ARTICLES

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CASE COMMENTS

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Divisions:
Academic Division
Publications Division
Equalities Division
Careers Division
Schools Division
CONTENTS

Articles

Why Venture Capital Will Not Be Crowded Out By Crowdfunding? ..................5
Ryan Kantor

The Evolution of International Humanitarian Law: An Anthropological Perspective.......................................................................................................................24
Tanya Krupiy

Trafficking v. Smuggling; Coercion v. Consent: Conceptual Problems with the Transnational Anti-Trafficking Regime .............................................................46
Luke Butterly

Civil Legal Aid and Parliamentary Implementation of Human Rights: A Cautionary Tale .................................................................................................................56
Temisan Boyo

The Rise of Islamic Finance in the United Kingdom .............................................75
Victoria Rowley

Case comment

The Role of Fleeting Glance in Eyewitness Identifications Following
R v Dossett ........................................................................................................88
Marco Wong
Why Venture Capital Will Not Be Crowded Out By Crowdfunding

Ryan Kantor

Abstract – As the recovery period from one of the worst recessions in our history continues on, life for the fledgling and even, often times, experienced entrepreneur has been tough. Indeed, President Obama remarked credit’s been tight, and no matter how good ideas are, if an entrepreneur can’t get a loan from a bank or backing from investors, it’s very difficult to get their businesses off the ground. In response to this ever-present need for business funding, and in an attempt to stimulate the economy and job growth, Obama signed the Jumpstart Our Business Startups Act (“JOBS Act”) into law on April 5, 2012. The Act, among other things, increases a business’s access to capital by enabling them to sell securities to both accredited and non-accredited investors without registering or completing the full disclosure requirements typically required for public offerings. The overarching purposes of this paper will be to: 1) explain and analyze the relationship and overall dynamic that will exist between crowdfunding and VCs; 2) elucidate why investors should avoid or, at the very least, be wary of investing money through the crowdfunding medium; and 3) expound reasons as to why crowdfunding as a means of financing should be used as a last resort for a budding entrepreneur.

Keywords: crowdfunding, venture capitalist (VC), financing, entrepreneur, startup business, capital

1. Introduction

As the recovery period from one of the worst recessions in our history continues, life for the fledgling and, often times, experienced entrepreneur, has been tough.1 Indeed, President Obama has remarked that ‘[c]redit’s been tight, and no matter how good their ideas are, if an entrepreneur can’t get a loan from a bank or backing from investors, it’s almost impossible to get their businesses off the ground’2 [sic]. In response to this ever-present need for business funding, and in an attempt to stimulate the economy and job growth, Obama signed the

2 Ibid.
Jumpstart Our Business Startups Act (‘JOBS Act’) into law on April 5, 2012. The Act, among other things, increases a business’s access to capital by enabling them to sell securities to both accredited and non-accredited investors without registering or completing the full disclosure requirements typically required for public offerings. More specifically, Title 2I of the Act, which is still awaiting commentary from the proposed rules recently promulgated and is likely to go into effect in early 2014, presents the option for an issuer, the company, to use the internet to access capital (‘funding’) from public investors (the ‘crowd’) at much lower costs than for a registered offering and with fewer regulatory burdens than in an exempt unregistered offering. This concept, which has been termed ‘crowdfunding,’ in the broadest sense, refers to the practice of using the internet to raise capital by way of small investment from a large number of investors. Allowing non-accredited investors to invest in private, startup companies will not only be completely undermining 80 years of securities doctrine, dating all the way back to the Securities Act of 1933 (‘Securities Act’), but it will also be totally changing the investment landscape with regard to the financing of startup companies.

In fact, the landscape may change so drastically that one of the most prominent venture capitalist, Fred Wilson, boldly suggested that venture capital (‘VC’) could be swept away altogether by a flood of crowdfunding money unleashed by the JOBS Act. His reasoning is something like this: if each family, or individual, invests 1% of their assets in crowdfunding it will equate to around $300 billion, which is approximately 10 times greater than the $30 billion annual average of VC funds infused in the market over the past couple of years. The logic follows that since the $300 billion in crowdfunding, which has been said to be a

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6 John S. (Jack) Wroldsen, ‘The Social Network and the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists’ Dilution of the Crowd’, 15 Vand. J. Ent. & Tech. L. 583 (2013) (crowdfunding is ‘the practice of many (i.e. crowds of) people investing small amounts of money over the Internet in early-stage businesses in exchange for equity interests that are not registered with the Securities and Exchange Commission.’)
conservative estimate in other pundits’ views, will dwarf the amount that venture capitalists put into the system, which will minimize their role as aggregators of cash, leading to less utility and an overall decrease in their value. It should be noted that Wilson also possessed this pessimistic outlook towards the VC industry for additional reasons beyond just the deluge of crowdfunding money being invested; namely, too much money flowing into closed-in funds and other ways of funding, which are outperforming VCs. In any event, one cannot deny the premise: the genesis of crowdfunding as an option for an entrepreneur looking to raise capital will have an effect on the VC industry. However, the converse is true as well, in that traditional means of financing, specifically VC funding, will have an effect on crowdfunding. Beyond impact that crowdfunding and traditional VC funding will have on one another are many other risks, cautions, and perils for companies looking to crowdfunding as means of financing and for investors looking to invest through crowdfunding portals.

The overarching purposes of this paper is: 1) to explain and analyze the relationship and overall dynamic that will exist between crowdfunding and VCs; 2) to elucidate why investors should avoid or, at the least, be wary of investing money through the crowdfunding medium; and 3) to expound reasons as to why crowdfunding as a means of financing should be used as a last resort for a budding entrepreneur.

Part 2 of this article briefly highlights the different methods startup ventures have used to obtain capital prior to the enactment of the JOBS Act and the appurtenant crowdfunding provision. VC funding will be the main focus in this part. The relationship between the inability to access capital and the failure rate of a startup will be analyzed. This part examines the corollary of the high failure rate of startups with an emphasis on the VC’s expectations and strategy. Part 2 concludes by citing reasons as to why the demand for financing from startup companies is not being met.

Part 3 inspects and scrutinizes the JOBS Act with a specific focus on Title 2I: Public Securities Crowd Investing. It spells out how non-accredited investors will be able to participate in investing in startups, including the investment amount limitations and required company disclosures investors are privy to. Lastly, an in-depth analysis is conducted and

11 Novellino, n 9.
12 Cale Guthrie Weissman, ‘Fred Wilson: Venture capital as we know it will cease to exist.’ Pando Daily. 17 Jun 2013. <http://pandodaily.com/2013/06/17/fred-wilson-venture-capital-as-we-know-it-will-cease-to-exist/>. (‘I believe that the venture capital business as we know it will not exist in 25 years’.)
viewed disparately from both the investor’s perspective and the company’s perspective highlighting potential problems, issues, and complications that may arise through the use of, or participation in, crowdfunding. From the lens and perspective of the investors (i.e., the new investing class of non-accredited, ordinary individuals), the focus is on fraud concerns and horizontal risks associated with not having appropriate VC protections. Shifting to the lens and perspective of the company, the focus is on the negative consequences of crowdfunding; namely deterring future funding from VCs.

Part 4 of this article concludes by reaffirming the notion that crowdfunding and VCs can, and will, coexist. I then propose some feasible, practical solutions that properly balance the JOBS Act’s goal of increasing access to capital for startups, on the one hand, and the SEC’s endless objective of protecting investors, especially the non-accredited, from fraud, malfeasance, and other unintended consequences, on the other hand.

2. Startup Financing

It is estimated that around two million new businesses are formed each year, of which about 550,000 are considered ‘startups’. To understand the different financing rounds, or funding stages, a startup company proceeds through, it is best to think of a new venture on a timeline. At the beginning is conception of the idea of the business and the creation of the business model. The company then moves forward along the timeline as the idea gains credibility and forward momentum. Throughout this process, the company, ideally, is hitting the necessary milestones previously put in place by investors like VCs and, to a lesser degree, ‘angels’ (who are high net worth, accredited investors seeking high returns through private placements in startup companies), resulting in the receipt of funds via the different rounds of funding discussed briefly below. These funding rounds are known in the startup world jargon as the ‘seed’ round, ‘series A’ round, ‘series B’ round, ‘series C’ round, and so on until the company ‘exists,’ which generally means either an IPO or an acquisition.

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15 Ibid. See also Brian Broughman & Jesse M. Fried, ‘Carrots and Sticks: How VCs Induce Entrepreneurial Teams to Sell Startups’, 98 Cornell L. Rev. 1319, 1321 (2013) for discussion of other ‘exit’ options such as dissolution and then liquidation of the company.
Traditionally, nascent companies are initially funded from credit cards and savings (‘bootstrapping’), and then from friends and family.\(^ {16}\) In a best-case scenario, this usually raised up to about $250,000; then the startup is then forced to look elsewhere for funding.\(^ {17}\) Angels are usually sought out at this point. Angels are typically looking to invest a set amount ranging from as low as $10,000 to as much as $1,000,000.\(^ {18}\) In addition, angels are normally seeking high growth-potential companies and often focus solely on particular industries with which they are familiar.\(^ {19}\) Assuming the company is in the vast minority and is actually fortunate enough to receive angel funding,\(^ {20}\) once that amount has been exhausted, the startup turns to a VC firm for funding. Although this funding process may sound rather simple, obtaining the necessary funding at the different stages of development can actually be so difficult that the ultimate demise of many businesses is lack of funding.\(^ {21}\)

### 2.1 Lack of Funding and the Funding Gap

It is well known that small business often face an uphill battle when attempting to raise money through traditional funding sources such as bank loans, angel investors, and VC firms.\(^ {22}\) Following the 2007 financial crisis, conditions worsened. Startups seldom have adequate cash flow or collateral to qualify for bank loans in normal economic times, let alone in post-recessionary times due to the tightened underwriting standards imposed by banks.\(^ {23}\) As a matter of fact, estimates suggest that there is a $60 billion shortfall in the demand for early-stage private equity financing each year.\(^ {24}\) Moreover, a joint report by PWC and


\(^ {17}\) Ibid.


\(^ {23}\) Ibid; see also Office of the Comptroller of the Currency, U.S. Dep’t of the Treasury, 2012 Survey of Credit Underwriting Practices 7-8 (2012). As of May 2012, only 10.2% of small businesses that applied for bank loans received them.

\(^ {24}\) Ibid; See also Bradford, 100, n 64, (quoting William K. Sjostrom, Jr., ‘Relaxing the Ban: It’s Time to Allow General Solicitation and Advertising in Exempt Offerings’, 32 Fla. St. U. L. Rev. 1, 3 (2004)).
National Venture Capital Association (NVCA) shows that from 2009 to the present, VCs have invested the least amount of money in early stage deals and have also invested the smallest amount of early stage deals by volume compared to the other stages of development. Some details from the joint report shed some light and provide a more context. In 2012 VCs invested in 3,826 deals, of which only 876 were early stage investments (22.8%), whereas in 2001 VCs invested in 4,590 deals total, of which 1,321 were early stage investments (28.8%). As can be seen, just over a decade ago, the chance of obtaining VC funding was more promising and even likely, especially at an early stage of development. With that said, however, procuring VC investment has never been an easy feat. In fact, it has been noted that for every 30-40 investment proposals that slide across the desk at a VC firm, only one will receive investment. So, the question is: if startups have a dire need for funding at an early stage of development in order to get their businesses off the ground, why are VCs failing to meet this demand?

2.2 Venture Capital Funding

VCs are selective and offer only limited assistance to startups; investing, on average, less than a quarter of their total investments in early-stage companies. This occurrence can be attributed to two main factors. First, VCs primarily seek to invest greater sums – on average between $2 million and $10 million – than startups are pursuing. Second, VCs have a preference for investing in somewhat less risky companies – those that have already endured through the initial startup phase with proven track records and clearer exit prospects. Before one can truly understand why VCs operate in the manner they do (and in

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the process fail to meet the demand of startups seeking early-stage financing) a brief explanation of the VCs’ structure and strategy is necessary.

In layman’s terms, venture capital is a professionally managed pool of capital that is invested in equity-related securities of private ventures at different stages of their development.\(^1\) The VC firm itself is typically the ‘general partner’. The outside investors contributing towards the pool of capital are typically institutional investors and high net worth individuals who are referred to as the ‘limited partners.’\(^2\) The prevailing form of organizational structure of the fund becomes a limited partnership in which the VC firm serves as the manager of the fund.\(^3\) In 2012, the median U.S. fund size was $150 million, which was a 12% increase from the median size of $134.5 in 2011.\(^4\) Normally, VC funds, despite getting hundreds or even thousands of investment proposals each year, invest in about 10-12 total.\(^5\) The general partner, or VC firm, is responsible for sourcing, evaluating, and ultimately negotiating the investments that are made into the startup, or portfolio, companies.\(^6\) Therefore, the ability of investment funds to invest is constrained by the ability, expertise, and experience of their managers.

The general partner is actively involved in the management and strategy of their portfolio companies. VCs with a $100 million fund simply cannot properly monitor and manage 100 investments of $1 million, even if they were all splendid opportunities.\(^7\) Performing due diligence on the investment opportunities is a time-consuming task due to the uncertainty involved with their business model. In addition, much of their time and attention is spent on prior investments already made in the attempt to minimize the risk of failure. The VC fund is therefore resource-constrained in the human capital sense (i.e., at full capacity),\(^8\) which is one major reason that VCs fail to meet the demand for financing of startup companies.


\(^3\) Ibid.


\(^5\) Sahlman, n 30; see also McKaskill, n 26.

\(^6\) Ibid.

\(^7\) 2013 WL 574518 (ASPATORE), 1 (ADJUSTING TO INVESTMENT TRENDS IN A NEW VENTURE CAPITAL MARKET)

\(^8\) ‘Venture Capital Funds Raised $20.6 Billion During 2012.’ *VC Industry Continues to Bifurcate Into Large and Small Funds*. Thomson Reuters Corporation, 07 Jan 2013. (Only 182 funds in 2012 further evidencing the lack of human capital resources in venture capital).
Another key reason that VCs don’t meet the demands of startups seeking financing relates to their high risk of failure, and the limited partners return on investment expectation. It is estimated by the NVCA that 40% of portfolio companies fail, 40% of portfolio companies return moderate amounts of capital, and only 20% or less produce high returns. In another study conducted by Shikhar Ghosh, Senior Lecturer at HBS, no matter how ‘failure’ is defined, the statistics are still discouraging. Ghosh even states that the failure rate is much higher than the industry usually cites, with as many as three-quarters of venture-backed firms in the US not even returning investors’ capital. Consequently, VCs have to hit home runs if they want to give their limited partners a reasonable yield on their investment. Since the vast majority of portfolio companies do not provide adequate returns, the fund is dependent on at least one of the portfolio companies to ‘knock it out of the ballpark’ with a 10x, 20x, or even 30x multiple of their investment so as to make up for the underachievers in the portfolio. For this reason, coupled with the pressure to deliver returns to limited partners in a timely manner, VCs target startups with the ability to grow really big rapidly. Growing big rapidly requires the ability to scale hastily and capture the market while delivering a high margin, which is only feasible for certain types of companies within particular industries such as: technology, healthcare, energy, life sciences, etc. As a result, many startups outside of those industries of interest often time go unfunded, because just being profitable isn’t enough. For example, even though a 10% return would be a great return for a retail investor investing in common investment products, 10% is not a good return for a portfolio company. In sum, the selectivity and the stringent investment criteria VCs call for, limits the universe of startup companies as candidates for VC funding. Thus, the ability for VCs to meet the demand for financing startup companies have is further limited.

40 ‘Frequently Asked Questions About Venture Capital,’ n 31
41 Shikhar Ghosh, http://hbswk.hbs.edu/item/6591.html ‘Very few companies achieve their initial projections. Failure is the norm’.
42 Gage, n 20.
44 Ibid.
Besides the inability of VCs to properly evaluate and monitor numerous portfolio companies due the lack of human capital, and the need for VCs to invest in specific kinds of business models that have the ability to be home runs in order to overcome the high likelihood of fellow portfolio company failures and thus meet the high yield return expectations of limited partners, simple logistics play a role in VCs failure to meet the high demand for financing by startups each year.\(^{48}\) As mentioned above, VCs tend to be actively involved in the portfolio companies, meaning they have significant participation in and oversight of each portfolio company.\(^{49}\) Accordingly, VC investment is an inherently local, or at most regional, activity.\(^{50}\) Indeed, data from 2010 and the first half of 2011 reveals that the top five regions for VC investment accounted for roughly 76% of total VC investment.\(^{51}\) More specifically, the data divulges that approximately 39% of total VC funding by region was invested in California’s Silicon Valley.\(^{52}\) The result of this VC investment concentration is that many startups located in less prevalent VC areas go unfunded.\(^{53}\)

For these reasons, \textit{inter alia}, many startups are short-lived and end up being nothing more than a business idea or concept that never materializes. In short, the lack of funding, although not the sole cause or reason, often precipitates the high failure rate among startup companies. With this in mind, the JOBS Act was created in which a new class of investors has since been born to help alleviate the lack of funding problem startups in the past have faced.

\section*{3. Crowdfunding}

The concept of crowdfunding—collecting small amounts from the general public in support of, or to complete a larger goal (e.g., politicians collecting small donation amounts from general public to win election)—is nothing new; however, internet-based crowdfunding is a relatively recent phenomenon.\(^{54}\) Crowdfunding, in fact, originated in the United States as a ‘donational’ model in which people provided money to fund different projects without expecting to receive an ownership interest or profit in return.\(^{55}\) So, if crowdfunding has been

\footnotesize
\begin{itemize}
\item \(^{49}\) Ibid.
\item \(^{50}\) Ibid.
\item \(^{51}\) Ibid.
\item \(^{52}\) Ibid.
\item \(^{53}\) MyCapital, n 44.
\item \(^{54}\) Bradford, n 20 (noting that the leading crowdfunding site today, Kiva, did not open for business until 2005).
\end{itemize}
around for a number of years and has already been legally utilized by different people, and companies, what exactly makes Title III meaningful?

There are five different types or uses of crowdfunding that can be categorized by distinguishing what the investor is promised in return for their contributions: 1) the donation model; 2) the reward model; 3) the pre-purchase model; 4) the lending model (peer-to-peer lending); and 5) the equity model. The first four types have been legally used in the past; however, the fifth type, the equity model, has only recently been enabled by Title III. The equity model differs from the other types because the contributor of funds expects to receive a share of the profits or return of the business they are funding, causing the transaction, categorizing it as a sale of securities and thus subject to Federal Securities Laws. Unless an exemption applies, a sale of securities needs to be registered with the SEC, which can be extremely burdensome and costly for an entrepreneur.

Title III of the JOBS Act, the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012, termed the ‘Crowdfund Act’, increases a business’s access to capital by allowing it to sell securities without registering or completing the complete disclosure requirements ordinarily mandated for public offerings. The goal of the Crowdfund Act is to give businesses (typically smaller ones) greater access to capital by making securities’ offerings conducted over the Internet to the public at significantly reduced costs by avoiding many of the SEC registration requirements.

Under the Crowdfund Act, a company will be able to raise up to $1 million over a twelve-month period. Crowdfunding websites display business plans/funding requests on their site and anyone can view them and decide whether to invest or not. Individual investors will be limited to contributing: 1) the greater of $2,000 or 5% of annual income or net worth if either annual income or net worth is less than $100,000; or 2) 10% of annual income or net worth, not to exceed $100,000, if either annual income or net worth is more than $100,000. The transaction must take place through a ‘broker’ or ‘funding portal’ and

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56 Bradford, n 20 (such as Kickstarter or IndieGoGo),
57 Ibid.
58 Ibid; see also Alan R. Paltimer, n 54.
59 Zachary J. Griffin, ‘Crowdfunding: Fleecing the American Masses’, n 27.
60 Benjamin P. Siegel, n 4.
61 Ibid; see also Mr. Merkley (for himself, Mr. Bennet, Mr. Brown of Massachusetts, and Ms. Landrieu), In The Senate Of The United States. S. 2190 (112th): Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012, 112th Congress, 2011–2013, Text as of Mar 13, 2012 (Introduced).
62 Griffin, n 27.
63 Ibid; see also Wroldsen, n 6 (the cap on individual investors applies to the aggregate amount invested via crowdfunding in any twelve-month period, not to each investment).
must comply with certain disclosure requirements.\textsuperscript{64} This intermediary (broker or funding portal) is responsible for making disclosures ‘related to risks and other investor education materials’ in which the SEC determines is appropriate.\textsuperscript{65} The Crowdfund Act also encompasses other rules and requirements such as the company: disclosing how the obtained funds will be used, being financially audited if it raises more than $500,000 within the 12-month period, acquiescing to a broad-based background check to be conducted by the intermediary, and other provisions intended to preclude fraud and protect investors in the process.\textsuperscript{66}

Crowdfunding could very well mark a ‘revolution in how the general public allocate[s] capital’, or, at a minimum, democratizes the process of deciding how, and whose ideas are financed. In fact, the impetus for passing the Crowdfund Act, was, as one senator noted, ‘[the] enormous potential [of crowdfunding investment] to bring more Americans than ever into the exciting process of powering up startups and expanding small businesses.’\textsuperscript{67} Copious examples of non-equity based, large, successfully rowdfunded projects exist, such as the ‘Pebble’ project in which over $10 million was raised in just thirty-six days to fund a highly customizable wristwatch that works in unison with a smartphone.\textsuperscript{68} So, if crowdfunding has the potential to provide startups with a completely new class of potential investors, and thus capital, it has been successful in the past under the non-equity based types or categories, and it has been publicly endorsed and signed into law by lawmakers, then what could possibly be wrong with crowdfunding?

\subsection*{3.1 Problems With Crowdfunding}

To achieve the goal of increasing a small businesses’ access to capital, the Crowdfund Act decreases the number of regulatory hoops that parties must jump through in order to participate in an exempted crowdfunded offering (i.e., effectively making the process less stringent and easier to conduct).\textsuperscript{69} With less regulation under the crowdfunding exemption, there is a greater potential of increased fraud exposure for an investor. Indeed, one of the

\begin{footnotes}
\footnotetext{64}{Ibid.}
\footnotetext{65}{Ibid.}
\footnotetext{66}{Siegel, n 4.}
\footnotetext{67}{Wroldsen, n 6.}
\footnotetext{68}{Ibid.}
\footnotetext{69}{Siegel, n 4.}
\end{footnotes}
main reasons security regulations exist is to prevent fraudulent dealings by issuers. Critics have listed countless reasons as to why crowdfunding may open the door for fraud to permeate the market, and I will focus on three primary reasons below.

In the past, unregistered securities have been offered to accredited individuals because either: i) their wealth allows them to tolerate the risk of loss; or 2) their financial sophistication aids them in better comprehending the risks affiliated with such investments. The primary issue with offering securities to the general public is that most individuals are non-accredited, and therefore in need of the protections provided by state and federal securities laws. Various studies and tests have evidenced that the much of the general public is largely financially illiterate. The financial illiterate, or unsophisticated, investor will have a much more difficult time understanding the risks associated with crowdfunding. Moreover, the issuer disclosures are usually distributed to investors in a very dense form containing financial verbiage that is unfamiliar and unintelligible for to an unsophisticated investor. To paraphrase what two law professors point out, disclosures that are seen today are often too long and complex. W, and when an ordinary investor is inundated with them such disclosures, they lack the necessary skills to identify and fully comprehend what the information means and how to use it effectively. Therefore, the combination of the average crowdfunding investor being naïve and being ill-equipped will facilitates higher levels of fraud.

The second dominant reason that crowdfunding may lead to more investment fraud stems from the idea that the Internet and fraud go hand-in-hand. Most people are familiar with the concept of cybercrime (fraud conducted over the Internet), yet many people may not realize that considerable amounts of securities fraud conducted over the Internet occurred in the not-too-distant past. In 1992, in a manner quite similar to the JOBS Act, and with the similar purpose to facilitate capital raising for small businesses, the SEC sought to reduce the

70 Ibid.
71 Ibid.
73 Ibid.; see also Palmiter, n 54.
74 Ibid.
75 Ibid.
76 Press Release, ‘IOSCO Publishes Paper on Cyber-Crime, Systemic Risk and Global Securities Markets’, Wall Street Journal, 16 Jul 2013. (This article highlights the urgent need to consider cyber threats to securities markets as a potential systemic risk due to the rapidly evolving nature in terms of actors, motives, complexity, and frequency).
78 Griffin, n 27.
burdens of registration under the Securities Act. In short, the SEC revised the rule 504 exemption under Regulation D to allow a non-reporting company to generally solicit and advertise their offering of securities. Soon thereafter, numerous cases of security fraud were identified. Specifically, the ‘pump and dump’ scheme occurred in which an unscrupulous promoter would purchase a low-priced, thinly capitalized, and relatively unknown and uncovered by analysts stock, known as a ‘microcap’ stock; endorse and stimulate buying activity around the stock, using the internet to reach the public; and then sell the stock at the artificially inflated price, which is only temporarily caused by the momentum built from using the Internet to garner interest from the public in the first place. The promotional materials were frequently comprised of misrepresentations of the microcap stock leading to the price crashing after the promoter dumped his/her position, leaving the investors with practically nothing. The whole scheme was, in essence, made possible due to the SEC’s decision to eliminate the restriction on general solicitation and advertising. Therefore, the lesson of the past in which the SEC relaxed regulations and allowed companies to use the Internet to raise capital, which is precisely what Crowdfund Act will permit, should serve as a reminder that fraudulent activities are ubiquitously entwined with the Internet.

The last of the three dominant reasons as to why crowdfunding may lead to more fraud revolves around the disincentive investors might have in bringing a cause of action forward. Due to the limits, or cap, on what an individual investor can invest in the aggregate over a twelve-month period (greater of $2,000 or 5% if annual income and net worth less than $100,000; up to 10%, not to exceed $100,000, if annual income or net worth greater than $100,000), it does not make economic sense for an investor to sue for damages. In other words, it is not practical for an investor to sue, even though a private right of action is enumerated in the Crowdfund Act. The most an investor will be able to contribute towards a crowdfunded venture is between $10,000 and $100,000, and often investors will have contributed even less (around $2,000), and therefore, it is unlikely investors will have sufficient damages to warrant bearing the great deal of costs associated with litigation (i.e., a

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79 Ibid; see also Revision of Rule 504 of Regulation D, The ‘Seed Capital’ Exemption, Securities Act Release No. 7644 (Feb. 25, 1999).
80 Ibid.
82 Ibid.
83 Ibid.
84 Siegel, n 4; see also Palmiter, n 54.
private suit by an individual is cost-prohibitive).\textsuperscript{85} Moreover, a successful lawsuit could potentially not be recovered ‘since it is possible that those engaged as crowdfunding issuers are ‘uncollectible’.”\textsuperscript{86} Even a class action lawsuit may not be a viable alternative given the total offering amount is capped at $1 million for a crowdfund exemption.\textsuperscript{87} The economic impracticality of this situation is true from an attorney’s perspective as well. Typically, an attorney litigating this matter would be working on a contingent fee basis (normally 20-30\% of the award), which, again, would not be a worthwhile undertaking. Therefore, after taking into consideration the small, limited investment amount and the attorney’s fees associated with litigating a fraud claim, it becomes unappealing and economically impractical to pursue a claim for both the investors and the attorney.

In conclusion, the problem of fraud is derived from the fact that the company (entrepreneur) has all of the power. As a well-regarded professor explains it, ‘[i]nvestors have little information about what is to come and little control over what the entrepreneur does. This presents the entrepreneurs with opportunities for self-dealing, excessive compensation, misuse of corporate opportunities, and dilution of investors’ interests…’\textsuperscript{88} This scenario lends itself to fraud, and thus investors need to be cautious in making their investments through the Crowdfund Act.

3.2 Horizontal Risks and the Absence of VC Protections

Assuming the investor, via crowdfunding, makes a sound investment into a successful startup company, and the company conducts itself in a legitimate, good-faith manner (i.e., fraud is not present), the investor may still not realize the expected above-average financial return (high risk–high return concept) due to the absence of investor protections against horizontal risk. The concept of horizontal risks considers the fact that promising investment opportunities in startups appeals to competing investors, who are often sophisticated VCs.\textsuperscript{89} Without adequate VC protections, an early-stage crowdfunding investment in a successful startup company can result in significantly lower financial returns.\textsuperscript{90}

\textsuperscript{85} Palmiter, n 54.
\textsuperscript{86} Siegel, n 4; see also Diamond Kaplan & Rothstein, ‘Crowdfunding May Increase the Likelihood of Fraud’, FindLaw (Nov. 1, 2012).
\textsuperscript{87} Ibid; see also Siegel, n 4.
\textsuperscript{88} Wroldsen, n 6; see also Bradford, n 20.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid.
The concept of horizontal risks was depicted in the film *The Social Network* when Eduardo Saverin’s ownership stake is diluted from his original 30 percent down to less than 1 percent when Facebook obtained VC financing.\(^{91}\) Other existing ownership interests, such as Mark Zuckerberg’s, were, at most, minimally diluted.\(^{92}\) Saverin’s failure to negotiate the essential investor protections led to this vast dilution. Similar to Saverin’s situation, individual crowdfunding investors will not be in a position to negotiate the kinds of protections against horizontal risks that VCs demand.\(^{93}\) Professor Bradford explains the dilemma by pointing out that most crowdfunding investors do not have the know-how and cleverness to understand the necessity of having control rights or protective covenants. Even if the crowdfunding investor does understand the importance of seeking such protection, it is uncertain how they would negotiate for the protection, or whether it would be worth their effort. ‘The small amount invested by each crowdfund investor and the remote, impersonal nature of crowdfunding preclude any meaningful negotiation’.\(^{94}\) The overarching concept of the VC being in a position of power, seeking control of the startup, and diluting prior investors is not novel nor is it exclusive to crowdfund investors.\(^{95}\) In fact, the problem known generally as ‘minority shareholder oppression’ has existed for years and is often referred to by different names such as ‘squeeze-outs,’ ‘freeze-outs,’ ‘washouts,’ etc.\(^{96}\) In substance, these are all VC ‘tools’ that can potentially take advantage of early-stage investors like crowdfund investors by reducing the value of their shares by enormous amounts.\(^{97}\)

Due to the potential problems associated with fraud and the horizontal risk due to absence of investor protections, crowdfund investors should proceed with caution. As painful as it would be for a crowdfund investor to surrender a capital investment to a mismanaged, failed, or fraudulent startup company, it would be even more unfortunate for a crowdfund investor to invest in a startup that becomes a huge success and then fail to earn an adequate return, while the VC profits immensely.\(^{98}\)

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91. Ibid.
92. Ibid.
93. Ibid.
94. Ibid.
95. Ibid.
97. Ibid.
98. Ibid.
Companies seeking investments from crowdfunding investors should also be leery. Using crowdfunding can lead to myopia in the sense that later investors like VCs will be deterred from investing in future rounds of financing for a few different reasons.\(^\text{99}\)

Crowdfunding creates a capital structure that is unappealing to VCs. VCs have little interest in competing and associating with the masses of retail investors, because they do not want to deal with inconveniences that ensue from having numerous shareholders (such as corporate actions that trigger voting requirements and approval).\(^\text{100}\) In other words, a large, diverse shareholder base leads to a logistical nightmare. In addition, deals with many small and unsophisticated shareholders can lead to an increased likelihood of lawsuits and liability for VCs down the road—a risk that VCs clearly do not want exposure to.\(^\text{101}\)

Beyond discouraging later investors, like VCs, from investing due to the large, diverse shareholder base being both burdensome and risky to deal with; merely using crowdfunding in the first place creates an unintended signaling problem.\(^\text{102}\) It goes something like this: the riskiest companies will be the ones who seek crowdfunding, because their family, friends and business associates denied them.\(^\text{103}\) In other words, crowdfunding may be seen as a last resort, or a sign that the particular venture seeking funding is even riskier than a typical startup. It has been argued that herein lies the overarching problem of crowdfunding: There is a dangerous mismatch occurring, because ‘the process introduces only the riskiest of startup ventures to the investors least able financially to absorb loss.’\(^\text{104}\)

4. Conclusion

In the past, VCs were seen as great investors and job creators. Recent reports, however, have criticizes VCs for providing less-than-expected returns while being much too dominant and harsh in the terms they demand.\(^\text{105}\) Investing in VCs is beyond the scope of this paper. Rather, VCs as investors, despite their harsh terms, are value-added partners. VCs provide substantial

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\(^{100}\) Ibid; see also Mashburn, n 22.

\(^{101}\) Mashburn, n 22.

\(^{102}\) Stocker, n 99.

\(^{103}\) Joyce M. Rosenberg, ‘Crowdfunding may be more bust than windfall’, New York (AP), 24 Apr 2013.

\(^{104}\) Ibid.

\(^{105}\) Diane Mulcahy, Bill Weeks, and Harold S. Bradley, ‘We Have Met The Enemy...And He Is Us’, Ewing Marion Kauffman Foundation, [http://www.kauffman.org/s Institute/kauffman.org/research%20reports%20and%20covers/2012/05/we%20have%20met%20the%20enemy%20and%20he%20is%20us(1).pdf].
amounts of funding, invest in multiple rounds of a company’s growth, participate in active management of the company, and provide introductions that can help lead to more business or funding down the road.\textsuperscript{106} Crowdfunding will not replace VCs, contrary to what Fred Wilson has predicted.

Large institutional investors like VCs turn down 99\% of the business plans submitted to them, which attests that crowdfunding and traditional VC can, and will, coexist. VCs target particular kinds of companies, which leave companies outside of that specification in desperate need of funding from an alternative source—like crowdfunding. For example, a mom-and-pop retailer that grows slowly would be a better candidate for crowdfunding than VCs, whereas a capital-intensive, high-growth company would be a better fit for VCs, but would not be a very good fit for crowdfunding due to the $1M limitation on funding over a 12-month period.\textsuperscript{107} Apart from focusing on dissimilar companies, crowdfunding also helps fill the gaps for fund-worthy startups that were overlooked or ignored. With that said, some have predicted that crowdfunding and VCs may end up investing in the same kinds of companies.\textsuperscript{108} The argument is that the online portals, or crowdfunding websites, are accessible by VCs too, so they have the opportunity to analyze companies they might have missed initially.\textsuperscript{109} Moreover, the online portals may even serve as validation, giving companies who have obtained funding from the crowd more credibility and allure in the eyes of VCs.\textsuperscript{110} In any event, traditional VCs and crowdfunding will coexist. And since they will be coexisting, what, if anything, can be done to protect the different parties involved?

Crowdfunding has the potential to be a huge, positive source of startup capital in the near future. However, those looking to become crowdfund investors, and those looking to obtain investment via the crowdfund investors, must both act with prudence. Many aspiring investors and investees are hopeful and confident, yet gloom and misery are right around the corner if the involved parties do not exercise due diligence and discipline.

The SEC will undoubtedly be an intricate part in curbing fraud in the crowdfunding realm.\textsuperscript{111} The SEC is tasked with creating rules and requiring certain disclosures, and their task is far from easy due to the inherent conflict in allowing companies to access capital more

\textsuperscript{106} McKaskill, n 27.
\textsuperscript{107} Andrew Stephenson, ‘Crowdfunding can supplement your offering to accredited investors’, CrowdCheck Blog, 05 Nov 2013, < http://crowdcheck.com/blog/crowdfunding-can-supplement-your-offering-accredited-investors>.
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Palmiter, n 54.
easily and cheaply from investors while also protecting those same investors by requiring them to perform certain tasks and disclose certain information.\(^{112}\) If the SEC were to implement too many rules, that were too difficult to obey, then it would have completely defeated the purpose of Title 2I of the JOBS Act since companies would find it too time-consuming and expensive to utilize. Other options may convolute and complicate the process, such as creating a ‘semi-accredited’ investor class to ensure investors are sophisticated enough to understand the risks and low probability of success in their investment.\(^{113}\) Taking into consideration the above, it seems that the SEC has done a worthy job on paper, yet the true test lies in how the online portals conduct their operations.

Online portals must be diligent and thorough in their reviews, background checks, and due diligence performed on the businesses seeking to be listed on their website for crowdfunding purposes. Idea stage companies, without any true direction or management experience, are simply too risky. Some of the websites have thus far been disciplined and have turned down companies deemed not worthy of investment.\(^{114}\) The more reputable and trustworthy these third-party intermediaries are, the less likely fraud will occur.\(^{115}\) Taking it one step further, online portals could implement a feedback rating system in which issuers build a reputation (similar to sellers on eBay) allowing for would-be investors to avoid issuers with negative reviews or feedback.\(^{116}\) This will help avoid fraud, though it will not be a solution to the more subtle horizontal risks.

Without sufficient protections, crowdfund investors will be at risk of dilution from both price-based and share-based actions by VCs.\(^{117}\) At a high-level overview, price-based dilution occurs when shares are issued at subsequent round at a lower price per share than what the existing investors paid (a ‘down-round’).\(^{118}\) Without price-based anti-dilution protection, crowdfunders will see the value of their existing investment be reduced to a nominal value in subsequent rounds of financing. Share-based dilution occurs when the company issues additional shares of common stock, which causes the convertible preferred stock held by crowdfund investors much less valuable.\(^{119}\)

\(^{112}\) Ibid.
\(^{113}\) Siegel, n 4.
\(^{114}\) Rosenberg, n 103 (on how Crowdfunder and CircleUp have been turning down many companies).
\(^{115}\) Ajay Agrawal, Christian Catalini, and Avi Goldfarb, ‘Some Simple Economics of Crowdfunding’ (June 2013), NBER Working Paper No. w19133 (on mitigating the problems of Adverse Selection and Moral Hazard).
\(^{116}\) Ibid.
\(^{117}\) Wroldsen, n 6.
\(^{118}\) Ibid.
\(^{119}\) Ibid.
Fortunately, there are anti-dilution protections available and commonly negotiated, in addition to other types of protections such as tag-along rights and preemptive rights.\(^{120}\) Including these contractual provisions as a default in contracts for crowdfund investors will go a long way in protecting them. If these provisions were included in standard contacts being negotiated with VCs, crowdfund investors would at least have the protections initially. Whether they remained in the contract pursuant to the negotiation is another story. Standard contracts with this boilerplate language provide for a better starting point in the negotiation for the crowdfund investor, because at least then there is awareness of crucial issues involved such as anti-dilution. Along the same theme of investor awareness and enlightenment, another potential solution to horizontal risk would be an easy-to-read disclosure table.\(^{121}\) The table would graphically highlight what investor protections the particular investee/company was offering.\(^{122}\) The table could appear on the website alongside the investor education materials that third-party intermediaries are required to supply. To be clear, the standard investor-friendly contracts and the disclosure table are merely suggestions that could mitigate, not eliminate, horizontal risks for crowdfund investors.

In closing, crowdfunding will become a major financing source for startups. Investors and investees contemplating involvement, however, should proceed carefully. Beyond the more obvious risk of fraud are more obscure horizontal risks, which are also value-destroyers to a crowdfund investor. An investee must be careful not to fall into the trap of immediately using crowdfunding, because it will, most likely, dissuade later-stage investors like VCs.

\(^{120}\) Ibid.
\(^{121}\) Ibid.
\(^{122}\) Ibid.
The Evolution of International Humanitarian Law: An Anthropological Perspective

Tanya Krupiy

Abstract – This article uses Douglas and Wildavsky’s cultural theory of risk from the field of anthropology, in order to provide a new explanation regarding what factors influenced the evolution of international humanitarian law in general, and the rules of targeting in particular. The starting point of the analysis is that the attitudes of states to risk, and the strategies states employ to manage risk influence their conduct on the international arena. Another facet of the discussion is an examination of whether the cultural theory of risk may be used to explain the motives of states and non-state actors for violating the rules of international humanitarian law. Building on the proposition that the attitudes of states to how risk should be managed may shape the content of the law, as well as whether the law is obeyed, the article additionally considers whether the disagreement between scholars, regarding how the legal rules are to be interpreted, may be explained by reference to attitudes individual scholars hold towards risk. The academic discussion regarding the legality of the employment of lethal autonomous robots on the battlefield is used as a case study to test this hypothesis.

Keywords: international humanitarian law, the rules of targeting, anthropology, risk theory, lethal autonomous robots

1. Introduction

Prior to 1864, there were no treaties that regulated the way in which states conducted armed hostilities and protected various groups such as those captured in a battle.1 Instead, states signed treaties which were binding on the parties to the conflict for the duration of that particular armed conflict.2 In contrast to the 19th century, international humanitarian law (hereinafter IHL) is now a well-established branch of international law.3 The purpose of this article is to chart the evolution of the rules of targeting through the perspective of

2 Ibid.
anthropology in order to explain what social phenomena spurred the relevant changes in the law. Subsequently, it will be investigated whether anthropology can provide an insight into why different legal commentators provide different interpretations of these norms. It is hoped that this analysis will shed light on why proponents of the lawfulness of employing autonomous robots on the battlefield apply the same rules as those who oppose the introduction of these technologies but reach a different conclusion as to the legality of these systems.

It is suggested that anthropology is an appropriate lens of analysis because it is concerned with the study of societies and culture. Particularly, Mary Douglas and Aaron Wildavsky’s cultural theory of risk is arguably a fruitful avenue for analysing the evolution of the rules of targeting and the current legal debates related to these norms. The notion of risk, which is defined as the possibility of a loss occurring, goes to the heart of the rules of targeting. The rules of targeting are concerned with alleviating the suffering in war as ‘much as possible’ while allowing parties to achieve the mission objective. These norms therefore delineate the point at which allocating more resources away from operational needs to the protection of civilians and the sacrifice of additional military advantage exposes the force and the attainment of the mission objective to such degree of risk that there is no legal requirement to take further measures to mitigate danger to civilians and civilian objects. The cultural theory of risk is a promising approach for shedding new insights into why the rules of targeting evolved in the way they did because the theory goes beyond explaining how individual psychology and cognitive processes shape how individuals estimate the likelihood of a particular adverse event occurring and the magnitude of potential loss. The theory examines how social, cultural, historical and geographical factors influence the way in which individuals and groups think about risk and respond to it.

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6 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November / 11 December 1868, taken from taken from (1907) 1 A.J.I.L. Supplement 95-6.; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, UKTS 9, Cd. 5030.
2. The Cultural Risk Theory

According to Douglas and Wildavsky, people do not perceive risk as loss which occurs on average. This is because, ‘...socialized cognitive patterns work like filters in the evaluation of information about risks.’ The values the person holds due to the cultural group she belongs to will influence the way in which that person will interpret the information before her. For instance, the Lele in Congo fear an attack by magicians while Californians in the U.S. are most concerned about the impact of second hand smoke on their health. This is not to say that Douglas and Wildavsky treat risks as if they do not materially exist. What they are saying is that, ‘...individuals encounter threats with a pre-existent package of beliefs and assumptions’ which are constructed through culture. In formulating the cultural theory of risk, Douglas and Wildavsky focused on how groups behave and treated the behavior of individuals as indirectly describing how groups conduct themselves under the influence of culture.

Douglas and Wildavsky maintain that all cultures and societies as well as specific groups in society have four group prototypes. These group prototypes explain attitudes to risk in societies and in segments of societies. However, their proposals have not been extensively empirically tested and some commentators such as Castel disagree with Douglas and Wildavsky. Castel argues that similarities in cultures are superficial and that cultures evolve so that the four cultural prototypes identified by the two authors even if true lack stability. On the other hand, Rippl who is a sociologist, has conducted a study which she argues shows that there is evidence that groups in society mirror the four cultural prototypes. Rippl gave a questionnaire to sociology students in Germany which tested their attitudes to various

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9 Boyne, Risk (Open University Press 2003) 44.
11 Renn, Risk governance: coping with uncertainty in a complex world (Routledge 2008) 22.
12 Boyne n.9, 44.
13 Mythen, ‘Sociology and the art of risk,’ 306.
14 Ibid.
15 Boyne n.9, 53.
16 Ibid.
17 Renn n. 11, 121.
18 Ibid.
19 Ibid., 56:60.
20 Ibid.
phenomena. Rippl used a specialist computer program to process the answers and to develop correlations between them. Rippl justified her method by arguing that although one cannot study culture by studying individuals, the study of individuals may nevertheless reveal cultural processes. Other studies such as those conducted by Marris, Langford and O’Riordan corroborate that it is possible to map the outlook of individuals on particular issues to the cultural prototypes developed by Douglas and Wildavsky. It is proffered that evidence for the validity of cultural theory can moreover be gleaned from the works of psychologists. Psychologists argue that culture involves mental constructs that provide people with guides how to judge situations and that give people guidelines for how to behave. Thus, cultural theory of risk merits consideration.

2.1 The Four Prototypes

Douglas and Wildavsky propose that in every society there co-exist individualists, egalitarians, hierarchists and fatalists. Each of these cultural prototypes is classified using the criteria of ‘group’ and ‘grid.’ The term ‘group’ refers to the degree to which individuals are either individualistic or collectivist. The term ‘grid’ refers to the degree to which there is a hierarchical system in society with those in authority adopting measures to restrict the freedom and choice of individuals. Those individuals who belong to a cultural prototype that is high in grid are bound by many cultural constraints. Meanwhile, those who belong to groups and societies which are characterised by low grid, have few social constraints influencing their actions. Each of the four prototypes scores differently on the ‘grid’ and ‘group’ criteria.

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22 Ibid, 154.
23 Ibid, 154.
24 Ibid, 151.
26 Renn, n. 11, 119.
28 Renn, n. 11 121.
29 Ibid.
31 Lupton, Ris (Psychology Press 1999) 51.
32 Ibid.
33 Renn n. 11 121.
Hierarchists rely on bureaucratic systems or those who have a high position in the
group’s hierarchy to manage the affairs of the group.\textsuperscript{34} What is more, the group is
classified by strong cohesion.\textsuperscript{35} Individuals belonging to the hierarchist cultural prototype
use rules to deal with uncertainty.\textsuperscript{36} They do not worry about risks as long as capable
institutions or those with authority manage risks and as long as risk management strategies
provide for all eventualities.\textsuperscript{37} The bureaucratic institutions only intervene to curb those
activities that impose excessive risks.\textsuperscript{38} In determining whether an activity poses excessive
risk, the bureaucrats use mathematics and statistics to calculate what harm is likely to occur
on average.\textsuperscript{39} They then apply a cost-benefit analysis to determine whether the risk is
acceptable, meaning that a risky activity is not regulated if its benefit to the group or society
outweighs the cost.\textsuperscript{40}

Hierarchists believe that agonising decisions can be resolved by applying the cost-
benefit analysis.\textsuperscript{41} For instance, in determining whether society should build mines to extract
resources, they will first ask individuals how much they are prepared to pay to have a slightly
higher chance of survival.\textsuperscript{42} They will then compare the incommensurable values of the
average reduction in life expectancy of a miner to the value of extracted resources using
monetary values as a yardstick.\textsuperscript{43} Hierarchists adopt this approach because they believe that
the application of the cost-benefit analysis leads to the welfare of society being maximised.\textsuperscript{44}
The good of the collective is more important to hierarchists than the rights of each individual
person.\textsuperscript{45} Hierarchists additionally support paternalistic legislation such as requiring
individuals to wear seat belts.\textsuperscript{46}

Egalitarians have a strong sense of solidarity in their group and do not like
hierarchical structures.\textsuperscript{47} Unlike hierarchists, they oppose small elites such as the government
or the experts making decisions how to manage risks.\textsuperscript{48} Egalitarians ignore the benefits

\textsuperscript{34} Rippl, n. 21, 149.
\textsuperscript{35} Ibid.
\textsuperscript{36} Renn, n. 11, 121.
\textsuperscript{37} Ibid.
\textsuperscript{38} Adams, n. 30, 34;208.
\textsuperscript{39} Rayner, \textit{Cultural theory and risk analysis} (Greenwood Press 1992) 110.
\textsuperscript{40} Ibid.
\textsuperscript{41} Adams, n.30, 107
\textsuperscript{42} Ibid, 102; 103; 107.
\textsuperscript{43} Ibid, 107.
\textsuperscript{44} Ibid, 105.
\textsuperscript{45} Rippl, n. 21,’149.
\textsuperscript{46} Adams, n.30 ,41;57.
\textsuperscript{47} Rippl, n. 21, 149.
\textsuperscript{48} Renn, n. 11,121.; Rippl, n. 21150.
conferred by risk activities such as by automobile transport and instead concentrate on the harm that the activity causes.\textsuperscript{49} They strive to the ideal of zero risk although they recognize that completely eliminating risk is unrealistic.\textsuperscript{50} Egalitarians are the most risk averse of the four cultural prototypes and are likely to mistakenly reject a risk which could have been safely accepted.\textsuperscript{51} When managing risks, egalitarians will consider technical, ethical and socioeconomic arguments.\textsuperscript{52} Egalitarians find that cost-benefit analysis objectionable either because it undervalues goods they value or because it ignores altogether the goods they value such as ‘community cohesion.’\textsuperscript{53}

Fatalists have weak group cohesiveness and believe that risk is best dealt with by luck or fortune.\textsuperscript{54} They view themselves as having little control over risk and their lives because they live in an environment characterized by inequality where other members of the group occupy higher positions in the group hierarchy.\textsuperscript{55} Fatalists would not participate in the debate over risk or try to manage risk.\textsuperscript{56}

Individualists have low group cohesiveness.\textsuperscript{57} They think that risk management should be left to the individual rather than to the state.\textsuperscript{58} Individualists think for example that it is for the individual to decide whether to use the seat belt and that the state should not intervene to pass legislation to make seat belt use compulsory.\textsuperscript{59} They would want the market forces to regulate food safety.\textsuperscript{60} Individualists think that more successful than adverse outcomes will transpire from risk taking.\textsuperscript{61} Individuals of this cultural prototype additionally see risk-taking as offering an opportunity to succeed in a competitive world and to pursue their goals.\textsuperscript{62} They value equality and individuality.\textsuperscript{63}

Individualists see nature as ‘robust’ and as capable of withstanding human impact.\textsuperscript{64} They are optimistic and believe in acting by trial and error.\textsuperscript{65} They are likely to mistakenly

\textsuperscript{49} Adams, n.30, 44
\textsuperscript{50} Ibid, 57.
\textsuperscript{51} Ibid, 58.
\textsuperscript{52} Rayner, n. 39, 110
\textsuperscript{53} Adams, n.30,107
\textsuperscript{54} Ibid ; Lupton, n.31, 51.
\textsuperscript{55} Adams, n.30,36.
\textsuperscript{56} Adams, n.30, 40;45.
\textsuperscript{57} Rippl, n. 21,149
\textsuperscript{58} Adams, n. 30, 40;64
\textsuperscript{59} Adams, n.30, 40.
\textsuperscript{60} Ibid.
\textsuperscript{61} Adams, n.30, 212.
\textsuperscript{62} Renn, n.11, 121.
\textsuperscript{63} Renn, n.11,37.; Adams, n. 30,36.
\textsuperscript{64} Adams, n. 30,40
\textsuperscript{65} Adams, n. 30, 212
pursue a risk which should have been rejected. ^66 Individualists are not concerned about equity. ^67 Anecdotal evidence reveals that they prefer a cost-benefit analysis when faced with risk management decisions. ^68 They are prepared to impose risks on society if it is to their benefit and will only care about risks imposed on society to the extent such imposition of risk impacts their own welfare. ^69

3. Chronological Examination of State Conduct

Having considered the four cultural prototypes, the conduct of states as a collective entity and the conduct of individual states will be examined so as to map them to the four cultural prototypes. The assessment will take a chronological approach to state practice.

3.1 Prior to 1864

The practice of Western states prior to 1864 arguably shows that they exhibited an attitude to risk which corresponds to the individualist cultural prototype. This is because they chose not to create a hierarchical structure such as a treaty-based IHL regime to mitigate suffering. ^70 Instead, they decided on an ad hoc basis how to manage risk to which military operations conducted by the adversary exposed their civilians by concluding agreements with adversaries for the duration of a particular armed conflict. ^71 Individualists prefer to make autonomous decisions instead of creating centralised institutions for managing risk. ^72 Additionally, it is being maintained that state behavior in the 19th century can be said to match the individualist attitude to risk-taking as offering an opportunity to pursue goals and to succeed in a competitive world. ^73

Particularly, in the 19th century states oftentimes viewed risks associated with the declaration of war as an opportunity to capture territory, augment wealth and increase

^66 Ibid, 58.
^67 Renn, n.11, 37.; Adams, n.30, 36.
^68 Renn, n. 11, 123.
^69 Adams, n. 30, 108-109
^71 Reydams n. 70,734.; Ripple, n. 21, 149.
^72 Adams, n.30, 40;64
^73 Renn, n.11, 121.
They knew that losing the war would mean finding themselves with heavy debts. Just like individualists who view nature as ‘robust’ and as capable of withstanding human impact, European states of that time period regarded their nations as capable of surviving human loss of death among conscripts and hardship associated with waging the war.

3.2 1899-1945

States signed the first IHL treaty, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1864, thanks to the efforts of a Swiss merchant Henry Dunant. Thereafter, states, including non-Western powers, continued to codify rules of IHL at a rapid pace through making declarations and acceding to treaties. The preoccupation with chiseling out clear guidelines can be seen from the fact that states scheduled regular conferences which led to the adoption of such instruments as the St. Petersburg Declaration 1868, the Hague Conventions of 1899 and the Hague Declaration Concerning Asphyxiating Gases 1899 among others.

It is suggested that this shift from ad hoc governance mechanisms for managing risks associated with the conduct of hostilities to development of a treaty framework signifies that states no longer espoused the individualist cultural prototype. They now exhibited a hierarchist cultural prototype. Hierarchists favour establishing centralised governance systems for regulating the affairs of the group and have cohesion between group members. Although states could not at that time period be characterised as a tightly-knit community, the conclusion of IHL treaties evidences the emergence of shared values. Moreover, similarly to hierarchists, states arguably only proscribed those practices which exposed civilians to ‘excessive’ risks. This is because the provisions of the treaties and state practice shows that measures to reduce humanitarian suffering and loss were only adopted if the benefit of adopting such safeguards far outweighed the cost in terms of military advantage of taking steps to protect civilians. For instance, Article 25 Hague Convention on War on Land IV

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75 Black, n.74, 7.
77 Reydams, n.70, 734.
79 n.11, 149.
80 Adams, n.30, 34; 208.
1907 prohibits attacks on undefended towns, villages, dwellings and buildings.\footnote{Art. 25 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, opened for signature 18 October 1907, in force 26 January 2010; UKTS 9, Cd.5030.} Whilst this provision encapsulates the requirement to distinguish between civilian objects and military objectives,\footnote{A.P.V. Rogers, ‘The principle of proportionality,’ in The legitimate use of military force: the just war tradition and the customary law of armed conflict, ed. Howard M. Hensel (Aldershot: Ashgate Publishing Limited, 2008),195;197.} states during World War I treated the bombing of the civilian population to degrade their morale as lawful.\footnote{Ibid., 198.} The co-existence of these two legal standards points to the fact that states were only prepared to reduce danger to the civilian population where the benefit of alleviation of humanitarian loss exceeded the cost of military advantage which had to be forgone to protect the civilians.

Furthermore, the conduct of states during World War II reveals the mindset of a group which belongs to the hierarchist cultural prototype. Hierarchists are prepared to sacrifice the interests of the minority if this benefits the majority of the population as a whole.\footnote{Adams, n.30, 105; Rippl, n.21,149.} They see the benefit of the policy to the majority as outweighing the cost to those who are made worse off by the measure.\footnote{Steve Rayner, n.39,110.} During World War II states carried out air bombings even though most bombs landed off target.\footnote{Nathan A Canestaro, ‘Legal and Policy Constraints on the Conduct of Aerial Precision Warfare,’ (2004) 37Vanderbilt Journal of Transnational Law,444.} Although states regarded indiscriminate attacks as unlawful, they used air power because the destruction of industrial facilities offered high military advantage.\footnote{W. Hays Parks, ‘Air War and the Law of War,’ (1990) 32 Air Force Law Review: 33;51.; A.P.V. Rogers, ‘The principle of proportionality,’ in The legitimate use of military force: the just war tradition and the customary law of armed conflict, ed. Howard M. Hensel (Aldershot: Ashgate Publishing Limited, 2008), 195.} States argued that civilian casualties were incidental collateral damage and hence were a lawful byproduct of the attack.\footnote{Hays Parks, n.87, 51.} Additionally, states took the position that they discharged their duties to civilians when they applied Article 27 of the Hague Convention on War on Land IV 1907 and exercised ‘reasonable’ care when placing the bomb onto the target.\footnote{Art. 27 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land; League of Nations Official Journal Document A.69, 1938 IX, 15-16 (Special Supplement 182 [1938]), in Hays Parks, ‘Air War and the Law of War,’36; Rogers, ‘The principle of proportionality,’ 201.} In effect, states applied a cost-benefit calculus in determining what military practices to
adopt. Those living in urban areas were arguably sacrificed for the greater goal of protecting
the country from the Nazi threat.  

Another source of evidence that states during World War II exhibited the hierarchist
cultural prototype is the dropping by the U.S. of the atomic bomb on two Japanese cities.  
Commentators who have examined the memoirs of military and political leaders concluded
that the U.S. dropped the bomb in order to induce the Japanese to surrender.  
Many more civilians would have died had the U.S. deployed ground troops to conduct military operations
and had it employed a naval blockade of the region.  
This reasoning resembles that applied by hierarchists who would treat the total lives saved by ending the war sooner as outweighing
the cost of lives lost in the immediate attack. What is more, there is some evidence that the
Allies in World War II carpet-bombed the civilians hoping this would end the war sooner.  
If this is the case, then such practices provide further evidence of states espousing a hierarchist
attitude to managing the risk of losing the military campaign.

Following the end of World War II, the individual and collective attitudes of states to
risk associated with taking steps to protect civilians are more difficult to trace. During this
time period states negotiated a treaty which imposes stricter obligations to take precautionary
measures to protect civilians.  
Equally, during this time period, some states and non-state
actors committed flagrant violations of IHL in international and non-international armed
conflicts.  
Thus, the analysis will draw a distinction between the factors which prompted
states to assume additional legal obligations from the perspective of cultural risk theory and
between the reasons why some states and armed groups chose to disregard their obligations.

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90 Peter Duignan and Lewis Henry Gann, World War II in Europe: Causes, Course, and Consequences (Stanford: Stanford University, 1995), 11–16.
93 Ibid.
95 Hays Parks, n.87, 151;153;154;157.
3.3 1945 and Onwards

The key development for IHL and for the rules of targeting in particular occurred in 1977 when states acceded to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The contribution of API 1977 to the targeting context was that it clarified customary international law and introduced a treaty provision, Article 57, which required the attacker to take precautions in attack so as to reduce the incidental injury to civilians and damage to civilian objects. Article 57(2)(a)(i) API 1977 requires those who plan or decide upon an attack to do everything ‘feasible’ to verify that the objectives to be attacked are military objectives. Meanwhile, Article 57(2)(a)(ii) API 1977 requires those who plan or decide upon an attack to take all ‘feasible’ precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects. Finally, Article 57(2)(a)(iii) API 1977 requires the attacker to refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

It is suggested that these provisions point to states gradually transitioning away from the hierarchist attitude to risk towards an egalitarian attitude to risk. Firstly, the provisions show that states were willing to cooperate more, a characteristic of egalitarian groups. Hays Parks observes that prior to the adoption of API 1977 customary international law placed the responsibility for incidental injury to civilians only on the defender and the civilians. By shifting the responsibility on the attacker for such injury, the provision

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100 Art. 57(2)(a)(ii) API 1977.
101 Art. 57(2)(a)(iii) API 1977.
102 Renn, n.11, 121.
103 Hays Parks, n.87, 153-154.
arguably fostered greater cooperation between the attacker and the defender to protect civilians.\footnote{104}{Ibid, 154.}

Secondly, it is suggested that the stringency of the obligations of the two rules provide further evidence of states gradually shifting away from the hierarchist attitude to risk. A number of states such as the U.K., Germany and Canada upon ratifying API 1977 entered a declaration that the term ‘feasible’ as used in Art. 57 API 1977 refers to, ‘...those [precautions] which are practicable or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations.' The standard of measures which it is ‘practicable or practically possible’ to take is high and denotes all precautionary measures which it is possible to take in the circumstances.\footnote{105}{Jean-Marie Henckaerts and Louise Doswald-Beck, \textit{Customary International Humanitarian Law}, vol. 2 (Cambridge: Cambridge University Press, 2005), 357;358.} This standard arguably resembles an egalitarian attitude to risk management because whilst the threshold of ‘feasible’ recognises that it is impossible to completely eliminate dangers to which the attack exposes the civilians, it reflects an aspiration to reduce risk to the lowest possible value.\footnote{106}{Belgium’s Law of War Manual provides that ‘everything possible must be done to avoid incidental damage to civilian objects and loss of civilian life.’ Belgium, \textit{Law of War Manual} (1983), p. 28.; The US Rules of Engagement for the Vietnam War stated that ‘while the goal is maximum effectiveness in combat operations, every effort must be made to avoid civilian casualties, minimize the destruction of private property, and conserve diminishing resources’. U.S, \textit{Rules of Engagement for the Vietnam War} (1971), § 3(a).; In 1991, in a letter to the UN Secretary-General concerning the Gulf War, Costa Rica commended ‘the precautions taken by the forces of the United States of America and its allies aimed at attacking as far as possible only military targets and causing the least possible suffering to the civilian population.’ Costa Rica, Letter dated 17 January 1991 to the UN Secretary-General, UN Doc. S/22101, 17 January 1991, p. 2., taken from Henckaerts and Doswald-Beck, \textit{Customary International Humanitarian Law}, 2:345;347;348.} What is more, in forgoing a degree of military advantage by taking precautionary measures, states could arguably be said to be akin to egalitarians who are prepared to forgo the use of automobiles in order to reduce pollution.\footnote{107}{Adams, n.30, 57.}

Although it is being put forward that there are signs of states moving from a hierarchist to an egalitarian approach to viewing risks, it is not being maintained that states have completely abandoned their hierarchist approach to risk management in the context of armed hostilities. Instead, societies and government apparatuses have a higher threshold of civilian casualties that they find acceptable. At the same time, states have maintained their hierarchist attitudes to managing risks associated with not attaining the strategic objectives of the military campaign. The current practices are a big improvement to those of World War I and World War II for instance.
According to Shaw, a sociologist who studies global politics, Western states are preoccupied with managing the political risk of losing domestic and international support for the military campaign. They thus concurrently pursue conflicting goals of reducing soldier casualties, civilian casualties and of managing the way in which the media portrays the prosecution of the military campaign. When states such as the U.S. assume risks to the force which go beyond legal requirements, they give pragmatic justification for the policy which appears to be premised on the cost-benefit analysis. For instance, whilst fighting a counterinsurgency in Afghanistan, the U.S. instructed that the principle of proportionality be applied differently. The military advantage offered by the destruction of the target was to be balanced against the number of civilian lives lost, civilian objects destroyed and the loss of legitimacy in the eyes of the local population. The rationale was that civilian casualties make it easier for the insurgents to recruit new followers. The counterinsurgency context is unique in that victory cannot be secured without gaining the support of the local population. Thus, the U.S. in determining what risks to assume to its force balanced the military cost of reducing civilian casualties against the strategic benefit offered by the mitigation of humanitarian loss. This cost-benefit approach to managing risks associated with the prosecution of the military campaign corresponds to the hierarchist cultural prototype.

The contention that many states are in the process of transition from one cultural prototype to another is consistent with cultural risk theory. There is evidence that people may combine more than one cultural prototype in their behavior depending on the issue at hand. Lovelock for example was an individualist who challenged the views held by the scientific community but he was also an egalitarian who campaigned for the protection of the endangered species.

Assuming that it is the case that international community is gradually shifting to an egalitarian outlook on how to manage risk to which military operations expose civilians, a question arises how one can explain violations of IHL. The answer is that states as an
international community may have a different cultural prototype to that exhibited by each individual state. The violations of IHL by states could be explained by reference to the individualist and hierarchist cultural prototypes. The motivation of the state for violating IHL will determine whether that state espouses individualist or hierarchist cultural prototype. For instance, Iran is not party to API 1977 and Iraq acceded to this treaty in 2010. During the Iran-Iraq 1980-1989 war, both parties directly targeted civilians and civilian objects. Iran arguably did so due to having a hierarchist attitude to risk management while Iraq exhibited an individualist outlook.

Iran targeted civilians and used children to charge into artillery barrages even though it was governed by Islamic laws. Islamic laws have a prohibition on targeting civilians which are similar to the principle of distinction of IHL. Islamic laws prohibit the targeting of (1) women, (2) children, (3) elderly, (4) members of the clergy whose activities are confined to worship and (5) individuals who are paid by the armed forces to perform services which do not amount to taking part in military operations. Iran aimed not only to drive back the Iraqis, but additionally to spread governance by Islamic laws to Iraq. The Ayatollah saw the leader of Iraq as a Sunni tyrant who oppressed the Shi’a majority.

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120 Ibid.
121 Ibid.
123 Al-Dawoody, ‘War in Islamic Law: Justifications and Regulations,’ 201-212.
is hostility between Shi’a and Sunni communities because they disagree over who the follower of Prophet Muhammad is and over the interpretation of religious texts.\textsuperscript{125}

It appears that the Ayatollah as the leader of Iran applied a cost-benefit analysis and decided that the benefit of toppling Saddam Hussein outweighed the human cost of innocent lives who were being sacrificed to achieve this goal.\textsuperscript{126} This approach to managing the risk of loss of lives among Iranian children and Iraqi civilians reflects a hierarchist cultural prototype. Hierarchists have persons in authority making decisions how society is governed and are prepared to sacrifice individuals when this serves the welfare of the community.\textsuperscript{127} They additionally use the cost-benefit analysis in determining whether to expose individuals to risk.\textsuperscript{128}

In invading Iran, Saddam Hussein arguably exhibited the individualist cultural prototype. He thought that Iraq was weakened by the Revolution which took place the previous year and that he would be able to topple the Khomeini regime which he saw as a threat.\textsuperscript{129} Just like individualists, Saddam arguably saw the taking of risk associated with the invasion of Iraq as offering an opportunity to succeed in a competitive world and to pursue his personal goals.\textsuperscript{130} He was prepared to impose risks on Iraqi society associated with the conduct of hostilities because he was only concerned with his own personal goal of remaining in power.\textsuperscript{131} This reflects the mentality of individualists who impose risks on society if it is to their benefit and only care about risks to which their decisions impose others to the extent such imposition of risk impacts their own welfare.\textsuperscript{132} Finally, just like individualists who are overoptimistic about risk-taking, Saddam underestimated the ability of Iran to resist.\textsuperscript{133} The armed conflict lasted eight years.\textsuperscript{134}

It is averred that non-state actors in choosing whether to observe the rules of targeting may exhibit individualist or fatalist cultural prototypes. Traditionally, armed groups engaged in non-international armed conflict have poor records of complying with their legal

\textsuperscript{125} Suni and Shi’a, BBC Religions, August 19, 2009, http://www.bbc.co.uk/religion/religions/islam/subdivisions/sunnishia_1.shtml.
\textsuperscript{126} Randal, n. 119.
\textsuperscript{127} Rippl, n.21, 149.
\textsuperscript{128} Rayner, n. 39, 110.
\textsuperscript{129} Hardy, n. 124.
\textsuperscript{130} Renn, n.11, 121.
\textsuperscript{131} Hardy, n. 124.
\textsuperscript{132} Adams, n. 30, 108-109.
\textsuperscript{133} Ibid., 58; Hardy, n. 124.
\textsuperscript{134} Hardy, n. 124.
According to Mack and Pejic who published a report in their capacity as legal advisers at the International Committee of the Red Cross, armed groups in order to be persuaded to disseminate IHL within their group usually need to be told why compliance with IHL is desirable from a strategic point of view. These armed groups arguably have an individualist attitude to risk because they believe that it is up to them rather than for the state or international treaties to prescribe whether to expose civilians to danger. Moreover, just like individualists, these armed groups are prepared to impose risks on society if it is to their benefit and will care about risks imposed on civilians to the extent such imposition of risk impacts their own welfare. They may choose to observe the rules of targeting in order to gain legitimacy among the local population, to ensure that their captured fighters are treated well and to conserve military resources. They may also observe IHL anticipating that this will allow for social reconciliation post conflict or in exchange for an amnesty from prosecutions for having taken a direct part in hostilities.

Armed groups who do not respond to incentives for complying with IHL in all likelihood do so because they belong to the fatalist cultural prototype. Some armed groups are decentralized and have semi-autonomous or splinter factions operating under an ill-defined leadership structure. They may lack control over territory and lack capacity to train and discipline their members. It is suggested that these armed groups are likely to view themselves as having little control over whether IHL is complied with, because they are a marginalised group in relation to the state, and because they lack the organised structure to disseminate the law within the group. They are thus akin to fatalists who view themselves as having little control over risk and their lives because they live in an environment characterized by inequality where other members of the group occupy higher positions in the

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136 Mack and Pejic, n. 135, 30.
138 Mack and Pejic, n. 135, 4-5.
139 Ibid.
141 Ibid.
142 Ibid, 11;23.
group hierarchy. Fatalists do not participate in the debate over risk and do not try to manage risk.

4. Applying Cultural Risk Theory to Understand Disagreement about the Law

Having examined how the cultural prototypes shape how states develop IHL and how states and non-state actors apply IHL, the discussion will consider whether cultural risk theory is capable of explaining why legal commentators give differing interpretations to the rules of targeting. The debate between commentators of whether the military commander in applying the principle of proportionality needs to consider reverberating effects of the attack on civilians will be used as a case study.

Reverberating effects of an attack are second and third order effects of an attack on civilians. An example is the inability of water plants, sewage facilities and hospitals to deliver services as consequences of an attack on the electricity generating plant. Traditionally, reverberating effects on civilians were considered too remote because at the time of the attack the commander is unlikely to know the amount of funds which will be available for repair, how the repair will be prioritised and whether the country will receive international assistance. Commentators such as Kalshoven accepted the traditional view and did not attempt to argue that reverberating effects of the attack are foreseeable and that potential intervening factors do not make such damage remote. Scholars such as McCormack and Mtharu on the other hand put forward an argument that reverberating effects are foreseeable because past armed conflicts supply evidence of how many civilians are

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143 Adams, n. 30 36.
144 Ibid, 40; 45.
147 Ibid.
likely to die on average over the longer term.\textsuperscript{149} Moreover, these two commentators point out that because commanders often take into account both the anticipated short-term and longer term military advantage in applying the proportionality principle, they should also consider both short and longer term harm to civilians.\textsuperscript{150} Meanwhile, Schmitt argued that reverberating effects had to be considered by military commanders because improved military capabilities have created an expectation among the national electorate and international community regarding the permissible level of incidental injury to civilians.\textsuperscript{151}

It is suggested that Kalshoven expressed the view that reverberating effects should not be considered as part of the application of the principle of proportionality because he views the law through the hierarchist cultural prototype. Hierarchists have respect for authority and ‘conform closely’ to existing group norms on how to manage risk.\textsuperscript{152} The existing position most likely was premised on the fact that the taking of reverberating effects into consideration would have limited the range of lawful targets and thereby increased the risk of not attaining the military goal of the campaign. Although Schmitt accepts that reverberating effects are relevant to the proportionality assessment, he exhibits a hierarchist attitude to risk.\textsuperscript{153} This is because he uses a cost-benefit analysis in order to argue in favour of the reinterpretation of the law. It is important to keep civilian casualties low in order to retain the support of the electorate for the military campaign and the targeting of dual-use military objectives such as electricity generation stations is likely to produce severe humanitarian loss in the longer term.\textsuperscript{154} Finally, it is suggested that McCormack and Mtharu are egalitarians who see it as inequitable that military commanders do not give weight to humanitarian loss which occurs weeks and months after the attack had been executed even though it is highly probable that such loss will transpire.\textsuperscript{155} This discussion shows that disagreements about the law and proposals as to how the law should be interpreted can be explained by reference to commentators espousing different cultural prototypes. Given the current debates regarding whether the fielding of autonomous robotic systems complies with the rules of targeting, it is of interest to examine what insight cultural risk theory provides into this discourse.

\begin{thebibliography}{1}
\bibitem{149} McCormack and Mtharu, n. 148,10-12.
\bibitem{150} ibid, 9.
\bibitem{152} Lupton, n. 31, 51.
\bibitem{153} Schmitt, n. 151, 156.
\bibitem{154} Shaw, The new Western way of war: risk-transfer and its crisis in Iraq,71;75;94;96;98; Middle East Watch, Needless deaths in the Gulf War: civilian casualties during the air campaign and violations of the laws of war (New York: Human Rights Watch, October 15, 2008),180-186.
\bibitem{155} McCormack and Mtharu, n. 148, 9.
\end{thebibliography}
investigation will focus on the arguments commentators put forward when discussing whether such systems fall foul of the principle of distinction.

5. Cultural Risk Theory and Debates about Autonomous Robots

Backstrom and Henderson argue that autonomous robotic systems are capable of complying with the requirement to discriminate between civilians and combatants on the one hand, and civilian objects and military objectives on the other hand.\textsuperscript{156} This is because scientists are capable of inventing robotic systems which possess artificial intelligence.\textsuperscript{157} The artificial intelligence would enable the robot to learn the characteristics of military objectives by being repeatedly exposed to different scenarios.\textsuperscript{158} Eventually, the robot will learn to reliably distinguish between military objectives and persons and objects which enjoy immunity.\textsuperscript{159}

The approach of Backstrom and Henderson to resolving the issue of whether the employment of autonomous robots is lawful reflects a hierarchist view of the world. Hierarchists have faith in the views of experts such as scientists and only intervene to mitigate risk where there is a high likelihood as opposed to a mere conjecture that the damage in question will materialise.\textsuperscript{160} Backstrom and Henderson take it as a starting point that scientists are capable of programming machines which will be able to distinguish between military objectives and civilian objects as reliably as human beings. They do not question whether proponents of autonomous robots are over confident about the ability of scientists to create machines which can match human recognition patterns. A blind faith in science creates a risk that machines will be put on the battlefield which do not meet the strict threshold of the principle of distinction of ‘at all times distinguish.’\textsuperscript{161}

Sharkey, a Professor of Artificial Intelligence and Robotics, believes that robots could never comply with the principle of distinction to the same standard as a human being.\textsuperscript{162}

\textsuperscript{157} \textit{Ibid}, 493.
\textsuperscript{158} \textit{Ibid}, 493.
\textsuperscript{159} \textit{Ibid}, 493.
\textsuperscript{160} Adams, n. 30, 107; Sigve Oltedal et al., \textit{Explaining Risk Perception. An Evaluation of Cultural Theory,} Rotunde (Trondheim: Norwegian University of Science and Technology, Department of Psychology, 2004), 20.
\textsuperscript{161} Art. 48 API 1977.
Robots rely on sensors to recognise the nature of objects and facial features.\textsuperscript{163} They can be misled in an environment where the situation is constantly in flux and where the targets are continuously moving.\textsuperscript{164} Moreover, Sharkey thinks that it is difficult to translate the IHL definition of a civilian into a computer code because a civilian is defined as someone who is not a combatant.\textsuperscript{165} Finally, effective discrimination requires the application of common sense and common sense cannot be programmed into computers.\textsuperscript{166} It is being put forward that another problem with Backstrom and Henderson’s overconfidence in science is that they do not consider the fact that a simulated battlefield can never recreate the complexity and unpredictability of the real battlefield.\textsuperscript{167}

Additionally, Backstrom and Henderson exhibit a hierarchist cultural prototype by proposing that the principle of distinction requires a degree of certitude of 95\% percent.\textsuperscript{168} This proposition does not reflect the fact that scientists have an unlimited time in which to develop robotic systems and that the principle of distinction is formulated as an absolute prohibition. Thus, their proposition is arguably premised on an assumption made by hierarchists that civilians should be protected from the imposition of ‘excessive’ risks rather than as being entitled to immunity.\textsuperscript{169}

In contrast to Backstrom and Henderson, Sharkey exhibits an egalitarian cultural prototype because he is hesitant to conclude that robots could ever comply with the principle of distinction.\textsuperscript{170} Egalitarians focus on the long-term impact of human activities and will abandon a course of action which has a potential to inflict irreversible hazards on future generations instead of taking chances even if the activity confers benefit on society.\textsuperscript{171} Robots confer a benefit on the country which uses them of reducing soldier casualties.\textsuperscript{172}

\textsuperscript{163} Ibid, 788-789.
\textsuperscript{164} Ibid.
\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid, 789.
\textsuperscript{168} Henderson and Backstrom, 'New Capabilities in Warfare: An Overview of Contemporary Technological Developments and the Associated Legal and Engineering Issues in Article 36 Weapons Reviews,' 495.
\textsuperscript{169} Adams, n.30, 34; 208.
\textsuperscript{171} Renn, n. 11, 121.; Rippl n 21, 150.
Kastan is another commentator who adopts an egalitarian approach to answering the question whether employment of autonomous weapons comports with the principle of distinction. He argues that even if it were possible to program a robot to require it to ascertain that it has a particular degree of certainty that the target is a military objective before firing, it is unclear how a robot could discern between different degrees of certainty. Furthermore, Kastan thinks that the use of autonomous robots should be confined to geographic areas where the robot is unlikely to encounter civilians. If the robot is likely to encounter civilians, it should be supervised by a military commander.

6. Conclusion

The comparison of how different commentators analyse compliance of robotic systems with the principle of distinction shows that the discussion is not confined to disagreement regarding what the law requires. Each argument has deeper roots and reflects how a particular commentator views science, technology and the world order. The cultural theory of risk sheds light into why some individuals place faith in science and why others distrust new technologies until evidence emerges to show such technologies to be safe. By revealing the assumptions a person makes when suggesting how the law should be interpreted, the analysis helps to reflect on the nature of the current debates. It reveals that the discourse is not confined to armed forces advocating the employment of autonomous robotic systems and to NGOs such as the International Committee for Robot Arms Control campaigning against the use of such systems.

The broader examination of what cultural prototype individual states and international community as a whole might exhibit suggests that the world order is constantly in flux. States at one point were individualists but have since changed their orientation. Although the hierarchist cultural prototype continues to predominate, it is also the case that adherence to the egalitarian cultural prototype is on the rise. Another interesting aspect of the article is that it illustrated why states and non-state actors choose to disregard their IHL obligations. The

175 Ibid, 62.
The upshot is that it is time for commentators to discuss not only what the law requires, but additionally what values individual societies and states collectively have. This greater awareness of social and cultural forces will enable a more informed discussion into whether the employment of robotic systems is (i) lawful and (ii) normatively desirable.
Trafficking v. Smuggling; Coercion v. Consent: Conceptual Problems with the Transnational Anti-Trafficking Regime

Luke Butterly

Abstract – This essay will seek to explain the differences between human smuggling and human trafficking as set out in international law and their respective regimes. It will examine the two Protocols relating to Trafficking and Smuggling, focusing on the differences in the two categories of movement concerned. The essay will then highlight some of the concerns regarding the enhanced penalisation of migration. It will also show that a core element separating smuggling and trafficking is that of ‘consent v coercion’. I will demonstrate how these terms are an unhelpful way to categorize the two phenomena. Throughout I will talk about the effects the two Protocols and the current anti-trafficking/anti-smuggling regimes have on border security, not least of all on refugees, and in conclusion analyse a human rights approach to trafficking.

Keywords: human trafficking, migrant smuggling, consent, coercion, exploitation, border security

1. Introduction

Human trafficking is a complex phenomenon. No-one can deny that human trafficking damages people’s lives greatly, and the practices associated with it violate some of the most basic human rights. Yet “much mystery still remains about the genuine extent and nature of the practice, and much controversy still surrounds the question of how national and international responses should best be formulated to address the problem”.¹ The current anti-trafficking regime is fraught with problems in its conceptualisation and its quantification of what is ‘trafficking’. What constitutes trafficking is a much heated discussion that suffers from a great deal of moral panic, ‘othering’ and victimization. The movement element of

trafficking, as well as the exploitations associated with trafficking (slavery, forced labour, etc), and the definitions of these elements have far reaching political, social, and philosophical implications. One of the most important elements at the root base of human trafficking is the notion of ‘coercion’ (the ‘means’ element of trafficking as laid out in the relevant Protocol). The notion of coercion is central to how the ‘victims’ of trafficking are separated from those who are smuggled (i.e. those who ‘consent’). What counts as coercion (whether social, economic, cultural, gender, etc factors count?) is problematic, as is the notion of consent, something which is not only found in the movement element but also in the forms of exploitation associated with trafficking. The most debated of these forms of exploitation is in regards to the sex industry and whether all sex work is exploitation and therefore cannot be consented to. As the Office of the High Commissioner of Human Rights (OHCHR) notes, the line between smuggling and human trafficking is blurry and one practice can quickly transform into the other.

Linked to all these issues is the impact the anti-trafficking regime has on increased border security and the knock-on effect this has on migration, not least of all on refugees. Principally, this impact manifests itself as an augmented emphasis on stopping illegal migrants getting into the country by increased identification of migrants routes, by penalisation of commercial transport carrying illegal immigrants and not performing visa checks, by tightening borders, etc. This paper looks at the various conceptual problems in the current anti-trafficking regime, and argues that trafficking should be seen as an element of exploitation, rather than exploitation as an element of trafficking as is currently the case. This alternative approach could more adequately deal with the coercion/consent issues and greater definitional problems as the emphasis would be more on the forms of exploitation and less on the forms of movement.

2. Migration v. Smuggling

With the division of smuggling and trafficking into two Protocols, it seems a clear line was drawn at the international level between the two activities. Obokata states that smuggling

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“can be summarized as an act of facilitating illegal immigration”. The OHCHR says that trafficking is always exploitative, always contains fraud or coercion, and encompasses both illegal and legal migration. Smuggling on the other hand is not necessarily exploitative, coercion is not a necessary element, and the migration is always illegal. Gallagher contends that smuggling, as compared to trafficking, is “only incidentally exploitative”. Smuggling requires the (illegal) crossing of an international border, while trafficking can occur within a state. Hathaway disagrees on the second point and claims the Trafficking Protocol only focuses on transnational dealings, and that no duty arises from the Protocol to tackle intra-state dealings of exploitation. Gallagher disagrees, contending that Article 5 of the Protocol obligates States to criminalize trafficking domestically. Because each of the elements of trafficking must be domestically sanctioned, it’s unlikely for anyone who has exploited someone not to have committed one of the sanctioned elements (i.e. harbouring someone).

The Council of Europe’s Convention on Action against Trafficking in Human Beings, perhaps aware of this problem, makes specific mention of this issue stating that trafficking can be carried out within a state and that criminal gangs need not be involved for it to be considered trafficking.

Yet in terms of the people concerned in these two Protocols (victims, migrants, etc), in reality the line between the smuggling and trafficking is often not so clear-cut. Holmes states that “the clear conceptual distinction that exists between people smuggling and human trafficking is not always sustainable in practice”, and that “people smuggling readily mutates into human trafficking”. The OHCHR asserts that “[t]he distinction between trafficking and migrant smuggling is a legal one and may be difficult to establish or maintain in practice”, because “trafficking and migrant smuggling are processes - often interrelated and almost always involving shifts, flows, overlaps and transitions”. A person can be smuggled one

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4 United Nations OHCHR, Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking, November 2010, HR/PUB/10/2, 34.
6 OHCHR Commentary (n 4) 34
8 Gallagher (n 5), 812
9 Gallagher (n 5), 814
10 Council of Europe, Convention on Action against Trafficking in Human Beings, Article 2
12 OHCHR Commentary (n 4), 34-5.
day, and trafficked the next.\textsuperscript{13} Gallagher finds it useful to think of both smuggling and trafficking as “processes that are often interrelated and almost always involve shifts, flows, overlaps, and transitions”.\textsuperscript{14}

Hathaway argues against the ‘processes’ approach put forward by Gallagher and the OHCHR. He claims that trafficking and smuggling rarely connect and that human smuggling is generally “consensual and relatively benign”.\textsuperscript{15} Thus, of the effects of smuggling on the person, he states that “[i]t is often too simplistic to assume that all, or even most, smuggling is rights diminishing”.\textsuperscript{16}


A look at the two Protocols shows that the drafters saw many key similarities between the two forms of migration. Much of the outline and details of the two Protocols are the same, yet the parts which differ are telling. The Trafficking Protocol talks of ‘repatriation of victims of trafficking’\textsuperscript{17} while the Smuggling Protocol talks of ‘return of smuggled persons’.\textsuperscript{18} The Trafficking Protocol speaks of preferred ‘voluntary’ repatriation\textsuperscript{19} while the other just stipulates return in an ‘orderly manner’.\textsuperscript{20} The Trafficking Protocol speaks of ‘prevention of’ trafficking,\textsuperscript{21} while the Smuggling Protocol talks of ‘measures against’ smuggling.\textsuperscript{22}

Yet, several articles in the treaties are almost identical, and generally deal with preventative measures and information exchange between State Parties.\textsuperscript{23} Article 11 deals with sanctioning and penalizing commercial carriers for allowing smuggling/trafficking. This shows the anti-migration focus of the Protocols. Articles 12 and 13, about securing documents, are identical. The ‘saving clauses’ (Article 14 for Trafficking, Article 19 for Smuggling Protocol) are also largely the same.

\textsuperscript{13} OHCHR Commentary (n 4), 35.  
\textsuperscript{14} Gallagher (n 5), 817.  
\textsuperscript{15} Hathaway (n 7), 5.  
\textsuperscript{16} Hathaway (n7), 35.  
\textsuperscript{17} Trafficking Protocol, Article 8.  
\textsuperscript{18} Smuggling Protocol, Article 18.  
\textsuperscript{19} Trafficking Protocol, Article 8 (2).  
\textsuperscript{20} Smuggling Protocol, Article 18 (5).  
\textsuperscript{21} Trafficking Protocol, Article 9.  
\textsuperscript{22} Smuggling Protocol, Article 8.  
\textsuperscript{23} Trafficking Protocol, Article 10; Smuggling Protocol, Article 10.
Hathaway states that the treaties have the same goal, namely tighter borders. When we see the common articles about sharing information on routes used (weak points of entry), on penalizing commercial craft, etc, it seems his point has some merit. It also demonstrates how in international law, if not the definitions, that some of the responses to deal with the allegedly separate phenomenon of smuggling and trafficking are the same. Yet when it comes to protection offered to those affected (‘victims’ of trafficking, ‘objects’ of smuggling), the troubling concept of coercion v consent serves to split the response each group receives.

4. Border Security

One of the pitfalls of the Protocols, in their seeking to better prevent trafficking and smuggling, are several provisions that lead to the intensification of States borders. This is problematic, as it is already the case that, “[i]n human rights terms, there can be no doubt that current migration regimes reinforce discrimination and inequality and contribute to global suffering.” The increased border controls called for in the two Protocols “may in practice exacerbate the risk of human rights abuse by creating the conditions within which simple smuggling is transformed into trafficking”. Heightened border security leads to an increase in the number who use the services of smugglers, the amount this service costs and the danger involved.

Obokata agrees that restrictive borders, in the context of illegal migration of East Europeans to the West after the fall of the Berlin Wall, “has compelled people to use the services provided by traffickers”. Hathaway claims that the trafficking agenda has allowed states to tighten their borders and in a sense criminalize those who are smuggled, under the cloak of human rights/anti-trafficking. With the implementation of the Protocols, “agreement was achieved to establish a transnational duty to criminalize any compensated effort to move unauthorized persons across a border”.

“Whether by design or simply happy coincidence” the Protocols have a negative effect on refugee’s ability to seek asylum. With recommended measures such as commercial carriers to be sanctioned for carrying the undocumented, and passports being more heavily

24 Hathaway (n 7), 30-1.
25 Gallagher (n 5), 833-4.
26 Hathaway (n 7), 6.
27 Hathaway (n 7), 32-4.
28 Obokata (n 3), 2.
29 Hathaway (n 7), 26.
30 Hathaway (n 7), 41.
scrutinized, the methods used by refugees to escape persecution are being diminished.\(^31\) As refugees often have to rely on (expensive) smugglers and traffickers, poorer refugees are worse off. The UN notes that irregular migrants and asylum seekers are among “those most likely to be trafficked”.\(^32\)

It is a State’s legal right to control its borders and turn away illegal migrants.\(^33\) As international lawyers this is the framework we are dealt, and if we are to be realistic we must work within it. Yet this may show the limits of international law in this case – it can play a part, but cannot be the whole solution, in seeking to end trafficking and deal in a pragmatic and realistic way with smuggling.

Despite all these restrictive measures that a State can carry out, and the tightened borders due to the Protocols, States’ actions still have limits. Article 19(1) of the Trafficking Protocol reminds states of their obligations under international law, not least in terms of refugee law, and states acting against ‘the letter or spirit’ of this Article are therefore in violation of their obligations.\(^34\) It is our task and that of the international community to hold states to account when they deviate from this letter and spirit.\(^35\)

5. Coercion v. Consent

The crux of what separates trafficking and smuggling – and thus shapes how a state deals with a certain case – is the notion of consent as opposed to that of coercion. It is what defines those trafficked as ‘victims’ and those smuggled as ‘accomplices’. Fitzgerald states that “[t]he distinction between trafficking and smuggling essentially turns itself upon the presence or absence of the elements of deception, coercion, or abuse of power in the relationship between the perpetrator(s) and the migrant”.\(^36\) The concept of being able to ‘consent’ to exploitation dominated a significant amount of the negotiations of the Trafficking Protocol. It was in particular reference to sex work, but the same principles can be applied to other areas of exploitation. Many authors and authorities claim that it is not possible to consent to exploitation. Indeed the Protocol itself, in Article 3 (b), states that any consent given was

\(^{31}\) Hathaway (n 7), 36-41.
\(^{32}\) OHCHR Commentary (n 4), 85.
\(^{33}\) Gallagher (n 5), 838-40.
\(^{34}\) Gallagher (n 5), 840.
\(^{35}\) Ibid.
invalidated by fraud, coercion or deception. Gallagher goes so far as to assert that international law states that one cannot consent to being exploited, stating that:

“[i]nternational human rights law has long recognized that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away. The issue came before the drafters of both the Supplementary Convention and the ICCPR in the context of proposals to add the qualification ‘involuntary’ to the term ‘servitude’. The proposal was rejected in both instances on the grounds that ‘it should not be possible for any person to contract himself into bondage’.”

The European Court of Human Rights, in Van der Mussele v Belgium, ruled that “consent of the person concerned was not enough to rule out forced labour” and that “the validity of consent has to be evaluated in the circumstances of the case”. The travaux préparatoires of the Trafficking Protocol notes that the ‘means’ element “precludes the consent of the victim”. The European Commission on Human Rights, in De Wilde, Ooms and Versyp v Belgium, stated that “personal liberty is an inalienable right which a person cannot voluntarily abandon”, meaning that no consent is possible.

Yet for other authors, especially with regards to sex work, the issue is not so clear cut. Doezema discusses the “complex and varied experiences of migrant sex workers”, and she cites studies on sex work from all corners of the globe, which “indicate that women seeking to migrate are not so easily ‘duped’ or ‘deceived’, and are often aware that most jobs on offer are in the sex industry”. Despite knowing the work involved, many women still agree to it. This is reflected in an International Organization for Migration (IOM) study which showed that some Eastern European women knew they were going to work as prostitutes, and yet still consented.

Still, the ‘coercion v consent’ paradigm risks painting “those smuggled as willing participants”. The definition of smuggling means they were not coerced or exploited and so

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37 Gallagher (n 5) footnote 95, 811-2.
40 Gallagher (n 39) footnote 68, 28.
42 Doezema (n 41), 66.
43 Obokata (n 3), 26.
44 Ibid.
“this may provide a justification for states to apply strict enforcement measures such as arrest, detention and deportation against them”.45

Other authors, keeping in line with the fluidity argument – that those smuggled can become those trafficked – state that consent can be given, yet this can be taken back or annulled due to coercion. This is not an uncommon situation. Obokata, while stating that coercion “in the definition under the Trafficking Protocol makes it clear that people cannot be trafficked voluntarily”,46 nonetheless acknowledges the complexity of the term.47 Part of this complexity is that there is no clear line where consent ends and where coercion begins.48 Much like trafficking itself, it can be a process. Allain speaks of a ‘continuum of coercion’ and how it “forces a person to decide between disagreeable alternatives – for instance, between working for less than minimum wage or not working at all”.49 In situations such as these the person is extremely vulnerable and often “has no real or acceptable alternative but to submit to the abuse involved”.50 People have different levels of awareness of what trafficking involves,51 yet even when someone consents to poor working conditions this “does not mean that they consent to be subjected to abuse of all kinds”.52 A useful approach to take is that consent “does not alter the offenders’ criminal liability”.53 Equally, Gallagher argues for the necessity in cases of consent to focus on the intentions of the trafficker.54

Further still, some authors seek to expand the notion of coercion, so that when some people appear to be consenting, they are really coerced. Obokata lists economic issues, war, and other ‘casual factors’, and thus finds that that while “traffickers may not be directly responsible for triggering the causes of trafficking, they do take advantage and profit from them”.55 Abramson argues for the:

“establishment of a minimum threshold of exploitation...[which] could have refined the definition of trafficking so as to provide a singular defining characteristic of trafficking in

46 Ibid, 25.
47 Ibid.
48 Explanatory Report (n 38) para 97.
50 EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings: Art 2(2)
51 Explanatory Report (n 38), para 97.
52 Ibid.
53 Explanatory Report (n 38), para 226.
54 Gallagher (n 39), 18.
55 Obokata (n 3), 25
persons. In fact, the Trafficking Protocol takes this route in its application to children: children are explicitly held to be trafficked if they are under eighteen and are recruited, transported, held, or received for exploitation, regardless of the methods used to recruit, transport, hold, or receive them.”

Might this route for children be applied to all victims of trafficking? This approach would shift the focus to the exploration and abuse of human rights, and consent would be irrelevant. In this way migrants under the Smuggling Protocol would also be covered.

6. Human Rights Approach to Trafficking

While it is true that the Trafficking Protocol, the main document to deal with human trafficking, is rooted in criminal law, several authors have argued convincingly for a human rights approach to understanding and combating trafficking. They feel such an approach would avoid many of the pitfalls of the current regime, and can ‘fill in the gaps’ where the regime fails (for instance in terms of redress for the victims). Due to the relevant provisions in the Convention of the Rights of the Child (UNCRC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), together with the Council of Europe’s Trafficking Convention, it can be argued that there now exists a “general consensus among states” that trafficking is a human rights violation. A human rights approach “seeks to both identify and redress the discriminatory practices and unjust distributions of power that underlie trafficking, that maintain impunity for traffickers, and that deny justice to victims of trafficking.” Forms of trafficking can be understood as a form of sex-based discrimination and as violence against women, as well as amounting to torture in certain cases. Further, all the forms of the end goal of trafficking – exploitation (slavery, etc) – are human rights offences under international law and often in national legislation. This is one of the benefits of the modern international anti-trafficking legal regime, the Trafficking Protocol and European Trafficking Convention; they bring various

57 Gallagher (n 5), 791.
58 OHCHR Commentary (n 4), 38-9.
59 Ibid, 49 emphasis added.
60 Ibid, 39-43.
61 Ibid footnote 32, 37.
62 Ibid, 3.
forms of exploitation under one umbrella and in so doing add greater emphasis and urgency.  

Importantly for the above discussion, a human rights based approach would side-step the concerns about consent and coercion. Everyone’s rights must be respected, whether ‘victim’ (trafficking) or ‘accomplice’ (smuggling), citizen or undocumented. A human rights approach, rather than turning migrants into victims, would serve to protect and empower migrants when and if they become victims. With regards to socio-economic reasons for why trafficking occurs in the first place, such an approach could better get at the root causes. “While the definition of trafficking under the Trafficking Protocol entails some conceptual difficulties, it seems reasonable to state that its scope is wide enough to accommodate different viewpoints, and therefore offers useful guidance to understand and respond to the practice.”

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64 Obokata (n 3), 36.
65 OHCHR Commentary (n 4), 3.
66 Obokata (n 3), 37.
Civil Legal Aid and
Parliamentary Implementation of Human Rights:
A Cautionary Tale

Temisan Boyo

Abstract – The Legal Aid, Sentencing and Punishment of Offenders Act came into force in April 2013 and has severely restricted the scope of civil legal aid in England and Wales. The Act includes an ‘exceptional category’ (section 10) through which legal aid will be provided to out-of-scope cases “if failure to do so would be a breach of the person’s Convention rights.” This paper casts doubt on the practical effectiveness of this category in ensuring protection of the right to a fair trial (Art 6 ECHR), largely due to knowledge barriers which will prevent potential legal aid clients from identifying the factors that the European Court of Human Rights considers as persuasive for mandating legal aid provision, and thus making use of the category. Further, it frames the issue as an example of the pitfalls of relying primarily on Parliament to implement human rights in new legislation. Notwithstanding the European Court’s increasingly unmanageable caseload, the story of the Legal Aid Act is a cautionary tale which counters the notion that – in the sphere of rights protection - parliamentary implementation can be an effective substitute for swift access to a court.

Keywords: legal aid, European Court of Human Rights, Convention rights, fair trial, role of parliament, access to justice

1. Introduction

When is the assistance of a lawyer ‘indispensable’?\(^1\) The Legal Aid, Sentencing and Punishment of Offenders Act came into force in April 2013 and severely restricted the scope of civil legal aid in England and Wales. Section 10 of the Act created an exceptional category whereby legal aid will be provided to out-of-scope cases “if failure to do so would be a breach of the person’s Convention rights.” In this way, the Government purported to comply with its minimum obligations under Article 6 (right to a fair trial) of the European

\(^1\) Airey v Ireland (1980) 2 EHRR 305, para 26.
Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth, ‘the Convention’ or ‘ECHR’). Meanwhile, the caseload burden of the European Court of Human Rights (henceforth, ‘the European Court’ or ‘the Court’) has become increasingly unmanageable, and this has led to increased calls for parliamentary participation in the implementation of Convention rights in new legislation.

This paper aims to look at these two issues in tandem, by critically examining parliamentary implementation of Convention rights in the context of the Legal Aid Act. Although Art. 6 does not guarantee an express right to civil legal aid, the Court has expanded its scope in several landmark rulings. As a result, when the right combination of factors is present, a State may be compelled to provide civil legal aid to an individual. These factors include the type of domestic court, the type of litigation, and the level of education, background and emotional involvement of the claimant.

Consequently, there are several significant problems with the use of the exceptional category to implement Art. 6 in the Act. Firstly, the majority of claimants with potential ‘exceptional’ cases will not be able to independently assess the list of factors and determine whether they would fit the category. This creates an inherent catch 22, where individuals need legal assistance in order to secure legal assistance, and it makes the right inaccessible and ‘practically ineffective.’ 

Secondly, there is likely to be a large number of people in this situation despite the rarity that the term ‘exceptional’ may imply. Thirdly, the use of the exceptional category as a drafting tool encourages minimal compliance with the spirit of the human rights Convention.

This paper contends that parliaments are faced with unique motivations and pressures, and thus parliamentary implementation of Convention rights may result in theoretical protection but practical ineffectiveness. Consequently, the Legal Aid Act should serve as a cautionary tale to counter the notion that parliamentary implementation can be an effective substitute for swift access to the European Court.

2. Parliament and the European Court

National implementation is “the alpha and omega” of human rights protection”, as rights created in international law are worth little until they are accessible to individuals at state level. However, in the case of the ECHR, judicial forms of interpretation and implementation have historically taken precedence. Decisions of the pioneering European Court often make headlines across the continent. In the United Kingdom, where the Convention was implemented through the enactment of the Human Rights Act (HRA) 1998, much of the popular and academic focus has been on the responsibility of national courts to ‘take into account’ the decisions and opinions of the Court, to interpret legislation in a way which is compatible with Convention rights, and their powers to make ‘declarations of incompatibility’ of current legislation. National parliaments were “often overlooked” in this context. Discussions of national implementation tended to focus on the failure of Member States to implement decisions handed down against them by the European Court (as required by Art. 46(1) ECHR), rather than on their readiness to incorporate the Court’s jurisprudence when drafting new laws.

However, in recent times, national parliaments have gained prominence. In 2004, Protocol 14 to the Convention came into force, increasing the powers of the Committee of Ministers to hold States responsible for failing to abide by a final judgment of the European Court. In its list of Recommendations accompanying the Protocol, the Committee highlighted the need for “effective mechanisms for systematic verification of the Convention compatibility of draft laws, existing laws and administrative practice (...).” The Interlaken Conference on the Future of the European Court of Human Rights, held in 2010, expanded

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6 Article 46(1) ECHR only requires states “to abide by the final judgment of the Court in any case to which they are parties” but Member States are in principle expected to respect all Court judgments e.g. the Interlaken Declaration (2010) called on States to take into account the Court’s developing case-law in judgments finding a violation of the Convention by other States. It urges states to consider the conclusions to be drawn from such judgments against other states where the same problem of principle exists within their own legal system; see also Adam Bodnar, ‘Res Interpretata: Legal Effect of European Court of Human Rights’ Judgments for other States Than Those Which Were Party to the Proceedings’ in Yves Haeck and Eva Brems (eds), Human Rights and Civil Liberties in the 21st Century (Springer 2014)
7 Committee of Ministers of the Council of Europe, ‘Declaration: Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels’ (114th session, May 2004).
this idea by emphasizing the crucial role of national parliaments, and calling on States in a resulting Action Plan to take into account the Court’s developing case law. It directed them to consider and adapt judgments finding a violation of the Convention by other States, when drafting their own laws.  

The following year, the Parliamentary Assembly of the Council of Europe “called on all Member States to provide for adequate parliamentary procedures to systematically verify the compatibility of draft legislation with Convention standards, and avoid future violations of the Convention, including regular monitoring of all judgments which could potentially affect the respective legal orders.” 9 The need for parliamentary implementation also featured prominently in the Izmir (2011) and Brighton (2012) Declarations, as well as in reports by the Rapporteur on the Implementation of Judgments of the European Court of Human Rights. 10

To some degree, this attitude shift could be justified as simply restoring the original intent of the Convention. After all, decisions of the European Court are binding on governments, not national courts, 11 and the executive and legislature have always had a responsibility to ensure that State laws and practices comply with the Convention. This means stopping the violation in question, expunging its effects (restituo in integrum) and taking any necessary steps to prevent new violations of the same kind from occurring. 12 The latter includes initiating parliamentary procedures to amend existing laws, and to ensure that newly drafted laws are in line with the Convention and the Court’s case law. Moreover, this obligation is inherent in the principle of subsidiarity; the Convention was intended to play a subsidiary role to the national system and State Parties must attempt to reflect the Convention in their national laws. It is further exemplified in Art. 1 ECHR, which requires States to “secure” Convention rights to all within their jurisdiction.

Nevertheless, the true reason for this shift is much more practical - it stems from the European Court’s increasingly unmanageable caseload. Often called “a victim of its own success”, the Court has seen a startling seven-fold increase in applications over the past decade, as its remit has expanded to include the 800 million citizens of the 47 members of the

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9 Parliamentary Assembly of the Council of Europe (n 5) Point 6.4.

10 Joint Committee on Human Rights (n 2) 9.


12 ‘Execution of Judgments of the European Court of Human Rights’ (Council of Europe, Date Unknown) <http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp> accessed 8 October 2013
Council of Europe. For example, in 2007 it received 57,000 applications, compared to 8400 in 1999 and a mere 404 in 1981. This sharp increase now threatens to overwhelm the Court and to undermine the effective operation, credibility and viability of the Convention system.

In 2008, 70% of the Court’s judgments involved issues that had been previously determined in prior cases. This high number of repetitive applications indicates that State Parties are not effectively reforming their laws based on past decisions. Moreover, States often fail to respect the Convention when drafting new laws, preferring instead to wait for a claim to be brought and a violation to be found before making the necessary changes. This “passive approach” has been widely criticized; then President of the Court, Judge Costa in his 2009 Memorandum (…) to the States with a view to preparing the Interlaken Conference warned that “it is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system.”

With this in mind, the drive to increase parliamentary involvement in the ECHR process and to ensure that new legislation is “Strasbourg proof” is understandable. Surely, the best way to “(stem) the flood of applications to the Court” would be “to enhance the authority and effectiveness of the ECHR in the national legal system.” By ensuring that human rights are effectively protected and implemented domestically, parliaments can reduce the need for individuals to seek justice in Strasbourg and thus the caseload of the Court.

The United Kingdom has a uniquely parliamentary model of human rights protection, which resulted from the drafting and debate that preceded the HRA. When seeking to incorporate the ECHR into UK law, there was a specific intention to do so “in a manner that

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13 Joint Committee on Human Rights (n 2) 5.
14 Ibid.
17 Joint Committee on Human Rights (n 2) 5.
18 Joint Committee on Human Rights (n 2) 57.
19 Ibid.
21 Joint Committee on Human Rights (n 2) 5.
strengthened and did not undermine the sovereignty of Parliament.”23 The resulting ‘British model’ paid heed to the notion that Parliament should have a major role in protecting the rights of a parliamentary democracy.24

This role is now played by the Joint Committee for Human Rights. Announced in 1998 in conjunction with the HRA, and established in 2001, the JCHR is a non-departmental body appointed by and comprising members of both Houses of Parliament.25 It was the first event standing joint committee and was given a very broad mandate.26 Its main task is to independently scrutinize most bills that engage the UK’s human rights treaties; it reviews both current and draft legislation,27 and also monitors the Government’s responses to court judgments concerning human rights.28 Robust procedures are in place to attempt to ensure that draft bills are vetted in advance for human rights compatibility. There are two stages of review: Before a bill can be introduced into legislative session, the Cabinet’s Parliamentary Business and Legislation (PBL) Committee requires a memorandum laying out its compatibility with the ECHR,29 and after the bill is introduced, the Joint Committee for Human Rights (JCHR) scrutinizes it for human rights issues and prepares a report, to which the executive issues a reply.

In her study of the JCHR, Janet Hiebert noted that the “conventional view of how a bill of rights operates assumes that rights based scrutiny occurs only after legislation has been passed and only courts are actively engaged in such scrutiny.” 30 Consequently, having a special parliamentary body with a mandate to verify and monitor the compatibility of new laws and practices with the Convention puts the UK in a special category; only five other Council of Europe governments have similarly dedicated committees.31 In its 2011 Resolution, the Council of Europe Parliamentary Assembly highlighted the UK as a “positive

23 Joint Committee on Human Rights (n 22) para 2.2.
24 Joint Committee on Human Rights (n 22) para 2.4; See also Home Office, Rights Brought Home (White Paper, Cm 3782, 1997).
26 Joint Committee on Human Rights (n 22) para 6.1.
28 Joint Committee on Human Rights (n 2) 9.
30 Hiebert (n 25) 35.
31 Drzemczewski (n 16) 174.
example” of national implementation. However, despite its seemingly unparalleled efforts to facilitate parliamentary implementation of the Convention, the UK still fails to do so effectively and this was made clear recently in the case of legal aid. The rest of this paper will analyze the failure of parliamentary implementation of Art. 6 ECHR in the legal aid context, and further explore whether this calls into question the validity of the paradigm as a solution to the Court’s backlog.

3. Parliamentary Implementation in the Legal Aid Context

Recent legislation to enact changes to the legal aid regime in England and Wales provides a timely and interesting case study for the shortcomings of parliamentary implementation of human rights. When the Legal Aid, Sentencing and Punishment of Offenders Act came into effect on April 1, 2013, it eliminated access to free legal services to those below a certain means for the majority of debt, employment, education, housing, immigration, welfare benefits and family law matters. These cuts are intended to reduce the state legal aid budget, hailed as the one of the highest in the developed world, by as much as 350 million pounds. The Act is the central piece of a series of reductions to the scope, remuneration and eligibility levels of legal aid.

The extreme nature of the cuts predictably caused great uproar, with voices from as high as the Supreme Court warning that these changes would “undermine the rule of law.” More pertinently, questions emerged about the Act’s compliance with the Government’s obligations under Art. 6 of the Convention (right to a fair trial), and more specifically the ‘right of access to a court’ that is “inherent” in Art. 6. In response, the Government pointed to the ‘exceptional funding’ scheme provided for in section 10 of the Act. Under this section, it will fund any case where:

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32 Parliamentary Assembly of the Council of Europe (n 5); However, there is no system in place to systematically monitor judgments against other States and consider implications in policy and practice for the UK, a system which exists in other countries such as Switzerland and the Netherlands. The JHCR has also criticized “lengthy” delays in implementation of some Strasbourg judgments against the UK. See JCHR (n 8) 57
34 Golder v UK (1975) 1 EHRR 524, para 36.
(a) (...) it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—

(i) the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or

(ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or

(b) (...) it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach. (emphasis mine)

In order to effectively analyze this form of parliamentary implementation of the Convention, we must first review the leading case law from the European Court in order to determine the types of situations that would engage this exceptional category.

3.1 The Case Law of the European Court on the Right to Civil Legal Aid

Article 6 of the Convention requires that:

'(1) In the determination of his civil rights and obligations (...), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;'

The right to free legal assistance has been described as “one of the most sensitive issues arising from Art. 6.” It juxtaposes the fundamental issue of equality in the judicial process with the problem of the proper use of state funds in the administration of justice, “the availability of which does not always keep pace with ever increasing demands.”

Unsurprisingly, most governments “have found that expenditures on legal aid have the potential to be ungovernable” and struggle to find ways to successfully combine

commitments to access to justice with the need to constrain growth in costs.37

Evidently, while the Article guarantees a minimum right to legal assistance for those of insufficient means who are charged with a criminal offence, it does not explicitly give the same right in the context of civil legal assistance.38 Nevertheless, in a string of landmark cases, the European Court has interpreted the provision in Article 6(1) as having this wider meaning in the right circumstances. This is in part due to the Court’s “creative” method of interpreting the Convention with an eye to ensuring that rights and freedoms are applied so that they are “of practical and effective use” to claimants.39 Notwithstanding the express wording of the Convention, it has established that the right of access to the court in civil matters will not be practically accessible to some claimants without the assistance of the state.

The leading case is Airey v Ireland40, where the Court recognized that in the context of civil litigation, “Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court.”41 Ms. Airey wished to petition for judicial separation at the Irish High Court, but she could not afford a lawyer and legal aid was not available in Ireland for civil proceedings. The Court had several reasons which taken together led it to rule that Ms. Airey had been denied an effective right of access to court. Firstly, her proceedings needed to be conducted in the High Court where the procedure was complex. Secondly, arguing the case might have required the use of expert evidence and witness examination, which presumably would be difficult for a non-lawyer. Thirdly, it was a marital dispute and thus entailed an ‘emotional involvement’ on her part that would be incompatible with the degree of objectivity required for court advocacy. Finally, Ms. Airey was from a “humble”42 background, with little education and had been unemployed for most of her life. As a result, the Court found it “most improbable” that Ms. Airey could effectively present her own case.43 It also took note of the fact that in all other

38 Note that the more recent EU Charter of Fundamental Rights explicitly recognizes a very general right to legal aid (Article 47: “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”). The Charter is declaratory of the existing human rights obligations of EU Member States and only applies to EU institutions and member states when implementing EU law.
40 (1980) 2 EHRR 305.
41 Para 26.
42 Para 8.
43 Para 24.
judicial separation proceedings initiated in Ireland in the six years prior, the petitioners had legal representation. The key question was not whether the law allowed the claimant to represent herself before the court but whether her appearance would be “effective” i.e. whether she would be able to present her case “properly and satisfactorily.”

The Court has further expanded on the scope of the rule introduced in *Airey* in subsequent cases against the UK. In *McVicar v United Kingdom (2002)*, the applicant was a journalist who was accused of defamation after he wrote an article accusing an athlete of taking performance-enhancing drugs. As legal aid is not available for defamation actions in the UK, he was a litigant-in-person, with some sporadic assistance from a specialist defamation lawyer. He lost his case and subsequently complained to the European Court that his inability to claim legal aid violated Article 6(1) of the Convention.

The *McVicar* judgment illustrates the fact-sensitive nature of the qualified right to legal aid. The applicant sought to rely on many of the same reasons which swayed the Court in *Airey*. His action was also conducted before a High Court judge and jury, but the Court held this to be inconclusive, noting that domestic law allowed self-representation before the court. Potentially thus, the reverse is also true: a case in a lower court, if sufficiently complex, could entitle the litigant to legal representation under Article 6(1). In *McVicar*, the Court found that proving allegations on a balance of probabilities was not “sufficiently complex to require a person in the applicant’s position” recourse to legal assistance under Art. 6(1).

The case also required witnesses, expert evidence and cross-examination. However, the judges placed great emphasis on the fact that, unlike Ms. Airey, Mr. McVicar was well educated with a university degree and significant work experience, and thus “capable of formulating cogent argument” and understanding the rules of procedure. The Court also considered the assistance Mr. McVicar received from the specialist lawyer, finding that the applicant could have sought further guidance from him if he was confused about the relevant law and procedure before the trial began. Finally, he claimed similar emotional involvement as Ms. Airey, arguing that the proceedings were conducted in a “highly charged emotional environment” with intense media coverage, where his reputation and finances were at stake.

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44 Para 314-315.
46 Schedule 1, Part II, s. 7 of the Legal Aid, Sentencing and Punishment of Offenders Act.
47 Para 55.
48 Para 53.
49 Para 33.
The court first pointed to Munro v UK\textsuperscript{50} which distinguished a defamation action from a judicial separation, the former being about just one person’s reputation while the latter involves at least two individuals and possibly children as well.\textsuperscript{51} It also looked again at Mr. McVicar’s background and experiences, holding that this, in conjunction with the distinction above, showed that he lacked the necessary level of emotional involvement. The McVicar judgment effectively demonstrated that “the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case.”\textsuperscript{52}

Steel & Morris v United Kingdom\textsuperscript{53} was another defamation case where the same issue arose but the claimants here were successful in claiming a right to civil legal aid. More widely known as the ‘McLibel Case’, it initially involved a suit brought by McDonalds against two social and environmental campaigners who had published and distributed leaflets making serious allegations against its organizational practices. When the fast food giant won, the defendants brought an action in the European Court complaining that the denial of legal aid for their case violated their Art. 6 rights.

The Court agreed, finding that in addition to being able to effectively present his case, the litigant must also be able to “enjoy equality of arms” with the opposing party.\textsuperscript{54} The applicants were “articulate and resourceful”, thus more like Mr. McVicar than Ms. Airey in terms of their ability to present their case.\textsuperscript{55} But while the claimant in McVicar had to prove only one single allegation, the applicants in Steel & Morris needed to prove several and the case involved extensive legal and procedural issues, scientific experts, 130 oral witnesses, 40000 pages of documentary evidence, and certain issues held by domestic courts to be too complicated for a jury to properly understand and assess.\textsuperscript{56} The scale of the case was a significant factor in the Court’s finding that legal assistance was required, and this is further evident from the fact that when the applicants made a similar claim before the start of the trial, it was declared inadmissible.\textsuperscript{57} The Court acknowledged that at that time it did not anticipate “the length, scale and complexity of the proceedings.”\textsuperscript{58}

\textsuperscript{50} (1987) 52 DR 158.
\textsuperscript{51} Para 61.
\textsuperscript{52} Para 61.
\textsuperscript{53} (2005) 41 EHRR 22.
\textsuperscript{54} Para 59.
\textsuperscript{55} Para 68.
\textsuperscript{56} Paras 65-66.
\textsuperscript{57} H.S. and D.M. v United Kingdom App no 21325/93 (Commission Decision, 5 May 1993).
\textsuperscript{58} Para 70.
The applicants, not unlike Mr. McVicar, had sporadic assistance from lawyers acting pro bono (or paid through external donations) pre-trial and during the appeal, and “extensive” judicial assistance as well.\(^{69}\) However, this was no “substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel.”\(^{60}\) The difference between the respective levels of legal assistance available to the applicants and to McDonalds was “of such a degree that it could not have failed (…) [give] rise to unfairness, despite the best efforts of the judges.”\(^{61}\) While total equality is not required, each side deserves “a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis the adversary.”\(^{62}\) Finally, the court placed emphasis on the fact that the applicants did not choose to commence the proceedings, and were acting to protect their right to freedom of expression, another important Convention right.\(^{63}\) It was also conscious of the high financial consequences of failure for the applicants,\(^{64}\) and took this into account despite the known fact that McDonalds had not attempted to enforce payment, noting that the applicants could not have foreseen or relied upon such an outcome.\(^{65}\)

It is important to recognize that Steel v UK is potentially in a class of its own due to its massive scale; it was the longest trial in English legal history. Nevertheless, it would be absurd to expect future applicants to meet this standard in order to deserve legal aid and the Court’s approach of assessing a variety of intersecting factors reflects this view.

An additional civil legal aid claim which sheds further light on the Court’s methodology is P, C and S v UK.\(^{66}\) The applicants were two parents and their child, and the parents had lost at trial against the local authorities which resulted in the child being taken away at birth, placed with foster parents (care proceedings) and freed for adoption (adoption proceedings). Although they initially had representation for the care proceedings, their lawyers withdrew mid-way and they were unsuccessful in finding another in the four days that the judge gave them. An application to defer the adoption proceedings in order to find legal representation was also denied.

\(^{59}\) Para 69.  
\(^{60}\) Ibid.  
\(^{61}\) Ibid.  
\(^{62}\) Para 62.  
\(^{63}\) Para 63.  
\(^{64}\) Para 63.  
\(^{65}\) Para 67.  
In deciding that the parents should have received legal assistance, the European Court gave weight to the seriousness of the outcome for the parents, the “exceptional complexity” of the proceedings, and the “highly emotive nature of the subject-matter” for a parent.\footnote{Para 95.} It held that even if the applicants were intellectually capable of handling the case, they should not have been expected to shoulder that burden due to their emotional distress.\footnote{Ibid.} When considered together with \textit{Airey}, this seems to indicate that the Court considers legal aid to be integral for cases that are “determinative of important family rights and relationships.”\footnote{Steel & Morris \textit{v} United Kingdom (n 53), para 63.} It was also considered significant that the trial judge explicitly stated in his judgment that the case would have been conducted differently with the help of a lawyer. For example, the applicants did not realize they could or should raise the possibility of an open adoption with continued direct contact as opposed to the closed adoption ordered by the judge.

From these key cases, we can distil the essentials of the Article 6(1) recipe, a comprehensive list of factors that the courts will take into account when considering whether to find a breach of the right to civil legal aid:

i. The applicant’s position/background

ii. The complexity of substantive law at issue

iii. The type of court and complexity of proceedings

iv. The type of litigation

v. The applicant’s emotional involvement in the subject matter of the dispute

vi. The scale of the case

vii. Existence of radical inequality of arms between the parties

viii. The use of legal representation in previous similar cases

ix. The applicant’s overall capacity to represent him or herself effectively

It is therefore clear the right to legal aid is dependent on a complex mix of factors. Rather than applying a clear test, the Court’s undertakes a case-determinant and holistic assessment. The factors are unweighted and “deployed flexibly in the case law (…). One does not need to tick all the boxes: strong evidence under one heading may compensate for weaker evidence under another.”\footnote{Jo Miles, ‘Legal Aid, Article 6 and ‘Exceptional Funding’ under the Legal Aid (etc) Bill 2011’ [2011] Fam Law 1003, 1005.} Overall, the general requirement seems to be that the lack of legal
aid will prevent the applicant from presenting an effective defence.

### 3.2 The Problematic Implementation of Art. 6 of the Legal Aid Act

As described above, the ‘exceptional category’ created by s. 10 of the Act provides legal aid for all issues outside the narrow scope of the new law, where failure to do so would breach the applicant’s Convention rights. In this one clause, the Act purports to take into account the dense and malleable jurisprudence of the European Court. Given this background, three main problems with the implementation of the Convention, and of Art. 6 specifically, in the Legal Aid Act become clear.

Firstly, the Act is designed with the expectation that potential legal aid recipients with out-of-scope cases will assess their own eligibility for consideration under s.10. Legal aid solicitors cannot receive funding for the preliminary work involved in applying for an exceptional case funding determination unless the application is successful. Presumably, providing funding at this early stage would reduce the costs savings the Government seeks to achieve, as every sensible legal aid solicitor would put in an exceptional claim as a backup measure. An unsuccessful application can be reviewed by a second Legal Aid Agency caseworker, but after that there is no right of appeal or further review.

As a result, potential legal aid recipients will be disadvantaged in the likely scenario where solicitors do not want to take the risk of preparing an exceptional claim without guarantee of payment. After more than a decade of frozen pay rates, and the introduction of fixed fees and fee cuts, many legal aid providers “cannot assume any more financial risk in their businesses. Even where a lawyer is willing to bring an application on this basis, this approach will affect the amount of legal work a solicitor or barrister is willing to do at any one time because the work is ‘at risk’.”

Moreover, prospective legal aid recipients are often from humble backgrounds with little legal knowledge or free time. Thus there is a real risk that they will not be able to identify unassisted whether their case falls within the category of civil legal aid claims.

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72 Ibid.
74 According to Ministry of Justice figures, 80 per cent of those receiving legal help and around 90 per cent of those receiving legal representation were in the poorest 20 per cent of the population; see Jon Robins (ed.), ‘Unequal before the law? The future of legal aid’ Solicitors Journal Justice Gap Series (Wilmington Publishing 2011) 11.
protected under the ECHR. This results in an intractable catch-22, as the prospective legal aid recipient will need legal assistance to assess whether her out-of-scope case should be funded under the exceptional category, but will have no access to a lawyer. It renders the right to legal aid under Art. 6 inaccessible and 'practically ineffective.' Furthermore, the Civil and Social Justice Survey, conducted before the Legal Aid Act came into force, estimated that up to 24% of people who sought and received free legal advice from a solicitor to tackle a family, social welfare or clinical negligence problem would not have sought alternative advice (from the local council, Citizens Advice Bureau, employer or other sources) had their advisor not been available. Regrettably, this indicates that many those denied legal assistance due to out-of-scope claims are unlikely to explore their options under section 10 of the Act.

Secondly, despite the use of the term ‘exceptional’, cases which engage section 10 may be more common than the word implies and than the Government expects. For example, family law is one the most significantly reduced areas in the Act, generating 60% of the savings expected from the scope restrictions. The Government estimated that approximately 5% of excluded family law cases would be re-admitted under the exceptional funding scheme. However, as is clear from Airey v Ireland and P, C, S v UK, family law cases will likely be one of the most promising contenders for the exceptional category due to the ‘emotional involvement’ factor. Graham Cookson’s report for the Law Society similarly found that the costs savings flowing from the Act may be less than anticipated, in part because of the potentially wide reach of the exceptional category. This compounds the problem, as the number of cases that merit legal aid but do not receive exceptional funding due to lack of knowledge or resources on the part of the applicant, may be a sizeable proportion of those who satisfy the means test for aid.

Thirdly, the use of the exceptional category as a drafting tool is also problematic. Granted, the Act’s predecessor, the Access to Justice Act 1999, also contained a similar
provision, allowing discretionary “exceptional funding” for cases outside the scope of legal aid by the Lord Chancellor if certain criteria was satisfied, including human rights concerns.84 Thus, exceptional funding is not new to legal aid. Rather, it seems to be “the narrowing of the scope”85 that has led the criteria to operate in a way which makes the right of access to a court practically ineffective. This further demonstrates the complex nature of parliamentary implementation of Convention rights; it is rarely possible to point to a simple solution and each piece of legislation is unique and can raise human rights concerns in different ways. Nevertheless, it seems that the use of an exceptional category – when applied specifically as a form of ECHR protection – may encourage minimal compliance by the executive. The inclusion of such a broad fallback clause potentially leads to a greater tolerance for Convention incompatibility in the rest of the legislation, since any ECHR violations that the new law may produce will in theory be in caught by the clause.

Thus, Parliament’s use of an exceptional category in order to shoehorn rights protection into the law results only in protection of an illusory nature. The Legal Aid Act seems compatible with Art. 6 on its face but “giv(es) rise in practice to breaches of human rights.”86 There is a serious possibility of prospective aid recipients slipping through the cracks i.e. failing to receive protection when they are entitled to it. Section 10 of the Act does not provide "sufficient guarantee that the new legal aid regime will not create a serious risk that its operation will lead to breaches of Convention rights."87 The failure of Parliament to properly implement the Convention is especially clear in the case of legal aid because access to justice gives practical effect to most other legal rights.88 This explains the stark clarity of the paradox found in s.10 where one needs access to a lawyer in order to secure access to a lawyer.

4. A Cautionary Tale

Parliamentary implementation of human rights is undoubtedly a worthy objective. Since parliaments are democratically elected, they can hold government to account, influence the direction and priority of legislative initiatives and channel funds to ensure implementation.89

84 Access to Justice Act 1999, (s 6(8)(b)).
85 Miles (n 70) 1007.
86 Francis (n 27).
87 Joint Committee on Human Rights, Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill (twenty-second report) (2010-12, HL 237, HC 1717) para 1.31
88 Francis (n 27).
89 Drzemczewski (n 16) 178.
Strengthening national compliance mechanisms raises awareness of human rights issues in Parliament, encourages greater transparency of government responses to Court judgments, and provides an opportunity for public scrutiny of government justifications. Moreover, the European Court seems more likely to respect national laws which are the result of significant parliamentary debate as to their compatibility with the Convention.

Nevertheless, it is important to recognize that Parliament has both unique capabilities and priorities. Hiebert describes how, in a Westminster-based parliamentary system, complex issues must be reduced to two viewpoints: in favour and opposed. In a partisan environment focused on goals, benefits and costs, and a culture where governments are hostile to any inquiries which seem to challenge or delay the pursuit of their policy goals, effective review for rights compatibility is bound to face difficulties. Politicians have an interest in cutting costs and are more concerned about political embarrassment. For example, they “may have political incentives to avoid publicly acknowledging the full implications of how a legislative initiative affects rights.” Furthermore, they are aware of the potential for reasonable philosophical differences which may arise between legislators about the scope of rights, notions of proportionality, or the proper role of the state, to be portrayed by the media as an intention to violate rights.

This goes some way in explaining the problems faced in parliamentary implementation of Convention rights. It also cautions against reliance on Parliament as the main arbiter of individual rights, and suggests a need to revisit and strengthen other reforms enacted to improve the European Court. This is not a revolutionary proposal by any means, and devotees of the late Ronald Dworkin may appreciate that the weaknesses of parliamentary implementation were hinted at in his conception of law as integrity. He showed that judges must engage in constructive interpretation of legal practice in order to “identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.” This involves going through the whole law (judicial precedent) to consider how to interpret it in a specific case, as well as employing their own moral convictions about what would be the best justification for past decisions and best “fit” the community’s principles. They will also consider whether their interpretation shows the interpreted practice in its best

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90 Joint Committee on Human Rights (n 2) 9.
91 Francis (n 27).
92 Hiebert (n 25) 11.
93 Hiebert (n 25) 11-12.
Consequently, courts rely on a different set of considerations than the legislature and this is what separates adjudication from legislation even in a novel case. Unlike parliament, judges are looking for principles that are coherent, morally attractive and which fit the existing law.

In addition, measures must still be taken to strengthen rights review in parliament. Only a fraction of issues can ever be litigated, thus relying on judicial correctives to prevent infringement of rights may also result in rights abuses that go un-remedied. However, progress will require “a significant shift in mindset about how parliamentarians are to conduct their scrutiny function.” Possible solutions include strengthening the JCHR by, for example, allowing it to review secondary legislation. This has been a problem in the legal aid context as secondary legislation was introduced which further reduced the scope of aid available, by for example requiring lawful residence of 12 months or more and denying aid work done on judicial review cases that fail at the permission stage. This activates human rights concerns but is outside the domain of review of the JHCR. The same logic applies to “the late introduction of Government amendments with significant human rights implications”, as then the JCHR lacks sufficient time to scrutinize and report on the amendments before the Bill moves to the next stage.

In the lead-up to the Interlaken Conference, multiple actors such as the President of the Court, the Secretary General of the Council of Europe, the European Commissioner for Human Rights, and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly opined that “the future effectiveness of the Court depends to a large degree on better national implementation of the Convention.” This article has called into question this emphasis on parliamentary implementation as a solution to the European Court’s dilemma. The case of legal aid shows that, despite the Parliament’s model efforts at rights implementation in new laws, it is faced unique motivations and pressures, and thus parliamentary implementation of Convention rights may result in theoretical protection but practical ineffectiveness. Consequently, LASPO should serve as a cautionary tale to counter...
the notion that parliamentary implementation can be an effective substitute for swift access to the European Court of Human Rights.
The Rise of Islamic Finance in the United Kingdom

Victoria Rowley

Abstract – This article discusses the increasingly important topic of Islamic finance in the United Kingdom. It begins with an introduction outlining the current government’s plan to become the first non-Muslim state to issue an Islamic sukuk bond, before providing an overview of modern Islamic finance and its roots in centuries-old religious principle. The article then discusses Sharia law, the religious law upon which Islamic finance is based, and highlights the five key principles that Sharia law embodies. The discussion then turns to focus specifically on one of these key principles, the prohibition on interest or riba, and examines the financial community’s response to this prohibition in the form of the sukuk bond. Against this general backdrop to the Islamic finance industry and the increasingly popular sukuk bond, the article moves on to consider in more detail the United Kingdom’s own Islamic finance sector. It discusses both economic and social benefits that Islamic finance can bring as well as a selection of the challenges that Islamic finance presents. The article then concludes with suggestions on steps that can be taken to encourage growth in the United Kingdom’s Islamic finance sector in order for its full benefits to be realised.

Keywords: Islamic finance, Riba / prohibition on interest, Sukuk bonds, Sharia law, UK Islamic finance sector

1. Introduction

On 29th October 2013, at the ninth World Islamic Economic Forum, David Cameron announced the government’s plan for the United Kingdom to become the first non-Muslim state to issue an Islamic bond. The bond, known as a sukuk, will be issued on the London Stock Exchange and it is estimated that it will be worth around £200 million. Although the value of the government bond appears relatively small in comparison to the overall sukuk

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market which is worth $1 trillion globally, the importance of the announcement is that it is representative of a wider governmental plan to make London into a ‘great capital of Islamic finance’. Having made the announcement in front of more than 1,800 political and business leaders from over 115 countries, Cameron hopes that such initiatives will allow London to ‘stand alongside Dubai and Kuala Lumpur as one of the great capitals of Islamic finance anywhere in the world’, and that such measures will act as a catalyst for greater investment and activity in the UK’s Islamic finance sector.

Therefore, although the term sukuk may not be a familiar concept for a large portion of the UK population, and the Islamic finance industry may not be well known, a more active role by the UK government in the industry will no doubt result in an increase in public awareness of what modern Islamic finance entails and its place in the UK economy. This article aims to provide a background to modern Islamic finance and in particular the nature of the sukuk bond. It will then examine the UK’s current Islamic finance sector and the opportunities and challenges that this industry presents.

2. Modern Islamic Finance

Modern Islamic finance developed relatively recently. Based on centuries-old religious principle, modern Islamic finance is best described as a ‘young industry rooted in very old tradition’. During the 1970s, pan-Islamism became a powerful movement aimed to restore Islamic values in all areas of life. An important part of this movement was the creation of Islamic banks and financial institutions. Alongside a rise in oil prices, which brought an unprecedented amount of wealth to a number of oil-rich Middle Eastern states, the right conditions existed to spur a growth of what has now become modern Islamic banking. A number of key institutions were established during this period, providing a framework for cooperation between Islamic states. The Organization of the Islamic Conference Movement,

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2 George Parker and Robin Wigglesworth, ‘Osborne to launch Islamic bond plan’ (FT.com, 28 October 2013) <http://www.ft.com/intl/cms/s/0/1e8c9c2c-3ff9-11e3-a890-00144feabdc0.html#axzz2sz1JBg3H> accessed 1 March 2014.
4 Ibid.
5 David Eisenberg, Islamic Finance: Law and Practice (OUP 2012) 4.
8 Ibid.
which later changed its name to the Organization of Islamic Cooperation, was formed in 1970. The Organization now boasts a membership of 57 countries and its modern day goal is to act as the collective voice of the Muslim world and to ensure that Muslim interests are safeguarded and protected. Shortly after the Organization was established, the intergovernmental Islamic Development Bank was founded (in 1974) to further the economic development of its member states in accordance with the principles of Sharia law. Today, the Bank has a 56-country membership and plays an active role in providing financial assistance, grants and equity to its members.

The creation of these institutions led many Muslim countries to establish their own Islamic banks. The Dubai Islamic Bank was created in 1975 followed by the Faisal Islamic Bank of Sudan in 1977. 1978 saw the establishment of both the Faisal Islamic Egyptian Bank and the Islamic Bank of Jordan. From only one bank in the early 1970s, the number had grown to nine by 1980. 1980 was also the year that the first Islamic Bank in a non-Muslim country was established: the International Islamic Bank of Investment and Development in Luxembourg. Growth of the Islamic banking sector continued between 1981 and 1985 during which time twenty-four more Islamic banks and financial houses were created. Islamic banking was therefore the first sector of the Islamic finance industry to develop, and it still maintains a central role in the modern day global economy. However, today’s modern Islamic finance industry is not limited to Islamic banking. It also incorporates related fields such as the Islamic capital markets and the Islamic insurance industry. It is fair to say that modern Islamic finance has grown and diversified to become a powerful force on in the twenty-first century global financial stage.

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11 Ibid.
14 Ibid.
15 M. Kabir Hassan and Mervyn K. Lewis (eds), Handbook Of Islamic Banking (Elgar Original Reference, Edward Elgar Publishing 2007) 401.
18 Saeed (n 16) 15.
2.1 Five Key Principles

Islamic finance is based on Sharia law, the law of Islam, and stems from two main sources: the Quran and the *sunnah*.\(^{19}\) The former is the holy book of Islam and the latter is the way of life adopted by the Muslim Prophet Mohammed. These sources form the basis for Sharia religious law which addresses all areas of Islamic society from marriage to commercial dealings.\(^{20}\) For the purpose of the financial industry, Sharia law has created a set of ‘interrelated norms’ \(^{21}\) that must be respected in order for financial transactions and services to be Sharia-compliant. It is this compliance that distinguishes Islamic finance from conventional finance. One writer has identified five key principles that underlie Sharia-compliant finance: a belief in divine guidance, the prohibition of interest, the prohibition of *haram* investments, the encouragement of risk sharing and financing based on real assets.\(^{22}\)

The first principle is the belief that the universe was created by Allah and humans must always obey Allah’s commands, including when engaging in financial transactions. Religious teaching therefore dictates how the Islamic finance sector will operate in contrast to conventional financing in which religion and governance are usually separated or have only a passing connection with religion.

The second principle prohibits interest. This means that a lender cannot require a borrower to pay interest on a loan, nor can a lender earn interest on a loan. The paying of interest in a conventional financing structure is therefore proscribed. However, this does not mean that money is borrowed or lent for free. Rather than paying interest, the borrower must pay a fee for the loan or share the profits acquired from the loan with the bank or financial institution that originally lent the money.

The third principle, the prohibition of *haram* investments concerns the nature of financial investments. *Haram* means forbidden\(^{23}\) or sinful, and prohibits financial investments in industries such as tobacco, alcohol or arms. Although such investments are not prohibited in conventional financing, the prohibition of *haram* investments has some similarities with socially responsible investing. Socially responsible investing encourages investors in


\(^{20}\) Vogel and Hayes (n 7) 4.

\(^{21}\) Ibid.


conventional financing investments to consider environmental, social and corporate governance issues as well as financial return.24

The fourth principle encourages risk-sharing and is intended to promote the equal distribution of risk, profits and losses between business partners. It is also intended to promote transparency and trust in financial transactions. It is predicted that current market instability will increase demand for products that encourage risk-sharing in both the Islamic finance sector as well as within conventional financing25.

The final principle, that financing is to be based on real assets, is intended to curb speculation and credit expansion in business transactions by ensuring that financial transactions are based on the state of the economy at the present time. In contrast, conventional finance can sometimes be based on the promise to pay in the future therefore allowing financing to grow ahead of the real economy.26

These key principles must be adhered to for a financial transaction to be Sharia-compliant and permissible under Islamic law. The Islamic finance industry has therefore created structures and frameworks to ensure an effective functioning financial market which also conforms to the religious law that governs it. The rest of this article focuses primarily on the prohibition of interest, also known as riba, and the sukuk bond structure. The sukuk bond adheres to this prohibition principle but is also an important financial instrument on the Islamic global capital markets.

2.2 Prohibition on the Riba and the Sukuk Bond

The prohibition of interest or riba is a key feature of Islamic finance.27 The literal translation of riba is ‘increase’, but in financial transactions it refers to a general prohibition on interest. In the debt capital markets, the riba prohibition means that Islamic investors cannot trade in pure-debt securities which pay interest to the buyer of the security. The capital markets have therefore created alternative financial instruments which do not pay interest and so are permissible as Sharia-compliant.

26 Abdullah and Chee (n 22) 6-7.
27 Visser (n 19) 31.
One such alternative financial instrument designed to avoid the prohibition is the *sukuk*. The *sukuk* structure was first developed in Bahrain and Malaysia in the 1990s\(^\text{28}\) and one of the first *sukuk* was issued in 1990 by Shell MDS in Malaysia.\(^\text{29}\) The *sukuk* has commonly become known as the Islamic equivalent of bonds,\(^\text{30}\) although a close analysis of the *sukuk* shows that it incorporates elements of both shares and bonds depending on the underlying Islamic financial contracts and structures.\(^\text{31}\) The *sukuk* is designed to generate the same economic effects as conventional bonds but in a Sharia-compliant manner. It is therefore not a pure debt security, which is proscribed by the *riba* prohibition, but is linked to the performance of an underlying real asset such as a mortgage or home equity loan. Each *sukuk* holder, unlike pure debt securities, has an undivided beneficial ownership in the underlying asset and is entitled to a share in the revenues generated by the asset, as well as a share in the proceeds of the realisation of the asset.\(^\text{32}\) Because the *sukuk* derives its return from the performance of the asset and not from interest it is Sharia law compliant.\(^\text{33}\) The *sukuk* is issued in the form of a certificate which entitles the certificate holder to trade the *sukuk* on the international capital markets.\(^\text{34}\) The distinction with conventional pure debt securities is that what is being traded on the capital markets is not merely a debt claim but an ownership right in a tangible asset.\(^\text{35}\)

The *sukuk* can be described as a success story on the international stage.\(^\text{36}\) It plays an increasingly important role in modern day Islamic capital markets and it is expected to continue to be a key financing tool in the coming years. A recent report concluded that total *sukuk* issuances in 2013 totaled approximately $120 billion and in the United States for example, US-dollar denominated sukuk issuances doubled from $9.5 billion in 2011 to $18.4


\(^{33}\) Iqbal and Mirakhor (n 28) 177.


\(^{35}\) Saeed and Salah (n 31) 47.

billion in 2012.\(^{37}\) It is no surprise therefore that this increasingly successful market is attracting new entrants. As noted above, the UK government plans to issue its first sukuk. A recent news announcement stated that HSBC will provide the necessary financial advice to the government for the sukuk bond issuance to ensure compliance with Islamic finance principles.\(^{38}\) This push from the UK government to be involved in the sukuk industry is also being duplicated in other parts of the world. Hong Kong has recently introduced legislation to allow for the issuance of a sukuk\(^{39}\), and South Africa announced in February 2014 that it plans to debut its international sukuk this year in an attempt to diversify its debt portfolio.\(^{40}\) This has led to predictions, such as that from FitchRatings, that 2014 may be a record year for the Sharia-compliant debt market.\(^{41}\)

3. UK Islamic Finance Industry

The Islamic finance industry is not a completely new phenomenon in the UK. Over the past thirty years, a regulatory and legal framework has been established supporting the growth of Islamic finance\(^{42}\), alongside the increased flow of Middle Eastern capital into London.\(^{43}\) Islamic finance is without a doubt a visible part of the UK’s economic skyline. Currently more than twenty UK banks offer Islamic financial products and services. One example is the Islamic Bank of Britain, which offers over thirty Sharia-compliant retail financial products to UK consumers.\(^{44}\) The London Stock Exchange also has a highly active role in the Islamic finance market. It describes itself as a ‘key global venue’ for the issuance of sukuk and has

\(^{37}\) Hancock (n 36).


\(^{44}\) UK Trade & Investment (n 42) 38.
issued forty-nine sukuk worth over $34 billion to date.\textsuperscript{45} Islamic finance has also been used to finance major UK infrastructure projects such as The Shard, the Olympic Village as well as Harrods\textsuperscript{46}. Other industries are also developing their Islamic finance capacities. Within the legal sector, twenty-five UK law firms have sizeable Islamic finance departments\textsuperscript{47} and Islamic finance has been described as ‘one of the fastest growing areas of law’.\textsuperscript{48} Similarly, the UK’s largest accountants, consultants and professional service firms now provide Islamic finance advisory services to a range of clients.\textsuperscript{49}

The UK government has played an active role in skilfully pursuing the creation of this Islamic sub-economy.\textsuperscript{50} Considering its success in introducing Islamic finance into the UK, some commentators have said that David Cameron’s announcement to issue a sukuk bond ‘represents little more than the logical next step in Britain’s embrace of Islamic finance’.\textsuperscript{51} The announcement does however represent a deeper commitment to engage with the industry going forward and declare that the UK is open for Islamic finance business. Alongside the sukuk bond, David Cameron has also announced that the London Stock Exchange is creating a new way of identifying Islamic finance opportunities with the launch of a world-leading Market Index. Furthermore, the government is partnering with the Shell Foundation to create a new £4.5 million grant to boost the work of the Nomou initiative. The Nomou initiative is a growth fund, providing skills and finance to small Middle Eastern and Gulf businesses and is intended to provide opportunities for British companies in the long-term.\textsuperscript{52} There is no doubt that Cameron hopes that the UK economy will reap the benefits of increased investment and activity in Islamic finance and aims to put in place a number of mechanisms to exploit these benefits. At the same time, it should not be overlooked that, alongside the benefits, Islamic finance also presents its own challenges. For the industry to truly thrive, these challenges must be identified and adequately addressed by all those who operate within the sector.


\textsuperscript{47} Prime Minister’s Office, 10 Downing Street (n 1).


\textsuperscript{49} UK Trade & Investment (n 42) 4.

\textsuperscript{50} Ercanbrack (n 43) 70.

\textsuperscript{51} A.R., (n 46).

\textsuperscript{52} Prime Minister’s Office, 10 Downing Street (n 1).
3.1 Opportunities and Benefits

The Financial Times has described industry insiders as thrilled at the announcement of the government’s plan to launch an Islamic bond. The sukuk structure has always been used as an alternative method for corporates and states to raise financing, and for many investors it is an appealing alternative to a conventional bond because it results in a share in an asset rather than a share in a debt. Increasing activity in sukuk bonds and the Islamic finance sector therefore has the potential to open up the UK economy to new investors and market participants. This is particularly valuable at a time when Western sources of capital are limited and the UK needs to diversify its capital base. Tapping into Islamic private and corporate investors is particularly beneficial considering the recent financial crisis. Whereas many Western investors have suffered since the 2008 downturn, and have less capital as a result, some Islamic investors have considerable oil wealth and as a result have not been damaged by the financial crisis at all.

As well as the potential for significant economic benefits, Islamic finance also has the potential to bring further wide-reaching benefits for the UK. George Osborne, writing for the Financial Times, highlighted that the Islamic finance industry will bring greater job prospects, and Baroness Warsi has pointed out that the Islamic finance industry addresses the UK’s desire for ethical finance. In a time when unemployment is an important political and social issue, and the financial industry is coming under increasing scrutiny for irresponsible practices, Islamic finance is a particularly attractive alternative. Furthermore, expanding the Islamic finance industry also recognises the UK’s diverse multicultural society and the need to provide a range of services and products that address cultural differences.

According to the Office for National Statistics, the Muslim population in England and Wales

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53 Robin Wigglesworth, ‘Industry welcomes George Osborne’s plan for UK Islamic bond’ (FT.com, 1 November 2013) <http://www.ft.com/cms/s/0/4f2e15ee-42de-11e3-9d3c-00144feabdc0.html#axzz2s7F0WdV7> accessed 1 March 2014.
55 Ibid.
in 2011 was 2.7 million, which equates to 4.8% of the population.\textsuperscript{59} This is a sizeable portion of the UK who may wish to access Islamic finance products and services. Continuing to grow the Islamic finance sector would therefore help to address this potential demand and encourage diversification in the financial markets.

### 3.2 Industry Challenges

However, alongside the benefits of the Islamic finance industry are multiple challenges. The legal and taxation landscape in the UK has developed around conventional financial transactions rather than the transactional structures of Islamic finance. It is therefore vital that the UK legal and tax framework can adapt to accommodate these differences. For example, because Islamic finance structures are typically asset-backed they could be exposed to multiple tax liabilities that conventional lending structures are not. This is potentially a significant deterrent for industry growth. The London Stock Exchange has introduced some important changes in tax liabilities which support the Islamic finance industry. These include the removal of a double tax on Islamic mortgages, as well as reform of the arrangements for issues of debt so that returns and income payments in Islamic finance can be treated as if they were interest.\textsuperscript{60} These changes signify a commitment to ensure that the UK economy can support Islamic finance. However, the UK must be able and willing to continually review and adapt its legal and regulatory framework to support the Islamic finance industry as a whole.

For any industry to thrive, it must possess a readily-available and skilled workforce, knowledgeable of how the sector operates. The UK needs an educated pool of individuals ready to play an active role in Islamic finance in order to fully exploit its potential. Recent statistics suggest that the education sector is adapting to meet this need. A Reuters 2013 report claims that sixty UK institutions offer Islamic finance courses, and twenty-two universities offer similar degrees. Bodies such as the Islamic Finance Council also provide training services to corporate and educational institutions.\textsuperscript{61} Still, concerns have been raised


about how the UK Islamic finance education sector measures up to its Gulf counterparts.\textsuperscript{62} Daud Vicary Abdullah, the chief executive of the International Centre for Education in Islamic Finance (INCEIF) specialising in Islamic finance, says that UK expertise in the industry is ‘spread very thin’ and that the standard of education in UK universities is ‘variable’.\textsuperscript{63} A New Statesman report also highlights a lack of expertise as an area of weakness for the UK Islamic finance industry. However, the report emphasises that this particular weakness is an obstacle that can be overcome.\textsuperscript{64} With determination, forward-planning and investment from both government and private bodies, the UK has the ability to grow its Islamic finance expertise by investing in education and training facilities. In doing so, the UK will increase its ability to make the most of the benefits that the Islamic finance industry has to offer.

Another challenge for Islamic finance operates at a global level. There are a variety of schools of thought concerning the interpretation of Sharia law. Scholars from these competing schools of thought often have contrasting views on Sharia law’s meaning. A particular structure or process may therefore be Sharia-compliant to one school of thought, but not to another. In practice, this means that a financial transaction may be acceptable in one particular Sharia law jurisdiction but not accepted elsewhere. Combating this lack of uniformity requires global standardisation as to Sharia-compliant financial products and services. Some initiatives for such a standardisation have already taken place. The Accounting and Auditing Organization for Islamic Financial Institutions publish Sharia standards in an attempt to provide a degree of harmonisation. Yet the very nature of Sharia law, with its roots in religious historical doctrine, raises concerns over whether true standardisation can ever be achieved.\textsuperscript{65}

Challenges for the UK Islamic finance industry therefore operate at both a national and global level. Being aware of such challenges and formulating ways to try and address them is a significant part of creating a thriving Islamic finance sector.

\textsuperscript{63} Ibid.
\textsuperscript{64} Knowles (n 54).
4. Conclusion

With Global Islamic investments having increased by 150% since 2006, and an estimate by accountants that the sector is growing 50% faster than the overall banking sector, Islamic finance presents a potentially profitable area for the UK. In an era when the economy is attempting to grow its way out of recession, Islamic finance is another way for the UK to diversify and attract new business. However, it also presents its own unique challenges which must be addressed. As this article has illustrated, the UK government has taken steps to support the industry and provide an environment in which Islamic finance can operate and flourish. Nonetheless, other countries across the globe can be considered as potential competitors for Islamic finance in the UK such as Istanbul, Hong Kong and New York. It is more important than ever, if the UK wishes to capitalize on the potential benefits of the industry, for government, business and society to work together to collectively embrace and support the Islamic finance industry as a whole. I have sought to highlight some of the key benefits and challenges that the current UK Islamic finance sector presents. The sukuk bond is an attractive source of financing for companies and governments and an increase in sukuk issuances demonstrates that there is growing interest in the sukuk. There is no doubt that the industry has significant growth potential but for the UK to take advantage of this growth it must encourage and develop its Islamic finance sector.

One commentator has outlined four ways that the UK can continue to develop Islamic finance and encourage activity in the sector. First, through engagement with key players in the industry such as businesses, retail groups, Sharia scholars, financial products providers and regulators. Second, by encouraging existing UK Islamic banks and financial institutions to invest in order to ensure that they maintain a competitive edge in the global Islamic finance market. Third, by ensuring that the UK legal, regulatory and financial environment works in coordination to promote London as a competitive centre for future Islamic finance activity. Finally, the UK can develop and encourage the Islamic finance sector by demonstrating to the rest of the world market that London has the necessary conditions for Islamic finance to operate and grow.

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68 Ibid.
In relation to this final method of demonstrating to the world the UK’s commitment to the Islamic finance sector, there is no doubt that David Cameron’s recent announcement to issue the UK’s first sukuk bond is a ‘positive move’ in the right direction. When the sukuk bond is issued, it should signify to investors that the UK is truly open for business in Islamic finance. The hope is that it will then bring further growth in this sector and allow the UK to take full advantage of all the benefits that can accompany this growth.

69 Asutay (n 67).
Abstract – This piece discusses the significance and role of weak eyewitness identifications in English law of evidence following the Court of Appeal decision in R v Dossett. It contrasts the reasoning given by the Crown Court with that delivered by the Court of Appeal, and finds that the latter adopts a narrower view of what constitutes a fleeting glance. This Court of Appeal-endorsed narrower approach is criticised for introducing uncertainty and arbitrariness, and reducing protection afforded to defendants.

Keywords: Eyewitness, evidence, fleeting glance, difficult conditions, bad character

1. Introduction

The significance of eyewitness identification in the law of evidence has been well recognised. Michael Zander and Paul Henderson have found that eyewitness identification is very or fairly important in 25% of cases tried in the Crown Court.\(^1\) In light of its widespread usage, it becomes all the more worrying that identification evidence is “relatively frail”.\(^2\) The Criminal Law Revision Committee in 1972 concluded that mistaken eyewitness identifications were “by far the greatest cause of actual or possible wrong convictions”.\(^3\) This prompted the combined hearing of four appeals in Turnbull,\(^4\) in which Lord Widgery CJ gave directions to trial judges in their summing up to juries to reduce “the danger of miscarriages of justice

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An identification that constitutes a ‘fleeting glance’ or made in difficult conditions are not admissible unless coupled with other supporting evidence.

The recent case of Dossett involves an interpretation of ‘fleeting glance’ and ‘difficult conditions’, the effect of which seems to be to significantly narrow the definitions of these terms, so broadening the type of identification evidence that the prosecution may rely on without supporting evidence. The more liberal approach adopted by Moore-Bick LJ in the Court of Appeal is contrasted with the more reserved position taken by Evans J in the Crown Court in the same case. Even though the same result is reached, it seems that the alternative route that Evans J takes in her judgment, which the Court of Appeal did not feel was required, is the more appropriate one. It has the effect of arriving at the same outcome while avoiding the narrowing exercise undertaken by the appellate court.

2. The Facts of the Case

Dee Riley (V1) and Michael Ryan (V2) were walking home at around 10:00pm on 8th May 2011 in Basingstoke. Two men stood idly on the road ahead of them. When V1 and V2 got closer, the two men attacked them. V1 and V2 were knocked to the ground, punched, and kicked, and V1’s handbag was removed from her possession. V1 suffered two fractured eye sockets and a fractured nose. V2 suffered a fractured eye socket, a significant injury to one of his eyes and several broken ribs.

Various items belonging to V1 were found, among which were her handbag, and receipts and vouchers contained in it. Fingerprints were found on the vouchers and blood on a receipt. A DNA profile from the bloodstain matched that of the co-defendant (who was eventually acquitted by the jury) but nothing incriminating was found to suggest that Steven Edward Dossett (D) was one of the two men. The primary evidence on which the prosecution sought to rely was an identification procedure sixteen days after the event. In the identification, V2 positively identified D as his attacker. Also admitted were D’s previous convictions for (1) robbery and (2) assault occasioning actual bodily harm (ABH).

D’s first contention was that the case should be withdrawn from the jury because of the inherent weakness of the identification evidence. In Turnbull, Lord Widgery CJ observes that “[w]hen, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation occurring”.

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5 R v Turnbull [1977] QB 224, 228.
made in difficult conditions...[t]he judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. On the facts, the attack took place over a short duration of time, the quality of street lighting was poor, and V1 and V2 had a poor view of the men in the course of the robbery. Neither V1 nor V2 were able to describe D’s neck tattoos, V1 was unable to pick D out at an identification procedure, and V2 was under attack, had serious injuries, and had erred in estimating D’s height. D submitted that these weaknesses meant that the case should be withdrawn from the jury.

D’s second argument was that the judge should not have allowed the prosecution to adduce evidence of D’s prior convictions because neither conviction was relevant to any important matter in issue in the proceedings. And even if relevant, exclusion under s. 101(3) Criminal Justice Act 2003 was necessary to prevent an adverse effect on the fairness of proceedings. In Hanson, Rose LJ remarked that there is no minimum number of events necessary, but a single prior conviction will often be insufficient unless the behaviour is unusual or the modus operandi is distinctive. D submitted that his bad character evidence should not have been admitted in support of the weak identification evidence.

3. Crown Court Decision

Evans J in the Crown Court at Winchester, after considering the weaknesses in the identification evidence, nonetheless had the view that this was not a case of a fleeting glance. Despite its low quality nature, the identification was not so poor that withdrawal of the case from the jury was necessary. V2’s positive identification of D at the identification parade, sixteen days after the robbery, was admitted with an extensive warning to the jury regarding how the evidence should be used.

Alternatively, Evans J observed that D’s bad character evidence, together with the evidence that the co-defendant’s blood was found on a receipt in V1’s handbag, was capable of supporting V2’s identification of D. The bad character evidence was relevant because it was less likely that V2 had by chance picked out at the identification procedure an innocent person who happened to have a history of this type of offending. It was also probative because it suggested that D had a propensity to attack victims in that particular area of

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8 R v Hanson (Nicky) [2005] EWCA Crim 824, [2005] 1 WLR 3169.
Basingstoke jointly with a co-defendant. The blood sample was relevant because D’s prior robbery conviction involved offending with the same co-defendant.

Despite recognising its highly prejudicial effect, Evans J concluded that the probative value of the evidence justified its inclusion. She further added that admitting this evidence would not have an adverse effect on the fairness of the trial. On 18th May 2012, D was convicted of robbery and sentenced to nine years’ imprisonment. He then appealed against conviction by leave of the single judge who referred his application for leave to appeal against sentence to the Full Court.

The Crown Court seems to have come to its decision through a two-stage process where the end result may be reached either on the basis of the identification evidence alone, or alternatively, that identification evidence coupled with D’s bad character and blood evidence. This is in stark contrast to the decision in the Court of Appeal.

4. Court of Appeal

With the Court of Appeal upheld the trial judge’s decision below, but arrived at this result by a different way. While Moore-Bick LJ agreed that D’s prior convictions were admissible, he observed that “this was a case in which the quality of the original observation was good enough”, and that Evans J’s analysis of the identification evidence alone would have been “sufficient for her decision” without her ground in the alternative in reliance on D’s bad character evidence.

In considering whether D’s prior convictions were admissible, the Court began with the premise that “the question, as always, is whether the previous conviction is relevant to an important matter in issue between the prosecution and the defence, and if so, whether its admission in evidence would have an adverse effect on the fairness of the proceedings”. In justifying the admission of D’s robbery and ABH convictions, Moore-Bick LJ observed that the circumstances were “significantly similar… to the present allegation” for a number of reasons. Both crimes (i) occurred in the same area of Basingstoke as the present offence; (ii) were committed jointly with a co-defendant; (iii) were opportunistic; (iv) involved the infliction of public violence on strangers; which (v) ceased after the robbers gained possession of property. The robbery and ABH convictions were also relevant because they

10 R v Steven Edward Dossett [2013] EWCA Crim 710, [15].
11 R v Steven Edward Dossett [2013] EWCA Crim 710, [10].
12 R v Steven Edward Dossett [2013] EWCA Crim 710, [20].
demonstrated that he was capable of “using violence of a different kind to ensure the success of a theft” and furthermore of “using similar violence in similar conditions to that of the offence in question”. Given the similarities between D’s prior crimes and present charge, and that they demonstrated his ability to commit robbery, Moore-Bick LJ observed that “it was open to the judge to conclude that the convictions could logically and properly demonstrate a propensity to behave as the appellant was said to have behaved in the robbery being tried”. The corollary was that D’s bad character evidence was ruled admissible.

In the judgment, the Court also considered the strength of the identification evidence, and whether the trial judge was entitled to choose not to withdraw the case from the jury. In this respect, Moore-Bick LJ observed that despite weaknesses in the identification, “this was not really a case of a fleeting glimpse” such as that to which Lord Widgery CJ alluded in Turnbull. Although it was accepted that the quality of the street lighting was poor and V2’s observation of D was under challenging conditions, his Lordship justified reliance on this evidence on the basis of V2’s claim that “he had got a clear look at him… [when] the street lights were shining on his face”. Even though the robbery occurred over a span of minutes and V2’s observation of D’s face was for a short time, he remarked that it was “not necessary to look at a person’s face for long in order to take in its essential features”. And while neither V1 nor V2 mentioned seeing D’s neck tattoos, he commented, “whether they were clearly visible under the prevailing conditions is uncertain”. Moreover, the height discrepancy was deemed not fatal to the value of the identification because assessing height in feet and inches requires a “conscious mental process”, as distinguished from taking in a person’s facial features, which involves an “instinctive process”. No explanation was given in relation to V1’s failure to pick D out, nor the impact of V2’s stress and injuries to his identification of D. The latter is particularly significant because high levels of stress have been found to negatively affect an eyewitness’ identification accuracy and memory. With all (or at least the majority of) weaknesses contended by defence counsel rebutted in his speech, Moore-Bick LJ concluded that the evidence was “good enough to justify leaving the case to the jury as it stood”, even if no other evidence was adduced by the prosecution.

13 R v Steven Edward Dossett [2013] EWCA Crim 710, [29].
14 R v Steven Edward Dossett [2013] EWCA Crim 710, [14].
15 R v Steven Edward Dossett [2013] EWCA Crim 710, [13].
16 R v Steven Edward Dossett [2013] EWCA Crim 710, [14].
17 R v Steven Edward Dossett [2013] EWCA Crim 710, [14].
18 R v Steven Edward Dossett [2013] EWCA Crim 710, [14].
20 R v Steven Edward Dossett [2013] EWCA Crim 710, [16].
Unlike the court below, and although the admissibility of D’s propensity evidence was considered in the judgment, the Court of Appeal appears to have arrived at the same decision based almost completely on the identification evidence. The different reasoning employed in the Crown Court and Court of Appeal has significant implications for the use of eyewitness evidence in criminal proceedings.

5. Analysis

With considering the strength of the identification evidence, a relevant question, according to Turnbull, is whether the witness’ observation of the defendant constituted no more than a fleeting glance, or was made in difficult conditions. What constitutes a fleeting glance or difficult conditions is determined on a case-by-case basis, taking into account the circumstances of the individual case. It may be helpful to turn to some case law following Turnbull, which seeks to clarify what is meant by these terms.

In Waterfield, the defendant was convicted of robbery and sexual assault. Even though the victim admitted she was avoiding eye contact as much as possible and the crime occurred in winter at dawn when lighting was dim, it was held that this was not a fleeting glance case. This was because the incident was said to have lasted ten minutes and the victim gave evidence that she was nonetheless observing the defendant despite not looking him in the eye. Reilly was also not a fleeting glance case, although the witness was mistaken about the defendant’s hair colour and failed to take part in an identification procedure until seven months after the alleged violent disorder offence occurred. This is because the observation was made over fifteen minutes and the witness paid special attention to him. In Davidson, neither the first victim’s failure to recognise a photograph of the defendant taken hours after the crime nor the second victim’s admission that she only saw the defendant’s eyes were conclusive as to the strength of the identification evidence, the court holding that this was not a fleeting glance case. This can be distinguished from the present case because as Rix LJ observed, the ordeal in that case did not take place “between strangers who did not otherwise know each other”. In Ley, however, the victim’s observation was held to be a fleeting glance because she only got a limited view of the side of the defendant’s face, despite having

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24 R v Harley George Edward Davidson [2011] EWCA Crim 2544, [32].
previously known the defendant for four years. The better explanation for Davidson, it seems, is that the identification was strong on the other facts of the case. Not only were the defendants inside the premises for three full minutes (as recorded in CCTV evidence), but also the victim accurately estimated the defendant’s height, build, and age. It appears that courts have been slow to characterise an identification as a fleeting glance or one made in difficult conditions. They will, nevertheless, do so where the factual circumstances of the case leave them no other option, as in Ley.

What is striking about the Court of Appeal decision in Dossett is the narrowness of the definition given to ‘fleeting glance’ or ‘difficult conditions’, so that it becomes difficult to imagine any case that clearly falls within this category. On the face of it, it seems that Dossett fits the requirements quite nicely. Short time duration, poor quality of lighting, inaccuracy of visual and height descriptions, and eyewitnesses’ strained physical and mental state (in light of their extensive bodily injuries and situational stress) all tend to indicate that despite V2’s best efforts, the identification was too weak to allow the case to go to the jury in the absence of other evidence. The Court of Appeal judgment, however, seems to excuse these flaws to reach the conclusion that the identification evidence was itself strong. What is rather surprising is the lack of substantive authority used to support its propositions regarding the effect of various factors traditionally considered to be determinative of the strength of identification evidence. The court deferred to “[e]xperience” in suggesting that the length of the incident had limited importance, drew up a novel distinction between “instinctive” and “conscious mental” processes to justify V2’s inaccurate assessment of D’s height, and, it seems, effectively put the defence to proof to demonstrate that the tattoos were “clearly visible under the prevailing conditions” if it wished to rely on the eyewitnesses’ failure to describe them.26 Lack of authority aside, we are left with no clear guidance as to what, if any, weight we should give to the above-mentioned factors. With the significant narrowing that took place in Dossett, the state of the law is such that it is even more difficult now to ascertain when identification evidence is so weak that we ought to give the defendant the benefit of the doubt.

It may be argued that strained interpretations are employed, whether justifiably or not, to do justice on the facts of individual cases. But even if we say that this is normatively desirable, which at best is unclear because of the legal uncertainty that is created, this reasoning cannot justify the approach taken by the Court of Appeal. It should be remembered

26 R v Steven Edward Dossett [2013] EWCA Crim 710, [14].
that there is an important proviso following the *Turnbull* direction to withdraw from the jury. The judge is to “withdraw the case… and direct an acquittal unless there is other evidence which goes to support the correctness of the identification”\(^\text{27}\). The corollary is that even if an observation can only be characterised as a fleeting glance or one made in difficult conditions, the case can still go to the jury where there is other supporting evidence. D’s prior convictions for robbery and ABH are significant in this regard because they indicate his propensity to offend. Also relevant is the evidence of the acquitted co-defendant’s blood on a receipt in V1’s handbag. The jury, with proper directions, then determines the weight of each piece of evidence in determining D’s guilt. It was open to the Court of Appeal, though they did not do so, to conclude that the conviction was secure on this basis, rather than identification evidence alone.

6. **Conclusion**

It may be that the Court of Appeal was, in *Dossett*, motivated by empathy for the victims, who seemed to be in the wrong place at the wrong time, public safety considerations, or a concern that relying heavily on bad character evidence might have led to more dubious cases being brought. In adopting a narrow view of what constitutes a ‘fleeting glance’ or ‘difficult conditions’, however, it has generated confusion over what scenarios are covered.

It is at least uncertain that its reliance on ‘experience’ and novel distinction between different types of thinking processes without grounded scientific authority is justified. More problematic is that this serious narrowing erodes protection previously afforded to defendants, who may now be tried and convicted on the basis of shaky identification evidence alone. This is particularly worrying given the significant weight that jurors attach to identifications and its extensive use in trials, a problem that *Turnbull* intended to remedy. Importantly, there seems to be another means to the end of securing a conviction in *Dossett*. As Evans J observed in the Crown Court, this is by honestly recognising the intrinsic weakness of the identification evidence at hand, but coupling it with other evidence in the case, and leaving it to the jury to decide what weight to assign to it.

In claiming that the identification was strong, the Court of Appeal’s dismissal of the appeal seems to carry greater force. At the same time, the effect of the narrowed definition facilitated by Moore-Bick LJ is that V1, V2, and the general public are better protected from

\(^{27}\) R v *Turnbull* [1976] QB 224 (CA) 229-230 - emphasis added.
offenders (though not from potential false convictions). If this was the court’s intention, they ought to have made it clearer. Instead, what we are left with is rather oblique reasoning that will make it more difficult for trial judges in the future to ascertain what constitutes weak identification evidence, and threatens to open the floodgates to convictions based on flimsy identifications alone.