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Forward

Welcome, everyone, to the 2021 edition of the newly revived Kent Law Review.

Run by students, for students, we aim to provide a platform that allows students to contribute their own voice to the wider academic discussions of law. Whether repurposed essays or specially written pieces, all the articles in this issue are the work of Kent students, getting their first experience in academic publishing, and sharing their ideas with the University as a whole. Our editors have been working hard to re-establish the journal and select the best pieces for publication, working with the writers and providing feedback to ensure that all the work in here is the highest quality possible and the best reflection of academic thought at Kent.

To mark the return of Kent Law Review, this issue includes special interviews with the Head of Kent Law School, Professor Lydia Hayes, about the creation of the Journal and the importance of academic writing; and with our Essay Competition winner, Larissa Balkissoon. Against lots of other strong contenders, Ms Balkissoon's essay, 'Cannabis: A Political Garden Tool', was chosen by our student editors for its strength of academic argument and clear, engaging writing style. Her interview gives an insight into why she was so passionate about this topic and how she came to write this essay.

To maintain good first impressions in this introduction piece I would rather not fall into the use of clichés, but nevertheless it is hard to deny that this has been a particularly difficult year for many people, limiting our normal everyday activities and adjusting to the new reality of working online. This is why we are even more grateful to all our editors for volunteering their time to put together this Journal, and to all the students who took the time to write and submit their work, even if they were not published. Thank you to everyone who was a part of this collaborative effort to revive the Kent Law Review. We hope you enjoy, or are interested in, or inspired by, or just want something to pass the time on your train journey by, reading our Journal.

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POWER AND PROGRESS IN LATE CAPITALISM: AN EXPLORATION OF GILLES DELEUZE'S 'POSTSCRIPT ON SOCIETIES OF CONTROL'

> The laws of history are as absolute as the laws of physics,
> and if the probabilities of error are greater, it is only because
> history does not deal with as many humans as physics
> does atoms, so that individual variations count for more.
>
> — Isaac Asimov, *Foundation and Empire*

> From a certain point onward there is no longer any turning back.
> That is the point that must be reached.
>
> — Franz Kafka, *The Trial*

INTRODUCTION

How ought we characterise the exercise of power in our societies? Are they societies that confine and discipline our bodies, or ones that control us in potentially subtler ways?

This article adopts the framework for analysis used by twentieth century French philosopher Gilles Deleuze in his short but defining essay on the subject, 'Postscript on Societies of Control'.[1] It firstly considers the background to the concept of control, then provides a definition of the concept, and, finally, asks whether our society is one of control. It argues that Deleuze is correct to say control has replaced discipline as the primary mechanism of power in our era.

ORTHODOXY

In order to address the question of whether societies of control are increasingly replacing disciplinary societies, it is imperative first to understand what disciplinary societies are.

Discipline is a concept developed most powerfully by Deleuze's contemporary, Michel Foucault.[2] Foucault's philosophy primarily concerns the technologies of power operating within society and their effect on human autonomy. He pursues this study via a genealogical approach; that is, he employs a historical critique to interrogate the workings of powers at play in modern society. In this way—despite his vocal opposition to Hegel—Foucault is very much Hegelian in his belief that close examination of historical parallels and events can clarify and deepen our understanding of present-day technologies of power and how they shape or restrict our autonomy.[3]

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[1] Gilles Deleuze, 'Postscript on Societies of Control' (1992) 59 October 3–7.
[2] On their complex relationship before and after Foucault's death, see François Dosse, 'Deleuze and Foucault: A Philosophical Friendship' in Nikolae Morar, Thomas Nail and Daniel W Smith (eds), *Between Deleuze and Foucault* (Edinburgh University Press 2016).
[3] James Muldoon, 'Foucault's Forgotten Hegelianism' (2014) 21 Parrhesia 102.

Through his historical work, which spans various societal and public institutions, Foucault identifies a fundamental change in the mechanisms of power exercised by the state in the eighteenth and nineteenth centuries. He articulates this shift as a transition away from sovereign power to technologies of discipline.

This notion of discipline and disciplinary society is perhaps best exemplified by Foucault's enquiry into the French penal system in his *Discipline and Punish.*[4] The book opens with vivid depictions of public torture and execution in pre-eighteenth century France. Foucault explains that the physicality and the public nature of punishment in the French criminal system up until then was an essential aspect of the exercise of sovereign power. Yet, while brutal public spectacle instilled fear and awe, it also provided public fora for communities to revolt against the perceived injustices of the sovereign. By moderating power through the benevolent reform of the criminal, by the discipline of the docile body, and by the fragmentation of public space into discrete, segregated institutions, state power could be obscured and, thus, maintained. These forces are the hallmarks of a disciplinary society.

REVISION

In his 'Postscript', Deleuze—building on the work of Foucault—argues that the twentieth century has marked a shift from disciplinary societies to societies of control. A precise definition of control and societies of control has proven to be elusive;[5] it is therefore helpful to consider both the antecedents and critiques of Deleuze's analysis in addition to his work itself.[6]

Antecedents

Deleuze has attributed the concept of control to William Burroughs.[7] Burroughs, in turn, provides not a definition of control, but brief observations as to its exercise; in truth, his analogies are of only limited assistance when read in the context of mechanisms of power within society at large.[8] Nevertheless, there are two salient points to note. Firstly, Burroughs establishes that when one maintains total or absolute power over the actions of another, they can more accurately be said to be *using* them rather than *controlling* them. Secondly, Burroughs shows that control requires concessions and illusions: controllers must make concessions to the controlled in order to maintain the illusion of choice and free agreement, obscuring their true motives in order to avoid revolt.

In contrast to Burroughs, Félix Guattari provides an analogy of control that usefully supports the conception Deleuze comes to advance: the gated home and community accessed and exited via electronic cards.[9] This has elements of discipline, as

[4] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edn, Vintage Books 1995)
[5] Michael Hardt, 'The Global Society of Control' (1998) 20(3) Discourse 139.
[6] Deleuze cites these authors in his 'Postscript': (n 1).
[7] Gilles Deleuze, 'Foucault: Lecture 19' (University of Paris, 15 April 1986).
[8] Burroughs himself concedes his analogy of the life-boat is a 'primitive' one: William S Burroughs, 'The Limits of Control' in James Grauerholz and Ira Silverberg (eds), *Word Virus: The William S Burroughs Reader* (4th edn, Fourth Estate 2010).
[9] 'Postscript' (n 1) 7.

movement being granted or denied constitutes a form of confinement. But, as Deleuze argues, it also represents a departure from the disciplinary society, as 'what counts is not the barrier but the computer that tracks each person's position […] and effects a universal modulation'.[10]

Among his identified influences, Deleuze contends that Foucault sees as 'our immediate future' societies of control.[11] Deleuze particularly emphasises that Foucault's work on discipline is historical (focused on the exercise of power in the nineteenth century); we should, therefore, not be so naive as to assume Foucault would not have recognised the possibility of further historical change. Indeed, Deleuze says that Foucault concludes his *Discipline and Punish* with the explicit recognition that a prison as a physical space is becoming less important in the exercise of power. This, Deleuze suggests, presages a fuller analysis of a new sort of power.[12]

Deleuze makes these forceful arguments as to Foucault's understanding of power in response to a critique by Paul Virilio that Foucault did not understand the nature of modern power. Ironically, that critique is also an important precursor to Deleuze's analysis. Virilio argues that the patrolling of the highway—and not the prison—exemplifies the exercise of police power. Deleuze concurs, adding that modern authorities possess predictive technologies that anticipate the movement of subjects and consequently have less need for confining subjects.

Deleuzian societies of control

That predictive power is a hallmark of control. In his 'Postscript', Deleuze fleshes out this position polemically. It must be noted that Deleuze never attributes any concrete definition to the notion of control itself; he is primarily concerned with how a society of control operates. This section will similarly consider the features and modes of operation that constitute a Deleuzian society of control.

Much like with the disciplinary society, the technologies of power that govern a society of control cannot be boiled down to one single technology or mechanism. Instead, there are targeted and multi-faceted ways in which societies of control manage the lives of their subjects.

Most fundamentally, there are no enclosures or strictly delineated confined spaces (like, for instance, the disciplinary society's schools, barracks, and factories, which are all subject to clear separation from one another). Instead, there is a single modulation, which allows for the coexistence and connection of various states (the corporation, the education system, and the army are all connected, one flowing into the other).

[10] ibid.
[11] 'Postscript' (n 1) 4.
[12] Foucault refers to it as 'biopower'. Biopower is not something that this essay will address, but we can observe that it may be that the Foucauldian notion of biopower and the Deleuzian notion of control are broadly similar or even the same: for a fuller discussion of that relationship, see Thomas Nail, 'Biopower and Control' in *Between Deleuze and Foucault* (n 2).

This brings us to the next point: exploring *how* these spaces or states are connected. The disciplinary society operates on the basis that its subjects start over when they move from one space to another. Though it does recognise analogies between the spaces (the discipline of the school may be similar to the discipline of the army), the spaces and norms are ultimately distinct from each other, with one having little bearing on the other. Societies of control, on the other hand, are predicated on connection *between* spaces, such that 'one is never finished with anything.'[13] These connections encourage a culture of constant progression or improvement. The question this cultural attitude begs (to what ends is progression and improvement directed?) admits no answer.

There are also differences in the conceptualisation and treatment of the person. The disciplinary society takes the individual and subjugates her through discipline so that she will conform to the mass. No such subjugation is necessary in societies of control. The individual is not viewed as a member of a mass, but as a data point, a market audience, a sample.

This allows for targeted control to take shape, where compliance is not forced upon the individual (as with discipline) but *facilitated*. There are no overarching aims or requirements outlined by societies of control (no 'watchwords'). The society is governed merely by way of codes that function as 'passwords'; these can allow or deny the individual access to certain information or amenities. The control of access is presumably based on the conduct of the individual and is a means of exercising control over individuals' choices: the individual *self*-disciplines because of incentives and disincentives encoded within herself as a data-point. This, in turn, suggests (perhaps even necessitates) a degree of technological surveillance that goes beyond that of the comparatively simple model of the Benthamic Panopticon Foucault famously employs.

Additionally, there are no clear hierarchies, if there are any at all. Unlike in disciplinary societies, power is not centralised or in the hands of a single 'owner' or state. Rather, control is exercised by a corporation—invested with its own personhood—comprising stockholders. The make-up of this corporation is transitory and fundamentally transformable.

All of these technologies—singular modulation across singular space, an ethos of the relentless pursuit of progress, the 'dividualisation' or 'data-fication' of the individual, the facilitation of compliance, the use of codes as passwords, technological surveillance, and the absence of clear hierarchies of power—together create a society of control.

Critiques

Here we will explore three critiques of Deleuze's thesis: the privatisation of public space, the role of surveillance in control, and the *telos* of control.

Privatisation

[13] 'Postscript' (n 1) 5.

Michael Hardt deals at length with the Deleuzian conception of societies of control, both in his joint work with Antonio Negri on Empire, as well as more specifically, in a piece titled 'The Global Society of Control.' Here, Hardt contends that there is an incompleteness to Deleuze's work on control, and proceeds to elaborate on the operation of societies of control to fill in these purported gaps. He does so by situating these societies within his and Negri's broader framework of Empire. The study is multifaceted, but here only one aspect of the critique will be considered: the erasure of the dialectic between public and private.

'There is no more outside,' insists Hardt.[14] This is to say, there are no longer any meaningful or permanent divisions between private and public spaces. Nikolas Rose, similarly, argues that inherently public spaces (like public parks, libraries, and playgrounds) are being abandoned in favour of privatised and privately secured places (like shopping malls and arts centres) for *acceptable* members of the public.[15] Those who have no legitimate, consumerised reason to occupy these new privatised 'public' spaces are denied access to them. Populations and classes of people deemed 'dangerous' or 'undesirable' are excluded from the private-public spaces and, so, from society itself.

Deleuze touches on this idea of exclusion as well, in saying that 'three quarters of humanity', who are too poor for debt (as in, those who cannot be managed through the mechanisms of 'control', because these mechanisms rely on monetary and consumerist incentives or 'passwords') and too numerous of confinement (which makes it logistically difficult to subject them to technologies of 'discipline' that rely on confinement) will have to face exclusion to shanty towns and ghettos.[16]

From this, we can take two points. Firstly, that neither the societies of control, nor disciplinary societies are or have ever been able to exercise control or discipline over every individual; when they are unable to, they simply exclude these potentially unpredictable and uncontrollable threats to order. Secondly, there is the implicit acknowledgment that technologies of control and discipline can coexist; to conceive of discipline and control as dichotomous notions would be inaccurate.[17]

In fact, the question posed by this essay itself may fall victim to a false dichotomy between Foucauldian discipline and Deleuzian control. These mechanisms of power are not necessarily mutually exclusive. We should, therefore, be wary to adopt a view that control represents a natural or irreversible progression (from discipline) in the exercise of power (as Hardt and Negri may be suggesting in saying that control is an intensification of discipline),[18] because they are contingent historical realities. That is what Foucault's work—and Deleuze's analysis of it—suggested of discipline, and it is no less true in the case of control. Thus, we can qualify our thesis by saying that while societies of control are increasingly replacing those of discipline, technologies of discipline (and even of sovereignty) are still employed in certain contexts.

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[14] Hardt (n 5) 140.
[15] Nikolas Rose, 'Government and Control' (2000) 40(2) The British Journal of Criminology 331.
[16] 'Postscript' (n 1) 7.
[17] JM Wise, 'Mapping the Culture of Control: Seeing through *The Truman Show*' (2002) 3(1) Television & New Media 29.
[18] Nail, 'Biopower and Control'.

Surveillance

Surveillance is implicit within Deleuze's conception of control (in the understanding of the individual as a mere data point, not the member of a mass), but Oscar Gandy articulates this technology more explicitly.[19] Such an emphasis on surveillance is problematised, however, by Rose, who posits that societies of control are not predicated on surveillance but on the instilling of self-discipline and self-regulation in their subjects. That rather misses the mark, because, as we have seen, societies of control employ a range of technologies to exercise power. Nothing suggests an emphasis on self-discipline ought to exclude the technology of surveillance, which is implicit in the incentivisation of labour and use of passwords.

Telos

But Rose's critique of surveillance does helpfully inform another point of discussion: the odd ideas prioritised within societies of control. Deleuze makes brilliant and incisive concluding remarks about this *telos* of self-improvement and self-actualisation. But what are the motivations behind this ethos of motivation? That is the question Deleuze poses in his conclusion, and it is a question that largely remains unanswered. In some ways, one can only hazard a guess at the mechanisms at work here. That is rather the point. Societies of control have evolved such that their technologies of power and their telos can be more obscure than that of disciplinary societies.

VALIDATION

With definitions—or, rather, understandings—of both disciplinary societies and societies of control to hand, this essay considers whether it can be said that the latter are replacing the former.

The institutions of the disciplinary society Foucault identifies in his body of work—the home, the school, the prison, the barracks, the factory—are all still extant. However, as we have noted above, there need be no 'either/or' as between societies of discipline and of control; the question is more accurately one of degree and we must identify whether a general movement may be occurring. Again, that movement need not be total or irreversible.

Such a movement seems to be taking place all around us. For example, remote working and learning, which Deleuze identified as increasing in the 1980's and which has skyrocketed in light of the coronavirus pandemic, has weakened substantially the disciplinary segregation of physical space.[20] At the same time, it has strengthened the all-encroaching productivity ethos of societies of control by placing work or study (itself little more than a preparatory step towards work) within the walls of the private family home.

[19] Wise, 'Culture of Control' 33.
[20] Deleuze, 'Foucault: Lecture 18'.

Whilst coronavirus may have accelerated a shift towards societies of control, this trend runs much deeper still. Below, we shall seek to validate the shift Deleuze identifies by employing and analysing four impressionistic vignettes.

Vignette A

In April 2021, Chinese state television broadcast an exposé of intolerable working conditions faced by food delivery drivers—long hours, meagre pay, algorithms that encourage dangerous driving and heavily fine lateness, and harassment from customers who have full and 'live' access to drivers' locations and contact details. China's couriers are estimated to contribute to close to 1% of the country's economic activity, but the undercover government official earned just £4.52 over a 12-hour shift.[21]

The courier works in no strictly delineated or confined space, but everywhere, openly. He is the subject of constant surveillance. Customers have his precise location, his 'ETA', the corporation's promised delivery slot, and his personal mobile phone number at their fingertips. The threat of an angry call or harsh review might appear in those circumstances to operate rather like a panopticon unconfined by space, enforcing conformity.

But that is only a minor part of this story; it is secondary to the algorithmic surveillance and control in which both the courier and the customer are merely variables. Drivers will be set timescales in which to complete a delivery determined by the average speed at which drivers have previously made that journey or a similar journey. If they beat that timeframe, they may be rewarded with bonus pay. If they fail, their pay will be docked. Both processes—the incentivisation of speed and disincentivisation of slowness—are automated. The algorithm does not care how the driver gets from A to B, only that he does so quickly and does not damage the customer's goods in the process. So, drivers will travel recklessly in order to beat the clock to boost their meagre pay, but this only shortens the average time of journey completion, making pay boosts harder to achieve and pay docks more likely and contributing to an insane culture of paranoia and uncertainty.

Compliance with the requirements of speed in this system is facilitated, not forced. In paying the less perfect worker less and the more perfect worker more, the corporation is nudging the courier to an (ultimately ephemeral) standard of compliance. But it need take no further punishing or corrective action: it knows that the courier, impacted by these forces, will correct *himself*. The password operating here is that of a courier 'score' that determines the level of pay afforded for work done.

This is ripe terrain to consider Deleuze's challenge as to whether the unions will be able to resist forces of control upon the breakdown of the workplace. China, where organised labour is met with fear and hostility, shows that the communist party will intervene by challenging monopolies and exposing low pay. They may moderate the technology of power, but they will not extinguish it; the work is too economically important for that. In the UK, there have been increased efforts by unions to protect

[21] Yuan Yang, 'China's food delivery groups slammed after undercover TV exposé' *Financial Times* (London, 29 April 2021).

insecure, 'gig-economy' labourers and they have had some success.[22] But here too the overall system of algorithmic control is not removed, but mollified.

Vignette B

A London-based junior employee at Goldman Sachs, one of the largest investment banks in the world, has complained that staff face 18-hour shifts that mean they are earning less than the UK living wage and regularly take sick leave due to burnout. In 2015, US employee Sarvshreshth Gupta, who had been working 100-hour weeks, took his own life.[23] The company has a £50,000 entry-level base salary.[24] The company's average employee takes home about £260,000 per year.[25]

It is at first blush surprising that employees at Goldman Sachs could be said to be subjects of control by twenty-first century technologies of power, and even more surprising to suggest that their situation is comparable to that of couriers in China. But this is precisely the sort of topsy-turviness that is to be expected from (and ultimately serves to legitimate) societies of control, where we all 'work hard'.

The impetus to 'get ahead' is central to the ethos of self-improvement and motivation instilled by societies of control. That is perhaps nowhere more evident than amongst the new, highly-remunerated, highly-overworked, 'meritocratic', professional or upper class of managers, bankers, and lawyers.[26] Previously, elite status was maintained through generations by inheritance. That method of status-maintenance has now mostly been displaced by investments in 'human capital'. This can be achieved directly—through funding private schooling, tuition, and even work placements paid for by the volunteer—or indirectly, through covering children's rent and paying for their goods.

The crucial factor in bringing about this shift has been the rise of 'meritocracy', which purports that success (i.e. the rate of remuneration for one's work) is a result and marker of an individual's inherent drive and talent but which in reality allows 'a relatively tiny segment of the population […] to transmit advantage from generation to generation' because elite parents stack the odds in favour of their children's advancement from birth.[27] This is the society of control in action: demanding, inequitable and possessing an obscured, democratically-papered-over *telos*, drive and skill directed at productive activities.

But the elite class are not spared from the brutalities of this system, as the above vignette suggests. Since societies are increasingly meritocratic (in the sense that the most skilled and driven will generally be remunerated the most, not in the sense that the system promotes a level playing field) young elite professionals still have to work incredibly hard to 'climb the ladder'. Even if they reach seemingly secure positions of employment, they will still want to continue to reap the rewards of their labour, still

[22] For instance, many will now be recognised as 'workers' rather than as 'self-employed', with greater protections: *Uber v Aslam* [2021] UKSC 5.
[23] Kalyeena Makortoff, 'Goldman Sachs junior banker speaks out over "18-hour shifts and low pay' *The Guardian* (London, 24 March 2021).
[24] ibid.
[25] Michael Foster, 'Guess How Much Goldman's Average Salary Is (GS)' *Investopedia* (25 June 2019).
[26] Stefan Collini, 'Snakes and Ladders' *London Review of Books* (London, 1 April 2021) 15.
[27] ibid 22.

need to work intensively to secure funds to invest in their children's human capital, and still be motivated by the overwhelming and corrupting cultural ideal of self-improvement and motivation.

The name of Goldman Sachs' personnel team, 'Human Capital Management', is telling. It has been noted, '[l]ives are things that people have; capital has rates of return.'[28]

Vignette C

About one in every hundred adults in Britain has been trained as a 'mental health first aider' by the MHFA.[29] They advertise their 'proactive' services thus: 'for every £1 spent by employers on mental health interventions, they get back £5 in reduced absence [...] and staff turnover.'[30] The second of five listed responsibilities for first-aiders is to communicate concerns about 'anyone in your workplace, for example to an appropriate manager.'[31] Separately, the UK government is providing '£1 million for innovative student mental health projects' that offer targeted support to those identified statistically as being at highest risk of mental ill-health.[32]

Deleuze argued the hospital was being replaced by 'neighbourhood clinics, hospices, and day care'.[33] Similarly, the above vignette suggests that the power that would in a disciplinary society be exercised by the asylum has, in our societies of control, been exercised dispersedly by employers, with the aim being to improve profit-margins and productivity rates. The actual mental wellbeing of employees—or, rather, of *human capital*—is a means to that end that may give rise to some incidental good. But even these incidental goods are monetised, such as when companies compete on their 'work-life balance' or their inclusion of private therapy in 'healthcare plans' so as to attract the most human capital.

Under these conditions, the public healthcare officials sectioning or supporting a member of the public who risks harm to herself or others are reduced in their significance. In their place, the anxious employer preempts possible harm to the corporation by proactively addressing and preventing harm to the employee. Similarly, 'mental health teams' in schools and universities are encouraged by the government to anticipate, based on a series of data-sets, those students who are 'more at risk' and provide targeted interventions to safeguard their health (and, by extension, their productivity).

Deleuze says that 'the socio-technological study of the mechanisms of control […] would have to be categorical'. By this it is meant that we must look to each institution of power—the healthcare system, the corporate system, the educational system—and describe the power being exercised there. The above vignette shows that that has become an artificial mode of analysis in this era of control. The healthcare system has

[28] ibid.
[29] Mark Rice-Oxley, 'UK training record number of mental health first aiders' *The Guardian* (2 September 2019).
[30]MHFA, 'Being a Mental Health First Aider: Your Guide to the Role'.
[31] MHFA, 'Workplace Info Pack'.
[32] Department for Education and others, '£1 million for innovative student mental health projects' *UK Government* (5 March 2020).
[33] 'Postscript' (n 1) 4.

been radically dispersed, with detection, prevention, and mitigation (recovery being ancillary) of illness now increasingly undertaken by the corporation and its agents, including crucially the employee herself *qua* employee or human capital. She will contact her mental health first aider colleague or her employer (though any difference between the two seems doubtful). She will purchase products—self-help books, meditation apps, tickets to motivational talks—with a view to her greater productivity and, hence, 'employability'. In fact, the monetary value she attributes (through her valuable spare time as much as through her pay-power) to her own productivity and employability may reduce the corporate system's nascent role in facilitating compliance; her self-improvement becomes her guiding, internalised ethos as a consumer-employee and she will discipline *herself*, knowing this self-improvement will be coded and rewarded.

Thus, technologies of power in the modern, mental health context cannot be identified within a healthcare system, a corporate system or an education system, nor even within what might be dubbed a 'consumer system'; there is no single system of operation of which we can speak. This conceptual challenge itself demonstrates the ultimate annihilation of the institutions Deleuze anticipates in societies of control.

Vignette D

In May 2021, the UK government proposed halving state funding for university courses they do not regard as 'strategic priorities', such as music, drama, visual arts, and archaeology. It is estimated that such courses would run at a deficit of £2,700 per enrolled student, and many courses may therefore have to close if the plans go ahead. The government says the decision is 'designed to target taxpayers' money towards the subjects which support the skills this country needs to build back better'.[34] *They also say universities should "focus [...] upon subjects which deliver strong graduate employment outcomes in areas of economic and societal importance".*[35]

Deleuze foretold the 'effect on the school of perpetual training, and the corresponding abandonment of all university research'.[36] Alarming an idea as this may be, the above vignette should at least discourage us from dismissing it altogether. The government's proposal betrays a deeply production-oriented approach to higher education that sees knowledge and learning as purely instrumental to the development of concrete 'skills' to be directed at the most economically valuable production of goods and services and, correspondingly, the strongest employment outcomes.

The UK education system no longer possesses its own watchwords (save, perhaps, 'instilling British Values'). Instead, all activity is directed at the future employment prospects of the student. The privatisation of schools (through academisation in England) has allowed for corporate sponsorship that makes this close instrumentalism perfectly plain: the corporation's senior managers become senior managers of underperforming schools and they are expected to foster students' 'aspirations'. Here, the corporate and educational systems are blended together, the former funding the latter, the latter supplying labour to the former. The physical spaces in which learning

[34] Lanre Bakare and Richard Adams, 'Plans for 50% funding cuts to arts subjects at universities "catastrophic' *The Guardian* (6 May 2021).
[35] Richard Adams, 'English universities must prove "commitment" to free speech for bailouts' *The Guardian* (16 July 2020).
[36] 'Postscript' (n 1) 7.

occurs can at times barely be distinct from the corporate, whether a company name is printed across the school entrance ('Bridge Academy in partnership with UBS') or affixed to laptops donated to school students studying remotely.

CONCLUSION

There is a great deal of truth to Deleuze's thesis that societies of control are replacing disciplinary societies. We have noted the destruction of swathes of confined and discrete spaces; the intermixing of institutions; the pervasive power of technology to tweak and modulate behaviour through coding; and the pointless but universal ethos of motivation. As Deleuze ably demonstrates, analyses of discipline, confinement, hierarchy, and masses can only take us so far in understanding these forces. More necessary in our quest to uncover the *telos* we are being made to serve is a socio-technological study of control and its methods.

However, this essay has also sought to demonstrate the limits of Deleuze's proposed methodology. For a 'categorical' socio-technological study of control becomes more elusive the more deeply a society succumbs to control. Schools, prisons, barracks, hospitals, factories, offices, and homes are increasingly blended (and so less discrete) environments. The office educates, entertains, protects, and diagnoses its employees. The school is a business, its pupils are prospective employees. University is a career stage. Beds, dining tables, and lounges are workstations. For those on 'home detention' during coronavirus in the United States or under TPIMs (Terrorism Prevention and Investigation Measures) in the United Kingdom, these same spaces are prison cells. The gradual annihilation of the disciplines as physical and conceptual spaces—which Deleuze foresaw—also renders obsolete our existing methods of understanding power. We are in need of new tools to respond to these developments; the study of categories must be replaced with the study of networks and systems. We must explore with curiosity and thoroughness the complex web of relations operating through spaces and lives.

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RIGHT TO STRIKE

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Striking, overtime bans and refusing to carry out certain tasks[1] are collective forms of actions that can arise from workplace disputes. These industrial actions are of fundamental importance: the temporary halt in work production leverages a demand to enforce workers' rights. Despite this, the UK does not recognise the legal right to withdraw labour. Instead, the UK's "right to strike" is said to depend on a complex statutory scheme[2].

This article will analyse a variety of sources, "statutes such as TULRCA 1992, the common law, Convention rights, and relevant case law[3]", to determine whether the UK's "right to strike" "is a classic instance of a 'legislated' right[4]" or if it is merely a "slogan/legal metaphor[5]".

[1] Hugh Collins, Aileen McColgan and Keith D Ewing, *Labour Law* (2nd edn, Cambridge University press 2019) pg.706.

[2] Alan Bogg and Ruth Dukes, 'Statutory Interpretation and The Limits of a Human Rights Approach: Royal Mail Group Ltd V Communication Workers Union' (2020) 49(3) Industrial Law Journal pg.478.

[3] Ibid, pg.478.

[4] Ibid, pg.478.

[5] Metrobus v UNITE [2009] EWCA Civ 829 (Maurice Kay LJ).

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'In truth, the "right to strike" in the UK depends for its realisation on a complex statutory scheme. Even in jurisdictions where the right to strike is specified textually in a constitutional document, such a complex right must be operationalised through labour statutes. It is a classic instance of a "legislated" right. Since the enactment of the Human Rights Act, and the evolving jurisprudence of the ECtHR, UK law may now be described as protecting a right to strike albeit one that is pieced together from a variety of sources: statutes such as TULRCA, the common law, Convention rights, and relevant case law.'[1]

Does this statement accurately encapsulate the UK law on the 'right to strike'? How do the different sources of law interact and what factors determine the correct balance to be reached between competing interests in regulating industrial action? Use case law, statute, legal commentary and social science material in your answer and provide illustrations to support your analysis.

In line with socialism and Professor Beverly Silver's assertions, capitalism is established upon 'two contradictory tendencies': 'crises of profitability and crises of social legitimacy'.[2] This 'inherent labour-capital'[3] struggle is reflected within the UK's hostile regulation of industrial action. The courts' and legislature's ideological approaches towards the collective right to withdraw labour unanimously and substantially favours economic growth above social welfare.[4]

Striking, overtime bans, and refusing to carry out certain tasks are collective forms of actions that can arise from workplace disputes.[5] These disputes typically occur because employers are unwilling to negotiate with employees and workers about their working terms or conditions. Undeniably, the duration – and the aftermath – of the collective action results in financial losses to the business and affect innocent third parties (i.e. the general public).[6] Therefore, in order to appease and 'bring the labour under control', the capital would 'have to make concessions [i.e. comply with the strikers' new terms], which provoke crises of profitability'.[7] However, the loss suffered by a business[8] during and after industrial action is justified on two persuasive grounds. The first ground identified by Gwyneth Pitt is the human right aspect.[9] To restrict the right to strike would be akin to the horrific period of slavery,[10] where man had no power to withdraw his labour. This justification is recognising the

[1] Alan Bogg and Ruth Dukes, 'Statutory Interpretation and The Limits of a Human Rights Approach: *Royal Mail Group Ltd v Communication Workers Union*' (2020) 49 ILJ 477, 478.
[2] Nicholas Pohl, 'Political and Economic Factors Influencing Strike Activity During the Recent Economic Crisis: A Study of The Spanish Case Between 2002 And 2013' (2018) 9 Global Labour Journal 19, 21.
[3] ibid, 21.
[4] Harry Smith, 'How Far Does UK Labour Law Provide for The Effective Exercise of a Right to Strike?' (2014) 6 The Student Journal of Law <https://sites.google.com/site/349924e64e68f035/issue-6/how-far-does-uk-labour-law-provide-for-the-effective-exercise-of-a-right-to-strike> accessed 15 December 2020.
[5] Hugh Collins, Aileen McColgan and Keith D Ewing, *Labour Law* (2nd edn, CUP 2019) 706.
[6] Gwyneth Pitt, *Cases and Materials on Employment Law* (1st edn, Pearson Education Limited 2008) 570.
[7] Pohl (n 2), 21.
[8] Beverly J Silver, *Forces of Labor Workers' Movements and Globalization Since 1870* (CUP 2003) 17.
[9] Pitt (n 6), 570.
[10] Manfred Davidmann, 'The Right to Strike' (*Solhaam*, 1996) <www.solhaam.org/articles/right.html> accessed 15 December 2020.

inequalities in bargaining power between employer and employee.[11] This inequality has been further escalated by the growth of the modern-day unstable gig economy; one in nine UK workers are in precarious work.[12] This form of work has limited protection and much lower salaries.[13] Hence, a subsequent ground for the justification of withdrawal of labour is the equilibrium argument. The power of the employer and their actions can only be matched and questioned by a 'concerted stoppage of work'.[14] Essentially, the right to strike is more than the withdrawal of labour: it is also the encompassing 'right to free expression, association, assembly and power'.[15] Yet there is 'no positive legal right to strike in the UK'.[16]

Instead, 'the "right to strike" in the UK depends for its realisation on a complex statutory scheme'.[17] In contrast to its neighbouring European countries' (Spain and Italy) jurisdictions 'where the right to strike is specified textually in a constitutional document', the UK law 'protects a right to strike … from a variety of sources: statutes such as TULRCA, the common law, Convention rights, and relevant case law'.[18] The accuracy of Bogg and Dukes' encapsulation of the UK law on the 'right to strike' and how the different sources of law interact will be subsequently discussed.

i. Common Law

Judiciary

While Spain[19] and Italy[20] protect the right to strike by suspending the contract of employment during industrial action, this contract is broken under English law.[21] This is because the English common law does not confer a right to strike,[22] hence 'the rigour of the common law applies in the form of a breach of contract on part of the strikers and economic torts … [for] the organisers and their union'.[23]

It is tortious and indefensible[24] to induce an individual to breach their contract of employment.[25] This principle was established in *Lumley v Gye*,[26] and this liability

[11] Adam Smith, *An Inquiry into The Nature and Causes of The Wealth of Nations* (Cofide 1776).
[12] Bethan Staton, 'The Upstart Unions Taking on The Gig Economy and Outsourcing' (*Financial Times*, 20 January 2020) <www.ft.com/content/576c68ea-3784-11ea-a6d3-9a26f8c3cba4> accessed 16 December 2020
[13] Employment Rights Act 1996, s212.
[14] Trade Union and Labour Relations (Consolidation) Act (TULRCA)1992, s246.
[15] Brian Smart, 'The Right to Strike and The Right to Work' (1985) 2 Journal of Applied Philosophy 31.
[16] 'Industrial Action' (*UNISON National*) <www.unison.org.uk/get-help/knowledge/disputes-grievances/industrial-action/#:~:text=Although%20there%20is%20no%20positive,some%20tough%20conditions%20are%20met.&text=The%20union%20must%20have%20conducted,called%20upon%20to%20take%20part.> accessed 7 December 2020
[17] Bogg and Dukes (n 1), 478.
[18] ibid, 478.
[19] Article 18 of the Spanish Constitution and regulated by Royal Decree-Law 17/1977 of 4 March on Labour Relations ('RDLLR') and Article 4.1.e) of the Spanish Workers' Statute.
[20] Article 40 of the Italian Republic Constitution of 1948.
[21] Collins, McColgan, and Ewing (n 5), 714.
[22] *RMT v Serco; ASLEF v London and Birmingham Railway* [2011] EWCA Civ 226, [2011] ICR 848 [2].
[23] *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173 [118].
[24] *South Wales Miners' Federation v Glamorgan Coal Co* [1905] AC 239.
[25] Collins, McColgan, and Ewing (n 5), 714.
[26] (1853) 118 ER 749.

extends to trade unions in the context of industrial action.[27] Additionally, there are two further economic torts trade unions can be held liable for: liability for conspiracy to injure (*Quinn v Leathem*)[28] and causing loss by unlawful means. Until *OBG Ltd v Allan, Douglas, and others v Hello! Ltd*,[29] the 'tort of procuring a breach of contract had been ["blurred"[30] and] extended [to be a wider] tort of unlawful interference with contractual relations'.[31] These torts were later distinguished and separated in the House of Lord's (HoL) judgment of *OBG v Allan*.

While it is not often, the courts are encouraged to distinguish and introduce new torts. The HoL in *OBG v Allan* subsequently outlined the distinguishing elements between unlawful means and the tort of procuring a breach of contract. The tort of procuring a breach of contract is an accessory liability. Whilst the tort of unlawful means is a 'primary liability that is not dependent on the third party having committed a wrong against the claimant'.[32] Yet, despite the tort differences, the HoL confirmed that the same act could give rise to liability under both unlawful interference and procuring a breach of contract.[33] This clarification and the development of unlawful interferences as a separate liability has notably accommodated employers in holding trade unions liable for more than one tort.

The *OBG v Allan* judgment is significant for discussing industrial action for two notable reasons. The first is that it confirms the judiciary's 'uncontrolled power'[34] in developing and 'defining torts boundaries on a case-to-case basis.[35] This power is 'ensur[ing] that trade unions cannot provide a lawful excuse or justification for their actions'[36]; trade unions are ultimately 'stood naked and unprotected at the altar of the common law'.[37] The insufficiency of protection for trade unions under the common law exhibits the judiciary's biased and hostile ideology towards industrial action.[38] This subsequently aligns with the following observation: the courts favour economic profits. This is discerned by the extent to which the contemporary judiciary extends protection for commercial bodies.[39] The primary function of English tort law was to protect physical integrity and property rights; tort law was never concerned with the protection of economic interests.[40] Nor had the common law ever been historically exercised to 'legitimately control aspects of the economy'[41] and yet *OBG v Allan* demonstrates the extent to which this has now changed. The judiciary has extensively and needlessly stretched the common law and its torts[42] to protect

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[27] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426.
[28] [1901] AC 495.
[29] [2007] UKHL 21, [2008] 1 AC 1.
[30] 'House of Lords Overhaul Economic Torts' (*Herbert Smith Freehills*, 17 May 2007) <https://hsfnotes.com/litigation/2007/05/17/house-lords-overhaul-economic-torts/> accessed 9 December 2020
[31] ibid.
[32] *OBG v Allan* (n 29).
[33] ibid, [37].
[34] Hazel Carty, 'The Economic Torts and English Law: An Uncertain Future' (2007) 95 Kentucky LJ 849.
[35] *Lonrho v Fayed* [1990] 2 QB 479, 492-93.
[36] Collins, McColgan, and Ewing (n 5), 714.
[37] ibid, 714.
[38] ibid, 849.
[39] ibid, 848.
[40] ibid, 847.
[41] ibid, 847.
[42] Cartey (n 34), 847.

'already powerful organisations'.[43] Hence, from the perspective of trade unions and their members, the common law's (inadequate) protection for the 'right to strike' has been, undeniably, very disappointing.

II. Statutes

Legislature

One of the major problems facing trade unions was the 'exposure of their funds to legal action by employers'[44]; in 1901, Taff Vale Railway Co successfully sued the Amalgamated Society of Railway Servants union for £42,000.[45] This sum is equivalent to £5,196,328.39 today. This verdict, in effect, eliminated 'the strike as a weapon of organized labour'.[46] Naturally, workers turned to political parties for redress. The concern and advocacy for trade union reform accounted for 59% of the winning Liberal party's election manifesto.[47] The Liberal government, led by Prime Minister Henry Campbell-Bannerman, provided unions with wide immunity against any tortious liability arising from trade disputes under The Trade Disputes Act (TDA) 1906. Although this Act did not introduce a 'legislated right' for industrial action,[48] this statute effectively recognised the vulnerability of unions under the common law by 'secur[ing] a [statutory] freedom' instead. [49] The TDA is one of the 'most important pieces of labour legislation ever passed by a British Parliament'[50]; it effectively 'kept the courts at a minimum'[51] and neutralised the most obvious adverse effects of the *Taff Vale* judgment. The 'sympathetic politicians' were 'periodically reconstructing' the role of the 'class-conscious', profit-favouring judiciary.[52] The outcome of the 1906 general election 'served the unions' interests well'[53] and it continued to for 65 years.

The 'long enjoyed'[54] immunity of trade unions for liability in tort was reduced to partial immunity under the Thatcher government (1979-90). There is a 'scale of government ideology' which ranges from 'fully participative' to 'fully authoritative',[55] and the Thatcher government was the undoubtable latter. The Conservative ideology and economists, such as FA Hayek, viewed trade unions as an obstacle to economic growth.[56] This perception was heightened by the Winter of Discontent (1978-79): a

[43] ibid, 849.
[44] Richard Kidner, 'Lessons in Trade Union Law Reform: The Origins and Passage of The Trade Disputes Act 1906' (2018) 2 Legal Studies 37.
[45] *Taff* Vale (n 27).
[46] Merriam-Webster, *Merriam-Webster's Collegiate Encyclopedia* (Merriam-Webster 2000) 1157.
[47] Kidner (n 44), 47.
[48] Bogg and Dukes (n 1), 478.
[49] *RMT and ASLEF* (n 22) [2].
[50] Keith Ewing, 'The Right to Strike: From the Trade Disputes Act 1906 To A Trade Union Freedom Bill 2006' (*Institute of Employment Rights*, March 2013) <www.ier.org.uk/product/right-strike-trade-disputes-act-1906-trade-union-freedom-bill-2006/> accessed 11 December 2020.
[51] The Editors of Encyclopedia Britannica, 'Trade Disputes Act' (*Encyclopedia Britannica*, 20 July 1998) <www.britannica.com/event/Trade-Disputes-Act-United-Kingdom-1906> accessed 11 December 2020.
[52] Ewing (n 50).
[53] Encyclopedia Britannica (n 51).
[54] FA Hayek, 'Trade Union Immunity Under the Law' *The Times* (London, 21 July 1977) 15 <www.margaretthatcher.org/document/114630> accessed 11 December 2020
[55] Davidmann (n 10).
[56] Hayek (n 54).

period characterised by widespread of strikes in response to the Labour government's wage cap (to maintain falling inflation).[57] Subsequently, Thatcher's government further justified the re-introduction of liability for trade unions upon the succeeding Green Papers: the 1981 *Trade Union Immunities*[58] and the 1989 *Trade Unions and their Members.*[59] Both papers outlined concerns regarding democracy, rights, and freedom of trade union members; 'too often in recent years it has seemed that employees have been called out on strike by their unions without proper consultation and sometimes against their express wishes'.[60] Accordingly, the Thatcher government introduced legislation that prior Conservative governments were afeard of passing: the Employment Act 1980, Trade Union Act 1984, and Trade Union Reform and Employment Rights Act 1993. These re-introduced vulnerability and high costs for unions. Under the Employment Rights Act 1980, 'trade-dispute' was re-defined, statutory liabilities were introduced and unions were exposed to injunctions and claims for damages. However, upon complying with the stringent balloting requirements (from secret ballot to the requirement for all ballots to be postal) in the 1984 and 1993 Acts, the dispute would be deemed lawful.[61] It is expensive for unions to comply and evidence the fulfilled balloting requirements, but if lawful union members are statutorily protected from unfair dismissals and injunctions.[62] While this is a brief summary of the Acts, these restrictive measures offer an insight into the Thatcher government's success in exercising its agenda of restricting the lawfulness of industrial action by limiting its previously protected scope and purposes.

Subsequently, the process of placing further controls on trade unions continued into the 21st century.[63] The 2015 Conservative government introduced the 'draconian'[64] Trade Union Act 2016 (TUA) – the most significant union legislation since the Employment Act 1980. The TUA introduced a minimum threshold of eligible members to vote in the ballot (at least 50% turnout and 50% voting in favour).[65] Moreover, in the instance the members are engaged in 'important public services',[66] 40% of all members entitled to vote must have voted in support of the industrial action. These stringent procedural requirements have to be strictly followed for a strike to be lawful.[67] Oddly, there was no pressing need to introduce these restrictive measures.[68] There were no significant problems in industrial relations at the time (ie, Winter of Discontent) nor any significant 'pressure from business for further laws on strikes',[69] but the Conservative government justified these 2016 measures through

[57] Alex Kitson, '1978-1979: Winter of Discontent' (*Libcom.org*, 24 January 2007) <http://libcom.org/history/1978-1979-winter-of-discontent> accessed 11 December 2020.
[58] Cmd, 8128, 1981.
[59] Cmd 821, 1989.
[60] *Trade Union Immunities* (n 58), para 247.
[61] Trade Union Reform and Employment Rights Act 1993, s238A.
[62] TULRCA 1992, ss237-38.
[63] Michael Ford and Tonia Novitz, 'Legislating for Control: The Trade Union Act 2016' (2020) 45 ILJ 227.
[64] Bart Cammaerts, 'The Efforts to Restrict the Freedom to Strike and To Deny A Right to Strike Should Be Resisted Fiercely' (*LSE Blogs*, 14 September 2015) <https://blogs.lse.ac.uk/politicsandpolicy/the-efforts-to-restrict-the-freedom-to-strike-and-to-deny-a-right-to-strike-should-be-resisted-fiercely/> accessed 11 December 2020.
[65] TUA 2016, s226(2)(a) (ii).
[66] ibid, s226(2)(e).
[67] ibid, s238A.
[68] Ford and Novitz (n 63), 291.
[69] ibid, 291.

the findings of Bruce Carr QC and Ed Holmes.[70] The Government submitted the Carr Review to indicate a consistent pattern of union bullying workers, and yet Carr himself 'did not contend his findings to be a sufficient basis' for influencing the TUA.[71] Instead, the true motivations behind the government's 2016 legislative programme are observed by the 'striking resemblance'[72] to Ed Holmes *Modernising Industrial Relations* (*MIR*) paper.[73] The policy paper daringly questioned the necessity of protecting industrial action by reflecting on the development of employment tribunals and discussing the economic consequences of strikes. The same 'free-market economic theory' that underpinned the *MIR*'s recommendations 'drove' the pragmatically restrictive and economically influenced 2016 statute developments.[74]

The substance of today's statute in protecting trade unions 'is far removed and much weaker than the position established in 1906'.[75] Since the Henry Campbell-Bannerman leadership, trade union membership has declined by more than half due to the 'three successive Conservative governments [who] have enacted labour legislation opposed by unions'.[76] It appears the deep-rooted ideology of the political party in power influences the legislative steps for protecting trade unions.[77] Therefore, the extent of the Conservative government's 'authoritarian, class-biased and oppressive'[78] industrial action policies will be exemplified and 'more evident than they are today when a Labour government is elected again'.[79]

Judiciary

While the likes of Maurice Kay LJ and Lord Neuberger MR 'characterised the statutory immunities as limited exceptions to the common law' to justify interpreting the statute provisions 'strictly against the trade union', the court's overall response to industrial action 'has been more mixed'.[80] The court in *Merkur Island Shipping v Laughton*[81] developed a three-part test to examine the legality of industrial action. This test encapsulates the substantive and procedural requirements for a lawful strike whilst observing the intertwined and 'uneasy' relationship between the common law and statute.[82] If the industrial action is unlawful at common law, the judiciary asks whether there is a 'prime facie statutory immunity' for the commission of torts.[83] This substantive question considers whether the action was 'in contemplation or furtherance of a trade dispute'[84] before questioning whether the

[70] ibid, 291.
[71] ibid, 291.
[72] ibid, 279.
[73] *Modernising Industrial Relations* n.7.
[74] Ford and Novitz (n 63), 279.
[75] Ewing (n 50).
[76] Brian Towers, 'Running the Gauntlet: British Trade Unions Under Thatcher, 1979-1988' (1989) 42 ILR Rev 163.
[77] Gareth Thomas and Ian K Smith, *Smith & Thomas' Employment Law* (9th edn, OUP 2007), 737.
[78] Davidmann (n 10).
[79] Bogg and Dukes (n 1), 492.
[80] Ruth Dukes, 'The Right to Strike Under UK Law: Not Much More Than A Slogan? *NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd*' (2011) 40 ILJ 302, 309.
[81] [1983] ICR 490.
[82] Collins, McColgan, and Ewing (n 5), 847.
[83] TULRCA 1992, s219.
[84] ibid.

immunity had been procedurally lost by one of the three specified statutory reasons in TULRCA 1992.[85] The union's partial immunity could be lost for minor 'inconsequential breaches of the statutory rules'[86]; there is a series of High Court instances of injunctions being granted to 'ever more powerful and well-resourced employers'[87] owing to invalid strike ballots.[88] The readily available labour injunctions continued to be the "key piece[89]" of suppressing collective action until the minor development in 2011.

In *RMT v Serco Ltd; ASLEF v London and Birmingham Railway Limited* (*RMT and ASLEF*),[90] the Court of Appeal approved and applied Millett LJ's 1996 observation in *London Underground Limited v National Union of Railwaymen, Maritime and Transport Staff*:[91] 'the democratic requirement of a secret ballot is not to make life more difficult for trade unions … but for the protection of the Union's own members'.[92] Owing to this proposed democratic aim, the court in *RMT and ASLEF* confirmed it was 'to interpret the statutory provisions somewhat less stringently'.[93] This interpretation is a stark contrast to Maurice Kay LJ's understanding of parliament's intentions. The court furthered Millett LJ's aim by recommending a neutral, 'without presumptions one way or the other',[94] interpretation of TULRCA. Upon the fact TULRCA is premised on the existing common law framework, the court's 'judicial creativity' could have easily 'outflank[ed] the intentions of Parliament'.[95] Instead of a 'neutral' approach, the courts have the power to mitigate unions disproportionate vulnerability against injunctions, damages, and unfair dismissals by encouraging and favouring social legitimacy. Although, the *RMT and ASLEF* court 'only indicated a change in emphasis rather than substance'[96] (since unions are still burdened with the challenges of exercising a 'lawful' strike),[97] this judgment enhanced union's ability to resist injunction applications (as observed by *Balfour Beatty Engineering Services Limited v Unite the Union*).[98] The unbiased interpretation encouraged in *RMT and ASLEF* continues to be the leading approach to interpreting domestic statutes regarding industrial action.

III. ECHR

Judiciary

[85] ibid, ss222, 224, and 226.
[86] Dukes (n 80), 309.
[87] Kalina Arabadjieva, 'Royal Mail Group Ltd v Communication Workers Union (CWU): Injunctions Preventing Industrial Action and The Right to Strike' (*UK Labour Law*, 6 March 2020) <https://uklabourlawblog.com/2020/03/06/royal-mail-group-ltd-v-communication-workers-union-cwu-injunctions-preventing-industrial-action-and-the-right-to-strike-by-kalina-arabadjieva/> accessed 12 December 2020.
[88] TULRCA 1992, s226.
[89] Arabadjieva (n 87).
[90] n 22.
[91] [1996] ICR 170.
[92] ibid, [180]-[182].
[93] Dukes (n 82), 309.
[94] *RMT and ASLEF* (n 22), [2].
[95] Smith (n 4).
[96] Ford and Novitz (n 63), 281.
[97] Arabadjieva (n 87).
[98] [2012] EWHC 267 (QB).

Admittedly, the scope of Maurice Kay LJ's strict interpretation was narrowly limited by the European Court of Human Rights (ECtHR).[99] The ECtHR confirmed, in *Enerji Yapi-Yol Sen v Turkey*,[100] that Article 11 of the European Convention on Human Rights included protection of the right to strike. This Article, and Article 6 of the European Social Charter[101] bestow the right to strike for their member states members and due to the UK Human Rights Act 1998, 'British workers are understood to enjoy a right to strike'.[102] This, unlike the mere domestic statutory immunities, is the only instance of a 'legislated' right to strike in the UK.[103]

Under section 3(1) of the Human Rights Act 1998, 'statutory provisions must be read and given effect in a way which is compatible with the Convention rights'[104] – 'the opportunity to test this line of argument'[105] in the English courts arose in *Metrobus Ltd v Unite the Union* (*Metrobus*).[106] The Court of Appeal rejected the *Enerji* arguments; the Court denied the authority's relevance for the interpretation of UK statutory provisions. This judgment continues to be the leading precedent on the UK's provisions of Article 11,[107] despite the *RMT* and *ASLEF* judgment. In *RMT and ASLEF*, the UK courts acknowledged the 'clearly protected'[108] right to strike under ECHR Article 11. However, the court emphasised the importance of a 'fair balance to be struck between the competing interests of the individual and the community as a whole'.[109] The emphasised interests of the 'community' motivated the court's justification for the ban on secondary action owing to its 'potential to … cause broad disruption within the economy and to affect the delivery of services to the public'.[110] Subsequently, the court confirmed that this ban aligns with Article 11(2) 'on the basis of a wide margin of appreciation accorded to the State'.[111] While the court is correct to recognise their bestowed margin of appreciation, the court rationalised the granting of the injunction, 'which itself cost the union a substantial sum',[112] upon economic factors. This factor is not only 'wholly irrelevant to the specific facts of the application' but it disregarded and postponed 'the exercise of what was acknowledged to be a convention protected right'.[113] The court effectively and 'successfully prevented industrial action on the basis of legal' human rights provisions 'which are intended to benefit workers'.[114]

In short, there 'is no point creating rights' or passing human rights legislation if the 'court is not prepared to defend them'.[115] There will continue to be an erosion of human rights protection until there is greater coordination between the domestic courts and the ECtHR. It is credible to conclude that the UK judiciary is more

[99] Keith Ewing and Alan Bogg, 'The Implications of The RMT Case' (2014) 40 ILJ 221, 222.
[100] [2009] ECHR 2251.
[101] 'The right to bargain collectively.'
[102] Keith Ewing and John Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 ILJ 2.
[103] Bogg and Dukes (n 1), 478.
[104] ibid.
[105] Dukes (n 82), 303.
[106] n 23.
[107] Dukes (n 82), 310.
[108] Ewing and Bogg (n 99), 221.
[109] *RMT and ASLEF* (n 22), [77].
[110] ibid, [82].
[111] ECHR Art 11 (2).
[112] Ewing and Bogg (n 99), 251.
[113] ibid, 221.
[114] Arabadjieva (n 87).
[115] Ewing and Bogg (n 99), 223.

concerned with profitability, self-preservation of UK powers, and 'in appeasing political forces'[116] above the interests of the individuals it and the Convention Rights was established to serve.

Legislature

The *RMT and ASLEF* court's 'blessing of a wide margin of appreciation' in the 'encompassment' of Article 11 offered a 'green light for further restrictive legislation on industrial action' by the 'only too happy Government'.[117] Here, Boggs and Ewing detect 'the crude politics of power'.[118] Upon observing the Court of Appeal's reluctance to exercise EU conventions, and the UK courts' developments that continue to be 'very much in line with the political approach of the Conservative government',[119] it materialises that the court and government are not 'looking to open a third (ECtHR) front'.[120]

The Government has recently launched an 'independent review' of the Human Rights Act.[121] The review aims to evaluate 'the duty to take into account' ECtHR case law and assess 'whether dialogue between our domestic courts and the ECtHR works effectively and if there is room for improvement'.[122] It is worth highlighting that this 'independent' review will be led by former Court of Appeal Judge, Sir Peter Gross – the same judge who remarked that 'the more that controversial areas are "outsourced" … the greater the challenge for … judicial leadership'.[123] The former judge is a notable advocate for greater domestic judicial leadership.[124] This advocacy hints the likelihood of the review condemning the relevance and precedence of the ECtHR (and Human Rights Act 1998) in 'controversial' matters such as industrial action. This review has the powerful ability to eliminate the only instance of a legislated right to strike in the UK.[125]

Ultimately

'The notion of lawful industrial action is restrictive', the procedural requirements are 'onerous' and the consequences of unions liability for unlawful strikes are 'serious'.[126] Nearly two decades after the European Social Charter's review,[127] the UK still does not guarantee the right to strike. The precedent in *Metrobus* still stands.

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[116] ibid, 251.
[117] Ford and Novitz (n 63), 282.
[118] Ewing and Bogg (n 99), 223.
[119] Thomas and Smith (n 77), 737.
[120] Ewing and Bogg (n 99), 223.
[121] Ministry of Justice, 'Government Launches Independent Review of the Human Rights Act' (*Gov.uk*, 7 December 2020) <https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act> accessed 15 December 2020.
[122] ibid.
[123] Jamie Susskind, 'Jamie Susskind Comments on Sir Peter Gross' Lecture on Judicial Leadership' (*Littleton Chambers*) <https://littletonchambers.com/jamie-susskind-comments-on-on-sir-peter-gross-lecture-on-judicial-leadership/> accessed 15 December 2020.
[124] ibid.
[125] ECHR Art 11.
[126] Ruth Dukes, The Right to Strike Under UK Law: Something More Than A Slogan? *Metrobus v Unite The Union* [2009] EWCA Civ 829' (2010) 39 ILJ 1, 7.
[127] ESC, Report of the Committee of Experts 2002.

There continues to be a 'poorly reasoned and barely consistent' series of judgments 'by what looks like a weak, timid'[128] and politically influenced[129] judiciary. The enactment of the 'Human Rights Act and the evolving jurisprudence of the ECtHR'[130] will not prescribe a right to strike in the UK until the Supreme Court or ECtHR rule UK's current provisions as incompatible with Article 11.

In truth, 'the right to strike [in the UK] has never been much more than a slogan or a legal metaphor'.[131] This 'slogan' is a regime of immunities that are purposely designed upon an overly complex and expensive statutory system.[132] These immunities are not adequately or proportionately protecting workers, unions, and one in nine vulnerable, precarious workers against the 'pitfalls'[133] of damages, injunctions, and unfair dismissals.[134] This system was successfully underlined with the political agenda of deterring trade disputes; the UK's worker strike total has fallen to its 'lowest level since 1893'.[135] The 'unanimous and hostile'[136] approach of the legislature and the judiciary towards industrial action exhibits the UK's covert 'culture of routinely disregarding'[137] social legitimacy in favour of profits.

[128] Ewing and Bogg (n 99), 251.
[129] Thomas and Smith (n 77), 737.
[130] Bogg and Dukes (n 1), 478.
[131] *Metrobus* (n 23) (Maurice Kay LJ)..
[132] Bogg and Dukes (n 1), 478.
[133] Dukes (n 125), 9.
[134] ibid, 7.
[135] Richard Partington, 'UK Worker Strike Total Falls to Lowest Level Since 1893' (*The Guardian*, 30 May 2018) <www.theguardian.com/uk-news/2018/may/30/strikes-in-uk-fall-to-lowest-level-since-records-began-in-1893#:~:text=The%20number%20of%20workers%20who,Victoria%20was%20on%20the%20throne.> accessed 15 December 2020
[136] Smith (n 4).
[137] ibid.

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CLOSING THE GAP

Constantin McGill

In this dissertation I explore the co-emergence of multinational corporations and the consolidation of the discourse on human rights at the level of the United Nations throughout the second half of the twentieth century and analyse the resulting conceptual gap that created tensions in the international legal order. Despite attempts by developing countries to alleviate this imbalance through the New International Economic Order (NIEO), a multitude of soft law initiatives and the reluctance to address human rights issues in MNCs at the level of the United Nations failed to make MNCs incorporate human rights standards in their operations. The merging of the two concepts became increasingly more challenging throughout the 70s and 80s when the world was faced with the oil crisis and the rise of neoliberalism. This shift in the global legal architecture forced the Third World to take a new approach to tackle the conceptual gap, this resulted in the emergence of the Third generation of human rights and ultimately, the concept of Corporate Social Responsibility (CSR). CSR is a concept of international private business self-regulation that aims at merging human, socio-economic, and political rights into the world of the corporation. As a response to the concerns for human rights violations by corporate actors, CSR slowly came to the forefront of the global business scene to enable the continuation of the operation of multinational enterprises. CSR presented a platform for global soft law initiatives to minimise the conceptual gap they had created over throughout the preceding decades. This allowed people such as John Ruggie to develop the Guiding Principles, the most successful initiative to date. This dissertation will provide its readers with a fruitful understanding of the crucial role that international law played in this development and further, what implications this had on the political and economic level.

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Introduction

In the words of Sundhya Pahuja and Anna Saunders, the second half of the twentieth century staged a 'series of encounters between rival practices of world making, each of which travelled with rival accounts of international law'.[1] Anti-colonial disputes, the Cold War, the rise of developmental issues and the increasing popularity of neoliberalism are only some of the events that generated these competing views of the international legal order. These events brought different coalitions across the Global North and Global South, and different 'alliances of interest between 'public' and 'private' actors'.[2] At the heart of the system that emerged during this period lie two fundamental elements: the modern multinational corporation and human rights. How to conceptualize multinational corporations (MNCs) and how to define their relation to the law and the State was part of these rival stories.

In this dissertation I explore the co-emergence of multinational corporations and the consolidation of the discourse on human rights at the level of the United Nations throughout the second half of the twentieth century and analyze the resulting conceptual gap that created tensions in the international legal order. In particular, I will examine how this encounter, which became evident as calls for a New International Economic Order (NIEO) were being advanced within the UN, came to eventually produce the idea of 'Corporate Social Responsibility' (CSR). I will show that CSR emerged from the failure of the NIEO, particularly in relation to the roles and responsibilities of private actors in the global economy and how this can be traced to the limits of initiatives addressing the tensions between human rights claims and the interests of multinational corporations. This dissertation will provide its readers with a fruitful understanding of the crucial role that international law played in this development and further, what implications this had on the political and economic level.

[1] Pahuja, Sundhya. Saunders, Anna. *Rival Worlds and the place of the Corporation in International Law* in Dann and Von Bernstorff *(eds). Decolonisation and the Battle for International Law* (OUP, 2018) p.1
[2] *Ibid.*

The first section of this dissertation critically examines the lack of direct use of human rights language in the UN literature focusing on MNCs and their role in world development from the 1960s to the 1970s. This will include an analysis of the report entitled 'Multinational Corporations in World Development'.[3] I demonstrate the emphasis and enthusiasm for multinational corporations that was displayed at the level of the United Nations and how from this standpoint, the concepts of the corporation and human rights were kept separate due to their respective supporters during the Cold War. I then focus on the attempts by the Organization for Economic Co-operation and Development (OECD), the International Labor Organization (ILO) and the 'Group of 77' (G77) to bridge this conceptual gap through the imposition of policies and initiatives, though without major success.

The second section of this dissertation critically analyzes the influence which the oil crisis and the rise of neoliberalism had on the shift of the global legal architecture, ultimately promoting the birth of the new developmental state. The dissertation focuses at this point on the new legal structures' attempt to merge the concepts of multinational corporations and human rights through the emergence of the third generation of human rights.[4] To do so, I will engage in theoretical approaches by legal scholars such as Samuel Moyn and Antonia Darder.

In the third section of this dissertation, I will investigate the concept of Corporate Social Responsibility (CSR) and analyze the extent of its application and limitations. CSR is a concept of international private business self-regulation that aims at merging human, socio-economic, and political rights into the world of the corporation. As a response to the concerns for human rights violations by corporate actors, CSR slowly came to the forefront of the global business scene to enable the continuation of the operation of multinational enterprises. In my analysis I demonstrate how CSR aspired to close a gap between human rights and corporate action in a way that would harmonize them through

[3] UN, *Multinational Corporations in World Development* ST-ECA/190
[4] Linarelli, John. Salomon, Margot. Sornarajah M. *The Misery of International Law*. (OUP, 2018) p.245

a multitude of soft law initiatives. This will lead me onto the question of whether direct regulations can apply to MNCs under international law and a discussion of the UN Global Compact which at the time was the world's largest and most far-reaching CSR initiative.[5] Finally, this dissertation will close with the most recent developments in the global legal order to tackle the conceptual gap between MNCs and human rights, namely through the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises[6] and the development of the Guiding Principles.

Dawn of co-existence

The United Nations lies at the heart of the international regime with its normative, institutional and procedural human rights activities.[7] By adopting the Universal Declaration of Human Rights in 1948, the UN created a milestone document in the history of human rights. The Declaration has had an enormous influence on the world both in terms of 'spreading the philosophy of human rights, and in terms of inspiring legal texts and decisions'.[8] New states have used the Declaration as a basis for their constitutions while domestic and international courts have invoked the Declaration in their judgments.[9] As human rights law developed, the International Covenant on Economic, Social and Cultural Rights, followed by the International Covenant on Civil and Political Rights, were both drafted under the auspices of the United Nations, adopted in 1966 and entered into force in 1976. Together, these three instruments make up the 'International Bill of Human Rights'.[10]

[5] Ruggie, John. *Just Business.* (W.W. Norton & Company, 2013) p.70
[6] United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises E/CN.4/Sub.2/2003/12/Rev.2
[7] Alston, Philip. Mégret, Frédéric. (eds) *The United Nations and Human Rights: A Critical Appraisal* (Second Edition, OUP, 2020) p.1
[8] Clapham, Andrew. *Human Rights: A Very Short Introduction* (OUP, 2007) p.42
[9] (n.8) p.108.
[10] *ibid* . p.109

Throughout the 1960s and 1970s, the world became a stage for global changes that altered the legal order. The end of colonialism dawned in the Global South. During the height of the Cold War, the West found itself facing the Soviet Bloc and its mission of 'exporting revolution'.[11] Leaders of nationalist resistance movements received military as well as financial aid from the Soviet Bloc which intensified anti-colonial mobilization for self-determination.[12]

Simultaneously, globalization was increasing rapidly, with multinational corporations emerging onto the global scene with heightened awareness of their existence as an entity with legal personality. As outlined by Sornarajah, their distinct bases of power allowed them to assert their interests through the law. With their economic resources often exceeding those of their host state, MNCs had the ability to sculpt and manipulate legal outcomes through arbitration processes concerning foreign investment protection. This was done by exerting lobbying pressure on a host state which might be reluctant or even unable to object to the activities of MNCs.[13]

The Report 'Multinational Corporations in World Development', drafted by the UN Secretariat's Department on Economic and Social Affairs in 1973, studies 'the role of multinational corporations and their impact on the process of development, especially that of developing countries [...] [and] international relations'.[14] From the outset, the Report identifies the emerging phenomenon of the MNC in international economic affairs and how its size and spread has multiplied, and identifies the wide array of its activities and its use of natural resources which 'rival traditional economic exchanges between nations'.[15] It is surprising therefore, that a Report from the Department on Economic and Social Affairs, does not contain the term 'human rights' once throughout the entire document.

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[11] Allina, Eric. *Imperialism and the Colonial Experience* in Paul A. Haslam, Jessica Schafer and Pierre Beaudet, *Introduction to International Development* (3rd Edition, OUP, 2017), pp. 24-42. p.39
[12] *Ibid.* p. 40
[13] Sornarajah M. *International Law on Foreign Investment* (CUP, 2010) p.5
[14] United Nations Department of Economic and Social Affairs, *Multinational Corporations in World Development*, 1973 ST-ECA/190 p.VI
[15] *ibid.* p.1

In the Report's introduction we see that the UN makes a clear distinction between the differing views of impacts MNCs have on host countries. While they 'are depicted in some quarters as key instruments to maximizing world welfare, [they] are seen in others as dangerous agents of imperialism'.[16] The fact that the United Nations recognized the potential neo-colonial nature of multinational corporations further highlights the need for guidance on human rights violations by MNCs. The Report's reluctance to engage in the area of human rights provides a first glimpse into the divergence of the concepts of multinational corporations and human rights.

An explanation for this obscure behavior by the UN can be formed when analyzing the previously mentioned Conventions, on Civil and Political Rights and on Economic, Social and Cultural Rights. This intentional reluctance by the United Nations was to avoid tensions between the respective supporters of both Conventions, the United States and the Soviet Union repectively. The US pushed for the development of civil and political rights, reflecting the protection of the freedom and liberties of individuals. Stemming from a Western philosophy, John Locke identified that in a 'state of nature' humans had 'natural rights' including the right to life, liberty and property. Similar ideas from French legal philosophers such as Rosseau, Montesquieu and Voltaire argued that such rights emerge from the inherent nature and virtue of man.[17] As stated by Joseph and Castan, 'natural rights theories were highly influential [...] particularly in the revolutionary fervor of the United States'.[18]The advancement of civil and political rights reflect the capitalist ideology of the United States as they conform to the libertarian nature of Western capitalist societies.[19]

The Soviet Union however pushed for the advancement of economic, social and cultural rights. These include the right to work, the right to an adequate standard of living and the

[16] *ibid.*
[17] Joseph, Sarah. Castan, Melissa. *The International Covenant on Civil and Political Rights: Cases, Materials*. (3rd Edition, OUP, 2013) p.4
[18] *ibid.* p.5
[19] *ibid.*

right to physical health. Contrary to the civil and political rights, these rights were based on the idea of equality, one that is deeply rooted in the political ideology of socialism. As the US would not commit to a proposition that there is a right to social goods, the US has never ratified this Convention.[20] As I stated before, the Soviet Bloc promoted the right of self-determination by providing military and financial aid to indigenous political activists in their fight for independence, an idea enshrined in Article 1 of the Covenant which states that: **'**All peoples have the right to self-determination'.[21] For the Soviets 'national self-determination was an adjunct to revolutionary communism'.[22] They envisioned self-determination as the tool for the transition from dismantling a colonial empire and in turn establishing a socialist state.[23]

However, while the United Nations was reluctant to adhere to human rights in the framework of multinational corporations, other international institutions were motivated to develop this area. The OECD attempted to impose human rights on MNCs by adopting the *Guidelines for MNCs* (hereinafter 'OECD Guidelines') in 1976. [24] These were 'voluntary recommendations for business practices relating to human rights, disclosure of information, anti-corruption, labour relations, taxation, the environment and consumer protection'.[25] The intention of the Guidelines was to strengthen the international investment climate by improving the relationship and confidence between MNCs and their host countries. National Contact Points (NCPs) were created that bore the responsibilities of enforcing and promoting the Guidelines in host countries, any natural person could make a claim related to the violation of the Guidelines.[26] This aspect of the Guidelines

[20] Alston, Philip. *U.S. Ratification of the Covenant on Economic, Social And Cultural Rights: The Need for an Entirely New Strategy*. The American Journal of International Law Vol.84, No.2 (CUP,1990) pp.365-393, p.4
[21] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 1966, Article 1
[22] Simpson, Gerry. *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age* (Ashgate Publishing, 2000) p.266
[23] *Ibid.*
[24] Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises*, 1976
[25] Carasco, Emily. Singh, Jang. *Towards Holding Transnational Corporations Responsible for Human Rights.* European Business Review Vol.22, No.4, (Emerald Publishing Group, 2010). p.4
[26] Cernic, Jernei. *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises* Hanse Law Review, Vol.4, No.1, (2008). p.16

provided a promising enforcing mechanism that was accessible to the public. Although the Guidelines were formally adopted by member states as a corporate responsibility instrument, they were subject to widespread criticism in the international legal order. As explained by Cernic, the Guidelines are ambiguous while the NCPs are limited in their influence on host states. Even though the Guidelines outlined the need to respect human rights, the obligations were not framed in mandatory terms.[27]. Since the Guidelines lacked legal basis, the OECD was unable to assert sanctions on corporations that were not complying with them As a result, critics of the Guidelines labeled them as weak and ineffective. However, it was the intention of the OECD to *guide* rather than to legislate, the reasoning being, as described by Sanchez, that voluntary versus legally binding standards are less of a dichotomy and more a continuum.[28] Although they were only voluntary, corporations would be under scrutiny and potentially harm their reputation if they violated the Guidelines.[29] Clearly, as the OECD relied on the assumption that corporations adopted them, the Guidelines were hardly successful in the international legal order.

The ILO attempted to bridge this gap a year later in 1977 when it adopted the *Tripartite Declaration of Principles Concerning MNCs and Social Policy.* These, like the Guidelines, attempted to 'encourage the positive contribution the MNEs can make to economic and social progress'.[30]. Article 8 emphasizes the respect for the Universal Declaration and the International Covenants. However, its voluntary and non-binding nature, as well as its weak monitoring process made this instrument as frail as the OECD Guidelines.[31]

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[27] *Ibid.* p. 12

[28] Sanchez, Juan Carlos Ochoa. "*The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation.*" Nordic Journal of International Law (2015) Vol.84, No.1, pp: 89-126 p. 18

[29] Bolt, Cassidy. "*Leveraging Reputation in Implicit Regulation of MNEs: An Analysis of the OECD Guidelines for Multinational Enterprises' Capacity to Influence Corporate Behavior.*" Corporations and International Law, 20 Jan. 2018, Available at: sites.duke.edu/corporations/2018/01/20/leveraging-reputation-in-implicit-regulation-of-mnes-an-analysis-of-the-oecd-guidelines-for-multinational-enterprises-capacity-to-influence-corporate-behavior/#_ftn6.

[30] (n.26) p.5

[31] Cernic, Jernej. *Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Miskolc Journal of International Law, Vol.6, No.1, (2009) pp:24-34. p.33

The lack of responsibility and perseverance stemming from international organizations and their disappointing attempt at bridging the gap between multinational corporations and human rights forced national and regional change. On the one hand, developing nations began taking matters into their own hands. To portray unity and solidarity throughout the 'Third World' the G77 took a strong initiative. The coalition was formed in 1964 by 77 developing member countries with the primary intention of promoting its members' economic and humanitarian interests through cooperation at the level of the United Nations. In the late 1970s the Group expressed its concern at the 'imbalance of negotiating power between TNCs [transnational corporations] and their host countries and inability on the part of the latter to control the activities of the TNCs within their territories'.[32] Simultaneously, home countries wanted to ensure that their investments abroad would be protected, 'specifically from expropriation without a commitment to compensation based on international law'.[33] In accordance with the principles and concerns of the freshly adopted NIEO, developing countries raised the issue of the dominance of MNCs over natural resources and strongly urged the UN for a reaffirmation of their sovereignty over their resources. The NIEO was an attempt by Third World developing states, in the wake of decolonization, to deploy international law to achieve economic justice and improvements in the areas of development and socio-economic rights.[34] Pushed by the G77, the United Nations General Assembly (UNGA) member states devised a set of NIEO proposals in 1974 including (1) that developing states are entitled to control and regulate all activities of MNCs within their territory; and (2) that international trade must be based on equitable, stable and remunerative prices for raw materials.[35]

However, despite its impressive aims and careful compilation, the NIEO was not a success. It failed 'to displace the power and advantage held by influential states', it failed to alter international law which favoured the economic interests of capital-exporting states

[32] (n.25) p.3
[33] (n.25) p.3
[34] (n.13) p.22
[35] Declaration for the Establishment of a New International Economic Order UN General Assembly A/RES/S-6/3201, 1974

and, most importantly, it demonstrated the Third World's acceptance of the economic ideology of the capitalist mindset, inflating the value of foreign capital including the exploitation of local labour in developing countries.[36]

Consequently, the UN set up the United Nations Commission on Transnational Corporations which drafted a code of conduct for TNCs, one of the first formalized instruments drafted by the UN that set an obligation upon MNCs to respect human rights in host countries.[37] However while developing countries insisted on the idea of adopting an international instrument that was binding on MNCs, developed countries were not prepared to go beyond the voluntary sets of guidelines that were already in place.[38]

On the other hand, due to the ineffectiveness of the international institutions, some MNCs that sought to abide by human rights law attempted to create some provisions themselves. An example of this are the *Sullivan principles.* Leon Sullivan, former member of the General Motors' Board of Directors designed a set of principles including the elimination of discrimination based on race, and the concept of equality in the workplace, for MNCs to follow. The aim of the principles was that by engaging in human rights concepts like dignity and respect, MNCs could be a direct lever for the elimination of apartheid in South Africa. However, like the previously established soft law on obligations on multinational corporations, these principles were voluntary and unlike the OECD Guidelines which had the NCPs, there was no enforcement mechanism. The great majority of MNCs that adopted his principles did so with the sole motive of being able to continue to prosper in South Africa.[39]

In summary, throughout the 60s and 70s, there were attempts at a variety of levels to bring together the concepts of human rights and multinational corporations. Though it was largely absent on the level of the United Nations until the late 1970s there were a multitude

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[36] (n.4)
[37] (n.25) p.3
[38] Sagafi-nejad, Tagi. Dunning, John. *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Indiana University Press, 2008) p.94
[39] (n.25) p.4

of first steps by international institutions to bridge this gap. The NIEO was the first set of concrete economic principles that were prescribed in international law 'articulating a form of justice based not on domination of one people over another'.[40] It was a rejection of colonialism, representing an 'effort to assert the sovereign autonomy of the non-western world'.[41] It exemplified the importance of linking human rights and development, and the fundamental values of duties of international cooperation. However, there was still much to be done as the new decade of the 1980s saw a drastic restructuring of the global trade and investment system ultimately ending in massive international debt and a drastic increase in foreign direct investment.

A Change in the Global Legal Architecture

An accumulation of capital obtained by the main oil producing states in the Middle East led to the establishment of the Organization for Petroleum Exporting Countries (OPEC) Cartel in 1972. With the intention of creating a monopoly and obtaining major profits, the members of OPEC drastically raised the price of oil by approximately 400%. OPEC members kept the money in banks in the United States or Europe which developing countries regularly borrowed in the forms of aid and loans.[42] However, now banks were lending at higher interest rates to these countries as they were deemed less creditworthy than developed countries. As a result of sovereign debt and the surplus problem in the international banking system, developing states were forced to rely on foreign direct investment (FDI), as opposed to private borrowing. The very principle that developing states wanted to control with the establishment of the NIEO was now negated by Western states selling MNCs to the developing world as necessary for their survival.[43]

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[40] (n.13) p. 22
[41] (n.13) p.23
[42] Weiping, Wu. Hooshang, Amirahmadi. *Foreign Direct Investment in Developing Countries*. The Journal of Developing Areas, Vol.28, No.2 (1994), pp.167-190 p.177
[43] (n.13) p.100

Simultaneously to the effects of the oil crisis, the political ideology of neoliberalism emerged on the global scene. Conservative governments gained power in western countries, communism collapsed in the Eastern Europe seeing them move towards market economics and Latin America implemented stabilization policies to boost their economies.[44] This process saw neoliberalism became an enemy for structural equality, political inclusion, economic access and human rights.[45]

Prior to the implementation of neoliberal policies, the relationship between multinational corporations and their host state was formed through the conflict between the host country's national developmental interests as opposed to the corporation's global investment interests. The state being the more powerful actor, attempted 'to channel its private investments to serve its own developmental objectives'.[46] However, as argued by Michael Peters, neoliberalism provides 'a universalist foundation for an extreme form of economic rationalism'[47], which according to Paul Haslam, was a re-forming of the modern state rather than the perceived notion of the state 'unambiguously withering away'.[48] As a result, power shifted from host countries towards multinational corporations as the era was characterized by liberalization of foreign investment rules.[49] This can be verified by the United Nations World Investment Report of 2000 which showed that out of the 1035 changes made in national legislation regarding Foreign Direct Investment (FDI) from 1991 to 1999, only 5.9% were directed at restricting FDI.[50]

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[44] Campbell, John. Pederson, Ove. *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press, 2001) p.1
[45] Darder, Antonia. *Neoliberalism in the Academic Borderlands: An On-going Struggle for Equality and Human Rights*, Journal of the Educational Studies Association Vol.48, No.5, (2012) pp:412-426, p.2
[46] Haslam, Paul Alexander. (2007) *The Firm Rules: Multinational Corporations, Policy Space and Neoliberalism*, Third World Quarterly, Vol.28, No.6, 2007, pp:1167-1183, p.1
[47] (n.45)
[48] (n.46)
[49] (n.46) p.2
[50] United Nations Commission on Trade and Development, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development, Geneva.* United Nations, 2000, p.6

Now more than ever before, the existence and nature of human rights were jeopardized in the sphere of multinational corporations that were led by neoliberal politics. Yet when analyzing human rights and neoliberalism, the two concepts have a plethora of similarities that run counter to this assertion. Samuel Moyn states that human rights and neoliberalism share (1) a predecessor and (2) a target, namely the welfarist West and the post-colonial nation state seeking economic autarky respectively.[51] Both concepts emerged and were formalized in the West. As a target, developing countries need both economic (neoliberalism) and social (human rights) elements to establish economic control. Furthermore, the two concepts share key foundational building blocks. Firstly, the principle of prioritizing the individual 'whose freedoms matter more than the collectivist endeavours' and secondly, their shared antipathy of the state due to their rejection of its moral credentials.[52]

As described by Darder, neoliberalism is characterized by a rampant greed that subsumes any notions of equality and public responsibility.[53] At the heart of this lies the ultimate subversion of human rights.. When faced with the powers of global capitalism, human rights struggle to maintain themselves in the Third World. A prime example countering this thesis is the idea that human rights are a handmaiden to neoliberal policies. The argument follows that human rights are so tightly related to the role of a freely functioning market that there could be no socio-economic rights without extreme capitalism.[54] Unfortunately under this notion, human rights fall victim to being seen as dependent upon the capitalist order. An illusion was created that multinational corporations had become a concept that enhanced and promoted human rights in the developing World. What Wolfgang Streeck termed as 'non-market notions of social justice' became impossible to secure. Any attempt to place social commitments over

[51] Moyn, Samuel. *Powerless Companion: Human rights in the Age of Neoliberalism*. Law and Contemporary Problems, Vol.77, No.4, (2014), pp:147-170. p.11
[52] *Ibid.*
[53] (n.45) p.2
[54] (n.13) p. 247

economic ones were expelled leaving market pressures to form human obligations and be governed by the dictatorship of neoliberalism.[55]

The World Bank and the IMF, backed by the United States and other western states, became key in the project for liberalization, privatization, and market-friendly policies, known as the Washington Consensus. MNCs were given the protection they needed, be it proprietary or intellectual property rights in order for them to flourish. The interests of human rights on the other hand were not regarded. Though they were excelling and growing more than ever before, human rights had done so 'on a discrete track spearheaded internationally through the UN'.[56] Directed by developing states, human rights were intentionally dealt with by the United Nations while international economic law was being dealt with by the international institutions where they hold the balance of power.[57]

Simultaneously, the developing world saw the third generation of human rights emerge as a result of anti-colonialist movements throughout the post-Second World War era, where newly born independent nations voiced their concerns over having to repeat their colonial past and so demanded the world to acknowledge a new set rights. These included the right to self-determination, the right to a healthy environment and the right to participation in cultural heritage. These rights are reflected in Declarations and Conventions such as the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, the Proclamation of Teheran of 1968 and the Stockholm Declaration of 1972.[58] What makes this generation of human rights exceptional however is that while they reflect neither the traditional individualistic approach of the first generation, nor the socialist tradition of the second generation, they simultaneously demand certain recognitions from the state while being able to be invoked against the state. Most importantly though, as articulated by Vasak, the third generation of human

[55] *ibid.*
[56] (n.13) p.102
[57] (n.13) p.102
[58] Marks, Stephen. *Emerging Human Rights: a New Generation for the 1980s.* Rutgers Law Review. Vol.33, No.2, (1981) pp:435-453 p.7

rights ‘can be realized only through the concerted efforts of all the actors in the social scene: the individual, the State, public and private bodies and the international community’.[59] In other words, these rights belong to the community as a collective, rather than to an individual.[60]

Drafted in 1986 by the UNGA, the Declaration on the Right to Development [61] (DRD) calls for effective international cooperation towards development objectives through the enhancement of human rights and the distribution of benefits.[62] The DRD gained inspiration from the NIEO as it relied on providing equal national opportunity through measures of fair distribution of natural resources and income. Alongside neoliberal policies, the two contradicting concepts were forced to work in tandem. Foreign investment in the developing world could proceed under the neoliberal ideology, as long as it did not infringe the DRD. Interestingly, the right to development was coined by the former UN Independent Expert on the Right to Development, Arjun Sengupta, as ‘growth with equity’. Growth should not only focus on the economic aspect, but also emphasize human rights and the principles of justice. This focus on equity, would require a ‘a change in the structure of production and distribution in the economy to ensure growth was equitable’, including the required international cooperation and not having to rely on the market.[63] Though the United Nations are promoting and enhancing the development of human rights, they are disregarding the fact that their work should be focused more on the human rights aspects entailed in the market, rather than solving human rights issues outside of the market framework.

The development of human rights and the regulatory frameworks supporting multinational corporations attended very different interests. The new global legal architecture that was born as a result of the oil crisis and the rise of neoliberalism during the 1970s reorganized the relations between the Global South and the Global North. At this point in history,

[59] (n.58) p.8
[60] Dickerson, Claire. *Human Rights: The Emerging Norm of Corporate Social Responsibility.* Tulane Law Review, Vol.76, No.5-6, (2002), pp:1431-1460 p.17
[61] UN General Assembly, The Right to Development Res/41/128
[62] (n.13) p.247
[63] (n.13) p.245

human rights and the regulation of corporations, with their distinctive genealogies, were forced to come together. The failure of this exercise could not be challenged until the late 1980s when the emergence of the third generation of human rights provided another opportunity for the merging of the two concepts. The outcomes of these new sets of discussions produced a more clearly defined relationship between human rights and multinational corporations which, although more sophisticated, was still unable to produce a satisfactory result.

Nevertheless, the right to development began to take root in the corporate world. For the sake of their reputations, corporations were forced to appreciate the power held by vulnerable individuals that could act together as a strong collective.[64] As stated by Claire Dickerson, multinationals became more aware of their relationship with human rights not only as regards to the individual but rather to the society as a collective.[65] These were the first formalized steps to the recognition of what came to be known as Corporate Social Responsibility (CSR).

The Heterodox Approach

What became apparent in the sphere of business and human rights were two situations, (1) that states were either unable or unwilling to implement human rights; and (2) that multinational corporations acting in such states were unprepared to deal with the risks of harming human rights through their activities. This was seen especially in the private extracting sector such as oil, gas and coal with using aggressive means to exploit remote areas and leaving large physical and social footprints. Local communities began resisting

[64] (n.60) p.31
[65] (n.60) p.27

the activities by the multinationals and the language of human rights became increasingly popular in challenging corporate norms.[66]

Some of the world's largest MNCs had become culprits of violating human rights standards, including Nike, Shell or Yahoo. Nike was guilty of child labour while Shell misused public funds to practice corruption and theft at all levels. [67] The effects were reflected in local communities that resorted to violence and criminal behaviour, significantly affecting the living conditions of these areas.

In the early 90s, some corporations began adopting measures to comply with responsible business conduct. CSR was a voluntary form of business self-regulation that attended the current societal goals. It involved the creation of monitoring schemes that regulated the workplace standards and policies of the global supply chains. However, what caused CSR to emerge, was not only the pressure exerted by nationals that felt their human rights had been impinged, but also the political ethos itself that had taken over the world. With its emphasis on privatization and deregulation, neoliberalism promoted CSR initiatives in order for corporations to gain self-control and rely less on direct government initiatives. Due to its voluntary nature, CSR was not conceived as a regulatory instrument but rather instead as a learning forum to promote strategies that enhanced socially responsible policies. This included the enhancement of human rights, environmental protection and anti-corruption efforts. [68]

CSR had progressed to the forefront of the global business scene by morphing out of corporate philanthropy.[69] Corporations began adopting voluntary schemes that not only adhered to social policy, but at times even went beyond the standard set by local requirements, which occasionally created conflict between the two. [70] Unilateral corporations produced company codes in the early 1990s with companies such as Gap

[66] (n.5) p.xxvi
[67] (n.5) p.4
[68] (n.5) p.xxvii
[69] (n.5) p.68
[70] (n.5) p.69

and Nike adopting theirs in 1992. This involved internal audit teams and ethics officers to be established, verifying that contractors were complying with their company's codes of conduct. Gradually, social audit teams emerged onto the global scene. As one of the most prominent, the Fair Labour Association (FLA) monitored the working conditions for some of the top athletic brands such as Nike, Puma and Patagonia. In the food industry, the label of Fair Trade emerged, ensuring for local farmers the social, economic and environmental standards they deserved.

Corporations adopted CSR measures mainly to improve their reputation. However, perhaps a greater incentive for corporations to adopt CSR measures lies in the financial risks posed by community pushback as a result of human rights violations. These pushbacks cause delays in design, operation, construction, siting, granting of permits etc. Further, they can create problems and relations with local labour markets, higher costs for financing, insurance and reduced output.[71] In a study of a large multinational company that wished to remain anonymous, Goldman Sachs found that it had accrued $6.5 billion in such costs over a two year period.[72] A great percentage of these costs could be related back to the staff time in managing conflicts that arise in communities as a result of human rights violations. In some instances between 50% and 80% of an assets manager's time can be devoted to these issues. Thus, it is clear that in this lose-lose situation, where MNCs violate human rights and thus incur losses, it makes sound corporate sense to adopt some sort of CSR measures to relieve them of this spiral.[73]

Despite the improvements and the clear step forward which the business world took in addressing human rights, CSR consisted of limitations and fragmentations that challenged its success. CSR was built on the underlying assumption that it is an effective mechanism for corporations to positively reconnect with the community they are based in. Thus, in practice, CSR operates under the presumption that society has granted

[71] (n.5) p.137
[72] (n.5) p.138
[73] (n.5) p.139

authority to corporations with naturally applying legal responsibilities.[74] In the year 2000 John Ruggie conducted research in the Fortune Global 500 and a wider range of corporations to assess the extent and success of voluntary initiatives promoting human rights. Staff monitoring schemes had evolved, demands by socially responsible investors had grown and large public sector funds all aided in this development. However, the research also proved that 'company based initiatives fell short as a stand-alone approach'.[75] Most companies still did not have the capabilities of managing human rights risks and instead were acting on a reactive based notion. Moreover, it was within the company's discretion to decide which human rights the company would address and furthermore how to define its measures. Thus, their voluntary nature could often be used as a camouflage to delay real reform.[76]

A logical response to such a broad limitation would be to impose direct obligations under international law upon MNCs. Though only states and international organizations have legal standing in international law, the general view on this contention is that it would be possible to impose obligations upon MNCs due to their major economic and political influence as explained earlier, and their capabilities of influencing the enjoyment of human rights.[77] However, as explained by Zerk, the challenge lies in 'developing jurisprudence which refines and makes precise the vague aspirational statements [...] in the CSR debate'.[78] However, as the law stands, the most promising and efficient method for applying obligations on multinational corporations remains to be the national courts. Yet the fact that claims must be raised as a tort-based litigation proving a violation of domestic tort principles rather than claiming a violation under international human rights casts doubt over this method.

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[74] Eslava, Luis. *Corporate Social Responsibility & Development: a Knot of Disempowerment.* Sortuz. Oñati Journal of Emergent Socio-legal Studies, Vol.2, No.2 (2008) pp.43-71 p.12
[75] (n.5) p.76
[76] Engle, Eric. *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?* Willamette Law Review Vol.40 No.103 (2004) p.7
[77] Zerk, Jennifer. *Multinationals and Corporate Social Responsibility.* (CUP, 2006) p.304
[78] *Ibid.*

An interesting exception to this is the US Alien Tort Statute of 1789. The tort states that district courts 'have original jurisdiction of any civil action by an alien for a tort only, committed in violations of the law of nations or a treaty of the United States'.[79] The original intention of the statute was to establish a civil remedy for violation of international law norms such as piracy, mistreatment of ambassadors and the violation of safe conducts.[80] This piece of legislation lay dormant until the 1980s when human rights lawyers discovered its potential for foreign plaintiffs to raise a claim for certain human rights abuses against an individual of any nationality, or a corporation as long as they had a presence in the United States. The question whether the Act could be enforced against a corporation was considered in 2012 in the U.S. Supreme Court case of *Kiobel.*[81] The court held that there was a presumption against extraterritoriality applying to claims under the Statute. There is therefore no application of the statute abroad unless it is explicitly stated in the international law which is the subject of the claim.[82]

As stated by John Ruggie in his advice to the Human Rights Council in 2007 'no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors.'[83]

Ultimately, as a measure to seek guidance on the matter, this led to the UN Global Compact in 2000, the largest global CSR initiative.[84] The UN Global Compact was a strategic policy initiative posed by the former UN Secretary General Kofi Annan that aimed at improving corporate conditions in areas such as human rights, environmental protection and labour rights.[85] It was a prospective and hopeful initiative that was designed as a learning forum to develop, implement and disclose sustainability principles

[79] 28 U.S.C. §1350
[80] (n.5) p.193
[81] *Kiobel v Royal Dutch Petroleum* 569 U.S. 108 (2012)
[82] *ibid.* Available here: https://webcache.googleusercontent.com/search?q=cache:DqBCZRsmUbEJ:https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf+&cd=3&hl=en&ct=clnk&gl=at p.14
[83] (n.5) p.77
[84] (n.5) p.70
[85] Meyer, William. Stefanova, Boyka. *Human Rights, the UN Global Compact, and Global Governance.* Cornell International Law Journal, Vol.34, No.3 (2001) pp:501-522. p.4

among corporate actors.[86] At its time, the Global Compact was the most far-reaching, non-governmental set of policies aimed at catalyzing the voluntary nature in the corporate citizenship movement.[87] Legal scholars such as Meyer and Stefanova felt the Global Compact could shape the relationship between MNCs and human rights through 'rewarding responsible TNCs [MNCs], while shaming at least some of the irresponsible TNCs [MNCs] into better promoting human rights'.[88] Their only concern about the extent of the success of the Global Compact lay, in the Global Compact's voluntary nature. Comparing it to the OECD Guidelines implemented 25 years earlier, an initiative like the Global Compact will only be successful if there is commitment to the initiative at all levels of the international system. Thus, the main task is to put a human face on globalization through the values and principles shared by the people, the corporation and the state.[89]

However, Aravalo and Fallon dispute this. Published in 2008, their Report uses the *Compact Quarterly and UNGC Annual Review* to critique the Global Compact's activities and practices throughout its eight years of existence. Published by local networks and the UN respectively, they evaluate new businesses adhering to the Global Compact, as well as Global Compact practices and responses. Aravalo and Fallon found that after evaluating the various progress reports, the Global Compact falls short of being a successful initiative.

According to the UNGC Annual Review, there are a multitude of gaps existing in the Global Compact framework. Research instruments for instance, under the principles of human rights and labour protection, have been deemed as inadequate as participants have failed to voice their concern over the protection of such rights within their corporation. The Global Compact has solely used online surveys to administer data, which smaller businesses are often unwilling or unable to provide. The methodology

[86] (n.5) p.xxvii
[87] Arevalo, Jorge. Fallon, Francis. *Assessing Corporate Responsibility as a Contribution to Global Governance: The Case of the UN Global Compact.* Corporate Governance International Journal of Business in Society Vol.8, No.4 (2008) p.1
[88] (n.85) p.5
[89] (n.5) p.11

applied by the Global Compact was ambiguous and did not show the extent of the success of CSR initiatives.[90] Alavaro and Fallon argue that it would be highly beneficial for the Global Compact to re-think its methodology process of evaluating its success by introducing a chronological component into its future research models. [91] It would allow for a clearer comparison not only for participants of the Global Compact, but also for the comparison with non-Compact companies in the area of corporate responsibility.[92]

As a result of this poor research methodology, the Global Compact has difficulty assessing its direct influence on the broad and voluntary concept of CSR. There are key principles of CSR that fail to receive the attention they deserve in the scope of the work of the Global Compact. However, this is not to say that the Global Compact has been an outright failure. The Annual Review, though lacking any quantifiable data, has provided a wide array of case studies providing evidence for the practical influence of the Global Compact on participants. These include various programs in education and working relationships the Global Compact has encouraged and facilitated. It can undoubtedly be said therefore, that the Global Compact is making a difference, even if it is only in these cases.

Until shortly after the turn of the millennium, neither company codes nor multilateral initiatives such as Global Compact, successfully achieved the necessary, concrete obligations in regard to human rights and environmental protection demands. This was set to change with the arrival of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Norms). Drafted in 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights attempted to merge the concepts of MNCs and human rights and transform these newly developed principles into hard law. The intention was to impose human rights obligations upon companies through the domestic legal systems of their host countries. The Norms clearly express that ‘states retain primary, overarching responsibility for human rights protection’ and that corporations are identified as ‘Duty-bearers’ based on that

[90] (n.87) p.5
[91] (n.87) p.3
[92] (n.87) p.5

expectation of following human rights principles.[93] The expectations expressed by the Norms are supported by enforcement mechanisms for their implementation which address the requirements that MNCs must adopt in terms of their internal practice. Furthermore, there are a multitude of rights that go beyond what is traditionally accepted as international human rights law. Examples include rights associated with consumer protection, the environment or corruption which are covered by different areas of the law.[94] However, the Norms failed to achieve promising results. Described as a 'train wreck' by John Ruggie, the Norms fell under heavy criticisms for a plethora of reasons.

Firstly, the Norms fall under heavy scrutiny for attempting to impose obligations upon corporations, while simultaneously imposing parallel obligations on the state. The intention was to address the fact that MNCs operate in a legal vacuum due to their status of acting as a multinational. To alleviate this issue, it was thought that binding MNCs to hard international law would be the best option. On the one hand, minimalists argue that binding multinational corporations to international law is not an appropriate method as this would go beyond the concept of soft law initiatives such as Global Compact. This argument is developed by stating that binding corporations to international law would 'privatise human rights'. The Norms would be placing obligations on an entity that was never democratically elected, nor eligible to make reasonable decisions in regard to human rights at the level of international law.[95] On the other hand, maximalists lobby for a judicial body solely focused on the practice of multinational corporations and argue that corporations should be bound by international law.[96]

Secondly, there was severe backlash against the Norms from states, corporations and businesses who argued that there was a lack of consultation from the Sub-Commission when drafting the Norms. However, this argument has since been disputed by institutions

[93] Kinley, David. Chambers, Rachael. "*The United Nations Human Rights Norms for Corporations: The Private Implications of Public International Law*" Human Rights Law Review Vol.6, No.3 (2006) pp:447-497; p.7
[94] *ibid.*
[95] (n.93)
[96] (n.93) p.6-7

such as the Corporate Europe Conservatory or the scholars Weissbrodt and Kruger.[97] In regard to the discontent presented by states, many argued that there was a lack of involvement on their behalf in the Norms' development. As stated by Kinely, Nolan and Zerial, it is of vital importance that in issues revolving around CSR and their wide variety of stakeholders, everyone's voice must be heard when protecting human rights.[98]

Thirdly, issues were raised regarding the language used by the Norms. Terms like 'sphere of influence'[99] and 'complicity' were deemed as vague and unclear.[100] It is agreed upon, even by supporters of the Norms, that such terms must be defined more definitively and where possible, draw definitions from more grounded areas of the law like criminal law, tort or contract law. This attitude towards the Norms from corporations shows the extent of their distrust and the scare factor used to attempt to dismantle the Norms.[101]

However, even though the Norms failed as a concept, it is argued by Kinley, Nolan and Zerial that 'the Norms have been a beneficial and fruitful initiative, reinvigorating debate on business and human rights'.[102] Previous to the imposition of the Norms, CSR had found itself in a position that was stagnant, focusing solely on codes of conduct that should be implemented by corporations using a bottom-up approach. The Norms altered the position of CSR to now provide a top-down approach and provided human rights activists with hope that human rights protection in regard to multinational corporations was now in the hands of the United Nations. However, the reactions to the Norms from the CSR community varied.

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[97] (n.93) p.5
[98] Kinley, David. Nolan, Justine. Zerial, Natalie. *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations* Company and Security Law Journal Vol.25, No.1 (2007) pp:30-42 p.6
[99] *Ibid.* p.8
[100] Buhmann, Karin. *Navigating from 'train wreck' to being 'welcomed': negotiation strategies and argumentative patterns in the development of the UN Framework.* Surya Deva and David Bilchitz (eds.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, (CUP, 2013) pp:29-57 p.11
[101] (n.98) p.8
[102] (n.98) p.2

CSR had been a newly emerging concept which was still unclear when fitted into the international legal order. It was still in its early years of development with highly broad-reaching initiatives in the fields of both soft and hard law. The playing field for CSR was simply too big for such an underdeveloped concept to handle. Further, it was attempted to implement CSR through domestic laws and quasi-legal initiatives raised to the level of international law. It is therefore often perceived that the implementation of the Norms were an attempt to remedy CSR by uniting these various aspects into one document at the level of the United Nations. The Norms conjoined national and international levels of CSR while maintaining that states continued to hold the primary responsibility of ensuring that businesses protect human rights.

The world was a 'deeply divided arena of discourse and contestation lacking shared knowledge, clear standards and boundaries; fragmentary and often weak governance systems concerning business and human rights in states and companies alike'.[103] A range of governments still expressed their demand for further attention to be given to the relationship between human rights and the practices of multinational corporations. Thus, the United Nations appointed a team led by John Ruggie to establish the *Guiding Principles.* Rather than establishing a new international framework as was previously attempted with the Norms, Ruggie was 'urged [...] to focus on identifying and promoting good practices and providing companies with tools to enable them to deal voluntarily with the complex cluster of business and human rights challenges'.[104] Ruggie moved away from the traditional 'mandatory approach' which involved the compliance of national laws in correspondence to a corporation's voluntary measures and practices, to a heterodox approach. This heterodox approach was devised to create an environment of mixed reinforcing policy measures that provided cumulative change and large-scale success. The Guiding Principles lay on three foundations: (1) the state duty to protect against human rights abuses; (2) the responsibility by corporations to respect human rights and the implied obligation of acting in due diligence; and (3) the need for greater access to remedies for victims.

[103] (n.5) p.xxxv
[104] (n.5) p.xx

However, there are two things that the Guiding Principles fail to accomplish. Firstly, to create binding international law and instead rely on normative contributions which further elaborate the implications of existing standards. Secondly, the Guiding Principles 'fail to ensure the right to an effective remedy and the need for States' measures to prevent abuses committed by their companies overseas'.[105] Amnesty International goes further by reiterating that aside from lacking accountability measures, the Guiding Principles should mandate a due diligence approach rather than only recommending it, as this would solve internal as well as extraterritorial accountability issues. Alongside Amnesty International, Human Rights Watch criticized the Guiding Principles for not adopting a global standard in corporate responsibility, and instead resort to a 'sliding scale' based on a corporation's size and geographic location.[106]

However, when compared to other governance regimes in the past and present, the Guiding Principles seem to be a robust framework. Although various human rights organizations and NGOs identify neglect of human rights in the framework of MNCs, the Guiding Principles reiterate business as an instrument to contribute to societal welfare.[107] Thus, it acts as a basis for the empowerment of society and a benchmark to judge practices and conduct of corporations and governments.[108]

Conclusion

The discourse of the co-emergence of multinational corporations and human rights certainly took the world by storm. The ever-growing globalization of the multinational corporation and the evolution of the concept of human rights were born attending different

[105] Blitt, Robert C. "*Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*." Texas International Law Journal, Vol.48, No.1 (2012) p.33-62. p.22
[106] *Ibid.* p.53
[107] Addo, Michael. *The Reality of the United Nations Guiding Principles on Business and Human Rights.* Human Rights Law Review Vol.14, No.1 (2014) pp:133-147 p.15
[108] (n.5) p.xliv

aims in the global legal order. Their greatest challenge however was not necessarily their harmonization and co-existence, but more importantly co-existing under the intentional gap that was created through the world's largest and most influential actor, the United Nations.

This was clearly visible in the 1960s and 1970s. Throughout the various Reports and Declarations that were passed through the international institution, the two concepts were kept separate. While the United Nations was enthusiastic for the growth of both MNCs and human rights, it intentionally avoided discussing the harmonization of both concepts. Due to the underlying pressures imposed on the United Nations by the tensions from the Cold War, the UN was left in a legal vacuum unable to merge the two distinctive genealogies. The global international legal order was unaware of the extent of the importance of such a gap being eradicated before adopting a resolution as complex as the NIEO. Thus, from this point onwards, the NIEO was therefore already bound to be unsuccessful. Not only had international law not developed enough to impose such obligations upon MNCs, the corporations themselves were not aware of the ramifications and necessity for abiding human rights obligations as I showed in the third section of this dissertation. Enthusiasm for further initiatives such as the push by the G77 or the United Nations Commission on Transnational Corporations was only short lived. The events of the 1980s greatly disrupted the already turbulent environment of the global international legal order creating a greater gap between the concepts of multinational corporations and human rights.

The 1980s became a stage which saw a great change in the global legal structure. The NIEO was an already broken concept from the outset as the conceptual gap had already created a disparity in the relationship between MNCs and human rights. This meant that although they were not aware of it at the time, the Global South could not rely on the imposition of the NIEO. Fostering the Western neoliberal policies, the conceptual gap between MNCs and human rights was now well established. For human rights to become a globally instructed concept, MNCs are a useful tool to spread, promote and enhance human rights across the globe. This of course is under the condition that the MNC does

not violate human rights. From the other perspective MNCs rely on human rights in terms of their societal and financial risks. It becomes clear that when this is not realized by the proponents of both concepts, it can lead to major discrepancies and disparities as was proven in the Global South during this period. If there had not been this conceptual gap, and instead there had been a clear and devised relationship between MNCs and human rights, the effects of the oil crisis and neoliberalism would not have left the detrimental mark in developing countries that they did, potentially allowing the NIEO to prevail. However, the ongoing persistence of developing countries and their call for the third generation of human rights to gain prominence forced MNCs to catch up with their relationship to human rights. What emerged, were essentially the first initiatives and practices of CSR.

CSR was heavily affected by the fact that it relied on the voluntary nature of businesses to adhere to as well as practice CSR. Even though corporations had an incentive to adopt CSR measures, weak monitoring systems allowed violations to still occur on a grand scale. The issue was that the multinational corporation as a concept was still unclear and lacked definition and that tying MNCs down with hard international law was not possible due to the diversity of MNCs. CSR allowed for too large a divergence from the issue at hand and required to approach human rights at a different angle. This was the key reason for the partial success of the Guiding Principles. Ruggie's unconventional, heterodox approach provided clarity and distinct concepts that individuals, business and states could adhere to. Although the conceptual gap has still not vanished, the UN has after an array of various attempts, managed to narrow the gap that it had created almost sixty years ago by continuously forcing society to rethink and redefine the relationship.

What exactly lies in the future is uncertain and impossible to foresee. It can be said with great certainty however, that if initiatives such as Global Compact or the Guiding Principles are enhanced and given more attention, the world will be faced with a much clearer and concise relationship between multinational corporations and human rights. Focusing on monitoring mechanisms, methodological research and greater transparency

and accountability among all actors involved will undoubtedly seal the conceptual gap that has caused the international legal order to experience such unsettling times.

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WORK LIFE BALANCE

Lucy Owens

My submission is essentially about how the law in the UK can be used to help those within the workforce achieve an effective work-life balance, meaning they have ample time and energy to focus on their professional responsibilities as well as their family life and leisure time. This article outlines that despite an apparent long-standing commitment by successive governments to tackle this issue, the legal framework created has largely failed to ensure people have an effective work-life balance. This is especially true for migrant workers who are often exploited within the UK workforce, as well as women, who arguably are not effectively protected by this area of law after pregnancy/early maternity and increasingly are having to find ways to cope with the dual burden of paid work and childcare/homemaking responsibilities. This submission also considers how this area of law has been impacted by the coronavirus pandemic as well as Brexit, both of which have created new challenges and exacerbated existing ones.

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Consider these two quotations from UK government White Papers/Consultation documents:

"Helping employees to combine work and family life satisfactorily is good not only for parents and children but also for businesses". (Fairness at Work, White Paper, May 1998, para 5).

"The proposals in this document will bring benefits for employers as well as employees, by increasing participation in the labour market while also helping people to balance work with their family and personal responsibilities". (Consultation on modern workplaces, May 2011).

How effectively has the law since 1997 ensured a 'work life balance' for workers with family responsibilities? Answer this question with reference to the relevant statutory materials, case law, legal commentary and social science literature.

Much like the other areas of labour and employment law, the legal framework used to help those in the labour market achieve an effective 'work life balance' has had to adapt to new challenges in society, which has in turn affected the realities of the UK workforce.[1] Primarily, this issue has become increasingly more prevalent since the latter half of the 20th century because of societal and legal changes that have meant the traditional model of a male breadwinner and female homemaker has become increasingly unrepresentative of the UK labour market.[2] The quotations contained in this essay question, although from different UK governments, suggest a firm and longstanding commitment to ensuring employees with familial responsibilities can use the law to achieve an effective work life balance. This essay will discuss and evaluate the various reasons for this commitment. However, it is arguable that since 1997 successive governments have failed to effectively tackle the UK's long working hours 'culture', as well as the ineffective legal framework that seeks to help achieve

[1] Hugh Collins, K.D. Ewing, Aileen McColgan, *Labour Law* (2nd edition, Cambridge University Press 2019) 398.
[2] ibid.

an effective work life balance.[3] This essay recognises the fact that there have been some positive advancements since 1997 in the statutory entitlements employees have (or can obtain) that afford them greater flexibility at work in order that they can also fulfil their familial responsibilities.[4] Examples discussed later include the introduction of shared parental leave and the laws protecting and promoting the rights of women during pregnancy and early maternity.[5] However, this essay will seek to show how these positive policies have had a limited overall effect in terms of achieving an effective work life balance, especially for women and immigrants participating in the UK workforce.[6] This will involve a statistics-based criticism, employ case law and a feminist theoretical perspective, as well as give general ideas and propositions as to how the law needs to go further to achieve its aims. I will argue that the law is currently tempered too much by fears of damaging businesses or the UK economy as a whole. Furthermore, the impact of coronavirus will be considered, specifically how new problems have emerged and existing issues have been exacerbated.[7]

The Development of the Law Concerning Work Life Balance Since 1997: Changes and Problems

[3] Chris Kerridge, 'How can we overcome the UK's long working hours culture?' (*People Management,* 8 November 2019) <https://www.peoplemanagement.co.uk/voices/comment/how-overcome-uk-long-hours-culture#:~:text=Employees%20in%20the%20UK%20work,or%2070%20hours%20per%20week> accessed 15 November 2020.

[4] Collins (n 1), 399.

[5] Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' [2016] Industrial Law Journal 45(4), 477.

[6] Sarah Dyer, 'Migrant work, precarious work-life balance: what the experience of migrant workers in the service sector in Greater London tells us about the adult worker model' [2011] Gender, Place and Culture; A Journal of Feminist Geography' 18.

[7] Kate Power, 'The COVID-19 pandemic has increased the care burden of women and families' [2020] Sustainability: Science, Practice and Policy 16(1), 69.

Although this essay is primarily concerned with the impact of the legal framework developed since 1997, there are some important contextual developments that occurred before this and are worth mentioning. Throughout the 20th century, the UK labour market moved from a *laissez faire* model to one characterised by increased regulation. This was controversial and different governments varied in their commitment to pursuing greater order in the labour market using the law.[8] This trajectory was reversed in the 1970s and afterwards, wherein the Thatcher government (influenced significantly by the ideas of neoliberalism)[9] pursued policies of de-regulation and privatisation. Moreover, from 1975 until 2020 the legislature of the UK was required to effectively implement EEC/EC/EU law and directives, which has had a profound impact on the labour market.[10] Furthermore, as previously mentioned the advent of feminism meant that more women than ever were entering (or re-entering) the workforce after having children, whereas before they would have been homemakers.[11]

In terms of the narrative of legal development this essay's starting point is the introduction of the 'New Labour' government in 1997, led by Tony Blair. This government helped to produce the *Fairness at Work* white paper, Chapter 5 of which contained a number of 'family friendly policies' aimed at ensuring a more effective

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[8] Collins (n 1), 9.

[9] Jamie Robertson, 'How the Big Bang changed the city of London for ever' (*BBC News*, 26 October 2016) <https://www.bbc.co.uk/news/business-37751599> accessed 5 December 2020.

[10] Maria Koumenta and others, 'Occupational Regulation in the EU and UK: Prevalence and Labour Market Impacts' (Department for Business, Innovation and Skills Final Report, July 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/343554/bis-14-999-occupational-regulation-in-the-EU-and-UK.pdf>accessed 30 November 2020.

[11] Pat Hudson, 'Women's Work' (*BBC History*, 29 March 2013) <http://www.bbc.co.uk/history/british/victorians/womens_work_01.shtml>accessed 25 November 2020.

work life balance for those with families.[12] The New Labour government had a few reasons behind the implementation of such policies, but primarily they were utilised to increase competitiveness in the market to ensure its prosperity[13] and to implement the 1996 EC Parental Leave Directive.[14] This directive had ambitious aims that even with the margin of appreciation would have been hard for the UK, with its long working hours culture, to achieve. These aims included promoting equal opportunities; flexible working; greater women's involvement in the labour market and; men taking an equal share of the responsibilities associated with family life.[15] Subsequently, Conservative led governments that published the *Consultation on Modern Workplaces*[16] and *Good Work: A Response to the Taylor Review of Modern Working Practices*[17] were also driven by rationales based on economic prosperity. It was thought that this would increase productivity, worker loyalty, the quality of work and reduce the costs associated with high employee turnover.[18]

The culmination of this narrative, i.e., the current legal framework governing the work life balance people in the UK labour market can achieve, covers a wide range of situations and involves many protected rights. Yet, despite this scope it also has many failings, primarily because it is fragmented and lacks a unified approach. The focus of this area of law on using skilled workers to diversify and increase

[12] Board of Trade, *Fairness at Work* (White Paper, Cm 3968, 1998).
[13] ibid.
[14] [1996] 96/34/EC.
[15] ibid.
[16] Department for Business, Innovation and Skills, *Consultation on modern workplaces* (Consultation, first published 16 May 2011).
[17] HM Government, *Good Work: A response to the Taylor Review of Modern Working Practices* (Department for Business, Energy and Industrial Strategy and Employment Agency Standards Inspectorate, 2018).
[18] Matthew Taylor, *The Taylor Review of Modern Working Practices* (Independent Review, Department for Business, Energy and Industrial Strategy, 2017).

competitiveness within the market means that often those working in more flexible or atypical employment are denied some of these rights and protections.[19] For example, most women require some level of maternity pay to be able to afford to take maternity leave, yet to qualify for it there must have been 26 weeks of continuous employment before the expected week of childbirth as well as a paycheck of at least £116 a week. So, for women without provisions for maternity pay within contracts and who earn less than this because they are employed on a temporary basis, work in the gig economy or other types of atypical work, statutory maternity pay is unobtainable.[20] Evidence from the Office for National Statistics found that 55% of the people working on zero-hour contracts (one example of atypical work) were women in its report *Contracts That Do Not Guarantee a Minimum Number of Hours,* which is even more significant because women make up only 46.8% of those employed not on zero hours contracts.[21] By contrast, 87% of men are in full time work.[22] This means that women who are entitled to statutory maternity leave under the Maternity and Parental Leave Regulations 1999 are not always able to take it because the law fails to provide them with an adequate way of surviving financially: the only other option is a very low level of maternity allowance from the government.[23] Additionally, there are many scholars who argue that flexible working for women with family responsibilities is the way forward, yet the right to

[19] Conor D'Arcy, Fahmida Rahman, 'Atypical Approaches; Options to Secure Workers with Insecure Income' (*Resolution Foundation*, January 2019).
[20] Collins (n 1), 406.
[21] *Contracts That Do Not Guarantee a Minimum Number of Hours* (Office for National Statistics, 23 April 2018) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018#what-are-the-characteristics-of-people-employed-on-zero-hours-contracts> accessed 30 November 2020.
[22] Trades Union Congress, Good Work Plan: Proposals to Better Support Families; TUC Responds to BEIS Consultation' (Consultation Response, 13 December 2019) <https://www.tuc.org.uk/sites/default/files/2019-12/TUC_BEISConsultation_GoodWorkPlan.pdf> accessed 7 December 2020.
[23] Collins (n 1), 406.

request this also requires continuous employment of at least twenty-six weeks.[24] Arguably, this is a cyclical issue: more women are in atypical work because it allows the flexibility to fulfil private domestic obligations, but these women lack statutory and contractual protections and so cannot achieve the same type of flexibility in full time, permanent employment which in turn excludes them from fully participating in the labour market.[25]

Additionally, the non-profit organisation Trust for London found that migrants were more likely to work "during night shifts and in non-permanent jobs".[26] This means that similarly migrant women who are in types of atypical work, such as zero-hour contract hospitality jobs (which is very common for this demographic), cannot claim maternity pay and cannot have help at home from their husbands who cannot get paternity leave under the Paternity and Adoption Leave Regulations 2002 because this also requires 26 weeks of continuous employment.[27] Of course, because of the numerous, inflexible requirements needed for shared parental leave to be available under the current law this is also not a viable option for immigrant families or women in low skilled or low paid areas of work that are atypical in nature.[28] All of this demonstrates that the law has little interest in human rights or equality as a justification for an effective work life balance, and that this economic focus has resulted in a legal framework that ignores the problems and experiences of these

[24] Employment Rights Act 1996, section 80(G)(1).
[25] Trades Union Congress, Good Work Plan: Proposals to Better Support Families; TUC Responds to BEIS Consultation' (Consultation Response, 13 December 2019) <https://www.tuc.org.uk/sites/default/files/2019-12/TUC_BEISConsultation_GoodWorkPlan.pdf> accessed 7 December 2020.
[26] Mariña Fernández-Reino, 'Migrants in the UK Labour Market: An Overview' (*Trust for London*, 17 July 2017) <https://trustforlondon.fra1.digitaloceanspaces.com/media/documents/Briefing-Migrants_in_the_UK_labour_market_overview_1.pdf> accessed 4 December 2020.
[27] Steve French, 'Between Globalisation and Brexit: Migration, Pay and the Road to Modern Slavery in the UK Hospitality Industry' [2018] Research in Hospitality Management 8(1).
[28] Shared Parental Leave Regulations 2014.

key demographics that make up a significant amount of the population who have both work and family commitments. It will only go so far as not to damage the competitiveness or prosperity of the economy.[29]

Furthermore, if those working part time in the labour market or in atypical work wanted to make an application based on the Part Time Workers (Prevention of Less Favourable Treatment) Regulation 2000 because they were being excluded from such rights, they would have to use their own resources and time to make a complaint to the Employment Tribunal. Arguably, this is not a particularly effective form of remediation as it only offers compensation for losses incurred because of this "less favourable treatment" and hear that the employer has been recommended to stop this action.[30]

The Impact of EU Law

The law concerning work life balance has been significantly impacted by EU law both before and after 1997. Unlike the mainly economic rationales behind the UK law, the EU acknowledges these benefits whilst also having a focus on social equality, equality of opportunity between men and women, the socioeconomic rights of individuals as well as dismantling harmful societally imposed gender roles.[31] This was evidenced clearly by the ambitious Parental Leave Directive.[32] It has influenced both the legal framework of rights concerning workers and employees with family responsibilities as well as UK equality law, as the UK legislature and judiciary is

[29] Joanne Conaghan, Kerry Rittich, *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press 2005).
[30] Collins (n 1), 425.
[31] Nicole Busby, 'The evolution of gender equality and related employment policies: The case of work– family reconciliation' [2018] International Journal of Discrimination and the Law 18(2),105.
[32] 96/34/EC.

obliged to implement the aims of these directives using domestic law (albeit with a margin of appreciation).[33] However, academic Nicole Busby in her article *'The Evolution of Gender Equality and Related Employment Policies: The Case of Work-Family Reconciliation'*[34] has argued that the focuses of the EU are conflicting, "parallel and incoherent".[35] The dual focus of both on improving the market as a whole by using policies to allow more people to be involved and using the law to equalise equality between men and women has resulted in "a patchwork of provisions rather than an overarching framework".[36]

This argument is an interesting one that definitely has its merits, especially the characterisation of familial responsibilities as a form of unpaid work because of its significant contribution to society - it re-frames the way these two goals are thought of.[37] Busby argues that this approach means the EU "subordinates gender equality to economic objectives".[38] Additionally, Busby makes agreeable statements about how EU law and the Court of Justice has failed to promote the rights and roles of men in the domestic setting.[39] However, she arguably fails to account for the numerous and ambitious advancements in work life balance law that has been facilitated in the UK by the EU. The examples of directives that have, even in a de jure way, protected women in the UK workforce from discrimination on the basis of pregnancy or maternity and helped to facilitate a more gender-neutral approach to governing parenting responsibilities. For example, section 18(2) of the Equality Act

[33] Busby (n 33), 106.
[34] ibid.
[35] ibid at 105.
[36] ibid.
[37] ibid at 106.
[38] ibid at 120.
[39] ibid at 112.

2010 which protects women from discrimination or dismissal on the basis of pregnancy or related sickness was influenced by the need to implement the Pregnant Workers Directive[40] and the Equal Treatment Directive,[41] which formalised the previous case ruling of *Webb v EMO Air Cargo (UK) Ltd* by removing the need for a male comparison in cases of discrimination.[42] The Pregnant Workers Directive also influenced the introduction of statutory maternity pay and the Equal Treatment Directive ensures a woman has a right to return to work after maternity leave.[43]

However, it is important not to overstate the influence or importance of EU law, especially because of the fact that the UK is due to leave the EU imminently. There is significant statistical evidence that EU law and UK equality law fails to tackle more "surreptitious" forms of discrimination against pregnant women.[44] The Equality and Human Rights Commission found in its report *Pregnancy and Maternity Discrimination and Disadvantage: Summary of Key Findings* found that ¾ of mothers surveyed said they had a negative/discriminatory experience during pregnancy and maternity leave, 20% said they experiences harassment or negative comments because of pregnancy or flexible working and 11% felt forced to leave their jobs.[45] On the side of employers, 84% said it was in their interests to support pregnant women yet 70% also felt women should declare upfront if they were pregnant and 27% felt the cost of maternity leave put an unreasonable burden on them.[46] Despite

[40] 92/85.
[41] 2006/54/EC.
[42] C-32/93.
[43] Collins (n 1), 407.
[44] ibid at 404.
[45] Lorna Adams and others, *Pregnancy and Maternity Discrimination and Disadvantage: Summary of Key Findings* (Equality and Human Rights Commission, Department for Innovation, Business and Skills, 2016).
[46] ibid.

this widespread discrimination, only around 1% of claims are brought.[47] This demonstrates how the de facto reality is that both EU and UK law fails to protect women from discrimination due to pregnancy, and remedies for this are few and far between because (like many other aspects of this area of law) there is poor take up of such rights.

Furthermore, in 2019 the EU introduced the Directive on Work-Life Balance For Parents and Carers which aims to do everything the current UK legal framework has failed to do: increase the participation of women in the workforce, increase the de facto use of family related leave and flexible working arrangements.[48] This would be incredibly influential in UK law, especially in terms of strengthening paternity rights and moving towards normalising men taking a more active role in familial responsibilities.[49] However, because of Brexit and the fact the transition period will not be extended again, the UK would have to choose to implement this directive,[50] and perhaps they will in the form of the Good Work Plan, which would have various implications in and of itself.[51]

The Good Work Plan – Gender Norms and the Legal Framework Beyond Pregnancy and Birth

[47] Amelia Gentleman, 'Pregnant? Wait Till the Boss Hears' (*The Guardian,* 23 June 2011) <https://www.theguardian.com/lifeandstyle/2011/jun/23/pregnant-wait-till-boss-hears> accessed 1 December 2020.
[48] 2019/1158.
[49] Rachel Crasnow, Chesca Lord, 'Will the New Radical Work-Life Balance Directive Help UK Parents and Carers? (*Cloisters – Employment*, 25 June 2019) < https://www.cloisters.com/will-the-new-radical-work-life-balance-directive-help-uk-parents-and-carers/> accessed 5 December 2020.
[50] ibid.
[51] Department for Business, Energy and Industrial Strategy, 'The Good Work Plan' (Policy Paper, 17 December 2018) <https://www.gov.uk/government/publications/good-work-plan/good-work-plan> accessed 15 December 2020.

In 2018, the UK government produced the *Good Work Plan: Proposals to Support Families,*[52] which was responding to the earlier *Taylor Review* and reiterated the same economic benefits that would be had from helping individuals to achieve a better work life balance.[53] There are definitely benefits to the approach that would be adopted. Recommendation 41 recognises that pregnancy and maternity discrimination remain a problem, and that an inherent cultural shift is needed to change this that the law should support and facilitate.[54] Overall, the idea of a "balance between flexibility and worker protections" sounds positive.[55] Arguably one of the most positive aspects of the Good Work Plan is that it recognises how the rights of atypical workers are often subverted under the current law and the fact that this needs to change. However, the reality is that the EU directive would have gone further because the UK still lacks a fundamental concern for a regulatory framework that is genuinely concerned with the rights of workers and not just the economic benefits of having more women in the workforce. Additionally, it does not directly relate the current law concerning pregnancy/maternity discrimination and an effective work life balance with the subversion of atypical worker's rights, which would be a significant step forward in and of itself.[56] Furthermore, the Trades Union Congress (TUC) has essentially argued that the Good Work Plan does not go far enough.[57] They point out that the reality is that the current legal framework reinforces harmful gender norms that continues to reproduce patriarchal ideas regarding gender roles.

[52] ibid.
[53] Taylor (n 18).
[54] Department for Business, Energy and Industrial Strategy, 'The Good Work Plan' (Policy Paper, 17 December 2018) <https://www.gov.uk/government/publications/good-work-plan/good-work-plan> accessed 15 December 2020.
[55] ibid.
[56] Trades Union Congress, Good Work Plan: Proposals to Better Support Families; TUC Responds to BEIS Consultation' (Consultation Response, 13 December 2019) <https://www.tuc.org.uk/sites/default/files/2019-12/TUC_BEISConsultation_GoodWorkPlan.pdf> accessed 7 December 2020.
[57] ibid.

They quote an article by Helen Norman ('*Does Paternal Involvement in Childcare Influence Mother's Employment Trajectories During the Early Stages of Parenthood in the UK?'* which essentially found that "mothers with preschool children are twice as likely to return to employment at nine months and at three years' post-childbirth if the father is involved by sharing or doing the most childcare at these times".[58] This area of law simply does not want to concern itself with supporting mothers in the workforce, which is yet again one of its primary downfalls.

This is significant in terms of establishing one of the least talked about but most problematic aspects of the current law concerning work life balance: it has a significant number of statutory rights and protections for during pregnancy and immediately after birth but fails to provide long term support for mothers.[59] This is because the law refuses to tackle the bigger issue of gendered norms in society that would allow women to be more active in the labour market and normalise men taking a more active role in the domestic sphere of life.[60]

Shared Parental Leave and the Feminist Perspective

Another important and influential source of criticism of the system governing work-life balance is the feminist perspective on how women are disproportionately affected and pushed out of the labour market as a result.[61] Primarily, feminist scholars of sociology argue that women, far from being freed from the oppressive nature of

[58] Helen Norman, 'Does Paternal Involvement in Childcare Influence Mother's Employment Trajectories During the Early Stages of Parenthood in the UK' [2019] British Sociological Association 54(2).
[59] James (n 5), 480.
[60] ibid.
[61] Emily Grabham, 'The Strange Temporalities of Work-Life Balance Law' [2014] feminists@law 4(1).

gender norms in society, now have a dual burden.[62] This is because the law concerning work life balance has failed to tackle these gender norms, which means the unpaid labour burdens of the domestic sphere and childcare is still disproportionately placed on women rather than men; women have the burden of paid work as well as those roles "associated with femininity and motherhood".[63] This is because, as this essay has previously mentioned, the law concerning work life balance in both the UK and Europe has failed in substantially tackling these gender norms despite the fact societal changes have significantly decreased the relevance of the male breadwinner and female homemaker model.[64] Moreover, there are feminist scholars who argue that women have poorer long term career prospects because they need to be in part time/atypical employment to manage their familial responsibilities because the law has not created an effective system where they would be able to do this in full time employment.[65] This is another way in which the law concerning work life balance fails to support mothers in a long-term sense beyond pregnancy and its immediate aftermath.

However, there has been some argument amongst legal scholars and officials about whether such arguments have been abated by the introduction of Shared Parental Leave in 2014. This new regulation, in theory, "makes it possible for partners to share the entitlement to maternity leave and maternity pay between them".[66] As

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[62] Gaëlle Farrant, Luca Maria Pesando, Keiko Nowacka, 'Unpaid Care Work: The Missing Link in the Analysis of Gender Gaps in Labour Outcomes' (OECD Development Centre, 2014) <https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf> accessed 2 December 2020.

[63] ibid.

[64] Mick Cunningham, 'Changing Attitudes toward the Male Breadwinner, Female Homemaker Family Model: Influences of Women's Employment and Education over the Lifecourse' [2008] Social Forces 87(1).

[65] Collins (n 1), 422.

[66] Collins (n 1), 409.

Grace James put it in her article *'Family-friendly Employment Laws (Re)assessed: The Potential of Care* Ethics' this has been added to the existing framework of rights for working parents and reiterates a commitment by the law to dismantling the gender norms that are keeping women from effectively and substantially engaging with the labour market.[67] Despite this, Grace James is right when she points out that this "package of rights" (including shared parental leave) is fundamentally flawed.[68]

Firstly, this shared parental leave package fails to deal with the continued discrimination against pregnant women and mothers that statistically feel pushed out of the labour market.[69] Furthermore, the refusal by the law on work life balance to place too much of a financial burden on the employers means that only a small proportion of the workforce are even eligible for this.[70] Both parents must be employees and pass the relevant statutory and common law requirements to be categorised as such, i.e., they must have a contract of employment under s.230 of the Employment Rights Act 1996, be able to satisfy the control test;[71] have their activity be an integral part of the business;[72] as well as the tests of economic reality;[73] mutuality of obligations and;[74] continuity of employment. Beyond these already numerous requirements, both parents also must have earnt at least £390 in thirteen out of the sixty-six weeks of employment.[75] Additionally, as couples are likely to work for different employers there is a great deal of organisational effort that goes

[67] James (n 5), 480.
[68] ibid at 478.
[69] ibid.
[70] Collins (n 1), 410.
[71] Established by Yewens v Noakes [1880] 6 QBD 530.
[72] Established by Stevenson Jordan v Macdonald and Evans [1952] 1 TLR 101.
[73] Stringfellows v Quashie [2012] EWCA Civ 1735.
[74] Carmichael v National Power plc [1999] UKHL 47.
[75] Collins,(n 1), 410.

into organising shared parental leave.[76] Again, this means that those working in atypical work are automatically not covered by such provisions. Furthermore, the slow uptake on this due to the law's failure to tackle traditional gender roles in society effectively enough has severely limited the de facto effectiveness of shared parental leave in dealing with the problems facing people with work and family responsibilities in the UK.[77] Moreover, this article offers an interesting contextual background about how remedies for people whose employers deny them such rights are limited because of cuts in "legal aid funding and the closure of many legal advice centres".[78] Arguably, this helps us understand how developments outside of the immediate legal framework also affect work life balance in a significant way which need to be remedied in the future if it is to be effective.

Jamie Atkinson offers an interesting perspective on shared parental leave in their article '*Shared Parental Leave in the UK: Can it Advance Gender Equality by Changing Fathers into Co-Parents?'* by comparing it with similar policies in Nordic countries that have much higher levels of gender equality.[79] To summarise, she argues that generous levels of compensation to parents, flexibility about how the leave is taken, wide reaching eligibility requirements and "other incentives to get the father to take leave" are the most important elements in ensuring the success of such policies (which she measures by the amount of people who make use of it).[80] Although she rightly identifies that these Nordic countries are also not perfect, it

[76] ibid at 411.
[77] James (n 5).
[78] Ibid at 485.
[79] [2017] International Journal of Law in Context 13(3).
[80] Jamie Atkinson, 'Shared Parental Leave in the UK: Can it Advance Gender Equality by Changing Fathers into Co-Parents?' [2017] International Journal of Law in Context 13(3), 361.

provides an interesting perspective for how shared parental leave in the UK can improve on itself to further gender equality.[81]

Impact of Coronavirus: Problems Old and New

The feminist narrative of women being disproportionately affected by poor regulation of work-life balance in the UK has only been strengthened by the impact of coronavirus.[82] Within the private sphere of unpaid work, women are already doing the majority of this work and school closures combined with millions of people working from home has meant this burden has only grown.[83] In her article *'The COVID-19 Pandemic has Increased the Care Burden on Women and Families'*, Kate Power cites a statistic that 41% of women currently inactive in the UK labour market are so because of their unpaid care responsibilities.[84] It is very unlikely that the law will recognise this problem or endeavour to solve it, because it is occurring in the private sphere.[85] These are the problems that coronavirus has exacerbated.

Additionally, the coronavirus pandemic has created new issues in the UK workforce because many people, most notably women and immigrants in atypical work, have lost their jobs due to the economic downturn and the law has failed to recognise that the issues facing men and women during this pandemic are different in many ways.[86] Women are more likely to be frontline healthcare workers, which additionally will have only increased their already substantial burden in terms of balancing

[81] ibid.
[82] Power (n 7).
[83] ibid at 68.
[84] ibid.
[85] ibid.
[86] Jenna Norman, 'Gender and COVID-19: The Immediate Impact the Crisis is Having on Women' [2020] British Politics and Policy at LSE.

professional work and private life responsibilities.[87] Furthermore, immigrant women (who like all other women are bearing a lot of the economic brunt of this crisis) because of the "'no recourse to public funds' condition stamped on many non-EU visas".[88] Additionally, undocumented women face even more issues because they are fearful of making use of social security or NHS services.[89] The response from the UK government in terms of labour law has failed to account for these differences. Furthermore, arguably this is more evidence of how the law is unconcerned with assisting women beyond pregnancy and childbirth because it demonstrates their unwillingness to get too over involved with the private sphere of life that would bring about a significant change in terms of the position of women within society.

Conclusion

This essay has demonstrated how UK law since 1997 has failed to ensure an effective work-life balance for those with familial responsibilities, an issue that has disproportionately affected women, as well as immigrants in the labour market. Additionally, it has shown that feminist perspectives are extremely useful in helping us to understand how women are still excluded from the UK workforce because the law refuses to go far enough to tackle harmful gender roles within society.[90] This is because the law is purely concerned with increasing competitiveness in the market and benefiting the economy and so ignores concerns about equality and human rights that EU law has adopted in its own rationales.[91] Women and immigrants in atypical or part time work are therefore often excluded from such benefits and

[87] ibid.
[88] ibid.
[89] ibid.
[90] James (n 5).
[91] Board of Trade, *Fairness at Work* (White Paper, Cm 3968, 1998).

arguably the Good Work Plan does not go far enough in the future to deal with these issues in the same way that perhaps the Directive on Work-Life Balance For Parents and Carers could if Brexit was not happening.[92] Furthermore, whilst the government response to coronavirus has been much more regulatory and helpful than predictions suggested, it has ignored the fact that women and men are experiencing different adverse effects because of the pandemic and worsened the dual burden women have to bear of paid and unpaid responsibilities.[93]

[92] 2019/1158.

[93] Alison Andrew and others, 'How are mothers and fathers balancing work and family under lockdown' (*Institute for Fiscal Sciences*, 27 May 2020) <https://www.ifs.org.uk/publications/14860> accessed 12 November 2020.

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CANNABIS : A POLITICAL GARDEN TOOL

Larissa Balkissoon

This paper aims to discuss how institutional racism plays a part in the continued criminalisation of cannabis in the United Kingdom. I will start with a short history of usage and attitudes toward cannabis in the United Kingdom, mainly England. I will then assess the relationship that the criminal justice system has with cannabis and its users and delve into how racial bias operates within law enforcement, using stop and search as a point of focus. This paper will explore how these biases lead to a disproportionate application of the law on certain groups of people. It will be argued while using Canada as point of comparison, that cannabis is being used in the United Kingdom as a political tool to favour voters of certain demographics, and that while more research is needed to fully assess the effects of cannabis, the reasoning behind maintaining cannabis' status as a dangerous substance is both absurdly hypocritical and entirely no longer necessary.

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Cannabis: a political garden tool

This paper aims to discuss how institutional racism plays a part in the continued criminalisation of cannabis in the United Kingdom. I will start with a short history of usage and attitudes toward cannabis in the United Kingdom, mainly England. I will then assess the relationship that the criminal justice system has with cannabis and its users, and delve into how racial bias operates within law enforcement, using stop and search as a point of focus. This paper will explore how these biases lead to a disproportionate application of the law on certain groups of people. It will be argued while using Canada as point of comparison, that cannabis is being used in the United Kingdom as a political tool to favour voters of certain demographics, and that while more research is needed to fully assess the effects of cannabis, the reasoning behind maintaining cannabis' status as a dangerous substance is both absurdly hypocritical and entirely no longer necessary.

Medicinal, recreational, and the law

The United Kingdom first listed cannabis as a prohibited drug in 1928 by adding it to the Dangerous Drugs Act 1920 in accordance with the International Opium Convention 1912. For an immeasurable amount of time the cannabis plant has been used recreationally, medicinally, and industrially across the planet, including many former British colonies and overseas territories.[1] The Misuse of Drugs Act currently lists cannabis and cannabis derivatives as Class B controlled drugs.[2] This classification means that it is a criminal offence in the United Kingdom to possess, grow, or supply cannabis to others. Section 6 of the act outlines the cultivation of any species of cannabis plant as a specific offence. Cannabis related offences are punishable through schedule 4 of the act. On indictment production or supplying of cannabis could result in up to fourteen years in prison, whilst possession alone, up to five years in prison, (an unlimited fine, or both).

In 2004 cannabis was moved from Class B to Class C, which holds less prison time for possession while retaining the same fourteen years penalty for production and supply.[3] This was done after the Advisory Council claimed that even though cannabis was harmful, it was not as harmful as other Class B drugs; amphetamines, methylamphetamine, barbiturates, and codeine.[4] Another driving point was to take the pressure off arrests for possession of small amounts of cannabis to shift the focus of law enforcement toward other more dangerous drugs and crime.[5] This reclassification only stood for five years as cannabis returned to Class B in 2009 against the

[1] Mohamed Ben Amar, 'Cannabinoids in Medicine: A Review of Their Therapeutic Potential' (2006) 105 Journal of Ethnopharmacology 1.
[2] Misuse of Drugs Act 1971, Schedule 2 Part II.
[3] ibid Schedule 4.
[4] Patrick McCrystal and Kerry Winning, 'Cannabis Reclassification: What is the Message to the Next Generation of Cannabis Users?' (2009) 15 Child Care in Practice 57.
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advice of the Advisory Council.[6] Currently in the United Kingdom a person can get a warning or Penalty Notice for Disorder (PND) for possession of small amounts instead of being arrested.[7]

The United Kingdom was once the world's largest exporter of cannabis for medical and scientific use, producing around 95,000 kilograms of cannabis in the year 2016.[8] In 2015, that production was at 41,706 kilograms.[9] For a country so determined to prohibit the use and supply of cannabis within its borders, it is quite ironic that businesses are being licensed for production for export, and that production doubled in that year.

Law and Enforcement: stop and search and racial bias

Canada, having legalised recreational cannabis in October 2018, will be used as a point of comparison to explore the UK's complex legal and political relationship with cannabis. While recreational cannabis is still considered illegal in most of the world, many countries seem to not strictly enforce their laws. In pre-legalised Canada, cannabis use became increasingly socially acceptable. The enforcement of possession laws became less and less important to society, which was reflected in the prioritisation used by the police.[10] While unregulated sales remained illegal post the legalisation of medical cannabis in 2001, there still existed brick and mortar dispensaries where the public was able to purchase cannabis illegally. For the most part, law enforcement would leave them to their business unless they suspected a connection to gang violence, sale to minors, or other crime. It was common to see them reopen after being raided and shutdown.[11]

Law enforcement in the United Kingdom has a lot of say about the way that perpetrators of cannabis-related crimes are dealt with. The Association of Chief Police Officers (ACPO) in the UK released an official policing guideline for cannabis possession for personal use in 2009 following the substance's return to a Class B status in the UK.[12] This document outlines whether a warning or PND should be issued in place of an arrest and explains the

[6] McCrystal and Winning (n 4).
[7] Simon Byrne, 'ACPO Guidance on Cannabis Possession for Personal Use: Revised Intervention Framework' (Association of Chief Police Officers, 28 January 2009).
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[11] Zach Dubinsky and Lisa Mayor, 'Who's Really behind Toronto's Chain of Illegal Pot Shops That Won't Quit?' (*CBC News*, 19 July 2019) <www.cbc.ca/news/canada/toronto/toronto-cafe-cannabis-dispensaries-1.5217307> accessed 28 April 2020; Robert Benzie, 'Trudeau urges police to "enforce the law" on marijuana' (*The Star*, 3 December 2016) <www.thestar.com/news/queenspark/2016/12/03/trudeau-urges-police-to-enforce-the-law-on-marijuana.html> accessed 4 May 2020.
[12] Byrne (n 7).

'escalation policy' used to determine which of the three the perpetrator will receive. To determine the severity of the possession they look at 'aggravating factors' such as whether they were caught in a public place, whether a young person is involved or could be exposed to drug use, and repeat offences.[13] This document states the purpose of these 'aggravating factors' as 'The circumstances of the offence form part of the consideration in determining whether an arrest can be made and justified'.[14] So in theory as per this document an adult over the age of 18 with no prior history caught in possession of cannabis for personal use and not falling under any of the aggravating factors should be let off with a warning (which would not show up on a standard criminal record check) even though it is a Class B illicit drug.

There are two important points regarding these guidelines. The first is that even though cannabis at this point had returned to Class B status, it was not being treated the same as other Class B substances – it is now being treated more leniently by law enforcement in comparison to other Class B substances. These more forgiving rules send a message to the public that even though cannabis was moved back to Class B status, it is accepted to be not as 'sinister' as the others. It begs the question of whether moving the drug back to Class B even had any bearing or real practical purpose. Herein lies an interesting unsynchronized relationship between the statute regarding the legality of cannabis and the approaches taken by law enforcement. Law enforcement is seemingly doing a better job than legislature at keeping up with public opinion by relaxing their approaches. Secondly, while they cover England, Wales, and Northern Ireland in a uniform manner, they are just that: guidelines. Each local policing authority has the prerogative of deciding how they may deal with a case of cannabis possession.[15]

What is evident is that this prerogative is used, to varying degrees. Some policing authorities, such as Durham, have made public statements in which they have announced they will not be targeting individuals for possession for personal use.[16] An article in the Canterbury Journal interviews a resident that describes the city as 'weed central', indicating the city even has its own cannabis club (the Canterbury Cannabis Collective) that lobbies politicians at Westminster.[17] It would suffice to say that being affiliated with this cannabis club would be enough to fulfil the 'reasonable belief' that law enforcement needs to target someone. They are lobbying openly for the legalisation of cannabis, which indicates that law enforcement is largely just allowing it to happen. So, if the people want recreational cannabis legalised

[13] ibid 4.
[14] ibid 9.
[15] Tom Harper, 'Police "Going Soft" on Cannabis Users' (*The Times*, 6 April 2019) <www.thetimes.co.uk/article/police-going-soft-on-cannabis-users-pzb3m5q7h> accessed 2 May 2020.
[16] Damian Gayle, 'Durham Police Stop Targeting Pot Smokers and Small-Scale Growers' (*The Guardian*, 22 July 2015) <www.theguardian.com/society/2015/jul/22/durham-police-stop-targeting-pot-smokers-and-small-scale-growers> accessed 25 April 2020.
[17] Pub Spy, 'Canterbury is "weed central" so why don't we just legalise it, say potheads' (*The Canterbury Journal*, 2 March 2018) <www.canterburyjournal.co.uk/canterbury-weed-central-dont-just-legalise-say-potheads/> accessed 28 April 2020.

(or are indifferent to it), and law enforcement has begun acknowledging that it is not a priority for them to police, why has Westminster not caught up?

Interestingly, in the same article another interviewee who is opposed to legalisation said she thinks, 'it'll increase the number of people smoking it by making it socially acceptable, like areas of Canada where people started smoking it openly and regularly once it had been legalised.'[18] This is statistically not true. According to Statistics Canada, self-reported cannabis use amongst Canadians rose from 14.9% before legalisation to 16.8% after legalisation. However, most of that difference of 1.9% could simply be accounted for by less hesitation to admit usage once it was not a criminal offence since results are self-reported. Additionally, respondents were to only report on whether they used in the three months prior to being surveyed.[19] So this is evidence of some apparent misconceptions about legalisation, and while a lax attitude from law enforcement may make cannabis users in those areas very happy, it is arguable that this prerogative in law enforcement's hands is a detriment to equal treatment of perpetrators of the same crime from different backgrounds.

There are many facets to consider when discussing the United Kingdom's relationship to cannabis. For one, it is not a plant native to the country and its use was introduced during the colonial period mostly through the Indian subcontinent.[20] In South Asia, cannabis was widely used medicinally and recreationally and is considered in Hindu Ayurveda to be one of five sacred plants that relieve anxiety.[21] While many may think of cannabis in the context of a relaxed Caribbean stereotype (or even particularly Jamaican), the plant was first introduced to the Caribbean through the movement of Indian indentured workers brought there by the British regime.[22] The origins of this plant are culturally and socially connected to (but not exclusively) two racial groups, people of South Asian and of African descent. Its history plays a part in the way that it is viewed socially. It is no secret that both of these racial groups have faced tribulations at the hands of British colonialism, the legacy of which still lingers.

One of these tribulations that has spilt into our modern existence is the entrenched racism that plagues the criminal justice system in the United Kingdom, of which law enforcement plays a huge part. The demonisation of dark skin leads to a disproportionate treatment of people of colour by law enforcement, and a disproportionate number of arrests and convictions. Crimes involving cannabis are one of the ways in which this disproportionality is manifested, but it is in no way the only one.

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[18] ibid.
[19] Michelle Rotermann, 'What has changed since cannabis was legalized?' (*Statistics Canada*, 19 February 2020) <www150.statcan.gc.ca/n1/pub/82-003-x/2020002/article/00002-eng.htm> accessed 28 April 2020.
[20] Leslie L Iversen, *The Science of Marijuana* (OUP 2008).
[21] Chris Conrad, *Hemp for Health: The Medicinal and Nutritional Uses of Cannabis Sativa* (Healing Arts Press 1997).
[22] Ivelaw Lloyd Griffith, *Drugs and Security in the Caribbean: Sovereignty under Siege* (Pennyslvania State UP 1997).

Stop and Search, and the Macpherson Report

The Stephen Lawrence Inquiry, which in 1999 generated the Macpherson Report, followed the racially motivated murder of Stephen Lawrence in 1993.[23] It was an important conversation-starter on the processes used when investigating a racially charged crime, in this case the murder of a black British teenager by a group of white youths.

Under 'stop and search' police officers can search you if they have 'reasonable grounds' to suspect you are carrying illegal drugs (or similar), or without reasonable grounds if it was approved by a senior officer.[24] According to the Home Office, as of the 2011 census, persons of black ethnicity comprise about 4% of the population of the UK, yet the Ministry of Justice reports that they are involved in about 20% of all drug stop and searches as well as prosecutions for cannabis.[25] With people of black ethnicity there is also a higher number of prosecutions than there are stop and searches in comparison with people of white ethnicity.

The racial element of these statistics is clear. If only 4% of the population is represented by black ethnicity, why are they involved in 20% of the searches? There is no correlation to suggest people of black ethnicity consume more cannabis in the UK. According to statistics on drug misuse available through the UK Government's website, in the 2018/2019 findings of adults aged 16 to 59, 8% of the white respondents versus 6.7% of the 'Black or Black British' respondents reported use of cannabis in the previous year.[26]

Stop and search gives individual police officers the power to use their own judgement to decide whether a person may be involved in a crime of some sort without seeing a crime being committed (in this case, in possession or planning to supply illicit drugs). Stop and search methods have been thoroughly scrutinised and continuously reformed as many do believe that they are not effective or an efficient use of law enforcement's time and resources.[27] The idea of law enforcement being able to search anyone they feel necessary could lead to a gross misuse of power.

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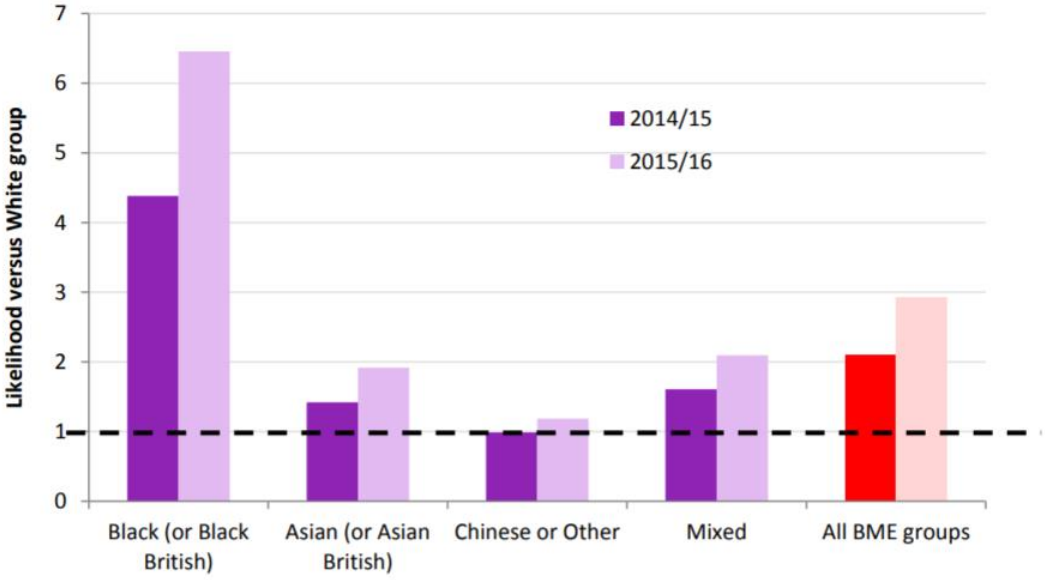
[23] William MacPherson, *The Stephen Lawrence Inquiry* (The Stationery Office 1999).
[24] Government Digital Service, 'Police Powers to Stop and Search: Your Rights' (*GOV.UK*, February 23, 2017) <www.gov.uk/police-powers-to-stop-and-search-your-rights> accessed 28 April 2020.
[25] Benzie (n 11).
[26] 'Drug Misuse: Findings from the 2018 to 2019 Crime Survey for England and Wales' (Home Office, 19 September 2019), 18. Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832533/drug-misuse-2019-hosb2119.pdf>. See Figure 3.1 'Proportion of 16 to 59 Year Olds Reporting Use of Illicit Drugs in the Last Year by Personal Characteristics'.
[27] 'Stop and Search: How successful is the police tactic?' (*BBC News*, 4 April 2018) <www.bbc.co.uk/news/uk-43641009> accessed 28 April 2020.

Figure 4.8 **Likelihood[1] of being stopped and searched by self-defined ethnic group, compared with those from White ethnic groups, England and Wales[2], year ending 31 March 2015 compared with 2016**



Source: *Stop and search table SS_13, Home Office*

Chart notes:

1. A likelihood of 1 indicates that the ethnic group is equally as likely to be stopped as those who are White.
2. Population breakdowns are based on the 2011 census. It is likely that ethnicity breakdowns have changed since 2011. Such changes are not accounted for in the figures. Therefore, these figures should be considered estimates only.

Figure 1[28]

Figure 1 illustrates the bias that exists within this system of law enforcement. The dotted flat line represents the likelihood of a person of white ethnicity being stopped within the years 2014-2016. Every non-white group surveyed had a higher probability of being involved in a stop and search. The black community does not consume more cannabis, and therefore should not be any more likely than someone of white ethnicity to be in possession of cannabis. Yet black individuals are still 6.5 times more likely to be stopped. According to the same data bank, people of black ethnicity used all surveyed drugs (powder cocaine, ecstasy, hallucinogens, amphetamines, mephedrone, ketamine and cannabis) less commonly than those of white ethnicity.[29] The obvious link: racial bias.

By this logic, police officers are, even unconsciously, under the impression that a black person is more likely to be involved in something illegal. The result of that is that the black population are being disproportionally affected by the law – a gross miscarriage of justice. We as citizens may want to believe that these statistics are an improvement, that the racial bias in the United Kingdom is a work in positive progress. However, 'figures for 1997/98 show that "black people were, on average, five times

[28] Jodie Hargreaves, Chris Linehan, and Chris McKee, 'Police powers and procedures, England and Wales, year ending 31 March 2016' (Home Office, 27 October 2016), 26.
[29] 'Stop and Search…' (n 28).

more likely to be stopped and searched by the police than white people." Black people are also "more likely to be arrested than white or other ethnic groups.'"[30] Many of these statistics are also based on self-identified ethnicity, where as to clearly see a bias or prejudice, one must know what others assume that person's ethnicity to be. What they identify themselves as, may be a useful indicator of how others view them, but it does not necessarily facilitate an understanding of the exact impact of racial identity on law enforcement.

The Macpherson Report is arguably one of the most important modern documents outlining the racial biases within the UK's criminal justice system. What it found was astonishing evidence exposing racial bias within the response and investigation of the death of Stephen Lawrence. No police officer on the scene performed any form of first aid after finding him, nor did they check his vitals to see if he was still alive.[31] The victim's parents reported being treated unprofessionally with insensitivity and were deprived of information regarding the case which they were entitled to. There was evidence suggesting that the perpetrators were not arrested for the crime, because they were white even though they were suspects with sufficient evidence to procure a warrant.

In general, they found that there was a lack of enthusiasm to find the murderers of a black man by white suspects.[32] While murder is beyond the scope of this essay, the findings of this report solidify the notion that in multiple ways people of black ethnicity are victims to the institutional racism present in the criminal justice system.

Cannabis and politics

The current Prime Minister of Canada Justin Trudeau and his Liberal Party's political crusade to legalise recreational cannabis use in Canada sat on two very important points: to make it harder for minors to access cannabis, and to tackle gang violence associated with cannabis sales.[33] Legalisation of cannabis was just one of the ways in which Justin Trudeau managed to rally two unlikely voter demographics: people of colour, and young voters between the age of 18-25. This won him two consecutive federal elections, while remaining at the time relatively appealing to the older voters.[34] With the changing demographic in Canada, rallying these voters was, and remains, a key political tool to holding power.

He, like his father, former Prime Minister the late Pierre Elliott Trudeau, prized multiculturalism in his political platform – a concept very important to the Canadian identity and society. The Canadian Multiculturalism Act is a law

[30] MacPherson (n 23).
[31] ibid.
[32] ibid.
[33] Benzie (n 11).
[34] 'Youth Voter Turnout in Canada' (Publication No. 2016-104-E, Library of Parliament, Canada, 13 October 2016). Available at <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/2016104E>.

passed in 1985 by the late Trudeau outlining all the ways in which it is expected that multiculturalism is to be upheld by the federal government. This includes, but is not limited to, 'ensur[ing] that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity.'[35] This policy of upholding diversity is part of the Canadian constitution.

The closest comparable statute existing in the United Kingdom is the Equality Act 2010. This piece of legislation covers a wider breadth of demographical information that may lead to discrimination, including, but not limited to, race, religion, gender, and age. Section 1 of the Act outlines the duty that public figures such as ministers, courts, police, and councils have toward socio-economic inequalities:

> An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.[36]

What is compelling is that Section 3 states that any breach of section 1 'does not confer a cause of action at private law,'[37] which limits how these public bodies are held accountable for breaching the Act and is realistically mostly just applicable to employers' relations with employees. The purpose of this act reads like a guide on what your legal options are if you feel that you were wrongly discriminated in the workplace by any of the protected demographics.

The purpose of the Canadian Multiculturalism Act is to focus much more on the acts and efforts that are expected of the Federal Government to uphold the integrity of diversity by recognising differences and adopting practices to accommodate them. This also includes promoting the use of languages other than English and French, the two official languages.[38] The entrenchment of this Act into the Canadian constitution, and the language used within it, shows just how important it is to Canadian society, run by a liberal government, as it holds everyone, including federal bodies, accountable for nurturing diversity in Canada. Whether or not it always plays out that way is beyond the scope of this paper.

There is a political connection with the way in which cannabis is 'officially' viewed versus the way that it is socially viewed when comparing Canada and the United Kingdom. Dalhousie University in Halifax published a study suggesting that 68% of Canadians (another 6.9% were indifferent) supported the legalisation of recreational marijuana in September 2017.[39] In a

[35] Canadian Multiculturalism Act 1985 s3(1)(e).
[36] Equality Act 2010 s1(1).
[37] ibid s3.
[38] ibid s3(1)(i).
[39] Sylvain Charlebois and Simon Somogyi, 'Marijuana-infused food and Canadian consumers' willingness to consider recreational marijuana as a food ingredient' (September 2017)

poll by YouGov for the Conservative Drug Policy Reform Group in the UK, 48% supported legalisation while only 24% opposed.[40] If that was not enough, a government survey found in 2017/2018 that 30% of adults aged 16 to 64 have tried cannabis at least once.[41] If the majority of the country is supportive or indifferent to the legalisation of recreational cannabis, why are the two governments approaching the idea so differently? This puts into question the strength of democracy in the United Kingdom as well, since the existing legislation does not reflect public opinion.

In 2019 three Members of Parliament from three parties visited Canada in order to evaluate the legal cannabis sector first-hand. Not surprisingly, the Liberal Democrat and Labour MPs later declared that they would support a change in 'cannabis legislation in the next five to ten years'. Only the Conservative MP did not show support for cannabis legalisation following the visit.[42] The Conservative Party of the UK has historically maintained that cannabis should remain an illegal substance.[43] There have also been allegations of racism linked to the Conservative Party and its leaders. One such point is the commentary on Enoch Powell's 'Rivers of Blood' speech in 1968 which, riddled with racist undertones, was aimed against the 1968 Race Relations Bill.[44] This bill made it illegal to refuse employment, public services, or housing to any person based on colour, race, or ethnic origin.[45] More recently, the current Prime Minister Boris Johnson has been quoted numerous times making racist comments. An article for the Guardian mentions that in articles written by Johnson before becoming Prime Minister he has referred to black people as 'piccaninnies with watermelon smiles' as well as claiming that the police were 'cowed' by the Macpherson Report.[46] While these claims were not made while he was in office, they are a glimpse into the rhetoric that has been accepted by the Conservative Party.

An NHS study suggested that while around 10% of cannabis users may develop an addiction to cannabis, 32% of tobacco users and 15% of alcohol users will become addicted to tobacco and alcohol, respectively.

<https://cdn.dal.ca/content/dam/dalhousie/pdf/management/News/Preliminary%20results%20cannibis-infused%20foods%20EN.pdf> accessed 28 April 2020.

[40] Elena Mazneva, 'U.K. Legalizing Cannabis Supported by Near-Majority of Voters' (*Bloomberg*, 14 July 2019) <www.bloomberg.com/news/articles/2019-07-14/u-k-legalizing-cannabis-supported-by-near-majority-of-voters> accessed 28 April 2020.

[41] 'Drug Misuse: Findings from the 2017/18 Crime Survey for England and Wales' (Home Office, July 2018). Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729249/drug-misuse-2018-hosb1418.pdf>.

[42] Emily Ledger, 'Cannabis Policy of the Political Parties – the Conservatives' (*The Cannabis Exchange*, 30 November 2019) <https://canex.co.uk/political-party-views-the-conservatives-cannabis-policy/> accessed 26 April 2020.

[43] ibid.

[44] Michael Savage, 'Fifty Years on, what is the legacy of Enoch Powell's "rivers of blood" speech?' (*The Guardian*, 15 April 2018) <www.theguardian.com/world/2018/apr/14/enoch-powell-rivers-blood-legacy-wolverhampton> accessed 26 April 2020.

[45] Race Relations Act 1968.

[46] Frances Perraudin, 'New controversial comments uncovered in Historical Boris Johnson articles' (*The Guardian*, 9 December 2019) <www.theguardian.com/politics/2019/dec/09/new-controversial-comments-uncovered-in-historical-boris-johnson-articles> accessed 27 April 2020.

There is also no recorded case of death caused by cannabis in the United Kingdom.[47] Alcoholchange.org has compiled statistics from the government showing that 24% of adults in England and Scotland regularly drink more than what is considered low-risk[48]; they found that in 2016 there were 9,214 alcohol-related deaths.[49] The Office for National Statistics found that 14.7% of adults over 18 years of age smoked cigarettes in the UK in 2018. In the same year there were 77,800 deaths attributed to smoking tobacco in the UK.[50] So, on the basis of death and addiction, cannabis seems to be relatively low risk compared to two substances that are legal and regulated. Yet, it is health concerns that are repeatedly cited when officials are asked about why there has been no significant movement toward legalisation of cannabis.[51]

Conclusion: A long road to legalisation

There is a worldwide shift happening in terms of social views of cannabis use. In Canada, while cannabis was still illegal it was clearly not a major concern of law enforcement, and there seems to be a similar attitude in the United Kingdom where other forms of crime take a greater importance. There is a complex web of connection between institutionalised racism, parliament, law enforcement, and politics regarding cannabis. There is a visible lag when it comes to legislation and law enforcement being up to date with social attitudes and there is clearly a disconnect between them. It seems even law enforcement does not stand on the same side of legalisation as current legislation. They seem to be shifting toward polled public attitudes that possession of cannabis and personal recreational use should not be criminalised.

Talking about the impact of a law moves far past the wording of the provision or the sentencing for the crime. Law enforcement is a key piece of the system that perpetuates this racial oppression. Even with the public support for cannabis legalisation, changing social attitude, and the prevalence of usage it does not necessarily look like the English Parliament will be pushing any bills forward to make that a reality anytime soon, especially not under a Conservative government.

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[47] Maria Correa, 'How Close Is the UK to Legalising Cannabis?' (*The Lawyer Portal*, 8 January 2019) <www.thelawyerportal.com/blog/how-close-is-the-uk-to-legalising-cannabis> accessed 26 April 2020.

[48] 'Alcohol Statistics' (*Alcohol Change UK*, 2 March 2020) <https://alcoholchange.org.uk/alcohol-facts/fact-sheets/alcohol-statistics> accessed 27 April 2020.

[49] Melissa Bennett, 'Dataset: Alcohol-related deaths in the UK' (*ONS*, 7 November 2017) <www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/datasets/alcoholrelateddeathsintheunitedkingdomreferencetable1> accessed 26 April 2020.

[50] Danielle Cornish and others, 'Adult smoking habits in the UK: 2018' (*ONS*, 2 July 2019) <www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandlifeexpectancies/bulletins/adultsmokinghabitsingreatbritain/2018> accessed 26 April 2020.

[51] Advisory Council on the Misuse of Drugs, 'Cannabis: Classification and Public Health' (Home Office, April 2008) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/119174/acmd-cannabis-report-2008.pdf> accessed 27 April 2020.

By looking at two multicultural countries we are able to see how political differences impact the legality of cannabis. The uses of cannabis in many other countries are tied to cultural significance as well as social tolerance such as in India, mentioned previously. Cannabis is not the problem; it is the connection to organised crime and violence which can be tackled through government regulation. This has been shown in the data gathered by statistics Canada showing that in every province and territory, legalisation has brought at minimum a 26% decrease in police reported cannabis offences.[52]

It is important that we continue to question the legitimacy of the claims the government makes about why they refuse to legalise and regulate cannabis as well as the institutionalised racism involved. There is evidence to suggest that the government has been using cannabis as a proverbial 'garden tool' to weed-out groups that they choose to target, or they believe are less important, and there is plenty of evidence showing that it is the black community that received the short end of that stick. All should be equal before the law, but this is virtually impossible to uphold when the law is represented through people, because people make judgements based on their inherent biases. There is no one statistic, statute, or study that will conclusively prove that politicians through the ages have used cannabis to paint a target on the backs of the black community, but there is evidence of it everywhere.

With the information that we do have in consideration, cannabis is no more dangerous to human health than alcohol and tobacco. Continuing to demonise cannabis and insist that it should have no place in the UK's society is hypocritical. Based on the attitudes of the public, as well as law enforcement, its criminal status is also completely unnecessary. There are better things for the justice system to be focusing on, and worse things to be keeping out of society.

[52] Gregory Moreau, 'Police-reported cannabis offences in Canada, 2018: Before and after legalization' (*Statistics Canada*, 24 July 2019) <www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2019055-eng.htm> accessed 27 April 2020.

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ARNOLD V BRITTON [2015]: AN ODYSSEY OF COMMERCIAL INTERPRETATION

Kyriakos Trigonis

Arnold v Britton [2015] clarified that where the language of a contract is unambiguous the literalist interpretation of the wording will outweigh the principle of commercial common sense. The subject of the litigation was a deceptively reasonable service charge clause included in 25 lease agreements at £90 a year, which increased by 10 percent compound interest per annum. Due to the high rate of inflation at the time the contracts were entered into, the service charge increased exponentially reaching extortionate rates. Deciding in favour of the landlord, the court marks a shift to a more conservative approach to contractual interpretation, which centers on textual analysis with less regard to external context. But beyond updating the rules of construction, the exercise of balancing literalism and business common sense has served as a lighthouse, illuminating the often-treacherous waves that govern commercial relations. The Lords' have deliberated whether commercial sensibilities should be allowed to interfere with the function of a competently drafted service charge and an answer has been reached. However, by favoring the commercially nonsensical interpretation of the provision in question, the Supreme Court has underestimated the value of ensuring amicability and fairness in business relations. The lingering question that remains unanswered and unchallenged is; what commercial behavior is the Supreme Court condoning by choosing to enforce this agreement?

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ARNOLD V BRITTON [2015]: AN ODYSSEY OF COMMERCIAL INTERPRETATION

(Case Commentary)

By Kyriakos Trigonis

INTRODUCTION

Arnold v Britton [2015][1] clarified that where the language of a contract is unambiguous the literalist interpretation of the wording will outweigh the principle of commercial common sense. The subject of the litigation was a deceptively reasonable service charge clause included in 25 lease agreements at £90 a year, which increased by 10 percent compound interest per annum. Due to the high rate of inflation at the time the contracts were entered into, the service charge increased exponentially reaching extortionate rates. Deciding in favour of the landlord, the court marks a shift to a more conservative approach to contractual interpretation, which centers on textual analysis with less regard to external context[2]. But beyond updating the rules of construction, the exercise of balancing literalism and business common sense has served as a lighthouse, illuminating the often-treacherous waves that govern commercial relations. The Lords' have deliberated whether commercial sensibilities should be allowed to interfere with the function of a competently drafted service charge and an answer has been reached. However, by favoring the commercially nonsensical interpretation of the provision in question, the Supreme Court has underestimated the value of ensuring amicability and fairness in business relations. The lingering question that remains unanswered and unchallenged is; what commercial behavior is the Supreme Court condoning by choosing to enforce this agreement?

REASONABLENESS OF THE JUDGEMENT

Historically, English principles of contractual interpretation have been perceived as strictly literalist. Contractual interpretation is considered the 'ascertainment of meaning which the document would convey to a reasonable person'[3] with access to all relevant background information. Generally, English courts are reluctant to stray away from the natural meaning of an agreement, where the language used is clear. In this case, the wording of the clause in question was identified as unambiguous, leaving little room for a different interpretation. Also, it is important to note that the question of fairness is unimportant as

[1] UKSC 36

[2] Suzanne Robertson, 'Making Sense of Commercial Common Sense' [2018] VUWLR 279

[3] Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] UKHL 28

English law 'does not often accept that people have made linguistic mistakes'[4] and courts avoid using their red pen to rectify a bad bargain. Interpretation is the exercise of identifying what the parties have agreed, not what the court thinks they should have agreed. Therefore, the Supreme Court's decision to assent to the commercially absurd interpretation was justifiable, as the danger of deciding otherwise would render legal relations in the business world volatile and risky. If plain words cannot be trusted, drafters would face an impossible task. Such was the opinion of Lord Neuberger who delivered the majority judgement, emphasizing that 'the language of the clause was simply 'too clear' as to lend itself to a different interpretation. He was reluctant to consider the agreement as commercially inconceivable given that inflation had been running over ten percent between 1974 and 1981[5], meaning that this unfair result could have occurred to the detriment of either party. The purpose of this analysis is not to condemn the decision of the Supreme Court, but to underline certain implications that may pose a danger to future commercial relations.

ROLE OF COMMERCIAL COMMON SENSE

The precedents of commercial common sense have emerged in cases were the court is required to navigate the murky waters of an ambiguous agreement. In its genesis it was held that 'detailed semantic and syntactical analysis of words'[6], which leads to a conclusion that is contrary to business common sense, must yield to the commercially probable interpretation. Opposing pedantry, it cuts through language that is commercially ambiguous and is hostile to technical interpretations and linguistic niceties[7]. In principle, business common sense clears the fog of a linguistically ambiguous contract granting flexibility in the process of construction. However, the judgement in *Britton* reflects the law's reluctance to rely on this concept in the fear of disrupting the continuity of English case law.

The service charge clause consisted of two parts, a descriptive part and a quantifying part. Lord Neuberger accepted that there was potential conflict between the two parts of the clause but rejected the lessee's argument that the first half should be interpreted as imposing a cap in order to avoid a commercially absurd result. Favouring the landlords fixed-rate interpretation, implies that commercial common sense can also be employed as a vehicle of deception. Just as technical language can conceal the consequences of an agreement, similarly CCS can also be used as a 'camouflage for partisan arguments'[8], which are really pleas for escaping a bad bargain. The majority held

[4] ibid.

[5] Katharine Osbergy, Christopher Stothers, 'Contracts Patents and Chess - Applying *Arnold v Britton* to patent claim construction' [2017] JIPL 23

[6] Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios) [1985] A.C. 191

[7] Neil Andrews, 'Interpretation of contracts and "commercial common sense": do not overplay this useful criterion' [2017] CLR 36

[8] ibid.

that 'the natural meaning of the words used was clear': the first half of the clause stipulated for an annual charge and the second part quantified that charge. This interpretation of the second half of clause 3(2) was understandable as a variable charge would give rise to many future disputes regarding proportionality. On the contrary, Lord Carnwath's advocation for a commercially sensible result was acknowledged but ultimately rejected as this would mean 'inventing a lack of clarity'[9] to depart from the natural meaning of the clause. By doing so, the majority's insistence on protecting the continuity of English case law and the clear wording of the agreement, was viewed as a higher priority than enforcing commercial logic. It is this very continuity in contractual interpretation which protects commercial parties by enforcing the virtues of certainty and predictability in business relations[10]. Paradoxically, the pursuit for continuity may instead have the effect of muddying the waters of future construction as courts will not always have the luxury of a singular clear interpretation. The majorities conditioning of commercial common sense as a variable dependent on the degree of ambiguity may inspire a heightened need for rectification in similarly ambiguous agreements, and of course the amount of red ink available is always limited.

LACK OF FACTUAL MATRIX

From a superficial perspective, the decision to undermine the importance of this concept in business agreements may be understood as a reminder to lower courts that commercial common sense is not to be employed in unambiguous contracts. However, the question of whether an agreement is commercially sound is to be determined by inquiry to the overall purpose and provisions of a contract[11]. The contention that business common sense should not be 'invoked retrospectively' to avoid offending the natural language of the clause in question appears rather reaching. Pragmatically, not all judges possess the business acumen required to decipher what constitutes a commercially sensible agreement. This is especially true in agreements were the language used lends itself to multiple competing interpretations. Therefore, it is imperative to investigate the factual matrix behind a transaction, to avoid de-valuing the commercial implications of an absurd result.

The question of whether to draw or conceal the proverbial sword of "commercial common sense" can be better determined by inquiry to overall purpose of the agreement[12]; a resource the Supreme Court had limited access to, due to the lack of "factual matrix", which includes any information that was available to the parties at the time the contract was entered into. In other words, the decision to undermine the authority of business good sense, while necessary, appears rudderless as the majority had insufficient material to justify this approach.

[9] *Britton* (n 1)
[10] Geoffrey Vos, 'Contractual Interpretation: Do judges sometime say one thing and mean another?' [2017] CLR
[11] Andrews (no 7)
[12] Ibid (no 7)

Apart from information about inflation, no other information was available for the majority to justify negating such a crucial agent of commercial interpretation. There was no clause in the agreement which calculated the possible exponential growth of the service charge. A measure which would have benefited both parties, if the majorities contention that the risk was mutual was indeed true (due to the high inflation of the 1970's). As established in *Rainy Sky* [2011], the process of construction requires the court to consider the language used having 'regard to all the relevant surrounding circumstances'[13]. So, the majority's reluctance to employ business common sense may be an indicator that they were ill-equipped to do so. But, evading the spotlight of abolishing a crucial tool of construction comes at the cost of thinning the line that the separates commercially unattractive agreements and undeniably absurd clauses, which clearly do not reflect the intention of the parties involved.

UNEXPLORED AMBIGUITIES IN THE AGREEMENT

To continue venturing into a credible rhetoric of skepticism without appearing redundant, one must assess the lack of factual matrix in line with the inherent ambiguities in the lease agreement. These ambiguities were highlighted in Lord Carnwath's dissenting judgement, advocating for the court to adopt the commercially logical interpretation. For example, the covenant requires the tenant to pay an annual service charge of £90 subject to exponential growth since 1974, while the alteration was made in 1980. In other words, the tenant is agreeing to pay six years of service charge before the lease was granted[14]. A result which runs contrary to the logic of a "reasonable commercial person". Also, the "triennial" covenants included in the early leases, contained the words "every subsequent Three-year period" instead of "every subsequent year". Whether these ambiguities allude that the variation of the leases were subsisting a loss incurred in the early leases is an argument Lord Carnwath was ill-equipped to employ. As asserted by Lord Neuberger, the court would not endeavor 'inventing a lack of clarity in the clause as an excuse for departing from its natural meaning'[15] as this would mean rewriting an unambiguous agreement. Additionally, there was no evidence available regarding the actual expenditure given by the landlord on meeting her obligations under the provision of the lease, whereas the escalator clause was quantified far more precisely. These minor details, when viewed together, may indeed legitimize the contention of ill-will. Naturally, no authority with the stature of the Supreme Court would dare navigate the potentially hazardous avenue of unilaterally altering the historically accepted nature of the English contract in order to emphasize the real intention of the parties. Ultimately, the clarity of the language used renders any rhetoric regarding ill-intent, futile, as the court would not undermine the clear language of a commercial agreement in order to facilitate such rhetoric. For this reason, no court though these ambiguities substantially material.

[13] Rainy Sky SA v Kookmin Bank [2011] UKSC 50
[14] Paul Clark, 'Drafting after Arnold v Britton' [2015] 373
[15] Britton (no 1)

WHAT COMMERCIAL BEHAVIOUR IS BEING CONDONED?

Returning to the initial question regarding the commercial principles the Supreme Court is allowing to prosper, it is likely that future matters of heightened linguistic ambiguity will emerge. Given the futility of Parliamentary intervention, due to the adverse impact this would have on many mixed-use developments[16], it is evident that the common law has a monopoly on writing the frameworks of construction. In *Britton*, Lord Neuberger emphasized seven factors to be employed in contractual interpretation. The weight of these frameworks is not to be undermined, as the Supreme Court is not only clarifying the rules of interpretation but is also implying (avoiding blatantly admitting) that mistakes have been made in prior cases of construction. An example of this is the implied correction of the approach in *Aberdeen*[17] (6th factor), in which Neuberger claimed that the clear intention of the parties will be given effect over other interpretations. This seems to run contrary to the result of *Britton*, which disregards the concept of "reasonable commercial intention" to avoid offending the clarity of the agreement. Most problematically, the second factor states that where the drafting of an agreement is clear, the court must not search for 'infelicities in order to facilitate a departure from the natural meaning'[18] [18]. In less polished words, it is justified to assent to an interpretation that is clear even where this clarity stems from an ambiguous agreement, with a commercially absurd result and with limited liberty to the matrix of fact. By favoring the landlord's interpretation, the court is inadvertently limiting its flexibility in regard to future construction. The same clarity that outweighed all other considerations in the present matter, may be used as a tool to facilitate improbable agreements, in such a way as to allow pedantic parties to overthrow the courts' monopoly of construction.

CONCLUSION

Although the decision in *Arnold v Britton* did not alter the underlying principles of construction, it shed light to the hierarchy of the components to be used in the interpretation of an unambiguous agreement. It is now evident that the clear wording of an agreement will supersede commercial infelicities and linguistic ambiguities. But, by laying the foundations of such a rigid interpretive autonomy, the Supreme Court is effectively better enabling ill-willed parties to monopolize the process of construction, using the overtly elevated judicial status of "clear language" in a contract as a tool to legitimize absurd interpretations. The exercise of clarifying the contemporarily accepted rules of construction has occurred at the detriment of other crucial variables.

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[16] Ibid (no 14)
[17] [2011] UKSC 56

[18] ibid (no 1)

More recent litigious proceedings have alluded that a mistake may have been made in the judgement of *Britton.* In the case of *Monsolar IQ Ltd v Woden Park Ltd* [2021][19], the Court of Appeal rejected the absurd interpretation of an indexation clause in a lease agreement, which clearly did not reflect the intentions of the parties. Ambivalence is evident on whether the Court of Appeal has received or accepted the message left by *Britton*, as Nugee LJ rejected the contention that Arnold v Britton had modified the *Chartbook*[20] principle, which states that commercial common sense may indeed outweigh the literal interpretation of wording. Though not binding upon the Supreme Court, the case of *Monsolar* is didactic of the fact that the line which separates commercially imprudent provisions and nonsensical clauses may indeed be thinning. I believe the Supreme Court has undermined the existence of pedantry amongst commercial parties, seeking to dominate the process of construction by adhering to the hierarchical structure of interpretative components set out in *Britton* in a way as to serve their own benefit. The rainy sky may have dried up, but the benevolent seas that govern commercial behavior, have yet to be explored.

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Interview with Prof LJB Hayes, Head of Kent Law School

KLR Editorial Board interviews

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Shaghayegh Ghezelayagh

Hannah Guy

Amber Lennox

Paarth Manjarekar

Hannah: Hello everyone, my name is Hannah Guy. I'm part of the Kent Law Review Publicity Team and today I will be interviewing Lydia Hayes, the new head of Kent Law School and head of release for the Kent Law Journal.

Hannah: Good afternoon Lydia. Congratulations on your recent appointment as head of law school, I'd love to ask how you feel about this change and is there any reflections on your first year you'd like us to know about.

Lydia: It's certainly been busy. I became head of law school on the first of August last year [2020]. It has been exhausting and exciting leading the law school through a critical time during the pandemic, and it's also been a privilege working with the staff and students.

Hannah: I'm glad you think so, considering how difficult the pandemic was for students. I understand you moved from Cardiff, and your accomplishments were widely known. I was curious to know what prompted this move.

Lydia: Kent is a very special place for me as a feminist researcher because there are so many other feminist researchers here. Two really incredible labour lawyers here stood out to me, professor Emily Grabber and Diamond Ashiabor [sic]. I really wanted to work with them and work with other colleagues. I really did love Cardiff, but the idea of coming to Kent appealed to me so as to work with other colleagues in my field of research.

Hannah: I'm familiar with your work and understand you focus on gender based violence. I want to know what pushed you towards this topic in particular.

Lydia: I suppose it would be unusual to think of me as a labour lawyer and I have an interest in gender based violence. The route to that would be the work I have done in the care sector. My interest came from listening to the care workers who worked in this sector, and understanding the various forms that gender based violence that exist, such as physical, emotional, and even economical.

A great example is the 'me-too' movement. One of the things that came out of this movement globally is pressure on international labour organisations, the special part of the UN which deals with employment around the world. There was pressure to produce a convention to address the violence in work, and to reduce this gender-based violence. To look at it from a labour law perspective was important for me.

Hannah: Thank you for addressing issues men face as well. I notice you have a lot of research in Australia – what drove you to pick Australia?

Lydia: That's because of a wonderful woman named professor Sarah Charlesworth, who works at RMIT in Australia. She's a lawyer at a business school whose research journey was so similar to mine, starting with equal pay and the legal framework surrounding it. We unfortunately have not made as much progress as we should have around this topic. Me and Sarah had a great connection in terms of benefiting and learning from each other and working with one another in a comparative way.

One thing that really interests me about Australia is the federal system. Working as an academic in Wales had given me a

really exciting insight in the devolution of the UK and Wales is really one of the youngest legislatives in Europe.

There were really relevant comparisons between the powers that existed in Wales and the powers that existed in Australia. For example, if we are looking for issues that concern care workers, which is where my research has focused on for the past 10 years, we have a situation where the industry where care workers work is regulated by law in a devolved way. As the industry has become marketized, there is serious tension between people with disabilities and their rights. Choices are limited because there is so little money in the system, so care workers are often engaged in unpaid labour. There needs to be some kind of creative thinking about different ways that different law affects different places.

Hannah: I'm really happy you guys reached out to each other and inspired each other. There is clearly an incredible connection. I'd like to talk about the journal now. Kent Law Review is launching soon and I want to know why you support this development.

Lydia: It's an absolutely fantastic thing. One of the things I've learnt this year is how resilient and innovative our students are and this journal provides a space where students can learn how to put the journal together and all the action behind it. It also means that you as a student are part of a wonderful thing we do as academics which is producing and sharing knowledge. No matter how different we are, it puts us in a place of privilege where we can share this knowledge.

Hannah: It's been an honour with me to work with this incredible team. Everyone is so motivated and it's so

interesting to work with people who all have different points of views. How do you feel now that we're ready to publish the first issue?

Lydia: I want the students who created this journal to feel proud of what they have achieved and have a sense of ownership over it. We have academics working with you and their role is very much to educate you and give you insight. Kent Law School educates its students so its alumna go out in the world and take this critical approach to law everywhere they go.

The pandemic has changed the world. You are launching this issue in circumstances that we never expected 18 months ago.

Hannah: I appreciate Kent Law School's critical approach as a student here and feel privileged to be part of the experience. I want to know what incites you to write after so many years of researching. It must have been an incredible journey and daunting.

Lydia: What helps me is that I know that it is a position of enormous privilege for me to be able to write my thoughts and make them accessible to other people. I am the first in my family to go to university. I am particularly interested in the impact of law on low wage and marginalised workers. That has been part of my approach that I have taken for my research in labour law. I also quite enjoy the creative parts of it – so I think perhaps for people outside of the law discipline, they may have a distorted view of what it means to be a legal researcher, and I hope this changes that notion.

Hannah: I love your passion. You fight so hard for something other people turn a blind eye to, and as a woman I do admire you. If you had any advice for aspiring writers, what would it be?

Lydia: I think that it's very important to pick things you are passionate about and commemorate it from an evidence-based perspective. Get started with it – but manage your expectations of perfectionism. Writing should be a liberating experience. Find work where you not only engage with the message, but where you love everything about the way it's written.

Who are you writing for? Ask yourself that. Find your audience and work off of that.

Hannah: I totally agree. I find it's very empowering when you take pen to paper but sometimes there are limitations. Everyone will have to deal with rejection, especially in a competitive market like law. I wanted to know if you ever dealt with rejection and how you dealt with it.

Lydia: It happens to everybody. Rejection is a part of life. Part of academic life to be specific. It's important to know it's not personal, although it feels like it. I'm passionate about my work. When it comes back with criticism, it hurts, but learn to pick yourself up and dust yourself off. The most important thing to know is that it's never personal.

We operate in the social sciences in law and it's fundamental to the production of scientific that work is rejected and peer reviewed. People are wrong. If it can't be wrong, then it's not part of scientific knowledge. If we believe in social scientific

matters, we need to accept rejection so we can improve what we produce.

Hannah: I feel like law students especially are so hard on themselves. But you can't grow unless you receive some constructive criticism.

Lydia: It's not just for students. It's part of being human. We're all students – it happens to everybody.

I think this is the biggest distinction between higher education and school. In school there's a right or wrong answer, but in university there is different arguments, particularly in a critical law school like Kent. There is no position where one can say I am objectively correct. There is no right answer.

Amber: Thank you Lydia for your time. I'm grateful to have someone like you leading our critical law school.

Interview with Larissa Balkissoon
KLR Essay Prize Competition Winner 2021

KLR Editorial Board interviews

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Shaghayegh Ghezelayagh

Amber Lennox

Paarth Manjarekar

Larissa

Amber: Hello I'm Amber Lennox. We will be joined today by Larissa Balkissoon, the recent winner of the Kent Law Review's essay competition, her piece, and what it means to her. Welcome Larissa.

Larissa: Thank you, it's my pleasure.

Amber: Firstly, tell me a bit about yourself.

Larissa: My name is Larissa Balkissoon, I'm 26 years old, I just graduated from the Senior Status LLB programme, which is a 2 year programme. Previously I did a bachelor of science in Ottawa, so I do have a science background which ties into what we will be talking about later. I'm currently in Toronto!

Amber: Thank you for that introduction, Toronto sounds amazing. Tell me about the competition, how do you feel after winning?

Larissa: Definitely amazing, but also shocked! To be honest, the content of the paper I wrote is one that generally isn't well-received, so I'm quite surprised at the positive reception. I was so used to backlash over this topic, so now I'm happy to see the open honest conversations we're having.

Amber: I read your piece, and it was honestly inspiring. Could you tell us a bit about it for those who haven't a full idea of what you have written? What inspired you?

Larissa: Of course. My piece is called 'Cannabis: A Political Garden Tool', I came up with the title the night before, and I

felt like it just fit perfectly. What I wanted to achieve with this paper is to basically look at the inequalities that exist in our criminal justice system. I wrote this piece for my dissertation, and I just really wanted to take a look at where race and law enforcement really meet, especially in light of the pandemic and recent news, because there's no denying the correlation between race and the law. We cannot keep pretending that race and law have nothing to do with each other, especially as law students, and it's time we address that. The reason I specifically spoke about cannabis and not any other drug is because I do have a personal connection to the topic. I work in the cannabis industry as an educator at one of the largest chains of legal dispensaries in downtown Toronto. My background is West Indian, both of my parents are Trinidadian. We have essentially moved from one colony to the other, and my ancestors actually brought cannabis seeds to the Caribbean, by people coming from India. People attach the idea of cannabis to the black community, when it was the Indian community who brought it over. It's such a complex topic for me. I know people who have suffered at the hands of law enforcement because of cannabis, which is interesting because more people use cannabis than you think, and it's time to move past the stereotypes.

Amber: It's so interesting you mention this connection between race and the law. There must be racial profiling.

Larissa: Definitely. My white peers do not get treated the same way my peers of colour did. The concept of laziness is often attached to the peers of colour, but that laziness doesn't necessarily translate when we start looking at different cultural groups.

Amber: For those who don't know, this essay had the theme of law and justice, a very broad topic. In the same vein really I was going to ask what drew you to this topic specifically.

Larissa: I think timing. In 2018 cannabis was legalised in Canada, and I came to Canterbury in 2019. Although it's regulated the same way alcohol is, the government didn't really take the time to research the effects and consequences of legalising it. I always wanted to tackle the topic so my dissertation presented a great opportunity for that. I had to remove a chunk of my essay to submit it for this competition, so it was hard to pinpoint exactly what I wanted to talk about. I think what's most frustrating is how my ancestors have used it for thousands of years and we were criminalised, but now that it's legalised it's the cool thing to do. I see it a lot in my workplace – it's frustrating.

Amber: What is one of the most harmful stereotypes you feel exist?

Larissa: Definitely the intersection of gang violence and cannabis use. After the legalisation the government did a research discovered the two were not related at all. This was in my dissertation but I had to cut it out due to word count.

Amber: Do you feel as if the illegal status of cannabis affects gang violence?

Larissa: Yes. In my paper I speak about legalisation, but there is a difference between legalisation and decriminalisation. The latter is necessary because people should not be behind bars for cannabis, but legalisation is a different infrastructure and

creates different rules and regulations. That's what Canada is trying to do, legalise instead of just decriminalise.

Amber: What do you think about what Canada is doing?

Larissa: Legalisation has its benefits. I personally don't support young people using it as it's harmful for their brain development, so it's a relief to see regulations put in place. You need to present ID, you need to be of legal age.

Amber: So do you feel that gang violence or activity changed after the legalisation?

Larissa: I'll preface this by saying I can only talk about Canada since I didn't grow up in England. When I was younger, cannabis was decriminalised, so I knew I would not be arrested for possession. There were bigger problems for law enforcement than a 21 year old with some cannabis in their pocket. In that time the black market thrived – it was legal but there were no dispensaries to buy from. The government assumed that would be sufficient to stop gang violence, but it really wasn't. Legalisation was helpful because dispensaries existed, but some people still preferred black markets. I think it's important to understand that even if cannabis is legalised, that doesn't end crime – there will always be something else. Someone is always trying to get something they shouldn't be getting. There will definitely be an impact – but not what the government is expecting.

Amber: You have obviously written this piece which is being published soon. Who in your head was your target audience? Who did you want to see this?

Larissa: There's not one person. Maybe my mother was in my mind. Although cannabis is very much in our culture, it's still something that's stigmatised. So maybe I hoped to change her mind.

Amber: What did you think the reception would be?

Larissa: I was unfamiliar with Canterbury and assumed that this is a taboo topic, so it's refreshing to see that I'm defying some stereotypes by looking at this through an academic lens. People need to stop stereotyping what a cannabis user is, and remove the harmful stigma. Cannabis is so versatile, and there are so many uses for it. This is a plant that grows from the ground. It can heal and harm just as much as any other plant.

People like me were displaced, and we had to hold onto whatever we had before we were displaced. That's what cannabis is for us. The UK displaced us, moved us around, and criminalised what was cultural for us. This is an impact of colonisation, and indeed a postcolonial subject.

Amber: You say that cannabis is a plant and should not be stigmatised the way it is. What do you feel about people calling it a gateway drug? Do you feel it leads to serious addictions, especially as someone in the industry?

Larissa: One thing I will say is that there is not enough credible research to call cannabis a gateway drug. Gateway drugs don't even exist from a scientific perspective. This is false stereotypes and stigma speaking – not real scientific research. If someone smokes cannabis for 10 years then does heroin, the reason might be some trauma or personal issues,

not because cannabis is a gateway drug. We need to start looking at circumstances.

Amber: In the UK, I can go and have a drink and it's perfectly fine. Alter my circumstances and I might become an alcoholic. Maybe a traumatic event happened, maybe I'm suffering. There should be more support and education instead of blatant dehumanisation.

Larissa: One point I did want to make is the concept of dependancy and addiction changes culture to culture. What is okay in one country is not in another. I knew someone in Pakistan who learnt that an ounce of alcohol is alcoholism in medical school. Alcohol is such a big part of British culture that that statement sounds obscure. I don't have an issue with alcohol, but if we can understand that the definition of alcoholism differs in the UK and a country like Pakistan, why isn't that same train of thought extended to cannabis? Cannabis is not a part of European culture at all, but it is a part of other cultures. So many people die from alcoholism but not cannabis use, and yet the government brushes over alcohol use.

Amber: What do you think about the movement of cannabis being dangerous not because of the plant itself, but because of what is mixed in it to sell illegally? Shouldn't legalisation remove that threat?

Larissa: That's a good point. I should reiterate that in Canada, legalisation didn't remove the black markets, that's a job for education. While legalisation will help make cannabis safer, it is ultimately up for education to eradicate that problem. Instead of scaring people, especially teenagers, let's be honest

with them. Tell them the damage it can cause to young brains that are still developing. Don't tell them 'don't use it'.

Amber: How do you think this correlates to race?

Larissa: I have had people assume I sell weed because of my skin tone, even an educator assumed I used cannabis when I was a teenager. This is stereotypes that can cause trauma, and it's just going to keep happening until we stop it.

Amber: Do you feel that Generation Z and Millenials are seeing a turn around on those attitudes?

Larissa: Painfully slowly. Because of people like me who talk about it. It's like mental health issues – start talking about it.

Amber: Again a big congratulations on winning the competition, your paper was amazing and deserved it. I just have to know: now that you're in your career and slowly advancing, how do you hope to implement your law degree?

Larissa: I'm looking into working in the cannabis industry as a legal professional. I want to talk about it as much as I can. In Canada so many people are still in jail because of marijuana-related crimes, and I want to help them.

Educate, educate, educate. You read something you disagree with? Research about it. That's all I have to say.

Amber: And there we have it, Larissa Balkissoon, our Kent Law Review essay competition winner telling us that education is the way forward. Thank you!