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### LETTER FROM THE EDITOR

It is with great pleasure and privilege to introduce the 9<sup>th</sup> Edition of the Bristol Law Review (BLR). This Issue includes nine articles, each of which exemplifies innovative legal scholarship, and is the culmination of several months of dedicated work by our Editorial Board.

I am very pleased to record that the Bristol Law Review has had another outstanding year. The mantle of Editors is passed on to a new Managing Board, with a fresh team of fourteen of the brightest undergraduates under their purview. The primary goal of the Editorial Board is what you currently hold in your hand – the publication of the annual edition of the Review, now scheduled to herald the end of graduation at Bristol.

Now in its ninth edition, the Review received over 50 original and thought-provoking manuscripts from people around the world, from common law jurisdictions such as Nigeria, Australia, India, and Singapore. Each writer's background and stage in life echoes a fresh and creative approach to legal scholarship, exemplifying the Review's purpose of giving law enthusiasts a platform to express their views and generate fruitful debates. This is by no means surprising given the journal's ongoing commitment to publishing high-quality scholarship and to being at the forefront of contemporary legal developments.

Within these pages, the reader will enjoy a fine selection of nine legal articles for their perusal. The articles span an array of legal issues, including: (a) a thesis that the regulation of gender stereotyping in media cannot solely be tackled through law, (b) advocating for harmonising the differences and highlighting the commonalities between human rights and investment arbitration, (c) a critique of the ambiguities concerning acts short of war in the Covenant of the League of Nations as exposed by the Corfu incident, (d) an analysis of the British Nationality Act 1981 to formulate the basis of Britain's neo-colonial framework of exclusion, (e) a critique of the Defamation Act 2013 and how inherent bias against 'low-level' speech fails to provide equal protection to media users, (f) a redefinition of 'capacity to consent' within the Mental Capacity Act 2005 to enable the formulation of a new test on assessing mental capacity, (g) advocating for a reevaluation of money laundering under its legal framework to effectively tackle its practices, and (h) an analysis of Nigeria's constitutional and legal framework on marriage, child-marriage, and the right of the girl-child, with a view to exposing its inherent destructiveness for the development of human rights in Nigeria. Overall, these articles have been chosen for the significant contributions that they make to the existing literature, which we believe will spark interest to both UK and international readers.

I hope you will take the time to peruse each piece with great attention and reflect on whether you agree or, just as importantly, disagree with each author. Within this edition, the quality of legal scholarship and distance from traditional subjects taught in law schools around the world serves as a reminder to readers to broaden their intellectual horizons. Even if one may not always agree with all the writers' conclusions, each of them displays an impressive mastery of their subject, a clarity of thought and a vigour of expression which is a delight to read.

The annual edition of the Review is but the BLR's flagship enterprise. Elsewhere, the Review has been busy expanding its partnerships both inwards and outwards. Within the legal community of Bristol, the Review held meetings with the Law Faculty Marketing Office to discuss support initiatives and continue the long tradition of an annual funding package for the BLR, as we continue to integrate ourselves deeper into the Bristol Law undergraduate and postgraduate experience. Externally, the Review is proud to announce that it has strengthened its ties within the global legal scholarship, partnering up with ten leading law reviews and journals across the UK, US, and Europe. Our partners have provided significant support on encouraging a law

review's position as a unique space for student discourse and development within a Law School, and they will continue to play a vital role in the issues and volumes to come, bringing thought-provoking legal scholarship forward.

Regarding the Review's other projects, it is with great pleasure to announce the launch of our new website, providing a user-friendly platform to increase our readership and promote academic legal scholarship within the community. One is to find our podcasts, online blog, and articles from past editions within the new website. Once again, this initiative stands true before the Bristol Law Review's goals and values, whilst allowing readership to grow and the review to flourish beyond the annual edition.

I would be remiss not to express my gratitude to a number of individuals and groups. First, to the Bristol Law Faculty, and its new Head of School, Professor Catherine Kelly, for supporting the Review in its work. Second, to our Academic Advisor Dr Philip A Burton, providing us with exceptional help and support on running the review and preparing the 9<sup>th</sup> Edition for publication. Third, to the 9<sup>th</sup> Editorial Board generally, who has exceeded every expectation placed upon it, and whose dedication to the Journal makes its predecessors proud. Special thanks must also go to our Managing Editor—Callum Hill—for his timeless work and dedication to the review, the Online Blog Editor, and our team of social media managers, who have strived to reach new readership and make our review as accessible as possible.

The Bristol Law Review remains a young publication, who I have no doubt that will continue flourishing and reaching new grounds with years to come. We aspire to the same principles as the Faculty – a commitment to excellence in the study of the law; uncompromising academic rigour; and leadership in legal scholarship and thought. We shall not claim that we have achieved all our aspirations. We shall, however, make no pretence to the fact that this is what we aspire to.

I wish the incoming Editorial and Managing Boards every success with the tenth edition, and I look forward to the future growth of the Bristol Law Review with confidence that they will take the journal to new heights.



Eleni Konstantinidou  
Editor-in-Chief

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# **GENDER STEREOTYPING IN THE MEDIA: IS THE LAW AN EFFECTIVE SOLUTION? A UK-BASED ANALYSIS**

Leya Grizi\*

## **ABSTRACT**

*This paper discusses the regulation of gender stereotyping in the media and asks whether the law is the solution to tackling it. This is done in the context of regulation in the UK of two media forms: the advertising industry and social media platforms, in light of the 2019 changes to the UK Advertising Standards Authority's framework and the Government's Online Safety Act 2023. The paper considers the harms of stereotypical gendered depictions in the media, with a focus on women as its main victims, and elaborates on the importance of regulating harmful gender stereotyping as a human rights concern. It will be concluded that, although the law is an invaluable authoritative tool in recognising gender stereotyping as a "harm" in need of redress, it is not the solution: gender stereotyping in the media will only be tackled if deep-rooted societal attitudes are fundamentally changed.*

*Keywords: Gender Stereotyping; Advertising; Social Media; Regulation; Freedom of Expression; Education.*

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## 1. INTRODUCTION

“Women, they have minds, and they have souls, as well as just hearts. And they’ve got ambition, and they’ve got talent, as well as just beauty”. This quote from *Little Women*<sup>2</sup> inspired this essay about gender stereotyping in the media, which this paper finds to be an issue of vital importance that must be addressed and ultimately eliminated.

Gender stereotypes have been recognised as a hurdle to the fulfilment of human rights by international human rights organisations, such as the United Nation’s Office of the High Commissioner for Human Rights (OHCHR).<sup>3</sup> They are also explicitly mentioned in international legal instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>4</sup> as an issue to be tackled. Nonetheless, gender stereotypes “continue to influence the legal and social structure of modern society.”<sup>5</sup> This leads us to question whether the law is an effective solution to eliminating gender stereotyping in the media.

In contemporary society, it is impossible to deny the media’s power, which remains regarded as the ‘Fourth Estate’. This term stems from France’s historical division of society into three ‘estates’ to represent the power and influence of different groups: the clergy (First Estate), the nobility (Second Estate), and the commoners (Third Estate), with the modern equivalent being the legislature, executive, and judiciary. The media was coined the ‘Fourth Estate’ in the 1800s by Edmund Burke when pointing out the power of the press on politics and the shaping of public opinions.<sup>6</sup> Summarised by Thomas Carlyle, Burke’s opinion was that “[T]here were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.”<sup>7</sup>

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<sup>2</sup> Louis May Alcott, *Little Women* (Penguin 1989).

<sup>3</sup> Simone Cusack, ‘OHCHR-Commissioned Report: Gender Stereotyping as a Human Rights Violation’ (OHCHR, 2013), p.ii <<https://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx>> accessed 11 April 2023.

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1979

<sup>5</sup> Sandra Fredman, *Women and the Law* (Oxford University Press 1998) 3

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198763239.001.0001/acprof-9780198763239>> accessed 12 April 2023

<sup>6</sup> ‘Fourth Estate - Political Dictionary’ (22 September 2023) <<https://politicaldictionary.com/words/fourth-estate/>> accessed 18 November 2023

<sup>7</sup> Thomas Carlyle, *Sartor Resartus. On heroes, hero-worship and the heroic in history*. (J. M. Dent & Sons Ltd 1910) 392.

Through its power, the media is a major contributor to the circulation of harmful depictions of gender, with women as the primary victims and the main focus of this paper. Second-wave feminists began drawing attention to the circulation of unrealistic images of women in the media, especially in advertisements.<sup>8</sup> For example, Betty Friedan<sup>9</sup> raised concerns over the advertising industry perpetuating negative stereotypes about women and reproducing patriarchal ideology and, in turn, contributing to the ‘symbolic annihilation’<sup>10</sup> of women.<sup>11</sup>

Such representations persist in the media of today. This paper will focus on the regulation of two forms of media in the UK: (1) advertisements, that have a major influence on our modern consumerist society, and (2) social media platforms, a new form of media that have become an integral part of society. The regulation of gender stereotyping within them will be assessed based on the recent changes to the UK Advertising Standards Authority’s (ASA) advertising framework, that explicitly target gender stereotyping as a harmful practice in advertising, and the introduction of the Government’s Online Safety Act 2023, which imposes a duty on social network sites, amongst others, to protect their users from harm. In doing so, this essay will conclude that, although the law, as an authoritative and legitimate body, plays a major role in the recognition of gender stereotyping as a harm to be eliminated, it is not the right tool to tackle the issue. In fact, gender stereotyping in itself is not a criminal offence under UK law, and explicitly legislating against it in the media creates conflicts with another fundamental right: freedom of expression. This paper instead finds that gender stereotyping in the media will only be eliminated if deep-rooted attitudes and beliefs within society are fundamentally changed. This can be achieved through the education of future generations.

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<sup>8</sup> Melanie Waters, *Women on Screen: Feminism and Femininity in Visual Culture* (Palgrave Macmillan 2011) 6

<sup>9</sup> Betty Friedan, *The Feminine Mystique* (Penguin 1963)

<sup>10</sup> Gaye Tuchman, Arlene Daniels and James Benét (eds), *Hearth and Home: Images of Women in Mass Media* (OUP 1978) 3.

<sup>11</sup> A. Antoniou and D. Akrivos, ‘Gender Portrayals in Advertising: Stereotypes, Inclusive Marketing and Regulation’ (2020) 12 *Journal of Media Law* 78, 84 <<https://www.tandfonline.com/doi/full/10.1080/17577632.2020.1783125>> accessed 12 December 2022

Through a socio-legal analysis of the law, this paper will start by discussing in chapter 2 why gender stereotyping is a challenge to the fulfilment of human rights, as well as the need to control it in the media. This will be done by evaluating the harms of gender stereotyping on different groups of individuals and by analysing the status of the law and the role of the media in society. In chapter 3, the regulation of gender stereotyping in the advertising industry and social media platforms will be evaluated respectively by discussing the merits and shortcomings of the UK's new ASA advertising legal framework and the recent Online Safety Act 2023. Finally, chapter 4 will assess whether the law is the solution to gender stereotyping in the media, whilst discussing the right to freedom of expression, to conclude that simply legislating against the issue will not eliminate it.

## **2. GENDER STEREOTYPING AS A CHALLENGE TO THE FULFILMENT OF HUMAN RIGHTS**

### **A. Defining Gender Stereotyping**

We must first define the concept of 'gender'. This essay will rely on the definitions provided by the UK Government, as well as the legally binding definition in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (The Istanbul Convention) (2011), which the UK ratified in July 2022. This is the first international instrument that contains a definition of gender.<sup>12</sup> Gender is a personal internal perception of oneself that may not correspond to the sex that one was born with. It is a social construct pertaining to roles, qualities, and behaviours— based on labels of femininity and masculinity,<sup>13</sup> and what is “[considered] appropriate for women and men” in society.<sup>14</sup> The Istanbul Convention's definition makes it clear that 'gender' is largely based on what is considered 'appropriate' for individuals in society, which mirrors what will further be discussed. 'Gender' has also recently expanded to

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<sup>12</sup> Council of Europe, 'The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)' <<https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence>> accessed 5 January 2023

<sup>13</sup> Office for National Statistics, 'What Is the Difference between Sex and Gender? - Office for National Statistics' (ONS, 21 February 2019) <<https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21#:~:text=The%20UK%20government%20defines%20gender,they%20were%20assigned%20at%20birth>> accessed 2 January 2023

<sup>14</sup> The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011, Art. 3.

include individuals who do not identify within the binary categories of ‘male’ and ‘female’, such as gender-fluid, transgender, gender-queer, and non-binary individuals.<sup>15</sup> Thus, gender is more than the innate biological characteristics of each sex and sets a framework for the roles and activities a particular individual is expected to perform in society. This coincides with gender theorist Judith Butler’s influential concept of “gender performativity”, which construes gender within a normative heterosexual reality as a rehearsed social performance, rather than a manifestation of a biological reality.<sup>16</sup> Gender is not simply the genetic result of ‘nature’; ‘nurture’ shapes one’s expression of gender through experience and environment.<sup>17</sup> We are not simply biologically programmed to function a particular way, rather we are clearly socially expected to. The non-biological aspects of gender emphasise how restrictive stereotypes surrounding it can be.

In fact, such notions of gendered socially-appropriate behaviour are the basis of oversimplified generalisations about different genders, and the root cause of gender stereotyping. The OHCHR defines gender stereotyping as “the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.”<sup>18</sup> Most importantly, it recognises harmful stereotyping as a pervasive human rights violation that limits rights and freedoms and causes substantial and systematic harm.<sup>19</sup> One could argue that assumptions and generalisations are a natural part of human behaviour in society; not all stereotypes are inherently damaging and ‘harmful’ by default. According to research by American social psychologists Kay Deaux and Laurie Lewis, gender stereotypes vary on four

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<sup>15</sup>Antoniou and Akrivos (n10).

<sup>16</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 2006).

<sup>17</sup> Spector R, ‘Sex, Gender, Nature and Nurture: Stanford School of Medicine Dean Lloyd Minor’ (*Stanford Medicine Magazine*, 20 May 2017) <<https://stanmed.stanford.edu/sex-gender-nature-and-nurture-stanford-school-of-medicine-dean-lloyd-minor/>> accessed 5 January 2023.

<sup>18</sup> United Nations Human Rights Office of the Commissioner, ‘Gender Stereotyping’ (*OHCHR*) <<https://www.ohchr.org/en/women/gender-stereotyping>> accessed 30 December 2022

<sup>19</sup> Simone Cusack, ‘OHCHR-Commissioned Report: Gender Stereotyping as a Human Rights Violation’ (OHCHR, 2013), p.ii <<https://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx>> accessed 23 November 2022.

components: physical characteristics, traits, role behaviours, and occupations.<sup>20</sup> Nonetheless, they become a serious concern when they are relied upon to “excuse and justify abuses of human rights.”<sup>21</sup>

## **B. The Harms of Gender Stereotyping**

### **(i) Women**

The OHCHR notably highlights the serious consequences for women, as gender stereotyping is frequently the cause of the discrimination, inequality, and gender-based violence that women continue to face.<sup>22</sup> American writer Lippmann states that “gender stereotypes form the ‘fortress of our tradition’ that women all too often cannot escape.”<sup>23</sup> In fact, the links between gender inequality in society and gender stereotypes are recognised. First, the Council of Europe sets “[preventing and combating] gender stereotypes and sexism” as the first area to be addressed in their Gender Equality Strategy 2018-2023.<sup>24</sup> Such findings are equally reflected in the work of feminist scholars, who highlight the severity of gender stereotyping and its link to gender discrimination. Human rights law associate professor Alexandra Timmer states that “stereotypes are both cause and manifestation of the structural inequality that non-dominant groups suffer from.”<sup>25</sup> These stereotypes reflect a social hierarchy established to the detriment of non-dominant groups within society, and their existence in turn reinforces inequality. For instance, women are stereotypically depicted as caring,<sup>26</sup> emotional, and gentle beings. This reinforces the stereotypical role of women as caregivers in the private domestic sphere, which, in turn, leads to the undermining of women in the professional sphere and the underrepresentation of women in positions of power. Simone de Beauvoir in *The Second Sex* challenged the belief that the differences between men and women in society were due to ‘natural causes’. She explains that women are the ‘Other’ in a society

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<sup>20</sup> Kay Deaux and Laurie L. Lewis, ‘Structure of Gender Stereotypes: Interrelationships among Components and Gender Label.’ (1984) 46 *Journal of Personality and Social Psychology* 991

<sup>21</sup> International Commission of Jurists, ‘Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice’ (ICJ, April 2015).

<sup>22</sup> Cusack (n2)

<sup>23</sup> Walter Lippmann, *Public Opinion* (first published 1922, BN Publishing, 2007), 36.

<sup>24</sup> Council of Europe, ‘Gender Equality Strategy 2018-2023’ <<https://rm.coe.int/ge-strategy-2018-2023/1680791246>> accessed 12 January 2022

<sup>25</sup> Alexandra Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’ (2011) 11 *Human Rights Law Review* 707 <<https://academic.oup.com/hrlr/article-lookup/doi/10.1093/hrlr/ngr036>> accessed 14 January 2023

<sup>26</sup> Jonathan Herring, ‘Where are the Carers in Healthcare Law and Ethics?’ (2007) 27 *Legal Studies* 51 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287149](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287149)> accessed 22 November 2023

where men are the default. Women are considered subordinate to men as the ‘second sex’.<sup>27</sup> Feminist legal scholars equally recognise the consequences of harmful stereotypes regarding female sexuality, which can lead to distorted views about sexual violence and contribute to the justification of violence against women and victim-blaming.<sup>28</sup> Harmful, gendered beliefs about women are a root cause of “a range of unacceptable and deeply distressing crimes”<sup>29</sup> known as Violence Against Women and Girls (VAWG). Moreover, intersectional feminist bell hooks recognises that gender is connected to different social classifications, such as race and sexual orientation, which change a woman’s experience of discrimination in society. Hooks stresses the importance of addressing sexism in conjunction with such classifications to accurately highlight the experience of women in society.<sup>30</sup> Thus, as is made clear by Cook and Cusack, challenging gender stereotypes is essential to the realisation of women’s human rights.<sup>31</sup>

## (ii) Men and non-binary individuals

However, it is important to note that gender stereotyping is not exclusively a feminine or ‘woman’s’ issue: it affects other genders, albeit sometimes differently. This is sometimes overlooked in certain strands of feminist academic debate on the issue, which tend to focus on women. This is also the case in international law, with CEDAW<sup>32</sup> (discussed in section D of this chapter) being one of the two international instruments which address gender stereotyping. Although men are mentioned,<sup>33</sup> the Convention’s purpose is to address the “[restriction of] women’s enjoyment of their fundamental rights.”<sup>34</sup> This reinforces the idea that gender stereotyping is exclusively a women’s issue.

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<sup>27</sup> Simone de Beauvoir, Constance Borde (tr), and Sheila Malovany-Chevallier (tr), *The Second Sex*. (Vintage Books 2011).

<sup>28</sup> Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) <<https://www.jstor.org/stable/j.ctt3fjmhhd>> accessed 9 January 2023

<sup>29</sup> ‘Violence against Women and Girls National Statement of Expectations (Accessible)’ (GOV.UK) <<https://www.gov.uk/government/publications/violence-against-women-and-girls-national-statement-of-expectations-and-commissioning-toolkit/violence-against-women-and-girls-national-statement-of-expectations-accessible>> accessed 9 January 2023

<sup>30</sup> bell hooks, *Ain’t I a woman?: Black women and feminism*, (Pluto Classics 1987).

<sup>31</sup> Cook and Cusack (n27)

<sup>32</sup> *ibid* n3

<sup>33</sup> *ibid*, Art. 2(e), Art 10, Art 5(a).

<sup>34</sup> ‘Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979’ (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>> accessed 12 January 2023

Comparatively, masculinities theorists posit that patriarchy, and therefore gender stereotyping, is not just a problem for women, but impacts different genders in a broad sense. Firstly, although gender stereotypes strengthen men's superior position in the social hierarchy, masculine stereotypes are detrimental to men. For example, American Professor Joseph Pleck's theory - the gender role strain paradigm - depicts the damage that occurs to men as a result of not adhering to traditional standards of masculine behaviour. Gender stereotypes create gender norms in society, which prove to be difficult to fulfil and are not representative of the majority of men. As a result, they cause men and boys psychological stress when they cannot adhere to such standards.<sup>35</sup> Similarly, research from Dr. Michael Addis *et al.* has shown that freeing men from such rigid and constraining gender norms can encourage gender equality for all, as it would lessen the oppressive behaviour towards women and individuals who express masculinity differently.<sup>36</sup>

Moreover, gender stereotypes are equally harmful to non-binary<sup>37</sup> and transgender individuals, for whom stereotypes result in serious negative consequences, including sexual and physical violence, murder, difficulties integrating into the job market, and suicide, as research from James *et al.* for the US' National Center for Transgender Equality shows.<sup>38</sup> Additionally, transgender people are often denied rights due to harmful, stereotypical assumptions that they are responsible for different problems within society.<sup>39</sup> For instance, US "Bathroom bills" scapegoat transgender individuals for gender-based violence, positing that allowing transfeminine individuals to use female bathrooms would place cisgender women in "harm's way."<sup>40</sup>

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<sup>35</sup> Joseph H. Pleck (1995), "The Gender Role Strain Paradigm: An Update." in *A New Psychology of Men* 11, edited by R. F. Levant and W. S. Pollack (Basic Books).

<sup>36</sup> Michael E. Addis, Abigail K. Mansfield, and Matthew R. Syzdek, "Is 'Masculinity' a Problem?: Framing the Effects of Gendered Social Learning in Men." (2010) 2 *Psychology of Men & Masculinity* 77.

<sup>37</sup> Silvan Agius, "Human Rights and Intersex People. Issue Paper Published by the Council of Europe Commissioner for Human Rights." (Council of Europe, 2015).

<sup>38</sup> Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, Ma'ayan Anafi, "The Report of the 2015 U.S. Transgender Survey" (National Center for Transgender Equality, 2016)

<<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>> accessed 22 November 2023.

<sup>39</sup> Ari Rosenblum, 'Gender Nonconformity and the Stereotype Content Model' (Oberlin College 2018)

<[https://etd.ohiolink.edu/acprod/odb\\_etd/etd/t/1501/10?clear=10&p10\\_accession\\_num=oberlin1528377926660424](https://etd.ohiolink.edu/acprod/odb_etd/etd/t/1501/10?clear=10&p10_accession_num=oberlin1528377926660424)> accessed 24 November 2023

<sup>40</sup> Ari Rosenblum, 'Gender Nonconformity and the Stereotype Content Model' (Oberlin College 2018)

<[https://etd.ohiolink.edu/acprod/odb\\_etd/etd/t/1501/10?clear=10&p10\\_accession\\_num=oberlin1528377926660424](https://etd.ohiolink.edu/acprod/odb_etd/etd/t/1501/10?clear=10&p10_accession_num=oberlin1528377926660424)> accessed 24 November 2023

However, this shifts the onus from the primary perpetrators of gender-based violence (cisgender men) onto transgender individuals, whilst also invalidating their identities.<sup>41</sup> Arguably, this is the result of gender non-conforming individuals being subjected to an additional layer of prejudicial assumptions that “accord a superior and normative status to... conformity with sex assigned at birth (cisnormativity).”<sup>42</sup>

Thus, although this essay extensively discusses the stereotyping of women, who are its primary victims,<sup>43</sup> it equally recognises its impact on other genders. This is vital to demonstrate the breadth of the harm of gender stereotyping and, in turn, to tackle it. Such stereotypes set a restrictive standard of socially acceptable behaviour for different members of society. Setting simplistic preconceptions of how given people are expected to behave based on their gender creates considerable social expectations and pressure to conform,<sup>44</sup> restricting individual freedoms.

### C. Why Focus on Media?

Controlling gender stereotyping in the media is a considerable step to eradicating it overall. Former Director General of Human Rights in the Council of Europe Philippe Boillat explained the media’s influence on gender stereotypes when he stated that “every single day the media expose us to images, situations and words which convey stereotyped descriptions of what is “feminine” and what is “masculine”, arbitrarily assigning to women and men roles determined by their gender.”<sup>45</sup> He also posits that most of the information received by humans is stored in their subconscious. At first, humans don’t consciously “filter” the information that they receive, thus the danger of a continuous influx of stereotypical depictions in the media. Humans are inevitably

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<sup>41</sup> Ari Rosenblum, ‘Gender Nonconformity and the Stereotype Content Model’ (Oberlin College 2018) <[https://etd.ohiolink.edu/acprod/odb\\_etd/etd/r/1501/10?clear=10&p10\\_accession\\_num=oberlin1528377926660424](https://etd.ohiolink.edu/acprod/odb_etd/etd/r/1501/10?clear=10&p10_accession_num=oberlin1528377926660424)> accessed 24 November 2023

<sup>42</sup> Silvan Agius, ‘Human Rights and Intersex People’ (The Council of Europe Commissioner for Human Rights, 2015), 15 <<https://rm.coe.int/16806da5d4>> accessed 24 November 2023.

<sup>43</sup> Cusack (n2)

<sup>44</sup> Olga Frańczak, ‘(Stereo)Typical Law: Challenging the Transformative Potential of Human Rights’ in Gizem Guney, David Davies and Po-Han Lee (eds), *Towards Gender Equality in Law* (Springer International Publishing 2022), 19 <[https://link.springer.com/10.1007/978-3-030-98072-6\\_2](https://link.springer.com/10.1007/978-3-030-98072-6_2)> accessed 20 November 2022

<sup>45</sup> Katharine Sarikakis, “Media and the Image of Women: Report of the 1<sup>st</sup> Conference of the Council of Europe Network of National Focal Points on Gender Equality, Amsterdam, 4 and 5 July 2013” (Council of Europe, November 2013) <<https://rm.coe.int/1680590587>> accessed 8 January 2023.

subliminally influenced by stereotypes.<sup>46</sup> Croteau and Hoynes demonstrate the reciprocity between society and the media: society shapes the media, in turn, media shapes society.<sup>47</sup> They define media as the “different technological processes that facilitate communication between the sender of a message and the receiver of that message.”<sup>48</sup> This definition widens the scope of media to include non-traditional media forms, such as social media (which will be discussed later). Media influences individuals of all ages and backgrounds, who assimilate information differently. Especially with the rise of social media, this paper finds that young impressionable individuals are vulnerable to the internalisation of circulated harmful stereotypes, which would provoke the continuation of such toxic behaviours amongst future generations. Ward and Grower conclude that regular exposure to screen media is linked to children and adolescents’ development of gender role stereotypes.<sup>49</sup> They stipulate that being subjected to screen media leads girls to prioritise their appearance and conform to an idealised sexual physical standard. It also leads both boys and girls to restrict their academic and professional goals and conform to respective socially appropriate gendered character traits.<sup>50</sup> Thus, while media is not the only factor influencing gender stereotypes, it plays a major role.

#### **D. The Role of the Law and its Status**

Nonetheless, despite their harm and their role as a barrier to the realization of human rights, gender stereotyping is often overlooked in the legal discourses surrounding human rights violations.<sup>51</sup> International legal instruments have recognized it as a hurdle to the achievement of gender equality as described below. However, as author Simone Cusack highlights, there is “limited awareness of the full extent and breadth of international human rights obligations related to stereotypes and stereotyping”, with a lot of the focus set only on the harmful and wrongful stereotyping obligations set in CEDAW.<sup>52</sup> To begin, no uniform definition of gender stereotyping exists within international legal instruments, despite gender stereotyping being addressed

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<sup>46</sup> *ibid.*

<sup>47</sup> David CROTEAU D, William HOYNES and Stefania MILAN (ed), *Media/Society: Industries, Images, and Audiences, 4th Edition* (Sage Publications 2012) <<https://cadmus.eui.eu/handle/1814/19235>> accessed 11 January 2023

<sup>48</sup> *ibid.*

<sup>49</sup> L. Monique Ward and Petal Grower, ‘Media and the Development of Gender Role Stereotypes’ (2020) 2 *Annu. Rev. Dev. Psychol.* 177, 187-188 <<https://doi.org/10.1146/annurev-devpsych-051120-010630>> accessed 9 January 2023

<sup>50</sup> *ibid.*

<sup>51</sup> Cusack (n2)

<sup>52</sup> *ibid.*

as a concept. The lack of express definition of the concept is concerning. Defining ‘gender stereotyping’ in a legal context would allow States to familiarise themselves with the parameters, forms, and effects of the practice before creating policies to address it. This would promote a more uniform and focused approach in the way it is tackled on a wider global scale. Alternatively, having no express binding definition leaves room for States to use their own discretion in addressing the issue, and rely on their own understanding of the phenomenon and how severe of a concern they believe it to be on a local scale.

It could be argued that imposing a definition of gender stereotyping on States is restrictive and could lead to the definition becoming outdated. However, this paper finds that its absence permits the issue to be tackled in a more scattered and heterogeneous manner, which goes against the goals and purposes of international instruments such as CEDAW.

In addition, only two international human rights treaties contain *express* obligations concerning harmful stereotyping, both of which the UK has ratified, and thus has committed to the articles, rights, and procedures they contain. CEDAW (Articles 2(e) and 5(a)) (ratified in 1986), declares that: “*States Parties shall take all appropriate measures (...) with a view to achieving the elimination of (...) practices which are based on (...) stereotyped roles for men and women.*”<sup>53</sup> Second, the Convention on the Rights of Persons with Disabilities (UN CRPD) (Article 8(1)(b)) (ratified in 2009) stipulates that: “*States Parties undertake to adopt (...) appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex (...).*”<sup>54</sup> Arguably, there is not enough express discussion of harmful stereotyping in internationally binding Human Rights treaties. This does not accurately reflect the seriousness of the issue as a human rights concern, failing to clearly delineate and articulate the obligation of State Parties. Stereotyping has been recognised as an underlying obstacle to the insurance of other important rights, such as the rights to equality and to non-discrimination,<sup>55</sup> which are prevalent in other international human rights

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<sup>53</sup> *ibid* n3.

<sup>54</sup> The Convention on the Rights of Persons with Disabilities 2007, Art 8(1)(b)

<sup>55</sup> Cusack (n2)

treaties,<sup>56</sup> such as the Convention on the Rights of the Child (1989).<sup>57</sup> Nonetheless, as Cusack states: “[more] needs to be done to identify and highlight the existence, content and scope of [State] obligations” with regards to gender stereotyping.<sup>58</sup>

Additionally, although discrimination and inequality on the basis of sex are already directly addressed in international and state law, such as through the UK’s Equality Act 2010, which would arguably implicitly include gender stereotyping, the law could go further in addressing gender stereotyping itself. This would facilitate the realisation of gender equality. In her report on gender stereotyping for the EU Court of Justice, Alexandra Timmer explains that “the link between gender stereotyping and discrimination can be conceived of as a self-reinforcing circle.”<sup>59</sup> She proceeds to provide an example to illustrate said vicious cycle: firstly, gender stereotyping can manifest itself as a form of inequality and discrimination, such as by way of policies discouraging new fathers from taking parental leave. Secondly, such stereotypes can be used to justify discriminatory practices, whereby the aforementioned policies would be justified on the basis of “the special relationship between the mother and her child.”<sup>60</sup> Finally, this reinforces further inequality, here because the burden of child care and the role of primary carer remains imposed on mothers.<sup>61</sup> Therefore, in order to break the self-reinforcing cycle of gender inequality as a whole, all elements must be addressed, including gender stereotyping in its own right as a harmful practice.

This lack of express legal discourse on the global human rights stage raises concerns, particularly when considering the role the law can play in the fight against harmful stereotyping. This goes back to the status of law in our society as a normative tool that delineates the parameters of what is considered acceptable behaviour. As *per* Professor Dennis Galligan, one of the significant aspects of modern legal orders is the

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<sup>56</sup> OHCHR (n17)

<sup>57</sup> Convention on the Rights of the Child 1989, Art 2.

<sup>58</sup> Simone Cusack, ‘OHCHR-Commissioned Report: Gender Stereotyping as a Human Rights Violation’ (OHCHR, 2013), p.ii <<https://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx>> accessed 23 November 2022.

<sup>59</sup> Alexandra Timmer, ‘Gender Stereotyping in the Case Law of the EU Court of Justice’ (2016) 1 European Equality Law Review 37, 39 <[http://www.njl.nu/uploads/17-06-20\\_Stereotyping.pdf](http://www.njl.nu/uploads/17-06-20_Stereotyping.pdf)> accessed 23 November 2023.

<sup>60</sup> Alexandra Timmer, ‘Gender Stereotyping in the Case Law of the EU Court of Justice’ (2016) 1 European Equality Law Review 37, 39 <[http://www.njl.nu/uploads/17-06-20\\_Stereotyping.pdf](http://www.njl.nu/uploads/17-06-20_Stereotyping.pdf)> accessed 23 November 2023.

<sup>61</sup> Alexandra Timmer, ‘Gender Stereotyping in the Case Law of the EU Court of Justice’ (2016) 1 European Equality Law Review 37, 39 <[http://www.njl.nu/uploads/17-06-20\\_Stereotyping.pdf](http://www.njl.nu/uploads/17-06-20_Stereotyping.pdf)> accessed 23 November 2023.

regulatory aspect of the law.<sup>62</sup> He stipulates that, while spontaneous social practices serve as the main guiding principle for social relations among citizens, “law brings added value in facilitating and protecting those relations, which it has the power to change and often does so by pursuing positive social goals.”<sup>63</sup> According to legal positivist H.L.A Hart, the law is a system of rules that can be differentiated from social habits due to their ‘internal aspect’, which make people regard them as a general standard to be followed by the group. Individuals don’t obey the law out of habit but because they internally accept that the law is ‘right’. Hart said “critical reflective attitude to certain patterns of behaviour as a common standard”<sup>64</sup> is expressed in normative language, which instructs how a group ‘ought’ to act, and what is ‘right’ or ‘wrong’.<sup>65</sup> Thus, if we view law as a set of generally accepted rules that dictate what ‘ought’ to be done, it is clear to see why the law can be an invaluable tool in combating a practice such as gender stereotyping. It can set a legitimate common standard that gender stereotyping is ‘wrong’ and that it ‘must’ be stopped.

Whilst there appears to be a lack of legal rules for gender stereotyping in the international sphere in its broadest conception, the UK is signatory to the Istanbul Convention, which is the first legally-binding instrument in Europe in the field of preventing and combating violence against women.<sup>66</sup> Once ratified, the Convention obliges parties to change practices which reinforce stereotyped roles for men and women (Article 12 (1)). The treaty was ratified in November 2022, however, at the time of writing, the UK has yet to receive its GREVIO evaluation report, which will occur in 2024. As one of the measures that State Parties are required to take, the Council of Europe lists ‘Prevention’ of violence against women, including “involving the media and the private sector in eradicating gender stereotypes and promoting mutual respect.”<sup>67</sup>

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<sup>62</sup> Denis Galligan, *Law in Modern Society*, Clarendon Law Series, (OUP 2007)

<sup>63</sup> *ibid* 21

<sup>64</sup> HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, Oxford University Press 2012) <<http://oxfordlawtrove.com/view/10.1093/he/9780199644704.001.0001/he-9780199644704>> accessed 6 March 2023

<sup>65</sup> *ibid*.

<sup>66</sup> Council of Europe, ‘The Istanbul Convention and the CEDAW framework: A comparison of measures to prevent and combat violence against women’ (Council of Europe, 2021) <<https://rm.coe.int/168059aa28>> accessed 24 November 2023.

<sup>67</sup> Council of Europe (n11)

The UK has also ratified the International Labour Organization (ILO) Violence and Harassment Convention, 2019 (No. 190) in March 2022, which entered into force on the 7<sup>th</sup> of March 2023.<sup>68</sup> In the Convention's Preamble, the ILO acknowledges that gender-based violence and harassment disproportionately affect women. They also explicitly name gender stereotypes as a risk factor and underlying cause that is essential to ending violence and harassment in the world of work.<sup>69</sup> Once again, gender stereotyping is acknowledged, but not actively tackled.

In 2019, the United Kingdom has made changes in its approach to tackling gender stereotyping in the media through the modification of its Advertising Codes, which will be discussed in the next chapter.

### **3. THE LAW AND STEREOTYPING IN THE MEDIA: WHAT HAS THE UK DONE?**

The CEDAW Committee's most recent Periodic Report on the United Kingdom (2017) listed "Perpetuating gender stereotypes in the media" as a key issue to be addressed.<sup>70</sup> When setting out the UK Government's overarching approach, the report names combating gender stereotyping in advertising as one of the UK government's strategies to address stereotyping under Article 5 of the Convention. At the time, the UK Government was considering options for how it "can work with the sector to ensure that adverts depict both women and men in a positive way."<sup>71</sup> Evidence that advertisements that include stereotypical depictions of gender roles and characteristics have the "potential to cause harm" was equally provided.<sup>72</sup>

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<sup>68</sup> 'Ratifications of ILO Conventions: Ratifications for United Kingdom of Great Britain and Northern Ireland' <[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102651](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102651)> accessed 20 February 2023

<sup>69</sup> International Labour Organization Recommendation C190: Violence and Harassment Convention, 2019 (No. 190), Preamble

<sup>70</sup> 'United Nations Convention on the Elimination of All Forms of Discrimination Against Women, United Kingdom's Fifth Periodic Report, 2011-2017', Annex 3 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/698249/UN\\_convention\\_on\\_the\\_elimination\\_of\\_all\\_forms\\_of\\_discrimination\\_against\\_women\\_8th.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698249/UN_convention_on_the_elimination_of_all_forms_of_discrimination_against_women_8th.pdf)> accessed 22 February 2023

<sup>71</sup> *ibid*, p.11.

<sup>72</sup> *ibid*.

## A. The Advertising Framework

To begin, it is important to understand the mechanism for regulating advertising in the UK in order to engage in an in-depth analysis of its merits and shortcomings.

Ofcom, the UK's communications regulator, established a co-regulatory relationship with the UK's Advertising Standards Authority (ASA) in 2004.<sup>73</sup> Since then, the ASA has maintained broadcast advertising standards in the UK<sup>74</sup> as the designated regulatory body. It ensures adherence to the Advertising Codes and assesses the likelihood of advertisements causing harm and offence.<sup>75</sup> The Committee for Advertising Practice (CAP) is responsible for writing the Advertising Codes that ASA applies when regulating advertisements.<sup>76</sup> Nonetheless, it is important to note that the law regarding gender stereotyping in advertisements in the UK is not primary legislation, but rather regulatory Codes enforced by ASA under Ofcom. Such Codes are supplementary to law passed by Parliament and may serve to provide "practical measures that enable the law to be enforced and operate in daily life."<sup>77</sup> The Leveson Inquiry of 2011-2012 delineated the benefits of self-regulation of respective industries, as opposed to legislative regulation, and briefly discussed the advertising industry. As the advertising sector is one that constantly changes and evolves, regulation as opposed to legislation allows for "flexibility in the light of social and technological change."<sup>78</sup> Moreover, self-regulation allows for a quicker "speed of response."<sup>79</sup> In fact, following any issues, self-regulatory bodies such as the ASA can update their regulations quickly, which also helps them deal satisfactorily with complaints. Most importantly, self-regulation allows the industry to maintain its autonomy and efficiently regulate itself, by

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<sup>73</sup> Advertising Standards Authority | Committee of Advertising, 'Self-Regulation and Co-Regulation. Find out How Our Self-Regulation System within a Co-Regulatory Framework Works.' <<https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html>> accessed 9 March 2023

<sup>74</sup> The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, s3.

<sup>75</sup> Public International Law and Policy Group, 'Legal Frameworks Regarding Sexism in Advertising: Comparison of National Systems Legal Memorandum' (PILPG, June 2015), 33

<sup>76</sup> Advertising Standards Authority | Committee of Advertising, 'About the ASA and CAP. Find out Who the ASA and CAP Are, and the Work We Do to Help Make All Ads Responsible.' <<https://www.asa.org.uk/about-asa-and-cap/about-regulation/about-the-asa-and-cap.html>> accessed 21 November 2022

<sup>77</sup> UK Parliament, 'What is Secondary Legislation?' (UK Parliament) <<https://www.parliament.uk/about/how/laws/secondary-legislation/>> accessed 19 November 2023

<sup>78</sup> Lord Justice Leveson, *An Inquiry Into the Culture, Practices and Ethics of the Press Report HC 780-I* (London: The Stationery Office November 2012).

<sup>79</sup> *ibid.*

promoting and upholding ethical standards of practice within the sector and allowing an industry body, such as ASA, to create specifically tailored regulation.

Although the advertising codes are not primary law, they are an extension of the law and are created to ensure compliance with the various laws that regulate the media. As *per* ASA, “our rules are designed to reflect the law.”<sup>80</sup> Therefore, the codes on gender stereotyping reflect the position of the law itself on the issue and are relevant to this paper. Moreover, Ofcom is a statutory regulator. This arguably reinforces the role of the law within advertising, which, through Ofcom, serves as statutory backing to self-regulation. This adds an element of compulsion to ASA’s enforcement of the standards, as it provides an incentive for industry players to comply with ASA to avoid being referred to Ofcom.<sup>81</sup> Ofcom may impose fines or even withdraw licences.<sup>82</sup> As Lord Justice Leveson recognises in his report, “advertising is a well known example of successful co-regulation.”<sup>83</sup>

Two main Codes are enforced by ASA: the UK Code of Broadcast Advertising (BCAP Code), applicable to television and radio, and the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code), covering the internet and online streaming services. In addition to acting on complaints from the public, the ASA carries out regulatory activities to ensure compliance with the advertising standards.<sup>84</sup> Moreover, the ASA can deploy sanctions and penalties for non-compliance to encourage both advertisers and broadcasters to respect the Codes.<sup>85</sup> These include removing ads from Search Engines and withholding access to advertising.<sup>86</sup>

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<sup>80</sup> Advertising Standards Authority | Committee of Advertising, ‘Legal and Regulation. Helpful Information on the Advertising Rules for Ads about Legal Services and Regulatory Matters.’ <[https://www.asa.org.uk/topic/legal\\_and\\_regulation.html](https://www.asa.org.uk/topic/legal_and_regulation.html)> accessed 22 November 2022

<sup>81</sup> Leveson (n77)

<sup>82</sup> Advertising Standards Authority | Committee of Advertising, ‘Sanctions. Our Sanctions Can Have Significant Negative Consequences for Advertisers Unwilling or Unable to Work with Us.’ <<https://www.asa.org.uk/codes-and-rulings/sanctions.html>> accessed 30 November 2022

<sup>83</sup> Leveson (n77)

<sup>84</sup> PLPG (n 74) 35

<sup>85</sup> ASA (n81)

<sup>86</sup> *ibid.*

The ASA has recently introduced changes to its framework in 2019, by incorporating new rules on gender stereotyping in advertisements.

**(i) Why focus on advertisements?**

Every day, people are audiences of advertisements in various forms. In such a digital and consumerist society, advertisements form an essential part of the media that is consumed.

With the expansion of online advertising, the public is now exposed to advertisements on a larger scale. Advertisements have taken on new forms, both visually and technologically, and now represent a more integral part of daily life.<sup>87</sup> The internet has equally widened the consumer demographic to include young children. According to child psychologist Allen Kanner, “it's becoming almost impossible to function as a child without a constant barrage of advertising,” which is concerning because of how vulnerable children can be.<sup>88</sup> As *per* leading UK media scholar Roger Silverstone, the media shapes our understanding of the world and our definitions of human behaviour.<sup>89</sup> Advertising images have become incorporated in the daily lives of individuals and form part of the frameworks that “enable and restrain our practices, thoughts and meanings.”<sup>90</sup>

Besides being commercial entities, modern advertising industries are equally cultural enterprises.<sup>91</sup> As British Professor Mica Nava has shown, skilful consumers “will consume the 'best' ads as cultural products in themselves, as they do video clips, movies and magazine images.”<sup>92</sup> Advertisements endorse consumer culture and promote lifestyles, careers and identities, including in terms of gender.<sup>93</sup> American sociologist Erving Goffman explains that advertisements employ repeated “ritualised [behavioural] practices”<sup>94</sup> present in society

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<sup>87</sup> Caroline Dahlberg, ‘Picturing the Public: Advertising Self-Regulation in Sweden and the UK’, 48 *Stockholm Studies in Psychology* 1 (Stockholm University 2010), 2.

<sup>88</sup> Rachael Post, ‘Friend or Foe? The Rise of Online Advertising Aimed at Kids’ *The Guardian* (28 February 2014) <<https://www.theguardian.com/sustainable-business/digital-online-advertising-children-privacy>> accessed 7 March 2023

<sup>89</sup> Roger Silverstone, *Media and Morality: on the Rise of the Mediapolis* (Polity 2007) 165-166

<sup>90</sup> Dahlberg (n86)

<sup>91</sup> *ibid* n3.

<sup>92</sup> Mica Nava, 1997, "Framing Advertising: Cultural Analysis and the Incrimination of Visual Texts.", *Buy this Book: Studies in Advertising and Consumption* 34 (Routledge 1997) 9

<sup>93</sup> Dahlberg (n86)

<sup>94</sup> Erving Goffman, *Gender Advertisements* (Harper & Row 1979) 26.

that have become 'natural' and taken for granted, such as gender. In advertisements, gendered depictions and their structural relationships are presented in a manner that is "hyper-ritualised", i.e. exaggerated, simplified and standardised.<sup>95</sup> By doing so, advertisers "stylize"<sup>96</sup> simplified depictions of gender and stereotypes, which allows them to continue to seem 'natural' to us.<sup>97</sup> For example, Goffman explains that one way in which social ranking is expressly recreated is through the 'relative size' of men, notably where: "the male's usual superiority of status over the female will be expressible in his greater girth and height."<sup>98</sup> Women and subordinated groups more generally tend to be represented as smaller and shorter in advertisements compared to their male counterparts.<sup>99</sup> This is directly linked to the social phenomenon whereby men and women choose to form couples in a manner which ensures that the man is taller in the relationship.<sup>100</sup> This subconscious practice is so ingrained in everyday life that, as *per* Goffman, such depictions of 'relative size' "can be routinely used as a means of ensuring that [a] picture's story will be understandable at a glance."<sup>101</sup>

As discussed, feminists began raising awareness about the unrealistic depictions of women in the media, including advertising, in the 1960s. Subsequently, strategies were put in place by marketers to address the concerns about harmful representation of women. Some marketers attempted to reverse the dominant gender representation in advertisements. This included representing men doing domestic tasks and being treated as sex objects and women as sexually assertive, successful and authoritative.<sup>102</sup> However, this only served to create new harmful stereotypes for men, such as the 'clueless dad'.<sup>103</sup> The sexualisation of men in ads equally contributed to the development of the 'Adonis Complex' in men, who continue to be affected by unrealistic

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<sup>95</sup> *ibid* 84.

<sup>96</sup> *ibid*

<sup>97</sup> Dahlberg (n86) 32.

<sup>98</sup> Erving Goffman, *Gender Advertisements* (Harper & Row 1979) 28.

<sup>99</sup> Caroline Dahlberg, 'Picturing the Public: Advertising Self-Regulation in Sweden and the UK', 48 *Stockholm Studies in Sociology* 1, (Stockholm University 2010), 32.

<sup>100</sup> Caroline Dahlberg, 'Picturing the Public: Advertising Self-Regulation in Sweden and the UK', 48 *Stockholm Studies in Sociology* 1, (Stockholm University 2010), 32.

<sup>101</sup> Erving Goffman, *Gender Advertisements* (Harper & Row 1979) 28.

<sup>102</sup> Antoniou and Akrivos (n10)

<sup>103</sup> *ibid*

standards of the ideal masculine physique.<sup>104</sup> As a result, in contemporary advertising, women are represented as ‘superwomen’ who are physically perfect, invested mothers and professionally accomplished and men are both muscular and powerful, but also caring and gentle.<sup>105</sup> Professors Gentry and Harrison explain that such societal expectations increase anxiety in men and cause significant health issues and decreased self-confidence.<sup>106</sup> Thus, such depictions set considerable pressure on individuals who may feel the need to adhere to such contradictory gender ideals to avoid judgement.

Overall, regulating advertisements is a vital step towards eliminating gender stereotyping and its impacts.

## (ii) UK framework: gender stereotyping in advertisements

Changes were introduced to the ASA’s ‘Harm and Offence’ framework in June 2019, which apply to both broadcast and non-broadcast advertisements, introduced as Rules 4.14 and 4.9 of the BCAP and CAP Codes respectively. They state that advertisements “must not include gender stereotypes that are likely to cause harm, or serious or widespread offence.”<sup>107</sup> The Codes equally come with guidance from the ASA,<sup>108</sup> which clarifies that the rule is not intended to prevent advertisements from featuring one gender only, or individuals undertaking gender-stereotypical roles.<sup>109</sup> Instead, they should avoid suggesting that these roles and traits are uniquely associated with one gender. Examples of gender representations that will not be accepted are

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<sup>104</sup> Harrison G. Pope, Jr., Katherine A. Phillips & Roberto Olivardia *The Adonis complex : how to identify, treat and prevent body obsession in men and boys*. (Touchstone 2002)

<sup>105</sup> Antoniou and Akrivos (n10) 85.

<sup>106</sup> James Gentry and Robert Harrison, ‘Is Advertising a Barrier to Male Movement toward Gender Change?’ (2010) 10 *Marketing Theory* 74, 83.

<sup>107</sup> The UK Code of Broadcast Advertising, Rule 4.14; The UK Code of Non-broadcast Advertising, Rule 4.9.

<sup>108</sup> Committee of Advertising Practice, ‘Advertising Guidance on depicting gender stereotypes likely to cause harm or serious or widespread offence’ < <https://www.asa.org.uk/static/uploaded/596b5237-27a5-444c-9b4811732f4a51e5.pdf>> accessed 10 December 2022.

<sup>109</sup> Advertising Standards Authority | Committee of Advertising, “Harm and Offence: Gender stereotypes. Advice online | 07 Mar 2022.” < <https://www.asa.org.uk/advice-online/harm-and-offence-gender-stereotypes.html>> accessed 10 December 2022.

provided, such as “a man or a woman failing to achieve a task specifically because of their gender.”<sup>110</sup> In addition, ads which juxtapose male and female stereotypical roles need to be handled with care. Furthermore, advertisements should not represent men being belittled for “displaying emotional vulnerability” and women only prioritising their appearance.<sup>111</sup> Moreover, ads should not “explicitly convey that a particular children’s product, pursuit, activity [...] is inappropriate for one or another gender.”<sup>112</sup>

Not much academic debate has arisen regarding the new rules and their application yet. Nonetheless, this section will attempt to draw a comparison between the change in ASA’s attitude towards gender stereotypes before and after the new rules, by evaluating its past rulings.

Before the implementation of these changes, the ASA focused on the likelihood of an advertisement causing “serious or widespread offence” under Rule 4.2 of the previous UK BCAP Code<sup>113</sup> and Rule 4.1 of the CAP Code. Rule 4.1 stated that particular care must be taken to avoid causing offence on various grounds, including gender.<sup>114</sup> However, there was no rule that was explicitly gender focused, and gender stereotypes were dealt with in the same manner as other issues of ‘offence’. Hence, the new rules provide us with a far more targeted and focused framework for offensive stereotypes in advertising, which explicitly *names* gender stereotyping as an issue. Arguably, prior to the modifications, cases of the likelihood of stereotypes causing widespread offence were evaluated on a very subjective and restrictive standard. The assessment of whether an advertisement was likely to cause ‘widespread offence’ was based on how advertisements were going to be received by the public – a clearly subjective standard. In addition to this, the framework exclusively focused on how an advertisement would be received by a *target* audience, in determining whether it was likely to cause widespread offence.<sup>115</sup> Arguably, the ASA limited ‘widespread offence’ to ‘widespread offence *within a portion of the public*’, which is not very indicative of how the advertisement was truly being received.

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<sup>110</sup> CAP (n107) 4

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid* 6.

<sup>113</sup> PILPG (n74) 35

<sup>114</sup> *ibid* 36.

<sup>115</sup> *ibid*

The previous case law under the old CAP and BCAP Codes, which has predominantly been removed from ASA's website, demonstrates the lack of transparency and consistency in ASA's decision pattern, and the subjectivity of the decision-making process. For example, complaints over similar advertisements that sexualised women and depicted them as sexual objects were upheld or set aside based on the medium used and its target audience. Thus, ASA's concern was not with whether the stereotypical gender depictions were causing harm to the group represented, which arguably lessened the seriousness of such depictions. For example, in 2015, the ASA rejected complaints about a Tom Ford Beauty perfume ad being offensive on the basis that it degraded and objectified women.<sup>116</sup> They reasoned that "the image was [...] artistic and in-keeping with ads for beauty products [...] where depictions of feminine beauty and the female body were commonly used."<sup>117</sup> Thus, the targeted consumers of such ads are accustomed to promotional images such as these, and therefore it is unlikely to cause widespread offence, and, as a result, did not degrade and objectify women. We can contrast this decision with that of an advertisement for bicycles in a cycling magazine, which pictured two scantily-clad women leaning on a wooden horse, captioned: "Sometimes it's hard to pick the right model...Test ride then decide." The ASA held that the advertisement was offensive because it was a cycling magazine.<sup>118</sup> In fact, this seems to suggest that an audience is only justifiably offended if they see something that surprises them, and alternatively, the advertisement would have been acceptable had it been in the 'right context.'<sup>119</sup> This approach corresponds with British sociologist Stuart Hall and film professor Paddy Whannel's account on how advertisements will vary in style and appeal based on the intended audience, when they state that: "If the same product is advertised [...] across the market, each advertisement will reflect in its style the demands of the appropriate medium."<sup>120</sup> Nonetheless, the ASA's reasoning was problematic as it downplayed the seriousness of depicting women as sexual objects.

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<sup>116</sup> Advertising Standards Authority | Committee of Advertising, 'ASA Adjudication on Tom Ford Beauty' <<https://www.asa.org.uk/rulings/tom-ford-beauty-a14-288599.html>> accessed 8 March 2023

<sup>117</sup> *ibid.*

<sup>118</sup> Dahlberg (n86) 170-171.

<sup>119</sup> *ibid* 170.

<sup>120</sup> Stuart Hall and Paddy Whannel, *The Popular Arts*. (Hutchinson 1964) 315.

Moreover, the Leveson Report criticised the Press Complaints Commission for simply being “a mediator in respect of complaints, rather than having any enforcement role that is consistent and effective.”<sup>121</sup> Arguably, under the old framework, the ASA also acted as a mere “mediator” of complaints through a reactive approach to offensive content, rather than a rule enforcer that addressed the harm suffered and upheld ethical industry standards.

Similarly, past decisions reveal the ASA’s tendency to dismiss complaints regarding ads that contain ‘traditional British humour’ that depicted objectifying gender roles.<sup>122</sup> For instance, an EasyJet ad in 2003, which featured women’s breasts with the slogan “discover weapons of mass distraction” was considered to be “lighthearted and humorous” by the ASA, and therefore not likely to cause widespread offence.<sup>123</sup>

Alternatively, with the new Rules, the ASA has made its position clear in terms of the use of humour, which is often a means used by advertisers to make stereotypical gender portrayals seem acceptable.<sup>124</sup> The guidelines state that “the use of humour or banter is unlikely to mitigate against the types of harm or serious or widespread offence identified in this guidance.”<sup>125</sup> This is a step in the right direction, explicitly warning advertisers that the use of offensive stereotypes masqueraded as humour will not be tolerated. Similarly, the new framework allows the ASA to formalise their general position regarding the use of gender stereotypes for advertisers, as an explicit rule under the ‘Harm and Offence’ section.<sup>126</sup> The focus on gender stereotyping in its code arguably demonstrates that the UK advertising industry takes the issue seriously, understanding the need to create stricter regulations that explicitly target the practice. It is also now focusing on the ‘harm’ such depictions cause to individuals, rather than on how ‘offensive’ they may be, which is a considerable improvement. Moreover, as *per* the examples given, the ASA widely focused on sexualisation, objectification and body image in their rulings prior to the new rules. However, the new framework expands gender stereotypes beyond

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<sup>121</sup> Leveson (n77) 1749.

<sup>122</sup> PILPG (n74) 36.

<sup>123</sup> *ibid.*

<sup>124</sup> Martin Eisend, Julia Plagemann and Julia Sollwedel, ‘Gender Roles and Humor in Advertising’ (2014) 43 (3) *Journal of Advertising* 256, 261.

<sup>125</sup> CAP (n107) 3.

<sup>126</sup> *ibid* n106.

the physical, and allows the ASA to address gender roles, characteristics and occupations as well, which are the three other components of the aforementioned Deaux and Lewis<sup>127</sup> framework of gender stereotyping.<sup>128</sup>

Nonetheless, the new framework can be criticised. Although it expands the gender stereotypes considered by ASA, sexualization and objectification are not explicitly mentioned as a form of harmful stereotyping. The guidance states that ASA had previously ruled against offensive and harmful stereotypes associated with gender under their past rulings regarding sexualization and objectification.<sup>129</sup> It arguably would have been favourable to add additional guidance about the harms of such sexualized depictions, especially considering that their past judgements mainly focused on the potential to ‘offend’ target audiences, rather than the ‘harm’ caused. The ASA continues to consider issues of sexualisation and objectification under the old ‘widespread offence’ framework, rather than ruling that ads that sexualise and objectify cause harm. For instance, in its ruling on Jigsaw’s clothing ad that featured a woman who was only wearing boots, a jumper and her underpants whilst climbing over a fence, the ASA held that, “because the ad objectified and stereotyped women as sexual objects, we concluded that it was irresponsible and likely to cause serious offence.”<sup>130</sup>

Moreover, the guidance remains very binary and only refers to ‘men’ and ‘women’, which disregards the existence of other genders who do not conform to the gender binary, thus failing to reflect contemporary social reality. This is especially concerning because the new rules were recently adapted in 2019, amid prevalent public discourse surrounding gender inclusivity.

Similarly, although this paper finds that the rules are a step in the right direction, there is still much work to be done to enhance their intersectionality and go beyond the limited examples provided in the guidance. In fact, the ASA did not go far enough in recognising that gender is deeply interconnected with other socio-cultural categories that can influence the degree of harm experienced by the individuals depicted. As feminist

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<sup>127</sup> Deaux & Lewis (n19).

<sup>128</sup> Antoniou and Akrivos (n10) 100.

<sup>129</sup> CAP (n107) 3.

<sup>130</sup> Advertising Standards Authority | Committee of Advertising, ‘ASA Ruling on Robinson Webster (Holdings) Ltd t/a Jigsaw’ <<https://www.asa.org.uk/rulings/robinson-webster--holdings--ltd-g21-1127608-robinson-webster--holdings--ltd.html>> accessed 15 April 2023

researchers have shown, individuals' intersecting identities must be at the forefront of any investigation of gender, which "must be understood in the context of power relations embedded in social identities."<sup>131</sup> This would ensure that the risk factors that contribute to such harmful practices across all demographic groups are accounted for.<sup>132</sup> Thus, the guidance arguably remains surface level.<sup>133</sup> Moreover, "without acknowledging that gender intersects with other grounds of discrimination, anti-stereotyping laws [may] reproduce stereotypes by representing the dominant experiences as the only valid experiences."<sup>134</sup> For example, when legal instruments make references to "women", they arguably refer to a particular group of women (white, cisgender, straight, abled). Consequently, the experiences of a dominant group of women become the *default* experience, with non-dominant groups being overlooked.<sup>135</sup>

The ASA's new rules are a positive step allowing the UK advertising regulation body to legitimise its position about gender stereotypes. Other media sectors should view ASA's initiative as an example to follow. However, the new framework does not go far enough yet and should explicitly mention sexualisation and objectification as forms of harmful stereotyping and adopt a more intersectional approach.

## **B. Regulating Gender Stereotyping in Social Media in the UK**

To begin, digital technologies have become an integral part of society and have a formative influence on our lives.<sup>136</sup> According to former CEO of Google Eric Schmidt and American businessman Jared Cohen, the internet offers a "new capacity for expression and free movement of information."<sup>137</sup> This includes the rise of

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<sup>131</sup> Stephanie A. Shields, 'Gender: An Intersectionality Perspective' (2008) 59 *Sex Roles* 301 <<http://link.springer.com/10.1007/s11199-008-9501-8>> accessed 8 March 2023

<sup>132</sup> Virtual Knowledge Center to End Violence Against Women and Girls, 'Stereotypes' (12 August 2020) <<https://www.endvawnow.org/en/articles/2023-stereotypes.html>> accessed 12 April 2023

<sup>133</sup> Kaitlyn Tiffany, 'Gender Stereotypes Have Been Banned from British Ads. What Does That Mean?' (*Vox*, 18 June 2019) <<https://www.vox.com/the-goods/2019/6/18/18684088/uk-gender-stereotype-ad-ban-sexism-advertising-history>> accessed 29 February 2023

<sup>134</sup> Frańczak (n35) 23.

<sup>135</sup> Olga Frańczak, '(Stereo)Typical Law: Challenging the Transformative Potential of Human Rights' in Gizem Guney, David Davies and Po-Han Lee (eds), *Towards Gender Equality in Law* (Springer International Publishing 2022), 23 <[https://link.springer.com/10.1007/978-3-030-98072-6\\_2](https://link.springer.com/10.1007/978-3-030-98072-6_2)> accessed 20 November 2022

<sup>136</sup> Jörn Lengsfeld, 'Jörn Lengsfeld: Digital Era Framework.' (2019) <<https://joermlengsfeld.com/en/publication/digital-era-framework/>> accessed 20 March 2023.

<sup>137</sup> Eric Schmidt and Jared Cohen, (2013). *The New Digital Age: Reshaping the Future of People, Nations and Business*. United Kingdom: John Murray.

major social networking sites such as Facebook, Instagram, Twitter, and TikTok, which create online communities for the sharing of information, personal messages, and content.<sup>138</sup> Such new media platforms, referred to as social media, play a significant role in shaping culture and influencing attitudes. This is to an extent which, according to American professor of communications Straubhaar *et al.*, “may be eroding the power of the conventional media. Ever-growing amounts of the news and entertainment are generated by those who do not work for established ‘big media’ [organisations].”<sup>139</sup> Such networking sites give anyone a far-reaching platform to express themselves and their viewpoints,<sup>140</sup> without the traditional limits of geography, politics, and the law.<sup>141</sup> In 2023, the UK witnessed a social media penetration rate of 84.4 percent of the population.<sup>142</sup> This demonstrates the wide reach that information circulated on these platforms may have. Thus, a modern study on regulating gender stereotyping in the media would not be complete without evaluating the regulation of social media, as opposed to the focus generally placed on more conventional forms of media.

### (i) Gender stereotypes in social media

These networks, as digital public spaces, have created new ways of perpetuating gender norms and stereotypes online.<sup>143</sup> Firstly, they give anyone a platform to voice their views on gender. Unfortunately, this allows individuals to permeate harmful stereotypical views, particularly on women, girls and trans and gender-nonconforming individuals, who are the main individuals targeted in such content.<sup>144</sup> This includes sharing

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<sup>138</sup> ‘Definition of SOCIAL MEDIA’ (11 April 2023) <<https://www.merriam-webster.com/dictionary/social+media>> accessed 18 March 2023

<sup>139</sup> Joseph Straubhaar; Robert LaRose, and Lucinda Davenport. *Media now: Understanding media, culture, and technology* (Cengage Learning 2015) 26.

<sup>140</sup> *ibid.*

<sup>141</sup> Richard Campbell; Christopher R. Martin, and Bettina Fabos. *Media and culture: An introduction to mass communication* (Bedford/St Martin’s 2009) 40, cited in Obiageli Pauline OHIAGU, and Victor Ogbonnaya OKORIE ‘SOCIAL MEDIA: SHAPING AND TRANSMITTING POPULAR CULTURE’ (2014) *Covenant Journal of Communication*, 102. <<https://journals.covenantuniversity.edu.ng/index.php/cjoc/article/view/57>> accessed 2 April 2023.

<sup>142</sup> ‘Active Social Media Audience in the United Kingdom (UK) in January 2023’ (*Statista*)

<<https://www.statista.com/statistics/507405/uk-active-social-media-and-mobile-social-media-users/>> accessed 2 April 2023

<sup>143</sup> ‘Hidden in Plain Sight: How the Infrastructure of Social Media Shapes Gender Norms’ (*Align Platform*, 18 February 2022) <<https://www.alignplatform.org/resources/report-hidden-in-plain-sight>> accessed 3 April 2023

<sup>144</sup> UN Women, ‘COVID-19 and Ending Violence against Women and Girls’ UN Women EVAW COVID-19 Briefs. (*UN Women – Headquarters*) <<https://www.unwomen.org/en/digital-library/publications/2020/04/issue-brief-covid-19-and-ending-violence-against-women-and-girls>>, cited in Katie Washington and Rachel Marcus, ‘Advancing Learning and Innovation on Gender Norms, ‘Hashtags, memes and selfies: Can social media and online activism shift gender norms?’ (Advancing Learning and Innovation on Gender Norms, 7 March 2022), 38 <<https://www.alignplatform.org/resources/report-social-media-online-activism>> accessed 3 April 2023.

misogynistic content which relies on stereotypes, to “dominate, silence and control women” or promote the inferiority of women.<sup>145</sup> A clear example is Andrew Tate, a social media figure who promotes misogynistic views on women and the hierarchy between the sexes. Gender stereotyping is being used on social media as a weapon to belittle, ridicule and discredit certain individuals, particularly women, which is often referred to as ‘gendertrolling’.<sup>146</sup> This is clearly demonstrated with women leaders on social media, who are judged according to a different standard than their male counterparts, due to “stereotypically feminine traits [being] associated with a lower level of political competence.”<sup>147</sup> Women leaders are often objectified and reduced to their appearance, which is widely mirrored on social media. This becomes the cause of widespread abuse online, notably when female leaders “don’t correspond to women’s commonly held gender stereotype as compassionate and caring decision-makers.”<sup>148</sup> This includes the use of harmful stereotypical insults pertaining to women’s intellect, such as ‘senseless female,’<sup>149</sup> or ‘lipstick on a pig’<sup>150</sup> in reference to former New Zealand Prime Minister Jacinda Ardern. This is notably made possible on social media due to the option of anonymity and pseudonyms, which will be explored later. Women online are equally subject to sexual insults and degradation, which perpetuate widespread sexual stereotypes.<sup>151</sup>

Harmful gender stereotypes are also usually the subject of ‘memes’: captioned images shared on social media that contain a humorous message.<sup>152</sup> Popular meme formats embody sexist stereotypes<sup>153</sup> and transmit “loaded

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<sup>145</sup> *ibid.*

<sup>146</sup> Karla Mantilla, *Gendertrolling: How Misogyny Went Viral* (Praeger, 2015) <<http://publisher.abc-clio.com/9781440833182>> accessed 3 April 2023.

<sup>147</sup> Ludovic Rheault, Erica Rayment and Andrea Musulan, ‘Politicians in the Line of Fire: Incivility and the Treatment of Women on Social Media’ (2019) 6 *Research & Politics* <<http://journals.sagepub.com/doi/10.1177/2053168018816228>> accessed 4 April 2023

<sup>148</sup> Neha Saluja and Dr N. Thilaka, ‘Women Leaders and Digital Communication: Gender Stereotyping of Female Politicians on Twitter’ (June 2021) 13 *Journal of Content, Community & Communication* 227, 229.

<sup>149</sup> Richard Rego, ‘Changing Forms and Platforms of Misogyny: Sexual Harassment of Women Journalists on Twitter’, 9 *Media Watch* 472, 478 <[https://journals.sagepub.com/doi/abs/10.15655/mw\\_2018\\_v9i3\\_49480](https://journals.sagepub.com/doi/abs/10.15655/mw_2018_v9i3_49480)> accessed April 5, 2023

<sup>150</sup> Adela Suliman, ‘Sexism Dogged Jacinda Ardern’s Tenure. Battling It Is Part of Her Legacy.’ *Washington Post* (19 January 2023) <<https://www.washingtonpost.com/world/2023/01/19/jacinda-ardern-resign-sexism-battles/>> accessed 6 April 2023

<sup>151</sup> Rego (n148) 477.

<sup>152</sup> Katie Washington and Rachel Marcus, ‘Advancing Learning and Innovation on Gender Norms, ‘Hashtags, memes and selfies: Can social media and online activism shift gender norms?’ (Advancing Learning and Innovation on Gender Norms, 7 March 2022), 6 <<https://www.alignplatform.org/resources/report-social-media-online-activism>> accessed 3 April 2023.

<sup>153</sup> *ibid.*

messages in their content under the guise of humour or joke.”<sup>154</sup> One may argue that memes are simply benign jokes that are ‘not that deep’, a phrase often used to describe something, particularly memes, as being not serious or important.<sup>155</sup> However, critical studies of the use of humour have highlighted its role in establishing or challenging power relations between genders.<sup>156</sup> American professor Bing argues that “jokes are effective ways of reinforcing existing hierarchies without seeming to do so because they are ambiguous and fictional,”<sup>157</sup> and can usually be dismissed by the defence “don’t you have a sense of humour?,”<sup>158</sup> even if offensive. An example of a meme that was circulated on the author’s high school class group chat was a picture of a suited man with the caption: “I’m not sexist. Sexism is wrong. And being wrong is for women.”<sup>159</sup> Other meme examples include variations of “women belong in the kitchen.” These respectively correspond to stereotypes about women’s traits and social roles according to the Deaux and Lewis framework.<sup>160</sup> Such memes, according to Drakett *et al.*, can “function as powerful persuasive devices”,<sup>161</sup> especially when considering that their primary audience is children and adolescents.<sup>162</sup>

In addition, social media, especially picture-based platforms such as Instagram, reproduce and uphold gender-normative body images.<sup>163</sup> A 2021 study from City University London involving 175 18-30 year old women and non-binary people in the UK showed that 90% of young women report using a filter or editing their photos before posting.<sup>164</sup> The digital enhancement of photos has become a mainstream practice, with the rising

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<sup>154</sup> Jessica Drakett, Bridgette Rickett, Katy Day, and Kate Milnes, ‘Old Jokes, New Media – Online Sexism and Constructions of Gender in Internet Memes’ (2018) 28 *Feminism & Psychology* 109,123

<<http://journals.sagepub.com/doi/10.1177/0959353517727560>> accessed 2 April 2023

<sup>155</sup> Fenix19, ‘Its Not That Deep?’ (*Memes Feel*, 17 January 2023) <<https://memesfeel.com/its-not-that-deep/>> accessed 13 April 2023

<sup>156</sup> Drakett *et al.* (n153) 111.

<sup>157</sup> Janet M. Bing, (2004). “Is feminist humor an oxymoron?” *Women and Language*, 27(1), 23.

<sup>158</sup> *ibid.*

<sup>159</sup> ‘Im Not Sexist Either’ (*Memedroid*, 20 September 2015) <<https://fr.memedroid.com/memes/detail/1455902>> accessed 7 April 2023

<sup>160</sup> Deaux & Lewis (n19).

<sup>161</sup> Drakett *et al.* (n131)

<sup>162</sup> ‘3 Stats That Show What Memes Mean to Gen Z & Millennials’ (*YPulse*) <<https://www.ypulse.com/article/2019/03/05/3-stats-that-show-what-memes-mean-to-gen-z-millennials/>> accessed 10 April 2023

<sup>163</sup> Dritter Gleichstellungsbericht, ‘Social Media Fact Sheet 6 Gender stereotypes on social media’ (2022) 1.

<sup>164</sup> Rosalind Gill, ‘Changing the perfect picture: Smartphones, social media and appearance pressures’, (City University London, 5 Mar 2021) <[https://www.city.ac.uk/\\_data/assets/pdf\\_file/0005/597209/Parliament-Report-web.pdf](https://www.city.ac.uk/_data/assets/pdf_file/0005/597209/Parliament-Report-web.pdf)> Accessed 9 April 2023.

pressures to comply with male or female beauty ideals.<sup>165</sup> Moreover, Butkowska *et al.* suggest that women on Instagram who incorporate and exaggerate idealised gender stereotypical feminine cues in their selfies tend to receive more feedback.<sup>166</sup> This is the same ‘ritualised’ display of gender that is present in advertising *per* Goffman, discussed earlier. In fact, Butkowska *et al.*’s findings suggest that stereotypical feminine gender displays that we see in mass media are not eliminated in user-generated content either. Rather, “young women who engage in gender stereotypical self-representation on Instagram tend to be rewarded with metrics of social success.”<sup>167</sup> A similar issue is that of sexualisation, particularly of women. Female “influencers” who seek to build a following on social media correlate sexiness with financial returns and potential success: “many women are convinced that it is not possible to be successful online without showing sex appeal.”<sup>168</sup> Women should be able to openly embrace their femininity and sexuality, however, this should be a personal choice they make without the added external pressure of social expectation. Women should be capable of gaining success on social media regardless of their gender identity, presentation and the qualities they choose to put forward or enhance.

Arguably, the algorithms and structure of numerous social media platforms themselves contribute to the issue. Social networking sites are predominantly user-driven and employ various algorithms to push content onto users based on their past activity, such as TikTok’s ‘For You’ page.<sup>169</sup> This arguably makes it easier for content containing harmful gender stereotypes to circulate and reach wider audiences. Content which employs stereotyping may reach communities of like-minded users who already view these notions as being true and regularly engage with such content. This may also be recommended to users who do not share these views,

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<sup>165</sup> *ibid* n162.

<sup>166</sup> Chelsea P Butkowski, Travis L Dixon, Kristopher R Weeks, & Marisa A Smith, ‘Quantifying the Feminine Self(Ie): Gender Display and Social Media Feedback in Young Women’s Instagram Selfies’ (2020) 22 *New Media & Society* 817 <<http://journals.sagepub.com/doi/10.1177/1461444819871669>> accessed 11 April 2023

<sup>167</sup> *ibid* 832.

<sup>168</sup> Hélène Bussy-Socrate and Karina Sokolova, ‘Sociomaterial Influence on Social Media: Exploring Sexualised Practices of Influencers on Instagram’ (2023) ahead-of-print *Information Technology & People* <<https://doi.org/10.1108/ITP-03-2022-0215>> accessed 11 April 2023

<sup>169</sup> Aparajita Bhandari and Sara Bimo, ‘Why’s Everyone on TikTok Now? The Algorithmized Self and the Future of Self-Making on Social Media’ (2022) 8 *Social Media + Society*, 2 <<http://journals.sagepub.com/doi/10.1177/20563051221086241>> accessed 12 April 2023

for instance if they have inadvertently viewed misogynistic content momentarily, often in the context of the aforementioned memes.

## (ii) Regulation

As is made clear in the Leveson Report, regulating social networking sites presents many challenges. At the time of the inquiry (2012), social media platforms were not as popular as they are today, which signifies that, despite all of the obstacles raised, regulation would arguably be more difficult in 2023. To begin, information shared on social media can be propagated “astonishingly” quickly.<sup>170</sup> Unlike traditional media forms, it would be difficult to regulate such a high influx of information. This is equally exacerbated by the ‘repost’ option we see available on multiple platforms. Another issue is anonymity: users can opt to post on social sites using a pseudonym to mask their identity. Extremely harmful stereotypes and views can be posted with “little likelihood of the publisher being identified and held to account.”<sup>171</sup> Another consideration is that law is jurisdictional. Major providers of internet services mainly operate under US law, which may cause conflicts of law, despite the fact that Internet firms will also seek to comply with local law if issues arise in a particular jurisdiction.<sup>172</sup>

Nonetheless, the UK government has recently implemented the Online Safety Act,<sup>173</sup> which establishes a legal regulatory framework for online service providers, including social networking sites.<sup>174</sup> According to the government, the Act delivers its “manifesto commitment to make the UK the safest place in the world to be online while defending free expression.”<sup>175</sup> The Act establishes Ofcom as the regulator, who is able to impose

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<sup>170</sup> Leveson (n77) 173

<sup>171</sup> *Ibid* 174.

<sup>172</sup> *Ibid*.

<sup>173</sup> Online Safety Bill: HL Bill (2022–23) 87.

<sup>174</sup> Emily Haves, ‘Research Briefing Online Safety Bill: HL Bill 87 of 2022–23’ (House of Lords Library, 25 January 2023).

<<https://lordslibrary.parliament.uk/research-briefings/ln-2023-0005/#:~:text=The%20bill%20would%20place%20duties,illegal%20content>> accessed 13 April 2023.

<sup>175</sup> John Woodhouse, ‘Online Safety Bill: Commons stages’ (House of Lords Library, 1 February 2023)

<<https://commonslibrary.parliament.uk/research-briefings/cbp-9579/#:~:text=The%20Online%20Safety%20Bill%20%5BBill,online%20while%20defending%20free%20expression%E2%80%9D>> accessed 13 April 2023.

finer on non-compliant providers and senior managers who refuse to supply information to Ofcom would be subject to imprisonment.<sup>176</sup> Thus, this Act would have been a pivotal opportunity to tackle online gender-based violence,<sup>177</sup> including harmful gender stereotyping.

Unfortunately, the Act does not address online VAWG at all, and much less gender stereotyping, which, according to the Centenary Action Group, is a “huge, missed opportunity to bring an end to a serious and widely prevalent form of violence against women and girls.”<sup>178</sup> The Act recognises multiple online harms, such as “protecting children”,<sup>179</sup> “revenge porn”, and “extreme sexual violence”,<sup>180</sup> which fall under VAWG, and of which stereotypes are a root cause. In fact, online VAWG is partly the result of gender stereotypes, as well as a source of further stereotyping. “Online VAWG takes place in the context of gendered norms of popular culture that can reinforce harmful stereotypes and gender inequality.”<sup>181</sup> Thus, regulating online VAWG would arguably help tackle gender stereotyping on social media. It seems that the government will not achieve its aim of creating a safe online space if the main victims of online violence are not *explicitly* protected.

Moreover, following concerns of censorship from critics, the Act has now removed ‘legal but harmful’ content as a category of harm for adults, which was present in past versions of the Online Safety Bill. The Centenary Action Group’s recommendations to the Government included retaining the provision and requiring platforms to use processes to reduce the circulation of such content.<sup>182</sup> This would have been relevant to harmful gender stereotyping as well, as this section existed to impose a duty of care on major service providers, such as

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<sup>176</sup> Haves (n173).

<sup>177</sup> Centenary Action Group, ‘Joint Briefing: The Online Safety Bill and Online Harms Against Women’ (Centenary Group, September 2021), 2

<sup>178</sup> *ibid.*

<sup>179</sup> Haves (n173).

<sup>180</sup> ‘A Guide to the Online Safety Bill’ (GOV.UK) <<https://www.gov.uk/guidance/a-guide-to-the-online-safety-bill>> accessed 14 April 2023

<sup>181</sup> Centenary Action Group, ‘Joint Briefing: The Online Safety Bill and Online Harms Against Women’ (Centenary Group, September 2021).

<sup>182</sup> *ibid.* 2.

Instagram, to shield its users from content that is harmful but remains below the threshold of criminality.<sup>183</sup> This would have been an influential provision for the regulation of harmful gender stereotyping on social media for both adults and children, if it were to be retained in the new legislation, as it would render such platforms accountable for the harms caused by allowing the circulation of such content.

However, the Online Safety Act is a clear example of the difficulty of explicitly legally regulating practices that are not illegal, but harmful, such as gender stereotyping, especially considering other protected fundamental rights such as freedom of expression, which will be explored in the next chapter.

#### **4. IS THE LAW THE RIGHT TOOL TO TACKLE GENDER STEREOTYPING IN THE MEDIA?**

In the UK, some initiatives have been put in place to tackle gender stereotyping in the media, notably in advertising. Although the framework remains surface level as explored above, it is a positive step towards the recognition of gender stereotyping as a harm that must be addressed in the media. Hopefully, this would lead other media sectors to explicitly recognize gender stereotyping and reinforce their positions surrounding the practice. However, using the law in this way is arguably exponentially more difficult for less traditional forms of media, primarily social media, where there is a continuous influx of information being shared by individuals around the world, rather than only from media professionals to the public.

As was explored, the Online Safety Act arguably demonstrates the difficulties of regulating harms such as gender stereotyping online, including on social media platforms. As Ofcom states: “[we recognise] that no platform that allows users freely to communicate and share content can entirely prevent harm.”<sup>184</sup> The Act generally places duties of care on such service providers to proactively shield its users from illegal content

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<sup>183</sup> Dan Milmo, ‘TechScape: Finally, the UK’s Online Safety Bill Gets Its Day in Parliament – Here’s What You Need to Know’ *The Guardian* (17 January 2023) <<https://www.theguardian.com/technology/2023/jan/17/online-safety-bill-meta-pinterest-snap-molly-russell>> accessed 18 April 2023

<sup>184</sup> Ofcom, ‘Online Safety Bill: Ofcom’s roadmap to regulation’ (Ofcom, 6 July 2022) <[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0016/240442/online-safety-roadmap.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0016/240442/online-safety-roadmap.pdf)> accessed 3 March 2023.

under UK law. Thus, platforms will be held accountable for allowing the circulation of illegal contents on their sites and for not protecting their users.

Nonetheless, it is important to note that, although wrongful gender stereotyping is a human rights violation according to the OHCHR,<sup>185</sup> and is recognised in international law as a harm to be eliminated, it is not in itself a criminal offence under UK law. Rather, it is an underlying cause and arguably a ‘gateway’ to offences such as discrimination based on gender, and different forms of gender-based violence, which would be prosecuted in turn.

The new legislation does not account for non-legal harms such as online gender stereotyping. This is predominantly due to concerns surrounding the fundamental right of freedom of expression under Article 10 of the Human Rights Act 1998, which states that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>186</sup> The right extends to all forms of expression.<sup>187</sup>

### **A. Gender Stereotyping, Freedom of Expression, and the Law**

The ‘legal but harmful’ provision, now removed from the Act, was the main concern of critics defending the right to free speech, who believed that the new legislation is a “censor’s charter”<sup>188</sup> despite the government’s intention of upholding free speech. However, it is a fine balancing exercise, and legislating against content that is not in itself illegal seems to tip the scale, as it may directly infringe on the right to free speech. Instead, the Government has stated that legal but harmful provisions will be replaced with new duties to boost free speech, whilst increasing the accountability of service providers.<sup>189</sup> Moreover, the Leveson Report, which took

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<sup>185</sup> Cusack (n18).

<sup>186</sup> Human Rights Act 1998, Art 10(1).

<sup>187</sup> House of Commons House of Lords Joint Committee on Human Rights, ‘Freedom of Speech in Universities Fourth Report of Session 2017–19’ (UK Parliament, 21 March 2018) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589.pdf>> accessed 15 April 2023.

<sup>188</sup> Milmo (n182).

<sup>189</sup> ‘New Protections for Children and Free Speech Added to Internet Laws’ (GOV.UK) <<https://www.gov.uk/government/news/new-protections-for-children-and-free-speech-added-to-internet-laws>> accessed 15 April 2023.

place before the Act, equally shed light on American social media platforms' strenuous defence of rights to free speech under American law, as they may themselves face prosecution for infringing on free speech if they remove content which is merely '*potentially illegal*'.<sup>190</sup> Even ASA's new framework banning gender stereotyping has been critiqued for being an assault on free speech, as "no free society can be in the business of banning mainstream adverts. For all our sakes, this new wave of paternalistic censorship must be stopped in its tracks."<sup>191</sup>

However, this is problematic for the victims of gender stereotyping. This can cause individuals to leave social media platforms altogether to avoid seeing harmful content and representations of their gender. As the Centenary Action Group makes clear, "[it is not] acceptable to suggest that people who are subjected to abuse simply remove themselves from the online space as a way of mitigating harm against themselves."<sup>192</sup> In fact, individuals who do not conform to traditional gender norms and express this on social media are often victims of gendered online violence, which in turn pushes individuals to delete their online presence.<sup>193</sup> Arguably, this impairs the victims' freedoms of expression, who are no longer capable of existing in the digital space without suffering from online violence or harmful and offensive depictions of their gender. The victims are being silenced, whilst the perpetrators' right to freedom of speech is being upheld. Similarly, the Online Safety Act has introduced new measures to 'shield' social media users from legal content they may find harmful, by giving adults "greater control over online posts they may not wish to see on platforms."<sup>194</sup> The Online Safety Act enforces the obligation on social media companies to offer tools to help adults avoid content they deem harmful, such as content glorifying misogyny, for example by way of human moderation tools or warning screens.<sup>195</sup> Although this seems like a reasonable middle ground to shield individuals from content that is harmful to them whilst preserving free speech, it does not eliminate the issue that harmful gender stereotypes

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<sup>190</sup> Levenson (n77) 178.

<sup>191</sup> Kate Andrews, 'The ASA's Puritanical Ban Spree Is a Flagrant Assault on Free Speech' (*CityAM*, 16 August 2019) <<https://www.cityam.com/the-asas-puritanical-ban-spree-is-a-flagrant-assault-on-free-speech/>> accessed 16 April 2023.

<sup>192</sup> Centenary Action Group (n180) 8.

<sup>193</sup> *ibid* n162, 2.

<sup>194</sup> *ibid* n188.

<sup>195</sup> *Ibid*.

are still circulating online. Moreover, this arguably promotes a victim-blaming approach, and places the onus on the victim to protect themselves from harm.

Nonetheless, an important fact remains which has been reiterated throughout: gender stereotyping as a practice is not unlawful under UK law. Although freedom of speech is a qualified and not an absolute right under Article 10,<sup>196</sup> its limits remain constrained within the law, such that the exercise of this freedom may be subject to restrictions based on the law.<sup>197</sup> The Joint Committee on Human Rights has made clear that this means that speech should be allowed unless it is unlawful.<sup>198</sup> However, in the case of gender stereotyping, it remains within the bounds of the law.

Furthermore, this can “include the right to say things which, through lawful, others may find disturbing or upsetting.”<sup>199</sup> Viewed this way, the right of freedom of expression surpasses the ability to legislate against the expression of harmful gender stereotypes without infringing on individual freedoms. For the right to free expression to be justifiably limited, it would have to be on the basis that gender stereotyping is unlawful, which is not the case. As we have explained, gender stereotyping can escalate into more dangerous crimes, such as the aforementioned VAWG, and is a root cause of discrimination, but is not a criminal offence in itself. Even under the ASA framework, gender stereotyping is not a ‘crime’, rather a harmful practice that must be avoided.

This raises the related normative question: should content that reinforces gender stereotyping be unlawful under UK law? Gender stereotyping is a complex and multi-faceted practice, which does not always manifest itself in the form of blatant hate speech, for example. Rather, gender stereotypes can be implicit or unintended. They may be circulated using countless different mediums, such as in the context of visual gender stereotyping

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<sup>196</sup> Human Rights Act 1998, Art 10.

<sup>197</sup> Human Rights Act 1998, Art 10(2).

<sup>198</sup> *ibid* n186

<sup>199</sup> *ibid* 3.

and the ‘ritualisation’ of the gender social hierarchy.<sup>200</sup> It would be difficult to define the legal parameters surrounding the practice and accurately delineate what is considered ‘gender stereotyping’. Furthermore, much of the harm that comes from gender stereotyping is due to it restricting individuals to roles, characteristics and societal functions based on their gender. However, such stereotypes are not always explicitly ‘harmful’ and hateful, which would prove to be even more difficult to regulate.

## B. Where Does that Leave Us?

As Swedish academic Dahlberg explains, relying on Goffman, “the organisation of gender in society is so invasive that it is very difficult to escape and hence to change.” Many areas of society would have to be reorganised in order to change the way gender stereotypes are presented in the media.<sup>201</sup> Although media sectors such as the advertising industry contribute “to culture stratification in our society,”<sup>202</sup> here in terms of gender, ultimately, the media (including advertisements), does not create gender stereotypes. Rather, the media is a “mirror” of what already exists in society, according to Goffman.<sup>203</sup> The relationship between the media and gender stereotyping is a circular one. Media forms such as advertisements help “hyper-ritualize”<sup>204</sup> the social gender hierarchy, but society ultimately channels its deep-rooted beliefs through the media as a medium. Seen this way, the influence of media content on society is one that primarily reinforces culture, rather than one that merely defines it.<sup>205</sup> In the context of social media, although the digital landscape allows us to express ourselves and our views through our e-identity, “in reality, digital settings simply lead us to the replication of the existing norms and culture of the tangible world, related to gender.”<sup>206</sup>

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<sup>200</sup> Goffman (n93) 84.

<sup>201</sup> Erving Goffman, ‘The Arrangement Between the Sexes.’ (1977) 4 *Theory and Society* 301, cited in Caroline Dahlberg, ‘Picturing the Public: Advertising Self-Regulation in Sweden and the UK’, 48 *Stockholm Studies in Sociology* 1, (Stockholm University 2010), 31.

<sup>202</sup> Stuart Hall and Paddy Whannel, *The Popular Arts*. (Hutchinson 1964) 315.

<sup>203</sup> Goffman (n93).

<sup>204</sup> *ibid* 26.

<sup>205</sup> Obiageli Pauline OHIAGU, and Victor Ogbonnaya OKORIE ‘SOCIAL MEDIA: SHAPING AND TRANSMITTING POPULAR CULTURE’ (2014) *Covenant Journal of Communication*, 98.

<<https://journals.covenantuniversity.edu.ng/index.php/cjoc/article/view/57>> accessed 2 April 2023.

<sup>206</sup> Dimitra Kladia, ‘Social Media and Gender: A Tricky Combination’ (*EAVI*, 22 September 2021) <<https://eavi.eu/social-media-and-gender-a-tricky-combination/>> accessed 16 April 2023.

Moreover, such depictions of gender in the media, particularly in the advertising industry, whose main purpose is to appeal to its audience to promote products and services, arguably exist because they are effective at fulfilling advertising's purpose. The EasyJet ad mentioned above in the discussion about advertisements serves an example of this. EasyJet would not use a close-up of a woman's breasts to promote cheap flights if they did not believe that such an image would appeal to their audiences and generate sales.

Ultimately, gender stereotypes are deeply embedded in the social fabric, as research by social psychologist Haines *et al.* has shown.<sup>207</sup> They are the result of deep-rooted attitudes that exist due to generations of conditioning and tradition and will not simply cease to exist by legislating against them. Haines *et al.* evaluated the fluctuation of gender stereotypes in society between 2014 and the 1980s, when Deaux and Lewis' framework on gender stereotyping was first established. Their research comparing both time periods revealed a stability of gender stereotypes across the characteristics of traits, physical characteristics, and occupations, except for female gender roles, which showed a *significant increase* in gender stereotyping.<sup>208</sup> The times are changing, but gender stereotypes are not. Such stereotypes existed before all forms of media, and only need to be regulated in the media because they exist in society. Ultimately, the media reflects pre-existing societal views, and the spread of such views makes them stronger, more ingrained, and more likely to be held by a larger fraction of society. Eradicating gender stereotyping in the media will not eradicate gender stereotyping, the same way the law will not "eliminate the deeply rooted attitudes which make discrimination not only possible but also encouraged."<sup>209</sup>

Nonetheless, the law remains an essential part in the fight against gender stereotypes, although not the solution in itself. The legitimacy of the law and its authoritative position in society makes it an invaluable tool when addressing issues such as gender stereotyping, particularly in terms of "naming" them.<sup>210</sup> As is highlighted by

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<sup>207</sup> Elizabeth L. Haines, Kay Deaux and Nicole Lofaro, 'The Times They Are A-Changing ... or Are They Not? A Comparison of Gender Stereotypes, 1983–2014' (2016) 40 *Psychology of Women Quarterly* 353, 360  
<<http://journals.sagepub.com/doi/10.1177/0361684316634081>> accessed 12 December 2022

<sup>208</sup> *ibid* 353.

<sup>209</sup> Frańczak (n43) 16

<sup>210</sup> *ibid* 28.

feminist legal scholars such as Rebecca J. Cook and Simone Cusack, the “law has an important role to play”<sup>211</sup> in ‘naming’ gender stereotyping as a ‘wrong’. This is the first step towards eliminating said wrong. In fact, the law labelling gender stereotyping as a human rights concern is essential, “because it can [...] authoritatively proclaim and transform an unacknowledged harmful experience into [one] that is recognised [as] harmful” and in need of redress.<sup>212</sup> Viewed this way, law helps treat the symptoms of gender stereotyping, but not the cause.

Alternatively, gradual and generational change is needed to reverse deeply ingrained attitudes and address the root of the issue. This paper finds that this is ultimately achievable by educating future generations and progressively reversing the patterns and traditions that lead to durable gender stereotypes. As the council of Europe states, education “plays a central role in [changing attitudes]. Schools occupy a unique position in society, and the role of the school is fundamental in promoting gender equality.”<sup>213</sup>

The importance of educating the new generations on the harms of gender stereotyping and inequality between genders is recognised in international law. Article 14 of the Istanbul Convention declares that: “States should include, where necessary, teaching material on: equality between men and women, non-stereotyped gender roles, [...] gender-based violence against women, [...] - in all forms of education and at all levels.”<sup>214</sup> Moreover, Article 10 of CEDAW provides that States shall take all appropriate measures to “ensure, on a basis of equality of men and women, the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education.”<sup>215</sup> CEDAW recommends that this be done through the

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<sup>211</sup> Cook and Cusack (n27) 39

<sup>212</sup> *ibid.*

<sup>213</sup> Maureen Bohan, ‘Combating Gender Stereotypes in and through Education’ (Council of Europe, February 2015), 3 <<https://www.coe.int/en/web/genderequality/-combating-gender-stereotypes-in-and-through-education->> accessed 18 November 2023

<sup>214</sup> The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011, Art 14

<sup>215</sup> The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011, Art 10.

encouragement of coeducation (the education of both female and male students together), the revision of textbooks and school programmes, as well as the adaptation of teaching methods.<sup>216</sup>

A positive step towards educating students in the UK on the harms of gender stereotyping and equality can be seen in the form of the new Relationships Education and Relationships and Sex Education (RSE) curriculums, which have become compulsory in all schools in the UK since 2020. In the Department of Education's guidance, they state that schools should take "positive action" to build a culture where issues such as gender stereotypes are not tolerated before they become ingrained. As the 2014 Council of Europe Conference *Combating gender stereotypes in and through education* concluded: "societies remain strongly gender stereotyped and [...] the education system, which is a subsystem of the societies they serve, reproduce the values and culture of those societies without challenging their possible limitations on the life opportunities and experiences of their pupils."<sup>217</sup> Thus, positive action is required to challenge and change pre-existing values and to build an educational 'subsystem' within which gender stereotyping is not tolerated, to ultimately influence change on society as a whole.

By the end of primary school, pupils should know "what a stereotype is, and how stereotypes can be unfair, negative or destructive."<sup>218</sup> Secondary schools should teach pupils to recognise how stereotypes, including stereotypes based on sex and gender, can cause damage including prejudice and the normalisation of non-consensual behaviour.<sup>219</sup> This should also be done in the form of the language and ideas used in school. Educators must be conscious of the language they use and the potential stereotypes it may perpetrate, for example through the use of terms such as "sweetie" for girls and "mate" for boys.<sup>220</sup> Moreover, this paper

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<sup>216</sup>Convention on the Elimination of All Forms of Discrimination Against Women 1979, Art 10.

<sup>217</sup> Maureen Bohan, 'Combating Gender Stereotypes in and through Education' (Council of Europe, February 2015), 3 <<https://www.coe.int/en/web/genderequality/-combating-gender-stereotypes-in-and-through-education->> accessed 18 November 2023

<sup>218</sup> Department for Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers (assets publishing) 22' <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1090195/Relationships\\_Education\\_RSE\\_and\\_Health\\_Education.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090195/Relationships_Education_RSE_and_Health_Education.pdf)> accessed on 28 March 2023

<sup>219</sup> *ibid* 28.

<sup>220</sup> Gender Stereotypes: Primary Schools Urged to Tackle Issue' *BBC News* (31 May 2021) <<https://www.bbc.com/news/education-57256075>> accessed 28 March 2023.

finds that a diverse gender representation in the school curriculum is essential. Unfortunately, this is not accounted for in the Department's guidance, despite a letter sent to former Education Secretary Gavin Williamson signed by various organisations and charities about the risk of the language and curriculums used in schools reinforcing stereotypes.<sup>221</sup>

Ultimately, measures to reverse deeply embedded attitudes, such as through the education of future generations from a young age, will be the solution to tackling gender stereotyping in the media in the long term.

## 5. CONCLUSION

To conclude, based on an analysis of media regulation in the UK, this paper sought to establish that, although the law can play an important role in tackling gender stereotyping in the media, it is ultimately not the solution to its eradication.

Gender stereotyping is a human rights violation that limits individuals' personal rights and freedoms by setting the parameters for how they are expected to behave based on their gender identity. Gender stereotypes are predominantly harmful to women, as they reinforce the patriarchal gender hierarchy and inequality. Moreover, women are equally the primary victims of sexual stereotypes, which can lead to distorted views sexual violence and contribute to the justification of VAWG. Nonetheless, gender stereotypes affect other genders as well, including men. Research by Addis *et al* has shown that freeing men from constraining masculine gender norms would ultimately encourage equality for all.<sup>222</sup> Stereotypes are equally harmful to non-binary and transgender individuals, who are the victims of an additional layer of prejudice stemming from a narrative that accords a superior status to cisnormativity.<sup>223</sup>

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<sup>221</sup> *ibid.*

<sup>222</sup> Addis *et al.* (n35).

<sup>223</sup> Silvan Agius, 'Human Rights and Intersex People' (The Council of Europe Commissioner for Human Rights, 2015), 15 <<https://rm.coe.int/16806da5d4>> accessed 24 November 2023.

The media is a major medium through which such harmful gender norms are circulated. This paper evaluated two media industries: the advertising industry, regulated by ASA, and social networking sites, that have become an integral part of the media consumed today. This was first done by considering the changes made to ASA's regulatory framework following the introduction of new rules that explicitly prohibit advertisers from using gender stereotypes. Although ASA's new framework legitimises the industry's position on gender stereotyping, it remains surface level and in need of further development, notably in the areas of intersectionality and the issues of sexualisation and objectification.

Then, the paper evaluated the Government's new Online Safety Act, which was created to make the UK "the safest place in the world to be online while defending free expression."<sup>224</sup> Despite the difficulties of regulating social media platforms raised previously, the Act sets duties of care on social media providers to shield their users from illegal content in the UK. Nonetheless, as this paper concluded, gender stereotyping is not in itself illegal, and thus would not fall under the scope of the new legislation, following the removal of the 'legal but harmful' provisions. This is notably due to the need to balance the implementation of such legislation with the right of freedom of expression under the Human Rights Act, which according to the Joint Committee on Human Rights should be protected unless unlawful.<sup>225</sup>

Overall, the media does not create gender stereotypes, but reinforces pre-existing 'culture'. Gender stereotyping is a deep-rooted and durable practice passed through generations. The media serves as a reflection of established societal views. Nonetheless, the long-term solution to the elimination of such practices is not simply by legislating against them.

Although the law as an authoritative regulator plays an important role in 'naming' gender stereotyping as an issue that must be addressed and serves as a reflection of what morally 'ought' to be done, as *per* Hart, it is

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<sup>224</sup> Woodhouse (n174).

<sup>225</sup> *Ibid* n186.

not the ultimate solution to eliminating gender stereotyping in the media. As discussed, international law which directly addresses gender stereotyping as a ‘harm’ is invaluable, as it delineates and articulates the obligation of State Parties and reaffirms the seriousness of the harm caused by the practice. Additionally, in terms of the spread of harmful stereotypical depictions in the media, the law can help limit and regulate the presence of gender stereotypes on different media platforms. As was explained, a reciprocal relationship exists between society and the media: society shapes the media and in turn media shapes society.<sup>226</sup> Thus, the law, by limiting society’s exposure to gender stereotypes in the media, will help minimise the overall influence such depictions have on society, notably on younger generations.

Nonetheless, the law ultimately only treats the symptoms of such a deep-rooted and ingrained social practice, rather than the cause. Addressing the root of the problem and reversing attitudes in society itself will lead to long term change and to the elimination of gender stereotyping in the media and in society. This can be done through education, whose importance is emphasised in international legal instruments such as CEDAW.

The value of the law in the fight against gender stereotyping cannot be ignored, but the progressive education of future generations is ultimately what will ensure that current society’s harmful beliefs about gender are not inherited.

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<sup>226</sup> David CROTEAU D, William HOYNES and Stefania MILAN (ed), *Media/Society: Industries, Images, and Audiences, 4th Edition* (Sage Publications 2012) <<https://cadmus.eui.eu/handle/1814/19235>> accessed 11 January 2023

## **BIBLIOGRAPHY**

### **Primary Sources**

Convention on the Elimination of All Forms of Discrimination Against Women 1979, Art. 2(e), Art 5(a), Art 10.

Convention on the Rights of Persons with Disabilities 2007, Art 8(1)(b).

Convention on the Rights of the Child 1989, Art 2.

Human Rights Act 1998, Art 10(1).

Online Safety Bill: HL Bill (2022–23) 87.

The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, s3.

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011, Art. 3, Art 10, Art 14.

### **Secondary Sources**

‘3 Stats That Show What Memes Mean to Gen Z & Millennials’ (*YPulse*)

<<https://www.ypulse.com/article/2019/03/05/3-stats-that-show-what-memes-mean-to-gen-z-millennials/>>

accessed 10 April 2023

Agius S, ‘Human Rights and Intersex People’ (The Council of Europe Commissioner for Human Rights, 2015) <<https://rm.coe.int/16806da5d4>> accessed 24 November 2023.

‘A Guide to the Online Safety Bill’ (*GOV.UK*) <<https://www.gov.uk/guidance/a-guide-to-the-online-safety-bill>> accessed 14 April 2023

‘Active Social Media Audience in the United Kingdom (UK) in January 2023’ (*Statista*)

<<https://www.statista.com/statistics/507405/uk-active-social-media-and-mobile-social-media-users/>>  
accessed 2 April 2023

Addis ME, Mansfield AK, and Syzdek MR, “Is ‘Masculinity’ a Problem?: Framing the Effects of Gendered Social Learning in Men.” (2010) 2 *Psychology of Men & Masculinity* 77.

Advertising Standards Authority | Committee of Advertising, ‘About the ASA and CAP. Find out Who the ASA and CAP Are, and the Work We Do to Help Make All Ads Responsible.’

<<https://www.asa.org.uk/about-asa-and-cap/about-regulation/about-the-asa-and-cap.html>> accessed 21 November 2022

— —, ‘ASA Adjudication on Tom Ford Beauty’ <<https://www.asa.org.uk/rulings/tom-ford-beauty-a14-288599.html>> accessed 8 March 2023

— —, ‘ASA Ruling on Robinson Webster (Holdings) Ltd t/a Jigsaw’

<<https://www.asa.org.uk/rulings/robinson-webster--holdings--ltd-g21-1127608-robinson-webster--holdings--ltd.html>> accessed 15 April 2023

— —, ‘Harm and Offence: Gender Stereotypes Advice Online 07 Mar 2022’

<<https://www.asa.org.uk/advice-online/harm-and-offence-gender-stereotypes.html>> accessed 10 December 2022

— —, ‘Legal and Regulation. Helpful Information on the Advertising Rules for Ads about Legal Services and Regulatory Matters.’ <[https://www.asa.org.uk/topic/legal\\_and\\_regulation.html](https://www.asa.org.uk/topic/legal_and_regulation.html)> accessed 22 November 2022

— —, ‘Sanctions. Our Sanctions Can Have Significant Negative Consequences for Advertisers Unwilling or Unable to Work with Us.’ <<https://www.asa.org.uk/codes-and-rulings/sanctions.html>> accessed 30 November 2022

— —, ‘Self-Regulation and Co-Regulation. Find out How Our Self-Regulation System within a Co-Regulatory Framework Works.’ <<https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html>> accessed 9 March 2023

Alcott LM, *Little Women* (Penguin Books 1989)

Andrews K, 'The ASA's Puritanical Ban Spree Is a Flagrant Assault on Free Speech' (*CityAM*, 16 August 2019) <<https://www.cityam.com/the-asas-puritanical-ban-spree-is-a-flagrant-assault-on-free-speech/>> accessed 16 April 2023

Antoniou A and Akrivos D, 'Gender Portrayals in Advertising: Stereotypes, Inclusive Marketing and Regulation' (2020) 12 *Journal of Media Law* 78  
<<https://www.tandfonline.com/doi/full/10.1080/17577632.2020.1783125>> accessed 12 December 2022

Beauvoir S de, Borde C and Malovany-Chevallier S, *The Second Sex* (Vintage Books, 2011)

Bhandari A and Bimo S, 'Why's Everyone on TikTok Now? The Algorithmized Self and the Future of Self-Making on Social Media' (2022) 8 *Social Media + Society* 205630512210862  
<<http://journals.sagepub.com/doi/10.1177/20563051221086241>> accessed 12 April 2023

Bohan M, 'Combating Gender Stereotypes in and through Education' (Council of Europe, February 2015)  
<<https://www.coe.int/en/web/genderequality/-combating-gender-stereotypes-in-and-through-education->> accessed 18 November 2023

Bussy-Socrate H and Sokolova K, 'Sociomaterial Influence on Social Media: Exploring Sexualised Practices of Influencers on Instagram' (2023) ahead-of-print *Information Technology & People*  
<<https://doi.org/10.1108/ITP-03-2022-0215>> accessed 11 April 2023

Butkowski CP and others, 'Quantifying the Feminine Self(Ie): Gender Display and Social Media Feedback in Young Women's Instagram Selfies' (2020) 22 *New Media & Society* 817  
<<http://journals.sagepub.com/doi/10.1177/1461444819871669>> accessed 11 April 2023

Campbell R, Martin CR, and Fabos B, *Media and culture: An introduction to mass communication* (Bedford/St Martin's 2009)

Carlyle T, Sartor Resartus. On heroes, hero-worship and the heroic in history. (J. M. Dent & Sons Ltd 1910).

Centenary Action Group, 'Joint Briefing: The Online Safety Bill and Online Harms Against Women', (Centenary Action Group, September 2021)

Committee of Advertising Practice, 'Advertising Guidance on depicting gender stereotypes likely to cause harm or serious or widespread offence' <<https://www.asa.org.uk/static/uploaded/596b5237-27a5-444c-9b4811732f4a51e5.pdf>> accessed 10 December 2022.

'Convention C190 - Violence and Harassment Convention, 2019 (No. 190)' <[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C190](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190)> accessed 18 April 2023

'Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979' (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>> accessed 12 January 2023

Cook RJ and Cusack S, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) <<https://www.jstor.org/stable/j.ctt3fhmhd>> accessed 9 January 2023

Council of Europe, 'Gender Equality Strategy 2018-2023' <<https://rm.coe.int/ge-strategy-2018-2023/1680791246>> accessed 12 January 2022

Council of Europe, 'The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)' <<https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence>> accessed 5 January 2023

Council of Europe, 'The Istanbul Convention and the CEDAW framework: A comparison of measures to prevent and combat violence against women' (Council of Europe, 2021) <<https://rm.coe.int/168059aa28>> accessed 24 November 2023.

'COVID-19 and Ending Violence against Women and Girls' (*UN Women – Headquarters*) <<https://www.unwomen.org/en/digital-library/publications/2020/04/issue-brief-covid-19-and-ending-violence-against-women-and-girls>> accessed 18 April 2023

CROTEAU D, HOYNES W and MILAN S, *Media/Society: Industries, Images, and Audiences, 4th Edition* (Sage Publications 2012) <<https://cadmus.eui.eu/handle/1814/19235>> accessed 11 January 2023

Cusack S, 'OHCHR-Commissioned Report: Gender Stereotyping as a Human Rights Violation' (OHCHR, 2013), <<https://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx>> accessed 23 November 2022.

Dahlberg C, 'Picturing the Public: Advertising Self-Regulation in Sweden and the UK', 48 *Stockholm Studies in Sociology* 1 (Stockholm University 2010).

Deaux K and Lewis LL, 'Structure of Gender Stereotypes: Interrelationships among Components and Gender Label.' (1984) 46 *Journal of Personality and Social Psychology* 991

'Definition of SOCIAL MEDIA' (11 April 2023) <<https://www.merriam-webster.com/dictionary/social+media>> accessed 18 March 2023

Department for Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers (assets publishing) 22

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1090195/Relationships\\_Education\\_RSE\\_and\\_Health\\_Education.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090195/Relationships_Education_RSE_and_Health_Education.pdf)> accessed on 28 March 2023

Drakett J, Rickett B, Day K, and Milnes K, 'Old Jokes, New Media – Online Sexism and Constructions of Gender in Internet Memes' (2018) 28 *Feminism & Psychology* 109

<<http://journals.sagepub.com/doi/10.1177/0959353517727560>> accessed 2 April 2023

Dritter Gleichstellungsbericht, 'Social Media Fact Sheet 6 Gender stereotypes on social media' (2022)

Eisend M, Plagemann J and Sollwedel J, 'Gender Roles and Humor in Advertising' (2014) 43 (3) *Journal of Advertising* 256.

Fenix19, 'Its Not That Deep?' (*Memes Feel*, 17 January 2023) <<https://memesfeel.com/its-not-that-deep/>> accessed 13 April 2023

'Fourth Estate - Political Dictionary' (22 September 2023) <<https://politicaldictionary.com/words/fourth-estate/>> accessed 18 November 2023

Frańczak O, '(Stereo)Typical Law: Challenging the Transformative Potential of Human Rights' in Gizem Guney, David Davies and Po-Han Lee (eds), *Towards Gender Equality in Law* (Springer International Publishing 2022) <[https://link.springer.com/10.1007/978-3-030-98072-6\\_2](https://link.springer.com/10.1007/978-3-030-98072-6_2)> accessed 20 November 2022

Fredman S, *Women and the Law* (Oxford University Press 1998)  
<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198763239.001.0001/acprof-9780198763239>> accessed 12 April 2023

Friedan B, *The Feminine Mystique* (Penguin 1963)

'Gender Stereotypes: Primary Schools Urged to Tackle Issue' *BBC News* (31 May 2021)  
<<https://www.bbc.com/news/education-57256075>> accessed 28 March 2023

Galligan D, *Law in Modern Society*, Clarendon Law Series, (OUP 2007)

Gentry J and Harrison R, 'Is Advertising a Barrier to Male Movement toward Gender Change?' (2010) 10 *Marketing Theory* 74

Goffman E, *Gender Advertisements* (Harper & Row 1979)

— —, 'The Arrangement Between the Sexes.' (1977) 4 *Theory and Society* 301

Haines EL, Deaux K and Lofaro N, 'The Times They Are A-Changing ... or Are They Not? A Comparison of Gender Stereotypes, 1983–2014' (2016) 40 *Psychology of Women Quarterly* 353  
<<http://journals.sagepub.com/doi/10.1177/0361684316634081>> accessed 12 December 2022

Hall S, and Whannel P, *The Popular Arts*. (Hutchinson 1964).

Hart H, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, Oxford University Press 2012)  
<<http://oxfordlawtrove.com/view/10.1093/he/9780199644704.001.0001/he-9780199644704>> accessed 6 March 2023

Haves E, 'Research Briefing Online Safety Bill: HL Bill 87 of 2022–23' (House of Lords Library, 25 January 2023). <<https://lordslibrary.parliament.uk/research-briefings/lln-2023-0005/#:~:text=The%20bill%20would%20place%20duties,illegal%20content>> accessed 13 April 2023.

Herring J, 'Where are the Carers in Healthcare Law and Ethics?' (2007) 27 *Legal Studies* 51 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287149](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287149)> accessed 22 November 2023

'Hidden in Plain Sight: How the Infrastructure of Social Media Shapes Gender Norms' (*Align Platform*, 18 February 2022) <<https://www.alignplatform.org/resources/report-hidden-in-plain-sight>> accessed 3 April 2023

Hooks B, *Ain't I a Woman?: Black Women and Feminism* (Pluto Classics 1987)

'Im Not Sexist Either' (*Memedroid*, 20 September 2015)

<<https://fr.memedroid.com/memes/detail/1455902>> accessed 7 April 2023

International Commission of Jurists, 'Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice' (ICJ, April 2015).

International Labour Organization Recommendation C190: Violence and Harassment Convention, 2019 (No. 190), Preamble

James S E., Herman J L., Rankin S, Keisling M, Mottet L, Anafi M, "The Report of the 2015 U.S. Transgender Survey" (National Center for Transgender Equality, 2016)

<<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>> accessed 22 November 2023.

Kladia D, 'Social Media and Gender: A Tricky Combination' (*EAVI*, 22 September 2021)

<<https://eavi.eu/social-media-and-gender-a-tricky-combination/>> accessed 16 April 2023

Lengsfeld J, 'Jörn Lengsfeld: Digital Era Framework.' (2019)

<<https://joernlengsfeld.com/en/publication/digital-era-framework/>> accessed 20 March 2023

Lippmann W, *Public Opinion* (first published 1922, BN Publishing, 2007)

Leveson LJ, *An Inquiry Into the Culture, Practices and Ethics of the Press Report HC 780-I* (London: The Stationery Office November 2012).

Mantilla K, *Gendertrolling: How Misogyny Went Viral* ( Praeger, 2015) <<http://publisher.abc-clio.com/9781440833182>> accessed 3 April 2023.

Milmo D, ‘TechScape: Finally, the UK’s Online Safety Bill Gets Its Day in Parliament – Here’s What You Need to Know’ *The Guardian* (17 January 2023)

<<https://www.theguardian.com/technology/2023/jan/17/online-safety-bill-meta-pinterest-snap-molly-russell>> accessed 12 April 2023

Nava M, 1997, "Framing Advertising: Cultural Analysis and the Incrimination of Visual Texts.", *Buy this Book: Studies in Advertising and Consumption* 34 (Routledge 1997)

‘New Protections for Children and Free Speech Added to Internet Laws’ (*GOV.UK*)

<<https://www.gov.uk/government/news/new-protections-for-children-and-free-speech-added-to-internet-laws>> accessed 15 April 2023

Ofcom, ‘Online Safety Bill: Ofcom’s roadmap to regulation’ (Ofcom, 6 July 2022)

<[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0016/240442/online-safety-roadmap.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0016/240442/online-safety-roadmap.pdf)> accessed 3 March 2023.

Office for National Statistics, ‘What Is the Difference between Sex and Gender? - Office for National Statistics’ (ONS, 21 February 2019)

<<https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02->

21#:~:text=The%20UK%20government%20defines%20gender,they%20were%20assigned%20at%20birth> accessed 2 January 2023

Office of the High Commissioner for Human Rights , ‘OHCHR-Commissioned Report: Gender Stereotyping as a Human Rights Violation (2013)’

<<https://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx>>

Ohiagu OP and Okorie VO, 'SOCIAL MEDIA: SHAPING AND TRANSMITTING POPULAR CULTURE' [2014] Covenant Journal of Communication  
<<https://journals.covenantuniversity.edu.ng/index.php/cjoc/article/view/57>> accessed 2 April 2023

Pleck, J.H. (1995), "The Gender Role Strain Paradigm: An Update." in *A New Psychology of Men* 11, edited by R. F. Levant and W. S. Pollack (Basic Books).

Pope HG, Phillips KA, and Olivardia R, *The Adonis complex : how to identify, treat and prevent body obsession in men and boys*. (Touchstone 2002)

Post R, 'Friend or Foe? The Rise of Online Advertising Aimed at Kids' *The Guardian* (28 February 2014)  
<<https://www.theguardian.com/sustainable-business/digital-online-advertising-children-privacy>> accessed 7 March 2023

Public International Law and Policy Group, 'Legal Frameworks Regarding Sexism in Advertising: Comparison of National Systems Legal Memorandum'(PILPG, June 2015),

'Ratifications of ILO Conventions: Ratifications for United Kingdom of Great Britain and Northern Ireland'  
<[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102651](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102651)  
> accessed 20 February 2023

Rego R, 'Changing Forms and Platforms of Misogyny: Sexual Harassment of Women Journalists on Twitter', 9 Media Watch 472 <[https://journals.sagepub.com/doi/abs/10.15655/mw\\_2018\\_v9i3\\_49480](https://journals.sagepub.com/doi/abs/10.15655/mw_2018_v9i3_49480)>  
accessed April 5, 2023

Rheault L, Rayment E and Musulan A, 'Politicians in the Line of Fire: Incivility and the Treatment of Women on Social Media' (2019) 6 Research & Politics  
<<http://journals.sagepub.com/doi/10.1177/2053168018816228>> accessed 4 April 2023

Rosenblum A, 'Gender Nonconformity and the Stereotype Content Model' (Oberlin College 2018)  
<[https://etd.ohiolink.edu/acprod/odb\\_etd/etd/r/1501/10?clear=10&p10\\_accession\\_num=oberlin1528377926660424](https://etd.ohiolink.edu/acprod/odb_etd/etd/r/1501/10?clear=10&p10_accession_num=oberlin1528377926660424)> accessed 24 November 2023

Saluja N and Thilaka N, 'Women Leaders and Digital Communication: Gender Stereotyping of Female Politicians on Twitter' (June 2021) 13 *Journal of Content, Community & Communication* 227.

Sarikakis K, "Media and the Image of Women: Report of the 1<sup>st</sup> Conference of the Council of Europe Network of National Focal Points on Gender Equality, Amsterdam, 4 and 5 July 2013" (Council of Europe, November 2013) <<https://rm.coe.int/1680590587>> accessed 8 January 2023.

Shields SA, 'Gender: An Intersectionality Perspective' (2008) 59 *Sex Roles* 301 <<http://link.springer.com/10.1007/s11199-008-9501-8>> accessed 8 March 2023

Silverstone R, *Media and Morality: on the Rise of the Mediapolis* (Polity 2007) 165-166

Spector R, 'Sex, Gender, Nature and Nurture: Stanford School of Medicine Dean Lloyd Minor' (*Stanford Medicine Magazine*, 20 May 2017) <<https://stanmed.stanford.edu/sex-gender-nature-and-nurture-stanford-school-of-medicine-dean-lloyd-minor/>> accessed 5 January 2023

Suliman A, 'Sexism Dogged Jacinda Ardern's Tenure. Battling It Is Part of Her Legacy.' *Washington Post* (19 January 2023) <<https://www.washingtonpost.com/world/2023/01/19/jacinda-ardern-resign-sexism-battles/>> accessed 6 April 2023

Tiffany K, 'Gender Stereotypes Have Been Banned from British Ads. What Does That Mean?' (*Vox*, 18 June 2019) <<https://www.vox.com/the-goods/2019/6/18/18684088/uk-gender-stereotype-ad-ban-sexism-advertising-history>> accessed 1 March 2023

Straubhaar J, LaRose R, and Davenport L, *Media now: Understanding media, culture, and technology* (Cengage Learning 2015)

The UK Code of Broadcast Advertising, Rule 4.14

The UK Code of Non-broadcast Advertising, Rule 4.9.

Timmer A, 'Gender Stereotyping in the Case Law of the EU Court of Justice' (2016) 1 *European Equality Law Review* 37 <[http://www.njl.nu/uploads/17-06-20\\_Stereotyping.pdf](http://www.njl.nu/uploads/17-06-20_Stereotyping.pdf)> accessed 23 November 2023.

— —, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’ (2011) 11 *Human Rights Law Review* 707 <<https://academic.oup.com/hrlr/article-lookup/doi/10.1093/hrlr/ngr036>> accessed 14 January 2023

Tuchman G, Daniels AK and Benét J, *Hearth and Home: Images of Women in the Mass Media* (Oxford University 1978)

UK Parliament, ‘What is Secondary Legislation?’ (UK Parliament) <<https://www.parliament.uk/about/how/laws/secondary-legislation/>> accessed 19 November 2023

‘United Nations Convention on the Elimination of All Forms of Discrimination Against Women, United Kingdom’s Fifth Periodic Report, 2011-2017’ <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/698249/UN\\_convention\\_on\\_the\\_elimination\\_of\\_all\\_forms\\_of\\_discrimination\\_against\\_women\\_8th.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698249/UN_convention_on_the_elimination_of_all_forms_of_discrimination_against_women_8th.pdf)> accessed 22 February 2023

United Nations Human Rights Office of the Commissioner, ‘Gender Stereotyping’ (*OHCHR*) <<https://www.ohchr.org/en/women/gender-stereotyping>> accessed 30 December 2022

UN Women, ‘COVID-19 and Ending Violence against Women and Girls’ UN Women EVAW COVID-19 Briefs. (*UN Women – Headquarters*) <<https://www.unwomen.org/en/digital-library/publications/2020/04/issue-brief-covid-19-and-ending-violence-against-women-and-girls>>

‘Violence against Women and Girls National Statement of Expectations (Accessible)’ (*GOV.UK*) <<https://www.gov.uk/government/publications/violence-against-women-and-girls-national-statement-of-expectations-and-commissioning-toolkit/violence-against-women-and-girls-national-statement-of-expectations-accessible>> accessed 9 January 2023

Virtual Knowledge Center to End Violence Against Women and Girls, ‘Stereotypes’ (12 August 2020) <<https://www.endvawnow.org/en/articles/2023-stereotypes.html>> accessed 12 April 2023

Ward LM and Grower P, ‘Media and the Development of Gender Role Stereotypes’ (2020) 2 *Annu. Rev. Dev. Psychol.* 177, <<https://doi.org/10.1146/annurev-devpsych-051120-010630>> accessed 9 January 2023

Washington K and Marcus R, 'Advancing Learning and Innovation on Gender Norms, 'Hashtags, memes and selfies: Can social media and online activism shift gender norms?' (Advancing Learning and Innovation on Gender Norms, 7 March 2022) < <https://www.alignplatform.org/resources/report-social-media-online-activism>> accessed 3 April 2023.

Waters M, *Women on Screen: Feminism and Femininity in Visual Culture* (Palgrave Macmillan 2011)

Woodhouse J, 'Online Safety Bill: Commons stages' (House of Lords Library, 1 February 2023)

<<https://commonslibrary.parliament.uk/research-briefings/cbp-9579/#:~:text=The%20Online%20Safety%20Bill%20%5BBill,online%20while%20defending%20free%20expression%E2%80%9D>> accessed 13 April 2023.

# HARMONISING HUMAN RIGHTS AND INVESTMENT ARBITRATION

Gomez Moreno\*

## ABSTRACT

*Corporate activities and state actions leading to investment arbitrations often intersect with human rights concerns, sparking discussions on harmonizing these areas within international arbitration. Despite ongoing debate, practical application has been hindered by perceived inherent conflicts between the two realms. This article seeks to bridge this divide by highlighting commonalities between human rights and investment arbitration, arguing for the feasibility and benefits of harmonization. It proposes an interpretative approach based on Article 31 of the Vienna Convention on the Law of Treaties, aiming to demonstrate that harmonization is not only viable but also beneficial for reconciling differences and enhancing coherence in international law. While not providing an exhaustive review or a definitive proposal, the article endeavours to explore policy considerations, offer insights from a legal perspective, and support the theory of harmonization by demonstrating that reconciling differences and enhancing coherence in international law is not only viable but also beneficial.*

*Keywords: Human Rights; Arbitration; Investment Arbitration; Article 31; Theory of Harmonization; International Law*

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## INTRODUCTION

Relevant scholars have referred to human rights and investment arbitration as water and oil due to the apparent conflicts and differences between both concepts.<sup>2</sup> This ‘conflictive’ relationship gives room to intriguing questions that make it a current hot topic in international arbitration.<sup>3</sup> Indeed, with the rise of the global discourse on corporate social responsibility (CSR)<sup>4</sup> and the ‘crisis of legitimacy’ of investment arbitration,<sup>5</sup> discussions around human rights in the international arbitration arena have become paramount.

For example, in recent years, there has been an increase in the discourse of corporate compliance with human rights.<sup>6</sup> This has led to the evolution of CSR through international instruments such as the UN Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises, which provide best practices for companies regarding human rights.<sup>7</sup> These developments demonstrate an increased interest in human rights in the business context. Now, from a legal perspective, there is still an important gap as such instruments remain non-binding, which makes compliance dependent on corporate goodwill.<sup>8</sup>

Turning to investment arbitration, the inclusion of human rights in international investment agreements (IIAs) is still underdeveloped. Against this backdrop, the purpose of this article is to briefly add some insights on the similarities between investment arbitration and human rights, which have been depicted as seemingly distant concepts, as well as to propose a methodology to harmonise both realms through Article 31 of the Vienna Convention on the Law of Treaties (VCLT). This article will provide alternatives to incorporate human rights considerations in investment arbitrations through legal interpretation.

The article consists of five sections. Section 2 introduces the conflict between human rights and investment arbitration, relying on relevant doctrine to explain the tension. Section 3 proposes similarities between both

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<sup>2</sup> Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (2011) 60 *International & Comparative Law Quarterly* 573.

<sup>3</sup> Catherine A Rogers and Roger P Alford, *The Future of Investment Arbitration* (Oxford University Press 2009).

<sup>4</sup> Barbara Lougee and James Wallace, ‘The Corporate Social Responsibility (CSR) Trend’ (2008) 20 *Journal of Applied Corporate Finance* 96.

<sup>5</sup> Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2004) 73 *Fordham Law Review* 1521.

<sup>6</sup> *Op. cit.* Lougee and Wallace (2008).

<sup>7</sup> John Gerard Ruggie, ‘Business and Human Rights: The Evolving International Agenda Current Developments’ (2007) 101 *American Journal of International Law*.

<sup>8</sup> Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone, *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016), 116.

realms, demonstrating that there are several crossroads in some concepts that are critical to both systems. Section 4 explains practical reasons that would justify the convenience of harmonising human rights and investment arbitration. Section 5 advances the proposal of harmonisation through the different elements of Article 31 of the VCLT.

## 1. THE CONFLICT BETWEEN HUMAN RIGHTS AND INVESTMENT ARBITRATION

Looking at human rights and international arbitration as separate and independent fields of international law, key differences in their very nature and common features may be found. Investment arbitration tends to be seen by certain critics as anti-democratic because there is no participation of communities in the negotiation of IIAs.<sup>9</sup> Other authors have criticised arbitral awards in these arbitrations and framed these decisions as contrary to the best interest of local communities for imposing penalties on states' measures to protect social values such as public health or the environment, among others.<sup>10</sup>

On the contrary, international instruments on human rights such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), to name a few, have been mostly described as a major development in the protection of public interest.<sup>11</sup> Likewise, permanent tribunals in charge of deciding human rights disputes, like the European Court of Human Rights (ECtHR) and the Interamerican Court of Human Rights (IACtHR), are generally seen as transformative forces despite criticism on compliance with their rulings.<sup>12</sup>

Regarding their actors and inherent principles, while the international investment regime usually praises quantification and measurement as seen in concepts such as 'damages,' human rights law deals with the value of fundamental rights as one of an unmeasurable character.<sup>13</sup> Additionally, each system addresses

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<sup>9</sup> Barnali Choudhury, 'Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights' [2009] *Alberta Law Review* 983.

<sup>10</sup> Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights' (2010) 39 *Denver Journal of International Law and Policy* 483.

<sup>11</sup> Douglas Cassel, 'Does International Human Rights Law Make a Difference' (2001) 2 *Chicago Journal of International Law* 121.

<sup>12</sup> Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.

<sup>13</sup> Nicholas J Diamond, '2019 in Review: International Investment Agreements and Human Rights' (*Kluwer Arbitration Blog*, 8 February 2020).

legal notions differently such as ‘nationality.’ In investment arbitration, an investor acting as a claimant must demonstrate that they are a national of a country that is a party to the IIA under which the claim is brought for them to be afforded protection.<sup>14</sup> On the contrary, human rights are perceived as universal and not subject to a specific nationality.<sup>15</sup>

Further, the inner structure of investment arbitration may impose legal limitations on tribunals to apply human rights considerations. This arises from the fact that, in theory, arbitrators have limited authority and should only decide on the ‘investment’ part of a dispute, restraining their interpretation of the language of the relevant IIA.<sup>16</sup> The leading case on this issue was *Biloune v Ghana*, a dispute before an *ad hoc* arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The case was initiated by Antoine Biloune and Marine Drive Complex Ltd because the former had been arrested and deported, being separated from his investments in the country.<sup>17</sup> Here, the tribunal stated that it only had jurisdiction to decide on ‘commercial disputes.’<sup>18</sup>

There may also be a sort of “human rights aversion” among arbitrators, mostly those with a private law background. For example, arbitrators may consider human rights alien to international arbitration because it is uncommon to see such issues in commercial arbitrations. Other arbitrators may be wary of making decisions on sensitive issues like human rights for fear of criticism, a loss of reputation, or an annulment of their award.<sup>19</sup> Notably, such a decision could be interpreted as a ‘manifest excess of powers by the Tribunal’ under Article 52(c) of the International Centre for the Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention).

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<sup>14</sup> Robert Wisner and Nick Gallus, ‘Nationality Requirements in Investor-State Arbitration’ (2004) 5 *The Journal of World Investment & Trade* 927.

<sup>15</sup> Clara Reiner and Cristoph Schreuer, ‘Human Rights in International Investment Law and Arbitration’, *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 17.

<sup>16</sup> Christoph Schreuer, ‘Jurisdiction and Applicable Law in Investment Treaty Arbitration’ (2014) 1 *McGill Journal of Dispute Resolution*.

<sup>17</sup> *Biloune v Ghana Investments Centre*, 95 I.L.R. 183 (UNCITRAL 1989).

<sup>18</sup> *Ibid.*, para. 203.

<sup>19</sup> Crina Baltag and Ylli Dautaj, ‘Promoting, Regulating, and Enforcing Human Rights Through International Investment Law and ISDS’ (2021) 45 *Fordham International Law Journal* 1, 23.

Some of the investment arbitrations against Argentina during the early 2000s are a good example of the conflict between human rights and investment arbitration. Due to a financial crisis, the government adopted radical measures to grant access to public services, which were then operated by private companies that suffered massive losses and thus decided to bring international claims against the state.<sup>20</sup> Among Argentina's defences, the state argued that it was protecting human rights recognised in international instruments. For instance, in the case of *Urbaser v Argentina* before an ICSID tribunal, the government argued that freezing the price of basic services such as water and sewage was justified because it protected the human right to water.<sup>21</sup>

While the tribunal acknowledged the importance of this right and the relevant international instruments on the matter, it did not give any substantive opinion on the application of human rights consideration in investment arbitrations. Such a situation has been replicated in many other arbitrations, with arbitral tribunals either ignoring human rights issues or explicitly denying the possibility of using them as a valid defence.<sup>22</sup> Then, previous cases demonstrate that in practice the gates of investment arbitration have remained closed to human rights considerations.

The examination of the conflict between human rights and investment arbitration reveals fundamental disparities in their nature, principles, and application. While investment arbitration is criticised for its perceived anti-democratic nature and limitations in addressing broader social values, human rights instruments are hailed as pivotal in protecting public interest. The divergences extend to actors, principles, and legal notions, exemplified by the contrasting treatment of nationality. The structural constraints of investment arbitration, coupled with potential arbitrator aversion to human rights issues, further hinder the integration of human rights considerations into this legal framework. The case of investment arbitrations against Argentina underscores the ongoing tension, with tribunals often sidestepping or outright rejecting human rights defences.

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<sup>20</sup> William W Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 Asian Journal of WTO and International Health Law and Policy 199.

<sup>21</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26.

<sup>22</sup> Susan L Karamanian, 'The Place of Human Rights in Investor-State Arbitration Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights' (2013) 17 Lewis & Clark Law Review 423.

Against such a framework, the next section will elaborate on the many similarities of these systems which is one of the reasons to advance proposals for closing the current gap between them.

## 2. THE CROSSROADS OF HUMAN RIGHTS AND INVESTMENT ARBITRATION

Despite their differences, human rights and investment arbitration share many commonalities. Both investors and victims of human rights violations are seen as the ‘weaker party’ in human rights law and investment arbitration.<sup>23</sup> Arguably, both systems were created to promote de-politicisation of claims before the courts of the host state and to grant individuals direct access to an international judicial mechanism capable of providing redress<sup>24</sup>. Further, many times foreign investments and human rights issues also happen at the same time and place, for example, when human rights problems arise in the course of an economic endeavour.<sup>25</sup> This may happen in industries such as mining which involve a high level of social or environmental risk, making them highly litigious from a human rights perspective.<sup>26</sup>

Parties to investment disputes and arbitrators have also referred to human rights in previous investment arbitrations.<sup>27</sup> A study conducted from 1989 to 2015 showed that 46 awards issued during this period include direct or indirect references to human rights.<sup>28</sup> It would be reasonable to expect that such references would only be incorporated by states or arbitrators, but foreign investors have also invoked the protection of human rights, claiming rights such as private property and due process.<sup>29</sup> This was evident in *Pietro Foresti v South Africa*, an ICSID arbitration regarding affirmative measures taken by the government to promote equal

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<sup>23</sup> Eric De Brabandere, ‘Human Rights Considerations in International Investment Arbitration’, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Brill Nijhoff 2012).

<sup>24</sup> Martins Paporinskis, ‘The Limits of De-politicisation in Contemporary Investor-State Arbitration’ in James Crawford and Sarah Nouwen (eds), *Select proceedings of the European Society of International Law* (Hart 2010), 271-272.

<sup>25</sup> Shannon Lindsey Blanton and Robert G Blanton, ‘What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment’ (2007) 69 *The Journal of Politics* 143.

<sup>26</sup> Henry Burnett and Louis-Alexis Bret, *Arbitration of International Mining Disputes: Law and Practice* (Oxford University Press 2017).

<sup>27</sup> Silvia Steininger, ‘What’s Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration’ (2018) 31 *Leiden Journal of International Law* 33.

<sup>28</sup> *Ibid.*

<sup>29</sup> Castillo Meneses Yadira, *El sesgo de debilidad a favor del inversionista extranjero: Un límite a la responsabilidad internacional de las corporaciones transnacionales* (Ediciones Uniandes-Universidad de los Andes 2015).

opportunities in the mining industry following apartheid, where investors sought to demonstrate an expropriation and a violation of fair and equitable treatment (FET) using rhetoric connected to human rights.<sup>30</sup>

For the case of states acting as parties to investment arbitrations, Simma proposed that their connection with human rights in such cases can be explained through the concepts of international and domestic commitments of a state to human rights obligations.<sup>31</sup> On the one hand, states must respect their human rights obligations as incorporated in those international instruments they are parties to.<sup>32</sup> On the other hand, states have domestic human rights obligations such as protecting their nationals from human rights violations and securing coherence between the content of their IIAs and domestic human rights regulations.<sup>33</sup> This has led states to raise arguments on the compatibility of investment matters and national constitutions.<sup>34</sup>

As to arbitrators, it is noteworthy that despite the aforementioned ‘human rights aversion’ present in investment disputes, several tribunals have appealed *ex officio* to human rights considerations while assessing critical aspects of investment arbitration.<sup>35</sup> This gives place to an interpretation paradox, meaning situations where tribunals feel comfortable using human rights by analogy or as long as they do not seem like a core concept of the award, but not addressing them in the substance. This distinction was drawn in *von Pezold v Zimbabwe*, an ICSID case concerning the seizure of several farmlands by the state, in which the tribunal made a differentiation between ‘being guided’ by external legal sources and ‘importing’ them to the realm of investment arbitration.<sup>36</sup>

This differentiation seems inappropriate and artificial. Notably, there are many arbitrations where complex substantive discussions have been addressed through core concepts of human rights law. In *Lauder v Czech Republic*, an *ad hoc* arbitration under the UNCITRAL Arbitration Rules concerning claims arising from regulatory measures on a private broadcasting enterprise, the tribunal was inspired by the reasonings of

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<sup>30</sup> *Ibid.*, 73.

<sup>31</sup> *Op. cit.* Simma (2011).

<sup>32</sup> Frederic Megret, ‘The Nature of International Human Obligations’, *International Human Rights Law* (Oxford University Press 2010).

<sup>33</sup> *Ibid.*

<sup>34</sup> See *CMS Gas Transmission Company v Argentina*, ICSID ARB/01/8, Award of 12 May 2005, para 114.

<sup>35</sup> *Op. cit.* Steininger (2018).

<sup>36</sup> *Ibid.*, 46.

the ECtHR in the case of *Mellacher v Austria*, which dealt with housing restrictions on the rent that can be charged by a property owner<sup>37</sup>. As the relevant IIA did not have a definition of expropriation, the tribunal in *Lauder* referred to the ECtHR ruling that several measures different to a direct transfer of property may also lead to expropriation.<sup>38</sup>

Another relevant case is *Amco v Indonesia*, an ICSID arbitration concerning governmental measures on a hotel management activity, in which the tribunal considered the approach of human rights bodies to the assessment of damages. As Indonesian law did not provide for a clear indication of whether unlawful acts of a procedural nature amounted *per se* to compensation, the tribunal relied on ECtHR cases.<sup>39</sup> Specifically, the tribunal deliberated on the *Sramek* case, addressing claims related to the right to a timely public hearing. The conclusion drawn was that procedural violations do not inherently lead to the acknowledgment of financial losses.

Lastly, in *Rompetrol v Romania*, an ICSID arbitration arising from anti-corruption and criminal investigations on corporate executives, the tribunal relied on human rights law to address a challenge to a counsel allegedly creating a bias on the arbitrators. Here, the tribunal considered the right to a fair trial in Article 6 of the European Convention on Human Rights (ECHR), as well as the rulings of the ECtHR.<sup>40</sup> Many other examples as the ones mentioned in this section may be found in the relevant literature, showing reference to human rights considerations in investment arbitrations.<sup>41</sup>

Despite their inherent differences, human rights and investment arbitration intersect on various fronts. Both systems position investors and victims of human rights violations as the 'weaker party,' aiming to depoliticize claims and provide direct access to international judicial mechanisms. Instances where foreign investments and human rights issues coincide, particularly in high-risk industries, further emphasise their

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<sup>37</sup> *Mellacher v Austria*, 169 Eur. Ct. H.R. (ser. A) para 48 (1989).

<sup>38</sup> Ronald S. Lauder v Czech Republic, 2001 WL 34786000, para 200 (UNCITRAL Final Award Sept. 3, 2001), paras 200-202.

<sup>39</sup> *Amco Asia Corp. v Indonesia*, ICSID Case No. ARB/81/1, Award for Resubmitted Case, May 31, 1990, 1 ICSID (W. Bank) 569, para 9 (1993).

<sup>40</sup> *Rompetrol Group N.V. v Romania*, Decision of the Tribunal on the Participation of a Counsel, ICSID Case No. ARB/06/3 (2013), para. 20.

<sup>41</sup> James D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative & International Law* 77.

interconnectedness. Notably, parties in investment disputes, including foreign investors, have invoked human rights in their claims, encompassing rights like private property and due process. States, as parties to investment arbitrations, navigate a complex relationship with human rights, balancing international and domestic commitments. Arbitrators, despite a perceived aversion to human rights in investment disputes, have inconsistently integrated human rights considerations into their decisions, often using them by analogy without addressing them substantively. This section underscores that arbitral practice reveals a degree of inconsistency concerning the interconnection between these closely related fields of law.

### 3. PRACTICAL REASONS THAT JUSTIFY HARMONISATION

The first consideration in favour of harmonisation comes from the perspective of the state. Some authors have referred to the importance of harmonisation for reasons of ‘legitimacy,’ understood traditionally as the willingness of people to obey the state because they consider its decisions to be appropriate and in the best interest of the society.<sup>42</sup> Additionally, there are reasons different to that to justify a state’s interest in harmonisation. For example, its duty to protect nationals from suffering human rights violations.<sup>43</sup> Put in these words, harmonisation would not only have a merely aspirational character but would constitute instead a positive obligation of the state.

Following this line of reasoning, harmonisation may prevent the state from adopting inconvenient decisions in scenarios of conflict between human rights and investment arbitration. To understand this premise and as suggested by De Brabandere, states’ approaches to human rights in the context of investment arbitrations must be framed in the context of the principle of political decision,<sup>44</sup> which dictates that, when a state faces conflicting obligations in different international instruments, it must make a sovereign decision,

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<sup>42</sup> Max Weber, AM Henderson, and Talcott Parsons, *The Theory of Social and Economic Organization*, (Oxford University Press 1947).

<sup>43</sup> Florian Wettstein, ‘The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy’ (2010) 96 *Journal of Business Ethics* 33.

<sup>44</sup> Op. Cit. De Brabandere (2012).

based on political considerations, to prefer one over the other.<sup>45</sup> Then, upon a conflict between human rights and investment arbitration, one prevails.

The two variations of this decision can be expressed in terms of ‘regulatory capacity’ and ‘regulatory chill.’ An exercise of regulatory capacity could be a state’s decision to affect the rights of investors as the lesser evil compared to the disruption of public interests such as human health or environmental preservation.<sup>46</sup> On the contrary, an exercise of regulatory chill could include situations in which the state accepts putting public interests on the line for the greater purpose of securing investors’ rights or preventing international claims that could result in the obligation to compensate foreign investors for incredibly high amounts coming out of the public treasury.<sup>47</sup>

From the perspective of ‘regulatory capacity,’ a leading case is that of *Bear Creek Mining v Peru*, a dispute concerning the cancellation of mining licences by government authorities.<sup>48</sup> Here, a series of protests by indigenous communities located near the job site led the state to protect the local communities over foreign investors, harming the latter and breaching its obligations under an IIA. Turning to ‘regulatory chill,’ Tienhaara discusses the case of mining activities in Ghana, where the government implemented measures to prevent harm to the permanent forest estate in the country and later repealed them for fear of being subject to investment arbitration.<sup>49</sup>

The tension of public *vis a vis* private interests in these cases usually appears in absolute terms, leaving states with the challenge of adopting an all or nothing approach to regulatory concerns.<sup>50</sup> Harmonisation could be of help to prevent such a situation because it would entail that states could look at both human rights and investors’ protections within the same framework and not necessarily as conflicting interests. Just as the

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<sup>45</sup> Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2008) 88.

<sup>46</sup> Klara Polackova Van der Ploeg, ‘Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design’ (2017) 51 *International Lawyer*.

<sup>47</sup> Ashley Schram and others, ‘Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill’ (2018) 9 *Global Policy* 193.

<sup>48</sup> *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award, 30 November 2017, paras 595–655.

<sup>49</sup> Kyla Tienhaara, ‘Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana’ (2006) 4 *International Environmental Agreements: Politics, Law and Economics* 371.

<sup>50</sup> Dora Marta Gruner, ‘Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform’ (2003) 41 *Columbia Journal of Transnational Law* 923.

investments protection regime now shields the private property of foreign investors to the point these are considered a human right,<sup>51</sup> it could also give substance to other human rights, such as those of vulnerable communities affected by an investment, without fear of receiving pressures or penalties.

A second consideration refers to the investment protection regime *per se* and suggests that harmonisation can help in creating a more balanced relationship between investors and states, thus promoting stability within the system.<sup>52</sup> Currently, the responsibilities in IIAs are clear for states, who are commonly presented as the systematic and exclusive debtors of investment protection.<sup>53</sup> Put simply, if a state violates the human rights of investors under an IIA, it will be responsible and therefore obligated to compensate.<sup>54</sup> But such obligations are not reciprocal because investors do not make equivalent commitments under IIAs.<sup>55</sup> To have equal terms, a proposal supported recently by commentators, investors should not be the ‘free rider’ in the relationship.<sup>56</sup>

Yet, it is possible to argue that investors do have certain obligations, at least those connected to a minimum standard of conduct. This level of commitment of investors to basic rules was acknowledged by the tribunal in *Phoenix v Czech Republic*, an ICSID case concerning several measures on claimant’s companies such as the freezing of funds in bank accounts and the seizure of business documents. Here, arbitrators pointed out that the investment protection regime only defends *bona fide* investments and therefore ‘nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights.’<sup>57</sup> This seems to be a general rule of investment arbitration based on previous cases.<sup>58</sup>

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<sup>51</sup> Op. cit. Castillo Meneses (2015).

<sup>52</sup> Arseni Matveev, ‘Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty’ (2015) 40 *University of Western Australia Law Review* 348.

<sup>53</sup> Jeswald W Salacuse, ‘Bit by Bit: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’ (1990) 24 *The International Lawyer* 655.

<sup>54</sup> Ibid.

<sup>55</sup> James Crawford, ‘Treaty and Contract in Investment Arbitration’ (2014) 24 *Arbitration International* 351.

<sup>56</sup> Karsten Nowrot, ‘Chapter 10: Obligations of Investors’, *International Investment Law* (Nomos 2015).

<sup>57</sup> *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5, paras. 110, 118.

<sup>58</sup> Ursula Kriebaum, ‘Human Rights and International Investment Arbitration’ in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020).

The third consideration is that harmonisation could bring some coherence to the system. Unlike other dispute settlement fora, investment arbitration does not pursue standardisation. Accordingly, the effects of an award are *inter partes* and there is no binding precedent applicable as a general rule to these disputes.<sup>59</sup> However, in practice, all of the relevant actors to a dispute rely on previous decisions seeking interpretative guidance or looking for security and predictability in future cases.<sup>60</sup> Despite the fact that diverse tribunals might reach disparate conclusions, it is a general rule in dispute settlement that inconsistencies and contradictions should not be present in the reasoning of an arbitral tribunal when it is deciding the same case.<sup>61</sup>

This type of inconsistencies may be found in decisions where tribunals were open to accept human rights considerations to safeguard the rights of investors, but not to address their obligations. Accordingly, in *Roussalis v Romania*, an ICSID dispute arising from measures such as investigations of privatisation authorities and the imposition of tax penalties, the tribunal considered that sometimes the provisions of an IIA might fail to encompass all protections available to a foreign investor and therefore human rights instruments can serve to ‘enlarge’ them.<sup>62</sup> Notably, however, Article 10 of the relevant IIA expressly permitted importing from other instruments more favourable substantive protections than those already in place between the parties.<sup>63</sup>

Similarly, in *Al-Warraq v Indonesia*, a dispute under the UNCITRAL Arbitration Rules on the bailout of a bank that led to the criminal conviction of the investor, the tribunal considered that the concept ‘basic rights’ in Article 10(1) of the IIA, contrary to the interpretation of the claimant, encompassed only ‘basic property rights,’ but not fundamental rights.<sup>64</sup> Yet, when analysing an independent claim on FET, the tribunal considered that the ICCPR was a part of ‘general international law’ and that the actions of Indonesia had been contrary to the right to a fair trial under Article 14(3)(d) of such treaty, which constituted a denial of justice.<sup>65</sup>

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<sup>59</sup> Thomas Schultz, ‘Against Consistency in Investment Arbitration’, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014).

<sup>60</sup> Tai-Heng Cheng, ‘Precedent and Control in Investment Treaty Arbitration Chinese Law in the Global Context’ (2006) 30 *Fordham International Law Journal* 1014.

<sup>61</sup> David Schneiderman, ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes’ (2010) 30 *Northwestern Journal of International Law & Business* 383.

<sup>62</sup> *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, paras 306–12.

<sup>63</sup> *Ibid.*, paras. 117, 209.

<sup>64</sup> *Al-Warraq v Indonesia*, UNCITRAL, Final Award, 15 December 2014, para 521.

<sup>65</sup> *Ibid.*, paras. 558, 564-565, 621.

These inconsistencies may also have diplomatic implications. Most IIAs were developed at a time when foreign investors were perceived as the 'weaker party' in the state-investor equation.<sup>66</sup> Nevertheless, the current reality highlights the strength of investors in arbitration proceedings, calling for a genuine 'equality of arms' between the parties.<sup>67</sup> Particularly, it has been pointed out that investors lack the same incentives of a state to comply with minimum standards of conduct such as human rights regulations.<sup>68</sup> Then, if the gates of investment arbitration are left closed to human rights considerations, serious doubts on the legitimacy of the investment protection system may continue, leading to decisions such as countries' withdrawal from and denunciation of IIAs.<sup>69</sup>

Practical reasons supporting harmonisation between human rights and investment arbitration emerge from multiple perspectives. From the state's viewpoint, harmonisation ensures not only legitimacy but also aligns with its duty to protect nationals from human rights violations, preventing inconvenient decisions in conflicting scenarios. The tension between regulatory capacity and regulatory chill underscores the need for a harmonised framework to avoid an all-or-nothing approach to regulatory concerns. For the investment protection regime itself, harmonisation can create a more balanced relationship between investors and states, promoting stability by introducing reciprocal obligations for investors. Lastly, harmonisation addresses the need for coherence within the system, offering interpretative guidance, security, and predictability.

#### **4. ARTICLE 31 OF THE VIENNA CONVENTION AS AN INSTRUMENT OF HARMONISATION**

Currently, there are few alternatives to incorporate human rights considerations into investment arbitration. The ideal solution would be having express references to human rights in the text of IIAs because then they could be considered undeniably within the 'terms of reference' of arbitrators.<sup>70</sup> For instance, Article 15.1 of

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<sup>66</sup> Sergio Puig, 'No Right without a Remedy: Foundations of Investor-State Arbitration Essay' (2013) 35 *University of Pennsylvania Journal of International Law* 829.

<sup>67</sup> Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 *European Journal of International Law* 1147.

<sup>68</sup> Beth Stephens, 'The Amoral of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 54.

<sup>69</sup> Clint Peinhardt and Rachel L. Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 *Global Policy* 571.

<sup>70</sup> *Op. cit.* Reiner and Schreuer (2009).

the South African Development Community Model BIT dictates that ‘investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located.’ However, since the first generation of IIAs, only a few treaties have included similar language.<sup>71</sup> Therefore, a feasible solution for harmonisation may be the rules of interpretation under provisions as Article 31 of the VCLT.

This provision is paramount to treaty interpretation as it sets forth a methodology to address the fact that most treaties use broad language and leave room for interpretation, requiring external interpretative guidelines.<sup>72</sup> Accordingly, Article 31 of the VCLT has become a customary rule of interpretation in international law and is applied frequently by different decision-making bodies to deal with ambiguous or vague treaty language.<sup>73</sup> In this section, the article analyses the harmonisation of human rights and investment arbitration reading into each one of the elements that constitute Article 31 of the VCLT. The first part of this provision reads that ‘[a] treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’

On the issue of ‘good faith,’ this principle has been defined differently by several legal authorities and international tribunals. A common interpretation is that good faith is aimed at preventing the abuse of rights by a party.<sup>74</sup> Therefore, an interpretation aligned with this mandate would suppose preventing a situation in which a party takes advantage of its rights for an end different from that for which such rights were incorporated and to the detriment of the other party.<sup>75</sup> Additionally, the relevant literature also defines good faith as compliance with international obligations.<sup>76</sup> In fact, this was the reasoning that the tribunal in *Al-*

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<sup>71</sup> Barnali Choudhury, ‘Human Rights Provisions in International Investment Treaties and Investor-State Contracts’ (University College of London 2020), 10-12.

<sup>72</sup> Oliver Dörr, ‘Article 31’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018).

<sup>73</sup> Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009).

<sup>74</sup> Robert Kolb, *Good Faith in International Law* (Bloomsbury Publishing 2017).

<sup>75</sup> Georg Schwarzenberger, ‘Uses and Abuses of the “Abuse of Rights” in International Law’ (1956) 42 *Transactions of the Grotius Society* 147.

<sup>76</sup> Lukashuk, ‘The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law’ (1989) 83 *American Journal of International Law* 513.

*Warraq* presented to justify the application of the ICCPR in the determination of the existence or not of a denial of justice.<sup>77</sup>

One of the most relevant standards of protection in investment arbitration is the FET. Tribunals such as the one in *Tecmed v Mexico*, an ICSID case concerning the decision of local authorities to shut down a waste landfill due to social protests in the region, have stated that the concept of ‘legitimate expectations’ is paramount in assessing a violation of the FET standard.<sup>78</sup> As interpreted in that case, this concept entails that investors have the right to expect from states not to change the circumstances that lead them to invest.<sup>79</sup> However, in response to concerns about limiting the regulatory capacity of states, arbitrators have also clarified that such protection is not equivalent to ‘freezing’ domestic regulations.<sup>80</sup>

Both understandings of legitimate expectations under the FET standard are examples of interpretations construed according to good faith, as they acknowledge the right to certainty, but also the limits of such right when opposed to the sovereign capacity of states.<sup>81</sup> Drawing from such patterns, the same logic could be applied to investor’s behaviour regarding human rights issues. Accordingly, while IIAs tend not to assign obligations directly to investors, this should not be extended to say that investors are exempted from any compliance with national or international human rights regulations because then they would be abusing their rights, contrary to good faith.

Further, certain jurisdictions have developed the concept of ‘objective good faith,’ which means that, in assessing the conduct of parties, decision-making bodies must consider the actions expected from them given their capacities.<sup>82</sup> Hence, tribunals must bear in mind that investors are private actors guided by economic motives and possess, as a general rule, deep expertise in their field of work.<sup>83</sup> As stated in the case

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<sup>77</sup> *Al-Warraq v Indonesia*, paras. 560-561.

<sup>78</sup> *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, para 154.

<sup>79</sup> Rudolf Dolzer, ‘Fair and Equitable Treatment: Today’s Contours’ (2013) 12 *Santa Clara Journal of International Law* 7.

<sup>80</sup> Michele Potestà, ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’ (2013) 28 *ICSID Review - Foreign Investment Law Journal* 88.

<sup>81</sup> Martijn Hesselink, ‘The Concept of Good Faith’, *Towards a European Civil Code-Fourth Revised and Expanded Edition* (4th Edition, Kluwer Law International 2010).

<sup>82</sup> Alex Grabowski, ‘The Definition of Investment under the ICSID Convention: A Defense of Salini’ (2014) 15 *Chicago Journal of International Law* 287, 291.

<sup>83</sup> Klaus Peter Berger, ‘Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1347.

of *Eudoro Olguin v Paraguay*, an ICSID case concerning claims for a lack of surveillance of one of the institutions where the investor made his capital contributions, tribunals are to expect from parties that in their commercial operations they act according to their best efforts and due diligence.<sup>84</sup>

It would be reasonable to accept that investors must know, by the time they decide to make an investment, which norms are in place in a country, including human rights regulations.<sup>85</sup> This is not so different from a common exercise of corporate due diligence expected from all investors and that is deeply interwoven with the principle of good faith.<sup>86</sup> More importantly, such obligations are even more reasonable considering that human rights regulations have usually been in place for years and are not likely to change.<sup>87</sup> This would not be adding content to IIAs but giving legal effects to the element of good faith.

As to the ‘object and purpose,’ it is noteworthy that in previous cases such an element has been obtained from the preamble of the treaty.<sup>88</sup> Then, by using the preamble of an agreement, tribunals could reasonably conclude that human rights compliance is incorporated within its very object and purpose. To illustrate this point, the preamble of the IIA between the Caribbean Forum States and the United Kingdom refers to ‘the respect for human rights, democratic principles, and the rule of law, which constitute the essential elements of this Agreement’ By reference to this wording pursuant to Article 31(1) of the VCLT, a tribunal could consider that basic human rights obligations inform the meaning of substantive provisions of the treaty.<sup>89</sup>

Relevant scholars have highlighted that the object and purpose of treaties constitute a fundamental rule of interpretation that should be disregarded ‘only if its interpretation exceeds treaty language’.<sup>90</sup> A practical problem for the application of this rule would be that, in light of the ‘human rights aversion’ discussed in Section 2, tribunals have applied this part of Article 31 of the VCLT as narrowly as possible. Accordingly, in *Grand River v United States*, a controversy under the UNCITRAL Arbitration Rules arising from a series of

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<sup>84</sup> *Eudoro Armando Olguín v Republic of Paraguay*, ICSID Case No. ARB/98/5.

<sup>85</sup> Yannick Radi, ‘Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox’ (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 1107.

<sup>86</sup> Joanna Kulesza, *Due Diligence in International Law* (Brill 2016).

<sup>87</sup> *Op. cit.* Radi (2014).

<sup>88</sup> Max H Hulme, ‘Preamble in Treaty Interpretation Comment’ (2015) 164 *University of Pennsylvania Law Review* 1281.

<sup>89</sup> Hervé Ascensio, ‘Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law’ (2016) 31 *ICSID Review - Foreign Investment Law Journal* 370.

<sup>90</sup> David S Jonas and Thomas N Saunders, ‘The Object and Purpose of a Treaty: Three Interpretive Methods’ (2010) 43 *Vanderbilt Journal of Transnational Law* 565.

settlements with big tobacco companies, the tribunal considered that there was no need to look at the preamble of the agreement because the plain text was sufficient.<sup>91</sup> In their opinion, to act otherwise would amount to an ‘illegitimate’ alteration of the text.<sup>92</sup>

Contrary to this type of reasoning, arguably inadequate as it arbitrarily ignores a relevant part of Article 31 of the VCLT and offers no compelling explanation to do so, interpreters should not miss the point that the ‘object and purpose’ criteria cannot be disregarded on subjective grounds and shall be considered in a holistic interpretation of the relevant provisions of an IIA.<sup>93</sup> All in all, unlike provisions such as Article 32 of the VCLT, which is related to the use of the negotiation history of a treaty for interpretative purposes, Article 31 is not a supplementary means of interpretation, but a customary rule that should be considered whenever possible.

On the element of ‘context,’ tribunals should not ignore that there are indirect references to human rights in IIAs, which could avail their application by reference to the overall meaning of the treaty. This is a consequence of the fact that, as there have been concerns on the limitation of states regulatory capacity in IIAs, several states have renegotiated them, including such wording.<sup>94</sup> Against this backdrop, recent treaties include references to issues such as the protection of ‘public values.’ For instance, the Brazil-Morocco IIA exempts measures for the maintenance of ‘public order,’ while the one between Armenia and Singapore refers to measures ‘necessary to protect human, animal or plant life or health.’ Then, such references could implicitly encompass human rights.<sup>95</sup>

Further, Article 31(3)(c) of the VCLT establishes that in interpreting a treaty there shall be considered ‘any relevant rules of international law applicable in the relations between the parties.’ This provision does not suggest any specific rules, but only those that are ‘relevant’ to the dispute, which could suggest some

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<sup>91</sup> Grand River Enterprises Six Nations, Ltd et al v United States of America, UNCITRAL, Award, 12 January 2011, para 154.

<sup>92</sup> Ibid.

<sup>93</sup> David S Jonas and Thomas N Saunders, ‘The Object and Purpose of a Treaty: Three Interpretive Methods’ (2010) 43 *Vanderbilt Journal of Transnational Law* 565.

<sup>94</sup> Yoram Z Haftel and Alexander Thompson, ‘When Do States Renegotiate Investment Agreements? The Impact of Arbitration’ (2018) 13 *The Review of International Organizations*, 29.

<sup>95</sup> Op. cit. Baltag and Dautaj (2021), 37-40.

degree of flexibility in the determination of such rules.<sup>96</sup> Nonetheless, such an approach gives place to many interpretative challenges. Evidently, there is the question of the meaning of 'relevant rules of international law applicable to the parties.' To most scholars that have discussed this issue, the provision should be applied only to assist factfinders in giving meaning to the treaty, not to overrule its terms.<sup>97</sup>

Therefore, rules applied by a tribunal seeking the clarification of the IIA at stake should follow an analysis of their relevance on a case-by-case basis. In *South American Silver v Bolivia*, a case before the Permanent Court of Arbitration (PCA) where the tribunal analysed the government's cancellation of mining licences granted to a foreign investor within indigenous territories, arbitrators pointed out that Article 31(3)(c) has to be applied cautiously to prevent a tribunal from exceeding its jurisdiction.<sup>98</sup> This anticipates that tribunals may also tend to read this rule narrowly. A question then is how to determine the relevance of the rules that a tribunal intends to consider and whether it may include human rights considerations.

As the provision refers to 'rules of international law,' arbitrators should at least refer to those instruments reflected in Article 38 of the ICJ Statute, which includes treaties, custom, and general principles of international law.<sup>99</sup> Among these rules, decision-makers in different international forums have repeatedly included general principles of international law.<sup>100</sup> For instance, this would support the argument on the applicability of the principle of good faith. In the context of investment arbitration, the tribunal in *Toto v Lebanon*, an ICSID arbitration relating to the interference of the state in the construction of a highway, considered that human rights, specifically the general principle of a fair trial, could be applied to the case.<sup>101</sup>

As briefly explained in Sections 3 and 4, tribunals have applied human rights considerations before, but they have limited them to a form of legal guidance rather than a formal source of law. Regarding the

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<sup>96</sup> Sumith Suresh Bhat, 'A Study of the Issue of 'Relevant Rules' of International Law for the Purposes of Interpretation of Treaties under Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2019) 21 *International Community Law Review* 190.

<sup>97</sup> Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (2014) 1 *Yale Human Rights and Development Law Journal* 12.

<sup>98</sup> *South American Silver Ltd v Bolivia*, UNCITRAL, Award of 22 November 2018, para 216.

<sup>99</sup> Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009).

<sup>100</sup> Stephan W Schill, 'General Principles of Law and International Investment Law', *International Investment Law* (Brill Nijhoff 2012):

<sup>101</sup> *Toto Costruzioni Generali S.p.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, (Sept. 11, 2009) 157-160.

application of human rights considerations as general principles of international law, such exercise has been limited to procedural issues such as fair trial and due process rather than other substantive legal issues.<sup>102</sup> For instance, in *Fraport v Philippines*, an ICSID dispute on the annulment of a concession contract, parties asked the annulment committee to bring into the analysis of the dispute principles that are common in the practice of human rights law, such as *in dubio pro reo* and *nullum crimen sine lege*, but the request was rejected.<sup>103</sup>

Against this reluctance to accept human rights in investment arbitration, in *Tulip v Turkey* an ICSID annulment committee held that ‘the integration of human rights law into international investment law is an important concern’ and acknowledged that reading Article 52(1)(d) of the ICSID Convention in harmony with human rights instruments was ‘a legitimate method of treaty interpretation.’<sup>104</sup> Notably, this provision grants annulment when ‘there has been a serious departure from a fundamental rule of procedure.’ Arguably, the possibility to incorporate relevant rules of international law could also be achieved through Article 42 of the ICSID Convention, which allows the use of ‘such rules of international law as may be applicable.’<sup>105</sup>

However, alternatives like this are not free from criticism. An important concern is that, if the gate of investment protection is open for human rights, there will not be proper boundaries to such considerations. For some authors, incorporating human rights considerations into investment arbitration primarily stems from concerns surrounding the potential dilution of the system’s core objective, which is primarily to protect foreign investors and promote economic development. There are also apprehensions that broadening the scope to include human rights is not desirable or possible.<sup>106</sup>

A good illustration of such concern is the recent and strong criticism of well-known arbitration practitioners to the application of concepts of human rights law such as the doctrine of ‘margin of appreciation’

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<sup>102</sup> Vivian Kube and EU Petersmann, ‘Human Rights Law in International Investment Arbitration’ (2016) 11 Asian Journal of WTO and International Health Law and Policy 93.

<sup>103</sup> *Fraport AG Frankfurt Airport Services Worldwide v The Republic of Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, 23 December 2010, paras 188–203, 193.

<sup>104</sup> *Tulip Real Estate and Development Netherlands BV v Turkey*, ICSID ARB/11/28, Decision on Annulment of 30 December 2015, para 92.

<sup>105</sup> Emmanuel Gaillard and Yas Banifatemi, ‘The Meaning of ‘and’ in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18 ICSID Review - Foreign Investment Law Journal 375.

<sup>106</sup> Davitti D, ‘Proportionality and Human Rights Protection in International Investment Arbitration: What’s Left Hanging in the Balance?’ (2020) 89 Nordic Journal of International Law 343.

to investment cases.<sup>107</sup> These authors argue that a reason to oppose such cross-fertilisation between human rights and investment law is that it promotes the undue application of concepts developed in alien systems to disputes that should be delimited by the language of the relevant IIAs.<sup>108</sup> However, while these authors make such complaints, they also acknowledge that considerations from other legal systems may appear as long as they are grounded on customary rules of interpretation such as Article 31 of the VCLT.<sup>109</sup>

While it is subject to criticism, Article 31 of the VCLT serves as a crucial avenue for harmonising human rights and investment arbitration. Despite limited explicit references to human rights in investment treaties, this section highlights how 'good faith,' 'object and purpose,' and 'context' can be leveraged to integrate human rights considerations into treaty interpretation. While challenges exist, Article 31 provides a valuable framework to bridge the gap between these realms, fostering a more cohesive relationship between human rights and investment arbitration.

## **5. CONCLUSIONS**

This article has undertaken a comprehensive exploration of the pressing issue of harmonisation between human rights and investment arbitration, shedding light on the inherent challenges and proposing a methodological pathway forward. The dichotomy between these two realms has been a subject of intense discourse among scholars and exemplified in real-world cases, particularly the arbitrations against Argentina during the early 2000s, highlighting a tangible interest among sovereign states to bridge this gap. Despite this, a prevalent 'human rights aversion' has persisted within arbitral tribunals, potentially stemming from concerns about criticism and retaliatory actions.

An examination of arbitral practice, encompassing instances where investment tribunals have grappled with human rights issues, exposes a notable reluctance among arbitrators to actively participate in such discussions. This hesitancy is especially prominent in arbitral tribunals comprising members rooted in a background of exclusive engagement with private law or business transactions, where the incorporation of

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<sup>107</sup> Gary Born, Danielle Morris and Stephanie Forrest, "A Margin of Appreciation': Appreciating Its Irrelevance in International Law" (2020) 61 Harvard International Law Journal 119-131.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

human rights considerations is infrequent and often perceived as an external and unfamiliar dimension. Another pivotal consideration in these scenarios is the apprehension that arbitrators may harbor concerning potential criticism or being labeled as unorthodox. The fear of such repercussions may stem from concerns about jeopardizing their reputation and, consequently, diminishing their prospects of being appointed in subsequent cases.

The proposed methodology for harmonisation, grounded in the relevant treaties and rules of interpretation of public international law, emerges as a pragmatic and viable solution to overcome this 'human rights aversion.' By equipping arbitrators with these tools, there is a greater likelihood of fostering a more inclusive and nuanced approach to cases involving human rights considerations. The flexibility inherent in this methodology stands as a counterpoint to the historical resistance observed within some arbitral tribunals, urging a reconsideration of the status quo. Notably, the lack of cogent explanations in previous awards rejecting this methodology underscores the potential room for a shift in the arbitral landscape.

Looking ahead, it is imperative to recognise the policy reasons supporting the proposed approach. Investment protection should not exist in isolation but serve as a venue capable of addressing disputes with inherent human rights components. This paradigm shift is crucial for ensuring that the investment arbitration system remains legitimate and adaptive to the evolving dynamics of international law. The articulation of express references to human rights in future IIAs could further solidify the harmonisation efforts. As states continue to renegotiate treaties, the integration of language akin to Article 15.1 of the South African Development Community Model BIT, explicitly recognising the duty of investors to respect human rights, could set a progressive precedent.

In the future landscape of investment arbitration, there is an opportunity for a more balanced and cohesive relationship between human rights and investment protection. The proposed methodology, grounded in established principles of international law, provides a pathway to harmonise these disparate realms, fostering a nuanced understanding of the complex issues at the intersection of human rights and investment arbitration. As the discourse evolves, a collective re-evaluation within the arbitral community, coupled with a proactive

embrace of this methodology, holds the potential to reshape the narrative and address the legitimate concerns embedded in the harmonisation debate.

# THE CORFU INCIDENT OF 1923: THE LAW AND INSTITUTIONS REGULATING THE USE OF FORCE SHORT OF WAR

Georgia Beard\*

## ABSTRACT

*The Covenant of the League of Nations restricted the customary right to resort to war. However, the Corfu Incident of 1923 revealed that there was a gap in the Covenant about whether forceful acts short of war were caught in the Covenant's restrictions on war. This crisis involved the Italian occupation and bombardment of Corfu, a forceful measure short of war, in retaliation to the murder of an Italian General Tellini and four others. This paper will argue how the Corfu Incident exposed the ambiguities in the Covenant about acts short of war and explore the League institutions' implicit viewpoints about this gap in the law. This is due to appeasement of Italy's hostility and reluctance to derogate from custom wholly. In doing so, this foregrounds the complex reality of the League in settling international disputes.*

*Keywords: The Corfu Incident; League of Nations; Customary Rights; Corfu Incident; International Law; Forceful Acts*

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## INTRODUCTION

The Covenant of the League of Nations (“the Covenant”) introduced significant advancements into the international law of the use of force.<sup>1</sup> The Covenant derogated from the nineteenth century custom of the unlimited right to wage war by qualifying the right to war.<sup>2</sup> This priority is evident through the Covenant’s preamble to “promote international co-operation and to achieve international peace and security”.<sup>3</sup> The Covenant restricted war by providing machinery to ensure the priority of the peaceful settlement of disputes in Articles 12, 13, and 15, with contravention to this sanctionable by Article 16.<sup>4</sup> War was also made a concern for the entire League, diverging from the custom that war is a “private duel”.<sup>5</sup> However, this only restricted the “resort to war”,<sup>6</sup> “any dispute likely to lead to a rupture”<sup>7</sup> and a “threat of war”,<sup>8</sup> not specifically the use of force.<sup>9</sup> The Covenant did not define these phrases, thus failing to remedy the uncertainty in the definitions of war, peace and law.<sup>10</sup> Therefore, an important gap arose questioning whether the use of force short of war was subject to the Covenant’s restrictions on war.<sup>11</sup> International law was divided into the “Law of War” and the “Law of Peace”.<sup>12</sup> However, forceful acts short of war blurred the distinction between peace and war.<sup>13</sup> Thus, it became critical to clarify if forces short of war were subject to the Covenant’s restraints or resided in the “Law of Peace”.<sup>14</sup> As this was a “difficult question of law”,<sup>15</sup> this instigated a debate because in state practice, war had acquired a subjective interpretation requiring disputing states to have the intention to initiate a war.<sup>16</sup> To contrast, the objective interpretation of war established that the nature of all forceful acts amounted

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<sup>1</sup> Stanimir A Alexandrov, *Self-Defense Against the Use of Force in International Law* (Brill Nijhoff 1996) 29.

<sup>2</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963).

<sup>3</sup> Covenant of the League of Nations (Covenant) (signed 28 June 1919, entered into force 10 January 1920) 1 LNTS 3 preamble.

<sup>4</sup> Brownlie (n 2) 57.

<sup>5</sup> Covenant, art 11; Kenneth W Thompson, ‘Collective Security Remixed’ (1953) 47(3) APSR 753, 753.

<sup>6</sup> Covenant, art 12, 13, 15, 16.

<sup>7</sup> *Ibid.*, art 12(1), art 15(1).

<sup>8</sup> *Ibid.*, art 11.

<sup>9</sup> Alexandrov (n 1) 29,34; H Lauterpacht, ‘Resort to War’ and the Interpretation of the Covenant during the Manchurian Dispute’ (1934) 28(1) AJIL 43, 45.

<sup>10</sup> Myres S. McDougal and Florentino P. Feliciano, ‘The Initiation of Coercion- A Multi-Temporal Analysis’ (1958) 52(2) AJIL 241, 256.

<sup>11</sup> Alexandrov (n 1) 34.

<sup>12</sup> Sir John Fischer Williams, ‘The Covenant of the League of Nations and War’ (1933) 5(1) CLJ 1, 2.

<sup>13</sup> JL Brierly, ‘International Law and Resort to Armed Force’ (1932) 4(3) CLJ 308, 308.

<sup>14</sup> *Ibid.*, 311; Williams (n 12) 2.

<sup>15</sup> Lauterpacht (n 9) 45.

<sup>16</sup> Hans Kelsen, *Principles of International Law* (The Lawbook Exchange Limited, 2003) 27.

to war. This gap is significant because the subjective view of war stipulated that forces short of war were outside of the Covenant's restrictions on war compared to the objective interpretation which ascertained that forces short of war were subject to the Covenant's provisions.<sup>17</sup>

Forcible measures short of war include acts like retortions, reprisals, embargoes, and pacific blockades.<sup>18</sup> Reprisals are injurious acts of self-help to coerce an action or obtain redress for a prior international delinquency.<sup>19</sup> Specific consideration will be granted to reprisals in this article because Italy adopted this type of measure in the Corfu Incident.

This paper investigates how the Corfu Incident revealed the ambiguities in the Covenant on the use of force short of war and the complexities of institutions regulating the use of force. The Corfu Incident of 1923 involved the occupation and bombardment of Corfu by Italy, after the murder of the Italian General Tellini whilst delimiting the Albanian-Greek border.<sup>20</sup> This incident revealed the ambiguity in the law on whether the use of force short of war was subject to the constraints of the Covenant and emphasised that League institutions were reluctant to explicitly clarify this lacuna. This was predominantly the Council of the League of Nations ("the Council"), who was the executive decision-making body of the League. The Council was disinclined to exert its competency and authority. Therefore, the "League followed the line of least resistance, displaying a reluctance to [explicitly] insist on the interpretation of the Covenant which would open the way for... reprisals".<sup>21</sup> However, it will be explored that this was understandable given the League's duty to safeguard peace on the one hand, but on the other hand, in order to fulfil this, prevent further aggravation of Italy's hostility. The League also did not want to derogate too far from the custom of an unlimited right to war which may incite aggression from other member states and lastly, the Council's role was only to conciliate,

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<sup>17</sup> Alexandrov (n 1) 34.

<sup>18</sup> Charles G Fenwick, *International Law* (4<sup>th</sup> edn, Appleton-Century-Crofts 1965) 634-642.

<sup>19</sup> Philip A Seymour, 'The Legitimacy of Peacetime Reprisal as a Tool against State-Sponsored Terrorism' (1990) 39 *Naval L Review* 221, 225; Lassa Oppenheim, *International Law: A Treatise* (Vol II: War and Neutrality, 2<sup>nd</sup> edn, Longmans, Green and Co 1912) 39.

<sup>20</sup> C.H.M Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 *Recueil des Cours* 455, 475.

<sup>21</sup> Albert E Hindmarsh, *Force in Peace: Force Short of War in International Relations* (Harvard University Press 1933) 129.

not arbitrate the law.<sup>22</sup> This emphasises the complex reality for the League to fruitfully regulate the use of force, as opposed to the idealistic hopes for the League's safeguarding of international peace.

Despite the lack of explicit clarification of the use of force short of war lacuna, deeper investigation reveals that the Council and the Commission of Jurists ("CoJ") desired for acts short of war to be constrained by the Covenant's provisions on war in certain circumstances. These circumstances most likely adhered to Charles de Visscher's interpretation and so, included Italy's occupation of Corfu being caught by the Covenant's restrictions on force.

This argument will be constructed in the following way. Chapter 1 considers the state practice and custom of the use of force between 1814 and 1920. It also examines the Covenant's provisions on the use of force to demonstrate how it deviates from custom by limiting the right to war. By looking at the Covenant's provisions, the emergence of the gap on the use of force short of war will also be explored. Chapter 2 investigates the Corfu Incident to highlight the ambiguity of whether Italy's reprisal was caught in the Covenant's restrictions on war and to stress the League Council's failure to pronounce the legality of Italy's acts. However, it will be inferred through the Council's meetings, that the authoritative interpretation of the majority considered that acts short of war were constrained by the Covenant's provisions to some extent. An analysis will also be conducted into the CoJ's ambiguous answer to this gap on the use of force, concluding the CoJ purposefully provided this vagueness because in truth, the CoJ possessed the same opinion as the Council majority. Chapter 3 then explores how this debate on the use of force short of war extended to the academic field.

Chapter 4 will finally consider how the Corfu Incident unveils the limitations of the Council's authority since the dispute was resolved outside of the League Machinery and the CoJ was chosen over the Permanent Court of International Justice ("PCIJ") to answer the surfaced contentious legal questions of the incident.

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<sup>22</sup> Malcolm Evans, *International Law* (5<sup>th</sup> edn, Oxford University Press 2018) 19.

## CHAPTER 1: CUSTOMARY LAW AND STATE PRACTICE OF THE USE OF FORCE 1914-1920

Imperialism dominated nineteenth-century Europe.<sup>23</sup> Therefore, the customary right to wage unlimited war flourished, albeit qualified by the Concert of Europe.<sup>24</sup> However, a growing doctrine in the late nineteenth century developed, construing the right to war as a last resort measure once any pacific settlement had been exercised.<sup>25</sup> This growth was attributable to the notion that war was no longer “a concern merely of states involved in the controversy”.<sup>26</sup> Globalisation and the improvements in communication, warfare, and freedom of movement meant that war would interfere with a wider proportion of populations in the warring states and have subsequent implications on nearby jurisdictions.<sup>27</sup> Moreover, the rights of neutrals evolved to permit engagement in wars outside their own jurisdiction.<sup>28</sup> Thus, states evolved from individual sovereign entities to forming part of an international community.<sup>29</sup>

Although the new doctrine emphasised the initial efforts to restrict the right to war, it did not derogate from the customary law of the right to unlimited war.<sup>30</sup> However, it did influence the state practice.<sup>31</sup> State practice established the technical “state of war” doctrine.<sup>32</sup> This requires the intention to create a state of war, an *animus belligerendi*, by the disputing states.<sup>33</sup> By defining war in this formal sense, states were permitted to employ forceful acts short of war whenever, not as a last resort, because they lack the *animus belligerendi*.<sup>34</sup> Nonetheless, these acts could only be employed by strong states against weaker ones, since the weaker state

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<sup>23</sup> Brownlie (n 2) 19.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid., 21.

<sup>26</sup> Hindmarsh (n 21) 82.

<sup>27</sup> Evans (n 22) 17; Brownlie (n 2) 26; Ruth Henig, *The League of Nations: The Makers of the Modern World* (Haus Publication 2010) 2, 3.

<sup>28</sup> Hindmarsh (n 21) 57.

<sup>29</sup> David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 QLR 99, 101; Evans (n 22) 11, 22.

<sup>30</sup> Brownlie (n 2) 19.

<sup>31</sup> Ibid., 21, 26.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid., 26, 27; Williams (n 12) 8.

<sup>34</sup> Brownlie (n 2) 26, 27.

did not have the power to declare war.<sup>35</sup> For example, Germany, Britain, and Italy in 1902-3 committed a lawful pacific blockade against Venezuela, a weaker state.<sup>36</sup> This doctrine supports the restriction of an unlimited right to war because this confines the definition of war to its formal sense, so this results in a wider scope of acts classified as forceful measures short of war, which could be employed freely and without the threat of causing a mass-scale war to redress international delinquency.<sup>37</sup>

Forces short of war were permitted in the pre-League era because although there was a growing movement towards war being a concern for third-party states, the customary norm of the disputing parties being the only ones concerned with war in the “full sense of international law”, persisted throughout the nineteenth century.<sup>38</sup> If the disputing parties established a war existed, third states could then abide by a duty of neutrality, but were not bound by custom to investigate if there had been a resort to war.<sup>39</sup> Measures short of war were also adopted, and encouraged by the subjective interpretation of war because no international organisation governed the international law on the use of force.<sup>40</sup> Therefore, states were forced to resort to forceful acts themselves, to secure justice and peace where amicable methods had failed.<sup>41</sup> This ties in with the eighteenth-century positivism surge that portrayed states as sovereign entities possessing fundamental rights and duties.<sup>42</sup> This model also rationalises a state’s rights of self-preservation, intervention, and necessity when justifying acts short of war.<sup>43</sup> Although this power to commit forceful acts was abused,<sup>44</sup> generally these measures adhered to the characteristics of a reprisal, not a state of war, and did not result in invasion.<sup>45</sup>

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<sup>35</sup> *Ibid.*, 28.

<sup>36</sup> Arnold McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals' (1925) 11 *Transactions of the Grotius Society* 29, 35; Lauterpacht (n 9) 53.

<sup>37</sup> Albert E Hindmarsh, 'Self-Help in Time of Peace' (1932) 26 *AJIL* 315, 320.

<sup>38</sup> Fischer Williams (n 12) 4.

<sup>39</sup> *Ibid.*

<sup>40</sup> Hindmarsh (37) 321; Hindmarsh (n 21) 57.

<sup>41</sup> *Ibid.*

<sup>42</sup> Evans (n 22) 13-15; Hindmarsh (n 21) 319.

<sup>43</sup> Evans (n 22) 14; Brownlie (n 2) 26.

<sup>44</sup> Hindmarsh (n 21) 99.

<sup>45</sup> Brownlie (n 2) 40; Fritz Grob, *The Relativity of War and Peace* (New Haven: Yale University Press 1949) 190, 191 .

## A) Machinery for Pacific Settlement

The shift in state practice of favouring recourse to pacific settlement, over the absolute right to resort to war, is also evident through the increase in the machinery for a peaceful settlement. In the late nineteenth century, as there was growing support for an “international order based on the rule of law”,<sup>46</sup> there was a simultaneous urge to govern the use of force by international rules.<sup>47</sup> Therefore, numerous multilateral and bilateral treaties were established based on the existing state practice governing the international rules of force.<sup>48</sup> Multilateral treaties included the Declaration of St Petersburg 1868 which prohibited the use of explosive projectiles.<sup>49</sup> Bilateral treaties included the Bryan Treaties<sup>50</sup> which featured a ‘cooling-off’ period of twelve months that prohibited any forceful measures until this period expired.<sup>51</sup> These treaties “provided a precedent for the moratorium on resort to war provided for in the Covenant”.<sup>52</sup> The Concert of Europe also offered a system of peaceful resolution through combined state action.<sup>53</sup> It relied on the consensus between the Great Powers to safeguard European peace by maintaining the balances of power and to promote the peaceful means of dialogue, over war.<sup>54</sup>

The Hague Conventions 1899 and 1907 were another turning point for peaceful settlement. These conventions provided an international legal framework of the commonly accepted rules of hostilities.<sup>55</sup> Organised by Tsar II of Russia,<sup>56</sup> although the 1899 Convention did not achieve its objective of limiting armaments,<sup>57</sup> it

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<sup>46</sup> Marcus M Payk, ‘“What We Seek is the Reign of Law”: The Legalism of the Paris Peace Settlement after the Great War’ (2018) 29(3) EJIL 809, 811.

<sup>47</sup> Thomas Erskine Holland, *Studies in International Law* (Clarendon Press 1898) 77

<sup>48</sup> Hindmarsh (n 21) 85; Manley O Hudson, *International Legislation* (Vol 1, Carnegie Endowment for International Peace 1931) 13.

<sup>49</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (signed 11 December 1868, entered into force upon signature) 138 CTS 297.

<sup>50</sup> The Chamorro-Bryan Treaty (signed 5 August 1914, entered into force 22 June 1916) 39 Stat. 1661.

<sup>51</sup> Manley O Hudson, ‘The Inter-American Treaties of Pacific Settlement’ (1936) 15 FA 165, 168.

<sup>52</sup> Brownlie (n 2) 56.

<sup>53</sup> Evans (n 22) 12.

<sup>54</sup> Owain Wright ‘Concert of Europe’ [2018] Encyclopaedia for Diplomacy 1.

<sup>55</sup> Diakonia International Humanitarian Law Centre, ‘Sources of International Humanitarian Law’ (*Diakonia International Humanitarian Law Centre*) < <https://www.diakonia.se/ihl/resources/international-humanitarian-law/sources-international-humanitarian-law/>> accessed 17 February 2023.

<sup>56</sup> Henig (n 27) 5.

<sup>57</sup> The Editors of the Encyclopaedia Britannica, ‘Hague Convention’ (*Encyclopaedia Britannica*, 8 June 2022) < <https://www.britannica.com/event/Hague-Conventions>> accessed 21 February 2023; Betsy Barker, ‘Hague Peace Conferences (1899 and 1907)’ [2009] MPEPIL 689, 689.

succeeded in adopted treaties relating to establishing a Permanent Court of International Arbitration<sup>58</sup> and issued declarations such as the ‘Declaration concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases’.<sup>59</sup> In 1907, a second Hague Conference was convened to strengthen the rules, such as the pacific settlement of disputes and the rights and duties of neutral powers in cases of war on land and in the sea.<sup>60</sup> The Hague Conferences highlighted the new “era of international conferences and institutionalized multilateralism” that set the foundation for the League’s restriction of resorting to war.<sup>61</sup>

## B) World War I

Despite the peaceful settlement ambitions, World War I broke out in 1914. This was an unprecedented conflict of scope and intensity that the international community had never witnessed before, killing around 40 million.<sup>62</sup> Witnessing these mass-scale atrocities and its violations of state practice and the Hague Conferences ignited the sentiment that the use of force should be restricted further. Thus, there was consensus post-war that there not only needed to be a return to the *status quo ante bellum*, but a stable set of legal rules governing the use of force to prevent the atrocities committed in World War I from reoccurring.<sup>63</sup> As a result, governments and civil groups began drawing up plans for an international organisation to safeguard peace post-war.<sup>64</sup> This is because the World War had proven that states could no longer rely upon national morality.<sup>65</sup>

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<sup>58</sup> Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910) UKTS 6.

<sup>59</sup> Françoise Bouchet-Saulnier, ‘The Hague Conventions of 1899 and 1907’ (*The Practical Guide to Humanitarian Law*) <<https://guide-humanitarian-law.org/content/article/3/the-hague-conventions-of-1899-and-1907/>> accessed 24 February 2023.

<sup>60</sup> Ibid.

<sup>61</sup> Stanislas Jeannesson, ‘The International Hague Conferences of 1899 and 1907’ (*Encyclopédie d’histoire numérique de L’Europe*, 22 June 2020) <<https://ehne.fr/en/encyclopedia/themes/international-relations/europe-and-legal-regulation-international-relations/international-hague-conferences-1899-and-1907>> accessed 27 February 2023.

<sup>62</sup> Lawrence Sondhaus, *World War One* (Cambridge University Press 2020) 3; History.com Editors, ‘World War I Battles: Timeline’ (*History*, 8 April 2021) <<https://www.history.com/topics/world-war-i/world-war-i-battles-timeline>> accessed 20 February 2023.

<sup>63</sup> Payk (n 46) 814.

<sup>64</sup> Oliver P Richmond, *The Transformation of Peace* (Palgrave MacMillan 2005) 35-42.

<sup>65</sup> Hindmarsh (n 21) 107.

### C) League of Nations

Following the end of World War I in 1918, the Paris Peace Conference convened to establish the peace terms of a post-war world.<sup>66</sup> The Treaty of Versailles expressed the agreed peace terms, which included the Covenant of the League of Nations. This instrument set up the League of Nations, which served as the first intergovernmental organisation to maintain international peace.<sup>67</sup>

The League Covenant did not implement a total prohibition of war but derogated from custom by qualifying the right to resort to war.<sup>68</sup> It predominantly restricted the right to “resort to war”, not the “use of armed force”, which was its original wording in the Covenant, and constricted “threats of war” and disputes “likely to lead to a rupture”.<sup>69</sup> However, this shift to “resort to armed force” instead of “resort to war” occurred for no authoritative reason.<sup>70</sup> War was therefore distinguished upon legal and illegal wars (*bellum legale*), unlike the prior doctrine of just and unjust wars (*bellum justum*).<sup>71</sup> The Covenant restricted war by granting statutory status to the nineteenth century state practice that recourse to pacific settlement should be sought before resorting to war. Nonetheless, the Covenant seemingly restricted force further by mandating a “dispute likely to lead to rupture”, rather than war, being submitted to peaceful settlement as a preventative measure to prevent minor disputes from escalating into another world war.<sup>72</sup> In the Covenant, a member state was only permitted to resort to war if it had exhausted the peaceful settlements unsuccessfully in Articles 12, 13, and 15 of the Covenant.<sup>73</sup> Article 12(1) states that “any dispute likely to lead to rupture” will be submitted to arbitration, judicial settlement or to the Council and “resort to war” cannot occur until three months after the arbitrators’ award, judicial decision or the Council’s report.<sup>74</sup> Article 13(4) provides that Member states should not “resort

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<sup>66</sup> U.S Department of State, ‘The Paris Peace Conference and the Treaty of Versailles’ (*State.gov*) <<https://2001-2009.state.gov/r/pa/ho/time/wwi/89875.htm>> accessed 25 March 2023.

<sup>67</sup> Covenant, preamble; United Nations, ‘The League of Nations’ (*United Nations*) <<https://www.ungeneva.org/en/library-archives/league-of-nations>> accessed 11 February 2023.

<sup>68</sup> Brierly (n 13) 310, 311; Hindmarsh (n 21) 26-40.

<sup>69</sup> Covenant, art 12(1), art 15(1), art 13(4), art 16(1); Lauterpacht (n 9) 49; Hindmarsh (n 21) 133; Waldock (n 20) 470.

<sup>70</sup> Lauterpacht (n 9) 49; Covenant, art 12(1), art 13(4), art 16(1).

<sup>71</sup> Josef L Kunz, ‘Bellum Justum and Bellum Legale’ (1951) 45(3) AJIL 528, 532.

<sup>72</sup> Covenant, art 12(1), art 15(1).

<sup>73</sup> Brownlie (n 2) 56.

<sup>74</sup> Covenant, art 12(1).

to war against a Member of the League which complies” with an award or decision.<sup>75</sup> Lastly, Article 15(6) notes that a League member must not go to war against another state who “complies with the recommendations” of the Council’s unanimously agreed report.<sup>76</sup>

Furthermore, the Covenant derogated from the custom that war is a “private duel” isolated from the rest of the international community, that only involved the neutrality of a third state if it wished to.<sup>77</sup> The Covenant established a collective security system: an aggressor against one member state was an aggressor against all the other member states.<sup>78</sup> This was fundamentally articulated in Article 11 that “any war or threat of war, whether immediately affecting any of the Members of the League or not... is a matter of concern to the whole League”.<sup>79</sup> War was thus now a breach of the peace that affected all the League members.<sup>80</sup> This is contrary to the Concert of Europe whereby the great powers enforced their own rights and safeguarded peace by localising issues.<sup>81</sup> Article 16 also established that if any member breaches Articles 12, 13, or 15, “it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League”.<sup>82</sup> This means that the state that breached the Covenant could be subjected to automatic economic sanctions,<sup>83</sup> as well as military sanctions by all Member States if the Council recommends.<sup>84</sup> This embodies third states employing force rather than impartiality to ensure peace. A strained interpretation of Article 16 may however hold that these sanctions do not apply to a breach of a “dispute likely to lead to a rupture” since it does not employ war terminology.<sup>85</sup>

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<sup>75</sup> *Ibid.*, art 13(4).

<sup>76</sup> *Ibid.*, art 15(6).

<sup>77</sup> Thompson (n 5) 753; Brownlie (n 2) 57.

<sup>78</sup> United Nations (n 65).

<sup>79</sup> Covenant, art 11(1).

<sup>80</sup> Brownlie (n 2) 57.

<sup>81</sup> Thompson (n 5) 755.

<sup>82</sup> Covenant, art 16(1).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, art 16(2).

<sup>85</sup> Lauterpacht (n 9) 46; Covenant art 12(1), art 15(1).

Despite this, a gap manifested in the Covenant as to whether forceful acts short of war were subject to these restrictions of war. It was ambiguous as to whether these were included within the meaning of some of the provisions and not others too.<sup>86</sup> The nineteenth century subjective interpretation of war established that measures short of war did not amount to war.<sup>87</sup> During the lifetime of the League, nonetheless, there developed a new objective interpretation of war: all forceful acts, including measures short of war, amounted to war and so, the Covenant's provisions were applicable.<sup>88</sup> This led to a significant debate on whether League members could lawfully resort to reprisals short of war under the Covenant before prior recourse to pacific settlement.

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<sup>86</sup> Quinsy Wright, 'The Test of Aggression in the Italo-Ethiopian War' (1936) 30 AJIL 45, 55.

<sup>87</sup> Lauterpacht (n 9) 47.

<sup>88</sup> *Ibid.*

## **CHAPTER 2: THE CORFU INCIDENT**

The central issue in the Corfu Incident of 1923 was whether the use of force short of war was subject to the constraints of the Covenant. This issue was raised in two ways: Italy's occupation and bombardment of Corfu, and the interpretation of the CoJ's ambiguous opinion.

### **A) The Corfu Incident**

The Corfu Incident involved a controversy between Greece and Italy about the murder of the Italian General Tellini in Janina, near the Albania frontier on 27 August 1923.<sup>89</sup> Tellini, the President of the Greek-Albanian boundary Commission, was one of the five members of the delimitation commission sent out by the Conference of Ambassadors to establish the Albanian-Greek boundary.<sup>90</sup> Italy consequently responded by issuing an ultimatum to Greece on 29 August 1923, demanding an official apology, memorial service, honours to the Italian flag, an inquiry into the incident with the presence of an Italian officer within five days, the capture and capital punishment of the murderers, compensation of 50 million lire to be paid within five days, military honours to the Italian victims, and a reply to this note within twenty-four hours.<sup>91</sup> Greece refused to comply with three of the demands, stating that if Italy refused to accept this offer, Greece would appeal to the League of Nations.<sup>92</sup> On 30 August 1923, the Conference of Ambassadors (CoA) began resolving the dispute by initiating an inquiry into Tellini's murder and "reserving the consideration of penalties which Greece ought to pay".<sup>93</sup> Irrespectively, on 31 August 1923, the Italian government initiated the occupation and bombardment of Corfu due to the failure of Greece to comply with all of its demands.<sup>94</sup> As a result, Greece

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<sup>89</sup> Quinsy Wright, 'Opinion of Commission of Jurists on Janina-Corfu Affair' (1924) 18(3) AJIL 536, 536.

<sup>90</sup> Manley O Hudson, 'How the League of Nations Met the Corfu Crisis' [1923] World Peace Foundation Pamphlet Series 176, 178.

<sup>91</sup> *Ibid.*, 179.

<sup>92</sup> *Ibid.*

<sup>93</sup> Hudson (n 90) 179.

<sup>94</sup> Telegram No 50, British Consulate to Corfu Greece TNA FO 286/864 (2 September 1925).

appealed to the League of Nations under Articles 12 and 15 of the Covenant,<sup>95</sup> but deliberately avoided appealing under Article 16.<sup>96</sup> This was to avoid escalating the issue since both Greece and Italy disclosed their intent that this was not a state of war. Official communiqué from Rome had confirmed that the occupation of Corfu was a peaceful enterprise of temporary nature so that Italy could achieve its objective of receiving reparation,<sup>97</sup> as confirmed by Salandra, the Italian representative, at the League Council meetings.<sup>98</sup> Given this, and the fact that Greece was a weak state compared to Italy, a Great Power, it lacked the power to go to war.

Furthermore, Italy wished for the CoA alone to deal with the matter since the League Council were incompetent.<sup>99</sup> Italy submitted that the Council did not need to resolve a dispute “likely to lead to a rupture”,<sup>100</sup> because Article 15 was not breached, and therefore, the Council did not have jurisdiction. Italy regarded its actions as a temporary measure taken in the national interest to secure reparations, thereby meaning the Council had no authority to intervene in this matter.<sup>101</sup>

Italy threatened to leave the League if the Council settled the dispute.<sup>102</sup> The dispute was ultimately resolved by agreement of mediation through both the League and the CoA.<sup>103</sup> After multiple Council meetings, Quiñones, the Spanish representative, proposed eight solutions for the Greek-Italian controversy, which received plenty of support.<sup>104</sup> This was used as inspiration to send a note to the CoA outlining similar points of discussion with the minutes of the Council’s meeting, and whilst doing this, at the request of Italy and Greece, bequeathed the question of reparation to the CoA.<sup>105</sup> The eight points included a funeral for the victims, Greece to deposit 50 million lire into a Swiss Bank as a guarantee and Greece to launch a Commission

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<sup>95</sup> James Barros, *The Corfu Incident of 1923: Mussolini and The League of Nations* (Princeton University Press 1965) 90.

<sup>96</sup> *Ibid.* 92.93.

<sup>97</sup> *Ibid.*, 92.

<sup>98</sup> ‘Fourteenth Meeting (Public)’ (1923) 4 LNOJ 1313, 1314.

<sup>99</sup> Hudson (n 90) 182.

<sup>100</sup> Covenant, art 12(1), art 15(1).

<sup>101</sup> Lord Robert Cecil, *A Great Experiment: An Autobiography* (J Cape 1941) 147-151.

<sup>102</sup> Hudson (90) 186.

<sup>103</sup> Wright (n 89) 536.

<sup>104</sup> Hudson (n 90) 183.

<sup>105</sup> *Ibid.*, 190; Cecil (n 101) 150.

of Inquiry to investigate the murders under the supervision of the League of Nations.<sup>106</sup> The CoA's decision closely resembled the eight submitted proposals, except that the CoA would supervise the inquiry instead of the League, and it must be completed by 27 September 1923.<sup>107</sup> Greece and Italy agreed to these terms and Italy confirmed its evacuation from Corfu by 27 September 1923.<sup>108</sup> On 26 September, before the inquiry had ended, the CoA held that Greece had not fulfilled the demand on the Italian note necessitating inquiry into finding the authors of Tellini's murder and therefore, Greece was liable to pay 50 million lire to Italy.<sup>109</sup> Italy subsequently evacuated Corfu on 29 September 1923.

As Italy and Greece accepted the CoA's decision, the dispute was settled outside the League.<sup>110</sup> Therefore, the Council did not offer a judgement on whether Italy's occupation of Corfu was subject to the restrictions of war by the Covenant, and thus the legality of its reprisal.<sup>111</sup> However, the British,<sup>112</sup> Swedish,<sup>113</sup> and Uruguayan<sup>114</sup> Council representatives explicitly voiced their belief that Italy's acts were illegal. Concurrently, the Assembly implicitly expressed the same opinion.<sup>115</sup> Furthermore, this left no answers to the "various legal contentions advanced during the discussion of the League".<sup>116</sup> These issues focused on the Covenant's interpretation and general points of international law like Italy's assertion that the League Council lacked competence over the dispute.<sup>117</sup> Despite a dispute arising over whether the Permanent Court of International Justice (PCIJ) or a Commission of Jurists (CoJ) should be the authority, these contentions were ultimately worded as questions to be asked before a CoJ appointed by the Council.<sup>118</sup>

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<sup>106</sup> Hudson (n 90) 188-190.

<sup>107</sup> Ibid.; Barros (n 95) 195, 196.

<sup>108</sup> Hudson (n 90) 184.

<sup>109</sup> Ibid., 192.

<sup>110</sup> Waldock (n 20) 473.

<sup>111</sup> Brownlie (n 2) 218.

<sup>112</sup> Statement of Lord Cecil, 'Sixth Meeting (Private)' (1923) 4 LNOJ 1276, 1279.

<sup>113</sup> 'Eighth Meeting (Private)' (1924) 5 LNOJ 1315, 1316

<sup>114</sup> Statement by Guani of Uruguay, 'Eighteenth Meeting (Private)' 4 LNOJ 1328, 1329.

<sup>115</sup> John H Wigmore, 'Case of Italy v Greece under International Law and the Pact of Nations' (1923) 18(3) Ill L R 131, 148; 'World Court Ruling on League Assured' *New York Times* (Associated Press Dispatch from Geneva, 28 September 1923).

<sup>116</sup> Wright (n 89) 536.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

The fourth question sent to the COJ about these legal issues focused on whether the forceful acts short of war were constrained by the Covenant's provisions on war:

*Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in these articles?*<sup>119</sup>

The CoJ replied with the following:

*Coercive measures which are not intended to constitute acts of war, may or may not be consistent with the provisions of Article 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.*<sup>120</sup>

The Council accepted this answer, including Salandra, but indicated that this did not express its own view.<sup>121</sup>

## **B) Analysis of the Corfu Incident: Law on the Use of Force Short of War**

Firstly, the question of whether the use of force short of war was encompassed in the Covenant's restrictions on war was raised through the lawful determination of Italy's reprisals against Corfu.

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<sup>119</sup> 'Sixth Meeting (Public)' (1924) 5 LNOJ 523, 524.

<sup>120</sup> Ibid.

<sup>121</sup> Williams (n 12) 13.

However, the League Council did not establish the lawfulness of Italy's acts: it merely acquiesced to the Conference of Ambassador's settlement which Italy and Greece had accepted. This settlement did not discuss the lawfulness of Italy's reprisals either, it alternatively held the victim of the reprisal, Greece, as responsible for the murders of Tellini and the others.<sup>122</sup> This demonstrates the Council's explicit failure as a body to remedy the gap in the Covenant on acts short of war because if Italy's acts were deemed lawful, the Covenant would enshrine the subjective interpretation of war so that acts short of war were not subject to the Covenant's restrictions. Whereas, if Italy's acts were held to be unlawful, the Covenant would uphold the objective interpretation of war meaning that all forceful acts are encompassed within the Covenant's restrictions. Wigmore criticises the Council's silence since the Council was the forum that could provide a worldwide "clear judgement upon any dispute involving aggression by force",<sup>123</sup> Whilst this is true, Wigmore fails to consider the complex reality of the Council effecting this in the given circumstances. The Council was required to "placate Italy['s hostility]".<sup>124</sup> This occurred due to the fact that Mussolini had threatened to leave the League if the Council settled the dispute, Italy could potentially permanently occupy Corfu if the issue remained unresolved, the Italian press had made violent accusations against the Greeks, and Greek consulates and individuals were being attacked in Italy.<sup>125</sup> Thus, the finding of a "resort to war"<sup>126</sup> or "any dispute likely to lead to a rupture"<sup>127</sup> involved a balance of political factors:<sup>128</sup> For the Council to successfully safeguard peace, it needed to control hostile acts like Italy's, but simultaneously guarantee peace by not employing measures that would exacerbate Italy's irritation further and induce it to leave the League and not Corfu. Moreover, the Council also likely did not want to derogate absolutely from customary right to war by outlawing Italy's reprisal so early on in the League's existence, which may also infuriate other member states. This is because member states had already deliberately abstained from accepting compulsory arbitration in the Covenant, so an absolute derogation would be unwelcomed.<sup>129</sup> But concurrently, the Council also did not

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<sup>122</sup> Hudson (n 90) 192.

<sup>123</sup> Wigmore (n 115) 142.

<sup>124</sup> Brownlie (n 2) 221; Alexandrov (n 1) 36.

<sup>125</sup> F P Walters, *A History of the League of Nations* (Vol 1, Oxford University Press 1952) 245; Hudson (n 88)

<sup>126</sup> Covenant, art 12(1), art 13(4), art 16(1).

<sup>127</sup> *Ibid.*, art 12(1), art 15(1).

<sup>128</sup> Brownlie (n 2) 222.

<sup>129</sup> Lauterpacht (n 9) 50.

desire to set a precedent encouraging forceful acts which was contrary to the League's responsibility to discourage the use of force. These difficult balancing acts rationalise the Council's silence: as the Conference of Ambassador's decision had resolved the dispute, the Council did not want to determine the legality of Italy's acts to disturb the peace. This same rationale elucidates the Council's acceptance of the CoJ's opinion, but it was the CoJ who purported this, not the Council. Although the Corfu Incident was resolved successfully,<sup>130</sup> the Council did not render an explicit authoritative opinion itself on the use of force short of war.

Even though there were divisions amongst the League members in the Council, an authoritative pronouncement could be inferred from the majority consensus. The general view of the Council was that the use of armed force short of war required prior recourse to pacific settlement under the Covenant, at least under the circumstances Italy bombarded Corfu in.<sup>131</sup> Lord Cecil affirms this: it is of "great difficulty in understanding how... [the occupation and bombardment] can be differentiated from an act of war",<sup>132</sup> although he acknowledges that the use of force short of war had already been frequently employed by League members.<sup>133</sup> Thus, Cecil considers that Italy's reprisal amounts to a recourse to war, despite that other members formerly committed similar acts. This sentiment was also expressed in the Assembly since no Italian was also included in the Assembly's Vice President, the first time that a permanent member of the Council was excluded.<sup>134</sup> In addition, Greece argued that Italy's acts "must be judged objectively, and it is for the Council to judge the acts regarding which Greece has the right to complain".<sup>135</sup> This confirms Greece's support of the objective interpretation of war: as Greece brought the appeal under Article 15, it maintains that Italy's reprisal is mandatorily subject to the consideration of the Council determined by its objective facts. This establishes that the majority of the League Council, and the Assembly, regarded the force short of war as subjected to the Covenant's restrictions, in particular any "dispute likely to lead to a rupture"<sup>136</sup> under Article

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<sup>130</sup> Cecil (n 101) 151.

<sup>131</sup> Alexandrov (n 1) 34.

<sup>132</sup> Sixth Meeting (Private) (n 112) 1279.

<sup>133</sup> *Ibid.*, 1279, 1280.

<sup>134</sup> Walters (n 125) 247.

<sup>135</sup> Sixth Meeting (Private) (n 112) 1277.

<sup>136</sup> Covenant, art 12(1), art 15(1).

15, and for Cecil, amounting to “resort to war”.<sup>137</sup> Although the Council does not make an authoritative opinion, this majority opinion could amount to an *opinio juris*. This, combined with the emerging state practice from the subjective to the objective approach suggests that a new customary rule may have emerged for restricting the right to resort to war. This majority opinion could also be deciphered as subsequent practice by the members to the Covenant as interpreting that these ambiguous phrases restricted acts short of war, at least in the circumstances that Italy committed the reprisal in. This general rule could only be construed and not an entire ban on all force, because each state offered a different test of varying severity for pronouncing Italy’s acts as unlawful, so it could only be interpreted that the majority wished to restrict forceful acts to some extent.

Nonetheless, Italy contended that its occupation of Corfu was not subject to the Covenant’s provisions, thus the Council did not have the competence to adjudicate the dispute under Article 15. Salandra submits that the League did not “forbid these peaceful means of repression”, since it is a recognised principle of international law to resort to force out of self-protection, which was to protect Italian prestige, a matter the League could not intervene on.<sup>138</sup> Given this, Salandra provided that there was “no violation of international law”<sup>139</sup> on this act short of war and an official communiqué confirmed Italy’s lack of intention to initiate war,<sup>140</sup> it was “no act of war”.<sup>141</sup> This conveys that Italy relied on the subjective definition of war to lawfully justify its occupation of Corfu. Italy employed this justification tactically because nineteenth century state practice endorsed the subjective war interpretation and the self-protection as grounds for acts short of war, and given the Covenant’s gap on the use of force short of war, Italy could adopt this defence fruitfully to avoid culpability.<sup>142</sup> Whilst these were recognised practices, the subjective interpretation of war flourished when no international organisation existed to redress international wrongs, unlike in the Corfu Incident, and Italy did not need to protect itself from Greece: Greece was willing to comply with most of its demands. This thereby

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<sup>137</sup> *Ibid.*, art 12(1), art 13(4), art 16(1).

<sup>138</sup> Barros (n 95) 101.

<sup>139</sup> Fourteenth Meeting (Public) (n 98) 1313, 1314.

<sup>140</sup> Barros (n 95) 92.

<sup>141</sup> Fourteenth Meeting (Public) (n 98) 1314.

<sup>142</sup> Brownlie (n 2) 26.

undermines the legitimacy of Italy's argument. Overall, given Italy's hostility, its influence as a Great Power,<sup>143</sup> and the Council's reluctance suddenly to restrict war absolutely from the custom to wage unlimited war meant that the Council understandably could not officially rule on Italy's actions. Although the Council did not make an authoritative pronouncement, by considering further the majority opinion of the Council and the Assembly, the gap could be somewhat remedied to infer that acts short of war are subject to the Covenant's restrictions in unreasonable circumstances like the Corfu Incident presented.

Secondly, the CoJ provided an opinion to the question asking whether the force short of war was compatible with the Covenant's restrictions on war in Articles 12 to 15. A literal interpretation of the opinion reads that in certain circumstances, measures short of war might be subject to the constraints of the Covenant and that when a dispute is submitted to the Council it possesses the discretion to decide if the measures are lawful or not with the Covenant.<sup>144</sup> This reply is delphic since it does explicitly confirm that acts short of war are absolutely compatible or incompatible with the Covenant.<sup>145</sup> The CoJ purposefully provided this ambiguous answer to not resolve the Covenant's gap. Given the hostility of Italy, the CoJ likely did not want to outrightly reprimand Italy for its acts nor diverge too far from the unlimited right to war custom. Nonetheless, the CoJ's opinion substantiated the League's competence in Article 15 situations, like the Corfu Incident thereby implicitly condemning Italy for asserting the League's incompetence. This reveals that the CoJ did not clarify the Covenant's gap but their intention to restrict acts short of war to some extent can be inferred from its deliberate ambiguity and proclamation of the Council's competence.

This interpretation of the CoJ's intentions aligns with Charles de Visscher's, one of the jurists on the Commission, clarification of the reply. Visscher argues that armed reprisals amount to a "dispute likely to lead to a rupture" under Article 12 so these acts are inconsistent with the observation of Article 12 in good faith.<sup>146</sup> If this were not so, the victim state subject to armed reprisals would bring a state of war if they employed

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<sup>143</sup> Walters (n 121) 253.

<sup>144</sup> *Ibid.*; Alexandrov (n 1) 36.

<sup>145</sup> Waldock (n 20) 475.

<sup>146</sup> *Ibid.*

forcible defence, which would be unjust.<sup>147</sup> However, economic reprisals are lawful since they do not lead to the risk of rupture.<sup>148</sup> This is insightful because Visscher sat on the Commission of Jurists and provided his opinion later, outside the pressure to appease Italy, so this conveys a more accurate depiction of the League's intention that acts short of war amounted to "disputes likely to lead to a rupture".<sup>149</sup> Visscher does not specify whether he believes that armed reprisals also amount to "resort to war".<sup>150</sup> But this absence ties in with this essay's argument that the CoJ wished to restrict acts short of war in certain circumstances, thereby for Visscher, acts short of war contravened a "dispute likely to lead to a rupture",<sup>151</sup> but not "resort to war".<sup>152</sup>

Moreover, the CoJ's intention to restrict force short of war somewhat is reflected in its balanced approach towards the objective and subjective interpretations of war. The CoJ's interpretation did not name *animus belligerendi* as a necessary condition to a state of war.<sup>153</sup> However, the other "circumstances" the CoJ refers to could fall under Lauterpacht's rationale that war arises by many factors, which includes, but is not limited to, the *animus belligerendi* of the disputing states.<sup>154</sup> To Lauterpacht whether an act is constrained by the Covenant's provisions is left to the discretion of the League members who consider it on its own merits.<sup>155</sup> This establishes that a force short of war is constrained to resort to pacific settlement prior execution only in circumstances that other League Members purport it to be, thereby aligning with the contention that CoJ intended to restrict force short of war to some extent and the notion that war is a concern for all League Members. Furthermore, although the Council's Branting of Sweden and Guani of Uruguay accepted the Jurists' reply subject to the declaration that "the use of armed force is not compatible with the Covenant in the circumstances indicated in the fourth question", it is unlikely that the CoJ intended all acts of force. This is

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<sup>147</sup> Ibid., 476.

<sup>148</sup> Constantine Antonopoulos 'The Unilateral Use of Force by States' (Doctor of Philosophy, University of Nottingham 1992) 33; Waldock (n 20) 476.

<sup>149</sup> Brierly (n 13) 316; Charles de Visscher, *Problèmes d'Interprétation Judiciaire en Droit International Public* (A Pedone 1963) 377. Covenant, art 12(1), art 15(1).

<sup>150</sup> Covenant, art 12(1), art 13(4), art 16(1).

<sup>151</sup> Ibid., art 12(1), art 15(1).

<sup>152</sup> Ibid., art 12(1), art 13(4), art 16(1).

<sup>153</sup> Lauterpacht (n 9) 55; Williams (n 12) 13.

<sup>154</sup> Lauterpacht (n 9) 52.

<sup>155</sup> Ibid., 53, 54.

because the Corfu Incident occurred early in the League's existence, during the beginning of the shift to the objective view, so it is likely the CoJ did not want to wholly support this.<sup>156</sup> Alternatively, like with the Council's majority opinion, the use of force short of war is subject to the Covenant's constraints in certain circumstances. Altogether, the CoJ's opinion does not explicitly clarify the law on the use of force short of war, but it can still be deduced that it intended acts short of war to be caught by the Covenant's provisions on war in certain circumstances, like the Council majority. These circumstances would most likely be Visscher's contention of constituting a "dispute likely to lead to a rupture" given Visscher's credible role.<sup>157</sup>

Overall, the League succeeded in resolving a difficult dispute quickly.<sup>158</sup> Although it was not explicit, it can be stipulated that the institutions inferred that the law in the Covenant should constrict measures short of war to a moderate extent.

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<sup>156</sup> Statement of Mr. Branting, Sixth Meeting (Public) (n 119) 523; Guani, Sixth Meeting (Private) (n 112) 1239.

<sup>157</sup> Covenant, art 12(1), art 15(1).

<sup>158</sup> Cecil (n 101) 151.

## CHAPTER 3: THE ACADEMIC DEBATE ON THE USE OF FORCE SHORT OF WAR

As the League institutions only implicitly confirmed their views on acts short of war, academics readily rushed to distinctively fill this void in the law.

### A) Subjective Approach

War, in its subjective and technical meaning, requires the manifestation of *animus belligerendi* by the disputing states. This means that one or both disputing states must have an “express or assumed intention... to bring about a state of war”<sup>159</sup> between themselves in the “full legal sense”.<sup>160</sup> A war in the full legal sense is where states consciously employ violence against each other, thereby requiring third-party states to remain neutral.<sup>161</sup> Furthermore, the *animus belligerendi* could be evidenced through a declaration of war or physical, forceful acts commencing a state of war.<sup>162</sup> On this approach, forceful measures short of war are not encompassed within the Covenant’s restrictions on war and thus, are permissible on any occasion since the Covenant only restricts a formal state of war from arising.<sup>163</sup> Thereby, Italy’s bombardment of Corfu was lawful in this interpretation of war.

The *animus belligerendi* of the initial aggressor state is conventionally investigated to ascertain whether a legal state of war has emerged.<sup>164</sup> However, Hall,<sup>165</sup> Westlake,<sup>166</sup> and McNair<sup>167</sup> purport that the *animus belligerendi* of the victim state can be relevant too. In particular, McNair establishes that “resort to war” occurs

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<sup>159</sup> Lauterpacht (n 9) 49.

<sup>160</sup> Williams (n 12) 8,14; Kelsen (n 16) 27.

<sup>161</sup> Williams (n 12) 14.

<sup>162</sup> McDougal and Feliciano (n 10) 241.

<sup>163</sup> Lauterpacht (n 9) 47.

<sup>164</sup> Williams (n 12) 10.

<sup>165</sup> William Edward Hall, *A Treatise on International Law* (8<sup>th</sup> edn, Oxford University Press 1924) 434.

<sup>166</sup> John Westlake, *International Law* (2<sup>nd</sup> edn, Vol II, Cambridge University Press 1907) 23, 24.

<sup>167</sup> McNair (n 36) 35.

when there is a declaration of war,<sup>168</sup> if not, where there is a declaration or a forceful act under the authority with an *animus belligerendi*.<sup>169</sup> A state of war can also manifest without an *animus belligerendi* when the defending state decides an aggressor state's act, even if it is an armed reprisal, as being a state of war, by repelling force by force or making a declaration.<sup>170</sup> However, the war arises on the commission of the attacking state's acts.<sup>171</sup> Resultantly forceful measures short of war are constrained by the Covenant when the victim state decides the attacking state's reprisal amounts to war.<sup>172</sup> As McNair considers *sine animus belligerendi* situations from the subjective interpretation of the defending state, this reinforces that his view is not absolutist.

Furthermore, there is a range of subjective interpretations stretching from complete subjectivism to weaker subjectivism. Absolutists like Hindmarsh affirm that no acts short of war are constrained by the Covenant.<sup>173</sup> As the Covenant only restricts war, this does not satisfy Hindmarsh's requirement that reprisals only amount to war if, when illegalising war, states are mandated only to adopt "amicable methods".<sup>174</sup> To contrast, Wright and Macoby, like McNair, are weak subjectivists since they establish that acts short of war are not encompassed in a "threat of war"<sup>175</sup> and "any dispute likely to lead to a rupture",<sup>176</sup> but not for "resort to war".<sup>177</sup> Wright proposes that League members can resort to armed reprisals before submission to pacific settlement if the "character and under circumstances which will assure their approval by the Council".<sup>178</sup> However, Wright fails to mention the threshold of the circumstances and character of this. Macoby submits that severe reprisals fall into "threats of war" under Article 11 and under Article 12,<sup>179</sup> only major reprisals constitute "likely to lead to a rupture".<sup>180</sup> Only in cases of necessity can a state commit a major reprisal under

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<sup>168</sup> Covenant, art 12(1), art 13(4), art 16(1).

<sup>169</sup> McNair (n 36) 45.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*, 46.

<sup>173</sup> Hindmarsh (n 21) 127.

<sup>174</sup> *Ibid.*, 126, 127.

<sup>175</sup> Covenant, art 11(1).

<sup>176</sup> *Ibid.*, art 12(1), art 15(1).

<sup>177</sup> *Ibid.*, art 12(1), art 13(4), art 16(1).

<sup>178</sup> Wright (n 89) 541, 542.

<sup>179</sup> Covenant, art 11(1).

<sup>180</sup> S Macoby, 'Reprisals as a Measure of Redress Short of War' (1924) 2(1) CLJ 60, 71-73.

Article 12, but the attacking state should inform the Council so it can investigate if the act was carried out in good faith.<sup>181</sup> Macoby recommends that the attacking state should inform the Council, even for lawful, smaller reprisals.<sup>182</sup> This explores that by involving the League Council, Macoby and Wright balance war's subjective interpretation against the League Council's role in resolving international disputes peacefully when attempting to gauge the League's intention behind the Covenant's provisions. With the angst of another war and the move to the objective approach to war, these academics likely inferred the League's desire to restrict resort to force more extensively through the Covenant's drafting. By involving the Council as a judge, this further eliminates William's criticism that under the subjective view, a state could conceal a breach by just claiming that it is just an act short of war instead of war.<sup>183</sup> Although Macoby and Wright do not make reference to the CoJ's opinions, their propositions align with the interpretation of the CoJ's opinion and the majority Council opinion that forces short of war are constrained by the Covenant in certain circumstances.

## **B) Objective Approach**

The objective interpretation of war relies on objective facts to ascertain the existence of a war. War emerges if "the factual concept of [the] armed conflict" indicates its presence.<sup>184</sup> Therefore, objectivists treat war as an act, rather than the legal status that subjectivists grant it.<sup>185</sup> The factual evidence that academics have formulated maintain that all measures of armed force are subject to the Covenant's restrictions.<sup>186</sup> Hence, Italy's occupation and bombardment contravened the Covenant according to the objective approach. This view reflects the twentieth-century drive to restrict all resort to war, including acts short of war, to prevent the horrors of World War I from reoccurring and were determined to prevent states, like Italy in the Corfu Incident, from claiming that their warlike acts are merely acts short of war to escape sanctions under Article 16.<sup>187</sup>

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<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Williams (n 12) 9.

<sup>184</sup> Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36(2) ICLQ 283, 304.

<sup>185</sup> Kelsen (n 16) 27.

<sup>186</sup> Lauterpacht (n 9) 46, 47.

<sup>187</sup> Brownlie (n 2) 50.

John Fischer Williams establishes that war is a violent or forcible “unilateral intentional action” by one state against another, which accords to when any “military, naval or air forces of the Government of one country are deliberately employed by order of that Government”.<sup>188</sup> As he submits that this amounts to the Covenant’s “resort to war”,<sup>189</sup> this conveys that all deliberate forceful measures employed by the Government amount to war, including forceful acts short of war.<sup>190</sup> Nonetheless, Brierly considers that only if the forceful acts are long-lasting and serious, the law should intervene to classify it as a war if the participating states refuse to do so.<sup>191</sup> Brierly’s objective facts are limited to a situation that demands a high threshold to convert armed reprisals to war, unlike Williams. Yet this can be rationalised through Brierly’s combined support of the objective and subjective interpretations of war.

### C) Intermediate Position

Lauterpacht and Brierly construct a compromise between the objective and subjective approaches to define war. Therefore, acts short of war are subject to the Covenant’s restrictions on war in particular circumstances.

For Lauterpacht a state of war brought about by numerous factors, including, but not limited to the *animus belligerendi* of the disputants.<sup>192</sup> One of the other factors capable of bringing a state of war is third parties treating forceful measures as a state of war between two other disputing states refusing or being unable to recognise it as a war.<sup>193</sup> Whether a particular hostility amounts to a “resort to war” is left to the discretion of each League member, judging each case on its own merits.<sup>194</sup> This aligns with the Second Assembly’s interpretation of the first paragraph in Article 16 as it being a “duty of each Member of the League to decide

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<sup>188</sup> Williams (n 12) 14.

<sup>189</sup> Covenant, art 12(1), art 13(4), art 16(1).

<sup>190</sup> *Ibid.*, 17.

<sup>191</sup> Brierly (n 13) 313.

<sup>192</sup> Lauterpacht (n 9) 52.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*, 53, 54; Covenant, art 12(1), art 13(4), art 16(1).

for itself whether a breach of the Covenant has been committed”.<sup>195</sup> Accordingly, Lauterpacht proposes a compromise between the freedom of member states, like the “state of war” doctrine offers, and the necessity to enforce the Covenant.<sup>196</sup> Although Lauterpacht only discusses “resort to war”,<sup>197</sup> as a “threat of war”<sup>198</sup> and “dispute likely to lead to a rupture”<sup>199</sup> has objectively lower thresholds, it can be deduced that his interpretation also applies to these phrases. Furthermore, Brierly argues for the requirement of *animus belligerendi* to establish a state of war.<sup>200</sup> However, if acts short of war are severe, long-lasting, and the participating states refuse to classify it as a war, international law should consider it amounting to a war.<sup>201</sup> Brierly and Lauterpacht interpret the Covenant’s restrictions by adopting the League’s retrospective actions to balance the subjective approach against the League’s purpose to safeguard peace. This intermediate approach notably aligns with the suggested interpretation of the CoJ’s and the Council’s majority opinion that acts short of war were constrained by the Covenant in particular circumstances.

This academic debate reveals that the discussion on the use of force short of war extended beyond politicians. This chapter has explored how academics like Brierly and Macoby have reconciled the subjective and objective approaches, albeit that each approach placed different weighting on this equilibrium. Nonetheless, this still supports the general argument that the CoJ and the Council desired to restrict acts short of war in certain circumstances. The specific circumstances are likely, however, to still adhere to Visscher’s interpretation, rather than these academics, given his standing.

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<sup>195</sup> Reports and Resolutions on the Subject of Article 16 of the Covenant Doc A, 14, 1927, 43.

<sup>196</sup> Lauterpacht (n 9) 50.

<sup>197</sup> Covenant, art 12(1), art 13(4), art 16(1).

<sup>198</sup> *Ibid.*, art 11(1).

<sup>199</sup> *Ibid.*, art 12(1), art 15(1).

<sup>200</sup> Brierly (n 13) 312, 313.

<sup>201</sup> *Ibid.*, 313, 314 .

## CHAPTER 4: CORFU INCIDENT: INSTITUTIONAL DEBATE ON GOVERNING THE USE OF FORCE IN INTERNATIONAL LAW

The Corfu Incident raises another question: What institutions have the authority to determine the legality of the use of force in international law and thus ascertain whether acts short of war were subject to the Covenant's restrictions on war? A conflict between the Council and the CoA emerged on who should interpret the law on the use of force in the Corfu Incident. A second conflict arose disputing whether the PCIJ or CoJ should opine the compatibility of acts short of war with the Covenant.

### A) Council vs Conference of Ambassadors

The first institutional conflict that the Corfu Incident instigated about the use of force manifested between the Council and the CoA.

The settlement of the Corfu Incident was ultimately a “common action” by both the Council and the CoA.<sup>202</sup> As Greece applied to the League of Nations under Article 12 and 15, but simultaneously accepted the CoA's jurisdiction through the agreement of launching an inquiry into the murder of Tellini and their decision on the reparation, the Corfu Incident had been submitted to both institutions.<sup>203</sup> As the CoA had begun contemplating the dispute, this put the Council in a difficult position because it wished to safeguard international peace, but it simultaneously did not aggravate Italy's animosity.<sup>204</sup> Therefore, the Council withdrew some of its authority by allowing the CoA to conciliate the dispute, only exclaiming its wish to be updated on the CoA's considerations.<sup>205</sup> However, the Council also submitted the proposals for the settlement of the crisis.<sup>206</sup> As Salandra vetoed, these were not Quiñones' exact suggestions, but the minutes of the Council meeting were

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<sup>202</sup> Barros (n 95) 158.

<sup>203</sup> Gerhard P Pink, *The Conference of Ambassadors (Paris 1920-1931)* (Geneva Research Centre 1942) 210.

<sup>204</sup> Cecil (n 101) 149.

<sup>205</sup> Pink (n 203) 217.

<sup>206</sup> *Ibid.*

sent along with the first part of the text which paralleled Quiñones' suggestions.<sup>207</sup> This depicts that the Council was not the central authority conciliating the dispute, it essentially passed competency to the CoA and offered supplementary help to them. Again, this reinforces the pattern of the League following the path of least resistance given the complexity of the situation.<sup>208</sup> Yet, this shared competency was not necessarily an adversity: the CoA was also a mediator body for the execution of the Treaties of Peace so it was proficient in settling disputes.<sup>209</sup> Furthermore, the institutions had already successfully shared competency on matters before like the Polish-Lithuanian disagreement over Vilna.<sup>210</sup> Given the complexity, the CoA and the Council rightfully shared competency in regulating the use of force in the Corfu Incident.

The Council and CoA's collective competency was also rational given Italy's denouncements of the Council's jurisdiction. Italy considered the Council incompetent because authority had been granted to the CoA since the murders occurred during the execution of the Peace Treaties,<sup>211</sup> the CoA was personally interested given the "officers who were assassinated were discharging a mission of the Conference",<sup>212</sup> and the CoA had already started settling the dispute.<sup>213</sup> Furthermore, Italy provided that Article 15 was inapplicable since the Council could not renounce Italy's acts conceived out of self-protection and national honour.<sup>214</sup> Thus alternatively, Italy anticipated the CoA to mediate the matter alone.<sup>215</sup> Mussolini affirmed that if the Council "continue[d] to exert its competence, Italy was faced with the problem of remaining in or leaving the League of Nations... [or] possibility that the Italians would remain in Corfu".<sup>216</sup> This hostility induced the Council to realise that Italy was more likely to accept a decision formulated by the CoA, than one made by the Council in Geneva.<sup>217</sup> A significant factor in this decision is likely because the Council's role is to encourage dispute

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<sup>207</sup> Ibid.; PJ Yearwood "'Consistently with Honour": Great Britain, the League of Nations and the Corfu Crisis of 1923' (1986) 21(4) *J Contemp Hist* 559, 566.

<sup>208</sup> Hindmarsh (n 21) 129.

<sup>209</sup> HC Deb 4 November 1920, vol 134 col 607W.

<sup>210</sup> Cornelius F Murphy Jr, 'Conciliatory Authority of the Council of the League of Nations' (1976) 15 *Duq L Rev* 199, 207.

<sup>211</sup> Pink (n 203) 213, 214.

<sup>212</sup> Sixth Meeting (Private) (n 112) 1278.

<sup>213</sup> Pink (n 203) 213, 214.

<sup>214</sup> Ibid.

<sup>215</sup> Hudson (n 90) 182.

<sup>216</sup> Ibid., 186.

<sup>217</sup> Ibid.

settlement, rather than be an arbiter of the law. This is a testament to the Council's conciliatory function as a political body rather than a judge, like a legalistic court.<sup>218</sup> This reflects the non-legalists', such as Wilson's, triumph of the League existing as a political system as opposed to the support of Root and Bourgeois who advocated for a legalistic League.<sup>219</sup> Furthermore, the Council enforced a Covenant centred on political consultation and dispute resolution, a living "vehicle of power" that changed on the circumstances and at the exerciser's discretion.<sup>220</sup> Therefore, the Council intended to resolve the Corfu Incident peacefully, in a way to keep Greece's territory unharmed, and without being subjected to its obligation to be the sole conciliator under Article 15.<sup>221</sup>

Italy further condemned the Council's competence because of its influence over the CoA.<sup>222</sup> Although Italy was a party to both the Council and the CoA, Italy's authority in the Council was weakened by the opinion of the smaller powers and Greece was able to partake in meetings to defend itself.<sup>223</sup> Moreover, the Council's meetings were public and the political character of the Council relied on public opinion. Therefore, if the Council had sole competency, the public, not Italy, would be in control of determining the outcome of Italy's action.<sup>224</sup> In comparison, Italy had stronger control over the CoA because there were fewer powers and France's support of Italy as well as the Japanese ambassador's lack of participation in the Corfu Incident discussions, meant that they could overpower Britain's opposition to the CoA.<sup>225</sup> On the other hand, the CoA's meetings were held privately, thereby Italy could employ coercive techniques to avoid condemnation for its acts without the public knowing. France's warm reception to Italy's occupation and bombardment of Corfu is attributable to the agreement of the French support for the Fascist's acts in Corfu in exchange for the

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<sup>218</sup> *Ibid.*

<sup>219</sup> Stephen Wertheim, 'The League of Nations: A Retreat from International Law?' (2012) 7 *J Glob Hist* 210.

<sup>220</sup> 'Preliminary Peace Conference' (Paris Peace Conference, Protocol No 3, 14 February 1914) <<https://history.state.gov/historicaldocuments/frus1919Parisv03/d5>> accessed 20 March 2023; Stephen Wertheim 'The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914-1920' (2011) 35(5) *Diplomatic History* 797, 829.

<sup>221</sup> Hudson (n 90) 186.

<sup>222</sup> Pink (n 203) 212, 213.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*; Sean Morris, *Transforming the Politics of International Law: The Advisory Committee of Jurists and the Formation of the World Court in the League of Nations* (Routledge 2021) 73.

<sup>225</sup> Pink (n 199) 212-213, 226.

support of France's occupation of the Ruhr, which England had objected to.<sup>226</sup> Moreover, France did not want the Council's interference in a dispute to set a precedent for the Council then to assess the French occupation of the Ruhr.<sup>227</sup> Therefore, Poincaré developed a strategy of appeasing Mussolini but also without alienating countries like Yugoslavia.<sup>228</sup> The French asserted that the issue should be resolved by the CoA and when Italy denied competence of the Council, Poincaré emphasised his loyal and unconditional support of Mussolini.<sup>229</sup> This establishes that France merely aligned with Italy with its objective of the Conference to resolve the dispute for political considerations, but it never outwardly confirmed that it aligned with Italy's motivations for denying the Council competence. Instead, it only stated that Italy had France's support. Therefore, France was offering Mussolini an escape with the CoA.<sup>230</sup> Irrespectively, the pressure of two Great Powers pushing for the CoA to settle the dispute highlights the complex position of the Council. Although there was wide support for raising the Corfu issue at the Council,<sup>231</sup> so that Italy could be condemned, the pressure of two Great Powers pushing for the CoA to settle the dispute suggests the rationality of the shared competency.

The complexity of the Council's position is also understood from the immediate stake the CoA had in the Corfu Incident.<sup>232</sup> Italy submitted that the Council lacked competency because the murdered victims were part of the delimitation commission sent out by the CoA and the CoA had assumed responsibility before Greece had appealed to the League.<sup>233</sup> Thereupon, it would be improper for the Council to exclude the CoA's right to establish responsibility for the death of its members and by relinquishing sole competency. Whilst this was a disposition to a body outside of the League, the Council prioritised peace, and so fulfilling its conciliatory function, over satisfying the utopian ideal that the League flawlessly safeguarded peace.

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<sup>226</sup> William I Shorrock, 'France, Italy, and the Eastern Mediterranean in the 1920s' (1986) 8(1) *Int Hist Rev* 70, 70-71, 74; Poincaré to Hanotaux, *DDI* 7, 2<sup>nd</sup> vol, 273 (3 September 1923).

<sup>227</sup> *Ibid*; Wright (n 89) 538.

<sup>228</sup> Joel Richard Blatt, 'French Reaction to Italy, Italian Fascism, and Mussolini 1919-1925: The View from Paris and the Palazzo Farnese' (PhD Thesis, University of Rochester 1976) 841, 842.

<sup>229</sup> *Ibid.*, 840.

<sup>230</sup> Lorna Lloyd, 'The League of Nations and the Settlement of Disputes' (1995) 157(4) *World Affairs* 160, 167.

<sup>231</sup> Statement of Hymans, 'Tenth Meeting (Public)' (1923) 4(11) *LNOJ* 1294, 1299; Statement of Guani, 'Tenth Meeting (Public)' (1923) 4(11) *LNOJ* 1294, 1300; Statement of Branting, Sixth Meeting (Private) (n 112) 1300; Murphy (n 210) 208.

<sup>232</sup> Hudson (n 90) 183.

<sup>233</sup> Hudson (n 90) 185, 186.

Lastly, the strength of public opinion induced the Council and CoA to share jurisdiction. Lord Cecil points out that as Italy and Greece had accepted the CoA's decision, the Council's objective "henceforward was to do everything we could to facilitate the task of the Ambassadors, and to make their decisions as nearly in accordance with public opinion of the world as expressed at Geneva".<sup>234</sup> Reliance on public opinion was a significant part of the political model of the League as non-legalists advocated the settlement of disputes in political institutions: a Council and an Assembly which was dependent on the moral influence of public opinion.<sup>235</sup> By listening to public opinion, the League subsumed its respect in order to secure a conciliation because it saw that this was a potentially fast dispute settlement for a difficult question of law where both party disputants were content.<sup>236</sup> Thus, the non-legalist doctrine was used in a way to facilitate the Council and CoA cooperating to govern law on use of force in the Corfu Incident.

Overall, the Council and the CoA jointly regulated the use of force in the Corfu Incident. This was rightful given the complexities of the incident and the League's character of fostering conciliation rather than be the law's arbiter. Nonetheless, the Corfu Incident was an anomaly because the CoJ's opinion confirms the sole competency of the Council where hostilities engage Article 15.

## **B) Permanent Court of International Justice vs Commission of Jurists**

Another institutional conflict regarding the use of force developed between the Permanent Court of International Justice (PCIJ) and Commission of Jurists (CoJ) in whom would be responsible for opining whether acts short of war were subject to the Covenant's constraints. The structure of the League was monopolised by political institutions and supplemented by the legalistic PCIJ.<sup>237</sup> As the institutional debate extended to this minor feature of the League, this demonstrates the widespread authority of Italy as a Great Power in disrupting the ordinary institutional hierarchy who regulated the use of force.

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<sup>234</sup> Yearwood (n 207) 560.

<sup>235</sup> Wertheim (n 219) 801; Ray Stannard Baker, *Woodrow Wilson and World Settlement: Written from his Unpublished and Personal Material* (Vol 3, DoubleDay, Page & Co 1922) 88-93.

<sup>236</sup> Yearwood (n 207) 560.

<sup>237</sup> Morris (n 224) 56.

As Italy and Greece accepted the CoA's resolution, the dispute was settled outside of the League.<sup>238</sup> This meant that there were remaining unanswered questions about the Covenant's interpretations and general points of international law which demanded clarification.<sup>239</sup> To address this, the Council held on 22 September 1923, that legal advisers should construct questions on these issues of law.<sup>240</sup> Cecil, Branting and others favoured the submission of these questions to the PCIJ for an advisory opinion.<sup>241</sup> Although the PCIJ's chief function was to settle legal disputes in accordance with the international rules of law, it also has a supplementary function of giving non-contentious advisory opinions upon any question submitted to it by the League Council or Assembly.<sup>242</sup> These states therefore desired the originally appointed institution, the PCIJ, to settle these questions of law. Nonetheless, Salandra opposed the submission to the PCIJ for questions three and four, with Hanatoux, the French Council representative, agreeing on question four because they maintained that a court would be incompetent to answer these questions.<sup>243</sup> Instead, Italy and France advocated for the CoJ to answer these issues, a different conventional body.<sup>244</sup> A conflict hence emerged on what institution should answer these contentions.

Italy and France's reasoning for the incompetence of the PCIJ was flawed. They contended the PCIJ's incapacity on the grounds that a court could not deal with abstract questions. He proposed questions included the interpretation of the Covenant, a power exclusively reserved for the Council or Assembly.<sup>245</sup> Furthermore, the questions included political issues, which the PCIJ was prohibited from interpreting.<sup>246</sup> Salandra also opposed the PCIJ's authority because although the Council could reject the PCIJ's advisory opinion, in reality

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<sup>238</sup> Wright (n 89) 536; Waldock (n 20) 473.

<sup>239</sup> Ibid.

<sup>240</sup> Hudson (n 90) 194; Leland M Goodrich, 'The Nature of the Advisory Opinions of the Permanent Court of International Justice' (1938) 32(4) AJIL 738, 738.

<sup>241</sup> Wright (n 89) 537.

<sup>242</sup> John Eugene Harley, *The League of Nations* (Oxford University Press 1921); Michla Pomerance, *The Advisory Function of the International Court in the League and U.N Eras* (John Hopkins University Press 1973) 1.

<sup>243</sup> Wright (n 89) 537, 538.

<sup>244</sup> Ibid., 538.

<sup>245</sup> Eighteenth Meeting (Private)' (1923) 4(11) LNOJ 1328, 1330-1332; 'Twentieth Meeting (Private)' (1923) 4(11) LNOJ 1338, 1339-1340; Pomerance (n 237) 204; Wright (n 89) 538.

<sup>246</sup> Eighteenth Meeting (n 245) 1331; Twentieth Meeting (n 245) 1340-1342; Pomerance (n 237) 204; Hudson (n 88) 194.

the Council would still likely adhere to the PCIJ's opinion given its authority, and so lose its independence.<sup>247</sup> These arguments do not have a strong basis since they were employed as a façade to prevent the PCIJ effecting an authoritative decision condemning Italy's occupation and bombardment of Corfu, and thus set a precedent for the French occupation of the Ruhr.<sup>248</sup> This is evident through the opposing member states' arguments that there were no political issues since the Corfu Incident had been settled and the interpretation of the treaties were legal.<sup>249</sup> Moreover, the PCIJ could deal with abstract questions because Article 14 of the Covenant's phrase "any dispute or question" is wide enough to include the questions concerned,<sup>250</sup> and it was for the court to judge its own competency, not the Council.<sup>251</sup> The only partly true ground was that the PCIJ's opinion would influence the Council. However this was not sufficiently extensive to deny the PCIJ competency. This aligns with and reconciles the opposing contentions of one side submitting that the PCIJ's opinion was only advisory so it would not limit the Council's freedom nor the League members' sovereignty, with the other side claiming that some limitation on the Council would be acceptable.<sup>252</sup> The Council would be morally influenced, not strictly legally bound, by the PCIJ's decision because the PCIJ was the most authoritative arbiter of the law, the League as a conciliator, would readily accept its opinion on a gap in the law it failed to fill itself.<sup>253</sup> Therefore, Italy and France favoured the jurisdiction of the CoJ because it was a less authoritative body and the governments involved could select the jurists.<sup>254</sup> With this institution, Italy and France could exert influence over the decision, like with the CoA, and even if the CoJ condemned Italy's acts, it carried less authoritative precedent. This exhibits the conflict over the PCIJ or CoJ to answer issues of law relating to Italy's use of force, the PCIJ being the more convincing institution to enforce it.

On 28 September 1923, the Corfu Incident turned into a "stillborn" request to the PCIJ because the Council decided to refer all the questions to a CoJ rather than the PCIJ.<sup>255</sup> However, this did not "reflect their views

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<sup>247</sup> Twentieth Meeting (n 245) 1339-1342.

<sup>248</sup> Lloyd (n 230) 166; Mack Smith, *Mussolini* (Granada Publishing Co 1983) 84.

<sup>249</sup> Pomerance (n 242) 206; Statement of Viscount Ishii, Twentieth Meeting (n 245) 1344, 1355.

<sup>250</sup> Covenant, art 14.

<sup>251</sup> Statements of Branting and Wood, Eighteenth Meeting (n 245) 1331; Pomerance (n 242) 205.

<sup>252</sup> Statements of Lord Cecil and Viscount Ishii, Twentieth Meeting (n 245) 1338, 1340, 1341, 1345; Pomerance (n 242) 205.

<sup>253</sup> Hudson (n 90) 186.

<sup>254</sup> Wright (n 89) 539.

<sup>255</sup> Pomerance (n 242) 172, 173; Hudson (n 90) 194.

regarding the Court's competence” on answering questions of law about the use of force.<sup>256</sup> Like the shared competency with the CoA, the Council appeased Italy's demands by selecting the CoJ, despite a Council majority favouring the PCIJ. Even though Mr Wood advocated that the only way for the Council to soothe public anxiety on forceful measures short of war was by “securing the most authoritative pronouncement”, by the PCIJ, the Council still did not.<sup>257</sup> As the Council subsided public opinion, the great force that the League’s political institutions rested on, for Italy’s demands, as well as disregarding the Council majority, this conclusively confirms the Council’s failure to effectively regulate the use of force short of war. Yet this was understandable given the Council’s challenging role: it aspired to fill the gap in the Covenant with the ordinarily appointed body, the PCIJ, who would provide an independent advisory opinion, but the Council was also compromised by the pressure of France and Italy, two Great Powers, to select the CoJ, which France and Italy could exert some influence over. Although the CoJ was still a technically competent body to answer the questions and had an individual from each represented Council member, the peril France and Italy carried of escalating hostilities would panic other jurists into acquiescence.<sup>258</sup> This pressure and Italy’s hostility, combined with Italy still being in the process of evacuating Corfu during this institutional debate, the Council validly chose the secure option of the CoJ to ensure that the dispute would be fully settled, thereby fulfilling its conciliatory function. As a result, the Council’s priority of appeasing Italy is reflected in the CoJ’s ambiguous answer.

Overall, this institutional debate unveils the Council’s rightful willingness to select the CoJ and CoA to govern the use of force, given the complexity of the situation.

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<sup>256</sup> Pomerance (n 242) 207.

<sup>257</sup> Eighteenth Meeting (n 245) 1331; *Ibid.*, 206.

<sup>258</sup> Wright (n 89) 538.

## CONCLUSION

To conclude, this paper has explored the role of the Corfu Incident in exposing the ambiguities in the Covenant about the use of force short of war and the complexities of institutions curing this gap.

The topic discussed was how the Covenant derogated from the customary right of war by following state practice in restricting war. This paper sought to establish that in doing this, a gap was left in the Covenant as to whether acts short of war were subject to the constraints of the Covenant, causing a debate to emerge between subjectivists and objectivists. The Corfu Incident spotlighted this ambiguity because it was faced with the question of whether Italy's reprisal was encompassed with the requirements of employing pacific settlement before occupying and bombarding Corfu. Although the dispute was settled, the Council and the CoJ did not outrightly confirm their views on the gap since the Council did not determine the legality of Italy's acts and the CoJ purposefully provided an ambiguous opinion. However, it can be interpreted from the majority Council opinion, the Assembly's reaction, and looking beyond the wording of the CoJ's answer that they wished for acts short of war to be constrained by the Covenant's provisions on war in certain circumstances. This is most likely in the circumstances that Visscher submits. Thus, striking a balance between the objective and subjective approaches. Although this choice was the path of lesser resistance, it was still comprehensible why they did so: Italy's hostility required appeasement, the Council's role of conciliating international disputes, and the refusal to derogate too extensively and suddenly from custom to prevent frustrating Member States. These factors highlight the complex reality of the League to fruitfully regulate the use of force. The Covenant's gap also influenced a significant academic debate to emerge on this matter. It was finally ascertained how the Council, despite being the main body to organise settlement of international disputes on force, was willing to succumb to Italy's desires of choosing the CoJ and the CoA. Yet again, this was logical given the complexity of the situation.

Even post-Corfu, the Council never provided an explicit authoritative opinion on the use of force short of war because in later crises, such as Manchuria and Abyssinia, similar issues were raised. These heightened

tensions, which culminated in 1939 with the outbreak of World War II. It was only after another world war, that an explicit strict interpretation of the use of force in Article 2(4) of the UN Charter was established in the *Corfu Channel case*.<sup>259</sup> In this case, the Court rejected the UK's justifications that it had employed force as a form of intervention.<sup>260</sup>

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<sup>259</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgement)* [1949] ICJ Rep 4.

<sup>260</sup> Christine Gray, 'The ICJ and the Use of Force' in Christina J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 239.

## BIBLIOGRAPHY

### A) Primary sources

#### i) Treaties and Other International Agreements

The Chamorro-Bryan Treaty (signed 5 August 1914, entered into force 22 June 1916) 39 Stat. 1661.

Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910) UKTS 6.

Covenant of the League of Nations (Covenant) (signed 28 June 1919, entered into force 10 January 1920) 1 LNTS 3.

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (signed 11 December 1868, entered into force upon signature) 138 CTS 297.

‘Preliminary Peace Conference’ (Paris Peace Conference, Protocol No 3, 14 February 1914) <<https://history.state.gov/historicaldocuments/frus1919Parisv03/d5>> accessed 20 March 2023;

#### ii) Official Publications

‘Eighth Meeting (Private)’ (1924) 5 LNOJ 1315

‘Eighteenth Meeting (Private)’ 4 LNOJ 1328

‘Fourteenth Meeting (Public)’ (1923) 4 LNOJ 1313

HC Deb 4 November 1920, vol 134 col 607W.

Reports and Resolutions on the Subject of Article 16 of the Covenant Doc A, 14, 1927, 43.

‘Sixth Meeting (Private)’ (1923) 4 LNOJ 1276

‘Sixth Meeting (Public)’ (1924) 5 LNOJ 523

‘Tenth Meeting (Public)’ (1923) 4(11) LNOJ 1294

‘Twentieth Meeting (Private)’ (1923) 4(11) LNOJ 1338

#### iii) Telegrams

Telegram No 50, British Consulate to Corfu Greece TNA FO 286/864 (2 September 1925).

Poincaré to Hanotaux, *DDI* 7, 2<sup>nd</sup> vol, 273 (3 September 1923).

**iv) Cases**

*Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgement)* [1949] ICJ Rep 4.

**B) Secondary Sources**

**i) Books**

Alexandrov S A, *Self-Defense Against the Use of Force in International Law* (Brill Nijhoff 1996).

Baker R S, *Woodrow Wilson and World Settlement: Written from his Unpublished and Personal Material* (Vol 3, Double Day, Page & Co 1922).

Barros J, *The Corfu Incident of 1923: Mussolini and The League of Nations* (Princeton University Press 1965).

Brownlie I, *International Law and the Use of Force by States* (Oxford University Press 1963).

Cecil R, *A Great Experiment: An Autobiography* (J Cape 1941).

Evans M, *International Law* (5<sup>th</sup> edn, Oxford University Press 2018).

Fenwick C G, *International Law* (4<sup>th</sup> edn, Appleton-Century-Crofts 1965).

Gray C, 'The ICJ and the Use of Force' in Christina J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013).

Grob F, *The Relativity of War and Peace* (New Haven: Yale University Press 1949).

Gross L, *International Law in the Twentieth Century* (Appleton Century Crofts 1969).

Hall, WE, *A Treatise on International Law* (8<sup>th</sup> edn, Oxford University Press 1924).

Harley J E, *The League of Nations and The New International Law* (Oxford University Press 1921).

Henig R, *The League of Nations: The Makers of the Modern World* (Haus Publication 2010)

Hindmarsh A E, *Force in Peace: Force Short of War in International Relations* (Harvard University Press 1933).

Holland T E, *Studies in International Law* (Clarendon Press 1898).

Hudson M O, *International Legislation* (Vol 1, Carnegie Endowment for International Peace 1931).

Kelsen H, *Principles of International Law* (The Lawbook Exchange Limited, 2003).

Morris S, *Transforming the Politics of International Law: The Advisory Committee of Jurists and the Formation of the World Court in the League of Nations* (Routledge 2021).

Neff S C, *Justice Among Nations: A History of International Law* (Harvard University Press 2014).

Oppenheim L, *International Law: A Treatise* (Vol II: War and Neutrality, 2<sup>nd</sup> edn, Longmans, Green and Co 1912).

Pink GP, *The Conference of Ambassadors (Paris 1920-1931)* (Geneva Research Centre 1942).

Pomerance M, *The Advisory Function of the International Court in the League and U.N Eras* (John Hopkins University Press 1973).

Richmond O P, *The Transformation of Peace* (Palgrave MacMillan 2005).

Smith M, *Mussolini* (Granada Publishing Co 1983).

Sondhaus L, *World War One* (Cambridge University Press 2020).

Visscher C, *Problèmes d'Interprétation Judiciaire en Droit International Public* (A Pedone 1963).

Walters F P, *A History of the League of Nations* (Vol 1, Oxford University Press 1952).

Zimmern A, *The League of Nations and the Rule of Law* (Macmillan and Co 1939).

## ii) Journal Articles

Barker B, 'Hague Peace Conferences (1899 and 1907)' [2009] MPEPIL 689.

Black T H, 'The Law of Reprisals as Affected by the League Treaty' (1923) 1(10) Canadian Bar Review 825.

Brierly J L, 'International Law and Resort to Armed Force' (1932) 4(3) CLJ 308.

Elrod R B, 'The Concert of Europe: A Fresh Look at an International System' (1976) 28(2) World Politics 159.

Fischer Williams J, 'The Covenant of the League of Nations and War' (1933) 5(1) CLJ 1.

Goodrich L M, 'The Nature of the Advisory Opinions of the Permanent Court of International Justice' (1938) 32(4) AJIL 738.

Greenwood C, 'The Concept of War in Modern International Law' (1987) 36(2) ICLQ 283.

Hindmarsh A E, 'Self-Help in Time of Peace' (1932) 26 AJIL 315.

Hudson M O, 'How the League of Nations Met the Corfu Crisis' [1923] World Peace Foundation Pamphlet Series 176.

Hudson M O, 'The Inter-American Treaties of Pacific Settlement' (1936) 15 FA 165.

Layton R, 'The Effect of Measures Short of War on Treaties' (1962) 30 University of Chicago Law Review 96.

- Lauterpacht H, 'Resort to War' and the Interpretation of the Covenant during the Manchurian Dispute' (1934) 28(1) AJIL 43.
- Lloyd L, 'The League of Nations and the Settlement of Disputes' (1995) 157(4) World Affairs 160.
- Kennedy D, 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 QLR 99.
- Kunz JL, 'Bellum Justum and Bellum Legale' (1951) 45(3) AJIL 528.
- Macoby S, 'Reprisals as a Measure of Redress Short of War; (1924) 2(1) CLJ 60.
- McDougal M and Feliciano F, 'The Initiation of Coercion- A Multi-Temporal Analysis' (1958) 52(2) AJIL 241.
- McNair A, 'The Legal Meaning of War, and the Relation of War to Reprisals' (1925) 11 Transactions of the Grotius Society 29.
- Mulligan M, 'The Re-Emergence of Conquest: International Law and the Legitimate Use of Force' (2020) 41(3) Liverpool L Rev 293.
- Murphy Jr C F, 'Conciliatory Authority of the Council of the League of Nations' (1976) 15 Duq L Rev 199.
- Payk M, "'What We Seek is the Reign of Law": The Legalism of the Paris Peace Settlement after the Great War' (2018) 29(3) EJIL 809.
- Seymour P, 'The Legitimacy of Peacetime Reprisal as a Tool against State-Sponsored Terrorism' (1990) 39 Naval L Review 221.
- Shorrock W I, 'France, Italy, and the Eastern Mediterranean in the 1920s' (1986) 8(1) Int Hist Rev 70.
- Thompson K, 'Collective Security Remixed' (1953) 47(3) APSR 753.
- Tucker R W, 'The Interpretation of War under Present International Law' (1951) 4(1) ILQ 11.
- Verdebout A, 'The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis' (2014) 1(2) Journal on the Use of Force and International Law 223.
- Waldock C, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 Recueil des Cours 455.
- Wertheim S, 'The League of Nations: A Retreat from International Law?' (2012) 7 J Glob Hist 210.
- Wertheim S, 'The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914-1920' (2011) 35(5) Diplomatic History 797.
- Wigmore J H, 'Case of Italy v Greece under International Law and the Pact of Nations' (1923) 18(3) Ill L R 131.
- Wright O 'Concert of Europe' [2018] Encyclopaedia for Diplomacy 1.

Wright Q, 'Opinion of Commission of Jurists on Janina-Corfu Affair' (1924) 18(3) AJIL 536.

Wright Q, 'The Test of Aggression in the Italo-Ethiopian War' (1936) 30 AJIL 45.

Yearwood P J, "'Consistently with Honour": Great Britain, the League of Nations and the Corfu Crisis of 1923' (1986) 21(4) J Contemp Hist 559.

Wertheim S, 'The League of Nations: A Retreat from International Law?' (2012) 7 J Glob Hist 210.

Wertheim S, 'The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914-1920' (2011) 35(5) Diplomatic History 797.

### iii) Newspaper Articles

'World Court Ruling on League Assured' *New York Times* (Associated Press Dispatch from Geneva, 28 September 1923).

### iv) Published Dissertations

Antonopoulos C, 'The Unilateral Use of Force by States' (Doctor of Philosophy, University of Nottingham 1992)

Blatt J R, 'French Reaction to Italy, Italian Fascism, and Mussolini 1919-1925: The View from Paris and the Palazzo Farnese' (PhD Thesis, University of Rochester 1976).

### v) Websites

Bouchet-Saulnier F, 'The Hague Conventions of 1899 and 1907' (*The Practical Guide to Humanitarian Law*) <<https://guide-humanitarian-law.org/content/article/3/the-hague-conventions-of-1899-and-1907/>> accessed 24 February 2023.

Diakonia International Humanitarian Law Centre, 'Sources of International Humanitarian Law' (*Diakonia International Humanitarian Law Centre*) <<https://www.diakonia.se/ihl/resources/international-humanitarian-law/sources-international-humanitarian-law/>> accessed 17 February 2023.

History.com Editors, 'World War I Battles: Timeline' (*History*, 8 April 2021) <<https://www.history.com/topics/world-war-i/world-war-i-battles-timeline>> accessed 20 February 2023.

Jeannesson J, 'The International Hague Conferences of 1899 and 1907' (*Encyclopédie d'histoire numérique de L'Europe*, 22 June 2020) <<https://ehne.fr/en/encyclopedia/themes/international-relations/europe-and-legal-regulation-international-relations/international-hague-conferences-1899-and-1907>> accessed 27 February 2023.

The Editors of the Encyclopaedia Britannica, 'Hague Convention' (*Encyclopaedia Britannica*, 8 June 2022) <<https://www.britannica.com/event/Hague-Conventions>> accessed 21 February 2023.

United Nations, 'The League of Nations' (*United Nations*) <<https://www.ungeneva.org/en/library-archives/league-of-nations>> accessed 11 February 2023.

*THE CORFU INCIDENT OF 1923: THE LAW AND INSTITUTIONS REGULATING THE USE OF FORCE SHORT OF WAR*

U.S Department of State, 'The Paris Peace Conference and the Treaty of Versailles' (*State.gov*)<<https://2001-2009.state.gov/r/pa/ho/time/wwi/89875.htm>> accessed 25 March 2023.

# THE RIGHT TO NATIONALITY IN 'GLOBAL BRITAIN': AN ODE TO COLONIALISM...?

Isaac Chambers\*

## ABSTRACT

*'If you was white, you'd be alright'<sup>2</sup> – Big Bill Bronzy*

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<sup>2</sup> Big Bill Bronzy, 'Black, Brown and White' accessed February 2022

## Chapter 1 – Introduction

This article focuses on Britain's racial migrants and citizens (population) and their increasingly precarious right to British nationality/citizenship. It aims to draw parallels between the current state of Britain's immigration system for its racial population with the aftermath of Britain's decolonisation, which created Britain's first citizenship model under the British Nationality Act (BNA) 1948.<sup>3</sup> This citizenship model was designed to retain promises of equality created through subjecthood.<sup>4</sup> Instead, it subsequently relegated its racial commonwealth citizens to second-class citizens.<sup>5</sup> However, British citizenship was later reconceptualised under the British Nationality Act (BNA) 1981 to eradicate the unequal citizenship statuses (i.e. Citizens of the United Kingdom & Colonies (CUKC) ; and Citizens of the Independent Colonies (CICC)), within its past citizenship structure.<sup>6</sup> This reconceptualisation paved the way for the 'Modern British Citizenship', which was designed to formalise access to social, political, civil, and economic rights upon qualifying individuals —effectively allowing them to participate in Britain.<sup>7</sup> However, this article will highlight how the 'Modern British Citizenship' is being altered to marginalise Britain's racial population through subversive policies, which consequently, appear to be restricting their access to associated citizenship rights. This alteration bears a semblance to Britain's colonial legacy, which engaged in the unequal and exclusionary treatment of its racial subjects (later citizens).

This dissertation chronologically addresses the historical and political events which eventually led to the reconceptualisation of British citizenship through the BNA 1981,<sup>8</sup> and how this Act formed the basis of Britain's neo-colonial framework of exclusion. A socio-legal lens will be utilised to explore the link between Britain's colonial history and the current state of its nationality and immigration laws, that perpetuate

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<sup>3</sup> British Nationality Act (BNA) 1948.

<sup>4</sup> *Calvin v Smith* (Calvin) (1608) 77 ER 377.

<sup>5</sup> Imogen Tyler, 'Designed to fail: A biopolitics of British citizenship' (2016) 14 Citizenship studies 61.

<sup>6</sup> Letter from Director INPD to Home Secretary, dated 24 April 2002, available at:

<https://publications.parliament.uk/pa/ld200506/ldlwa/60503wa1.pdf>

<sup>7</sup> Devyani Prabhat, *BRITISHNESS, BELONGING AND CITIZENSHIP* (1<sup>st</sup> edn, Policy Press 2018) 4-5.

<sup>8</sup> British Nationality Act (BNA) 1981.

exclusion and inequality. This exploration will highlight the ongoing presence of Britain's colonial legacy within its immigration framework. Its immigration structure is ensuing colonial ideologies of excluding racial citizens and migrants through its newly formed neo-colonial framework.

Chapter 2 explains the terminology and framework underpinning this dissertation. Chapter 3 explores the historical and political events surrounding Britain's colonialism to showcase how these events shaped the state of its nationality and immigration law since its inception in 1905.<sup>9</sup> It highlights a general theme of exclusion which encompasses the UK's immigration and nationality law framework since its inception. Therefore, a chronological socio-legal exploration will be adopted to highlight how exclusion has placed the UK's relatively new strand of law in a constant state of flux, due to its colonialism. Consequently, this culminated into the reconceptualisation of British citizenship under BNA 1981. Chapter 4 will continue this exploration to highlight how Britain's newly reconceptualised citizenship is being utilised as a conduit for Britain's current neo-colonial framework. This will showcase the deployment of various neo-colonial tools through this conduit that continues to maintain Britain's neo-colonial framework of exclusion. Finally, it will highlight Britain's continuous modification of these neo-colonial tools in the form of citizenship testing; charging high application fees for acquiring citizenship; and citizenship deprivation. These tools will be used to highlight the current plight of Britain's racial population who have their right to nationality placed in a precarious position.

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<sup>9</sup> Aliens Act (AA) 1905.

## Chapter 2 – Research Framework

The definition for who can be classed as a British citizen is found in BNA 1981.<sup>10</sup> This is the basis for the understanding of 'Modern British Citizenship' in this dissertation. Whilst the terms 'citizenship' and 'nationality' are used interchangeably in this dissertation, the subtle differences between the two are acknowledged. Nationality is the international dimension of citizenship, which carries a set of international obligations for states.<sup>11</sup> However, states are allowed to define the dimensions of their nationality,<sup>12</sup> which has allowed the UK to provide its 'nationals' with differing citizenship rights. The scope of this dissertation will be limited to addressing Britain's racial citizens and migrants' access to the UK's 'internal' citizenship rights (ch.1).<sup>13</sup> Thus, the terms 'nationality' and 'citizenship' will be used interchangeably to mean these 'internal' citizenship rights.

The thematic understanding of colonialism and neo-colonialism in this dissertation is drawn from El-Enany's 'Bordering Britain: Law, Race, and Empire'.<sup>14</sup> References to Britain's colonialism in this dissertation can be understood as the act of dispossessing the land and resources of its colonised peoples' for its own benefit.<sup>15</sup> In view of this, El-Enany explains Britain's post-colonialism through her conceptualisation of 'Bordering'.

Britain's bordering can be understood through its use of law and policy, whether in the form of its internal or external border controls. They are utilised to control access to the spoils of its empire from its racial population.<sup>16</sup> Whilst her conceptualisation of 'Bordering' paints a novel approach to address the ongoing expression of Britain's colonial empire; it falls short by her usage of the term 'post-colonialism' to explain immigration and nationality laws in the UK. El-Enany, like other post-colonial authors, is attempting to

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<sup>10</sup> (n 7) s1

<sup>11</sup> Robert D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard Intl. Law Review.

<sup>12</sup> Ibid.

<sup>13</sup> Rainer Baubock, 'Optional citizenship; articulation of interests and identities in naturalisations, Innovation' (1992) 5(2) The European Journal of Social Science Research < doi: [10.1080/13511610.1992.9968300](https://doi.org/10.1080/13511610.1992.9968300)> accessed 10 March 2022

<sup>14</sup> Nadine El-ENany, *Bordering Britain: Law, Race, and Empire* (1<sup>st</sup> edn, Manchester University Press 2020)

<sup>15</sup> Ibid.

<sup>16</sup> Ibid, 5.

explain and use ‘post-colonialism’ in the context of colonies gaining independence, and the practices undertaken by Britain after providing its colonies with independence.<sup>17</sup> However, Knox notes that the usage of ‘post-colonialism’ carries with it no radical connotation because it was not connected to any political movement and was seemingly neutral in its description. He argues that the ‘post’ in ‘post-colonialism’ created a temporal de-linking of any necessary or common conditions following Britain’s colonialism.<sup>18</sup> The ‘colonialism’ in the ‘post-colonialism’ tends to be relegated to the past and marked with a closure,<sup>19</sup> which contradicts and undermines El-Enany’s ‘Bordering’.<sup>20</sup> Instead, this dissertation will build on her ‘Bordering’ framework by employing a neo-colonial lens that better reflects British nationality as an ongoing expression of its empire. Accordingly, neo-colonialism articulates that the colonial age has not concluded; colonial powers such as Britain have merely adapted their ‘tactic’ of direct colonialism with indirect colonialism after providing its colonies with independence.<sup>21</sup> This adaptation (i.e, indirect colonialism — continuity of colonisation) can be seen in the deployment of British nationality as a bordering tool, which emphasises on continuity rather than rupture. Therefore, this article will reconceptualise El-Enany’s ‘Bordering’ as neo-colonial since it is an ongoing expression of its empire. This conceptualisation of neo-colonialism forms the basis of understanding the current state of Britain’s immigration framework, which is riddled with inequality for its racial population.

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<sup>17</sup> Celeste Michelle Condit Editor & Anandam P. Kavoori, ‘Postcolonial or Neocolonial? Defining the Grounds of Research in Global Communication Studies’(1998) 15(2) *Critical Studies in Mass Communication* < doi: 10.1080/15295039809367042> accessed 12 March 2022.

<sup>18</sup> Robert Knox, ‘A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law’ (PhD thesis, London School of Economics and Political Science 2014) 68.

<sup>19</sup> Ella Shohat, ‘Notes on the “Post-Colonial”’ (1992) 31(32) *Social Text* < <https://doi-org.bris.idm.oclc.org/10.2307/466220>> accessed 15 March 2022.

<sup>20</sup> (n 15)

<sup>21</sup> Kwame Nkrumah, *Revolutionary Path* (1<sup>st</sup> edn Panaf 1973) 324.

### Chapter 3 – Britain's 'right to nationality' is in constant flux

Immigration law is a relatively new strand of law that has developed and become prominent over the last century. This chapter explores how immigration control and the right to nationality is shaped by Britain's colonial history. It will demonstrate how no meaningful discussion on the right to nationality can be explored without examining Britain's colonial history and the politics surrounding decolonisation, which continues to foster and harbour resistance towards immigrants. Britain's continued resistance towards immigrants has shaped 'Global Britain'<sup>22</sup> today. Consequently, this disproportionately marginalises racial communities within its borders.

#### 3.1 Historical Relevance

By the 19<sup>th</sup> century, Britain had amassed an empire which covered 25% of the world's land mass, which naturally included a variety of peoples and their cultures.<sup>23</sup> Despite its wide-reaching empire, the multi-racial Britain of today is a relatively recent development.<sup>24</sup> Britain was a white-dominated society until the 20<sup>th</sup> century.<sup>25</sup> It witnessed the mass arrival of racial citizens from its colonies as result of its colonial presence and unintentional open-border policy,<sup>26</sup> which made Britain, global today. This development of multiracial migration eventually led to various restrictions in the form of statute, to limit the number of permitted migrants.<sup>27</sup> This remains to be the plight of 'Global Britain' and the state of its immigration law framework.

Nationality legislations have developed in tandem with immigration control in Britain. Prabhat argues that the modern-day framework of immigration control in Global Britain has developed in response to the

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<sup>22</sup> Boris Johnson, Foreign Secretary of State, 'Beyond Brexit: A Global Britain' (Speech at Chatham House, London, 2 December 2016) < <https://www.gov.uk/government/speeches/beyond-brexit-a-global-britain> > accessed 16 April 2022

<sup>23</sup> The British Medical Journal, 'The Census of The British Empire' (1906) 1 BMJ 748 < <https://www.jstor.org/stable/20289118> > accessed 11 February 2022

<sup>24</sup> Ian R. G. Spencer, *British Immigration Policy Since 1939* (1<sup>st</sup> edn, Routledge 2010) 2.

<sup>25</sup> (n 11) 4.

<sup>26</sup> (n 2)

<sup>27</sup> Commonwealth Immigrants Act (CIA) 1962; Commonwealth Immigrants Act (CIA) 1968; Immigration Act (IA) 1971.

decolonisation and breakup of the British empire in the 20<sup>th</sup> century.<sup>28</sup> The law surrounding immigration and the ‘right to nationality’ is often linked to politics of the time. This can be witnessed by various conservative political movements, ranging from Arteras Allers-Dougal’s introduction of the Aliens Act (AA) 1905 to prevent Britain from being a repository for destitute, diseased and criminal aliens,<sup>29</sup> to Enoch Powell’s ‘Rivers of Blood’ speech.<sup>30</sup> As a result, it is imperative to explore the history surrounding the politics which influenced the immigration legislations, starting from the AA 1905. This historical exploration provides context and insight into the current state of immigration and nationality laws in Britain.

### 3.2 Genesis

The AA 1905 was the first statute regulating immigration in Britain. It can be seen as the genesis of immigration restrictions in the UK.<sup>31</sup> The AA was a reaction to the number of refugees fleeing from the pogroms and economic hardships of Russia and Eastern Europe.<sup>32</sup> This Act was the culmination of two reports: the first was the Select Committee of the House of Commons which delved into the issue of alien immigration into the UK. Whilst the first report contained discriminatory undertones when describing the aliens, it did not advocate for immigration control of aliens.<sup>33</sup> However, the second report by the Royal Commission on Alien Immigration in 1903 reported in favour of statutory regulation of immigration.<sup>34</sup> Fifteen years after the first report, the brimming anti-alien hostility came to fruition when populist politicians pandered to the anxieties of the local population by advocating for legislation to protect the British workers from cheap foreign labour.<sup>35</sup> This age-old tactic has been embraced by the British government to pass racist immigration laws under the guise of economic protectionist policies.<sup>36</sup>

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<sup>28</sup> Devyani Prabhat, ‘Unequal citizenship and subjecthood: a rose by any other name...?’ (2020) 71(2) NILQ < <https://doi.org/10.53386/nllq.v71i2.321> > accessed 11 February 2022

<sup>29</sup> HC Deb 18 April 1905, vol 145, col 468

<sup>30</sup> Enoch Powell, Member of Parliament, ‘Rivers of Blood’ (Speech at Conservating Association Meeting, Birmingham, 20 April 1968) < [https://anth1001.files.wordpress.com/2014/04/enoch-powell\\_speech.pdf](https://anth1001.files.wordpress.com/2014/04/enoch-powell_speech.pdf) > accessed 11 March 2022

<sup>31</sup> James Walvin, *Passage to Britian*, (1<sup>st</sup> edn, Harmondsworth: Penguin in association with Belitha Press 1984) 117.

<sup>32</sup> Satvinder S. Juss, *Immigration, Nationality and Citizenship* ( 1<sup>st</sup> edn, Mansell Publishing 1993) 32.

<sup>33</sup> *Ibid* 34.

<sup>34</sup> *Ibid* 34-35.

<sup>35</sup> John A. Garrad, *The English and the Immigration 1880-1910*, (1<sup>st</sup> edn, Oxford University Press) 18.

<sup>36</sup> (n 31) 35.

Whilst the UK enacted the AA 1905 to enforce economic protectionism and exercise sovereignty over its borders, there was a clear anti-Semitic sentiment in the Act.<sup>37</sup> The Act appeared neutral on the surface and did not make any direct references to racial groups for exclusion.<sup>38</sup> Instead, it provided immigration officers with wide-ranging discretionary powers to determine which aliens were 'desirable' and 'undesirable'.<sup>39</sup> The basis of their discretion was to prevent the 'undesirable aliens' from becoming a burden on public funds or a detriment to the public.<sup>40</sup> However, discretionary powers such as these are often subject to abuse, and the power to appeal against the decision of the immigration officers was futile. This is evidenced through the low success rate of the existent appeal process at the time.<sup>41</sup> Therefore, despite the Act appearing neutral on the surface, the policy reasoning behind this Act and the powers attributed to the immigration officers highlight Britain's desire to cherry-pick immigrants. Consequently, the genesis of immigration control in the UK lies at the heart of racist rhetoric. This Act paved the way to showcase British hostility towards immigrants since its genesis and how immigration has historically been viewed. This sentiment seeps into practice when examining inequalities built into British citizenship.

### **3.3 The Illusory Promises of Equality**

While the AA 1905 created restrictions only for aliens, Hansen contends that Britain operated with an open-border policy for its subjects.<sup>42</sup> Superficially, this may appear true, but a deeper examination of the practice would suggest an illusory promise of equality to its colonial subjects. Prior to formalising citizenship with the British Nationality Act (BNA) 1948,<sup>43</sup> people were subjects who pledged allegiance to their feudal lords,<sup>44</sup>

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<sup>37</sup> (n 31) 34.

<sup>38</sup> (n 8)

<sup>39</sup> Ibid, S 1

<sup>40</sup> (n 31) 32.

<sup>41</sup> M.J Landa, *The Alien Problem and Its Remedy* (1<sup>st</sup> edn, P.S. King & Son 1911) 228-230.

<sup>42</sup> Randall Hansen, 'The Politics Of Citizenship in 1940s Britain: The British Nationality Act' (1999) 10(1) *Twentieth Century British History* < <https://doi.org/10.1093/tcbh/10.1.67> > accessed 15 March 2022.

<sup>43</sup> (n 2)

<sup>44</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [48].

which later changed to the crown. As a precursor to citizenship, subjecthood can be traced to the *Calvin* case.<sup>45</sup> This case dealt with issues arising out of the succession of James VI of Scotland as James I, when he ascended the English throne. The legal issue was whether an individual could hold land in Scotland and England, thus raising the novel question of distinguishing between an alien and a subject.<sup>46</sup> The court held that an individual becomes a subject when they are born in the ruling monarch's dominion.<sup>47</sup> The decision showed how Britain appeared to connect subjecthood to territorial control and allegiance to the ruling monarch.<sup>48</sup> This provided the framework for subjects in the British empire as having rights, in the same way **Arendt** describes citizenship to be a precursor for gaining any human rights – 'right to have rights'.<sup>49</sup>

These rights were granted through *Jus soli* – the foundation of British nationality law – that had been extended to Britain's colonies as the empire expanded. *Jus soli* is the automatic entitlement of British nationality to those born in the UK;<sup>50</sup> it was officially codified by statute in 1914.<sup>51</sup> This, in theory, granted the empire's 800 million subjects,<sup>52</sup> including an increasing number of racial commonwealth subjects, with rights equal to those of British-born subjects.<sup>53</sup> However, in practice the racialised subjects faced difficulties in exercising their rights in the same way as British-born white subjects. The latter viewed their subjecthood as imperial supremacy, while the former were always viewed as socially, culturally, and politically inferior.<sup>54</sup>

Colonialists argue that subjecthood and the nature of the empire, provided colonial subjects with equal rights and freedom of movement.<sup>55</sup> However, those who chose to exercise their rights of free movement in the empire

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<sup>45</sup> (n 3)

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> (n 27)

<sup>49</sup> Hannah Arendt, *The Origins of Totalitarianism* (1<sup>st</sup> edn, London: Andre Deutsch 1986) 277.

<sup>50</sup> Gina Clayton, *Immigration and Asylum Law* (7<sup>th</sup> edn, Oxford University Press 2016) 79-80.

<sup>51</sup> British Nationality and Status of Aliens Act 1914 (BNSAA) S.1

<sup>52</sup> Randall Hansen, 'British Citizenship after Empire: A defence' (2000) 71(1) *The Political Quarterly* <<https://doi.org/10.1111/1467-923X.00278>> accessed 22 April 2022.

<sup>53</sup> *Ibid.*

<sup>54</sup> (n27).

<sup>55</sup> Martin Thomas & Andrew Thompson, 'Empire and Globalisation: from 'High imperialism' to Decolonisation' (2013) 36 *Intl Hist Review* <[10.1080/07075332.2013.828643](https://doi.org/10.1080/07075332.2013.828643)> accessed 25 March 2022.

were at the extreme ends of the social strata.<sup>56</sup> These individuals found the promise of equality in subjecthood to be illusory. Their movement was severely restricted by dominions, such as Canada, which had racial qualifications added to their entry and settlement.<sup>57</sup> More specifically, Canada amended its Immigration Act 1908 to include the 'continuous journey regulation'.<sup>58</sup> This regulation only allowed immigrants to disembark in Canada if they undertook a continuous journey from their original point of departure. Whilst appearing neutral, it sought to restrict the entry of Southeast Asians, as evidenced by the Komagata Maru incident, where the ship carried 376 passengers from Hong Kong, who were predominantly Sikhs of South Asian origin. They were denied entry into Canada because they did not meet the continuous journey regulation.<sup>59</sup> This highlights the level of discrimination faced by non-white migrants who were looking to migrate from Britain's colonies. Despite appearing liberal and inclusive, when promises of equal subjecthood were exercised, they were found to be tiered and riddled with inequalities. White British subjects from dominions found it easier to travel and exercise identical subjecthood rights because of their link to their 'motherland' – Britain.<sup>60</sup> These riddled inequalities within its subjecthood framework have been passed down to its successor – British citizenship.<sup>61</sup>

### **3.4 Birth of Citizenship**

The BNA 1948 was the first piece of legislation that defined citizenship in the UK. It created two types of citizenship: Citizen of the UK and the Colonies (CUKCs) and Citizen of the independent Commonwealth Countries (CICCs).<sup>62</sup> This inclusive piece of legislation appeared to retain freedom of movement and allowed individuals who fell within this framework of citizenship the right to abode in the UK. It functioned as a declaratory system, which did not require CUKCs and CICCs to formalise their legal status to exercise their right to abode in the UK. However, examination of the political reasons surrounding the Act shows that its

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<sup>56</sup> (n 27)

<sup>57</sup> Ibid.

<sup>58</sup> Immigration Act 1908 (CAN)

<sup>59</sup> Government of Canada, 'Significant events in history of Canadians of Asian heritage' (Canada.ca) <<https://www.canada.ca/en/canadian-heritage/campaigns/asian-heritage-month/important-events.html>> accessed 29 April 2022

<sup>60</sup> (n 27)

<sup>61</sup> Ibid.

<sup>62</sup> (n 2) S. 1

liberal appearance is problematic and betrays an imperialist need to control the movement of its racialised inhabitants.

Naqvi suggests that the creation of a single ‘umbrella’ status might appear inclusive, but it was not intended to promote movement into the UK.<sup>63</sup> Instead, it was a response to the Canadian government creating Canadian citizenship.<sup>64</sup> This proved to be a backdoor into gaining British subjecthood without the British government controlling the process of who gains access to its empire. The BNA 1948 can be seen as an attempt to ensure that the British government did not lose its imperial control over who could become a subject – now a citizen – within its borders. The origins of the Act lie in imperialism; and it was therefore a way to control Britain’s colonial subjects and their migration to Britain. This can be witnessed by the plight of Anglo-Indians as Britain was decolonising India.

Anglo-Indians are descendants of individuals born in the UK.<sup>65</sup> They sought to claim British passports under the newly implemented BNA 1948 as result of their direct descent from British-born individuals.<sup>66</sup> However, the Anglo-Indians were refused passports because they were unable to produce documentary evidence of their descent from individuals born in the UK.<sup>67</sup> This hurdle of documentary evidence was insurmountable for individuals of a colony that had just achieved independence. Furthermore, it was a monumental task to furnish such documentary evidence to the British High Commission at a time when even procuring birth certificates was a hurdle in colonial India. The British government was putting in place invisible policies that denied the legal rights of its own eligible citizens to curb racialised migration to Britain.<sup>68</sup> The plight of the Anglo-Indians illustrates how individuals have been slipping through the cracks since the inception of citizenship in Britain.

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<sup>63</sup> Zainab Batul Naqvi, ‘Coloniality, Belonging and Citizenship Deprivation in the UK: Exploring Judicial Responses’ (2021) *Socio & Legal Studies* < <https://doi.org/10.1177/09646639211044294> > accessed 11 April 2022

<sup>64</sup> (n 27)

<sup>65</sup> (n 23) 25.

<sup>66</sup> (n 2) S.12(6)

<sup>67</sup> (n 23) 26.

<sup>68</sup> *Ibid.*

Furthermore, it showcases Naqvi's claim that Britain was involved in curtaining the movement of its racial citizens into Britain.<sup>69</sup>

Additionally, the British government sought to limit entry from other CUKCs by influencing policy for the newly independent colonies like India, which required individuals to have a high financial threshold so as to avail themselves of an Indian passport which they could use to travel.<sup>70</sup> Ironically, the declaratory nature of the BNA 1948 allowed CUKCs the right to travel and abode in Britain, but the British government made it arduous for its racialised CUKCs to be able to exercise these illusory inclusive rights.

### **3.5 BNA 1948 Opened Pandora's Box**

It is important to question how and why Britain implemented immigration control of its racial citizens post-BNA 1948. As the British empire waned after the Second World War (WWII), it rebuilt itself by actively inviting cheap labour from its colonies.<sup>71</sup> However, Britain had not envisaged the significant levels of mass migration into its borders, even with the formalisation of citizenship in statute, and the recruitment drives for labour shortages.<sup>72</sup> Britain found this watershed migratory trend astonishing,<sup>73</sup> which Prabhat attributes to the world never having witnessed mass global migration to this degree from its colonies.<sup>74</sup> Thus, upon realising the flood of non-white immigrants into its borders, Britain immediately attempted to shut Pandora's box. This resulted in disproportionate immigration controls which sought to exclude and restrict its racial citizens through subsequent immigration Acts. Hence, BNA 1948 created a snowball effect that opened Pandora's box, which put Britain's racial citizens in a precarious position in relation to their right to nationality in global Britain.

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<sup>69</sup> (n 62)

<sup>70</sup> (n 23) 25- 26.

<sup>71</sup> Wendy Williams, 'Windrush Lessons Learned Review' (March 2020). <

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/874022/6.5577\\_HO\\_Windrush\\_Lessons\\_Learned\\_Review\\_WEB\\_v2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf) > accessed April 04 2022.

<sup>72</sup> (n 2) S 1

<sup>73</sup> (n 41)

<sup>74</sup> (n 27)

### 3.5.1 Exclusion Formed the Basis of Britain's Transformation into a Young Nation-State

Upon realising that the unintentional flood of migration from its racialised CUKCs was a result of the BNA 1948, Britain's covert attempts at limiting racial migration were abandoned<sup>75</sup> for overt limits on migration with subsequent acts that aimed to limit the entry of racial CUKCs. Britain's decolonisation process appears indicative of its intention to terminate its open-door policy towards commonwealth peoples.<sup>76</sup>The 1962 and 1968 Commonwealth Immigrants Acts (CIA) alongside further legislation in 1971<sup>77</sup> emerged as the first form of formal immigration control of commonwealth migrants. These Acts coincided with Britain's decolonisation process, which supplemented its transformation from a colonial empire to a young nation-state. Moreover, Britain's decolonisation seems to have propelled it into a national identity crisis period between the late 1950s and early 1960s, which appears to have framed its contemporary notion of exclusionary citizenship. This identity crisis period is exemplified by the Notting Hill race riots,<sup>78</sup> and Powell's populist movement which culminated in his 'Rivers of Blood' speech<sup>79</sup> and his notions of British empire, which excluded racial migrants from the commonwealth. Buettner posits that it was mounting British concerns about racial and cultural differences – alongside the racial migrants' lack of assimilation – that led to increasing vocal demand for the restriction and exclusion of minorities in Britain.<sup>80</sup> Therefore, the CIA 1962 was used as a conduit to restrict and exclude undesirable immigration of its racial commonwealth citizens to appease growing concerns that Britain was becoming too global. However, this was largely a failure to educate and persuade the British populace of the racial commonwealth citizens' legitimate claim to citizenship rights due to Britain's colonial history, which was ultimately the reason for their growing presence. Instead, Britain's national identity crisis led it to shed its notion of designing a coherent commonwealth system, which was intended to seamlessly

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<sup>75</sup> Ibid.

<sup>76</sup> Re Bevens, "The people have no more love left for the Commonwealth": Media, migration and identity in the 1961-2 British smallpox outbreak' (2007) 25(3) *Immigr Minor* <doi:10.1080/02619280802407376> accessed 15 April 2022.

<sup>77</sup> (n 26)

<sup>78</sup> (n 75)

<sup>79</sup> (n 29)

<sup>80</sup> Elizabeth Buettner, 'Postcolonial Migrations to Europe' in Martin Thomas and Andrew S. Thomson (eds), *The Oxford Handbook of the Ends of Empire* (Oxford University Press 2018) 610.

replace the old empire as Britain's major trading and cultural partner.<sup>81</sup> This eventually culminated in Britain joining the European Economic Community (EEC) to form closer ties with Europe<sup>82</sup> and cutting its ties with the Commonwealth through restrictive immigration Acts.<sup>83</sup>

Buettner suggests that this shift was racially charged and mainly caused by the local opinion that racial migrants from the commonwealth were culturally and economically inferior to European society.<sup>84</sup> Although decolonisation forced Britain to adopt new attitudes and form new relationships with its former colonies and colonial dependents, Patterson suggests that the British population at large seemed unwilling to see them as equals.<sup>85</sup> Therefore, she concludes that it is Britain's entrenched belief system as 'civiliser' that played a key role in shaping British sentiment, that was generally uneasy living with immigrants of races they were unaccustomed to treating as equals.<sup>86</sup> Although race was never a criterion for inclusion or exclusion, Britain reworked its legislation through CIA 1968 and Immigration Act (IA) (1971) to include partiality, which placed an emphasis on descent.<sup>87</sup> The intention was to use descent to restrict racial migration into Britain and allow for more white migration which the British populace would see as culturally and economically equal. This explains the move towards forming closer ties with continental Europe by signing the European Convention of Human Rights and applying to join the EEC.

However, by the end of the decade these Acts led to a significant flow of migration from the South Asian Diaspora due to the Africanisation movement<sup>88</sup> and laxer rules which allowed them to immigrate from the Indian subcontinent.<sup>89</sup> The hasty enactment of CIA 1968<sup>90</sup> and further enactment of the IA 1971

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<sup>81</sup> (n 63)

<sup>82</sup> European Communities Act (ECA) 1972

<sup>83</sup> (n 26)

<sup>84</sup> (n 79)

<sup>85</sup> Sheila Patterson, *Dark Strangers: A Study of West Indians in London* (Harmondsworth: Penguin, 1965), 210–211

<sup>86</sup> *Ibid.*

<sup>87</sup> IA 1971 (n 26), s 2.

<sup>88</sup> Sara Cosmans, 'Undesirable British East African Asians. Nationality, Statelessness, and Refugeehood after Empire, Immigrants & Minorities' (2021) *Immigrants & Minorities* <DOI: 10.1080/02619288.2021.1967752 > accessed 25 March 2022

<sup>89</sup> *Ibid.*

<sup>90</sup> J. G. Collier, 'The Commonwealth Immigrants Act 1968 – A British Opinion.' (1969) 2 *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 457.

disproportionately affected East-African Asians, who slipped through the cracks and were left *de facto stateless*.<sup>91</sup> These legislations equated to discrimination that resulted in the exclusion of the East-African Asians' right to nationality in the UK. The plight of these East-African Asians will be examined through the lens of *Nottebhom* jurisprudence.<sup>92</sup>

**(i) Plight of the East-African Asians**

The International Court of Justice (ICJ) ruling in *Nottebhom* will be utilised as the framework within this subsection<sup>93</sup> to provide an explanation for the UK's exclusionary nationality and immigration legislations. The *Nottebhom* Jurisprudence will be used to shed light on the plight of the East-African Asians. *Nottebhom* was a significant ruling which dealt with the question of an individual's nationality rights, which confer diplomatic protection. Nottebhom failed to secure diplomatic protections conferred upon him by Liechtenstein, when Guatemala refused to recognise this citizenship and branded him as an enemy alien during WWII,<sup>94</sup> because of his dual status as a German national. The ICJ formally considered when an individual could be classed as having an effective nationality that confers full rights attached to it. The ICJ answered this question by developing a nationality test— 'genuine link' principle, which requires an individual to have a 'social fact of attachment, a genuine connection of existence'<sup>95</sup> to claim a relevant state's diplomatic protections from the nationality in question. The ICJ held that Nottebhom lacked the 'genuine link' to claim Liechtenstein's diplomatic protections. Jones criticised the ICJ's failure to account for the onset of various decolonisation processes,<sup>96</sup> which could have wide-reaching implications for the decolonised. This is highlighted through the UK's enactment of restrictive immigration control legislations from the 1960s and 1970 that sought to limit the entry of its racial commonwealth citizens (i.e. East-African Asians).

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<sup>91</sup> (n 87)

<sup>92</sup> *Nottebhom case (second phase)* [1955] ICJ Rep 1955

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> J Mervyn Jones, 'The Nottebhom Case' (1956) 5(2) INT'L & Comp. L.Q. < <https://www.jstor.org/stable/755847> > accessed 25 April 2022

Britain's colonial authorities that existed prior to some East-African nations' independence provided the East-African Asians with British nationality.<sup>97</sup> However, the UK enacted and relied on the CIA 1968 to substantiate the refusal of the East-African Asians' status as British citizens who had the right of abode in the UK.<sup>98</sup> They were restricted entry on the basis of their passports being issued abroad and their failure to demonstrate white British parentage.<sup>99</sup> Parallels can be drawn between the intended effect of this Act and the *Nottebhom* jurisprudence, which could have been relied on and utilised to exclude all racial migration into its borders, particularly that of East-African Asians.<sup>100</sup> This highlights the UK's unwillingness to recognise them as British citizens, due to their insufficient 'genuine link' to Britain. This 'genuine link' was used to exclude them because of their race and the rising populist pressure from within Britain's borders.<sup>101</sup> However, Britain's deployment of 'genuine link' from *Nottebhom* appears narrow and reformulated.<sup>102</sup> The judgment states that an individual's right to nationality is a legal bond that recognises certain social facts, alongside their political bond.<sup>103</sup> Accordingly, Britain's colonialism would have allowed the East-African Asians to meet those criteria. Therefore, Britain narrowly reformulated the social element of the 'genuine link' based on race ('blood links') to exclude and restrict East-African Asians. The CIA 1968 culminated into the IA 1971, which allowed Britain to deploy its reformulated 'genuine link' under the guise of 'partiality'.<sup>104</sup> This rule highlights Britain's attempt to deny entry to its racial citizens who lacked a 'connection' (blood-related) to the country, due to their insufficient 'genuine link' to Britain. This seemingly supplements Britain's exclusionary aim—restricting access to its borders for racial migrants.

The reformulation of 'genuine link' to 'blood links', can be attributed to the majority in *Nottebhom*, which failed to account for decolonisation.<sup>105</sup> This reformulation allowed Britain to thwart any arguments relying on

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<sup>97</sup> (n 74)

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> (n 87)

<sup>102</sup> (n 78)

<sup>103</sup> Ibid.

<sup>104</sup> (n 86)

<sup>105</sup> (n 95)

the original ‘genuine link’ due to its status and colonial power. This appears to have allowed Britain to weaponise its criterion for nationality as an exclusionary tool, thereby the onset of its neo-colonial legacy.

### **3.6 Conclusion**

While the UK appeared to have formalised the equal status of subjecthood through the enactment of BNA 1948, it had the contrary effect. This chapter demonstrated how BNA 1948 opened Pandora’s box for Britain and allowed it to restructure the various citizenship statuses into a tiered system. The enactment of various Acts between the 1960s and 1970s allowed Britain to create tiered structure within its citizenship framework. This structure was Britain’s attempt to restructure itself as a young nation-state, which eventually culminated in the BNA 1981. These historical trends associated with immigration statutes show how it disproportionately affects racial minority groups who have repeatedly had their right to nationality affected in ‘Global Britain’. The next chapter will highlight how the UK reconceptualised British citizenship to create its neo-colonial framework through the deployment of various tools.

## Chapter 4 – British Citizenship Reconceptualised to Create a Neo-Colonial Framework

### 4.1 Introduction

As the previous chapter showed, British citizenship has been modified and designed to serve Britain's colonial legacy – aimed at controlling and excluding its racial citizens from accessing its borders. However, British citizenship was reconceptualised under the BNA 1981:<sup>106</sup> it aimed to eliminate the various unequal citizenship statuses created under BNA 1948,<sup>107</sup> and attempted to confer equal rights to all British citizens.<sup>108</sup> Instead, BNA 1981 formally ended *Jus soli* and moved towards *jus sanguinis*, which was citizenship by descent.<sup>109</sup> This reconceptualised citizenship requires any person born in the UK after the commencement of the BNA 1981, to have at the time of their birth, a parent who is a British citizen or settled in the UK.<sup>110</sup> Whilst this 'Modern British Citizenship' appears to confer rights and protections to its citizens, Britain's neo-colonial framework allows it to be utilised as a continuous form of immigration control.<sup>111</sup> This chapter highlights how the reconceptualised 'Modern British Citizenship' was structurally designed to be conduit for a neo-colonial framework, which perpetuates a hierarchy between the racialised naturalised citizens ('undeserving') and the descended white citizens ('deserving'). Thus, it enables Britain to continue policing its borders in a neo-colonial manner, which perpetually places many individuals living in the UK in a state of precariousness.

First, Prabhat's conception of citizenship will be considered – British citizenship in its current form is designed as a sorting process of who is deserving and undeserving of such a right.<sup>112</sup> Second, this reconceptualised citizenship design will be used to highlight various internal bordering practices (invisible barriers; citizenship test (Life in the UK (LUK) + high fees; citizenship deprivation), which are being employed to enforce Britain's

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<sup>106</sup> Ann Marie-Fortier, *Uncertain Citizenship* (1<sup>st</sup> edn, Manchester University Press 2021) 62.

<sup>107</sup> (n 5)

<sup>108</sup> Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (1<sup>st</sup> edn, Biteback Publishing 2022) 197.

<sup>109</sup> (n 49)

<sup>110</sup> (n 6)

<sup>111</sup> (n 6) 5

<sup>112</sup> (n 6)15

neo-colonial framework. Consequently, this makes naturalisation harder for the ‘undeserving’. The deployment of citizenship tests will be explained using Fortier’s citizenisation/decitizenisation theory – UK’s naturalisation process has the effect of citizenising and decitizenising a would-be citizen simultaneously. Furthermore, El-ENany’s ‘Bordering’(policies aimed at restricting racial commonwealth citizens’ and migrants’ access to Britain and its colonial spoils) framework<sup>113</sup> and Isin’s ‘neurotic citizen’ (‘citizen that governs itself through responses to anxieties and uncertainties’)<sup>114</sup> framework will be used to examine Britain’s reasoning for deploying the LUK test as a neo-colonial tool. The deployment of high fees as a barrier will be addressed by examining the *PRCBC*<sup>115</sup> case to highlight how these fees serve to act as a barrier. Additionally, it will be used to showcase the ineffectiveness of the judiciary to break this barrier for the would- be citizen. Finally, the reconceptualisation of citizenship deprivation will be examined through Britain’s war on terror. This will highlight how citizenship deprivation is being redeployed as the UK’s most potent tool to maintain its neo-colonial framework.

#### 4.2 Design and Deployment of British Citizenship as a Neo-Colonial Tool

T.H. Marshall conceptualises citizenship as carrying social, political, civil, and economic rights that are conferred upon qualifying individuals to effectively participate in Britain.<sup>116</sup> Prabhat suggests that Britain’s citizenship has currently been designed as a sorting process, aimed at filtering out the ‘undeserving’ would-be citizens, in order to provide the ‘deserving’ would-be citizens access to rights.<sup>117</sup> The abandonment of *jus soli* for *jus sanguinis* under the BNA 1981 demonstrates the presence of Prabhat’s sorting process, which automatically limits access to these rights for the ‘undeserving’. The renewed emphasis on blood-links derived from *jus sanguinis* provides third-generation British emigrants with access to British citizenship despite settling in colonies such as Canada, Australia, and South Africa.<sup>118</sup> This suggests that Britain viewed

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<sup>113</sup> (n 13) 3-6.

<sup>114</sup> Egin F. Isin, ‘The Neurotic Citizen’, (2004) 8 Citizenship Studies 217.

<sup>115</sup> *PRCBC & O v Secretary of State for the Home Department (PRCBC)* [2022] UKSC 3.

<sup>116</sup> (n 6)

<sup>117</sup> *Ibid.*

<sup>118</sup> (n 97) 198.

'whiteness' as deserving of its citizenship to remake its ethnic makeup, which was altered by its 'undeserving' racial commonwealth migrants due to its previous open-border policy under BNA 1948. The effects of retaining *jus soli* would have altered and broadened Britain's original ethnic makeup with diversity, as witnessed in the United States (US).<sup>119</sup> This is evidenced by the US census results, which demonstrates a 276% increase in its multiracial population and a decline of its white population.<sup>120</sup> Therefore, shifting to *jus sanguinis* allowed Britain to replace its emphasis through birth on British territory. This appears to highlight Britain's intent to preserve the ethnic origins of its predominantly white population prior to BNA 1948. Moreover, it highlights El-ENany's 'white Britain policy',<sup>121</sup> which aims to show Britain's racial commonwealth citizens that its colonial spoils are preserved for its white citizens and access to it was going to be restricted for the 'undeserving'.

Prabhat's point is further illustrated in the way Britain designed a perpetual state of 'probationary citizen' through the BNA 1981 and the Representation of the People Act (RPA) 1983,<sup>122</sup> to keep its eligible racial commonwealth citizens from formally acquiring British citizenship. The BNA 1981 required the predominantly racial commonwealth residents, who entered Britain as subjects or CUKCs to register as British citizens if they met the five years of UK residency threshold and paid the fees. The fees and complexity surrounding the process would have served as a barrier to the Windrush generation (i.e. group of Caribbean migrants who arrived in Britain legally between 1948 and 1971, following an invitation by the British Government to rebuild the country and fill labour shortages), who never registered and were caught by the hostile immigration policies.<sup>123</sup> Moreover, the declaratory system failed to encourage many to register and acquire British citizenship, since they benefited from the civil and social benefits of a 'full citizen'. Additionally, Britain created the RPA 1983 to confer the right to vote in parliamentary and local elections for the commonwealth

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<sup>119</sup> Ibid.

<sup>120</sup> Nicholas Jones, Rachel Marks, Roberto Ramirez, Merarys Ríos- Vargas, '2020 Census Illuminates Racial and Ethnic Composition of the Country' (Census.gov 2021) < <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html> > accessed 19 April 2022

<sup>121</sup> (n 13) 103.

<sup>122</sup> (n 6)

<sup>123</sup> (n 107) 188.

citizens residing in the UK.<sup>124</sup> The conferral of these political rights of participation under this Act, along with access to other derived benefits as long-term residents were designed to keep its racial population from acquiring British citizenship. Consequently, it is contended that Britain designed these Acts to keep its so-called ‘undeserving’ residents in a perpetual state of probationary citizenship, which onset its neo-colonial legacy.

These probationary citizens were kept in a perpetual state of precariousness in relation to their immigration status. Furthermore, this design aided Britain in keeping its naturalisation figures low from the ‘undeserving’ racial residents, who would have entered as citizens. Isin’s framework of the ‘neurotic citizen’ is applicable here:<sup>125</sup> the citizen self-governs itself through responses to anxieties and uncertainties surrounding immigration. British Citizenship has been designed as a neo-colonial tool to appease the neurotic citizen. It has been designed to make acquiring citizenship difficult for its ‘undeserving’ residents; this design reassures the neurotic citizen that access to British citizenship is controlled, and Britain is being safeguarded from ‘foreign’ influences that could threaten ‘Britishness’.<sup>126</sup> Britain’s desire to make acquiring citizenship more difficult and keep its naturalisation numbers low for its ‘undeserving’ residents remains a common theme of the past and present. Britain’s continued engagement in utilising invisible barriers to control and exclude racial migration within its borders has evolved into adding supplementary barriers. The introduction of the LUK test and high fees to acquire British citizenship continues to serve Britain’s current neo-colonial framework.

### 4.3 Invisible Barriers to Naturalisation

Britain’s open-border policy from its days as an old colonial power and the current prominence of globalisation have shaped Britain’s modern identity as a Global and multicultural society.<sup>127</sup> This section highlights Britain’s use of internal bordering practices (neo-colonial tools), such as the LUK test and high

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<sup>124</sup> Representation of the People Act (RPA) 1983 s 1- 2.

<sup>125</sup> (n 113)

<sup>126</sup> Ibid.

<sup>127</sup> (n 31) 4-7.

citizenship application fees, which are being deployed as invisible barriers to make naturalisation harder for a racial would-be citizen. The naturalisation process includes the requirements of 'good' character, an intention to live in the UK, lawful residence of five continuous years in the UK, and possessing settlement at the time of the application.<sup>128</sup> The rules concerning the period of residency vary for applicants married to a British citizen (five continuous years of UK residency), and for those who are not (five continuous years of residency + 12 months of possessing indefinite leave to remain (ILR); or 'settled status'; or indefinite leave to enter).<sup>129</sup> These barriers impose additional layers of complexity to the naturalisation process which undermines Britain's multiculturalism. Firstly, this section will highlight how the LUK test has colonial roots and is presently neo-colonial in its design. This design fails to fulfil its supposed aim of integration. The high fees will be addressed the context of the *PRCBC*<sup>130</sup> case to highlight the executive's attempts that rely on the UK's constitutional framework to restructure its nationality and immigration legislation to circumvent judicial oversight.

### **(i) Citizenship Testing**

The Nationality, Immigration and Asylum Act (NIAA) 2002 introduced citizenship testing, the LUK test, and a mandatory naturalisation ceremony.<sup>131</sup> The LUK test and citizenship ceremonies have become the most symbolic and significant part of the current British naturalisation process.<sup>132</sup> However, the LUK test will be examined through a historical lens, before addressing the English language requirement to demonstrate how it prevents the 'undeserving' would-be citizens from successfully naturalising. Therefore, the LUK's aim to facilitate integration of the 'undeserving' would-be citizen seems to fail its objective because of its neo-colonial design.

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<sup>128</sup> (n 106) ; Kamran Khan, 'Raciolinguistic border-making and the elasticity of assessment and believability in the UK citizenship process' (2021) 21 *Ethnicities* 333.

<sup>129</sup> GOV.UK 'Apply for citizenship if you have indefinite leave to remain or 'settled status' (Gov.UK) <<https://www.gov.uk/apply-citizenship-indefinite-leave-to-remain> >accessed 29 April 2022

<sup>130</sup> (n 114)

<sup>131</sup> Nationality, Immigration and Asylum Act (NIAA) 2002

<sup>132</sup> Kamran Khan (n 127)

The Crick Report was commissioned following a push to increase greater engagement with the formal processes of democracy by exploring the possibility of employing citizenship education.<sup>133</sup> The recommendations from the Report led to the incorporation of citizenship education in secondary schools, and the formation of the Advisory Board on Naturalisation and Integration to work on the creation of the language and citizenship courses to test its would-be citizens.<sup>134</sup> However, the LUK test was introduced after the initial failure of the attempted integration measures recommended by the Crick Report in 1998.<sup>135</sup> The LUK test was expedited due to the culmination of the events in 2001 (race riots; 9/11) and the subsequent Cantle report, which was commissioned to look into integration and security in Britain.<sup>136</sup> The introduction of the LUK test lies within this specific climate of challenging multiculturalism and Britain's hostility towards immigration, which is distinct from the longer-established citizenship tests in Canada.<sup>137</sup> The Canadian citizenship test was introduced in 1985, and the enactment of the Canadian Multiculturalism Act 1988 (the first of its kind)<sup>138</sup> remains foundational in showing Canada's contrasting efforts to celebrate and promote multiculturalism.<sup>139</sup> By contrast, Fortier argues that the LUK test is a process of 'citizenisation'— integration and naturalisation measures – whereby naturalisation of the would-be citizen is the end goal.<sup>140</sup> However, the UK has designed this LUK test to be deployed as an invisible barrier that allows Britain to continue its neo-colonial legacy of excluding its racial would-be citizens via the process of citizenisation.

David Blunkett, ex- Home Secretary of State, and the authors of the subsequent commissioned reports suggest that the LUK tests were designed to assist the would-be citizen in understanding the key elements (culture, language, democracy) of 'Britishness',<sup>141</sup> which would allow the would-be citizen to be easily accepted and

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<sup>133</sup> Bernard Crick, *Education for citizenship and the teaching of democracy in schools* (Qualifications and Curriculum Authority 1998)

<sup>134</sup> (n 127)

<sup>135</sup> *ibid.*

<sup>136</sup> T. Cantle, *Community Cohesion: A Report of the Independent Review Team.* Government Printing Office 2001)

<sup>137</sup> Bridget Bryne, 'Testing Times: The Place of the Citizenship Test in the UK Immigration Regime and New Citizens' Responses to it' (2017) 51 *Sociology* 323.

<sup>138</sup> Sarah V. Wayland, 'Immigration, Multiculturalism and National Identity in Canada' (1997) 5 *Intl Journal on Minority and Group Rights* 33.

<sup>139</sup> Canadian Multiculturalism Act 1988 S3(1)

<sup>140</sup> Ann-Marie Fortier, 'Afterword: Interrogation Naturalisation, naturalized uncertainty and anxious states' (2021) 21 *Ethnicities* <<https://doi.org/10.1177/14687968211001626>> accessed 05 May 2022.

<sup>141</sup> David Blunkett, 'What does citizenship mean today' (*guardian*) <<https://www.theguardian.com/world/2002/sep/15/race.thinktanks>> accessed 29 April 2022; (n 132); (n 134)

integrated into British society.<sup>142</sup> The Cattle report accurately highlighted that ethnic communities from the commonwealth led parallel lives to the white British communities<sup>143</sup>, due to their failure to integrate. However, this narrow collective outlook of the British political class appears to have neglected the fundamental reasons as to why Britain's ethnic communities may segregate themselves from British society and, consequently, lead parallel lives. This has resulted in the injudicious designing of the LUK test, which continues to exclude and segregate. Isin's conceptualisation of the neurotic citizen<sup>144</sup> and El-ENany's Bordering framework rely on the use of racial terror, which can be used to explain British policy post-BNA 1948 that resulted in exclusion and segregation.<sup>145</sup> Britain's policy would have assisted in creating the neurotic citizen, who self-governs itself by relying on the deployment of racial terror, which aids in its neo-colonial bordering.<sup>146</sup> Whilst the government might argue that the enactment of its Race Relations Acts (RCA) from the 1960s were an attempt to prevent the ensuing racial terror,<sup>147</sup> Brown's briefing paper highlights the contrary effect of these Acts.<sup>148</sup> Her conclusions echoed Dummett's claim that the RCAs' were inadequately designed to provide sufficient protection against the racial terror it perpetuated.<sup>149</sup> The media has filled the role of Isin's neurotic citizen by: (i) perpetuating racial terror in its disapproval ; and (ii) its demonisation of 'racial migrants'.<sup>150</sup> The media's disapproval of the steep increase in high naturalisation figures<sup>151</sup> is an argument for the 'citizenisation' process (LUK test) not being adequately restrictive to prevent this increase.<sup>152</sup> Moreover, the public outrage and calls for restricting knowledge and access to Britain's welfare benefits in its LUK test<sup>153</sup> appears to devalue British

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<sup>142</sup> (n 97)

<sup>143</sup> (n 118)

<sup>144</sup> (n 101)

<sup>145</sup> (n 11) 5.

<sup>146</sup> Ibid.

<sup>147</sup> Labour Party (1964) "THE NEW BRITAIN" 1964 General Election Manifesto; Race Relations Act 1965; Race Relations Act 1968

<sup>148</sup> Jennifer Brown, 'An early history of British race relations legislations' (July 2018). <

<https://researchbriefings.files.parliament.uk/documents/CBP-8360/CBP-8360.pdf> > accessed 04 May 2022

<sup>149</sup> A Dummett, *A Portrait of English Racism* (Penguin 1973) 181.

<sup>150</sup> Glenda Cooper, Lindsey Blumell, Mel Bunce ' " beyond the 'refugee crisis": How the UK media represents asylum seekers across national boundaries' (2021), 3, *The International Communication Gazette*

<sup>151</sup> Połońska-Kimunguyi, 'Echoes of Empire: racism and historical amnesia in the British media coverage of migration.' (2022) 9 *Humanit Soc Sci Commun* <<https://doi.org/10.1057/s41599-021-01020-4> >accessed 25 April 2022

<sup>152</sup> (n 135)

<sup>153</sup> Slack M, ' At last, immigrants will be made to learn British history rather than how to claim benefits' *Mail Online* ( 11 October 2011) < <https://www.dailymail.co.uk/debate/article-2047885/UK-immigration-Cameron-test-British-history-claim-benefits.html> > accessed March 22 2022.

citizenship.<sup>154</sup> The neurotic citizen's opinions are a reiteration of the idea that non-white people of immigrant descent are a threat to 'Britishness' and its resources.<sup>155</sup> However, these opinions reiterate the absence of any acknowledgement in political discourse that the making of Britain's welfare state was a result of the resources acquired through colonialism.<sup>156</sup> Access to welfare benefits would arguably be a fundamental benefit and right conferred to attaining citizenship; this is reiterated by the United Nations,<sup>157</sup> which likens citizenship rights to human rights.<sup>158</sup> Fortier's citizenisation/de-citizenisation framework can be drawn upon to showcase how these negative media and public opinions decitizenise the would-be citizen, by framing them as undesirable and undeserving of claiming access to British citizenship rights.<sup>159</sup> The introduction of the LUK test coupled with the neurotic citizen's exclusionary opinions have framed Britain's neo-colonial internal bordering. These internal bordering processes serve to formulate Britain's narrative arc – access to its material and temporal resources appropriated by its colonialism lie behind its borders for its white citizens.<sup>160</sup> Consequently, the racial would-be citizens are required to subjugate themselves to Britain's immigration and nationality laws, which require them to 'earn the privilege'<sup>161</sup> of accessing these resources via naturalisation. Accordingly, it can be argued that this view disregards these would-be citizens' roles as active citizens (informally/formally), whereby they are already earning the right to stay through paying taxes, or in some would-be citizens cases, they are already exercising the right to vote in parliamentary elections.<sup>162</sup> Therefore, Britain's use of the LUK test is its neo-colonial attempt to sustain its post-colonial 'White Britain' project. This is further illustrated by Britain's reformation of the LUK test in 2014,<sup>163</sup> which attempted to reflect 'Britishness' more narrowly and extended the test to those attempting to attain an indefinite leave to remain (ILR).

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<sup>154</sup> (n 119)

<sup>155</sup> (n 13) 74- 76.

<sup>156</sup> (n 13) 1.

<sup>157</sup> United Nations Human Rights Office of the High Commissioner, 'OCHR and the right to a nationality' (ochr.org.) < <https://www.ohchr.org/en/nationality-and-statelessness> > accessed 19 April 2022

<sup>158</sup> Ibid.

<sup>159</sup> (n 122)

<sup>160</sup> (n 11) 220.

<sup>161</sup> (n 97) 195.

<sup>162</sup> (n 122)

<sup>163</sup> Immigration Act (IA)2014.

Whilst Blunkett seemingly recognised Britain's usage of its immigration and nationality laws to control and exclude its racialised citizens,<sup>164</sup> his introduction of the LUK test fails to adequately incorporate Britain's multiculturalism, which has diverse languages spoken within its borders. The English language requirement has become a key component of this test to help with assimilation and integration.<sup>165</sup> Fortier suggests the use and promotion of English under the guise of citizenship is remnant of Britain's imperial expansion, which exported English as an attempt to maintain its supremacy over other languages.<sup>166</sup> Consequently, the recent trend of bordering Britain by utilising English in a neo-colonial manner could exclude its racialised would-be citizens.<sup>167</sup> However, if the supposed aim of using the LUK test is to promote integration,<sup>168</sup> Britain must attempt to embrace its multicultural identity as 'Global Britain'.<sup>169</sup> Instead, Britain's rejection of this idea is exemplified by David Cameron's claim that 'multiculturalism has failed', and the use of non-English was identified as the root cause for segregation and racial tensions within Britain.<sup>170</sup> Whilst there is some merit to the argument that English could assist with the integration effort, it would be ill-considered to use 'monolingualism' as an attempt to recreate Britain as a homogenous and unified society. Britain's monolingualistic promotion of English allows it to weaponise and use English as a neo-colonial tool. This allows Britain to map out its borders when it attempts to define its (non)citizens,<sup>171</sup> as evidenced by the multiple reports that looked at facilitating integration since 1998.<sup>172</sup> Therefore, Cameron's argument that English can be used as a device to help facilitate integration and shield Britain from security threats posed by radicalisation falls short.<sup>173</sup> His argument for monolingualism as an integratory tool exceptionalises migrants and their languages as being inherently problematic in terms of social cohesion and security.<sup>174</sup> The abandonment of

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<sup>164</sup> Blunkett (n 139)

<sup>165</sup> Kamran Khan (n 127)

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Blunkett (n 139)

<sup>169</sup> (n 15)

<sup>170</sup> David Cameron, Ex- Prime Minister, 'Radicalization and Islamic Extremism' (Speech at Munich Security Conference, 10 Downing Street, 5 February 2011) < <https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference> > accessed 16 April 2022

<sup>171</sup> Kamran Khan (n 127); (n 135)

<sup>172</sup> (n 123)

<sup>173</sup> (n 151)

<sup>174</sup> (n 135)

multiculturalism and the push for monolingualism through the LUK test have failed to effectively integrate Britain's multicultural society and safeguard it from the threat of radicalisation.<sup>175</sup>

The exceptionalisation of racial migrants can be seen in the LUK test results from 2017: on their first attempt 97% of Australians passed in contrast to 40% of racial migrants.<sup>176</sup> These results illustrate the LUK test's neo-colonial design since it appears to favour its white migrants from its dominions.<sup>177</sup> Australia's official language is English, and its culture and values share a closeness to 'Britishness', which allows Australians to pass the LUK test with relative ease. This allows them to secure their citizen status. These test results appear indicative of Britain's neo-colonial design that framed citizenship with *jus sanguinis*, which favoured and welcomed white migration from its dominions. The LUK test does not appear to be an invisible barrier for the white migrants from its former colonies. However, it appears to affect and marginalise its racialised population. Consequently, De Leeuw and Van Wichelen state that these testing regimes can be seen as the death of multiculturalism in Europe, which seemingly includes Britain.<sup>178</sup> Therefore, it can be ascertained that this designed test builds on Britain's past use of segregation to continue its neo-colonialism.

## (ii) High Fees

The Modern British Citizenship under BNA 1981 currently provides three pathways to becoming British: birth, descent, and application. However, the complex neo-colonial design of this Act meant that there was no automatic entitlement of British citizenship post 1983. Therefore, the genesis of Britain's neo-colonial design (BNA 1981) resulted in many individuals not claiming their right to British citizenship because of Britain's internal bordering – high fees. The process of acquiring citizenship through application varies for adults and children, but the effect of being charged high fees to access British citizenship results in a similar

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<sup>175</sup> Ibid.

<sup>176</sup> 'Life in the UK Test Pass Rates', Garuda Publications 5 March 2017.

<sup>177</sup> (n 27)

<sup>178</sup> M de Leeuw, and S. van Wichelen, 'Civilizing migrants: Integration, culture and citizenship' (2012) 15(2) European Journal of Cultural Studies < doi: 10.1177/1367549411432029> accessed 15 April 2022

marginalisation of its racialised poor. This will be shown by examining the *PRCBC* case and the ineffectiveness of the judiciary to illustrate Britain's deployment of high fees as an additional invisible barrier.

The enactment of British citizenship under *Jus sanguinis* now requires children born in the UK to have any of their parents settled (possession of British citizenship, indefinite leave to remain [ILR], permanent residence, right to abode) in the UK to gain automatic British citizenship and circumvent the high fees associated with registering as one.<sup>179</sup> The other two principal routes for a child born in the UK of acquiring British citizenship requires them to make an application to register as one. This could apply to a child who has continuously lived in the UK for the first ten years of their life;<sup>180</sup> or to a child, where either one of their parents, or both, become settled in the UK after the child's birth. Neither of these two rights confer an automatic right to be registered as British citizens. They would be required to make an application to register as a citizen, which requires a high payment of £1,012.<sup>181</sup> However, as highlighted above, the application route for an adult to acquire British citizenship is called naturalisation. The application fee for an applicant married to a British citizen is currently £1,330, and the fee required by those who are not currently requires an initial payment of £2,404 to acquire ILR after five continuous years of UK residence, and an additional fee of £1,330 to naturalise as a British citizen.<sup>182</sup> The *PRCBC* case concerned a challenge to the level of fees charged to children who are applying to register as British citizens. The Supreme court (UKSC) in *PRCBC* held that the fee charged did not infringe on the common law right of access to British citizenship.<sup>183</sup> Whilst the citizenship acquired through registration was a statutory right, this right could only be accessed by fulfilling the conditions set by Parliament (i.e., payment of fees set by the executive).<sup>184</sup> However, the UKSC did acknowledge that the high fees payable to acquire British citizenship is being charged at a significant surplus,<sup>185</sup> and that the current level of fees makes

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<sup>179</sup> *Ibid.*

<sup>180</sup> (n 6) S. 1(4)

<sup>181</sup> (n 6) S.41(1)

<sup>182</sup> Home Office, 'Home Office immigration and nationality fees: 26 February 2022' (*Gov.uk*, 30 May 2022) <<https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-26-february-2022>> accessed 12 June 2022.

<sup>183</sup> (n 114) UKSC 62 [27]; [33]

<sup>184</sup> *Ibid* [27].

<sup>185</sup> *Ibid* [3].

it unaffordable for many individuals.<sup>186</sup> Interviews and reports both support these findings: four in ten people living in Britain are unable to save up enough to make one month's rent,<sup>187</sup> let alone save up to pay the amount associated with acquiring British citizenship. This reiterates the notion of deploying high fees as an invisible barrier which attempts to prohibit access to British citizenship and the fundamental rights attached to it. However, despite the court's acknowledgement of the implications associated with the high fees, it still held that charging a fee and the level of fee was within the ambit of the executive's powers as conferred by statute.<sup>188</sup> *PRCBC* showcases that there is no statutory right to British citizenship without paying the high fee associated with the application process. Furthermore, it confirms that there is no common law right to citizenship. This decision in *PRCBC* showcases the executive's engagement in reorganising and designing Britain's immigration and nationality laws to serve its neo-colonial legacy since the onset of Britain's decolonisation.

The executive utilises the ambit of parliamentary sovereignty to pass legislation that achieves its neo-colonial framework, which legitimises its sovereignty over nationality, immigration, and border control. This requires the courts to operate within this constitutional framework. El-ENany argues that this has structurally limited judicial oversight of the executive's decision, pertaining to nationality and immigration control.<sup>189</sup> Consequently, Britain's bordering practices, which include the limits placed on the judiciary, appear to have led to many people living in the UK with an insecure status.<sup>190</sup> Yeo argues that the insecure status of some of these individuals can be attributed to the unaffordability of the high fees, which disproportionately affects the racialised poor.<sup>191</sup> Their poverty is a generational by-product of Britain's colonial framework that keeps them in a state of precariousness.<sup>192</sup> Consequently, this carries social and economic disadvantages that continue to keep them in precarity. Therefore, an argument to address the effects of racial injustice resulting from any of its immigration and nationality legislations will prove ineffective at the judicial level. This would require the

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<sup>186</sup> Ibid [5].

<sup>187</sup> Coram Children's Legal Centre, 'The fee barrier: can you afford the place you call home?' (Clcc, March 2018) <[https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/CCLC\\_The-fee-barrier\\_March2018.pdf](https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/CCLC_The-fee-barrier_March2018.pdf)> accessed 12 April 2022; (n7) 77-82.

<sup>188</sup> (n 114) [51].

<sup>189</sup> (n 13) 148- 149.

<sup>190</sup> (n 106) 191.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

UKSC to acknowledge and address the broader question of Britain's colonialism and those Acts which assisted in creating its neo-colonial framework. This framework has allowed Britain to cordon off its borders to retain all the wealth and resources appropriated from its colonialism.<sup>193</sup> This is exemplified by the executive's justification for currently profiting from Britain's neo-colonial framework that allows it to charge high fees. This has been justified on the grounds of providing access to the multiple benefits conferred in acquiring British citizenship, therefore resulting in a commodification of citizenship as property. Britain's neo-colonial framework has deployed high fees to restrict its racialised poor from accessing this newly commodified property; acquiring this property will allow them access to the 'multiple benefits' derived from Britain's colonial theft. This neo-colonial framework allows Britain to cater to its 'white Britain policy' that continues to benefit and provide for poor white Britons.<sup>194</sup> Therefore, the UKSC would be ill-equipped and unable to address the issue of racial injustice derived from Britain's colonial legacy and its current neo-colonial framework; it would be restricted by policy considerations, and the court would be required to rely on parliamentary intention to interpret statutes.<sup>195</sup> Consequently, it would be unable to interpret the IA 1971 and BNA 1981 for what they were: Acts of safeguarding colonial theft. Any contrary interpretation would call Britain's very existence as a sovereign state into question, and by implication, its own power of adjudication.

Britain's neo-colonial framework is held together by these contemporary invisible barriers. Its constitutional structure caters to this neo-colonial framework; this allows Britain to keep its racialised population in a state of precariousness. This is further exemplified by examining Britain's most potent neo-colonial tool within this framework: citizenship stripping.

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<sup>193</sup> (n 13) 5.

<sup>194</sup> *Ibid*, 215.

<sup>195</sup> *Ibid*, 148-149.

#### 4.4 Citizenship Deprivation

‘Earning the privilege’ to be British is based on flimsy grounds due to the presence, increase, and expansive use of UK’s citizenship deprivation powers. This appears indicative of Britain’s attempt to expand the notion of ‘probationary citizens’ from its would-be citizens (ILR & Permanent Residence [PR] holders) to its naturalised and British-born citizens with foreign connections. Citizenship deprivation’s origins in statute can be traced to the British Nationality and Status of Aliens Act (BNSAA) 1914.<sup>196</sup> Whilst the UK’s deprivation powers had always been constrained to its naturalised citizens, it has been expanded to incorporate British-born citizens (under limited circumstances) as a national security measure for Britain’s war on terror.<sup>197</sup> This section explores how Britain’s neo-colonial framework transformed British citizenship from an inalienable right to an ‘earned privilege’ that is conditional for some of its citizens due to its war on terror. Consequently, this conditionality will be examined through the UK’s modification of its citizenship deprivation powers. The modification of these powers post 9/11 has recreated structural inequality within its citizenship framework. Additionally, this section builds on the argument made above regarding the limitations of the judiciary in matters relating to nationality and immigration law. These limitations are further explored in the context of statelessness, which allows the executive to circumvent the checks and balances of the judiciary to prevent statelessness. Therefore, the expansion of the UK’s deprivation powers has allowed Britain to redeploy it as a neo-colonial tool under the guise of its war on terror.

##### (i) War on Terror

Reconceptualising British citizenship under BNA 1981 appears to have provided Britain with the neo-colonial framework to evolve its citizenship deprivation powers dynamically and incrementally since the events of

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<sup>196</sup> British Nationality and Status of Aliens Act (BNSAA) 1914 S.7

<sup>197</sup> Mark B. Salter, ‘When the exception becomes the rule: borders, sovereignty, and citizenship’ (2008) 12(4) Citizenship Studies < doi: 10.1080/13621020802184234 > accessed 06 May 2022.

9/11.<sup>198</sup> The substantial increase in Britain's use of these powers to combat the war on terror could be attributed to Britain's neo-colonial framework. Britain could only deprive its naturalised or registered citizens of their citizenship until the events of 9/11.<sup>199</sup> These events led to the passage of several Acts since 2002,<sup>200</sup> which have provided Britain with expansive deprivation powers. These powers now allow the deprivation of British-born citizens who have plural nationalities, or the potential to access another nationality so they are not rendered stateless.<sup>201</sup> The applicable tests for citizenship deprivation were altered along with these relevant Acts to make it easier for the executive to exercise these powers.<sup>202</sup> Additionally, the executive appears to pass ad-hoc legislation to circumvent any judicial victory (*Al-Jedda*<sup>203</sup> & *D4*<sup>204</sup>) that safeguards individuals from arbitrary statelessness.<sup>205</sup> *Al-Jedda* involved the deprivation of a naturalised citizen's nationality since he had let his Iraqi nationality lapse. The court found that he could not be made stateless under the current framework,<sup>206</sup> which resulted in the passage of the Immigration Act (IA) 2014.<sup>207</sup> Furthermore, it is recently evidenced by the victory in *D4*, which held that an individual cannot be deprived of their citizenship without being adequately notified of the deprivation decision.<sup>208</sup> Consequently, this resulted in the incorporation of S.10 Nationality and Borders Act 2022.<sup>209</sup> The current test allows the executive to deprive naturalised and British-born citizens of their citizenship,<sup>210</sup> even in circumstances that would render them stateless. British-born citizens can be rendered stateless if their conduct satisfied the 'conducive to public good' test, and the executive had reasonable grounds to believe the affected individual had another nationality or access to another.<sup>211</sup> Naturalised citizens can currently be made stateless if their conduct was seriously prejudicial to

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<sup>198</sup> Tufyal Choudhry, 'The radicalisation of citizenship deprivation.' (2107) 37(2) *Crt Social Policy* <<https://doi.org/10.1177/0261018316684507>> accessed 06 May 2022.

<sup>199</sup> *Ibid.*

<sup>200</sup> Nationality, Immigration and Asylum Act 2002; Immigration, Asylum and Nationality Act 2006; Immigration Act (IA) 2014

<sup>201</sup> CJ McKinney, 'How many people have been stripped of their British citizenship?' (*Freemovement.org*, 10 January 2022) <<https://freemovement.org.uk/how-many-people-have-been-stripped-of-their-british-citizenship-home-office-deprivation/>> accessed 15 May 2022.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Secretary of State for the Home Department (Appellant) v Al-Jedda (Respondent)* (Al- Jedda) [2013] UKSC 62

<sup>204</sup> *D4, R (On the Application Of) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department (D4)* [2022] EWCA Civ 33

<sup>205</sup> (n 13) 150.

<sup>206</sup> (n 199) UKSC 62 [32]; [34].

<sup>207</sup> Immigration Act (IA) 2014

<sup>208</sup> (n 202) EWCA Civ 33 [59].

<sup>209</sup> Nationality and Borders Act (NBA) 2022 s. 10

<sup>210</sup> BNA 1981 s 40

<sup>211</sup> *Ibid.*, s 40(2); s 40 (4A) ( c)

the vital interests of the UK, even if they do not have access to another citizenship.<sup>212</sup> This deprivation framework appears to create a tiered British citizenship structure. British-born citizens with no foreign link are classed as first-class citizens; naturalised and British-born dual citizens are classed as second-class citizens. This disproportionately affects its racialised citizens because of their potential foreign links. Britain's tiered citizenship structure appears to be reminiscent of the CIA 1968 and IA 1971 that reformulated the 'genuine link' with 'blood link' to exclude its racial citizens. The passage of various Acts that evolved deprivation powers to include British-born citizens with a foreign link appears indicative of Britain's neo-colonial framework, which is continuing the 'white Britain policy'.<sup>213</sup>

The *Begum* case concerned Shamima Begum, a British-born citizen, who travelled to Syria as a teenager to marry an ISIS soldier. She was deprived of her British citizenship by the executive in 2019.<sup>214</sup> Whilst the UKSC adjudicated on three appeals, the scope of this section will focus only on the court's decision to deny her permission to enter the UK, in order to challenge the deprivation of her citizenship.<sup>215</sup> This judgment shows how the interest of public safety supersedes the human rights (i.e., right to a fair and effective trial) attached to citizenship.<sup>216</sup> This judgment seemingly abandons the notion of citizenship being an inalienable human right for the canonised interest of national security. It is posited that Britain's war on terror can be attributed to its renewed emphasis on placing national security measures over individual human rights. Moreover, the judgment appears to suggest that British-born citizens can also be rendered stateless in circumstances where the executive's reasonable belief of their claim to another citizenship is thwarted.<sup>217</sup> Consequently, this adopted approach seems to disproportionately affect Britain's racial citizens (naturalised and British-born), which appears to continue El-ENany's racial place-making project that subsequently classifies them as second-class citizens. Britain's war on terror appears to be a guise for the ensuing racial terror within its

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<sup>212</sup> *Ibid*, s 40(4A)

<sup>213</sup> (n 13) 103- 121.

<sup>214</sup> *Begum (Respondent) v Secretary of State for the Home Department (Appellant) (Begum)* [2021] UKSC 7

<sup>215</sup> *Ibid* [3].

<sup>216</sup> *Ibid* [135].

<sup>217</sup> BBC, 'Shamima Begum will not be allowed here, Bangladesh says' *BBC* (21 February 2019) <<https://www.bbc.co.uk/news/uk-47312207>> accessed 12 April 2022.

borders; hostile immigration policies and exclusionary bordering practices have resulted in othering them.<sup>218</sup> In light of this, Begum's radicalisation occurred on British soil, and research attributes this to Britain's misguided 'bordering' policies that failed to effectively integrate individuals like Begum into British society.<sup>219</sup> In view of this, it seems inappropriate for the UK to discharge its responsibilities towards Begum to Bangladesh or Syria. Rendering her stateless would have a dual effect – the UK would breach its international obligations of good faith towards those nations<sup>220</sup> and would be allowed to continue its neo-colonial measures of exclusion towards those it deems 'undesirable'.

A potential justification for Britain's approach towards its naturalised citizens and British-born citizens like Begum could be derived from its failure to view her or others like her as capable of being 'fully British', due to their ethnic origins.<sup>221</sup> However, this conception of Britishness is antiquated, since there are no historical consistencies about Britishness, or even geographical certainty.<sup>222</sup> Prabhat offers a conception of Britishness and belonging, which appears to signify territorial connections or relational ones.<sup>223</sup> This could still satisfy the racialised citizens' 'genuine link' to Britain. However, the UK's citizenship deprivation powers have arguably been modified and expanded to catch its 'undeserving' racial citizens with a relational connection to the UK. This relational connection ('blood link') appeared to be the basis of Britain's neo-colonial framework under BNA 1981. Therefore, it may be better suited to use Hall's conception of Britishness: 'We – all of us – are still [empire's] inheritors'.<sup>224</sup> This conception reflects Britain more accurately by accounting for its colonial history. Hence, it encapsulates the multi-belonging and what it means to be British today, in contrast to the

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<sup>218</sup> Aisha Phoenix, 'Negotiating British Muslim belonging: a qualitative longitudinal study' (2019) 42(10) *Ethnic and Racial Studies* <doi: 10.1080/01419870.2018.1532098> accessed 10 May 2022.

<sup>219</sup> Arun Kundnani and Ben Hayes, 'The Globalisation of Countering Extremism Policies Undermining human rights, instrumentalising civil society: Research carried out by SOURCE (Societal Security) Network' (February 2018) <[https://www.tni.org/files/publication-downloads/the\\_globalisation\\_of\\_countering\\_violent\\_extremism\\_policies.pdf](https://www.tni.org/files/publication-downloads/the_globalisation_of_countering_violent_extremism_policies.pdf)> accessed 30 May 2022.

<sup>220</sup> Guy S. Goodwin-Gill, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law', paper (revised) presented at Middlesex University, 14 February 2014.

<sup>221</sup> (n 107) 192.

<sup>222</sup> Ann Dummett and Andrew Nicol, *Citizens, Subjects, Aliens and Others: Nationality and Immigration Law* (1<sup>st</sup> edn Weidenfeld and Nicholson, 1990) 53.

<sup>223</sup> (n 6) 56.

<sup>224</sup> Robert Saunders, 'Brexit and Empire: 'Global Britain' and the Myth of Imperial Nostalgia' (2020) 48(6) <doi: 10.1080/03086534.2020.1848403> accessed 20 April 2022

narrow outlook of the present British government that fails to accommodate multi-belonging.<sup>225</sup> However, Hansen argues the contrary by claiming that the UK already caters to multi-belonging in its permittance of citizens who have plural nationalities. On the other hand, Britain's evolution and expansion of its deprivation powers undermines his claim since it penalises the holders of plural nationalities by keeping them in a precarious state as migrant-citizens.<sup>226</sup> This claim is substantiated by Bauböck and Paskalev who argue that the possession of other nationalities would appear to go against Britain's notion of loyalty to state,<sup>227</sup> reiterating Britain's colonial legacy of giving with one hand but taking away more with the other.

#### 4.5 Conclusion

Modern British Citizenship was designed to be a conduit for Britain's neo-colonial framework. It allows Britain to design and deploy neo-colonial tools through this conduit, which sustains and expands its neo-colonial framework. Britain's increased use of these tools to border itself highlights the functionality of its neo-colonial framework. Moreover, Britain's continuous modification of its neo-colonial tools has expanded its framework to transform British citizenship from an inalienable right to an earned privilege, which is conditional for some. This conditionality was explained through the expansion of deprivation powers through ad-hoc legislation under the guise of Britain's war on terror. Consequently, this has recreated its tiered citizenship structure, and expands the notion of 'probationary citizens' from its would-be citizens (ILR & Permanent Residence (PR) holders) to its naturalised and British-born citizens with foreign connections, in its ongoing expression of neo-colonial legacy.

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<sup>225</sup> Audrey Macklin, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' In Rainer Bauböck, R. (eds), *Debating Transformations of National Citizenship*. IMISCOE Research Series. (Springer 2018) 169- 171.

<sup>226</sup> Pete J. Spiro 'The New International Law of Citizenship' (2011) 105 *American Journal of International Law* <<https://ssrn.com/abstract=1939374>> accessed 15 May 2022.

<sup>227</sup> Rainer Bauböck, Vesco Paskalev, 'Cutting genuine links : a normative analysis of citizenship deprivation' (2015) 30(1) *Georgetown immigration law journal* <http://hdl.handle.net/1814/42964> accessed 12 May 2022.

## **Chapter 5 – Conclusion**

This dissertation has highlighted that British Nationality was created under illusory promises of equality for Britain's racial population.<sup>228</sup> A chronological socio-legal approach showcased how Britain's immigration and nationality framework continues to be heavily influenced by the historical and political events surrounding its colonial history. Britain's populist movements framed exclusion as the basis of Britain's immigration control since its genesis in 1905, whereby the AA 1905 was enacted as a reactionary measure to curb the influx of migration into its borders.<sup>229</sup> Notably, Britain's decolonisation process coupled with the enactment of BNA 1948 led to the influx of racial migration from the commonwealth into its borders. However, the creation of British citizenship through BNA 1948 was superfluous because citizenship only formalised identical rights already afforded through subjecthood.<sup>230</sup> This dissertation has contended that British citizenship was created at the backdrop of its decolonisation to continue its expression of colonialism through "bordering" practices. Hence, the creation of British citizenship was neo-colonial – an ode to its colonialism.

Moreover, it is argued that the UK's constitutional framework has allowed various governments to continuously legislate and alter the immigration and nationality legislation which shield it from the checks and balances provided by the judiciary. This created a neo-colonial framework, which is underpinned by the creation of the 'Modern British citizenship' under BNA 1981. The Modern British Citizenship has currently been structured as a conduit for the UK to utilise neo-colonial tools, which exclude its racial population under the guise of war on terror. Importantly, the modification of deprivation powers has made it Britain's most potent neo-colonial tool. This tool has evolved to deprive even British-born citizens with foreign links. Thus, allowing Britain to recreate its tiered colonial citizenship structure. Thus, ensuing its colonial legacy of excluding racial peoples.

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<sup>228</sup> (n 62)

<sup>229</sup> (n 31)

<sup>230</sup> (n 3)

Whilst the focus of this dissertation was to show British Nationality as a neo-colonial tool and the resulting disproportionate effects for Britain's racial population, the current citizenship structure will affect anyone with a foreign link. The UK should approach its deprivation powers with caution, and refrain from exercising them in the expansive way to rid itself of people like Begum, who it considers undesirable.<sup>231</sup> Therefore, its current ability to exclude the 'undesirable' and 'undeserving' through its neo-colonial immigration framework showcases the right to British Nationality as an ode to its colonialism.

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<sup>231</sup> David Weissbrodt and Michael Divine, 'Unequal access to human rights: the categories of noncitizenship' in Katherine Tonkiss and Tendayi Bloom (eds), *Theorising Noncitizenship Concepts, debates and challenges* (Routledge 2017) 34-38.

## **Bibliography**

### **Statute**

Aliens Act (AA) 1905

British Nationality Act (BNA) 1948

British Nationality Act (BNA) 1981

British Nationality and Status of Aliens Act (BNSAA) 1914

British Nationality and Status of Aliens Act 1914

Commonwealth Immigrants Act (CIA) 1962

Commonwealth Immigrants Act (CIA) 1968

European Communities Act 1972

Immigration Act (IA) 1971

Immigration, Asylum and Nationality Act 2006

Nationality and Borders Act (NBA) 2022

Nationality, Immigration and Asylum Act (NIAA) 2002

Race Relations Act 1965

Race Relations Act 1968

Representation of People Act (RPA) 1983

### **Foreign Statute**

Canadian Immigration Act 1908

Canadian Multiculturalism Act 1988

### **Cases**

Begum (Respondent) v Secretary of State for the Home Department (Appellant) (Begum) [2021] UKSC 7

Calvin v Smith (Calvin) (1608) 77 ER 377

Pham v Secretary of State for the Home Department [2015] UKSC 19

PRCBC & O v SSHD [2022] UKSC 3

R (D4) v Secretary of State for the Home Department [2022] EWCA Civ 33

*Secretary of State for the Home Department (Appellant) v Al-Jedda (Respondent)* [2013] UKSC 62

## **International Cases**

Nottebhom case (second phase) [1955] ICJ Rep 1955

## **Journal Articles**

Bauböck R, 'Optional citizenship; articulation of interests and identities in naturalisations, Innovation' (1992) 5(2) The European Journal of Social Science Research < doi: [10.1080/13511610.1992.9968300](https://doi.org/10.1080/13511610.1992.9968300)> accessed 10 March 2022.

Bauböck R and Paskalev V, 'Cutting genuine links : a normative analysis of citizenship deprivation' (2015) 30(1) Georgetown immigration law journal <http://hdl.handle.net/1814/42964> accessed 12 May 2022.

Bevins Re, "'The people have no more love left for the Commonwealth": Media, migration and identity in the 1961-2 British smallpox outbreak'(2007) 25(3) Immigr Minor < doi:10.1080/02619280802407376> accessed 15 April 2022.

BMJ, 'The Census of The British Empire' (1906) 1 The British Medical Journal 748

Byrne B, 'Testing Times: The Place of the Citizenship Test in the UK Immigration Regime and New Citizens' Responses to it' (2016) 51 Sociology 323

Choudhry T, 'The radicalisation of citizenship deprivation.' (2107) 37(2) Crt Social Polocy <<https://doi.org/10.1177/0261018316684507>> accessed 06 May 2022.

Collier J.G., 'The Commonwealth Immigrants Act 1968 – A British Opinion.' (1969) 2

Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 457

Cooper G, L Blumell and M Bunce, 'Beyond the 'refugee crisis': How the UK news media represent asylum seekers across national boundaries' (2020) 3 the International Communication Gazette 195

Cosemans S, 'Undesirable British East African Asians. Nationality, Statelessness, and Refugeehood after Empire, Immigrants & Minorities' (2021) Immigrants & Minorities <DOI: 10.1080/02619288.2021.1967752 > accessed 25 March 2022

Fortier A-M, 'Afterword: Interrogation Naturalisation, naturalized uncertainty and anxious states' (2021) 21 Ethnicities <<https://doi.org/10.1177/14687968211001626>> accessed 05 May 2022

Hansen R, 'British Citizenship after Empire: A defence' (2000) 71(1) The Political Quarterly <<https://doi.org/10.1111/1467-923X.00278> > accessed 22 April 2022.

Hansen R, 'The Politics Of Citizenship in 1940s Britain: The British Nationality Act' (1999) 10(1) Twentieth Century British History <<https://doi.org/10.1093/tcbh/10.1.67> > accessed 15 March 2022.

Isin E.F., 'The neurotic citizen' (2004) 8 Citizenship Studies 217

Jones J.M., 'The Nottebhom case' (1956) 5 International and Comparative Law Quarterly

Khan K, 'Raciolinguistic border-making and the elasticity of assessment and believability in the UK citizenship process' (2020) 21 Ethnicities 333

Kimunguyi P, 'Echoes of Empire: racism and historical amnesia in the British media coverage of migration.' (2022) 9 *Humanit Soc Sci Commun* <<https://doi.org/10.1057/s41599-021-01020-4>> accessed 25 April 2022

Leeuw M. De, and Wichelen S. Van, 'Civilizing migrants: Integration, culture and citizenship' (2012) 15(2) *European Journal of Cultural Studies* < doi: 10.1177/1367549411432029> accessed 15 April 2022.

Naqvi Z.B, 'Coloniality, Belonging and Citizenship Deprivation in the UK: Exploring Judicial Responses' (2021) *Socio & Legal Studies* < <https://doi.org/10.1177/09646639211044294> > accessed 11 April 2022

Phoenix A, 'Negotiating British Muslim belonging: a qualitative longitudinal stud' (2019) 42(10) *Ethnic and Racial Studies* <doi: 10.1080/01419870.2018.1532098> accessed 10 May 2022.

Prabhat D, 'Unequal citizenship and subjecthood: a rose by any other name...?' (2020) 71(2) *NILQ* < <https://doi.org/10.53386/nilq.v71i2.321> > accessed 11 February 2022

Salter M.B., 'When the Exception Becomes the Rule: Borders, sovereignty, and citizenship' (2008) 12 *Citizenship Studies*

Saunders R, 'Brexit and Empire: 'Global Britain' and the Myth of Imperial Nostalgia' (2020) 48(6) < doi: [10.1080/03086534.2020.1848403](https://doi.org/10.1080/03086534.2020.1848403)> accessed 20 April 2022

Sloane R.D., 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 *Harvard Intl. Law Review*

Shohat E, 'Notes on the "Post-Colonial"' (1992) 31(32) *Social Text* < <https://doi-org.bris.idm.oclc.org/10.2307/466220>> accessed 15 March 2022.

Spiro J.P, 'The New International Law of Citizenship' (2011) 105 American Journal of International Law <  
<https://ssrn.com/abstract=1939374>> accessed 15 May 2022

Thomas M and A Thompson, 'Empire and Globalisation: from 'High Imperialism' to Decolonisation' (2013)  
36 Intl Hist Review 142

Tyler I, 'Designed to fail: A biopolitics of British citizenship' (2016) 14 Citizenship studies 61

### **Theses**

Knox R, 'A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to  
International Law' (PhD thesis, London School of Economics and Political Science 2014)

### **Books**

Arendt H, *The Origins of Totalitarianism* (2nd edn, Meridian Books 1958)

Blackledge A, *Discourse and Power in a Multilingual World* (1<sup>st</sup> edn, John Benjamin 2005)

Clayton G, *Immigration and Asylum Law* (7<sup>th</sup> edn, Oxford University Press 2016)

Dummett A and A Nicole, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (2<sup>nd</sup> ed.  
edn, Butterworths Law 1990)

Dummett A, *A Portrait of English Racism* (1<sup>st</sup> edition, Penguin 1973)

El-Enany N, *Bordering Britain: Law, Race and Empire* (1<sup>st</sup> edn, Manchester University Press 2020)

Fortier A-M, *Uncertain citizenship: Life in the waiting room* (1<sup>st</sup> edn, Manchester University Press 2021)

Garrard J.A., *The English and Immigration 1880-1910* (1<sup>st</sup> edn, Oxford University Press 1971)

Hampshire J, *Citizenship and Belonging: Immigration and the Politics of Demographic Governance in Postwar Britain (Migration, Minorities and Citizenship)* (1<sup>st</sup> edn, Palgrave Macmillan 2005)

Juss S.S., *Immigration, Nationality and Citizenship* (1<sup>st</sup> edn, Mansell Publishing 1993)

Landa, M.J., *The alien problem and its remedy* (1<sup>st</sup> edition, P.S. King & Son 1911)

Nkrumah K, *Revolutionary Path* (1<sup>st</sup> edn Panaf 1973)

Patterson S, *Dark strangers: A study of West Indians in London* (1<sup>st</sup> edn, Harmondsworth: Penguin 1965)

Prabhat D, *Britishness, Belonging and Citizenship: Experiencing Nationality Law* (1<sup>st</sup> edn, Policy Press 2018)

Spencer I.R.G., *British Immigration Policy Since 1939* (1<sup>st</sup> edn, Routledge 2010)

Walvin, J, *Passage to Britain: Immigration in British History and Politics* (1<sup>st</sup> edn, Penguin 1984)

Yeo C, *Welcome to Britain: Fixing Our Broken Immigration System Hardcover* (1<sup>st</sup> edn, Biteback 2020)

**Edited books**

Buettner E, 'Postcolonial Migrations to Europe' in Martin Thomas and Andrew S. Thomson (eds), *The Oxford Handbook of the Ends of Empire* (Oxford University Press 2018)

Macklin A, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' In Rainer Bauböck, R. (eds), *Debating Transformations of National Citizenship*. IMISCOE Research Series. (Springer 2018)

Weissbrodt D and Divine M, 'Unequal access to human rights: the categories of noncitizenship' in Katherine Tonkiss and Tendayi Bloom (eds), *Theorising Noncitizenship Concepts, debates and challenges* (Routledge 2017)

**Government information**

Government UK, 'Apply for citizenship if you have indefinite leave to remain or 'settled status' (*Gov.uk*, Date not given) < <https://www.gov.uk/apply-citizenship-indefinite-leave-to-remain> > accessed 17 May 2022

Government UK, 'Home Office immigration and nationality fees: 26 February 2022' (*Gov.uk*, Updated 6 April 2022) < <https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-26-february-2022> > accessed 17 May 2022

**Official publications – Briefings, reports, reviews and other papers**

Labour Party, 'The New Britain: 1964 Labour Party Election Manifesto' (1964) <<http://labour-party.org.uk/manifestos/1964/1964-labour-manifesto.shtml>> accessed 15 April 2022

Blunkett D, 'Secure borders, Safe haven: Integration with Diversity in Modern Britain', White Paper presented to parliament by the Home Office (2002)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/250926/cm5387.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250926/cm5387.pdf)> accessed 16 April 2022

Blitz B.K., 'Statelessness, protection and equality' Forced Migration Policy Briefing (2009)  
<<https://www.refworld.org/docid/4e5f3d572.html>> accessed 16 April 2022

Brown J, 'An early history of British race relations legislations' (July 2018). <  
<https://researchbriefings.files.parliament.uk/documents/CBP-8360/CBP-8360.pdf> > accessed 04 May 2022

Cantle, T, 'Community Cohesion: A Report of the Independent Review Team', Home Office (Date not Given)  
< <https://tedcantle.co.uk/pdf/communitycohesion%20cantlereport.pdf> > accessed 17 May 2022

Goodwin-Gill G.S., 'Mr Al-Jedda, Deprivation of Citizenship, and International Law', Paper presented at Middlesex University (revised 14 February 2014)

<<https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf>> accessed 17 May 2022

Home Office, ' Policy Paper Home Office immigration and nationality fees: 26 February 2022' (*Gov.uk*, Updated 30 May 2022) < <https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-26-february-2022> >accessed 12 June 2022.

Jolly, A., S Thomas and J Stanyer, 'London's children and young people who are not British citizens: A profile', Greater London Authority (2020)

<[https://www.london.gov.uk/sites/default/files/final\\_londons\\_children\\_and\\_young\\_people\\_who\\_are\\_not\\_british\\_citizens.pdf](https://www.london.gov.uk/sites/default/files/final_londons_children_and_young_people_who_are_not_british_citizens.pdf)> accessed 17 May 2022.

Kundnani A and Hayes B, ‘The Globalisation of Countering Extremism Policies Undermining human rights, instrumentalising civil society: Research carried out by SOURCE (Societal Security) Network’ (February 2018) < [https://www.tni.org/files/publication-downloads/the\\_globalisation\\_of\\_countering\\_violent\\_extremism\\_policies.pdf](https://www.tni.org/files/publication-downloads/the_globalisation_of_countering_violent_extremism_policies.pdf) > accessed 30 May 2022.

‘Life in the UK Test Pass Rates’, Garuda Publications 5 March 2017.

United Nations Human Rights Office of the High Commissioner, ‘OCHR and the right to a nationality’ (ohchr.org.) < <https://www.ohchr.org/en/nationality-and-statelessness> > accessed 19 April 2022

Williams W, ‘Windrush Lessons Learned Review’, Independent Review (March 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/874022/6.5577\\_HO\\_Windrush\\_Lessons\\_Learned\\_Review\\_WEB\\_v2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf)> accessed 4 April 2022.

### **Hansard and select committee reviews**

House of Commons Debate 18 April 1905, vol 145, col 468

### **Letters**

Letter from Director of Immigration and Nationality Policy Directorate (INPD) to Home Secretary (24 April 2002) <<https://publications.parliament.uk/pa/ld200506/ldlwa/60503wa1.pdf>> accessed 14 April 2022

## **Speeches**

Cameron D, Ex- Prime Minister, 'Radicalization and Islamic Extremism' (Speech at Munich Security Conference, 10 Downing Street, 5 February 2011) < <https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference> > accessed 16 April 2022

Johnson B, Foreign Secretary of State, 'Beyond Brexit: A Global Britain' (Speech at Chatham House, London, 2 December 2016) < <https://www.gov.uk/government/speeches/beyond-brexit-a-global-britain> > accessed 16 May 2022

Powel E, Member of Parliament, 'Rivers of Blood' (Speech at Conserving Association Meeting, Birmingham, 20 April 1968) < [https://anth1001.files.wordpress.com/2014/04/enoch-powell\\_speech.pdf](https://anth1001.files.wordpress.com/2014/04/enoch-powell_speech.pdf) > accessed 11 March 2022

## **Websites**

Coram Children's Legal Centre, 'The fee barrier: can you afford the place you call home?' (Clcc, March 2018) < [https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/CCLC\\_The-fee-barrier\\_March2018.pdf](https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/CCLC_The-fee-barrier_March2018.pdf)> accessed 12 April 2022.

Editorial, 'Shamima Begum will not be allowed here, Bangladesh says' BBC (London, 21 February 2019) < <https://www.bbc.co.uk/news/uk-47312207> > accessed 17 May 2022.

Government of Canada, 'Significant events in history of Canadians of Asian heritage' *Government of Canada* (Canada, No date Given) <<https://www.canada.ca/en/canadian-heritage/campaigns/asian-heritage-month/important-events.html>> accessed 29 April 2022.

Greenslade R, 'Newspapers publish anti-immigration stories - but what is to be done?' *Guardian* (London, 5 September 2016) <<https://www.theguardian.com/media/greenslade/2016/sep/05/newspapers-publish-anti-immigration-stories-but-what-is-to-be-done>> accessed 17 May 2022.

Jones N, R Marks, R Ramirez and M Ríos- Vargas, '2020 Census Illuminates Racial and Ethnic Composition of the Country', *United States Census Bureau* (USA, 21 August 2021) <<https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>> accessed 19 April 2022.

McKinney CJ, 'How many people have been stripped of their British citizenship?' (*Freemovement.org*, 10 January 2022) < <https://freemovement.org.uk/how-many-people-have-been-stripped-of-their-british-citizenship-home-office-deprivation/>> accessed 15 May 2022.

Slack M, 'At last, immigrants will be made to learn British history rather than how to claim benefits' *Mail Online* (11 October 2011) < <https://www.dailymail.co.uk/debate/article-2047885/UK-immigration-Cameron-test-British-history-claim-benefits.html> > accessed March 22 2022.

# EVALUATING THE FUNCTIONAL TEST FOR CAPACITY UNDER THE MENTAL CAPACITY ACT 2005 THROUGH THE LENS OF CONSENT TO SEXUAL RELATIONS, AND ITS IMPACT ON PEOPLE WITH DISABILITIES

Cristina Pinuaga\*

## ABSTRACT

*This paper explores the mechanisms in which the Mental Capacity Act 2005's functional test fails to adequately assess the mental capacity of people with disabilities. The Act, in the context of consent to sexual relations, operates and approaches capacity in ways inconsistent with contemporaneous perspectives. The exclusion of critical components that inform decision-making has resulted in an inaccurate representation of the course of decision-making for people with disabilities, and by extension, sexual relations. In evaluating the above, jurisprudence regarding the capacity to consent to sexual relations will be normatively analysed, and academic literature of the 2005 Act will be critically engaged with to ascertain what the next steps for the UK should be regarding the assessment of mental capacity.*

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## Introduction

The Mental Capacity Act 2005 (hereinafter “MCA”) is the principal piece of legislation that oversees the rights enjoyed by incapacitated people and the duties and responsibilities owed to them by medical professionals and the courts. It is an important piece of legislation since the exercise of legal capacity in certain areas of life is, particularly for adults with disabilities, subject to having mental capacity. These range from decisions relating to medical treatment to financial decisions. The context in which it was passed instigated the dire need for a piece of statute which would aid medical professionals in knowing how to act in the gaps left unsettled by the common law.<sup>2</sup> At the time, the MCA was classified as a spearheading statute that would modernise the outlook on the legal status of mentally disabled adults within the existing paradigm of capacity law.<sup>3</sup> However, with the emergence of newer and more inclusive approaches, increasing calls from within politics and academia advocate for reforming aspects of the statute to accommodate more adequate approaches to treating mental incapacity in the law.

The notion of capacity, both on a social and judicial level, is a matter of complexity and sensitivity, given that it intersects with intricate medico-legal principles, namely autonomy and consent. *Prima facie*, the principle of autonomy is hard to reconcile with some of the powers of the Act itself, which generally operates on a substitute decision-maker paradigm. Critics often point out contested infringements of rights contained in the European Convention of Human Rights (ECHR),<sup>4</sup> in particular Articles 5, 10 and 14 entrenched in the Human Rights Act 1998 (HRA).<sup>5</sup> The reality is that adults with mental disabilities are subject to certain legal barriers which inhibit their exercise of legal agency that people with full capacity seldom face. The definition given by the British Medical Association to the right to autonomy as one of ‘competent adults to make informed decisions about their own medical care’<sup>6</sup> has further solidified that autonomy will often be contingent on the

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<sup>2</sup> Emily Jackson, *Medical Law: Texts, Cases, and Materials* (6th edn, OUP 2022) p258.

<sup>3</sup> Peter Bartlett, ‘At the Interface Between Paradigms: English Mental Capacity Law and the CRPD’ (2020) 11 *Front. Psychiatry* 2

<sup>4</sup> European Convention on Human Rights 1950

<sup>5</sup> Human Rights Act 1998, Schedule 1.

<sup>6</sup> ‘Autonomy or Self-Determination as a Medical Student - Ethics Toolkit for Medical Students’ (2020) British Medical Association <https://www.bma.org.uk/advice-and-support/ethics/medical-students/ethics-toolkit-for-medical-students/autonomy-or-self-determination> accessed 28 February 2023.

notion of capacity. Consent, moreover, is a principle equally as inherent to any interaction in the medical field. The presence of consent, or lack thereof, will strike the finest balance between fulfilling a medical objective and committing a criminal offence (*R v Brown*).<sup>7</sup> In the judicial field, it was only in 2021 that capacity to consent to sexual relations reached the Supreme Court (“SC”), which was described as a ‘difficult area’ where ‘an apparent conflict of judicial opinion’<sup>8</sup> persists.

What this essay seeks to dissect is precisely these divided opinions expressed by the judges tasked with ruling on this matter, undertaking an overall evaluation of the statute itself and its application in the common law. Thus, this paper will be divided into three different chapters. The first chapter will break down the relevant statutory provisions, identifying the different sources of judicial friction, and the specific provisions accused of perpetuating discriminatory outlooks on people with disabilities. The second chapter will then disseminate some of the key authorities, by giving a normative analysis of the application of the test for capacity and the rationales employed in judicial decision-making post-MCA. The final chapter will consider some of the overarching criticisms of the Act, and the plausibility of academic commentary and suggestions for reform, in the hope of critically analysing whether the current law’s direction is adequate or change is due.

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<sup>7</sup> *R v Brown* [1993] UKHL 19, [1994] 1 AC 212.

<sup>8</sup> *IM v LM* [2014] EWCA Civ 37 at [2] (Leveson P).

## **Chapter 1: The Legislative Framework**

As discussed above, the introduction of the MCA into the legal system was an awaited entrance following decades of uncertainty and discriminatory categorisations of people with mental disabilities. Currently, disability (including mental disability) is a protected characteristic under the Equality Act 2010,<sup>9</sup> and while there is no right to sexual freedom per se, it is widely regarded as included in the right to private life held in the ECHR.<sup>10</sup> It is also important to note that, whilst this paper is only concerned with the aspects of the Act relating to the test for capacity, the Act bears wide-ranging powers regarding the lives of incapacitated adults. Before analysing the definitions, tests and the court's approaches, it is imperative to interrogate the purposes of the MCA, and the underlying principles that dictate the interpretation of the Act. The Code of Practice for the Mental Capacity Act 2005 provides that the statutory principles 'aim to assist and support people who may lack capacity to make particular decisions, not to restrict or control their lives'.<sup>11</sup> Set out in the first section of the Act, the relevant statutory principles are the following: the presumption of capacity (unless established otherwise); only treating someone as unable to make decisions if all practicable steps to help them do so have failed; the ability to make unwise decisions; decisions on behalf of an individual being made in their "best interests"; and opting for the least restrictive course of action for the individual.<sup>12</sup> These principles, which introduce the Act, lay the foundation for all decision-making done on behalf of someone who lacks capacity. Despite aiming to protect an individual's autonomy, these principles (and in particular, the "best interests" principle) have been subject to criticism for their underwhelming and somewhat deceiving outcomes. The United Nations Committee on the Rights of Persons with Disabilities has elucidated that acting in an individual's "best interests" is not an appropriate safeguard since it does not ensure legal capacity and allows too much scope for their 'will and preferences' to be overridden.<sup>13</sup> The Code of Practice for the Act itself mentions that as much as their 'wishes and feelings' are considered, 'the final decision must be based entirely

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<sup>9</sup> Equality Act 2010, Section 6.

<sup>10</sup> ECHR (n3) Article 8.

<sup>11</sup> Mental Capacity Act Code of Practice, p24 at [2.1].

<sup>12</sup> Mental Capacity Act 2005, Section 1.

<sup>13</sup> UN Committee on the Rights of People with Disabilities, 'General Comment No. 1' (2014) CRPD/C/GC/1 at [21].

on what is in the person's best interests'.<sup>14</sup> However, extensive case law demonstrates just how often decisions made on behalf of an individual in their "best interests" are paradoxically made directly against that person's wishes. This explains why the extent of the actual protection that the statute offers to the people subject to it is often questioned. As a result, many cannot rely on it as a guarantee that their wishes will be fulfilled by those making decisions on their behalf. At the outset, mistrust and scepticism from human rights experts plague the principles, so judges must balance with their potential intrusion of autonomy. Hence, it cannot be confidently argued that legislation that fails to understand and protect the needs and wants of those subject to its powers is one that promotes autonomy, consent, and freedom of action.

The basis for analysis in this paper, however, is the test for capacity. There are two stages to this test, the first often being referred to as the "diagnostic" threshold.<sup>15</sup> This is stipulated in Section 2(1) of the Act, which states that:

a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.<sup>16</sup>

Section 3 of the Act formulates the second stage - the "functional" test. It stipulates four conditions that an individual must be unable to satisfy in order to be regarded as unable to make a decision for themselves:

- a) To understand the information relevant to the decision,
- b) To retain that information,

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<sup>14</sup> MCA Code of Practice (n10) 5.38.

<sup>15</sup> Mental Capacity Act 2005 Explanatory Notes, 22

<<https://www.legislation.gov.uk/ukpga/2005/9/notes/division/6/1/2?view=plain#:~:text=This%20sets%20out%20the%20test,the%20decision%20making%20process%20itself>> Accessed 21 March 2023.

<sup>16</sup> Mental Capacity Act 2005, Section 2(1).

- c) To use or weigh that information as part of the process of making the decision, or
- d) To communicate his decisions (whether by talking, using sign language or any other means).<sup>17</sup>

This is the test which assesses the capacity to engage in a decision-making process,<sup>18</sup> and is the one this essay will focus on. It operates on the premise that understanding and retaining relevant information will not amount to capacity, unless that information can be used or weighed to arrive at a decision, which can subsequently be communicated. Capacity under this test is assessed on a decision-specific basis, as it is evaluated only *at the material time* of the decision being taken. The functional approach adopted by this test is a deliberate choice - Lord Stephens, sitting in the Supreme Court, illustrated the two other approaches to the question of capacity considered by the Law Commission pre-MCA: the “outcome” approach and the “status” approach.<sup>19</sup> Both approaches, it was concluded, were either misaligned with the policy aim of preserving as much autonomy as possible for incapacitated adults, or penalis[ing] individuality and demand[ing] conformity at the expense of personal autonomy’, respectively.<sup>20</sup> The functional approach was understood to be the one which, to the furthest extent, preserves the most autonomy for the individual. Crucially, it also takes into account the fluctuation of the notion of capacity, meaning that, for example, a person may be deemed to have capacity to make decisions as to who they are in contact with, but not to consent to sexual relations. That being said, this approach, in spite of being regarded as the most appropriate, has not been exempt from criticism, which will be further explored in Chapter 3.

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<sup>17</sup> Ibid Section 3(1).

<sup>18</sup> MCA Explanatory Notes (n14) 26.

<sup>19</sup> *A Local Authority v JB* [2021] UKSC 52 at [57] (Lord Stephens).

<sup>20</sup> Law Commission, *Mental Incapacity* (Law Com No 231, 1995) (HC 189) p33.

## Chapter 2: Jurisprudential Analysis

Since the passing of the Act, courts in England and Wales have had the opportunity to engage with the question of capacity in the context of consent to sexual relations in a new light, and judges have been tasked with ruling within the scope of the Act as well as with having due regard to the statutory principles stipulated in Section 1. This chapter will analyse the conflicted areas within the common law to evaluate whether the current law affords due respect and equality to people with disabilities.

### (i) ‘Issue-Specific’ vs ‘Situation-Specific’ Approach

The approach to be taken when assessing one’s capacity has so far extensively yielded controversial jurisprudence. While the MCA itself and its Code of Practice state that the test should be applied on a “decision-” or “issue-specific” basis, (non-binding) statements made by Baroness Hale in the House of Lords have contested this assumption.<sup>21</sup> For the sake of practicality, Leveson P in *LM v IM* identifies and names the two apparent lines of thought as pertaining to either Munby J or Baroness Hale, although particularly the former have been endorsed and adopted by other judges.<sup>22</sup> Munby J’s approach, preceded by a lineage of cases ranging from capacity to consent to marriage, to consent to sexual relations, is that of the “issue-specific” approach.<sup>23</sup> This approach assesses one’s capacity to consent on a general basis, not taking into consideration any information regarding the situation sexual relations would arise in, or the person with whom the activity would happen. Baroness Hale’s “situation-specific” approach was put forward in *Regina v Cooper*,<sup>24</sup> a criminal case concerning the prosecution of an individual for an offence under the Sexual Offences Act 2003, where she controversially stated that ‘it is difficult to think of an activity which is more person- and situation- specific than sexual relations’ and that ‘[o]ne does not consent to sex in general’.<sup>25</sup> These two opinions, seemingly at odds with each other, were reconciled by Leveson P, due to the fact that they were made in

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<sup>21</sup> *Regina v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786.

<sup>22</sup> *IM v LM* (n7) at [65].

<sup>23</sup> *Re MM; Local Authority X v MM & KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443; *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 968.

<sup>24</sup> *Cooper* (n20).

<sup>25</sup> *Ibid* at [27].

different contexts, and that the situation-specific test could only reasonably be applied in a criminal case, ie. retrospectively. He further asserted that it would be practically impossible to carry out any assessment that is not approached on ‘a general and non-specific basis’ in a civil context. Indisputably, each system is equipped to address matters of law in different ways, either retrospectively or prospectively. The Court of Appeal correctly identified that, since criminal law seeks to rule retrospectively, an approach that includes details about the other person, and a nuanced analysis of the intricacies of the crime, is necessary. Civil rulings on capacity must judge whether someone has the capacity to consent to sexual relations on a general basis. The practical rationale being that, judges cannot individually vet every partner an individual seeks to engage in sexual relations with, as such an evaluation would result in an unnecessary, long-term undertaking, also arguably crossing the line into an unethical intrusion into a person’s private life. This logic however, excuses a flagrantly reductionist approach which denies consideration of factors (such as sexual partners) inherent to informing decision-making. While the test will probably remain act-specific and not person-specific, more efforts must be made to not arbitrarily abstract potential sexual relations and recognise the influence of these factors.

Key to contextualising this conflict are the implications of Section 3(4) of the Act, which prescribes that ‘information relevant to a decision includes information about the reasonably foreseeable consequences’ of the outcome of the decision.<sup>26</sup> In the context of sexual relations, what should be conceived as reasonably foreseeable consequences? This is a complex question with no straightforward answer. Creating an exhaustive list would be impractical, unrealistic, and an attempt to trivialise something as layered and intuitive as the decision-making process behind engaging in sexual relations. To engage in this matter, the starting point is often taking as a reference what people of full capacity consider. Leveson P in *IM v LM* argued at [81] that a ‘refined analysis’ of the reasonably foreseeable consequences is not one that ‘inform[s] the decision’ of someone of full capacity.<sup>27</sup> He then expanded his point by stating that the information people of full capacity

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<sup>26</sup> Mental Capacity Act Section 3(4).

<sup>27</sup> *IM v LM* (n7).

tend to consider relevant when deciding to consent to sexual activity is ‘relatively limited’.<sup>28</sup> Herring and Wall have disputed this, asserting that this statement is open for question.<sup>29</sup> Not only does the judge offer no tangible evidence to support his claim, he is also making a wide generalisation, implying that when people engage in sexual activity, it is the exception to the rule that they might consider wide-ranging pieces of information to inform their decision. It is crucial to understand that ‘the identity of the person and the nature of the act’ are inevitably going to alter the circumstantial elements that make up a potential sexual interaction,<sup>30</sup> and that on a theoretical level, the issue-specific approach fails to take into account these external factors that influence the decision-making process.

Returning to Baroness Hale’s speech, one consents to sex with a particular person, in a particular place, at a particular time.<sup>31</sup> All these other factors, as seen above, have been considered to be part of a ‘refined analysis’. This illustrates the fundamental flaw with approaching capacity in this context on an “issue-specific” basis: requiring no more than a basic understanding of the mechanics of sexual relations, and using or weighing consequences as far as the risk of pregnancy or STIs, is purposefully neglecting the influence that social and environmental factors have on the decision-making process. To exclude from the assessment their capability to be influenced by external or emotional cues, while solely placing focus on the cognitive, procedural decision-making capacity of an individual is intrinsically a reductionist and discriminatory approach. Doyle has argued that the application of this test is ignorant to ‘the variety of pressures and influences’ faced by these individuals, which may be ‘unappreciable from a cognitively ableist perspective’.<sup>32</sup> Feminist theorists have expanded on this argument, claiming that it is a dangerous and discriminatory decision to strip a sexual encounter from its context, consequently removing from the equation all external factors that may inform potentially incapacitated individuals’ decision-making, beyond their rudimentary understanding of the

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<sup>28</sup> Ibid at [82].

<sup>29</sup> Jonathan Herring, Jesse Wall, ‘Capacity to Consent to Sex’ (2014) 22 Med L Rev, 620, 624.

<sup>30</sup> Ibid (n28) 626.

<sup>31</sup> *Cooper* (n20) at [27].

<sup>32</sup> Suzanne Doyle, *The Notion of Consent to Sexual Activity for Persons with Mental Disabilities* (2010) 31 Liverpool L Rev 111, 121.

mechanics of sex or the risk of contracting STIs.<sup>33</sup> This bears more weight in cases regarding allegations of abuse, or rape, where there is an existing power dynamic. Thus, judges are precluded from obtaining a nuanced and well-rounded view of the situation, given that the very framework under which they evaluate people with disabilities' perceived "consent" lacks an understanding of the key intricacies of how they often engage in decision-making processes. This often results in the somewhat paradoxical occurrence in the courts of balancing emotional and instinctive drive with rational choice. Judges will afford limited or null importance to the emotional forces that take place when discussing an individual's capacity to consider reasonably foreseeable consequences. Accordingly, the considerations generally accounted for informing one's decision-making risks being overly rational, resulting in a mismatch between reality and judicial evaluation. Hayden J, in *Tower Hamlets v NB*, took the chance to reconcile this and acknowledged that a sexual encounter cannot be fully stripped of its circumstances, for similar reasons as the above explained, while still retaining the prescribed test.<sup>34</sup> He held that instinct and emotion, however much they may 'eclips[e] ... calculation of risk', are 'central to sexual impulse', and that to exclude them from the evaluation is to formulate an entirely artificial rationality.<sup>35</sup> He then emphasised, in his concluding remarks, the need to apply an "act specific" test (as opposed to a "person specific" test) which 'accommodates [the individual] and [their] individual circumstances',<sup>36</sup> embracing the fact that the (majoritarily) intellectually disabled individuals dealt with by the Court of Protection ("CoP") are equally as 'rich' in 'personality and circumstances'.<sup>37</sup> All in all, to blatantly ignore this fact, and to insist on projecting strictly rational and inflexible approaches to something as complex as sexual relations will continue to render them as artificial, as well as lose sight of the very purposes of the Act.

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<sup>33</sup> Nicola Lacey, 'Unspeakable subjects feminist essays in legal and social theory' (1998) Oxford: Hart.

<sup>34</sup> *London Borough of Tower Hamlets v NB and AU* [2019] EWCOP 27 (Hayden J).

<sup>35</sup> *Ibid* [29].

<sup>36</sup> *Ibid* [64].

<sup>37</sup> *Ibid* [66].

**(ii) *A Local Authority v JB***

Having scrutinised a number of cases and engaged with the main issues surrounding the test for capacity, the only Supreme Court ruling on capacity to consent to sexual relations to date will now be analysed. In *A Local Authority v JB*, Lord Stephens engaged with the critical question of whether it is a necessary component of capacity to consent, to know and understand that both the individual in question as well as their sexual partner have the ability to give or withhold their consent. This case concerned a local authority who sought to obtain declarations of capacity (for a number of matters) regarding a man (JB) with Asperger's. Records submitted to the court indicated that JB had a concerning history of 'violent and inappropriate sexual behaviour' towards women in particular. The first appeal was raised by the local authority after the CoP declared that the 'absent consent of a sexual partner' was not 'information relevant to the decision' for the purposes of Section 3(1) of the Act.<sup>38</sup> In the Court of Appeal, Baker LJ recast the relevant "decision" to "engaging in" sexual relations as opposed to "consenting to" them. He accurately argued that by looking at the question in those terms, the other person being able to consent, and such consent being present, is necessarily 'information relevant to the decision', adding that

[a] person who does not understand that sexual relations must only take place when, and only for as long as, the other person is consenting is unable to understand a fundamental part of the information relevant to the decision whether or not to engage in such relations.<sup>39</sup>

Upon a further appeal from JB, the Supreme Court upheld Baker LJ's ruling that information relevant to the decision does include the other person's ability to consent and their consent being present throughout.<sup>40</sup> This decision is indisputably correct. It would have set a wildly dangerous precedent to require no understanding of the notion of mutual consent in cases concerning capacity. Lindsey and Harding, who undertook an

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<sup>38</sup> *A Local Authority v JB (Capacity: Consent to Sexual Relations and Contact with Others)* [2019] EWCOP 39 at [87] (Roberts J).

<sup>39</sup> *Re JB (Capacity: Sexual Relations)* [2020] EWCA Civ 735 at [94] (Baker LJ).

<sup>40</sup> *JB* (n18) at [121] (Lord Stephens).

evaluation of case laws concerning sexual relations in the CoP, shared that a significant number of cases concerning sexual capacity involve allegations of abuse in some way or another, specifically in 18 out of the 20 cases they reviewed.<sup>41</sup> This contextualises the *JB* decision and sheds light on just how fundamental the notion of consent is, especially when contrasted with the further finding that almost every case regarding sexual capacity since 2016 (both in the CoP and CA) has involved allegations of exploitation or abuse in some capacity.<sup>42</sup> While it is a matter for celebration that the Supreme Court has established a forward-facing precedent regarding how to assess capacity to consent to sexual relations, their jurisprudential review found only one case (out of ten) that implemented the consent requirement stipulated by Lord Stephens.<sup>43</sup> A consent-focused test for capacity, which Lindsey and Harding advocate for, has been described as potentially raising the threshold for people subject to it, since it adds another requirement to the existing test. However, understanding what consent is and knowing that either party should be able to communicate their consent (or lack thereof) is an inherent element of engaging in sexual relations that should be established regardless of the capacity of who is involved. Arguably, it would also add an additional safeguard for the allegations of abuse that appear to be commonplace in these scenarios. The overemphasis on medicalised risks of pregnancy and contracting STIs are undeniably important and should be central to what reasonably foreseeable consequences should be envisaged, as per Section 3(4). However, this often comes at the expense of other risks such as abuse and exploitation, which is worrying considering that, according to the Office for National Statistics in 2016, people with long-term illnesses or disabilities are twice as likely than those without to be victims of domestic abuse.<sup>44</sup> It is hopeful to see that judgements such as that of *JB* and *NB* (both handed down in the last 4 years) have placed an increased focus on the importance of consent, as well as the sexual health risks which are already prevalent. However, these efforts must continue in the following years in order to afford

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<sup>41</sup> Jaime Lindsey and Rosie Harding, 'Capabilities, Capacity, and Consent: Sexual Intimacy in the Court of Protection' (2021) 48 (1) *Journal of Law and Society* 60, 70.

<sup>42</sup> *Ibid* 71.

<sup>43</sup> *Ibid*.

<sup>44</sup> Office for National Statistics (ONS), 'Intimate Personal Violence and Partner Abuse' (2016) *Crime Survey for England and Wales*, 16.

incapacitated people contemporaneous approaches to sexual relations that reflect the fundamental importance placed on values like consent and autonomy.

### Chapter 3: Academic Discussion and Critique

The overarching sentiment expressed by most academics who have explored the jurisprudence relating to consent to sexual relations, and indeed other areas, is that the current test stipulated in Section 3 is simply underwhelming, or inadequate. It does not adequately grapple with the sensitive and nuanced surroundings of sexual relations or provide a comprehensive understanding of the needs and wants experienced by people with disabilities. Importantly, the statute must go beyond being “adequately written”, ‘[its] strengths must also be reflected in beneficial changes to the lives of people on the ground’.<sup>45</sup> The Select Committee on the MCA undertook a review of the Act in 2014, where multiple testimonies highlighted how people with disabilities had been failed by the powers of the Act.<sup>46</sup> The report exposed numerous issues experienced relating to the application of the test in Section 3 and the use of statutory principles *outside* the courts. Witness statements indicated that ‘a lack of capacity was sometimes assumed in order to justify a decision made by the local authority’,<sup>47</sup> in order to reduce expenditure, or that medical practitioners often avoided carrying out the test themselves in fear of their findings being ‘tested’ in the courts,<sup>48</sup> highlighting the unfortunate yet common disputes between legal professionals and medical experts in the courts.<sup>49</sup> Similar experiences were reported regarding the “best interests” principle, which was concluded to be often misused and misinterpreted to enforce “clinical decisions” that gave way to paternalistic decision-making.<sup>50</sup> Concluding the report was the finding that there appeared to be no single organisation or body who bears the overall responsibility for the Act and its implementation.<sup>51</sup> All of the above testimonies and findings solidify the fact that, if the implementation of the Act is subpar at the level of medical practitioners and patients, these failings will only be amplified as they enter the judicial realm. Since the publishing of the report, minimal efforts from the Government to take on board the Select Committee’s recommendations for improvement have resulted in the

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<sup>45</sup> Bartlett (n2) 9.

<sup>46</sup> Mental Capacity Act Select Committee, ‘Mental Capacity Act 2005: post-legislative scrutiny’ (HL 2013-2014).

<sup>47</sup> Ibid para 65.

<sup>48</sup> Ibid para 62.

<sup>49</sup> Robin Mackenzie, John Watts, ‘Capacity to Consent to Sex Reframed: IM, TZ (No 2), the Need for an Evidence-Based Model of Sexual Decision-Making and Socio-Sexual Competence’ (2015) 40 International Journal of Law and Psychiatry 50, 65.

<sup>50</sup> MCA Committee (n45) para 90.

<sup>51</sup> (n45) para 113.

perpetuation of poor use and understanding of how the Act is to be enforced, inevitably coming at the expense of vulnerable adults and people with disabilities.

This discussion leads to the lingering question that surrounds this statute and capacity law more generally, of whether the MCA unfairly discriminates against people with disabilities. At the heart of this issue is the MCA's compliance with the United Nations Convention on the Rights of Persons with Disabilities (CRPD),<sup>52</sup> which the UK ratified in 2009. General Comment No. 1 ("GC1"), issued by the Committee on the Rights of Persons with Disabilities, severely disapproved of the functional approach to capacity embodied by the legislation. Its first criticism related to how its application is discriminatorily targeted towards people with disabilities.<sup>53</sup> This is not an uncommon label for the test, which has also been deemed as allowing "indirect discrimination", which is regarded as prohibited conduct under Section 19 of the Equality Act. Grace argues that, while in principle the test is 'persuasive', the way in which capacity is examined practically 'isolates the assessed individual from their decisional support network', which he argues offers an erroneous view of what autonomy consists of.<sup>54</sup> He claims that this method of assessment provides only a partial representation of an individual's capacity, since there is no regard for their support network, or ability to engage with external influences. Returning to the "issue-specific" versus "situation-specific" conflict, by excluding from the assessment external influences, the concept of autonomy is inevitably reduced to an 'overly individualistic conception',<sup>55</sup> which in turn labels people with disabilities even more likely to be deemed incapacitated. This view of autonomy does not adequately facilitate the statutory aim of maximising the ability of disabled individuals to make their own decisions, since often, as certain disabilities inevitably require individuals to rely on external support more than the average person, which is an ability they cannot count on for the purposes of this test. It would be a misrepresentation to allege that fully capacitated people make decisions exclusively

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<sup>52</sup> UNGA A/RES/61/106 'Convention on the Rights of Persons with Disabilities' (2007).

<sup>53</sup> General Comment No. 1 (n12) para 15.

<sup>54</sup> Matthew Grace, 'Do Mental Capacity Laws Unfairly Discriminate Against People with Disabilities?' (2018) 9 *Journal of Undergraduate Research* 43, 44.

<sup>55</sup> *Ibid.*

through their internal cognitive ability as opposed to with (to varying extents) the advice and guidance provided by the people they trust and turn to. The weight of this support network becomes greater in the case of people with mental disabilities. Grace thus advocates for a more inclusive test for assessing capacity in a more holistic manner, that has due regard to external factors affecting an individual's life and consequently, their decision-making capacity.<sup>56</sup> While his suggestion is put forward through a relational autonomy perspective, in the context of consent to sexual relations, this would successfully take place through the manifest inclusion of environmental factors that influence decision-making processes into the assessment of capacity, which more accurately reflects the practical reality of the decision-making process and is overall a more reliable test.

The Committee's second criticism was that the functional test operates on the assumption that capacity is a quality that can be objectively assessed, and when found to be lacking, the outcome is to deny individuals their right to exercise *legal* capacity.<sup>57</sup> As pointed out by Martin, an important caveat is that, in ratifying the CRPD and its Optional Protocol, the UK became bound to the Convention, not to the *Committee's* interpretations of the CRPD, which is what GC1 expresses.<sup>58</sup> While the Convention itself makes no judgement on whether capacity is objective or not, the Committee claims capacity is contingent on 'social and political contexts'. While this is a true statement, for it to hold up the claim that capacity cannot be objectively assessed it would have to also be true that, if something is contingent on the above contexts, it *cannot* be objective.<sup>59</sup> Martin et al. have discussed that, in acknowledging that socio-political factors have an important impact on the lives of people with disabilities, the difference between being able to make decisions and not, is an objective one.<sup>60</sup> Of course, this objective difference can only be upheld by extensive research and reducing malpractice on both a judicial and clinical level. Notably, it is important not to forget the first statutory

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<sup>56</sup> Ibid 45.

<sup>57</sup> General Comment No. 1 (n12) para 15

<sup>58</sup> Wayne Martin, 'The MCA under Scrutiny: Meeting the Challenges of CRPD Compliance' (2015) 5 (1) The Elder Law Journal 32, 35.

<sup>59</sup> Wayne Martin et al., 'Achieving CRPD Compliance...' (September 2014) The Essex Autonomy Project 22.

<sup>60</sup> Ibid 21.

principle – the presumption of capacity. Where evidence suggests an individual lacks capacity, such evidence (even if subject to the functional test and its flaws) will be the objective proof of incapacity under current English law. However, in its absence, presumption of capacity should prevail, in cases where it is either apparent or unobvious. In terms of the MCA’s denial of legal capacity to those labelled mentally incapacitated, so as to render their legal agency null, it is important to refer to Martin’s statement that the UK, or any other State Party, is fundamentally bound to the Convention – which does not define, or require, active legal capacity at any point. Hence, while the Committee does raise important points regarding the ability to exercise such agency, as far as the CRPD goes, the UK is largely within its bounds. Nonetheless, it is clear that the MCA in its present form must be cautiously applied in order to not constitute outright discriminatory practice. It cannot be reasonably said that the judges and medical practitioners tasked with its application purposefully disregard the needs of people with disabilities, as much as infringements upon their autonomy are produced. However, in support of the House of Lords’ report, it is apparent that widespread training on the application of the Act must be enforced, and the functional test altogether must be reconsidered and contrasted to modern practice and policy.

## **Conclusion**

The evaluation of the different conflicting judicial opinions regarding the functional test, viewed through the lens of consent to sexual relations, has revealed the apparent disconnection between the law and reality. As argued by the critics, people with mental disabilities rely on a multitude of factors to inform their consent, and engage in decision-making processes. The test, by adopting an exclusive assessment of the cognitive element of the process and excluding considerations beyond this, fails to observe the whole picture, thus running the risk of being labelled as discriminatory and misguided. Most recently, judicial opportunities to rule on this matter have been positive, yet, while it is important to acknowledge these improvements, more effort is required to afford people with disabilities due respect and legal equality. The statute is in need of review, with the aim of reformulating a test which adequately captures the internal and external factors that inform one's decision to engage in sexual relations, and that embodies the well-established values of autonomy and consent as intrinsic to the capacity to consent to sexual relations.

## **Bibliography and References**

### **Case Law**

*A Local Authority v JB* [2021] UKSC 52

*IM v LM* [2014] EWCA Civ 37

*London Borough of Tower Hamlets v NB and AU* [2019] EWCOP 27

*R v Brown* [1993] UKHL 19, [1994] 1 AC 212

*R v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786

*Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549, (Fam) [2011] Fam 61

*Re C (Adult Refusal of Medical Treatment)* [1994] 1 All ER 819; [1994] 1 WLR 290, 295

*Re: M (an Adult) (Capacity: Consent to Sexual Relations)* [2014] EWCA Civ 37

*Re MB (Medical Treatment)* [1997] 2 FLR 426

*Re MM; Local Authority X v MM & KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443

*Re T (An Adult) (Refusal of Medical Treatment)* [1992] 4 All ER 649

*X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 968

### **UK Legislation**

Human Rights Act 1998

Mental Capacity Act 2005

Mental Capacity Act 2005 Code of Practice (2007)

Sexual Offences Act 2003

### **International Legislation / UN Documents**

European Convention on Human Rights 1950

United Nations Committee on the Rights of People with Disabilities, 'General Comment No. 1' (19 May 2014) CRPD/C/GC/1

United Nations General Assembly, Convention on the Rights of Persons with Disabilities, (13 December 2006) A/RES/61/106

## Secondary Sources

'An NHS Foundation Trust v AB & CD' (39 *Essex Court*, 21 October 2019)

<[https://www.39essex.com/cop\\_cases/an-nhs-foundation-trust-v-ab-and-cd/](https://www.39essex.com/cop_cases/an-nhs-foundation-trust-v-ab-and-cd/)> accessed 12 November 2022

'Autonomy or Self-Determination as a Medical Student - Ethics Toolkit for Medical Students' (British Medical Association, 1 May 2020) <<https://www.bma.org.uk/advice-and-support/ethics/medical-students/ethics-toolkit-for-medical-students/autonomy-or-self-determination>>

Bartlett P, 'At the Interface Between Paradigms: English Mental Capacity Law and the CPRD' (2020) 11 *Frontiers in Psychiatry*

Doyle S, 'The Notion of Consent to Sexual Activity for Persons with Mental Disabilities' (2010) 31 *Liverpool Law Review* 111, 121

Grace M, 'Do Mental Capacity Laws Unfairly Discriminate Against People with Disabilities?' (2018) 9 *Journal of Undergraduate Research* 43

Herring J, Wall J, 'Capacity to Consent to Sex' (2014) 22 (4) *Medical Law Review* 620

Jackson E, *Medical Law: Texts, Cases and Materials* (6th edn, Oxford University Press 2022)

Keene AR, Kane NB, Kim SYH, Owen GS, 'Mental Capacity - Why Look for a Paradigm Shift?' (2023) *Medical Law Review* 1

Keene AR, Kane NB, Kim SYH, Owen GS, 'Taking Capacity Seriously? Ten Years of Mental Capacity Disputes before England's Court of Protection' (2019) 62 *International Journal of Law and Psychiatry* 56

Lacey N, *Unspeakable Subjects Feminist Essays in Legal and Social Theory* (Oxford: Hart 1998)

Lindsey J, Harding R, 'Capabilities, Capacity, and Consent: Sexual Intimacy in the Court of Protection' (2021) 48 (1) *Journal of Law and Society* 60

Mackenzie R, 'Transsexuals' Legal Status and Same Sex Marriage in New Zealand: *M v M*' (1992) 7 Otago Law Review 556

Mackenzie R, Watts J, 'Capacity to Consent to Sex Reframed: IM, TZ (No 2), the Need for an Evidence-Based Model of Sexual Decision-Making and Socio-Sexual Competence' (2015) 40 International Journal of Law and Psychiatry 50

Martin W, 'The MCA under Scrutiny: Meeting the Challenges of CRPD Compliance' (2015) 5 (1) The Elder Law Journal 32

Martin W, Michalowski S, Jütten T, Burch M, 'Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If not, what next?' (September 2014) The Essex Autonomy Project

Mental Capacity Act Committee, 'Mental Capacity Act 2005: post-legislative scrutiny' (HL 2013-2014)

Office for National Statistics (ONS), 'Intimate Personal Violence and Partner Abuse' (2016) Crime Survey for England and Wales

Skowron P, 'The Relationship Between Autonomy and Adult Mental Capacity in the Law of England and Wales' (2018) 27 (1) Medical Law Review 32

# A legal critique and innovative method to fighting against money laundering

Mohammad Belayet Hossain\*

## ABSTRACT

*Authorities in charge of enforcing the law and implementing policy face tremendous hurdles when attempting to combat money laundering. Despite its widespread recognition as a kind of "serious and organized crime," the process of "placing," "layering," and "integrating" criminal proceeds have typically been regarded as convoluted and difficult to understand. The purpose of this article is to reevaluate the notion of money laundering as it relates to organized crime and to provide a critical analysis of its theoretical foundations. This research delves into the ways in which criminals work together in organized money-laundering schemes to thwart law enforcement and advance the regulatory-spatial paradigms within which they do business. This shifts the discussion's focus to the "who" and "where" of money laundering. This article contends that the efforts of law enforcement agencies to prevent money laundering are doomed to failure because they are based on principles and legal definitions that are too narrow and idealistic. Very little academic discussion has challenged the underlying framework under which money laundering is understood. In order to effectively tackle money laundering, this article suggests a novel strategy that takes into account both the people and places where it occurs.*

*Keywords: AML; Organised Crime, Money Laundering, Framework, Legal.*

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## **Introduction**

The word "organized crime" is often used interchangeably with "money laundering." Money laundering is considered a "severe and organized crime" by various anti-money-laundering (AML) agencies around the world (Levi and Soudijn, 2020). Demand for illegal goods and services drives organized crime, and offenders' motivations generally include the desire to make a profit (Lord et al., 2018). Like drug trafficking, the goal of money laundering is to make it look like the money came from a credible source so that it can be reinvested in more illegal activity (Albanese, 2021, p. 341). When money launderers collaborate and organize their operations, they increase their chances of success. The capacity to manipulate financial markets, take advantage of legal loopholes, and sidestep anti-money-laundering regulations is another way in which they will profit. Their goal is to remain undetected by police enforcement at any cost.

The literature extensively describes money laundering as the abstract activity of cleaning "dirty" cash so that it appears "clean." Previously obvious profits from organized crime are converted and camouflaged to further conceal them within the financial system. This idea is foundational to the worldwide effort to combat money laundering and is used as a basis for various authorities' understanding of the phenomenon. In addition, criminal law is typically used to define illegal activity and decide an appropriate sentence in cases of money laundering and organized crime (Faraldo Cabana, 2014, p. 14). But the people engaged and the locations where organized money laundering takes place have been underappreciated in worldwide agendas and legal frameworks. There hasn't been any work done in the past to reorient the core AML architecture toward these vital components.

By situating money laundering in the context of organized crime, this paper reexamines the AML structure and offers a juridical critique and research of its modern tendencies. It demonstrates that the prevalent method of considering money laundering has significant drawbacks. It contends that efforts to combat money laundering rely too largely on a stale knowledge of the money-laundering method and on rigorous judicial systems that have failed to adjust to evolving money-laundering and organized crime trends. Therefore, the essay suggests a

new strategy for countering money laundering by providing a deeper understanding of the evolving patterns in money laundering as well as the players and environments in which money laundering takes place. The anti-money-laundering (AML) sector could be more effective if they adopted such an approach.

### **Program to Prevent the Laundering of Funds**

Academics and lawmakers have argued over the definition of "money laundering" for decades. The practice of washing money is not novel. Over two thousand years ago, in an effort to evade authorities, Chinese merchants pioneered the practice by trying to launder the proceeds of unlawful trade (Morris-Cotterill, 2001, p. 16; Purkey, 2010, p. 114). In order to live lavishly and expand their illegal operations, organised criminals have historically sought means to recycle, conceal, and legitimize the proceeds of their illicit activities (International Bar Association, n.d.).

This allows them to gain influence within corporations and generate illicit profits. For example, Italian mafia organizations often choose to exert their influence and launder money through the management of casinos and restaurants (El Siwi, 2018, p. 126). During the 1920s Prohibition Era, American mafia leaders made money laundering a top priority as a means of hiding profits from the unlawful selling of alcohol and other illicit operations (International Bar Association, n.d.). In order to avoid further incrimination, one of the main goals of laundering money is to conceal the true origins of the money.

However, government officials have only recently begun to view money laundering as a priority issue in and of itself (Gilmore, 2011). Authorities have focused on seizing illegal gains since the 1980s, when they realized that drug trafficking had become a lucrative business. This was part of a larger attempt to reduce organized crime. The United States was the first country to criminalize money laundering as its own offense in 1986 (Laptes, 2020).

In the 1990s, governments prioritized preventing money laundering because of its link to combating drug trade and other forms of organized crime. Following the September 11th attacks in the United States, the West made combating money laundering a priority in its "war on terrorism" (Alldridge, 2003). Many other countries and regions have also since banned it. Several money-laundering crimes are detailed in the Proceeds of Crime Act 2002 of England and Wales, which also defines illicit property as the gain one experiences as a result of criminal activity. The Act gives law enforcement the authority to seize the proceeds of crime and makes it illegal for anybody to knowingly acquire, conceal, or make arrangements to acquire unlawful property on behalf of another.

**Looking at the system and procedure of money laundering critically:**

There has been a lot of discussion about the method used to clean dirty cash. Traditional government knowledge of money laundering centers on a three-stage paradigm of placement, layering, and integration (Gilmour, 2020; Hopton, 2009; Soudijn, 2016). The first step in the process of money laundering is sometimes depicted as the introduction of illegal funds into the monetary sector. Money can be placed directly into a bank account, or it can be moved from one type of asset held by a bank to another.

In the second phase, known as "layering," modest, illegal contributions are spread out among a large number of bank accounts or are combined with legitimately earned funds or assets to hide their true provenance. Using fake documents, anonymous shell firms, and convoluted organizational structures, the origins of the unlawful money can be further obscured. Afterwards, the money is reintegrated into the legal economy by purchasing stocks in a genuine company, a piece of real estate, or a high-end vehicle (Cassella, 2018; Irwin et al., 2012; Naheem, 2015a).

This three-step process of money laundering has been extensively discussed in the literature, and as a result, many governmental agencies and governments use it as a guide for their enforcement operations and to create

anti-money-laundering legislation (Soudijn, 2016). The criminal "wash cycle" of "placement-layering-integration" is commonly used to "clean" "dirty" money and make it appear legitimate. To give just one example, the Financial Action Task Force (FATF), an intergovernmental organization responsible for establishing global AML standards, describes the money-laundering process in this way across their many reports and recommends that every country legislate for convicting money laundering (FATF, 2021; Kemsley et al., 2022; Soudijn, 2016; Alexander, 2001).

Furthermore, several governments have exaggerated the idea of money laundering, portraying it as a sort of "serious and organized" crimes (Levi and Soudijn, 2020). In such policy literature, discussions of money laundering are generally accompanied by complex case studies. This phrase presents an issue since it makes money laundering sound more sophisticated than it really is.

It is also dated to use such language to describe money laundering. Money laundering, as Levi and Soudijn (2020, p. 583) show, was first conceived in the 1980s, when most transactions were conducted in cash. However, the numerous and diverse techniques used by modern money launderers as a result of technological and globalization advancements render the traditional three-stage model inadequate. Despite its continued popularity, especially in developing countries, cash transactions continue to be more time-consuming and inconvenient for many people than other forms of payment.

Many trade-based money-laundering strategies involve tactics that modify value within trade invoices to escape detection as cash transactions (Gilmour, 2022; Levi and Soudijn, 2020; Naheem, 2015b). But it is important to remember that it is still tricky to determine the exact volume of cash transfers because of the anonymity of these transactions (G4S, 2018). This is not to say that physical cash plays no part in money laundering. Actually, because cash is untraceable and unmeasurable, laundered money can easily travel through underground economies (like Hawala) (Soudijn, 2016).

This illustrates yet another serious shortcoming of the three-stage model: money can be "laundered" without completing all three steps. The "placement-layering-integration" concept is frequently used to explain money laundering as though it were the primary (and, in some cases, sole) method by which criminals legitimized their illicit gains. Sadly, this is rarely the case. For example, money earned illegally through street-level drug selling and stashed away under floorboards with the intention of investing it in more drugs does not get "put" into the conventional financial system. Cash-intensive enterprises like car washes, laundromats, and pawnshops make it easy to spend that cash legally without a bank account. Further, there is no requirement to "layer" such money before spending it.

There are also scenarios where the classic three-stage money-laundering model may not apply, such as with irregular wealth transfer systems (e.g. Hawala). These require informal arrangements among a group of foreign trustworthy individuals acting as "financial service providers" to move money from one jurisdiction to another outside of the formal sector (Teichmann and Falker, 2021; van de Bunt, 2008). The goal is not to use the centralized banking system or introduce new money into the economy, but rather to conduct business using a tried-and-true method that has been used successfully in certain communities for millennia. Yet, one may argue that such methods still entail "layering," since they help to disperse and conceal the starting points of illegal transactions.

Finally, the unlawful monies can be reintegrated into the regular financial system without having to be deposited in other assets. Instead, one can frivolously blow them at nightclubs and casinos without worrying about investing in one's future (Levi and Soudijn, 2020, p. 583). Fraudulent investment schemes, wherein money is laundered through subsequent investments without any "placement, stacking, or integration" of funds are another example, as shown by Cassella (2018, p. 496). Cassella (2018) argues that authorities should focus less on the specifics of how money is laundered and more on the people who are doing it. Therefore, it is claimed that the three-stage model of money laundering ignores the people involved, such as the characters that facilitate money laundering to grow, and the locations where money laundering takes place. The best way for

authorities to combat the money-laundering phenomena is for them to gain a deeper understanding of money launderers and the illegal markets they operate in.

In addition, since the point of money laundering is to conceal illicit gains from law enforcement, it is important to know all the ways in which criminals can get their “hands on” your cash. Eventually, the predicate crimes that can link money-laundering procedures and the fraudsters to their illegal origins become a topic of inquiry in the investigation of money laundering. The obvious precursors to money laundering are financial crimes like fraud and corruption. The AML regulatory landscape, however, has its roots in the 1980s, when the government began cracking down on the illegal revenues generated by drug trafficking. From these early discussions, AML policies have evolved.

According to Pavlovi and Paunovi (2019, p. 223), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, that criminalized the laundering of criminal earnings resulting from drug trafficking, failed to even identify corruption offences. Terrorism (and the funding of terrorism), people smuggling, fraud, and counterfeiting currency, among others, were added to the list of predicate crimes as a result of the United Nations Convention against transnational organized crime, which entered into force in 2000. (Mugarura, 2011, p. 180). In addition, the Financial Action Task Force's (2012) Recommendations provide a complete structure for how nations should collectively combat money laundering as well as terrorist funding, including a specific reference to precursor crimes to money laundering.

Nevertheless, it is possible that governments have focused too heavily on predicate crimes in their efforts to make money laundering illegal. Korejo et al. (2021) argue that governments' failure to clearly define money laundering has led to an overcriminalization of the practice. The term "proceeds of crime" refers to the monetary, real-estate, and asset gains made by illicit means, and it is broadly defined across international contexts as money laundering. Indeed, money laundering frequently results from a wide variety of other illegal

actions and is frequently tied to its predicate crimes, as the proceeds of these crimes are frequently reinvestment in additional unlawful endeavors (Financial Action Task Force, 2012; Rusanov and Pudovochkin, 2018, p. 22).

On the other hand, as Korejo et al. (2021) point out, money laundering has grown to include a wide variety of significant and global organized crimes that could serve as a predicate offense. In addition to drug trafficking, fraud, corruption, human trafficking, and terrorism, the 6th EU AML Directive also includes cybercrime, piracy, tax evasion, arms trafficking, environmental crimes, murder, and major assaults (Council Directive 2018/1673/EU, 2018, pp. 26-27). Korejo et al. (2021) argue that there is too wide a range of actions that could qualify as predicate offenses to money laundering. Although the proceeds of any crime could be laundered, the government's narrow focus on money-laundering enforcement and its failure to consider the players involved or the places in which they operate pose a difficulty with the traditional criminal-law approach to conceptualizing money-laundering. The operational and strategic difficulties in combating money laundering must first be understood before these factors can be taken into account.

### **Obstacles in the Fight Against Money Laundering:**

The government and law enforcement agencies face special difficulties when dealing with money laundering. Money launderers successfully adapt to the authorities' increasing AML efforts by constantly refining and varying their operations to conceal the source of their unlawful gains (Brown, 2016; Cassella, 2018; Naheem, 2015a). Consequently, tracking down the source of the money laundered is a major obstacle for law enforcement when pursuing criminal charges.

Complex legal due process, insufficient intergovernmental collaboration, and an absence of political will, can also stymie authorities and delay the introduction of new anti-money-laundering regimes (Gilmour, 2020). Because it takes so long for governments to pass new anti-money-laundering legislation and develop enforcement actions, money-launderers frequently adapt their methods to thwart these efforts (Turner, 2011).

The growing internationalization of our societies adds further layers of difficulty to the already challenging task of combating money laundering.

Because of globalisation, it is now easier to travel internationally and more commodities, services, and information may be traded across national boundaries (Otusanya and Lauwo, 2012; Schroeder, 2001). Since financial markets have been liberalized, there are less restrictions on world commerce (Otusanya and Lauwo, 2012). From 1990 to 2016, an estimated \$8 trillion more flowed over borders, with 20% of this being illegally obtained funds (Christensen, 2012, p. 331). There are more opportunities for money laundering due to the volume of international transactions, the variety of payment methods available, the ease with which criminals may communicate, and the convenience with which they can gain access to the financial markets (Gelemerova, 2011; Menz, 2020).

Even though cash is still widely used, more and more people are opting to use electronic payment methods (Gilmour and Ridley, 2015). Rechargeable membership cards, peer-to-peer payment systems, and other digital payments make it easier for criminals to manipulate the financial system while also facilitating faster and more convenient transactions (He, 2010; Simser, 2013). In the same way, compared to traditional financial systems, trading in alternate payments like crypto currencies offers convenience and perceived secrecy. Criminals are now able to more effectively communicate via the web and social media platforms, expanding their reach across national boundaries and into previously inaccessible demographics (Dolliver and Love, 2015). The ability of law enforcement to track criminal activity has been hampered by globalization, which has made it easier for criminals to work together and move illicit funds more quickly.

The transatlantic and cross-border characteristics of money laundering make it even more challenging for authorities to track down laundered cash that have been transferred internationally. A number of legal, moral, and practical hurdles may stand in the way of law enforcement's efforts to crack down on money laundering and other forms of financial crime (Gilmour, 2020). The difficulty of complying with the numerous and often

contradictory AML regulations in different international jurisdictions is compounded by the lengthy and difficult legal or corporate procedures they must go through (Gelemerova, 2011).

Unless constrained by treaty obligations or even other reciprocal legal arrangements, foreign jurisdictions may not be obligated to help foreign law-enforcement officials in investigating money laundering. When it comes to protecting their own financial and economic interests, certain foreign jurisdictions may be hesitant or even actively hostile to foreign investment and trade (Gilmour, 2020, p. 726). As a result, law enforcement agencies may lack access to critical data or information on money laundering, impeding the trace and recovery of stolen funds, and missing opportunities to pursue perpetrators using civil or criminal law remedies.

**To develop a new anti-money-laundering structure:**

Many people, for many reasons, may partake in money laundering activities. Law enforcement and governmental agencies, however, frequently lack the knowledge and training necessary to spot and effectively pursue suspected money launderers. One of the most important steps in determining criminal responsibility for money laundering is identifying those who are actively engaged in the crime. Although money launderers can choose to launder proceeds on their own, whether or not they do so depends on several factors, including the nature of the crime, the intended use of the funds, the total amount to be laundered, and the launderer's confidence in his or her ability to avoid detection (Levi and Soudijn, 2020, p. 610).

Money laundering, on the other hand, is often the domain of well-connected, well-organized criminal gangs working toward a common aim. This motivation could be the search for financial gain, political influence, or access to underground economies. Money laundering could be an unintended side effect of these transactions. However, it typically entails hiding the money from the law enforcement.

In order to maximize profits while minimizing dangers, organized crime groups will increasingly move their operations online (András Nagy and Mezei, 2016). There is some debate about whether cybercriminals are less organized than a regular mafia gang because they operate independently of one another and rarely if ever meet

in person (András Nagy and Mezei, 2016; Stevenson Smith, 2015, p. 110). Despite this, they are exceptionally talented and adaptable people (András Nagy & Mezei, 2016). Because of the speed, breadth, and anonymity afforded by online payment systems, criminals have a more convenient avenue for money laundering via the internet (Irwin and Turner, 2018). Transactions involving cryptocurrency are more discreet than those involving high street bank accounts or wire transfers thanks to blockchain technology and the rise of digital currencies. Because of this, it is crucial that authorities have an understanding of the methods used by internet money launderers.

Furthermore, professionals are frequently in a position to facilitate coordinated money-laundering operations. The intricacies of professional relationships inside money-laundering schemes are better understood thanks to the growing corpus of studies focusing on "professional enablers" (Benson, 2020; Lord *et al.*, 2018, 2019). Lawyers, accountants, bankers, and others working in the financial services industry can lend an air of respectability to shady transactions and cover corrupt activities with their knowledge of complex corporate systems (Levi, 2020, p. 103). Recent exposes, such as 2016's "Panama Papers," have revealed the extent to which experts have helped rich clients launder money offshore (de Groen, 2017). The Panama Papers controversy surfaced in April of 2016, with the disclosure of 11.5 million papers from the Panamanian legal firm Mossack Fonseca. The records were shared with the International Consortium of Investigative Journalists (ICIJ) and multiple other media outlets after being acquired by the German publication *Süddeutsche Zeitung*. A law firm called Mossack Fonseca, situated in Panama, was dedicated to setting up and overseeing offshore businesses and shell organisations for global clientele. The financial activities of thousands of people and organisations from more than 200 countries were made public by the hacked documents. Prominent figures in business, politics, and other fields were among those implicated. The records exposed the ways in which Mossack Fonseca helped customers establish shell corporations and offshore accounts in different tax havens (de Groen, 2017).

These activities can be utilised for money laundering, asset concealment, and tax evasion, even if they are not criminal in and of themselves. Numerous well-known politicians were linked to the controversy, including Sigmundur David Gunnlaugsson, the prime minister of Iceland, who resigned in the wake of the findings. Leaders like Nawaz Sharif, the prime minister of Pakistan, and Vladimir Putin, the president of Russia, were also accused. A number of nations have launched investigations and legal measures as a result of the use of offshore accounts and shell corporations, which generated moral and legal questions. It sparked conversations about tax avoidance, corruption, and financial transparency (de Groen, 2017). The incident led to heightened scrutiny of offshore financial operations and tax havens. International initiatives to fight tax evasion and improve financial transparency gained traction.

According to Christensen (2012, page 333), widespread exploitation in the financial sector is unthinkable without the collusion of powerful persons with knowledge of and access to the markets. The use of several offshore shell companies and other intricate business structures makes it more difficult for law enforcement to trace the trail of laundered money (Unger, 2017). Additionally, the regulatory authorities who are delegated to handle out due diligence inspections and report suspicious activities may be misled by the flawed "placement-layering-integration" model that undergirds global AML compliance programmes, which could impede the fight against emerging instances of money laundering. Therefore, experts can devise ways to provide the impression of adhering to AML regulations while actually aiding the money-laundering aims of their criminal customers (Murray, 2018, pp. 223–224). By taking advantage of weaknesses in anti-money laundering (AML) regimes, corrupt professionals may be willing or even complicit in aiding illegal operations (Benson, 2020; Lord et al., 2019).

Moreover, politically exposed (PEPs) are people in important public positions, either now held or held in the past, which puts them at a higher risk of being involved in corruption or money laundering. PEPs are high-risk for money laundering because of their high public profile and political prominence, making them easy targets for bribery (Canestri, 2019). Members of the judiciary, legislators, foreign envoys, prominent board members of

multinational corporations, political appointees, and even members of the royal family are all considered PEPs because of the trust placed in them [Financial Conduct Authority (FCA), 2018]. Important international governmental organisations, such as the European Union, the Joint Money Laundering Steering Group (JMLSG), the Wolfsberg Group, and the Financial Action Task Force (FATF), all have slightly different ways of identifying PEPs, suggesting a lack of worldwide consensus (Choo, 2008, p. 372). For instance, the European Union (EU) has taken a number of steps to identify individuals who are PEPs as part of its efforts to combat money laundering and the financing of terrorism. The EU classifies PEPs in the following ways:

- **Legal Definitions:** PEPs are defined by EU law as those who have or have occupied prominent positions in the public sphere on a national and international level. Heads of state, members of parliament, and senior officials in positions related to the government, military, judiciary, or political parties are all included in this definition.
- **Regulations:** PEP identification procedures must be incorporated by EU member states into their national anti-money laundering and counterterrorism financing laws. Financial institutions have an obligation to identify and confirm the identity of PEPs among their clientele, including banks and other reporting businesses.
- **Customer Due Diligence (CDD):** In the EU, financial institutions must perform enhanced CDD on clients who are designated as PEPs. This entails carrying out a comprehensive risk analysis, keeping an eye on transactions, and looking for more details regarding the source of money and wealth.
- **Lists and Databases:** The European Union (EU) keeps databases and lists of PEPs that are accessible to reporting bodies for identification needs. These are maintained by the EU through its member states and other agencies. Financial firms can cross-reference customer data with the aid of these lists.
- **International Cooperation:** To guarantee uniform PEP identification standards and procedures, the EU works with international organisations like the Financial Action Task Force (FATF). The identification

of overseas PEPs who could be more likely to engage in financial misbehaviour is made easier by this international cooperation.

- **Requirements for Non-Financial Sectors:** In addition to financial organisations, PEP identification is mandatory for real estate, legal professionals, and accountants. Regulations pertaining to money laundering and counterterrorism financing are being applied more and more to these non-financial industries.
- **EU stresses the use of a risk-based methodology to identify PEPs.** This implies that organisations should evaluate the degree of risk that their clients represent and take appropriate precautions. PEPs and other higher-risk customers need closer inspection.
- **Training and Awareness:** To inform employees of financial institutions and other pertinent professionals on PEP identification, risk assessment, and reporting requirements, training programmes and awareness campaigns are carried out.
- **Record-Keeping and Reporting:** Reporting companies must keep track of their due diligence procedures and notify the relevant authorities of any suspicious transactions or activities concerning PEPs.
- **finances and Penalties:** Financial institutions and professionals who fail to meet their duties may face fines and penalties for failing to comply with PEP identification and due diligence requirements.

The EU is committed to fighting financial crime, money laundering, and the funding of terrorism. This includes its attempts to detect PEPs. The aforementioned approaches are designed to augment openness and accountability in financial transactions while mitigating the likelihood of PEP engagement in criminal activities (Canestri, 2019).

As a corollary, this makes the fight against economic crime that was committed by or facilitated by PEPs weak and untrustworthy. Because of insufficient legal frameworks that make it possible for individuals to evade money-laundering sanctions, AML initiatives have mainly failed to directly target PEPs, as argued by Teichmann (2020). Examples include customer due diligence compliance processes that are uneven and orders

for large amounts of unexpected wealth that go unanswered (Gilmour, 2022; Moiseienko, 2022; Stephenson, 2017). Canestri (2009, p. 366) argues, however, that PEPs typically use the legal businesses they control to conceal their illicit political wealth. Therefore, in order to effectively prevent money laundering, governments should enhance legal systems governing corporations connected to PEPs.

It is also important to gain a deeper understanding of the corporate and legal environments in which organized money launderers operate. Criminal enterprises can range from the most "street"-level to the most "high-end" of the professional variety. According to Gilmour (2016, pp. 5-7), criminal activities on the street level fuel international trade. Money launderers are able to thrive in cash-intensive industries like nightclubs, car washes, and salons because of the widespread cash available to pay for products and services (Gilmour and Ridley, 2015).

Businesses on the street level can be used to launder money since they are a convenient way to transfer funds from an illegal source into a more secure financial system (Gilmour, 2016, p. 5). Establishing and maintaining a firm that relies heavily on cash flow is relatively simple and provides communities with much-needed commercial space. While this is a common form of money laundering, it is not the only type (Christensen, 2012; Gilmour, 2016). It is also common in the banking industry and other highly structured commercial settings with more organized practices (Christensen, 2012).

Recent crises involving offshore banking have shed light on an often overlooked but crucial offshore sector for money laundering. They have revealed the systematic nature of the banking industry's facilitation of money laundering as well as other illegal operations via offshore countries (Gilmour, 2020, 2022). The favorable legislative frameworks that draw in foreign investors and contribute to reduce cross-border trade restrictions present in other countries give rise to these offshore zones. The British Overseas Territories of Anguilla and the British Virgin Islands, both located in the Caribbean, are among the places commonly thought to fall under this category. Hong Kong, Singapore, the City of London, and the State of Delaware are just some of the other

significant financial centers that are involved. Illicit markets for unlawful goods and services can flourish in such settings thanks to criminal networks that are either highly territorial and organised or strictly limited but flexible (Clark et al., 2021, p. 248).

The issue of offshore money laundering has been hotly discussed since the advent of free ports. Within the borders of a certain jurisdiction, but beyond the reach of its tax regulations, free ports serve as storage facilities (Gilmour, 2022; Webb, 2020). Customers who use free ports can take advantage of the reduced trade restrictions and more personal freedoms that result from the absence of public oversight. Others argue that the confidentiality and nondisclosure rules characteristic of free ports are crucial for legitimate actors to operate and that free ports benefit society by stimulating legitimate economic activity (Lavissière and Rodrigue, 2017; Steiner, 2017), but there is ongoing issue over the criminological risks that free ports present.

These novel regulatory-spatial paradigms have been compared to Passas's 1999 concept of "criminological asymmetries." According to Passas (1999), criminological asymmetries—a collection of battles and inequities across the political, cultural, economic, and legal spheres—are the root cause of economic crime. Because of these asymmetries in criminology, crime occurs because demand is stoked for unlawful goods and services, criminal behavior is encouraged as individuals and businesses vie for control of the economy, and law enforcement is hampered in their efforts to counteract criminal activity (Passas, 1999, p. 402). Globalization exacerbates the impact of criminological inequalities (Passas, 1999). Dolliver and Love (2015) expanded on Passas's (1999) argument, providing evidence of criminological asymmetries in the context of "cybercrime," or crimes made possible by or dependent on digital devices. Given the prevalence of technology developments that facilitate money laundering and organized crime, this is a natural development of the idea presented by Passas (1999).

Instead of focusing solely on the "what" and "how," the "who" and "where" of money laundering must also be considered in order to effectively combat this global problem. Changing the way we talk about money laundering will improve authorities' knowledge of the issue and lead to more effective solutions. Authorities

have only taken a partial response to the money-laundering concern because of the excessive concentration on theoretical work relating to money laundering via purely legal means. It may be argued that knowing who is involved in money laundering and where it takes place is just as crucial as knowing what the legal definition of the crime is.

### **Conclusion**

This paper shows why it is important to change how we think about money laundering, shifting our attention from merely explaining the process to the people and places where it occurs. While drug trafficking has long been thought of as the prototypical predicate offense to money laundering, the reality is that there is a wide variety of actions that could serve as a predicate (Korejo et al., 2021). Governments have recognized the issue of money laundering and taken steps to make it a criminal offence. However, AML regulations continue to fall short in their attempt to combat money laundering because they are based on a flawed conceptualization of the problem (Cassella, 2018; Gilmour, 2020; Lapteş, 2020; Levi and Soudijn, 2020; Soudijn, 2016). Modern money-laundering techniques, such as those made possible by technological advancements and globalization, are not captured by the antiquated "placement, layering, and integration" model.

Moreover, criminal actors participating in money laundering might be diverse and sophisticated. In order to avoid detection by law enforcement, criminals who launder money use sophisticated methods to hide their financial transactions from the public eye. It is possible for money laundering to involve professional intermediaries due to their familiarity with and access to corporate structures and financial markets (Benson, 2020; Christensen, 2012; Levi, 2020; Lord et al., 2018, 2019). Furthermore, PEPs in prominent public positions are at risk for money laundering, and corporations with ties to PEPs are the hiding places for much illicit wealth (Canestri, 2019; Teichmann, 2020). The potential for money laundering by these people and the importance of addressing that risk should be central to AML regimes.

The value of understanding the context of money-laundering operations is also emphasized. The money laundering industry spans the entire economic spectrum, from the underground to the corporate boardroom. High-end commercial worlds, like offshore overseas jurisdictions and freeports, offer attractive surroundings for the money launderer due to their rigorous secrecy, restricted monitoring, and laxer trade objectives compared to low-end corporate settings (Gilmour and Ridley, 2015; Gilmour, 2016). (Gilmour, 2020, 2022; Webb, 2020). These areas might encourage criminal activity because of the high demand for illicit goods and services and the resulting fierce competition in the marketplace (Passas, 1999). We need to move beyond simplistic descriptions of the money-laundering process and update the existing framework. A more effective strategy is one that takes into account the various players and locations in the money-laundering procedure and is able to adapt to new circumstances. Learning more about the "who" and "where" of money laundering must provide new perspectives on how to effectively address the issue.

**Bibliography**

Albanese, J.S. (2021), “*Organized crime as financial crime: the nature of organized crime as reflected in prosecutions and research*”, *Victims and Offenders*, Vol. 16 No. 3, pp. 431-443, doi: 10.1080/15564886.2020.1823543.

Alexander, K. (2001), “*The international anti-money-laundering regime: the role of the financial action task force*”, *Journal of Money Laundering Control*, Vol. 4 No. 3, pp. 231-248, doi: 10.1108/eb027276.

Alldrige, P. (2003), *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, Hart Publishing, Oxford.

András Nagy, H.Z. and Mezei, K. (2016), “*The organised criminal phenomenon on the internet*”, *Journal of Eastern European Criminal Law*, Vol. 2, pp. 137-149.

Benson, K. (2020), *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and Its Control*, Routledge, London.

Brown, S.D. (2016), “*Cryptocurrency and criminality: the bitcoin opportunity*”, *The Police Journal: Theory, Practice and Principles*, Vol. 89 No. 4, pp. 327-339.

Canestri, D. (2019), “*Politically exposed entities: how to tailor PEP requirements to PEP owned legal entities*”, *Journal of Money Laundering Control*, Vol. 22 No. 2, pp. 359-372, doi: 10.1108/JMLC-06-2018-0042.

- Cassella, S.D. (2018), "*Toward a new model of money laundering*", *Journal of Money Laundering Control*, Vol. 21 No. 4, pp. 494-497, doi: 10.1108/JMLC-09-2017-0045.
- Choo, K.R. (2008), "*Politically exposed persons (PEPs): risks and mitigation*", *Journal of Money Laundering Control*, Vol. 11 No. 4, pp. 371-387, doi: 10.1108/13685200810910439.
- Christensen, J. (2012), "*The hidden trillions: secrecy, corruption, and the offshore interface*", *Crime, Law and Social Change*, Vol. 57 No. 3, pp. 325-343, doi: 10.1007/s10611-011-9347-9.
- Clark, A., Fraser, A. and Hamilton-Smith, N. (2021), "*Networked territorialism: the routes and roots of organised crime*", *Trends in Organized Crime*, Vol. 24 No. 2, pp. 246-262, doi: 10.1007/s12117-020-09393-9.
- Council Directive 2018/1673/EU (2018), "*On combating money laundering by criminal law*", *Official Journal of the European Union*, Vol. L284, pp. 22-30.
- De Groen, W.P. (2017), "*The role of advisors and intermediaries in the schemes revealed in the Panama papers*", Study for the PANA Committee, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/602030/IPOL\\_STU\(2017\)602030\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602030/IPOL_STU(2017)602030_EN.pdf)
- Dolliver, D.S. and Love, K.L. (2015), "*Criminogenic asymmetries in cyberspace: a comparative analysis of two tor marketplaces*", *Journal of Globalization Studies*, Vol. 6 No. 2, pp. 75-96.
- El Siwi, Y. (2018), "*Mafia, money-laundering and the battle against criminal capital: the Italian case*", *Journal of Money Laundering Control*, Vol. 21 No. 2, pp. 124-133, doi: 10.1108/JMLC-02-2017-0009.
- Faraldo Cabana, P. (2014), "*Improving the recovery of assets resulting from organised crime*", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 22 No. 1, pp. 13-32, doi: 10.1163/15718174-22012037.

Financial Action Task Force (2010), “*Money laundering vulnerabilities of free trade zones*”, available at: [www.fatfgafi.org/media/fatf/documents/reports/ML%20vulnerabilities%20of%20Free%20Trade%20Zones.pdf](http://www.fatfgafi.org/media/fatf/documents/reports/ML%20vulnerabilities%20of%20Free%20Trade%20Zones.pdf)

Financial Action Task Force (2012), “*International standards on combating money laundering and the financing of terrorism and proliferation, the FATF recommendations*”, available at: [www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf)

Financial Action Task Force (2021), “*What is money laundering?*”, available at: [www.fatf-gafi.org/faq/moneylaundering](http://www.fatf-gafi.org/faq/moneylaundering)

Financial Conduct Authority (FCA) (2018), “*High-risk customers, including politically exposed persons*”, available at: [www.fca.org.uk/firms/money-laundering-terrorist-financing/high-risk-customers-politically-exposed-persons](http://www.fca.org.uk/firms/money-laundering-terrorist-financing/high-risk-customers-politically-exposed-persons)

G4S (2018), “*World cash report 2018*”, available at: [www.g4scashreport.com/-/media/g4s/cash-report/files/2018-world-cash-report--english.ashx?la=en&hash=0F3BECD46B4820D7FA32112E99252AAB](http://www.g4scashreport.com/-/media/g4s/cash-report/files/2018-world-cash-report--english.ashx?la=en&hash=0F3BECD46B4820D7FA32112E99252AAB)

Gelemerova, L. (2011), *The anti-Money Laundering System in the Context of Globalisation: A Panopticon Built on Quicksand*, Wolf Legal Publishers, available at: [https://pure.uvt.nl/ws/portalfiles/portal/1383101/Gelemerova\\_anti\\_28-06-2011.pdf](https://pure.uvt.nl/ws/portalfiles/portal/1383101/Gelemerova_anti_28-06-2011.pdf)

Gilmore, W. (2011), *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism*, 4th ed., Council of Europe Publishing, Strasbourg.

Gilmour, N. (2016), “*Understanding the practices behind money laundering – a rational choice interpretation*”, *International Journal of Law, Crime and Justice*, Vol. 44, pp. 1-13, doi: 10.1016/j.ijlcj.2015.03.002.

Gilmour, N. and Ridley, N. (2015), “*Everyday vulnerabilities – money laundering through cash intensive businesses*”, Journal of Money Laundering Control, Vol. 18 No. 3, pp. 293-303, doi: 10.1108/JMLC-06-2014-0019.

Gilmour, P.M. (2020), “*Lifting the veil on beneficial ownership: challenges of implementing the UK’s registers of beneficial owners*”, Journal of Money Laundering Control, Vol. 23 No. 4, pp. 717-734, doi: 10.1108/JMLC-02-2020-0014.

Gilmour, P.M. (2022), “*Freeports: innovative trading hubs or centres for money laundering and tax evasion?*”, Journal of Money Laundering Control, Vol. 25 No. 1, pp. 63-71, doi: 10.1108/JMLC-01-2021-0002.

He, P. (2010), “*A typological study on money laundering*”, Journal of Money Laundering Control, Vol. 13 No. 1, pp. 15-32, doi: 10.1108/13685201011010182.

Hopton, D. (2009), Money Laundering: A Concise Guide for All Business, 2nd ed., Routledge, London.

International Bar Association (n.d.), “*Money laundering, anti money laundering forum*”, available at: [www.anti-moneylaundering.org/Money\\_Laundering.aspx](http://www.anti-moneylaundering.org/Money_Laundering.aspx)

Irwin, A.S.M., Choo, R.K.-K. and Liu, L. (2012), “*An analysis of money laundering and terrorism financing typologies*”, Journal of Money Laundering Control, Vol. 15 No. 1, pp. 85-111, doi: 10.1108/13685201211194745.

Irwin, A.S.M. and Turner, A.B. (2018), “*Illicit bitcoin transactions: challenges in getting to the who, what, when and where*”, Journal of Money Laundering Control, Vol. 21 No. 3, pp. 297-313, doi: 10.1108/JMLC-07-2017-0031.

Kemsley, D., Kemsley, S.A. and Morgan, F.T. (2022), “*Tax evasion and money laundering: a complete framework*”, Journal of Financial Crime, Vol. 29 No. 2, pp. 589-602, doi: 10.1108/JFC-09-2020-0175.

Korejo, M.S., Rajamanickam, R. and Md. Said, M.H. (2021), “*The concept of money laundering: a quest for legal definition*”, *Journal of Money Laundering Control*, Vol. 24 No. 4, pp. 725-736, doi: 10.1108/JMLC-05-2020-0045.

Lapteş, R. (2020), “*Combating money laundering – a mandatory topic for the professional accountant*”, *Bulletin of the Transilvania University of Brasov. Series V: Economic Sciences*, Vol. 13 No. 62, pp. 141-146, doi: 10.31926/but.es.2020.13.62.2.15.

Lavissière, A. and Rodrigue, J.-P. (2017), “*Free ports: towards a network of trade gateways*”, *Journal of Shipping and Trading*, Vol. 2 No. 7, pp. 1-17, doi: 10.1186/s41072-017-0026-6.

Levi, M. (2020), “*Making sense of professional enablers’ involvement in laundering organized crime proceeds and of their regulation*”, *Trends in Organized Crime*, Vol. 24 No. 1, pp. 96-110, doi: 10.1007/s12117-020-09401-y.

Levi, M. and Soudijn, M. (2020), “*Understanding the laundering of organised crime money*”, *Crime and Justice*, Vol. 49, pp. 579-631, doi: 10.1086/708047.

Lord, N., Van Wingerde, K. and Campbell, L. (2018), “*Organising the monies of corporate financial crimes via organisational structures: ostensible legitimacy, effective anonymity, and Third-Party facilitation*”, *Administrative Sciences*, Vol. 8 No. 2, pp. 1-17, doi: 10.3390/admsci8020017.

Lord, N.J., Campbell, L.J. and Van Wingerde, K. (2019), “*Other people’s dirty money: professional intermediaries, market dynamics and the finances of white-collar, corporate and organized crimes*”, *The British Journal of Criminology*, Vol. 59 No. 5, pp. 1217-1236, doi: 10.1093/bjc/azz004.

Menz, M. (2020), “*Show me the money – managing politically exposed persons (PEPs) risk in UK financial services*”, *Journal of Financial Crime*, Vol. 28 No. 4, pp. 968-980, doi: 10.1108/JFC-12-2019-0169.

Moiseienko, A. Reid, A. and Chase, I. (2020), “*Improving governance and tackling crime in free-trade zones*”, available at: [www.rusi.org/publication/occasional-papers/improving-governance-andtackling-crime-free-trade-zones](http://www.rusi.org/publication/occasional-papers/improving-governance-andtackling-crime-free-trade-zones)

Moiseienko, A. (2022), “*The limitations of unexplained wealth orders*”, *Criminal Law Review*, Vol. 3, pp. 230-241.

Morris-Cotterill, N. (2001), “*Money laundering*”, *Foreign Policy*, Vol. 124 No. 124, pp. 16-20, doi: 10.2307/3183186, 22.

Mugarura, N. (2011), “*The institutional framework against money laundering and its underlying predicate crimes*”, *Journal of Financial Regulation and Compliance*, Vol. 19 No. 2, pp. 174-194, doi: 10.1108/13581981111123870.

Murray, K. (2018), “*The cost of not wanting to know – the professions, money laundering and organised crime*”, *Journal of Financial Crime*, Vol. 25 No. 1, pp. 218-229, doi: 10.1108/JFC-11-2016-0071.

Naheem, M.A. (2015a), “*Money laundering using investment companies*”, *Journal of Money Laundering Control*, Vol. 18 No. 4, pp. 438-446.

Naheem, M.A. (2015b), “*Trade based money laundering: towards a working definition for the banking sector*”, *Journal of Money Laundering Control*, Vol. 18 No. 4, pp. 513-524, doi: 10.1108/JMLC-01-2015-0002.

Otusanya, O.J. and Lauwo, S. (2012), “*The role of offshore financial centres in elite money laundering: evidence from Nigeria*”, *Journal of Money Laundering Control*, Vol. 15 No. 3, pp. 336-361, doi: 10.1108/13685201211238070.

Passas, N. (1999), “*Globalization, criminogenic asymmetries and economic crime*”, *European Journal of Law Reform*, Vol. 1 No. 4, pp. 399-424.

Pavlović, Z.S. and Paunović, N. (2019), “*Corruption criminal offenses as predicate economic crimes to money laundering*”, *Journal of Eastern European Criminal Law*, Vol. 2, pp. 223-231.

Purkey, H. (2010), “*The art of money laundering*”, *Florida Journal of International Law*, Vol. 22 No. 1, pp. 111-144.

Rusanov, G. and Pudovochkin, Y. (2018), “*Money laundering and predicate offenses: models of criminological and legal relationships*”, *Journal of Money Laundering Control*, Vol. 21 No. 1, pp. 22-32, doi: 10.1108/JMLC-12-2016-0048.

Schroeder, W.R. (2001), “*Money laundering: a global threat and the international community’s response*”, *FBI Law Enforcement Bulletin*, Vol. 5, pp. 1-7.

Simser, J. (2013), “*Money laundering: emerging threats and trends*”, *Journal of Money Laundering Control*, Vol. 16 No. 1, pp. 41-45, doi: 10.1108/13685201311286841.

Soudijn, M.R.J. (2016), “*Rethinking money laundering and drug trafficking: some implications for investigators, policy makers and researchers*”, *Journal of Money Laundering Control*, Vol. 19 No. 3, pp. 298- 310, doi: 10.1108/JMLC-07-2015-0028.

Steiner, K.L. (2017), “*Dealing with laundering in the Swiss art market: new legislation and its threat to honest traders*”, *Case Western Reserve Journal of International Law*, Vol. 49 No. 1, pp. 351-372, available at: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/21>

Stephenson, A. (2017), “*The criminal finance act 2017 and unexplained wealth orders (UK): concerns and implications*”, *International Enforcement Law Reporter*, Vol. 33 No. 9, pp. 332-335.

Stevenson Smith, G.S. (2015), “*Management models for international cybercrime*”, *Journal of Financial Crime*, Vol. 22 No. 1, pp. 104-125, doi: 10.1108/JFC-09-2013-0051.

Teichmann, F.M. and Falker, M.-C. (2021), “*Money laundering via underground currency exchange networks*”, *Journal of Financial Regulation and Compliance*, Vol. 29 No. 1, pp. 1-14, doi: 10.1108/JFRC-01-2020-0003.

Teichmann, F.M.J. (2020), “*How effective are financial sanctions against individuals?*”, *Journal of Money Laundering Control*, Vol. 24 No. 2, pp. 440-445, doi: 10.1108/JMLC-03-2018-0026.

Turner, J.E. (2011), *Money Laundering Prevention: deterring, Detecting, and Resolving Financial Fraud*, Wiley, Chichester.

Unger, B. (2017), “*Offshore activities and money laundering: recent findings and challenges (European Parliament Study for the PANA Committee)*”, Luxembourg: Office for Official Publications of the European Communities, available at: [www.europarl.europa.eu/studies](http://www.europarl.europa.eu/studies)

Van De Bunt, H. (2008), “*A case study on the misuse of hawala banking*”, *International Journal of Social Economics*, Vol. 35 No. 9, pp. 691-702, doi: 10.1108/03068290810896316.

Webb, D. (2020), “*Freeports, house of commons briefing papers [no. 8823]*”, House of Commons, London, available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-8823>.

# CHILD MARRIAGE AND THE RIGHT OF THE GIRL CHILD IN NIGERIA – BETWEEN THE LAW AND REALITY

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## ABSTRACT

*Through the route of received English law, the Nigerian State has adopted the concept of statutory marriage as one of the dominant types of marriages in the country. Under a statutory marriage, a marriage is deemed void when contracted with a child. Interestingly, this is how far statute goes on this matter. The Nigerian Constitution, plus reality on the ground, clearly undercuts this position. With a constitutional provision surreptitiously allowing child marriage through the backdoor, the result has been a continuous flourishing of this practice, in flagrant violation of domestically and internationally guaranteed right of the girl-child. This article examines the complex mix of Nigeria's constitutional and legal framework on marriage, child marriage and the right of the girl-child, with a view to exposing the inherent issues. It seeks to contribute to the current debate on the unconstitutionality of this practice and its inherent destructiveness for the development of human rights in the country. This article submits that, to indeed secure the rights of the girl-child, the government and other stakeholders must move fast to match law with reality.*

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## 1. INTRODUCTION

The right to marry and found a family, which is recognised in International Human Rights Law (IHRL),<sup>3</sup> is one of the few matters of life that individuals are expected to have in their possession.<sup>4</sup> This right is dependent upon the condition that parties have the capacity to tie the nuptial knot and give their full and free consent<sup>5</sup> without any trace of duress or fraud.<sup>6</sup> Legal capacity is an essential requirement in the validity of a marriage as it helps to uphold the family structure and prevent children from entering into immature relationships.<sup>7</sup> However, in several parts of the world, many girls, who are defined as young female children, are deprived of this right and are compelled into such unions against their will. Oftentimes, consent is rendered on their behalf by parents or relatives, while they are expected to comply.<sup>8</sup> Such marriages are promoted as having conferred womanhood on the girls as some sort of social standing.<sup>9</sup> Child marriage is defined as “any legal or customary union involving a boy or girl younger than the age of eighteen”.<sup>10</sup> The United Nations Children Educational Fund (UNICEF) defines it as “any formal marriage or informal union between a child under the age of 18 and an adult or another child”.<sup>11</sup> This age is recognised in international instruments dealing with the rights of women and girls.<sup>12</sup>

In Nigeria, the celebration of marriages is governed by three forms of law, that is statutory, customary and Islamic laws. The concurrent application of these three laws has increased the challenge of curbing child marriages in the country. For example, customary laws in Nigeria did not initially fix any marriageable age, thereby encouraging parents to marry off their girls at will. Subsequently, some regions in the country enacted laws which provide for minimum ages of marriage. The Eastern Region, for example, fixed 16 years<sup>13</sup> while the Northern Region fixed

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<sup>3</sup> Universal Declaration of Human Rights, Article 16; International Convention on Civil and Political Rights, Art 23.

<sup>4</sup> UNICEF, ‘Early Marriage – Child Spouses’, United Nations Children’s Fund Innocenti Research Centre, (2001) <<https://www.unicef-irc.org/publications/pdf/digest7e.pdf>> accessed 12 December 2021.

<sup>5</sup> Free and full consent to a marriage is required by international instruments like: UDHR, Article 16(6); ICCPR, Article 2; ICCPR; Article 23; ICESCR, Article 10(1); CEDAW, Art 16(1)(b); Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Article 1.

<sup>6</sup> UNICEF, ‘Child Marriage and the Law’ (2007) <<https://www.unicef.org/media/86311/file/Child-marriage-the-law-2020.pdf>> accessed 23 August 2022.

<sup>7</sup> Lind Goran, *Common Law Marriage: A Legal Institution for Cohabitation*. (Oxford University Press, 2008) 187.

<sup>8</sup> *Mordaunt v Mordaunt* [1870]126 LR 2 P&D 109; Miriam Chinyere Anozie, Millicent Ele and Elizabeth Ijeamaka Anika, ‘The Legal, Medical and Social Implications of Child Marriage in Nigeria, (2018) *International Journal of Law, Policy and The Family*’ 1–21.

<sup>9</sup> UNICEF, ‘Early Marriage – Child Spouses’ n (2).

<sup>10</sup> Jennifer Parsons, et al, ‘Economic Impacts of Child Marriage: A Review of the Literature’, (2015) 13 (3) *The Review of Faith and International Affairs*, 12.

<sup>11</sup> UNICEF, ‘Child Marriage’, United Nations Children’s Fund, UNICEF, <<https://www.unicef.org/protection/child-marriage>> accessed 12 August 2021.

<sup>12</sup> Quentin Wodon, et al, ‘Ending Child Marriage: Child Marriage Laws and their Limitations’, Children’s Investment Fund Foundation, Global Partnership for Education, Save the Children and the World Bank, October 2017, 1, 2.

<sup>13</sup> See section 3(1) of the Age of Marriage Law, 1956, Laws of Eastern Nigeria, 1963, Cap 6, which provides that a marriage between two persons neither of whom is up to 16 years shall be void.

between 12-14 years.<sup>14</sup> In the Western Region, it was stated that the marriageable age of persons should be considered upon a petition for divorce, but such age was not defined.<sup>15</sup> Marriageable age in Islamic law depends on attainment of puberty and depends on the tradition in a particular area.<sup>16</sup> Statutory marriage in Nigeria, is governed by the Marriage Act (MA),<sup>17</sup> the Matrimonial Causes Act (MCA)<sup>18</sup> and the Child Rights Act, (CRA) 2003.<sup>19</sup> The MA permits the marriage of a person under the age of 21 years, on the condition that the written permission of the parents is obtained.<sup>20</sup> Furthermore, the MCA<sup>21</sup> provides that a marriage where parties are not of marriageable age is void, without defining the term “marriageable age”. The CRA however provides a solution by specifically fixing 18 as the minimum age of marriage.<sup>22</sup>

The scale of child marriage is staggering. The United Nations (UN) for instance, records that across the globe, about 750 million women and girls were married before the age of eighteen.<sup>23</sup> In addition, the UN has stated that the COVID-19 pandemic, has increased the risk of the occurrence of child marriage for about 10 million girls, due to the closure of schools and increasing levels of poverty. This is in addition to the 100 million girls estimated to become child brides before the pandemic.<sup>24</sup> By 2016, the practice had gained enough international concern that eradicating it by the year 2030 became an international commitment under goal 5 of the Sustainable Development Goals (SDGs), set by the UN.<sup>25</sup> Eradicating it is also important to achieving other component parts of the SDGs, which has increased efforts and advocacy in this respect, though achieving the set target has remained problematic.<sup>26</sup> UNICEF in 2018, notes that while the rate of the practice has decreased from 25 percent to 21 percent in the last decade, there has not been much progress in a country with a high prevalence of this practice.<sup>27</sup>

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<sup>14</sup> See section 49 Native Authority Law (Laws of Northern Nigeria, 1963, Cap 77); section 2 (1) (a) Native Authority (Declaration of Idoma Native Marriage and Custom) Order Native Authority Legal Notice (NALN) 63 of 1959; section 2 (a) N A (Declaration of Tiv) Order NALN 149 of 1955; section 2 (1) (a) N A (Declaration of Borgu) Order, NALN 52 of 1961; section 1 (a) N A (Declaration of Biu) Order, NALN 9 of 1964.

<sup>15</sup> See section 7, Marriage, Divorce and Custody of Children Adoptive Bye-Law Order 1958; Anozie, Ele and Anika, n (6).

<sup>16</sup> Jeremiah J. Bowden, ‘Marriageable Age in Islam: A Study on Marriageable Age Laws and Reforms in Islamic Law’ (2013) 2(1) *LUX: A Journal of Transdisciplinary Writing and Research from Claremont Graduate University* 2.

<sup>17</sup> Cap M6 The Laws Federation of Nigeria (LFN) 2004.

<sup>18</sup> Cap M7 LFN 2004.

<sup>19</sup> Cap C50 LFN 2004.

<sup>20</sup> Marriage Act, section 18.

<sup>21</sup> See Matrimonial Causes Act, section 3(1)(e).

<sup>22</sup> CRA, section 21.

<sup>23</sup> UN, ‘Goal 5: Achieve Gender Equality and Empower all Women and Girls’, Sustainable Development Goals, United Nations <<https://www.un.org/sustainabledevelopment/gender-equality/>> accessed 12 August 2022.

<sup>24</sup> UNICEF, ‘10 Million Additional Girls at Risk of Child Marriage due to COVID-19 – UNICEF’, (2021) <<https://www.unicef.org/eap/press-releases/10-million-additional-girls-risk-child-marriage-due-covid-19-unicef>> accessed 12 August 2021.

<sup>25</sup> Lemmon and ElHarake, (n 10) at 29.

<sup>26</sup> Anju Malhotra and Shatha Elnakib, ‘20 Years of Evidence Base on What Works to Prevent Child Marriage: A Systematic Review’, (2021) 68 *Journal of Adolescent Health*, 847, 848.

<sup>27</sup> *Ibid* at 848.

Nigeria is one of such countries. Accordingly, this article examines the problem of child marriage in the country, its prevalence, as well as the rights of children that are violated when such marriages occur. It examines domestic and international legal responses to the problem while also engaging the controversies on how the Nigerian Constitution legitimizes the practices. It argues that the practices have been enabled by the socio-cultural and traditional norms especially prevalent in the north of the country which makes it a difficult practice to fight. It nonetheless makes two important recommendations, that is, a call for country domestication of the Child's Rights Act 2003, as well as an amendment to Section 29 (4) and Item 61 Part 1 of the Constitution.

## **2. PREVALENCE OF CHILD MARRIAGE IN NIGERIA AS A VIOLATION OF THE RIGHT OF THE GIRL CHILD**

### **A. Child Marriage in Nigeria**

According to a 2019 UNICEF report, Nigeria has the highest number of child brides in Africa, with an estimate of 3.5 million girls who got married before attaining the age of 18 years.<sup>28</sup> At the core of this practice are largely socio-cultural norms and religious beliefs. For instance, prevalent socio-cultural norms in a lot of places regarding the place of the girl in the society, means that girls and women are not considered as important in terms of education.<sup>29</sup> Thus, it is believed that girls have the sole purpose of taking care of their husbands, having children and minding the home, while boys are sent to school.<sup>30</sup> A study conducted in Yola, Bauchi, and Maiduguri states, all located in north-eastern Nigeria, revealed that children in these communities get married often between 11 to 15 years of age, or at the onset of menstruation, mostly due to cultural norms and religious beliefs rooted in their community.<sup>31</sup> Another study revealed that the prevalence of child marriage among the Hausa/Fulani ethnic group was much higher than ethnic groups in southern Nigeria.<sup>32</sup> The Kambari and Fulfude ethnic groups, also in the North were found to have the highest rates with 74.9% and 74.8% respectively compared to the Hausa/Fulani groups which had 54.8%.<sup>33</sup> The high rates of child marriage in Nigeria's north, has further been exacerbated by the brutal violence against women and girls by the Boko Haram insurgent group. It has been noted that the group's acts of terror, finds support in the entrenched disdain for women's' intellectual and economic empowerment in

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<sup>28</sup> UNICEF, 'A Profile of Child Marriage in Africa', <file:///C:/Users/ooolus/Downloads/UNICEF-Child-Marriage-Brochure-High-Single\_246.pdf> accessed 12 August 2021.

<sup>29</sup> Parsons, et al, n (8) at 12.

<sup>30</sup> Eno-Obong Akpan 'Early Marriage in Eastern Nigeria and the Health Consequences of Vesico-Vaginal Fistulae (VVF) among young Mothers (2003) 11(2) *Gender and Development* 70, 71.

<sup>31</sup> Yakub, Hadiza; Foltysova, Jirina; and Connors, Jeanne, 'Child Marriage: Parents' Lived Experience of Decision-Making Processes and Consequential Health Effects' (2020) <[https://scholarworks.waldenu.edu/shs\\_pubs/187](https://scholarworks.waldenu.edu/shs_pubs/187)>.

<sup>32</sup> Jacob W. Mobolaji, Adesegun O. Fatusi and Sunday A. Adedini. 'Ethnicity, Religious Affiliation and Girl-child Marriage: A Cross-sectional Study of Nationally representative sample of female adolescents in Nigeria.' *BMC public health* 20.1 (2020): 1-10. at 2.

<sup>33</sup> *Ibid.*

the region.<sup>34</sup> Such a toxic environment has not only kept the practice in operation, it has encouraged Non-State Armed Groups such as Boko Haram to ride on its wave and unleash their vicious motives.<sup>35</sup>

Also, the nexus between child marriage and poverty or economic underdevelopment is unmistakable.<sup>36</sup> Children are mostly forced into marriages in very poor countries where a large majority of the people lack socio-economic opportunities to make proper investment in the girl-child.<sup>37</sup> Thus, parents marry off their girls to lessen their financial hardship and settle debts. In some other instances, the practice is done to increase their social status, maintain their family honour by marrying off their girls as virgins and reduce the risk of pre-marital sexual relations.<sup>38</sup> In situations of armed conflict, economic consideration is closely linked to the possibility of protection, as giving away the child bride in marriage to fighters, not only offer economic prospects, but also protection from sexual abuse.<sup>39</sup> Child marriage is more common in rural communities, because of entrenched traditional norms and fewer livelihood options for young women.<sup>40</sup>

## **B. Child Marriage as a Violation of the Rights of the Girl Child**

Child marriage exposes its victims to harm, which is against the best interest of the child, a principle established by the UNCRC and reiterated in the CRA.<sup>41</sup> It has also been recognised as a form of child abuse, with severe effects on the child's wellbeing, development and other rights accruable to him or her.<sup>42</sup> The practice is contrary to the right of the child to equality and non-discrimination, as established in section 10 of the CRA, which prohibits any form of discrimination of a child based on his or her "origin, sex, religion or political opinion". It is also contrary to Article 2(2) of the CRC, which encourages Parties to take measures in protecting children from discrimination and bias as a result of their parents' "status, activities, expressed opinions, or beliefs".<sup>43</sup> Child

<sup>34</sup> Olusola Babatunde Adegbite, Oreoluwa Omotayo Oduniyi and Ayobami Aluko, 'International Human Rights Law and the Victimization of Women by the Boko Haram Sect', (2020) 11 (2) *Nnamdi Azikiwe Journal of International Law and Jurisprudence*, 44, 55.

<sup>35</sup> *Ibid.*

<sup>36</sup> Lemmon and ElHarake, (n 10) at 36.

<sup>37</sup> Parsons, et al, n (8) at 12.

<sup>38</sup> Yakub, n (31).

<sup>39</sup> Guilia Granata, 'Child Marriage Today: Which Perspective for Girls?', (2015) 1 *Interdisciplinary Journal of Family Studies*, 38 – 53 at 43.

<sup>40</sup> Svanemyr Joar, et al. 'Preventing Child Marriages: First International Day of the Girl Child "My Life, My Right, End Child Marriage' *Reproductive Health* 9.1 (2012): 1-3.

<sup>41</sup> See UNCRC, Article 3(1); CRA, section 1. See also African Charter on the Rights and Welfare of the Child, Article 4(1).

<sup>42</sup> Olaitan O. Olusegun and Amos A. Idowu, 'Child Abuse in Nigeria: Dimension, Reasons for its Persistence and Probable Solutions', (2016) 4 (1) *Child and Family Law Journal*, 1, 3; Hoko Horii, 'A Blind Spot in International Human Rights Framework: A Space Between Tradition and Modernity Within the Child Marriage Discourse', (2020) 24 (8) *The International Journal of Human Rights*, 1057, 1059; Tenkorang, Y. E. 'Explaining the Links between Child Marriage and Intimate Partner Violence: Evidence from Ghana' (2019) 89 *Child Abuse & Neglect*, 48–57.

<sup>43</sup> CEDAW, Art 2(e). See also, CFRN, section 42; CRA, Section 10; ACRWC, Articles 3 and 21(1)(b).

marriage has a basis in discriminatory social norms, that is, social expectations and perspectives, which view the role of girls in the society as secondary, thereby limiting the choices they are able to make in life.<sup>44</sup> Also, legislation fixing lower minimum ages for girls compared to boys, depicts gender discrimination,<sup>45</sup> as girls are deprived of their dreams and future ambitions because of the stereotyped roles forced upon them by the society. They are thus treated differently and deprived of rights and resources made accessible to boys on the basis of their sex. The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), enjoins countries to use all measures, including legislation, to ensure that they repeal or modify customs which victimise women.<sup>46</sup> The discrimination of girls and women deprive them of education and development and affect the contributions they would have made in the society.

Furthermore, studies have shown a link between early marriages and the poor level of education of victims of the practice.<sup>47</sup> Child marriage impacts the education of young girls who are likely not to attend school or have their education truncated by reason of early marriage.<sup>48</sup> Education is not obtained by child brides either due to outright prohibition by the husband or the demands of keeping a home and they are thus deprived of its many benefits.<sup>49</sup> Girls are to enjoy all opportunities available to boys and sent to school instead of being married off at young ages just because of their gender.<sup>50</sup> Absence of formal education affects employment opportunities, leads to reduced earnings and productivity, lack of social skills, as well as the capacity to meaningfully make progress which will be beneficial to the society.<sup>51</sup> It also creates a cycle of intergenerational poverty and disadvantage, as children from such girls are also impacted.<sup>52</sup> According to the Committee on Economic, Social and Cultural Rights, “Education is both a human right in itself and an indispensable means of realizing other human rights...”<sup>53</sup>

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<sup>44</sup> Jennifer McCleary-Sills, et al, ‘Child Marriage: A Critical Barrier to Girls’ Schooling and Gender Equality in Education’, (2015) 13 (3) *The Review of Faith & International Affairs*, 69 – 80 at 70.

<sup>45</sup> Arthur Megan et al., ‘Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions and Gender Disparities’ (2018) 39(1) *Journal of Women, Politics & Policy* 51-74.

<sup>46</sup> CEDAW, Article 2, 5(a).

<sup>47</sup> Jenson, R. and Thornton, R. ‘Early female marriage in the developing world’. Vol. 11, No 2. (2003) *Gender and Development*. P. 9-19; Nguyen, Minh Cong, and Quentin Wodon. "Impact of child marriage on literacy and education attainment in Africa." *Washington, DC: UNICEF and UNESCO Statistics* (2014). [https://www.allinschool.org/media/1956/file/P\\_aper-OOSCI-Child-Marriage-Literacy-Education-2014-en.pdf](https://www.allinschool.org/media/1956/file/P_aper-OOSCI-Child-Marriage-Literacy-Education-2014-en.pdf).

<sup>48</sup> Quentin Wodon, et al, ‘Economic Impacts of Child Marriage: Global Synthesis Report’, International Centre for Research on Women and World Bank, Conference Edition June 27, 2017, 1 – 93 at 4.

<sup>49</sup> Kayode Olatunbosun Fayokun, Legality of Child Marriage in Nigeria and Inhibitions Against Realisation of Education Rights, *US-China Education Review B*, July 2015, Vol. 5, No. 7, 460-470 at 467.

<sup>50</sup> Anozie, Ele and Anika, n (6).

<sup>51</sup> Parsons, et al, n (8) at 15.

<sup>52</sup> Richard de Groot, Maxwell Yiryele Kuunyem and Tia Palermo, ‘Child Marriage and Associated Outcomes in Northern Ghana: A Cross-Sectional Study’, (2018) 18 (285) *BMC Public Health*, 1 – 12 at 1.

<sup>53</sup> General Comment No. 13: The Right to Education (article 13) (1999) (Adopted by the Committee on Economic, Social and Cultural Rights at the Twenty-first Session, E/C.12/1999/10, 8 December 1999)

[https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d\)GeneralCommentNo13Therighttoeducation\(article13\)\(1999\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralCommentNo13Therighttoeducation(article13)(1999).aspx)

Denial of the opportunity to attend school, is against the provisions of international instruments like the Universal Declaration of Human Rights (UDHR),<sup>54</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>55</sup> UNCRC,<sup>56</sup> CEDAW<sup>57</sup> and the ACRWC.<sup>58</sup> Furthermore, the CRA<sup>59</sup> stipulates that children are entitled to free primary and junior secondary education, which should be made available by the government. Section 15 (5) also provides that girls who are expecting a baby should be permitted to complete their education after childbirth.

In addition, child marriage affects the right of children to the “best attainable state of physical, mental and spiritual health”.<sup>60</sup> It increases the risk of reproductive health issues in girls, which could be as a result of too many pregnancies and childbirths, the inability to make decisions and exercise control over their bodies, limited knowledge of contraceptive options,<sup>61</sup> as well as sexual relations with a husband who has multiple partners. In a study conducted on the maternal health effect of child marriage in Adamawa state Nigeria, 82 percent of the respondents stated that their husbands singularly made decisions relating to reproductive issues.<sup>62</sup>

Principally, child brides are forced into marital responsibilities which they are not physically/biologically, psychologically and socially matured enough to undertake.<sup>63</sup> For instance, being married off at such an early age, means early exposure to sexual activity,<sup>64</sup> to which the necessary organs may not be well developed yet.<sup>65</sup> In addition, they are largely unaware of information concerning their sexual and reproductive health. They are thus at the risk of consequences like; contracting HIV and other sexually transmitted diseases,<sup>66</sup> stillbirths,

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<sup>54</sup> Article 26, Universal Declaration of Human Rights, 1948, which states that “everyone has a right to Education.”

<sup>55</sup> See Article 13 of the ICESCR which provides for the commitment of the States parties in ensuring free and compulsory primary education in a range of forms including technical and vocational secondary education.

<sup>56</sup> See Art 28, which enjoins States to make primary education compulsory and free to all, to encourage the development of different forms of secondary education; to offer financial assistance in case of need, as well as to take measures to encourage regular attendance at schools and the reduction of drop-out rates.

<sup>57</sup> CEDAW, Article 10.

<sup>58</sup> Article 11, African Charter on the Rights and Welfare of the Child 1990.

<sup>59</sup> CRA, Section 15

<sup>60</sup> CRA, Section 13. See also, *UNCRC, Article 24; o access to health services; and to be protected from harmful traditional practices*

<sup>61</sup> Godha Deepali, David R. Hotchkiss and Anastasia J. Gage, ‘Association between Child Marriage and Reproductive Health Outcomes and Service Utilization: A Multi-Country Study from South Asia’ (2013) 52(5) *Journal of Adolescent Health* 552–558.

<sup>62</sup> Olaide Adedokun, Oluwagbemiga Adeyemi and Cholli Dauda, ‘Child Marriage and Maternal Health Risks Among Young Mothers in Gombi, Adamawa State, Nigeria: Implications for Mortality, Entitlement and Freedoms’, (2016) 16 (4) *African Health Sciences*, 986 – 999 at 991.

<sup>63</sup> Sanni Yaya, Emmanuel Kolawole Odusina and Ghose Biswajit, ‘Prevalence of Child Marriage and its Impact on Fertility Outcomes in 34 Sub-Saharan African Countries’, (2019) 19 (3) *BMC International Health and Human Rights*, 1 – 11 at 9.

<sup>64</sup> Ayako Kohno, et al, ‘Investigations of the Key Factors that Influence Girls to enter into Child Marriage: A Meta synthesis of Qualitative Evidence’, (2020) 15 (7) *PloS ONE*, 1 – 20 at 2.

<sup>65</sup> UNICEF, ‘Child Marriage’, United Nations Children’s Fund UNICEF, <<https://www.unicef.org/protection/child-marriage>> accessed 12 August 2022.

<sup>66</sup> Examples of these diseases include herpes simplex virus type two, gonorrhoea and chlamydia, cervical cancer and Human Immunodeficiency Virus (HIV). See Nawal M Nour ‘Child Marriage Medical’ (2009) 2(1) *Review in Obstetrics and Gynaecology* 51-56 at 54.

miscarriages, unwanted pregnancies, obstetric fistula (vesicovaginal fistula and rectovaginal fistula)<sup>67</sup> as well as maternal mortality and morbidity.<sup>68</sup> In a study by Agege and others on how parents perceive child marriage amongst the Urhobo ethnic group in Nigeria's Niger-Delta, 78 percent of the respondents agree that Vagina Fistula disease as well as death, are consequences of child marriage.<sup>69</sup> Also, in a study by Alabi et al, on underage marital childbirth issues in the Northwest part of the country, it is noted that early pregnancies had a higher risk of affecting the growth of the foetus, due to the physical immaturity of the mother.<sup>70</sup> Furthermore, the mental health of child brides is sometimes affected by child marriages, due to loneliness, change of environment, neglect and domestic violence.<sup>71</sup> They are usually helpless in their husbands' house and may lack access to family and friends, which may cause anxiety and depression.<sup>72</sup>

Child marriages are also contrary to established statutes which prohibit the abuse of children. The CRA forbids the exposure of a child to 'physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse...'.<sup>73</sup> A lack of educational as well as employment opportunities has been identified as two key risk factors engendering intimate partner violence with respect to the child bride.<sup>74</sup> This is equally accentuated by the massive age imbalance between the child bride and the husband,<sup>75</sup> unfamiliarity before marriage and power imbalances between the couple.<sup>76</sup> Traditional norms that highlight the superiority of the male child and the subordinate role of the female, creates an environment that promotes violence against the child bride.<sup>77</sup> According to UNICEF, domestic violence has devastating effects on brides who are children, both physically and psychologically.<sup>78</sup> Due

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<sup>67</sup> Obstetric fistula is 'an abnormal opening or hole between the bladder and the vagina (VVF) or between the rectum and vagina (RVF)'. It occurs mostly in persons who try to give birth with immature pelvis and birth canal, causing 'continuous and uncontrollable flow of urine and faeces through the vagina'. See Nnamuchi, O., Ezike, E. and Odinkonigbo, J. 'Obstetrics Fistula – a Menace to Maternal Health: Does Fidelity to Country Obligations Under the Millennium Development Goals and Human Rights Regimes Provide an Antidote?' (2016) 25(1) *Annals of Health Law* 65, 66–67.

<sup>68</sup> Yaya, n (63).

<sup>69</sup> Emmanuel A. Agege, Ezekiel U. Nwose and Stella Odjimogho, 'Parental Perception of Girl-Child Early Marriage Amongst the Urhobos in Nigeria', (2018) 5(8) *International Journal of Community Medicine and Public Health*, 3186 – 3190 at 3187.

<sup>70</sup> Olatunji Alabi, Olusola Omisakin and Adeola Alabi, 'Under-age Marital Child Birth in Northwest Nigeria: Implications for Child Health', (2018) 32 (3) *African Population Studies*, 4443 – 4453 at 4451.

<sup>71</sup> See Yakub, n (31), where a child bride who was not sick before marriage developed mental illness which was ascribed to witchcraft.

<sup>72</sup> Seelinger, K.S. 2010. Op cit. 56-117

<sup>73</sup> CRA, section 11. See also, the UNCRC, Art 19, 34 and 36

<sup>74</sup> Eric Y. Tenkorang, 'Explaining the Links Between Child Marriage and Intimate Partner Violence: Evidence from Ghana', (2019) 18 *Child Abuse & Abuse*, 48 – 57 at 49.

<sup>75</sup> K.G. Santhya and Shireen J. Jejeebhoy, 'Sexual and Reproductive Health and Rights of Adolescent Girls: Evidence from Low- and Middle-Income Countries', (2015) 10 (2) *Global Public Health*, 189 – 221 at 197.

<sup>76</sup> Kidman, Rachel. "Child marriage and intimate partner violence: a comparative study of 34 countries." *International journal of epidemiology* 46.2 (2017): 662-675.

<sup>77</sup> Bright Opoku Ahinkorah, et al, 'Association Between Girl Child Marriage and Intimate Partner Violence in Sub-Saharan Africa: Insights from a Multicountry Analysis of Demographic and Health Surveys', (2021) *Journal of Interpersonal Violence*, 1 – 21 at 2.

<sup>78</sup> UNICEF Innocenti Research Centre (2000) Report on Domestic Violence against Women and Girls Innocenti Digest No. 6. Florence: UNICEF.

to the several forms of abuse perpetrated on child brides, many of them have been reported to either try to escape from their homes or kill their husbands as a result of frustration.<sup>79</sup>

A child's right to leisure, recreation and cultural activities<sup>80</sup> is violated when she gets married. This right involves "any behaviour, activity or process initiated, controlled and structured by children themselves which takes place whenever and wherever opportunities arise".<sup>81</sup> Marriage affects childhoods, takes away the usual carefree and happy attitude mostly associated with children and makes her a mother who has to cater for the needs of her children. Due to the huge responsibility involved in minding the home, she is engaged most of the time with little or no time to be carefree and relaxed.<sup>82</sup> The harm inflicted on a child bride might also be passed on to her children through her inability to properly care for them, either due to her young age or psychological wellbeing which may have been affected.

The CRA asserts the right of the Nigerian child to survival and development.<sup>83</sup> Child marriage does not provide the appropriate setting needed for children to remain alive and make sustainable progress. It is difficult for these children to achieve their potential because of the trauma they experience, which include deprivation of; education, health services, peace of mind, care, leisure and recreation.

Forced separation from parents is a violation of the rights of children clearly espoused in legal instruments, with the exception that such separation is in furtherance of their education or in their best interests.<sup>84</sup> This right ensures parental care, provision and protection, which is essential at this stage of their lives where they are still growing. Children are meant to receive guidance, mentorship and basic skills about issues of life at home. Getting married too early and leaving their homes deprives them of these benefits.

Child marriage is also contrary to the rights to dignity of children as the practice promotes slavery.<sup>85</sup> Several men get married to young girls due to the perception that these girls can handle house chores and child bearing more efficiently. Girls who do not satisfy these requirements after marriage, are returned to their parents while the bride

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<sup>79</sup> See *Maimuna Abdulmumini v FRN, Kastina State Government and the Nigerian Prison Service* ECW/CCJ/jud/14/14

<sup>80</sup> See CRA, Section 12; UNCRC Article 31.

<sup>81</sup> International Play Association, 'Children's Right to Play and the Environment' A discussion paper prepared by the *International Play Association: Promoting the Child's Right to Play for the UN Committee on the Rights of the Child Day of General Discussion, Children's Rights and the Environment*, (2016) <<http://ipaworld.org/wp-content/uploads/2016/05/IPA-Play-Environment-Discussion-Paper.pdf>> accessed 18 February 2017.

<sup>82</sup> Ine Nnadi 'Early Marriage: A Gender Based violence and a Violation Women's Human Rights in Nigeria' (2014) 7(3) *Journal of Politics and Law* 35-40 at 36.

<sup>83</sup> CRA, Section 4. See also UNCRC, Article 6;

<sup>84</sup> See CRA, Section 14; UNCRC, Article 9; ACRWC, Article 19.

<sup>85</sup> See the CRA, Section 11.

price paid to her family is demanded back.<sup>86</sup> Other men wish to get married to innocent and naïve girls due to the high tendency that they are chaste and submissive.<sup>87</sup> The relationship between the girl and her husband is thus one “in which a spouse is reduced to a commodity over whom any or all the powers of ownership are attached” and which the UN has condemned as not only heinous, but a human rights violation.<sup>88</sup>

### **3. INTERNATIONAL AND DOMESTIC LEGAL RESPONSES TO THE PROBLEM OF CHILD MARRIAGE**

Child marriage is not limited to Nigeria but cuts across countries in Africa, Asia, the Middle East, Europe, North America and Latin America.<sup>89</sup> The practice is particularly rampant in Niger, Chad, Bangladesh, Guinea, India, Mozambique, Mali, Burkina Faso, Somalia, South Sudan, Malawi, Madagascar and Eritrea.<sup>90</sup> Given the significant impact of child marriage on children’s rights and their wellbeing, efforts to eradicate the practice has gained the right momentum under IHRL.<sup>91</sup> Also, with the threat it poses to the female gender and the wider community, several international agreements have called on governments to respond accordingly in this respect.<sup>92</sup> Key in this regard is the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, (Marriage Convention) which prohibits the marriage of persons below the minimum age established by national legislation.<sup>93</sup> The UNCRC fails to expressly prohibit the practice of child marriage, but nevertheless requires States to abolish all harmful practices.<sup>94</sup> The omission is due to the limited knowledge of the forms of harmful practices at the period the UNCRC was drafted. Subsequently however, further developments concerning Article 24(3) have been recorded in the general recommendations and general comments of the Committee of the Rights of the Child, where child marriage was included as one of the harmful practices to be eliminated. To protect the rights to equality and non-discrimination of women and girls, CEDAW specifies that the ‘betrothal and the

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<sup>86</sup> Lisa Avalos et al., ‘Ending Female Genital Mutilation and Child Marriage in Tanzania’ (2015) 38 *Fordham International Law Journal* 639-687 at 647.

<sup>87</sup> Olga Voinarevich ‘A Fairy Tale Interrupted: The Long-Term Impact of Child Marriage in Yemen and the Necessary Adjustments to both Local and International Laws to Stop the Practice and to Protect Voiceless Child Brides’ (2015) 16 *Rutgers Race and the Law Review* 203–217 at 208.

<sup>88</sup> See e.g., UNGA, ‘The Report of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, Gulnara Shahinian’, Human Rights Council HRC 21<sup>st</sup> Session, 10 July 2012, A/HRC/21/41.

<sup>89</sup> Girls Not Brides, ‘Solution Brief on Entertainment -Education to Address Child Marriage’ at 1, available at <http://www.girlsnotbrides.org/wp-content/uploads/2017/05/EE-solutions-brief-May-2017-final.pdf>, assessed on 28 May 2017.

<sup>90</sup> Statista, ‘Countries with the Highest Child Marriage Rate as at 2021’ <<https://www.statista.com/statistics/1226532/countries-with-the-highest-child-marriage-rate/>> accessed 22 April 2022.

<sup>91</sup> Isabela Warioba, ‘Child Marriage in Tanzania: A Human Rights Perspective’, (2019) 23 *The Journal of Law, Social Justice & Global Development*, 1 – 18 at 2.

<sup>92</sup> Megan Arthur, et al, n (45) at 54.

<sup>93</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Article 2.

<sup>94</sup> UNCRC, Article 24(3); Tameshnie Deane, ‘Marrying Young: Limiting the Impact of a Crisis on the High Prevalence of Child Marriage’ (2021) 10 *Laws* 1 – 21 at 6.

marriage of a child shall have no legal effect’ as well as requests that Parties fix ‘a minimum age of marriage’.<sup>95</sup>

At the regional level, responses to the practice of child marriage is covered by the ACRWC, which prohibits harmful and discriminatory traditional practices that are contrary to children’s wellbeing. It also prohibits the betrothal and marriage of children as well as enjoins States to fix 18 years as the legal marriageable age.<sup>96</sup> Furthermore, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), replicates this provision by fixing 18 as the minimum age of marriage,<sup>97</sup> in addition to enjoining Parties to eradicate harmful traditional practices so as to protect women and girls from bias.<sup>98</sup> Some legal instruments also promote the need for free and full consent of persons before they get married.<sup>99</sup> However, the Marriage Convention and CEDAW do not prescribe a minimum age at which a person would be deemed able to give free and full consent to marriage, and leaves it to States to determine through domestic legislations.<sup>100</sup> The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, in their general comment,<sup>101</sup> stipulate that States establish 18 years as the minimum age of marriage for both boys and girls. The Committees add that when in exceptional situations the minimum age must be set at an earlier age, it should not be set below the age of 16 years.

The African Commission on Human and Peoples’ Rights (the Commission), based on its responsibility to protect the human rights of Africans as established by Article 30 of the African Charter on Human and People’s Rights (ACHPR), adopted Resolution ACHPR/Res.292(EXT.OS/XVI)2014.<sup>102</sup> The Commission expresses concern at the ongoing practice of child marriage in several African countries due to the prevalence of traditional practices. In line with its mandate to conduct research on human rights issues affecting the African population,<sup>103</sup> the Commission agreed to conduct a study on the practice of child marriage with the purpose of making available, all relevant details concerning the practice as well as developing best practices in providing solutions in the countries

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<sup>95</sup> CEDAW, Article 16(2).

<sup>96</sup> ACRWC, Article 21(2).

<sup>97</sup> See Article 6(a) (b).

<sup>98</sup> Maputo Protocol, Article 2(2).

<sup>99</sup> See art 16(b), UDHR, Article 23 of the ICCPR; Art 10, ICESCR, Art 16(1)(b), CEDAW, Art 1, Convention on the Consent to Marriage, in addition to the Minimum Age for Marriage and Registration of Marriage.

<sup>100</sup> Michelle Scobie and Afiya France, ‘Child Marriage, Human Rights and International Norms: The Case of Legislative Reforms in Reform in Trinidad and Tobago’, (2020) 14 (10) *Third World Quarterly*, 1687 – 1706 at 1692.

<sup>101</sup> Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices CEDAW/C/GC/31-CRC/C/GC/18 [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&SymbolNo=CEDAW/C/GC/31/CRC/C/GC/18](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&SymbolNo=CEDAW/C/GC/31/CRC/C/GC/18)

<sup>102</sup> African Commission on Human and Peoples’ Rights, 292 Resolution on the Need to Conduct a Study on Child Marriage in Africa - ACHPR/Res.292(EXT.OS/xzXVI)2014.

<sup>103</sup> Art. 45(1)(a) ACHPR.

of study. The report of this study published in 2018, recognises child marriage as a ‘significant hindrance to Africa’s development’, and urges the African Union to intensify its efforts in preventing and promoting the human rights of women in Africa. It also specifies that the prohibition of child marriage is extended to all forms of marriages, including customary and religious marriages and exceptions to the minimum age of marriage should not be permitted. To facilitate the implementation of laws which prohibit child marriage, law enforcement officers should be trained on related issues and school teachers should be encouraged to educate parents on the disadvantages of the practice in addition to making reports when suspected cases are discovered.

A joint comment by the Commission and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage,<sup>104</sup> elaborates on State obligations concerning child marriage. Paragraph 7 explains that the provisions of the African Children’s Charter were interpreted using the principles of the ‘best interest of the child, the child’s right to freedom from discrimination, the right to survival, development and protection, and children’s right to participate in matters that affect them.’ Paragraph 10 notes that child marriage is not in accordance with the best interests of the child (BIC) principle and thus, legislation that prohibits child marriages for both boys and girls must be enforced. The Commission and ACERWC also emphasize the importance of establishing prevention mechanisms for those threatened by the practice of child marriage, in addition to ensuring that those who are already victims obtain redress. According to paragraph 11, States should not justify child marriage on the BIC principle, with claims that the practice will benefit children financially. In addition, the African Commission and ACERWC declare that States who have signified their commitment to non-discrimination against women and girls, should recognise child marriage as violating that principle and take appropriate measures to curb the practice. It is recognised in paragraph 13, that children are deprived of participating in issues concerning their lives when they are forced to get married, with the consent of their parents or guardians considered above theirs. This also applies to situations where a perpetrator of rape is allowed to marry his victim, thereby avoiding prosecution and where a girl is prevented from leaving or opting out of a marriage. The joint comment makes it clear in Paragraph 12, that child marriages prevent development and increase the rates of infant and maternal mortality. States are thus enjoined to eliminate traditional practices which affect the rights and health of the child, and are contrary to the rights and responsibilities contained in the ACRWC. They note that institutional measures like birth and marriage registration help to identify potential victims of child marriage and curb the practice.

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<sup>104</sup> Joint General Comment of the African Commission on Human and Peoples’ Rights (ACHPR) and The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) ON ENDING CHILD MARRIAGE.

The Committee on the Rights of the Child (the Committee), in their general comment No 4 on Adolescent Health and Development in the context of the CRC,<sup>105</sup> in paragraph 5, calls upon States to establish the same minimum marriageable age for boys and girls in their national legislation. This is in compliance with Article 4 of the CRC which encourages States to establish legislative measures to implement the rights contained in the Convention. These established ages should “closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity”. The Committee also stipulate that access to information provided for in Article 17 of the CRC, is important in protecting children from health consequences resulting from harmful traditional practices, including early marriages.<sup>106</sup> The Committee thus recommends that adolescent girls are to be provided with information on the harmful effects of early marriage and early pregnancy, while those who are pregnant should be able to access health care which considers their rights and specific needs.<sup>107</sup> The Committee expresses its concern as regards the negative effect of child marriage on the sexual and reproductive health of women and girls. Other effects apart from health are highlighted to include; deprivation of education and denial of the special care these children are entitled to under the CRC, based on the regulation in some countries that married children are adults, notwithstanding their ages. It recommends in paragraph 16, that States amend their legislation and fix the minimum marriageable age for both boys and girls at 18. States, on their own part, are to take effective measures to ‘reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices, and to support adolescent parents’.<sup>108</sup> This is because children who become parents may experience depression and anxiety, particularly when they lack support, with the effect that they cannot efficiently care for their child.<sup>109</sup> States are to further make available, programmes that ensure adolescent parents continue with their education.<sup>110</sup>

CEDAW, in its General Recommendation No. 35 on gender-based violence against women,<sup>111</sup> identifies child marriage as a form of gender-based violence against girls and calls upon States to repeal all legislation that

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<sup>105</sup> Committee on the Rights of the Child, General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (2003). <<https://www.globalhealthrights.org/instrument/crc-general-comment-no-4-adolescent-health-and-development-in-the-context-of-the-convention-on-the-rights-of-the-child/>> accessed 12 August 2022.

<sup>106</sup> Paragraph 6.

<sup>107</sup> Ibid.

<sup>108</sup> Paragraph 27.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf)> accessed 12 July 2022.

tolerates or condones such practice.<sup>112</sup> The Human Rights Council (the Council) in its 2015 Resolution,<sup>113</sup> identifies child marriage as an abuse of the human rights of women and girls, which affects their physical and psychological health and facilitates the occurrence of other harmful practices. It recognises that child marriage is an obstacle to sustainable development, in addition to exacerbating the cycle of poverty, and notes that the prevalence of the practice becomes worse in situations of armed conflicts. According to the Council, States are to collaborate with other stakeholders to curb child marriages and support children who are married already.<sup>114</sup> It urges States to allow children to participate in issues that concern them and ensure they are provided with information concerning the consequences of child marriages.<sup>115</sup>

The Council in 2019, adopted Resolution A/HRC/RES/41/8 on child, early and forced marriage.<sup>116</sup> It notes that countries have made progress in curbing such marriages, but expresses concern at the slow rate of progress in several countries, with the tendency to affect the fulfillment of target 5.3 of the SDGs. The Council recognises further that child, early and forced marriages also occur within informal or unregistered marriages. Policies and programmes must therefore address such special situations in addition to the collation of data, to help develop efficient measures to protect victims. It also notes that a ‘holistic human rights-based approach’, is required to effectively stop the practice of child marriage with particular focus dedicated to the prevention and elimination of social norms and attitudes that underlie the practice. Changing these norms require efforts from all members of the society. It recognises that the victims of child marriages as well as their children, should be supported and provided with services including: health care, education and access to justice. The Council in paragraph 6 of the Resolution, thus encourages States to eliminate child marriages through measures ranging from the adoption of national and subnational action plans, to providing resources to relevant sectors including the health, nutrition, protection, governance and education sectors. Physical, administrative and procedural barriers that restrict the timely registration of births and marriages, including customary and religious marriages, should be identified and removed, particularly for persons who reside in rural communities.<sup>117</sup> States are also called upon to promote the access of women and girls to free and quality primary and secondary education, as well as ensure that pregnant girls or those who are married, complete their education.<sup>118</sup> Two criteria stand out when it comes to the efforts at eradication of the practice of child marriage, that is, the prescription of the accepted age of marriage and the

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<sup>112</sup> Ibid, Paragraph 31(a).

<sup>113</sup> Human Rights Council, ‘Strengthening Efforts to Prevent and Eliminate Child, Early and Forced Marriage’, Resolution A/HRC/RES/29/8, <<https://www.right-docs.org/doc/a-hrc-res-29-8/>> accessed 12 September 2022.

<sup>114</sup> Ibid, Paragraph 2.

<sup>115</sup> Ibid, Paragraph 9.

<sup>116</sup> Human Rights Council, ‘Consequences of child, early and forced marriage’ Resolution A/HRC/41/L.8/Rev.1 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/211/10/PDF/G1921110.pdf?OpenElement>> accessed 12 July 2022..

<sup>117</sup> Ibid, Paragraph 5.

<sup>118</sup> Ibid, Paragraph 7 and 8.

provision for ‘free and full consent’ in order to make a marriage contract valid. As Warria has correctly noted, “consent cannot be free and full when one of the parties entering marriage is not mature enough to make informed decisions”.<sup>119</sup> It is immaterial that guardians give consent on behalf of such minors, it would still be deemed absence of consent.<sup>120</sup>

It is worth noting that while the move towards a minimum age for marriage has attained some level of success at the international level, given the agreement on the age of 18 as a unified marriage age in human rights legal instruments. The same is not the case under some domestic constitutional and legislative frameworks.<sup>121</sup> The minimum age requirement remains problematic given the several differences in the global view of childhood and attainment of puberty.<sup>122</sup> This has allowed countries acting on the basis of their power to domestically determine minimum marriageable age, to carve pathways to child marriage, through exceptions to the general rule on the age of 18.<sup>123</sup> A case in point, is the United States, where some states including; Alabama, Alaska, Iowa, Arkansas, Georgia, Florida, California and Arizona,<sup>124</sup> allow persons who are between 16 to 17 years to get married, on the condition that they obtain the consent of their parents. In states like Hawaii, Massachusetts, Kansas, Louisiana, New York, North Carolina and West Virginia, minors who obtain judicial approvals in addition to parental consent are permitted to get married.<sup>125</sup> In Idaho, Arizona, Colorado and Louisiana, persons between the ages of 16 and 17 can get married, provided that the age gap between the couple does not exceed three years.<sup>126</sup> Only a few states like Delaware, New Jersey, Minnesota and Pennsylvania, prohibit child marriages without exceptions.<sup>127</sup> Parental consent as a form of exception undermines efforts to protect children from early marriages, as most child marriages occur through the arrangement of parents.<sup>128</sup> A study conducted by Megan and others, indicate that 90 percent of American countries permit the legal exception of parental consent to a child marriage, as compared to 62 percent for East Asian and the Pacific countries, 53 percent in Middle East and North African

<sup>119</sup> Ajwang Warria, ‘Child Marriages, Child Protection and Sustainable Development in Kenya: Is Legislation Sufficient?’, (2019) 23 (3) *African Journal of Reproductive Health*, at 121 – 133 at 124.

<sup>120</sup> *Ibid.*

<sup>121</sup> Quentin Wodon, et al, ‘Ending Child Marriage n (11) at 2.

<sup>122</sup> Hoko Horii, ‘A Blind Spot in International Human Rights Framework: A Space Between Tradition and Modernity Within the Child Marriage Discourse’, (2020) 24 (8) *The International Journal of Human Rights*, 1057 – 1079 at 1061.

<sup>123</sup> Belinda Maswikwa, et al, ‘Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sib-Sahara Africa’, (2015) 14 (2) *International Perspectives on Sexual and Reproductive Health*, 58 – 68 at 58.

<sup>124</sup> Arizona Revised Statutes Annotated (“A.R.S.”) sections 25-102 and 122; RE: the Marriage of: Michael Joe MEDLIN v. Michelle Ann MEDLIN, No. 1 CA-CV 98-0592. (1999).

<sup>125</sup> Goran n (5) at 196.

<sup>126</sup> Findlaw, State-by-State Marriage "Age of Consent" Laws (2020) <https://www.findlaw.com/family/marriage/state-by-state-marriage-age-of-consent-laws.html>

<sup>127</sup> Sarah Ochieng, ‘Child Marriage in the US: Loopholes in State Marriage Laws Perpetuate Child Marriage’ (2020) 2(1) *Immigration and Human Rights Law Review* 3.

<sup>128</sup> Megan Arthur, et al, n (45) at 57.

countries, 50 percent in sub-Saharan countries, 38 percent in South Asian countries and 26 percent in Europe and Central Asian countries.<sup>129</sup>

Apart from parental exception, child marriage is difficult to curb because of plural legal systems, that is customary and Islamic laws, which operate alongside statutory law.<sup>130</sup> Some of these retained customs encourage traditional practices that are harmful to girls and women and violate their rights.<sup>131</sup> Many customary laws, for example, do not fix a minimum age of marriage, while others fix the attainment of puberty as marriageable age.<sup>132</sup> A study by Arthur et al,<sup>133</sup> revealed that about 30 countries permit girls younger than 18 years old to get married, because of cultural and religious beliefs. These countries are mostly found in the Middle East, North Africa, South Asia and sub-Saharan Africa, with percentages of 41 percent for the first two, 33 percent and 26 percent respectively.

Some countries have modified their laws or enacted laws prohibiting child marriage.<sup>134</sup> For example, initially in Malawi, children from 15 years of age could enter into a marriage with the permission of their parents. However, the parliament in 2017, amended the Marriage, Divorce and Family Relations Act, raising the marriageable age from 16 years to 18 years for both boys and girls, with a penalty of 10 years imprisonment for violators.<sup>135</sup> A taskforce was also set up by the Ministry of Justice and Constitutional Affairs, with the duty to ensure that all laws comply with the amended constitution.<sup>136</sup> Previously, Saudi Arabia did not prohibit child marriage and their boys and girls could get married at any age. In December 2019 however, individuals who had not attained 18 years were banned from entering into a marriage, except with the permission of such marriage by a special court.<sup>137</sup> While Saudi Arabia did not ban child marriage completely, people have argued that fixing 18 years as marriageable age is significant progress, considering the conservative nature of the kingdom.<sup>138</sup> Likewise, Mozambique in July 2019, passed a new Bill fixing the marriageable age at 18, with no exceptions. This Bill is

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<sup>129</sup> Ibid.

<sup>130</sup> Felix E. Eboibi, 'The Impact of Federalism and Legal Pluralism on The Enforcement of International Human Rights Law Against Child Marriage In Africa' (2018) 1 *African Journal of Law and Human Rights* at 75.

<sup>131</sup> J E Bond, 'Constitutional Exclusion and Gender in Commonwealth Africa' (2008) 31 *Fordham International Law Journal* 289.

<sup>132</sup> Kamran Hashemi, 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation' (2007) 29(1) *Human Rights Quarterly* 194-227 at 199.

<sup>133</sup> Megan Arthur, et al, n (45) at 57.

<sup>134</sup> Eboibi, n (130) at 77.

<sup>135</sup> Marriage, Divorce and Family Relations Act 2015, Section 14; Andrea J Melnikas., et al. 'Perceptions of Minimum Age at Marriage Laws and their Enforcement: Qualitative Evidence from Malawi' (2021) 21(1) *BMC Public Health* 1-12.

<sup>136</sup> UNFPA and UNICEF, Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage (2020) <<https://www.unicef.org/media/86311/file/Child-marriage-the-law-2020.pdf>> accessed 13 December 2022.

<sup>137</sup> Asma I. Abdumalik, 'Saudi Arabia's Child Marriage Ban a Leap Forward', <<https://www.arabnews.com/node/1613691>> accessed 25 December 2022.

<sup>138</sup> The Week, 'Saudi Arabia has Curbed, not Banned, Underage Marriages' (December 27, 2019)

<<https://www.theweek.in/news/world/2019/12/27/saudi-arabia-has-curbed-not-banned-marriages-under-18.html>> accessed 22 November 2022.

awaiting the assent of the president before it becomes law and enforceable.<sup>139</sup> Yemen on the other hand, still allows child marriage till date, which is exacerbated by the 7<sup>th</sup> year conflict which was described by the UN in 2019, as “the worst humanitarian crisis in the world”.<sup>140</sup>

In Africa, some countries, including Eritrea, Ethiopia, South Sudan, Uganda, Rwanda and Kenya, have also fixed the age of marriage at 18 years, without exemptions.<sup>141</sup> On the other hand, many others allow marriages below that age, once parents have given their consent. These include countries like Gabon (15), Niger (15), Sao Tome and Principe (14), Burkina Faso (17), Senegal (16), Zambia (16) and Tanzania (15).<sup>142</sup>

In Nigeria, legal response to the problem of child marriage has been a mixed bag. With the landmark adoption of UNCRC, Nigeria proceeded to crystalize its obligations under the Convention into a domestic child-specific legislation.<sup>143</sup> This happened with the enactment of the CRA, 2003.<sup>144</sup> The CRA specifically deals with the issue of child marriage, mincing no words in prohibiting the act. Section 21 states that “No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatever”.<sup>145</sup> Section 21 of the CRA is in line with the provisions of the CEDAW, which enjoins States to prescribe a minimum age of marriage in their legislation.<sup>146</sup> Further prohibiting the related act of child betrothal, section 22 (1) adds that “No parent, guardian, or any other person shall betroth a child to any person”.<sup>147</sup> In providing punishment, section 23(d) provides that anyone who engages in child marriage, child betrothal, or promotes any of these acts, is expected to pay a sum of 500, 000 or is imprisoned for a period of 5 years or both, if found guilty. However, the CRA 2003, being a federal law, is only applicable in the Federal Capital Territory FCT Abuja, with the 36 states of the Federation required to domesticate it in their domains, for it to have the force of law. The non-domestication of the CRA 2003 by some states, means that the practice of child marriage has not yet received national support, to the end that eradicating it in full has remained problematic. However, aside from

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<sup>139</sup> Reliefweb, ‘Mozambique Bans Child Marriage’ <<https://reliefweb.int/report/mozambique/mozambique-bans-child-marriage>> accessed 2 December 2022.

<sup>140</sup> Kara Hunersen et al., ‘Child Marriage in Yemen: A Mixed Methods Study in Ongoing Conflict and Displacement’ (2021) 34(1) *Journal of Refugee Studies* 1, 3.

<sup>141</sup> UNFPA and UNICEF, Child Marriage: A Mapping of Programmes and Partners in Twelve Countries in East and Southern Africa <[https://esaro.unfpa.org/sites/default/files/pub-pdf/Child%20marriage%20mapping\\_final\\_digital.pdf](https://esaro.unfpa.org/sites/default/files/pub-pdf/Child%20marriage%20mapping_final_digital.pdf)> accessed 12 November 2022.

<sup>142</sup> Maswikwa, et al. n (123) 58-68.

<sup>143</sup> Nike Adebawale, ‘Why Every Nigerian State Must Domesticate, Implement Child Rights Act’, Premium Times (24 June 2019), <<https://www.premiumtimesng.com/health/health-features/336790-why-every-nigerian-state-must-domesticate-implement-child-rights-act.html>> accessed 7 July November.

<sup>144</sup> Child’s Right Act 2003, No. 26.

<sup>145</sup> Child’s Right Act 2003, No. 26.

<sup>146</sup> See CEDAW, Article 16 (2).

<sup>147</sup> Child’s Right Act 2003, Section 26.

the problem of non-domestication of the CRA 2003, an hindrance in the CFRN, has remained a veritable succor to perpetrators of child marriage and a big impediment to those calling for its eradication.

#### **4. CHILD MARRIAGE UNDER THE NIGERIAN CONSTITUTION – ANALYSING THE CORE ISSUES**

Another problem allowed in a number of other countries, is the fact that once a girl is married, she is deemed as having attained majority. This has remained a back-and-forth debate under Nigeria's constitutional framework with the crux of the matter being Section 29 (4) of the CFRN. However, before distilling the core issues thrown up by Section 29 (4), it is important to consider an ancillary issue that appears to have consistently validated this provision, that is, the status of children under the country's constitutional framework.

Nwauche brilliantly engages with this issue, through a dissection of how the different texts in the CFRN has been viewed to support child marriage. He notes elementarily, that alongside the recognition of three levels of government in Nigeria, that is, the federal, state and local government councils, the CFRN also accommodates three levels of power sharing, namely the exclusive, concurrent and residual list.<sup>148</sup> The first argument he highlights is that children are only covered under the residual list of the federation, which connotes that they are the obligation of the state government, in line with Section 12 (2) and (3) of the CFRN.<sup>149</sup> He further notes that one area where this unique design under the CFRN would appear to have reared its head, is in terms of the enactment of the CRA, 2003, which was passed into law, pursuant to the National Assembly's obligation to enact laws for the Federal Capital Territory (FCT), and not the federating units.<sup>150</sup> With children being under the obligation of state governments, the idea is that it becomes incumbent on each state to then domesticate the CRA 2003, in line with its local realities.<sup>151</sup> This has remained a major debacle for a number of the states, especially when viewed from the lens of the complex children-related issues in their domain. He then observes a second argument which is that, a possible implication of this constitutional design, is that neither the fundamental objectives and directive principles of state policy in Chapter 2, nor fundamental human rights provisions contained in the constitution's bill of rights under Chapter 4, applies to them, as their protection is only covered under the CRA.<sup>152</sup>

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<sup>148</sup> Enyinna Nwauche, 'Child Marriage in Nigeria:(II) legal and (Un) Constitutional', (2015) 15 *Africa Human Rights Law Journal*, 421 – 432 at 422.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

The implication is that it makes it difficult for Childs' rights advocates to directly challenge the government regarding its obligation to children under the Constitution.

Nwauche has however negated the idea that Nigeria's children are the obligation of state governments and therefore outside the purview of the CFRN. He argues that the constitutional text governing fundamental human rights clearly states that the rights concerned therein, is that of 'any person' and that the phrase "any person" in this context necessarily includes children.<sup>153</sup> He also argues that the same rule of interpretation that applies to women, who though not expressly mentioned in the CFRN are deemed as protected by Chapter 4, ought to apply to children and that more importantly, the CFRN uses the term "citizen" with reference to everyone, instead of the definition of the word "person".<sup>154</sup> Nwauche's argument is consistent with constitutional norms across the globe. It appears incomprehensible that anyone would view a living being such as a child, as being less of a human, with respect to the application of constitutional provisions. In fact, this itself may be considered a violation of the right to freedom from discrimination against the child. The great benefit in Nwauche's position is that it strengthens the view that the constitutional bill of rights under Chapter 4, are directly applicable generally to children in Nigeria, specifically to the girl-child, and consequentially to the problematic issue of child marriage. However, it would have been laudable that this matter had ended here. The only challenge is that the apparent breakthrough in applying the fundamental human rights provisions to children, which would have been sufficient in rendering the practice of child marriage unconstitutional, is then impeded by the provision of Section 29 (4) of the CFRN, thereby throwing up fresh challenges. Section 29 (4) states that a citizen of full age may renounce his Nigerian citizenship and for this purpose, a woman who has entered into a marriage is presumed to be of full age. Thus, this means that a minor who gets married before the age of 18 years is deemed to be an adult. Several legal scholars have engaged the critical issues thrown up by Section 29(4), especially its implication for the legal and social development of the country. According to Tchoukou, this constitutional provision is 'used as a tool to bring into being specific forms of division by constructing identities to which individuals, in our case women, become tied or associated'.<sup>155</sup> This provision was cited by a prosecutor in the case of *Maimuna Abdulmumini v FRN, Kastina State Government and the Nigerian Prison Service*<sup>156</sup> when the prosecutor claimed that the defendant was of age by virtue of section 29(4), in a bid to get her punished through death by hanging for killing her husband when she was 13 years old.

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Julie A. Tchoukou, 'Religion as an Ideological Weapon and the Feminisation of Culture in Nigeria: A Critical Analysis of the Textuality of Violence through the Legal Regulation of Child Marriages' (2020) 24(10) *The International Journal of Human Rights* 1515-1536 at 1533.

<sup>156</sup> ECW/CCJ/jud/14/14.

Aside, the debacle of Section 29 (4) of the CFRN, landmines are to be found in other laws related to the girl child. For instance, while Section 218 and 357 of the Criminal Code Act<sup>157</sup> protects the girl child from forced sexual intercourse, Section 6 of the Act provides an exception where it has to do with a girl of that age married under customary law. While the drafters of the Act recognised the danger that early sexual intercourse poses to girls of that age, they did not have the courage to apply it as a general rule, due largely to the unwholesome customary practices of the north of the country. Such provisions as Section 6 of the Criminal Code Act can no longer stand in the face of current human rights standards. The matter has been a concern for the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) who has suggested that Section 6 of the Criminal Code Act which legitimizes child marriage and rape be repealed, in order for the protection offered the girl child under Section 218 and 357 to be fully realized.<sup>158</sup>

The fact that child marriage has been legitimized through a constitutional process in Nigeria speaks volume. Nigeria's constitutional provision allowing the practice is not only a violation of the country's IHRL obligations, but also a violation of the wellbeing of children.

## **5. TOWARDS CONSTITUTIONAL AND LEGISLATIVE REFORMS**

The normative expectation of any IHRL treaty is that it would ultimately lead to the protection of rights of deprived persons and victims domestically.<sup>159</sup> It is on this basis that States have been obligated to take domestic legislative, institutional and policy steps to realize the rights in the treaties. Notwithstanding the international spotlight on child marriage, it is essentially the responsibility of any country where this practice remains endemic, to deal with the issue. To this end, this article canvasses two important legal measures which are required to significantly halt the move of this practice in Nigeria. These are: a countrywide domestication of CRA 2003 and the need to amend Section 29 (4) and Item 61 Part 1 of the Schedule to the Constitution.

### **A. A Countrywide Domestication of the CRA 2003**

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<sup>157</sup> CAP C38, LFN 2004.

<sup>158</sup> UN, 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Nigeria', Committee on the Elimination of Discrimination Against Women, 24 July 2017, CEDAW/C/NGA/CO/7-8, p. 16.

<sup>159</sup> Nkoyo Toyo, 'Revisiting Equality as a Right: The Minimum Age of Marriage Clause in the Nigerian Child Rights Act, 2003', (2006) 27 (7) *Third World Quarterly*, 1299 – 1312 at 1299.

There is an urgent need for the countrywide domestication of the CRA 2003. Currently, 11 states are yet to domesticate the CRA 2003 in the country.<sup>160</sup> These are Adamawa, Bauchi, Borno, Gombe, Jigawa, Kano, Katsina, Kebbi Sokoto, Yobe, and Zamfara.<sup>161</sup> These are mostly states where this practice is prevalent. Although Jigawa state has adopted the CRA and prohibits child marriage,<sup>162</sup> the law defines a child as ‘a person below the age of puberty’ and defines puberty as ‘the age when a person is physically and physiologically capable of consummating a marriage’.<sup>163</sup> Children in the states that are yet to adopt the CRA are thus not legally protected from child marriage.<sup>164</sup> The campaign to domesticate the Act has not only received local attention, it has also been an issue of concern at the international level. As part of the recommendations contained in Section 2 of the Report of the Working Group on the Human Rights Council’s Universal Periodic Review (UPR) on Nigeria, countries such as Cote d’Ivoire, Cyprus, Portugal, Slovenia and Slovakia all called on Nigeria to fast-track work on adoption and enforcement of the CRA 2013 in all states of the federation.<sup>165</sup> Domesticating the Act will enhance the condition of life of the Nigerian child generally, and specifically that of the girl-child.

While the enactment of a legislation such as the CRA is key, implementing a treaty obligation couldn’t have fully ameliorated the provision of Section 29 (4) of the CFRN, given that implementing legislation at their best can only have the same force of law as federal statutes, however it has the potential of normatively impacting the behaviour of the society, at least in a measure and gradually affect the reality on ground. It could also be a basis for federal authorities having the mandate to protect children from this problem. Domesticating and implementing the CRA 2003 by all states also has the potential of being a useful armour in the arsenal of Civil Society Organisations (CSOs) who ultimately have a mandate to hold governments accountable.

## **B. Amendment of Section 29 (4) and Item 61 Part 1 of the Constitution**

It is also important that the National Assembly begin a process of amending the provisions of Sections 29 (4) and Item 61 part 1 of the Schedule to the Constitution. Such a move was made in the past but resisted by vested

<sup>160</sup> Agency Report, ‘11 States Yet to Domesticate Childs Rights Act – Minister’, Premium Times (13 October 2020), <<https://www.premiumtimesng.com/news/top-news/420620-11-states-yet-to-domesticate-child-rights-act-minister.html>> accessed 7 September 2021.

<sup>161</sup> Haleem Olatunji, ‘11 States Yet to Domesticate Child Rights Act – 17 Years After Passage’, The Cable (14 October 2020), <<https://www.thecable.ng/11-states-yet-to-domesticate-child-rights-act-17-years-after-passage>> accessed 7 September 2022.

<sup>162</sup> See Jigawa State CRL, section 15(1).

<sup>163</sup> See section 2(2) Jigawa State CRL; Anozie, Ele and Anika, n (6).

<sup>164</sup> Tim S Braimah ‘Child marriage in Northern Nigeria: Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage’ (2014) 14 *African Human Rights Law Journal* 474-488 at 481.

<sup>165</sup> UPR, ‘Responses to Recommendations’, Promoting and Strengthening the Universal Periodic Review (9 Nov. 2018), <[https://www.upr-info.org/sites/default/files/document/nigeria/session\\_31\\_-\\_november\\_2018/2rps\\_nigeria\\_31\\_upr.pdf](https://www.upr-info.org/sites/default/files/document/nigeria/session_31_-_november_2018/2rps_nigeria_31_upr.pdf)> accessed 07 August 2022.

interests from the northern part of the country. As long as this constitutional provision is tolerated, the goal of advancing the rights of the girl child will remain elusive. Any effort at amending Section 29 (4) is bound to be as problematic as the provision itself and this is for a number of reasons. Being a constitutional provision, any amendment process must be in line with Section 9 of the CFRN, which stipulates a vote of not less than two-thirds majority of both houses of the National Assembly, in addition to approval by resolution of not less than two-thirds of all the States.

Such an amendment will also require a bipartisan consensus across political lines. This is likely to be difficult given the likely politicisation of the issue, and the possibility of either party looking to make political and electoral gains, from the misfortune of the other. In addition, such a process will demand extensive geopolitical bargaining between the north and the south of the country, that often stand as two separate divides, when it comes to serious socio-political and constitutional issues. For one, the practice of child marriage is largely dominant in the north of the country where it is deeply entrenched in the region's socio-cultural norms. As a matter of fact, that provisions such as Section 29 (4) made it into the CFRN, can be attributed to the years of northern dominance of political power in the country, especially under military rule.

To then give away one of such prize possessions which child marriage represents, is likely to engender some sort of fracas between both regions. However, such confrontation would most likely be spearheaded by the elites of north, who have particularly benefitted from the practice of child marriage. These consist of the traditional, religious, as well as political leaders in the regions, who due to their power, wealth, and influence are able to marry and cater for so many wives. Their power and wealth, puts them in a privileged position where they can marry girls of any age without being questioned. In such situations, the parents of the girls, given their disadvantaged financial position are often unable to do much. It therefore means that for there to be a flicker of hope in amending Section 29 (4), such effort must leverage largely on the mass of the poor and impoverished people of the region, who must be mobilised to ensure that their voices are heard loud and clear in the amendment, while shutting down the dominance of the elites. Such an amendment can be sponsored by CSOs, on whose shoulders also rests the responsibility of mobilising the people. Writing on the quest for a constitutional state in Nigeria, Adegbite has adumbrated on how necessary and important it is, for the consent of the people to be a part of any constitutional amendment process.<sup>166</sup> He notes that ultimately, the ball is in the court of the people, who must deploy this power, in overthrowing the interest of the political elites.<sup>167</sup> Section 29 (4) and Item 61 part 1 of the CFRN are two ruinous provisions that must give way for any meaningful development to be recorded with

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<sup>166</sup> Olusola Babatunde Adegbite, 'Between Chasms and Contours: Revisiting Constitutional Legitimacy and the Quest for a Constitutional State in Nigeria', (2019) *African Journal of Comparative Constitutional Law*, 77 – 101 at 96.

<sup>167</sup> *Ibid* at 96.

respect to the rights of the girl-child in the country. Whereas the CFRN ensures all citizens of the protection of their fundamental human rights, these provisions undermine the same protection through its pervasive perpetuation of social inequality and gendered norms.

The constitutional window allowing child marriage under customary law must be addressed to ensure a meaningful realisation of the rights of the girl-child. At the root of child marriage, are the same norms that drive several other gendered social and traditional practices such as female genital mutilation, some of which are already beginning to give way.<sup>168</sup> Important lessons can be learnt from the behavioural and attitudinal changes that occurred, in decreasing these practices, towards applying the same to the eradication of child marriage.<sup>169</sup> These would include increased education and awareness for parents on the inherent harm that child marriage does to the girl-child and more international effort in calling out countries still involved in this practice.

## 6. CONCLUSION

Child marriage is a terrible practice that negatively impacts the life of the girl-child in several respects and threatens their health and dignity. The practice violates the rights of children to receive quality education, develop in a conducive environment, live a healthy life, receive protection and care from parents, and have freedom from discrimination, abuse and servitude. These violations reduce, if not destroy completely, their productivity and contribution towards the development of the society. Article 16 of the CEDAW requires states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family. Legislative loopholes regarding child marriage must be handled by relevant stakeholders so that children are protected from early marriages. Curbing child marriage will enhance efforts at empowering women and promoting gender equality as specified by goal 5 and target 5.3 of the Sustainable Development Goals.

**THE PROTECTION OF FREE SPEECH  
UNDER THE DEFAMATION ACT 2013:  
ANALYSING WHETHER THE ACT  
STRIKES A BALANCE BETWEEN  
REPUTATION AND FREEDOM OF  
EXPRESSION IN THE DIGITAL  
ENVIRONMENT**

Rolands Barkans\*

**ABSTRACT**

*“So the engines of history have other plans for us. Save a few Amish and survivalists, we have all been swallowed by the cultural superorganism of digital technology, a beast now well beyond anyone's control, and it is slouching off to Cyberspace with us in its belly. Since it's inevitable, I would suggest we make peace with our fate, rather as though we were Jonah setting up a permanent settlement inside the whale.”*

J.P. Barlow, *“Jack In, Young Pioneer!”* (1994)

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\* LLB Law graduate from Durham University

## **LIST OF FIGURES**

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Figure 1: Diagram showing the dyadic combination of the agent and patient, intention and suffering. Taken from G Kurt, A Waytz and L Young, 'The Moral Dyad: A Fundamental Template Unifying Moral Judgment' (2012) 23(2) *Psychological Inquiry* 206.

Figure 2: Diagram outlining Rowbottom's classification. Taken from J Rowbottom, 'In the shadow of the big media: freedom of expression, participation and the production of knowledge online' (2014) *Public Law* 491.

## INTRODUCTION

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The freedom of expression right encompasses a wide array of speech. This has been ever more apparent with the exponential growth of social media platforms as a form of communication by general members of the public, as well as traditional media outlets and business entities. The consensus is that political speech and traditional news media adds the most value to society, warranting more extensive protection. Artistic speech<sup>2</sup> is next on the list, followed by commercial expression. These are afforded intermediate protection and are not discussed in this thesis. This text is concerned with forms of speech which are not as well-protected against the ‘chilling effect’ of defamation law. These include, but are not limited to, celebrity gossip on social media,<sup>3</sup> gratuitous personal attacks,<sup>4</sup> and liability of website operators.<sup>5</sup>

The common understanding of defamation law, as applicable under *Derbyshire*<sup>6</sup> and *Reynolds*<sup>7</sup>, is that all speech is covered by the Defamation Act 2013 (DA 2013), irrespective of the type of expressive platform. Chapter 3 challenges this notion, by breaking the ‘hierarchy’ between speech in traditional media and that in social media.

All types of speech are ‘deserving of protection in a democratic society’.<sup>8</sup> However, this text focuses on the spreading of libel on online platforms. This will be contrasted with the court’s treatment of traditional media platforms, which will highlight the inadequate protection of ‘low-level’<sup>9</sup> speech. This concern has the potential to upset the balance between the right to freedom of expression and the protection of reputation. This was a key aim stated in the Bill.<sup>10</sup> While social media was originally designed as a tool for online user interaction, it

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<sup>2</sup> See *Muller v Switzerland* (1991) 13 EHRR 212, *Otto Preminger v Austria* (1995) 19 EHRR 34.

<sup>3</sup> *Campbell v MGN* [2004] UKHL 22.

<sup>4</sup> *Gorelishvili v Georgia* (2009) 48 EHRR 36, [40].

<sup>5</sup> *Tamiz v Google Inc* [2013] EWCA Civ 68.

<sup>6</sup> [1993] AC 534.

<sup>7</sup> [2001] 2 AC 127.

<sup>8</sup> Baroness Hale in *Campbell v MGN* [2004] UKHL 22, [148].

<sup>9</sup> This is a term of art coined by Rowbottom. For a comprehensive definition see section 3.3.2.

<sup>10</sup> Draft Defamation Bill HL 203, HC 930-I (2011–12).

has evolved into a ‘powerful force in contemporary life, paving way for the rise of digital participatory cultures’.<sup>11</sup>

This text explores rationales for the many shortcomings in the DA 2013. It then substantiates the argument that inherent bias against ‘low-level’ speech is why the reform Act inadvertently failed to redress the issue of competing rights and the ‘chilling effect’. In this regard, the Act is a ‘disappointing’<sup>12</sup> piece of legislation based on outdated principles that are incapable of grasping complex digital issues. The Act disregards these forms of speech under the false guise that they are not valuable enough to warrant equal protection. In the end, social media users and website operators are left in a precarious situation, unsure whether the law will protect them should a claim be filed against them.

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<sup>11</sup> J Velasco, ‘You are Cancelled: Virtual Collective Consciousness and the Emergence of Cancel Culture as Ideological Purging’ (2020) 12(5) *Rupkatha Journal* 1.

<sup>12</sup> See D Mangan, ‘Regulating for Responsibility: Reputation and Social Media.’ (2015) 29(1) *Int. Rev. Law Comput. Technol* 16.

## CHAPTER 1 – THE DEFAMATION ACT CAUSING A ‘CHILLING EFFECT’ ON FREE SPEECH

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### 1.1 Introduction

Historically, English law enforcement has almost always shown a preference for the claimant.<sup>13</sup> The state of the old common law was so inadequate and outdated according to Nick Clegg, who reportedly described the new ‘English libel laws [turning] from an international laughing stock to an international blueprint’.<sup>14</sup> Given this, it is unsurprising that England is seen as an international ‘hotspot’ for initiating legal action in defamation. This chapter explains the notion of defamation as a sword, and how the Defamation Act evolved into having a ‘chilling effect’ on free speech.

### 1.2 Reputation and libel law – a continuously evolving doctrine

#### 1.2.1 The historical aspect – defamation as a sword

The ‘essential’ purpose of defamation law has been described as protecting reputation from harm by false statements.<sup>15</sup> While this appears to be a statement of common-sense, defamation law has endured an illustrious history. A quick historical overview will highlight how the goals of defamation have changed. The earliest evidence of common law litigation in this area is 1507, when the King’s courts began to handle defamation cases.<sup>16</sup> Prior to this ‘actions for the predecessor of defamation were obscure and purely within the jurisdiction of the Church courts’.<sup>17</sup> The definition of ‘harm’ was extremely narrow, confined to *tangible* actions such as assault or murder. When the concept of defamation was relatively formalised in the 1500’s, judges began to open their eyes to *intangible* harms that may result from words, such as a person’s honour.<sup>18</sup> These early developments show that defamation law served as a sword, not a shield. The free speech aspect of defamation

<sup>13</sup> K Horsey and E Rackley, *Tort Law* (7<sup>th</sup> edn, OUP 2021), 484.

<sup>14</sup> Patrick Winton, “‘Laughing stock’ libel laws to be reformed, says Nick Clegg” (*The Guardian*, 6 January 2011). <<https://www.theguardian.com/law/2011/jan/06/libel-laws-nick-clegg>> accessed 29 October 2023.

<sup>15</sup> G Millar QC and A Scott, *Newsgathering: Law, Regulation and the Public Interest* (OUP 2016), [17.03].

<sup>16</sup> See J Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (2<sup>nd</sup> edn, OUP 2019) ch 25.

<sup>17</sup> Ben Darlow, ‘History of Defamation’ (*The NewJurist*, 17 May 2014) <<https://newjurist.com/history-of-defamation.html>> accessed 1 February 2023.

<sup>18</sup> See L Kaplan, *The Culture of Slander in Early Modern England* (CUP 2009).

was not a discussion point yet. Furthermore, an action could be brought under strictly three circumstances: words accusing someone of a crime, incompetence, or carrying disease. Hence, there was no distinction between slander or libel.<sup>19</sup> These provisions in the old common law were a precursor for the current concerns over the ‘chilling effect’ of defamation.

Seeing defamation as a body of law that is continuously evolving raises the question: what is the point of libel law?<sup>20</sup> The ‘point’ of protecting reputation in post-modern times has been understood differently by scholars depending on which values they attach to reputation. Robert Post regards ‘honour, property and dignity’ as ‘concepts of reputation’.<sup>21</sup> This reflects the culture of reputation in early modern England, as aforementioned. While this text cannot engage with all theories, they can generally be separated into those which see reputation as a person’s intrinsic right, and those which are judged by a fair-minded third party.<sup>22</sup> McNamara and Rolph tell us that a third party view of reputations involves ‘social judgement of the person’<sup>23</sup> and the extent of their ‘celebrity’ status.<sup>24</sup> But in the case of celebrities and their sphere of influence, Robert Post’s treatment of reputation as a ‘property right’ is more convincing. Online presence is akin to ‘social capital’.<sup>25</sup> By measuring a celebrity’s online following, one can gauge the potential loss of reputation, just like losing money or other tangible property.<sup>26</sup> This theoretical account is helpful in conceptualising reputation as a ‘property right’.<sup>27</sup> However, the reader must bear in mind that judicial practice does not treat reputation in such a clear-cut manner. The recognition of free speech has gone a long way to blur these lines, leaving the purpose of libel law in a muddle.

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<sup>19</sup> The common law did not consistently distinguish between the two until 1660. See J Baker, *An Introduction to English Legal History* (London: Butterworths, 1990) 495-7.

<sup>20</sup> E Barendt, ‘What is the point of libel law?’ (1999) 52(1) CLP 110.

<sup>21</sup> R Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 California Law Review 691, 693.

<sup>22</sup> J Oster, ‘Theories of reputation’ in Koltay A and Wragg P (eds.), *Comparative Privacy and Defamation* (Edward Elgar Publishing, 2020), 49.

<sup>23</sup> L McNamara, *Reputation and Defamation* (OUP 2007), 21.

<sup>24</sup> D Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate 2008), 178.

<sup>25</sup> P Bourdieu, ‘The Social Space and the Genesis of Groups’ (1985) 14 Theory and Society, 723.

<sup>26</sup> Many metrics can serve as indicators of one’s repute. These include the number of followers, subscribers, comments, likes, etc.

<sup>27</sup> D Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74 MLR 845, 853.

### 1.2.2 The situation at present – defamation as a sword and a shield

In recent decades there has been a shift in the hierarchy of human rights. As noted by the US Supreme Court: ‘...our society accords greater weight to the value of free speech than to the dangers of its misuse.’<sup>28</sup> The sentiment of Judge Holmes bears much truth in common law jurisdictions, particularly England. When human rights are placed in a hierarchy, free speech places higher than it ever has in relation to reputation. This sentiment is gaining greater support from comparative law commentators. For instance, Mangan contrasts the approach of different jurisdictions, stating that English defamation cases emphasise free speech while the ECtHR is more protective of reputation.<sup>29</sup> Since the 21<sup>st</sup> century, common law countries have been following this trajectory towards greater respect of free speech.<sup>30</sup>

There are few recent defamation cases which oppose prioritising free speech. One such case is *Sheffield Wednesday Football Club & Ors v Hargreaves*.<sup>31</sup> In this case, a Norwich Pharmacal Order was issued against the defendant to reveal the identity of eleven football fans who left defamatory comments on the defendant’s website discussing the financial probity of the club directors. The judge concluded that, in relation to five postings ‘the Claimants’ entitlement to take action to protect their *right to reputation outweighs... the right of the authors to maintain their anonymity and their right to express themselves freely*’.<sup>32</sup> The basis for this decision is questionable, perhaps even arbitrary considering the fact that the remaining nine statements were dismissed for being ‘barely defamatory or little more than abusive or likely to be understood as jokes’.<sup>33</sup> Therefore, it is contended that the judgment of *Sheffield v Hargreaves* be taken with a pinch of salt. Accordingly, the English courts have been following the trajectory towards greater respect of free speech.

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<sup>28</sup> Holmes J dissenting in *Abrams v United States* (1919) 250 US 616, 630-1.

<sup>29</sup> Mangan D, ‘The Relationship Between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content’ (Law Commission of Ontario 2017).

<sup>30</sup> *Ibid.*, 3.

<sup>31</sup> [2007] EWHC 2375 (QB).

<sup>32</sup> *Ibid.*, [18] (emphasis added).

<sup>33</sup> *Ibid.*, [17].

### 1.3 ‘Chilling effect’ concerns as a catalyst for 2013 reforms

The ‘chilling effect’ of defamation law traditionally refers to the threat of libel action experienced by journalists for commenting on public figures that are ‘particularly prone’ to request the removal of the statement.<sup>34</sup> However, defamation law does more than keeping the media disciplined. Barendt notes that ‘libel law [arguably] civilizes the standards of public discourse’.<sup>35</sup> This text acknowledges that regulating public discourse may generate a net positive effect, but questions whether it is worth sacrificing the voices of individuals in marginalised communities or corporate whistle-blowers who lack bargaining power to speak up.

The ‘chilling effect’ that a large company can exert on employees and/or critics cannot be understated. In *Linklaters LLP v Frank Mellish* Warby J issued an injunction against ex-employee preventing ‘indiscriminate disclosure of sensitive information which others have a legitimate interest in keeping confidential’.<sup>36</sup> Furthermore, the House of Lords recognised in *Derbyshire* that restricting the individual’s freedom to criticise government is contrary to democratic processes and ‘places an undesirable fetter on freedom of speech’.<sup>37</sup> Given this, it seems unlikely that public discourse can be regulated using defamation laws without producing a ‘chilling effect’ on vulnerable or marginalised groups of individuals.

### 1.4 Locating the wrongness of libel

The legal requirements for libel under the Defamation Act will be explored in chapter two. This section focuses on the principle which lays foundation to defamation law: reputational harm. This analysis will contextualise the notion of harm and relate it to the courts’ constant grapple with this concept in defamation claims.

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<sup>34</sup> Barendt E and others, *Libel and the Media: The Chilling Effect* (Oxford 1997).

<sup>35</sup> Barendt (1999) (n 19), 112.

<sup>36</sup> [2019] EWHC 177 (QB), [34].

<sup>37</sup> [1993] AC 534, [549].

### 1.4.1 Deriving the ‘harm’ principle in libel

Libel, as a written defamation, poses greater risk to individuals in the digital world than does slander, because emotion almost never translates through written words alone. Inadvertently, the true intention behind a seemingly offensive statement is left open to interpretation. This is particularly worrying in the digital environment, where herd mentality has cultivated into a ‘cancel culture’. In our current online culture, a small misinterpretation of a single Facebook post<sup>38</sup> or Tweet<sup>39</sup> have been fatal to the reputation of many celebrities. This makes establishing causation in an online libel claim a seemingly impossible task if it is based solely on the subjective mind of the defendant. Commentators acknowledge that ‘vagueness’ and ‘lack of consensus’ surrounding the definition of hate speech provides a gateway for ‘infringements on a wide range of lawful expression’.<sup>40</sup> While this text is not directly concerned with hate speech, it provides a useful analogy – lack of consensus as to the wrongness in libel would make defamatory speech harder to identify and produce a chilling effect on speech on social media. On the chilling effect, Coghlan argues that a clear separation between hate and lawful speech would alleviate the chilling effect, as it would allow law enforcement databases to ‘more accurately’ refer to lawful speech as ‘perceived hate incidents’.<sup>41</sup> Unfortunately, ‘perception’ is equally unhelpful as a descriptor if it was applied to libel. It is a wholly subjective criterion which could foster further confusion. For instance, a person’s reaction to a comment on religion may be skewed if they practice that religion. Alternatively, setting the legal standard for libel on a case-by-case basis would be practically impossible. Hence, objective and subjective standards must be used to locate the wrongness of libel.

When dealing with a written statement – such as a short and carelessly written Tweet – the court must apply a balanced subjective/objective standard to determine the wrongness of a written statement. Section 1(1) of the DA 2013 places the burden of proof on the claimant to produce evidence of ‘serious harm’ to their reputation. Therefore, what makes libel wrong is the fact that it produces *harmful effects* on the claimant. In

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<sup>38</sup> See *Stocker v Stocker* [2019] UKSC 17.

<sup>39</sup> See *Monroe v Hopkins* [2017] EWHC 433 (QB).

<sup>40</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (9 October 2019) A/74/485 19.

<sup>41</sup> N Coghlan, ‘Are our laws on freedom of speech fit for purpose in the age of “cancel culture”?’ (December 15, 2020) Jonathan Brock QC Memorial Prize Essay 2020 <<https://ssrn.com/abstract=3760389>> accessed 7<sup>th</sup> January 2023.

other words, it is the consequences of a lawful statement which turn it into an unlawful one.<sup>42</sup> If this is the case, one has to define ‘serious harm’ in order to locate the wrongness of libel.

Firstly, the ‘seriousness’ threshold must be met if the statement is to be considered genuinely harmful.<sup>43</sup> This was a change introduced by the DA 2013. However, it poses little controversy, its main purpose being to ‘raise the bar’ for claimants so that ‘only cases involving serious harm... are brought’.<sup>44</sup> Regarding the meaning of ‘harm’, Haidt explains that across all cultures, the act of causing harm is immoral.<sup>45</sup> However, acts that are considered immoral lie on an extremely wide spectrum, ranging from murder and rape at one end, and gambling, prostitution, and blasphemy on the other. However, there are certain acts in the moral code which are universally condemned.<sup>46</sup>

Studies including participants from the US and India showed that, when asked to name a single immoral act, the majority named a dyadic act.<sup>47</sup> This is a reasonable response considering the human tendency to attribute blame to rationalise the unfairness of heinous acts happening to them, and consequently, allow one to feel vindicated. On the basis that morality is dyadic, so is the notion of harm. Applying this to libel, reputational harm derives its wrongness from the element of causation. This conclusion agrees with the previous argument that libel is based in consequentialism.

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<sup>42</sup> Note that this argument is underpinned by teleological reasoning. Teleology applied in this content reduces libel to a function of its end. The ethical theory that best embodies the wrongness in libel is consequentialism, a subset of classic utilitarianism. For further insight and criticism of consequentialism see D Brink, ‘Some Forms and Limits of Consequentialism’ in *The Oxford Handbook of Ethical Theory* (D Copp (ed.), OUP 2007).

<sup>43</sup> The courts added this requirement as part of their consideration before the 2013 Act implemented the term, thereby closing the floodgate to hopeless claims. See *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75 and *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

<sup>44</sup> Explanatory Notes to the Defamation Act 2013 [11].

<sup>45</sup> J Haidt, ‘The new synthesis in moral psychology’ (2007) 316 *Science*, 998.

<sup>46</sup> For examples, refer to Figure 1 in G Kurt, A Waytz and L Young, ‘The Moral Dyad: A Fundamental Template Unifying Moral Judgment’ (2012) 23(2) *Psychological Inquiry* 206.

<sup>47</sup> See Figure 1 for a visual representation of dyadic acts. K Gray and D Wegner, ‘Moral typecasting: Divergent perceptions of moral agents and moral patients.’ (2009) 96 *JPSP* 505.

“an abstract perfect or complete form of a thing”



Figure SEQ Figure \\* ARABIC 1: Diagram showing the dyadic combination of the agent and patient, intention and suffering. Taken from G Kurt, A Waytz and L Young, ‘The Moral Dyad: A Fundamental Template Unifying Moral Judgment’ (2012) 23(2) *Psychological Inquiry* 206.

#### 1.4.2 Why enforce something that is impossible to define?

The aim of this analysis was to identify the unique characteristic of libel which separates it from other forms of lawful/unlawful speech. This helps to define the scope of harmful online speech. In fact, the findings tells us that offensive speech – when expressed online – is not deemed harmful to one’s reputation if the words themselves infringe some moral code, but rather it is the harmful consequences of the words which makes them defamatory. To this day, reputation remains an undefined term. The argument put forward is that legal doctrine should not concern itself with defining libel. Rather, treating libel as a fluid concept that continuously evolves means resources will not be wasted on transient definitions. ‘Legal action does not exist in a vacuum’, and judgments ought to reflect larger societal principles as are discussed in this text.<sup>48</sup>

<sup>48</sup> T Fort and M Latini, ‘The Duty to Establish, Monitor, and Enforce: How Today’s Corporate Compliance Standards Provide a Workable Model to Limit Defamation and Protect First Amendment Freedoms’ (2019) 33(1) *NDJLEPP* 35.

## **1.5 Conclusion**

English law attaches great importance to reputation, with scholars like Post describing it as a property right. At the same time, the common law has ‘never attempted to define reputation’.<sup>49</sup> This Chapter aimed to reconcile these two conflicting issues by locating the wrongness in libel elsewhere. While reputation is continuously evolving in England, the legal doctrine remains rooted in consequentialism. Therefore, it is unsurprising that libel law is capable of having a ‘chilling effect’ on free speech.

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<sup>49</sup> Barendt (1999) (n 19), 114.

## CHAPTER 2 – OVERPROTECTION OF REPUTATION REMAINS THE DRIVING FORCE BEHIND THE ACT

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### 2.1 Defamation under the DA 2013 – what are the controversial elements?

The *structure* of defamation claims was not changed by the DA 2013: it only affected the *substance* of the law. For instance, the ‘fair comment’ defence under section 3 was reformulated to ‘honest opinion’. There are four essential questions that need to be answered to establish liability:

- 1) *Is the statement defamatory?*
- 2) *Does the statement refer to the claimant?*
- 3) *Has the statement been published?*
- 4) *Can the defendant rely on any defences?*<sup>50</sup>

Determining whether a statement is defamatory requires that it ‘lower[s] the claimant in the estimation of *right-thinking members of society* in general’<sup>51</sup> causing them to be hated or ridiculed, or even ‘cancelled’ online.<sup>52</sup> This is assessed objectively against ‘someone who is fair-minded, who is not avid for scandal, nor overly suspicious nor unduly naïve’.<sup>53</sup> While this first step is not particularly controversial, it bears noting that the common law definition is out-of-step with modern times. Today, the ‘typical’ social media user should not be confused with internet “trolls” who defy Lord Reid’s definition of the ‘right-thinking member of society’. It is the defences to defamation which draw attention to online defamation cases, and which will be addressed in this chapter.

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<sup>50</sup> Horsey and Rackley (2021) (n 12), 488.

<sup>51</sup> *Sim v Stretch* [1936] 2 All ER 1237 [1240] (Lord Atkin).

<sup>52</sup> *Parmiter v Coupland* (1840) 6 M.&W. 105, 108.

<sup>53</sup> *Lewis v Daily Telegraph* [1964] AC 234 [260] (Lord Reid).

## 2.2 Statutory defences – a considerable burden for defendants

The statutory defences under the Defamation Act are the primary form of protection available to the defendant. In essence, they are his saving grace. For this reason, their effectiveness must be examined under a magnifying glass. This text focuses on sections 3 and 5 DA 2013 as these defences are particularly relevant to social media comments and website operators.

### 2.2.1 Section 3 DA 2013: from fair comment to honest opinion

The defence of honest opinion marks a corrective shift in the defendant's right to free speech. Fair comment has been considered 'fundamental' to the protection of free speech,<sup>54</sup> although it was strongly criticised for its complexity in distinguishing 'comments' from allegations of 'fact'.<sup>55</sup> Section 3 DA 2013 responded to calls for a 'broader and more relaxed definition' of comment,<sup>56</sup> although Mangan argues that this replacement is an 'awkward codified version' as it only aims to protect free speech.<sup>57</sup>

Under the common law, fair comment applied to matters of public interest,<sup>58</sup> statements that were either true or privileged, and capable of being made by an honest person.<sup>59</sup> The incompatibility of the old defence ('fair comment') with free speech was articulated by Lord Phillips: 'the internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed'.<sup>60</sup> Thankfully, a statement no longer needs to be on a matter of *public* opinion. The malice rebuttal has also been eliminated in the DA 2013. By doing so, the Act acknowledged the inherent unfairness of the 'malice' criterion when applied to derogatory statements on social media which are not in fact 'malicious'. This ought to extend the availability of the defence to more defendants.<sup>61</sup> On the other

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<sup>54</sup> *British Chiropractic Association v Singh* [2011] 1 WLR 133, [36].

<sup>55</sup> G Robertson and A Nicol, *Media Law*, (5<sup>th</sup> edn, London 2008), 150.

<sup>56</sup> English PEN & Index on Censorship, *Free Speech*, 9.

<sup>57</sup> Mangan D, 'An Argument for the Common Law Defence of Honest Comment' (2011) 16 *Communications Law* 140.

<sup>58</sup> *London Artists v Littler* (1969) 2 QB 375, 391.

<sup>59</sup> *Spiller v. Joseph* [2010] UKSC 53, [103].

<sup>60</sup> *Ibid.*, [99].

<sup>61</sup> Collins M, *Collins on Defamation* (OUP 2014), [9.25]-[9.30].

hand, the Act continues to protect ‘factual inferences’ in addition to comments,<sup>62</sup> but fails to address whether the caselaw has narrowed the scope of honest opinion to the point that ‘factual inferences’ are in fact excluded.<sup>63</sup> Taking these factors together, it is justifiable to conclude that the DA 2013 has gone beyond just ‘adopting a new label’ to the old defence of fair comment, as Descheemaeker argues.<sup>64</sup>

While this reform goes beyond mere codification, it fails to clarify the scope of ‘comment’ which would have benefited the doctrine, and even more so, the defendant.<sup>65</sup> After all, it is he who faces the burden of proof for defences.<sup>66</sup>

### 2.2.2 Section 5 DA 2013: website operators’ liability

Section 5 of the DA 2013 is a ‘significant development to the law of libel’<sup>67</sup> insofar as it extends the defence offered to website operators under the old Act.<sup>68</sup> Under the 1996 Act, a defendant may refute liability under the defence of ‘innocent defamation’<sup>69</sup> which requires him to prove that he was not the author of the statement, took reasonable care in its publication, and did not know or had no reasonable belief that his actions caused and contributed to the publication of the statement.<sup>70</sup> More importantly for the context of this text, by virtue of section 1(3)(e) the scope of protection extends to ISPs and website operators such as Facebook or Twitter.

However, this is stated implicitly in the Act. It is argued that by not referring to website operators explicitly, the law is likely to prejudice website operators who may wish to rely on the defence. If the law places the burden of proof on the defendant, it also ought to explicitly state to whom that defence applies. This is the case for print media and ‘mechanical distributors’<sup>71</sup> which are explicitly defined in the Act, but not website

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<sup>62</sup> Factual inferences rely on other facts. For instance, knowing that (A) and (B) have occurred, the defendant deduces that (C) must also have occurred. See *Channel Seven Adelaide v Manock* (2007) 232 CLR 245, [35].

<sup>63</sup> J Bosland and others, ‘Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion’ (2015) 74 TCLJ 234.

<sup>64</sup> E Descheemaeker, ‘Three Errors in the Defamation Act 2013’ (2015) 6(1) JETL 24.

<sup>65</sup> *Ibid.*

<sup>66</sup> M Jones, ‘The Defamation Act 2013: a free speech retrospective.’ (2019) 24(3) Communications Law 117.

<sup>67</sup> I Wilson and M Campbell ‘Defamation Act 2013: A Summary and Overview’ (*Inform’s blog*, 21 January 2014) <<https://inform.org/2014/01/21/defamation-act-2013-a-summary-of-the-act-iain-wilson-and-max-campbell/>> accessed 17 February 2023.

<sup>68</sup> Defamation Act 1996, s 1.

<sup>69</sup> Horsey and Rackley (2021) (n 12), 522.

<sup>70</sup> DA 1996, s 1(a)-(c).

operators. Indeed, this under-protection of free speech by the old law is to be expected considering the internet was still in its early days when the 1996 Act was enacted. However, this text argues that the extension of protection offered by section 5 DA 2013 does not go far enough to protect free speech either.

Section 5 applies to website operators who are not responsible for the defamatory statement that was posted.<sup>72</sup> This is stated explicitly. Following the change introduced by the 2013 Act, the law no longer ‘ignores’ the defendant. Website operators will not, *prima facie*, be liable even if they moderate user activity.<sup>73</sup> While at first this may seem like a faithful attempt to raise the level of protection, the reality is that section 5(3) imposes limitations on the defendant which will in many cases defeat the defence. For instance, the defendant will be liable if he failed to account for any notices of complaint from the claimant, or act in accordance with the regulations.<sup>74</sup>

Taking section 5 altogether, website operators still face significant challenges for avoiding liability under the DA 2013. There are circumstances which provide ‘website operators with complete immunity’.<sup>75</sup> However, these are too narrow to strike a balance between protections of reputation and free speech. A prime example is section 5(3)(a), on user anonymity which states that if the claimant can prove that it was not possible for the website provider to identify the user responsible for the publication of the statement, the defence fails.<sup>76</sup> While the issue of anonymity is discussed in Chapter 3, it suffices to say that the use of pseudonyms on social media is now commonplace. Internet “trolls” have proven to be vexatious litigants, many of whom may even be ‘happy to engage in tortious litigation’ until the claimant drops the claim.<sup>77</sup> This may happen where the claimant is no longer willing to engage in lengthy litigation, or where the claimant cannot risk the high costs of litigation. Doing so would permit the operators to leave defamatory statements on their websites and receive

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<sup>71</sup> Section 1(3)(a) defines this to include ‘printers, producers, distributors and sellers’. This was reformulated into section 10 DA 2013.

<sup>72</sup> DA 2013, s 5(2).

<sup>73</sup> Horsey and Rackley (2021) (n 12), 523.

<sup>74</sup> The Defamation (Operators of Websites) Regulations 2013 sets out the procedure one must follow to rely on the defence.

<sup>75</sup> Wilson and Campbell (2014) (n 66).

<sup>76</sup> DA 2013, s 5(3)(a).

<sup>77</sup> Wilson and Campbell (2014) (n 66).

monetary gains ‘by virtue of seekers of scandalous material bringing increased traffic to the site’.<sup>78</sup> Therefore, it is even possible to argue that section 5 does not protect reputation to a sufficient level. Given this, one may question whether the DA 2013 is really biased, or whether certain defendants like website operators are simply held to a stricter standard than others. The section 5(3) limitations to this defence may even establish defamation as a strict liability offence for website operators, and not any other type of defendant.

This raises the question: can defamation be regarded as a strict liability tort? In this inquiry, Hylton explains that liability can either be ‘strict, based on negligence, or based on intent to harm’.<sup>79</sup> Chapter 1 established that defamation has traditionally been based on the principle of compensation for harm, irrespective of intention. Furthermore, it was argued that the wrongness of libel is based in consequentialism; a branch of ethics which focuses on results and subordinates intention. Holmes’ suggestion that defamation is a ‘specific intent tort’<sup>80</sup> is diametrically opposed with these conclusions. Accordingly, there is more evidence demonstrating that liability is traditionally automatic/strict. Prosser is a proponent of this conclusion, suggesting that defamation is a ‘type’ of strict liability just as the *Rylands*<sup>81</sup> doctrine; a tort concerned with the non-natural use of one’s land.<sup>82</sup> While Prosser’s analogy may be of value when contextualising defamation within a realm of other torts, it is not entirely clear how the two torts are related. Many torts like nuisance and battery concern activities which are physically dangerous, like an explosion or a punch in the face. By contrast, defamation law applies to free speech ‘which generally benefits society’.<sup>83</sup> Considering both sides of the debate, neither Holmes’ nor Prosser’s arguments are entirely convincing in light of the reformed DA 2013.

Overall, defamation covers a vast area of law that extends far beyond the ambit of website operators. Generally, it may be understood as an ‘amalgam of strict liability, negligence, and per se legality’, applying the most applicable approach on a case-by-case basis.<sup>84</sup> While strict liability may not apply to website

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<sup>78</sup> Ibid.

<sup>79</sup> Hylton KN, “Defamation” in *Tort Law: A Modern Perspective* (CUP 2016) 301.

<sup>80</sup> Holmes OW, *The Common Law* (1881) 130-163.

<sup>81</sup> *Rylands v Fletcher* (1868) LR 3 HL 330.

<sup>82</sup> Prosser W, *Handbook of the Law of Torts* (4<sup>th</sup> edn, West Pub. Co 1971) 772.

<sup>83</sup> Hylton (2016) (n 78), 302.

<sup>84</sup> Hylton (2016) (n 78), 330.

operators by virtue of this new defence, it is doubtful whether this will be used in practice due to the extremely wide scope of section 5(3) which will often defeat the defence. In this sense, the DA 2013 failed to strike a balance between the protection of reputation and free speech. This text has argued that this is more likely to be the result of an inherent bias in the Act rather than defamation being a strict liability offence; a bias that existed under then common law which favours the claimant.

### 2.3 Anonymity – a saving grace for free speech

The extensive use of pseudonyms on social media aggravates attempts to regulate content. This factor alone makes ‘seeking relief for defamation unnecessarily difficult’.<sup>85</sup> Online users often prefer to operate anonymously to protect their ‘personal privacy interest’.<sup>86</sup> It also has an ‘important role in fostering free expression’.<sup>87</sup> Anonymity achieves this by making the tracing of users practically impossible, providing a gateway into open discussion, safe from defamation litigation.<sup>88</sup> It must not be the case that questionable claims are brought solely to obtain the individual’s identity. This could see corporate whistle-blowers be chilled into silence or gay people being “outed”. The latter happened in *McVeigh v Cohen*<sup>89</sup> after an ISP exposed the defendant’s account information and post history to the US Navy. He was subsequently discharged. As *Cohen* demonstrates, the effects of compelled identification are far too harmful to be efficacious.

While uncovering an individual’s identity is necessary in situations concerning particularly offensive or hateful speech, the law struggles to draw a line with ‘low-level’ speech.<sup>90</sup> The risk of litigation is currently dependent on the goodwill of the aggrieved party and their ability to take criticism. Those thinking of suing

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<sup>85</sup> M Sunkel, 'And the I(SP)s Have It..But How Does One Get It - Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation' (2003) 81 NC L Rev 1189, 1190.

<sup>86</sup> D Sobel, 'The Process that John Doe is Due: Addressing the Legal Challenge to Internet Anonymity' (2000) 5 Va JL & Tech 1, [3].

<sup>87</sup> Ibid.

<sup>88</sup> A court may well order the ISP to identify the user by tracing the pseudonym back to the physical device, for instance *Keith-Smith v Williams*. The point here is that use of pseudonyms is so common that tracing every post and repost is a practically unworkable task.

<sup>89</sup> (1998) 983 F. Supp. 215.

<sup>90</sup> ‘Low-level’ speech refers to amateur content that is spontaneous and cheap to produce; a term coined by Rowbottom. See section 3.3.2 for comprehensive definition.

anonymous online gossips ought to be more open to criticism, recognising that ‘pub-talk’<sup>91</sup> has simply changed its venue. Furthermore, anonymity promotes an open discussion of unpopular political ideas and controversial topics like abortion and sexual abuse. Levine argues that this may not happen if not for pseudonyms.<sup>92</sup> The use of pseudonyms has generated a less restricted culture where ‘anything goes’.<sup>93</sup> An American decision in which the court struck down an Ohio statute prohibiting the anonymous distribution of campaign leaflets,<sup>94</sup> recognised that the ‘vast democratic fora of the Internet’<sup>95</sup> would be stifled without anonymity. In fact, reputational damage arising from gossip and speculation is often incidental. It should not be the oblivious commenter who must face the risk of expensive civil law litigation.

#### 2.4 The scope for including ‘discursive remedies’

Some claims in defamation today are driven – at least partly – by the prospect of receiving a handsome sum in damages. The need for monetary compensation to vindicate the claimant’s reputation was justified by Lord Hailsham as necessary ‘in case the libel... [to allow the claimant] to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge’.<sup>96</sup> However, in most cases – and particularly involving corporate entities – the aim is not monetary compensation.<sup>97</sup> Companies are more often interested in identifying the unknown speaker who is often an employee of the claimant,<sup>98</sup> or removing the statements from existence.<sup>99</sup> Regardless of claimants’ motives for suing, the reform Act retained a wide range of remedies providing a balanced approach to corrective justice in respect of the competing rights. The following paragraph considers whether ‘discursive remedies’ are to be preferred over damages.

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<sup>91</sup> *Clift v Clarke* [2011] EWHC 1164 (QB), [36].

<sup>92</sup> N Levine, ‘Establishing Legal Accountability for Anonymous Communications in Cyberspace’ (1996) 96 Colum. Law Rev. 1526, 1530.

<sup>93</sup> L Lidsky, ‘Silencing John Doe: Defamation and Disclosure in Cyberspace’ (2000) 49 DUKE LJ 855, 863.

<sup>94</sup> *McIntyre v Ohio Elections Commission* (1995) 514 US 334.

<sup>95</sup> *Reno v American Civil Liberties Union* (1997) 521 US 844, 870.

<sup>96</sup> *Cassel v Broome* [1972] AC 1027, [1071].

<sup>97</sup> Lidsky (2000) (n 92).

<sup>98</sup> J Furman, ‘Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation’ (2001) 25 Seattle U.L. Rev. 213, 217.

<sup>99</sup> *Ibid.*, 218 (stating that the purpose of suing is not to establish liability but to silence the speech).

While damages do provide vindication, there may be more ‘efficacious or appropriate’ remedies available.<sup>100</sup> Mullis and Scott spot a lost opportunity in the Act, namely, to promote discourse in the Act’s remedies.<sup>101</sup> This has been achieved in other jurisdictions: ‘in many European countries the primary remedy is an order for the publication of corrections or apology – often in the form of the publication of a summary of the Court’s judgment. This would provide vindication without the need for substantial damages’.<sup>102</sup> Section 12 provides the court with the power to order a summary of its judgment to be published. In this regard, the Act successfully reformed the remedy which was previously only available under section 9 of the DA 1996. This is because ‘the chief remedy in libel should be an apology, not financial reward’.<sup>103</sup> Correction of misinformation protects the sanctity of free speech while mending the reputation of the claimant. In contrast, deleting the defamatory statement after it has caused irreversible damage perpetuates the overprotection of reputation. Furthermore, ‘the chilling effect of a potentially large damages award would be reduced, and importantly – if we are serious about achieving one of the underlying purposes of freedom of expression – the truth would enter the public sphere and be made available to the public’.<sup>104</sup> However, this text does not go so far as Mullis and Scott, who advocate for the withdrawal of damages from the statutory framework.<sup>105</sup> Put into practice, discursive remedies might not be effective where the claimant’s reputation is particularly ‘tainted’, but their codification in the reform Act was a positive change for free speech.

## 2.5 Conclusion

The Act failed to rebalance these competing interests. The traditional values of reputation still pervade the statutory system we have in place today. The individual’s autonomy to do and say what they want outweighs their interest to protect their reputation. Mass media outlets such as newspapers have the privilege of getting

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<sup>100</sup> A Mullis and A Scott, ‘Reframing libel: Taking (all) rights seriously and where it leads’ in D. Capper (ed.), *Modern Defamation law: Balancing Reputation and Free Expression* (Belfast: Queens University Belfast Press, 2012) [Mullis & Scott (2012)], 1-21, 13.

<sup>101</sup> *Ibid.*, 15.

<sup>102</sup> Hugh Tomlinson QC, ‘Libel, Damages and Declarations of Falsity’ (*Inform*, 2 November 2010) <<https://inform.org/2010/11/02/libel-damages-and-declarations-of-falsity/>> accessed 17 December 2022.

<sup>103</sup> Index on Censorship / English PEN, *Free Speech is Not For Sale* (2009) <[https://issuu.com/englishpen/docs/libeldoc\\_medhires](https://issuu.com/englishpen/docs/libeldoc_medhires)> accessed 17 December 2022.

<sup>104</sup> Mullis and Scott (2012) (n 99), 14.

<sup>105</sup> *Ibid.*

the ‘final say’, while the individual has no opportunity to reply or defend themselves.<sup>106</sup> Coad has reasonable basis in holding that ‘*[w]e have reached the point where the claimant in a libel action has effectively been reduced to the status of a spectator while judges debate whether or not the journalist in question complied with vague and disparate concepts of fairness and responsibility*’.<sup>107</sup> The law ought to serve in the best interests of the society in which it subsists, rather than a tool used by the privileged to assert their dominance, consequently suppressing the voice of the masses.

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<sup>106</sup> J Coad, ‘*Reynolds and Public Interest—What About Truth and Human Rights?*’ (2007) 18 Entertainment LR 75, 84.

<sup>107</sup> *Ibid.*, 83.

## CHAPTER 3 – THE LEGAL BIAS FAVOURING ‘TRADITIONAL’ SPEECH AND ITS FAR-REACHING CONSEQUENCES

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### 3.1 Introduction

The previous chapter explored the troubled parameters set by the Act and identified the statutory defences as a ‘saving grace’ for the defendant against defamatory speech. Despite the high burden placed on the defendant, this is the most common way for an individual to assert his right to free speech. The individual is offered secondary protection under Article 10 of the ECHR. Communication via social media ‘has now become one of the principal means by which individual exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest’.<sup>108</sup> We now live in a ‘hypersocial society’<sup>109</sup> where people have an always-on digital persona.<sup>110</sup> This chapter will explore the parameters of free speech and will expand on the categorisation model adopted by Rowbottom to separate ‘high’ and ‘low level’ speech. This method of categorising forms of speech allows us to identify further shortfalls in the Act, which provides a reason for its failure to strike a balance between the competing rights of reputation and free speech. The final part will assess the seriousness of this legal imbalance for individuals as well as service providers.

### 3.2 The origin and justification of free speech

#### 3.2.1 The sociological perspective

In its early days, the internet was often viewed as a ‘digital wild west’.<sup>111</sup> This view characterised the internet as a new digital space beyond the reach of laws and regulation and therefore ‘anarchic and untamed’.<sup>112</sup> It is easy to see how free speech may flourish in such an environment. Despite the ease of posting expression to a

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<sup>108</sup> *Yildirim v Turkey* [2012] ECHR 2074, [56].

<sup>109</sup> Castells M, “The networked society: From knowledge to policy.” In Castells M and Cardoso G (eds.), *The Network Society: From Knowledge to Policy*, 3-22. Washington: Centre for Transatlantic Relations.

<sup>110</sup> J Velasco, ‘Millenials as digital natives: Examining the social media activities of the Y-generation.’ 28(3) *Pertanika Journal of Social Science and Humanities* 1939.

<sup>111</sup> A Yen, “Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace” (2002) 17 *Berkeley Tech. L.J.* 1207.

<sup>112</sup> John Perry Barlow, “Jack In, Young Pioneer!” (*Electronic Frontier Foundation*, 11 August 1994) <<https://www.eff.org/pages/jack-young-pioneer>> accessed 22 December 2022.

world-wide audience, new forms of regulation have ensured that many are held accountable for their past actions. Indeed, Youtubers such as Shane Dawson and Trisha Paytas have since faced ‘cancellation’ – which is, in essence, digital exile – for dissemination of derogatory and offensive content.<sup>113</sup> For it is the ‘persistence’<sup>114</sup> of digital communication which means it is eternally under the scrutiny of public opinion – what one says “sticks around”. Free speech has cultivated many other harmful effects online. While providing opportunity to speak freely should be celebrated, commentators often point to the decline of privacy, the growth in cyberstalking, bullying, hate speech, conspiracies and more. These harms affect people in ways that in-person conversation cannot.<sup>115</sup> Overall, the notion of free speech has been fundamentally changed by the digital world: the right to freedom of expression is accessible to anyone so long as the speaker acknowledges and accepts the likely repercussions of their statement.

### 3.2.2 The legal perspective

The laws governing expressive activities like speech have evolved during the age of digitalisation. Most significantly, laws regulating media, public order, and targeted communications<sup>116</sup> were originally designed to address distinct issues but have since converged in relation to digital communication regulation.<sup>117</sup> While this text is only concerned with libel under the Defamation Act, it is useful to grasp the full extent of free speech protection.

The body of media laws includes libel, misuse of private information, copyright and numerous other specific grounds for restraining the media. Prior to the reform Act, there already existed a substantial body of caselaw applying media laws to internet content. In 2006, a parliamentary candidate for UKIP successfully claimed against a chat room user who falsely accused him of being a sexual offender and labelled him a Nazi.<sup>118</sup> As

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<sup>113</sup> For examples see Doug Criss, “Blackface and celebrities: A (growing) list” (*CNN*, 7 February 2019) <<https://edition.cnn.com/2019/02/07/us/celebrities-in-blackface-list-trnd/index.html>> accessed 22 December 2022.

<sup>114</sup> D Boyd, “Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications” in Z. Papacharissi (ed.), *Networked Self: Identity, Community, and Culture on Social Network Sites* (Oxford 2010).

<sup>115</sup> B. Leiter, “Cleaning Cyber-Cesspools: Google and Free Speech” in Levmore S and Nussbaum M (eds.), *The Offensive Internet* (Cambridge, Mass., 2010).

<sup>116</sup> This is not an exhaustive list.

<sup>117</sup> J Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71(2) CLJ 355, 357.

<sup>118</sup> *Keith-Smith v Williams* [2006] EWHC 860 (QB).

acknowledged by Stephens, this was ‘a dark day for freedom of speech with broad implications’<sup>119</sup> because it confirmed that defamation laws apply to internet discussions and abusive blogging. In *Applause Stores*, the claimant sued following the publication of information discrediting the claimant’s company on a Facebook profile.<sup>120</sup> In *Cairns v Modi*, libel damages worth £90,000 were awarded against Twitter comments alleging cricket match fixing.<sup>121</sup> With the benefit of hindsight, we can identify these situations as ‘textbook’ defamation claims. Media law was certainly not ready to tackle more complex issues such as attributing liability where an individual provides a hyperlink to a defamatory article<sup>122</sup> or the republication of an author’s post.<sup>123</sup>

Libel under media law has most often affected the mass media.<sup>124</sup> Media laws have always dealt with mass media, but their ability to adapt to digital communications is intrinsically limited. Litigation by mass media outlets has resulted in the establishment of *Reynolds* privilege; a defence available where the statement in question is of public interest and the defendant is a "responsible journalist."<sup>125</sup> This latter requirement is confined to the standards of the mass media professional. Hence, the defence is of limited value to regular members of society. Over the years, mass media litigation has shaped the statutory safeguards for free speech, while the regular member of society was ignored. This is concerning in light of the growing role media is cultivating outside the traditional media context.

Public order laws also apply in situations concerning libel. Individuals have been convicted under the Public Order Act 1986 (POA) for publishing and distributing racially inflammatory material including a pamphlet titled ‘The Holofoax’.<sup>126</sup> In *S v DPP*, an individual who posted a photograph with the caption ‘C’mon I’d love to eat you! We’re the Covance Cannibals’ was convicted under s.4A POA. Like defamation, public order law aims to balance the competing rights and uphold standards of behaviour in public. ‘Targeted communications’

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<sup>119</sup> Mark Stephens, “Verdict casts dark cloud over freedom of speech” (*The Times*, 22 March 2006) <<http://www.timesonline.co.uk/tol/news/uk/article0743901.ece>> accessed 22 December 2022.

<sup>120</sup> *Applause Store Productions Ltd v. Raphael* [2008] EWHC 1781 (QB).

<sup>121</sup> [2012] EWHC 756 (QB).

<sup>122</sup> See *Canadian Supreme Court in Crooks v Newton* [2011] SCC 47.

<sup>123</sup> M Collins, *The Law of Defamation and the Internet* (3<sup>rd</sup> edn, OUP 2010), [5.38-5.41].

<sup>124</sup> Mass media are frequent defendants. For evidence, see Jackson LJ, *Review of Civil Litigation Costs*, Preliminary Report (2009) Appendix 17.

<sup>125</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127.

<sup>126</sup> *R v Sheppard* [2010] EWCA Crim 65.

is a category of laws that were initially concerned with offensive phone calls and stalking.<sup>127</sup> Instances demonstrating the recognition of digital communication are few. A four-month prison sentence was issued against a man after a journalist reported an online discussion including a Twitter message referring to Newcastle United football team as ‘Coon Army’.<sup>128</sup> Under the Communications Act 2003, section 127, an individual was convicted for a Twitter message that reads: ‘You’ve got a week and a bit to get your shit together otherwise I am blowing the airport sky high!’.<sup>129</sup> Although often intended as a joke, online comments such as these are a very common and arguably integral part of the digital community. These examples highlight the disruptive nature of speech on the internet. Perhaps this is the main reason why judges have been so reluctant to interpret the law more openly and giving equal importance to ‘high’ and ‘low-value’ speech.

Overall, the legal coverage of online expression contains ‘considerable overlap’ in the protection of free speech. The three categories of laws discussed regulate different types of activity, however, the fact that they can be applied flexibly and in similar contexts indicates that there a degree of convergence in the coverage. This is a consequence of society advancing in the age of digitalisation.

### 3.2.3 Summary

In Chapter 1 it was established that libel should not be defined; it is a fluid concept that does not exist in a vacuum. The same conclusion applies to all other forms of speech. The primacy of the individual’s autonomy over other rights extends all the way to the courts.

*‘So important is freedom of expression that sanctions will not be imposed on remarks considered rude, unwarranted or even unfair’.*<sup>130</sup> Defamation law seeks to protect such comments, recognising the greater good of unburdened and uncensored discussion. Free speech is the freedom to ‘[s]peak what we feel not what we ought to say’.<sup>131</sup> As such it includes provocative speech: ‘[f]reedom only to speak inoffensively is not worth

<sup>127</sup> Such as the Malicious Communications Act 1988 and the Protection from Harassment Act 1977.

<sup>128</sup> ‘Man sentenced over racist tweets about Newcastle United’ (*BBC News*, 27 February 2012) <<https://www.bbc.co.uk/news/uk-england-tyne-17183384>> accessed 22 December 2022.

<sup>129</sup> *Paul Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (QB).

<sup>130</sup> See Mangan (2015) (n 11).

<sup>131</sup> *Henry VI, Part 2, Act V, scene 3*, cited in *R(Miller) v College of Policing* [2020] EWHC 225 (Admin) 12.

having'.<sup>132</sup> Despite this, the Act has struggled to place 'low-value' equally alongside other forms of speech that are protected unfair interference. The following section explores the root of this issue by adopting a speech categorisation model.

### 3.3 Distinguishing 'high' and 'low level' speech

*"The framework brought forward by the United Kingdom's Defamation Act 2013 underlines a traditional hierarchy of expression in which news media is viewed as high-level speech".*<sup>133</sup>

Free speech is an elusive concept. For this reason, it is of no surprise that the reform Act has struggled to strike a balance between the competing rights of reputation and free speech. The reforms failed to account for the way in which most defamatory information is now spread, namely through social media. User-generated platforms – which includes social media – have exacerbated any attempts to contain this unprecedented scope for expression. Sithigh notes that individuals have 'increasingly fewer opportunities to engage with each other through... traditional public forums'.<sup>134</sup> To Sithigh, the declining availability of traditional public forums 'adds to the relevance of political expression (and the enormity of censorship) on youth-targeted social networking sites'.<sup>135</sup> Of course, user-generated platforms are used far more extensively than this. Most would agree that these platforms are the digital equivalent of engaging in a conversation.<sup>136</sup> American commentator O'Neill explains that 'our traditional public forums are less and less the crossroads of the community, less and less the setting where we encounter our fellow citizens on foot'.<sup>137</sup> Similarly, in *Pridgen* the claimants argued: 'things that are said on here are not deigned to be held up to intense scrutiny, it is merely the equivalent of having an online conversation'.<sup>138</sup> <sup>139</sup> These examples highlight the prominence of user-generated platforms as a medium through which defamatory statements can so easily be spread. Before we can begin to separate expression into

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<sup>132</sup> *Redmond-Bate v DPP* [1999] EWHC 733 (Admin) 20.

<sup>133</sup> Mangan (2015) (n 11).

<sup>134</sup> D Mac Sithigh, 'The mass age of internet law' (2008) 17 *Information & Communications Technology Law* 79-94 [Mac Sithigh], 83.

<sup>135</sup> *Ibid.*

<sup>136</sup> See S Birkbeck, 'Can the use of social media be regulated?' (2013) 19 *Computer and Telecommunications Law Review* 83-85, 83.

<sup>137</sup> K O'Neill, 'Privatizing public forums to eliminate dissent' (2007) 5 *First Amendment Law Review* 201, 203.

<sup>138</sup> *Pridgen v University of Calgary* (2012) ABCA 138, [32].

<sup>139</sup> *Ibid.* This case regarded the posting of negative comments on a Facebook "Wall" about an unpopular professor.

‘high’ and ‘low-level’ speech, we must establish reasonable grounds to do so. To do this, we must challenge the idea of free speech as an absolute good.

### 3.3.1 ‘Challenging the idea of free speech as an absolute good’<sup>140</sup>

The categorisation of speech into ‘high’ and ‘low-level’ expression rests on the hypothesis that all speech is not of equal value. ‘Free’ speech is a distinct concept from ‘equal’ speech. Traditionally, political speech exemplifies the good in free speech. The court emphasised this point in *Derbyshire Country Council v Times Newspapers Ltd.*,<sup>141</sup> holding that governmental bodies could not sue in defamation due to the chilling effect this may have on democracy. Governmental criticism is key to a free press, which is the essential ingredient for democracy.<sup>142</sup> Although political speech is a part of public law – and hence, not the focus of this text – it serves as a useful example of the division that exists between traditional platforms and social media. The inevitable consequence is that social media speech is not afforded ‘equal’ protection against defamatory censorship by the courts because it is not seen as ‘equal’ speech. Furthermore, by failing to accommodate for ‘low-level’ speech, the Act views social media as an illegitimate form of communication and challenges the notion of free speech as an absolute good.

Another perspective holds that ‘defamatory’ speech is not ‘free’ speech. Various EU authorities have held judgment based on this principle. The European Court of Human Rights held that speech did not contribute to social debate where the worker’s explicit intention was to damage the employer’s reputation.<sup>143</sup> In a decision by the Leuven Labour Tribunal, it was determined that a business development manager's critical statements on his Facebook account constituted serious misconduct that justified his dismissal.<sup>144</sup> This decision was based on the company's communications policy, the manager's position, and the timing of the comments, which came when the CEO was trying to reassure the market about the company's strength. Hence, an individual’s

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<sup>140</sup> Mangan (2015) (n 11), 24.

<sup>141</sup> [1993] AC 534.

<sup>142</sup> A Sen, *Development as Freedom* (OUP, 1999).

<sup>143</sup> *R Predota v Austria* App. No. 14621/06 (18 January 2000).

<sup>144</sup> *Revue du Droit des Technologies de l'Information* (2012) 46, 79.

right to speak freely can only occur if he has already accepted the response and/or consequences of the defamatory statement he wishes to make.

### 3.3.2 Substantiating the two categories of speech

The perceived superiority of news media to social media comments exposes the façade of neutrality; a fiction upheld by the Act where there is no formal ranking of different types of publication. The need to confine ‘free speech’ to a single definition should be substituted by a system of categorisation. This form of analysis allows us to identify the shortcomings in the Act. The classification of ‘high’ and ‘low-level’ speech originates with Rowbottom.<sup>145</sup> He explains that the term “high level” is adopted here to refer to expression that is professionally produced, aimed at a wide audience, is well resourced and researched in advance. By contrast, the “low level” refers to amateur content that is spontaneous, inexpensive to produce, and is often akin to everyday conversation. With “low level” communications, lower standards of responsibility will normally be expected of the speaker than of a professional mass media entity.<sup>146</sup>

The employment tribunal’s decision in *Crisp v Apple Retail (UK) Ltd.*<sup>147</sup> provides a foundation for further discussion. Apple’s decision to terminate Crisp’s employment for comments that were posted criticising Apple’s workspace and its products was upheld by the tribunal.<sup>148</sup> The degree of misconduct by Crisp was judged against the ‘great importance of image to the company’.<sup>149</sup> Although the *Facebook* profile through which the comments were made didn’t state that he was an employee of Apple, the court deemed it sufficient that the comments were accessible to his friends who knew that he worked for Apple. Furthermore, Crisp could not control his friend’s ability to pass on his comments.<sup>150</sup> More relevant to this discussion is the fact the court dismissed the claimant’s freedom of expression argument partly on the grounds that such comments are insignificant to the notion of free speech as compared with ‘political opinion’.<sup>151</sup> Although this is a case

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<sup>145</sup> Rowbottom (2012) (n 115).

<sup>146</sup> *Ibid.*, 357.

<sup>147</sup> ET/1500258/11 [Crisp].

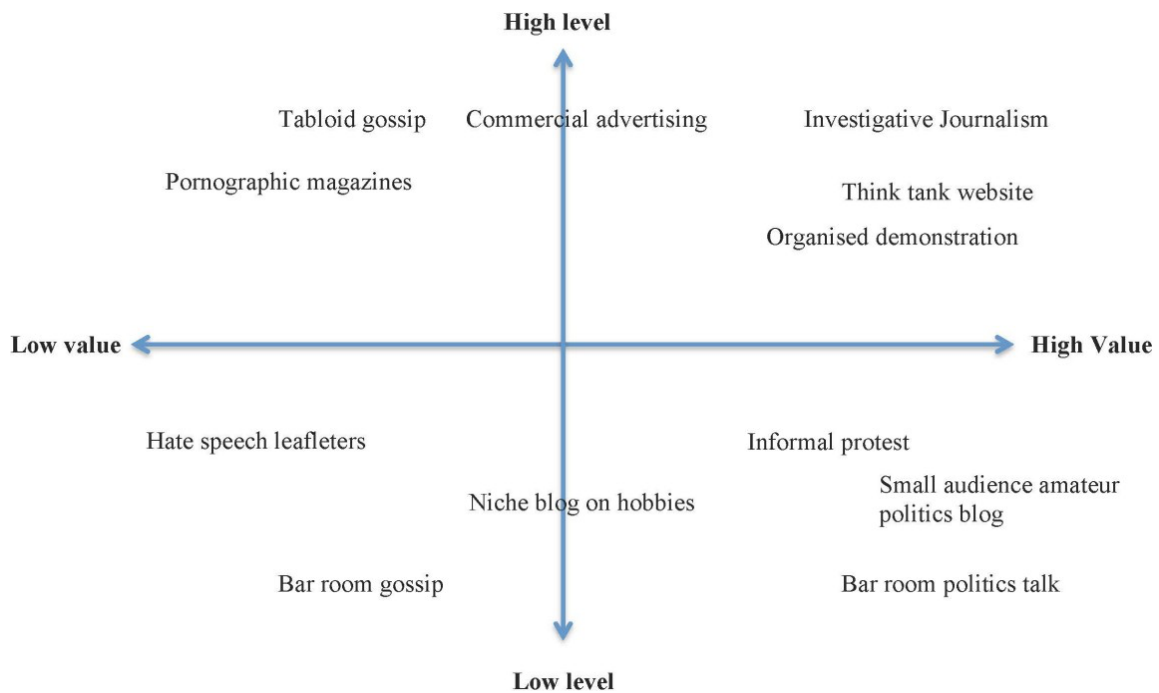
<sup>148</sup> *Ibid.*, [14].

<sup>149</sup> *Ibid.*, [39].

<sup>150</sup> In this case it was Crisp’s co-worker who ‘blew the whistle’ on him: *Crisp*, [44]-[45].

<sup>151</sup> *Ibid.*, [46].

from 2011 – two years before the reform Act was enacted – it epitomises the train of logic which holds that comments made on social media are ‘low-level’ speech, and as such, not worthy of equal protection. The approach of the English courts is ‘unusually limited’<sup>152</sup> in this regard. The kind of relaxed treatment of speech on social media as expressed by the employment tribunal has endured the enactment of the Defamation Act, which still undervalues free speech.



### 3.4 The Act fails to account for ‘low form’ speech

*“Social media platforms have now vaulted the individual into a novel dimension that challenges the domain held by traditional new agencies.”<sup>153</sup>*

Traditional news media outlets are held in higher regard than the information posted on social media. Perhaps this is because the former is spread by a team operation, rather than an individual. For the consumer, this

<sup>152</sup> Mangan (2015) (n 11), 28.

<sup>153</sup> Mangan (2015) (n 11), 25.

creates the reasonable presumption that this information is peer-reviewed and fact-checked. Consequently, the perception of free speech has developed under the influence of this preference. The remarks of Eady J in *CTB v News Group Newspapers Ltd.*<sup>154</sup> illustrate this: ‘it may be thought that the wish of NGN to publish more about this “story”, with a view to selling newspapers and perhaps achieving other commercial advantages, demonstrates that coverage has not yet reached its saturation point... NGN is a media group *legitimately* interested in making profits from *communicating to the world at large*. It surely does not aspire to the role of social worker or “relationship counsellor”’.<sup>155</sup> These remarks exemplify the point being made: unlike social media platforms, the ‘legitimacy’ of traditional media platforms is almost always assumed. Furthermore, the grounds on which the judge granted the injunction thwarts any attempts to justify this predisposition in favour of ‘high-level’ speech. When granting the injunction to prevent the publication of an extra-marital affair, Eady J stated that ‘tawdry allegations about an individual’s private life does not attract the robust protection under Article 10 afforded to *more serious journalism*.’<sup>156</sup> The reasoning provided in this part of the judgment is disjointed from the first. Although the judge acknowledged that this is an unserious topic for a newspaper like NGN to report on, he nevertheless granted an injunction. It is doubtful whether the same injunction would have been granted if the information can from an anonymous Twitter account, or indeed any other ‘low-level’ platform. Therefore, the notion of free speech has been following a skewed trajectory based on outdated principles.

One of the stated purposes of the Act was to reduce the amount of unnecessary defamation litigation. The issue was and still is the abuse of power by affluent individuals against independent commentators on social media who has close to zero bargaining power. *McAlpine v Bercow*<sup>157</sup> demonstrates the opposite. The case also serves as a reminder as to the speed with which information is spread on the internet. The celebrity defendant made the offending comment on Twitter – “Why is Lord McAlpine trending? \*Innocent face\*”<sup>158</sup>. At the time, the claimant was receiving accusations on social media regarding paedophilia which were later

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<sup>154</sup> [2011] EWHC 1326 (QB).

<sup>155</sup> *Ibid.*, [25] (emphasis added).

<sup>156</sup> *Ibid.*, [33] (emphasis added).

<sup>157</sup> [2013] EWHC 1342 [McAlpine].

<sup>158</sup> *Ibid.*, [3].

determined to be false. The court found that it was by ‘implication a repetition of the accusation with the addition of the name which had previously been omitted’.<sup>159</sup> This case had positive implication on free speech, as it suggested that a person asking an innocent question, albeit disguised as an innuendo of criminal activity, will not necessarily avoid liability. The importance of this example is not about the outcome of the case, but instead to draw attention to how ‘litigants are steering the process with regards to social media libel’<sup>160</sup> rather than the Act. It is argued that the Act ought to have been drafted in a more nuanced way in order to modernise the law, not merely codify it.

The Act, existing manifestly as a codification of the common law principles, maintains the speech hierarchy. This natural predisposition in favour of traditional news media challenges the notion of free speech; something that the Act explicitly sought to fix. The previous chapter discussed discursive remedies as a preferred means to ‘vindicating reputation’ and providing the public with the ‘fullest possible information on matters of collective importance’. Although ‘mandated discursive remedies – such as corrections, retractions, and rights of reply’<sup>161</sup> may rebuild the claimant’s reputation, they may be more impactful towards the notion of free speech. It would certainly be preferable to the limited list of remedies available under the Act, which operates under the principle of recrimination. Section 13 grants the court with power to order the removal of defamatory materials or cease distribution of such materials. These remedies enforce a ‘print media paradigm’ in which traditional platforms that distribute information exclusively on paper get the ‘definitive and final statement on a topic’.<sup>162</sup> Traditional media appears to stand on a higher pedestal than social media. This may justify the need for a unique charter regulating UK press.<sup>163</sup> Seeing traditional media swiftly migrate to the digital world in the last decade has diminished the boundaries between ‘high’ and ‘low-level’ speech. There are increasingly fewer reasons to treat one in higher regard than the other. It seems the Act has missed a profound opportunity

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<sup>159</sup> Ibid., [87].

<sup>160</sup> Mangan (2015) (n 11), 31.

<sup>161</sup> A Mullis and A Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) 77(1) *Modern Law Review* 87-109, 107.

<sup>162</sup> Mangan (2015) (n 11), 26.

<sup>163</sup> The Royal Charter on self-regulation of the press. The operation of which comes under the Crime and Courts Act 2013 and the Enterprise and Regulatory Reform Act 2013.

which may have unprecedented consequences. The subordination of ‘low-level’ speech poses significant threats to certain groups. These are discussed next.

### 3.5 Who is under threat in the age of digital media?

*“Our faith in new media and our belief in the value of user-generated content has the potential to upset the balance between freedom and control”*.<sup>164</sup>

#### 3.5.1 Social media: a breeding ground for gossip and speculation

Individuals who engage in online gossip automatically put themselves at risk of defaming someone.<sup>165</sup> According to our classification of speech, gossip falls in the ‘low-value’ category. Some commentators may challenge this. According to Zimmerman, ‘gossip, and the rules governing who participates and who is privy to what information about whom, helps mark out social groupings and establish community ties’.<sup>166</sup> Under this line of argument, gossip acts as a ‘social glue’ which helps bond people together. Accordingly, it is not the content of a communication which determines its value, but rather, the way in which it develops social norms. This argument is not convincing. Although gossip is a way of making social connections, this falls short of justifying the value of such speech considering the monumental harm that may result from a single piece of gossip. In summary, gossip and speculation found online are prime examples of ‘low-value’ speech. Cases dealing with Twitter libel and other SMPs demonstrate the risks users are facing under the Defamation Act.

The first reported case on speculation involved a series of claims made on a Yahoo! discussion forum called ‘In the Hole’ about Michael Keith-Smith, a UK Independence Party candidate in 2005.<sup>167</sup> The defendant, hiding behind a pseudonym, threw out numerous allegations; calling him a racist, a Nazi, a sex offender, and

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<sup>164</sup> Síthigh (2008) (n 133).

<sup>165</sup> Notably, the Social Issues Research Centre at the University of Oxford reports that gossip accounts for 55 per cent of male conversation time and 67 per cent for women. See K Fox, ‘Evolution, Alienation and Gossip: The Role of Mobile Telecommunications in the 21st Century’ (2001) <<http://www.sirc.org/publik/gossip.shtml>> accessed 8<sup>th</sup> January 2023.

<sup>166</sup> D Zimmerman, ‘Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort’ (1983) 68 Cornell L. Rev. 291.

<sup>167</sup> *Keith-Smith v Williams* [2006] EWHC 860 (QB).

more. Following a court order against the ISP to identify the defendant, she was charged with £10,000 in compensatory and aggravated damages. This case is an example of very serious and direct allegations. The statements are not ambiguous – there is no doubt the defendant was blameworthy for reputational harm. However, the award of damages exposes the high risk of engaging in some online gossip. Even the judge regrettably noted that ‘the defendant possibly, or indeed probably, does not have the means to pay an award of damages or costs’.<sup>168</sup> Another claimant won £10,000 in damages when indecent images of children were posted on his Facebook profile under the comment ‘Ray, you like kids and you are gay so I bet you love this picture, Ha ha’.<sup>169</sup> It was not necessary to determine that actual number of people who would actually see the post to establish liability. It was enough to speculate about the statistics based on the number of Facebook friends.<sup>170</sup> This poses a unique risk to users of social media which does not apply to traditional media. Before making a comment, a user should self-assess the potential reach of the statement in order to pre-empt the consequences. Indeed, this is a futile task because online trends are volatile and posts can gain traction days, or even months, after they were originally posted.

The caselaw generally supports the proposition that gossip does not deserve the same level of protection as news media. It is argued that there should nevertheless be some limited protection to speech on SMPs: ‘it should not be absolute but should ensure restrictions are proportionate and do not hamper people’s day-to-day conversations [online]’.<sup>171</sup> This is where the Act struggles. Individuals engaging in online gossip on Twitter or Reddit are often writing spontaneously, with little thought or preparation. Even though statements made on social media platforms are potentially accessible by anyone, liability should not arise in these circumstances. Social media users are aware that this medium is unreliable and inaccurate, and so their reaction to statements is tailored to the circumstances. For instance, students are discouraged from using Wikipedia in academic

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<sup>168</sup> *Ibid.*, [15].

<sup>169</sup> Unreported July 26, 2010 (HC). See ‘Law student wins £10,000 after being branded a paedophile on Facebook’ (*The Telegraph* 2010) <<https://www.telegraph.co.uk/technology/facebook/7912731/Law-student-wins-10000-after-being-branded-a-paedophile-on-Facebook.html>> accessed 4<sup>th</sup> January 2023.

<sup>170</sup> A Murray, *Information Technology Law: The Law and Society* (4th edn, OUP 2019) 187-8.

<sup>171</sup> Zimmerman (1983) (n 165), 368.

settings because its ‘content is user-generated and anyone may contribute’.<sup>172</sup> In contrast, a reader of a traditional news outlet such as *The Times* or *The Economist* will expect articles to be well researched. Readers will attribute a higher level of authority to it. Social media users cannot be equally responsible for their statements as journalists are of their official media publications. The Act fails to apply this notion to ‘low-level’ speech which places undue constraints on social media users who knowingly make unguarded statements.

An additional reason for protecting spontaneous online gossip and speculation is the degradation of the distinction between free speech and freedom of thought. When someone speaks their mind, they are hardly communicating to the world. The gap between thought and expression is minimal.<sup>173</sup> Considering the growth of the digital ecosystem, there are more means than ever before for people to live their lives online.<sup>174</sup> Our current cyberspace is raising a generation that is ‘chronically online’. Punishing such individuals for venting their thoughts seems indistinguishable from an attack on one’s thoughts. Freedom of thought is a powerful factor in online communication today, and it engages with broader issues than just free speech, for instance privacy and autonomy.

### **3.5.2 Search engine liability**

Unlike social media, search engines are distinguished from traditional media on the basis that they do not publish the content they index.<sup>175</sup> A search engine is its own form of media, capable of influencing the opinions of users.<sup>176</sup> Preventing the dissemination of inaccurate and defamatory information is a never-ending battle. Under-regulating threatens the reputability of search engines, while over-regulating may impede on free speech. Who should bear this responsibility?

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<sup>172</sup> C Tardy, ‘Writing for the World: Wikipedia as an Introduction to Academic Writing’ (2010) v48 n1 English Teaching Forum 12, 14.

<sup>173</sup> Rowbottom (2012) (n 115), 371.

<sup>174</sup> P Rue, ‘Make Way, Millennials, Here Comes Gen Z’ (2018) 23(3) About Campus 5.

<sup>175</sup> A Koltay, ‘Defamation on the internet: the role and responsibilities of gatekeepers’ in Koltay A and Wragg P (eds.), *Comparative Privacy and Defamation* (Edward Elgar Publishing, 2020) 290, 292.

<sup>176</sup> E Laidlaw, *Regulating Speech in Cyberspace* (CUP 2015), 178.

Numerous solutions have been posed, and it is agreed that search engines ought to bear some level of responsibility. Option (1): Pasquale suggests that search engines should provide a link with a justification and/or apology from the person for the defamatory statement.<sup>177</sup> Option (2) is for the search engine or third-party to provide its own statement or links to sources that challenge the statement. Either route reaps benefits for consumers by protecting the sanctity of free speech. However, the level of regulation and maintenance demanded by the latter example (2) is realistically too strenuous for search engine operators. Option (2) may be employed voluntarily in relation to oppressive statements or ‘hate speech’.<sup>178</sup> It may be reasonable to shift the onus onto the search engine provider to remedy *serious* misconduct like ‘hate speech’ since it will also be in its own best interests to contain this. However, mandating complete regulation by the search engine provider will be too burdensome.

This text now returns to the claim that freedom of expression is ‘free’ so long as the speaker acknowledges the consequences of making a statement. If this is the case, the self-regulatory approach is to be preferred. Self-regulation is compatible with the notion that individuals should bear responsibility for what they say. But this approach is also problematic. Self-regulation is a low-cost regulatory approach which can encourage groups to bring claims to suppress content they disagree with, not because it is offensive or defamatory.<sup>179</sup> Additionally, the speed at which information is reposted means that any attempt at regulation is futile. Accepting this undesirable reality means accepting the precarious position of free speech within the digital world.

### 3.6 Conclusion

Dershowitz accurately concludes that “neither freedom of speech nor due process of law are guarantors of liberty, democracy, or truth, since they both rely on the intelligence and goodwill of fallible human beings”.<sup>180</sup>

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<sup>177</sup> F Pasquale, ‘Rankings, Reductionism and Responsibility’ (2006) 54 Clev. St. L. Rev. 115.

<sup>178</sup> D Citron and H North, ‘Intermediaries and Hate Speech: Fostering Digital Citizenship for our Information Age’ (2011) 91 B.U.L. Rev. 1435, 1471.

<sup>179</sup> J Bennett, ‘Letting artistic merit speak for itself’ (The Founder's Dinner, St Anne's College, Oxford, 28 February 2005) <[https://www.bbc.co.uk/pressoffice/speeches/stories/bennett\\_oxford.shtml](https://www.bbc.co.uk/pressoffice/speeches/stories/bennett_oxford.shtml)> accessed 3<sup>rd</sup> January 2023.

<sup>180</sup> A Dershowitz, *Cancel Culture: The Latest Attack on Free Speech and Due Process* (Hot Books, 2020).

Overall, the reform Act missed an opportunity to alleviate some of the pressures social media users are currently facing. Ascertaining the intention behind written words generally requires greater reflection than spoken words.<sup>181</sup> Although the Act cannot be blamed for the innate ambiguity of written statements, its subordination of ‘low-level’ speech certainly hampers the autonomy of individuals who wish to safely gossip online.

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<sup>181</sup> WVH Rogers, *Gatley on Libel and Slander* (11<sup>th</sup> edn, London: Sweet and Maxwell, 2008) at [3.35].

## CONCLUSION

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Both in culture and law, free speech rests on common principles; promoting autonomy and self-fulfilment of members of society,<sup>182</sup> protecting minority ideas from majority oppression,<sup>183</sup> and being essential to pluralism.<sup>184</sup> At various points in this text the reader has been reminded that free speech is not unlimited. ‘At a minimum, speech will have to be limited for the sake of order: if we all speak at once, we end up with an incoherent noise.’<sup>185</sup> This is where defamation law steps in. The major concern for the reform Act was to equalise the protection afforded to individuals to participate in open debate without overstepping the reputational harm boundary. In other words, the Act aimed to strike a balance between reputation regulation and freedom of expression. Despite its efforts, this text has argued that this has not been achieved with libel in the digital environment.

This text has argued that defamation law does not protect ‘low-level’ forms of speech to the same standard. The DA 2013 is to a large extent still rooted in biased common law principles. As such, the DA 2013 continues to have a ‘chilling effect’ on social media users, as well as vulnerable and marginalised groups of individuals. Whether this ‘chilling effect’ will produce enough of an impact to place defamation reform back onto the political agenda remains to be seen.

The standards by which libel is judged must change due to mass speech on the internet, because the ‘internet significantly accelerates the pace at which these insults and offences spread’.<sup>186</sup> By codifying the notion of ‘harm’ under section 1 and narrowing the scope of the website operators defence under section 5, the 2013 Act struggles to keep up to date with speech on the internet.

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<sup>182</sup> *DPP v Ziegler* [2019] EWHC 71 (Admin), 49.

<sup>183</sup> J Mill, *On Liberty* (Parker 1859), 31-2; *McIntyre* (1995) 514 US 334, 357.

<sup>184</sup> *R v Shayler* [2002] UKHL 11, 21.

<sup>185</sup> D Mill, "Freedom of Speech", *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), E Zalta (ed.), <<https://plato.stanford.edu/archives/spr2021/entries/freedom-speech/>> accessed 6<sup>th</sup> January 2023.

<sup>186</sup> Koltay (2020) (n 174).

The common understanding of defamation law, as applicable under *Derbyshire*<sup>187</sup> and *Reynolds*<sup>188</sup>, is that all speech is covered, irrespective of its form type of expressive platform used. Chapter 3 challenges this notion, by breaking the ‘hierarchy’ between speech in traditional media and that in social media. This chapter explores a unique way of categorising free speech which further exposes how the DA 2013 failed to strike a balance between reputation and free speech. Rowbottom’s hierarchy of speech separates traditional ‘high-level’ media from ‘low-level’ media. By doing so, this text was able to establish social media users, search engines, and website operators, as subjects which the 2013 Act is not fully equipped to deal with.

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<sup>187</sup> [1993] AC 534.

<sup>188</sup> [2001] 2 AC 127.

**TABLE OF CASES AND LEGISLATION**

---

**Table of Cases**

- Abrams v United States* (1919) 250 US 616
- Applause Store Productions Ltd v. Raphael* [2008] EWHC 1781 (QB)
- British Chiropractic Association v Singh* [2011] 1 WLR 133
- Cairns v Modi* [2012] EWHC 756 (QB).
- Campbell v MGN* [2004] UKHL 22
- Canadian Supreme Court in Crooks v. Newton* [2011] SCC 47
- Cassel v Broome* [1972] AC 1027
- Channel Seven Adelaide v Manock* (2007) 232 CLR 245
- Clift v Clarke* [2011] EWHC 1164 (QB)
- Crisp v Apple Retail (UK) Ltd.* ET/1500258/11 [Crisp].
- CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB)
- Derbyshire Country Council v Times Newspapers Ltd.* [1993] AC 534
- DPP v Ziegler* [2019] EWHC 71 (Admin)
- Gorelishvili v Georgia* (2009) 48 EHRR 36
- Jameel v Dow James & Co Inc* [2005] EWCA Civ 75
- Keith-Smith v Williams* [2006] EWHC 860 (QB)
- Keith-Smith v Williams* [2006] EWHC 860 (QB).
- Lachaux v Independent Print* [2019] UKSC 27
- Lewis v Daily Telegraph* [1964] AC 234
- Linklaters LLP v Frank Mellish* [2019] EWHC 177 (QB)
- London Artists v Littler* (1969) 2 QB 375
- McAlpine v Bercow* [2013] EWHC 1342 [McAlpine]

*McIntyre v Ohio Elections Commission* (1995) 514 US 334

*McVeigh v Cohen* (1998) 983 F. Supp. 215

*Monroe v Hopkins* [2017] EWHC 433 (QB)

*Muller v Switzerland* (1991) 13 EHRR 212

*Otto Preminger v Austria* (1995) 19 EHRR 34

*Parmiter v Coupland* (1840) 6 M.&W. 105

*Paul Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (QB)

*Pridgen v University of Calgary* (2012) ABCA 138

*R Predota v Austria* App. No. 14621/06 (18 January 2000)

*R v Shayler* [2002] UKHL 11

*R v Sheppard* [2010] EWCA Crim 65

*R(Miller) v College of Policing* [2020] EWHC 225 (Admin) 12

*Redmond-Bate v DPP* [1999] EWHC 733 (Admin) 20.

*Reno v American Civil Liberties Union* (1997) 521 US 844

*Reynolds v. Times Newspapers* [2001] 2 AC 127

*Rylands v Fletcher* (1868) LR 3 HL 330

*Sheffield Wednesday Football Club & Ors v Hargreaves* [2007] EWHC 2375 (QB)

*Sim v Stretch* [1936] 2 All ER 1237 [1240]

*Spiller v Joseph* [2010] UKSC 53

*Stocker v Stocker* [2019] UKSC 17

*Tamiz v Google Inc* [2013] EWCA Civ 68

*Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB)

*Yildirim v Turkey* [2012] ECHR 2074

**Table of Legislation**

Crime and Courts Act 2013

Defamation Act 1996

Defamation Act 2013

Draft Defamation Bill HL 203, HC 930-I (2011–12)

Enterprise and Regulatory Reform Act 2013

Explanatory Notes to the Defamation Act 2013

Malicious Communications Act 1988

Protection from Harassment Act 1977

Public Order Act 1986

The Defamation (Operators of Websites) Regulations 2013

The Royal Charter on self-regulation of the press

## BIBLIOGRAPHY

---

### Books

Baker J, *An Introduction to English Legal History* (London: Butterworths, 1990)

Baker J, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (2<sup>nd</sup> edn, OUP 2019)

Barendt E and others, *Libel and the Media: The Chilling Effect* (Oxford 1997)

Collins M, *Collins on Defamation* (OUP 2014)

Collins M, *The Law of Defamation and the Internet* (3<sup>rd</sup> edn, OUP 2010)

Dershowitz A, *Cancel Culture: The Latest Attack on Free Speech and Due Process* (Hot Books 2020)

Holmes OW, *The Common Law* (1881)

Horsey K and Rackley E, *Tort Law* (7<sup>th</sup> edn, OUP 2021)

Hylton KN, *Tort Law: A Modern Perspective* (CUP 2016)

Kaplan L, *The Culture of Slander in Early Modern England* (CUP 2009)

Laidlaw E, *Regulating Speech in Cyberspace* (CUP 2015)

McNamara L, *Reputation and Defamation* (OUP 2007)

Mill J, *On Liberty* (Parker 1859)

Millar G QC and Scott A, *Newsgathering: Law, Regulation and the Public Interest* (OUP 2016)

Murray A, *Information Technology Law: The Law and Society* (4<sup>th</sup> edn, OUP 2019)

Prosser W, *Handbook of the Law of Torts* (4<sup>th</sup> edn, West Pub. Co 1971)

Robertson G and Nicol A, *Media Law* (5<sup>th</sup> edn, London 2008)

Rogers WVH, *Gatley on Libel and Slander* (11<sup>th</sup> edn, London: Sweet and Maxwell 2008)

Rolph D, *Reputation, Celebrity and Defamation Law* (Ashgate 2008),

Sen A, *Development as Freedom* (OUP 1999)

### **Contributions to Edited Books**

Boyd D, "Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications" in Papacharissi Z (ed.), *Networked Self: Identity, Community, and Culture on Social Network Sites* (Oxford 2010)

Brink D, 'Some Forms and Limits of Consequentialism' in Copp D (ed.), *The Oxford Handbook of Ethical Theory* (OUP 2007)

Castells M, "The networked society: From knowledge to policy." in Castells M and Cardoso G (eds.), *The Network Society: From Knowledge to Policy* (Washington: Centre for Transatlantic Relations, 2005)

Koltay A, 'Defamation on the internet: the role and responsibilities of gatekeepers' in Koltay A and Wragg P (eds.), *Comparative Privacy and Defamation* (Edward Elgar Publishing, 2020)

Leiter B, "Cleaning Cyber-Cesspools: Google and Free Speech" in Levmore S and Nussbaum M (eds.), *The Offensive Internet* (Cambridge, Mass., 2010)

Oster J, 'Theories of reputation' in Koltay A and Wragg P (eds.), *Comparative Privacy and Defamation* (Edward Elgar Publishing, 2020)

### **Journal Articles**

Barendt E, 'What is the point of libel law?' (1999) 52(1) *Current Legal Problems* 110

Birkbeck S, 'Can the use of social media be regulated?' (2013) 19 *Computer and Telecommunications Law Review* 83

- Bosland J and Kenyon AT and Walker S, 'Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion' (2015) 74 *The Cambridge Law Journal* 234
- Bourdieu P, 'The Social Space and the Genesis of Groups' (1985) 14 *Theory and Society* 723
- Citron D and North H, 'Intermediaries and Hate Speech: Fostering Digital Citizenship for our Information Age' (2011) 91 *B.U.L. Rev.* 1435
- Coad J, '*Reynolds* and Public Interest—What About Truth and Human Rights?' (2007) 18 *Entertainment LR* 75
- Fort T and Latini M, 'The Duty to Establish, Monitor, and Enforce: How Today's Corporate Compliance Standards Provide a Workable Model to Limit Defamation and Protect First Amendment Freedoms' (2019) 33(1) *NDJLEPP* 35
- Furman J, 'Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation' (2001) 25 *Seattle U.L. Rev.* 213
- Gray K and Wegner D, 'Moral typecasting: Divergent perceptions of moral agents and moral patients.' (2009) 96 *JPSP* 505
- Haidt J, 'The new synthesis in moral psychology' (2007) 316 *Science*, 998
- Howarth D, 'Libel: Its Purpose and Reform' (2011) 74 *Modern Law Review* 845
- Jones M, 'The Defamation Act 2013: a free speech retrospective.' (2019) 24(3) *Communications Law* 117.
- Kurt G, Waytz A and Young L, 'The Moral Dyad: A Fundamental Template Unifying Moral Judgment' (2012) 23(2) *Psychological Inquiry* 206
- Levine N, 'Establishing Legal Accountability for Anonymous Communications in Cyberspace' (1996) 96 *Colum. Law Rev.* 1526
- Lidsky L, 'Silencing John Doe: Defamation and Disclosure in Cyberspace' (2000) 49 *Duke L.J.* 855

Mac Síthigh D, 'The mass age of internet law' (2008) 17 *Information & Communications Technology Law* 79

Mangan D, 'An Argument for the Common Law Defence of Honest Comment' (2011) 16 *Communications Law* 140

Mangan D, 'Regulating for Responsibility: Reputation and Social Media.' (2015) 29(1) *International Review of Law, Computers and Technology* 16.

Mullis A and Scott A, 'Reframing libel: Taking (all) rights seriously and where it leads' in D. Capper (ed.), *Modern Defamation law: Balancing Reputation and Free Expression* (Belfast: Queens University Belfast Press, 2012) [Mullis & Scott (2012)], 1-21

Mullis A and Scott A, 'Tilting at Windmills: the Defamation Act 2013' (2014) 77(1) *Modern Law Review* 87

O'Neill K, 'Privatizing public forums to eliminate dissent' (2007) 5 *First Amendment Law Review* 201

Pasquale F, 'Rankings, Reductionism and Responsibility' (2006) 54 *Clev. St. L. Rev.* 115

Post R, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691

Rowbottom J, 'In the shadow of the big media: freedom of expression, participation and the production of knowledge online' (2014) *Public Law* 491

Rowbottom J, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) *Cambridge Law Journal* 355

Rue P, 'Make Way, Millennials, Here Comes Gen Z' (2018) 23(3) *About Campus* 5

Sobel D, 'The Process that John Doe is Due: Addressing the Legal Challenge to Internet Anonymity' (2000) 5 *Va JL & Tech* 1

Sunkel M, 'And the I(SP)s Have It..But How Does One Get It - Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation' (2003) 81 NC L Rev 1189

Tardy C, 'Writing for the World: Wikipedia as an Introduction to Academic Writing' (2010) v48 n1 English Teaching Forum 12

Velasco J, 'Millenials as digital natives: Examining the social media activities of the Y-generation.' 28(3) Pertanika Journal of Social Science and Humanities 1939

Velasco J, 'You are Cancelled: Virtual Collective Consciousness and the Emergence of Cancel Culture as Ideological Purging' (2020) 12(5) Rupkatha Journal 1

Yen A, "Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace" (2002) 17 Berkeley Tech. L.J. 1207

Zimmerman D, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 Cornell L. Rev. 291.

### **Conference Papers**

Bennett J, 'Letting artistic merit speak for itself' (The Founder's Dinner, St Anne's College, Oxford, 28 February 2005) < [https://www.bbc.co.uk/pressoffice/speeches/stories/bennett\\_oxford.shtml](https://www.bbc.co.uk/pressoffice/speeches/stories/bennett_oxford.shtml) > accessed 3<sup>rd</sup> January 2023

Kwak H and others, 'What is Twitter, a social network or a news media? (Proceedings of the 19th international conference on World Wide Web, Raleigh, 2010) 591 < <https://www.ambuehler.ethz.ch/CDstore/www2010/www/p591.pdf> > accessed 2<sup>nd</sup> January 2023

**Research Papers**

Mangan D, 'The Relationship Between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content' (commissioned background research paper, Law Commission of Ontario 2017)

Rhodes P, 'Defamation on the Internet: an analytical study of defamation law and the Internet in England and Wales: 1996 to 2009' (DPhil thesis, Loughborough University 2010)

Usman M, 'Does Cyberspace outdate Jurisdictional Defamation Laws?' (DPhil thesis, University of Bradford 2019)

**Law Commission Reports**

Law Commission, *Hate Crime Laws* (LC C250, 23 September 2020)

**Websites and Blogs**

'Man sentenced over racist tweets about Newcastle United' (*BBC News*, 27 February 2012) <<https://www.bbc.co.uk/news/uk-england-tyne-17183384>> accessed 22 December 2022

Ben Darlow, 'History of Defamation' (*The NewJurist*, 17 May 2014) <<https://newjurist.com/history-of-defamation.html>> accessed 1<sup>st</sup> February 2023

Doug Criss, "Blackface and celebrities: A (growing) list" (*CNN*, 7 February 2019) <<https://edition.cnn.com/2019/02/07/us/celebrities-in-blackface-list-trnd/index.html>> accessed 22 December 2022

Hugh Tomlinson QC, 'Libel, Damages and Declarations of Falsity' (*Inform*, 2 November 2010) <<https://inform.org/2010/11/02/libel-damages-and-declarations-of-falsity/>> accessed 17 December 2022

Iain Wilson and Max Campbell ‘Defamation Act 2013: A Summary and Overview’ (*Inform’s blog*, 21 January 2014) < <https://inform.org/2014/01/21/defamation-act-2013-a-summary-of-the-act-iain-wilson-and-max-campbell/> > accessed 17 February 2023

Index on Censorship / English PEN, Free Speech is Not For Sale (2009) < [https://issuu.com/englishpen/docs/libeldoc\\_medhires](https://issuu.com/englishpen/docs/libeldoc_medhires) > accessed 17 December 2022

John Perry Barlow, “Jack In, Young Pioneer!” (*Electronic Frontier Foundation*, 11 August 1994) < <https://www.eff.org/pages/jack-young-pioneer> > accessed 22 December 2022

Statista, < <https://www.statista.com/statistics/303681/twitter-users-worldwide/> > accessed 2<sup>nd</sup> January 2023

## Newspaper Articles

‘Law student wins £10,000 after being branded a paedophile on Facebook’ (*The Telegraph* 2010) <<https://www.telegraph.co.uk/technology/facebook/7912731/Law-student-wins-10000-after-being-branded-a-paedophile-on-Facebook.html>> accessed 4<sup>th</sup> January 2023

Mark Stephens, “Verdict casts dark cloud over freedom of speech” (*The Times*, 22 March 2006) < <http://www.timesonline.co.uk/tol/news/uk/article0743901.ece> > accessed 22 December 2022

Patrick Wintor, ““Laughing stock” libel laws to be reformed, says Nick Clegg’ (*The Guardian*, 6 January 2011). <<https://www.theguardian.com/law/2011/jan/06/libel-laws-nick-clegg>> accessed 29 October 2023.

## Other sources

Coghlan N, ‘Are our laws on freedom of speech fit for purpose in the age of “cancel culture”?’ (December 15, 2020) Jonathan Brock QC Memorial Prize Essay 2020 < <https://ssrn.com/abstract=3760389> > accessed 7<sup>th</sup> January 2023

Fox K, 'Evolution, Alienation and Gossip: The Role of Mobile Telecommunications in the 21st Century' (2001) *SIRC*: <<http://www.sirc.org/publik/gossip.shtml>> accessed 8<sup>th</sup> January 2023

Jackson LJ, *Review of Civil Litigation Costs*, Preliminary Report (2009)

Mill D, "Freedom of Speech", *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), E Zalta (ed.) < <https://plato.stanford.edu/archives/spr2021/entries/freedom-speech/> > accessed 6<sup>th</sup> January 2023

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (9 October 2019) A/74/485 19