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THE POLITICS OF ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW: ISLAM AND RATIFICATION OF THE UN CONVENTION AGAINST TORTURE IN THE GULF COOPERATION COUNCIL (GCC) STATES

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ABSTRACT

Modern international human rights treaties developed over the latter half of the 20th century to address a wide range of human rights issues. Their number is large and growing, yet there is little evidence that these instruments make a difference. Nowhere does the evidence appear more glaring than in the Gulf Cooperation Council (GCC) states, where high ratification rates correspond with relatively poor human rights records in practice. Nevertheless, states in the Gulf have today voluntarily acceded to most UN human rights conventions. The resulting engagement has brought about an ongoing and vibrant diplomatic discourse, particularly about human rights and Islam. Using the case of the ratification of the 1987 Convention Against Torture (CAT) in the GCC, this paper examines the nature and content of discourses about Islam and human rights over time resulting from CAT ratification in the region. The paper demonstrates how arguments about Islam and human rights have been shaped by interactions with the CAT over time, arguing that where UN human rights treaties have failed to result in improved human rights practices, they have provoked an evolving and variegated dialogue about Islam and human rights worthy of greater scholarly attention.

Key Words: Islam, International Law, United Nations, Convention Against Torture, GCC

INTRODUCTION

As the international system developed over the twentieth century into a complex arrangement of multilateral treaties and institutions, the explosion of the international legal system onto the world stage has raised many questions for scholars interested in the role of these laws. Once a minimal collection of specific state-to-state agreements, the international legal realm has expanded to include a multiplicity of international treaties, conventions, agreements, and declarations purporting to regulate the conduct of individual states. These documents have contributed to a growing codification, or 'legalisation', of the international sphere (Abott et al., cited in Simmons and Steinberg, 2012). Because the international sphere lacks direct coercive enforcement mechanisms, however, international relations scholars have fundamentally challenged the 'strength' of international law—and even its status as 'law' at all (D'Amato, 2010; Goldsmith and Posner, 2005).

One area perhaps most perplexing to international law sceptics has been the amount of time and resources devoted to the creation of a growing collection of international human rights laws. Existing scholarship tends to find little to no correlation between human rights treaty ratification and human rights compliance in practice. Human rights records are simply 'not associated' with UN human rights treaty ratification, and sometimes the human rights records of countries party to human rights treaties are worse than those of non-parties (Hafner-Burton, Tsutsui and Meyer, 2008; Goldsmith and Posner, 2005). Lack of evidence that human rights treaties make a difference has contributed to a 'growing scepticism' that 'the world's idealists

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have thrown too much law at problems of human rights' – as Beth Simmons puts it in her 2009 book *Mobilizing for Human Rights*.

The sheer futility of international law at successfully ameliorating human rights problems is clearly evident when considering the Gulf Cooperation Council (GCC) countries, Saudi Arabia, Kuwait, Qatar, UAE, Oman, and Bahrain. These countries have ratified most or all of the UN human rights instruments, but are consistently accused by various human rights monitors of failing to live up to their legal obligations after ratification. This gap between commitment and compliance is obvious when reviewing Gulf state commitments to the 1987 UN Convention Against Torture (CAT), a UN document aimed at protecting all individuals from torture and cruel punishment. All GCC states except Oman have voluntarily ratified the CAT, yet GCC states are consistently widely criticised by leading human rights monitors for torture practices and other forms of 'cruel punishment.' (Human Rights Watch, 2016a).

Most international legal scholars argue that these cases clearly demonstrate the futility of international law, where states can easily sign up to 'look good' at little cost, in a meaningless manoeuvre to marginally improve regime image (Goldsmith and Posner, 2005). Discounting the act as entirely meaningless, however, and subsequently ignoring it in scholarship, fails to provide an account for a growing collection of evolving dialogue and engagement that has resulted from ratification, which will be the focus of this paper.

This paper analyses the ways in which Islam has been negotiated and discussed by GCC states relating to CAT ratification. The paper argues that GCC ratification of the CAT 'matters' more than the traditional international legal literature claims because of its influence on framing diplomatic discourses on Islam and human rights. GCC engagement with the CAT and its committee has 1) exposed a diversity and flexibility across the Gulf in conceptions of Islamic understandings of punishment, and 2) contributed to some 'modernisation' of language and concepts used by GCC representatives. By tracing how norms about punishment and Islam in the Gulf are communicated by states related CAT commitment, the paper will argue that ratification of the CAT across GCC states has served as a unique space that has both captured and progressed how Islam and punishment are discussed by Gulf representatives.

THEORETICAL FRAMEWORK

The concept of norm diffusion broadly discussed within the Constructivist school of International Relations theory is useful to viewing human rights treaty ratification's impact on dialogue. The expanding literature on 'norm diffusion' (Keck and Sikkink, 1998; Klotz, 1999; Risse et al.,1999; Barnett and Finnemore, 2004; Reus-Smit, 2004; and Simmons, 2009)) can help trace the ways human rights have been discussed over time across a wide variety of political contexts. The concept has been applied broadly within the literature to consider a number of factors and indicators for scholars to trace the movement of norms; according to Gilardi, 'Diffusion can take place also within countries, among a wide range of public and private actors, and it can lead to the spread of all kinds of things, from specific instruments, standards, and institutions, both public and private, to broad policy models, ideational frameworks, and institutional settings' (Giraldi, as cited in Carlnaes, Risse and Simmons, 2012).

Norm diffusion describes a process rather than an outcome (Elikins and Simmons, 2005). Seen as a 'consequence of interdependence' (Gilardi, 2012), literature on norm diffusion considers when and how norms in international sphere influence state behaviour (Katzenstein, 1996; True and Mintrom, 2001). International institutions are often identified as playing a central role in this process as the 'carriers' or 'diffusers' of international norms (Park, 2006; Finnemore, 1996; Checkel, 1999; Grigorescu, 2002). The concept of norm diffusion can help scholars establish whether—and, if so, to what extent—international human rights institutions play a role in the development and spread of human rights norms in particular.

Part of the reason why the existing literature fails to provide satisfactory accounts of outcomes and dynamics concerning norms in the Middle East is that it tends to suffer from Western-centrism. Bettiza and Dionigi suggest that literature on norm diffusion tends to be characterised by a bias, focusing too heavily on Western norms being spread from a 'Western core to a non-Western periphery', and tend to over-emphasise liberalisation as a necessarily related, and even desirable, outcome. 'Constructivism's Western-centrism,' Bettiza and Dionigi argue, 'tends to overlook the fact that the international sphere is replete with normative contestation' (p. 2). This is problematic in considering the Middle East, where actors and norm entrepreneurs are clearly 'not solely norm-takers, but also active norm-makers, seeking to promote and internationalize their own beliefs, values and principles' (Bettiza and Dionigi, p. 2).

A useful concept to consider is that of 'norm localisation', developed most prominently by South Asian scholar Amitav Acharya, who argued through a study of norm diffusion in the Association of Southeast Asian Nations that norms diffuse in varied cultural contexts by processes in which local agents 'reconstruct foreign norms to ensure the norms fit with the agents' cognitive priors and identities' (Acharya, 2004). Norms about punishment take hold in Islamic contexts through congruence-building between Islamic language, concepts and understandings of punishment based on Islamic ideas of justice and humility alongside international concepts of humane and fair treatment, which will be demonstrated in the sections that follow.

Constructivist theorists might posit that in the cases of human rights treaty ratification in the Middle East, where a high ratification turnout corresponds with low compliance in practice, we see a case in which norm diffusion has failed to take place. The reality remains, however, that the process of spreading liberal norms about human rights has perhaps succeeded in certain forms (for example, in shaping Middle Eastern actors' use of certain language and concepts about human rights used in public statements made by government representatives), but failed to result in fully liberalised human rights laws and practices. Identifying and understanding this spread of language and concepts used concerning human rights as a result of interactions between Middle Eastern representatives and UN human rights treaties, regardless of the results in the practice of domestic human rights, will be the focus of this paper.

This paper draws on archival research of UN dialogues between GCC diplomats and the UN CAT Committee, alongside interview research conducted in Doha, Qatar in the summer of 2016 to explore how dialogue about Islam and punishment has developed in relation to CAT ratification. It will begin with an overview of Islam in the GCC states, review GCC engagement with the CAT, starting with the initial ratification decision, followed by an analysis of official UN CAT committee diplomatic dialogues. It will then present conclusions as to how GCC states have engaged in similar and different ways regarding Islam and punishment as a result of CAT engagement, and offer some preliminary thoughts on how these findings might be relevant to international human rights law legal scholars and practitioners.

BACKGROUND

Islamic Law and Punishment in the Gulf

Since the early expansion of the Islamic empire, law in the Middle East has traditionally been 'anchored to religious institutions and personnel' (Zubaida, 2003, p. 440). Law in the region was considered to be derived from divine origin, based on the Qu'ran and the examples of the Prophet. In reality, however, far from being anchored in some static authority from the divine, sacred law has been closely intertwined with the social and political context in which it has been interpreted throughout history, broadly invoked in early Islamic history by clerics ('*ulama*) and interpreted to regulate a wide range of affairs from civil transactions, taxation, penal law, and most other areas of criminal and social law. By 1900, religious Sharia law in

the Middle East had reduced in scope to mainly concern finite areas of 'personal status' such as child custody, marriage, and inheritance (Hallaq, 2005, p. 115).

Islamic *sharia* law has historically influenced (and continues to influence) criminal law in varying ways, depending on interpretation. Sharia's influence in sanctioning certain styles of punishment has attracted significant criticism for its role in condoning or even promoting controversial practices such as flogging and stoning in some countries, including many in the GCC. However, the influence of Islamic law in condoning controversial practices like flogging varies between various interpretations of Islamic jurisprudence (*fiqh),* and indeed the practical interpretation of punishment under Islamic law varies widely in the varying domestic contexts of the states of the MENA region. With a dynamic history, the analysis that follows demonstrates that Islamic law neither comprehensively bans torture, nor does it prevent such a ban, making Sharia no clear impediment to the CAT, should one wish to find historical and jurisprudential bases within Islam in support of the convention. Sadiq Reza claims that Islam's stance on torture is as much 'a matter of politics as of law': 'those who seek justification for investigative torture in the *fiqh* or *siyasa* will find it there; so too will those who seek its prohibition.'

Islamic legal understandings of punishment are based on varied interpretations of scared text. Concepts of 'cruelty', 'degradation' and 'torture' are present in the Quran, and their practical import is debated between and within Islamic schools of thought. While there are many mentions of such concepts directly in Quranic text, the below verses illustrate how these are mentioned. For example, cruelty of a husband towards a wife is condemned:

> If a wife fears *cruelty* or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do. (Q4:138)

Yet God's 'cruel' power to 'torment' is also identified in sacred text as being just and powerful. The Quran says, 'And (remember) when thy Lord proclaimed that He would raise against them till the Day of Resurrection those who would lay on them a *cruel* torment. Lo! verily thy Lord is swift in prosecution and lo! verily He is Forgiving, Merciful' (7(167)).[2] And certain punishments (such as amputations for thieves) are set out in such verses as 'And the male thief and the female thief: then cut (off) the hands of both, as a recompense for what they (both) have earned, as a *torture* from Allah; and Allah is Ever-Mighty, Ever-Wise' (2:66).

Islamic law sets out a number of 'categories' for types of criminal offence, prompting varied types of penalties based on the nature of the crime. These include offences said to violate divine authority and prescribed a specific punishment in the Qu'ran (*hadd/hadud(pl.)*); those said to violate the divine as well as another individual, resolved in quid-pro-quo exchanges (such as money paid to the family of a murder victim) (*qisas*); those against another individual that fall under a judge's discretion (*ta'zir*); offenses against the public policy of a state that call for administrative penalties (*siyasa*); and offenses that can be addressed by personal penance (*kaffara*) (Forte, n.d.) The first three offenses of *hadd (hadud pl.)*, *jinayat*, and *ta'zir* are to be adjudicated before a religious judge (*qadi*) unless a state has moved jurisdiction under another court. *Fuqaha* (jurists) from the different schools of Islamic law present varying perspectives, then, on how these punishments are imparted (Hakeem, 2003).

The tension surrounding Quranic Hadd punishments and international law, Reza argues, 'richly illustrates … an essential dynamic of Islamic law: the interplay between the jurists of Islam, whose doctrines and discourses over fourteen hundred years form the corpus

[2] Also see (The people of the city) said: We augur ill of you. If ye desist not, we shall surely stone you, and grievous *torture* will befall you at our hands. 36:18.

of formal Islamic jurisprudence, and Islam's political authorities, whose rules and actions both depend on the jurists' doctrines for legal legitimacy and constitute a complementary source and measure of Islamic law' (Black et al., 2014, pp. 222-223).

While there is some variance among Islamic legal schools of jurisprudence (*madhab*), the five common Sunni schools (Hanafi, Maliki, Shafi'I, Hanbali, Zahiri) and two Shia schools (Ja'fari, Zaidi) tend to converge in their understanding of divine (*hadd)* crimes to include sex outside of marriage, false accusation of unlawful sexual acts, wine drinking (sometimes drinking of any alcohol), theft, and highway robbery, and apostasy. Punishments understood to be divinely sanctioned for *hadd* offenses include flogging, amputation, exile, or sometimes stoning and other forms of execution.

Scholars viewing these legal standards with a view to historical context, as today's relatively strict interpretation of *hadd* crimes and legal punishment may not have, in fact, originated in such rigid form. Islamic legal scholar Joseph Schacht writes that the rules of punishment in Islamic law, seemingly rigid and set in current form from direct reference to Quranic verses, did not, in fact, originate clearly and strictly from the time of Mohammed, and were highly contested in their origins. Schacht makes the point that the religious basis of this law evolved over time until the early 'Abbasid period (yrs. 750–1517). Early Islamic society began to form religious legal institutions along the ancient Arab system of arbitration, in which punishments were often imparted for political reasons, for example in response to disloyalty. More extreme practices of stoning to death as a punishment for adultery (*rajm*) according to the interpretation of the alleged commands of the Prophet also have contested Quranic origins; the verse is claimed to be entirely spurious by some early Muslim sects such as the Khawarij/Khajirites.[3] It was only after the first century of Islam the concepts of punishment began to coalesce into the form commonly invoked today.

Still, although there exists strong convergence relating to sanctioning certain extreme punishments in criminal law in modern MENA states, lesser penalties are far more commonly imparted for most *hadd* offenses, with the more extreme forms of punishment prescribed by law often seen as more metaphorical than literal. This is, however, by no means universally the case. Flogging still occurs in several MENA states, and other violent penalties for adulterous acts remain commonplace. For example, the Quranic guidance for the punishment of stealing by amputating the hand (and if it is a repeated offense, the foot) in Quran 5:38 is still literally invoked today in numerous cases cited in Iran, Saudi Arabia, and northern Nigeria.

These types of literal interpretations of Islamic punishments are often deemed 'cruel' by most human rights monitors. Their purpose, however, is meant to be purely punitive, and thus not in breach of the *intentional* notion contained in the CAT definition of torture (the intention of obtaining information through punishment), although often understood as being in violation of the 'cruel treatment' clause. The extremity of physical suffering endured by those accused of *hadd* crimes, as well as concern over the validity of accusations and allegations that these punishments are often used to provoke false confessions, has grown to be a topic of concern for numerous human rights monitors that the nature of religious punishments across MENA could violate international law against torture.

Torture has been acutely and consistently alleged to take place in the GCC, where Amnesty International reports 'Hundreds of dissidents, including political activists, human rights defenders, journalists, lawyers, and bloggers, have been imprisoned across the region, many after unfair trials and allegations of torture in pretrial detention. GCC rulers' sweeping campaigns against activists and political dissidents have included threats, intimidation, investigations, prosecution, detention, torture, and withdrawal of citizenship' (Human Rights Watch Report, 2016).

Saudi Arabia in particular has been subject to criticisms of torture. Although the Saudi Criminal Procedure Code prohibits 'torture' and 'undignified treatment' (Article 2), it does not provide any specific definition of torture or prescribe criminal sanctions for government officials who carry it out. Human Rights Watch reported in 2016 that Saudi prisons sometimes subject detainees to torture and other ill-treatment, including at detention facilities run by Saudi Arabia's Public Security Department (police) and by the General Directorate of Investigation (*al-Mabahith*) (Human Rights Watch Report, 2016b). Similarly, Human Rights Watch has documented widespread allegations of torture in the UAE prison system, citing 'credible allegations that security forces tortured people held in pretrial detention' and sometimes forced disappearances (Human Rights Watch Report, 2016c). Similar accusations of torture particularly in prison and detention systems have been lodged against the rest of the GCC states, including Oman, Kuwait (Human Rights Watch Report, 2016d), Qatar (Amnesty International, 2016) and Bahrain (Human Rights Watch Report, 2016e).

Islam in the Gulf is 'constantly reinterpreted and negotiated' (this is Pernilla Ouis' phrase: Ouis, 2002, p. 318). According to Ouis, the concepts of Islam, tradition and modernity are central for the legitimisation of power in the Gulf. The Gulf states are engaged in an ongoing balancing of these areas. As El-Affendi (2001) puts it, Gulf states are often challenging how to balance these factors: 'How much of modernity is compatible with Islam? Or, put differently, how much of the Islamic tradition can (and deserves) to survive modernity?'(El-Affendi, 2001). CEDAW ratification exposes these tensions unravelling in Gulf state rhetoric over time.

The legal relevance of Sharia today is globally strongest and most pervasive in the legal systems of the Arab Gulf states. In Saudi Arabia, in particular, Islamic law has remained in a much more traditional and conservative form than in other states of the Middle East. This is what Zubaida calls the 'Saudi Exception': 'The Kingdom of Saudi Arabia is the one major country in the region which has not followed the general pattern of the codification and etatization of law. Saudi courts and *qadis* (judges) rule in accordance with Hanbali *fiqh* (jurisprudence), which is not codified as state law but formally left largely to the discretion and *ijtihad* (reason) of the qadi … The ulama remain the main legislators' (Zubaida, 2003, p. 153). In Saudi Arabia, strong adherence to conservative principles in Islamic law have also resulted from the monarchy's quest for legitimacy. Zubaida argues that the political importance of Shari'a is strong in bolstering the Saudi monarchy: 'Religious legitimacy and its agents have been crucial for the defence of the [Saudi] dynasty against modernist political opposition of nationalism, constitutionalism and democracy, as well as against the Islamic opposition from various quarters, mainly centred on the dependence of the dynasty on US power, as well as the perceived hypocrisy and corruption of the royal house and its circles' (Zubaida, 2003, p. 155).

Given this context, it is important to view Islam as a moving and dynamic topic influencing law, society and power in the Middle East. Of course, the region is not monolithic, and these dynamics play out in varied ways in each country. The ways in which Islam is discussed at the United Nations reflect certain patterns and commonalities across the region, as well as a heterogeneity in understandings concerning Islam. The era of the proliferation of UN human rights treaties has helped provoke a unique and evolving discourse on Islam and human rights among GCC state representatives at meetings with UN human rights committees. The nature and content of these discourses among GCC and UN diplomats over time since ratification of the CAT will be the focus of the following section.

FINIDINGS

Islam and CAT Ratification Engagement: Initial RUDs

Despite slow ratification of the CAT across the GCC, formal concern with applying the tenets of the convention, at least in form, were minimal. Where Reservations, Understandings, and Declarations (RUDs) were submitted to the CAT by states in the region upon ratification, they

tended, on the whole, to be brief and highly specific to particular articles concerning procedure, compared with the longer and more sweeping RUDs sometimes submitted to the other UN human rights treaties.[4] Only in one case did a formal RUD submitted to the UN Committee Against Torture upon ratification of the CAT mention religion (this state, Qatar, went on to remove this reservation, a move which will be examined later).

GCC Ratification of the CAT

Kuwait 8 Mar 1996 *Torture Rating 2.0*[5]
Saudi Arabia 23 Sep 1997 *3.0*
Bahrain 6 Mar 1998 *4.0*
Qatar 11 Jan 2000 *1.0*
Iraq 7 July 2011 *5.0*
UAE 19 July 2012 *1.8*

Table 1: MENA RUDs to CAT (* indicates one or more withdrawn)

Mention of Islam	1 *[6]
Articles 21 & 22 (competence of CAT Committee)	2*[7]
Article 30 (competence of the ICJ for referral)	5[8]
Article 20 (competence of CAT committee investigations)	4*[9]
Other concern	6

While seven MENA states ratified the CAT without reservation, the MENA states that did submit RUDs primarily expressed concern with the same procedural aspects of the convention: the reach of the UN CAT Committee to assess and refer alleged uses of torture, and the competence of the International Court of Justice to adjudicate these cases. Ratifying MENA states almost never expressed concern over arguably more substantive elements of the Convention, such as its definition of torture and the imperatives set for governments to denounce and eliminate the practice (Table 1).

All but one GCC state ratified the CAT (Oman is the only country in the region which has not ratified). GCC countries that did ratify entered various reservations. Bahrain entered a reservation concerning Article 30 (concerning competence of the ICJ for referral). Saudi Arabia mentioned a similar concern with Article 30, but reserved additionally against Article 20 (regarding the competence of the CAT Committee). The UAE entered reservations on Articles 30 and 20, adding a declaration that 'The United Arab Emirates also confirms that the lawful sanctions applicable under national law, or pain or suffering arising from or associated with or incidental to these lawful sanctions, do not fall under the concept of "torture" defined in article 1 of this Convention or under the concept of cruel, inhuman or degrading treatment or punishment mentioned in this Convention.'

[4] Particular pushback in the case of the CAT is mainly against Paragraph 1 Article 30 of the Convention, relating to the competence of the committee and referral of cases to the ICJ.

[5] Torture ratings from year 1999 in study of Hathaway (2002). Scale of 1-5, 5 is worst practice. Average in MENA region is 3.3.

[6] Qatar submitted in 2000, Reserved 'Any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion' (*later withdrawn and amended)*.

[7] Qatar (*withdrawn*), Tunisia (*withdrawn*).

[8] Kuwait, Morocco, Saudi Arabia, Turkey, UAE.

[9] Bahrain, Kuwait, UAE, Tunisia (*withdrawn*).

Where Qatar initially expressed reservation upon its ratification of the CAT ('Any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion'), it later removed this statement, reserving instead only Articles 21 and 22 (concerning competence of the committee). It is puzzling and even more provoking that Qatar holds the lowest possible torture rating among its GCC neighbours, according to Oona Hathaway's measures (1.0), yet Qatar was the only Muslim-majority country to mention possible tensions with Islamic law in its reservation. Qatar faced significant backlash from other state parties to the treaty that expressed concern with Qatar's RUDs submitted (and accepted) upon ratification in 2000. Some years after acceding, Qatar withdrew these controversial reservations, a move one Qatari diplomat explained was the result of broad social change: 'We withdrew … because with the change of society and decision making ideas we found that there were no remaining conflicts' (Cali and Ghanea, 2012).[10]

Islam and GCC-CAT Diplomatic Dialogues

This section will analyse the ways in which Gulf representatives have subsequently discussed Islam and punishment in relation to CAT ratification, highlighting trends and differences in interactions after ratification between GCC countries and over time. CAT ratification has stimulated a space for dialogue in which conceptions about Islam and punishment have been contested. Interactions have also served as a forum in which Gulf representatives have all pushed back against UN imposition of certain 'universal standards' in various ways, all the while consistently framing Islam in language of humanity and modernity, particularly as a religion firmly in support of so-called 'justice' and 'fairness.'

Islam supports 'human rights' and 'human dignity' and abrogates 'torture'

Although Islam was not central to GCC initial RUDs to the CAT (with the exception of Qatar), the topic of controversial Islamic punishments quickly became prominent in resulting diplomatic dialogues between GCC representatives and the CAT Committee. One important way in which discourse has been framed in GCC engagement with CAT has been the ways in which Gulf state representatives have all described Islam as against gender 'torture' and in favour of 'human rights' and 'human dignity.'

In a 2001 dialogue between Saudi diplomats and the UN CAT Committee, for example, the Saudi delegation insisted that the Kingdom fully upheld human rights in its law:

> The Kingdom of Saudi Arabia protects human rights through its system of law and order in the light of its Constitution. … [A]cts of torture were already prohibited in the Kingdom's judicial and administrative legislation (CAT/C/42/Add.2).

Later, when defending criticisms from the committee for Islamic punishments 'such as flogging, and its domestic legislation and jurisprudence based on its own interpretation of certain religious principles' (CAT/C/SAU/Q/2), the Saudi delegation refuted allegations of torture, insisting that the Koran stood against 'torture' and, by extension, that the acts referred to were forms of religious justice that did not amount to torture:

> The sanctions referred to in the Koran were not forms of torture within the meaning of Article 1 of the Convention—which excluded pain or suffering arising from, inherent in or incidental to lawful sanctions—precisely because they were the law of the land. The

> Saudi Arabian Code of Criminal Procedure prohibited the infliction of any punishment other than that prescribed by the Shariah or the law.

Similarly, the Qatari delegation insisted in its summary meetings with the CAT Committee that Islam was against torture:

> The Islamic sharia totally prohibits acts of torture and other forms of ill-treatment, since such acts are an affront to human dignity, which the religion enjoins us to respect and protect.[11]

Emirati delegates echoed these claims more broadly, suggesting Islamic law did not stand in the way of basic freedoms, including freedom of expression, in response to criticisms of the torture and cruel treatment of certain prominent bloggers and social media users who had criticised the government (Human Right Watch, 2016f). Emirati delegates directly referred to Islamic law's compatibility with principles of freedom:

> UAE Freedom of expression and scientific research was guaranteed under the Constitution, and everyone had the right to express his opinion orally or in writing, without prejudice to Islamic law and the unity of the people (CAT/C/SR.656).

Conflict between Islam and CAT is 'rare' or 'small'

Another aspect of Gulf engagement with CAT has been the defence which religious practices have perceived as conflicting with international law as only 'rare' or 'small'. These statements frame Islam as the reason for which the state held otherwise unpopular practices, defending them by claiming the practices were uncommon.

Saudi delegates, for example, used this tactic to respond to criticisms about the flogging of certain prominent bloggers, issuing broad assurances rather than specific defences: 'As a rule, Saudi law did not condone flogging' (CAT/C/SR.1405).

Qatar, for example, justified practices of amputation and stoning in criminal punishment in the country as exceptions that must be justifiable under Sharia, but defended them by claiming they were rare:

> Article 1 of the Penal Code stipulated that Islamic sharia applied to the crimes of theft, banditry, adultery, apostasy and alcohol consumption, when the perpetrators or victims were Muslims. Under the same article, stoning and amputation concerned only a very small number of offences and were hardly ever put into practice (CAT/C/SR.710).

Islam as a source of 'protection'

Engagement between GCC and UN diplomats in CAT Committee meetings also developed a discourse relating to Islam as a positive source of 'protection' against torture. The Saudi delegation, for example, refuted accusations of torture, claiming that Sharia forbids it: 'As to confessions obtained under torture, Article 187 of the Code of Criminal Procedure expressly stated that evidence obtained in that manner constituted a violation of the Islamic

sharia and was to be deemed null and void' (CAT/C/SR.1405). UN diplomats also contributed to framing Islam this way; for example, a European UN CAT committee member, Mr. Camara, opened a CAT meeting with Kuwait as follows: 'Mr. CAMARA, warmly welcoming the submission of Kuwait's report, said that Islamic countries had nothing to fear from an appearance before the Committee, since there was no place for torture in the rules of evidence established by Islamic law' (CAT/C/SR.334).

CONCLUSIONS

GCC states' engagement with the CAT has produced a framing effect on discourse, where GCC representatives have increasingly discussed Islamic understandings of justice and punishment in modern terms as firmly against 'torture' and 'cruel punishment.' Importantly in the case of the CAT, the relevance of Islam to GCC understandings of just punishment did not manifest itself in initial RUDs. Such initial statements issued by GCC states upon ratification did not initially capture significant commentary on Islam, and thus did not have any initial 'framing' effect on discourse about Islam and torture during this step in the ratification process. Later on in the process of diplomatic dialogue between GCC state parties and the CAT Committee, however, Islam became a topic of key concern, and a framing effect resulting in changed language and concepts used to discuss Islam as against torture manifested in CAT meetings with GCC diplomats over time. These changes, I argue, constitute a stage of norm diffusion.

CAT ratification in the GCC has revealed tensions between a Gulf state desire to be perceived as modern and compatible with international human rights efforts alongside an opposing desire to assert arguments about Islamic exceptions to UN human rights efforts. Where UN human rights treaties have failed to result in improved human rights practices on the ground in a conventional understanding of successful norm diffusion, they have provoked increased communication over an evolving and variegated dialogue about Islam and human rights. This is a form of norm 'localisation' in a diffusion process. Without modernising and liberalising language and concepts about human rights, one cannot expect liberalised practices. Changes in language about norms among diplomats is a necessary, but not sufficient step in the norm diffusion process worth tracing. Because ratification is theoretically a voluntary action by states, as opposed to other human rights environments such as responding to outside governments or NGO human rights activism, ratification has served as a unique space in which arguments about Islam and women's rights have been voluntarily expressed and negotiated, revealing a diverse and evolving discourse among GCC states about the topic stimulated by CEDAW ratification. The findings reveal the GCC states are not monolithic in the ways in which they communicate understandings of Islam and punishment, while highlighting the continued relevance and centrality of Islamic understandings of punishment to the debate concerning human rights in the region.

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TO WHAT EXTENT DOES THE LAW NEED TO DO MORE TO ADDRESS GENDERED DISCRIMINATION IN EMPLOYEE DRESS CODES?

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ABSTRACT

This paper advocates reform to address discriminatory attitudes to dress, focusing on the adverse effect on women. It agrees with the conclusions of the High Heels and Workplace Dress Codes Inquiry that compensation should be awarded in the interim, with serious reconsideration of the Equality Act 2010 (EA) in parliamentary debates in March 2017. Nevertheless, the high threshold tools for reform, through notions such as 'direct discrimination', fail to tackle the nuances of the problem; not least that 'sex sells' (Chapter Three), and debates surround 'what woman is' (Chapter Four). An element of scepticism is needed for a law that has at least perpetuated, and at most created, rigid gender binaries seen as relevant when establishing dress code policies. A holistic socio-legal analysis of why gender distinctions are relevant is more appropriate than law alone in providing sustainable reform in this area.

Keywords: Gender equality, Dress Codes, Discrimination, High Heels Inquiry

INTRODUCTION

The *de jure* 'glass ceiling', operating through unequal treatment of women in dress discrimination, is symptomatic of outmoded patriarchal attitudes, restricts true equality and operates as a significant anomaly to otherwise progressive EA motives. The Parliamentary Inquiry has significant strength to take the unacceptable practices seriously, and overdue legal reform is now suggested to be on the horizon. Legal tools cannot operate in a vacuum, however, and the deeply-entrenched views underpinning society must also change. Blanket legal reform is made more difficult by two problems: i) objectifying women through their sex has tangible commercial benefits (a 'sex sells' argument), and ii) society's discrepancies in gender identity are ill-addressed (a 'femininities' argument). To be effective, reform should not be used politically to quieten feminist thinkers, if these two strands remain operative considerations for employers. Reformists must borrow from socio-legal, psychological and philosophical thought to see law's interaction with societal perceptions as the only way to achieve significant reform.

Aims

The year 2016 was a significant year for dress, from the French 'burkini' prohibition to Theresa May's 'glass cliff' ministership being overshadowed in the media by her loud footwear (Ryan et al., 2014). One case had a particularly high profile—Nicola Thorp sent home from Pricewaterhouse Coopers for refusing to wear high heels. Media attention, online petitions and a subsequent parliamentary inquiry brought this issue to the forefront of numerous other legal debates, defining discrimination/equality, individuality in law, perceptions of femininity, formal and substantive equality and the masculine bias of law creation/enforcement. Thorp's plight caught my attention and I decided to locate the legality of 'reasonable and conventional' standards of dress, before analysing its compatibility with wider societal views. In pursuing this objective, I will be one of the first to engage in academic, extended research related to the inquiry.

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This paper attempts to raise awareness of an issue that may only offend a number of feminist theorists and fall on deaf ears in our particular socio-political climate, still out of reach of the patriarchal system. Reflecting on these aims, the increased political interest in the issue has also led to a conservative backlash, forcing me to regroup and further justify the worth of the research. Tabloid-style rhetoric could not disguise some valid opposing arguments, including freedom of contract, the dangers of paternalistic intervention in capitalist societies, and that dress ranks low in a hierarchy of political problems facing a 'Brexiting' Britain. This has prompted much of the 'macro' outlook adopted throughout: the law must do more to address discrimination in dress because of its symbolic and thematic relevance.

During preparation, the conscious decision to focus on women's discrimination has been made; acknowledging discrimination based on race, disability and age, their inter-sectionalities and the marginalisation of the transgender individual, probes linked and relevant questions but falls beyond the scope of this thesis. It is hoped that others will ask whether legal reform is needed to overcome these problems.

Methodology

This paper combines a black-letter analysis of English and Welsh law with socio-legal understandings and feminist theory to form a relevant, modern analysis rooted heavily in its 2016 context. The frequented legal position forms only the 'undergarments' of the suggested importance of this thesis, and it has been necessary to directly apply the fast-moving discourse to abstract law through non-traditional sources: Thorp's website, the Twitter hashtag #highheelsinquiry, evidential podcasts, news sources and blogs.

LEGAL CRITIQUE: 'A PWC V THORP [2017]?'

In considering a '*PwC v Thorp* [2017]' should her dismissal be litigated, this section will apply and evaluate the four types of discrimination under the EA – direct (s.13), indirect (s.19), harassment (s.26) and victimisation (s.27).

Direct Discrimination

The nature of binary gendered dress codes is often alarmingly simple: 'men wear X, women wear Y.' Thorp's case is likely to fall under this heading of direct discrimination (discrimination 'because of gender'), as the firm's Code stated women must wear heels, with no corresponding requirement for men. This would, however, likely be another frequented example of 'demeaning' discriminatory women's uniforms,[2] which are not treated judicially as less favourable to an 'actual or hypothetical' man (s.13 EA). If women's polyester uniforms while men wore suits[3] or women-only 'little hats'[4] did not lead to a legal remedy, why should high heels (which many see as conveying authority or power) do so?

Furthermore, 'women must wear nail varnish' rules returned the verdict of *de minimis*[5]— the requirement that women alone paint their bodies to display a version of their gender identity being so insignificant as to destroy the likelihood of a claim, even though the elements of direct discrimination were made out (Zalesne, 2007, p. 2). This suggests that even if Thorp's heels could be found to be more onerous than the men's dress code and thus satisfied the test, it could be struck out by unsympathetic 'judicial laissez-faire' (Levi, 2008, p. 5). Highly offensive to the proposed significance of dress discrimination, obiter judicial statements to 'restrict a culture of hypersensitivity' (Richmond Pharmacology v Dhaliwal, 2011) reflect a potential prevailing view explaining inaction and ambivalence from the Bench. Highlighted as out of touch with the progress of other sex discrimination claims (Levi, 2008, p. 3), dress law interpreted on

[2] *Burrett v West Birmingham Health Authority* [1994] IRLR 7.
[3] *Cootes v John Lewis Plc* [2001] All ER (D) 395.
[4] *Burrett v West Birmingham Health Authority* [1994] IRLR 7.
[5] *Murphy and Davidson v Stakis Leisure Ltd ET* (1989) S/0534/89.

'conventional sex differences'[6] is seen to rebut the underlying rationale of the legislation to challenge discriminatory assumptions.[7] Alarmingly, this has led to commonplace attempts to strengthen cases through supplementary considerations encompassing some of the worst discriminatory elements: psychiatric damage,[8] gender dysphoria[9] or the contention that dress codes perpetuate stereotyped views of women as inferior or as sexual objects. The legal approach therefore remains one of a large margin of appreciation to employers,[10] with 'accessories' to law needed for substantive legal benefit.

It could be argued that the judiciary, themselves wearing archaic wigs and gowns (Robson, 2013, p. 48), remain immune to these problems. Judges often represent masculine viewpoints, even if they are not all male. They see their wives applying make-up, or apply it themselves, so struggle to empathise with those bringing claims (Levi, 2007, p. 20). Female judges put on high heels to gain status in the courtroom (ACAS, 2016, 38). The privileging of the 'ornamental' woman (Crane, 2000, p. 16) through appearance codes is seen as sensible, competitive and not illegal. Dress codes instigating specific and different rules for women and men are commonplace, 'conformity' with societal gender norms encouraged, and the professional projection of companies successfully used to justify[11] an apparently non-derogable obligation.[12] It is apparent that in this area the views that high heels should be a 'choice not requirement', and that an obligation to wear them 'reeks of sexism' (Bates and Parkinson, 2016), remain unique to the abstract commentators lobbying for reform. Conclusively, until this position is debated, the law would respect the innocence of PricewaterhouseCoopers in looking to 'common practice' within the industry and 'professional appearances', without analysing whether this could be achieved in a less onerous way.

Lemes (2009) highlighted *obiter* that many women feel uncomfortable, objectified and prostituted when forced to wear heels. The College of Podiatry's Inquiry responses, however, highlight genuine health concerns from permanent back, posture, ankle and foot problems through to pain tolerance averaging only around 40 minutes. These show that the aesthetic reason compelling heels is not taken lightly, and is engrained and normalised among many fashion choices that impede health. Opponents arguing the fragility of the symbolic argument would surely struggle to rebut proven medical harm caused by heels. Furthermore, in a 'compensation culture', we would question why high heels on shiny marble floors are not prohibited rather than mandated to avoid employer liability, following trends elsewhere.

Other Grounds

The peculiar situation is that many unsuccessful direct discrimination cases are squeezed into indirect discrimination, which provides for gender-neutral rules with the effect of differential treatment through a 'policy, criterion or practice' (PCP). Albeit incorrect, use of indirect discrimination is more favourable to employers, as it rebuts *prima facie* illegality by allowing justification: business conventionality and perhaps even brand image akin to aesthetic labour (Chapter Three) become engaged. A genuine indirect gender claim could be the PCP of a blanket prohibition of earrings, which adversely impact women, as they tend to have pierced ears more often (ACAS, 2016). Ultimately, however, the majority of dress codes bypass this discussion as they have nothing to hide; the law allows gendered distinctions, so common practice is to have two dress codes. They are not caught out because they fall short of the 'bolted on' tests for favourability of treatment that legal direct discrimination has developed to protect

[6] *Fuller v Mastercare Service and Distribution* [2001] All ER (D) 189.
[7] *Smith v Safeway plc* [1996] IRLR 4656 CA.
[8] *Lemes v Spring and Greene Ltd* (2009) ET 2201943/08.
[9] *Kara v London Borough of Hackney* [1996] UKEAT 325_95_2802.
[10] *Schmidt v Austicks Bookshop Ltd* [1978] ICR 85.
[11] *Kara v United Kingdom* (1999) 27 EHRR CD272.
[12] *Department for Work and Pensions v Thompson* [2004] IRLR 348.

current practice (Wadham, 2012, p. 55). The utility of indirect discrimination lies beyond the scope of this paper in the religious parallel (in not allowing head coverings[13] or jewellery[14]), which adversely affect demonstration of faith (skewed towards women), perhaps reflecting unaddressed cultural insensitivities in the UK, or—worse—using the shield of derogable obligations to discriminate. Victimisation and harassment also have some limited utility, such as cases where skimpy clothing encourages unwanted attention, and are prevalent for their value in pre- and post-employment claims. The frequency of all four being claimed despite direct discrimination being obvious in gender cases, however, reflects the lack of certainty/confidence in success in these cases and reflects further why the law should be reformed.

Suitable?

Media attention has raised the profile of dress in the last six months. Legislation from 2010 (Equality Act 2010), however, is unlikely to be wholly inaccurate or unsafe in the 2016/7 context. Reform proposals must acknowledge that the law reflects extensive domestic review and conclusions regarding what non-discrimination looks like constitutionally. Without explicit legislative comment on dress discrimination, it remains 'good law.' I do not believe there is value in upholding discrimination, but the opposing view may represent the oft-criticised masculine lens of law, which struggles with the nuances of women's advancement position. Moreover, some viewed the Equality Act 2010 as 'political correctness gone too far', summarised as 'white men need not apply' (Wadham, 2012, p. x). Law's ambivalence can therefore demonstrate that, for many, the legal position is still suitable or even overly generous.

Thorp's case would undoubtedly run all four types of discrimination, as well as health and safety concerns to strengthen the case. In a culture without legal aid, this creativity necessary for successful application of law is unsuitable. The masculine-lensed ambivalence of the judiciary in implementing law prohibit true efficiency through legal reform alone, and notions of gender normality in society, need to be outlined in some form for any intended consequence to trickle down to individualised justice in employment tribunals. Further probing of the roots of discrimination in law are needed.

THE 'OCCUPATIONAL QUALIFICATION' OF SEXISM: LESSONS FROM THE USA?

Within 'sex' discrimination, the central consideration premising differential treatment is the objectification of women for the purposes of sex. The idea of 'privileging of the ornamental' (Crane, 2000) across western societies must be developed, most notably comparing the domestic situation with the explicit American legislation through Title VII Civil Rights Act 1964 to draw attention to the prevalence of sexualisation in the dress code discourse. Despite consideration, this analysis is confined to 'forgetting lessons from the USA', arguing that the US exemption for discrimination when 'selling sex' (Assiter et al., 1999), jars with a satisfactory resolution of the autonomy/equality discourse.

When seeking a comparator for Chapter Two's compulsory heels for organisational professionalism, we draw an uneasy parallel with the same requirement alongside 'tight-fitting, sexy, uncomfortable costumes' in the 'Babes and Beefcakes' of the American literature (McGinley, 2007). The US Title VII prohibition against sex discrimination allows employers to hire women for sex appeal, if the 'central mission' of the business is to sell sex (Rafaeli and Pratt, 1993, p. 3) —a 'bona fide occupational qualification' (BFOQ) (s.703(e) Title VII Civil Rights Act 1964). Perhaps counterintuitively, this means that the highly-legislated, constitutional 'protection' (Shin, 2007) that we could be calling on for UK reform advice would

[13] *Azmi v Kirklees Metropolitan Council* [2007] IRLR 343.
[14] *Eweida v British Airways plc* [2010] EWCA Civ 80.

allow exotic dancer clubs (McGinley, 2007, p. 17) and perhaps Hooters or the Playboy mansion (Williamson, 2006, p. 16) to rebut sex discrimination claims by invoking that their business model necessitates scantily-clad women.

Autonomy?

If the link of sexuality in Thorp's case was inexplicit, an additional element of the BFOQ test springs from another, albeit relatively archived, Price-Waterhouse litigation: discrimination must adversely affect the claimant's ability to her job.[15] The law's utility is therefore demarcated by the idea of 'willingness to serve' (Watt, 2013, p. 184), and it should be considered that many women feel empowered, in control, valued for their sexuality and autonomous due to the same dress codes that others would find discriminatory. The argument could be invoked that women have earned the right to dress in a provocative manner and be proud of their sexuality (Keenan, 2001, p. 45), and if the sex-based industry is a reality, the US law would be paternalistic in not respecting the proven effectiveness of sex to drive up business among willing participants. This, however, goes to the heart of the feminist debate of the right to choose to be sexually attractive vs. protecting equal treatment for men and women.

Virgin

The dangers of justifying sex discrimination through Title VII have led to its narrow successful application by courts in the case study of airlines. *Diaz v Pan American World Airway* (1972)[16] and *Wilson* (1982) highlighting BFOQ failure where 'safe transportation of passengers' was the business purpose, with 'the sex appeal portion of the job tangential to its duties' (McGinley, 2007, p. 9). Airborne Collision Avoidance System (ACAS), however, moots Virgin Atlantic as having one of the worst offending dress codes. Falling short of the US 'BFOQ' test should not prevent us from noting that air hostesses' appearance is seen as relevant to their role, despite and perhaps above their performance. While we could see that the 'extremely feminine silhouette' of professionally-styled Vivienne Westwood uniforms are a genuine ode to power-dressing (Friedman, 2016), and admit there is truth in Sir Richard Branson's 'If you dress in clothes that make you feel you look good … [you] do your job a lot better' (Nicholson, 2014), this mirrors the direct gendered discrimination of Chapter Two, as such comments are targeted at the 'erotic capital' of women in exclusive hiring.

Abercrombie

As an all-American 'tweenaged' brand, explicit sexuality would no doubt be age-inappropriate in the case of Abercrombie. Nonetheless, perpetuating a 'cool' brand has seen much of the aforementioned law applied—their business aims aligned with strict application of appearance codes and the aestheticisation of labour. From prosthetic arms[17] to headscarves (Basin and Fairchild, 2013), a number of litigations have led Abercrombie to 'overhaul' its distinctive exclusive hiring policy, under which 'models' were previously weighed at interview and selected when shopping in store rather than through direct applications. They have also reviewed their 'sexualised marketing' featuring semi-nude models on gift cards and shopping bags (Goode, 2015). However, while official statements reassure customers of the hardly novel or forward-thinking approach that Abercrombie will not 'discriminate based on body type or physical attractiveness', the real motive behind the change can be summarised in plans 'to cater for more shoppers' and remedy a 39% fall in shares (Kasperkevic, 2015). Using the language of BFOQ defence in its public statements, it is clear that the 'famously preppy, rumpled, hormonally charged aesthetic' in its Look Policy is at the 'very heart of its business model.'

[15] *Price Waterhouse v Hopkins* (1989) 490 US 228.
[16] *Diaz v Pan American World Airways* (1972) 346 F Supp 1301.
[17] *Dean v Abercrombie and Fitch* (2009) 2203221/2008

As the law mobilises to address gendered discrimination, it must have open and frank discussions about exclusive hiring arrangements and the commoditisation of female sexuality leading to tolerance of discrimination. Directly skewed against the interests of equality for women, the US approach to Title VII is inappropriate for its purpose—to allow equal access to job opportunities, not to abolish every sex dependent practice from the workplace in the abstract (Willingham, 1972). While acknowledging the differential context, not least in the European influence on our equality laws, it is evident that our messy, judicially-created law should not draw inspiration from the American situation, which considers employee protection last. Suing for $35 million from Abercrombie's flagship store (Showalter, 2016), the tale of a transgender employee forced to ascribe to the already-criticised gendered dress as what 'customers wants to see' provides an ideal bridge between 'selling sex' (Chapter Three) and gender identities (Chapter Four).

GENDER IDENTITIES: 'WOMEN ARE FROM VENUS'

A legal framework no more nuanced than direct gender distinctions (Chapter Two) presents further problems when we consider that notions of 'what woman is' are not homogenous. Beyond the realms of Human Rights campaigns urging that transgender employees be able to dress consistently with full-time gender presentation, a 'conventional standards' approach means that even now it would be almost impossible for a man to claim for not being able to wear the same high heels that are a requirement for women.[18] There will be no domestic or European remedy in the absence of an intention for gender reassignment surgery following Kara, and judicial anachronism can be highlighted in that sex and gender terminology is still used interchangeably in court judgements (Lemes, 2009). Despite prevailing views that one is biological and one reflects gender identity, conventionality is so engrained as to ignore their severance. This paper considers one facet of an artificially binary system—not the impact of dress for trans individuals, but this extreme end of a continuum where gender identity jars with required 'conventional' dress, illuminating the struggles of an individualistic element of femininity mapped far from what dress codes consider uncontentious.

Fair treatment is premised on these binary assumptions: women wearing skirts,[19] men wearing suits.[20] Some 'unwritten' dress codes expect the socialisation of individuals to second-guess the subjective employer expectations of conventionality, or 'learn the dress norms', using phrasing like 'no unconventional hairstyles.' This suggests that even for professionals, cautious of litigation scrutiny and refraining from explicit codes, dress conventionality has relevance. Three feminist viewpoints challenge this artificiality; Butler's view that gender is communicated through social performances via appearance, not the other way around, with no concrete, inherently feminine or masculine self (Butler, 2000); Davis' view that hegemonic femininities are patriarchal, emphasising sexuality and appearance for control (Davis, 1999); and Heckman that feminism is no longer based on a universal concept of womanhood (Heckman, 1999). This 'new conventionality' is making an impact.

Judicial reasoning, however, represents the polar opposite. A waitress's refusal to wear a short red dress was 'vehement', her views about modesty and decency 'unusual in Britain in the 21st century' (Lemes, 2009). One questions which feminist theorists, or even women, were consulted to get this homogenous view of conventional femininity and their attitudes towards modesty. With the unilateral modification of dress, without consultation, making the claimant 'constitutionally unable' to work, we question why this does not form precedent as a good example of constructive dismissal: sexualised dress only justified anywhere if it is relevant to the performed role (Title VII), unlike waitressing. The answer is that conventionality is

[18] *Ryder Barratt v Alpha Training ET* (1991) No. 43377/91.
[19] *Schmidt v Austicks Bookshop Ltd* [1978] ICR 85.
[20] *Department for Work and Pensions v Thompson* [2004] IRLR 348.

perceived by the judiciary with no objective analysis, meaning a dress which most women regardless of their politicisation would class as inappropriate. This is not anomalous, or *Stevenson*'s non-conformity misunderstood and justified—'the image of a stereotypical heterosexual female is a female wearing a dress, heels and make-up. … The claimant normally wears trousers, flat shoes and no make-up. She dresses well, would normally wear a trouser-suit for work', her above average performance ignored.[21] Short of a 'lesbians ignite' badge,[22] reflecting a freedom of expression case but jarring with standard notions of appropriate dress, these claimants were still dressing conventionally in business dress, simply refusing elements of a dress code they found grossly offensive, and could not find legal remedy.

Thorp falls into this category: she would have looked smart, if not smarter, in flat shoes with a business suit. Yet she was dismissed. In Thorp's case, *de minimis* and conventionality arguments make it likely that her discrimination claim would have failed without the current scrutiny of high heels. Regarding identity, Nicola herself in the parliamentary inquiry offers that if she had identified as 'Nicholas', her case would have been stronger (Petitions Committee, 2016). Ultimately, this shows that, despite the prevalence of marginalising trans discourse in law, they are seen as significant in the ranking of dress code violations and prioritised over the inherent problems with conventional femininity, which rank last and are accepted and justified in law.

Disparate identities make a law premised on 'reasonableness and conventionality' difficult. The nuances of why female dress code conventionality sustained on patriarchal norms is absurd, and the increasing range of individualistic notions of identity, are not understood or enforced by the current judiciary. This must be addressed during reform considerations.

'COVERING UP'

This research has identified gendered discrimination in dress codes, viewed through the lens of the current High Heels Inquiry. The expected conclusion of EA reform has, however, been tempered by societal barriers, suggesting that removing the law as it currently operates without addressing *why* our constitutional protection of discrimination was so limited in the first place would lead to foundational flaws. In providing effective reform, consultation and democratic consideration of the issue is needed, for example in analysing why we distinguish between genders *ab initio*.

The narrow focus of this paper may also be unsuitable moving forward. In tackling dress discrimination, we must acknowledge that, in granting intermittent equality protection for minority groups, we send a discriminatory message. Reform proposals should go beyond 'high heels, skirts and make-up', not least in addressing the societal ignorance of dress customs of religious groups that are not catered for in contemporary dress codes. Furthermore, the law's approach could be too juvenile to deal with linked discourses surrounding how the EA has focused its 'protected characteristics', and whether discrimination falling outside of the scope of the current law (such as against tattoos and piercings in the workplace) should be considered.

There is no way of predicting the outcome of the current inquiry; there are precedents for upholding the minimum level of formal equality to suit political desires, without necessarily engaging with the disparate views on the issue. Disquiet on other gendered issues has not led to complete reform as proposed, and indeed we may question whether the law wants to get involved, or change its inherent attitudes. A conscious effort should therefore be made perhaps even to re-route the likely legal solution concentrating on high heels, of limited protection against a backdrop 'hypersensitivity' viewpoint, and locate the relevance of the debate with macro approaches. Law can provide an element of 'stick' through effective legal enforcement

[21] *Stevenson v Avon Cosmetics* [2014] WL 8663532.
[22] *LM Boychuk v HJ Symons Holdings Ltd* [1977] IRLR 395.

of new rules and punishment and 'carrot' through raising awareness to change attitudes, which has already taken place to an extent through media and social media attention.

This paper has contributed the formal literature on the legal reform position—'law must do more'—proposing reform of discrimination generally, acknowledging the pitfalls of the legal control and trying to use legislation and law enforcement procedures to ensure an effective, sustainable mechanism. The problems with dress discrimination are symptomatic of discrimination generally, and narrow legislation or badly addressing the outmoded views of tribunals and employers could lead to discrimination change rather than eradication. This research could therefore act as a springboard for further analysis opportunities into judicial training and appeal procedures, for example, which could contribute to an extensive consultation process.

In explaining *why* discrimination exists, however, political contexts have been important. Sex sells, and in a capitalist society, over-intervention may challenge business growth; regulation and legislation must be justifiably important to retract from a *laissez-faire* approach otherwise. Similarly, law's utility in prompting change in this issue is restricted as the vehicle of historic perpetuation of binary genders and patriarchal control. The predominant approach is one of 'separate but equal', 'different but not less favourable', rather than seeking true equality and the opinions of those affected. Law does not operate in a vacuum, and in a turbulent post-Brexit climate, the political insight required to challenge this issue is unlikely to materialise. While perhaps tempering the likelihood of wholescale reform, law-makers' ignorance demonstrates the need for the accountability of media, the value of the parliamentary petition and, not least, the importance of academic theorising in an area that perhaps might otherwise have escaped scrutiny.

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LAW AS AN ENABLING DEVICE

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ABSTRACT

To many, law may be perceived as nothing more than a restrictive device. To the legal scholar, however, law may be perceived as an enabling device, even where it restricts. Nonetheless, it would not be appropriate to maintain that every restrictive norm enables. A paternalistic norm may enable; a tyrannical norm by definition restricts. This exposition advocates the position whereby law can effectively be a device of freedom. Correspondingly, there cannot be freedom without law, even though the opposite is not necessarily true. Furthermore, law, as an enabling device, points to liberal legal theory. The classical statist model of liberalism, as compared to the more communitarian model of liberalism, is promoted, even though partial inroads to communitarian liberalism are made (especially where the State is an absentee). The model promoted is also the one which comes with rights and duties: it is of relative nature and makes allowance for a hybrid state of affairs, wherein *anthropos* is the carrier of rights but also, importantly, the fulfiller of duties. Law serves man; equally, man serves the law. The paper proceeds with the elaboration, exemplification and critical analysis of the above, based on relevant literature from legal, political and economic theory. Thereafter, certain practical and theoretical connotations of the proposed analytical model are considered in detail. The analysis thus takes into account classic legal theoretical matter and tests such matter against the operation of law in the domestic and the international sphere. For instance, the analysis will revert to the theoretical differentiation between norms, laws, rules and commands by explaining how such variable legal issues can be manifested in practical matters. In this respect, the leading example of the legal harmonisation thesis will be utilised in the manifestation of certain of the points made, especially considering that such a thesis has wide-ranging implications for the domestic and the international sphere.

Key Words: law, liberalism, statist liberalism, communitarian liberalism, anthropocentricity, values, principles, norms, rules, commands, harmonisation of laws

INTRODUCTION

'The freedom of the mind is the source of all freedom' (Jenks, 1969, p. 54).

This article deals with the fact that law is an enabling force—a force of freedom for society and individual. It thus negotiates the desirability of law acting as an enabling device. It acts on the established hypothesis that a perfect life is in agreement with fair laws, while human existence succumbs to no other man but to laws and laws alone.

LAW AS AN ENABLING DEVICE

To the lay person, the law must surely be perceived as a restrictive device. 'Law restricts us.' – 'There is too much red tape.' – 'Regulation is all too abundant.' Let us take a closer look at the related questions. First of all, the lay person may certainly be excused for thinking law to be a restrictive and bureaucratic device, when law may actually not be such a device. The reason for such a misconception may be that, with the development of society and corresponding laws, law became an ever more distant reality to the lay person, a technocratic chimera. Yet such a perception neglects the very essence of law. When it comes to an initial categorisation, legal norms in any given society can take a number of forms:

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- Norms which are not paternalistic (purely enabling);[2]
- Norms which are partially paternalistic (generally enabling);
- Norms which are wholly paternalistic (enabling on the basis that, even though these deprive choice, come about by way of democratic process); and
- Norms which deprive freedom (restrictive).

FREEDOM AND LAW

Law thrives in freedom. Law liberates. When it restricts, it ought to do so in the name of the freedom of the many—the enlightened many. Law enables. It is with trust that one abides to such law cognisant of the fact that laws will not always be free from error. Laws are otherwise not walls but pathways of freedom. In the realm of law, we hold that these truths are eternal. Our laws do not, however, operate only in the interests of justice; they also seek fairness and *epieikia*. Furthermore, the call for freedom is one that expands all over the world.[3] To the author, freedom takes two forms: freedom of the mind and freedom of commercial operations. The former has to do with the primordial fundamental rights of the individual; the latter has to do with the co-extensive economic rights, which arise from civil rights and liberties in the first place.

Freedom cannot be guaranteed without law, even though the opposite is not necessarily true. Three centuries ago, Locke argued: 'Where there is not law, there is not freedom' (Locke, cited in Domingo, 2010, p. 138). Normally, for laws to enable, they should come in the form of rules (as opposed to them coming in the form of commands). The following example is illustrative of our point:

- 'Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement'[4] (example of a rule); and
- Any compulsory civilian/military conscription law (example of a command)

The difference between a rule and a command is that the former comes with an expectation (e.g. good faith in trade operations), while the latter comes with an obligation (e.g. civilian/military service). The former aspires to changing human behaviour; the latter imposes a predictable (Reynolds, 2005, p. 334) change in human behaviour. The former points to an 'ideal' state of affairs, while the latter imposes an 'ideal' state of affairs. The point of convergence between the two is that both rules and commands make the law, while breach of either may come with legal sanction. However, there is a clear preference for a legal framework which enables by way of rules rather than by commands. As Robin Letwin has rightly argued: '[o]ur freedom of choice depends on the extent to which we are governed by regulations that have the character of rules rather than orders' (Letwin, as cited in Reynolds, 2005, p. 334). This builds on established legal doctrine, according to which '[t]he notion of law as a command and merely a command cannot be satisfactory to anyone' (Buckland, 1945, p. 49).

The Willenstheorie may have a role to play in this respect. This theory provides that the 'the rule of law gives effect to each man's will so far as this is consistent with equal freedom of other men's will, according to a universal law of freedom' (Buckland, 1945, p. 49).[5] Freedom is, thus, one of boundaries.

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[2] This agrees with the approach expected under the calls of liberalism (political liberalism and legal liberalism being the counterparts of economic liberalism). Recent European examples of liberalisation in the sphere of legal services are Directive 98/5/EC (Establishment Directive) [1998] OJ L77/36 and Directive 2005/36/EC (Recognition of Qualifications Directive) [2005] OJ L255/22. For an illuminating discussion see R.G. Lee, 'Liberalisation of legal services in Europe: progress and prospects' (2010) 30(2) LS, pp. 186-207.

[3] In the sphere of economic laws, the obvious examples are those of the World Trade Organization, the European Union and the North American Free Trade Agreement. The idea behind these organisations is the creation and sustainability of market liberalisation. In relation to the European Union see e.g. R.G. Lee, 'Liberalisation of legal services in Europe: progress and prospects' (2010) 30(2) LS, pp. 186-207, p. 186.

[4] §1-304 (Obligation of Good Faith) of the American Uniform Commercial Code.

[5] Citing Hastie's translation of *Philosophy of Right*, p. 45.

In any case, the notion of law is multifaceted. The following diagram understands law, in its fundamental essence, as a hierarchical system of values, governing principles of law, legal norms and laws themselves. Thereafter, one could extend such a model by including rules and commands.

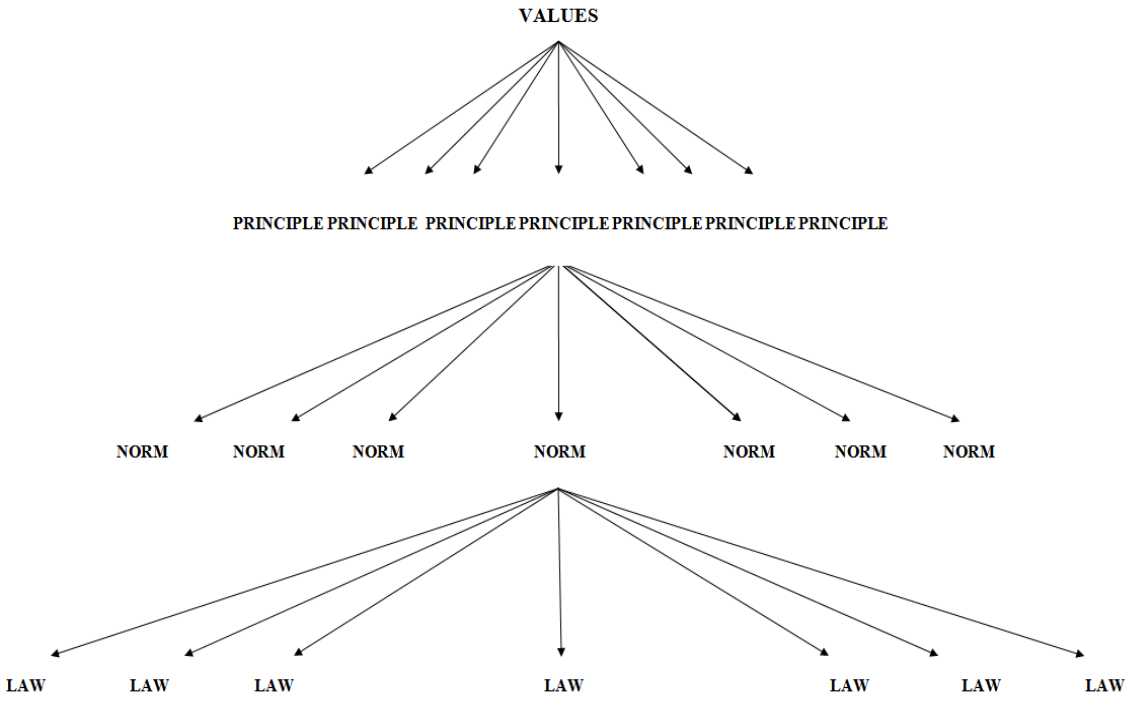

Diagram 1

Values are taken to be definitive notions of human existence; principles are constitutive of values, whereas norms (legal or social) prescribe human behaviour implicitly or explicitly, only for them to be crystallised into concrete laws. Laws, on the other hand, normally contain specific rules and, as stated, may even manifest themselves by way of commands.

The example of the harmonisation of legal systems is indicative of how economic and political values (for example) may be transformed into domestic law. Let us propose that the value of freedom of trade, the old and well-known laissez-faire doctrine, is an economic value, which defines many of the world's legal systems. The more concrete legal principle behind such an economic value is what jurists would call the principle or the idea of freedom of contract. The question would be how would such a principle could transform itself into legal norms and, subsequently, into harmonised law. The European experience on this is illustrative:

Articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union clearly establish such an environment of free trade, in that they have created a normative supranational environment, an internal European market for free trade.

ENABLING LAW FOR AN ENABLING SOCIETY

Law in society is a central characteristic of Aristotle's man as *zōon politikon.* Beyond this, we need to ask whether our analysis should stop at the recognition that human society is made out of political beings who have laws that they should normally respect. The author wishes to depart from such a view, in the sense that the view in question restricts itself to a factuality. The proposition herein is that, while society is made out of political beings, societies are there to enable (as are the laws thereof).

The quest for freedom, happiness and perfection does not, therefore, become an individual exercise, but rather an exercise of the collective that would, in the first place, enable the individual. In such a society, full recognition is granted to 'the principle of equality of rights among citizens regardless of their social, geographical, professional, ethnic, or religious background—or their wealth' (Brousseau et al., 2012, p. 464). This approach also enables a perception of the law whereby the law operates as a uniting force of heterogeneous components in a given society (Reynolds, 2005, p. 328). So far, however, whether the ideas of capitalism or socialism are utilised in one's analysis, these ideas point to a mode of legal machinery operations, which moves either on a top-down basis (from society to individual: socialism) or on a bottom-up basis (from individual to society: capitalism). One is of the view that, while a top-down model is likely, this is to be the case only where the collectivity enables the individual (as opposed to it merely serving the individual). Close to Adam Smith's perception, our proposition suggests that there should be few or no legal frameworks; if such frameworks exist, however, then these frameworks should normally enable the individual. In short, our perception of legal frameworks is a minimal one and, where this is the case, frameworks would be enabling.

One's proposition for an enabling society, through enabling law, places the Rule of Law at the very centre of one's analysis. Accordingly, the position advocated is related to that of legal liberalism, in which case the thesis of Hutchinson and Monahan is of interest. For them, the Rule of Law stands as 'the central jewel in liberalism's crown' (Monahan and Hutchinson, cited in Cotterrell, 1996, p. 456). Rule of law is normally promoted as a form of minimum law (Cotterrell, 1996, p. 463). Legal liberalism is thus the shortest way to a society that manifests its will to promote the welfare of individuals (and by extension the welfare of society itself). To bypass the problem of 'certain individuals [being] […] morally isolated and legally unprotected; unable to and unwilling to call either on legal agencies of the state or their fellow citizens for aid' (Cotterrell, 1996, p. 463), we should put forward an analysis whereby the State (as the crystallisation of a society of the individual) acts in the same pro-active fashion as its pro-active individuals would act in their own life and towards one another. Accordingly, legal liberalism is not necessarily and wholly repugnant of a moderately pro-active State. By having such a model of a State, we escape the need for excessive regulation, which would not fit a State operating under liberal ideals. In other words, while our model of the Rule of Law is promoted as a form of minimum law, inroads to a more expansive Rule of Law are made, especially where a minimum law approach (for example, one that lacks additional legislation to the effect of our Rule of Law) would lead us to absurd or poor results. In our thesis, the Rule of Law is of minimum original specification, but of expansive subsequent operation, where this would be appropriate, only it would not be for the legislator to unilaterally expand such rule of law on a top-down basis, creating a sort of polynomous legal order; it would be for the citizen to directly alert the legislature to the effect of expanding the original core of a limited, in its conception, albeit fundamental Rule of Law model.

In our analysis, the classical statist model of liberalism (Luban, 1994, p. 32-33) as compared to the more communitarian model of liberalism (Luban, 1994, p. 33) is promoted, even though we would probably have to opine that partial inroads to communitarian liberalism could be made (especially where the State would be absent altogether). The difference between the two is found in that the former (statist liberalism) places its emphasis on rights and the rule of law, the model operating mainly in pursuit of order, while the latter (communitarian liberalism) places its emphasis on the relationships of citizens, the model operating predominantly in pursuit of justice (Luban, 1994, p. 33). Individual responsibility is the case in the former model *ab initio*, even though we know that this amounts ultimately to the responsibility of the collective; individual and collective responsibility is *ab initio* the case in the latter model (Luban, 1994, p. 33). Here is where one wishes to make a contribution: while one recognises the paramount importance of individual responsibility close to the calls of classical liberalism, one is of the opinion that collective individual responsibility should manifest itself in the relationships of individuals towards one another and in the absence of the State in enabling. That does not negate one's view in favour of the superior character of classical statist liberalism; it simply places the classical liberalism as the default rule in our analysis, while promoting communitarian liberalism as a reality that would occur in the absence of the State. Communitarian liberalism would only enable if the State of individuals would not.

One still cannot escape the reality of modern legal complexity. Our societies have become peculiar legal creatures of polynomy. Byzantine structures of complexity define the modern legal system. Complex as our societies became, so have our laws. There is inflation of regulation. Maybe then the fact that regulation is created in excess, creates a need to create further regulation. This is hardly satisfactory, and moves us away from the original position for minimum regulation in society. Regulation became the master rather than the servant. Rather than the laws serving us, we serve the laws. This cannot be a state affairs whereby law enables. How could it?

Additionally, even though it is understood that the law, as a whole, is not just a collection of rules but rather a systematic structure (Reynolds, 2005, p. 32), this is not to say that we should sacrifice the degree of freedom, which the law should inspire, at the altar of systematisation. Equally, the degree of systematisation should be one that reinforces the enabling features of the law, not one that systematises legal information by disregarding practicalities and necessities.

IDEOLOGICAL CORE OF THE LAW: *ANTHROPOS*

The individual stands in the middle of our analysis. In other words, our analysis is anthropocentric. This individual is characterised by autonomy and liberty (Ogus, 2010, p. 65). Collectivist understandings of law and *anthropos* are worthy of accommodation in our proposed thesis to the point that collectivism does not disallow even marginal understandings of individualism.

Law serves man; laws are not made for the benefit of machines and microchips. Laws are made for man. Laws are made for machines and microchips to serve man. Law is the servant of *anthropos*, not his master. Equally, implications of authority are ever-existent in the relationship between man and law, law standing above the will of the man. While these implications of authority are superimposed over the exoteric existence of man, they do not touch upon the esoteric existence of man. Thus, laws have exoteric force only on human existence. The authority of law over man is the result of the law's wellbeing. Laws derive their authority from their legitimising ethos. Thus, '[l]aw's authority might depend on how far it corresponds with, or meets, felt needs for regulation of social relations' (Cotterrell, 2002, p. 638).

PATERNALISTIC LAWS DO NOT NECESSARILY AMOUNT TO RESTRICTIVE LAWS

Another common misunderstanding is that laws that are 'paternalistic' tend to be perceived as restrictive, when, in reality, they may actually enable. As has been rightly suggested, the question here is the amount of freedom law should give (Ogus, 2010, p. 62), not whether it restricts or enables altogether. In other words, it is not a question of restrictions but rather whether or not law reduces risks (Ogus, 2010, p. 62). Laws that restrict may actually enable (Sunstein and Thaler, 2003, p. 1159-1202).

If the father of the family imposes a 'rule' on his child by clearly advising that it should avoid talking to strangers, surely that would be a paternalistic move in the form of a command. That would create a 'law' by way of command in the family environment (as opposed to creating law by way of a rule). That law would, on the face of it, restrict. *Secunda facie*, the very same command would enable. What would it enable? On the basis that the command would be carried out, it would enable the very protection of the younger member of the family. *Laws, which come in the form of commands, may be very much like those commands of the good father in a family.* They may restrict but in reality they enable.

In addition, it is understood that the value of laws arises out of the fact that laws are neutral impersonal responses to personal matters (Aristotle, cited in Reynolds, 2005, p. 23). The father's command should thus only be perceived as an impersonal response to a given person, his child (even if it would be directed to specific offspring). So too, the impersonal nature of the father's command here comes out of the fact that every reasonable father in a family would wish to protect his offspring. By extension, the paternalistic command of the father restricting his child from talking to strangers can only act as enabling law, providing for the wellbeing of his offspring, on the basis that it is not in the interest of the child to speak to strangers.

In an ideal world, laws should actually only enable. This is an idea that few would resist. Our freedom is one emanating from law, but would have to be ultimately somewhat regulated. Law is our liberator, recognising that raw freedom without limits can be tyrannical and oppressive. As Lacordaire said:

> Between the strong and the weak, between the rich and the poor, between the master and the servant, it is liberty that oppresses and the law that sets free (Lacordaire, cited in McCorquodale, 2010, p. xii).

Nonetheless, a pragmatic approach in the matter would suggest that occasionally restrictive regimes may be enabling ones. Thus, one's model is one of liberalism, which comes with rights and duties.[6] That is to say, our model is relative in nature. This is not to argue that a tyrant's legal directive on anything is an enabling law (unless, of course, that tyrant would be a liberator, which is a contradiction in terms). Law emanating from a tyrannical regime would rarely address the needs of the social. Accordingly, our preference clearly falls in an approach whereby 'normative ideas [are] embedded in social practices' (Cotterrell, 2002, p. 640). Harmony between the social and the legal should be maintained on all occasions.

Externality provides one of the bases for using the law as a restrictive device (Ogus, 2010, p 64). Essentially, we speak of a situation where the individual (in the form of a natural or legal person) turns against third parties or society (Ogus, 2010, p. 64). This state of affairs would then justify restrictions that enable, and it is one concerned with an economic analysis: is it not less costly to restrict than allow harm to materialise? (Ogus, 2010, p. 64). If it is, then

6 *Cf.* the position of neo-liberalism, which seems to place its emphasis on individual freedom and choice rather than on duties to others (Cotterrell, 2008, p. 153).

restrictions should be the case. If it is not, then the law should not interfere. Lack of adequate information is the second basis for interference that is not restrictive. The individual here cannot make an informed decision. The law then intervenes and interferes to the benefit of the individual. Again, such interference is non-restrictive. On the contrary, the individual is enabled to commit acts which he otherwise would not be able to commit (Ogus, 2010, p. 64-65).

Beyond this, paternalism in law can have two faces: a hard face (where it deprives choice) and a soft face (where it streamlines choice). A law which, on the other hand, is not paternalist is purely enabling.

It is important to note that even an otherwise paternalistic law may amount to a law which enables, on the basis that such law, *inter alia*, comes in agreement with the ethos, the ideological norms and values of the people it addresses. Thus, as Abioye has maintained in a different context, it is true that

> [f]or any law to be binding on a group of people, for it to be obeyed and respected by the people, without the threat of sanctions, it must reflect the norms and values of the people which it seeks to bind (Abioye, 2011, p. 61).

PERFECT LIFE IS A LIFE IN AGREEMENT WITH LAW

Enabling laws are the ideal. Again, even where those laws restrict, they actually enable. Beyond this, one could certainly argue that perfect life is life in agreement with those laws that actually enable. There are thus two elements of liberal essence here:

- Liberal essence, in that laws should enable; and
- Liberal essence, in that those very same laws are adhered to by way of a will that is the result of free choice.

It is not, however, for the State to prescribe a perfect life, or even a good life. In this respect, nanny States are omitted as paradigms from our analysis, in that they prescribe the life of the individual and by extension they offer him their version of perfect life. Our thesis complies, therefore, with political liberalism, which suggests that the State should be neutral in one's life (Green, 2001, p. 87). The individual prescribes his life, not the State. This individual's 'laws' are not prescriptive of his life; they enable him to lead his life together with others. It is the individual that drives society, not society that drives the individual. It is individuals that form our society, not groups of individuals with certain interests that formulate our agenda; not society in some form of abstract conception. Our thesis is, and certainly should be, about a society of individuals, not about a society made out of formless masses of human beings. Our individual is what others have called the 'citizen.' This comes in agreement with classical constitutional doctrine implying a social contract between the citizen and the State (e.g. Lomasky, 2011, p. 50). In any case, our citizen places man at the centre of his/her analysis. In this perception, liberal society is made out of citizens with anthropocentric aspirations. In this society of individuals, law as an enabling device could flourish.

There is one exception in justification of the State's intervention. While the individual recognises the value of the law and for this reason applies it, on occasion the same individual may not pay recognition to the value of law, in which case the State may have to intervene. Do individuals otherwise recognise the value of law? In the proposed thesis herein, both an individual who breaks the law and an individual who upholds the law may give recognition to the value of the law. The difference is that the individual who upholds the law does so, because he believes in the law. The individual who breaks the law may not respect the law, but that is not to say he does not recognise the intrinsic value of it. Upholding the law in every single possible occasion of one's life is one thing, and recognising the intrinsic value of the law is quite another. Besides, if a person breaks the law on one occasion, is that to say this person

does not recognise the value of the law as a whole? What if that person broke the law at an age before reaching adulthood? Are we to say that this person would not recognise the value of the law in the future? Or, on the basis that we deny this person's recognition of the intrinsic value of the law, would it not be true that our argument would then border on hypocrisy? It is clear then that incidents of breaking the law in an instance (with all the consequences that the law brings to its perpetrator) do not change the fact that our societies subscribe to our model of overall recognition to the value of law.

In our societies, the overall respect for the law is the sole unifying nexus of individuals. In other aspects of life, our individuals can be as divided as they may.[7] Law unites. The life of each and one of us divides us. Respect for the law equals to a society where each and one of us prescribes their life in their own way by respecting that which the law posits for all.

Respect for the law on the part of the individual equals goodness, indeed perfection in our thesis. We do not need to use our imagination in stating that our society of individuals is one that largely takes a uniform approach in respecting the law. In this respect, pluralism does not come into play. If it did, it would open Pandora's box for all sorts of different interpretations in what needs to be upheld and what is not worthy of being upheld. However, pluralism does come into play in the law-making processes and in the prescription of each and one's life on an individual basis. Accordingly, while pluralism is given full recognition in our thesis, the societal demands from individuals a uniform approach in respecting the law, in that laws have been generated by a majority of individuals (principle of democracy).

Finally, a general duty to obey the State and its laws defines our thesis. Socrates taught us this sometime ago. One may wish to question and disagree with the State and its organs, but one will uphold its laws and its decisions. The fact that one will uphold the law in the first instance does not equate to retreat on the part of our individual. On the contrary, even where our individual is asked to uphold the law, the individual may still judicially examine the decisions of the State. The duty to obey the law in a democratic society by far exceeds the remit of the duty to disobey the law.

CONCLUSION

Legal norms, in precise terms, can restrict but can, of course, also enable. Where it restricts, however, law may still enable. Law's magnificence is found in its positive force, a force which has been used (for the better) by democracies, and (for the worse) by tyrannies. The point remains: law enables.

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COMBATTING PIRATED VCDS/DVDS IN BATAM CITY, INDONESIA: FACTS AND EXPECTATIONS

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ABSTRACT

Piracy levels in Indonesia are among the highest in the world, at an 85–95% range for all industry sectors. Among other Indonesian cities, Batam City remains a haven for pirated VCDs/DVDs. This research analyses the reasons why the people of Batam buy pirated VCDs/DVDs and provides solutions for the effective implementation of copyright law. The research finds that even though most of Batam society understands that pirated VCDs/DVDs constitute a violation of copyright law, they still buy them because newly released foreign movies can be purchased at lower prices. To prevent or minimise copyright infringement, the law enforcers should establish best practice by imposing optimum penalties on the perpetrators. The Batam City government should engage the community to combat the sale and production of pirated VCDs/DVDs by raising public awareness regarding the implementation of the new copyright law and imposing strict penalties on the violators.

Key Words: Pirated VCDs/DVDs, Copyright Law, Batam City

INTRODUCTION

Violations of Intellectual Property Rights (IPR) are still happening and are becoming even more alarming. One of these violations is the production of pirated VCDs/DVDs. Copyright violations in the form of pirated VCDs/DVDs in Indonesia are rampant. The Recording Industry Association of Indonesia (ASIRI) complains that a number of pirated CDs/VCDs containing songs that were hits in Indonesia are circulated publicly without payment of royalties. The number of pirated CDs/VCDs of Indonesian songs reached 3 million copies and pirated versions of foreign songs reached 120 million copies in circulation in 2002 (Taufiqurrahman, 2003). According to the Chairman of the Recording Industry Association of Indonesia (ASIRI), approximately 237 million songs were illegally downloaded per month in 2015, or 7 million songs per day (Tempo Co. Tekno, accessed 3 April 2017).

In Indonesia, sales of pirated copyrighted works in the optical disc medium of either VCDs/DVDs are blatantly conducted, ranging from the store in the shopping centre (mall) to retail traders alongside the road. This is not surprising considering the huge price difference between the pirated versions and the originals. The price might vary from 1/10 to 1/20 of the original. Besides the price, copying an optical disc does not require any special skills, and only needs a simple computer. Indonesia has suffered greatly from this piracy. The traders might obtain billions of rupiah without paying anything to the state (Sjahputra, 2016).

Among other Indonesian cities, Batam City remains a haven for pirated VCDs/DVDs. It is one of the high circulation areas for pirated VCDs/DVDs in Indonesia. Many original versions have not yet officially been screened in cinemas in Batam City. There are five cinemas in various malls which screen both Indonesian and foreign films. The cinema tickets vary from Rp. 25,000 (USD $2.50) to Rp. 40,000 (USD $7). According to Batam-today, an electronic newspaper in Batam, the price of new pirated VCDs/DVDs in Batam is around Rp. 10,000 (USD $1). They can easily be found in many plazas and markets (such as Plaza Top 100, Plaza Botania, Plaza Mustafa, or Nasa Market) in Batam City.

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LEGISLATIVE AND THEORETICAL FRAMEWORK

The Indonesian Government has enacted a new copyright law (Law No. 28 of 2014) to amend Copyright Law No. 19 of 2002. The new Copyright Law is generally favourable to copyright owners. Prior to the enactment of this new law a number of regulations to anticipate and combat intellectual property (IP) piracy, especially with optical products (CDs, VCDs, DVDs), have been issued: Government Regulation No. 29 of 2004 regarding High Technology Production Facilities for Optical Discs; the Decree of the Minister of Trade and Industry No 645/MPP/Kep/10/2004 regarding the Provisions on the Importation of Machines, Machinery Equipment, Raw Material and Optical Discs; and the Decree of the Minister of Trade and Industry No. 648/MPP/Kep/10/2004 regarding the Report and Supervision of Companies of Optical Disc Industries. In addition, the Indonesian Government also established the Directorate of Investigation under the Directorate General of Intellectual Property Rights on 30 December 2010 for the purpose of combating IPR infringement in Indonesia. On 4 September 2012 the National Taskforce on Intellectual Property Rights, a team consisting of 13 ministries, police, and public prosecutors, was established by Presidential Decree No. 4 of 2006 to mitigate IPR violations in Indonesia, by distributing posters or banners concerning the prohibition of selling or distributing pirated CDs, VCDs and DVDs and software in several places in Jakarta: the Glodok area, Harco Glodok Mall and Plaza Pinangsia. The investigators of the Directorate General of IPR successfully raided one of the producers of pirated VCDs and DVDs located at Plaza Glodok (North Jakarta) on 1 February 2013. The raid was directly led by the Director of Investigations, Moh. Adri, and seized six tonnes of pirated VCDs and DVDs from three locations (Kusumah and Prabawa, 2012). Although Indonesia has a new Copyright Law and has conducted a number of raids against pirated VCDs/DVDs, it appears that their circulation in Indonesia cannot be stopped.

This research adopts the Effectiveness of Law Theory of Soerjono Soekanto. This is because this theory examines the effective implementation of a law by approaching it in books and in actions. Soekanto (2008) asserts that the effective implementation of law is very much influenced by five factors:

1. The legal substance must contain justice, certainty and utility;
2. Law enforcers must be professional and ethical;
3. Legal facilities and means must be supported by good organisation, equipment and adequate finance;
4. Society must act to achieve harmony among its members; and
5. The legal culture must contain the common values of society (e.g. the values of morality, sustainability, security and order).

RESEARCH AIMS AND METHODS

This research aims to analyse the reasons that the Batam community buys pirated VCDs/DVDs and provide solutions for the effective implementation of the new Copyright Law. To meet these aims, it has adopted a socio-legal/empirical research method that considers law as a social phenomenon with a structural approach (Saptomo, 2009). Socio-legal research covers research on the identification of unwritten law and the implementation of law, i.e. the effectiveness and impacts of law (Soekanto, 1984). This research focuses on the effective implementation of the Copyright Law against the circulation of pirated VCDs/DVDs in Batam City. The data used by this research was primary data, collected through in-depth interviews (Amiruddin, 2004; Wignjosoebroto, 2002) with students, lecturers, VCD/DVD pirates and the public by using random sampling. Observations at a number of malls which sell these pirated materials were also conducted. Secondary data used by this research focused on Law No. 28 of 2014 as the primary or authorised legal material. It also used secondary legal materials collected from articles, books and other relevant materials on copyright law to support the primary legal

material (Marzuki, 2008). All the data was analysed based on its content (content analysis) using a qualitative approach to seek answers to the questions (Coutin, accessed July 2016):

1. Why has the Copyright Law not been effectively implemented in Batam City?
2. How can the circulation of pirated VCDs/DVDs be combatted in this city?

RESEARCH FINDINGS

Currently, the circulation of pirated VCDs/DVDs in Batam City is still rampant, even though the Copyright Law governs the activity of piracy and provides heavy penalties. Article 1(24) of the Copyright Law stipulates: 'Piracy is the copying of works and/or products related rights with the unauthorized duplication and distribution of goods aimed extensively to gain economic advantage.' Article 113(4) of the Copyright Law emphasises: 'Any person who commits the actions referred to in paragraph (3) and carried out in the form of piracy, shall be punished with imprisonment for ten (10) years and/or a maximum fine of Rp.4,000,000,000 (four billion rupiah).'

Based on the observations for this research, pirated VCDs/DVDs are not only sold in plazas but also in malls in Batam City, such as Mustafa, Top 100, Botania Plaza and BCS and Nagoya Hill Mall. They are also sold along the roads near the plazas. Figure 1 below shows one of the outlets selling pirated VCDs/DVDs.

Figure 1: Sales of pirated VCDS/DVDs

Sellers of pirated VCDs/DVDs can get a 100 percent profit from each sale. Most of the products are obtained from Jakarta and sent to Batam City (Zaimi and Dodo, 2015). Based on the interviews with the sellers of pirated VCDs/DVDs, they all said that the price of pirated ones is not high. It is only Rp. 10,000 (around USD $1) for films and Rp. 5,000 (around USD $0.50) for songs. Some of them are new films that have not yet been released in Batam City. In addition to ordinary pirated VCDs/DVDs, pornographic pirated VCDs/DVDs can also be obtained in some outlets. Barelang police seized 175 pornographic pirated VCDs/DVDs in the area of Jodoh Boulevard (near Top 100 Plaza) on 27 February 2015 (JPNN, 2015). Interestingly, the raids only stopped the circulation of these pirated materials temporarily.

The interviews with the sellers of pirated VCDs/DVDs in Nagoya Hill Mall and Top 100 Plaza revealed that most of the pirated materials contain foreign songs and movies. Only a small number of them are Indonesian songs and movies. According to the traders, during the raids the polices only seized those which contained Indonesian songs and movies. They left the foreign pirated VCDs/DVDs untouched. It is questioned whether the Copyright Law only protects the Indonesian creations. It should be noted that the Copyright Law does not discriminate between the creations of Indonesian and foreigners, as Article 2 of the Copyright Law stipulates: 'This law applies to:

- all works and product related rights of citizens, residents and Indonesian legal entities;

- all works and product related rights of people who are not citizens of Indonesia, are not Indonesian residents and do not have an Indonesian legal entity, and the publication of which [works and products] was first made in Indonesia;
- all works and/or product related rights and users of works and/or product related rights who are not citizens of Indonesia or Indonesian residents, and do not have Indonesian legal entity, provided that:
  1. The country has a bilateral agreement with the Republic of Indonesia concerning the protection of Copyright and Related Rights; or
  2. The country and the Republic of Indonesia are parties or participants in multilateral agreements giving the same protection regarding Copyright and Related Rights.'

It should be noted that Indonesia joined the World Intellectual Property Organization in 1979 and has become a member of the WIPO treaties. Consequently, the Copyright Law is applied to non-Indonesians whose countries are WIPO members. The management of the malls and plazas where the pirated VCDs/DVDs are sold do not take any action to stop their circulation, even though they know that the Copyright Law prohibits it. Article 10 of the Copyright Law stipulates that: 'Business trading places are forbidden from allowing the sales and/or duplication of goods that infringe Copyright and/or related rights in a trade under its management.' This Law also imposes sanctions, as Article 114 of the Copyright Law stipulates: 'Every person managing a place of trade in all its forms, who deliberately and knowingly allows the sale and/or duplication of goods that infringe Copyright and/or related rights in a trade under its management, as referred to in Article 10, shall be punished by a fine of Rp. 100,000,000,00.' Buyers of pirated VCDs/DVDs are not merely adults, as minors are also consumers even though their parents buy the pirated copies for them.

Many consumers of these pirated materials are educated people. Forty-eight law students randomly chosen for the interviews revealed that all of them (48 students) have bought pirated VCDs/DVDs at plazas (15 students), malls (23 students) and on the streets (10 students). The students all understand that the pirated products infringe the Copyright Law, as it is shown by Table 1.

Table 1: Law students' attitudes to pirated VCDs/DVDs

Question	Response
Have you ever bought pirated VCDs/DVDs?	Yes (48)
Where do you buy them?	Plaza (15) Mall (23) Street (10)
Do you know that pirated VCDs/DVDs are an infringement of the Copyright Law?	Yes (48)

Source: data analysed by authors

In-depth interviews with five university lecturers also revealed that they knew about the sales of pirated VCDs/DVDs in many areas in Batam City. Some of them have bought pirated copies, even though they are not regular customers. They also know that the sales of pirated products violate the Copyright Law, but they do not take action against it. Random interviews with 24 citizens from various areas of Batam City revealed that only three respondents had never bought pirated VCDs/DVDs. The others said they bought pirated

VDCs/DVDs in malls (10 respondents), plazas (5 respondents), streets (8 respondents). Table 2 shows the responses of Batam City citizens regarding pirated VCDs/DVDs.

Table 2. Batam City citizens' responses to pirated VCDs/DVDs

Question	Response
Have you ever bought pirated VCDs/DVDs?	Yes (21) No (3)
Where do you buy them?	Plaza (5) Mall (10) Street (8)
Do you know that pirated VCDs/DVDs are an infringement of the Copyright Law?	Yes (24)

Source: Data analysed by authors

Today, Batam City society has a tendency to buy pirated VCDs/DVDs on the grounds that it is very cheap compared to the original product. 80 respondents (48 students, 24 Batam City citizens, 5 lecturers and 3 sellers) from various economic backgrounds, levels of education and gender were asked the question: 'Why do you or people tend to buy pirated VCDs/DVDs?' Of the respondents, 75 answered that the price of pirated VCDs/DVDs was much cheaper than for the originals. Pirated VCDs/DVDs, especially films, cost only Rp. 10,000 (USD $1), whereas the original versions are Rp. 100,000 (USD $10). A further five respondents answered that they could enjoy the newest movies or latest music albums, which are not yet officially circulating in Batam City. Films that have not been screened in cinemas can be purchased easily at most shopping malls, plazas and streets in Batam City. Of the respondents, 70 said that a lot of pirated VCDs/DVDs had a good quality picture and sound. The most frequent comment from the public consumers of pirated VCDs/DVDs in Batam City was: 'We are looking for pirated VCDs/DVDs because counterfeit goods are sold at a much cheaper price. After all, the picture and sound quality is not much different from the original ones.'

DISCUSSION

A. Analysis of the effective implementation of the Copyright Law

As mentioned previously, the Effectiveness of Law Theory by Soerjono Soekanto states that the effectiveness of the implementation of law is very much influenced by five factors: the legal substance, law enforcers, legal facilities and means, society behaviours, and legal culture. The first factor provided by this theory examines the substance of the legal instruments. In this regard, it is questionable whether the Copyright Law meets the requirements of justice, certainty, and utility. The answer is affirmative, since the substance of this law clearly states: 'The developments in science, technology, art and literature have been so rapid that increased protection and a guarantee of legal certainty are required for the creators, rights holders and owners of related rights.' This statement meets the requirements of the justice and certainty of a legal instrument. This Law further states: 'Indonesia has been a member of various international agreements in the field of copyright and related rights but further implementation is required in the national legal system so that the national creators are able to compete internationally.' This statement manifests the utility of a legal instrument. The substance of the Copyright Law, among other things, covers the protection of copyright and related rights, economic rights, traditional cultural expression and creation, the limitations of copyright, licences, costs, dispute resolutions and penalties. In general, the substance of the Copyright

Law is favourable to copyright owners. On this point, from a legal substance perspective, the Copyright Law complies with the requirements of justice, certainty and utility.

The second factor influencing the effective implementation of law according to the Effectiveness of Law Theory is that the conduct of law enforcers (police, prosecutors, judges and lawyers) must be professional and ethical. In conjunction, it is obvious that the professionalism of law enforcers, especially the police in Batam City, in acting against the circulation of pirated VCDs/DVDs, is questionable. Based on interviews with the sellers of pirated VCDs/DVDs, it was found that law enforcement in this regard in Batam City occurs sporadically and only focuses on Indonesian pirated products. This indicates the absence of the will of law enforcement to act on the Copyright Law. It is even dilemmatic, because the sales of pirated VCDs/DVDs are sometimes conducted in front of law enforcers. For example, plazas and malls that sell pirated VCDs/DVDs are located not far from police stations. It seems that copyright infringement, particularly the sale of pirated VCDs/DVDs is a common offence in Batam City; yet no serious action is being taken by law enforcement on the copyright violators (sellers and the management of retail places). In general, the Indonesian court system is also weak in enforcing copyright law. The weakness of prosecutors in Batam City is that their familiarity with the Copyright Law is still inadequate. In addition, it is considered difficult for the police and prosecutors to present evidence (International Intellectual Property Alliance Report, 2003). Judicial orders to destroy seized pirated VCDs/DVDs have often been ignored, and the court proceedings are costly and lengthy. The law enforcers, especially the police, who are obliged to combat Copyright Law infringements in connection with the circulation of VCDs/DVDs in Batam City are not professional. Their discriminatory attitudes towards Indonesian and foreign pirated VCDs/DVDs indicate that they do not fully understand the substance of the Copyright Law and how to implement it consistently (Hidayah, 2008).

The third factor under the Effectiveness of Law Theory that must be met for the effective implementation of law is adequate legal facilities and means. Irregular and unsustainable raids against pirated VCDs/DVDs in Batam City indicate a lack of facilities and means to combat this piracy. Good organisation of law enforcement is also a main condition to achieve the effective implementation of law based on the Effectiveness of Law Theory. This is not fully met in Batam City. According to the report of a Haluan Kepri journalist (Kepri, 2014), the distributors of pirated VCDs/DVDs in Batam City with the initials YH and ACN can be easily found in the area of Nagoya Hill Mall and Botania Plaza. It was reported that the distributors have bribed certain police to allow them to conduct this illegal business. The businessman with the initials ACN, whose business is located behind DC Mall, confessed that he has 'secured' his pirated VCD/DVD business by bribing certain relevant stakeholders. In addition, there is a lack of intensive coordination between the police and civil servants under the Directorate General of Intellectual Property in seizing pirated VCDs/DVDs in Batam City. This failure to meet the third factor of the Effectiveness of Law Theory may contribute to the ineffectiveness of implementing the Copyright Law in Batam City.

The fourth factor stipulated by the Effectiveness of Law Theory is society's actions against a legal instrument. In this regard, it is apparent that most of Batam City society is not obeying the implementation of the Copyright Law. This is manifested by the conduct of society in buying pirated VCDs/DVDs, even though they know that it is against the Copyright Law, simply because the price of the pirated ones is much lower than that of the originals. The option to buy pirated VCDs/DVDs in Batam City is not merely because of the economic conditions of buyers. People in the middle and even upper economic classes in Batam City also buy them (Lamaberaf, 2015). Both educated and non-educated people buy them on the grounds that the films have not yet been screened in Batam City. People in Batam City still consider that it is a common practice to buy pirated VDCs/DVDs. They even opine that the producers and retailers do not commit a crime as long as the pirated editions are not Indonesian products or

pornographic films. This thought is derived from the actions of the police, who only seize the Indonesian and pornographic pirated products. The ignorance of the police regarding foreign and non-pornographic pirated VCDs/DVDs contributes to people's acceptance of the pirated goods in Batam City. The sellers even argued that: 'the distributors of pirated goods in the Nagoya area of Batam City must be arrested instead of seizing the pirated goods of small retailers' (Zaimi, 2016).

The fifth factor under the Effectiveness of Law Theory is the legal culture of a society. In this regard, the Theory stipulates that there should be common values in society regarding morality, sustainability, security and order for the effective implementation of a legal instrument. Based on the empirical research, it is clear that most of Batam City citizens understand that pirated VCDs/DVDs infringe the Copyright Law, yet they demonstrate sceptical attitudes toward the circulation of pirated VCDs/DVDs in Batam City. They are even permissive towards copyright infringements due to a lack of serious action taken by the legal enforcers. Abdussalam (2007) states that violations of norms frequently occur in society because of 'too much tolerance towards legal violators, ignorance of legal offenses, and disrespectful attitudes of certain legal enforcers which taint the good image of the entire legal enforcement.' It is obvious that the situation identified by Abdussalam occurs in Batam City today. It seems that Batam City has shifted its perceptions regarding pirated VCDs/DVDs because the people consider that pirated VCDs/DVDs are illegal only if they are classified as pornographic or are Indonesian productions. This may be true, because they do not make any effort to stop the circulation of pirated VCDs/DVDs. On the contrary, they buy them for different reasons, and consequently their circulation is mushrooming in Batam City.

B. Proposed actions to combat the circulation of pirated VCDs/DVDs

Based on the analysis of the implementation of the Copyright Law in Batam City, it can be deduced that the ineffective implementation of the Law is caused by four factors under the Effective Law Theory:

1. Law enforcers are not professional in tackling the circulation of pirated VCDs/DVDs;
2. Legal facilities and means of supporting the raids and seizure of pirated VCDs/DVDs are not adequate;
3. Society has different perceptions regarding pirated VCDs/DVDs, since only those of Indonesian productions or pornographic films are considered to be an infringement of the Copyright Law; and
4. The legal culture of Batam City society is sceptical and permissive of the copyright infringements due to a lack of serious action being taken by legal enforcers.

It is obvious that among the five factors stipulated by the Effectiveness of Law Theory, only the first factor, the legal substance of the Copyright Law, supports the effective implementation of this Law in Batam City. At this juncture, this research proposes several solutions to improve the effective implementation of the Copyright Law in Batam City. The solutions, based on the approaches of the Effectiveness of Law Theory, are presented in Table 3.

Table 3. Proposed solutions to improve the effective implementation of the Copyright Law

Factors impeding the effectiveness of the Copyright Law	Proposed solution for the effective implementation of the Copyright Law
The lack of professionalism of law enforcers in tackling the circulation of pirated VCDs/DVDs	Raids against the circulation of pirated VCDs/DVDs should be conducted regularly, without any

	discrimination towards foreign songs or films
	Regular dissemination of the Copyright Law to legal enforcers, either by conducting workshops and seminars or by posting posters and banners as reminders in their offices
	Judges who handle the Copyright Law or any IPR cases must have the courage to implement the IPR laws in their decisions. They should establish a best practice by imposing optimum penalties on the perpetrators
	Imposing heavy penalties on any stakeholders who support the circulation of pirated VCDs/DVDs
Inadequacy of legal facilities and means to support the raids and seizure of pirated VCDs/DVDs	Conducting regular coordination between the police and civil servants of the Directorate General of Copyright in seizing pirated VCDs/DVDs
	Establishing a partnership between law enforcers, the community, the government and businessmen [retailers] or industries to combat the production and sale of pirated VCDs/DVDs
	Raising public awareness regarding the implementation of the Copyright Law

Different perceptions of society in its approach to pirated VCDs/DVDs	Applying sanctions on the sellers and the management of trading places that sell pirated VCDs/DVDs
	Educating the people of Batam City that buying pirated VCDs/DVDs supports crime
Sceptical and permissive legal culture of society towards copyright infringements.	Campaigning with the slogan of 'Circulating or selling pirated VCDs/DVDs is a crime with heavy penalties'

Source: Data analysed by authors

The proposed solutions in Table 3 emphasise not only the improvement of legal enforcement, but also the fact that public awareness is required for the effective implementation of copyright law in Batam City. Public awareness is very significant in combating the production and sale of pirated VCDs/DVDs because, in the absence of public demand for the pirated goods, their sale or circulation could be stopped. This approach is supported by Arief (1998), quoting the opinions of Taft and England, explaining that law is a means of social control and that customs, group support and/or pressure, as well as public opinion, can be more effective in regulating people's conduct than legal sanctions.

CONCLUSIONS

IPR violations, especially copyright, in Batam City keep occurring due to the weakness of copyright law enforcement by those responsible. A lack of public awareness relating to the implementation of the law contributes to the increase in sales and circulation of pirated VCDs/DVDs in this city. To combat infringements of the Copyright Law, it is a challenge for law enforcers to educate people in Batam City not to support this crime by buying, selling and circulating pirated VCDs/DVDs. At the same time, law enforcers and their organisations must improve their performance in combating pirated VCDs/DVDs by conducting regular raids and seizures at malls, plazas or streets where pirated goods are sold. The Copyright Law must be made familiar to law enforcers and to the public in Batam City to abolish the bad reputation of the city as a haven for pirated VCDS/DVDs. This label taints the reputation of the city, and may discourage foreign investors.

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JUNCKER'S FIVE SCENARIOS FOR BREXIT AND THEIR IMPACT ON SOCIAL SECURITY COORDINATION

ANNA PIENIAZEK[1]

ABSTRACT

Current debates around the issue of United Kingdom leaving the EU are escalating due to the uncertainty about the direction of negotiations. We must remember that the UK, the EU as a separate entity, and the other 27 Member States can—and will—have different priorities in terms of various areas that are important to them, for example trade, immigration, and the single market. Most publications deal with trade and immigration issues, but there are problems that individual migrants may encounter and with which they need real help and assurance. Brexit will have an impact on principles of coordination of social security depending on the result of negotiations. It is important that those interested parties consider available options and are prepared for the future after Brexit in relation to social welfare regulations.

Key Words: Brexit, social security, coordination, Juncker, European Union

INTRODUCTION

Social security coordination is an important mechanism of the EU that ensures that people's rights are respected and that risks, for example aging, injuries, and ill-health, are secured. Coordination does not obviously mean a harmonisation of legal principles in all Member States of the EU, and it therefore gives some leeway for each country to have their own regulations as long as they are governed by principles of social security coordination. The purpose of this paper is to analyse five scenarios proposed by Jean-Claude Juncker, in which he predicts what might happen to the EU and remaining Member States after the UK ceases to be a member. After careful analysis of these scenarios, one might be able to consider their possible impact on social security coordination mechanisms. As Juncker's White Paper is written from the perspective of the EU and its remaining Member States, this paper will look for most probable option in consideration of those five scenarios, while underlining the options open to the UK and its welfare system after it leaves the EU.

SOCIAL SECURITY COORDINATION

General aspects

Social security coordination is currently governed by the EU Regulation (EC) No 883/2004 on the coordination of social security systems, which came into force on 1 May 2010. Cases that arose prior to that date are still being considered by courts under the old Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. There are few changes wrought by the new legal instrument on the personal scope and on the material scope (i.e. benefits), but the pressure of both regulations lies on principles of social security coordination. It is important to consider this area in light of Brexit, and especially in terms of what will happen to principles of current social security coordination mechanisms. Some of these principles are directly mentioned within the Regulation (like equality of treatment and aggregation of periods), and some of them are implied. Various theories show a different number of principles and authors group them in a

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different way. This paper will emphasise that there are six main principles of social security coordination: protection of acquired rights, reasonable expectations, equal treatment, single legislation applicable, aggregation of periods and exportability of benefits. Those principles are applicable to all migrants and their families moving between Member States and acquiring rights to social security. It must be taken into account that the migration level in the UK is high (Office of National Statistics: Migration Statistics Quarterly Report May 2017), and the UK is still a Member State to which coordination applies.

It is therefore important to examine the impact of Brexit, not only on the UK, the EU and the individual Member States, but also mainly on migrants relying on social security coordination regulations. A possible method chosen by the UK when leaving the EU would show whether there is a chance that principles would be observed by both Member States and the UK after Brexit. It is also vital because the European Commission emphasises that coordination applies not only to Member States of the EU, but also to Iceland, Switzerland, Norway and Liechtenstein. These countries are members of EFTA, which suggests that if the UK leaves the EU but becomes a member of EFTA the country will still have to observe the principles of social security coordination; migrants would benefit from such a possibility. The only question remaining is whether or not the UK will choose, and would be allowed through negotiations, to go that way. It might be that another way will have to be chosen that might impact on migrants' social security rights through ignorance of principles.

Free movement of workers

Free movement of workers allows a person to move freely between Member States through Art. 45 of the Treaty on the Functioning of the European Union. It therefore allows migrants to rely on social security coordination principles. Generally, all abovementioned principles are based on the free movement of workers rule. It can be seen through cases such as *ZUS v Tomaszewska* [2011].[2] Migrants are only willing to move between Member States (including the countries making up the EEA and EFTA, namely Iceland, Norway, Liechtenstein and Switzerland) if they can be sure that contributions they have made in relation to their employment will be available when they reach retirement age or become ill. Migrants must be ensured that, if a risk occurs, the country they are based in will be able to help with that risk's implications, and in terms of social security coordination. This can be done through exportability of benefits and aggregation of periods mechanism that will allow a migrant to move to another Member State and use that social welfare system without losing previously acquired rights. This paper considers whether the UK will accept social security coordination principles after Brexit if negotiations with the EU and other Member States ends in so-called 'hard Brexit.' If the UK leaves the EU without willingness to observe social security coordination, those that move freely between Member States may have a problem in executing their rights to contributions made in the UK, for example because exportability of benefits will not be possible. On the other hand, bilateral agreements that the UK could sign with other Member States may create unequal treatment of citizens coming from different States due to individual arrangements with those countries. Social security coordination principles operate when there is free movement of workers, and this situation is thus dependent on the result of negotiations to see whether or not those principles will still be in place in relation to the UK after Brexit. One must also remember that these principles and regulation do not only apply to migrants that move on the basis of Art. 45 TFEU, but also apply to their families.

Principles of social security coordination: an overview

There are six principles of social security coordination: protection of acquired rights, reasonable expectations, equal treatment, single legislation applicable, aggregation of periods

[2] [2011] C-440/09 (CJEU)

and exportability of benefits. These ensure that the future of those migrating is secured in terms of problems with their employment or pensions, also taking into account their families' welfare. Acquired rights, discussed by the European Court of Human Rights in cases such as *Moskal v Poland* [2010][3] or *Stec and others v United Kingdom* [2006],[4] are protected through this coordination, which means that if a migrant has paid contributions towards a social welfare system, he will be entitled to use those acquired rights if the need arises. All rights acquired by legitimate means must be available, and they must always be ready to secure the welfare of that interested person. Migrants can also reasonably expect that, if they have fulfilled certain obligations imposed by a Member State, they will be entitled to benefits, either in this or in another EU country (Slingenberg, 2015).

Equal treatment, however, is a two-way street. As suggested by Cornelissen in 2009, migrants and their rights are treated equally, taking into account migrants' characteristics but also the fact that men and women in the same position are treated equally. A strict non-discrimination rule applies to all citizens of Member States, as they are considered citizens of the EU and must be treated equally as such (Myszke, 2006). At any given time, a single legislation should be applicable that excludes problems arising in choosing which legal system should be used when a person accrues rights when travelling from one country to another within the EU. Mostly it is decided by the principle of *lex loci laboris*, explained by the Court of Justice of the EU in cases such as *Bosmann v Bundesagentur fur Arbeit–Familienkasse Aachen* [2008][5] or *Gemeenschap v Baesen* [2010][6] as meaning that the appropriate system is the one where the worker is based, or where the main office of employer is located (if the worker was delegated).

The last two principles that form the basis of the social security coordination mechanisms in some respects work together. The aggregation of periods principle works mainly in situations where one would move between Member States and then claim retirement benefits. On the other hand is the exportability of benefits, which allows for periods to be considered in a Member State other than the one in which they were acquired due to the fact that they can be moved from one system to another within the EU. This brief overview of social security coordination system shows how important it is for individuals to know what they can expect after Brexit, to allow them to plan their future. If they can be sure that rights acquired in the UK will be considered in another Member State after Brexit, they can plan to stay in the UK and contribute to its welfare system. If on the other hand this may not be possible, migrants may want to work in another Member State where they will be allowed to claim acquired benefits after their return to the home country.

JUNCKER'S WHITE PAPER

'Drivers of Europe's Future'

Juncker opened his White Paper with an introduction going through different aspects of living and working in the EU. He focused on ideas based on single market and trade issues from the perspective of the EU. Juncker did not go through possible scenarios for the UK after Brexit, as his five scenarios only covered the interests of Member States and the EU as a separate entity (Juncker, 2017).

In first eight pages of the document, the president of the European Commission acknowledged that the population in Europe is aging fast. He touched upon the euro currency and its share of the global market, but also stated that defence expenditure has been maximised. Juncker also questioned security and defence measures and trust in, and legitimacy of, the EU.

[3] [2010] 10373/05(ECtHR).
[4] [2006] 65731/01(ECtHR).
[5] [2008] C-352/06 (CJEU).
[6] [2010] C- 296/09(CJEU)

For the purposes of this article, the most important information from the introduction of the White Paper is that the population is getting older with lower life expectancy. In terms of the risks EU citizens may expect, Member States must be ready at any time to secure citizens' rights in retirement, ill health and other possible problems covered by the social security system. Unfortunately, Juncker only mentioned society's problems in this introductory part of his White Paper, focusing on trade and single market areas in the main body of the document.

Five possible scenarios

Juncker mentioned five scenarios, all from the perspective of the EU and 27 Member States. The purpose of the White Paper was to create more vivid debate about possible outcomes. Unfortunately, there is no clear indication as to which scenario is the most probable and which would be most beneficial. Identifying these aspects is therefore the purpose of this paper.

The first scenario titled 'carrying on' is about the preservation of the status quo. It means that the EU, without the UK, will continue programmes created by the 'New start for Europe' document in 2014. The single market will be strengthened, coordination of migration security will be improved and, most importantly, free movement between Member States for EU citizens will be respected. This might suggest that, in terms of Art. 45 of TFEU, free movement of workers will still be possible and there will be no issue regarding the use of social security coordination principles. These principles will remain as they are, with no change due to the lack of focus in this area. This option looks as a possible scenario but the impact on citizens who have already migrated to the UK, as well as UK citizens living in other Member States, must be considered, as those principles may not (and probably will not) apply to them. This could mean that their rights are not protected unless bilateral agreements come in to play.

'Nothing but the single market' is the second scenario, focusing on strengthening the single market, but this does not guarantee free movement of workers and services. Juncker commented that he would not opt for this scenario, but it is one that is open to the EU. Again, if social security coordination is based on free movement between Member States, then making free movement harder would also impact on social security coordination. Following on from this, if one becomes ill abroad, medical bills will be much higher; in addition, the exportability of benefits like pensions may not be possible at all. By working on making a better single market, the EU would have to abandon work on some of the other priorities, which could weaken the EU in other areas such as defence. This would be a disastrous scenario, not only in relation to social security coordination but also in general for the EU's actions.

The third scenario, 'those who want more, do more', focuses only on certain areas of EU work. The only beneficial aspect is that there would be harmonisation of various regulations and enhanced security and justice. This is a 'two-speed Europe', in which countries that want to participate in certain fields can do so, while others can opt-out due to various reasons, for example a lack of financial resources. We have to bear in mind that a similar mechanism already exists on a much smaller scale, but making its scope wider would not bring anything more beneficial in the area of social security coordination. This is due to the fact that some countries would be able to strengthen this area, and others would have to be left behind, creating unequal treatment of citizens. On the other hand, the relationship with third countries could be managed by the EU (a separate entity), and therefore the UK could deal not with Member States individually in creating separate agreements but would have to make arrangements with the EU as an institution. This looks to be a viable option, but it would still depend on the terms of the social security agreement and whether such an agreement would preserve the principles of coordination. It could be safer for the UK to negotiate separate bilateral contracts with the possibility that most of those agreements would be beneficial for the country's welfare system.

A completely different tone is presented in the fourth scenario, 'doing less more efficiently', in which Juncker foresees that establishing priorities mentioned and agreed by Member States could happen more quickly. However, those priorities would have to be very

specific and could not concern general issues. Juncker sees less work being done in areas such as public health, employment and social policy, which Member States would have to regulate individually (Piec sciezek do Europy, 2017). On the other hand, action would be taken in fields such as migration, defence, trade and innovation, while the single market is being strengthened. This seems like a less viable option in the context of preserving principles of social security coordination. On the other hand, it is also true that Member States have the competency to decide their rules and regulations respecting social security, as we deal with coordination (and not harmonisation) of social security systems. The only criterion regards following coordination's principles. Therefore, applying this scenario would not entail much change in the situation we currently have. From the perspective of the UK as a third country, also, making bilateral agreements with other Member States separately can be beneficial for both parties. In relation to social security and principles of coordination, this scenario seems to preserve the current situation, although if the UK will be signing bilateral agreements we cannot be sure that they will observe all, or any, of the current principles regarding the coordination of social security systems.

Juncker's fifth scenario, 'doing much more together', sees Europe as one entity on the international scene. The EU could be one large federal state, which would take in more national competencies with EU embassies in all Member States and other third countries. Therefore, it would the EU with which the UK would have to negotiate bilateral agreements in relation to social security. It is impossible to make such a united state, as all Member States have different interests and want to protect their citizens in different ways. As with the third scenario, it would be in the interest of each Member State (and the UK) to have separate agreements and to try to observe the principles of social security coordination. It would not be beneficial to negotiate on the platform of EU v UK, as the EU would force the UK to make an agreement according to principles of coordination. This would mean, in effect, that the UK would be dragged back to a mechanism similar to that of the EU. This seems even more unrealistic if we think that UK would like to have a 'hard Brexit', distancing themselves from everything related to EU.

OTHER MODELS AVAILABLE TO THE UK

The scenarios presented by Jean-Claude Juncker in his White Paper are shown purely from the perspective of the EU. Juncker's view stands in contrast with possible outcomes for the UK. However, as was mentioned at the beginning of this article, there are countries that are not members of the EU but still enjoy the benefits of social security coordination, such as Iceland or Liechtenstein. Similar ideas operate in Norway and Switzerland, and those two countries could serve as examples of how UK can finalise its negotiations with the EU.

The Norwegian model

Norway is a member of EFTA and of the EEA, which allows this country to be part of the single market without being a Member State of the EU. In this model, a country preserves the status of free movement of goods, services, people and capital, not only between the EU countries but more widely with members of the EEA. This allows a country to be part of the social security coordination, while observing all principles of this coordination. The main downside for the UK in applying this model would be payments that must be made to the budget, while participation in other activities of the EU would be excluded. The UK would also have to follow EU rules and regulations.

Even though a country pays into the fund of the EEA and must follow EU rules, it cannot have any decision-making powers in the EU, which means that all EU legislation must be observed. This touches on the question of country's sovereignty.

As the UK's Prime Minister Theresa May stated that she would like to follow the 'hard Brexit' option and separate the UK from the EU, it is unrealistic to expect that the Norwegian model could be followed. The UK would have to pay into the budget and follow EU law, while

having no influence on the law-making mechanisms. This could be seen by UK citizens as a simple swap from EU to EEA to preserve the current status quo (nearly fully) without following the voice of the people. It therefore seems that this model is not one that could be chosen by the UK, although it would be beneficial in terms of following the principles of social security coordination.

The Swiss model

Switzerland is slightly different from Norway, as this country is only a member of EFTA and not of the EEA. Not being a member of EEA means negotiation of various bilateral agreements with Member States of the EU will look like negotiations with third countries. Usually each treaty does account for one EU programme. In the context of social security, this means participation in pension programmes, insurance policies, etc. EFTA allows Switzerland to have free trade in non-agricultural goods with EU states.

This model looks like a viable option for the UK, as the country can choose which EU initiative to participate in. This provides a country with greater sovereignty than the Norwegian model. Although Switzerland chose not to be part of the single market in relation to services, there is currently free movement of people in place, which awaits revision due to the negative referendum in 2014.

Like Norway, Switzerland has no power in the decision-making processes, but makes financial contributions to the EU's budget. In choosing this model, the UK would have no guarantee that the EU would want to negotiate with them about social security systems or anything else. The EU offered such negotiations to Switzerland, but whether it would do so for the UK is a matter for the EU to decide. This model is therefore also not ideal for the UK, as they would pay into the budget, adopt EU law and still have no say in decision-making (if remaining a member of the single market). The only benefit is the possibility of choosing areas and regulating them through bilateral agreements, if the EU wishes to negotiate them.

The World Trade Organisation

Becoming a member of the World Trade Organisation is a viable option that the UK might want to pursue, as the free movement of workers would be a non-existent mechanism. Bearing in mind that this option focuses on trade and less on other policies (and cooperation with countries in other areas like defence, migration, integration, etc.), we must note that the UK would be able to trade with the EU, as capital can move freely, unlike workers and their families.

In this instance, the UK would have to negotiate separate bilateral agreements with various countries as a third country. However, it can be claimed that observing the principles of social security coordination will not be ensured. There would be no single market, no paying into the EU budget, and no following of EU legislation that could potentially impose a duty to secure social security coordination principles. The UK would therefore be free to negotiate whatever it wishes, if the other country agrees; there would otherwise be no agreements and no regulation in respect of benefits, pensions and security of other rights. This looks like a dangerous option, but if the UK leaves the EU on strict terms they will want to preserve their sovereignty, and this option thus seems possible, although draconian regarding social security and its principles.

CONCLUSIONS AND RECOMMENDATIONS

If one can imagine that Brexit negotiations happen at the three-side table with the EU, Member States and the UK negotiating the terms for leaving the EU, one would be able to imply from the above analysis what can be claimed by each party in respect of their interests.

The most likely scenario that could be used by the EU and Member States in negotiations is Juncker's fourth scenario. This is because, in some aspects, competencies of Member States will be preserved in relation to passing own legislation about social security

according to coordination's principles. The EU would be able to focus on other issues and do less in a more efficient way, because of their direct focus on agreed priorities. The UK would obviously be treated as a third country (although dependent on the final outcome of negotiations), and therefore the EU, as a representative of Member States, could impose the observance of social security principles in a negotiated bilateral agreement (also if each country had a separate one signed with the UK).

If, however, we look at the choice that the UK is most likely to make, the UK is likely to leave negotiations without an agreement. Following from that is the membership of the World Trade Organisation, which would mean no free movement of workers and therefore no social security coordination for the UK. This is 'hard Brexit', a reflection of the referendum and the voice of UK citizens. The UK is less likely to want to pay into the budget and follow EU legislation, especially if they are unable to have a say about its shape.

Those negotiations can end with no agreement, as the EU, together with the Member States, have a completely different view of what Brexit should look like, especially regarding getting money into the budget. Unfortunately, the most likely consequence is the creation of separate bilateral agreements regarding social security systems, and some of the main principles of current coordination may therefore not be preserved, making it less beneficial for migrants to work in countries other than Member States. The main problem, however, would be the preservation of rights already acquired. This is because social security benefits are usually long term, for example by paying contributions to make plans for the future, and people expect those benefits to help them if the need arises. This, however, is now uncertain.

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