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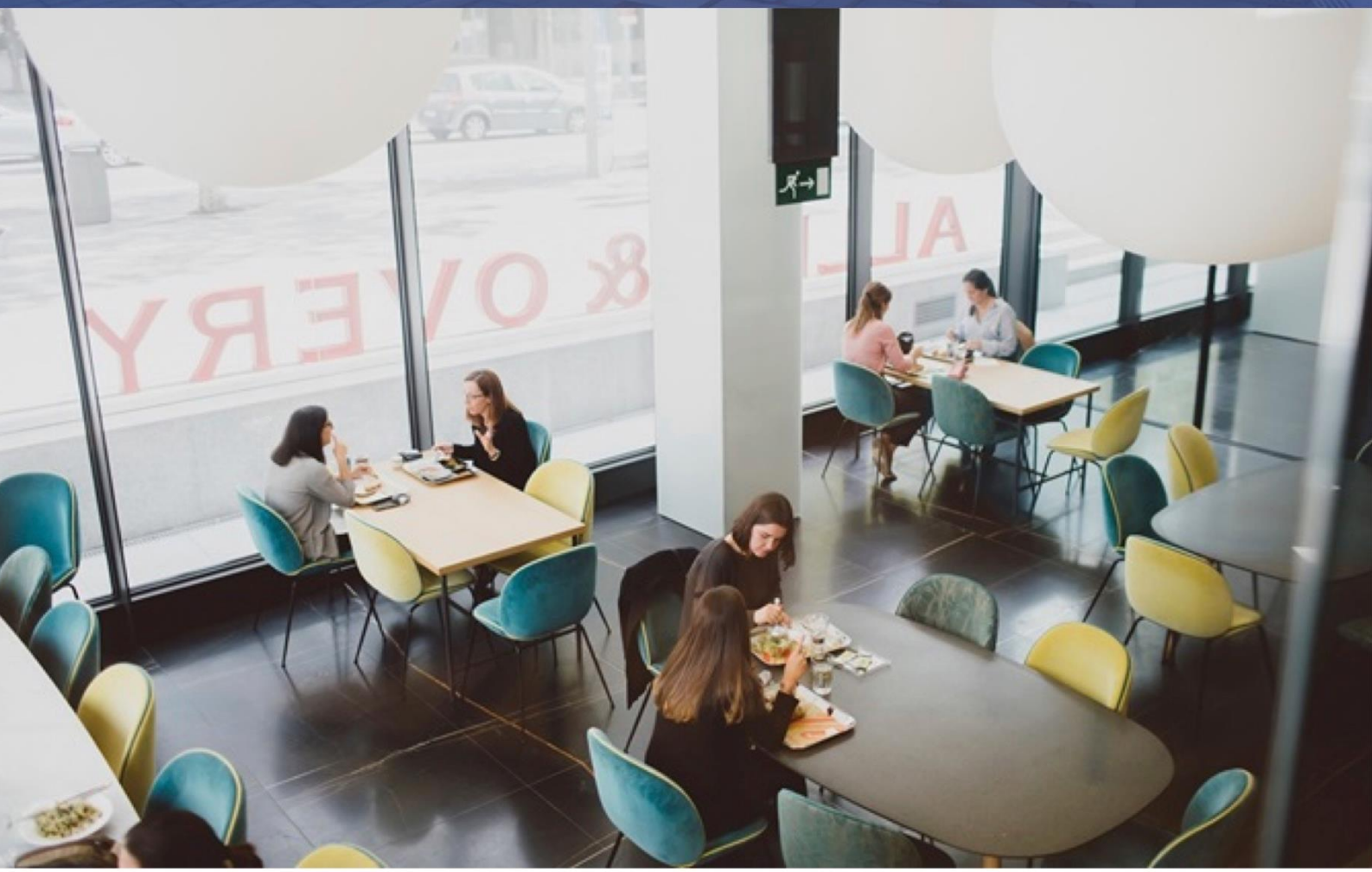

Note from the Editors-in-Chief

As Co Editors-in-Chief, we are very proud to present Issue 9 of the Leicester Student Law Review.

This year's Issue has been a special one, as our main focus this year has been to reach out more to non-Law students and encourage them to share their perspectives on the Law. We are excited to say that one of the articles in this issue has been written by a non-Law student and we look forward to welcoming more of this in the future.

Another aspect of this year's review that we are thrilled about is our incredibly diverse committee! It was very important for us to ensure that we display talents from all different types of backgrounds as women of colour ourselves. And we certainly believe we have achieved this, having produced an issue of great quality, leading to our final point.

We are lastly very happy that we have been able to focus on revamping the design of the Law Review this year. Having looked at our previous Issues as well as other Law Reviews and Journals, we feel that we have designed a modern, sleek Issue that progresses well from our predecessors. We, as Editors-in-Chief, had the goal of bringing improvement in every aspect of the Review this year, and I hope our successors will achieve even greater feats than us!

Thanks to all our sponsors, readers, authors and committee members this year. We hope you enjoy Issue 9

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What is the legacy of the application of the body of human rights protected by EU law in the UK?

By Simeon Green

Leicester Law Review
Spring 2020

The legacy of European Union Law in the United Kingdom is of particular concern given the current political climate surrounding Brexit. This essay argues that the revocation of the relevant European Union Law regarding Human Rights as a result of Brexit will leave a gap in the legal system which will undoubtedly need to be filled in the near future. It will therefore determine what the effects may be after these laws no longer have any effect. It is important to consider the flaws that may be left in the domestic systems without the protection of EU Laws, as human rights are fundamental to a functioning society, and without an effective protective system in place to act against potential abuses there would be obvious and alarming issues in the future.

Introduction

In an era in which the United Kingdom's (UK) membership of the European Union (EU) has been propelled into the foreground of political discourse, it seems an appropriate juncture to reflect on the legacy of the EU in the UK. One such component, and indeed the focus of this essay, will be the body of human rights covered by EU law, and more pertinently, the legacy regarding its application within the UK. I will examine two facets that I believe define the legacy of EU human rights law in the UK. That includes analysing the legal ramifications, that is the relationship between the international and domestic jurisprudence in that area; as well as the political impact, or how such mechanisms have been received in the political arena, and how political arguments have both been shaped by, and shaped, the legacy of EU human rights law. I will assert in this essay, that whilst there are unquestionably instances in which the EU's measures helped to fill 'gaps' in the British legal system concerning human rights, ultimately the instruments used by the EU represented, to many, the ever increasing encroachment of an international political body on the ability of Member States to implement their own legal framework. It is with that in mind, that I believe whilst we may reflect on the legal legacy of EU human rights law positively, we must conclude that there are political questions to consider about the aforementioned legacy.

The Background of the Charter of Fundamental Rights

When engaging in an examination of the protection of human rights under EU law, the key instrument to be analysed in this article is the Charter of Fundamental

Rights of the European Union[1]. The Charter acts as the EU's 'Bill of Rights' and contains fifty-four articles. These articles range from protecting substantive, explicit rights such as the right to life[2], to more generalised, adaptable rights or 'principles' such as the provision on environmental protection[3]. Prior to the implementation of the Lisbon Treaty in 2009,[4] the Charter was not legally binding on Member States. However, after 'Lisbon', the Charter is now legally binding on Member States when they are acting within the scope of EU law, with some notable exceptions.

In the preamble of the Charter, we see reference to the oft-repeated notion of the ambition to create and promote an 'ever closer union'. Indeed, the overall goal of achieving this ever-closer union can be found in the preamble of both the Treaty on the European Union[5] and the Treaty on the Functioning of the European Union[6]. One could certainly argue that this unrelenting quest for a closer union of States, and the balancing act that is required in complementing the above whilst allowing the EU's own stated aim of "respecting the diversity of the cultures and traditions…as well as the national identity of the Member States"[7] to come to fruition, has contributed to the political legacy. As will be outlined in a later section, the overriding political perception of the EU's law-making may be one of overreaching and encroachment on State sovereignty, and that this perception expands to include the Charter.

The Legal Legacy

As a direct result of the period in which the Charter was drafted, it serves as a modern, progressive human rights instrument. This is certainly true when considered in comparison to a comparable statutory provision such as the European Convention on Human Rights, which was drafted in 1950. To that end, elements encompassed by the Charter include protections on contemporary issues that would not have previously been included, such as data protection under Art 8. The Charter also goes further in application than the ECHR. In instances of a conflict between domestic law and the European protections, under the Human Rights Act, the legislation that enshrines the ECHR into UK domestic law, the domestic courts may declare a statement of incompatibility that does not affect the ongoing validity of the law in question. Contrastingly, the Charter allows for a stronger response, in that any incompatible legislation is 'set-aside'. Furthermore, not only does the Charter represent a more modern approach to human rights than comparable international provisions, but it also covers areas that are not present in domestic equivalents in the UK[8]. These include the right to education under Art.14, and elements of Art.3 such as the prohibition of eugenic practices. In practice and in application, the Charter showcases elements of not only forward-thinking, progressive protections on rights, but it also goes further than domestic law- in some instances- in the protection of various individual rights.

The argument that the Charter fills various gaps within the domestic legal framework that exists in the UK for protecting human rights is one that is supported by examination of relevant case law. Cases such as *Benkarbouhce*, an employment tribunal case in which the

[1] Hereafter referred to as 'the Charter'.
[2] Charter of Fundamental Rights of the European Union [2000] C364/01, art 2.
[3] ibid art 37.
[4] Whilst the treaty was ratified in 2007 it was not implemented until 2009.
[5] Consolidated version of the Treaty on the European Union [2016] C202/01.
[6] Consolidated version of the Treaty on the Function of the European Union [2012] C326/01.
[7] ibid CFREU Preamble.
[8] Liberty, 'Bringing Rights Home? What's at stake for rights in the incorporation of EU law after Brexit' (January 2018) <https://www.libertyhumanrights.org.uk/sites/default/files/Bringing%20human%20rights%20home%20-%20Jan%202018.pdf> accessed 12 January 2020.

Charter provided the framework for a claim that would have been impossible under domestic provisions[9]. This is also reflected in other cases concerning the rights of the child under Art 24(3) of the Charter. In a post-Brexit landscape, potential claimants will not be able to rely on the protections enshrined within the Charter at a domestic level. Therefore, the legacy in this context may well be determined by how effectively the UK can replicate these protections in a post-Charter landscape in order to effectively protect the human rights of its citizens.

The Political Legacy

It would be remiss not to mention the colossal phenomena that is Brexit, and the impact it has had on the political discourse in the UK. It is without question that one of the fundamental claimed reasons, for those members of the electorate who were so inclined to vote to leave the EU, was to limit the impact of 'Brussels' on domestic law-making and the constraints this supposedly has on state sovereignty. Indeed, in a poll roughly 30% of respondents claimed that it was the predominant reason for their vote, with another 30% placing it as the second highest reason.[10]This view was not only held by the electorate. The government's Withdrawal Bill confirms that the Charter will not apply post-Brexit. There have been various attempts by the Conservatives to repeal the Human Rights Act and replace the authority of the ECHR with a 'British Bill of Rights'[11]. Whilst of course the ECHR is not an instrument of the EU, it does highlight the British 'euro-scepticism' that arguably comes to define the application of European human rights law. This has existed even prior to the implementation of the Charter, and as such has defined its life-span and subsequent demise in the UK. As Sionaidh Douglas-Scott points out, the British government had been reluctant to enforce the Charter as a binding object.[12] The result was the negotiation of a 'special status'. Under Protocol 30,[13] the Charter does not extend the jurisdiction of the Court of Justice of the EU to the UK. The actual effect of this clause is debated; however, it does highlight the scepticism to European law adjudicating over British cases that was apparent at conception and has remained ever-present. Perhaps this stems from the notion that the EU has gone beyond its own borders. As Scott states, it was merely intended to be a trading bloc, although human rights protections are now firmly entrenched in its remit. It is with this in mind, that we must conclude that the political legacy of European human rights protections in the UK will be one of interference.

Conclusion

The legacy of the application of the European Union's human rights law will perhaps be from a legal perspective that

[9] Equality and Human Rights Commission, 'Brexit and the EU Charter of Fundamental Rights: Our Concerns' <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union-0> accessed 12 January 2020.

[10] Centre for Social Investigation, People's Stated Reason for Leave or Remain (25 April 2018) <http://csi.nuff.ox.ac.uk/?p=1153> accessed 12 January 2020.

[11] Mark Sweeney, 'Conservatives' British bill of rights proposal to guarantee freedom of press' (The Guardian, 11 November 2014) <https://www.theguardian.com/media/2014/nov/11/british-bill-of-rights-proposal-guarantee-freedom-press> accessed 12 January 2020.

[12] Sionadh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' [2011] 11(4) Human Rights Law Review 645, 654.

[13] PROTOCOL (No 30) ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION TO POLAND AND TO THE UNITED KINGDOM.

you do not fully appreciate what you have when it is gone, with regards to the holes it could well leave in the British system. However, from a political perspective, many will see the end of the Charter as a good thing and a move away from Brussels encroaching on the right of Member States to dictate and enforce their own legal protections for human rights.

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How has human dignity been used to defend and criticise the divide between public and private?

By Joschka Nakata

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This essay discusses Marxist and liberal criticism and establishes a defence of the public-private divide in terms of human dignity, specifically the viewpoints of Marx and Habermas respectively. It is argued that Marx, while criticizing the public-private divide as false in capitalist society – to the detriment of human dignity – envisioned a genuine and positive public-private divide as ideal. Habermas sees the constitutional democracy as indispensable to human dignity, and a good public-private divide as necessary to that constitutional democracy. However, Habermas is criticized for failing to propose a solution to what he considers a broken-down public-private divide in present Western society, although it is suggested that the internet may possibly offer such a solution. Ultimately the conclusion is reached that both theorists agree on the need for a public-private divide and that a healthy interaction between public and private is necessary for upholding human dignity.

To investigate and explain the relationship between human dignity and the public-private divide is a challenging endeavour as both terms are subject to a dizzying variety of interpretations that may seem irreconcilable on the surface. However, instead of adopting a narrow angle on the relationship between human dignity and the public-private divide and confining these ideas to a limited definition, which would be an injustice to their inherently vague and all-encompassing nature, I will attempt to provide provisional definitions of the two concepts. These perhaps at least approach the essence of what they generally mean, so that an account of the relationship can be constructed around them. Accordingly, human dignity is argued to be a universal moral claim to, above all, autonomy. I further argue that what is private is also linked inextricably with autonomy, an approach that satisfies various understandings of the private including private property, freedom from state interference and control of self-image. The public can be defined as state and civil society, and the public-private divide as the necessary distinction between the two spheres. On the matter of the relationship between the two concepts, I will argue that both public and private are indispensable to human dignity, as is acknowledged by a wide range of theorists who invoke, whether implicitly or explicitly, the idea of human dignity.

In section 1 of the article, I will explain and justify my suggested

definitions for human dignity and the public-private divide with reference to the history of ideas. In section 2, I will explore Marxist criticism of the public-private divide that I categorise as dignitarian, arguing however that there is no genuine attack on the existence of the public-private divide, but merely on the structure of our society in which it operates. In section 3, I will present a liberal defence of the public-private sphere, focusing particularly on Habermas' vision of human dignity as dependent on a particular interaction between the public and the private.

[1] However, the concept of human dignity, far predates the recognition of human rights. Cicero ascribed dignity to humans in consideration of their superiority to animals.[2] Such an ancient idea has naturally undergone evolution over time, and Sensen even denies human dignity as a continuous tradition. He points to an older understanding that an individual's inherent dignity behoves her to act befittingly, incompatible with a "contemporary paradigm" which holds human dignity a non-relational property.[3] However, a restriction of human dignity to a strictly 20th Century iteration for the purposes of this article is uncalled for, as human dignity's conceptual discontinuity should not be exaggerated. An aspect found in premodern and recent interpretations of human dignity alike is its relationship with autonomy. For example, where the German Basic Law, espousing human dignity as its foundational principle, guarantees the freedom to develop one's personality,[4] Pico della Mirandola thought humans have dignity as they forge their own destinies.[5] As Riley points out, even drawing a clear border between human dignity and 'dignity *simpliciter*' is futile, not least because their use is often interchangeable.[6] Hence, even 19th Century Marxist arguments that invoke dignity in its essence, as something inherent to humans and based in autonomy, can be comfortably characterised as using human dignity.

The Universal Declaration of Human Rights notably makes a connection between inherent human dignity and human rights, with human dignity now being widely regarded as their foundation.

That established, it must be conceded that there are uses of dignity far removed from what is now understood as human dignity, most importantly the concept of social or aristocratic dignity, which is attached to holding a particular office or membership of a class or corporate unit e.g. university.[7] Here, a genealogical relation between social dignity and privacy can be identified; in Europe, privacy law has developed to protect the dignity of social elites in the face of the mass media.[8] It is unsurprising, then, that both privacy and human dignity, both having been at least partly derived from social dignity, put autonomy at their centre, whether it is concerned with the right to control one's self-image as in European privacy law or simply the human right to life in Article 3 of the Universal Declaration of Human Rights.[9] There are many superficially disparate

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[1] Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' (2013) NYU School of Law Public Research Paper 12-73, 1 http://ssrn.com/abstract=2196074> accessed 7 January 2020.

[2] Michael Rosen, *Dignity: Its History and Meaning* (Harvard UP 2012) 12.

[3] Oliver Sensen, 'Human dignity in historical perspective: The contemporary and traditional paradigms' [2011] European Journal of Political Theory 10(1) 71, 76.

[4] Art 2 GG (FRG).

[5] Rosen (n 2) 14.

[6] Stephen Riley, 'Human Dignity: Comparative and Conceptual Debates' [2010] International Journal of Law in Context 6(2) 117, 131.

[7] Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' [2010] Metaphilosophy 41(4) 464, 472.

[8] James Whitman, 'The Two Western Concepts of Privacy: Dignity versus Liberty' [2004] Yale LJ 113(6) 1153, 1219.

[9] Habermas (n 7) 472.

understandings of what is private, whether it refers to personal possessions, personal security, liberty from state intrusion as in the United States,[10] or protection of free self-realization as in Germany,[11] but it is telling that all of these manifestations essentially defend human autonomy, an individual's self-determination, regardless of whether the enemy is the state, media, or crime. Bloustein went further, arguing that human dignity and privacy are not merely cousins, but that human dignity, in his understanding ('man's essence as a unique and self-determining being'), is what privacy fundamentally protects.[12] While it may be argued that dignity is too nebulous a foundation for the private, its vagueness is essentially its strength because it coherently applies to the collective aforementioned uses of the private.

Where there is private, there must also be public. The public-private divide can be traced back to ancient times, specifically to the Greek city-state, where *oikos* referred to a private sphere, while the *polis* was common to all free citizens.[13] Since then, matters complexified. The term 'public sphere' conjures up images of a Habermasian coffee-house culture, a sanctuary of public reason wedged between the private domain and the state.[14] This vision is completely at odds with what neoclassical economists would call public, which to them is something belonging precisely to the state,[15] and foreign too to the divide that feminists demark between the family and wider society.[16] As the term 'public-private divide' evidently takes on mutually contradictory meanings depending on the context of its use, it suffices here to designate 'public' something that encompasses both civil society (including any Habermasian realm of public reason) and state.

Marxists, including Marx himself, have commented on the public-private divide within the context of human dignity as something reserved for humans and founded in autonomy. Marx envisioned a future society where humankind would attain dignity by freeing the fruits of its labour from the abstract values of capitalism that pay no heed to genuinely human ends;[17] in concrete terms, to achieve autonomy from oppressive modes of production and fulfil human nature.[18] Marxists have often identified the public-private divide *in the bourgeois form it has assumed* as an obstacle on the path to this revolution.

Klare, whose views on this area are analogous to Marxist ones, denies that using a public-private dichotomy to enforce democracy is productive. He believes this to be true on the grounds that the state (he equates the public with state power) partly shapes the oppressive power relations within the private sphere; which he criticizes for undermining dignity e.g. in workplace disputes; that is, private and public interests are enmeshed.[19] Marx reaches the latter conclusion too, but in the exact opposite reasoning that it is really the state that is wholly subservient to the social 'base' of the private sphere,

[10] Whitman (n 8) 1161.
[11] Ibid 1182.
[12] Edward Bloustein, 'Privacy as an Aspect of Human Dignity' [1964] NY Law Review 39 962, 974.
[13] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1st edn MIT Press 1991) 3.
[14] Peter Hohendahl and Patricia Russian, 'Habermas: "The Public Sphere"' (1974) New German Critique 3, 45 46.
[15] Judith Squires, 'Public and Private' in Richard Bellamy and Andrew Mason (eds), *Political Concepts* (Manchester UP 2003) 131.
[16] Kenneth McLaughlin, 'Revisiting the public/private divide: Theoretical, political and personal implications of their unification' [2007] Practice 19(4) 241, 242.
[17] Philip Hodgkiss, 'A Moral Vision: Human Dignity in the Eyes of the Founders of Sociology' [2013] Sociological Review 61(3) 417, 420.
[18] Ibid 421.
[19] Karl Klare, 'The Public/Private Distinction in Labor Law' [1982] University of Pennsylvania Law Review 130(6) 1358, 1418.

i.e. bourgeois interests.[20] I would suggest that the two theorists are not substantially in disagreement but that the comparison of their positions merely demonstrates the general confusion around defining the public-private divide. Marx would characterize the state as superimposed on a bourgeois private sphere, condemning 'public life' as an ideological fantasy,[21] but it would only have taken him a minor adjustment of terming state authority 'public', if only descriptively, for his position to move more obviously closer to Klare's. In any case, such criticisms of the public-private divide seem to point to the conclusion that Marxists are opposed to the concept as detrimental to human dignity altogether. Indeed, Arendt appears to suggest that Marx portrayed a communist society where public and private interests merge into total and harmonious 'social' interests, losing relevance as separate categories.[22]

However, Schwartz argues that Marx's view on the public-private divide was more subtle, deeming the public-private divide a sham only in its bourgeois variation.[23] For Marx, the public element of life in capitalist society is fiction, as politics only serves bourgeois class interests.[24] This leads to what Ellison characterizes the 'privatization of the self'; private aims, such as protecting private property, replace what should have been *public* goals of 'political association and social bonds', estranging individuals from their human essence, or in other words, their human dignity.[25] If we accept these interpretations of Marx's thought, one can venture to assert that Marx condemned bourgeois society for not implementing a *genuine* public-private divide. Such a claim is backed by Marx's apparent preference of feudalism over capitalism on the basis that the public-private divide there *did* exist because public power relations, for example between kings and vassals, were openly laid bare and justified, enabling people to distinguish between the private and public elements of their lives.[26]

A potential criticism of this article's overarching argument is that Marx clearly indicted liberal individualism as part of the privatization of bourgeois society and hence damaging to human dignity, raising the question of whether the more communal picture of human dignity Marx painted is actually compatible with my provisional definition of human dignity as founded in autonomy. I would answer that it is, as Marx did not see the subversion of the public domain negatively as a triumph of individual autonomy - which he did not oppose -but rather as something imposed involuntarily by an oppressive economic system. Freedom and therefore dignity was to be found in a future communist society with a more positive relationship between public and private.[27] I will also clarify that I do not seek to argue in favour of the Marxian understanding of bourgeois society, only to show that Marx never opposed the public-private divide in principle, nor its importance to human dignity.

In Habermas, Marx would have found an unlikely ally in his claim that human dignity requires a healthy interaction between the private and the public. Habermas acknowledges the importance of the private to human dignity as an aspect of autonomy,[28] and probably values it higher

[20] Nancy Schwartz, 'Distinction between Public and Private Life: Marx on the Zōon Politikon' [1979] Political Theory 7(2) 245, 247.
[21] Ibid 248.
[22] Hannah Arendt, *The Human Condition* (2nd ed University of Chicago Press 1958) 44.
[23] Schwartz (n 20) 246.
[24] Ibid 248.
[25] Charles Ellison, 'Marx and the Modern City: Public Life and the Problem of Personality' (1983) Review of Politics 45(3) 393, 397.
[26] Schwartz (n 20) 249.
[27] Ellison (n 25) 394.
[28] Juan Manuel Amaya Castro, 'Human Rights and the Critiques of the Public-Private Dimension' (2010) University Amsterdam Migration Law Working Paper 7/2010, 32

than Marx did, who saw the public as worthier than the private.[29] However, Habermas argues that a consequence of the evolution of human dignity from social dignity is that the former remains a social status that is empty if it is not protected by 'membership in an organized community in space and time'.[30] In contemporary Western practice, this 'organized community; is the constitutional democracy, of which citizens (with the legal and political means to enforce their human rights) are members. If we accept the state as public, Habermas is thereby already acknowledging that the public, at least in the sense of 'public authority', is mandatory for upholding human dignity, but he further elaborates that point through his theory of the public sphere.

Habermas posits the intercourse between public sovereignty (understood as state and political community) and private rights as one of tension, and presents the 18th Century bourgeois 'public sphere', which provided a venue for *private* individuals to discuss and influence the conduct of government, as an exemplary model on how to negotiate that tension.[31] He lauds, for example, the achievements of the British public sphere in forcing Parliament to accept greater public scrutiny.[32] As Habermas considers that an effective constitution of a democratic state (one that will ensure human dignity) is perpetually a work-in-progress, continuously constructed and reconstructed through discourse between citizens, the implication is that a political community which lacks a healthy Habermasian public sphere and its transformative effects will also lack a good constitution, and by extension, a functional means by which to ensure human dignity.[33] Hence, Habermas clearly believes that a strong working relationship between the private and public domains, with the public sphere acting as the state's intermediary with the private, is a precondition of human dignity. On the basis that Habermas sees both public and private as instrumental to maintaining human dignity, his theory can be characterised as an assertive defence of the public-private divide.

A valid criticism that Hohendahl and Russian make of Habermas' theory of the public sphere is grounded in Habermas' pessimism at the present state of the Western constitutional democracies, specifically, in his conviction that the bourgeois public sphere has perished.[34] Habermas argues that a commercialized media industry has replaced the forums of critical debate that once constituted the public sphere and essentially spoon-feeds the population opinions that suit the interests of the state and special interests.[35] Not only is this a cynical dismissal of the principle of journalistic integrity, but as Hohendahl and Russian point out, Habermas fails to outline a solution to this crisis. As Vaidhyanathan indicates, the advent of the internet has ignited hopes that a Habermasian 'global public sphere' can be based on that unprecedented communication network, though Vaidhyanathan himself rejects that vision on the grounds that the internet is not subject to the norms of civility required for rational debate.[36] I would suggest that Vaidhyanathan significantly underplays the opportunity the internet offers as a

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<www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf > accessed 9 January 2020.

[29] Schwartz (n 20) 262.

[30] Habermas (n 7) 472.

[31] Jürgen Habermas, 'The Public Sphere: An Encyclopaedia Article (1964)' (1974) New German Critique 3, 49, 50.

[32] John Thompson, 'The Theory of the Public Sphere' [1993] Theory, Culture & Society 10(3) 173, 177.

[33] Funda Gencoglu-Onbasi, 'Democracy, Pluralism and the Idea of Public Reason: Rawls and Habermas in Comparative Perspective' [2011] CEU Political Science Journal 6(3) 433, 453.

[34] Hohendahl and Russian (n 14) 47.

[35] Habermas (n 31) 55.

[36] Siva Vaidhyanathan, 'The Anarchist in the Coffee House: A Brief Consideration of Local Culture, the Free Culture Movement, and Prospects for a Global Public Sphere' [2007] Law and Contemporary Problems 70(2) 205, 209.

means of communication which can largely bypass the commercialized media organizations Habermas criticizes. Social media groups may be replacing the coffee-houses of old. However, the internet is still an unfolding phenomenon and its impact on the public-private divide and human dignity merits a separate discussion beyond the scope of this article.

To conclude, the account I suggest regarding the relationship between the public-private divide and human dignity is that both the public and private spheres, and the distinction between them, are obligatory for the maintenance of human dignity. As Bloustein argues, human dignity is the foundation of the private, as the private is essentially the realm of individual autonomy. Yet it is clear, as both Habermas and Marx concur, that the private must not exist in a vacuum. For Marx, the hidden domination of the private in capitalist society crushes the public aspect of life required for a dignified life, while for Habermas, enforcing human dignity is only possible in a political community that features each of the two halves of the public domain – Habermas' public sphere and the constitutional state. Habermas and Marx thus agree that human dignity relies on a good relationship between the public and the private and ultimately defend the public-private divide. To find common ground between two such dissimilar thinkers requires the adoption of a broad definition of both human dignity and the public-private divide, but it is abundantly evident that these important concepts deserve a wide interpretation.

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The Philippines' 'War on Drugs': the challenges in enacting the universality of International Human Rights

By Lou Virrey

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The series of extrajudicial killings under the administration of the democratically elected President Rodrigo Duterte, has sparked considerable media attention within the international political sphere; particularly amongst human rights advocacy groups, including Amnesty International and Human Rights Watch.
The purpose of this article is to broadly outline the infringement of human rights of those identified victims by the extrajudicial killings under the incumbent's, war on drugs. It aims to reveal the challenges of exercising international customary law within the premise of human rights, in the Philippines case study where democratic institutions – from the judiciary to the National Bureau Investigation, remain complicit in continuing to suppress a number of appeals to investigate behind the extrajudicial killings.

Background: The War on Drugs

The series of extrajudicial killings following President Rodrigo Duterte's inauguration [1] However, a quantitative overview of public opinion reveals a consensus of trust and national popular support for the exercise of 'penal populism' under the administration. Published figures by the Social Weather Stations (SWS)[2] in 2019 exhibit a net satisfaction rating of +65, previously reaching a rating of +73, or 'excellent', from a public poll in June 2019. The array of public support that has sustained the Duterte administration is grounded in a key issue. That issue is the government's aim to reinforce law and order under its campaign of eliminating the illicit drug trade in the Philippines. Duterte has justified his crusade against illicit drugs by upholding it as the country's biggest problem; as an issue of national security and "cleansing the streets from unholy men". Subsequently, the President declared a 'war on drugs'; targeting users, peddlers, suppliers and producers, and further urging the criminal justice system to put an end to the "drug epidemic." In practice, this has been translated into the national government mobilising a political into power in June 2016 has been scrutinized and denounced as a "clear derogation from the rule of law" by the international community.

[1] Alexander Agnello, 'Extrajudicial killings and Human Rights in the Philippines' (2007) 5 ,CHRLP 4-30.

[2] The SWS uses a scale that runs from negative 70 (categorised as, execrable) to positive 70 (categorised as, excellent), with a -9 to +9 score considered as neutral or no opinion.

system of criminalisation and punishment for those allegedly involved in the drug trade, and adopting punitive measures for the Philippine National Police (PNP) and local government units to engage in 'door-to-door' operations, as part of "Project Double Barrel."[3] The "command responsibility" of law enforcement agencies under this operation is outlined under the premises of *Project Tokhang*[4] (the Lower Barrel Approach) and Project HVT (Upper Barrel Approach) – with the former involving the groundwork of, "registering, talking to and rehabilitating drug addicts" audited under a drug watchlist. However, Human Rights Watch (HRW) reports have recognised that the *Tokhang* watchlists have been used instead as an execution list within poor, urban communities. According to data provided by the Philippine Drug Enforcement Agency (PDEA), suspected drug users and dealers found dead during police operations have totalled to 4,948; while those recognised as "homicides under investigation" has equated to 22,983 between July 2016 to September 30, 2018.[5]This has later been disputed by the country's Commission on Human Rights (CHR) who has claimed that drug related killings could be as high as 27,000.[6] While the President has branded his campaign against drugs under an anti-corruption platform, it is the intention behind his public pronouncements toward killing drug suspects and its implications, which continue to encourage government agencies such as the PNP to violate civilians' basic rights. Publicly acclaimed messages to government agencies such as, "if in the process you kill one thousand persons because you were doing your duty, I will protect you"[7] have implicated a series of unprecedented executions, including that of Kian Lloyd delos Santos - a seventeen-year old boy mistaken as a drug courier by three policemen in 2017. The case of Santos had been the first conviction in Duterte's war against drugs, brewing public outrage and urging the President to temporarily halt his campaign of "wholesale murder."

Evidently, Duterte's War on Drugs has been struck as morally and legally unjustifiable, mounting to a myriad of human rights violations. Human rights activists and advocacy groups have pursued a campaign to hold the President accountable for his crusade against illicit drug control, which has cost the lives of up to 27,000 Filipinos.[8]The one hundred-and-fifty-page report, produced by HRW in 2017, outlined its investigation of the thirty-two recorded deaths of suspected drug offenders in Metro Manila - twenty-four being victims of extrajudicial killings committed by the national police, or reported to be killed under their custody. While the penal popularity of the administration has been grounded on its anti-corruption platform, there is an urge to hold the administration accountable in upholding customary international law. This desire is written in the pretexts of human rights treaties that the Philippines have subscribed to.

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[3]National Police Commission – Philippine National Police Directorate for Investigation and Detective Management, *Additional Guidelines in the Conduct of PNP Anti-Illegal Drugs Campaign Plan: "Double Barrel"* (Philippines, 2016).

[4] *Operation Tokhang* translates to, "knock and plead", referring to local officials doing rounds of alerting drug addicts in communities and telling them to join drug rehabilitation programmes.

[5]Human Rights Watch, *Philippines World Report* (2018) < https://www.hrw.org/world-report/2019/country-chapters/philippines > accessed 18 January 2020.

[6] Commission on Human Rights in BBC, *Philippines Drug War: Do we know how many have died?* (12 November 2019) < https://www.bbc.co.uk/news/world-asia-50236481 > accessed 18 January 2020.

[7] Human Rights Watch, *License to Kill* (2 March 2017) < https://www.hrw.org/report/2017/03/02/license-kill/philippine-police-killings-dutertes-war-drugs > accessed 20 January 2020.

[8] ibid (6).

The custom of Human Rights

The treaty of International Covenants on Civil and Political Rights (ICCPR) outlines the right to life, liberty and security before the law. In particular, Articles 6, 10 and 14 outline the "right to life", the "right of detained persons to be treated with humanity" and the "right to a fair trial" respectively.[9] The killing of Mr Delos Santos in 2017, among the other 27,000 lives lost under the President's campaign against illicit drugs, are a denial of the rights to life, due process and freedom from execution. The conviction of the three PNP agents, due to public outrage, exemplifies how the war on drugs has victimised innocent individuals by those committing extrajudicial killings. It exhibits the imbalance in the administration's convictions of those police and militia groups, who have justified the incidents involving police killings as asserting 'self-defence.' Further, it reveals the incumbent's reluctance to investigate the violations of the right to life and freedom from extrajudicial killings.

Article 2(1) of the ICCPR urges that each bounded state party should ensure the "rights recognised in the present Covenant" to the individuals within its territory; subject to its jurisdiction.[10]While international law outlines the mandate for the state to comply with international standards; in upholding protection against human rights violations under its domestic legal framework, its implementation and the extent to which this is enforced this lies on the will of the states.

International law is a "product of political and social forces that is dependent on the behaviour". The interest of the state is necessary, as "we cannot have genuine and effective law in a society of sovereign States dominated by power and self-interest."[11]Therefore, sceptics have identified that the divisions in aims and culture within an international society are responsible for the challenges in the 'universality' of human rights. This further raises the question of how independent states can be held accountable if they have acted outside the premises of international law.

The challenges in implementing the universality of Human Rights

The normative universalism[12] of human rights has been defined as a matter of "moral and philosophical principle" in which the norms of human behaviour outlined in the Covenants should be universally respected. However, the process of concretizing and materialising such rights goes beyond the discourse of rights within the premises of social theory and political philosophy.[13]Rather, there is a need for the discourse to be politicised in order to serve as a foundation for legal reconstruction. The *sui generis* character[14] of international law has developed through a range of sources, varying across treaty laws and customs and amongst the General Assembly's Resolutions. Within these premises of upholding international governance, states are the "principal subjects" in creating, executing and enforcing international law. While there are international pressures to respect human rights - in obliging governments to prevent killings and hold those responsible to account - states maintain the exclusivity in creating norms and to an extent, the power of choice in adopting the principles outlined under the Covenants. The doctrine of International Human Rights has been sustained to be "a set of values

[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, in accordance with Article 49) OHCHR 4.

[10] ibid OHCHR 2.

[11]Henry Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context* (3rd edn, Oxford University Press, 2008), p78.

[12] Anthony J Langlois, 'Human Rights Universalism' in, Patrick Hayden (eds), *The Ashgate research companion to ethics and international relations* (Ashgate Publishing 2009), p207.

[13] ibid (11).

[14] Javaid Rehman, International Human Rights', *International Human Rights Law* (2nd eds, Pearson Education Limited, 2010), pp16-26.

to formulate a society,"[15]under intergovernmental organisations and the mobilisation of NGOs. The creation of the International Criminal Court (ICC) for instance, was created to hold states accountable according to the standards of universal human rights and the rule of law by creating an international jurisdiction to prosecute those convicted of committing the atrocity crimes of genocide; crimes against humanity; war crimes; and crime of aggression.

The case of the Philippines exhibits the limited role international organisations and individuals have had within the international legal system, as the dominant position of the State is firmly established. President Duterte has repeatedly voiced a rhetoric in dismissing drug dependents as inhuman; echoed by his bureaucratic supporters within the PNP, who have defended that its "crimes against criminality", as opposed to 'humanity', is a protection against modern day evil.

Despite the growing number of executions and President Duterte's pronouncements to encourage extrajudicial killings, only a handful of investigations have been conducted and not a single government official has been convicted under the President's War on Drugs. While presidential immunity is not formally codified under the revised 1987 Constitution of the Philippines, the High Court has cited and rationalised its position under Philippine law as: -

> *"Settled is the doctrine that the President, during his tenure of office or actual incumbency, may not be sued in any civil or criminal case, and there is no need to provide for it in the Constitution or law. It will degrade the dignity of the high office of the President, the Head of State, if he can be dragged into court litigations while serving as such."*[16]

Although the President has not made direct orders for any institutional bodies to conduct extrajudicial killings, as Head of State, its legitimation of the parameters of violent exchange within the system has given authorities the "license to kill" individuals involved in the illicit drug trade. It is insufficient for the President to use the justification that he did not order the killings, as it then questions the role of the democratic bodies in preventing the series of extrajudicial killings under his administration, who is accountable in conducting the relevant investigations to convict those held responsible. Human rights activists have used this as a basis for the ICC proceedings against the President's crimes against humanity. Senator Antonio F Trillaner has publicly stated that, while the President has rationalised his war on drugs on an anti-corruption rhetoric, it has consequently "transformed the violent exchange within the system", making it more "expensive, expansive and unstable."[17]Instead, the President opted to leave the ICC in 2019, following its launch for an examination into Duterte's War on Drugs. The challenges lie in enacting such human rights as the "set of values which formulate a society" when there is a need to first address state accountability on its civic engagement, access to accurate information and reforming the structural apparatuses of the criminal justice system in the Philippines.

NGO International Drug Policy Consortium have identified that the drug problem could not be resolved through a counterproductive, "punitive approach and imposition of criminal sanctions".[18]Instead, there has been a lack of attention brought to reforming and investment in the capacity of the judicial and penal system

[15] ibid (1).

[16] David v Macapagal-Arroyo [2006] (no. 171396).

[17] Senator Antonio Trillaner, *ICC conducts prelim exam of Duterte's War on Drugs* [video] (2018).

[18] International Drug Policy Consortium, *A Public Health Approach to Drug Use in Asia* (2016) <https://fileserver.idpc.net/library/Drug-decriminalisation-in-Asia_ENGLISH-FINAL.pdf > accessed 21 January 2020.

involved within the illicit drug trade. Academic, Richard Javad Heydarian, has claimed that a single judge handles six hundred and forty-four cases per year and the judiciary receives 0.76% of the national budget. Furthermore, an average prison operates at more than 400% of its capacity, one of the worst cases being the prison of Bilibid operating at more than 2000% of its capacity, where over 50% of its inmates are pre-trial.[19]The lack of investment in the criminal justice system has not only revealed the need to reform political institutions, but also that the type of hard-line leadership style implemented by the current administration has had a detrimental impact on the civil and political outcomes from the state.

Structural reform

The suppression of Civil and Political Rights has been a persistent reality in the Philippines during the Fourth and Fifth Republics, following the twenty-year rule of Ferdinand E. Marcos. While the post-Marcos Philippine democracy witnessed a series of developments in civil society, this had been shortly overturned under Gloria Macapagal-Arroyo's ten-year administration. Elusive political legitimacy defined Arroyo's administration, according to its series of electoral scandals, extrajudicial killings and political violence against the leftists and the press. This was notably marked by the 2006 'all-out war' against communist insurgencies, activists and church personnel, as well as the 2009 Maguindanao massacre where mass graves of fifty-eight journalists were identified.

In parallel to Duterte's anti-drug campaign, HRW claimed that not a single perpetrator was convicted under Arroyo's anti-insurgency campaign and only two cases among the killings of thirty-two journalists for their reporting (between 1991-2006) had led to convictions.[20]The remnants from Arroyo's imbroglio of political violence continues to undermine civil society actors and the political discourse central to resolving the problems that confront the Philippines. The lineage of Philippine administrations has underlined how democratic structures in the global South have become increasingly imperilled.

Conclusion

It has been established that, the "fight against drug crimes" needs to be conducted within the law, by ensuring that the rights to due process and the safeguarding of human rights are guaranteed under the proportionality principle.[21]The legitimisation of the extra judicial killings has brought forth little justice to an already unjust system. International law sceptics have emphasized the dominance of state power over its obligations in upholding customary human rights that it is subscribed to. Therefore, the Philippine state should recognise its obligation in upholding international law, whilst also ensuring that it takes substantive steps towards progressively achieving the maintenance of human rights.

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It is Objectively Good that Laws be Effective

By Nicholas John Postle

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How can one measure a law? Lon L. Fuller presents eight requirements for determining the efficacy of law. This paper argues that effective laws lead to a sound and stable framework for society. A sound and stable framework increases the agency of each individual within the society by at the least increasing their predictive capacity. Such greater agency allows each individual to achieve their own subjective aims more readily. This improvement in the ability to achieve individual aims is universal, and a universal improvement in the ability to achieve collective and individual 'goods' is objectively good. In the end, to put it simply, it is objectively good that laws be effective. Therefore, individuals should be vigilant in ensuring that all laws, even laws which they disagree with substantively, are drafted and implemented so as to follow Fuller's requirements of efficacy. To measure a law, at the least look to its efficacy.

Introduction

Not everyone will like every law. Each person will calculate in one's own head the merit of a law based on one's own circumstances. In that moral calculus, some weight will be placed on how effective the law is. This article will explore what is meant by effective law and seeks to establish that there is intrinsic objective moral value in it being effective.

Setting the Stage

In his book, *The Morality of Law*, Lon Fuller sets out eight ways to fail to make law, or in other words, to make ineffective law.[1] Amongst these are examples such as making retroactive legislation, arbitrary decision-making, and a lack of promulgation. Fuller argues throughout his book that these principles of legality constitute an intrinsic and internal morality of law; that the more a law conforms to these principles the more of a law it is and that the more law-like a law is the more moral it is. Fuller's most famous critic, Hart, decried Fuller's internal morality of law as no more than a measure of efficacy, and claimed that if that alone constituted an internal morality then there would be such a thing as the internal morality of poisoning.[2] This article assumes for the purposes of discussion that Hart is correct, and that Fuller's internal morality is 'merely' a system of creating effective law. Efficacy is defined in the dictionary as 'the ability to produce

[1] Lon Fuller, The Morality of Law (Revised Edition, Yale University Press 1977).

[2] HLA Hart, Essays in Jurisprudence and Philosophy (Oxford University Press 1964) 350.

a desired or intended result'.[3] When responding to his critics Fuller makes much the same argument: 'It is not hard to see what is meant by efficacy when you are trying to kill a man with poison; if he ends up dead, you have succeeded. But how do we apply the notion of efficacy to the creation and administration of a thing as complex as a whole legal system?'[4]

Fuller answers his own question later in the same book when he makes clear the intended result of laws that follow his principles, to him 'Law ...is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another...'[5] Fuller takes on the herculean task of asserting that his principles of legality are not only what makes law effective but what makes it law at all.[6] This article is attempting a lesser goal of proving that even if avoiding these eight failures only makes laws effective at producing a sound and stable framework for human interaction, such an increase in efficacy would make those laws objectively better than ineffective laws.

Are Fuller's Principles Effective?

The following are the principles of legality that Fuller claims constitute an internal morality of law: ...

> A failure to achieve rules at all, so that every issue must be decided on an ad hoc basis... (2) a failure to ... make available to the affected party the rules he is expected to observe; (3) the abuse of retroactive legislation... (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[7]

The first step in the journey towards proving that following these principles are objectively good, is establishing that they are indeed effective at creating a strong and stable framework for human interaction.

One of Fuller's fiercest critics, H.L.A Hart, went so far as to compare Fuller's principles with like principles of poisoning, i.e.: '('Avoid poisons however lethal if they cause the victim to vomit', or 'Avoid poisons however lethal if their shape, colour, or size is likely to attract notice.')' The pertinent element in this passage is that even while criticizing Fuller's assertion of legal morality, Hart concedes that Fuller's principles 'are essentially principles of good craftsmanship'.[8] Even Hart seems to agree that Fuller's principles of legality are effective means of evaluating the 'craft' of legislation. Indeed, Hart shows a great deal of respect for Fuller's principles of legality until Fuller extends to them the mantle of 'morality'.

Finnis claims that the extension of legal order via Fuller's principles '[...]is justified not only by the desirability of minimizing tangible forms of harm and economic loss but also by the value of securing (for its own sake), a quality of clarity, certainty, predictability, and trustworthiness, in the human interactions of buying and selling, etc.'[9] This seems to support the proposition that Fuller's principles are effective in so far as they lead to a stable framework of interaction. Between proponents such as Finnis and critics such as Hart, there is agreement that Fuller's laws at the very least do what they say on

[3] John Rawls wrote on page 130 of A Theory of Justice (Harvard University Press 1971) that definitions alone never solved any fundamental questions, but one must admit it makes a good start for understanding said fundamental questions.

[4] Fuller (n 1) 202.

[5] Fuller (n 1) 210.

[6] ibid 39.

[7] ibid.

[8] Hart (n 2) 347.

[9] John Finnis Natural law and natural rights (Second Edition, Oxford University Press 2011) 272.

the tin, namely that they make law that is effective; effective at creating a strong and stable framework for human interaction. However, Hart was not in full agreement with Fuller on the moral nature of such clear laws. In his criticisms he claimed that while Fuller's proposed principles of legality could indeed form a basis for evaluating the clarity of a law, Fuller failed to prove that 'Clear laws are not "ethically neutral" between good and evil substantive aims.'[10] This evidently takes for granted an idea of objective good that conforms to the author's own views and is patently unknowable, but what about a concept of objective good that is universally applicable in a pluralist society?

What are good and evil really? – Is it objectively good to be helped towards your subjective goal?

For Conan, the Barbarian, what is best in life is 'To crush your enemies, to see them driven before you, and to hear the lamentations of their women.'[11] Mother Teresa on the other hand believed that to live a good life one should 'Spread love everywhere you go. Let no one ever come to you without leaving happier.' The outcomes and goals people set themselves are subjective and can clearly differ greatly. However, that does not necessarily exclude the possibility that some modes of activity aid every individual actor that has access to them in achieving their subjective goals. For example: two roommates each have a task to do for the day; one goes north to volunteer at a soup kitchen, the other goes south to murder happy kittens. Both have a great distance to go, and while their goals are opposing in many ways, both would benefit greatly from access to well-maintained roads. In this metaphor the well-maintained road system would be objectively good. So, to claim something is objectively 'good' is to claim that it is in the best interest of every individual rational actor. It would help them achieve their goals faster, more readily, with added certainty, or with more comfort. Furthermore, that goal or interest is to be determined by the rational actor in question, not imparted on them by another's moral code. Anything that universally increases the capacity of individuals to achieve similar or disparate 'goods' is objectively good.

Would an orderly society increase such a capacity?

This question becomes whether an orderly society as envisaged by Fuller would constitute the metaphorical road system in the paragraph above. An orderly society is one with laws that provide 'a sound and stable framework for citizens to interact with one another'.[12] Law-abiding citizens would be protected from random acts of violence and have recourse against malevolence. More generally applicable though is the concept of predictability. When the framework for interaction within a society is stable and sound it is more easily predictable by the citizenry. Being able to accurately predict the consequences of one's actions makes it easier for one to achieve one's desired outcome. For example, if one wants to push a boat towards an island, the effects of one's paddle must be reasonably consistent, and they must follow at least a somewhat orderly pattern and not push one in an entirely chaotic way. The more consistent and predictable the result of the paddling action, the easier it will be to steer one's boat. This holds true even in a pluralist society with a variety of different moral objectives. The more predictable the society, the more accurately one is able to steer one's moral boat toward whichever goal or set of goals one wishes. This predictability increases the capacity of every rational actor to achieve their goals.

What about criminals?

The question naturally arises now of those who, for whatever reason, desire an

[10] Hart (n 2) 352.

[11] Conan the Barbarian (Directed by John Milius, Universal Pictures 1982).

[12] Fuller (n 1) 210.

enterprise which the majority would find immoral. Would the common thief rather live in a society that embraces Lon Fuller's rules for 'moral' laws or one that does not? Putting aside the auxiliary benefits to the economy which might make thievery less desirable, the answer remains affirmative. When the thief decides to embark on his law-breaking, it would clearly benefit him to know the risks for being caught. As a rational actor who believes thievery is in his best interest, there are several reasons for desiring the law against thievery be effective; (1) knowing he will not face an arbitrary or retroactive death penalty,[13] (2) knowing the action is illegal enables him to take precautions should he wish to continue to steal, and (3) he will avoid thinking it legal only to find out later he was incorrect. Those whose moral code pushes them to break the law benefit from knowing exactly the risks of breaking the law as well as what the law indeed is. Notably the thief might prefer thievery to be legal or to have a reduced punishment, but if he is stuck with a law against thievery it is in his best interest that it be an effective law. In the same way most might prefer there not be a law against owning kittens, but if there were one most would want it to be clear, uniformly instituted, and successfully promulgated, so as to avoid getting into legal troubles.

Opposing Goals

What about two opposing subjective goals? For example, if one person's idea of morality is determined by how many people they save from hunger and another by how many people they starve to death. If effective law helps both equally then it would lose its objective good designation by being as bad in one's eyes as it is good in the others. This is of course a mostly hypothetical question, as in most democracies the majority would favour a law against purposefully starving people and the efficacy of such a law would be aiding all of them much more than it would be aiding the lone starver. However, even in the nightmare land where 'those who want to starve others' and 'those who want to feed others' are evenly matched, one can see that it is mutually beneficial that law be effective. If both sides of this food fight were to get together and decide upon rules of engagement, it would be irrational for them to prefer those rules to be vague, ad hoc, retroactive, unknown, unenforceable, and perhaps unconformable. It can be logically proven that it would be in the best interests of both parties that whichever laws are decided upon are effective even if they disagree with the law. Without knowing which party's moralities the law will affirm, it is in the best interest to agree ahead of time that either way, the law be effective. Consider the following diagram:

	Agree	Disagree	Net
Effective	+3, -1	-1, +3	+2, +2
Ineffective	+1, -3	-3, +1	-2, -2

This represents the satisfaction of two parties based on how the law could decide the matter in dispute. The weighting is as follows: +2 Points for agreeing with the law, +1 point for the law being effective, -2 points for disagreeing with the law, -1 point for being effective. When the law is ineffective, it causes a net dissatisfaction, regardless of which morality it affirms. However, if the law is effective, there is a net satisfaction. Even from an individual perspective, if one is given the opportunity to restrict the possible outcomes to only effective ones, it is in one's best interest to do so. Where the result on the X axis is unknown such a limitation on the Y axis increases the probability of a positive pay-out, especially across multiple instances such as the creation of an entire system of laws.

[13] Which for most people might well outweigh the possibility that despite being caught he will go free due to a failure of the law to be consistent.

Conclusion - What is the Point?

This article has determined that something can be considered objectively good when it increases the capacity of any and every rational actor to achieve their independent goals. Lon Fuller's eight principles of law lead to an orderly society that contains a sound and stable framework for the citizenry to interact. Such a society allows greater predictability of the outcome of their actions, which in turn increases the capacity of all rational actors. It is safe to conclude from this chain of reasoning that effective law as defined by Lon Fuller's eight principles is objectively good. It should be noted that it does not follow that all effective laws are objectively good, but merely that law being effective is objectively good. As Hart says, 'There is therefore no special incompatibility between clear laws and evil.'[14] But a clear evil law is still universally morally superior to a vague or ad hoc evil law. Carrying this forward into society one should look to current legislation that runs counter to Fuller's principles with great scrutiny. Even, and especially, when such legislation appears at first glance to agree with one's moral code, it is imperative to remember that there is an intrinsic moral value to legal efficacy. One's internal calculus will still determine that the legislation that offends Fuller's rules is worth it to satisfy one's specific moral good. Hopefully this article increases the intrinsic moral weight one may put on effective law-making.

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[14] Hart (n 2) 352.

What does human dignity contribute to legal judgement, and is greater coherence found in the use of human dignity through the assertion of universal humanity or the isolation of what is particular about the individual?

By Colette Tan

Without human dignity driving the growth of human rights as a legal concept and advancing the battle against oppression, the world would be a very different place. Landmark cases such as Roe v Wade and Somerset v Stewart may have never seen the light of day and constitutional jurisprudence would be far less developed. Procedural justice would still be in its infancy and international law would be less effective for lack of universal values. Interestingly, however, despite the tremendous impact of human dignity, there is still much debate about whether it should be a universalist or particularist concept. Though the former would lend power and transcendence to the doctrine of human dignity, reducing any arbitrary focus on particular characteristics of individuals, universalism could deny the variety in our reality and present definitional difficulties. At its core, human dignity should assert what is universal in humanity. However, particularism must refine the concept of human dignity and acknowledge our capacity for self-determination.

Human dignity is the inborn, unconditional value of the human being that is "not [1] Its basis has been most commonly said to be humans' capacity for "self-determination."[2] This article will outline human dignity's contributions to legal judgement and evaluate whether it is more coherent and persuasive to use human dignity to assert what is universal in humanity or to isolate what is particular about individual humans.

Human Dignity and Legal Judgement

Human dignity greatly contributes to legal judgement. Human dignity is critical to the wholly dependent upon […] external goods and conditions." establishment and promulgation of human rights as a legal concept. Furthermore, it is crucial to the judiciary's role in battling oppression, procedural justice and the use of international law to hold the power of foreign actors to account.

Growth of human rights as a legal concept and the battle against oppression

Human dignity has elevated the concept of human rights to one that is widely recognized, non-violable and having legal

[1] Stephen Riley, 'Dignity as the Absence of the Bestial: A Genealogy' (2010) Journal for Cultural Research 14.2 143-159, 157.

[2] Joel Feinberg, 'The social importance of moral rights' Philosophical Perspectives 6 (1992) 175-198, 180; John O. McGinnis 'The limits of international law in protecting dignity' (2003) Harv. JL & Pub. Pol'y 27:237; Cindy Holder 'Self-determination as a universal human right' (2006) Human Rights Review 7.4: 5-18, 7.

force, hence paving the way for human rights legal jurisprudence. It furthered human rights by stressing the importance of one's basic needs to live .These basic needs, such as the need for shelter, water and food, have taken shape in the form of human rights like the right to life and the right to housing and property. Additionally, with human dignity recognized as a central concept in the United Nations Charter and the Universal Declaration on Human Rights,[3] human rights gain persuasive force from the "most urgent claims of human dignity."[4] By adding weight being the concept of human rights, this also gives force to the correlative duties that each person and state owes to an individual. Where cases involve such inalienable rights, the underlying force of human dignity allows courts to favour morality and principle over mere positivist law. The fact that human dignity is inherent in all has ensured that fundamental rights are "equal rights",[5] shedding light on arbitrary discrimination. In this way, human dignity has allowed controversial issues and systemic human rights violations to be addressed through the law.

For example, in the landmark case of *Somerset v Stewart,* which concerned a black slave's right to freedom, the court ruled in his favour for "the state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law."[6] This was a major step toward furthering the concept of human dignity[7] and correspondingly, the universality of human dignity. Notably, the lack of a Declaration or Bill of Human Rights was not fatal – our worth as human beings is a concept that can, by itself, prove justification for the need for moralistic law. In *Planned Parenthood v Casey*, which upheld the controversial *Roe v Wade* of legalizing abortion, the judge cited the right to "define one's own concept of existence […]" and the central importance of protecting one's "personal dignity and autonomy".[8] (citation?) The court also found the principle of "equal dignity to which each […] is entitled" greatly persuasive.[9] Indeed, years of conflict has shaped the US' "constitutional protections for women's decisions about abortion in the language of dignity",[10] despite dignity not being mentioned in their Constitution. This would not have been possible without the influence of human dignity on the law. Besides abortion, the US Supreme Court has held that the fundamental right to marry is guaranteed to same-sex couples, citing "equal dignity in the eyes of the law."[11] Hence, human dignity paved the way for the legal response to systemic oppression.

In this manner, human dignity has helped courts carve out a role as spokespeople for the marginalized. As powerful people tend to make the rules, rules usually favour the already powerful at the expense of the oppressed. With little resources, it is difficult for the oppressed to effect any change and this cycle continues throughout generations. However, as human dignity gains momentum as a legal instrument, it

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[3] Christopher McCrudden, 'Human Dignity and Judicial interpretation of Human Rights' (2008) EJIl Vol. 19 no. 4 <http://www.ejil.org/pdfs/19/4/1658.pdf> accessed 24 December 2019.

[4] Pablo Gilabert, 'The Socialist Principle "From Each According To Their Abilities, To Each According To Their Needs"' (2015) Journal of Social Philosophy 46.2: 197-225, 219.

[5] United Nations Charter 1945, Article 1(2)

[6] *Somerset v Stewart* [1772] Easter Term, 13 Geo. 3, K.B., 510.

[7] Sir Guy Green, 'Human Dignity and the Law' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer, 2007), 154.

[8] *Planned Parenthood of Southeastern Pennsylvania v Casey* [1992] 505 U.S. 833.

[9] *Planned Parenthood of Southeastern Pennsylvania v Casey* [1992] 505 U.S. 833.

[10] Reva B Siegel, 'Dignity and sexuality: Claims on dignity in transnational debates over abortion and same-sex marriage' (2012) International Journal of Constitution Law 10.2: 355-379, 366.

[11] *Obergefell v Hodges* [2015] 576 U.S. 28.

becomes an increasingly powerful avenue for the poor and oppressed to enforce their rights. They need not rely on disadvantageous rules to bring a case. That human dignity and its resulting rights are recognized in legal judgements mean that one can bring a successful case even if the legal system is against them. The role of human dignity in constitutional jurisprudence serves as a good example. In *Brown v Board of Education*, though they did not use the term human dignity, the court "emphasized the demeaning impact [of discrimination in education] on African-American children" and "the right to be free from the unnecessary humiliation and degradation of a race-based classification."[12] The court declared the "separate but equal" doctrine unconstitutional due to its incompatibility with the principle of Equal Protection. Over the years, a growing body of constitutional jurisprudence has allowed oppressed individuals t to challenge oppression on grounds of human dignity.

Procedural justice

Human dignity has also ensured that legal judgements strictly adhere to procedural justice. Human dignity recognizes the autonomy of each individual. This includes strongly grounded principles such as treating like cases alike, the need for clear justification – whether under statute or case law – before one's freedom can be curtailed, the presumption of innocence,[13] and treating suspects and prisoners humanely.[14] For example, the presumption of innocence may lead to guilty persons being occasionally acquitted. However, as human dignity entitles each human to live a dignified life with as little oppression of freedom as possible, the thought of sentencing an innocent person is so repulsive that the law places the onus on the state to prove them guilty on a balance of probabilities or, in criminal cases, beyond a reasonable doubt. In *Horych v. Poland*, the court affirmed the need to perform personal searches of inmates but also emphasized the need for such controls to be "performed with respect for human dignity, applying the principle of humanitarianism and legality."[15]

International law

The concept of human dignity has allowed courts to more effectively hold perpetrators of human rights violations accountable, even in international situations. There is now an "institution of legal processes designed to require individuals to assume personal responsibility for violations of International Humanitarian Law."[16] Human dignity, as a universal concept, has become "the basic underpinning and indeed the very raison d'etre of international humanitarian law and human rights law."[17] This has helped counter the concept of state immunity in foreign courts and held powerful state actors accountable for heinous actions. In *R (Pinochet Ugarte) v Bow St Metropolitan Stipendiary Magistrate,*[18] Pinochet, Chilean dictator and former head of state, was issued an arrest warrant by a Spanish court for torture crimes (footnote for the full case citation?). The House of Lords held that the concept of state immunity would not avail itself to

[12] Maxine Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2005) 84 Neb. L. Rev., 762-763 <https://digitalcommons.unl.edu/nlr/vol84/iss3/3> accessed 24 December 2019.
[13] Sir Guy Green (n 7) 153.
[14] *Svvinarenko and Slyadnew v Russia* App nos 32541/08 and. 43441/08 (ECHR, GC, 17 July 2014).
[15] *Horych v. Poland* App no 13621/08 (ECHR, 17 April 2012), para 78.
[16] Michael Tate, 'Human Dignity: The New Phase in International Law' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer, 2007), 183.
[17] [1998] ICTY 3 [183].
[18] *R (Pinochet Ugarte) v Bow St Metropolitan Stipendiary Magistrate* [2000] 1 AC 61, 119.

him.[19] Although the reason given was UK, Spain and Chile having ratified the 1984 Torture Convention, this case was a strong indication that judges were prepared to prosecute foreign figures of the highest state authority for heinous human rights violations and complete disregard for human dignity.[20]
Human dignity was also instrumental in the enactment of war crime tribunals. For instance, the International War Crimes Tribunal has held Japanese officials responsible for the 'rape of Nanking' and punished commanders for committing rape, sexual torture and slavery in the Yugoslav conflict. In *The Prosecutor v Jean-Paul Akayesu,* mayor Akayesu was found guilty of genocide in the horrendous Rwanda conflict.[21] The elevation of human dignity over power and status has allowed for the accountability of powerful foreign figures. Although such judgements do not always bear fruit due to factors such as international friction and corruption, the fact that powerful state figures can be subject to prosecution for violations against human dignity sends an important message – no one may violate human dignity. All humans are of equal intrinsic value and must be treated as such.

The growing wave of support for integrating human dignity in law and governance is heartening. As seen, human dignity has contributed much to the law and made the judiciary a key driver in our quest for a better world. It is hoped that this will continue.

<u>i. Human dignity - Asserting universalities vs. isolating particularities</u>

Schools of thought surrounding human dignity have developed, converged, diverged and today, are mainly separated into the universalist conception and the particularist conception. The former uses human dignity to assert what is universal in humanity by "speak[ing] of the basic moral worth possessed by all human beings" and "invok[ing] a species referenced conception that ascribes worth to human beings simply on the basis of their humanity."[22] This forms the dominant conception of human dignity in the political and legal sphere.[23] On the other hand, the particularist school of thought entails several perspectives on what constitutes dignity for a person or a group. Such conceptions of dignity include conceptions that are "tied to particular historical, traditional, cultural, or otherwise personal perspectives on what gives life […] meaning and purpose."[24] In this manner, human dignity is used to isolate what is particular about individual humans.
As the following paragraphs will demonstrate, the foundation of human dignity should assert what is universal about humanity. Only then should particularism be factored in, and necessarily so, to develop a coherent picture of human dignity and fully recognize our capacity as self-determining individuals.

<u>Universalism is the more powerful, transcendent concept</u>

A huge distinction between the universal and particular conceptions of human dignity is the former's focus on what *ought to be* contrasted against the latter's focus on what *is*. The former has been criticized for being unrealistic. In criticizing Kant's emphasis on a universal conception of human dignity, Georg Hegel asserted that a moral conception can only reach its highest potential in a "concrete moral

[19] *R (Pinochet Ugarte) v Bow St Metropolitan Stipendiary Magistrate* [2000] 1 AC 61, 119.
[20] Michael Tate (n 15) 183.
[21] Michael Tate (n 15) 184.
[22] Daryl Pullman, 'Universalism, Particularism and the Ethics of Dignity' (2001) Christian Bioethics Vol. 7, No. 3, 341.
[23] Martha Albertson Fineman 'The vulnerable subject: Anchoring equality in the human condition' (2008) Yale JL & Feminism 20: 1, 10.
[24] Pullman (n 20) 342.

society."[25] Something overly idealistic would never materialize.
However, this stance is unpersuasive. Firstly, it is this aspirational nature of a universal conception of human dignity that drives the human rights movement. A universal conception of human rights is sacred and transcendent because it is rooted in our common status as human beings. No one can refuse the application of such a conception, because insofar as we are all humans, it would be equally refused for all of humanity and the detractor must then accept that their own human dignity is to be unprotected. By being universally relevant and desirable to us all, a universal conception of human dignity is capable of gaining global traction and being advocated for worldwide, more so than a conception of human dignity that isolates individuals' particularities.

Focusing on particular characteristics of individuals risk arbitrariness

Secondly, with each individual respecting a conception of human dignity that is tied to their particular perspectives, there is a huge risk that such a conception of human dignity will only be arbitrarily satisfied.
It is often impossible for the international community to fully understand and accurately measure the extent of human dignity violations in other communities. With a conception of human dignity that is rooted in particularism, it would be easy for corrupt officials to dismiss concerns with the excuse that their country's historical, traditional and cultural perspectives have resulted in a concept of human dignity that the state and citizens are upholding, when the opposite is true. With no means of genuinely reaching that same perspective on human dignity by immersing ourselves in their experiences, we would lack standing to bring such crimes to light and end up perpetuating systemic oppression of underprivileged groups. Not only will a concept of human dignity that focuses on isolating what is particular about individual humans run the risk of such arbitrary evaluation, it will diminish our ability to identify human dignity violations. Violations against the most basic of rights, such as the right to life, may still be easy to identify and prosecute as it is a right commonly deemed globally fundamental. However, rights such as freedom of expression and privacy, which often stir up controversy and are susceptible to a great range of cultural differences, may become empty concepts. Where we allow for human dignity to be a completely particularist conception, we open the doors to arguments that any degree of protection given to such rights, any degree of fundamentalism ascribed to the rights, is in accordance with human dignity. Moreover, we have no way of credibly pushing back on any heinously obvious disregard for a basic right, for the only prosecutor whose voice will have standing is a prosecutor in the violated community. Where there are ongoing human rights violations, these prosecutors are usually corrupt.

Universalism denies the variety of our reality

However, universalism may obfuscate or deny the reality of variety in the world in which we live. This is particularly so, where a universalist conception of human dignity is defined too stringently, stubbornly fixated on supposedly desirable characteristics. Made undeniably applicable to the whole world, it generates a system of human rights that ignores the particularities of different groups and individuals whom the system purports to apply to. This way, it may end up enforcing a concept of the good life that is overly onerous on many.
This is contrary to the foundation of a universal conception of human dignity, which is most popularly thought to be humankind's capacity for self-determination. For example, in *Chapman v UK*, the minority opinion considered "the applicant's occupation of her caravan […] an integral part of her ethnic identity as a

[25] Pullman (n 20) 343.

Gypsy."[26] Characteristics particular to her – the Gypsy tradition and the effect of modernization on that tradition – were, however, set aside when the majority held that ordering her to vacate the land she owned and refusing to let her site her caravan there did not constitute a violation of the special obligations toward vulnerable and minority groups. This case ignored particular characteristics in favour of what was "necessary in a democratic society".[27] Pegging human dignity at a universal standard and not giving enough weight to particular characteristics of the application denied the applicant the space to live in a manner consistent with her traditional perspectives on life, contrary to the principle of self-determination. Thus, asserting what is universal raises problems of enforcing a standard of the good life with little regard for individual differences.

Difficulty in defining the content of a universal conception

Additionally, what would a concept of human dignity, applicable to every human on earth, entail? If we were to assert what is universal in humanity, can we go beyond the fact that we are physically similar, of the same species with the same basic needs? Would it be possible to extend human rights beyond the most basic of them, such as a right to life, food and shelter? In law and politics, human dignity is often not used in silos but to substantiate rights, which is often the most direct issue. To establish rights such as rights to freedom of expression and privacy, human dignity must go beyond a bare-bones concept. However, as aforementioned , "the less empty it is the greater the opportunity for exclusion or demotion."[28]

Conclusion

Ultimately, it cannot be denied that human dignity is a concept that is meant to be universally applied. Even if we were to use it to isolate particular characteristics of individuals, we would have to acknowledge that every individual is entitled to some form of human dignity. For human dignity to be a universally substantive and meaningful concept, it is unpersuasive to use human dignity to isolate what is particular about individual humans. Hence, the foundation of human dignity should assert what is universal about humanity. Only then should particularism factor in to develop a coherent picture of human dignity and fully recognize our capacity as self-determining individuals.

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[26] *Chapman v UK* App no. 27238/95 (ECHR, 18 January 2001), para 73
[27] *Chapman* (n 23) dissenting opinion, para 3.

[28] Lawrence J Hatab, 'Human Nature in a Postmodern World: Reflections on the Work of Eugene Gendlin' (1994) Human Studies 27: 363-371, 370

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“The Australian Constitution; a lingering legal relic of British racism?”

By Sophie Plant

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This article seeks to examine the Australian Constitution, focusing on the lingering significance of discriminatory attitudes inherent in Britain’s colonial past towards Indigenous people. The existence of problematic “heads of power”, under which the Commonwealth parliament is granted the power to make law, and a lack of Indigenous representation, preserves historic hostility towards a marginalised demographic. This article will establish the need for constitutional reform to protect the interests of Australia’s First Peoples, thus setting a precedent of respect at the highest legal level, steering Australia into an age of inclusivity and reparation.

Introduction

This article will examine the historical and current legal representation of Indigenous Australians in the Australian Constitution. Focusing on “heads of power” permitting the Commonwealth Parliament to make law, this article will discuss how Australia could benefit from constitutional reform; to better protect Indigenous groups, better represent all races and distance itself from the residues of white supremacy common in the era of British Colonisation.

In 1901, Royal Assent was vested in The Constitution of the Commonwealth of Australia. [1] The document’s social significance is inherent. Establishing the legal and political beginnings of a new and exciting land of opportunity, the document shaped a nation.[2] Representing Australia’s “birth certificate”, the Constitution comprises the fundamental law of Australia which the State Parliaments, the Commonwealth Parliament, and every citizen fall subject to.[3] This noteworthy introduction of the Constitution is juxtaposed by the “glaring omission”[4] of the nineteenth-century

[1] Commonwealth of Australia Constitution Act 1900.
[2] ibid.
[3] Parliamentary Education Office and Australian Government Solicitor, ‘Australia’s Constitution pocket edition : with overview and notes by the Australian Government Solicitor’ (2010, 7th edn).

[4] Sir A Mason, ‘The Australian Constitution in retrospect and prospect’ in G Lindell

drafters in failing to acknowledge and recognise Aborigine and Torres Strait Islander peoples, the first people of Australia.

An undisputedly marginalised demographic, these Indigenous peoples have been subjected to indiscreet and unreserved inequality and racism since the British colonisation of 1788. From frontier massacres throughout the 1800s and 1900s,[5] to oppressive governmental policies such as the forced removal of Aboriginal children from their homes,[6] the Australian Commonwealth openly subjected these Indigenous groups to undeniable oppression.

The economic and political impetus of European settlers acted as a veneer, concealing their view that the indigenous community were primitive and sub-human.[7] The only constitutional recognition of Indigenous Australians within the document was to expressly and explicitly discriminate. An analysis of specific constitutional sections - later discussed - clearly establish that its drafting served the interests of the dominant demographic.

Aboriginal Australians were not included in the national count until as late as 1967.[8] As Williams points out, this is due to the constitution being enacted against a backdrop of racism and white superiority.[9] One does not have to delve far into a history book to recognise the inherent and underlying racism in the early years of British colonialism. As a consequence, there have been calls for constitutional reform, to offer proper representation and protection for the First Peoples of Australia.

The Australian Constitution is composed of eight chapters and one-hundred and twenty-eight sections. The document depicts the role, composition and powers of both the federal and state Parliaments.[10] Its legal being came into force on 1 January 1901 after having been granted Royal Assent by The Constitution Act 1900; an act of the Parliament of the United Kingdom. Transforming British colonies into Australian states, the document merged these entities into a single Australian federation. Within the document are various “heads of power” under which Parliament is granted the power to make laws. These heads of power are contained in section 51 which has thirty-nine subsections. Section 51 xxvi, commonly referred to as *the race power*, grants the Australian commonwealth the power to make specific laws for specific races. This article will discuss section 51 in detail and focus on the Constitution’s legitimisation of societal racism within Australia and why there is a consequent need for profound change.

<u>Current Indigenous Recognition within the Constitution</u>

Despite inhabiting Australia for over 60,000 years,[11] the Constitution does not

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(ed), The Sir Anthony Mason Papers (2007) 144, 148.

[5]https://www.theguardian.com/australia-news/ng-interactive/2019/mar/04/massacre-map-australia-the-killing-times-frontier-wars

[6] Lloyd, Ceridwen (6 December 2017). "The mapping of massacres", New Yorker. Retrieved 4 March 2019.

[7] https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/3-aboriginal-societies-the-experience-of-contact/changing-policies-towards-aboriginal-people/.

[8] Commonwealth of Australia Constitution Act 1900 s127.

[9] George Williams, ‘Why it's time to recognise indigenous peoples in the constitution’ (2015) 23 *Australian Psychiatry*, 215.

[10] Commonwealth of Australia Constitution Act 1900.

[11] Australian Geographic, *DNA Confirms Aborigine Culture One of Earth’s Oldest*

recognise the First Peoples. Williams stirringly states 'it is as if their history does not matter and is not part of the nation's story'.[12] Even more damningly, section 127 stated; 'in reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, *aboriginal natives shall not be counted'*.[13] Whilst this section was repealed in 1967this article will argue, through discussions of cases such as *Kartinyeri*,[14] thatrelic sections such as these have a prominent and lingering presence.

Under s127, Aboriginal Australians were expressly excluded from population counts under any electoral system. This legitimised the belief that Aboriginal Australians were a separate, inferior class of people unpermitted from participating or being included within the Australian Federation. The Sydney Morning Herald in 1961 showcases this inherent, open racism of s127 within its article entitled "*Form-Filling Not for Full-Bloods*", whereby the newspaper commented its stance on the possibility of Indigenous Australians being included in the national count; "trailing after the primitive tribesman for the purposes of enumeration would have been more difficult that rounding up a mob of wild brumbies."[15] This implicit racism went so far as to reject Aboriginal Australians as persons of human entities; individual States "considered them as the native flora and fauna."[16]

Sections 25 and 51 permit the Commonwealth to legislate purely on the basis of race.[17] This "Race Power" allows the Commonwealth to make laws in respect to 'the people of any race, *other than the aboriginal race* in any State, for whom it is deemed necessary to make special laws'.[18]

The Race Power

Section 51 xxvi permits the Australian commonwealth to make specific laws for people of a particular race. The underlying rationale of s51 xxvi is reflected in Barton's comment that its purpose was to 'regulate the affairs of the people of coloured or inferior races'.[19] Aboriginal people were excluded from this provision because state laws were deemed as more appropriate to deal with indigenous Australians.[20] Its rationale was to allow the government to control migrant individuals such as the Chinese; "to localise them within defined areas, to restrict their migration…or to give them special protection". [21] Pritchard comments on the lack of inclusion of native Australians, suggesting it may be due to a more deeply rooted desire for a complete lack of

(23 September 2011) <http://www.australiangeographic.com.au/news/2011/09/dna-confirms-aboriginal-culture-one-of-earths-oldest/> accessed 19 January 2020.

[12] George Williams, 'Why it's time to recognise indigenous peoples in the constitution' (2015) 23 *Australian Psychiatry.*

[13] *Commonwealth of Australia Constitution Act 1900* s127.

[14] *Kartinyeri v Commonwe*alth [1998] 195 CLR 337

[15] The Sydney Morning Herald, Sunday, May 07, 1961.

[16] Van Den Berg, Rosemary (2002). "Racism: The Nyoongar Experience". *Nyoongar People of Australia: Perspectives on Racism and Multiculturalism*. Brill Publishers. pp. 62–82.

[17] *Commonwealth of Australia Constitution Act 1900* s25, s51.

[18] *Commonwealth of Australia Constitution Act 1900* s51(xxvi).

[19] Official Record of the Debates of the Australasian Federal Convention (1891–1898). Melbourne, 27 January 1898, pp.228–229 (Edmund Barton).

[20] Referendum Council, 'Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (October 2016) 4.

[21] Sir John Quick, *The Annotated Constitution of the Australian Commonwealth* (Sydney, Angus [and] Robertson, 1901) 623.

Aborigine representation.[22] She states; 'there was no discussion of their exclusion from the scope of the power, and no acknowledgment of any place for them in the nation created by the Constitution." She goes on to propose that this exclusion amounted to 'a pattern of marginalisation and systematic discrimination.'[23]

The case of *Kowaarta*[24] concerned the constitutional validity of the *Racial Discrimination Act 1975* and challenged whether laws under s51 xxvi were valid if they were detrimental to a race. Murphy J stated that laws should be 'for the benefit of' the race to which they are addressed.[25] The case of *Kartinyeri*[26] further discussed this issue, and held the power could be used both for the benefit *and detriment* of a race.[27] Furthermore, the judiciary expressed their view that the powers should 'not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race'.[28] The lack of a definitive prohibition of racist law-making is emphatic.

Whilst this discussion demonstrates a dismal reflection on the legal foundation of a contemporary and modern society, this constitutional head of power also represents a positive head to steer Australia away from its discriminatory past. Despite no judicial confirmation that detrimental laws cannot be enacted, s51 xxvi could allow the Constitution's recognition of Indigenous Australians, in that "beneficial" law could be enacted. This was advocated in Prime Minister Holt's statement that the amendment would 'secure the widest measure of agreement with respect to Aboriginal advancement'[29], and that discrimination should be 'favourable, not unfavourable'.[30] This is positive, and hints that constitutional reform is potentially not needed as this section may offer a premise to enact laws beneficial to Indigenous communities. But is this enough?

Is Constitutional Reform Needed?

There is currently recognition of Indigenous people in Australia's broader legal framework. For example, the decision in *Mabo*[31] recognised that despite previous thinking, Australia was already inhabited before the Europeans settled. His recognition is incorporated into the *Native Title Act 1993*. However, this recognition lacks the supremacy of being at a constitutional level. The aim of this article is to put forward the idea that recognition at this superior constitutional level is needed.

With no concrete judicial and constitutional affirmation that s51 xxvi cannot be used to enact detrimental law, there is still the lingering possibility of state-sanctioned discrimination. Reform is needed to ensure against this. Lino calls for broader constitutional change, stating that a simple repeal of s51 xxvi would 'do little to overcome the constitutional potential for state-sanctioned racism.' [32] Lino suggests the need for new heads of power, to give Indigenous people positive protection against state-sanctioned

[22] Sarah Pritchard 'The Race Power in Section(XXVI) of the Constitution' (2011) *Australian Indigenous Law Review* 47.
[23] Sarah Pritchard 'The Race Power in Section(XXVI) of the Constitution' (2011) *Australian Indigenous Law Review* 47.
[24] Koowarta v Bjelke-Petersen (1982) HCA 27.
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[26] K*artinyeri v Commonwealth* [1998] HCA 22.
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[28] *Kartinyeri v Commonwealth* (1998) HCA 22, 267 [152] (Kirby J).
[29] Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, 263.
[30] Commonwealth, *Parliamentary Debates*, Senate, 8 March 1967, 359.
[31] Mabo and Others v Queensland (No. 2) [1992] HCA 23.
[32] Dylan Lino 'Replacing the race power : a reply to Pritchard' (2011) *Australian Indigenous Law Review* 15, 58-63.

discrimination.[33] To prevent the possibility of potentially discriminatory law, constitutional change is needed to replace s51 xxvi altogether and enact positive heads of power to better protect Indigenous people.

Moreover, there are broader arguments for the reform of s51 xxvi, mainly that it is tainted with a prejudiced past and should be replaced altogether. Lino puts forward this argument, stating that s51[xxvi] is grounded in the anachronistic, incorrect and, to many, offensive concept of 'race': it is not an appropriate form of constitutional recognition for Australia's first peoples.'[34]A constitutional reform would promote a complete reconceptualization of Indigenous peoples' place in the constitution and force discourse on addressing Australia's history of inequality. Professor Patrick Dodson states that 'the actions of Australian Governments have given Aboriginal people little faith in the promises Governments make in relation to protecting and defending the rights of Indigenous Australians.'[35] Positive heads of power and express constitutional recognition of Indigenous groups would promote the security and protection of indigenous rights within Australia.

In conclusion, the Australian Constitution needs to be amended to rectify the draftsmen's profound discriminatory colonial mindset. Drafting occurred during a period wherein society was entrenched in the unsavoury assets of British colonialism; an era which destroyed Indigenous peoples' culture and lifestyle, as well as subjecting them to genocide, explicit turmoil, and suffering. Indigenous racism is undoubtedly still a prominent incidence in modern Australia. Marni Tuala, a Moorung Moobar woman of the Bundjalung nation, describes an urgent level of "structural, systemic reform is required if we are to disrupt the revolving discourse around achieving equity in this country."[36]. In reflecting on the continued prejudice, she and many Australians are subjected to, she comments "how dare you continue to pretend you don't see us, that you don't see the inequity, the injustice and the solution."[37] Whilst there has been some recognition of the atrocities committed by the Australian Government at a constitutional level, this is not enough. "The National Apology" in 2008 witnessed the Australian Prime Minister, Kevin Rudd formally apologise to the Indigenous community for the forced removal and assimilation of their children from their families throughout the 1900s. These children were stripped from their families and placed within White institutions, typically churches and foster homes and often resulted in profound physical and sexual abuse. Occurring until as late as the 1970s, under international law, these policies amounted to genocide.[38] Prime Minister Kevin Rudd apologised for the "profound grief, suffering and loss of our fellow Australians" inflicted by "the laws and policies of successive Parliaments and governments."[39] To truly exemplify regret and initiate positive change from this, constitutional recognition prohibiting discrimination against Indigenous communities is needed to end systematic racism from a constitutional level.

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[33] ibid.

[34] ibid.

[35] Patrick Dodson, 'Until the Chains are Broken', Vincent Lingiari Memorial Lecture, Darwin, 8 September 1999.

[36] https://www.theguardian.com/commentisfree/2019/oct/01/its-black-and-white-racism-in-australia-is-common-and-accepted

[37] https://www.theguardian.com/commentisfree/2019/oct/01/its-black-and-white-racism-in-australia-is-common-and-accepted

[38] https://www.reuters.com/article/us-australia-aborigines-stolen-factbox/factbox-key-facts-about-australias-stolen-generations-idUSSYD20665020080213.

[39] https://www.nma.gov.au/defining-moments/resources/national-apology.

Constitutional reform could ensure Indigenous communities are better protected from discriminatory law and would acknowledge their presence and heritage, ultimately provoking a more inclusive and respectful legal framework.

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A Failure to Act: More than Just a Guilty Conscience

By Christina Di Lella

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The focus of this article is determining whether criminal liability for omissions, or failing to act, if projected as a standard to be met by society, would infringe a citizen's autonomy. The difficulty English courts currently face when establishing liability for an individual's failure to act has led to inconsistent judgements and a significant lack of certainty. A collection of arguments put forward by prominent legal theorists, such as Andrew Ashworth and his academic counterparts, are assessed to gain a deeper understanding of the criticisms and proponents of what having a 'duty to act' would legally entail. France's penal code regarding a 'duty to assist a person in peril' is discussed as a potential to serve as a model for the UK to mirror. Nevertheless, negative implications of a legally entrenched 'citizenship duty' do not outweigh the positive ramifications for the good of society.

A lack of clarity has plagued the criminal law through a failure to provide guidance that is concrete and consistent. This remains a frustrating element when establishing the actus reus component of an offence. This difficulty hinges, from a moral standpoint, on the fact that "the English law has not so far developed to the stage of treating [what may have been deemed as deplorable] as [being] criminal", as quoted by Lord Diplock in the case of *Miller*.[1] What may be deplorable rests on the question of whether a failure to act is purely immoral or whether it can be considered the cause of the harm. The distinction that the courts seek to find between acts and omissions only functions to strengthen the complexities that surround the establishment of liability. There continues to be frustration where there is a failure to set clearer guidelines when dealing with omissions. These will potentially continue to be dealt with in years to come. This article seeks to outline why the courts struggle with acts and omissions, the added difficulty that is accompanied by the role that morality plays, and what has been done in certain jurisdiction to counter this complexity. A 'citizenship duty' implemented through legislation in the United Kingdom, if it is deemed reasonable, would not only encourage greater social responsibility but also act as a complementary protection of individual liberty.

A Failure to Act is an Act

The courts often struggle when providing judgments that combine ethical and moral questions, which in criminal cases are fundamental in nature. George Fletcher, a Professor of Jurisprudence states, The difference between killing and letting die, between creating a risk, and tolerating a

[1] *R v Miller* [1983] 2 AC 161, 175.

risk, is one of the principles that sets the framework for assessing moral responsibility.[2]

Killing is often seen as an intentional act to commit harm which ends someone's life; however, this narrow view fails to account for the circumstances where someone's failure to act results in the same type of harm (this sentence is a little bit unclear). The current approach of the courts when determining liability in criminal cases includes: "Classifying the scope of liability, finding the moral basis of liability and then dealing with issues of causation".[3] The difficulty is in deciding to what extent an omission, or a failure to act, can be said to have a positive effect (harmful result) and, therefore, meet the standard of criminal liability. It is in deciphering whether something is an act or an omission that creates this uncertainty, and if it is viewed as an omission, then what is the scope for finding liability?

The general consensus is that acts by omission should not be punished within criminal law unless there exists a specific situation in which a duty to act arises.[4] The House of Lords in the case of *Miller* found it to be an erroneous notion that a failure to act cannot give rise to criminal liability in English law.[5] Lord Diplock criticised the common use of the actus reus formula for its misleading implications, since it suggests that some positive act on the part of the accused is needed to make him guilty of a crime and that a failure or omission to act is insufficient to give rise to criminal liability.[6]

The actus reus, which reflects the harmful conduct element of criminal liability, is commonly described as involving an act committed in legally relevant circumstances (the victim does not give their consent), and for causing the prohibited result or harm.[7] The difficulty is in deciding the extent to which omissions should be punishable and whether they should be criminalized just as much as positive acts. It is accepted and has been put forth by Professor Ashworth, a prominent legal theorist, that although cases do exist of omissions that are clearly distinctive from acts, there are ambiguous cases where doing and non-doing overlap.[8] Turning a blind eye on a situation is somehow perceived on the surface to not be as criminally liable as committing an act that directly causes harm. Brian Hogan, who co-authored one of the leading undergraduate texts titled *Smith & Hogan's Criminal Law*, takes issue with linking causation with the omission to find liability. Hogan has written,

> There is no way you can cause an event by doing nothing…to prevent it. If grandma's skirts are ignited by her careless proximity to the gas oven, the delinquent grandson cannot be said to have killed her by his failure to dowse her…To say to the child, 'You have killed your grandmother' would simply be untrue.[9]

While this argument may seem flawed due to Hogan's assumption that a child would be held to the same standard to that of a capable adult, it also ignores instances where a failure to act is just as criminally unsound as acting. In the case of *Walter*

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[2] George Fletcher, *Rethinking Criminal Law* (Little, Brown Book Group 1978) 601.

[3] Tracey Elliot and David Ormerod, *Acts and Omissions: A Distinction without Defence?* (Cambridge Law Review 2008) 39.

[4] Sally Kyd, Tracey Elliot, and Mark Walters, *Clarkson and Keating Criminal Law: Text and Materials* (9th edn, Sweet & Maxwell 2017) 127.

[5] *Miller* (n 1).

[6] *Miller* (n 1) 174.

[7] *Kyd, Elliot, and Walters* (n 4) 114.

[8] Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2009) 100.

[9] Brian Hogan, *Omissions and the Duty Myth* (Criminal Law: Essays in Honour of J.C. Smith, Butterworths 1986) 85.

Gibbins and Edith Rose Proctor, the parents of the defendant withheld food and allowed the husband's seven-year-old daughter to die.[10] In *DPP v Santana-Bermudez,* the defendant omitted to notify the police officer of the presence of a hypodermic needle in his pocket after she had initially informed him that she would be searching his person.[11] The failure to offer aid can be seen as equivalent to committing an act, where there is conscious acknowledgment of the victim's need of assistance and the real risk of imminent consequences that may result. Is it worse to kill than to let someone die? Leo Katz, who was awarded the Guggenheim fellowship for his writings in law and morality, explains that there is a deeper moral reason as to why killing by omission offends us less than killing by commission.[12] The person who fails to prevent a harmful situation, even one that would occur regardless of the defendant's actions, simply fails to interfere. However, the person who causes harm has an active role in the bringing about of the end result.[13] Katz explains, "Both persons are callous, but only the latter offends our sense of personal autonomy."[14] A similar view has been taken by Butler-Sloss LJ in *Airedale NHS Trust v Bland,*[15] where she explains the distinction between a doctors' lawful discontinuance of life-sustaining treatment where there was no hope of recovery for the patient, and a doctor who administers a lethal injection to a dying patient as in *Regina v Cox.*[16] The key distinction surrounding the court's view was a focus on punishing acts which interfere with an individual's autonomy. The court's reasoning behind the finding that the discontinuance of treatment was lawful was that the patient would have died without the medical treatment that was artificially keeping him alive.[17] Therefore they were not causing death that would otherwise have occurred inevitably sometime after the Hillsborough disaster.[18] In this view the element of control plays a crucial distinction between the finding of an act and an omission and where omissions may actually be seen as acceptable.

Autonomy vs. Social Responsibility

An influential reason that persuades Parliament and the views of the Law Commission when considering whether a revision of the Criminal Code could involve incorporating a 'duty to rescue' or 'citizenship duty' for omission-based offences is based on the distinction that exists between maintaining the freedom to make one's own choices and being accountable to others. The academic debate between legal theorists H.L.A Hart and Patrick Devlin involved a discussion of the relationship between morality and the law. The harm principle, articulated by J.S. Mill, a prominent British philosopher, in his work titled *On Liberty*, argues that the actions of the individual should only be limited to the extent that they prevent harm to others.[19] Mill used this principle in justifying the freedom of the individual in opposition to unlimited state and social control. Arguably, one of the most important jurisprudential debates of the 20th century was between Hart and Devlin in response to the Wolfenden debate that took place in 1957, discussing whether the criminal law should have jurisdiction over homosexual activity that happens behind closed doors.[20] Although this report focuses on moral and sexual behaviour, it raised other important questions involving what the criminal law should be able to control. Hart upheld J.S. Mill's harm

[10] (1919) 13 Cr App R 134.
[11] (2004) Crim LR 471.
[12] Leo Katz, *Bad Acts and Guilty Minds*: *Conundrum of the Criminal Law* (The University of Chicago Press Chicago and London 1987), 145.
[13] ibid.
[14] *Katz* (n 12) 145.
[15] [1983] AC 789.
[16] [1992] CLY 886.
[17] [1983] AC 789, 28.
[18] [1983] AC 789, 28.
[19] J.S. Mill, *On Liberty* (Oxford University Press 1859) 21-22.
[20] 'Report of the Committee on Homosexual Offences and Prostitution' [1957] 596 Parliamentary Archives 365.

principle to counter Devlin's view that society should have a common morality, describing the 'reasonable man' consistent with the 'moral person'.[21] Hart held that "the unimpeded exercise by individuals of free choice may be held a value in itself with which it is *prima facie* wrong to interfere".[22] In his writing on *Immorality and Treason,* Hart acknowledged that consensus of moral opinion is required if "society is to be worth living". However, he qualified his statement by indicating that not all morals are of equal importance, nor would the importance be shared evenly throughout society.[23] Hart opposed interference of the law using the fear of punishment and stated he believed the Wolfenden reforms, decriminalizing sexual acts between men, did not go far enough in the context of protecting social liberty.[24] He regarded Devlin's view of the decriminalization of homosexuality to be 'perverse' (as Devlin expressed belief in a collective judgment that homosexuality inspires a deep feeling of disgust towards it).[25]

Relating these principles to the discussion of acts and omissions with regards to causation, brings about the question: if our failure to act does not cause a resulting harm, would criminalization amount to a breach of the harm principle? As has been discussed previously in some case law, there are many incidents where harm does result from a failure to take action. In the case of *Miller,* a vagrant went to live in an unoccupied house and fell asleep one night with a lit cigarette, which he dropped onto the mattress setting it alight.[26] The defendant did nothing to extinguish the fire when he awoke but merely moved to another room and was convicted of criminal damage for failing to try and prevent or reduce such risk that he created and had been made aware of.[27] In this case, where failing to act actually does cause harm, there is subsequently no breach of the harm principle. The important question then becomes, at which point are we expected to act?

<u>Autonomy: Is It Always Isolated to the Defendant?</u>

Autonomy is often viewed from the perspective of the potential defendant, but not so much on what it would mean for the victim. The autonomy argument usually stems from the conventional view, as Glanville Williams defends, that omissions liability stops the defendant from pursuing all courses of action that are not the one that is required to avoid liability.[28] In this view, the defendant is not making the world worse, but is just failing to make it better.[29] The conventional view argues that autonomy requires a freedom of choice for each individual and only one option of what will be the only escape from liability. Williams contends that a 'citizenship duty' requiring one to act when someone is in need would be uncertain and lacks any fair warnings to those who may become liable for their omissions.[30]

However, this view fails to realize that there would be some requirements of a citizenship duty. The goal would be to combat the uncertainty of when one should act, which currently exists within the law. The five grounds, which generally give rise to a duty to act, are still plagued with ambiguity in their reasoning. While not well-defined in their parameters, the following situations will give rise to a duty to act: a special relationship between the

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[21] Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1965) 9.
[22] H. L. A. Hart, *Law, Liberty and Morality* (The Harry Camp Lectures at Stanford University, Stanford University Press 1963) 21.
[23] H. L. A. Hart, 'Immorality and Treason' (The listener 1959) 49.
[24] 'Hart Interviewed: H.L.A Hart in Conversation with David Sugarman' [2005] 32, Journal of Law and Society 267, 285.
[25] ibid 284.
[26] *Miller* (n 1).
[27] *Miller* (n 1).
[28] Glanville Williams, 'Criminal Omissions – The Conventional View' [1991] 107 LQR 86.
[29] John Child and David Ormerod, *Smith, Hogan, and Ormerod's Essentials of Criminal Law* (3rd edn, Oxford 2019) 75.
[30] *Williams* (n 27).

victim and defendant, an assumption of responsibility, a contractual duty, a statutory duty, and the creation of a dangerous situation.[31] In *Evans,* a mother was found liable for manslaughter for her omission to take reasonable steps to attempt to revive her daughter after a drug overdose. While the mother was found to have a special relationship with the daughter,, her stepsister was convicted based on providing the drugs, therefore creating a dangerous situation.[32] The law is uncertain as to how far the 'special relationship between the defendant and victim' extends to brothers, sisters, friends and common-law partners. This difficulty compounds in the fact that until cases are decided, one will not know whether they may be liable for their failure to act, and in many cases it will be too late. In the case of *R v Instan*, the defendant lived with her 73-year-old aunt who, until very shortly before her death, developed gangrene in her leg. The defendant was convicted of manslaughter for failing to provide for her aunt or seek medical help when only she knew of her aunt's state. Lord Coleridge, residing on the case, stated, "It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation […] the prisoner [the defendant] was under a moral obligation to the deceased from which arose a legal duty towards her."[33] The causation was founded upon the assumption of responsibility that she acquired when her aunt became ill after taking her in, not from a special relationship. There is no detailed explanation provided on why the duty did not arise because of a familial relationship or even if it could be extended as far as saying the defendant created a dangerous situation by placing her aunt in danger. By not feeding the victim, allowing the infection of the gangrene to spread, and not notifying anyone for assistance, the defendant would have breached her duty to remedy the dangerous situation that had been created.[34]

The overlap in the duty scenarios demonstrates how narrow the categories are for when a duty to act exists. No rationale is offered in explanation for why a duty occurs over others in certain cases. The 'special relationship' duty is therefore, in need of future expansion as the courts are beginning to recognize the close ties existing not only between parent-child relationships and spouses, but also for close friends and common-law partners.[35] The ability of the courts to assess this on an ad-hoc basis is undoubtedly required where each case is distinguishable and unique. However, it does not help when the law fails to provide consistency or concrete guidance to the citizens that are governed and protected by it. Even though general categories have been created through common law to provide justification in finding liability for an omission, they do not provide a sufficiently clear expectation of the duty to act, which has the potential to create an increase in criminal cases of this nature. Parliament's ability to impose a citizenship duty would aid with the confusion that surrounds omissions by defining , within statute, the expectations and limits on the duty to act.

Ashworth proposes counterarguments to the conventional view and supports a duty to act based on citizenship, arguing that this would promote the betterment of society. The duty to act would mandate reasonable action to prevent harm whenever the defendant is in a position to do so for the benefit of others.[36] Ashworth contends that the current approach to omissions assumes a moral difference between acts and omissions that does not exist because in certain cases it may be more culpable to omit than to act.[37] In response to the autonomy argument, Ashworth focuses on how a lack of rescue in scenarios where it is reasonable to do so, will severely restrict the victim's

[31] *Kyd, Elliot, and Walters* (n 4) 128.
[32] [2009] 1 WLR 1999.
[33] [1893] 1 QB 450, 3.
[34] *Kyd, Elliot, and Walters* (n 4) 136.
[35] *Kyd, Elliot, and Walters* (n 4) 129.
[36] Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013).
[37] ibid 35.

autonomy through their injury; the defendant will also benefit from the potential for similar assistance in the future.[38] Although omissions liability restricts the defendant's options, it must be kept in mind that a duty would only arise in exceptional circumstances where the victim is in considerable danger.

France: A Duty to Rescue in Action

Ashworth discussed France's incorporation of a 'duty to rescue' into their Penal Code, considering the similar liberalism roots that they shared with their English neighbours.[39] The drafting of the Penal Code in 1810 was inspired by upholding individual autonomy and the liberalism of the age. However, a projected reform in 1934 sought to encourage the physical safety of their citizens.[40] Articles 223-6 of the Penal Code became law in 1941 during German occupation and asserted, "Citizens have real moral duties to act for the social good in certain circumstances."[41] France recognized the benefits derived from prioritizing social responsibility, while respecting an individual's autonomy by incorporating limitations on what is expected of someone for failing to provide assistance to someone in peril. Devlin makes an important argument of the requirement of balance within a society between autonomy and social responsibility. He states: "There must be toleration of the maximum individual freedom that is consistent with the integrity of society".[42] He recognizes the importance of liberty but also the significance of when choosing to act will benefit society and the dependence that citizens' feel towards one another, as well as the state, to prosper and have their needs met. The failure to assist persons may be translated as follows:

> Any person who voluntarily fails to render assistance to a person in peril, which he or she could have given either personally or by calling for help, without personal danger or danger to others, is guilty of an offence and may be punished by imprisonment from three months to five years or by a fine of 340 francs to 20,000 francs or both[43]

Autonomy is respected within this legislation when criminalisation does not apply if it would put the defendant in any risk of danger to themselves or to others. It also requires the individual to be aware that a person is in peril, and consequently, a mistaken belief that someone was not in need of immediate assistance in a life or death situation would not impose criminal liability. The expectation is where it is safe to do so, a citizen would offer their assistance in whatever capacity possible. The criticism that being caught somewhere at the wrong place and the wrong time as a consequence of an unfair element of luck that should not be punishable within the criminal law is negated by the onus, which is such that any reasonable person would have provided assistance had they been in that person's shoes. The way that this legislation is appropriately incorporated into France's criminal code should be a reference for English criminal law, as it would be an advantage to society as a whole. Fostering a more trusting and active collective by taking interest in the well-being of neighbours far outweighs any criticisms. Especially where the legislation provides judges with the discretion to rule upon the facts of each case, having a wide range of sentencing options. The Court of Appeal at Room in France held that a defendant, the driver of a vehicle, should be acquitted where he was able to establish the priority of extinguishing his own car to avoid further danger to himself and others as more

[38] *Ashworth, Positive Obligations* (n 35) 37.
[39] Andrew Ashworth and Eva Steiner, 'Criminal omissions and public duties: the French Experience' [1990] Legal Studies 153.
[40] ibid 156.
[41] *Ashworth and Steiner* (n 38) 157.
[42] Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 16.
[43] *Ashworth and Steiner* (n 38) 157.

urgent than that of assisting the injured party whose clothes had caught fire.[44] The courts can only expect citizens to act in a way that is reasonable and expecting any more would be unfair. would be unfair..

Too Close to Home

Recently, on January 6, 2020, a 17-year-old girl was approached by two men who attempted to abduct her into their car at approximately 5:40pm in Leicestershire within close proximity to the University of Leicester. One of the men allegedly grabbed the student's arm telling her to go with him, as conveyed by the Leicester Mercury News.[45] The entire attack was reported to have lasted around 8 minutes where the victim stated she was shouting, "get off me". However, the people that were walking past her did not stop to help.[46] Fortunately, she managed to escape by breaking the attacker's grip and remained uninjured but shaken up. The failure of a 'citizenship duty' may or may not decrease the prevalence of the bystander effect. Whereas had someone intervened with at least calling the police to assist, it would have made a world of a difference for the victim and been of little detriment to the bystander. Attacks of this nature are prevalent in society and taking comfort in the fact that there is a responsibility on every citizen to assist, where they are able to do so, would be a benefit to all members of the community.

Conclusion

Individual freedom does not have to be compromised in an attempt to foster social responsibility if the expectations and limitations function to protect not only the victims of omission offences but also the defendants. The complexities of moral distinctions between acts and omissions continue to pose difficulty when determining criminality and when creating coherent understanding of when one would face liability. The essential question is: where do you draw the line between the autonomy of potential defendants and acting for the betterment of society? Ashworth makes a convincing argument that where reasonable requirements are set out, autonomy is upheld while the victim's wellbeing is preserved. Modelling the French legislation regarding a duty to provide assistance would set reasonable limitations, creating a low threshold of when the defendant is expected to act, and a minimal effort required in providing assistance. As citizens exist in cohesion, their dependence on one another as a community cannot be ignored. The primary goal of criminal law should be to find a balance between providing for the greater good of society while respecting individual freedoms. This can be achieved through the parliamentary enactment of a citizenship duty to assist.

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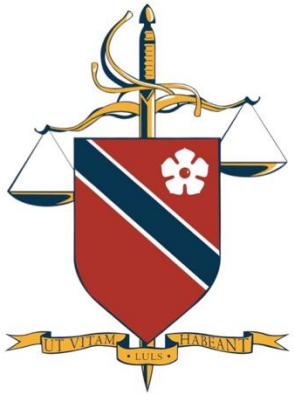

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