality: they are equally concerned with reaching and affecting the farthest corners of the globe. Second, they both emphasise the priority of their respective projects over the power of the state.

Salomon rests her optimism in the right to development on the premise that it pursues justice not just domestically but nationally too. She draws comparisons with the collective right to self-determination, in that they each have *internal* and *external* dimensions to them.²⁹ In both cases, the external dimension signals interactions on the international stage; the internal dimension focuses on states' domestic policies. The principle of self-determination, first seen in the UN Charter had its status lifted to that of a right in both human rights covenants only once the "agitation in the context of decolonisation raised both the stakes and the normative aspirations of its proponents".³⁰ It is at this point that she hopes the right to development, with similar agitations of subjugation, will follow the trajectory of the right to self-determination.

3. The Right to Development as the Demise of Modernity

One thing all articles on development have in common is the repetition of often shocking and appalling statistics on the worsening conditions of the world's poor. This omission has been a purposeful one.. For the majority of citizens in the affluent West there is not a tremendous difference in appreciation for those reading that 80, 000 people rather 70, 000 people are dying of daily of preventable diseases. There is too often an emphasis on scale rather than occurrence. This section will aim to put these figures back into a wider context, and reunite them with the moral force they deserve; it will aim to show that the right to development signals the final jettisoning of the paradigm of modernity.

26 Shelton (n 19) 23

27 Margaret Salomon, 'Legal Cosmopolitanism and the Normative Contributions of the Right to Development' [2008] LSE legal studies working paper no.16

28 Quoted in Shelton (n 19) 4

29 Salomon (n 27) 3

30 Philip Alston quoted in Salomon (n 27) 12

Almost every aspect of modernity is defined differently depending on the author. Its emergence has been interpreted as varying between periods of up to three hundred years, while some have defined it solely by capitalism³¹. For most it entails a move from feudal, agrarian and medieval society into a more industrial and urban lifestyle. This critique will isolate the most important feature of modernity – the tension between emancipation and regulation – to signal a breakdown in its efficacy as a social paradigm. This section will appropriately establish the existence and importance of the tension between emancipation and regulation, first in theory and then in practice, then trace its breakdown using the sub-paradigmatic techniques found in the themes of Asian values and Feminism.

3.1 The existence of the tension between emancipation and regulation

3.1.1 Theory

In *The European Nation-State and the Pressures of Globalization*, Jürgen Habermas discerns that there is a “conceptual gap” in the legal construction of the state, one that cannot be explained in “purely normative terms – how the universe of those who come together to regulate their common life by means of positive law should be composed”.³² To have any sort of appeal, the concept of the state must show, in addition to its ability to organise and protect individuals, some appreciation of equity and justice. Boaventura de Sousa Santos explores the establishment of the tension between regulation and emancipation across three different periods: Roman law, rationalist natural law and social contract theories.³³ Rationalist natural law and social contract theories will be looked at in greater detail.

3.1.1.1 Rationalist Natural Law

This tension is put forward most forcefully by Giambattista Vico: in rejecting Cartesian naturalism, he argued that the science of society cannot be developed in the same manner as the science of nature.³⁴ His formulation of the tension between emancipation and regulation manifests itself in his fundamental distinction between the certain (*certum*) and the true (*verum*). The certain in law is “an obscurity of judgment backed only by authority”; the true is instead empowered by the *aequum*, the just.³⁵ Law ought to be constituted to hold in equilibrium the force of authority and the force of reason, justice and equity.

3.1.1.2 Social Contract Theories

The main focus here will be on the work of Jean-Jacques Rousseau and the Enlightenment. Rousseau’s famous quotation, “man is born free, and everywhere he is in chains”,³⁶ both cogently and concisely encapsulates the tension between the ethical and the political. There is an overwhelming overlap here between both Vico’s *certum* and *verum* distinction and the liberal conceptions of the state based on the maximisation of autonomy. Social contract theories proceed from a “state of nature”, a theoretical plane before the state arrived as a form of social organisation. The virtues most emphasised are man’s capacity for rational thought, reason and autonomy. As the state encroaches upon this condition, man is said to give up a measure of his individuality (in accepting rights and duties) to live under the protection

31 Boaventura de Sousa Santos, *Towards a New Legal Common Sense* (2nd edn Butterworths Lexis Nexis 2002) 189

32 Habermas quoted in Benhabib, *The Rights of Others* (9th edn Cambridge university press 2009) 17

33 Santos (n 31) 21

34 *ibid* n 27

35 *ibid* n 29

36 *ibid* n 30

and organisation of the state. In other words, as a consequence of man being both free and equipped to make moral choices, society is a product of human choice. Rousseau rebuffs the Hobbesian theory of social contract, which proceeds from a violent state of nature, and argues that it would not be logical to enter into such a contractual relationship if it were to entail a loss of freedom. Rousseau thus offers the solution: the sovereignty of the state is constituted by the general will of the populace.³⁷ This clearly brings to the fore the distinction between emancipation and regulation.

3.1.2 Practice

Modern international law is littered with a litany of natural law and ethical expressions. In many of the charters, documents and declarations the “inherent rights of man” or the basic requirement of “human dignity” is given the foreground. However, the establishment of this tension must be explored in a more detailed manner. Positive social change in practice displays itself in two ways: through *incremental* and *revolutionary* change.

The subject of revolutionary change is taken up with aplomb by Harold Berman, in the book *Law and Revolution: the Formation of Western Legal Tradition*,³⁸ as he embarks upon the task of challenging the ideological bias in favour of incremental change. He sees revolutionary change as the highest form of emancipation and argues the reason why this has been obscured is because law itself, premised on stability, declares such actions illegal. Once a revolution occurs, further revolutions will be discouraged by turning to incremental reform. This is how Berman explains that “the myth of a return to an earlier time is, in fact, the hallmark of all the European revolutions”.³⁹ Berman analyses several modern revolutions – the English, American, Russian, French, Papal and Protestant revolutions – and claims that in all these examples, the outbreak of revolution was due to the failure of the old law to respond adequately to changes that were taking place in society before the revolutionary outbreak. This he claims, is idiosyncratic of the inherent contradiction within Western legal tradition, that of preserving order and pursuing justice.

Santos identifies this tension in the different modern periods of “liberal capitalism” and “organised capitalism”. In the period of liberal capitalism, the state in the nineteenth century took charge of the theoretical challenges of preserving this tension, and reduced “ethical claims and political promises to fit the regulatory needs of capitalism”.⁴⁰ The rise of positivism in both law and science help to reduce social progress to the sole criterion of capitalist development. It is hardly surprising therefore that some see economic progress as the mainstay of the right to development. This represents a first crisis of the paradigm of modernity. With the rise of both positivism and capitalism, the epistemological implications for emancipation were severe: change could only be effected through empirical regularities. Yet even in this first period of liberal capitalism, the idea of romantic idealism still fought for ascendancy. Socialism emerged as a political movement as well as many Utopian projects and practices. These acts of resistance were very important in keeping emancipation alive and carrying it on into the twentieth century of organised capitalism (until 1960s). Organised capitalism brought about tremendous economic growth, yet, as Santos describes, the political recognition of the social effects of capitalist development was one of the major hallmarks of the period. The politicisation of social inequality led to state involvement and protection in “job security, minimum wages, workers’ compensation, pension funds, public education,

37 Jean-Jacques Rousseau, *The Social Contract* (19th edn Penguin Classics 2004)

38 Santos (n 31) 30

39 Berman quoted in Santos (n 31) 80

40 Santos (n 31) 40

health and housing” and set a new political precedence: the welfare state. The apogee of this period was marked by the emergence of socio-economic rights in human rights discourse.⁴¹

3.2 The breakdown of the tension between regulation and emancipation

In stark contrast to romantic idealism in the period of organised capital, the recent period has yielded the stormy petrel of existentialist literature. With the end of the Cold War consigning social experiments to the dustbin of history, Francis Fukuyama triumphantly delivered the message: mankind has reached “the end of history”,⁴² the final form of government. This was a declaration that western liberal democracies, championed by the right to neo-liberal agenda of the right to development, was undisputedly the best way to organise a state. After the terror attacks of 9/11, Jacques Derrida made the controversial claim that the attacks were not a “major” event because they were predictable. It was here that he developed the metaphor of autoimmunity. During the Cold War, the United States sought to establish a key ally in the East. They provided weapons and military training in Afghanistan, which Derrida contends returned to haunt them in the 9/11 attacks. Using the biological metaphor of the autoimmune system, while seeking to immunise themselves, they were blind to the danger confronting them.⁴³ In *The Development Dictionary*, Wolfgang Sachs called for the abandonment of development. One of the reasons he gave was that the Cold War context which gave rise to development no longer exists.⁴⁴ President Truman was “quite candid, and indeed emphatic, about the fact that a major aim of his “programme for development” was to establish or consolidate United States influence, and discourage the underdeveloped regions from turning to communism”.⁴⁵ It is proposed here, that Derrida’s metaphor can be extended to development. The ruthless development programme of consolidation and exploitation by the Western hegemonic powers, despite seeking to immunise themselves, has brought about the “end of [western] history” in a much more sinister way: by exhausting the paradigm of modernity.

3.3. Analytical tools

In the same vein as Derrida, this section will also employ Deconstructionist methodology and look at the presuppositions behind feminism, Asian values and cosmopolitanism. Modernity’s push for justice will provide a useful backdrop and will be represented by the Western notions of non-discrimination, equality, participation and democracy. Santos comments that since the seventeenth century “science has colonised our notions of reason and rationality”. Toulmin notes that there has been “drastic separation that has occurred between the related concepts of rationality and reasonableness, theory and practice, logic and rhetoric, and that total priority was given to rationality, theory and logic”.⁴⁶ This “hyperscientificisation” of the pillar of emancipation allowed modernity to issue lofty promises. In the wake of this, the over-performance of these promises for some sections of global society and the neglect for others will be analysed.

41 Santos (n 31) 46-48

42 Francis Fukuyama, “The End of History?” [1989] *National Interest* (Summer) 3

43 Giovanna Borradori, *Philosophy in a Time of Terror – Dialogues with Juergen Habermas and Jacques Derrida* (1st edn University of Chicago Press 2003)

44 Marks and Clapham (n 2) 93

45 *ibid*

46 Santos (n 31) 15

3.4 Asian values

Perhaps now more than ever, the West is guilty of Orientalism.⁴⁷ China's unyielding drive for industrialisation has brought its people from agricultural simplicity into modernity in a mere thirty years, something that took two-hundred years in Europe. Western discussion has been consumed with ideas about how to manage the rise of China. It gives us a "sense of control and mastery, and of paternalistic superiority".⁴⁸ As Mark Leonard mentions, "the Western world is abuzz with talk of managing China's rise. How can China be 'moulded', 'socialised' or 'coerced into becoming like us?'"⁴⁹ The Western view of China's rise is lamentably two-dimensional. It is treated as a political bloc or an economic powerhouse but there is little to offer about China's intellectual debates or ideological values. In exposing this new thinking, it shows two things – an unthinking of development and underlines the rotten state of Western modernity. The challenge they pose to three key conceptions of Western development will be looked at in particular: soft power, participation and the rule of law.

3.4.1 Participation and the rule of law

Participation in state policies, the right to have a say in one's life is fundamental to the Western idea of modernity. In the mould of Rousseau, the idea of popular sovereignty is one of the vital tenets of modernity. In the West, and to the parts of the world that have had western development foisted upon them, this right to participation is evident with democracy. Mark Leonard tellingly reports the reception of democracy for Chinese modernity under the heading "democracy = chaos". Democracy has traditionally been viewed as a precondition for any real economic or political progress but the success of the Chinese model, with one party in power has led this to be questioned. Leonard quotes an incisive student at Beijing University, Pan Wei, in saying that democracy will "not solve any of the problems facing China today".⁵⁰ With rural bankruptcy, a lack of domestic consumption and a widening gap between the rich and poor, the pressing issue for him is not "who should run the government?" but "how should the government be run?".⁵¹ It advances a view more attuned to the country's social problems.

The Western view of modernity and development fails to delineate between democracy and the rule of law. Rather than being bundled together and exported wholesale, upon closer examination it is possible to see that they are two forces in conflict with each other. Democracy is about empowering citizens, while the rule of law places limits on this power. While democracy concerns making laws, the rule of law is about the enforcement of them. While the former gains legitimacy from elections, the latter gains legitimacy from meritocracy. The West, already in full receipt of modernity's productive advances, can afford to use the two in tandem. However, the effect of giving temporal priority to democracy ahead of the rule of law is dire. This has been the case in many countries influenced by the West – Yugoslavia, Rwanda, Angola, Lebanon and so forth. As politicians have appealed to the majority, ethnic tensions have been exploited to gain power and priorities have shifted from long-term reforms to the short-term happiness of voters.

47 The phrase "Orientalism" was coined by Edward Said. It refers to a pejorative distinction between the Orient and the West made by Western thinkers, often formed without real evidence. Prior to the human rights movement, it was done in a very purposeful way for ideological reasons. Today, it is more evident in Said's sense as Western academics have not simply set out to demonise the East but largely neglected the idea that there is anything to learn from Chinese culture. See Edward Said, *Orientalism* (5th edn Penguin book 2003)

48 Mark Leonard, *What does China Think* [1st edn Harper Collins 2008] 115

49 *ibid*

50 *ibid* n 60

51 *ibid* n 61

China has started to use increasingly sophisticated methods of public participation, which bears much more likeness to Athenian democracy than the kind practised in the West. The city of Chongqing has been used as a test for strengthening the rule of law and consulting the public over major decisions. The method used is “deliberative polling”.⁵² Of the 120,000 inhabitants, 275 are chosen at random for democratic discussions. One example shows these citizens given a full overview of the pros and cons of 30 different building projects, while at the end of the day the twelve most favoured projects are pursued. Despite the obvious problems of legitimacy, in that only a very small proportion of the populace have agency, the promise of emancipation is still being pursued in a more meaningful way than Western liberal democracies can offer.

3.4.2 Soft power

For President Truman, one of the benefits of development was the ideological gain; a new foothold in a distant part of the world, a “strategic siege”⁵³ around their enemies, thereby strengthening themselves. This method of gaining footholds in the world through popularity has been labelled “soft power”.⁵⁴ While American soft power reached its nadir after the internationally condemned campaigns in Iraq, China’s fortunes have experienced a sharp upturn. China is challenging the dominant conception of international development: either accept the neo-liberal agenda or stay in isolation. This had conventionally led to a catch-22 situation for many developing countries. Recently, China has started to develop “special economic zones”⁵⁵ in Africa that boosts economic development but crucially does not require any “structural adjustment” policies. This shift from the right to development in Western modernity is embodied by the example of Angola. As Leonard elucidates, international institutions used to be viewed with reverence. In recent times, the IMF spent years negotiating a loan agreement with the Angolan government “only to be told hours before the deal was due to be signed that the authorities in Luanda were no longer interested in the money: they had secured a \$2billion soft loan from China”. This trend has been repeated several times throughout the African continent.⁵⁶

3.5 Feminism

While Section 2 examined the effects of development from a feminist perspective, in this section feminist techniques will be used to deconstruct the development and unveil its state of disrepair. Methods utilised by two of the most famous proponents of feminist literature will be called upon: the technique used by Hilary Charlesworth in her article titled *‘International Law: a Discipline of Crisis’*⁵⁷ - namely that one must look beyond the short-term crisis to its structural origins - and Christine Chinkin’s critique of the public/private divide.⁵⁸ Charlesworth encourages a move away from looking at crises in international law, from examining the symptoms of a problem and identifying the causes. Chinkin notes that most actions against women take place in the private sphere but that international law will only regulate the public.

52 *ibid* n 70

53 *ibid* n 93

54 *ibid*

55 *ibid* n 119

56 *ibid* n 120

57 Hilary Charlesworth, ‘International Law: a Discipline of Crisis’ [2008] 3 *Modern Law review* 65

58 Christine Chinkin, ‘Critique of the Public/Private Dimension’ [1999] 2 *European Journal of International Law* 10

3.5.1 Structural examinations

How does this methodology translate to the right to development? There are many layers of discontent and suffering involved in the right to development that shroud the root cause of the problems. Once this root has been ascertained and assessed then it is possible to see that the potential for emancipation in modernity has been completely eroded.

In her article, *'Human Rights and the Bottom Billion'*,⁵⁹ Susan Marks takes three publications on the right to development into consideration. The economist Paul Collier's book *The Bottom Billion*, an article by philosopher Thomas Pogge, and a report by the United Nations on poverty reduction. Collier cites four "traps": the conflict trap, the natural resource trap, the trap of being landlocked with bad neighbours, and the bad governance trap. In advocating a solution, he sees trade liberalisation, international military action to restore peace and new laws and charters as the way ahead. Despite a massive legal dimension to his plans, he suffers from a failure to separate the *a priori* from the *a posteriori*. He details the functioning of these traps but fails to question how they got there. The 2004 UN report titled *'Human Rights and Poverty Reduction – a Conceptual Focus'* is next appraised. The report asserts the moral authority of human rights and how this must be given priority. It calls on states to strengthen these human rights. Both publications, despite differing aims (one explaining traps and the other explaining human rights) suffer from the same common ground: they view the destitution in purely domestic terms. Both fight to overcome bad leadership and policies. Pogge goes beyond these domestic causes and rightly finds International Trade Law to be the big problem. Structural adjustment programmes insisted upon by the world's financial institutions such as the IMF and World Bank demand developing countries to open up their internal markets and reduce national spending, hindering their ability to protect their citizens. For Susan Marks, whilst Pogge is right in seeing the problem in international terms, he misses the fact that poverty is not simply a condition but a relationship.⁶⁰

3.5.2 The Public/Private Divide

Chinkin's critique of the public/private divide is an important tool for deconstructing law. While this divide was traditionally seen by liberals as a blessing, as it kept law out of the private lives of citizens and increased autonomy, feminist literature has shown that deregulation through the right to development has also had scathing effects on human rights. The method of examining the public/private divide looks at conventional binaries in law and questions the logic behind them. How is this best applied to the subject-matter here? One of the key reasons as to why the increasing sector of deregulation is so dangerous is that not only does it facilitate rights-violations but it masks them too. It gives them an anodyne quality by placing them outside the subject-matter of law, portraying them as "natural" and *prima facie* robbing it of any moral indignation.. Looking at the right to development two clear uses of the public/private divide become apparent: first, in the relationship of exploitation created by international law; and second, that legality in regulation, owing to a concurrent crisis in science, has been reduced and solely defined by its ability to fall within the criterion of pro-capitalist/anti-capitalist.

The relationship of exploitation in law can be exposed using Karl Marx's distinction between the *marketplace* and the process of *production* in his analysis of capitalism.⁶¹ The marketplace was put forward as a place of equality, where the rich and poor, the capitalist and worker meet on equal footing. However, once one turns to the mode of production, this

59 Susan Marks, 'Human Rights and the Bottom Billion' [2009] European Human Rights Law Review 1

60 *ibid* n 49

61 Susan Marks, *International Law on the Left* (1st edn Cambridge University Press 2008) 284

relationship changes dramatically. The extraction of profit out of labour becomes the real concern. Marx splits the working day up into two timescales – *necessary* labour, where the worker earns money for himself, and *surplus* labour, where the worker makes money for the capitalist. These two time-periods are in conflict, with the capitalist setting the conditions there is always the danger the necessary labour will be dwarfed by the surplus labour. It was seen in the period of liberal capitalism examined earlier that the marriage of modernity and capitalism was never as beneficent as it was made out to be. In the current era, the distinction between necessary labour and surplus labour has seen more debonair forms of exposition: ways in which surplus value, masquerading as deregulation and the positive of being beyond state control, has worked to entrench a relationship of exploitation. The *bête-noir* of contemporary deregulation is the redistribution of resources, in the interest of modernity's promise of equality has been placed beyond the power of state, into the fields of "privatisation" and "deregulation". It is here that capitalist elites, western states and powerful transnational corporations are left to exploit the developing world, the collective workers. Under capitalism, wealth will always flow towards the rich and away from the poor. Capitalism nourishes one part of society and deprives another. Using money as an indicator of freedom, Modernity's promises are have been both fulfilled in excess and neglected. Without resources, agency or the very right to have rights, many of the global poor have been left beyond the reach of modernity.

4. A Paradigmatic Transition?

While the marriage of capitalism and modernity was to some extent rescued, and at any rate prolonged, in the period of organised capitalism (through the welfare state), the contemporary right to development has witnessed the total degradation of all of modernity's emancipatory promise. Santos identifies an epistemological transition at the heart of this.⁶² Vico's *verum* has been subsumed into the *certum*. A crisis of science lies at the heart of this epistemological change. The American Dream, engaging in the starry rhetoric of all men being created equally and the "rags to riches" pursuit of happiness, is the embodiment of this phenomenon. Science, like a Greek tragedy, spurred on by its tremendous progress has fallen foul to its fatal flaw – hubris. The rapid progress of capitalism strengthened and multiplied the promises of the modernity, but in this process science has experienced a huge disjuncture between its capacity to create and its capacity to predict. One can no longer say with any certainty that simply because you are born into a social class, you will remain there. This has led to concurrent trouble with law's ability to regulate and predict under the pillar of regulation. In his book, *The passions and the Interests*, Albert Hirschman has gradually outlined the process through which modern social science has forced a partition between technical analyses (interests) and moral issues (passions).⁶³

In order to counteract the deficits of capitalism, legal epistemology must once again be reunited with the heart of modernity's promises: popular sovereignty, non-discrimination, equality and emancipation in general. It is here that the theme of cosmopolitanism in section two becomes invaluable. One of the discussions about the 9/11 terror attacks was that due to its media coverage, citizens all over the world have become eye-witnesses to human rights violations. There are obvious problems with the creation of a world state: how would an enlargement of statism go any way to solving inequality if it cannot be solved at a smaller scale? A world state has been almost universally shunned by academics due to the heady

62 Santos (n 31) 8

63 Alston (n 1) 18

concentration of power in the hands of the decision-makers and the potentially catastrophic effects any misuse of this power could have. The suggestion here is not along these lines, but one in which the era of globalisation could be appropriated for the forces of good, for the *verum* and just. One of the biggest problems of deregulation is the lack of organisation of those affected.

It is suggested that globalisation's power could be harnessed, and newly emerging global networks could be formed to assert pressure on violators of human rights. Just as Salomon drew inspiration from the evolution of the right to self-determination, this article will point to indigenous peoples' rights. As highly marginalised sections of society, they have enjoyed considerable success in recent years in gaining justiciable rights by fostering links with powerful non-governmental organisations. This strategy of exposing violations and asserting pressure could be applied to other members of society as well.

5. Conclusion

This essay was inspired by the spirit of Terry Eagleton's example of a "White's only" bench.⁶⁴ Writing on ideology, he asserts that if one sits on a bench with the words "white's only" inscribed on it, even if one doesn't subscribe to this view, they are in some way legitimising it. In the same way, this essay has sought to delegitimise the hegemonic perspectives on development prevalent in the world today.

Any paradigmatic transitions usually take place over hundreds of years. The aim of this article is more to give a clue as to what direction the new paradigm might evolve in and not to speak with certainty. While feminism helped to explore the relationship of exploitation, the Asian values thesis helped to unpack the uniform neo-liberal agenda in light of modernity's promises. In each section, the answers to the questions posed at the beginning have been alluded to, with these iterations getting progressively stronger and explored more thoroughly. These themes have hopefully helped to overcome the difficulties of speaking with any certainty in relation to paradigmatic transitions that a linear narrative may have encountered by focusing on specific problems. The world must no longer search for temporary fixes, it must realise the depth of its problems; it must look for long-term solutions.