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BRYAN CAVE LEIGHTON PAISNER BCLP

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The City Law Review (the 'CLR') is City, University of London's student-managed, peer-reviewed, publication of legal scholarship. This year, we are proud to have been sponsored by Bryan Cave Leighton Paisner LLP who have been generous supporters of the CLR and have created an award in their name for Best Diverse Piece. We are primarily funded by the City Law School, without the endorsement of which we would not function.

The objective of the CLR is to provide a space whereby students are able to have their work published, and the Editorial Board can be exposed to legal writing and responsibility not often afforded to undergraduates. The CLR operates through a double-blind peer-review process, organised by our Editorial Board, meaning all pieces retain anonymity until the final draft at which point they undergo academic review by selected City, University of London staff. This process, originally set up by former Editor-in-Chief, Shabana Elshazly, ensures the robustness of the CLR and has provided an invaluable foundation upon which this Volume, and future Volumes, are built.

This year, we looked at ways in which we could further establish the highly regarded reputation of the CLR and we are delighted to announce that, from April, all submissions will be made available on City, University of London's Online Research Database (CRO). This allows for the online publication of pieces onto a research database to be used, and referenced, by students for years to come. We hope that this will allow future Volumes to continue growing in size, reputation and reach.

The views expressed by the contributors are not necessarily those of the CLR, the Editorial Board, the City Law School or our sponsors. This publication is intended to be a conduit for the scholarship of the student body. While every effort has been made to correct and develop the articles, the accuracy and completeness of information is the duty of each author individually. The CLR does not assume responsibility for any factual errors, misquotations, misleading representations or inconsistencies.

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VOLUME III

Editor's Note

We are proud to present to you the third volume of the *City Law Review*.

The City Law Review is demonstrative of the legal excellence present at City, University of London. Established in 2013, under the former title of the *City Law Society Journal*, each and every Editorial Board has had the evolution and growth of the *Review* in mind; this year's Volume is no exception. As City's first and sole student-led publication of legal scholarship, it is our prerogative to be ever-developing, each year further reinforcing and improving the foundations upon which future Volumes will be built. As the Editor-in-Chief of Volume III, it is an honour and a privilege to have contributed to this growing legacy.

One year following the publication of Volume II and outbreak of COVID-19 and we continue to adapt to the new way of remote working, facing challenges never previously encountered and having to constantly adapt in this time of uncertainty. Volume III signifies the determination, ingenuity and perseverance of both our Editorial Board and Writers alike in contributing to our growing Review in such difficult times. This year, we are proud to be sponsored by Bryan Cave Leighton Paisner LLP, who have been great supporters of the Review since Volume I. In light of the ongoing social restrictions, we again have arranged for an online launch event, this year accompanied by an insightful panel event joined by Dr S Chelvan, Sara Hossain, and Sunita Chawla, who will be talking on the topic of 'Intersectionality: The Changing Face of Law'. We would like to extend gratitude to our guest speakers who have so kindly offered their time to speak with us. I hope that this event and discussion will help to inspire City's student body in such unprecedented times.

A special thanks must also be given to the City Law School and its Executive Committee, without whose support and funding the Review could never exist. I would like to thank Dean Professor Andrew Stockley for his writing of this year's foreword and his continued support in establishing a platform that uplifts student voices both through their written work and also the unique chance to undertake significant responsibility, as part of the Editorial Board. Stephen Hitchcox also deserves recognition for the support and guidance he has offered to me as Editor-in-Chief, without which the publication would not have been half as efficient. Dr David Seymour, the Review's longest-standing supporter, deserves a special thanks for his unbridled support throughout my entire time on the Editorial Board. Not only is he responsible for the organisation and running of our Academic Review process, which helps to ensure the integrity and legal excellence of our submissions, but he has also continued to encourage us to develop the Review into what it is today. David's advice has been invaluable to me as Editor-in-Chief, always happy to take time to meet with me, bounce ideas and lay out action plans. The support of the faculty members of the City Law School to various student-led initiatives sets City ahead of others and is a merit to its commitment to legal excellence.

The City Law Review would not be where it is today without the commitments made by our former Editorial Boards. Recognition must be made to Sophie Evans, who, as Editor-in-Chief, navigated the uncertainty of last year with confidence and produced a remarkable second Volume of the Review. Many features of the Review have been developed over the years,

Shabbir Bokhari helped to materialise the Review in its earliest days and since then has continued to support its growth, providing invaluable insight and encouragement through our Patron System. My commitment and passion for the Review owes its thanks to Shabana Elshazly, since accepting my application as an Article Editor in first year she has been a constant point of inspiration and motivation for me. Being responsible for its 2019 rebranding, organising our Patron System, and developing the idea of a fully realised, student-led publication of legal scholarship into a reality, Shabana's commitments to the Review are not to go unnoticed and I personally thank her for realising my potential long before I did.

To the members of our Volume III Editorial Board, I am so proud of you all. Each of you have contributed such a variety of skills and experience that have made the process of publication so efficient, smooth and most importantly, inspiring. Michael Denison and Peter Schwarz have offered insightful, practical guidance when making team decisions. Mirfeth Cader has always listened with a keen ear, suggesting improvements for future Volumes and, in her work as editor, helping writers further develop their legal writing. Priya Ahsan Chowdhury deserves special praise for her tireless commitment to the review despite working from the other side of the world. Both Andrew Chow Mun Wai and Victoria White have exceeded expectations in their thorough work as Editors, always happy to offer extra support wherever needed.

Emily Wolf, our Publishing Editor, deserves a special thanks for her continued commitment to the Review. As a Publishing Editor, she efficiently anticipates tasks and performs them to an impeccable standard before it is even asked of her. Emily has been a supporting crutch for all members of the team to rely upon, I am so thankful to her for the effort put into her role and the standard set for future Volumes. Emily has liaised with all writers, developing relations and overseeing the work of our two Managing Editors, Monica Kiosevva and Soreya Arif who have also been crucial in the smooth-running of Volume III. Responsible for co-managing all writer correspondence, Monica and Soreya undertook a mammoth task and I could not be more proud of the work they have contributed. To Teya Fiorante, our Deputy Chief, you have a remarkable work ethic and an eagerness to excel; I have no doubt you will be an exceptional Editor-in-Chief.

My time as Editor-in-Chief has been an absolute honour, I would once again like to thank the City Law School for their support and Dr David Seymour for supporting me through this position. Lastly, I would like to thank my mother, Deborah, for being my biggest supporter and raising me to be as strong and as independent as she is.

It is my sincere hope that you enjoy reading Volume III of the City Law Review.

Yours Faithfully,

Jonathon Lynch
Editor-in-Chief

I am delighted to have been invited to write a foreword to this issue of the *City Law Review*.

Like many of the very best American law journals, the *City Law Review* is student-led and student-edited. It provides a wonderful opportunity for some of our best students to be involved in all aspects of producing a law journal, from soliciting and reading a wide range of work, deciding what should be published, developing all the skills needed to edit legal writing, and overseeing the publication, marketing, and distribution processes. I congratulate the Editor-in-Chief, Jonathon Lynch, and all the other students involved in producing this volume. They have done especially well given the circumstances of the last year and all the restrictions of the Covid-19 pandemic. The cover picture shows the new City Law School building in Sebastian Street completed towards the end of 2020. As at the time of writing this foreword, we have not yet been able to occupy it but look forward to doing so later this year!

This is a journal that aims to publish some of the very best of our students' research. One of the strengths of the City Law School is that we teach law at all levels, from apprenticeships to the LLB, LLM and PhD degrees, from the Graduate Diploma in Law for graduates of other disciplines, to the Bar Vocational Studies Course and the Legal Practice Course for intending barristers and solicitors. Having formerly been the Inns of Court School of Law we have a proud and distinguished history of legal education. Students from all parts of the School have an opportunity to submit work for the *City Law Review* and this volume shows the variety of legal and topical issues some of them have been researching and writing on.

My congratulations to everyone involved for their enthusiasm and hard work. The editors and contributors can be very proud of this issue of the *City Law Review*.

Professor Andrew Stockley

Dean of The City Law School

WHY WE SHOULD REVERT TO THE PRE-2002 LAND REGISTRATION ACT LAW ON ADVERSE POSSESSION: THE DEMONISATION OF SQUATTERS AND ADDRESSING LAND SCARCITY

by Adam Haines and Alfred Wrigley

INTRODUCTION

Adverse possession, often known informally as squatters' rights, offers a legal means for those who are not legal owners to acquire legal title over a property based on continuous occupation of a property without the consent of the legal proprietor. Its object is to fortify bad or doubtful titles and put them beyond challenge.

The passing of the 2002 Land Registration Act (LRA 2002) brought significant change to the law of adverse possession, making acquisition of land in this way virtually impossible unless the land's registered proprietor truly has no desire to retain the land. The legislation has rendered the law of adverse possession ineffective, preventing it from fulfilling its original function. Namely, ensuring that land, being a finite necessity, should be used efficiently. Of course, this objective should be balanced against the need to respect the rights of owners, however we submit this balance was achieved under the old law.

This is particularly worrisome in the context of a grave housing crisis which has seen unprecedented levels of homelessness. Rather than being a response to real inadequacy in the old law, legislative change appears to have been precipitated by a tide of hysterical press attention. Such coverage has often purveyed outright falsehoods about the legal nature of squatting, particularly regarding the ease with which property could be acquired under the old law.

THE CONTEXT: A SHORT HISTORY OF SQUATTING, ITS DEMONIZATION AND THE HOUSING CRISIS

The law of adverse possession emerged from the social unrest of the Peasant's Revolt (1381) and the subsequent activity of the Diggers (1600s), a

group of protestant proto-socialists.[1] Both movements were composed of impoverished peasants who opposed the profound inequality between themselves and the land elites. The Diggers, in particular, perceived this inequality to be rooted in the system of ownership, which allowed the aristocracy to hold onto vast swathes of land, much of which was unused, while the peasantry struggled to subsist. This led the Diggers to occupy and collectively cultivate unused land in places such as Weybrige, Surrey. Notable Digger, Gerrard Winstanley, summarised their position as "the poorest man hath as true a title and just right to the land as the richest man".[2] The law of adverse possession thus emerged as a recognition of radical action and social need, responding to some of the poorest and most disenfranchised in society asserting a right to a roof over their heads and a means to subsist.

Squatting as a means of answering social needs can be best seen post-World War Two, when the destruction of homes and the death of breadwinners during the war led to unprecedented levels of squatting, with 45,000 squatters in London alone during 1946. This was further exacerbated by an influx of 160,000 Polish immigrants who had fought for the allies rather than having to return to Communist Poland.[3]

Popular opinion in response was warm. The Daily Mail, which in recent history has become the publication most vehemently opposed to squatting, at the time referred to the squatters‘ ’robust common sense…[in

[1]John Passant, ‘Tax and the Forgotten Classes: from the Magna Carta to the English Revolution’ (2016) BFJ Vol 10 Issue 3.
[2] Gerrard Winstanley, *The Complete Works of Gerrard Winstanley* (Oxford OUP 2009).
[3] Susan Cooper, ‘Snoek Piquante’, in Michael Sissons and Philip French (eds*), The Age of Austerity* ((London: Hodder and Stoughton, 1963) 43.

taking] matters quietly but firmly into their own hands.'[4] The rhetoric of the political elites was even more positive, with Clementine Churchill, wife of Winston Churchill, imploring the press to stop using the "ungraceful term 'squatters' to refer to 'respectable citizens whose only desire is to have a home.'"[5]

However, beginning in the 1960s, public opinion began to shift likely due to increasingly negative press narratives which associated squatting with counter cultural groups, such as the hippies, and, more recently, immigrants. As Steve Platt has noted, the media has managed to whip much of the public into a 'moral panic 'which has a classist and xenophobic subtext.[6] Moral panics are far from simple mistakes in rationale, instead they are deeply entrenched in social conflicts regarding class and culture.

THE VILIFICATION OF THE SQUATTER

Rather than addressing the causes of squatting, a simplistic narrative of 'heroes and villains' is told, with the squatter being portrayed as a criminal and foreign other. These discourses become stigmatised and eventually define the squatter to be intrinsically criminal.[7] For example, the Daily Mail ran the headline ,Knife-wielding Lithuanian squatters who move in when residents go

[4] Daily Mail (London, 10 August 1946).
[5] The Times (London, 19 August 1946) 3.
[6] Stephen Platt, 'Home Truths: Media representations of Homelessness' in Franklin, B. (ed.) *Social Policy, the Media and Misrepresentation*. (London: Routledge, 1999).
[7] ETC Dee & Deanna Dadusc, 'The Criminalisation of Squatting' <https://sqek.squat.net/wp-content/uploads/sqek/2012/03/dadusc-dee-criminalisation-second-draft.pdf>, accessed 08 March 2021.

out.'[8] The squatter is constructed as a terrifying other who is distinctly foreign, criminal and ready to pounce on a property left vacant for a few hours with deadly force. Many of the stories are premised on a fundamental legal conceit. Namely, that squatters can reside for extended periods in another's home with the legal owner's knowledge but without their consent and that evicting them requires a costly and lengthy court battle. This is not and never has been true.

The demonization of squatting has occurred in the context of a worsening housing crisis. Property prices have ballooned to prices unaffordable for many. For example, the average salary in London is £38,000 whilst the average price for a flat in London is £568,737. The result has been precarity and homelessness, with rough sleeping figures rising by 141% since 2010.[9] This is despite roughly 700,000 houses currently being unoccupied in the UK.[10] Indeed, despite frequent references to housing scarcity, new housing construction has kept well abreast of population growth, even in dense urban areas like London.[11] The crisis is thus one rooted in modes of ownership and property use, not a physical lack of places to live.

[8] Ryan Keisel "Knife-wielding Lithuanian squatters who move in when residents go out" *Daily Mail* (London, 24 September 2010).

[9] 'Rough Sleeping: Our Analysis' (Homelessness.org.uk, 02 February 2021) <https://www.homeless.org.uk/facts/homelessness-in-numbers/rough-sleeping/rough-sleeping-our-analysis> accessed 08 March 2021.

[10] Research Briefing, '*Empty Housing (England*) House of Commons Library (*Commonslibrary,* 21 October 2020) < *https://commonslibrary.parliament.uk/research-briefings/sn03012/*> accessed 08 March 2021.

[11] Ian Mulheirn. "Why building 300,000 houses per year won't solve the housing crisis – and what will" (*Blogs.LSE,* 28 August 2019) <https://blogs.lse.ac.uk/politicsandpolicy/tackling-the-uk-housing-crisis> accessed 08 March 2021.

However, the housing crisis has not prevented the growing opposition to squatting from being mirrored at a governmental level. A Home Office report rejected that squatting could be a 'reasonable recourse of the homeless resulting from social deprivation', instead referring to it as mere 'self-gratification or an unreadiness to respect other people's rights.'[12] The view of Clementine Churchill that squatters were, 'respectable citizens whose only desire is to have a home,' has been long forgotten and instead squatting is construed as a fundamentally immoral act that no level of deprivation can justify.

Unsurprisingly, legislative change has followed, with the 1925 Land Registration Act, which was deemed 'too easy 'and incompatible with the notion that register title should be secure, being replaced by the 2002 Land Registration Act . A move which made the already difficult act of successfully acquiring ownership by adverse possession even more difficult. As Dixon notes, this is 'the emasculation of adverse possession', depriving the law of any real-world application apart from in the rarest of cases where a registered proprietor possesses no wish to hold on to the property.[13]

OLD LAW

Under the old law, S.75 of the now superseded 1925 LRA provided that if a squatter had been in possession of a property for a minimum of twelve years they could acquire title and the right to become the registered

[12] Law Commission, *Land registration for the Twenty-First Century: 'A Conveyancing Revolution'* (Law Com No 271 2001).
[13] Martin Dixon, "The reform of property law and the Land Registration Act 2002: A risk assessment" (2003) 67 Conv 136 at 150.

proprietor.[14] As LJ Nourse noted, this was a process of 'extinguishing the right of the true owner to recover the land' and granting the squatter superior title[15]. It, thus, functioned as a means of lawful property acquisition which circumvented the need for either formalities or payment.

As Cobb and Fox note, the accusation that under this regime it was 'too easy 'to acquire property rights without formalities is inaccurate as, in addition to s.75, a long list of requirements had to and still have to be met for adverse possession to be proved.[16] First, factual possession must be demonstrated and this had no formulaic approach.[17] A finding which will be case-specific and specific to the land in question. The case law in establishing factual possession varies from using the land for extensive periods for game shooting to mooring a boat, this enormous juxtaposition in land usage makes it clear that there is no breadcrumb trail to success in proving factual possession.[18]

Secondly, there must be an intention to possess, but not an intention to own, which is a confusing distinction in its own right. This must be demonstrated by the adverse possession treating the property as it was their own. Finally, possession is required to be adverse and without the permission of the registered proprietor.[19] This matrix of requirements has been difficult to meet and if one condition is not satisfied then a claim, which a squatter will

[14] Land Registration Act 1925.
[15] *Buckinghamshire County Council v Moran* [1990] Ch 623, 636.
[16] Lorna v Lorna Fox & Neil Cobb, *Taxonomies of squatting: Unlawful occupation in a New Legal Order* (2008) MLR 71 (6).
[17] *Powell v McFarlane* (1977) 38 P&CR 452.
[18] *Port of London Authority v Ashmore* [2009] EWHC 954 (Ch), [2009] All ER (D) 74; *Red House Farms v Catchpole* [1977] 1 EGLR 125.
[19] *BP Properties v Buckler* [1988] 55 P & CR 337, CA (Eng).

have waited years to make, will be unsuccessful and he must start again, which will now be impossible as the registered proprietor will have been alerted to his adverse presence. Additionally, the presumption of lawful possession has resulted in courts being strongly inclined to favor the legal owner as long as they can adduce any evidence that indicates in the slightest that they remained in possession of the land.[20] The Law Commission in its 2001 report, '*A Conveyancing Revolution*', summed up the doctrine of adverse possession as 'land theft', this sentiment paved the way for 2002 legislation to make impactful changes.[21]

NEW LAW

In contrast, under the Land Registration Act 2002, a squatter that seeks to acquire title must make an application to the Land Registry after having been in adverse possession for at least ten years.[22] Once an application is made, the Land Registry notifies the legal owner of the squatter's presence. This is followed by a further period of 65 working days, or roughly 13 weeks, during which the owner may serve a counter notice. If the notified owner fails to do this in the allotted period, then the squatter will be transferred the title and become the registered proprietor of the property they applied for.

However, if a counter-notice is served correctly and none of the three exceptions are met[23], then application will be denied, and the legal owner possesses two years to initiate possession proceedings against the applicant. Not doing so during this period allows the squatter to make an application for

[20] *Balevents Limited v Sartori* [2011] EWHC 2437 (Ch).
[21] The Law Commission, *'A Conveyancing Revolution'.*
[22] Land Registration Act 2002.
[23] These being mentioned in LRA 2002, Schedule 6, para 5.

being registered as the owner. Under this scheme adverse possession regardless of the time period will not alone allow the adverse possessor to acquire title. The case law even reflects that when the registered proprietor fails to correctly fill in the counterclaim, they still can retain their property.[24]

The advocates of this change argued that it was crucial for promoting one of the LRA's central purposes - making registered titles more certain and thus easier for purchasers to rely upon. However, as Dixon notes, 'there is nothing inherently contradictory in having principles of adverse possession operate in registered land' as its function is one of transferring titles between individuals.[25] It is easy to see that it is not a means for legally binding rights which are off the register to be created, rather it is a means for on register rights to be transferred. Accordingly, it is not intrinsically a doctrine which compromises the state's guarantee of registered title.

Instead, the change in the law was a fundamentally moral decision. The Law Commission indicates this, stating:' it is, of course, remarkable that the law is prepared to legitimise such 'possession of wrong 'which, at least in some cases, is tantamount to sanctioning a theft of land.'[26] However, this is to be contrasted with proprietors who have invariably been characterised as innocent victims, regardless of the fact that are culpable of not having exercised sufficient oversight over their own property or used the property in any manner for over a decade. A failure which, we submit, is not morally neutral in the context of the housing crisis. Moreover, as the Law Commission itself noted, the change benefited landowners with substantial holdings, stating 'own numerous and perhaps widely scattered parcels of land for which they may have no present use, and which they cannot keep under regular scrutiny.'[27] Thus, the effect of the changes has been to entrench and widen

[24] *Baxter v Mannion* [2011] EWCA Civ 120.
[25] Martin Dixon, 'Criminal Squatting and Adverse Possession: The Best Solution?' [2014] JHL 17(5), 94.
[26] ibid.
[27] ibid.

wealth gaps, despite the poorest in society being affected by unprecedented levels of homelessness and housing unaffordability.

The moral landscape used to justify the changes pays little heed to the motivations of the Diggers and participants of the Peasant Revolt which gave rise to the doctrine of adverse possession. Instead, legal discourse, particularly coming from state sources, overwhelmingly favors absentee landowners who generally have so much land they are unaware of what is happening on all of it.

In the Law Commission's consultation prior to the passing of 2002 LRA, scant reference was made to the economic or social reasons which have been used to justify the existence of squatters rights.[28] No mention, for example, was made of the need for incentivising 'productive land use'. Nor was mention made of the role which the concentration of property in the hands of the few can have on intergenerational class and wealth disparities. It might be worth noting, for instance, that 66% of the land is owned by 0.33% of the population, with those descended from the Norman aristocracy of William the Conqueror being far more likely to be part of that class of elite landowners. [29]

None of this is to say that we are advocating a complete removal of measures which protect title. Rather, an adverse possession regime which strikes a better balance between different societal interests is needed. England and Wales' housing needs are not currently being answered. Accordingly, greater incentives should exist to ensure that property is distributed in a way which meets them. Such an incentive did exist under the old regime but has now been done away with due to a mass panic which employed binary and simplistic moral narratives. We acknowledge that a reversion to the old system would cause relatively minor changes and, of course, would not solve the

[28] A Conveyancing Revolution' The Law Commission.

[29] Kathryn Garrity, 'Debunking the myths about squatting' (The Guardian, 03 April 2011) <https://www.theguardian.com/society/2011/apr/03/social-mobility-britain-aristocracy> Accessed 08 March 2021.

housing crisis by itself. However, it would deter some of the most excessive examples of land wastage and would likely only affect the wealthiest of landowners.

CONCLUSION

Following the passing of the 2002 LRA, the way registered title could be acquired through adverse possession was made more significantly more difficult. As the law stands, adverse possession has been rendered almost ineffective as a means of acquiring title apart from the infrequent cases where an exception applies, or a proprietor truly has no desire to hold onto the land.

While the ostensible justification was to promote the aim creating a more certain title registration which could then be relied upon by potential purchasers, we submit that this, following the analysis of Dixon, the old system was not fundamentally incompatible with a system of title registration which aims to offer a state guarantee.[30] The more influential motivation behind the change was likely a moral discourse which had its roots in hysterical and often untruthful press coverage of squatting. This was easily justified when squatting was associated to 'land theft 'by the government.

Such coverage often employed xenophobic and classist tropes which portrayed squatters as a parasitic and criminal presence. These were simplistic narratives which were heavily skewed towards wealthy landowners, portraying them as guiltless victims despite the fact they only lost their land because they neglected to make any use of it or even scrutinize it for over a decade[31]. An omission which we believe should be strongly disincentivized in the context of a housing crisis. Accordingly, we advocate a return to the old law. A law which is better suited to promoting the original purpose behind adverse possession, ensuring that land, being a scarce necessity, is used efficiently and is distributed in a way which is beneficial for all in society.

[30] Dixon (n 25).
[31] *Pye v Graham* [2002] UKHL 30.

A STUDY IN PRECEDENT

Rohit S. Doad*

ABSTRACT

Consistency serves as a vital bedrock to the faith and the resulting legitimacy of any form of legal resolution. The wide disparity of awards handed down by arbitral panels in the field of international investment arbitration, therefore, present a pressing problem both to practitioners and the long-term viability of this form of alternative dispute resolution. This paper seeks to address this issue by adopting a filtered form of binding precedent, so as to protect against conflicting awards and ensure consistency in the award process for both parties.

I. INTRODUCTION

Foreign direct investment "FDI" is the mechanism through which a resident in one economy seeks to obtain a lasting interest in an enterprise in another economy.[1] Such transactions are often undertaken with the view towards the creation of a symbiotic relationship as emerging economies benefit from the influx of capital and investor parties reap the future gains of their speculation.[2] The massive number of such transactions undertaken annually dictate that international investment arbitration, the system for FDI

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[1] Carol S. Carson, 'Foreign Direct Investment Trends and Statistics: A Summary' [28 October 2003] IMF 1, 2.

[2] Ann Harrison, 'The role of multinationals in economic development: The benefits of FDI' (1994) 29(4) The Columbia Journal of World Business 6.

regulation and dispute resolution, comprises an indispensable component of public international law.[3]

Despite its importance in the global sphere, international investment arbitration continues to be plagued by an efficiency and legitimacy crisis.[4] Recognizing that this places into question international investment arbitration's ability to adjudicate in a fair and just manner as well as challenges the long-term viability of the mechanism, proponents for change have never been in shortage; however, substantial changes have been far from ubiquitous.[5] Throughout this essay, therefore, I shall seek to demonstrate that adopting precedent through the filter of a dual prong objective and subjective test successfully addresses these issues by counteracting the wide divergence in arbitral outcomes so as to return a general consensus of faith and consistency to this form of arbitration.

The test will first require an arbitrator to analyze relevant past tribunal decisions. The arbitrator, while taking into consideration the need for efficiency and consistency, will be required to question whether former decisions present a reasonable resolution to the issue at hand. Secondly, the precedent considered must provide a proportionate response to the subjective views of the parties in contention. This article will be divided into three parts: the first will reiterate the need for reform by exhibiting the general contemporary poor health of international investment arbitration, the second will explain and illustrate a proposed solution, and the third will both address

[3] Anthea Roberts, 'State-to- State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55(1) Harvard International Law Journal 1, 1-5.

[4] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1583.

[5] Charles N. Brower and Stephen W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 471.

the feasibility of the proposal and discuss its alignment with inherent principles of international investment arbitration.

II. CURRENT STATE OF ISDS

Investor state dispute settlement "ISDS" is the umbrella term for the differing institutions and mechanisms available for parties to seek dispute resolution in the field of international investment arbitration. This expansive system has centres ranging from Stockholm to Washington, D.C. with each often utilizing a separate set of procedural rules and regulations. These heterogenous structures generally can be broken down into three categories: the United Nations Commission on International Trade Law "UNCITRAL", the International Centre for Settlement of Investment Disputes "ICSID", and "other" forms of institutional arbitration.[6] This range of options not only complicates the lives of legal advisors considering which system to use, but also places into question the rule of law. The celebrated Victorian scholar A.V. Dicey, writing on the importance of the rule of law, noted that established legal doctrine must be the sole basis of punishment.[7] Therefore, without a concrete basis for legality, individuals risk exposure to capricious decision making.

A comprehensive system that allows its employers to adopt and ignore legal provisions on the basis of their volition may arguably be an infringement to the systematic and consistent adjudication advocated by Dicey, as party

[6] V.V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties' (2009) 3 Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 5.
[7] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1982).

manipulation supersedes reasoned judgment. The most pressing depiction of the gross departure from the rule of law, however, comes not from the mechanical manipulation between institutional selection but rather from the manifest contradiction among tribunal decisions taken within these respective bodies. For the sake of relevance, though, this article will limit its discussion to awards made under ICSID or UNCITRAL rules as they collectively comprise over 80% of all ISDS disputes.[8]

A series of ICSID decisions involving Guatemala provide a prime case study to examine purported rule of law violations. In order to combat the growing electricity blackouts plaguing the nation in the early 1990's, Guatemala decided to privatise a number of its assets in this sector.[9] Investment by Iberdrola of Spain and Teco of the Dominican Republic led to the creation of EEGSA, the electricity department primarily responsible for providing electricity to the central part of the nation.[10] However, after an unfavourable ruling from a Guatemalan governmental regulatory body concerning the evaluation of an energy sector tariff distribution, both foreign shareholders brought separate claims against the Latin American nation.[11] Although the claimants were shareholders of the same corporation and presented the same set of facts, the two separate tribunals reached starkly different outcomes.

[8] Roberto Echandi, 'The Debate on Treaty-Based Investor–State Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications' (2019) ICSID Review 1, 8.
[9] Jaime Millán and Nils- Henrik M. von der Fehr (eds), *Keeping the Lights on: Power Sector Reform in Latin America* (1st edn, Inter-American Bank 2003) 217-220.
[10] The World Bank- Report No. 25429 (June 19, 2003) 1, 10.
[11] Lise Johnson and Lisa Sachs, 'Inconsistency's Many Forms in Investor-State Dispute Settlement and Implications for Reform' [November 2018] Columbia Center on Sustainable Investment.

Iberdrola saw the majority of its claims fail on the basis of jurisdiction, as the Tribunal distinguished between a treaty violation and a constitutional act committed by a state.[12] The Tribunal held that it did not possess the competence to decide on the majority of Guatemala's decisions questioned in the ISDS claim as they invoked a state's "exercise of constitutional, legal, and regulatory powers,"[13] rendering irrelevant Iberdrola's view that the tariff evaluations were arbitrary. In addition, despite finding competence to determine fair and equitable treatment, this claim was also rejected by the Tribunal on the grounds that no recourse was available for a claimant who disagreed with a domestic court decision undertaken without a denial of justice. Furthermore, Iberdrola was ordered to pay USD 5.3 million to cover Guatemala's legal costs.[14]

In contrast to the view in *Iberdrola Energia*[15], the Tribunal constituted in light of Teco's later claim,[16] found for Iberdrola's Dominican co-shareholder. Claiming the facts to be more than a simple variance in interpretation of Guatemalan domestic law, the Tribunal held the decision to set a lower tariff distribution invoked the need for scrutiny into the "breach of minimum standard of treatment under international law."[17] Furthermore, it required Guatemala to pay the claimant the difference between its regulatory body's tariff distribution and those set by EEGSA. The space of a year and two

[12] *Iberdrola Energía v. Guatemala*, ICSID Case No. ARB/09/5, Award, August 17, 2012.
[13] ibid para 363.
[14] *Iberdrola Energia* (n 12) paras 510-511.
[15] *Iberdrola Energia* (n 12).
[16] *Teco Guatemala Holdings v. Guatemala*, ICSID Case No. ARB/10/2, Award, December 19, 2013.
[17] ibid para 470.

different arbitral panels, therefore, brought about a difference of over USD 35 million to the respective claimants.

Fastidious critics, though, might applaud the contrasting decisions as an example of Tribunal approval of treaty party autonomy; differing results for the same facts thereby demonstrate the Tribunals' willingness to be bound by the party's wishes expressed in their respective treaties. However, in the Guatemala cases, the applicability of two differing treaties does not excuse the variance in awards. This is because jurisdiction, which hindered Iberdrola's claim, is a procedural element in an ICSID proceeding; primary reference stems from Articles 25-27 of the ICSID Convention rather than treaty provisions. Furthermore, Convention Articles are constants and are not generally affected by treaty provisions;[18] therefore, differing treaties would not justify a polarity in awards. In addition, minimal difference is present between the language of the two respective bilateral investment treaties "BITs",[19] and no specific guidance is present to suggest that a heightened jurisdictional threshold should apply to proceedings between Guatemala and Spain, in comparison to those between Guatemala and the Dominican Republic. Therefore, the disparity in awards is a singular depiction of arbitrary decision making.

Contradictory arbitral awards are not reserved solely for proceedings containing similar facts; they are also found among decisions brought under the same treaty. A hattrick of ICSID cases surrounding the BIT between

[18] Preamble, 'Convention on the Settlement of Investor Disputes Between States and Nationals of Other States,' (1966).
[19] *Treaty between the Kingdom of Spain and Guatemala for the Reciprocal Promotion and Protection of Investments*, signed on 9 December 2002; *U.S.- Dominican Republic-Central America Free Trade Agreement*, signed on 1 March 2006.

Turkmenistan and Turkey[20] further depict the dearth of consistency in ISDS. In the first case of the series, Kilic, a Turkish corporation, was denied recourse by an ICSID Tribunal against charges of Turkmenistan's failure to uphold contractual obligations in the construction sector. [21] It was held that Article VII.2 of the respective BIT[22] required claimants to first bring the case before domestic courts in Turkmenistan and to not receive a judicial decision for at least a year in order to enable Tribunal jurisdiction of the matter.[23] Kilic's failure to satisfy this mandatory provision resulted in their claim's failure.

In the second case, Sehil, another Turkish construction company, brought a request for ICSID proceedings against Turkmenistan in response to the state's termination of their construction project. However, despite the fact that the case was brought under the same binding reference of the Turkey and Turkmenistan BIT[24], the Tribunal held that it had jurisdiction to hear the claim.[25] Moreover, in contrast to *Kilic Insaat*[26] the panel found the domestic court requirement transcribed in Article VII.2[27] to be optional rather than mandatory. In addition, despite recognizing the polarity of its decision to that

[20] *Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments*, signed on 2 May 1992.
[21] *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan,* ICSID Case No. ARB/10/1, Award, 8 March 2016.
[22] *Turkey- Turkmenistan* (n 21).
[23] *Kilic Insaat* (n 21) 6.4.2.
[24] *Turkey- Turkmenistan* (n 20).
[25] *Muhammet Cap Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No. ARB/12/6, Award, February 13, 2015.
[26] *Kilic Insaat* (n 21).
[27] *Turkey- Turkmenistan* (n 21).

found in *Kilic Insaat,*[28] the Tribunal justified their award on the grounds that no form of binding precedent exists in international investment arbitration.[29] Adding salt to the wounds of inconsistency, an annulment proceeding commencing five months after the award in *Sehil Insaat*[30] upheld the award in *Kilic Insaat.*[31]

In the final case of this trilogy, Içkale, another Turkish construction company, brought ICSID proceedings against Turkmenistan in response to the state's interference with the company's construction projects.[32] This time the Tribunal found a middle ground between the two prior decisions; they determined that Article VII.2[33] created a special legal requirement or *lex specialis* rather than a strictly mandatory requirement, therefore, dictating that exhaustion of domestic proceedings was irrelevant.[34]

Another nail in the coffin of investment arbitration's legitimacy is found in *Achmea B.V.*[35], a UNCITRAL award. Achmea, a Dutch insurer, entered the Slovak market after the central European state liberalised its sickness insurance regulations. However, after 2 years Slovakia enacted a legislative reversal of its liberal policies. In response, Achmea commenced arbitral

[28] *Kilic Insaat* (n 21).
[29] *Sehil Insaat* (n 26) para 275.
[30] *Sehil Insaat* (n 25).
[31] *Kilic Insaat* (n 21).
[32] *Içkale Inşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016.
[33] *Turkey- Turkmenistan* (n 20).
[34] *Içkale Inşaat* (n 32) para. 261.
[35] *Achmea B.V. v The Slovak Republic,* UNCITRAL, PCA Case No. 2008-13, Award, 7 December 2012.

proceedings against Slovakia relying on a BIT[36] between the two nations. After an arbitral panel awarded Achmea EUR 22.1 million, Slovakia challenged the decision in German courts, who referred the case to the European Court of Justice "CJEU" for a preliminary judgment.[37] In its decision, the CJEU overturned the foundations of the Tribunal's award by holding European law to be superior to arbitral decisions.[38] While *Achmea* C-284/16[39] may not definitively signal the end of investment arbitration, even fervent dissenters of the judgment cannot deny the case does little to dispel the worrying cracks present in the foundational structure of this form of arbitration.

Opponents, though, may seek to belittle the departure from the rule of law in arbitral awards by distinguishing arbitration from that of the traditional domestic judicial system; the flexibility of sources of authority require a system uninhibited by the chains of firm procedure in order to fulfil party preferences. However, such a claim is unfounded; the rule of law provides the framework for constituent trust. This trust serves to induce all forms of investment including FDI, as investors are more likely to risk their assets when they know the security of legal protection exists.[40] Therefore, the constructive benefits to economic development supplied by the protection of the rule of law mandate its preservation and highlight the detriment of its absence under the current investment arbitration regime.

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[36] *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic* signed on 29 April 1991, 2242 UNTS.

[37] Jens Hillebrand Pohl, 'Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?' (December 2018) 14(4) European Constitutional Law Review 767, 769-773.

[38] Case C-284/16 *Slovak Republic v Achmea B.V.* [2018] ECLI:158.

[39] ibid.

[40] Kevin E. Davis, 'What Can the Rule of Law Variable Tell Us about the Rule of Law Reforms' (2004) 26 Mich. J. Int'l L. 141, 148.

III. EXPLAINING THE TEST

This article's proposed solution to the maladies facing ISDS is the acceptance of a binding form of precedent. The proposed availability of precedent is tempered, however, by a dual limbed objective and subjective test, the satisfaction of which is necessary before precedent may be employed. The test has been designed to ensure that precedent is not unfetteredly accepted into ISDS but rather allowed to trickle in through a filter. This is to ensure that change is adopted steadily rather than immediately, so as to not act as a figurative shock to the system. The progressive stage approach is especially crucial for precedent, as it allows for a body of law to be built up, so as not to unduly restrict arbitrators from making just awards. This is because unfettered use of precedent would present problems both for legal questions that have not been addressed by many prior arbitral awards and also for those where awards have been more plentiful.

ISDS is a relatively young institution with the first substantial collection of ICSID claims arising in the late 1990's.[41] Therefore, a tenable proposition exists that a novel concern may be brought to a tribunal. With a blanket requirement of precedent, arbitrators would be forced to amalgamate what little awards existed in this subject area to craft or mould a relevant decision. Such a restriction on arbitrators would arguably present little improvement to the current system.

In addition, popular topics brought to tribunals would also pose issues to an unconditional acceptance of precedent. As demonstrated previously, tribunals have consistently reached differing outcomes on matters concerning similar or even the same collection of facts; reconciling them with precedent would not only be difficult but would likely become an arbitrary or capricious decision. Therefore, by allowing precedent to be available only when it

[41]World Bank Group, 'The ICSID Caseload-Statistics' (2019) 1 ICSID 1, 7 <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf >.

satisfies the threshold of the test, the sources of law are allowed to naturally grow and evolve.

i. FIRST LIMB

The first limb of the test is designed specifically to counteract these two stated problems. Arbitrators will first be required to undertake an analysis of the relevant prior awards made in the subject area in contention. The limit for relevance will be determined by the arbitrators through an objective standard, with the tribunal possessing the ability to disregard submissions brought by the respective parties on the grounds of extraneousness. The objective standard will require cases included in the pool to possess reasonable pertinence to the issue at hand.

Once a relevant pool of arbitral awards is amassed, the tribunal will then decide whether a solution exists in the awards that would satisfy a reasonable individual with experience in ISDS. This may require arbitrators to view all the applicable decisions as an evolution of the law in the traditional sense of *stare decisis.*[42] However, in those situations where conflicting awards exist with no clear evolutionary path, discretion would need to exist to enable arbitrators to select a "most applicable" prior decision out of the figurative bundle. The selected decision would have to satisfy the reasonable solution criteria and would then later be placed in a different category in comparison to

[42] Krzysztof J. Pelc, 'The Politics of Precedent in International Law: A Social Network Application' (2014) 108 APSA 547, 549 < https://www.cambridge.org/core/services/aop-cambridgecore/content/view/BAB3E5D202BE2A4BB28AD0C89392D162/S0003055414000276a.pdf/politics_of_precedent_in_international_law_a_social_network_application.pdf >.

awards made before the adoption of the test. The objective determination of applicability would be ratified by the arbitrators with a simple majority sufficing to constitute acceptance.

Critics at this point may seek to challenge the feasibility of an objective test by pointing to the opaqueness of reasonableness as a definitive standard.[43] However, objective standards are not a novel legal construction and continue to be successfully employed globally[44] despite these concerns. Furthermore, in the event confusion exists as to the definition and scope of a reasonable individual, formal guidance may be published directly from specific arbitrational centres.[45]

The difference in category represents the adoption of a hierarchal structure to ensure the ease of transition from the pre-precedent to the precedent stage. Arbitral awards that are made after the incorporation of precedent would be placed as category 1 decisions. Awards that were made before the adoption of the precedent test would reside in category 3. In addition, awards that are located in category 3 but were used as authority for a precedent stage award would be promoted to category 2. The rank becomes prevalent at the award pooling stage, where arbitrators are amassing a collection of relevant arbitral decisions. To combat the inherent flexibility of arbitration and to make it more suitable for employing precedent, the ranking system helps to distinguish

[43] *See e.g.,* Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (1st edn, Oxford University Press 2003).
[44] *See e.g.,* The dual objective and subjective test employed in American federal law for employment discrimination when determining hostile environment sexual harassment found in *Faragher v City of Boca* Raton, 524 U.S. 775, 787-788 (1998); the objective test employed in the U.K. to determine medical negligence found in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; the objective test employed in Australian law for sexual harassment in § 28A Sex Discrimination Act 1984.
[45] *See e.g.,* The CJEU's guidance on the definition of a trader in Case C-105/17 *Komisia za zashtita na potrebitelite v Evelina Kamenova* [2018] ECLI:808.

awards that have been "cleansed" by the precedent test from those that have not.

"Cleansed" decisions or those from category 1 would comprise the first source of consideration for arbitrators determining whether the first limb of the test is satisfied to allow for the incorporation of precedent into the specific award process. Therefore, if a category 1 award exists that presents a reasonable solution to the issue at hand, the arbitrators would proceed to the second limb to determine if it may be employed as a basis for decision making. If no category 1 award exists concerning the pertinent decision, then the arbitrator would proceed to category 2 and 3 and follow the same steps. Moreover, should all categories be exhausted without the discovery of a reasonable award, the test is failed, and precedent or past arbitral decisions will not be employed as binding reasoning.

Critics may argue that employing a categorical system to classify an award pool and precedent in general is not feasible in investment arbitration due to the plethora of different rules and institutions housing ISDS proceedings. Although the use of precedent requires certain constants, including procedural elements, this criticism may be countered with reference to two points. Firstly, advanced proposals already exist to house international investment arbitration in a single permanent court. The multilateral investment court "MIC"- the brainchild of the European Commission-[46] would easily allow for precedent and consequently the ranking system to be employed, as a singular body of rules and regulations would bind all parties.

[46] European Commission, 'Trade for all- Towards a more responsible trade and investment policy' (2015) 21-23 <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>.

Secondly, should the MIC not materialise, precedent could be applied within each specific arbitral institution. Due to the growing prevalence of investment arbitration with over 3300 bilateral, regional, and sectoral treaties in existence,[47] a sufficient body of awards will likely eventually be generated to allow for the use of precedent. Furthermore, by employing the before mentioned cleansing ranking system, the arbitral decisions may be easily classified. For example, Energy Charter Treaty awards made under the rules of the Stockholm Chamber of Commerce "SCC" could serve to shape the body of future arbitral decisions brought under SCC rules, but would not serve as a reference for requests for arbitration brought under the Energy Charter Treaty employing UNCITRAL or ICSID rules.

ii. SECOND LIMB

The second subjective limb of the test ensures that the specific interests of the parties in dispute are respected. This is because an objective solution alone may be contrary to the wishes of the parties and as a result, hinder party autonomy. Once arbitrators have selected a reasonable precedent that satisfies both the objective standard and the categorical ranking equation, they must then proceed to analyze the respective precedent through the lens of a subjective test. This test will require the arbitrators to ask whether the precedent in question presents a solution that is aligned with the views of the parties.

Opponents of accepting precedent in ISDS proceedings have often defended their choice by arguing against its proportionality. Precedent may

[47] UN Conference on Trade and Development, 'Recent Developments in the International Investment Regime' (2018) 2 < https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf >.

provide increased consistency; however, this does not justify the loss of accuracy and sincerity required when aligning cases under *stare decisis.*[48] The subjective element of the test ensures that this is no longer a substantive concern, as accuracy and sincerity will be retained by ensuring due weight is given to the wishes of both parties. Arbitrators should determine the potential subjective alignment by referring to three sources: the respective binding treaty, the prior conduct of the parties, and other formal prior agreements between the parties. Moreover, a simple majority of the arbitrators will be required to affirm the second limb. The successful affirmation of the second limb would enable the prior decision in question to be accepted as a binding source of precedent in the reasoning of the arbitral proceedings at hand.

Opponents of this approach, though, may state that the implementation of precedent requires the further establishment of an appeal mechanism. However, such reasoning fails to take into account the extra-tribunal scrutiny enforced by the categorical ranking system. The need for an upper regulating body would be mitigated as the use of precedent would be confined to the ranking parameters. Furthermore, in the case that a form of appellate scrutiny is required, a quasi-appeal mechanism already exists in proceedings brought under ICSID.[49]

IV. FEASIBILITY AND BENEFITS OF IMPLEMENTATION

[48] *See generally,* Irene M. Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51(2) Columbia Journal of Transnational Law 418.

[49] Under the authority of Articles 49-52 ICSID Convention parties already possess the ability to request annulment; therefore, instruments are already in place to ensure the smooth transition to the precedent stage.

By employing precedent, clarity is brought to the law, as parties can cite a directional and evolutionary pattern to legal decisions.[50] This clarity supplies a host of benefits that traverse the investor- state divide. Firstly, the cost of arbitral proceedings would significantly decrease; this includes costs required for legal counsel and tribunals. According to a subcommittee report of the IBA, over half of the surveyed states demonstrated concerns over the consistency of ISDS proceedings.[51] These concerns correlate in higher legal fees when practitioners are required to give answers to clients. This is because the disparity in arbitral awards dictate that practitioners are unable to provide a definitive answer and must, therefore, primarily estimate a hypothesized outcome. This requires a substantial assemblance of research to encompass the broad variance in potential outcomes. Incorporating the predictability instilled by precedent removes the need for extensive research and the resulting large legal fees. This is because billable hours for a client would decrease, as legal research would be shorter and more definitive.

Additionally, employing precedent would also result in faster and subsequently cheaper arbitral awards, as tribunals could decrease their fees in light of the shorter work schedule. Currently, tribunals are compelled to write long and expansive awards in fear of invoking annulment proceedings under Article 52[52] under a charge of manifestly exceeding their powers. This creates an unhealthy system of defensive arbitrational decision making, which often promulgates waste through superfluity. However, with a system of precedent, defensive practices are curtailed as the relevant cited awards, chosen by the ranking system, eliminate the need to report a superfluous collection of

[50] David Lyons, 'Formal Justice and Judicial Precedent' (1985) 38 Vand. L. Rev. 495, 507.
[51] IBA Subcommittee on Investment Treaty Arbitration, 'Report on the Subcommittee's Investment Treaty Arbitration Survey' [2016].
[52] ICSID, 'Convention on the Settlement of Disputes Between States and Nationals of Other States' (1965) 575 UNTS 159.

awards. This in turn will create smaller and consequently cheaper arbitral decisions.

As a further benefit, lower arbitrational costs induce greater access to justice, as finances become less of a barrier to claimants alleging breaches by states. Cost savings would also accrue to states, thus, allowing them to be able to provide a more comprehensive legal defence. A predictable system of decision-making further serves to diminish risk, as capricious verdicts are made more difficult to rationalize by precedent. This would encourage third party funders to invest in claims, which would also ensure a heightened access to the arbitral forum and consequently to justice. Consider, for example, that smaller investors or those under the threat of bankruptcy may still be unable to afford arbitrational proceedings despite the price reductions, and, therefore, third party funding may constitute their final hope to obtain a hearing.

The expanded use of precedent would also assist in the depoliticization of ISDS proceedings. Investment arbitration draws it roots from an attempt to impose American capitalism on the investment landscape challenged by the threat of communism.[53] Remnants of this American centric heritage remain, as the U.S. has yet to lose an ISDS proceeding.[54] Such an omnipotent winning streak combined with the omnipresent inconsistency, taint investment arbitration's canvas with the stench of partiality. However, adopting precedent would assist in removing any lingering doubt surrounding the legitimacy of arbitrational decision making, as reasoning may be traced to a source other than geo-political might.

[53] Alex Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 JIEL 469, 474.
[54] Maude Barlow, 'Fighting TTIP, CETA, and ICSID: Lessons from Canada' (2015) Report of the Council of Canadians 1, 9.

In addition, numerous complaints have been raised challenging the lack of diversity present in arbitral appointments; questioning how a homogeneous collection of arbitrators can make fair and just awards, opponents have sought to increase the mechanisms of facilitating appointments of differing arbitrators.[55] However, in a system employing precedent, repeat appointments become immaterial, as the element of predictability places a sufficient limitation on the tribunal to ensure the lack of diversity does not contribute to inequity.

Opponents, though, may seek to claim that the implementation of a precedent based test is an attempt to impose common law superiority on the arbitrational world and, therefore, discriminate against the civil law tradition. However, such an allegation is groundless. Despite the general trend in international law to distance itself from the employment of precedent,[56] investment arbitration is conducive to a precedent based system. This is because while no formal adoption of precedent exists in arbitration, the citation of prior decisions in submissions and awards is common.[57] For example, decisions from the European Court of Human Rights are often cited as persuasive dicta in investment awards.[58] Therefore, since both civil and common law lawyers have experience using jurisprudence as persuasive dicta,

[55] UNCITRAL, 'Arbitrators and decision makers: appointment mechanisms and related issues' (2018) A/CN.9/935/WG.III/WP.152.
[56] Art. 59, Statute of the International Court of Justice (1945).
[57] Jeffrey P. Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 JIA 129, 148-152.
[58] Silvia Steininger, 'What's Human Rights Got to do with it? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31(1) Leiden Journal of International Law 33, 38-58.

extending its role to a binding form of precedent is unlikely to unjustly bias practitioners from either legal school.

Furthermore, in contrast to commercial arbitration,[59] the general public nature of awards makes investment arbitration favorable for the employment of precedent; this is because general access to arbitral decisions is often unhampered.[60] In addition, tribunal flexibility may be maintained through the adoption of the Mark's rule;[61] this principle allows arbitrators to preclude awards from entering the precedential pool which they believe to be reserved for an overly specific set of facts. Therefore, the addition of precedent should not be viewed as an upheaval of the established order of public international law but rather as providing a formal definition for the role of a pre-existing arbitrational and legal tool.

V. CONCLUSION

In conclusion, the contemporary system of ISDS faces a legitimacy crisis as the incongruity between awards leads to the appearance of capricious decision making. This is illustrated by awards concerning Guatemala, Turkmenistan, and Slovakia. Such an appearance is not only harmful for states, who require effective and transparent dispute resolution mechanisms in order to entice foreign investment but also threatens the long-term future of this form of arbitration. This curtain of inconsistency, however, may successfully be pierced through the adoption of precedent as a binding regulatory standard. This is because precedent safeguards against blatant disparity in awards by providing legal practitioners and the general public alike with a directional trend to monitor and track developments in the law.

[59] Phillip J. McConnaughay, 'The Risks and Virtues of Lawlessness: A Second Look at International Commercial Arbitration' (1999) 93 NULR 453, 498.
[60] August Reinisch and Christina Knahr, 'Transparency versus Confidentiality in International Investment Arbitration- Biwater Gauff Compromise' (1 January 2007) 6(1) The Law & Practice of International Courts and Tribunals 97.
[61] *Marks v United States,* 430 U.S. 188 (1977).

Furthermore, ensuring that the adoption of precedent does not unduly unsettle the nuanced arbitrational system, precedent will have to satisfy the threshold of a two-part objective and subjective test before being available for employment in an award.

ADMISSIBILITY AND USE OF GOOD CHARACTER EVIDENCE IN CRIMINAL TRIALS: IS THE EXCLUSION OF NON-DEFENDANTS FROM A '*VYE* DIRECTION' FAIR AND SENSIBLE?

Maryam Okorie*

INTRODUCTION

A criminal trial is one of the few procedures in the world where, for good reasons, the good character of an accused is valued and respected more than that of his/her accuser. In the case of a defendant, evidence of his/her good character is admissible and subject to a jury direction, more commonly known as a '*Vye* direction', which bolsters his/her credibility. However, such a direction is not available for non-defendants.

This distinction has raised questions surrounding fairness and the extent to which this is reasonable. This Article attempts to address this question. Part I examines the definition of 'good character' and discusses relevant principles and practices relating to the concept, with particular reference to its admissibility and use by defendants and non-defendants in criminal trials. Part II introduces and evaluates the application of the *Vye* Direction, with a particular focus on its credibility limb.

Adopting an antithetical approach, Part III then examines arguments for and against the distinction, albeit maintaining the position that the distinction is fair and sensible. This Article concludes that the distinction is necessary to ensure justice according to law.

I. DEFINITION OF 'GOOD CHARACTER'

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At common law, a person's character consists only of their reputation in the community and nothing more.[1] This definition has since been expanded at varying degrees depending on whether bad or good character evidence is at issue.

The term 'good character' is neither provided for nor defined in any statute for the purposes of a criminal trial. However, it has now been firmly established through case law that for the purposes of a criminal trial, the term 'good character' can be categorised into two types,[2] namely: absolute good character and effective good character. A defendant is said to be of "absolute good character" where he/she has no previous convictions or cautions recorded against them and no other reprehensible conduct alleged, admitted or proven even if they do not adduce evidence of positive good character.[3] "Effective good character" refers to where a defendant has previous convictions or cautions recorded against them which are old, minor and have no relevance to the charge.[4]

The definition of good character is wide and problematic,[5] especially regarding its implication on jury direction. For example, to what extent does absence of conviction constitute evidence of good character of the defendant? This is in view of the failure to acknowledge such evidence in some jury directions which has resulted in a number of appeals.[6] Similarly, would absence of conviction alone suffice as evidence of good character of a prosecution

[1] *R v Rowton* (1865) Le & Ca 510 CCR.

[2] *R v Hunter* [2015] 1 WLR 5367 (CA).

[3] *R v Hunter* (n 2).

[4] ibid.

[5] Roderick Munday, 'Directing Juries on the Defendant's Good Character' (1991) 55 J Crim L 521.

[6] Roderick Munday, 'New Cases: Evidence and Procedure: Good Character' (CLW/20/04/1) Criminal Law Week.

witness where his/her good character is an issue? Further issues around this definition will be discussed below in this Article.

ADMISSIBILITY OF THE GOOD CHARACTER OF DEFENDANTS

A defendant in a criminal trial has, for long,[7] been permitted to adduce evidence of his/her good character. Generally, such evidence is admissible to bolster the accused's credibility.[8] It is also a mitigating factor for sentencing.[9] Evidence of good character of a defendant may be adduced[10] by calling a witness to give evidence of the defendant's good character,[11] by eliciting evidence of good character of the defendant through cross examination of prosecution witnesses, and by the defendant himself/herself testifying to his/her own good character.[12]

It has been the recent opinion of the courts[13] that the good character evidence which can be adduced by or on behalf of the defendant is no longer restricted to only evidence of reputation as earlier decided in *R v Rowton*[14]. Although Keane and Mckeown[15] rightly agree that *Rowton* is no longer strictly

[7] Nicola Monaghan, *The Law of Evidence* (CUP 2015).

[8] Judicial College Crown Court Compendium (part I, amended December 2020).

[9] Sentencing Council, General Guideline: 'Overarching principles' (Sentencingcouncil.org.uk, 1 October 2019) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> accessed April 20, 2020.

[10] Diane Birch, 'A Credible Solution? Non-defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' (2019) 10 Criminal Law Review 841.

[11] *R v Grimes* [2017] NICA 19.

[12] *R v Vye* [1993] 1 WLR 471 (CA) 480, 482.

[13] *R v Mader* [2018] EWCA Crim 2454.

[14] *Rowton* (n 1).

[15] Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (12th edn, OUP 2018) 501.

adhered to in practice, they seem to suggest that *Rowton*, having not been overruled, is still applicable even where evidence of good character is given by a defendant himself/herself. It is difficult to agree with this for the simple reason that *Rowton*, though not expressly overruled, appears to have been overtaken by displaced by legislation. For example, the expansion of the meaning of bad character under section 98 of the Criminal Justice Act 2003 (CJA), to include dispositions towards misconduct, is a clear indication of a departure from *Rowton*. Case law also suggests such deviation. In *R v Redgrave*,[16]which was also discussed by the learned authors, the Court of Appeal while rejecting evidence of a disposition, indirectly approved that such evidence could be adduced when it held that an accused could give evidence of his normal sexual relationship with his wife or girlfriend.

For the purposes of this Article however, it is unnecessary to delve further into the nature of admissible good character evidence. It is well established that evidence of good character of a defendant is admissible to bolster his character.

ADMISSIBILITY OF THE GOOD CHARACTER OF NON-DEFENDANTS

The term 'non-defendant' refers to any person other than a defendant whose credibility might be an issue in a case. Since the credibility of witnesses are always of issue, the term therefore rightly refers to both prosecution and defence witnesses. However, the focus of this Article is on the prosecution witnesses, in particular the victims of crimes or the complainants who testify at trial. Therefore, in this Article, the term 'non-defendant' refers to prosecution witnesses.

The general rule is that evidence is not admissible simply to show that a prosecution witness (non-defendant) has good character in the sense of their

[16] *R v Dodd* (1981) 74 Cr App R 10.

being generally truthful persons who should be believed.[17] As Lawton LJ observed in *R v Turner*,[18] evidence in general can be called to impugn the credibility of witnesses but not to bolster it up.

However, as an exception to the general rule, evidence of good character of a prosecution witness may be adduced where it is relevant to the matters in issue ("issue relevancy").[19]

In *R v Mader*,[20] the Crown applied to admit the good character (lack of criminal conviction) of the witnesses to rebut the assertion of the defence that C (the prosecution's chief witness) was dishonest and W (the complainant and prosecution witness) was the aggressor. *Mader*, the defendant, accused the witnesses of attempting to rob him. The court was of the view that the context in which *Mader* had picked up the knife was an issue to which the good character of the prosecution witnesses was relevant. The trial judge admitted evidence of disposition of the witnesses as relevant.

In *R v Amado Taylor*[21], the Court of Appeal held that the evidence of the complainant's lack of sexual experience, her attitude and religious belief that sex before marriage was wrong, was capable of being relevant and admissible as it went to the issue of consent even though it did not bolster her credibility.

Where the character of a witness is not in itself an issue, the party calling the witness may not call evidence as to the good character of the witness for the purpose of rebutting such allegations.[22]

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[17] *R v Mader* (n13); *R v Amado-Taylor* [2001] EWCA Crim 1898

[18] *R v Turner* [1975] 1 QB 834, 842 (CA).

[19] *R v Mader* (n13); Ashlee Beazley, 'Good Character (Non-defendant Witnesses)' Criminal Law Week CLW/19/40/2.

[20] *R v Mader* (n13).

[21] *R v Amado-Taylor* (n 17).

[22] Ashlee Beazley, 'The Problematic Standard of Good Character Evidence of Non-Defendants' (2019) 8 Archbold Review 5-6.

In *R v Hamilton*,[23] it was held that evidence of good character proposed to be called to bolster the testimony of prosecution witnesses had no probative value regarding any issue in the case and was to be excluded on the ground of collaterality.

In *R v Wood*,[24] the counsel to the defendant during cross-examination had asked C (the prosecution witness and complainant) whether on the night relating to the charge, he had made an improper suggestion to the defendant and committed an act of gross indecency against him. The defendant was indirectly suggesting that he may have reacted the way he did to C because C may have behaved or acted in an inappropriate manner towards him. The prosecution proposed to call evidence in rebuttal to prove that C was generally a person of good reputation. It was held that the evidence was not admissible.

CRITIQUE OF THE RULE

The exception of 'issue relevancy' to the admissibility of good character evidence of a non-defendant is too restrictive and illusive as can be seen in its application in some of the cases mentioned above, for example, in R v Wood. The issue of relevancy appears to have been restricted mostly to issues of consent in sexual offences and a few other exceptions. However, every imputation on the character of a prosecution witness made by the defendant is an issue. This is because it borders on the veracity of the imputation and, by extension, the credibility of the defendant, which is always in issue. To this extent alone, evidence of good character of the non-defendant which provides a rebuttal of the defendant's imputation, becomes an issue whether or not the subject of the imputation itself is a fact in issue. Secondly, under section 100 of the CJA, evidence of bad character of a non-defendant is admissible where it is directly or indirectly relevant to a matter that is in issue in the proceedings. Therefore, evidence of good character of the non-defendant adduced by the

[23] *R v Hamilton* [1998] 6 WLUK 490 CA.

[24] *R v Wood* [1951] 35 Cr App R 61.

prosecution to rebut such an attack cannot logically be said not to be relevant either directly or indirectly to the case.

The Court of Appeal in *R v Tobin*,[25] acknowledged that this distinction (issue of relevancy) is difficult to defend in some cases, especially in sexual offences cases which mostly depends on the balance of credibility between the parties. In other words, whether it is the defendant or the victim that should be believed. In such circumstances, there is hardly any difference between questions going to credit and those going to the facts in issue.[26] In *Tobin*,[27] the defendant was tried for and convicted of committing indecent assault. During the trial, he had alleged that the complainant had voluntarily given him oral sex as a payment for a ride. The complainant's mother testified as to the general good character of the complainant. Objection was taken on the ground that it amounted to boosting credibility of the complainant ('oath helping'). The Court of Appeal held that the evidence was properly admitted.

Admissibility should depend on the discretion of the judge in each case. After all, the judge retains the power to exclude or refuse to admit evidence considered as unduly prejudicial and which have no probative impact upon the jury. [28] The only caveat is that the court must ensure that the effect of admitting good character evidence is not to undermine the protection provided by the primary obligation upon the prosecution to prove its case and any good character direction that may be given to the defendant. [29]

It can be concluded on this issue that although there are instances where evidence of good character of a non-defendant is permitted, those instances exclude admissibility of such evidence to boost or bolster credibility of the

[25] *R v Tobin* [2003] EWCA Crim 190.
[26] *R v Funderburk* [1990] 1 WLR 587.
[27] *R v Tobin* [2003] EWCA Crim 190.
[28] Beazley (n 22).
[29] Mader (n 13); *R v Green* [2015] 4 WLR 39 CA; Beazley (n 22).

witness.[30] With regard to its relevance to the question being addressed in this Article, it will suffice to state that there remains a sharp distinction between admissibility of good character evidence of a defendant and that of a non-defendant. While it is admissible to boost or bolster the credibility of a defendant subject to a *Vye* direction on credibility, it is not the case with a non-defendant.

II. *VYE* DIRECTION

The term '*Vye* direction' is derived from the case of *R v Vye*,[31] and refers to the obligation placed on a trial judge to direct the jury on the use of evidence of good character of a defendant in a criminal trial. The *Vye* direction has two limbs. The first limb ('credibility limb') provides that, where a defendant who is of good character testifies or relies on pre-trial answers or statements (containing 'inculpatory and exculpatory statements'),[32] the trial judge is obliged to direct the jury that the defendant's good character is relevant in determining his credibility.[33]

The second limb ('propensity limb') provides that where a defendant is of good character, whether or not he has testified or made pre-trial statements, the judge is obliged to direct the jury that the defendant's good character is relevant in determining the likelihood of his having committed the offence charged against him.[34]

This Article focusses on the credibility limb of the *Vye* direction. It is worthy to note that although the term "*Vye* direction" is derived from the *Vye* case, the principle of good character direction on credibility of a defendant was

[30] *R v Turner* (n 18).
[31] R v *Vye* (n 12).
[32] Keane and McKeown (n 15).
[33] *R v Hunter* (n 2) *R v Vye* (n 12); Crown Court Compendium (n 8)
[34] ibid.

established before *Vye*.[35] The main significance of *Vye* however, is its extension of the credibility direction to pre-trial statements even where a defendant does not testify at trial. Although the principles established in *Vye* had been welcomed by the House of Lords in *R v Aziz*,[36]their application remained confusing until the Court of Appeal in *R v Hunter* provided a clear guidance on the application of the principles.[37] The Court of Appeal held that the failure to give an adequate good character direction often will not be fatal to the safety of the conviction. Also, that only a defendant who is entitled to a good character direction should be given one. Judges had a residual discretion to decline to give a good character direction, particularly when they considered it absurd or meaningless.

The settled position of the law with regard to the subject matter of this Article (credibility direction) as derived from the cases of *Vye*, *Aziz* and *Hunter*, is that a judge is obliged to give a credibility direction where the defendant is of absolute good character or is deemed or adjudged to be of effective good character. The term 'deemed' or 'adjudged' is fundamental because the judge has a discretion regarding whether or not a defendant is of effective good character. Where a judge decides to treat a defendant as a person of effective good character, he/she becomes obliged to give the direction, subject to such modification as required to ensure other matters or details, and more importantly that the jury is not misled.[38]

Failure to give a *Vye* direction (credibility limb), where a defendant is of absolute good character or has been deemed to be of effective good character, will result in the conviction of the defendant being quashed.[39] In *Vye* itself, the

[35] *R v Berrada* (1989) 91 Cr App 131.

[36] R v Aziz [1996] AC 41 (HL).

[37] Keane and McKeown (n 15).

[38] *Hunter* (n 2).

[39] *R v Vye* (n 12) *R v Berrada (*n 35); *R v Marr* (1989) 90 Cr App R 154.

conviction in two of the appeals were quashed by the Court of Appeal on this ground. In *R v Hunter*, although the court indicated that the failure to give a *Vye* direction is not necessarily fatal, it nonetheless endorsed the observations made in *R v Singh*.[40] Singh confirmed the court's willingness to intervene where the trial judge fails to make directions on the credibility of the accused and/or his/her propensity of committing the offence in cases where good character may be relevant. In effect, the procedure laid down in Singh, which was endorsed in Hunter, appears to require judges to give a *Vye* direction.

EVALUATING THE APPLICATION OF THE *VYE* DIRECTION

The obligation imposed on judges to give a good character direction (credibility limb or credibility direction), has been criticised by the Australian Court of Appeal in *Melbourne v The Queen*.[41] The Court emphasised the need for the judge to retain discretion on whether to give a good character direction depending on the relevance or probative significance of the evidence. The main justification for this position is that where good character evidence has no logical connection with the elements of the offence, a mandatory direction is likely to divert the jury from properly evaluating the evidence which more directly and logically bears upon the guilt of the accused which may confuse the jury.[42]

The decision in Melbourne and argument in support are unassailable. There is no doubt that retention of discretion by judges in all cases involving a good character direction has become necessary. The current obligatory stance appears to have occasioned injustice in many cases, especially where convictions have been quashed, including for failure to direct in the absence of evidence of a past conviction, even where no clear injustice had been occasioned

[40] *R v Singh* [2006] 1 WLR 2948.

[41] *Melbourne v The Queen* [1999] HCA 32.

[42] Roderick Munday, 'What constitutes a good character?' [1997] Crim LR 247.

by such failure.[43] This could lead to injustice to victims, especially since defendants are entitled to have their good character considered in sentencing.[44] After all, good character is not an element of the offence. In *R v Garnham*,[45] the defendant in that case was of effective good character, but the court did not give a good character direction to the jury. Although the court was of the view that the case had features of real strength, the conviction was nonetheless quashed on the ground that it was significant for a man of effective good character (spent conviction for assault), not to have had the benefit of a modified good character direction. It is difficult to see how a *Vye* direction based on a spent conviction for assault would have changed the verdict of the jury in light of the court's acknowledgment that the case had features of real strength. The court seemed however, to have considered a spent conviction as more important than the strong case made by the prosecution. It is such frustration about the implementation of the *Vye* direction that led Roderick Munday to conclude that the rule hampered effective trial management, provoked protracted discussions at trial about directions to juries, convoluted jury directions, and prompted a flood of appeals.[46]

III. *VYE* DIRECTION AND NON-DEFENDANTS

The rule regarding a non-defendant is that unless there is a justifiable reason for directing the jury on their good character, no mention of it should be made and the jury may assume that there are no issues as to that witness's

[43] *R v Aziz* (n 36).

[44] Sentencing Council (n 9).

[45] *R v Garnham* [2008] EWCA Crim 266, [22].

[46] Roderick Munday, 'Good Character Directions in Criminal Trials: An Exercise in Containment' (2015) 74 The Cambridge Law Journal 338; *R v Hunter* (n 4).

credibility.[47] In simple terms, there is no requirement in law or practice for the judge to direct the jury on the relevance of good character of a non-defendant on his credibility, which is in contrast with the practice concerning a *Vye* direction.

This leads to the core question in this Article which is "to what extent is this a fair and sensible distinction?"

HOW FAIR AND SENSIBLE IS THE DISTINCTION?

To what extent is it fair and sensible to give a good character direction (*Vye* credibility limb) to the jury on the defendant's good character but not one for the non-defendant?

The position of this Article is that the distinction is fair and sensible in favour of the defendant. However, in order to ensure a balance, this Article will also examine possible arguments to the contrary (i.e. the distinction is not fair and sensible). This Article adopts an antithetical approach of first presenting a possible argument against the distinction, followed by a refutation.

LACK OF BALANCE

The first possible argument against the distinction is on the grounds that the admissibility of good character and the *Vye* direction principles, when weighed against existing statutory provisions on bad character, do not seem to convey a sense of balance. This is because section 100 of the CJA allows evidence of bad character of a non-defendant to be adduced, including by agreement of parties. It is only fair therefore (by extension) to also allow

[47] Harriet Johnson of Doughty Street, 'Good Character Directions in Criminal Proceedings' (Lexis PSL Lexisnexis.com) <www.lexisnexis.com/uk/lexispsl/corporatecrime/docfromresult/D-WA-A-AU-AU-MsSAYWZ-UUA-UZEYAAUUW-U-U-U-U-U-U-ACEWEEUAYW-ACEUCDUEYW-EAUADWUCE-U-U/1/391423?lni=5K44-NCK1-F188-32FG-00000-00> accessed 20 April 2020.

evidence of their good character to be admissible to bolster their credibility as is the case with a defendant whose evidence of bad character is also admissible under section 101 of the CJA. This will ensure a sense of balance.

It is the contention of this Article that the argument as analysed above is misplaced. Under section 100 and 101 of CJA, a non-defendant[48] enjoys an advantage over a defendant[49] in the sense that evidence of bad character of a defendant is admissible in wider circumstances[50] than that of a non-defendant.[51] Even in very limited cases where evidence of the bad character of non-defendant is admissible,[52] leave of the court is required to do so, except by agreement of parties.[53] It is therefore not out of place to reverse or balance the situation with regard to good character evidence, by allowing a defendant to adduce evidence of his/her good character in wider circumstances than a non-defendant. In any case, the comparison between a defendant and a non-defendant under these provisions is unfair to the defendant, given their incomparable positions. While the defendant is on trial, the non-defendant is not.

UNFAIR COMPARISONS

The second possible argument against the distinction is that a good character direction in favour of the defendant alone has the propensity to sway the jury in the direction of the beneficiary. This could lead to verdicts that are based on sentiments of character assessment whereby defendant's version of events is believed solely on account of credibility arising from good character evidence. This could happen even where the defendant is guilty and evidence

[48] Criminal Justice Act (CJA) 2003, section 100.
[49] ibid, section 101.
[50] ibid.
[51] Criminal Justice Act (n 48).
[52] ibid section 100(1).
[53] ibid section 100 (4)

exists to that effect, especially where such evidence is tied to the testimony or other evidence from the complainant on whom imputations of bad character may have been made.

This second argument is also unfounded. Jury direction on good character of non-defendants could equally lead to unfair comparison. In such a case, a verdict is also likely to be based on character rather than on evidence of guilt. Juries, however directed, could convict a defendant solely because of the witness' exemplary character.[54] Where a prosecution witness has led a good life, has an impeccable and blameless character, free of crime and bad behaviour, there is a high probability that the jury will consciously or unconsciously compare the character of the defendant and the non-defendant if the good character of the non-defendant is allowed to be given as a *Vye* direction.[55] In *R v G*,[56] the appeal was allowed and the conviction quashed because the judge allowed unfair comparison between the character of the defendant and the complainant. The trial judge after giving a proper good character direction to the jury about the defendant had further directed the jury to bear in mind the good character of the complainant (no previous trouble with the police, no previous offence and no reputation for untruthfulness or anything of that sort). The Court of Appeal held that such direction undermined the defendant's credibility and enhanced that of the complainant. It had the effect of watering down the protection afforded an accused person of good character and reducing the burden of proof imposed on the prosecution.

INJUSTICE

The third possible argument against the distinction is that failure to admit evidence of good character of a non-defendant (complainant in particular)

[54] Charles Crinion, 'Adducing the Good Character of Prosecution Witnesses' (2010) 7 Criminal Law Review 570.

[55] ibid.

[56] *R v G* [2017] EWCA Crim 1774.

or give a *Vye* direction of such evidence may occasion injustice to the complainant. This is particularly so where the defendant has adduced evidence of the complainant's bad character or has made imputations on his or her character. This may lead to the jury disbelieving the complainant's testimony. This is unfair when viewed through the lens of 'interest of justice' and 'equality before the law' which supports equal justice for the accuser and the accused. Justice in a criminal case is a three-way traffic[57] involving the defendant, the state and the complainant/victim. Therefore, any principle or practice of law that overly confers privileges on an accused that are denied to the victim in determining the latter's complaint is unfair. It seems that such unfairness is responsible for the growing decline in victims' willingness to pursue their complaints in the criminal justice system of England and Wales. This is evidenced by a report that 23% of cases in 2019 were dropped for failure of the victims to support further action, a rise from 8.7% in 2015. [58] This has led to calls for law reform to stop people from losing faith in the criminal justice system.[59]

The argument of equating the defendant and non-defendant (complainant) in the scale of justice is unfair to the defendant. Whilst it is true that justice is a three-way traffic, there is also a primary burden of proof imposed by law on the prosecution. The presumption of innocence is one of the key components of the fundamental right to a fair hearing as guaranteed not only by the European Convention on Human Rights[60] but also by the major international

[57] *State v Josiah* (1985) 1 NWLR (Pt. 11) 125 [141] [Oputah, JSC].

[58] James Tapper, 'Call for New Law to Protect Victims in the Justice System' *The Guardian* (London, 26 January 2020) <https://www.theguardian.com/uk-news/2020/jan/25/crime-victims-justice-system-courts> accessed May 11 2020.

[59] ibid.

[60] European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] (European Convention on Human Rights) (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) Article 6.

human rights treaties.[61] The Convention has been incorporated into the domestic law of England and Wales through the Human Rights Act 1998. It is on the basis of this right that the burden of proof is placed on the prosecution. The burden is required to be discharged beyond reasonable doubt. The *Vye* direction is potentially one of the least means of ensuring that the jury is sure of the guilt of the defendant.

Where the defendant is from a socially unpopular background, the jury is more likely to find the person (defendant) guilty.[62] The use of good character evidence is possibly the most important factor in correcting this prejudice in favour of the defendant.[63] A *Vye* direction will be more helpful to a defendant's case unlike a non-defendant who may have nothing to lose at the end of the day except the acquittal of the defendant who may be innocent.[64] As Ross[65] asserts, there is character assassination implicit in most indictments and opening speeches against the defendant. A good character direction serves to strengthen the presumption of innocence and a lack of it enforces the presumption of guilt.[66]

CONCLUSION

This Article has examined the scarcely discussed concept of admissibility and use of a *Vye* direction (good character evidence of a defendant)

[61] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) articles 10 and 11; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 14.

[62] Josephine Ross, 'He Looks Guilty: Reforming Good Character Evidence to Undercut the Presumption of Guilt' (2004) 65 U Pitt L Rev 227.

[63] ibid.

[64] ibid.

[65] ibid.

[66] ibid.

with emphasis on the extent of fairness and sensibleness of the distinction that exists between a defendant and non-defendant regarding this concept.

This Article has explored arguments for and against the distinction from the perspectives of statutory provisions, due or undue advantage and the interest of justice and equality before the law, human rights and burden of proof. This Article maintains the view that the distinction is not only fair and sensible but is also logical and necessary in the interest of justice.

In conclusion, it is submitted that the current practices in relation to a *Vye* direction is an important tool for the law to ensure that accusations of crime against a presumed innocent individual are proved on the strength of the prosecution's evidence and not on the sentiment of the good character of his/her accuser. If at all there is any injustice likely to arise from the acquittal of a guilty person for misjudgement of their good character, it is still safer than the conviction of an innocent person for misjudgement of the complainant's character. Essentially, it is believed that it is much better to have "ten guilty persons go free than one innocent person be convicted". [67]

[67] William Blackstone, *Commentaries on the Laws of England* (First published 1765, JB Lippincott Co Philadelphia, 1893).

COLOUR-BLIND - HOW LEGAL AID FUNDING CUTS DISPROPORTIONATELY AFFECT BLACK AND MINORITY ETHNIC GROUPS

Emily Broad

ABSTRACT

Aim: The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") has been deemed a success by the United Kingdom government for its cost-saving attributes. This paper explores the detrimental impact this 'saving' has had on Black and minority ethnic groups.

Findings: Despite being more likely to encounter litigation and require legal representation, many Black and minority ethnic people do not have access to the necessary legal resources as a direct consequence of LASPO and further civil legal aid cuts. This has led to an increase in litigants in person amongst these groups and increased hardship. The Government of the United Kingdom's ("UK government") response to high-profile organisation reports highlighting racial inequality in the civil justice system have been inadequate.

Conclusion: LASPO is demonstrative of the UK government's short-sighted attitude towards access to justice. This paper recommends that an urgent review is undertaken to examine and address the inequality that Black and ethnic minorities experience as a result of LASPO within the current justice system in England and Wales.

INTRODUCTION

Black and minority ethnic groups experience disadvantages associated with their ethnicity in all areas of life. Black and minority ethnic groups in England and Wales experience significant wealth inequality compared to White

groups and are more likely to have low household incomes.[1] The introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") in April 2013 narrowed the scope of civil legal aid.[2] Private family, housing, debt, welfare benefits, employment and clinical negligence matters are now exempt from public funding, leaving those who could not afford legal representation at a serious disadvantage. In its 2019 report, the UK government described LASPO as a 'success' for saving £110 million in public money.[3] However, the Equality and Human Rights Commission ("EHRC") has raised concerns about the impact of this reduced scope on people with certain protected equality characteristics, including minority ethnic groups.[4] The latest report by the Joint Committee on Human Rights[5] ("JCHR") provides damning proof that consecutive governments have failed to act in response to successive reports detailing how racial inequality is an issue in the UK.[6]

This article explores the intersection of poverty and ethnicity in England and Wales and its impact on access to justice. It explains how funding

[1] *Equal Treatment Bench Book* (The Judicial College 2020) <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020.pdf> accessed 14 September 2020 168.
[2] *Race Rights in the UK, Submission to the UN Committee on the Elimination of Racial Discrimination in Advance of the Public Examination of the UK'S Implementation of ICERD* (Equality and Human Rights Commission 2016) <https://www.equalityhumanrights.com/sites/default/files/race-rights-in-the-uk-july-2016_0.pdf> accessed 14 September 2020 14.
[3] ibid.
[4] ibid.
[5] Joint Committee on Human Rights, 'Black People, Racism and Human Rights' (House of Commons House of Lords 2020).
[6] ibid 12.

cuts disproportionately affect Black and minority ethnic groups and provides a critical overview of the UK government's actions in light of the EHRC's continuing response to LASPO. Because there is an extensive body of academic literature and research into unequal access to justice and representation in the criminal law, this article looks solely at the effect of LASPO on civil legal aid and other non-criminal areas of law.

It is worth noting that this article heavily relies on sources from the Equality and Human Rights Commission. This is because information regarding the effects of LASPO on Black and ethnic minorities was scarce at the time of writing this piece. It is argued that this demonstrates how such inequality is not being addressed with the urgency it deserves.

POVERTY, ETHNICITY, AND ACCESS TO JUSTICE

Black and minority ethnic groups in England and Wales are more likely to live in poverty compared with the White population.[7] They are therefore less likely to be able to afford legal representation should the need arise; this is an issue, as they are also the groups most likely to require legal representation, even in fundamental civil and administrative matters. In the UK government's own assessment of the likely equality impact of LASPO, limiting legal aid for housing matters was predicted to have a disproportionate impact on Black and ethnic minority groups, given they account for thirty-two percent of the housing legal aid caseload compared to eleven percent of the general population.[8]

[7] 'Race Report Statistics | Equality and Human Rights Commission' (*Equalityhumanrights.com*, 2020) <https://www.equalityhumanrights.com/en/race-report-statistics> accessed 14 September 2020.

[8] Equality and Human Rights Commission (n 2) 15.

Similar trends can be seen in other civil matters, including family and discrimination.[9]

The effects of this rise in inequality are already evident: the number of cases receiving support under civil legal aid has declined significantly since LASPO. Official figures show that the proportion of litigants with legal representation fell from sixty percent in 2012 to thirty-three percent in the first quarter of 2017, and it is not uncommon for a commercial entity in a civil case to be represented by a lawyer while their disadvantaged opposition is not.[10]

Consequently, a disproportionate number of Black and minority ethnic people are engaging in litigation without proper legal representation.[11] A recent report by Bail for Immigration Detainees found that forty-six percent of detainees did not have a solicitor to represent them in deportation appeals.[12]

This lack of access to legal expertise has been confirmed by judges, who report that litigants in person have difficulties presenting legal arguments

[9] ibid.

[10] 'The Guardian View on Legal Aid: Cuts Have Caused Chaos and Must be Reversed | Editorial' (*the Guardian*, 2020) <https://www.theguardian.com/commentisfree/2018/aug/12/the-guardian-view-on-legal-aid-cuts-have-caused-chaos-and-must-be-reversed> accessed 14 September 2020.

[11] Helen Anthony and Charlotte Crilly, *Equality, Human Rights and Access to Civil Law Justice: A Literature Review* (Equality and Human Rights Commission 2015) 30. <https://www.equalityhumanrights.com/sites/default/files/research-report-99-equality-human-rights-and-access-to-civil-law-justice.pdf> accessed 15 September 2020.

[12] *POSITION PAPER Spring 2019 Legal Advice Survey* (Bail for Immigration Detainees 2019) <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/890/190523_legal_advice_survey_spring_2019.pdf> accessed 15 February 2021 2.

or complex financial information to the court.[13] The disadvantages faced by litigants in person have serious implications for their right to a fair hearing and are a cause for great concern.[14]

A significant lack of public information and advice on the procedural and legal issues related to court proceedings has resulted in many litigants lacking access to information that is essential for them to be able to represent themselves effectively. For example, opportunities for free legal advice for family matters are scarce; such advice available is usually general in nature, such as information about how the divorce process works and where the relevant forms can be found online.[15] The EHRC reported that "there is very little free casework, such as help to gather the evidence needed for court, and very limited free legal representation available".[16]

The English and Welsh Civil and Social Justice Survey results showed that 66% of people who faced a discrimination problem did not know how to seek legal redress.[17]

In some legal areas, information is being purposely withheld: in one immigration detention survey, of the twenty-eight individuals who said that they

[13] The Guardian (n 10).
[14] The right to a fair hearing is enshrined in Article 6(1) ECHR.
[15] James Organ and Jennifer Sigafoos, *The Impact of LASPO on Routes to Justice* (Equality and Human Rights Commission 2018) <https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf> accessed 17 January 2021 22.
[16] ibid.
[17] *Access to Legal Aid for Discrimination Cases* (Equality and Human Rights Commission 2019) <https://www.equalityhumanrights.com/sites/default/files/access-to-legal-aid-for-discrimination-cases-our-legal-aid-inquiry.pdf> accessed 14 September 2020 44.

had used the internet to research their case, twenty-two reported that the detention facility computers blocked websites relating to legal and human rights services. For instance, one detainee said that they entered the terms 'legal aid solicitors' into Google's search facility and found the first five results blocked.[18]

The scarcity of public information and free advice available to people confronting complex legal matters has contributed to an increased number of litigants in person who are no match for the qualified legal professionals they confront in court. Most worryingly, it has been suggested that ethnic minority tribunal applicants find it more difficult to represent themselves as litigants in person during proceedings.[19] For example, studies have shown that in deportation proceedings, most ethnic minorities struggle to represent themselves adequately, meaning their case and the best interests of their children cannot be properly considered by the court.[20] This is having detrimental effects on Black and ethnic minority children, who face detrimental emotional and developmental consequences of having a parent deported. In some cases, these children are left without a legal guardian, and are put into the care system.[21] In family proceedings (which has seen a 30% increase in litigants in person since 2013), judicial racial bias, and more recently, a lack of access to technology during the COVID-19 pandemic is leaving unrepresented individuals unfairly

[18] Bail for Immigration Detainees (n 12) 9.
[19] Anthony (n 11) 67.
[20] ibid 30.
[21] *Justice Select Committee Inquiry: Impact of Changes to Civil Legal Aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Bail for Immigration Detainees 2014) <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/353/JUSTICE_CTTE_-_VERSION_FOR_SUBMISSION_1ST_DECEMBER_2014_1.pdf> accessed 15 February 2021 2.

treated, and some unable to successfully participate in remote hearings.[22] Where the barriers to access to justice are this high, it is no surprise that these communities are faring worse than their White counterparts.

Instead of making legislative changes to LASPO and civil legal aid cuts that aim to address the cause of the increase in litigants in person, the UK government chose to enhance the support offered to such litigants by the Ministry of Justice and Her Majesty's Courts and Tribunal Service.[23] This is an inadequate response for two reasons. Firstly, it treats the symptom of the litigants in person issue rather than treating the cause. In a fair justice system, people should be allowed to choose whether they wish to legally represent themselves or not – they should not be forced into it as a last resort and with limited resources. Offering 'support' is not equivalent to providing people with funding for the qualified legal representation required for a fair trial. Secondly, the UK government's response lacks any acknowledgement of the disproportionate percentage of Black or minority ethnic litigants in person and the effect this has on their communities. For example, in discrimination cases, if an issue does not fall under another legal aid category (for example, discrimination by someone selling goods or services), advice is only available through the mandatory telephone gateway ("the Gateway").[24] Disturbingly, the EHRC found that twenty-six percent of White Gateway service users received positive outcomes, compared to only seventeen percent of ethnic minority

[22] Rebekah Wilson and Nkumbe Ekaney, 'Equal Family Justice – Its Pursuit in a Pandemic' (2020) August 2020 Family Law Journal 959.
[23] *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (Ministry of Justice 2019) 8.
[24] Equality and Human Rights Commission (n 17) 15.

service users.[25] Further, academic research backs up the importance of face-to-face advice for Black and minority ethnic groups, which may be more likely to have a language barrier when seeking legal advice.[26]

Moreover, losing a legal matter can have a detrimental effect on a person's life. In most legal cases, Black and minority ethnic people, who are already marginalised, will be responsible for the winning side's costs. Given that nearly half of Black and ethnic minority UK households are living in poverty, it is without doubt that these communities cannot afford to risk the financial consequences of losing in court.[27] The Government's inadequate response to the litigant in person issue merely demonstrates that racial inequality is entrenched in the legal system. Failing to address this will only deepen the disparity.

LASPO funding cuts have also significantly reduced the capacity of third-party and voluntary sector organisations to provide law advice in matters that disproportionately affect Black and ethnic minority people.[28] Citizens Advice, for example, lost around £19 million of funding as a result of LASPO.[29] Consequently, free legal help, as well as funded legal representation, are now very difficult to find.[30] In employment law, people have fewer options for

[25] ibid 8.
[26] ibid.
[27] Patrick Butler, 'Nearly Half of BAME UK Households are Living in Poverty' (*the Guardian*, 2020) <https://www.theguardian.com/society/2020/jul/01/nearly-half-of-bame-uk-households-are-living-in-poverty#:~:text=It%20found%20that%2019%25%20of,African%2FCaribbean%2FBlack%20British.> accessed 15 February 2021.
[28] Organ (n 15) 7.
[29] ibid 11.
[30] Organ (n 15) 18.

accessing third-sector specialist advice and representation,[31] while in welfare benefits law there is almost no specialist advice left to provide support to appeal benefits decisions.[32]

Subsequently, many disadvantaged Black and ethnic minority people are declining to challenge their legal disputes and are accepting unjust outcomes.[33] In addition to being unable to see a way to resolve a legal problem without free legal advice,[34] many fear that the stress of pursuing such litigation would be overwhelming.[35] The notion that any person would have little option but to accept unjust wrongdoing against them is shameful. The fact that the UK government is facilitating such injustice is nothing short of a scandal.

For those who decide to challenge their legal issues, many will opt to fund legal representation using personal loans or credit cards.[36] Such loans are often insufficient to cover the unprecedented costs of the entire litigation process, with many clients only able to afford one or two solicitor consultations. As a result, clients are left with an unresolved legal issue and a financial debt they will struggle to repay.[37] Studies by the EHRC and human rights charities have repeatedly indicated that LASPO has indirectly increased the financial hardship of Black and ethnic minorities, but this concern is being ignored.[38]

For example, a 2018 report by the EHRC found that unresolved welfare benefits issues resulted in 'financial deprivation, including in some cases a risk

[31] ibid 7.
[32] ibid.
[33] ibid 34.
[34] ibid.
[35] ibid 33.
[36] ibid 6.
[37] ibid 21.
[38] Anthony (n 11) 8.

of homelessness and an inability to pay for necessities such as food, heating and electricity'.[39] That same report found that the most pronounced financial impacts were in family law disputes, where 'participants reported going into debt or taking extreme measures [e.g. selling their property] to be able to pay for formal advice.[40] Although Black and minority ethnic people do not make up the majority of such instances (excluding immigration law), the issue is that they make up a disproportionate number of cases compared to the general population.[41] LASPO is further entrenching their oppressed position within the justice system and society as a whole.

It is worth noting that, for most civil litigation matters, claimants can enter into 'no win, no fee' Conditional Fee Agreements ("CFAs") and Damages Based Agreements ("DBAs").[42] While these carry a much lower cost-risk than self-funding litigation (as the claimant pays no costs if they lose, save for certain circumstances), they come with many disadvantages.[43] For instance, under most CFAs and DBAs, the solicitor's fees are deducted from the claimant's award in damages, either as a fixed amount or on the contingency basis.[44] Winning claimants therefore fare worse under such agreements compared to conventional funding methods, which usually result in the court ordering the losing side to

[39] Organ (n 15) 43.
[40] ibid.
[41] Anthony (n 11) 14.
[42] Courts and Legal Services Act 1990, s 58; Courts and Legal Services Act 1990, s 58AA.
[43] 'Paying for a Solicitor' (*Lawsociety.org.uk*, 2021) <https://www.lawsociety.org.uk/en/public/for-public-visitors/using-a-solicitor/paying-for-a-solicitor> accessed 26 February 2021.
[44] ibid.

pay the claimant's costs (which usually includes the solicitor's fees).[45] Further, concerns over the ethics of such conditions have been raised, as notably seen by the omission of solicitors in *Surrey v Barnet and Chase Farms Hospitals NHS Trust* [2018] to fully explain the cost disadvantages of CFAs to their client.[46] It follows that these agreements are not an adequate alternative to legal aid and do not address the inequality of the justice system.

CRITICISM AND THE UK GOVERNMENT'S RESPONSE

The EHRC has been vocal in its opposition to LASPO and its consequent effects on access to justice in England and Wales. The Commission warned as early as 2013 that the cuts would have a disproportionate impact on Black and minority ethnic groups; this position remains unchanged and is supported by legal practitioners and legal advice charities.[47]

The EHRC's findings reported that excluding most housing and immigration matters from legal aid has disproportionally affected minority ethnic people, who are more likely to live in social housing and make up 92% of immigration cases.[48] The government have acknowledged this impact but have argued that the exclusions are reasonable because the exceptional cases funding scheme ("ECF") is available for the most serious of cases. This is an incorrect view. Firstly, the government fail to consider how the urgency of such cases, where the client is already facing severe hardship, means that they are ill-

[45] CPR 44.2.
[46] *Surrey v Barnet and Chase Farms Hospitals NHS Trust* [2018] EWCA Civ 451.
[47] Anthony (n 11) 14; 'Laspo Act' (*Lawsociety.org.uk*, 2021) <https://www.lawsociety.org.uk/en/topics/legal-aid/laspo-act> accessed 17 January 2021.
[48] Equality and Human Rights Commission 2016 (n 2) 15; Anthony (n 11) 30.

suited for the delays likely to be involved in making an application for ECF.[49] Second, 'most serious' of cases is not a catch-all for the people who need, but cannot afford legal representation. In 2019, sixty-nine percent of ECF applications were granted, and forty-two of those granted were from Black and ethnic minorities.[50] While sixty-nine percent is high, assuming every applicant who applies cannot afford the cost of hiring a lawyer, it still leaves thirty-one percent of applicants without any legal representation. Given the disproportionately high number of Black and ethnic minority ECF clients, it is likely that these groups make up a similar proportion of the unsuccessful applicants.[51] Moreover, evidence suggests that the scheme is not working as intended: between 2013/14 and 2017/18, only ten ECF applications were made for discrimination cases, and none were granted.[52]

To add sour to an already bitter situation, the Justice Secretary made no mention of racial inequality in their 2019 LASPO report, highlighting that, for them, such inequality is not a priority.[53] The resulting trajectory is not difficult to predict: in the last year alone the number of Black and ethnic minorities ECF clients increased to fifty percent, and the number of applications increased by

[49] ibid 32.
[50] Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics quarterly, England and Wales January to March 2019* (Office for National Statistics 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/821851/legal-aid-statistics-bulletin-jan-mar-2019.pdf> accessed 26 February 2021 15.
[51] ibid.
[52] Equality and Human Rights Commission (n 17) 38.
[53] Ministry of Justice (n 23).

seventeen percent overall.[54] With no direct action to address the issues with LASPO that lead to people relying on ECF in the first place, it is likely that Black and ethnic minorities will become increasingly more reliant on them.

It is worth noting that, in a truly fair and equal justice system, ECF schemes would not exist. Everyone would have access to the same level of representation, irrespective of their financial situation (and ethnicity). The very fact, therefore, that the ECF scheme is being used to defend the discriminatory effects of LASPO is a contradiction, one that is causing irreparable harm to marginalised ethnic minorities across England and Wales. For example, an analysis of national data in 2018 found that many participants reported 'significant financial deprivation as a result of trying, but not being able to resolve their legal issues'.[55]

The EHRC's report also found that omitting cost protection for claimants in discrimination claims acts as a barrier to justice, because many claimants funding their own discrimination cases will not wish to risk having to pay the defendant's full costs if they lose.[56] As Black and minority ethnic people are more likely to experience discrimination in the workplace than their White colleagues, omitting cost protection indirectly discriminates against them.[57]

[54] Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics quarterly, England and Wales January to March 2020* (Office for National Statistics 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf> accessed 26 February 2021 18.

[55] Equality and Human Rights Commission (n 17) 6.

[56] ibid.

[57] Equality and Human Rights Commission (n 17) 6.; 'What is Direct and Indirect Discrimination? | Equality and Human Rights Commission'

Furthermore, by failing to maintain the financial eligibility threshold in line with inflation, LASPO excludes potential claimants from eligibility for legal aid despite being unable to afford to fund their case themselves. This disproportionately effects those Black and minority ethnic groups who are more likely to require civil legal assistance.[58]

The government have accepted that funding is an issue and have stated it was considering a review of the eligibility threshold in 2019.[59] However, they again failed to acknowledge the indirectly discriminatory nature of LASPO. More than a year has elapsed since their promise to adjust the threshold, and it remains unchanged. It is clear from the government's response that cost saving takes priority over providing a fair justice system, and as a result, the justice gap will continue to grow. Unfortunately, given the recent COVID-induced recession, it is unlikely that a change in the threshold will materialise any time soon.[60] Such inaction has the potential to cause devastating effects on those in need of legal aid.

There was some optimism when the UK Supreme Court ruled fees for discrimination cases unlawful in 2017;[61] it looked as though it could be the beginning of the end for the imposition of barriers to access to justice. However,

(*Equalityhumanrights.com*, 2021) <https://www.equalityhumanrights.com/en/advice-and-guidance/what-direct-and-indirect-discrimination> accessed 17 January 2021.

[58] Indirect discrimination is prohibited by s. 19 Equality Act 2010.

[59] Ministry of Justice (n 23) 10.

[60] Richard Partington, 'Covid-19 Second Wave Pushing UK to Brink of Double-Dip Recession' (*the Guardian*, 2020) <https://www.theguardian.com/business/2020/oct/30/covid-19-second-wave-pushing-uk-to-brink-of-double-dip-recession> accessed 11 November 2020.

[61] *R* (on the application of UNISON) (Appellant) *v Lord Chancellor* (Respondent) [2017] UKSC 51 20.

this is unlikely to be the case. As of January 1st 2021, the UK has fully left the European Union and is no longer bound by the European Treaty of Human Rights. It is wholly possible that, following this, the Human Rights Act 1998 will also be dismantled, based upon the current UK government's criticism of it.[62] With no law enshrining fair access to justice, the UK risks losing it completely.

CONCLUSION

Since its introduction in 2012, LASPO has been deemed a success by the UK government for its cost-saving attributes. Unfortunately, their failure to acknowledge the detrimental impact this 'saving' has had on Black and minority ethnic groups is demonstrative of the government's short-sighted attitude to access to justice. While it is positive that the UK government continues to be scrutinised for their failures by high-profile organisations whose proposed changes could see an immediate improvement in the architecture that protects human rights and promotes racial equality,[63] this change will not manifest quick enough to relieve the immediate effects of LASPO on Black and minority ethnic communities. Access to justice post-Brexit is even more uncertain.

It is recommended in light of these arguments that an urgent review is undertaken to examine and address the inequality that Black and ethnic minorities experience as a result of LASPO within the current justice system in England and Wales.

[62] Owen Bowcott, 'UK Government Plans to Remove Key Human Rights Protections' (*the Guardian*, 2020) <https://www.theguardian.com/law/2020/sep/13/uk-government-plans-to-remove-key-human-rights-protections> accessed 15 September 2020.

[63] Joint Committee on Human Rights (n 5) 12.

WHERE DOES STANDING STAND IN THE CONSTITUTIONAL ORDER: LEGAL OR POLITICAL POWER?

Andrew Ratomski*

The UK's constitutional system of representative Parliamentary democracy limits all public power by law. As the late Sir John Laws powerfully summarised, the citizen may do anything not prohibited whereas the state *should* justify every act with positive law.[1] This principle is today more orthodox than Megarry VC's declaration in *Malone* that phone-tapping by the executive is lawful 'simply because there is nothing to make it unlawful'.[2] It is the courts, to the benefit of each relatively powerless citizen, who ensure that public power is exercised within the legal limits ascribed by Parliament. Yet who determines which citizens may ask these vital constitutional questions about the misuse of public power? The gatekeeper for such adjudication is the law of standing in judicial review. *Standing* or *locus standi* determines whether an individual or an organisation can stand before the court to challenge the decisions of a public body. It is the test of legal capacity for judicial review. It also determines who may intervene in these cases with oral or written submissions to assist the court. In private law claims,

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[1] Sir John Laws, 'The Rule of Law: The Presumption of Liberty and Justice' (2017) 22:4 Judicial Review 365, 368.

[2] *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (HC), 381D.

the number of potential claimants are limited and readily identified through reference to their individual legal rights. In contrast, public law *standing* is necessary to filter or, by an alternative view, justify who can contest a public decision to preserve the rule of law. The Independent Review of Administrative Law led by Lord Faulks asked in its 2020 call for evidence if *public interest* standing, where individuals without a personal interest are permitted to challenge decisions, is treated too 'leniently' by the courts.[3] The inquiry's question assumes that standing enables the courts to undermine the executive. This essay offers a broader assessment and will argue standing is indivisible from rule of law principles.

My thesis is that standing for applicants and interveners reflects only legal power and protects fundamental constitutional values. Moreover, current practices should not be viewed as constituting political interference or executive usurpation. Nonetheless, this essay will consider the core tension between legal and political power (both real and perceived). It argues that legal and political power are divisible and it is an essential element of our constitutional order that no branch of the state can assume whole control of either. The argument is developed as follows. First, this essay reviews briefly the liberalisation in the standing rules from the 1960s to the present day before, second, interrogating where the law currently "stands" by close reference to the Divisional Court's judgement in *McCourt*.[4] Third, it will discuss the implications for the constitutional order from cases where standing

[3] Independent Review of Administrative Law, 'Call for evidence' (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf> accessed 15 December 2020, 8.
[4] *R (McCourt) v Parole Board of England and Wales* [2020] EWHC 2320 (Admin), [2020] 8 WLUK 235.

was not in issue, principally the *Miller 2* litigation.[5] As is well known, Ms Gina Miller brought proceedings in 2016 to review if under UK domestic law the formal notification of withdrawal from the European Union could be given by a minister or required primary legislation *("Miller 1"*).[6] In a later unrelated case, Ms Miller led a judicial review claim in 2019 to challenge the Prime Minister's decision to prorogue Parliament for a period of five weeks ("*Miller 2").*[7] The discussion of standing in these cases is important because some commentators have expressed scepticism about the potential implications flowing from its grant to Ms Miller for politically-motivated claims in the future. For example, John Finnis characterises the judgment's influence as introducing a 'new, indeed revolutionary; layer of judicial scrutiny' that he considers unsustainable.[8] While atypical, both cases nonetheless embody the public interest standing test at its simplest: if not her (or him) then who? This inquiry raises important rule of law considerations regarding access to justice, procedural propriety and equality before the law that underpin any standing assessment.

I. THE LIBERALISATION OF STANDING

The test of who can stand before the court in administrative law opens both the literal front door of the court for claimants and at the same time, a

[5] *R (Miller) v Prime Minister* [2019] UKSC 41 ("*Miller 2*"), [2020] AC 373.
[6] *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5, [2018] AC 61.
[7] *Miller 2* (n 5).
[8] John Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment' (2019) Policy Exchange <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf> accessed 17 January 2021, 10.

figurative "back door" to potential political interference through litigation. Lady Hale speaking extra-judicially in 2013 memorably equated standing to distinguishing between terrorists and freedom fighters.[9] Lady Hale highlighted and endorsed Mark Elliott's summation that the root of the issue should remain about identifying individual rights and public wrongs above over-analysis of technical questions and procedural errata.[10] Farrah Ahmed and Adam Perry argue the court's assessment of standing is a measure of civic virtue with judges determining if the claimant is a *virtuous* claimant standing for *virtuous* reasons.[11] Paul Craig suggests that uncertainty in Parliament's intentions with the standing test in the Senior Courts Act 1981, discussed below, has resulted in more 'general' perceptions about the role of the individual in public law influencing judges over a narrow focus on private law rights.[12] Standing ultimately goes to the role of individual citizens in judicial review.

As with many public law principles, standing evolved considerably over the post-war period as administrative law developed. The Order 53 reforms in the early 1980s were a critical element of this change.[13] These reforms sought to ameliorate the balance between the protection of individual citizens' interests versus government bodies facing vexatious claims. The suggestion from Denning LJ in *R v Paddington Valuation Officer* that the

[9] Baroness Hale, 'Who Guards the Guardians?' (2014) 3:1 Cambridge Journal of International and Comparative Law 100, 101.
[10] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001).
[11] Farrah Ahmed and Adam Perry, 'Standing and Civic Virtue' (2018) 134 LQR 230.
[12] Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) 1293.
[13] Now Part 54 of the Civil Procedure Rules.

'mere busybody' was the outer limit of the standing test is now certainly a low bar.[14] Years later, Lord Denning MR would readily grant standing to the politically-engaged Mr Raymond Blackburn in a case concerning film censorship.[15] Mr Blackburn was no stranger to judicial review having brought several claims previously. Denning identified his 'sufficient interest' as equivalent to that of any citizen who has grounds for suspecting a public authority has caused harm by transgressing the law.[16] Since standing was put on a statutory footing, the test has evolved through subsequent decisions, and it now appears to be broader, more liberal, and blended with both amenability and merits. As Lady Hale's speech indicated, the question can appear to be one of perception.[17]

The background to the Order 53 reforms provides some guidance. In the post-war period, the division of available remedies through public and private law exposed various procedural tensions. Denning LJ in *Barnard v National Dock Labour Board* created a procedural innovation by awarding a declaration through *private law* procedure to right an unattractive *public* wrong. [18] The *Barnard* decision prevented a tribunal from freely disregarding the law.[19] In this case, a dock worker had challenged his suspension by his employer and alleged that the statutory power given to the Labour Board had been unlawfully delegated to a manager. *Barnard* is a landmark case because the court faced head-on the interdependency of procedure and the ambit of

[14] *R v Paddington Valuation Officer* [1966] 1 QB 380 (HC).
[15] *R v Greater London Council ex parte Blackburn* [1976] 1 WLR 550 (CA).
[16] ibid 558-559.
[17] Lady Hale (n 9).
[18] *Barnard* [1953] 2 QB 18.
[19] *Barnard* (n 18).

administrative law. Ian Loveland argues persuasively that *Barnard* represents the start of a more expansive judicial approach to scrutinising executive action and protecting citizens.[20] This shift would enable seminal administrative law decisions such as *Anisminic*, a claim arising from the sequestration of property by the Egyptian government during the Suez canal crisis in 1956.[21] This case considered the government's use of "ouster clauses" in legislation and errors of law. The House of Lords held that there was a strong presumption against "ousting" the High Court's jurisdiction to review decisions made by inferior courts and tribunals. Although the proper interpretation of the second principle is not settled, *Anisminic* established that any decision vitiated by an error of law either is, or is to be treated as, a nullity.[22] This approach continued into the twentieth-first century as the functions of the modern state have grown. Around the time of *Barnard,* aggrieved citizens and would-be litigants faced uncertainty and trade-offs with the procedural routes open to them.[23] The Order 53 reforms sought to rationalise administrative law by affirming the availability of a declaration or injunction through private law and created what is now the claim for judicial review for the prerogative remedies (certiorari, mandamus and prohibition). Standing was put on a statutory basis in section 31(3) of the Senior Court Acts 1981 (emphasis added):

> No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it

[20] Ian Loveland, *Public Law* (8th edn, OUP 2018) 416.
[21] *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 AC 147 (HL).
[22] ibid.
[23] *Barnard* (n 18).

> considers that the application has *a sufficient interest in the matter to which the application relates.*

Crucially, 'interest' is linked to 'matter'. As noted, these procedural innovations sought to balance the competing interests of the citizen and public bodies.

The 'sufficient interest' hurdle was notably tested in *IRC* and a loosening began.[24] In that case on the legality of a tax amnesty for the so-called "Fleet Street Casuals" who operated newspaper presses, the House of Lords declined to grant a small-business federation standing. Across five speeches, the law lords articulate how an assessment of standing was fused with evaluating the merits of the claim.[25] Standing was no longer a threshold issue: a bipartite inquiry was needed. It appeared from this decision, notably in Lord Diplock's speech, that claimants, including pressure groups with narrow motives, could overcome remote standing with a thorough legal argument about unlawfulness.[26] Their lordships acknowledge that citizens must be able to challenge unlawful action so that the court can uphold its supervisory constitutional role, but equally, the citizen must bring an *arguable* 'matter'.

This liberalisation and what began to look like a citizen's action basis is evident in cases following *IRC*. Lord Rees-Mogg was granted standing to challenge the UK's ratification of the Maastricht treaty without parliamentary approval due to his 'sincere concern' for constitutional issues although his

[24] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93; [1982] AC 617 (HL) ["*IRC*"].
[25] ibid 633E (Lord Wilberforce), 645D-F and 647B (Lord Fraser), 655A (Lord Scarman) and 664A-C (Lord Roskill).
[26] ibid 644E-G (Lord Diplock).

claim was unsuccessful.[27] Environmental pressure group Greenpeace was granted standing in *R v HM Inspectorate of Pollution* to challenge the issue of a licence for testing a method of nuclear waste disposal at a power plant.[28] Crucial was the analysis of its UK-based membership, in particular their 2000 members close to the plant, and the recognition of Greenpeace's relevant expertise. 'Interest' is defined and justified on various grounds, a point well highlighted by Ahmed and Perry who identify ten distinct factors the courts have cited across the caselaw.[29]

However, this liberalisation was not unbounded. Schiemann J in *Rose Theatre Trust* declined to grant standing to a group of interested citizens who had banded together to challenge a decision *not* to list the unearthed site of a sixteenth-century theatre and therefore allow its redevelopment.[30] The creation of a pressure group alone did not multiply the remote interest of each individual sufficiently to satisfy the hurdle. The evidence of unlawful decision-making could not secure standing for *any* individual to challenge the decision. This reasoning appears somewhat perverse but illustrates that the relational *locus* retains importance.

The fusion in standing and merits was affirmed in *AXA v HM Advocate,* a Supreme Court case that considered judicial review under Scots law, including its distinct standing rules, and the constitutional effect of the

[27] *R v Foreign Secretary, ex parte Rees-Mogg* [1994] QB 552 (HC).
[28] *R v HM Inspectorate of Pollution, ex parte Greenpeace Ltd (No. 2)* [1994] 4 All ER 329 (HC).
[29] Ahmed and Perry (n 12) 240-241.
[30] *R v Secretary of State for the Environment, ex parte Rose Theatre Trust* [1990] 1 QB 504 (HC).

Scotland Act 1998.[31] The court held that Scottish legislation on asbestos-related damages was legal and affirmed the amenability of acts of the Scottish Parliament to judicial review.[32] Lord Hope clarified that the notion of being directly affected under the Scottish test captured the essence of sufficient interest and need not be only personal.[33] Lord Reed's judgment emphasised the importance of considering the context in assessing interest, including what best serves the purpose of judicial review, and noting that the bar lowers when the misuse or excessive use of power affects the public generally.[34] Lord Reed also contemplated in express terms that too high a standing requirement would undermine the rule of law as it is a central tenet of access to justice.[35] A too narrowly rights-based approach becomes at some point incompatible with the court's supervisory role. The reverse of this principle is also important: too low a test on standing or merits would disrupt the separation of powers between the executive, Parliament and the judiciary. The reasoning in *Axa* assumes all citizens have an interest, if not in good governance, at least in governance within the law. Nonetheless, a tension emerges between legal power and the political power of the government's democratic position. The system tolerates a level of poor administration when the effect is specific, narrow or of very limited interest. Relatedly, in cases where the merits are spurious or far-fetched, public interest standing appears harder to achieve. This division arises in part in deference to the democratic legitimacy of political power.

[31] [2011] UKSC 46, [2012] 1 AC 868.
[32] At issue was the Damages (Asbestos-related Conditions) (Scotland) Act 2009.
[33] *Axa* (n 31) [63].
[34] ibid [170].
[35] ibid.

II. WHERE THE LAW STANDS: *MCCOURT*

These tensions between the competence afforded to public bodies by Parliament versus citizens seeking to challenge their decision-making is thoroughly examined in the 2020 case of *McCourt*.[36] The judgment from Macur LJ and Chamberlain J in a decision declining permission for judicial review summarises the current law on standing. *McCourt* considers both *R (DSD and NBV)* [*"Worboys"*], a judicial review of the Parole Board's decision to release notorious offender John Worboys, and Lord Reed's judgment from *Axa*.[37] Mary McCourt sought a review of the Parole Board's decision to release Ian Simms, who was convicted of the murder of her daughter Helen McCourt in 1989. Simms has never admitted guilt or revealed the location of the victim's remains. The novel administrative law issue examined in *McCourt* was whether a victim of crime or their relative has the standing to seek a judicial review of a Parole Board decision to release an offender.[38] The Divisional Court in *Worboys* (Sir Brian Leveson P, Jay J and Garnham J) proceeded on the basis that they did, although only the standing of interveners and not victims was argued in that claim.[39] In *McCourt,* the court reached a different conclusion.[40] There are four areas of force in their analysis that merit discussion: the assessment of standing, the primacy afforded to rule of law

[36] *McCourt* (n 5).
[37] *R (DSD and NVB) v Parole Board of England and Wales* [2018] EWHC 694 (Admin), [2019] QB 285; *Worboys* was the first judicial review of a *successful* Parole Board application; *Axa* (n 32).
[38] *McCourt* (n 4) [7].
[39] *Worboys* (n 37).
[40] *McCourt* (n 4).

considerations, the evident fusion with merits and finally, the case's implications for other victims of crime in parole decision-making.

The Divisional Court characterise the 'sufficient interest' test of s.31(3) as a 'deliberately open-textured' choice of phrase by Parliament.[41] This approach is reflected in the acceptance of public interest standing when an individual claimant is not more affected by a decision than anyone else. The court also highlighted the notably restrictive interpretation of standing in *Bulger* where the father of James Bulger was not granted standing to review the sentencing of his son's murderers.[42] In criminal cases, the Crown and any defendants can and do challenge judicial decisions. There is thus no need to rely on third parties to uphold the rule of law.[43]

After highlighting standing's inescapable role in vindicating the rule of law, the court asserts that such considerations are fundamental.[44] Following *UNISON*, arguably any procedural element of judicial review is implicated in a rule of law assessment given the primacy this case establishes for the access to justice principle.[45] In *UNISON,* the Supreme Court considered if employment tribunal fees imposed by the Lord Chancellor were unlawful because of their restraining effect on access to justice and held unanimously that the fees did prevent access under both domestic and EU law.[46] Nonetheless, a tension emerges: courts can only ensure public power is exercised within its legal limits if there are effective mechanisms to bring

[41] ibid [31].
[42] *R (Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449 (HC).
[43] *McCourt* (n 4) [34] citing *Bulger* [21] (Rose LJ).
[44] ibid [41].
[45] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869.
[46] ibid [90-98] (Lord Reed).

unlawful exercises before them. This role, interpreting the proper legal limits of public power, in turn gives meaning to the democratic mandate of Parliament who determined those limits.[47] Too restrictive an application of standing rules inhibits access to justice, much like the excessive tribunal fees of *UNISON*. For these reasons, the definition of 'interest' is varied to best meet the needs of the rule of law. It is also the basis for justifying public interest challenges brought by individuals or particular charities and informed organisations. However, for these same reasons, the court expressed considerable reluctance about granting standing in criminal justice matters given the public interest is represented by the Crown in those cases.[48] The Parole Board is unusual. It does not apply legal tests from criminal law and adopts the civil standard of proof in assessing risk to the public under the purvey of the Secretary of State for Justice (who can challenge its decisions). To avoid satellite litigation around the Secretary of State's decision-making and following *Worboys*, the court identified as preferable the grant of standing directly to victims/relatives but only if they have identified an arguable challenge.[49] This hurdle was ultimately not passed in relation to the release of Ian Simms.

Equally significant, Mrs McCourt cannot be granted standing due to her campaigning activities around when offenders are released or, as was argued, her considerable public support and high profile. None of these factors secure standing or are relevant preconditions.[50] This point illustrates a nuanced proposition on what constitutes access to justice. The decision can be taken as

[47] ibid [68] (Lord Reed).
[48] *McCourt* (n 4) [48].
[49] *Worboys* (n 37).
[50] ibid [50].

an express rejection of a citizen's action basis (*actio popularis)*, a model from Roman law where any citizen has the right to bring a legal action to vindicate a public interest, but the justification for standing in public interest cases remains rooted in rule of law considerations. By linking standing tightly to merits, claimants must possess an arguable public law error for the court to correct. *McCourt* reflects how liberalisation on standing tightens scrutiny of merits. As in *Axa*, the court treats standing and merits as fused.[51] Macur and Chamberlain use a two-step process in their judgment but one which illustrates how standing, amenability to review and merits are in practice a tripartite inquiry.

For the amenability of Parole Board decisions, the *McCourt* decision leaves a narrow aperture for such actions in the future.[52] While this aspect is of considerable interest to the victims of serious crimes, it reflects understandable caution about the respective ambits of public law, the Criminal Justice System, sentencing and parole decisions. It would be undesirable to establish through administrative law a quasi-appeal avenue for serious criminal cases. In any event, the role, function and jurisdiction of the Parole Board remains a live political issue and the government has initiated a review due to report in 2021.

Beyond its influence in *McCourt*, *Worboys* is also significant for its analysis of the standing of interveners.[53] A curious example is the denial of standing to Sadiq Kahn as the Mayor of London in that case. This discrete issue raised an intriguing constitutional question: could an elected politician, by virtue of his democratic mandate, intervene in criminal justice matters and if yes, could such an intervention ever be apolitical? The Divisional Court acknowledged as 'obvious' the Mayor's interest in addressing crime in the capital, his statutory remit and the importance of Londoner's confidence in the criminal justice system.[54] These factors were, however, insufficient to secure

[51] *Axa* (n 31).
[52] *McCourt* (n 4).
[53] *Worboys* (n 37).
[54] ibid [105].

standing relative to the matter. The court held these functions as of only general versus *specific* interest in the case. For any bystander and perhaps particularly for the Mayor, parole and criminal justice policy should be reformed through means outside the courtroom. However, the justification lies more convincingly in the fact that the main claimants were victims of Worboys. Therefore, the court was not prevented from performing its review function.

III. NO QUESTION OF STANDING: *MILLER 2*

Standing back even further, something can also be learned from cases where standing was unchallenged. It is now evident from the cases discussed that any judicial assessment of standing is replete with rule of law considerations. Yet the proper role of the judiciary warrants scrutiny in relation to their control of procedural elements of judicial review (does this amount to political power?) and the constitutional principles of the separation of powers and Parliamentary sovereignty (is judicial review capable of transgressing the separation?). These questions are even more apposite when standing is not in issue, as is frequently the case. Mr Blackburn discussed above is a limited precedent for repeatedly granting standing to a single claimant in disparate matters.[55] The question of standing was at no point argued in either *Miller 1* or *Miller 2*.[56] Most recently in the challenge to the lawfulness of the government's proposal to prorogue Parliament, the Supreme Court lucidly and convincingly re-stated the twin constitutional principles of parliamentary sovereignty and accountability.[57] However, that analysis

[55] *Blackburn* (n 15).
[56] *Miller 1* (n 6); *Miller 2* (n 5).
[57] *Miller 2* (n 5) [51].

emerged only after Lord Reed and Lady Hale's judgment disposed of the issue of justiciability. They reached a wholly different conclusion from that of the Divisional Court (who had held that the matter was *political* and therefore non-justiciable).[58] A key argument advanced by the government was that political questions before the judiciary risk disrupting the traditional notion of the separation of powers.[59] The Supreme Court had no issue with the political hue of the decision. As the judiciary has a constitutional role in supervising the executive, any issue before the court, regardless of its political nature, cannot offend the separation *if justiciable*.[60] The reasoning risks circularity as Aileen McHarg has noted (arguing it reduces non-justiciability to a 'tautology') but it reflects a constrained Harlow and Rawlings "red light" view towards transgressions of executive power.[61] The standing rules represent only *legal* power. Any case is capable of political effect, but having explicit grounds of citizen's action standing could channel political power through legal process. The court judges 'the legal limits of the powers conferred on each branch of government' and adjudicates on transgressions.[62] Much of the justification for the current expansion of standing, and amenability, is rooted in this constitutional responsibility.

Yet should Ms Miller's standing have been challenged more closely? Some might consider her success as confirmation of *actio popularis* in this jurisdiction, but that misses the purpose of administrative law. *Miller 2* is

[58] ibid [52].
[59] ibid [29].
[60] ibid [52].
[61] Aileen McHarg, 'The Supreme Court's Prorogation Judgment: Guardian of the constitution or architect of the constitution?' (2020) 24 Edinburgh Law Review 88, 93.
[62] *Miller 2* (n 5) [39].

certainly one case likely to have supported the accusations that judicial review was a legal procedure that risked becoming 'politics by another means' (the Conservative party election manifesto 2019).[63] From one perspective, *Miller 2* is the perfectly conventional and effective operation of standing and the judicial review procedure in the face of *ultra vires* decision-making by the government. If Ms Miller was not granted standing, then who would be to challenge unlawful administrative action? Critical commentators see the litigation as demonstrating ably that judicial review is indeed a legal procedure capable of circumventing politics and Parliament (as Timothy Endicott and others have forcefully argued).[64] Endicott notes perceptively that the court nullified a prorogation Parliament chose not to; in his view, Ms Miller's argument that Parliament should meet as appropriate may not support the Supreme Court's proposition that the law requires this.[65]

It is possible our constitutional order does not demarcate legal and political power so neatly. If true, then any grant of standing may be significant. Laws LJ sitting in the Divisional Court in *Cart* (on the amenability of Upper Tribunal decisions to judicial review) and in his articles argued firmly that statutory text needed the interpretation of the judiciary to give it effect otherwise it was only *opinion*.[66] The same argument could be levelled at the review of *any* amenable power: citizens *must* be able to challenge the

[63] For example, John Finnis charges the court with making 'political' assessments, (n 9) 9.
[64] Timothy Endicott, 'Making constitutional principles into law' (2020) 136 *LQR* 175; also Martin Loughlin, 'The Case of Prorogation' (2019) Policy Exchange <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf> accessed 17 January 2021, 18.
[65] Endicott (n 64) 178.
[66] *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012 [38].

administration's opinion of it and their decisions as a result. If one welcomed a judicial role across blurred legal/political lines with a more formalised citizen's action basis, then the adjudication of more vexed political questions would be required. Lord Sumption argued in his 2019 Reith lectures that law was infringing on the space of politics and sounded the alarm about decisions which he felt were better left exclusively to representative democracy, even if judges were capable of making them.[67] The proper role of victims of serious violent crimes within Parole Board decision-making is probably one such example.[68] The risk lies in judicial declarations of "legality" being used to enforce whatever set of socio-economic norms are currently favoured, or worse, fashionable. This risk is particularly acute when the court is asked to interpret constitutional principles and conventions, including those which have been traditionally upheld by political consensus. Martin Loughlin asks of *Miller 2* if the court has in fact transformed a political practice into constitutional principle and given it unwarranted normative authority.[69] The standing test is a discrete area where the courts have assumed significant discretion; but the exercise of discretion alone does not equate to making policy decisions.

Extending this argument further, too loose a standing test to serve the rule of law risks the court becoming a forum for robustly airing political views and promoting causes. Lady Hale noted the usefulness of interveners to the

[67] Jonathan Sumption, *Trials of the State* (2019 Profile).
[68] Indeed, the Prisoners (Disclosure of Information About Victims) Act 2020 was given Royal Assent in November 2020 following a campaign from Mary McCourt and this law requires Parole Boards to have regard to prisoners who fail to disclose information about their victims in certain serious cases.
[69] Loughlin (n 64) 15.

court's work and suggested that civil liberties NGO Liberty as an intervener provided the 'killer argument' in *Belmarsh*, the landmark case on the incompatibility of indefinite detention under anti-terror laws with Article 5 ECHR.[70] However, this enthusiasm should be qualified. Might the rule of law be critically undermined if a citizen could too easily challenge government policies that concerned them and argue *ad infinitum* based on the resources available due to the cause's popularity, fashion or normative moral value?

CONCLUSION

This essay has defended the current law on standing and highlighted the significance of Macur LJ and Chamberlain J's judgment in *McCourt* and the Supreme Court's in *Miller 2* in relation to this constitutionally significant debate. If standing was liberalised further or a public action basis (equivalent to *actio popularis)* was formalised within the procedural rules, it would risk giving the courts a position to exercise political power. Such a development would be wholly undesirable and conflict with the role of Parliament. Importantly, the current balance is a fine one and any attempt to heighten standing requirements, or restrict access to the courts for judicial review, would weaken the protection of access to justice and the rule of law. Any modification may lead to judges, in turn, loosening their assessment of amenability, justiciability or merits at the permission stage. A key lesson for lawyers, and governments, is to be wary of any overreliance on technical distinctions. It may be wise to heed Lady Hale's warning that the core of any inquiry remains fundamentally about good evidence of recognised individual rights meriting protection and public wrongs requiring correction. Identifying either remains a *legal* question.

[70] Hale (n 9) 107.

THE DIMINISHMENT OF INDIRECT DISCRIMINATION

Hugh Whelan*

ABSTRACT

The concept of 'discrimination' has become unbalanced in the UK courts. Specifically, the courts have exhibited an over-reliance on the concept of 'direct discrimination', thereby diminishing the scope of 'indirect discrimination', which is a more pervasive form of discrimination in society. The essay will contend that this is an unfortunate state of affairs, as it has resulted in unclear and occasionally illogical judgments. This shift has a philosophical basis: the courts' increasing reliance on direct discrimination reflects an attempt to reconcile historical and contemporary accounts of equality by stretching the formalist account of equality to account for a society that has adopted a decidedly substantive approach to equality. As a solution, the essay will propose a reconceptualization of indirect discrimination, drawing upon early ECJ case law, which focusses upon the test of necessity when determining whether an indirectly discriminatory measure is justified in its pursuit of a legitimate aim. The essay will conclude that a test of 'necessity' will clarify the law of indirect discrimination, compelling the courts to utilize the concept in a principled manner, instead of over relying upon the simpler but more restrictive concept of direct discrimination.

I. INTRODUCTION

This essay will argue that the courts have diminished the scope of indirect discrimination to the detriment of legal certainty and substantive protection. A reinvigoration of indirect discrimination is therefore required. To this end, the essay will make three points. First, indirect discrimination is presently misused in the UK courts. Second, indirect discrimination remains a valuable tool for identifying discrimination. Third, a proper application of indirect discrimination, which draws upon the original test of 'necessity' as

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propounded by the ECJ, provides the most effective means of implementing substantive equality.

II. THE JUDICIAL DIMINISHMENT OF INDIRECT DISCRIMINATION

The concept of indirect discrimination can be traced be traced to the US case of *Griggs v Duke Power Co.*, where Burger CJ discussed the capacity of a statute to be 'fair in form, but discriminatory in operation', resulting in a 'disparate impact' between groups.[1] As Baroness Hale explained, this concept provided the opportunity to litigate on 'requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic'.[2] The ECJ and English courts adapted the concept of indirect discrimination in cases, such as *Bilka-Kaufhaus GmbH v Weber von Hartz* and *Hampson v Dept of Education and Science*, respectively.[3] In both cases, the courts developed robust methodologies of justification and legitimacy for determining indirect discrimination. This approach provided a counterpoint to the more rigid doctrine of direct discrimination, allowing the courts to account for more subtle forms of discrimination. Most recently, the distinction between indirect and direct discrimination was statutorily reaffirmed through the Equality Act 2010.

Despite the statutory position, the common law use of indirect discrimination has diminished, while the use of direct discrimination has expanded. This expansion may be observed in *R (E) v Governing Body of JFS*,

[1] 401 U.S. 424 (1971) at 431; later expanded to gender discrimination in *Dothard v Rawlinson* 433 U.S. 321 (1977) at 328-9.
[2] *Chief Constable for West Yorkshire Police v Homer* [2012] UKSC 15 at [17].
[3] C-170/84; [1989] ICR 179.

where Lords Mance and Clarke discussed the 'inherently racial' nature of a directly discriminatory act.[4] As Fredman notes, a court can only make this judgment by analysing the Act's effect.[5] But Section 13(1) Equality Act 2010 states that a finding of direct discrimination has no relation to the Act's effect; what matters is whether an individual was treated worse than others 'because of a protected characteristic.' Instead, the approach of Lords Mance and Clarke to direct discrimination reflects the statutory definition of indirect discrimination, which considers more contextual factors, such as 'particular disadvantage' upon comparison with other groups, along with the question of whether the act is a 'proportionate means of achieving a legitimate aim.'[6] Lords Mance and Clarke's thus conflate the concepts of direct and indirect discrimination within the ambit of direct discrimination.

The expansion of direct discrimination into areas formerly occupied by indirect discrimination can be observed in statute too. For example, the UK's broad interpretation of Article 6(1) Framework Directive 2000/78/EC through Section 13(2) Equality Act 2010 has allowed justifications to be invoked for direct age discrimination. The introduction of 'justification' into direct discrimination erodes a key distinction between direct and indirect discrimination. Lady Hale defended this incursion in the context of age discrimination by reference to two concepts: 'inter-generational fairness' and

[4] *R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2009] UKSC 15 & 1 at [78] & [132].
[5] S. Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) at 42.
[6] Section 19(2), Equality Act 2010.

'dignity'.[7] However, Blackham correctly notes that Lady Hale appears to equate dignity with 'social respect', while ignoring a second meaning of dignity; 'individual autonomy', and specifically, the autonomy of individuals who are subjected to direct discrimination on the basis of age.[8] Lady Hale's explanation has been nonetheless widely followed in the courts.[9] However, the omission of individual autonomy undermines the conceptual basis for allowing direct age discrimination to be justified. This conceptual lacuna, in turn, highlights the risk of transporting the techniques developed within the indirect discrimination doctrine into the analysis of direct discrimination; namely, it diminishes methodological and conceptual rigour.

These judicial and statutory expansions of direct discrimination have created incoherence in the law of discrimination. Fredman describes this phenomenon as a 'blurring of the boundaries',[10] but it is more akin to a take-over. As direct discrimination has expanded, courts have diminished the importance of indirect discrimination. This is perceptible in *Lee v Ashers Baking Company Ltd*, which concerned a baking company's refusal to bake a cake with a message supporting gay marriage, on religious grounds.[11] Lady Hale held that this refusal was not a directly discriminatory act, before turning to the county court judge's conclusion of indirect discrimination, and concluding that it was 'not easy to see how she could have done so'.[12] Discussing this brief treatment, Connolly argues that the Supreme Court demonstrated 'a lack of ambition for discrimination law.'[13] This criticism is dubious: it is possible that the claim for

[7] *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16 at [56]-[57].
[8] A. Blackham, 'Interrogating the "Dignity" Argument for Mandatory Retirement: An Undignified Development?' (2019) 48 *Industrial Law Journal* at 378.
[9] See, e.g. *Prof Ewart v The Chancellor, Master and Scholars of the University of Oxford*: 3324911/2017 [2020] (ET).
[10] Fredman (n 5) at 49.
[11] *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49.
[12] ibid, at [21].
[13] M. Connolly, 'Lee v Ashers Baking and Its Ramifications for Employment Law' (2019) 48 *Industrial Law Journal* at 247.

indirect discrimination would have failed too. However, Connolly is correct to question the reason indirect discrimination was dismissed as irrelevant, because the case implicated interested parties with protected characteristics, such as Northern Ireland's LGBTQ community, who had suffered detriment. It is therefore at least arguable that Section 13 Equality Act 2010 was engaged, through the interested parties' inability to procure the baker's service. Lady Hale's approach appears to be a tacit affirmation of the diminishing role of indirect discrimination in the courts. But the outcome demonstrates that a focus on direct discrimination can lead to an incomplete analysis and a failure to consider all viable legal avenues of redress.

III. THE CONTINUING VALUE OF INDIRECT DISCRIMINATION

The concept of indirect discrimination is important because the doctrine addresses a conceptually distinct type of injustice. Specifically, indirect discrimination provides a unique scope for contextualism when considering complex discrimination claims. The value of indirect discrimination is perceptible in cases, such as *London Underground Ltd v Edwards (No 2)*, where the tribunal took account of the fact that women were ten times more likely to be single parents than men, when determining the presence of indirect discrimination in relation to early starting times.[14] Similarly, in *R (Seymour-Smith) v Secretary of State for Employment*, the House of Lords adopted a flexible account of disparate impact, acknowledging that 'a lesser but persistent and relatively constant disparity' between men and women could exacerbate the disparate impact of an act over a prolonged passage of time.[15] These cases

[14] [1997] IRLR 157.
[15] [2000] UKHL 12 at [61].

demonstrate that a proper utilisation of indirect discrimination allows courts to look beyond matters of strict causation, without artificially extending the concept of directness in discrimination.

The useful flexibility of indirect discrimination also extends to providing different substantive outcomes. The different judgments in *James v Eastleigh Borough Council* illustrate this point.[16] The case concerned a swimming pool which permitted a discount for individuals of 'pensionable age', that age being different for men and women. Speaking for the majority, Lord Goff introduced the formalist 'but for' test, concluding that direct discrimination on the basis of sex had occurred through the requirement that the complainant pay according to 'pensionable age'.[17] However, as Lord Griffiths and Lord Lowry noted in their dissents, the pensionable age difference itself could be based upon broader factors, such as discrepancies in economic well-being between the sexes.[18] Their analyses reveal the potential benefit of an indirect discrimination approach for parties, as it provides an opportunity to explain their actions in a more nuanced manner.

The attention to context and motivation that is inherent in the indirect discrimination approach also benefits employers. Specifically, Section 19(2)(d) Equality Act 2010 allows employers to contend that their indirectly discriminatory act was a 'proportionate means of achieving a legitimate aim.' Earlier, the ECJ provided a similar test in *Bilka-Kaufhaus* through the requirement that the indirectly discriminatory act corresponded to a 'real need on the part of the undertaking, [which is] appropriate with a view to achieving

[16] [1990] 2 AC 751.
[17] ibid 774.
[18] ibid 767, 781.

the objectives pursued and are necessary to that end.'[19] The hypothetical benefit of this approach for employers can be observed in *Amnesty International v Ahmed*, where the Employment Appeal Tribunal held that the employer's decision to revoke a job offer in Sudan to a North Sudanese applicant on account of her race amounted to direct discrimination.[20] Crucially, the tribunal accepted that the employer had a 'benign motive' for revoking the employment offer, but noted the employer's failure to submit a defence concerning this occupational requirement through the lens of indirect discrimination.[21] Thus, the tribunal could not engage with the issue on the facts. The implied suggestion that these submissions would have been viewed sympathetically demonstrates the scope for indirect discrimination to better protect the employer and more accurately account for the complexity of the contemporary workforce.

IV. USING INDIRECT DISCRIMINATION FOR SUBSTANTIVE EQUALITY

Judicial reticence regarding indirect discrimination broadly accords with the governing theoretical framework of discrimination law; namely, the formal conception of equality. This notion is oriented upon principles of individualism and consistency, which are incompatible with the idea of a 'creditor or a debtor race'.[22] Formal equality is exercised in the majority of the UK, EU, and US case law. Yet it can produce perverse results. Some results appear to contradict the overall purposes of discrimination law. In *Grant v South West Trains*, for example, the ECJ rejected the submission that a lesbian

[19] C-170/84.
[20] [2009] IRLR 884.
[21] ibid at [33].
[22] *Adarand Constructors, Inc. v Peña* 515 U.S. 200 (1995), per Scalia J at [79].

employee had been subjected to discrimination when her employer failed to provide travel concessions for her partner, notwithstanding company policy to provide heterosexual partners with free tickets, reasoning that a comparator of a gay male employee would be treated in the same manner.[23]

Even in the cases where an apparently equitable solution is reached, the means of reaching it are frequently dubious, as in the US case, *Bostock v Clayton County*.[24] This case concerned the question of whether a man whose employment had been terminated on the basis of his homosexuality had suffered direct discrimination on the basis of sex, as defined under Title VII of the Civil Rights Act 1964. Gorsuch J, giving the majority opinion, concluded that this termination was a discriminatory act, reasoning that the relevant characteristic was attraction to men, and a heterosexual woman would not have had her employment terminated for sharing this characteristic of attraction to men.[25] Gorsuch J applied a decidedly textualist interpretation of the relevant statute, but as the approach of the ECJ in *Grant v South West Trains* highlights, an arguably more accurate comparator in this scenario would have been a homosexual woman, who would have been fired too and thus, treated equally to Mr Bostock. Indeed, in his dissenting opinion, Kavanaugh J reaches a similar conclusion, stating: 'Bostock and Zarda were fired because they were gay, not because they were men.'[26] Despite applying similar analytical rubrics, the divergence between the judgments in *Bostock* and in *Grant v South West Trains* demonstrates the risk of an over-reliance on the formalism of direct discrimination, which allows different judges to arrive at opposite conclusions

[23] C-249/96.
[24] *Bostock v Clayton County* 140 S. Ct. 1731 (2020).
[25]ibid, per Gorsuch J at 9-10.
[26] ibid, per Kavanaugh J at 131.

concerning the same discriminatory acts, depending upon what characteristics each judge identifies the hypothetical comparator.

Indirect discrimination partially offsets the risks of judicial subjectivity because the doctrine relies on a substantive version of equality, as opposed to a formalist conception of equality. The substantive approach recognises the inherently subjective nature of concepts like merit, while allowing for broader societal factors to impact equality, and therefore enables judges to openly engage with these crucial considerations when determining whether discrimination has occurred.[27] The broad scope of indirect discrimination does present the risk of misuse, which may partially explain the present judicial reticence regarding the concept. But this can be ameliorated by applying a stricter process for the courts to follow when determining whether indirect discrimination has occurred. Such a procedure was applied in *Bilka-Kaufhaus GmbH v Weber von Hartz*, where the ECJ held that an indirectly discriminatory measure will only be proportionate if it is 'necessary' to the achievement of a legitimate aim.[28] As Lane and Ingleby observe, the UK courts have transformed this necessity test into a broader reasonableness test.[29] This alteration is significant. In *Azmi v Kirklees Metropolitan Borough Council*, a school's prohibition of a teacher wearing a veil was upheld as reasonable, even though the school had failed to consider less extreme measures, and thus potentially not necessary.[30] Indirect discrimination, using a 'necessity' test, would allow the courts to cultivate a methodologically rigorous approach to substantive equality.

V. CONCLUSION

Independent discrimination is under threat as an independent doctrine. This development is unfortunate because indirect discrimination provides a

[27] S. Fredman, 'Reversing Discrimination' (1997) 113 *Law Quarterly Review* 575-600.
[28] C-170/84.
[29] J.A. Lane and R. Ingleby, 'Indirect Discrimination, Justification and Proportionality: Are UK Claimants at a Disadvantage?' (2018) 47 *Industrial Law Journal* at 532.
[30] [2007] IRLR 434 (EAT).

unique tool to address the complexities of discrimination. A judicial reinvigoration of indirect discrimination under the 'necessity' test would clarify the scope of direct discrimination while also providing the most effective means of implementing substantive equality.

THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO THE ISSUE OF HONOUR CRIMES IN THE UNITED KINGDOM

Pujita Saini

In defining 'honour', many theorists emphasise the power of the parallel concept of 'shame', frameworks of which operate to control, oppress and direct individuals of a particular community.[1] Thus, honour is dynamically interrelated to the behaviour expected from these individuals and transgression of such social norms and conduct is said to bring shame.[2] The Association of Chief Police Officers of England, Wales and Northern Ireland (ACPO) in 2010 defined Honour Crime or Honour-Based Violence as 'a crime or incident which has or may be committed to protect or defend the honour of the family or community.'[3] It assimilates a range of coercive behaviours including death threats, financial control, emotional abuse, killings, forced marriages, domestic violence, isolation, oppression of women, all ironically, in the name of 'honour'[4] which is usually seen as residing in bodies of women.[5] Consequently, upholding of honour has different and unequal implications[6] for

[1]Unni Wikan, *In Honor of Fadime: Murder and Shame* (University of Chicago Press, 2015) 59.
[2]Lynn Welchman and Sara Hossain, *'Honour': Crimes, Paradigms, and Violence Against Women* (Zed Books ltd, 2005) 78.
[3]Cyril Eshareturi, Angela Morgan and Chris Lyne, 'Proposed reforms to UK policy on honour-based violence: the big societal divide?' [2014] J.A.M.T 370.
[4]James Brandon, & Salam Hafez, *Crimes of the community: Honour-based violence in the UK. London: Centre for Social Cohesion* (The Cromwell Press, 2008) 37.
[5]Anand Kirti et al., 'The face of honour based crimes: Global concerns and solutions' [2011] I.J.C.J.S 345.
[6]Rupa Reddy, 'Gender, Culture and the Law: Approaches to 'Honour Crimes' in the UK' [2008] F.L.S 307.

men and women as 'honour' of a man is generally underpinned by policing female sexuality and behaviour to ensure that women do not bring shame to their family or community.[7]

Women's oppression as a repercussion of these honour systems varies with their ethnicity, culture, religion and their family's socio-economic status.[8] Furthermore, gender role expectations take different forms, depending on the extremely patriarchal nature of the communities on the one hand to the comparatively egalitarian on another.[9] Due to this disparity, the majority of victims of such crimes are young women while their perpetrators are most often their own male blood relatives or in-laws.[10] Honour crime came to light in the UK with the much publicised case of *R v Naz*[11] in 1999, when a nineteen-year-old pregnant girl was strangled to death by her own mother and brother for refusing to stay in a forced marriage to her cousin.[12] Rukhsana wanted to divorce her husband, whom she had only met twice since her arranged marriage to him at the age of fifteen. She allegedly disgraced her family by having an extra-marital affair with a man she loved and was

[7]Baker, Nancy V., Peter R. Gregware, and Margery A. Cassidy, 'Family killing fields: Honor rationales in the murder of women' [1999] V.A.W 168.
[8]Cyril Eshareturi, Angela Morgan and Chris Lyne, 'Proposed reforms to UK policy on honour-based violence: the big societal divide?' [2014] J.A.M.T 371.
[9]Lynn Welchman and Sara Hossain, *'Honour': Crimes, Paradigms, and Violence Against Women* (Zed Books ltd, 2005) 111.
[10]Aisha K. Gill, C. Strange, and K. Roberts, *'Honour' Killing and Violence: Theory, Policy and Practice* (Springer, 2014) 3.
[11] *R v Naz* [2000] EWCA Crim 24.
[12] Kate Watson Smith, 'Mother murdered pregnant daughter' (26 May 1999) <https://www.independent.co.uk/news/mother-murdered-pregnant-daughter-1095933.htm> accessed 12th April 2019.

pregnant with his child.[13] The so-called 'dishonourable acts' drastically vary and include factors such as defying parental authority, dressing or acting western, sexual independence or having relationships before marriage,[14] albeit, this list is not exhaustive. Generally, it is argued that such crimes are unrelated to any specific religion but are analogous to cultures that stress the importance of such practices to uphold patriarchal ideologies.

Within the multicultural context of the UK, the issue of honour crimes or HBV has commanded increased political and media attention.[15] Consequently, the issue at hand is now recognised as one of common occurrence within a variety of ethnic minorities and different communities in the UK.[16] Globally, around 5000 individuals are said to fall prey to this vicious crime each year[17] with about twelve deaths in the United Kingdom annually.[18] The Crown Prosecution Service (CPS) has recorded more than

[13] ibid.

[14] Centre for Social Cohesion, *Crimes of the Community Honour-based violence in the UK* (2008) 27 – 35 <http://www.civitas.org.uk/pdf/CrimesOfTheCommunity.pdf> accessed 12th April 2019.

[15] Aisha .K. Gill, C. Strange and K. Roberts, '*Honour' Killing and Violence: Theory, Policy and Practice* (Palgrave MacMillan: Hampshire, 2014) 1.

[16] Rupa Reddy, 'Gender, Culture and the Law: Approaches to 'Honour Crimes' in the UK' [2008] F.L.S 306.

[17] UNICEF Innocenti Research Centre, *A study on violence against girls* (March, 2009) < https://www.unicef-irc.org/publications/pdf/violence_girls_eng.pdf> accessed 12th April 2019.

[18] Her Majesty's Inspectorate of Constabulary*, The depths of dishonour: Hidden voices and shameful crimes. An inspection of the police response to honour-based violence, forced marriage and female genital mutilation* (2015) < https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/the-depths-of-dishonour.pdf> accessed 13th April 2019.

11,000 cases of honour crimes from 2010 to 2014.[19] However, there is significant evidence that a majority of victims do not report such offences to the police[20] which can be due to a variety of reasons such as victims being financially or emotionally dependent on perpetrators or fear of shame and threats from their family or community. Therefore, it is safe to infer that the annual number of these victims in England and Wales is much higher. HBV or honour crime is not recognised as a separate crime in itself in the UK. Consequently, many cases are flagged under different legislations such as assault, battery, murder, sexual offences, threats to kill and harassment, among others. It is estimated that in 2012 alone, over one-fifth of the UK's police forces were unsuccessful in recording data on honour crimes.[21] The CPS report of 2014-2015 indicates that 216 honour-based violence complaints were referred to the CPS from the police, out of which only 91 (less than 50%) resulted in a conviction.[22]

The UK government also encapsulates evident discomfort in intervention, guised under the concept of 'multicultural sensitivity.'[23] The fear

[19]ibid.

[20] Home Office and Ministry of Justice, *Official statistics an overview of sexual offending in England and* Wales (2013) <https://www.gov.uk/government/statistics/an-overview-of-sexual-offending-in-england-and-wales> accessed 13th April 2019.

[21] IKWRO, *Police failing to record Honour Based Violence* (2014) <http://ikwro.org.uk/2014/02/failing-honour-violence/> accessed 13th April 2019.

[22] Crown Prosecution Service, *Violence Against Women and Girls Crime Report* (2015–2016) <http:// www.cps.gov.uk/publications/docs/cps_vawg_report_2016.pdf> 61.

[23] Cyril Eshareturi, Angela Morgan, and Chris Lyne, 'Proposed reforms to UK policy on honour-based violence: the big societal divide?' [2014] *J.A.M.T* 370.

of being seen as racially discriminatory is often used as a mitigating factor by the government even if a citizen's basic human rights are in question.[24] This idea of respecting the values and traditions of ethnic minorities subsequently contributes to the perpetuation of HBV in the UK. Furthermore, international human rights institutions use the same pretext for non-intervention, leading to the exclusion of honour crimes from their agendas for action.[25] This leaves no scope for legislative reform as it renders HBV outside the framework of Human Rights violations.[26] Article 4(c) of the Declaration on the Elimination of Violence Against Women insisted that states must 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of Violence against Women, whether those acts are perpetrated by the state or by private persons.'[27] The UK government's failure to take measures to protect women who constitute a majority of victims of honour crime is thus a violation of their human rights.[28] Furthermore, the state being responsible for private acts, it is prudent for the government to view the issue at hand as a national one as opposed to cultural.

The current strategy adopted by the UK government to address the issue of honour crimes is to deal with it within the context of domestic

[24] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001) 20.
[25] Savitri Goonesekere, 'Human rights as a foundation for family law reform' [2000*] I.J.C.R* 97.
[26] ibid.
[27] The Declaration on the Elimination of Violence Against Women [2008] Article 4(c).
[28] Crown Prosecution Service, *Honour Based Violenve and Forced Marriage* <https://www.cps.gov.uk/publication/honour-based-violence-and-forced-marriage> accessed 13th April 2019.

violence policy framework.[29] The introduction of the Domestic Violence and Crime Victims Act of 2004[30] exhibits the blanket criminalisation of separate crimes. The dimensions of these individual crimes vary to a great extent in nature. The integration of honour crimes in the wider policy framework of domestic violence trivialises the issue's seriousness. Although it can be argued that there is substantial overlap between domestic violence and violence perpetrated in the name of 'honour', HBV should not be categorised under the umbrella of domestic violence as it involves multiple perpetrators that at times extend beyond 'domestic' context of interpersonal violence.[31] Domestic violence does not reflect the true nature and forms of honour crimes as it involves a premeditated act designed to restore honour that operates within the framework of collective family and community structures.[32] Academics argue that this amalgamation of tackling HBV under a wider framework of domestic violence would aid the provision of services within the governmental policies[33] and reduce duplication of work and unnecessary diversion of staff.[34] However, this might prove to be counterproductive as it may lead to HBV

[29] House of Commons Home Affairs Committee Report, *Domestic violence, forced marriage and "honour"-based violence*. Sixth Report of Session 2007–08, Vol. 1 and 2. (London: The Stationery Office, 2008).
[30] Domestic Violence and Crime Victims Act 2004.
[31] Mohammad Mazher Idriss, 'Sentencing Guidelines for HBV and Honour Killings' [2015] J.C.L 8.
[32] Aisha Gill, 'Honor Killings and the Quest for Justice in Black and Minority Ethnic Communities in the United Kingdom' C.J.P.R [2009] 478.
[33] Sundari Anitha, Aisha Gill, 'Coercion, Consent and the Forced Marriage Debate in the UK' [2009] F.L.S 181
[34] Cyril Eshareturi, Angela Morgan and Chris Lyne, 'Proposed reforms to UK policy on honour-based violence: the big societal divide?' [2014] J.A.M.T 375.

cases being lost and overlooked. This is because individuals who are trained to tackle domestic violence cases might not be well-equipped to handle HBV and truly assess the risk to which a victim is exposed in such cases. Hence, it seems more practical and viable to target the issue of honour crimes independently as it does not fit under the government's definition of domestic violence.

The response of the police towards the issue of honour crime in the UK has mostly been passive. This matter presents a challenge for police officers both in terms of knowledge and judgement. The publication of Lawrence Inquiry Report in 1999 implied that the investigation of honour crimes should be with the same vigour with no scope for multicultural sensitivity, irrespective of victim's race, culture or religion.[35] The inadequacy of the police response is certainly reflected in the way the case *R v Mahmod Babakir Mahmod* [36] was handled. Banaz Mahmod was only twenty when she was raped and murdered by her cousins. Her body was subsequently buried in a suitcase.[37] It was later discovered that her murder was planned by her father and uncle.[38] Her 'crime' was her decision to walk out of her forced 'arranged' marriage to be with someone she loved. Banaz was atrociously let down by the police, who in the weeks and the months before her death failed to take her seriously when she made repeated attempts to seek help and even provided them with a list of people she thought would harm her.[39] In fact, the police

[35] Lawrence Inquiry Report, *The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson of Cluny* (London: Stationary Office, 1999).
[36] *R v Mahmod Babakir Mahmod* [2009] ECWA Crim 775.
[37] ibid.
[38] ibid.
[39] Nick Britten, 'Police failed to heed pleas from honour victim' (2nd April 2008).

considered charging Banaz with criminal damage as she had to break a window once to escape from her father, who allegedly tried to kill her.[40] The Independent Police Complaints Commission in 2008 criticised 'delays in investigations, poor supervision, a lack of understanding and insensitivity' in the handling of her case.[41] Banaz was a child bride. The UK laws allow sixteen and seventeen year olds to get married with parental consent.[42] Activists often construe this consent as coercion and a global partnership of thousands of organisations are seeking to make marriage of young girls under the age of eighteen illegal.[43] Another case that brings to light the scanty response of police is the case of Tulay Goren who was murdered at the hands of her father for falling in love with a man older than her.[44] Tulay's murder verdict followed a police investigation which saw detectives travel to her native country, Kurdistan, to 'learn' about honour killings.[45] Turkish

<https://www.telegraph.co.uk/news/uknews/1583629/Police-failed-to-heed-pleas-from-honour-victim.html> accessed 16th April 2019.

[40] ibid.

[41] ibid.

[42] Imran Ramzan, 'Girls not Brides calls for ban on child marriages in Britain'(7 July 2019) < https://www.thetimes.co.uk/article/girls-not-brides-calls-for-ban-on-child-marriages-in-britain-fq0nvfcqd> accessed 29th December 2020.

[43] ibid.

[44] Karen McVeigh, 'Tulay Goren's father given life sentence for 'honour killing' (17 December 2009) < https://www.theguardian.com/uk/2009/dec/17/tulay-goren-father-honour-killing> accessed 16th April 2019.

[45] John Bingham, 'Honour killing: father convicted of murder of Tulay Goren' (17 December 2009) < https://www.telegraph.co.uk/news/uknews/crime/6832862/Honour-killing-father-convicted-of-murder-of-Tulay-Goren.html>accesed 21st April 2019.

psychiatrists were brought to British courts for the first time to give evidence on the issue as expert witnesses.[46]

These infamous cases illustrate the complete lack of awareness and how the UK police have been tenderfeet to the issue of honour crimes. A review carried out by HMIC in 2015 into the effectiveness of police responses to honour crimes outlined that out of forty-three police forces across England and Wales, only three are equipped to deal with honour crimes.[47]Although it has been more than a decade since the Banaz and Tulay cases, this review affirms the state's reluctance to combat the contentious issue of honour crime. In line with this disinclination, the ACPO (2010) has advocated education for police services members to effectively combat the issue at hand to ensure that no victim should be lost through actions or omissions of the police force.[48] The strategy by ACPO also emphasised the importance of understanding the 'one-chance rule', which rightfully suggests that the window that police officers have with an individual case of honour crime is very bleak.[49] The 'one' opportunity can be lost based on how the officer interacts with the victim, with this 'one' interaction being the difference between a life lost and a life saved.[50] Hence, the education of the police force in this regard is of utmost

[46] ibid.
[47]Her Majesty's Inspectorate of Constabulary*, The depths of dishonour: Hidden voices and shameful crimes. An inspection of the police response to honour-based violence, forced marriage and female genital mutilation* (2015) < https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/the-depths-of-dishonour.pd> accessed 21st April 2019.
[48] Association of Chief Police Officers of England, Wales and Northern Ireland, *Honour based violence strategy* (2010).
[49] ibid.
[50] ibid.

importance. Another issue that needs to be dealt with is the misconstrued notion of multicultural sensitivity as a consequence of which the police have often led to the construction of honour crime as a neutral aspect of immigrant culture.[51] Therefore, oversensitivity to culture should not override peace-keeping.

Judicial sensitivity for cultural criteria in deciding cases of honour crimes often leads to miscarriages of justice. This is because judges in deciding cases concerning honour killings have often considered cultural defence in assessing provocation, which has resulted in lenient sentences. These defences have been given relevance when the defendant attempted to plead guilty to manslaughter instead of murder by reason of provocation. Such was the case in *R v Shabir Hussain*,[52] in which Shabir killed his sister-in-law by running her over with his car repeatedly until she died. Although he was initially convicted of murder, the prosecution at the retrial accepted his plea of guilty of manslaughter, and during his sentencing, the judge observed that 'something blew up in your head that caused you a complete and sudden loss of self-control.' Moreover, the judge's preceding statement observed that this 'would be deeply offensive to someone with your background and your religious beliefs.'[53] As a result, a reduced sentence was imposed due to the 'mitigating factors'[54] accepted by the judge. This was mirrored in the case of *R*

[51] Cyril Eshareturi, Angela Morgan and Chris Lyne, 'Proposed reforms to UK policy on honour-based violence: the big societal divide?' [2014] J.A.M.T 378.
[52] *R v Shabir Hussain* [1997] EWCA Crim 24.
[53] Rupa Reddy, 'Gender, Culture and the Law: Approaches to 'Honour Crimes' in the UK' [2008] F.L.S 314.
[54] ibid.

v Faqir Mohammed[55], wherein the defendant killed his daughter after finding a man in her bedroom. He tried pleading the defence of provocation on the basis that the thought of his daughter having sexual relations before marriage provoked him to the extent that he lost his self-control and stabbed her nineteen times. At the original trial, the judge directed the jury to take into account the defendant's 'cultural and religious beliefs on sex before marriage, especially with regard to daughters.'[56] However, the jury rightfully rejected this and found him guilty of murder. The case of *R v Abdulla M. Younes*,[57] in which a father murdered his daughter, also addresses the judicial discourse on cultural clash and fuelling such patriarchal norms in ethnic minorities. In this particular case, the judge while sentencing made a remark stating, 'a tragic story arising out of, to quote defence counsel, irreconcilable cultural difficulties between traditional Kurdish values and the values of Western society.'[58] Almost all the defendants in all cases akin to the above mentioned offered a cultural defence stating that the victim brought shame upon the family and thus, justified the killing to restore the honour imposed by culture and tradition.

Throughout the 1990s, judges in the UK accepted such defences and imposed reduced sentences. This lenience came to be perceived as an incentive for patriarchal communities to continue to commit such crimes in the name of honour. Moreover, it fuels the policing of female family members by male relatives as these rulings suggest that men involved had the right to

[55] *R v Faqir Mohammed* [2005] EWCA Crim 1880.
[56] Rupa Reddy, 'Gender, Culture and the Law: Approaches to 'Honour Crimes' in the UK' [2008] F.L.S 315.
[57] *R v. Abdulla M. Younes* [2003] Crim LR.
[58] ibid.

punish, control and even kill female relatives to moderate their behaviour.[59] However, some recent cases instantiate positive changes in judicial attitudes towards honour killings. In *R v Ibrahim Iqbal*[60], the President of the Queen's Bench Division, Sir John Thomas, stated that the sentencing judge had acted properly in imposing a lengthy sentence on the two defendants, and that 'this kind of honour killing needed to be marked by a severe sentence.'[61] He backed this up by further saying, 'honour killings cannot be tolerated in this society and must be marked by severe deterrent sentences.'[62] In another case[63] the Court of Appeal stated that the notion of 'honour' in the context of honour crimes has come to be regarded as 'sordid criminal behaviour' and also 'arson, domestic violence and potential revenge likely to result in abduction or death are criminal acts which will be treated as such.'[64] These cases indeed exemplify how the prosecuting authorities are moving towards disregarding cultural defences and actively seeking to bring perpetrators of honour crimes to face full rigour of the English criminal law like any other criminal for committing murder and bring them to justice for their crimes.

The parliament in response to the increased attention to honour-based crimes criminalised breaches of Forced Marriage Protection Orders (FMPOs) which are issued under the Forced Marriage (Civil Protection) Act 2007.[65] This change was implemented by The Anti-Social Behaviour, Crime and

[59] Crown Prosecution Service, *Forced marriage and honor crimes pilot study in the UK* (London, 2007).
[60] *R v Ibrahim Iqbal* [2011] EWCA Crim 3244.
[61] ibid 23.
[62] ibid.
[63] *AM v Local Authority, The Children's Guardian, B-M (Children*) [2009] 2 FLR 20.
[64] ibid 117-119.
[65] Forced Marriage (Civil Protection) Act 2007.

Policing Act 2014.[66] To force a person to get married without their consent was also made a criminal offence under this act. However, this relatively recent initiative caters to only one subset of the distinct legal category of honour-based violence: forced marriages. Even though forced marriages were criminalised in 2014, sentencing judges are left on the fence when deciding such cases as no sentencing guidelines are available.[67] These guidelines are important because through the development of these judgements and the reasons underlying the choice of sentence shapes the sentencing law to provide clarity and an overall system of balance.[68]

O'Brien eloquently summed up that, 'multi-cultural sensitivity is no excuse for moral blindness.'[69] To conclude, it is safe to recapitulate that to deal with the fledging issue of honour crimes, it is essential to dissociate it from culture or religion and regard it as a human rights issue that requires serious policy intervention. It is a matter that should be perceived as a distinct legal category instead of considering it under the government's blanket initiative of tackling it through the subsets of domestic violence and forced marriages which reflect only a subspace of honour crimes. Furthermore, it is evident that currently the authorities starting from the police to the judiciary are novices to the issue at hand, heavily influenced by the philosophy of multiculturalism, therefore, devaluing life over misplaced cultural competency. The Criminal Justice System has been ill-equipped to address the issue of honour crimes over the past decade. Nevertheless, it can be said that the Criminal Justice System is circumspectly proceeding towards reform with

[66] The Anti-Social Behaviour, Crime and Policing Act 2014, s.120.
[67] Mohammad Mazher Idriss, 'Sentencing Guidelines for HBV and Honour Killings' [2015] J.C.L 2.
[68] Ralph Henham, 'Sentencing Policy and the Role of the Court of Appeal' [1995] H.J.C.J 218.
[69] Home Office Communication Directorate, *A choice by right: The report of the working group on forced marriage* (London, 1999).

slow but gradual initiatives such as education of police forces, introduction of specially trained prosecutors, less receptivity of courts to cultural defences and introduction of strong legal measures.

INNOVATION OUTPACING LEGISLATION - ARTIST COPYRIGHT PROTECTIONS IN RELATION TO RADIO, RECORD LABELS AND DSP'S IN THE U.S

Brooke Anderson*

ABSTRACT

The digitisation of music transformed the power dynamics of the entire industry, shifting power from major labels to tech companies and artists themselves. However, U.S Copyright Law lags in its ability to protect artist rights in modern music deals. The following Article will submit that radio, major labels and digital service providers (DSPs) maintain entrenched power which is leveraged to obscure the value of artists' copyrights. Section I will provide a brief overview of the development of the music industry, its unlawful induction to online distribution and the copyright law that governs music in the U.S. In Section II, radio's historical significance in the industry is considered, and its lobbying power and share of revenue in the overall industry is examined. It is submitted that radio's failure to pay royalties to the sound recording copyright holders is unjustifiable in the digital era in light of the comparable services. Section III asks why, when the cost of developing an artist has fallen so much in the digital era, do major labels continue to retain control over their artists' copyrights and fail to offer more equitable deal structures to them? Section V analyses the newest power in the industry, the digital service providers. The issue of large conglomerates such as YouTube exploiting the safe harbour provisions under the Digital Millennium Copyright Act 1998 (DMCA) is addressed. Moreover, it examines the unequal split DSP's such as Spotify pay out to sound recording rights holders and musical composition rights holders, submitting that this is a result of DSPs taking advantage of the lack of regulation in this area.

INTRODUCTION

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U.S Copyright law is at the core of the music industry. The right to control the use and distribution of one's musical work broadens an artist's revenue stream beyond live performance, widening the potential audience and enabling global stardom. However, as technology has continuously disrupted the industry, the law has struggled to keep up at the expense of the artists it is meant to protect. Outdated copyright laws allow the entrenched powers of radio, major labels, and digital service providers to obscure the value of artists' copyrights. It is submitted that the digital distribution of music ultimately represents the democratisation of opportunities and exposure that have previously been safeguarded by the major label system yet artists are disenfranchised and still unable to leverage themselves against the global corporations that rely on their work. U.S Copyright Law must adapt more quickly to protect artists in an industry with an otherwise bright future.

I. INDUSTRY OVERVIEW

Every country has its own music laws. However none are as influential as those in the U.S. The U.S accounts for nearly 39% of the global industry,[1] so understanding the U.S music industry offers an understanding of the industry at large. In its infancy, the record industry began with the promotion of music manufactured on Thomas Edison's patented 'Edison Records Wax cylinder' recording device in the 1870's.[2] While Copyright protection for written work dates back to 1710 in the Statute of Anne[3] and

[1] International Federation of the Phonographic Industry, 'Global Music Report: The Industry in 2019' (2020) <https://www.ifpi.org/wp-content/uploads/2020/07/Global_Music_Report-the_Industry_in_2019-en.pdf>.
[2] Michael D. Smith, *Streaming Sharing Stealing: Big Data and the Future of Entertainment* (The MIT Press 2016) 19.
[3] 8 Ann c 21.

1790 in US statute,[4] artistic and musical works were given protection globally by the Berne Convention of 1886[5] and in the U.S under the Copyright Protection Act of 1909.[6] By the turn of the century, both recorded music and terrestrial radio were steadily emerging.[7]

The massive growth of the music industry throughout the 20th century is characterised by its key events; reconfigurations and consolidations of labels, an emergence of many new listening devices, a cultural movement away from singles to concept albums, and a temporary loss of control from the major labels to the independents during the underestimated rise of the Rock'n'Roll era.[8] Towards the end of the century, the industry was at its most profitable and albums were selling at their highest volume in history. By the end of 1995, the International Phonographic Industry reported that "annual sales of pre-recorded music reached an all-time high with sales of 3.8 billion units valued at almost $40 Billion USD", doubling the real value of the global music market since 1985.[9] Shortly thereafter, internet piracy would cause sales to plummet to what many believed to be irrecoverable levels.[10]

Piracy played an integral role in the transition to online distribution. Two major cases of copyright infringement litigation resulted in the major labels ultimately losing control of the music industry to tech companies. In the context of intellectual property, piracy refers to the unauthorised distribution

[4] The Copyright Act of 1790.
[5] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886.
[6] The Copyright Protection Act of 1909.
[7] Smith (n 2).
[8] ibid 20-22.
[9] International Federation of the Phonographic Industry, *Investing in Music: How Music Companies Discover, Nurture and Promote Talent* (2014) 7-9.
[10] Jonathan Band, 'The Copyright Paradox: Fighting Content Piracy in the Digital Era' (2001) <https://www.brookings.edu/articles/the-copyright-paradox-fighting-content-piracy-in-the-digital-era/>.

of copyrighted material.[11] Piracy is distinct from the practice of bootlegging, which refers to unauthorised recording and distribution, such as the taping of a live concert or the burning of a stolen unreleased CD. Bootlegging effectively adds to the product variety by bringing a product into existence at a high fixed cost to the bootlegger which is usually of lower sound quality and sold at a similar price of the official record.[12] Meanwhile piracy simply illegally sells copies.

Wide-spread digital piracy came about following the publication of MP3 encoding technology as a freely distributable 'shareware' available on MP3.com.[13] Throughout the 1990's, pirated MP3's were becoming commonplace at colleges across the U.S. and repudiation of the existing copyright infringement laws became a generation-wide social norm. In 1999, Shawn Fanning developed a peer-to-peer file sharing programme called Napster that changed the music industry forever.[14] Before Napster found wide stream adoption, the major labels had everything in their favour; International market presence, streamlined distribution network and fixed pricing power. However, by November 2000, 1.7 billion songs had been shared over Napster and sales were declining by over half a billion U.S. dollars.[15] This prompted the music industry to try to defeat the MP3 with two major lawsuits, one targeted at the devices MP3's were played on, and the other at the platform that allowed them to be shared.

First, the Recording Industry Association of America (RIAA), which represents the interests of major and independent record labels sued the device

[11] Jonathan Stern, *MP3: The Meaning of A Format* (Duke University Press 2012) 187.
[12] Alireza Jay Naghavi, 'Bootlegging in the Music Industry: A Note' (2001) 2 European Journal of Law and Economics 57-72.
[13] Smith (n 2) 62.
[14] Seung-Hyun Hong, 'Measuring the Effect of Napster on Recorded Music Sales: Difference-in-Differences Estimates under Compositional Changes' (2013) 28(2) Journal of Applied Econometrics 297-324.
[15] Allen Bargfrede, *Music Law in The Digital Age* (2nd edition, Berklee Press 2017) 8.

makers. In *RIAA v Diamond Multimedia Systems*[16] the RIAA sought an injunction prohibiting the sale of Diamonds' portable digital audio devices. Secondly, the RIAA filed a lawsuit against Fanning and Napster for contributory copyright infringement that would go to the Ninth Circuit Court of Appeals as *A&M Records v Napster*[17] and become one of the most important rulings on copyright and digital distribution of music to date.[18]

The fate of the CD player was decided in the outcome of *RIAA v Diamond Multimedia Systems*. If the RIAA lost, consumers would have a reliable MP3 player that could better store MP3 downloads in one place, and the CD would become obsolete. The U.S Congress attempted to introduce legislation to make MP3.com legal but this was ultimately shut down. Although the bill was far-fetched, the intention had been to change the laws for digital distribution of music based on what was 'right' rather than what was 'legal'.[19] The labels won against Napster and lost to Diamond which resulted in peer-to-peer networks being driven underground but MP3 players were kept on the shelves. Napster's servers went offline in July 2001, by which time hundreds of millions of MP3 files were downloaded on home computers. It is submitted that the music industry had won the wrong lawsuit as this outcome set the stage for further disruption to the music industry. In the reverse situation, Napster would continue to allow users to share and download MP3's at their own risk of being pursued for copyright infringement, but CD's would have continued to be the predominant format which would continue to encourage physical sales. Instead, Apple's iPods

[16] *Recording Indus Ass'n of Am v Diamond Multimedia Sys Inc* 180 F3d 1072, 51 USPQ 2d 1115.
[17] *A&M Records Inc v Napster Inc* 239 F3d 1004.
[18] Hong (n 14).
[19] Amy Harmon, 'The Music Industry and Napster' *The New York Times* (New York, 30 July 2000).

were here to stay and Steve Jobs seized the opportunity to develop their own legal online music service: iTunes.

Apple's rise to dominance initially relied upon Napster. In order for Apple to establish a legal source of content for the iPod, the balance of power lied with the major labels.[20] Instead of adapting to the digital era by creating their own online retailers, the labels fought innovation with litigation to protect the CD album format. This defensive strategy was decidedly misguided as it ultimately forced them to enter content license deals with Apple, making their catalogues available on iTunes for 70 cents on the dollar for every MP3 file. Steve Jobs successfully legitimised the online distribution of music and sold billions of tracks, establishing iTunes as the dominant retailer of music online. However, online music services have now evolved beyond the retail model to subscription-based services like Spotify, Tidal and Apple Music, which has shifted total recorded music revenue from a 'sales' model to an 'access' model.[21] While some important music markets still deal in predominantly physical sales, overall digital sales exceed physical sales globally as in the U.S.[22] Streaming as an on-demand music service and the 'access' model has changed the value of copyrights for better and for worse. It has fallen outside the realm of existing laws governing licensing issues,[23] and has disrupted traditional recording and publishing agreements. While the streaming model has effectively saved the overall profitability of the industry,

[20] Stephen Witt, *How Music Got Free* (1st edn, Vintage 2016).

[21] ibid.

[22] International Federation of the Phonographic Industry, 'Digital Music Report' (2016).

[23] Jason Koransky, 'Digital Dilemmas: The Music Industry Confronts Licensing for On-Demand Streaming Services' (American Bar Association, Landside, 2016). <https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/digital-dilemmas-music-industry-confronts-licensing-on-demand-streaming-services/>.

it is up to the law to ensure artist and rights holders interests are fairly compensated.

II. COPYRIGHT IN MUSIC

The Copyright Act of 1976,[24] which serves as the primary basis for U.S Copyright law today, was created to govern music rights in the era of physical copies. While various amendments have been made, and new legislation is regularly considered, Copyright law is particularly challenged by the new systems of the internet era. It is important to understand the protections granted to music through copyright in order to understand the issues that arise.

There are two vital copyrights in every musical work; the copyright in the musical composition and the copyright in the sound recording. The musical composition, referred to as the 'song', consists of the lyrics and written music, whereas the sound recording refers to the actual recorded performance of a certain musical composition.[25] A sound recording can be a cover of a musical composition. The two copyrights differ in the protections they are provided and are distinct from one another in the way they are monetised by copyright holders. The copyright in the musical composition grants the same six exclusive rights that are granted to all copyright holders; reproduction, preparation of derivative works, distribution, public performance, public display and public performance of a sound recording by means of digital audio.[26] In the U.S, the copyright in the sound recording excludes the rights to public display and public performance other than in digital transmissions. Public display is less of a concern to the music industry overall as the right is limited to displaying lyrics and music notes of a musical

[24] US Copyright Act of 1976 17 USC.
[25] Copyright Law of the United States (Circular 92, 2020) <https://www.copyright.gov/register/pa-sr.html>.
[26] ibid 106 <https://www.copyright.gov/title17/92chap1.html#106>.

work. The right to public performance permits copyright holders to control performances of a creative work in public, which means artists do not receive income when their song is played over the air on terrestrial radio or on-demand stream rendered over the internet, but musical composition copyright holders do.[27]

III. RADIO

Radio was the first innovation to threaten the record industry. Considered a competitor at the time, radio caused a similar decline in sales as that resulting from the digital distribution of music.[28] Many predicted that the ability to access music in the home through the radio would be the demise of the recording industry as it could provide a substitute for the need to purchase physical copies of music. However, radio became the most valuable marketing tool available to the recording industry as it introduced the public to new music and would single-handedly drive sales. The substitutive nature of radio is fundamentally different than that of on-demand digitally available music and has proven to be a complementary good. As explained by Stan J. Liebowitz in his study on the impact of radio, the ability to stream or download a particular musical work online provides a substitute to the purchase of that work, where radio offered no ownership or choice in what was listened to beyond unreliable 'radio request shows'.[29]

As piracy rose and digital technology began to stand in for physical records, the U.S. Congress responded by enacting the Digital Performance Right in Sound Recordings Act (the DPRSA) of 1995.[30] The Act provided the

[27] Bargfrede (n 15) Ch 3.
[28] Witt (n 20).
[29] Stan J. Liebowitz, 'The Elusive Symbiosis: The Impact of Radio on the Record Industry' (2004) University of Texas at Dallas.
[30] The Digital Millennium Copyright Act 1998.

sixth right of 'public performance for recordings in digital transmissions',[31] creating an exception for public performance through digital means such as satellite radio and digital service providers (DSP's) like Sirius XM, Pandora and Spotify. It is submitted that the amendment was a great development to protect artist rights and thereby their revenue. However, if artists and song recording copyright holders are entitled to compensation for a 'listen' on Pandora or Spotify, why does this right not apply to a 'listen' on AM/FM radio? This arrangement is the outcome of broadcasters' long standing contention that airplay drives album sales and therefore sound recording copyright holders profit from the free promotion of radio play.[32] Radio still accounts for 40% of non-live music listening revenue,[33] so imposing a full performance right would unlock significant revenue for rights holders. Many attempts have been made to assign a full performance right to sound recordings, however radio lobbying groups have successfully defeated them all.[34] Broadcasting lobbying groups such as The National Association of Broadcasters are amongst the most powerful in Washington. In 2018 they spent over $14 Million USD and are listed as the 6th most influential lobbying group, directly behind big pharma company 'Bayer'.[35] As radio's marketing influence is fading yet revenues remain strong, it is time to revisit this

[31] Copyright Law of the United States (Circular 92, 2020) 106.
[32] Future of Music Coalition, 'Public Performance Right For Sound Recordings' (*Future of Music Coalition*, 5 March 2018) <http://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings>.
[33] Matthew Ball, 'Audio's Opportunity and Who will Capture it' (*Matthew Ball*, 15 October 2020) Ch 3 <https://www.matthewball.vc/all/audiotech>.
[34] Stasha Loeza, 'Out of Tune: How Public Performance Rights are Failing to hit the right notes' (2016) 31(2) Berkeley Technology Law Journal 725-758.
[35] Joe Perticone, 'The 20 companies and groups that spend the most money to influence lawmakers' (*The Business Insider*, 11 March 2019) <https://www.businessinsider.com/lobbying-groups-spent-most-money-washington-dc-2018-2019-3?r=US&IR=T#national-association-of-broadcasters-6>.

arrangement and bring it in line with similar platforms such as Pandora or SiriusXM.

IV. MAJOR LABELS

In the 90's, 'The Big 6' major labels, consisting of CBS, MCA, BMG, Capitol-EMI, PolyGram and Warner Music, controlled nearly 85% of the global recording market (as of today, there are 3: Warner Music Group, Sony and Universal Music Group).[36] The structure of the music business during the 'golden age', or 'album-era', from the 1970's to 1990's,[37] favoured concentration. As the industry boomed and grew in complexity, the ability to leverage economies of scale became increasingly important for survival.[38] For example, major labels leveraged their size for better bargaining power for shelf space with large record retailers and promotional channels such as radio. The record labels engaged in price fixing in violation of federal antitrust laws, working together to convince larger retailers to push prices up and refrain from discounting discs.[39] As is often the case with oligopolistic industries, the major labels benefited from barriers to entry and economies of scale that led to significant pricing power, to the disadvantage of the consumers. Between 1995 and 2000, record labels' price fixing resulted in a cost to the consumer of $500m.[40] Furthermore, industry promoters would pay cash to radio DJs to get their labels' songs played, a form of systematic bribery known as Payola

[36] Jan W. Rivkin, 'BMG Entertainment' (Harvard Business Publishing Education, 2000).
[37] Smith (n 2).
[38] ibid 23.
[39] ibid.
[40] US Federal Trade Commission, 'Record Companies Settle FTC Charges of Restraining Competition in CD Music Market' (2000) <https://www.ftc.gov/news-events/press-releases/2000/05/record-companies-settle-ftc-charges-restraining-competition-cd>.

scandals.[41] Despite attempts made to protect independent labels from further consolidation of power by blocking mergers between major labels such as Sony Music and BMG, this merger was allowed on the justification of the threat of piracy facing the industry.[42]

The transition from the brick-and-mortar album era has significantly changed the costs to major labels and the value they provide. However, this change is not reflected in the unfavourable deal terms offered to artists. In the brick-and-mortar album era the major labels provided indisputable value to artists as the ultimate gate-keepers to success in the industry. They had exclusive bargaining powers with retailers, radio, media, and manufacturing supply chains. However, artists of today's digital age have the power to self-release music online, as well as self-promote and build their audience through social media. Undoubtedly this has decreased the cost and risk of signing a new artist, as well as the value they can offer. While lower barriers to entry is to the benefit of creators, label deals are still necessary to reach global stardom as they are marketing powerhouses. In the digital era, distribution and manufacturing costs traditionally borne by the label have fallen significantly.

Despite the economic changes, there are still many inequitable deal terms that stem from a physical supply chain and higher risk investments. Due to the high distribution costs of the physical era, artists typically received 10-20% of total revenue after costs such as marketing, production and advance payment.[43] This is still the cut offered to artists in the digital era despite the reduction in cost to the label. Furthermore, artists contracts have included a clause for 'breakage', in which labels only paid out artists on 90% of sales to

[41] Witt (n 20).
[42] Impala representing 2000 independents appealing to EU Commission; Economics Online 'The Music Industry' <https://www.economicsonline.co.uk/Business_economics/Music_industry.html>.
[43] Donald S. Passmann, *All you Need to Know About the Music Industry* (10th edn, Simon & Schuster 2019) Ch 7.

account for breakage of shellac records in transit, long since shellac records stopped being a primary format of music consumption.[44] Although major label heads have stated this practice is no longer used, most recently to the UK parliamentary committee in their ongoing inquiry into the economics of the music industry.[45]

Other major label deal points include 'perpetuity deals'. Under perpetuity deals, which most major label catalogues are built on, labels acquire full control of the copyright until it becomes public domain 70 years after it is created. Even after the label has stopped marketing and investing in a song, they collect 80% of the revenue every time it is played. Most artists can now ask for 'reversion clauses' to be included in the contract which stipulate that ownership of the copyright reverts back to the artist after a period of time such as 10 or 20 years. However, this loss of control remains problematic as the label may choose to license a song regardless of the artist's permission. For example, the label could license a song for use in a political campaign that the artist does not agree with. Furthermore, the speed and accuracy of how labels are paid out by DSP's in the digital era has been vastly improved from physical stores because of their heightened ability to analyse listeners data allows them to pay out in a lump sum based on projected market share. However, this improvement has not been passed on to the artists, as they often still receive very complex royalty statements that can be anywhere from 6-18 months trailing; depriving them of steady cash flow and keeping them at an unnecessary disadvantage.

Under a traditional record deal, artists are required to transfer full ownership of their copyright in the sound recording. Usually this is in exchange for money upfront as an advance against future royalties, as well as

[44] ibid.

[45] Digital, Cultural, Media and Sports Committee, *Oral Evidence: Economics of Music Streaming* (HC 2021 868) Q253.

recording costs for the album.[46] The advance is recouped from the artist's royalties but is not considered a loan so the artist is not exposed to the risk of being sued for unrecouped royalties if the album is unsuccessful.[47] In practice however, artists will remain liable for unrecouped amounts through future agreements under the concept of cross-collateralization. When an artist releases multiple albums under different agreements, cross-collateralization allows labels to recoup advances for an unrecouped album from royalties payable to another, more successful album.[48] This of course is unfavorable to artists who would otherwise collect the royalties payable for the successful album and let the advance for the unsuccessful album remain unrecouped if the agreements were not cross-collateralized.

It is important to note that the major label deal structure is different to that of publishers, who take ownership of the copyright in the musical composition. As the musical composition is protected by all U.S exclusive copyrights, the copyright owner must give permission in the form of a license for any use of the song. Artists enter into agreements with publishing companies for opportunities for their songs to be monetised and for help in collecting and tracking the monies.[49] In a standard publishing agreement, writers assign 100% of the copyright to the publisher and the revenue is split 50/50.[50] The main sources of publishing income are public performance, mechanical royalties, and synchronisation license fees. Radio and sync licensing have remained important revenue streams helping publishers avoid

[46] ibid.

[47] ibid Ch 8.

[48] Passmann (n 43).

[49] Peter J. Strand, Robert Kouchoukas and William Rattner, 'Legal Issues Involved in the Music Industry' (Lawyers for the Creative Arts, 2005) 5 <https://law-arts.org/pdf/Legal_Issues_in_the_Music_Industry.pdf>.

[50] Bargfrede (n 15).

the financial turmoil felt by the rest of the industry in the beginning of the 21st century.[51] However, the value of publishing rights were eroded by streaming as DSP's pay out more to labels and recording artists than publishers and songwriters. Although the Copyright Royalty Board ordered a 44%+ rise in royalty pay-outs in 2019, Spotify and Amazon appealed the decision and it has now been returned to the CRB for review.[52] It is important to note that publishing deals often concern songwriters who do not have an 'artist project' and thereby rely heavily on publishing revenue as they cannot capitalise on trademarks or rights of publicity. For this reason, Apple Music actually chose to abstain from the appeal, recognising the need for higher pay-outs to songwriters.

V. DIGITAL SERVICE PROVIDERS

Artists are at a further disadvantage from the lack of accountability of online service providers who rely on "safe harbour" protections under s.512 of title 17 of the DMCA Act 1998 instead of acquiring the necessary rights.[53] Written at a time when the internet was very new, the Act did not foresee what were at the time small blogs or publications becoming the behemoth providers of today with 100 Billion market caps (Google, Amazon, Facebook, Spotify et al.) The Act removes liability from the online service platform if its users infringe copyright law with content uploads as long as the platform has a system in place to quickly remove them.[54] This places the onus on rights holders to detect their copyrights being infringed upon and issue hundreds, if not thousands of notices. This can be an insurmountable task if you are an

[51] Dina Lapolt, Submission to the Library of Congress US Copyright Office 'Music Licensing Study: Notice and Request for Public Comment' (2014).
[52] *George Johnson v Copyright Royalty Board and Librarian of Congress USCA* Case #19-1028.
[53] s.512 of Title 17 of the DMCA Act 1998.
[54] Band (n 10).

independent rights holder and not helped by a major label or publisher. The online service platform is not required to secure sync, mechanical and performance rights for the music uploaded by its users on the platform.[55]

The companies hiding behind the safe harbour provisions and not obtaining proper licenses are no longer small upstart companies. YouTube, which has been pegged by Morgan Stanley at a value of 160 billion,[56] 8 times the entire recorded music industry's value,[57] was one of the worst proponents of this for years. Copyright infringement was rampant on the platform and takedowns were sometimes slow to be acted upon. The NMPA[58] sued YouTube for violating the DMCA in 2007 and won,[59] resulting in YouTube developing a comprehensive content ID platform that allowed rights holders to opt in to receive ad revenue if their copyright was used; a major revenue unlock for the industry. In 2010, Viacom, an entertainment production company, contended that YouTube's business model essentially relied upon the infringement of third party copyrighted content, however, YouTube was granted dismissal by summary judgement on the grounds that they complied with all relevant safe harbour provisions under the DMCA, thus were shielded from any liability.[60]

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[55] Min Yan, 'The Law Surrounding the Facilitation of Online Copyright Infringement: Lessons from The Pirate Bay' (2012) 34(2) European Intellectual Property Review.
[56] Morgan Stanley (2018).
[57] Statista, Global recorded music revenue from 1999 to 2019.
[58] National Music Publishers Association.
[59] *Warner/Chappell Music Inc et al v Fullscreen Inc et al* (13-cv-05472); National Music Publishers' Association, 'NMPA Reaches Resolution of Copyright Infringement Lawsuit Against YouTube Agreement Results in New Licensing Opportunity for Music Publishers' (NMPA, 17 August 2011) <http://nmpa.org/press_release/nmpa-reaches-resolution-of-copyright-infringement-lawsuit-against-youtube-agreement-results-in-new-licensing-opportunity-for-music-publishers/>.
[60] *Viacom International Inc v YouTube Inc* No 07 Civ 2103.

The practice of abusing the 'Safe Harbour" protection began at the very start of the digital era. In the Napster case, Fanning unsuccessfully argued that since Napster only connected users to share files with one another and never hosted any files on its servers, the service should fall under the safe harbour protections of the DMCA. Today, massive tech conglomerates build platforms and audiences using music copyrights until they finally reach scale and enter into proper licensing deals. Twitch, which is a live streaming platform owned by Amazon, is one of the latest to do so. Twitch is slow to respond to takedown notices, and specifically avoids letting users use music in the recordings of livestreams; therefore avoiding a sync license. While paying out nearly no money to music rights holders, the audience of the platform has grown from 33m to 56m in the U.S in the last year alone. The U.S. Copyright Office conducted a review of the provision in May of this year and released a report which essentially found that a one-size-fits all approach is not suitable as a modern internet policy as social media and online services continue to evolve.[61] The U.S Congress must now determine if the DMCA can be tailored to protect both creators and DSPs. One such possible solution could be to tie the safe harbour protections to revenue or user numbers; ensuring that once a platform reaches scale, that they would need to license music or take more responsibility for the actions of their users. More specific policies like this would unlock significant revenue for music rights holders.

CONCLUSION

Advancements in technology are often elusive to the law's scrutiny as innovation outpaces the speed of legislation by nature. Music law will continue to struggle to accommodate innovation as understanding how to fairly apply traditional rules to new technology takes time. It is sure to affect most stakeholders in the industry, not least of all the artists themselves. If artists and songwriters were to unionise, similar to how Hollywood's screenwriters have, it would provide them much more collective bargaining power over labels and DSP's and they could solve some of the issues mentioned themselves. The ability to strike and lockout song writing could be

[61] US Copyright Office, 'Section 512 of Title 17: A Report on the Register of Copyrights' (2020).

devastating to the major labels and DSP's which could force them to accept better standard terms for artists. An examination or congressional hearing on the power of the radio lobbying groups and how they do not share advertising revenue with rights holders would be very informative now that their marketing influence is fading with the rise of streaming services. With all this being said, it is clear that the best years for artists are ahead of us. With technology unlocking social media, ease of inexpensive widespread distribution and low cost production tools, artists have never been more self-empowered. This is slowly starting to be reflected in deal structures, market share for independents, and revenue paid back to them from technology companies. As more tools and options for partners become available for artists their bargaining power and opportunity will continue to grow but ultimately, suitable copyright protections under law are imperative to success in an increasingly complex industry.

THE LIABILITIES OF THE SHIPOWNER, THE CARRIER, THE SHIPPER AND THE CONSIGNEE ARISING FROM STOWAGE OPERATIONS

Lluís Gómez Huguet*

This paper investigates the liabilities that can arise under the English Law when cargo gets damaged or lost due to bad stowage for the different entities implied in the contract of carriage of goods by sea: the shipowner, the carrier, the shipper, and the consignee. Our analysis shows that this is a grey area where different regulations, both national and international, and case law converge, making essential a thorough analysis of the circumstances that surround each case.

I. INTRODUCTION

Carriage of goods by sea has become the core of international trade, being responsible for transporting more than 11 billion of tons of cargo annually.[1] However, the sea is a harsh environment that entails risks for the ships as well as for the cargo they carry.

Besides the inherent perils of sea transport, which include stranding, sinking, collision, heavy wave action, and high winds, the cargo and/or the ship can also be damaged during the loading and unloading operations that take place either before the voyage has started or once it has been finished. Even if the damages are caused during the voyage, they can be attributed to the loading operation when it is determined that their cause lies on a poor stowage.

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[1] United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2019* (United Nations 2020) 15.

Traditionally the responsibility of carrying out the stowage, that is, the operation of loading properly the cargo aboard the ships, lied exclusively on the shoulders of the shipowner. Conversely, in modern times, it is usual that the stowage operations are deputed to stevedores, making loading a complex operation that involves a third party from outside the sphere of the entities responsible for the transport of the goods.

The legal relationship that these entities establish with the stevedores has been analysed by the English Courts, which distinguish between paying for, performing, and taking responsibility for the stowage; although it must be noted that there is no presumption that these obligations are taken by the same person, being possible *v. gr.* that the shipper agrees to pay for loading, but the charterer remains responsible for the damages resulting from the operation.[2]

Thus, in this area the configuration of the charterparty or the Bill of Lading will be of vital importance as they can include clauses that limit or transfer the liabilities arising from the stowage operations.

In addition to these contractual obligations between the parties, a wide range of regulations exist both at national and international level that restrict their freedom in configuring the apportionment of liabilities in this sector.

The different factors mentioned above contribute to making the discernment of the responsibilities derived from the loading of cargo a complex and often litigious matter. This study will analyse the legal position under the English Law regarding the liabilities derived from stowage operations whether they happen under the responsibility of the shipowner, the carrier, the shipper, or the consignee, following a qualitative[3] and doctrinal or "black letter" approach,[4] as it is based on the analysis of primary sources and

[2] *Jindal Iron & Steel Co Ltd v Islamic Solidarity Co Jordan Inc* [2003] EWCA Civ 144.
[3] Peter Cane and Herbert M Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012) 929, 930.
[4] Michael Salter and Julie Mason, *Writing Law Dissertations* (Pearson Longman 2007) 49-51.

provides a conclusion only once the evaluation of the subject of study has finished.

i. LEGAL FRAMEWORK

The liabilities that can derive from the stowage operations are stipulated in different legal texts and judicial decisions. Knowing the scope of application of each one of these regulations is essential for the subsequent assessment of their impact.

Because it is focused on an analysis of the liabilities arising from stowage operations under the English Law, the present paper will consider the history of its regulation in the early judicial decisions and the changes that the Hague-Visby Rules brought to the legal regime while exploring their interpretation by the English Courts.[5]

ii. STRUCTURE

The present paper will be structured as it follows: The first section will examine the liabilities that stowage operations can involve for the shipowner and the carrier, focusing on different distinctive points such as the regulation of the negligence in this area; what happens when it is impossible for the shipowner to carry out the works while being responsible of performing them; the incidence of the seaworthiness of the ship in the distribution of liabilities; the possibility and methods to delegate the responsibility for the stowage operations, mainly analysing the FIOS Clauses and the two leading cases on this matter, *The Jordan II* and *The EEMS Solar*; the protection of the stevedores by

[5] Adopted in Brussels, the 25th of August 1924, the Hague Rules constituted the first attempt of the international community to establish a unified set of responsibilities and obligations for carriers and shippers operating under a Bill of Lading that has been issued in a contracting state (articles 2 and 10 of the Hague Rules). The Hague Rules were modified by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of August 1924 adopted in Brussels, the 23rd of February 1968, giving rise to the Hague-Visby Rules.

the use of Himalaya Clauses; and what happens when the cargo is stowed on deck without the authorisation of the shipper.

The second section will examine the liabilities that the stowage operations can involve for the shipper and the consignee focusing on the effects that the shipper's failure to act in a proper manner can have over damage claims, and the indemnities that his acts and omissions can entail, with particular attention to the stowage of dangerous cargo.

The third section will gather the conclusions resulting from the analysis done in the previous sections and will raise the challenges that the regulation of stevedoring liabilities will face in the future.

II. THE LIABILITIES OF THE SHIPOWNER AND THE CARRIER

At Common Law, the shipowner has traditionally been the party responsible for stowing and discharging the cargo, since it was customary for stowing operations to be performed by the ship's crew under the orders of the Master, who acted on behalf of the owner of the ship.[6]

In such circumstances, the shipper was bound to bring the goods alongside the ship and deliver them to the shipowner's servants, which constituted the starting point of the shipowner's responsibility over the cargo.[7]

[6] *Sir Thomas Blaikie, Knight, and Others v Stembridge* (1859) 6 Common Bench Reports (New Series) 894.
[7] *The British Columbia and Vancouver's Island Spar, Lumber, and Saw-Mill Company, Limited v Nettleship* (1867-68) L.R. 3 C.P. 499.

The shipowner therefore had to bear the expense and risks of putting the goods into the ship,[8] which included his obligation to stow the cargo properly,[9] in a manner that allowed the consignee to take delivery of them.[10]

This practice changed with the development of maritime transport, which later favoured the outsourcing of the stevedoring services to longshoremen, who initially acted as the shipowner's servants,[11] but which later allowed the transfer of the obligations to load to be made by agreement with the charterer or the carrier.[12] Stowage operations can now be performed by the shipowner's servants (mainly professional stevedores) or by the servants of the party who had agreed to take responsibility for carrying out the stowage.

In the following sections we will examine the reallocation of the obligation to stow and the consequences that it entails for the liabilities' regime, and also analyse some particularities of the responsibilities derived from stowage operations.

i. NEGLIGENCE

Bearing the risk for stowing the cargo supposes for the shipowner or carrier to become liable for any cargo damage caused by them or their servants' negligence during the stowing operation.[13]

[8] *Fletcher v Gillespie and Others* (1826) 3 Bingham 635.
[9] *Sandeman v Scurr* (1866) LR 2 QB 86.
[10] *Petersen v Freebody & Co.* [1895] 2 Q.B. 294.
[11] Thomas Rothwell Taylor, *Stowage of Ship Cargoes* (US Govt Print Off 1920) 14.
[12] *The Jordan II (n* 2).
[13] *RF Brown & Co Ltd v T & J Harrison* (1927) 43 TLR 633; see also Simon Baughen, *Shipping Law* (Taylor and Francis 2015) 88.

Negligence can be defined as the absence of care that a skilful workman would provide as stated by Willes, J. in *Grill v The General Iron Screw Collier Company*:

> In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant. […] A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. [14]

Which, in our area of analysis, supposes that the shipowner/carrier and its servants must exercise the same skill in stowing and lashing as competent stevedores.[15] The English Courts have defined, *a contrario sensu,* incompetent stevedore as the one having a "disabling lack of knowledge"[16] that prevents him from carrying on the required works in a proper and safe way; but such

[14] *Grill v The General Iron Screw Collier Company (Limited)* (1865-66) L.R. 1 C.P. 600.
[15] *The Anglo-African Company, Limited v Lamzed and Others* (1865-66) L.R. 1 C.P. 226.
[16] *Macieo Shipping Ltd v Clipper Shipping Lines Ltd (MV 'Clipper Sao Luis')* [2001] C.L.C. 762.

incompetence does not result from merely a general lack of discipline[17] or the making of one or more mistakes[18] as a defining feature.[19]

a. THE LEGAL REGIME OF NEGLIGENCE UNDER THE HAGUE/HAGUE-VISBY RULES

Although the Hague/Hague-Visby Rules usually refer only to the liabilities of the carrier, it must be considered that the wide definition of "carrier" they contain can include the shipowner when he is the party that concludes the contract of carriage with the shipper[20] as provided by the Article I(a) of the Hague/Hague-Visby Rules, which includes "the owner" in the definition of carrier: "Carrier includes the owner or the charterer who enters into a contract of carriage with a shipper."

According to the Article III Rule 2 of the Hague/Hague-Visby Rules, the shipowner/carrier is bound to carefully load, handle, stow the cargo: "Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

The standard set by the words "properly and carefully" will vary depending on the nature of the voyage and the specific conditions that the ship and the cargo may encounter along the journey, as stated in *The Bunga Seroja*:[21]

[17] *ibid.*
[18] *Manifest Shipping Ltd. v. Uni-Polaris Insurance Co. Ltd (The Star Sea)* [1997] 1 Ll Rep 360.
[19] Malcolm Clarke, "Good faith and good seamanship" [1998] LMCLQ 465.
[20] This will happen usually when the shipowner is a liner service operator which provides the service of transport aboard its own ships.
[21] *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja)* [1999] 1 Lloyd's Rep. 512.

> "The proper stowage of cargo on a lighter ferrying cargo ashore in a sheltered port will, no doubt, be different from the proper stowage of cargo on a vessel traversing the Great Australian Bight in winter."

By "properly," according to *The Caspiana*,[22] we must understand "in accordance with a sound system," which was defined by Lord Pearce and Lord Reid in *The Maltisian*[23] as an equivalent to efficiency in applying the general practice regarding the carriage of goods "in light of all the knowledge which the carrier has or ought to have about the nature of the goods" and the circumstances of the journey.[24]

By "carefully," we must understand that the stowage operations must be carried out taking care, which some authors have considered it to be an equivalent to the standard of reasonable care,[25] as a subjective test to determine negligence by comparing the analysed act or omission with what a rational person would have done in the same circumstances.[26]

Thus, under the Hague/Hague-Visby Rules the shipowner/carrier will be liable for the damages caused by him or his servants arising from the stowage operations when their origin lies on not taking the necessary precautions and procedures considering the circumstances of the voyage and the nature of the

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[22] *GH Renton & Co Ltd v Palmyra Trading Corp of Panama (The Caspiana)* [1957] A.C. 149.

[23] *Albacora S. R. L. v Westcott & Laurence Line (The Maltisian)* (1966) S.C. (H.L.) 19.

[24] Qais Ali Mahafzah "The Legal and Economic Impact of the Caspiana Clause under Bills of Lading and Charterparties" [2018] ANZ Mar L J 28.

[25] John Furnenotess Wilson, *Carriage of Goods by Sea* (Pearson/Longman 2010) 191.

[26] Ilian Djadjev, *The Obligations of the Carrier Regarding the Cargo* (Springer International Publishing 2017) 60.

goods, and/or the performance does not meet the standard of reasonable care required in the particular case.

b. BURDEN OF PROOF

Under the Common Law, the traditional principle that governed the burden of proof in this area was set out by Lord Esher MR's judgment in *The Glendarroch*,[27] in which it was determined that the party that files the claim for damages (usually the cargo-owner) must prove the contract and the non-delivery or the delivery in a damaged condition, to which the carrier could allege the existence of an exception, having then the claimant to prove that the established excepted peril had been occasioned by the carrier's negligence.[28]

Therefore, the party that filed the claim for damages had to first demonstrate the lack of reasonable care in stowage and that the loss or damage suffered by the cargo was a result of negligent stowage.[29]

This view was questioned in the early years of application of the Hague Rules in *The Canadian Highlander,*[30] where it was held that, on the basis of bailment, the burden was on the carrier to disprove its negligence, although it was expressly disapproved by the House of Lords in *The Albacora*,[31] where it was held once again that the carrier is debarred as a matter of law from relying on an exception unless it proves absence of negligence on its part.

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[27] *The Glendarroch* [1894] P. 226 CA.
[28] William Tetley, "The burden and order of proof in marine cargo claims" 4, 5.
[29] Indira Carr and Peter Stone, *International Trade Law* (Routledge 2018) 217.
[30] *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)* [1927] 2 K.B. 432 KBD.
[31] *Albacora SRL v Westcott & Laurence Line Ltd* [1966] 2 Lloyd's Rep 53.

The recent decision of the Supreme Court in *Volcafe*[32] has put an end to the debate providing that when the Hague/Hague-Visby Rules apply and the cargo had been shipped in apparent good order and condition but is discharged damaged, the carrier, who acts as a bailee of the cargo, bears the burden of proving that it was not due to its breach of the obligation in Article III Rule 2 to take reasonable care or that it was caused by an excepted peril enumerated in Article IV Rule 2,[33] (which is no longer regarded as an exception within an exception).[34]

ii. IMPOSSIBILITY FOR THE SHIPOWNER TO CARRY OUT THE LOADING OPERATIONS BY HIMSELF

It is possible that, although the shipowner takes responsibility for the stowage operations, the circumstances of the port or trade compels him to use the carrier's own stevedores.[35] Under the English Law, in these circumstances, the shipowner remains liable for the damages caused by the improper or negligent stowage carried out by the stevedores, as it is considered that they act "under the control and direction of the master" who, in turn, is the legal representative of the shipowner on the ship.[36]

Nevertheless, it is important to note that the carrier will be responsible for the appointment of generally competent stevedores, as exposed by

[32] *Volcafe Ltd v Compania Sud Americana de Vapores SA* [2018] UKSC 61.
[33] Richard Hedlund, "Coffee and water don't mix: clarifying the burden of proof under the Hague Rules" [2019] JBL 236.
[34] Paul Todd, "The Hague Rules and the burden of proof" [2019] LMCLQ 186.
[35] J. H. S Cooke, *Voyage Charters* (Informa Law from Routledge 2014) 232.
[36] *Sack v Ford* [1862] 11 WLUK 124.

Donaldson J. and Lord Denning M.R. in *The Sinoe*,[37] where the shipowner filed a claim for demurrage resulting from a delay caused by the incompetence of the stevedores hired by the charterer:

> …the incompetence of these particular stevedores involved the charterers in a breach of their implied obligation to provide competent stevedores, and that breach exculpated the shipowners from responsibility even if they had agreed to be responsible for the stevedores as their servants.[38]

Therefore, when the cause of the damages is attributed to the incompetence of the stevedores the party that had appointed them will be held liable.[39]

iii. THE REAL LOCATION OF THE RESPONSIBILITY FOR STOWING

A strict interpretation of the Article III Rule 8 of the Hague/Hague-Visby Rules suggests that the agreement delegating the obligation to carry out the loading and stowing of the cargo to third parties is null because it would lessen the carrier's liability:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising, from negligence, fault, or failure in the

[37] *Overseas Transportation Co v Mineralimportexport (The Sinoe)* [1972] 1 Lloyd's Rep. 201.

[38] This argument has been used more recently in *The Clipper Sao Luis, Macieo Shipping* (n 16); see also Jonathan Chambers, "Shipping law - cargo fire caused by careless discard of smoking materials by stevedores" [2000] Int. M.L 72.

[39] John Schofield, *Laytime And Demurrage* (Informa Law from Routledge 2016) 243; see also London Arbitration 6/08 - LMN 744, 21 May 2008.

> duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect...[40]

However, the commercial practice has opted for the delegation of those responsibilities with the acceptance of the Courts as showed by the early cases of *Pyrene v Scindia*[41] and *The Caspiana*,[42] which stated that the Hague Rules were not intended to "impose a universal rigidity in this respect, or to deny freedom of contract to the carrier" on the grounds that under other national laws or port practices the obligation to perform the stowage operations could lie on the shoulders of an entity different from the carrier/shipowner and that precisely the freedom of contract covers the delegation by agreement.[43]

Even though it will be analysed in depth, it is worth pointing out here that *The Jordan II*[44] ended any discussion that might have existed in this regard by establishing that the clauses that allocate and describe the stowing functions that each party undertakes to perform are not nullified by the Article III Rule 8 of the Hague/Hague-Visby Rules, as they only define the agreed scope of the obligations assumed by them.[45]

Therefore, we must conclude that the delegation of the obligation to perform the stowage operations is permitted under the English Law, although it must be noted that in other jurisdictions, such as the French, it is only valid

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[40] Ilian (n 26) 64.
[41] *Pyrene Co. LD. v Scindia Navigation Co. LD.* [1954] 2 Q.B. 402.
[42] *GH Renton* (n 22).
[43] Jason C.T. Chuah, "Contractual reallocation of the duty to load, stow and discharge goods properly in the Hague Visby Rules (The Jordan II)" [2005] S.L. Rev. 49.
[44] *The Jordan II (n* 2).
[45] *Cooke,* (n *7*) 1067; see also Simon Baughen, "Defining the limits of the carrier's responsibilities" [2005] LMCLQ 159.

to transmit the obligation to pay the cost of the stowage operations and not the liability for the eventual damages that can derive from them.[46]

This delegation is usually accomplished by the incorporation of a Free In and Out Stowed (FIOS) Clause to the charterparty or Bill of Lading,[47] by which the obligation to load, stow, and discharge the cargo is transferred to the carrier, charterer, shipper, and/or consignee, although the shipowner is still obliged to avoid damaging the cargo that is already on board during the loading operation and to take care of it during the voyage.[48]

Nevertheless, as pointed out in the introduction of this paper, we must differentiate between the responsibility to carry out the tasks included in the FIOS Clause, the responsibility to pay for these tasks and the responsibility over the damages caused in the performance of those tasks, as the mere inclusion of the FIOS acronym transfers only the cost but not the responsibility.[49]

Therefore, examining the wording of the Clauses that surround the FIOS acronym will be essential to understand the intention of the parties in terms of the transfer of costs and responsibilities.

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[46] Tomotaka Fujita, "The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications" [2009] TIJL 355.

[47] When these terms are incorporated in a charterparty, the shipowner transfers the cost and/or the responsibility for the stowage operation to the charterer, whereas when they are incorporated in a Bill of Lading, the cost and/or the responsibility for its performance is transferred to the shipper or the consignee; see Nicholas John Margetson, *The System of Liability Of Articles III And IV Of The Hague (Visby) Rules* (Paris 2008) 59.

[48] William Tetley, *Marine Cargo Claims* (Les Éditions Yvon Blais Inc 2008) 661.

[49] *The Jordan II (*n 2); see also Alexander Ziegler, "The Liability of the Contracting Carrier" [2009] TILJ 329.

Almost 50 years after the abovementioned decisions in *Pyrene v Scindia*[50] and *The Caspiana,*[51] which opened the door to the possibility of transferring the obligation and responsibility for carrying out the stowage operations in compliance with the Article III Rule 8 of the Hague/Hague-Visby Rules, the House of Lords was questioned again over the validity of a FIOST Clause in *The Jordan II*.[52]

The *Jordan II* was chartered for a voyage from India to Spain on a Stemmor voyage charterparty (1983) form that incorporated the Hague-Visby Rules. The cargo, consisting of 435 steel coils, was shipped under two Bills of Lading issued by the shipper on Congenbill charterparty forms that incorporated the terms and conditions of the charterparty. Both the charterparty and the Bills of Lading were subject to the English Law.

When the coils were discharged at the destination port, they were found to be damaged due to a defective stowage. Consequently, the shipowner was sued by the charterer under the charterparty and by the shipper and consignee of the cargo under the Bills of Lading, ruling both the High Court and the Court of Appeal in favour of the shipowner.

The charterparty and the two Bills of Lading provided: "Clause 3: Freight to be paid at the rate of U.S.$ . . . per metric tonne F.I.O.S.T. — lashed/secured/dunnaged […] Clause 17: Shippers/charterers/receivers to put cargo on board, trim and discharge cargo free of expense to the vessel. Trimming is understood to mean levelling off the top of the pile and any additional trimming required by the master is to be for owners account […]."

The dispute revolved around whether the exposed clauses transferred from the shipowner only the costs to the charterer, or also the responsibility to perform the cargo operations properly and carefully and if so, whether that

[50] *Pyrene* (n 41).
[51] *GH Renton (n* 22).
[52] *The Jordan II* (n 2).

transfer of responsibility would suppose a violation of the Article III Rule 8 of the Hague/Hague-Visby Rules.

As stated above, the FIOST term by itself can transfer only the cost of the stowage, or also the responsibility to perform it in a proper way depending on the configuration of the rest of the clauses of the contract of carriage. In this case, from clauses 3 and 17 of the charterparty/Bill of Lading, it was clear that the intention of the parties was for the charterer to assume the cost and responsibility of the operation, as its performance rested on his shoulders.

As for the compatibility of this transfer of responsibility and the Article III Rule 8 of the Hague/Hague-Visby Rules the House of Lords maintained the current position established in *Pyrene v Scindia*: "Under the common law the duty to load, stow and discharge the cargo prima facie rested on shipowners but it could be transferred by agreement to cargo interests." [53]

This judgement gave a definitive response to the discussion over the validity of a FIOST term that transfers the responsibility for stowage operations to the Shippers/charterers/receivers when it is incorporated to a contract of carriage subject to the Hague/Hague-Visby Rules. Nevertheless, this legal position has been criticised for breaking the balance of interests that the Hague/Hague-Visby Rules try to accomplish and allowing carriers to impose standardized contract terms that exonerate themselves for their negligence.[54]

Moreover, this rule prevents the consignee from initiating an action based on the contract of carriage against the charterer when the Bill of Lading,

[53] *Pyrene* (n 41).

[54] Theodora Nikaki "Fiost —Responsibility for Cargo Work — Bills of Lading — Hague Rules — Article III, Rule 2" [2005] JIML 17.

issued on behalf of a shipowner, transfers responsibility for the stowage to the charterer and the cargo is damaged or lost in its performance, as there is no privity of contract between them, and it forces him to bring an action in tort or bailment.[55]

Another paradigmatic case that recently transformed the regulation regarding the transfer of liabilities for stowage operations is *The Eems Solar.*[56]

The *EEMS Solar* was chartered for a voyage from China to Russia on a Gencon 1994 form (BIMCO's general voyage charterparty) incorporated in a Congenbill 1984 Bill of Lading subject to the Hague Rules through a General Paramount Clause.

When the cargo, consisting of 411 coils of steel sheets coils, was discharged at the destination port, it was found to be partially damaged due to defective stowage carried out by stevedores appointed by the shipper.

Consequently, the shipowner was sued by the cargo-owner under the Bill of Lading. The core of the dispute concerned the alleged breach of contract by the shipowner for failing to comply with his duty to duly load, stow, handle, carry, and care for the cargo and to exercise due diligence to ensure the seaworthiness of the vessel for not providing spare lashing materials, as well as the validity of the clause that transmitted the responsibility for the stowage operations to the charterer.

As for the lack of spare lashing materials Jervis Kay Q.C. held that it did not amount to unseaworthiness of the vessel and that the stowage plan and the Master's intervention were not a plausible cause of the damage.

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[55] Nicholas Gaskell 'Shipowner Liability for Cargo Damage Caused by Stevedores — *The Coral*' [1993] LMCLQ 174.

[56] *Yuzhny Zavod Metall Profil LLC v EEMS Beheerder BV* (*The EEMS Solar*) [2013] 2 Ll. L. Rep. 489.

As for the transmission of responsibility, the charterparty provided:

> 5. Loading/Discharging (a) Costs/Risks
> The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers, free of any risk, liability and expense whatsoever to the Owners. The Charterer shall provide and lay all dunnaged material as required for the stowage and protection of the cargo onboard, the Owners allowing the use of all dunnaged available on board."

Relying on the above-mentioned cases,[57] the Court concluded that, even though the clause did not mention expressly the cargo-owner, it was intended to exclude the responsibility of the shipowner for stowing and to transfer it to the shipper/cargo owner:

> Although it is correct to say that there is nothing in the wording which transfers the responsibility for loading the cargo to cargo owners who are not also charterers, nonetheless the wording is sufficiently clear to make it apparent that the shipowner intended to exclude his own responsibility for the manner in which the loading was performed. […] It seems to me to follow that, as between themselves, the parties to the bill of lading must have thereby intended the responsibility of the stowage to have been transferred to the shippers/cargo owners. [58]

[57] Especially *The Caspiana* and *The Jordan II.*
[58] Paul Todd, "Incorporation of charterparty terms by general words" [2014] JBL 410.

This ruling expands the protection of the shipowners and carriers as it affirms the effectiveness of the transfer of responsibility for stowage operations from them to the holder of the Bill of Lading, even when the charterparty only refers to the charterer, something that was unthinkable a few years ago.[59]

Once more, this position has raised the criticism that the FIOS Clauses are distorting the aim of the Hague/Hague-Visby Rules to protect the weakest party in the contracts of carriage, which will usually be the shipper or the consignee, and has led some authors to suggest the retrieval of the possible solution raised in *The Coral*:[60] The shipowners could perform the stowage operations through the agency of another party while remaining ultimately responsible for them, but with the possibility of claiming an indemnity from the entity that had actually performed the stowage.[61]

iv. UNSEAWORTHINESS –THE INVOLVEMENT OF THE MASTER IN THE LOADING OPERATION

Under the English Law, the shipowner/carrier undertakes the obligation to ensure that the ship that is object to a contract of carriage is seaworthy, which was firstly defined by Lord Ellenborough CJ in *Lyon v Mells* as "a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public […]."[62]

This duty has been evolving over time. A good example of what the modern doctrine considers about seaworthiness was set out by Cresswell J in *The Eurasian Dream*,[63] providing that seaworthiness is not an absolute concept,

[59] Simon Baughen, "Defining the ambit of Article III r8 of the Hague Rules: obligations and exceptions clauses" (2003) JIML 216.
[60] *Balli Trading Ltd v Afalona Shipping Co Ltd (The Coral) [*1993] 1 Lloyds Rep 1.
[61] Paul Todd, "Hague Rules and stowage" [2014] LMCLQ 144.
[62] *Lyon and Another v Mells* (1804) 5 East 428.
[63] *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118 (Comm).

as it must be judged by the standards and practices of the industry at the relevant time and the nature of the ship and the characteristics of the particular voyage. Moreover, it was established that this duty is composed by two obligations, 1) "the vessel must be in a suitable condition and suitably manned and equipped to meet the ordinary perils likely to be encountered" which in turn relates to "(a) The physical condition of the vessel and its equipment; (b) The competence / efficiency of the Master and crew; (c) The adequacy of stores and documentation" and 2) "the vessel must be cargoworthy in the sense that it is in a fit state to receive the specified cargo."

This obligation is also contemplated by the Article 3 Rule 1a. of the Hague/Hague-Visby Rules:

> "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence: a. Make the ship seaworthy;"

It is important to note here that, conversely to the obligation to carry out the stowage operations, the obligation to ensure the ship's seaworthiness is non-delegable and therefore, even when the works of maintenance or repairs are done by an independent contractor, the shipowner/carrier is still responsible for providing a seaworthy ship as stated by Lord Keith of Avonholm in *The Muncaster Castle*:

> There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure. The question, as I see it, is not

> one of vicarious responsibility at all. It is a question of statutory obligation. [64]

In the same sense Lord Steyn in the abovementioned case *The Jordan II,*[65] stated that the seaworthiness obligation in the Article III Rule 1 of the Hague/Hague-Visby Rules is a fundamental obligation that cannot be transferred:

> For example, it is obvious that the obligation to make the ship seaworthy under article III, rule 1, is a fundamental obligation which the owner cannot transfer to another. The Rules impose an inescapable personal obligation… On the other hand, article III, rule 2, provides for functions some of which (although very important) are of a less fundamental order e g loading, stowage and discharge of the cargo.

Before analysing the liabilities that may arise at this point, it is important to keep in mind the following quote of Langley J's judgment in *The Imvros*: "It is often not an easy question to determine the moment when the line between bad stowage and unseaworthiness is crossed." [66]

The leading case on this subject is *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd*,[67] in which a ship, *The Grelwen,* transported palm oil and bags of palm kernels from South Africa to England. A claim for damages was filed against the shipowner, Elder Dempster, as a consequence of the loss of

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[64] *Riverstone Meat Co. Pty. Ltd. Appellants; v Lancashire Shipping Co. Ltd. Respondents (The Muncaster Castle)* [1961] A.C. 807; see also Chen Liang, "Seaworthiness in charter parties" [2000] JBL 9.
[65] *The Jordan II* (n 2).
[66] *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd (The Imvros)* [1999] 1 Lloyd's Rep. 848.
[67] *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522.

cargo provoked by the casks' break by the weight of the bags of palm kernels, which were too heavy to be stowed over the casks. First determining whether the damage was caused by a bad stowage or by the unfitness of the ship for transporting the cargo,[68] making it unseaworthy, was essential because the Bill of Lading exonerated the shipowner of any liability arising from the stowage operations, but it would still be liable for the ship's unseaworthiness.

According to Viscount Cave, when "a ship having been injured in consequence of bad stowage, the warranty of seaworthiness of the ship has been held to be broken; but in such cases it is the unseaworthiness caused by bad stowage and not the bad stowage itself which constitutes the breach of warranty. There is no rule that, if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy."[69]

Therefore, a bad stowage may amount to unseaworthiness but only if it affects the ship, not when only the cargo gets damaged. In this case the ship was found to be seaworthy and accordingly, the damage of the cargo was attributed to an improper stowage of the cargo:

> Applying these principles to the present case, I have come to the conclusion that the damage complained of was not due to unseaworthiness but to improper stowage. […] At the moment when the palm oil was loaded the Grelwen was unquestionably fit to receive and carry it. She was a well built and well found ship, and lacked no equipment necessary for the carriage of palm oil; and if damage arose, it was due to the fact that after

[68] In the case it is argued that the incorporation of a tween deck could have helped to distribute the pressure of the weight preventing the damages that had taken place.
[69] *Elder Dempster (*n 67).

> the casks of oil had been stowed in the holds the master placed upon them a weight which no casks could be expected to bear.[70]

However, this judgement does not address the possible negligence of the Master in the stowage and the liabilities that could derive from it, which is relevant to our analysis because, as a representative of the shipowner, his negligence can result in the liability of the latter.

This allocation of liabilities should be clear when the Bill of Lading or the charterparty provides for the obligation of the Master to perform a supervision of the stowage operations, so even if they are performed by the stevedores appointed by another party, the shipowner could be held liable if the Master's negligence caused the unseaworthiness of the ship.[71] An example of this configuration can be found in the clause 8(a) of the NYPE form - Time Charters:

> Subject to Clause 38 (Slow Steaming) […] the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging, and tallying, at their risk and expense, under the supervision of the Master.[72]

Nevertheless, even when the contract of carriage does not contain any provision requiring the Master's supervision or attributing him the responsibility for the operation, the shipowner might still be liable for bad stowage in certain circumstances in which the safety of the ship can be affected, such as where the

[70] ibid.
[71] *Ilian (*n 26) 130.
[72] Clause 8(a) of the NYPE form - Time Charters.

stability of the ship is concerned as stated by Lords Atkin, Wright and Porter in *Canadian Transport Co Ltd v Court Line Ltd:*

> But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers.[73]

Therefore, the Master is always under a duty to intervene when he considers that the proposed method of stowage would render his ship unseaworthy for affecting its safety.[74]

Although the judgements on this matter lack an analysis of the scope of the Master's duty, the following conclusions can be drawn:

> If the Master directs the stowage operation and the damage is attributable to his intervention, the shipowner is held liable unless protected by an exception clause.[75] This is exemplified

[73] *Canadian Transport Co Ltd v Court Line Ltd* [1940] A.C. 934.

[74] An argument shared by Steyn J. in *Centrala Handlu Zagranicznego (CHZ) Rolimpex v Eftavrysses Compania Naviera SA (The Panaghia Tinnou)* [1986] 2 Lloyd's Rep. 586; This illustrates the necessity to differentiate between the stowage that renders the vessel uncargoworthy and that which imperils the safety of the vessel itself, as the former will be classified as bad stowage while the latter as a case of unseaworthiness that the Master is obliged to prevent, see Simon Baughen, "Bad stowage or unseaworthiness?" [2007] LMCLQ 5.

[75] Cooke (n 35) 367.

> in a clear manner by Langley J. in *The Imvros,*[76] a ship that became unseaworthy owing to inadequate lashing of the deck cargo, but it was held that the shipowner was not responsible for the lack of proper supervision by the Master *'at least unless it was proved that the bad stowage was caused only by the Captain's orders or was the result of matters of which the Captain was but the charterers were not aware.'*[77]

The same position was held recently by Jervis Kay Q.C. in *The EEMS Solar*,[78] although it was clarified that the intervention of the Master must be significant, which means that "*it operates so as to tie the stevedores' hands and was caused only by the Captain's orders or was the result of matters of which the Captain was, but the charterers were not, aware."*[79]

Even when the Master does not participate directly in the particular operation that ultimately causes the unseaworthiness of the ship, the shipowner will be liable when it arises out of something within the Master's province, as will be the case when the stowage operations affect the stability of the ship.[80] Conversely, the shipowner will not be liable if the unseaworthiness is caused by a defect in the stowage that is exclusively in the province of the stevedores and is not connected with the characteristics of the

[76] *Transocean Liners* (n 66).
[77] However, this decision was criticised for not considering a distinction between a bad stowage resulting in uncargoworthiness and a bad stowage that affects the safety of the ship, Simon Baughen, 'Problems with Deck Cargo' [2000] LMCLQ 297.
[78] *Yuzhny Zavod* (n 56).
[79] ibid.
[80] *The Socol 3,* (n 7).

ship, as will occur for example when the cargo is lashed in an incorrect manner.[81]

When the charterparty provides for the stowage to be done under the responsibility of the Master, the shipowner is to be held liable for any damages arising from a faulty stevedoring except when the Master's intervention is impossible as stated by Leggatt J in *The Argonaut*:[82] *"a master cannot be said to be responsible for damage which he cannot avoid by the reasonable exercise of his powers of supervision and control."*[83]

v. THE PROTECTION OF THIRD PARTIES

According to the Privity of Contract doctrine, a third party cannot benefit from the limitation or exclusion of liability clauses that a contract provides.[84] For this reason, the agents and servants of the carrier will not be, in general, able to enforce the limitations of liability that are provided by the Hague/Hague-Visby Rules incorporated through a Clause Paramount to a Charterparty or Bill of Lading or through any other clause that modifies the scheme of responsibilities that the contracts of carriage can incorporate, as the parties that participate in them will usually be the shipowner, the shipper, the carrier and the consignee.[85]

However, these third parties, among which are the stevedores, have always looked for a way to benefit from the exclusions and limitations set for

[81] Ilian, *(n* 26) 132.
[82] *MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co (The Argonaut)* [1985] 2 Lloyd's Rep. 216.
[83] ibid.
[84] Ewan McKendrick, *Contract Law* (Palgrave 2015) 112.
[85] William Tetley "The Himalaya Clause – Revisited" 4.

the carrier in the contract of carriage, ultimately leading to the creation of the most used device within the Common Law that attempts to accomplish that, the Himalaya Clause.

a. HIMALAYA CLAUSES

Owing their name to *The Himalaya,*[86] Himalaya Clauses are contractual provisions that seek to extend the carrier's protection against liabilities that the contract of carriage provides for him to third parties such as his servants, agents, and subcontractors, including stevedores.[87]

Relying on the privity of contract doctrine, the English Courts have rejected the possibility that the stevedores could be able to rely on a limitation clause contained in the Bill of Lading between the carriers and the cargo-owners after negligently damaging the cargo. Lord Reid, in *Scruttons Ltd v Midland Silicones Ltd*,[88] however, opened the door to the possibility of considering the existence of a contractual relationship between the shipper and the stevedores through the agency of the carrier:

> "I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the

[86] *Adler v Dickson (The Himalaya)* [1954] 2 Lloyd's Rep 267.
[87] Jonatan Echebarria Fernández, "Paramount Clause and Codification of International Shipping Law" [2019] JMLC 60.
[88] *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446.

> carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome".[89]

This approach has been recognised in later judgements such as *The New York Star*,[90] *The Eurymedon*,[91] *The Pioneer Container*[92] and *The Mahkutai*[93] and has the support of the Contracts (Rights of Third Parties) Act 1999[94] and the Hague-Visby Rules.[95]

From this line of cases, we must conclude that the stevedores will be able to benefit from the exclusions and limitations of liability set out for the carrier in the contract of carriage if a Himalaya Clause is included in them stating clearly that it is intended to protect the stevedores, for which the carrier is contracting as an agent by extending the scope of application of the limitations and exclusions of liability set out in the contract.

Nevertheless, it is important to note that a certain tension exists between the Himalaya Clause and the abovementioned Article III Rule 8 of the

[89] An example of Himalaya Clause that follows these guidelines can be found on (*Bimco.org*, 2020) <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/international_group_of_pi_clubs_himalaya_clause> accessed 11 August 2020.
[90] *Port Jackson Stevedoring Pty v Salmond & Spraggon (Australia) Pty (The New York Star)* [1981] 1 W.L.R. 138.
[91] *New Zealand Shipping Co.* v. *A.M. Satterthwaite (The Eurymedon)* [1974] 1 Lloyd's Rep. 534.
[92] *The Pioneer Container* [1994] 2 A.C. 324.
[93] *The Mahkutai* [1996] A.C. 650.
[94] Contracts (Rights of Third Parties) Act 1999 section 6(5).
[95] The Hague-Visby Rules Article IV bis.

Hague/Hague-Visby Rules, as it can suppose in certain cases the immunity of the carrier and its stevedores before the cargo interests even when they acted negligently (blanket immunity).[96] The House of Lords had the opportunity to decide upon this issue in *The Starsin*,[97] where it was concluded that Himalaya Clauses cannot provide a wider exemption than that available to the contractual carrier under the Hague/Hague-Visby Rules as that would be rendered void by the Article III Rule 8.[98]

vi. UNAUTHORISED STOWAGE ON DECK

The cargo stowed and carried on the deck of a ship gets substantially more exposed to the external elements than the cargo stowed in a hold, as the latter will hardly be affected by the wind, the rain or the saltpetre.[99]

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[96] In this sense, a clause of a charterparty excluding any liability whatsoever applicable to any person who works on behalf of the shipowner or carrier (among which we could find the stevedores) would be qualified as a blanket immunity clause rendered null and void under the article III Rule 8 of the Hague/Hague-Visby Rules, which prohibits the relief or lessening of liabilities of the carrier or the ship by means of agreement or clause.

[97] *Owners of Cargo Lately Laden on Board the Ship or Vessel "Starsin" and Others v Owners and/or Demise Charterers of the Ship or Vessel "Starsin" and Two Other Actions* [2003] UKHL 12.

[98] The level of acceptance depends on the courts of each state *e.g.* in the Canadian case *Eisen Und Metall A.G. V. Ceres Stevedoring Co. Ltd. and Canadian Overseas Shipping Ltd. [1977] 1 Lloyd's Rep. 665* the Quebec Court of Appeal held that the stevedores could not be protected by an Himalaya Clause where the damages were caused by their gross negligence, see William Tetley, 'The Himalaya Clause, "Stipulation Pour Autrui". Non-Responsibility Clauses and Gross Negligence under the Civil Code' [2005] Les Cahiers de droit 468.

[99] Jason Chuah, Anthony Rogers and Martin Dockray, *Cases and Materials on The Carriage of Goods by Sea* (Routledge 2016) 312.

Given the greater risks that it entails, the Hague/Hague-Visby Rules include an exemption to their own application when the Bill of Lading permits deck carriage and it contains a specific declaration that the cargo is carried on deck.[100] Furthermore, stowing the cargo on deck when it has been provided in the contract of carriage that the cargo is to be stowed in hold entails negative consequences for the defaulting party.

Traditionally under the English Law, stowage of cargo on deck against the instructions of the shipper is regarded as a fundamental breach of the contract of carriage which provokes the loss for the defaulting shipowner/carrier of every right to limit his liability for damages as explained by Mr Justice Hirst in *The Chanda*:[101]

> Clauses which were intended to protect the shipowner provided he honoured his obligation to stow goods under deck did not apply if he was in breach of that obligation; the package limitation fell within this category since it could hardly have been intended to protect the shipowner who as a result of the breach exposed the cargo in question to such risk of damage; the package limitation clause being repugnant to and inconsistent with the obligation to stow below deck, was inapplicable.[102]

[100] Simon (n 59) 296.
[101] *Valla Giovanni & Co SpA v Gebr Van Weelde Scheepvaart Kantoor BV (The Chanda)* [1985] 1 Lloyd's Rep. 563; see also Lina Wiedenbach, *The Carrier's Liability for Deck Cargo* (Springer Berlin Heidelberg 2015) 156.
[102] ibid.

However, this line of thinking was challenged in *The Kapitan Petko Voivoda*,[103] where it was concluded that the wording of the Article IV Rule 5(a) of the Hague-Visby Rules,[104] means that the severity of the breach does not have any relevance as there is no restriction on the scope of application of the limitation,[105] and hence it is applicable even when the cargo has been unauthorizedly stowed on deck.

III. THE LIABILITIES OF THE SHIPPER AND THE CONSIGNEE

As stated above, even though under the English Law the default responsibility for the stowage operations lays with the shipowner, it is possible to transfer it to the carrier, but also to the shipper or the consignee if the cargo or ship gets damaged by them or their servants in their respective assigned obligations.

However, the most common way to distribute the cargo related operations will be for the shipper to assume the obligation to stow the cargo on-board and for the consignee to discharge it from the ship at destination. For this reason, the present section will focus on the shipper's participation in stowage operations.

i. DAMAGES NOT CAUSED BY THE SHIPPER – RESERVATIONS

[103] *Daewoo Heavy Industries Ltd (of Korea) & Anor v Klipriver Shipping Ltd (of Cyprus) & Anor. (The Kapitan Petko Voivoda)* [2003] EWCA Civ.

[104] "…Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit..."

[105] Nevertheless, this outcome has been criticised as it can suppose the application of limitation clauses in cases where the damages are a result of deliberate wrongdoing. Paul Todd, "Excluding and limiting liability for misdelivery" [2010] JBL 264.

When the shipper plays an active role in the stowage of the cargo and is aware of apparent defects in stowage, he must voice his reservations at the time, or otherwise he will not be able to complain about the deficiencies taken place in a finished stowage operation.[106]

ii. DAMAGES CAUSED BY THE SHIPPER

a. BAD INSTRUCTIONS AND MISDESCRIPTION OF THE GOOD

Under Article IV Rule 2(i) of the Hague/Hague-Visby Rules, even when the shipowner or the carrier have assumed the responsibility for the stowage operations and the ship or the cargo gets damaged in their performance, it is possible that the shipper must bear the costs of compensating those damages if they have been caused by the shipper's acts or omissions:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: Act or omission of the shipper or owner of the goods, his agent or representative."[107]

This is thought to cover damages caused on the cargo by improper stowage due to bad instructions or the misdescription of the goods provided by the shipper,[108] and is complemented by two specific cases where the carrier and the shipowner will be exonerated from liabilities for the damages caused

[106] Indira (n 29) 217.
[107] Article IV Rule 2(i) of the Hague/Hague-Visby Rules.
[108] Thomas Gilbert Carver and Raoul P Colinvaux, *Carver's Carriage by Sea* (Stevens & Sons 1982) at para 537.

by the shipper's fail to provide sufficient packing[109] and sufficient or adequate marks for the cargo.[110]

b. DANGEROUS CARGO

The Article 4 Rule 6 of the Hague/Hague-Visby Rules subjects the loading of dangerous cargo to the carrier's knowledge or consent, forbidding the shipper to load dangerous cargo without it.

While this Article applies to dangerous cargo that can cause physical damage to the ship, the English Common Law extends an implied obligation, for the shipper to communicate to the carrier the existence of any dangerous cargo.[111]

If the shipper does not inform the carrier about the existence of dangerous cargo among the goods loaded on-board, he will be liable for any damage to the cargo and/or ship and for any loss that the arrest or detention of the ship could entail if it is related precisely to the dangerous cargo loaded. At this point it is essential to note that this constitutes an absolute obligation that according to the House of Lords in *The Giannis NK*,[112] (following the decision in *Brass v. Maitland)*,[113] applies even when the shipper is unaware of the existence of the dangerous cargo for what it can be qualified as a case of strict liability that is unaffected by Article IV Rule 3 of the Hague/Hague-Visby Rules.[114]

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[109] Article IV Rule 2(n) of the Hague/Hague-Visby Rules.
[110] Article IV Rule 2(o) of the Hague/Hague-Visby Rules.
[111] Dangerous cargo can also be that which could provoke delays due to arrest or detention of the ship: *Mitchell, Cotts & Co. v Steel Brothers & Co., Limited* [1916] 2 K.B. 610; see also Stephen D. Girvin, "Shipper's liability for the carriage of dangerous cargoes by sea" [1996] LMCLQ 500.
[112] *Effort Shipping Co. Ltd. Respondent v Linden Management S.A. (The Giannis NK)* [1998] A.C. 605.
[113] *Brass v Maitland* (1856) 6 E & B 470.
[114] Sukhninder Panesar, "The shipment of dangerous goods and strict liability" [1998] ICCLR 139.

IV. CONCLUSION

There are many factors that can affect the good condition of cargo carried by sea. Although the most obvious would be to think about the inclement weather and the dangers that the sea entails, the cargo is at risk even before the commencement of the voyage. This is the case of the stowage operations by which the cargo is placed safely on board, even though the human factor implied in the stowing process can provoke that the cargo gets damaged or lost during the loading or even throughout the voyage. Precisely, this paper has analysed the liabilities that can arise from these incidents under the English Law for the different entities implied in the contract of carriage of goods by sea: the shipowner, the carrier, the shipper, and the consignee. For this reason, the main object of analysis has been the Common Law as well as the Hague-Visby Rules, which have been incorporated into the English legal system by the Carriage of Goods by Sea Act (1971) and is widely used in the international trade.

First, this paper has analysed the liabilities of the shipowner and the carrier pointing out that they share the same regime of negligence by which they become liable for the damages caused by either they or their servants not taking the necessary precautions and procedures, accounting for the circumstances of the voyage and the nature of the goods, and/or their performance does not meet the standard of reasonable care required in the particular case. Moreover, when at discharge it is made evident that the cargo has been damaged, there is a presumption that the carrier was negligent which obliges him to prove his diligence or that the damage was caused by an excepted peril.

Sometimes, the shipowner, although being responsible for the stowage, will not be able to perform the operation themselves and needs to employ the carrier's stevedores, becoming then liable for their negligence. However, in these circumstances, the carrier is responsible for appointing competent stevedores.

Traditionally the stowage operations were performed by the ship's crew itself, acting under the shipowner's orders (represented by the Master), and transferring the obligation to stow was considered null under the Hague/Hague-Visby Rules. However, the commercial practice has extended the use of FIOS

Clauses, which have been recently declared lawful by the English Courts in the paradigmatic cases of *The Jordan II* and *The EEMS Solar*.

Regarding the seaworthiness in relation to stowage, we must differentiate between bad stowage and unseaworthiness by analysing which was the cause and subject of the damages. When the stowage can render the ship unseaworthy by affecting its safety, the Master must intervene or otherwise the shipowner can be held liable for the damages.

Although the privity of contract doctrine prohibits in principle the protection of a third party in a contract, the Himalaya Clauses have spread as a way to protect the stevedores appointed by the carrier through a virtual agency. With their incorporation in a Bill of Lading, the stevedores can benefit from the same limitations of liability and exclusions that are intended for the carrier

The cargo carried on deck is exposed to more risks and therefore, if the carrier/shipowner stowed it on deck against the instructions of the shipper it would be traditionally regarded as a fundamental breach of the contract of carriage that prevents the defaulting party from benefiting from any limitation of liability. However, since the decision in *The Kapitan Petko Voivoda*, the shipowner/carrier can still rely on the limitations of liability provided by the Hague/Hague-Visby Rules even when they disregard the shipper's instructions.

As for the shipper and the consignee, it has been argued that the consignee will not normally be implicated in the stowage operations as it is more usual for the shipper to assume the obligation, although nothing prevents the consignee from doing so.

When the shipper does not perform the stowage operations but is aware of apparent defects in stowage, he must voice his reservations at the time to guarantee their effectiveness. Moreover, the shipper can be held liable for the damages caused by his negligence, acting as an exception to the liability of the shipowner/carrier.

When the shipper performs the stowage operations, he must inform the carrier of the dangerous nature of the goods that are supposed to be loaded, being otherwise held liable should any damage, loss, arrest, or detention arise in relation to the said dangerous cargo.

Nevertheless, we must acknowledge that all these rules might change in the near future as there are projects in development that intend to introduce

the automated stowage of ships, which will be carried out by pre-programmed autonomous vehicles, guided by the instructions given by the stowage plan, in an attempt to improve the efficiency.[115] Some questions arise from this: Who will be held liable if the cargo gets damaged but the stowage plan was correct?; who will be responsible for the good operation of the autonomous vehicles?; will there be someone in charge of supervising them? We will have to wait to answer these questions by examining how the legal regime gets adapted to the future developments of the sector.

[115] Jesus Murgoitio Larrauri *et. al*., "Spanish initiative for fully automated stowage on roll-on/roll-off operations" [2016] TRP.

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"MOTHER" OR "FATHER": BIRTH REGISTRATION AND THE RIGHTS OF TRANSGENDER PARENTS

Fintan Molloy*

ABSTRACT

In the UK, when an individual does not identify with the gender assigned to them at birth they are able to apply for a Gender Recognition Certificate. The holder of a Gender Recognition Certificate is to be regarded as living in their acquired gender for all purposes. Yet, when a transgender individual, who holds a Gender Recognition Certificate, registers the birth of their child, the parent' relationship to their child is likely to be recorded in a form that does not align with their acquired gender. This essay, therefore, focuses on the laws inability to consistently recognise the gender of transgender parents and the discrepancy between the way the law assigns the role of mother and father to cisgender and transgender individuals. Firstly, this essay analyses the interaction between the Gender Recognition Certificate and our current system of birth registration. It then seeks to understand how the law defines who is a mother and who is a father. Finally, it considers the prospect of reforming these terms.

INTRODUCTION

In 2018, the Parliamentary Assembly of the Council of Europe set its members the objective of 'achieving equality' in regard to Article 8 of the European

* I would like to thank Dr S Chelvan for providing me with information on the case of *R (on the application of H) v Secretary of State for Health and Social Care*.

Convention on Human Rights (ECHR).[1] Specifically, it urged its member states to:

> provide for transgender parents' gender identity to be correctly recorded on their children's birth certificates, and ensure that persons who use legal gender markers other than male or female are able to have their partnerships and their relationships with their children recognised without discrimination.[2]

The United Kingdom is one of the founding members of the Council of Europe.[3] Domestically, the UK government has also publicised its commitment to upholding transgender peoples' right to equality.[4] Transgender individuals have been able to legally change their gender since the implementation of the Gender Recognition Act 2004 (GRA 2004), a step that has been important in ensuring that the law recognises an individual's identity beyond the one that was assigned

[1] Parliamentary Assembly of the Council of Europe, 'Private and family life: achieving equality regardless of sexual orientation' (2018) Resolution 2239 Parliamentary Assembly of the Council of Europe <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25166&lang=en> accessed 19 May 2020.
[2] ibid
[3] Council of Europe, *Statute of the Council of Europe: London 5 May 1949* (London, HMSO 1949).
[4] UK Government Equalities Office, 'Advancing Transgender Equality: A Plan For Action' (2011) UK Government Equalities Office < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf> accessed 19 May 2020; UK Government Equalities Office, 'Reform of the Gender Recognition Act – Government Consultation' (2018) UK Government Equalities Office < https://consult.education.gov.uk/government-equalities-office/reform-of-the-gender-recognition-act/user_uploads/gra-consultation-document.pdf> accessed 19 May 2020.

to them at birth.[5] Recent case law, however, suggests that 'Parliament has failed to provide in legislation for the circumstances [in which a transgender person has a child]'.[6] In 2015, the family court ruled that a transgender woman who has a child will be recorded on that child's birth certificate as "father"—not as "mother" or "parent".[7] Similarly, 2019 saw the family court rule that a transgender man, who gestates a child, shall be recorded on the child's birth certificate as "mother",[8] a decision that has since been affirmed by the Court of Appeal.[9] Although each family unit is unique, the decisions in both cases mean that a transgender parent will often experience a disconnect between their social and psychological position within a family and their legally recognised role on their child's birth certificate. Consequently, it is important to ask whether our current system of birth registration, in England and Wales, adequately protects the rights of transgender parents. To answer this question, this essay will first understand how the Gender Recognition Act 2004 interacts with our current method of birth registration. It will then consider how common-law and statute defines who is a mother and who is a father. Furthermore, it will seek to understand the implications of these definitions on cisgender and transgender parents and recognise how they differ. It is only then that we may consider the prospect of reform and whether or not it is needed.

BIRTH REGISTRATION

[5] Gender Recognition Act 2004 (2004 c 7), s 9 (Gender Recognition Act).
[6] *R (on the application of TT) v The Registrar General for England and Wales* [2019] EWHC 2384 (Fam), [2020] Fam. 45 [102].
[7] *R (on the application of JK) v The Registrar General for England and Wales* [2015] EWHC 990 (Admin), [2016] 1 All ER 354.
[8] *R (on the application of TT)* (n 6).
[9] *R (on the application of Alfred McConnell, YY) v The Registrar General for England and Wales* [2020] EWCA Civ 559 [2020] 4 WLUK 281.

In almost all states, a birth certificate is the legal document that records an individual's identity and grants that individual with civil rights. In the United Kingdom, for example, the registration of a child at birth automatically grants them British citizenship which provides the right to access education, free health care, employment, and their eligibility to vote. Moreover, birth certificates provide an individual with the knowledge of their parentage. As a result, this can allow an individual to access further legal rights, for example, through citizenship by descent. Additionally, it can provide a greater understanding of any inherited health issues. Such is the importance of birth registration to a child, that it is codified in the United Nations Convention on the Rights of the Child.

> ***Article 7***
> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.[10]

The birth certificate is not only significant to the individual, the state also has an interest in birth registration, at both a micro and macro level. The knowledge of a child's parentage allows individuals to be held accountable when they fail to fulfil their parental responsibilities. It is only with the knowledge of a child's existence that the state is able to intervene when that child's welfare is at risk. Similarly, the knowledge of many individual births provides the state with key demographic information which it can then use to inform policy decisions. The consequences of a birth registration are, therefore, prominent beyond an individual's birth and childhood and, as such, require great accuracy in the recording of information.

[10] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 7.

The Births and Deaths Registration Act 1953 (BDRA 1953) currently governs birth registration in England and Wales. It provides that '... [T]he birth of every child born in England or Wales shall be registered by the registrar of births and deaths for the sub-district in which the child was born by entering in a register kept for that sub-district such particulars concerning the birth as may be prescribed...'.[11] The 'particulars concerning the birth' are authorised by The Registration of Births and Deaths Regulations 1987 (TRBDR 1987), made under s 39 of the BDRA 1953.[12] Regulation 7 requires that:

> (1) The particulars concerning a live-birth required to be registered pursuant to section 1(1) of the [BDRA 1953] Act shall... be those required in spaces 1 to 13 of form 1 and that form shall be the prescribed form for registration of live-births for the purpose of section 5 of the Act...
>
> (2) Except as otherwise provided in these Regulations the particulars to be recorded in respect of the parents of a child shall be those appropriate as at the date of its birth.[13]

Schedule 2 of TRBDR 1987 gives an example of the required form for the registration of live births.[14] This form has sections for the details of "child", "father/parent", "mother" and "informant". The "child" is the person whose birth is being registered. The "informant" is a qualified person who has the legal

[11] Births and Deaths Registration Act 1953 (1 & 2 Eliz 2 c 20), s 1(1) (Birth and Death Registration Act).
[12] Births and Deaths Registration Act, s 39.
[13] The Registration of Births and Deaths Regulations 1987, SI 1987/2088, reg 7 (Registration of Births and Deaths Regulations).
[14] Registration of Births and Deaths Regulations, sch 2.

power or obligation to provide the particulars.[15] The "father/parent" and the "mother" refer to the legal parents. Birth registration limits a child to having two legal parents and, thus, only recognises binary family units. Julie McCandless refers to this as 'the normative two-parent family model'.[16] Within this model, the role of "mother" carries different expectations and responsibilities to the role of "father/parent". For example, it is only a "mother", and not a "father/parent", who is required to state a 'usual address if different from place of child's birth', implying an innate bond always exists between mother-child and not father-child.[17] Thus, our current structure of the birth certificate relies on rigid gender roles that are reflective of social and historical stereotypes. Such is the rigidity of these gender roles that no alterations to the register are permitted, except for the correction of clerical errors and corrections of fact or substance by way of margin entry, without any alteration to the original entry.[18] Although the most radical amendment of the birth certificate allows a second female person to be named as a child's "parent" (in place of "father"), the information documented in such cases is the same as has always been for traditional heterosexual couples. Harding notes that 'heteronormativity is experienced as a regulatory practice'[19] within the legislation surrounding birth registration—'heterosexual desire and identity are not merely assumed, they are

[15] Births and Deaths Registration Act, s 1(2) and s 2.
[16] Julie McCandless, 'Reforming Birth Registration Law in England and Wales?' (2017) 4 Reproductive Biomedicine & Society Online <https://www.rbmsociety.com/article/S2405-6618(17)30018-7/fulltext#secst0030> accessed 19 May 2020.
[17] Registration of Births and Deaths Regulations, sch 2 Form 1.
[18] Births and Deaths Registration Act, s 29.
[19] Rosie Harding, "(Re)inscribing the heteronormative family: Same-sex relationships and parenting 'after equality'" in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2015) 186.

expected.'[20] Thus, I shall refer to 'the normative two-parent family model' as the heteronormative binary model. This model is upheld by the birth certificate and, as I shall go onto discuss, its surrounding legislation. The model is rooted in the notion that heterosexuality is the default sexual orientation of those who occupy the role "mother" or "father/parent" and it fails to consider the possibility that, in a social and psychological sense, any parent of a child may fulfil either of these roles at different periods of a child's life.

The birth certificate, therefore, poses a threat to all parents who do not identify as heteronormative and wish to keep their gender and sexual orientation private. In particular, the birth certificate threatens the privacy of transgender parents who, having transitioned either before or after the birth of their child, will have their parent-child relationship recorded in a term that reveals the parent's previous gender. In circumstances where a transgender person might have their previous gender exposed (for example, being required to produce their child's birth certificate), individuals have reported feeling embarrassed, fearful, and at its worst, suicidal as well as having an increased sense of gender dysphoria.[21] The exposure of an individual's previous gender and these associated feelings, place transgender parent and child in an "intermediate zone" that has previously been identified by the European Court of Human Rights (ECtHR) as breaching Article 8 ECHR in a decision that led the United Kingdom to create the GRA 2004.[22]

[20] Samuel A. Chambers "An Incalculable Effect': Subversions of Heteronormativity' (2007) 55(3) *Political Studies* 55(3) (2007) 665 <https://journals-sagepub-com.manchester.idm.oclc.org/doi/full/10.1111/j.1467-9248.2007.00654.x> accessed 19 May 2020.

[21] Transgender Equality Network Ireland, *Speaking from the margins*, (Transgender Equality Network Ireland, Dublin, 2013) 34–36.

[22] *Goodwin v United Kingdom* App no 28957/95 (ECHR, 11 July 2002) [2002] 35 EHRR 18 [90].

Under the GRA 2004, a person who is over the age of 18 years may make an application for a Gender Recognition Certificate (GRC) on the basis that the individual has been living in their acquired gender and provided that they have been medically diagnosed with gender dysphoria.[23] The applicant must make a statutory declaration that: they have lived in the acquired gender throughout a period of two years ending with the date on which the application is made; and that they intend to continue to live in the acquired gender until death.[24] The application is then determined by a Gender Recognition Panel.[25] If the application is successful, Parliament grants the transgender individual with the following rights:

> **9 General**
>
> (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

[23] Gender Recognition Act, s 1 and s 2.
[24] Gender Recognition Act, s 2.
[25] Gender Recognition Act, s 1(3).

> (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.[26]

Thus, for "all purposes" an individual with a GRC is to be regarded as living in their acquired gender. The act, however, also provides an extra provision related to parenthood:

> **12 Parenthood**
>
> (1) The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.[27]

The 2019 decision of *R (TT) v Registrar General for England and Wales* means that the family court will read s 12 both retrospectively and prospectively.[28] Where an individual acquires legal recognition of their new gender through a GRC, this recognition is disregarded in circumstances relating to their child's birth registration. In his judgement, Sir Andrew McFarlane indicated that by enacting s 12 GRA 2004, 'Parliament has made a social and political judgement as to how the competing interests [of transgender parents and a functioning registration system] should be accommodated.'[29] Regardless of whether or not this was Parliament's intention, it has failed to adequately legislate for its transgender citizens who wish to become parents. The consequence is that the GRA 2004 only partially upholds the gender identity

[26] Gender Recognition Act, s 9.
[27] Gender Recognition Act, s 12.
[28] *R (on the application of TT)* [144] (n 6).
[29] *R (on the application of TT)* [263] (n 6).

rights that are granted to transgender parents by Article 8 ECHR.[30] Despite social and scientific advances now allowing individuals to bear children regardless of their gender, being a transgender parent is a barrier to having consistent legal recognition from the state. Alghrani writes how these advances have begun to 'necessitate the redefinition of parenthood, and consequently the notions of motherhood and fatherhood'.[31] A successful redefinition of these terms would include a greater alignment between their legal meaning and their meaning in wider social practice. Specifically, in the context of the birth certificate, it may mean a relabelling of the terms used to record a child's parent/s. Before any such attempt is made, however, we must first understand our current definitions of the terms "mother" and "father" and how cisgender and transgender parents fit into them.

WHO IS A "MOTHER"?

In September 2019, the Family Court—for the first time—gave a common-law definition to the term "mother".

> a) At common law a person whose egg is inseminated in their womb and who then becomes pregnant and gives birth to a child is that child's 'mother';

[30] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' [2019] Council of Europe/European Court of Human Rights 49 <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> Accessed 20 May 2020.

[31] Amel Alghrani, 'Assisted Reproductive Technologies and Family Formation: Womb Transplant Technology and the Allocation of Family Responsibilities' in Craig Lind, Heather Keating and Jo Bridgeman (eds), *Taking Responsibility, Law and the Changing Family* (Ashgate 2011) 232.

> b) The status of being a 'mother' arises from the role that a person has undertaken in the biological process of conception, pregnancy and birth;
>
> c) Being a 'mother' or a 'father' with respect to the conception, pregnancy and birth of a child is not necessarily gender specific, although until recent decades it invariably was so. It is now possible, and recognised by the law, for a 'mother' to have an acquired gender of male, and for a 'father' to have an acquired gender of female.[32]

It follows that in all cases of birth registration, it will be the individual that gestates a child who is recorded as that child's "mother". This decision reinforces the idea that there is an innate bond between a child and their gestational parent—an idea that is also imposed by automatic parental responsibility being placed only on a "mother" from their child's birth.[33]

With the above common law definition of "mother" a cisgender woman, who conceives through sexual intercourse and gestates a child, will be registered as that child's "mother". In contrast, a transgender woman, who is unable to gestate, will never be legally recorded as "mother". Yet, in both cases, a cisgender woman and transgender woman are likely to be regarded psychologically and socially as their child's mother. It is because of their combination of gestation, genetics, and intentions of motherhood aligning to meet the state's heteronormative binary model, that cisgender women are able to be registered as "mother" and are rewarded with consistent legal recognition. Transgender women, on the other hand, are unable to achieve this, even in cases where they contribute genetically to the conception of a child. For example, where a transgender woman has sexual intercourse with a female partner who

[32] *R (on the application of TT)* [280] (n 6).
[33] Children Act 1989 (1989 c 41), s 2 (Children Act).

then conceives and gestates a child, it will be the female partner who is documented as the child's "mother" and the transgender woman will not be registered as a second "mother" or "parent" but instead will be recorded as "father". This common-law definition, therefore, aligns with the social and psychological familial reality of cisgender women but discriminates against transgender women on the basis of their physical biology. It fails to recognise the possibility of a mother-child relationship existing outside of the circumstances in which a woman has given birth. By doing so it re-enforces the archaic idea that woman and childbirth are synonymous. This idea is also reflected within the legislation that governs Artificial Reproductive Technologies (ART).

Where a woman is unable to conceive through sexual intercourse, she may use ART as an alternative method of conception. A woman may do this with or without a male partner who intends to be the father of the child. Governed by the Human Fertilisation and Embryology Act 2008 (HFEA 2008) examples of ART include Intra-Uterine Insemination; In Vitro Fertilisation; In Vitro Maturation; Vitrification; and Intra-Cytoplasmic Sperm Injection. All of these methods can and often involve donors of sperm or embryos which can extinguish the known biological parents of a child. However, many parents also use sperm and embryo donations from people they know or their own where possible.

Evidently, Sir Andrew McFarlane was influenced by the HFEA 2008 when forming the common law definition of the term "mother". S 33 of the act defines "mother" as '[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.'[34] The heteronormative binary model is, therefore, not just enforced through the birth certificate but is present within its surrounding legislation. Once again, as they are unable to gestate,

[34] Human Fertilisation and Embryology Act 2008 (2008 c 22), s 33 (HFEA 2008).

transgender women are removed from their female gender identity and will never be legally recognised as a child's "mother" under this act.

Despite, the lack of legislation to accommodate transgender parents within HFEA 2008, the act does acknowledge the possibility of two women raising a child. Under part two of the act, there is a presumption that where the "mother" is married to a female partner who consented to the assisted reproduction, the female partner will be registered in the gender-neutral term of "parent" on the child's birth certificate.[35] Moreover, the act also allows for an unmarried female partner to be listed as the child's "parent" provided that they consent to "the agreed female parenthood conditions".[36] In contrast, regardless of whether or not a "mother" is married to a transgender woman, the transgender woman may only register a relationship to their child as "father" under "the agreed fatherhood conditions", not in the gender-neutral term of "parent".[37] Thus, while the legislation surrounding ART, acknowledges the existence of family units outside of the heteronormative binary model, specifically cisgender lesbian women, it does so cautiously. Both the agreed fatherhood conditions and the agreed female parenthood conditions limit the possibility of a child having multiple "father/parent".[38] Moreover, the requirements of both sets of conditions are near identical. On the one hand this could be interpreted as the statute acknowledging that the role of "father" can be played by a female parent. On the other, however, the duplication demonstrates a disregard for any lived differences between a heteronormative "father" and the female "parent". It is a perfunctory nod towards non-traditional family units and still relies on a gender binary of men and women, thus, forcing transgender women to sacrifice their right to Article 8 in order to have a child.

[35] HFEA 2008, s 42.
[36] HFEA 2008, s 44.
[37] HFEA 2008, s 37.
[38] HFEA 2008, s 37(1)(d) & s 44(1)(d).

This gender binary is also present in the Human Fertilisation and Embryology Act 1990 (HFEA 1990) which restricts the provision of "treatment services" as only 'assisting *women* to carry children' (emphasis added).[39] Read with Article 14 ECHR, this could be interpreted as discriminating against those of a transgender status as no provisions are made for transgender men to gestate a child. Notwithstanding this, it has been reported that registered clinics have been providing these services to transgender men and medically recording their genders as male.[40] Therefore, as well as failing to provide for the lived experience of the transgender man, Parliament may also be failing to keep up with accepted medical practises.

As both the common-law and statutory definitions of mother rely on gestation, it is important to analyse the circumstances in which it is medically impossible for a person to gestate their child. In such cases, surrogacy arrangements may be sought. The legislation that governs ART also governs surrogacy. Thus, the surrogate will be registered as the child's "mother" and 'the surrogate mother is always the child's legal parent unless and until a court order is made in favour of the commissioning parents.'[41] Regardless of a surrogate's intention to extinguish parenthood after birth, she is, pursuant to section 33(1) of the HFEA 2008, deemed the legal mother of the child.[42] In order to give legal effect to the surrogacy arrangement, the intended social mother must either adopt the child or apply for a parental order.[43] S 41 of the BDRA 1953 (inserted by para 13(6) of Sch 3 to the Children Act 1975) states that '"mother", in relation to an adopted child, means the child's natural mother'.[44] Thus, neither a cisgender nor transgender woman will ever be registered as

[39] Human Fertilisation and Embryology Act 1990 (1990 c 37) s 2.
[40] *R (on the application of TT)* [5] (n 6).
[41] *Whittington Hospital NHS Trust v XX* [2020] UKSC 14 [9].
[42] HFEA 2008, s 31(1).
[43] HFEA 2008, s 54.
[44] Births and Deaths Registration Act 1953, s 41.

"mother" when adopting a child as the law prioritises gestation and genetics over intentions of motherhood. Although a parental order could be seen to extinguish the status of birth parents in favour of the commissioning parents, it does so too only to uphold the heteronormative binary model. Applicants for a parental order must consist of two people: who are husband and wife; civil partners of each other; 'two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other'.[45] Thus, when having a child using a surrogate parent and choosing to raise that child solely, neither a cisgender woman nor a transgender woman can be registered on the child's birth certificate.

The only exception to this is in the circumstance where a woman uses her female partner as a surrogate. Diduck and Kaganas have written about how ''intra-partner' egg sharing is becoming increasingly common among lesbian partners'.[46] This is where one woman donates eggs to her partner in order to be the biological mother of the child. The partner receiving the eggs will then gestate the child and be regarded as "mother" on the child's birth certificate. However, the partner donating the eggs may be regarded as "parent" as per the HFEA legislation discussed above. In contrast, if a transgender woman has a female partner willing to be a surrogate, the transgender woman shall not be regarded as the child's "parent" regardless of whether she contributes genetically to the child.[47] Instead, the transgender woman, if they 'consent', will be recorded as the child's "father".[48] Thus, in circumstances of surrogacy, the law prioritises gestation over biology or intentions of motherhood. This is true for both cisgender and transgender women. As Cook and others write 'Surrogacy is problematic for traditional notions of 'mother, 'father' and

[45] HFEA 2008, s 54(2).
[46] Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (Hart Publishing Ltd 2012) 128.
[47] HFEA 2008, s 36(d).
[48] HFEA 2008, s 35(1).

'family' when it introduces a third (or even fourth) party into reproduction… when it fragments motherhood… makes motherhood negotiable and confounds both social and biological bases of claims to parenthood.'[49] The current legislation fails to acknowledge different forms of family units made up by these fragments and instead forces them to fit the heteronormative family model.

WHO IS A "FATHER"?

When asking who is a child's "father", Bracewell J notes how the law prioritises genetic parentage over intentions of fatherhood: 'I find fatherhood concerns genetics and the provision of sperm which results in the birth of a child'.[50] This has been confirmed in later cases such as *Re R (A Child) (IVF: Paternity of Child).*[51] Indeed, at present when a child is conceived through sexual intercourse, the person who will be registered as the child's "father" will usually be the individual whose sperm fertilised the egg, if their identity is known. There are two exceptions to this rule. The first is the presumption of legitimacy and the second is statutory intervention as discussed below.

The long-held presumption of legitimacy (now affirmed in statute) is that the husband of a gestational mother is presumed to be the child's "father".[52] As a matrimonial relationship is present, the law favours a heteronormative binary family model and confers on a husband automatic rights to parenthood. However, scientific and social advancements have cast doubts on the usefulness

[49] Rachel Cook and Shelley Day Sclater and Felicity Kaganas, 'Introduction' Rachel Cook and Shelley Day Sclater and Felicity Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Oxford, Hart Publishing 2003) 4.
[50] *Re B (Parentage)* [1996] 2 FLR 15.
[51] *Re R (A Child) (IVF: Paternity of Child)* [2003] EWCA Civ 182, [2003] 2 All ER 131 [20].
[52] Legitimacy Act 1976 (1976 c 31).

of this presumption.[53] The best evidence the court currently has at determining the parentage of a child is scientific. This is acknowledged in the Family Law Reform Act 1969 by enabling the presumption of legitimacy to be rebutted on the balance of probabilities.[54] A child is also able to seek a declaration of legitimacy and, if necessary, obtain DNA proof of a relation to a father.[55] Cisgender men, therefore, have a 'double element of choice. A man who is not married to the mother of his child can choose to recognize that child as his own, while married men can choose to deny paternity on the basis of genetic evidence.'[56]

In contrast, neither genetics or intentions of fatherhood will ever allow a transgender man to be registered on their child's birth certificate as "father". Where a transgender man has a male partner and conceives a child through sexual intercourse, the transgender man shall be recorded as "mother" on that child's birth certificate. In cases where a transgender man has a female partner who conceives a child through sexual intercourse, however, the transgender man shall not be recorded on the child's birth certificate at all. The law, therefore, penalizes transgender men affording them no means to be registered as "father" because they do not meet the expectation of the heteronormative binary model. In contrast, the law takes steps to preserve the heteronormative binary model, by rewarding cisgender men with the ability to become a "father" through marriage, genetics, or intentions of fatherhood. Indeed, similar attempts to preserve the heteronormative binary model are also present in statute.

Under part two of the HFEA 2008, there is a presumption that where a woman using ART is married, her husband will be listed as the "father" of the

[53] *Re H and A (Children) (Paternity: Blood Tests)* [2002] EWCA Civ 383, 2002 WL 346996 [2002] EWCA Civ 383 [30].
[54] Family Law Reform Act 1969 (1969 c 46) s 26.
[55] Family Law Act 1986 (1986 c 55) s 56.
[56] R Mykitiuk, 'Beyond Conception: Legal Determinations of Filiation in the Context of Reproductive Technologies' (2001) 39 *Osgoode Hall Law Journal* 771.

child, with the provision that he gives 'consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination'.[57] The act also allows for a man unmarried to the gestational mother, whose sperm was not used in the treatment,[58] to be listed as the child's "father" (provided the Woman using ART is not married to another individual).[59] Thus, where there is the presence of a heteronormative binary union, that is a marriage, HFEA 2008 preserves it by extinguishing any claims of genetic parentage from sperm donors. When defining transgender men who use ART, however, the law is more complex.

Where a transgender man gestates a child through ART, he shall be recorded as "mother" on that child's birth certificate. Contrastingly, in cases where a transgender man is married to a female partner who conceives a child through ART, the transgender man shall be recorded on the child's birth certificate as "parent" and the female partner shall be recorded as "mother". Finally, where a transgender man is unmarried to a female partner who conceives a child through ART, the transgender man can still be recorded on the child's birth certificate, however, this will be done under "the agreed female parenthood conditions" not "the agreed fatherhood conditions".[60] Despite both the HFEA 1990 and the HFEA 2008 providing expressly for parentage in cases of assisted conception (even if the notions of parenthood are not always consistent) when debating the 2008 act parliament did not discuss issues relating to transgender parents at all, let alone the possibility of a transgender man carrying and delivering his own child.[61] The result is that HFEA 2008 is inconsistent when defining the type of parent a transgender man is, regardless of his consistent intention to be a father.

[57] HFEA 2008, s 35.
[58] HFEA 2008, s 36(d).
[59] HFEA 2008, s 37.
[60] HFEA 2008, s 44.
[61] HC Deb 12 May 2008, vol 475, cols 1063–1168.

The legislation that governs ART also governs Surrogacy and, thus, defines transgender men as above. Surrogacy arrangements may be sought where it is medically impossible for a woman to have a child, or if a single man or male couple wish to have a child. It is possible for a sperm donor to be used in egg fertilization. In the majority of cases, however, a commissioning father will use his own sperm in order to be genetically related to his child. Where the surrogate is married, her husband will be listed as the child's "father", regardless of his fatherhood intentions or genetic contribution. This has been confirmed in the case of *R (on the application of H) v Secretary of State for Health and Social Care* where it was argued that the commissioning father's inability to be named as "father" on his child's birth certificate was a breach of his and the child's article 8 and 14 ECHR rights.[62] In this case A and B (two men in a relationship) entered into a surrogacy arrangement with C (the surrogate). As part of the arrangement, A fertilised the egg using his sperm and was, therefore, genetically related to H (the child). Notwithstanding his genetic contribution to H—and the fact that A was socially and psychologically regarded by H as their father—it was confirmed by the High Court that C's husband (who had consented at the outset of the arrangement) should be registered as H's "Father". Thus, both statute and case law surrounding surrogacy disregard a child's lived experience and prioritise the heteronormative binary model, even in circumstances where the commissioning father's genetic contribution and intentions of fatherhood align. It is of note that subsequent to the High Court's decision, H has lodged an application with the ECtHR. At the time of writing, this application has been registered with the ECtHR and a Statement of Facts and Questions have been put to the UK government.[63] Although this is a hopeful development, until the

[62] *R (on the application of H) v Secretary of State for Health and Social Care* [2019] EWHC 2095 (Admin) [2019] 7 WLUK 840.
[63] *H v. The United Kingdom* App no 32185/20 (ECHR 22 March 2021).

proceedings conclude it is likely that domestic law will continue to deny children the freedom to identify their own "father".

Illogically, had C not been married A still would not have been registered as H's "Father". Where a surrogate is unmarried, a cisgender man whose sperm was not used in the treatment may only be listed as the child's "father". Ergo, a commissioning father may only be registered equivalently on the child's birth certificate if he makes no genetic contribution in the process of surrogacy. Fathers using surrogacy, therefore, must choose between having a legal relationship with their child or a genetic one. Where a commissioning father chooses the latter, he and a partner may, if the surrogate consents, apply for a "Parental Order" under which the commissioning parents become the "parents" of the child, and any parental responsibility of other individuals is extinguished.[64] However, it should be noted that, unlike parenthood, parental responsibility will cease to exists when a child reaches the age of 18 years.

Finally, if the above methods are unavailable to a man, he may choose to adopt a child solely or with a partner (male or female). S 41 of the BDRA 1953 (inserted by para 13(6) of Sch 3 to the Children Act 1975) states that '"Father", in relation to an adopted child, means the child's natural father.'[65] Therefore, neither cisgender nor transgender men will ever be regarded as a child's "father" in cases of adoption.

A CASE FOR REFORM?

When asking who is a "father", the law mixes its priorities of marriage, biology, and intentions of fatherhood. 'On the one hand, fatherhood by consent is contrary to law's privileging of biology and things 'natural' but, on the other, it contradicts this position when there is a marriage or marriage-like partnership

[64] HFEA 2008, s 54–55.
[65] Births and Deaths Registration Act, s 41(1).

to privilege above nature'.[66] When defining the term "mother", the law prioritises gestation over genetics, psychological relationships, or intentions of parenthood—the 'law privileges certain forms [of the family] and denies recognition and benefits to others, while simultaneously denying that a coherent family exists'.[67] The definition of "mother" and "father" are problematic for both transgender women and transgender men. Transgender women are unable to gestate and, therefore, their legal relationship with a child will never align with their intentions of motherhood. Similarly, transgender men, through their ability to gestate, will have their legal parenthood incorrectly defined. If a transgender man is married to a cisgender woman and the cisgender woman gives birth, the transgender man will be registered as "parent". Yet, if a transgender man is married to a non-transgender woman and the transgender man gives birth, then the transgender man will be registered as "mother". The law fails to recognise consistently a child's parent who, in both cases, is likely to be socially and psychologically regarded as a father. Further still, if a family unit consists of a transgender man and a transgender woman and they conceived through sexual intercourse, the transgender man would be regarded as the child's "mother" and the transgender woman would be regarded as the child's "father". The result leaves transgender parents in limbo between two genders; their psychological relationship with their child being in conflict with their legal relationship.

Our current system of birth registration is, therefore, incongruent with transgender parents and forces upon them an "intermediate" status. An example of this incongruence occurred in the case of *X, Y and Z v UK*, where X (a transgender man) was refused his request to be registered as the "father" of Z (his child).[68] This resulted in the space of "father" being left blank on Z's birth

[66] Diduck and Kaganas (n 34) 170.
[67] Katherine O'Donovan, *Family Law Matters* (London, Pluto 1993) 39.
[68] *X, Y and Z v. The United Kingdom* App no 21830/93 (ECHR 22 April 1997).

certificate.[69] Accordingly, a worrying effect of the current birth registration system may be that it acts as a deterrent to transgender parents. Although there is an obligation on "mothers" and "fathers" to register their child, only a mother's information is needed to complete registration.[70] Consequently, children of transgender parents may be left without a "father/parent" being registered on their birth certificate. Not only does this potential exclusion of information counteract the policy objectives of the birth certificate, but it could leave the child to be legally vulnerable. For example, if the transgender man were to die intestate, their child would have no automatic right of inheritance.[71] Although this problem could be solved in practice if the transgender man were to make a will, this forces a legal expense on transgender parents that is not enforced on cisgender parents.

Moreover, the full and accurate content of a birth certificate is both important for the identity of a child and their parent/s. Accordingly, it should be fully reflective of an individual's family unit. This is acknowledged in the GRA 2004 whereby the issuing of a GRC, allows a transgender person to acquire a new birth certificate that is reflective of their lived gender and protects their transgender identity. Yet, transgender parents are denied the opportunity to protect their transgender identity when registering the birth of their child. It is not appropriate to simultaneously grant "equal" legal status through a GRC to transgender parents and then to undermine that very same recognition with a refusal to accommodate lived difference into that equality. Consequently, a transgender parent's Article 8 right to respect for private and family life is infringed. Transgender parents are forced to choose between either having a child and entering a state of legal disparity in relation to their gender or

[69] ibid.
[70] Registration of Births and Deaths Regulations, s 8.
[71] Administration of Estates Act 1925 (15 and 16 Geo 5 c 23), s 47.

abandoning their prospects of children and retaining their affirmed gender for all purposes. This is arguably damaging for both parent and child.

When a transgender parent needs to produce his child's birth certificate for administrative reasons, both parent and child may be anxious about the disclosure of the parent's transition. A practical example of this may be when the transgender parent and child are travelling abroad. When applying for the child's passport, his/her birth certificate would reveal the parent's previous gender and the parent's passport would show their acquired gender. Moreover, if the child is unaware of their parent's transition, discovering this legal discrepancy could perplex or worry them. As Dunne states, children of transgender parents are 'confronted with a system which is confused, unclear and incapable of catering for their specific family dynamics'.[72] Thus, both transgender parent and child are negatively impacted by the state's refusal to recognise a transgender parent's gender identity. The result is that the state infringes upon the rights of both child and transgender parent as granted by Article 8 and Article 14 ECHR.[73]

With consideration to all of these points, the question is raised about whether or not reform of the birth certificate's terms "mother" and "father/parent" is in the best interest of the child? As already stated, the primary objectives behind birth registration are to provide the state with reliable demographic information about its citizens and provide the registered child with accurate knowledge of their parentage. Encompassed in these objectives should be the desire that they are reflective of a child's social and psychological family unit. It is on these determinants that prospects of reform should be focused. I shall comment on some possibilities of reform below, under the condition that any successful reform would require a much more comprehensive analysis.

[72] Peter Dunne, 'Recognising transgender parenthood on birth certificates: R (JK) v Secretary of State for the Home Department' [2015] *IFL* 233.
[73] Human Rights Act 1998 (1998 c 42), sch 1 arts 8 and 14.

Short-form Birth Certificate

It is arguable that reform is not necessary as their already exists a mechanism by which transgender parent can conceal their previous gender identity. Under the current system of birth registration, there exists the option for transgender parents to acquire a short-form version of their child's birth certificate.[74] Unlike a full birth certificate, a short-form birth certificate omits any information about the child's parentage and, thus, does not disclose the transition of a transgender parent. In circumstances where a child needs to provide their birth certificate for administrative reasons, the family court has held that the short-form birth certificate is a solution to the breach of privacy that transgender parents face when registering their child.[75] In this respect, the court maintains the coherent registration of births and upholds a child's right to know their genetic heritage (as they can obtain a full birth certificate which can be kept private). This "solution", however, does not acknowledge the administrative discrepancies that transgender parents face when registering as "mother" or "father". Furthermore, it neglects the fact that the legal status of transgender parents is not aligned with their familial reality. Moreover, in many day-to-day administrative circumstances, the use of the short-form birth certificate is not accepted, for example, opening a child's ISA or applying for a passport. Irrespective of the number of occasions that a full birth certificate needs to be produced when the circumstance does arise, it is likely to cause great anxiety for a transgender parent and may even cause an increase in gender dysphoria.[76] Further still, the use of a short-form birth certificate by a transgender parent could indicate to their child that they are concealing an aspect of their identity. Thus, the solution of a short-form birth certificate still infringes upon the human rights of transgender parents and their children. Moreover, its use does not erase

[74] Births and Deaths Registration Act, s 33.
[75] *R (on the application of TT)* [236] (n 6); *R (on the application of JK)* [87] (n 7).
[76] Transgender Equality Network Ireland, *Speaking from the margins*.

the discrepancies found in the current system of birth registration that deter a transgender parent from registering the birth of their child.

Removing s 12 from the Gender Recognition Act

Another possibility of reform would be to remove s 12 from the GRA 2004. The consequences of this would be that transgender parents retain full legal recognition of their acquired gender when registering a birth. Where a child is conceived through sexual reproduction or ART, transgender men would be able to register as "father" and transgender women would be able to register as "mother". This would achieve greater equality between the legal recognition granted to cisgender and transgender parents, however, it would also dramatically alter other areas of law. For example, a transgender man who gestates a child and is registered as the child's "father" would undermine the principle that the gestational parent equals "mother". This could have unforeseen consequences on ART, surrogacy, and adoption and may negatively impact the rights of other parents and children.

Under the Children Act 1989, it is vital to understand who does or does not have parental responsibility for a child. At present, a "mother" automatically has parental responsibility for their child from birth.[77] If, under the current system, a transgender man gestated a child and was not automatically regarded as the child's "mother", the transgender man would only acquire parental responsibility when he is officially registered as the child's "father".[78] Thus, there is a danger that children could be left without a legally responsible parent between birth and the completion of birth registration (of course, a possible solution to this could be to give both mother and father automatic parental responsibility from birth).

Nevertheless, a further danger may arise where a single transgender man gives birth to a child registered as "father". The result being that the child

[77] Children Act, s 2.
[78] Children Act, s 4(1)(a).

would be without a legal "mother". In France, a mother may abandon her child at birth and deny the child information about her.[79] This law was held by the ECtHR not to violate a child's Article 8 rights.[80] However, a child without a legal mother in England and Wales is unprecedented. Moreover, recent cases such as *Jäggi v Switzerland* and *Mennesson v France* demonstrate the ECtHR giving more weight to the right to know one's origins.[81] As per *Mennesson,* a child has the right 'to establish the substance of his or her identity'.[82] A core element of that right must normally include the right to know who gave birth to them. This is of both psychological value and biological value (as some medical conditions only pass through the maternal line). Thus, if the full history of a transgender parent is not disclosed to a child, the child may be ignorant of potential health problems.

Clearly, any consideration of the removal of s 12 from the GRA 2004 would have significant effects on other areas of statute. Any prospect of reform would require a thorough analysis of how this impacts both cisgender and transgender parents and a proportionate balancing of their rights. Furthermore, where a parent has a child, transitions, and then has another child (as in the case of *R (JK) v The Registrar General*) , parliament would have to answer the difficult question of whether or not it is in the best interest of both children for their birth certificates to be amended and their parent consistently recognised.

Additional Parents

Perhaps a simpler solution to the shortfalls of our current system of birth registration would be to allow more than two parents to be registered on a child's birth certificate. If, for example, there was the possibility that a child could have

[79] Social Action and Families Code (France) (Art. 222-6); *Odièvre v France* App No 42326/98 (ECHR 13 February 2003).
[80] *Odièvre* (n 65)
[81] *Jäggi v Switzerland* App no 58757/00 (ECHR 13 July 2006); *Mennesson v France* App no. 65192/11 (ECHR 26 June 2014).
[82] *Mennesson* [99] (n 67).

a third legal father or a third legal mother, the birth registration scheme would offer more reliable demographic information and be more reflective of the many variations of family units that already exist outside of the heteronormative binary model.[83]

In relation to the HEFA 2008, Anthony Hayden QC and others have commented that the legislations lack of 'opportunity for children to have three parents' is disappointing, particularly given the 'informal arrangements for the conception of children to be brought up by parents of the same sex.'[84] Indeed, Smart, Neale, and Wade note that when children are determining whether or not a person is a member of their family they do not rely solely on a legally recognised relationship.[85] Thus, this reform has the potential to offer a greater legal recognition of a child's familial reality. If such a reform were to protect the rights of transgender parents, however, the legislative definitions of who is a "mother" and who is a "father" would need to be expanded. Inevitably, any expansion on the number of parents a child can have on their birth certificate would involve this, as the current definition of "mother" only allows for the singularity of gestation. This would have to be done with caution as, currently, parents who are registered on a child's birth certificate are automatically granted parental responsibility[86]—the rights and duties of which have never been

[83] Office for National Statistics, *Families and Household in the UK: 2019* (2019) Office for National Statistics <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019> accessed 18 May 2020; Simon Duncan and others, *Living Apart Together: uncoupling intimacy and co-residence* NatCen Social Research < http://natcen.ac.uk/media/28546/living-apart-together.pdf > accessed 18 May 2020.

[84] Anthony Hayden QC and others, *Children and Same Sex Families: A Legal Handbook* (Jordan Publishing Ltd and Family Law 2012) 11.

[85] Carol Smart, Bren Neale, Amanda Wade, *The Changing Experience of Childhood: Families and Divorce* (Polity 2001).

[86] Children Act, s 2.

specifically codified and exists in a large array of common law and legislation too exhaustive to list.[87] Moreover, extensive research would be needed to assess how such a reform might affect the wellbeing of children. Whether parliament currently has the desire to do such research is questionable. McCandless and Sheldon observe that, although other jurisdictions allow more than two parents to be named on a child's birth certificate, 'in the UK, despite the lack of political or cultural consensus on what actually makes someone a parent, the idea that a child may benefit from having more than two parents appears to be too radical to have merited any discussion.'[88]

"Gestational Parent" and "Parent"

A final possible solution to the incongruence transgender parents face when registering a birth (and one that would work alongside the previous suggestion) would be to replace the term "mother" with "gestational parent" and "father/parent" with "parent" on the birth registration form. Stuart Bridge writes of how the law has constantly drawn a line between parenthood (motherhood and fatherhood) and parentage (our biological origins), 'persons who have parental responsibility in respect of children may or may not be their parents… parenthood is clearly very different from parentage.'[89] Indeed, this is evidenced by our current common-law and statutory definitions of "mother" and "father" which, for transgender parents, rarely align with intentions of motherhood or fatherhood. By removing the terms "mother" and "father" from the birth certificate a parent and child would not have a particular relationship thrust upon them by the state. Olsen comments that 'Family law is an arena for the

[87] Law Commission *Family Law Review of Child Law Guardianship and Custody* (Law Com No 172, 1985b) para 2.6.

[88] Julie McCandless and Sally Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *MLR* 193.

[89] Stuart Bridge, 'Assisted Reproduction and the Legal Definition of Parentage' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds) *What is a Parent? A Socio-legal Analysis* (Hart Publishing 1999) 74–75.

ideological struggle over what it means to be a mother, daughter, wife and so forth… one of the most important questions about any legal decision is how it affects ideological struggles.'[90] The adoption of gender-neutral terms such as "gestational parent" and "parent" would help eliminate those ideological struggles being fought in a legal context, without dramatically altering the surrounding law. Their non-partisanship does not enforce a particular notion of family and could serve a diverse array of family units. Whilst in cases where a transgender man gives birth the birth certificate would still reveal their transitioned history, it would not impose on a parent the already culturally weighted terms of mother and father; a parent and child would be free to identify their own relationship and still retain the legal rights conferred to them through birth registration.

CONCLUSION

As stated, any reform of our current method of birth registration will require a thorough consideration and balancing of its impact on both the best interest of the child and the child's parent/s. In accordance with the objectives that UK government has set itself, these considerations should be inclusive of both cisgender and transgender individuals. Presently, what structure such a reform should take requires more comprehensive scrutiny. What is clear from the analysis of current statute and case law, however, is that reform is need. In a judgement concerning gender, Lady Hale has written that:

> [There is a] basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other

[90] Frances Olson, 'Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child' (1992) 6 *International Journal of Law and the Family* 209.

> people's views of what it means to be a woman or a man, is all debateable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self.[91]

The *ratio decidendi* adopted in both the case of *R (JK) v The Registrar General*[92] and *R (TT) v The Registrar General*[93] undermines a transgender parent's "sense of self". The result is that under the common law of England and Wales, there is a concept of male mothers and female fathers; the terms "mother" and "father" are 'freestanding and separate from consideration of legal gender'.[94] In some respects, this can be seen as a dismantling of the heteronormative binary model as it acknowledges the fluidity of gender and attempts to disregard our binary understandings of reproduction. Notwithstanding this, the decisions fail to acknowledge that the terms "mother" and "father" are, in a deeply social and historical sense, already highly gender-specific. Casting these terms as legally gender-neutral only increases the distance between the law and the experiences and needs of transgender parents. As a result of their status as "transgender", transgender parents are discriminated against when registering a birth, the state infringing upon their right to Article 14 ECHR. The system violates their right, under Article 8 ECHR, to private and family life. If parliament does not reform the current method of birth registration, transgender parents will continue to be thrust into a legal "intermediate zone" where they are neither: male nor female; mother nor father.

[91] *R (C) v Secretary of State for Works and Pensions* [2017] UKSC 72 [1].
[92] *R (on the application of JK)* (n 7).
[93] *R (on the application of TT)* (n 6).
[94] *R (on the application of TT)* [251] (n 6).

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[90] *R (C) v Secretary of State for Works and Pensions* [2017] UKSC 72 [1].
[91] *R (on the application of JK)* (n 7).
[92] *R (on the application of TT)* (n 6).
[93] *R (on the application of TT)* [251] (n 6).

ANALYSING THE REGULATORY HURDLES SURROUNDING THE USE OF BLOCKCHAINS IN THE COMMERCIAL SECTOR

Jonathan Khoo Boo Wern*

Blockchains remain one of the most prominent technologies that aim to change the very nature of the commercial world. Despite calls for legitimising Blockchains as a viable tool to be used, regulators only afforded it recognition rather than proper regulation. This article strives to point out the various regulatory challenges in legitimising Blockchain on both a national and international level from an economic standpoint. This article would also seek to delve into the very nature of blockchains to determine the incompatibilities with data protection legislation in its current form. This article will then propose a rudimentary system of governance to properly regulate blockchain and allow its use, whilst ensuring that the consumer and economy are properly safeguarded.

"Where we are going, we don't need roads[1]"

In the current digital era of the 21st century, the emergence of new technology has been a common occurrence. This is in line with the development of Industrial Revolution 4.0's shift towards a more virtual environment.[2]

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[1] Robert Zemeckis *Back to the Future* 1985.

[2] Bernard Marr, 'Why Everyone Must Get Ready For The 4th Industrial Revolution' (5 April 2016, Forbes) Available at https://www.forbes.com/sites/bernardmarr/2016/04/05/why-everyone-must-get-ready-for-4th-industrial-revolution/#5af877b33f90 Accessed 26 May 2020.

This change in industrialization has not exempted the legal fraternity with legal technology being the new industry buzzword.[3] Whilst the emergence of case management systems and the development of e-discovery software are both areas ripe for exploration, the development of blockchain technology would surpass the former areas in scope and technological complexity.[4]

The "blockchain phenomenon"[5] serves as an interesting development as the existing regulators are still grappling with cutting edge technology and what exactly should be done to safeguard its users and the wider economy. The question of regulation becomes two-fold as regulators dictate what to regulate as well as the mechanics of the regulation.

Considering the current set of challenges, there are questions regarding whether blockchain should be regulated, the extent to which they should be regulated and who should regulate blockchains as they enter the commercial world. There are no easy answers to these questions and the possible solutions will be discussed within this study. As of June 2020, whilst there are steps taken to regulate blockchain technology, there has yet to be a consistent policy.[6]

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[3] Law Insider, 'What is Legal Tech?' (Law insider) Available at http://www.thelawinsider.com/insider-news/what-is-legal-tech Accessed 26 May 2020.

[4] Jaliz Maldanado, 10 Ways Blockchain Technology Will Change The Legal Industry (19 November 2018, National Law Review) Available at https://www.natlawreview.com/article/10-ways-blockchain-technology-will-change-legal-industry Accessed 26 May 2020.

[5] Juri Mattila, 'The Blockchain Phenomenon – The Disruptive Potential of Distributed Consensus Architectures' (2016) ETLA Working Papers 38, The Research Institute of the Finnish Economy.

[6] Insider Intelligence, 'How the laws & regulations affecting blockchain technology and cryptocurrencies, like Bitcoin, can impact its adoption' (Business Insider, 4 March

As such, this study will serve as first a rudimentary introduction to blockchain and its inherent functionality. This study would then delve into an analysis of the potential challenges faced by the various regulators as to the precise measures and safeguards that need to be in place for blockchain technology to be adopted for use the wider commercial world. This study will then conclude by suggesting various proposals or reforms for blockchains to be properly adopted into the commercial world. This study focuses on the regulation of blockchains in the United Kingdom (UK) with occasional deviations to other international jurisdictions for illustration purposes.

I. WHAT ARE BLOCKCHAINS?

In order to discuss the regulatory challenges surrounding the usage of blockchains, it is necessary to properly discern how blockchains function and how this would create a problem. Blockchain is a decentralised system in which a series of data is stored in 'blocks', which are linked in a chain using cryptography.[7] With the blocks being chain-linked, blockchains are resistant to outside tampering. This is due to the fact that any alteration of data in a single block would require alteration of data in subsequent blocks.

Firstly, we need to determine what was the 'mischief' of the previous state of affairs in the commercial world which required the 'relief' that

2020) Available at https://www.businessinsider.com/blockchain-cryptocurrency-regulations-us-global Accessed 9 June 2020.

[7] The Economist, 'The great chain of being sure about things' (The Economist, 31 October 2015) Available at https://www.economist.com/news/briefing/21677228-technology-behind-bitcoin-lets-people-who-do-not-know-or-trust-each-other-build-dependable Accessed 4 March 2021.

blockchains sought to provide.[8] In this chapter, we would proceed to discuss and introduce the concept of blockchain technologies and the struggles regulators are posed with when regulating this technology.

i. HISTORY OF BLOCKCHAIN TECHNOLOGY

With the shift from the barter system to a recognized currency, there was a noticeable shift towards a centralized operator in order to facilitate commercial transactions. This can be seen with the adoption of a *lex monetae* doctrine that explicitly requires state decision on what currency should be adopted.[9]

This reliance on a trusted and centralised third party has its own share of problems. Should the centralised third party be negligent or abusive of their position, livelihoods would be compromised. This was seen with the 2008 United States of America's (USA) financial collapse due to the actions of banks such as Lehman Brothers.[10] As such, it soon became clear that the traditional centralised institutions overseeing these transactions have had to develop alternative solutions.

ii. HOW DO BLOCKCHAINS WORK?

To determine how such a system could work, this study demonstrates the functionality of Blockchain's most common application Bitcoin. Bitcoin works hastily, by relying on a combination of transactional transparency and a

[8] *Heydon's Case* (1584) 76 ER 637.
[9]Eurocoins, 'The Eurozone' (Eurocoins) Available at http://www.eurocoins.co.uk/eurozone.html Accessed 26 May 2020
[10] M. Williams, (April 12, 2010). Uncontrolled Risk. McGraw-Hill Education. p. 213.

consensus algorithm[11] that requires nodes to find a solution to a mathematical puzzle in order to validify transactions and add them to the system's transactional history.[12]

Blockchains work by using a secure ledger that sequentially stores timestamped data in the form of 'blocks' which serves as a reference point to an earlier block, therefore forming a 'chain'. Transactions on the blockchain utilize asymmetric encryption, where each user holds a couple of public keys which merely reflect the balance of all transactions made from that particular key.[13] Once a transaction takes place, this transaction is effectively broadcasted to all users on the blockchain whilst also having software that verifies the validity of the transaction, before being added to the chain.

iii. MERITS OF UTILIZING BLOCKCHAIN TECHNOLOGY

Due to the aforementioned problems with the reliance of centralised institutions as the facilitator of commercial transaction as well as the safeguarding consumers, blockchain technology has emerged as an increasingly relevant alternative to this.

With the usage of such decentralised ledgers, there is no risk in a centralised system crash or mismanagement on the part of the centralised facilitator which would block the transaction from taking place. This is very

[11] A consensus algorithm is a process used to achieve agreement on a single data value among distributed processes or systems such as blockchains in this context

[12] Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (Bitcoin,org, 2008), p.6.

[13] 'Where are the user's bitcoins actually stored?' (StackExchange, 17 October 2011) <https://bitcoin.stackexchange.com/questions/1600/where-are-the-users-bitcoins-actually-stored> Accessed 31 May 2020.

much in line with libertarian ideals of self-governance and minimal oversight, but as discussed further in this study, methods of enforcement and regulation are important in ensuring the proper usage and adoption of blockchains in a functioning economy.[14]

By using a decentralised nature, there is a vastly reduced risk of forgery and fraud with the commercial transactions in question. This is due to the fact that the encryption would mean that a single fraudulent block would theoretically be possible to create but the level of resources required to keep up the constant computational work is impractical. In addition, fellow users would also favour the longer change due to the nature of blockchain functionality, making fraudulent measures unlikely due to its impracticality.[15]

In addition, the lack of an emphasis on a centralised facilitator would mean that the privacy concerns are greatly lessened. In simple terms, this is due to the fact that blockchains functions through a peer-to-peer system in which a transaction is conducted between users and then updated to the rest of the users on the blockchain. With no central registry and reliance on peer-to-peer networks, there are many more fault points needed in order to result in an equivalent data leak as that of a centralised facilitator.[16]

[14] Martin Wolf, 'The libertarian fantasies of cryptocurrencies' (13 February 2019, Financial Times)Available at https://www.ft.com/content/eeeacd7c-2e0e-11e9-ba00-0251022932c8 Accessed 26 May 2020.
[15] Mohan Venkataraman, 'How Blockchain Can Fight Counterfeiting and Fraud' (28 August 2019, Global Trade) Available at https://www.globaltrademag.com/how-blockchain-can-fight-counterfeiting-and-fraud/ Accessed 26 May 2020.
[16] Fradeom, 'How blockchain technology keeps data secure' (Fraedom.com, 2018) Available at https://www.fraedom.com/496/blockchain-technology-keeps-data-secure/ Accessed 26 May 2020.

As a further point regarding privacy considerations, blockchains are limited by the amount of data they can transmit.[17] In lieu of this, only the most relevant information relating to the transaction would be encrypted into the blockchain. This is decided as a matter of best practices which all serve to further protect privacy information.

iv. APPLICATIONS OF BLOCKCHAIN

A notable use of blockchain technology is in the implementation of smart contracts.[18] These contracts work by incorporating script and programming languages which allow checks to be performed on the conditions of a contract and automated enforcement to take place.[19]

One other use of blockchains is the auditing and verifying of various transactions.[20] This usage is unsurprisingly due to the decentralised ledgers which are continuously self-updating. This would ensure that the accounting and entire process is made more transparent for all stakeholders whilst also ensuring that the auditing process is also streamlined.

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[17] Michele Finck, 'Blockchains and Data Protection in the European Union' [2017] Max Planck Institute for Innovation and Competition Research Paper No 18-01, 28.

[18] Röscheisen, Baldonado, and others "The Stanford InfoBus and its service layers: Augmenting the internet with higher-level information management protocols". (1998) Digital Libraries in Computer Science: The MeDoc Approach. Springer: 213–230.

[19] Nick Szabo "The Idea of Smart Contracts" (Satoshi Nakamoto Institute 1997).

[20] Provenance, 'Home Page' (Provenance) Available at https://www.provenance.org/ Accessed 27 May 2020.

In addition, another application of blockchains is found in the use of Land titling.[21] As seen with Factom Harmony's mortgage business, this would mirror existing recordkeeping services in order to ensure compliance with governmental regulations.[22] This adoption of blockchain technology would also improve the efficiency and revolutionize the conveyancing sector.

In addition to this, another use of blockchain technology can be seen in the automation and managing of intellectual property rights.[23] Due to the smart contract's capability to automate enforcement, tech giants Microsoft has announced a partnership with professional services network Ernst & Young (EY) to utilise blockchains in process royalty payments to creators on the Xbox video game ecosystem.[24]

Further to its uses are, ensuring that secure voting would be able to take place. With the rise in democratic awareness, the issue of secure voting has become an increasingly important issue. This is one of the uses of Blockchain technology as showcased by the Democracy Earth Foundation.[25] Its application the use of Quadratic Voting which utilizes blockchain tokens in order to undertake certain tasks like validate/reject the identity of candidates.[26]

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[21] Factom, 'Main Page' (Factom) Available at https://www.factom.com/ Accessed 27 May 2020.
[22] ibid.
[23] Muse Blockchain, 'Home Page' (Muse Blockchain) Available at https://museblockchain.com Accessed 27 May 2020.
[24] Anthony Spadafora, 'EY and Microsoft announce royalties blockchain' (TechRadar, 16 December 2020) Accessed 27 December 2020.
[25] Democracy Earth, 'Main Page' (Democracy Earth) Available at https://democracy.earth/ Accessed 27 May 2020.
[26] ibid.

v. DIFFICULTIES IN REGULATING BLOCKCHAINS

Despite all the benefits and possible uses of blockchain technology, there remains various difficulties and concerns which regulators have to solve before the widespread use of blockchain technology is adopted in the commercial world.

One of the main features of blockchains is its decentralised nature, which considerably raises the difficulty of regulatory bodies in regulating it for use. In the absence of a central registry or facilitator, the only way to properly regulate operations using the blockchain is by monitoring the programming and coding that goes into its functioning.[27]

Another issue emerges when dealing with the transnational nature of blockchains. As seen with various forms of regulation, including numerous national stakeholders would inevitably complicate matters.[28] This is due to the fact that each country would have their own national interests and achieving any sort of consensus involves diplomacy and compromise on many fronts.[29] As with any debate involving multiple nations, this would require compromise and discussion, and further delay a regulation from being implemented.

In addition, regulatory lag would remain a pertinent issue. As is the case with any new technological development, the proper regulation would remain a

[27] Stephen R. Galoob and Ethan J. Leib, Intentions, 'Compliance, And Fiduciary Obligations' 2014 Cambridge University Press.

[28] These conflicts arise particularly when laws which impose burdens and/or provide protection are enacted. Conflicts may also arise with the establishment of Licensing bodies or Economic regulators.

[29] Phillip Paiement (2019) 'The Challenge of Oversight, Transnational Legal Theory' (2019)10 Transnational Legal Theory 137-139.

couple of years behind the latest development.[30] With the nature of law being a reactionary science, the issue of regulating a ground-breaking new piece of technology would be difficult to navigate until most of its initial features have been ironed out.

Blockchains are also widely used and the type of regulation would have to depend on the form of blockchain as well as the purpose it is serving at the time.[31] As such, cryptocurrencies as an economic platform as well as blockchains serving as the delivery system, are likely to be regulated differently due to the differing purposes that they would serve.

II: THEORY OF REGULATION: INNOVATION VS REGULATION

As is the case with any new technology, commercial regulators (such as the Bank of England in the UK) are posed with the quandary of how to best exercise their powers in order to ensure an optimal commercial market for the benefit of all stakeholders.[32]

This chapter discusses the framework of regulatory law, inconsistencies in enforcement and the usage of sanctions in ensuring competitive landscape in the wake of blockchain technology adoption. In

[30] Mark Fenwick and others, "Regulation Tomorrow: What Happens When Technology Is Faster than the Law?" (2016) 6 American University Business Law Review 3.

[31] Boris Loktev, 'TrustechBlockchain: versatility by means of transparency' (Smart Insights, September 2016) Available at https://www.trustech-event.com/Media/Cartes-Media/Images/Press/White-Papers/Blockchain-versatility-by-means-of-transparency Accessed 27 May 2020.

[32] G. Majone, 'Regulatory Legitimacy' in Majone (ed.), Regulating Europe (London: Routledge, 1996) 284–301, 294.

addition, this chapter discusses the penalties in non-compliance on the part of blockchain users and operators.

i. THEORIES OF COMPETITION IN A REGULATED INDUSTRY

There are numerous theories as to whether regulation is necessary or that the market should be left unimpeded in order to provide for an optimized market for all of its stakeholders. These theories correspond with economic theories of allowing the market self-regulate as opposed to requiring intervention from a public authority.

One of these theories is called the race to the top approach.[33] This approach is also known as a libertarian or free market view as it believes that the market would correct itself to ensure better amenities and conditions for the consumer. The study disagrees with this view as the unimpeded allowance over an industry would result in the detriment of consumers as the financial bottom line is emphasised.

Conversely, there is the race to the bottom theory.[34] This theory suggests that competition would only result in the undercutting of costs. This would lead to employee exploitation and defying compliance. The study does not fully subscribe to this theory as the element of competition would incentivize innovation and the progress of a new industry, as opposed to a fully controlled economy.

The final theory sits in between the previous two, coined as the middle approach.[35] This theory follows that while competition is desirable for innovation to occur, some controls need to be in place in order to safeguard

[33] Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 212-27.
[34] Corporate Rights and Responsibilities: Hearings Before the Senate Comm. on Commerce, 94th Cong., 2d Sess., 241, 244-45 (1976) (Statement of Harvey J. Goldschmid)
[35] Lucian Arye Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' (1991) 105 Harvard Law Review 1435, 1461-70.

stakeholders. The study agrees with this assertion as it serves as a good balance between the previous stated theories and is definitely workable, as most national economies are classified as mixed economies.

In consideration of the difficulties that persist, the task of regulating the development and adoption of blockchains in the commercial world is a tall order for regulators to consider.

ii. FRAMEWORK OF REGULATORY LAW

Regulation can be classified as being split into, either of a public or private nature. Due to the different forms of regulation and their effects, both of these forms of regulation will be discussed individually.

TRADITIONAL STATE REGULATION

In a traditional view, regulation by the state involves the creation of legislation and is enforced just as any other law made by the state. This type of regulation would involve the state actor to take steps such as mandating certain guidelines for the technology (such as Data Protection requirements) before it can be adopted for wider commercial use.

A direct involvement of the state would mean that there is a higher degree of efficiency in the implementation of regulatory acts due to the fact that the same body that regulates and implements the act. Despite this, there are concerns that the state's involvement will have unintended consequences due to public pressure, whilst lacking accountability. Despite this, there has been a gradual shift from a delegated regulatory role, to a separate provider. This would leave the technology in a state of transition on a macro scale.[36]

Extending the same problems of public regulation with regards to the matter of blockchains, public authorities would thus be entrusted with the regulation of the usage and operation of blockchain technology in a traditional

[36] Mark Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' (2002) 25 West European Politics 125.

state regulatory system on all fronts. This study contends that this remains inefficient as well as not optimal due to the lack of focus placed in regulating blockchain technology. This would be the case without a dedicated blockchain regulatory board with a recognised and credible portfolio.

As such, the study advocates for the implementation of education and consulting as methods for the state to use, whilst reserving the authority of the state to regulate legal penalties and sanctions.[37]

PRIVATE REGULATION

With the aforementioned problems of fully relying on the State to directly regulate and enforce the development and usage of blockchain technology, the study shall now proceed to discuss the viability of relying on private regulation.

Regulatory agencies are well-established and certainly commonplace in other industries. An example of this would be the UK's telecommunication industry being regulated by the Office of Communications which was created by the Office of Communications Act 2002[38] and the Communications Act 2003[39]. These regulatory entities are enshrined in statute as well as being subject to the purview of judicial review in order to maintain accountability.[40]

[37] I. Ayres and J. Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford: Oxford University Press, 1992).
[38] UK Office of Communications Act 2002
[39] UK Communications Act 2003
[40] J. Black, 'Proceduralising Regulation—Part I' (2000) 20 Oxford Journal of Legal Studies 597–614 and 'Part II' (2001) 21 Oxford Journal of Legal Studies 33–58.

One of the biggest concerns of an appointed body to oversee regulation, is the perceived lack of transparency and democracy.[41] In order to strive for a balance between the interests of the public and the market, these regulatory bodies ought to be appointed by elected officials.[42]

In order to determine which optimal regulatory structure would allow for the usage of blockchain technology, several factors need to be considered such as, the balancing of consumer interests with the focus towards encouraging innovation by the minimization of regulatory interventions. Whilst reducing the extent of possible regulatory interventions would allow more resources to be allocated to 'prioritized interventions',[43] this approach is incomplete as regulatory effectiveness and responsiveness should be assessed by increasing the range of interests that the regulator should consider.[44]

As such, whilst delegation to a regulatory agency would have its advantages, the study believes that there is need for a comprehensive review on the structure and possible 'interventions' that the regulatory agency is empowered to take in order to oversee blockchain technology's use in the commercial world. This comprehensive review ought to be conducted by the governmental body such as The Bank of England in order to prevent a destabilized economy.

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[41] Tony Prossner, *The Economic Constitution* (Oxford University Press 2014) and *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press 2010).
[42] Majone (n.3)
[43] Philip Hampton, 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (London HM Treasury, 2005), paras 1.7–1.8.
[44] ibid.

iii. INCONSISTENCIES IN COMPETITION LAW ENFORCEMENT

The discussion now shifts to the inconsistencies in the enforcement in Competition Law which incidentally also serve as obstacles to the proper regulation of Blockchain technology.

Competition Law is mainly used to ensure a role for the citizen in decision-making and to facilitate the development of a coherent common will.[45] This is especially true with regards to the stance taken by the European Union (EU) for its Competition law. A contrary viewpoint would be that competition law harms consumers in the long run due to more stringent regulations.[46]

With the nature of a nation's sovereignty, the question shifts to whether antitrust regulations are purely a legal concept and whether they can be invoked to non-state actors such as the European Union (EU), International Monetary Fund (IMF) or the United Nations (UN). Klabbers (2004) believes that international organizations should be considered equivalent to member states as opposed to being considered as separate entities.[47] With the added complication of the UK leaving the European Union in January 2020, there is increasing doubt as to the state of affairs for non-state actors.[48]

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[45] Deirdre Curtin, 'Making a Political Constitution for the European Union' (2006) 8 European Journal of Law Reform 65, 66, 73.
[46] Robert A. Levy, 'The Case Against Antitrust" (Cato Institute 2004).
[47] Jan Klabbers, 'Constitutionalism Lite' (2004) 1 International Organization Law Review 31, 33.
[48] BBC News, 'Brexit: UK leaves the European Union' (BBC News, 1 February 2020) Available at https://www.bbc.co.uk/news/uk-politics-51333314 Accessed 20 June 2020.

Within the European Union, national regulatory agencies enforce competition law based on their own interpretation. In the USA, the Federal Trade Commission has its own directives to follow. As a result of this, there is an absence of consistency, which becomes a glaring issue to be resolved stemming from the transnational nature of blockchain adoption in the commercial world. These considerations and jurisdictional issues are elaborated further in subsequent chapters within the study.

The study proposes that a degree of harmonization should be sought in order to provide a viable working solution to the adoption of blockchain technology. It is suggested that the United Nations Centre for Trade Facilitation and Electronic Business (UNCTED) drive the various member nations to provide a cohesive and consistent regulatory ecosystem.[49]

iv. SANCTIONS FOR NON-COMPLIANCE

Sanctions serve as a deterrence towards non-compliance of the various industry regulations, this should be no different when it relates to the usage and implementation of blockchains in a commercial context.[50]

A report conducted by Macrory states that regulators should have access to a greater range of sanctions in order to adequately deal with the various issues that the industry would regurgitate.[51] In order to have a regulated environment for all stakeholders, it would be useful for regulators if there is a comprehensive list of sanctions for various infractions related to the use of blockchains.

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[49] United Nations Economic Commission for Europe 'White Paper Blockchain in Trade Facilitation' (United Nations Economic Commission for Europe, 5 December 2018) Available at http://www.unece.org/fileadmin/DAM/cefact/GuidanceMaterials/WhitePaperBlockchain.pdf Accessed 29 May 2020.

[50] Ayres and Braithwaite (n 35).

[51] Richard Macrory, 'Regulatory Justice: Making Sanctions Effective Final Report' (Cabinet Office, 2006), in this chapter termed 'the Review'.

In resolving a potential breach in blockchain usage, a best practise method, would be to identify the type of breach which occurred. The study takes the view that increasing the purview of the proposed blockchain regulator would be beneficial to properly ensure that blockchains would be sufficiently regulated for use in the commercial sector. These would include introducing to separate divisions for data protection and anti-trust measures.

To put this into practice, it is suggested that periodic reports be prepared by the blockchain platform operators and the businesses using blockchain technology be referred to the proposed regulator for annual checks. In doing so, random checks of the 'chain' itself (said checks would be ensured to have compliance with GDPR and Data Protection laws) ought to be conducted by this proposed regulator in order to ensure compliance. Non-compliance with these standards or checks would result in a monetary penalty or a suspension of the license to utilize blockchains.

III: ECONOMIC REGULATION OF BLOCKCHAIN TECHNOLOGY

Having dealt with the theoretical landscape of blockchain regulation, the study discusses the state of economic regulation, the conflict between national and international bodies, as well as the possibility of tendering regulation to privatised bodies.

This chapter shall focus on the roles that financial regulators would play in blockchain regulation, in addition to exploring the possibility of tendering regulatory duties to a private entity.

i. CURRENT STATE OF ECONOMIC REGULATION IN THE UK

There is an increasing prevalence of competition law and the regulation of financial services. As such, this would show that the state intervention within the economy is pretty much inevitable with regards to the

regulation of blockchains in the near future.[52] This aspect of state interventionism been broadened to a state of regulatory capitalism, involving the governance of economic policies.

In the UK, the regulatory framework of the economy consists of a plural network of different institutions. This provides for specific remedies in order to deal with defects in the economy.[53] These institutions include: Her Majesty's Treasury, the Bank of England and the Financial Conduct Authority.

Her Majesty's Treasury is one of the core institutions tasked with management of the UK's economy. One of its major functions is to ensure economic stability, which would include the properly regulating the use of blockchains in the commercial sector and the wider economy.

Economic constitutions effectively list the key state institutions, their interrelations and their relationship with civil society. They also permit effective governance by way of a organised implementation of public policy.

As such, the law establishes the basic principles of economic conduct and there only government intervention in order to enforce these principles.[54] Conversely, economic constitutionalism may be seen as an illegitimate restriction on collective democratic choice as it concentrates on economic

[52] Stephen Wilks, 'Competition Policy' in David Coen and Wyn Grant (eds), *The Oxford Handbook of Business and Government* (Oxford University Press, 2010), 730–56.
[53] John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham: Edward Elgar, 2008), 25.
[54] David Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus (Oxford:
Clarendon Press, 1998), 245.

outcomes rather than having a safeguard by way of citizens right to vote their elections.[55]

ii. NATIONAL REGULATORY BODIES VS INTERNATIONAL REGULATORY BODIES

There has always been some disunity between states and transnational organizations, even outside the realm of financial regulation.[56] As such, the friction between national and international regulatory bodies should come as no surprise.

In order to coordinate the different agencies, Tony Prossner (2014) advocates for the influence of international law as it places behavioural effects on the nation state.[57] Dealing with the matter of international law, there are three international bodies of particular importance when intervening in nations financial regulatory systems. The Financial Stability Board, the Basel Committee on Banking Supervision and the International Accounting Standards Board are of particular significance to financial regulation within the EU.[58]

Market considerations and the effect of market scandals have had a significant effect in incentivizing the adoption of standards seen internationally. These economic standards have been incorporated into EU

[55] ibid.
[56] Donald Nuechterlein, "National Interests and Foreign Policy: A Conceptual Framework for Analysis and Decision-Making" (1976) 2 British Journal of International Studies 246
[57] Prossner (n.41).
[58] ibid.

Law via EU regulations.[59] In the European Union, the Economic and Financial Affairs Council has adopted a Joint Statement calling for a unified approach to blockchains in order to promote certainty.[60]

Internationally, the United Nations Department of Economic and Social Affairs has acknowledged the role of Blockchains in developing a better sense of community for society.[61] The United Nations Conference on Trade and Development has also looked into the opportunities that the adoption of blockchain would bring to trade.[62]

There are various considerations and obligations between the different institutions before the adoption of blockchains in the commercial sector can fully be allowed. With the constant interplay between national and trans-national bodies, the question of a unified system would always be one of utmost concern, due to the sovereignty of individual states.

iii. SHIFTING REGULATORY LANDSCAPE IN THE UK FINANCIAL SECTOR

[59] Regulation 1606/2002 on the application of international accounting standards [2002] OJ L243/1 as amended.
[60] Blockchain and Virtual Currencies Working Group, 'ECOFlN and Commission adopt Joint Statement on Stablecoins' (Blockchain and Virtual Currencies Working Group, 5 December 2019) Available at https://www.blockchainwg.eu/ecofln-and-commission-adopt-joint-statement-on-stablecoins/ Accessed 30 May 2020.
[61] Elliot Harris, 'Closing Statement 2018 ECOSOC Partnership Forum "Partnering for Resilient and Inclusive Societies: Contribution of the Private Sector"' (United Nations, 2018) Available at https://www.un.org/development/desa/statements/mr-liu/2018/04/closing-statement-2018-ecosoc-pf.html Accessed 30 May 2020.
[62] Lance Thompson, 'Transport, Trade Logistics and Trade Facilitation, Seventh session: Trade facilitation and transit in support of the 2030 Agenda for Sustainable Development' (United Nations Conference on Trade and Development, 8 May 2019) Available at https://unctad.org/meetings/en/Presentation/cimem7p16_Lance%20Thompson_en.pdf Accessed 30 May 2020.

The different financial institutions in the UK have adopted a 'principles-based regulation' which a deviation by adopting detailed, prescriptive rules and supervisory actions on how firms should operate their business. In addition, financial institutions have also adopted a sophisticated risk assessment an advanced, risk responsive, operative framework known as 'ARROW'

Following numerous shortcomings by the financial institutions in handling the financial crisis of 2008, there was a need for major reforms to take place. These reforms have taken shape in the form of regulatory responsibilities being consolidated into regulatory responsibilities have now been consolidated into the Prudential Regulation Authority. With the existing mechanisms ill-equipped to handle the new challenges brought by blockchain technology, we ought to question the existing regulatory structures.

IV. DATA PRIVACY REGULATION IN BLOCKCHAIN TECHNOLOGY

As with the case with any new technology, the issue of confidentiality and privacy are significant concerns. In order to deal with this issue, this study will discuss the impact of the EU's introduction of the General Data Protection Regulation (GDPR) on blockchains as well as Blockchain governance in general. This chapter seeks to explore the complexities of data protection regulation (with a particular focus on the European Union's GDPR) and its compatibility with blockchain technology.

The General Data Protection Regulation (GDPR), came into force in 2018 as a replacement for the former Data Protection Directive as an updated

legislation which strives to strengthen the individuals' rights over their data.[63] Despite this, the enactment of the GDPR had arrived at a time there was an increasing amount of centralization as well as power imbalances between platforms and its users.[64] As such, there have been many suggestions that applications of GDPR provisions will be harder to enforce, due to the inherent architectural differences in the platforms.[65]

Adding to the disconnect between the systems is the fact that GDPR distinguishes data controller ('platforms') as well as those data subjects ('users') in their various rights and obligations.[66] As previously mentioned, blockchains would not have a central registry and platform which thus leaves this distinction obsolete in relation to blockchain technology.

i. PROBLEMS WITH ANONYMITY

Of primary concern, is whether the data stored on the blockchain would be considered 'personal data' as defined in Article 4(1) of the GDPR. The problem with this in the context of blockchain is that the security used in

[63] Matthias Berberich & Malgorzata Steiner, 'Blockchain Technology and the GDPR - How to Reconcile Privacy and Distributed Ledgers.' (2016) 2(3) Eur Data Prot L Rev 422.

[64] I Khan, Who's in Command Here? Analyzing the technology and governance of public blockchains to identify regulatory targets, and to resolve compliance and enforcement tensions in the context of the GDPR (Undergraduate Thesis, London School of Economics 2018).

[65] Shannon Liao, 'Major blockchain group says Europe should exempt Bitcoin from new data privacy rule' (The Verge, 5 April 2018) < https://www.theverge.com/2018/4/5/17199210/blockchain-coin-center-gdpr-europe-bitcoin-dataprivacy> accessed 31 May 2020.

[66] General Data Protection Regulations, Chapter 3 and Chapter 4

Blockchain sequences such as encryption and hashing are considered as pseudonymization measures.[67] Whilst the nature of encryption does lead to the possibility of identification in the case of a leaked key, hashing is more secure, providing a link between the data controller and the data subject.[68] On a blockchain, 'personal data' can come in the form of public keys or 'transactional data'.

'Transactional data' relates to any data of a personal nature stored on the blockchain itself subject to plaintext, encryption or hashing. Plaintext, encryption or hashing are all considered personal data under the GDPR due to the lack of anonymity within the block's 'chain' itself. Currently, there are various theories to ensure a better compliance with the GDPR such as storing the 'transactional data' off-chain and retaining the reference.[69] Despite this, there are some issues which add an unnecessary complexity to the structure of blockchains which open it up to additional vulnerabilities or bugs.[70]

Another type of data stored on blockchains are known as public key, which although anonymous, merely serve as a roadblock by using a string of numbers and letters which can be linked to identify the key's owners. Unlike the case with transactional data, public keys cannot be separated from the

[67] European Union Article 29 Working Party Opinion 04/2014 on Anonymisation Techniques, 0829/14/EN, 20
[68] ibid.
[69] IBM Storage, 'Why new off-chain storage is required for blockchain' (IBM, 2018) Available at https://www.ibm.com/downloads/cas/RXOVXAPM Accessed 27 December 2020.
[70] A Van Humbeeck, 'The Blockchain-GDPR Paradox ' (Medium, 21 November 2017) <https://medium.com/wearetheledger/the-blockchain-gdpr-paradox-fc51e663d047> accessed 31 May 2020

inherent structure of the blockchain which means that compliance may need measures beyond the scope of the GDPR.[71]

One of the main advantages for the use of blockchain technologies is the degree of anonymity offered by its decentralised nature. As of now, it remains to be seen whether cryptographic techniques would amount to an acceptable form of anonymization. Article 29 Working Party of the European Union states that there is no requirement for anonymization to be perfect as there exists a risk of re-identification.[72]

ii. ISSUES WITH LAWFUL DATA PROCESSING

An additional obstacle is the legality of of processing by the data controllers in relation to the blockchain. With the lack of a dedicated 'data controller' this would mean that the entry and usage of blockchains are minimal to null, as there exists no contractual relationship between data controllers and data subjects. In fact, the line is blurred here as users would determine the blockchain's functionality, thus leaving involvement and processing as a completely voluntary function. Relying on consent as a basis of processing resurfaces a new set of challenges, as the data subject's right to withdraw consent does not work well considering the nature of blockchain technology.

Another reason for lawful processing of personal data is the consideration of the legitimate interests pursued by the controller(s) of the public blockchain.[73] Whilst the GDPR does not explicitly state which purposes

[71] Khan (n 56).
[72] Article 29 Working Party (n 66).
[73] Article 6(1)(f) GDPR.

are considered legitimate, the prevention of fraud is a notable one.[74] In the context of blockchains, every full node would continue storing, relaying and verifying incoming transactions in order to promote consensus, thereby improving consensus and ensuring the security of the blockchain. As such, this would help lessen, if not eliminate fraud in the form of spending attacks.[75]

iii. IMPLEMENTATION OF DATA PROTECTION RIGHTS

The next set of issues deal with the principles underlying the GDPR and the implementation of the substantive rights of a data subject. This part will focus on the various principles and rights enshrined in the GDPR that have been identified as being incompatible with blockchain technology.

DATA MINIMIZATION

Data minimization is listed in the GDPR as being limited to the purpose which they are processed for.[76] As they are based on the replicated and perpetual storage pf data, the inner workings of blockchains would run into difficulties with the principles of the GDPR.

In addition to the solution of storing the aforementioned data off-chain,[77] the very nature of blockchain would arguably make the storage and processing of data necessary for its purpose as it requires the data to be stored

[74] Recital 47 GDPR.
[75] Harsh Agrawal, 'What is Double Spending & How Does Bitcoin Handle It?' (CoinSutra, 2 February 2018) < https://coinsutra.com/bitcoin-double-spending/> accessed 1 June 2020.
[76] Article 5(1)(c) GDPR.
[77] Finck (n15).

in the chain to ensure legitimacy, would arguably make the storage and processing of data necessary for its purpose.

DATA PROTECTION BY DESIGN

One of the core tenets of the GDPR is data protection by default and design, which means that the principle of data protection and privacy has been built into the system from the development stage rather than being restricted by external regulations later on.[78]

Certain key tenets of blockchain technology, like the use of encryption and pseudonymization, are thought of as compliant with the implementation of "appropriate technical measures" in safeguarding the data of data subjects.

SUBSTANTIVE RIGHTS

Whilst there are numerous substantive rights, particular focus shall be given to the right to be forgotten and the right to amendment. The right to be forgotten has been enshrined in the GDPR[79] but of course this is subject to applicable grounds.[80] One method to ensure compliance with the GDPR provisions is the use of chameleon hashes to enable deletion or modification of data.[81] Another alternative solution is partial obscurity,[82] or reduce access to the identifiable information, which is in line with the USA's approach.[83]

[78] Berberich & Steiner (n.55).
[79] Article 17(1) GDPR.
[80] ibid.
[81] Finck (n.15) 25.
[82] Partial security involves having the information still being available, but not as easily accessible in relation to the person's name or identity.
[83] Kieron O'Hara and Nigel Shadbolt 'The right to be forgotten: its potential role in a coherent privacy regime.' (2015) European Data Protection Law Review, 1 (3) 18.

Another right to consider is the right to rectification/amendment.[84] These manifests in the right of access involving the right of data subjects to request confirmation as to whether data relating to the blockchain user is being processed.[85] A possible route towards compliance is in approaching wallet providers who run other information provision services and having them run full nodes alongside existing operations.[86]

iv. BLOCKCHAIN GOVERNANCE IN RELATION TO THE DATA CONTROLLER

Whilst the study has focused on the individual workings of the blockchains, an analysis of GDPR compliance remains incomplete without dealing with the 'data controller'.

As defined by the GDPR, data controllers are "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determine the purposes and means of processing personal data".[87] On a cursory view of the decentralised nature of blockchains, the capacity to join the network and the extent of involvement is determined by the fact that every individual and user is considered as a data controller.[88]

In order for the nodes to be able to validate transactions, there needs to be a signal of intent to adopt/refuse the proposals floated by the core developers-the absence of which, renders the nodes to be incompatible with

[84] Article 15-16 GDPR.
[85] Article 15(1) GDPR.
[86] Khan (n 56).
[87] Article 4(7) GDPR.
[88] Finck (n.15) p.17.

the rest of the network.[89] This of course is not a clearly defined allocation of responsibilities.

An alternative consideration is to consider nodes as data processors. This is difficult to reconcile as there needs to be a formal contractual mechanism which establishes the relationship between data controllers and processors.[90] As such, it is clear for all to see that the existing state of data protection and privacy legislation is not wholly compatible with the unique nature of blockchains. it is suggested that, in future application there ought to be a way to effectively govern data protection rights. However, as previously set out, our existing understanding of centralised data protection would have to be reworked.

V: THE FUTURE OF BLOCKCHAINS IN THE COMMERCIAL WORLD

With all the prior discussion of the difficulties faced by the regulators when dealing with the conundrum of blockchains, it would have been remiss if this study did not have propose a method of regulation with regards to blockchains.

Hence, this chapter draws various comparisons to previous decentralised technology in the commercial world before attempting to propose a structure of regulation in order for blockchains to be properly regulated.

[89] Vitalik Buterin, 'Hard Forks, Soft Forks, Defaults and Coercion' (Vitalik Buterin's Website, 14 March 2017) < https://hackernoon.com/hard-forks-soft-forks-defaults-and-coercion-ko9zn3pef> accessed 1 June 2020.
[90] Article 28(3) GDPR.

i. COMPARISON WITH PREVIOUS DECENTRALISED INNOVATIONS

Whilst the introduction of blockchains is a monumental shift from the nature of banks and the financial sector, its decentralised nature is not the first of its kind. The study discusses subsequently, the previous decentralised technologies in an attempt to predict the course of blockchain regulation.

STORED VALUE CARDS

One of the existing decentralised systems subsists in the form of prepaid stored value cards. This is a card with a set value stored on the card itself and is an electronic development of the token coin.[91] The types of stored value cards are split in two types, that being of closed system prepaid cards and semi-closed system prepaid cards.

CLOSED SYSTEM PREPAID CARDS

For a closed system prepaid card, the prepaid value remains valid for purchase at a select retailer such as Amazon.[92] These cards have replaced the traditional system of paper gift certificates. Due to its nature, the merchant would consider these prepaid cards as liabilities in their accounts due to the nature of 'debts' being owed to the cardholder.

[91] L R Dlabay.; James L Burrow; B Brad, (2009). Intro to Business. Mason, Ohio: South-Western Cengage Learning. p. 433.
[92] Amazon, 'Help & Customer Service', (Amazon) Available at https://www.amazon.com/gp/help/customer/display.html?nodeId=201895590 Accessed 1 June 2020.

In fact, the regulations surrounding these cards is minimal due to not being subject to the Patriot Act in the USA as it cannot be used to identify its users.[93] These cards' scope under USA abandoned property law is mixed.[94]

The value stored on the card is non-refundable, as such these cards as a general rule cannot be redeemed for cash. As such, its nature as store credit has very limited application.

SEMI-CLOSED SYSTEM PREPAID CARDS

Semi-closed system prepaid cards have a slightly wider scope as they are able to be used at a range of vendors in a select locality. This card is usually issued by a 3rd party.

In the USA, the card issuer may require a license in order to be able to issue said semi-closed system card. 17 states in the USA require an explicit license in order for merchants to be able to issue said cards, whilst other states have slightly lower requirements. In addition, it is a crime in the USA for a merchant to have a 'money transmitting business' without possessing the appropriate license.[95]

In the UK, one can look to the development of Oyster Cards.[96] These cards inherently hold no value outside of their use on Transport For London

[93] United States of America, Patriot Act 107-56.

[94] The states of North Carolina and Illinois have excluded it completely (should the card have no expiration date or service fee) whilst the states of Maine and Virginia hold the card issuer liable to pay the state once the card is abandoned. Interestingly, the state of Connecticut requires merchants to identify the address of the gift card owner but this defaults to the state treasurer's office due to the anonymity of said gift cards.

[95] 18 U.S. Code § 1960.

[96] Transport for London, 'Transport for London Conditions of Carriage

services, functioning mainly on payment for transport within London. Transport For London has also set out its privacy and data protection policy.[97]

M-PESA

M-Pesa is a mobile-phone based money transfer service, payments and micro-financing system. This system was launched by Vodafone Group and Safaricom (Kenya's largest mobile phone network)[98] in 2007.

The initial pitch of M-Pesa was to create a service which would utilize Safaricom airtime resellers to allow microfinance borrowers to receive and repay loans in a more convenient manner[99]. After a pilot phase and discussions with various parties, M-Pesa pivoted to a different direction and launched with the model of sending remittances home across the country and making payments.[100]

Throughout the development process, M-Pesa had engaged Kenyan regulators to ensure compliance with domestic Kenyan telecommunications

- Bus and Underground Services' (Transport For London, 2 January 2020) Available at https://www.appealservice.co.uk/Documents/tfl-conditions-of-carriage-1.pdf Accessed 1 June 2020.

[97] Transport for London, 'Oyster Card' (Transport For London, February 2020) Available at https://tfl.gov.uk/corporate/privacy-and-cookies/oyster-card Accessed 1 June 2020.

[98] Communications Commission of Kenya, 'CCK releases 2nd quarter ICT sector statistics for 2011/2012' (Communications Commission of Kenya, 17 April 2012) Available at https://web.archive.org/web/20120817110419/http://www.cck.go.ke/news/2012/sector_statistics.html Accessed 1 June 2020.

[99] Nick Hughes & Susie Lonie, 'M-PESA: Mobile Money for the "Unbanked": Turning Cellphones into 24-Hour Tellers in Kenya' (2007) Innovations: Technology, Governance, Globalization, 2(1–2), 63–81.

[100] ibid.

regulation. In addition, M-Pesa also reached out to various international regulators to ensure compliance with internationally known best practices in ensuring consumer protection.[101]

One of these practices is that Know Your Customer (KYC) requirements are imposed on prospective clients and banks. These requirements require banks to collect clients' identification documents before proceeding with the intended act.[102]

ii. PROPOSED STRUCTURE OF REGULATION

With the complex nature of a transnational authority, we ought to take a scientific and technical approach to regulating the use of blockchains.[103] In addition, this study argues that a mixed approach is the best possible fit in regulating a nuanced area such as blockchains. As such, the study approves of the Delaware approach advocated for by Ehud Kamar.[104]

The structural model the study would advocate for is the establishment of a new regulatory agency enshrined in statute. The proposed regulatory agency is to have full oversight of blockchain usage and certification in a particular state. All blockchain operators will need to apply for a paid license to use a particular platform whilst each blockchain transaction involves a minimal cut in order to finance the operation of this body. It should be noted that certification is only required when a blockchain platform emerges onto the market, as such research & development efforts would not be inhibited.

[101] One of these being the United Kingdom's own Financial Conduct Authority.
[102] I. Mas (2011). Why Are Banks So Scarce in Developing Countries? Critical Review: A Journal of Politics and Society, 23(1–2), 135–145.
[103] Vesco Paskalev 'May science be with you: can scientific expertise confer legitimacy to transnational authority?' (2017) 8 Transnational Legal Theory, 202-223.
[104] Ehud Kamar, 'A Regulatory Competition Theory of Indeterminacy in Corporate Law' (1998)98 Columbia Law Rev.

This new regulatory body shall be empowered to draft the secondary legislation for the usage of Blockchains in commercial transactions as well as to ensure the compliance of the various platforms and its users. Platform operators are then required to submit annual reports that declare their operations and compliance with said requirements.

In dealing with the various privacy concerns as well as compliance with the general data protection legislation, this statutory regulator would tender a contract of retention with various top cybersecurity firms for a period of approximately 20 years in order to have the necessary expertise to monitor that compliance with the relevant legislation is obtained.

As for the auditing side, a similar tendering of government contracts will be opened to various top auditing firms to be kept on retention for a period of approximately 20 years in order for the annual reports submitted by the various Blockchain operators to be properly analysed for compliance. In addition, this serves with licensing and taxation calculation for the sake of operation.

Having said that, this proposed statutory body will have dedicated divisions in order to deal with the various uses of Blockchains. As Smart Contracts and cryptocurrency are the most common, these will be given focus.

SMART CONTRACTS

One of the models that this study seeks to emulate is the structure of the Fédération Internationale de l'Automobile's (FIA) Contract Recognition Board.[105] This would entail keeping various lawyers on staff in order to ensure that the smart contracts that have been drafted/programmed remains compliant with the basic principles of Contract Law.

Being kept separate from its Legal Department, the proposed Smart Contracts Recognition Department will serve as an approval body which

[105] Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (Kluwer Law International 2001). 553.

serves the arbiters of these smart contracts. This will not be a judicial role but a mere authorization body in order for said templates and contracts being allowed to run.

As for the matter of staffing, this study proposes that a similar role to the FIA's Contract Recognition Board that independent lawyers comprise said department. However, due to the nature of being a governmental body, a tendering for a retention contract with top legal firms is essential. Similar to the other governmental tendering contracts, these would run for a long period of 20 years or so in ensuring that these firms would assist with the recognition of a smart contract.

CRYPTOCURRENCY

The issue of ownership in Cryptocurrencies is a fundamental issue. In order to combat the use of cryptocurrency in an illicit measure, it is best to either require crypto licensing or outright banning them.

Dealing with the proposed statutory body, the Cryptocurrency department requires collaboration with the relevant state's National Bank as well as their Economics Ministry. As such, it is proposed additional crossovers between these organizations in order for a more cohesive and structured level of enforcement to take place.

As such, this crossover collectively serves as a monitoring and oversight board to ensure the compliance of the various Cryptocurrencies on the market.

INTERNATIONAL COOPERATION

With the nature of blockchains being cross-jurisdictional, the question of how to ensure compliance over a number of different states would come into question.

Firstly, there have already been suggestions that the very nature of Blockchains might be able to replace and bypass the current International

Monetary Fund.[106] As such, the introduction of Blockchains would shake up the current status quo in the world of finance and commerce.

With the EU, this study suggests that the Economic and Financial Affairs Council should take active steps in ensuring a unified approach towards the adoption of Blockchains. This allows most of the European nations to be under similar levels of regulation either directly or indirectly due to the transactions with European nations.

On an international scale, the United Nations Conference for Trade and Development ought to seek a consensus and obtain parity between its various member states in order to be cohesive and compliant thus ensuring a true global standard.

VI. CONCLUSION

As mentioned in the opening of this study, the 'Blockchain phenomena' serves as a whole new challenge to the very way that we regulate commercial transactions as well as monetary policy. With this, the study examines the basics of regulatory theory and competition law to properly discern the difficulties faced by the various regulators.

With the unique decentralised structure of blockchains, the study recognizes that the introduction of Blockchains have complicated the issue of regulation in an economic sense as well as in terms of data protection. In addition, the various jurisdictional issues also further add to the complexity faced when dealing with blockchains.

As such, this study has proposed some regulatory reforms in order to properly regulate the emergence of the 'blockchain phenomena' into the commercial sector. In coming with this conclusion, the study has also looked at prior developments in decentralised technology to estimate what a development for blockchain regulation might eventuate.

[106] Rohinton Medhora, 'Bypasses to the International Monetary Fund' (2019) 10Transnational Legal Theory, 318-332.

UNRAVELLING THE CASE LAW ON FRAUD AND RECTIFICATION UNDER THE LAND REGISTRATION ACT 2002

James Megarry

The common law notion that 'fraud unravels all' first emerged in *Lazarus Estates v Beasley,* a dispute regarding the adequacy of repairs carried out by a landlord.[1] In that case, Lord Denning asserted that "no court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything".[2] His dictum has assumed considerable importance in several areas of English jurisprudence. In 2019, the Supreme Court decided the maxim took precedence even over the principle of *Res Judicata.*[3]

In the law of real property, where the maxim is not wholly without application, it is weighed against fundamental tenets. Namely, it must be balanced with the aim of title by registration under the Land Registration Act 2002 ("LRA 2002"). This paper will explore how English land law deals with transactions tainted by fraud between innocent parties, with regard to the paradigmatic A-B-C dispute. In such cases, the principle that 'fraud unravels all' dictates that the title of the original defrauded owner should always be restored. The LRA tends to the contrary approach but, in deciding cases, the judiciary have often given precedence to pre-registration ideas about fraud. This has produced judgments that are logically flawed and unfair. Ultimately, inconsistency makes it difficult to say with accuracy whether 'fraud unravels all' in land law, but it is clear that case-law and statute provide distinct answers to the question.

[1] *Lazarus Estates Ltd. v Beasley* [1956] 2 W.L.R. 502.
[2] ibid (712).
[3] See judgment of *Takhar v Gracefield Developments Ltd*

With reference to important recent decisions, this paper contends that Modern Land Law would benefit from being free of the maxim and that the LRA 2002 provides the most effective mechanism for balancing competing interests in contentious fraud disputes. It will first explain the paradigmatic fraud case and its statutory solution, before showing that a tendency towards pre-registration principles has meant that this has not always been applied by the courts.

THE PARADIGMATIC CASE: A, B AND C:

The archetypal fraud case is often referred to as the A-B-C dispute.[4] In this case, A is the registered proprietor of the land. B acquires the land from a fraudster purporting to be A and is duly registered as proprietor, despite the transaction being void at common law. B then sells the land to C who becomes registered, before A realises the fraud and seeks restoration of her title to the register. In the course of these transactions, all parties have acted conscientiously and in good faith.

The problem need not take the form of the A-B-C dispute: there might be a D or even an E. The definitional element is that an interest in some land is claimed by two innocents, as the result of third-party fraud. It is now clear that a mistake, whether or not it is induced by fraud, will necessarily taint later

[4] There are a myriad of academic works on this type of dispute. For an explanation of case law relevant to this essay I recommend: Amy Goymour, 'Mistaken Registrations of Land: Exploding the Myth of 'Title by Registration.', (2013), *Cambridge Law Journal*, vol. 72, no. 3, pp. 617–650, Emma Lees 'Rectification of the Register – Prospective or Retrospective?' (2015), *Modern Law Review*, vol. 78, Issue 2, pp. 361-371, and Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake and The Land Registration Act 2002' (2013), Modern Law Review, vol. 76, Issue 1, pp. 62-82.

transactions so that they too are 'mistaken'.[5] The issue is whether the law should restore the title of the former innocent owner, or preserve the title of the innocent registered proprietor.

TITLE GUARANTEE AND INDEMNITY: THE STATUTORY SOLUTION TO FRAUDULENT TRANSACTIONS.

A common law resolution produces what Smith refers to as an 'all or nothing' result: either A is restored and C gains nothing, or the opposite occurs. On the other hand, title by registration under the LRA 2002, as secured by s.58 and schedule 8, provides indemnity for the party who suffers the loss.

In *Gold Harp v MacLeod,* A's lease was fraudulently removed from the register by B, who subsequently let the top floor of the property to a company, C. A sought rectification of the register to restore their title, but this would prejudice C's lease.[6] Accordingly, when A's title was restored, C was able to claim indemnity under schedule 8 of the LRA 2002. The statute thus allows a solution whereby the victims of fraud are either restored to title or entitled to indemnity, per the 'insurance principle'.[7]

This does not resolve the question of whose title should be restored to the register when fraud has occurred. The principle that 'fraud unravels all' would seem to favour the *Gold Harp* approach: A is the original owner, and

[5] See *MacLeod v Gold Harp Properties Ltd [2015] 1 W.L.R. 1249* and *Bakrania v Lloyds Bank Plc* [2017] 4 WLUK 347.

[6] *Gold Harp v MacLeod* [2015] 1 W.L.R. 1249.

[7] This is one of Ruoff's principles of registered land. It is a fundamental tenet of modern land registration, and a clear benefit of the statutory solution over the 'fraud unravels all' approach of the common law. For a full discussion see Martin Dixon, 'Modern Land Law'(Routledge, 2010, 11th edn) p.27-8.

any subsequent transactions are 'unravelled' by the fraud, so that their right to the title takes precedence over C's. This view is known as 'static security'. It recognises existing titles and, according to Smith, draws on the 'refined wisdom' of property lawyers in the centuries prior to Land Registration.[8] Yet, it is not the approach inherent in the statute. That approach- informed by the view that the law should protect the innocent purchaser who has been registered as proprietor- places greater emphasis on the conclusiveness of the register and aspires to make conveyancing more secure. It is known as 'dynamic security'.[9]

The statutory mechanism for rectification is located in schedule 4 of the LRA 2002. It offers a higher threshold for the alteration of the register where the proprietor is in possession. [10] Where there is no such possession, the register will be altered to restore the original defrauded owner unless there are 'exceptional circumstances' that justify the contrary.[11] Though there is no statutory guidance as to exceptional circumstances, the standard was defined in *Patton v Todd,* as describing events 'outside of the ordinary course'.[12]

The majority of applications are against a registered proprietor in possession within the meaning of s.131 LRA 2002.[13] In these cases, the

[8]Roger Smith, "Forgeries and Indemnity in Land Registration" (2015)74 *The Cambridge Law Journal* 3, 403.

[9] ibid, p.402. Dynamic security rests on the idea that it is.

[10] What is meant by possession in this context is outlined in s.131 LRA 2002 (see footnote 13).

[11] This was applied in *Farooq v. Kensington Mortgage Company* [2017] EWLRA 2015.

[12] *Paton and another v Todd* [2012] EWHC 1248 [p.67].

[13] This is the section of the act which defines possession. The first limb of that definition is 'physical possession', in the second, certain relationships are said to be

register will only be altered where (i) the proprietor consents; (ii) he has contributed to the fraud; or (iii) it would be 'unjust' not to. In the typical application of this mechanism, nothing will be unravelled by the fraud. Instead, C's title will remain and the original owner, A, will be left to claim indemnity. This is because s.58 ensures that the transfer of land confers absolute ownership to C, and ownership of title can only be altered within the confines schedule 4. Absent consent or contribution to the fraud, the register will only be altered if the 'unjust' threshold is met. As Dixon notes, this threshold is not to be interpreted liberally and there is no general discretion in schedule 4 to alter the register against a registered proprietor in possession.[14] [15]

THE ADVANTAGES OF THE STATUTORY FRAMEWORK

There are several advantages to the statutory framework which are not shared by the common law approach of unravelling of fraudulent transactions. Crucially, the LRA 2002 recognises that two innocents are involved in the A-B-C dispute and that the resolution of that dispute should not leave one of them without any remedy whatsoever. One might argue that it is unacceptable that A might unjustly lose their family home and only have recourse to

capable of vicariously giving rise to possession. For example, the physical possession of a tenant gives rise to the physical possession of a landlord.

[14] Martin Dixon, 'Fraud, Rectification and Land Registration: A Choice.' (*The Conveyancer and Property Lawyer, 2017),* 3. 161, p. 2.

[15] *Patel v. Freddy's Ltd* [2017] EWHC 73 and *Walker v. Burton* [2012] EWHC 978 are cases that have been decided along these lines. The transactions subsequent to the mistake- fraudulent or otherwise- were not unravelled by the common law principle in question, rather the statutory mechanism was followed, and the title of the registered proprietor was unprejudiced.

schedule 8 for a financial remedy. Yet, this argument neglects that C also faces injustice and that, under the common law, they would receive no remedy whatsoever. Financial compensation may not always be sentimentally adequate for A or C, but it is preferable to receiving nothing.

The idea that fraud should unravel all relies on a false assumption that the injustice done to A will necessarily be greater than that done to C.[16] This is not the case, and the relative injustice will vary from dispute to dispute. A model which automatically restores title to A prohibits the administration of justice in those cases where it might be especially unfair for C's interest to be extinguished. The provisions of schedule 4 allow the statutory mechanism to be sensitive to the particular requirements of justice in each dispute. This nuanced approach is to be preferred to the 'all or nothing' solution mandated by the fraud maxim, because it is better equipped to regulate the competing interests of two innocent parties.[17]

Further, there is a clear advantage to the LRA 2002's mechanism in respect of certainty and security. The essence of title by registration is that commercial and conveyancing parties should be able to rely on the conclusiveness of the land register.[18] Parties will be less inclined to engage in conveyancing if they cannot guarantee that they will retain entitlement to what they are purchasing. In this sense, there is a clear economic advantage to the dynamic security model favoured by the statute.[19]

[16] At least insofar as the maxim is relevant to this aspect of the law of real property.
[17] Smith, R. (2015), p. 402.
[18] There are of course limits to this and so there is scope for alteration.
[19] This has been the subject of much scholarship; see Dixon (2010) p.24-30 for a discussion of it.

It should be acknowledged that this framework is not without its faults. Hopkins and Field argue that HM Land Registry are poorly equipped to identify fraud and that the system errs in bestowing the cost of it upon them- and thus the taxpayer.[20] Further, whilst mortgagees and conveyancers are better able to identify fraud, recourse to schedule 8 for indemnity means they have little incentive to do so. Nonetheless, it is preferable to have a system which provides indemnity when title is prejudiced.

To some degree, this debate has already been decided: the LRA 2002 is an Act of Parliament and a strict interpretation of its provisions makes- or should make- this area of land law generally exempt from the principle that fraud unravels all. This is because the act stipulates that transactions tainted by fraud should be upheld unless certain thresholds are met.[21] Despite this, the vestigial influence of common law and pre-registration principles means that the 'static' approach is often pursued regardless, and fraudulent transactions which do not meet the statutory thresholds are unravelled all the same. This has led to some complicated judicial innovations to evade the statutory mechanism. These innovations have confused the law's approach to A-B-C disputes and made it less likely that they will be justly resolved.

COMMON LAW INNOVATION AND FRUSTRATION OF THE STATUTORY MECHANISM

Malory Enterprises Ltd. v Cheshire Homes has obfuscated the statutory approach to fraudulent transactions.[22] Though decided under the old

[20] Nicholas Hopkins Sarah Nield, 'Land Law: Text, Cases and Materials', (Oxford 2009), p. 535.
[21] i.e., the requirements for alteration in schedule 4.
[22] *Malory Enterprises Ltd. v Cheshire Homes* [2002] EWCA Civ.

law, it was deemed to apply to LRA 2002 cases in *Fitzwilliam v Richall Holding Services Ltd.*[23] The Malory judgment produced two important principles: (i) a fraudulent transfer of land vests legal title in the transferee, but leaves equitable title in the original proprietor; and (ii) the original owner retains a proprietary 'right to rectify', which is capable of overriding under paragraph 2 schedule 3 to the LRA 2002.

In *Re Chowood's Registered Land (1933),* the court held that the alteration of the register to give effect to an overriding interest would not entitle the registered proprietor to indemnity: the register was being brought up to date rather than rectified.[24] Consequently, an alteration of the register following a fraudulent transaction, where A was in actual occupation, would not be rectification, but rather the updating of the register to reflect the priority of the overriding interest. In this case, the registered proprietor would be denied indemnity, irrespective of the provisions of Schedules 4 and 8 of the LRA 2002.

These issues were addressed in *Swift 1st v Chief Land Registrar (2015)*. In *Swift,* the bank's (C's) tainted charge was removed from the register following consent to an application for rectification by the original owner (A).[25] The *Malory/Chowood* line suggested that C (the bank) would not be entitled to indemnity: A was in actual occupation and so the alteration was the updating of an overriding interest. In the decision, *Malory I* was declared *per incuriam* and wrongly decided, but *Malory II* was approved in *obiter.* Its

[23] *Fitzwilliam v Richall Holding Services Ltd.* [2013] EWHC 86.
[24] *Re Chowood's Registered Land* [1933] 2 WLUK 56.
[25] *Swift 1st v Chief Land Registrar* [2015] 4 WLUK 1.

effect was circumvented by a construction of paragraph 1(2)(b) of schedule 8 which deemed the bank to have suffered a loss, entitling them to indemnity.[26]

AFTER *SWIFT 1ST*

The entitlement to indemnity is a fundamental aspect of the LRA 2002's mechanism for dealing with fraudulent dispositions. Nonetheless, it does not determine whether A or C's property interest should be favoured in the paradigmatic case- an argument that it did was rejected in *Bakrania v Shah.*[27] Following *Swift 1st,* confusion has persisted over whether the dynamic or static approach should be favoured. This is because common law precepts, like Mallory II, have retained residual influence despite the existence of statutory mechanism.

In *Bakrania v Lloyds Bank,* the former registered proprietors of a house (A) were defrauded by B. C then purchased the land from B with a mortgage.[28] A applied for rectification on the grounds of the fraud and asked that C's title and the mortgage be removed from the register. Application of the *Swift 1st* judgment should dictate that A retains no beneficial interest in the title after being defrauded of it. S.58 guarantees that the new owners take the property absolutely and, absent beneficial ownership under Malory I, the register could only be altered through schedule 4 LRA 2002. In *Bakrania*, there was nothing 'unjust' to merit alteration and so the register would not have been rectified. However, the tribunal judge held that A retained a right to

[26] Ibid, [42]-[45] By avoiding the statutory mechanism, they form the right to indemnity. Remedy was only available because of a technical construction of the statute.
[27] *Bakrania v Shah* [2019] 4 WLUK 376.
[28] *Bakrania v Lloyds Bank* [2017] 4 WLUK 347.

rectify, that it was proprietary, and that it could bind the newly registered purchasers. It was ultimately held that this interest was overreached (a controversial decision in itself), and the same result was reached that would have occurred if the statutory scheme were applied.[29]

Malory II is emblematic of the judicial reluctance to abstain from corrective action when confronted with fraud. The notion that a defrauded former owner retains any interest in a property is derived from extra-statutory, pre-registration ideas.[30] In continuing to apply it, the judiciary pursue the principle that 'fraud unravels all'- the retained 'right to rectify' acting as a mechanism to disqualify (or 'unravel') subsequent transactions. It is at odds with the statutory provisions for the resolution of fraudulent dispositions and its continuance renders land law's approach to the A-B-C dispute capricious. Further, it has engendered a strange situation, wherein a proprietor's entitlement to indemnity might be contingent upon the actual occupation of the original owner. Malory II may well be legally impossible and 'illusory'[31], but it nonetheless continues to beguile the judiciary and limits the application of the statutory mechanism.

Rashid v Nasrullah cast further doubt on the law's approach post-*Swift 1st*.[32] In *Rashid*, A purchased a property and was registered as proprietor. Four years later, B forged a transfer of the property to himself and was registered as the new owner and then transferred the property to his son C as a gift. Rather than applying the statute, a mechanism was contrived whereby C

[29] For a full discussion of this case see Dixon (2017).
[30] See Dixon (2017).
[31] This is argued by Dixon in 'Rectifying the Register Under the LRA 2002: The Malory 2 Non-Problem' (Conveyancer and Property Law, 2016) p.382.
[32] *Swift 1st* [2019] 4 All E.R. 424.

gained a right to his own land through adverse possession. A was left with no property and no entitlement to indemnity- his loss deriving from adverse possession, not from a mistake.

CONCLUSION AND REFORM

The Law Commission's 2016 report posited various reforms to simplify the issues regarding rectification and indemnity, including a long stop of 10 years and the possibility of a statutory duty to limit fraud.[33] It is unclear whether these reforms will be enacted, but the present writer believes that a proper implementation of the statutory scheme should be effected, so to protect land law from the doctrine that 'fraud unravels all'.

It is likely that, as Hopkins suggests, these reforms will reduce the incidence of fraud and rectification disputes. However, the proposed measures do not seem to guarantee a uniform application of land registration principles. The intellectual gymnastics of *Bakrania* and *Rashid* can only be avoided by abandoning common law ideas about fraud and unjust enrichment.[34] Were this to occur, a consistent and statutorily authorised process would apply to A-B-C disputes: section 58 would mean that C was generally favoured, whilst schedule 4 would grant sufficient flexibility to prevent injustice when faced with especial facts. Further, the provisions of schedule 8 would curb the inequity of decisions like *Rashid,* wherein the prejudiced title-holder was denied indemnity because the LRA 2002 was not applied.

It is unclear how reform could assist in eliminating common-law precepts and their associated problems. There is no deficiency in the current law to remedy: the solution to these problems exists in a statutory instrument that has already been passed. The issue lies in the interpretation and proper application of that statute. Perhaps then, legislators should aim to issue clear

[33] Law Commission, (2016),*Consultation Paper,* No. 227.
[34] Nick Hopkins, 'Whose Land is it Anyway? The Challenges of Registered Title Fraud, *New law journal (0306-6479), 166 (7695), p. 11.*

guidance for judges deciding A-B-C cases or a further statute providing for proper interpretation of the LRA 2002. An Act of Parliament expressly prohibiting the application of pre-registration principles in respect of fraud might be an alternative route to clarity in this area of jurisprudence, but the creation of such a statute would be fraught with difficulty. It is frustrating that such measures might be necessary to bring about the uniform application of a law that already exists, yet it is difficult to see how this might be achieved without them.

INTERPRETING ARTICLE 25(A) OF THE ICCPR: THE RIGHT TO PUBLIC PARTICIPATION IN DECISION-MAKING

Marina Heilbrunn*

ABSTRACT

Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR) does not explicitly make reference to the right to public participation in decision-making. Nonetheless, throughout the article, I adopt the position that it provides such a right. Public participation in decision-making has developed significantly as a concept in international law over the last 50 years. I argue that one of the primary reasons for this is to create robust democratic standards and strengthen representative democracy. The use of public participation for this purpose is a change in legal circumstance. I posit that this directly impacts the ICCPR, as its "object and purpose" is to create legally binding democratic standards. Although the treaty does not explicitly provide a right to democracy, it will be demonstrated that human rights and democratic principles are entwined; in order for the ICCPR to achieve its object and purpose, it must provide the right to public participation in decision-making.

INTRODUCTION

On the International Day of Democracy 2016, the United Nations Independent Expert on the Promotion of a Democratic and Equitable

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International Order proclaimed that "democracy requires respect for the right to… meaningful public participation in decision-making, *as provided in Article 25 ICCPR (International Covenant on Civil and Political Rights)* [emphasis added]."[1] In the same year, a joint report from the Council of Europe and the European Centre for Not-for-profit Law stated that Article 25 "recognises and provides guarantees for public participation in decision-making processes for every citizen."[2]

Public participation in decision-making is now widely advocated for on the domestic and international level. However, despite statements from international bodies, Article 25 does not *explicitly* provide for the right to public participation in decision-making. The relevant provision, sub paragraph (a) of Article 25 states that: "every citizen shall have the right and the opportunity…to take part in the conduct of public affairs, directly or through freely chosen representatives."[3] The ICCPR's monitoring body, the Human Rights Committee (HRC), is also yet to interpret Article 25 to contain the right to public participation in decision-making. Although its General Comment 25, released in 1996, suggests that public participation in decision-making is one

[1]'Statement of Mr. Alfred-Maurice De Zayas Independent Expert On The Promotion Of A Democratic And Equitable International Order At The Human Rights Council 33Rd Session' (Ohchr.org, 2016) <https://www.ohchr.org/ar/newsevents/pages/displaynews.aspx?newsid=20480&langid=e> accessed 14 February 2019.

[2] 'Civil Participation In Decision-Making Processes: An Overview Of Standards And Practices In Council Of Europe Member States' (European Center for Not-for-profit Law 2016) <https://rm.coe.int/civil-participation-in-decision-making-processes-an-overview-of-standa/1680701801> accessed 14 February 2019.

[3] International Covenant on Civil and Political Rights 1966.

mode of participation in public affairs, [4] the HRC's case law suggests that it is not a right in itself.[5]

Therefore, the following question arises: does Article 25 ICCPR provide the right to public participation in decision-making? I adopt the position that it does.

The first section identifies common features of the concept to gage what the content of the right might be. It also contains an analysis of sources external to the ICCPR and describes how public participation in decision-making has developed in international law over the last 50 years.

Having illustrated what the content of public participation is and how it has proliferated in international law, the second section then addresses interpretation methods for Article 25(a) and applies the traditional interpretation methods of the Vienna Convention on the Law of Treaties (VCLT) 1969. This aims to establish whether it was intended for Article 25(a) to be reinterpreted in light of a change in legal circumstance. First, in order to demonstrate the current, common position of Article 25(a)'s content, the HRC's interpretation of the provision is set out. Then, through the VCLT interpretation methods, the ordinary meaning and context of Article 25(a) is addressed in order to assess whether it is capable of being reinterpreted to contain the right to public participation in decision-making. Finally, it is examined whether the object and purpose of the ICCPR was intended to be evolutive in nature.

Proceeding on the basis that the ICCPR is compatible with the right to public participation, and that its object and purpose is evolutive in nature, the

[4] UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7 <https://www.refworld.org/docid/453883fc22.html> accessed 14 February 2019.

[5] *Marshall v. Canada*, (1991) Communication No. 205/l986, U.N. Doc. CCPR/C/43/D/205/l986, 40.

final section asks: what are the legal circumstances that have resulted in the need for the ICCPR to be reinterpreted in light of its object and purpose? The section demonstrates that through Article 31(3)(c) VCLT, the instruments referred to in the first section are relevant to the interpretation of the ICCPR. Then, the instruments are revisited in order to establish the legal change in circumstance through addressing *why* they prescribe public participation. Finally, it is demonstrated that the ICCPR must be reinterpreted in light of the change in legal circumstance. This allows for the treaty to achieve its object and purpose.

SECTION 1: THE CONTENT AND DEVELOPMENT OF PUBLIC PARTICIPATION IN DECISION-MAKING

I. THE CONTENT OF PUBLIC PARTICIPATION IN DECISION-MAKING

The term "public participation in decision-making" is vague. Its precise content is difficult to ascertain and it can take many different forms, ranging from referendums, participatory budgeting, citizen councils, public consultations, neighbourhood councils and participatory planning.[6] However, common elements can be identified.

i. WHAT IS "DECISION-MAKING"?

"Decision-making" is a fairly self-explanatory concept, but it is helpful to elaborate on what form decision-making takes and at what level.

[6] Laurence Bherer, Pascale Dufour and Françoise Montambeault, 'The Participatory Democracy Turn: An Introduction' (2016) 12 Journal of Civil Society, 225.

Participation can occur, for example, in national and local strategies,[7] in programmes,[8] and in government policy.[9] Therefore, the type of decision-making that the public can participate in varies according to the appropriate method needed to address a particular issue. As a minimum, the form of the decision-making process should yield a practical, outcome focused solution. This is supported by Creighton, who states that public participation is "the process by which public concerns, needs and values are incorporated into governmental and corporate decision-making. It is two-way communication and interaction, with the overall goal of better decisions that are supported by the public."[10] This suggests that the purpose of public participation is not only for the public to have a say on the public decisions made, but for participation to be meaningfully reflected in the outcome of the decision.

International instruments refer to participation taking place at "all levels"[11] (local, regional, national or international) or at the *"*relevant level"[12]. If decision-making powers have been decentralised, the public can

[7] United Nations Conference on Environment & Development Rio de Janerio, Brazil, (3-14 June 1992), Chapter 8 <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> accessed 12 January 2019.
[8] The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994, Art 10(2)(f).
[9] The Convention on the Elimination of All Forms of Discrimination against Women 1979, Art 7.
[10] James L Creighton, The Public Participation Handbook (Jossey-Bass 2005), 7.
[11] Sustainable Development Goal Target 16.7 <https://sustainabledevelopment.un.org/sdg16> accessed 14 January 2019.
[12] Report of the United Nations Conference on Environment and Development (3-14 June 1992) U.N. Doc A/CONF.151/26 (Vol. III), Principle 10.

participation on a smaller scale at the local level. There is a wide scope for the level at which participation can take place. This demonstrates its globally recognised importance; participation is considered a necessary tool for local community decision-making, to decision-making at an international level.

ii. WHO CAN PARTICIPATE?

Who are the participating public? Picolotti states that participation is "the real involvement of all social actors in social and political decision-making processes that potentially affect the communities in which they live and work."[13] This in line with international instruments. Principle 10 of the Rio Declaration states that "environmental issues are best handled with participation of *all concerned* citizens."[14] The Aarhus Convention also uses similar terminology; it states that those who have an *interest* or who may be *affected* must be informed early on in the decision-making process.[15] The International Law Commission's (ILC) threshold for who can or should participate is similar, but it does not include the term "interest" or "concern"; it refers to individuals whose lives, health, property and environment might be affected being involved in the process.[16] Circumscribing who can participate to those who are concerned or affected is arguably necessary as it prevents arbitrary participation; for example, an individual or group of individuals overriding the decision-making process despite the outcome having little

[13] Romina Picolotti and Jorge Daniel Taillant, Linking Human Rights And The Environment (University of Arizona Press 2010) 50.
[14] ibid.
[15] Aarhus Convention 1998, Art 2(5); Art 6(2).
[16] Draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries 2001, Art 13.

impact on them. However, it is interesting that there is broad terminology used, such as "interest" or "concern". These are fairly relaxed criterion, as someone may be vaguely concerned about a decision, without being particularly affected by it. Conceivably, this could be to keep the participation process as open as possible.

Some legal instruments, such as human rights treaties, do not refer to interested, concerned or affected parties. They address the rights of specific minority groups, as the purpose then is to facilitate the participation of those groups.[17] Such positive discrimination is most likely needed to remedy the marginalisation of certain groups, enshrining their right to have their voice heard into law.

Overall, the above demonstrates that "the public" who participate is generally anyone whose opinion may be overlooked due to their minority status, or anyone with an interest in the outcome of the decision.

iii. WHAT IS PARTICIPATION?

There are various methods by which an individual could, in practise, participate. But what does the term "participation" mean?

International instruments repeatedly mention that there must be information given to the public. This is explicitly stated by the 1987 World Commission on Environment and Development,[18] the ILC,[19] and the Aarhus

[17] See section 1, subsection B(2) of this article.
[18] UN, Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427.
[19] Draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries 2001, Art 13(1).

Convention.[20] Information is a necessary part of, but also a prerequisite, to participation. Without knowledge of what is being decided upon, participation in decision-making would not be meaningful. This is supported by the ILC, who state that "the purpose of providing information to the public is to allow its members to inform themselves and then to ascertain their views. Without the second step, the purpose of the Article would be defeated".[21] There are also references to being "heard" in the context of public participation by the ILC,[22] and in the Aarhus Convention, which says that "procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions."[23]

Arguably, both elements of receiving information and being heard are essential to participation. This is the position held by A du Plessis: "public participation… boils down to the communication (through different means) of views/concerns on public issues by those concerned and/or affected."[24] Bekhoven also considers that public participation in decision-making enables the public to be heard and to affect decisions.[25]

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[20] Aarhus Convention 1994, Art 1.
[21] Draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries 2001, Art 13(1).
[22] ibid Art 13(3).
[23] Aarhus (n 20), Art 6(7).
[24] A Du Plessis, 'Public Participation, Good Environmental Governance And Fulfilment Of Environmental Rights' (2008) 11 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad.
[25] Jeroen van Bekhoven, 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' 11 National Taiwan University Law Review 222.

a. HOW HAS IT DEVELOPED?

Public participation in decision-making dates back to times of colonial development, where British colonial administrators used the concept to legitimise colonial intervention,[26] and even further to Ancient Greece, where in some societies, all citizens were assembled to provide their views on important issues. [27] It was not until the 1960s, however, that public participation in decision-making started to be institutionalised in domestic jurisdictions. In particular, this was in response to decisions surrounding environmental and development issues that had generated significant opposition from citizens. Formal public consultation procedures were introduced to allow members of the public to voice their opinions.[28]

The concept of public participation in decision-making gained international recognition in the 1970s. It has developed most substantially within the field of sustainable development, to the extent that it is now considered "one of the fundamental prerequisites" for the achievement of

[26] Andrea Cornwall, 'Historical Perspectives On Participation In Development' (2006) 44 Commonwealth & Comparative Politics, 65.
[27] Nondumiso Maphazi, 'A Critical Analysis of the Role of Public Participation in Governance and Service Delivery with Specific Reference to the Buffalo City Municipality', <https://core.ac.uk/download/pdf/145041627.pdf> accessed 16 February 2019.
[28] Sharon Beder, "Public participation or public relations?", with commentaries by Gavan McDonell and Ben Selinger, in Brian Martin (ed.), Technology and Public Participation (Wollongong, Australia: Science and Technology Studies, University of Wollongong, 1999) 169.

sustainable development.[29] Climate change has, over the last 50 years, increasingly become the biggest challenge facing humanity. It is therefore significant that in order to address such issues, it has been deemed necessary to shift from a solely representative to a participatory form of democracy.

Human rights treaties and declarations illustrate a similar trend with regards to enshrining the concept of public participation in decision-making. Lee and Abbot state that "the emphasis on public involvement is one of a range of responses to a certain disillusionment with the authority of the state… to regulate for environmental protection".[30] As a result of the references made to public participation in decision-making within human rights instruments, this statement can be taken further; it shows that the need for more inclusive action involving the public stretches far beyond the environmental sphere and into all elements of political life.

The instruments on sustainable development provide detail on *how* public participation in decision-making should take place, whereas the human rights instruments focus more on *who* should participate. This is unsurprising, considering that they serve separate purposes and were created to address separate issues. Nonetheless it is clear, that through their own methods, they seek to achieve the common aim of facilitating public participation in decision-making.

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[29] Report of the United Nations Conference on Environment and Development (3-14 June 1992) U.N. Doc A/CONF.151/26 (Vol. III) <http://www.un.org/documents/ga/conf151/aconf15126-3.htm> accessed 14 February 2019.

[30] M Lee and C Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 MLR, 80.

b. SUSTAINABLE DEVELOPMENT

The 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) marked the beginning of developments in international environmental law.[31] The Declaration stated that "[Achieving the environmental goal of defending and improving the human environment…] will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts."[32] The reference is particularly noteworthy considering that this Declaration was the first attempt to forge a common international stance on how to tackle environmental challenges.[33] This indicates that the decisions and actions of democratically elected governments alone were, from the outset, not considered sufficient to meet the challenge.

A significant increase in awareness of environmental issues at the international level then followed.[34] A UN multinational task force began drafting a guide for regulating international environmental development, entitled the "World Charter for Nature".[35] The Charter was passed by the

[31] Report of the United Nations Conference on the Human Environment (5-16 June 1972) U.N. Doc A/Conf.47/14/Rev.1 < http://www.un-documents.net/aconf48-14r1.pdf> accessed 14 February 2019.
[32] ibid para 7.
[33] Günther Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' United Nations Audiovisual Library of International Law, 1 <http://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf> accessed 12 February 2019.
[34] ibid.
[35] Harold W. Wood Jr, 'The United Nations World Charter for Nature: The Developing Nations' Initiative to Establish Protections for the Environment' (1985) 12 Ecology Law Quarterly 977.

General Assembly in 1982, and makes indirect references to public participation in decision-making.[36] Compared to the Stockholm Declaration, the Charter contains further description of when and how the public might have the opportunity to participate in decisions concerning the environment. [37] This demonstrates that the concept of public participation in decision-making was evolving and gaining traction within the international community.

It was not until 1987 that an explicit reference was made to public participation in decision-making. The World Commission on Environment and Development published a report entitled *Our Common Future*, which reinforced the principles in the Stockholm Declaration and World Charter.[38] The report states that "the law alone cannot enforce the common interest. It principally needs community knowledge and support, which entails *greater public participation in the decisions that affect the environment* [emphasis added]."[39] This appeared to be a direct acknowledgment that the existing forms of decision-making were not fit for purpose, and that to formulate appropriate solutions a collective effort was necessary.

The *Our Common Future* report highlighted the urgency of sustainable development issues and resulted in a decision by the UN to convene the 1992 Conference on Environment and Development in Rio de

[36] UNGA RES 37/7 (28 October 1982) UN Doc A/RES/37/7.
[37] ibid para 23, "individually or with others, in the formulation of decisions of direct concern to their environment."
[38] UN, Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427.
[39] ibid para 77; para 20 also makes reference to public participation in decision-making.

Janeiro,[40] where the 1992 Rio Declaration was produced. The Rio Declaration reaffirms the Stockholm Declaration[41] and was the first legal instrument to make a declaration regarding public participation. Principle 10 states that "environmental issues are best handled with participation of all concerned citizens, at the relevant level".[42] Other principles also address participation of particular groups.[43] The Rio Declaration was not adopted as a legally binding instrument, but Principle 2 is an accepted statement of customary international law.[44] Principle 10 has inspired significant developments in international environmental law,[45] although its status as customary international law is uncertain. The Rio Declaration went further than previous declarations, specifically referencing the groups of individuals who should participate. Again, this shows that the international community was further expanding the idea of public participation in decision-making, ensuring it was more inclusive and cementing their support for the concept.

The 1992 Earth Summit in Rio saw the adoption of an action plan for sustainable development: Agenda 21. This calls for, *inter alia*, "the broadest

[40] Report of the United Nations Conference on Environment and Development (3-14 June 1992) U.N. Doc A/CONF.151/26 (Vol. III).
[41] ibid, preamble.
[42] ibid.
[43] ibid.
[44] In *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* [1996] ICJ Rep 2, p. 226, it was established that the prevention principle as enshrined in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration are part of custom.
[45] Dinah Shelton, 'Stockholm Declaration (1972) and Rio Declaration (1992)' (2008) MPEPIL < http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608> accessed 11 January 2019.

public participation and the active involvement of the non-governmental organizations and other groups" in the context of environment and development[46] and "empowering women through full participation in decision-making".[47]

The mid-to-late 90's saw the enactment of legally binding treaties that addressed public participation. This is an important development, evidencing the need to go beyond the making of non-binding declarations. The enshrining of such mechanisms into law arguably represents the international community's confidence in, and long-term commitment to, public participation in decision-making.

The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, was enacted in 1994. It currently has 114 signatories and 197 parties. The preamble states "the importance of ensuring the full participation of both men and women at all levels in programmes to combat desertification…" Article 3 reads that "the Parties should ensure that decisions…are taken with the participation of populations and local communities".[48]

Not long after came the enactment of The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

[46]United Nations Conference on Environment & Development Rio de Janeiro, Brazil, (3-14 June 1992) preamble <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> accessed 12 January 2019.

[47]ibid, para 3.7.

[48] The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994.

Environmental Matters (Aarhus Convention). The Convention's preamble reaffirms Principle 10 of the 1992 Rio Declaration. It is the first and only Convention exclusively dedicated to participation in environmental matters, adopted 25 June 1998. It entered into force 30 October 2001. The Convention is open to accession by non-ECE countries, subject to approval of the Meeting of the Parties.[49] As of 17 October 2017, there were 47 Parties to the Convention.[50]

The public are guaranteed the right to participate in decisions with potential environmental consequences. Those who have an interest or who may be affected must be informed early on through an environmental decision-making procedure. Following notification, all members of the public must be given the right to participate, and their opinion must be taken into account. The final decision must be made publicly available.[51]

The 2001 International Law Commission (ILC) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries contains similar content to the Aarhus Convention.[52] It also notes that the "article is inspired by new trends in international law, in general, and environmental law, in general…"[53] The commentary explains that due to

[49] UNECE, Content <https://www.unece.org/env/pp/contentofaarhus.html> accessed 7 December 2020.
[50] UNECE, Status of Ratification <https://www.unece.org/env/pp/ratification.html> accessed 13 January 2019.
[51] ibid, Art 4(1)(ii).
[52] John H Knox and Ramin Pejan, The Human Right To A Healthy Environment (Cambridge University Press 2018).
[53] Draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries 2001, Art 13.

the development of human rights law, there is scope for public participation to be viewed as an emerging right under national and international law.[54]

In 2015, countries adopted the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals. This placed emphasis on adopting public participation methods. [55] Particular reference is made to the participation of vulnerable groups in the decision-making process.[56] The Sustainable Development Goals were adopted by the world leaders of 193 countries and universally apply to all countries.[57] This reflects a global consensus on the importance of public participation in decision-making.

iv. HUMAN RIGHTS TREATIES AND DECLARATIONS

The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 by its 99 signatories. Article 7 refers to political and public life, and says States Parties "shall ensure to women, on equal terms with men, the right… to participate in the formulation of

[54] ibid, Art 13(10).
[55] Sustainable Development Goal Target 16.7 <https://sustainabledevelopment.un.org/sdg16> accessed 14 January 2019.
[56] Sustainable Development Goal Target 5.5 <https://sustainabledevelopment.un.org/sdg5>; Sustainable Development Goal Target 10.6 <https://sustainabledevelopment.un.org/sdg10> accessed 13 January 2019.
[57] The Sustainable Development Agenda <https://www.un.org/sustainabledevelopment/development-agenda/> accessed 19 January 2019.

government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government".[58]

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Persons was adopted in 1992 without a vote. Article 2(3) declares that "persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live."[59]

The United Nations Declaration on the Rights of Indigenous Peoples, adopted in 2007, received 143 votes in favour. Article 18 states that "indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."[60] Article 19 refers to a state's duty to consult and co-operate with indigenous peoples.[61]

The Convention on the Rights of Persons with Disabilities (CRPD) entered into force in 2008. It has 161 signatories. Article 29 provides that "states parties… shall undertake to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives…"[62] Although this does not explicitly prescribe public participation in decision-making,

[58] The Convention on the Elimination of All Forms of Discrimination against Women 1979.
[59] UNGA Res 47/135 (18 December 1992) UN Doc A/RES/47/135.
[60] UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295.
[61] ibid.
[62] The Convention on the Rights of Persons with Disabilities 2008.

authoritative interpretation of the Article has concluded that this includes such a right.[63]

SECTION 2: INTERPRETATION OF THE ICCPR

I. HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION ON THE LAW OF TREATIES

Section 1 mapped out the development of public participation in decision-making and ascertained its content. Section 2 will now address Article 25(a) ICCPR and begin to assess whether the provision contains the right to public participation in decision-making.

Human rights treaties are considered to have "special character".[64] This means they have features unique to other treaties of international law. Namely, the agreements are between states which grant specific rights to the individuals, where the latter are not parties to the instruments themselves.[65] Human rights treaties are also thought to establish a "long-term framework for co-operation".[66] Consequently, this "special character" can have an impact on how the rights within the treaty are interpreted. But how is this established?

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[63] Text to n 120.

[64] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, [1951] ICJ Rep 15, Dissenting opinion of Judge Alvarez, 51.

[65] M. Magdalena Sepúlveda, María Magdalena Sepúlveda Carmona, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003), 78.

[66] Matthias Herdegen, 'Interpretation in International Law' (2013) MPEPIL, para 30 <http://opil.ouplaw.com.ezproxy.leidenuniv.nl:2048/view/10.1093/law:epil/9780199231690/law-9780199231690-e723?rskey=hQxc6M&result=1&prd=EPIL> accessed 5 January 2019.

Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) 1969 prescribe interpretation methods for treaties of international law. Although there has been debate on the topic, Cali and Schlütter argue that the VCLT interpretation rules apply to human rights treaties. [67] Craven supports this position, and states that otherwise, the object and purpose of the VCLT would be defeated.[68] The ICCPR was in force at the time of the VCLT's drafting. Therefore, it is unlikely that the drafters would not have provided for the speciality of human rights treaties in the treaty interpretation methods.

There are nuances within the interpretation methods, largely due to grey areas in the provisions. This allows for the "special character" of human rights treaties to be accounted for. As a part of this special character is the long-term frameworks established by human rights treaties, this has led to arguments that human rights treaties are "evolutive" or "dynamic" in nature. This refers to the content of the rights being susceptible to "evolving" over time, as opposed to remaining static. Arato sets out some of the main reasons why human rights are inherently evolutive; for example, they address the fundamental rights of individuals and represent standards of civilization.[69] As

[67] Basak Cali, '21 Specialized Rules of Treaty Interpretation: Human Rights' in Duncan B Hollis, (eds) *The Oxford Guide To Treaties* (Oxford University Press 2014), 546; Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Leena Grover, (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012), 261.
[68] M Craven, 'Legal Differentiation And The Concept Of The Human Rights Treaty In International Law' (2000) 11 European Journal of International Law.
[69] Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 Law & Practice of International Courts and Tribunals, 486.

society and civilisation are in a constant state of evolution, the rights they are governed by cannot remain unchanged by time. Evolutive interpretation has been interpreted as implicitly endorsed by the VCLT.[70]

The case of Iron Rhine Arbitration distinguished between two types of evolutive interpretation: one based on the terminology of a treaty and one in light of a treaty's object and purpose.[71] Both types of interpretation are based on the changing of factual and legal circumstances external to the treaty.[72] The former refers to interpreting the treaty in light of the meaning of a term in the treaty that has changed over time. The latter refers to ensuring that the treaty maintains its effectiveness in light of its object and purpose.[73] It may be necessary to reinterpret the treaty if factual and legal circumstances have changed to ensure the treaty remains effective.

The argument advanced in the article is that a change in legal circumstances has resulted in a need to interpret Article 25(a) to ensure it can achieve its object and purpose. However, the emergence of changing legal circumstances is not reason enough to reinterpret the treaty. It is necessary to assess whether the parties intended for the treaty to be subject to an evolutive interpretation.[74]

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[70] *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion OC-16/99, Inter-Am. Ct HR. para. 114 (Oct. 1, 1999).
[71] *Iron Rhine Arbitration*, Belgium v Netherlands, Award, ICGJ 373 (PCA 2005), para 80.
[72] Arato (n 69) 481.
[73] *Iron Rhine Arbitration* (n 71).
[74] Ulf Linderfalk 'Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches should be Taken in the Interpretation of Treaties' (2008) 10 Int'l Cmty L Rev. 109, 111.

As demonstrated, there has been a significant development in public participation within international law. Before addressing in the final section why the legal developments warrant a reinterpretation of the ICCPR, the following issues will be addressed: 1) the Human Rights Committee's current position in terms of the meaning of Article 25(a) and 2) whether the ICCPR is capable of an evolutive interpretation. Through analysing the ordinary meaning and the context of Article 25(a), it will be assessed whether the provision is specifically capable of being reinterpreted so it contains the right to public participation in decision-making. Then, the object and purpose of the treaty and *travaux preparatoires* will be assessed in order to ascertain whether Article 25(a) can be subject to an evolutive interpretation.

II. CURRENT POSITION OF THE HUMAN RIGHTS COMMITTEE

The United Nations Human Rights Treaty Bodies are committees of experts created with the purpose of monitoring states' compliance with human rights conventions.[75] "General comments" or "general recommendations" are the publications of treaty bodies' interpretations of the provisions of its respective human rights treaty. Whilst such comments or recommendations are not binding, they provide an authoritative interpretation of their respective human rights treaties.

The ICCPR's monitoring body, the Human Rights Committee (HRC) has provided an interpretation of Article 25 through its General Comment 25.[76] In 1996, it explained that the conduct of public affairs under Article

[75] International Justice Resource Centre, UN Human Rights Treaty Bodies <https://ijrcenter.org/un-treaty-bodies/> accessed 12 January 2019.
[76] General Comment 25 (n 4).

25(a) has a wide scope relating to the exercise of legislative, executive and administrative political power. The General Comment stated that "the conduct of public affairs covers all aspects of public administration and the formulation and implementation of policy at international, national, regional and local levels."[77] Citizen participation in public affairs can also take place through referendums or other electoral processes, and "may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government." It also refers to citizens influencing public decisions through dialogue with representatives and through the organisation of civil society. [78] This would appear, if taken in isolation, to support the premise that public participation in decision-making is a human right within Article 25(a).

Nevertheless, in the case of *Marshall et al. vs. Canada,* the HRC declared: "it is for the legal and constitutional system of the State party to provide for the modalities of such participation [in public affairs]" and "Article 25(a)… cannot be understood as meaning that any directly affected group… has the unconditional right to choose the modalities of participation in the conduct of public affairs." [79] The case illustrates that whilst public participation in decision-making may be *a* modality of participation in public affairs, it is *one* possible mode of participation or conduct, of which is to be determined by the state.

However, as the case is from 1986, the later General Comment delivered by the HRC in 1996 may be a more relevant determination of the treaty body's views on Article 25(a) and reflect a change in stance over the space of 10 years. Overall, the determinations of the HRC demonstrate that

[77] ibid.
[78] ibid.
[79] *Marshall v. Canada*, (1991) Communication No. 205/l986, U.N. Doc. CCPR/C/43/D/205/l986, 40.

there is scope for Article 25(a) to contain the right to public participation in decision-making. It remains to be seen whether the treaty is capable of an evolutive interpretation in terms of its object and purpose, and subsequently if a reinterpretation is necessary in light of a change in legal circumstances.

III. ORDINARY MEANING

Before assessing whether an evolutive interpretation can be applied to the object and purpose of the treaty, the ordinary meaning of Article 25(a) will be ascertained. As discussed, the HRC have held that public participation in decision-making is, at least, one possible mode of participation in public affairs envisaged under the ICCPR. In order to confirm that approach and establish that Article 25(a) is capable of prescribing public participation as described in the first section, it is necessary to assess the ordinary meaning of the words in the treaty.

It is well established in international law that the ordinary meaning of the words in a treaty should be given primacy. This is no different for human rights treaties that are subject to an evolutive interpretation.[80] Article 31(1) VCLT is the starting point for treaty interpretation: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[81]

[80] *Iron Rhine Arbitration* (n 71) para 47.
[81] VCLT 1969.

Article 25 ICCPR provides that "every citizen shall have the right and the opportunity… (a) To take part in the *conduct of public affairs, directly* or through freely chosen representatives [emphasis added]."[82]

In the *Case Concerning Oil Platforms*, the ICJ confirmed that the ordinary meaning of words in a treaty can be established by general dictionary definitions.[83] Applying this method to the phrase "public affairs", it is found that this is a broad term, defined in Collins English Dictionary as "politics; the business of governing"[84] and in Oxford Learners Dictionary as "issues and questions about social, economic, political, or business activities, etc. that affect ordinary people in general."[85] This definition is expansive enough to encompass the meaning of "decision-making"; as established, this generally consists of participation in national and local strategies, in programmes, and in government policy.

In addition, it is clear from the phrase "directly *or* through freely chosen representatives" that the provision prescribes participation in the conduct of public affairs through both direct and indirect participation.

IV. CONTEXT

[82] ICCPR 1966.
[83] [1996] ICJ Rep 803, para 45; Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28 EJIL 89, 96.
[84] Collins Dictionary, Definition of 'public affairs' <https://www.collinsdictionary.com/dictionary/english/public-affairs> accessed 13 February 2019.
[85] Oxford Learner's Dictionary, Definition of 'public affairs' <https://www.oxfordlearnersdictionaries.com/definition/american_english/public-affairs> accessed 13 February 2019.

Having established that Article 25(a) is broad enough to encompass public participation in decision-making, it is now necessary to look to other provisions of the ICCPR to help determine the meaning of Article 25(a).

Due to the indivisible nature of human rights, such treaties are to be interpreted "in their context".[86] The HRC has stated that within the ICCPR, the right to freedom of expression[87] and self-determination[88] are connected to, and support, the notion of citizens taking part in the conduct of public affairs.

Article 1(1) ICCPR states that "all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[89] Self-determination is a broader right than Article 25(a), as the former provides the right to "all peoples",[90] whereas the latter circumscribes the right to "citizens".[91] Nonetheless, arguably they are intrinsically linked as determining political status and pursuing economic, social and cultural development are activities within the sphere of public affairs. Self-determination has been

[86] VCLT 1969, Art 31(1).
[87] UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, UN Doc CCPR/C/21/Rev.1/Add.7 (General Comment No. 25).
[88] ibid.
[89] ICCPR 1966.
[90] ibid.
[91] ICCPR 1966, Art 25(a).

consistently linked to public participation in decision-making. This is most commonly iterated in the context of indigenous peoples.[92]

Article 19(2) ICCPR provides that "everyone shall have the right to freedom of expression; this right shall include *freedom to seek, receive and impart information and ideas of all kinds*."[93] This is supported by the OSCE, who state that freedom of expression is a "basic condition for enhancing the participation of associations in public decision-making processes."[94] Furthermore, as demonstrated in section 1, receiving information is an essential element of public participation in decision-making. The provision is widely interpreted as imposing a positive duty on states to ensure a right of access to information.[95] However, the key wording in Article 19(2) is the assertion that it includes the right to "impart information and ideas of all kinds".[96] This is a broad provision, and can be assumed to include imparting information in relation to decision-making activities. The Commission on Human Rights Resolution 2001/47 made a direct link between the two and stated that: "the Commission on Human Rights… recognizes that effective participation depends on… the freedom to seek, receive and impart information… and urges Governments to facilitate the effective participation of women in decision-making".[97]

[92] UNHRC 'Progress report on the study on indigenous peoples and the right to participate in decision-making - Report of the Expert Mechanism on the Rights of Indigenous Peoples' (23 August 2010) UN Doc A/HRC/15/35.
[93] ICCPR 1966.
[94] OSCE 'Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes' (15-16 April 2015) <https://www.osce.org/odihr/183991?download=true> accessed 14 January 2019.
[95] UNCHR, Fifty-fourth session 'Report of the Special Rapporteur, Mr. Abid Hussain, submitted pursuant to Commission on Human Rights resolution 1997/26' (28 January 1998) UN Doc E/CN.4/1998/40, para 14.
[96] ICCPR 1966.
[97] UNCHR Res 41 (2001) UN Doc E/CN.4/RES/2001/47.

The existence of Article 25(a) alongside Article 1 and Article 19 supports the argument that Article 25(a) can be reinterpreted to include the right to public participation. As the right to self-determination prescribes that individuals can freely determine their own political status and pursue their economic social and cultural development, this would indicate that other rights in the treaty, (e.g Article 25(a)), would help facilitate this. It would make little sense if the rights frustrated one another. Likewise, the right to freedom of expression, which prescribes that individuals can seek, receive and impart information, must apply in the important context of participating in decision-making.

V. OBJECT AND PURPOSE

Having demonstrated through the ordinary meaning and context that Article 25(a) is capable of containing the right to public participation in decision-making, the evolutive nature of the treaty's object and purpose will now be addressed.

It has been confirmed in case law that the preamble of a treaty can help establish the object and purpose of a treaty.[98] The ICCPR's preamble calls for the establishment of "conditions created whereby everyone may enjoy his civil and political rights" and that "individuals… are under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant."[99] This is in line with the HRC's declaration in its General Comment 24, concerning reservations made to the

[98] *Rights and Nationals of the United States of America in Morocco (France v United States of America), Judgment,* [1952] ICJ Rep 176, pp 196-7.
[99] ICCPR 1966, preamble.

Covenant and Optional Protocols. The HRC said the object and purpose of the ICCPR is to "create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify."[100] General Comments are not binding, and therefore the object and purpose of the ICCPR as defined by the HRC is not wholly conclusive. Nonetheless, it is arguably the most authoritative pronunciation on the object and purpose, and therefore will be adopted for the purpose of this article.

In order for the treaty to be subject to an evolutive interpretation, it must have been the intention of the parties to create a treaty with evolving obligations.[101] Arguably, the object and purpose of the ICCPR was intended to be interpreted in an evolutive manner. Creating "legally binding standards" is a concept that must evolve over time, as such standards generally do not remain static. This is particularly true for human rights, as they are categorised as evolutive in nature,[102] meaning that they "evolve" alongside social, legal and historical developments,[103] and are to be considered living instruments.[104]

VI. TRAVAUX PRÉPARATOIRES

[100] UN Human Rights Committee (HRC), CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6
[101] Linderfalk (n 74).
[102] Schlütter (n 67).
[103] Tom Campbell, Jeffery Goldsworthy & Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press 2003).
[104] *Roger Judge v Canada,* Communication No. 829/1998, UN Doc CCPR/C78/D/829/1998 (2003).

The *travaux préparatoires* supports the notion that the drafters intended the object and purpose of the treaty to be open to an evolutive interpretation.

Article 32 VCLT states that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty… in order to confirm the meaning resulting from the application of Article 31." Therefore, the *travaux préparatoires* can be analysed to assess whether there is any indication of the parties for the treaty to be open to an evolutive interpretation.

The use of language in relation to Article 25 ICCPR in the *travaux préparatoires* is kept deliberately broad. For example, the term "without reasonable restrictions" in relation to the right to exercise Article 25(a) is adopted, instead of the prior proposal of "property, educational and other qualifications."[105] Although this is likely to be partially due to the need to compromise between the parties, it is conceivable that the broad language was intentional to capture any future change in voting restrictions. This would indicate that the drafters recognised that participation in public affairs is highly susceptible to developments over time, and therefore, its object and purpose must evolve in line with this.

SECTION 3: ANALYSIS OF THE CHANGE IN LEGAL CIRCUMSTANCE

I. ARTICLE 31(3)(C) VCLT

[105] Marc J. Bossuyt, *Guide to the "travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishera 1987) 472, citing Commission on Human Rights, 9th Session (1953) Un Doc E/ON.4/SR.366, p.7, p.8 and p.11.

Article 31(3)(c) VCLT prescribes that when interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties"[106] shall be taken into account. Case law and academic commentary helps shed light on which rules are to be considered "relevant". In the *Namibia Advisory Opinion*, it was stated that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" and that such rules are not limited to the international law that was applicable when the treaty was concluded.[107] The ILC's *Fragmentation* report makes clear that there is no limitation to the scope applicable law.[108] Following this reasoning, "any relevant rules" is broadly construed. This would suggest that there is nothing to prevent the treaties discussed in section 1 from being taken into account when interpreting Article 25(a).

Below, the legal instruments discussed in section 1 are revisited further exploring *why* the concept of public participation in decision-making has developed. This serves the purpose of demonstrating that there has been a change in legal circumstances that necessitates a reinterpretation of Article 25(a).

II. CHANGE IN LEGAL CIRCUMSTANCE

[106] VCLT 1966.
[107] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion [1971] ICJ Rep 16, para. 53
[108] UNGA, Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, para 45.

In literature, one explanation for the rising importance of public participation in decision-making is that it is viewed as an integral part of democracy itself.[109] Breakfast argues that the concept is "imperative" for a democratic government. Through involving the public in the decision-making process, the public are far more likely to perceive the outcome as legitimate, and the benefits for society are arguably greater. [110]

Creighton advances this argument further, and opines that the notion of experts discerning what is right for society is no longer received with confidence, and that in fact, many decisions made which are believed to be technical are in fact not, and do not need technical expertise in order to come to a suitable decision.[111] This is supported by Fraenkel-Haeberle et al, who advance the view that representative democracy is facing increasing criticism. They explain that critics consider democracy to be in need of modernisation, and to enable citizen involvement beyond voters deciding between "yes" or "no". [112]

The academic opinion suggests that public participation is an essential tool for democratic purposes and has been utilised where traditional representative democracy has been considered insufficient. It will now be addressed whether the legal instruments support this notion.

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[109] Creighton (n 10) 243.
[110] Ntsikelelo Breakfast, Itumeleng Mekoa, Nondumiso Maphazi, 'Participatory Democracy in Theory and Practice: A Case Study of Local Government in South Africa' 3 Africa's Public Service Delivery & Performance Review 31.
[111] Creighton (n 10).
[112] Cristina Fraenkel-Haeberle, Sabine Kropp, Francesco Palermo, Karl-Peter Sommermann*, Citizen Participation in Multi-level Democracies* (Hotei Publishing 2015).

i. AARHUS CONVENTION

Within the Aarhus Convention, there are various mentions of strengthening democracy within the reports on the negotiations of the convention.[113] This is reflected in the preamble: "the parties to this Convention [are] convinced that the implementation of this Convention will contribute to strengthening democracy…"[114] Furthermore, Kofi Annan, the late Secretary-General of the UN stated that "although regional in scope, the significance of the Aarhus Convention is global.. it is the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations...."[115].

Academics such as Boyle and Duvic-Paoli advance the view that the Aarhus Convention is in fact a human rights treaty.[116] They base this reasoning on the Convention's foundations in human rights treaties, in particular Article 25 ICCPR.[117] Also, the treaty grants enforceable rights to individuals, as opposed to states; as explained by Verschuuren, human rights

[113] UN Economic Commission for Europe, Report of the Ninth Session (27 January 1998) UN Doc CEP/AC.3/18; UN Economic Commission for Europe, Report of the First Meeting of the Parties (17 December 2002) UN Doc ECE/MP.PP/2
[114] Aarhus Convention 1998, preamble.
[115] UNECE, Aarhus Convention, Content of the Convention <https://www.unece.org/fileadmin/DAM//env/pp/contentofaarhus.htm> accessed 12 January 2019.
[116] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 ELIJ 613; Leslie-Anne Duvic-Paoli, 'The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence' (2012) 23 Yearbook of International Environmental Law 80.
[117] ibid.

can be considered legal rules that are enforceable by individuals.[118] A thorough discussion of the Aarhus Convention as a human rights treaty is outside the scope of the article. However, even the fact that the argument is gaining traction provides evidence of the importance of public participation as a key legal principle, one that is seen as paramount in addressing issues of public importance.

Parola argues that public participation plays a "narrow role" throughout the convention, which is evidenced by public authorities' ultimate determination of what the decision will be, and there is no binding obligation to accept or act on the comments of the participants.[119] However, leaving the final say to representatives does not dramatically limit public participation's usefulness as a concept, or rebut its purpose as a remedy for democratic insufficiency. To reiterate, public participation is a mechanism to *strengthen* democracy which, in most cases, will be representative democracy. The public's opinion may not always form the outcome of the decision, but such participation creates a platform for communication between public authorities and the public. It means that the public's opinion will, or should be, considered. Arguably, it is impracticable for the public authorities to be bound by every decision made by the public; there may be, for example, security or resource issues. Nonetheless, public participation must remain meaningful. If it is an arbitrary exercise that in practice contributes very little, it cannot be considered a method of addressing representative democracy failings.

ii. HUMAN RIGHTS TREATIES

The human rights treaties enacted post ICCPR neatly illustrate a change in approach to how participation in public affairs is facilitated.

[118] Jonathan Verschuuren, 'Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention' (2004) 4 Yearbook of European Environmental Law, 31.
[119] Giulia Parola, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (Walter de Gruyter 2013) 100.

Although the treaties tend to use similar wording to Article 25 ICCPR, they commonly refer to public participation in decision-making. This is particularly important, as the ICCPR and its subsequent treaties share the same general object and purpose stated in section 2 of the article: to recognise and protect the rights of individuals.

In the Convention on the Rights of Persons with Disabilities, the wording in Article 29 is similar to Article 25(a) ICCPR and appears to be based on the latter provision. However, interpretation of the provision demonstrates that Article 29 CRDP is a right for persons with disabilities to participate in the decision-making process. In a recommendation from the Committee on the Rights of Persons with Disabilities, it was stated that "the Committee urges the State party to adopt a strategy for guaranteeing full protection and enjoyment of the rights of women and girls with disabilities, while also *ensuring* their effective participation in decision-making processes."[120] The language used by the Committee illustrates that institutionalising public participation in decision-making is not a discretionary act of the state, but something that is necessary for the fulfilment of the treaty.

This is supported by the Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas, who undertook a study on the right of persons with disabilities to participate in decision-making, specifically outlining barriers women and girls with disabilities face when participating in

[120] UN Committee on the Rights of Persons with Disabilities, Communication No. 4/2011, (20 September 2013) UN Doc CRPD/C/10/D/4/2011 <https://hslda.org/content/landingpages/crpd/docs/CRPD_Committee_Appendix.pdf> accessed 11 January 2019.

public decision-making processes. She called for special attention to guarantee their rights to participate directly in decision-making processes. [121]

Under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 7 creates an obligation for parties to ensure that women "on equal terms with men" can participate in the formulation of government policy and its implementation.[122] The commentary on Article 7 states that "the term 'government policy' is a broad concept congruent with the concept 'conduct of public affairs' in Article 25 ICCPR.[123] The right to participation in the formulation of policy can be considered a public decision-making activity. Furthermore, the commentary explains that although the Convention does not explicitly prescribe any particular form of political system, "the implementation of Article 7 demands a form of governance where the will of the people plays a substantial role in determining State policy."[124]

Article 25(a) ICCPR broadly prescribes participation in public affairs, and General Comment 25 states that participation in decision-making is one mode of participation in public affairs.[125] Conversely, Article 7 CEDAW explicitly states that participation in the formulation of government policy is a right for women. The 13-year gap between the enactment of the ICCPR and the CEDAW appears to be significant: as described in section 1, international recognition of public participation did not begin to proliferate until the early 1970s. This paradigm shift is arguably reflected in the CEDAW. There was, undoubtably, a recognition during the drafting of CEDAW that broadly

[121] UNHRC, Thirty-seventh session, 'Report of the Special Rapporteur on the rights of persons with disabilities' (12 December 2017).
[122] CEDAW 1979.
[123] Marsha A. Freeman, Beate Rudolf, Christine Chinkin, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP Oxford 2012) 203.
[124] ibid 202.
[125] General Comment 25 (n 4).

providing the right to participation in public affairs would not be sufficient; in order to uphold individual's rights, participation in decision-making (or to be more specific, participation in government policy), was necessary.

One counter-argument is that the inclusion of the right to public participation in decision-making in treaties that protect minorities does not support the argument that Article 25 ICCPR must prescribe the right to public participation in order to fulfil its object and purpose. Different treaties may guarantee greater levels of protection, particularly in relation to minorities; this is sometimes the core purpose of enacting a separate treaty. Individually, CEDAW or CRPD do not demonstrate that representative democracy is insufficient if it is not coupled with public participation. However, the frequent use of public participation throughout all examples illustrates a trend. Namely, that public participation is the concept used to combat, at least partly, insufficiencies in democracy.

III. REINTERPRETATION OF THE ICCPR

The treaty can be reinterpreted only if it is necessary in order to achieve its object and purpose. Otherwise, the change in legal circumstances are not considered to be relevant to the fulfilment of the treaty's object and purpose.

It has been established in the previous section that the object and purpose of the ICCPR is to create "legally binding standards."[126] What connects the object and purpose of the ICCPR to the change in legal circumstances set out is that, arguably, the ICCPR's "legally binding standards" are democratic. As it has been established that public participation

[126] General Comment 24 (n 100).

is used as a key concept to strengthen democracy, Article 25(a) must contain the right to public participation in order to achieve its object and purpose.

Some academics and legal practitioners point towards the omission of the word "democracy" from Article 25(a) to support the argument that the right to political participation is not a right to democracy , and remark that democratic governance is a "political ideal", as opposed to an individual right enforceable through Article 25.[127] Further, they assert that even if democracy is recognised as a principle of the UN, it is "not the same as asserting that an obligation exists for states to introduce and maintain democratic systems of government."[128]

However, in *Marshall v Canada,* the HRC asserted that there was a need for a "democratic state."[129] In *Debreczeny v The Netherlands*[130]*,* they referred to the "democratic decision-making process", the "democratic decision-making procedures"[131] and "democratic rules".[132]Although the cases alone may not be concrete evidence of the ICCPR providing democratic standards (as Canada and the Netherlands are, in any event, democratic states), there is further evidence to support the notion that such standards are provided for in the ICCPR. For example, almost 30 years from the enactment and ratification of the ICCPR, the Vienna Declaration of 1993 confirmed the

[127] Tim Wood, 'Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties' (2015) 28 Harvard Human Rights Journal, 152.
[128] Steven Wheatley, 'Democracy in International Law: A European Perspective' (2002) 51 The International and Comparative Law Quarterly, 255.
[129] Communication No. 205/l986, U.N. Doc. CCPR/C/43/D/205/ l986.
[130] Communication No. 500/1992, U.N. Doc. CCPR/C/53/D/500/1992, paras. 4.2, 7.1, 7.3, and 9.3.
[131]Communication No. 205/l986, U.N. Doc. CCPR/C/43/D/205/ l986, para. 7.9.
[132] ibid 40, para. 8.4.

world leaders' acknowledgement of the interdependence between democracy and human rights.[133] In addition, according to the HRC's General Comment 25: "Article 25 lies at the core of democratic government."[134]

If legal circumstances establish that the method of ensuring democratic standards is to provide for public participation in decision-making, the ICCPR must also provide for public participation in decision making in order to fulfil its object and purpose. This is supported by Ebbesson. As previously stated, in the case of *Marshall v Canada,* the HRC proclaimed that "Article 25(a)… cannot be understood as meaning that any directly affected group… has the unconditional right to choose the modalities of participation in the conduct of public affairs."[135] In response, Ebbesson opines that the judgment "does not provide for participatory rights beyond the election of representatives" and that it does not "offer *minimum standards*… beyond the right to vote in… elections." Therefore, this interpretation would afford states a wide measure of discretion in terms of establishing the content of article 25(a) ICCPR.[136]

As Article 25 ICCPR "lies at the core of democratic government",[137] there must be a need for it to establish robust democratic standards. As illustrated above, representative democracy is appearing insufficient to address issues of public concern. Public participation in decision-making has been introduced with remedial effect. If public participation is not a right as enshrined in Article 25, but merely an optional modality, this exposes weaknesses in the ICCPR. Arguably, the Covenant therefore would not achieve its object and purpose of creating legally binding standards in the

[133] UNGA, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc A/CONF.157/23.
[134] General Comment 25 (n 4).
[135] Communication No. 205/l986, U.N. Doc. CCPR/C/43/D/205/ l986.
[136] Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997)52 Yearbook of International Environmental Law, 71.
[137] General Comment 25 (n 4).

context of participation in public affairs. This is not to say that public participation *replaces* representative democracy; instead, as illustrated above, it is a mechanism to strengthen the latter.

CONCLUSION

Overall, the article has attempted to demonstrate that public participation in decision-making is a right within Article 25(a) ICCPR. This is distinct from the situation expressed in General Comment 25; there, the HRC stated that public participation in decision-making was one mode of establishing participation in public affairs. This means that although states can fulfil their obligations under Article 25(a) by implementing public participation in decision-making, it is not the only means by which they can do this. Conversely, the position taken in the article is that if states *do not* facilitate public participation in decision-making, they will be in breach of their human rights obligations.

Throughout the article, it was argued that public participation is a right within Article 25(a) ICCPR due to changing legal circumstances that resulted in a need for the object and purpose of the treaty to adapt. It was discussed that the general object and purpose of the treaty, to create legally binding standards, can be framed as a democratic standard in light of Article 25(a). Therefore, the treaty must ensure it creates legally binding democratic standards.

However, it was illustrated in the final section that post enactment of the ICCPR, other treaties in international law prescribe public participation in decision making in order to create robust democratic standards. This was the "legal change in circumstance" necessitating an interpretation of Article 25(a) and an assessment of the object and purpose. It was shown that public participation in decision-making is now necessary to address insufficiencies in democracy, or in other words, provide democratic standards. Bringing the argument full circle, public participation is a right under Article 25 ICCPR in order to provide democratic standards, and therefore fulfil the object and purpose of the ICCPR.

KNOW THY ENEMY: THE CASE FOR A UNIVERSAL DEFINITION OF TERRORISM

Zahrah Latief*

ABSTRACT

Post-9/11, terrorism has embedded itself into the collective global consciousness, spawning decades of public, political, and scholarly debate on how threats to national security should be neutralised. As tensions about terrorism intensify across the world, one question continues to elude the international community: how is terrorism defined? Absent a universal international definition, States have sought to defeat terrorism on their own terms, resulting in a fragmented array of over-broad domestic anti-terrorism legislation. This Article seeks to argue that States' discretion to unilaterally define terrorism is one of the greatest threats to the application of human rights today. Part II of this Article explores existing international attempts to define terrorism, contextualising the volatile political backdrop against which such definitions have been developed. Part III examines the strained relationship between domestic counter-terrorism measures and the application of human rights law, using examples from across the world to demonstrate the abandonment of and indifference to fundamental tenets of

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international human rights law. In Part IV, this Article briefly broaches the relationship between counter-terrorism legislation and the (flawed) application of international humanitarian law (or 'IHL'). Part V makes a definitive case for formulating a definition of terrorism at the international level, arguing that, by so doing, the international community would be able to limit the abuse of executive power and confer uniformity, legitimacy, and transparency on the fight against terror. In its conclusion, this Article reflects on the most profound failing of the war on terror: trading liberty for safety, and division for unity.

I. INTRODUCTION

"The most dangerous thing about terrorism is the over-reaction to it."[1]

Terrorism is the *bête noir* of the twenty-first century. Though it is firmly embedded in humanity's collective lexicon, terrorism is the monster without a singular shape, form, or definition. Indeed, the attempts that *have* been made to formulate a definition at the international level have been equal parts volatile and futile. The result of this disagreement has been a disjointed mélange of 'sectoral' terrorism treaties, United Nations resolutions, General Assembly draft conventions, and vaguely worded domestic counter-terrorism legislation. Shortly after the events of September 11, 2001, the British Ambassador to the UN proclaimed that "what looks, smells, and kills like terrorism is terrorism."[2] Given that charges of terrorism fundamentally alter the application of human rights law, this is a deeply troubling statement. Respect for fundamental rights is contingent upon a definition of terrorism more infrangible than one based on instinct, executive discretion, and alleged good faith. In a post 9/11 world, it has increasingly been the case that in

[1] Yuval Noah Harari, *Homo Deus: A Brief History of Tomorrow* (Harvill Secker, 2016)

[2] Max Abrahms, 'The T-Word: When is an Attack Terrorism?' *Los Angeles Times* (8 November 2017) <https://www.latimes.com/opinion/op-ed/la-oe-abrahms-terrorist-definition-20171108-story.html> accessed 1 May 2019.

balancing the right to security and the right to liberty, States have resorted to preventative security measures that favour the former and significantly restrict the latter. This Article argues that the legal machinery designed to combat terrorism must be cogent, impenetrable, and, above all, universal. As such, the need to develop a consistent and universally accepted definition of terrorism is not merely a game of semantics, but of absolute necessity. The current malleability of the concept has caused several States to saturate domestic definitions of terrorism with their own political agendas, allowing fundamental international human rights norms to be unjustifiably and excessively derogated from. The greatest threat to human rights is not terrorism; rather, it is the belief that, in the fight against terrorism, human rights may be disposed of.

In making the case for the creation and implementation of a universal definition of terrorism, this Article will be structured as follows: Part II will examine past and recent attempts to develop a definition of terrorism at the international, regional, and domestic levels, their shortcomings, and some of the issues associated with finding international consensus. Part III will go on to explore the inexorable bond between terrorism and the (limited) application of human rights across the world. In particular, it will survey the extent to which questionable domestic interpretations of terrorist acts have directly resulted in human rights violations in China, Russia, the UK, and the USA. In brief, Part IV also examines counter-terrorism legislation and the application of international humanitarian law, and the extent to which lawful parties to a non-international armed conflict (NIAC) may be speciously characterised as 'terrorists'. Part V will make a definitive case for developing and adopting a universal definition of terrorism. Finally, in concluding this Article, Part VI will reflect on the exigent need for the international community to understand, confront, and defeat terrorism by unequivocally defining it.

II. THE QUEST FOR A DEFINITION

Before turning to the interplay between terrorism and the application of international human rights law and the extent to which the lack of a comprehensive definition impacts this relationship, it is worth mapping the development of existing definitions of terrorism, their shortcomings, and some

of the key tensions between States on this sensitive matter. The aim here is to contextualise the development of anti-terrorism legislation in order to offer a greater insight into the political nuances that have saturated this area of international law.

The pursuit of a legal definition of terrorism has been famously likened to the quest for the Holy Grail[3]: a gruelling pursuit that elides the boundaries between faith and fanaticism. Much like the quest for the Holy Grail, attempts to define terrorism are not new; between 1936 and 1981, well over one hundred different definitions have been formulated worldwide[4], and these figures have only been rising. At the international, regional, and domestic levels, considerable effort has been expended into understanding and delineating the elements of terrorism, as well as developing strategies to counter it. Greene has argued that, across time, definitions of terrorism have been influenced by the historical and political environment of the categoriser, and have thus "spawned a vast array of different methodologies, paradigms, and branches of knowledge."[5] But heterogeneity does not yield unanimity, and as the remainder of this chapter will illustrate, a universal definition of terrorism continues to elude the international community.

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[3] Geoffrey Levitt, 'Is 'Terrorism' Worth Defining?' (1986) 13 Ohio National University Law Review 97(97) <https://heinonline.org/HOL/P?h=hein.journals/onulr13&i=107> accessed 1 May 2019.

[4] Walter Laqueur, 'Reflections on Terrorism' *Foreign Affairs* (1 September 1986) <https://www.foreignaffairs.com/articles/1986-09-01/reflections-terrorism> accessed 1 May 2019.

[5] Alan Greene, 'Defining Terrorism: One Size Fits All?' 66(2) Int'l and Comparative Law Quarterly 411, 415 <https://doi.org/10.1017/S0020589317000070> accessed 2 May 2019.

i. INTERNATIONAL INSTRUMENTS

One of the earliest recorded definitions of terrorism is contained in the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, Article 1(2) of which expresses that acts of terrorism are "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."[6] Unfortunately, the breadth of this definition impeded its success, and with only one ratification by India, it failed to see the light of day.[7] Following the massacres at Israel's Lod Airport and the Olympic Games in Munich in 1972, the United Nations (UN) General Assembly began to assume a greater role in confronting terrorism, but little progress was made in universalising a definition.[8] During the Sixth Legal Committee of the General Assembly, the United States put forth a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, which, rather than defining terrorism, called upon States to criminalise "offences of international

[6] League of Nations, Convention for the Prevention and Punishment of Terrorism 1937 <https://www.wdl.org/en/item/11579/view/1/9/> accessed 1 May 2019.
[7] John F Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1990) 19 Israel Yearbook of Human Rights, accessed 1 May 2019.
[8] Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation' (2006) 29(1) B C Int'l & Comp L Rev 23, 29 <https://heinonline.org/HOL/P?h=hein.journals/bcic29&i=29> accessed 2 May 2019.

significance".[9] Unsurprisingly, this Draft did not gain traction, and was lost in the affray of draft conventions that were being presented to the UN.[10]

Sectoral counter-terrorism treaties aside, it is also important to note the prominent role the UN Security Council has played in condemning and responding to terrorism. Just one day after the September 11 terror attacks in New York and Washington D.C., the Security Council adopted Resolution 1368, which condemned the attacks and affirmed their status as a threat to international peace and security, thereby triggering the self-defence provisions of Chapter VII of the Charter of the UN.[11] Later that month, the Security Council adopted the comparably more comprehensive Resolution 1372, which was "designed mainly to outlaw the financing of terrorist activities and terror groups", and required States to, *inter alia*, prevent, suppress, and prohibit the financing of terrorist acts; criminalise the provision or collection of funds to be used to carry out terrorist acts; and freeze the financial assets of persons who commit, or attempt to commit, terrorist acts.[12] A Counter-Terrorism Committee (CTC) was set up to monitor the implementation of the Resolution, and request mandatory State reports.[13] Saul has been critical of the ad hoc approach of the CTC, whose conviction in the ability of States to combat terrorism without agreeing on a universal definition is misguided and woefully

[9] Levitt (n 3) 9.
[10] Young (n 8).
[11] Surya P Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of Definition in International Law' (2002) 4(3) Int'l LF D Int'l 159, 174 <https://heinonline.org/HOL/P?h=hein.journals/intlfddb4&i=169> accessed 2 May 2019.
[12] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[13] ibid.

idealistic.[14] Rather than encouraging States to constrain broad and vaguely-worded domestic counter-terrorism legislation, "the CTC has advocated that domestic terrorism laws be jurisdictionally widened to cover international terrorism, even though some domestic crimes more closely resemble broad national security or public order offences."[15] For these reasons, Young considers Resolution 1372 to be a "lost opportunity"; by failing to define, or codify existing international definitions of terrorism, the Resolution "remained subject to interpretative conjecture and vulnerable to opportunistic and bad faith implementation."[16] The gap left by Resolution 1372 was partially filled by Resolution 1566 (2004), which, in its paragraph 3, *recalled* that:

> "criminal acts, including against civilians, *committed with the intent to cause death or serious bodily injury*, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as

[14] Ben Saul, 'Definition of 'Terrorism' in the UN Security Council: 1985-2004' (2005) 4(1) Chinese J Int'l L 141 <https://heinonline.org/HOL/P?h=hein.journals/chnint4&i=145> accessed 3 May 2019.

[15] ibid.

[16] Young (n 8).

> defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable…"[17]

While this paragraph references several components of existing definitions of terrorism, including the requirement for an act intended to cause death or serious injury, committed with the purpose of provoking terror or compelling a government from doing or abstaining from doing any act, it is not framed as a definition in the Resolution. This quasi-definition indicates two important points: first, that Security Council has, at least on some level, conceptualised what it considers terrorism to encompass. Second, given that adoption is contingent upon consensus, it is patently unwilling to reify an authoritative definition. An important development in this area was made in 2011, when the Special Tribunal for Lebanon (STL) – established by Resolution 1757 to prosecute the individuals responsible for the 2005 assassination of Prime Minister Rafiq el Hariri and twenty-two others[18] – laid out a customary international law definition of terrorism, based on State practice and *opinio juris*. According to the Tribunal, three key elements constitute terrorism: (i) the perpetration [or threat] of a criminal act; (ii) the intent to spread fear among the population, or to directly or indirectly compel a national or international authority to either take, or refrain from taking, some action; and (iii) the involvement of a transnational element.[19] At the time, it was suggested

[17] UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566.

[18] UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.

[19] 'Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging' *Special Tribunal for Lebanon* (15 February 2011) <https://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936> accessed 1 May 2019.

that this decision of the STL, which is "the world's first international court with jurisdiction over the crime of terrorism"[20], would have a profound effect on the international community's attempt to formulate a widely-accepted definition of terrorism.[21] Although the Tribunal has certainly elucidated the concept of terrorism, it is unclear whether this definition will resolve any of the abovementioned issues, particularly those pertaining to freedom fighters and State-led terrorism. Finally, as recently as 2015, the Security Council adopted Resolution 2249, which "unequivocally condemns"[22] a string of terrorist attacks committed by the Islamic State (ISIL). While Resolution 2249 ostensibly supports the use of force against ISIL, and indeed, provides some legitimacy for actions taken against it, it does not explicitly sanction the use of force against the group in Syria or Iraq.[23] Much like Resolution 1372, which also did not overtly authorise the use of force in Afghanistan following 9/11, Resolution 2249 merely calls upon States to take "all necessary measures…[in compliance with] international human rights…to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL."[24]

[20] Michael P Scharf, 'Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation' (2011 *American Society of International Law)* <https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and> accessed 1 May 2019.
[21] ibid.
[22] UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
[23] Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (21 November 2016) *EJIL Talk* <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 1 May 2019.
[24] R/2249 (n 22).

ii. REGIONAL INSTRUMENTS

Unsurprisingly, efforts to define terrorism have been far more successful at the regional and domestic levels, owing to States' abilities to unilaterally construct their own definitions. In 2001, the European Council affirmed that the fight against terrorism was one of the European Union's (EU) foremost priorities, and adopted Common Position 2001/1931/CFSP to apply further measures to combat terrorism, and articulate a list of individual groups and entities associated with terrorism whose funds were to be frozen to prevent the financing of terrorism.[25] The Council defined terrorist acts as "intentional acts that may serious damage a country or an international organisation by intimidating a population, exerting undue compulsion of various types or by destabilising or destroying its fundamental political, constitutional, economic, or social structures."[26] Other regional anti-terrorism conventions of note include the European Convention on the Suppression of Terrorism (1977); the Arab Convention on the Suppression of Terrorism (1998); the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (1999); and the Protocol to the AU Convention on the Prevention and Combating of Terrorism (2004).[27]

[25]Council Common Position 2001/931/CFSP (2001) on the Application of Specific Measures to Combat Terrorism <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33208> accessed 1 May 2019.
[26] ibid.
[27]Cephas Lumina, 'Counter-Terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice' (2005) 7(1) Afr Hum Rts LJ 35, 42 <https://heinonline.org/HOL/P?h=hein.journals/afrhurlj7&i=41> accessed 1 May 2019.

iii. DOMESTIC INSTRUMENTS

Domestically, in the United States, the events of 9/11 saw Congress pass the United and Strengthening America by Providing Appropriate Tool to Intercept and Obstruct Terrorism (USA PATRIOT) Act in 2001. The PATRIOT Act became a lynchpin of the US's legal strategy in the war on terror, and substantially broadened the powers of the executive in the name of national security. It "provides for enhanced national security against terrorism, greater surveillance procedures, mechanisms to detect and report money laundering…stricter immigration measures"[28], and criminalises the provision of "material support or resources"[29] to terrorist groups. These provisions have been interpreted stringently in practice, and as the following section will explicate, have had profound effects on the human rights of terror suspects.

In the United Kingdom, counter-terrorism measures predate 9/11 by decades, resulting from the political violence engendered by the conflict in Northern Ireland. Pre-9/11, the Terrorism Act 2000 "marked an important new phase in the laws against political violence within the UK…[and] launched a more unified and permanent regime."[30] Its Section 1 defines terrorism as the use or threat of action where the use or threat is designed to influence the

[28] ibid.

[29] United States of America: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (26 October 2001) <https://www.govinfo.gov/content/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf> accessed 5 May 2019.

[30] Clive Walker, 'Clamping Down on Terrorism in the UK' (2006) 4(5) Journal of International Criminal Justice 1, 13 <https://www.researchgate.net/publication/31082234_Clamping_Down_on_Terrorism_in_the_United_Kingdom> accessed 1 May 2019.

government or to intimidate the public or a section of the public,[31] and is made for the purpose of advancing a political, religious, or ideological cause.[32] Sir David Williams has stated that this definition reposes significant trust in the "good sense of the police and security services, prosecutors, judges, and jurors to maintain a sense of proportion when acts of terrorism are alleged."[33] In 2004, the UK government enacted the Anti-Terrorism, Crime and Security Act 2001, Part IV of which was concerned with immigration and asylum, and significantly extended the ambit of police powers. Walker has forcefully argued that many of the measures in the 2001 "represented opportunistic changes that would not have been sustained outside a period of crisis"[34], and were propelled by fears of dangerous foreigners at large in the country.

It is hoped that the above examples of the definitions of terrorism contained in international, regional, and domestic instruments have demonstrated the breadth of powers available to individual states to develop counter-terrorism strategies. The international community in particular has been deluged with numerous formulations and incantations of this highly elusive concept, but political sensitivities and an unwillingness to equivocate have obstructed the road to consensus. To cajole out of the international community a universal

[31] Terrorism Act 2001 (TA 2001) s1(1)(b).

[32] TA 2001, s1(1)(c).

[33] Ben Golder and George Williams, 'What is Terrorism – Problems of Definition' (2004) 27(2) UNSWLJ 270, 299 <https://heinonline.org/HOL/P?h=hein.journals/swales27&i=280> accessed 2 May 2019.

[34] Walker (n 30).

definition is to manoeuvre the numerous labyrinthine political considerations and find some agreeable middle ground.[35]

III. COUNTER-TERRORISM AND HUMAN RIGHTS

"Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety."

These words, famously attributed to Benjamin Franklin, are relevant today more than ever. Post-9/11, terrorism has become the Zeitgeist of the twenty-first century. When President Bush declared his "global war on terror" in the aftermath of the attacks,[36] it was not known that the war waged would be a perpetual one, spanning time, borders, and enemies; indeed, Hoffman has described the war on terror as existing "in a parallel legal universe in which compliance with legal norms is a matter of executive grace…or public relations necessity."[37] As anxieties about terrorist attacks and the development of destructive technologies continue to mount across the world, it is clear that the legal machinery designed to combat terrorism must be both robust and

[35]For a more detailed discussion of precisely why it has been difficult to develop a customary international law definition of terrorism, see Ben Saul's work on the matter, which argues that the "divergent approaches to definition and persistent disagreement over the scope of exceptions…have inhibited the emergence of a customary crime.": Ben Saul, 'Terrorism in Customary International Law' in Ben Saul (ed), *Defining Terrorism in International Law* (OUP, 2008).

[36] 'Sept. 20, 2001: Bush Declares War on Terror' *ABC News* <https://abcnews.go.com/Archives/video/sept-20-2001-bush-declares-war-terror-10995502> accessed 22 April 2019.

[37] Paul Hoffman, 'Human Rights and Terrorism' (2004) 26(4) Hum Rts Q 932, 933 <https://heinonline.org/HOL/P?h=hein.journals/hurq26&i=942> accessed 1 May 2019.

coherent. Indeed, the debate surrounding an international definition of terrorism are not confined to the realm of scholarly debate; the absence of a universal international definition of terrorism has tangible consequences, manifested primarily through over-broad domestic anti-terrorism legislation. Although it is incumbent upon national governments to adopt counter-terrorism legislation consonant with their obligations under international human rights law,[38] in practice, States have been willing to erode the fundamental rights and liberties of individuals deemed to threaten national security with alarming alacrity. To this end, Murray has suggested that, in times of crisis, States revert to what Loewenstein has termed a 'military democracy': "a liberal democratic governance order which has supposedly shaken off 'legalistic self-complacency in response to an existential threat".[39]

When we speak of protecting human rights in the context of terrorism, we speak of the rights of two categories of people: (a) the individuals who are affected by terrorist attacks, whose security and physical integrity must be protected, and (b) the individuals suspected or charged with the commission of terrorist acts, whose civil liberties hang in the balance. The difficulties involved in striking the optimal balance between liberty and security have been prevalent since time immemorial; doubtless, one must be wary of adopting an absolutist view of human rights when evaluating the relative primacy of these competing rights. As Menon has argued, "such an approach ignores the fact that there is necessarily indeterminacy in the trade-off of

[38] Lumina (n 27).
[39] CRG Murray, 'Convergences and Divergences' (2017) 28(3) KLJ 445. <https://doi.org.10.1080/09615768.2017.1398257> accessed 1 May 2019.

rights within any human rights framework".[40] Nevertheless, while *some* degree of inequity between the protection of liberty and security is to be expected, this "should not be used as a carte blanche for the government of the day to do whatever it wishes in the name of security."[41] In order to observe their responsibilities under international human rights law, States must draw a line between the pursuit of legitimate security measures and arbitrary violations of human rights, and act proportionately. Perhaps, in light of the vague counter-terrorism legislation drafted by a number of States in the wake of 9/11, this is somewhat idealistic; States have, by unilaterally defining terrorism, facilitated the growth of repressive regimes aimed at attacking political opponents.[42]

The remainder of this chapter will survey some of the most concerning counter-terrorism strategies across the world, using China, Russia, the UK, and the USA as case studies to paint an expansive picture of the extent to which certain civil liberties – including the rights to privacy, free speech, and due process – have been imperilled in the war on terror.

i. CHINA

In China, the war on terror has substantially corroded the fundamental right to privacy, protected by Article 12 of the UDHR and Article 17 of the

[40] Sundaresh Menon, 'International Terrorism and Human Rights' (2014) 4(1) Asian JIL 1,4 <https://heinonline.org/HOL/P?h=hein.journals/ajoinl4&i=7> accessed 1 May 2019.
[41] ibid.
[42] Paul Hoffman, 'Human Rights and Terrorism' (2004) 26(4) Hum Rts Q 932, 933 <https://heinonline.org/HOL/P?h=hein.journals/hurq26&i=942> accessed 1 May 2019.

ICCPR. Paragraph 1 of the latter affirms that "no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence", and paragraph 2 ensures the right to the protection of the law against such interference. Indeed, the right to privacy is integral to the exercise of autonomy and dignity, and "helps us to establish boundaries to limit who has access to our bodies, places and things…[and] communications and our information."[43] Owing to unduly broad counter-terrorism legislation, Uighur separatists in the Xinjiang region – or Eastern Turkestan – have been unceremoniously branded with the terrorist label. Chung writes that the events of 9/11 inspired China's own war on terror against the Uighur population, who are a religious, ethnic, and linguistic minority.[44] In a white paper issued by the State Council Information Office, the Chinese government claims to have arrested some thirteen-thousand terrorists over the past five years,[45] but Chung has argued that, "whether or not they support the use of violent methods, the Xinjiang separatist groups…are too small, dispersed, and faceless to constitute a threat to Chinese control over the region."[46] In countering this so-called terrorist threat, Xinjiang has become a "state-sponsored surveillance

[43] 'What is Privacy?' *Privacy International* <https://privacyinternational.org/explainer/56/what-privacy> accessed 1 May 2019.
[44] Chien-Peng Chung, 'China's War on Terror – September 11 and Uighur Separatism' (2001) 81(4) Foreign Aff 8 <https://heinonline.org/HOL/P?h=hein.journals/fora81&i=650> accessed 1 May 2019.
[45] Zak Doffman, 'China Deploys 'Breakthrough' Surveillance Technology to Arrest 13,000 Terrorists' *Forbes* (18 March 2019) <https://www.forbes.com/sites/zakdoffman/2019/03/18/xinjiang-claims-13000-terrorist-arrests-justify-high-tech-population-control/#5f7ad2d0455c> accessed 1 May 2019.
[46] ibid.

laboratory",[47] where millions of Uighurs have been forced into re-education camps, and subjected to facial and iris recognition, biometric registration, GPS tagging, blanket video surveillance, and mandatory communications monitoring.[48] Detainees have been arrested for alleged religious and political transgressions through social media, and despite the absence of actual evidence of criminal activity, "the digital footprint of unauthorised Islamic practice, or even a connection to someone who committed one of these vague violations, was enough to land Uighurs in a detention centre."[49] China's heightened surveillance tactics and its assault on the privacy of the Uighur population, carried out in furtherance of a political desire to retain control over Xinjiang, also erodes religious freedom. Article 18(1) of the ICCPR protects freedom of thought, conscience, and religion, and any restriction on this right is permissible to the extent that it is prescribed by law and are necessary to protect public safety, order, health, or morals.[50] Article 18(2) makes clear that no individual should be subject to coercion which would impair the exercise of religious freedom. China's counter-terrorism legislation, Counter-Terrorism Law of the People's Republic of China, came into effect in 2016, and altered the legal architecture for combating terrorism. Troublingly, the legislation has conflated protest, dissent, and religious activity with international terrorism to

[47] ibid.
[48] ibid.
[49] Darren Byler, 'China's Hi-Tech War on its Muslim Minority' *The Guardian* (23 August 2018) <https://www.theguardian.com/news/2019/apr/11/china-hi-tech-war-on-muslim-minority-xinjiang-uighurs-surveillance-face-recognition> accessed 1 May 2019.
[50] Article 18(2), International Covenant on Civil and Political Rights.

justify the continued subjugation of the Uighur people.[51] A joint report published by the International Campaign for Tibet and the International Federation for Human Rights has stated that the legislation contravenes UN guidance on protection of human rights, and, by virtue of its vague terminology, provides for the penalisation of almost any peaceful expression of Uighur identity.[52]

ii. RUSSIA

Russian efforts to combat terrorism have led to brazen violations of the right to free speech, protected by Article 19 of the UDHR and Article 19 of the ICCPR. The former affirms that the right to freedom of expression includes "freedom to seek, receive, and impart information and ideas of all kinds…". Indeed, this right may be qualified where, among other things, the speech in question is libellous, slanderous, obscene, or incites violence. Per John Stuart Mill's harm principle, "the only purpose for which power can be rightfully exercised over any other member of a civilised community against his will, is to prevent harm to others."[53] If an individual expresses an intent to commit terrorist acts, or encourages others to do so, it is certainly not unreasonable to quash and criminalise such speech. The issue rather, is when governments repress any form of dissent under the pretext of counter-terrorism measures; surely, this is inimical to the values of any democratic society. Alas, this increasingly appears to be the case in Russia. In February

[51] 'China's New Counter-Terrorism Law: Implications and Dangers for Tibetans and Uyghurs' *International Federation for Human Rights* (November 2016) <https://www.refworld.org/docid/582b119b4.html> accessed 1 May 2019.
[52] ibid.
[53] John Stuart Mill, *On Liberty* (Cosimo Classics, 2005)

2019, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, penned an open letter to the High Commission for Human Rights in the Russian Federation in order to discuss the criminal charges levied against a Russian journalist.[54] The journalist, Svetlana Prokopyeva, is embroiled in a criminal case under Article 205.2 of the Criminal Code of the Russian Federation for 'justifying terrorism.'[55] In her letter, Mijatović wrote that, while Prokopyeva's comments were critical of the state authorities for their handling of a 2018 suicide-bombing, this could not justify the penalty of seven years' imprisonment. To do so would be a misuse of anti-terrorism legislation and is plainly incompatible with the human rights standards on freedom of expression.[56] "Apart from breaching Ms Prokopyeva's right to freedom of expression", she wrote, "the criminal prosecution against her has a broader chilling effect on all media and journalists in the Russian Federation".[57] Human Rights Watch has reported that in the Russian government's attempt to stifle free speech, state authorities have prosecuted dozens of individuals on criminal charges for posts on social media, videos, and interviews.[58] By so doing, the government erroneously conflates criticism with extremism[59] –

[54] High Commission for Human Rights in the Russian Federation <https://rm.coe.int/letter-to-tatiana-moskalkova-high-commissioner-for-human-rights-in-the/168092e8f7> accessed 1 May 2019

[55] ibid

[56] ibid.

[57] ibid.

[58] Adam Maida, 'Russia's Assault on Freedom of Expression' (2017) *Human Rights Watch* <https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression> accessed 1 May 2019.

[59] ibid.

eerily reminiscent of the practices of the Chinese government and their treatment of the Uighurs. Russia's criminalisation of legitimate dissent and its politicisation of terrorism once more illustrates the extent to which States are able to brazenly cast aside fundamental human rights norms, all for want of a universal definition of terrorism.

iii. UNITED KINGDOM

In the United Kingdom, prolonged and arbitrary pre-trial detention of terror suspects is a routinely deployed measure in the fight against terrorism. In many cases, individuals are not charged and do not have access to court or counsel.[60] Article 9(1) of the ICCPR obliges States to respect the inviolable right to liberty and security of person by prohibiting arbitrary arrest or detention. The Working Group on Protecting Human Rights While Countering Terrorism has confirmed that, upon arrest or detention for terrorism charges, "persons must be informed of the reasons for arrest or detention, be promptly informed of any charges and of the person's rights and be informed of how to avail oneself of those rights…[and] competent authorities must record and communicate certain further information to the detained person and/or his or her legal counsel concerning the circumstances of the detention."[61] An arrest or detention may be considered 'arbitrary' if it is the result of discrimination,

[60] David P Steward, 'Human Rights, Terrorism, and International Law' (2005) 50 Vill L Rev 685, 691 <https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/8> accessed 1 May 2019.

[61] 'Detention in the Context of Countering Terrorism', Counter-Terrorism Implementation Task Force <https://www.ohchr.org/EN/newyork/Documents/DetentionCounteringTerrorism.pdf> accessed 1 May 2019.

extends beyond a reasonable time, and is not adequately justified.[62] Liberty, a UK-based human rights organisation, has been particularly critical of the increased pre-charge detention period of individuals accused of terrorism in the UK, which, pursuant to the Criminal Justice Act 2003, has been extended to fourteen days.[63] Indeed, from 2006 to 2011, the detention period was increased to a startling twenty-eight days, presumably in response to the London underground and bus bombings that took place in 2005. Although this has since been reduced, the organisation has pointed out that the fourteen day period is still longest of any comparable democracy, with the limit in the US being two days, seven in Ireland, four in Italy, and only one day in Canada.[64] Prolonged pre-trial detention is certainly not new in the UK; the Civil Authorities (Special Powers) Act 1922 was used by the British government in 1971 to introduce the policy of internment to Northern Ireland, which enabled police to detain terrorist suspects indefinitely, without having to arrest, charge, or try them in court.[65] This draconian internment policy was not only a contravention of Article 9(1) of the ICCPR, but infringed upon the right to liberty and security guaranteed by Article 5 of the European Convention on Human Rights (ECHR). Alas, the UK insisted upon its permissibility by virtue of the "continuous state of public emergency in Northern Ireland."[66] Beyond

[62] ibid.
[63] 'Extended Pre-Charge Detention' *Liberty* <https://www.libertyhumanrights.org.uk/human-rights/countering-terrorism/extended-pre-charge-detention> accessed 1 May 2019.
[64] ibid.
[65] Jessie Blackbourn, 'Counter-Terrorism and Civil Liberties' (2018) 29(2) KLJ 297, 313 <https://doi.org/10.1080/09615768.2018.1502070> accessed 1 May 2019.
[66] ibid.

the UK, anti-terrorism laws adopted in France, Germany, and Italy also extended the period of pre-trial detention.[67]

The UK has also demonstrated excessive reliance on proscription powers to inhibit the growth and presence of, and support for, recognised terrorist organisations under its jurisdiction.[68] First implemented to counter terrorism in Northern Ireland,[69] the intention behind proscription was to indicate society's disapproval of a particular group's ideology and supress its ability to act violently. Per the Terrorism Act 2000, the Home Secretary can proscribe an organisation if he considers it to be affiliated with terrorism;[70] as of now, some seventy-six international terrorist organisation are proscribed under the Act.[71] Nevertheless, Jarvis and Legrand have argued that the "terminology of blacklisting, listing, designation, outlawing…and more…are reflective of the often opaque and ambiguous processes and powers that constitute these regimes." It is clear that the ability of governments to silence the message of a group without the need to establish criminal actions of its adherents, beyond voluntary membership or a show of support, is open to abuse. Given that the rights to freedom of expression and association are derogable under Articles 10(3) and Article 11(3) of the ECHR respectively, it appears that the executive

[67] Lumina (n 27) 40.
[68] Lee Jarvis and Tim Legrand, 'The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons' (2018) 30(2) Terrorism and Political Violence 199, 201 <https://doi.org/10.1080/09546553.2018.1432199> accessed 1 May 2019.
[69] Murray (n 38) 7.
[70] TA 2000, s17.
[71] 'Proscribed Terrorism Organisations' *Home Office* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795457/Proscription_website.pdf> accessed 1 May 2019.

has an uncomfortably wide latitude to criminalise the peaceful and non-violent conduct of individuals who do not directly partake in terrorism under counter-terrorism legislation.

iv. UNITED STATES OF AMERICA

Alongside China, Russia, and the UK, the USA has also implemented a number of discriminatory counter-terrorism practices that have led to the restriction of civil liberties. In the aftermath of 9/11, Arab nationals and Muslim males in the United States were questioned and detained in the thousands, and in most instances, the detentions were undertaken in conditions of absolute secrecy.[72] The preventative nature of this strategy meant that the individuals under suspicion were racially profiled, despite the prohibition on discrimination based on race, sex, language, and religion.[73] One of the most contentious post-9/11 measures introduced by the US was the National Security Entry-Exist Registration System (NSEERS), which was designed to register non-citizen visa holders when they entered the US – this involved fingerprinting, taking a photograph, and interrogation.[74] NSEERS also kept track of registered individuals leaving the country, so as to ensure that they did not remain in the US illegally.[75] The 'Special Registration' programme, as it is often termed, was aimed at men over the age of sixteen from Muslim-majority

[72] Hoffman (n 41) 6.
[73] Article 1, Universal Declaration on Human Rights.
[74] ibid.
[75] Nadeem Muaddi, 'The Bush-Era Muslim Registry Failed - Yet, the US Could be Trying it Again' *CNN* (22 December 2016) <https://edition.cnn.com/2016/11/18/politics/nseers-muslim-database-qa-trnd/index.html> accessed 1 May 2019.

countries.[76] In 2007, the American Arab-Anti Discrimination Committee condemned NSEERS for discrimination based on national origin, and for instilling fear and confusion in Muslim communities.[77] Although the programme was officially terminated in 2011, many believe that its consequences linger; the *New York Times* reports that potentially thousands of individuals are "still caught in the program's net", as lengthy deportation proceedings outlive the programme.[78] In the US, it appears that the war on terror has been principally aimed at foreign nations, the vast majority of whom had little to do with the September 11 attacks; "by targeting immigrant communities", writes Hoffman, "the government fosters the discrimination and exclusion that human rights law has struggled so hard to eradicate, making it all the more difficult to engender understanding and cooperation between communities in the fight against terrorism".[79] Indeed, restricting civil liberties and alienating large swathes of society based on their religious and ethnic backgrounds adversely affects any meaningful attempt to combat terrorism, by allowing actual terrorist groups to bolster their narratives and recruit adherents to their cause.[80]

Like the UK, proscription and designation regimes also play a key part in the counter-terrorism framework of the US. The USA PATRIOT Act prohibits the provision of 'material support' to Foreign Terrorist Organisations

[76] ibid.
[77] ibid.
[78] Sam Dolnick, 'A Post-9/11 Registration Effort Ends, but Not Its Effects' *New York Times* (30 May 2011) <https://www.nytimes.com/2011/05/31/nyregion/antiterrorism-registry-ends-but-its-effects-remain.html> accessed 1 May 2019.
[79] Hoffman (n 41) 15.
[80] Blackbourn (n 47) 5.

(FTOSs), which are designated by the Secretary of State in accordance with Section 219 of the Immigration and Nationality Act (INA).[81] Section 2339A(b)(1) of Title 18 to the United States Code states that material support encompasses the provision of "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services…[and] expert advice or assistance…".[82] Rather emphatically, Cole has written that the "material support principle is 'guilt by association in twenty-first century garb."[83] He argues that, in the wake of 9/11, the Bush administration sought to revive the tactics of the Cold War, and promulgated a climate of collective guilt, even where the support offered to FTOs is lawful, peaceful, and non-violent.[84] The narrative of the Bush administration was that freedom of association was not being limited, as only 'material support' was criminalised – but, as Cole has noted, association cannot thrive without support.[85] It is precisely for these reasons that Murray considers that material support provisions "pose a greater risk to liberal democratic values than have been experienced to date."[86]

Perhaps the most sobering and familiar emblem of the US's war on terror, however, is the Guantánamo Bay detention facility in Cuba. Amnesty

[81] 'Foreign Terrorist Organizations', *US Department of State* <https://www.state.gov/j/ct/rls/other/des/123085.htm> accessed 1 May 2019.
[82] 18 US Code §2339A: Providing Material Support to Terrorists <https://www.law.cornell.edu/uscode/text/18/2339A> accessed 1 May 2019.
[83] David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the War on Terror' in Bianchi and Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publication, 2008).
[84] ibid.
[85] ibid.
[86] Murray (n 38) 6.

International has reported that since its erection in 2002, just under eight-hundred men have been transported to Guantánamo;[87] only seven of those seven-hundred and seventy-nine have ever been convicted, and five out of those seven convictions were pre-trial agreements where a plea of guilt was exchanged for release from the facility.[88] At present, one-hundred-and-seven detainees toil behind the bars of Guantánamo,[89] awaiting an absolution that may never arrive. Hoffman argues that the Guantánamo detainees are imprisoned in a "legal black hole",[90] where their only prospects of justice are occasional visits by the International Committee of the Red Cross. Although the US has fervently claimed that the detainees are treated in accordance with the laws of war and international human rights law, this is not reflected by the rising allegations of torture and inhuman, cruel, and degrading treatment taking place at the facility. The UN Special Rapporteur on Torture, Nils Melzer, has cited the case of Ammar al-Baluchi, who has been held in isolation in Guantánamo Bay for over a decade.[91] Baluchi continues to undergo torture and ill-treatment in the facility, and Melzer has expressed concern that, "in addition to the long-term effects of past torture, noise vibrations are reportedly still being used against him, resulting in constant sleep deprivation and related physical and mental disorders, for which he

[87] 'Guantanamo Bay: 14 Years of Injustice' (12 January 2018) *Amnesty International* <https://www.amnesty.org.uk/guantanamo-bay-human-rights> accessed 1 May 2019.
[88] ibid.
[89] ibid.
[90] Hoffman (n 41) 23.
[91] '"US Must Stop Policy of Impunity for the Crime of Torture" – UN Rights Expert' *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E> accessed 1 May 2019.

allegedly does not receive adequate mental attention."[92] By virtue of the Military Order of November 13, 2001 – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, the US is able to authorise the detention and trial of alleged terrorists, who are deliberately defined with a broad brush, so as to allow them to fall within the ambit of the Order.[93] The lack of judicial, domestic, and international oversight of Guantánamo has allowed the US to undertake interrogation techniques that are fundamentally inimical to the absolute prohibition on torture, including "twenty-four-hour illumination, sleep deprivation, and standing for long periods of time."[94]

With regards to torture, it is difficult to accept the position that any part of the world may be a human-rights free zone – even where the national security of a State is at stake. The prohibition against torture is an established tenet of customary international law, and Lumina has suggested that it has taken on the character of a *jus cogens* prohibition;[95] Article 1 of the UN Declaration defines torture "as an act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official." Any acts undertaken by the US which result in severe and lasting physical or mental harm therefore constitutes as torture and are appalling displays of unbridled executive power. In a particularly scathing analysis of US counter-terrorism policy, Clarke has contended that the Bush administration's insistence on retaining discretion to use obsolescent and 'clean' interrogation techniques like waterboarding, and its consistent denial of the use of torture, indicates that it has "succeeded in creating a full-fledged

[92] ibid.
[93] Hoffman (n 41) 8.
[94] ibid 97.
[95] Lumina (n 27).

torture culture that has been granted de facto immunity."[96] Although a number of scholars have spoken up in defence of torture, including Bagaric and Clarke, who consider that "compassion-based laws that involve direct harm to one person for the benefit of another or the wider community do not lead to widespread abuses",[97] and Dershowitz, who has most famously formulated the 'ticking time bomb' scenario,[98] significantly more worrisome is President Donald Trump's enthusiastic approach to waterboarding and other forms of torture. The current POTUS has gone on the record as saying: "when [ISIS] are chopping off the heads of our people…would I feel strongly about waterboarding? As far as I'm concerned, we have to fight fire with fire."[99] His retributive language appears to suggest that the Trump administration is keen to normalise torture as a legitimate counter-terrorism strategy. Of all the rights under international human rights law, surely the right to be protected against torture should be inviolable and impenetrable. In these circumstances, unfettered executive discretion cannot, and indeed, *should not*, be trusted.

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[96] Alan Clarke, 'Creating a Torture Culture' (2008) 32(1) Suffolk Transnat'l L Rev 8 <https://heinonline.org/HOL/P?h=hein.journals/sujtnlr32&i=3> accessed 1 May 2019.
[97] Bagaric and Clarke, 'Tortured Responses (A Reply to Our Critics): Physically Persuading Suspects is Morally Preferable to Allowing the Innocent to Be Murdered' (2006) 40(3) University of San Francisco Law Review 703, 708 <https://repository.usfca.edu/cgi/viewcontent.cgi?article=1169&context=usflawreview> accessed 1 May 2019.
[98] Alan Dershowitz, 'The Case for Torture Warrants' (7 September 2011) *Reuters* <http://blogs.reuters.com/great-debate/2011/09/07/the-case-for-torture-warrants/> accessed 1 May 2019.
[99] 'Trump Favours 'Waterboarding', But Will Let CIA, Pentagon Decide on Reinstating Torture' (26 January 2017) *DW* <https://p.dw.com/p/2WPPb> accessed 1 May 2019.

Suffice it to say, the fight against terrorism engages the application of international human rights in a number of different contexts. The latitude offered to States to define both terrorism and terrorists opens the doors to legislation imbued with political motives, "the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent, and suppression of resistance to military occupation."[100] In most of the examples listed above, it was not the case that liberty and security were being poorly balanced – rather, they were not being balanced at all. In most instances, States have prioritised national security and have infringed civil liberties in a bout of preventative decision-making. Menon put it best when he wrote: "the best approach will entail carefully calibrated balancing that – having taken all possible factors into consideration…– recognises that some rights may be curtailed, but only in exceptional circumstances, and with real safeguards to prevent undue sacrifice of liberty in the name of increased security."[101] Thus, the only way to distinguish legitimate counter-terrorism measures from illegitimate and arbitrary ones is by having a cogent framework by which to assess them.

IV. COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW

In addition to its impact on the application of international human rights law, the absence of a unified definition of terrorism and autarchic counter-terrorism legislation also poses significant dangers to the application of international humanitarian law (hereafter, 'IHL') and the principle of

[100] UN Working Group on Terrorism (2003).
[101] Menon (n 39) 18.

equality of belligerents, which bestows equal rights and obligations to all parties to a conflict under IHL.[102] In brief, IHL is the branch of international law that regulates the conduct of parties to armed conflict, and aims to mitigate the effects of hostilities on persons who are not participating in the hostilities.[103] In recent years, the International Committee of the Red Cross (ICRC) has identified a nascent propensity among States to consider acts of violence carried out by a non-State armed groups in armed conflict as "being 'terrorist' by definition, even when such acts are lawful under IHL."[104] Crucially, this means that groups that should be party to a non-international armed conflict (or, 'NIAC')[105] within the remit of IHL are instead labelled as terrorist groups, and are consequently unentitled to the protections and permissions that apply to all lawful participants of armed conflicts. Although IHL proscribes the commission of specific acts of terrorism in armed conflict, the norms governing armed conflict do not apply to acts of terrorism, and any conduct characterised as such is automatically penalised as unlawful and criminal.[106] While counterterrorism legislation may not always impede the application of IHL, post 9/11, the boundaries between State designations of NIACs and terrorism have to begun to elide, and troublingly so. Not only does

[102] 'International Humanitarian Law' *RULAC* <https://www.rulac.org/legal-framework/international-humanitarian-law> accessed 16 March 2021.
[103] 'What is International Humanitarian Law?' *International Committee of the Red Cross* <https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf> accessed 16 March 2021.
[104] 'The Applicability of IHL to Terrorism and Counterterrorism' *ICRC* (1 October 2015) <https://www.icrc.org/fr/node/14180> accessed 16 March 2021.
[105] NIACs arise where hostilities take place in the territory of a State between its armed forces and dissident armed forces or other organised armed groups.
[106] Red Cross (n 103).

this risk eroding the motivation of non-State armed groups to defer to the rules of IHL, but as Debarre has noted, "[c]ertain counterterrorism frameworks can and have negatively impacted people whom IHL seeks to protect, such as wounded and sick fighters and the civilian population in armed conflicts."[107] Ultimately, continuing to assess potentially lawful acts of war under domestic counterterrorist framework also produces legal uncertainty and adds another layer of criminalisation when such acts are already prohibited under IHL.[108]

Although this chapter only took a cursory glance at some of the key issues surrounding counter-terrorism and the application of international humanitarian law, the issues raised above are undoubtedly symptomatic of the wider themes explored in this Article.

V. THE CASE FOR A UNIVERSAL DEFINITION OF TERRORISM

"If you know thy enemy and know yourself, you need not fear the result of a hundred battles."[109]

There is a strong case to be made in favour of the adoption of a consistent, comprehensive definition of terrorism by the international community. Murphy has written that, "given the intractable conceptual and political differences among States on this issue, a definition of international terrorism produced by the United Nations would be so ambiguous as to provide a further basis for dispute and invective."[110] Concededly, attempts to unanimously define terrorism have thus far been highly divisive and have engendered inflamed debate – but this is precisely *why* a universal definition is

[107] Alice Debarre, 'The Tensions Between Counterterrorism Approaches and International Humanitarian Law/Principled Humanitarian Action' *International Peace Institute* (April 2018) <https://www.ipinst.org/wp-content/uploads/2018/05/IPI_April-26-workshop_Background-paper-2.pdf> accessed 16 March 2021.
[108] Tristan Ferraro, 'Interaction and Overlap Between Counter-Terrorism Legislation and International Humanitarian Law' *Proceedings of the Bruges Colloquium* (21 October 2016) accessed 16 March 2021.
[109] Sun Tzu, *The Art of War* (Simon & Schuster, 2011).
[110] Murphy (n 7) 15.

so essential. Murphy's focus on divergent political sensitivities ignores the fact that, absent a cohesive approach to terrorism, the gulf between States only deepens. Political unrest and soured international relations are apt to metastasise if the lines between terrorist and freedom fighter, citizen and suspect, dissenter and incendiary, are erratically and irreconcilably drawn. Terrorism is a political concept, but it need not be an *elastic* one; the only way to distinguish legitimate counter-terrorism measures from illegitimate and arbitrary ones is by having a cogent framework by which to assess them. The purpose of this section is to lay out how the adoption of a universal definition of terrorism would, in theory, rectify the harms caused by its absence – particularly with regards to the application of international human rights law.

Indeed, one of the most compelling arguments in favour of adopting a universally accepted international definition of terrorism is that, by so doing, the international community would be able to limit the abuse of executive power and confer uniformity, legitimacy, and transparency on the fight against terror. In some depth, Part III of this Article established the extent to which the elasticity and flexibility of domestic counter-terrorism legislation has led to egregious violations of a vast range of human rights across the globe. However, not *all* measures that restrict fundamental rights and freedoms should be instinctively deemed illegitimate – particularly where there is a real and urgent need to do restrict such rights, and where there are transparent and established limits to said restrictions. That said, the trouble arises from the ability of States "with dubious human rights records [to] actively suppress political opposition, curtail civil and political rights, or simply continue human rights abuses under the pretext of taking the required steps to fight terrorism."[111] The extended ambit of police powers and novel legal machinery available to States in times of crisis has resulted in a world in which governments are not merely defining terrorism, but they are defining – and targeting – their political opponents.

[111] Young (n 8).

Certainly, the way in which a State is able to freely frame the threat to its national security impacts the extent to which its assault on fundamental human rights is tolerated, as well as the accountability of the executive. The demagoguery of political leaders thrives in climates of societal division and anxiety; most notably, President Trump continues to stoke the anti-foreigner, anti-immigrant, anti-Muslim fire in the United States, capitalising on and amplifying legitimate fears about national security and using them to justify the suppression of human rights norms. Per the *Washington Post*, there are four hallmarks of any demagogue. First, he identifies himself as a man of the people; second, he engenders passion and outcry; third, he takes advantage of the outcry for his political benefit; and fourth, he breaks established rules of governance.[112] Demagogues, like Trump, appeal to the lowest common denominator, amass a cult-like following, and present pressing political issues through the parochial "us versus them"[113] lens. By promulgating racist, xenophobic, misogynistic, and authoritarian rhetoric,[114] political leaders are able to mould public sentiment in accordance with their own agendas and disintegrate the rule of law. This legacy, it seems, has been inherited from President Bush, who led the US – and, indeed, much of the Western world – into a war without frontiers and without end. Saul suggests that "terrorism is

[112] Michael Signer, 'Yes, Trump is Undignified – Demagogues Have to Be' (8 March 2019) *Washington Post* <https://www.washingtonpost.com/outlook/yes-trump-is-undignified-demagogues-have-to-be/2019/03/08/bd8d8d9c-4109-11e9-a0d3-1210e58a94cf_story.html?utm_term=.db7ba357bfff> accessed 1 May 2019.
[113] Patricia Roberts-Miller, 'Trump's Demagoguery' (11 March 2019) *Washington Spectator* <https://washingtonspectator.org/roberts-miller-deconstructing-trump/> accessed 1 May 2019.
[114] ibid.

imbricated in a dense ideological discourse",[115] where references to terrorism are cast in an "existential struggle of polarities: humanity and inhumanity; civilisation and barbarism; freedom and fear…the West and Others; Christianity and Islam…good and evil."[116] Greene has argued that these dualities are armoured by stereotypes based on race, religion, and cultural background,[117] and only accelerate the moral panic related to terrorist threats. This "folk-devil construct", says Greene, has allowed States to invoke a public emergency narrative, and justify exceptional counter-terrorism measures that disregard the primacy of human rights.[118] In the post-9/11 period, "imperial zealotry"[119] was revitalised, and language that was once considered politically correct became commonplace.[120] In the US, and, to some extent, in the UK, it was Muslims who were demonised;[121] in Israel, it was Palestinians; in China, it was Uighur separatists; in Russia, it was Chechen rebels. This is not to say, however, that a unified international definition of terrorism is a panacea for these issues; given the political nature of terrorism, abuse of counter-terrorism legislation is, regrettably, somewhat inevitable. Nevertheless, delineating the precise boundaries of terrorism would help minimise such abuse, and restrain the considerable leeway presently enjoyed by States to marginalise, alienate,

[115] Ben Saul, 'Reasons for Defining and Criminalising Terrorism' in Ben Saul (ed) *Defining Terrorism in International Law* (OUP 2006).
[116] Ibid.
[117] Greene (n 5) 6.
[118] ibid.
[119] Makau Mutua, 'Terrorism and Human Rights: Power, Culture, and Subordination' 8(1) Buff Hum Rts L Rev 1, 7 <https://digitalcommons.law.buffalo.edu/bhrlr/vol8/iss1/1> accessed 1 May 2019.
[120] ibid.
[121] ibid.

and maltreat certain demographics of individuals in the name of national security.

Moreover, the argument that no special definition of terrorism is needed because existing criminal prohibitions exist against terrorist acts is fallacious and misguided. Although reproducing existing criminal offences is not desirable, it is generally accepted that terrorism, unlike the criminal offences of murder or theft, has a special character. In most existing treaty, regional, and domestic definitions of terrorism, it is recognised that the intent to terrorise, intimidate, or coerce a population or the government, imbues upon it a unique political character, which cannot be adequately countered by established legal prohibitions.[122] Certainly, Murphy's suggestion that "the use of the term 'terrorism' in United Nations debates and negotiations should be avoided"[123] is even more difficult to accept. Humanity crossed the proverbial Rubicon decades ago; 'terrorism' has deeply embedded itself into the collective lexicon, and any attempts to erase its relevance will only make it more difficult to overcome. Rather than hoping that existing criminal law provisions will be able to respond to terrorism, and, more importantly for the purposes of this Article, protect the human rights of those accused of it, it would surely be more appropriate to define it with clarity and coherency. The principle of legal certainty requires that the law should be laid out in a clear manner which allows individuals to regulate their conduct in accordance with it.[124] "If we are to be understood rather than misunderstood", writes Cooper, "we must be sure that our words are received with the meaning and

[122] Saul (n 107).
[123] Murphy (n 7).
[124] Greene (n 6) 6.

significance that we intend they should be bear".[125] Further, Hodgson and Tadros have argued that the definition of terrorism must also be fit for purpose.[126] In other words, because terrorism laws trigger extended State powers and the legitimate derogation of human rights, it is of paramount importance that an individual knows the conduct for which he or she may be liable for. A universal definition adopted by the international community would not only offer enhanced clarity, but would "shape how the term is used by both national and international actors."[127] Once again, while this would not curb the improper application of terrorism law entirely, it would certainly promote greater adherence to the rule of law and increase public confidence in State practice.

On a more pragmatic level, if the international community were to unanimously compose and adopt a single definition of terrorism, the symbolic value would be immeasurable. Put simply, the condemnation and repudiation of an act on which there is universal consensus would "[send] a symbolic message that certain kinds of violence…cannot be tolerated, and [would] reinforce the ethical values of the political community."[128] This would, in turn, apply considerable pressure on States to adopt domestic legislation compatible with international consensus, as well as their obligations under international human rights law. By the same token, terrorist groups who are legitimately

[125] HHA Cooper, 'Terrorism: The Problem of the Problem of Definition'(2001) 44(6) American Behavioural Scientist 881, 887 <https://doi.org/10.1177/00027640121956575> accessed 1 May 2019.
[126] Jacqueline Hodgson and Victor Tadros, 'The Impossibility of Defining Terrorism' (2013) 16(3) New Criminal Law Review 494, 515 <https://doi.org/10.1525/nclr.2013.16.3.494> accessed 1 May 2019.
[127] Greene (n 5) 6.
[128] Saul (n 107) 15.

condemned by the international community as improperly promulgating their cause might be compelled to pursue alternative, non-violent means to relay their message.[129] To be sure, the implication here is not that a unified definition of terrorism will miraculously limit or inhibit the commission of terrorist acts; terrorism, as well as the exploitation of the concept of terrorism by states and the resultant human rights issues that stem from counter-terrorism legislation cannot be singularly explained by the absence of a universal international definition. Rather, taking firm steps in the direction of such a definition may certainly reduce one of the underlying conditions that encourage terrorism, which Dean and Yonah Alexander have identified as including, among other things, the "religionization of politics, exploitation of the media…loss of resolve by governments to take effective action against terrorism…[and the] high cost of security in democracies."[130] Finally, a universal definition would facilitate the harmonisation of domestic jurisdictions, "enhance intelligence sharing and international cooperation…[and] facilitate coalition building and strengthen the legitimacy of the war [on terror]".[131] Wallace has even pointed towards the pure economic costs of the "malleable and amorphous definition of terrorism"[132] in

[129] Vincent DeFabo, 'Terrorist or Revolutionary: The Development of the Political Offender Exception and its Effects on Defining Terrorism in International Law' (2012) 2(2) American University National Security Law Brief <https://digitalcommons.wcl.american.edu/nslb/vol2/iss2/5> accessed 1 May 2019.
[130] Dean C Alexander and Yonah Alexander, *Terrorism and Business: The Impact of September 11, 2001* (Brill, 2002).
[131] Young (n 8).
[132] Wallace Michael Wallace, 'U.S. National Security Requires a Legally Binding International Definition of Terrorism: Does a Broader Definition of Terrorism Put Us in the Proper Condition to Punish Those Who Challenge Our National Security?'

the United States, which has caused its already-overburdened legal system to languish under the weight of greater traffic in immigration courts and detention facilities.[133]

VI. CONCLUSION

"An objective definition of terrorism is not only possible; it is also indispensable to any serious attempt to combat terrorism."[134]

For citizens, the modern-day terrorist is a bogeyman: he is amorphous, incapable of definition, and lurks in the shadows. For States, he is oftentimes a known political foe, who must be culled from the masses, castigated, and vanquished. The trouble, however, is that States are continuously eliding the boundaries between friend and foe; the road taken by governments to guarantee national security are paved with egregious infringements of human rights, discriminatory security measures, and a refusal to abrogate overbroad counter-terrorism legislation. Ultimately, States have taken advantage of the lack of a consistent international definition of terrorism to justify their substandard adherence to international human rights law. Until and unless a universally accepted definition is formed that delineates the contours of terrorism – and comprehensively outlines the limits of the law in combatting terrorism – the terrorist will continue to be an unconquerable opponent, and blameless individuals will be forced to pay the price with their rights and civil liberties. In order to confront the threat, minimise the attrition of human rights norms, and collectively mobilise against the enemy[135], the international community must be prepared to equivocate their stances and come to a compromise. The palpable lack of unity is one of the most profound failings of the war against terror; rather than closing the gap between States and moving

(2012) 3(1) Creighton International and Comparative Law Journal 105, 109 <https://dspace2.creighton.edu/xmlui/bitstream/handle/10504/115328/CICLJ_2012_V3N1P105.pdf?sequence=1&isAllowed=y> accessed 1 May 2019.

[133] ibid.

[134] Boaz Ganor, 'Terrorism: No Prohibition Without Definition' *International Institute for Counter-Terrorism* (7 November 2001) <https://www.ict.org.il/Article.aspx?ID=1588#gsc.tab=0> accessed 16 March 2021

[135] Namely, the terrorist.

towards the harmonisation of domestic legislation, the international community has thus far been content to let political frictions intensify. It is difficult to ascertain how – or indeed *when* – the matter of definition will be resolved; one can only hope that, for the sake of safeguarding fundamental human rights, it is sometime soon.

GENDERING CONSTITUTIONAL DESIGN: CHALLENGES TO FEMALE POLITICAL REPRESENTATION IN EASTERN AFRICA

Mayombe Odubah*

ABSTRACT

This Article seeks to study the correlation between recent changes to constitutional design and its effect on female political representation in Eastern Africa. Attempts by women to increase female political representation during the constitutional drafting and negotiation process fundamentally depends on male political backing in this particular region. This subsequently affects the way constitutional design tools, such as laws on electoral and quota systems, are implemented to address gender disparities. Thus, the supposition that proportionate representation and gender quotas translate to increased female political representation, and the ensuing belief that this in itself spurs the promotion of gender issues in public administration and policy, is seriously challenged. To explore this development further, analyses discussed herein will primarily be based on affirmative action measures taken by Uganda's National Resistance Movement government, and, Kenya's casual approach towards mainstreaming gender issues via the Two-Thirds Gender Bill which has resulted in the Chief Justice's recommendation to the President to dissolve Parliament.

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Women in Uganda and Kenya have made immense contributions toward major political movements in Eastern Africa. They were active figures in the anti-colonial and subsequent independence movements that swept across the region.[1] However, their presence was notably lacking in both the constitutional design and building processes prior to independence. This absence can largely be attributed to the fact that pre-colonial societies, and to some extent early post-colonial societies, were socialized to believe that politics and civic leadership was the reserve of men, thus severely limiting the involvement of women.[2] As a result of this dynamic, patriarchal practices originating from both local traditional customs and foreign colonial conceptions of gender shaped political thought and were preserved in the constitutions of the newly liberated countries, much to the overall detriment of women.

Efforts to make constitutional provisions for female political representation have widely been heralded as successful with East African significantly contributing to Africa's increase in its number of female legislators.[3] This has been achieved through constitutional design tools such as constitution drafting and building, gender quotas and legislation founded on affirmative action policies. Nevertheless, gendered constitutional design has not necessarily translated into the prioritization of women's issues on the political

[1]Emmanuelle Bouilly, Ophélie Rillon and Hannah Cross, 'African Women's Struggles in a Gender Perspective' (2016) 43(149) Review of African Political Economy 338 <https://doi.org/10.1080/03056244.2016.1216671> accessed on 1 November 2020.
[2] Janet Kabeberi-Macharia and Kivutha Kibwana, 'A Study of the Implementation of the UN Convention on the Elimination of all Forms of Discrimination against Women in Kenya' (1992) at 22.
[3] Nayé Bathily, 'Africa takes historic lead in female parliamentary speakers' (*World Bank Blogs*, 13 February 2020) <https://blogs.worldbank.org/nasikiliza/africa-takes-historic-lead-female-parliamentary-speakers> accessed on 1 November 2020.

agenda as it has overwhelmingly failed to alter public opinion on the exclusion of women in politics and similarly lacks the political will to be implemented.[4] The impeding constitutional, political and ethical crises that have been borne from this dilemma will be discussed in this Article in relation to the debates on female political representation taking place in Uganda and Kenya. It will also look into the repercussions of these crises from a comparative perspective and finally conclude with possible resolutions that can be adapted to suit each country's socio-legal contexts.

I. UGANDA: AN INTRODUCTION TO CONSTITUTING GENDER EQUALITY

The colonisation of Uganda greatly shaped its post-colonial society's perception of women.[5] The most notable perception emanating from colonial Uganda, that has also been a steadfast feature of its post-colonial society, is the view that women are subservient to men.[6] The development of this view can be traced back to the introduction of high Victorian gender norms by the British administration and its missionaries, who relied on the forceful imposition of patriarchal practices promoted by church doctrine to inform and sustain their

[4] Vibeke Wang, 'Women Changing Policy Outcomes: Learning from Pro-Women Legislation in the Ugandan Parliament' (2012) 41 WSIF 113 < https://doi.org/10.1016/j.wsif.2013.05.008> accessed on 28 October 2020.
[5] Rebecca Kadaga, 'Women's Political Leadership in East Africa with Specific Reference to Uganda' (10th Commonwealth Women's Affairs Meeting, Dhaka, 17-19 June 2013) 35<http://www.commonwealthgovernance.org/assets/uploads/2013/11/6-Womens-political-leadership-east-africa.pdf> accessed on 31 October 2020.
[6] ibid.

administration of Uganda.[7] Following independence in 1962, succeeding Ugandan governments further continued to enforce female subordination as it played a critical role in sustaining communities affected by conflict that plagued the country.[8] As a result, Women began to assume the responsibilities of men who had been forcefully recruited to fight –like fetching water, farming and collecting wood— and due to the protracted volatility this eventually became the norm.[9]

In the short term, with their rights diminishing but labour output increasing, women often found themselves as the primary victims of direct violence. The rape and the abduction of women was essentially used to dispossess them off of their economic and political assets.[10] Women were typically 'defiled' by enemy soldiers and ostracized from their communities, resulting in the widespread loss of women's economic and political rights.[11] On the other hand, women captured by enemy soldiers were kept as sexual slaves or forced laborers, and their objectification ensured that the predominantly male soldiers satisfied their sexual needs while benefiting from free labour and the ability to generate their own additional income achieved by selling the women

[7] Simone Datzberger and Marielle L.J. Le Mat, 'Just Add Women and Stir? Education, Gender and Peacebuilding in Uganda' (2018) 59 IJEDUDEV 64 < https://doi.org/10.1016/j.wsif.2013.05.008> accessed on 28 October 2020.
[8] ibid.
[9] Datzberger (n4) 64.
[10] Meredeth Turshen, 'The Political Economy of Violence against Women During Armed Conflict in Uganda' (2000) 67(3) Social Research 810-811<https://www.jstor.org/stable/40971411?seq=1#metadata_info_tab_contents> accessed on 28 October 2020.
[11] ibid.

they kept in such conditions for a profit.[12] Thus, in the long run, debilitating levels of political instability contributed to the gradual erosion of women's overall societal value which ensured that they remained an after-thought in the country's overwhelmingly male-dominated political discourse.[13]

When the National Resistance Movement (NRM) Government, led by President Yoweri Museveni, asserted its control of the country throughout the late 1980s, a critical component of its governance structure was that it sought a constitutional mandate for the political rehabilitation of its female citizenry.[14] This resulted in the Ugandan Constitution of 1995 which sought to formally constitutionalize gender parity.[15] Amongst its National Objectives and Directive Principles of State Policy, which are constitutionally protected socio-economic rights, is the protection and promotion of Gender Balance and Fair Representation of Marginalized Groups as a Human Right.[16]

Aside from recognizing that women were previously unfairly represented in public life, it serves to place a duty on the state towards ensuring gender balance and fair representation.[17] The 1995 constitution also features the

[12] ibid.
[13] ibid.
[14] Jane Onsongo, 'Affirmative action, gender equity and university admissions – Kenya, Uganda and Tanzania' (2009) 7(1) London Review of Education 73 < https://doi.org/10.1080/14748460802700710 > accessed on 31 October 2020.
[15] ibid.
[16] Section VI on gender balance and fair representation of marginalised groups, Constitution of the Republic of
Uganda 1995, ROU (1995).
[17] United Nations Development Programme, 'Gender Equality and Women's Empowerment in Public Administration: Uganda Case Study' 34 <http://hdr.undp.org/> accessed on 1 November 2020.

Recognition of the Role of Women in Society whose deliberate classification as the second Objective under the state's list of Social and Economic Objectives, acknowledges the assignment of economic and political value on women's output as significant to social justice and economic development.[18]

However, it is questionable whether National Objectives and Directive Principles of State Policy focusing on women provide sufficient legal protection of women's rights considering that they do not expressly place the state under a legal obligation to guarantee these rights as part of its Bill of Rights.[19] Furthermore, as these rights do not form part of the operative section of the constitution, Ugandan courts cannot rely on them.[20] It thus begs the question, if the state is under no legal obligation to guarantee the socio-economic environment envisioned for women's rights in the constitution, does it mean that women's rights in Uganda are not fully recognized?

Uganda's National Objectives and Directive Principles of State Policy illustrate some of the inherent shortcomings of gendering constitutions towards a more equal distribution of political rights and powers. In as much as these rights are commonly constitutionally enshrined, the deduction that can be made from not placing a legal impetus on the state to guarantee them whether in the public or private sphere is that women's rights are essentially treated as negative

[18] Section XV on Recognition of Role of Women in Society, Constitution of the Republic of
Uganda 1995, ROU (1995).
[19] The Women Rights Cluster for Uganda, 'Joint Submission by The Women Rights Cluster for Uganda To Be Considered at The Twelfth Session of The HRC By National Association of Women's Organizations in Uganda' (Universal Periodic Review of Uganda 14th Meeting: 12th Session of the Universal Periodic Review, Geneva, 12 October 2011).
[20] ibid.

rights. This means that the state has an interest in ensuring that institutions refrain from treating women unequally but has no positive duty to ensure that they are protected and promoted.[21] Accordingly, women's concerns begin to appear outside the Government's scope.[22]

The treatment of women's rights as negative rights is important to consider when analysing the effectiveness of constitutional gendering in Uganda. This is because one is able to argue that the state's approach toward the implementation of women's rights is entirely counterproductive to the spirit of the 1995 constitution. The 1995 constitution expressly adopted in its text international treaties on the protection and promotion of women's rights, such as The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, The International Covenant on Civil and Political Rights (ICCPR) 1966 and The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, that place a positive obligation on the state to defend these rights.[23] These international treaties appear to have been informed by The Sexual Difference Model which submits that differences between women and men puts one sex at a disadvantage; hence, the legal system should be structured in a manner that makes up for the resulting differences to members of the disadvantaged sex.[24] But there has been an evident reluctance

[21] Mary E. Becker, 'The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective' (1992) 59 University of Chicago Law Review. 453<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11486&context=journal_articles> accessed on 1 November 2020.
[22] ibid.
[23] The Women Rights Cluster for Uganda (n19).
[24] Judith Resnik, 'Comparative (in)equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production' (2012) 10(2) I•CON 538 <https://doi.org/10.1093/icon/mor064> accessed on 1 November 2020.

by the state to develop and pass domestic legislation that fully adheres to the spirit of gender equity envisioned in the aforementioned international treaties on women's rights.[25] A passive state response towards the implementation of women's rights could then be interpreted as a reluctance by the state to properly discharge its constitutional duties.

The ensuing dissonance arising between domestic and international law on the state's duties towards women and their rights, has been noted. Uganda has not discharged its obligation of reporting under certain international conventions and treaties ratified decades ago such as the ICESCR.[26] By 2010 it had failed to fully implement all recommendations issued by the CEDAW committee and it ratified the Maputo Protocol on the Rights of Women in Africa 2003 only 5 years after it had been enforced.[27] Ordinarily, in international law, domestic courts are expected to enforce international rules in domestic litigation.[28] But since the 1995 constitution is designed in a manner that places obligations in international treaties focusing on women's rights outside operational law, women have limited legal recourse.[29] Amendments to the constitution would require female political mobilization and representation, but the evident dissonance between Uganda's domestic and international legal obligations exemplified in its constitution could easily be used to impede this.

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[25] The Women Rights Cluster for Uganda (n19).
[26] ibid.
[27] ibid.
[28] Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34(1)(7) Loy. L.A. Int'l & Comp. L. Rev. 133 <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1674&context=ilr> accessed on 1 November 2020.
[29] The Women Rights Cluster for Uganda (n19).

As a result, male political patronage has not fundamentally been eroded from Uganda's governance structure and the underlying effect of this is that women's political rights are qualified.[30] Uganda follows a parliamentary system, with political parties fielding female candidates for reserved Women Representative positions, secured by legal reserved seat quotas.[31] Article 78(1) of the Constitution states that the parliament shall consist of 1 woman representative for each of Uganda's 112 districts.[32] These positions are largely limited to issues concerning local governance and generally do not extend to national politics.[33] Not only does this allow political parties to get away with the fielding female candidates that are deemed acceptable to men to but it also allows them to limit the conversation surrounding gender imbalance to district politics rather than address the fact that it as a systemic issue arising from seemingly deliberate constitutional misinterpretation. [34]

We are therefore able to insinuate that for women to gain traction in national politics they must not appear too keen to disturb the entrenched

[30] Dan Ottemoeller, 'The Politics of Gender in Uganda: Symbolism in the Service of Pragmatism' (1999) 42 (2) African Studies Review 89 < https://doi.org/10.2307/525366> accessed on 1 November 2020.

[31] Susan H. Williams, '*Constituting Gender Equality: Gender Equality and Comparative Constitutional Law*' (CUP, 2009) 34.

[32] International IDEA, 'Explore Quota Data: Uganda' (*Quota Project*, 19 May 2020) <https://www.idea.int/data-tools/data/gender-quotas/country-view/293/35> accessed on 31 October 2020.

[33] Sam Hickey, 'The Politics of Staying Poor in Uganda' (2003) Chronic Poverty Research Centre Paper 37/2003, 11 <https://www.files.ethz.ch/isn/128067/WP37_Hickey.pdf> accessed on 1 November 2020.

[34] Ottomoeller (n3 0) 92.

patriarchal system, which places limits on their political rights. This seems to form an integral part of women's social contract theory. As long as they do not advocate for the state to undertake a positive obligation towards the advancement of their rights, especially at a societal level, continued access to political representation will be guaranteed.[35] This underlying attitude is reflected in the fact that relatively few women are present in Ugandan national politics, outside gender assigned positions.[36] Uganda's last election in 2016 only increased the number of female representatives occupying parliamentary seats to 160 with 48 of those seats being occupied by women whose positions were not reserved by gender quotas.[37]

This means that only 10% of female parliamentarians managed to secure seats without affirmative action and thus seems to negate the belief held by several feminists and constitutional philosophers that gender quotas encourage female political representation and policies centred around women's issues.[38] In this case the opposite is true; gender quotas, if used without the intention to promote gender equality, allow the restriction of female political representation to that of elected positions with mitigated powers.[39] Therefore, women's contributions to transformative policies that can positively influence their social standing remain considerably minor. Adversely, with limited political influence, there is more pressure to remove the role of Women

[35] Hickey (n 33) 12.

[36] The Women Rights Cluster for Uganda (n19).

[37] IDEA (n32).

[38] Williams (n31) 30.

[39] Mona Lena Krook, 'Gender Quotas and Democracy: Insights from Africa and Beyond' [2013] 41 Women's Studies International Forum 161 < https://doi.org/10.1016/j.wsif.2013.05.017> accessed on 1 November 2020.

Representatives as their marginal impact feeds into prevailing cultural stereotypes that women are inept in matters concerning politics.[40]

Nonetheless, if we choose to approach gendered constitutional design in Uganda irrespective of the social contract theory which dictates women's access to political power, another explanation as to why female political representation encounters various challenges begins to emerge. Orestes Brown, a noted constitutional philosopher who firmly rejected the idea of social contract theory argues that, 'Forms of government are like the forms of shoes—those are best which best fit the feet that are to wear them.'[41] In simpler terms, he saw written constitutions as a reflection of the unique identities of the societies they embody.[42] This meant that written constitutions had to 'fit' the unwritten ones practiced in social codes.[43] If we consider that the removal of economic and political assets belonging to women constituted an integral part of social code, it is therefore not surprising that the constitution absolves the state from being compelled to instate gender neutrality in politics.

The above dynamic also ensures that the law is still practiced without seeing women as fully entitled to the same rights as men. It thus becomes difficult for female political representatives to rely on the 'written' constitution to negotiate better terms for women's rights which ultimately impacts their

[40] ibid.

[41] Orestes Augustus Brownson, 'Brownson's Quarterly Review' [1874] 212.

[42] Michael J. Connolly, 'Orestes Brownson's New England and the Unwritten Constitution' (*The Imaginative Conservative*, 19 May 2019) <https://theimaginativeconservative.org/2019/05/orestes-brownson-new-england-unwritten-constitution-michael-connolly-timeless.html> accessed on 1 November 2020.

[43] ibid.

ability to be represented in politics. The 'written' constitution does not 'fit' the 'unwritten' one which asserts the subordination of women. As a case in point, the Ugandan Constitution and Land Policy consists of several statutory instruments that regulate the non-discriminatory acquisition and ownership of property for women.[44] With the agricultural sector being the country's largest employer of women, the inequitable ownership of land assets prevents them from fostering sustainable livelihoods.[45] National laws on labour rights that would ideally benefit women have not been implemented and further add to their economic incapacity.[46] The ensuing high levels of poverty make it difficult for a greater number of women to fully organize and engage in politics.[47] Women's concerns are also not prioritised in political discourse as their economic contributions are undervalued.[48] It is also in the interests of the male-controlled legislature for this to continue as their political relevance is dependent on restraining threats to the current social order.[49] Ultimately, legal reform on female political representation is structurally curtailed.

[44] Jacqueline Asiimwe, 'Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses', (2001) 4(1)(8) Yale Hum. Rts. & Dev. L.J 179 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1026&context=yhrdlj> accessed on 1 November 2020.

[45] Mila Sell and Nicholas Minot, 'What factors explain women's empowerment? Decision Making among Small-Scale Farmers in Uganda' [2018] 71 Women's Studies International Forum 46 <https://doi.org/10.1016/j.wsif.2013.05.017> accessed on 1 November 2020.

[46] The Women Rights Cluster for Uganda (n14).

[47] Kadaga (n5) 35.

[48] ibid.

[49] Hickey (n 33) 12.

Unfortunately for women's advocates in Uganda, the constitutional dissonance created by the gendered design of the constitution and its interpretation has not triggered a constitutional crisis. There have been careful attempts to avoid this through the implementation of structured affirmative action measures which are guaranteed by Article 33 of the Constitution.[50] One of the NRM Government's first of such measures includes the establishment of the Ministry of Gender, Labour and Social Development (MGLSD) in 1989 which developed the National Gender Policy founded in 1999 to redress the role and status of women in Uganda. It was responsible for the visible gender mainstreaming of key Government ministries, putting more women in decision making roles relating to policy.[51] This was followed up by the creation of the Local Governments Act 1997 which sought to set up gender sensitive administrations in local government that necessitated the introduction of a gender quota system.[52] It requires that a third of local government structures be represented by women and that each district provide one female representative in Parliament.[53] This was essential in helping bring the current number of female Parliamentarians to 35%.[54]

These examples and figures are favourable in terms of female political representation at a regional and continental level. Taking this into consideration, it would be unfair to simply dismiss the gendering of Uganda's 1995

[50] Chapter 4, Article 33 on Rights of Women, Constitution of the Republic of Uganda 1995, ROU (1995).
[51] Datzberger (n4) 64.
[52] Chapter 243, Local Governments Act 1997 (LGA), s 2(3).
[53] LGA 1997, s 23(2)(5).
[54] ibid (n38).

Constitution as insignificant to the increase of female political representation in the country as the Government has made tangible efforts in policy and practice. Where this argument may perhaps fall short is when one begins to comprehend the reality that women are not exercising their own political power as envisaged in the spirit of the Constitution.[55] The MGLSD did not come into existence as a result of Article 33 but rather due to Chapters 4 and 16 that demand the government "empower communities to harness their potential through skills development, Labour productivity and cultural growth."[56] As demonstrated above, old ideas of gender that were supposed to be corroded through a gendered approach to constitutional design have barely gone away.[57] There is little emphasis placed on women's rights and more on their economic output. When a section of the population is solely valued for their economic value and contribution to economic development, they are commodified and thus not viewed as equal.[58] This rejects the idea of Formal Equality that is embedded in the Constitution because structural discrimination levelled against women is palpably in-built into the very institutions meant to exercise gender neutrality.[59]

[55] The Women Rights Cluster for Uganda (n14).

[56] Government of Uganda, 'Ministry of Gender Labour and Social Development' (*Government of Uganda*, 7 March, 2017) <https://www.gou.go.ug/ministry/ministry-gender-labour-and-social-development> accessed on 31 October 2020.

[57] ibid.

[58] Alessandra Mezzadri, 'Class, Gender and the Sweatshop: On the Nexus Between Labour Commodification and Exploitation' (2016) 37(10) Third World Quarterly 1880. <https://doi.org/10.1080/01436597.2016.1180239> accessed on 1 November 2020.

[59] Catherine A. MacKinnon, '*Towards a Feminist Theory of the State*' *(Harvard University Press*, 1989) 57.

Moreover, we have already seen how electoral quotas for women have constrained them to positions with limited political influence thus jeopardizing their opportunities for meaningful political representation. Another detrimental aspect of women being left with minimal political capital is that it generates a vicious cycle of inefficacy where with lower chances of participating in constitution making processes, the ability to create an environment of increased female representation is minimized, which in turn discourages women from pursuing these positions. They do not have sufficient numbers to command a majority in those key institutions that enact policies and neither are they in enough positions of decision making to change the Government's current approach to women. This is exacerbated in local courts where the overwhelming presence of male Magistrates translates into 'a strongly patriarchal interpretation [of local customary law that] has colored judicial doctrine,' severely hindering the implementation of women's constitutional rights.[60]

II. KENYA: A COMPARATIVE PERSPECTIVE

2020 marks 10 years since Kenya promulgated it's second constitution since gaining its Independence from British colonial rule in 1963. The drafting of Kenya's Independence Constitution and its successor, the 2010 Constitution, involved the input of women. However, their ability to secure the interests of women through participation has had mixed success.

The Independence Constitution of 1962 negotiated during the Lancaster Conference involved the presence of Hon. Priscilla Ingasiani Abwao who was

[60] Lynn S. Khadiagala., 'Justice and Power in the Adjudication of Women's Property Rights in Uganda' (2002) 49(2) Africa Today: Women, Language and Law in Africa 2 104 <https://www.jstor.org/stable/4187500?seq=1#metadata_info_tab_contents> accessed on 31 October 2020.

both an advocate for women's rights and the first African woman to occupy a role in the country's colonial Legislative Council.[61] However, gender inclusivity was not necessarily a prerogative of Kenya's newly independent political and legal administration, illustrating that the female presence in constitution building alone is not enough to secure affirmative action measures for the political participation of women. As a result, Kenya did not have a single female parliamentarian at independence.[62] This only changed in 1969 with the second parliamentary term and did not vary by a large margin in the succeeding years.[63] Furthermore, Section 82(4) of the former constitution of Kenya prohibited discrimination but contained important exceptions, notably in respect to adoption, marriage, divorce, burial, and devolution of property on death or

[61] British Chamber of Commerce, 'Investing in Women Gives the Best Returns' (*British Chamber of Commerce*, 14 January 2020) <https://www.bcckenya.org/blog/2020/01/14/investing-women-gives-best-returns/> accessed on 1 November 2020.

[62] Eboso Christabel Mideva, 'The Nexus Between Two-Thirds Gender Rule and Equality of Counties: A Case Study of Kenya's Senate' University of Nairobi Research Paper G62/7482/2017 23 <http://erepository.uonbi.ac.ke/bitstream/handle/11295/105151/Mideva_The%20Nexus%20Between%20Two-Thirds%20Gender%20Rule%20And%20Equality%20Of%20Counties.pdf?sequence=1/> accessed on 1 November 2020.

[63] ibid.

matters of personal law.[64] Due to the cultural practices that viewed women as inferior, exceptions to this rule usually applied to women.[65]

Guided by Kenya's early post-colonial administrations, one can conclude that in order for gendered constitutional design to feature prominently, it must be accompanied by both organized female representation and mobilization. The first Constitution of Kenya was drafted at a time when the political representation of women was a novelty.[66] However, the second Constitution was drafted at a time where Women's organizations and movements had already been established.[67] These organizations began as politicized bodies, independent of the country's one-party state that required women to negotiate their rights in line with party policies which sought to maintain the status quo.[68] Therefore, the subsequent democratization of the country saw women shift from civic and opposition leaders to Government representatives as their political contributions towards ending one party rule were duly recognized.[69] The policies that those representatives advocated gradually started to form part

[64] Chapter V, Section 82 Protections from Discrimination on the Grounds of Race etc., Constitution of the Republic of Kenya 1963, ROK (1963).
[65] Maria Nzomo, 'The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities' (1994) 22(2) African Studies Association 18 <http://www.jstor.org/stable/1166727/> accessed on 1 November 2020.
[66] Catherine Kaimenyi, Emelda Kinya and Chege Macharia Samwuel, 'An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya' (2013) 3(6) International Journal of Business, Humanities and Technology 94 <http://ijbhtnet.com/journals/Vol_3_No_6_June_2013/11.pdf/> accessed on 1 November 2020.
[67] Mideva (n 62) 24.
[68] ibid.
[69] ibid.

of Government policy, which consequently impacted the drafting of the second Constitution.[70]

In contrast, the history of gendered constitutional design in Uganda differs in various respects to that of Kenya and partly explains the discrepancies in female political representation between the two countries. The Constitutional Commission that drafted Uganda's 1995 Constitution did not feature any prominent female appointments despite the fact that its provisions were going to have a considerable impact on the lives of women. To compensate for the lack of credible representation, Uganda's women's groups relied on the submission of individual and group memoranda to the commission as a way of ensuring that gender concerns feature in the constitution-making process.[71] The level of involvement of women in the process was unprecedented not only in Africa but perhaps in the world.[72] No other sector of society sent as many memoranda to the commission as Uganda's women's groups.[73] The most obvious outcome of this is that they were able to ensure there is no discrimination in any way against women anywhere in the Uganda's Preamble, National Objectives, and the nineteen chapters and seven schedules that form the Ugandan Constitution.[74] There would only be positive 'discrimination' in the

[70] ibid.

[71] Aili Mari Tripp, 'The Politics of Constitution Making in Uganda' in Lauren E. Miller and Louis Aucoins (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making (US Institute of Peace Press 2010).*

[72] ibid.

[73] ibid.

[74] Maude Mugisha and Danny Barongo, 'Women's Participation and Gains in The Formulation of the 1995 Constitution' (Food & Agricultural Organization, 1 October

form of affirmative action in favour of women. Apart from the provision for affirmative action, every Chapter and provision in the Ugandan Constitution would apply equally to both women and men.[75]

However, this approach has had significant shortcomings. Unlike Kenya, were women directly contributed to the post-independence Constitution, Ugandan women had to have their contributions vetted. NRM leaders, who were and continue to be mostly male, were tasked with the responsibility of vetting memoranda at the sub-county level before submitting them to the Constitutional Commission for evaluation.[76] This made it possible for them to remove issues that they considered contentious and promote gender issues that did not strongly challenge the patriarchal order that the NRM Government benefited from to establish its control over the country.[77] As a result, the constitution-making process cannot be deemed as consultative and in part explains why despite the constitutional enshrinement of women's rights in Uganda, the exclusion of women's concerns is still a prevalent feature of Government policies.

Furthermore, grassroots mobilization was extremely difficult to organize in Uganda. Notwithstanding the fact that most of the country was just emerging from a long period of civil strife, the NRM Government made a conscious effort to ban organizations it felt were not partisan to its interests.[78] Therefore, women's organizations that were engaged in carrying out civic

2000) <http://www.fao.org/3/X6090E/x6090e05.htm> accessed on 19 December 2020.

[75] ibid.

[76] Tripp (n71) 163.

[77] ibid.

[78] ibid.

education on the constitution-making process, as part of a broader Non-Governmental Civic Education movement eventually found themselves banned.[79] Following several years of dealing with independent organisations, the NRM Government reversed the ban. But the damage had already been done. It was widely understood by these independent organisations that the Government did not tolerate alternative views that were central to the work of these organizations.[80] Consequently, the autonomy and operations of women's organisations was supressed and this meant that the initial momentum that secured women their constitutional rights could not be pursued with the same vigour when it came to implementation. It also illustrates, how undemocratic environments lend themselves poorly to the advancement of women's rights. Uganda has had fewer tangible results in this realm than Kenya simply because the right to hold a dissenting opinion on Government policy by women challenges the NRM's patriarchal power structure, thus making it harder for the NRM to enforce its authoritarian rule.

As exemplified in the constitutional histories of Kenya and Uganda, grassroots mobilization and organizing women's movements within political parties is evidently key to women's input being considered in constitutional processes. Grassroots mobilization ensures that women are seen as a political force whose vote is dependent on the fulfilment of a set of issues determined by women themselves. Conditionalizing the female vote with the support of such issues encourages political parties to create opportunities for female political representation within their structures, as previously demonstrated in Kenya where women used their political expediency to secure their interests in the

[79] ibid.
[80] ibid.

2010 Constitution.[81] If these parties then go on to capture state power, constitution making will subsequently include the female presence and guarantee the political support of Government.

Due to these efforts in Kenya, the country's 2010 Constitution was designed as the country's first constitution that recognized women's rights as human rights[82]. It was heavily influenced by international treaties that viewed women's rights through the same lens, the most prominent one being CEDAW 1979.[83] As a result, Kenya's international obligations have been reflected in its Constitution, meaning there is a clear interpretation of the state's obligations towards women's rights. Aside from guaranteeing women's rights in both public and private life, the constitution's Bill of Rights places a positive obligation on the state to effect gender neutrality.[84] The Bill of Rights also attempts to redress gender disparity by removing exclusions to discriminatory practices prevalent in the previous Constitution.[85] The incorporation of electoral positions exclusive to women, such as the Woman Representative position, which has resulted in an increase of female representation is a popular example.[86] The Judiciary and the Executive have also tried to uphold

[81] Kaimenyi (n 66) 92.

[82] Makau Stepehen Wambua, 'Realization and The Implementation of The Two Third Gender Rule as Enshrined in The Constitution: The Kenyan Case' (2019) SSRN 5 < https://dx.doi.org/10.2139/ssrn.3435485/> accessed on 1 November 2020.

[83] Mideva (n 62) 24.

[84] Chapter 4, Article 81(b) Constitution of the Republic of Kenya 1963, ROK (1963).

[85] ibid.

[86] Kaimenyi (n 66) 92.

the principle of fair representation which is evidenced in the sizeable uptick in the number of women represented in these arms of Government.[87]

The Bill of Rights also creates the legal requirement that elective bodies should not comprise of more than two-thirds of one gender.[88] A Two-Thirds Gender Bill has repeatedly been crafted in an attempt to progressively reconcile the country's political arrangement with the constitution but with little success.[89] The casual approach of the majority male legislature towards the Two-Thirds Gender law has culminated into a constitutional crisis with the Chief Justice recommending that the President dismiss Parliament on the grounds that it is not properly constituted.[90] Despite possibly being dissolved, the Legislature has been unable to come up with a meaningful solution to the Two-Thirds Gender rule stalemate. Instead, most of Kenya's legislators are focused on debating a national Referendum aimed at changing the 2010 Constitution. The implementation of the Two-Thirds Gender law is expected to be adversely affected by the proposed changes.[91]

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[87] Mideva (n62) 29.

[88] Constitution of the Republic of Kenya 1963, ROK (1963) c.4, 81(b).

[89] Wambua, (n 82) 30.

[90] Muthomi Thiankolu, 'How Kenya Courted a Constitutional Crisis Over Parliament's Failure to Meet Gender Quotas' (*The Conversation*, 1 October 2020) <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145> accessed on 1 November 2020.

[91] Moses Nyamori, 'Ex-MPs Want BBI Fast-Tracked to Cure Two Thirds Gender' (The Standard, 26 September 2020) <https://www.standardmedia.co.ke/kenya/article/2001387753/use-bbi-to-fix-gender-crisis-say-ex-mps> accessed on 1 November 2020.

The operationalization of women's rights in Kenya's 2010 Constitution is an important safeguard to any infringements made to women's rights. Unlike Uganda where the operationalization of women's rights has been carefully avoided, Kenyan women have been afforded a legal instrument that simultaneously protects and promotes their interests through the operationalization of their rights. Fortunately, the effects of the Two-Thirds Gender Bill crisis on women's rights have thus far been mitigated by Kenya's strong institutions and the checks and balances that these institutions can exercise through a clear observance of the principle of separation of powers guaranteed by the Constitution.[92] If Parliament does not enact a law to reverse the current situation and the President opts to not dissolve Parliament, the President and Parliament may suffer from a crisis of validity and any legislative efforts they undertake in such a situation may be construed as illegal, leaving them vulnerable to public, and more importantly, judicial scrutiny.

Alternatively, the President's dissolution of Parliament could create a political crisis.[93] The seats in Parliament would be declared vacant leading to new parliamentary elections within 90 days of its dissolution.[94] The Executive is very likely to emerge without a majority in fresh elections given the current political upheaval in the President's coalition party.[95] This would consequently leave the President unable to secure the effective enactment of laws that align

[92] Thiankolu (n 90).

[93] ibid.

[94] ibid.

[95] Macharia Gaitho, 'All you need to know about the clash between Kenyatta and Ruto' (*Al Jazeera*, 18 August 2019) <https://www.aljazeera.com/features/2019/8/18/all-you-need-to-know-about-the-clash-between-kenyatta-and-ruto> accessed on 6 December 2020.

with party policies. Either way, because gender inclusivity in political representation lies at the heart of the 2010 constitution's design, it is difficult for the institutions created by the Constitution to properly satisfy their mandate without considering it.

A constitutional crisis may play out differently in Uganda if it chooses to legally operationalize its state policies on women without fully adhering to them. The Ugandan Constitution recognizes the doctrine of Separation of Powers but in practice the state is still under the authority of an Executive that has repeatedly shown a disregard for the Constitution and its dictates on the allocation of power.[96] A constitutional crisis that leaves the legislature at the mercy of the executive through its dissolution could potentially flare up existing political tension.[97] An undermined Judiciary would only be further weakened by attempting to resist a very powerful Executive, especially without legislative and popular support.[98]

In a society that is still entrenched with patriarchy, exchanging relative political stability for something seemingly insignificant as the advancement of women's rights would be a difficult trade-off for political parties to sell to the public. Furthermore, it is hard to imagine that a country with a constitution that was founded on discord between its domestic and international obligations towards women would want to adopt a design that would rectify the discord but possibly be left with crises that could potentially destabilize the country's fragile governance structure. This is especially important to consider given the

[96] Denis M. Tull and Claudia Simons, 'The Institutionalisation of Power Revisited: Presidential Term Limits in Africa' (2017) 52(2) Africa Spectrum 98 <https://doi.org/10.1177/000203971705200204> accessed on 6 November 2020.
[97] Siri Gloppen and Fidelis Edge Kanyongolo, 'Judicial Independence and the Judicialisation of Electoral Politics in Malawi and Uganda' in Danwood M. Chirwa and Lia Nijzinks (eds), *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (UCT Press 2012).
[98] ibid.

fact that Uganda has successfully managed to avoid constitutional and political crises on the same with the current constitutional design.

CONCLUSIONS

Based on the comparative analyses drawn from both Kenya's and Uganda's approaches towards increasing female political representation, it would be fair to say that the reliance on electoral and quota systems to gender constitutional design is not a definitive measure of ensuring the greater advancement of female political representation. In fact, the over-reliance on these two instruments by lawmakers to increase the representation of women has been used to excuse their inability to create an environment that fosters meaningful female political representation which directly challenges the patriarchal nature of law and politics. Impactful gendered constitutional design must fundamentally involve the contributions of women who are capable of articulating their needs outside the present patriarchal system, requires political concessions within the system and finally, should consider the social, economic and legal contexts in which they operate in and are expected to do so.

THE COPYRIGHT LAWS IN THE ERA OF ARTIFICIAL INTELLIGENCE OF FACIAL RECOGNITION AND SURVEILLANCE

Simona Ovcarike*

ABSTRACT

The purpose of this essay is to assess whether the current copyright laws provide an adequate protection to the copyright owners or should the legislators encourage and foster innovation in facial recognition and surveillance technology by limiting their rights over their creations such as images and photographs. This is achieved by identifying differences between the US and the UK copyright law concepts of fair use and fair dealing, assessing whether such concepts still serve their intended purpose of fostering public good and expressive creativity as well as by recognising any shortcomings and areas for improvement.

INTRODUCTION

Artificial intelligence (AI) is an often-heard catchall phrase and is generally used to describe the smart machines used to mimic cognitive thinking for problem solving and assisting humans with their work in various industries. However, AI comprises machine learning (ML), natural language

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processing, speech and text recognition, visual recognition, expert systems, scheduling, planning, analysis and robotics and each one of these have a very different meaning and purpose. AI is known to draw upon computer science, analytics, mathematics, engineering, information technology, linguistics, ethics, philosophy and many other fields.[1] Although AI was known for over 60 years since becoming a separate field in 1956, it really emerged in 2015 as a field attempting to create autonomous machines.[2] Technological innovations have also opened up new possibilities to data storage and categorisation leading to a concept now known as Big Data.[3] By using the Big Data – AI now drives not only innovation in technology but also the global business and investments.

The amount of data that is produced daily is also increasing and companies continue to look for new ways to process and dissemble that data. Reliable AIs make that data insightful and valuable to the businesses but as Martin Kirsten argues, the insights from the Big Data do not come from us staring at the spreadsheets.[4] Algorithms first require testing on various datasets before being embedded into the core of a business. Training algorithms require vast amounts of data; AI developers acquire this data from business data bases, Internet and social media accounts by relying on the UK and the US fair use and fair dealing concepts found in the copyright laws.

[1] S J Russell, P Norvig, *Artificial Intelligence: A Modern Approach* (3rd edn, Prentice Hall: Pearson, 2010), 17.
[2] ibid 7.
[3] Fernando Iafrate, 'Artificial intelligence and big data: the birth of a new intelligence' (1st edn, Wiley-ISTE 2018) 78.
[4] Kirsten Martin, 'Ethical Implications and Accountability of Algorithms' (2019) Journal of Business Ethics 160(4), 836.

Quality data is required not only for the training of algorithms but also to prevent biases and errors.[5] As developers source their datasets from within the business, internet and social media websites, they do so with little concern or, as Benjamin Sobel argues, without realising that assembling such datasets could be infringing intellectual property laws, particularly copyright of the authors who had produced those copyrighted works in the first place.[6]

COPYRIGHT LAWS AND LICENSING

The concept of fair dealing within the UK copyright law is governed by Sections 29 and 30 of the Copyright, Designs and Patents Act 1988 ("CDPA 1988") and the framework is applicable to many works such as musical, artistic, literary, dramatic works, sound recording, film and typographical arrangements. Additionally, the Copyright and Related Rights Regulations 2003 transposed the Information Society Directive of the European Parliament with an aim of broadening fair dealing exceptions under the CDPA 1988 and amending other provisions found in UK acts and secondary legislation.[7]

The concept of fair dealing was originally designed to allow a lawful reproduction of copyright protected works without permission from the copyright holder and without infringing owner's rights and interests. Despite there being no such definition of fair dealing within the UK legislation – the CDPA 1988 outlines instances where fair dealing is a legitimate defence: the

[5] Christopher Kuner, Fred Cate et al, 'Expanding the artificial intelligence-data protection debate' (2018) International Data Privacy Law 8(4), 290.
[6] Benjamin Sobel, 'Artificial Intelligence's Fair Use Crisis' (2017) 41 Colum JL & Arts 45, 61.
[7] Information Society Directive 2001/29/EC.

work is used for non-commercial research and private study, to provide review, criticism or to report on current events (except for the photographs and provided that the work is sufficiently acknowledged).

Although, the successful defence under the fair dealing doctrine cannot be attributed to a specific criterion, the UK courts have identified relevant factors of whether such dealings are regarded as fair use or not. The courts ask whether the amount of work used was reasonable and necessary for the required purpose and whether such use had negatively impacted the market of the original work causing loss of profits to the copyright holder.[8] It is important to note that fair dealing is always assessed on a case-by-case basis and having regard to its own facts and degree but the use must always meet the legislative purpose and be fair.

On the other hand, copyright protection in the US is found in the Copyright Act 1976 ("CLA 1976") and it arises automatically upon the creation of the work. This principle was first accepted under the Berne Convention for the Protection of Literary and Artistic Works (commonly referred to as the Berne Convention) in 1886 and it remains an international agreement on principles of copyright between 177 parties including the US and UK.[9] The Berne Convention recognises copyright between the members of the convention and provides equal and harmonised rights to the copyright holders whose works are published in other member states.

[8] Gov.uk 'Exceptions to Copyright' <https://www.gov.uk/guidance/exceptions-to-copyright> accessed 2 April 2020.

[9] Wipolex.wipo.int. 'WIPO Lex: WIPO-Administered Treaties'.<https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=B&code=ALL&bo_id=7> accessed 26 December 2020.

In the US, the concept of fair use is codified under Section 107 in Title 17 of the CLA 1976 or the Technology, Education and Copyright Harmonization Act 2002 (which in 2002 refined sections 110(2) and 112(f) of the US Copyright Act). Similar to the fair dealing concept in the UK, the US fair use doctrine does not consider copyright infringement when the work is used for criticisms, news reporting or commentary, teaching, research, and creating new scholarly works.

Moreover, US case laws suggest that data mining also falls within the fair use concept, being limited to public and its transformative use.[10] Whereas in the UK, only non-commercial data mining falls under the fair dealing exception described in Section 29A of CDPA 1988. Thus, the legal position of accessing copyrighted material for ML development and training varies between both jurisdictions. Even if the non-commercial data mining for AI training is still considered as legal by the US and UK, many organisations and researchers want to have access to data for commercial purposes instead. Therefore, such enterprises continue to rely on data found in the public domain (which itself attracts several issues described hereafter) or seek for data which is licensed under the international Creative Commons license.[11]

Even though these individual licenses and their conditions are important, individual copyright holders can still find themselves at adversity if their work is used as part of a larger dataset for ML development and training. A dataset could consist of thousands of copyrighted works that undergone countless modifications throughout the training process without the copyright

[10] *Authors Guild v. Google, Inc.,* No. 13-4829 (2d Cir. 2015).
[11] Creative Commons 'About' <https://creativecommons.org/about/> accessed 2 April 2020.

holder's permission.[12] If such dataset is created in the US, an instant protection under the fair use and data mining exceptions is attracted, permitting use of the work for a commercial purpose even if the individual copyright holder does not permit any such use. However, this is not a new issue either; high-technology organisations have been relying on fair use concept to develop the AI powered tools such as Google Images, Pinterest images search engine, and Instagram which process large amounts of copyrighted material and, yet, are not considered as copyright breaching tools due to their non-expressive processing nature.[13] As far as the copyright laws are concerned, the current application of copyright laws is for humans, whilst the fair use and fair dealing exceptions are for the machines.[14]

While expressive uses of copyrighted works for AI development can be argued to be promoting economic growth and innovation in technology, they also promote economic inequality with underlying copyright issues. It could be argued that if the courts find a machine model creating a derivative work from its training dataset, the copyright and Creative Commons license holders could be awarded compensation on a case-by-case basis by way of apportioning the profits and without adversely affecting the expressive ML.[15]

FACIAL RECOGNITION AND SURVEILLANCE AI

Essentially, facial recognition is a technique used to identify and verify individuals from a digital image or a video. It first emerged back in the

[12] Sobel (n 6) 48-49.
[13] Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103 NU L.R. 1639.
[14] James Grimmelmann, 'Copyright for Literate Robots' (2015) 101 IOWA L. REV. 681.
[15] ibid.

1960s and in the decades since it became increasingly common to use AI tools to identify humans, their facial expressions and emotions.[16] The process of facial recognition is performed in two steps, first, by feature extraction from an initial dataset, followed by object classification.[17] The most commonly known adaptations of classic facial recognition processes are traditional algorithms that simply identify facial features in the photographs to search for similar images. Such tools use a three-dimensional facial feature capturing technique and apply skin surface analysis. Police, transport authorities and airports have adapted these techniques to speed up and facilitate verification processes and to identify any suspects with past criminal or terrorism related convictions. Besides, social media platforms and other technology giants have also adapted facial recognition techniques. How it allows to diversify their software functionality and attract more end users boosting their revenues will be discussed further below.

NON-EXPRESSIVE USE

AI and ML tools copy and process massive amounts of human creations but only with the intention to act as data carriers.[18] Such phenomena is commonly referred to as non-expressive fair use which relies on both the fact that the machine by itself cannot process the copyrighted material in an infringing way and that such use does not affect the market of the original

[16] Xijian Fan, Tardi Tjahjadi, 'A dynamic framework based on local Zernike moment and motion history image for facial expression recognition' (2017) Pattern Recognition, 64, 399-406.
[17] Max Bramer, *Artificial Intelligence in Theory and Practice: Santiago, Chile* (1st edn, Springer and Ifip 2006) 395.
[18] Grimmelmann (n 14) 657.

copyright holders in a way that is material to the copyright laws.[19] The rationale is that such AI tools are treated as mere processors of expressive works for non-expressive, factual reference.[20] As discussed earlier, it is possible to use copyrighted works, such as pictures, for education and non-commercial research purposes. However, relying on fair use is less to do with the use being fair and more to do with the outcome of such use being in the public interest. Therefore, it can be argued that current projects and programmes focus on using images from the public domain and governmental department archives for facial recognition training and development.

According to the research carried out by the Center on Privacy & Technology at Georgetown Law (Georgetown University), the US Department of State has the largest facial recognition programme in the world due to its mugshot and driving license photograph database of over 117 million of American adults.[21] Even if some states have now banned the use of facial recognition technologies in their cities, other states and their police departments are continuously working on advancing their facial recognition tools.[22]

Likewise, public bodies in London already legally use non-expressive facial recognition tools to analyse footage from cameras in major train station areas for instance, Liverpool Street and Mile End to spot unusual behaviours

[19] Sobel (n 6) 57.
[20] *Perfect 10, Inc. v. Amazon.com, Inc., 508* F.3d 1146 (9th Cir. 2007).
[21] The Perpetual Line-Up 'Unregulated Police Face Recognition In America' <https://www.perpetuallineup.org/> accessed 2 April 2020.
[22] ibid.

such as lingering pedestrians or suspicious baggage.[23] London Borough of Newham is one of the local councils that have trialled smart CCTV (Closed Circuit Television Cameras) that send automatic alerts to the Metropolitan Police of suspicious objects and crowd buildups in the area.[24]

As much as this is advantageous for public security and preserving public order, it is important to use high quality datasets to reduce imperfections of technology in law enforcement.

Apart from drawing data from police archives, availability of high-quality photographs on various online platforms and collection of information from open sources improves facial recognition tools, but may also potentially make such tools more intrusive.[25] Unfortunately, not many individuals realise that law enforcement agencies could integrate their photographs from social media platforms into the datasets used for AI training.[26]

Non-expressive use by machines is not a problem, and hence it successfully falls under the fair use and fair dealing concepts.[27] Nonetheless, use of facial recognition technologies being an unregulated business, many concerns around civil freedoms and privacy remain. Continuous tension between civil rights, privacy concerns and general security objectives will

[23] Madhumita Murgia, 'How London Became a test case for using facial recognition in democracies' (Financial Times, London, 1 August 2019) <https://www.ft.com/content/f4779de6-b1e0-11e9-bec9-fdcab53d6959> accessed 2 April 2020.
[24] ibid.
[25] Monique Mann, Marcus Smith 'Automated facial recognition technology: Recent developments and approaches to oversight' (2017) University of New South Wales Law Journal 40 (1), 125.
[26] ibid.
[27] Grimmelmann (n 14) 657.

remain a controversial topic of discussion for years to come. However, it is certain that non-expressive facial recognition technologies are here to stay.

EXPRESSIVE USE

All the data that people share on their social media platforms is collected, stored, processed and used for unforeseen and unknown internal purposes, and for commercial goals of companies and their partners.[28] Some users may not realise that upon signing up with social media platforms or with every new gadget that they buy to use, they also accept terms of service sometimes permitting their uploaded images be used for unspecified non-exclusive purposes.[29] Technology giants do not own the copyright to their user content but instead act as licensees when it suits them.[30] Due to the vast amount of data that is available to technology companies various AI driven facial recognition innovations have been created. It is now possible to unlock Apple devices, recognise faces in the images uploaded on Facebook, and unlock Microsoft devices using facial recognition tools.

AI tools are currently being used to provide technology companies with a competitive advantage in the fast-evolving digital market. Unrestricted use, and processing of copyrighted images creates opportunities for these technology companies to teach their AI how to create works of its own. Although AI creations are not yet copyrightable under the existing copyright laws, this does not prevent high-technology companies from repackaging and commercialising AI tools into something new.

Fair use and fair dealing traditionally benefited society through fostering expressive creativity.[31] Today, high-technology companies arguably

[28] Domenico Talia, *Big Data and the Computable Society: Algorithms and People in the Digital World* (2 edn, World Scientific 2019), 124.
[29] Facebook: Instagram Terms of Use <https://www.facebook.com/help/instagram/termsofuse> accessed 1 January 2021.
[30] ibid.
[31] Sobel (n 6) 49.

use both the concepts to serve the economic interests of their shareholders. However, if the courts reject the fair use and fair dealing concepts in the expressive ML then this could have an impact on valuable technological innovation and advancement. Until algorithms become most powerful units governing and shaping our society, policy makers need to ensure that the AI continues to be ethical and serves public good without infringing copyright holders' rights and interests.

DATA MINING

Currently, text and data mining are considered transformative and, thus, are permitted in the US under the fair use, regardless of whether the use of data is for a commercial or non-commercial purpose.[32] In the UK, it is also possible to lawfully access data via mining, however, it is limited to non-commercial purposes only. As large amounts of high-quality data are required for AI training and developing, some organisations turn to data brokers. Data brokers are companies that collect personal information about people with the intention of selling or licensing it to other enterprises. They are able to extract personal information from a variety of sources such as social media platforms, bank accounts, emails and other public archives.[33] Their role is to use this data to create individual profiles describing the individual's age, weight, height, religious beliefs, marital status, gender, nationality, net wealth, political

[32] Thomas Margoni and GiuliaDore, 'Why we need a text and data mining exception (but it is not enough)', presented at the 10th edition of the Language Resources and Evaluation Conference (LREC 2016), Portorož (Slovenia): Zenodo. http://doi.org/10.5281/zenodo.248048.

[33] Alexander Tsesis, 'The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data' (2014) 49 Wake Forest L. Rev. 433, 436.

affiliations and their name. Various companies and enterprises use this information for targeted advertising but it can also be used for verification purposes, fraud prevention and for people searching.[34]

Moreover, the economic advantages and decision-making power lie with organisations that manage to source their data, whether themselves or from data brokers.[35] User generated data is the key driver for AI. Other enterprises choose to source their own data for the benefit of competitiveness and producing cutting edge AI tools, even if this means taking up the risk of potential copyright infringement. Nevertheless, only very few developers choose to clear intellectual property rights with the right holders before using the data that they have acquired.[36] The reason behind such a tendency is possibly the lack of legal awareness or willingness to learn about intellectual property rights. The developers might assume that acquiring data free of charge through crawling (that analyses content on the internet websites without actually downloading any data), scraping (that downloads website specific data and extracts information), or simply downloading it from the internet is easier and justifiable under the fair use concept in the US.[37]

Furthermore, the fact that companies are capable of aggregating large amounts of data increases the inequality between those who have access to data and those who do not have the power or resources to possess that data. Although, there are tools and technologies that are capable of offering licensed copyrighted materials through the reuse of data found on the internet and the Creative Commons licensed content, the US enterprises continue to try their

[34] Talia (n 28) 60.
[35] Talia (n 28) 63.
[36] Kublik Vadym, 'Copyright and Machine Learning: from human-created input to computer-generated output' (PhD diss., Master's Thesis, Law and Information Society University of Turku Faculty of Law 2018), 70.
[37] ibid, also see: Simon Munzert, Christian Rubba et al, 'Automated Data Collection with R: A Practical Guide to Web Scraping and Text Mining, (1st edn, John Wiley & Sons, Ltd 2015) 279.

luck and defend their actions under the fair use doctrine. If the UK wishes to benefit from the technological advancements as well, it should consider widening the exceptions for text and data mining and permit commercial use. In the long run, this would bring the UK up to speed with the fast evolving Big Data and AI markets in the US and would also create a uniform system that fosters technological advancements between the two countries, which will be of great importance to the post-Brexit UK economy in years to come.

COPYRIGHT INFRINGEMENT

In order to avoid any copyright infringements, individuals and various organisations should always obtain copyright holder's prior permission before using their work in machine training dataset.

One way of legally gathering required data for ML training is through reading terms of service of websites which may contain the information about the type of data that can be downloaded. For example, in 2019, IBM (a US based company) released a paper on how it created a dataset called Diversity of Faces with an aim to reduce biased decision making in facial recognition AI.[38] Although IBM has legally obtained images from Flickr through the Creative Commons licensing, users criticised such a move claiming that they were not aware of their photographs being included in the dataset.[39] Apart

[38] IBM Research Blog 'Diversity in Faces' <https://www.ibm.com/blogs/research/2019/01/diversity-in-faces/> accessed 2 April 2020.

[39] Flicrk 'Creative Commons'<https://www.flickr.com/creativecommons/> accessed 2 April 2020, for criticism see James Titcomb, 'IBM criticised for collecting social media photos for facial recognition research' (The Telegraph, San Francisco, 12 March 2019) <https://www.telegraph.co.uk/technology/2019/03/12/ibm-criticised-collecting-social-media-photos-facial-recognition/> accessed 2 April 2020, also see

from privacy concerns, this still is very much a grey area. Legally scraping images from the internet and various websites could still amount to copyright infringement.

By contrast, Clearview AI is a US based facial recognition selling company that has a database of thousands of images. Clearview AI lets its private customers and public agencies search for various individuals such as murderers, suspected terrorists and other dangerous individuals with accuracy, speed and using publicly available information that complies with all applicable laws.[40] According to the company, more than 600 law enforcement agencies around the world including the FBI, US Department of Homeland Security, and London Metropolitan Police used the software.[41] Clearview AI has legally acquired images but the company has still been served with three class action complaints in which plaintiffs sought injunction against Clearview AI's mass photograph collection.[42] If plaintiffs are successful they would be seeking for an order requiring deletion of the data which Clearview AI holds in its databases, essentially destroying their whole business model.[43] Even if

Emily Price, 'Millions of Flickr Photos Were Scraped to Train Facial Recognition Software' (Fortune, United States, 12 March 2019). <https://fortune.com/2019/03/12/millions-of-flickr-photos-were-scraped-to-train-facial-recognition-software/> accessed 2 April 2020.

[40] Clearview <https://clearview.ai/> accessed 2 April 2020.

[41] BBC.com, 'Met Police to Deploy Facial Recognition Cameras' (BBC, United Kingdom, 30 January 2020) <https://www.bbc.com/news/uk-51237665> accessed 2 April 2020.

[42] J Alexander Lawrence, Sara Stearns, 'Clearview AI and the Legal Challenges Facing Facial Recognition Databases' (Lexology.com, USA, 10 February 2020). <https://www.lexology.com/library/detail.aspx?g=6f6f34d7-cc2e-4054-ade8-d821793d5ba2> accessed 2 April 2020.

[43] ibid.

the outcome of these lawsuits are yet to materialise, it will be interesting to see whether social media companies and other internet giants will have any standing for copyright infringement claims against Clearview AI. It will most likely depend on the agreements those internet giants have with their end users.[44] On the other hand, if the social media giants and other internet websites (who are affected by Clearview AI data mining) do not have standing as legal or beneficial owners of images uploaded on their websites, the users themselves may.

FUTURE OF AI

Alongside the intended benefits of facial recognition and surveillance, AI poses a number of serious concerns relating to existing copyright laws such as infringement, collection and processing of Big Data, and lack of regulatory processes and controls. It is vital to have access to high quality of data in order to develop and train AI tools and it is apparent that whilst some enterprises manage to acquire the required data themselves others choose to turn to the data brokers. Acquiring copyrighted data illegally or not having enough qualitative data to produce an AI tool are also challenges that many organisations will continue to face. The US high technology enterprises managed to rely on the fair use defence allowing them to build empires from utilising data over the years but the AI developers should now start moving towards greater awareness of Creative Commons licenses. They should also have a better understanding of the intellectual property laws and even consider acquiring professional accreditations validating their knowledge of intellectual property laws before they can work on the AI training and development.

Whilst AI is making its way into everyday lives, the collection and processing of vast amount of data will also remain a fundamental ingredient in developing high-quality facial recognition and surveillance tools. Creating an independent oversight institution capable of auditing algorithms or developers

[44] ibid.

could prevent the emergence of monopolies, and empires that build unethical or biased AI tools based on copyright infringing data. Furthermore, algorithmic accountability could be achieved through setting up a national algorithm safety board or an oversight institution responsible for independent oversight of algorithms. Such institutions would be responsible for auditing algorithms with the purpose of determining whether they serve the public interests.[45] An establishment of a similar but international uniform system could also foster not only technological advancements in the UK but would also ensure that copyright holders receive adequate protection in the US.

CONCLUSION

The existing principles behind fair use and fair dealing are no longer serving its intended purpose of fostering creativity nor are they addressing the recent changes and developments in technology and emergence of AI tools that consume vast amount of copyrighted data. It is apparent that there is a need and a possibility for both the US and UK jurisdictions to contribute towards a unification of their fair use and fair dealing concepts. This would ensure that the intended purpose of creativity fostering remains, and the copyright holders have a say on how their works are used in machine learning and development. Offering greater copyright protection to the copyright holders in the US and widening fair dealing exceptions in the UK would not only preserve copyright holders' rights and interests but would also continue to promote and foster innovation in technology such as facial recognition and surveillance. Balancing out the application of fair use and fair dealing concepts between both jurisdictions would also strengthen their economic relationship and business partnerships for years to come.

[45] Center for Data Innovation, 'How Policymakers Can Foster Algorithmic Accountability' (2018). <http://www2.datainnovation.org/2018-algorithmic-accountability.pdf> accessed 2 April 2020, 13-14.

SAUCE FOR THE GOOSE IS NOT SAUCE FOR THE GANDER – MALE VICTIMS OF RAPE

Alexander Ng

ABSTRACT

This essay focuses on the issue of male rape. It is recognised that some parts of the essay contain sensitive information in which certain individuals may find disturbing or discomforting. Male rape is a significant social and legal issue. Male victims of sexual offences were traditionally not given equal protection under statute as compared to their female counterparts. Although significant improvements have been made in the Sexual Offences Act 2003, there is still room for improvement. Inspiration can be sought from other common law jurisdictions, namely Australia and Canada, to see how current rape law can be improved. Judicial interpretation, however, also has to be improved to give effect to the strides made in statutory law. There remain significant misunderstandings in male biology, particularly the processes of erection and ejaculation during sexual assault, which can be traced to traditional ideals of masculinity. This can be resolved by adopting modern medical understanding of male physiology. If such problems in the current law are not recognised and rectified, it is submitted that serious ramifications may arise in relation to further stigmatisation of male victims and increased acquittals of dangerous sex offenders. Only by putting male and female victims of sexual offences on equal footing can true gender equality be realised.

I. INTRODUCTION

Sauce for the goose is not sauce for the gander. What is provided to the goose is not available to her male counterpart. This cannot be more accurate when describing the disparity in legal protection of male and female victims of sexual offences.

Traditional masculinity poisons boys and men, to the extent that they are denied equality under the law in relation to sexual assault. Conceptualisations of manhood such as emotional imperviousness and solidity persist in our

society. The male exhibition of vulnerability and sadness in the workplace is still penalised according to an article published in Harvard Business Review.[1] Fuchs aptly summarised: 'men are not encouraged within our society to show vulnerability, or to admit to feelings of fear and anxiety'.[2] This idea is translated into the myth that he cannot be raped. A study was performed by Donnelly and Kenyon to look into the provision of support services for rape victims by agencies, including hospitals and rape crisis centres.[3] The study evidenced that many believed men could not be raped and many rape victim services were not provided to men.

This is supplemented by the myth that men do not require protection, since they are subservient to their sexual desires and are always sexually available. It is difficult to think that men sometimes do not want sex. Kerwin Kay states: 'We have this underlying belief that men should be sexually available at all times – and like it.'[4] It is perpetuated that men are no more than sex machines that cannot be turned off. As Stevi Jackson puts it: 'If a man attributes this to himself, perceives himself as a helpless slave to his desire, then he will be less inclined to curb himself in the face of a woman's refusal and more inclined to resort to force to attain his ends.'[5]

This article aims to explore how male victims of sexual offences are not protected adequately by statutory provisions, relative to their female

[1] David M Mayer, 'How Men Get Penalized For Straying From Masculine Norms' (Harvard Business Review, 2018) <https://hbr.org/2018/10/how-men-get-penalized-for-straying-from-masculine-norms> accessed 30 October 2020.
[2] Siegmund Fred Fuchs, 'Male Sexual Assault: Issues Of Arousal And Consent' (2004) 93 Cleveland State Law Review.
[3] Denise A. Donnelly and Stacy Kenyon, '"Honey, We Don't Do Men"' (1996) 11 Journal of Interpersonal Violence.
[4] 'Introduction', in Kerwin Kay, Baruch Gould and Jill Nagle, Male Lust (Harrington Park Press 2000).
[5] 'The Social Context of Rape: Sexual Scripts and Motivation', in Patricia Searles, Rape and Society: Readings on the Problem of Sexual Assault (Westview Press 1995).

counterparts. Throughout this article, the term 'male victims' covers those subjected to offences committed by any person, regardless of gender. Firstly, it examines the statutory development of sexual offences in England and Wales. Although statutory law gradually recognises the possibility of males being subjected to sexual offences, there remain significant areas of improvement. Inspiration can be sought from Australia and Canada with regard to their statutory provisions for sexual offences. However, comprehensive legal protection can only be achieved by finessing both statutory law and judicial interpretation of the law, i.e. common law. The second part of this article discusses the issue of ejaculation and erection. Although male victims are protected by statute, the presentation of either physical feature during the assault is likely to affect courtroom opinion, leading to the acquittal of the defendant(s). Lastly, this article explains the consequences which may emanate from diminished protection provided to male victims of sexual offences.

i. STATUTORY DEVELOPMENT OF SEXUAL OFFENCES IN ENGLAND AND WALES

To understand the traditional position of the law of England and Wales in the matter of male sexual assault, it is essential to commence two separate discussions. Firstly, we need to understand the criminalisation of male same-sex sexual activity in English legal history. The offence of buggery, alternatively known as sodomy, eclipsed statutory protection, if any, afforded to men who were sexually assaulted or raped. Since the act of being raped by other men satisfied the definition of the offence, victims would be convicted of the crime even if he had no intention of committing the offence and did not give his consent. Secondly, the conversation surrounds the gendered wording adopted in early statutes conferring protection to victims of sexual offences, and traditional conceptualisations that rape could only be committed against females by males.

ii. BUGGERY AND MALE-ON-MALE SEXUAL ACTIVITY

Our discussion starts with The Buggery Act 1533. The Act was enacted in the reign of King Henry VIII which criminalised the act of buggery (or sodomy). It was defined as the act of anal sexual intercourse between entities, where the term 'entities' refers to men, women, and animals. However, the conviction of male sexual intercourse was the most publicised. The crime was punishable by death.[6] The crime was established in light of outdated attitudes towards homosexuality, and same-sex sexual activity in general. Historical records on the subject contain indelicate comments and convey contempt, regardless of the state of mind of the parties committing the act.[7] As mentioned above, the Act took the position that anyone committing the act of buggery or sodomy would be liable for conviction. Although only the active party would be prosecuted, prevailing social attitudes back then would mean that the victim was subjected to a high evidential threshold to prove his innocence. Otherwise, the victim might be deemed complicit in the crime. One might question whether it would be better formulated that English law followed the morality and social behaviours of its time than claiming that male individuals were subjected to gender-based discrimination. While there is some truth to the claim, female-on-female sexual acts, regardless of whether they are consensual, have never been criminalised in English legal history until the early 21st century.[8] Therefore, female victims are better protected than men by the sexual assault provisions in England and Wales.

[6] The Buggery Act 1533, Cap. vi.

[7] Stephen Noble, 'Records Of Homosexuality In 17Th Century England' (British Library - Untold Lives Blog, 2019) <https://blogs.bl.uk/untoldlives/2019/04/records-of-homosexuality-in-17th-century-england.html> accessed 18 January 2021.

[8] There had been an attempt to illegalise sexual acts between female subjects, known as 'acts of indecency'. The matter was debated in the House of Commons. The attempt failed. For more details regarding the debate, refer to: HL Deb 15 August 1921 vol 43 col 567-77W. Under Sexual Offences Act 2003 (current law), non-consensual female-on-female sexual activity can be liable for prosecution.

This continued onwards to 1861, when the Offences Against the Person Act was enacted. The punishment for buggery was reduced from death to life imprisonment or 'for any term not less than ten years'.[9] However, the essence of criminality remained. It was not until the 1950s that the criminalisation of homosexuality was questioned by society. Published in 1957, the Wolfenden Report,[10] was not related directly to the introduction of complete gender equality in the context of male victims of sexual offences. However, it advocated for the decriminalisation of consensual homosexual acts. Parliament finally adopted the recommendations presented in the Wolfenden Report, and legalised consensual homosexual acts between men in 1967.[11]

This was exceptionally significant. By promoting gradual acceptance of male homosexuality in society by way of recognising citizens as voluntary agents, the focus of sexual offences was no longer confined to the gender of the victim. It concentrated on the deprivation of liberty through superimposing sexual intercourse without the consent of the victim. Male victims, especially those afflicted by other males, were no longer thought, at least by the majority, to be criminals of an unspeakable crime in virtue of their gender and the gender of their perpetrators. They were considered to be 'genuine' victims since they were violated against their will.

However, it is glib to suggest that the issue of gender discrimination in sexual offences stops with the legalisation of homosexuality. Men are still subjected to exceptionally high standards of behaviour imposed by traditional tenets of masculinity. The myth that men could not be raped still pervaded.

[9] Offences Against the Person Act (OATP) 1861, s.61 (repealed).
[10] Departmental Committee on Homosexual Offences and Prostitution, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (HC 1957-58 575).
[11] Sexual Offences Act 1967.

Sexual offence provisions enacted by Parliament historically focused merely on female subjects, as deduced by the gendered wording adopted in statutes.

iii. GENDERED WORDING IN STATUTES RELATED TO SEXUAL OFFENCES

The offence of rape existed in the sphere of common law until its consolidation into statute in 1828, when the first Offences Against the Person Act was enacted. Traditional conceptualisations of the offence dictated that it could only be committed against female subjects. In the renowned work in criminal law by barrister William Hawkins, *A Treatise of the Pleas of the Crown (Vol. 2)*, rape was defined as: 'the unlawful carnal knowledge of a woman by force and against her will.'[12] It was further suggested that 'it is a brutal and violent attack upon the honour and chastity of the weaker sex'.[13] It did not occur to traditional legal scholars such as Hawkins, that male subjects could be raped and sexually assaulted as well. It was also written that the offence could only be committed by the male sex.[14]

The common law requirements pertaining to evidence of rape also exhibited clear male bias. Before 1828, the proof of rape required two elements: (1) proof of penetration, and (2) proof of ejaculation. This was affirmed in the case of Samuel Hill in 1781 by the assizes at Lincoln.[15] This formed a bias against male subjects since both acts could only be performed by a male perpetrator in accordance with anatomical differences between genders. A female subject was, according to common law, unable to commit

[12] W Hawkins, 'A Treatise of the Pleas of the Crown Or a System of the Principal Matters Relating to that Subject, Digested Under Proper Heads: In Two Volumes. Of courts of criminal jurisdiction and the modes of proceeding therein' (Vol. 2, Sweet 1824), 434.
[13] Id, 436.
[14] Id, 435.
[15] *Samuel Hill's Case* (1781) MS.

the offence of rape. Furthermore, even if a female forcefully imposed sexual activity upon a male subject without his consent, the performance of both elements would be executed by the male subject, not the female. Therefore, the male subject could possibly be prosecuted without the presence of witnesses or any other form of evidence suggesting that he was not the initiator. Similar to the law governing homosexuality, the crime originated from the performance of the act and the gender of the 'victim'.[16]

Unfortunately, such outdated conceptualisations found their way in statutory provisions in 1828.[17] Although the Act did not provide a firm definition of the offence of rape, gender bias was exhibited in a multiplicity of ways. To begin with, we examine the change in requirements of evidence of rape. Proof of ejaculation was no longer required. Victims only had to show proof of penetration.[18] However, since only male perpetrators have the corresponding anatomy to perform the act of penetration, this modification still perpetuated the erroneous belief that only males could rape. In addition, provisions pertinent to the sexual violation of minors (legally defined at the time as under twelve years of age) were only applicable to female children:

> …if any Person shall unlawfully and carnally know and abuse any Girl under the Age of Ten Years, every such Offender shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any Person shall unlawfully and carnally know and abuse any Girl, being above the Age of Ten Years and under the Age of Twelve Years, every such Offender shall be guilty of a Misdemeanor, and being

[16] The word victim is put in quotation since, in the conventional sense, the subject has irrefutably been afflicted with a non-consensual act performed by another. However, in the eyes of the law at the time, the subject was deemed as the criminal who committed the crime.
[17] OATP 1828.
[18] ibid, section XVIII.

> convicted thereof, shall be liable to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for such Term as the Court shall award.[19]

There were no separate provisions in protection of their male counterparts. When the offence of indecent assault was first introduced in 1861, it only protected females rather than males:

> Whosoever shall be convicted of any indecent Assault upon any Female, or of any Attempt to have carnal Knowledge of any Girl under Twelve Years of Age, shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.[20]

Such archaic beliefs persisted up to the segregation of sexual offences from other offences against the person, including common assault, manslaughter, and murder, in the 20th century. Given remarkable strides undertaken by the human race in improvement of gender equality such as the Suffragette Movement and equal pay, it came as a surprise that Sexual Offences Act 1956, the first statute to formally give a definition of rape, stated: 'It is felony for a man to rape a woman.'[21] Sections 5 and 6 of the Act also outlined offences concerning having sex with minors. However, rather than eliminating outdated conceptions of masculinity, these offences still only protected minor female subjects (defined as subjects under sixteen years of age). The most remarkable improvement in protection for male victims of sexual offences was the creation of an offence for indecent assault on male subjects.[22] It also

[19] ibid, section XVII. The term 'carnal knowledge' is an archaic term for sexual activity.
[20] OATP 1861, s.52 (repealed). The term 'indecent assault' is known as 'sexual assault' under current statutory arrangements.
[21] Sexual Offences Act (SOA) 1956, s.1(1) (repealed).
[22] ibid s.15(1) (repealed).

recognised the vulnerability of male minors under the age of sixteen years, revoking any consent given in the context of indecent assault.[23] The rest of the Act focused significantly more on the sexual welfare of females, exemplified by provisions covering abduction and prostitution.

A counterargument could be found in Schedule 2 of the Act. Indecent assault on males carried the maximum penalty, on indictment, of ten years' imprisonment, corresponding to merely two years for females.[24] There was greater protection for males relative to females. However, we should not disregard the fact that female welfare remained disproportionately represented in the Act. While men coerced to have sexual activity by women could only be protected by the offence of indecent assault, the reverse was not true. Male perpetrators could be convicted of rape, which carried a maximum sentence, on indictment, of life imprisonment.[25] The 1956 Act made decent developments in promoting gender equality, but it still had room for improvement.

Its replacement, Sexual Offences Act 2003, is to be welcomed. The Act removed all gendered language that persisted in its predecessors. Rape is committed by the intentional penetration of the vagina, anus or mouth of another person with his penis where the other person does not consent to the penetration, and the defendant does not reasonably believe that the other person consents.[26] The maximum sentence is life imprisonment on indictment. Words directly indicating gender (such as man and woman) are replaced by anatomical designations that differentiate between biological males and females. It can be said that male-on-male rape is now classified as rape in law instead of sodomy, which is a huge gain in the interest of fair labelling.

[23] ibid s.15(2) (repealed).
[24] ibid Sch. 2 Part 1 para 17, 18.
[25] ibid para 1(a).
[26] SOA 2003, s.1.

Glanville Williams finessed the concept of fair labelling, stating that the particulars of the offence should adequately convey the degree of moral guilt and the culpability of the defendant.[27] Rape in our society represents a heinous crime. It is recognised as a weapon used by the more powerful party against the weaker party, which is not limited by the gender of the victim.[28] Therefore, male-on-male rape is formally recognised as a crime amounting to equal severity to male-on-female rape. The law has taken steps to realise that men can be raped and should not be precluded from protection.

However, vestiges of gender discrimination remain. The construction of the definition of rape still means it is impossible for a woman to commit rape against a man, unless she is complicit in the offence of someone with a penis. Some may argue that adequate protection is given in these circumstances, with the creation of a new offence: causing a person to engage in sexual activity without consent.[29] The broad scope of the offence implies that there are no anatomical restrictions. Furthermore, under section 4(4), if the offence involves penetration performed in the outlined scenarios, a person guilty of the offence is liable to life imprisonment on indictment. For a woman to force a man to have penetrative intercourse with her, she can be prosecuted under this section and be given a sentence equally severe to that of rape. Moreover, a woman who penetrates a man's anus with a non-corporeal object can be charged with assault by penetration, another offence in the same Act.[30] This is a huge leap in recognising the plight of male victims and aims to reduce stigmatisation. Nonetheless, this does not give the fullest effect to the idea of

[27] G Williams, 'Convictions and Fair Labelling' (1983) 42 CLJ 1, 85.
[28] PNS Rumney, 'In Defence Of Gender Neutrality Within Rape' (2007) 6 Seattle Journal for Social Justice, 494. Also read: S Brownmiller, Against Our Will: Men, Women and Rape. (Simon and Schuster 1975): 'While the penis may remain the rapist's favourite weapon, his prime instrument of vengeance, his triumphant display of power, it is not in fact his only tool.'
[29] SOA 2003, s.
[30] ibid s.2.

fair labelling. Female perpetrators can still get away with the title of 'rapist', although as mentioned above, rape concerns victim denigration through intense power play that is not gender-specific. Complete endorsement and recognition of the male rape victim in society can only be achieved once the anatomical specifications are removed.

II. INSPIRATION FROM AUSTRALIA AND CANADA

The problems in current statutory provisions in English law can be mitigated by referring to the arrangements in other common law jurisdictions, namely Australia and Canada.

In Australia, rape offences are gender-neutral across all jurisdictions.[31] For instance, in New South Wales, rape is the 'sexual connection occasioned by the penetration to any extent of the genitalia … of a female person or the anus of any person' by 'any part of the body of another person, or any object manipulated by another person.[32] While retaining the vestige of physical specification, the statute effectively removes any specific reference to the penis as the only tool of perpetration. The corollary is that a perpetrator is a perpetrator. The gender of whom and the tool employed are irrelevant.

In Canada, matters are taken even further. The criminal code does not hold a special provision for rape.[33] Instead, it defines assault,[34] and applies the

[31] This includes both federal and state jurisdictions. 'Rape': The Penetrative Sexual Offence | ALRC' (ALRC, 2010) <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/25-sexual-offences-3/rape-the-penetrative-sexual-offence/> accessed 11 October 2020.
[32] Crimes Act 1900 (NSW) s 61H(1).
[33] 'Sexual Assault Criminal Law, Rape Shield, Evidence, And Sentencing In Canada' (Sexassault.ca, 2020) <https://www.sexassault.ca/criminalprocess.htm> accessed 11 October 2020.
[34] Criminal Code. R.S.C., 1985, c. C-46, c. 265 (1).

definition to sexual assaults as well.[35] The removal of anatomical specification is the first step in recognising the psychological suffering of victims, regardless of gender. It does not create a special evidential hurdle for those who have experienced rape. Instead, the severity of the otherwise more traumatising incident is reflected in sentencing.[36]

i. PHYSICAL ASPECT OF MALE RAPE: VICTIM ERECTION AND EJACULATION

It is a truth universally acknowledged, that a man who has maintained an erection or ejaculated when raped, has asked for it.[37] From the non-medical perspective, society sees erection as a psychological signifier of pleasure. The pseudo-logic further submits that consent, a concept rooted from free-will, choice and capacity, must have been obtained for the victim to demonstrate a sign of relish biologically. This idea is attractive since, as stressed above, it is popularly believed that there are no instances where men do not desire sexual activity. Such physiological responses, when occurring at the male genitalia, are easily accepted as confirmation of such belief. The courts subscribe to this stance, notwithstanding its shaky foundation. It has also pervaded in the legal sphere long enough to cause significant impact on the lives of numerous victims and the rule of law.[38] It should be stressed that this is not an issue endemic to England and Wales. It concerns the wider common law world, which have inherited traditional constructs of masculinity and legal interpretations of male biology from English law.

[35] ibid c. 265 (2).
[36] ibid 271.
[37] Fuchs (n 2) 116.
[38] See AW Coxell and MB King, 'Male Victims Of Rape And Sexual Abuse' (1996) 11 Sexual and Marital Therapy. It is suggested the legal community regards erection as a voluntary process and therefore any evidence of so indicates consent.

In a Canadian case, *R v R.J.S.,*[39] the court stated that the victim: 'maintained and regained an erection, and then penetrated the accused's anus while the accused continually moved up and down…[he] appeared to go along with the accused.'[40] The fact that the erection occurred more than once reinforced the belief. Professor Catherine A. MacKinnon responded by asking if erection denotes '*prima facie* consent', where any sign of resistance displayed during the assault is to be ignored.[41]

In England and Wales, courts adopted a similar, archaic approach. In *Willan v Willan,*[42] due to the fact that the claimant had an erection, the judge established that the act: 'constitute[d] the evidence of condonation…it can only be said of him that what he does he does on purpose, and that sexual intercourse with his wife must be a voluntary act on his part.'[43] This is exemplary of how the court's reasoning divorces from medical reality. It is well-established in medical science that erection and orgasm involve the 'autonomic nervous system', which is beyond voluntary control.[44] This also applies to ejaculation.[45] Both can occur in extremely stressful situations, especially for phobic patients, as well as some 'other previous role reflected in the victim's subconscious'. Making a distinction between male erection and

[39] 123 Nfld & P.E.I.R. 317 (1994).
[40] Fuchs (n 2).
[41] CA MacKinnon, Sexual Equality (Foundation Press 2001).
[42] (1960) 2 All E.R. 463.
[43] ibid.
[44] In contrast to the somatic nervous system. See Edward David Kim, 'What Is The Normal Erectile Process Relative To Erectile Dysfunction (ED)?' (Medscape, 2018) <https://www.medscape.com/answers/444220-69926/what-is-the-normal-erectile-process-relative-to-erectile-dysfunction-ed> accessed 12 October 2020; also, François Giuliano and Olivier Rampin, 'Neural Control Of Erection' (2004) 83 Physiology & Behavior.
[45] F Giuliano and P Clément, 'Physiology Of Ejaculation: Emphasis On Serotonergic Control' (2005) 48 European Urology.

female vaginal lubrication, which is also under autonomic control, during assault is 'ludicrous'.[46]

Fortunately, some courts in the United States are willing to accept that erection and ejaculation can occur even if the complainant is unconscious. This is one step forward in terms of recognising the involuntariness of such physiological processes and the fallacious logic in ascribing them to any indication of consent. In *State v Karlen*, one of the complainants (Johnston) used marijuana and other drugs to the extent that he literally passed out at the time of the sexual assault, where he was incapable of consenting.[47] Another complainant (Grimsley) was found to have ejaculated upon awakening, after having fallen asleep watching films. This was attributable to non-consensual sexual contact initiated by the defendant when he was unconscious.[48] However, it did not obstruct the court from convicting the defendant rape and sexual assault. In *Commonwealth v Tatro*, the fourteen-year old complainant dozed off in the defendant's flat.[49] He woke up transiently, realising that the defendant had made sexual advances, including rubbing his pubic area and buttocks. The defendant started performing fellatio on him when he was unconscious. Nonetheless, the court held that non-consent was established.

However, it would be overly optimistic and glib to claim that contemporary understanding of male physiology is widely adopted. After all, in *Commonwealth v Tatro*, the judge gave the jury direction that consent could not be given by children under the age of 16. Should the complainant be over sixteen years of age and conscious, the outcome might have been different. Coupling unconsciousness with erection and ejaculation also gave off the mirage that, when conscious, both processes could still be viewed as valid

[46] Fuchs (n 2).
[47] 1999 SD 12, 589 N.W.2d 594.
[48] ibid 50.
[49] 42 Mass. App. Ct. 918 (Mass. App. Ct. 1997).

signs of consent. The only feasible avenue for change is for the judiciary to recognise that, in modern medicine, both are involuntary processes that do not, in any way, give any inkling regarding the consent of the complainant.

III. RAMIFICATIONS

There are two major ramifications if the legal system fails to improve upon current arrangements and provide male victims with adequate protection: (1) further marginalisation and discrimination, and (2) acquitting rapists who affect society at large.

Stigmatisation prevails, with traditional ideals of masculinity preventing male victims from seeking help. In *People v Ayala*, the victim, when asked why he did not complain sooner, explained: '[I was] scared and didn't feel comfortable really talking about it. It was just embarrassing.'[50] Male victims respond similarly to female victims after rape. The emotional trauma is not less significant because the victim is male. Even if he exhibits any biological sign of arousal, it does not render the defendant less culpable. Nor does, that an involuntary process arises, cast any shadow of doubt over the absence of the victim's consent. Glanville Williams rejected the sexist undertones contained within the judgments in *R v Court* [1989] AC 28, when discussing the meaning of 'indecency' in indecent assault.[51] He stated that 'stripping a woman in public is an indecent assault without proof of a sexual motive' but 'stripping boys is not indecent without a sexual motive'. The criminal justice system's monolithic attitudes serve only to remind society and such victims that the law does protect victims against rape, but that it is conditional upon gender and the male experience is less worthy of attention. Male victims are construed to have deviated from the ideal and are progressively marginalised.

[50] G052443 (Cal. Ct. App. May. 23, 2017).
[51] Glanville Williams, 'The Meaning Of Indecency' (1992) 12 Legal Studies.

It is also erroneous to postulate that this is confined to male victims. As explored afore, rape is a crime of control and coercion. It is a gender-neutral way to exert dominance. It is not associated with mere sexual gratification. Remaining in the community at large, the gender of the victim is unlikely to be a main factor of consideration when criminals go on their quest for victim domination and humiliation.

IV. CONCLUSION

Despite the significance of sexual offences as a major social and legal issue, male victims are still treated on a different footing to their female counterparts. Statutory provisions traditionally favoured protection towards females and side-lined male interests when it came to sexual offences such as rape. Current statutory provisions, that is Sexual Offences Act 2003, made significant progress in promoting gender equality and removing outdated beliefs of masculinity. However, certain problems still remain. It is advised that we learn from the current arrangements in Australia and Canada which focus more on the criminality of the act rather than the gender or anatomy of the victim. Moreover, traditional beliefs of male biology in the courtroom also affect the efficacy of statutory protection afforded to male victims. Since such beliefs are coupled with old-fashioned conceptualisations of masculine ideals, perhaps a preferable solution is that the criminal justice system discards such beliefs and readily accepts submissions from modern medicine.

It is by acknowledging the experiences of male victims and giving them equal protection that we uphold equality for all persons, regardless of gender.

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RESHAPING DEFINITIONS: CHINA'S APPROACH TO INTERNATIONAL HUMAN RIGHTS

Eu-Fern Lai*

The prevalence of authoritarianism has ostensibly contributed to the resistance of non-Western states in embracing ideas of international human rights. An argument commonly invoked in reverse is such that international human rights are inherently incompatible with non-Western value systems, ideologies and cultures. This is particularly true regarding China and its ruling government, the Communist Party of China (CPC). This essay firstly evaluates whether Chinese culture, morality and values are indeed incompatible with human rights, and concludes that authoritarianism presents a great obstacle to the realisation of the human rights ideal in the Chinese context – where the *greatest* obstacle is the tendency for the CPC rely upon 'Chinese culture and values' as justification for and foundation of its authoritarian practices. This essay will go on to examine the CPC's attempt to reshape the discourse of international human rights in light of its cultural relativism argument, which has become a key feature of its relatively recent engagement with the various regimes of international law. It therefore posited that the authoritarian spirit of China's expansion poses the greatest threat to not only the realization of the human rights ideal in China, but also internationally with regards countries that now 'look to the East.'

As a starting point, it is useful to distinguish between what constitutes an authoritarian regime as opposed to authoritarianism. An authoritarian regime is characterized by several defining traits, advanced by Juan Linz over half a century ago, namely: limited, non-responsible, political pluralism; the absence of an elaborate and guiding ideology; the absence of intensive and extensive political mobilization; and lastly, the exercise of power within

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formally ill-defined yet predictable limits by a leader or small group[1]. Conversely, authoritarianism is centred on 'practice', which allows a broad interpretation so as to move away from a focus on state structures – this recognizes that authoritarianism is not found only within a ruling state government, but within contemporary politics, governance arrangements and even communities[2]. This essay therefore adopts a practice-focused definition of authoritarianism, such that it does not necessarily regard the actions of the CPC state to be the product of a single-minded entity, but rather a "hodgepodge of disparate actors"[3] who may possess different ways of operating premised on similar (yet non-identical) ideas and values.

CULTURAL RELATIVISM OR UNIVERSALISM?

The idea of distinct non-Western values, ideologies and cultures is embedded in discourses of cultural relativism, contrary to the presumed Western notion of human rights universalism as an ideal. Central to Confucian thought as the root of Chinese culture is the principle of filial piety underpinning social interaction, such that individuals are regarded as serving the purposes of their parents, families, and above all, society; as Rosemont[4] observes, individuals become the totality of roles that they live in relation to others, and there should be no life lived as if one were in abstract isolation. The individual's relationship to society and therefore the state becomes characterised by duty, lying in obvious opposition to the individualistic human rights ideal of intrinsic possession of certain entitlements originating in Western liberal thought.

[1] Juan Linz, 'An Authoritarian Regime: Spain' in Erik Allardt and Yrjo Littunen (eds), '*Cleavages, Ideologies, and Party Systems' Transactions of the Westermarck Society* (No.11, Helsinki: The Academic Bookstore, 1964) 291-341.
[2] Marlies Glasius, 'What authoritarianism is… and is not: a practice perspective' (2018) 94 International Affairs 523.
[3] Rachel Stern, and Kevin O'Brien, 'Politics at the boundary: mixed signals and the Chinese state' (2012) 38 Modern China 191.
[4] Henry Jr. Rosemont, 'Rights-bearing Individuals and Role-bearing Persons*'* in Chun-chieh Huang (eds), *Confucian Role Ethics: A Moral Vision for the 21st Century?* (V&R Unipress 2016) 52.

Although theorists such as Lo Chung-Sho[5] posit that Chinese culture had indeed in this way developed an early concept of human rights, one cannot negate the fact that whatever semblance of a human right it produced was qualified heavily by whether such persons had firstly lived up to the moral and social codes of their community – the right in question is not imbued in one's personhood nor humanity, but is a right to be earned. By virtue of this very caveat, Confucianism "runs the risk of fostering conventionalism" and "its teachings are accused of denying selfhood, or else of reducing selves to social functionaries and pliant tools".[6] In such a communal context, rights have meaning only when framed in terms of the responsibility the individual firsts owes to others. As such Donnelly[7] accurately draws a line between Confucian 'rights' and international human rights as we know them to be today, where the former merely grants a benefit and the latter bestows a right in terms of a responsibility by the State.

That Chinese traditional thought did not have an explicit construction of human rights inherent in personhood[8] forms part of the basis for rejection of the human rights ideal in China. An overarching narrative of moral and cultural relativism forwarded by the CPC[9] places emphasis on China's unique political, cultural, social and economic history as the key to the inapplicability of human rights. Xie and Niu[10] in line with this reasoning advance the idea that the universal principle of civil society is such that the individual is not entitled to put their interests above that of society – a stark contrast to for example a

[5] Lo Chung-sho, 'Human Rights in the Chinese Tradition*'* in Jacques Maritain *Human Rights, Comments and Interpretations* (Columbia University Press 1949) 186.
[6] Fred Dallmayr, '"Asian Values" and Global Human Rights' (2002) 52 *Philosophy East & West* 173-189.
[7] Jack Donnelly, 'The Universality and Relativity' in Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013) 77.
[8] Stephen Angle, '*Human Rights in Chinese Thought: A Cross-cultural Inquiry*' (Cambridge University Press 2003).
[9] Ann Kent, 'Chinese Values and Human Rights' in Leena Avonius, and Damien Kingsbury, *Human Rights in Asia: A Reassessment of the Asian Values Debate* (Palgrave Macmillan New York 2008) 83.
[10] Bohua Xie, and Lihua Niu, *'The Review and Comments on the Issue of Human Rights'* (JUST International Conference on "Rethinking Human Rights", Kuala Lumpur 1994).

Lockean theory of inalienable, pre-political natural rights.[11] Ironically, this cultural relativist argument is one that collapses unto itself due to inherent self-contradiction: it makes a universalist claim in arguing that tolerance is the ultimate good. Further, although the argument posited by those such as Raimundo Panikkar[12] that human rights is frequently appropriated as a tool of imperialism is not without its merits considering the emergence of neoliberalism in Western states that excessively privileges economic concerns, the CPC has exploited this aspect of the international human rights regime to further a specific agenda focusing on advancing only social and economic rights, as opposed to civil and political rights. Nonetheless, as Donnelly[13] argues, Confucian traditions of communitarian morality are not incompatible with the human rights ideal because cultures are malleable and everchanging. Nathan's concept of 'tempered universalism'[14] allows for the treatment of human rights as fundamentally universal with variation in implementation, opening up doors to reconciling supposedly Chinese values with the human rights ideal. This method of implementing human rights reserves spaces for those who choose to subscribe to Confucian values, while at the same time protecting those who choose to deviate from these norms. In this way traditional Chinese systems, ideologies and cultures need not be sacrificed to implement human rights; nor do they appear to pose a significant obstacle to realisation of the human rights ideal in China.

AUTHORITARIANISM AND THE INSTRUMENTS OF INTERNATIONAL LAW

As discussed, one can hardly make a convincing argument such that Chinese morality is wholly different and irreconcilable with human rights – how

[11] John Simmons, *A Lockean Theory of Rights* (Princeton University Press 1992) 68-120.
[12] Raimundo Panikkar, 'Is the Notion of Human Rights a Western Concept?' (1982) 30 *Diogenes* 75-102.
[13] Donnelly (n 7) 107.
[14] Andrew Nathan, 'Universalism: A Particularistic Account' in Lynda Bell et al *Negotiating Culture and Human Rights* (Columbia University Press 2001) 349-268.

then does such an idea prevail? Authoritarianism in China perhaps poses the greatest obstacle to the realisation of the human rights ideal *because* of its use of Chinese moral values and culture to justify itself, and by extension, its rejection of international human rights. Coupled with its firm stance on absolute state sovereignty and non-interference, the CPC has thus far mostly enabled itself to escape international isolation while also reaping the benefits of joining a global community. It is therefore no surprise that despite its long-standing animosity towards international human rights, the CPC has become increasingly attuned to the benefits of being a permanent and proactive presence on the international plane. Its launch of a "wholesale campaign to reshape the rules and instruments of the international human rights system"[15] is a powerful attempt to alter the discourse of international human rights by presenting itself as both the archetype of a previously overshadowed nation consumed by the hegemony of colonial Western powers, and as the "leading voice of the Global South."[16] In doing so, the CPC toys with the many arms of international law through its membership of international bodies and use of bilateral foreign aid treaties. China's accession to the World Trade Organization signified the start of its marked efforts to re-join the international community[17] and improve its global reputation after being deemed a pariah state after the Tiananmen Square Massacre, in which its suppression of a student-led pro-democracy movement produced deaths ranging in estimate from hundreds to thousands.[18] In the immediate aftermath of the Massacre, it suffered numerous sanctions and the freezing of loans it had so far acquired to address the economic devastation of its earlier Cultural Revolution[19]. Widespread condemnation of its handling of

[15] Ted Piccone, '*China's Long Game on Human Rights at the United Nations*' (2018) Foreign Policy at Brookings, Brookings Institution.
[16] Yu-jie Chen, 'China's Challenge to the International Human Rights Regime*'* [2019] 51 *International Law and Politics* 1179.
[17] Qin JY, 'Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*'* (2007) 191 *The China Quarterly* 720.
[18] Timothy Brook, 'Quelling the People: The Military Suppression of the Beijing Democracy Movement*'* (*Stanford University Press* 1998) 154.
[19] Jean-Pierre Cabestan, 'How China managed to de-isolate itself on the international stage and re-engage the world after Tiananmen' in J-P Beja (ed), '*The Impact of China's 1989 Tiananmen Massacre'* (Taylor and Francis 2010) 194-205.

human rights would later fuel the concerted effort on the CPC's part to address this issue by way of proposing an alternative narrative of human rights, built upon a years-long campaign to fight for a principle of non-interference in its domestic affairs that is now reflected in all aspects of its international agenda.[20]

REPURPOSING THE UNITED NATIONS

Although the United Nations was "born plural and decentralized and was never intended to approximate a formal world government",[21] it remains one of the key institutional frameworks on a global level through which states can be held accountable. Its many-pronged structures allow for a range of solutions, both legally binding and non-binding, to be sought. As one of its organs, the United Nations Human Rights Council is responsible for upholding human rights internationally. This is bolstered by its Universal Periodic Review, which serves to evaluate the human rights record of member states by conducting individual reviews of each on the basis of several instruments including the Charter of the United Nations and the Universal Declaration of Human Rights. Via a group feedback approach the UPR also allows states to present recommendations to others on specific points while highlighting any particularly positive elements. Although engagement with the Universal Periodic Review does not directly produce legal effects, it has been indicated that if documents such as state national reports can constitute *opinio juris*, the UPR would "accelerate the forming of new customary law" since a country's acceptance of recommendations can be "interpreted as a binding unilateral act, which establishes autonomous obligation of the relevant state."[22] In other ways, states "[demonstrate] on the international plane that they are willing to alter their

[20] Chen Zheng, 'China Debates the Non-Interference Policy' (2016) 9 *The Chinese Journal of International Politics* 349-374.
[21] TG Weiss, DP Forsythe, RA Coate, and KK Pease, '*The United Nations and Changing World Politics*' (Routledge 2019) 1.
[22] Bjorn Ahl, 'The Rise of China and International Human Rights Law' (2015) 37 *Human Rights Quarterly* 637-661.

human rights practices and laws",[23] which places the UPR in position to "encourage compliance with international human rights law."[24] It is therefore no surprise that China's tendency to reject outright many of the recommendations made to it is a move borne out of caution. However, this aspect of its engagement should not overshadow the fact that the CPC utilizes the UPR as both sword and shield. In an analysis of its first review in 2009, Ahl noted that China's rejected recommendations tended to originate from European countries as well as Australia and New Zealand – on the other hand, few recommendations from Asian or African countries were rejected.[25] Its statements and recommendations on other States also tended to focus on economic and social rights while side-lining civil and political concerns.[26] Overall, China tended to make a low number of recommendations compared to Western European nations with the marked exception of its approach to the United States.[27]

Its most recent review in 2018 marked a significant improvement in the number of acceptances it made, totalling 284 – but the majority of its 'noted' recommendations, which were in other words rejected, again originated mostly from Western countries including those in Europe, as well as Australia, New Zealand and the United States. [28] All of the recommendations made by the United States were rejected.[29] The majority of the rejected recommendations overall concerned the human rights abuses of groups including the Uyghurs, Tibetans, and Falun Gong, as well as China's treatment of human rights defenders and its use of the death penalty.[30] The pattern of rejecting

[23] Frederick Cowell, 'Understanding the legal status of Universal Periodic Review recommendations' (2018) 7 *Cambridge International Law Journal* 164-184.
[24] ibid.
[25] Ahl (n 22) 653.
[26] ibid.
[27] ibid.
[28] United Nations Human Rights Council, Universal Periodic Review '*Responses to Recommendations: People's Republic of China*' (2019) < https://www.upr-info.org/sites/default/files/document/china/session_31_-_november_2018/2rps_china_31upr.pdf> accessed 13 January 2021.
[29] ibid.
[30] ibid.

recommendations revolving round civil and political rights has therefore remained central to China's responses to the UPR, possibly reflecting its wider rejection of interference it regards as originating West. Nonetheless, the improvement in its number of acceptances is a reflection that the UN human rights agenda need not purely be Western – the idea that UN contemporary "global agenda [is] developed and nurtured by both… developed and developing countries"[31] is crucial to the CPC's long-game with the systems of international law. It is significantly "easier for Chinese leaders to state that they were conforming to the UN standards or to the wishes of the international community rather than to the wishes of the Western countries",[32] particularly if such UN standards can be moulded with ease.

Indeed, the soft power and influence that China possesses over a range of other countries is worrying. China's position as a permanent member of the UN Security Council together with support from the Like-Minded group of countries (who also have a record of human rights abuses and instances of authoritarian rule[33]) has also lent it power to abuse international human rights law in opposing all country-specific resolutions to address serious human rights issues. Countries such as Malaysia and Singapore in particular who have a history of professing distinct 'Asian values'[34] in doing so further legitimize the East/West dichotomy and its pattern of using related discourses to deflect criticism. The CPC utilizes such polarities, ironically relying on anti-imperialist, post-colonial thought to further detach itself from the international plane of accountability – exemplified for example in the CPC's recent rejection of the Human Rights Watch 2020 survey of global human rights, its Foreign Ministry spokesman claiming that only Chinese people were best suited to judge the

[31] Surya P Subedi, 'China's Approach to Human Rights and the UN Human Rights Agenda' (2015) 14 *Chinese Journal of International Law* 437-464.
[32] ibid.
[33] Garry Rodan, 'Accountability and Authoritarianism: Human Rights in Malaysia and Singapore' (2009) 39 *Journal of Contemporary Asia* 180-203; Haris Azhar, 'The Human Rights Struggle in Indonesia: International Advances, Domestic Deadlocks' (2014) 11 *International Journal on Human Rights* 227-234.
[34] Boo Teik Khoo, 'The Value(s) of a Miracle: Malaysian and Singaporean Elite Constructions of Asia' 23 *Asia Studies Review* 181-192.

human rights situation in China.[35] It therefore follows that China's firm narrative within the UPR reflects related discourses of rights for developing countries which are often framed as a "tension between economic and social rights versus civil and political rights",[36] where Western countries are often deemed to prioritise the latter. Nonetheless, the remoulding of UN norms is not a feat easily achieved by a single outlier – to which the solution lies in China's relationship with other countries it considers equally wronged by the West.

LOOKING TO THE EAST

In their acceptance of the centrality of human rights in the modern world (but a rejection of its core concept as being rooted in individual rights), the CPC sought to introduce a version of human rights that was seemingly more compatible with domestic culture by presenting 'human rights with Chinese characteristics'. In 2018 when China presented its resolution on 'Promoting the International Human Rights Cause Through Win-Win Cooperation' at the United Nations Human Rights Council in Geneva, it framed the growth of international law and its constituent arms of human rights concerns as an "expansion and enlargement of the embedded gene of European ideas"[37] for the benefit of not just itself, but for the many other nations who had sought to establish themselves as being precluded from international notions of human rights. Hand-in-hand with its increasing number of foreign aid investments over the last two decades, the CPC seems to have further promoted the spirit of authoritarianism in the course of contemporary engagement most prominently in Sino-African relations. For example, Wang asserts that China's no-questions-asked signing of such bilateral treaties has "emboldened Sudan and undermined

[35] Sanya Mansoor, 'China Refutes Human Rights Report, Insists The Country's Record Is At Its Historical Best' (Time 2020) <https://time.com/5765467/china-hrw-human-rights-report/> accessed 13 December 2020.

[36] Yvonne Tew, 'Beyond "Asian Values": Rethinking Rights' (2012) Centre of Governance and Human Rights Working Paper 5, University of Cambridge Centre of Governance and Human Rights.

[37] Zhengqing Yuan, Zhiyong Li, and Xiaofei Zhufu, 'China and the Remolding of International Human Rights Norms' (2017) 38 *Social Sciences in China* 25-46.

international efforts to stop the then continuing atrocities in Darfur",[38] while Robert Mugabe's numerous military crackdowns and nonchalant attitude towards international sanctions were said to have been supported by backing from China.[39] In reverse, such countries are keen to support China in deflecting international criticism on its management of human rights. In 2019, a statement presented to the United Nations Human Rights Council saw 54 countries (including Sudan, Uganda and Zimbabwe) backing the CPC's policies on the Hong Kong National Security Law.[40] In a similar vein, many of these 54 countries also backed the CPC against criticism on its handling of the Xinjiang human rights abuses against the Uyghur peoples.[41] A reprisal of such supporting statements was made again in late 2020, submitted by Cuba's representative on behalf of 45 countries[42] that again included the aforementioned African nations receiving significant amounts of aid from China. It becomes clear that the relationship between China and its African associates poses an obstacle to upholding the rule of law and international human rights by distorting important institutions of accountability.

Nonetheless, the relationship is one of imbalance. The soft power that China holds in such countries is not so blatantly acknowledged by its ruling government – in much of its foreign aid policy material, the language used reiterates 'win-win' situations, 'mutual benefit' and 'friendship' as opposed to 'charity'. Osondu-Oti points out that in this way China "maintains that it

[38] CK Wang, 'Fueling Ethnic Cleansing in Darfur' (2005) 2 *China Rights Forum* 85-90.

[39] Adaora Osondu-Oti, 'China and Africa: Human Rights Perspective' (2016) 41 *Africa Development* 49-80.

[40] Shannon Tiezzi, '*Which Countries Support China on Hong Kong's National Security Law?*' (The Diplomat 2020) <https://thediplomat.com/2020/10/which-countries-support-china-on-hong-kongs-national-security-law/> accessed 13 January 2021.

[41] ibid.

[42] Catherine Putz, '*2020 Edition: Which Countries Are For or Against China's Xinjiang Policies?*' (The Diplomat 2020) <https://thediplomat.com/2020/10/2020-edition-which-countries-are-for-or-against-chinas-xinjiang-policies/> accessed 13 January 2021.

remains a developing country with low per-capita income and a large poverty-stricken population; thus its foreign aid is suited both to its actual conditions and the needs of recipient countries."[43] This deliberate portrayal as opposed to one that would reflect the realities of its continuing ascension to becoming a world superpower is an effort to distinguish itself from any Western democracies that seek to provide similar financial assistance to developing nations. The CPC's ideological basis for doing so has not gone unnoticed, as echoes of its neo-coloniality reverberate in sources ranging from mainstream media to academic criticism. Irregardless it seems that any form of neo-colonialism levied on such countries will not outweigh a beneficial relationship, as it fortifies growing disregard for international standards of human rights and its enforcing institutions.

CONCLUSION

It is difficult to ignore that China's focus on national self-determination as basis for the non-implementation of international human rights, although possibly a tactic to justify authoritarian governance, is premised upon similar Western discourses of democracy. But the tenacity with which the CPC defends its rule by invoking seemingly unquestionable issues of cultural relativism renders such forms of authoritarianism one of, if not the most significant obstacle to the realisation of the human rights ideal in non-Western states. As such one should be careful not to conflate the authoritarianism of Chinese government with Chinese value systems, ideologies and culture, and render the latter irreconcilable with individual human rights – an amalgamation made too often by the CPC with increasing success. Compounded by its growing role on the international plane, and the introduction of a brand of 'Chinese' human rights, the CPC's ability to deflect attempts to hold it accountable for abuse also guarantees states elsewhere of a tenable approach to escaping the scrutiny of international law. It remains to be seen whether the CPC will be wholly

[43] Osondu-Oti (n 39) 70.

successful in modifying what constitutes human rights, but if its growing influence is any indication, the regimes of international human rights law are at severe threat.

AFTERWORD
Emily Wolf

Thank you for making it to the end of the third volume of the City Law Review; I hope you enjoyed the pieces as much as the editorial board has. I believe this year's edition reflects the vast scope of interest areas and specialisations here at the City Law School. This volume truly encompasses the wide variety of practice areas and interests being studied at City. I would like to thank the authors for their unique and interesting contributions as well as those who submitted a piece that was not able to be included. The interests of the student body are what keep this review alive and growing.

The Law Review has looked slightly different this year; our meetings have had to take place over multiple continents and various time zones, as the pandemic has kept us from meeting in person and kept some of us from returning to the United Kingdom. I would like to take a moment to acknowledge the dedication of the editors and thank them for being no less committed, despite the difficult circumstances.

The Editorial Board and I would also like to take the time to thank the City Law School, the Dean, and our academic advisor Dr David Seymour for supporting this year's volume. It would not be possible to create this project without their support and guidance. I would also like to thank the handful of academics that help ensure the quality of this project by reviewing the pieces prior to publication. Their support and guidance reflect the collaborative spirit of the City Law School.

I hope you have enjoyed reading Volume III of the City Law Review and that you will return to its pages many times.

Yours faithfully,
Emily Wolf
Publishing Editor