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Foreword

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It is with great pleasure that I introduce the sixth volume of the *York Law Review*. Now in its sixth year, the *Review* continues to stand as a testament to the intellectual curiosity, rigorous legal analysis, and commitment to innovative, socially engaged research fostered within the York Law School.

At York Law School, we pride ourselves on cultivating a vibrant learning community where our students are active participants in the discovery, critical evaluation, and application of law as a social phenomenon – deeply embedded in cultural, historical, and political contexts. Through our problem-based learning approach (or the 'flipped classroom' used in some of our LLM programmes), our students do not passively receive knowledge but are directly called to analyse, discuss, apply, and criticise legal norms, principles, and theories. We encourage them to consider the real-world effects of law in action, guiding them to observe the reality of statutes and case law, to contextualise them, and to present and discuss what about law works (and for whom) and what does not (and who is mostly affected). The *York Law Review* embodies this ethos. Run by a dedicated team of undergraduate and postgraduate (taught and research) students, it offers a vital platform to showcase the very best scholarly work produced by their peers.

Publishing in a student-run academic journal like the *York Law Review* offers an invaluable opportunity. It allows students to develop their research and writing skills, engage in scholarly debates, and disseminate their work to a wide audience. Thanks to its open-access availability via the University of York's website, White Rose Research Online, and HeinOnline, the *Review* ensures that the insightful contributions of our students – whether selected as the best undergraduate and postgraduate dissertations of the previous academic year or through our annual abstract competition – reach readers well beyond the university, placing their ideas on a more public stage. Equally important is the experience gained by those students who dedicate their time and skills to the editorial process itself. Serving on the editorial board develops crucial skills in critical analysis, collaborative work, and academic publishing standards. The

experience gained by running and editing an academic journal provides valuable preparation for future legal practice or an academic career. The *York Law Review* offers our students an environment in which they can build confidence in publishing, reviewing, critiquing, and, ultimately, improving legal scholarship.

The articles within this sixth volume reflect the impressive breadth and depth of our students' interests and their commitment to socially engaged, critical, and contextually aware (socio)-legal scholarship. The articles published tackle pressing contemporary issues, ranging from the jurisdictional and technical challenges of cybercrime investigation and the impact of alternative dispute resolution (ADR) on small and medium-sized enterprise (SME) development in England and India, to the intersection of disability and homelessness in shaping law and policy. Other articles examine the effects of Hong Kong's National Security Law on environmental human rights, explore the legal background of arriving irregularly in the UK through the story of Paddington Bear, and confront the tension between economic development and human rights in the context of natural resource extraction. These works demonstrate not just a strong command of legal doctrine but a passion for exploring how law affects diverse communities across different countries and contexts. They confront challenging, timely societal questions with analytical rigour and critical insight.

The successful production of this volume would not have been possible without the dedication and hard work of the student editorial team. My sincere thanks go to Senior Editors Malak Farag, Lewis Wells, and Isaac Mittoo, and Junior Editor Roma Beke. Their commitment to upholding the quality and vision of the *York Law Review* is commendable. A special and heartfelt thank you must be extended to the Editor-in-Chief, Eleana Kasoulide. Eleana's leadership, diligence, and vision have been truly exceptional, guiding the *Review* through some unexpected challenges, eventually steering it through another successful year – all while balancing her own PhD research and research assistant responsibilities. The York Law School is immensely grateful for her outstanding contribution and leadership.

It is with great pride that we present this sixth volume. We are confident that the articles contained within will stimulate thought and discussion, showcasing the talent, curiosity, and dedication of York Law School students.

Dr Mattia Pinto

May 2025

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Editorial

Eleana Kasoulide

Once again, it is a pleasure to be introducing another volume of the *York Law Review*. This issue carries on the tradition for a sixth year giving York Law School students the chance experience the publication process and push them to grow as fledgling academics. We are presenting six articles from undergraduate and postgraduates discussing matters of immigration law, cybercrime law, environmental law, disability law, and corporate law. We hope that this volume, with its varied arguments and ideas, has something for everyone and that it might help shed some light on what our legal student community currently finds interesting. A new team of students has come together to make this journal a reality. A big thank you to Isaac, Lewis, and Malak, our Senior Editors, for tirelessly working and balancing their own academic ambitions to guide the authors through this novel experience. Our Junior Editor, Roma, should also be thanked for handling various administrative tasks, our social media, and organising our annual abstract competition to great success. We would also like to express our gratitude to Professor Mattia Pinto for his constant support throughout this academic year which continues to make this publication possible. We wish you a pleasant reading experience and look forward to perhaps working with some of you in the future.

Investigating Cybercrime: The Key Jurisdictional and Technical Challenges Faced by Law Enforcement and Ways to Address Them

Hayden Coupland

Abstract

The rapid expansion of cyberspace has created significant opportunities but also introduced new threats in the form of cybercrimes. Law enforcement agencies are increasingly challenged in investigating these crimes due to the complex, transnational nature of the internet. This paper examines the key jurisdictional and technical obstacles that hinder effective cybercrime investigations and explores strategies to overcome these challenges. Jurisdictional challenges primarily arise from the global nature of cybercrimes. Disparate legal frameworks, conflicting international laws, and limited cooperation between countries further complicate the ability of agencies to investigate and prosecute offenders. On the technical front, cybercrimes often exploit sophisticated technologies that evolve faster than the capabilities of law enforcement agencies. Encryption, anonymisation tools, and the use of dark web platforms make it increasingly difficult for investigators to track cybercriminals, especially given the limitations of their forensic tools and training. Having established the challenges, the article discusses some approaches to reform and suggests a multifaceted approach to improving cybercrime investigations combining investing in advanced training, better resource allocation, and public–private partnerships to enhance investigative capabilities, while also supporting the existing calls for legal harmonisation.

1 Introduction

The rapid advancement of technology has profoundly transformed the landscape of crime, with cybercrime appearing as a significant threat to global security. Law enforcement agencies worldwide are grappling with the dual challenges of jurisdictional and technical complexities in their efforts to investigate and combat cybercrimes. These crimes, which encompass a wide range of illegal activities including hacking, identity theft, online fraud, and cyber espionage, often transcend national borders, creating intricate legal dilemmas regarding jurisdiction.[1] Moreover, the sophisticated technical means employed by cybercriminals, such as encryption, anonymisation tools, and the dark web, further complicate the investigative process.[2]

The primary aim of this article is to dissect these challenges and propose practical strategies to enhance the efficacy of cybercrime investigations. The paper thus does three things: first, it delineates the scope and nature of the jurisdictional and technical challenges of investigating cybercrime; second, it analyses the current relevant measures and their shortcomings; and third, it proposes improved strategies for future cybercrime investigations.

2 Overview of Cybercrime and Its Societal Impact

Cybercrime stands for a profound challenge to modern society, fundamentally reshaping how individuals, corporations, and governments view security in the digital age. As Wall asserts, the rapid expansion of digital infrastructures has simultaneously created fertile ground for malicious activities, making cybercrime not just a technological issue, but one that permeates economic, societal, and psychological realms.[3] Brenner concurs, noting that the borderless nature of cyberspace amplifies the complexity of combating cybercrime, with both personal and corporate entities at heightened risk.[4] This multifaceted threat impacts global economies, with McGuire and Dowling estimating the economic toll to exceed trillions annually, when factoring in financial losses, business interruptions, and long-term reputational damage.[5]

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[1] Susan W. Brenner, *Cybercrime: Criminal Threats from Cyberspace* (Praeger 2010); Marc Goodman, *Future Crimes: Inside the Digital Underground and the Battle for Our Connected World* (Doubleday 2015).
[2] Thomas J. Holt, Adam M. Bossler, and Kathryn C. Seigfried-Spellar, *Cybercrime and Digital Forensics: An Introduction* (2nd edn, Routledge 2017); Roderic Broadhurst et al., 'An Analysis of the Nature of Groups Engaged in Cyber Crime' (2014) 8 International Journal of Cyber Criminology 1.
[3] David S. Wall, *Cybercrime: The Transformation of Crime in the Information Age* (Polity 2007).
[4] Susan W. Brenner, *Cybercrime: Criminal Threats from Cyberspace* (Praeger 2010).
[5] Michael McGuire and Samantha Dowling, *Cybercrime: A Review of the Evidence* (Home Office Research Report 75, 2013).

Further, on an individual level, the increasing vulnerability of citizens to offences such as identity theft, financial fraud, and violations of privacy are of serious worry. The psychological toll of these crimes is significant, often leading to trauma, a diminished sense of security, and a pervasive distrust of online platforms.[6] Deeply personal crimes disrupt daily life, presenting a complex challenge to law enforcement and regulatory agencies, especially where individuals are unaware of the full extent of the damage until it's too late, as is true for many cybercrime cases, exacerbating the emotional and financial costs experienced.[7]

Corporations, likewise, are prime targets for cybercriminals. Businesses, especially those operating critical infrastructures, face existential threats from cyberattacks, which can result in financial losses and operational paralysis. Holt and Bossler underscore the transformative impact of cybercrime on corporate operations, pointing to the rise of sophisticated attacks such as ransomware and data breaches, which pose significant financial burdens. These threats are further compounded by the complex digital ecosystems in which corporations run, creating a challenging environment for ensuring robust cybersecurity measures.[8]

The societal implications of cybercrime extend beyond immediate economic damage. Yar insists that cybercrime undermines public trust in the digital infrastructures that form the backbone of contemporary life, stifling technological innovation and slowing societal progress, highlighting that the pervasive threat of cyberattacks represents a substantial barrier to further digital transformation.[9] The critical role of public trust in supporting digital security cannot be overstated, with Goodman warning that without significant improvements in cybersecurity, the social contract between citizens and digital systems is at risk of breaking down completely.[10]

Consequently, the social ramifications of cybercrime manifest in more insidious ways, particularly in relation to online harassment and exploitation. An interesting investigation done by Holt and Bossler explores the rise of cyberbullying and the exploitation of children through online platforms, illustrating how the anonymity and reach of the internet have worsened these problems. Such crimes not only have severe psychological impacts on victims but also

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[6] Robert Moore, *Cybercrime: Investigating High-Technology Computer Crime* (Anderson 2010); Marc Goodman, *Future Crimes: Inside the Digital Underground and the Battle for Our Connected World* (Doubleday 2015).
[7] Michael McGuire and Samantha Dowling, *Cybercrime: A Review of the Evidence* (Home Office Research Report 75, 2013).
[8] Thomas J. Holt and Adam M. Bossler, *Cybercrime in Progress: Theory and Prevention of Technology-Enabled Offences* (Routledge 2015).
[9] David S. Wall, *Cybercrime: The Transformation of Crime in the Information Age* (Polity 2007); Majid Yar, *Cybercrime and Society* (2nd edn, SAGE Publications 2013).
[10] Marc Goodman, *Future Crimes: Inside the Digital Underground and the Battle for Our Connected World* (Doubleday 2015).

represent a significant challenge for law enforcement agencies, who must navigate evolving technologies while addressing public demand for enhanced protections.[11]

3 Legal Framework for Cybercrime Investigation

A legal framework for cybercrime investigations is essential in addressing the complexities of a rapidly evolving digital landscape. However, it currently remains rife with inconsistencies, fragmentation, and limitations that hinder effective enforcement and cross-border cooperation. This section critically examines international treaties, national legislation, and case law to highlight the challenges and contradictions that undermine the investigation of cybercrime. A close analysis of these frameworks shows how they simultaneously support and obstruct law enforcement efforts in responding to cyber threats.

3.1 International Treaties and Agreements: Harmonisation vs Fragmentation

International treaties such as the Council of Europe's Convention on Cybercrime in Budapest 2001 are often praised for setting a common legal standard to combat cybercrime. The Budapest Convention, the first international treaty specifically addressing cybercrime, encourages cooperation among states in investigating cyber offences, particularly those with cross-border elements. Yet, its efficacy is undermined by the absence of major players like China and Russia, creating jurisdictional gaps where cybercriminals can evade justice by operating in non-signatory states. This omission exemplifies how geopolitical considerations weaken the harmonising potential of such treaties.[12]

The United Nations Convention against Transnational Organized Crime 2000, although broader in scope, also addresses cybercrime as part of global crime prevention efforts. Like Budapest, its implementation is hampered by the slow pace of international cooperation, particularly in terms of accessing digital evidence. This challenge is further complicated by the reliance on mutual legal assistance treaties (MLATs), which are cumbersome and ineffective in cases requiring rapid access to volatile data.[13]

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[11] Thomas J. Holt and Adam M. Bossler, *Cybercrime in Progress: Theory and Prevention of Technology-Enabled Offences* (Routledge 2015).
[12] Convention on Cybercrime of the Council of Europe (ETS No. 185, Budapest, 23 November 2001).
[13] United Nations, United Nations Convention against Transnational Organized Crime (2000).

Regional frameworks such as the Inter-American Convention on Cybercrime 1999[14] and the African Union Convention on Cyber Security and Personal Data Protection 2014[15] aim to address cybercrime within specific geographical regions, yet they face similar challenges. Inconsistent legal standards across countries lead to difficulties in enforcing laws, while the lack of widespread adoption further fragments global efforts to effectively tackle the problem. The APEC Cybersecurity Strategy 2005[16] and the NATO Tallinn Manual 2014[17] contribute to regional security but are limited in scope, often reflecting the geopolitical interests of their respective members rather than establishing universally applicable norms.

Moreover, the Additional Protocol to the Convention on Cybercrime 2003, which aims to combat acts of racism and xenophobia committed through computer systems, reveals another layer of complexity in cybercrime law. While it expands the scope of criminalisation, it introduces new legal challenges, especially when addressing freedom of speech concerns and differing national approaches to hate speech including acts of a racist and xenophobic nature.[18]

3.2 National and Regional Legislation: Contradictions

At the national level, countries adopt a variety of legal frameworks to address cybercrime, but these frameworks often conflict with one another, creating legal grey zones for multinational corporations and law enforcement. The Computer Fraud and Abuse Act (CFAA) is a cornerstone of US cybercrime law. Having said this, its broad interpretation of "unauthorised access" has led to criticism for criminalising legitimate activities, such as security research, which could otherwise enhance cybersecurity. This overreach results in a chilling effect, stifling necessary innovation and collaboration between private sector entities and law enforcement.[19]

In the European Union (EU), the General Data Protection Regulation (GDPR) aims to protect individual privacy but complicates cybercrime investigations by limiting the sharing of personal data across borders, especially sharing with non-EU countries. The EU Directive 2013/40/EU[20] on attacks against information systems strengthens the legal framework for

[14] Organization of American States, Inter-American Convention on Cybercrime (1999).
[15] African Union, Convention on Cyber Security and Personal Data Protection (2014).
[16] Asia-Pacific Economic Cooperation (APEC), APEC Cybersecurity Strategy (2005).
[17] NATO Cooperative Cyber Defence Centre of Excellence, Tallinn Manual on the International Law Applicable to Cyber Warfare (2nd edn, CUP 2017).
[18] Council of Europe, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (Strasbourg, 2003).
[19] Computer Fraud and Abuse Act (CFAA), 18 USC 1030 (United States).
[20] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [2013] OJ L218/8.

addressing cyberattacks but remains constrained by the GDPR's stringent data privacy rules, particularly in interactions with US law, which is governed by the Clarifying Lawful Overseas Use of Data Act (CLOUD) Act. This results in legal uncertainty for multinational corporations caught between conflicting legal obligation.[21]

In Japan, the Act on Prohibition of Unauthorised Computer Access focuses on unauthorised access as a criminal offence yet lacks clear provisions for international cooperation, limiting its efficacy in addressing global cybercrime networks.[22] Similarly, the Cybercrime Act (Australia, 2001) and Information Technology Act (India, 2000) highlight the national focus on combating cybercrime but fall short of providing mechanisms for effective cross-border enforcement.[23] In contrast to these examples, Germany's Strafgesetzbuch (StGB) Sections 202a and 202b, which criminalise data espionage, set strict standards for prosecuting unauthorised access to digital data, reflecting the country's emphasis on data protection. Although on the right track, this strictness also complicates international cooperation, particularly in balancing data privacy with the need for law enforcement to access critical information.[24]

3.3 Case Studies: Jurisdictional Ambiguities

The complexities of cybercrime jurisdiction are vividly illustrated in case law, where courts wrestle with the borderless nature of cyberspace. *Microsoft Ireland*[25] highlighted the challenge of accessing data stored overseas, as the U.S. government sought to compel Microsoft to hand over emails stored on servers in Ireland. The case underscored the legal uncertainty regarding the extraterritorial application of national laws to data stored in foreign jurisdictions. Although the issue was addressed through the CLOUD Act, which allows US authorities to request data stored abroad, it still fails to resolve the deeper tension between national sovereignty and global digital infrastructures.[26]

Yahoo!, Inc. v. LICRA starkly illustrates the jurisdictional challenges within cyberspace. A French court ordered Yahoo! to block French users from accessing Nazi memorabilia on its US-based platform, despite such content being legal under US law. This case ignited heated

[21] General Data Protection Regulation (GDPR), Regulation (EU) 2016/679 (European Union); Clarifying Lawful Overseas Use of Data Act (CLOUD Act), 18 USC Chapter 119 (United States).
[22] Act on Prohibition of Unauthorised Computer Access (1999) (Japan).
[23] Information Technology Act 2000 (India); Cybercrime Act 2001 (Cth) (Australia).
[24] Strafgesetzbuch (StGB) Section 202a and 202b (Germany).
[25] *Microsoft Corp. v United States* 829 F.3d 197 (2d Cir. 2016).
[26] Ibid.

debate over the extent to which a nation may impose its laws on foreign entities operating online, and how such extraterritorial enforcement aligns with principles of sovereignty and free expression. It exemplifies the clash between national sovereignty and the borderless nature of the internet, raising critical questions about the limits of jurisdictional authority in cyberspace.[27]

Similarly, the *Google LLC v. CNIL*[28] ruling by the Court of Justice of the European Union (CJEU) addressed the "right to be forgotten" under the GDPR. The CJEU ruled that this right does not extend globally, reflecting the court's reluctance to impose EU data protection standards on non-EU entities. However, this decision leaves a significant gap in protecting EU citizens from cyberthreats emanating from jurisdictions with weaker privacy protections.[29]

The *United States v. Ivanov* case[30] involving a Russian hacker prosecuted under US law for crimes committed outside the United States, is a critical case in understanding the jurisdictional challenges in prosecuting cybercriminals operating in foreign countries. Despite the significant harm caused within US borders, the prosecution struggled with enforcing the judgment due to the hacker's location being within a noncooperative jurisdiction, further showcasing the limitations of current international frameworks for addressing cross-border cybercrime.[31]

In assessing the current legal framework for cybercrime investigations – international, regional, national, it is obvious that, though well-intentioned, suffer from fragmentation and jurisdictional conflicts that undermine their effectiveness. A combination of missing key actors, conflicting priorities between privacy and security, and persistent jurisdictional ambiguities make prosecuting cross-border cybercrime exceedingly difficult. The legal framework then must evolve toward greater international collaboration, clearer jurisdictional boundaries to be more effective.

4 Jurisdictional and Technical Challenges in Cybercrime Investigations Background

[27] *Yahoo! Inc v LICRA* [2006] 433 F 3d 1199 (9th Cir); Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (OUP 2006).
[28] *Google Inc. v Commission nationale de l'informatique et des libertés (CNIL) Case* C-507/17 (Court of Justice of the European Union, 24 September 2019).
[29] *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (Case C-131/12) [2014] ECR I-317.
[30] *United States v Ivanov* 175 F Supp 2d 367 (D Conn 2001).
[31] Ibid.

The jurisdictional and technical barriers confronting law enforcement in the digital realm are arguably among the most pressing issues in cybercrime investigation. The inherently transnational nature of cybercrime is noted as one of the primary obstacles, demonstrating that cybercriminals can operate from any location with internet access, rendering traditional notions of territorial jurisdiction inadequate. Existing legal frameworks, which are often predicated on geographical boundaries, fail to account for the borderless nature of cyberspace. This lack of legal cohesion leads to significant delays in investigations, as law enforcement agencies must navigate a labyrinth of divergent national laws and often cumbersome MLATs.[32] Also, cross-border investigations require extensive collaboration between law enforcement agencies and the absence of streamlined processes and the frequent lack of trust between jurisdictions often hinder progress. For example, the acquisition of electronic evidence from foreign servers can be delayed for months, if not years, impeding timely investigations.[33]

On the technical side, the proliferation of encryption and anonymisation technologies poses significant challenges for cybercrime investigations. Brenner points out that the widespread use of such technologies enables criminals to evade detection, a consequence of which results in law enforcement agencies unable to trace illicit activities effectively.[34] Moreover, dark web marketplaces, which are heavily reliant on encryption and anonymity, have become hubs for cybercriminal activities, further complicating efforts to identify and apprehend offenders by law enforcement agencies.[35] Even when law enforcement *can* track cybercriminals, the admissibility of digital evidence in court remains a contentious issue for our legal system, with many legal systems ill-equipped to handle the intricacies of digital forensics with the procedures in place today.[36]

4.1 Jurisdictional Challenges in Cybercrime Investigations

Jurisdictional challenges in cybercrime investigations reveal more than mere procedural hurdles; they highlight systemic deficiencies within the global legal framework. A pertinent illustration of jurisdictional ambiguities is the example of a cybercriminal in Country A hacking a server in Country B, causing financial harm to victims in Country C. The question of which

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[32] David S. Wall *Cybercrime: The Transformation of Crime in the Information Age* (Polity 2007); Susan W. Brenner (*Cybercrime: Criminal Threats from Cyberspace* (Praeger 2010).
[33] Smith RG, and Grabosky P and Urbas G, *Cyber Criminals on Trial* (Cambridge University Press 2004)
[34] Susan W. Brenner, *Cybercrime: Criminal Threats from Cyberspace* (Praeger 2010).
[35] David S. Wall *Cybercrime: The Transformation of Crime in the Information Age* (Polity 2007).
[36] Thomas J. Holt and Adam M. Bossler, *Cybercrime in Progress: Theory and Prevention of Technology-Enabled Offences* (Routledge 2015).

country holds the jurisdiction to investigate and prosecute becomes fraught with complexity. While the principle of extraterritoriality allows states to claim jurisdiction over acts committed beyond their borders, provided these acts have a significant impact within their territory, its application remains inconsistent and frequently contested.

These challenges accentuate the discord between the inherently global nature of cyberspace and the territorially confined legal systems of sovereign states. This section offers a sophisticated examination of how jurisdictional conflicts undermine the efficacy of cybercrime investigations, alongside a critical exploration of potential strategies for harmonising the global legal order to better address these transnational crimes.

4.1.1 Jurisdictional and Legal Principles in Cyberspace

The traditional principles of jurisdiction are increasingly inadequate when applied to the digital realm. The principle of "territoriality", which grants states authority over activities within their geographic boundaries, is fundamentally challenged by the borderless nature of cyberspace.[37] In cyberspace, where digital interactions defy physical boundaries, the principle of territoriality becomes anachronistic and is unable to accommodate the fluid and ubiquitous nature of cyber activities.[38]

The principle of territoriality, long central to legal theory, asserts that a state has jurisdiction over crimes committed within its borders. Yet, applying this doctrine to cybercrime proves increasingly problematic, as offences such as hacking, online fraud, and data breaches frequently span multiple jurisdictions. The rigidity of territoriality often leaves significant enforcement gaps, particularly when the perpetrator, victim, and the digital infrastructure used in the crime reside in different countries.

The effects doctrine, which permits a state to assert jurisdiction based on the effects of a cybercrime within its territory, offers a partial remedy but introduces significant complexities.[39] While this doctrine provides a basis for pursuing cybercriminals whose actions affect multiple jurisdictions, it also risks jurisdictional overreach, leading to conflicts between sovereign states. The application of the effects doctrine often results in overlapping jurisdictions, where

[37] David R. Johnson and David G. Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48(5) Stanford Law Review 1367; Lawrence B. Solum, 'Models of Internet Jurisdiction' (1998) 1998(4) University of Illinois Law Review 1017.
[38] Anthony D. Trotter, 'Jurisdiction in Cyberspace: Rights and Regulation' (2010) 108(8) Michigan Law Review 1.
[39] Jack L. Goldsmith, 'Against Cyberanarchy' (1998) 65(4) University of Chicago Law Review 1199.

multiple states claim authority based on perceived impacts, thus creating a fragmented enforcement landscape.[40] This fragmentation not only allows cybercriminals to exploit legal inconsistencies but also impedes effective prosecution, undermining the rule of law in cyberspace.[41]

The fundamental mismatch between the global reach of cyber activities and the territorially confined nature of legal systems lies at the heart of jurisdictional challenges in cybercrime investigations. The complexities of territoriality become particularly acute in cases involving multiple jurisdictions, each governed by distinct legal standards and procedural norms.[42] These conflicts are further exacerbated by divergent laws governing cross-border data access, where critical evidence may be stored in jurisdictions with stringent data protection laws, thereby complicating or obstructing law enforcement access.[43]

The principle of double criminality, an element of extradition treaties and MLATs, which requires a crime to be recognised in both the requesting and requested jurisdictions, often impedes the extradition of cybercriminals, particularly in cases where national laws differ significantly.[44] This lack of uniformity in cybercrime legislation across countries creates a fragmented legal landscape that cybercriminals can exploit, often operating from jurisdictions with inadequate enforcement mechanisms.[45] Such exploitation not only constitutes a procedural barrier but also undermines the integrity and effectiveness of international law in the digital era.

4.1.2 Legal Fragmentation

The legal fragmentation within national cybercrime laws has concrete and often detrimental effects on the enforcement of cyber laws. This fragmentation is particularly pronounced in cross-border hacking cases, where the legal frameworks of involved countries may directly conflict.[46] Such conflicts arise from differences in both substantive law – how crimes are

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[40] Susan W. Brenner, 'Cybercrime Jurisdiction' in Susan. W. Brenner, *Cybercrime: The Transformation of Crime in the Information Age* (Polity 2006).
[41] Dan Jerker B. Svantesson, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Kluwer Law International 2017).
[42] Dan Jerker B. Svantesson, 'A New Jurisprudence for the Internet?' (2019) 30(3) European Journal of International Law 1071.
[43] Ronald J. Deibert and Masashi Crete-Nishihata, 'Global Governance and the Spread of Cyberspace Controls' (2012) 18(3) Global Governance 339.
[44] M. Cherif Bassiouni, *International Criminal Law: Volume III: Enforcement* (Martinus Nijhoff Publishers 2008).
[45] Abraham D. Sofaer and Seymour E. Goodman, 'Cyber Crime and Security: The Transnational Dimension' in Abraham D. Sofaer and Seymour E. Goodman (eds), *Transnational Dimension of Cyber Crime and Terrorism* (Hoover Institution Press 2001).
[46] Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press 2010).

defined – and procedural law – how evidence is gathered and presented. The lack of harmonisation among national legal frameworks creates a fragmented legal environment in which cybercriminals can manoeuvre with relative ease. Conflicts are then exacerbated by varying national priorities – such as differing approaches to privacy versus security – which can lead to legal impasses that delay or even preclude justice.[47]

The global scale of cybercrime and its jurisdictional challenges are vividly illustrated by real-world examples. The 2017 WannaCry ransomware attack, which affected over 200,000 computers across 150 countries, is a case in point. Attributed to North Korean hackers, the attack exploited vulnerabilities in Microsoft Windows, encrypting users' data and demanding ransom payments in Bitcoin. Coordinating international efforts to trace the attackers and mitigate damage underscored the difficulty of managing a cybercrime spanning multiple jurisdictions. Kuerbis and Badiei highlight the challenges faced by international law enforcement agencies in responding to such a widespread cyberattack, citing the consensus held amongst scholars and experts emphasising the need for more effective global cooperation and information sharing.[48]

The extraterritorial application of laws, exemplified by the US CLOUD Act, further complicates the legal landscape. Although intended to facilitate international data access for law enforcement, such laws often clash with foreign data protection regimes, creating significant legal uncertainties for multinational companies.[49] These companies, caught between conflicting legal obligations, face severe financial and reputational risks, underscoring the urgent need for harmonised international legal standards that effectively balance cybercrime enforcement with respect for national sovereignty and legal traditions.[50]

Conflicting legal standards are particularly problematic in cases involving data protection laws, such as the GDPR, which often clashes with US data disclosure requirements under laws like the CLOUD Act. These conflicts create a complex legal landscape, delaying investigations or, in some cases, rendering the collection of critical evidence impossible. Such legal conflicts can impede the flow of information necessary for cybercrime investigations, highlighting the need

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[47] Jakub Kulesza, *International Internet Law* (Routledge 2012).
[48] Brenden Kuerbis and Farzaneh Badiei, *Mapping the Cybercrime Ecosystem: Deterring Cybercrime and Increasing Cooperation* (Georgia Tech University 2017).
[49] Urs Gasser, and John Palfrey, *Breaking Down Digital Barriers: When and How ICT Interoperability Drives Innovation* (Berkman Klein Center Research Publication 2007).
[50] Dan Jerker B. Svantesson, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Kluwer Law International 2017).

for greater harmonisation of data protection laws at the international level.[51] Furthermore, the reluctance of certain countries to extradite their nationals complicates prosecutions, exacerbated by outdated treaties that fail to address the realities of cybercrime. The lack of effective extradition agreements for cybercrime suspects undermines international efforts to bring perpetrators to justice, calling for the modernisation of extradition treaties to reflect the transnational nature of cybercrime.[52]

The struggle to balance data privacy with security concerns highlights the broader challenge of developing a cohesive global legal framework for cybercrime. The absence of such a framework exacerbates jurisdictional challenges, impeding effective law enforcement and undermining global cybersecurity efforts.[53] This situation demands immediate attention from the international legal community to establish integrated and universally accepted legal standards for addressing cybercrime.[54]

4.2 Artificial Intelligence: An Emerging Jurisdictional Challenge

The growing integration of artificial intelligence (AI) into cybercriminal activities introduces novel jurisdictional complexities that traditional legal frameworks struggle to address. AI can automate cyberattacks, making them more difficult to trace and attribute, while operating autonomously across multiple jurisdictions. These developments raise pressing questions about where such crimes are "committed", and which legal systems should hold jurisdiction.

From a legal perspective, the use of AI in law enforcement – particularly in cross-border surveillance – raises concerns about extraterritorial privacy violations. AI-driven surveillance tools may collect data in ways that infringe on the privacy laws of other countries, highlighting the need for legal frameworks that address both AI's unique characteristics and its role in cybercrime.[55] Wagner emphasises that the deployment of AI in law enforcement must be accompanied by robust legal safeguards to protect individual privacy and ensure compliance with international human rights standards.[56] The extraterritorial use of AI surveillance tools

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[51] Christopher Kuner, 'The Internet and the Global Reach of EU Law' in B. Van der Sloot, D. Broeders and E. Schrijvers (eds*), Exploring the Boundaries of Big Data* (Amsterdam University Press 2020).
[52] M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, OUP 2014).
[53] Ronald J. Deibert and Masashi Crete-Nishihata, 'Global Governance and the Spread of Cyberspace Controls' (2012) 18(3) Global Governance 339.
[54] Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (OUP 2006).
[55] Ben Wagner, 'AI and Policing: Ethical and Legal Implications' in M. Hildebrandt and K. O'Hara (eds), *Life and the Law in the Era of Data-Driven Agency* (Edward Elgar Publishing 2021).
[56] Ibid.

poses significant legal and ethical challenges, necessitating a careful balancing of security and privacy considerations.

The challenge of assigning accountability in AI-driven cybercrime further complicates jurisdictional issues. Legal frameworks typically assume human actors with clear intent, but AI can autonomously perform actions without direct human oversight. Determining whether responsibility lies with the programmer, user, or system owner becomes a vexing legal question. As noted by Mantelero, the legal principles developed for traditional forms of cybercrime may not be adequate for addressing the complexities introduced by AI. The autonomous nature of AI systems challenges the existing notions of intent and responsibility, requiring a rethinking of legal doctrines to effectively address AI-driven cybercrime.[57]

4.2.1 AI use by law enforcement: Legal and Ethical Implications

The integration of advanced technologies into cybercrime investigations raises critical legal and ethical questions, particularly regarding the tension between security and privacy. The GDPR underscores this conflict, imposing stringent data protection standards that complicate law enforcement efforts to collect and utilise digital evidence.[58] While these regulations are essential for safeguarding individual privacy, they may inadvertently hinder the effective investigation of cybercrime, particularly when evidence is located across multiple jurisdictions.

The ethical implications of AI and machine learning (ML) in law enforcement are profound. Predictive policing, for example, raises concerns about discriminatory practices, particularly where AI systems are used to forecast criminal behaviour. The potential for AI to exacerbate existing biases, particularly against marginalised groups, cannot be overlooked.[59] These technologies, if left unchecked, could erode civil liberties, leading to a surveillance state where privacy is sacrificed in the name of security. Robust legal frameworks and oversight mechanisms must be instituted to ensure transparency, accountability, and respect for fundamental rights.

5 Technological Challenges in Cybercrime Investigations

[57] Alessandro Mantelero, 'AI and Big Data: A Blueprint for a Human Rights, Social and Ethical Impact Assessment' (2019) 34 Computer Law & Security Review 754.
[58] Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017).
[59] Elizabeth E. Joh, 'Policing by Numbers: Big Data and the Fourth Amendment' (2019) 89(1) Washington Law Review 35.

The challenges that law enforcement agencies face in investigating cybercrime are multifaceted and deeply entrenched in the rapid evolution of technology and its interplay with law, policy, and resources. Cybercrime, by its very nature, defies traditional legal and operational frameworks. The pace of technological advancements, the global nature of cybercrime, and the resource limitations within police forces all exacerbate these challenges. A critical analysis reveals that addressing these obstacles requires not only a shift in legal and technological paradigms but also a rethinking of transnational cooperation, training, and resource allocation.

The evolving landscape of cybercrime demands a critical rethinking of how digital evidence is collected and preserved. Unlike traditional physical evidence, digital evidence is defined by its volatility, susceptibility to alteration, and sheer scale. These characteristics challenge law enforcement's ability to gather reliable and admissible data, exacerbating the limitations of established forensic methods. Crucially, the instability of digital evidence, coupled with its volume and ubiquity, often results in investigative delays, contributing to what may be described as a 'data deluge'.[60] This section interrogates the shortcomings of conventional forensic practices while engaging in a nuanced exploration of emerging technologies – such as AI and ML – that could revolutionise investigative capacities.

Traditional forensic techniques are ill-suited to address the rapid advances in cybercrime. These methods, rooted in physical evidence collection, fail to grasp the dynamic nature of digital evidence, which may disappear or be encrypted at the slightest provocation. The inability to address these emerging challenges indicates a systemic flaw in current law enforcement protocols.[61] Further, this analysis delves into how such inadequacies can be mitigated by the integration of cutting-edge technologies, particularly AI and ML, capable of processing vast amounts of data with speed and accuracy unmatched by human investigators. Yet, the efficacy of these technologies' hinges not only on technical competence but also on addressing legal, ethical, and regulatory challenges, which remain substantial hurdles.

5.1 Technological Disparities: A Rapidly Evolving Threat Environment

[60] Marc D. Goodman and Susan W. Brenner, 'The Emerging Consensus on Criminal Conduct in Cyberspace' (2002) 10(2) International Journal of Law and Information Technology 139.
[61] Eoghan Casey, *Digital Evidence and Computer Crime: Forensic Science, Computers, and the Internet* (3rd edn, Academic Press 2011).

At the core of the difficulties in cybercrime investigations is the profound technological asymmetry between cybercriminals and law enforcement agencies. As Casey highlights, digital evidence presents unique challenges due to its fragility and transience.[62] Unlike physical evidence, digital data can be altered, hidden, or deleted with little trace, complicating traditional forensic approaches. The rise of sophisticated anonymisation technologies, such as the dark web and virtual private networks (VPNs), exacerbates this issue, allowing criminals to obfuscate their digital footprints with relative ease.[63] The transience of digital evidence not only hinders investigations but also creates a race against time, where critical data can disappear before investigators can preserve it.

Encryption, a double-edged sword in the realm of cybersecurity, further compounds this issue. Brenner underscores how end-to-end encryption has created a "going dark" problem, rendering even legally sanctioned interception of communications ineffective. Law enforcement agencies, confronted with the "going dark" phenomenon, struggle to balance the legitimate need for privacy with national security imperatives.[64] Encryption tools, which render digital communications nearly impenetrable, have become a double-edged sword. They safeguard personal data from malicious actors, yet their pervasive use by cybercriminals creates an impenetrable shield that frustrates legal investigations, even when authorised by court orders.

While encryption protects personal privacy, it also shields illicit activities, making it nearly impossible for law enforcement to access crucial evidence in real time.[65] The fundamental tension between privacy rights and law enforcement needs complicates the legislative framework surrounding digital evidence. The dilemma is magnified by the limited capacity of law enforcement to develop decryption technologies capable of keeping pace with the encryption standards employed by cybercriminals.[66] As a result, law enforcement often finds itself outpaced by the very technologies it seeks to regulate, with minimal tools at its disposal to penetrate these fortified digital walls.

The legislative response to this dilemma is fraught with complexity. Acts such as the UK's Investigatory Powers Act 2016 and the US CLOUD Act 2018 reflect a growing consensus that

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[62] Ibid.
[63] Robert Moore, *Cybercrime: Investigating High-Technology Computer Crime* (1st edn, Anderson Publishing 2010); Eoghan Casey, *Digital Evidence and Computer Crime* (3rd edn, Academic Press 2011).
[64] Susan Landau, 'Making Sense from Snowden: What's Significant in the NSA Surveillance Revelations' (2013) 11(4) IEEE Security & Privacy 54.
[65] Susan W. Brenner, *Cybercrime: Criminal Threats from Cyberspace* (Praeger 2010).
[66] Ibrahim Baggili and Frank Breitinger, *Digital Forensics and Cyber Crime* (Springer 2019).

service providers must play an active role in assisting law enforcement to decrypt data.[67] Still, the enactment of such laws invites controversy. Critics argue that mandating decryption powers for the state risks undermining civil liberties, particularly in an era where data privacy is increasingly recognised as a fundamental right. In this light, any legislative attempt to regulate encryption must walk a delicate tightrope, balancing state security against the erosion of privacy. Furthermore, this tension is exacerbated by anonymisation technologies, which enable criminal networks to exploit platforms like the dark web. The sophisticated anonymisation methods deployed on these platforms' complicate attribution, frustrating law enforcement efforts to track illicit activities such as drug trafficking and identity theft.[68]

While international operations like Europol's Operation Onymous have demonstrated some success in penetrating dark web networks, the resilience of these networks suggests that current approaches are insufficient. The persistence of the dark web as a locus for criminal activity points to a deeper issue – the limitations of existing forensic and investigative techniques. More innovative approaches, rooted in collaborative international efforts and adaptive technologies, are urgently needed to counteract the technological advantages enjoyed by cybercriminals.

5.2 Forensic Limitations: A Disjuncture in Methodologies

A critical analysis of cybercrime investigations reveals a substantial inadequacy in traditional forensic techniques. Traditional forensic practices, when applied to cybercrime investigations, are often unable to maintain the evidentiary integrity required in court. Central to this problem is the chain of custody – a principle foundational to forensic investigation, yet notoriously difficult to enforce with digital evidence. Unlike physical evidence, which degrades with each replication, digital data can be copied *ad infinitum* without degradation. Therefore, this very attribute makes it susceptible to tampering. Establishing an incontrovertible chain of custody becomes more challenging in cases where digital evidence is transferred across multiple jurisdictions, a situation all too common in the context of transnational cybercrime.[69]

Casey spearheads that the forensic methodologies developed for physical crime scenes are ill-suited to the digital world.[70] Digital evidence is not just fleeting but also highly fragmented and distributed across multiple locations and devices, frequently crossing international borders.

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[67] Michael D. Green and Ian Kearns, *Encryption and Lawful Access: Resolving the Tensions* (Policy Institute 2021).
[68] Gabriel Weimann, 'Going Dark: Terrorism on the Dark Web' (2016) 62(1) Studies in Conflict & Terrorism 25.
[69] Susan W. Brenner, *Cybercrime: Criminal Threats from Cyberspace* (Praeger 2010).
[70] Eoghan Casey, *Digital Evidence and Computer Crime* (3rd edn, Academic Press 2011).

This contrasts starkly with physical crime scenes, where evidence is typically contained within a single jurisdiction and subject to well established chain-of-custody protocols.[71] The inadequacy of these traditional methods is further exacerbated by the overwhelming volume of data that law enforcement must sift through in cybercrime cases. As Moore notes, the sheer scale of digital evidence – ranging from hard drives to cloud-based storage – makes the collection and preservation of data far more time-consuming than in physical crime investigations.[72]

Moreover, the conventional understanding of jurisdiction and evidence in criminal law struggles to adapt to the digital age. As digital evidence is often stored in multiple jurisdictions, the time-sensitive nature of cybercrime investigations is at odds with the sluggish pace of obtaining mutual legal assistance from foreign authorities.[73] This lag creates significant opportunities for cybercriminals to evade justice by relocating data or by exploiting the legal discrepancies between national jurisdictions. In response to this fragmentation, some scholars suggest that the development of international forensic standards could streamline these processes, but such an initiative requires extensive political and legal cooperation.[74]

Unfortunately, the sheer volume of data encountered in contemporary cybercrime investigations has rendered traditional forensic methodologies obsolete. In complex cases, investigators often face terabytes of data requiring analysis – a quantity that exceeds the capabilities of manual forensic methods.[75] This points to a critical gap: the absence of standardised procedures for the collection and preservation of digital evidence. Inconsistencies in handling this evidence undermine both the credibility of the investigation and its admissibility in court, as demonstrated in high-profile cases where procedural flaws have led to the dismissal of critical evidence.

5.3 Cybercrime-as-a-Service: The Democratisation of Illicit Tools

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[71] Eoghan Casey, *Digital Evidence and Computer Crime* (3rd edn, Academic Press 2011); Avi Laykin, *Investigative Computer Forensics: The Practical Guide for Lawyers, Accountants, Investigators, and Business Executives* (Wiley 2013).

[72] Robert Moore, *Cybercrime: Investigating High-Technology Computer Crime* (1st edn, Anderson Publishing 2010).

[73] Susan W. Brenner and John Schwerha, 'Cybercrime: A Blueprint for Modernising Our Ability to Investigate and Prosecute' (2002) 19 Journal of Computer Information Systems 1.

[74] Mohamed Chawki et al., *Cybercrime, Digital Forensics and Jurisdiction* (Routledge 2015).

[75] Marie-Francine Moens et al., *Information Retrieval: Uncertainty and Logics: Advanced Models for the Representation and Retrieval of Information* (Springer 2018).

The rise of cybercrime-as-a-Service (CaaS) has fundamentally transformed the nature of cybercrime, lowering the barrier to entry for would-be offenders. Brenner highlights that CaaS allows low-skill actors to access sophisticated tools, dramatically increasing the frequency and complexity of cyberattacks.[76] This shift mirrors broader trends in technology democratisation, where powerful tools are no longer confined to experts but are widely available to the public. The scalability of cybercriminal operations through CaaS platforms creates a substantial challenge for law enforcement, which is already struggling to keep pace with the technical proficiency required to combat cybercrime.[77]

Furthermore, the diffusion of CaaS has created an environment in which attribution – the process of identifying the perpetrators of cybercrime – has become increasingly difficult. The global nature of the internet allows cybercriminals to operate from multiple jurisdictions simultaneously, further complicating efforts to trace their activities back to a single location or individual.[78] In this context, the challenge for law enforcement is twofold: not only must they develop the technological capabilities to identify perpetrators, but they must also navigate the complex legal frameworks governing transnational criminal activity. Without the development of more robust attribution technologies and legal agreements, law enforcement agencies will continue to operate at a significant disadvantage in the fight against cybercrime.

5.4 Emerging Technologies: AI and ML in Cybercrime Investigation

To address the increasing complexities of cybercrime, AI and ML offer innovative, albeit imperfect, solutions. AI's capacity for processing and analysing vast datasets enables law enforcement agencies to identify patterns, prioritise leads, and even anticipate criminal behaviour with unprecedented precision.[79] Similarly, ML algorithms, which refine themselves through exposure to additional data, offer the potential to identify cybercrime trends more effectively than human investigators.

The application of AI in law enforcement is fraught with risks. AI systems are intrinsically limited by the quality of the data they are trained on. As recent studies have shown, biassed or

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[76] Susan W. Brenner, *Cybercrime: Criminal Threats from Cyberspace* (Praeger 2010).
[77] Sean E. Goodison et al., *Digital Evidence and the US Criminal Justice System* (RAND Corporation 2015).
[78] Peter Grabosky, 'The Globalization of Crime: Notions, Trends, and the Impact on Law Enforcement' (2001) 4 Australian and New Zealand Journal of Criminology 123.
[79] Jeffrey P. Brantingham et al., 'Does Predictive Policing Lead to Biased Arrests? Results from a Randomized Controlled Trial' (2018) 5(1) Statistics and Public Policy 1.

incomplete datasets can lead to erroneous conclusions, resulting in wrongful accusations and unjust prosecutions.[80] Furthermore, the rise of adversarial attacks – whereby malicious actors exploit AI vulnerabilities to manipulate outcomes – presents a significant threat to the integrity of these systems. Moreover, ethical concerns surrounding the deployment of AI in predictive policing, particularly its potential for reinforcing societal biases and exacerbating existing inequalities, demand urgent scrutiny.[81]

5.5 Training and Resource Gaps: A Structural Weakness

The lack of specialised training and resources within law enforcement agencies represents a significant impediment to the effective investigation of cybercrime. As Holt and Bossler make clear, many law enforcement agencies are staffed by officers with limited technical knowledge of cybercrime and digital forensics.[82] These skills gap not only limits the ability of officers to conduct thorough investigations but also hampers their ability to understand and anticipate new developments in cybercrime.

Broadhurst notes that while larger law enforcement agencies may have access to specialised cybercrime units, smaller jurisdictions often lack the resources necessary to conduct even basic digital investigations. This disparity in capabilities is a critical weakness in the global fight against cybercrime, as smaller, under-resourced jurisdictions can become safe havens for cybercriminals.[83] The uneven distribution of resources and expertise leads to a patchwork of enforcement capabilities, where cybercriminals can exploit the weakest links in the global law enforcement network.

6 Addressing the Challenges

This section sets out and critically engages with some of the prominent approaches on facing the challenge posed by cybercrime and explores possible solutions to the issues outlined in the article so far. Budling upon the proposals of others, it shows how ultimately, addressing the jurisdictional and technical challenges of cybercrime requires a coordinated, multi-stakeholder

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[80] Battista Biggio and Fabio Roli, 'Wild Patterns: Ten Years After the Rise of Adversarial Machine Learning' (2018) 84 Pattern Recognition 317.
[81] Kate Crawford, *Atlas of AI: Power, Politics, and the Planetary Costs of Artificial Intelligence* (Yale University Press 2021).
[82] Thomas J. Holt and Adam M. Bossler, *Cybercrime and Digital Forensics: An Introduction* (Routledge 2015).
[83] Roderic Broadhurst, 'Combating the Cybercrime Threat' in Hossein Bidgoli (ed), *Handbook of Information Security: Information Warfare, Social, Legal, and International Issues and Security Foundations Volume 2* (Wiley 2006).

effort. Harmonisation of legal frameworks, technological advancements, and public-private partnerships are essential to overcoming these obstacles and ensuring that law enforcement agencies have the tools they need to effectively combat cybercrime. As the digital landscape continues to evolve, so too must the legal frameworks that govern it. Developing a truly global legal framework that reflects the borderless nature of the internet is essential for the future of cybercrime investigations.

6.1 The Legal Framework

6.1.1 Is Cybercrime Unexceptional?

In their research, Post critiques the assumption that cyberspace represents a chaotic, lawless domain that fundamentally requires new forms of internet governance, challenging the narratives that have long framed this debate through the concepts of "cyber anarchy" and "cyber unexceptionalism."[84] He suggests that the legal challenges posed by the internet are not unique but are exaggerated by the perception of cyberspace as entirely distinct from the physical world. By promoting "cyber unexceptionalism" Post argues that existing legal frameworks, grounded in traditional jurisdictional principles, can regulate the digital sphere, provided they are applied with sensitivity to the internet's decentralised and transnational character.

While Post's critique of cyber-exceptionalism offers a pragmatic approach to internet regulation, it risks oversimplifying the profound jurisdictional complexities inherent in cyberspace. His view assumes that existing legal doctrines can adapt to the internet without significant modification, overlooking the ways in which the digital landscape subverts traditional notions of sovereignty, territoriality, and control. For instance, the fluidity of cyberspace, where data flows instantaneously across borders, challenges the foundational legal assumption that jurisdiction is inherently tied to physical territory. Post's call for legal continuity may undervalue the need for new transnational legal architectures that are more agile and capable of responding to the novel challenges of a borderless digital environment. In this sense, while Post provides a necessary counter to the overstatement of cyber-exceptionalism, his reluctance to advocate for more radical legal reforms may fall short in addressing the full scope of internet governance challenges.

[84] David G. Post, 'Against 'Against Cyberanarchy'' (1998) 17 Berkeley Technology Law Journal 1365.

In contrast, the view highlighted by Rustad is that the internet has outpaced traditional legal mechanisms such as MLATs with the legal frameworks aiming to govern cyberspace being inadequate to do so effectively given the jurisdictional chaos that arises from the internet's inherently transnational nature.[85] Hence, his focus is advocating for greater harmonisation of international law to resolve the challenges posed by cybercrime, through international state cooperation.

Similarly, Perritt's research into jurisdictional conflicts in cyberspace offers a sophisticated analysis of the competing forces that shape internet governance.[86] Perritt highlights the tension between states' desire to assert territorial jurisdiction over online activity, the extraterritorial reach of certain national laws,[87] and the self-regulatory regimes adopted by tech companies that often operate beyond the effective reach of any single government body. This relationship underscores the complexity of internet regulation, where no single actor – state, corporation, or international body – can effectively control the digital sphere without the intersection of another.

Rustad's proposals often rest on the assumption international law harmonisation is achievable in the short term, without fully grappling with the political and sovereignty-based obstacles that have long hindered international cooperation on this issue. Hence, his critique could benefit from a deeper exploration of the power dynamics that shape transnational internet governance. His emphasis on legal harmonisation does not fully account for the fact that states are often reluctant to cede sovereignty in cyberspace, particularly when it comes to issues of national security, data sovereignty, and economic control. Countries with authoritarian regimes may resist harmonisation that imposes limits on state control over the internet, while liberal democracies might resist frameworks that compromise privacy or freedom of expression. Thus, the call for harmonisation, though ideal in theory, may be unrealistic in practice without a deeper consideration of these entrenched geopolitical tensions.

On the other hand, while Perritt's perspective provides a better account of the shaping power dynamics and aptly captures the jurisdictional tensions, it could be critiqued for placing too little attention on the proposal of greater regulation as a viable governance mechanism to combat cyber challenges. The growing concentration of power among a small number of tech

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[85] Michael L. Rustad., 'Transnational Internet Governance: Jurisdictional Quandaries' (2009) 44 University of San Francisco Law Review 635.
[86] Henry H. Perritt Jr., 'Jurisdiction in Cyberspace' (1996) 41 Villanova Law Review 1.
[87] Ibid.

giants, often referred to by many researchers as “digital sovereigns”, notably Baldoni and Luna,[88] complicates the notion that self-regulation offers a meaningful check on state overreach. These companies wield enormous power over the global flow of information, often prioritising profit and market dominance over the public safety, undermining the potential of self-regulation as a sustainable or ethical model for governing an increasingly corporatised internet. The extraterritorial application of national laws, especially by powerful global states such as the US, raises questions about digital colonialism, where certain jurisdictions impose their legal norms on the rest of the world without constraint, undermining local sovereignty and legal diversity.

Briefly, both reform proposals expose critical flaws in current internet governance models but should be engaging more deeply with the political, economic, and ethical complexities that complicate efforts to create a unified legal framework for cyberspace. While providing valuable insights, they highlight the need for more comprehensive, critical strategies that consider not only legal principles but also the global power dynamics that shape cyberspace regulation.

Certainly, the fragmented legal frameworks and divergent national laws create a system where cybercriminals can exploit jurisdictional loopholes, rendering prosecution exceedingly difficult. This situation is aggravated by the inadequacies of traditional forensic methodologies, which are often overwhelmed by the volume and complexity of digital evidence. Given these challenges, the current state of cybercrime investigation necessitates a fundamental reassessment of both legal and investigative practices. First, there is an urgent need to establish a long-term plan for international legal harmonisation. Even though it will take time, efforts must be made to update and align legal frameworks to better facilitate cross-border cooperation in cybercrime cases. In particular, the legal admissibility of digital evidence must be revisited, with reforms aimed at ensuring that evidence collected across borders can be reliably used in prosecutions.

6.3 Technical Obstacles

Fewer reform proposals have been made in relation to the technical obstacles faced by law enforcement agencies. Addressing the technical obstacles of cybercrime including the use of encryption, the pervasive use of anonymisation techniques and platforms like the dark web, requires a prioritisation of the adoption of cutting-edge forensic tools and the provision of

[88] Roberto Baldoni and Giuseppe Di Luna, ‘Sovereignty in the digital era: The quest for continuous access to dependable technological capabilities’ (2025) 23(1) IEEE Security Privacy 91.

ongoing training for law enforcing personnel. This includes not only technical training in digital forensics but also comprehensive education on the legal aspects of cybercrime investigation. Even though it might be impossible to eliminate the tension between privacy and security consideration, ensuring that law enforcement officers are equipped with the latest tools and knowledge is essential for maintaining the integrity of cybercrime investigations.[89] The balancing act between security and civil liberties will remain a central issue as cybercrime continues to evolve, and the future of law enforcement will depend on its ability to navigate this delicate terrain.

In addition, ways must be found to address the transient nature of digital evidence, which presents formidable challenges, complicating traditional forensic methods. A potential approach, which would particularly help law enforcement agencies with limited resources, would be to establish international taskforces dedicated to the enhanced coordination of more efficient response for cybercrimes. There must be more advocates for the formation of dedicated cybercrime taskforces to facilitate rapid information sharing and coordinated action across jurisdictions.[90] Significant investment in advanced digital forensic technologies is essential to ensure law enforcement agencies have the necessary tools to keep pace with the technological advancements employed by cybercriminals. Teams with cutting-edge forensic tools and more streamlined processes for digital evidence preservation can help reduce deficiencies in this area.

6.4 Facilitating improvement

6.4.1 A Multi-Stakeholder Approach to Overcome Cybercrime Challenges

A truly effective response to cybercrime cannot rely solely on law enforcement efforts. Instead, a multi-stakeholder approach is essential, incorporating government entities, law enforcement, private sector partners, and international organisations. Public–private partnerships are crucial, as private sector companies, particularly in the technology industry, are often better positioned to develop and provide the advanced forensic tools and threat intelligence needed to combat cybercrime. The involvement of private companies in facilitating lawful access to encrypted

[89] Mohamed Chawki, Abdel-Aziz Darwish, and Mohammad Bin Hassan Khan, *Cybercrime, Digital Forensics and Jurisdiction* (Routledge 2015)
[90] Scott Shackelford, *Managing Cyber Attacks in International Law, Business, and Relations: In Search of Cyber Peace* (CUP 2014).

data, within clear legal frameworks that safeguard privacy, will be a critical component of a successful cybercrime strategy.[91]

The *Microsoft Corp.*[92] and *Ivanov*[93] cases underscore the critical importance of international collaboration in addressing jurisdictional challenges. They also reveal the limitations of current legal frameworks, which often fall short in managing the complexities of cross-border investigations.[94] To address these challenges effectively, the global community must enhance international cooperation and develop more cohesive legal frameworks capable of navigating the intricacies of cyberspace jurisdiction.[95]

To address the jurisdictional challenges posed by cybercrime, it is essential to promote greater international cooperation. This could involve the development of new bilateral or multilateral treaties or agreements that facilitate cross-border investigations and the sharing of digital evidence. International organisations, such as Interpol and Europol, play an equally vital role by providing platforms for cross-border cooperation and intelligence sharing. Emphasis must be attached to the importance of diplomatic engagement in fostering international cooperation and addressing the jurisdictional challenges of cybercrime. The role of cross-border agencies such as Interpol and Europol in streamlining MLA procedures and fostering a more integrated approach to cybercrime investigation cannot be overstated. Governments must also ensure that sufficient resources are allocated towards research and development in the field of digital forensics, particularly in the areas of AI and ML, which offer significant potential for the future of cybercrime investigations.[96]

6.4.2 The Importance of Resource Allocation

To address the ever-growing threat of cybercrime, it is essential to allocate substantial resources towards research, education, and the development of innovative technologies. Cutting-edge forensic tools, such as AI and ML, have the potential to revolutionise cybercrime investigations by processing vast datasets, identifying patterns, and predicting criminal behaviour with unprecedented accuracy.[97] Obviously, these technologies must be accompanied by adequate

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[91] Rainer Böhme, *Economics of Information Security and Privacy* (Springer 2013).
[92] *Microsoft Corp. v United States* 829 F.3d 197 (2d Cir. 2016).
[93] *United States v Ivanov* 175 F Supp 2d 367 (D Conn 2001).
[94] Susan W. Brenner, 'Cybercrime jurisdiction' (2006) 46(4) Crime Law Social Change 189.
[95] Anthony D. Trotter, 'Jurisdiction in Cyberspace: Rights and Regulation' (2010) 108(8) Michigan Law Review 1.
[96] Timo Rademacher, 'Artificial Intelligence and Law Enforcement' in Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer 2020).
[97] Ibid.

legal frameworks and oversight to prevent potential abuses and ensure that civil liberties are not infringed.

Specialised training for law enforcement officers is equally important, as it provides them with the technical expertise necessary to handle the complexities of digital evidence. Collaboration with the private sector and academia will also be critical in advancing cybercrime research, as public–private partnerships provide access to state-of-the-art technology and expertise that many law enforcement agencies lack. This approach will ensure that law enforcement agencies remain capable of addressing the increasingly sophisticated methods used by cybercriminals.

6.4.3 Public–Private Partnerships: The Future of Cybercrime Investigations

Considering Ginsburg's triangle, public–private partnerships are essential for addressing the challenges posed by cybercrime. Private sector companies, particularly those in the technology and cybersecurity industries, possess critical resources, intelligence, and expertise that can significantly enhance law enforcement capabilities. Collaboration between law enforcement and the private sector is critical for tackling cybercrime. Such collaborations must be framed within clear legal boundaries to safeguard against the potential misuse of data and to protect individual privacy.[98] Finally, sustained investment in research and development is crucial. International initiatives, such as the Global Forum on Cyber Expertise (GFCE) and Europol's Innovation Lab, exemplify the power of cross-border cooperation in advancing cybercrime investigation techniques.[99]

Private companies often have access to valuable threat intelligence and resources that can aid in investigations. Establishing formal partnerships and information-sharing mechanisms can help bridge the gap between the public and private sectors, fostering a more coordinated and effective response to cybercrime. By establishing formal mechanisms for information sharing, both sectors can work together to combat cybercrime more effectively. However, such partnerships must be carefully regulated to ensure that they respect privacy rights and do not overreach into areas that could harm civil liberties.[100]

Essentially, it is through a multifaceted approach that the jurisdictional and technical challenges of cybercrime investigations can begin to be addressed.

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[98] Rainer Böhme, *Economics of Information Security and Privacy* (Springer 2013).
[99] Michel J. G. van Eeten and Johann M. Bauer, 'International Cooperation to Address Challenges in Cybersecurity: Institutional Efforts and Regional Coordination' (2009) 35(2) The Information Society 60.
[100] Stephen Mason, *Electronic Evidence* (4th edn, LexisNexis 2020).

7 Conclusion

This paper has explored the complex interplay of jurisdictional and technical challenges, two mutually reinforcing areas, that law enforcement agencies face in investigating cybercrimes. At its core, the investigation of cybercrime is inhibited by two primary obstacles: the borderless nature of cyberspace and the rapid pace of technological advancement.

Jurisdictionally, one of the most significant challenges lies in the fact that cyberspace operates beyond the physical borders of nation-states. This creates substantial difficulties in determining which country's laws apply when cyber-crimes are committed across multiple jurisdictions. The lack of harmonisation between national and international legal frameworks further compounds this issue, as countries often apply different standards regarding what constitutes a cybercrime, what evidence is admissible, and how cooperation between agencies should occur.[101] This has been evidenced by inconsistencies in MLATs, delays in obtaining cross-border data, and jurisdictional overlap that leads to conflict or even impunity for offenders.

From a technical perspective, the investigative process is complicated by a range of challenges, including the encryption of communications, anonymisation tools such as VPNs and the Tor network, and the dynamic nature of malicious software. Additionally, the sheer volume of data and the use of cloud computing systems make it difficult for law enforcement to secure and analyse evidence effectively and diminish the current threats we face. Coupled with the skills gap in digital forensic capabilities among law enforcement personnel, these issues create multiple, substantial barriers to both detecting and prosecuting cybercriminals.

The findings contribute to the growing body of knowledge on cybercrime investigation by clarifying the need for a more coordinated, globally inclusive legal framework. The current fragmented approach to jurisdictional issues necessitates reforms that promote international cooperation. One such reform could be the development of a comprehensive, binding international convention on cybercrime, which would provide clear jurisdictional guidelines for law enforcement agencies and streamline mutual legal assistance processes, to mitigate the inconsistencies that currently hinder countless investigations and prosecutions across jurisdictional borders.

[101] Stein Schjolberg, 'The History of Global Harmonization on Cybercrime Legislation – The Road to the Budapest Convention and Beyond' (2008) Computer Law Review International.

Alongside this, the technical challenges identified in this paper underscore the need for law enforcement agencies to adapt to the rapidly evolving technological landscape. This requires both investment in digital forensic tools and the upskilling of law enforcement personnel to match the sophistication of cybercriminals. A key policy recommendation is for agencies to invest in continuous, specialised training programs that focus on emerging technologies and forensic techniques. In tandem, partnerships between public law enforcement and private sector technology companies should be strengthened to foster real-time data sharing and access to cutting-edge technologies.

For future policymakers, this paper's findings strongly suggest a dual approach is required for a more positive future in cybercrime investigation: one that focuses on legislative harmonisation at the international level and another that ensures technological preparedness at the operational level. By enhancing cross-border legal frameworks and equipping law enforcement with the tools and skills necessary to navigate the complexities of cyberspace, the gap between cybercriminal activity and law enforcement capabilities can be narrowed.

Moving forward, both law enforcement agencies and policymakers must recognise that cybercrime is a constantly evolving challenge requiring an adaptive, multifaceted response. International cooperation, investment in technological capabilities, and a commitment to safeguarding human rights and privacy in the digital space are crucial for creating a more resilient cybercrime investigation framework.

Finally, while there are substantial jurisdictional and technical challenges impeding cybercrime investigations, this paper has shown that these challenges are not insurmountable. With the right policy interventions, investment in training and technology, and a focus on international collaboration, the efficacy of law enforcement in tackling cybercrime can be significantly enhanced. These changes will be essential not only to keep pace with the current landscape of cybercrime but to anticipate and mitigate future threats in an increasingly digital world.

The Impact of ADR on SME Development: A Comparative Study Between England and India

Anirudh Gundumi

Abstract

This article explores the impact of alternative dispute resolution (ADR) on the development of small and medium-sized enterprises (SMEs), focusing specifically on mediation and arbitration. A comparative analysis between ADR frameworks prevalent in England and India is conducted. ADR offers SMEs a flexible, time efficient and cost-effective alternative to traditional litigation, allowing them to resolve disputes while maintaining crucial business relationships. The article highlights mediation as the most suitable form of ADR for SMEs due to its adaptability which gives parties control over the process. While arbitration provides finality, it is identified as less ideal for SMEs due to its high costs, particularly in institutional settings. This article delves into the legislative frameworks supporting ADR in both countries, identifying key differences and areas where improvements are needed. In England, ADR is well integrated into the legal system, with a robust infrastructure supporting its use. In contrast, ADR is gaining traction in India but its adoption is hindered by the perception that ADR is a weak alternative to litigation. The article argues that legal reforms in both nations are necessary to enhance the accessibility and effectiveness of ADR for SMEs, ensuring that these mechanisms evolve alongside the changing landscape of business and technology. Additionally, this article emphasises the importance of increasing awareness of ADR, particularly among vulnerable groups like SMEs. Further, suggestions regarding renaming ADR as “amicable dispute resolution” could make it more appealing. The research also calls for deeper future studies focusing on the cost, speed and efficiency of ADR. This will assist governments to formulate more effective ADR frameworks that meet the evolving needs of SMEs.

1 Introduction

According to the Department of Business and Trade, the United Kingdom is home to 5.6 million businesses in the private sector. Out of these, 5.51 million businesses were classified as small, 36,900 businesses as medium and 8,000 as large.[1] Evidently, the majority of the private sector consists of small and medium enterprises (SMEs). For a business to qualify as a medium enterprise it must satisfy at least two of three criteria – a turnover of less than £36 million, a workforce of less than 250 employees, or a balance sheet total of less than £18 million.[2] Similarly, a business qualifies as a small enterprise if it satisfies at least two of these three criteria – a turnover of less than £10.2 million, a workforce of less than fifty employees or a balance sheet total of less than £5.1 million.[3]

SMEs play a vital role in the UK's economy as they contribute to the UK's private sector by employing 16.3 million individuals, constituting 61% of total employment and also generating an estimated turnover of £2.3 trillion, comprising 52% of the sector's total annual turnover.[4] However, SMEs in their initial years of operation are focused on survival rather than growth.[5] While all SMEs are bound together through the crucial link of finance, they struggle to access financial resources which impedes their ability to grow.[6] They are also more vulnerable to economic downturns in comparison to large enterprises due to their limited resources, especially financial resources.[7] Additionally, SMEs encounter legal obstacles that cause further financial strain.[8] These obstacles include the length of the trial, inconsistency of judicial decisions, lack of affordability, and additional costs incurred during the litigative processes.[9] The growing costs of litigation are alarming as the expenditure could exceed the disputed

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[1] Department for Business and Trade, 'Business Population Estimates for the UK and Regions (Gov.uk, 5 October 2023) <Business population estimates for the UK and regions 2023: statistical release – GOV.UK> accessed 16 April 2025.
[2] Companies Act 2006, s 465.
[3] Ibid, s 382.
[4] Department for Business, Energy and Industrial Strategy, 'BEIS Small and Medium Enterprises (SME) action plan: 2022 to 2025' (*Gov.uk*, 26 January 2023) <BEIS small and medium enterprises (SME) action plan: 2022 to 2025 – GOV.UK> accessed 16 April 2025.
[5] Marc Cowling et al., 'What really happens to small and medium-sized enterprises in a global economic recession? UK evidence on sales and job dynamics' (2015) 33(5) International Small Business Journal 488.
[6] Satish Kumar and Purnima Rao, 'A Conceptual Framework for Identifying Financing Preferences of SMEs' (2015) 22 Small Enterprise Research 99.
[7] Marc Cowling et al., 'What really happens to small and medium-sized enterprises in a global economic recession? UK evidence on sales and job dynamics' (2015) 33(5) International Small Business Journal 488.
[8] Thorsten Beck et al., 'Financial and Legal Constraints to Growth: Does Firm Size Matter?' (2005) 60 The Journal of Finance (New York) 137.
[9] Ibid.

amount in certain cases, when timely disposal is not even promised.[10] While legal obstacles tend to have minimal impact on large enterprises, these obstacles significantly obstruct growth of SMEs and even result in closure of business, due to their limited resources.[11]

In recent years, there has been growing inefficiency of litigation with overcrowded courts and delayed judgments worldwide.[12] This has raised questions regarding access to justice.[13] When conflicts arise, parties often attempt to resolve them on their own. However, in case of failure they resort to legal action, which is time-consuming, costly and has other disadvantages.[14] This has prompted a shift towards finding alternatives to resolving disputes in an effective and non-adversarial manner, leading to a growing interest in alternative dispute resolution (ADR). In fact, many legal jurisdictions and frameworks worldwide have adapted to encourage its use.[15]

ADR serves as an alternative to litigation for resolution of civil disputes.[16] Generally, the ADR process is overseen by a third party who acts as an evaluative or facilitative authority. This third party could be a commercial or non-profit organisation, both providing parties with a clear structure on how the ADR process unfolds.[17] The ADR process concludes with a binding decision, either made by the third-party authority or the parties themselves through mutual agreement.[18] The ADR processes can either be formal or flexible. ADR is convenient, as it can be conducted through paper documentation, online platforms, or in-person meetings.[19] Each form of ADR has a different method and mechanism of reaching a resolution, giving parties a wide range of choices.[20] The parties can also integrate two ADR methods, wherein they adopt the advantages of different ADR options to achieve a resolution.[21] In addition, parties control the process and occasionally the final decision, based on the form of ADR chosen.[22]

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[10] Ummey Sharaban Tahura, 'Does mandatory ADR impact on access to justice and litigation costs?' (2019) 30(1) Australasian Dispute Resolution Journal 31.
[11] Thorsten Beck et al., 'Financial and Legal Constraints to Growth: Does Firm Size Matter?' (2005) 60 The Journal of Finance (New York) 137.
[12] Bruno Deffains et al., 'Choosing ADR or Litigation' (2017) 49 International Review of Law and Economics 33.
[13] Ummey Sharaban Tahura, 'Does mandatory ADR impact on access to justice and litigation costs?' (2019) 30(1) Australasian Dispute Resolution Journal 31.
[14] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018) 3.
[15] Bruno Deffains et al., 'Choosing ADR or Litigation' (2017) 49 International Review of Law and Economics 33.
[16] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016) 2.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Maria Goltsman et al., 'Mediation, Arbitration and Negotiation' (2009) 144 Journal of Economic Theory 1397.
[21] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 20.
[22] Ibid.

There are a variety of ADR options available to parties; however, this article will only be discussing the two most popular forms of ADR, arbitration and mediation. Arbitration involves parties to a dispute appointing a single arbitrator or a panel of arbitrators, which will render a decision based on the submissions made by both parties.[23] In contrast, mediation involves engaging a neutral third-party facilitator who guides discussions between the parties, encouraging compromise and promoting an amicable settlement of their issues.[24] Arbitration is adjudicative, while mediation is non-adjudicative.

1.1 History of ADR

Historically, there has been a significant record of ADRs existence, tracing its roots back to the *Vedas* (religious texts and scriptures of Hinduism).[25] There were various types of arbitral bodies in ancient and medieval India, often involving a neutral third person who was either a respected elder or the village chief.[26] These bodies paved way for the existence of "Panchayat raj" (people's rule), a system of dispute resolution where elders of the village would act as a neutral third party. The decisions passed by the Panchayat were accepted by the people and treated as binding.[27]

Similarly, ADR has existed in England for centuries, coupling local customs with third-party intervention to resolve disputes.[28] ADR became part of legal practice following the Norman Conquest where respected members of the community would participate in resolving private disputes. Accordingly, the king would endorse these decisions, essentially promoting an early version of ADR over adjudication through the royal courts.[29] More recently in the Victorian era, the use of arbitration was encouraged through statutory regulation and the establishment of the London Court of International Arbitration in 1892.[30] Additionally, in the 1990s, the courts motivated the use of ADR by requiring lawyers to advise their clients about its existence

[23] Maria Goltsman et al., 'Mediation, Arbitration and Negotiation' (2009) 144 Journal of Economic Theory 1397.
[24] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.
[25] Krishna Agrawal, 'Justice Dispensation through the Alternative Dispute Resolution System in India' (2015) 2 Russian Law Journal 63.
[26] Ibid.
[27] Ibid.
[28] Michael McManus and Brianna Silverstein, 'Brief History of Alternative Dispute Resolution in the United States' (2011) 1(3) Cadmus 100.
[29] Ibid.
[30] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), 7.

and effectiveness.[31] Furthermore, the Woolf Reforms followed by the Civil Procedural Rules 1998 encourage the use of ADR.[32] This shift towards ADR is due to the shortcomings of litigation. Notably, judges in England attributed ADRs growth to the excessive costs and delays in litigation, advocating for mechanisms that divert cases from the courts, reducing backlogs and ensuring access to justice.[33]

1.2 Research Objectives

This article addresses the gap in understanding how ADR mechanisms can support SMEs in overcoming legal challenges, thereby easing their financial burdens. Research suggests that ADR has good rates of success and satisfaction amongst parties.[34] In fact, the Ministry of Justice in England and Wales has sponsored a number of independent research projects on the use and success of ADR.[35] SME owners must be aware of and equipped to use ADR to their advantage, providing them with a dispute resolution option that is cost and time effective. While ADR is compulsory in some cases, parties may voluntarily opt for it if they are aware of its benefits.

The research questions are as follows:

1. To what extent can ADR assist SMEs over litigation?
2. To what extent does ADR's effectiveness depend on external factors?
3. How do ADR frameworks in England and India compare?
4. What directions are required to enable ADR to continue to assist SMEs in the future?

1.3 Research Gap

While previous studies have examined the advantages of ADR in civil and commercial disputes, they have largely overlooked its impact on SMEs specifically. This article seeks to address this gap by exploring how the two most popular forms of ADR – arbitration and mediation – benefit SMEs. It compares their benefits and limitations, while suggesting the most appropriate form for SMEs. Furthermore, a comparison of the ADR frameworks in England

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[31] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press (2016) 2.
[32] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), 9.
[33] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[34] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 9.
[35] Ibid, 10.

and India is made to determine further strengths, limitations, and best practices of the general framework for ADR in both jurisdictions.

This article is limited to exploring only arbitration and mediation, as these are two most widely used forms of ADR globally. They have seen significant legal development in the recent past, with institutional support in various jurisdictions, making them highly relevant to the present research. However, this research does not provide an analysis of the full range of ADR mechanisms available, focusing solely on these two forms. Additionally, existing literature on other forms of ADR is limited, suggesting a need for future research to further explore other forms of ADR, such as negotiation or expert determination.

1.4 Methodology

This study adopts a doctrinal research method to analyse primary sources, including case law and statutes, in order to understand the legal framework of ADR. Additionally, secondary sources such as books and articles provide broader insights into ADR's development and its impact on SMEs. Moreover, a comparative research method is employed to examine ADR in England and India, thereby identifying strengths, weaknesses and best practices that potentially enhance effectiveness. By combining doctrinal and comparative methods, the article aims to enrich the academic discourse on ADR and advocate for improvements that enhance accessibility and foster a positive perception of ADR among SMEs.

2 To What Extent Can ADR Assist SMEs Over Litigation?

2.1 Challenges Faced By SMEs

SMEs encounter a range of challenges, particularly financial and legal constraints, which hinder their growth. SMEs are bound together through the crucial link of finance, however, SMEs often struggle with insufficient funds and face barriers in obtaining financial support.[36] Unlike larger firms, SMEs face high collateral requirements, complicated bank procedures, high interest rates and limited credit history.[37] Furthermore, SMEs in both developed and developing countries often rely on short-term debt because financial institutions are hesitant to

[36] Satish Kumar and Purnima Rao, 'A Conceptual Framework for Identifying Financing Preferences of SMEs' (2015) 22 Small Enterprise Research 99.
[37] Thorsten Beck et al., 'Financial and Legal Constraints to Growth: Does Firm Size Matter?' (2005) 60 The Journal of Finance (New York) 137.

provide long-term loans, seeing them as risky ventures with limited collateral.[38] These issues are exaggerated during a recession, leaving SMEs vulnerable to economic downturn or even closure.[39]

A major contributor to SMEs financial constraints are the legal obstacles and challenges they face.[40] These include financial and time constraints associated with litigation, insufficient knowledge of dispute resolution options, and uncertainty over the outcome of legal proceedings.[41] It also includes inefficient dispute resolution and enforcement of contracts during litigation.[42] This negatively impacts the sales growth of SMEs causing further financial strain.[43] The inability of SMEs to handle legal obstacles is a result of financial constraints and lack of access to resources.[44] Additionally, lengthy court procedures, and issues regarding affordability and efficiency of litigation hinder SMEs from timely and fair justice, putting them at a disadvantage compared to larger firms that are equipped to handle such challenges.[45] Furthermore, a survey conducted by the Asia-Pacific Economic Cooperation (APEC) concluded that 35% of SMEs viewed effective and consistent dispute resolution as a major issue.[46] Another survey conducted by the Asia-Pacific Economic Cooperation Business Advisory Council (ABAC) in 2022 concluded that 58% of SMEs which engaged in international trade, lacked effective mechanisms for dispute resolution.[47]

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[38] Satish Kumar and Purnima Rao, 'A Conceptual Framework for Identifying Financing Preferences of SMEs' (2015) 22 Small Enterprise Research 99.
[39] Mark Cowling et al., 'What really happens to small and medium-sized enterprises in a global economic recession? UK evidence on sales and job dynamics' (2015) 33(5) International Small Business Journal 488.
[40] Greta Falavigna and Roberto Ippoliti, 'SMEs' Behaviour under Financial Constraints: An Empirical Investigation on the Legal Environment and the Substitution Effect with Tax Arrears' (2023) 66 The North American Journal of Economics and Finance 101903.
[41] Jean-Francios Roberge and Veronique Fraser, 'Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMEs) Disputes' (2019) 35 Ohio State Journal on Dispute Resolution 1.
[42] Ibid.
[43] Anh Tuan Bui et al., 'Legal and Financial Constraints and Firm Growth: Small and Medium Enterprises (SMEs) versus Large Enterprises' (2021) 7(12) Heliyon e08576.
[44] Jean-Francios Roberge and Veronique Fraser, 'Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMEs) Disputes' (2019) 35 Ohio State Journal on Dispute Resolution 1.
[45] Thorsten Beck and Asli Demirguc-Kunt, 'Small and Medium-Size Enterprises: Access to Finance as a Growth Constraint' (2006) 30 Journal of Banking & Finance 2931.
[46] Jean-Francios Roberge and Veronique Fraser, 'Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMEs) Disputes' (2019) 35 Ohio State Journal on Dispute Resolution 1.
[47] APEC Business Advisory Council, 'APEC Launches Collaborative Framework on Online Dispute Resolution to Help Small Businesses' (*APEC,* 19 May 2022) <https://www.apec.org/press/news-releases/2022/apec-launches-collaborative-framework-on-online-dispute-resolution-to-help-small-businesses> accessed 28 February 2025.

As legal inefficiencies increase uncertainty, SMEs often adopt alternative strategies such as delaying tax to temporarily boost resources.[48] This uncertainty stems from procedural delays, expensive trial, enforcement issues and inconsistent decisions, thereby undermining SMEs confidence in institutional protection.[49] Furthermore, limited access to financial and legal resources due to legal inefficiencies, forces SMEs to rely on informal mechanisms, exposing them to legal and financial risks. These behaviours highlight a direct correlation between legal inefficiencies and the legal vulnerability of SMEs.[50] However, research suggests that improved access to financial resources and ADR could assist SME growth and improve their economic contribution.[51] One solution is to develop and rely on ADR as an appropriate alternative to tackle legal inefficiencies associated with litigation, while simultaneously improving the business environment to better address the challenges that SMEs face, allowing them to better manage business risks.[52]

2.2 ADR Mechanisms: Focusing on Arbitration and Mediation for Assisting SMEs

2.2.1 Arbitration

Arbitration is one of the most common forms of ADR used in commercial cases[53] and has wide application in labour and consumer disputes.[54] Arbitration is the preferred choice for resolving international commercial disputes with many notable arbitration institutions capable of handling the arbitral process.[55] Arbitration is an adjudicatory form of ADR which closely resembles a court trial but involves the appointing of an arbitrator/arbitrators by the parties to the dispute, who then pass an award based on the submissions made.[56] While consent to arbitration is voluntary, once it has been chosen and a binding decision is made, the courts can

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[48] Greta Falavigna and Roberto Ippoliti, 'SMEs' Behaviour under Financial Constraints: An Empirical Investigation on the Legal Environment and the Substitution Effect with Tax Arrears' (2023) 66 The North American Journal of Economics and Finance 101903.
[49] Jean-Francios Roberge and Veronique Fraser, 'Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMEs) Disputes' (2019) 35 Ohio State Journal on Dispute Resolution 1.
[50] Ibid.
[51] Rajamani K et al., 'Access to Finance: Challenges Faced by Micro, Small, and Medium Enterprises in India' (2022) 33(1) Engineering Economics 73.
[52] Thorsten Beck and Asli Demirguc-Kunt, 'Small and Medium-Size Enterprises: Access to Finance as a Growth Constraint' (2006) 30 Journal of Banking & Finance 2931.
[53] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016) 14.
[54] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[55] Ibid.
[56] Maria Goltsman et al. 'Mediation, Arbitration and Negotiation' (2009) 144 Journal of Economic Theory 1397.

be asked to enforce it against a noncompliant party.[57] The disputed parties can either mutually agree to a process (known as ad hoc arbitration) or it can be delegated to an arbitral tribunal. In fact, arbitration institutions have their own set of rules and provide facilities to further simplify the arbitral process, including sample arbitration agreements.[58]

2.2.2 Control, Expertise and Confidentiality in Arbitration

The popularity of arbitration stems from the control it gives to the parties over the process and its flexibility to be tailored to the specific needs of a dispute. In fact, parties have the opportunity to appoint an arbitrator with particular experience and expertise that is required for the adjudication of that specific dispute.[59] In most cases, retired judges are appointed as arbitrators in order to maintain a standard of expertise for adjudication.[60] This guarantees that no matter how complex the dispute, it will be adjudicated by a referee who fully understands the legal intricacies surrounding the subject matter. Additionally, arbitration may involve hearings similar to trial, or it may be conducted through written submissions.[61] The entire process is private and confidential, unlike trial in open court where members of the public are present.[62] The parties can also control their submissions to the arbitral tribunal.[63]

2.2.3 Arbitral Awards: Binding Decisions and Challenge of Award

Arbitration is beneficial to parties that want a binding decision using a particular approach that is suitable and mutually agreed upon for their specific dispute.[64] Arbitration is used to definitively resolve an existing dispute that requires fact-finding, interpretation of contractual terms and the application of legal principles.[65] The process is less formal than litigation and results in a written decision known as an arbitral award.[66] The award passed is binding on the parties.[67] However, in England, the Arbitration Act 1996 allows challenge of an award in cases of serious irregularity affecting the tribunal, arbitral proceedings or final award which has led

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[57] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III (1958).
[58] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 13.
[59] Ibid, 14.
[60] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[61] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 13.
[62] Ibid, 14.
[63] Ibid.
[64] Ibid.
[65] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[66] Ibid.
[67] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 13.

to substantial injustice affecting the applicant.[68] Fraud, corruption, serious legal errors and miscarriages of justice through the arbitral process are strong grounds for challenging an award before court.[69]

Additionally, challenging the award on a point of law arising from the award is also permitted.[70] However, precedent depicts that the success of such challenges is rare. Notably, the High Court of England and Wales in *K v S*[71] while rejecting the appeal, held that there is an exhaustive list of grounds for challenging an award under Section 68 of the Arbitration Act 1996. These grounds include: tribunals failure to comply with its general duty; tribunal exceeding its powers; irregularity in proceedings, etc. Recently, in *The Federal Republic of Nigeria v Process & Industrial Developments Ltd.*, [72] the High Court acknowledged the high threshold set under Section 68 of the Act but nevertheless set aside the award. Similarly, in *Tricon Energy Ltd v MTM Trading LLC*,[73] the court while overturning the tribunals decision, affirmed that challenges brought under Section 69 of the Arbitration Act 1996 also face a high threshold for success.

Alternatively, nonbinding arbitrations allow parties to appeal or proceed to other forms of dispute resolution such as mediation or to use litigation as the award merely serves as a recommendation. Nonbinding arbitrations are rare but possible if parties agree to such terms in advance.[74] This demonstrates the flexibility of arbitration, allowing parties to a dispute to establish mutually acceptable rules for the arbitral process.

2.2.4 Time and Cost Efficiency in Arbitration

Arbitration is praised for its time and cost efficiency. Time is saved by implementing a prescribed plan outlining when each stage of the adjudicative process will commence.[75] This plan might feature automatic scheduling of the prehearing conference once a milestone is reached, limited discovery, and a time limit for requesting a retrial. These elements not only save time, but also significantly cut costs.[76] Even lawyers have reported that time saving allows

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[68] Arbitration Act 1996, s 68.
[69] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[70] Arbitration Act 1996, s 69.
[71] [2019] EWHC 2386 (Comm).
[72] [2023] EWHC 2638 (Comm).
[73] [2020] EWHC 700 (Comm).
[74] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[75] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 405
[76] Ibid.

cost saving.[77] Additionally, judges have stated that arbitration provides speedier dispute resolution than litigation.[78] This result of quick dispute resolution is directly connected to saving lawyer fees and related costs.[79] In addition to saving time, arbitration also produces accelerated disposition if there is no new trial.[80] While a request for a new trial is permitted in court referred arbitrations, the requesting party must post bond or deposit a hefty amount for costs to prevent misuse.[81]

2.2.5 Evaluating Arbitration: Cost, Time, Efficiency, Fairness and Judicial Perspectives

A study conducted on mandatory court-referred arbitration programs focusing on cost reduction, litigation speed, providing alternatives to litigants, and reducing caseload concluded that 70% of litigants found the time required for arbitration reasonable. Additionally, lawyers had a positive opinion on the cost and time savings associated with arbitration unless there was a retrial.[82] Another study on arbitration concluded that participants experienced enhanced dignity and worth due to the formality and structure of arbitration. Some 84% of participants supported arbitration programs and 80% of participants believed the process to be fair, even though the outcome was not in their favour. This sense of fairness is linked to the litigants understanding of the arbitral process, their ability to exercise control over it and the reasonable amount of time taken to reach an outcome.[83] In cases where arbitration is court referred, litigants did not feel like they received inferior justice.[84] While clients have expressed appreciation for the arbitral process, 92% of the lawyers involved in the study also deemed the procedures fair, highlighting factors such as formality, well-prepared arbitrators, reasonable time and cost savings.[85] Considering factors such as cost, time and fairness, arbitration was favoured over court proceedings by half of the litigants and majority of the lawyers involved in the study.[86] In another study conducted amongst judges who were to evaluate mandatory arbitration programs, it was found that they support these programs as it was directly associated

[77] Ibid.
[78] Ibid, 409.
[79] Ibid.
[80] Ibid, 402.
[81] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[82] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 406.
[83] Ibid, 407.
[84] Ibid.
[85] Ibid, 408.
[86] Ibid.

with reducing the caseload on courts.[87] Overall, studies consistently show high satisfaction rates amongst users of arbitration.[88]

In summary, arbitration assists SMEs by providing a structured, confidential and enforceable resolution process that has the potential to reduce costs and delays in comparison to litigation. It also provides greater control and predictability through its flexible procedure, choice of arbitrators and limited scope for appeal. Such features assist SMEs in overcoming financial and legal constraints by offering an accessible dispute resolution option.

2.3 Mediation

Mediation is a non-adjudicatory ADR process where a neutral third party facilitates discussions between the disputing parties, thereby fostering compromise and promoting a mutually agreeable resolution.[89] The facilitator is known as a mediator, and they are required to be independent and impartial towards the parties and the subject matter of the dispute.[90] Mediation is utilised to enhance communication between the parties, particularly those having existing relationships, with the intention to help them reconnect and create forward-looking solutions to their conflicts.[91] The outcome of mediation involves compromise and a fair distribution of resources as the mediator's goal is a balanced outcome. To achieve this, the mediator promotes open communication, encouraging the parties to voice out their concerns.[92]

Participation in mediation is voluntary (unless mandated by courts) and any agreements which are reached are based on mutual consent.[93] Mediation is not legally binding unless the parties explicitly agree otherwise in writing.[94] While the mediator's proposal is not binding, parties should exercise caution when rejecting it. If mediation fails and the court's decision in trial mirrors the mediator's suggestion, the judge may disallow the winning party from recovering their expenses. Even if the final ruling differs, the judge may still order the winning party to

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[87] Ibid, 410.
[88] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation (Print) 214.
[89] Ibid.
[90] Giuliana Romualdi, 'Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context' (2018) 14 Utrecht Law Review 52.
[91] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[92] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 393.
[93] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[94] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.

bear their own expenses, if justified on reasonable grounds.[95] This is intended to prevent misuse of mediation and to ensure that litigation is not used as a tool to harass the opposite party. Mediation is binding only after the parties have executed a settlement agreement which is enforceable in a court of law.[96] Additionally, parties can abandon mediation if they deem it futile, provided this occurs before reaching an agreement. However, if the dispute resolution clause i.e., a provision in a contract that states the agreed-upon method for resolving any disputes between the parties, mandates a minimum number of mediation sessions, abandonment is not permissible.[97]

2.3.1 Advantages of Adopting Mediation

Mediation reduces costs in resolving disputes especially when it is successful, however, an unsuccessful mediation does not necessarily increase expenses either.[98] In fact, many judges find mediation particularly suitable for civil and commercial cases where the cost of litigation could exceed the disputed amount.[99] Additionally, mediation saves cost and time for parties which lack the financial resources to fully utilise the court system.[100] Furthermore, mediation allows customised settlements to be tailored to meet individual needs.[101] Mediation also offers faster resolution than litigation because it allows a thorough analysis of the issues in a short time with the collective efforts of all the parties involved.[102]

Mediation helps reduce court caseload by avoiding trial.[103] In fact, mandatory mediation programs are implemented in many jurisdictions to reduce backlogs. Additionally, mediation does not compel parties to disclose confidential information. If parties disclose confidential information during mediation it remains inadmissible in court. This confidentiality encourages parties to engage openly in mediation without fear of public exposure or potential bias in court.[104]

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[95] Giuliana Romualdi, 'Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context' (2018) 14 Utrecht Law Review 52.
[96] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[97] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.
[98] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 392.
[99] Ibid, 398.
[100] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.
[101] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 398.
[102] Ibid, 391.
[103] Ibid, 398.
[104] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.

Research consistently shows that client satisfaction in mediation is higher than litigation.[105] In fact, judges report that mediation settlements are typically accepted, with many litigants expressing satisfaction.[106] One study found that approximately 75% of mediation participants were satisfied with the process, even without a settlement. This was directly related to the control, privacy, fairness, and opportunity to express opinions.[107] Furthermore, satisfaction remains high even after a settlement, with participants being reassessed six to twelve months after the settlement still viewing mediation as fairer and more satisfactory than litigation.[108] Further, research shows higher compliance rates (67%–87%) with mediated outcomes compared to traditional court rulings, promising long term stability.[109]

In conclusion, research indicates that mediation is effective, adaptable and can achieve multiple objectives with appropriate adjustments.[110] It is increasingly preferred over arbitration as it emphasises party autonomy and flexibility.[111] As dispute resolution evolves, mediation remains a cornerstone for fostering understanding and cooperation while resolving disputes.

2.3.2 Disadvantages of mediation

While mediation has its advantages, it is not recommended in all cases. Since mediation places the responsibility for resolving disputes on parties, it is unlikely to yield a positive outcome in cases involving deliberate bad faith or where public vindication is sought.[112] Additionally, the process is confidential with no record, making mediation agreements difficult to appeal[113]. In fact, the absence of formal procedures and rules leaves parties with no recourse if they discover procedural misconduct.[114] Finally, mediators (unlike arbitrators or judges) lack any enforcement authority during the process.[115]

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[105] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[106] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 409.
[107] Ibid, 387.
[108] Ibid.
[109] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[110] James A. Wall and Timothy C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) Negotiation Journal 217.
[111] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[112] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.
[113] Zeynep Derya Tarman, 'Mediation as an Option for International Commercial Disputes' (2016) 48 Annales de la Faculté de Droit d'Istanbul 244.
[114] Ibid.
[115] Benjamin Balzer and Johannes Schneider, 'Managing a Conflict: Optimal Alternative Dispute Resolution' (2021) 52 The Rand Journal of Economics 415.

2.4 Mediation vs Arbitration

Mediation differs from arbitration as it is a non-adjudicative dispute resolution mechanism wherein parties retain their decision-making power.[116] This distinction leads to two conclusions. Firstly, arbitration outcomes are determined by objective standards (applicable laws) making it a rights-based process, while mediation outcomes are based on subjective standards (will and interests of parties), making it an interest-based process.[117] Secondly, in arbitration, the parties present their arguments before an arbitrator seeking a ruling, while mediation involves the parties working alongside the mediator to reach a mutually acceptable outcome, with the mediator acting as a facilitator rather than a decision-maker.[118] Furthermore, arbitrators have limited enforcement powers during the process, allowing them to enforce decisions and hearings. However, once the award is passed, enforcement depends on the courts, which can be approached to compel a reluctant party to comply with the award. On the other hand, mediators lack any such enforcement authority.[119]

2.4.1 How Does ADR Provide More Assistance to SMEs Than Litigation?

ADR is a highly effective conflict resolution method, offering multiple advantages over litigation. ADR is cheaper than litigation, making it beneficial for SMEs operating on limited budgets, as the high expenses of litigation can prove detrimental to them.[120] Since ADR allows parties to manage their disputes, it becomes cheaper than litigation.[121] When early settlements are unsuccessful, ADR can still help reduce overall costs in the long run.[122] The rising cost of legal counsel further improves the appeal of ADR's cost efficiency.[123] Alternatively, litigation not only involves direct fixed costs such as court fees but also includes indirect costs during lengthy proceedings, including strain on operations, reputation management and loss of

[116] Ilijana Todorovic and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.
[117] Ibid.
[118] Ibid.
[119] Benjamin Balzer and Johannes Schneider, 'Managing a Conflict: Optimal Alternative Dispute Resolution' (2021) 52 The Rand Journal of Economics 415.
[120] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.
[121] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.
[122] Benjamin Balzer and Johannes Schneider, 'Managing a Conflict: Optimal Alternative Dispute Resolution' (2021) 52 The Rand Journal of Economics 415.
[123] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.

clientele, all of which can severely impact a business's ability to function.[124] Furthermore, ADR provides a solution by allowing the swift and private resolution of disputes. In minimising disruptions, ADR allows SMEs to focus on their core business activities.[125] ADR also provides predictability, structure and collaborative resolution, which enables SMEs to strategise and anticipate outcomes with greater certainty than in litigation.[126]

ADR prioritises maintaining business relationships, which is vital for SMEs that rely on partnerships, customer goodwill and vendor networks to remain competitive. Since litigation is adversarial in nature, it risks destroying these valuable relationships.[127] The rigid win–lose structure increases bitterness between disputing parties, ruining future business collaborations. In contrast, ADR focuses on finding mutually agreeable solutions while preserving business relationships, which can be just as important as securing a financial victory in court.[128] Furthermore, ADR improves access to legal remedies by offering a streamlined and cost-effective alternative to litigation.[129] It provides a fair platform for resolving disputes, unlike litigation which is more suited for parties with greater financial and legal resources. By reducing the formal constraints of a courtroom, ADR creates a balanced environment where both parties have the opportunity to be heard.[130]

In conclusion, ADR triumphs over litigation by offering SMEs a flexible, cost-effective and efficient approach to dispute resolution. The ability to preserve business relationships and reduce legal fees are added advantages. Ultimately, ADR allows SMEs to focus on growth and stability by negating the burdens associated with litigation. Thus, depicting that arbitration, and mediation can successfully assist SMEs. The next section will discuss ADRs limitations which could potentially hamper its ability to assist SMEs.

3 To What Extent Does ADR's Effectiveness Depend on External Factors?

[124] Jean-Claude Goldsmith et al, *ADR in Business: Practice and Issues across Countries and Cultures, Volume I* (Kluwer Law International 2006), 5.
[125] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 427.
[126] Ibid.
[127] Jean-Claude Goldsmith et al, *ADR in Business: Practice and Issues across Countries and Cultures, Volume I* (Kluwer Law International 2006) 5.
[128] Ilijana Todorović and Bobby Harges, 'Alternative dispute resolution in the world of commercial disputes' (2022) 5 Journal of Strategic Contracting and Negotiation 214.
[129] Motiwal OP, 'Alternative Dispute Resolution in India' (1998) 15 Journal of International Arbitration 117.
[130] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 428.

3.1 Factors that Influence Effectiveness

3.1.1 Cost

ADR is recognised for reducing costs compared to litigation.[131] However, the extent of these savings depends on the specific ADR method chosen. The cost-effectiveness of ADR may reduce when a court mandated ADR session fails and litigation resumes, or when an ADR clause is poorly drafted, leaving the parties unable to determine the appropriate form of ADR.[132] Moreover, litigation adopts safeguards to prevent unnecessary delays, such as imposing costs on the party responsible for delays and requiring processes like discovery. Such safeguards are generally absent in ADR (except arbitration) due to its flexible nature, which can lead to potential delays and increased costs if disputes remain unresolved and proceed to court.[133]

In particular, mediation offers substantial reduction in costs.[134] However, this may be lost if mediation fails and the dispute proceeds to court after significant resources have been spent, regardless of how the mediation process began.[135] Similarly, arbitration occasionally resembles the costs of litigation, particularly when the process becomes judicialised through procedural complexities.[136] Moreover, it involves fixed expenses such as arbitrator's fees, facility fees and administrative costs which can accumulate in high-stakes matters, further reducing arbitration's cost-effectiveness.[137] Overall, mediation has proven to be a cost-effective alternative to litigation, largely because it involves fewer formalities and legal fees.[138] Whereas arbitration's cost-effectiveness depends on the nature of the dispute and the procedural complexities involved.[139]

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[131] Lynn a. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 397.
[132] Jean-Claude Goldsmith et al, *ADR in Business: Practice and Issues across Countries and Cultures, Volume I* (Kluwer Law International 2006) 116.
[133] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[134] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.
[135] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 18.
[136] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.
[137] Yusuf Olaoluwa, 'Analysis of The Strengths and Weaknesses of Alternative Dispute Resolution (ADR) In Commercial Disputes' (*Afribary,* 2021) <https://afribary.com/works/adr-in-commercial-disputes> accessed 23rd Sept. 2024.
[138] Pranay Prakash Singh, 'ADR Processes: Comparative Analysis and Effectiveness' in Komal Vig and Ritu Gautam (eds), *ADR Strategies: Navigating Conflict Resolution in the Modern Legal World* (Inkbound Publishers 2022).
[139] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.

3.1.2 Time

ADR can potentially resolve disputes faster than litigation. However, this depends on the third party involved as poor preparation and lack of skill can lead to deadlock which reduces time efficiency.[140] Additionally, where a dispute involves a contract with an ADR clause, the contract becomes crucial in setting timeframes for each stage of the process, helping to safeguard against delays. If poorly drafted, it can inevitably prolong the dispute.[141] Furthermore, parties may exploit nonbinding ADR as a dilatory tactic, particularly when there is a lack of cooperation between the parties, thereby causing delays.[142]

In particular, mediation resolves disputes efficiently by avoiding the lengthy procedures of litigation, although this depends on its success, as failure would see parties approaching or returning to court.[143] Since mediation lacks safeguards to address power imbalances, one party may dominate the process and prolong the session, thereby reducing time efficiency.[144] Moreover, the time efficiency of mediation largely depends on the mediator's skill, as an unskilled mediator may cause delays.[145] Alternatively, arbitration saves time compared to litigation, provided the parties waive their right to a new trial in nonbinding arbitration or no challenge is made to the award. However, if these rights are exercised by the parties, then significant time may be lost.[146] While arbitration can be swift when parties cooperate, enforcing the award relies on court intervention if a party refuses to comply.[147] Hence, arbitration may mimic litigations lengthy procedures if it becomes too judicialised.[148]

3.1.3 Party Autonomy and Satisfaction

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[140] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), 3.
[141] Jean-Claude Goldsmith et al, *ADR in Business: Practice and Issues across Countries and Cultures, Volume I* (Kluwer Law International 2006), 116.
[142] Sterling Miller, 'The problems and benefits of using Alternative Dispute Resolution' (*Thomson Reuters*, 29th April 2022) <https://legal.thomsonreuters.com/en/insights/articles/problems-and-benefits-using-alternative-dispute-resolution> accessed 29th Sept 2024.
[143] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 18.
[144] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 433.
[145] Giuliana Romualdi, 'Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context' (2018) 14 Utrecht Law Review 52.
[146] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 410.
[147] Yusuf Olaoluwa, 'Analysis of The Strengths and Weaknesses of Alternative Dispute Resolution (ADR) In Commercial Disputes' (*Afribary,* 2021) <https://afribary.com/works/adr-in-commercial-disputes> Accessed 23rd Sept. 2024.
[148] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.

In comparison to litigation, ADR provides more autonomy by giving parties some control over the process. However, in cases where the referee exercises excessive control over the process, clients may feel as if they have lost autonomy, negatively impacting satisfaction rates.[149] Additionally, ADR does not guarantee the finality that litigation provides, except in the case of binding arbitration. This lack of finality may reduce party satisfaction.[150] Further, ADR can reinforce existing power imbalances amongst parties, resulting in less favourable outcomes for weaker participants.[151] Mediation is lauded for its party autonomy, however, its success depends on the genuine commitment of the parties involved.[152] The process may fail if the relationship between the parties is beyond repair or if one party has unrealistic expectations.[153] Further, the potential power imbalance that may exist in mediation could lead to weaker parties assuming that stronger parties are dominating the process and ultimately lead to dissatisfaction, especially in commercial disputes involving companies of different sizes.[154] Despite these concerns, research consistently reports high levels of satisfaction with mediation.[155] In contrast, arbitration offers minimal party autonomy as it is adjudicative, and satisfaction levels depend on the complexity of the dispute. In fact, clients and lawyers prefer litigation over arbitration in complex cases, particularly when arbitration does not meet their expectations.[156]

3.1.4 Confidentiality and Privacy

Confidentiality is a hallmark of ADR; however, this may lead to the privatisation of justice as private settlements hinder the creation of legal precedents and reduce public awareness of broader issues.[157] Confidentiality can also limit the development of public legal standards, as private settlements do not contribute to broader legal reform.[158] Furthermore, confidentiality

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[149] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), 3.
[150] Ibid.
[151] Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (1st edn., Oxford University Press 2022), 169.
[152] Thomas Wälde, 'ADR in Business: Practice and Issues across Countries and Cultures by J.C. Goldsmith, A. Ingen-Housz, and G. Pointon' (2008) 24 Arbitration International 503.
[153] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 17.
[154] Yusuf Olaoluwa, 'Analysis of The Strengths and Weaknesses of Alternative Dispute Resolution (ADR) In Commercial Disputes' (*Afribary,* 2021) <https://afribary.com/works/adr-in-commercial-disputes> Accessed 23rd Sept. 2024.
[155] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[156] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 411.
[157] Carrie Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution (ADR)' (2015) 59 International Encyclopaedia of the Social and Behavioural Sciences 1.
[158] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.

limits public scrutiny and reduces opportunities for systemic change.[159] Arbitration allows businesses to resolve disputes privately without divulging sensitive information. This does not serve the larger public as wrongful acts could remain private, with the wrongful party facing no backlash.[160] Similarly, mediation allows parties to resolve issues without public scrutiny.[161] Overall, the confidentiality promised by ADR limits transparency and accountability, especially in disputes with broader societal implications.[162]

3.1.5 Limitations of ADR in Certain Disputes

ADR is not universally effective, particularly in disputes requiring formal resolution mechanisms. ADR may also fail where the power imbalance is excessive, or where the relationship between the parties is beyond repair.[163] Additionally, court-mandated ADR may disadvantage marginalised groups, as power imbalances can influence less formal processes that lack strong procedural safeguards.[164] Mediation is unsuitable for adversarial disputes where the parties want a clear winner and loser as its informal and flexible nature is not designed for definitive resolutions.[165] Similarly, arbitration's inability to issue injunctions or address non-monetary disputes reduces its scope in complex disputes.[166] However, it is more definitive than mediation. This highlights how insufficient judicial oversight may lead to unjust ADR outcomes.[167]

3.1.6 The Importance of Skilled ADR Practitioners

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[159] Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (1st edn., Oxford University Press 2022), 168.
[160] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement', (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[161] Pranay Prakash Singh, 'ADR Processes: Comparative Analysis and Effectiveness' in Komal Vig and Ritu Gautam (eds), *ADR Strategies: Navigating Conflict Resolution in the Modern Legal World* (vol 1, Inkbound Publishers 2022).
[162] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016) 18.
[163] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), 3.
[164] Yusuf Olaoluwa, 'Analysis of The Strengths and Weaknesses of Alternative Dispute Resolution (ADR) In Commercial Disputes' (*Afribary,* 2021) <https://afribary.com/works/adr-in-commercial-disputes> accessed 23rd Sept. 2024.
[165] Jean-Claude Goldsmith et al, *ADR in Business: Practice and Issues across Countries and Cultures, Volume I* (Kluwer Law International 2006), 117.
[166] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[167] Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (1st edn., Oxford University Press 2022), 169.

The success of ADR hinges on proper education and training of its practitioners (mediators and arbitrators).[168] Underqualified practitioners risk causing deadlock and ineffective outcomes.[169] Poor performance in ADR potentially results in confusion, unsatisfactory resolutions and wasted resources undermining the process and increasing expenses and frustration.[170] Additionally, the quality of practitioners impacts fairness and satisfaction of the ADR process.[171] Lawyers play a significant role in ADR as their attitudes and practices influence client satisfaction and public acceptance of ADR.[172] However, research indicates that lawyers hesitate to participate in compulsory mediation as they lack trust in the mediator's abilities.[173]

3.2 What Factors Ultimately Influence the Effectiveness Of ADR?

The effectiveness of ADR depends on the nature of the dispute, the skill of the practitioner and the clarity of contractual terms. In particular, mediation generally offers more flexibility, speed and cost-effectiveness compared to arbitration. Although, a successful mediation relies on the cooperation of the parties involved, as only a genuine involvement in mediation can provide satisfying results. Unrealistic expectations by parties and power imbalances risk causing failure.

Alternatively, arbitration offers formal procedures and finality, which can provide the certainty and enforceability that mediation may lack, making it valuable in complex disputes where a clear outcome is necessary. However, arbitration can mirror the complexities and costs of litigation, with fixed costs, including arbitrator fees and administrative expenses, which may make it less cost-effective than expected. Despite its strengths, the flexibility and lower costs of mediation often make it a more suitable option for SMEs.

ADR's potential is best realised in disputes suited to its flexible nature. However, in complex cases, its limited ability to manage intricate legal issues can cause delays or ineffective outcomes. The effectiveness of ADR also depends on clear contractual terms and the

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[168] Giuliana Romualdi, 'Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context' (2018) 14 Utrecht Law Review 52.
[169] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), 3.
[170] Susan Blake et al., *The Jackson ADR Handbook* (2nd edition, Oxford University Press 2016), 17.
[171] Pranay Prakash Singh, 'ADR Processes: Comparative Analysis and Effectiveness' in Komal Vig and Ritu Gautam (eds), *ADR Strategies: Navigating Conflict Resolution in the Modern Legal World* (vol 1, Inkbound Publishers 2022).
[172] Lynn a. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 412.
[173] Yusuf Olaoluwa, 'Analysis of The Strengths and Weaknesses of Alternative Dispute Resolution (ADR) In Commercial Disputes' (*Afribary,* 2021) <https://afribary.com/works/adr-in-commercial-disputes> Accessed 23rd Sept. 2024.

willingness of the parties to cooperate. Ultimately, ADR's effectiveness depends on both internal factors, such as the skill of the practitioner, and external factors, such as the complexity of the dispute. Its success also relies on choosing the method that aligns with the parties' intentions, whether they seek finality through arbitration or wish to preserve business relationships through mediation.

4 How Do ADR Frameworks in England And India Compare?

4.1 What is the Difference Between ADR Frameworks in England and India?

ADR is a more efficient and cost-effective alternative to litigation, with both India and England incorporating it into their legal framework. However, their approaches vary due to differences in their legal traditions, sociocultural backgrounds, and economic conditions. India's ADR framework is a blend of modern legislation and traditional mechanisms such as Lok Adalats, reflecting the country's commitment and intention to offer accessible justice to all sections of society. On the other hand, England's ADR framework emphasises formal and strict arbitration and mediation processes with definitive outcomes. This comparative analysis explores the ADR frameworks in both countries, highlighting their differences and similarities.

4.1.1 Arbitration: India vs England

Arbitration is the most formalised method of ADR in both jurisdictions, governed by comprehensive legal frameworks. In England, arbitration is governed by the Arbitration Act 1996.[174] The Act aligns with the UNCITRAL Model Law to ensure a globally recognised standard for arbitration.[175] The Act also incorporates the New York Convention.[176] It mandates the enforcement of arbitral awards, making arbitration a preferred method for resolving commercial disputes.[177] Furthermore, the Act emphasises party autonomy.[178] This ensures that the parties retain control over the arbitration process.[179] Additionally, judicial intervention is

[174] Arbitration Act 1996.
[175] UNCITRAL Model Law on International Commercial Arbitration (1985), UN Doc A/40/17, Annex I.
[176] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).
[177] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[178] Arbitration Act 1996, s 1(b).
[179] Shakthi Jayanth S And Kavitha Durai, 'Reforms to Be Made In ADR Laws – A Comparative Study With UK Laws' (2023) 11(3) Russian Law Journal 2485.

limited to concerns about procedural fairness and there is reluctance to allow challenges to arbitral awards.[180] The framework adopts a focused approach towards swift and efficient dispute resolution that promises finality, particularly in commercial transactions.[181] This effectively allows SMEs in England to avoid prolonged uncertainty, potentially reduce legal costs and maintain business stability.

In India, the Arbitration and Conciliation Act governs arbitration.[182] It aligns with the UNCITRAL Model Law and emphasises swift and efficient resolution through judicial oversight. In fact, Indian courts play an active role in arbitration, for example the courts appoint arbitrators when parties fail to do so.[183] Initially, Indian courts were allowed to intervene in international arbitration awards.[184] However, the Supreme Court of India later held that the Indian court's jurisdiction is limited to domestic arbitrations, aligning India's arbitration framework with international standards.[185] Additionally, the scope for challenging domestic arbitral awards is wider, wherein courts can set aside awards that are considered to be in violation of public policy or "patently illegal".[186] Despite these reforms, arbitration continues to face challenges in India, including delays in enforcement and frequent judicial intervention.[187]

England's approach regarding judicial intervention in arbitration depicts its commitment to upholding the autonomy of ADR and promises finality in the process, while India's approach allows for greater judicial oversight to ensure fairness and efficiency.[188] The broad interpretation of public policy in India contrasts with England's narrower approach, where intervention is limited to procedural or jurisdictional issues.[189] For SMEs, India's greater judicial oversight may offer protection against unfair outcomes, particularly for less experienced parties, while England's emphasis on autonomy can benefit SMEs seeking faster resolutions with minimal court involvement.

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[180] Arbitration Act 1996, s 68 and 69.
[181] Shakthi Jayanth S And Kavitha Durai, 'Reforms to Be Made In ADR Laws – A Comparative Study With UK Laws' (2023) 11(3) Russian Law Journal 2485.
[182] Arbitration and Conciliation Act 1996.
[183] Ibid, s 11.
[184] *Bhatia International v. Bulk Trading S.A* [2002] 4 SCC 105.
[185] *Bharath aluminium co. v. Kaiser Aluminium Technical Services Inc.* [2012] 9 SCC 552.
[186] *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd* [2003] 5 SCC 705.
[187] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[188] Ibid.
[189] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.

4.1.2 Mediation: India vs England

Mediation is commonly used in India and England, but its application differs. In England, mediation is formal and encouraged, particularly in commercial disputes. Parties to a dispute are mandatorily required to explore mediation, at different stages of the dispute.[190] Courts in England have power to penalise parties that unreasonably refuse to mediate.[191] In fact, English courts have emphasised the importance of mediation in reducing litigation costs and promoting settlements.[192] Furthermore, pre-action protocols within the Civil Procedure Rules 1998 mandate that parties consider ADR before litigation, thereby embedding mediation into the legal framework.[193] Finally, English courts take a proactive stance in promoting mediation and this can be seen in *Halsey v. Milton Keynes General NHS Trust*, wherein the court imposed penalties on the party that refused to mediate with no reasonable justification.[194] This legal infrastructure ensures that mediation is not perceived as an alternative path but as a necessary route to be explored in the dispute resolution process.

In contrast, India's approach to mediation is less formal and is governed by the Mediation Act.[195] Mediation in India is nonbinding unless the parties voluntarily settle the dispute.[196] However, there is mandatory pre-instituted mediation in commercial cases (where no urgent reliefs are sought)[197] and in divorce cases.[198] Additionally, Lok Adalat incorporates elements of mediation offering flexibility in resolving disputes. While comparing the two, India's less formal approach offers flexibility and lower costs for SMEs but may prolong disputes due to limited structure and enforceability. In contrast, England's formal mediation framework offers SMEs greater certainty and enforceability but may increase costs and reduce flexibility.

4.1.3 The Role of Lok Adalats in India

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[190] Shakthi Jayanth S And Kavitha Durai, 'Reforms to Be Made In ADR Laws – A Comparative Study With UK Laws' (2023) 11(3) Russian Law Journal 2485.
[191] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
[192] Shakthi Jayanth S And Kavitha Durai, 'Reforms to Be Made In ADR Laws – A Comparative Study With UK Laws' (2023) 11(3) Russian Law Journal 2485.
[193] Prashant Subhash Arbune and Dr. Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[194] [2004] EWCA Civ 576.
[195] Mediation Act 2023.
[196] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[197] Commercial Courts Act 2015, s 12A.
[198] Family Courts Act 1984, s 9.

A distinctive feature of India's ADR framework is Lok Adalat. It is an informal and community-based approach to dispute resolution governed by legislation.[199] It provides a platform for resolving disputes through compromise and mutual agreement with no court proceedings.[200] This system may effectively resolve disputes involving marginalised groups as Lok Adalats operate without rigid legal formalities, making them accessible and cost-effective.[201]

The success of Lok Adalats can be attributed to its non-adversarial nature. Lok Adalats encourage parties to find a mutually acceptable solution, making it useful in disputes where maintaining relationships is important, such as commercial disputes involving SMEs.[202] The informality of the process and the absence of court fees makes Lok Adalat a popular option for resolving minor disputes quickly and efficiently. Additionally, Lok Adalats are praised for their ability to reduce the burden on courts. However, this informality can be a disadvantage when disputes involve complex legal issues or power imbalances. Lok Adalats in India can be contrasted with the approach taken in England, where ADR is formal, ensures clear procedures, legal certainty and enforceability, which can protect SMEs in high-stakes disputes. However, the increased formality raises costs and causes delays, with no community-driven aspect attached.[203] While Lok Adalats are ideal for minor conflicts, England's formal ADR is ideal for disputes requiring legal clarity and protection.[204]

4.1.4 Public Awareness and Challenges

India and England face similar challenges in raising public awareness and encouraging use of ADR. In England, public awareness of ADR is high but misconceptions about the enforceability of ADR outcomes still exist with parties choosing litigation assuming that court judgments are more easily enforceable.[205] England's legal framework encourages the use of ADR, but further efforts are needed to remove misconceptions, thereby ensuring ADR is

[199] Legal Services Authorities Act 1987.
[200] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[201] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[202] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[203] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[204] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[205] Shakthi Jayanth S And Kavitha Durai, 'Reforms to Be Made In ADR Laws – A Comparative Study With UK Laws' (2023) 11(3) Russian Law Journal 2485.

understood as an equally effective means of resolving disputes.[206] Alternatively, ADR in India is regarded as secondary to litigation.[207] ADR has proven successful in resolving disputes at the ground level, but many individuals remain unfamiliar with it.[208] However, targeted public awareness campaigns and legal literacy programs can help promote ADR as a viable option in disputes that include ongoing relationships, potentially encouraging greater use amongst SMEs.[209]

4.2 How Could The ADR Frameworks in England and India Benefit from Each Other?

ADR frameworks in India and England share common goals, reflecting their unique legal, cultural and social contexts. In England, ADR is formalised and structured, offering strong alternatives to litigation by promoting efficiency, reducing costs and providing quick resolutions.[210] In India, ADR encompasses both modern and traditional community-driven approaches, such as Lok Adalats that provide informal, accessible and cost-effective dispute resolution.[211] However, India faces challenges in raising public awareness of ADR and improving the enforcement of arbitral awards.[212] Despite these challenges, ADR retains its potential to reduce the backlog of cases in Indian courts.

India could benefit from adopting England's formalised and structured ADR system, which incorporates procedural safeguards to enhance effectiveness. This may also encourage viewing ADR not just as an alternative, but as an essential component of the dispute resolution process. In contrast, England could benefit from adopting community-driven mechanisms like Lok Adalats, particularly in disputes that involve ongoing relationships between parties, such as disputes pertaining to SMEs. Lok Adalats emphasis on compromise and community resolution

[206] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[207] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.
[208] Ibid.
[209] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[210] Shakthi Jayanth S and Kavitha Durai, 'Reforms to Be Made In ADR Laws – A Comparative Study With UK Laws' (2023) 11(3) Russian Law Journal 2485.
[211] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[212] Pham Thanh Nga, 'Alternative Dispute Resolution (ADR): A New Trend of Economic Conflicts Settlement' (2022) 8 (6) International Journal of Legal Developments and Allied Issues 1.

could offer an inclusive and accessible form of justice, particularly for vulnerable groups in England.

England's ADR framework can reduce legal uncertainty and instil confidence in SMEs by offering predictability, enforceability and institutional support. On the other hand, India's community-driven approach provides SMEs with greater accessibility and cultural familiarity through its informal characteristics. While England's approach may better assist SMEs in complex or cross-border disputes, India's approach may better assist SMEs in local, modest-value disputes where procedural simplicity is key. Ultimately, both jurisdictions can improve their respective ADR frameworks by learning lessons from one another.

5 How Can ADR Continue to Assist SMEs?

5.1 Proposed Recommendations

5.1.1 Increasing Awareness and Accessibility of ADR

There is a requirement to improve awareness of availability and benefits of ADR amongst SMEs. One suggestion is to provide brochures to clients and have lawyers discuss ADR options with clients at the outset of the dispute, ensuring that ADR is not an afterthought.[213] Furthermore, technology can improve awareness and accessibility of ADR. Digital platforms for online mediation and arbitration reduce geographical barriers and allow parties with limited resources to access ADR, which is beneficial in large countries like India with an urban–rural divide that creates accessibility challenges. [214] Additionally, the inclusion of ADR in a university curriculum can help build a legally literate population.[215] Law and business courses should prioritise ADR as a primary subject to ensure that future lawyers and entrepreneurs are aware of all the available dispute resolution options.[216] Early exposure to ADR can encourage future generations to embrace diverse dispute resolution methods. Furthermore, awareness campaigns that go beyond the legal community and focus on the public can produce greater

[213] Lynn a. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 430.
[214] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.
[215] Vishnu Konoorayar et al. , 'Alternative Dispute Resolution in India – ADR: status/effectiveness study' (*Social Science Open Access Repository*, 2014) <(PDF) Alternative Dispute Resolution in India – ADR: status/effectiveness study> accessed 16 April 2025.
[216] Prashant Subhash Arbune and Priti Vijaynarayan Yadav, 'Comparative Analysis of the Efficacy of Alternative Dispute Resolution Mechanisms in India and the UK' (2023) 12 European Chemical Bulletin 7734.

benefits including added collaboration with media outlets to amplify the message.[217] Finally, ADRs appeal could be enhanced by rebranding "alternative dispute resolution" to "amicable dispute resolution" as done by the International Chamber of Commerce, thereby preventing it from being perceived as a mere alternative.[218]

5.1.2 Strengthening the Role of Mediation

Mediation is the most useful ADR method for SMEs due to its ability to save cost and time, especially when they lack the financial resources to initiate litigation.[219] More importantly, mediation preserves business relationships, which is invaluable to small businesses.[220] Hence, SMEs could benefit from including mandatory mediation clauses in contracts, allowing them to handle conflicts efficiently.[221] Additionally, the voluntary and flexible nature of mediation needs to be promoted as it gives parties a sense of control over the outcome.[222] Efforts should also focus on improving mediator skills, including problem-solving techniques and relationship-building techniques.[223] By enhancing these aspects, mediation can become an even more powerful tool for resolving disputes efficiently.

5.1.3 Enhancing ADR Training for Legal Professionals

Many lawyers struggle to fulfil their roles in ADR as they must act as advisors and educators, which is difficult if they are unfamiliar with ADR processes or if they view ADR as a threat to litigation.[224] Hence, training lawyers in ADR can increase its efficiency and also help improve the lawyer's negotiation skills.[225] Eventually, such training initiatives should be extended to include ADR practitioners as well.[226]

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[217] Vishnu Konoorayar et al., 'Alternative Dispute Resolution in India – ADR: status/effectiveness study' (*Social Science Open Access Repository*, 2014) <(PDF) Alternative Dispute Resolution in India – ADR: status/effectiveness study> accessed 16 April 2025.
[218] Jean-Claude Goldsmith et al, *ADR in Business: Practice and Issues across Countries and Cultures, Volume I* (Kluwer Law International 2006), 4.
[219] Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1 Journal of Empirical Legal Studies 843.
[220] Mare Lampe and Seth R. Ellis, 'Resolving Small Business Disputes Through Mediation' (1995) 6 Journal of Small Business Strategy 85.
[221] Ibid.
[222] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 430.
[223] James A. Wall, and Timothy C. Dunne, 'Mediation Research: A Current Review' (2012) 28 (2) Negotiation Journal 217.
[224] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 381, 434.
[225] Mare Lampe and Seth R. Ellis, 'Resolving Small Business Disputes Through Mediation' (1995) 6 Journal of Small Business Strategy 85.
[226] Vishnu Konoorayar et al., 'Alternative Dispute Resolution in India – ADR: status/effectiveness study' (*Social Science Open Access Repository*, 2014) <(PDF) Alternative Dispute Resolution in India – ADR: status/effectiveness study> accessed 16 April 2025.

5.1.4 Monitoring and Evaluating ADR Effectiveness

ADRs success largely hinges on continuous monitoring and evaluation. Much of the existing ADR literature reiterates well-researched issues, highlighting the need for more structured research programs, especially with mediation.[227] Additionally, further research into arbitrations benefits could be achieved through deeper comparison with litigation.[228] Empirical studies on real-world ADR cases can help identify areas for improvement and determine the most effective techniques. Additionally, controlled comparisons between mediation, arbitration, and litigation are needed to further assess factors like cost, speed and participant satisfaction.[229]

Examining the impact of ADR on SMEs is specifically vital as cost reduction, preserving business relationships, and the speed of dispute resolution are critical concerns for SMEs.[230] Creating comparison groups to assess effectiveness of each form of ADR on different groups could offer valuable insight.[231] The continuous evaluation of ADR systems is crucial.[232] Constant evaluation, data collection, and case analysis can continuously improve ADR effectiveness.[233] Additionally, stakeholders (litigants, lawyers, etc) can contribute to improving ADR by participating in feedback loops.[234]

6 Conclusion

The findings of this article indicate that ADR offers significant benefits for SMEs. In particular, mediation offers flexibility, cost and time effectiveness and control over the process and outcome. Additionally, mediation preserves business relationships by fostering collaboration and mutual understanding, which is essential for SMEs that depend on long-term partnerships. Since SMEs operate on limited financial and human resources, these advantages make

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[227] James A. Wall and Timothy C. Dunne, 'Mediation Research: A Current Review' (2012) 28 (2) Negotiation Journal 217.
[228] Lynn A. Kerbeshian, 'ADR: to be or …?' (1994) 70 North Dakota Law Review 411.
[229] James A. Wall, and Timothy C. Dunne, 'Mediation Research: A Current Review' (2012) 28 (2) Negotiation Journal 217.
[230] Mare Lampe and Seth R. Ellis, 'Resolving Small Business Disputes Through Mediation' (1995) 6 Journal of Small Business Strategy 85.
[231] James A. Wall and Timothy C. Dunne, 'Mediation Research: A Current Review' (2012) 28 (2) Negotiation Journal 217.
[232] Vishnu Konoorayar et al. 'Alternative Dispute Resolution in India – ADR: status/effectiveness study' (*Social Science Open Access Repository,* 2014) <(PDF) Alternative Dispute Resolution in India – ADR: status/effectiveness study> accessed 16 April 2025.
[233] Ibid.
[234] Ameen Jauhar, 'Hearing the 'Little Guy – Litigant Involvement to Promote Alternative Dispute Resolution Mechanisms in India' (2019) 15 Socio-Legal Review 30.

mediation a viable alternative to litigation. While mediation is effective for SMEs, arbitration often proves to be expensive. For instance, the London Court of International Arbitration charges £1,950 for registering a domestic arbitration dispute in England. While arbitration provides finality and efficiency, its high costs make it unsuitable for SMEs that lack financial resources. Therefore, mediation is advised as the preferred ADR method for SMEs.

The weaknesses of ADR need to be addressed to prevent them from reducing its efficiency. In countries having significant backlog of cases like India, ADR has the potential to alleviate some burdens. However, current ADR mechanisms need improvements to fully address the needs of SMEs. Legislative reforms are also required to help ADR adapt to societal changes and the evolving legal landscape. Another key solution is to integrate technology into ADR which enables remote participation and reduces costs while streamlining dispute resolution. It is also crucial for India to follow England in introducing legislative reforms and backing for mediation. Such reforms will provide SMEs with well-regulated and efficient ADR processes, allowing them to fully benefit from these mechanisms with no hindrance.

Another crucial requirement is to increase awareness of ADR among SMEs, which remain unaware of ADRs ability to stand as a viable alternative to litigation. Increased awareness and use of ADR among SMEs could prompt government support, as seen with arbitration in international commercial disputes. This may drive investment in improving ADR frameworks and strengthen ADR's role as a necessary step before litigation. Future research should prioritise deeper analysis of the cost, speed, and efficiency of all forms of ADR. Regular data collection, case analysis, and feedback integration can provide continuous evaluations to help policymakers strengthen ADR frameworks that meet SMEs evolving needs. As society advances and technology reshapes business landscapes, the complexity of disputes will grow, requiring laws and ADR mechanisms to adapt. This ensures SMEs and other vulnerable groups can compete fairly in a dynamic business environment.

The Chilling Effect: Hong Kong's Securitisation and the Erosion of Rights-Based Environmental Protection

Mateusz Tokarz

Abstract

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL) threatens the exercise of rights-based approaches (RBAs) to environmental protection. Enacted in 2020, the NSL has been criticised for its draconian and ambiguously formulated provisions that contravene China's obligations under the Sino-British Joint Declaration of 1984 and international law. This paper posits that the NSL undemocratically constrains the fundamental rights required to exercise RBAs for environmental protection, thereby facilitating long-term risks to ecocentric legislative activity in the Hong Kong Special Administrative Region (HKSAR). It also investigates the capacity of civil society to demand accountability for environmentally focused HKSAR policies and laws. Challenges to environmentalism in the post-NSL era are examined, evaluating the law's impact on environmental activism. The paper concludes that the NSL has facilitated the erosion of environmentalism in the HKSAR, limiting the activities of nongovernmental organisations (NGOs), muzzling free expression, and suppressing political opposition. Given the current political environment, the prospect of legal reform appears bleak. Sustained international support for local environmental human rights defenders is necessary, and future research must focus on developing alternative strategies for environmental advocacy in restrictive political settings.

1 Introduction

"If we fail our environment, we fail to protect our human rights" – Ban Ki-moon [1]

This paper assesses the effect of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region[2] (NSL) on the exercise of rights-based approaches (RBAs) to environmental protection. Promulgated in 2020, the NSL has been subject to widespread condemnation due to its draconian and ambiguously formulated provisions, which contravene China's international obligations,[3] and its commitments to preserve the autonomous common law system retained after the 1997 handover from Britain.[4] Once crowned as the 'Pearl of the Orient'[5] for maintaining judicial independence from Mainland China, the Hong Kong Special Administrative Region (HKSAR) now mourns the decline of constitutional human rights protections.

The planetary environmental crisis threatens the enjoyment of fundamental human rights, which are increasingly recognised as interdependent with the natural environment.[6] In the HKSAR, environmental interest groups have traditionally played a significant role in holding the government accountable for environmental governance, thereby ensuring it fulfils its international human rights obligations.[7] Focusing on the former aspect, this paper discusses how the NSL has affected the ability of HKSAR environmental groups to pursue rights-based approaches and considers the broader implications for the future of human rights protection in the jurisdiction.

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[1] '"If We Fail Our Environment, We Fail to Protect Our Human Rights," Warn UN Experts on Earth Day' (*OHCHR*) <https://www.ohchr.org/en/press-releases/2013/04/if-we-fail-our-environment-we-fail-protect-our-human-rights-warn-un-experts> accessed March 1 2024.

[2] Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, passed by the NPCSC on June 30 2020 (hereafter NSL), English translation available at <http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm> accessed March 1 2024.

[3] Han Zhu, 'A Chinese Law Wedge into the Hong Kong Common Law System: A Legal Appraisal of the Hong Kong National Security Law' (2023) 21 Northwestern Journal of International Human Rights 43, 46.

[4] Brendan Clift, 'Hong Kong's Made-in-China National Security Law: Upending the Legal Order for the Sake of Law and Order' (2020) 21 Australian Journal of Asian Law 1.

[5] Chan RCK and Lin GCS, 'From a Colonial Outpost to a Special Administrative Region: Hong Kong's First Decade of Reunion with China' (2008) 8 China Review 1 <https://www.jstor.org/stable/23462258>.

[6] UNGA 'The Human Right to a Clean, Healthy and Sustainable Environment' (28 July 2022) UN Doc A/RES/76/300; Louis Jacobus Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) Global Journal of Comparative Law 5.

[7] Hung SC-F, 'Interest Groups and the Democracy Movement in Hong Kong: A Historical Perspective', *Interest Groups and the New Democracy Movement in Hong Kong*, vol 1 (1st edn, Routledge 2018), 213.

Extant literature on RBAs for environmental protection has advanced to acknowledge the importance of employing human rights arguments to challenge states on the implementation of adaptation and mitigation measures for environmental degradation.[8] The efficacy of RBAs is contingent upon the ability to exercise fundamental rights,[9] including freedom of expression,[10] peaceful assembly,[11] and association,[12] which enable public participation in environmental governance and accountability. Despite extensive research on how security legislation affects human rights,[13] discourse concerning its effect on RBAs to environmental protection remains notably absent. Given environmental protection's recognition as a required component of national security,[14] and the HKSAR's contribution to one of the world's largest greenhouse gas emitters (GHGE), China, this omission is conspicuous. Previous studies[15] conducted by international human rights organisations[16] concur on the NSL's human rights impact but omit the issue of environmentalism.

This paper aims to contribute to the extant body of scholarship by examining the influence of security legislation on environmentalism in politically restrictive jurisdictions. Part 1 evaluates the theoretical foundations of RBAs to environmental protection, considering the requirements of additional freedoms in order to undertake RBAs. Part 2 contextualises the NSL within the HKSAR's politico-legal history and its implications for fundamental rights and environmental advocacy. Part 3 investigates the feasibility of legal reform, and the broader human rights risk associated with climate crises. The paper concludes by reaffirming the importance of balancing anthropocentrism and ecocentrism within legal frameworks, the need for future research on

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[8] Ceri Warnock and Brian Preston, 'Climate Change, Fundamental Rights, and Statutory Interpretation' (2023) 35 Journal of Environmental Law 47, 49.
[9] Brian Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 Chinese Journal of Environmental Law 133.
[10] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter, ICCPR), Art. 19.
[11] Ibid, Art. 21.
[12] Ibid, Art. 22.
[13] See for example, Myriam Feinberg, 'International Counterterrorism – National Security and Human Rights: Conflicts of Norms or Checks and Balances?' (2015) 19 International Human Rights 388; P Sean Morris, 'National Security and Human Rights in International Law' (2020) 8 Groningen Journal of International Law 123.
[14] United Nations Trust Fund for Human Security (UNTFH), 'Human Security Handbook: An integrated approach for the realization of the Sustainable Development Goals and the priority areas of the international community and the United Nations system' (January 2016), 7.
[15] Surya Deva, 'Putting Byrnes and Hong Kong in a Time Machine: Human Rights in 2021 Under the Shadow of Beijing's National Security Law' (2021) 27 Australian Journal of Human Rights 467.
[16] International Service for Human Rights, 'The National Security Law for Hong Kong: Impacts on Civic Space and Civil Society Engagement with the UN' (*International Service for Human Rights*, September 2022) <https://ishr.ch/wp-content/uploads/2022/09/ISHR_Report-Impact-of-HK-National-Security-Law_web.pdf>accessed 3 May.

environmental advocacy in restrictive jurisdictions, and the prudent recognition that national security requires environmentalism.

2 Reconciling Environmental Protection with Human Rights

To examine the impact of the NSL on RBAs to environmental protection, it is necessary to define RBAs and their theoretical basis. Recent academic debate concerning RBAs can be attributed to two historic developments: the United Nations (UN) General Assembly's recognition of the right to a clean, healthy, and sustainable environment,[17] and a preceding resolution by the UN Human Rights Council acknowledging the same right.[18] Despite the watershed moment linking human rights with environmental concerns, development in this area of international law has faced significant obstacles. Political resistance and competing views on the value of RBAs have remained ongoing challenges[19] since contemporary discourse on environmental rights was initiated[20] by the Stockholm Declaration.[21]

Part I is comprised of three sections. Section 1.1 delineates RBAs to environmental protection by considering foundational theoretical principles. Section 1.2 discusses the efficacy of RBAs in the context of environmental litigation. Section 1.3 concludes by emphasising the significance of procedural rights in the implementation of RBAs to combat environmental degradation. It is posited that RBAs are necessary for ensuring state accountability in attaining environmental and human rights obligations.

2.1 Anthropocentrism versus Ecocentrism: Justifying RBAs

The absence of a universal definition of RBAs has resulted from ongoing debate and disagreement in the literature concerning their theoretical principles.[22] It is beyond the purpose of this paper to examine all these debates or the study of human rights philosophy. However, considering the primary theoretical arguments is necessary to determine their value and identify

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[17] UNGA 'The Human Right to a Clean, Healthy and Sustainable Environment' (28 July 2022) UN Doc A/RES/76/300.
[18] UNHRC 'The Human Right to a Clean, Healthy and Sustainable Environment' (8 October 2021) UN Doc A/HRC/RES/48/13.
[19] Azadeh Chalabi, 'A New Theoretical Model of the Right to Environment and Its Practical Advantages' (2023) 23 Human Rights Law Review 1.
[20] Jonas Ebbesson, 'Getting It Right: Advances of Human Rights and the Environment from Stockholm 1972 to Stockholm 2022' (2022) 52 Environmental Policy and Law 79.
[21] Report of the United Nations Conference on the Human Environment, Stockholm, 15-16 June 1972 (adopted 16 June 1972) UN Doc A/CONF.48/14/Rev.1 (hereafter, Stockholm Declaration), ch 1.
[22] E Donald Elliott and Daniel C Esty, 'The End Environmental Externalities Manifesto: A Rights-Based Foundation for Environmental Law' (2021) 29 New York University Environmental Law Journal 505, 514.

a suitable definition of RBAs for the subsequent analysis. Leib classifies contemporary environmental thought into two perspectives, anthropocentrism and ecocentrism.[23] Anthropocentrism places humans at the centre of moral consideration.[24] Adopting a moral view of this nature facilitates environmental destruction by prioritising human interests.[25] Hardin convincingly articulated the dangers of this by arguing that ecological collapse is inevitable when individuals exploit the shared environmental 'commons' for personal benefit and that law and policy must be employed to control our exploitative tendencies.[26] Hardin's fear has undeniably manifested in the HKSAR.

Scholars have challenged these assertions by claiming they are inherently flawed and have not adapted to contemporary thought.[27] Most convincingly, it has been suggested that this conception of the human–nature relationship has been "translated into global legal instruments".[28] For example, the 1972 Stockholm Conference[29] and its subsequent Declaration[30] placed environmental protection at the centre of "human well-being and economic development".[31] Although the Declaration was nonbinding, its political influence persisted. The Paris Agreement's[32] preamble demonstrates the continued influence of anthropocentrism in international law. It reinforces the idea that environmental protection is not just for our planet's sake but for the benefit of human development.[33] Although anthropocentrism may underpin the relationship between human rights and the environment in international law, it cannot singularly justify the rationale behind advancing RBAs. Recognising anthropocentrism's limitations is necessary, namely it's potential to marginalise

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[23] Linda Hajjar Leib, *Human Rights and the Environment [electronic Resource]: Philosophical, Theoretical and Legal Perspectives.* (BRILL 2011), 26.
[24] Allen Thompson, 'Anthropocentrism: Humanity as Peril and Promise', *The Oxford Handbook of Environmental Ethics* (Oxford University Press 2017).
[25] Ibid.
[26] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science (American Association for the Advancement of Science) 1243.
[27] Jonathan M Karpoff, 'The Tragedy of "The Tragedy of the Commons"; Hardin Versus the Property Rights Theorists' (2022) 65 The Journal of Law and Economics S65; Sayem MA, 'Lynn White, Jr.'s Critical Analysis of Environmental Degradation in Relation to Faith Traditions: Is His "The Historical Roots of Our Ecological Crisis" Still Relevant?' (2021) 56 Journal of Ecumenical Studies 1,
[28] Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame' (2018) 30 Journal of Environmental Law 235.
[29] Stockholm Declaration (n. 21).
[30] Ibid, ch 1.
[31] 'Report of the United Nations Conference on the Human Environment' (Stockholm 5-16 June 1972) (1973) UN Doc A/CONF.48/14/Rev.1, 3.
[32] 'Adoption of the Paris Agreement' (12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev.1, 20, Annex (hereafter, Paris Agreement).
[33] Ibid.

nonhuman life and essential ecological processes.[34] By focusing on human liberty and economic interests, the law neglects the interests of indigenous communities with connections to their natural environments and those disproportionately affected by environmental degradation.[35]

Conversely, ecocentrism challenges the anthropocentric narrative of international law by emphasising the interdependence of humans and the environment, displacing us from our superior moral position.[36] By adopting this approach, ecocentrism reorients our anthropocentric legal frameworks to value nature beyond its utility to humanity.[37] International documents, such as the Earth Charter, demonstrate that ecological integrity had been acknowledged internationally, to a certain degree, prior to recent developments in environmental jurisprudence.[38] Recent judicial decisions, such as those in New Zealand[39] and Colombia,[40] have increasingly begun recognising nature's rights as equal to human rights.[41] These decisions indicate that we are witnessing a growing awareness of the importance of ecocentric law. However, studies caution that the need for practical solutions in complex legal scenarios tempers the potential of such approaches.[42]

Consequently, despite addressing the main limitations of anthropocentric thought, ecocentrism remains an imperfect solution. Critics rightly argue that its idealism is utopian and can conflict with the needs of human survival.[43] While ecocentrism's attempt to recognise nonhuman life as a beneficiary of international law is necessary, we must not forget to consider human requirements. Balancing anthropocentric and ecocentric law is the solution to protecting the

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[34] Louis J. Kotze & Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 Global Journal of Comparative Law 5, 12–14.
[35] Lisa Mardikian and Sofia Galani, 'Protecting the Arctic Indigenous Peoples' Livelihoods in the Face of Climate Change: The Potential of Regional Human Rights Law and the Law of the Sea' (2023) 23 Human Rights Law Review 1.
[36] Vito De Lucia, 'Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law' (2017) 8 Journal of Human Rights and the Environment181, 186.
[37] Ibid.
[38] Earth Charter Commission, 'The Earth Charter' (2000) <https://earthcharter.org/read-the-earth-charter/> accessed 25 March 2024.
[39] *Michael John Smith v Fronterra Co-operative group Ltd and others* [2024] NZSC 5.
[40] Judgement T-622/16 (The Atrato River Case), Constitutional Court of Colombia [2016], translated by the Dignity Rights Project and available at <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20161125_T-62216_judgment.pdf> accessed 25 March 2024.
[41] Philipp Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) 33 Journal of Environmental Law 531.
[42] Dirk Hanschel, 'Ecocentric Rights: A Global Trend towards Protection of Nature', Max Planck Institute for Social Anthropology <https://www.eth.mpg.de/6285606/news-2023-07-19-01> accessed March 25, 2024.
[43] Linda Hajjar Leib, *Human Rights and the Environment [electronic Resource]: Philosophical, Theoretical and Legal Perspectives.* (BRILL 2011), 39.

planet and human rights. Accordingly, the most suitable definition of RBAs for this paper's analysis must reflect this balanced approach. Gauri and Gloppen's "rights-talk approach" aligns with this requirement.[44] The proposed approach acknowledges the power of rights-based claims and social accountability as a mechanism for marginalised individuals to advance their environmental interests, and those of nonhuman life, against powerful actors, including the state and corporations.[45] This will be demonstrated in the subsequent section's discussion concerning environmental litigation.

The Office of the High Commissioner of Human Rights' (OCHCR) framework for applying RBAs to climate change corresponds to Gauri and Gloppen's approach.[46] This framework is based on international human rights commitments and aims to safeguard rights by identifying right-bearers, their entitlements – alongside duty bearers – and their obligations.[47] By emphasising the promotion of non-discriminatory participation, providing access to information, and upholding the rule of law,[48] the OCHCR rightly acknowledges that environmental degradation is unevenly distributed and disproportionately affects the most vulnerable, including indigenous communities, women and children, and nonhuman life. Adherence to these principles enables the chosen definition of RBAs to recognise the necessity of protecting human interests while acknowledging the value of nature's rights for environmental protection. Unifying ecocentrism and anthropocentrism provides a strong framework for achieving environmental adaptation and mitigation by advancing rights discourse in policy development and litigation.

2.2 Evaluating RBA Efficacy in Litigation

In recent years, an emerging category of environmental litigation has assumed considerable importance. 'Climate rights' consist of actions that assert the legal rights of individuals and communities for climate mitigation and adaptation based on domestic and international commitments.[49] Scholars convincingly argue that these rights are inherent in existing

[44] Varun Gauri and Siri Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy' (2012) 44 Polity 485, 494.
[45] Ibid.
[46] Ibid.
[47] Office of the UN High Commissioner for Human Rights (OHCHR), 'Application of a Human Rights Based Approach in Climate Change Negotiations, Policies and Measures' <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf> accessed 25 March 2024.
[48] Ibid.
[49] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2023 Snapshot' Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy 2023), 32.

constitutional and human rights laws.[50] Similarly, these rights can be mandated by international treaties such as the Paris Agreement,[51] which can be interpreted as a legally binding human rights document,[52] a view supported by the Brazilian Supreme Court.[53] By considering fundamental rights, including life and health, these RBAs support academics' assertions of a "rights turn"[54] in environmental litigation that is facilitating the "greening of rights".[55]

The seminal decision in *Urgenda v. State of Netherlands*[56] demonstrates the efficacy of adopting RBAs to influence state action on environmental protection. In the landmark judgment, the Dutch Supreme Court held that its government must reduce GHGE by at least 25%. Importantly, by grounding this decision in Articles 2[57] and 8[58] of the European Convention on Human Rights (ECHR), the court adopted RBAs for environmental protection throughout its opinion. This ruling set a historic precedent by suggesting that governments have legally binding obligations, based on existing human rights law, to protect their citizens from environmental degradation. Increased citizen action in other countries reinforces the view of *Urgenda*[59] having demonstrated the potential of RBAs in environmental litigation.

For instance, in *Daniel Billy and Others v. Australia,*[60] the UN Human Rights Committee cited the precedent set by *Urgenda.*[61] It was concluded that by failing to reduce GHGE and continuing fossil fuel use, Australia had failed to prevent foreseeable loss of life and violated the rights of the plaintiffs[62] under Article 6 of the International Covenant on Civil and Political

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[50] John H Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 Annual Review of Law and Social Science 79, 83.
[51] Paris Agreement (n.32).
[52]See John H Knox, 'The Paris Agreement as a Human Rights Treaty', *Human Rights and 21st Century Challenges* (Oxford University Press 2020).
[53] *PSB et al v. Brazil (on Climate Fund)* (ADPF 708) [2022], [17], unofficial translation available at <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220701_ADPF-708_decision-1.pdf> accessed March 26 2024.
[54] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 39.
[55] Azadeh Chalabi, 'A New Theoretical Model of the Right to Environment and Its Practical Advantages' (2023) 23 Human Rights Law Review 1, 3 – 5.
[56] *Urgenda Foundation v. State of the Netherlands, Supreme Court of the Netherlands*, Case No. 19/00135, 20 December 2019 (hereafter, Urgenda).
[57] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (hereafter, ECHR) art 2.
[58] Ibid, Art 8.
[59] Urgenda (n. 56).
[60] *Daniel Billy and others v. Australia (Torres Strait Islanders Petition), United Nations Human Rights Committee*, CCPR/C/135/D/3624/2019 (23 September 2022).
[61] Urgenda (n. 56).
[62] Ibid, Annex III, [1].

Rights (ICCPR).[63] This demonstrates the growing success of RBAs in influencing states to protect fundamental rights through climate adaptation and marks the first time a UN body determined that inadequate policies could constitute a breach of international human rights law. However, previous analyses of these "systematic mitigation" actions[64] have raised noteworthy criticisms of RBAs in environmental litigation that merit consideration. Academics point to the application of a 'common ground' test to determine emission-reduction targets[65] as a primary challenge.

Jurisprudence of the European Court of Human Rights (ECtHR) supports this approach by noting the importance of applying accepted international standards in interpreting the provisions of the ECHR.[66] This method was effective in the *Urgenda*[67] case, allowing the court to determine that a 25–40% reduction target was appropriate based on the Intergovernmental Panel on Climate Change's (IPCC) AR4 report, widely referenced in climate change conferences.[68] Despite its demonstrable strengths, academics are right to express concern that this method may experience difficulties within post-Paris Agreement actions.[69] The Paris Agreement's[70] framework for nationally determined contributions is a departure from the fixed targets and timelines mandated by the previous international agreement on emissions reduction, the Kyoto Protocol.[71] Consequently, decisions employing *Urgenda*-style reasoning will face difficulties, as plaintiffs are more likely to struggle to cite specific emission reduction targets. Although these criticisms are substantial and merit consideration, recent judicial decisions have successfully contested this view.

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[63] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter, ICCPR).
[64] Orla Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2022) 34 Journal of Environmental Law 107.
[65] Margaretha Wewerinke-Singh and Ashleigh McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-based Climate Litigation' (2021) 30 Review of European Community and International Environmental Law 275, 278.
[66] *Oluic v Croatia* App no 61260/08 (ECtHR, 20 May 2010) [60].
[67] Urgenda (n. 56).
[68] Ibid, [6.1] – [7.6.2].
[69] Wewerinke-Singh M and McCoach A, 'The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-based Climate Litigation' (2021) 30 Review of European Community and International Environmental Law 275, 278.
[70] Paris Agreement (n. 32)
[71] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) UNTS vol. 2303, p.162.

In *Milieudefensie et al v. Shell*,[72] the Hague District Court held that Shell must reduce its greenhouse gas emissions by 45%. The court determined these obligations pursuant to the Dutch Civil Code,[73] which imposes a duty to act in accordance with "what can be regarded as proper social conduct",[74] an open duty that judges can interpret in line with current social norms such as consensus on climate change. When determining specific reduction targets, the court referred to IPCC reports and the Paris Agreement,[75] ruling that both were relevant to non-state actors, including corporations.[76] This ruling demonstrates that emission reductions can still be successfully determined and enforced in the post-Paris era and is supported by its replication in similar decisions.[77] Similarly, the case of *Neubauer et al. v Germany*[78] led the German Federal Constitutional Court to rule that parts of Germany's Climate Protection Act were unconstitutional due to the inadequacy of mitigation targets for protecting human rights. Consequently, the court mandated that the legislature establish clear post-2030 reduction objectives.[79] Invoking constitutional rights in this manner has proven successful in other instances,[80] thereby strengthening the proposition that RBAs to environmental protection can be attained post-Paris without significant challenges.

More substantially, the most significant development in environmental litigation was achieved when the ECtHR issued judgements on three cases related to climate change in 2024. While the cases filed by *Careme*[81] and *Agosthino*[82] were declared inadmissible for reasons unrelated to their substance,[83] it ruled in favour of the applicants in *KlimaSeniorinnen Schweiz and Others v. Switzerland.*[84] The court determined that Switzerland had breached its human rights

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[72] *Milieudefensie et al. v. Royal Dutch shell plc*., The Hague District Court, C/09/571932/HA ZA 19-379 (25 April 2022) Official English translation available at <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf> accessed 28 March 2024.
[73] Burgerlijk Wetboek (Civil Code of the Netherlands) English translation available at <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 28 March 2024.
[74] Ibid, [4.4.1].
[75] Paris Agreement (n. 32).
[76] Ibid, [4.4.34].
[77] See for e.g. *Mullaley Gas and Pipeline Accord Inc v. Santos NSW (Eastern) Pty Ltd*, New South Wales Land and Environment Court, NSWLEC 147 (16 December 2021); *Guyane Nature Environnement and France Nature Environnement v. France, Council of State of France* N°2001348 (10 February 2022).
[78] *Neubauer et al. v. Germany, Federal Constitutional Court of Germany* Case No. BvR 2656/18/1 (29 April 2021) Official English translation available at <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210324_11817_order-1.pdf> accessed 28 March 2024.
[79] Ibid, 266.
[80] See for e.g. *ClientEarth v. Poland (on Behalf of P.N)* Sygn. akt XIV C 493/21, Poznan Regional Court (20 December 2021).
[81] *Careme v. France* App no. 7189/21 (ECtHR, 9 April 2024).
[82] *Duarte Agosthino and Others v. Portugal and 32 others* App no. 39371/20 (ECtHR, 9 April 2024).
[83] *Careme v. France* App no. 7189/21 (ECtHR, 9 April 2024), para [75] – [88].
[84] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* App no. 53600/20 (ECtHR, 9 April 2024).

obligations by failing to take adequate climate mitigation measures.[85] This had harmed the applicant's right to family life due to the adverse effects of climate change.[86] Notably, the ECtHR held that ECHR Article 8[87] encompasses an individual's right to adequate protection by state authorities from the severe consequences of climate change on their life, health, well-being, and quality of life.[88] One arguable shortcoming is that the court declined to specify the measure that should be implemented to comply with the judgement due to the broad discretion given to the state in this area.[89] Despite this, the ruling is bound to be influential as it has affirmed that states have positive obligations to address environmental degradation under the ECHR[90] to protect the fundamental rights of their citizens. Indisputably, the judgement has demonstrated the efficacy and importance of exercising RBAs for protecting the planet and human rights.

In sum, recent judicial decisions have demonstrated the effectiveness of RBAs at both international and domestic levels in influencing states and corporations to protect the environment. Judiciaries have adopted progressive methods to determine specific reduction targets in the post-Paris era. These decisions refute criticisms which assert that *Urgenda*-style reasoning is ineffective within a nationally determined reduction target framework and that RBAs underestimate the collective consequences of environmental harm. RBAs can succeed in future environmental litigation by adapting to new scientific research and international agreements. Law can be a solution in the Anthropocene, transforming environmental protection from a policy or business choice to a human rights obligation. Having established their value in environmental litigation, the final section evaluates the potential challenges in implementing RBAs and the rights required for their success.

2.3 Towards Effective Implementation of RBAs

A significant challenge in implementing RBAs has been identified in the literature, arguing that their application relies on rights-bearers' ability to exercise their rights.[91] This argument is strong, correctly identifying the importance of procedural rights such as access to information, association, and participation in ensuring the successful implementation of RBAs. The role of

[85] Ibid, para [327].
[86] Ibid, para [546].
[87] ECHR (n.61) art 8.
[88] Ibid, para [519].
[89] Ibid, para [653].
[90] ECHR (n. 65).
[91] Madebwe T, 'A Rights-Based Approach to Environmental Protection: The Zimbabwean Experience' (2015) 15 African Human Rights Law Journal 110, 112.

procedural rights in implementing RBAs has been evident since the adoption of the Aarhus Convention,[92] which guaranteed access to information, public participation, and justice in environmental matters. More recently, the Escazú Agreement[93] also recognised the protection of these rights as necessary for the role of environmental defenders. The UN's proposed Framework Principles on Human Rights and the Environment, support this by emphasising the importance of access to these rights. Principles 5 and 9 propose that states should facilitate public participation and protect the rights to freedom of expression, association, and peaceful assembly.[94] These proposals were reaffirmed in a further report outlining good practices for states to follow when implementing RBAs for environmental protection. Similarly, this report correctly drew attention to the role of procedural rights in this process.[95]

In many cases, existing environmental laws explicitly guarantee the protection of these procedural rights. For example, Montenegro's Law on the Environment[96] protects citizens' right to be informed about the environment and to participate in related matters. Similar constitutional provisions protecting procedural rights exist in nearly forty constitutions.[97] Therefore, the significance of safeguarding procedural rights in environmental protection has long been acknowledged and is critical to using RBAs as an accountability mechanism against the state. Case law supports the importance of access rights by demonstrating the consequences of restricting them in the context of environmental activism. *In Bryan and others v. Russia,*[98] the ECtHR held that Russia had violated the freedom of expression of Greenpeace activists during a protest at a Russian offshore oil-drilling platform. Notably, the ECtHR emphasised that in reaching its decision, it considered the importance of the activists' ability to express their opinion on a matter of social interest, namely the environmental consequences of continued oil drilling.[99] Similarly, in *Bumbes v Romania,*[100] an activist was fined for protesting proposed mining activities. Again, the ECtHR ruled that the domestic courts' imposition of a

[92] Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention) (adopted 25 June 1998) UNTS vol. 2161, p. 447.
[93] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement) LC/PUB.2018/8/Rev.1.
[94] UNHRC Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment' 'Framework Principles on Human Rights and the Environment", (24 January 2018) UN DOC A/HRC/37/59.
[95] UNHRC 'Right to a healthy environment: good practices' (30 December 2019) UN DOC A/HRC/43/53.
[96]Law on Environment ("Official Gazette of Montenegro", No. 052/16, 073/19) English translation available at <https://leap.unep.org/en/countries/me/national-legislation/environmental-law-0> accessed 30 March 2024.
[97] Erin Daly, 'Constitutional Protection for Environmental Rights: The Benefits of Environmental Process' (2012) 17 International Journal of Peace Studies 71.
[98] *Bryan and other v. Russia* App no 22515/14 (ECtHR 12 July 2018).
[99] *Ibid*, [85].
[100] *Bumbes v. Romania* App no 18079/15 (ECtHR 3 May 2022).

fine on the activists had violated Articles 10[101] and 11[102] of the ECHR and was unnecessary in a democratic society.[103] The significance of implementing RBAs and the documented consequences of their restriction are widely recognised in the literature, with scholars asserting that they play "an important role in limiting climate change".[104]

In sum, RBAs should be implemented for environmental protection. RBAs have been successfully employed in recent environmental litigation supporting their efficacy in protecting human rights and the environment. For RBAs to be effectively implemented, rights bearers must be empowered to exercise human rights, such as freedom of expression, access to information, and public participation. The next section will consider their relevance to the HKSAR NSL. The NSL has raised important questions concerning the continued viability and efficacy of RBAs in the region. The section will, firstly, contextualise the NSL's enactment, and then critically discuss existing research concerning its effect on procedural rights and environmental governance.

3 Environmentalism Within the Constraints of Security

Part 3 evaluates the implications of the NSL on the rights necessary to exercise RBAs to environmental protection. Section 3.1 contextualises the evaluation by tracing the NSL's origins and development. Section 3.2 evaluates whether the NSL's restrictions on procedural rights directly impact environmental activists and their initiatives.

3.1 The Emergence of Hong Kong's National Security Legislation

Provisions of the NSL can be traced back to the nineteenth-century British governance of the HKSAR. Although this may initially seem a remote point of reference for contextualising legislation enacted in 2020, "any discussion on freedoms and the rule of law in Hong Kong needs to be situated in an informed understanding of its history".[105] Academics have previously observed that much of the HKSAR legal system was shaped by its colonial past, which enacted laws for media censorship, controlling mass movements, and prohibiting opposition politics.[106]

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[101] ECHR (n. 61) art 10.
[102] *Ibid*, art 11.
[103] Bumbes (n. 105), [24] – [25].
[104] Svitlana Kravchenko, 'Procedural Rights as a Crucial Tool to Combat Climate Change' (2010) 38 Georgia Journal of International and Comparative Law 613.
[105] Wu C and others, *Political Censorship in British Hong Kong: Freedom of Expression and the Law (1842-1997) / Michael Ng, University of Hong Kong*. (Cambridge, United Kingdom; New York, NY: Cambridge University Press 2022, 5
[106] Yan-ho Lai, 'Securitisation or Autocratisation? Hong Kong's Rule of Law Under the Shadow of China's Authoritarian Governance' (2023) 58 Journal of Asian and African Studies (Leiden) 8, 3.

Notably, libel prosecution in English-language newspapers, like the *Hong Kong Telegraph*, was used to limit freedom of speech and suppress the publication of criticism to support Britain's geopolitical interests in East Asia.[107] Many of these colonial-era laws were adapted or revived after the 1997 handover of the region to China. Certainly, media censorship has been a consistent feature of Mainland Chinese governance.[108]

The legal continuity of colonial-era authoritarianism was observable during the 2019 anti-extradition bill protests. The Emergency Regulations Ordinance,[109] used to suppress port strikes against the colonial government in 1922,[110] was adapted by the HKSAR government (HKSARG) to prohibit face coverings at protests.[111] Importantly, political analysts identified the use of this ordinance as "signalling the start of authoritarian rule" in the region.[112] Recent commentary supports this view, demonstrating a regression to colonial-era restrictions on freedom of assembly, association, and expression.[113] It is evident that colonial legal continuity has constrained the fundamental rights necessary for RBAs to environmental protection.

The revival of colonial-era regulations during the 2019 demonstrations facilitated a slide towards human rights erosion under the NSL. However, it is more compelling to propose that colonial legal continuity existed prior to this period and remains embedded in the region's 'quasi-constitution', the Basic Law (BL),[114] to ensure Mainland China's politico-legal sovereignty over the HKSAR. Negotiations leading to the handover from Britain to the People's Republic of China (PRC) in 1997 culminated in the ratification of the Sino-British Joint Declaration[115] on the Question of Hong Kong (JD).[116] The JD delineates the policies the

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[107] Wu C and others, (n.105), 14.
[108] Ankit Kumar, 'Internet Censorship in China: The Struggle to Swat "Flies" Away' (*ICS Research Blog*, 10 October 2023) <https://icsin.org/blogs/2023/10/10/internet-censorship-in-china-the-struggle-to-swat-flies-away-2/> accessed 1 May 2024.
[109] Emergency Regulations Ordinance (Cap. 241).
[110] David Law, 'Hong Kong's 1922 General Strike: When the British Empire Struck Back' (*The Conversation*, 8 June 2023) <https://theconversation.com/hong-kongs-1922-general-strike-when-the-british-empire-struck-back-177793> accessed 1 May 2024.
[111] Wu C and others (n.105), 195.
[112] Guardian reporter in Hong Kong, 'Hong Kong Emergency Law "Marks Start of Authoritarian Rule"' (*The Guardian*, 5 October 2019) <https://www.theguardian.com/world/2019/oct/05/hong-kong-emergency-law-marks-start-of-authoritarian-rule> accessed 1 May 2024.
[113] See e.g. Secretary of State for Foreign, Commonwealth and Development Affairs, 'The Six-Monthly Report on Hong Kong: 1 July to 31 December 2023' (15 April 2024), 24.
[114] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereafter, BL) English translation available at <https://www.basiclaw.gov.hk/en/basiclaw/index.html> accessed 1 May 2024.
[115] Instrument A301, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (hereafter JD) English translation available at <https://www.legco.gov.hk/general/english/procedur/companion/chapter_1/mcp-part1-ch1-n24-e.pdf> accessed 1 May 2024.
[116] Paul Fifoot, 'China's Basic Law for Hong Kong' (1991) 10 International Relations (London) 301.

PRC aimed to implement upon reassuming sovereignty in 1997 and establishes a foundation for the post-colonial constitution of the HKSAR, the BL.[117] Importantly, the BL[118] "expressly confers constitutional status"[119] on human rights protected in the Hong Kong Bill of Rights Ordinance (BORO).[120]

The BL was intended to operationalise the policies within the JD and was drafted by the PRC's primary legislative body. However, Mainland Chinese appointees oversaw the process.[121] Consequently, the drafting of the BL aligned with Chinese legal principles rather than maintaining the HKSAR's distinct common law system which preceded the handover. This contravenes the plural governance framework under "One Country, Two Systems", which guaranteed that the HKSAR's legal and human rights principles would be preserved for a minimum of fifty years after 1997.[122] This indicates that the PRC's intention to assimilate the HKSAR into a more unified state to safeguard China's sovereignty existed prior to the NSL's enactment. Considering this, it is unsurprising that colonial-era censorship laws have been reintroduced in the NSL era to achieve this objective. Scholars endorse this position and correctly conclude that "One Country, Two Systems" was inherently to impose "assimilation and stringent direct control by the central government".[123]

The PRC's stance towards BL Article 23[124] is indicative of its paranoia and can be traced directly to the NSL's enactment. Article 23[125] imposes an obligation on the HKSARG to implement its own national security regulations to protect against threats to China's Central People's Government. China's heightened focus on internal threats to national security after the Tiananmen Square massacre may have facilitated conflicts between Article 23 and the BL's rights provisions due to the massacre's influence on the drafting process.[126] The 2003 protests,

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[117] *Ibid.*
[118] BL (n. 114), Ch III.
[119] Po Jen Yap and Francis Chung, 'Statutory Rights and 'de Facto' Constitutional Supremacy in Hong Kong?' (2019) 17 International Journal of Constitutional Law 836, 837.
[120] Hong Kong Bill of Rights Ordinance (Cap. 383).
[121] Paul Fifoot, 'China's Basic Law for Hong Kong' (1991) 10 International Relations (London) 301–302.
[122] Stephen Vines, *Defying the Dragon: Hong Kong and the World's Largest Dictatorship* (London: Hurst & Company 2021), 19.
[123] Gary Ho, 'The Chessboard of Hong Kong and Chinese Politics: The Downfall of "One Country, Two Systems"' (The University of Waikato, 2018), 10.
[124] BL (n.114) art 23.
[125] *Ibid*.
[126] Wendy Dullea Bowie, 'The Effect of the Tiananmen Square Massacre upon Negotiations for the Draft Basic Law of the Hong Kong Special Administrative Region' (1990) 8 Dickinson Journal of International Law 245, 248.

which led to the withdrawal of the HKSARG's proposed National Security Bill,[127] support this assertion.[128]

Although the 2003 protests temporarily halted the PRC's autocratic ambitions, the HKSARG's continued failure to implement national security legislation provoked impatience in Mainland China.[129] This impatience was compounded by a governance crisis in 2018 when Chief Executive of the HKSAR, Carrie Lam, proposed a bill that included provisions for extradition to Mainland China.[130] Concerns over the bill's erosion of judicial autonomy led to the most extensive and sometimes violent protests in the region's history.[131] Notwithstanding early success in halting the legislation,[132] Beijing reasserted its authority bypassing the HKSAR Legislative Council (Legco), which resulted in the NSL coming into force in 2020 despite widespread concerns regarding the protection of rights. [133] For instance, lawyers and human rights activists expressed concern over ambiguous definitions for proposed offences and their potential for arbitrary application.[134]

Evidently, although BL Article 23[135] accords the HKSAR legislative autonomy on matters of national security, this does not inherently negate Beijing's constitutional authority. The NPC and its standing committee (NPCSC) still have the power to establish Special Administrative Regions (SARs), like Hong Kong, and dictate their governance, [136] possessing legislative and judicial oversight which can be exercised for preserving sovereignty.[137] Therefore, while the HKSAR theoretically retains legislative independence under the BL,[138] it is not absolute and can be superseded by Beijing in direct opposition to the principle of "One Country, Two Systems". Scholars have correctly identified that the BL "contains the means to undermine

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[127] National Security (Legislative Provisions) Bill (gazetted 14 February 2003, lapsed 22 July 2004).
[128] Ngok Ma, 'Civil Society in Self-Defense: The Struggle Against National Security Legislation in Hong Kong' (2005) 14 The Journal of Contemporary China 465.
[129] Edward Vickers and Paul Morris, 'Accelerating Hong Kong's Reeducation: 'mainlandisation', Securitisation and the 2020 National Security Law' (2022) 58 Comparative Education 187, 195.
[130] Stephen Vines, *Defying the Dragon: Hong Kong and the World's Largest Dictatorship / Stephen Vines.* (London: Hurst & Company 2021), 79.
[131] Ibid, 83.
[132] Jeffie Lam and Zuraidah Ibrahim, *Rebel City: Hong Kong's Year of Water and Fire.* (Singapore: World Scientific Publishing Co Pte Ltd; Hong Kong: South China Morning Post Publishers Limited 2020), 13.
[133] Stephen Vines (n.143), 82; Jeffie Lam and Zuraidah (n.132), 11.
[134] Jeffie Lam and Zuraidah (n.132), 473.
[135] BL (n.124), art. 23.
[136] Conveyed by Articles 31 and 62 of the Constitution of the People's Republic of China 2018 (Adopted at the Fifth Session of the Fifth National People's Congress and promulgated by the Announcement of the National People's Congress on December 4, 1982; amended in accordance with the *Amendment to the Constitution of the People's Republic of China* adopted at the First Session of the Thirteenth National People's Congress on March 11, 2018) (hereafter, PRC Constitution).
[137] Ibid.
[138] BL (n.124), art. 23.

Hong Kong's autonomy".[139] Thus, it cannot be refuted that the NSL's encroachment on human rights violates the principle of legality.

The NSL's origin and the legislature's recent motivations are a continuation of colonial repression and a reassertion of Beijing's sovereignty. During British governance, the rights necessary to exercise RBAs were subject to London's security considerations for public order and geopolitical interests.[140] These rights are now subject to Beijing's national security paranoia and autocratic ambitions. The 1997 handover was not just a territorial transfer but a handover of repressive measures that continued to exist under a different guise. Dishearteningly, the PRC's distinct conception of human rights condemned rights protections in the HKSAR to conflict with considerations of sovereignty, unity, and national security. The concept of "One Country, Two Systems" was never a sincere guarantee of autonomy for the HKSAR, but rather a statement that should have been met with scepticism. This is unsurprising, given that neither the JD nor the BL contain any reprimand or rationale for the signatories to fulfil their obligations. Having examined the history and legal motivations underpinning the NSL, its effect on the exercise of RBAs to environmental protection can now undergo analysis.

3.2 Challenges to Environmental Advocacy Post-NSL

As of 31 January 2024, there have been 292 individual arrests, 159 indictments and 71 convictions under the NSL.[141] The breadth of these statistics is unsurprising, given the NSL's conflict with the requirement of legal certainty.[142]

Four principal offences were introduced under NSL Chapter III:[143]

1. Secession – attempts to withdraw the HKSAR from the PRC;[144]
2. Subversion – undermining the authority of the central government;[145]
3. Terrorism;[146] and

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[139] Amy Stein, 'Rule of Law v Rule of Law: The Doomed Fate of Hong Kong's Autonomy' (2021)17 Colum Undergraduate L Rev 43.
[140] Wu C and others (n.105), 195.
[141] 'Tracking the Impact of Hong Kong's National Security Law' (*ChinaFile*, 9 April 2024). <https://www.chinafile.com/tracking-impact-of-hong-kongs-national-security-law> accessed 1 May 2024
[142] Office of the High Commissioner for Human Rights (OHCHR), joined by 7 mandates, Communication on the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, 1 September 2020, UN Doc. OL CHN 17/2020, 2.
[143] NSL (n.1) Ch. III.
[144] Ibid, Art. 20-21.
[145] Ibid, Art. 22-23.
[146] Ibid, art.24-28.

4. Collusion with foreign or external forces.[147]

These offences incur a maximum penalty of life imprisonment and criminalise acts that are considered a danger to the HKSAR's security and, by extension, Beijing's authority. Beyond this, the NSL revived the colonial offence of sedition which outlaws violence, disaffection, and other offences against the government.[148] It can be argued that these offences are necessary to fulfil the HKSARG's constitutional obligation to enact its own national security legislation pursuant to BL article 23.[149] The NPCSC emphasised the necessity of this obligation to protect rights and the rule of law in the HKSAR.[150] NSL articles 4[151] and 5[152] would appear to demonstrate the sincerity of this justification, stating that all rights shall be protected, including those within the ICCPR.[153] Indeed, the development of laws that limit fundamental rights has previously been considered proportionate to address global security concerns in the wake of 9/11.[154] This is a position that Beijing itself has asserted in defence of the NSL.[155] From a constitutional and security perspective, the NSL's necessity appears justifiable, aligning with contemporary rule of law.

However, national security is often subject to political interpretation and lacks a universally accepted definition.[156] Extensive reporting by international human rights organisations and the FCDO have demonstrated that the absence of a definition within the NSL has created dangerously vague offences.[157] This view is widely shared by the international community, with the UN Human Rights Office expressing ongoing concerns about the NSL.[158] They rightly emphasise that ambiguously worded legislation can result in "discriminatory or arbitrary

[147] Ibid, Art. 29–30.
[148] Crimes Ordinance (Cap. 200) s. 9.
[149] BL (n.124), art. 23.
[150] Consulate General of the Peoples Republic of China in Edinburgh, 'Embassy Spokesperson on the Legislation on Article 23 of the Basic Law of Hong Kong' (*Edinburgh China Consulate*, 20 March 2024) <http://edinburgh.china-consulate.gov.cn/eng/zygsgfyr/202403/t20240320_11262852.htm> accessed 2 May 2024.
[151] NSL (n.1), art. 4.
[152] Ibid, Art. 5.
[153] Ibid, Art. 4.
[154] Connor Gearty, 'Liberty and Security' (2013) 6 European Human Rights Law Review 660.
[155] Edward Vickers and Paul Morris, 'Accelerating Hong Kong's Reeducation: 'mainlandisation', Securitisation and the 2020 National Security Law' (2022) 58 Comparative Education 187, 199.
[156] New Books Network, 'Roberts R S, The War on the Uyghurs' (24 March 2021) <https://newbooksnetwork.com/the-war-on-the-uyghurs> accessed 25 January 2024.
[157] The International Service for Human Rights 'The National Security Law for Hong Kong: Impacts on Civic Space and Civil Society Engagement with the UN' (*International Service for Human Rights*, September 2022) <https://ishr.ch/wp-content/uploads/2022/09/ISHR_Report-Impact-of-HK-National-Security-Law_web.pdf>accessed 3 May 2024; Secretary of State for Foreign, Commonwealth and Development Affairs, 'The Six-Monthly Report on Hong Kong: 1 July to 31 December 2023' (15 April 2024), 4 – 6.
[158] UN Human Rights Committee, 'Concluding observations on the fourth periodic report of Hong Kong, China' (11 November 2022) UN Doc CCPR/C/CHN-HKG/CO/4.

interpretation and enforcement which could undermine human rights protection".[159] The PRC have responded to these concerns by arguing that the "rights and freedoms of Hong Kong residents are better protected in a safer and more orderly environment"[160] under the NSL. Despite these claims, seminal prosecutions since 2020 have conveyed an alternate reality to the official position maintained by Beijing.

Cases tried under the NSL have consistently undermined the rights necessary for the effective implementation of RBA approaches to environmental protection. The NSL has been employed to incarcerate protestors, restrict free expression by sentencing accredited professionals for their publications, and curtail press freedom by charging pro-democracy media persona, Jimmy Lai, for his criticisms of the PRC and HKSARG.[161] In 2021, his independent news outlet, *Apple Daily*, was ordered to cease operations.[162] Although Lai's prosecution has received significant attention due to his status, many other independent journalists and media outlets have become targets under the NSL.[163] The closure of a sustainable transport news website run by environmental activist James Ocdken is a significant example, as research indicates that press freedom coincides with greater environmental protection.[164] Restricting access to information contributes to a lack of public and political support for environmental action and policymaking. Undoubtedly, press freedom, expression, and access to information have been primary targets under the NSL.

Provisions of the NSL have also targeted free association, public participation, and peaceful assembly. Notably, the Hong Kong National Party was banned for its pro-independence advocacy,[165] while numerous pro-democracy activists continue to be imprisoned for expressing

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[159] Colville R, 'Press Briefing Note on China / Hong Kong SAR' (*United Nations Human Rights Office of the High Commissioner*, 3 July 2020) <https://www.ohchr.org/en/press-briefing-notes/2020/07/press-briefing-note-china-hong-kong-sar?LangID=E&NewsID=26033> accessed 3 May 2024.
[160] Constitutional and Mainland Affairs Bureau, 'Report of the Hong Kong Special Administrative Region for the United Nations Human Rights Council Universal Periodic Review' (23 December 2023), 2.
[161] HKSAR v Lai Chee Ying [2020] HKCFI 3161, para [4].
[162] 'Hong Kong: Apple Daily Closure Is Dark Day for Press Freedom' (*Amnesty International*, 8 August 2022) <https://www.amnesty.org/en/latest/news/2021/06/hong-kong-apple-daily-closure-is-press-freedom-darkest-day-2/> accessed 4 May 2024.
[163] Chan Miu Ling E, 'The Fate of Hong Kong's Journalists under China's Rule: Seven Stories of Broken Dreams, Perseverance and Hope' (*Reuters Institute for the Study of Journalism*, 30 June 2022) <https://reutersinstitute.politics.ox.ac.uk/fate-hong-kongs-journalists-under-chinas-rule-seven-stories-broken-dreams-perseverance-and-hope> accessed 4 May 2024.
[164] Grundy T, 'Transport News Site Transit Jam Becomes Latest Hong Kong Outlet to Close' (*Hong Kong Free Press HKFP*, 9 May 2023) <http://hongkongfp.com/2023/05/09/transport-news-site-transit-jam-becomes-latest-hong-kong-outlet-to-close/> accessed 4 May 2024.
[165] Richardson S, 'China: Hong Kong Party Banned' (*Human Rights Watch*, 27 October 2022) <https://www.hrw.org/news/2018/09/25/china-hong-kong-party-banned> accessed 4 May 2024.

their views against the government and judiciary.[166] Recently, forty-seven activists were charged with subversion after holding unofficial pre-election polls to choose opposition candidates for LegCo elections.[167] These judgments contravene international human rights standards, which state that national security cannot be invoked as a reason to limit rights to express different political views or other human rights under the ICCPR.[168] Accordingly, NSL prosecutions are not a proportionate restriction of fundamental rights. The NSL's impact on civil society's ability to exercise the rights necessary for RBAs is far-reaching and indisputable. Although international consensus has been attained regarding this perspective, no specific assessment has been conducted to evaluate the NSL's impact on environmentalism.

In the years preceding the NSL's promulgation, the HKSAR's environmental governance shifted from a state-driven approach to a more inclusive model enabling participation from nongovernmental organisations and activist groups through various channels.[169] Previously, environmental policymaking was not prioritised.[170] However, following the handover, scholars observed that government management gained momentum[171] as the new government adopted environmental policy initiatives.[172]

The introduction of the Environmental Impact Assessment Ordinance[173] and strategic environmental assessments[174] enabled public involvement in developing policies and strategies to identify and address environmental issues.[175] Yet, despite efforts to increase public engagement in environmental governance, their prevalence has been limited. This can be ascribed to the fact that provisions concerning economics and the region's relationship with Mainland China are more detailed in the BL than those concerning the environment.[176]

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[166] See for example, *HKSAR v Tam Tak Chi* [2021] HKDC 506; HKSAR v Ma Chun Man [2022] 5 HKLRD 246.
[167] *HKSAR v. Ho Kwai Lam* [2023] HKFCI 541.
[168] UN Economic and Social Council, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (September 28, 1984) UN DOC E/CN.4/1985/4, 8-9.
[169] Steven Chung-Fun Hung, 'Interest Groups and the Democracy Movement in Hong Kong: A Historical Perspective', *Interest Groups and the New Democracy Movement in Hong Kong*, vol 1 (1st edn, Routledge 2018), 210.
[170] Stephen Wing Chiu et al., *The Dynamics of Social Movement in Hong Kong* (Hong Kong University Press 2000), 261.
[171] Benjamin L. Liebman, 'Autonomy through Separation: Environmental Law and the Basic Law of Hong Kong' (1998) 39 Harvard International Law Journal, 239.
[172] Chiu SW and others (n.191), 286.
[173] Environmental Impact Assessment Ordinance (Cap. 499).
[174] Stephen Tsang et al., 'Trust, Public Participation and Environmental Governance in Hong Kong' (2009) 19 Environmental Policy and Governance 99, 105.
[175] Ibid.
[176] Lisa A. Royee, 'The Basic Law of Hong Kong and Its Effects on the Environment' (2000) 9 Currents: International Trade Law Journal 55, 57.

Consequently, environmentalism has remained low on the political agenda. Scholars have observed that the limited opportunities to participate in policy development and distrust of the government have led residents to seek alternative methods of expressing their opinions and safeguarding their rights.[177]

Aside from criticising government policies through media outlets, public possession and mass demonstrations have been an invaluable mechanism for public participation in environmental issues.[178] Influential NGOs, notably Green Peace East Asia, have demonstrated the success of these methods in their campaigns to oppose projects that endangered the region's environment and biodiversity. For example, in 2010, the Secretary for the Environment responded to Greenpeace's "No Nuclear HK" campaign and released the demanded consultation report on nuclear power for input from HKSAR residents.[179] Again, in 2014, the organisation successfully influenced the withdrawal of an Initial Public Offering application from Hong Kong's Stock Exchange, which would have exacerbated overfishing in the Pacific Ocean.[180] These efforts would have proven unsuccessful without the campaigner's ability to exercise their rights to freedom of expression and association. The "proliferation of environmental groups" operating within the HKSAR since the 1990s[181] demonstrates the role of these rights in enabling environmental groups to demand action from the government successfully. Such efforts depict a prior era of influential public engagement in environmentalism that promoted environmental awareness.[182]

Alongside enabling activism and formulating policies promoting public engagement on environmental issues, the HKSAR has implemented numerous laws and regulations to combat the persistent issue of waste-induced pollution. For instance, the Shipping and Port Control Ordinance[183] prohibits sea pollution by oil from land-based and marine sources. Additionally, the Public Health and Municipal Services Ordinance[184] aims to prevent waste and remove litter from any location. While this indicates that the HKSAR has previously possessed a legal

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[177] Stephen Tsang et al. (n.174), 105.
[178] Ibid.
[179] Greenpeace, 'Achievements' (*Greenpeace East Asia*) <https://www.greenpeace.org/eastasia/achievements/> accessed 5 May 2024.
[180] Ibid.
[181] Steven Chung-Fun Hung, 'Interest Groups and the Democracy Movement in Hong Kong: A Historical Perspective', in Shiu Hing Lo (eds) *Interest Groups and the New Democracy Movement in Hong Kong* (1st edn, Routledge 2018), 213.
[182] Chiu SW and others, *The Dynamics of Social Movement in Hong Kong* (Hong Kong University Press 2000), 286.
[183] Shipping and Port Control Ordinance (Cap. 313).
[184] Public Health and Municipal Services Ordinance (Cap. 132).

framework that recognises environmental management's importance, it remains evident that environmental protection in the region has historically relied on the ability of civil society to exercise RBA associated rights.

The NSL has facilitated a significant decline in environmentalism in the region by terminating the government's previously responsive relationship with NGOs. There are increasing concerns that communicating with international organisations, even the UN, will be interpreted as colluding with foreign forces. [185] Many high-profile organisations such as Amnesty International have ceased operations and left the area due to fear of prosecution. This fearmongering arguably violates Principle 4 of the proposed Framework Principles on Human Rights and the Environment, which emphasises the importance of establishing an environment absent of threats and violence towards organisations involved in human rights and environmental issues.[186] The ongoing controversies surrounding the Northern Metropolis Plan and the Kau Yi Chau Artificial Islands projects, which aim to convert wetland and farmland for economic benefit with significant potential environmental harms, [187] have exposed the repercussions of limiting NGO autonomy. Notably, the HKSARG's decision to omit the public from the initial consultation[188] demonstrates that without NGOs exercising RBAs against these projects, Hongkongers' fundamental rights remain at risk.

However, this has not been the sole consequence of recent events. Peaceful environmental activism has undoubtedly waned. In one of the first approved demonstrations since the NSL's enforcement, protestors marching against a proposed land reclamation and rubbish processing project were required to wear numbered lanyards[189] in an Orwellian display of Beijing's control over the right to freedom of expression and assembly. Hong Kong police only authorised the protests on the condition that the organisers ensured it would not engage in any displays or

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[185] International Service for Human Rights, 'The National Security Law for Hong Kong: Impacts on Civic Space and Civil Society Engagement with the UN' (*International Service for Human Rights*, September 2022), 18 – 20 <https://ishr.ch/wp-content/uploads/2022/09/ISHR_Report-Impact-of-HK-National-Security-Law_web.pdf>accessed 5 May 2024.

[186] UNHRC Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment' 'Framework Principles on Human Rights and the Environment", (24 January 2018) UN DOC A/HRC/37/59, 9.

[187] Curtis Lam, 'Hong Kong's Lantau Tomorrow Vision: How (Not) to Respond to Criticism as a Policymaker' (*Earth.Org*, 7 March 2023)< https://earth.org/lantau-tomorrow-vision/#:~:text=The%20Lantau%20Tomorrow%20Vision%2C%20or,and%20the%20ongoing%20housing%20crisis.> accessed 5 May 2024.

[188] Ibid.

[189] Jessie Pang, 'Hong Kong Police Keep Tight Tabs on First Authorised Protest in Years | Reuters' (*Reuters*, 27 March 2023) <https://www.reuters.com/world/asia-pacific/hong-kong-police-keep-tight-tabs-first-authorised-protest-years-2023-03-26/> accessed 5 May 2024.

speech deemed seditious.[190] Such control limits public awareness and engagement in environmental governance.

Since the reporting of this protest, actions by environmental groups have continued to decline, and activism has been limited to isolated cases of a reduced scale compared to the pre-NSL era. Few notable instances of post-NSL exercises of RBAs to environmental protection can be identified. These include animal welfare groups protesting City University's cattle importation plans,[191] environmental groups opposing land reclamation developments and the destruction of wetlands.[192] In 2024, only a dozen animal welfare activists were reported assembling outside the venue of the HKSAR International Fur Fair.[193] While it is reasonable to conclude that the NSL has affected RBAs to environmental protection in the HKSAR, it would be inaccurate to claim that environmental protection has become an explicit target of prosecution. The recent directive for environmental groups to sign a national security declaration marks the sole instance of direct targeting.[194] It is more accurate to conclude that RBAs to environmental protection have been an indirect victim of the NSL's chilling effect alongside all declining civil society activity since 2020.

While environmentalism has not been explicitly targeted, this conclusion should not diminish the significant decline in its prominence since the momentum it enjoyed following the handover. The NSL has exacerbated the de-prioritisation of environmental activism, which has been ever-present due to the overwhelming political issue of the Hong Kong–China identity struggle, through restricting rights essential to the effective exercise of RBAs to environmental protection. Without the freedom to express dissenting views, assemble protests, elect environmentally conscious politicians, or form unions to lobby for environmental rights, Hongkongers' capacity to protect their fundamental rights against environmental degradation

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[190] Ibid.
[191] Rural and New Town Planning Committee, 'Application for Permission Under Section 16 of the Town Planning Ordinance' (City University of Hong Kong represented by P.K NG & Associates (HK) Limited, 15 May 2020) RNTPC Paper No. A/NE-LT/662D, 13.
[192] Peter Lee, '11 Hong Kong Green Groups Boycott Closed-Door Gov't "briefing" over Proposed Lantau Artificial Islands' (*Hong Kong Free Press HKFP*, 14 February 2023)<https://hongkongfp.com/2023/02/07/11-hong-kong-green-groups-boycott-closed-door-govt-briefing-over-proposed-lantau-artificial-islands/> accessed 11 May 2024.
[193] Lo Hoi-ying, 'Hong Kong Fur Show Set to Open to Public for First Time despite Protest at Venue' (*South China Morning Post*, 22 February 2024) <https://www.scmp.com/news/hong-kong/society/article/3252825/fur-and-fury-hong-kong-animal-rights-activists-protest-against-trade-show-calling-end-industry> accessed 5 May 2024.
[194] Ying Cheung and Harry McKenny, 'Hong Kong Orders Funded Environmental Groups to Sign National Security Declaration' (*The Epoch Times*, 27 July 2023) <https://www.theepochtimes.com/china/hong-kong-orders-funded-environmental-groups-to-sign-national-security-declaration-5387786> accessed 5 May 2024.

is limited. To address these issues, it is imperative to critically analyse the potential for legal reform of the NSL, assessing whether the established impact on RBAs to environmental protection can be rectified and identifying the risks of persisting down the present path for human rights in the region in light of climate change.

4 Two Countries, One Future

This section considers whether legal reform could mitigate the adverse effects of the NSL on civil society and RBAs to environmental protection. Section 4.1 will argue the NSL perpetuates anthropocentric policies which prioritise economic and political interests over concerns of environmental degradation. This misdirection endangers the region's climate targets and contradicts the NSL's objective of national security. Section 4.2 will address and critically evaluate the feasibility of repealing the NSL, noting the supremacy of the NSL over the BL, the erosion of judicial and electoral independence, recent legislative developments, and Beijing's response to UN condemnation to emphasise the rigidity of its stance to legal reform. It is concluded that sustained international pressure has proven ineffective and efforts to repeal the NSL to enable public participation in environmental decision-making to address the human rights implications of environmental degradation are unlikely to succeed.

4.1 Security at What Cost?

The HSKAR's economic prosperity has come at the expense of significant environmental problems,[195] rendering it a "first world economy with a third world environment".[196] Economic freedom's threat to the region's environment has gradually intensified since the handover.[197] Rapid urbanisation and regulatory inertia have exacerbated severe concentrations of air pollutants, exceeding World Health Organisation air quality guidelines,[198] landfill saturation,[199]

[195] See for example, Peter Hills and William Barron, 'Hong Kong: The Challenge of Sustainability' (1997) 14 Land Use Policy 41; Ka-Ho Mok and Maggie Lau, 'Changing Government Role for Socio-Economic Development in Hong Kong in the Twenty-First Century' (2002) 23 Policy Studies 107.
[196] Benjamin Liebman, 'Autonomy through Separation: Environmental Law and the Basic Law of Hong Kong' (1998) 39 Harvard International Law Journal 231, 239.
[197] Agboola MO and Alola AA, 'The Energy Mix-Environmental Aspects of Income and Economic Freedom in Hong Kong: Cointegration and Frequency Domain Causality Evidence' (2023) 12 Journal of Environmental Economics and Policy 63.
[198] Environmental Protection Department, The Government of the Hong Kong Special Administrative Region, 'Latest Annual Aqi' <https://www.aqhi.gov.hk/en/annual-aqi/latest-annual-aqi.html> accessed 6 May 2024.
[199] Ming Hung Wong, 'Integrated Sustainable Waste Management in Densely Populated Cities: The Case of Hong Kong' (2022) 2 Sustainable Horizons Article 100014, 1-2.

coastal plastic contamination,[200] and biodiversity loss.[201] Extreme weather and flooding further threaten the built environment, negatively impacting local food production and causing disease transmission.[202] As detailed in Part 1, jurisprudence increasingly recognises that these issues can endanger fundamental rights, including health,[203] food,[204] work,[205] education,[206] and life.[207]

As a Chinese Special Administrative Region, the HKSAR bears obligations mandated by the Paris Agreement.[208] The HKSAR appears to be actively pursuing its positive obligations to fulfil these mandates and safeguard its residents' human rights against environmental degradation. In 2021, the HKSARG introduced its Climate Action Plan, which delineates decarbonisation strategies, including energy-saving buildings, electric vehicle infrastructure, waste reduction, and net-zero electricity generation, to achieve carbon neutrality by 2050.[209] Notably, the plan emphasises the necessity of cooperation and support from civil society to realise these objectives.[210] As discussed, this requirement remains in conflict with the NSL's constraints on civil society's capacity to exercise RBAs. Consequently, despite ambitious decarbonisation plans, the political issue of 'Mainlandisation' has assumed priority over environmental concerns.

For instance, the HKSAR Education Bureau reforms mandate national security curricula across all subjects.[211] Academic freedom is now subject to Beijing's "programme of thought reform",[212] displacing opportunities to integrate climate literacy in favour of ideological conformity to central government directives. The increasing probability of producing a generation inadequately prepared to critically assess policy deficiencies or address systemic environmental failures is becoming apparent. Such divergences are alarming considering the 2023 IPPC report's conclusion that climate impacts are more extensive and severe than

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[200] YY Tsang et al., 'Spatial and Temporal Variations of Coastal Microplastic Pollution in Hong Kong' (2020) 161 Marine Pollution Bulletin Article 111765, 1.
[201] Wang X and others, 'Effects of Coastal Urbanization on Habitat Quality: A Case Study in Guangdong-Hong Kong-Macao Greater Bay Area' (2023) 12 Land (Basel) 34, 19.
[202] Emma Ferranti, Joanna Ho Yan Wong and Surindar Dhesi, 'A Comparison of Government Communication of Climate Change in Hong Kong and United Kingdom' (2021) 13 Weather, Climate, and Society 287, 13.
[203] ICCPR (n. 67) Art. 12.
[204] Ibid, Art. 11.
[205] Ibid, Art. 6.
[206] Ibid, Art. 13.
[207] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 3
[208] Paris Agreement (n. 32).
[209] Hong Kong's Climate Action Plan 2050' (*CNSD.GOV.HK*, October 2021) <https://cnsd.gov.hk/wp-content/uploads/pdf/CAP2050_booklet_en.pdf> accessed 7 May 2024.
[210] *Ibid*, para 3.10.
[211] Edward Vickers and Paul Morris, 'Accelerating Hong Kong's Reeducation: 'mainlandisation', Securitisation and the 2020 National Security Law' (2022) 58 Comparative Education 199.
[212] *Ibid*, 200.

anticipated.[213] Critically, there is a greater than 50% probability that global temperature increase will surpass 1.5 degrees between now and 2040, indicating a significant risk of failing to attain the Paris Agreement's objectives.[214] Unprecedented weather events[215] are expected to become increasingly frequent. These changes are already manifesting in the HKSAR, where climate projection data predicts a sustained worsening of conditions.[216] For instance, rising sea levels are anticipated to increase the threat of tropical typhoons,[217] such as Typhoon Haikui, which facilitated the HKSAR's worst flash flooding in 140 years in September 2023.[218]

Ultimately, the HKSAR's environmental policy framework is caught between progressive aspirations and political machinations. Despite nominal commitments to sustainability, the predominance of security narratives and "Mainlandisation" policies subordinates environmental protection to ideological and economic priorities. This undermines the very rights (assembly, expression, education) that enable RBAs, leaving climate responses technocratic and fragmented. Without legal reforms to reconcile security laws with environmental imperatives, the HKSAR risks perpetuating a governance model that entrenches ecological harm while eroding the civic freedoms necessary to combat it.

4.2 Pathways to Reform

Reform of the NSL is highly improbable due to two substantive factors: (a) the structural limitations within the HKSAR's politico-legal framework, which compromise judicial independence and rule of law safeguards, and (b) the ineffectiveness of international pressure to effect change. These obstructions are symptomatic of the broader authoritarian turn in the jurisdiction, which fundamentally weakens RBAs to environmental protection by restricting legal and political space for reform.

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[213] Intergovernmental Panel on Climate Change, 'Climate Change 2023: Synthesis Report. Summary for Policymakers' (IPCC 2023), 7.
[214] Ibid, 9, Box SPM.1.
[215] Ibid, 12 – 13.
[216] Hong Kong Observatory 'Climate Projections for Hong Kong' (*Hong Kong Observatory (HKO) Climate Change*) <https://www.hko.gov.hk/en/climate_change/future_climate.htm> accessed 7 May 2024.
[217] Hong Kong Observatory 'Mean Sea Level Projection for Hong Kong' (*Hong Kong Observatory (HKO) Climate Change*) <https://www.hko.gov.hk/en/climate_change/proj_hk_msl.htm> accessed 7 May 2024.
[218] Gavin Blair and Richard Spencer 'Hong Kong suffers worst flash flooding in 140 years' The Times (8 September 2023)<https://www.thetimes.co.uk/article/hong-kong-suffers-worst-flash-flooding-in-140-years-zt2tkp0zs> accessed 7 May 2024.

The NSL has been subject to widespread condemnation from the United Nations,[219] European Parliament,[220] human rights organisations,[221] and Western nations,[222] who have collectively called for its immediate repeal and urged China to adhere to its international human rights obligations. Despite the passage of several years, the situation in the HKSAR remains unchanged; as previously concluded, civil society has experienced a significant decline. China's response to the concerns raised by UN expert bodies and other nations during the recent universal periodic review is telling. Its denial of the human rights violations documented in UN reports concerning the NSL demonstrates its rigid stance concerning the legislation[223] and the continued priority of mainland politics over environmental degradation. The absence of academic research examining the potential for repealing the NSL is indicative of the current outlook concerning the improbability of NSL reform.

"The existence of the rule of law and an independent judiciary" have historically set the HKSAR apart from the PRC.[224] Their role in constitutional review is necessary for protecting fundamental rights.[225] Accordingly, BL Article 11 requires that any law contradicting the BL be declared unconstitutional,[226] enabling reform. Despite the presence of this safeguard in the BL, the NSL raises doubts about its constitutionality, as it supersedes both the BL and other local HKSAR laws where they are inconsistent with the NSL. "Inconsistency" lacks a precise definition, facilitating arbitrary application.[227] Consequently, the NSL has limited the authority of domestic courts and judicial autonomy. The court of final appeal demonstrated this when stating that it cannot declare any provision of the NSL unconstitutional or invalid under the BL or BORO.[228] It cannot challenge the legislative acts of the NPC.[229]

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[219] OHCHR, joined by 7 mandates, Communication on the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, 1 September 2020, UN Doc. OL CHN 17/2020, 2.
[220] Amnesty International Briefing, Hong Kong: In the Name of National Security: Human Rights Violations Related to the Implementation of the Hong Kong National Security Law (Amnesty International, 29 June 2021).
[221] European Parliament, 'Deterioration of fundamental freedoms in Hong Kong, notably the case of Jimmy Lai' Resolution P9_TA (2023)0242 of 15 June 2023.
[222] 'Joint Statement from the UK, Australia, Canada, and United States on Hong Kong, Foreign & Commonwealth Office <https://www.gov.uk/government/news/joint-statement-from-the-uk-australia-canada-and-united-states-on-hong-kong> accessed 7 May 2024.
[223] Constitutional and Mainland Affairs Bureau, 'Report of the Hong Kong Special Administrative Region for the United Nations Human Rights Council Universal Periodic Review' (23 December 2023), 2.
[224] Steve Tsang and Jui-sheng Tseng, *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2001), 1.
[225] Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (1st edn, Oxford University Press 2017), 137.
[226] BL (n.124), art. 11.
[227] NSL (n. 1) art. 62.
[228] *HKSAR v. Lai Chee Ying* [2021] HKCFA 3, para [32].
[229] Ibid.

The establishment of four extra-judicial bodies not subject to HKSAR courts[230] has further undermined the judiciary's independence by granting Beijing control over national security matters in the region.[231] Crucially, the NSL's vagueness can allow Beijing to exert this control where it deems necessary. For instance, the Committee for Safeguarding National Security (CSNS) can designate judges and reject those deemed to endanger national security,[232] strengthening Beijing's capacity to intervene in the HKSAR justice system. This indicates that the Mainland Chinese government has assumed supremacy over the HKSAR judiciary and, consequently, that the NSL is not subject to review for supposed incompatibility with human rights protections. These provisions contravene the rule of law, making legislative reform increasingly remote. Beijing has attained complete control of the local judiciary.

The obstacles to reform are exacerbated by the NSL's influence on electoral integrity. Post-NSL reforms have created a new Candidate Eligibility Review Committee to determine who is eligible to run in elections.[233] The evaluation process heavily relies on the opinions of the CSNS and background checks by the National Security Department, with no possibility of judicial review.[234] These modifications have resulted in the judiciary relinquishing its role as the final arbiter of electoral integrity and political opposition being precluded from participating in elections. This reinforces the compromises on the rule of law, the prospects for free and fair elections, and the right to participation. With the erosion of democratic institutions and an autonomous judiciary, the urgent need for the NSL's repeal cannot be addressed by the judiciary or politicians in the HKSAR.

While it is true that these provisions restrict the capacity of local courts and politicians to scrutinise the legitimacy of the NSL and advocate for change, this does not necessarily preclude the potential for legislative reforms altogether. Prospects for reform may still exist at the national level in China. Nonetheless, this argument appears unpersuasive, as it is unclear what could prompt the repeal of the NSL in Mainland China. According to BL Article 5, the HKSAR will be integrated into China in 2047,[235] and given that China already possesses its own national

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[230] Amy Stein, 'Rule of Law v Rule of Law: The Doomed Fate of Hong Kong's Autonomy' (2021) 17 Columbia Undergraduate Law Review 43, 63.
[231] Ales Karmazin, 'The Hong Kong National Security Law and the Changing Character of Rule in the China–Hong Kong Relationship' (2023) 59 China Report (New Delhi) 25, 30 – 31.
[232] *Ibid*, 35.
[233] Surabhi Chopra and Eva Pils, 'The Hong Kong National Security Law and the Struggle over Rule of Law and Democracy in Hong Kong' (2022) 50 Federal Law Review 292, 310.
[234] Ibid, 311–312.
[235] BL (n.124) art. 5.

security law,[236] there appears to be little incentive for the HKSAR or Beijing to act. Instead, it is more likely that both parties will continue to gradually implement the 'Mainlandisation' of the region rather than delay a complete integration of the HKSAR into China until 2047.

Furthermore, it is doubtful that any international actor could exert sufficient pressure on Beijing or the HKSAR to alter their position on this issue. Efforts by the UN and other organisations to date have demonstrated this. Despite sustained appeals for economic sanctions, previous academic studies indicate that measures such as the Hong Kong Autonomy Act[237] have proven ineffective.[238] Furthermore, while China has experienced economic challenges that could make it cautious of attracting sanctions,[239] its GDP and growth rate indicate that it remains a significant global economic power.[240] Consequently, the imposition of economic sanctions appears to be improbable, particularly at a time when the maintenance of positive diplomatic relations between China and the West is crucial to address global economic, security, and human rights threats such as climate change and escalating conflicts in Europe and the Middle East.

This conclusion is supported by the recent enactment of the Article 23 Law in the HKSAR.[241] This legislation exhibits a more direct historical lineage to the BL and repressive colonial law than the 2020 NSL and severely penalises further offences while bolstering the police's powers and the executive's authority to enact subsidiary legislation without oversight.[242] Under the shadow of the new legislation, the HKSAR has "gone quiet".[243] Despite further calls for repeal

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[236] China National People's Congress, National Security Law of the People's Republic of China (passed at the 15th Meeting of the 12th National People's Congress Standing Committee on 1 July 2015) Unofficial English translation available at <https://digichina.stanford.edu/work/national-security-law-of-the-peoples-republic-of-china/> accessed May 7 2024.
[237] Brendan Clift, 'Hong Kong's Made-in-China National Security Law: Upending the Legal Order for the Sake of Law and Order' (2020) 21 The Australian Journal of Asian Law 1, 19.
[238] Justine Yu, 'The United States' Ineffective Response towards Hong Kong's National Security Law' (2022) 73 Hastings Law Journal 161,
[239] Anne Stevenson-Yang, 'Opinion, China's Dead-End Economy is Bad News for Everyone'(11 May 2024) The New York Times <https://www.nytimes.com/2024/05/11/opinion/china-economy-dead-end.html> accessed 11 May 2024.
[240] United Nations Department of Economic and Social Affairs, Statistics Division, 'Country Profile: China' (United Nations, December 2023) <https://unstats.un.org/unsd/snaama/CountryProfile?ccode=156> accessed 11 May 2024.
[241] Instrument A305 Safeguarding National Security Ordinance (23 March 2024), English translation available at <https://www.elegislation.gov.hk/hk/capA305!en?INDEX_CS=N> accessed 11 May 2024.
[242] Amnesty International, 'What is Hong Kong's Article 23 Law? 10 Things You Need to Know' (24 March 2024) <https://www.amnesty.org/en/latest/news/2024/03/what-is-hong-kongs-article-23-law-10-things-you-need-to-know/> accessed 11 May 2024.
[243] Amy Hawkins and Helen Davidson, 'The old days are no more: Hong Kong goes quiet as security laws tighten their grip' (*The Guardian*, 12 April 2024)<https://www.theguardian.com/world/2024/apr/12/hong-kong-national-security-law-2020-impacts>accessed 11 May 2024.

of the new law from international organisations[244] and the UN,[245] no substantive action has been taken, indicating that the HKSAR is not deemed important enough by any nation to take risks on in the present global environment. Coupled with constraints on academic freedom, limitations on freedom of expression, and the capacity of NGOs to interact with the UN, the potential for demanding accountability and reform through RBAs or otherwise is presently improbable and may result in imprisonment under the NSL. Unfortunately, a positive outcome for the protection of human rights appears increasingly unlikely. Given that such guarantees are not features of contemporary China, this shouldn't be surprising. As the HKSAR transitions towards reunification in 2047, these protections will no longer be features of the HKSAR. Within this context, the erosion of RBAs to environmental protection should not be seen as an isolated issue, but rather as part of a broader dismantling of the institutional structures required for environmental and human rights accountability.

5 Conclusion

This paper's findings demonstrate that balancing anthropocentric and ecocentric legislative action is necessary to address the erosion of fundamental rights and environmental degradation resulting from repressive legal systems. Integrating RBAs in litigation and policymaking can ensure the law protects both human and nonhuman interests. Regrettably, the undemocratic limits imposed on RBAs by the NSL in the HKSAR represent a regression to colonial era limitations on fundamental rights. These limitations align with China's authoritarian legal system more than the autonomous common law system that protected human rights under the "One Country, Two Systems" principle. Historical analysis demonstrates that the NSL is part of a politically driven lineage of colonial legal continuity and authoritarian governance in the HKSAR to ensure China's sovereignty and further facilitate the NSL's influence on environmental governance in the HKSAR.

The arbitrary application of NSL offences has criminalised the right to freedom of expression, association, assembly, and public participation, essential for the success of RBAs. This erosion of fundamental rights profoundly impacts environmental advocacy, limits the activities of NGOs, silences forms of expression, and suppresses political opposition. Although the NSL did not explicitly prosecute environmental activists, the law's chilling effect in imposing a

[244] International Service for Human Rights, 'UN Voices Unanimously Condemn Hong Kong's New National Security Law' (28 March 2024) <https://ishr.ch/latest-updates/un-voices-unanimously-condemn-hong-kongs-new-national-security-law/> accessed 11 May 2024.
[245] OHCHR, joined by 6 mandates, Communication on the Safeguarding National Security Ordinance under article 23 of the Basic Law of Hong Kong, 22 March 2024, UN Doc. JOL CHN 5/2024.

culture of fear and self-censorship amongst educators, politicians, and the judiciary, has muted effective environmental campaigns and the mobilisation of civil society.

The PRC's political focus on the "Mainlandisation" of the HKSAR under the guise of fabricated internal threats to national security has diverted attention from the legitimate danger of environmental degradation. This misdirection undermines environmental protection efforts and threatens the realisation of human rights. The prospects for legal reform appear bleak given the present political environment, entrenched extrajudicial power structures, and the HKSAR's predetermined reunification in 2047. However, gradual changes might be realised through continual international support for local environmental organisations and activists.

Further research and discussions are required at the international level to determine alternative methods of holding China accountable to its human rights obligations; previous methods, including economic sanctions and UN recommendations, have proven ineffective. Future research must develop new strategies for environmental advocacy in restrictive political settings. Comparative studies of comparable regions under authoritarian rule could provide valuable conclusions concerning methods of promoting environmental protection under legal constraints.

If preserving national security is of paramount importance for the PRC, it would be prudent for Beijing to recognise that anthropocentric legislation, such as the NSL, perpetuate environmental degradation in the pursuit of economic and political stability. The PRC would be fatally unwise to overlook the fact that "there are no human rights on a dead planet".[246] Equally, on a dead planet, there is neither security nor authority for the PRC.

[246] Kumi Naidoo, 'Human Rights and the Climate Crisis: International and Domestic Legal Strategies' (2020) 25 UCLA Journal of International Law and Foreign Affairs 1, 5.

Pedal to the Metal: Safeguarding Local Communities' Affected Rights in Developing Countries' Mining Legal Frameworks Amid the Global Rare Earth Race

Hòa Bùi

Abstract

This article explores how developing countries can address the challenges of balancing economic benefits and local human rights when drafting legal frameworks for rare-earth elements (REE) mining. REEs are critical minerals widely used in defence and green energy industries. Other developing countries with abundant unexploited REE reserves are now facing growing international attention and economic opportunities after China's recent restrictions on REE exports, amid tensions with the United States. However, like other mining activities, relaxing regulations to attract investment often comes at the long-term expense of public health, living conditions, and labour standards. The article first identifies some common challenges developing countries face when walking the fine line between REE mining's economic benefits and human rights impacts. These include the pressure to adopt low regulatory standards due to technological and economic dependency, as well as weak enforcement driven by corruption. It then proposes that REE-rich developing nations agree on a common set of minimum standard practices to ensure that raising their current standards does not discourage prospective partners. It would also address possible limitations to this approach such as countries' divergent priorities, market effects, and potential issues with competition law. Then, to find solutions for the mining corruption challenge, the article reflects on international examples like Tanzania and China to conclude that regulations should ensure frequent supervision and assessment to prevent and detect corruption before, during, and even after every project.

1 Introduction

If historical eras are named after their dominant resources – such as the Stone Age or Iron Age – then the current era might rightly be called the 'Rare Earths Age', though it does not roll off the tongue quite as smoothly. Rare earth elements (REEs) are minerals widely used in today's world, from everyday technological appliances to the green energy and defence industries to spaceship construction. A global race towards mineral security, especially in search of REEs, started in the 2010s when China, the main global REE supplier, accounting for 90% of raw ore exports, cut down these exports.[1] After years of exploration and research for alternative suppliers, some developing countries have emerged as notable for their commercially exploitable REE reserves and low mining regulatory standards.

However, whether the standards for REE mining in developing countries will stay low in the future is subject to discussion. Given that developing countries are also trying to keep up with the sustainability transition,[2] it might be worth asking whether this 'Rare Earth Age' is the time they advance the longstanding inadequate human rights protection in their mining industries. In the scope of this article, sustainability is used as a lens to point out some common challenges that prevent the legal frameworks from effectively protecting the locals' affected rights, namely the technical and commodities dependence, and the corruption and illegal mining issues. Then, it is suggested that developing countries develop an international collaboration to agree on higher standard practices and a more decentralised approach in the procedures to tackle corruption to balance mining's economic benefits and local communities' rights.

2 Challenges in Safeguarding Human Rights in Rare-Earth Mining

This section will go into two common challenges that most developing countries with REE reserves would face when trying to safeguard communities' rights in REE mining legal frameworks. These challenges are: i, commodity and technology dependence; and ii, corruption and illegal mining. The reasons behind each challenge and how they weaken human rights

[1] Reuters, 'China proposes new rules to tighten control over rare earth sector' (*Reuters.com,* 19 February 2025) https://www.reuters.com/markets/commodities/china-proposes-new-rules-tighten-control-over-rare-earth-sector-2025-02-19/#:~:text=Rare%20earths%20are%20a%20group,90%25%20of%20global%20refined%20output accessed 9 March 2025.

[2] Robin Broad and Julia Fischer-Mackey, 'From Extractivism towards *buen vivir*: Mining Policy as an Indicator of a New Development Paradigm Prioritising the Environment' (2017) 38 Third World Quarterly 1327.

protection are examined, which helps identify suitable approaches to balance REEs mining's economic benefits and its human rights impacts.

The first challenge that would prevent developing countries from effectively protecting local communities' rights in REE mining regulations is their commodity and technology dependence. Commodity dependence is a phenomenon when a country relies heavily on the export of primary commodities, such as minerals, fuels, and agricultural products, for a significant portion of its export earnings.[3] A nation is considered commodity export dependent when these commodities constitute more than 60% of its total merchandise exports.[4] In terms of REEs, some developing countries with REE reserves have a history of commodity dependence on mining, which indicates the same reliance on this resource. An example is Tanzania, South Africa.[5] Even without commodity dependence, developing countries with REE reserves are also under pressure to make use of this highly sought-after resource. Because of this position, losing out on foreign investments in the extractive industry can be said to be a considerable loss for their economies, even destabilising them. The usual way to secure the position as suppliers of raw minerals is by attractive lax regulations. However, the rise of sustainability transition dawns on developing countries that they need to move up in the supply chain, or they will end up exhausting the resources at a cheap price.[6] Moving up in the supply chain means trying to process the minerals so that they can be exported at higher prices, and mining can be more strictly regulated.[7] The problem they face when trying to move up is that they do not have the core technology to process the minerals by themselves, especially to process REEs which are fairly complicated minerals and an emerging market.[8] These dependencies on foreign investment and technology in REE mining are said to make these countries hesitant to raise the standards for their mining regulations.[9] Mining companies always

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[3] UNCTAD, 'The state of commodity dependence' (*UNCTAD*) https://unctad.org/topic/commodities/state-of-commodity-dependence accessed 1 April 2025.
[4] Ibid.
[5] Ibid.
[6] UNCTAD, 'Critical minerals boom: Global energy shift brings opportunities and risks for developing countries' (*UNCTAD*, 26 April 2024) https://unctad.org/news/critical-minerals-boom-global-energy-shift-brings-opportunities-and-risks-developing-countries accessed 1 April 2025.
[7] Ibid.
[8] Shuang-Liang Liu et al., 'Global rare earth elements projects: New developments and supply chains' (2023) 157 Ore Geology Reviews 105428; Lisa Depraiter and Stéphane Goutte, 'The role and challenges of Rare Earths in the Energy Transition (2023) HAL Open Science 9/2023, halshs-04199796 https://shs.hal.science/halshs-04199796/file/REE_in_Energy_Transition_DG.pdf?utm_source=chatgpt.com accessed 1 April 2025.
[9] Kyla Tienhaara, 'Mineral investment and the regulation of the environment in developing countries: lessons from Ghana' (2006) 6 International Environmental Agreements: Politics, Law and Economics 371; Eric Neumayer, *Greening Trade and Investment: Environmental Protection Without Protectionism* (Routledge 2001); Nick Mabey and Richard McNally, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development (WWF-UK 1999).

need to keep operation costs as low as possible,[10] so if one potential host country sets higher standards, resulting in higher operation costs, foreign investors might cease to invest or go to another country. The Ok Tedi gold and copper mine in Papua New Guinea is an example of why immediately setting standards similar to those of developed countries is not advised for developing countries that lack the economic abilities.[11] With an estimated 70% of export income coming from mining exports,[12] the government of Papua New Guinea had to lower its environmental standards eventually, despite being very wary of its impacts in preliminary negotiations with foreign entities.

Low human rights standards due to dependencies are reflected in the fact that local people are usually displaced and do not have their consent acquired when mining projects are planned to operate in their areas.[13] Their labour standards are barely considered and are vaguely worded in the legal frameworks, so that the labour costs can be kept as low as possible to attract foreign investment. No one takes responsibility for accidents caused by inadequate mine construction and working conditions, because the vague wording in regulatory standards leaves space for companies to argue that the law is unclear.[14] Low environmental standards also affect human rights in that they lead to land degradation and a toxic living environment where the locals cannot continue living or working.[15] All of this happens because developing countries, on each of their own, are toothless when faced with foreign investors whose projects they heavily rely on.

If commodity and technology dependence leave developing countries with no choice but to lower regulatory standards, then corruption and illegal mining add fuel by preventing effective enforcement of established standards. The culprits of corruption in developing countries are mostly weak institutions, together with, specifically in the mining sector, the lack of anti-

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[10] Hervé Losaladjome Mboyo et al., 'Distribution of Operating Costs Along the Value Chain of an Open-Pit Copper Mine' (2025) Applied Science 1602.
[11] AS Mather and K Chapman, *Environmental Resources* (Routledge 2018); Gavin Hilson and James Arthur Haselip, 'The Environmental and Socioeconomic Performance of Multinational Mining Companies in the Developing World Economy' (2004) 19(3) Minerals and Energy – Raw Materials Report 25; Xia Cao, 'Regulating Mine Land Reclamation in Developing Countries: The Case of China' (2007) 24 Land Use Policy 472.
[12] Hilson and Haselip (n 11).
[13] Siri Lange, 'Gold and Governance: Legal Injustices and Lost Opportunities in Tanzania' (2011) 110 African Affairs 233; Amnesty International, 'Viet Nam: Authorities must investigate reports of beatings at mining quarry' (Amnesty International Public Statement 2018)
[14] Cindy S. Woods, 'It isn't a state problem: The Minas Conga Mine Controversy and the Need for Binding International Obligations on Corporate Actors' (2015) 46(2) Georgetown Journal of International Law 629
[15] Linlin Zhang, 'Towards Sustainable Rare Earth Mining: A Study of Occupational and Community Health Issues' (M.A.Sc thesis, University of British Columbia 2014).

corruption infrastructure.[16] An example of a weak institution can be seen in Vietnam, where a scandalous corruption case in the REE mining sector occurred, leading to the arrest of some big names in both the public and private sectors, including the Former Deputy Minister of Natural Resources and Environment.[17] Corruption has allowed for tons of illegally mined REEs to be transported to China in this case. The weak institution is partially due to the lack of suitable anti-corruption infrastructure and technology in place to assess and detect corruption possibilities in the mining sector. Anti-corruption infrastructure in developing countries is often underwhelming compared to the mining industry's complications in technical matters, public–private sector relationships, and high-value transactions.[18] Even with adequate infrastructure, there can still be inaction against corruption due to the lack of political will.[19] The authorities might refrain from effectively solving corruption issues, either because it requires fundamental changes or because they are benefiting from it.

Corruption affects the locals' rights to a fair trial regarding their complaints or lawsuits against mining companies or the persons in authority. In 2018, the locals near a mine in Yen Bai province in Vietnam posted on social media photos and videos of the mine's guards physically assaulting them with guns, batons, and electric cattle prods while they were protesting against the project. The local authorities and police then demanded that the local people take their posts down instead of demanding restitution from the mining company for assaulting the protesters.[20] This practice, where the authorities benefit and ignore the locals' opinions, is commonly seen in most mining regions in Vietnam. Corruption, when illegal mining is involved, affects the people's rights to adequate housing, safety, etc, because illegal mining is mostly conducted below permitted environmental and safety standards.

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[16] Bertrand Venard, 'Institutions, Corruption and Sustainable Development' (2013) 33(4) Economics Bulletin 2545; Ramos-Mejia and others, 'Sustainability transitions in the developing world: Challenges of sociotechnical transformations unfolding in contexts of poverty' (2018) 84 Environmental Science and Policy 217; Azmat Gani, 'Sustainability of Energy Assets and Corruption in the Developing Countries' (2021) 26 Sustainable Production and Consumption 741.

[17] T Nhung, 'Gây thất thoát hơn 736 tỷ đồng, cựu thứ trưởng bị truy tố' (*VietnamNet,* 11 March 2025) https://vietnamnet.vn/truy-to-cuu-thu-truong-bo-tn-mt-vi-gay-that-thoat-hon-736-ty-dong-2379367.html accessed 12 March 2025.

[18] Nieves Zúñiga, 'Corruption risk mitigation in the mining sector' (2019) (*Transparency International*, 22 February 2019) https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-risk-mitigation-mining-sector-2019.pdf accessed 12 March 2025; Oyu O'Leary, 'Bribery & Corruption in the Mining Industry of Developing Countries, With the Main Focus on Mongolia, and the Role of the IFA' (MFAcc thesis, University of Toronto Mississauga 2024).

[19] Gani (n 16).

[20] Amnesty International, 'Viet Nam: Authorities must investigate reports of beatings at mining quarry' (2018) Amnesty International Public Statement https://www.amnesty.org/fr/wp-content/uploads/2021/05/ASA4192752018ENGLISH.pdf accessed 9 April 2025.

In short, the dual challenges of commodity and technology dependence, along with corruption and illegal mining, significantly undermine the protection of local communities' human rights in developing countries with REE resources. These structural issues not only discourage the establishment of stringent regulatory standards but also weaken enforcement mechanisms where standards do exist. Dependency on foreign investment and processing technologies compels states to maintain lax regulations to remain economically competitive, often at the expense of human rights and environmental protections. Meanwhile, corruption, fuelled by weak institutions and insufficient infrastructure, further erodes accountability, enabling rights violations to persist. Understanding and addressing these obstacles is therefore crucial to designing a legal framework that balances economic development with the well-being of affected communities.

3 Recommendations for Developing Countries to Protect Their Locals' Human Rights in the Rare-Earth Mining Legal Frameworks

To improve human rights protection in REE mining regulation, this section suggests that: 1, an international collaboration might help raise standards without the fear of losing investments; and 2, a more decentralised approach might help tackle ineffective enforcement caused by corruption and illegal mining. Merits of each of the suggestions are explained, followed by considerations of possible shortcomings or case study examples.

To establish higher standards without risking investment loss, developing countries with REE reserves could form an international cooperation or agreement to adopt higher sustainability standards for rare-earth mining simultaneously. This model resembles the Organization of the Petroleum Exporting Countries (OPEC) but would focus on sustainable development rather than market price control. It aligns with the International Commodity Agreement (ICA) model, historically used by commodity suppliers to manage market prices, though its effectiveness remains debated.[21] Predictions suggest REE suppliers may pursue similar agreements due to the sector's geographic advantages and fluctuating demand, though primarily for economic reasons rather than sustainability goals.[22]

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[21] John Baffes, Peter Nagle and Shane Streifel, 'International Commodity Agreements and Cartels: Lessons and Policy Implications' (2024) The World Bank Research Observer lkae008.

[22] Jennifer Harris, 'No Country Can Solve Critical Mineral Shortages Alone' (*Financial Times,* 7 July 2023) https://www.ft.com/content/394dca37-ac50-4380-9b03-4fdfcef2ff7c accessed 8 March 2025.

Nonetheless, one might argue that this approach's feasibility can be driven by market effects and states' divergent priorities or face anti-competition issues. The market effect issue is that countries joining the agreement still lose investment because those which do not prioritise human rights and do not join would attract the investment instead. However, this is where sustainability comes into play. As the goal of sustainable development is to balance among its pillars to benefit the current generation without risking the needs of future generations, it helps find a middle ground to make the obligation to human rights less of a trade-off to states' economic benefits. Because of this, states might feel more encouraged to join the sustainability agreement and uphold human rights while protecting their environment. This agreement could be on a shared minimum set of standard practices that are higher than what they would have gotten on their own, because they are now free from the fear of losing investments. As explained above, raising the standards might cause a loss of investments, which is detrimental to the economies with commodity dependence, but they are free from this fear when all the potential countries for mining share the same minimum standards and requirements. Higher reclamation standards help ensure that the land can be utilised for other purposes so that the locals can continue their economies post-mining. Besides requiring stricter supervision to ensure compliance with higher standards and adequate reclamation plans after mine closure, they can even consider demanding technology exchange. It can be demanded that the locals be prioritised in terms of job opportunities and skills training, like what is usually promised by mining supporters, but rarely becomes a reality.[23]

The international agreement approach might also face concerns related to competition law. Unlike other areas of international economic law, there is no overarching international competition law regime or a global court with jurisdiction over states' decisions to join such agreements.[24] While states are not obligated to enter international agreements, tensions could arise in this context of the current global race for mineral security. Countries importing REE elements may resist increased mining costs imposed by stricter sustainability standards in exporting nations. They could argue that the cooperation functions as a *de facto* cartel if it establishes binding sustainability standards that apply to non-member states, effectively

[23] Bonita Meyersfeld, 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' (2016) 2(1) Business and Human Rights Journal 31; Nhi Ba Nguyen, Bryan Boruff and Matthew Tonts, 'Mining, Development and Well-Being in Vietnam: A Comparative Analysis' (2017) 4 The Extractive Industries and Society 564.

[24] Chris Noonan, 'The Emerging Principles of International Competition Law' in Chris Noonan (ed), *The Emerging Principles of International Competition Law* (Oxford University Press 2008).

restricting supply and influencing market conditions. For example, the United States has a history of challenging international resource-related agreements under its extraterritorial antitrust laws. A key precedent is *United States v. Aluminum Company of America (Alcoa)* (1945), where the US applied antitrust law beyond its borders to address anti-competitive practices. In that case, the court ruled that foreign agreements affecting US markets could be subject to US antitrust law.[25] However, the US has repeatedly failed in its attempts to apply extraterritorial antitrust laws against OPEC, which it deemed operated as a resource-exporting cartel.[26] Given this history, the US might struggle to challenge the proposed sustainability-focused cooperation under its anti-cartel framework, especially when the cooperation lacks the explicit intent to manipulate prices or restrict output for profit maximisation, which are core characteristics of a cartel.[27] The international agreement proposed can also be used as an international legal mechanism for developing states to exchange anti-corruption infrastructure with more developed countries and ask them for joint and bilateral efforts to tackle corruption in their transnational REE projects hosted in developing countries. This is particularly helpful when the central government wants to prevent corruption among its ministries or local authorities. China, for example, has collaborated with the United Kingdom, one of the world's biggest financial hubs, to fortify recovery and confiscation of assets obtained through corruption.[28]

In the context of land reclamation after REE mining, Cao argues that, besides requiring better standards with more advanced technology and skilled experts, developing countries need to plan beyond the "end of mine" control.[29] It is suggested that this mindset could be implemented in the bigger context of mining as a whole. As in dealing with corruption, with suitable techniques in hand, the authorities need to think beyond what can be done after corruption has occurred and have a vision to "sustain" legal obligations from the stage of granting permissions. The principles of the 2030 Sustainable Agenda identified and categorised anti-corruption approaches into: Prevention, Detection, Sanction, and Awareness.[30] The Prevention step may

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[25] *United States v Aluminum Co of America* 148 F2d 416 (2nd Cir 1945).
[26] Irvin M Grossack, 'OPEC and the Antitrust Laws' (1986) 20 Journal of Economic Issues 725.
[27] Library of Congress, 'Organizations and Cartels' (*Library of Congress – Research Guides)* https://guides.loc.gov/oil-and-gas-industry/organizations#note1 accessed 12 March 2025.
[28] Zhuan Zuo, 'Cooperation Mechanism between China and the UK in Anti-Corruption Asset Recovery' (2023) 14 Beijing Law Review 2028.
[29] Xia Cao, 'Regulating Mine Land Reclamation in Developing Countries: The Case of China' (2007) 24 Land Use Policy 472.
[30] United Nations, 'World Public Sector Report 2019: Chapter 2: Corruption And The Sustainable Development Goals' (United Nations, 2019)

include mechanisms to assess potential corruption risks before granting mining permissions. Detection means assessments and supervision to expose corrupt behaviours in operating mines; then, the Sanction step suggests that there are credible accountability institutions to carry out punishments and look for remedies. The Awareness step can contribute significantly to the success of the Detection and Prevention steps if the law does not disregard the "grassroots" and refuses to utilise the human factors to combat corruption, leading to an ineffective and out-of-touch legal framework. Thus, the legal framework must consider raising awareness among the local people and allow their active participation, which is also an international human rights obligation of civil self-determination that has not been properly practiced in developing countries' mining activities.

In Tanzania, the government have carried out transparency, awareness, and oversight steps to tackle corruption in the mining sector and received some positive results.[31] They reformed the law to adopt the Extractive Industries Transparency Initiative (EITI) standard requirements,[32] ran public awareness campaigns on the radio and television, and public education about the harms of corruption,[33] and detected potentially corrupt transactions through an "oversight" scheme. These efforts have created a growth of transparency in management, followed by the growth in government revenue in the mining sector, and exposed any corporations intending to bribe officials to avoid the social responsibility packages.[34] In Peru, the government gives a lot of weight to the communities' voices through their transparent public hearings on prospective mining projects. Public hearings play such a crucial role in community involvement that they have prompted the government to reassess certain mining projects, occasionally even leading to their suspension or cancellation.[35]

However, these changes can only happen when the authorities have the political will to tackle corruption and uphold human rights. When there is a lack of political will, there needs to be

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[31] Elikana Eliakimu Sadock, 'The Fight Against Corruption? The Effectiveness Of Efforts To Mitigate Grand Corruption In The Healthcare And Mining Sectors In Tanzania' (Master thesis, University of Gothenburg 2021).
[32] Japhace Poncian and Henry Michael Kigodi, 'Transparency initiatives and Tanzania's extractive industry governance' (2018) 5(1) Development Studies Research 106.
[33] Elikana Eliakimu Sadock, 'The Fight Against Corruption? The Effectiveness Of Efforts To Mitigate Grand Corruption In The Healthcare And Mining Sectors In Tanzania' (Master thesis, University of Gothenburg 2021); Alan Doig and Stephen Riley 'Corruption and anti-corruption strategies: Issues and case studies from developing countries' (1998) Corruption and Integrity Improvement Initiatives in Developing Countries, 45–62.
[34] Gráinne de Búrca, 'The Past and Future of Human Rights' in Gráinne de Búrca (ed), *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021).
[35] Maiah Jaskoski, 'Environmental Licensing and Conflict in Peru's Mining Sector: A Path-Dependent Analysis' (2014) 64 World Development 873.

pressure from different stakeholders and interested actors to advocate for changes. Burca's[36] "experimentalist" model is a promising proposal that creates pressure on the authorities to continuously investigate and revise the law,[37] creating up-to-date literature that goes hand in hand with its practice. Burca's model works by creating a flow back and forth among three actors of the international human rights systems: the governments, the international institutions, and the people. It aims to use the government as a centre to process issues, while international institutions and NGOs stand in the middle to engage with and maximise the people's voices, then pressure changes by states. This model is engaged closely with the grassroots to improve both the literature on human rights treaty adoption and the states' enforcement.[38]

4 Conclusion

With China's more restrictive strategies in REE exportations recently, the race towards mineral security by the United States and other developed countries is becoming more and more heated every day. REEs are expected to be in high demand at least until the near future of 2030 and beyond.[39] The legal frameworks for REEs are becoming increasingly dynamic and complex, involving disciplines such as politics, economics, technology, environmental protection, and human rights. This shift is driven by developing countries' growing focus on sustainable development and rising public expectations for human rights protection, fuelled by efforts to raise awareness from international institutions and NGOs. This position might suggest to developing countries with potential REE reserves and sustainable development goals that it is high time for fundamental challenges like corruption and commodity dependence to be tackled seriously, instead of by marginal alterations as they have been. Sustainability in general, and human rights protection in specific, should not just be an overall development goal that the law assists in achieving, but should also be the vision incorporated in the legislating process and

[36] Gráinne de Búrca, 'The Past and Future of Human Rights' in Gráinne de Búrca (ed), *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021).
[37] Charles Sabel and William H. Simon, 'Democratic Experimentalism', in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017).
[38] Gráinne de Búrca, 'The Past and Future of Human Rights' in Gráinne de Búrca (ed), *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021).
[39] Philip Andrews-Speed and Anders Hove, 'China's rare earths dominance and policy responses' (2023) Oxford Institute for Energy Studies Working Paper CE7 https://www.oxfordenergy.org/wpcms/wp-content/uploads/2023/06/CE7-Chinas-rare-earths-dominance-and-policy-responses.pdf accessed 8 March 2025.

law enforcement.[40] This means the law should not just be set out to meet the goals of sustainable development, but should be set out using a sustainable vision. It should be made to last and last well through the rapid changes of this day and age. Adopting this vision suggests that developing countries should pay more attention to the human factors in their sustainable REE mining legal frameworks. To do that, they should cooperate on the international level and, domestically, build sustainable, decentralised supervision and decision-making processes to tackle challenges, as REE cannot be a standalone fight.

[40] Margherita Pieraccini and Tonia Novitz, 'Sustainability and Law: A Historical and Theoretical Overview' in Margherita Pieraccini (ed) and Tonia Novitz (ed), *'Legal Perspectives on Sustainability'* (Bristol University Press 2020) 10.

Legal, Financial, Physical and Structural: A Socio-Legal Analysis of the Reasons Why Disabled People are More Likely to Experience Homelessness

Helen Clifton

Abstract

This paper seeks to identify the barriers impeding Disabled people's access to safe and secure housing, and to evaluate the extent to which UK law and government policy mitigates their harm. To provide context, the author revisits the atrocities experienced by Disabled people during the Second World War and the international measures taken in the aftermath of that war. The paper briefly reviews the evolution of the medical and social models of disability, considering how they inform domestic and international legal instruments. The discussion then turns to financial barriers facing Disabled people including additional costs, low employment and the scarcity of accessible housing. The paper explores the impact of welfare reform to the financial support available to Disabled people and the challenges when invoking the reasonable adjustment duty. Subsequently the focus turns to hidden disabilities: the prevalence of comorbidity; the debate surrounding the inclusion of substance dependency as a mental illness; and the unique challenges facing those with dual diagnosis. The paper will then evaluate key government approaches to homelessness since 1990, their economic and political context and the extent to which they have addressed homelessness. To conclude, the author will challenge the assumption that homelessness is the scourge of individuals who society has a moral duty to assist. They will argue instead that homelessness is a symptom of structural inequality and it is in addressing these harms that homelessness can be prevented for the most part and individuals' economic, social and cultural human rights can be realised.

1 Introduction

The UN Committee on the Rights of Persons with Disabilities (CommRPD) reviewed the "cumulative impact of legislation, policies and measures" adopted by the UK and in 2016 found "reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been met".[1] In 2019, 83% of rough sleepers reported health vulnerabilities, yet homelessness has continued to rise despite government pledges to end it by 2024,[2] with 1.3 million people remaining on social housing waiting lists in 2023.[3] That winter, compared to the previous year, the number of people who were made homeless rose by 16%,[4] while the number of people sleeping rough increased by 27% in 2023.[5] Experts have investigated the reasons for the disproportionate number of Disabled people in the homeless population.[6] Research has also considered legislative and policy approaches to homelessness and antidiscrimination.

This paper seeks to answer the question: *What are the barriers impeding Disabled people's access to secure housing, and to what extent does UK law and government policy address them?* The author first considers the historical injustices faced by Disabled people, and the initial international and domestic legal protections that were enacted in response. This paper will then discuss the economic, physical, systemic and misunderstood barriers that Disabled people must overcome to obtain and afford secure long-term housing. As each set of barriers is reviewed, the government legislative and policy responses will be outlined. To evaluate the extent to which these approaches mitigate the harms caused, attention will be paid to the

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[1] Committee for the Rights of Persons with Disabilities, 'Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention', (CommRPD October 2016) 18, 18.

[2] Ministry of Housing, Communities & Local Government 'Understanding the Multiple Vulnerabilities, Support Needs, and Experiences of People who Sleep Rough in England: Initial findings from the Rough Sleeping Questionnaire' (MHCLG December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944598/Initial_findings_from_the_rough_sleeping_questionnaire_access.pdf> accessed 29 August 2024.

[3] LG Inform, 'Total households on the housing waiting list at 31st March in England' (2023) https://lginform.local.gov.uk/reports/lgastandard?mod-metric=105&mod-area=E92000001&mod-group=AllRegions_England&mod-type=namedComparisonGroup accessed 16 July 2024.

[4] Department for Levelling Up, Housing and Communities, 'Statutory homelessness in England: October to December 2023, 20 April 2024' (2024) https://www.gov.uk/government/statistics/statutory-homelessness-in-england-october-to-december-2023/statutory-homelessness-in-england-october-to-december-2023#temporary-accommodation accessed 16 July 2024.

[5] Department for Levelling Up, Housing and Communities, 'Rough sleeping snapshot in England: autumn 2023, 29 February 2024' (2024) https://www.gov.uk/government/statistics/rough-sleeping-snapshot-in-england-autumn-2023/rough-sleeping-snapshot-in-england-autumn-2023 accessed 16 July 2024.

[6] Beth Stone and Emily Wertans, 'Homelessness and disability in the UK' (Centre for Homelessness Impact 2023)

economic and political context, the model of disability that informed it and the impact on levels of homelessness.

2 Methods

This study takes a Critical Realist approach and acknowledges the powerful impact of society, as well as the law, and therefore adopts a socio-legal methodology. The author initially adopted a legal-doctrinal approach, examining first the legislative and jurisprudential framework, as it relates to homelessness and Disabled people. The existing literature regarding disability rights, homelessness and housing, including government policy, was then reviewed to give context to the discussion. A range of sources were examined including legal and sociological books and articles, government and NGO reports as well as academic, scientific and empirical research.

The scope of the empirical research was narrowed to two English regions: Yorkshire and the West Midlands. The study relies on primary data gathered from eleven key stakeholders in Local Government and the VCSE sector. This choice was made due to logistical considerations and pre-existing professional and academic networks. Including two regions allowed for comparisons of the approach of different councils with their respective demographics, resources and personnel, in terms of disability and homelessness provision.

Primary data was collected via semi-structured one-on-one interviews which lasted between 30 and 60 minutes. This structure was chosen for three reasons. Firstly, it allowed the author to respond to and be informed by any unanticipated answers, especially as they often allowed for common themes to become apparent. Secondly, it reduced the formality and allowed for more free-flowing dialogue. Thirdly, it gave the interviewee more agency and helped to mitigate the inherent power imbalance.

In each interview, there were questions regarding the working relationship between local government and the voluntary, community and social enterprise (VCSE) sector; how the organisations could better work together and the experience of Disabled people who experience homelessness or housing insecurity. The interviewee was asked for their views on how organisations could work together better to improve the situation for their service users. All but three interviews were undertaken remotely, at the participants' request.

Interviews took place during June and July 2024. Interviews were recorded as this allowed for a more natural dialogue and ensured the accuracy of the data captured. The recording was transcribed verbatim, anonymised and supplemented, where necessary, with additional

observations and notes to provide relevant context. The researcher adopted a thematic analysis of the transcripts: a "matrix-based method for ordering and synthesising data".[7] This approach allowed the researcher to uncover patterns and themes from the data collected.

One limitation of the research is that the author interviewed participants from only two regions of England, with the majority based in Yorkshire. As such, the views of the interviewees cannot be said to reflect their colleagues nationwide and may incorporate some regional bias. The author took a reflexive approach and was mindful of their positionality, previous experience and world view. As a white, middle-class, non-disabled person, the author does not share personal experiences with those at the centre of the research though does share some commonalities with the research participants. The author's previous project related to disability hate crime in York. The author has endeavoured to remain unbiased in addition to being fully transparent regarding the methodological approach taken.

3 A historical lack of legal and societal equality

"How a society treats its most vulnerable is always the measure of its humanity."[8]

3.1 Persecuted: An International Approach to Addressing Atrocities

Disabled people have been persecuted,[9] pathologised[10] and pitied[11] over the centuries, frequently treated as subhuman. Almost 250,000 Disabled people, including children, were

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[7] Jane Ritchie and Jane Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003), 219.

[8] Matthew Rycroft, UK Mission Ambassador to the UN, 'How a society treats its most vulnerable is always the measure of its humanity' (Statement at the Security Council Open Debate on Children and Armed Conflict, New York, 18 June 2015) <https://www.gov.uk/government/speeches/how-a-society-treats-its-most-vulnerable-is-always-the-measure-of-its-humanity> accessed 16 July 2024.

[9] Holocaust Memorial Day Trust, 'The Holocaust: Nazi Persecution of Other Groups: 1933–1945: Disabled People' (2024) https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/nazi-persecution/disabled-people/ accessed 2 September 2024.

[10] The medical model of disability focuses on diseases and disorders and looks at 'fixing' the person rather than considering that genetic and biological variations are representative of the heterogeneity of the human species. For further details, see: 'NEURO*DIVERSITY: Medical & Social Models of Disability' (Neurodiverse Inclusive Central E-Network 2017) <https://www.neurodivercitysg.com/medical-model-vs-social-model.html#:~:text=The%20medical%20model%20looks%20at,and%20control%20in%20their%20lives.&text=The%20social%20model%20does%20not,what%20the%20person%20can%20do.> accessed 7 September 2024.

[11] The Charity Model of Disability views the Disabled person as having a 'problem' and being a victim or an object of pity. For further details, see: 'Inclusive Participation Toolbox: What are models of disability' (CBM Participation 2024) <https://participation.cbm.org/why/disability-participation/models-of-disability#:~:text=The%20charity%20model%20identifies%20the,recipients%20and%20beneficiaries%20of%20services.> accessed 7 September 2024.

'euthanised' under the Nazi regime.[12] This is an example of the "massive affront to human dignity of the Second World War",[13] which precipitated the creation of the United Nations with the aim to "promote peace, justice and better living for all humankind".[14] Following its creation, the United Nations, began the "codification, at the international level, of human rights and fundamental freedoms".[15] The Universal Declaration of Human Rights (UDHR) 1948[16], is explicit, unlike the UN Charter of 1945,[17] in its inclusion of disabled people,

> "Everyone has the right to a standard of living adequate for the health and well-being … including … **housing …** and the right to security in the event of … **disability**."[18]

Though not legally binding itself,[19] the rights upheld in the UDHR were distributed between two separate Human Rights treaties. The International Covenant on Civil and Political Rights (ICCPR) [20] prohibited discrimination but did not make specific reference to disability as a motivator. The International Covenant on Economic, Social and Cultural Rights (ICESCR) [21] outlined the right to housing but, unlike the ICCPR, states party to the ICESCR are not considered immediately liable, instead the rights need only be realised progressively. The difference in the timeframe and legal liability accorded to civil and political (CP) rights as opposed to economic, social or cultural (ESC) rights, may have resulted in a hierarchisation of human rights, with Degener referring to ESC rights as "second generation".[22] Some question

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[12] Holocaust Memorial Day Trust, 'The Holocaust: Nazi Persecution of Other Groups: 1933–1945: Disabled People' (2024) https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/nazi-persecution/disabled-people/ accessed 2 September 2024.
[13] Jane Connors and Sangeeta Shah, 'United Nations' in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, OUP 2022), 385.
[14] United Nations, 'Model United Nations: History of the United Nations' (2024) https://www.un.org/en/model-united-nations/history-united-nations accessed 2 September 2024

[15] Connors (n13), 385.
[16] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[17] United Nations, *Charter of the United Nations,* 1 UNTS XVI, 24 October 1945. Art 1(3).
[18] Ibid, Art 25.
[19] Ionel Zamfir, 'The Universal Declaration of Human Rights and its relevance for the European Union' (EPRS, Members Research Service, PE 628.295 November 2018).
[20] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[21] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11.
[22] Theresia Degener, 'A human rights model of disability' (2014) 8 <https://www.researchgate.net/profile/Theresia-Degener/publication/283713863_A_human_rights_model_of_disability/links/5644463208aef646e6ca7886/A-human-rights-model-of-disability.pdf> accessed 2 September 2024.

whether this contributed to the right to housing not being actualised for more than one in five people in the world.[23]

Farha argues that "[t]he global housing crisis is intensifying".[24] The symptoms of this "global crisis"[25] are visible here in the UK including "a 27% increase in rough sleeping"[26] (from 2022 to 2023). The disproportionate impact on Disabled people is perhaps less visible. This phenomenon was explored in a 2023 paper,[27] which reported that, while there are approximately 14.6 million Disabled people in the UK (22% of the general population),[28] "an analysis of single people experiencing homelessness reported a disability prevalence rate of 34%".[29]

"The first duty of the government is to keep citizens safe."[30] (The Home Office)

While historical discrimination and unfulfilled international protections may have contributed to the disproportionately high levels of homelessness experienced by Disabled people, the protective duty owed by the government remains. The UK government outlawed discrimination against disabled people under the Disability Discrimination Act (DDA) 1995, with a ministerial reassurance that the bill "will not place undue burdens on those [employers] who will be responsible for delivering its provisions".[31] Despite voting for the Conservative government bill, the Labour Party highlighted and critiqued its "unduly restrictive" definition of disability.[32] Disabled people now had legal redress against direct discrimination, failure to make a reasonable adjustment and victimisation within, inter alia, employment and occupation,

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[23] Balakrishnan Rajagopal, *Special Rapporteur on the Right to Adequate Housing*, 'Protecting the Right to Housing in the Context of the COVID-19 Outbreak' (OHCHR 2024) https://www.ohchr.org/en/special-procedures/sr-housing/protecting-right-housing-context-covid-19-outbreak accessed 29 August 2024.
[24] Ibid.
[25] Ibid.
[26] Department for Levelling Up, Housing and Communities, 'Rough Sleeping Snapshot in England: Autumn 2023' (2024) https://www.gov.uk/government/statistics/rough-sleeping-snapshot-in-england-autumn-2023/rough-sleeping-snapshot-in-england-autumn-2023 accessed 29 August 2024.
[27] Stone (n6).
[28] Department for Work and Pensions, 'Family Resources Survey: Financial Year 2020 to 2021' (2023) https://www.gov.uk/government/statistics/family-resources-survey-financial-year-2020-to-2021 accessed 17 July 2024.

[29] Beth Stone and Emily Wertans, 'Homelessness and Disability in the UK' (Centre for Homelessness Impact 2023)25 citing Nicholas Pleace and Joanne Bretherton, *Crisis Skylight: Final Report of the University of York Evaluation* (Crisis 2017)
[30] Home Office, 'Home Office' (GOV.UK, 2024) https://www.gov.uk/government/organisations/home-office accessed 5 September 2024.
[31] Ibid.
[32] Ibid.

education, transport and the exercise of public functions. The efficacy of, "reasonable adjustments" and its impact on reducing barriers to employment will be discussed further in 4.2.

3.2 Pathologised: From "Fixing" the Individual to Removing Barriers

The rights of Disabled people, including to not be discriminated against, are the subject of the UN Convention on the Rights of Persons with Disabilities[33] (CRPD) which the UK ratified in 2009. The drafting of the CRPD was groundbreaking due both to its authorship and outcome; for the "meaningful participation" of Disabled people from the global south and for honouring the motto of the Disability Rights Movement, "nothing about us without us".[34] It was the "first internationally legally binding instrument to address specifically the rights of persons with disabilities at a global level".[35]

Further, the treaty immortalised a shift in the paradigm: unlike previous legal approaches rooted in the medical model, the CRPD adopted the social model of disability.[36] The medical model of disability frames disability as "the result of individual impairments that could be 'fixed' by medical or technical intervention".[37] This narrative was challenged by disability rights activists, arguing that it was barriers in society rather than their medical condition that disabled them.[38] Crystallising this concept, Mike Oliver named it "the Social Model" and contrasted it with the incumbent individual (or medical) model.[39]

The CRPD does not explicitly required governments to ensure new policy and law comply with it,[40] and some argue that the social model approach was not followed when drafting the Equality

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[33] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106, (CPRD).
[34] Strength and Solidarity Podcast, '26. Disability rights: How 'nothing about us without us' powered a global treaty' (19 July 2022) comments by Alberto Vasquez, Centre for Inclusive Policy in Geneva https://strengthandsolidarity.org/podcast/26-disability-rights-how-nothing-about-us-without-us-powered-a-global-treaty/ Accessed 17 July 2024.
[35] 'How 10 Years of the CRPD Have Been a Victory for Disability Rights, 6 December 2016' (The Huff Post 2016) https://www.huffpost.com/entry/how-ten-years-of-the-crpd-have-been-a-victory-for-disability_b_58473671e4b0cc9e7cf5dbdd?timestamp=1481064573703 Accessed 17 July 2024.
[36] Degener (n22), 4.
[37] Coreen A McGuire, 'What is disability history the history of?' (2024) 22(5) *History Compass*
[38] UPIAS, 'Fundamental Principles of Disability' (London: Union of the Physically Impaired Against Segregation 1976).
[39] Mike Oliver, 'The social model of disability: thirty years on' (2013) 28(7) Disability & Society 1024.
[40] House of Lords Library, 'Disability Discrimination Act: 1995 and Now, 6 November 2020' (2024) https://lordslibrary.parliament.uk/disability-discrimination-act-1995-and-now/ accessed 17 July 2024.

Act.[41] The UK act considers that any "hindrance" experienced by a Disabled person "results entirely from the impairment" and "anchors itself firmly in the medical or individual model of disability".[42] The Equality Act[43] combined 116 separate pieces of legislation, "harmonising protection"[44] for nine protected characteristics, including disability, and rendered the DDA obsolete. The Equality Act[45] incorporates a duty to reduce socioeconomic inequalities (which often disproportionately impact those with protected characteristics). However, critics argue that the Act has not gone far enough to remove barriers preventing disabled people from engaging fully in society.[46]

3.3 Pitied: From an Individualised to a Societal Approach

Although leading national and international organisations[47] have rejected the medical model, the transition to the social model has been neither seamless nor without its critics. Three decades after he named the concept, Oliver wrote that, "almost from the beginning, critics of the social model began to emerge. Initially these came from the major disability charities".[48] Questioning whether it was "simplistic and possibly misleading",[49] Shakespeare also highlighted the argument put forth by several Feminist disability scholars that, as a model, it "excluded many dimensions of personal experience, particularly issues relating to impairment and identity".[50] Degener hails the social model of disability as summarising the success of the Convention. However, she has sought to develop the model further, into a human rights model of disability.[51] Distinguishing the two models, she explains that, while the former addresses CP rights of inclusion, the latter also empowers disabled people in terms of ESC rights, emphasising the importance of shelter and employment for Disabled people.[52]

As part of their efforts to monitor the UK's implementation of the CRPD, the CommRPD published a review in 2017 of the progress made by the UK on its treaty obligations. The head

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[41] Equality Act 2010.
[42] Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40(4) Industrial Law Journal 359, 364.
[43] Equality Act 2010.
[44] Equality and Human Rights Commission, 'Equality Act 2010: The Purpose of the Equality Act' (August 2018) https://www.equalityhumanrights.com/equality/equality-act-2010 accessed 24 August 2024.
[45] Equality Act 2010.
[46] House of Lords Library (n40).
[47] The UN, the World Health Organisation and Disability Rights UK among others.
[48] Oliver (n39), 1025.
[49] Tom Shakespeare, 'Social Models of disability and other life strategies' (2004) 6(1) Scandinavian Journal of Disability Research 8, 12.
[50] Ibid, 13.
[51] Degener (n22).
[52] Degener (n22), 4.

of the treaty body concluded that the UK Government's social cuts "had led to a human tragedy as they had completely disregarded vulnerability".[53] The inquiry also drew attention to the "continued gaps in legal protection provided by the Equality Act 2010",[54] calling into question both the UK government's action and inaction in addressing barriers faced by Disabled people.

4 Financial and Physical Barriers

A British Disabled person is more likely to be living in poverty than their non-disabled counterpart. There are several reasons for this disparity. One is the cumulative effect of the extra, disability and ill-health-related costs that Disabled people often incur.[55] Another is that multiple barriers to employment mean that Disabled people are much less likely to be in paid work.[56] Further, as a marginalised group, Disabled people are disproportionately likely to experience in-work poverty.[57] Consequently, Disabled people, and the households in which they live, often depend on benefit payments and the welfare state.[58] As a result, "households containing a person in receipt of disability benefits are more heavily impacted by reforms than other households".[59] A "chronic shortage of accessible homes"[60] is a further barrier Disabled people must overcome to access safe, secure housing. This section will consider to what extent the Government has taken effective action to mitigate these barriers.

4.1 The Disability Price Tag

The disability price tag (DPT), is defined by Scope as "the additional amount of money a disabled household would need to have the same standard of living of a non-disabled

[53] United Nations Office at Geneva, 'Meeting Summaries: Committee on the Rights of Persons with Disabilities Reviews Report of the United Kingdom: 24 August 2017' (2017) https://www.ungeneva.org/en/news-media/meeting-summary/2017/08/committee-rights-persons-disabilities-reviews-report-united accessed 2 September 2024.
[54] Ibid.
[55] Leticia Veruete-McKay and Others, 'The disability price tag: Summary report 2023' (SCOPE, 2023).
[56] House of Commons Work and Pensions Committee, 'Disability employment gap: Second Report of Session 2021-22' (House of Commons, 30 July 2021).
[57] James Richards and Kate Sang, 'The intersection of disability and in-work poverty in an advanced industrial nation: The lived experience of multiple disadvantages in a post-financial crisis UK' (2019) 40(3) Economic and Industrial Democracy, 636.
[58] Joseph Rowntree Foundation, 'UK Poverty 2024: The essential guide to understanding poverty in the UK' (JRF, 2024), 66.
[59] Policy in Practice, 'The Cumulative Impacts of Welfare Reform: A National Picture' (Policy in Practice, August 2017), 6.
[60] Equality and Human Rights Commission, 'Housing and disabled people: Britain's hidden crisis' (EHRC, May 2018), 7.

household".[61] The DPT comprises three key elements: the cost of specialist equipment, products or services that Disabled people require; the need to spend more on everyday things such as having groceries delivered; as well as the increased cost incurred due to higher usage of essential items including utilities.[62] The second and third elements are compounded due to Disabled people being more at risk of poverty and the consequent poverty premium.[63] The cumulative effect is that, on average "disabled households (with at least one disabled adult or child) need an additional £975 a month to have the same standard of living as non-disabled households".[64]

Many Disabled people must pay for specialist essential products and services. These include, "powered wheelchairs or … physiotherapy".[65] This "disability premium", is "caused by inequality, rather than by disability itself".[66] Their description echoes a social model of disability approach, viewing disability as something for society to address, rather than the individualised approach of the medical model.[67] It could be argued that the current approach sees the DPT as an individual's burden. The second and third elements of the DPT relate to how it often costs Disabled people more to use "every day" products and services,[68]

> "People just daren't turn the heating on because of the cost. But if you've got … your wheelchair to charge, you've got a hoist you've got to charge…"[69] (Disability VCSE Worker)

The effect of DPT on Disabled people is compounded by structural discrimination, the poverty premium and the unequal impact of the COVID-19 pandemic.[70] "The Inequality of Poverty"[71] investigates the connection between the poverty premium and protected characteristics and

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[61] Veruete-McKay (n55), 3.
[62] Veruete-McKay (n55).
[63] The 'Poverty Premium' refers to the idea that those living in poverty pay more for essential goods and services. For further details, see: 'Research: Reducing the Poverty Premium' (University of Bristol 2024) < https://www.bristol.ac.uk/research/impact/poverty-premium---sara-davies/#:~:text=The%20Poverty%20Premium%20is%20a,for%20essential%20goods%20and%20services.> accessed 7 September 2024.
[64] Veruete-McKay (n55), 3.
[65] Joseph Rowntree Foundation (n60), 66.
[66] S Davies and D Collings, 'The Inequality of Poverty: Exploring the link between the poverty premium and protected characteristics' (The University of Bristol PFRC, Feb 2021) 31.
[67] Oliver (n39).
[68] Davies (n66), 31.
[69] VCSE (Disability) Chief Executive (Yorkshire, Friday 12 July 2024).
[70] World Bank Group, 'Chapter 1. The Economic Impacts of the COVID-19 Crisis' (2024) https://www.worldbank.org/en/publication/wdr2022/brief/chapter-1-introduction-the-economic-impacts-of-the-covid-19-crisis accessed 5 September 2024.
[71] Davies (n66).

concluded that disability, is associated with an increased risk of poverty in the UK. Nearly half of households in poverty include a Disabled person, making additional financial burdens harder to manage. Since 2016–17, UK inflation has driven up the cost of food and essentials, disproportionately affecting Disabled households, which spend a larger share of their budget on these necessities .[72] Further, Disabled people in poverty often rely on expensive pre-payment meters[73] and are "more likely to lack digital capability"[74] and so be at a disadvantage as often the "best deal" is online.[75] These elements combine to reduce a Disabled person's financial flexibility and increase the barrier to accessing secure housing.

The government acts as "the guarantor of fairness within the welfare system".[76] Many Disabled people, and the households in which they live, depend on benefit payments and the welfare state.[77] Successive UK governments have expanded benefits and protections available to its Disabled citizens, theoretically improving their daily lives. However, following fourteen years of austerity and a ten-year period (2010–20) in which the UK Social Security system underwent several changes,[78] the benefits and government support now available to Disabled people, including those living in poverty, has changed. The Department for Work and Pensions (DWP) explained that these changes were to create a benefits system that "rewards work, and … helps people lift themselves out of poverty, and stay out of poverty".[79] However, "households containing a person in receipt of disability benefits are more heavily impacted by reforms than other households"[80] with those in receipt of certain benefits losing more than £50 weekly.

In its review of the DWP,[81] a House of Commons Select Committee (the Committee) raised several concerns about their approach and how it impacts Disabled people. The Committee concluded that the Work Capability Assessment intended to determine whether a person is medically 'fit for work' was not a satisfactory tool and that Job Centre Plus (JCP), the client-

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[72] Veruete-McKay (n55).
[73] Davies (n66).
[74] Davies (n66), 8.
[75] Davies (n66), 8.
[78] Ian Green, Secretary of State for Work and Pensions, 'From welfare state to welfare system' (Reform Conference, London, 16 November 2016) <From welfare state to welfare system – GOV.UK (www.gov.uk)> accessed 3 September 2024.
[77] Joseph Rowntree Foundation (n58), 66.
[78] House of Commons Library, 'The Aims of Ten Years of Welfare Reform (2010–2020)' (2020) https://commonslibrary.parliament.uk/research-briefings/cbp-9090/ accessed 29 August 2024.
[79] Department for Work & Pensions, 'DWP Reform: DWP's Welfare Reform agenda explained' (DWP February 2015) <https://assets.publishing.service.gov.uk/media/5a808d5ce5274a2e8ab50cc5/dwp-reform-agenda-explained-1-feb-2015.pdf> accessed 29 August 2024.
[80] Policy in Practice, 'The Cumulative Impacts of Welfare Reform: A National Picture' (*Policy in Practice*, August 2017), 6.
[81] Work and Pensions Committee (n56).

facing part of the Department, was not itself accessible to Disabled people. As well as citing examples of British Sign Language users not being provided with an interpreter and visually impaired people not receiving help from staff, the Committee advised that JCP staff should be given disability training on different impairments. As a public sector organisation, JCP has an anticipatory duty to provide reasonable adjustments.

4.2 The Disability Employment and Pay Gap

"Gaining paid employment still is a massive challenge."[82] (Disability VCSE Worker)

"Disabled people are considerably less likely to be in employment than non-disabled people."[83] While acknowledging a five percentage point reduction in the disability employment gap (DEG) over the preceding eight years and an increase in the number of Disabled people in employment, the Committee explained that the existing gap is the result of "unacceptable barriers" to Disabled people gaining, retaining and improving their employment.[84] To contextualise further, there is a higher number of people reporting that they are Disabled and a general uptick in the UK labour market.[85] As of July 2021, the DEG was just under thirty percentage points. However, this statistic does not elucidate the disability pay gap (DPG) or how the DEG impacts people with different impairments. The Committee recommends that government improves the quality of data it collects regarding the employment status of people with specific impairments as the DEG is in fact wider for, "people with learning disabilities, mental health problems and epilepsy, and people with multiple health conditions".[86]

> "It just seems to be a reluctance and fear of employing disabled people."[87] (Disability VCSE Worker)

Complex and nuanced, the DEG results from exterior walls barring entry to Disabled people as well as social injustice[88] and in-work poverty[89] that prevent Disabled people from sustaining their employment. The DPG reflects barriers to career progression, not just employment access.[90] The DPG refers to "the difference between how much disabled employees are paid,

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[82] VCSE (Disability) Chief Executive (Yorkshire, Friday 12 July 2024).
[83] Work and Pensions Committee (n56), 5.
[84] Ibid, 3.
[85] Ibid.
[86] Ibid, 9.
[87] VCSE (Disability) Chief Executive (Yorkshire, Friday 12 July 2024).
[88] Rupert Harwood, 'What Has Limited the Impact of UK Disability Equality Law on Social Justice?' [2016] 5 Laws <https://www.mdpi.com/2075-471X/5/4/42> accessed 20 July 2024.
[89] Richards (n57).
[90] Work and Pensions Committee (n56), 12.

on average, compared to their non-disabled counterparts"[91] and according to the TUC it, along with the DEG, comprises the "double discrimination" that Disabled people face at work.[92] The pay gap rose from 15.5% in 2019 to 19.6% in 2020,[93] and might be viewed as one reason why, "[i]n-work poverty disproportionately impacts…the disabled".[94]

The government addressed work place discrimination, first through the DDA and later the Equality Act,[95] with the codification of a duty by an employer to make reasonable adjustments (the Duty) should the "Disabled person concerned [be] at a substantial disadvantage in comparison with persons who are not disabled".[96] This duty, has been described as "ill-equipped to achieve its original purpose".[97] Harwood draws this conclusion having determined "a strong reluctance to make reasonable adjustments for workers on zero hours contracts" and a fear amongst Disabled workers that enforcing their right to reasonable adjustments may lead to dismissal and benefit sanctions.[98]

The definition of 'disability' employed by the DDA[99] and subsequently the Equality Act[100] has been repeatedly criticised as too narrow and reflecting a medicalised approach,[101] citing the exclusion of those who have one-off or short-term impairments.[102] It is also argued that not all workers who are covered by the Act are aware of this fact and due to the emphasis on medical evidence, some workers struggle to convince their employer that they are disabled.[103] It has also been highlighted that some provisions of the Equality Act have not (yet) been brought into effect, including a provision providing legal protection to those with two or more protected characteristics.[104] It is further argued that the Duty could be strengthened by requiring the employer to assess the work environment with reference to the (prospective) employee in

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[91] Ibid, 18.
[92] Ibid.
[93] Trades Union Congress, 'Written Evidence to Parliamentary Committees' (*Written evidence from the Trades Union Congress (TUC) (DEG0134)* < https://committees.parliament.uk/writtenevidence/19223/pdf/> accessed 22 July 2024.
[94] Richards (n57), 636.
[95] Equality Act 2010.
[96] Disability Discrimination Act 1995, c.50, Part II, Employment, Section 4A (1).
[97] Harwood (n88), 42.
[98] Ibid.
[99] Disability Discrimination Act 1995.
[100] Equality Act 2010.
[101] Harwood (n88); Colin Barnes, 'Disability Activism and the Struggle for Change' (2007) 2(3) *Education, Citizenship and Social Justice* 203; Carol Woodhams and Susan Corby, 'Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act 1995' (2003) 32(2) *Journal of Social Policy* 159.
[102] Harwood (n88), 49.
[103] Harwood (n88).
[104] Harwood (n88).

question and anticipate potential reasonable adjustments as is the case with public sector organisations.[105]

Richards and Sang concluded that disability and in-work poverty were "inextricably linked"[106] and, rather than mitigate disadvantages experienced, employers were considered to have created barriers and agreed only to "minimal reasonable adjustments".[107] Rather than incorporating less taxing duties, allowing more rest breaks and taking a more flexible approach to how tasks were carried out, by treating Disabled workers exactly as their non-disabled counterparts and not accounting for their less-than-ideal health, half of those interviewed were not able to increase their hours and therefore their income.[108] Whether a consequence of its formation or execution, ineffectiveness of the Duty is seen here to be limiting entry to, and success within, the workplace for Disabled people. Unemployment or in-work poverty will only increase reliance on the Welfare System and compound economic barriers to accessing housing.

4.3 Inaccessible Housing

The EHRC described housing as the cornerstone of independent living,[109] a right that is enshrined in the UN Convention on the Rights of Persons with Disabilities.[110] For a Disabled person, an inaccessible home can lead to: mobility problems, the indignity of not being able to live independently, poorer mental health, being four times less likely to be in work and feelings of social isolation and anxiety.[111]

> "She cannot leave her flat unless someone physically picks her up and carries her out."[112] (Disability VCSE Worker)

In 2020, the Government committing to 'raising accessibility standards for new homes', mandating that the minimum standard for all new homes be elevated to M4(2),[113] which refers to Category 2 – accessible and adaptable dwellings. However, the Government failed to

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[105] Public Health England, 'Reasonable Adjustments: A Legal Duty' (September 2020) https://www.gov.uk/government/publications/reasonable-adjustments-a-legal-duty/reasonable-adjustments-a-legal-duty accessed 18 August 2024.
[106] Richards (n57), 652.
[107] Ibid, 653.
[108] Ibid.
[109] Ibid.
[110] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106, (CPRD).
[111] Equality and Human Rights Commission (n60), 5.
[112] VCSE (Disability) Chief Executive (Yorkshire, Friday 12 July 2024).
[113] Ibid.

implement this, leading to the House of Commons Levelling Up, Housing and Communities (LUHC) Committee expressing its disappointment.[114] While acknowledging that England has the oldest housing stock in Europe, the LUHC Committee nevertheless highlighted the findings of the EHRC report, including that a lack of accessible homes had left disabled people "demoralised and frustrated".[115] The result is that only 7% of homes in England meet the basic accessibility requirements[116] and with the current default requirements for new build homes in most of the country guaranteeing neither accessibility nor adaptability, the EHRC have labelled this a crisis.[117]

Long, if not indefinite, waiting time have confined Disabled people to one or two rooms without access to proper bathing facilities resulting in an increased reliance on social care and family members, accidents and hospital admissions, often culminating in serious deterioration in mental wellbeing.[118] The expectation is that local authorities (Las) will build homes to meet the needs of those within their borders but there is an insufficient number of accessible homes. National data shows that the number and proportion of Disabled people is increasing with a rise from 11.9 million (19%) in 2013–14 to 16.1 million (24%) in 2016,[119] and evidence shows that accessible housing results in savings on health and social care and future adaptations.[120] However, the lack of "good" data available[121] is perhaps a reason why few LAs set targets for accessible housing. Building accessible housing is initially more expensive (£1,100 more on average) and therefore unappealing to developers. However it is significantly less expensive than retroactively adapting a property.[122] This is a possible reason for the report's finding that 68% of LAs reported that developers did not comply with accessibility regulations.[123]

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[114] House of Commons Levelling Up, Housing and Communities Committee, 'Disabled people in the housing sector: Seventh Report of Session 2023-24' (House of Commons, 20 May 2024), 20.
[115] Ibid, citing: Equality and Human Rights Commission, 'Housing and disabled people: Britain's hidden crisis' (EHRC, May 2018).
[116] Levelling Up, Housing and Communities Committee (n114), 20.
[117] Equality and Human Rights Commission (n60).
[118] Equality and Human Rights Commission (n60) 6.
[119] ONS (2014), 'Family Resources Survey 2012 to 2013'. Available at: https://assets.publishing.service.gov.uk/media/5a74de8240f0b65f61322e4f/family-resources-survey-statistics-2012-2013.pdf [accessed 19 August 2024]; ONS (2024) 'Family Resources Survey: financial year 2022 to 2023', Available at: Family Resources Survey: financial year 2022 to 2023 – GOV.UK (www.gov.uk) accessed 19 August 2024.
[120] Equality and Human Rights Commission (n60).
[121] Ibid, 7.
[122] Ibid, 25.
[123] Equality and Human Rights Commission (n60), 8.

Nevertheless, evidence suggests that if the more accessible regulations became industry standard, the difference in costs would eventually become negligible.[124]

Both the LUHC Committee and the EHRC report highlight the proportion of Disabled people currently living in unsuitable accommodation;[125] as such, more immediate solutions are necessary, in the form of adaptations to existing homes. Disabled Facilities Grants (DFGs) support adaptations but face delays, averaging twenty-two weeks.[126] Problems with adaptations are particularly acute within the private rental sector (PRS). A 2018 External review determined that the process was, "slow and cumbersome";[127] the upper limit of £30,000 was too restrictive and often resulted in cheaper, ineffective solutions being adopted. Further, a higher proportion of grants goes to those in social housing, despite Disabled people increasingly being housed in the PRS.

"A year [wait time] for Disabled Facilities Grant, and they don't seem at all ashamed about it."[128] (Disability VCSE Worker)

Reasons why a third of Disabled people living in the PRS are currently living in unsuitable accommodation include a conflict with tenancy duration. DFGs are intended as a long-term solution and require the applicant to have a tenancy of at least three years.[129] However, many private landlords are only able to offer tenancies of a year or less, meaning that their tenants do not qualify.[130] Further, both the EHRC and LUHC Committee reports included examples of private landlords refusing to support DFG applications, with common areas being a key source of contention. Considering that Disabled people on average must pay more to achieve the same standard of living,[131] but that they are less likely to be in employment and, if they are, more likely to be paid less than their non-disabled peers,[132] they are far less likely to be able to subsidise adaptations to their homes themselves.

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[124] Ibid; Women and Equalities Committee (2017), 'Building for Equality: Disability and the Built Environment'. Available at: https://www.parliament.uk/business/committees/committeesa-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/ disability-and-the-built-environment-16-17> accessed 19 August 2024.
[125] Equality and Human Rights Commission (n60), 8.
[126] Housing Grants, Construction and Regeneration Act 1996 Pt 1 Ch 1 Disabled Facilities Grants.
[127] Sheila Mackintosh et al., 'Disabled Facilities Frant (DFG) and Other Adaptations: External Review' (UWE Bristol December 2018), 3.
[128] VCSE (Disability) Chief Executive (Yorkshire, Friday 12 July 2024).
[129] Equality and Human Rights Commission (n60), 43.
[130] Ibid.
[131] Veruete-McKay (n57).
[132] Work and Pensions Committee (n14).

5 Invisible Disability

> "hidden disabilities … people think they should be able to just get on with."[133] (Homelessness VCSE Worker)

5.1 Mental Illness

> "It feels like 99% of the people that come to us struggle with their mental health."[134](Homelessness VCSE Worker)

Homeless people are more likely to experience mental illness than members of the general population.[135] A 2021 review called for healthcare services to revisit how they assess, treat and follow up homeless people.[136] The review outlined not only the harm that could be avoided by addressing mental ill health but also the fact that, in many cases, mental illness is treatable and such treatment could help to address health inequalities. The prevalence of psychiatric morbidity among homeless individuals varies depending on the type of homelessness they are experiencing, be it the use of temporary leased accommodation, staying in night shelters or special hostels or sleeping rough, but mental disorders were particularly prevalent amongst those staying in homeless hostels.[137] There was also variation in the types of mental illnesses experienced with depression, affective disorders, substance dependence, psychotic disorders, schizophrenia and personality disorders being the most commonly occurring. A higher frequency of mentally ill individuals at emergency shelters and hostels has led many to argue that providing mental health training to emergency shelter and hostel staff could increase reach and improve interactions for both staff and service users.[138]

> "How do you cope with [mental health] … If you live in a large hostel?"[139] (Homelessness VCSE Worker)

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[133] VCSE (Homelessness) Former Head of Governance (West Midlands, Tuesday 2 July 2024).
[134] VCSE (Homelessness) Worker 1 (Yorkshire, Friday 14 June 2024).
[135] Seena Fazel, John R Geddes and Margot Kushel, 'The health of homeless people in high-income countries: descriptive epidemiology, health consequences, and clinical and policy recommendations' (2014) 384 The Lancet 1529.
[136] Stefan Gutwinski et al, 'The Prevalence of Mental Disorders Among Homeless People in High-Income Countries: An Updated Systematic Review and Meta-Regression Analysis' (2021) 18(8) *PLOS Medicine* <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1003750> accessed 3 August 2024.
[137] Bernice Prinsloo, Catherine Parr and Joanne Fenton, 'Mental Illness Among the Homeless: Prevalence Study in a Dublin Homeless Hostel' (2012) 29(1) *Irish Journal of Psychological Medicine* 22
[138] Ibid, 22.
[139] VCSE (Homelessness) Worker 2 (Yorkshire, Thursday 27 June 2024).

Despite the acuteness of their vulnerability and need, a 2019 article found that homeless individuals are more likely to have problems accessing healthcare; underlining the assertion that this population are "among the most marginalised and vulnerable in society";[140] detailing the acute prevalence of physical ailments, mental disorders, addiction, victimisation, early childhood trauma, and incarceration.[141] The literature identifies homeless individuals who are mentally ill as experiencing specific additional barriers due to their housing insecurity that in turn exacerbates their health status, particularly in terms of accessing care services in the community following discharge from hospital.[142] A homeless person is forty times less likely to be registered with a GP.[143] Lack of access to primary care settings was shown not only to impact the health care infrastructure, as it increased the chance that someone would attend Accident and Emergency, but also the quality and standard of living due to untreated psychiatric and physical health problems compromising social integration and employment.[144]

> "Mental health is caused by homelessness and homelessness causes mental health."[145] (Homelessness VCSE Worker)

5.2 Dual Diagnosis

> "People who are homeless… their main things will be addiction and physical and mental health"[146] (Homelessness VCSE Worker)

Substance dependence is incorporated as a mental illness and therefore a disability by the American Psychiatric Association (APA) and the World Health Organisation (WHO);[147] but it is excluded from the definition of disability in most circumstances by the Equality Act 2010. This exclusion also differs from the approach adopted by the CRPD,[148] which does not preclude such conditions from its remit. The approach of the Act was questioned at the time by the UK Drug Policy Commission (UKDPC – no longer in operation) as to whether it was fair to problem drug users, considered one of the most disadvantaged groups in society, with 80% not

[140] Christian Schütz and others, 'Living with Dual Diagnosis and Homelessness: Marginalized Within a Marginalized Group' (2019) 15(2) Journal of Dual Diagnosis 88, 88.
[141] Ibid; Fazel (n135).
[142] Prinsloo (n137).
[143] Ibid.
[144] Ibid.
[145] VCSE (Homelessness) Worker 2 (Yorkshire, Thursday 27 June 2024).
[146] Ibid.
[147] Simon Flacks, 'Deviant Disabilities: The Exclusion of Drug and Alcohol Addiction from the Equality Act 2010' (2012) 21(3) Social and Legal Studies 395.

[148] CRPD (n33).

in employment. The UKPDC highlighted the frequent co-occurrence of physical and mental health problems alongside substance use. However, this argument was not mentioned during the parliamentary debates preceding the enactment of the Equality Bill.[149] In contrast, in the USA, Australia, and Canada, alcohol and drug dependence are not explicitly excluded from the definition of disability.[150]

> "I visited hostels which actually had drug dealers living in [them] … what we've got is a system that is not fit for purpose."[151] (Homelessness VCSE Worker)

Substance dependence, and its definition, is a political as well as a legal issue, with public opinion at least a consideration, if not a deciding factor.[152] According to the Royal College of Psychiatrists, those experiencing drug and alcohol addiction, alongside people with schizophrenia, are those most stigmatised among those with mental ill health.[153] This high level of stigma has been attributed by some to perceptions of greater blameworthiness or danger compared with other types of mental illness.[154] Further, some ascribe a loss of self-control or even a "disease of the will"[155] to those who are dependent on addictive substances. A dichotomy between disability and substance dependence is theorised by Schneider and Ingram who contrast two groups – *dependents [sic]* – which includes Disabled people, is viewed positively, while the other – *deviants* – including "drug addicts", is perceived negatively.[156] While this is a theoretical work, there is evidence that the public do indeed view these two groups differently: an Australian court ruling that was consistent with opioid dependency being considered a disability was met with outrage from the national media, with newspaper articles denouncing those experiencing addiction as "junkies" and "enemies of society".[157]

Although its existence is widely acknowledged, the source of the stigma is disputed. It has been argued that the stigma is exacerbated by punitive drug policies and rhetoric surrounding the

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[149] Flacks (n147).
[150] Ibid.
[151] VCSE (Homelessness) Worker 3 (West Midlands, Thursday 27 June 2024).
[152] 'The Overton Window' (Mackinac Center for Public Policy 2019) < https://www.mackinac.org/OvertonWindow> accessed 5 September 2024.
[153] Flacks (n149) 399 citing AH Crisp, M Gelder and E Goddard, 'Stigmatization of people with mental illness: A follow-up study within the Changing Minds campaign of the Royal College of Psychiatrists' (2005) 4 World Psychiatry 1106.
[154] Flacks (n147), 399.
[155] Flacks (n147), 400 citing M Valverde, *Diseases of the Will: Alcohol and Dilemmas of Freedom* (Cambridge University Press 1998).
[156] Anne Schneider and Helen Ingram, 'Social Construction of Target Populations: Implications for Politics and Policy' (1993) 87(2) The American Political Science Review 334.
[157] Flacks (n147), 400.

links between drug and alcohol use and crime. Flacks[158] cites, as an example, the UK Government 2010 Drug Strategy, in which the then Home Secretary described substance dependence as a key cause of, "societal harm, including crime, family breakdown and poverty".[159] Alternative theories consider the role that the perception of "choice" plays, leading to the idea of people being "deserving" and "undeserving" or the idea of reversibility should someone experiencing addiction "choose" to stop.[160] For others, it is the exclusion from legal protection itself that attaches stigma.[161]

The philosophical argument must be accompanied by an examination of the reality for a significant proportion of homeless individuals who are both dependent on an addictive substance and have a mental illness, a combination which is described as dual diagnosis.[162] Concurrent mental ill health and substance abuse disorders are particularly prevalent in the homeless population,[163] and there is a strong correlation with those who are chronically homeless.[164] Compared with other members of the homeless population, itself a marginalised group, those with dual diagnosis were often more vulnerable with even more complex needs.[165] The prevalence of dual diagnosis may even be underestimated given that a lot of research centres on those living in homeless shelters, whereas those who are sleeping rough are more likely to be affected.[166] Additionally, a 2019 study found that individuals with dual diagnosis were more likely to have problems accessing the health care system and were less likely to receive optimal care. These findings corroborated the existing literature.[167]

In contrast to the prevalence and acuity of dual diagnosis, studies have shown that many services intended for use by homeless individuals are not designed to address the reality of concurrent substance dependence and mental illness.[168] A systematic review of clinical

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[158] Ibid.
[159] HM Government Drug Strategy (2010) 'Reducing Demand, Restricting Supply, Building Recovery: Supporting People to Live a Drug Free Life' (London: Home Office) 2.
[160] Flacks (n147).
[161] Flacks (n147), 404.
[162] Schütz (n140); Sam Tsemberis, Leyla Gulcur and Maria Nakae, 'Housing First, Consumer Choice, and Harm Reduction for Homeless Individuals With a Dual Diagnosis' (2004) 94(4) *American Journal of Public Health* 651
[163] Schütz (n140).
[164] Tsemberis (n162).
[165] Schütz (n140).
[166] Ibid.
[167] Schütz (n140).
[168] Tsemberis (n162); Ray Alsuhaibani et al, 'Scope, Quality and Inclusivity of International Clinical Guidelines on Mental Health and Substance Abuse in Relation to Dual Diagnosis, Social and Community Outcomes: A Systematic Review' (2021) 21 *BMC Psychiatry* 209 <https://bmcpsychiatry.biomedcentral.com/articles/10.1186/s12888-021-03188-0> Accessed 3 August 2024.

guidelines advocated for more person-centred and integrated care, given the "very high co-prevalence" of substance use disorder and severe mental illness, highlighting the lack of consideration for coexisting disorders.[169] The Review's conclusion echoes the finding of a 2011 study in Dublin where services distinguished themselves as either addressing psychiatric illness or addiction, without considering possible opportunities for collaboration, the need for which remains particularly acute.[170]

Given the high prevalence of substance dependence among Disabled homeless people,[171] a failure to adequately treat and support those with drug and alcohol addiction will disproportionately impact Disabled people, impeding their route out of homelessness. Dual diagnosis was mentioned multiple times by the research participants interviewed. In addition to highlighting its pervasiveness, they referenced the reduction of financial investment in specialist services that had proved effective during previous policy approaches.[172]

> "Where a worker would have had … 12 clients, a worker on average now in most Drug services, it's about 90."[173] (Homelessness VCSE Worker)

Alongside offering a theory for the resurgence in homelessness after the significant reduction in the early 1990s, the participant added that drug services had had a dual role as the "first line"[174] in mental health support, with workers often identifying a psychiatric condition in addition to substance dependence. As such, it can be argued that reduced funding for drug services reduces the opportunities to identify and support those with mental ill health. If substance dependence is indeed a mental illness, then the Equality Act excludes a significant number of Disabled people from the legal protection it can provide.

6 UK Approaches to Housing and Homelessness

Levels of housing and homelessness over the last thirty-five years have fluctuated amid Government interventions and global economic downturns. In the late 1980s and early 1990s, the Government addressed rising numbers of rough sleepers with the successful Rough Sleeping Initiative (RSI). Following the economic crash in 2008, the ensuing recession,

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[169] Alsuhaibani (n168), 209.
[170] Prinsloo (n137), 23.
[171] For example, in one study, more than a third of individuals with Intellectual Disability ascribed their homelessness to substance dependence: Cécile Mercier and Sylvie Picard, 'Intellectual Disability and Homelessness' (2011) 55(4) *Journal of Intellectual Disability Research* 441
[172] See 6.1.
[173] VCSE (Homelessness) Worker 2 (Yorkshire, Thursday 27 June 2024).
[174] VCSE (Homelessness) Worker 2 (Yorkshire, Thursday 27 June 2024).

consequent austerity measures and welfare reform, rough sleeping increased again, and the Conservative government responded with the Homelessness Reduction Act in 2017. Exploring new methods, the government also funded three regional pilots of Housing First,[175] an approach designed to tackle chronic homelessness, which is strongly associated with individuals who have a dual diagnosis.[176]

6.1 The Rough Sleeping Initiative

While a statutory duty to house homeless people was first introduced in 1977,[177] the RSI was a policy strategy of a Conservative government, introduced in 1990, which, it is argued, came closest to achieving functional zero homelessness.[178] The initiative was, initially, a £30 million, three-year programme to fund outreach and resettlement workers as well as emergency hostel places and other temporary and permanent accommodation in London.[179] The RSI was extended twice, with the final extension expanding the reach nationwide. A lack of data regarding geography and the scale of the problem on a national level impeded the allocation of budgets.[180] Shortly after the start of the third and final phase, there was a change of government, but the initiative ran its course until 1999.

In 1998, under the now Labour government, a newly created group, the Social Exclusion Unit, released a report identifying unemployment, low incomes and intergenerational poverty as wider, structural causes of homelessness as well as individual factors such as mental ill health, addiction and family breakdown.[181] Taking a preventative approach, the Unit recommended provisions for care and prison leavers as well as an inter-agency approach at the local level to be coordinated nationally.[182]

The Rough Sleepers Unit (RSU) was set up in 1999, tasked with reducing rough sleeping in England by two thirds within three years, in fact meeting its target within twenty-four months.[183] The scheme used a combination of methods that included hiring mental health and addiction services specialists as well as taking a preventative approach regarding care and

[175] Emily Batchelor, '"It's like a dream come true" An inquiry into scaling up Housing First in England' (APPG for Ending Homelessness, Crisis, 2021), 3.
[176] Tsemberis (n162).
[177] The Housing (Homeless Persons) Act 1977.
[178] Matt Downie, 'Everybody In: How to end homelessness in Great Britain' (London: Crisis 2018), 51.
[179] Wendy Wilson, 'Rough Sleepers Initiative (RSI) 1990 – 1999' (House of Commons Library, Standard Note SN07121 2015).
[180] Downie (n178), 175.
[181] Ibid.
[182] Ibid.
[183] Downie (n178), 176.

prison leavers.[184] Its early success has been, at least partially, attributed to the political importance it was assigned; the Government department was managed by the deputy prime minister with a direct reporting line to the prime minister.[185]

A year after the RSU met its ambitious target,[186] the government took a legislative approach to the issue of homelessness, enacting the Homelessness Act.[187] The 2002 Act put more responsibility on LAs, requiring them to "take a more strategic, multi-agency approach to the prevention of homelessness and the provision of accommodation for homeless people".[188] While the stated intention was to improve protection for homeless individuals and the Act encouraged a preventative approach while strengthening the duties owed to them, it was emphasised that the duty was owed to people who were homeless "through no fault of their own".[189]

> "[the] Housing Options Team get 260 contacts a week for people … that's a lot of people that are at crisis point."[190] (LA Worker)

One preventative element was the introduction of Housing Options, increasing the breadth of advice and assistance available. The proactive approach of Housing Options has been praised, although LAs are restricted to the social housing they have available or the decreasing number of properties in the PRS which are affordable. Further, under the 2002 Act,[191] the relief duty, but not the duty to prevent, was encompassed by the statutory framework and, as such, created an asymmetry between the prevention duty and the relief duty.

6.2 The Homelessness Reduction Act 2017

[184] Downie (n178), 176.
[185] Emma Norris, 'What Angela Rayner's new homelessness unit can learn from New Labour' (*Institute for Government*, 12 June 2024) < https://www.instituteforgovernment.org.uk/comment/angela-rayner-homelessness-unit > accessed 29 August 2024.
[186] Ibid.
[187] Homelessness Act 2002.
[188] 'Homelessness Act 2002 Explanatory Notes' (legislation.gov.uk) < https://www.legislation.gov.uk/ukpga/2002/7/notes#:~:text=The%20Act%20requires%20local%20housing,no%20fault%20of%20their%20own.> accessed 29 August 2024.
[189] Ibid.
[190] Local Authority Worker #3 (Yorkshire, Friday 12 July 2024).
[191] Homelessness Act 2002.

> "The intention is great, because I do think we could, should do more to prevent homelessness… But I think we always tried to prevent homelessness, even when there wasn't a legal duty to do it."[192] (Homelessness VCSE Worker)

The Homelessness Reduction Act (HRA) 2017 was hailed as representing "the most significant reform" of the previous four decades regarding the "duties of local authorities towards people experiencing homelessness".[193] The HRA went some way to redress the imbalance between the prevention and relief duties with a statutory prevention duty that was extended to fifty-six days. Further, the Act compelled LAs to develop a personalised plan for individuals experiencing, or threatened with, homelessness.[194] The HRA, came in the wake of the Welfare Reform Act 2012 and evolved from proposals put forth by a panel of industry experts,[195] and many LAs.[196] However, concerns and criticisms have since been levied on a range of aspects. The government initially allocated £72.7 million to LAs, which contrasts starkly with the £2.44 billion that was spent by LAs in 2022–23 on homelessness services.[197]

> "We've got a lack of [housing] stock. That is a really protracted process at the moment, talking months, and months and months."[198] (LA Worker)

More concerns, both practical and philosophical, were forthcoming. A critical analysis of the Act's application in the West Midlands, following interviews with various VCSE sector homelessness organisations as well as staff at Coventry City Council, acknowledged the "mixed responses from both policy makers and organisations".[199] The report highlighted participant concerns regarding insufficient financial resources and a lack of available housing relating to relationships between the council, homelessness organisations and private landlords, as well as a call to abolish the priority status.[200] Bevan, too, highlights the significance of the HRA, calling it groundbreaking, but argues that in practice, it is "contributing to, rather than

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[192] VCSE (Homelessness) Former Head of Governance (West Midlands, Tuesday 2 July 2024).
[193] Carla Reeson, 'Personalisation under the Homelessness Reduction Act 2017: how personal are personal housing plans?' (2024) Journal of Social Welfare and Family Law 2 <https://www-tandfonline-com.libproxy.york.ac.uk/doi/full/10.1080/09649069.2024.2381993> accessed 29 August 2024.
[194] Homelessness Reduction Act 2017 s 3.
[195] Reeson (n193).
[196] Downie (n178), 103.
[197] National Audit Office, 'Report: The effectiveness of government in tackling homelessness: The Department for Levelling Up, Housing & Communities' (Session 2024-25 HC 119).
[198] Local Authority Worker #3 (Yorkshire, Friday 12 July 2024).
[199] Cerise White and others, 'The Homelessness Reduction Act: A critical analysis of its application in the West Midlands' (2018) Capabilities in Academic Policy Engagement 3.
[200] White (n199).

obviating, the marginalisation and social exclusion of homeless people".[201] Bevan argues that the Act conceives homeless people as "self-responsibilised [sic] citizens responsible for their own housing precarity".[202] He paints the effect of the Act as marginalising, contrasting this construction with the "widespread recognition that the principal causes [of homelessness] are structural".[203]

6.3 Housing First

> "We need to try Housing First because they [homeless individuals] need their own place, because it's not working in these environments [hostels]."[204] (LA Worker)

In the 2017 Autumn Budget, the UK government announced funding for three regional pilots of the Housing First model (Housing First).[205] The Government initially pledged £28 million, which funded 1,100 Housing First places in Greater Manchester, Liverpool City Region, and the West Midlands Combined Authority (WMCA).[206] Housing First is often described by contrasting it with the more traditional, and previously dominant approach, often referred to as 'treatment as usual' (TAU). TAU generally involves an initial stay in a hostel or homeless shelter before progressing to "move-on" accommodation. The underlying premise of TAU is that the individual who has been experiencing homelessness must prove that they are "tenancy-ready" before being provided with long term accommodation.[207]

In addition to longer term accommodation being contingent upon compliance with certain requirements and acceptance of substance dependency treatment, the tenancy for the move-on accommodation is often limited to two years. This is a condition of the Government funded Rough Sleeping Accommodation Programme (RSAP) to ensure the 6,000 places provided can be used by the greatest number of people.[208] While this approach aims to help as many individuals as possible, it necessarily focuses on immediate need rather than ongoing support. In contrast, flexible ongoing support is one of the eight tenets of Housing First and it was envisioned as an antidote to the issue of chronic homelessness.[209] People experiencing chronic

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[201] Chris Bevan, 'The Homelessness Reduction Act 2017: furthering not fracturing marginalisation of those experiencing homelessness' (2022) 18 International Journal of Law in Context 41, 42.
[202] Ibid, 52.
[203] Bevan (n201), 52.
[204] Local Authority Worker #3 (Yorkshire, Friday 12th July 2024).
[205] Batchelor (n175), 3.
[206] Batchelor (n175).
[207] Batchelor (n175), 11.
[208] Batchelor (n175), 10.
[209] Tsemberis (n162).

homelessness were likely to have a combination of mental illness and substance dependence,[210] often alongside other issues. The model is targeted towards those with "poor physical health, limiting illness and disabilities" as well as those with a dual diagnosis and any combination thereof.[211]

> "The Housing First pilots [were] targeting your entrenched longer term rough sleepers. Within that, absolutely, there is an over representation of people with disabilities."[212] (LA Worker)

The European Federation of National Organisations Working with the Homeless (FEANTSA) Housing First Guide refers to the Model as "probably the single most important innovation in homelessness service design in the last 30 years".[213] Housing First's success is measured by retention rates, substance use, and well-being improvements. There are multiple studies and strong evidence to support its effectiveness in ending chronic homelessness. In North America and Europe, research shows that Housing First helps 80% of participants, many of whom have the highest need, to escape homelessness.[214] A review of four key randomised controlled trials of the Housing First model determined that there was strong evidence that the model is effective with regard to ending homelessness. [215]

Other key principles of Housing First include "rapid access to a stable home"[216] and separation of that housing from any treatment, encouraging active engagement with support without coercion or threat of losing their accommodation.[217] The model acknowledges housing as a human right and not contingent on sobriety or abstinence.[218] As sobriety is not enforced, concerns are sometimes raised that this will lead to higher levels of substance use in comparison to where individuals receive TAU. However, the meta-analysis determined that such fears are "contradicted by these data".[219] In terms of the final marker, the evidence is not as conclusive.

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[210] Ibid.
[211] Nicholas Pleace, 'Housing First Guide Europe' (FEANTSA 2016) 12 <https://www.feantsa.org/download/hfg_full_digital1907983494259831639.pdf> accessed 30 August 2024
[212] Local Authority Worker 1 (West Midlands, Wednesday 26 June 2024).
[213] Pleace (n211).
[214]Nicholas Pleace and Joanne Bretherton, 'The Case for Housing First in the European Union: A Critical Evaluation of Concerns about Effectiveness' (2013) 7(2) *European Journal of Homelessness* 21
[215] *American Journal of Public Health*, 'Is the Housing First Model Effective? Different Evidence for Different Outcomes' (2020) 110(9) *American Journal of Public Health* 1376.
[216] Downie (n178), 170.
[217] Pleace (n211), 24.
[218] Downie (n178), 170.
[219] AJ Baxter et al, 'Effects of Housing First Approaches on Health and Well-Being of Adults Who Are Homeless or at Risk of Homelessness: Systematic Review and Meta-Analysis of Randomised Controlled Trials' (2019) 73 *Journal of Epidemiology and Community Health* 379, 385

The review showed reduced use of non-routine health services compared to those receiving TAU. Other indicators, such as rates of suicidality, HIV, criminality and mental well-being show positive results for Housing First participants but not necessarily any more so than their TAU counterparts.[220]

The UK has followed in the footsteps of the USA, Canada, France, Denmark, Spain, the Netherlands, and Australia in introducing the Housing First Model. In 2022, the Government extending the funding for the regional pilots to 2025. The pilots are supporting high need individuals, with 84% of the people accessing the WMCA pilot having mental health needs, while 26% have a physical disability. One particular organisation delivering Housing First services reported that, of their 171 clients, "144 have mental health issues, 148 experience drug misuse, 82 experience alcohol misuse, 140 have dual diagnosis … 103 have physical health issues and 67 have disabilities."[221] There is also positive evidence from all three regional pilots that the Housing First model is proving effective with 88% of participants sustaining their tenancies as of September 2020. The mayors of each region have also publicly voiced their support for this approach and of the need to scale up the program to a national roll out.[222] The All-Party Parliamentary Group for Ending Homelessness has released a report to "make a compelling case to the Government that the national roll out of Housing First is essential if we are to end the plight of homelessness of the most vulnerable people in our society".[223]

7 Conclusion

In 1948, the UDHR proclaimed "the inherent dignity … of all members of the human family".[224] Since then an internationally recognised Human Rights Treaty has been drafted *by* Disabled people, *for* Disabled people[225] and the focus of discussion has moved from how to fix Disabled people to how to remove the barriers that disable them, emphasising that disability is not an individual issue but a societal one.[226] Some argue there is still distance to travel and outline a Human Rights model which not only protects against discriminatory action but empowers Disabled people to realise their ESC rights.[227] Domestic legislation is accused of not

[220] Peter Mackie, Sarah Johnsen and Jenny Wood, 'Ending rough sleeping: what works?' (An international evidence review Crisis London December 2017), 38.
[221] Batchelor (n175), 13.
[222] Batchelor (n175), 17.
[223] Batchelor (n175), 4.
[224] UDHR (n16) Preamble.
[225] CRPD (n33).
[226] Oliver (n39).
[227] Degener (n22).

embodying more progressive models of disability, with the DDA and EA said to have codified the medical model, embedding an individualised view of the barriers that Disabled people must overcome to access secure housing.

Some of the barriers Disabled people face are financial and physical. In England, it costs more for Disabled people to achieve the same standard of living as their non-disabled counterparts[228] and much of this increased expenditure relates to everyday costs. Further, only half of Disabled people are employed, compared to 80% of the general population. This Disability Employment Gap is stark but masks the fact that even when Disabled people are employed, they are more likely to experience in-work poverty. These three issues contribute to the fact that Disabled people are more likely to live in poverty in England. As such, many Disabled people are unable to obtain the 7% of housing that is minimally accessible in England. A third of Disabled people in privately rented properties live in unsuitable accommodation. Government housing grants face delays, restrictive limits, and eligibility issues in the private rental sector.[229] The result is that a Disabled person is less likely to be able to afford secure housing but, should they be able to, there is great difficulty in assuring it is safe.

Many research participants raised concerns about their service users with hidden or invisible disability. Mental illness was raised repeatedly as being extremely prevalent among homeless individuals along with the lack of suitability and provision in the homelessness sector. Research has shown that mental ill health also occurs more frequently among those with intellectual disabilities and is often experienced concurrently with substance dependence. While being ubiquitous among the homeless population, particularly those with mental illness, substance dependence is not universally accepted as such. While national and international health organisations accept it as a psychiatric condition, it is not included in the Equality Act's definition of disability. Arguably a political decision, as it goes against international consensus, the exclusion of substance dependence from the definition of disability brings additional barriers to those experiencing it: eliminating the possibility of legal protection while the resources for specialist drug and recovery services have decreased.

Successive UK governments have addressed homelessness with a mixture of legislation and policy decisions. The Housing Act,[230] the Homelessness Act[231] and the Homelessness

[228] Veruete-McKay (n57).
[229] Equality and Human Rights Commission (n62).
[230] The Housing (Homeless Persons) Act 1977.
[231] Homelessness Act 2002.

Reduction Act,[232] placed increasing responsibility on Housing Authorities to first relieve and later prevent homelessness; but it was a policy strategy[233] that had the more definitive success. The trends in homelessness recorded reflect the peaks and troughs of the UK economy with 2023 figures being 120% higher than in 2010, following a period of austerity, welfare reform and the Covid-engendered economic downturn. The deployment of mental health and addiction service specialists, alongside a preventative approach, are credited with the success of the RSU at the turn of the century.

The HRA focuses on individual responsibility, overlooking structural causes of homelessness.[234] In contrast, the government has been praised for funding a Housing First approach in three regions, an essential element of which is ongoing support for participants with issues such as mental health and substance dependency.[235] With regional funding guaranteed until 2025, an all-party parliamentary group, many industry experts, and professionals in the sector are calling for a scaling up of Housing First across the country to follow in the footsteps of schemes in other Western nations. Housing First addresses homelessness but not its root causes. This author concludes that homelessness is not the individual's problem and rather shines a light on the structural inequality that precipitates it. Law and government policy must address the source of this inequality to fully realise Disabled people's right to 'housing, and to the continuous improvement of living conditions'.[236]

> "He always says, … thank you so much for … helping me get this place [home] … it's the best thing that's ever happened to me."[237] (LA Worker)

[232] Homelessness Reduction Act 2017.
[233] Rough Sleepers Unit.
[234] Bevan (n203).
[235] Batchelor (n175).
[236] CRPD (n33) art 28.
[237] Local Authority Worker 2 (Yorkshire, Friday 28 June 2024).

Paddington Bear and the View from Outside the Hostile Environment: A Legal Analysis of Refugee Stories in the UK

Amber Asmeena Shah

Abstract

Paddington Bear is a beloved children's book character, created by Michael Bond in 1958. Heralded as a symbol of British culture, he is known for his polite manners and love of orange marmalade. But Paddington's story also cannot be separated from the history of migrants and refugees who have made a life for themselves in the UK.

Originally inspired by Bond's memories of British evacuees moving to the countryside during the Second World War, and Jewish refugee children arriving to the UK through the Kindertransport, Paddington is the embodiment of the UK's own narrative on its stance towards child refugees: that it has always been on the right side of history, welcoming them with open arms.

But when one views this character, within his books or highly successful film franchise, against the UK's overt attempts to create a hostile environment to deter refugees and migrants, Paddington begins to feel hypocritical, and even anachronistic. This bear cannot symbolise a country which is proud to have been deeply influenced and shaped by immigrants. Instead, he tells a story of a country that has never welcomed young refugees, despite the stories it tells itself.

This essay will therefore reflect on the legal background that underpins Paddington's well-known story of arriving irregularly in London, having fled an environmental disaster in "darkest Peru" – and highlight the deep tension between one of Britain's most beloved characters, and the reality he would have faced in the UK's hostile environment.

1 Introduction

Paddington Bear is a beloved children's character, created by Michael Bond in 1958.[1] Inspired by Bond's memories of British children being evacuated to the countryside and Jewish children arriving on the Kindertransport during the Second World War, Paddington cannot be separated from UK immigration history and politics.[2] Yet in light of the current and purposeful hostile environment towards migrants and refugees in Britain, Paddington's story no longer stands out as an example of historical welcoming of others; but as an anachronistic and unrealistic fiction.

There have been multiple contributions from varying social science fields regarding Paddington's place in British culture – such as the use of Paddington as a symbol to protest against child migrant detention,[3] or a critique of the imperialist undertones of Bond's work.[4] However, beyond a light-hearted application of UK immigration law to Paddington's case,[5] there has been little attempt to analyse Paddington's story from a legal perspective. As such, the idea that Paddington's story was ever realistic within the UK's legal framework remains unchallenged.

This essay will therefore reflect on the legal background that underpins Paddington's story, in order to highlight the deep tension between one of Britain's most beloved characters and the reality he would face in the hostile environment. Namely, this essay will analyse Paddington's arrival in the UK, his whimsical life in London, and his acquisition of British citizenship. It will subsequently conclude that, when approached through a legal lens, Paddington's story is not just anachronistic due to the current political climate towards refugees and migrants – rather, it always has been.

It is naturally an unserious exercise to attempt to legally analyse the background of a fictional bear. However, it is important to confront long-lasting myths around Britain's historical stance towards refugees, and to recognise the vital role the law has always played in the tolerance and acceptance – or, more prominently, the lack thereof – of migrants in Britain.

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[1] Michael Bond, *A Bear Called Paddington* (New Edition, HarperCollins Children's Books 2018).
[2] Susanne Reichl, 'From Darkest Peru to Contemporary Politics: The Timelessness of Paddington's Search for a Home' (2022) 56-57 Fachzeitschrift für Kinder – und Jugendliteraturforschung 37, 44.
[3] David K. Seitz, '"Migration Is Not a Crime": Migrant Justice and the Creative Uses of Paddington Bear' (2022) 112(3) Annals of the American Association of Geographers 859.
[4] Philip Smith, 'Paddington bear and the erasure of difference' (2020) 45(1) Children's Literature Association Quarterly 25.
[5] Colin Yeo, 'An immigration lawyer reviews Paddington' (Free Movement, 29 June 2017) <https://freemovement.org.uk/an-immigration-lawyer-reviews-paddington/> accessed 26 February 2025.

2 A Bear Called Paddington

"They will not have forgotten how to treat a stranger."[6]

Paddington arrived in London with a label around his neck reading "please look after this bear".[7] In creating this origin story for Paddington, Bond was inspired by the image of children in London train stations during the Second World War – both British children evacuating to the countryside, and Jewish children arriving on the Kindertransport, often wore labels stating their name and address.[8] The Kindertransport is regularly cited as the prime example of UK generosity and heroism in choosing to rescue refugee children; including calls for the UK to be more welcoming of refugees now, as it was in the past.[9] But so-called memories of the Kindertransport are in fact myths, as such a scheme to rescue selected Jewish refugee children was only needed due to the UK's increasingly restrictive immigration rules.[10]

When Paddington arrived on UK shelves in 1958, the Aliens Restriction (Amendment) Act 1919 was in place. This amended the Aliens Act 1905 in order to make UK immigration law more restrictive, in particular to limit the number of "undesirable" immigrants arriving in the UK. Whilst the 1905 Act stated that those fleeing religious or political persecution should not be automatically refused entry if deemed to be "undesirable",[11] the 1919 Act contained no such exemption.[12] Instead of repealing these restrictive immigration laws, the Kindertransport – a visa waiver scheme – was used to only allow for a limited number of unaccompanied minors fleeing Nazism to arrive.[13] This was in direct response to growing anti-migrant rhetoric in the UK, and a desire to limit the number of European refugees who were able to arrive in Britain.[14] As such, memories of the Kindertransport also serve as memories of the UK's intentionally inadequate response to people fleeing persecution during the Second World War.[15] Many children with physical disabilities or mental health concerns, and all parents of the children

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[6] Paul King, *Paddington* (United Kingdom, StudioCanal 2014).
[7] Bond (n 1), 7.
[8] Michaelle Pauli, 'Michael Bond: 'Paddington stands up for things, he's not afraid of going to the top and giving them a hard stare'' *The Guardian* (London, 28 November 2014) <https://www.theguardian.com/books/2014/nov/28/michael-bond-author-paddington-bear-interview-books-television-film> accessed 1March 2025.
[9] Andrea Hammel, *The Kindertransport: What Really Happened* (1st edn, Polity Press 2024), 5.
[10] Ibid, 6.
[11] Aliens Act 1905, s.1(3).
[12] Hammel (n 9), 6.
[13] Ibid, 7.
[14] Ibid, 6.
[15] Amy Williams and Bill Niven, 'Memory of the Kindertransport in Britain and Germany, and the current refugee crisis' (2020) 36 Négocier l'accueil 109, 109.

accepted on the scheme, were unable to seek sanctuary.[16] Therefore, whilst the Kindertransport has often been interpreted as a kindness, a more critical approach reveals its cruelty.

Increasingly restrictive immigration laws in response to migration flows and refugee crises is a story repeated throughout British history. The Commonwealth Immigrants Act 1968 subjected people from former colonies to immigration control, in a direct response to the increase of South Asians leaving newly independent East African states for the UK.[17] The Immigration Act 1971 privileged Commonwealth citizens with British ancestry, such as those from Australia and Canada, in order to reduce the number of Black and Asian people able to claim a right to abode in Britain.[18] Had the UK government known in 1958 that bears from 'darkest Peru' would attempt to arrive and settle in the UK, it is likely that new immigration legislation would have been drafted to restrict such movement.

Paddington is of course a fictional bear, but it is not difficult to interpret him as a metaphor for a racialised migrant.[19] Bond originally conceived as the bear being from "darkest Africa", before moving him to Peru where bears can actually be found.[20] Paddington is given his name by the white family who take him in, after Paddington informs them that no one can understand his actual name.[21] The recent film franchise also uses music to make the connection between Paddington and UK immigration history clear: as Paddington is driven through London in the 2014 film for the first time, he is followed by a cover of the song "London is the Place for Me" – written and performed by Lord Kitchener for his arrival on the Empire Windrush in 1948.[22] This suggests that Paddington's story, originally echoing false memories of the Kindertransport, now takes place in a less romanticised context – that of the Windrush scandal, Brexit, and growing anti-migrant rhetoric in the UK.[23] In other words, Paddington is no longer arriving in a postwar Britain which finds use in refugees, but into a hostile environment which uses the law to reject him.

3 Paddington Here and Now

[16] Ibid, 9.
[17] Gresham College, 'The Immigration Act 1971: Celebrated or Flawed?' *Race, Colonialism and Power in the Legal System* (2021) <https://www.gresham.ac.uk/watch-now/immigration-act> accessed 2 March 2025.
[18] Ibid.
[19] Smith (n 4), 28.
[20] Seitz (n 3), 861.
[21] Smith (n 4), 29.
[22] Reichl (n 2), 43.
[23] Reichl (n 2), 48.

"[A]lthough I don't look like anyone else, I really do feel at home. I'll never be like other people, but that's alright, because I'm a bear."[24]

The hostile environment was announced in 2012 by Theresa May, then the UK's Home Secretary, as a plan to create a "really hostile environment" for undocumented migrants and their families.[25] But it is not just a Home Office policy or politician's phrase. Rather, the hostile environment is an intricate legal framework which demonstrates the UK's "specific intention of making life as difficult as possible, for racialised migrants … to remain in the UK".[26] As proud as Britain may be of its myths around the Kindertransport, its government is even prouder to announce and publish its plans to deter more refugees and migrants from entering the UK, regardless of the moral costs.[27] From paying social media influencers to create content aimed at dissuading young men from crossing the channel,[28] to spending an estimated £715 million on the failed scheme to deport asylum seekers to Rwanda,[29] the UK government has made no attempts to hide that refugees are not welcome here. Whilst some claim that Paddington should be deported back to the realm of apolitical children's fiction,[30] others acknowledge that Paddington's recent film franchise, arriving in the context of the hostile environment, is an important challenge to anti-immigrant sentiment.[31] But whilst the Paddington films have been well-received, Paddington himself would have faced a much harsher reception were he really to have smuggled himself out of Peru and into a London train station.

Although Paddington's exact age is unknown, he is widely understood to be a child when he arrives in London. Unfortunately for him, however, "UK immigration policy responds to

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[24] King (n 6).
[25] Frances Webber, 'On the creation of the UK's 'hostile environment'' (2019) 60(4) Institute of Race Relations 76, 77.
[26] Maggie O'Neill, Tracey Reynolds and Umut Erel, 'Editorial introduction: Racialised migrants navigating the UK's hostile environment policies' (2024) 44(2) Critical Social Policy 165, 167.
[27] Ayesha Riaz, 'The New EU-UK Land Border: Legal Issues over Asylum and Migration in the Light of the Nationality and Borders Bill 2022' in Ivan Mifsud and Ivan Sammut (eds), *Human Rights Issues in Migration and Border Management: Challenges and Perspectives* (Eleven 2024) 121.
[28] Kieran Kelly, 'Albanian TikTok influencers to be paid thousands to warn migrants against crossing Channel in small boats' *LBC* (London, 14 February 2024) <https://www.lbc.co.uk/news/home-office-pay-tiktok-influencers-urge-migrants-avoid-crossing-channel/> accessed 1 March 2025.
[29] Madeleine Sumption and Peter William Walsh, 'The uncertain financial implications of the UK's Rwanda policy' (*The Migration Observatory*, 26 April 2024) <https://migrationobservatory.ox.ac.uk/resources/commentaries/the-uncertain-financial-implications-of-the-uks-rwanda-policy/> accessed 2 March 2025.
[30] Gareth Roberts, 'Paddington shouldn't have been given a passport' *The Spectator* (London, 22 October 2024) <https://www.spectator.co.uk/article/paddington-shouldnt-have-been-given-a-passport/> accessed 10 March 2025.
[31] Smith (n 4), 26.

children as asylum seekers first, and as children secondarily (if at all)".[32] For example, despite local authorities in the United Kingdom having clear legal duties to accommodate unaccompanied asylum-seeking children in safe and suitable accommodation,[33] official Home Office policy enabled such children to be housed in hotels between 2021 and 2024.[34] A clear lack of safeguarding and measures and support for these children, including staff not being subject to DBS checks and a lack of formal education provision,[35] culminated in 440 of these children going missing – likely subject to criminal and other exploitation.[36] This scandal highlights the clear disparity in the treatment of British national children and children who are asylum seekers.

This is especially true for children whose physical appearance and presentation does not align with a Western understanding of childhood, thereby casting increased suspicion on their age and deservingness of protection.[37] In 2022 alone, more than 1,300 children were wrongly assessed to be adults by the Home Office on the basis of their appearance and demeanour.[38] Furthermore, whilst charges for illegal entry into the UK under the Nationality and Borders Act 2022 are not officially being brought against child asylum seekers, this does not apply to children who are wrongly assessed to be adults by the Home Office, and detained in adult men's prison without safeguards as a result.[39] Much like these children, Paddington arrived in the UK without any documents confirming his age, and without the outer-appearance of minority expected by Home Office officials.[40] It is therefore very likely that Paddington would become another age-disputed statistic.

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[32] Tracey Anne Maegusuku-Hewett, 'UK Immigration Policy and the Welfare of Children Seeking Asylum' (DPhil thesis, University of Glamorgan 2008) 5.
[33] The Children Act 1989, s.20(1)(a).
[34] David Neil, 'A re-inspection of the use of hotels for housing unaccompanied asylum-seeking children' (Independent Chief Inspector of Borders and Immigration report, 2024), 2.
[35] Ibid.
[36] Ella Cockbain, Lucia Durán, Sonja Ayeb-Karlsson and Thais Valiquette, 'Behind Closed Doors: A Storytelling Legal and Empirical Analysis of Human Trafficking Risks in Home Office Hotels Compared to Other Accommodation for Unaccompanied Children and Young People Seeking Asylum in the UK' (ECPAT UK and University College London 2024) 7
[37] Angeliki Manta et al, 'Problematising Separated Children: A Policy Analysis of the UK "Safeguarding Strategy: Unaccompanied Asylum Seeking and Refugee Children"' (2021) 47(3) *Journal of Ethnic and Migration Studies* 501, 504
[38] Helen Bamber Foundation, Humans for Rights Network and Refugee Council, 'Forced Adulthood: The Home Office's Incorrect Determination of Age and How This Leaves Child Refugees at Risk' (2024) https://www.helenbamber.org/resources/reportsbriefings/forced-adulthood-home-offices-incorrect-determination-age-and-how-leaves accessed 20 June 2025
[39] Vicky Taylor, '"No Such Thing as Justice Here": The Criminalisation of People Arriving to the UK on "Small Boats"' (Border Criminologies, Centre for Criminology, University of Oxford 2024) https://blogs.law.ox.ac.uk/sites/default/files/2024-02/No%20such%20thing%20as%20justice%20here_for%20publication.pdf accessed 20 June 2025
[40] Yeo (n 5).

Even if Paddington were able to avoid prosecution for his illegal arrival in the UK, he would still carry the label of an "unaccompanied asylum-seeking child" – and the suspicion of illegality that comes with this.[41] Within the hostile environment, legal arrival in the UK is conflated with safety, whilst illegal arrival is conflated with risk and irrationality.[42] The 2014 film makes this clear. Paddington's journey to London is clandestine, with the audience watching him hide in a boat and van until he makes it to his namesake station – and even after his arrival, Paddington is treated with suspicion by strangers and neighbours alike.[43] In this way, it appears the hostile environment permeates the screen, as it is no longer possible to tell the story of a fictional bear coming to London without connotations of illegality. Indeed, Paddington's story is now deeply associated with criminality. Beyond his illegal arrival, Paddington has illegally worked as a barber, been wrongfully convicted of theft, and acted as an accomplice in a prison escape.[44] At surface level, this is simply a humorous and fictional story for children. In the hostile environment, this is the dual label Paddington carries: immigrant and illegal.

4 Paddington Takes the Test

> "I have mixed feelings about who I am but that is okay. I'm a little bit of everything."[45]

Whether Paddington falls under the definition of a refugee, as per the 1951 Refugee Convention,[46] is beyond the scope of this essay. However, it has been argued that it would be difficult for Paddington to establish a valid asylum claim due to him fleeing from a natural disaster, rather than from persecution.[47] Being recognised as an "environmental refugee" is exceptionally difficult due to the need to establish a causal nexus between a natural disaster, such as the earthquake in Paddington's home country, and persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[48] As such, the concept of "environmental refugee" is contested, with many interpreting this group as a subset of economic migrants rather than genuine refugees.[49] However, despite the weaknesses

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[41] Manta et al. (n 37), 508.
[42] Ibid.
[43] King (n 6).
[44] Paul King, *Paddington 2* (United Kingdom, StudioCanal 2017).
[45] Dougal Wilson, *Paddington in Peru* (United Kingdom, Studio Canal 2024).
[46] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art 1(A)(2).
[47] Yeo (n 5).
[48] Refugee Convention (n 46).
[49] Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020), 49.

of anthropomorphising a natural disaster into an actor of persecution, it has been recognised that where a state intentionally causes environmental damage to harm a particular group, this could give rise to refugee status.[50] Perhaps Paddington would be able to make the case that his species of bear is increasingly exposed to natural disasters in Peru, with little being done by the state to protect them due to species discrimination – or perhaps he makes a successful claim for humanitarian protection. However, this would first require Paddington to approach the Home Office, and for the Home Office to believe his story in the first place.[51]

Regardless of the likelihood of Paddington being granted refugee status in the UK, the third instalment of his recent film franchise makes it very clear that Paddington, in brandishing his new passport, is officially British.[52] This means that, at some point between his irregular arrival in London and return to Peru to visit his family, Paddington became a naturalised British citizen. Naturalisation is a crucial aspect of security for migrant families, as it removes the possibility of the revocation of settled status and deportation.[53] As such, the process has been used by the UK government to control migrant communities, forcing them to integrate or naturalise into British society in order to earn the privilege of nationality and the entitlements that come with this.[54] But Paddington becoming British is surprising not because he has a weak asylum claim, or because he is a bear – but because UK citizenship laws are increasingly restrictive.

As part of the UK's desire to exclude the eligibility of certain migrants for naturalisation, the Borders, Citizenship and Immigration Act 2009 introduced the "good character requirement" for acquiring British citizenship.[55] Under this provision, an applicant will not be granted British citizenship "unless the Secretary of State is satisfied that the adult or young person is of good character".[56] Home Office guidance on what constitutes a "good character" was updated in February 2025 to confirm that someone "who has previously arrived without a required valid entry clearance or electronic travel authorisation, having made a dangerous journey will

[50] Ibid, 55.
[51] Yeo (n 5).
[52] Colin Yeo, 'An immigration lawyer reviews Paddington in Peru: A very british bear' (Free Movement, 11 November 2024) <https://freemovement.org.uk/an-immigration-lawyer-reviews-paddington-in-peru-a-very-british-bear/> accessed 26 February 2025.
[53] Catherine Puzzo, 'UK Citizenship in the Early 21st Century: Earning and Losing the Right to Stay (2016) XXI-1 French Journal of British Studies 1, 2.
[54] Ibid, 7.
[55] Borders, Citizenship and Immigration Act 2009 s 47(1).
[56] Ibid.

normally be refused citizenship".[57] In clarifying that a dangerous journey includes "travelling by small boat or concealed in a vehicle",[58] it is explicitly clear that this updated guidance aims to exclude refugees, who having fled persecution were forced to arrive illegally in the UK due to the lack of safe and legal passages, from ever obtaining the privilege of nationality. This is despite the absence of evidence that restrictive citizenship laws and long-term exclusion from settlement and security will deter irregular migration to the UK.[59] Indeed, reducing the ability of refugees to become British citizens is further legislative reinforcement of the hostile environment's aim of making life as difficult as possible for refugees and migrants.[60]

It has been questioned how Paddington met the "good character" requirement given his criminal history, including his means of arriving in the UK.[61] But regardless of such questions, it has been made clear that Paddington is now British – and this reveals a darker truth behind this character. Beyond Paddington's connections to British immigration history, his story is also linked to the afterlives of British imperialism and colonisation.[62] Paddington, a racialised migrant, is taken in by the wealthy and white Browns, who rename Paddington and teach him how to live according to their civilised British standards.[63] This is plainly an asymmetrical power dynamic, emphasising Paddington's vulnerability and mirroring an imperial narrative.[64] Yet before Paddington's Britishness became legally official, it was widely accepted that Paddington was already an icon of British culture.[65] This is not because his story resonates as a heartwarming tale of migration and acceptance – but because his story avoids the 'problem of difference' entirely.[66] Paddington is not British because he now has a passport; rather, he always has been. He idolised London before his arrival, speaks English with a perfect accent, and one of his defining characteristics is his polite "British" manners.[67] In other words:

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[57] UK Visas and Immigration, 'Guidance: Good character requirement' (13 February 2025) <https://www.gov.uk/government/publications/good-character-nationality-policy-guidance/good-character-requirement-accessible#criminality> accessed 4 March 2025.
[58] Ibid.
[59] Lucy Mort, 'Citizenship: A race to the bottom?' (*IPPR*, 10 March 2025) <https://www.ippr.org/articles/citizenship-a-race-to-the-bottom?mc_cid=dcc2c0b2fe&mc_eid=3b85c2035b> accessed 11 March 2025.
[60] Webber (n 25), 77.
[61] Yeo (n 52).
[62] Seitz (n 3), 859.
[63] Reichl (n 2), 39.
[64] Smith (n 4), 27.
[65] Smith (n 4), 34.
[66] Ibid.
[67] Reichl (n 2), 39; Smith (n 4), 31.

> "Paddington himself elicits uncomplicated sympathy from the implicitly white English reader/viewer not because he is a migrant, but because he presents no threat to the cultural praxis".[68]

The question therefore should not be how Paddington managed to successfully navigate the UK's legal framework, which seeks to make life unbearable for refugees and migrants. Instead, we should consider the implications of Paddington being an exception to the rule. The Paddington books and films have been interpreted as a story of a racialised migrant arriving in the UK and, much like the children on the Kindertransport, or the Windrush generation, finding a family and making a home for himself despite the difficulties he faces.[69] Instead, perhaps Paddington has been enthusiastically welcomed into British culture because he in fact tells a story about the kind of migrants that can find acceptance in the UK – those who admire and adhere to traditionally "British'' customs, and never threaten the status quo. After all, he is a bear – so whilst his story may depict the experiences of migrants and refugees in the UK, this is told primarily through a white author, accompanying white human characters, and the white actors who depict them.[70] Paddington has survived the hostile environment, but this does not make him an exemplary success story. Instead, he is a cautionary tale to migrants and refugees about the need to be as loveable and acquiescent as possible in order to gain acceptance in the UK.

5 Conclusion

UK immigration history and law is the reason Paddington exists – and the reason he is fictional. In 1958, Paddington was a fictionalised retelling of the UK accepting Jewish refugee children who arrived on the Kindertransport; fictional, because such memories of the Kindertransport are far from the historical and legal truth and consequences of this scheme.[71] In 2025, Paddington is a fictionalised representation of how a refugee or migrant ought to be treated in the UK; fictional, because UK immigration laws and systems ensure this cannot occur.

Yet even within an awareness of how the hostile environment would interact with Paddington's story, he remains an icon of British culture. Whilst this essay has highlighted deep tensions in Paddington's story, and its lack of alignment with the legal reality of migrants and refugees in

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[68] Smith (n 4), 27.
[69] Smith (n 4), 44.
[70] Smith (n 4), 36.
[71] Hammel (n 9).

the UK, it cannot be argued that this should render his story obsolete. Paddington's world, where someone can arrive in London and be treated with kindness, rather than legal obstacles and punishments, is a world that appeals to many.[72] His endurance across decades of changes to the factual and legal immigration landscape in the UK shows that Paddington's story is one we still want to tell children and ourselves. A real Paddington would not survive the UK's hostile environment; but the fictional one persists. Paddington's bright, funny, whimsical story of life in London could not exist without migrants and refugees – and amidst increasing anti-migrant rhetoric and hostility in the UK, it is important that we remember this.

[72] Seitz (n 3), 864.