Social & Political Review

TRINITY COLLEGE DUBLIN

VOLUME XXIII

Published in 2013 by the Social and Political Review, Trinity College Dublin

C/O TCD Publications Committee
6, Trinity College
Dublin 2
Ireland

www.spr.tcdlife.ie
https://www.facebook.com/SocialandPoliticalReview

A catalogue record for this journal is available from Trinity College Library, Dublin (ISSN 07915314). Set in Minion. Printed in Co. Wicklow, Ireland.

SOCIAL & POLITICAL REVIEW

TRINITY COLLEGE DUBLIN

VOLUME XXIII

SOCIAL & POLITICAL REVIEW
TRINITY COLLEGE DUBLIN

VOLUME XXIII

This edition of the *Social and Political Review*
would not have been possible without the generous support of
the following organisations:

FRIENDS:
Department of Political Science, Trinity College Dublin
Political Studies Association of Ireland (PSAI)
Sheehan & Partners
Trinity Publications

SUPPORTERS
Department of Sociology, Trinity College Dublin

Preface

On January 21st 1989, as the first volume of the Trinity College Social and Political Review went to print, the front page of The Irish Times proclaimed "*Bush Challenges U.S. to Work for Good of All.*" Almost twenty-four years later as we prepare to publish the twenty-third volume of the SPR, I am proud that the articles included in this years publication reflect a similar desire to articulate and address matters of social and political importance which impact on the common good, both at home and abroad.

The writing in this years volume covers topics as diverse as social contract theory, territorial control in the twenty-first century, the use of drones in warfare, recent French policies of repatriation, China's social insurance law and the introduction of gender quotas in Irish politics to name but a few.

This level of engagement at a domestic as well as an international level, not only with theoretical issues of longstanding debate but, more notably, with very practical issues which affect the lives of all citizens- from civilians in war to leaders in the most powerful states on earth- displays a compassion, critical analysis and vision for positive change in society which is a testament to the authors and belies a social conscience and academic competence which is a credit to them as well as their educators.

The talent of the authors published in Volume XXIII and the unrelenting diligence and hard work of the editorial team whom I have had the pleasure of leading this year is testament to the unique college community I have been privileged to be part of for the last four years. I would like to extend my thanks to my board and to our friends and supporters who, through their generous contributions, make the Review possible. In particular, both the board and myself express our sincerest thanks to the Departments of Sociology and Political Science, in

particular, to Dr. Jacqueline Hayden and Dr. Elaine Moriarty for giving so kindly of their time and support this year.

In its first twenty-three years the SPR has been a pioneering forum for student debate and scholarship on campus. With the continued support of the college community, the board and I fervently hope this will continue for many years to come. My sincerest congratulations to all those involved in this year's publication and good luck to the board of Volume twenty-four.

Róisín Áine Costello
Editor in Cheif

Contents

The Mutual Interactions of Domestic-level and International-level Decision Making

ELEANOR FRIEL
Postgraduate, MSc in International Politics

Decision-making in the international arena is deeply entangled with decision making at a domestic level. Understanding the mechanisms at play in agreements between sovereign states is a complicated task, but that is not to say that an ever-expanding body of scholarship has not devoted considerable effort to doing so. Much groundwork in this area has been laid by figures such as Joseph Nye and Robert Keohane, whose 1977 conception of 'complex interdependence' has set the scene for subsequent studies. A more concentrated focus on the concept of international cooperation has however, come at the expense of domestic factors, which are frequently painted out of the picture in institutionalist literature.

Thus, this essay seeks to explore an array of scholarship in order to better account for reciprocal causation in the spheres of domestic and international politics. First, effects attributable to the supra-state level stem from international institutions, broadly conceived as "sets of rules that stipulate the ways in which states should cooperate and compete with each other" (Mearsheimer, 1994: 8). Employing the two level games approach as a starting point illustrates some advantages, before exposing certain drawbacks to this framework. Further, it is critical to examine ideas drawn from institutionalist, liberal and constructivist schools of thought in an attempt to

integrate a two-level games framework within a wider field. Ultimately, examining influences stemming from national politics alongside effects attributable to international institutions under perspectives from across the sub-fields, offers a clearer understanding of the interactions in question.

First, Robert Putnam's seminal 1988 article; "Diplomacy and Domestic Politics: The Logic of Two Level Games" makes a monumental step toward integrating studies of international decision-making with studies of domestic interactions. Putnam's primary interest is the effect of domestic political opposition in relation to international negotiators. Employing a bargaining framework, Putnam propounds a theory whereby outcomes negotiated by international decision makers are ex-ante constrained by political preferences, coalitions and institutions at a domestic level (1988: 440-448). This touches on a wide field of pre-existing literature (Olson, 1965; Hobson, 1961; Gourevitch 1978) and subsequent scholarship (Moravcsik, 1997; Kirschner, 1997) that view the distribution of political and social organisation within states as determining outcomes in global politics.

In a subsequent co-edited volume, Putnam unpacks several cases of organised domestic interests determining the trajectory of international institutions (Evans et al, 1993). One such instance is that of the divergent outcomes of negotiations by the US and Great Britain in the aftermath of World War Two. Under identical systemic conditions, Putnam argues the failure in establishing an intergovernmental oil regime and the success in establishing an international civil aviation system can be accounted for by the contrasting internal political alignments in both cases. Namely, domestic preference structures, ratification processes and governmental support strategies are identified as the crucial factors in determining the variation in outcomes (Milner, 1993: 208). Thus, the two-level games framework lends heavier weight to the effects of domestic political institutions on international institutions.

Although the two-level games framework holds domestic institutions have greater impact on international decision making , it also sheds light on how the relationship operates in the opposite direction, via the channel of synergistic linkage and the channel of reverberation (1988: 456). The first international input into the domestic game described by Putnam is that of "reverberation"(ibid: 454), or international pressures, either positive or negative, that tip the balance of level two constituents. A second input comes in the form of "synergistic linkage", whereby, as a result of external interaction, new domestic policy options become available to decision makers that were previously beyond their control (ibid: 447)., Both of these mechanisms, however, are remarkably underspecified, resulting in more questions than answers. Thus, while Putnam can be said to have made strong inroads in fleshing out Keohane and Nye's notion of 'complex interdependence', there are notable limitations to this version of international institutions' effects on domestic politics.

The first major drawback of Putnam's analysis is the positioning of the nation state

as the primary actor in the international system. With this assumption, Putnam aligns himself with a large body of established international relations scholarship, generally of a realist/neo-realist hue (Morgenthau, 1948; Waltz, 1979; Walt, 1987; Mearsheimer, 1994; 2001). Although granting that unitary states fall under the influence of fragmented domestic interests on occasion, with a nod to Allison's (1969) earlier bureaucratic politics model, by and large the two level games approach views outcomes in international cooperation as the result of interactions between one nation state and another nation state. Similarly, Milner's game theory model, which expands on Putnam's approach, finds no room for international institutions as actors in and of themselves (Milner, 1997: 70). Such a perspective overlooks instances where decisions are negotiated between a states and a multilateral institution. In other words, an exclusive focus on unitary state actors ignores significant instances of supra-state state bodies intruding on a state's domestic affairs.

The ability of the European Court of Human Rights to enforce their rulings in national legal systems (Krasner, 1999: 35), for example, illustrates the analytical shortcomings in Putnam's theory. In this instance, the authority of European member states can be effectively over-ruled with regard to national matters, not by another member state, but by an international judgement. Indeed, Arthur Stein makes the point that once developed, a certain legitimacy is generally associated with international institutions as entities in and of themselves, and not just as the sum of their parts (1992: 322). Ultimately, it becomes clear states cannot be thought of as the unitary actor in international exchanges.

The unit of analysis, however, is just one flaw in the two-level games approach Reverberation of international pressures and issue linkage are both significant influences that supra-state actors can have on domestic politics. Putnam's approach, however, suffers from tunnel vision in hypothesising the variety of roles international institutions play in domestic decision making. First, international institutions allow decision makers to signal commitment to domestic actors in a credible fashion, as reneging from an international agreement would be costly in terms of reputation (Schelling, 1960; Fearon, 1994; Morrow, 1999). One illustration of this comes from former Egyptian President Anwar Sadat's costly conciliatory actions in the wake of the Yom Kippur War. In brokering a peace treaty with Israel, the victorious Sadat signalled the credibility of his intentions to his level two audience vis-à-vis the reputational costs at stake at a level one institution, i.e. among the Arab League (Morrow, 1999: 89). In sum, reputation plays an influential role in the relationship between international and domestic institutions.

Furthermore, transnational actors can use supranational status and influence, such as access to information and coercion to influence domestic decisions. International institutions make otherwise inaccessible information and expertise available to domestic actors. This is an especially salient force in issue areas such as climate change

and ecological resources, where problems are of global concern, yet understandings tend to require in-depth expertise not commonly held by domestic-level policy makers (Haas, 1989). Likewise, transnational actors can threaten punishment and/or coercion that influence the course of domestic decision-making. One such example is that of multilateral aid and the conditions attached influencing the behaviour of third world leaders such as Mengistu in Ethiopia, whereby the conditions of funding from the US and its allies caused the autocratic leader to switch allegiance during the course of the Cold War (David, 1991:246).

Further, although Robert Dahl finds many disadvantages in the notion of international organisations, he points out that that can be invaluable in aiding states' transitions to democracy, as well as promoting rule of law and expanding human rights (1999: 32). The role played by UN peacekeeping missions, for instance, may be difficult to carry out under the auspices of state military forces. Dahl neatly illustrates the roles of international institutions in domestic decision making by highlighting the their supranational nature and subsequent advantages.

Finally, Putnam's approach also places a singular emphasis on the ratification of major agreements on the back of sequential negotiations. Many interactions between domestic and international actors, however, are of a more routine, informal nature. While such casual interaction can be less clear cut in terms of observable, attributable implications, there can be no denying that it often accounts for significant outcomes in global politics. Under Putnam's logic, organised interests and preferences of the chief negotiator in a state's bargaining in the lead up to joining the World Trade Organization would determine the domestic win-set, and hence be of central importance to international trading outcomes for that state. In contrast, Kucik and Reinhardt (2008: 499) find the presence and character of seemingly innocuous anti-dumping laws are in fact crucial to the trade trajectory of a state, allowing member states to retain reduced tariffs after accession. Having said this, such a seemingly minor mechanism falls outside of the modeling of major ratifications negotiated between state actors as presented in the two level games approach. Thus a multitude of possible avenues of influence between the domestic and international spheres are effectively overlooked.

After establishing the two level games approach offers a useful exposition of preferences and strength of national actors, it becomes evident those of international institutions are largely underspecified.. Consequently, scholarship has been devoted to characterising the role of international institutions in a systematic and theoretical sense, most notably, Robert Keohane's rationalist account. Keohane specifies which international institutions can be expected to affect domestic politics. Namely, institutions that firstly, overcome "political market failure", and secondly, operate as a "forum for bargaining", permit mutually beneficial decisions to be negotiated. In this sense, institutions have impact in that they decrease the "costs of legitimate transac-

tions, while increasing the costs of illegitimate ones, and of reducing uncertainty" (1984: 107). In other words, enhanced communication channels and lower tariff levels mean that above-board transactions gain at the expense, for instance of casual trading practises.

Thus, this line of thinking highlights the information-sharing and cost-reducing role of international regimes. Seen from another angle, by facilitating collaboration and coordination in continued reciprocal interactions, institutions affect the behaviour of nation states (Stein, 1982; Axelrod, 1984; Martin 1992). Davis (2012) describes an acocunt whereby the European Union filed a case against Peru in the WTO for unauthorised use of the label 'sardine' on fish products. An adjudication panel subsequently found in favour of Peru, and furthermore offered a forum through which both parties could come to a mutually acceptable agreement. This instance lends strong empirical support to a process in which an international institution (in this case, the World Trade Organization) offered a forum for bargaining and an opportunity to overcome political market failure by means of adjudication that would otherwise be unavailable.

Although the neoliberal institutionalist approach of Keohane and others has done much to fill in the blanks left by the two level games framework, it must be noted this approach has major shortcomings in itself, in that the response of various domestic actors to international institutions put forth by this account is largely simplistic. A prominent interpretation made by Keohane and many like-minded scholars is that of the nation-state as a unitary actor. The problematic nature of such assumptions has been partly dealt with above, as Putnam was found equally guilty of making such a presumption. A fundamental challenge to this view is formulated by Andrew Moravcsik, who asserts that private groups and individuals are the fundamental actors in global politics, and that it is on the basis of such organised societal subsets that states define their preferences and act purposively (1997: 516-519).

Taken together, the propositions of Moravcsik's liberal international relations theory offer a useful update to analyses of the mutual effects of domestic institutions and international organisations. By suggesting "the pattern of interdependent state preferences imposes a binding constraint on state behaviour" (ibid: 520) the relationship no longer hinges on interactions between unitary state actors. This, in turn, creates space for the possible effects of epistemic communities, such as transnational networks of highly influential environmental experts (Haas, 1992: 13), among other non-governmental agencies, to play a role at both levels of Putnam's eponymous games.

Moravcsik's work widens the scope of analysis for international decision-making however, there are still weaknesses to his theory in its assumptions of domestic preferences, which can be supplemented with constructivism. Moravcsik suggests domestic preferences are formulated in a one-off fashion. Thus we are left with a rather static vision of international interaction that fails to answer the puzzle of how varying

national institutions respond to the varying pressures of international institutions. Constructivist theories offer a more dynamic interpretation of the relationship between national and supranational politics, grappling with the idea that international institutions construct and disseminate norms that subsequently permeate domestic institutions (Wendt, 1992; Finnemore and Sikkink, 1998). Such suppositions expand on Putnam's original concept of 'reverberation,' presenting more nuanced accounts of how and when international institutions reinforce or transmit norms in a national setting. One version of this stems from a sociological paradigm, whereby international organisations go so far as to entirely reform identities of constituent actors, as iterated interaction between both parties results in renewed intersubjective understandings (Ikenberry and Kupchan, 1990). Finnemore and Sikkink draw on a wide variety of empirical cases from the abolition of slavery and the suffragette movement to contemporary UN declarations to support their "norm life cycle" account of the dynamic interaction of ideas and institutions over both domestic and international levels (1998: 896-899).

Again, however, constructivist theory possesses notable drawbacks in terms of accounting for the relationship between international institutions and domestic politics, in particular, the role of norms. Because certain classes of norms are successfully disseminated across states by international actors, whereas others fail to reach the "cascade" and "internalization" stages of the life cycle described by Finnemore and Sikkink (ibid), constructivism falls short in explaining variations in outcomes. Relatedly, the causal mechanisms behind norm dissemination are neither well examined nor well presented by constructivist theorists. For instance, conventional theory struggles to deal with how and why certain forms of weaponry and warfare have become globally taboo, whereas other equally harmful means have not. The logic presented by Wendt, Finnemore and others is largely passive and fails to engage wholeheartedly with the process whereby domestic institutions replicate externally originating practices. In the end, constructivism proves not to be universally applicable because of inconsistencies in outcomes of international decisions making.

This essay has attempted to investigate how the global system constrains and empowers domestic politics, as well as how domestic interests affect global decision-making. While Putnam's two level games approach offered considerable insight into the effects of domestic interests on international institutions, this perspective fails to account for observed effects in the opposite direction. Furthermore, there were limitations to its emphasis on major ratifications as well as on the state as a unitary actor, and finally a lack of imagination with regard to the plethora of channels through which global politics operate. Some of these issues found answers in constructivist, liberal and institutional accounts, however, these theories suffered from an inability to deal adequately with the response of domestic interests to international institutions. Indeed, where attempts are made to integrate both spheres, what often emerges

are simple observations of influences.

Thus future research would do well to specify reciprocal causal mechanisms in greater detail, with a greater focus on how both levels speak to each other on an iterated basis. Furthermore, an expansion of levels of analysis beyond the unitary sovereign state would offer fruitful avenues for potential investigation. Examining, for instance, the negotiation strategies of institutions from different unit levels, alongside their motivations and resources, could offer stronger insights into the causal mechanisms at play in the interactions of multi-level decision making. In this sense, the challenge in understanding precisely how Waltz's second and third image of politics speak to one another can only be met by a greater focus on alternative channels of influence.

BIBLIOGRAPHY

Allison, Graham. 1969. Conceptual Models and the Cuban Missile Crisis. *American Political Science Review* (Sept 1969): 696-718.

Axelrod, Robert. 1984. *The Evolution of Cooperation*. New York: Basic Books.

Dahl, Robert A. 1999. 'Can International Organizations be Democratic? A Skeptic's View', in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges*. Cambridge: Cambridge University Press, 19-36

David, Steven R. 1991. Explaining Third World Alignment. *World Politics* 43(2): 233-256.

Davis, Christina. 2012. Why Adjudicate? Enforcing Trade Rules in the WTO. Princeton, NJ: Princeton University Press.

Evans, Peter B., Harold Karan Jacobson and Robert D. Putnam. 1993. *Double-edged diplomacy: International Bargaining and Domestic Politics*. Berkeley, CA.: University of California Press.

Fearon, James D. 1994. Domestic Political Audiences and the Escalation of International Disputes. *American Political Science Review* 88(3): 577-592.

Finnemore, Martha and Kathryn Sikkink. 1998. International Norm Dynamics and Political Change. *International Organization* 52(4): 887-917.

Haas, Peter M. 1992. Introduction: Epistemic Communities and International Policy Coordination. *International Organization* 46(1): 1-35.

Hobson, John A. 1961. Imperialism: A Study. In H.M. Wright (ed) *The New Imperialism*. Boston: Heath.

Ikenberry, John G. and Charles A Kupchan. 1990. Socialization and Hegemonic Power. *International Organization* 44(3): 283-315.

Keohane, Robert O. and Joseph S. Nye. 1977. *Power and Interdependence: World Politics in Transition*. Boston: Little Brown.

Keohane, Robert O. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ.: Princeton University Press.

Kirschner, Jonathan. 2007. *Appeasing Bankers: Financial Caution on the Road to War*. Princeton: Princeton University Press.

Krasner, Stephen. 1999. 'Globalization and Sovereignty,' in David Smith, Dorothy Solinger, and Steven Topik, eds., *State and Sovereignty in the Global Economy*. New York: Routledge.

Kucik, Jeffrey and Eric Reinhardt. 2008. Does flexibility promote cooperation? An Application to the Global Trade Regime. *International Organization* 62(3): 677-505.

Martin, Lisa L. 1992. Interests, Power and Multilateralism. *International Organization.* 46(4): 765-792.

Mearsheimer, John J. 1994. The False Promise of International Institutions. *International Security* 19(3): 5-49.

Milner, Helen. 1993. 'The Anglo-American Oil Negotiations and the International Civil Aviation Negotiations: the Interaction of Domestic and International Politics.' In Peter Evans, Harold Jacobson and Robert Putnam, (eds.), *Double-Edged Diplo-*

macy: Domestic and International Interaction in Global Cooperation, Berkeley, CA: University of California Press: 207-32

Milner, Helen V. 1997. *Interests, Institutions, and Information: Domestic Politics and Information*. Princeton: Princeton University Press.

Moravcsik, Andrew. 1997. Taking Preferences Seriously: A Liberal Theory of International Politics. *International Organization* 51(4): 513-553.

Morgenthau, Hans. 1948. *Politics Among Nations.* New York: Knopf.

Morrow, James D. 1999. 'The Strategic Setting of Choices: Signalling, Commitment and Negotiation in International Politics,' in David A. Lake and Robert Powell, (eds.), *Strategic Choice and International Relations*. Princeton, NJ: Princeton University Press.

Olson, Mancur. 1965. *The Logic of Collective Action*. Oxford: Oxford University Press.

Putnam, Robert. 1988. Diplomacy and Domestic Politics: The Logic of Two Level Games. *International Organization* 42(3): 379-414.

Ruggie, John G. 1982. International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic System. *International Organization* 36(2): 379-415.

Schelling, Thomas . 1960. *The Strategy of Conflict*. Cambridge, MA: Harvard University Press.

Stein, Arthur. 1982. Coordination and Collaboration: Regimes in an Anarchic World. *International Organization* 36(2): 299-324.

Walt, Stephen M. 1987. *Origins of Alliances*. Ithaca: Cornell University Press.

Waltz, Kenneth. 1979. *Theory of International Politics*. Reading, MA: Addison-Wesley.

Wendt, Alexander. 1992. Anarchy is what States Make of it: The Social Construction of Power Politics. *International Organization* 46(2): 391-425.

Conditional Partisan Effects: The Role of Intraparty Cohesion

RYAN KENNY SCH.
Postgraduate, MSc. International Politics

A relatively novel approach to testing for the elusive partisanship effect is taken by the recent paper of Starke Kaasch and Van Hooren (2012) (SKV). They analyse the effect of government partisanship on the responses of social policy to international financial crises in four OECD countries. The details of Starke, Kaasch and Van Hooren's research design are analysed below, providing an account for why it allows them to conduct a most-likely scenario test of for partisanship effects. However, despite such favourable conditions, their research finds evidence of only a "constrained" partisanship effect, which operates in some cases but not in others. The authors' account for this variation appeals to the stabilising effect of size of the existing welfare state. They fail to test an alternative explanation which is much more prominent in the literature on the partisanship effect and its impact on welfare state spending - the theory of Conditional Party Goverment (CPG). The details of this alternative account, and the motivation for considering it a plausible alternative explanation to the welfare state account are presented. In light of this analysis, SKH's failure to test the CPG theory's ability to explain the variation in partisanship effects they observe constitutes a serious oversight. The remainder of the paper addresses this omission by testing the CPG hypothesis in the cases considered by SKH using a new dataset on intraparty cohesion provided by Jahn and Oberst (2012). Very little support for the CPG hypothesis is found, leaving

SKH's welfare state based account as the most plausible explanation for the observed variation in partisanship effects.

As the primary agents of political choice in a democracy, the efficacy of political parties is of fundamental importance to the legitimacy of the democratic process. Whether, and when, partisanship matters for policy outcomes is therefore of central concern to political scientists. Despite the compelling reasons to expect to observe partisanship effects in a functioning democracy, such effects have proved notoriously difficult to isolate. The complexities of a modern representative democracy are such that policy outcomes often appear to be as much a function of any number of confounding variables as they are a function of the partisanship of the government which enacts them. However, this does not necessarily mean that partisanship does not matter when it comes to policy formation, only that it is not determinative – an unsurprising result in political science, in which even the most clear-cut results tend to be probabilistic only. Even though by itself it does not determine policy outcomes, government partisanship may still play a role in shaping policy. To establish whether this is the case, a research approach must be devised which eliminates as many of the other factors as possible. By designing research in such a way as to eliminate other factors which contribute to policy formation, and therefore potentially confound attempts to observe a partisanship effect, a persuasive test of the partisanship hypothesis can be constructed.

One potentially fruitful approach to such a research design is suggested by Starke, Kaasch and Van Hooren (2012) (SKH). They take the relatively novel approach of analysing the effect of government partisanship on social policy responses to economic crises. More specifically, they investigate whether the presence of absence of a left-leaning party in government affects welfare state expansion or retrenchment in the aftermath of economic crises in four OECD economies.[1] This approach has a number of distinct advantages. The first of these relates to the relevance of the traditional Left-Right dimension of party classification. One of the most formidable obstacles to constructing an adequate test of the partisanship hypothesis is multidimensional nature of partisan competition. Using the traditional classification of parties along an economic Left-Right dimension to identify a partisanship effect is problematic because the Left-Right dimension may not be dominant dimension along which the parties compete. Position on alternative issue-dimensions is not a good predictor of position on the Left-Right scale(Moreno 1999), and as a result, if the dominant cleavage in particular democracy is regional-centrist, environment-growth, socially liberal-conservative, religious-secular, or any of the other multitude of issue-dimensions along which parties compete, a party which is coded as nominally left wing on a one dimensional scale may in fact be no more likely to implement expansionary social

1 Australia, Belgium, The Netherlands, and Sweden's responses to the oil shocks of the 1970s, the 1990s recession, and the financial crisis of 2008

policies than one which is coded as nominally right wing. This problem is further complicated if multiple alternative issue dimensions are pertinent – accurately evaluating and weighting the relative importance of each dimension in informing partisan policy outcomes would be an empirical impossibility. SKV avoid this problem by focusing only on welfare policy outcomes. Focusing on welfare policy responses allows a plausible case for the relevance of the traditional Left-Right classification of parties, as it is by reference to these policies that Left-Right orientation is defines in the first place. A party is defined as a left party if it is in favour of welfare state expansion,[2] therefore, if a partisanship effect is to be found, it will most likely be in policies leading to welfare state retrenchment or expansion.

Another, related advantage of the SKH approach is the question of issue salience. Parties in power have limited political capital. If they are assumed to optimise the political impact of their policy decisions, then they will chose to focus on the most salient issues of the day. It is reasonable to expect parties operating in an environment in which economic concerns dominate other issues to be more likely to implement the preferred economic policies of their constituents than those in an environment in which partisan conflict is currently centred on other issue dimensions. The problem caused by the question of the relevance of the Left- Right dimension is avoided by focusing on welfare policies, where the Left-Right distinction is relevant by definition. However, even when focusing only on these policies, efforts to observe a partisanship effect may be confounded by the possibility that partisan conflict is dominated by other issue-dimensions that strictly economic concerns. A left (/right) party in government might do nothing to expand (/retrench) the welfare state, if other issues dominate the agenda. However, this problem is also avoided by SKV. Focusing on the aftermath of major international economic crises diminishes the possibility that other issues dominate the political agenda. In such circumstances, economic concerns can reasonably be expected to be more salient in informing partisan competitions (Singer 2011).

Finally, by confining their study to the responses of developed democracies to exogenous international economic shocks, SKV can plausibly carry out cross-national comparisons. These advantageous elements of their research design make SKV's paper a plausible "most-likely scenario" test of the partisanship hypothesis. If parties do in fact matter, then these are the conditions under which their effect should be most clearly observable.

Under these most favourable conditions, the study succeeds in identifying a partisanship effect – but only in certain cases. The authors' account for this variation

2 This is not to say that a party is only considered a left party if it expands the welfare state while in government – as the effect of partisanship on policy outcomes is the very issue in question. Current approaches to party classification analyse not policy outcomes in government, but policy preferences expressed through manifestos. In order to classify a party as Left or Right by analysing manifestos, certain policy preferences are defined as being left leaning, while others are defined as right leaning. Welfare state expansion is classified as a left leaning policy (Budge and Klingeman 2001)

appeals to the automatic stabilising effect of a large welfare state. They argue that in countries in which there already exist large welfare states, the fiscal response to a financial crisis is already built-in to the system – increases in unemployment benefits and other social welfare programmes have an inherent anti-cyclical effect, and so constitute a automatic fiscal stimulus. In countries with small welfare states, this automatic stabilising effect is also small, so the question of whether and to what extent to pursue discretionary fiscal stimulus is on the political agenda in the aftermath of a financial crisis. Therefore, if parties do have an effect on social policy outcomes in the aftermath of financial crises, it will be more likely to be observable in countries with small welfare states than those with large ones. This is confirmed by their analysis of the size of the welfare state in each of the four countries they consider. Australia, which demonstrates the clearest partisanship effect in its social policy response to the three international financial crises, has a considerably smaller welfare state than the three Northern European social democratic countries considered. However, there is an alternative, highly plausible explanation for such a constrained partisanship effect, supported by a substantial body of literature, which the authors fail to test.

The Theory of Conditional Party Government

A theory of constrained partisan effects on policy outcomes in the United States Congress was developed during the 1990s by a number of scholars of US government. Following Rohde (1991) and later Aldrich (1995) this literature refers to the thesis as the theory of conditional party government (CPG). This body of literature provides an alternative account for why a partisanship effect may be observed in some cases but not in others. The "condition" which constrains party government in the US Congress, according to CPG, "concerns the distribution of policy preferences in the two parties. It is increasingly well satisfied the more homogenous the preferences of Members are within each party (especially the majority party)" (Aldrich and Rohde, 1998: 5). This is a theoretically plausible suggestion, and the extensive literature on the detrimental effects of factionalism and party disunity on partisan efficacy[3] further supports this hypothesis. Parties which are internally divided are less likely to be able to efficiently implement the policy preferences of their constituents when in government than those which are internally united. That party disunity would be a legislative handicap seems a plausible suggestion.

Besides being theoretically compelling, the CPG thesis has considerable empirical support. Aldrich and Rohde verify their hypothesis with a quantitative studies of roll call voting in the US Congress. Using both Poole and Rosenthal's (1985) and Heckman and Sydner's (1997) methods of estimating ideal points for individual legislators, Aldrich and Rohde find evidence that "As the condition was increasingly satisfied ... the ability of the majority party to achieve outcomes preferable to its members

3 See Boucek (2009)for a recent review. On the connection between the study of factionalism and party government see Cox and McCubbins (1993)

over the policy center required less structure and resources." (Aldrich and Rohde, 1998: 24).[4]

The CPG theory provides an alternative explanation of the forces which limit the partisanship effect based on party cohesion. Aldrich and Rohde's formulation of the theory does not specifically concern social policy. Nevertheless, SKH's failure to test this alternative explanation becomes glaring when the emphasis placed on the role of party unity in prominent studies on the rise of the welfare state is considered. One of the dominant theories on the role of partisanship in the rise of the welfare state is known as power resource theory. As explained by Bradley et al. (2003) the power resource theory holds that: "organisation in social democratic parties ... results in shifts of political power that direct state policy towards more redistribution" but "the degree of organisation varies greatly across societies and through time within societies. These variations in power resources are hypothesised to result in variation in distribution outcomes." (Bradley et al. 2003: 197). Bradley et al.'s study goes on to establish substantial empirical support for the power resources theory. SKH appear to be aware of power resource theory, as they reference Korpi (1983) – the landmark publication on the subject (Starke, Kaasch and Van Hooren, 2012: 4). But the reference is only peripherally, as a study which supports the role of partisanship in explaining the rise of the welfare state. In doing so, they entirely miss the explanatory mechanism behind the theory, which accounts for the variation in degree of partisanship effects with reference to the degree of coherence (or "organisational power")of the left movement. Like the CPG hypothesis developed in the study of US Congress in the 1990s, the power resource theory developed in the 1980s studies of the rise of the welfare state place much importance on the role of intraparty cohesion in determining whether or not partisan outcomes are observed.

Given that their study wishes to provide an account for variation in the degree of partisanship effects on the welfare state, neglecting to test the CPG thesis is a serious shortcoming of SKH's study – particularly in light of the emphasis power resource theorists place on party cohesion in their widely cited accounts of the rise of the welfare state. The remainder of this paper seeks to address that omission by testing the ability of the CPG hypothesis to account for the constrained partisanship effect they observe. The CPG hypothesis is tested for three of the four countries[5] considered by SKH using a new dataset provided by Jahn and Oberst (2012), which provides a

4 Further support for the CPG theory is offered by Cox and McCubbins (2005) and Aldrich, Berger and Rohde (2005). For the primary criticism of the theory see Krehbiel (1999, 2000). For a response to the concerns raised see Aldrich and Rohde (2000).

5 Australia, The Netherlands, and Sweden are tested. Although Jahn and Oberst also provide data for Belgium, the fragmentation of the Belgian socialist movement into three parties along linguistic and other issue dimensions makes it an exceptional case (the socialist movement in the other three countries is dominated by one party). Belgium is therefore omitted for simplicity. As the other three cases prove adequate to dismiss the CPG thesis, including it would not change the result of the analysis.

measure of party cohesion of the dominant left parties in OECD countries for four time periods between 1950 and 2005. If the countries that SKH identify as demonstrating a partisan effect can be shown to be significantly more cohesive than those which demonstrate no such effect, the CPG thesis would become a serious challenge to SKH's preferred welfare state explanation for the observed variation in partisanship effects.

Testing the Effects of Intraparty Cohesion

In compiling their index, Jahn and Oberst are confronted with several important challenges relating to the definition and operationalisation of the concept of party cohesion. The most important of these is the question of issue dimensions. In much the same way that inter party conflict can occur on multiple issue dimensions, and positioning different parties on a single issue dimension is therefore conceptually problematic, intraparty conflict can also occur on multiple issue dimensions, and so evaluating the degree of intraparty cohesion on a single issue dimension is similarly conceptually problematic. While the problem of classifying parties based on the Left-Right issue dimension can be avoided by focusing on social policy outcomes, which define the parties' positions on the Left-Right scale, a similar approach is not possible at the individual level. Because the unit of analysis in Jahn and Oberst's study is the party rather than the individual legislator or roll call vote, there is no way to isolate only those cases in which the Left-Right dimension is unequivocally dominant. This is addressed to some extent by their inclusion of measure of the importance of the Left-Right dimension to intraparty conflict for each party considered. As long as the countries considered here do demonstrate have a markedly low importance of the Left-Right dimension, the index remains an adequate test of the CPG thesis.

Table 1 contains the relevant data from Jahn and Oberst's index of intraparty cohesion for each period and party considered by SKV. The first thing to note is that, in each case the Left-Right dimension is highly important for intraparty competition. Indeed when all twenty four parties considered by Jahn and Oberst are sorted by the importance of the Left-Right dimension, the left parties of The Netherlands and Sweden come out first and second respectively, with Australia's Liberal party in fourth. Concerns about multidimensional intraparty competition can therefore be put to rest. The second important observation is that there is considerable variation in the party cohesion scores, both between parties and over time. This allows a rigorous test of the CPG thesis.

The Swedish left party of the 1970s demonstrates the lowest intraparty cohesion of the four cases considered, and indeed places either last or second last (depending on the time period) of all the parties measured by Jahn and Oberst. The CPG thesis therefore expects no partisanship effect to be observed, and this is confirmed by

SKV's findings. However in the aftermath of the 1990s recession, the Swedish left party was measurably more cohesive. This would lead the CPG thesis to predict an increase in partisanship, but no such increase is observed. In fact, while the left party of the 1970s was not associated with any change in social policy in response to the oil shocks, the left party of the 1990s, which was almost 10 index points more cohesive,

Table 1[1]

Country	Crisis	Period	Partisan Composition	Direction of Social Policy Change	IPC(L-R)	Importance (L-R)
Australia	Oil Shock	1974-75	Left	0	23.81	62.69
		1975-83	Right	-	23.81	62.69
		1983-87	Left	+	23.81	62.69
	1990s recession	1990-92	Left	+	23.81	62.69
		1992-96	Left	+	23.97	62.69
	Financial crisis	2007-10	Left	+	-	-
		2010-present	Left	+	-	-
Netherlands	Oil Shock	1973-77	Left-CD-Lib	+	40.02	67.48
		1977-81	CD-Lib	0	40.02	67.48
		1981-82	CD-Left-Lib	0	40.02	67.48
		1982-86	CD-Lib	-	40.02	67.48
	1990s recession	1989-94	CD-Left	-	23.26	67.48
	Financial crisis	2007-10	CD-Left	+,-	-	-
		2010-present	Lib-CD	-	-	-
Sweden	Oil Shock	1973-76	Left	0	20.43	67.25
		1976-82	Centre-Right	+	20.43	67.25
	1990s recession	1991-94	Centre-Right	-	30.72	67.25
		1994-96	Left	-	30.72	67.25
	Financial crisis	2006-present	Centre-Right	+	-	-

implemented welfare state retrenchment. So, in the case of Sweden, an increase in party cohesion did not lead to an expansion of the welfare state, but rather to retrenchment, flatly contradicting the expectations of the CPG thesis.

The left party of The Netherlands in the 1970s and 1980s demonstrates the highest levels of intraparty cohesion and is therefore expected by the CPG hypothesis to demonstrate the clearest partisanship effect. Once again, the CPG hypothesis is not definitively supported by the data. No clear partisanship effect is observable in The Netherlands social policies in the aftermath of financial crises. Of the five governments considered, the left party had a presence in three. The first instance (in which it was highly cohesive and led the coalition) was associated with an expansion of the welfare state, the second instance (in which it remained highly cohesive, but was a junior coalition partner) neither expanded nor diminished the size of the welfare state, while the third instance (in which it was once again a junior partner, but was almost 16 index points less cohesive) was associated with a retrenchment of the welfare state. This provides some tentative support for the CPG thesis, in that the fall in the cohesion of the left party may have made it less effective in generating its preferred policy outcomes. However the prominence of multiparty coalition government complicates matters considerably, and a detailed case study of the intraparty and coalition dynamics of The Netherlands during these time periods is necessary before any definite conclusion can be drawn.

The clearest partisan effect on social welfare policy responses to financial crises found by SKV is in Australia. Of the seven governments considered, six were controlled by the Liberal Party, of which all but one expanded the welfare state in response to the crisis. By contrast, the only conservative government observed in the sample cut back on the welfare state in the aftermath of the crisis. There is therefore a strong positive correlation between the presence of a left-leaning government and welfare state expansion in response to financial crises in Australia. The CPG hypothesis would expect to explain such an observation by reference to high levels of cohesion within the Liberal party in Australia, but once more this prediction is not supported by the data. The Liberal Party in Australia consistently scores low on Jahn and Oberst's measure of cohesion. Such a finding is borne out by McAllister's (1991) study of factionalism in Australian political parties. The relatively highly level of fragmentation within the Liberal Party once again confound the expectations of the CPG hypothesis.

Conclusion

The conditional partisanship effect demonstrated by SKV gives some support to the idea that parties matter. The question then becomes what condition determines when and to what extent they matter. The Conditional Party Government theory has had considerable success in explaining the conditionality of partisanship effects

in the US Houses of Congress by reference to intraparty cohesion. The emphasis placed on intraparty cohesion by studies documenting the effect of partisanship on the rise of the welfare state make the CPG hypothesis a plausible account for the conditionality observed by SKV. Their failure to test such a well-established alternative explanation represents an oversight in their research, one which this paper addresses by testing the cases studied by SKV using Jahn and Oberst's (2012) index of intraparty cohesion. This test establishes no clear relationship between the instances of partisanship observed by SKV and higher levels of intraparty cohesion, leaving their preferred explanation by appeal to the automatic stabilising effect of large welfare states as the more plausible account.

BIBLIOGRAPHY

Aldrich, J. (1995) *Why Parties? The Origin and Transformation of Party Politics in America* Chicago: University of Chicago Press

Aldrich, J., Berger, M. and Rohde, D. (2002) "The historical variability in conditional party government, 1877-1994." In Brady, D. and McCubbins, M. *Party, process, and political change in congress. Vol. 2*. Stanford: Stanford University Press

Aldrich, J. and Rohde, D. (1998) "Measuring Conditional Party Government." Presented at the annual meeting of the Midwest Political Science Association, Chicago. Available at http://people.duke.edu/~dcross/Aldrich3.pdf (DOA 16/12/12)

Aldrich, J. and Rohde, D (2000) "The consequences of party organization in the House: The role of the majority and minority parties in conditional party government." In Bond, J. and Fleischer, R. (eds.) *Polarized politics: Congress and the president in a partisan era*. Washington: CQ Press

Boucek, F. (2009) 'Rethinking Factionalism: Typologies, Intra-Party Dynamics and Three Faces of Factionalism' *Party Politics* 15: 445

Bradley, D., Huber, E. Moller, S., Nielsen, F. and Stephens, J. (2003) 'Distribution and Redistribution in Postindustrial Democracies' *World Politics* (55: 193-228)

Budge, I. and Klingemann, H. (2001). 'Finally! Comparative Over-Time Mapping of Party Policy Movement' In Budge, I., Klingemann, H., Volkens, A., Bara, J. and Tanenbaum, E. (eds.) *Mapping Policy Preferences: Estimates for Parties, Electors, and Governments 1945-1998.* Oxford: Oxford University Press

Cox, G. and McCubbins, M.D. (1993) *Legislative Leviathan: PartyGovernment in the House*. Berkeley, CA: University of California Press.

Cox, G. and McCubbins, M.D. (2005) *Setting the Agenda: Responsible Party Government in the USHouse of Representatives*. Cambridge: Cambridge University Press.

Heckman, J. and Snyder, Jr., J. M. (1997) "Linear Probability Models of the Demand for Attributes with an Empirical Application to Estimating the Preferences of Legislators," *RAND Journal of Economics* (28: 142-89)

Jahn, D. and Oberst, C. (2012) 'Ideological Party Cohesion in Macro-comparative Politics: the Nordic Social Democratic Parties From a Comparative Perspectiv' *Scandinavian Political Studies*. (35: 3)

Korpi , W. (1983) *The Democratic Class Struggle*. London: Routledge

Krehbiel, K. (1999) "Paradoxes of Parties in Congress." Legislative Studies Quarterly 24: 31–64.

Krehbiel, K. (2000) "Party Discipline and Measures of Partisanship." *American Journal of Political Science* (44: 212–27)

McAllister, I. (1991) 'Party Adaptation and Factionalism Within the Australian Party System' *American Journal of Political Science* (35: 1)

Moreno, A. (1999) *Political Cleavages: Issues, Parties and the Consolidation of Democracy*. Boulder: Westview Press.

Poole, K., and Rosenthal, H. (1985) "A Spatial Model for Legislative Roll Call Analysis" *American Journal of Political Science*, (29: 2)

Rohde, D. (1991) *Parties and Leaders in the Postreform House.* Chicago: University of Chicago Press.

Starke, P., Kaasch, A. and van Hooren, F. (2012) "Comparing social policy responses to global economic crises: Constrained partisanship in mature welfare states." Presented at ESPAnet annual conference, Edinburgh. Available at http://www.espanet2012.info/__data/assets/pdf_file/0007/89251/Starke_-_Stream_8.pdf (DOA 16/12/12)

Convictions and the Just: A teleological challenge to the social contract state

ROBERT PATRICK WHELAN
Senior Sophister, Theology and Sociology

The essential argument of this analysis is to elucidate a particular problem found in the conception of the modern state built upon the social contract theory, specifically as it is articulated in the work of John Rawls (1921-2002). Guiding our specific enquiry is the tension that is created between concepts of Justice, such as the obligation to rules of the state, and conceptions of the 'Good life' that point towards individual pursuits of happiness and flourishing. These two elements of political discourse are put as mutually exclusive within the social contract theory purported by Rawls and it is our aim to analyse how such a split has a tendency towards an atomised and individualised liberal state, particularly as emanating from the concept of procedural justice. By loosely taking Thomas Hobbes' (1588-1679) account of the need for a state as aanalogical starting point, a fruitful cross comparison emerges that suggests that the type of state presented by Rawls has a convoluted stance on essential issues. The main principle here is to show that there is an unnecessarily drastic split between deontological and teleological thought in social contract states. Deontology concerns ones obligations in terms of justice and relates to the elements of the social and political sphere that demand that an individual can pursue their conception of the good life only in so far as they do not break their obligation to concepts of justice.

For example an individual can pursue their hobbies/passions only insofar as they do not encroach upon the rights of others to do the same. On the other hand teleology owes its origins to Aristotle's reflections and understanding of people's pursuit of what constitutes what is 'good' through their individual lives. The Telos, or 'final Cause', is that which motivates people into action. It is the end for the sake of which something is done. For instance people follow a certain understanding of the right or desirable way to live as it fits in with their acceptance of what constitutes a good life. However, in the liberal contract state, there is a lack of dialogue between the reasons for following a certain life or engaging with a certain worldview when it comes to ones obligations to justice (Bogen, 1995, p. 868).

This split between the Just and the Good, will be assessed by drawing upon the French hermeneutical phenomenologist, Paul Ricoeur (1913-2005), who, in his treatment of the Just, shows that the split between Aristotelian teleology and Kantian Deontology in political philosophy and theory is far more drastic than need be the case, with specific and relevant overlaps between the two being offered. This analysis will begin with proposing an analogy from Thomas Hobbes, who is one of the earliest proponents of the social contract theory of which Rawls is indebted, but who also shows in his treatment of a generally negative anthropology and through the 'state of nature' thesis that human beings are atomised individuals before the construction of the state, and that there is a necessity of the state to provide elements of communitarianism, in diametric opposition to the sequence Rawls argument takes.

The modern neo-liberal state, as seen through the positions offered by Rawls, suggests a system and conception of the Just that narrowly emphasises a focus upon the Right which has led to the creation of a highly atomised, privatised and individualistic society whereby the particularities of one's identity are not needed within the public forum, as if people were to leave their cultural particularities at the foot of all institutions. What is perhaps an irony to be found in comparing Hobbes initial social contract theory to Rawls' is that the state of nature that precedes the State itself is characterised as a highly atomised and antagonistic society. Here the reliance on the bare minimum in terms of rights in neo-liberal societies has to a very real degree reproduced this level of atomisation and to some degree ruled out the level of community or sense of self, living with and through others and otherness at the political level. An attempt to remedy or re-situate the focus of the state away from a one-sided emphasis on the Just and the Right towards the conception of the Good, that resides at the individual and the communal can occur by re-configuring the contours of the state. In turn an attempt is made to make the specific desires towards one's conception of the Good and ones particularities of life, for example ones religious beliefs, of relevance to conceptions of the Just and the Right within the liberal state, rather than subservient if not irrelevant to them.

Thomas Hobbes: Setting the stage for the social contract theory

The analysis begins with Thomas Hobbes logical and philosophical deduction of the meaning for the construction of a state itself, not with tracing the historical developments of states in particular (Copleston, 2003, p.41). In his most seminal work, the "*Leviathan*" (1668), Hobbes offers his reflections, as to what necessitates logically the construction and dependence upon a sovereign authority and system of adjudication for the interests of peoples to flourish.

Negative Anthropology and the State of Nature:

The sequence Hobbes argument takes is to first ground the necessity for a third party adjudication in the cynical anthropology of human beings as existing in a pre-state society, the "State of Nature", which acts as the narrative of the asocial condition of humankind. In this fictional situation, Hobbes' negative anthropology, in which the radical emphasis on humanities ability to be violent, selfish and ruthless in their pursuit of the good, . naturally establishes an atomised, individualised world.

Hobbes presents the state of nature as containing a multiplicity of individual human beings, each of whom is driven solely by their passions and desires (Copleston, 2003, p.31). This individualism suggests the existence of a State of Nature as it relies upon the individual to be dependent solely upon their own self, desires and passions for their security. However by applying a somewhat abstract logical analysis, vaguely resembling rational choice theory, Hobbes suggests that the necessity for a state becomes obvious and arises from the rules a reasonable being would observe to enable them in pursuing their own life goals. Within the world of Hobbes' abstractions, the logically and rationally minded individual would, if they were conscious of the predicament of all being governed by impulse and passion, desire for a third party to turn to. While the antagonism between individuals is clearly necessary to ascertain the desire for a sovereign ruler, this does not exclude the notion of goodwill towards others from Hobbes altogether. However altruism and charity as a feature of humanity is quickly dismissed as a relevant factor, as Hobbes suggests that it is not a strong enough character of humanity to be a basis for constructing civil society (Gert, 1995, p.368). As a mentality or conviction, the idea of generosity and mutual recognition is not able to trump the greater intuition towards self-interest in humans.

Entering into the contract:

Hobbes concludes that to escape such anarchy, the basic reciprocal contract theory is necessitated, and is reinforced and adjudicated by something like a state government, one that to concur with Weber, held the monopoly on the legitimate use of violence to resolve conflict between members of the republic (Robinson and Groves, 1998, pp. 51-52). In light of the aggression potential in the State of Nature, Hobbes

argues that letting some elements of individual choice being given to the state so that one's long term preservations may be enhanced and better guaranteed is the most logical conclusion of living within the State of Nature. The hallmark of the Hobbesian state is this social contract, an imaginary device whereby atomised individual people come together to form a society that accepts some minimal form of obligation to one another. At the time of its writing the contract theory had other significant achievements as it was able to justify the political state/government on the basis of the consensus of the people and away from more abstract decrees such as divine right. Nevertheless the hallmark constraint that it has offered is its particular issues of minimalism. It is an argument for obeying the law of the state as long as it is generally obeyed by others, and this minimal reciprocity is a key characteristic of the contemporary contract liberal states follow (Gert, 1995, p.369).

The insights from Hobbes break down in relevance for the current task in that though pertinent to note, for Hobbes atomised individualism is not simply ruled out by the state. What is initially ruled out is the proneness to self-destructive mutual enmity, due to the power and might handed to the adjudicator found in the state. However communal enterprises, especially in the economic sense are suggested as only being possible within the state, and so suggests that atomism is resolved in certain spheres naturally by the state and that that is its intention in Hobbes' work (Copleston, 2003, p.40-41).

John Rawls; A procedural approach to Justice

Turning now to the contemporary application of the social contract theory made exemplary by John Rawls, it is suggested by his work "*A Theory of Justice*" (1971) that it is possible to harmonise social justice with a liberal capitalist democracy utilising the contract theory. Through a nuanced and specific understanding that deliberates at a procedural conception of justice it is suggested that justice is exclusively abstracted from conceptions of the particular good that are unable to be "translated" to a form of pure dialogic reason (Robinson and Groves, 1998, p.114).

Rawls formulates a procedural justice that attempts to eradicate the values already upheld by particular participants that may be in contest. He applies the device of a contract to find overall principals of justice, specifically for the redistribution of wealth in society and what is particularly important is that he does not allow those involved in the contract to justify the principals of justice through any values or considerations they may have inherted from their culture or particular backgrounds and beliefs.. Through his model of "Justice as Fairness", convictions are left behind a "Veil of Ignorance" that will in turn facilitate the creation of general principles.

This "Veil of Ignorance" can be comparable to Hobbes State of Nature in that it is asocial and precedes the construction of the state, however, the important distinc-

tion is that in Hobbes the asocial framework is inherently tied to people's desires and particularities, while in Rawls' "Veil of Ignorance" it is precisely the opposite. It is the setting aside of all information about your distinguishing social characteristics to ensure a fair choice for principles of justice. One must choose as if you will be in any social position so that you are compelled rationally to take the interests of everyone equally, ensuring fairness to all (Nagel, 1995, p.897). With ignorance of ones future outcome, the essential cognitive exercise is to deliberate fairly on what way society should be, given that one's race, gender, and all physical and social characteristics are unknown in the veil..

Despite its merits and achievements what is of particular interest in this analysis is that what is essentially a lowest common denominator of convictions is necessary for the exercise to have worked. For example, while ones conception of the good life at large owing to their particular beliefs (e.g. their view that life is best based upon religious doctrines) is eradicated from the dialogue, specific and more "basic" values can be treated, such as safety, security and self-respect. Though what can be contended against this is that these more prime or basic concepts cannot be so wholly abstracted from the particular teleological backgrounds and ideas that people use to ground them. For example, the concepts of dignity, of justice and even of fairness finds their expressions through tradition and heritage, so that one's religious belief constructs what dignity is, not the other way round, nor is it possible without it. To abstract the particular is essentially to render the concepts completely ephemeral. With an emphasis on the Right alone within the confines of the state, a society remains whereby the only preferences are based on what is supposedly completely transparent and universal, in turn making such a state, if such preferences even exist, clinically reciprocal and cautious to the point of losing those characteristics that make humanity (Blackburn, 2001, pp.108-110).

The Teleological critique from Ricoeur

The state offered by Rawls can be bluntly characterised as one focusing on reciprocity alone, where the adage to give only as much as the other will give is internalised into a system of redistribution based upon concepts of justice supposedly grounded in universal reason. Rather, one must take into account the historically and culturally determined character of the estimation among which historical judgment has to find its orientation. The strictly procedural interpretations of justice emphasising the Right in Rawls, in turn overemphasises the return of any teleological considerations back to the private conscious of all parties involved in the social contract, which in turn completely detaches the concept of the Just from considerations of the Good.

Reducing everything to the law and legality in the sense of the Just and its pragmatic exposition in terms of rights is problematic for Ricoeur as the law always seeks to ad-

dress the general features of a case and not its singularity. Drawing upon Aristotle, it can be seen that the law always deals with cases in their universal aspect, not in terms of their uniqueness, and again the challenge to the solely contractual approach is that the strictly defined notions of justice, in terms of equivalence and reciprocity, usurp the need to treat the particular (Pellauer, 2007, pp. 134-137). Regarding concepts such as justice, fairness and redistribution through particular social institutions there is a tendency to ignore that there is a historical and communitarian nature to the meanings and outcomes desired for this.

A pertinent analogy is to be found through the concept of Human Rights as they are an integral basis of the modern contract theory. The split between deontology and teleoology can be found again in commentators such as Mary Robinson and Hans Kung (Robinson, 2003) who seek for a 'Global ethic', again a concept grounded in Enlightenment universalism whereby the principles of justice seek to establish a universal set of rules for good conduct and the operation of states that can be applied globally. However, many critiques are amenable to such an ambition, despite how intuitively good it may seem, the primary critique being that such a construction of rights comes historically from Western thought, grounded in Western history of the use and understanding of particular anthropological and moral concepts. Again the relation between universal concepts based on abstract reasoning comes to a head with the contingent and concrete particularities of given social understandings.

Deliberating upon the concept of Human rights, Ricoeur notes that though they have been ratified by about every state, suspicion can be levelled against them that they are the fruit of the history belonging to the West alone, which in its most extreme form could be charged as cultural imperialism. In human rights discourse a particularly global use of both the universal and the particular conceptions of the good and the just can be found, in that they emanate from a particular, mostly Western cultural history. Rather what is crucial in Ricoeur's eyes is that through their acceptance into the rest of the world, what is exemplary and necessary will be a submission of the claims to discussion; one that incorporates the level of convictions to be elevated above conventions. Only such dialogue will be able to deal with the proclamation and acceptance of such universals (Ricoeur, 1992, p 290).

For Ricoeur the mediation between the highly Western understanding of rights and the desire to make it universal can only happen through the freedom to apply universal decrees through particular understandings, where such an action demands that conviction and obligation meet head on in discussion and debate rather than the latter regulating the former to the private sphere. Despite its cultural baggage, Human Rights have been lauded by most of the world in completely different contexts and cultures, therefore a brilliant use of the dialogue between the Just and the Good is the implementation of the institutional understanding of human rights within particular societies using the convictions of that society to articulate them. For example

the right to education as a universal principal can be evaluated by each particular society, where the leap from a right to a privilege rests on public convictions and dialogue

> "*This concerns not only the meaning that each of these needs, taken separately, may possess in a given culture but also the order of priority established in each case among the spheres of justice and the diverse and potentially rival goods that correspond to them. In this sense every distribution … appears problematic: in fact, there is no system of distribution that is universally valid; all known systems express revocable, chance choices, bound up with struggles that mark the violent history of societies*"(Ricoeur, 1992, p. 284).

The fruitful insights gained from the concept of Human rights, find similar relevance for the treatment of liberal states regarding all forms of Justice, especially in the fashion of procedural justice found in Rawls. Regarding concepts of redistribution and the stance of the state on varying laws and policies such as religion in education and abortion, greater dialogue and evaluation of conceptions of the Good need to occur. In line with Ricoeur individuals need to come from their particularities in issues of discussion with differing parties on a topic, rather than being subjected to a highly speculative test of what is perceived as the lowest common denominator to all groups involved. While concepts may be shared between the Atheist, Theist, Deist, Pro-choice and Pro-life, the meaning of the concepts find different expression per group, which in turn both nullifies the notion that it has a fixed meaning away from a reception and also demands that dialogue between them is a necessary constituent of any liberal democratic state. In turn, dialogue in the public forums argues for a new capacity of the members of the public within the state to understand a worldview other than one's own, akin to learning a foreign language to the point of being able to appreciate it with respect to one's own (Ricoeur, 2007, p209).

It is equality itself, and respect owed to others in their singularity that calls for differential treatment right up to the institutional level of rules and procedures for action. Abstract universalism is lambasted for having remained blind to particular differences in the name of liberal neutrality. This comes to a head in such public debates regarding justice and legality such as abortion, when convictions rise to the level of the state, in terms of interpreting the data where no recourse to a purely objective and universal answer may be found.

Conclusion

This analysis started by outlining the state envisioned by Hobbes, that rested upon initially acknowledging that individuals have distinct conceptions of how to pursue the good life and that these conceptions may differ.. However, in Hobbes this disagreement was characterised as antagonistic violence towards each other and in turn necessitated the arbitrator found in entering a contractual obligation towards the other. In Rawls we found a contemporary re-imagining and application of the contract theory that started without recourse to people's convictions but rather demanded an abstraction from them. In turn it was suggested that the relinquishing of the teleological altogether from the state and from public discourses upon the very content of justice and obligations tended toward an atomised individualised society.. Finally, we suggested with Ricoeur that conceptions of legality and justice in their relation to the state cannot be based upon a universal sense of reason that attempts to hinder dialogue with teleological conceptions of the good grounded in the historical and particular as this renders such universal principles devoid of any relevant understanding or content. In turn what it suggested is that the public forums and dialogues with respect to policies and political manifestations of justice enter into discussion with the convictions of society rather than neglect them.

BIBLIOGRAPHY

Blackburn, Simon. 2001 *Ethics: A very short introduction*. Oxford: Oxford University Press.

Bogen, James. 1995 "Teleological explanation" in Honderich, Ted (ed.) *The Oxford Companion to Philosophy*, Oxford: Oxford University Press.

Copleston, Frederick. 1959 (2003 reprint), A History of Philosophy. Volume 5: British Philosophy, Hobbes to Hume. Continuum.

Flanagan, Owen. 1995 "Deontology" in Honderich, Ted (ed.) *The Oxford Companion to Philosophy*, Oxford: Oxford University Press.

Gert, Bernard. 1995 "Thomas Hobbes" in Honderich, Ted (ed.) The Oxford Companion to Philosophy, Oxford: Oxford University Press.

Nagel, Thomas. 1995 "Veil of Ignorance" in Honderich, Ted (ed.) *The Oxford Companion to Philosophy*, Oxford: Oxford University Press.

Pellauer, David. 2007. Ricoeur : a guide for the perplexed. London: Continuum.

Ricoeur, Paul. 1992 (English translation). *Oneself as Another*. Chicago: University of Chicago Press.

Ricoeur, Paul. 2007 (English translation) *The Course of Recognition*. Cambridge: Harvard University Press.

Robinson, Dave and Groves, Judy. 1999. *Introducing Philosophy*. Cambridge: Icon Books.

Robinson, Mary. 2003. "Linking Ethical and Globalisation" in Hogan Linda and Fitzgerald Barbara (ed.) *Between poetry and politics: essays in honour of Enda McDonagh* Dublin: Columba Press.

Reconciling International Humanitarian Law with Targeted Killing Operations: A Study of US Drone Strikes in Pakistan.

LAURA TWOMEY
Senior Sophister, Law.

Laws are silent in times of war

- Cicero

Since 2004, the United States has deployed a sophisticated programme of targeted missile strikes launched from remotely piloted aerial unmanned vehicles (*drones*), aimed at killing suspected terrorists in Northwestern Pakistan (Stanford and NYU, 2012, p. vii). It has been framed as a successful counterterrorism policy in response to the threat of al-Qaeda (Yoo, 2011/12, 60-61). The Obama Administration has taken the unprecedented move to escalate the programme, whilst maintaining that the drone strikes cause "extremely low or no civilian deaths" (CCIC, 2012, 28-30). This view is contested. According to data collected from June 2004 - January 2013, The Bureau of Investigative Journalism ('Covert Drone War', 2013), whose data collection methods have been deemed "highly transparent" and their investigations "more thorough than others" (Stanford and NYU, p. 53), has estimated the number of US drone strikes in Pakistan to be 359 (the Obama Administration authorised 307 of them). They estimate the strikes to have killed 2,621-3,442 people in total; with 473-889 civilians and 176 children included in these figures. In addition to this, there have been 1,262-

1,424 people reported injured.
The policy has received considerable criticism, which has centered upon the non-disclosure of targeting criteria, the reports of significant collateral damage and the legal basis for the application of International Humanitarian Law (*IHL*) outside the traditional battlefield. During his time as UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Philip Alston (2010, p.24) noted with concern that the recent increased use of drones, "make it easier to kill without risk to a States forces … policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively." Furthermore, according to a report conducted by the Human Rights Clinics at both Stanford and NYU (2012, p. v). , " … in light of *significant evidence of harmful impacts to Pakistani civilians* … current policies to address terrorism through targeted killings and drone strikes must be carefully re-evaluated." The UN is to open an investigation into the strikes in 2013. The current Rapporteur has cited the absence of an independent monitoring programme mechanism to keep the US in check, and the possibility that some of the strikes may amount to war crimes, as reasons for his decision to take this action (Boycott, 2012).

This article will focus on US compliance with IHL, both customary and as enshrined in the Geneva Conventions, governing the treatment and protection of non-combatants. It will note, with grave concern, that the US does not appear to be making adequate positive efforts to reconcile their targeting killing programme with IHL. This results in disproportionate and unnecessary collateral damage, creating unfathomable hardship for the civilian population of Northwestern Pakistan.

Death from above: the Role of Targeted Killing in US Counterterrorism Policy in Pakistan

The drone strikes in Pakistan fulfill the constituent elements of a targeted killing programme. First, the threshold for the use of lethal force is clearly met by the heavily armed drones. Intent and premeditation is encompassed in US drone strike policy, as the Obama Administration and the CIA reportedly list the names and details of "high value terrorists, who are marked next to be targeted and killed" in advance of many strikes (Becker and Shane, 2012). Lack of physical custody is a factor in these strikes. Within the Administration, it is generally understood that, "the capture part has become largely theoretical" (*Ibid*.). Finally, those targeted must be attributable to a subject of international law. Armed non-state actors may be included in this definition. Described broadly as, "groups that are armed and use force to achieve their objectives and are not under state control," (International Council on Human Rights Policy, 2000, p. 13) they can include terrorist groups such as al-Qaeda, and associated armed operatives such as rebel groups, local militia, vigilantes, warlords and

paramilitary groups (Holmqvist, 2005, p. 45).

Targeted Killing: The Israeli Perspective

The policy of targeted killing was examined before the High Court of Israel in *The Public Committee against Torture in Israel v The Government of Israel,* 2005 (*PCATI v Israel*). The policy permitted the Israeli Defence Forces (*IDF*) to act in order to kill members of terrorist organizations involved in the "planning, launching, or execution of terrorist attacks against Israel" (*Ibid*., para 2). This large-scale policy, executed during the second intifada, differed to previous targeted killing operations conducted by the IDF, considering the scale of the effort and the tactics deployed; *eg* the use of sophisticated weaponry, helicopters and warplanes in targeting (David, 2002, p. 5).

The majority held that the operations, tempered by the constraints of IHL, are lawful. President A. Barak noted from the outset that " ... military activity does not take place in a normative void..." (*PCATI v Israel*, para. 17) invoking the aforementioned "normative paradigm of hostilities." He impressed the need to balance "security needs and individual rights" upon the IDF (*Ibid*., para. 63). President D. Beinisch, in his concurring opinion, acknowledged that international law has not yet developed the laws of armed conflict to respond to combat against terrorist organisations, as opposed to a traditional army (*Ibid*., para. 48). In adapting to this new state of affairs, the judgment emphasised a strong burden of proof on State authorities, recommended a mandatory ex post judicial review to establish the legality of each targeted killing, and crucially, that the decision to target must only be made "on the condition there are *no less harmful means*" (*Ibid*., paras. 40, 54, 60).

The IDF policy is similar to that used by the US in Pakistan, in terms of its breadth, strategy, and the weaponry deployed. Therefore, the case represents valuable guiding jurisprudence as to the lawfulness of US policy, and how it can be more closely reconciled with the aims of IHL. Thus far, no US Court has reviewed the drone strikes. As such, this case will be referred to throughout this study as the most relevant legal commentary on the subject.

PCATI v Israel demonstrates it is only when Israel's security interests are balanced with the estimated collateral damage of a strike, that targeted killing as a counter-terrorism policy may be deemed compatible with IHL. When such conditions are met, the lethal targeting of a legitimate threat is reconcilable with IHL. The judgment delicately balanced the elements of applicable IHL, to find that a targeted killing may be lawful within the "normative paradigm of hostilities," however this can only be determined on a case-by-case basis, and must be weighed against collateral harm (*Ibid*., paras. 45-46).

Which Legal Framework Regulates Targeted Killing Operations?

The application of IHL will be triggered as soon as the threshold for armed conflict has been reached (Aust, 2011, p. 235). It follows that the use of lethal force is generally permitted by IHL, subject to restrictions (Henckaerts, 2005, p. 198). It is therefore permitted in the course of an armed conflict. Difficulty arises in this instance because Pakistan has not been recognised by the US as an active armed conflict (akin to the neighbouring conflict in Afghanistan). The drones patrol an unconventional battlefield, populated by civilians. There is no acknowledged presence of US troops on the territory of Pakistan, however there is a reported total of 335 CIA officers, contractors and special operations forces present (France 24, 2011). Thus, determination of an armed conflict must be dependent upon objective criteria sourced elsewhere.

Despite this, the Obama Administration has repeatedly stated that the US is engaged in an armed conflict with "al-Qaeda, the Taliban and associated actors" (Holder, 2012), without referencing a territorial nexus. An "associated force" has been defined as, "an organized, armed group that has entered the fight alongside al Qaeda, and is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners" (Johnson, 2012).

Are the Operations Part of an International Armed Conflict?

An armed conflict is classified as international when arising between two sovereign States, and when, "any difference arises between two States and (leads) to the intervention of members of the armed forces," (Common Article 2 to the Geneva Conventions, of 12 August 1949). This determination applies, regardless of there being a declaration of war, or recognition of a state of conflict on the part of either party. As there is currently no armed conflict underway between the military of the United States and the military of the State of Pakistan, it follows that the regulations applicable to international armed conflict (*IAC*) do not apply to the targeted killing programme.

Are the Operations part of a Non International Armed Conflict?

The determination of a non-international armed conflict (*NIAC*) is more complex than the determination of an IAC (between two States), as the threshold required for determination is codified in neither IHL Treaty law nor referenced in customary law. The factual threshold for an armed conflict remains undefined by treaty and customary humanitarian law.

In the absence of codified criteria, the International Criminal Tribunal for the Former Yugoslavia (ICTY) provides us with important guiding jurisprudence. Here, the Court held that

> [a]n armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and *organised armed groups* or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.
>
> (*Prosecutor v Tadic*, 1995, para. 70)

Furthermore, to qualify as an organised armed group, the ICTY provides the following criteria

> [t]he existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics.
>
> (*Prosecutor v Ramush Haradinaj* , 2008, para. 60).

Additionally, President A. Barak (2005, para. 21) notes in *PCATI v Israel* that, " ... in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states."

Characterising the Current Armed Conflict: The US Drone Strikes as part of the NIAC in Afghanistan: Application of the *Tadic* Criteria.

(a) Protracted Armed Violence

Violence in Northwestern Pakistan has long involved a range of armed non-state actor groups, a situation that has escalated since the US invasion of Afghanistan (Stanford and NYU, 2012, p. 18). In 2011, Suicide bombings, armed attacks, and killings by the aforementioned groups killed hundreds (Human Rights Watch, 2012). Islamist militant groups *including al-Qaeda*, affiliated with the umbrella group, Tehrik-e-Taliban Pakistan (TTP), control parts of the FATA and the Northwest Fron-

tier province (Breau, Aronsson and Joyce, 2011, p. 11). The Guardian has reported that the TTP works closely with the Haqqani network which is considered to be the strongest fighter against international forces in central and eastern Afghanistan. Its attacks have included the rocket-propelled grenade assault on the US embassy and NATO compound in Kabul in September 2011 ('Haqqani network is a terrorist body, announces Hillary Clinton', 2012).

Thus, the criterion of protracted armed violence is fulfilled in this region. It is clear that when faced with a large armed network akin to the above, law enforcement methods would be ineffective in suppressing sustained violence.

(b) al-Qaeda, the Taliban and associated actors as "Organised Armed Groups"

In application of the "organised" criterion, it is recommended to keep in mind two categories of al-Qaeda. The first category is the "global network" of al-Qaeda, a "series of loosely connected operational and support cells", "that … lack the characteristics of armed groups" (Duffy, 2005, p. 252). The second category is a characterisation of al–Qaeda as an organised armed group, part of the network of Islamic militants taking a "direct part in hostilities" against US forces (Paust, 2012, p. 255). The "*al-Qaeda core*" is based in Northwest Pakistan, (Nelson and Sanderson, 2011, p. VII) and "has provided a combination of training, explosives, strategic communications, and counterintelligence expertise to the TTP (and) the Haqqani Network ..." (*Ibid*., p. 10). It follows that the latter category may be characterised as an organised armed group that satisfies the *Tadic* and *Haradinaj* criteria in Northwestern Pakistan.

The facts purport to establish a NIAC between the US and "al-Qaeda, the Taliban and associated actors" (Koh, 2010) is underway in *at least* the Northwestern territory of Pakistan. It is debatable whether this state of affairs is derived from an armed conflict that has independently arisen, or one that is a 'spill-over' armed conflict *ie* an armed conflict that has spilled over the borders from Afghanistan.

A "spill-over" conflict is a possibility, because the *Tadic* criteria arguably do not limit a NIAC to a territorial nexus, *ie* IHL coverage of the predetermined NIAC in Afghanistan does not end abruptly at its borders. Furthermore, Common Article 3 (discussed below), if read in conjunction with its Commentary, emphasises the need for "armed conflict" to have a broad as possible interpretation (Pictet, 1952). In the policy document "National Security Strategy 2010", the Obama Administration singles out Afghanistan and Pakistan as the "frontline of their fight," (The White House, 2010, p. 4) and "the epicenter of violent extremism practiced by al-Qaeda" (*Ibid*., p. 20). With specific reference to Pakistan, the document describes al-Qaeda's core there, as the "most dangerous component of the larger network." Upon examination of the language used, the document seems to address the strikes in Pakistan as being part of *one NIAC* with Afghanistan.

The Alternate View: US Drone Strikes in Pakistan as a Part of a Wider "Transnational Armed Conflict"

Another school of thought claims to justify the application of IHL to drone strikes in Pakistan. It has been posited that the new transnational aspects of modern terrorism "seem to have produced a quest for new law" (Pejic, 2005, p. 97) and a third category of armed conflict, known as "transnational armed conflict" (Sassoli, 2006, p. 42). This theory takes into account the more dispersed, «transnational» network of al-Qaeda, that acts globally.

This theory is supported by public statements by the Obama Administration who often refer to, «... a *global campaign* against al-Qaeda and its terrorist affiliates" (*Ibid*., at 19). This would point to a potential engagement by the United States in a "transnational armed conflict", without a territorial nexus. This view is supported by US drone strikes in Yemen, Somalia and Nigeria (Becker and Shane, 2012). The theory suggests that in the course of a "transnational armed conflict", "[IHL] goes where the participants in an armed conflict go" (Guiora, 2012, p. 312). This is relevant even in instances where the *Tadic* criteria are not fulfilled on a territory *ie* where there is no "paradigm of hostilities." This is a dangerous broadening of the rules of IHL. Christian Tomuschat (2010, p. 5) correctly holds that "[i]n circumstances where no fighting between opposite forces takes place, a license to kill is unacceptable". Mary Ellen O'Connell is also correct in her formulation that, "[h]umanitarian law has a territorial aspect and limits. It exists where (but only where) fighting by organized armed groups is intense and lasts for a significant period," in a territorially limited zone" (*Nasser al-Aulaqi v Obama*, 2010, ps. 13-14).

It is clear that the lethal force used in the course of the "paradigm of hostilities" in Pakistan should be distinguished from the use of lethal force that has taken place elsewhere, removed from "hostilities." The wider geographic application of IHL to counterterrorism operations is outside the scope of this study, but in brief, it is submitted that such strikes do not take place within the "normative paradigm of hostilities" (Melzer, 2008a, pp. 234 - 244) and as such are unlawful under IHL, as distinct from the use of lethal force within this paradigm, in Pakistan.

It is thereby established that IHL applicable to a NIAC applies to the drone strikes in Pakistan, either as a result of an independently determined NIAC upon application of the *Tadic* criteria, or as a result of a spillover NIAC from Afghanistan. Therefore, the drone strikes may be permissible within this "normative paradigm of hostilities." The suggestion that the operations may be part of a "transnational armed conflict" is too broad a theory to reconcile with the aims of IHL. It should not apply to the operations in Pakistan, and consequently, elsewhere. Such targeted killing operations taking place removed from the "normative paradigm of hostilities." *Ergo*, such targeted killings cannot be lawful.

What rules of International Humanitarian Law are applicable to the US Drone Strike Operations?

The dearth of treaty rules governing NIAC emphasises the importance of customary law in this regard. A rule of custom emerges from the practice of States, and by the general recognition by States that this practice is sufficiently settled to amount to a binding obligation (Aust, 2011, p.6.). The fundamental customary principles of distinction, proportionality and necessity apply to the drone strikes. The US will be bound by customary IHL by force of its "existence as a sovereign and independent State" (*PCATI v Israel*, 2005, para. 19).

Common Article 3

Common Article 3 constitutes customary law applicable to a NIAC (Henckaerts, 2005, p. 187). It has been "invoked, reaffirmed and relied upon" numerous times since its creation, crystallising its position as a mode of State practice (Cassese, 1986, p. 283). It provides a rudimentary framework that establishes a minimum foundation of protection. It "prescribes the humane treatment ... of all those who take no active part in hostilities," once an armed conflict has arisen (Kalshoven and Zegveld, 2001, p. 69). Most significantly, it discards the need for non-state parties to ratify the Geneva Conventions.

It follows, that in terms of the current NIAC, the USA is at a minimum bound by the provisions of Common Article 3 in its operations in Pakistan, and the applicable customary law. Common Article 3 remains the sole application of Treaty IHL to a NIAC when the State has not ratified Protocol II (8th June 1977) to the Geneva Conventions. Protocol II relates to the protection of victims of NIAC. It is a significant instrument that emphasises the necessity to protect human rights during a NIAC. However, the United States has not ratified this Protocol.

Who may be deemed a "Lawful Target" in a Drone Strike? The Principle of Distinction

The principle of distinction is formulated as part of customary law as follows, "the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians" (Henckaerts, 2005, p. 198). This places a burden of proof on the State to ascertain the legitimacy of the target, and crucially, take precaution in the course of a targeting operation.

The Principle of Distinction and NIAC: Diverging concepts

While a State party is expected to abide by IHL, a non-state actor is, as described by Amos N. Guoira (2012, p. 320), "beholden to neither law nor morality." This factor proves to be particularly troublesome when applying the principle of distinction. The Geneva Conventions (I - IV, 12 August 1949) codify the principle of distinction for lawful combatants in IAC only. A lawful combatant is an actor who follows the laws of armed conflict ie is a member of the armed forces of a party to a conflict (Article 4 (1) GC III relative to the Treatment of Prisoners of War, 12 August 1949). However, members of a militia who carry their arms openly, have a fixed and distinctive sign visible from a distance, are commanded by someone responsible for their subordinates, and conduct their operations in accordance with the laws and customs of war also fulfill the criteria to be classed a lawful combatant (Article 4 (2) (a) - (d), GC III and Article 43 Protocol II). A lawful combatant is a legitimate military target.

As distinct from a traditional IAC, the factual determination of a lawful target under a NIAC is significantly more vague. The 21st century model of asymmetric and transnational conflict between States and non-State actors was unprecedented at the time of drafting the Geneva Conventions. The aforementioned lawful combatant status does not exist. States have never acknowledged a privileged status for "rebels in internal situations" (Human Rights Institute, 2011, p. 95). This recognition also does not stretch to terrorists and members of organised armed groups party to a conflict. Thus, a so-called "irregular" in a NIAC is not entitled to such privileges that would be accorded to a "combatant" during an IAC. The terrorist or "irregular" in a NIAC maintains status as a civilian and protections therein until they "take an active part in hostilities", as provided for by Common Article 3 and customary law.

Antonio Cassesse (2008b, p. 17) outlines two reasons engagement in armed conflict by "irregulars" creates risks for the local population. First, as the irregulars do not adhere to the identification requirements of Article 4 of GC III, the identification of a potential target is extremely difficult. Second, without the support of a State military, they must rely on the support of the civilian population in terms of shelter, supplies and transport. This leads to the potential mistaken identification of those with protected civilian status as "irregulars" as a result of their conduct.

The ICRC's Interpretive Guidance: Criteria for Participation

As established, Common Article 3 (as a minimum) applies to the targeting operations, and provides the only applicable Treaty guidance for the principle of distinction. However Common Article 3 merely provides protection for those "taking no active part in hostilities." Taking a "direct part" in hostilities, although referred to, remains undefined by customary law.

In the ICRC document, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" Melzer (2008b, p. 995-996) provides valuable guidance in interpreting this important provision.

First, in outlining a temporal scope of immunity, Melzer (*Ibid*.) recommends that a civilian will lose their protective status in the "preparation before the execution of an act of participation, and deployment to and from the location." This is quite a narrow construction of taking a "direct part." Melzer (*Ibid*.) refers here to direct participation in *hostilities* and not a broader "armed conflict". Thus, if criminal activity during this time meets the required level of harm, but does not meet the criteria for direct participation within the "paradigm of hostilities", the State response must comply with law enforcement standards (Alston, 2010, p. 64). This is a well constructed interpretation, which puts limits on the right to use lethal force when it is clearly unnecessary and "arbitrary", even within the broader 'theatre' of armed conflict. Melzer (2008b, p. 995-6) further requires that the action of participation reach a "threshold of harm" and that a "belligerent nexus" is maintained, with the action being committed in support of the party, to the detriment of the other.

Melzer (*Ibid*.) further holds that members of an armed group, belonging to a non-State party to an armed conflict, "cease to be civilians, for as long as they assume their continuous combative function (*CCF*). Most notably, within this document an "organised armed group" refers exclusively to the *armed wing* of a non-state party (*Ibid*., p. 1006). A person who has assumed a CCF is a legitimate target *at all times*.

To What Extent does the US Adhere to the Principle of Distinction?

The identification of "legitimate targets" in Pakistan presents a stumbling block for US drone pilots in fulfilling their obligation of conducting discriminate targeting. It is in Northwestern Pakistan that, "fighters regularly intermingle with civilians, engage in routine activities and do not wear uniforms" (Stanford and NYU, 2012, p. 112).

CCF is especially pertinent in the case of the armed conflict with "al-Qaeda, the Taliban, and associated actors" in Pakistan, as the degrees of "participation" vary owing to the nature of their operations as non-State actors who require civilian support in their operations.

It must be noted that the drone vehicles themselves are technologically capable of *enhancing* adherence to the principle of distinction. The drones have highly advanced surveillance technology onboard, giving a "perfect picture" of a proposed target, ensuring optimum accuracy in deploying lethal force (Mayer, 2009). The problem is not one caused by means of lethal force, rather the *ratione personae* of the target.

(a) "Personality" Strikes

When the US target named individuals, this is known as a "Personality strike." This method is described by the Administration as being distinct from "targeted killings ... directed against collected, unspecified or random targets" (Becker and Shane, 2012). The CIA has not disclosed the criteria for inclusion in the "Kill List." (*Ibid*.,) Brown J in *al-Bihani v Obama* pointed toward the Obama Administration, "supporting a standard (of identification) whose outer bounds are not readily identifiable." Alston (2010, p. 68) believes the criteria are "more expansive than that set out by the ICRC Study." This silence on criteria and safeguards surrounding targeting has led to the potential that some of these killings may be extrajudicial and unlawful.

(b) "Signature" and "Pattern of Life" Strikes

When the US target unknown yet suspicious groups of individuals, this is known as a "Signature strike" (*Ibid*.,). These "pattern of life" strikes further obfuscate the already blurry adherence to the principle of distinction in the course of the drone strikes. These strikes target "groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known'" (Stanford and NYU, 2012, ps. 11-12). These defining characteristics are classified (*Ibid*.,). These strikes often result in the deaths of low level fighters, therefore invoking doubt as to their military necessity. Owing to the reported civilian casualties as a result of the drone strikes, it is probable, again, that the targeting criteria for a signature strike are significantly broader than that set out in *Interpretive Guidance* (Melzer, 2008b). It is therefore recommended that, as the identities of the actors are unknown, the "defining characteristics" of "direct participation" must be construed narrowly, to reduce the possibility of erroneous targeting or cases of mistaken identity. They should be construed in line with Interpretive Guidance's three constitutive elements of "direct participation."

This position is supported by Kevin Jon Heller (2012, p. 7), who holds that a "signature strike" may be lawful if the strike is based on a "legally adequate signature" (invoking a narrow interpretation of direct participation criteria) and the evidence is sufficient enough to establish the individual(s) are engaged in this behaviour.

The Use of the Civilian Population as a Shield

The use of the civilian population as a shield by a non-State actor, party to an armed conflict, is unlawful (Henckaerts, 2005, p. 207). Non-state actors in this instance are taking advantage of the State party's adherence to IHL (Guiora, 2012, p. 328). This is achieved by disguising themselves within an area with a high concentration of civilians, in a bid to deter targeting.

In a broad interpretation of the concept, John Yoo (2011/12, p. 75) has argued that the US is not responsible for "murder" if innocent deaths occur as a result of bombing a location that contains for example, an al-Qaeda leader and his associates. Yoo (*Ibid*.) holds the fighters themselves responsible, as actors "who violate the rules of war by deliberately hiding themselves and their bases of operation within civilian populations."

However, (notwithstanding adherence to the principles of proportionality and necessity in this instance), Article 51(8) Protocol I states that these circumstances cannot release the State party of their legal obligations with respect to the civilian population (Henckaerts, 2005, p. 210).

It is thereby suggested that the temporal and substantive scope of when a citizen has assumed "direct participation in hostilities" and "CCF" should be construed narrowly in order to reduce erroneous targeting. The US must keep in mind that all non-State actors have protected civilian status, up until such time they take a direct part in *hostilities*, as distinct from criminal acts. The US have not disclosed their targeting criteria, however the targeting of low level fighters has led to concerns that the CIA has interpreted "direct participation in hostilities", as set out in Common Article 3, too broadly. In order to allay these concerns, it is recommended that the CIA: (1) publicly outline their targeting criteria, so that it be held up to standards of IHL, (2) adopt stricter targeting standards in line with recommendations by the ICRC, which will reduce subjective targeting decisions, and (3) ensure that information used to qualify a non-state actor for inclusion on the reported "Kill List" has been "most thoroughly verified" (*PCATI v Israel*, 2005, para. 40) before an assessment is made on their status. The standard for inclusion, and procedure for this verification process should also be outlined to the extent it is practical to do so. Finally, it is submitted that the practice of using "human shields" by non-State actors may not relieve the US of their legal obligations to respect the civilian population.

The Principle of Necessity in Armed Conflict

The principle of necessity requires that, "military action be both necessary for the achievement of a legitimate military purpose, and not otherwise prohibited by IHL" (Melzer, 2008a, p. 285). Furthermore, as seen in customary law, when military necessity needs to be balanced against humanitarian considerations, a *concrete and direct military advantage* must be anticipated (Henckaerts, 2005, p. 199).

Melzer has observed that the principle has both a permissive and restrictive capability. If there is no military necessity in an operation, it cannot justify an otherwise lawful strike. Conversely, a targeted killing cannot be justified on the basis of military necessity alone (Melzer, 2008a, p. 397). The principle of humanity is implicit in this

rule of necessity, setting limits for the infliction of suffering that is not strictly necessary for the accomplishment of legitimate military purposes.

In discussing the relevance of necessity as it pertains to a drone strike, the following element deserves particular consideration: has an attempt to capture rather than kill been made of the actor in question? Kretzmer proposes a narrow interpretation of the necessity requirement that can apply in this instance. For a targeted killing to be lawful under IHL it:

> must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim state and no other operational means of stopping those attacks are available.
>
> (Kretzmer, 2005, p. 15).

This formulation emphasises the use of alternate non-lethal means of apprehension. D. Beinish J (*PCATI v Israel,* 2005, para. 5*)* also took this line of reasoning, stating that "[t]argeted killings are not to be carried out where it is possible to arrest a terrorist taking a direct part in hostilities." Under IHL, the initial use of alternative non-lethal means is not required, once the actor has been deemed a legitimate target. However, it may not be necessary to deploy a drone strike, owing to the potential collateral damage, when the opportunity to capture is available.

These factors are also of particular importance with regard to the targeting of low level fighters, as a strike in this instance may not be linked to a *direct and concrete* military advantage, rendering potential collateral damage unnecessary. Such an assertion is substantiated by claims that the number of high-level targets killed as a percentage of total deaths amounts to just 2% (Stanford and NYU, 2012, p. vii). There is also evidence that the vast majority of the irregulars targeted have been killed in circumstances where there is little or no public evidence that they had the means or access to pose a serious threat to the US (*Ibid*., p. 129). This naturally leads to the question, how much weight does the US place on military necessity, before a strike is deployed?

The Principle of Proportionality in Armed Conflict

The principle of proportionality is to be found in customary IHL applicable to a non-international armed conflict as follows:

> Launching an 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, is prohibited.
>
> (Henckaerts, 2005, p. 199)

It has been acknowledged that State practice supports the "inevitability of collateral damage" (Banbridge, 2012, p. 440). However, the language again is vague, citing those conducting military operations to "take all feasible precautions" to "ensure constant care [is] taken to spare the civilian population …" No single set of objective criteria is likely to satisfy all situations, with effect to be given to the principle by determination by interpretation in good faith.

With specific reference to State and non-State actor conflict, it is clear there cannot be proportionality between the conduct of the two sides, as the two are inherently dissimilar in terms of military power. Guiora (2012, p. 321) has identified the appropriate enquiry in this case is to determine "whether operational counterterrorism measures applied by the State are proportionate to the threat posed by the non-State actor."

From the theoretical perspective, Kretzmer (2005, p. 15) has discussed the principle of proportionality as being "a heavy burden that rests on the State to show this could not have been reasonably foreseen, or the necessity of the attack justified the risk." He asserts that the State must be able to make an "extremely strong case" to justify an attack when it is "likely" that the attack will cause the death of civilians. This is qualified by a proposed lower threshold if a terrorist attack is "about to take place, and can only be thwarted by targeting them." He asserts that the presumption should be that "suspected terrorists must not be targeted when there is a *real danger* that civilians will be killed or wounded too" (*Ibid*., p. 15).

Finally President A. Barak (*PCATI v Israel, 2005, para. 45)* undertook a lengthy discussion on proportionality in his judgment, with particular focus on the proportion between "benefit and damage." He prescribed a proportionality assessment based on a "values based test" similar to the customary rule outlined above. This values based test intends to balance the civilian damage with the military advantage, therein "concretising" the abstract concept (*Ibid*., para. 60). He cites its basis as a "balancing between conflicting values and interests." The Court acknowledges this is a difficult balancing act to make and should be correctly determined on a case by case basis. The judgment emphasised that a democratic state does not have unlimited power, and that the ends do not justify the means (*Ibid*., paras. 45-46, 63). Vice President E. Rivlin went further, stating that there can come a threshold where "collateral damage to the civilian population which is so severe that even a military objective with very substantial benefit cannot justify it" (*Ibid*., para. 5).

The Red Cross has acknowledged that it is impossible to determine *ex ante* the

precise amount of force that will be needed to complete a targeting operation, but that considerations of proportionality and military necessity set parameters for this use of force, as a consideration based on wide range of operational and contextual circumstances (Melzer, 2008b, 1042).

In an attempt to distill the discussion of proportionality, it is recommended that the principle be looked at in the context of a drone strike. The relevant constitutive elements are as follows: (1) The drones themselves have highly advanced surveillance technology onboard, giving a "perfect picture" of a proposed target, ensuring optimum accuracy in deploying lethal force. Thus, collateral damage should, at the outset, be lower than that of a traditional military operation. (2) The drone strikes use lethal force against a predetermined "high value" terrorist, named on the "Kill List", whose location has been tracked for some time. (3) The technological capacity of the drones is such that they have the ability to halt the deployment of weaponry at very short notice, as distinct from other forms of aerial bombardment. (4) Finally, the risk of harm, to at least those operating the drones, is zero. A construction of the proportionality test may address the fact that protection of one's own troops is a factor also. In this case, this protection is of little relevance in situations where US troops will not be nearby, or in immediate danger.

From these observations, it can be concluded that a narrow construction of the proportionality principle must be taken in instances targeted killing operations by drone strikes. A "values based judgment" must be undertaken, to "weigh the anticipated military advantage against the gravity of the expected collateral damage (Melzer, 2008a, p. 404). There is ample time to make this judgment, as premeditation and intent are part of the drone strike process, and unintentional collateral damage may be avoided by taking advantage of the drone targeting technology.

"Double Tap" Strikes and Strikes on First Responders

"Double tap" strikes are reported as where, "a targeted strike site is hit multiple times in relatively quick succession." These strikes have reported killing those who first reach the scene who wish to act as rescue workers (Stanford and NYU, 2012, p. 74). These strikes flagrantly violate the principle of military necessity, as no military advantage is to be gained from the targeting of "first responders" to those injured at the scene of a drone strike. Second, these strikes blatantly violate the principle of proportionality, as when weighing up the (absent) military necessity with the (significant) collateral damage that results from these strikes; a balance clearly cannot be struck.

In sum, when conducting a drone strike, the US strategy is clearly not to deliberately target non-combatants. However, it must be asked, do the US take due care in their targeting, to take *positive steps* to minimise collateral damage? Clearly, in

instances of reported "double tap" strikes, the answer is no. Furthermore, if reported figures of collateral damage as a result of US drone strikes are accurate, this evidence points toward the US employing a broad interpretation of military necessity and proportionality that is near impossible to reconcile with the rules of IHL.

Conclusion

Despite the assurances by the US that great care is taken in conforming to IHL standards, the reports of civilian death, injury and suffering at the hand of the drones speak for themselves (Stanford and NYU, 2012). It is thereby submitted that the US does not make adequate positive efforts to reconcile their targeting programme with IHL, to avoid collateral damage.

In summation, this article suggested that drone strikes are to be conducted *only for such time* as the *Tadic* criteria are satisfied in Pakistan, giving rise to an armed conflict. It recommended a strict interpretation of criteria in the determination of a legitimate target, that emphasised a nexus with the armed wing of a non-State party, a "direct part on hostilities", and the requirement of a threshold of harm. The principles of necessity and proportionality are to be narrowly construed in light of the technological and military capability of the US.

We must not allow the rule of law be silenced; as the traditional laws of war shift to incorporate transnational terrorism and robotic technology, its safeguards and guarantees to protect the victims of armed conflict are more important than ever. In consideration of the above cumulative elements, it is submitted that the drone strikes be deployed only as a *last resort* to *concrete* threats from al-Qaeda and associated actors in the course of an armed conflict in Pakistan. This follows the reasoning in *PCATI v Israel*, where apprehension by non-lethal means was advocated. The use of lethal force must be determined on a *case by case basis* with a *heavy presumption against its use.*

BIBLIOGRAPHY

Alston, P. 2010. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, UN Document A/HRC/14/24/Add.6. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [accessed 16th December 2012].

Aust, A. 2011. Handbook of International Law. Cambridge: Cambridge University Press.

Banbridge, R. P. 2012. 'A Qualified Defense of American Drone Attacks in Northwest Pakistan under International Humanitarian Law,' 30 Boston University International Law Journal 409, p. 440.Becker, J. and S. Shane. 2012. "Secret "Kill List" Proves a Test of Obama's Principles and Will", New York Times. Available at: <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0> [accessed 17th December 2012].

Boycott, O. 2012. 'UN to investigate civilian deaths from US drone strikes'. The Guardian. Available at < http://www.guardian.co.uk/world/2012/oct/25/un-inquiry-us-drone-strikes?INTCMP=SRCH> [accessed 30th December 2012].

Breau, S., Aronsson, M. and Joyce, R. 'Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict,' (Oxford Research Group: 2011) Available at: <http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf> [accessed 9 December 2012].

Cassese, A. 1986. International Law in a Divided World. Oxford: Oxford University Press.

Cassese, A. 2008. 'Current Trends in the Development of Armed Conflict,' Goeta, P. and Zappala, S. eds., The Human Dimension of International Law, Selected Papers of Antonio Cassese. Oxford: Oxford University Press.

Centre for Civilians in Conflict (CCIC). 2012. 'The Civilian Impact of Drones, Unexamined Costs, Unanswered Questions.' Available at <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf> [accessed 15th December 2012].

David, S. R. 2002. 'Fatal Choices: Israel's Policy of Targeted Killing,' Mideast Security and Policy Studies no. 51, p. 5.

Duffy, H. 2005. The "War on Terror" and the Framework of International Law. Cambridge: Cambridge University Press.

France 24. 2011. 'Pakistan demands US slash CIA presence,' <http://www.france24.com/en/20110412-pakistan-demands-us-reduce-cia-special-forces-presence> [accessed 12 December 2012].

Guiora, A. N. 2012. 'Determining a Legitimate Target,' 47 Texas International Law

Journal 2.

Heller, K. J. 2012. 'One Hell of a Killing Machine, Signature Strikes and International Law,' Journal of International Criminal Justice (forthcoming).

Henckaerts, J. 2005. 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' 87 International Review of the Red Cross 857, p. 198.

Holder, E. 2012. 'Speech to Northwestern University School of Law, (Delivered 5 March 2012).' Available at < http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> [Accessed 26th November 2012].

Holmqvist, C. 2005. 'Engaging Armed Non-State Actors in Post-Conflict Settings' in Bryden, A. and Hänggi, H. (eds.) Security Governance and Post-conflict Peacebuilding (Geneva Centre for the Democratic Control of Armed Forces). Available at <http://archives.sipri.org/contents/conflict/Non_state_actors.pdf/download> [accessed 13th December 2012].

Human Rights Institute. 2011. Targeting Operations with Drone Technology: Humanitarian Law Implications. Columbia Law School. Available at <http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pd > [accessed 13th November 2012].

Human Rights Watch, 'World Report 2012: Pakistan.' Available at: <http://www.hrw.org/world-report-2012/world-report-2012-pakistan> [accessed 13 January 2012].

International Council on Human Rights Policy. 2000. 'Summary of Findings, Ends and Means: Human Rights Approaches to Armed Groups.' Available at <http://www.uthr.org/PDF%20files/Ends&Means%20summary.pdf> [accessed 9th January 2013].

Stanford International Human Rights and Conflict Resolution Clinic (IHRCRC) and Global Justice Clinic (GJC), NYU School of Law. 2012. Living under Drones: Death, Injury, and Trauma to Civilians from US drone Practices in Pakistan. Available at <http://livingunderdrones.org/report/> [accessed 13th December 2012].

Johnson, J. 2012. 'National security law, lawyers and lawyering in the Obama Administration, Speech to Yale Law School, (Delivered 22 February 2012). Available

at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/> [accessed 26th November 2012].

Kalshoven, F. and Zegveld, L. 2001. Constraints on the Waging of War, An Introduction to International Humanitarian Law. International Committee of the Red Cross.

Koh, H. 2010. 'The Obama Administration and International Law, Speech to the Annual Meeting of the American Society of International Law, (Delivered March 25 2010). Available at < http://www.state.gov/s/l/releases/remarks/139119.htm> [accessed 7th November 2012].

Kretzmer, D. 2005. 'Targeted Killing of Suspected Terrorists: extra-judicial executions or legitimate means of self defence?' 16:2 European Journal of International Law 171, p. 15.

Mayer, J. 26 October 2009. 'The Predator War, What are the risks of the C.I.A.'s covert drone program? 'The New Yorker. Available at <http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer> [accessed 20th November 2012].

Melzer, N. 2008a. Targeted Killing in International Law. Oxford: Oxford University Press.

Melzer, N. 2008b. 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' 90 International Review of the Red Cross 872.

Nasser al-Aulaqi v Obama. 2010. No. lO-cv-01469, Declaration of Prof. Mary Ellen O'Connell.

Nelson, R. and Sanderson, T. M. 2011. A Threat Transformed, al-Qaeda and Associated Movements in 2011. Center for Strategic and International Studies. Available at <http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf>.

Paust, J.J. 2012. 'Propriety of Self-Defense, Targetings of Members of al-Qaeda and Applicable Principles of Distinction and Proportionality" 18 Journal of International and Comparative Law.

Pejic, J. 2005. 'Terrorist Acts and Groups: A Role for International Law?' The British Yearbook of International Law 71, 97.

Prosecutor v Ramush Haradinaj. 2008. International Criminal Tribunal for the Former Yugoslavia, Case Number IT-04-84-T.

Prosecutor v Tadic. 1995. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T.

Public Committee Against Torture in Israel v. The State of Israel. 2005. HCJ 5100/94.

Sassoli, M. 2006. 'Transnational Armed Conflict and International Humanitarian Law,' HCPR Occasional Paper Series, Harvard University.

The Bureau of Investigative Journalism. 2013. "Covert Drone War.' Available at <http://www.thebureauinvestigates.com/category/projects/drones/> [accessed 12th January 2012].

The Guardian. 2012. 'Haqqani network is a terrorist body, announces Hillary Clinton, Afghan rebels allied to Taliban branded biggest threat to US-NATO forces and put under sanctions.' Available at <http://www.guardian.co.uk/world/2012/sep/07/haqqani-network-terrorist-hillary-clinton> [accessed 14 December 2012].

The White House. 2010. 'National Security Strategy.' Available at <http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf> [accessed 30th December 2012].

Tomuschat, C. 2010. 'Human rights and International Humanitarian Law,' European Journal of International Law 15.

Yoo, J. 2011/12. 'Assassination or Targeted Killings after 9/11,' 56 New York Law School Law Review.

The French Repatriation of the Roma and Its Implications for Europe

CAROLINE MURPHY
Senior Sophister, Law and French

In August 2010, President Nicolas Sarkozy of France intensified a "voluntary repatriation" programme concerning Roma, primarily of Romanian and Bulgarian origin, living in temporary dwellings outside of the large cities in France. The government offered these Roma, who have since 2007 been official members of the EU, €300 to leave the French territory immediately and return to their countries of origin. This practice, defended by the Sarkozy administration and continued by President Hollande, has continued to this day, despite some domestic and much international uproar.

While there are measures in place within the European Union and the European Court of Human Rights which allow for the deportation of European citizens on certain grounds, there is much evidence for the argument that France does not meet the requirements to legally deport the Roma, and are in blatant breach of both EU law and Convention law in doing so. It is possible to establish that the case law of the European Court of Human Rights points to a clear breach on the part of the French administration, and that the practice is contrary to the principles of Freedom of Movement and Non-Discrimination which are central to the European Union.

The European Commission has repeatedly raised concerns about the practices of the French government in this area in the past. In 2010, Viviane Reding, European

Commissioner for Justice, Fundamental Rights and Citizenship, compared the behaviour to that of Nazi Germany. However, the Commission appears to have backtracked after this heated rhetoric, and seems to be content with promises of change from the government and minor legislative changes rather than substantive reform.

Interestingly, this is a sentiment that transcends political allegiance in France. Public opinion in France is largely in favour of the measures against the Roma population, and while we can always sense racial discrimination on the side of the Front National, there is much support within the current government's own supporters as well. This makes the Roma problem especially unique; rarely do we have such an open and widespread appearance of bipartisan racism present relating to other ethnic minorities.

The acceptance of this practice by the European authorities and the general public raises larger questions for Europe in general; why are laws put in place if they are not followed? Is the EU being *political* in their treatment of France and its breaches of EU and ECHR law? Why do we, as a continent, accept these practices against Roma, while other vulnerable minorities are so fiercely protected? Is the problem too big for one country to deal with?

This article intends to examine the repatriation in five parts; there will be a brief overview of the history of the repatriation, followed by the international response and the international law relating to the practices. The wider implications of these practices will be examined, and critiqued. Finally, possible solutions to the current situation will be considered.

A Brief History of the Repatriation Programme

The origins of the programme can be traced to July 2010, when French police shot and killed a 22-year old French Romani man who fled a police checkpoint. This led to an attack on the police station in Saint-Aignan in central France by a group of French Roma (BBC, 2010). On July 29 2010, President Nicholas Sarkozy announced a plan to dismantle 300 illegal camps within a matter of months.This policy of dismantling the Roma camps outside large cities began a process of repatriation of people of Roma origin, put in place by the legislation detailed in a circular of 24 June 2010 (Ministre de L'Intérieure et Ministre de l'Immigration, 24/06/10).

On 19 August 2010, the first groups of Roma left the country, French authorities insisting that they did so voluntarily after being offered a resettlement sum of €300 for each adult and €100 for each child. There are arguments that it was not completely voluntary, as the alternative was facing the chance of forcible expulsion in a month (Erlanger, 2010). It also may be argued that, as one of the most economically disadvantaged factions in society, this monetary offering could be seen as coercion.

On the 9th September 2010, a memo circulated to police chiefs, dated 5th August 2010, and signed by the chief of staff for interior minister Brice Hortefeux, was leaked and seemed to confirm suspicions that the raids on settlements were targeting Roma in particular, especially as the memo instructed that "300 camps or illegal settlements must be evacuated within three months; Roma camps are a priority". This contradicted the claim by Eric Besson, immigration minister, who had said a few days previously that "France has not taken any measure specifically against the Roma [who] are not considered as such but as natives of the country whose nationality they have," (Willsher, 2010).

The contents of the memo sparked outrage both within France and in the wider community of the EU and the world. On the same day, the European Parliament passed a resolution by 337 votes to 245 calling on Paris to "immediately suspend all expulsions of Roma", saying that the policy "amounted to discrimination." The Parti Socialiste questioned whether the document was legal and said it had undertones of "xenophobic policy." Sarkozy held his position that the Roma living in such camps would be deported "voluntarily". While the circular was swiftly repealed, extensive research has shown that targeting of Roma communities has continued (Human Rights Watch, 2012)

On the 14th September 2010, EU Justice Commissioner Viviane Reding expressed her outrage at the situation, and voiced her opinion that the Commission will have no choice but to launch "infringement proceedings against France for a discriminatory application of the Free Movement Directive and infringement proceedings for the lack of transposition of the procedural and substantive guarantees under the Free Movement Directive," (Reding, 2010) She asserted that the leaked memo was clear evidence of stigmatisation of an entire ethnic group. Reding said that she was "appalled" by the actions of France, and said that a policy of expulsions based solely on ethnicity "is a situation [she] had thought Europe would not have to witness again after the Second World War." The strong stance and provocative rhetoric from the EU Justice Commissioner implied that charges against France were imminent.

During a European Union summit in Brussels on the 16th September, President Sarkozy said that, "The disgusting and shameful words that were used [by Commissioner Reding] - World War II, the evocation of the Jews - was something that shocked us deeply," (BBC, 2010) The BBC correspondent at the summit noted that this was an "unprecedented row" between the EU and France, and the European Commission President Jose Manuel Barroso recognised that Commissioner Reding had made excessive comments, although European MPs had accused the Commission of failing to protect the Roma deported from France. On the 29th September, the Commission told France that it had two weeks to start implementing a 2004 EU directive on freedom of movement. France was warned that it would face an official EU "infringement procedure" if it failed to do so. The directive sets out rules for de-

portation cases, (European Parliament & Council, 2004).

On October 19th 2010, the European Union dropped charges against France in relation to their repatriation of the Roma, after plans were submitted to bring its legislation in line with the EU law on freedom of movement. In what was noticeably more neutral rhetoric, Commissioner Reding said that, "The situation of Roma in France over this summer has raised substantial concerns," but the Commission expected legislation that would protect Roma would bring France in line with the EU law. On the same day, Ban Ki-Moon, Secretary General of the UN, addressed the European Parliament on major global changes. His comments were perceived to be squarely directed at France, speaking of tolerance of ethnic minorities (Moon, 2010)

While the European Commission accepted France's proposed legislative changes, there were not seen to be any changes in the practice of repatriation and targeting Roma groups generally. In June 2011, an immigration law was enacted to comply with the European Commission's orders and the European Union position on free movement. Although it enacted general laws on immigration and clarified the French law, it appeared to target Eastern European Roma specifically in restrictive policies, and fell short of complying with France's obligations under European Union rules of freedom of movement and international human rights law.The law lists as grounds for expulsion repeated short-term stays in France, as well as being in France "for the fundamental purpose" of benefiting from the social assistance system (Loi nº 2011-672 relative à l'immigration).

Research has shown that authorities around the country commonly expel Roma on a mere presumption that they might one day receive social benefits (Human Rights Watch, 2012) Furthermore, while the law requires authorities to assess this on a case-by-case basis, there is evidence that they still issue expulsion orders on a large scale. Thus, while this law was enacted as promised, it can be seen to be severely restrictive and does nothing to alleviate the discrimination against the Roma.

On May 1st 2012, François Hollande called for "discriminatory measures against the Roma populations… to be abolished" (Human Rights Watch, 2012) This plea by Hollande has since been contradicted by his actions on entering the Elysée, beginning a renewed crackdown on Roma in August 2012 (Le Monde, 2012). Until this day, the deportations continue, with demolitions of camps outside of Paris and Lille, and the "voluntary" repatriation of Roma to Romania and Bulgaria (Sayare, 2012)

On September 4th 2012, Laszlo Andor, EU Commissioner for Employment, Social Affairs and Inclusion, said that repatriating Roma from France is no solution for one of Europe's most discriminated-against and disenfranchised minorities.He claimed that "The European Commission stood up three years ago against the discriminating practice of the French authorities and we also said that it is not a solution and it can in fact be counterproductive to repatriate Roma people in France." (EU Observer, 2012) It seems that, to avoid conflict with one of the largest and most powerful countries in

Europe, the European Commission will accept minor changes in the domestic law in France, despite the fact that no substantive change takes place. Discrimination and repatriation on a mass scale still continue.

On September 12th 2012, France and Romania signed a deal on the voluntary repatriation of Roma to Romania.This measure is in line with the French view that the best way to integrate the Roma is to integrate them first in their countries of origin. The problem with this is that it is completely opposed to the principles of the EU on freedom of movement, and there is still no guarantee that the repatriations are being treated on a case-by-case basis. The Roma are a nomadic people and to tie them to one country is against their culture; they are originally from India and while being most populous in Romania and Bulgaria, they are generally spread across Europe. Despite the evidence being that legislation and rhetoric have not changed anything in practice, Commissioner Reding commended France for abiding by the rules of the EU while dealing with the Roma issue.

The International Perspective: An Analysis of the EU Response and An Overview of the Implications of Previous European Court of Human Rights Decisions

The two European Union principles that are central to the argument against the French process of repatriation are that of free movement and discrimination. It is argued in this section that France has breached the laws governing these principles and should be sanctioned by the EU.

In the case of free movement, there is a stark contrast between the immigration law enacted in 2011 and the 2004 Directive on free movement (Directive) In fact, the law appears to contain provisions that directly intervene to facilitate the deportation of Roma from France. Article 39 of the law gives France the opportunity to remove an individual from the country under an OQTF, *obligation de quitter le territoire français*, if after the initial three months the individual is "staying in France for the fundamental purpose of benefitting from the social assistance system". However, while the Directive states that "only receipt of social assistance benefits can be considered relevant to determining whether the person concerned is a burden on the social assistance system" (COM(2009) 313 Final, 2009), that is to say that the absence of financial means is not a sufficient motive for expulsion, it seems that the mere assumption that an individual will become a burden on the country is grounds for deportation under the French law (Kropp, 2012) It has been argued that this aspect of the law is specifically targeting Roma, as their poor economic status means that it is possible to imagine that they may at some stage claim social assistance, without having to prove actual intent or receipt of assistance (Human Rights Watch, 2011).

The European Union forbids discrimination on grounds of nationality, sex, part-time or temporary employment, racial or ethnic origin, religion or belief, disability, age or sexual orientation, with an exception in place in relation to measures necessary to public order, public security, the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others (Ellis, 2005) It is also generally acknowledged by the EU that the Roma are among the most discriminated against minority in Europe as a whole (European Commission, 2012) The EU has thus instigated several measures in recent times to allow for a legislative framework of non-discrimination. In 1997, article 13 of the Amsterdam Treaty said that the European Council "may take appropriate action to combat discrimination", and in 2000 the Charter of Fundamental Rights of the European Union and the Race Equality Directive cemented this standpoint against discriminatory practices (European Commission, 2000).

Since 1997, the European Union has initiated several investigations and reports on the rights of Roma in member states and those applying to become member states. This was particularly prevalent in 2004 and 2007, in the lead-up to the expansion of the European Union to the east, where there is a far greater Roma population. To comply with the EU's standards, applicant states had to demonstrate a respect for human rights and the protection of minorities, in keeping with the Copenhagen criteria, and many were roundly criticized for their treatment of their Roma population. This may be seen as highly hypocritical considering that laws enacted in EU-stronghold countries such as France and Italy may be said to display racist undertones (O'Nions, 2011). Indeed, the recent repatriation in France can be seen as a smear on Western Europe and the EU's image as a bastion for human rights.

In September 2010, the European Parliament passed a resolution by 337 votes to 245 calling on Paris to "immediately suspend all expulsions of Roma," saying that the policy amounted to discrimination (Willsher, 2010), and individual parliamentarians equally expressed their outrage, just as various Commissioners did. The French administration quickly repealed the offending memo and promised to put in place clearer legislation on immigration. The Commission dropped infringement proceedings and Justice Commissioner Viviane Reding said, "France has responded positively, constructively and in time with the Commission's request." She used the events as evidence of "proof of the good functioning of the European Union as a Community governed by the rule of law" (EU Observer, 2010). The figures show that while France took these measures to appease the EU, there was no substantive change in the number of Roma being deported back to Bulgaria and Romania. This prompts the question as to what political undertones are overruling the rule of law.

There is much precedent from the European Court of Human Rights to suggest that France would be found to be in breach of the Convention if a case was to be

taken. We will mainly consider those rights contained within Article 14, which provides the principles against discrimination, Article 4 of Protocol 4 which prohibits the collective expulsion of aliens, and Article 8 on the right to a private life (ECHR).

Article 14 prohibits discrimination in the enjoyment of rights protected, *inter alia*, on grounds of sex, race, colour, language, religion and national minority. It does, however, allow for some flexibility and exceptions to be instrumented on the part of the administration of individual signatory states (Byrne & Duncan, 1997).For a practice to be said to be discriminatory, it is necessary to establish that the party alleging the discrimination is in an analogous situation with others. Also, certain treatment can be said to be discriminatory only when there is no objective and reasonable justification. The practice must have some sort of legitimate aim, and a test of proportionality is applied between the means employed and the desired outcome, as established in *Anguelova v Bulgaria* (2002). The ECHR also allows for a margin of appreciation in assessing whether differences in otherwise similar situations allow for a different treatment in law. However, it is unlikely that race or ethnicity would be considered an appropriate justification.

The French administration uses the above restrictions on article 14 as justification for their practice of repatriation of the Roma. President Sarkozy said in 2010 that the illegal Roma camps outside of the large cities in France pose a considerable threat to security, and as such the deportations are justifiable. However, it is unlikely that this is sufficient justification under current ECHR case law, and the proportionality test is probably not met.

In the case of *D.H. v Czech Republic* (2007), the European Court of Human Rights considered the issue of discrimination against Roma children in schools in the Czech Republic. The evidence in this case showed that Roma children were automatically being segregated into special schools for students with learning disabilities. The momentous decision for Roma rights across Europe ruled that this was a form of unlawful discrimination in breach of Article 14, taken in conjunction with Article 2 of Protocol No. 1, which secures a child's right to education. This judgment was groundbreaking in a number of respects, and is particularly pertinent to the French repatriation issue.

The court underscored that the Convention addresses not only specific acts of discrimination, but also systematic practices that deny the enjoyment of rights by racial or ethnic groups (Open Society Justice Initiative). This is significant for the issue in France as Roma settlements specifically are being targeted, rather than illegal camps in general. There was evidence of this contained in a leaked memo to police chiefs in France. The memo states that the President's orders were that "300 camps or illegal settlements must be evacuated within three months; Roma camps are a priority. It is down to the prefect in each department to begin a systematic dismantling of il-

legal camps, particularly those of the Roma." (Ministre de l'Intérieure et Ministre de l'Immigration, 2010) While this memo was quickly repealed after the scandal that followed its leak, there is much evidence that the targeted breakup of camps and deportation of Roma continues (Sayare, 2012).

The court also considered the issue of indirect discrimination. A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure, which, though couched in neutral terms, discriminates against a racial or ethnic group. It was the first time that the Court clarified that in such a situation the actions may amount to "indirect discrimination", in breach of the Convention. This may have implications for President Hollande's government. While there is evidence that President Sarkozy's government were specifically discriminating against Roma, there is no written proof in relation to the Hollande administration, but the discrimination in the breakup of the camps continues (Sayare, 2012).

The court established that there is no waiver of the right to non-discrimination. It was held that as the prohibition of racial discrimination is of profound importance, any waiver of a right to discrimination would counter an important public interest. In the case of *D.H. v Czech Republic*, this was in reference to the Czech administration's argument that as the children had accepted places in the special schools, they waived their right to non-discrimination. Thus, in the case of Roma repatriation in France, there can be no argument that the Roma volunteered for the deportation programme and therefore waived their rights to non-discrimination. This argument is compounded if we pair it with the idea that the monetary offering could be seen as coercion, the Roma predominantly being severely economically disadvantaged.

Crucially, the court held that the Roma possess a special status in Europe. As a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority who require special protection. This is one of the strongest arguments to support the assertion that France would be liable under ECHR law. The French administration's behaviour may be found to be in breach of the ECHR if it were in relation to another minority; the justification of the security risks of the camps would probably be found insufficient as it would not outweigh the issue of racial discrimination, and proportionality would probably not be met; the petty crimes engaged in by some members of a community would not be sufficient grounds to deport the entire community. However, the fact that the minority is Roma, as opposed to another group, is taken into account, the argument against the French government becomes significantly stronger.

Finally, this judgement unified the anti-discrimination principles for Europe; it brought the European Court of Human Rights' Article 14 jurisprudence in line with principles of anti-discrimination law that prevail within the EU.

Article 4 of Protocol 4 of the Convention states that "collective expulsion of aliens

is prohibited." In *Conka v Belgium* (2002), the ECHR found that Belgium's expulsion procedure of Slovakian nationals of Roma origin did not eliminate all doubts that the expulsions were collective, rather than based on individual evaluations. Therefore, the ECHR found Belgium's actions to be in violation of Article 4. This issue is pertinent to the breakup of camps and repatriation of Roma; it can be said that the Roma are being considered collectively due to the evidence of the leaked memo in 2010. They are not being considered on a case-by-case basis and therefore there may be a breach. Furthermore, the judgment is extremely restrictive; signatory states must rule out *all* possibilities that expulsions are collective.

As well as the European Union and the European Court of Human Rights, many NGOs and Human Rights watchdogs around the world have spoken out against the repatriation scheme. It seems that the global community and many within France condemn the practices of the French administration, and yet they have continued unhampered since 2010. Considering the evident breaches of European Union law and human rights under the Convention, it is possible to deduce that the reason for European inaction is a political one.

The Political Nature of the European Union's Inaction

While it may be possible to establish that there have been breaches of EU law and of the European Convention on Human Rights, it is harder to find a robust solution to the deep-set problem of Roma integration in Europe as a whole. In fact, France is only one example of an inherent discrimination towards Roma that exists in many European countries today. Europe-wide, we see a flouting of EU and ECHR rules in relation to the Roma population (O'Nions, 2011). In allowing this to happen, it is hard to establish that the European Union is indeed an organisation that promotes liberty, equality and a protection of human rights. As it has always held itself up as a defender of human rights above its member states, requiring a certain threshold in rights to be met in order for eligibility to join, and policing the domestic activities of member states in relation to minorities, it is necessary for them to stand up on the issue of Roma rights against France in order to retain legitimacy. In fact, the European Union must protect human rights partly for the sake of individuals within its borders, and partly for its *raison d'être*.

The events of the past three years in France have underlined the fact that systematic discrimination and occasional violence is widespread in Western Europe, once thought to be a bastion of human rights, and that it is not just limited to the former Communist states of the East. An altogether more unsettling fact is that discrimination against Roma has become the norm. In France, there has been political upheaval in the last 12 months that has seen the electorate choose the first leftist President

since President Mitterrand left office in 1995. However, despite a dramatic change in public sentiment over political and economic issues, the support for the Roma expulsions has not waned; the deportations have continued at the same rate as under President Sarkozy (Sayare, 2012). This bipartisanship on issues of border control and latent discrimination is highly unusual; such principles are usually reserved for the far right supporters of Front National. Originally, Mr. Sarkozy used the issue of Roma expulsions during the Presidential elections of 2012, as it was a mobilising force on the right and a divisive force on the left (Bloomberg, 2010). However, since the elections, the Roma expulsions have continued at much the same pace as before without public outcry, and thus it is safe to say that a large section of French people support the move by Mr. Hollande to continue his predecessor's policy.

As established by the ECtHR in *D.H. v Czech Republic*, the Roma are a vulnerable minority in Europe and therefore efforts must be made to protect them. Efforts have been made to protect Roma Rights by several lobbying groups in Brussels, including the ERRC (European Roma Rights Centre) and the European Roma Policy Coalition and Human Rights Watch. These groups maintain a constant discourse on the breaches of EU law and Convention law against Roma and submit reports to the Commission frequently (European Roma Rights Centre). However, public opinion in Europe is overwhelmingly anti-Roma, and for this reason the lobbying by these groups has made very little progress (Rosenfield, 2011). While the Commissioners are supposed to be independent of their own member states, there is very little opportunity for reform if European Member States, the European Parliament and the Council are unreceptive to Commission proposals.

This lack of public support may be the reason for the lack of a Roma civil rights movement to combat such discrimination. To create a new social policy, civil rights movements of the past have often relied on political opportunity to achieve their goals. It could be fruitless for such a strategy to be undertaken by Roma; politically, it is advantageous for European governments to exercise strength against the Roma population. Political opportunity implies not only the openness of a system, with access to the administration, but also political receptivity to the claims being made by the group. In the absence of this, the next route open to a group looking to change social policy is litigation (Hilson, 2002).

Litigation in the European Court of Justice can be initiated either by those affected by Member States' breaches of EU law or by a Commission Proposal. If the French national law were to be challenged, on a breach of Freedom of Movement (TFEU), or discrimination grounds, it has been suggested in the previous section that there could be a breach of EU law on the part of France. Furthermore, on consideration of precedent in the European Court of Human Rights, it is possible that there is a breach of Convention law.

However, when considering the possible avenues of action open to Roma, particu-

larly in France, it must be acknowledged that, as one of the most severely deprived sections of society today, it is not always possible to act. Litigation takes time, money and education to know that there is even remedies open to oneself; it has been acknowledged that resource constraints are the primary barrier to litigation (Alter & Vargas, 2000). The Roma are being offered €300 for "voluntary" deportation from France, which in their deprived situation it can be argued they are coerced to accept. Thus, it can be argued that they are not in a position to assert their EU and Convention rights.

If it is accepted that the Roma, as a vulnerable and deprived faction in society, are unable to act to protect their own rights, it can be argued that the onus is on the European Commission to act on the behalf of them and take an action to the European Court of Justice. The Commission acknowledged this responsibility in 2010 when they initiated infringement proceedings against France, which were dropped when France introduced their new immigration laws. It has been acknowledged that this domestic law falls short of complying with the Freedom of Movement Directive and the Treaty. As action in France against the Roma has continued much as before, and could be found to be contrary to Community law, there is no real reason for the Commission's inaction.

The European Union was founded on the principles of the rule of law and human rights. In order to retain their legitimacy, action must be taken against any member state that violates these fundamental ideas. When the deportations of Roma began in August 2010, the inflammatory rhetoric used by Ms. Reding in condemning the practice led to an "unprecedented row" between the Commission and France. It became necessary for Mr. Barroso to delicately apologise for Reding's remarks, and she later praised the changes that the French administration had promised to make in their domestic law. France is one of the most powerful European member states, and crucial to the survival of the EU. Thus, it can be argued that it was politically necessary for the Commission to back down (Gunther, 2012). It is possible that the Commission would have accepted any peace offering that France gave, so when the Sarkozy administration agreed to legislate to clear up the position of the EU Directive on free movement it was inevitable that the Commission would gratefully accept this, despite the fact it was largely useless, and in fact codified discriminations against Eastern Europeans, and Roma in particular, that are contrary to the Directive (Human Rights Watch, 2011).

This political aspect to Europe's inaction is apparent when we consider that, despite the evidence being that legislation and rhetoric adopted by the French administration have not changed anything substantively, Commissioner Reding commended France for abiding by the rules of the EU while dealing with the Roma issue, adding that "this is proof of the good functioning of the European Union as a Community governed by the rule of law." Since it has been established that it is likely that France

continue to be in breach of EU and ECHR law, this seems quite transparently political. If it can be said that the European Union is standing by and allowing the French administration to conduct itself as it sees fit, the question arises from this as to why laws are created if they are allowed to be broken by powerful member states, and raises the question as to how powerful the European organisations are in practice.

Human Rights, Public Opinion and the Treatment of Roma

The law of the European Union was established to be the supreme law in all member states, to which all domestic laws must conform, and the law of the European Court of Human Rights is expected to be followed in all signatory states. However, too often we are seeing the enforcement of the law being avoided for political reasons. Human rights must retain a position in the EU that is not touched by the political goings-on of the organisation, however this seems almost impossible to achieve, above all on the widespread issues to do with Roma rights. The same disregard of the law in relation to Roma can be seen in the lack of compliance with the rulings of the European Court of Human Rights. If it is argued that the Roma, due to their economic status and their vulnerable position in society, are not in a position to take a case to the ECtHR, they should nonetheless be able to depend on previous rulings. However, while the rulings of the court are binding, there is no follow-up to assure that the judgements are in fact followed.

There is some evidence that despite the ruling in *D.H. v Czech Republic* (2007) which said that automatically placing Roma children in "special schools" was discrimination, the practice still continues to this day in Czech Republic (Gunther, 2012). Still less acknowledgement has been given to the judgement in *D.H.* by other signatory states, in particular the important assertion that as an especially vulnerable minority, the Roma should be afforded a special protection. This disregard is central to the breach by France in relation to the deportations. So, if the laws are not followed in relation to the Roma, is there any point in taking a case to the European Court of Human Rights? Will it change anything?

Unfortunately, judging by the examples of past failures to initiate change in relation to Roma, there is a considerable possibility that it will not. However, it cannot be denied that despite this frustrating reality, there are always benefits to taking action in Strasbourg. Racism is something that is deep-seated and quite difficult to change quickly. This is a possible reason for the flagrant flouting of the European law and Convention by France and others, but one way of overcoming such a problem is through constant dialogue. In bringing a case to the European Court of Human Rights, central issues to minorities and individuals are brought to public consciousness. In maintaining a public discourse, a change in the public sentiment can be incurred.

After all, it is the public sentiment that influences the French administration to defy the law of the European Union and the rulings of the European Court of Human Rights in introducing legislation that limits the free movement of Roma who are EU citizens. If there was not the overwhelming public support for the measures taken by the French administration, it is probable that such action would not be possible. However, this raises an important and perturbing issue; how can a government legislate on something that is a probable breach of human rights just because public opinion supports it? Surely the idea of having laws in place is to provide a society that protects the common good, but also balances the rights of individuals against this? Of course, there is little doubt that the law of any given jurisdiction owes its authority in some way to the public opinion of the electorate, past or present (Dicey, 1917).

However, the adoption of public opinion on every aspect of the law is highly dangerous, especially in relation to human rights. Human rights law is the right of the individual as balanced against the common good. It is therefore paradoxical to allow the will of the general electorate to dictate what is protected by it. Deference to the European Union and the European Court of Human Rights is therefore crucial on the part of the French administration in protection of human rights, as politicians are always going to act politically in response to a public opinion. If the French electorate is in favour of the deportations of the Roma, there is nothing to stop the President from pursuing this except the higher authority exterior to the country's jurisdiction.

The French Republic is founded on the fundamental document that is the Declaration of the Rights of Man and Citizen of 1789. It was founded on the theory of natural law, and it in turn acted as a basis for much of the human rights law enacted around the world in the centuries that followed. Throughout this document, rules are established on the rights of man that we can assert render the law on Roma repatriation void (1789). The fact that France may be considered the historical home of human rights due to this declaration makes the recent developments and human rights abuses all the more worrying. It can be suggested that France possesses a historical role as an example to other countries that do not possess such a background.

Human rights advocates and international NGOs, while effective in bringing about a dialogue on breaches of human rights and possible changes, have no hard legitimate power over administrations. This raises the importance of the ECHR and European Union law on anti-discrimination and rights of EU citizens; if human rights are to be respected they must come from an organisation with actual power. And if, as established earlier, many of the judgments of the ECHR, above all relating to the Roma, remain unheeded, it is necessary to augment the powers of the ECHR and the European Union.

Possible Solutions to Roma Discrimination

Racism is generally quite deep-seated and for this reason it is hard to overcome in a short space of time. Therefore, in order to combat the particular problems of European countries in relation to Roma, such as the deportations in France, as well as the widespread problems across Europe as a whole, solutions must be implemented that are both short-term, to protect the individuals of the present day, and long term, to change the public sentiment towards Roma in Europe.

The key to changing public sentiment is integration of Roma in Europe. At present, Roma live in large self-contained communities, and it is for this reason that they are considered "other". While France have adopted a programme with Romania which allows for the deportation of Roma back to Romania for integration there before integration can be achieved continent-wide, it can be said that this is contrary to the values of the EU (Le Monde, 2012). It has reached the point where the problem is too widespread, and the EU must adopt a unified policy of integration. While the Commission have launched several initiatives over the last few years, there have been no concrete changes as of yet (European Commission, 2012). It has been detailed that for integration to succeed, regional and local level government must mobilise and gain the support of the communities, and there must be a monitoring system in place (Communication from the Commision, 2012).

If this were pursued, some level of success could be achieved immediately and it would also set a foundation for complete integration of Roma in the future. While establishing an integrated society, the EU could introduce regulatory bodies that guarantee the application of its laws.

The European Court of Human Rights needs to introduce a monitoring body that could follow up on past judgments to ensure that they are being followed. In this way, the court could have more substantive success with their judgements rather than often relying on nothing more than a reprimanding of the offending signatory state. The continued use of the European Court of Human Rights would maintain a dialogue on Roma rights in Europe. It also needs to be considered whether the provision of courts as a remedy to human rights infringements is useless to vulnerable groups in deprived situations.

Conclusion

The situation in Europe in relation to discrimination against Roma is more urgent than ever. Since the expansion of the European Union to the east in 2004 and 2007, the Roma are the largest minority in Europe at 10 – 12 million (European Commission, 2012), and this figure will increase as the EU expands further east. The fact that France, as one of the most powerful member states, openly disregards EU law in relation to the Roma sets a bad example for the treatment of such laws in newer EU states such as Hungary. Indeed, Hungarian leaders view the French and Italian practices

in relation to the Roma, and particularly the French Roma expulsion measures, as legitimate benchmarks for the treatment of Roma(O'Nions, 2011). It can be argued that France is both a product of the general European sentiment towards the Roma, but also a negative effect on attitudes across Europe. It is therefore crucial that, in order to solve the problem of Roma rights across Europe, the harsh measures taken by the French administration against the Roma are put to an end.

Racism is not an easy problem to solve, especially in relation to Roma in Europe, who are particularly vulnerable to discrimination. However, with the deportations in France and widespread measures against Roma in Europe, we have reached a point where it is absolutely crucial to act. In order for Europe to maintain its position in the world as a bastion of human rights and to respect the fundamental freedoms of individuals, as well as to protect the integrity and the central ideals of the European Union, action must be taken against European countries who do not respect Roma rights and the continent must work as one to integrate the Roma. In maintaining a dialogue, A changed could be reached where Roma are considered as citizens of the EU rather than by their ethnicity. Through these changes to the organisations, as well as continued discourse, in the long run, public opinion can become the solution to and not the cause of Roma discrimination.

BIBLIOGRAPHY

Alter, K. J., & Vargas, J. (2000). Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy. *Comparative Political Studies , 33* (4), 452 - 482.

Anguelova v Bulgaria (Grand Chamber of the European Court of Human Rights, Strasbourg June 13, 2002).

BBC. (2010, October 19). Q&A: France Roma Expulsions.

BBC. (2010, September 16). Sarkozy Denounces Commissioner's Roma Remarks.

Bloomberg. (2010, August 13). Expulsions of Illegal Roma Win Approval From Public in Sarkozy's France.

Byrne, R., & Duncan, W. (Eds.). (1997). *Developments in Discrimination Law in Ireland and Europe.* Irish Centre for European Law.

Communication From The Commission to the European Parliament on How To Apply The Directive . (2009, July 2).

Conka v Belgium (Grand Chamber of the European Court of Human Rights, Strasbourg February 5, 2002).

D.H. v Czech Republic (Grand Chamber of the European Court of Human Rights, Strasbourg November 14, 2007).

Declaration des Droits de l'Homme et du Citoyen. (1789).

Dicey, A. (1917). *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century.* Macmillan.

Directive, E. U. (n.d.). 2004/38/EC.

Ellis, E. (2005). *EU Anti-Discrimination Law.* Oxford University Press.

Erlanger, S. (2010, August 19). Expulsions of Roma Raises Questions in France. *The*

New York Times .

EU Observer. (2012, September 4). *EU Commissioner: Booting Roma Out Of France is No Solution*.

EU Observer. (2010, October 19). *EU Drops Charges Against France On Roma*.

European Commission. (2000). *Race Equality Directive 2000/43/EC.*

European Commission. (2012). *The Situation of Roma in 11 EU Member States: Survey Results At A Glance.*

European Convention on Human Rights. (n.d.).

European Parliament & Council. (2004, April 29). Directive 2004/38/EC.

European Roma Rights Centre. (n.d.). From http://www.errc.org/research-and-advocacy

Gunther, C. (2012). France's Repatriation of the Roma: Violation of Fundamental Freedoms? *Cornell International Law Journal , 45*.

Hilson, C. (2002). New Social Movements: The Role of Legal Opportunity. *Journal of European Public Policy , 9* (2), 238 - 55.

Human Rights Watch. (2012, May 1). France: Candidates Pledge To Address Human Rights Issues.

Human Rights Watch. (2011, September 28). France's Compliance With the Free Movement Directive and the Removal of Ethnic Roma EU Citizens.

Human Rights Watch. (2012). *Renewed Crackdown on Roma.*
Kropp, M. &. (2012). La Migration des Roms au Sein de l'Union Européenne - Une Minorité Ethnique est devenue "La Patate Chaude" de la Politique Européenne. *Transform! , 10*.

Le Monde. (2012, August 14). La Politique d'Expulsion des Roms est une Honte pour un Pouvoir de Gauche.

Loi nº 2011-672 relative à l'immigration. (n.d.).

Ministre de l'Intérieure et Ministre de l'Immigration. (2010, August 5). Circulaire au Préfet du Police et Préfets.

Ministre de L'Intérieure et Ministre de l'Immigration. (24/06/10). *Circulaire au Préfet du Police et Préfets.*

Moon, B. K. (2010, October 19). United Nations Secretary General Addresses European Parliament on Major Global Changes.

O'Nions, H. (2011). Roma Expulsions and Discrimination: The Elephant in Brussels. *European Journal of Migration and Law , 13*, 361 - 88.

Open Society Justice Initiative. *D.H. v Czech Republic: Major Conclusions of the Judgment.*

Reding, C. V. (2010, September 14). European Commission Press Conference.

Rosenfield, E. (2011). Combating Discrimination Against the Roma in Europe:

Why Current Strategies Aren't Working and What Can Be Done. *Human Rights and Human Welfare: Topical Research Digest: Minority Rights* .

Sayare, S. (2012, August 30). Roma Still Waiting For A Change of Fortune in France. *The New York Times* .

TFEU. (n.d.). Art 45.

Willsher, K. (2010, September 13). Orders To Police on Roma Expulsions from France Leaked. *The Guardian* .

Fruitful Simplifications: Beyond The Unitary Actor Model in International Relations Theory

RYAN KENNY SCH.
Postgraduate, MSc. International Politics

The unitary actor model is one of the most prominent assumptions employed in the study of international relations – playing a particularly central role in the dominant realist (Morgenthau 1960) and neorealist (Waltz 1979) traditions. The assumption that states can be conceived of as having one identity, one set of interests, and one coherent approach to realising those interests, is certainly neither self-evident nor trivial, and so should properly be questioned. However, many challenges – implicit or otherwise – to this approach to conceptualising states in international relations do so incorrectly. This paper first aims to establish the flaw in how many criticisms[1] attempt the task of challenging the unitary actor assumption, and then will consider the relative merits of two contrasting approaches to discarding this assumption and peering inside the black box of the state within which domestic political dynamics have traditionally been confined in studies of international politics.

One of the most important, and most frequently neglected, lessons from the philosophy of science is the relationship between a model and reality. Reality, in the most general sense, might be defined as something like the set of all true facts, but in a more specific sense it might be said to refer to the set of all true facts about a

1 See Milner (1998) for a review of criticisms of the unitary actor assumption

particular field of study. For students of biology, reality is the set of all true facts about living organisms; for students of geometry it is the set of all true facts about physical spaces; and for students of international relations it is the set of all true facts about the behaviour and interactions of states in the international arena. The study of any of these fields involves attempting to maximise our understanding of the particular reality to which it relates. As should be immediately and intuitively obvious, in both the general and specific sense the set of all true facts is, for all practical purposes, infinite. The problem for the scientific study of any discipline is therefore how to achieve an understanding of an infinitely complex reality with all too finite resources.

The solution to this problem is the use of simplifying assumptions and theoretical models. By assuming away many of the vast complexities of the larger reality in which we are interested, it is possible to focus the attention on one small element of that reality. This, much simpler, theoretical construction may not look very much like the empirically observable reality which exists in the world around us, but its virtue lies not in the degree to which it approximates reality, but in the understanding of reality which it generates. After all, a street map of a city – which is no more than a simplified model of a physical space – does not look very much at all like the city it represents. The map only includes a tiny proportion of all of the possible features of the city, and those features it does include are only represented by symbols, which in turn fail to capture the full nature of the particular physical objects to which they correspond. A map which reproduced every detail of the city perfectly accurately would be of no practical use in navigating the city, whereas a map of the city which represents only the streets, using thin lines on a large piece of paper, is much more useful. The virtue of the map lies not in the degree to which it resembles the space, but its utility in navigating that space. In the same way, the virtue of a theoretical model of any other realm of reality lies not in its fidelity to its subject, but in its utility in generating understanding of the subject, and so allowing the generation of useful, empirically verifiable hypotheses.

The above analysis[2] illustrates that theoretical models, and the simplifying assumptions on which they are based, are not to be judged as either true or false, but rather as fruitful or not. That the unitary actor model has been fruitful is not generally challenged by its critics, but this is the only valid challenge to a theoretical assumption. If one wishes to do away with the unitary actor model, it is not sufficient to point out that, in reality, states are animated by internal dynamics. Rather it is necessary to demonstrate that assuming these internal dynamics away is not a fruitful approach to understanding the behaviour of states in the international arena.

However, the understanding of a problem provided by any given simplification is inherently limited by the extent of that simplification, and the unitary actor assump-

2 Based on Nagel (1961). In its application to political science, Waltz (1979). The map analogy is due to Louis Carroll, by way of Borges (1946)

tion in international relations theory is no exception. While the conception of states based on this assumption has been fruitful for generating a richer understanding of states behaviour in the international arena, as a simplification, it cannot, by definition, extend to explain the totality of the subject. For a more complete understanding of the reality under study, a more holistic approach is needed. By relaxing the assumption of unitary action and peering inside the black box of the state, it is possible to expand a theory's ability to account for outcomes in international relations.

It is important to note that to do so is not to repudiate the model or its contribution, but rather to expand on it. Such an expansion provides an account of the circumstances under which its assumptions are valid, and so whether its conclusions are expected to hold, or whether its deviations from the empirically observed reality cause it to miss important details, and so come to incorrect conclusions. To return to the analogy of a map, additional information might be included to give a greater understanding of the city and therefore to allow better navigation. Knowing that one street connects to another is of no navigational value if it turns out that that particular street is one-way, so the inclusion of traffic rules is an additional detail which might expand the knowledge provided by the more basic map. This gives insight about when the information on the more basic map is relevant and when it is not. However, although the inclusion of detailed, time-specific, statistical information on traffic patterns for every intersection might provide additional, relevant information, it also might ultimately reduce navigational utility by overcomplicating the picture. Therefore, only by selectively including additional detail can the map's utility can be increased, and the validity of the selection and inclusion of the additional details is derived solely from this increase in utility. In much the same way, including a theory of internal political dynamics selectively complicates a theory of international relations in an attempt to expand its ability to provide an understanding of the reality of international politics. Whether or not such a complication is justified depends solely on whether or not such an increase can be achieved.

The literature which looks inside the black box of the state in international relations theory can be divided in two groups, based on the degree of complexity to which it extends. The first group consists of a set of what might be termed "structural" approaches. These consider internal characteristics of the state to be relevant in the determining outcomes in international relations only to a relatively limited and entirely apolitical extent (Gourevitch, 1978). Such approaches consider, for example, whether or not the state is a democracy (Russett and Maoz, 1993; Doyle, 1986), or the relative strength of the executive within the state (Katzenstein 1976). The other side of the divide constitutes what could be termed as overtly political analyses of states internal dynamics. These approaches argue that it is not enough to know the degree of democratisation, or relative strength of the executive, or the number of veto-points within each state, without also knowing who occupies those veto points, and what

the interests of the people who make up, or control, the executive are (Allison, 1969; Moravcsik, 1997). The essential question is whether information about domestic political interactions is more like information about traffic rules or traffic patterns. Both are of elements of the reality which is under study, but the inclusion of one enhances understanding of that reality, while inclusion of the other detracts from it.

The structural approach to analysing the role of internal characteristics of states in determining outcomes in the international arena is exemplified by two bodies of theory in particular – the bureaucratic politics literature developed by Allison in the late 1960s (Allison, 1969), and the more recent, and considerably more sizeable literature concerning democratic peace theory (Russett and Maoz, 1993) [3]. The bureaucratic politics literature, which generated a flurry of publications in the 1970s[4], has stalled somewhat since that time. Although Allison's original article on analyses of the Cuban Missile Crisis, and his book which further developed those ideas, have both achieved canonical status, Putnam states that "the theoretical contribution of this literature did not evolve much beyond the principle that bureaucratic interests matter in foreign policymaking"[5] (1988: p. 431). By contrast, the literature on democratic peace theory has been one of the most active in the study of international politics – Sebastian Rosato calls it "the most powerful liberal contribution to the debate on the causes of war and peace" (2003: p. 585) and, despite aiming to challenge the theory, concedes that "Democratic peace theorists have discovered a powerful empirical generalisation: Democracies rarely go to war or engage in militarized disputes with one another"(ibid). Its empirical success has led to a general consensus that democratic peace theory is "as close as anything we have to an empirical law in international relations."(Levy, 1989: p. 88). Despite their diverging theoretical success, both of these literatures share the same focus on structural, apolitical accounts of the role of domestic characteristics on international outcomes.

By contrast, many other accounts of the role of internal dynamics in determining international outcomes appeal to overtly political explanations. Reaching back at least as far as Hobson's analysis of the role of domestic constituencies in motivating imperialistic policy in 19th century Britain (Hobson, 1902), this long tradition of liberal thought has had many more recent proponents. Much recent work has followed Hobson's approach – analysing the role of domestic economic interests in motivating states behaviour in the international arena, although with a more modern emphasis on the transnational nature of contemporary finance (Frieden, 1991)[5]. In addition, Cutrone and Fordham find a mix of domestic interests, including economics, at play in their study of the origins of concern for human rights in the United States (Cutrone and Fordham, 2010). By contrast, Pape and Kaufmann, in their case study of the British crackdown on the Atlantic slave trade, find that this particular example

3 For a more recent review and criticism, see Gowa (2011)

4 For a slightly more recent update, and a review of the relevant literature, see Bendor and Hammond (1992)

5 For criticism see Garrett (1998)

of international action could not be explained by appeal to domestic economic interests. Instead, their account suggests that coalition dynamics, and interest group capture – two factors which combined to create what they refer to as a "saintly logroll" – offer the only explanation of Britain's foreign policy decision in this instance (Pape and Kaufmann, 1999: p. 632). Similarly, Putnam's analysis of the entanglement between domestic and international politics gives some attention to the role of coalition dynamics and the possibility of interest group capture of the representative capacities of the state (1988). However, of all of the many explicitly political accounts of the role of internal dynamics in motivating outcomes in the international arena, perhaps the most influential is that offered by Moravcsik. His analysis of the state as a representative organ, subject to capture and recapture by different domestic interest groups (Moravcsik, 1997) most clearly encapsulates the political approach to explaining the role of internal dynamics in accounting for states' behaviours in the international arena. It also offers the most explicit connection with the wider canon of international relations scholarship by clearly establishing the theoretical relationship between his liberal theory and the other dominant schools of thought in international relations – neorealism and institutionalism.

As Putnam reminds us "Domestic politics and international relations are often somehow entangled" (1988: p. 427), the question is not whether this is so, but rather whether or not including a theory of this entanglement enhances or undermines our understanding of outcomes in the international arena. Is an account of domestic politics in each state analogous to detailed statistical information about traffic patterns at each intersection on a street map, undermining our understanding of the area of study by clouding the picture with unnecessary detail, as those who prefer a structural account implicitly suggest? Or is such an account instead more closely analogous to information on one-way systems and other traffic rules, as those who prefer an overtly political account would claim, enhancing our understanding by providing necessary additional information which usefully extends and deepens our knowledge of the area in question?

Although structural accounts of internal characteristics do constitute an extension to the understanding generated by the black box conception of states in international relations, the deeper level of analysis offered by political accounts not only avoids undermining our understanding by clouding the picture with detail, but enhances it . It does so by providing useful and relevant information in determining when and under which circumstances the simplifications made by the other approaches include all of the relevant details, and so their predictions can be expected to be borne out empirically, and when their simplifications miss something important, and so can be expected empirically unsupported predictions, or as Moravcsik puts it, "Liberal theory is analytically prior to both realism and institutionalism because it defines the conditions under which their assumptions hold" (Moravcsik, 1997: p. 516).

The simplification of the unitary actor model cannot be criticised by appeal to its failure to correspond to empirical reality, for that is not the virtue against which theoretical models are to be judged. Rather it should be questioned only on its fruitfulness in generating deeper understanding of the field of international relations. On this criterion, the contribution of the literature rooted in this assumption cannot be faulted. Many of the most important developments in the study of international relations in the twentieth century are to be found in this body of literature. However, a simplification, is, by definition, a limitation in a discipline's attempt to maximise its understanding of its field of study. Therefore, to relax the assumption of the unitary actor model and look inside the black box of the state does not constitute a repudiation of this tradition, but rather an attempt to expand it, and deepen the understanding of international politics.

The question then becomes, to what depth should one delve into the black box – at what level of detail does knowledge of domestic characteristics cease to add to our understanding and begin to undermine it? Structural accounts stop at the most shallow level of detail. Although this has not prevented them from generating formidable theoretical advancements, the question remains as to whether an additional level of detail can yet further enhance our understanding. The subtleties of modern liberal theories of international relations reveal that additional detail can indeed enhance our understanding without clouding our vision, and as a result, much fruitful further study can be expected in this direction.

BIBLIOGRAPHY

Allison, G. (1969) 'Conceptual Models and the Cuban Missile Crisis' *America Political Science Review*. 63:3 (689-718)

Borges, J. L. (1946) 'On Exactitude in Science' in Hurley, A. (ed.) (1998) *Jorges Louis Borges: Collected Fiction* New York: Penguin

Cutrone, E. And Fordham, B. (2010) 'Commerce and Imagination: The Sources of Concern about International Human Rights in the US Congress' *International Studies Quarterly*. 54:3 (633-655)

Doyle, M. (1986) 'Liberalism in World Politics' *American Political Science Review*. 80:4 (1151-1169)

Frieden, J. (1991) 'Invested Interests: The Politics of National Economic Policies in a World of Global Finance' *International Organization*. 45:4 (425-451)

Garrett, G. (1998) ' Global Markets and National Politics – Collision Course or Virtuous Circle' *International Organization*. 52:4 (787-824)

Gourevitch, P. (1978) 'The Second Image Reversed: The International Sources of Domestic Politics' *International Organization*. 32:4 (881-912)

Gowa, J. (2011) *Ballots and Bullets: The Elusive Democratic Peace*. Princeton University Press, 2011.

Hobson, J. (1902) 'Imperialism: A Study' in Wright, H. (ed.) (1961)*The New Imperialism*. Boston: Heath

Kaufmann, C. and Pape, R. (1999) 'Explaining Costly International Moral Action: Britain's Sixty-Year Campaign against the Atlantic Slave Trade' *International Organization*. 53:4 (631-668)

Katzenstein, P. (1976) 'International Relations and Domestic Structures: Foreign Economc Policies of Advanced Industrial States' *International Organization*. 30:1 (1-45)

Levy, J. (1989) 'Domestic Politics and War' in Rotberg, R. and Rabb, T. (eds) *The Origin and Prevention of Major Wars.* New York: Cambridge

Milner, H. (1998) 'Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics' *International Organization.* 52:4 (759-766)

Moravcsik, A. (1997) 'Taking Preferences Seriously: A Liberal Theory of International Politics' *International Organization.* 51:4 (513-553)

Morgenthau, H. (1960) *Politics Among Nations*. New York: Knopf

Nagel, E. (1961) *The Structure of Science*. Cambridge: Hackett

Putnam, R. (1988) 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' *International Organization*. 42:3 (427-460)

Rosato, S. (2003) 'The Flawed Logic of Democratic Peace Theory' *American Political Science Review.* 97:4 (585-602)

Russett, B. And Maoz, Z. (1993) 'Normative and Structural Causes of the Democratic Peace, 1946-1986' *American Political Science Review*. 87:3 (624-638)

Waltz, K. (1979) *Theory of International Politics.* Redding: Addison-Wesley

To What Extent and Under What Conditions are Policymakers Controlled by their Civil Servants? What are the Sources of Civil Servants' Power?

ORLAITH DELARGY
Senior Sophister, European Studies

From the bureaucracies of Ancient Greece and Rome, through treatises from Condorcet and Montesquieu in the eighteenth century and up to the present day, concerns about excessive bureaucratic power are pervasive among political thinkers. A burgeoning literature explains why civil servants enjoy disproportionate power over their masters in government, while hundreds of counter-arguments depict an army of compliant, dutiful bureaucrats who bend easily to the will of the policymakers who control them. Traditionally, parties to the right of the political spectrum tend to support rolling back the public sector, and believe the bureaucracy has too much power and is ineffiecient. Conversely, parties on the left posit that a well-managed civil service populated by academics would faithfully execute the will of the incumbent government

This article will explore the possibility of a situation in which policymakers are controlled by their civil servants, explaining the conditions under which this might occur and the extent of the power bureaucrats would stand to gain in such circumstances. Even if such a scenario is a myth and civil servants are obedient, as political theorists believe them to be, "the question still remains whether [they can] give firm guidance and direction to the policymaking process" (Gordon, 1971, p.3). To ad-

dress this question, this article will explore the role of the policymaker, the information asymmetry between her and her civil servants and, finally, the sources of civil servants' power. Though the term 'bureaucracy' is more favoured in the American literature while 'civil service' is preferred in Europe, these terms – as well as their derivatives 'bureaucrat' and 'civil servant' – will be used here interchangeably.

The Role of The Policymaker

First and foremost, it is useful to reconsider the role of the policymaker. What tasks are expected of her as an elected official and how might civil servants subtly influence her decisions? The most basic answer to this question is that policymakers are expected to draft and pass the policies for which they are given a mandate. That they were elected to the legislature suggests their "announced policy comments, previous record, or both were preferred to the partisan alternative by a majority of the citizens" (Huber and Powell, 1994, p.291). Once elected, however, drafting policy in accordance with their constituents' preferences presents a problem. The literature reminds that politicians are faced with insufficient time and resources, as well as incomplete information. Hence, government ministers must delegate to their respective departments filled with civil servants who will both advise on and propose policy.

To understand the control dynamic between civil servants and their 'masters', one must consider the exchange of goods and services between the two parties. Niskanen (1973, p. 14) tells us:

> a bureau offers a promised set of activities and the expected output(s) of these activities [in exchange] for a budget.

At first glance, this definition of the exchange seems to resolve the issue of a 'runaway bureaucracy'. if this is in quotes it needs a reference The civil service is powerless without a budget and, in order to secure a budget, it must satisfy its superiors and deliver on its promises. If civil servants must be obedient in this way, is it not impossible that they could control the policymaker?

This would perhaps be true if there were multiple organisations vying for the position of the official civil service, but in reality the government is faced with a "lack of significant alternative" (Ibid.). No other organisation provides the same services as the bureaucracy and the government cannot function without these services, meaning that though the power relationship between policymaker and bureaucrat is nominally a "bilateral monopoly", it is really the bureaucrat who is in the position of "monopoly supplier" (Niskanen, 1973, p. 16, 17).

Information asymmetry and preference heterogeneity

A. Expertise

One of the reasons for the belief that policymakers are controlled by their civil servants is the fact that, in the majority of cases, the latter are more expert in their field than the former (Bawn, 1995, p.62). Following Strøm et al. this information asymmetry is one of the most basic problems associated with Principal Agent Theory (2003, pp.61-2), and the relationship between policymaker and civil servant is perhaps the best example of it. As Niskanen (1973, p.16) explains, "there is usually a wide disparity in the relative information available to the sponsor and to the bureau…[and] as a rule…a bureaucrat will know much more about the costs and production processes." Huber and Shipan (2000, p.27) confirm this, reminding that even when politicians attempt to micromanage their civil servants or observe them closely, they "do not know precisely what outcomes will result from the adoption of specific policies." The result is that even when under close scrutiny, the bureaucrat is still in a position of power because she has the benefit of "the accumulation of experience in policy implementation" (Smith, 1988, p.44).

B.Preference Heterogeneity

In policymaking, knowing the political preferences of those around you is highly beneficial, as information regarding policy can be framed or edited in such a way as to maximise the chances of achieving your preferred outcome (Strøm et al., 2003, pp.61-2). This represents another informational asymmetry between policymaker and bureaucrat: while the preferences of the bureaucrat are protected and "must not be jeopardized by public exposure" (Smith, 1988, p.46) those of the policymaker are more or less public thanks to past record in office or previous campaigns and manifestos.

Thus, the bureaucrat can use these resources to ascertain the preferences of her superior and has more time than the latter to do so. When presenting a piece of advice or a policy suggestion, bureaucrats thus have the advantage of being able to ascertain the political preferences of their superior. Politicians, on the other hand, may not discover their civil servants' political allegiances until after a contract has been made. The civil servant's power in this regard is greatest where *ex-ante* control mechanisms such as selection and screening are not in place, as these controls limit bureaucrats' range of feasible actions and attempt to mitigate informational asymmetries and specific moral hazard problems (Braun and Gilardi, 2006, p.7).

As Strøm (in Dietmar and Fabrizio, 2006, p.66) explains , "the bulk of civil servants are normally recruited through exams on their knowledge and expertise, and their preferences are generally unknown". As a result, the policymaker may have no say in the recruitment and hiring of the bureaucrats who will be advising her and implementing her decisions for the duration of her time in government. This poses a real

problem for the policymaker given the aforementioned ability of the bureaucrat to frame and edit information. Leslie Johns deals with this question succinctly in her 2007 paper 'A Servant of Two Masters':

> bureaucrats often serve as informational agents: collecting information and reporting back to their superiors about what they have learned. An agent's incentive to report truthfully is affected by how the information that he provides will be used. If the principal will make a decision that the informational agent finds distasteful, then it is unlikely that the agent will tell the truth. (p. 3)

In this way, civil servants may exercise a great deal of control over their masters. Where bureaucrat and policymaker have conflicting preferences, the bureaucrat is effectively in the driver's seat and may cherry-pick information in order to limit the policymaker's choice of action. It is from this scenario that the picture of a controlling, manipulative and subversive bureaucrat is derived: the policymaker still makes her decision autonomously, but she does so with incomplete, even misleading information.

Nevertheless, this ability of bureaucrats to frame information is only of concern in certain situations. Where the preferences of policymaker and bureaucrat align, for example, the informing civil servant will provide all the information necessary for the policymaker to take the decision that will lead to both parties' most-preferred outcome. Furthermore, the 'manipulative bureaucrat' scenario implies that the policymaker's final decision was the sole product of information from the bureaucrat (or lack thereof). In reality, however, the policymaker receives advice from diverse sources (interest groups, NGOs etc.) and also has her own personal preferences which may influence her choice. Though it is true that civil servants can sometimes pick and choose the type of information they provide, discerning the extent to which a minister's decision was influenced by this presents distinct measurement difficulties. We are told, for example, that in studies of the British civil service:

> the underlying nagging question…was whether the executive machine was so structured that ministers had many informed ideas of their own, could count on their being rigorously analysed in concrete policy situations by officials sympathetic to them, and could be sure of getting a wide range of divergent views framed, if need be, by bold, imaginative advisers. (Gordon, 1971, p.4)

It is crucial to bear these measurement problems and alternative influences in mind when considering civil servants' control on policymakers lest we ascribe to

bureaucrats an authority which is not all their own.

What are the sources of civil servants' power?

Bureaucrats are not elected and are often appointed for life. They do not have a democratic mandate to influence policy, and yet it is these workers who implement (and to a certain extent manipulate) government policy on a daily basis: no policy gets off the ground without the help and input of civil servants. Without doubt, it is this reality that most worries political scientists and policymakers.How can we make a body of unelected officials – the so-called 'permanent government' – accountable to the people? Civil servants derive their power from a simple chain of delegation whereby the voter delegates to a politician who, due lack of time and information, must in turn delegate to civil servants in her department. Therefore, the source of civil servants' power is effectively the voter, who bestows them with the authority to implement policy through a chain of delegation.

The problem in this scenario (as with all instances of delegation) is that the longer the chain, the harder it is for the principal (voter) to oversee the actions of the agent (civil servant). The links of authority in parliamentary democracies stem from the voters, to their representatives, to the prime minister, to her cabinet ministers and finally, to the civil servants (Strøm in Dietmar and Fabrizio, 2006, p.33). This six-stage chain of delegation leaves much room for moral hazard, and a certain amount of deviation from the voters' preferences down to the actions of the civil servants is inevitable.

Smith, however, argues that "appointed servants of the state … [are] ultimately answerable to the people" (1988, p. 40) and that "constitutional arrangements have been developed to ensure that bureaucracies remain responsive to political direction." At the same time, however, it is true that a policymaker who decides to act against the advice of her civil servants could have her decision overruled "by presidential opposition, court decisions, or the actions of agency personnel" (Bawn, 1995, p. 62). It is therefore possible that civil servants may indirectly achieve their desired outcome even without the approval of their superiors.

Case study: what students of the European Union can learn from bureaucracy in the United States

Given that the voluminous literature on bureaucracies and the question of their autonomy is largely focused on the relationship between Congress and the American bureaucracy, it seems appropriate to briefly consider the case of the United States. Congress' control over the bureaucracy has been studied extensively and the mecha-

nisms (screening, selection, contract design etc.) which attempt to limit bureaucrats' ability to shirk their responsibilities have been repeatedly tested and evaluated by political scientists (Strøm, 2003, pp.45-48). Scholars of the European Union have followed such studies (Pollack, 2002, p.202) and the American dynamic which appears to have changed in recent decades: "congressional micromanagement increasingly takes the form of devising elaborate, detailed rules instead of demanding particular favours for particular people" (Wilson, 1989, p.242). The resultant problem is that bureaucrats, mindful of the danger of sanctions, will "rationally anticipate" their superiors' preferences and "adjust their behaviour accordingly" (Pollack, 2002, p.202). Bureaucrats are ostensibly compliant, the instance of sanctions is rare, and it is therefore assumed that the 'runaway bureaucracy' scenario has been avoided (Ibid.). Effective bureaucracy for the EU does not require that its students "slavishly follow" this example of extensive regulation set by the US, but rather that they may learn from the problems associated with determining how and why a civil servant acts in a particular way (Ibid. p.216).

Conclusion

This article has contended that the degree to which policymakers may be controlled by their civil servants is dependent on the existence of four key factors. Civil servants may exert disproportionate power over their policymakers where the bureaucracy has 'monopoly supplier' status, where control mechanisms are weak, where the information of both parties is highly asymmetrical and where there is a long chain of delegation from voter to civil servant. When considering the different sources of the unelected bureaucracy's power, it is clear that though bureaucrats can sometimes achieve their goals through favourable decisions from presidents or courts, they mainly derive their authority from, the voters, and through delegation of authority from elected policymakers.

BIBLIOGRAPHY

Bawn, Kathleen, 1995. 'Political Control Versus Expertise: Congressional Choices about Administrative Procedures', *The American Political Science Review*, 89:1, pp. 62-73, Washington, DC: American Political Science Association.

Bekke, Hans and Van Der Meer, Fritz, 2001. *Civil Service Systems in Western Europe*, Edward Elgar.

Braun, Dietmar, and Gilardi, Fabrizio, 2006. *Delegation in contemporary democracies*, London: Routledge.

Gordon, Michael R., 1971. 'Civil Servants, Politicians, and Parties: Shortcomings in the British Policy Process', *Comparative Politics*, 4:1, pp. 29-58, New York, NY: Ph.D. Program in Political Science of the City University of New York.

Huber, John D., and Bingham Powell Jr., G., 1994. 'Congruence Between Citizens and Policymakers in Two Visions of Liberal Democracy', *World Politics*, 46:3, pp. 291-326, New York, NY: Cambridge University Press.

Huber, John D. and Shipan, Charles R., 2002. *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy*, New York: Cambridge University Press.

Huber, John D. and Shipan, Charles R., 2000. 'The Costs of Control: Legislators, Agencies, and Transaction Costs', *Legislative Studies Quarterly*, 25:1, pp. 25-52, Iowa: Comparative Legislative Research Center.

Johns, Leslie, 2007. 'A Servant of Two Masters: Communication and the Selection of International Bureaucrats', *International Organization*, 61:2, pp. 245-275, New York: Cambridge University Press.

Niskanen, William A., 1973. *Bureaucracy: Servant or Master?*, London: The Institute of Economic Affairs.

Peter, B. Guy, 2001. *The Politics of Bureaucracy*, London: Routledge.

Pollack, Mark A., 2002. 'Learning From the Americanists (Again): Theory and Method in the Study of Delegation', *West European Politics*, 25:1, pp. 200-219, London: Frank Cass.

Shafritz, Jay M., and Hyde, Albert C., 1997. *Classics of Public Administration*, Fort Worth, TX: Harcourt Brace.

Smith, Brian C., 1988, *Bureaucracy and Political Power*, Sussex: Wheatsheaf.

Strøm, Kaare, Müller, Wolfgang C. and Bergman, Torbjörn (eds.), 2003. *Delegation and Accountability in Parliamentary Democracies*. New York: Oxford University Press

Wilson, James Q. 1989. *Bureaucracy: What Government Agencies Do And Why They Do It*, New York: Basic Books.

Psychopathy, a convenient tag for academics? An Analysis of Psychopathy in the Criminal and Social Sphere.

CÍODHNA NÍ GHUIDHIR
Senior Sophister, TSM Psychology and English

Psychopathy as a criminological and psychological diagnosis believed to identify individuals who both pose a threat to and cannot normally function in society has long been controversial. Tim Newburn notes that one of the numerous criticisms of the term "psychopathy" is that it is tautologous; "the identification of dangerous individuals being made on the basis of their dangerous behaviour rather than any other factors which might differentiate them from others in the population" (Criminology, page 846). However, psychopathy as measured by the Psychopathy Checklist Revised (PCL-R) is a disorder characterised by personality traits as well as behaviours. The statement that psychopathy is nothing but a convenient label for high levels of deviancy shall be challenged by a thorough examination of the construct validity and clinical application of the PCL-R.

Research demonstrating incidences of psychopathic personalities in both normative and criminal populations shall be critiqued to ascertain whether this concept also applies regardless of criminal record. Potential incorrect diagnoses of psychopathy in certain populations shall be discussed. Environmental situations in

which psychopathy may manifest will be elucidated, suggesting that a more situational explanation of psychopathic behaviour may provide a greater understanding of the condition. Particular crimes and psychopathy correlatives will be discussed to illustrate differences between psychopathic and non-psychopathic criminals. The ontological validity of this construct shall be supported by research indicating that there are "neurobiological underpinnings of psychopathy" (Yu Gao et al, 2009, page 813). Throughout, the evidence supporting psychopathy as a valid construct in criminology shall be critically analysed and alternative explanations for some of the phenomena detailed shall be discussed.

The construct of Psychopathy and the Psychopathy Checklist Revised

The PCL-R is widely considered the pre-eminent assessment of psychopathy and includes factors that measure personality variables as well as behaviours that differentiate psychopaths from the normative population. Personality based criteria are evident in Interpersonal (such as glibness, narcissism, manipulativeness) and Affective (such as lack of remorse, lack of empathy, non-acceptance of responsibility) categories, which fall under Factor 1. Behavioural based criteria are evident in Lifestyle (need for stimulation, impulsivity, lack of long-term goals) and Anti-social (poor behavioural controls, early behavioural problems) which fall under Factor 2. Promiscuous sexual behaviour and many short-term relationships are two other items that do not load onto either factor but are included to calculate the individual's score.

The PCL-R has been extensively reviewed and administered to community, clinical and forensic populations and has been described as "the gold standard for the assessment of psychopathy" (Acheson, 2005, page 430). A meta-analysis by Leistico et al (2008) showed that psychopathy was a strong risk factor for institutional problems, general recidivism and violence in particular. Previous meta-analyses on the link between psychopathy and anti-social behaviour had similar findings, especially with regards to general, violent and sexual recidivism (Leistico et al 2008, page 30). Robert Hare & Craig Neumann (2009) argue that the PCL-R is particularly valuable because of it's "demonstrated ability to predict recidivism, violence and treatment outcome" (page 792) and because "internal consistency and inter-rater reliability...are generally high in basic and applied research contexts" (page 793). Indeed, it is difficult to obtain any modern peer-reviewed study of psychopathy that does not use the PCL-R.

Despite the PCL-R's high approval ratings amongst the academic community, it is liable for inaccurate use. It must be considered that clinicians who administer the PCL-R and its derivatives could fall foul of the psychological phenomena of confirmation bias: if one was administering a particularly violent person who had committed numerous egregious crimes it would be natural for even the most experienced professional to be influenced by their presupposed ideas about this person and thus might incorrectly diagnose the individual as psychopathic. Hare and Neumann (2009) acknowledge that "there is a possibility of rater bias in assessments completed by clinicians involved in adversarial proceedings" based on the findings of Murrie et al (2008). However, they argue that any problems posed by misapplication of the PCL-R can be avoided by proper professional conduct, such as using all of the information provided on the person to assess him/her, taking measurement error into account and providing detailed reasoning for their ratings.

Hare and Neumann (2009) also note "the possibility that some features measured by the PCL:YV are found in normally developing youth" (page 795). One might imagine such features manifesting in particular situations or contexts, such as a teenager frequently lying to appease his/her peers or to avoid punishment from over-authoritarian parents. Furthermore, callous affect may not be an innate quality of the individual but if he/she is influenced by macho ideals that espouse being "tough" and unemotional as virtues, one can expect the individual to aspire and attempt to exhibit such attitudes. Indeed, this too may be the case in individuals assessed for psychopathy in prison environments, which tend to be violent and hostile by nature. This is a cause of concern for many researchers, particularly those cited above, who suggest that more research needs to be carried out in non-forensic populations. However, incorrect diagnosis could be avoided if clinicians took into account the contexts in which the behaviours and attitudes occur and the environmental influences precipitating on the individuals.

Thus, whilst the PCL-R and it's derivatives may be susceptible for misuse, it is a highly valuable assessment of psychopathy due to it's high internal consistency and inter-rater reliability and its ability to identify individuals at risk of anti-social behaviour, criminal behaviour and recidivism. Should psychopathy be a personality trait and not just a label for highly deviant individuals, we should expect to see neurobiological correlates underpinning this condition.

Neurobiological correlates of Psychopathy

If the PCL-R is a measure that identifies groups with particular personality

traits, it should follow that psychopathy has neurobiological correlates which could differentiate psychopaths from the normative population, a wealth of which are discussed by Yu Gao et al (2009). Whilst a thorough analysis of research in this area is beyond the scope of this inquiry, the most consistent findings identified by Yu Gao are worth interrogating. To date, these include "structural and functional abnormality in the amygdala and orbitofrontal-ventromedial PFC, deviant attention, language, and executive functions, diminished autonomic activity and responsivity to aversive stimuli, and reduced cortisol levels in psychopathic people" (page 820).

The connection, for example, between specific brain areas and hormones with psychopathic tendencies is far from tenuous. Deficits in the amygdala, a brain region considerably linked with emotion and violence, have been linked to affective and inter-personal psychopathic traits and damage to the ventro-medial region of the pre-frontal cortex has been linked to affective, inter-personal and anti-social psychopathic traits (Gao et al, 2009). Robert Sapolsky (2004) notes "it is the job of the frontal cortex to bias an individual towards doing the harder rather than the easier thing" (page 1790) and the work of Camille et al (2004) on the role of the orbito-frontal cortex in regret demonstrated that participants with normal function in this brain area "chose to minimize future regret and learned from their emotional experience" (page 1167) whilst those with damage did not. High cortisol levels are associated with stress and particularly risk aversion. The role of cortisol in real life decision making has been well substantiated, a prime example being the risk inhibition high cortisol levels incurs in stock traders (although this also corresponded to testosterone levels) (Coates & Herbert, 2008). As such, low cortisol levels in psychopaths may precipitate less inhibited and more risk-prone behaviour.

At present the etiologies of conditions such as Schizophrenia, Attention Deficit Hyperactive Disorder (ADHD) and Autistic Spectrum Disorder are not conclusively known so it is not surprising that the etiology of psychopathy hasn't been identified yet either. Whilst these findings are not conclusive, they successfully illustrate the link between a high PCL-R score and neurobiological states, lending validity to the ontological construct of Psychopathy through its biological manifestation. Further to these biological differences between psychopaths and the normative population, we may expect discernible differences in the behaviour of psychopathic and non-psychopathic criminals.

Traits of the psychopathic criminal

The link between psychopathy and crime would suggest that psychopaths are

more disposed to certain types of crime. Hare and Neumann (2009) note that sexual offences committed by psychopaths tend to be more violent and more sadistic than the sexual offences of non-psychopathic offenders (Harris et al 2003; Porter et al 2003). Other research indicates that amongst extreme criminal cases of psychopaths, murderers for example, incidence of sadistic personality is extremely high (Hare et al 1999; Ochberg et al 2003; Stone et al 1998; Stone et al 2009: as cited by Hare and Neumann, 2009). The consistent applicability of the PCL-R in correctly assessing recidivism (Leistico 2008) amongst offenders (particularly violent and sexual offenders) is congruent with the criteria that a psychopath is more impulsive, less empathetic, less remorseful and less likely to learn from one's mistakes.

Spidel et al (2006) make a strong case that psychopathic personality is very conducive to the crime of pimping, an inherently parasitic lifestyle and to the abusive control that pimps have on their victims through impulsive beatings and manipulation. Although a small sample of 22 participants who had served time for pimping was used, over one third of the participants scored 30 or above on the PCL-R.

Woodworth and Potter (2002) found a general difference between the motivations of psychopathic and non-psychopathic murderers as almost all of the homicides committed by psychopaths (as diagnosed by the PCL-R with a cut-off score of 30) were instrumental (i.e. premeditated, not reactionary or 'crimes of passion'), whilst those committed by non-psychopathic murderers "did not show the same clear preference for or tendency toward instrumental violence witnessed in the psychopathic offenders" (page 442). This suggests that the difference between psychopathic and non-psychopathic murderers is also reflected in the nature of their murders and their motives.

Indeed it seems that those identified as psychopaths by the PCL-R pose a heightened risk of committing especially vicious and pernicious crimes. To further the case that Psychopathy is more than just a label for high levels of deviant behaviour, we must demonstrate that psychopathic individuals are present in non-criminal populations.

Occurrences of Psychopathy in non-forensic populations

A prominent concept in psychopathy research is the "successful" and "unsuccessful" psychopath. The "successful" psychopath has not been arrested for his/her deeds yet still conducts him/herself in a manner that befits the traits of the psychopath. They would be considered likely candidates for corporate fraud and other "white collar" crimes (Babiak, 2010) whilst the unsuccessful psychopath commits deviant

and criminal acts. Babiak et al (2010) conducted a study to determine if there were psychopaths amongst the corporate population, their role in these companies and how they were perceived by their colleagues.

The PCL-R and PCL: SV was administered to 203 corporate professionals who had been selected by their companies to participate in management development programs. This took place across seven companies and the PCL-R and PCL: SV results were compared to the 360º assessments and performance ratings that each individual received from their colleagues (including superiors and inferiors). 3.9% of the participants (8 individuals in total) had a PCL-R score of 30 or higher (by comparison approximately 15% of male offenders obtain this score.) The analysis conducted on the PCL: SV equivalents revealed that 3% of the participants achieved a score of 18 (which was thought to be comparable to the 30 cut off point for the PCL-R). This contrasted with a MacArthur community sample where the PCL: SV was administered and only 0.2% of the population achieved this score as well as a study done by Coid et al (2009) on the house-hold population of Great Britain which revealed that psychopathy affected less than 1% of the sample population. Psychopathic individuals were judged to have poor interpersonal skills by their colleagues (such as poor management style, not a team player) but have good communication skills, strategic thinking ability and were creative and innovative.

The authors noted that out of the nine participants who attained a PCL-R score of 25 or higher, seven of them "had already achieved considerable rank and status within their respective organisation" such as the position of director or vice-president (page 185). This shows a disproportionate presence of psychopaths in a particular sample and would tentatively suggest that the corporate world is conducive to psychopathic personalities achieving success. A potential alternative explanation for this could be provided by Galinsky et al (2006), who demonstrated that being primed for power causes more egocentric attitudes and behaviour.

Power was defined as controlling the ability of another person to get something he/she wanted or being in a position to evaluate someone else. Participants who were primed for power showed less sensitivity to other's perspectives and were less accurate at interpreting facial expressions. If mere temporary priming can have this result, it is quite possible that being in a position of power everyday can cause individuals to develop patterns of behaviour lacking in empathy, lacking in remorse for negative consequences one's actions had on others and manipulative tendencies.

To assess whether these psychopathic traits in individuals of high corporate rank are inherent or cultivated by their environment, longitudinal studies including the administering of the PCL-R on corporate workers before and after they achieve

positions of power could achieve this although few corporations are willing to participate in this type of research (Babiak et al). Furthermore this study only examined the participants in their professional lives but not in any other areas of their life. It would be pertinent to ascertain if this type of behaviour applied in every area of the individual's life or just in the so-called "cut-throat world of business" where certain psychopathic qualities could be seen as virtues as lack of empathy would facilitate "tough" decision making that prioritises the interests of the business yet have disastrous effects on employees or third parties (Babiak et al 2010).

Babiak's study may support the concept of the non-criminal psychopath, disproving the idea that psychopathy only applies to criminals. On the contrary, this study may illustrate the nuances of measuring psychopathy as psychopathic traits and behaviour may be situation specific, thus resulting in a misdiagnosis of psychopathy. Indeed, this too may apply to a criminal population.

Misdiagnosing psychopathy: mistaking the situational as innate

In a study by Stevenson et al (2004) on the relationship between socio-moral reasoning and criminal rationalisations, some participants produced justifications for their crimes that displayed a lack of guilt, lack of empathy with the victim, impulsivity and a sense of entitlement. To illustrate this we can look at two justifications given by individuals who committed armed robbery.

> "Cause they have a job, me I'm battling to get $5 a week and I need to support my habit, they have insurance, can get their stuff back."

> "When you rob banks, who is the worst criminal, the bank or the robber, how much social damage do banks do, does anyone question the banker's morals, but really this is only justifying it and you can't have people justifying everything or you'll have anarchy."

The authors relate their findings to Sutherland's Differential Association theory that once criminal sentiments have been internalised, one's morality is framed in such a way that accommodates and rationalises criminal behaviour (Sutherland, 1974). The greater likelihood for internalising such sentiments rationalising crime rather than more prevalent societal norms is due to identification with other criminals and viewing oneself as apart from or outside of society. Thus criminals may display

empathy, guilt and emotional bonds with those with whom they identify but not display these towards non-criminals and those perceived as 'other'. This could also be the case with religious fanatics who remorselessly commit violent crimes towards 'others' but who display no psychopathic affective or inter-personal traits in the context of their own communities. This highlights the importance of establishing whether the individual's attitudes and behaviour towards others is universal or a consequence of who they do or don't identify with and establish relationships with when assessing psychopathy.

Compounding the situational explanations for psychopathic behaviours is Zimbardo's Stanford Prison experiment (1971). Although participants in this study were deliberately selected based on psychological healthiness and stability, those randomly assigned into the "prison guards" role were authoritarian and abusive to participants in the "prisoners" role, suggesting that certain situations and roles invoke particular behaviours. Individuals with no prior semblance of psychopathy behaved in a manner evoking interpersonal and affective traits of a psychopath.

Rather than this being an exceptional case, Zimbardo identified the conditions of Abu Ghraib prison as bearing similarity with the conditions of his experiment and contended that the torture may have been the outcome of the military incarceration system itself rather than simply the behaviour of "a few bad apples". If behaviour befitting a psychopath may result from such short-term situational conditions as the Stanford Prison experiment, then there is considerable likelihood that psychopathy would also be bred in other environments in the long term.

Conclusion

Some might interpret the high rate of psychopathy amongst prison populations, high rate of recidivism, high tendency for violence and for instrumental murder as indications that psychopathy is just a term for "high levels of deviant behaviour". In doing so, one would have to ignore that the construct of psychopathy as measured by the PCL-R has withstood considerable scrutiny, despite some vulnerabilities for improper usage, and has been proven to be very reliable whilst providing the benefit of predicting recidivism. One would also have to ignore that crimes such as pimping and instrumental murder are also committed by people who do not score high on the PCL-R, that non-criminal psychopaths live amongst the general population and that like other personality disorders psychopathy has substantiated neurobiological foundations. Examples of how non-psychopathic individuals could be incorrectly diagnosed have been discussed, as well as providing alternative explanations for

seemingly psychopathic behaviour.

It is naïve to expect psychopaths and non-psychopaths to fall neatly into two different behavioural categories that perfectly reflect their personalities – just as some psychopaths channel their impulses in the corporate boardroom, we can expect non-psychopaths to commit crimes associated with psychopathy. It could be beneficial to begin to study psychopathy as a continuum as Sapolsky (2004) notes that a particular problem in psychiatry (and the justice system) is delineating the individuals who don't fit neatly into a normative or psychiatric category yet still show concerning traits of a particular psychiatric condition. Hare and Neumann (2008) state that much research "suggests that psychopathic personality traits in adults and adolescents are best viewed as existing on a continuum" (page 234). Further research on psychopathy might focus on where on this continua different types of criminals fall as well as where "successful" and "unsuccessful" psychopaths fall. Critical analysis would also be necessary in evaluating whether traits and behaviour befitting psychopathy are cultivated in certain situations or manifest exclusively in specific areas of an individual's life such as the corporate workplace.

In conclusion, it would appear that psychopathy as measured by the PCL-R is a substantiated personality disorder and not merely a convenient tag for high levels of deviant behaviour. However, the validity of this construct is complicated by how psychopathy may manifest in certain environments rather than solely inhering in the individual in all situations. Zimbardo voiced further concerns that the results of his research may have been incorporated by the Pentagon into its various programs, using his literature not to explain but to cultivate behaviour which could be deemed psychopathic. It is an uncomfortable theory that the callous behaviour and personality traits of psychopathy may derive from environmental and social factors, indicting our social structures when we may be more inclined to demonise the psychopath. To truly understand the nuances of psychopathy, we must be open to the suggestion that it may be bred or solely manifest in certain situations, not solely inhere in the individual.

BIBLIOGRAPHY

Acheson. (2005). Review of the Hare Psychopathy Checklist-Revised, 2nd edn.. In R.A. Spies & B.S. Plake (eds.) (2005). The Sixteenth Mental Measurements Yearbook (pp. 429-31). Lincoln, NE: Buros Institute of Mental Measurements.

Archer, Buffington-Vollum, Stredny, Handel. (2006). A survey of psychological test use patterns among forensic psychologists. *Journal of Personality Assessment.* Vol 87(1). pp. 84-94

Babiak, Neumann, Hare. (2010). Corporate psychopathy: Talking the walk. *Behavioural Sciences and the Law.* Vol 28(2). pp. 174-93.

Camille, Coricelli, Sallet, Pradat-Diehl, Duhamel, Sirigu. (2004) The involvement of the orbi-tofrontal cortex in the experience of regret. *Science.* Vol 304. pp. 1167-1170.

Coates, Herbert. (2008). Endogenous steroids and financial risk taking on a London trading floor. *PNAS Proceedings of the National Academy of Sciences of the United States of America,* 105(16), 6167-6172.

Coid, Yang, Ullrich, Hare. (2009). Prevalence and correlates of psychopathic traits in the household population of Great Britain. *Int J Law Psychiatry.* Vol. 32, (2). pp. 65-73.

Galinsky, Magee, Inesi, Gruenfeld. (2006). Power and perspectives not taken. *Psychological Science.* Vol 17(12). pp. 1068-1074

Gao, Glenn, Schug, Yang, Raine. (2009). The neurobiology of psychopathy: A neurodevelopmental perspective. *Canadian Journal of Psychiatry.* Vol 54(12). pp. 813-823.

Hare, R. D., & Neumann, C. S. (2008). Psychopathy as a clinical and empirical construct. *Annual Review of Clinical Psychology.* Vol 4. pp. 217-246.

Hare, Neumann. (2009). Psychopathy: Assessment and forensic implications. *Canadian Journal of Psychiatry.* Vol 54(12). pp. 791-802.

Hare. *(1991). The Hare Psychopathy Checklist—Revised. Toronto (ON):* Multi-Health Systems, Inc;

Hare. *(2003). The Hare Psychopathy Checklist—Revised. 2nd ed. Toronto (ON):* Multi-Health Systems, Inc;

Leistico, Salekin, DeCoster, Rogers. (2008). A meta-analysis relating the Hare measures of psychopathy to antisocial conduct. *Law and Human Behaviour.* Vol 32(1). pp. 2–45.

Newburn. (2007). *Criminology*, Cullompton: Willan

Porter, Porter. (2007). Psychopathy and violent crime. In: Hervé H, Yuille JC, editors. The psychopath: theory, research, and practice. Mahwah (NJ): *Lawrence Erlbaum Associates, Inc.*
pp. 287–300.

Sapolsky. (2004). The Frontal Cortex and the Criminal Justice System. *Philosophical Transactions: Biological Sciences*, 359, 1451. pp.1787-1796

Stevenson, Hall, Innes. (2004). Rationalizing Criminal Behaviour: The Influence of Criminal Sentiments on Sociomoral Development in Violent Offenders and Nonoffenders. *International Journal of Offender Therapy and Comparative Criminology.* Vol 48(2). pp. 161-174.

Sutherland. (1974). *Criminology*. J.B. Lippincott Company

Woodworth, Porter. (2002). In cold blood: characteristics of criminal homicides as a function of psychopathy. *Journal of Abnormal Psychology.* Vol 111(3). pp. 436-45.

Zimbardo, P. G. (1971). *Stanford prison experiment*. Stanford University.

Zimbardo, P.G. (2005) *"YOU CAN'T BE A SWEET CUCUMBER IN A VINEGAR BARREL" [1.19.05] A Talk with Philip Zimbardo.* http://www.edge.org/3rd_culture/zimbardo05/zimbardo05_index.html

Return Of The Iron-Rice Bowl: A Social, Economic and Legal Analysis of China's Social Insurance Law.

RORY PLANT
Junior Sophister, Law and Political Science

On July 1st 2011, the People's Republic of China (hereafter China) introduced the measures enacted in the Social Insurance Law, effectively transforming the means by which Chinese citizens receive welfare benefits (Austcham,2011). Media commentary on social welfare issues has paid more attention to the issues surrounding 'Obamacare' in the West than to this (Economist, 2012). This is interesting, as the scale of the legal reorganisation of the welfare system in China is far more radical, and of much larger scale than the measures introduced in the United States.

This article will examine this ambitious Social Insurance Law (hereafter SIL) that was introduced in the People's Republic of China (hereafter China) in 2011. In doing so it will argue that, from a theoretical perspective, the SIL has radically altered China's traditional welfare state model - a phenomenon that may be indicative of a shift in the social, economic and ethical priorities of the Chinese Communist Party (hereafter CCP). Due to the relative youth of the SIL, the full effects of the Law have yet to be realised but there is still scope for speculation on it's possible consequences on the region.

This article will begin with a brief explaination of the structure of the traditional

Chinese Welfare State as assessed with one of the most popular templates of Welfare Studies: Esping Andersons *Three Models of Welfare Capitalism* (1995). The article will then examine the historical trajectories that have created such great demand to reinvent China's Welfare State, before offering a critical analysis of the provisions of the SIL and speculating on its potential efficaciousness. Finally, it will conclude by outlining the social, economic and legal complexities that will be necessary for the new welfare regime to survive.

Defining the Welfare State; Three Worlds of Welfare Capitalism

A Welfare State is defined as a system in which government undertakes the main responsibility for providing the social and economic security of the State's population by means of pensions, social security benefits, free health care (McClain and MacMillan, 2010). Such measures, at least theoretically, help mitigate the potential for social and political instability within regions.

The method by which a State ensures the welfare of its citizens varies from country to country, although there are often empirical similarities in the welfare regimes between States. (Stepan, 2008, p 14.) One of the most influential scholars of Welfare Studies has been Esping-Andersen, who identified three general models of welfare practice in his seminal work *Three Models of Welfare Capitalism* (1995). This section will briefly examine the structure of these various models in order to give the reader a fuller appreciation of the radical nature of the new SIL in comparison to previous models of Chinese welfare distribution.

The first regime is the Anglo-Saxon model, or 'liberalist regime', whereby the role of government is to nurture welfare on the basis of market transactions rather than take on a paternalistic role in the welfare of its citizens. It is the citizen's primary responsibility to find the best market value for their welfare. It is not uncommon for the government to foster private welfare by providing tax deductions rather than increasing taxes. The US and the UK are practitioners of this model. (Esping Anderson,1995).

The second regime is the 'social-democratic' regime that is often championed by the Nordic countries. It is unique in its emphasis on the government pillar providing welfare (Esping Andersen 1995, p. 14) and on the universal inclusion of its citizens in centralised welfare programmes that have comprehensive social entitlements. Generally, these welfare regimes are financed by higher taxation.

The third regime is the 'conservative regime' that places a greater emphasis on the role of economic units such as families and corporations in providing for the welfare of their workers. In more recent years this has manifested itself in the form of welfare being employment-linked rather than being delivered by government. This form of

welfare is practised widely throughout Europe, with exemplary examples including Austria and Germany.(Esping Anderson, 1995).

These models are not rigid and many States use mixtures of the three models in their own welfare programmes. For example, although the UK falls into the Anglo-Saxon model, the National Health Service is a strongly State regulated body since 1990 that is financed through taxation (McLean and McMillan,2010). However for the purposes of this article it will be argued that the new SIL marks a shift away from the 'conservative model', and closer toward the 'social-democratic' model - a phenomenon worthy of examination.

Chinese Welfare: The Traditional model.

Despite the varying nuances of the Chinese welfare practices between 1949 and 2002, China has traditionally been a 'dualist-welfare system' operating with two separate and distinct welfare spheres that have no influence over each other. (Li, Feng and Gizelis, 2007, p. 12). The main institutional driving force of this 'dualist-welfare system' is the *hukou* or residential housing registration, used to control the movement of citizens within the country. Within this system, citizens must register as either urban or rural residents and, up until recently, it was *solely* (own emphasis) on this basis that one determined to which model of social security one would access (Li, Feng and Gizeli's, 2007, p. 6).

The CCP first introduced this model at the inception of the State in 1949 (Stepan, 2008, p.49). In keeping with Marxist ideology, the CCP tried to create a system that gave workers a minimal standard of living, based upon the 'Five Guarantees' (*wu bao*); pensions, medical insurance, work related injury insurance, unemployment insurance and housing. It was hoped that ensuring this standard of living would encourage worker productivity in the labour force. This system divided labourers into those who worked for State-Owned Enterprises (hereafter SOE's) or 'big business', or for Collective Owned Enterprises (hereafter COE's) which generally consisted of the collectivised farms. Generally, those who worked in the SOE's lived in urban areas while those who worked in the COE's lived in rural areas. Thus different workers received different social security benefits (Stepan,2008).

The social-security benefits enjoyed by workers of SOE's were generally far more favourable than those in the rural system. The State played a strong role in providing heavily subsidised benefits in the fields of pensions, educational services, health services, unemployment benefit and housing costs. This comprehensive welfare system was colloquially referred to as the 'Iron-Rice Bowl' and rivalled the 'cradle to the grave' model of welfare endorsed by Sweden around the same time (Aspalter, 2001).

The scheme for those residents in rural areas, on the other hand, placed greater em-

phasis on the role of family and the collective farms in ensuring the welfare of their fellows. Although there was some State participation in health care and education programmes, it was not to the same degree as in the urban scheme. Social security was to be provided by the family, generally perceived as a more traditional source of welfare (Stepan,2008, p. 88).

Although the previous Chinese model of welfare generally conforms with a 'conservative model' of welfare (with different corporate entities providing the welfare of their own workers), the institutional arrangements for the urban welfare scheme led to a *de facto* 'social-democratic´ arrangement. This was mainly due to the fact that SOE's were run on the assumption that there was full employment of urban workers in SOE's or in other parts of the public sector. Rural workers, on the other, hand still relied heavily upon family members and colleagues for welfare (Gao, 2010, p 6.) .

The institutional arrangements of this early period greatly contributed to many problems that the CCP has only recently tried to alleviate, particularly the problem of how social security provided to economic migrants moving from rural to urban areas. The infrastructure of China did not accommodate an easy transition into the urban welfare projects, particularly due to incompetence and rigid control within the *hukou* system (Chen and Lu, 2006). Furhter examination of this shall be discussed below.

Economic Openness and Liberalisation.

The success of the 'Iron-Rice Bowl' was completely devastated by the great economic and political instability that plagued China between 1958 and 1976, particularly during the Great Leap Forward and The Great Proletarian Cultural Revolution. During this era the welfare system effectively did not exist, due to inefficient funding and lack of any real or effective central authority. (Stepan, 2008) It was not until after Mao's death in 1976 that a major paradigm shift changed the *de facto* social-democratic model of welfare within the urban system. With the realisation that China was falling behind economically, the CCP introduced more liberal economic policies in the pursuit of economic growth, under the leadership of Deng Xiaoping. The pursuit of economic growth has been the main priority for the CCP and has, at least until recently, relegated their 'war on class struggle as a secondary task' (Miller 2006, p 6).

China soon began to introduce competition into the markets and sought greater foreign investment. As SOE's began to dissolve under pressure from the introduction of foreign competition, the 'Iron-Rice Bowl' that was promulgated in the 1950's began to rust and disintegrate. With the variety of different welfare schemes that each employer or enterprise offered, the 'Five Guarantees' became largely commodified and employment-linked. In this regard the urban model of welfare began to conform more towards a conservative-liberal form of Welfare State - as exists in countries such

as Germany and Italy.

In 1999, however, the State set up a Minimum Living Standard Guarantee System for urban residents, to ensure that employers provided minimum standards of social welfare (Herberer, 2009, p 110). However, an official at the Ministry of Civil Affairs is reported to have emphasised that the main goal of this reform was to "guarantee that the economic system reform could progress without incident." (Wang, 1999) In this respect, welfare reform was strictly an economic aim rather than having a more humanitarian objective (Solinger & Hu, 2012). It should be noted, however, that during this time no substantive change was made to the rural model of welfare provision.

Need to reform 'Dualist-Welfare' State and Income inequality.

The growth of the Chinese economy since the economic policies of the opening up period were introduced has been staggering, with some statistics estimating an average annual GDP growth at 9.8% since the 1980's (Hale & Hale, 2003, p. 53). As a consequence of such strong economic growth, there have been many positive developments in Chinese society, notably a decrease in poverty. Between 1981 and 2005 the absolute poverty headcount ratio ($1.25 poverty line) in China fell from 94% to 26% in rural areas and from 44% to 2% in urban areas (World Bank, 2005). This has led to a far greater standard of living in China than had been experienced by most people in the years prior to the 'opening up' period.

Although poverty has decreased substantially, the income gap between rich and poor has been rising (Chen and Lu, 2006, p. 42). China's urban-rural income gap is now one of the largest in the world and has led to social stratification particularly between urban and rural regions in China (Chang, 2002, p 335). The case can be advanced that the design of the traditional Chinese welfare system has contributed to institutionalizing this income gap and has not been flexible enough to adapt to the changing make up of modern Chinese society.

As mentioned earlier, the 'dualist-welfare' system has generated two separate classes who enjoy separate models of welfare. A recent study conducted by Gao (2010, p. 3) has indicated that urban workers receive approximately 25% of their income in the form of State welfare benefits and enjoy comprehensive social insurance. In contrast, rural workers receive only 1% of their income from State welfare benefits and only enjoy a far more limited range of social benefits (Gao,2010,p.3). In this respect there seems to be a disparity within the traditional 'dualist-model'. Urban workers are enjoying a progressive model of welfare, whereas the rural model is largely regressive. The much lower household income in rural China, coupled with the fact that most redistribution of wealth is done within urban regions, is driving a wedge between the experience of urban and rural thus exacerbating the relative poverty throughout the

Chinese regions (Gao, 2010, p17-19.).

The *hukou,* (housing registration system design has also failed to adequately inhibit the increase in relative inequality. The policies pursued during the 'opening up' era caused an unprecedented change in the velocity of movement of workers from rural regions to industrial urban areas. By 2010, the number of migrants living in the cities reached 242 million, making up nearly 30% of the entire labour force in China (National Bureau of Statistics, 2010). Many of these migrant workers have been unable to successfully registe rwith an urban *hukou*. Indeed Chen and Lu (2006) have found that it is only the richer rural migrants have been able to successfully do so. This has left poorer rural migrants without any substantive social security net to fall back upon, leaving them particularly vulnerable during times of unemployment. This was particularly problematic for the State between 2003 and 2005 when the unemployment rate in many urban areas was as high as 8% (Hale and Hale, 2003, p. 41).

Social and Economic motivations for the introduction SIL.

This increase in the income gap may be one of the factors that has led to the large increase in public protests that have mushroomed around China in recent years. The Chinese Ministry of Public Security has reported an increase in protests "from 8,700 in 1993, to 32,000 in 1999, to about 50,000 in 2002, and surpassing 58,000 in 2003 (Tanner 2005). Kreft (2006) quotes the official numbers of mass group incidents as 74,000 reported incidents in 2004 and 87,000 in 2005. As was the case with the creation of the original Welfare State in Bismarckian Germany, the restructuring of the social security system may be a response to prevent potential political violence (Li, Feng and Gizelis ,2007, p 13.).

Furthermore, the introduction of the SIL may help the CCP regain social legitimacy (Herberer, 2009, p 100). A study by Zhang on social welfare discourse shows that the Party's policy of 'economic efficiency first' that began in the late 1970's up through 2004 has been replaced by greater emphasis on the Confucian ideal of *hex shehui* or 'harmonious society'. It would appear that the CCP is satisfied with the amount of progress the country has made economically, and it is now willing to return to their struggle against class warfare (Miller, 2001). By introducing the measures of the SIL (discussed below) the CCP may gain support from the poorer classes who will profit materially, as well as appealing to the middle classes who can have a legally guaranteed safety net in the event of an emergency (Herberer 2009, p 102). By increasing the social legitimacy of the CCP, the potential for social unrest in China may reduce.

Reform of the welfare system may also have an economic motivation. Chinese people traditionally have had a greater propensity to save rather than to consume. In the 1990's one study estimated that Chinese propensity to save approximated to 33% of family income. (Modigilani & Cao, 2004, p. 167). The CCP, appreciating that the Chi-

nese economy cannot rely on foreign investment and the export market forever, and in the face of rising labour costs, is attempting to decommodify certain insurances and increase the propensity of citizens to spend their money internally within China.

Despite China's staggering economic successes, it is still less competitive in the field of innovation. Although fewer than 5% of China's tertiary students live outside of China (Gibson, McKenzie 2012, p. 340), the CCP remains concerned about a potential 'brain drain', and is attempting to promote a 'reverse brain drain' where the educated elite of other countries are enticed to enter China's labour market. A better-organised welfare system and the promise of a decent social security net may be one of the many carrots that the CCP is offering to stimulate this 'reverse-brain drain'.

Breakdown of the SIL

The SIL is a radical departure from the old traditional Welfare State that China has promulgated since the 1940's. This next section will focus on the structure of the Act and examine how it is substantively attempting to deal with the problems discussed above.

Normative Features of the Law.

The first chapter of the Act presents a skeletal outline of the aims and administration of the new law and outlines that, at the core of the law is a desire to promote 'harmonious society' in China (SIL, Article 1) by promulgating and ensuring that the 'Five Guarantees´ (pensions, medical insurance, work related injury insurance, unemployment insurance and maternity benefit) of social security are effectively actualized This is consistent with the Chinese government rhetoric on Human Rights - the assertion that Social and Economic Rights are an essential aspect of Human Rights (SIL, Article 2). The means by which it intends to maximize its effectiveness is by greater State control of insurance funds (SIL, Article 6) and a more centralized administration of the insurance scheme (SIL, Article 7).

Rhetorically, the SIL marks a return of the 'Iron-Rice Bowl' and conforms very closely to a 'social democratic' model of welfare. Emphasis is placed on the *legal right* (own emphasis) to social security because one is a citizen, (SIL, Article 1) as opposed to of receiving separate treatment if belonging to a different rural or urban demographic. In this light, it is more universal than the previous 'dualist-welfare system'. Furthermore the government, as the pillar of the welfare programme, is committing to providing comprehensive social entitlements.

The success of a 'social-democratic' model, despite its many attractive features, is generally operable with considerably smaller populations than that of China. The population of Sweden, the largest country that utilises a 'social-democratic' model

of welfare, is only 9.5 millions and is dwarfed by China's estimated population of 1.4 billions (UN 2007). In this regard the SIL is certainly an ambitious piece of legislation and will require a massive undertaking to effectively implement.

Pensions

All workers must participate in the basic pension scheme, which shall be funded by employees as well as the employers. Furthermore, the law adds an opt-in clause for those who are non-fulltime workers or have never previously participated in a social security programme (SIL, Article 10). This further emphasizes the concept that this is a scheme based on more universal principles, and not merely applying to full time workers.

The Law, at the very least, offers material benefit to China's elderly particularly to the rural population. Of China's approximately 76.5 million rural elderly (China Civil Affairs Statistical Bulletin, 2007), only 9.2 million were covered under any form of pension scheme in 2007. This offers greater autonomy for pensioners during their retirement.

One of the major challenges to the pension scheme that must not be overlooked is China's ageing population (Hale and Hale, 2003 p. 43). It is anticipated that 31% of China's population (UN 2007) will be over the age of 60 years by 2050 and presumably taking advantage of the pension system being offered. If this Law is successfully implemented, the Chinese government will have accepted a huge administrative and financial burden.

It should be noted that the contribution made by employers and employees varies from region to region as stipulated by each administrative division (SIL, Article 12). It has been argued that part of China's economic success has derived from decentralization of the economy and inducing competition between the many administrative divisions within the country (Montinola, Qian Weingast, 1995). In this light, it seems the CCP is not committed to fully centralizing control over the welfare project, as it may reduce the positive effects that this institutional arrangement has had for the economy. The Law, encourages administrative divisions, to keep insurance contributions as low as possible, in hope that it may mitigate potential flight of capital within the country. This problem shall be discussed further below.

Medical Insurance

Medical insurance follows a similar pattern to the new pension scheme, with mandatory participation, as well as an opt-in clause. It also endeavors to improve the current medical healthcare received by both urban and rural workers. Workers will pay an insurance premium that will be subsidized by the government. (SIL, Article 23)

The State will subsidize any medical insurance for retirees and for any family living below minimal standard conditions (SIL, Article 25). Furthermore, the medical insurance premiums can be transferred from region to region, thus allowing greater mobility between regions (SIL, Article 32).

This provision has been particularly successful to date, and received much global attention. A recent study reported in the *Economist* (2012) indicates a massive expansion in health care coverage. In 2003 only 3% of the rural population had health care insurance. In 2011 a staggering 97.5% of rural workers were covered by health insurance. Such a development can only have a positive effect on the welfare of the rural population as a whole.

Workplace related injury

It will be the sole responsibility of employers to fund the workplace related injury scheme. Naturally such a measure has been introduced to help improve the safety of the workplace environment. (SIL, Article 33). In light of this, the State has attempted to legislate against the possibility of workers exploiting the scheme. An employer will not be liable for workplace related injury if the injured party in question has obtained their injury by committing a criminal offence intentionally, getting drunk or taking drugs, inflicting harm on themselves or committing suicide, etc.(SIL, Article 37).

One of the weaknesses of the Law is the lack of clarity as to how workplace related injury should be assessed. It merely advances that the method for identification and assessment of a workplace related injury be 'simple and convenient' (SIL, Article 36). It is clear that there will be a need to introduce secondary legislation to stipulate the particularities of a 'simple and convenient' method of assessment, but this shall be a challenge for the Chinese government as it has been for many other States.

Unemployment Scheme

The unemployment insurance scheme will be jointly funded by the workers and the employers. In order to benefit from the scheme one must be contributing to the scheme for at least 1 year. However, if a worker has been contributing for less than 5 years, and becomes unemployed he/she may only claim unemployment benefit for a maximum period of 12 months. If he/she has been contributing for over 10 years benefit may be available for a maximum of 24 months (SIL, Article 46).

One of the main criticisms of the Welfare State in general, is that it may promote excessive reliance on the State and it stifles and individuals initiative to solve there own problems (McLean and McMillan, 2010). The CCP has introduced this measure to inhibit such a phenomenon. Article 46 appears to provide an incentive to seek full time employment and provide social benefits only for 'honest workers'. .

Maternity insurance

The chapter dealing with social insurance is the shortest int the SIL Only employers fund the maternity insurance pool (SIL, Article 53), and female workers are entitled to maternity benefit(SIL, Article 56). The benefits they receive are to pay for costs related to giving birth and are to be calculated based on the average monthly wage of the employee (article 56). There is, however, no mention of the specifics of what legally constitutes maternity leave and specifics on the length of time a women is allowed to receive maternity benefit is not outlined. The vagueness of this article means that its actualization will rely heavily on secondary legislation.

Collection and Registration

Chapter 7 of the law legislates for the process of registration in the new programme. Any new business or employment enterprise must register with the social insurance programme within 30 days of its establishment. (SIL, Article 57) The onus is also on the employer to register any new employees within 30 days of their employment. The State is also obliged to create a social insurance number for everyone contributing to the premium (SIL, Article 58).

Articles 62 and 63 stipulate the outline of a punishment mechanism for those businesses that refuse or do not pay the full amount into the social insurance fund. First of all, if the entity refuses to pay, they can be charged 110% of the amount owed into the next month, or if they have not paid the full amount, the administrative body can allow a period of grace in accordance with the practice of each administrative region. If an employer/entity continues to refuse payment into the system, the administrative body may make inquiries as to the bank account details of the employer and even, if necessary, claim a court order to seize goods from the business and auction off the goods in order to paythe social insurance premiums.

This punishment mechanism marks a shift from the free market liberal economy that has been responsible for China's massive growth in the past 30 years. The State is playing a far more active role in market affairs, which shows a shift back towards the socialist ideals or Keynesian management of the economy.

Social insurance funds

The Law sets out to establish separate monetary accounts for each of the 'Five Guarantees'. The pension fund is to be gradually coordinated on a national level, while the others shall be coordinated on a provincial level. It should be noted that, although the scheme operate as a balanced budget activity, the State is willing to sub-

sidise any payment that cannot be made (SIL, Article 65).

This may be problematic for State finances in the long run. If there is a dip in the economy, State finances may be strained in subsidizing these programmes. In light of this, the CCP is relying on full compliance of funding with employers, in order to ensure that funding does not become too State centric. Furthermore, any potential flight of foreign investment that may occur will also reduce the potential pool of contributors to the funds. This issue will be discussed below.

Legal liability

The Law also addresses the potential legal liability of those who refuse to pay into the scheme, embezzle funds, or gain material advantage through fraud or counterfeit documents, even establishing criminal liability for disobeying this Law (SIL, Article 94). This section merely re-emphasizes the prospect of punishment with non-compliance or abuse of the system.

Supplementary Provisions

Perhaps quite a controversial addition to the SIL is that foreign owned companies that are operating in China, are also obliged to participate in the insurance scheme (SIL, Article 97.) This provision may have a negative effect on foreign investment in China. Foreign Direct Investment has been a significant element in China's massive economic growth. Attractive features have been China's cheap labor and other set up costs. Indeed in 2003 alone, American FDI in China amounted to $70 billion worth of investment in China (Hale & Hale, 2003, p 44.).

This Law is radically changing the modus operandi of setting up business, and increasing overheads for businesses entering into China. A recent survey shows that in Beijing, employers are responsible for contributing 32.5% of an employees social insurance contributions, whereas in Shanghai this figure is 37%. (Austcham, 2011). This may be one factor explains why some large multinational corporations such as Nike and Adidas have relocated their businesses elsewhere, to South East Asia in those instances(Week in China, 2012).

Economic Legal Complexities for SIL goals to be achieved.

In order for the goals implicit in the enactment of the SIL to be achieved, the decommodification of insurances must be matched by an increase amongst Chinese citizens in the marginal propensity to consumem, and this increase must be sufficient to maintain an increased demand within the domestic economy. IN the absence of this, any potential flight of capital that occurs in response to the introduction of

the SIL may have devastating effects on China's continued development, and hence derail the very objectives desired. It is not clear what, if any, effect the enactment of the SIL will have on the marginal propensity to consume.

Government Enforcement of the SIL

It is clear that this law marks at least a rhetorical return to the 'Iron-Rice Bowl' as promulgated at the inception of the State.. The SIL does offer, at least as a document, quite rational solutions to many of the problems that the traditional welfare system had exacerbated.

There still remains the problem of actually enforcing the law. This is a difficult issue for any government (Gillion, 2000). China is still investing a great deal of effort into fully institutionalizing a 'rule of law' culture (Halverson 2004). Since the accession of China to the WTO in 2001, there has been a gradual trend towards constitutionalisation and professionalizing the legal service. However, the relative newness of the Chinese Legal System leaves it still vulnerable to a perception that it is weak and subordinate to the CCP. The perception that the country still lacks effective legal institutions should not be underestimated (Song 2007, p 147).

Indeed, a study in 2000 reported only 18 per cent of private firms fully met their legally mandated obligations (Zhu and Nyland, 2004, 2005). The most common reasons given for non-compliance were: prospects for economic gain, and lack of 'effective enforcement' (Pearson, 2007; Pringle and Frost, 2003; Wang, 2006; Wright, 2004, 2007). 'Effective enforcement' is a combination of three factors; human resources capable of carrying out administration work; fiscal resources to afford substantial enforcement; and legal recourse (Zhu and Nyland, 2004). Consequently it appears the success of the SIL will be heavily reliant on the ability of the legal service to properly institutionalize the 'rule of law' and punish non-compliance.

It has been highlighted that the SIL has been drafted using somewhat vague terminology. This has the potential of according large discretionary power to bureaucrats in the interpretation of administration legislation. For example, it is not entirely clear how much discretion is allowed to each administration division has to interpret and enforce the Law. In this light, political influences may be important in ensuring implementation. In a State whose judiciary is not fully independent political influence may play a great role on how the Law is interpreted and implemented (Halverson, 2004, p 364.).

Conclusion.

The SIL has, at least in theory, completely transformed the Chinese Welfare State. The traditional 'dualist-model' of welfare has completely disintegrated, allowing for

the re-emergence of the 'Iron-Rice Bowl' on a more universal scale. However, this project has many obstacles including: the massive scale of the project; the potential economic consequences of the project and; potential political obstruction of the project, particualry on a regional basis. It appears that the Law is heavily reliant on the concept of 'effective enforcement', a concept which Chinese Law more generally is still struggling to institutionalize. This volatile mixture of social and economic factors coupled with a potentially cumbersome bureaucratic structure of government may affect the degree of influence the State has in effectively implementing this Law. In light of this, it is difficult to judge whether the return of the 'Iron-Rice Bowl' under the SIL, will be a progressive or regressive move for China.

BIBLIOGRAPHY

Aspalter, C. (2001). Identifying Variations of Conservative Social Policy in North East Asia: The Welfare State in Japan, South Korea and Mainland China. Discussion Paper No.81, July 2001. Retrieved October 23rd, 2012. http://dspacedev.anu.edu.au/bitstream/1030.58/12603/2/No81Aspalter.pdf.

Austcham,(2011) 'China's labour revolution continues: New social insurance law', 11 July, Retrieved on October 23rd,2012. http://www.austcham.org/about-us/news/2011/jul/11/china%E2%80%99s-labour-revolution-continues-new-social-insurance-law.

Baeten. S, Van Ourti. T, Van Doorslaer. E, (2012) 'Rising Inequalities in Income and Health in China: Who is left behind?' *Tinbergen Institute Discussion Paper 12-091/V.*

Chang, G.H., (2002). 'The cause and cure of China's widening income disparity'. *China Economic Review.* 13, pp. 335–340.

Esping-Andersen, G. (1995). *'Three Worlds of Welfare Capitalism*'. Cambridge: Polity Press. 5th edition.

Gao. Q, (2010) 'Redistributive Nature of the Chinese Social Benefit System: Progressive or Regressive?' *The China Quarterly*, vol. 201, pp. 1–19.

Hale. D, and Hale. LH , (2003) 'China Takes Off', *Foreign Affairs*. vol. 36 pp. 36-53. Halverson. K, (2004), 'China's WTO Accession: Economic, Legal, and Political implications', *Boston College International and Comparative Law Review*, vol. 27, pp. 319-372.

Heberer. T (2009), 'Relegitimation through New Patterns of Social Security: Neighbourhood Communities as Legitimating Institutions'. *The China Review*, vol. 9, No. 2, 99–128.

Kaizen Certified Accountants Limited, (2011), 'Social Insurance Law of the People's Republic of China.' Retrived on the October 23rd, 2012. http://www.bycpa.com/html/news/20116/1585.html

Li. J, Feng. Y and Gizelis. I (2007): China's New Social Security System in the Making: Problems and Prospects,' *International Journal of Public Administration*, vol. 31.1, pp.

5-23.

Lu. M, and Chen. Z, (2006) 'Urbanization, Urban-Biased Policies, and Urban-Rural Inequality in China, 1987-2001' *Chinese Economy* , vol. 39, pp. 42-63.
McLean. I, and McMillan. A, (2009)'*Concise Dictionary of Oxford Politics*', Oxford University Press; Oxford, 3rd Edition.

Miller, A. (2007). 'Hu Jintao and the Sixth Plenum.' *China Leadership Monitor*, vol. 20, pp. 1-12.
Modigliani. F, & Cao. SL, (2004), 'The Chinese Saving Puzzle and the Life-Cycle Hypothesis', *Journal of Economic Literature*, Volume 42, pp. 145–170.

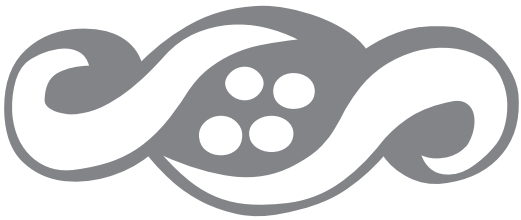
Montinola. G, Qian Y. and Weingast. B, (1995), 'Federalism Chinese Style: the Political basis for Economic Success in China,' *World Politics*, pp. 50-81.
Nyland. C, Thomson. S and Zhu C. (2011) 'Employer attitudes towards social insurance compliance in Shanghai,' *China International Social Security Review*, vol. 64, pp.73-98.
Song. J (2007), 'China's Judiciary: Current Issues', *Maine Law* Review, Volume 59, pp. 141-148.
Stepan, M. (2008), '*The development of the Chinese Welfare State and the prospects of EU Policy Diffusion,*' Unpublished Masters Thesis, Erasmus University of Rotterdam, Netherlands.

The Economist (2012), 'New cradles to graves : The welfare state is flowering in Asia. Will it free the continent from squalor? Or sink it in debt?' 8 September, retrieved on October 23rd, 2012. http://www.economist.com/node/21562210

Wang. Z, (1999) . "Chengshi jumin zuidi shenghuo baozhang," ("Urban residents' minimum livelihood guarantee"), *Zhongguo minzheng,* vol. 11, pp. 18–19.

Yang. Y, Williamson. JB, Shen. C, (2010), 'Social security for China's rural aged: a proposal based on a universal non-contributory pension', *International Journal of Social Welfare*, Volume 19, pp. 236–245.

Week In China (2012), 'Burmeze Days' 27 July, Retrieved October 23rd, 2012.http://www.weekinchina.com/msingle/?mpage=1506



The Emergence of Social Neuroscience: a New Understanding of Social Issues and Interactions

RÒISÍN WHITE
Senior Sophister, Psychology

The disciplines of neuroscience and social psychology have traditionally been at odds with each other regarding the best way to study human behaviour. Neuroscience was seen as a branch of biology which limited itself to the study of the brain and nervous system, and ignored the impact of social influences or processes on the brain and subsequent behaviour. Although social factors were thought by some to have relevance to brain structure and function, it was largely maintained that such factors were so complicated that they should be considered only after the basic brain mechanisms had been comprehensively determined (Cacioppo et al., 2007). Social psychology, on the other hand, places emphasis on how the thoughts or behaviours of an individual are influenced by the actual, imagined or implied presence of others (Allport, 1985) and came to prominence in the aftermath of WWII, with groundbreaking research by the likes of Milgram which viewed the individual as "an element in a larger system" (Steiner, 1974, p. 94). Events such as the war and the Great Depression focused social research on moral and cultural elements, and biological explanations were put to one side (Allport, 1947). Although the two fields seem at first glance to be quite independent of each other, this paper aims to outline the successes of research when social and neurological elements are combined, and

highlight the importance of new approaches to age-old dilemmas in order to gain a deeper and multi-layered level of analysis of exigent social issues ranging from drug addiction and racial prejudice to social pain and empathy.

Background and Beginnings

The two disciplines began to officially align in the early 1990's with the emergence of social neuroscience, popularised by Cacioppo and Berntson's (1992) seminal paper and broadly defined as "the exploration of the neurological underpinnings of the processes traditionally examined by, but not limited to, social psychology" (Decety & Keenan, 2006, p. 1). Cacioppo and his colleagues argue that our biological make-up has shaped our social and cultural world and that the same applies vice-versa; our social interactions have a direct impact on our brains and bodies. With this being the case, combining the disciplines serves to provide a different level of analysis which can lead to a more nuanced understanding of complex social phenomena and group processes highly relevant to everyday life.

However, some concerns have been raised regarding the impact of neuroscientific methods on social psychological research. Dovidio, Pearson and Orr (2008) claim that attempts to reduce social phenomena to specific brain structures may be detrimental to the field and may also distract researchers from seeking broader explanations for behaviour. Amodio, Harmon-Jones and Devine (2003) go as far as to warn that certain social constructs, such as consciously held beliefs and subjective experiences,may be impossible to reduce to a biological level of analysis. Advocates of social neuroscience do much to allay these fears, and stress that because the focus of both social psychology and social neuroscience is social behaviour, the two fields have the potential to add to and inform each others' theories and constructs, as well as changing the way we approach and deal with pertinent social issues (Berntson & Cacioppo, 2008).

Although the controversy lingers even today, the concept of social neuroscience is not a new one. The links between brain and social functioning were already beginning to form as far back as the early 19th Century; the phrenology movement, led by Franz Joseph Gall and Johann Spurzheim, identified a number of mental faculties, including cautiousness, secretiveness and even friendship, each located in a different area of the cerebral cortex and revealed as bumps in the skull (Kihlstrom, 2010). The notion that ventral and medial regions of the prefrontal cortex are involved in social cognition has been maintained since the 1848 case of Phineas Gage, who survived serious frontal lobe brain injury but whose personality and behaviour changed dramatically (Adolphs, 2009). Understanding the neural correlates of social behaviours is a necessary step to broadening our wider knowledge of social

phenomena and to one day informing policy; likewise, the theoretical models and paradigms of social psychology are essential for understanding the biological basis of behaviour and also serve to guide researchers in their empirical studies (Cacioppo, Berntson & Decety, 2010).

The Three Principles of Social Neuroscience

The three principles of social neuroscience as outlined by Cacioppo and Berntson (1992, p. 1023) illustrate excellently how social theory and neurological findings combine to afford researchers a deeper and more nuanced understanding of social, cultural and behavioural phenomena and issues. The first principle is multiple determinism construing that a target event at one level of organization can have multiple antecedents within or across levels of organization. A real-world example of this principle at work is highlighted by Cacioppo, Berntson and Decety (2010); in investigating drug abuse, researchers have noted both the roles of individual differences in the opiod receptor system as well as social context. Both factors contribute to the issue and if either is excluded, our understanding of drug abuse, an issue which directly affects an estimated 15.3 million people worldwide (WHO, 2013), is compromised.

The second principle, the principle of nonadditive determinism, posits that "properties of the collective whole are not always predictable from the properties of the parts" (Cacioppo & Berntson, 1992, p. 1023). Cacioppo and his colleagues (2010) point to an example which illustrates how an amalgamation of neural and social factors can produce "emergent phenomena"; in a study which investigated the effects of amphetamines on primate behaviour (Haber & Barchas, 1983), no clear difference was found between the drug and placebo groups until individual primate's original position in the social hierarchy was taken into account. When both social and biological factors were considered, the drug was found to increase dominant behaviour in high-ranking primates and increase submissive behaviour in low-ranking primates. In this case, a strictly physiological or social analysis would not have revealed the underlying relationship that existed. Research such as this in primates may also inform our understanding of human social hierarchies, from power struggles between criminal gangs to the 'status syndrome' effect, which maintains that those in high-power jobs live longer than those with low status, low responsibility occupations (Marmot, 2004).

The third principle is that of reciprocal determinism, which states that "there can be mutual influences between microscopic (e.g. biological) and macroscopic (e.g. social) factors in determining brain and behavioural processes" (Cacioppo & Berntson, 1992, p. 1023). Cacioppo and his colleagues (2010) again illustrate an example of this by pointing to a study by Rose, Gordon and Bernstein (1972),

which found that the availability of receptive females influences testosterone levels in Rhesus monkeys, which in turn influences sexual behaviour. If both levels of analysis are not taken as necessary, then a complete understanding of the processes at play cannot be achieved.

The Issue of Racial Prejudice

The three principles of social neuroscience highlight the importance of pooling our knowledge by combining social research with biological studies in order to fully understand a variety of complex phenomena. The area of prejudice in particular has captured the attention of a number of neuroscientific researchers in recent years. This issue remains one of the most problematic social concerns encountered by law enforcement agencies worldwide; the British Crime Survey (2012) found that crimes motivated by race accounted for an estimated 136,000 incidents on average per year in England and Wales. Traditionally, sociological studies in this area relied on the techniques such as self-report and behavioural measurement, which are often prone to inaccuracies.

In their study on guilt in the context of racial prejudice, Amodio, Devine and Harmon-Jones (2007) used EEG to measure brain activity in the frontal cortex and record changes in motivational responses which would otherwise be inaccessible without disrupting the participant's engagement with the task. Building on the ideas of Gordon Allport (1954), a number of studies have increased our understanding of how seemingly liberal individuals can possess underlying tendencies to think and act in racially biased ways; work from Devine (1989) and also Wilson, Lindsey and Schooler (2000) suggests that people may hold explicit egalitarian beliefs while simultaneously possessing implicit racial associations that operate automatically in subconscious mental processes. It is thought that increasing the general public's awareness of these implicit and automatic tendencies may serve to counteract or override their effects and lead to a reduction in racially-motivated prejudice (Amodio & Lieberman, 2009).

This area of research has also focused in particular on the links between amygdala activation and implicit racial bias (Phelps et al., 2000; Amodio, Harmon-Jones & Devine, 2003) and the suggestion which arose from research that this bias reflects a fear conditioning mechanism. Because of this research, later studies began to apply existing knowledge about memory systems which underlie implicit stereotyping in order to form new hypotheses as to how such biases could potentially be reduced or unlearned (Amodio, 2008). Ito (2010) also highlights the fact that many patterns of amygdala activity from countless fMRI studies seemed contradictory and disorganized until later studies took socially relevant perspectives such as intensity and in-group membership into account, which lead to a more nuanced

understanding of processing within the amygdala and the finding that it responds flexibly to motivationally relevant information which can be either positive or negative (Cunningham, Van Bavel & Johnsen, 2008). This kind of research is crucial for achieving a greater understanding of racism in society, as well as developing new ideas for combating its perpetuation.

The Neural Correlates of Social Pain

There are numerous areas of research which have enhanced our understanding of social psychological theory through use of neurological techniques and approaches. Brain mapping approaches have also been shown to highlight links between psychological constructs which had previously been thought to be separate (Amodio, 2010); a fascinating study by Eisenberger, Lieberman and Williams (2003) used fMRI to scan participants while they played a virtual game of ball-toss, during which the other 'players' excluded the participant. It was found that the brain bases of social rejection were similar to those of physical pain, and that both types activate the anterior cingulate cortex. Although the study does not reveal why the two are related, it brings to light the possibility that new theories could account for both types of pain, and may lead to the development of new coping strategies when dealing with depressive symptomatology following severe bullying or social isolation.

A broad range of correlational research has also shown that individuals with more social support experience less cancer pain (Zaza & Baine, 2002) and are less likely to suffer from chest pain following coronary artery bypass surgery (Kulik & Mahler, 1989), which has lead to the suggestion from Eisenberger and colleagues (2006) that it may be possible to alleviate physical pain symptoms, in part, by treating the social stressors that may go along with them.

The Links Between Oxytocin and Empathy

Another research area which serves to elucidate an important aspect of everyday social interaction is that of the role of oxytocin in human cognition; particularly its relation to empathy. Researchers have found that oxytocin increases levels of both trust (Kosfeld, Heinrichs, Zak, Fischhacher & Fehr, 2005) and generosity (Zak, Stanton & Ahmadi, 2007) in humans. One study noted that, compared to controls, participants who had received a dose of oxytocin showed significantly increased ability in correctly inferring the mental states of others on a test which required them to detect subtle facial expressions (Domes et al., 2007). In their review of the neurobiology of attachment, Insel and Young (2001) propose that the interaction of oxytocin and dopamine in the brain amplifies the reward of social interactions, thus promoting continued social engagement; an adaptive response, given further

research which suggests that having a larger social network decreases your chance of experiencing cognitive deficits later in life (Bennett, Schneider, Tang, Arnold & Wilson, 2006).

Kirsch and colleagues (2005) demonstrated how, compared to a placebo, oxytocin significantly reduces activation of the amygdala and modulates its connections to other brain-stem areas associated with involuntary fear reactivity, a promising finding which has implications for research into prejudice and aggression. Furthermore, they suggest that future exploration of therapeutic strategies involving oxytocin and its receptors may be useful for those with disorders such as autism or social phobia, in which abnormal amygdala function has been implicated. A study by Heinrichs and colleagues (2003) illustrated how oxytocin applied to participants via nasal spray enhanced the effect of social support in decreasing stress responsiveness, indicating that the combination of neurochemical and environmental factors at play in dealing with socially stressful situations. The extensive research on oxytocin and its involvement in social behaviours has led to a greater understanding of social theoretical constructs such as altruism and empathy, and points to the growing possibility that these methods may be used in a clinical setting as part of treatment programs for those with severe social disorders, anger or anxiety issues.

The Importance of Face Perception

Research on face perception is also an important example of social neuroscience's contribution to our understanding of human interaction. Traditionally, face perception had been dealt with outside the field of social psychology, even though it is an essential process for social recognition and interaction; a human face's proportions and expressions convey a wealth of information which allows us to infer a person's origin, emotional tendencies and health qualities, and also to recognise social cues and familiar individuals (Ito, 2010). With the advent of social neuroscience, researchers have successfully combined social psychological models of person perception, cognitive science models of face perception, and cognitive neuroscience research on the neural aspects of face perception in order to increase our understanding of this important aspect of social functioning (Bruce & Young, 2000; Golby, Gabrieli, Chiao, & Eberhardt, 2001; Ito & Urland, 2005). An examination of the condition of Prosopagnosia, in which face recognition abilities are severely impaired was carried out by Farah, Rabinowitz and Quinn (2000), who studied Adam, a teenager who sustained brain damage to the occipital lobe at 1 day of age. Adam exhibited profoundly impaired face recognition, whereas his recognition of objects was much less impaired, leading to the view that faces, as particularly important social stimuli, are processed differently from other objects. There is also evidence that this 'specialised' face processing system is in place from a very early age; Walton

and colleagues (1992) found that 2 day old infants were able to identify their mother's face when paired with unfamiliar faces on a videotape. This evidence highlights the crucial role face recognition plays in social interactions, even from birth.

Challenges for Future Research and Policy

Despite the many successes of social neuroscience, Ito (2010) points out that, as is the case with any neuroscientific study, precise experimental measures which isolate the mechanism of interest can "come at the cost of external realism" (p. 690). The aim is to measure, using neurological approaches, the processes that occur in real-life social contexts; a challenging problem given the complex and dynamic nature of human interactions. Although the task is difficult, it is not impossible, and researchers have come a long way in improving the validity and applicability of many of their tests; for example, the effects of physical contact on neural responses to threat have been investigated by having participants undergoing fMRI scanning hold hands with someone outside the scanner (Coan, Schaefer, & Davidson, 2006), and many researchers have used multi-player games such as the prisoner's dilemma and the ultimatum game to study the neural basis of and physiological responses to cooperation, competition, altruism and economic decision making (Decety, Jackson, Sommerville, Chaminade, & Meltzoff, 2004; Rilling, Sanfey, Aronson, Nystrom, & Cohen, 2004; Sanfey, Rilling, Aronson, Nystrom, & Cohen, 2003). These efforts to develop more naturalistic experiments demonstrate a growing effort within academia to procure relevant findings, which will in turn lead to a better understanding of real human interaction and social contracts.

In conclusion, it seems evident that social neuroscience represents one of the most controversial, challenging yet fascinating new areas of research. Amodio (2010) notes that although, in the beginning, psychologists worried that neuroscience was "poised to swallow the fields of personality and social psychology" (p. 711), the birth of social neuroscience has instead opened up the rich theoretical tradition of social psychology to neuroscientific methods, allowing for an improvement in experimental design and interpretation of results. Additionally, the adoption of more scientific measures has also elevated the status of social research in the eyes of other scientific fields as well as helping to increase its discussion in the social media. Decety and Keenan (2006), in the foreword to the first edition of the journal *Social Neuroscience*, highlight the fact that further developments in the field of functional neuroimaging "hold tremendous promise for the understanding of social cognition" (p. 2), but also assure that even though technology advances, "we need not lose sight of the creativity of experimental design or how theoretical considerations can guide our next advance".

Any field in its infancy is hesitant when it comes to proposing direct recommendations for policy, however, social neuroscience has yielded results which

have greatly enriched our knowledge of a number of important and problematic social and sociological phenomena. This research has the potential to inform sociologists and policy makers; while it may take time to assimilate the theories and ideas of social neuroscience into these areas, it is important that its findings are taken on board. When it comes to implementing policies that have the potential to alter the social edifice, there is little room for error, and it is essential that knowledge from all fields pertaining to human behaviour be taken into account. With this in mind, it remains to be seen how much more this relatively young area of research may contribute to our knowledge base and reveal about social issues and interactions in years to come.

BIBLIOGRAPHY

Adolphs, R., 2009. The social brain: Neural basis of social knowledge. *Annual Reviews in Psychology,* 60, pp. 693-716.

Allport, G.W., 1947. Scientific models and human morals. *Psychological Review,* 54, pp. 182-192.

Allport, G.W., 1954. *The Nature of Prejudice.* Reading, MA : Addison-Wesley Publishing Co.

Allport, G.W., 1985. "The historical background of social psychology". In G. Lindzey and E. Aronson eds., *The Handbook of Social Psychology*. New York: McGraw Hill.
Amodio, D.M., 2008. The social neuroscience of intergroup relations. *European Review of Social Psychology*, 19, pp. 1-5.

Amodio, D.M., 2010. Can neuroscience advance social psychological theory? Social neuroscience for the behavioural social psychologist. *Social Cognition,* 28(6), pp. 695–716.

Amodio, D.M., Devine, P.G. & Harmon- Jones, E., 2007. A dynamic model of guilt: Implications for motivation and self-regulation in the context of prejudice. *Psychological Science*, 18, pp. 524-530.

Amodio, D.M., Harmon-Jones, E. & Devine, P.G., 2003. Individual differences in the activation and control of affective race bias as assessed by startle eyeblink responses and self-report. *Journal of Personality and Social Psychology*, 84, pp. 738-753.

Amodio, D. M. & Lieberman, M. D., 2009. Pictures in our heads: Contributions of fMRI to the study of prejudice and stereotyping. In T. Nelson ed. *Handbook of Prejudice and Discrimination* Taylor & Francis. pp. 345-363.

Bennett, D., Schneider, J., Tang, Y., Arnold, S. & Wilson, R., 2006. The effect of social networks on the relation between Alzheimer‘s disease pathology and level of cognitive function in old people: a longitudinal cohort study. *The Lancet Neurology,* 5(5), pp. 406-412.

Berntson, G.G. & Cacioppo, J.T., 2008. The neuroevolution of motivation. In J. Shah & W. Gardner eds. *Handbook of motivation science.* New York: Guilford. pp. 188-200.

British Crime Survey, 2012. *Hate crime, cyber security and the experience of crime among children: Findings from the 2010/11 British Crime Survey. Supplementary Volume 3 to Crime in England and Wales 2010/11* [pdf]. Available at: < http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0612/hosb0612snr?view=Binary> [Accessed 18 Jan 2013].

Bruce, V. & Young, A., 2000. *In the Eye of the Beholder: The Science of Face Perception*. Oxford: Oxford University Press.

Cacioppo, J.T., Amaral, D.G., Blanchard, J.J., Cameron, J.L., Carter, C.S., Crews, D. et al., 2007. Social neuroscience: Progress and implications for mental health. *Perspectives on Psychological Science,* 2, pp. 99–123.

Cacioppo, J.T. & Berntson, G.G., 1992. Social psychological contributions to the decade of the brain: Doctrine of multilevel analysis. *American Psychologist*, 47, pp. 1019-1028.

Cacioppo, J.T., Berntson, G.B. & Decety, J., 2010. Social neuroscience and its relationship to social psychology. *Social Cognition,* 28(6), pp. 675-685.

Coan, J.A., Schaefer, H.S. & Davidson, R.J., 2006. Lending a hand: Social regulation of the neural response to threat. *Psychological Science,* 17, pp. 1032-1039.

Cunningham, W.A., Van Bavel, J.J. & Johnsen, I.R., 2008. Affective flexibility: Evaluative processing goals shape amygdala activity. *Psychological Science,* 19, pp. 152-160.

Decety, J., Jackson, P.L., Sommerville, J.A., Chaminade, T. & Meltzoff, A.N., 2004. The neural bases of cooperation and competition: An fMRI investigation. *NeuroImage,* 23, pp. 744–751.

Decety, J. & Keenan, J.P., 2006. Social Neuroscience: A New Journal. *Social Neuroscience,* 1(1), pp. 1-4.

Devine, P.G., 1989. Prejudice and stereotypes: Their automatic and controlled components. Journal of Personality and Social Psychology, 56, pp. 5-18.

Domes, G., Heinrichs, M., Glascher, J., Buchel, C., Braus, D. & Herpertz, S., 2007. Oxytocin attenuates amygdala responses to emotional faces regardless of valence. *Biological Psychiatry,* 62, pp. 1187–1190.

Dovidio, J.F., Pearson, A.R. & Orr, P., 2008. Social Psychology and Neuroscience: Strange Bedfellows or a Healthy Marriage? *Group Processes & Intergroup Relations,* 11(2), pp. 247–263.

Eisenberger, N. I., Jarcho, J. M., Lieberman, M. D., & Naliboff, B. D., 2006. An experimental study of shared sensitivity to physical pain and social rejection. *Pain*, *126*(1), pp. 132-138.

Eisenberger, N. I., Lieberman, M. D., & Williams, K. D., 2003. Does rejection hurt? An fMRI study of social exclusion. *Science*, *302*(5643), pp. 290-292.

Farah, M. J., Rabinowitz, C., Quinn, G. E., & Liu, G. T., 2000. Early commitment of neural substrates for face recognition. *Cognitive Neuropsychology*, *17*(1-3), pp. 117-123.

Haber, S. N. & Barchas, P. R., 1983. The regulatory effect of social rank on behavior after amphetamine administration. In P. R. Barchas, ed., Social hierarchies: essays toward a sociophysiological perspective. Westport, CT: Greenwood Press, pp. 119-132.

Heinrichs, M., Baumgartner, T., Kirschbaum, C. & Ehlert, U., 2003. Social support and oxytocin interact to suppress cortisol and subjective responses to psychosocial stress. *Biological Psychiatry,* 54, pp. 1389–1398.

Insel, T.R. & L.J. Young., 2001. The neurobiology of attachment. *Nature Reviews Neuroscience,* 2, pp. 129–136.

Ito, T.A., 2010. Reflections on social neuroscience. *Social Cognition,* 28(6), pp. 686–694.

Ito, T.A. & Urland, G.R., 2005. The influence of processing objectives on the perception of faces: An ERP study of race and gender perception. *Cognitive, Affective, and Behavioral Neuroscience,* 5, pp. 21-36.

Kihlstrom, J.F., 2010. Social neuroscience: The footprints of Phineas Gage. *Social Cognition,* 28(6), pp. 757–783.

Kirsch, P., Esslinger, C., Chen, Q., Mier, D., Lis, S., Siddhanti, S., Gruppe, H., Mattay, V., Gallhofer, B. & Meyer-Lindenberg, A., 2005. Oxytocin modulates neural circuitry for social cognition and fear in humans. *The Journal of Neuroscience,* 25, pp. 11489–11493.

Kosfeld, M., Heinrichs, M., Zak, P.J., Fischhacher, U. & Fehr, E., 2005. Oxytocin increases trust in humans. *Nature* , 4(35), pp. 673-676.

Kulik, J.A. & Mahler, H.I., 1989. Social support and recovery from surgery. *Health Psychology,* 8, pp. 221–238.

Marmot, M., 2004. *The Status Syndrome: How Social Standing Affects our Health and Longevity*. London: Bloomsbury Publishing Plc.

Phelps, E.A., O'Connor, K.J., Cunningham, W.A., Funayama, S., Gatenby, J.C., Gore, J.C. & Banaji, M.R., 2000. Performance on indirect measures of race evaluation predicts amygdala activation. *Journal of Cognitive Neuroscience*, 12, pp. 729-738.

Rilling, J.K., Sanfey, A.G., Aronson, J.A., Nystrom, L.E., & Cohen, J.D., 2004. Opposing BOLD responses to reciprocated and unreciprocated altruism in putative reward pathways. *Neuroreport,* 15, pp. 2539-2543.

Rose, R., Gordon, T.P. & Bernstein, I.S., 1972. Plasma testosterone levels in the male rhesus: Influences of sexual and social stimuli. *Science & Society,* 178, pp. 643-645.

Sanfey, A.G., Rilling, J.K., Aronson, J.A., Nystrom, L.E. & Cohen, J.D., 2003. The neural basis of economic decision-making in the ultimatum game. *Science, 300*, pp. 1755–1758.

Steiner, I.D., 1974. Whatever happened to the group in social psychology? *Journal of Experimental Social Psychology,* 10, pp. 94–108.

Walton, G.E., Bower, N.J. & Bower, T.G., 1992. Recognition of familiar faces by newborns. *Infant Behavior and Development*, 15(2), pp. 265–269.

Wilson, T.D., Lindsey, S., & Schooler, T.Y., 2000. A model of dual attitudes. Psychological Review, 107, pp. 101-126.

World Health Organization. [online]. 2009. *Management of substance abuse.* Available at: <http://www.who.int/substance_abuse/facts/en/index.html> [Accessed 18 Jan 2013].

Zak, P.J., Stanton, A.A. & Ahmadi, S., 2007. Oxytocin Increases Generosity in Humans. PLoS ONE 2(11): e1128. doi:10.1371/journal.pone.0001128

Zaza, C. & Baine, N., 2002. Cancer pain and psychosocial factors: a critical review of the literature. *Journal of Pain and Symptom Management***,** 24, pp. 526–542.

States and Security: An Examination of Territorial Control in the late 20th and early 21st Century

ALANA RYAN
Senior Sophister, PPES

In the wake of the Cold War the definitive boundaries of a bi-polar world – and the certainty which such a dichotomy brought - have become increasingly obsolete (Bigo, 2001). Power is no longer identifiable with two single countries, but rather is diffused through many transnational connections. The intervention of global institutions, multi-national corporations and non-governmental actors has ensured that states can no longer exercise complete autonomy. Yet, while interdependency and the increased porosity of borders bring many positive gains, it also leaves states vulnerable to unwelcome outsiders who are perceived as exploiters of limited state resources and an affront to the carefully constructed national ideology. It is this perceived vulnerability that has led to a desire to increase state security.

This essay will illustrate why and how states have augmented their powers of control in four steps: it will first briefly outline the current global context and show that the climate of uncertainty which pervades this global order has acted as a catalyst for increased securitisation. Thirdly, it will illustrate that interdependency has actually paradoxically led to greater desires to maintain traditional sovereign lines through appeals to communitarian arguments. The final section will focus on how modern states translate this desire into tangible power through normalising discourse and

the employment of advanced security apparatuses (Foucault; 1975, 2007), drawing examples from the USA, Canada, Australia and Europe.

Globalisation and Mobility

While globalisation is not intrinsically a new phenomenon (Holton, 2005, pp.28-30), the growth in technological capabilities, the developed communication systems and the expansion of travel routes has certainly contributed to the ease with which states interact with one another. This idea of the single global society can be seen in economic, political and cultural interdependency (Palier and Sykes, 2001, pp 2-3). In recent years there has been a 'high intensity of exchanges, new modes of transacting and multiplication of activities that require cross border travel on a sustained basis'. (Portes et al, 2011, p.219).

Aside from changing the composition of everyday life, these transnational ties also transform the nature of movement, leading to a re-negotiation of the migratory processes. Whereas in previous centuries migration was primarily one directional – on account of cost and the travel distance – modern moves are often temporary and multidirectional, motivated by lifestyle just as much as economic opportunities (Moriarty, 2012, p.2). However, while this flow of mobility can yield many positive gains, it can pose considerable challenges to the nation state. As Hollified (2004, p.885) highlights 'unlike goods, capital and services, the movement of people involves greater political risk'.

Conflict and Uncertainty

> '*As the world community has become more connected through the globalisation of technology, transportation, commerce and communication...the benefits of globalisation available to peace loving, freedom loving people are available to the terrorists as well.*'
>
> Tom Ridge, US Secretary of Homeland Security 2003-2005
> (Amoore,2006, p.339)

The main feature associated with the current escalation of state security is pervasive uncertainty. Robinson (2005, p.11) remarks that 'the very fate of humanity has never been so uncertain as it is in the early 21st century'. States operating in an anarchic system, where asymmetries in information are rife, can no longer identify one sole threat - 'The end of bipolarity had already, by depriving policy makers of a massive enemy geographically localised and symmetrical to the US, created a destabilisation of the simples categories' (Bigo, 2001, p.69). The stark distinctions between good and

bad, profitable and detrimental, economical and political, are constantly being re-negotiated and challenged as states become increasingly interdependent.

Alderson (2009, pp.209-210) argues that to properly comprehend why states are, of late, so keen to make borders bio-political it is necessary to return to the French idea of 'sécurité' which is often lost in translation. Foucault (2007) differentiates between 'sécurité' and 'sûreté'. The latter concept refers to the actual defensive strategy taken, the literal meaning of security, whereas the former encapsulates the notion of risk management. The uncertainty of a multipolar world awakens this 'sécurité' idea within states. In such a climate, there are numerous potential hazards which must be prepared for.

Terrorism is arguably the greatest single threat to state security today. Terrorists operate in covert, disciplined cells and as such are extremely difficult to trace. Unlike traditional security threats these aggressors are not tied to any specific country, but rather, as Condoleezza Rice articulates, are 'highly mobile extremists who have no allegiance to any government and are therefore immune to the usual pressure points of international diplomacy (Bhattacharyya, 2008, p.120). This inability to engage in conciliatory talks, coupled with the rapidity and effectiveness of strikes, leaves countries in a state of constant fear. It is this fear which will be used as a springboard for normalising discourse and dispositifs.

Another factor contributing to Western states mistrust is the large number of applicants for refugee status, and the potential that many may be 'bogus'. Ethno-national conflicts dominated the decade after the Cold War and the early 1990s was a peak time for armed conflict resulting in many displaced migrants (Crawley, 2006, p.61). Under the Geneva Convention 1951 states are obliged to take any refugee who 'owing to a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to avail himself of that country` (Hein, 1993, p.44). In 1992, despite the narrow nature of the definition there were 18 million refugees, all who needed to be settled and integrated into a new country (Crawley, 2006, p.62). This number has declined in more recent years, and it is actually the developing countries who take the vast majority of asylum seekers, yet the West still constructs those it receives as a resource drain and a threat to the stability of the welfare state.

In the late 20th century the expansion of the bureaucracy surrounding migration has also led to a growing number of 'illegals' within the system. This too contributes to the climate of alarm, as the outsider in now inside. This illegality is rarely by choice though. For example many asylum seekers to the EU who are persecuted in their home country see no option except to either evade deportation or apply again in a second country – thus breeching the Dublin Convention. With respect to family reunification, spouses are only allowed to apply outside of the country of proposed residence (Chari and Kritzinger, 2006, p.187) – a position which could be unfeasible

for many.

Indeed, even in circumstances where migrants can apply on arrival the bureaucracy is often immense, with little consideration given to their treatment. In Ireland for example the officially reported median processing time for non- priority applications was 11.7 weeks (ORAC, 2011). Yet, 50% of asylum seekers living in direct provision have been living there for three years or more (FLAC, 2011). Calvita (2005, p.45), highlights that this bureaucracy is also common place in Spain and Italy where 'immigration laws anchored by a temporary and contingent permit systems build in illegality'. Thus, the lack of efficiency in dealing with migration prolongs the stay of the immigrant within territorial borders which reinforces the state's unease.

The Supremacy of the Nation State: 'Self Limited Sovereignty'

> *'When the safety of one's country wholly depends on the decision to be taken, no attention should be paid either to justice or injustice.'*
>
> (Machiavelli, 1984, p 515)

Holten (2005, p.45) highlights that the paradox of this increased interdependency through globalisation is that the state is still a central actor. However, destabilisation of traditional tenants through increased interdependence does threaten state sovereignty. The complexity of the current world renders that traditional Realist idiom that states 'at minimum, seek their own preservation and, at maximum, drive for universal domination' (Waltz, 1979, p.118) highly difficult. It would appear that the majority of states do not actively aspire to aggrandisement, choosing instead to derive power through delimitation of entry. This 'self-limited sovereignty' (Joppke, 1999, p.21) may in part be due to a defensive desire to preserve position within the international system, but to view it solely as that would be ignorant to the vast power such a strategy yields.

Through appeals to communitarian arguments which portray the state as not merely a geographical entity but a type of 'moral community' (Yural Davis, 1997, p.71) governments are able to manipulate security policies to suit their own strategic purposes – and in doing so increase their power and presence. The categorisation of certain types of migrants as a security risk affords governments the opportunity to implement policies with little consideration for justice or equality. Walzer (1983, p.32) argues that states are normatively justified in this approach: 'we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of community we want to have'. These communitarian arguments allow states the potential to only take those immigrants who are beneficial to the state, while cutting those who could threaten the hegemonic ideal and be 'a resource drain'. As Taylor (2005, p.12) highlights the

aim of immigration policies is always to create a 'gain' for the host country. States achieve these gains through numerous technologies which subordinate conventional international standards to state- centred security fears.

Mechanisms of Control: Discourse and Dispositifs de Sécurité

> *'There has been an attempt in the last few years to convince us to accept, as the humane and normal dimensions of our existence, practises of control that had always been properly considered inhumane and exceptional.'*
>
> (Giorgio Agemben, 2004, Le Monde)

By cultivating a hegemonic discourse which individualises the migrant as antithetical to the aims of the community, the state creates the necessary conditions for facilitation of its policies. This discourse is so expansive and pervasive that the immigrant gradually becomes 'a semantic synonymous with 'suspect' and 'potentially hostile foreigner' Bigo (2001, p.66). It is embraced so readily precisely because native citizens wish to see themselves as law abiding and naturally entitled to state provision and economic opportunities. The 'outsider' acts as a foil to define themselves against - identity can't be developed in isolation; it is socially constructed 'through the relation to the other, the relation to what it is not' (Moriarty, 2007b, p.264). Calvita (2005, p.15) reiterates this stating that the 'immigrant-stranger-outsider' and citizen-member-insider' dichotomisation is exceedingly evident today. And while certain countries may perceive themselves as subject to a greater security risk and thus employ such discourse more fervently, by virtue of the fact that 'the sovereignty of states had never entailed their insulation from the effects of other states action'(Waltz, 1979, p. 96), their actions will be perpetuated by neighbouring countries. In this way the transnational norm ensures that state rational for specific actions takes precedent from global developments

Yet by passively accepting this discourse the people of the state are equally as culpable for inserting borders - tangible and metaphorical, between the natives and migrants. As Foucault (2007, p.20) observes the population is both the object and the subject of mechanisms of security. The state manages to co-op its citizens into this fictional reality as the 'new normal' discourse is so pervasive that 'it is rendered invisible to the subject who practises it' (Bhandar, 2004, p.262) Citizens share rumours, which serve to 'mobilise rival groupings and harden the battle lines between minorities and between majority and minorities' (Bhattacharyya, 2008, pp 111-112) The rule of the norm extends into the society as a whole enabling everyone to play the role of judge by constantly surveying and ostracising those outside the norm (Foucault, 1975). This type of 'conceptual border' of us versus them is an integral security technique as 'conceptual borders of belonging and identity can reinforce

territorial and organisational borders (Geddes, 2007 p.59)

This employment of an intangible, narrative based, division between migrants and natives legitimises and reinforces the use of new legislative, judicial and administrative 'dispotifs' making the often covert prejudice glaringly real. Through frequent media speeches which employed emotive, reactionary language - 'These acts of mass murder were intended to frighten our nation into chaos and retreat. But they have failed. Our country is strong. A great people has been moved to defend a great nation' (Bush, 9/11) - Bush's administration exploited the public's horror and despair to justify increasingly invasive security mechanisms. The Patriot Act of October 26th 2001, allowed for the virtually unlimited application of biometric devices in the War on Terror (Amoore, 2006, p.342). This was followed by the US Canada Smart Borders Declaration which 'included pre-screening mechanisms to expedite legitimate movement while focusing more heavily upon suspected illegitimate ones' (Alderson, 2009, p.207).

Interestingly this security apparatus undertook further divisions; no longer was it just the natives and the migrants, but instead the natives, the legitimate migrants and the 'illegals'. One can observe that such categorisation is imperative for keeping economically essential migrants whilst simultaneously shutting the border to the more ambiguous cases (Alderson, 2009, p.206). Indeed, in 2004, the desire to secure all borders was realised with the Visa Immigration Status Indicator Technology (VISIT) a 10 billion project which utterly changed the management of US air, land and sea entry (Amoore, 2006, p.337).

Aligned to this, the introduction of the Nexus Programme for the US/ Canada border strengthened this dichotomisation of migrants by marketing the Nexus card at 'low risk citizens' and allowed the private sector to enter the security arena (Bhandar, 2004, p269). Here, by appealing to 'safe' citizens to voluntarily submit their biometric details a system is created whereby the norm – for those who supposedly had nothing to hide – was to comply. The people then become the subject of securitisation and enabled its perpetuation. As Bhandar (2004, p. 269) writes 'through this habituation of this voluntary programme there is an act of conditioning, this leads to accepting this technology, relying on this technology and ultimately normalising the use of this technology'.

In Europe too we can see a growth in border security in recent years through the establishment of FRONTEX. While European Union security is less overtly tied to the nation state, upon examination it's evident that there was a strong intergovernmental aspect to its implementation. The board of FRONTEX consists of all the heads of member states national boarder guard services yet only two commissioners (Neal, 2009, p.342). Indeed the head of the agency admitted that it was a 'coordinating body with few executive powers of its own' (Laitinen, quoted in Neal, 2009, p.247). Furthermore it is dependent on the contribution of resources by member states

(ibid). In this way Geddes' (2007, p.49) observation that 'what Europe does is actually inspired to a great extent by what its member states want it to do' appears to hold considerably merit.

Similarly, the member states by passing the Amsterdam Treaty gained further control of their borders. The treaty incorporated the new regulations which were laid forth in the Schengen Acquis into law (Lipies, 2010, pp391-393). While all Europeans, as citizens of Europe are entitled to free movement, the treaty enabled the codification of the movement limitation on non-EU citizens. This then led to strengthening Council regulations which culminated in Council Regulation (EC) 562/2006 which divided all non EU countries into two groups – those whose nationals requires visas for every EU border and those states who were exempt (but only for three month basis if unemployed) (ibid). Here we see the stratification of the desirable and undesirable migrant again, with those 'safe citizens' (diplomatic, service and official passport-holders) exempt completely.

Aside from increased border security there has been a notable worldwide rise in the 'rationing of citizenship' (Feldblum, 2000, p.494). To take the Irish case, the 2004 Citizenship Referendum fundamentally altered the nature of Irish citizenship limiting it to only those who had an Irish parent (Moriarty, 2007, p.1). Like the case of border security in the US, the new legislation was a product of the normalising discourse which relied on 'myths and urban legends' (ibid, p.2). The government racialised and sexualised the issue portraying migrants, in particular Nigerian women, as abusers of scarce Irish resources.

An interesting parallel can be seen in Republican Pete Wilson's re-election campaign for Californian Governor in the 1990s. Wilson's political platform was his desire to repeal the citizenship bestowed on immigrants, in particular Mexican women who he portrayed as a significant threat to the health, educational and welfare services of the state (Luibheid, 2002, p xix). Through an open letter to the New York Times he elevated what was initially constructed as a state resource threat to a national ethical question – 'why does the US government reward illegal immigrants who successfully violate the law and manage to have a child born on US soil? Rather than penalising it, we reward their illegal act: we pay for delivery and confer US citizenship on the baby' (ibid, p.xx). In both examples dialogue of risk and illegality was used to push the securitisation agenda and boost elite power. These examples give credence to Goldberg's (2001) thesis that all states are inherently racial. Citizenship represents one of the 'apparatuses and technologies… [which] have served to fashion, modify and reify the terms of racial expression as well as racist exclusion and subjugations' (ibid, p.4).

Indeed, the administrative process surrounding citizenship in the US is so arduous it alone acts as a formidable apparatus of deterrence. North (1987, p.325) writes 'documents are needlessly cold and potentially alarming to some. The language is

often needlessly ponderous and above the average education level of most of the applicants'. The system is so bureaucratic that documents are frequently slow to be processed and many get lost in transit (ibid). Alarmingly, given the plenary nature of the American courts the judiciary has virtually no power to review what the legislator does (Boniak, 2006, p.50). This means that migrants are voiceless in a system which strives to prohibit their attainment of the pivotal status. The overall effect of this increased securitisation is that the number of foreign born US citizens has decreased from '79% in the 1950s to less than half that in 1997' (Bloemraad, 2006, p.18).

In the domain of residency rights qualification to the rights of migrants have also been made. In Australia, in 1993, the government rescinded the right to unemployment and sickness benefits for the first six months for new arrivals and this was later extended to the first two years (Feldblum, 2000, p.484). Aligned to this, states continue to have full regulative power over the length of stay of foreign citizens (Hammar, 1990, p.12). This was particularly apparent in the development of EU Family Reunification Policy whereby the Council re-negotiated crucial terms of the policy proposed by the Commission. Member states felt the initial definition of family was too broad, sought to guarantee that only those who were currently residing outside of the territory could apply and added a clause which gave national governments the ability to discern whether or not the spouse was entitled to a work permit (Chari and Kritzinger, 2006. pp184-187). In this way there is a clear intervention by states to retain the deciding vote in securitisation debate.

Conclusion

There is little doubt that states are resorting to more complex and expansive means to curtail the flow of migrants. The logic of securitisation is fuelled by the uncertainty of the multi-polar world which states are operating in. This uncertainty leads states to increase control over the one definitive thing they own – their territory. Through the instigation and perpetuation of a discourse which positions the migrant as outside the community norm, states subtly engage their citizens in an ostracisation of 'the other', to the extent that highly invasive and controversial biometric technologies are rarely questioned.

These devices, coupled with more stringent citizenship and visa criteria are portrayed as necessary for keeping the state 'safe' - and due to a lack of significant debate they're authorised unwittingly by its people. While there is little ability to change the dynamics of this new irregular and temporary mobility, it is never too late to reform standard practise. As has been shown migrants are all too often defamed and subjected to blatant infringements of their civil liberties which would be considered totally unacceptable if applied to 'natural' citizens. As Castles (2010,

p.1568/1569) notes 'If there is a normative goal, it should not be to reduce migration but to find ways in which it could take place under conditions of equality and respect for human rights'.

BIBLIOGRAPHY

Agamben, G. 2004, 'No to Bio-Political Tattooing' in *Le Monde* http://modernrhetoric.files.wordpress.com/2010/11/agamben.pdf

Alderson, C. 2009. 'Border Security' in Binkley and Capetillo (eds), *A Foucault for the 21st Century*. Cambridge Scholars Publishing.

Amoore, L. 2009. 'Biometric Border: Governing mobilities in the War on Terror,' *Political Geography,* 25:3. pp331 – 356.

Bhandar, D. 2004. 'Renormalising Citizenship and Life in Fortress North America,' *Citizenship Studies* 8:3. pp261 – 278.

Bhattacharyya, G. 2008. *Dangerous Brown Men: Exploiting Sex, Violence and Terrorism in the War on Terror*, London: Zed Books.

Bigo, D., 2001. 'Migration and Security,' in Guiraudon and Joppke (eds), *Controlling a New Migratory World,* London: Routledge.

Boniak, B., 2006. *The Citizen and the Alien*, Princeton.

Bloemraad, I., 2006. *Becoming a Citizen*, University of California Press.

Bush, G. 2001. 'Speech for 9/11,' http://articles.cnn.com/2001-09-11/us/bush.speech.text_1_attacks-deadly-terrorist-acts-despicable-acts?_s=PM:US

Calvita, K. 2005. *Immigrants at the Margins: Law, Race and Exclusion in Southern Europe*, Cambridge University Press.

Castles, S. 2010. 'Understanding Global Migration: A Social Transformation Perspective,' *Journal of Ethnic and Migration Studies* 36:10.

Chari, R. and Kritzinger, S. 2006. *Understanding EU Policy Making*, London: Pluto

Crawley, H. 2006.'Refugees, Asylum- Seekers and the Internally Displaced: the

Politics of Forced Migration,' in Marshall, B (ed.) *The Politics of Migration.* London: Routledge

Feldblum, M. 2000.'Managing Membership: New Trends in Citizenship and Nationality Policy,' in T. Alexander Aleinikoff, Douglas Klusmeyer, (eds.) *From Migrants to Citizens*, New York: Brooklyn Institute Press

FLAC. July 2011. *Asylum Seeker Fact Sheet* http://www.flac.ie/download/pdf/2011_07_01_asylum_seekers_factsheet_july_2011.pdf

Foucault, Michel. 1975. *Surveiller et Punir*, Gallimard.

Foucault, Michel. 2007. *Security, Territory and Population: Lectures at the College de France*, London: Palgrave Macmilan

Geddes, A. 2007. 'The Europeanisation of What?,' Migration, Asylum and the Politics of European Integration,' Faist and Ette (eds.) *The Europeanisation of National Policies and Politics of Immigration.* London: Palgrave Macmillan

Goldberg, D., 2002. *The Racial State*, Oxford: Blackwell

Hammer, T. 1990. *Democracy and the Nation State*, Aldershot: Aveburg

Hein, J. 1993. 'Refugees, Immigrants and the State, ' *Annual Review in Sociology,* 19, pp43-59.

Hollified, J. 2004. 'The Emerging Migration State,' in *International Migration Review, Special Issue* 38:3 pp.885-912

Holton, R. 2005. *Making Globalisation*, London: Palgrave Macmillan

Joppke, C. 1999. *Immigration and The Nation State,* Oxford University Press

Lipies, L. 2010. 'The Impact of Visa Policy on Integrated Border Management,' in *Current Issues of Business and Law* 5:2

Luibheid, E. 2002. *Access Denied: Controlling Sexuality at the Border*, University of Minnesota Press

Neal, A. 2009. 'Securitisation and Risk at the EU Border: The Origin of Frontex, ' *Journal of Common Market Studies* 47:2 pp.333.356

Moriarty, E. 2007a. *Ireland and Race: Ideas, Intellectuals and Identities*, PHD extract

Moriarty, E. 2007b. *Routinized Practises and Technologies of the State: Dialectical Constraints Irishness and Otherness,* PHD extract.

Moriarty, E.,2012. 'Polish Migration to Ireland: 'Free Movers' in the New European Space,' *Journal of Ethnic and Migration Studies,* 34:5

Machiavelli, Niccolo. 1984. *The Discourses,* Penguin Classics

North, David. 1987. 'The Long Grey Welcome: A study of the American Naturalisation Programme,' in *International Migration Review* 21:2, pp.311-326

ORAC. 2011. *Annual Report*
http://www.orac.ie/website/orac/oracwebsite.nsf/page/CRSE-8XZGK713241510-en/$File/Office%20of%20the%20Refugee%20Applications%20Commissioner%20-%20Annual%20Report%20-%202011.pdf

Palier B.and Sykes,R. 2001. *Globalsiation and European Welfare States*, London: Palgrave Macmillan

Portes, A, Guarnizo, L and Landolt, P. 1999. 'The Study of Transnationalism: Pitfalls and Promise of an Emergent Research Field, ' *Ethnic and Racial Studies* 22:2 pp.217-237

Robinson, I. 2005. 'What is a Cultural Globalisation Studies? Intellectual Labour and Global Society,' in Appelbaum, R and Robinson (eds), *Cultural Globalisation Studies*, London: Routledge

Taylor, A. 2005. 'From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement,' in Finer, C (ed.) *Migration, Immigration and Social Policy*, London: Blackwell

Yural- Davis. 1997. *Gender and Nation*, London: Sage

Waltz, K. 1979. *A Theory of International Politics*, London: Mc-Graw Hill

Walzer,M. 1983. *Spheres of Justice: A Defence of Pluralism and Equality*, Oxford University Press

The Introduction of Gender Quotas into Irish Politics

SALLY HAYDEN
Postgraduate, MSc in International Politics

Inspired by the Electoral (Amendment) (Political Funding) Bill, this paper examines gender quotas in the political process. It attacks this topic on various levels – why equality of representation is necessary, why gender quotas themselves are currently necessary, and why they alone are not a solution.

In analysing why gender equality is essential for a legitimate political system, this paper looks at the importance of attitudinal congruence between politicians and the represented. Therefore it moves on to say that the requirement of representation absolutely trumps that of a meritocratic system, as unlike in other professions, politics is a field where there are no specified qualifications, and therefore the emphasis should be placed on providing a voice for all citizens instead.

This paper then examines both the systemic and societal factors that can prevent women from being adequately represented, and recognises that these are as likely to emanate from the females in the population as the males.

The idea of affirmative action to ensure gender equality in politics is not a recent phenomenon, but has been suggested various times over the last forty years. Considering this time period, the argument that conditions are improving steadily and that natural progression is happening is also shown to fall. An examination of quota law both in Europe and globally shows how Irish legislation is actually lacking when

compared with international progress.

However the current Irish proposal is a step in the right direction. Whilst there are various constitutional issues that could hinder its progress, including the right to freedom of association, this paper dismisses these, concluding on this matter that as long as parties don't identify themselves specifically as operating to represent one gender, this should not be an issue. Finally it concludes that it is unlikely that quotas can operate as a permanent solution, but that at the moment they are absolutely necessary for ensuring equal representation. Nevertheless they must not be treated as an isolated answer, and further challenges to the societal and systemic factors that also operate in our current political system must continue to be voiced and debated.

Introduction

The highly visible activities of Constance Markievicz in the early years of the twentieth century – as a participant in the Easter Rising, the First Dail Eireann, the Anglo-Irish War, and the first woman ever to be elected to the British Parliament – might convey the impression that women have been playing a critical role in Irish politics for the last century. However her participation remains an anomaly to the trend. In the following fifty years not one woman held a Cabinet position, and during the same period the average number of women in the Dail was four. The record in the Seanad during the same period, whether in its first form (1922-36), or after its reform under the 1937 Constitution, was no better, nor was that of the various elected local authorities (Finnegan and Wiles, 2005, p.374).

Today women hold a mere 25 of the 166 seats in the 31st Dail, and Ireland stands in an unimpressive 79th place in the global gender electoral league table (McTeirnan, 2012). One of the problems with a lack of women in politics is a lack of women's issues being represented in politics. Whilst Phillips (1995, p.75) inclines towards the somewhat cynical yet realistic view that "the contrast between those who get involved in politics and those who do not is deeper than any gender difference between those who are elected", it is clear that certain issues will usually not be presented as comprehensively or advocated as vigorously by men as they would by those who have experienced them firsthand. This argument is also collaborated by Lombardo and Meier's (2008, p.109) observation that the main actors initiating policies promoting women even on the EU level appear to women politicians, women ministers, the European Expert Network Women in Decision-making, and the European Women's Lobby (EWL).

Gender quotas currently exist in over a hundred countries worldwide, and with varying results (Krook, 2009, p.4). Their impact will be realised here when the Electoral (Amendment) (Political Funding) Bill, which proposes that 30% of all candidates must be women by 2016, is enacted. This kind of affirmative action has been

successful in various countries, such as India, where long-term electoral increases have resulted (Pande and Ford, 2011, p.3), though of course many arguments also exist against quotas. For one thing, their implementation must not lead to an abandonment of other methods of reform. Research has indicated that while the proportional representation electoral system is actually good for achieving equality in representation, other factors, like Ireland's small constituency sizes, may work against women (Henig and Henig, 2001, p.96).

The concept of representation lies at the heart of liberal democratic thinking. This essay attempts to examine both the systemic and societal factors that affect women's participation and success in the Irish political system, to examine the proposed legislation, provide an EU and international perspective on gender quotas and eventually conclude that, while they are not enough, as a temporary measure quotas may be a necessary intrusion to achieve this elusive concept of representative democracy.

Representation

"Before I die I want to be able to vote for a mediocre woman."
Kathleen Lynch, Labour Party Minister of State (Minihan, 2012)

The National Women's Council (2007) has estimated that it will take 370 years for equality of gender to be realised in politics. But is this really important?

Among the literature on the meaning of a representative political legal system, the lowest common denominator seems to be that there should be a certain amount of attitudinal congruence between the citizens and their elected representatives. Women make up 50% of the population, and whilst most issues are not gender specific, some can undeniably affect such a greater proportion of women than men as to be labelled "women's issues". Distinct concerns in relation to child-bearing, sexual harassment, domestic violence, and the division of unpaid care-work disproportionately affect women. An estimated 213,000 women in Ireland have been severely abused by a partner, compared to a much lower of proportion of men (National Crime Council and ERSI, 2005), whilst 61% of those involved in unpaid care work are women (Lynch and Lyons, 2007).

And, while representation does not necessarily require personal experience, on such gendered issues, while men are of course able to recognise problems and debate policy solutions, they cannot be expected to understand the issues in as deep a manner, nor represent them with the same passion as would be expected when the issue was one's own.

One of the common arguments against a gender quota is that of the need to maintain meritocracy, a system which quotas could thwart by promoting less qualified women over their male counterparts. This argument leads to various empirical con-

testations. Its presumption that all elected officials are chosen on merit is questionable in the field of politics, where no one really knows what qualifications should be.

This argument also relies on the premise that an equal number of women to men will never run for political office, as no one could argue that women in general are "less qualified", but instead the number of women stepping forward remains much less, and therefore quotas and societal change must go hand in hand.

It has been theorised by some that quotas can be viewed in the context of democratic innovation. This viewpoint is buoyed by the observation that demands for quotas frequently emerge during periods of democratic transition, or the creation of new democratic institutions. During these times quotas for women can be included in broader bundles of political reform being implemented to guarantee the representation of traditionally under-privileged groups and to establish national and international legitimacy for a changing state (Krook, 2004, p.10).

Women have certainly been an oppressed group historically, and have only recently gained equal rights. Though the law has changed, it is important to go a step further and actively encourage input from those who have not traditionally had a say in the legislation that affects our daily lives.

Systemic Factors

In the last General Election, the percentage of women running for office corresponded to the percentage of women elected, which was in both cases 15% (womenforelection.ie, 2012). This would suggest that voters are not the main perpetrators of inequality of representation, and in fact can be somewhat gender neutral in their choice of a candidate. Thus, along with the cultural attitudes, both within parties and within themselves, that stop women from running, there must be various systemic factors that also discriminate, albeit unknowingly.

Various institutional factors have been proven to mitigate the effect of the discrimination against women in politics. One factor which has regularly been identified as a vital "enabling condition" for women's progression within politics is the electoral system employed in a state (Henig and Henig, 2001, p.93). In a study conducted between 1987 and 1991 Rule and Zimmerman found that the seventeen countries they examined that used a system of proportional representation (PR) had approximately double the amount of women in their parliaments than the eight countries using non-proportional systems (Henig and Henig, 2001, p.93). This benefit was also referred to specifically in the Irish context in section 490 of the 1972 Report to the Minister of Finance by the Commission on the Status of Women.

However, though generally PR is considered to benefit women aiming for electoral success, Ireland is the one country that has been observed to counteract this trend. Henig and Henig (2001, p.96) suggest the reason for Ireland's particularly low score

is that the small number of members elected per constituency seems to undermine the benefit of a PR system. By contrast, Sweden, with an average of eleven members elected per district, enjoys the highest proportion of women parliamentarians in the world, and the Netherlands, with just one multi-member district covering the entire country, comes close behind, with the highest proportion of female MPs in the world outside Scandinavia.

Multi-member districts can promote female participation from two sides. Whilst the electorate are more likely to vote for a woman in districts with more members, Phillips (1995, p.59) has also noted that to maintain an appearance of practicing equality, and to counteract any potential criticism, parties that adopt multi-member rather than single-member constituencies themselves tend to be more favourable towards women.

In a report by the European Commission (1998, p.86), Bystydzienski theorised that to elect women in meaningful numbers the ideal number of representatives per district should be five or more, as "when several parties can represent a party in one constituency, female candidates are not the party's only representatives within a given election unit, and thus have a better chance of being nominated and elected."

Parties internal candidate selection procedures are another systemic factor, that whilst they differ from party to party, they do need to be examined for any bias or discrimination. Research carried out in 2009 by the National Women's Council of Ireland found that a quarter of women candidates cited a lack of party support as something that makes it difficult for women to run a campaign.

Societal Factors

From ex-Late Late Show host Gay Byrne asking newly elected women TDs who is minding their children(McManus , 2010), to the constitutional enshrinement of the woman's right to work in the home, it is clear that Ireland has long held very traditional views of women that permeate all aspects of society, albeit views that are very gradually changing.

Whilst it is undeniable that cultural attitudes play a huge role in the lack of women achieving in politics, it would be unfair and indeed a gross oversimplification to suggest that these ideas only emanate from men, the "patriarchy". When examining the issue in 1972 the Commission on the Status of Women found that there were no constitutional or legal provisions in Ireland restricting the participation of women in politics, and indeed no other evidence of formal discrimination against them. Instead they concluded that perhaps the prejudice towards their position came from women themselves, stating that a "considerable degree of apathy" was displayed (Finnegan and Wiles, 2005, p.375).

Forty years later a certain apathy still seems to subsist, but this essay would argue

that that apathy is not a lack of interest, but rather a lack of equation between solving societal problems and running for office. Even in 1972 it was noted that women's interest in civic problems and their commitment in the area of social responsibility tended to manifest itself in involvement in voluntary or non-party-political organisations rather than in organised political activity (Finnegan and Wiles, 2005, p.382).

Partially lending itself to this is that some forms of discrimination can be inadvertent but incidental to the ways in which the sexes socialise and form relationships, and thus influence the career prospects available and the career choices which they tend to consider for themselves. The existence of enhanced male networking opportunities and "clubs", and the impact this has on career advancement can be seen in many different professions, including that of politics.

Another cultural area referred to by almost all academics who have written on gender inequality is education. The suggestion that, from the age of four, girls are rewarded for being quiet, neat and doing what they are told, whereas boys are encouraged to be proactive and ask questions is a common one (Banks, 1988, p.46). This conditioning can have significant and possibly immeasurable impacts on decisions made later on in life.

The way in which society perceives women is also important when it comes to deciding who to vote for. A US study found female candidates tend to be perceived as more liberal than their male counterparts. Similarly they were viewed as being more capable of dealing with social welfare issues, whilst men were believed to be more suitable to deal with foreign policy, defence, and crime (Hayes, 2011, p.135). Whilst this may be true to an extent, the real harm is caused by the more femininely perceived traits being seen as weaker or less necessary in a government, and similarly for a more feminine style of leadership. Their qualifications can be downgraded and minimised by a prevailing attitude that does not perceive them as being worthwhile, because traditionally they have not been respected to the same extent as the should this be – because traditionally they have not been respected to the same extent as their male counterparts and their qualifications have as a result been given a lower status/ranking than the qualifications of their male counterparts (Dahlerup and Freidenvall, 2008, p.19).

The role of the media also plays a major part in society's perception of women and their abilities. Voters are only willing to devote a limited amount of time to thinking about political matters, and therefore, when trying to strive towards equal representation, stereotypes and the way in which the media perpetuate or challenge them is important too. Studies by Kahn and others have shown that when female candidates are portrayed in the news in gender-stereotypic ways, they will more likely be viewed in traditionally female terms, which can result in disadvantage (Hayes, 2011, p.139).

An International Perspective

The global situation of women is improving. Whilst female suffrage did not exist anywhere in 1890, women had obtained the right to vote in 96% of countries of varying development stages by 1994. Of these, many, including Barbados, Chile, Ecuador, Malta, Puerto Rico, Sweden and the US, now show consistently higher female voter turnout than male (Pande and Ford, 2011, p.1). Women are also showing higher turnouts in the area of education. The World Bank (2012) recently found that in lower-income countries eleven women to every ten men are enrolling in tertiary education, and the ratio is fourteen to ten in upper-middle-income countries. However, despite these breakthroughs, less than 19% of the legislators today in the world are women (Pande and Ford, 2011, p.1), and not one country in the world has achieved equal political representation for the sexes (Seager, 2008, p.16).

The Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations General Assembly in 1979, states that women and men should have equal opportunity to participate in public life. This idea was reinforced with a call for more proactive and practical measures to be introduced directly targeting the underrepresentation of women, in the 1995 adoption by all UN member states of the Beijing Platform for Action (Lindgren et al., 2009, p.33).

As was previously stated, over a hundred countries worldwide have implemented quotas at some level of government. These quotas usually fall into three broad categories: reserved seats, political party quotas, and national legislative quotas (Krook, 2004, p.2).

Gender quotas range from being internally implemented, to being recommended or even enforced by international organisations, as a way to encourage democratisation, peace and stability. This was seen most recently in Bosnia, Kosovo and Afghanistan (Krook, 2004, p.16-17). Quotas have also moved transnationally through parties or ideologies, an example of which is the adoption of quotas by Socialist International, who now promote the use of quotas by their affiliates around the world.

Sometimes quotas happen in tandem with other democratic reforms, such as in the African National Congress's in South Africa, who along with adopting democracy, in their first election operated a quota for women (Phillips, 1995, p.57).

Geographical regions can also follow their neighbours. Argentina has employed some form of gender quotas since their original 1951 introduction was first orchestrated by Evita Peron, and in 1993 it became the first country to use gender quotas for national legislative elections (Jones, 2009, p.56). Throughout the continent the impact of women promoting women's issues was seen, as following on from the UN Fourth World Conference on Women, a series of meetings specifically among Latin American female politicians were organised in 1995 within the region, later culminating in the adoption of quota laws in fourteen Latin American countries (Krook,

2004, p.19). This has made Latin America the world leader in the use of national gender quota legislation (Jones, 2009, p.57).

India provides much of the strongest evidence of the impact of gender quotas, specifically because the design of the India reservation system allows for causal analysis (Pande and Ford, 2011, p.3). The so-called Panchayat Reforms - two constitutional amendment acts, passed in 1992 and 1993 – ensured a higher degree of female representation at a local level. Research carried out monitoring the long-term effects of this in both a wealthy and a more disadvantaged region, found that in both cases the attitudes and opinions of the governed and the elected had a greater degree of correlation following the reforms than before (Lindgren, et al. 2009, p.50).

Rwanda is another country that is frequently cited as a gender quota success story. In 2008 Rwanda became the first country in the world with a majority-female national legislative body. Though arguably this has so far not led to a greater statutory protection of women's rights, it has generated impacts that domestically are of great consequence. Though it has been noted that urban, elite women have received the vast majority of these benefits, a knock-on effect is plausible, and the longer term consequences remain to be seen (Burnet, 2011).

A European Perspective

Equality of representation in the European political system is seen as important because its antithesis is perceived as a sign of the poor quality of democracy and lack of legitimacy of EU-political institutions. The first EU activities to promote gender equality in politics occurred in the late 1980s, with a report by the Committee of Women's Rights leading to the European Parliament's first 1988 resolution on women in decision-making. EU interest in this area intensified from the 1990s onwards, and increased amount of activity was noted both before and after the dates of the European Parliament elections of 1999 and 2004 (Lombardo and Meier, 2008, p.109).

The recognition of equality between men and women has been laid down as a fundamental principle in every treaty since the Amsterdam Treaty. This framework informed the European Commission's road map for equality between men and women for 2006-10, which incorporated the promotion of equal representation in decision-making as one of the six priority areas for action (Dahlerup and Freidenvall, 2008, p.13).

The exact framing of the representation and gender quotas debate can change. Sometimes it is seen as a question of women's numerical political representation, linked to a debate on the lack of lack of institutional responses to the problem. Alternatively it can be framed within the more traditional EU debate of labour market issues, and linked to the structural inequalities and discrimination that exist therein.

In Europe it will seem unsurprising that with regards to the implementation of gender quotas the Nordic countries took a lead, introducing them for the selection of parliamentary candidates in the 1970s (Phillips, 1995, p.57). A voluntary cumulative effect was noted in Norwegian politics when, after the Socialist Left Party first adopted quotas it was followed in the 1980s by similar initiatives by the Labour and Centre Left parties, and substantial increases in the Conservative Party's chosen candidates too. Similar developments also occurred in Germany, when the German Green Party decided to alternate women and men on its list for the 1986 election, leading to the Christian Democrats adoption of a voluntary quota, and to the Social Democrats conversion to a formal one.

Internal party initiatives such as recommendations and guidelines are also observed in many other countries, as was shown by the PARQUOTA Survey, returned by 80 political parties, and several other countries, including Portugal, Slovenia, and Spain have opted for legislative quotas (Dahlerup and Freidenvall, 2008, p.13). However, at an EU level, discussion on how best to tackle the problem of equal representation, along with a greater focus on other issues relating to women is still progressing.

The Current Irish Proposal

The draft version of the Electoral (Amendment) (Political Funding) Bill was first published on the 8th of June 2011. Along with restricting corporate donations significantly, it will cut political party funding in half unless 30% of general election candidates representing those parties are of either gender, a number that will rise to 40% within seven years.

Constitutionally quotas have been an issue in other jurisdictions. France is one country that has attempted to introduce a quota, only to have the Constitutional Council find it to be in breach of the constitutional principle of the equality of all citizens before the law, on the grounds that Article 3 of the French Constitution and Article 6 of the Declaration of the Rights of Man and the Citizen promoted the principle of equality before the law, and precluded any kind of categorisation of voters and candidates.(Finnegan and Wiles, 2005, p.404) (Dahlerup and Freidenvall, 2008, p.13). Their particular proposed percentage was one of the least severe, as it only required a minimum of 25% of candidates for local elections being of the same sex.

In the UK, likewise, the Labour Party's policy from 1993 on all-women shortlists was declared illegal by an Industrial Tribunal in 1996. However this policy was reintroduced in 2002 upon the approval of the Sex Discrimination Bill, permitting parties to apply positive action without the risk of legal challenge when selecting candidates for election to the House of Commons, European Parliament, Scottish Parliament, National Assembly of Wales, and local councils.

Whether the introduction of the Bill here in Ireland would be an issue constitutionally has been the subject of some debate. This suggestion was first raised by former Minister of Justice Michael McDowell (2011), though he has failed to outline exactly where an issue would arise.

One suggestion is that it could threaten the Article 40.6.1 right to freedom of association, which, as was established in *NUR v Sullivan* [1947] IR 77, protects the right to join an association of one's choice, and more saliently, guarantees associations' autonomy with regards to the determination of membership, as was seen when it was held in *Tierney v Amalgamated Society of Woodworkers*1959 IR 254 that a trade union's refusal to accept a particular member is protected by this article (Daly, 2011).

This view was upheld with regard to gender in the 2009 case *Equality Authority v Portmarnock Golf Club.* This case hinged its decision on an interpretation of the Equal Status Act 2000, and included a recognition by Hardiman J of the constitutional conflict between the reconciliation of equality law and freedom of association. However whether this right goes beyond the ability to choose and exclude members, to the further allowance of ranking, promoting and organising internally of members, is uncertain. This case also relied primarily on the fundamental nature of gender to the establishment of the club, something which would not apply to Irish political parties. A party established under gender specific lines would be more likely to be able to invoke the right of freedom of association, to find the new Bill unconstitutional.

The proposed draft Electoral (Amendment) (Political Funding) Bill is worthy of consideration because it ensures that most parties will comply, but they are not forced to do it. It also forces the traditionally male-dominated parties to consider whether their internal power structures are hindering women's success, whether deliberately or through unappreciated indirect consequences. By regulating selection, rather than election, it ensures that the meritocracy arguments cannot stand, as the electorate can still choose those they believe are best suited to the position, and a violation on democracy cannot be plausibly suggested.

Conclusion

As quotas are a relatively recent phenomenon, research has not been conducted measuring their long-term impact and whether they can function as a permanent solution. This essay would propose that it seems unlikely that they alone can ensure permanent change, and that they would even potentially have the capacity to harm in the long-term, as while affirmative action is necessary at the moment, in the future the quota number could begin to be viewed as a conciliatory target rather than a suggested minimum.

The Second Commission on the Status of Women in 1993 suggested that quotas

come under the type of temporary compensatory measure that is provided for in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, to which Ireland is a party. As such they are not intended to operate in isolation, but should be one element of a strategy that includes making changes in the areas of financing, training and selection procedures. The education system, and the different values it can promote for different genders, particularly in a hugely segregated school system, must be examined, as must the role played by informal and inaccessible networking.

While the draft version of the Electoral (Amendment) (Political Funding) Bill ignited a lot of indignation, from both men and women, critics did not seem to put energy into suggesting alternative solutions, or even accepting that a real problem currently exists. Recognition of the importance of representation, and the democratic deficit that can result when certain voices are not heard in the decision-making process needs to be a topic of discussion. Women have made huge increases, but in the last thirty years these have stagnated, and affirmative action seems the only way forward. Politics will always be an elitist game, but that doesn't mean that efforts can't be made to at least attempt to achieve the ideal of liberal inclusive democracy.

BIBLIOGRAPHY

Bacik, I., Costello, C. and Drew, E., Gender InJustice: Feminising the Legal Professions? Dublin: Trinity College Dublin Law School.

Banks, T. L. (1988) Gender Bias in the Classroom. Journal of Legal Education. 38 (1-2): 137-46

Burnet, J. E., 'Women Have Found Respect: Gender Quotas, Symbolic Representation, and Female Empowerment in Rwanda'. Politics & Gender. 7 303–334.

Caul, M. 'Political Parties and the Adoption of Candidate Gender Quotas: A Cross-National Analysis' The Journal of Politics. Vol. 63, No. 4. 1214-1229

Connell, R, (2005) 'Growing Up Masculine: rethinking the significance of adolescence in the making of masculinities'. Irish Journal of Sociology.14 (2):11-28
Dahlerup, D., and Freidenvall, L. (2008), Electoral Gender Quota Systems and their Implementation in Europe.

Daly, E., (2011). Gender Quotas and Freedom of Association. Available at http://www.humanrights.ie/index.php/2011/06/04/gender-quotas-and-freedom-of-association/, last accessed on 08.04.12

De Londras, F. (2010) A "New Politics" Without the Seanad: Concerns from a Human Rights Perspective.

European Commission, Employment and Social Affairs Directorate. (1998). Equal Opportunities: Annual Report.

Finnegan, R. B., and Wiles, J. L.(2005). Women and Public Policy in Ireland: A Documentary History 1922-1997. Irish Academic Press.

Hayes, D.(2011). 'When Gender and Party Collide: Stereotyping in Candidate Trait Attribution'. Politics & Gender. 7.133 –165

Henig R., and Henig, S. (2001). Women and Political Power: Europe since 1945. Routledge.

Jones, M. P., (2009).'Gender Quotas, Electoral Laws, and the Election of Women: Evidence from the Latin American Vanguard'. Comparative Political Studies. 42: 56
Krook, M. L. (2009). Quotas for Women: Gender and Candidate Selection Reform Worldwide. Oxford University Press.

Krook, M. L.,(2004). Reforming Representation: The Diffusion of Candidate Gender Quotas Worldwide. Paper presented at the International Studies Association Annual International Convention. Montreal.

Lindgren, K. O., Inkinen, M., and Widmalm, S. (2009). 'Who Knows Best What the People Want: Women or Men?' Comparative Political Studies. 42: 31

Lombardo, E., and Meier, P. (2008).Framing Gender Equality in the European Union Political Discourse. Oxford University Press.

Lynch, K., and Lyons, M.. (2007). 'The Gendered Order of Caring' in Barry, U. (ed.) Where Are We Now? New Feminist Perspectives on Women in Contemporary Ireland. Tasc New Island.

National Crime Council and ERSI. (2005). Domestic Abuse of Women and Men in Ireland: Report on the National Study of Domestic Abuse.

National Women's Council of Ireland. (2007). What Women Want from the Next Irish Government, Women's Manifesto Election 2007. Available at http://www.nwci.ie/download/pdf/manifesto_07_7.pdf. Last accessed on 06.04.12

Pande, R. and Ford, D. (2011). 'Gender Quotas and Female Leadership'. World Development Report 2012: Gender Equality and Development: Background Paper.

Phillips, A.(1995). Quotas for Women, The Politics of Presence. Clarendon Press: Oxford.

Seager, J.(2008). The Penguin Atlas of Women in the World. Penguin Books.
World Bank Gender Statistics Database Available at http://data.worldbank.org/data-catalog/gender-statistics. Last accessed on 16.04.12

Table of Cases

Equality Authority v Portmarnock Golf Club [2009] IESC
NUR v Sullivan [1947] IR 77
*Tierney v Amalgamated Society of Woodworkers*1959 IR 254

Table of Legislation

The Electoral (Amendment) (Political Funding) Bill 2011
The Convention on the Elimination of All Forms of Discrimination Against Women, 1979

Newspaper Articles

Bacik, I. (November 27 2011). 'McDowell case lacks substance'. Irish Independent. available at http://www.independent.ie/opinion/letters/mcdowell-case-lacks-substance-2946930.html, last accessed on 07.04.12

McDowell, M. (20 November 2011). 'Michael McDowell: Dail gender law unconstitutional'. Irish Independent. available at http://www.independent.ie/opinion/analysis/michael-mcdowell-dail-gender-law-unconstitutional-2940071.html

McManus, L. (4 September 2010). "I was naive to think number of women TDs would grow", Irish Independent. available at http://www.independent.ie/opinion/analysis/i-was-naive-to-think-number-of-women-tds-would-grow-2324341.html, last accessed on 14.04.12

McTeirnan, A. (9 March 2012). 'Unacceptable for women to collude with State's gender apartheid any longer', Irish Times

Minihan, M. (21 January 2012). 'Our system fails to represent women in Dáil, says Kenny'. Irish Times.