York Law School — University of York


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# EDITORIAL BOARD
# VOLUME II

# FOREWORD
# by Professor Caroline Hunter
# Head of York Law School

It gives me great pleasure to provide this Foreword to the second volume of the York Law Review. I do so in a time of uncertainty and change.

Uncertainty because of COVID pandemic. This has clearly meant different ways of working and learning in the last 18 months. I want to congratulate the student editors in publishing this volume in such difficult circumstances. The team has been expanded this year, and no doubt that has helped, but it brings its own challenges as meetings are moved on-line and quick chats have to the scheduled.

Beyond the editorial team, COVID has brought changes to University teaching and learning. For much of 2020–21 the Law School's teaching has been entirely on-line. One of the defining elements of York Law School is the use of problem-based learning (PBL) for all of our undergraduate core modules — the question posed by COVID was whether we could translate that form of learning into the virtual classroom. It is lovely to read Fraser King's article — 'It's Not All Zoom and Gloom: Reflections of University Study during COVID-19' — reflecting on his experience as both an LLM student and a graduate teaching assistant.

The pandemic has brought huge legal changes both in the UK and across the world. In line with the Law School's research focus on socially engaged research, members of staff at the School has been involved in different projects probing COVID and the effects of the law for the public, particularly the vulnerable in our society. That will be published in the next few months. This volume came too early for our students to write in their dissertations about the legal changes that COVID has brought. However, I look forward to dissertations on the topic this year

and in future years and I hope some will find their way into the Review in future volumes.

I am sure some will come from our LLM students, particularly from our students based in the Centre for Applied Human Rights (CAHR) taking the LLM in International Human Rights Law and Practice. I am very pleased that this volume includes more from our LLM students than the first. The timing for our taught post-graduate dissertation did not allow for any to be included in that volume. This second volume has enabled a number of these to be showcased, including the empirical projects undertaken by students at CAHR.

Another change this year is more personal. This is the last Foreword I will write as Head of School as my term of office ends in September. I know that the School is in great hands with my successor Professor TT Arvind. Over the eight years of my term of office the School has grown hugely. In 2013 we had 376 LLB and 16 LLM students, this undergraduate number has now more than doubled to 724 and the LLM numbers are five times bigger at 70 students. Growth is challenging but it allows the School to invest in student projects like the Review. It also challenges us to consider how our values can be maintained. In the first Foreword to the Review I commented that:

> The starting principle in our culture is that YLS is a learning community in which staff and students are active participants. The Review is new venture that reflects this culture: it is a collaboration between students and staff and shows the active learning of our students particularly the research that goes into a dissertation.

This volume continues to demonstrate that core value of the Law School. I have every reason to believe that like the School, the Review will continue to grow and flourish in the hands of our students.

Caroline Hunter
June 2021

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# EDITORIAL: PUBLISHING IN THE 'NEW NORMAL'

Carl Makin and Sam Guy

For everyone, the past year has been incredibly challenging. The COVID-19 pandemic has had wide-ranging effects and has exacerbated existing societal injustices and inequalities. It has also brought with it radical implications for the workplace, many of which will surely be grappled with and developed long after the pandemic has passed. Invariably, this context has brought with it many difficulties for the operation of the York Law Review, particularly given that, having been established in 2019, it is so nascent in form. Despite – and, indeed, especially in light of – these unique challenges, it gives us great pleasure to introduce the second volume of the Review.

This volume shows the development of the journal, as we move from our inaugural volume to this second and indeed more mature collection of papers. The volume goes further to showcase the variety of scholarship undertaken and taught at the York Law School. It exhibits how the School is not only pedagogically innovative, but that its methodologically diverse staff pass on their skills and expertise to students in a way which sponsors and encourages an equally diverse level of scholarship within the student body.

This volume can be neatly divided into two halves. The first seven pieces are doctrinal and theoretical in nature. They examine and analyse a wide variety of legal fields – from criminal culpability in cult environments to international protocols on the patenting of traditional knowledge relating to plants where this can be used for medicinal or other commercial purposes. In interrogating this wide field of subjects, the papers presented in this volume go beyond simply ordering our understanding of law and legal provisions. Instead, they often

problematise and challenge the extant provisions. Some, such as Amy Butler's piece on the Overseas Operations Act, do so through historicism and deploy historical happenings as a challenge to current thinking. Comparably, Stephanie Cohen's piece on hair discrimination deploys both an element of historicism and a racial lens to argue that notions of 'ideal hair' are perpetuated in the professional world through institutional policies and are inadequately dealt with in equalities legislation. The latter paper was the chosen submission from our postgraduate essay competition, which asked students from across the York Law School's postgraduate taught programmes to discuss a recent development in the law. In the parallel competition for undergraduate students, Jakub Kozlowski's paper was selected. This piece examines the contentious decision in *Weiss II*, where Germany's national Federal Constitutional Court declared a preliminary ruling of the Court of Justice of the European Union invalid. Jakub situates the judgment within a growing trend whereby Member States have felt increasingly empowered to disregard EU law when it conflicts with national agendas, in contravention of the long-established concept of the supremacy of EU law, and suggests that this may set a dangerous precedent in light of States such as Poland and Hungary facing internal rule of law crises. Both Stephanie's and Jakub's respective papers exemplify the vision for the competitions process, showcasing the capacity of the Law School's student body to engage with the multifaceted role of law in pressing social issues.

Some of our papers, such as Laura Burke's piece on conscientious moral objection and the Iraq war, draw on theoretical and philosophical arguments to deal with contemporary issues – in this case, the question of whether Katharine Gun, the former Government Communications Headquarters (GCHQ) linguist, could be prosecuted under the Official Secrets Act 1989. The popular importance of these issues is evident in the fact that the saga was turned into a film, *Official Secrets* (2019) starring Keira Knightley. Laura's work here tackles the tension between legal obedience and moral obligation. In a similar vein, Max Williams' piece provides an engaging examination of Dworkin's moral reading of

the United States Constitution. Through a thorough treatment of three scholars' criticism of Dworkin's work, Max convincingly argues that Dworkin's approach maintains fidelity to the Constitution's text whilst also protecting minority rights and democratic interests.

The second half of this volume moves away from the doctrinal approaches taken above. The first piece here by Fraser King continues the praxis set in Volume I of showcasing the reflective approach taken to teaching and learning at the York Law School. The author here has a somewhat unique hybrid position as both a graduate teaching assistant and student, and through this position is able to provide an intriguing reflection on the challenges and opportunities COVID-19 has presented for the law school. The final two pieces signal a slight departure from the methodological approaches taken by York Law Review authors so far. Nabila Okino's and Ella Allen's respective articles both draw on empirical studies conducted as part of the LLM in International Human Rights Law and Practice offered by York Law School and the University of York's Centre for Applied Human Rights (CAHR). These are the first CAHR pieces published by the Review, and illustrate not only the global scope of legal scholarship undertaken, but also the depth of empirical and socio-legal scholarship embedded in the syllabus.

In keeping with the aforementioned reflective emphasis at the York Law School, we felt it important that we should reflect on the growth of the journal as it moves into its second volume. This volume represents an expansion in many ways. In its most basic and quantitative sense, the number of papers included within the journal has grown from six in its first iteration to ten in the current volume. Whilst this has increased the collective workload for the editorial team, the additional strain has been alleviated by a considerable expansion in the team – from two editorial members in the first volume to six in its second year. In light of ongoing restrictions in response to the pandemic, this process has occurred largely through the now-notorious medium of video-conferencing meetings on Zoom. Indeed, it has been a quirk of the year that, as a team, we have spent lots of time in meetings

and resolving one another's queries, but have had almost no face-to-face contact whatsoever. The task of embedding an effective structure within this larger team, with clear lines of communication and appropriate workload allocations, has been a challenging but vital process in the journal's move towards increasing maturity. We have made sure to recognise both where our approach has been effective, and where there have been mistakes and experiences from which we can learn, with at least one eye on future editions. That a sustainable dynamic within the team has been achieved in an entirely online context is to be celebrated.

Indeed, communication and learning have been vital elements of the past year for the journal. It is easy to overlook in hindsight the importance of setting up the right platforms for teamwork in the 'new normal'. As a team, we found that Trello, a shared task board software that operates much in the same way as a traditional team whiteboard, was an essential tool for setting up a workflow and ensuring that papers progressed through our editorial stages with an appropriate level of speed. It also allowed us to quickly pick up papers where there were particular issues and update each other on progress without clogging our inboxes with e-mails or our calendars with unnecessary meetings. Overall, this year has been about establishing a balance. Establishing a balance within our new, larger team to ensure that the workload is equitably distributed, but also a balance in terms of ensuring that work on the York Law Review is compatible with our own studies. This is an ongoing learning process, and our colleagues in the editorial team will attest to the fact that we have all felt overwhelmed at times by the level of work involved in bringing this volume to publication. As we move forward, we will continue to work towards more sustainable ways to run the journal throughout the academic year and to spread the workload at the 'pressure points' we experience. We want future editorial teams to inherit a journal with strong and manageable structures that help them to showcase the excellent academic work that takes place at York Law School.

To that end, we want to acknowledge the sustained, gargantuan efforts made by our editorial team colleagues throughout the year. Through their collective hard work and steadfast commitment to bringing this volume to publication in its best possible form, we have produced a collection of papers that we are all truly proud of. Alongside that, despite rarely meeting face-to-face given the current public health situation, we have also built an incredibly strong and supportive team dynamic. This camaraderie has helped us through the twists and turns that have come with producing this volume, and is a reflection of the truly exceptional team that we have had the honour to be a part of.

On a final note of thanks, we would also like to extend our gratitude to our staff editorial board. Throughout the year, they have acted as a rudder by providing us with direction, encouragement and support. Our thanks first go to Dr Sue Westwood, who has generously given her time on numerous occasions to scrutinise our work and provide the editorial team with such high quality and thought-provoking reviews. Our thanks also go to Martin Philip, the York Law School liaison librarian, who also sits on our board, for providing excellent support throughout the year on matters relating to the publication, marketing, and dissemination of this volume. Our thanks to Dr Jed Meers, whose encyclopaedic knowledge of the University of York as well as his previous experience of editing a student journal have been invaluable throughout this process. And finally, a special thanks to the chair of our board, Professor Caroline Hunter. The York Law Review is Caroline's brainchild, and as she nears the end of her term at the head of York Law School, we hope that this volume and the many other volumes to come in the future will be a source of pride for her as one of the many successful ventures inaugurated during her time in office.

# Understanding Jonestown: The Criminal Liabilities of the Port Kaituma Airstrip Shooting and Jonestown Massacre

Charlie Tye

**Abstract**

This article explores the extent to which those in a cult environment can be said to be responsible for their actions, and whether unlawful acts should instead be attributed to a controlling mind. It focuses on the Peoples Temple, a cult headed by Jim Jones. In 1977, Jones moved his followers to a remote settlement in Guyana, known informally as Jonestown. Conflict with authorities culminated in Jones ordering the assassination of a US Congressman at the Port Kaituma airstrip. Shortly thereafter, Jones ordered a mass suicide involving nearly 1,000 Jonestown residents. This paper argues that Jones could be held criminally responsible for the deaths at both the airstrip and at Jonestown. Firstly, by reviewing the literature on coercive persuasion, this paper suggests individuals within the Peoples Temple might be analogous to non-autonomous robots, incapable of criminal responsibility. Automatism is posited as a defence, and the existing principles of causation can be interpreted to attribute the airstrip shooting to Jim Jones, thought to be the controlling mind. Secondly, by dividing the victims of the Jonestown massacre into three theoretical classes, the article argues that the deaths, despite some superficial willingness, were not voluntary acts and, instead, Jim Jones was the factual and legal cause of death. On this account, the Jonestown Massacre would be an act of murder. A lacking historical account leaves this article hesitant to make definitive claims of guilt or innocence, but a sufficient philosophical and doctrinal argument exists for murder charges to be put to a jury.

# 1 Introduction

Jonestown, formally known as the Peoples Temple Agricultural Project, was a remote jungle colony in Guyana established by Jim Jones in 1973. Jones, a political activist turned cult leader, hoped to build a self-sustaining commune for the followers of his Peoples Temple. This imagined paradise resulted in approximately 1,000 members, led by Jones, settling in Guyana.

Allegations of abuse within the commune attracted the attention of United States (US) Congressman, Leo Ryan, who, with his entourage, visited Jonestown on 17 November 1978. Only one day later, Congressman Ryan sought to leave Jonestown with approximately twenty defecting members of the Peoples Temple. In response, Jones ordered his armed security detail, the Red Brigade, to ambush the congressional party. At the Port Kaituma airstrip, the Red Brigade opened fire, ultimately killing Congressman Ryan and four others, and seriously wounding eleven more. This event has come to be known as the Port Kaituma Airstrip Shooting.

Back in Jonestown, Jones ordered his remaining followers to die by 'revolutionary suicide' – thought to be the ultimate act of self-sacrifice to defy the cruel injustices in the world. When the Guyanese Defence Force entered the settlement the following day, they found 909 bodies. This event became an international sensation, responsible for the largest loss of American life in a non-natural disaster until 9/11, known infamously as the Jonestown Massacre.

Before these events are contextualised further, it must be recognised that there are inescapable limitations to understanding Jonestown. Professor Rebecca Moore, co-founder of the Jonestown Institute, has long argued that the Jonestown Massacre is clouded by the myth that all victims were gullible individuals manipulated into suicide by a malevolent cult leader, which has arguably stunted academic

investigation.[1] Even now we do not have a complete account of the historical record.[2] As the flow of information was concentrated in the hands of Jim Jones, he was the only person with a complete picture.[3] Further, anyone who could shed light on our unanswered questions died in Guyana. This has been described this as the 'Jonestown Vortex', for any answer inevitably invites further questions, meaning subsequent academic work will, at least partially, be based on assumption, hypothesis or conjecture.[4]

Despite the gaps in our understanding, Jonestown invites pertinent questions of criminal responsibility, autonomy and capacity. To what extent were members of the Peoples Temple responsible for their actions? Did those who died by revolutionary suicide do so of their own volition? And, fundamentally, to what extent should we attribute the acts of seemingly autonomous moral agents to a secondary 'controlling' mind? In answering these questions, this article seeks to identify legal principles that could be widely applied to determine the criminal liabilities of influencers for the unlawful acts they inspire.

This article naturally encounters questions of free will and acknowledges there are those who will not accept the philosophical argument presented. To be clear this paper operates on a compatibilist account of responsibility and of the criminal law. Simply put, whether human beings have free will in a deterministic sense does not undermine our capacity to assign moral responsibility or blame.[5] For the purposes of this paper, the question of whether the individuals analysed are capable of being responsible for their actions is independent of wider questions of free will. While scepticism of moral

[1] Rebecca Moore, 'Is the Canon on Jonestown Closed?' (2000) 4(1) Nova Religio 7.
[2] ibid 22.
[3] James T Richardson, 'Peoples Temple and Jonestown: A Corrective Comparison and Critique' (1980) 19(3) J Sci Study Relig 239, 243; Jeff Guinn, *The Road to Jonestown: Jim Jones and Peoples Temple* (Simon & Schuster 2017) 106
[4] Leigh Fondakowski, *Stories from Jonestown* (University of Minnesota Press 2013) 27.
[5] Stephen J Morse, *Compatibilist Criminal Law* (OUP 2013) 125.

responsibility and the controversies surrounding free will pose legitimate arguments, they are beyond the scope of the paper.

### 1.1 Jim Jones

Jim Jones, the American cult leader, established the Peoples Temple in 1955 in Indiana as a multi-ethnic church with an unshakeable emphasis on racial equality. Jones mobilised members of the church to desegregate local businesses, and he and Marceline Jones became the first Indianan couple to adopt an African American child.[6] Later, in 1961, he was appointed human rights commissioner.[7] But, even in these early years, there were signs of the abuse to come. Jones routinely deceived his followers with faith healings and threats of divine retribution should they leave the Temple.[8] In 1965, he capitalised on fears of nuclear war to move his followers to Ukiah, California.[9]

Jones preached a mishmash of theological and ideological positions, which Beck describes as an amalgamation of Christianity, socialism, communism, and atheism.[10] Jones later described his religiosity as a ploy to direct people towards socialism.[11] Jones adapted this theology to serve his own interests, which ultimately manifested in an explicit claim to divinity.[12] Temple Pastor Hue Forston quoted Jones as saying,

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[6] Yael Ksander, 'Moments of Indiana History: Jim Jones' (*Indiana Public Media*, 25 June 2007) <https://indianapublicmedia.org/momentofindianahistory/jim-jones/> accessed 5 July 2020.
[7] Guinn (n 3) 95–101.
[8] Tim Reiterman, *Raven: The Untold Story of the Rev Jim Jones and His People* (Tarcherperigee 2008) 54.
[9] Guinn (n 3) 110.
[10] Don Beck, 'The Theology of Peoples Temple: A View From Inside' (*Alternative Considerations of Jonestown & Peoples Temple*, 25 July 2013) <https://jonestown.sdsu.edu/?page_id=33195> accessed 5 July 2020.
[11] Guinn (n 3) 28.
[12] Reiterman (n 8) 93.

'[I]f you need a father, I'll be your father. If you need a friend, I'll be your friend. If you see me as a God, I'll be your God.'[13]

Jones abused his divine status prolifically; even targeting devotees for sexual favours was on theological grounds. Representing himself as a god, Jones was the epitome of desire and the honour of having sex with him would inspire loyalty among Temple women.[14] Men were also targeted; Jones claimed to be the world's only heterosexual, and male followers required sexual humbling to overcome their secret homosexuality.[15] David Parker Wise described Jones as using his divine status to seduce young women and dominate any man he felt threatened by.[16]

Jones demanded 10 per cent of a member's monthly income, though he preferred 25. Recruits would sign over their homes, surrender their social security, and donate their possessions to live in Temple communes.[17] Tim and Jean Clancy, both members of the Peoples Temple, described being worked to excess, being told to dedicate everything to the cause, and being so sleep-deprived that questioning Jones was not possible.[18] Jones described his ethos as 'keep them poor, and keep them tired, and they'll never leave'.[19] Control was further exerted through 'catharsis sessions' where adult members were publicly shamed for dissent.[20] Members were conditioned to venerate Jim Jones in all aspects of their lives, and Jones backed that conditioning with force.

[13] Fondakowski (n 4) 67.
[14] Guinn (n 3) 222–23.
[15] Reiterman (n 8) 171–80.
[16] David Parker Wise, 'Sex in Peoples Temple (*Alternative Considerations of Jonestown & Peoples Temple*, 9 March 2013) <https://jonestown.sdsu.edu/?page_id=17014> accessed 3 July 2020.
[17] Guinn (n 3) 181–84, 190.
[18] Fondakowski (n 4) 167.
[19] Guinn (n 3) 195.
[20] Guinn (n 3) 240.

Jones wielded his Planning Commission as a pseudo-judicial system.[21] Drinking alcohol, smoking, interacting with outsiders, and unsanctioned romantic relationships earned Jones's ire. Punishments ranged from public shaming to group beatings or assaults with a rubber hose.[22] Mike Cartmell, who defected from the Temple in 1977, observed Jones forcing members to box before the congregation, one victim being a three-year-old whose own mother encouraged the violence.[23] Vigorous psychological, financial, and extrajudicial control were commonplace within the Peoples Temple. Consequently, members were vulnerable to Jones's coercion, deception, and manipulation long before they reached Guyana.

## 1.2 Jonestown

A string of defections in 1977 exposed the Temple's abusive practices and, to escape scrutiny, Jones began a mass exodus to Guyana.[24] He acquired the Jonestown site in 1974, and established a settlement in 1975, which developed into a small community encased by one of the world's densest jungles.[25]

By September 1977, Jones had moved nearly 1,000 members to Jonestown.[26] Jones's eldest son, Stephan, attested to widespread discontent when settlers realised their tropical paradise was much less than advertised.[27] Jonestown was not ready for such a large influx of people; it was immediately overcrowded and food supplies were

[21] Fondakowski (n 4) 179.
[22] Guinn (n 3) 192, 285.
[23] Mike Cartmell, 'Why We Left' (*Alternative Considerations of Jonestown & Peoples Temple*, 25 July 2013) <https://jonestown.sdsu.edu/?page_id=31351> accessed 3 July 2020.
[24] ibid 331–40.
[25] Guinn (n 3) 2–5.
[26] Reiterman (n 8) 337.
[27] Fondakowski (n 4) 202.

heavily constrained.[28] Everyone surrendered their passports and personal belongings, whilst Jones deployed armed guards to deter defectors.[29] To many, life in Jonestown was characterised by backbreaking labour, primitive surroundings, limited rations, strict rules, and the absolute power of Jim Jones.[30]

Discipline reached new heights in Jonestown.[31] Those who violated his rules were subjected to group beatings, social ostracisation, or degradation in the Public Service Crew, meaning members were often afraid of everyone around them. In extreme cases, adult members were confined to a sensory deprivation box and buried underground.[32] In one instance, two escapees were recaptured and held in leg irons for several weeks.[33] Eventually, Jones established the Extended Care Unit, where troublemakers would be drugged.[34] Defiance in Jonestown was punished harshly, and residents had every reason to be afraid of disobeying Jones.

## 1.3 White Nights

As Jones described it, his flock narrowly escaped the terrors of the United States, where, Jones claimed, the Ku Klux Klan was ascendant, fascism had all but taken over and military leaders were planning for the genocide of African Americans.[35] To keep the threat alive, Jim Jones Jr assisted his father in faking two assassination attempts.[36] Jones then flew a private investigator to the commune, who made outlandish

[28] Guinn (n 3) 355.
[29] Guinn (n 3) 75; Reiterman (n 8) 451.
[30] Guinn (n 3) 365.
[31] Guinn (n 3) 365.
[32] Reiterman (n 8) 334–35, 393–94.
[33] Guinn (n 3) 386.
[34] Reiterman (n 8) 450.
[35] Reiterman (n 8) 451; Guinn (n 3) 360.
[36] Fondakowski (n 4) 157–58.

claims about leading armed mercenaries to the compound.[37] Jonestown was rife with fear and tension; everyone expected an attack from anywhere at any time.

This tension culminated in the 'Six Day Siege'. Owing to a custody dispute, in which Jones unlawfully retained control of a six-year old child, a Guyanese court issued a warrant for Jones's arrest. In response, Jones called his followers to attention on 7 September 1977 and told them the Guyanese Defence Force would attack.[38] Weapons were distributed and, for the next six days, his followers stood at the perimeter ready to fight fictional invaders. To maintain the illusion of a siege, Jones ordered his security to fire into the compound and proclaimed their willingness to die rather than hand themselves over.[39] The invaders never materialised; Jones was able to have the warrant suspended and declared victory.

As a consequence of the 'siege', in early 1978 Jones began the practice of 'white nights'. When the residents were sleeping, an alarm would be sounded, and Jones would call to them attention. They would be informed that an external threat was poised to destroy Jonestown and that revolutionary suicide was the only solution. Dissenting residents would be identified, and were almost always among the first ordered to die.[40] Vats purporting to contain poison would be produced and everybody was expected to drink.[41] Following ingestion, Jones would announce that this had been a loyalty test and residents would return to

[37] Reiterman (n 8) 439–40.
[38] Guinn (n 3) 372–73.
[39] Reiterman (n 8) 360–72, 391.
[40] Don Beck, 'Murder or Suicide: Coercion or Choice' (*Alternative Considerations of Jonestown & Peoples Temple*, 25 July 2013) <https://jonestown.sdsu.edu/?page_id=31974> accessed 7 July 2020; Michael Bellefountaine, 'Christine Miller: A Voice of Independence' (*Alternative Considerations of Jonestown & Peoples Temple*, 25 July 2013) <https://jonestown.sdsu.edu/?page_id=32381> accessed 8 July 2020.
[41] Guinn (n 3) 388.

bed. The 'white nights' would repeat as a fortnightly routine and, by November, residents knew exactly what was expected of them.[42]

## 1.4 The Jonestown Massacre

Following Jones' exodus to Guyana, several leaked reports detailing the conditions in Jonestown and ongoing legal action attracted the attention of Congressman Ryan. On 13 November 1978, a congressional party flew to Guyana to visit Jonestown.[43] Jim Jones initially resisted but was convinced to allow Ryan into the commune.[44] The congressional party were permitted to speak with whomever they wished, the press interviewed enthusiastic settlers, and Congressman Ryan praised the community to rapturous applause.[45] Whilst the visit appeared to be successful, unbeknownst to Jones, that same evening, Vernon Gosney, a resident of Jonestown, passed a note to a member of the press asking for help in escaping Jonestown. The following day, 26 more residents defected and asked to leave with the Congressman.[46]

Congressman Ryan intended to remain in Jonestown to process any remaining defectors, but was forced to withdraw after a resident, Don Sly, attacked him with a knife.[47] The congressional party left Jonestown with the defectors, but were joined by an armed double agent sent to infiltrate the group. Shortly after they arrived at a nearby airstrip to await evacuation, armed members of Jonestown's internal security, the Red Brigade, pulled onto the tarmac and opened fire.[48] Congressman Ryan, three members of the press, and one of the defectors were

[42] Reiterman (n 8) 399; Dianne E Scheid, 'The Plain Ugly Truth' (*Alternative Considerations of Jonestown & Peoples Temple*, 25 July 2013) <https://jonestown.sdsu.edu/?page_id=31947> accessed 7 July 2020, 63.
[43] Reiterman (n 8) 457–66.
[44] Guinn (n 3) 423.
[45] Reiterman (n 8) 487–503.
[46] Guinn (n 3) 432.
[47] Guinn (n 3) 433–34.
[48] Fondakowski (n 4) 231–33.

killed.[49] Leo Ryan became the only US Congressman to die in the line of duty, while in Jonestown the final 'white night' began.

As with all 'white nights', Jones called everyone to attention. This time, he claimed the threat was real and soldiers would soon descend to destroy Jonestown. To avoid this fate, Jones called for revolutionary suicide.[50] A mixture of cyanide, sedatives, and grape Flavor Aid was administered to the 300 children of the commune.[51] Jones admonished anyone who cried as the children screamed.[52] Vats of poison were presented for the adults to drink. Although it is unknown how many complied with this demand, the residents, one way or another, were put to death. Jim Jones died of a gunshot wound to the head; it is commonly believed to be the result of suicide. In total, including the congressional party, 918 people lost their lives.[53]

## 2 The Port Kaituma Airstrip Shooting

This section examines the criminal liabilities arising from the Port Kaituma Airstrip Shooting and, specifically, the events following Congressman Ryan's withdrawal from Jonestown with several defectors, including the double agent, to the Port Kaituma Airstrip.[54] At the airstrip, armed members of the Red Brigade ambushed the congressional party and opened fire. Simultaneously, the double agent

[49] Fondakowski (n 4) chs 14–15.
[50] 'Death Tape' (*Alternative Considerations of Jonestown & Peoples Temple*) <https://jonestown.sdsu.edu/?page_id=29084> accessed 8 July 2020, pt 4.
[51] Guinn (n 3) 443–47.
[52] Fielding M McGehee III, 'Q042 Transcript' (*Alternative Considerations of Jonestown & Peoples Temple*) <https://jonestown.sdsu.edu/?page_id=29079> accessed 8 July 2020.
[53] Fondakowski (n 4) 3.
[54] Guinn (n 3) 433–34.

attempted to kill several defectors and the pilot before being overpowered.[55] Five were killed and 11 others were wounded.[56]

Jones' intention to kill the congressional party, along with the defectors, can be presumed. In the final Jonestown recording, Jones referenced a plot to shoot down Congressman Ryan's plane and a jury later convicted the double agent of conspiracy to murder, amongst several other crimes related to the airstrip shooting, and he was subsequently imprisoned for 18 years.[57] As Jones and the remainder of the Red Brigade were later killed in the Jonestown Massacre, no further prosecutions were possible. However, working on the assumption that Jones and the Red Brigade targeted Congressman Ryan for assassination, it is argued that five counts of murder and 11 of attempted murder arise from the airstrip shooting.

Murder is committed when a person of sound mind unlawfully kills another creature in being with malice aforethought.[58] The modern interpretation of malice aforethought is a specific intention to kill or commit grievous bodily harm.[59] The fact that the fatal harm intended for Congressman Ryan struck innocent parties changes nothing; the intention to kill can be transferred onto every victim killed or wounded during the shooting.[60] But we must question the extent to which the Red Brigade were capable of criminal responsibility in light of the pressures exerted by the cult. Can the criminal law recognise Jones as the controlling mind behind the shooting? To address these questions, let us begin with the Red Brigade and a theory of coercive persuasion.

[55] Fondakowski (n 4) 231–33.
[56] Fondakowski (n 4) chs 14–15.
[57] 'Death Tape' (n 50); *United States v Layton* 549 F Supp 903 (ND 1982).
[58] 3 Co Inst 47.
[59] *R v Cunningham* [1981] UKHL 5, [1982] AC 566.
[60] *R v Latimer* (1886) 17 QBD 359 (Lord Coleridge CJ).

## 2.1 Coercive Persuasion

Traditionally, coercive persuasion is synonymous with notions of brainwashing, thought control, or the idea that through cultic control one person can be totally subsumed by another. Singer and West developed a theory, building upon earlier research documenting prisoners in re-education camps. [61] Through systematic isolation, exhaustion, deprivation, emotional manipulation, and ritualised peer pressure, coercive persuasion is thought to undermine the victim's sense of identity and they are, ultimately, reconstructed to be subordinate to the will of another.[62] Brown describes coercive persuasion as enabling an indoctrinator to usurp the victim's view of reality and condition them towards specific behavioural patterns.[63] Shapiro analogised this as a form of psychological bondage that strips the victim of the attributes that make them an autonomous human being.[64] They are transformed from independent moral agents into robots subject to a programmer they cannot defy.

Coercive persuasion could be said to have characterised the Peoples Temple long before the exodus to Guyana. Through coercive tactics, members were expected to break with their 'bourgeois' identities and be reconstructed as good socialists, subordinate to the Peoples Temple. In Jonestown, this coercion was escalated; residents became physically dependant on Jones, who ruled the settlement as his personal fiefdom.[65] Their identities were so compromised that Jones could order residents

[61] Louis Jolyon West and Margaret Singer, 'Cults, Quacks, and Non-Professional Psychotherapies' in Harold I Kaplan, Alfred Freedman and Benjamin J Sadock (eds), *Comprehensive Textbook of Psychiatry* (Williams & Wilkins 1980) 3245–58.
[62] ibid.
[63] Laura Brown, 'He Who Controls the Mind Controls the Body: False Imprisonment, Religious Cults, and the Destruction of Volitional Capacity' (1991) 25(3) Valparaiso U L Rev 407, 410–16, 413.
[64] Robert Shapiro, 'Of Robots, Persons, and the Protection of Religious Beliefs' (1983) 56 Cal L Rev 1277, 1279, 1281–82.
[65] Reiterman (n 8) 450; Guinn (n 3) 386.

to write detailed essays on how to torture and kill former loved ones trying to bring them home.[66] It is on this basis it could be argued the Red Brigade were victims of coercive persuasion, reduced from independent moral agents to non-autonomous robots.

Criminal responsibility is contingent upon personhood, which is made up of volition and desire states. Volition describes simple actions, including the functional state by which an individual moves their body in a certain way. For example, it is by Alice's volition that she picks up the gun and pulls the trigger. The desire state describes the specific outcome her volition intended to produce; Alice pulls the trigger to realise her desire of seeing James dead.[67] Alice's volition and desire must be joined to trigger criminal responsibility; neither firing a gun nor desiring another to die is, in and of itself, a criminal offence. In shooting and killing James, Alice's volition has caused the death of another, but this is not sufficient to hold her criminally responsible. Alice must desire to kill or grievously wound to be culpable of murder; alternatively, she could be culpable of manslaughter if she held a different desire state. But, if Alice's volition and desire state are divorced — for example, if her actions are the result of a reflex or involuntary action — she is not culpable.[68]

Coercive persuasion uncouples a victim's volition from their desire state, transforming them into a metaphorical robot who lacks capacity for independent voluntary action. Criminal responsibility is contingent on the capacity to respond to one's own reasoning and modify one's behaviour accordingly. This necessarily depends on autonomy and responsibility. For some, a person has autonomy provided they can choose between multiple courses of action; they are responsible if they

[66] Reiterman (n 8) 428.
[67] Vincent Chiao, 'Action and Agency in the Criminal Law' (2009) 15 LEG 1, 5–6.
[68] ibid 6–7.

can understand and comply with social and legal expectations.[69] Robots, for example, do not have independent reasoning but respond automatically to the reasons of another; they are an extension of a programmer's volition. If the standards by which we propose to scrutinise their behaviour are external to their mode of thinking, robots cannot be morally or legally culpable.[70]

In response to this, Emory proposed a specific 'brainwashing' defence.[71] If coercive persuasion breaks and rebuilds the victim to serve the interests of another, their mental processes and behavioural controls are so impaired that their actions cannot be said to be their own. In law, this may be considered akin to insanity.[72] The victim has no goal beyond appeasing their indoctrinator and acts exclusively to further those interests.[73] It is on this basis that it could be argued the Red Brigade ought to be excused their criminal acts. However, without refinement this defence could be too widely applied.

Coercive persuasion has been partially inspired by Robert Lifton's account of thought reform in communist re-education camps where totalitarian control was present, although its effectiveness was only temporary.[74] Victims who returned to the West reverted to their previous selves as the coercive persuasion was unsustainable without

[69] Nora Markwalder and Monika Simmler, 'Guilty Robots? — Rethinking the Nature of Culpability and Legal Personhood in an Age of Artificial Intelligence Criminal Law' (2019) 20 Crim L Forum 1, 11.
[70] Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (CUP 2009) 155–60.
[71] Rebecca Emory, 'Losing Your Head in the Washer — Why the Brainwashing Defense Can Be a Complete Defense in Criminal Cases' (2010) 30(4) Pace LR 1338.
[72] ibid 1340–47.
[73] ibid 1355.
[74] Robert Jay Lifton, *Thought Reform and the Psychology of Totalism: A Study of 'Brainwashing' in China* (first published 1961, University of North Carolina Press 1989).

constant reinforcement possible only in the prison camp.[75] There is no evidence to suggest coercive persuasion can be accomplished without this physically coercive environment.[76] Consequently, any defence arising from coercive control is reserved for the most extreme cases.[77] Jonestown, a remote jungle settlement where total isolation could be effected with physical force, could be conceived as being an extreme case.

## 2.2 'The Totalist System'

The environment necessary to reduce victims of coercive persuasion to the status of non-autonomous robot-like beings is best described as 'totalist'. Stein coined the term to describe how cults use isolation to effect indoctrination.[78] A totalist system isolates members from their prior support structures and sense of identity, and enforces ideological purity to limit interaction between followers. Such actions are capable of exhausting victims to isolate them from their own thoughts.[79] It is in this totalist environment that victims are subject to coercive persuasion, which begins the protracted process of their transformation into robots.[80]

Totalist systems accomplish this through external threat and internal stress. The external threat is a nebulous insurmountable force that members cannot withstand beyond taking refuge within the group, whereas internal stresses, such as deprivation, hunger, and exhaustion,

[75] ibid 61–63, 84.
[76] James T Richardson, 'Cult/Brainwashing Cases and Freedom of Religion' (1991) 33(1) J Church & State 55, 60–61.
[77] Thomas Robbins and Dick Anthony, 'The Limits of "Coercive Persuasion" as an Explanation for Conversion to Authoritarian Sects' (1980) 2(2) Polit Psychol 22.
[78] Alexandra Stein, *Terror, Love and Brainwashing: Attachment in Cults and Totalitarian Systems* (Routledge 2016) ch 4: Totalist Indoctrination.
[79] ibid 54, 63–68.
[80] ibid 64.

deplete cognitive resources, limit self-reflection, and prevent the victim from challenging their environment.[81] The victim becomes more susceptible to fearing the external threat and more likely to seek comfort within the group, which, in turn, exacerbates their fear.[82] This becomes a constant cycle of trauma, undermining the victim's identity and autonomy, which, if left unchecked, could see them subordinated to the will of another.

Most cults cannot operate a totalist system unchecked. Members cannot be totally separated from the outside world and will inevitably be exposed to external influences. It is through this that they can form the necessary connections to escape the cult, informally known as the escape hatch.[83] The cycle of trauma can be interrupted and escaped so long as members have the capacity to form escape hatch connections. So long as this is true, the totalist system is incomplete and, thus, the process of coercive persuasion is imperfect. The complete totalist system perfects the process by closing the escape hatch; it succeeds by totally isolating members and perpetually subjecting them to the traumatic cycle. It is this which reduces the individual to a non-autonomous robot-like state.

Selisker describes this transformation as being analogous to the 'break', a phenomenon associated with victims of torture where their reality is reduced to a single set of rooms and experiences.[84] Coercive persuasion in a complete totalist environment may affect constant trauma sufficient to produce something similar known as the 'snap'. The snap dilutes and restricts the individual's perception of reality until they are defined by their totalitarian environment. They are enthralled to their indoctrinator and conditioned to behave as if they were a human automaton.[85]

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[81] ibid 69–70.
[82] ibid 71–72.
[83] ibid 82–84.
[84] Scott Selisker, *Human Programming: Brainwashing, Automatons, and American Unfreedom* (University of Minnesota Press 2016) ch 4, 130–32.
[85] ibid 132, 136–42.

The Peoples Temple in California could be described as an incomplete totalist system. Whilst members were cut off from external support networks, deterred from defection, and subject to the external threats and internal stresses, Jones could not totally isolate or physically restrain his followers without consequence. In this sense, members, if they so wished, were able to form escape hatch connections and walk away. The cycle of trauma could not entirely strip them of autonomy. Jonestown, by contrast, might be described as a complete totalist system. Residents could not leave of their own volition as their passports were seized on arrival, they were encased on all sides by a deadly jungle, and they were unable to communicate with the outside world. This traumatic cycle could be repeated in perpetuity and it is feasible that some members experienced the snap and became subordinate robot-like beings.

## 2.3 Robots

Totalism depends on coercive persuasion but only in extreme cases does it deprive members of their autonomy. When determining whether a totalist system is complete, the robot analogy proves illuminative. Ying distinguishes between autonomous robots who act independently in accordance with their programming and individuals who act merely as tools performing automatic functions.[86] Programming in the first instance serves as a value system, generating principles by which the robot interacts independently with the outside world.[87] This robot would be capable of communicating their decision-making with reference to those principles and their environment; this is the hypothetical smart robot. Smart robots possess the bare minimum of rationality necessary for criminal responsibility to be attached.[88] Victims of coercive persuasion in an incomplete totalist system could be conceived of as

[86] Ying Hu, 'Robot Criminals' (2019) 52 U Mich J L Reform 487.
[87] ibid 499–500.
[88] ibid 497–512, 515, 519–23.

smart robots; trauma would have induced a partially robotic state but stopped short of destroying their autonomy.

The incomplete totalist environment in California may have prevented members from becoming automatons. Instead, members may have been the equivalent of smart robots, impaired by a value system imposed upon them through coercive persuasion, but with their decision-making capacity still intact. Consequently, their impaired reasoning was still sufficient to attract criminal responsibility. This changed in Guyana. It is feasible residents were subjected to a complete totalist system in which reality began and ended in Jonestown. The outside world ceased to exist, and an unbroken cycle of trauma could strip them of the autonomy and responsibility attributed to smart robots. To Gless, robots without the capacity for self-reflection and moral evaluation cannot be considered culpable.[89] Instead, they are tools, a blameless means by which another effects their will on the world.[90] It is plausible that the totalistic environment in Jonestown allowed unimpeded trauma to reduce the Red Brigade to a robotic state where they served as the tools of another. Mere tools are incapable of moral reasoning; if we do not blame the drone for the murder ordered by its pilot, it stands to reason that we should not blame the Red Brigade for an assassination commanded by Jim Jones.

## 2.4 Proposed Legal Argument: Automatism

For the criminal law to distinguish between smart robots and robots without capacity, the defence of automatism is proposed. Automatism is the claim a defendant's consciousness is so divorced from their

[89] Sabine Gless, 'If Robots Cause Harm, Who Is to Blame? Self-Driving Cars and Criminal Liability' (2016) 19(3) New Crim L Rev 412, 416–23.
[90] ibid 425.

actions that they must be involuntary.[91] In *Burgess*, the court described a defendant who successfully relied on automatism as suffering a defect of reason, and was therefore exonerated on the grounds that they acted without conscious motivation.[92] This is a high threshold that requires the defendant's mind to be so compromised as to construct their actions as involuntary reflexes.[93] For automatism to be sustained, a defendant must demonstrate their mind was entirely detached from their body.[94] This was clarified by the Court of Appeal in *Attorney General's Reference No 2* to mean a defendant suffering from a 'total destruction of voluntary control'.[95] The aforementioned class of smart robots would not meet this threshold and would therefore be criminally responsible for their actions. Robots who lack the necessary capacity after being subject to a complete totalist system may satisfy the criteria, permitting them to rely on automatism. In practice, it would be for juries to determine whether a defendant is so impaired by coercive persuasion as to be considered criminally non-culpable.

In *Coley*, Coley sought to rely on automatism after being convicted of attempted murder, a crime allegedly committed in a psychotic state where he believed himself to be a video game character.[96] The court denied this appeal, breaking down the offence into its components. Coley decided to break into another's home, decided to arm himself, decided to dress for the occasion, and, delusional or not, had a clearly conscious motivation. Automatism requires the defendant's actions to be completely beyond their control.[97] Initially this might be said to exclude members of the Red Brigade from automatism: they armed themselves, followed the congressional party, and opened fire.

[91] John Child and David Ormerod, *Smith, Hogan, & Ormerod's Essentials of Criminal Law* (3rd edn, OUP 2019) 307.
[92] *R v Burgess* [1991] 2 QB 92 (CA).
[93] *Watmore v Jenkins* [1962] 2 QB 572 (QB).
[94] *R v Isitt* (1978) 67 Cr App R 44 (CA).
[95] *Attorney General's Reference (No 2 of 1992)* [1994] QB 91 (CA).
[96] *R v Coley* [2013] EWCA Crim 223, [2013] MHLR 171.
[97] ibid [23] (Hughes LJ).

However, coercive persuasion informs us that a victim subject to an unimpeded cycle of trauma is reduced to a non-autonomous robot incapable of making any decisions. On this account, the Red Brigade simply took the necessary steps to execute their programming.

While coercive persuasion is yet to be recognised by the courts, external, but extreme, trauma is capable of inducing automatism. In *Hennessy*, stress and anxiety were rejected as triggers for automatism as they were facts of life and not at all extraordinary.[98] Although no precise definition of extraordinary trauma was given, when considering the complete totalist system that members of the Red Brigade were subject to, it is difficult to envision a more extreme set of facts. In *R v T*, a defendant who claimed her actions were driven by a dreamlike state caused by rape successfully relied on automatism; a largely unreported Crown Court decision was later endorsed by the Court of Appeal.[99] It stands to reason that, if physical and psychological trauma is capable of inducing automatism, it would not be a novel stretch for this to be true for those subjected to a complete totalist system.

There is a distinct difference between these types of trauma: rape is necessarily non-consensual, but this is not true for coercive persuasion. In the Peoples Temple, going to Jonestown was an honour and residents entered the commune of their own volition. In *Bailey*, a defendant who voluntarily failed to take their medication was not permitted to rely on automatism when it resulted in him attacking another with an iron bar.[100] Defendants who recklessly or intentionally put themselves in a position likely to induce automatism cannot then benefit from the defence.[101] It could be argued that the Red Brigade are in the same position, for they were capable of independent choice when they

[98] *R v Hennessy* [1989] EWCA Crim 1, [1989] 1 WLR 287.
[99] *R v T* [1990] Crim LR 256 (note); Brian Riley, 'Post-Traumatic Stress Disorder and Dissociative State — Defence of Non-Insane Automatism or "Insanity"' [1990] Crim LR 256; *AG's Reference* (n 95) 95, 104 (Lord Taylor).
[100] *R v Bailey* [1983] EWCA Crim 2, [1983] 1 WLR 760.
[101] ibid 765 (Griffith LJ).

decided to migrate to Jonestown. The coercion of the Peoples Temple was well known by the time of the exodus, and thus it could be argued the Red Brigade would have known their migration was likely to result in trauma. It is important to consider whether this should be a barrier to the defence of automatism.

It is argued that, while trauma may have been foreseeable, the harm was not. In the case of *Hardie*, the defendant was permitted to rely on automatism despite consensually taking Valium, for there was no obvious connection between the drug and the resulting arson. The question for the jury was whether taking the drug was sufficiently reckless as to merit a guilty verdict.[102] Murder is a crime of specific intention — it cannot be committed recklessly — thus for automatism to be entirely disregarded there must be a precise connection between the defendant's voluntary act and the death. Whether or not members of the Red Brigade knowingly entered a traumatic environment, it is difficult to comprehend they held the necessary foresight that they would be deployed as assassins in a Guyanese jungle. It is on this basis that automatism should not be dismissed outright but should be left to a jury.

## 2.5 Proposed Legal Argument: Jim Jones

If we are to construct the Red Brigade as non-autonomous robots, then, logically, responsibility for their actions would reside with a secondary controller. This controlling mind would be culpable for the actions it ordered of its human automatons, as if it had used any other tool to fulfil their criminal intent. For the Red Brigade, this controlling mind was Jim Jones. It is therefore pertinent to consider whether the criminal law could hold Jim Jones accountable for the murders and attempted murders he set in motion.

[102] *R v Hardie* [1984] EWCA Crim 2, [1985] 1 WLR 64.

The first question is factual causation: whether we can attribute the crime to the defendant's actions. Since *White*, causation has been determined through the 'but for test', that is, but for the defendant's actions would death have occurred?[103] Jones may not have pulled the trigger, but his orders set a chain of events in motion without which death would not have occurred. This is his criminal act.[104] A charge of murder is not confined to those who deliver the killing blow but can flow from any act or omission that results in death.[105] Given that the airstrip shooting and resulting deaths flowed directly from the commands of Jim Jones, there is a case to be made that factual causation is satisfied.

The second question we must consider is legal causation, that is, whether the defendant's act or omission significantly contributed to the resulting harm.[106] This requires an intrinsic link between the defendant's conduct and the harm caused.[107] An intrinsic link exists so long as the defendant's action directly and significantly contributes to death.[108] For example, in *Kennedy*, the House of Lords ruled that a defendant could not be charged with manslaughter for preparing and handing a syringe full of heroin to the deceased, for unless his action directly caused the victim to inject the drug there was no intrinsic link,[109] while in *Mellor* the defendant could be convicted of murder when they inflicted injuries that brought on fatal broncho-pneumonia.[110]

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[103] *R v White* [1910] 2 KB 124 (CA).
[104] ibid 130 (Bray J).
[105] *R v Gibbins and Proctor* (1919) 13 Cr App R 134 (CA) 139 (Darling J); *R v Blaue* [1975] EWCA Crim 3, [1975] 1 WLR 1411.
[106] *R v Warburton and Hubbersty* [2006] EWCA Crim 627.
[107] *R v Dalby* [1982] 1 WLR 425 (CA).
[108] *R v Hughes* [2013] UKSC 56, [2013] 1 WLR 2461.
[109] *R v Kennedy (No 2)* [2007] UKHL 38, [2008] 1 AC 269.
[110] *R v Mellor* (1996) 2 Cr App R 245 (CA).

Orders given by Jim Jones to his non-autonomous subordinates to kill are intrinsically tied to the resultant deaths. In *Bentley*, a defendant who shouted 'let him have it' to an armed accomplice who then shot a police officer was convicted and executed for murder. Decades later, the conviction was quashed, though the Court of Appeal reinforced that a properly directed jury would be entitled to convict the defendant of murder on these facts.[111]

The defendant does not need to be the sole cause of death; their contributions can remain significant even with others involved.[112] If a defendant set in motion a chain of events calculated to cause death or grievous bodily harm, their intention flows through all subsequent acts.[113] *Attorney General's Reference No 3* clarifies this to mean death is treated in law as if it occurred at the moment the chain was set in motion.[114] In this sense, Jim Jones set a chain of events in motion the moment he ordered his followers to kill; it should be as if the shooting happened then and there. Direct contact is unnecessary; the deaths cannot be separated from his command and thus he ought to be culpable for them.[115]

The actions of the Red Brigade should not be sufficient to break the chain of causation. In *Cogan and Leak*, Leak facilitated the rape of his wife by misleading Cogan into thinking she wanted to have sex with him.[116] Cogan was charged and acquitted of rape, though Leak was convicted of aiding and abetting rape. The Court of Appeal upheld Leak's conviction on the grounds that he used Cogan to procure a criminal purpose. Similarly, in *DPP v K*, two defendants who

[111] *R v Bentley* (2001) 1 Cr App R 21 (CA).
[112] *R v Benge* (1865) 4 F & F 504, 176 ER 665; *R v Cheshire* [1991] 1 WLR 844 (CA).
[113] *R v Church* [1965] EWCA Crim 1, [1966] 1 QB 59.
[114] *Attorney General's Reference (No 3 of 1994)* [1997] UKHL 31, [1998] AC 245, 261 (Lord Mustill).
[115] *R v Mitchell* [1983] QB 741 (CA); *R v Smith* [1959] 2 QB 35 (CA).
[116] *R v Cogan and Leak* [1975] EWCA Crim 2, [1976] QB 217.

imprisoned a young girl and instructed another boy to penetrate her were also liable for rape.[117] Once again, the defendants were responsible because they used another person as their tool. In *Cogan*, the tool was an independent moral agent; in *K* the tool was a vulnerable young boy. To that end, this principle should be easily extended to any non-autonomous robot-like beings in Jonestown. If Jones used coercive persuasion within a totalist system to subordinate the Red Brigade to his will, he used them as tools to facilitate his criminal purpose and ought to be liable for the offences procured.

On this account, the criminal law can hold Jim Jones to account for the murders and attempted murders arising from the airstrip shooting. Jones set in motion a chain of events where death was a natural consequence of his orders. He remained a factual, substantial, and operating cause of death as if he had possessed and programmed armed drones to kill Congressman Ryan. The fact that his drones were human beings changes nothing; factual and legal causation can be satisfied and, thus, there is a case to go before a jury.

## 3 The Jonestown Massacre

During the early evening of 18 November 1978, Jones summoned the residents to the central pavilion. He claimed responsibility for the plot to kill Congressman Ryan and warned that Temple enemies would invade Jonestown in retaliation. Couched in the language of mercy, he called for revolutionary suicide.[118]

The children were put to death first. Using syringes to strategically trigger the swallow reflex, nurses squirted a mixture laced with cyanide down their throats. Older residents were similarly injected in their cabins. There is little controversy here; anyone forcefully injected with

[117] *DPP v K* [1997] 1 Cr App R 36 (QB).
[118] Death Tape (n 50) 3.

cyanide by another has been murdered. Murder charges against Jones could be established on the existing principles of joint enterprise in this respect.[119] Thus, this article is more concerned with resolving the liabilities of the subsequent victims.

Under the watch of armed guards, vats of poison were presented to the adults, who were expected to drink. We will never know how many complied. A Guyanese medical examiner, Dr Mootoo, suggested some might have been forcibly injected and there are historical accounts to that effect.[120] This is, of course, speculation as the advanced decomposition of the Jonestown dead prevented a definitive analysis. Rebecca Moore identified a consensus that the vast majority drank the poison of their own volition, leaving a small minority of dissenters who did not.[121]

Chidester describes the Jonestown Massacre as being motivated by the genuine belief that suicide was preferable to the dehumanising death members expected from external invaders.[122] Jones claimed anyone who survived him would be seized by invading fascists, tortured, and deported to concentration camps.[123] Suicide became merciful in comparison to the brutality of an outside invader, and this rhetoric was integral to life in Jonestown.[124] Each white night was driven by Jones passionately arguing that suicide was merciful when compared with

[119] *R v Jogee* [2016] UKSC 8, [2017] AC 387.
[120] Leslie Mootoo, 'Guyana Inquest' (RYMUR Section 28, Serial 1840, 13 December 1978); Tim Carter, 'Murder or Suicide: What I Saw' (*Alternative Considerations of Jonestown & Peoples Temple*, 25 July 2013) <https://jonestown.sdsu.edu/?page_id=31976> accessed 5 July 2020.
[121] Rebecca Moore, 'Rhetoric, Revolution, and Resistance in Jonestown, Guyana' (2013) 1(3) J Relig Violence 303–05.
[122] David Chidester, *Salvation and Suicide: Jim Jones, the Peoples Temple, and Jonestown* (Indiana UP 2003).
[123] ibid 131–46.
[124] Moore, 'Rhetoric, Revolution, and Resistance in Jonestown, Guyana' (n 121) 306–08.

fascist torture.[125] This even extended to heaping praise on parents who promised to kill their own children before they fell into enemy hands.[126] Moore observes that the Peoples Temple had long preached the virtue of self-sacrifice, which facilitated the eventual shared view of the Jonestown Community that swift and merciful death epitomised love and compassion.[127] Only through revolutionary suicide could the residents defy their oppressor, escape a dehumanising death, and protest the inhumanity of the world.[128]

Jones's culpability is grounded in deceit. America had not fallen to fascism, there were no concentration camps, and no outside invaders were ready to torture the Jonestown population. Nothing on the scale he described was ever going to happen. The dehumanising death his followers sought to escape was a fiction. However, Jones's culpability may go well beyond lying. Not only did he plan for this eventuality but he rehearsed his followers for the inevitability of mass suicide and directed his agents to import and test potassium cyanide.[129] His deceit was no spontaneous act but part of a wider pattern to realise his ambitions for mass suicide.

Jones used manipulation, coercion, and deception to kill his followers. It is on this basis that it is argued he ought to be constructed as a murderer. To address each type of conduct, the victims are divided into three classes. First, the non-autonomous robot-like members of the community, whose existence was posited earlier. Second, those who were coerced to take the poison because the alternative was to be forcefully injected or shot. Finally, true believers, who genuinely believed Jim Jones and died to avoid the dehumanising death they were

[125] Moore, 'Rhetoric, Revolution, and Resistance in Jonestown, Guyana' (n 121) 314.
[126] Chidester (n 122) 147.
[127] Moore, 'Rhetoric, Revolution, and Resistance in Jonestown, Guyana' (n 121) 307.
[128] Moore, 'Rhetoric, Revolution, and Resistance in Jonestown, Guyana' (n 121) 317.
[129] Guinn (n 3) 389; 'Memo From Dr Schacht' (Alternative Considerations of Jonestown & Peoples Temple).

deceived into expecting. It is likely members that Jim Jones did not act alone; many of his inner circle were aware of both his deception and murderous ambitions.[130]

It should be noted these descriptions capture a set of logical spaces rather than an empirical description. Each category defines a possible type. Whether in fact there were any tokens of these types and, if so, how many, is an empirical question not only beyond the scope of this article but also beyond the scope of the historical record as we have it. Furthermore, it is important to acknowledge that these categorical heuristic devices are deployed here to develop our understanding of potential liability of Jones and his victims. They do not attempt represent the lived reality of those present in Jonestown nor are they intended undermine the truly catastrophic human tragedy that took place.

## 3.1 The Robots

Say a robot, programmed to obey an operator, is built with a self-destruct button. The robot is an amoral tool by which the operator exerts their will on the world. The operator would therefore be solely responsible should the robot be ordered to kill. A robot ordered to press the self-destruct button is no more responsible for suicide than for the killing. The robot's self-destruction is caused by the operator. If the robot is replaced with a human actor ordered to destroy their sense of self via mind control, the operator would be liable for murder.

It is posited that residents were subordinated to Jones, so that they had become non-autonomous robot-like beings and were incapable of drinking the poison of their own volition. But for Jones's command to self-destruct, their deaths would not have occurred, thus factual causation could still be satisfied as Jones remained a substantial and

[130] Whilst their culpability is beyond the scope of the paper, it is likely they would also attract a high degree of criminal liability.

operating cause of death. Neither legal nor factual causation is undermined when a robot's violence is directed inwards. Consequently, it would be appropriate for a jury to determine whether Jim Jones murdered his non-autonomous robots.

## 3.2 The Coerced

Whatever residents made of the dehumanising death Jones promised, the Peoples Temple was no monolith. It is evident not everyone wished to die. Christine Miller verbally dissented, Marceline Jones resisted to the point Jim Jones ordered she be physically restrained, and three successfully escaped the commune.[131] For those who did not want to die but could not escape, the notion that they were coerced is a distinct possibility. Armed members of the Red Brigade patrolled the pavilion, and it is possible dissenters were forcefully injected with cyanide. Residents were given a simple choice: drink the poison, be injected with the poison, or be shot by the Red Brigade.

To demonstrate the threat this poses to victim autonomy, consider the following hypothetical. Say Alice approaches James with a gun, throws him a vial of poison and instructs him to drink or be shot. Should James decide to drink, his cause for suicide does not come from within but is imposed by an external force. Instead, death is the product of Alice's coercive choice. Rogers argues that a defendant who inflicts physical or psychological trauma to bring about suicide forges a causative link between their wrongful act and the death.[132] Thus, criminal causation is unbroken when suicide is the natural result of a defendant's action.[133] Say James jumped from a balcony to escape Alice but underestimated the height and died on impact. Surely the death is still attributed to her: but for Alice's violent conduct, neither the escape attempt nor death

[131] Guinn (n 3) 445, 456.
[132] Audrey Rogers, 'Death by Bullying: A Comparative Culpability Proposal' (2014) 35(1) Pace L Rev 343, 355–56.
[133] ibid 356–57.

would have occurred. Likewise, but for Alice's coercive choice, James would not have drunk the poison. Her wrongful acts provoked the suicide; she has caused the death and is responsible for homicide. If this was her intention, she is a murderer.

There is little domestic case law on this point, though there are several US cases that prove illuminative. In *Stephenson v State*, the grand dragon of the Ku Klux Klan abducted, raped, and mutilated a woman who later died by suicide.[134] The court held that the defendant subjected the victim to his absolute and inescapable control, which led to her believing she had no viable alternative to suicide.[135] The circumstances imposed upon her by the defendant rendered her mentally irresponsible and, as suicide naturally followed, he could be guilty of murder. In *State v Lassiter*, the defendant tormented his victim to the point that she threatened to jump out of a window. The defendant's conduct was said to impose a choice upon her: be beaten to death or suffer a swifter demise at her own hands. The court held that, by imposing this choice, the defendant caused the suicide and was properly convicted of murder.[136]

Alice has imposed a similar choice on James. Should he decide poison is a preferable end to the bullet, this does not reflect either his will or any authentic desire on his part. He submits rather than consents to her terms. The Court of Appeal distinguished between consent and submission in *Olugboja*.[137] The defendant contested his conviction for rape on the grounds the victim verbally consented, even after being abducted and raped by the defendant's friend. The court held that the victim was so impaired by the ordeal she was unable to give consent; instead, she offered submission, which did not excuse the defendant.[138] Similarly, James submits to Alice's coercion by drinking the poison. His

[134] *Stephenson v State* 179 NE 633 (IN 1932).
[135] Rogers (n 132) 359.
[136] *State v Lassiter* 197 NJ Super 2, 484 A 2d 13 (NJ 1984).
[137] *R v Olugboja* [1981] EWCA Crim 2, [1982] QB 320.
[138] ibid 332 (Dunn LJ).

act of compliance is not sufficient to break the causal chain and absolve Alice. She has caused his suicide, and ought to be liable for that as if she were a murderer.

Those in Jonestown who were coerced are in the same position as James. A choice was imposed upon them by Jones where the only certainty is death. If they did not want to die, the case can be made that their suicides were caused by another's inescapable coercion. On this account, their decision to drink the poison is not an independent act but compliance extracted through coercion. Thus, the coerced have been murdered and, with nothing to break the causal link between Jones's coercive conduct and their deaths, he ought to be charged accordingly.

## 3.3 True Believers

True believers are conceived as individuals who accepted Jones's narrative without question and drank the poison out of genuine fear of a dehumanising death. Likely, many of them were among those who thanked Jones for bringing them and their children peace.[139] The extent of their uncritical devotion to Jones creates an instinct to group true believers alongside the robot-like members of the community, but this would be an oversimplification. It is argued that these individuals genuinely believed in Jim Jones, rather than forming such views due to the coercive persuasion. This distinction is inspired by Rebecca Moore, who describes discourse surrounding Jonestown as falling into the trap of casting everyone involved as a brainwashed cultist, with no thought spared for their humanity.[140] Thus, in deference to the autonomy and humanity of the victims, it must be recognised some true believers may have retained volitional capacity and went to their deaths willingly.

The liability arising because of their deaths is constructed on the basis

[139] Guinn (n 3) 445–47.
[140] Rebecca Moore, 'The Stigmatized Deaths in Jonestown: Finding a Locus for Grief' (2011) 35(1) Death Stud 42, 46.

that, despite being capable of acting on their own volition, the reasons behind the act of suicide were fraudulent. There were no fascists at the gate, no concentration camps, and no real chance of a dehumanising death. They were driven to death by suicide on a false premise. It is on this basis that this article seeks to extend the principles of causation to recognise 'murder by deception'. This is not a proposed change to the law; it is simply an attempt to explain how deceit induced suicide should be held to satisfy the *actus reus* of murder.

## 3.4 Deception

Deception is an attack on autonomy, defined by Alexander and Sherwin as words or conduct to induce false beliefs in another.[141] The victim is motivated to act on those false beliefs, meaning they are manipulated into serving the interests of a deceiver. [142] Shute and Horder conceptualise deception as being capable of overriding the victim's will, by denying them the opportunity to make an authentic choice.[143]

Consider a father, trusted implicitly by his daughters, who raises them to believe their family has been targeted by neo-Nazis who will torture and kill them at the earliest opportunity. Eventually, he warns them the Nazis are searching the local area and recommends the girls hide in a panic room. Days later, the father announces they have been discovered and the Nazis are moments away from invading their sanctuary. Rather than face a dehumanising death at the hands of the Nazis, the family collectively agree suicide is preferable and take their own lives.

As with the coerced, these daughters have had a choice imposed upon them by an external invader who ought to be liable for the resulting

[141] Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 L & Phil 393, 393.
[142] ibid 397.
[143] Stephan Shute and Jeremy Horder, 'Thieving and Deceiving: What Is the Difference?' (1994) 56(4) MLR 548, 552–53.

suicide. They act autonomously, given the circumstances, although the circumstances are not autonomously chosen. However, this is not true if their reasons for acting are the result of deception.

Say the father, for no good reason beyond a few days of peace, lied about the neo-Nazis to induce his daughters to hide in the panic room; their decision is neither authentic nor autonomous. Through fear they have been manipulated into serving the wishes of their father. But this does not extend beyond their decision to hide. Should the Nazis arrive, the deception would not be intrinsic to their decision-making. The daughters could authentically and autonomously choose to die by suicide to avoid a dehumanising death.

Say instead that the father is lying on the final day; there is no external invader and no real cause for suicide. Deception is now intrinsic to the decision because they cannot authentically choose to avoid a dehumanising death. Suicide would occur independently of their will because the manipulation of their father undermines their status as autonomous moral agents.

For Gardner, if a victim of deception would have chosen another course of action had they known the true facts, the deceit is so fundamental to their thought process that it makes the action involuntary.[144] Had the daughters known there was no real prospect of a neo-Nazi invasion, they would not have chosen to die. Consequently, the father's deception vitiates their will to suicide, prevents any exercise of autonomy, and renders the deaths involuntary.

To understand why these actions are involuntary, consider the fact that the daughters chose to die in a world where neo-Nazis were about to break down the door, but that was not the world they lived in. There is no value to their compliance because there was never a real connection

[144] Simon Gardner, 'Appreciating Olugboja' (1996) 16(3) LS 275, 287–88.

between the desired outcome and the act itself.[145] Such deception, according to Herring, is egregious because the 'deceiver' usurps the victim's decision-making capacity and transforms them into an instrument of their own harm.[146] The daughters have had their free will weaponised into carrying out their father's murderous intentions; they are but weapons by which he kills them. The father attracts the highest degree of culpability and murder becomes the most appropriate charge.

Jim Jones is no less culpable. Jones depended on deception to create the illusion his followers were under threat and ritualised the practice of white nights to condition them to accept the necessity of revolutionary suicide. He created the necessary standard at which true believers knew they would be called upon to lay down their lives. Jones's exploitation of this standard saw the true believers die to escape a dehumanising death that did not exist in the world they lived in. True believers may have chosen to die rather than live in a world without the Peoples Temple, but that was not the choice they were given. The deaths were involuntary because Jones denied them the opportunity to make an informed choice, undermined their autonomy, and twisted their will.

## 3.5 Murder by Deception

It is argued in this paper that a defendant who purposely causes suicide through deceit should be liable for murder. This liability is constructed on the basis that the deception was the tool that caused the suicide.

Factual causation for murder by deception should be satisfied by the defendant depriving the victim of a will to live. It is an extension of the principles used when suicide is caused by coercion. For Shaffer, if a defendant's wrongful conduct causes another to die by suicide, the

[145] I Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40(1) OJLS 82, 86–97.
[146] Jonathan Herring, 'Mistaken Sex' [2005] Crim LR 511, 524.

victim's will is not a driving force behind their death.[147] The defendant has transformed the victim into an instrument by which their murderous intentions are exercised, for which they ought to be culpable.[148]

Jim Jones accomplished this by convincing those who trusted him that there was an imminent fascist invasion in which their homes would be destroyed, their children would be tortured, and all would be slaughtered. He made them believe they were in an utterly hopeless position, depriving them of the will to live. In the world they believed themselves to be in, they were faced with suicide or the utter devastation of everything they held dear. Of course, this was not the reality of their situation. But for Jones's deceptive conduct, there would have been no cause for suicide. If deceit has been intentionally used by a defendant to deprive the victim of a will to live, then they should be held as the factual cause of any resulting suicide.

Murder by deception ought to provide an exception to the general rule that suicide is an intervening act that breaks the chain of causation. Zavala argues that the defendant who sets in motion a chain of events that results in suicide remains the factual and legal cause of death.[149] The defendant remains culpable because the victim's suicide is not sufficiently free or deliberate to break the chain of causation.[150] This principle has been accepted in the United States. In *People v Lewis*, the victim was shot during an altercation and promptly cut their own throat.[151] The court held that the death could still be attributed to the defendants because the wound they inflicted was a significant contribution to the victim's decision to take their own life. Their

[147] Catherine D Shaffer, 'Criminal Liability for Assisting Suicide' (1986) 86(2) Colum L Rev 348, 364–66.
[148] ibid 372–74.
[149] Carla Zavala, 'Manslaughter by Text: Is Encouraging Suicide Manslaughter?' (2016) 47(1) Senton Hall L Rev 297.
[150] ibid 318.
[151] *People v Lewis* 124 Cal 551 (CA 1899).

unlawful acts set in motion a chain that led to the death of another and, although they did not intend the victim to die, they were convicted of manslaughter. Domestic criminal law recognises that those who set in motion events that inevitably lead to death can be charged with murder;[152] the principle should not change when the victim is deceived into becoming an instrument of their own harm.

This is eminently applicable for true believers whose suicides were not only inspired by deception but actively planned out. LaPalme asserts that the causal chain is only broken when the victim acts so sufficiently out of the ordinary that it is no longer fair to say harm was caused by the defendant.[153]

True believers had been rehearsed to expect suicide at a moment's notice; their obedience as a response to deception should not be sufficiently unforeseeable as to break the chain of causation. This is particularly true of Jones, who used the white nights to ensure everyone would comply when the time came. It seems appropriate to argue Jim Jones was a substantial and operating cause of the true believers' decisions to die. Their deaths were caused by his deception; thus, he should be held as both the factual and legal cause of death. Deception was simply the weapon he used to facilitate the deaths of true believers and he should answer for that as if he had used any other tool. By interpreting the existing principles of criminal causation to recognise murder by deception, there is a case here to go before a jury.

[152] *R v Church* [1965] EWCA Crim 1, [1966] 1 QB 59.
[153] Nicholas LaPalme, 'Michelle Carter and the Curious Case of Causation: How to Respond to a Newly Emerging Class of Suicide-Related Proceedings' (2018) 98(5) BUL Rev 1443, 1448.

# 4 Conclusion

To explore the criminal liabilities arising from the Port Kaituma Airstrip Shooting and Jonestown Massacre, this article considered each event in turn. The literature surrounding coercive persuasion was analysed, which demonstrated that the Red Brigade could be constructed as non-autonomous robot-like beings, incapable of criminal responsibility. Automatism was proposed as a legal defence to convey this non-autonomous state. The existing principles of causation could be extended to hold Jim Jones liable for the acts of his robot-like followers. If we consider that robots do not act independently, it is apparent that, but for Jones's orders, the Port Kaituma Airstrip Shooting would not have occurred. Thus, there is an unbroken causal link between his act and the murders.

For the Jonestown Massacre, the victims were divided into three theoretical classes: robot-like beings, who automatically complied with the order to self-destruct; those who were coerced, who complied under threat; and true believers, who drank the poison out of genuine fear of the dehumanising death Jones deceived them into expecting. For each of these classes, a different reasoning is required for the attribution of criminal liability.

To conclude, the criminal law of England and Wales can adequately address the harms arising from the Port Kaituma Airstrip Shooting and the Jonestown Massacre. There is a philosophical and doctrinal basis for extending the principles of causation, automatism, coercion, and deception to levy successive murder charges against Jim Jones. This is not unwarranted; the extreme facts of this extraordinary case study would have required an extraordinary legal response.

# Lessons Unlearned: Bloody Sunday and the Conduct of British Armed Forces in Conflict

Amy Maria Butler

**Abstract**

As one of our most important cultural, political, and legal resources, history can enrich our collective understanding of present events. Conversely, historical narratives can be manipulated to fit a political agenda. This paper explores these issues with reference to Bloody Sunday, 30 January 1972. On this day, 13 civil rights demonstrators were killed in Derry, Northern Ireland, by a unit of the British Parachute Regiment. The report that followed the subsequent tribunal of inquiry justified the actions of the unit to produce propaganda against the Irish Republican Army. However, a second inquiry into the events of Bloody Sunday was established to consider new, as well as historical, evidence, in order to develop an accurate account of the day. Based on this evidence, Lance Corporal F of the 1st Battalion of the British Parachute Regiment was charged in 2019 with murder and attempted murder on Bloody Sunday. Media outlets consequently perpetuated a narrative that there is a 'witch hunt' against British veterans for 'doing their job'. This denial of military accountability has facilitated the British government's disregard of known abuses of civilians by the British Army during the Iraq War. This paper will use the case of Lance Corporal F to demonstrate the complexity of crimes committed in conflict and the extent to which new legislation, the Overseas Operations (Service Personnel and Veterans) Act 2021, is insufficient in providing the necessary temporal scope to investigate them. It will further argue that the British government remains committed to cultivating a 'culture of protection' for British armed forces personnel, in turn denying justice for unlawfully killed civilians.

# 1 Introduction

In 2010, the second tribunal of inquiry into the events of Bloody Sunday, 30th January 1972 concluded that there was a 'serious and widespread loss of fire discipline' among the 1st Battalion of the Parachute Regiment of the British Army (1 Para).[1] On this day, a civil rights march through the Bogside area of Derry, Northern Ireland, was violently suppressed by 1 Para, whose actions resulted in the loss of thirteen lives. The evidence presented as part of the second tribunal, which became known as the Saville Inquiry, led to charges being brought against Lance Corporal F (L/C F) for murder and attempted murder in 2019, more than 47 years after Bloody Sunday.[1] These charges fuelled a narrative, led by sections of the mainstream media and by senior members of the Conservative government, of a 'witch hunt' being perpetrated against British veterans of operations in Northern Ireland.[2] The European Center for Constitutional and Human Rights (ECCHR) notes that this attitude has led to a political climate where allegations of war crimes perpetrated by British soldiers during the Iraq War are disregarded by the British government.[3] The trauma experienced by victims of violence by state actors, as well as the effects on their families, which is well-documented in the case of the Bloody Sunday families, continues to be dismissed politically in favour of

[1] Northern Ireland Public Prosecution Service, 'Bloody Sunday Decisions Press Release — Principal Conclusions' (*Northern Ireland Public Prosecution Service*, 2019) <https://www.ppsni.gov.uk/news-centre/bloody-sunday-decisions-press-release> accessed 3 January 2020.

[2] HC Deb 11 March 2020, vol 673, col 126W.

[3] 'ECCHR is an independent, non-profit legal and educational organization dedicated to enforcing civil and human rights worldwide' — European Center for Constitutional and Human Rights, 'Who We Are' (European Center for Constitutional and Human Rights) <https://www.ecchr.eu/en/about-us/> accessed 3 April 2020; ECCHR, *War Crimes by UK Forces in Iraq: Follow-Up Communication by the European Center for Constitutional and Human Rights to the Office of the Prosecutor of the International Criminal Court* (ECCHR 2019) 21.

preventing reputational damage to the British armed forces.[4] The validity of such an interpretation is illustrated by the recent protests against the notice of L/C F's prosecution by thousands of retired soldiers, who collectively asserted that armed forces personnel should not be prosecuted for 'doing their job'.[5]

## 2 The History of Bloody Sunday

The history of Bloody Sunday requires exploration to understand the brutal and complex nature of the Northern Irish conflict, of which there are conventionally two sides — Catholic Nationalists, who endorsed a united Ireland, and Protestant Loyalists, who favoured unification with Britain.[6] Of the paramilitary organisations that sought to represent each group, the Provisional Irish Republican Army (PIRA) arguably remains the most well-known.[7] Together with Loyalist paramilitaries and the Royal Ulster Constabulary (RUC), the British Army was

[4] After hearing the PPS decision to prosecute only one member of 1 Para on Bloody Sunday, the families released a joint statement noting that the event in 1972 created 'a deep legacy of hurt and injustice and deepened and prolonged a bloody conflict'; Owen Bowcott, '"People Were Devastated": Relatives of Bloody Sunday Victims on the Charge' *The Guardian* (London, 14 March 2019) <https://www.theguardian.com/uk-news/2019/mar/14/people-were-devastated-relatives-of-bloody-sunday-victims-on-the-charge> accessed 4 April 2020.

[5] Dominic Nicholls, 'Thousands of Retired Soldiers Protest through London over Charging of Soldier F for Bloody Sunday Murders' *The Telegraph* (London, 12 April 2019) <https://www.telegraph.co.uk/news/2019/04/12/thousands-retired-soldiers-protest-central-london-motorbikes/> accessed 15 March 2020.

[6] Whilst this paper solely discusses the two sides of the conflict, it should be noted that there were Protestants who favoured a United Ireland and Catholics who favoured the union with Britain; Samantha Anne Caesar, 'Captive or Criminal? Reappraising the Legal Status of IRA Prisoners at the Height of the Troubles under International Law' (2017) 27 Duke J Comp & Int'l L 332; Dave McKittrick & Dave McVea, *Making Sense of the Troubles* (2nd edn, Penguin Viking 2012) 2.

[7] ibid Caesar 332. The paramilitary group believed in a united Ireland, independent of British rule, and the military branch of the Irish Republican Army.

controversially sympathetic to Protestant loyalism. [8] For some, militancy was not the answer. The Northern Ireland Civil Rights Association (NICRA) emerged in 1967: an organisation that sought to reform the Catholic community's 'second class citizenship status', which had been the norm since the Government of Ireland Act 1920 created the six counties that comprised Northern Ireland, governed by a disproportionately Protestant Loyalist government.[9] One mechanism of the NICRA's activism was organised marches, one of which took place in Derry on the morning of Sunday, 30 January 1972. This march, which was initially peaceful, escalated into a brutal incident that would become infamous in the wider history of the 30-year-long Troubles.[10] The march was suppressed by 1 Para, a unit of the British Army, whose actions would later be described as a 'massacre'.[11] The events of Bloody Sunday are considered by academics to have highlighted the extent to which the British and Irish governments were unable to provide 'political, economic and cultural' equality between Protestant and Catholic communities, including the right to life.[12]

Throughout the latter half of the twentieth century, Northern Irish leaders attempted to address the discrepancies between the societal positioning of Protestants and Catholics in Northern Ireland; the then prime minister (PM), Terence O'Neill, attempted to reform its governance to facilitate intercommunity equality. [13] International

[8] The police force in Northern Ireland from 1922 to 2001.

[9] Gregory Maney, 'The Paradox of Reform: The Civil Rights Movement in Northern Ireland', in Sharon Erickson Nepstad and others (eds), *Nonviolent Conflict and Civil Resistance* (Emerald Group Publishing 2012) 6–15.

[10] Angela Hegarty, 'Truth, Law and Official Denial: the Case of Bloody Sunday' (2004) 15 Crim L Forum 202.

[11] Although it was not an isolated incident of excessive force used by the British Army against Catholic Nationalists; Dermot Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (Macmillan 2000) 12.

[12] ibid.

[13] PM of Northern Ireland from 1963 to 1969. Audra Mitchell, *Lost in Transformation: Violent Peace and Peaceful Conflict in Northern Ireland* (Palgrave Macmillan 2011) 48.

relations academic Audra Mitchell notes that O'Neill's legislative efforts were poorly received, however, ultimately increasing levels of intercommunity violence and inadvertently exposing the extent to which the RUC were lacking in resources to suppress it.[14] With support from Westminster, in 1969 O'Neill sanctioned the deployment of British troops on Northern Irish soil, which became known as Operation Banner.[15] Responding to the intrusiveness of the troops, the PIRA escalated their campaign against British rule weaponised with resources provided by global supporters, including sympathisers in the United States of America.[16] Motivated by the organisation's vast resources, in 1971 the Northern Irish PM Brian Faulkner extended the powers granted to British troops through the Civil Authorities Special Powers Act 1922.[17] Troops were thus able to exercise controversial capacities such as internment without trial through the concomitant invocation of the Act, which breached several articles of the Universal Declaration of Human Rights.[18] Maney, for example, notes how 340 people participating in a civil rights march in 1971 were arrested and held in jail without charge. All but two of the protesters were Catholic.[19] As this example coveys, internment without trial purposefully criminalised the Catholic Nationalist community. Walsh, author of a report detailing the evidential flaws in the Widgery Tribunal that ultimately contributed to the fruition of the second inquiry, noted that '[it] formally subordinated the liberty of the individual to the absolute discretion of executive authority'.[20] This sentiment was shared by White, who noted

[14] ibid 56.
[15] Mark Saville, William L Hoyt and John L Toohey, *Report of the Bloody Sunday Inquiry* (vol 1, Stationery Office 2010) 219–20.
[16] Sean Boyne, 'Uncovering the Irish Republican Army' in *Jane's Intelligence Review: The IRA & Sinn Fein* (PBS Frontline 1996).
[17] PM of Northern Ireland from 1971 to 1972.
[18] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 33; The Universal Declaration of Human Rights 1948, arts 10, 12–13.
[19] Maney (n 9) 18.
[20] Dermot Walsh, *The Bloody Sunday Tribunal of Inquiry: A Resounding Defeat for Truth, Justice and the Rule of Law* (CAIN Web Service 1997) 51.

that internment without trial was an act of 'organised' repression by the state, which invigorated more IRA recruitment than Bloody Sunday, which he categorised as 'unorganised' repression.[21]

## Sunday, 30 January 1972

The nature of Bloody Sunday provides the context for the discussion of the subsequent tribunals of inquiry. Of these, the second inquiry's findings will be examined to explore the events of the day, which saw the 'largest single loss of life' incurred throughout the course of the Troubles.[22] On the morning of Sunday, 30 January 1972, the NICRA marched through the Bogside area of the city of Derry, protesting against the British Army's use of internment without trial.[23] As the march proceeded through William Street, 'rioting broke out … in the form of members of the crowd throwing stones' at the British Army.[24] Under the provisions of the 1922 Act, the NICRA's march was illegal.[25] This provided a basis for military intervention, with the troops initially responding with baton rounds.[26] The director of operations, Brigadier MacLellan, intervened, authorising Colonel Wilford, commander of 1 Para, to send 'one subunit' of paratroopers to the outskirts of the Bogside. The unit were tasked with conducting the arrests of rioters, but MacLellan explicitly stipulated that 1 Para 'must not conduct running battle down Rossville Street'. This order was, however, rejected by Wilford, who, according to the Saville Report, believed that the soldiers were trained to 'seek out the "enemy" aggressively, and not behave like

[21] Robert White, 'From Peaceful Protest to Guerrilla War: Micromobilization of the Provisional Irish Republican Army' (1989) 94(6) Am J Sociology 1277, 1289.
[22] Hegarty (n 10) 202.
[23] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 7.
[24] *Principal Conclusions* (n 1) 14.
[25] Caesar (n 6) 333.
[26] *Principal Conclusions* (n 1) 14.

"Aunt Sallies"'.[27] Instead, Wilford deployed one company of 1 Para through Barrier 14 onto William Street, followed by a second company in vehicles through Little James Street, resulting in a chase down Rossville Street and subsequently into the Bogside, where rioters and demonstrators were indistinguishable.[28] This movement resulted in a panicked chase. The predetermined arrest operation became impossible — rioters and demonstrators intermingled in the chaos, resulting, as the Saville Report highlights, in every civilian in the Bogside becoming 'the enemy'.[29]

The Saville Report provides a detailed account of what happened in the minutes following the chase. In the car park of the Rossville Flats, Jack Duddy was mortally shot as he '[ran] away from the soldiers' and six other civilians were wounded.[30] Soon after, Hugh Gilmour, William Nash, John Young, Michael McDaid, and Kevin McElhinney were shot dead, and Nash's father, Alexander, was injured.[31] Like Duddy, Gilmour was shot as he was running away from the soldiers and McElhinney was shot as he crawled to safety.[32] Four members of 1 Para arrived in Glenfada Park North, where they shot two more men: Jim Wray, who was shot a second time 'when he was lying mortally wounded on the ground', and William McKinney.[33] A further four men were injured in this area, one of whom was aged 16.[34] One soldier left

[27] Mark Saville, William L Hoyt, and John L Toohey, *Report of the Bloody Sunday Inquiry* (vol 8, Stationery Office 2010) 571.
[28] ibid 576. Barriers separated nationalist and loyalist communities to limit inter-communal violence.
[29] *Principal Conclusions* (n 1) 52–53.
[30] *Principal Conclusions* (n 1) 22–23, 40. There were six casualties in this area of the Rossville Flats. Margaret Deery, Michael Bridge, Michael Bradley, and Patrick Brolly were wounded by 1 Para rifle fire. Additionally, Pius McCarron and Patrick McDaid suffered injuries from flying debris caused by 1 Para rifle fire.
[31] *Principal Conclusions* (n 1) 24.
[32] *Principal Conclusions* (n 1) 35.
[33] *Principal Conclusions* (n 1) 35.
[34] *Principal Conclusions* (n 1) 26–27. The four casualties in this area of Glenfada Park North were Michael Quinn, Joe Mahon, Joe Friel, and Patrick O'Donnell.

Glenfada Park North and advanced to Abbey Park, where Gerard McKinney was mortally shot, and the bullet passed through his body and killed Gerald Donaghey.[35] The other three soldiers who had been in Glenfada Park North entered Rossville Street, where Bernard McGuigan and Patrick Doherty were shot dead and two other men were injured.[36] The Saville Report highlights the rapidity with which 1 Para acted, stating that 'only some ten minutes elapsed between the time soldiers moved in vehicles into the Bogside and the time the last of the civilians was shot'.[37]

Bloody Sunday can be categorised as 'unorganised' state repression.[38] However, academics have speculated that the British political and security establishment intended to use this march through Derry's Bogside to 'inflict severe punishment on rioters' involved with increased civil rights mobilisation in the area.[39] The notion of inflicting punishment directly rejects the policy of 'minimum force' that governed the activities of the British Army in Northern Ireland.[40] Through the deployment of 1 Para, a unit with a reputation for meticulous combat training and breeding the toughest men in the British Army, the making of a volatile environment was inevitable.[41] In the direct aftermath of Bloody Sunday, Westminster Irish Republican Member of Parliament (MP) Bernadette Devlin suggested at a House of Commons debate that 1 Para's lethal response to rioters was not an

[35] *Principal Conclusions* (n 1) 35.
[36] *Principal Conclusions* (n 1) 30. The two casualties in this area between Joseph Place and Rossville Flats were Patrick Campbell and Daniel McGowan.
[37] *Principal Conclusions* (n 1) 31.
[38] White (n 21) 1289.
[39] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 5; Maney (n 10) 15–16.
[40] Huw Bennett, 'Smoke without Fire? Allegations against the British Army in Northern Ireland, 1972–75' (2013) 24(2) Twentieth Century British History 275, 277.
[41] Christopher Dobson, 'Inside the Minds of the Hard Men' *The Independent* (London, 22 October 2011) <https://www.independent.co.uk/voices/inside-the-minds-of-the-hard-men-1572200.html> accessed 21 March 2020.

accident, arguing that rigorously trained paratroopers do not simply go 'berserk'.[42] Devlin, who had been present in Derry on Bloody Sunday, concluded that the events in the Bogside were akin to 'a normal, ordinary exercise to those men'.[43] Instead of accepting the criticisms of 1 Para, it can be argued that the British government used official discourse in the form of a tribunal of inquiry to justify the force they inflicted during the operation on Bloody Sunday.

## 3 The First Inquiry — The Widgery Tribunal and Report

At the end of January 1972, the British government formed a tribunal of inquiry into the events of Bloody Sunday, presided over by Lord Chief Justice Widgery.[44] MP Reginald Maudling read the British Army and government's account of Bloody Sunday to the House of Commons, which he noted was 'disputed' by some members of the general public in the United Kingdom.[45] Official records document Maudling's subsequent interaction with MP Devlin, during which Maudling asserted that 1 Para were returning the 'assault' of a 'large number of trouble makers' using firearms.[46] Devlin notably queried Maudling's account, ultimately asking: 'Is it in order for the Minister to lie to this house?'[47] Indeed, analysis of both the Widgery and Saville Reports proves Maudling's claim that British soldiers were attacked with firearms to be false.[48] Whilst the proceedings were intended to be

[42] HC Deb 1 Feb 1972, vol 830, col 293.
[43] ibid; HC Deb 31 Jan 1972, vol 830, col 41.
[44] HC Deb 31 Jan 1972, vol 830, col 33.
[45] ibid.
[46] HC Deb 31 Jan 1972, vol 830, col 32.
[47] HC Deb 31 Jan 1972, vol 830, cols 36–37.
[48] John Widgery, *Report of the Tribunal Appointed to Inquire into the Events on Sunday, 30th January 1972: Which Led to Loss of Life in Connection with the Procession in Londonderry on That Day* (Stationery Office 1972) 31–38; *Principal Conclusions* (n 1) 36–38.

impartial, Maudling's stance became indicative of the position held by those at the highest level of the British Army and government as acting in defence of 1 Para's actions.[49]

According to Hegarty, a public inquiry was considered to be the most suitable form of truth-telling in the context of Bloody Sunday as mechanisms governed by law are the primary method by which accountability can be achieved.[50] Public inquiries are susceptible to outside influences, however, with Gilligan highlighting that they can be 'staged, managed and manipulated' in order to promote a political agenda. [51] The Widgery Tribunal is arguably illustrative of this contention, as judicial and political bias was present in the proceedings. The tribunal primarily investigated eyewitness evidence, including statements made by an insufficient number of march attendees and several, but not all, of the wounded.[52] By not hearing evidence from most civilian eyewitnesses and all of the wounded, Widgery was heavily influenced by information provided by the British Army.[53] One example of bias was highlighted in 1995, when a record of a meeting between PM Heath and Lord Widgery became known. Prior to the beginning of the Tribunal's proceedings, Heath instructed Widgery that, whilst presiding over the inquiry, he should 'never forget it is a propaganda war we are fighting'.[54]

Published in April 1972, ten weeks after Bloody Sunday, Lord Widgery's report seemingly accommodated PM Heath's instruction.

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[49] HC Deb 31 Jan 1972, vol 830, col 33.
[50] ibid; Hegarty (n 10) 199.
[51] George Gilligan and John Pratt (eds), *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge* (Willan 2004) 63.
[52] Widgery (n 48) 3.
[53] Hegarty (n 10) 212.
[54] Museum of Free Derry, 'The Widgery Memo — Widgery Memo Damns British' (*Museum of Free Derry*) <https://www.museumoffreederry.org/content/%E2%80%98widgery-memo-damns-british%E2%80%99> accessed 19 January 2020.

Whilst the document concluded that none of the deceased men were handling firearms at the time they were shot by 1 Para, the Widgery Report found that the deceased men had most likely possessed firearms at undetermined times during the march on Bloody Sunday.[55] In actuality, the only man with a weapon shot by 1 Para was Donaghey, who was found with four nail bombs in his pockets.[56] It was alleged to the Tribunal by some attendees of the march that these weapons were planted on his body by British Army personnel after he was shot. However, this testimony was disregarded by Widgery with the incident reported in the report as 'mere speculation'.[57] This, and the suggestion that the deceased men were in possession of firearms, was found by Widgery to be one of the principal justifications of 1 Para opening fire. This contrasts strongly with the findings of the subsequent Saville Inquiry, published some 38 years after Widgery, which determined that the bombs were not visible to either the soldier that shot Donaghey or the medical officers that subsequently aided him. Further, the Saville Report contradicted the conclusions of Widgery, vindicating the rest of the deceased men by asserting that they had not wielded firearms during the march on Bloody Sunday.[58] Despite the Widgery Report portraying the deceased men as 'hooligans', it went on to conclude that the men killed were 'not acting aggressively and … the shots were fired without justification'.[59] This statement ostensibly implicates the soldiers as acting unlawfully. However, one of the report's central contradictions was its further statement that 'there was no general breakdown in discipline' on the part of 1 Para, further complexifying the issue of apportioning blame as the report seemingly vindicates both 1 Para and the deceased men. The report's obfuscation has provoked academic speculation that Widgery was acting to sustain the British government

[55] Widgery (n 48) 28–30.
[56] *Principal Conclusions* (n 1) 32.
[57] Widgery (n 48) 32–33.
[58] Widgery (n 48) 32.
[59] Widgery (n 48) 31–32.

and Army's 'concoction of deceit'.[60]

These examples combine to indicate, as Gilligan noted, that the British government in 1972 had a desire to document a 'self-serving version of the truth'.[61] This was demonstrated by the Widgery Report's clear conclusion that there would have been no fatalities had the NICRA not organised the march.[62] By finding that NICRA were responsible for the events of Bloody Sunday, the Widgery Report demonised the civil rights movement and signalled to Nationalists in Northern Ireland that their right to protest against oppressive measures would be met with fatal force and further validated in official discourse.[63] This version of the 'truth' perpetuated by the Widgery Report was presented to the House of Commons on 19 April 1972 by PM Heath.[64] However, it was rebutted by Frank McManus MP as a 'whitewash' of the 'activities of the Army on that Sunday'.[65] This was also echoed in the literature, as Dawson states that by not exercising the evidential scope provided by the Tribunals of Inquiry Act 1921 to thoroughly investigate the events of Bloody Sunday, nor holding the 1 Para to account, the tribunal's conclusions amounted to a 'denial of justice'.[66]

## 4 The Second Inquiry — The Saville Report

The inconsistencies and partial investigations of the Widgery Tribunal have led scholars such as Hegarty to contend that the mechanism was ultimately used as a political tool by Heath's government to prevent 'the

[60] Widgery (n 48) 38; Don Mullan, *Eyewitness: Bloody Sunday* (3rd edn Wolfhound Press 1997) 219.
[61] *Crime, Truth and Justice* (n 53) 65.
[62] Widgery (n 48) 38.
[63] Hegarty (n 11) 222.
[64] HC Deb 19 April 1972, vol 835, col 519.
[65] HC Deb 19 April 1972, vol 835, col 526.
[66] Graham Dawson, 'Trauma, Place and the Politics of Memory: Bloody Sunday, Derry, 1972–2004' (2005) 59(1) History Workshop Journal 151, 163.

truth of the events emerging'.[67] Naturally, this discouraged public trust in the British justice system across the United Kingdom. In 1998, in response to 'new' material presented by the Irish government and the Bloody Sunday Campaign, British PM Tony Blair stated in Parliament that 'there are indeed grounds for … a further inquiry'.[68] Walsh notes that this material formed an 'impressive dossier' of evidence gathered from a range of sources.[69] Integral to this dossier was eyewitness evidence and statements that the British soldiers had shot from Derry's walls on Bloody Sunday.[70] From assessing the trajectory of the entrance wounds, it was alleged that Young, Nash, and McDaid had been shot from the protected position of the walls.[71] This, corroborated by the evidence that none of the three deceased had handled firearms on Bloody Sunday,[72] signified the falsehoods in the claims made by the British Army that 1 Para only fired in retaliation to being fired upon.[73] The evidence presented in the dossier was not 'new', having been available but disregarded by the Widgery Tribunal in favour of the accounts of the British Army.[74] When the Irish government produced the dossier, they pressured the British government, headed by then PM

[67] Hegarty (n 10) 220.

[68] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 292–93; HC Deb 29 Jan 1998, vol 305, col 502. According to the Museum of Free Derry, The Bloody Sunday Justice Campaign was 'founded on the 20th anniversary to demand the repudiation of Widgery; the formal acknowledgement of the innocence of the victims; and the prosecution of those responsible'. See Museum of Free Derry, 'Bloody Sunday Justice Campaign' (*Museum of Free Derry*) <https://museumoffreederry.org/bloody-sunday-justice-campaign/> accessed 5 June 2021.

[69] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 293; Irish Government, 'The Irish Government's Assessment of the New Material Presented to the British Government in June 1997' (CAIN Web Service, 1997) <https://cain.ulster.ac.uk/events/bsunday/irgovt.htm> accessed 19 March 2020.

[70] ibid; Mullan (n 60) 70.

[71] ibid; Mullan (n 60) 70–91.

[72] Widgery (n 48) 31–38.

[73] ibid.

[74] Don Mullan is an Irish author and media producer and Dermot Walsh is a former barrister and senior lecturer; Channel 4 Investigations; *Sunday Business Post* Investigations.

Tony Blair, to acknowledge the failings of the Widgery Tribunal and establish a new inquiry into the historical events of Bloody Sunday to restore 'public confidence in the justice system'.[75]

Headed by Lord Saville, the second tribunal of inquiry began in 2000. Before its commencement, PM Blair stated that, in order to succeed, the tribunal needed to consider both the evidence originally presented by the 1972 Widgery Tribunal and the documents raised in the Irish government's dossier.[76] Seeking to address one of the principal criticisms of Widgery — its partial investigations — Blair stipulated that the second inquiry must dedicate a sufficient period of time in which to thoroughly investigate the available evidence.[77] Second, an important factor in instigating the Saville Inquiry was the disparity in nature of the legal representation of the families of those who died on Bloody Sunday and the soldiers in the Widgery Tribunal.[78] Across ten volumes, the Saville Report outlined the judicial processes adopted by the inquiry, which were designed to facilitate balanced legal representation between the Ministry of Defence (MoD) and the Bloody Sunday families. The literature highlights that the adversarial nature of legal representation at the Widgery Inquiry, where the MoD's legal assets far outweighed those of the 'under-resourced' Bloody Sunday families, prompted this provision.[79] The Saville Inquiry sought to ensure that all parties had 'confidence in the inquiry' by having the capacity to thoroughly explore the events of 30 January 1972.[80]

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[75] HC Deb 29 Jan 1998, vol 305, col 503.
[76] ibid.
[77] The introductory volume of the Saville Report echoed Blair's instruction by outlining the necessity of time in the collection, analysis, hearing, and consideration of the evidence, which is voluminous. See Lord Saville, William L Hoyt, and John L Toohey, *Report of the Bloody Sunday Inquiry* (vol 1, Stationery Office 2010) 15.
[78] ibid 16; Lord Saville, William L Hoyt and John L Toohey, *Report of the Bloody Sunday Inquiry* (vol 10, Stationery Office 2010) 4–25.
[79] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 298.
[80] *Report of the Bloody Sunday Inquiry* (vol 1) (n 77) 6–7.

## The Conclusions of the Saville Inquiry

In Channel 4's documentary *Secret History: Bloody Sunday*, Bishop Daly recalled that 'what really made Bloody Sunday so obscene was the fact that people … at the highest level of British justice, justified it'.[81] Mansfield postulates that this criticism was addressed throughout the volumes of the Saville Report by its explicit emphasis on 'fairness, thoroughness and impartiality'.[82] Further, the report was unambiguous in its conclusion that Widgery's assertion that NICRA and the attendees of the civil rights march engaged in criminal activity on Bloody Sunday was invalid.[83] Further, the Saville Inquiry reviewed evidence of causative links between the actions of senior members of the British Army and the direct killings perpetrated by 1 Para on Bloody Sunday.[84] Its report found that Colonel Wilford, in giving orders to 1 Para to enter the Bogside on Bloody Sunday, created a 'significant' and foreseeable risk that people other than 'justifiable targets' would be killed or injured.[85] Saville goes on to attribute blame, surmising that, if Wilford had not given those orders, the terror of Bloody Sunday may have been avoidable.[86] This conclusion represents a defining moment in the wider story of Bloody Sunday, as the report found that there had been a 'serious and widespread loss of fire discipline' amongst 1 Para.[87] Further, the report asserts that the response of the paratroopers could not be justified as their targets were not 'posing a threat or causing death

[81] Bishop Daly was present on Bloody Sunday. He also delivered the last rites to Jackie Duddy as he lay on the ground after being shot by 1 Para. Derry Janner, *Channel 4 — Secret History: Bloody Sunday* (originally screened 5 December 1991, 1 January 2019) 3.58–4.08 <https://www.youtube.com/watch?v=hdcYhTPg1wQ> accessed 15 March 2020.
[82] *Report of the Bloody Sunday Inquiry* (vol 1) (n 77) 43–53.
[83] Nevin Aiken, 'The Bloody Sunday Inquiry: Transitional Justice and Post Conflict Reconciliation in Northern Ireland' (2015) 14(1) JHR 101, 111.
[84] *Principal Conclusions* (n 1) 53.
[85] *Principal Conclusions* (n 1) 53.
[86] *Principal Conclusions* (n 1) 52.
[87] *Principal Conclusions* (n 1) 57.

or serious injury'.[88] This conclusion stands in almost direct opposition to the earlier outcomes of the Widgery Report; as previous sections of this paper have discussed, Widgery notably asserted that several of the dead had used or carried firearms or bombs, which seemingly justified the response of 1 Para.[89]

As Aiken notes, in publicly exculpating the victims and institutionally acknowledging Bloody Sunday as an historic injustice, the Saville Report served as a form of closure for the families of the victims.[90] On the day of its publication in 2010, the Saville Report was welcomed by Tony Doherty — whose father, Patrick, was killed on Bloody Sunday — when he condemned the actions of 1 Para on behalf of the victims' families.[91] The newly-elected British PM David Cameron made an official apology in the House of Commons, where he stated that to justify the actions of 1 Para would be 'defending the indefensible'.[92] However, Cameron's gesture has been diluted by his successors. Consecutive PMs Theresa May and Boris Johnson have endorsed a statutory 'presumption against prosecution' for British soldiers for 'alleged offences committed in the course of duty', validating a political climate where accountability for alleged war crimes perpetrated by British soldiers is unimportant.[93] It can be inferred from the resistance of successive UK prime ministers to criticise British soldiers that supporting justice for unlawfully killed civilians is not politically viable, which is illustrated by the current controversy surrounding retrospective prosecutions of L/C F.

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[88] *Principal Conclusions* (n 1) 53.
[89] Widgery (n 48) 38, 69–82.
[90] Aiken (n 83) 112.
[91] Museum of Free Derry, 'Bloody Sunday Trust — Innocent: Remembering 15 June — Reactions to the Saville Report on Bloody Sunday' (Derry, 2011).
[92] HC Deb 15 June 2010, vol 305.
[93] Boris Johnson is the PM of the United Kingdom from 2019 to the present (as of April 2021); Overseas Operations (Service Personnel and Veterans) Act 2021; ECCHR (n 3) 43.

## 5 2019: The Charges Against L/C F and 1 Para

The scope of the two tribunals discussed thus far, Widgery and Saville, were governed by the Tribunals of Inquiry Act 1921.[94] According to Blom-Cooper, this Act effectively limited the jurisdiction of the Inquiries to truth-finding initiatives.[95] Despite the Saville Report being unambiguous in its findings regarding 1 Para's misconduct, both the Widgery and Saville Tribunals lacked the inherent jurisdiction to rule on civil or criminal liability.[96] The authority to bring public prosecutions rests with the Northern Ireland Public Prosecution Service (PPS), which has the authority to infer findings of criminal or civil liability from the evidence presented in the Saville Report for the Bloody Sunday killings.[97] In 2019, the PPS announced that there was sufficient evidence to prosecute L/C F for murder and attempted murder.[98] This section of the paper will focus on the charges against L/C F as the only member of 1 Para being charged for his actions on Bloody Sunday.

Whilst the British Army personnel active in Northern Ireland were 'constitutionally the responsibility of the MoD in London', the Northern Irish courts take legal responsibility for prosecuting the soldiers involved in Operation Banner.[99] This section of discussion considers the legal precedents for unlawful force inflicted by British Army personnel on military operations in Northern Ireland. As noted in the House of Lords judgment in *R v Clegg*, any legal proceedings brought against a member of the armed forces of the Crown are

[94] HC Deb 29 Jan 1998, vol 305, col 503.
[95] Louis Blom-Cooper, 'What Went Wrong on Bloody Sunday: A Critique of the Saville Inquiry' [2010] PL 64.
[96] ibid 65.
[97] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 300.
[98] *Principal Conclusions* (n 1).
[99] *Report of the Bloody Sunday Inquiry* (vol 9) (n 15) 211. This means that it is within PPS's jurisdiction to decide to prosecute any of the British soldiers involved in the killings of Bloody Sunday.

considered by the same principles of law as the ordinary citizen.[100] This judgment highlights that the duties of armed soldiers to 'search for criminals' and 'risk his life' permit coercive action.[101] Nevertheless, as *Clegg* stipulates, this notion does not allow soldiers to act 'beyond that which was reasonable'.[102] In this case, the defendant, a soldier in Northern Ireland, was on patrol when a stolen vehicle approached a checkpoint and did not stop. The defendant fired three shots at the vehicle, which missed the target, before firing a fourth shot which hit the passenger and was a significant cause of her death. The defendant argued at his murder trial that he fired in self-defence — this was not accepted for the fourth shot, which was fired after danger had passed. Upon appeal, the House of Lords upheld the murder conviction, holding that the defendant was guilty of murder because he had exhibited a 'grossly excessive and disproportionate use of force' that refutes the claim of self-defence.[103] Several aspects of *Clegg* are pertinent in the context of Bloody Sunday. First, 1 Para claimed to both tribunals that they used lethal force in response to being fired upon first, which was untrue, and thus the notion of coercive action and self-defence cannot be engaged. Second, it suggests that 1 Para ought to be judged in a court of law on the same criterion for murder as an ordinary citizen. This requires the *actus reus* and *mens rea* to be determined. For the prosecution of L/C F to succeed, it must be determined that he had the intent to kill or cause grievous bodily harm under the Queen's peace.[104] Using primarily the Saville Report, the following discussions seek to understand the extent to which the actions of 1 Para, and L/C F in particular, constitute murder.

In March 2019, 47 years after Bloody Sunday, the PPS charged L/C F with the murder of James Wray and William McKinney and the

[100] *R v Clegg* [1995] UKHL 1, [1995] 1 AC 482.
[101] ibid 497 (Lord Lloyd).
[102] ibid 497 (Lord Lloyd).
[103] ibid 489 (Lord Lloyd).
[104] 3 Co Inst 47.

attempted murder of Patrick O'Donnell, Joseph Friel, Joe Mahon, and Michael Quinn. This is based on evidence from eyewitness testimonies and forensic data incriminating 1 Para collectively.[105] Based upon this evidence, provided to the Saville Inquiry by the Irish government, Walsh suggests that 1 Para may have acted in a joint enterprise to commit murder and attempted murder on Bloody Sunday.[106] Further, the report considered evidence that L/C F was responsible for killing three more men and grievously harming two others, which is not reflected in the charges brought against him by the PPS.[107] The charges made, and not made, against L/C F by the PPS will be explored below in conjunction with an evidenced discussion of the possibility of a joint enterprise between 1 Para.

The report states that in an area of the Bogside, namely Glenfada Park North, either L/C F or Private H, another member of 1 Para, 'fired the shot that mortally wounded William McKinney'.[108] The report stated that 'each hit … McKinney with one shot' in the back, one of which passed through his body and hit Joe Mahon.[109] In their decision not to prosecute Private H, the PPS noted that 'there was no admissible evidence to prove' that he fired his weapon in Glenfada Park North, thus attributing the murder of McKinney and attempted murder of Mahon to L/C F.[110] The second count of murder attributed to L/C F by the PPS is that of Jim Wray.[111] Despite Saville concluding that either Private G or H fired the first shot to hit Wray, not L/C F, the report noted

[105] *Principal Conclusions* (n 1).
[106] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 160.
[107] *Principal Conclusions* (n 1) 30–57.
[108] *Principal Conclusions* (n 1) 34.
[109] Lord Saville, William L Hoyt, and John L Toohey, *Sector 4: Events in Glenfada Park North and Abbey Park* (vol 6, Stationery Office 2010) 584–85.
[110] Northern Ireland Public Prosecution Service, *Bloody Sunday — Summary of Decisions Not to Prosecute* (Northern Ireland Public Prosecution Service 2019) 11 <https://www.ppsni.gov.uk/publications/bloody-sunday-summary-reasons> accessed 20 March 2020.
[111] ibid.

that, between L/C F and three other members of the unit, they killed McKinney and Wray, and injured Mahon, Friel, Quinn, and O'Donnell.[112] The implication of a joint enterprise between the soldiers of 1 Para is considered in the literature. Walsh, for example, hypothesises that even if it cannot be established which paratrooper discharged fatal rounds in the Bogside, the group of soldiers may all be criminally liable if they were aware that one or more of them was contemplating the use of unlawful lethal force.[113] The actions of 1 Para on Bloody Sunday can be considered against the precedent of joint enterprise's wider case law.

## Joint Enterprise between 1 Para

According to the case law of the UK's Supreme Court, the expression 'joint enterprise' is 'not a legal term of art'.[114] Outlined in *R v Jogee*, it is a doctrine that accords responsibility if several parties agree to carry out a criminal venture.[115] As the judgment states, each party is therefore 'liable for acts to which they have expressly or impliedly given their assent'.[116] When applied to the context of Bloody Sunday, the principle of joint enterprise is engaged if one soldier committed the act of murder against a civilian but several other soldiers encouraged or facilitated it. According to the precedent set forth in *Jogee*, this would be an act of joint enterprise whereby the first soldier was the 'principal' offender

[112] *Principal Conclusions* (n 1) 34–43.
[113] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 160.
[114] *R v Jogee* [2016] UKSC 8, [2017] AC 387 [77] (Lord Hughes and Lord Toulson SCJJ). *Jogee* was a landmark ruling which set a precedent on defendants being convicted as accessories to an offence if they acted to 'aid, abet, counsel, or procure' the commission of a crime with the intent to do so. Explained in depth and with examples in Jessica Jacobson and others, 'Joint Enterprise: Righting a Wrong Turn? Report of an Exploratory Study' (Institute for Criminal Policy Research, University of London, 2016).
[115] ibid.
[116] ibid.

and the others were 'secondary' offenders.[117] When considered together with the evidentiary language of the Saville Report, Walsh's contention of a joint enterprise between four members of 1 Para to murder two civilians and injure a further four addresses the conflicting charges brought against L/C F for actions he alone did not commit. For L/C F and his cohort to have been acting in a joint enterprise, it must be determined that they had a common pursuit that caused the deaths in the Bogside.[118] Across the extensive documentation that comprises the Saville Report, there are a number of instances where the shared intent of 1 Para is evidently discernible. In one example, the report describes how the soldiers would have been 'highly apprehensive', if not 'frightened' that they were going to come under 'attack by paramilitaries using bombs and firearms'.[119] The possibility that 1 Para were therefore mentally prepared for conflict, rather than conducting an arrest operation, is further evidenced in other sections of the report. This mentality was exacerbated by General Ford, the most senior British Army commander in Northern Ireland at the time of Bloody Sunday, who is reported as having incited a sense of 'war-zone urgency' in 1 Para as the soldiers entered the Bogside, shouting 'Go on the Paras, go and get them, go on, go and get them'.[120] The report goes on to criticise the unit's commander, Wilford, because he ordered 1 Para into the Bogside to 'as he himself put it, seek out the "enemy"'.[121] Drawing upon these accounts, it could be suggested that senior members of the British Army encouraged 1 Para to act outside their duty, and in doing so committed gross negligence in their incitement of a foreseeably

[117] ibid [78] (Lord Hughes and Lord Toulson SCJJ).
[118] ibid [21]–[54] (Lord Hughes and Lord Toulson SCJJ).
[119] *Principal Conclusions* (n 1) 39.
[120] British Irish Rights Watch, 'Bloody Sunday: Submission to the United Nations' Special Rapporteur on Summary and Arbitrary Executions: the Murder of 13 Civilians by Soldiers of the British Army on "Bloody Sunday" 30th January 1972' (CAIN Web Service, 1994) <https://cain.ulster.ac.uk/events/bsunday/birw.htm> accessed 13 March 2020.
[121] *Principal Conclusions* (n 1) 53.

deadly environment on Bloody Sunday.[122] Once deployed, the members of 1 Para 'reacted by losing their self-control … forgetting or ignoring their instructions and training'.[123] It can be concluded that the common pursuit between 1 Para, encouraged by senior officers, fulfils the criterion of a joint enterprise by the soldiers and their superiors on Bloody Sunday.

It is also crucial to the fulfilment of the criteria for joint enterprise that at least one of the victims was killed unlawfully.[124] Throughout their involvement in the Northern Ireland conflict, the British Army used the Yellow Card, which set out the conditions of permissibility for British soldiers to discharge weapons. These conditions stipulated that soldiers must not use more force than necessary and to only fire without warning when a person can be 'positively identified' as carrying a weapon.[125] According to Mills, contravention of these rules amounted to unlawful use of force.[126] As preceding sections have discussed, one of the principal conclusions of the Saville Report was that 1 Para shot at civilians without warning, when those civilians were not armed and were ultimately not posing a discernible threat.[127] These findings, surmises Walsh, indicate that 1 Para were 'in breach of the Yellow Card rules' when they allegedly resorted to the unlawful use of lethal force during the events of Bloody Sunday.[128]

Whilst a joint pursuit can be inferred from 1 Para's actions on Bloody Sunday, it can be further solidified in their perjured statements to the Widgery Tribunal.[129] The Saville Report concluded that the soldiers of

[122] *Principal Conclusions* (n 1) 57.
[123] *Principal Conclusions* (n 1) 53.
[124] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 207.
[125] Claire Mills, 'Investigation of Former Armed Forces Personnel Who Served in Northern Ireland' (CBP 8352, 2020) 12–14.
[126] ibid 14.
[127] *Principal Conclusions* (n 1) 35.
[128] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 207–08.
[129] *Events in Glenfada Park North and Abbey Park* (n 109) 577–89.

1 Para sought to provide 'knowingly' false accounts to both of the Tribunals in an attempt to justify firing their weapons.[130] Illustratively, L/C F claimed that he had shot at least two men on the streets of the Bogside because he identified them as having a firearm on Bloody Sunday. The report did not find this testimony sufficiently compelling, however, and ultimately determined that L/C F shot unjustifiably at civilians without 'caring' whether their behaviour was threatening or not.[131] In the wider context of the perjured statements from 1 Para to the inquiries, the Saville Report suggests the possibility that the soldiers 'invented details' in an attempt to make claims of gunmen in the Bogside more credible.[132] Such obfuscation means that responsibility for a number of deaths and injuries cannot be attributed to any one soldier.[133] It is possible that, in taking such steps to mislead the inquiries, members of 1 Para sought to protect one another from incrimination. The development of such a 'culture of protection' meant that, as the Saville Report acknowledged, British soldiers in Northern Ireland felt they could 'fire with impunity', secure in the knowledge that possible investigation by the RUC or Royal Military Police would be undertaken sympathetically.[134]

As the preceding paragraphs have sought to present, 1 Para worked in joint enterprise to cause death and grievous bodily harm on Bloody Sunday. The paper will now consider the extent to which this has informed the pursuit of legal justice against members of 1 Para. The only charges being brought against the unit are against L/C F, for which he is yet to stand trial. The test for prosecution cannot be applied to two members of the joint enterprise because they are deceased, and there is insufficient evidence to charge the fourth member.[135] However, whilst

[130] *Principal Conclusions* (n 1) 38.
[131] *Principal Conclusions* (n 1) 42–57.
[132] *Report of the Bloody Sunday Inquiry* (vol 1) (n 78) 80.
[133] *Principal Conclusions* (n 1) 33–44.
[134] *Principal Conclusions* (n 1) 50.
[135] *Summary of Decisions Not to Prosecute* (n 110) 11.

the Saville Report had 'no doubt' that L/C F was responsible for the deaths of Kelly, Doherty, and McGuigan, as well as causing injury to two other men, the PPS charges against L/C F do not reflect this.[136] According the PPS, there was insufficient forensic evidence to ascribe the death of Kelly to L/C F and any accounts of the soldier firing in this area were rendered inadmissible due to the unit's perjury.[137] It was also for this reason that L/C F could not be charged with the murder of McGuigan and Doherty.[138]

Evidential issues are not the only challenges that the PPS faced in their decision to charge L/C F. In their recent report, entitled *Historical Investigation & Information Recovery*, the Commission for Victims and Survivors determined that the central issue facing contemporary investigations into historical events is the passage of time.[139] The report notes that witnesses to events under investigation may be deceased. In the case of Bloody Sunday, both of these challenges are evident.[140] However, according to the literature, this reluctance to begin criminal proceedings was outweighed by three factors: first, the seriousness of the offence; second, the delay in criminal proceedings caused by 1 Para's perjury and the British government in 1972 by imploring Widgery to produce a form of propaganda against the IRA; and, third, the PPS determining that the evidence against L/C F proved 'beyond reasonable doubt' that he committed an offence and were also satisfied that it satisfied the public interest.[141] However indisputable the evidence against L/C F may be, there remains a section of society that does not

[136] *Principal Conclusions* (n 1) 34–45; *Summary of Decisions Not to Prosecute* (n 110) 9.
[137] ibid.
[138] ibid.
[139] The Commission for Victims and Survivors & Deloitte, *Research on Historical Investigations & Information Recovery* (Commission for Victims and Survivors 2012) 8–9.
[140] ibid.
[141] *Report of the Bloody Sunday Inquiry* (vol 10) (n 81) 38–45; Museum of Free Derry (n 54); Northern Ireland Public Prosecution Service, *Code for Prosecutors* (Northern Ireland Public Prosecution Service) 16.

wish for the British Army to be held to account. This will be explored in the succeeding paragraphs using the examples of the reluctance of Conservative PMs to condemn British Army personnel for human rights abuses in Northern Ireland and Iraq.

## 6 Opposition to the Good Friday Agreement and Prosecution of Operation Banner Veterans

In recent years, public distaste for charges brought against veterans of Northern Ireland has grown across the UK. In 2019, thousands of retired soldiers marched to protest the charges for murder and attempted murder on Bloody Sunday brought against L/C F.[142] This protest reinvigorated conversations about a number of grievances that emerged from the signing of the Good Friday Agreement (GFA) in 1998.[143] In particular, these concerns centred around the absence of a formal mechanism for dealing with unresolved deaths of those killed in PIRA attacks.[144] This is because some communities, most notably British Army veterans, believe that, whilst Northern Irish civilians killed by British forces have received a large-scale inquiry and public apology by a British PM, the same will not be afforded to those whose lives were lost in paramilitary attacks. Lukowiak notes that it is for the aforementioned reason that the GFA was not received positively by Northern Ireland veterans, who considered it an institutional betrayal

[142] Nicholls (n 6).
[143] The GFA was signed on 10 April 1998 by the British and Irish Governments and most of the political parties in Northern Ireland. The Agreement comprises three strands: i) the structure of the democratic institutions in Northern Ireland; ii) the relationship between the North and Republic of Ireland; and iii) the relationship between the UK and the Republic of Ireland. It also includes sections addressing constitutional issues, rights, decommissioning of arms, security, policing and prisoners; see Northern Ireland Office, *The Belfast Agreement* (Cm 3883, 1998).
[144] Mills (n 125) 15.

by the British government.[145] Further, there are grievances around the inter-group consensus between the British and Irish governments, which implored PM Blair to authorise the early release of political prisoners to encourage IRA disarmament.[146] This, Neumann argues, was a miscalculation because the British government weakened popular support for the GFA by compromising on a '"powerful incentive"' for the IRA to make their peaceful means permanent'.[147] It can be argued that the public receptiveness towards the prosecution of Northern Ireland veterans across the United Kingdom has been affected by the compromises made in the GFA.[148]

Recognising the contentious nature of retrospective prosecution for British Army personnel, the trial of L/C F, if it takes places, represents a significant moment for the enactment of post-conflict peace and justice in Northern Ireland. As Aiken observes, the case may provide an opportunity for intercommunity reconciliation for Nationalists and Loyalists as truth and justice can 'end impunity for past abuses'.[149] Further, the trial would demonstrate the capacity of the justice system to champion the rule of law to overcome temporal and political adversity. The legal journey of the Bloody Sunday charges in 2019 from the event in 1972 highlights the extent to which political agendas can both interrupt and influence investigative processes.[150] However, lessons have not been learned. In 2019, the Conservative government proposed legislative protection for British military personnel in Iraq

[145] Ken Lukowiak, 'Bloody Sunday and the Paras' Guilt' *The Guardian* (London, 18 June 2010) <https://www.theguardian.com/commentisfree//jun/18/bloody-sunday-paratrooper-apology> accessed 27 November 2019.
[146] Donald Horowitz, 'The Northern Ireland Agreement: Clear Consociational, and Risky' in John McGarry (ed), *Northern Ireland and the Divided World: Post-Agreement Northern Ireland in Comparative Perspective* (OUP 2001) 101.
[147] Peter Neumann, 'The Government's Response' in James Dingley (ed), *Combating Terrorism in Northern Ireland* (Cass Series on Political Violence, Routledge 2008) 193.
[148] ibid.
[149] Aiken (n 83) 108.
[150] Aiken (n 83) 108.

against 'vexatious' claims of liability.[151] The legislation arguably represents a legal manifestation both of the 'culture of protection' that continues to surround the British Army and an entrenched governmental reluctance to hold state forces to account. Catalysed by an unprecedented number of legal claims for damages during military operations in Iraq, the Overseas Operations (Service Personnel and Veterans) Act 2021 was proposed and has subsequently been enacted.[152] Whilst the Act does not apply to the events of the Troubles, it seems likely that the British government will introduce similar legislation to address the statutory gap between legacy issues in Iraq and Afghanistan, and the Troubles in Northern Ireland.[153]

## 7 Parallels between the Overseas Operations (Service Personnel and Veterans) Act 2021 and the Widgery Report

The Saville Report is considered representative of considerable progress made in the championing of truth recovery initiatives in the UK.[154] However, the Act as it now stands is counterproductive to this progress. The legislation stifles the possibility of historical investigation into claims of civilians unlawfully killed or tortured by Iraq and Afghanistan veterans. In 2019, a joint investigation conducted by BBC Panorama and *The Sunday Times* reported that the British government and Army had covered up war crimes perpetrated by British soldiers in Iraq and Afghanistan.[155] The investigation reported a source at the now-defunct

[151] *Conservative Manifesto* (The Conservative and Unionist Party 2019) 52.
[152] Explanatory Notes to the Overseas Operations (Service Personnel and Veterans) Act 2021.
[153] Mills (n 125) 7.
[154] John Brewer and Bernadette Hayes, 'Victimhood and Attitudes towards Dealing with the Legacy of a Violent Past: Northern Ireland as a Case Study' (2015) 17(3) Brit J Poli 513.
[155] Editorial, 'UK Government and Military Accused of War Crime Cover-Up' *BBC* (London, 17 November 2019) <https://www.bbc.co.uk/news/uk-50419297> accessed 2

Iraq Historic Allegations Team (IHAT), stating that the MoD 'had no intention of prosecuting any soldier' unless 'they couldn't wriggle their way out of it'.[156] If true, such institutional denial of accountability arguably serves as a contemporary manifestation of the culture of protection, reminiscent of the lack of parliamentary oversight when PM Heath presented the findings of the Widgery Report to the House of Commons without providing copies to other members of the House.[157]

The closure of IHAT, tasked with investigating allegations of human rights abuses by British Army personnel in Iraq, suggests the continuation of the denial of military accountability by the British government.[158] The ECCHR suggested that, whilst allegations of abuse of Iraqi detainees have indeed been acknowledged by chief Army advisers and British politicians, IHAT's closure represented a failure in obtaining justice for those subjected to abuse by British armed forces.[159] In an attempt to hold the UK to account for this failure, the ECCHR invited the International Criminal Court[160] to investigate the alleged crimes committed by British forces during the Iraq War.[161] Despite these movements, the British government remains insistent that the claims of abuse of Iraqi detainees are 'without foundation'.[162] This continued stance has been interpreted by the ECCHR as an institutional

April 2020.

[156] Closed by the Secretary of State for Defence in 2017 amidst 'domestic political pressure'; European Center for Constitutional and Human Rights (n 3) 45.

[157] HC Deb 19 April 1972, vol 835, col 521.

[158] European Center for Constitutional and Human Rights, 'War Crimes by UK Forces in Iraq: Q & A on the Legal Basis' (updated December 2020, Berlin) 1.

[159] European Center for Constitutional and Human Rights (n 3) 21.

[160] 'The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression'; International Criminal Court, About the Court <https://www.icc-cpi.int/about> accessed 2 February 2021.

[161] 'War Crimes by UK Forces in Iraq: Q & A on the Legal Basis' (n 158) 2.

[162] European Center for Constitutional and Human Rights (n 4) 43.

reluctance to investigate British armed forces.[163]

In an address to the House of Commons, PM Boris Johnson stated that it 'cannot be right that people should face unfair prosecutions when no new evidence has been forthcoming'.[164] This sentiment has translated into Section 2, Part 1 of the Act which names a 'presumption against prosecution'.[165] For this presumption to be fulfilled, a number of conditions must be met: first, the person must be a member of the armed forces, deployed overseas at the time of the alleged conduct; and, second, it must have been no longer than five years since the conduct took place.[166] The inclusion of an expiration date has specific implications for historical investigation. It places pressure on victims of violence in conflict to cooperate at the time of the event, which may not be possible. Rourke's research can be used to suggest that statutory expiration dates do not allow for the existence of a psychological phenomenon; it excludes those experiencing 'amnesia and delayed recall for some memories' as a consequence of suffering from delayed-onset trauma.[167] This is important because this type of trauma has been suffered by victims of sexual abuse and political torture, which are crimes known to have been perpetrated by British Army personnel in both Northern Ireland and Iraq.[168] However, Article 6 of the European Convention on Human Rights (ECHR) stipulates that 'everyone is entitled to a fair and public hearing'.[169] Clarificatory documentation

[163] ibid.
[164] HC Deb 14 October 2019, vol 666.
[165] Overseas Operations (Service Personnel and Veterans) Act 2021 (n 93) pt 1, s 2.
[166] ibid ss 1(3)–(4).
[167] US Department of Health and Human Services, *Treatment Improvement Protocol: Trauma-Informed Care in Behavioral Health Services* (Substance Abuse and Mental Health Services Administration, US Department of Health and Human Services 2014) 57, 129.
[168] Catherine O'Rourke and Aisling Swaine, 'Gender, Violence and Reparations in Northern Ireland: A Story Yet to Be Told' (2017) 21(9) IJHR 1302, 1308–11; European Center for Constitutional and Human Rights (n 4) 21.
[169] European Convention on Human Rights, art 6(1).

further notes that this must take place 'within a reasonable time'.[170] Whilst the ECHR endorses expiration dates for legal investigations, it can be argued that the blanket 'five year' period in the Act does not appreciate the complex nature of allegations against the armed forces. As illustrated by the case of L/C F, a blanket expiration date on proceedings is not a reasonable component of legislation as it does not allow for cases to be assessed individually based on their circumstances and varying temporal requirements.[171] Whilst the legislation applies to the operations in Iraq and Afghanistan, Mills claims that similar but separate legislation is being proposed for legacy issues in Northern Ireland.[172] If this is true, it will be founded on the claim that investigations into the actions of the armed forces in past conflicts are 'disproportionately high' and 'unnecessary'.[173] This statement is contradicted by the figures published by *The Guardian* in 2019: of the 300,000 British Army personnel who served in Northern Ireland, the MoD informed the media outlet that approximately 150 to 200 of them currently face investigations.[174] If accurate, these figures suggest that future legislation will have been designed to protect less than 1 per cent of the personnel involved in Operation Banner.[175]

The vigour of the British government in protecting the British Army through legal instruments, despite acknowledging the abuses of civilians overseas, is reminiscent of MP Maudling's praise of 1 Para in his erroneous statements to the House in 1972.[176] This attitude persists

[170] European Convention on Human Rights, 'Guide on Article 6 of the European Convention on Human Rights — Right to a Fair Trial (Criminal Limb)' (2020), 59.
[171] ibid 60.
[172] Mills (n 125) 15.
[173] HC Deb 20 May 2019, vol 660.
[174] Ministry of Defence, 'Armed Forces Mark 50 Years since the Start of Operations in Northern Ireland' (*Gov.uk*, 2019) <https://www.gov.uk/government/news/armed-forces-mark-50-years-since-the-start-of-operations-in-northern-ireland> accessed 4 April 2020; Bowcott (n 4).
[175] HC Deb 20 May 2019, vol 660.
[176] HC Deb 31 Jan 1972, vol 830, col 32.

in House of Commons debates, as Damien Moore MP stated in 2019 that the deaths attributed to the British forces in Northern Ireland were a 'result of entirely lawful' actions.[177] This is a contravention of ministers' duties to honesty and integrity.[178] It directly contrasts with evidenced narratives of excessive force used by British soldiers in Northern Ireland, one example being documented in the Saville Report.[179] As made abundantly clear in the debates about the legacy of the Troubles cited throughout this paper, the victims of violence perpetrated by personnel of the British armed forces have not been consistently and collectively prioritised by British politicians.[180] However, there have been statements made to the House by MPs, such as Stephen Pound, who have advocated for the importance of mentioning victims in House of Commons debates. Whilst recognising that it is indeed 'unfortunate' that veterans are being investigated for historical allegations, Pound underscored the significance of victims of violence, concluding that, ultimately, 'we have to look into the eyes of those whose relatives were killed'.[181] McEvoy echoes this sentiment, arguing that the most difficult issue regarding the Northern Irish peace process is 'the impact upon those who have been victims'.[182] In pushing through legislation that opposes historical investigation, the British government is prioritising the preservation of the reputation of British armed forces over justice for civilians unlawfully killed in conflict.

[177] HC Deb 20 May 2019, vol 660.
[178] *The Code of Conduct for Members of Parliament* (Houses of Parliament, 2018), 1.
[179] Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (n 11) 12.
[180] HC Deb 20 May 2019, vol 660.
[181] ibid.
[182] Kieran McEvoy, 'Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict' (1998) 22 Fordham Int'l LJ 1539, 1567.

# 8 Conclusion

This paper has discussed the case of Bloody Sunday and the charges that have subsequently been brought against L/C F, a member of the 1st Battalion of the Parachute Regiment of the British Army. By chronologically analysing the events of 30 January 1972, the paper has sought to demonstrate the importance of government-facilitated historical investigations to secure justice for civilians unlawfully abused and killed by British Army personnel during conflict. Discussions have determined that the British government in 1972 had an institutional responsibility to inquire into the events of Bloody Sunday and hold accountable those who caused the deaths of 13 boys and men and the injury of 15 more. Instead, the Widgery tribunal of inquiry and subsequent report was driven by political motivations to deal a 'blow' to the IRA's campaign by justifying the actions of 1 Para.[183] Had an impartial and thorough investigation into the evidence been taken in the immediate aftermaths of Bloody Sunday, there would not have been a need for historical investigation into the events.[184] However, owing to the flawed nature of the Widgery Report, the second inquiry sat for ten years to consider the evidence to establish the truth of the events, which led to charges being brought against one member of 1 Para in 2019, L/C F. Any possible charges of murder or attempted murder against other members of the unit were unable to be carried forward by the PPS due to the inadmissibility of perjured statements made by 1 Para about their actions on Bloody Sunday.

The charges brought against L/C F for murder and attempted murder are a positive step towards reconciliation and societal healing in Northern Ireland.[185] Despite this, there are sections of the general public, particularly British Army veterans, that do not accept the historic prosecution of soldiers. This is reflected in the media, who

[183] HC Deb 19 April 1972, vol 835, col 527.
[184] *Crime, Truth and Justice* (n 51) 65.
[185] Brewer and Hayes (n 154) 513.

perpetuate a narrative of a legal 'witch hunt' against Northern Ireland veterans.[186] The Saville Report offered the British government the opportunity to reflect on the way in which allegations against the armed forces are addressed and the mechanisms in place to seek justice for unlawfully killed civilians. However, the unwillingness to investigate such allegations appears largely unchanged since 1972; thus, known abuses of civilians in Iraq by British forces have been ignored, and justice for unlawfully killed and abused civilians obstructed. Such obstruction to the investigation of historical allegations has been formalised by the Overseas Operations Act. As a statute of limitations on allegations made against British soldiers during operations, the Act does not appreciate the complex nature of trauma associated with soldier misconduct in conflict, as demonstrated by the case of Bloody Sunday. Instead, known allegations of abuse against Iraqi civilians by British Army personnel have failed to be investigated, and further historic allegations will be opposed in statute by the 'presumption against prosecution' of British soldiers enshrined in the Act.[187]

[186] HC Deb 11 March 2020, vol 673.
[187] Overseas Operations (Service Personnel and Veterans) Act 2021 (n 93) pt 1, s 2.

# Legitimising Biopiracy? Fairness and Efficacy of the Nagoya Protocol

Dominic Querée Hodnett

**Abstract**

When utilised in new and innovative ways, traditional knowledge associated with vascular plants and other organisms is rendered patentable, which allows for its corporate exploitation in pharmaceutical and agricultural applications. This article explores the Nagoya Protocol, a voluntary, international agreement that purportedly promotes benefit-sharing arising from the commercialisation of traditional knowledge. First, this paper establishes the role of stakeholders in the bioprospecting field, analysing how the Nagoya Protocol unfairly and inequitably promotes corporate interests to the detriment of state and indigenous interests in the global south. Second, it addresses how the Nagoya Protocol perpetuates unfairness between regions, largely due to varying state practices arising from differing interpretations of the Nagoya Protocol's benefit-sharing doctrine. Third, it contends that such unfairness is a remnant of colonial attitudes and relies on reticence to promote global inequality, under the guise of global benefit, to the considerable harm of lesser-developed countries. Consequently, it is argued that lesser-developed countries should exploit the flexibility embedded within the regime to tighten domestic law, allowing for a fairer distribution of benefits to indigenous stakeholders. Ultimately, this paper advances the debate on bioprospecting to consider whether the line drawn between corporate innovation and indigenous interests in the Nagoya Protocol is fair and equitable or whether it instead operates to advance western corporate interests.

# 1 Bioprospecting and Benefit-Sharing: the Nagoya Protocol

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010 ('Nagoya Protocol') supplements the earlier Convention on Biological Diversity 1992 ('CBD').[1] The CBD built momentum in promoting the conservation of biological diversity and reflected a 'turning point' in the sustainable use of biological components. However, many believe that it inadequately addressed benefit-sharing to indigenous ethnic and national groups, whose traditional knowledge associated with vascular plants is actively patented by global corporations through bioprospecting activity, often without tangible benefit to these aforementioned ethnic and national groups. [2] The Nagoya Protocol was developed to remedy such unfairness arising from bioprospecting (the search for plant and animal species from which medicinal drugs, biochemicals and other commercially valuable material can be obtained) by promoting the principle of benefit-sharing.[3]

This article evaluates the extent to which the Nagoya Protocol has operated to remedy the issues arising from the exploitation and commercialisation of traditional knowledge and analyses its role in promoting principles of fairness and equity. By scrutinising the interests

[1] The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010; Convention on Biological Diversity 1992.

[2] Kanchana Kariyawasam, 'Access to Biological Resources and Benefit-Sharing: Exploring a Regional Mechanism to Implement the Convention on Biological Diversity in SAARC Countries' (2007) 29(8) EIPR 235, 235; Richard Tarasofsky, 'Publication Review: International Law and the Conservation of Biological Diversity attrib. Bowman' (1997) 46(2) ICLQ 486, 486; Krishna Dronamraju, *Biological and Social Issues in Biotechnology Sharing* (1st edn, Ashgate 1998) 12.

[3] Athanassios Yiannopoulos, 'Publication Review: *Droit Réel, Propriété et Créance: Élaboration d'un Système Rationnel des Droits Patrimoniaux* attrib Ginossar' (1963) 12(1) Am J Comp L 116.

and roles of stakeholders, it establishes that the regime promotes unfairness at a constitutional level; unfairly favours corporate interests by promoting corporate innovation over priority rights; and inequitably degrades the cultural interests of indigenous groups — effectively legitimising biopiracy through weak corporate social responsibility ('CSR') -style provisions.[4] Subsequently, the article contends that variation between common and civil law regimes nourishes global inequality, and thus promotes unfairness due to discrepancies between 'monist' and 'dualist' interpretations of benefit-sharing and state practice.[5] Finally, the article argues that remedying unfairness in the Nagoya Protocol relies on the strengthening of domestic provisions in the global south to circumvent interpretative issues that currently promulgate unfairness through reticence and the favouring of 'capital accumulation' over indigenous custom.[6]

## 2 Vitalism

Salami conveys the 'vitalist' view that plants and their employ reflect humanity's 'collective and global heritage'. He contends that this heritage 'ought not to be appropriated by a few under any guise', and that the role of intellectual property regimes ('IPRs') in allowing for the patenting of traditional knowledge and thereby restricting the use of biological material to corporate bodies, contravenes the innate human

[4] Tom Bingham, *The Rule of Law* (1st edn, Penguin 2010); Andrew Crane and Dirk Matten, *Business Ethics* (3rd edn, OUP 2010) 51.

[5] Johnathan Schaffer, 'Monism', *The Stanford Encyclopaedia of Philosophy* (2018) <https://plato.stanford.edu/entries/monism/> accessed 5 May 2020; Jean-Francois Bretonniere and Thomas Defaux, 'French Copyright Law: a Complex Coexistence of Moral and Patrimonial Prerogatives' in Baker & McKenzie France, *Building and Enforcing Intellectual Property Value* (Baker & McKenzie 2012) 83; Nagoya Protocol (n 1) art 1; Genevieve Bourdy, 'Quassia Biopiracy Case and the Nagoya Protocol: A Researcher's Perspective' (2017) 206(1) J Ethnopharmacology 290.

[6] Londa Schiebinger, *Plants and the Empire: Colonial Bioprospecting in the Atlantic World* (Harvard UP 2004) 226; Molly Scott Cato, *The Bioregional Economy* (Routledge 2013) 61; Carol Chi Ngang and Patrick Agejo Ageh, 'Intellectual Property Protection of African Traditional Medicine within the Legal Framework of the Right to Development' (2019) 27(3) Afr J Comp L 426.

nature of benefit-sharing.[7] Salami's view is grounded in the principle of the sanctity of life, which holds that all life forms have intrinsic value regardless of consciousness or perceived life quality.[8] The vitalist view informs intellectual property ('IP') restrictions by establishing that natural vascular plants themselves are ordinarily unpatentable, by virtue of a universal appreciation of nature. Contrastingly, plant knowledge and traditional uses are patentable, as the specific employ of the living material reflects scientific or human progress — ie occurring by means of human intervention.[9]

This article advances the ongoing dialogue surrounding the 'product of nature' doctrine by contending that benefit-sharing provisions per se should not legitimise biopiracy, which is viewed as inherently unfair and inequitable under normative principles established in international law. Biopiracy is understood here to be the 'unauthorised and uncompensated' taking of biological resources by parties who 'patent them for their own benefit', and is widely agreed to be an illegal form of bioprospecting.[10] Biopiracy is of specific relevance to traditional knowledge relating to vascular plants that possess pharmaceutical and agricultural potential. Morgera contends that a regime *consensually* enforced by signatory states may not be truly consensual, and thus fair, for indigenous groups.[11] This article expands this view and contends that the Nagoya Protocol legitimises biopiracy by virtue of its dependence on lesser-developed signatory states, illustrating unfairness both within domestic law (between state and indigenous peoples in the global south) and at the international level (between countries in the global north and global south). The Nagoya Protocol promotes a

[7] Emmanuel Salami, 'Patent Protection and Plant Variety Rights for Plant Related Inventions in the EU and Selected Jurisdictions' (2018) 40(10) EIPR 630.
[8] Elizabeth Martin, *Concise Medical Dictionary* (9th edn, OUP 2015) 234.
[9] Tim Roberts, 'Patenting Plants around the World' (1996) 18(10) EIPR 531.
[10] Chris Park and Michael Allaby, *A Dictionary of Environment and Conservation* (3rd edn, OUP 2017) 234.
[11] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27(2) EJIL 354.

globalised and arguably unsustainable provisioning of resources, dependent on a form of 'colonial pillaging' of traditional knowledge.[12]

## 3 Ownership and Innovation

Varied perspectives on 'ownership' kindle the biopiracy conflict.[13] Whilst Rosenberg, a western philosopher, argues that IP ownership is a right, effectively promoting restrictions and licensing in respect of traditional knowledge associated to vascular plants, others believe that this fosters an environment in which the 'tragedy of the commons' principle becomes enshrined, as individualistic, profit-driven ideals accelerate the 'exploitation of Earth's resources'.[14] Conversely, other theorists suggest that, if left unregulated without an effective property system, the destruction of natural resources becomes inevitable through 'resource degradation and depletion'.[15]

In the bioprospecting field, IP ownership is deemed necessary to promote innovation and allow for economic growth and prosperity.[16] The establishment of property and monopoly rights conferred by IPRs allows for state regulation and the promulgation of benefit arising from commercialisation. Without property rights, little incentive would exist for innovation, resulting in stagnation — moreover, biopiracy would be legitimised as no tangible claim could be asserted over property

[12] Antony Barnett, 'The New Piracy: How the West "Steals" Africa's Plants' *The Guardian* (London, 27 August 2006) <https://www.theguardian.com/science/2006/aug/27/plants.theobserversuknewspages > accessed 14 March 2020.
[13] Clark Wolf, 'Patent Fairness and International Justice' (2015) (7)1 WIPOJ 67.
[14] Alex Rosenberg, 'Designing a Successor to the Patent as Second Best Solution to the Problem of Optimal Provision of Good Ideas' in Annabelle Lever (ed), *New Frontiers in the Philosophy of Intellectual Property* (CUP 2014) 77; Garrett Hardin, 'The Tragedy of the Commons' (1968) 162(3859) Science 1243; Paul J Crutzen and Eugene F Stoermer, 'The Anthropocene' (2000) 41 Global IGBP Change Newsletter 17.
[15] Daniel Cole, *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (CUP 2002) 20.
[16] Roberts (n 9) 531.

whatsoever.[17] Consequently, it is first necessary to analyse whether the Nagoya Protocol affords adequate and fair protection to stakeholders and, second, whether the Nagoya Protocol distributes IP rights to legitimate stakeholders.

## 3.1 Novelty

Innovation is a key concept in IPRs globally.[18] In applying tangible property rights to intangible or abstract concepts, corporate and individual interests are maintained by virtue of supressing market 'free-riders' whilst providing an 'incentive to innovate' to creators.[19] This doctrine holds that, without restrictions on the use of IP, any innovator would be placed at a competitive disadvantage to use their developments, disincentivising breakthroughs and stagnating collective human progress. [20] Such a view supports corporate interests, necessitating ownership as a means of promoting development.

Whilst Salami contends that IPR restrictions on plant use, whether by means of patenting knowledge or scientific processes, contravene principles of vitalism, others contend that humankind's endeavours in patenting plants are morally fair and justifiable by virtue of development pursuits. [21] This view adopts a perspective that the patenting of life forms 'is justifiable in science', as reflected in the US ruling of *Diamond v Chakrabarty*, which established the doctrine that the novel creation of life, or employment of it, maintains innovation, and thus ought to be patentable to maintain ordinary pursuits in IP law.[22]

[17] Robert Benko, *Protecting Intellectual Property Rights: Issues and Controversies* (American Enterprise Institute 1987) 17.
[18] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn, OUP 2019) 15.
[19] ibid.
[20] ibid.
[21] Salami (n 7); *Diamond v Chakrabarty* 447 US 303 (1980).
[22] ibid.

Whilst some argue that the very commercialisation of vascular plants represents innovation in the bioprospecting field, others contend that the 'discovery' of traditional knowledge associated with vascular plant properties does not satisfy the product of nature doctrine, delegitimising any claim over the corporate discovery of traditional knowledge in this respect.[23] Arguably, the pre-existence of traditional knowledge in bioprospecting fulfils the doctrine of innovation, as the traditional knowledge itself is tangibly different to the vascular plant to which the traditional knowledge applies.

## 3.2 Priority

The right of priority dictates that the first to file an application for a patent or right over property establishes a right in title.[24] Formally, the Nagoya Protocol allows for corporations to fulfil the right of priority, despite the pre-existence of traditional knowledge, provided that the patent conveying appropriate knowledge is innovative by virtue of being newly registered within a domestic regime.[25] This position promotes innovation by allowing for commercialisation, whilst effectively relegating original indigenous users to stakeholders — ie failing to recognise the historical role of indigenous people in innovating traditional knowledge.[26]

The doctrine of innovation promotes the concept of materialism in the bioprospecting field, by establishing that IPRs are necessary to safeguard and promote innovations in the use of genetic material.[27] Theoretically, such a view conforms to the Aquinian perspective that innovators naturally deserve recognition for their output, while at the

[23] Benko (n 17) 17.
[24] Joseph Straus, 'The Right to Priority in Article 4A (1) of the Paris Convention and Article 87(1) of the European Patent Convention' (2019) 14(9) JIPLP 687, 687.
[25] Nagoya Protocol (n 1) arts 15–18.
[26] Crane and Matten (n 4) 51. To clarify, Crane and Matten observe that those who 'are affected by' an organisation's objectives are stakeholders.
[27] Benko (n 17) 17.

same time Bentham's 'greatest happiness' principle is satisfied — as IPRs promote innovation that benefits mankind, satisfying both consumer and producer interests.[28] Currently the Nagoya Protocol presents a purportedly satisfactory playing field for bioprospecting corporations, which prosper from innovations arising from genetic material. However, the Protocol fails to account for unfairness in respect of other stakeholders or pre-existing users who fall outside the corporate–consumer nexus — arguably breaching normative interpretations of the doctrine of innovation.

The Nagoya Protocol arguably contravenes the doctrine of innovation by failing to necessarily account for the innovation of indigenous groups, whilst allowing for the corporate patenting of traditional knowledge by a party that has not necessarily partaken in innovation, per se. In other terms, whilst innovation in respect of genetic material is beneficial from a corporate interest perspective, benefit-sharing provisions in the Nagoya Protocol fail to adequately reflect the contribution of traditional knowledge, which arguably constitutes the major innovation. The Lockean view, expressed by authors such as Morris, holds that 'every man has a property right in his own person' — ergo, intellectual creativity leads to the property right over that intellectual creativity.[29] As such, the existence of traditional knowledge within indigenous communities arguably establishes a property right, supporting the view that indigenous people inform the innovation undertaken in a bioprospecting regime, thereby arguably securing their right to the patent under the doctrine of innovation. The employment of the right of priority principle within current interpretation of the Nagoya Protocol defeats the purpose of the doctrine of innovation by circumventing a requirement for innovation, allowing for corporate profiteering to the detriment of indigenous communities.

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[28] Thomas Aquinas in Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, OUP 2017) 18; Lucia Zedner, *Criminal Justice* (Clarendon Law Series, OUP 2004) 91.

[29] Sean Morris, 'The Contemporary Ideological Legitimacy of Global Intellectual Property Rights' [2020] IPQ 44, 45; Walton H Hamilton, 'Property — According to Locke' (1932) 41 Yale LJ 864, 867.

## 4 Indigenous Interests

In the bioprospecting field, indigenous interests are difficult to quantify. Whilst the Nagoya Protocol promotes objective ideals of benefit-sharing, in accordance with western ideals that monetary and non-monetary benefits reflect adequate compensation for loss, Macfarlane and others present the notion that indigenous interests may vary from western cultural norms.[30] Consequently, benefit-sharing provisions may reflect an unsatisfactory outcome for certain indigenous groups.

Whilst Article 6(2) of the Nagoya Protocol reflects the necessity of signatory states consulting indigenous groups, the role of the state in safeguarding these stakeholders is relatively limited.[31] Similarly, placed on 'sustainable development' in Article 1 of the Nagoya Protocol, such a principle arguably remains unsubstantiated in later provisions, and amounts to little more than a high-level aspiration.[32] Consequently, a lack of protection arises regarding indigenous stakeholder interests as adherence and enforcement remain in the hands of the state, which, as established later, may be under coercive financial pressure stemming from a desire for economic development. This stance is echoed by Morgera, who argues that the Nagoya IPR manifests as a positive legal development, whilst stripping the dignity away from indigenous populations without adequately establishing a mutual promissory agreement comprising what they may desire.[33] Instead, the onus rests on the state — whose economic interests may conflict with

[30] Ben McFarlane, Nicholas Hopkins, and Sarah Neild, *Land Law: Text, Cases and Materials* (4th edn, OUP 2018) 359; Ngang and Ageh (n 6) 426.
[31] Nagoya Protocol (n 1) art 6. Article 6(2) states that signatories shall 'take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.'
[32] Nagoya Protocol (n 1) art 1.
[33] Morgera (n 11) 354.

those of indigenous groups — to determine outcomes, usually reflecting an unfair and overly formalist interpretation of the right of priority.[34]

Cadavid contends that a lack of consultation with indigenous communities renders IPRs invalid.[35] Without adequate consultation, he argues that signatories impose legislative provisions on groups whose stakeholder interests remain unidentified, whose lobbying power and resources are generally limited, and whose interests are most likely to be overlooked on a diplomatic level.[36] Cadavid's analysis focusses on the use of power by public authorities, which, by virtue of international agreements, allows the state to establish unjust and disproportionate expectations on indigenous people, resulting in provisions that, though seemingly legitimate (supporting the *pacta sunt servanda* principle), fail to respect ordinary public law duties in jurisdictions across the global south.[37] This perspective reflects earlier criticisms of the International Union for the Protection of New Varieties of Plants 1961 ('UPOV') and the Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 (TRIPS), both IPRs that sought to address bioprospecting issues on an international scale, whilst arguably failing to promote proportionality on a domestic basis.[38]

Whilst such criticisms are valid, difficulty arises in addressing varied interests among ethnic groups globally to consolidate in an international agreement. Should a new IPR be too comprehensive, it risks dissuading signatories as a result of potential transposition issues into domestic law. As such it is necessary for consultation clauses to reflect the

[34] Straus (n 24) 687.
[35] Jhonny Anonio Pabon Cadavid, 'Indigenous and Traditional Communities Must Be Consulted before Approval of Intellectual Property Treaties' (2015) 10(1) JIPL 11.
[36] International Convention for the Protection of New Varieties of Plants 1991.
[37] Cadavid (n 35); Hans Wehberg, 'Pacta Sunt Servanda' (1959) 53(4) AJIL 775.
[38] International Union for the Protection of New Varieties of Plants 1961; Agreement on Trade-Related Aspects of Intellectual Property Rights 1995; Piers Bierne and Nigel South, *Issues in Green Criminology* (1st edn, Willan 2007) 57; Kunal Mahumuni, 'TRIPS and Developing Countries: The Impact on Plant Varieties and Traditional Knowledge' (2006) 12(6) TLR 134.

doctrine of proportionality; any developments in an IPR must promote consultation on basis of domestic interpretation — allowing for proportionate domestic responses to varied interests among indigenous groups.[39]

The conflict between corporate interests, state interests, and indigenous interests reflects a global IP environment wherein inequality is propagated by virtue of the discrepancy between northern capitalism and southern cultural identity.[40] States, in promoting economic development, arguably veer in support of corporate interests as a result of the perceived economic advantage this provides to the 'greater good' of its people.[41] Arguably, temporal innovation undertaken by indigenous people is ignored, resulting in unfair and inequitable benefit-sharing provisions that undermine the legitimacy of the IPRs themselves — whether by failing to satisfy the right of priority in IP law or by failing to earnestly recognise the role of indigenous communities as stakeholders in bioprospecting activity.[42]

## 5 Corporate Social Responsibility

CSR is now a widely accepted part of corporate governance and encourages the involvement of business in promoting contribution to 'social, economic and environmental development'.[43] Essentially, CSR promotes sustainable business practices, based on an understanding that stakeholders in corporate activity lie beyond those with financial

[39] Lisa Webley and Harriet Samuels, *Complete Public Law: Text, Cases and Materials* (4th edn, OUP 2018) 538.
[40] Nigel South, 'The "Corporate Colonisation of Nature": Bio-Prospecting, Bio-Piracy and the Development of Green Criminology' in Piers Beirne and Nigel South (eds), *Issues in Green Criminology* (1st edn, Willan 2007).
[41] Nick Marshall, 'Whither Intellectual Property Law in Jersey' (2018) JGLR 4, 4.
[42] Straus (n 24) 687.
[43] Crane and Matten (n 4) 51; Department of Trade and Industry, 'Press Release: Corporate Social Responsibility — A Draft International Strategic Framework' (DfT, 22 March 2004) <https://webarchive.nationalarchives.gov.uk/20060216070732/http://www.dti.gov.uk/sustainability/weee/corp_soc_resp.pdf> accessed 10 March 2020.

interests, and are also within the communities where corporate activity occurs. Although not a legal principle, the concept of CSR informs corporate ethics and company law and is therefore of interest to organisations involved in bioprospecting.

The Nagoya Protocol encapsulates notions of CSR by allowing for the imposition of community-focussed obligations on corporate stakeholders within domestic regimes. Provisions include requiring states to provide a 'help desk' for indigenous and local communities; promoting educational collaboration and training; and encouraging corporations to recognise indigenous and local communities as stakeholders in their activity through 'social recognition'.[44] Although these benefit-sharing provisions provide positive recognition in respect of indigenous groups, these measures do little to enforce a fair and equitable delineation of ownership between corporate and indigenous entities. Arguably, this reflects the notion that the Nagoya Protocol equates to little more than corporate CSR measures, with the sole difference being that compliance is regulated by the respective signatory state, as opposed to being a voluntary corporate operation.[45] Moreover, such action diminishes the cultural innovation of indigenous and ethnic communities — framing them as stakeholders rather than creators.

The Nagoya Protocol thereby reflects a westernised perspective on IPRs in the bioprospecting field, which arguably prioritises the 'exchange, profit and capital accumulation' endemic within capitalism over the interests of stakeholders without substantial financial interest.[46] Such central concerns have diminished the role of innovation by virtue of the overtly formalist interpretation this establishes on the right of priority, which, although intending to promote fairness in IPRs, has been circumvented to prioritise corporate innovation.[47]

[44] Nagoya Protocol (n 1) art 21(c), annexes 2(d), (p).
[45] Nagoya Protocol (n 1) art 16.
[46] Cato (n 6) 61.
[47] Straus (n 24) 687.

In essence, the Nagoya Protocol reflects an IPR wherein corporate interests, owing to their seemingly beneficial output, have been promoted without adequate consideration for the role of innovation under the right of priority, and by replacing equitable benefit with watered-down CSR provisions. Ultimately, this reflects a lack of adherence to the core principles of the doctrine of innovation, arguably compromising the Nagoya Protocol's legitimacy as a fair and equitable IPR.

## 6 Rule of Law Considerations

In accordance with the rule of law, states have a duty to respect obligations in international law, as conceptualised by Bingham and the Venice Commission.[48] Such alignment is propagated by the *pacta sunt servanda* ('agreements must be kept') principle.[49] Whilst compliance with the Nagoya Protocol is addressed by Article 18, which ensures that signatories comply and cooperate in their adoption of provisions into domestic law, the Nagoya Protocol itself is inherently flawed in contending with differing legal regimes internationally, owing to the onus of interpretation this places on states with varying normative values.[50]

The rule of law is a universal concept — extending beyond the parameters of western or eastern jurisprudence.[51] States must comply with it to prevent tyranny and anarchy resulting from the arbitrary exercise of public power.[52] The concept that a world deprived of the rule of law, where law becomes licence, is mimetic of the tragedy of the

[48] Bingham (n 4); Preamble, 'European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist' (European Commission for Democracy through Law 2016).
[49] Wehberg (n 37).
[50] Nagoya Protocol (n 1) art 18.
[51] Soli Sorabjee, 'The Rule of Law: A Moral Imperative for South Asia and the World' (Soli Sorabjee Lecture, Brandeis University, 2010) 2.
[52] Anne Dennett, *Public Law Directions* (OUP 2019) 147.

commons theory.[53] Compliance relies on the moral integrity of the state itself, further emphasising the importance of the *pacta sunt servanda* principle.[54]

Bingham lists eight key ingredients in the rule of law, observing that a failure to comply with any results in a breach.[55] Ingredients of importance to state interests in the Nagoya Protocol include 1) equality, 2) certainty and 'substantive fairness', and 3) legality.[56] The Nagoya Protocol arguably contravenes these ingredients and, in doing so, undermines its legitimacy as a source of international law in signatory jurisdictions.[57]

## 6.1 Equality

Equality is a key component of the rule of law. Bingham contended that 'laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.[58] Likewise, the Venice Commission made clear the necessity of 'equality before the law and non-discrimination'.[59] The Nagoya Protocol contravenes the principle of equality by promoting supposedly equitable benefit-sharing over true equitable interests — as reflected in Article 1 of the Nagoya Protocol, which centres the objective of the Nagoya Protocol on benefit-sharing.[60] This is intrinsically inequitable owing to the lack of involvement and consultation it affords to indigenous people, whilst their innovation is utilised commercially regardless of any extra-patrimonial right

[53] Hardin (n 14).
[54] Wehberg (n 37).
[55] Bingham (n 4).
[56] Jeffrey Jowell, Dawn Oliver, and Colm O'Cinneide, *The Changing Constitution* (8th edn, OUP 2015) 3; Neil Parpworth, *Constitutional and Administrative Law* (10th edn, OUP 2018) 38.
[57] Bingham (n 4).
[58] Scott Slorach and others, *Legal Systems & Skills* (3rd edn, OUP 2017) 25.
[59] European Commission (n 48).
[60] Nagoya Protocol (n 1) art 1.

assertion of a doctrine of innovation claim.[61] Conversely, it may be argued that 'objective differences' (as defined by Bingham) should allow for a form of 'ancestral patenting' whereby the requirement for innovation is set aside in favour of recognising the extra-patrimonial rights of indigenous communities.[62] Such a view reflects the perilous discrepancy emerging in state interpretation and practice — whilst formalism and monism promote an unadulterated title, with ancillary benefit-sharing provisions, whilst natural law and dualism arguably extend the concept of extra-patrimonial rights. Overall, this reflects an IPR that fails to satisfy the rule of law by virtue of the inequality it creates in respect of the right of priority. This is due to the preference that the IPR currently shows towards corporate interests and the divergent interpretations by states, as outlined later on.[63]

## 6.2 Certainty

Certainty is another ingredient of the rule of law.[64] From a positivist perspective, legal certainty propagates the idea that any regime is fair, provided that the system conforms 'to its own clear rules'.[65] This is embodied in the Nagoya Protocol regime, which, by promoting benefit-sharing, establishes a rule that enables parties to 'foresee with fair

[61] Extra-patrimonial rights extend beyond patrimony (i.e. the property that makes up one's estate). In certain jurisdictions, extra-patrimonial rights essentially enable a party to be granted a right in another's property that is then binding upon subsequent transfer of that property. Extra-patrimonial rights do not alter the ownership of the property, but simply afford rights to others without patrimony.

[62] Bingham (n 4); Elizabeth Pain, 'French Institute Agrees to Share Patent Benefits after Biopiracy Accusations' (*Science*, 2016) <https://www.sciencemag.org/news/2016/02/french-institute-agrees-share-patent-benefits-after-biopiracy-accusations#> accessed 10 March 2020.

[63] Straus (n 24) 687.

[64] Parpworth (n 56) 38.

[65] Leslie Green and Thomas Adams, 'Legal Positivism' *The Stanford Encyclopaedia of Philosophy* (Winter edn, 2019) <https://plato.stanford.edu/entries/legal-positivism/> accessed 1 May 2020; Scott Slorach and others (n 58) 25.

certainty how the authorities will use its coercive powers'.[66] However, legal certainty is not provided in the Nagoya Protocol for indigenous groups, where rules surrounding the patenting of traditional knowledge undermine ideas of natural justice, and thus certainty. This broader understanding of the rule of law is side-lined within the Nagoya Protocol's, as its current positivist approach does not ensure that legal progress moves in tandem with societal development. This arguably results in the arbitrary exercise of public power as there is a discrepancy between the legitimate expectations of justice, owed to indigenous communities, and the *de facto* implementation of the Protocol. As such, a positivist interpretation results in 'window dressing' — a means by which authorities *seem* virtuous without *being* virtuous — replacing 'legitimacy' with 'coercion'.[67]

The Nagoya Protocol creates a situation where economic incentives ride roughshod over the natural perspectives of justice.[68] IPRs provide great economic stimulus within a state, which arguably manifests as a coercive reason for a state to become signatory.[69] Despite the 'greater good' that economic growth encourages, the influence that financial accumulation exerts over expectations of justice results in greater cultural and social loss, as multinational corporations direct financial proceeds elsewhere.[70] Such practice within the IP forum is exhibited in the Intellectual Property (Plant Varieties) (Jersey) Law 2016,[71] which seeks to 'encourage business … to locate and invest', grounded on the basis that business arising from 'adherence to international treaties' is of greater advantage to jurisdictions over potential economic and cultural losses elsewhere.[72]

[66] Scott Slorach and others (n 58) 25.
[67] Scott Slorach and others (n 58) 25–26.
[68] Scott Slorach and others (n 58) 26.
[69] Marshall (n 41) 10.
[70] Jeremy Bentham in Zedner (n 28); Marshall (n 41) 10.
[71] Intellectual Property (Plant Varieties) (Jersey) Law 2016.
[72] Marshall (n 41) 10.

As such, the Nagoya Protocol reflects capitalist doctrine, superseding legitimate expectations of law and natural justice. Whilst state interests are conflicted depending on normative outlooks (ie priorities of justice or business) under legal positivism, the very purpose of law is to conform to social expectations and norms, in order to remain legitimate.[73] If not, rogue and 'brutish' justice will override 'civilised' jurisdictions — uprooting overarching concepts of fairness, justice, and equity.[74] Arguably, the discrepancy between legitimate expectations of benefit-sharing within the Nagoya Protocol and state practice arising from interpretation reflects a lack of substantive fairness, impacting the legal certainty it provides to indigenous traditional knowledge users.

## 6.3 Legality

Likewise, legality is an integral ingredient in the rule of law.[75] This ingredient extends beyond adherence to international law, another necessity for the rule of law, and reflects the need for law to respect constitutional values of a jurisdiction. Articles 15 to 18 of the Nagoya Protocol promote transposition into domestic law regimes, thus galvanising compliance on a domestic basis.[76] The Venice Commission emphasises the importance of compliance in respect of legislative regimes, observing that public authorities must 'act within the limits of the powers that have been conferred on them' and that 'public authorities must actively safeguard the fundamental rights of individuals *vis-à-vis* other private actors'. As such, acting within the powers conferred on a state by the Nagoya Protocol still arguably relies on the safeguarding the fundamental rights of indigenous groups. Depending on perception, the Nagoya Protocol breaches the spirit of the doctrine of innovation, instead promoting corporate interests. This arguably compromises its legality owing to the misapprehension of ownership rights by corporate bodies and the misguided conferring of

[73] Patrick Selim Attiyah, *Law and Modern Society* (2nd edn, OUP 1995).
[74] Thomas Hobbes in Wacks (n 28) 25.
[75] Bingham (n 4).
[76] Nagoya Protocol (n 1) arts 15, 16, 17, 18.

such rights by signatory states, undermining legitimacy.

Therefore, the Nagoya Protocol arguably does not conform to these particular rule of law concepts. The power it confers on states to distribute ownership rights and the scope for a lack of consultation with stakeholders therefore compromises: normative ideals of equality; any certainty it affords to indigenous groups; and the legality of its terms. This is, of course, dependent on transposition into domestic law failing to remedy such shortcomings. It is necessary to consider whether it is in a state's interest to remedy such substantive issues.

## 7 Colonial Legacy

Linarelli observes that international law originated out of the 'use of force in support of European commercial interests to compel non-European peoples to trade … in the conquests of the land, and resources of non-European peoples'.[77] Such sentiment is echoed by Fassbender and Peters, who contend that international law reflects 'Eurocentric values' of 'colonial origins' imposed on other regions and countries, despite reassurances that this imposition is a consensual interaction.[78] Conversely, Beinart and Middleton contend that transfers relating to plants and traditional knowledge under imperial and post-imperial regimes were not wholly consensual but instead depended on 'asymmetrical patterns' of trade and exchange, reflecting the domination of western powers over indigenous communities.[79] These theories illustrate that international law is grounded in ideas of colonialism, the annexing of resources prevalent in lesser-developed

[77] John Linarelli, Margot Salomon, and Muthucumaraswarmy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 25.

[78] Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (OUP 2012) 82.

[79] William Beinart and Karen Middleton, 'Plant Transfers in Historical Perspective: A Review Article' (2004) 10(1) Env & History 3.

countries, and a western capitalisation of resources endemic to these regions.

This theory extends to the field of bioprospecting. Former regimes, such as the UPOV and TRIPS agreements, received heightened criticism surrounding their provisions, which commentators respectively argued failed to account for indigenous stakeholder interests, and enabled the colonial exploitation of traditional knowledge. [80] Ultimately, the Nagoya Protocol similarly establishes a domination of the 'global north' over regions of the 'global south' in a corporate–colonial conquest.[81]

In her seminal work *Plants and Empire*, Schieberger draws parallels between modern bioprospecting and historical colonial pursuits. Portraying western 'ignorance' as a 'choice' rather than an incidental development of cultural internationalism, she conceives of the 'many forms of ignorance' as something ignorantly promoted by western powers and individuals — later codified by virtue of 'funding priorities, global strategies, national policies, the structures of scientific institutions, trade patterns, and gender politics'. Further, she observes how scientific advancement historically led to the 'vilification' of indigenous peoples, whose remedies, including plant knowledge associated with 'abortifacients', promoted the institutionalised view that non-European ethnic groups were immoral, belittling their customs whilst allowing for the hypocritical commercialisation of them.[82] These undertones, it is argued, continue to influence the Nagoya Protocol, where ethnobotany has been subsumed by corporate interests as a result of institutionalised bias.

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[80] International Union for the Protection of New Varieties of Plants 1961 (n 38); Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 (n 38); Charles Kamau Maina, 'Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums' (2011) 18(2) Int J Cult Prop 144.

[81] South (n 40) 239.

[82] Abortifacients are substances capable, or believed to be capable, of inducing an abortion. Londa Schiebinger, 'The Art of Medicine: Exotic Abortifacients and Lost Knowledge' (2008) 371 Lancet 318, 318.

## 8 Legal Doctrine and State Practice

A key issue in international law surrounds the conflict between legal doctrine and state practice.[83] Whilst a legal doctrine established in an international agreement may be unanimously supported by signatories, Fassbender contends that '[i]nternational law is what a state says it is', reflecting that the resulting outcome and interpretation of a doctrine is as important as the doctrine itself.[84] This divergence between doctrine and state interpretation is relevant to the Nagoya Protocol. Firstly, evaluating how state practice allows for varied interpretation of provisions permits a broader consideration of whether the agreement strikes a just and fair balance between interests. Secondly, by analysing the outcome versus the intention of the agreement, it is possible to consider its legitimacy and effectiveness as a source of international law seeking to promote 'equitable' and 'fair' benefit-sharing provisions.[85]

A doctrine established in the Nagoya Protocol is that of 'fair and equitable' benefit-sharing arising from the use of genetic resources.[86] From a positivist perspective, rulings arising from disputes between parties with reference to the Nagoya Protocol ought to stick to this key objective owing to the existence of such a provision, regardless of merit or detriment.[87] 'Fair' and 'equitable' benefit-sharing is similarly paradigmatic of natural law and corresponds to the Aquinian view that sharing per se reflects a natural inclination of wider love and grace that 'elevates the natural abilities of humans'.[88] By contrast, it would be remiss not to address the fact that corporations themselves lack human personality, despite being legal persons, and that states themselves reflect 'inaccessible character' due to the breadth of their representation

[83] Fassbender and Peters (n 78) 82.
[84] ibid.
[85] Nagoya Protocol (n 1) art 1.
[86] Nagoya Protocol (n 1) art 1.
[87] *Stanford Encyclopedia of Philosophy* (n 55)
[88] Nagoya Protocol (n 1) art 1; Wacks (n 28) 18.

and division of powers.[89] It is therefore necessary to explore the role of adjudication in civil and common law regimes to appreciate whether the doctrine of benefit-sharing transcends into domestic regimes in a fair and equitable way, as per an Aquinian interpretation, or whether interpretation gives rise to an unfair discrepancy and sustains the 'misery of international law'.[90]

### *8.1 Quassia amara*

The Nagoya Protocol thus establishes an IPR regime that is stacked in favour of corporate interests, despite compelling CSR activity.[91] This is reflected in the Quassia incident ('Le cas de biopiraterie du Couachi') arising in French Guiana.[92] Here, the French Institute for Development Research (IRD) consulted the Kali'na, Palikur and Creole indigenous groups, inter alia, on traditional remedies for treating malaria.[93] The IRD subsequently patented compounds extracted from the *Quassia amara* plant, endemic to South America, which expressed beneficial properties for malaria treatment.[94] The Fondation Danielle Mitterrand (FDM) contested the patent's legitimacy, which failed to acknowledge the Guianese communities who contributed traditional knowledge to the IRD.[95] The FDM argued that the traditional knowledge was 'crucial

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[89] David Sugarman, 'Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies: Part 1' (1997) 18(8) Company Lawyer 227.
[90] Wacks (n 28) 18; Linarelli, Salomon, and Sornarajah (n 77) 25.
[91] Straus (n 24) 687.
[92] Fondation Danielle Miterrand France Libertes, 'The Couch Plant – A case history of biopiracy' (Fondation Danielle Miterand 2021) < https://www.france-libertes.org/en/publication/the-couachi-plant-a-case-history-of-biopiracy/> accessed 10 May 2021.
[93] Bourdy (n 5) 290.
[94] World Weekly, 'Biopiracy: When Corporations Steal Indigenous Practices and Patent Them for Profit' (The World, 2016) <https://www.theworldweekly.com/reader/view/2464/biopiracy-when-corporations-steal-indigenous-practices-and-patent-them-for-profit> accessed 15 May 2020.
[95] Bourdy (n 5) 290.

for the developmental innovation', calling for the 'just and equitable sharing of the patent's benefits resulting from exploitation' between the IRD and indigenous groups.[96] A hearing held at the European Patent Office in Munich acknowledged that benefit-sharing was necessary in accordance with the Nagoya Protocol; although the IRD was under no obligation to share equity with indigenous groups, it ought to establish a unilateral benefit-sharing agreement.[97] Subsequently the parties reached a multilateral agreement wherein monetary benefit-sharing provisions were established to cover income arising from any commercialisation of the traditional knowledge.[98]

The Quassia case is informative, as it first confirms that the Nagoya Protocol has statutory bearing on entities wishing to exploit traditional knowledge, second as it reflects corporate reticence to establish benefit-sharing provisions, and third as it reflects an unfair power imbalance between corporate entities and indigenous groups. Such power asymmetries are reflected in the intervention of the FDM, which both raised awareness of the case in support of indigenous groups and contested the legitimacy of the patent. Without charitable support, it is apparent that corporate interests would have overruled the interests of indigenous people. This arguably reflects inadequacies in the Nagoya Protocol in ensuring that indigenous groups receive adequate consultation on corporate activity based of their own input — illustrating (1) a stark and unresolved conflict between western corporate interests and indigenous interests in the bioprospecting field and (2) inadequate consultation naturally prevalent in state interpretation of the Nagoya Protocol.

## 8.2 Civil Law Perspective

As a French case, the Quassia incident illustrates a civil law interpretation of Nagoya Protocol provisions, and arguably hints at the

[96] The World (n 93).
[97] ibid.
[98] ibid.

contemplation of 'moral rights', which introduce greater consideration for the right of priority in civil law jurisdictions.[99] Described as 'directly opposed to the Anglo-Saxon copyright system', the influence of moral rights transcends a limited copyright scope and influences practice in French IP law, reflecting greater emphasis on moral and extra-patrimonial stakeholder considerations.[100]

The outcome of the Quassia hearing reflects the influence of both civil law and moral rights in a bioprospecting case. Whilst the hearing established that benefit-sharing provisions were integral provisions within the Nagoya Protocol, the ruling seems to point to an acknowledgement that the use of traditional knowledge by indigenous people reflects their individualism. This recognition arguably illustrates the weighing of 'proprietary' ownership against the 'extra-proprietary rights' granted to indigenous groups as stakeholders.[101] The differentiation between the use of traditional knowledge and the legality of patenting traditional knowledge illustrates a philosophy whereby ownership, and restrictions placed thereupon, can be freely influenced by stakeholders' interests.[102] Whilst under civil law it is entirely possible for corporations to patent traditional knowledge, the inalienable, extra-patrimonial rights of indigenous people cannot be discredited, and as such requires consideration within the fair and equitable 'use' of biological resources.[103] This philosophy reflects Morillot's theory on French civil practice, and Klostermann's theory on patrimonial rights, wherein it is contended that ownership is valid only in the recognition of the innovator.[104] Such a theory is supported by Ngang and Ageh, who contend that traditional knowledge can be viewed as a form of cultural expression, and as such should be

[99] Bretonniere and Defaux (n 5) 83; Straus (n 24) 687.
[100] Bretonniere and Defaux (n 5) 83.
[101] Nagoya Protocol (n 1) art 1; Bretonniere and Defaux (n 5) 83.
[102] Thomas F Cotter, 'Pragmatism, Economics and the Droit Moral' (1997) 76(1) NCL Rev 1, 1.
[103] Nagoya Protocol (n 1) art 1.
[104] Andre Morillot in Bretonniere and Defaux (n 5) 83; Mira T Sundara Rajan (ed), *Moral Rights: Principles, Practice and New Technology* (OUP 2011) 75–76.

accounted for on a human rights basis, as opposed to under IPRs.[105] Given the value of traditional knowledge in expressing cultural identity, Ngang and Ageh contend that western concepts surrounding intangible property are inadequate in scope, arguably reflecting the potential for extra-patrimonial rights as a means of promoting concepts of equality and fairness.[106]

Moreover, the backlash against corporate domination in the Quassia case is mimetic of attitudes to ownership in both French and other European IPRs. French IP regimes offer explicit protection of moral rights. This is best reflected in the sanctity of 'droit de suite' principle, which is an extra-patrimonial right afforded to creators or their heirs to receive a fee for the resale of their creation, regardless of its ownership. It is evident that such intervention is grounded in the 'originality' of the traditional knowledge, and the 'special relationship' forged between indigenous people and vascular plants. This means that as stakeholders, 'any harm done' in the commercialisation of a plant will 'effectively be inflicted on the author' — that being the indigenous group.[107] This view mirrors artistic views on ritual and performance and plays into romantic concepts of 'identity' as not solely scientific, or genetic but a reflection of the customs and experiences that inform individual and group congruence.[108] Ultimately, the Quassia affair illustrates the way in which the Nagoya Protocol can be interpreted dualistically as a cultural and social phenomenon under civil law, promoting stakeholder interests as an extra-patrimonial right to property interests, despite inadequacies in the regime as a whole.

Arguably, the role of the FDM in contesting the patent similarly illustrates a more socialist approach to challenging power asymmetries,

[105] Ngang and Ageh (n 6) 426.
[106] Ngang and Ageh (n 6) 426.
[107] Cotter (n 102) 1; Nobuko Kwashima, 'The Droite de Suite Controversy Revisited: Context, Effects and the Price of Art' (2006) 3 IPQ 223; Bretonniere and Defaux (n 5) 83.
[108] Ngang and Ageh (n 6) 426.

by raising of awareness and condemning the 'exchange, profit and capital accumulation' of corporate bodies when such 'central concerns' harm others.[109] Balick and Cox, proponents of dualism as state practice, similarly convey that 'the very roots of human culture are deeply entwined with plants'.[110] They posit that both international agreements and human attachment should be considered in bioprospecting arbitration, establishing that monist interpretations sever human attachment in place of corporate interests.[111] Such a belief establishes that monist state practice surrounding IPRs including the Nagoya Protocol are outdated, reiterating the requirement for reform or greater emphasis on non-economic considerations in its interpretation.

## 8.3 Common Law Perspective

Whilst the Quassia case arguably reflects the scope for extra-patrimonial rights to be encompassed within benefit-sharing provisions, such a view is contrasted in the monist view adopted in common law jurisdictions. Monism dominates IP philosophy in common law jurisdictions, as the concept of ownership overrules other stakeholder interests, under the belief that extra-patrimonial rights compromise legal title.[112] Essentially, this reflects the fact that corporatism and individualism are dominant forces in common law states, resulting in two key phenomena — common law jurisdictions generally rule more favourably in the interest of corporations, and, consequently, bioprospecting corporations register businesses and patents in favourable common law jurisdictions to protect IP, essentially to avoid paying benefit-sharing contributions to indigenous communities around the world.[113]

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[109] Cato (n 6) 61.
[110] Michael Balick and Paul Alan Cox, *Plants, People, and Culture: The Science of Ethnobotany* (Scientific American Library 1997) 100.
[111] ibid.
[112] Cotter (n 102) 1.
[113] Maina (n 80) 144; Marshall (n 41) 4.

The monist approach endemic to common law jurisdictions reflects the sanctity of property within the majority of Anglo-US, and Commonwealth, jurisdictions.[114] Described as a 'fundamental right', intellectual property is treated as an asset that like material property can be divided equitably or wholly — restrictions may exist in ownership, but the implications of inalienable moral rights exert too substantial a risk in stifling 'innovation and experimentation'.[115] Put simply, benefit-sharing attempts to satisfy both civil and common law regimes by attempting to provide greater stakeholder protection, which is ultimately at odds with such ownership principles. The Nagoya Protocol arguably contrasts with other IPRs, such as the Paris Convention, which purportedly established 'harmonisation' measures in respect of variation between dualist and monist regimes.[116] Despite the Nagoya Protocol obliging states to cooperate in the resolution of disputes, the regime respects the autonomy of distinctive legal systems, thereby allowing for a divergence in outcome. Such softness reflects unfairness in 'equality before the law' internationally.

Under common law regimes, several remedies may be available to indigenous stakeholders under the Nagoya Protocol. IP is a form of intangible property.[117] The doctrine of proprietary estoppel establishes that, in property law, a claim by party B can give rise to personal or property rights over the property of party A, provided that a number of grounds are met.[118] Such a principle can arguably be considered a

[114] Bretonniere and Defaux (n 5) 83.
[115] Tom Allen, 'Property as a Fundamental Right in India, Europe and South Africa' (2007) 15(2) APLR 193.
[116] Paris Convention for the Protection of Industrial Property 1883; Poku Adusei, 'Regulatory Diversity as Key to the Myth of Drug Patenting in Sub-Saharan Africa' (2010) 54(1) J Afr Law 26.
[117] M Clarke and others, *Commercial Law: Text, Cases and Materials* (5th edn, OUP 2017) 54–55.
[118] David Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) CLJ 538.

common law remedy to contending with biopiracy claims, dependent on these points being satisfied.[119]

Although the doctrine of proprietary estoppel typically deals in land, Attenborough contends that the principle could be refigured to deal with environmental interests — arguably, it could similarly be applied to claims surround the biopiracy of traditional knowledge. [120] Under this arrangement, an indigenous group could operate as the claimant. By establishing that they would have a realised or promised interest in the corporate activity, the indigenous party should be able to rely on a corporation's assurances and establish detriment. Proprietary estoppel results in reliance damages — that being the 'minimum to do justice' to the afflicted claimant.[121]

Whilst the application of proprietary estoppel may remedy a breach of agreement under the Nagoya Protocol, such a resolution does not remedy broader shortcomings in respect of the fairness and equity embedded within the regime as a whole. Estoppel primarily focusses on the pecuniary award of damages, which may not be of interest to indigenous groups, and requires resources not ordinarily available to indigenous peoples, such as legal knowledge and travel flexibility. The resolution ordinarily requires the input of NGOs to remedy wrongs of tort on behalf of indigenous groups, mirroring the role of FDM in the Quassia case, owing to the onus it places on the claimant. Moreover, indigenous groups must be able to establish numerous elements of the proprietary estoppel test. Such a monist regime reflects less flexibility in the extra-patrimonialism exhibited under French and civil law IP regimes, despite similar issues surrounding access to justice.

As such, proprietary estoppel appeals only in its breadth of application within the existing IPR, and similarly only reflects a doctrine that may be applied in common law jurisdictions; in doing so, it fails to account

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[119] Daniel Attenborough, 'An Estoppel-Based Approach to Enforcing Environmental Responsibilities' (2016) 28 J Env Law 275.
[120] ibid.
[121] *Crabb v Arun District Council* [1976] Ch 179 (CA) 198 (Lord Denning MR).

for jurisdictional variation globally. Moreover, proprietary estoppel is monist in its scope, as the establishment of personal or property rights per se does not deal with the collective interests of indigenous populations, save for the award of equity in a patent in a class action. This remedy is variable depending on state practice, and wholly unsatisfactory in redressing a lack of recognition for innovation among indigenous people, should a tangible relationship not exist between corporations and indigenous people. If knowledge is transposed to a western source, and then on to a corporate entity, this remedy affords limited, if any, protection to indigenous groups.[122]

# 9 Reform

The foregoing discussion has established that the Nagoya Protocol is unfair and inequitable as a result of: (1) the benefit-sharing arrangements it establishes; (2) the favour it extends to corporate stakeholders; and (3) interpretation issues in international law. Its benefit-sharing provisions fail to adequately and collectively reimburse indigenous people as innovators, whilst the regime results in states incidentally breaching the core rule of law doctrines of equality, certainty, and legality. Variation in state practice waters down the benefit-sharing provision that the Nagoya Protocol seeks to advance, which in itself allows for a derogation of equitable involvement in exchange for weak CSR-like provisions.

Benefit-sharing is arguably the central objective of the Nagoya Protocol, allowing for the revenue generated by multinational corporations to 'trickle down' into the local cultures where bioprospecting operations take place.[123] Having scrutinised the role of corporations in the Nagoya Protocol regime, it is apparent that the balancing line between corporate and indigenous interests is poorly

[122] Cato (n 6) 61.

[123] Nagoya Protocol (n 1) art 1; Verdiana Giannetti and Gaia Rubera, 'Innovation for and from Emerging Countries: a Closer Look at the Antecedents of Trickle-Down and Reverse Innovation' (2019) 1(1) J Acad Marketing Science 1.

drawn. In promoting benefit-sharing, the Nagoya Protocol has prioritised the involvement of corporations over that of indigenous groups, by failing to acknowledge indigenous peoples' original ownership of traditional knowledge.[124] This contravenes a naturalist interpretation of the doctrine of innovation as corporations have complete control over the equitable title, and thus commercial output, associated with traditional knowledge, to the detriment of original users, whose communities have arguably undertaken the innovation — whether historically or otherwise. In essence, this illustrates corporations benefiting from title without having made a novel contribution by virtue of the Nagoya Protocol. This undermines the doctrine of innovation and diminishes the integrity of the IPR.

The benefit-sharing provisions of the Nagoya Protocol thus reflect a codified extension of CSR regimes, without providing adequate stakeholder involvement to indigenous peoples through an equitable share of corporate interest. Remedy for this arguably rests in the strengthening of domestic interpretation in the global south. Annex 1(j) of the Nagoya Protocol provides a means for indigenous peoples to receive equity in corporate bioprospecting ventures, which appears an overlooked solution.[125] Incorporating and enforcing statutory rights for indigenous stakeholders to share in the commercial outputs of bioprospecting, more specifically those embodying traditional knowledge, will consolidate a corporation's ability to legitimately benefit from traditional knowledge. It will do so by firstly satisfying the right of priority, secondly by providing fair and equitable benefits to indigenous people, and thirdly by providing indigenous people with a say in the corporate activity arising from the use of traditional knowledge.[126] Such changes would bolster the legitimacy of the Nagoya Protocol by placing heightened emphasis on benefit-sharing, as addressed in Article 1.

[124] Nagoya Protocol (n 1) art 1.
[125] Nagoya Protocol (n 1) Annex 1(J).
[126] Straus (n 24) 687.

Such domestic reform is unlikely to occur owing to the prevalence of corporate lobbying and protectionism in many nations, but may arguably encourage greater economic development by providing legal certainty to all stakeholders and promoting a dynamic and more fair and equitable distribution of benefit.

However, the inadequacies identified here within the Nagoya Protocol reflect the need for greater adherence to key rule of law doctrines and the need for greater consideration of indigenous stakeholders beyond moderate benefit-sharing. State practice waters down the benefit-sharing provisions of the Protocol when transposed into domestic law, by virtue of discrepancies in legislative regimes. In order to recognise the cultural innovation of indigenous people and fulfil promises of true fairness and equity, it is submitted that a flexible international regime should remain, allowing for greater domestic flexibility among signatories. This aligns with Cato's contention that economies need localising in order to accommodate sustainable development and to promote non-corporate interests in economies.[127] With regard to the global bioprospecting field, this necessitates domestic legal reform to regionalise corporate activity, allowing for greater state regulation and greater stakeholder involvement. Such a view is reflected by Morris, who contends that 'the concept of international property rights is, in itself, problematic', owing to the very suggestion that 'certain property rights are transferable beyond the sovereign state'.[128] Similarly, he argues that the view that IP constitutes property per se only muddies interpretation, resulting in a 'system of rights' that 'privatise[s] public international law'.[129] An appropriate remedy for this is a radical domestic reinterpretation of the Nagoya Protocol in the global south. Whereas the existing regime legitimises biopiracy by stripping the property rights of indigenous groups and replacing their involvement with weak benefit-sharing provisions, measures must be taken to promote equity in patents among indigenous groups, or an ability to assert extra-patrimonial rights universally.

[127] Cato (n 6) 61.
[128] Morris (n 29) 45.
[129] ibid.

Views on what constitutes property vary within the international community, as does the legitimacy of extra-patrimonial rights. Whilst some states convey that traditional remedies reflect artistry,[130] and as such ought to be protected under safeguards for artistic expression, others contend that traditional knowledge merely conforms to ordinary property ownership.[131] The only way in which these discrepancies can feasibly be addressed is for a signatory to define what it considers traditional knowledge to be, and to ensure that this ownership or artistry is protected in accordance with stricter domestic legislation. Such a domestic overhaul will not only afford greater fairness and equity in the bioprospecting regime but will also localise global corporate operations. The need for more localised and specialised regulatory knowledge could help force corporations into considering and involving indigenous interests. Ultimately, the breaking of the present 'colonialist' attitude to the patenting of traditional knowledge rests on the exercise of autonomy by countries in the global south. The global north is unlikely to commit to reform that may hinder its prosperity.[132]

As the field of ethnobotany develops and indigenous rights become increasingly recognised, it is essential that signatories address a lack of equity and fairness in the Nagoya Protocol by adopting more stringent domestic regimes.[133] Such regimes will encourage a divergence from western reticence to distributing profit, historically arising from colonial practice and business interests.[134] Fair and due consideration of rights will satisfy the spirit of the Nagoya Protocol by allowing for both dualist and monist regimes, and thus both common law and civil law jurisdictions, to properly engage with indigenous interests on a

[130] Adusei (n 116) 26.
[131] Adusei (n 116) 26.
[132] Fassbender and Peters (n 78) 82.
[133] J Valles and T Garnatje, 'A Vindication of Ethnobotany' (Metode Universitat de Valencia, 2015) <https://metode.org/issues/document-revistes/a-vindication-of-ethnobotany.html> accessed 10 November 2019; Cathal Doyle, 'Indigenous Peoples and the Millennium Development Goals — Sacrificial Lambs or Equal Beneficiaries' (2009) 13(1) IJHR 44, 44.
[134] Fassbender and Peters (n 78) 82; Cato (n 6) 61.

proportionate basis. The provision of equity to indigenous originators of traditional knowledge will similarly reduce discrepancies in philosophy surrounding traditional knowledge — whether considered strict IP, as per the Lockean view, or 'cultural property' depending on the normative values of the jurisdiction. Such a recognition of rights in respect of traditional knowledge serves as an acknowledgment of indigenous communities' innovation, legitimises the Nagoya Protocol by promoting equity and fairness, and ensures that the Protocol aligns with key tenets of the rule of law.

# The Truth within Our Roots: Exploring Hair Discrimination and Professional Grooming Policies in the Context of Equality Law

Stephanie Cohen

**Abstract**

Hair discrimination is a form of social injustice targeted at those of Black heritage. The Equality Act 2010 provides protection from discrimination, harassment, and victimisation on the basis of nine protected characteristics, one of which is race. Under its provisions, race can mean colour, nationality, ethnic or national origins. Hair is not explicitly mentioned, creating a grey area within the law. This paper considers the prevalence of hair discrimination cases in the United Kingdom, where racialised hair discrimination can be perpetuated through policies in schools or workplaces. Recent media reports have illustrated that these policies, which aim to regulate 'professional' hairstyles, can have a disparate impact on those with Afro-textured hair. Mixed raced pupils have been excluded from schools, with their hair perceived as 'unprofessional' and 'inappropriate'. The United States of America (USA) has taken steps to address these issues through the CROWN Act 2020, which prohibits racialised hair discrimination. This paper posits that our current legal understanding of race, as it exists in the Equality Act 2010, is inadequate to address racialised hair discrimination. It proposes that reforms similar to those contained in the USA CROWN Act 2020 could be enacted to better encapsulate a more holistic statutory understanding of race.

# 1 Introduction

In 2019, Ruby Williams, a mixed-race high school student from east London, was awarded monetary compensation in an out-of-court settlement after being repeatedly sent home from school due to her 'Afro style hair'.[1] Williams was told that her hair breached the school's policy, which stated that 'Afro style hair must be of reasonable size and length'.[2] Despite the prohibition of racial discrimination in the Equality Act 2010 (EQA) cases of hair discrimination (HD) remain prevalent.[3] Further clarity within both the law and society is required in order to acknowledge and address the socialised perceptions of Black hair. In education and corporate policies, Black hair is often negatively labelled as 'unprofessional' or 'inappropriate', reflecting the treatment of Black people in professional environments.[4]

As 'one of the primary signifiers of [B]lack heritage', hair requires legal recognition and protection within the EQA and by the Equality and Human Rights Commission (EHRC).[5] This paper addresses the inadequacy of available law and guidance in the following ways:

[1] Kameron Virk, 'Ruby Williams: No Child with Afro Hair Should Suffer Like Me' *BBC News* (London, 10 February 2020) <https://www.bbc.co.uk/news/newsbeat-45521094> accessed 4 September 2020.
[2] ibid.
[3] *G v X*: Challenging an Discriminatory Work Hairstyle Policy <https://legal.equalityhumanrights.com/en/case/challenging-discriminatory-work-hairstyle-policy> accessed 27 May 2021
[4] Aftab Ali, 'Bournemouth University Graduate Lara Odoffin "Discriminated Against" After Recruiter Revokes Job Offer Because She Has Braided Hair' *The Independent* (London, 27 November 2015) <https://www.independent.co.uk/student/news/bournemouth-university-graduate-lara-odoffin-discriminated-against-after-recruiter-revokes-job-offer-because-she-has-braided-hair-a6751231.html> accessed 5 September 2020; Meah Johnson, 'I Am Not My Hair, Hair Discrimination in Corporate America' (2019–20) 11 J Race, Gender & Poverty 109.
[5] Emma Dabiri, 'Black Pupils Are Being Wrongly Excluded over the Hair. I'm Trying to End This Discrimination' *The Guardian* (London, 25 February 2020) <https://www.theguardian.com/commentisfree/2020/feb/25/black-pupils-excluded-hair-discrimination-equality-act> accessed 13 September 2020; Wera Hobhouse, 'We Must End Hair Discrimination' (Liberal Democrats, 14 October 2020) <https://www.libdems.org.uk/end-hair-discrimination> accessed 4 November 2020.

Section 2 defines HD by discussing its evolution. Following this, Section 3 analyses the EQA and the EHRC's guidance with reference to HD case law, arguing it provides insufficient protection against HD. Section 4 assesses the United States of America's (USA) CROWN Act 2019, contending that it could provide a useful guide for the UK for understanding why HD requires legal protection. Building on this, Section 5 justifies the proposal to add 'hair' to the existing definition of race in the EQA, focussing on systemic issues of race perception. Overall, this article suggests that education is a vital mechanism for a change in approach and concludes that, whilst it is crucial for students and employees to be educated through policy internal to professional institutions, this must be accompanied with legal action to guarantee recourse for HD victims.

## 2 The Evolution of Hair Discrimination

Focussing on its historical origins, this section explores the relationship between definitions of HD in the legal literature and wider society and its influences on current attitudes towards Black hair. Intrinsically linked to racial identity, Black hair is a distinctive feature separating those of Black heritage from other races. Recognising this, HD has been defined by Mbilishaka and others as:

> A social injustice characterized by unfairly regulating and insulting people based on the appearance of their hair. Within Black communities, hair discrimination can be localized as the imposition of racially biased appearance standards on hair, which can be accompanied by verbal or nonverbal consequences.[6]

Discussions of HD must be attentive to its historical development. As

[6] Afiya M Mbilishaka and others, 'Don't Get It Twisted: Untangling the Psychology of Hair Discrimination within Black Communities' (2020) 90(2) Am J Orthopsychiatry 590.

Dabiri observes, Afro-textured hair[7] and hairstyles are seen as an invaluable symbol of identity, family, age, tribe, and social rank within Black communities.[8] The physical form of cornrows, for example, represents agriculture and order. Hairstyling knowledge is shared as a social activity, creating meaningful bonds between people.[9] Furthermore, it is important to note the importance of protective hairstyles. Black hair has the tendency to break and dry out, thus sometimes requiring protective hairstyles, including dreadlocks or braids, for the maintenance of healthy Black hair.[10] These shared practices, which have become embedded in tradition, were disrupted by the advent of fifteenth-century slavery and colonialism.[11] Black hair was reclassified as 'dreadful', indicating the derogatory attitude of colonists towards Black people's hair.[12] The term 'dreadlocks' originated in this period — a descriptor coined by slave owners.[13]

Historic intrusions upon, and attitudes towards, Black culture set precedence for the continued negative (and internalised) perceptions of Black hair.[14] Despite the abolition of slavery, narrow attitudes of what is perceived as acceptable and ideal hair are perpetuated through the circulation of global definitions of beauty, which are dominated by perennial racism.[15] Western European features associated with 'civility' and 'respectability' were held to be the standard and,

[7] Thanks to Avtar Matharu, Chair of the University of York's Staff Race Equality Forum and Committee for clarification of terminology.
[8] Emma Dabiri, *Don't Touch My Hair* (Penguin Books 2019) 16.
[9] Johnson (n 4).
[10] Aleesha Hamilton, 'Untangling Discrimination: The CROWN Act and Protecting Black Hair' (2021) 89 U Cin L Rev 483.
[11] Editorial, 'We're Building a Future without Hair Discrimination' (*The Halo Collective*, December 2020) <https://halocollective.co.uk/> accessed 8 December 2020.
[12] Dabiri, *Don't Touch My Hair* (n 8).
[13] Francesco Mastalia and Alfonse Pagano, *Dreads* (Artisan 1999).
[14] Emma Dabiri, *Twisted: The Tangled History of Black Hair Culture* (Harper Collins 2020) 172.
[15] ibid.

consequently, encouraged Black people to use straighteners and harsh chemicals to 'tame' their hair in an attempt to mirror European styles.[16]

Since the emergence of the natural hair movement in the 1960s, Black people have been rejecting the Eurocentric standards of beauty that pressurise Black people to disguise and damage their natural hair.[17] Marcus Garvey, an activist of that movement, inspired Black people to embrace their natural hair, arguing that copying white Eurocentric standards of beauty 'denigrated the beauty' of Black people.[18] Nonetheless, Akutekha argues that the movement has failed Black people by encouraging the acceptability of Black hair 'only when it leans toward Eurocentric beauty standards'.[19] Akutekha asserts that the movement's failure is due to the glamorisation of 'looser curls', limiting the acceptance of all Black hair types defined by their unique textures.[20]

Given its history, HD lingers in the UK, particularly in professional environments. Demonstrative of this is *Erogbogbo*.[21] Here, an African woman was informed that her short spiky plaits were unacceptable in the workplace, with her employer deeming them unprofessionally messy. Erogbogbo's claim for racial discrimination was upheld, as there was no objective justification for the employer's disapproval of her natural hair. Despite Erogbogbo's successful claim and the establishment of the EQA a decade later, there appears to have been no significant change in this period.[22] Tied to the existence of HD cases,

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[16] Mbilishaka and others (n 6).

[17] Amberly Alene Ellis-Rodríguez, 'Black Is Beautiful: Photographs on the Hip Hop and Natural Hair Movements in Cuba Today' (2019) 21(4) Souls 355; Dabiri, *Twisted: The Tangled History of Black Hair Culture* (n 14).

[18] Chanté Griffin, 'How Natural Black Hair at Work Became a Civil Rights Issue' (Politics and Government, JSTOR Daily, July 2019) <https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue/> accessed 3 April 2021.

[19] Esther Akutekha, 'How the Natural Hair Movement Has Failed Black Women' (*HuffPost*, 16 March 2020) <https://www.huffingtonpost.co.uk/entry/natural-hair-movement-failed-black-women_l_5e5ff246c5b6985ec91a4c70> accessed 5 April 2021.

[20] ibid.

[21] *Erogbogbo v Vision Express UK Ltd* [2000] ET/2200773/00.

[22] Editorial, 'Boy "Didn't Want to Be Black Anymore" after Being Sent Home from

there remains a consistent problem concerning the understanding of racial discrimination. It is therefore necessary to question the protection that the Act offers to victims of HD in the UK.[23]

## 3 The Current Approach in Practice

Recognising the continued existence of such cases, the sufficiency of the current approach towards protecting people against HD must be assessed, with particular focus on whether the law and guidance on HD misinterprets the understanding of racial characteristics.

Described by Dabiri as 'the metric by which discrimination is measured',[24] the EQA replaced previous anti-discrimination laws,[25] attempting to simplify and unify equality law.[26] However, as Hand observes, this rationale may present an inherent shortcoming regarding the interpretation of the Act — particularly when its provisions are applied to complex issues such as HD.[27] That is, because hair is not explicitly identified as an element of race within Act, there is a lack of awareness of HD being classed as a form of racial discrimination. The UK government has aimed to address the potential deficiencies of equality legislation by constructing the EHRC — a statutory body established by the Equality Act 2006 and whose remit was extended and reaffirmed in the Equality Act 2010.[28] The EHRC's purpose is to

School for "Too Short" Hair, Says Mum' *ITV News* (London, 17 May 2019) <https://www.itv.com/news/central/2019-05-17/boy-didnt-want-to-be-black-anymore-after-being-sent-home-from-school-for-too-short-hair-says-mum> accessed 4 January 2021.

[23] Emma Dabiri, 'Emma Dabiri on Slaying the Stigma with the Halo Code' (Dove, April 2021) <https://www.dove.com/uk/stories/real-voices/emma-dabiri-halo-code.html> accessed 3 April 2021.

[24] ibid.

[25] Race Relations Act 1976.

[26] James Hand, 'Outside the Equality Act: Non-Standard Protection from Discrimination of British Law' (2015) 15(4) Int'l J Discrimination & L 205.

[27] ibid.

[28] 'Our Powers' (Equality and Human Rights Commission, 12 November 2019) <https://www.equalityhumanrights.com/en/our-legal-action/our-powers> accessed 3 April 2021.

safeguard equality and human rights legislation through advice and guidance, as well as sometimes supporting relevant legal action. In the case of Williams, the chief executive of the EHRC observed potentially dangerous legal and social implications, stating that: 'policies which single out children from particular ethnic groups are unacceptable'.[29] The Commission argued that the policy was indirectly discriminatory, placing Williams and other Black pupils at a disadvantage. It is therefore important to note the different types of discrimination that are recognised under the current law and guidance, and how this relates to the interpretation HD.

## 3.1 Direct and Indirect Discrimination

Direct and indirect forms of discrimination are defined in the EQA and subject to guidance from the EHRC.[30] Direct discrimination occurs when one person is treated less favourably than another person in a comparable situation because of a protected characteristic.[31] If, for example, a Black man is not offered employment due to his race, this constitutes direct discrimination. Contrastingly, indirect discrimination occurs when a provision, criterion or practice applies to all groups equally but has a discriminatory impact on people sharing a particular protected characteristic.[32] A health club that only accepts customers on the electoral register may, for example, be indirectly discriminating against Gypsies and Travellers, groups who are less likely to be on the electoral register and therefore will likely find it more difficult to join.[33]

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[29] Mark Smulian, 'School Argues £8.5k Settlement to Pupil Excluded over Size of Afro' (*Public Law Today*, 13 February 2020) <https://www.publiclawtoday.co.uk/education-law/394-education-news/42668-school-agrees-8-5k-settlement-to-pupil-excluded-over-size-of-afro-hair> accessed 4 April 2021.

[30] Equality Act 2010, ss 13, 19; Editorial, 'What Is Direct and Indirect Discrimination?' (*EHRC*, 25 November 2019) <https://www.equalityhumanrights.com/en/advice-and-guidance/what-direct-and-indirect-discrimination> accessed 3 April 2021.

[31] EQA, s 13.

[32] EQA, s 19.

[33] Citizens Advice Bureau, 'Gypsies and Travellers — Race Discrimination' (*Citizens Advice Bureau*) <https://www.citizensadvice.org.uk/law-and-

## 3.2 Case Law's Ignorance of Hair Discrimination

Having identified the relevant types of discrimination, the following section details how indirect discrimination has been determined in case law, demonstrating the ignorance towards HD within judgments. The case of *SG* [2011] concerned a challenge to a school uniform policy that banned cornrows.[34] The claimant was a Rastafarian whose religious beliefs prohibited him from cutting his hair. The High Court accepted that the policy indirectly discriminated against Black pupils, agreeing that the policy was not proportionate.[35] Yet, a significant part of the Court's reasoning relied upon a narrow exception to the claimant's hair, explaining that pupils who had a 'genuine cultural practice or family practice of not cutting hair' were to be regarded as an exception to the school's uniform policy.[36] The court took a restricted approach towards the protection from indirect discrimination, rather than wholly dismissing the uniform policy as explicit racial discrimination. Despite *SG* demonstrating a successful advancement towards identifying discrimination, the Court's analysis does not explicitly consider HD a form of racial discrimination within its judgment.

The public sector equality duty imposes a requirement on public authorities to have due regard to the need to *inter alia* eliminate discrimination and remove or minimise disadvantages suffered by persons who share a relevant protected characteristic when exercising its functions.[37] Yet, as Wagner observes, the consideration of HD issues was not made in *SG*.[38] The school assumed that HD was not a matter of

courts/discrimination/protected-characteristics/gypsies-and-travellers-race-discrimination/> accessed 28 May 2021.

[34] *SG v St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin), [2011] ACD 91.

[35] ibid [48] (Collins J).

[36] Adam Wagner, 'Hey Teacher! Leave Those Cornrows Alone' (*UK Human Rights Blog*, 20 June 2011) <https://ukhumanrightsblog.com/2011/06/20/hey-teacher-leave-those-cornrows-alone/> accessed 4 March 2021.

[37] Equality Act, s 149; 'Public Sector Equality Duty' (*EHRC*) <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty> accessed 4 April 2021.

[38] Wagner (n 36).

concern, because there were no complaints regarding their questionable policy. Assessing the reasoning for the lack of complaints, the judge in *SG* noted: 'It may be that those who complied were prepared to accept the disadvantage to receive a place in an excellent establishment.'[39] This statement reiterates the notion that Black people are expected to conform to Eurocentric ideals in order to avoid being excluded from valuable educational opportunities. Overall, *SG* illustrates how schools or workplaces, when defending their establishment's policies, are actively involved in perpetuating the disadvantages that Black people face in professional environments, through their ignorance of HD. The Court's decision displays a misinterpretation of a uniform policy that reflects the inherent nature of racial discrimination within an establishment's system. The next section discusses the implementation of the Creating a Respectful and Open World for Natural Hair Act (CROWN Act 2019), which recognises HD as a violation of human rights in parts of the USA, and offers useful insights for the UK context.

## 4 The CROWN Act 2019

The USA has recognised HD as a form of racial discrimination and has enacted legislation to tackle its prevalence in the country, in response to a rising number of cases. Seven states, including California, currently have anti-hair-discrimination laws, in the form of state-based CROWN Acts. The federal CROWN Act was passed by the House of Representatives in 2020 and is now awaiting Senate approval. The Act prohibits discrimination based on natural hair texture, and the legal definition of race has been expanded to include hair in several USA states. [40] The definition contained within the California Fair Employment and House Act, for example, now recognises: 'traits historically associated with race including, but not limited to, hair texture and protective hairstyles'. [41] For Johnson, the formation of CROWN highlights the extent to which European traits have been normatively embedded into the perception of 'professional' appearance

[39] *SG v St Gregory's Catholic Science College* (n 34) [45] (Collins J).
[40] CROWN Act 2019.
[41] Fair Employment and Housing Act, California Government Code, s 12926(w).

in society.[42] What is considered 'beautiful', 'acceptable', and 'professional' has undoubtedly been shaped by societal standards to which people have been exposed.[43] The lack of representation of Black hair in the USA within facets of public life, and in mainstream social media, encourages the ignorance of Black people and their distinctive traits. Despite the approval of the CROWN Act from states that have acknowledged the misinterpretation of Black people, the Act has been rejected by others.[44] The following section discusses the reasons for such opposition.

### 4.1 False Perceptions of Black Hair in Professional Environments

This section discusses the common misconceptions of Black hair and hairstyles in professional environments, arguing that judgments in USA HD cases often dismiss Black hair or hairstyles as unprofessional. *Equal Employment Opportunity Commission v Catastrophe Management Solutions* (*EEOC*) exemplifies this.[45] In this case, heard in an Alabama Court in 2016, the claimant had been offered a job at a call centre on the condition that she would not wear her dreadlocks. The employer stated that her dreadlocks were in violation of the grooming policy, which prohibited 'excessive hairstyles'.[46] The claimant refused, and the offer of a job was consequently revoked by the employer.[47] The Alabama Court regarded dreadlocks as a mutable characteristic, concluding that the hairstyle was not indicative of a racial trait and that it has no relation to the claimant's racial background.[48] The claimant's

[42] Johnson (n 4).
[43] Johnson (n 4) 110.
[44] Melissa A Milkie, 'Social Comparisons, Reflected Appraisals, and Mass Media: The Impact of Pervasive Beauty Imagines on Black and White Girls' Self-Concepts' (1999) 62(2) Social Psychology Quarterly 190; 'Creating a Respectful and Open World for Natural Hair' (*The CROWN Act*) <https://www.thecrownact.com/about> accessed 2 January 2021; Hamilton (n 10).
[45] *EEOC v Catastrophe Management Solutions* 852 F3d 1018 (11 Cir 2016).
[46] ibid.
[47] ibid.
[48] Civil Rights Act 1964.

dreadlocks were classed by the court as a form of self-expression, an approach that denied the significance of the protective hairstyle.[49] This case has set a narrow precedent that ultimately relied on flawed federal discrimination law.[50]

Within the context of HD in the USA, the findings in *EEOC* are significant for several reasons. First, the court misinterpreted Black hair, labelling it a mutable characteristic.[51] This finding stands in opposition to the history of Black culture and affiliated hairstyles.[52] As noted in Section 1, Black hair holds cultural significance for one's identity, whilst protective hairstyles are required to maintain healthy hair, due to Black hair's susceptibility to breakage and dryness.[53] Second, the case highlights how previous USA court decisions have facilitated a pattern through a narrow interpretation of racial discrimination, where protective hairstyles are dismissed as a mutable characteristic.[54] For example, in *Rogers*, a case decided in the Southern District of New York in 1981, the Court held that an employer's grooming policy was not discriminatory, because cornrows were a 'mutable aesthetic choice'.[55] Unlike in *EEOC*, the court here contrasted cornrows with 'Afro hairstyles', and found that the latter are acceptable.[56] Both cases demonstrate a judicial failure to comprehend the necessity of Black hairstyles, displaying an incoherent approach towards the nature of workplace policies.[57] These cases adopt

[49] Michelle De Leon and Denese Chikwendu, *Hair Equality Report 2019: 'More Than Just Hair'* (World Afro Day CIC, 2019).
[50] Hamilton (n 10).
[51] Title VII of the Civil Rights Act (n 46), 'protects persons in covered categories with respect to immutable characteristics, but not their cultural practices'.
[52] Hamilton (n 10).
[53] Hamilton (n 10).
[54] Hamilton (n 10) 497.
[55] *Rogers v American Airlines, Inc* 527 F Supp 229 (NY 1981).
[56] ibid.
[57] Dawn Siler-Nixon and Cymoril White, 'Diversity in the Works: The Crown Act — a Root to End: Overview for Employers on Hair Discrimination Laws and the Impact on Employer Grooming Code' (*JD Supra*, 3 March 2021) <https://www.jdsupra.com/legalnews/diversity-in-the-works-the-crown-act-a-6167912/> accessed 4 April 2021.

inaccurate perceptions of Black hair and protective hairstyles as a fashion or aesthetic choice. For, whilst hairstyles can be fashionable, it is simply more practical and protective for some Black people to wear their hair in braids or dreadlocks.[58]

## 4.2 The Impact of The CROWN Act in the United States of America

The CROWN Act has created transformational change in parts of the USA, overcoming systemic barriers.[59] First, the Act has increased awareness of covert racism within establishments' policies, directly linking to the disproportionate treatment of Black people in such environments.[60] The Act forms part of a movement to educate those who misinterpret HD as insignificant, whilst also providing recourse for victims of HD.[61] Second, previous USA case law such as *Rogers* indicates that HD remains a divisive topic with no consensus on the identification and sanctioning of HD. The CROWN Act represents an opportunity for the country to develop consistent legal reasoning on a prevalent societal issue. With the Act's further growth as additional states consider its enaction, the country could see an eradication of the false narratives around HD, where such legislation has the ability to explicitly categorise HD as a form of racial discrimination.[62] Third, the Act represents part of a social justice movement through the broadening of entitled minority rights, and serving to educate those not affected by HD.[63] Drawing upon the relative successes of the USA's legislative action on HD, the penultimate section of this paper proposes that hair be added to the definition of race as it is set out in the EQA within the UK.

[58] George Driver, '21 Hairstyles and Hair Trends You Need to Try in 2021' (*Elle*, 11 December 2020) <https://www.elle.com/uk/beauty/hair/g32408/hairstyle-trends/> accessed 4 March 2021; Hamilton (n 10).
[59] ibid.
[60] ibid.
[61] Siler-Nixon and White (n 57).
[62] The Crown Act (n 38); Hamilton (n 10).
[63] Hamilton (n 10).

# 5 Why Should Hair Be Added?

## 5.1 Racist Policies and Hair as a Mutable Characteristic

Formulated because of the prevalence of USA cases, and the incorrect notion that hair is a mutable characteristic, the challenges that CROWN addresses resonate clearly within the context of the UK. As such, legal reform, achieved through a refined definition within the EQA, is necessary for several reasons. The first justification for adding hair to the EQA race definition emerges from the *Williams* case. Despite succeeding in claiming compensation based on HD, the case's outcome has been viewed as controversial among some commentators.[64] For instance, a prominent barrister, Jon Holbrook, argued that Williams's school's policy is 'not an instance of racism', asserting that the establishment believed that Williams had breached policy.[65] However, Holbrook's interpretation inherently misunderstands a policy that was systematically racist, wherein the school initially refused to accept that their policy had a discriminatory effect. If an organisation bans Afro-textured hairstyles, such actions target people of Black heritage.[66] Views such as Holbrook's overlook the differential impact of policies on certain hairstyles and, therefore, certain races, which in turn constitutes a form of indirect discrimination. Despite Williams' school's policy being revised, Holbrook's assertions continue to echo throughout UK society.[67] If explicit legal recognition of hair as an element of the Act's definition of race is incorporated within the EQA, this could contribute to eliminating HD and its associated disadvantages.

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[64] Virk (n 1).

[65] Jon Holbrook, 'Should School Uniform Policy Have to Accommodate Cultural Sensitivities?' (*The Conservative Woman*, 25 January 2021) <https://www.conservativewoman.co.uk/should-schools-have-to-accommodate-cultural-sensitivities/> accessed 2 April 2021.

[66] Annie Fendrich, 'Why the Law on Indirect Discrimination Is So Vital in the Fight for Equality' (*Human Rights Pulse*, 11 February 2021) <https://www.humanrightspulse.com/mastercontentblog/why-the-law-on-indirect-discrimination-is-so-vital-in-the-fight-for-equality-1> accessed 4 April 2021.

[67] Virk (n 1); Justin Parkinson, 'Equality Debate Can't Be Led by Fashion, Says Minister Liz Truss' (*BBC News*, 17 December 2020) <https://www.bbc.co.uk/news/uk-politics-55346920> accessed 3 January 2021.

The second justification for adding hair to the EQA's definition of race derives from comments made in December 2020 by the UK's minister for women and equalities, Liz Truss MP. Truss suggested that efforts to incorporate hair within the definition of race amounted to identity politics. [68] This view is problematic and alludes to the mutable characteristic argument also adopted in USA courts in their justification for permitting HD policies.[69] As this paper has outlined, classing Black hair as a mutable characteristic is to misinterpret the significance of the distinct appearance of Black hair and its correlated culture.[70] Give some of the parallels between the issues in the USA and the UK surrounding HD, it is submitted that aspects of the CROWN Act, particularly its purpose to recognise HD in a sociolegal context, could be emulated in the UK through the EQA. In October 2020, Wera Hobhouse MP of the Liberal Democrats raised the issue of HD on her party's website, calling on government to act on 'an all-too prevalent form of racial discrimination'.[71] To date, the government has yet to respond.

## 5.2 Education as a Mechanism for Change

Despite this article's predominant focus upon legal change, it must be acknowledged that education remains a powerful mechanism for reform. The Halo Code, a Black hair guide that has been designed to protect HD victims in British schools and workplaces, is emblematic of this.[72] The Code represents a set of voluntary guidelines for professional establishments to adopt, encouraging the appreciation of Black hair and protective styles.[73] Since its inception in December 2020, the code has

[68] ibid.
[69] *EEOC* (n 45).
[70] Hamilton (n 10).
[71] Hobhouse (n 5).
[72] The Halo Collective (n 11).
[73] Michelle Chance and Chris Warwick-Evans, 'Voluntary New Code Issued by Campaigners to Tackle Hair Discrimination: What Are the Issues and How Can Employers Avoid Discrimination Claims?' (*Rosenblatt*, 18 January 2021) <https://www.rosenblatt-law.co.uk/media/voluntary-new-code-issued-by-campaigners-to-tackle-hair-discrimination-what-are-the-issues-and-how-can-

been adopted by more than 20 schools in South London, and various workplaces.[74]

Although the Halo Code has improved awareness of HD in professional settings, this educational and self-regulatory measure must be accompanied by legal protection. These actions may combine to challenge the ignorance surrounding HD and provide formal legal protection, redressing damaging and historically entrenched perceptions of Black hair in education. Whilst initiatives such as the Halo Code represent a positive step towards the eradication of HD, the adoption and implementation of such provisions remain at the discretion of workplaces and schools' headteachers.[75] The Code lacks a compulsory authority, which does not allow for the assurance of protection from HD. The recognition of hair as a characteristic feature of race within the EQA would help settle the issue of mutability and provide a route to redress for those faced with HD measures.[76]

# 6 Conclusion

This paper has outlined the historical origins of HD, its connection to racism, and the consequent development of negative perceptions of Black hair in professional settings. The paper has suggested that there exists a gap in the understanding and definition of race as it exists in the EQA. The existence of HD cases in the UK highlights ongoing discrimination within professional and educational establishments. Having examined the flaws within the UK's approach towards indirect discrimination, the paper has argued that the law inadequately addresses issues of HD.

The impact of the CROWN Act reforms in the USA was then examined, with its provisions proving to be a successful component of transitional change. The CROWN Act demonstrates an increasing awareness of the

employers-avoid-discrimination-claims/> accessed 18 January 2021; The Halo Collective (n 11).

[74] The Halo Collective (n 11); Chance and Warwick-Evans (n 73).

[75] Chance and Warwick-Evans (n 73).

[76] EQA (n 30) s 119.

multifaceted and immutable nature of race, leading to the expansion of racial discrimination's legal definition to include HD. Opposition to the introduction of such legislation can often be explained by reference to persistent misconceptions surrounding Black hair and hairstyles, for instance, dismissing braids as unprofessional or mutable. Lessons can be learned from the Act within a UK context for establishing necessary rights and eradicating problematic attitudes within professional spaces.

Existing efforts to address HD within the UK are essential for education and in furthering the equality agenda beyond formal law. Most notably, the guidelines contained in the voluntary Halo Code were considered in this paper. However, these voluntary mechanisms must form part of a suite of measures that include legislative reform to ensure substantive recognition of HD and avenues for its victims to seek redress. The proposal put forward in this paper, that hair should be added to the definition of race in the EQA, may achieve similar successes to the CROWN Act in the US, whilst also aiming to address racist misconceptions regarding the 'unprofessionalism' of Black hair and hairstyles. The examples of HD discussed in this paper demonstrate that our understandings of race and other characteristics must evolve and change over time as we understand and acknowledge past prejudices and failings. Further legal research and activism must continue to push the boundaries of these legal definitions and measures to ensure that the drive for equality does not stagnate and wither.

# Blowing the Whistle on the Iraq War: Conscientious Moral Objection and the Duty to Obey the Law

Laura Burke

**Abstract**

This article explores whether there exists a duty to obey the law of a reasonably just state, even when doing so would violate an individual's moral beliefs. There has been extensive discussion of legitimate authority, political obligation, civil disobedience, and the duty to obey over the past century. However, given the nature and scope of these topics, little clarity exists regarding the extent of any duty to obey the law and what protection the law should offer to conscientious objectors. Using the contentious case of Katharine Gun, a translator at the Government Communication Headquarters who in 2003 leaked a confidential memo related to the Iraq invasion, the article interrogates whether moral obligation is ever a legitimate justification for legal disobedience. The circumstances under which Gun engaged in whistle-blowing force the society of the reasonably just state to consider whether, in some circumstances, moral conviction should be a valid legal defence against breaking some laws. Gun's case highlights the jurisprudential problems arising from imposing an absolute philosophical duty to obey the law. First, the article engages with the notion of a duty to obey, proposing that, whilst there is often good reason to do so, there is no absolute moral duty to obey the law. Second, it examines theories of conscientious objection and civil disobedience, establishing that, whilst there is no absolute right to conscientious objection, there exists scope for increased legal protection for those that disobey the law for moral reasons. Finally, it assesses the current state of law and policy in the United Kingdom on conscientious objection, offering proposals for reform.

# 1 Introduction

‘There comes a time when silence is betrayal.’

— Martin Luther King Jr[1]

Obedience to law in cases of moral conflict is one of the most morally complex and pertinent discourses in legal philosophy. It cuts to the core of questions as to why we obey the law, whether we owe reasonably just states our obedience, and how far that obedience should extend. Conscientious objection and civil disobedience have been employed by civil society actors throughout political history as tools through which to challenge injustice, to invoke the public conscience, and to trigger legal reform. This article utilises the case of Katharine Gun as a lens through which to consider these concerns.

The case of Katharine Gun provides a politically charged example of the tension between legal obedience and moral obligation.[2] Gun worked as a translator for the Government Communication Headquarters (GCHQ) from 2001 to 2003, when she received a highly confidential memo revealing that the USA was working with the UK to collect sensitive information on members of the United Nations Security Council (UNSC), in order to illegally pressure states into supporting the Iraq invasion.[3] Gun's decision to leak the memo led to widespread

[1] Martin Luther King Jr, ‘Beyond Vietnam’ (The Martin Luther King Jr Research and Education Institute, 4 April 1967) <https://kinginstitute.stanford.edu/king-papers/documents/beyond-vietnam> accessed 1 May 2020.
[2] Paul Wood, ‘Katharine Gun: The Spy Who Tried to Stop the Iraq War’ *The Spectator* (London, 14 September 2019).
[3] Martin Bright and Ed Vulliamy, ‘15 Years Later: How U.K. Whistleblower Katharine Gun Risked Everything to Leak Damning Iraq War Memo’ (*Democracy Now*, 19 July 2019) <https://www.democracynow.org/2019/7/19/15_years_later_how_uk_whistleblower> accessed 8 May 2021.

public outcry over the government's actions.[4] On 13 November 2003, she was charged with violating Section 1 of the Official Secrets Act 1989, which government employees dealing with sensitive matters agree to abide by upon commencement of their employment. Her trial brought the conflict between the citizen's legal and moral duties back into the heart of public and academic discourse. The legal case against Gun was ultimately dropped. The director of public prosecutions at the time, Sir Ken Macdonald, indicated that her prosecution would require the revelation of confidential government documents that would threaten national security.[5] As the case was not brought to trial, no definitive answer was provided as to the legality of Gun's position, and particularly the defence of necessity, which her legal team intended to argue at trial. Gun's case reignited the debate as to whether the citizen's first duty should be to the law or to personal morality. It forces us to consider if, even in a reasonably just state, certain moral compulsions can justify breaking laws.

Employing a jurisprudential lens, this article analyses conscientious moral objection in the context of Gun's case. Utilising legal theory on the duty to obey the law and conscientious moral objection, it re-examines the current legal position of contemporary conscientious moral objectors. Whilst rejecting the argument that there is an absolute right to conscientiously disobey law, it will conclude that disobedience to law can have significant and compelling moral and practical justification. The article then argues that, if disobedience can be justified, then there must be a presumption in favour of giving it some form of legal recognition. Finally, the article offers a view as to what form that legal recognition should take, favouring acknowledgement of a defence of necessity.

[4] Tim Adams, 'Iraq War Whistle-Blower Katharine Gun "Truth Always Matters"' *The Guardian* (London, 22 September 2019).
[5] Mark Townsend, 'Iraq War Whistle-Blower's Trial Was Halted Due to National Security Threat' *The Guardian* (London, 1 September 2019).

## 2 The Existence and Scope of a Duty to the Obey the Law

In western legal philosophy, the debate as to whether there is a prima facie moral obligation to obey the law dates back to 360 BC, with Plato's discussion of Socrates in *Crito*.[6] Socrates refuses to flee Athens when faced with the death penalty because it would be morally wrong to forego the punishment imposed upon him by law, because he is morally obliged to abide with Athenian law as a citizen of Athens. Such a conclusion, that there exists a prima facie moral obligation to obey the law simply because it is the law, remains much debated in contemporary jurisprudence.[7]

To assess the relationship between conscientious moral objection and legal obedience, the article first engages with the contested existence of a prima facie moral obligation to obey the law. It concludes that, whilst there is often good reason to obey the law, those reasons cannot justify the claim that every citizen is duty-bound to obey every law, because such a moral duty does not exist.

### 2.1 The Concept of a Moral Obligation

The concept of a moral obligation to obey the law is such that, 'in cases where the law requires X to do Y, it would be prima facie morally wrong for X not to do Y simply because the law requires it'.[8] This article will follow Simmons, Hart, and Rawls in adopting Brandt's paradigmatic use of the terms of 'obligation' and 'duty', treating the terms as broadly synonymous.[9] In the context of obedience to the law, these terms refer to 'moral requirements to act in certain ways in matters

[6] Ernest J Weinrib, 'Obedience to the Law in Plato's Crito' (1982) 27 Am J Juris 85.
[7] Nicholas J McBride and Sandy Steel, *Jurisprudence* (Palgrave 2014) 132.
[8] ibid 133.
[9] RB Brandt, 'The Concepts of Obligation and Duty' (1964) 73(291) Mind 374.

relating to law and politics'.[10] What distinguishes the specialised use of these terms is the coercive moral bond that an obligation places on an action. Simmons clarifies the important distinction between 'moral' and 'positional' duties.[11] Simply put, something is a moral duty if it would be *ipso facto* morally wrong not to fulfil that duty. Rawls terms these 'natural duties' that 'apply equally to all individuals irrespective of status'.[12] Positional duties, by contrast, arise from roles or positions that the individual undertakes. The following analysis is concerned not with a positional duty to obey the law but with a moral one.

In this context, the question of duty refers to whether law is morally authoritative and whether its subjects are morally obliged to comply because of its status as law. Crucially, a moral obligation is distinct from a coercive obligation, whereby X has authority over Y because X is capable of coercing Y to comply by punishing Y for non-compliance. In the case of coercion, punishment might give Y reason to comply, but this does not mean that there would be anything morally deficient about Y's refusal.[13] This is illustrated in the debates between Hart and Austin. The 'imperative theory of the state', as espoused by Austin, dictates that human law is conceived of commands given by a political superior and enforced by coercive sanctions.[14] Under this theory, the law is authoritative because it has been created by a superior capable of imposing sanctions. Austin claimed that '[c]ommand, duty and sanction are inseparably connected': a duty exists because of the command of the state, and such a duty is reinforced by the power to impose coercive sanctions.[15] However, Hart, in his seminal work, rejects this command model as failing to account for the internal thought processes of citizens

[10] A John Simmons, *Moral Principles and Political Obligations* (first published 1979, Princeton UP 2010) 12.
[11] ibid.
[12] John Rawls, *A Theory of Justice* (Harvard UP 1971).
[13] Daniel Mark, 'The Failure of Joseph Raz's Account of Legal Obligation' (2016) 61(2) Am J Juris 217, 218.
[14] John Austin, *The Province of Jurisprudence Determined* (first published 1832, Prometheus 2000) 9–14.
[15] ibid 17.

who act out of a belief in a 'moral duty to obey the law' as opposed to being obliged by coercion.[16] An individual in the position to impose sanctions can indeed compel obedience, but Austin fails to address whether such authority is just and legitimate. Hart's rejection of command theory revolutionised the contemporary study of jurisprudence.[17] Hart demonstrates that the command model does not sufficiently account for the law's content and function, and instead frames the debate in terms of whether a moral obligation to obey exists, from where it derives its authority, and whether it is binding on the citizen. For this reason, the 'duty to obey the law' as examined here focusses not on whether political authority can coerce behaviour via punishment but on whether the law of a reasonably just state has moral authority over its citizens, which in turn imposes a moral duty to obey the law.

## 2.2 Raz and the Duty to Obey

The debate around a duty to obey the law has received significant academic scrutiny in recent decades. Joseph Raz's seminal work supported the conclusion that there is never an absolute moral duty to obey the law.[18] He persuasively questions the necessity, and the existence, of an absolute duty to obey, arguing that its existence depends on factors other than whether the law is just and sensible. His article convincingly concludes that any obligation is a prima facie one that can be overridden by a variety of countervailing considerations.[19] Raz's position is not that one never has any moral reason to account for the existence of the law but rather that the extent of the obligation to obey varies depending on factors such as the expertise or beliefs of the citizen, or the circumstance of the violation. The law affects an individual's moral obligations but does not bind them.

[16] HLA Hart, *The Concept of Law* (first published 1961, Clarendon Press 2012) 6.
[17] Mark (n 13) 218.
[18] Joseph Raz, 'The Obligation to Obey: Revision and Tradition' (1984) 1 Notre Dame J L Ethics & Pub Pol'y 139, 140.
[19] ibid 147.

He opens his article by stating that political and moral theorists generally hold that each citizen has a prima facie moral duty to obey the laws of a reasonably just state. Several conditions for this theory of obedience require examination. There is an argument that the obligation to obey is unjustifiable on the grounds that no state can be truly just. If obligation to obedience is dependent on the certainty of justice, and this guarantee is impossible, then no absolute obligation can be imposed.[20] Raz, however, proposes the 'paradox of just law', arguing that the presence of justice in fact diminishes the need for an absolute duty to obey. He argues that the more just and valuable the law is, the more reason the citizen has to conform to it and the less the need for a duty to obey becomes.[21] Since the law is just, the reasons that establish its justice should be the reasons for obedience. Individuals do not obey the law because of legal obligation but instead conform to the same doctrine of justice to which the law itself conforms. Since it is established that there only exists a duty to obey when the law is just, the duty to obey the law becomes redundant.[22]

One of the most persuasive aspects of Raz's paradox theory is its application to the law on murder. The theory explains that society expects people to refrain from morally reprehensible actions regardless of whether they are legally forbidden, for reasons unrelated to the law.[23] If someone claimed that they do not murder because of the law, society would find that morally unacceptable. This raises the question of whether there can be a moral obligation to perform an action, if to take the existence of an obligation as the justification for the action would be morally wrong. Raz proposes that, because the existence of a 'duty to obey the law' does not strengthen the moral duty not to murder, then, in philosophical terms, a moral duty to obey is somewhat redundant.[24] The laws prohibiting murder, rape, and torture are central to the legal

[20] Robert Wolff, *In Defence of Anarchism* (first published 1970, University of California Press 1998) 18.
[21] Raz (n 18) 141.
[22] Raz (n 18) 141.
[23] Raz (n 18) 139, 141.
[24] Raz (n 18) 140.

systems of all just states. If these laws make little difference to our pre-existing moral obligations, then it logically follows that there is no absolute obligation to obey law on the basis that it is law.

## 2.3 Consent Theory

Arguably the most prominent justification for a duty to obey the law is consent theory. In the eighteenth century, Rousseau highlighted the value of the social contract as the act that constitutes civil society, and the notion of consent to the state has become popular as a justification for a duty to obey the law, as it aligns better with the principles of natural law.[25] The central doctrine of consent theory is that no individual is obligated to comply with any political power unless they have consented to its authority.[26] Raz agreed that '[c]onsent to obey the law of a relatively just government indeed establishes a prima facie obligation to obey the law'.[27] However, valid consent to obey requires a deliberate action, such as the oath taken in national military service, and in order to be binding it must be voluntarily undertaken. The central difficulty with consent as the general foundation of political authority and, by extension, a duty to obey is that many people living under a state's laws have never performed any such action. Many theorists instead argue in favour of the implicit social contract — that individuals give their consent to obey implicitly by belonging to the state, accepting its benefits, and refraining from opposing the state.[28] However, the main problem with implicit consent as a justification for imposing a duty to obey the law is that valid consent requires a reasonable way of opting out. Implicit social contract theory utilises the acceptance of the benefits of the state as justification for a duty, yet these perceived benefits are given to a citizen regardless of whether they want them and, for many individuals, there is no reasonable way of opting out.[29] Therefore,

[25] Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Everyman 1950); Raz (n 18) 153.
[26] John Locke, *Two Treatises of Government* (first published 1689, CUP 1960).
[27] Joseph Raz, 'Authority and Consent' (1981) 67 Va L Rev 103.
[28] Michael Huemer, *The Problem of Political Authority* (Palgrave Macmillan 2013) 22.
[29] ibid 24.

neither theory accounts for full and valid consent from all citizens, and so a blanket obligation to obey cannot be imposed on the grounds of consent.

Other theorists have argued that an obligation to obey the law can arise from belonging to or identifying with a country or community as a form of consent.[30] However, whilst communal loyalty is a valuable aspect of a strong state, it is not obligatory. There is no 'moral duty to feel a sense of belonging to a country or community'; a feeling of loyalty that may trigger obedience to the state differs sharply from a binding duty of loyalty to the state.[31] Raz argues that the law and government are 'organs of the community'; if they accurately and justly represent the community, then an inclination to obey the law will arise.[32] This is what Raz refers to as 'respect for law', a condition distinct from obligation. The notion of respect represents a desire to uphold a system based on a belief in that system. This is incongruous with obligation, which is a requirement placed upon the individual.[33] Obeying the law in this context is a way of expressing confidence in the state and trust in its justice. However, respect-based obedience does not derive from consent to the state — it develops because of belief in the state.[34]

An obligation to obey due to loyalty to the state is a semi-voluntary obligation because it is a belief one has developed — an individual does not have a moral duty to identify with their community. Raz clarifies that 'vindicating the existence of a sense of duty based on loyalty does not establish a general obligation to obey'.[35] The argument of voluntary consent to obey the laws of a state based on the communal value of that state can be used to explain compliance, but does not prove the existence of a prima facie moral obligation to obey. The community-based rationale fails to show that obedience to the law is an absolute

[30] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 153.
[31] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 154.
[32] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 154.
[33] Simmons (n 10) 7.
[34] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 154.
[35] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 155.

duty, but rather drives the alternate argument that it is a trust-based inclination. This argument suggests that the perception of justice is correlated with an inclination to obey. It follows that, if a citizen were to identify reason to distrust in the state and observe its injustice, that inclination towards respect-based obedience would diminish.

## 2.4 Finnis, Rawls, and the Duty to Obey

Finnis disputes Raz's claim that compliance with the law is dependent on a variety of factors. He writes in favour of a significant duty to obey the law. Finnis's central claim is that the 'law is a seamless web: its subjects are not allowed to pick and choose'.[36] Similarly, Rawls favours a natural duty to support just and efficient institutions, justified by reference to his social contract doctrine. He provides two main reasons why individuals should comply with just social arrangements. First, 'we have a natural duty not to oppose the establishment of just and efficient institutions'.[37] Second, if we knowingly accept the state's benefits and expect others to, we are obliged to 'do our share' to maintain the social contract.[38] Echoing Finnis's notion of law as a 'seamless web', he states that '[t]he injustice of a singular law is not a sufficient ground for non-compliance any more than the legal validity of legislation is always a sufficient ground for obedience'.[39] He adds, 'justice binds us to a just constitution and the unjust laws that may be enacted in precisely the same way that it binds us to any other social arrangement'.[40] Even in a relatively just society, Rawls contends, we cannot frame a procedure in which only just legislation is enacted. We must accept the risk of suffering injustice, providing it does not exceed certain limits, for the existence of a relatively just and efficient system.

[36] John Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory' (1984) 1 Notre Dame J L Ethics & Pub Pol'y 115.
[37] John Rawls, 'The Justification of Civil Disobedience in Jail' in Aileen Kavanagh and John Oberdiek (eds), *Arguing about Law* (Routledge 2009) 244.
[38] ibid 244.
[39] ibid 246.
[40] ibid 247.

However, Raz highlights that the fairness argument does not apply convincingly to all forms of disobedience to law. Even where it is unfair not to obey the law in some circumstances, it cannot be unfair to perform innocuous acts that do not impede the public good.[41] Many violations of law are innocuous acts; therefore, the argument of fairness cannot be used to justify a generalised obligation to obey. Whilst Rawls explains that the law is a way of achieving coordination and a relatively just system, he fails to demonstrate that such coordination requires the existence of an obligation to obey.[42] Equally, Raz refutes Finnis's proposal as incomplete because its justification for a duty to obey the law presupposes such a duty. The conception of the law as a 'seamless web that citizens cannot pick and choose between' only holds logical authority if there first exists a justified and absolute prima facie duty to obey. It does not justify the duty *ipso facto*. One cannot presuppose that we have a duty to obey in order to provide the reason for that duty. This illustrates that the conception of the law as a seamless web is a personal belief; it is not a coherent theory that convincingly establishes a binding moral duty to obey.

Finnis further argues that the only way to ensure that individuals fulfil their moral duties is to enforce upon them a moral duty to obey the law.[43] He presents the following example: '[a] farmer has a duty not to pollute the river, but the individual farmer may dispute this, so the logical way to get the collective to fulfil their moral duty is to create a law and enforce a consequent moral duty to obey that law'.[44] Raz persuasively contends that this only constitutes a coherent argument in favour of a general obligation to obey if the lawmakers are definitively less likely to make mistakes than the farmers on all issues of law and morality. He explains that a generalised obligation to obey the law cannot ground its moral superiority in singular cases, because 'what is

[41] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 152.
[42] Rawls, 'The Justification of Civil Disobedience in Jail' (n 37) 245.
[43] Finnis (n 36) 134–37.
[44] Finnis (n 36) 134.

achieved in pollution could be lost in other areas of the law such as the treatment of the elderly or mentally ill'.[45] Finnis illustrates a way in which the law can do good and uses this as justification for obliging obedience to the law. However, Raz does not dispute that, when the law can do good, it should be obeyed. Finnis's argument in favour of an obligation to obey does not logically refute Raz's scepticism of its existence.

Raz refutes the proposition that there is a moral danger in people deciding for themselves, such that a duty to obey is necessary. Raz agrees that 'human judgment fails; it is distorted by temptations, error and bias'.[46] This should, Raz agrees, colour the debate, but it should not necessarily incline in favour of an absolute duty to obey since '[p]oliticians, governments and lawmakers are not exempt from human error'.[47] By extension, human law is not exempt from problems and so its power to demand obedience should not be absolute. He adds that, 'too often in the past, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude'.[48] As long as there exists no conviction that the decision of the state will always be correct, or moral, an absolute duty would be not only misguided but, if its purpose were to enhance civil society, also redundant. Raz raises the only persuasive answer to this conundrum, and to the fallibility of human law — that the existence of a duty to obey is conditional.

This article supports Raz's conclusion that 'there are risks, moral and other, in uncritical acceptance of authority'.[49] Raz persuasively demonstrates that imposing an absolute duty prevents the citizen from being able to critically assess the law and its moral facets, make rational decisions based on circumstance, and utilise agency. He convincingly dismantles other scholars' arguments and presents a logical and

[45] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.
[46] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.
[47] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.
[48] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.
[49] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

coherent case in opposition to a duty to obey the law. This article therefore argues that, if the proposition in favour of a prima facie duty to obey presupposes that obeying the law is the morally right thing to do, its existence should vary between circumstances and be dependent on the laws in question, the consequences of obedience, and the knowledge of the citizen.[50] In some situations the correct choice requires submission to authority, and in others it leads to denial of authority.[51] Enforcing an absolute duty to obey would oversimplify the complexity of the relationship between law and morality, and, as Raz notes, there is no conclusive evidence that it would aid society.

Raz concludes his article by arguing that there is a clear orthodoxy of modern legal and political theory, which claims that, if there is an obligation to obey the law, it exists because it is voluntarily undertaken.[52] Since any obligation that is voluntarily undertaken cannot be absolute, the duty to obey the law is conditional and does not morally bind the citizen. That is the view that Raz defended and that this article supports.

## 3 Obedience to the Law in Cases of Moral Conflict

Changes in societal perspectives in the twentieth century led to a rise in protests, activism, and conscientious objection. This encouraged a process of legal reform that changed the face of law in the United Kingdom and gave rise to a wave of theorists arguing in favour of the citizen's right to dissent against laws that they find morally objectionable. Wolff's *In Defence of Anarchism* set a precedent for this school of thought. Wolff proposed that a law being passed is 'never a reason which deserves to be given any particular weight in our deliberations'.[53] Equally, Simmons urges the citizen not to regard a legal requirement as the sole reason to act, arguing that the simple fact

[50] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.
[51] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.
[52] Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 155.
[53] Wolff (n 20).

that conduct is required or forbidden by law is irrelevant to its moral status. He suggests that, even within relatively just states, citizens should consider the morality of an action on independent grounds.[54] Whilst the majority of theorists disagree with Wolff's claim that law *never* provides a valid reason for acting, his argument shapes the belief that the law is not *always* a good reason for acting and so by extension is non-binding on the citizen's moral choices.[55] Thus, theories of conscientious objection began to gain popularity in modern political theory.

These theories of conscientious objection borrow concepts from the Thomist tradition of natural law. This theory centres on a twofold contention: first, that there are certain inalienable principles of true morality and, second, that man-made laws that conflict with these principles are invalid law, '*lex iniusta non est lex*'.[56] This Latin motto, originating from St Augustine and used by St Thomas Aquinas, was popularised by Martin Luther King Jr during the civil rights movement and used as a way to articulate the justification of conscientious disobedience.[57] The argument against a duty to obey does not propagate the natural law theory that laws that conflict with certain fundamental principles of morality are not law at all. Rather, it establishes that the existence of something in law does not morally bind an individual to action. The concept of conscientious moral objection in this context is that, if the law is in fundamental conflict with an individual's moral beliefs, then this moral objection justifies disobedience.

In order to assess the position of conscientious whistle-blowers like Katharine Gun, it is first necessary to critically analyse the concept of conscientious disobedience and the legal and philosophical validity of the claim that moral objection is a justifiable reason to break the law.

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[54] Simmons (n 10) 8.
[55] Patrick Durning, 'Joseph Raz and The Instrumental Justification of a Duty to Obey the Law' (2003) 22 L & Phil 597.
[56] Hart (n 16) 156.
[57] Martin Luther King Jr, 'Letter from Birmingham Jail' in Aileen Kavanagh and John Oberdiek (eds), *Arguing about Law* (Routledge 2009).

This section examines civil disobedience and conscientious objection through a jurisprudential lens, arguing that the legal system of the relatively just state should provide some form of legal protection to those who conscientiously disobey law.

## 3.1 Examining a Moral Duty to Disobey

The question of the obligation to obey laws that one morally opposes extends beyond the issue of whether there is a prima facie moral obligation to obey the law and also addresses the moral justification for disobedience. Smith asserts that "[a] person (S) has a prima facie obligation to do an act (X) if there is a moral reason for S to do X'.[58] The fact that the act is law could be such a moral reason. Smith continues that, 'unless [they have] a moral reason not to do so at least as strong as [their] reason to do so, failure to do X is wrong'.[59] This argument posits that, even if a law does provide a moral obligation to act, failure to obey this obligation is only wrong insofar as one lacks sufficient moral justification for disobedience. Raising the concept of proportionality, he suggests that disobedience to law is morally acceptable insofar as the moral consideration is sufficient to render disobedience to law a proportionate act.

Simmons argues that, if society does not accept obligation as a justification for behaviour that violates our fundamental morality, then we cannot justifiably impose an obligation to obey the law regardless of countervailing moral considerations, as to do so would be contradictory. Simmons notes that we are 'unmoved by the Nazi Officer's pleas, even if we acknowledge that he did have a form of obligation to obey his superior's commands to kill innocent people'.[60] The reason for this lack of sympathy is a collective recognition of the

[58] MBE Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82(5) Yale LJ 950, 951.
[59] ibid.
[60] Simmons (n 10) 10.

fact that duties and obligations do not give conclusive reasons for acting — there is a moral facet to the decision to carry out these orders.[61] If the duty to obey the law is a moral obligation, as its proponents would suggest, then it appears illogical that an individual would recognise the law's moral claim over their actions without also acknowledging that this claim is overridden by many more substantial moral considerations.[62] This argument convincingly illustrates that some factors take moral precedence above legal duty. This is the purpose of conscientious moral objection and represents the grounds on which a legal recognition of moral considerations would rest.

In the context of political obligations, this demonstrates that to identify that an individual has an obligation is not to say that they ought to, or are in any moral sense bound to, discharge that obligation.[63] To hold an absolute duty on the grounds of moral obligation would be contradictory if the same obligation bound individuals to deny countervailing moral considerations. It follows from this conclusion that, if it is not the case that the legality of an action exempts it from all moral scrutiny, then the illegality of an action does not render it the morally wrong choice.[64]

It is important to distinguish conscientious moral objection from civil disobedience. For the purposes of this analysis, Raz's definitions will be employed. Civil disobedience refers to a 'politically motivated breach of law designed to contribute directly to a change of law or public policy, or to express one's protest against a law or public policy'.[65] Conscientious moral objection is a personal breach of the law because the agent is morally prohibited to obey it.[66] The two often overlap — for instance, an individual can protest against a law in the hope of policy reform because they are personally morally prohibited from obeying

[61] Simmons (n 10) 10.
[62] James K Mish'alani, 'Duty, Obligation and Ought' (1969) 30(2) Analysis 33.
[63] Simmons (n 10) 11.
[64] JW Harris, *Legal Philosophies* (first published 1997, OUP 2004) 226.
[65] Joseph Raz, *The Authority of Law* (first published 1979, OUP 2009) 263.
[66] ibid.

that law. Both forms of conscientious objection share the characteristic belief that obeying the law would be a greater moral wrong than disobeying.

## 3.2 Is There a Right to Dissent?

Raz suggests that a right to conscientious disobedience would include within it the right to do something that the law dictates should not be done, because that individual sincerely holds opposing moral views. Take the example of military service — even if the military service can be morally justified, an individual would be allowed to opt out because they ardently believe it is wrong for them. The argument proposes that, 'even if performing the action would, disregarding the agent's attitude towards it, be morally obligatory, it may not be so once their attitude is accounted for'.[67] This suggests that, in a liberal society, the moral beliefs of the agent add a moral facet to obliging them to act, even if the act itself is otherwise morally positive or morally neutral. The agent's personal moral beliefs may tip the balance. The legal protection of those who disobey the law for moral reasons, if it were to exist, would rest on respect for the individual's moral beliefs and the seriousness of these beliefs in situations of moral complexity.

However, the legal acknowledgement of the gravity of the individual's moral beliefs in situations of moral complexity does not automatically equate to the proposition of an absolute right to dissent. In his discussion of civil disobedience, Raz distinguishes between the assertion that civil disobedience is an individual's absolute right and the claim that, under certain conditions, civil disobedience is a morally right choice.[68] A characteristic of rights is that a right contains within it the protection of the freedom to do what one ought not to do. For example, the right to freedom of expression (subject to a small number

[67] ibid 278.
[68] ibid 267.

of restrictions) extends to the right to say what one ought not to say.[69] Raz identifies that this cannot logically extend to conscientious disobedience, as to have a right to conscientiously disobey when one ought not to do so would be to contradict the very definition of conscientious disobedience, which is dependent on the moral conditions of the disobedience. To say that there is a *right* to conscientiously disobey law is to suggest that the legitimacy of conscientious disobedience is not dependent on the rightness of one's cause.[70]

This position does not mean that civil disobedience and conscientious moral objection are never justified, but that it would be inaccurate to assume that disobedience on the grounds of conscience is an absolute right. Instead, it proposes that, because the liberal state has the capacity to contain bad and iniquitous laws, sometimes it will be morally right to engage in a form of conscientious disobedience to protest against them. Conscientious objection and civil disobedience are, by their characteristics, exceptional: they go beyond the bounds of the law and so extend beyond the protected right to political action.[71] Hence, this article proposes that conscientious disobedience is a form of political action to which no one has an absolute moral right but to which individuals may have sufficient moral justification. It therefore argues in favour of a legal defence of necessity that acknowledges at trial the moral seriousness of the conscientious objector's decision to disobey. It does not equate this to an absolute philosophical right to disobey, as this would be incompatible with the nature and purpose of civil disobedience and conscientious objection.

[69] HLA Hart, 'Bentham and Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (OUP 1973).
[70] Raz, *The Authority of Law* (n 65) 268.
[71] Raz, *The Authority of Law* (n 65) 275.

## 3.3 A Defence of Civil Disobedience

Even if we accept that there is no absolute right to civil disobedience, it remains a concept worthy of recognition. In *Taking Rights Seriously*, Dworkin emphasises the importance of distinguishing between civil disobedience and lawlessness.[72] He identifies the common argument in favour of treating the conscientious moral objector in the same way as the prima facie offender. This argument is based on the apparent truism that the law must be enforced because it is the law and so, even if disobedience to the law is morally justified, it cannot be legally justified.[73] He identifies Erwin Griswold's statement, during a speech given in his capacity as solicitor-general, that:

> 'It is the essence of law that it is equally applied to all, that it binds all alike, irrespective of personal motive. For this reason, one who contemplates civil disobedience should not be surprised if a criminal conviction ensues.'[74]

Griswold adds that 'organised society cannot endure on any other basis'.[75] Dworkin analyses the two main arguments raised by this position: first, that 'society cannot endure' if it tolerates all disobedience. He notes that, whilst this may be the case, this argument has little weight in opposition to civil disobedience in particular, because there is no evidence to suggest that society will collapse if it tolerates *some* disobedience. Dworkin states that there are many 'good reasons' that a prosecutor considers when deciding not to prosecute an individual for an offence. Such reasons suggest that society does, to an extent, tolerate some disobedience. There are prima facie good reasons for not prosecuting those who disobey laws based on questions of conscience. There is an argument that society would suffer if it prosecuted moral, loyal, and normally law-abiding citizens who

[72] Ronald Dworkin, *Taking Rights Seriously* (first published 1977, Duckworth 1978) 206.
[73] ibid.
[74] ibid.
[75] ibid.

conscientiously object, as this would alienate those individuals and reduce the collective belief in the justice of that state.[76]

Second, Dworkin addresses the equal treatment argument Griswold raises, that the law applies equally to all, meaning it is unfair to make exception for those who morally disagree. Dworkin identifies the critical flaw in this argument: it contains the hidden assumption that dissenters are knowingly breaking a valid law and that they assert an unfair privilege to do so. Dworkin convincingly argues that proponents of this view fail to see the complexity of the connection between legal and moral issues. This reasoning distorts the crucial fact that the substantive validity of the law may be doubtful or debated, even if it is enacted in a procedurally legitimate manner. Government officials may believe that the law is substantively valid, and dissenters may believe it is invalid, and both may have legitimate legal and philosophical justifications informing their positions.[77] It is reductionist to suggest that all legal issues have a singular valid moral standpoint. Since the question of the law's substantive validity in these circumstances is debatable, the fairness argument is irrelevant, given that it rests upon the certainty of valid law.

Dworkin illustrates the positive benefits that society gains from individuals following their own moral judgement. He proposes that an individual operating upon their own legitimate understanding of the law or morality provides a means of testing relevant hypotheses in uncertain areas of legal and moral discourse. He effectively argues that in some areas it is unreasonable to impose a burden of obedience on those who dissent. This includes cases where the law is uncertain, to the extent where lawyers reasonably disagree about what courts ought to decide, or where morality is uncertain, to the extent that citizens can reasonably disagree about what constitutes the moral course of action. Dworkin's article highlights the societal disadvantages of refusing to accept some forms of conscientious disobedience. It convincingly demonstrates that, if society were to force its citizens to accept the status quo when the

[76] ibid 207.
[77] ibid 207.

validity or morality of the law is in question, then society would lose its chief vehicle for social progress and 'over time the law we obeyed would become less fair and just, and the liberty of our citizens would be diminished'.[78] This highlights one of the critical arguments in favour of civil disobedience: that it is a necessary tool for social progress. This argument is exemplified through Katharine Gun's case in the following section.

Despite supporting a general obligation to obey the law of just and efficient systems, Rawls argues that such a duty does not prevent the individual from engaging in civil disobedience. This account is critical because it highlights that the belief in a general obligation to obey is not prima facie incompatible with theories of conscientious disobedience. Rawls argues that, '[i]f in the individual's judgment the actions of the law, state or majority exceed certain bounds of injustice, then the citizen may consider civil disobedience'.[79] Rawls convincingly dismantles the counterargument that civil disobedience is incompatible with respect for law, proposing that, when civil disobedience is a conscientious, public, and non-violent act based upon a sincere moral conviction, it in fact manifests a principled respect for legal procedures entirely compatible with the values of the liberal state.[80] Similarly, in his 'Letter from a Birmingham Jail', Martin Luther King Jr stated that 'an individual who breaks a law that conscience tells him is unjust […] in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law'.[81] These viewpoints diminish the argument that civil disobedience and respect for the establishment are *ipso facto* incompatible. These arguments persuasively demonstrate that insofar as it satisfies the condition of nonviolence, and where other options of legal obedience or political appeal have been exhausted or are unavailable, then civil disobedience could be justified, even in a relatively just state.

[78] ibid 212.
[79] ibid 247.
[80] ibid 248.
[81] Martin Luther King Jr, 'Letter from Birmingham Jail' (n 57) 258.

The above analysis has outlined the conditions under which legitimate and compelling moral objection to the law may arise. It demonstrates the circumstances in which civil disobedience is not only justified but of genuine and substantial benefit to civil society. It therefore concludes that to prosecute conscientious dissenters to the same extent as the prima facie offender would not be a true reflection of culpability.

# 4 Conscientious Objection in the Case of Katharine Gun

The final section of this article considers the extent to which the legal system of a liberal state should acknowledge the individual's right to break the law for moral reasons. First, it explores the case of Katharine Gun, the circumstances of her conscientious objection, and its contested legitimacy. Gun's case reopened the conversation regarding the citizen's ability to object to actions of the state, even in circumstances where the means of that objection are illegal. Within this, it examines the concept of a 'defence of necessity', which Gun's legal team intended to argue. Second, this section analyses the current legal position in the UK of those who break the law for moral reasons. Using Gun's case, it demonstrates that the law does not provide sufficient protection to individuals in these circumstances and argues in favour of acknowledging the defence of necessity.

## 4.1 The Case of Katharine Gun

The case of Katharine Gun represents an instance of conscientious disobedience at the interface of civil disobedience and conscientious moral objection. Gun did not disobey the Official Secrets Act because it was prima facie morally bad law, nor did she necessarily intend to make legal change. However, her decision to leak the memo to the public, on the grounds that she could not in good conscience remain silent, contravened the Official Secrets Act to which she was bound and

had the potential to derail the legitimacy of the Iraq invasion.[82] Simeck argues that, '[w]histle-blowers are neither "disloyal" nor "heroes" but rather individuals who find themselves at the crux of a moral impasse and are forced to make an ethical decision they can consciously stand by'.[83] Similarly, Delmas argues that, '[g]overnment whistleblowing should be viewed along the lines of civil disobedience as a collective cognition and legitimacy enhancing device'.[84] Gun's actions in these circumstances invoked the collective conscience to question, and by extension enhance, the accountability of government. Not only did Gun's actions give rise to questions regarding the validity of the law that prevented her from whistle-blowing; they also opened a public debate on the legality of the actions of government in the Iraq invasion. Her decision led to a crucial re-examination of the relationship between the citizen and the state and the potential for arbitrary misuse of government power.[85] A growing section of the public supported her decision. Indeed, the information released regarding the potential illegitimacy of the Iraq invasion caused international uproar.[86] The consequences of Gun's decision transcended the legal ramifications facing Gun herself and fuelled the social, political, and legal discourse surrounding the legality of the Iraq War.[87] The disclosure informed the public about an act of government that threatened principles of justice and democracy and led to a rise in public distrust of the government.[88]

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[82] Norman Solomon, 'To Stop War, Do What Katharine Gun Did' (*Consortium News*, 8 March 2018) <https://consortiumnews.com/2018/03/08/to-stop-war-do-what-katharine-gun-did/> accessed 8 May 2021.

[83] Gabrielle Simeck, 'Five Things Not to Do If You Want to Be a Successful National Security Whistle-Blower' (*Government Accountability Project*, 8 August 2019) <https://whistleblower.org/blog/five-things-not-to-do-if-you-want-to-be-a-successful-national-security-whistleblower/> accessed 8 May 2021.

[84] Candice Delmas, 'The Ethics of Government Whistleblowing' (2015) 41(1) Soc Theory & Prac 77.

[85] Marcia Mitchell and Thomas Mitchell, *The Spy Who Tried to Stop a War: Katharine Gun and the Secret Plot to Sanction the Iraq Invasion* (Polipoint Press 2008).

[86] Michael Segalov, 'This British Spy Exposed a Devious US Plot to Justify the Iraq War' (*Vice*, 15 October 2019) <https://www.vice.com/en_uk/article/ne8997/official-secrets-true-story-katharine-gun-iraq> accessed 8 May 2021.

[87] Solomon (n 82).

[88] Adams (n 4).

The social impact of Gun's act of civil disobedience cannot be dismissed as marginal, nor can the moral force that compelled her to act in contravention of the Official Secrets Act. Her case exemplifies Dworkin's theory that civil disobedience can engender social progress and highlights the role of the conscientious objector in enhancing justice within the liberal state. There is, therefore, justification for the proposition that her decision to leak the memo, detailing the decision to place illegal pressure on the UNSC to allow the invasion of Iraq, represented a legitimate, appropriate, and important example of civil disobedience.

The role of a 'political obligation' is defined by Simmons as a special kind of obligation that binds the citizen to the state with specific pressure to perform, distinguishing it in political philosophy from other forms of moral judgement.[89] The special role of such an obligation is most distinct in 'moral dilemmas'.[90] Gun's case is an example where such conflicting obligations arose. Gun had a legal obligation not to disclose the memo on the grounds that it was an official secret and a matter of national security, while disclosure also violated her responsibilities as a GCHQ translator. However, Gun's belief in the seriousness of the humanitarian issue of a potentially illegal war, coupled with the illegality of placing pressure on the UNSC, provided strong moral compulsion not to discharge the obligation to remain silent. Gun believed that the government was acting illegally and that this illegal act could lead to an illegal war, which in consequence could lead to the unjustified deaths of thousands. This was a belief based on legitimate grounds, and the moral weight of this consideration cannot be overlooked.[91] Leaving aside the question of whether she acted rightly or wrongly, there cannot be any doubt that Gun was faced with a moral dilemma. Raz's account of conscientious objection and the capacity to remove oneself from morally contentious dilemmas, discussed below at Section 4.3, therefore does not sufficiently account

[89] Simmons (n 10) 7; CH Whiteley, 'On Duties' (1952) 53 Proceedings of the Aristotelian Society 95.
[90] EJ Lemmon, 'Moral Dilemmas' (1962) 71(2) Phil Rev 139.
[91] Adams (n 4).

for the complexity of situations such as Gun's. Considering the nature of the moral dilemma, a conclusion that Gun should not have been morally bound to the Official Secrets Act is persuasive. Such a conclusion is justified by reference to theory regarding the legitimacy of civil disobedience and the lack of a compelling argument in favour of an absolute duty to obey in situations of profound moral conflict.

Had her case moved forward, Gun's legal team intended to argue a 'defence of necessity' justifying her decision to act in contravention of the Official Secrets Act. This defence is based on the argument that in situations of profound moral complexity where the agent is compelled to disobey for substantive moral reasons, it is unfair to hold them as culpable as the prima facie offender. The nature of this defence aligns with the above theory. Section 2 established that there is no binding moral duty that tied Gun to the Official Secrets Act and proposed that the agent should be able to assess the moral facets of their individual situation when deciding whether or not to obey. Section 3 clarified that there exists no guarantee that legal action is moral action purely on the basis of its legality. It is therefore submitted that the moral considerations outlined in the case of Katharine Gun represent sufficient moral justification as a defence for disobedience. Where moral dilemmas of similar complexity arise in future, such considerations should be acknowledged in a court's assessment of blameworthiness in the legal system of the liberal state. This is explored subsequently.

## 4.2 The Current Legal Status of Conscientious Objection

Having directly addressed the core questions as to the existence of a moral duty to obey the law and the philosophy of conscientious objection, the article now discusses the current legal status of conscientious objectors in the UK. The UK offers some legislative protection for a right to conscientiously object. This is primarily limited

to areas of moral complexity and discourse within medical law.[92] For example, Section 4(1) of the Abortion Act 1967 protects the right to refuse participation in terminations of pregnancy, other than where it is necessary to save the life of, or prevent grave injury to, the pregnant woman. Similarly, Section 38 of the Human Fertilisation and Embryology Act 1990 prevents any duty being placed on an individual to participate in activity governed by the Act. The basis for these exemptions is a legal acknowledgement that participation in such procedures may violate some individuals' moral beliefs. The law in these instances deems the moral objection to be sufficiently substantive and the area to be sufficiently divisive to refrain from imposing a positive obligation to participate on the medical practitioner. However, there exists no protected 'right to conscientious objection' in British or international law. Article 9(1) of the European Convention on Human Rights, which guarantees the right to freedom of thought, conscience, and religion, does not explicitly refer to a right to conscientious objection.[93] This has been clarified in a number of cases under the Convention, such as *Gandrath v Germany* and *G.Z v Austria*.[94] In both cases, the applicant appealed to a right to conscientiously object in order to be exempted from military service or substitute civilian service. However, the European Commission of Human Rights held that conscientious objectors did not have an absolute right to exemption from military service on the basis of Article 9 and that each contracting state could decide whether to grant such a right.[95] Article 9 is subject to 'the limitations prescribed necessary by law in a democratic society'.[96] This arrangement is brought into UK domestic law by Article 9 of the

[92] Editorial, 'Conscientious Objection' (*Medical Defence Union*, 7 February 2020) <https://www.themdu.com/guidance-and-advice/guides/conscientious-objection> accessed 10 May 2020.
[93] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 9.
[94] *Gandrath v Germany* App no 2299/64 (Commission Decision, 12 December 1966); *G.Z v Austria* App no 5591/72 (Commission Decision, 2 April 1973).
[95] ibid *Gandrath v Germany*.
[96] ECHR Art 9.

Human Rights Act 1998.[97] This jurisprudence clarifies that the prima facie right to freedom of conscience does not include the right to break the law on the grounds of conscience.

However, the court leaned in favour of the conscientious objector in the more recent European Court of Human Rights (ECtHR) judgment in the case of *Bayatyan v Armenia*.[98] It found that opposition to military service, where it is motivated by 'a serious and insurmountable conflict between the obligation to serve and a person's conscience or his deeply and genuinely held religious or other beliefs' constitutes a 'belief of sufficient cogency, seriousness, cohesion and importance' to attract the guarantees of Article 9.[99] The ECtHR concluded that the question of whether the conscientious objection falls within the ambit of the provision is a matter that requires assessment of the particular case.[100] Whilst the court maintains that no 'right to conscientious objection' is protected, it has leaned in favour of the conscientious objector in cases where the circumstances of the objection and the belief held are of 'sufficient cogency, seriousness, cohesion and importance'.[101]

The judgment in the *Bayatyan* case demonstrates a positive movement within the ECtHR jurisprudence towards ruling in favour of the conscientious objector under some circumstances. The court acknowledged the seriousness of the moral beliefs held by the conscientious objector and argued that they cannot be dismissed as marginal when obliging the individual to act.[102] The current law on conscientious objection remains uncertain. However, this judgment provides some scope to expand the legal protections afforded to the

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[97] Human Rights Act 1998, sch 1, art 9.
[98] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).
[99] Editorial, 'Factsheet — Conscientious Objection' (*European Court of Human Rights*, March 2020) <https://www.echr.coe.int/Documents/FS_Conscientious_objection_ENG.pdf> accessed 8 May 2021.
[100] ibid.
[101] ibid.
[102] *Bayatyan v Armenia* (n 98).

conscientious objector and consequently leaves the law at a crucial turning point for the future of conscientious objection.

This section has identified that there exists no nationally or internationally protected right to conscientiously object, and little defence of such an absolute right in either law or literature.[103] However, there remains considerable force to the argument that conscientious moral objection and civil disobedience is justified in certain circumstances. In the case of Katharine Gun, the particular moral characteristics of the situation, the complexity of her position, and the public outcry it sparked support the strong argument that her actions were justified. In situations of moral dilemma such as these, even if one does not believe that inaction is the morally wrong choice, one cannot morally condemn the choice to act; this is a characteristic of a moral dilemma.[104] Given that there is an argument in favour of the position that breaking some law is morally justifiable, then there remains an argument in favour of a legal defence of this nature.

## 4.3 Conscientious Objection and the Defence of Necessity

If it were to be implemented, the legal recognition of conscientious moral objection rests on acknowledgement of the gravity of the individual's moral considerations in situations of moral complexity. The practical purpose of such a recognition would be for the court to acknowledge the impact of these considerations on the culpability of the conscientious objector. Such a legal recognition would fall under the scope of a 'defence of necessity' and would remove the culpability of the conscientious objector against charges such as Gun's. Although the courts hold the general position that there is no criminal defence of necessity, as exemplified in *R v Dudley and Stephens*, necessity has been acknowledged in piecemeal ways, in judgments and sentences.[105] Whilst it is unclear what specifics Gun's legal team intended to argue, a

[103] Raz, *The Authority of Law* (n 65) 281.
[104] Lemmon (n 90).
[105] *R v Dudley and Stephens* [1884] EWHC 2 (QB), (1884) 14 QBD 273.

defence of moral necessity in cases of non-violent conscientious disobedience would draw upon the court's piecemeal acknowledgement of the way in which moral necessity alters the culpability of the offender. This would consequently demonstrate that it is unfair to treat the conscientious objector as equally culpable as the prima facie offender, given the substantive moral considerations present in their decision to act unlawfully.

Raz raises the following argument against the legal recognition of conscientious objection. He argues that the circumstances that lead to conflict between the law and an individual's moral duty are normally subject to that individual's control. Therefore, if that individual can prevent them, rather than disobey the law, then society is entitled to require the individual to shoulder the burden of their conviction, rather than require society itself to do so.[106] Yet this article proposes that this argument is oversimplistic and fails to acknowledge the nature of certain instances of conscientious objection, such as the complex moral dilemma in Katharine Gun's case. Conscientious moral objection, as Raz defines it, is not merely the case of the agent breaking the law for moral reasons but also extends to the proposition that the agent was morally compelled to disobey because the law itself was wrong.[107] If the law or the act of obeying the law in that context is wrong, and personal morality compels them to protest against such wrongness, it is not a logical moral solution for those individuals to remove themselves from the circumstances of their objection. Moreover, in many cases of conscientious objection, it may be the act of remaining silent or refusing to act in opposition in the face of wrongdoing that the individual finds morally impermissible. Therefore, whilst this article does not support the conclusion that conscientious objection is an absolute right, because such a conclusion is incompatible with the nature of rights, as outlined in Section 3.2, it disagrees with Raz that there are not significant and compelling grounds in favour of legal protection of conscientious objectors — in the form of a defence of necessity.

[106] Raz, *The Authority of Law* (n 65) 282.
[107] Raz, *The Authority of Law* (n 65) 282.

# 5 Conclusion

The principal aim of this article was to re-examine the question of the duty to obey the law in cases of moral conflict, through the contemporary lens of whistle-blowing. This article presents the view that, while there exists no absolute duty to obey the law, there is usually good reason to comply with the law. However, in the absence of good reason to comply and in the presence of a morally compelling reason for non-compliance, disobedience to law can be morally justified. This article proposes that the law should acknowledge that some moral considerations are sufficiently substantial to justify breaking the law. It does not defend the concept of a moral 'right to disobey', nor believe this to be philosophically justifiable or practically enforceable. It does, however, take the view that, in cases such as Gun's, a 'defence of necessity' should be considered a valid legal defence. Moral considerations should be taken into account by the courts when assessing the culpability of the defendant and the wrongness of their conduct. The evidence and philosophy examined demonstrate that a blanket refusal of the law to consider moral objection or the human conscience as reasons for acting in cases of conscientious disobedience would be an unfair assessment of the culpability of the conscientious objector. Such a refusal would grossly oversimplify and undermine the complex link between legal and moral obligations.

# Dworkin's Gift to Constitutional Jurisprudence: Justifying the Moral Reading of the US Constitution

Max Williams

**Abstract**

This article undertakes an analytical review of Ronald Dworkin's 'moral reading of the American Constitution', which conceptualises a form of judicial review that unconventionally champions the compatibility of strong judicial review with the democratic principles underpinning the American Constitution. Moral readings are commonly rejected by commentators for subverting these democratic principles, by enabling the judiciary to depart from the text of the Constitution. However, this article argues that Dworkin's moral reading is necessarily respectful of the fidelity that judges are expected to show towards the constitutional text. However, because the text is written in abstract terms, judges should actively embrace its ambiguity, as Dworkin suggested, rather than embrace the expectations of the Constitution's drafters for how the text would be applied. This is because the authors of the Constitution purposefully designed the text to be abstract in form. The article discusses three primary variables inherent to Dworkin's account of the moral reading, namely democracy, textual interpretation, and accounting for the moral issues arising from constitutional, legal questions. Though central to Dworkin's thesis, each of the three variables is also utilised as a challenge to the integrity and comprehensibility of the moral reading by, respectively, Jeremy Waldron, Antonin Scalia, and Michael McConnell. According to these scholars, the existence of the three variables within Dworkin's account are inherently contradictory to Dworkin's attempt to ensure judicial restraint and to respect the wide scope of interpretation provided by the Constitution. This article refutes the existence of such a contradiction.

# 1 Introduction

Ronald Dworkin championed the compatibility of strong judicial review with the democratic principles underpinning the American Constitution.[1] His jurisprudence is defined by his 'moral reading of the Constitution', where judges decide cases by interpreting the abstract moral principles found within vague constitutional clauses.[2] Importantly, Dworkin did not advocate for judges departing from the Constitution's text, because he agreed that judges should show textual fidelity to the intended instructions of the framers, that is, those who wrote the Constitution.[3]

However, Dworkin recognised how the Constitution often spoke abstractly of unenumerated rights, referring vaguely to 'liberty' or 'equal protection'.[4] Dworkin therefore claimed to provide a framework for judges to analyse the semantic intentions embedded within those abstract instructions — that is, for judges to infer the framers' intentions using the clearest connotative meaning of any ambiguous clauses. This would create a plethora of potential adjudicative outcomes, but without sacrificing textual fidelity, which is vital given the judiciary is an unelected and nonrepresentative body.[5] Hence, Dworkin saw this exercise as democratically legitimate because judges did not have the scope to determine the Constitution's semantic content based on their own convictions.[6]

[1] For example, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard UP 1996); Ronald Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1997) 65 Fordham L Rev 129; and Ronald Dworkin, *Justice in Robes* (Harvard UP 2006).
[2] See Dworkin, *Freedom's Law* (ibid) 3 for Dworkin's most detailed self-account of the moral reading.
[3] ibid.
[4] US Constitution Amend XIV.
[5] ibid.
[6] ibid.

There are three prominent criticisms of Dworkin's moral reading.[7] First, some argue that strong judicial review is incompatible with democracy, because it provides judges with the capacity to rule on legislatively enacted law when they lack the necessary democratic credentials to do so.[8] The second argument made against moral readings is that they contravene the common originalist theory that the Constitution's original meaning is only discernible with an historical account of how the framers interpreted it.[9] Since the Constitution is democratically adopted, the understanding of those who enacted it has supremacy over any other interpretation.[10] Treating the words used by the drafters of the Constitution as abstract rather than precise would encourage inferences that they might not have intended, inferences that would see judges abandon textual fidelity and exceed their democratically restrained role.[11] Third, some critics claim there is no scope for moral analyses in judicial review.[12] For example, a criticism of adjudication under the Fourteenth Amendment, which concerns equal protection under the law, is that judges are 'guided only by their personal views as to the fundamental rights' the Constitution protects.[13] Though moral readings could garner more favourable results for minorities, where judges extend the scope of rights protection, they encourage judges to subvert democratic processes and exalt themselves 'at the expense of the people from whom they derive their [constitutional] authority' by encroaching upon the legislative role.[14]

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[7] See, for example, Scott Hershovitz, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2008).
[8] For example, see James Madison, 'The Federalist' in John Shapiro (ed), *The Federalist Papers (Rethinking the Western Tradition)* (Yale UP 2009).
[9] J Harvie Wilkinson, 'Originalism' in J Harvie Wilkinson (ed), *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Rights to Self-Governance* (OUP 2012) 34.
[10] See Robert H Bork, *The Tempting of America* (Free Press 1990).
[11] ibid.
[12] Mitchell N Berman, 'Originalism Is Bunk' (2009) 84 NYU L Rev 1, 87.
[13] *Obergefell v Hodges* 576 US 644, 645–46 (2015) (Thomas J dissenting) (slip opinion).
[14] ibid.

Considering these propositions in turn, this article argues that Dworkin's moral reading is in fact an entirely appropriate approach to navigating concerns over the nature of democracy, the Constitution's text, and the inevitable role of moral judgments in contemporary appellate decision-making. The moral reading embraces the democratic principles necessary to properly protect the fundamental rights of minorities and the constitutional text's semantic properties, and to recognise that, when unenumerated rights are contested, the court faces an inevitable moral decision where the Bill of Rights does not address them. Accordingly, this article uses Fourteenth Amendment adjudication as an example that embodies these tensions, demonstrating how the moral reading is not only plausible but necessary.[15]

The article is structured as follows. Section 2 analyses the premise of the moral reading, its adherence to democratic principles, and Dworkin's claim that it respects American constitutionalism with regard to the judiciary's limited role in the law-making process. Section 3 assesses the moral reading's compatibility with democracy, by comparing the moral reading as it exists in Dworkin's 'partnership' democracy with Jeremy Waldron's account of 'majoritarian' democracy, which embraces weak judicial review.[16] Waldron's account is the theoretical opposite to that of Dworkin's moral reading. Hence, it is the best account to use for comparison and to support this article's argument that the moral reading not only justifies strong judicial review, but that it is necessary in democratically protecting unenumerated rights. This article argues not only that the moral reading justifies strong judicial review but that it is necessary in democratically protecting unenumerated rights. Section 4 considers the moral reading's democratic requirement of textual fidelity. Distinguishing 'semantic' from 'expectational' intentions, it argues that, when interpreting abstract written instructions, the semantic interpretation that Dworkin

[15] H Jefferson Powell, 'The Original Understanding of Original Intent' (1985) 98 Harv L Rev 885, 948.
[16] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346.

favoured is in fact a more democratically legitimate exercise than determining how the framers would have interpreted the rules according to their archaic views. Section 5 analyses Michael McConnell's critique of the moral reading, which challenges its supposed normative inconsistency and theoretical incomprehensibility.[17] It argues that McConnell perpetuated some fundamental misconceptions about the moral reading, unfairly characterising it as democratically illegitimate and therefore offensive to principles of judicial review.

## 2 The Moral Reading

Representative democracy has underpinned American law and politics since its founding.[18] Paine described the Constitution as 'populist-legal' — popular through the people's self-governance, and legal in binding the federal government.[19] Hence, the Constitution has democratic character because it was enacted by elected statesmen for the purpose of holding the federal government accountable to the people.[20] Accordingly, the judiciary, whose role it is to determine whether laws are made in accordance with the Constitution, is traditionally conceptualised as the 'least dangerous' branch of government.[21] It lacks the democratic credentials to legitimise any changes they make to the law because judges are unelected and have no representative mandate to do so (beyond judges being appointed by other officials who *are*

[17] Michael W McConnell, 'The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution' (1996) 65 Fordham L Rev 1269.
[18] For example, see Thomas Paine, *Rights of Man* (originally published 1791, Virginia Tech 2001).
[19] Robin West, 'Tom Paine's Constitution' (2003) 89 Va L Rev 1413, 1433.
[20] See Charles Warren, *Congress, the Constitution and the Supreme Court* (Johnson Reprint Corp 1968).
[21] See Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale UP 1986).

elected).[22] Rather, as Alexander Hamilton suggested, the judiciary should be an 'intermediate body between the people and the legislature … to keep the latter within the limits assigned to their authority'.[23] Hence, there would be no scope for morality in constitutional adjudication because that would encourage judicial activism.[24]

However, contemporary constitutional judgments demonstrate that the judiciary is not this 'least dangerous' institution. The judiciary has practised various forms of activism within the last century and demonstrated law-making power not envisioned by the framers.[25] For example, judicial adjudication has extended contemporary civil rights for women, African Americans, and parts of the LGBTQ community, pre-empting national legislative action on the policies at issue[26] — although adjudication may also serve to restrict the scope of rights. Furthermore, the much earlier *Lochner*[27] era of constitutional jurisprudence from 1897 to 1937 has been maligned because it is said to represent a period of judicial activism in opposition to regulations on labour conditions, consolidating its policy preference for economic freedoms. The judiciary developed a doctrine of substantive due process that routinely squashed popular mandates via an unconstitutionally self-exalted discretion to overrule majority determinations.[28]

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[22] See Jamin B Raskin, *Overruling Democracy: The Supreme Court versus the American People* (Routledge 2004).
[23] Madison (n 8) 513.
[24] McConnell (n 17) 1273.
[25] See Bruce E Cain and Nada Sabbah-Mourtada, *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books 2007).
[26] See *Brown v Board of Education of Topeka* 347 US 483 (1954); *Loving v Virginia* 388 US 1 (1967); *Obergefell v Hodges* (n 13) and *Lawrence et al v Texas*, 539 US 558 (2003); *Roe v Wade* 410 US 113 (1973).
[27] *Lochner v New York* 198 US 45 (1905).
[28] See, for example, Natalie Banta, 'Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment' (2013) 13 Wy L Rev 151.

As a result, it is often argued that the judiciary has issued a challenge to democracy in its contemporary jurisprudence by diverging from the Constitution's text, resulting in what Bernard Schwartz has called a usurpation of power where judges are 'determining upon [their] own judgment whether particular legislation [is] desirable', and not the judgement of the people.[29] Whether these claims are accurate is not the subject of this article, but the debate continues due to concerns that the judiciary's willingness to utilise strong judicial review forecasts a likely trend towards extreme judicial minority rule.

## 2.1 Establishing the Moral Reading

Dworkin posited a theory that accounts for the notions of judicial restraint *and* the inevitability that decisions will take a moral character. Dworkin never properly defined this moral reading but explained it by use of analogies. Regarding the Bill of Rights' ambiguity, he recognised how the Fourteenth Amendment refers to an 'equal' protection of all citizens.[30] This provides a significant right but one which remains abstractly defined, and 'must be understood in the way [its] language most naturally suggests'.[31] Because the language is purposefully abstract, it 'most naturally suggests' that judges should account for the Fourteenth Amendment's scope being undefined, so that its possible meaning is not limited to one narrow answer. The moral reading posits that ambiguous clauses 'refer to abstract moral principles' and judges should 'incorporate these by reference, as limits on [their] power'.[32]

[29] See, for example, Branson D Dunlop, 'Fundamental or Fundamentally Flawed? A Critique of the Supreme Court's Approach to the Substantive Due Process Doctrine under the Fourteenth Amendment' (2014) 39 U Dayton L Rev 261; Jonathan F Mitchell, 'Textualism and the Fourteenth Amendment' (2017) 69 Stan L Rev 1237; Bernard Schwartz, *The Supreme Court: Constitutional Revolution in Retrospect* (Ronald Press 1957) 13–14; Richard G Stevens, 'Due Process of Law and Due Regard for the Constitution' (1985) Teaching Political Science 25.
[30] Dworkin, *Freedom's Law* (n 1) 7; see also US Constitution Amend XIV.
[31] ibid.
[32] ibid.

These abstract moral principles provide the limits on judicial interpretation, but, because the text does not disclose those limits, they are as wide in scope as the connotations of the clauses' objects.
Approaching constitutional interpretation as a search for abstract moral principles is therefore a result of the text's linguistic nature. Take the Fourteenth Amendment's Due Process Clause. It precludes the deprivation of 'any person of liberty … without due process of the law'.[33] But what does 'liberty' truly mean? What does 'due process' mean? The rule, its qualifications, and a complete understanding of the clause are seemingly left to judicial discretion *within the confines of the text's language*. As such, a higher level of abstraction is required in accordance with the abstract instructions available to judges for determining the constitutional validity of legislation.

Hence, principles like 'liberty' have been subject to expansive judicial review. The aforementioned Fourteenth Amendment rights derive from abstract clauses — for Dworkin, this is no less legitimate than a ruling against a presidential candidate assuming office before the age of 35, which is explicitly required by Article II of the Constitution.[34] There is, of course, an inherent contrast between the two propositions as the democratic validity of the latter decision is difficult to question on textual grounds.[35] Nevertheless, Dworkin's view is sustainable because, just as the framers' explicit language in Article II demands narrow application, their ambiguous language in the Fourteenth Amendment inherently invites an abstract interpretation that, unlike Article II, is not restricted by explicitly narrow intentions. Therefore, this is not an example of judicial activism but applied constitutional adjudication of particular language.

[33] US Constitution Amend XIV.
[34] Dworkin, *Freedom's Law* (n 1) 8.
[35] US Constitution Art II.

## 2.2 Limits on the Moral Reading

Importantly, Dworkin had regard for democracy because he recognised two inherent restraints on the moral reading's application. First, 'constitutional interpretation must begin in what the framers said', with reference to specific information about the context in which they gave their instructions.[36] Second, '[j]udges may not read their own convictions into the Constitution', particularly any moral judgement that does not accord with identifiable abstract moral principles.[37] Hence, Dworkin insisted history is relevant 'in a particular way' because it helps explain what the framers intended to say with the abstract instructions they provided, but it also ensures judges are restrained by history, precedent, and the text, and are not misguided by their own convictions.[38]

Accordingly, Dworkin recognised that 'the moral reading is not appropriate for everything the Constitution contains'; it is derivative of how constitutional clauses were written and cannot be justified in all cases.[39] For instance, Article II would not require the moral reading because there is nothing textually contestable about the requirement that the president must be aged 35 or older when assuming office.[40] The same cannot be said about the Fourteenth Amendment. This vital distinction, between clauses which are abstract and those which are clear and uncontested, usefully denotes where the moral reading is democratically legitimate – in addressing those clauses which were written purposefully abstractly. Hence, Dworkin provided a method of interpretation that respects and utilises the text's abstract linguistic qualities.

[36] Dworkin, *Freedom's Law* (n 1) 7.
[37] ibid.
[38] ibid.
[39] Dworkin, *Freedom's Law* (n 1) 8.
[40] ibid.

# 3 Democratic Legitimacy

This section distinguishes two different conceptions of democracy that influence views on the moral reading's legitimacy as an example of strong judicial review. Jeremy Waldron subscribes to 'majoritarian' democracy and favours only weak judicial review, whereas Dworkin subscribed to 'partnership' democracy and favoured strong judicial review. This section argues that the moral reading justifies strong judicial review that protects unenumerated rights in a majoritarian democracy.

To understand the basis of Dworkin and Waldron's divergence, strong and weak judicial review must first be distinguished. The relative strength or weakness of a nation's approach to judicial review relates to the authority of a court's ruling on legislatively enacted law – that is, whether the court has authority to overrule legislation.[41] In systems with strong judicial review, like America, a court's interpretation of the Constitution always stands except when reversing its own judgment, when changing its previous interpretations, or when the legislature amends the Constitution.[42] Comparatively, in systems with weak judicial review, the legislature can simply pass the law again irrespective of the court's interpretation of the Constitution directing otherwise.[43] Thus, the distinction is that strong judicial review limits the legislature to amending the Constitution *in line with the court's ruling*.[44] There is nothing outside the scope of the court's ruling with greater authority over the validity of law. The legislature's only recourse is amending the court's source of contention. Only with weak judicial

[41] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton UP 1999) 5.
[42] Walter Sinnott-Armstrong, 'Weak and Strong Judicial Review' (2003) 22 L & Phil 381, 381–82.
[43] ibid 382.
[44] ibid.

review do legislatures have the power to retain their enacted laws irrespective of the outcome of adjudication.[45]

## 3.1 Waldron's Democracy

Waldron pragmatically justifies his majoritarian proposition, defined above, arguing that, if democratic processes are legitimately facilitated, the outcomes of those processes are irrelevant.[46] First, he argues that collective action is democratic where a decision is made by counting the votes of elected representatives.[47] This is the culmination of a proper deliberative process among representatives voicing the opinions of those they represent, thereby respecting the political equality of every person entitled to engage in the process.[48] This is representative democracy. Second, rather than assessing the propriety of the outcomes produced by democratic processes, Waldron prefers to assess the propriety of those processes.[49] Hence, if the process is improper, the outcome cannot be legitimate because whatever collective action follows cannot be authoritatively valid regardless of its content or effects. Importantly, Waldron is not wholly unconcerned with morality. He argues that there should be a 'strong commitment [to] minority rights': an equality in democratic processes where minority views are expressed in democratic fora alongside the majority view, though he does not demand equality in how rights are ultimately decided.[50] Therefore, Waldron's limited vision of judicial power accords with weak judicial review.[51]

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[45] See Stephen L Newman, *Constitutional Politics in Canada and the United States* (University of New York Press 2004).
[46] Waldron (n 16) 1371.
[47] Waldron (n 16) 1391–93.
[48] Waldron (n 16).
[49] Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 Perspectives on Politics 805, 812–13.
[50] Waldron (n 16) 1364.
[51] See Robin West, 'Tom Paine's Constitution' (2003) 89 Virginia Law Review 1413.

## 3.2 Dworkin's Democracy

Dworkin agreed that the political equality of every person is necessary to legitimise collective action.[52] However, he distinguished himself from Waldron by characterising this process as 'the people acting together as members of a cooperative joint venture with *equal standing*'.[53] This was defined not only procedurally but substantively, with respect to how beneficial the outcome of the process proves to the whole community, not just the majority.[54] Dworkin therefore presupposed that democracy requires three conditions relating to political participation.

First, 'all citizens must be given an opportunity to play an equal part in political life'.[55] This encompasses 'not only an equal franchise but an equal voice both in formal public deliberations and informal moral exchanges'.[56] Waldron agrees with this. Second, citizens must have 'an equal stake in the government. It must be understood that everyone's interests are to be taken into account, in the same way, in determining where the collective action lies'.[57] This does not, by his own account, seem to contravene Waldron's premise because his 'majoritarian' democracy does account for equality in the democratic processes. He argues for a political commitment to minority rights.[58] The problem is that, given his majoritarian position, Waldron's commitment to minority rights cannot sufficiently arise if we accept Dworkin's third condition. That is, citizens must be provided with a 'private sphere' where they can make decisions on religion and ethics, answerable only

[52] Dworkin, *Freedom's Law* (n 1) 17.
[53] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 Alta L Rev 324, 327 (emphasis added).
[54] ibid.
[55] Dworkin, *Freedom's Law* (n 1) 133.
[56] Dworkin, *Freedom's Law* (n 1).
[57] Dworkin, *Freedom's Law* (n 1) 134.
[58] Waldron (n 16) 1364.

to themselves and not the conscience or judgement of a majority.[59] Dworkin argued that '[n]o one can regard [themselves] as a full and equal member of an organised venture that claims authority to decide for [them] what [they] think self-respect requires [them] to decide for [themselves]'.[60]

This is a bold condition that departed from the status quo at the time of Dworkin's writing, and still does today. The First Amendment may guarantee religious freedom, and the Fifth and Fourteenth Amendments' due process clauses guarantee similarly ethical decisions of conscience and self-respect, but only the former can truly be said to have enjoyed unyielding constitutional security within the majoritarian arrangement.[61] That there is a large volume of Fourteenth Amendment adjudication is itself evidence that the majoritarian conception of democracy has provided insufficient protection to the unenumerated rights that would exist within the private spheres that Dworkin described. Disagreement about the existence or nature of certain rights in the legislature has prevented the proper equal standing of minorities. This is because the decision on what self-respect entails relies on the result of constitutional procedure, not a specified mandate amongst those affected parties designed to action their proclaimed constitutional rights. In other words, minorities have not been given the opportunity to rely on their constitutional rights by legal virtue, because the majoritarian nature of the legislature precludes this.

That said, the 'private spheres' condition is sensible. Loper, for example, recognises that the Due Process Clause in the Fourteenth Amendment requires the government to protect equality even though

[59] Dworkin, *Justice in Robes* (n 1) 133.
[60] Dworkin, *Justice in Robes* (n 1).
[61] US Constitution Amend I, V and XIV; Sarah E Agudo and Steven G Calabresi, 'Individual Rights under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?' (2008) 87 Tx L Rev 7.

the text mentions only liberty.[62] This is because applying laws 'equally serve[s] to cabin [the] infringement on liberty'. [63] Hence, the constitutional values of liberty and equality are inherently linked by the dominant notion that, in part, meaningful liberty requires an equal access to particular institutions or services. [64] Moreover, to attain 'meaningful liberty' is to attain Dworkin's 'private spheres'. That 'private sphere' ensures equality in democracy and, therefore, law. There is an interdependence between liberty and equality because it is the latter which 'prevents the law from making an improper or arbitrary distinction' between citizens on matters of unenumerated rights.[65] In other words, equality guarantees the liberty rights of all citizens because it ensures the law cannot discriminate without due process, and if that is so, it gives liberty its true meaning of living without oppression. This interdependence thus indicates that, where minority rights are subjected to democratic discussion, the claim that equal standing can exist in a representative democracy is fallacious.

Hence, Dworkin's 'partnership' democracy demands strong judicial review to ensure the equal standing of minorities in the democratic process. He qualified the legitimacy of democratic processes further by protecting proper equality as defined by the 'private spheres' guaranteed to all citizens.

## 3.3 Waldron's Criticisms

Though 'partnership' democracy might be appealing because of the equality it guarantees for minorities, Waldron remains steadfast as to

[62] Timothy P Loper, 'Substantive Due Process and Discourse Ethics: Rethinking Fundamental Rights Analysis' (2006) 13 Wash & Lee J Civil Rights and Social Justice 41, 44.
[63] Pamela S Karlan, 'Some Thoughts on Autonomy and Equality in Relation to Justice Blackman' (1998) 26 Hastings Const LQ 59, 62.
[64] ibid.
[65] Kenneth Karst, 'Equality as a Central Principle in the First Amendment' (1975) 43 University of Chicago Law Review 20, 43-44.

the democratic illegitimacy of strong judicial review. Waldron's core criticisms are addressed subsequently, namely, that the moral reading is democratically illegitimate, and that legislatures protect rights better than courts do.

### 3.3.1 Democratic Legitimacy

Waldron argues that strong judicial review is democratically illegitimate because there is no principled reason why judicial decision-making is better than that of legislators.[66] Thinking pragmatically, he argues that appellate courts use the same majoritarian premise in reaching verdicts as legislators do — by counting heads in a popular vote.[67] The decision still relies on the same majoritarian arrangement that Dworkin rejects as being incapable of ensuring minority equality.

Waldron uses the United Kingdom as an affirmative example that legislative action is more appropriate for securing equality. He carefully selects examples including the legalisation of abortion and sexual relations between men —[68] issues that have been resolved in America by the Supreme Court and *not* Congress —[69] and argues that 'wide-ranging public deliberation was mirrored in serious debate in the House of Commons'.[70] As such, the people could 'decide among themselves' the lawfulness of these matters through their representatives. While it is possible that Waldron's account of the UK experience might be accurate, the comparison with the US does not strengthen his argument, for two reasons.

First, Dworkin's 'partnership' democracy, and the moral reading, is a reflection of the abstract language of the US Constitution in particular. The moral reading is not a form of strong judicial review applicable to

[66] Waldron (n 16) 1390–91.
[67] Waldron (n 16) 1390–99.
[68] See, respectively, Abortion Act 1967; Sexual Offences Act 1967 (inter alia).
[69] See, respectively, *Roe v Wade* (n 26); *Lawrence v Texas* 539 US 558 (2003).
[70] Waldron (n 16) 1349.

any system of law. The constitutional arrangement of the UK at the time of Waldron's examples was very different to the US — the UK does not have a codified constitutional text akin to the US Constitution. As such, this comparison cannot substantiate Waldron's claims, because UK courts were not bound by a text enshrining citizens' rights. As such, their scope for judicial review was incomparable to that of courts in the US, where the Constitution binds action and provides unique grounds for adjudication not mirrored in the UK.

Second, Waldron misunderstands Dworkin's proposition that representative democracy does not account for minority rights in its outcomes. [71] Waldron can easily champion the UK's legislative responses to the issues of abortion and sexual relations between men because they achieved results which might be regarded as 'desirable', in extending the protection afforded to those rights at the time, without judicial interference. Yet he fails to recognise that these UK decisions took place several years or decades before their US counterparts, suggesting that, had it not been for judicial review, those rights might have continued to go unaddressed in legislative fora. Representative democracy might have continued to deprive minorities of proper equal standing in the democratic process, much less 'a private sphere within which they are free to make the most religious and ethical decisions for themselves'. Waldron's comparison does not support his claim regarding the legitimacy of legislative supremacy, because it demonstrates that the US has needed judicial review to resolve similar issues in the absence of legislative treatment. This supports Dworkin's argument for strong judicial review within the framework of 'partnership' democracy. Waldron would need to retreat from his positive appraisal of the UK to justify the lack of federal abortion laws or the permissibility of sexual relations between men without judicial review in the US. However, this would require him to admit that his pragmatism fails to account for a potential lack of practical change in rights protection as a consequence.

[71] Dworkin, *Freedom's Law* (n 1) 17.

### 3.3.2 Legislative Protection

Waldron's second criticism is that rights are better protected by legislatures than by courts because courts are comparatively unconcerned with precise moral issues. Rather, 'judicial reasoning is dictated by arcane legal issues which are secondary to the moral issues at hand'. [72] In practice, though, there is little to vindicate this majoritarian claim upon an examination of constitutional history.

First, Waldron's claim is ignorant of the reality that some civil rights movements in the US have traditionally sought to make progress via legislative governmental branches, that is, democratic fora, but the lack of progress has encouraged a turn to the courts.[73] Hence, because the democratic process has proven ineffective in expanding rights protection in certain areas, some civil rights movements have required use of the courts to make progress in rights protection. Waldron's aforementioned criticism of the US courts' constitutional review of abortion and sex between men therefore mischaracterises that process of review as an unconstitutional act of an unelected body. He fails to acknowledge that without those decisions, the equal rights' doctrines which have since been developed may not have been realised, revealing an irony in his position as a result.[74]

Waldron claims there is a commitment to rights on the basis of 'majoritarian' democracy, but that commitment is only a procedural one. It might be that by some objective measure the proponents of unenumerated rights were given equal platforms to express their views during these democratic processes. However, committing to hearing minority views is not equivalent to committing to protecting those rights. The former is effectively futile if the latter cannot be guaranteed

[72] Waldron (n 16) 1379–80.
[73] See Emily Zackin, 'Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts' (2008) 42 Law & Society Review 367.
[74] See, for example, Civil Rights Act 1964; *Lawrence v Texas* (n 69); *United States v Windsor* 570 US 744 (2013); *Obergefell v Hodges* (n 13).

because the very purpose of ensuring a procedurally equal platform for minority views is to ensure their rights are adequately protected.

This tension highlights that, where Waldron claims that the majoritarian position protects unenumerated rights for minorities, this creates a constitutional imbalance in his account. This is because, in practice, representative democracy does not promise to protect rights. It merely promises to listen to why they should be protected, but it may reject them nevertheless. Though Waldron could argue that characterising his position in this way unduly imparts morals into an otherwise pragmatic arrangement, rights are inherently of moral concern. In that respect, the scope that 'partnership' democracy provides judges to engage in the moral reading ensures the democratic process is not used to subjugate the rights of those minorities to a mere headcount. It avoids the empty promise of representational deliberation, because the equal standing which minorities are guaranteed already encompasses the matters of conscience and self-respect that they desire within their 'private sphere'.[75]

Second, it is an unfair claim that courts unduly adjudicate disagreements about rights without regard to the precise moral issue. Comparatively speaking, legislative deliberation should have as much regard for the lawful parameters of the Constitution as is claimed of adjudication, because failure to do so triggers the very constitutional adjudication which addresses whether a law is unconstitutional. Thus, judicial review is a safeguarding by-product of the system's recognition that failure to comply with the Constitution requires a determination of a law's constitutional character and authority. Moreover, many argue that constitutional adjudication is abundant with morally self-characterised judgments – indeed, a common criticism of judicial review is that judges are too often swayed by their own moral convictions and not enough by the Constitution's text.[76] Waldron

[75] Dworkin, *Justice in Robes* (n 1) 133.
[76] See, for example, Michael J Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (OUP 1999).

himself says as much when criticising strong judicial review on the basis that judges should not have the power to change or create law, a power that, if used, is influenced by whatever convictions they have regarding the existing state of the law as it applies to an instant case.[77] So, while Waldron argues that courts are not sufficiently concerned with the moral issues at stake, when judges do show concern for morals, this is used as justification to reject the strong judicial review that they must undertake to properly commit to protecting those morals. These two propositions are inherently contradictory, and so cannot coexist. This emphasises further the neglect that Waldron's account of democracy pays towards the protection of minorities.

Nevertheless, the moral reading offers what is needed to strike the balance required by Waldron's contradictory concerns. It allows judges the scope to properly consider the constitutional protection afforded to unenumerated rights, but with an expectation that judges demonstrate textual fidelity. So, under Dworkin's moral reading, courts have the authoritative power to announce rights not explicitly referred to by the text, but not to the extent that judges are left to their own moral convictions.

In summary, the dominant notion that mere head-counting suffices to determine the validity of minority rights endangers the protection of those rights. By conceiving democracy as an equal joint venture, the moral reading ensures minorities do not become subject to a majority's rule on the matters of conscience and self-respect that the Fourteenth Amendment already prescribes, justifying strong judicial review within the US context.

## 4 Textual Fidelity

Whether the Fourteenth Amendment can truly be conceived as prescribing the equal protection of rights in practice is essential to

[77] Waldron (n 16).

justifying Dworkin's theoretical proposition. Hence, this section elaborates on the judicial interpretation that Dworkin envisioned for the moral reading, namely that judges can demonstrate textual fidelity by performing an analysis of the text's semantic meaning, rather than identifying the framers' specific expectations.

## 4.1 Originalism

Broadly, originalism is a form of constitutional interpretation reliant upon the framers' original intentions, prioritising the people's mandate that the framers relied upon during the drafting.[78] As such, originalism adheres to the Constitution's democratic character.[79] According to originalist doctrine, since moral interpretations may elicit a wide scope of possible outcomes not envisioned by the framers, moral readings subvert the democratic legitimacy of whatever decision the court reaches. Indeed, while broadly opposed to originalism, Justice Reinhardt recognised that grounding constitutional interpretation in the framers' original intentions provides 'a concrete foundation for analysis'.[80] Scalia J concurred, arguing that without this principled reasoning, 'the answers to many constitutional questions would be open to debate'.[81] Hence, because judicial discretion would subvert the fidelity which judges should show to the framers, discretion is illegitimate.[82]

[78] Wilkinson (n 9); see also Cass R Sunstein, 'Black on "Brown"' (2004) 90 Va L Rev 1649.
[79] See, for example, Lawrence B Solum, 'Originalism and Constitutional Construction' (2013) 82 Fordham L Rev 453.
[80] See *Compassion in Dying v Washington* 79 F 3d 70 (9th Cir 1996) (en banc).
[81] Antonin Scalia, 'Originalism: the Lesser Evil' (1989) 57 U Cin L Rev 849, 854.
[82] ibid 863.

## 4.2 Distinguishing Semantics from Expectations

Dworkin distinguished 'semantic' from 'expectation' originalism.[83] The former 'takes what the legislators collectively meant to say as decisive of constitutional meaning'; the latter 'makes decisive what [the legislators] expected to accomplish in saying what they did'.[84] The distinction is thus one of interpretive process. Semantic originalism considers the text's linguistic construction as a manifestation of how specific the framers intended to be with their instructions. Expectational originalism considers how the framers themselves would have applied the text with respect to their own society's attitudes.[85]

Perry's analogy highlights this distinction.[86] He gives the example of a US university's decision to make 'philosophical talent' the primary consideration in the department's hiring policy, presupposing that a majority of those who voted for this resolution assumed that 'philosophical talent' consisted of skilfulness and sophistication.[87] According to semantic originalism, future members who 'become more skeptical' of skilfulness and sophistication are justified in implementing their own views about 'philosophical talent' because they are showing fidelity to that phrase as it is, undefined.[88] By contrast, expectation originalism presupposes that the resolution is defined only by the enactors' particular conception of 'philosophical talent'.[89] For future members to apply their own views on 'philosophical talent' would thus be considered illegitimate. Arguably, this latter interpretation contradicts the hiring policy. Dworkin recognised that, where the

[83] Dworkin, *Justice in Robes* (n 1) 120.
[84] Dworkin, *Justice in Robes* (n 1).
[85] Andrei Marmor, 'Meaning and Belief in Constitutional Interpretation' (2013) 82 Fordham L Rev 577, 578.
[86] John Perry, 'Textualism and the Discovery of Rights' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 105–06.
[87] ibid.
[88] ibid.
[89] ibid.

instruction prescribes an abstract standard, readers must decide what that standard means, which, as Dworkin caveated, is 'a different question to what some person … thinks meets that standard'. [90] Accordingly, the hiring policy's framers did not clarify the meaning of 'philosophical talent', providing the scope for future members to decide for themselves. The original members cannot question the fidelity of those future members to this policy given they failed to explicate how they themselves would have interpreted the policy.

Likewise, the Fourteenth Amendment's abstract instructions semantically provide scope for judges to determine what 'liberty' encompasses, since the framers failed to explicate their own interpretation. Therefore, the text does not restrain judges from finding that, for example, the right to marry extends to same-sex couples, despite the likelihood that the framers would have disapproved of this in 1868.[91] Therefore, semantic originalism accords with the abstract nature of the instructions provided, given the framers' expectations are irrelevant to the Constitution's text. As Dworkin said, they were 'careful states[people] who knew how to use the language they spoke'; 'they used abstract language because they intended to state abstract principles'. [92] Thus, if judges are expected to demonstrate textual fidelity, they should not be 'confined to a process of discovering' the framers' specific intentions, because that process would go beyond the text.[93]

Yet, the dissenting justices in *Obergefell v Hodges*, a landmark US Supreme Court case which held that the fundamental right to marry is guaranteed to same-sex couples by the Fourteenth Amendment, did just that.[94] They concluded the right to marry does not extend to same-sex

[90] Dworkin, *Justice in Robes* (n 1) 125.
[91] Robert A Destro, '"You Have the Right to Remain Silent:" Does the US Constitution Require Public Affirmation of Same-Sex Marriage?' (2013) 27 BUJPL 397.
[92] Dworkin, *Justice in Robes* (n 1) 122.
[93] Terrance Sandalow, 'Constitutional Interpretation' (1981) 79 Mich L Rev 1033, 1035.
[94] *Obergefell v Hodges* (n 13).

couples because the framers would not have accepted such a definition of marriage. Such expectational originalism denies the logistical and democratic plausibility of any moral reading. Yet, semantic originalism, a core feature of the moral reading, seemingly accords with the Constitution's abstract instructions better than making inferences based on knowledge of unwritten, and therefore non-binding, expectations. The forthcoming discussion assesses why the moral reading accords with democracy and textual fidelity, highlighting the hypocrisy embedded within the expectational originalist position in the process.

## 4.3 Dworkin's Fidelity

Scalia's own account enables us to easily identify that Dworkin's moral reading *does* in fact demonstrate textual fidelity. Scalia rejected Dworkin's moral reading and presented his argument by considering two other commentators — Laurence Tribe and Paul Brest — who he claimed likewise reject the Constitution's original meaning.[95] However, Dworkin was both theoretically and pragmatically distinguishable from these commentators.

First, Scalia claimed that Tribe 'does not believe that the originally understood content of [constitutional] provisions has much to do with how they are to be applied today'.[96] Rather, the Constitution 'invites us … to expand on the … freedoms that are uniquely our heritage' and 'invites a collaborative inquiry, involving both the Court and the country, into the contemporary content of freedom, fairness, and fraternity'. [97] Dworkin himself mentioned that Tribe seemingly disregards textual fidelity, particularly since Tribe scolds Dworkin's moral reading for retrieving 'empirical facts about what a finite set of

[95] Scalia (n 81) 853.
[96] Laurence H Tribe, *God Save This Honorable Court: How the Choice of Justices Shape Our History* (Random House 1985) 45.
[97] Laurence H Tribe, *American Constitutional Law* (2nd edn, Foundations 1988) 771.

actors at particular moments in our past meant to be saying'.[98] Dworkin, though, contended he had never held such a strict view on the framers' specific intentions.[99]

Though Tribe encourages a cooperative venture between the courts and the people to develop the text's meaning in accordance with changing social attitudes, this process is democratically improper. The court is not conceived as a law-making body. It lacks the legislature's representational structure to properly determine a popular mandate, a structure that can be used to justify any developments made in the name of social attitudes. Moreover, this was not Dworkin's position. Their arguments diverge on the reliance on the framers' intentions, but Tribe fails to understand that Dworkin's textual fidelity relies on seeking semantic intentions. Tribe is not necessarily wrong to criticise expectational originalism for the above reasons. But he wrongly characterises Dworkin as subscribing to the same notions, while at the same time purporting an alternative theory of adjudication that subverts the proper democratic process. Dworkin's moral reading demonstrates textual fidelity to abstract instructions, but Tribe intends to ignore those instructions altogether.

Second, Scalia mentioned how Brest openly 'abandoned consent and fidelity to the text and original understanding' because, Brest says, 'the practice of constitutional decision-making should enforce [only those] values that are fundamental to our society'.[100] Moreover, any notions that the text and original understanding inform the determination of those values ignores that the subsequent conclusions are 'defeasible at best in the light of changing values'.[101] Hence, not only is morality the touchstone of Brest's account of judicial review, but he contends that

[98] Dworkin, *Justice in Robes* (n 1) 127; Laurence H Tribe, 'Comment' in Amy Gutmann and Antonin Scalia (eds), *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP 2018) 75.
[99] Dworkin, *Justice in Robes* (n 1) 127.
[100] Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 BUL Rev 204, 226.
[101] ibid.

judicial review should recognise these contemporary changes in morality when interpreting the text.

Dworkin did embrace Brest's moral endeavours. Being concerned with abstract moral principles, the scope of Dworkin's approach is sufficiently wide to account for society's changing morality, since the Fourteenth Amendment lacks textual qualifications to the rights it contains. However, they diverge pragmatically because Dworkin not only expected textual fidelity but predicted that the kinds of results Brest desires are capable of being found in the text if we employ semantic originalism. [102] Because the Fourteenth Amendment's instructions are abstract, 'liberty' can be interpreted widely to include the many things 'liberty' typically connotes, including an array of equal and civil rights reflecting the freedom of choice. Hence, there are no textual qualifications preventing the courts from considering society's changing morality. This is particularly apparent if judicial review is also characterised as fulfilling the requirements of a 'partnership' democracy — however fundamental rights arise over time to reflect changing social attitudes, it would be within the judiciary's capacity to facilitate those rights' protections.

It might not be enough for expectational originalists to show Dworkin's moral reading can be distinguished from other claims regarding textual fidelity, since Dworkin still relied on morality. No matter the semantic evidence of abstract moral principles within the Constitution, the text offers such loose ideas of what 'liberty' encompasses that judges could theoretically hinge any moral claim on 'liberty' in the name of textual fidelity. This next section defends this by comparison to the lack of textual fidelity displayed in the pursuit of traditional values by expectational originalists.

[102] Dworkin, *Justice in Robes* (n 1) 120.

## 4.4 Arbitrary Tradition

### 4.4.1 Scalia's Rule of Law

Scalia explicated a rule of law that he believed would 'guard against the arbitrary exercise of judicial power', and framed the moral reading as such an arbitrary exercise. He suggested that, because general constitutional notions of morality 'provide such imprecise guidance', it is necessary to 'adopt the most specific tradition as the point of reference', to avoid judges dictating rather than discerning society's views.[103] So, taking the constitutionality of same-sex marriage, the tradition in question is that of same-sex marriage rather than marriage generally, because the specific issue was the legality of marrying same-sex unions.[104] Taking the opposite interpretation to the moral reading, Scalia embraced expectational originalism because historical inquiry informs contemporary adjudication of the framers' likely views at the time of enactment with regard to the instant issue.

Scalia's method fails because it is, ironically, itself an arbitrary limitation on decision-making.[105] By selecting the most specific relevant tradition, Scalia became 'conceptually at odds' with the Fourteenth Amendment's purpose to protect minority interests from majority oppression.[106] He subjected minority interests to 'the conventional morality of the majority', claiming that this appropriately defines tradition.[107]

Consequently, Scalia's argument demonstrates a lack of attention to judicial restraint by unduly narrowing the Fourteenth Amendment's

[103] *Michael H v Gerald D* 491 US 110 (1998).
[104] *Obergefell v Hodges* (n 13) 644 (Thomas J, dissenting).
[105] Edward G Spitko, 'A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication' [1990] Duke LJ 1337, 1353.
[106] ibid 1353; see, for example, Judith A Baer, *Equality under the Constitution: Reclaiming the Fourteenth Amendment* (Cornell UP 2018).
[107] Spitko (n 105) 1353.

protection of fundamental rights without any textual justification.[108] There are therefore concerns that Scalia's account is activist because he not only mischaracterised the wide scope of the Fourteenth Amendment's abstract instructions but did so to imply into the text restrictions that do not exist. His activist rejection of the framers' written instructions ironically succumbs to the judicial divergence he claims is inherent in the moral reading.

### 4.4.2 Defining Tradition

This issue is exacerbated by the indeterminate definition of tradition. Graglia, for example, claims judges 'consistently aim to overthrow and undermine … traditional values', but he does not explain where and when we define these traditions.[109] The definition of 'tradition' may generally have broad connotations, but, like 'liberty', no definition is provided. The difference is that, unlike 'liberty', 'tradition' cannot be found in the Constitution's text. Consequently, 'tradition' is merely an 'illusory limitation' because judges are unrestricted in deciding for themselves what qualifies as a tradition.[110] Thus, there is no basis for the claim that using 'tradition' as a barometer for constitutional interpretation is democratically legitimate, because the expectational originalists' definitions of 'tradition' have changed from case to case, demonstrating a lack of judicial restraint.

For example, how is it that expectational originalists in *Loving v Virginia* accepted the decision to legalise interracial marriage when the same theoretical position was used to resist affirmation of same-sex

[108] Spitko (n 105).
[109] Lino A Graglia, 'Constitutional Law Without the Constitution: The Supreme Court's Remaking of America' in Robert Bork (ed), *A Country I Do Not Recognise* (Hoover Institution Press 2005) 1; Łukasz Machaj, 'Is the United States Supreme Court an Undemocratic Institution? An Outsider's Perspective' (2011) 1 Wroclaw Review of Law, Administration and Economics 13, 15.
[110] Spitko (n 105) 1339.

marriage in *Obergefell*?[111] The distinction was made that, in *Loving*, the judges were not changing the traditional understanding of marriage being a union of one woman and man, unlike in *Obergefell*.[112] Yet, traditionally understood, individuals of African descent were considered *by the Supreme Court* the property of white US citizens until at least the Civil War.[113] So, interracial marriage cannot possibly have roots in US tradition and should be as unjustifiable according to US tradition as same-sex marriage.

How, then, can expectational originalists justify this discretionary application of tradition? Not only did the courts show discretion between the two cases as to the level of generality with which they would define tradition, but they showed discretion in *Loving* to only consider the specific issue of marriage as an internationally recognised union. This surely compromises their faithfulness to the framers' expectations in ignoring the totality of the context, namely that, while marriage would have been defined as a union between opposite-sex couples, it would likely also have been limited to couples of the same ethnicity.

This section has rebutted the dominant notion that expectational originalism prevents judicial discretion, and that seeking the traditional understanding of contemporary issues best serves democracy. The moral reading and semantic originalism account for the abstract nature of the Constitution, recognising that broad, undefined instructions must have been intentionally devised to provide discretionary scope, which remains restrained only by the words provided. Accordingly, inferring the requirement of 'traditional' justification from these abstract instructions unduly narrows their broad connotations, ironically demonstrating the activism that originalists fear the moral reading will allow.

[111] *Loving v Virginia* (n 26).
[112] *Loving v Virginia* (n 26) 16 (Roberts CJ dissenting).
[113] *Dred Scott v Sandford* 60 US 393 (1857).

# 5 'The Two Dworkins'

Michael McConnell attacks Dworkin's moral reading for advocating contradictory notions of textual fidelity and democracy. He refers to these positions as the 'Dworkin of Fit' and the 'Dworkin of Right Answers'.[114] Yet it is argued here that McConnell fundamentally misunderstands several important elements of Dworkin's moral reading, rendering his criticisms of inconsistency and illegitimacy moot.

## 5.1 Introducing the Two Dworkins

McConnell says the Dworkin of Fit believes judges are 'seriously constrained by what has come before by text, history, tradition and precedent, and should exercise their moral-philosophical faculties only within the limits set by history'.[115] Conversely, the Dworkin of Right Answers argues the Constitution's text 'must be interpreted at a sufficiently abstract level that they do not interfere with the judge's ability' to make the Constitution 'the best it can be'.[116] McConnell therefore surmises that the moral reading is theoretically irreconcilable, arguing that 'the Dworkin of Fit [would] attack the Dworkin of Right Answers for the latter's lack of respect for the distinctive qualities of judging within the US tradition'.[117] Equally, he expects 'the Dworkin of Right Answers to charge the Dworkin of Fit with sacrificing "principle" to "history"'.[118] McConnell seemingly concedes, however, that 'the two [Dworkins] work together harmoniously at a practical level' if we distinguish the kinds of cases that each would adjudicate.[119] 'The Dworkin of Right Answers decides all important contested cases', whereas 'the Dworkin of Fit defends against charges of judicial

[114] McConnell (n 17) 1270.
[115] McConnell (n 17) 1270.
[116] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 62.
[117] ibid.
[118] ibid.
[119] ibid.

imperialism', by accounting for the problem of 'judicial overreaching' and acknowledging that judges do not decide cases on a blank slate but rather in accordance with the constitutional text and history.[120] McConnell concludes that Dworkin cannot be said to appropriately mediate the tensions over the nature of democracy, the Constitution's text, and the role of moral judgments in appellate decision-making because the two Dworkins subscribe to contradictory views on judicial review. Yet this conclusion is misguided because the alleged 'contradictions' form part of a cohesive framework that McConnell has overlooked.

## 5.2 Fidelity with a Moral Reading

McConnell surmises that the Dworkin of Fit cannot possibly engage with the commitments that Dworkin argued are embedded in the text, because 'many provisions of the Constitution are written in broad and abstract language'.[121] In other words, McConnell presupposes that Dworkin was concerned with expectations. This is false — Dworkin emphasised the importance of distinguishing between expectations and semantics for understanding how judges can remain committed to the text via the moral reading even when the text is abstract, as discussed above in Section 4.

McConnell does not acknowledge this distinction, and subsequently argues that in relation to 'directive or prohibitory language', like that of the Fourteenth Amendment, 'what the authors intended to say is precisely what they intend to require, authorise, or prohibit'.[122] In other words, if the authors hypothetically intended to limit the remit of marriage to opposite-sex couples in a constitutional amendment relating to marriage in some way, they intended to preclude same-sex marriage in consequence and for as long as the Constitution remained valid. This

[120] ibid.
[121] McConnell (n 17) 1271.
[122] McConnell (n 17) 1280.

seemingly conflates semantics with expectations because McConnell suggests that the semantic clarity of the Constitution is determined by the framers' identifiable expectations. The scope of the Constitution's semantic properties, he contends, is not determined by the plethora of dictionary definitions we can attribute to the words used, but dictated by 'the broader context of [the framers'] purpose and political theory'.[123]

McConnell raises the example of the Ex Post Facto Clauses of Article I of the Constitution, which prohibit Congress and the state legislatures from retroactively criminalising conduct.[124] He says that, while the language could be interpreted to preclude all legislation, '[w]e know from Madison's notes of the Convention … that the framers understood this term to be limited to retroactive *criminal* laws'.[125] Therefore, Dworkin's commitment to semantic intentions is 'compromised', because a moral reading of the text could not deduce this particular focus that the framers had in mind.[126] Hence, semantic originalism reduces the legitimacy of judicial review because it is not capable of discerning these historical facts.

This, however, is flawed logic. First, why does McConnell seek the clarification of vague constitutional clauses in extra-legal sources that have no binding force? Moreover, what makes this process different, and constitutionally more appropriate, to inferring abstract moral principles? Ultimately, why did the framers choose not to include all of the information they deemed relevant to properly understanding their intentions? How can contemporary judges be expected to understand that they intended for the Ex Post Facto Clauses to only refer to criminal legislation? It is illogical for abstract instructions to have been provided with particular intentions when the framers had the power and

[123] ibid.
[124] US Constitution Art I.
[125] See Jonathan Elliot, *The Debates in Several State Conventions of the Adoption of the Federal Constitution* (originally published 1827, HardPress Publishing 2019); McConnell (n 17) 1280.
[126] McConnell (n 17).

competency to make them more precise — that is, unless the framers intended only to provide abstract instructions. Hence, McConnell is incorrect when he claims that Dworkin 'tries to have it both ways' in liberating judges 'to achieve their own vision of the best answers to controversial questions without regard to the framers' opinions' (the Dworkin of Right Answers) while also 'claiming to be faithfully carrying out the framers' intentions' (the Dworkin of Fit). It is widely accepted that the text is imprecise.[127] The framers deliberately omitted some information that could have clarified their intentions, and that information is inconsequential for judges interpreting the text today because their duty is only to the text. McConnell cannot justifiably criticise the imbalance of the moral reading when the instructions are abstract.

By way of analogy, it is akin to asking your neighbour, who is new to the area, to drive you to your desired location. The only direction you provide is that you want to go 'over there' while pointing in a general direction. When they cannot find that location, you scold them for not following your directions properly. Yet it is not your neighbour's fault because the instructions provided were too imprecise to satisfy your specific intentions. This displays the issues with McConnell's overly strict expectations of judicial interpretation. Judges are provided a limited quality of direction. Yet, McConnell nevertheless believes that the moral reading does not adequately curb judicial discretion, despite Dworkin's insistence that we should take the framers' abstract instructions as evidence that they knew they were providing the scope for judges to arrive at different 'destinations'.[128] This is not a compelling basis on which to discredit the moral reading, least of all because the source of McConnell's contention is the Constitution itself and not the moral reading. Hence, there is no textual dichotomy separating the two

[127] See Katharine T Bartlett, 'Tradition as Past and Present in Substantive Due Process Analysis' (2012) 62 Duke LJ 535; Craig Haney, 'The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process' (1991) 15 Law and Human Behaviour 183; Spitko (n 105).
[128] Dworkin, *Freedom's Law* (n 1) 9.

Dworkins. Abstract interpretation (which the Dworkin of Right Answers prefers) is inevitable even with strict textual fidelity (that the Dworkin of Fit prefers) because the framers did not provide anything more specific for judges to apply.

## 5.3 Circle Stories

McConnell criticises Dworkin's 'chain novel' analogy by offering his own analogy. Dworkin argued that the relationship between the branches of federal government on constitutional matters reflects a situation where chapters of a book are written subsequently but by different authors.[129] McConnell agrees with this concept, but argues that the situation in practice more resembles a childlike game of circle stories, that is, where one party to the game begins a narrative, and each other party takes turns to continue the narrative as they see fit.[130] Indeed, one branch writes the first chapter, another the second, and so on.[131] However, he questions why Dworkin assigned the courts the role of author given their analogous existence is more akin to an editor or 'referee', not a writer.[132] Particularly, he argues that their presumptive role as writer (or lawmaker) *and* editor (or a branch of government reviewing the laws written by another branch) provides the courts with the scope to decide on their own not just whether the other branches have devised new laws in accordance with proper procedure and constitutional integrity, but to decide what the law should be.[133] They would be embracing the Dworkin of Right Answers. This criticism is rooted in traditional constitutional theory, where courts ought to adjudicate over the constitutional practice of other branches of government but not create law.[134] Hence, the moral reading would be

[129] Dworkin, *Freedom's Law* (n 1).
[130] McConnell (n 17) 1275.
[131] Dworkin, *Freedom's Law* (n 1) 9.
[132] McConnell (n 17) 1275.
[133] McConnell (n 17).
[134] Madison (n 8) 513.

'anti-democratic' because the dual role of writer and editor would invert the primacy of popular self-governance respected by the Dworkin of Fit.[135] However, that is not necessarily the case.

As Rousseau argues, constitutional judges should be considered an 'indispensable corollary' of a true constitutional democracy because their anti-majoritarian neutrality presupposes a politically agenda-less interpretation and protection of constitutional values.[136] Importantly, being anti-majoritarian is not the same as being anti-democratic. The role of constitutional judges is to ensure that laws are enacted in accordance with those values. Otherwise, the Constitution becomes a powerless enactment if there is no governmental body that can safeguard the promises it expounds.[137] One significant reason that this becomes confused in discourse on US constitutionalism is that the Constitution itself is not sufficiently clear as to satisfy the entire population that judges' interpretative work is a legitimate form of judicial review, rather than an example of judicial activism.

Nevertheless, that their decision-making may result in amending or overruling legislatively enacted laws does not necessarily exemplify the proposed 'tyranny of the minority' about which McConnell is concerned.[138] In fact, McConnell's own 'referee' analogy supports Dworkin's notion that the semantic plurality of the Constitution's abstract instructions justifies the quasi-law-making power of the courts. McConnell presupposes that referees, or editors, should be impartial, consistent, and fair. Yet, if the rules themselves are not sufficiently clear, consistency is difficult to achieve where the particular facts of the case raise unique challenges for the application of those rules. Hence, where unique circumstances rest on rulings based on abstract

[135] Robert H Bork, 'Styles in Constitutional Theory' (1985) 26 South Tx LJ 383, 389; Graglia (n 107) 1–5.
[136] Dominique Rousseau, 'The Constitutional Judge: Master or Slave of the Constitution?' in Michael Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke UP 1994) 276.
[137] Machaj (n 109) 18.
[138] Waldron (n 16) 1399.

instructions, referees, editors, or judges are left to their own convictions on how those rules would apply.

This is the unfortunate reality for commentators seeking impartiality, consistency, or 'fairness' in judicial review. Judges should not be criticised for drawing new abstract moral principles that ultimately overturn legislatively enacted law simply because the connotations of the Constitution's text are broad. It is not that judges are making the 'story' 'the best it can be' in the mere context of a childhood game, as McConnell contextualises it.[139] Rather, in dealing with new constitutional questions regarding an imprecise text, the moral reading provides judges the scope to necessarily consider those questions without being restrained by the framers' expectations. In many cases, those expectations are too outdated to support a contemporary ruling. Hence, it ensures judges are not arbitrarily compromising the democratic equality of those bringing these new constitutional claims because of those 'traditional' values.

Moreover, it demonstrates that the two Dworkins cannot be so simply compartmentalised to exploit purported inconsistencies within the moral reading. The abstract method of judicial review inherent to the Dworkin of Right Answers arises because the Dworkin of Fit instructs judges to show textual fidelity, and effective textual fidelity would identify that the text is purposefully imprecise. As Sandalow recognises, '[e]ven the most prophetic of the men who drafted and ratified the Constitution' could not foresee the constitutional questions of our time because the questions they had were only of theirs.[140] They had no stimulus to consider LGBTQ rights, for example. Not only is McConnell's circle story analogy therefore improper in practical terms as it pertains to the two Dworkins but it also fails to recognise that the 'story' began with the abstract drafting of the Constitution, 250 years ago. It should be no surprise that subsequent chapters, which only arise centuries later, diverge from what the framers would have expected.

[139] McConnell (n 17) 1275.
[140] Sandalow (n 93) 1035.

Equally, it should not be problematic to accept that judges, in their constitutional role and in respecting the abstract nature of the instructions provided, reach these seemingly novel conclusions.
To summarise, McConnell's criticisms result from a misconstruing of the Constitution's abstract language. Not only does he mistake Dworkin's semantic originalism to be inconsistent with democracy, but he mis-conceptualises the moral reading as a betrayal of the judiciary's restrictive editorial role by observing two different 'Dworkins'. The Constitution's text provides ample scope to depart from a static application of the law, and the moral reading inherently embraces this. Dworkin accounted for the constitutional values with which McConnell challenges the moral reading, but with proper appreciation for the consequences of the framers' linguistic choices.

# 6 Conclusion

The moral reading draws criticism for defying the theoretical status quo of judicial review: that judges are bound by textual fidelity to uphold the Constitution's democratic principles, leaving no room for moral readings in judicial decision-making. However, Dworkin's moral reading is far more substantial in its theoretical construction than the unrestrained judicial activism commonly associated with constitutional interpretations that do not seek to determine the framers' specific expectations.

What makes Dworkin's moral reading tenable is the consideration it affords to a core trifecta: democratic principles; the Constitution's text; and the inevitable role of moral judgments in appellate decision-making. Dworkin justified the moral reading on democratic grounds because of the protection it affords minorities, in contrast to the ordinary 'majoritarian' arrangement of democracy, which fails to properly fulfil the protection of rights in substance that it guarantees in its processes. 'Partnership' democracy addresses the constitutional imbalance for minorities that their rights' concerns may be heard, but they need not be practically addressed. It rectifies the practice of mere head-counting in

the legislature, which results in the statistical majority determining the validity of those rights, despite the intended purpose of those constitutional guarantees being to enshrine certain rights irrespective of democratic mandate. Hence, Dworkin recognised how constitutional review can positively intervene to strengthen democratic principles.

Though Dworkin's distinction of semantic and expectational originalism is familiar, it is paramount to properly appreciate that the instructions the framers provided were purposefully abstract, with the knowledge that any judge applying it would need to somehow overcome the lack of precision. Any notions of 'tradition' defy the textual fidelity that expectational originalists claim is the bedrock of their approach because it empowers judges to apply historical qualifications to fundamental liberties that are unfounded in the text. This discretionary scope cannot be justified textually.

Dworkin therefore posited a framework that he believed could support the challenges associated with the inevitable moral adjudication. Judges are necessarily restrained, but that restraint is itself wide in accordance with the scope of the Constitution's abstract written instructions. These abstract instructions refer to grandiose concepts like 'liberty' that inherently require the courts to engage with moral questions of fundamental liberties, questions that are necessarily entangled with the Constitution's text and do not exist within the realm of judges' own moral convictions.

There are countless other critics of Dworkin's moral reading offering different conceptual attacks.[141] However, this article demonstrates that many existing attacks are based on misconceptions of the moral reading, both deliberate and accidental. Moreover, the article concludes that Dworkin provided a logically sound and democratically legitimate conception of judicial review that appropriately navigates the tensions

[141] See, for example, Raoul Berger, 'Ronald Dworkin's "The Moral Reading of the Constitution:" A Critique' (1997) Ind LJ 1099; and Jon Mahoney, 'Objectivity, Interpretation, and Rights: A Critique of Dworkin' (2004) 23 Law and Philosophy 187.

of democracy, the Constitution's text, and the inevitable role of moral judgments in appellate decision-making.

# A Game of Thrones: The Battle for the Supremacy of EU Law Following *Weiss II*

Jakub Kozlowski

**Abstract**
This paper examines the *Weiss II* judgment delivered by the Federal Constitutional Court in Germany. The Weiss saga began with a legal challenge to the European Central Bank's Public Sector Purchasing Programme on the grounds that its economic effects were outside the scope of the bank's mandate. Following this, the German Federal Constitutional Court ruled, for the first time in its history, that the preliminary ruling of the Court of Justice of the European Union in *Weiss I* was ultra vires. This article analyses the judgment's implications in relation to European Union supremacy and considers whether it forms part of a wider trend, drawing upon cases in the Czech Republic and Denmark. It also examines the effect this judgment may have if Member States in the future are in dispute with the European Union. The paper concludes with the view that given the current socio–political climate, particularly in Member States such as Poland and Hungary, this judgment may have set a dangerous precedent.

# 1 Introduction

On 5 May 2020, the Second Senate of the German Federal Constitutional Court (FCC) delivered its judgment (*Weiss II*) in response to the preliminary ruling of the Court of Justice of the European Union (CJEU) in the *Weiss and others* case (*Weiss I*).[1] The case concerned the mandate of the European Central Bank (ECB), which, according to the initial judgment delivered by the CJEU, was managed proportionately. Despite this assessment, the FCC declared, for the first time in its history, that the preliminary ruling in *Weiss I* was ultra vires (beyond the CJEU's powers).

This paper will first provide a background to the *Weiss* saga. Following this, it will analyse the implications of the judgment for the supremacy of European Union (EU) law and will consider the extent to which this judgment is part of a wider trend. Lastly, it will conclude with some observations regarding the potential future impact this judgment may have, particularly in reference to EU Member States such as Poland and Hungary. The overall argument presented is that, given the current socio-political climate, especially in these Member States, this judgment may have set a dangerous precedent and, unless the EU take decisive, lawful action, they may not be well placed to respond to these challenges.

# 2 How Did We Get Here?

Controlling inflation is essential in every economy and, by keeping prices stable, central banks – the institutions managing the monetary system of a state or union of states – are able to ensure that jobs are safe and economies grow.[2] Independent central banks, such as the ECB, are

[1] BVerfG, *Judgment of the Second Senate of 05 May 2020* — 2 BvR 859/15 (*Weiss II*); Case C–439/17 *Weiss and others v Bundesregierung* [2018] EU:C 114 (GC, 11 December 2018) (*Weiss I*).

[2] European Central Bank, 'Why Are Stable Prices Important?' (European Central

able to stabilise inflation efficiently as they are politically insulated.[3] In the EU, Article 130 of the Treaty on the Functioning of the European Union (TFEU), one of the EU's constitutional treaties, provides the ECB with almost complete independence from political interference and exclusive competence on matters of monetary policy, with its main objective being price stability.[4]

As a result of the Global Financial Crisis, it was no longer possible to lower interest rates to effectively control inflation.[5] To avoid risks of deflation, the ECB introduced non-standard measures, including the Asset Purchase Programme (APP), which sought to introduce price stability to firms and households across Europe, and was extended in 2015 by the introduction of the Public Sector Purchasing Programme (PSPP).[6] The PSPP can be thought of as a specific tool used by the APP, to purchase bonds issued by Eurozone governments, agencies and European institutions. Together, the APP and the PSPP seek to increase inflation, which was a notable challenge following the Global Financial Crisis.

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Bank — Eurosystem, 2021) <https://www.ecb.europa.eu/explainers/tell-me-more/html/stableprices.en.html> accessed 27 February 2021.

[3] Jon Faust, 'Why Do Societies Need Independent Central Banks?' (2016) 3 Sveriges Riksbank Economic Review 21, 22.

[4] Statute on the ESCB and ECB, art 2; 'European cooperation' (*European Central Bank*) <https://www.ecb.europa.eu/ecb/tasks/europe/cooperation/html/index.en.html> accessed 26 May 2021.

[5] Athanasios Orphanides 'European crisis and its implications for global inflation dynamics' in Settlement, Bank for International (eds) *Globalisation and inflation dynamics in Asia and the Pacific* (2013, Bank for International Settlements) 131.

[6] European Central Bank, 'How Does the ECB's Asset Purchase Programme Work?' (*European Central Bank — Eurosystem*, 28 February 2019) <https://www.ecb.europa.eu/explainers/tell-me-more/html/app.en.html> accessed 27 February 2021; Peter Conti-Brown and Rosa M Lastra, *Research Handbook on Central Banking* (Edward Elgar 2018) 202.

The ECB's ability to pursue such measures is derived from the monetary policy, codified in TFEU, Chapter 2, Title VIII.[7] In contrast, Article 119 of TFEU reserves the powers of economic policy to Member States.[8] Distinguishing between the two policies permits Member States to focus on taxation and spending, and central banks to focus on price stability and interest rates. Despite there being a distinction in principle between economic and monetary policy, that is not to suggest that economic and monetary policy can be easily differentiated, as the boundaries between the two are often blurred. It is for this reason that the monetary policy has the potential to encroach on economic policy.[9] This factor, along with the existence of tensions between Member States and the ECB which were underpinned by the financial crisis, formed the basis of a legal challenge to the PSPP, in a case that has come to be known as *Weiss I*. The claimants asked the FCC to decide whether:

a the ECB went beyond its monetary policy mandate and pursued an economic policy through the PSPP; and
b the ECB violated the German constitution by preventing the Parliament from controlling the country's public finances.[10]

[7] Dražen Rakić and Dirk Verbeken, 'European Monetary Policy' (*Europarl*, December 2020) <https://www.europarl.europa.eu/factsheets/en/sheet/86/europaische-geldpolitik> accessed 28 April 2021.

[8] 'EU Economic and Monetary Union' (*EUR-Lex*, 15 September 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aec0015#:~:text=Article%20119%20states%20that%20the,lays%20down%20some%20guiding%20principles> accessed 28 April 2021.

[9] There is substantial overlap between the monetary and the economic policy and this is recognised by the ECB Statute. For instance, the statute states that the Eurosystem shall 'support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union'. See Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F04> accessed 06 April 2021.

[10] *Weiss II* (n 1) para 80; Hoai-Thu Nguyen and Merijn Chamon, 'The Ultra Vires Decision of the German Constitutional Court' (2020) Hertie School Policy Paper

To answer the first question posed by the claimants, the FCC pursued the preliminary reference procedure, asking the CJEU if the ECB had breached Article 123 of TFEU and if it had violated its mandate regarding monetary policy.[11] In its judgment, the CJEU ruled that the PSPP was compatible with EU law and there was no breach. [12] Furthermore, adopting a purposive approach, the CJEU held that the provisions within the TFEU did not intend to make a complete separation between economic and monetary policies.[13] It suggested that, in practice, some overlap between these policies was necessary for the ECB to pursue its objectives.[14] Finally, the CJEU found that the measures enacted as part of the PSPP were proportionate and did not go beyond the necessary means to achieve its objectives. [15]

This legal saga reached its climax when the FCC delivered its judgment in *Weiss II*, which ultimately disagreed with the preliminary ruling of the CJEU. This action alone was extreme. The purpose of the preliminary reference procedure is solely to facilitate cooperation between the CJEU and national courts.[16] Instead of interpreting EU law in cases of doubt, a national court must refer questions to the CJEU. When the judgment returns to the national court, that court must uphold it. However, in *Weiss II*, the FCC did quite the opposite and declared the judgment of the CJEU and the PSPP ultra vires.

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<https://opus4.kobv.de/opus4-hsog/frontdoor/index/index/docId/3524> accessed 27 February 2021.

[11] *Weiss II* (n 1) para 80; Annelieke AM Mooij, 'The Weiss judgment: The Court's Further Clarification of the ECB's Legal Framework' (2019) 26(3) Maastricht Journal of European and Comparative Law 449, 451.

[12] *Weiss I* (n 1) paras 100, 144, 158.

[13] *Weiss I* (n 1) para 60.

[14] *Weiss I* (n 1) para 67.

[15] *Weiss I* (n 1) para 100.

[16] Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45(6) CMLR 1611.

In what some may deem an attack on the CJEU's application of proportionality in *Weiss I*, the FCC held that 'suitability and necessity [were] not balanced against the economic policy effects', meaning its application of proportionality was flawed.[17] The FCC criticised the CJEU for its failure to consider the economic effects of the PSPP; this, according to the FCC, resulted in the ECB having freedom to choose any measures within its mandate, even if such measures were harmful to Member States.[18] Consequently, the failure of the CJEU to properly undertake the proportionality analysis meant it exceeded its competences; it was for this reason that the FCC declared the preliminary ruling ultra vires.[19]

The FCC adopted a similar approach in relation to the second question posed by the claimants. In considering the remit of the ECB, the FCC held that it did not balance the economic effects of the PSPP with its monetary policy objective; it was on this basis that the FCC constituted the creation of the PSPP as being an ultra vires act.[20] As a result, the FCC held that the German government must require the ECB to conduct a comprehensive proportionality assessment of the PSPP.[21] Following *Weiss II*, this assessment was successfully carried out, thus permitting the continuation of the PSPP in Germany.[22]

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[17] Franz C Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020' (2020) 21(5) German LJ 1116, 1117; *Weiss II* (n 1) para 133.
[18] *Weiss I* (n 1) para 140.
[19] *Weiss I* (n 1) headnote 2.
[20] *Weiss I* (n 1) para 176.
[21] Although it has been argued that there was no basis in the German Constitution for the Federal Constitutional Court to legally instruct the government and parliament 'to ensure that the ECB conducts a proportionality assessment in relation to the PSPP'. See Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German LJ 979, 983.
[22] Birgit Jennen, 'German Parliament Backs ECB Bond-Buying After Court Standoff' (*Bloomberg*, 2 July 2020) <https://www.bloomberg.com/news/articles/2020-07-02/german-parliament-backs-ecb-bond-buying-ending-court-standoff> accessed 27 February 2021.

## 3 A Wider Trend

Prima facie, it would appear that the matter is settled — the German government was able to conclude that the adoption of the PSPP satisfied the proportionality analysis, just as the FCC ruled. However, this only considers the judgment as a sum of its facts. Looking at the judgment more closely, and considering what it represents, we can identify the significant challenges it presents for EU law. The decision in *Weiss II* was the result of a national court declaring a judgment delivered by the CJEU, and a programme legally mandated by EU law, ultra vires, which may have significant consequences for the supremacy of EU law.

The principle of supremacy was established by case law. In *Costa v ENEL*, the CJEU stated that, by joining the Community, Member States 'have limited their rights'.[23] It was later confirmed in *Simmenthal* that the principle of supremacy principle applies to any piece of national law that contradicts EU law.[24] This means that even the constitution of a Member State must be displaced if it is in conflict with EU law.

In *Solange I*, the FCC considered the principle of supremacy, but had difficulty in accepting that EU law would prevail over the national constitution.[25] As a result, the FCC placed numerous conditions on the supremacy of EU law when in conflict with national issues to protect and uphold constitutional rights. Following this decision, the FCC considered the case of *Solange II* and seemingly took a more moderate approach.[26] It was held that, so long as EU law protected the fundamental rights of German citizens, it would not be subject to any

[23] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 614, para 3.
[24] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[25] Case 11–70 *Internationale Handelsgesellchaft mbH v Einfuhr- & Vorratsstelle fur Getreide & Futtermittel* (17 December 1970) (*Solange I*).
[26] Case 69–85 *Re Wünsche Handelsgesellschaft* (22 October 1986) para 339 (*Solange II*).

review by the national judiciary.[27] However, if EU institutions, such as the ECB, were found to exceed their powers codified by the treaties, any subsequent acts made by those institutions would not be legally binding in Germany.[28] Nevertheless, the FCC also held that the CJEU would always be given an opportunity to provide a preliminary ruling in cases where national law conflicted with EU law.[29] In the light of this, it should not be too surprising that the FCC came to the conclusion they did in *Weiss II*.

Notwithstanding the history underpinning the judgment in *Weiss II*, it is also possible that the decision was part of a wider trend. Interestingly, it is not the first time a national court has taken a decision that has undermined the supremacy of EU law. We perhaps first saw the beginning of this trend in 2012, when the Czech Constitutional Court declared a judgment delivered by the CJEU ultra vires. This case concerned a dispute between the two succession states, following the dissolution of Czechoslovakia, whereby the Czech Republic sought to award special pension increments only to Czech citizens.[30] This was not only in breach of the agreement come to by the two succession states but, according to the CJEU in *Landtová*, it also contravened EU law surrounding the protection from discrimination on the grounds of nationality.[31] In response, the Czech Constitutional Court held that the CJEU went beyond its competences as it omitted to give due consideration to the unique legal situation created by the dissolution of Czechoslovakia.[32]

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[27] ibid.
[28] Case 9–72 *Brunner v The Federal Republic of Germany* (4 October 1972).
[29] *Weiss II* (n 1).
[30] Jan Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII' (2012) 8 EuConst 323, 325.
[31] Case C–399/09 *Marie Landtová v Česká správa socialního zabezpečení* [2011] ECR I–5596.
[32] *Pl. ÚS* 5/12 of 31 January 2012.

Only four years later, in 2016, the Supreme Court of Denmark heard the *Ajos* case, which concerned a conflict between a Danish statute, permitting an employee's allowance to be revoked based on their age, with the protection against age discrimination enshrined in EU law.[33] In its preliminary ruling, the CJEU held that a national court cannot claim it is unable to interpret national law in a manner compatible with EU law merely because that court had earlier applied national provisions that were inconsistent with EU law.[34] The Danish Supreme Court disagreed with this assessment and held that, at the time of Denmark joining the Community, protection from discrimination on the grounds of age was not codified in the treaties, thus permitting them to disapply the regulation.[35]

Both cases in the Czech Republic and Denmark represent a departure from the principle of EU supremacy. In both circumstances, the European Commission would have been permitted to bring infringement proceedings against the Member States in violation. Infringement proceedings are used as a tool that requires Member States to comply with EU law, usually through the form of a formal request. Where Member States choose not to comply, the case may be referred to the CJEU to consider the imposition of financial penalties.[36]

Surprisingly, neither Member State has faced any consequences for contravening the principle of EU supremacy. In both cases, it is unclear why no further action was taken. However, it is arguable that, by

[33] Case C–15/2014 *Ajos A/S v Estate of A* [2016] OJ C211/12; Nguyen and Chamon (n 10) 8.
[34] Case 441/14 *Dansk Industri v Rasmussen* (GC, 19 April 2016); Sim Haket, 'The Danish Supreme Court's Ajos Judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order' (2017) 10(1) REA Law 135, 138–39.
[35] *Dansk Industri* (n 34).
[36] 'Infringement procedure' (European Commission) <https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en> accessed 6 April 2021.

omitting to initiate infringement proceedings, the EU may have facilitated a wider trend whereby national courts have rejected the supremacy of EU law in favour of national measures. Inevitably, this is problematic, as Mayer rightly notes: 'if every Member State claimed the final word on EU law, we could kiss the European community of law and the idea of a common legal system good-bye'.[37]

Of course, in the context of the *Weiss* saga, bringing infringement proceedings against Germany would no longer be reasonable as the matter has already been settled by the German government. However, this should act as a warning to the European Commission that they should be ready to adopt a tougher stance against Member States who infringe EU law. Without further action, we may observe a continuing trend whereby Member States, such as Poland and Hungary, two Member States currently experiencing challenges to the rule of law from within their national governments, are able to selectively apply EU law at national level.

## 4 A Dangerous Precedent

One does not need to look much further beyond the socio-political climate in Poland and Hungary to conceive the potential consequences of the *Weiss II* judgment. In both countries, a rule of law crisis has emerged amidst the actions of right-leaning governments.[38] It has been argued elsewhere that it would be difficult to apply the *Weiss II* judgment to the context of Poland and Hungary, as the rule of law crisis is a matter completely distinct from the issues raised by the PSPP.[39]

[37] Mayer (n 17) 1118.
[38] James Shotter and Valerie Hopkins, 'Hungary and Poland Stand Firm against EU Rule of Law Conditions' *Financial Times* (London, 18 November 2020) <https://www.ft.com/content/6868477d-38a2-464e-b1c4-188fd0a62b1a> accessed 6 April 2021.
[39] Von Matthias Jestaedt, 'Keine Handlangerdienste' *Frankfurter Allgemeine Zeitung* (Frankfurt, 14 May 2020) <https://www.faz.net/einspruch/exklusiv/das-ezb-urteil-ist-kein-handlangerdienst-fuer-populisten-16770506.html> accessed 27 February 2021.

However, it is argued here that the principle of undermining EU law is easily transferable and it is plausible that Poland and Hungary will adopt the principles underpinning the *Weiss II* judgment to their benefit. Indeed, in May 2020, Hungary's justice minister stated that 'the fact that [the] CJEU has been overruled is extremely important' and Poland's deputy justice minister claimed that 'the EU says only as much as we, the Members States, allow it'.[40]

It is difficult to predict with precision the context in which *Weiss II* may be used in both Member States. However, the context may centre around the judicial independence crisis in Poland and the 'Stop Soros' laws in Hungary. In Poland, the creation of the Disciplinary Chamber of the Supreme Court by the Law and Justice Party, the largest party in the Polish parliament, is thought to have displaced an independent judicial system.[41] Owing to the enactment of recent legislation, the Chamber has the authority to prosecute members of the judiciary or deprive them of their judicial mandate if they are found to criticise the government.[42] In the context of Hungary, the Parliament has passed the 'Stop Soros' legislation, which 'criminalises activities that support asylum and residence applications and further restricts the right to request asylum'.[43] This legislation has been condemned by the

[40] Imre Csekő, 'Mindenki Legyen Bátor és Hűséges a Saját Elveihez' (*Magyar Nemzet*, 9 May 2020) <https://magyarnemzet.hu/belfold/mindenki-legyen-bator-es-huseges-a-sajat-elveihez-8096054/> accessed 6 April 2021.

[41] Maria Wilczek, '"The Courts Are Destroyed for at Least 20 Years": Poland's Supreme Court Chief Looks Back on Her Term' (Notes from Poland, 3 April 2020).

[42] Dz.U.2021. 154, Art 27.

[43] 'Stop Soros' legislation includes: Bill T/19776 on the permits for organisations supporting migration; Bill T/19774 on the immigration restraint order; and Bill T/19775 on the immigration funding fee. See the translated version at <https://helsinki.hu/wp-content/uploads/Stop-Soros-package-Bills-T19776-T19774-T19775.pdf> accessed 30 April 2021; The European Commission, 'Commission Takes Hungary to Court for Criminalising Activities in Support of Asylum Seekers and Opens New Infringement for Non-Provision of Food in Transit Zones' (European Commission, 25 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260> accessed 20 April 2021.

European Commission for having breached numerous EU Directives.[44]

The European Commission invoked infringement proceedings against the Member States, but received no satisfactory response, and have since referred the matters to the CJEU.[45] Whatever conclusion the CJEU reaches, it may be that the lack of cooperation shown by Poland and Hungary in the initial phase of the infringement proceedings forms part of this growing trend of Member State non-compliance.

Perhaps the most significant question posed by this paper is how *Weiss II* will influence the response of the Polish and Hungarian governments with respect to the future judgments delivered by the CJEU. Even though neither Member State would be acting in a novel way by disapplying EU law, they may, as a result of the judgment in *Weiss II*, feel especially empowered to do so. Indeed, there persists a view that the judgment will permit both governments to set aside the decisions of the CJEU where this conflicts with a political agenda — a view difficult to quash considering the initial failure to ameliorate the concerns of the European Commission.[46]

It remains to be seen how the CJEU will proceed in relation to the measures adopted by the Member States, and equally how the Member States will respond to the judgments. However, it is conceivable that,

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[44] ibid.

[45] European Commission, 'Rule of Law: European Commission Refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures' (31 March 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524> access 27 May 2021; European Commission, 'Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones' (25 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4260> accessed 27 May 2021.

[46] Daniel Mooney, 'The EU in Danger? What the German Constitutional Court's Weiss Ruling Might Mean for Europe' (European Student Think Tank, 21 June 2020) <https://esthinktank.com/2020/06/21/the-eu-in-danger-what-the-german-constitutional-courts-weiss-ruling-might-mean-for-europe/> accessed 7 April 2021.

following the lack of action taken by the European Commission in respect of *Weiss II* and the earlier cases in Denmark and the Czech Republic, the EU may have inadvertently facilitated the Polish and Hungarian governments to not comply with CJEU decisions, despite their supposed legal paramountcy over Member States.

# 5 Conclusion

This paper has analysed the *Weiss* saga, in which a national court overruled the CJEU. The judgment itself has the potential to disrupt longstanding concepts in EU law. This is not the first time a national court has disagreed with a ruling of the CJEU, and it appears that the *Weiss* saga has continued a growing trend whereby Member States have felt empowered to displace areas of EU law in conflict with national agendas. In the examples outlined in this paper, no Member State has been sanctioned by the EU for their infringement of EU law. We will never know whether invoking the relevant procedures at the time would have effectively brought an end to the apparent trend. However, this paper has argued that, by taking lawful action against Member States who seek to infringe EU law, the EU is better placed to uphold the principle of supremacy, particularly in light of the challenges posed by Member States such as Poland and Hungary.

# It's Not All Zoom and Gloom: Reflections on University Study During COVID–19

Fraser King

**Abstract**
The ongoing COVID–19 pandemic has presented varying challenges for students and teaching staff alike. The difficulty of transitioning from traditional in person teaching to an online delivery of teaching that students and teaching staff are now well-acquainted with cannot be understated. This article analyses the challenges that have arisen as a result of the pandemic and offers reflections on these difficulties from the author's two different perspectives within York Law School — first as a Master of Laws student and, second, as a graduate teaching assistant. In particular, this paper will focus on how the COVID-19 pandemic has affected the delivery of the York Law School's problem-based learning methods and the process of completing an independent dissertation project. Finally, this paper offers thoughtful recommendations for the future of teaching and learning at higher education.

# 1 Introduction

The COVID–19 global pandemic led, in March 2020, to the United Kingdom being placed into an unprecedented national lockdown. A consequence of the lockdown measures was the dramatic transition from teaching in person to online delivery in higher education. The difficulty of adjusting well-established teaching techniques to an online environment cannot be understated; the fact that universities across the country continued to teach students throughout the differing stages of the pandemic should be applauded.

As a Master of Laws (LLM) student at York Law School (YLS), having graduated from YLS with a Bachelor of Laws (LLB) degree in 2020, and also as a Graduate Teaching Assistant (GTA), I have experienced first-hand the implications of the period of disruption caused by COVID–19. My LLM was a one-year programme composed entirely of option modules, most of which were delivered through problem-based learning (PBL): a form of student-centred pedagogy where students learn about areas of law through the experience of solving legal problems identified in an initial scenario. Throughout my time as an LLM student, I experienced the challenges of learning in a new online environment. At the same time, as a GTA, involved in teaching elements of the undergraduate law programme for first- and second-year students, I have had a unique viewpoint on the impact of the pandemic in higher education, having experienced it as a member of the teaching staff.

In this paper, I will, first, reflect upon the impact that the COVID–19 pandemic has had on the delivery of PBL, drawing upon my experiences as a student and a GTA. Second, I will consider the challenges I faced whilst conducting an independent research project under pandemic restrictions and how I overcame these difficulties.

# 2 Problem-Based Learning

Throughout the pandemic, the most marked change in the context of higher education has been the transition from in-person teaching to online delivery. The ethos of YLS is largely one of collaboration and this is core to its teaching methods, including its unique PBL style, adopted for both undergraduate and postgraduate study. Before reflecting upon the impact of COVID–19 on the delivery of PBL, this paper will first provide an overview of the PBL process.

## 2.1 Overview

For the duration of each academic year, students at YLS are divided into student law firms (SLFs), where they are expected and encouraged to collaborate with one another for the entirety of the PBL process. As SLFs are largely self-regulated, each group may approach PBL in a slightly different manner. The PBL approach aims to both increase legal knowledge and to teach students to act ethically and solve complex problems.[1] Additionally, there is no emphasis on 'right' or 'wrong' sources to use, meaning that, in terms of pedagogy, students, through conducting independent research, discover a range of sources they find to be useful.[2] The PBL process, whilst daunting at first, has been beneficial for my own development. As I look to legal practice in the future, I have gained a valuable skill set in applying abstract legal knowledge and principles to factual situations.

The PBL process works on a cyclical basis, each week being one full cycle. Usually, two sessions are delivered at the beginning or end of each week, with one interim session sandwiched in between. A typical PBL seminar is formed of two halves: the feeding back of the previous

[1] Jenny Gibbons, 'Reflection, Realignment and Refraction: Bernstein's Evaluative Rules and the Summative Assessment of Reflective Practice in a Problem-Based Learning Programme' (2019) 24(7) Teaching in Higher Education 834, 836.
[2] Richard Grimes, 'Delivering Legal Education through an Integrated Problem-Based Learning Model — the Nuts and Bolts' (2014) 21(2) IJCLE, 228, 253.

week's problem scenario and the 'pick-up' of a new problem. In a typical PBL session, a student in the SLF will be appointed as chairperson, who will act in a leadership capacity, and another student will be appointed as a scribe, who will record the whole process for the group.

During the pick-up phase, the tutor will distribute scenarios to the SLF; these scenarios are fictional legal problems that usually relate to content from two areas of law. The objective of this part of the session is to work collaboratively to identify these problems. To do so, students thoroughly process the problem scenario by clarifying any unclear terms, identifying the key parties and their interests, along with the key facts, then summarising and naming the scenario. Finally, students brainstorm any legal issues they believe to be related to the problem, which leads to the development of ideas or questions for further independent research. Following the independent research process, the students will present their findings to the SLF and then apply the law to the factual matrix within the scenario. This both reinforces the substantive legal knowledge gained from research and practises the skill of applying the law in real-life situations.

Each week there are interim sessions that take place in between the main PBL seminars. In these sessions, the students present their initial findings on the problem scenario. The role of the tutor in interim sessions is to facilitate and encourage the students to further develop their own research skills, rather than give correct answers or provide a list of sources to consult. After the interim session, students continue their research and then apply it to the problem scenario in advance of their next PBL seminar, where they feedback their completed and detailed research to the tutor and fellow students.

Additionally, to further support students, lectures, known at YLS as plenaries, are delivered to coincide with the content relevant to a given week's PBL problem. Prior to the COVID–19 restrictions, plenaries were delivered as interactive, in-person lectures, meaning students

could pose questions to lecturers. However, due to the COVID–19 pandemic, plenaries were pre-recorded by teaching staff and uploaded for students to access at their convenience. Despite the lack of interactivity, this new format permitted me, as an LLM student, to make more comprehensive notes as I was able to set aside sufficient time to watch and understand the content. Drawing from my experience on the LLB at YLS, I believe plenaries being delivered in an online format has been more beneficial for my learning. This brings me to question whether, when we look to the future, a hybrid approach that incorporates the benefits of online plenaries, coupled with in-person seminars, could be adopted in higher education.

## 2.2 PBL from a Student Perspective

PBL, even without the challenges associated with COVID–19, has been a challenging style of learning to adapt to. These sessions are facilitated by PBL tutors at YLS, in line with the important pedagogical objectives that underpin PBL. The sessions primarily focus on conducting productive research, and application of the law to the factual matrix of the week's scenario.

When picking up a new problem scenario as an undergraduate, I often struggled to maintain a balance between capturing the required level of detail to sufficiently complete the learning objectives and moving swiftly through the process. Throughout my experience as an LLM student, where the delivery of teaching has been solely online, I have found that this problem was not necessarily replicated as, initially, we tended to move efficiently through the stages of PBL. Instead, attending the sessions online meant I felt almost disconnected from the other students in the SLF and we appeared to be more concerned with establishing the relevant learning outcomes efficiently than working collaboratively to achieve this. As a result, in the first term, I felt that successfully working through particularly challenging problems was less rewarding than it had been throughout my undergraduate experience, where the delivery of PBL had mostly been in person.

The lack of collaboration could be attributed to the online setting, which felt at times like artificial separation between me and the other members of the SLF, meaning I felt less familiar with who I was working with. Prior to the pandemic, I would often work closely with students in my SLF, especially if I had been having difficulty navigating the research. Owing to the restrictions on social contact as a result of COVID–19, I was unable to meet with my fellow students in person and, unless I arranged to collaborate in an online setting, I mostly worked independently. This meant that I felt less certain of the quality of my research and I was often less forthcoming in the following week's feedback session.

During the second term, after previously experiencing a disconnect with my fellow students, I consciously made attempts to facilitate positive discussions within the PBL setting, particularly when acting as the chairperson. I would often directly ask members of the SLF to participate, which initially led to stilted silences and, occasionally, instances of students accidentally speaking over one another. Eventually, the SLF established a 'hands up' policy, meaning we would take it in turns to contribute our thoughts by first signalling to the chairperson our intention to do so. Consequently, I felt more confident in sharing my contributions with the group, without fear of interrupting another student. I believe this also had a positive effect on other quieter members of the group who previously did not frequently contribute to ongoing discussions. This was not a perfect method, as it did not permit a free-flowing discussion that may be expected in an in-person setting, but it did remedy some of the problems associated with online delivery.

Whilst individual members of the SLF attempted to facilitate discussions, these efforts were greatly assisted by the tutor. Within online sessions, tutors tended to adapt their teaching style to be more proactive in encouraging contributions through leading questions or suggesting potentially fruitful areas of discussion. This adaption of teaching style aided the SLF, encouraging us to work collaboratively whilst still successfully working through the legal problems generated

by the scenario. Furthermore, the leading questions asked by the tutor prompted me to do further independent research around the topic that consequently informed my understanding of the week's scenario. As I have experienced, the role of a tutor is a challenging one – especially during the restrictions in place due to COVID-19. Whilst it is a tutor's role to encourage productive academic conversations, it can be difficult to create an atmosphere of academic community and collaboration in a virtual environment. Despite this, tutors continued to deliver outstanding teaching and support in PBL sessions, in line with the YLS's intentional student-centred pedagogy.

The experience of online learning in a group setting has demonstrated the importance of developing and maintaining positive relationships with colleagues. As the use of online platforms may become part of normality, even after COVID–19 restrictions have ceased, I will ensure that I cultivate meaningful relationships with colleagues in order to encourage collaborative and friendly interaction both within and outside formal meetings.

## 2.3 PBL from the GTA Perspective

Whilst completing the LLM course, I delivered virtual interim sessions as a GTA. During this time, I observed that the levels of attendance and preparedness of students had not been disproportionately affected by the shift to online delivery; however, having previously attended interim sessions whilst completing my LLB, I did notice a reduction in participation. It appeared as though students were less forthcoming in sharing their initial research findings, which may, as I found during PBL for the LLM, have been a result of the lack of familiarity students had with their peers.

A further challenge I identified in my capacity as a GTA was the technological constraints some students faced. I was often unsure whether students were unable to contribute owing to having poor-quality microphones or webcams, or whether they needed further

support on the content being delivered. This was a challenge I had not anticipated having to face initially, but one I became more accustomed to as the academic year progressed. In the second term, after getting to know the students, I felt more confident in my ability to successfully encourage students to participate. I was able to recognise that some students felt more comfortable or, as a result of their technology, were only able to contribute using the 'chat' function on Zoom. Eventually, I encouraged the use of this function, which ultimately increased the level of participation within the interim sessions.

To understand the challenges that the students were facing, I drew upon my experiences as a YLS undergraduate student. For instance, whilst completing my LLB, I often struggled to identify the most appropriate legal sources, including textbooks and case law. Therefore, when delivering the interim sessions, I ensured students were completing their research using appropriate material and, where necessary, I would encourage students to consider alternative sources to enhance their independent research. Reflecting upon my own experiences also allowed me to grow in confidence in the role, as I could ensure I guided the students to develop their research skills. Additionally, I was able to share my own experiences with the students during the interim sessions to help them understand the purpose of PBL. It felt particularly rewarding when sharing this guidance with students actually encouraged participation and, on occasion, when individual students would thank me for my delivery of the interim session.

Working as a GTA has been an enjoyable experience and one I would recommend to other students considering further education at master's or PhD level. The role was enriching as I was able to work with the same groups of students throughout the academic year and could chart their development and confidence. I could also apply this journey at a personal level, as I learned to adapt my own style of teaching to accommodate the needs of others and work flexibly in a challenging and uncertain time. These skills will benefit me in my own future career in the legal sector.

## 3 The Dissertation Project

COVID–19 has undoubtedly had a significant impact upon the delivery of learning in higher education, but it has also noticeably affected independent research projects. At YLS, independent research tasks usually take the form of a dissertation, a project that spans the whole academic year, with a word limit of 10,000 words at undergraduate level and 12,000 at master's level. As both my undergraduate and master's dissertations were completed under restrictions caused by the COVID–19 pandemic, I have faced significant challenges in completing these research tasks. A substantial element of any dissertation project is the consultation and analysis of a range of sources, often made possible by access through the library facilities. However, in March 2020 the university library, along with all other study spaces across campus, closed and during that time access to those resources was inherently limited. The library reopened in July 2020 and, ever since, its capacity has been limited, with a requirement to book study spaces in advance.

Throughout my time as an undergraduate student, I used the library as a study space. Inevitably, when the library closed, this disrupted my working pattern and I found that my productivity was negatively impacted. Just as many of us were required to do, I adapted my home environment to accommodate my study needs. This was particularly challenging for me, as I was previously accustomed to having a separation of work and home life. Further, despite the increased provision of online resources and most key texts being available, I also found it difficult to adapt to consulting materials in an online form, rather than in hard copy.

These challenges I faced as a result of the COVID–19 restrictions meant I experienced some difficulties completing my undergraduate dissertation project. The project itself focussed on police negligence and the respective high levels of immunity from liability. In order to answer my research questions, I initially intended to take a sociolegal approach in one chapter, analysing the role of the police in society and its relation

to negligence in the sphere of tort. At the time, a sociolegal approach to research was largely unfamiliar to me and, as access to resources was difficult at this time, I did not feel confident continuing with this approach. Consequently, I felt it would be appropriate to adapt my dissertation project accordingly and I took a wholly doctrinal approach to answering the research question. Despite initially feeling disappointed that I wouldn't be able to pursue a project outside my comfort zone, it also highlighted to me the importance of being flexible and adaptable, particularly in challenging times.

My undergraduate dissertation was the first time I had conducted a larger-scale independent research project and, consequently, I found it challenging to effectively manage my time. For other assessments that I had completed as part of my undergraduate degree, I found that working in a collaborative environment in the library with other students who were experiencing the same process of writing and studying alleviated my anxieties and helped me to focus on my work. Due to the COVID–19 restrictions, this was not possible, and I completed most of my dissertation in isolation. As a result, I often struggled to motivate myself to complete the work, which was exacerbated by the lack of interaction with fellow students.

In order to successfully complete the dissertation, I developed skills to help me manage the workload. I initially felt overwhelmed by the scale of the project and found it difficult to envisage the project as a whole. To combat this, I was able to break the project down into smaller, more manageable components and would set myself smaller goals accordingly, such as reading and understanding a journal article. Once I had completed the task, I would feel a sense of achievement, which would motivate me to progress to another task. I carried this approach forward to my master's dissertation, which, despite being a larger project, felt more manageable than my undergraduate dissertation.

# 4 Conclusion

In this paper, I have considered the significant impacts that COVID–19 has had on the delivery of learning at YLS. Drawing upon my experiences as a master's student and a GTA, I have reflected upon the delivery of online teaching and learning in the context of PBL and an independent dissertation project. This paper has established that the value of in-person teaching and access to in-person resources cannot be understated, particularly in the context of YLS, where collaboration is at the core of its pedagogy. This was inevitably harder to replicate in an online setting which posed additional challenges for students and tutors respectively, including, in some cases, a reduction in participation. As we look to return to in-person delivery of teaching and learning in higher education, hopefully these challenges will be remedied.

Nevertheless, it has been important to recognise and reflect upon the valuable skills that have been acquired to successfully collaborate with others in an online environment. The development of these skills could be essential in the future, where we may see a hybrid approach to education, with some aspects of courses being delivered virtually and others in person. Considering this from the perspective of YLS, elements of both the LLB and LLM, including plenaries, could be successfully delivered in an online setting, with PBL, where possible, being delivered in person to achieve the desired collaboration.

# ‘They Were Supposed to Protect Us’: Analysing Patriarchy and the Work of Human Rights Defenders in Nigeria

Nabila Okino

**Abstract**

In challenging oppressive systems around the world, human rights defenders (HRDs) put themselves at risk of violence, as well as forms of mistreatment within their communities. HRDs working on women's rights issues, including initiatives against sexual and gender-based violence (SGBV), are often confronted with challenges in the public and private spheres that are perpetrated by state and non-state actors. Some challenges are grounded in patriarchal hegemony, which in turn informs the creation of family, institutional, and religious structures. This paper aims to understand how patriarchy impacts on the activities of HRDs working on SGBV initiatives. Grounded in the empirical research of defenders working in Nigeria, the paper undertakes a sociolegal analysis of patriarchy and its manifestations in religion, human rights law, and the human rights movement. It finds that patriarchy plays a critical role in shaping the work of HRDs and their ability to make an impact. Chief among the paper's conclusions is the finding that patriarchy plays a role in bolstering fundamentalist ideals, which shape societal perceptions on the role and status of women. This effectively informs institutional responses to the issue of SGBV and the work of HRDs. The paper also finds that, whilst patriarchal constraints persist, HRDs have found creative ways of navigating these challenges by negotiating patriarchal systems through the use of male HRDs and persistent lobbying. This ultimately facilitates entry into hard-to-reach spaces, such as the male-dominated legislature, communities, and religious institutions, while still positioning women defenders at the forefront of activities against SGBV.

# 1 Introduction

The patriarchal nature of Nigerian society creates and embeds structures of inequality, which puts men in dominant positions and women in subservient positions.[1] According to Allanana Makama, this inequality is manifested in 'discriminatory laws, socially constructed norms of femininity and masculinity, gender roles and stereotypes and unequal access to economic and political power'.[2] The cumulative effects of these constraints is a society where women's rights and bodily agency become secondary considerations to their male counterparts'. Sexual and gender-based violence (SGBV) constitutes one form of this inequality. General Recommendation No 35 of the Committee on the Elimination of Discrimination against Women (CEDAW) notes that SGBV is pervasive across a range of settings, from private and public spaces to technological spheres, and is perpetrated by 'states, intergovernmental organisations or non-state actors'.[3] This inequality has contributed to the prevalence of SGBV across all levels of society in Nigeria, such as the family, educational and religious settings, markets, and even the workplace.[4] The culture of shaming victims, which often leads to their ostracisation from communities, has further contributed to their silence.[5] This has, over time, hampered the mainstreaming of conversations about SGBV and prevented the enactment and enforcement of legislation that may address this pressing issue. The Nigerian state has systemically failed to institute adequate legislative, judicial, and executive structures to curb the prevalence of

[1] Godiya Allanana Makama, 'Patriarchy and Gender Inequality in Nigeria: The Way Forward' (2013) 9 European Scientific Journal 17, 116.
[2] The World Bank, 'Gender-Based Violence: An Analysis of the Implication for the Nigerian Women Project' (The World Bank 2019) 4.
[3] UN Committee on the Elimination of Discrimination Against Women (CEDAW), 'CEDAW General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No.19' (CEDAW/C/GC/35, 14 July 2017), para 20.
[4] The World Bank (n 2).
[5] The World Bank (n 2).

SGBV, and to prioritise the rights of women and hold perpetrators accountable. Human rights defenders (HRDs) continue to conduct sensitisation initiatives, organise protests, provide psychosocial and legal support to victims, and champion advocacy across all levels of government.[6] Through these activities, HRDs have provided safe spaces and support for victims of SGBV in Nigeria. Their activism has also led to some legislative change and emboldened victims to speak about their experiences.[7] In the course of their work, however, HRDs working on SGBV encounter multilayered obstacles that emanate from social, family, and state structures, cultural practices, and religious institutions in Nigeria. This can often lead to HRDs being physically and verbally abused, ostracised from their communities, disowned, and in some instances targeted by smear campaigns perpetrated by both state and non-state actors.[8] These challenges stem from patriarchal ideals that limit how HRDs, especially women human rights defenders (WHRDs), can exercise their agency — thereby impacting on their ability to conduct their activities.[9]

Recognising the pivotal role HRDs play in the protection spectrum, this paper seeks to understand how patriarchy influences the activities of HRDs working on SGBV initiatives in Nigeria. Drawing upon in-depth qualitative interviewing and broad-based interdisciplinary research, the

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[6] 'Human rights defender' is a term used to describe people who, individually or with others, act to promote or protect human rights in a peaceful manner; they can be individuals and non-governmental organisations (NGOs). See Cheluchi Onyemelukwe, 'Legislation of Violence Against Women: A Critical Analysis of Nigeria's Violence Against Persons (Prohibitions) Act 2015' (2016) 5 DePaul Journal on Women Gender and the Law 3; Fakhrriyyah Hashim, 'How Nigeria's Conservative Northern Region Came to Terms with Its Me Too Movement' (*Quartz Africa*, 22 July 2019) <https://qz.com/africa/1671204/nigeria-metoo-movement-shook-up-north-with-arewametoo/> accessed 24 August 2020.

[7] ibid.

[8] Michel Forst, 'Report on the Situation of Women Human Rights Defenders' (A/HRC/40/60, Human Rights Council, 25 February–22 March 2019).

[9] ibid para 6. Within the context of this paper, the protection spectrum includes human rights litigation, advocacy and the formation of human rights norms and institutions at the domestic, regional and international levels.

following discussions examine the concept of patriarchy, its role in shaping human rights law, and how it influences activities within the human rights movement. The paper commences with an introduction to the background of SGBV in Nigeria and the role that HRDs have come to play in filling practice and protection gaps left by institutional inaction. Following this, the discussion will engage with critical perspectives on the contested concept of patriarchy that are set forth in the social sciences scholarship. The literature will analyse cross-disciplinary, scholarly, and practitioner works on patriarchy, how it plays out within the human rights project, and its threat to the security and wellbeing of HRDs. Not considered in the following literature review, however, is literature on patriarchal communities. This is due to the limited research conducted in this field and specifically on HRDs working within the Nigerian context. In providing deeper context of the activities and challenges of HRDs in Nigeria, this paper briefly outlines the HRD framework and Nigeria's laws, policies, and international obligations. The paper will conclude by summarising the research findings, which highlight the role of cultural and religious fundamentalism in shaping societal perceptions and institutional responses to the activities of HRDs working on SGBV issues. It will also discuss how HRDs navigate patriarchy through compromise and male allyship.

As part of the empirical research, seven WHRDs and three male HRDs (MHRDs) were interviewed. Through engagement with the literature and drawing from the experiences of these HRDs, this paper therefore contributes to the limited but growing research on the activities of HRDs by examining and understanding the constraints posed by patriarchy, which may aid the effectiveness of the activities of HRDs working on initiatives against SGBV in Nigeria.

# 2 Literature Review

The opening section of this paper discussed how the activities of HRDs can put them at risk of violence and violations of their human rights. The literature considers these challenges at length, most often focussing on the analysis of patriarchy and its relationship with religion, human rights law, and the human rights movement. It discusses how these challenges can lead to the shrinking of the civic space, which can create an environment where HRDs are vilified and their activities criminalised.[10] HRDs face a range of intersecting challenges that are based on gender, stereotypical notions of femininity and masculinity, culture, and religion. Shaped by a range of factors such as community, ethno-religious institutions, and public structures, some of the challenges and push-back that HRDs encounter stem from the patriarchal ideologies that people continuously interface with in their everyday lives. As this section illustrates, patriarchal systems, both social and legal, go beyond the creation of oppressive systems and structures, extending to stifling and supressing voices and initiatives fighting for women's rights.

## 2.1 Understanding Patriarchy

Patriarchy has been subjected to various conceptual interpretations at different points in history and in different socio-spatial spheres.[11] In its

[10] Civic Space is the political, legislative, social, and economic environment that enables citizens to come together, share their interests and concerns and act individually and collectively to influence and shape the policymaking (https://civicspacewatch.eu/what-is-civic-space/). Michel Forst, 'World Report on the Situation of Human Rights Defenders' (United Nations Special Rapporteur on the Situation of Human Rights Defenders, December 2018) 8; Editorial, 'Report of the Challenges Faced by Women in Civil Society in Nigeria' (*CIVICUS*, March 2011) <https://www.civicus.org/view/media/Challenges_Faced_by_Women_in_Civil_Society_in_Africa.pdf> accessed 24 February 2021.

[11] Fionnuala Ní Aoláin, 'Women, Security, and the Patriarchy of Internationalized Transitional Justice' (2009) 31 HRQ 4, 1060.

earliest socialised iteration, patriarchy was primarily understood as domination by the father, grandfather, son, or other older male figure over women or younger men in a household or family.[12] Men were deemed to be 'naturally' placed to function as heads of the family, a position that has been shored up by socio-economic factors, culture, and religious constructs.[13] The entrenched societal perception of men as protectors and providers has extended to control over familial property, decision-making and even the sexuality and reproductive rights of women.[14] In contrast, as Chisale notes, women's roles in the family stereotypically centre around catering, nurturing the family, and satisfying male sexual desires.[15]

In her influential work *Theorising Patriarchy*, Walby defines patriarchy as 'a system of social structures and practices in which men dominate, oppress and exploit women'.[16] This definition is notable for its conceptualisation of patriarchy as extending beyond the household into wider societal structures, which inform the treatment and status of the women within them. Scholars such as Benstead and Hunnicutt note the significance of building upon the rich explorations of previous works such as *Theorising Patriarchy*. Benstead argues that the multidimensionality of patriarchy, which has metamorphosed across different epochs, makes it particularly difficult to explain various mechanisms sustaining gender inequality, hence the importance of reflecting on previous works.[17] Thus, Hunnicutt's theorisation of patriarchy as spanning the macro and micro levels is crucial in gaining

[12] Sinenhlanhla Sithulisiwe Chisale, 'Patriarchy and Resistance: A Feminist Symbolic Interactionist Perspective of Highly Educated Married Black Women' (MA thesis, University of South Africa 2017), 14.
[13] Reshma Sathiparsad, Myra Taylor, and Siyabonga Dlamini, 'Patriarchy and Family Life: Alternative Views of Male Youth in Rural South Africa' (2008) 22 Agenda 76.
[14] Chisale (n 12) 14.
[15] Chisale (n 12) 14.
[16] Sylvia Walby, *Theorising Patriarchy* (Basil-Blackwell 1990), 20.
[17] Lindsay J Benstead, 'Conceptualizing and Measuring Patriarchy: The Importance of Feminist Theory' [2020] Mediterranean Politics 5.

a nuanced understanding of patriarchy's functioning.[18] The macro level of society encompasses 'bureaucracies, government, law, markets and religion and the micro level involves interactions, families, organisations, and patterned behaviours between individuals'. [19] However, notwithstanding the space in which it exists, at patriarchy's core lies the inequality that exists between men and women.[20] This has been systematised to such an extent that women are constricted and oppressed within the spaces they find themselves.[21] It is important to note that patriarchy is not geographically bound; it exists in both western and African societies to varying degrees and in different forms. However, Tamale argues that, although pre-colonial Africa was not immune to some forms of oppression of women, the prevalence and institutionalisation of patriarchy within African societies is a consequence of colonialism. She notes that the influence of religions that are perceived to exalt men over women have also contributed to entrenching patriarchal ideals in African societies.[22] The preeminent role religion plays in most African countries necessitates a greater analysis of its relationship with patriarchy and how it impacts on the work of HRDs.

### 2.2.1 Patriarchy and Religion

Religion has a prominent place in African societies, influencing culture, shaping legislation, and playing a role in developing a community's ideals and values. [23] Its practice predominantly takes the form of

[18] Gwen Hunnicutt, 'Varieties of Patriarchy and Violence against Women' (2009) 15 Violence Against Women 5.
[19] ibid.
[20] Sylvia Walby, 'The "Declining Significance" and the "Changing Forms" of Patriarchy?' in Valentine Moghadam (ed) *Patriarchy and Development: Women's Position in the Twentieth Century* (OUP 1996).
[21] ibid.
[22] Sylvia Tamale, 'Women's Sexuality as a Site of Control & Resistance: Views on the African Context' (Paper Presented at the International Conference on Bride Price Makerere University, Uganda, 16–18 February 2004).
[23] Sylvia Tamale, 'Exploring the Contours of African Sexualities: Religion, Law and Power' (2014) 14 AHRLJ 152.

Christianity, Islam, and, in some cases, the worship of traditional deities. Examining the existence and influence of patriarchy in the practice of religion provides a nuanced understanding of how societal structures impact upon the rights of women. The literature discusses how this influence is predominantly manifested in the practice of the monotheistic religions. Chisale, for example, argues that, in societies where harmful cultural practices and 'religious misperceptions' exist, those who challenge patriarchal powers are often put in a precarious position.[24] Van der Vyver, however, cautions against generalising religions as inherently patriarchal, noting that adherents of monotheistic religions may discount notions of a patriarchal bias or inequality within their religion.[25] Regardless of such perceptions, analysis of monotheistic Abrahamic religious practices shows an overwhelming domination of men in places of worship — as religious leaders and teachers, as well as in the organisation of religious spaces.[26] As a consequence of occupying such positions of authority, men are often afforded a monopoly in the interpretation of religious doctrines and in the practice of the religion itself. In communities where the subjugation of women exists, either as a result of colonial vestiges or cultural beliefs, those monopolising interpretation may construe religious texts in ways that become harmful to women. This, alongside challenges such as poverty, conflict, discrimination, and economic inequality, compounds the disadvantaged position of women.[27] The position of women in so-called religious societies often affects the lives and work of both male and female HRDs, because they are seen as challenging the status quo. The United Nations Special Rapporteur on Violence Against Women noted that WHRDs can be subjected to 'corrective'

[24] Chisale (n 12) 14.
[25] Johan D van der Vyver, 'Religious Fundamentalism and Human Rights' (1996) 50 J Int'l Aff 1, 21.
[26] Pamela J Prickett, 'Negotiating Gendered Religious Space: The Particularities of Patriarchy in an African American Mosque' (2015) 29 Gender & Society 1, 54.
[27] Report submitted by the UN Special Rapporteur on Violence Against Women, Yakin Erturk to the 61st session of the Commission on Human Rights (E.CN.4/2005/72, 17 January 2005) para 22) citing Coomaraswamy, A/CONF.189/PC.3/5, para 2.

physical and sexual violence in an attempt to 'place them back' into socially constructed gender roles.[28] MHRDs who advocate for women's rights also encounter some similar challenges. They experience physical violence, vilification by members of their communities, and smear campaigns.[29] In some cases, their masculinity is questioned and measured through the lens of stereotyped and socially constructed notions of masculinity.[30] This section has examined the effect of patriarchal interpretations of religious texts and the practice of religion on the activities of HRDs. Attention now turns to consider other iterations of patriarchy found within international human rights law and the human rights movement.

## 2.2 Patriarchy within International Human Rights Law and the Human Rights Movement

Before discussing the ways in which patriarchal norms and values manifest in the human rights movement, it is pertinent to understand how patriarchal norms have shaped the formation of international human rights law (IHRL) and its application at various scalar levels. In her pivotal monograph *Violence against Women under International Human Rights Law*, Edwards posits that IHRL 'privileges the realities of men's lives while marginalising those of women'.[31] In making this assertion, the author highlights that it was only in the mid-1990s that rape, forced pregnancy, and other forms of gender-based violence were recognised as war crimes and crimes against humanity.[32] Drawing upon this apparent inequality in the recognition of crimes that affect women at the international level, Edwards presents the following four criticisms of the wider system: 1) the exclusion of women in the formation of laws

[28] ibid.
[29] Forst, 'World Report on the Situation of Human Rights Defenders' (n 10) 8.
[30] Editorial, *Being a Man in Nigeria: Perceptions and Realities* (Voices 4 Change Nigeria 2015).
[31] Alice Edwards, *Women Under International Human Rights Law* (CUP 2011), 7.
[32] ibid.

and regulatory mechanisms; 2) the marginalisation of concerns that affect women; 3) criticism of the private and public dichotomy of international law; and 4) the essentialisation of women's experiences.[33] Although all four criticisms touch on issues raised in this paper, the first two criticisms are discussed in turn because of the length of this paper.

The first criticism articulated by Edwards centres on the omission of women's voices and experiences in the formation of IHRL.[34] Men have dominated politically at the international and regional levels, playing influential roles in 'negotiating, developing, articulating, drafting, monitoring, implementing, and enforcing human rights norms'.[35] This has led to a delay in prioritising laws and policies that specifically concern women. Although CEDAW exists at the international level, more specific policy documents such as the Declaration on the Elimination of Violence against Women (DEVAW) does not have the binding legal authority of a convention, thus showing a lack of prioritisation of the prevalent issue of violence against women. Moreover, the state-centric focus of human rights bodies such as the United Nations (UN) and the African Union (AU) make it fundamentally difficult for women's voices to inform the creation of laws and policies that are responsive to the challenges they encounter.[36] This is because state parties play a key role in the decision-making process, and men lead most states. This has a bearing on the substance, language, and types of laws and policies created at the regional level.[37] Edwards, drawing on Kaufman and Lindquist's *Critiquing Gender Neutral Treaty Language*, highlights that:

[33] ibid.
[34] ibid 37.
[35] ibid 44.
[36] Jaclyn Grace, 'The Human Rights Patriarchy: Masculine Liberal Subjects and the Paradox of Universalism' (AMES 450S: Human Rights in Islam, Duke University, 29 April 2013), 6.
[37] ibid.

> When the interpretation of laws is undertaken by men … or by women who have been socialised to accept the male elite's norms and interests as their own, women's lives within the law are constructed from a male-centred perspective.[38]

The nature of such interpretations is apparent from the international level to the regional and domestic levels, where women are again typically under-represented at the decision-making table. This inadvertently leads to the unequal prioritisation of issues that specifically affect women, as opposed to those that affect men.[39] Edwards's second criticism regarding the privileging of men's lives and the marginalisation of concerns that affect women in the functioning of IHRL, as illustrated in the normative prioritisation of civil and political rights, exemplifies this point.[40] Charlesworth and Chinkin posit that:

> Human rights law has put primacy on civil and political rights (CPR) which most times focusses on men and their relationship with the state. Economic, Social and Cultural Rights (ESCR), although state responsibility, impacts more on women and their role in the private sphere.[41]

Where states, at the international and domestic levels, continue to avoid legislating and enforcing both CPR and ESCR in a way that encompasses the realities of both men and women, women's rights under IHRL will continue to be excluded. As advanced by Edwards, these criticisms demonstrate the pervasiveness and multidimensionality of patriarchy. They also show how patriarchy exists not only in systems and societies that are considered oppressive but also within the formal 'protective spaces' that elucidate, promote, and protect universal standards of human rights. The inequality in the prioritisation of rights

[38] Edwards (n 31) 46.
[39] Edwards (n 31) 46.
[40] Edwards (n 31) 37.
[41] Hilary Charlesworth and Christine Chinkin, 'Gender of Jus Cogens' (1993) 15(1) HRQ 69.

transcends the substance of IHRL and the problematic structuring of systems of IHRL. It may also manifest in the activities of the human rights movement in different ways, from the way cases are handled and issues of discrimination to the various forms of abuse women encounter within the workplace.

### 2.2.1 Patriarchy within the Human Rights Movement

International human rights norms, policies, and practices contribute to shaping laws and practices at the regional and domestic levels.[42] This means that a lack of prioritisation of women's rights at the international level can play a role in determining its prioritisation at the domestic level. Within the human rights movement, NGOs have been criticised for their approach in the implementation of some of their activities and campaigns. This includes issues of discrimination and the absence of gender and cultural sensitivity. There have also been criticisms about the positioning of WHRDs within structured work environments, where their work is sidelined, their opinions are ignored, and they are prevented from taking up leadership positions. This paper now discusses a recent example of patriarchy within the human rights movement.

In 2018, the NGO Safe Spaces published an open letter to Amnesty International Netherlands. Here, Safe Spaces raised concerns about the glamorisation and sexualisation of the experiences of refugee women of colour in Amnesty International's publications. A recent refugee campaign by Amnesty that showcased a woman ‘posing alluringly on a bed of life jackets’ prompted Safe Space to write:

> The simple and inconvenient fact that has been erased by Amnesty Netherlands is that many black women and women and girls of colour who constitute the majority of the world's refugees exist in contexts where their bodies do not belong to

[42] Anne-Marie Slaughter and William Burke-White, ‘The Future of International Law Is Domestic (or the European Way of Law)’ (2006) 47(2) Harv Int'l LJ 327.

them.[43]

The action raised concerns about the 'harmful, racist and sexist portrayal of women, causing patriarchal harm and damage to women from the global south'.[44] Aoláin observes that there is a lack of focus on 'dissecting the patriarchy inherent in international institutions' and a masculinity bias, which prioritises the lives and experiences of men, that may be inherent in the organisations and their representatives.[45] The publication by Amnesty indicates how human rights organisations can be participatory in the suppression of women's rights, where a gender-sensitive lens is not adopted in the implementation of projects. Also, where the composition of organisations does not include diverse women, the portrayal of women's lives and experiences may be misrepresented or, as in the case of Amnesty Netherlands, may become 'harmful, racist and sexist'.

As Grace presciently observes, the fact that an organisation presents itself as human rights-focussed does not automatically preclude the existence of patriarchal biases.[46] Initiatives and approaches by human rights organisations geared towards dismantling patriarchy in social structures must be adopted and implemented within human rights spaces. One way in which this may be achieved is through the inclusion of more women in organisational leadership positions, as well as the adoption of a gender-sensitive lens in the initiation and implementations of projects. Furthermore, action must be taken where WHRDs are working in structured, professional organisational environments, as it is documented that women are more likely to

[43] Editorial, 'An Open Letter to Amnesty International from NGO Safe Space' (*Media Diversified*, 19 December 2018) <https://mediadiversified.org/2018/12/19/an-open-letter-to-amnesty-international-from-ngo-safe-space/> accessed 1 July 2020.
[44] ibid.
[45] Fionnuala Ní Aoláin, 'Women, Security, and the Patriarchy of Internationalized Transitional Justice' (2009) 31(4) HRQ 1055.
[46] Grace (n 36).

experience indices of patriarchy than independent HRDs.[47] In a policy brief on gender, intersectionality, and security, Nah and Dwyer Smith document a number of instances where WHRDs were subjected to violence and discrimination within NGOs The authors highlight that WHRDs are abused and harassed, with their work sidelined and not given due recognition.[48] These challenges that WHRDs confront in the workplace are illustrations of Grace's contention, where she notes that the focus of human rights law on the masculine subject also exists in human rights institutions and organisations. Where these patriarchal leanings and masculinity biases within the law and practice of the human rights system are not addressed, they may become inherently discriminatory,[49] thereby reinforcing existing systems of inequality and creating temporary solutions to the challenges women face.

### 2.2.2 Negotiating Patriarchy: MHRDs as 'Gatekeepers'

The literature notes an increasing presence of men around the world working either alongside or independently of women's rights organisations on gender equality matters and the elimination of violence against women.[50] In some instances, where patriarchy is prevalent in social, cultural, and political structures, the involvement of men is essential to WHRDs' activities and campaigns. Mwiine assesses the motivation for this, suggesting that involving men in the work of WHRDs can be a useful a tool in addressing resistance to issues of gender equality.[51] Researching gender equality before Uganda's parliament, Mwiine reports an interview with a women's rights activist who noted that 'when a man brings an issue of gender to parliamentary

[47] Alice M Nah and Hannah Dwyer Smith, 'Gender, Intersectionality and Security' (Human Rights Defender Hub Policy Brief 6, Centre for Applied Human Rights, University of York, 2018).
[48] ibid.
[49] ibid.
[50] Amon Ashaba Mwiine, 'Negotiating Patriarchy? Exploring the Ambiguities of the Narratives on "Male Champions" of Gender Equality in Uganda Parliament' (2019) 33 Agenda 1.
[51] ibid 110.

debate, it is taken seriously by fellow males as well as female MPs'.[52] This practice of men functioning as 'gatekeepers' in the implementation of women's rights initiatives is arguably a manifestation of Nnaemeka's theory of 'nego-feminism'. In her monograph, the author discusses the importance of 'shared values … and principles of negotiations, give and take, compromise and balance in African Cultures'.[53] Distinguishing western feminism from African feminism, Nnaemeka goes on to highlight that 'African feminism challenges through negotiation and compromise. It knows when, where and how to negotiate with or negotiate around patriarchy in different contexts.'[54] This sense of navigating around patriarchy recognises that progress will not be immediately achieved by directly challenging oppressive systems. Therefore, in pursuit of the dismantling of patriarchal structures, concessions within those structures first have to be made. However, theorisations such as Nnaemeka's that encourage compromise have been criticised, especially where such compromise places men at the forefront of women's rights initiatives. Shamim Meer cautions that in doing so 'men are once again in charge — only this time they are in charge of women's liberation struggles'.[55] A consequent marginalisation of women's voices and the loss of their agency has also been highlighted. Mwiine suggests that this may lead to the institutionalisation of a system 'where men are now expected to speak on behalf of women'.[56] For progress to be made, however, partnerships and concessions are often necessary. Where men take centre stage in conversations on women's rights and SGBV specifically, it is likely going to create a vicious cycle of oppression where women's voices, experiences and contributions continue to go unheard.

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[52] ibid 112.
[53] Obioma Nnaemeka, 'Nego-Feminism: Theorising, Practicing and Pruning African Ways' (2004) 29(2) Signs 377.
[54] ibid 378.
[55] Shamim Meer, 'Place of Men and Men's Organisations in the Struggle for Gender Equality' (Open Debate, 22 November 2011).
[56] Mwiine (n 50) 109.

## 2.3 'The Personal Is Political': Analysing Public/Private Patriarchy

In understanding how patriarchy impacts on the work of HRDs, it is important to analyse how various aspects of patriarchy operate and intersect within the private and public sphere. Walby's explanation of private patriarchy focusses on the domestication of women by limiting their 'function' to household labour and the rearing of children, effectively keeping women occupied and away from public spaces.[57] Public patriarchy is accordingly different because it is 'based on public structures other than the domestic or family space'.[58] Walby goes on to differentiate between private and public forms of patriarchy based on the 'relations between the structure and the institutional form of each structure' — with the former being exclusionary and latter segregationist.[59] However, the research of this paper indicates that private and public realms of patriarchy are cyclical, with different ends feeding into each other, as opposed to conceptualising them as mutually exclusive. This discussion looks beyond the private towards the broader consequences of patriarchy. Feminist theorists have criticised this differentiation of patriarchy on the basis that the private or domestic does not exist in isolation of the public.[60] Drawing on the work of Okin, Romany argues that the 'public/private dichotomy ignores the political character of power unequally distributed in family life, [which] obscures the political nature of private life'.[61] One implication of the political nature of the private sphere is that states configure it in such a way that perpetuates and maintains the subjugation of women. This can be done through the absence of legislation that protects women against various forms of violence and/or discriminatory laws and policies,

[57] Walby, *Theorising Patriarchy* (n 16) 178.
[58] Walby, *Theorising Patriarchy* (n 16).
[59] Walby, *Theorising Patriarchy* (n 16).
[60] Susan M Okin, *Justice, Gender and Family* (Basic Books 1989); Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 Harv Hum Rts J 8; Edwards (n 31).
[61] Romany (n 60) 100.

which restrict women's participation in work life. This has the capacity to affirm and reinforce male domination in the private sphere, regardless of its detriments to the lives of women within them. Romany, for example, suggests that 'the family … remains a sanctuary of privacy into which one can retreat to avoid state regulation. As long as the family remains the consolidating unit of male hierarchy, the state can remain neutral towards it'.[62] In discussing the public–private divide in the interpretation of human rights, Lajoie notes that 'rights violations that take place in the "private sphere" are not traditionally addressed in human rights discourse as they are viewed as outside of the realm of state accountability'.[63] The creation of IHRL is a public endeavour and consequently seen as largely controlled by men.[64] Grace observes that 'international law-making institutions have always been, and continue to be, dominated by men, while international human rights law has developed to reflect the experiences of men and largely to exclude those of women'.[65] Therefore, where the international regime does not prioritise 'private issues', which disproportionately affect women, states may take advantage of legislative and regulatory gaps to reinforce patriarchal culture or traditions.[66]

## 3 Setting the Context

Attention now turns to consider the wider context of the human rights defender paradigm and concomitant state obligations at the international and regional levels. Following this, an analysis of Nigeria's political and legal system and its human rights situation is provided in order to contextualise the legal realities within which Nigerian HRDs operate. The section concludes by discussing a number

[62] Romany (n 60) 104.
[63] Amie Lajoie, 'Challenging Assumptions of Vulnerability: The Significance in the Work, Lives and Identities of Women Human Rights Defenders' (PhD thesis, National University of Ireland Galway 2018), 10.
[64] Grace (n 36) 6.
[65] Grace (n 36).
[66] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester UP 2000), 57.

of Nigeria's laws, policies, and practices that directly influence the work of HRDs and ultimately considers whether the state has complied with its obligations to create an enabling environment for HRDs.

## 3.1 The Human Rights Defender Paradigm

Throughout history, individuals and groups have promoted equality, human rights, and social justice. From the anti-slavery movement to the struggle against colonialism and the recognition of women's rights as human rights, the importance of courageous people challenging 'accepted norms' and confronting systems of injustice cannot be overemphasised. The UN's 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[67] (hereafter the Declaration on HRDs) formally recognises the role of individuals and groups as critical stakeholders in the promotion and protection of human rights.[68] Whilst non-binding in its nature, the Declaration on HRDs draws upon rights and obligations enshrined in legally binding instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and Peoples' Rights (AfCHPR).[69] The central tenets of the Declaration on HRDs are translated at the regional level through declarations and resolutions such as the Grand Bay Declaration and Plan of Action, the Kigali Declaration, and the

[67] The declaration was adopted by consensus by the UN General Assembly exemplifying the state's commitment to its implementation.

[68] Luis Enrique Eguren Fernández, and Champa Patel, 'Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders' (2015) 19(7) IJHR 896, 897.

[69] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, UNTS 993); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (AfCHPR).

Resolution on the Protection of Human Rights Defenders in Africa, among others.[70] These mechanisms also enjoin African states to take appropriate measures to adopt the Declaration's provisions and provide an environment conducive to HRDs carrying out their activities.

## 3.2 Nigeria as a Case Study

Nigeria is a country of more than 193 million people, comprising over 200 ethnic groups spread across 36 states.[71] Its historic and contemporary heterogeneity, which has intermittently led to political crises and ethnic strife, rendered federalism a suitable political model after colonialism.[72] Nigeria operates a pluralist legal system, with statutory law coexisting with Shariah law (Islamic law) in the north and customary law in both the north and south.[73] With regard to the transposition of international and regional treaties, the country's dualist nature requires domestication by Acts of the National Assembly before such Acts can have national effect.[74] Laws enacted federally become applicable at the state level when domesticated by respective state Houses of Assembly. This legislative process has led to uneven progress across states, especially in respect of laws and policies on human rights and women's rights. This is further complicated by the influence of

[70] Grand Bay (Mauritius) Declaration and Plan of Action 1999, para 19 <https://www.achpr.org/legalinstruments/detail?id=44> accessed 23 July 2020; Kigali Declaration 2003, para 28 <https://www.achpr.org/legalinstruments/detail?id=39> accessed 22 July 2020; Resolution 69 (XXXV) 04 on the Protection of Human Rights Defenders in Africa; Resolution 119 (XXXXII) 07 on the Situation of Human Rights Defenders in Africa; Resolution 196 (L) 11 on Human Rights Defenders in Africa.

[71] National Bureau of Statistics, '2017 Demographic Statistics Bulletin' (May 2018), 12; William O Mbamalu, 'Revisiting Shari'ah, Democracy and Human Rights in Nigeria' (2012) 46(2) In die Skriflig/In Luce Verbi 1.

[72] Said Adejumobi, 'Civil Society and Federalism in Nigeria' (2004) 4(2) Regional & Federal Studies 214.

[73] ibid.

[74] ibid.

religion and culture on the type of laws enacted and prioritised by states.[75]

Nigeria has had a complex relationship with human rights. Whilst the country has ratified all nine core human rights treaties, the protection and prioritisation of human rights at the national level has not received as much attention.[76] The introductory section of this paper explained that SGBV is one of the major challenges women and girls confront in Nigeria. The inadequacy of judicial, executive, and legislative mechanisms in curbing its prevalence is primarily rooted in the inequality that exists between men and women. Both institutionally and socially, women's rights have not been prioritised, leading to an absence of 'gender equality mainstreaming' in the enforcement and application of laws and policies.[77] These challenges are further magnified by patriarchal interpretations of religious texts that are prevalent in both the northern and southern parts of Nigeria. In an attempt to protect victims of abuse, in 2015 the National Assembly passed the Violence Against Persons (Prohibitions) Act (VAPP Act).[78] Whilst the Act does not address the issue of gender inequality caused by patriarchy, it remains a significant piece of legislation due to its prioritisation of SGBV. It does this by providing a broad definition for rape, expanding acts that constitute SGBV, and increasing the punishment for various forms of SGBV, among other salient provisions.[79] Despite the importance of the Act in protecting the rights of women, the VAPP Act

[75] Rebecca Zahn, 'Human Rights in the Plural Legal System of Nigeria' (2009) 1 Edin Student LR 66, 83.
[76] United Nations Office of the High Commissioner for Human Rights, 'Status of Ratification' <https://indicators.ohchr.org/> accessed 30 June 2020; Nlerum S Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospect' (2005) 3(2) SURIJHR 95.
[77] Nkiru Igbelina-Igbokwe, 'Contextualizing Gender-Based Violence within Patriarchy in Nigeria' (*Pambazuka*, 2013) <https://www.pambazuka.org/gender-minorities/contextualizing-gender-based-violence-within-patriarchy-nigeria> accessed 20 April 2020.
[78] Violence Against Persons (Prohibition) Act 2015 (VAPP Act).
[79] ibid.

has not been consistently domesticated across the country. Since the Act's enactment in 2015, only 15 out of the 36 states in the country have domesticated the VAPP.[80] Of those states yet to domesticate its provisions, over half are located in the northern states.[81] Possible explanations for states' reluctance are put forward in the literature. The World Bank, for example, notes that 'the main barriers to the domestication of [this law] are resistance based on entrenched norms of gender inequity and opposition to concepts around equality and rights that are perceived as foreign'.[82] Some states become reluctant to domesticate laws that promote equality and the protection of women where it is thought that such laws are against cultural and religious beliefs.[83] Interestingly, states' reluctance to domesticate what are perceived as 'foreign norms or beliefs' is only raised when the issue of women's rights and protection arises.

## 3.3 National Laws, Policies, and Practices

International and regional mechanisms outlining the nature of states' obligations to HRDs, including the Declaration on HRDs, have not been implemented in any meaningful way in Nigeria.[84] The enjoyment of rights to freedom of assembly, association, and expression — some of the key rights underpinning the work of HRDs — are illustrative of this. These rights are nominally protected by central legal mechanisms of Nigeria. Chapter IV of the Constitution of the Federal Republic of

[80] Rule of Law and Empowerment Initiative, 'VAPP Tracker' (*Partners Nigeria*) <https://www.partnersnigeria.org/vapp-tracker/> accessed 22 July 2020.
[81] Seun Durojaiye, 'Hall of Shame: 23 States Yet to Pass Anti-Rape Law, the Majority Are from the North' (*ICIR Nigeria*, 12 June 2020) <https://www.icirnigeria.org/hall-of-shame-23-states-yet-to-pass-anti-rape-law-majority-are-from-the-north/> accessed 22 July 2020.
[82] Editorial, 'Gender-Based Violence: An Analysis of the Implication for the Nigerian Women Project' (The World Bank 2019), 8.
[83] Cheluchi Onyemelukwe, 'How Well Does the Law Protect Women at Home? An Analysis of Nigeria's Domestic Violence Legislation' (2018) 60 Int JLM 2.
[84] Zahn (n 75).

Nigeria, the AfCHPR,[85] and the ICCPR, to which Nigeria is also a state party, all guarantee these rights. Although qualified in their nature, in some instances pieces of local legislation in Nigeria have been used to curtail these rights.[86] Freedom of assembly, for example, is regulated by the Public Order Act, which requires individuals or groups to request a permit before they can carry out protests.[87] The permit is usually issued by the police force, meaning that the process is often vulnerable to abuse. The discretion given to the police may lead to the arbitrary use of power and the infringement of people's fundamental human rights in Nigeria. In the everyday work of HRDs, this may manifest in the following ways. When a protest is taking place, state actors opposed to the protest may give directives for the protests to be disrupted. HRDs use protests as a tool to challenge government policies, protection gaps, and the infringement of people's rights. Therefore, the disruption of their activities contributes to the shrinking of the civic space and prevents them from holding government officials accountable. The role of HRDs and NGOs in challenging oppressive government systems/policies is important because of their critical function of stepping into protection gaps created by the state's inaction. Non-state actors are therefore actively participating in monitoring, advocating, and bringing more attention to human rights issues more broadly. With regard to continued efforts to eradicate SGBV, organisations have created shelters and provided legal, medical, and psychosocial support to victims.[88] These organisations have also participated in advocating for more progressive laws against SGBV and the strengthening of institutional support, by organising protests, educational initiatives, and

[85] Constitution of the Federal Republic of Nigeria (as amended) 1999, s 39–40; AfCHPR, arts 9(2), 10–11.
[86] This means they can be restricted on the grounds of public order, health, security, and the rights of others.
[87] Public Order Act 1979, sch 1(2).
[88] The World Bank (n 82).

legislative and social media campaigns.[89] However, it has also placed them at the receiving end of some backlash from both state and non-state actors. Whilst there are no specific laws criminalising HRD advocacy on SGBV, actors of the state play a role in restricting activities such as protests, or inflicting physical harm on protesters.[90] HRDs are also met with vitriol from wider community members such as religious actors and institutions that believe HRDs are acting against the prevailing religion or culture. Whilst preceding sections have outlined the theoretical basis for this paper, it is pertinent at this point to contextualise these discussions through examination of the experiences of HRDs working on SGBV initiatives in Nigeria collected through primary research.

# 4 Experiences of HRDs Working on SGBV Initiatives in Nigeria

Grounded in engagement with the literature, this section thematically analyses data gathered through extensive qualitative research. Chief among the conclusions drawn from the research are the constraints on the activities of HRDs motivated by cultural and religious fundamentalism in shaping societal perceptions on SGBV, and the creation of oppressive institutions. As discussed in previous sections, regardless of the challenges patriarchy presents, HRDs working on these issues have made some progress in the form of policy and legal reform, education, and the provision of services and support for victims of SGBV.[91] Also, the approach of HRDs in navigating and negotiating patriarchy in the course of their work will be analysed.

[89] Corlett Letjolane, Connie Nawaigo, and Andrea Rocca, 'Nigeria: Defending Human Rights: Not Everywhere, Not Every Right' (2010) International Fact-Finding Mission, 25.
[90] ibid.
[91] Onyemelukwe, 'Legislation of Violence Against Women' (n 6).

### 4.1 The Constraints Presented by Cultural and Religious Fundamentalism

Culture is often understood as a value system, a way of living and thinking shared by people in a particular society or community.[92] Ssenyonjo notes that African societies are considered 'traditional', and as holding sets of values and beliefs separate from western cultures.[93] The significance of cultural values is enshrined and illustrated in Article 29(1) of the AfCHPR, which underscores the importance of preserving:

> Positive African cultural values in [the] relationship with other member states in the spirit of tolerance, dialogue and consultation and … to contribute to the promotion of the moral wellbeing of society.[94]

Previous discussions have sought to highlight how the construction and interpretation of culture and religions can be male-centric and largely patriarchal.[95] This perception was reflected in the responses of research participants. Sani Muhammad, a MHRD, explained how the perception that men have to be strong and tough, perpetuated by cultural norms that traditionally position men as superior, is one factor contributing to the prevalence of SGBV in Nigeria. This can be exacerbated by the misinterpretation of Quranic provisions in different parts of Nigeria, which enjoin men to 'protect and maintain women'.[96] Muhammad's point strongly reflects a central tenet of feminist scholarship, which emphasises the socially constructed nature of patriarchy, informed by the male-centric hierarchies that exist within the family, in

[92] Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51(1) JAL 39, 50.
[93] ibid 51.
[94] Article 29(1), African Charter on Human and Peoples' Rights (adopted 27 June 1981, art 29(1) (entered into force 21 October 1986).
[95] Hunnicutt (n 18).
[96] Interview with Sani Muhammad, Executive Director, Bridge Connect (Zoom, 6 July 2020).

communities, and even within the workspace.[97] These manifestations of patriarchy sustain an environment where violence against women is normalised. Sani Muhammad's responses were again instructive as they demonstrated that the patriarchal nature of Nigerian society results in 'toxic cultural and religious practices that undermine the position of women'.[98] This often extends to the creation and application of laws. It is important to note, however, that other participants observed that religion and culture are not inherently destructive and do not legitimise SGBV. What exists are men who benefit from a system of patriarchy, thus construing religion and culture in a way that only benefits them.[99] This perspective is reflective of van der Vyver's caution against the generalisation of the perception that religions are inherently patriarchal.[100]

The interview process also demonstrated how culture and religion operate on a spectrum in the realities of everyday life, serving to simultaneously inspire and curtail the activities of HRDs. At one end of the spectrum, some of the participants declared that their religious and cultural background inspired their activism and their desire to advocate for and 'protect' women from SGBV.[101] At the other end, the religious practices of some communities and the ways in which beliefs have been institutionalised serve to constrain the activities of HRDs. In some cases, the actions of religious leaders appear to have motivated forms of assault against HRDs working on SGBV initiatives. One participant recounted:

[97] ibid.
[98] ibid.
[99] ibid; interview with Anonymous Participant A (WhatsApp Call, 27 June 2020).
[100] Van der Vyver (n 25).
[101] Interview with Sani Muhammad (n 96); interview with Anonymous Participant A (n 99); interview with Anonymous Participant B (Zoom, 5 July 2020).

> I received 17–19 death threats in an hour when an Islamic cleric went to the mosque and said I was making girls protest — it was just a protest against rape.[102]

The participant's description of the reaction of the men in the mosque indicates anger and fear of women clamouring for their right and safety. The influence of religious leaders in shaping perceptions illustrates the fluidity of patriarchy within all facets of society, echoing the discussions in the literature of how patriarchy manifests in both the public and the private sphere, with both institutions coalescing in the oppression of women.

In some conservative northern states, the entrenchment of cultural and religious ideals at an institutional level, in the form of laws and judicial decisions, has resulted in a lack of progress on cases of SGBV.[103] Campaigns such as the #ArewaMeToo movement have sought to address this absence of political will to engage with SGBV and the continuous rise in cases.[104] Predominantly led by WHRDs, the movement seeks to advocate for the rights of victims of SGBV and push state legislators to domesticate the VAPP Act in northern Nigeria. Although #ArewaMeToo was not well received by some groups, its initiation prompted a wave of protests that spread across the region.[105] In one of the more conservative states in the north, the sultan of Sokoto issued a statement banning the movement and all its activities.[106] One of the prominent leaders and co-convenor of the movement, Fakhrriyyah Hashim, a WHRD, received backlash for her work on the movement, which ranged from death threats to intense trolling and harassment on the internet. Recounting one of her experiences, she explained:

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[102] Interview with Sani Muhammad (n 96).

[103] The World Bank (n 82).

[104] 'Arewa' is used to describe the northern part of Nigeria.

[105] Hashim (n 6).

[106] John Campbell, 'Nigeria's Sultan of Sokoto Bans #MeToo Movement' (*Council on Foreign Relations*, 10 December 2019) <https://www.cfr.org/blog/nigerias-sultan-sokoto-bans-metoo-movement> accessed 20 August 2020.

> My colleague and I were invited to speak on consent at a University, but this was interpreted [by some student groups] as us speaking on westernised conceptions of SGBV, they said our activities were influenced by an LGBTQ agenda, that we were there to destroy their social fabric, to desecrate their traditional and cultural values. This led to death threats, they said: 'when you come, you are not going to leave this place intact'. The event was eventually cancelled.

Fakhrriyyah's experiences with the student group and the response of the sultan of Sokoto, combined with the previous example of the Islamic cleric's sermon triggering death threats to an HRD, illustrate the extent to which beliefs, which are normatively personal, are brought into public spaces. This is arguably done with the purpose of controlling the actions of women and stifling voices that speak in their defence. This example demonstrates how religious actors in Nigeria often take advantage of the apathy of state actors towards the issue of SGBV, thereby taking advantage of the gaps in the legislation to impose their beliefs on people, state structures, and institutions. Moreover, these empirical examples suggest an intentionality by the male-dominated state in maintaining the status quo of violence and oppression through the entrenchment of culture and religion at institutional levels.

#### 4.1.1 'They Were Supposed to Protect Us': Impact of Cultural and Religious Fundamentalism on Attitudes and Approaches of State Actors

> During the preparation for one of our rallies … I had an encounter with a police officer regarding getting a permit for the rally. He said to me, 'rape has been going on for a long time and you think your advocacy can change anything? If a person is beating you, you do not beat them back, you beg them to stop'. After refusing to give me the permit, he asked

> if I could meet him in a hotel.[107]

Reported by a participant in the research, this interaction with a police officer offers one illustration of the nature of daily interactions of Nigerian women, with the representatives of public institutions and services. As previously highlighted, permission to conduct protests is a process that can be open to misuse — ordinarily, requests for permits to conduct a protest should be assessed on the possibilities of leading to public disorder or destruction.[108] As reported by a research participant, this empirical example demonstrates how the transference of personal biases can lead to the demeaning of the WHRD and her work. It also indicates how cultural sentiments, grounded in patriarchal hegemony, are imposed in the execution of a public role. Such interactions often lead to the restriction of the fundamental rights and freedoms of HRDs by outrightly preventing protests, discouraging protests, and inflicting harm on HRDs. In addition, the participants' responses indicate that the activities of WHRDs are being socially perceived as 'a transgression to established norms',[109] and a disruptive representation of a gender often expected to be docile, homely, and domesticated.

Although, in the course of conducting protests and the implementation of their activities, HRDs may experience some form of harassment, the interview process showed that the experiences of MHRDs and WHRDs differed. Whilst Sani Muhammad's activism was questioned by religious leaders, Participant A's interactions with the police, an institution charged with the protection of society, were ultimately reduced to the sexualisation of the participant's body. This comparison exemplifies one consequence of patriarchal societies — the actions or activities of women are undermined by suggestions (by both state and non-state actors) that their place in society is not to challenge or

[107] Interview with Anonymous Participant A (n 99).
[108] Public Order Act 1979, sch 1(2).
[109] Philomina E Okeke-Ihejirika, 'Asserting Agency and Negotiating Patriarchy: Nigerian Women's Experiences' (2017) 34 J Global South Stud 1.

question oppressive systems but to be confined in traditional spaces where they fulfil sexual obligations, rear children, and tend to their families. The experiences of these HRDs indicate a seamless relationship between both forms of patriarchy, reflecting Uberoi's contention that the private mirrors the public and that both spheres are ultimately governed by the same patriarchal principles.[110] Therefore, the creation of an enabling and effective environment for HRDs goes beyond the creation of laws and policies that make this possible. It particularly requires taking a few steps back to reorient communities and people who enforce and implement laws about harmful cultural and religious perceptions, which impacts on their work and the rights of individuals.

## 4.2 'The Compromises We Make': Navigating Patriarchy and Making an Impact

Previous discussions have sought to highlight some of the structural impediments that render Nigeria a challenging environment for the implementation of women's rights initiatives. Initiatives against SGBV have been met with opposition emanating from the legislative and executive branches of governance. One possible reason for this persisting recalcitrance is the absence of women in positions of power and authority. In the National Assembly, for instance, women occupy just seven of 109 seats in the Senate and 11 out of 360 seats in the House of Representatives.[111] When combined with the country's deep-seated culture and religiosity, the disproportionate nature of representation at the highest levels of governance has frustrated efforts to create and

[110] Patricia Uberoi, 'Feminism and the Public-Private Distinction' in Gurpreet Mahajan (ed) *The Public and the Private: Issues of Democratic Citizenship* (SAGE Publications India 2003) 3.

[111] Editorial, 'Nigerian Women in National Assembly and the Geo Bill: Matters Arising' (*EIE Nigeria*, 26 July 2019) <https://www.shineyoureye.org/blog/nigerian-women-in-national-assembly-and-the-geo-bill-matters-arising> accessed 24 August 2020.

implement laws that take action against SGBV. One research participant, Busola Odubela, observed the paradoxical nature of this, remarking that 'the beneficiaries of patriarchy will not create institutional structures against SGBV'.[112] Resistance to facilitating women's access to political positions may be interpreted as a way of controlling the access of women into the public sphere. This consequently leads to the lack of prioritisation of issues affecting women, such as SGBV. These challenges limited the creation of laws against SGBV, to the extent that, even when laws are proposed, such laws take a long time before they are passed at the federal level and even longer at the state level.

### 4.2.1 Road to the VAPP Act

The absence of women in legislative positions meant that for a long time the laws that existed did not provide sufficient protection for women. Prior to the adoption of the VAPP Act, the key pieces of legislation governing issues of rape and other forms of abuse were the Penal Code Act and Criminal Code Act (applicable in northern and southern Nigeria, respectively). These pieces of legislation are problematic, formalising restrictive interpretations of what constitutes rape. In some cases, the Acts permit the abuse of women,[113] and outline less stringent punishments for SGBV offences than for other criminal offences.[114] In discussing reasons for the lack of progress in developing laws against SGBV, one interview participant noted that 'men cannot legislate on what they are not aware of'.[115] This interpretation broadly aligns with Kaufman and Lindquist's writings on male-centred construction and

[112] Interview with Busola Odubela, journalist for Premium Times Centre for Investigative Journalism (Google Meet, 20 June 2020).
[113] Onyemelukwe, 'How Well Does the Law Protect Women at Home?' (n 83).
[114] Onyemelukwe, 'How Well Does the Law Protect Women at Home?' (n 83); Penal Code Act, No 25 of 1960, s 55(1); Criminal Code Act [Nigeria], Cap C38 LFN 2004, 1 June 1916, s 353.
[115] Interview with Busola Odubela, journalist for Premium Times Centre for Investigative Journalism (n 112).

interpretation of law.[116] However, drawing on the findings of this research, this paper argues that the insensibility of legislators towards SGBV is not the product of ignorance but rather a deliberate ploy to evade state accountability. As previous sections have sought to demonstrate, patriarchal control is multidimensional.[117] A refusal to legislate on issues that affect women enables men to act with impunity both within the private and public sphere.

The eventual legislative prioritisation of the VAPP Act came about following more than a decade of advocacy, lobbying, and negotiation by women's rights groups. The Act was intended to address both the shortcomings of the laws and the lacklustre attitude of legislators.[118] The Legislative Advocacy Coalition on Violence against Women (LOCVAW) took a prominent role in this process, notably initiating the bill's drafting in 2002. Whilst hailed as a moment of progression, the Act itself was shaped by a number of compromises. This was discussed in some of the interviews. Osai Ojigho indicated that one such compromise was its very name.[119] The LOCVAW initially proposed the 'Violence against Women Bill', which was rejected by the legislators.[120] Ojigho described in the interview how the present name was eventually chosen to reflect a more 'gender-neutral' legislation.[121] The earliest phases of the VAPP were also marked by other tensions such as the inclusion of marital rape.[122] At its broadest level, the story

[116] Edwards (n 31) 46.
[117] Benstead (n 17).
[118] Onyemelukwe, 'How Well Does the Law Protect Women at Home?' (n 83).
[119] Interview with Osai Ojigho, country director, Amnesty International Nigeria (Google Meet, 23 June 2020).
[120] Onyemelukwe, 'Legislation of Violence Against Women' (n 6). The name of the Act was changed by legislators to the 'Violence (Prohibition) Bill' in 2003 on the basis that 'not only women experience violence'.
[121] Onyemelukwe, 'Legislation of Violence Against Women' (n 6).
[122] This, however, did not make it to the final Act, passed in 2015. Interview with Osai Ojigho (n 119).

of the VAPP Act serves to exemplify many of the fundamental challenges that HRDs working in Nigeria confront, such as the absence of enabling laws and the political will of legislatures. The VAPP Act also brings to the fore the criticisms by Edwards regarding the exclusion of women in the formation of laws and regulatory mechanisms, which similarly exist at the domestic level.[123] This is illustrated in the case of the National Assembly, which is the central law-making body of Nigeria, and the creation of the VAPP Act and other laws on women's rights, thus reaffirming the pervasive nature of patriarchy and how it creates obstacles from the international to the domestic level.

### 4.3 Navigating Patriarchy through 'Allies'

'Allies are necessary, but the fight is ours.'[124]

When interview participants were asked about the role of men in their initiatives against SGBV, all ten participants reiterated the importance of male allies in advocating and implementing activities against SGBV. One interview participant went as far as asserting that 'we need men to penetrate patriarchal systems'.[125] This response demonstrates the reality of women's rights advocacy in Nigeria, that campaigns and strategies do not usually make much headway when women are solely at the forefront of activities. As the VAPP's advocacy journey shows, the prioritisation of some Acts usually takes years of activism, strategic negotiation and liaising with stakeholders within and outside the governance structure. It is, however, important to note that the negotiations and navigation that have been shown to be crucial to successful activism are not limited to legislative advocacy. Such negotiations necessarily require the embryonic implementation of initiatives at the communal level, in interactions with religious leaders,

[123] Edwards (n 31) 7.
[124] Interview with Khadijah EL-Usman, lawyer (Zoom, 24 June 2020).
[125] Interview with Anonymous Participant B (n 101).

and even within the human rights and development network. Fakhrriyyah Hashim observes that in legislative or communal advocacies 'the presence of men often give[s] activities legitimacy'.[126] For interview participant B, the successful domestication of the VAPP Act in Bauchi State could be credited to strong male 'allyship'.[127] This participant also noted that one of the reasons this was possible was because of the intense social advocacy/campaigns conducted across northern states. These campaigns led to the creation of important allies within the government.[128] However, whilst the significance of the allyship of MHRDs cannot be discounted, it is crucial to note that their involvement sometimes results in women being ignored or sidelined in the course of their work against SGBV. One female participant explained:

> Sometimes when we go for outreach visits in schools to teach young children about consent, the boys do not listen to me when I speak, but when my male colleague says exactly what I said, they respond.[129]

Interactions with research participants have shown that the inclusion of men is necessary in the fight against SGBV. As Sani Muhammad observes, 'the quest to dismantle patriarchy is not a women's rights issue, it is a human rights issue'.[130] Nonetheless, there must be sustained awareness of any detrimental consequences this may impart. The involvement of men in facilitating access into traditionally male-dominated spaces should be undertaken in a way that prioritises the agency of women and makes clear their pivotal role in championing these causes.

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[126] Interview with Fakhrriyyah Hashim (Zoom, 6 July 2020).
[127] Interview with Anonymous Participant B (n 101).
[128] Interview with Anonymous Participant B (n 101).
[129] Interview with Anonymous Participant A (n 99).
[130] Interview with Sani Muhammad (n 96).

The negotiation of patriarchy, which the empirical research has shown unfolds through methods such as the use of allies, compromising on needs, or political leveraging on the power of votes, indicates a practical illustration of Nnaemeka's nego-feminism.[131] Although this theory typifies what is needed to make progress in a patriarchal African society, it simultaneously reinforces and solidifies patriarchal structures. When the default response to patriarchal oppression is always negotiation, it is unlikely going to create real, sustainable change. Such negotiations may create a reoccurring cycle where HRDs have to continuously yield to the demands of patriarchy.

# 5 Conclusion

This paper has sought to advance understanding of the influence of patriarchy on the activities of HRDs working on SGBV initiatives in Nigeria. This research does not suggest that the experiences of HRDs, and WHRDs in particular, are monolithic, however, instead observing similarities in the experiences of those people working on SGBV initiatives in Nigeria. In doing so, the paper has presented an interdisciplinary analysis of various iterations of patriarchy, which in turn formed the theoretical basis for the empirical research. The discussion on patriarchy brought into focus its multidimensional fluidity within various sectors of society. While noting the presence of laws and policies for the protection of HRDs, this paper has noted how the male-centric human rights sphere does a disservice to women and HRDs working on women's rights issues. Underpinned by the responses of research participants and the submissions in the literature review, this paper has found that patriarchy indeed plays a critical role in shaping the activities of HRDs. The pre-eminence of culture and religion, which are mostly patriarchal or interpreted within patriarchal boundaries, has influenced the ability of HRDs to push for legislation that can hold perpetrators accountable and carry out initiatives in support of victims.

[131] Nnaemeka (n 53) 377–78.

This plays out in their interactions with both state and non-state actors. The analyses further suggest that, for HRDs to make progress with their initiatives against SGBV, they have to find ways to navigate patriarchy either with the use of male allies to infiltrate patriarchal spaces or through conceding certain patriarchal demands, albeit not those that compromise the core of their work.

The importance of providing an enabling and protected environment for HRDs to work safely is a budding area of human rights law and practice globally. Within the Nigerian context, it is an area with very sparse research and one that policymakers have not legislated upon. The recognition of the work of activists, NGO staff, and other human rights actors as HRDs may be a vital step in creating an institutional framework that prioritises the rights of HRDs and their ability to make an impact.

# Mechanisms Used to Translate the International Prohibition on Child Recruitment to Armed Non-State Actors in The Democratic Republic of Congo

Ella Allen

**Abstract**

Armed conflict in the twenty-first century is largely characterised by armed non-state actors (ANSAs), a phenomenon that is not reflected in international legal provisions. ANSAs generally have little regard for international law, as demonstrated by their continuous indifference towards humanitarian norms. They are the most prolific recruiters of child soldiers globally, with ANSAs operating within the Democratic Republic of Congo (DRC) being some of the most prolific offenders. This paper provides a fresh analysis of the suitability of the mechanisms utilised by national and international actors to translate the prohibition of child recruitment from international law to ANSAs in the DRC. This was achieved by conducting empirical research in the DRC to understand the intricacies of the voluntary and coercive mechanisms being utilised, comprising ten interviews with NGO employees involved with the DRC. This research highlights three mechanisms of voluntary compliance used by both local and international NGOs, as well as one coercive compliance mechanism, prosecution by the International Criminal Court. This paper identifies a myriad of factors specific to the DRC that inhibit efforts to translate the prohibition on child recruitment. It then argues for the systemic reinforcement of the prohibition through the application of a variety of mechanisms in order to support norm diffusion and eventual norm internalisation.

# 1 Introduction

Hottinger contends that 'there is no discussion: whether we like it or not, today NSAs [Non-State Actors] are the main feature of violent conflicts both within States and at a regional level'.[1] The international legal instruments that govern armed conflict, however, remain inherently state-centric, being mostly designed, ratified, and implemented by state actors. Krieger argues that, in legal terms, armed non state actors ('ANSAs' hereafter) are not equal to state actors, and benefit from an asymmetry of rights and obligations.[2]

Humanitarian norms are established by the international community and 'comprise shared understandings of appropriate behaviour reflecting legitimate social purpose[s] for actors with a given identity'.[3] Whilst there are examples of academic scholarship analysing mechanisms of achieving the translation of humanitarian norms from international law to ANSAs, there is little research focussing on the diffusion of specific norms, such as the prohibition of the recruitment and use of child soldiers.[4] This is concerning as ANSAs are currently the most prolific users of child soldiers.[5] In February 2019 it was reported that there had been a 159 per cent increase in the recruitment of child soldiers in the previous five years, which serves to highlight the severity and urgency of the situation.[6]

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[1] Julian Thomas Hottinger, 'The Engagement to Respect Humanitarian Law and Human Rights: A Prerequisite for Peace Negotiations, or a "Future" Component within Peace Negotiations?' in Geneva Call (ed), *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law Conference Report* (November 2008) 26.

[2] Heiker Krieger, *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015) 2.

[3] Melissa Labonte, *Human Rights and Humanitarian Norms, Strategic Framing and Intervention: Lessons for the Responsibility to Protect* (Routledge 2013) 4.

[4] Krieger (n 2).

[5] Editorial, 'Child Soldiers' (*Their World*) <https://theirworld.org/explainers/child-soldiers#section-2> accessed 15 September 2020.

[6] Anna Varfolomeeva, 'Number of Child Soldiers Involved in Conflicts Worldwide

This paper focusses on the specific case study of the Democratic Republic of Congo (DRC), as the country has one of the highest rates of child recruitment in armed conflict in the world.[7] This situation persists despite the DRC being a signatory to Additional Protocol II of the Geneva Convention, the United Nations Convention on the Rights of the Child and its Optional Protocol, as well as the Rome Statute.[8] These core international treaties prohibit the use of child soldiers. For example, Article 4(3)(c) of Additional Protocol II to the Geneva Conventions, states that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups, nor allowed to take part in hostilities'.[9] This provision binds all armed groups party to a conflict and is therefore applicable to ANSAs.[10] Whilst the international human rights community has, on the whole, enjoyed a marked success in reducing the use of child soldiers by the DRC's state armed forces, this has not been replicated within ANSAs.[11]

Jumps 159% in 5 Years' (*The Defense Post*, 11 February 2019) <https://www.thedefensepost.com/2019/02/11/child-soldiers-global-increase/> accessed 13 August 2020.

[7] Editorial, '"Our Strength Is in Our Youth": Child Recruitment and Use by Armed Groups in the Democratic Republic of the Congo 2014–17' (*MONUSCO*, January 2019) 9.

[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 (Protocol II); Convention on the Rights of the Child (adopted 20 November 1980, entered into force 2 September 1990) 1577 UNTS (CRC); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS (Optional Protocol); Rome Statute of the International Criminal Court (adopted 17 July 1995, entered into force on 15 July 2002) 2187 UNTS.

[9] Protocol Additional to the Geneva Conventions (n 8).

[10] Protocol Additional to the Geneva Conventions (n 8).

[11] Office of the Special Representative of the Secretary General for Children in Armed Conflict, 'Children, Not Soldiers' (*UN*) <https://childrenandarmedconflict.un.org/children-not-soldiers/> accessed 27 May 2020.

ANSAs in the DRC have been consistently listed by the UN Special Representative of the Secretary-General for Children and Armed Conflict for the continued utilisation of child soldiers, and recruitment levels continue to rise.[12] These factors suggest that international instruments are not influencing the behaviour of ANSAs and that the translation of the prohibition of the recruitment and use of child soldiers has not enjoyed substantial success on the ground. There is a need to understand, develop, and adapt mechanisms that may then be utilised as effective tools to improve the diffusion of the prohibition amongst ANSAs.

This paper offers an analysis of the mechanisms utilised by international and local actors in the DRC to translate the norm on the prohibition of child soldiers to ANSAs. As the prohibition of the use of child soldiers exists at an international legal level, this paper will investigate the process by which this norm is diffused into the domestic context. It will employ Finnemore and Sikkink's concept of international norm dynamics, which posits that 'norm entrepreneurs' — those interested in changing social norms — attempt to 'socialize' ANSAs into becoming 'norm followers'.[13] Norm entrepreneurs, often local, national, or international human rights NGOs, are the 'driving force for the emergence of new norms', calling attention to issues and attempting to persuade a mass of individuals to accept the prohibition of child recruitment.[14] Once norm entrepreneurs have promoted the norm and framed it in a way that the public is receptive of, the norm 'cascades

[12] Child Soldiers International, 'Child Soldier Levels Doubled Since 2012 and Girls' Exploitation is Rising'(*ReliefWeb*, 11 February 2019) <https://reliefweb.int/report/world/child-soldier-levels-doubled-2012-and-girls-exploitation-rising> accessed 20 September 2020.

[13] Cass R Sustein, 'Social Norms and Social Roles' (1996) 96 Colum L Rev 903, 909; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 INTL ORG 887, 895.

[14] Finnemore and Sikkink (n 13) 897; Müller Harald and Carmen Wunderlich, *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (University of Georgia Press 2013) 25.

through the rest of the population'.[15] As a result of this process, 'norm internalization' may occur, meaning that the prohibition of child recruitment 'acquires a taken-for-granted quality and is no longer a matter of broad public debate'. [16] Mechanisms utilised by 'norm entrepreneurs' within the DRC will therefore be evaluated in order to understand the extent to which they support or fail to support the diffusion of the norm.

This paper divides its understanding of translation mechanisms used by norm entrepreneurs into two categories: voluntary and coercive. A voluntary compliance mechanism is a technique where ANSAs freely engage with actors, with the aim of facilitating translation of the norm. A coercive translation mechanism is a technique utilised to induce or force compliance by ANSAs. This study combines both desk-based and empirical qualitative research carried out between May and October 2020. It reports the findings of ten interviews with research participants. Nine of these interviews involved local NGOs and aimed to reveal the nuances of the translation mechanisms employed, their local application, and their perceived effectiveness.[17] A further interview was conducted with an employee of Geneva Call, with a view to understanding the role of international NGOs (INGOs) in this area. This interview data was supplemented by a survey of local NGOs operating in the DRC, which received 17 completed responses.

The paper commences by analysing three voluntary mechanisms identified within the empirical data. These are: ad hoc negotiations; unilateral declarations; and the education and training of ANSAs. An additional coercive translation mechanism is also analysed — the work of the International Criminal Court (ICC) — as this was found to be the most prominent coercive mechanism identified by research participants. The analysis here focusses on two prosecutions of ANSA

[15] ibid 895.
[16] ibid 895.
[17] Carl Auerbach and Louise B Silverstein, *Qualitative Data: An Introduction to Coding and Analysis* (NYUP 2003) 32.

leaders for the recruitment and use of child soldiers. For each mechanism a summary is provided, revealing the intricacies of how this mechanism is employed in the DRC. Throughout, this paper aims to understand the suitability of particular mechanisms in translating the norm. Herein, suitability is defined as '[t]he quality of being right or appropriate for a particular person, purpose, or situation'.[18] The appropriateness of each mechanism to translate the prohibition of child recruitment and use to ANSAs in the DRC is critically analysed.

## 2 Case Study Organisations

**Action Chretienne Pour La Paix Et Le Développement (ACPD)** — ACPD operates in Eastern DRC, in North Kivu Province, and supports youth economically, socially, and educationally.

**Action Communautaire pour le Developpement du Kivu (ACDK)** — ACDK's mission is to promote and supervise women and children based in the North Kivu.

**Centre Resolution Conflits (CRC)** — CRC is a peacebuilding organisation working across 38 communities in North Kivu.

**Coalition des Volontaires pour la Paix et le Développement (CVPD)** — CVPD looks to support the promotion and defence of human rights, peace, good governance, and community development in North Kivu.

**Geneva Call** — Geneva Call is an international NGO headquartered in Geneva, Switzerland. It has offices in the DRC, based in Goma, and its primary focus is engagement with ANSAs, with the aim of facilitating compliance with humanitarian norms.

[18] 'Suitability' (*Lexico*) <https://www.lexico.com/definition/suitability> accessed 5 June 2021.

**Jeunesse a l'Oeuvre de la Charite et du Développement (JOCHADEV)** — JOCHADEV's main focus is on peacebuilding, community development, humanitarian action and conservation in South Kivu.

**Organisation for Peace and Development (OPD)** — OPD operates in South Kivu and focusses on the promotion of sustainable peace, democracy, and development.

**Synergy of Great Lakes Initiatives (SYNIGL)** — SYNIGL is headquartered in South Kivu and its main focusses are peace, community development, health, and human rights.

**Union des Juristes Engagés pour les Opprimés, la Paix et le Développement (UJEOPAD)** — UJEOPAD is mostly active in eastern DRC and focusses on ensuring the protection of vulnerable individuals, specifically conflict victims.

# 3 Voluntary Translation Mechanisms

## 3.1 *Ad Hoc* Agreements

### 3.1.1. Summary

This study found that ad hoc agreements are usually made between an ANSA and another entity (eg a local NGO) to encourage compliance with a humanitarian norm. Ad hoc arrangements to release child soldiers was the most commonly identified mechanism to be used by the local NGO research participants. These arrangements directly support the translation of the prohibition on child recruitment by securing the release of children from an ANSA's control as well as often trying to dissuade the ANSA from recruiting further. Participant responses suggest that organisations usually follow a similar process in negotiating the release of child soldiers with ANSAs. The methods of one NGO, ACDK, are examined in detail.

ACDK's executive director explained that the decisions to embark upon negotiations with ANSAs to release child soldiers most typically originate in 'complaints from parents of children, other actors in civil society or other community organisations'.[19] ACDK manages this process by employing the SMART — 'specific, measurable, attainable, realistic and temporary' — method of communication to negotiate the release of child soldiers with ANSAs, when defining the objective of the communication with the ANSA.[20] Achieving the release of child soldiers involves identifying 'advocacy targets', defining the message to send to the 'decision maker' (derived from in-depth research), identifying allies (influencers or intermediaries), analysing the risk and success factors, developing an action plan, and advocating with groups.[21]

A number of participants noted difficulties in communicating with ANSAs on the issue of child soldiers. Several representatives described a significant lack of trust, as ANSAs fear that NGOs will disclose to the authorities their location, their '*modus operandi*', and instances of child recruitment or abuse.[22] Participants emphasised that gaining trust was therefore an essential prerequisite for any engagement with ANSAs. They listed various ways of establishing trust with groups, including sending intermediaries who are of the same ethnicity and who speak the same language as the group; meeting in neutral places; frequent courtesy visits; offering aid to the wounded; offering training; staying with the group and sharing a meal; and ensuring confidentiality.[23] Building a rapport with a network of ANSAs facilitates translation of

[19] Interview with Participant D, executive director, Action Communautaire pour le Developpement du Kivu (ACDK) (12 September 2020).
[20] ibid 187; Interview with Participant D (n 19).
[21] ibid.
[22] Anonymous survey response; interview with Participant B, executive director, Jeunesse a l'Oeuvre de la Charite et du Developpement (JOCHADEV) (11 September 2020).
[23] Interview with Participant J, national coordinator, Union des Juristes Engagés pour les Opprimés, la Paix et le Développement (UJEOPAD) (23 September 2020).

the norm, as ANSAs are more likely to be receptive to NGO influence if trust is established.

### 3.1.2 Suitability of the Mechanism

The national coordinator of UJEOPAD asserted that securing the release of child soldiers is one of their organisation's 'most important and privileged activities'.[24] Survey responses, however, indicated that their negotiations to release child soldiers were only partially effective. An important question for reflection is whether the release of child soldiers is a mechanism that assists the translation of the prohibition of the recruitment and deployment of child soldiers. Owing to the ad hoc nature of negotiations to release child soldiers, it is questionable how far these impromptu negotiations can assist in the broader translation of the prohibition. This is a particularly pressing concern when negotiations are being used by certain organisations as the sole method of norm translation.

In terms of process, the national coordinator of ACPD explained that they first present ANSA leaders with their release proposal. In any response, the ANSA's leadership will typically include requests that the NGO will have to comply with in order to secure the release of the child. These requests often include financial incentives or specific measures, such as requiring that children be placed in demobilisation centres.[25] However, when negotiations are based on a mutually beneficial exchange, the release of the child can become transactional, rather than amounting to any acceptance or translation of the norm. The ACPD coordinator suggested that ANSAs continue to recruit children, as having them in their ranks places the group in a position to negotiate with organisations.[26] They explained that, if an ANSA has child soldiers, INGOs and local NGOs will approach the group in an attempt

[24] ibid.
[25] Interview with Participant K, national coordinator, Action Chretienne Pour La Paix Et Le Développement (ACPD).
[26] ibid.

to release them.[27] This places the ANSA in a position to negotiate the release and ask for something in return.[28] Hottinger warns that 'once you are caught in such a dynamic, where every issue is up for a bargain, you are bound to create more harm than good'.[29] This suggests a complete lack of translation of the norm as the motivation for granting the release is based on ensuring a benefit.

A number of participants claimed that armed groups often request items of monetary value in exchange for the release of children. One survey respondent highlighted that for 'any communication with them, you need financial motivation'.[30] This requirement was illustrated by the executive director of ACDK, who reported that, despite completing all of the above stages, the organisation had to pay 100 US dollars to secure the release of one child in 2017.[31] Whilst an effective way of securing the freedom of children, practices such as the exchange of an item of monetary value for the release of a child soldier can be detrimental to the translation of the norm, owing to its incentive capacities. This is largely analogous to the ransom dilemma that often characterises hostage situations. Outlining the 'complicity objection' theory, Howard argues that '[t]hose who pay ransoms to unjust organisations, become reluctant accomplices to those organisations' unjust activities'.[32] If this hostage dilemma is applied, it can be argued that, by giving money to an ANSA in exchange for a child, the NGO is contributing to or financing further child recruitment.

A local NGO, ACPD, has, however, devised a method to ensure that the pecuniary benefits of a transactional negotiation are directed

[27] ibid.
[28] ibid.
[29] Hottinger (n 1) 25.
[30] Anonymous survey response.
[31] Interview with Participant D (n 19).
[32] Jeffrey Howard, 'Kidnapped: the Ethics of Paying Ransoms' (2018) 35(4) J Applied Phil 681.

towards the children.[33] The national coordinator explained that the ANSA will agree to release the children if the NGO has the correct funds to support their demands.[34] These funds, however, will not be utilised by the ANSA for their financial gain but instead used on the condition that NGO funds and facilitates the release of child soldiers into demobilisation centres.[35] This particular type of negotiation indicates the diffusion of the norm as a group can only make financial requests that will benefit the children. It remains, however, a transactional exchange, as the research participant warned that, if the NGO does not have enough funding, the deals will often fall through. This is a crucial limitation in this type of negotiation.[36]

The research carried out highlighted that not all negotiation techniques employed by local NGOs are transactional in their nature. The national coordinator of UJEOPAD explained that the substance of their negotiations with ANSA leaders focussed solely on the 'national and international legal instruments that protect children and prohibit their recruitment' and informs them of the risk of keeping children in the group.[37] The participant stated that, after presenting this information through talks, as well as providing supporting documentation, they leave the group and wait for the leadership to call with their decision.[38] This process is arguably more effective at norm translation, as pecuniary incentives are removed from the decision-making process. When financial benefits are discounted, the decision to release may be more likely to be based on a belief that children should not be members of that group. However, the data here does not indicate whether any decisions to discontinue such practices result from a fear of potential sanctions or a recognition on the part of the ANSA leadership that child

[33] Interview with Participant K (n 25).
[34] Interview with Participant K (n 25).
[35] Interview with Participant K (n 25).
[36] ibid.
[37] Interview with Participant J (n 23).
[38] Interview with Participant J (n 23).

recruitment is morally wrong. One might doubt the efficacy of this negotiation style owing to its lack of incentive for the ANSA. It has, however, been relatively successful — UJEOPAD has secured the release of 600 children from ANSAs since 2014.[39] This amounts to 4 per cent of the overall approximate number of children released over this time period.[40] It is significant that this has been achieved by one NGO, utilising one method. If applied by other of NGOs and supplemented by additional mechanisms, it may have significant potential in translating the norm.

## 3.2 Education/Training of Armed Group Members

### 3.2.1 Summary

The empirical data collected also pointed to the delivery of training for ANSA members as another mechanism often employed by NGOs to support the prohibition of child recruitment and use. The data suggests that there are two different approaches typically employed by NGOs when offering training for ANSA members. These alternative approaches represent norm entrepreneurs' different ways of 'framing' the issue of child recruitment. This strategic framing can be understood as 'an integral vehicle for transmitting norms, [as it helps to] create shared understandings … that further legitimate and motivate collective action'.[41] Framing is employed with the aim of 'actively assess[ing] the content of a particular … norm … and "chang[ing] their minds"'.[42]
The first framing approach employed by NGOs focusses on educating

[39] Interview with Participant J (n 23).
[40] United Nations Security Council, 'Children and Armed Conflict in the Democratic Republic of the Congo Report of the Secretary-General' (UN DOC S/2018/502, 25 May 2018) 18; United Nations Security Council, 'Children and Armed Conflict in the Democratic Republic of the Congo Report of the Secretary-General' (S/2020/1030, 19 October 2020) 1.
[41] Labonte (n 3) 4.
[42] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 Duke LJ 621, 635.

ANSA leaders as to the laws prohibiting the use of child soldiers at both national and international levels, as well as the potential consequences of non-compliance. In addition to providing training to ANSAs on the legal framework, OPD also offers technical training to assist ANSAs in applying the law on the ground. For example, they offer training on determining the age of new recruits and how to review identity documents, evaluate physical appearances, and conduct interviews with children.[43] An alternative framing approach is utilised by other NGOs, and is aimed at educating ANSAs on the psychosocial consequences of recruiting child soldiers. ACPD prefers to focus on such implications, designing and delivering workshops entitled 'What If It Was Your Child?' In framing their activities in this way, the organisations are emphasising the pain of parents when children are forcibly taken or when they voluntarily join armed groups.[44]

### 3.2.2 Suitability of the Mechanism

Within the context of this study, NGOs generally supported the training and education of ANSAs, with 60 per cent (n=9) of survey respondents explaining that these measures are extremely important in preventing the use of child soldiers. The national coordinator of ACPD, for example, argued that the most efficient way to induce the release of child soldiers is through the provision of educational workshops.[45] The data did, however, highlight disagreements as to which approach is the most effective method to translate the prohibition to ANSAs. Within the literature, David Capie emphasises that '[i]t is the quality of their ideas and the nature of their reasoning that results in a particular norm's adoption by targets', thus highlighting the importance of the 'framing' of the norm in the provision of training.[46]

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[43] Interview with Participant E, Executive director, Organisation for Peace and Development (OPD) (14 September 2020).
[44] Interview with Participant K (n 25).
[45] Interview with Participant K (n 25).
[46] David Capie, 'Influencing Armed Groups: Are There Lessons to Be Drawn from Socialization Literature?' in Geneva Call (ed) (n 1) 87.

Participants who had delivered training stated that their work mainly focussed on the legal framework concerning the use of child soldiers. This reflects Heffes's point that 'providing information and training on IHL [international humanitarian law] is … essential to increase ANSAs respect for this legal framework', as very often ANSAs 'have little knowledge of the actual content … of IHL'.[47] According to Goodman and Jinks' accumulation theory, group actors experience pressure to comply with group norms. New group members are exposed to, and experience pressure to comply with, group norms via a process of 'cuing', which prompts them to re-evaluate their beliefs in relation to those of the group.[48]

Further findings raised doubts as to the sustainability of solely educating ANSAs on the legal consequences of child recruitment. All interview participants stated that ANSA leaders were aware of the illegality of child soldier recruitment, and the threat of prosecution by the ICC. The national coordinator of ACPD explained that their organisation only broaches the legal prohibitions and risk of being prosecuted at the end of the training they provide, owing to armed groups having little fear of this consequence, as they have an awareness that prosecutions due to non-compliance are extremely rare.[49] This line of argument points to a lack of effectiveness in the deterrent role of legal prohibitions. Additionally, this counters Heffes's claim that ANSAs have minimal awareness of international humanitarian law. If there is no perceived 'cost' of using child soldiers, educating armed groups on the laws prescribing its prohibition is arguably of little use in translating the norm and ensuring compliance.

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[47] Ezequiel Heffes, 'Non-state Actors Engaging Non-state Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds) *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Asser Press 2020) 7.

[48] Goodman and Jinks (n 42) 637.

[49] Interview with Participant K (n 25).

An alternative approach is applied by ACPD. The national coordinator explained that the NGO finds it more beneficial to play on the emotions of the ANSA members, in an attempt to induce an empathic response.[50] Such a technique may involve asking ANSA members to imagine that their child was recruited and had endured such horrific experiences.[51] For the national coordinator of UJEOPAD, the 'personal convictions' of the leadership are one of the most important factors in determining whether an ANSA will release children.[52] A recent study conducted by Martinez and others found evidence that 'perspective-taking propensities relate to the tendency to experience empathic-concern, which influences guilt-proneness; this propensity to experience guilt, in turn, negatively predicts criminal behaviour'. [53] This technique is apparent in the ACPD's methods, as teaching ANSA members to see the harms as if they were committed on their own child can introduce an emotional connection to child recruitment.[54] This 'give[s] rise to the capacity to experience anticipatory distress, (guilt) should one face the option to' accept a child into the armed group.[55] Evidence suggests that this process may influence and possibly change an individual's personal conviction that child recruitment and use is acceptable.[56] This can be seen as an effective mechanism in achieving translation of the norm, for those who are susceptible to emotional influence. This framing could apply particularly to ANSAs that are unresponsive to the perceived threat of formal prosecution.

[50] Interview with Participant K (n 25).
[51] Interview with Participant K (n 25).
[52] Interview with Participant J (n 23).
[53] Martinez Andres, Jeffrey Stuewig, and June P Tangney, 'Can Perspective-Taking Reduce Crime? Examining a Pathway Through Empathic-Concern and Guilt-Proneness' (2014) 40(12) Personality and Social Psychology Bulletin 1659, 1664.
[54] ibid.
[55] ibid.
[56] ibid.

Geneva Call's approach attempts to combine the teaching of international law with appropriate technical training based on the needs of the ANSA, similar to OPD. An interviewee explained that the context, size, and structure of the group will affect who the organisation carries out training with and what is focussed upon.[57] Geneva Call's engagement with one ANSA, the Alliance of Patriots for a Free and Sovereign Congo (ACPLS), is demonstrative of this, with the ACPLS requesting training 'on age assessment methods and processes, as they were lacking the capacity to carry them out'.[58] In their study, Rojas and Fresard found that simply having knowledge of the law does not mean 'that combatants will conform to it in a real-life situation'.[59] It could therefore be argued that it is counterintuitive to educate ANSAs on the law and not educate them on how to implement it — the provision of training solely on legal provisions is an unsuitable mechanism in norm translation.

It has been established that '[i]t is critical to analyse the context, such as the NSA's structure [and] motivations', before commencing training.[60] It will then be possible to formulate a realistic strategy, appropriate to the group it is being provided to. Training that is aligned with the ANSAs ideology is more likely to translate the prohibition than a one size fits all approach used for all groups.

[57] Interview with Participant G, employee, Geneva Call (5 August 2020).
[58] Pascal Bongard and Ezequiel Heffes, 'Engaging Armed Non-State Actors on the Prohibition of Recruiting and Using Children in Hostilities: Some Reflections from Geneva Call's Experience' (2019) 101 Int'l Rev Red Cross 603, 614.
[59] Daniel Munoz-Rojas and Jean-Jacques Fresard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 Int'l Rev Red Cross 189, 196.
[60] Greta Zeender, 'Protecting the Internally Displaced: an Opportunity for International NGOs to Engage NSAs' (2005) 24(3) Refugee Survey Q 96, 105.

## 3.3 Unilateral Declarations

### 3.3.1 Summary

Rojas and Fresard argue that, 'as far as combatants are concerned, if IHL is to be respected, it is more important to influence behaviour than attitudes'.[61] Declarations signed by ANSAs provide an express and written commitment on the prohibition of child soldier recruitment and attempt to bind ANSAs to change their behaviour. In the DRC, local NGOs have designed unilateral declarations that allow ANSAs to make signed commitments not to recruit children. For example, local NGO UJEOPAD explained that they had designed three different standard forms of unilateral declaration: 1) a document for ANSAs to sign and 'commit to no longer recruiting or using child soldiers'; 2) a declaration that states they are 'not to recruit again the children whose release we have already negotiated'; and 3) a more comprehensive document that is an agreement to 'respect the norms of war, the protection of civilians, national and international legal texts for the protection of the rights of the child, that the groups sign after each training'.[62]

Local NGO Centre Resolution Conflicts (CRC) has designed what they call 'a deed of engagement'[63] mirroring Geneva Call's internationally renowned 'Deed of Commitment'. This deed is signed by ANSAs that commit 'not to recruit any more children'.[64] Geneva Call's 'Deed of Commitment' (DOC) was developed primarily for use with ANSAs. The DOC is signed by ANSA leaders and countersigned by Geneva Call and the Government of the Republic and Canton of Geneva.[65] Geneva

[61] ibid 205.
[62] Interview with Participant J (n 23).
[63] Interview with Participant F, employee, Centre Resolution Conflits (CRC) (26 September 2020).
[64] ibid.
[65] Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-state Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment' (2011) 93 Int'l Rev Red Cross 673, 684.

Call has engaged with seven ANSAs in the DRC.[66] The organisation has successfully facilitated the signing of one declaration in 2016, with the ACPLS, a commitment focussed on the protection of children in armed conflict.[67] This includes both negative and positive obligations 'to ensure that children are not recruited into our armed forces, whether voluntarily or under duress'.[68]

### 3.3.2 Suitability of the Mechanism

Despite the fact that ANSAs are bound by international law, which prohibits the recruitment and use of child soldiers, alongside the abstract nature of international norms and their lack of involvement in its creation, ANSAs often feel as if they are not bound by the provisions of international law.[69] Unilateral declarations are excellent tools in empowering ANSAs to commit to humanitarian norms, as the powers of persuasion utilised by NGOs are 'a communication act intended to modify the mental state of an individual in a context where he retains or believes that he retains a certain freedom'.[70] Through the process of adoption, ANSAs are in effect making their own written and formal commitments to humanitarian law. The national coordinator of UJEOPAD suggested that ANSAs are more likely to 'keep to their promises' if the declaration is written.[71] This attitude was generally reflected across the research participants, but some did express concerns relating to ANSAs not abiding by the declarations, highlighting issues

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[66] Geneva Call, 'Where We Work' <https://www.genevacall.org/where-we-work/> accessed 28 September 2020.
[67] Acte d'Engagement auprès de l'Appel de Genève pour la Protection des Enfants des Effets des Conflits Armes (*Their Words*, 21 November 2016) <http://theirwords.org/media/transfer/doc/signed_doc_apcls-bed635e4c57888eb0d30381a66c53166.pdf> accessed 28 September 2020.
[68] Article 4 of DOC signed with Geneva Call.
[69] ICRC, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts International Committee of the Red Cross Geneva' (ICRC, February 2008) 19.
[70] Munoz-Rojas and Fresard (n 59) 205.
[71] Interview with Participant J (n 23).

in the translation of the norm.[72] The executive director of OPD argued that, whilst there has been positive, personal, and collective engagement with declarations, perhaps inevitably, 'signing was something and execution of release and liberation of children was another thing'.[73] This behaviour suggests that the ANSAs that sign the declarations may concede that the use of child soldiers 'is contrary to morality in absolute terms', yet they will tell themselves 'that circumstances render it not only admissible but also necessary' to recruit them.[74] There is, as such, evidence of a disconnect between commitments made and actions taken.

The executive director of OPD, however, maintained that the mechanism is efficient only if there is permanent and consistent monitoring, which will in turn encourage implementation and thus increase diffusion of the norm.[75] NGOs, however, require adequate resources to carry out this monitoring, which is often an issue for smaller, more local organisations. One interviewee pointed to the notion that declarations are often used by more financially endowed NGOs.[76] However, a local NGO, CRC, has managed to develop a more resourceful and cost-effective method of monitoring violations to their 'deed of engagement'. An employee explained that, once there has been a report of a child in an ANSA that has signed a deed of engagement with the CRC, the organisation will request that the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) collects the child from the ANSA.[77] Under MONUSCO's Disarmament, Demobilization and Reintegration programme, they release children from ANSAs and place them in the

[72] Interview with Participant J (n 23); interview with Participant E (n 43); interview with Participant K (n 25).
[73] Interview with Participant E (n 43).
[74] Munoz-Rojas and Fresard (n 59) 198.
[75] Interview with Participant E (n 43).
[76] Interview with Participant B (n 22).
[77] Interview with Participant F (n 63).

care of NGOs that MONUSCO has a relationship with.[78] This is a more cost-effective method for local NGOs as negotiation, retrieval, and monitoring responsibilities are transferred to MONUSCO, with local NGOs focussing on rehabilitation and reintegration. The CRC employee described this as an extremely effective method, resulting in a 'containment site' being constructed to accommodate all of the children whose release had been facilitated by this mechanism.[79]

Large INGOs, such as Geneva Call, must still take resources into consideration. An employee explained that a deed of commitment will only be proposed if Geneva Call has the capacity to follow up on the deed, its implementation plan, and monitoring.[80] Geneva Call has been successful with its monitoring programme, as '[n]o signatory has ever refused to receive a Geneva Call delegation, even following allegations of non-compliance', suggesting that ANSAs are willing to be monitored.[81] The organisation has also installed permanent staff in the DRC to facilitate easier access to local NGO partners and ANSAs for communication and monitoring purposes.[82] The signing of any declaration is only effective in diffusing the norm if it is implemented and consistently complied with. Monitoring is therefore arguably an essential condition to bolster compliance and subsequent translation of the norm. However, this can render this mechanism inaccessible to smaller, local NGOs that lack the capacity to carry out sustained monitoring.

## 3.4 Summary

This section has considered three voluntary translation mechanisms used in the DRC to help translate the international prohibition on child soldier recruitment to ANSAs, namely ad hoc agreements, education,

[78] Pardonne interview.
[79] Interview with Participant F (n 63).
[80] Interview with Participant G (n 57).
[81] Bongard and Somer (n 65) 695.
[82] Interview with Participant G (n 57).

and unilateral declarations. Empirical findings suggest that negotiations to release child soldiers that lack a transactional exchange are more effective in translating the norm. With reference to the provision of training for ANSAs, it has been illustrated that in-depth research is required before conducting training that the ANSA will be receptive to. Declarations not to use child soldiers seem to be effective in translating the norm, but only when the declaration is followed by monitoring activities to ensure implementation. The empirical data suggests that each of these mechanisms suffers drawbacks and that the use of single mechanisms alone is unlikely to be effective in translating the prohibition of child recruitment and use. The data suggests that the most suitable way to translate the prohibition is through sustained engagement with ANSAs, utilising a variety of mechanisms. This can, however, be difficult to maintain, as the conflict in the DRC involves a multitude of ANSAs that regularly fragment and change leadership.[83] Furthermore, many NGOs do not have the capacity or resources to employ multiple mechanisms and to ensure follow-up visits, which inhibits success. For those ANSAs that do not wish to voluntarily comply with the norm or require an extra push, a form of coercive translation may be required. In the DRC, the International Criminal Court (ICC) is a prominent force and its work is subject to analysis in the next section of this paper.

# 4 Coercive Translation Mechanisms

## 4.1 Prosecution by the International Criminal Court (ICC)

Formed in 2002, the ICC is a permanent judicial organisation situated in The Hague, the Netherlands.[84] The Rome Statute, which established the court and outlined its jurisdiction, was ratified by the DRC two months before it came into force, which points to a clear commitment

[83] Interview with Participant G (n 57).

[84] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS), art 13.

to its jurisdiction at the nation state level.[85] The court is unique, as it has the power to prosecute any individual under the following conditions: where that person is a national of a state that is party to the Rome Statute, or where the state accepts the court's jurisdiction, or where the offence took place in a state that is party to the statute.[86] The court may exercise its jurisdiction when a crime is referred to the prosecutor by a state party, where the prosecutor has independently initiated an investigation, or where a crime has been referred to the prosecutor by the UN Security Council.[87] In addition, under the legal principle of 'complementarity', the court will only exercise jurisdiction when the state party 'is unwilling or unable genuinely to carry out the investigation or prosecution' and the individual has not already been tried for the specific complaint.[88] As rampant impunity is central to the DRC conflict, the court is therefore in a unique position, in that such countries that lack the power or political will to prosecute can refer crimes to the ICC.

## 4.2 ICC Prosecutions

President Joseph Kabila of the DRC sent a case referral to the ICC prosecutor Luis Moreno Ocampo on 3 March 2004.[89] The ICC's investigations began on 21 June 2004 and have been based predominantly 'on alleged war crimes and crimes against humanity, committed mainly in eastern DRC', To date, the ICC has successfully prosecuted three individuals relating to crimes committed in the DRC — two of whom were prosecuted for the enlistment and conscription of

[85] ibid.
[86] ibid art 12.
[87] ibid art 13.
[88] ibid art 17(1).
[89] ICC, 'ICC — Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo' (*ICC*, 19 April 2004) <https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+receives+referral+of+the+situation+in+the+democratic+republic+of+congo> accessed 25 September 2020.

children under the age of 15.[90] This section focusses on the prosecution of those two defendants — Thomas Lubanga and Bosco Ntaganda.[91]

Thomas Lubanga was the leader of the Union des Patriotes Congolais (UPC), an ANSA that operated in the Ituri region until 2003.[92] Prosecutors in the case stated that, 'at the height of the conflict in 2003, as many as 30,000 children … were part of Mr Lubanga's militia'.[93] Human Rights Watch reported locals in Ituri regularly describing the UPC as 'an army of children'.[94] As a result, in January 2006 the ICC prosecution filed an arrest warrant for Thomas Lubanga, who was detained and subsequently transferred to The Hague. At the trial's conclusion in 2012, Lubanga was charged as co-perpetrator for three counts of the war crime: of 'conscripting or enlisting children under the age of fifteen years, into armed forces or groups, or using them to participate actively in hostilities' contrary to Article 8(2)(e)(vii) of the Rome Statute.[95] Lubanga was sentenced to 14 years' imprisonment on 10 July 2012.[96] On subsequent appeal, both the conviction and sentence were upheld by the ICC.[97]

[90] ICC, *Situation in the Democratic Republic of the Congo* (ICC–01/04); *The Prosecutor v Thomas Lubanga Dyilo* ICC–01/04–01/06; *The Prosecutor v Bosco Ntaganda* ICC–01/04–02/06.
[91] *Thomas Lubanga Dyilo* and *Bosco Ntaganda* (n 90).
[92] Alicia Mazurek, 'Prosecutor v Thomas Lubanga Dyilo: The International Criminal Court as It Brings Its First Case to Trial' (2009) 86 U Det Mercy L Rev 535.
[93] Simons Marlise, 'Congo Warlord's Case Is First for International Criminal Court' *New York Times* (New York, 10 November 2006) <https://www.nytimes.com/2006/11/10/world/europe/congo-warlords-case-is-first-for-international-criminal-court.html> accessed 29 September 2020.
[94] Editorial, 'The Democratic Republic of Congo: ITURI: "Covered in Blood" Ethnically Targeted Violence in North-Eastern DR Congo' (2003) 15(11A) Human Rights Watch 47.
[95] Rome Statute of the International Criminal Court (n 85).
[96] *Thomas Lubanga Dyilo* (n 90) 2901.
[97] *Thomas Lubanga Dyilo* (n 90) 3122.

Bosco Ntaganda, nicknamed 'The Terminator', was the deputy chief of general staff and commander of military operations of the Patriotic Forces for the Liberation of Congo (FPLC), the military wing of the UPC.[98] The ICC issued a sealed arrest warrant in August 2006, followed by an unsealed arrest warrant in 2008.[99] Having surrendered voluntarily at the US Embassy in Rwanda, Ntaganda's trial began in The Hague on 2 September 2015. The judgment was given on 8 July 2019, with Ntaganda found guilty of 18 counts of war crimes and crimes against humanity committed between 2002 and 2003 in Ituri, DRC.[100] He was found to be an indirect perpetrator of all other crimes, including child recruitment and use.[101] He has been sentenced to 30 years' imprisonment.

### 4.2.1 Suitability of the Mechanism

When applied to the crime of child recruitment and deployment in armed conflict, the deterrent function of the ICC is of particular significance in the DRC, given that the 'abysmal' national criminal justice system lacks the impartiality, resources, and authority to penalise members of ANSAs.[102] Research participants consistently stated that the lack of prosecution of those individuals involved in the recruitment of child soldiers continues to contribute to poor translation

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[98] Sarah T Deuitch, 'Putting the Spotlight on "The Terminator": How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence During Conflict' (2016) 22 Wm & Mary J Women & L 3 655, 678.

[99] The ICC sealed the arrest warrant 'because public knowledge of the proceedings in this case might result in Bosco Ntaganda hiding, fleeing, and/or … endangering … the Court'. Owing to the failure to arrest Ntaganda, the ICC made the decision to unseal the arrest warrant on 28 April 2008. cf ICC, 'DRC: ICC Warrant of Arrest Unsealed Against Bosco NTAGANDA' (*ICC*) <https://www.icc-cpi.int/pages/item.aspx?name=drc_+icc+warrant+of+arrest+unsealed+against+bosco+ntaganda> accessed 29 September 2020.

[100] *Bosco Ntaganda* (n 90) 2359.

[101] ibid.

[102] International Refugee Rights Initiative, *Steps Towards Justice, Frustrated Hopes: Some reflections on the experience of the International Criminal Court in Ituri* (Civil Society, International Justice and the Search for Accountability in Africa 2012) 2, 8.

of the prohibition on child recruitment to ANSAs. When asked about the significance of prosecutions in preventing the use of child soldiers, 86 per cent (n=13) of survey respondents stated that prosecutions at an international level were either very or extremely effective, emphasising the value of ICC prosecutions.

After a visit to the DRC, ICC Prosecutor Fatou Bensouda made a statement in which deterrence was a common theme.[103] Bensouda discussed two different forms of deterrence theory: prosecutorial deterrence and social deterrence.[104] Emphasising prosecutorial deterrence, Bensouda described the almost 'omnipotent' strength of the court to prosecute any individual that commits such heinous crimes as child recruitment, reflecting Simmons's theory that prosecutorial deterrence amounts to 'anticipated legalized, court-ordered punishment'.[105] Social deterrence theory is also deployed by Bensouda, as she claims that it 'is the responsibility of all' to ensure the translation of humanitarian law owing to the 'extra-legal social costs associated with law violation'.[106] Jo and Simmons argue that the ICC is highly influential when 'prosecutorial and social deterrence reinforce one another'.[107] This occurs when legal, social, domestic, and international mechanisms interact to reduce the perpetration of crimes and thus increase diffusion of the norm.

[103] ICC, 'Statement by the ICC Prosecutor, Fatou Bensouda, at the Conclusion of Her Visit to the DRC: "The Fight Against Impunity and the Critical Prevention of Crimes Under the Rome Statute are Essential for Social Stability"' (ICC, 4 May 2018).
[104] Hyeran Jo and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 International Organization 443.
[105] ibid.
[106] ICC, 'Statement by the ICC Prosecutor, Fatou Bensouda, at the Conclusion of Her Visit to the DRC: "The Fight Against Impunity and the Critical Prevention of Crimes Under the Rome Statute are Essential for Social Stability"' (n 103).
[107] Jo and Simmons (n 104) 444.

## I. Prosecutorial Deterrence

Based on a rationalist model, deterrence is predicated on the conscious choice of whether or not to commit a crime.[108] Rational choice theory, developed by Becker, consists of two elements.[109] First, individuals will commit a crime when the predicted utility of committing the crime is greater than the objective probability of being prosecuted for it[110] and, second, where the predicted utility minus the punishment is greater than the objective probability of being prosecuted.[111] This theory is, however, based on individuals being able to understand the likelihood of being captured and prosecuted. It is difficult to apply this theory in protracted, complex contexts, as it is based on predictions concerning constantly shifting variables. When examining the activities of members of ANSAs in the DRC that operate largely 'in the bush' and off grid, with groups frequently fragmenting, it is difficult to conceive that members would objectively be able to weigh the probability of punishment.

The most significant criticism of rational based deterrence theories, according to Pogarsky, is that they rest on the predicted behaviour of the 'rational' individual, or the 'deterrable' individual.[112] This is an individual or group that has the potential to be influenced by the threat of prosecution and is likely to be more receptive to accepting the norm.[113] There are, however, individuals who do not react 'rationally' in certain situations, or at all. In the literature, these individuals have

[108] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1907); Cesare Beccaria and Marchese di Voltaire, *Essay on Crimes & Punishments* (Stephen Gould 1809).
[109] Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 J Poli Econ 169.
[110] Ross L Matsueda, Derek A Kreager, and David Huizinga, 'Deterring Delinquents: A Rational Choice Model of Theft and Violence' (2006) 71(1) Am Socio Rev 95.
[111] ibid.
[112] Greg Pogarsky, 'Identifying "Deterrable" Offenders: Implications for Research on Deterrence' (2002) 19 Justice Q 3.
[113] ibid.

been described as 'incorrigible offenders', owing to their unresponsiveness to an increased risk of formal sanction.[114] The executive director of ACDK explained that 'leaders of the armed groups are aware of the threat of prosecution from the ICC' yet, they have a tendency 'to pretend and ignore this institution' and continue to recruit children.[115] Tom Farer supports this proposition, as he writes that a 'remote threat of criminal sanctions … will not resonate in the paranoid world of domestic armed conflict'.[116] Such an interpretation indicates the difficulties that the ICC faces in diffusing the prohibition of child recruitment.

The perceived threat of prosecution may also be counterbalanced by knowledge that spheres of influence will protect the individual. Broache's study suggests that the Ntaganda ICC warrant lacked a deterrent effect — multiple CNDP/M23 officers reported Ntaganda's lack of fear both of arrest and of the ICC more generally.[117] Ntaganda's initial lack of response to the release of his arrest warrant can, however, be attributed to the fact that he had been promoted to a general in the DRC's national armed forces, thus ensuring his protection. President Kabila of the DRC refused to hand Ntaganda over to the ICC, publicly claiming that Ntaganda was an 'important partner for peace'.[118] This was a flagrant violation of Article 12 of the Rome Statute, to which the DRC is a signatory, which states that the state party 'shall cooperate with the Court without any delay or exception'.[119] This is of particular

[114] ibid.
[115] Interview with Participant D (n 19).
[116] Tom J Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22 HuM RTs Q 90, 98.
[117] M Broache, 'Irrelevance, Instigation and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case' (2016) 10 IJTJ 402.
[118] Editorial, 'DR Congo: Arrest Bosco Ntaganda for ICC Trial President Suggests He's Willing to Apprehend General Wanted for War Crimes' (*Human Rights Watch*, 13 April 2012) <https://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial> accessed 29 September 2020.
[119] Rome Statute of the International Criminal Court (n 84).

poignancy within the DRC, where the state itself has referred the armed conflict to the prosecutor as clear bias and political influence was shown as to who the state feels should be prosecuted and who should not. This significantly weakens the legitimacy of the court in the DRC and consequently its deterrent effects. This weakness is often attributed to the fact that the ICC requires cooperation by states and does not have the jurisdiction to carry out the arrest warrant alone. A national coordinator of a local NGO, ACPD, explained that the ICC's main technique is 'intimidation of perpetrators', yet the ICC often fails to implement its mandates owing to its lack of power, leading ANSAs to continue flouting the law, thus reducing the ICC's effectiveness.[120]

The ICC's focus on the 'big fish' such as Lubanga and Ntaganda may also be a reason for the lack of deterrence.[121] 'Small fries', suggests Alexander, may fail to be intimidated and thus perceive the risk of being prosecuted as little to non-existent.[122] The national coordinator of ACPD agreed with this point, as he posited that the ICC's impact was limited by the fact that it has only prosecuted leaders, and that its impact could be increased if it prosecuted those who directly recruit child soldiers in the field.[123] Owing to resources and time constraints, the court aims to only indict those 'who bear the greatest responsibility', which, Alexander argues, has a greater chance of deterring other 'big fish'.[124] This method also relies on the 'big fish', translating the prohibition of the use of child soldiers vertically to regional commanders. Broache found that a significantly lower number of atrocities were committed after Ntaganda's surrender.[125] The executive director of the OPD also argued that prosecutorial deterrence is in play,

[120] Interview with Participant I, employee, Coalition des Volontaires pour la Paix et le Développement (CVPD) (14 September 2020).
[121] James F Alexander, 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' (2009) 54 Vill L Rev 17.
[122] ibid.
[123] Interview with Participant K (n 25).
[124] Alexander (n 121).
[125] Broache (n 117).

as he stated that ANSAs release child soldiers because, according to them, the ICC 'apprehends even the most powerful … It is not of their free will that they do it, it is under the constraint of justice.'[126] The analysis has demonstrated the general premise that an 'increase in the certainty, severity, or celerity of potential punishment, increases the perceived costliness of the contemplated offense and can thereby discourage it' is not as straightforward as it seems when applied to complex conflicts.[127]

## II. Social Deterrence

Analysis of the ICC's potential powers of prosecutorial deterrence has revealed that, owing to a lack of resources and the length of proceedings, very few individuals can be prosecuted by the ICC, thus decreasing its ability to deter individuals. The successful prosecution of Lubanga and Ntaganda has, however, raised awareness of the illegality of child recruitment, provided clarification of the law, and exposed the horrific effects of child soldiering. These consequences of the ICC prosecutions can also produce wider social deterrent effects. Jo and Simmons describe social deterrence as a process whereby 'community norms are challenged in a clear way (signalled, for example, by ICC actions'), which provides 'significant potential for a social reaction to law violations'.[128] Finnemore and Sikkink postulate that '[w]e only know what is appropriate by reference to the judgments of a community or a society'.[129] 'We recognise norm-breaking behaviour because it generates disapproval or stigma.'[130]

One of the central issues with child soldiering is its wide acceptance in countries such as the DRC, where children's association with groups 'is

[126] Interview with Participant E (n 43).
[127] Pogarsky (n 112).
[128] Jo and Simmons (n 104).
[129] Finnemore and Sikkink (n 14) 892.
[130] Finnemore and Sikkink (n 14) 892.

considered acceptable and even desirable'. [131] Multiple research participants disclosed that ANSAs often recruit children and are subsequently reluctant to release them, for reasons that include the belief that children have mystical powers, that they hold the rites of war, and that they are war charms that protect the group from confrontation.[132] Child soldiers were described by a survey respondent as 'the raw materials of these rebels'.[133] In addition, many families voluntarily send their children to join armed groups or are coerced by ANSAs. An interviewee reported that 'in some communities families have to send a child to the armed group in exchange for community protection'. [134] Matambura writes that many in the DRC 'have misunderstood this progressive socialization of children into adult life … holding children and youth as responsible for the defense of the community'.[135] Social acceptance of the prohibition of child soldiering, is therefore a necessary prerequisite for complete translation of the norm. This is particularly poignant where community values 'are strong, but the formal institutions of law — policing, courts and formal confinement capacities — are weak', analogous to the situation in the DRC.[136]

The prosecution of Lubanga and Ntaganda for the crime of child recruitment and use has elevated a widely accepted practice to one of serious international awareness and concern. All interview participants indicated fear of ICC prosecution as a motivation for releasing child soldiers. This is hugely significant, highlighting the previous lack of awareness of the illegality of child recruitment at an international level.

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[131] Coalition to Stop the Use of Child Soldiers, *Briefing Paper: Democratic Republic of Congo, Mai Mai Child Soldier Recruitment and Use, Entrenched and Unending* (2010) 1.
[132] Interview with Participant D (n 19); interview with Participant E (n 43); anonymous survey response.
[133] Survey response.
[134] Interview with Anonymous Participant A (20th August 2020).
[135] ibid.
[136] Jo and Simmons (n 104) 450.

This has additionally been reflected in evidence stated in the Human Rights Watch report, which emphasised civilian awareness of the illegality and negative effects of children joining ANSAs.[137] The report stated that 'child protection agencies admitted that the Lubanga case seems to have reached out to families in the region, much more effectively than years of their own campaigning'.[138] A report on the ICC's experience in the DRC additionally purports that 'children themselves had been educated about their rights and sensitised to their roles, as both victims and perpetrators, in a way which may impact their own future behaviour'.[139]

There have, however, been claims that greater social awareness of the ICC prosecutions and the illegality of child recruitment has affected child recruitment. A Human Rights Watch report states that, before the charges were brought against Lubanga, 'leaders openly admitted … numbers of children in their ranks and handed children over.' [140] 'Following the confirmation of charges against Lubanga … many denied having children under their command.'[141] Activists dubbed this phenomenon 'Lubanga syndrome'.[142] This phenomenon appears to still exist. The secretary general of CVPD claimed that ANSAs now refuse to admit that they use child soldiers, and 'continue to use them in secret, hiding their age, their identity cards, hiding them during visits'.[143] Multiple participants further disclosed that communication and

[137] Editorial, 'Courting History: The Landmark International Criminal Court's First Years' (*Human Rights Watch*, July 2008). Human Rights Watch separate interviews with MONUC, UNICEF, and Save the Children, Bunia, 2–3 May 2007, and ONUC, Goma, 10 May 2007.
[138] ibid.
[139] International Refugee Rights Initiative (n 102) 10.
[140] 'Courting History: The Landmark International Criminal Court's First Years' (n 137).
[141] 'Courting History: The Landmark International Criminal Court's First Years' (n 137).
[142] 'Courting History: The Landmark International Criminal Court's First Years' (n 137).
[143] Interview with Participant I (n 120).

meaningful dialogue between local NGOs and ANSAs were affected by the fear that NGO workers will report examples of child recruitment to the authorities, causing them to be prosecuted.[144] This is particularly problematic, as the prosecutions appear to have impacted on meaningful discussions between NGOs and ANSAs, thus making it more difficult to engage with ANSAs using mechanisms of voluntary translation. The majority of the survey respondents expressed the view that prosecutions were the most effective mechanism for norm translation, with 81 per cent (n=16) stating that the prosecutions of Thomas Lubanga and Bosco Ntaganda have been effective in reducing the use of child soldiers. However, whilst reflecting on these answers in their subsequent interviews, many participants did raise doubts about the overall, long-term effectiveness of prosecutions in reducing the use of child soldiers.

## 4.3 Summary

The analysis has revealed that theories of prosecutorial and social deterrence are difficult to apply to protracted, complex armed conflicts, such as in the DRC, as a plethora of factors are in play. Owing to the rampant impunity and political connections of ANSA leaders in the DRC, an ICC arrest warrant may not have the effect of acting as a deterrent against further crimes, as the certainty of prosecution is perceived to be low. The prosecutions have certainly increased awareness of the illegality of child recruitment and use and the perceived certainty of prosecution, contributing to an increased translation and acceptance of the norm more generally. In reaction to increased enforcement, ANSAs appear to have adapted their behaviours to facilitate the continued recruitment of child soldiers, suggesting that there is a lack of reinforcement of both theories of deterrence, which is required for full translation of the norm.[145] It could therefore be

[144] Interview with Participant C, deputy director, Synergy of Great Lakes Initiatives (SYNIGL) (15 September 2020); interview with Participant B (n 22); anonymous survey response.
[145] Jo and Simmons (n 104) 450.

suggested that sensitisation to the norm is required on the ground, by NGOs and INGOs, to encourage diffusion of the norm and in the reinforcement of the theories of deterrence. Deterrence is therefore required at both a prosecutorial and a social level to achieve norm translation.

# 5 Conclusion

Using the case study of the DRC, this paper has sought to evaluate the suitability of mechanisms employed to translate the prohibition of child recruitment and use to the activities of ANSAs. It has drawn upon the findings of an empirical research project involving ten interviews and a small survey carried out with NGO representatives. In doing so, the paper has explored and analysed the most utilised and prominent mechanisms employed by both national and international actors. It has offered a novel case study evaluation of a norm's translation, as well as an exploration of the variety of unique factors that inhibit NGOs' efforts to translate the norm which prohibits the use of child soldiers in armed conflict in the DRC. Notable factors that were identified through the course of the research were: the plethora of ANSAs; the rate at which they fragment and cease to exist; the 'incorrigible nature' of the individuals responsible for the recruitment of child soldiers; and the social acceptance of child recruitment. Given the range of these factors, it is apparent that it can be exceedingly difficult for one mechanism to successfully translate the norm. The research findings indicate that there is a need for systemic reinforcement of the prohibition norm through a variety of methods, to allow the international prohibition to cascade and eventual internalise within ANSA leadership and the wider DRC.[146] This suggests that effective translation requires a hybrid approach — combining voluntary and coercive translation mechanisms. The responses of survey participants supported this mixed approach, with 81 per cent (n=16) of survey respondents supporting mixed mechanisms to successfully prevent the use of child soldiers. A hybrid

[146] Finnemore and Sikkink (n 13) 895.

approach does not, however, reduce the utility of each mechanism. It became evident during the course of this research that each ANSA is unique in its leadership, nature, and personnel, meaning that certain mechanisms are more effective at translating the norm with some individuals and/or groups than others.

With regard to voluntary translation mechanisms, three mechanisms and their application by local NGOs have been examined, providing a level of detail not previously available within the literature. This paper has argued that negotiations to release child soldiers were more effective in translating the norm when they were not transactional in nature, in the context of the DRC. Where NGOs provide training on the use of child soldiers, it has been suggested that educating ANSAs in the legal provisions alone was less successful at diffusing the norm when not supplemented by technical training on the implementation of these provisions. An alternative approach which promotes empathy by emphasising the impact on the children, their families, and communities was considered to be preferable for norm translation, particularly for individuals unresponsive to the threat of prosecution. Overall, the signing of unilateral declarations was considered to be the most effective voluntary mechanism, when two conditions are present to induce compliance and reduce relapse: 1) the application of alternative mechanisms, in which the declaration can be used to solidify a commitment to not recruit children, and 2) the ability of the NGO to carry out monitoring of the ANSA, to ensure compliance with the deed of commitment and hence increase translation.

For all three mechanisms of voluntary translation to have a greater chance at ensuring translation, research by the NGOs into the ANSAs prior to engagement allowed organisations to adjust their approach to suit the style of the ANSA. It appears that doing so may increase the receptiveness of the ANSA in accepting the norm and may promote successful engagement with the mechanisms. Participants also reported that the three mechanisms were commonly not applied in isolation and often complemented one other, each incrementally bolstering the

translation norm. However, such a mixed approach may be unavailable to smaller NGOs owing to resource constraints, whereas INGOs can often offer a more sustained engagement package. Further research identifying ideal combinations and situational applications of voluntary translation mechanisms may provide local NGOs with the opportunity to direct their resources more appropriately.

The most frequently cited coercive translation mechanism by research participants was prosecution by the ICC. Deterrence theory, which forms part of the narrative adopted by ICC prosecutors, was used to analyse this mechanism and revealed two different, yet complementary, theories: prosecutorial and social deterrence. It has been argued that the ICC needs to successfully deter ANSAs on both of these levels to achieve norm internalisation. The analysis revealed that rational choice theories are extremely difficult to apply in complex, protracted conflicts such as in the DRC, as many other factors often outweigh the (remotely) perceived formal sanction. Prosecutions are considered, however, to have increased the overall social awareness of the illegality of child recruitment and use, and have contributed to the diffusion of the norm throughout the wider DRC population. The generally held view is that this may have increased perceived stigma relating to child soldier recruitment among some ANSAs, which is a step closer to acceptance and internalisation of the norm. There are, similarly, a multitude of factors that limit the deterrence capabilities of the ICC in the DRC, suggesting that the ICC's remote and abstract nature is not conducive to ensuring successful translation of the norm alone. The ICC's work requires supplementary sensitisation by NGOs on the ground, increasing awareness of the illegality of child recruitment and use and the psychosocial consequences on children.

This reinforces the argument supporting a hybrid approach. Utilising a mixture of both voluntary and coercive mechanisms is the most suitable approach to achieve norm internalisation within ANSAs operating in the DRC. It would seem that the most effective approach to achieve ANSAs' internalisation of the norm involves a combined intervention.

This would, ideally, comprise a mixture of direct NGO interaction (training, negotiations, and signed commitments) together with prosecutorial deterrence. It is to be hoped that broader social acceptance of the prohibition will ensure its greater and more effective internalisation by the ANSAs. While literature that analyses one type of mechanism exists, this piece has highlighted the utility of allowing the coercive and voluntary mechanisms to complement each other. More research needs to be carried out to understand how coercive and voluntary mechanisms can interact and reinforce each other to better inform the DRC community, so as to ensure greater translation of the norm.