York Law School - University of York

THE

YORK LAW REVIEW

VOLUME V
SUMMER 2024

EDITORIAL BOARD
VOLUME V

Foreword

Professor TT Arvind

Head of York Law School

It gives me a strong sense of satisfaction to write this foreword to the fifth edition of the York Law Review. The York Law Review is run by students to showcase the best work our students do. That it is now in its fifth edition is a testimony to the ability of our students and their commitment to the deeper academic values that York Law School has sought to promote since its founding.

York Law School was founded with the goal of producing students and researchers who think differently about law. We sought to create a department where staff and students worked within a shared culture of guided and grounded discovery. Our goal was to nurture a generation fo students who would study the law through open-minded, curiosity-led enquiry. Rather than have the law explained to them as a set of rules, precedents, and facts, they would study law in a way that gave them the opportunity and encouraged them to develop their own ideas and views about the law, which would be grounded in engagement with legal sources as well as with the social context in which the law operates.

We believed firmly that this distinctive, enquiry-led approach would create students who had the tools and ability to independently analyse and evaluate the law and shed new and interesting light on it. York Law Review was set up to celebrate the best of our students' work and present it to the wider world. We also wanted to give students a vehicle for engaging in discussions with a wider audience. A hallmark of our curriculum and our pedagogy is that students constantly engage in debate and mutual learning with their peers. A goal of this Review is to let students take their debates and perspectives beyond York Law School and place them on a more public stage.

The contents of this volume show that it has succeeded admirably in every one of these goals. The articles relate to a very wide range of topics, ranging from algorithmic decision-making in policing through grave-robbery to the ivory trade. They are unafraid to engage in controversial questions that are the subject of intense public debate. As in previous editions, the rights of women and the extent to which the law respects them continues to be an important focus for

our students. In this volume, that focus is represented by a critical comment on the controversial decision in *R v Lawrence* [2020] EWCA Crim 971; an in-depth discussion of the many hidden restrictions that—arguably—operate beneath the surface to trammel and stigmatise the right to abortion that many women believe they enjoy; and a fresh approach to the difficult question about how the law should approach pre-nuptial agreements.

But the concerns of the articles in this issue are not just with England and Wales. As in previous issues, our students remain globally engaged, as the article on the challenges facing constitutional institutions in Indonesia show. The global environment, too, is a concern of several articles in this issue, with a particular focus being on the way the law thinks about the position of humans vis-à-vis animals. This issue, accordingly, has a critical analysis of the way in which global ivory legislation deals with the protection of elephants, and a final article discussing whether the time has come to recognise that non-human animals, too, deserve rights.

The quality of the articles, the range of topics they cover, and the social importance of the issues they take up speak are a powerful testimony to the moral and intellectual commitments of our students as well as to their intellectual ability. The articles in this issue are not a dry read. They do not present a dispassionate analysis of legal rules, and the issues they take up are not matters of abstract theory or abstruse 'lawyers' law'. They speak, rather, to issues of pressing contemporary importance, and are written with passion and a real commitment to giving voice and drawing attention to perspectives, experiences, and positions that are all-too-often neglected in the world of the law.

The authors and the editors are to be congratulated for the tremendous effort they have put into this volume—an effort which is clearly visible on every page. In that effort, and the commitment that underpins it, this volume instantiates the deeper social and intellectual values which York Law School tries very hard to foster, and it is a real pleasure to write this introduction presenting this volume to the wider world of readers interested in law.

TT Arvind

May 2024

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Editorial

Eleana Kasoulide

Following months of hard work, creative revisions, and close collaboration it is a wonderful privilege to be presenting the fifth volume of the York Law Review. As always, the York Law Review looks both to showcase and nurture the writers of some of the best undergraduate and postgraduate dissertations of their year. It is also our aim that we encourage current students to engage in legal research, to think about and investigate legal issues that matter to them, and to fuel their passion for law. Thus, anyone may be given the opportunity for their work to be published through our annual competition.

In this volume we have the pleasure of including three undergraduate and three postgraduate dissertations, as well as our two competition winners. All pieces of work stood out to our editorial team due to their timeliness, as well as their sensitive and thoughtful approaches to the legal themes they explore.

Harriet Green identifies the revolutionary effect technology has had on public functions and discusses how judicial review may respond to these changes, managing to be both instructive and innovative. Azeem Marhendra Amedi's article although situating itself within the constitutional democracy decline experienced in Indonesia, a fascinating case study in and of itself, also speaks to concerns that are relevant to democracies who are facing a rise in populism and authoritarianism everywhere. Emily Patterson asks us to re-evaluate our understanding of pre-nuptial agreements and in the process brings us face to face with our changing society, perceptions of gender-roles, relationships, and reminds us of the value of exploring different approaches in our attempt to modernise our laws.

The two following articles investigate issues which despite the attention they have attracted especially in feminist legal literature for a long time, are still the subject of heated debate today. Lauren Seery-Loudon, through a feminist lens, analyses the implications of a controversial case on the meaning of consent and in a refreshing move employs empirical methods to provide an insight to women's understanding of both the case and the issue at hand. Caitlin Day on the other hand explores the subtle legal and cultural barriers women still face to access abortion services in the UK arguing for abortion to be viewed as a medical operation.

We then follow Genevieve Celeste Steele's analysis of legislation seeking to protect elephants from extinction and ivory poaching practices; a piece that brings us face to face with our responsibility towards the environment, art, and history and how these different considerations sometimes clash in unexpected ways.

Finally, the volume ends with our two competition winners. Ellie Allan, a postgraduate student, poses some interesting questions around cultural heritage and restitution through an investigation of the case of a grave-robber. Roma Beke, an undergraduate student, ponders the viability and ramifications of extending the legal rights of animals echoing the concerns, enquiries, and passion towards nature of a growing number of young individuals who hope for a better relationship between nature and humanity.

While different, what all these pieces have in common is that they present interesting and salient legal issues for the reader to consider with a high awareness of the practical impact law has on our changing society. To their credit many of our writers have not just presented a problem but have tried to explore viable solutions, whether that is through utilising existing legal principles, entertaining the possibility of legal reform or contemplating the effects of a shift in perspective. These pieces are an example of the breadth and depth of discussion that may be initiated when curiosity is nurtured, and when people come together to support each other's work. It is our hope that the volume is a source of inspiration for other ambitious and inquisitive York Law students as well as our wider audience.

It goes without saying that the volume would not be the same without the time, work, and dedication of a number of wonderful people. First and foremost thank you to my lovely team and fellow editors, Cindy Leung, Amy Mitchell, Kamée Payton, and Rachel Deyis, for their commitment to their assigned authors, excellent communication, and creativity. We would also all like to thank the outgoing editor Shivangi Gangwar for her seamless passing of the torch and patience with our questions. Last but not least we are deeply grateful to Dr Mattia Pinto and Martin Philip, for their continual support, guidance, and instruction which was a constant reassurance through all these months.

Consciousness over Code: How Judicial Review can Address Algorithmic Decision-Making in Policing

Harriet Green

Abstract

Algorithmic decision-making (ADM) systems have the potential to improve operational efficiency in policing by streamlining decision-making, swiftly analysing intelligence, and maximising the effective allocation of resources. However, integration of these systems into the discretionary decision-making process raises concerns regarding their compatibility with lawful decision-making practices. Discretionary decision-makers must exercise their statutory powers *themselves*,[1] and integrating an ADM system (ADMS) into the discretionary decision-making process risks potential interference with human discretion.[2] Currently, there is no legal framework that specifically governs the use and regulation of ADMS.[3] This article explores how the courts could step in to help embed high standards and issue guidance so that police discretionary decision-makers may use these systems lawfully. It examines how the courts, through judicial review, could apply the non-fettering and non-delegation principles to shape the legal framework for ADMS use in policing contexts in England and Wales. It critically applies these principles to real-life examples of police using ADMS in discretionary decision-making contexts to investigate how these principles can be adapted to guide lawful machine-assisted decision-making. The article concludes that the application of these principles reveals important questions for the courts to address, including: if, and how, machines can occupy an advisory role, how human decision-makers can evidence independent judgement when using ADMS, the impact of bias in ADM processes, how ADM outcomes can be interpreted, and how strictly ADM outcomes may be applied.

[1] Denis J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (OUP 1990).

[2] Reuben Binns, Lilian Edwards and Rebecca Williams, 'Legal and Regulatory Frameworks Governing the Use of Automated Decision Making and Assisted Decision Making by Public Sector Bodies' (2021) TLEF Working Paper <https://research.thelegaleducationfoundation.org/wp-content/uploads/2021/07/FINAL-Legal-and-Regulatory-Frameworks-Governing-the-use-of-Automated-Decision-Making-and-Assisted-Decision-Making-by-Public-Sector-Bodies-1.pdf> accessed 6 June 2024.

[3] Marion Oswald, 'Algorithm-Assisted Decision-Making in the Public Sector: Framing the Issues Using Administrative Law Rules Governing Discretionary Power' (2018) Philosophical Transactions of the Royal Society A 376; Binns, Edwards and Williams (n 2).

1 Introduction

Scholarship surrounding the use of ADM systems (ADMS) in public body decision-making contexts has identified judicial review (JR) as a toolkit[4] to build a legal framework for the lawful use of these systems. However, there is currently insufficient research that applies specific JR principles to the use of ADMS in a policing context. Thus, this article will critically examine how JR, through the application of the non-fettering[5] and non-delegation[6] principles, could help shape a framework for the lawful use of ADMS in a police discretionary decision-making context in England and Wales. To illustrate this argument, this article draws upon real-world examples of ADMS that have been used in police discretionary decision-making contexts.

The adoption of ADMS is widespread across public bodies in the United Kingdom (UK), and particularly in the policing sector. This is unsurprising given the crisis that the criminal justice system faces. Insufficient funding, the continual closure of courts, cuts to Legal Aid, and staff shortages have put pressure on police officers and staff to do more with less.[7] The growing sophistication of algorithmic[8] tools,[9] has led police forces towards data-driven[10] policing (where forecasting ADMS inform police action) to improve efficiency, consistency, and accuracy in decision-making, thereby relieving operational burdens.[11]

[4] Rebecca Williams, 'Rethinking Administrative Law for Algorithmic Decision Making' (2021) 42 OJLS 2.
[5] *Carltona v Commissioners of Works* [1943] 2 All ER 560; *R (CCWMP) v Birmingham Justices* [2002] EWHC 1087, [2002] Crim LR 37; *R v Inhabitants of Leake* (1833) 5 B & Ad 469; *British Oxygen v Minister of Technology* [1971] AC 610.
[6] *Lavender Son ltd v Minister of Housing and local Government* [1970] 3 All ER 871; *R v London Borough of Tower Hamlets ex parte Khalique* [1994] 26 HLR 517; *Noon v Matthews* [2014] EWHC 4330 (Admin).
[7] The Bar Council, 'Access Denied: The State of the Justice System in England and Wales in 2022' (*The Bar Council*, November 2022) <www.barcouncil.org.uk/static/88a28ac3-5866-4d73-99ecb9b05c03c815/Bar-Council-Access-denied-November-2022.pdf> accessed 5 January 2023.
[8] For the purposes of this article, *algorithmic decision-making* is defined as: the automation of any human decision-making process, through the application of technology. The algorithm processes the data held by the organisation deploying the ADM system, and will reach a decision/outcome through the process of data analytics.
[9] For the purposes of this article, *algorithm* is defined as: a coded formula that, when triggered, will accomplish a given purpose under given instruction. The types of algorithmic systems relevant to this article are predictive algorithms; Alexander Babuta, 'Big Data and Policing' (2017) RUSI.
[10] For the purposes of this article, *data* is defined as: any information that has been translated into a format that is conducive for 'movement or processing'. *Data-analysis* refers to the computational analysis of data which seeks to discover, interpret, and communicate meaningful patterns in data.
[11] Ibid.

However, despite widespread adoption of ADMS, there is no cross-departmental strategic approach from the Government for overseeing the use of these systems,[12] nor a legal framework that specifically governs their use and regulation.[13] Pilot guidance documents, such as the Transparency Standard[14] and Ethical Framework,[15] have been published to guide the use of ADMS by public bodies, but these are not legally binding nor sufficient. Similarly, the legislation most relevant in regulating the operation of these systems, the UK General Data Protection Regulation (GDPR) 2018,[16] and the Data Protection Act 2018,[17] are untested in an ADM context.[18] The Equality Act 2010[19] and the Human Rights Act 1998[20] have been successfully used to challenge instances of algorithmic bias, discrimination, and a breach of privacy rights.[21] However, whilst bringing cases under these pieces of legislation (rightfully) attacks the substantive outcome of the decision itself (ie, the breach of an individual's rights), it does not address the question of how ADMS might be *used* lawfully.

Furthermore, the decentralised structure of policing in England and Wales, accompanied by the insufficient regulatory framework for police using ADM,[22] means that there is no standardised approach to tackle potential unlawful decision-making *before* it happens.[23] Instead, each police

[12] Parliament UK, 'Technology Rules? The Advent of New Technologies in the Justice System' (*GOV UK*, 30 March 2022) <https://publications.parliament.uk/pa/ld5802/ldselect/ldjusthom/180/18004.htm> accessed 10 December 2022.
[13] Oswald (n 3) 376; Binns, Edwards and Williams (n 2).
[14] Elena Hess-Rheingans and Lara Bird, 'Developing the Algorithmic Transparency Standard in the open' (*GOV UK*, 10 October 2022) <https://rtau.blog.gov.uk/2022/10/10/developing-the-algorithmic-transparency-standard-in-the-open/> accessed 1 December 2022.
[15] Cabinet Office, Central Digital & Data Office, and Office for Artificial Intelligence, 'Ethics, Transparency and Accountability Framework for Automated Decision-Making' (*GOV UK*, 13 May 2021) <www.gov.uk/government/publications/ethics-transparency-and-accountability-framework-for-automated-decision-making/ethics-transparency-and-accountability-framework-for-automated-decision-making> accessed 10 December 2022.
[16] UK General Data Protection Regulation (GDPR) 2018.
[17] Data Protection Act 2018.
[18] Binns, Edwards and Williams (n 2).
[19] Equality Act 2010.
[20] Human Rights Act 1998.
[21] Amnesty International, 'Trapped in the Matrix: Secrecy, Stigma, and Bias in the Met's Gangs Database' (*Amnesty International*, May 2018) <www.amnesty.org.uk/files/reports/Trapped%20in%20the%20Matrix%20Amnesty%20report.pdf> accessed 18 January 2023; *Ed Bridges v The Chief Constable of South Wales Police* [2020] EWCA Civ 1058.
[22] Williams (n 4) 2.
[23] Centre for Data Ethics and Innovation, 'Review into Bias in Algorithmic Decision-Making' (*GOV UK*, November 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957259/Review_into_bias_in_algorithmic_decision-making.pdf> accessed 25 October 2022.

force is responsible for developing their own policies for utilising ADMS.[24] Thus, it is of the upmost importance to address this gap within the regulatory framework.

The courts are uniquely placed to establish doctrinal principles to shape standards, outline obligations and offer guidance for public body decision-making.[25] As such, this article argues that the courts have considerable powers to inform the foundations of the developing legal framework surrounding the lawful use of ADMS in policing. This article adopts a doctrinal approach,[26] viewing public law as a toolkit[27] with established principles for lawful decision-making that may be adapted to guide police's lawful use of ADMS.

This article chooses the ground of illegality for review because it necessitates that decision-makers correctly understand and exercise their statutory powers,[28] making it most applicable to scrutinise a human decision-makers' use of ADMS. The non-fettering[29] and non-delegation[30] principles, which are sub-grounds of illegality, are most relevant to the use of ADMS because they fundamentally address the extent to which a discretionary decision-maker can utilise the outcomes of ADMS lawfully.

While acknowledging that legislation and supplementary guidance will also be necessary in regulating the use of ADMS, this article argues that the courts can still inspire principles for best practice within the developing legal framework. It concludes that the courts have the potential to adapt the non-fettering and non-delegation principles of lawful human decision-making to address the use of ADMS in policing, thereby entrenching best-practice into the developing legal framework for these systems.

2 Algorithmic Decision-Making: What is it?

[24] Ibid.
[25] Mark Elliott and Robert Thomas, *Public Law* (4th edn, OUP 2020).
[26] P Ishwara Bhat, *Idea and Methods of Legal Research* (OUP 2019).
[27] Williams (n 4) 2.
[28] Per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[29] *Carltona v Commissioners of Works* [1943] 2 All ER 560; *R (CCWMP) v Birmingham Justices* [2002] EWHC 1087, [2002] Crim LR 37; *R v Inhabitants of Leake* (1833) 5 B & Ad 469; *British Oxygen v Minister of Technology* [1971] AC 610.
[30] *Lavender Son ltd v Minister of Housing and local Government* [1970] 3 All ER 871; *R v London Borough of Tower Hamlets ex parte Khalique* [1994] 26 HLR 517; *Noon v Matthews* [2014] EWHC 4330 (Admin).

The term ADM refers to the automation (in full or in part) of human decisions.[31] Algorithmic decision-making systems assist by identifying meaningful patterns[32] in data, which entails: cross-comparing data from large datasets, identifying points of correlation (or, to some extent, causation), and then generating a predictive outcome.[33] As such, ADM, more broadly, is a socio-technical process;[34] with human programmers and end-users working at the creation and operational stages, as well as the machine itself generating outcomes that assist the organisation and operation of human actors.[35]

In a policing context, predictive ADMS are often used to assist discretionary decision-makers by predicting a certain risk and the likelihood of that risk occurring.[36]

3 Judicial Review and the Lawful Use of ADM

Judicial Review (JR) is a crucial component of the democratic system that plays a vital role in overseeing the exercise of public functions by public bodies.[37] This process involves examining the procedural aspects of decision-making, rather than the substantive outcome of a decision.[38] The law scrutinises the actions of natural or legal persons, placing legal responsibility on public entities and human decision-makers for any decisions that involve ADMS.[39] Police personnel, especially those granted with discretionary powers, bear responsibility for ensuring the lawful exercise of said powers.[40] Thus, JR has the potential to shape a framework for the lawful use of

[31] Verena Bader and Stephan Kaiser, 'Algorithmic Decision-Making? The User Interface and Its Role for Human Involvement in Decisions Supported by Artificial Intelligence' (2019) 26 Organization 655.
[32] For the purposes of this article, *meaning patterns* are defined as: the presentation of data patterns in one of three ways- descriptively (existing data is simply presented in an understandable manner), predictively (existing data is used to generate a prediction of possible future events and their likelihood), and prescriptively (existing data is analysed to produce a recommendation).
[33] AI Business, 'Descriptive, Predictive & Prescriptive Analytics: What are the differences?' (*AI Business*, 10 September 2020) <https://aibusiness.com/data/descriptive-predictive-prescriptive-analytics-what-are-the-differences> accessed 25 October 2022.
[34] Jennifer Cobbe, Michelle Seng Ah Lee and Jatinder Singh, 'Reviewable Automated Decision-Making: A Framework for Accountable Algorithmic Systems' (2021) Conference on Fairness, Accountability, and Transparency (FAccT '21).
[35] Ibid.
[36] Zoë Hobson and others, 'Artificial Fairness? Trust in Algorithmic Police Decision-Making' (2021) 19 JEC 165–189.
[37] Raphael Hogarth, 'Judicial Review' (*Institute for Government*, 18 December 2019) <www.instituteforgovernment.org.uk/explainer/judicial-review> accessed 13 November 2022.
[38] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[39] Jennifer Cobbe, 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making' (2019) 37 CUP 1–34
[40] Jennifer Brown, 'Police Powers: An Introduction' (*House of Commons Library*, 21 October 2021) <https://researchbriefings.files.parliament.uk/documents/CBP-8637/CBP-8637.pdf> accessed 20 October 2022.

ADMS,[41] as well as offer guidance to discretionary police decision-makers on how to properly exercise their discretion while using these systems.

3.1 ADM: Grounds for Judicial Review

In an ADM context, there are two kinds of decisions that could be subject to JR: the decision to deploy an ADMS, and any subsequent decision it makes or assists.[42] This article asserts that JR of these types of decisions are most suited to the substantive grounds of illegality because this principle specifically requires that decision-makers 'understand correctly the law that regulates [their] decision-making powers and must give effect to it.'[43] As discretionary decision-makers are granted their powers by statute, they must honour this authority by exercising the powers *themselves*.[44] Thus, there is a question as to whether a discretionary decision-maker, who uses an ADMS in a decision-making context, is giving effect to their power or if said ADMS is impeding their discretion. Accordingly, the relevant sub-ground of illegality is the retention of discretion,[45] which comprises two principles: non-fettering[46] and non-delegation.[47] The decision-making processes of a nominated decision-maker may be judicially reviewed under the grounds of illegality if the decision-maker's discretion was fettered and/or delegated.[48]

3.1.1 Fettering of discretion

This principle asserts that a decision-maker who has been granted statutory discretionary powers is obligated to exercise those powers and cannot abstain from exercising their own discretion.[49] Accordingly, a decision-maker with discretionary powers must: consider the individual circumstances of the matter, keep an open-mind, and must not operate with rigidity.[50]

[41] Mark Elliot, 'Judicial Review's Scope, Foundations and Purposes: Joining the Dots' (2012) 75 NZLR University of Cambridge Faculty of Law Research Paper No. 3/2012.
[42] Binns, Edwards and Williams (n 2).
[43] Per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[44] Galligan (n 1).
[45] Matt Hutchings, 'Delegation of Functions: Principles and Recent Perspectives' (2016) 21 JR 93–98; Galligan (n 1).
[46] *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] UKHL 3.
[47] *Lavender Son ltd v Minister of Housing and local Government* [1970] 3 All ER 871.
[48] *R v London Borough of Tower Hamlets ex parte Khalique* [1994] 26 HLR 517; *Noon v Matthews* [2014] EWHC 4330 (Admin).
[49] *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] UKHL 3.
[50] Cobbe (n 39).

The use of ADMS in policing poses a risk for decision-makers trying to exercise their discretion: as the decision-maker's independent, objective judgment is at risk of being swayed, or even superseded, by an algorithmic prediction.

3.1.2 Delegation of discretion

Delegatus non potest delegare (the delegate cannot delegate) refers to the well-established principle of statutory interpretation whereby a public body cannot delegate its responsibilities, including the decisions it makes.[51] The applicability of this principle is contingent upon the interpretation of the relevant statute, and whether the public body, in delegating their power, have conflicted the wording, purpose, and context of the statute.[52] Unless explicitly or implicitly allowed in statute,[53] the delegation of the authority of a decision-maker is considered unlawful.[54] While this principle is concerned with human delegation, it certainly has implications for ADMS. The police decision-maker who decisively acts upon the dictation of an ADMS, without putting their own mind to the matter at hand, is still delegating their discretion, albeit to a machine rather than a human.

3.2 ADM: Amenability to Judicial Review

To be granted permission to bring forth a claim, claimants must meet the preliminary requirements.[55] Approval to proceed is then granted at the court's discretion.[56]

[51] Hutchings (n 45).
[52] LexisNexis, 'Grounds of Judicial Review—Illegality' (*LexisNexis*, 2024) <www.lexisnexis.co.uk/legal/guidance/grounds-of-judicial-review-illegality?utm_source=google&utm_medium=cpc&utm_campaign=BL_LN_retargeting_Search_RDSA|Legal_DSA&utm_content=103437&utm_term=&gad_source=1&gclid=Cj0KCQjwpNuyBhCuARIsANJqL9PaMfK0Q-0iqQL8oSmJTRPTJjX9aAkN6sRMzEwwA23AUapLHuLC7b8aAn2qEALw_wcB> accessed 13 November 2022.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.

Table 1 Summary of how the use of ADMS by a descretionary police decision-maker might be amenable to JR

Amenability requirement	Test	Application
The claim must concern a public law matter involving the act or omission of a public body.[57]	Whether the body exercises a public function, and the actor was exercising a public function at the time in question.[58]	Police bodies are public bodies, tasked with protecting and serving the public.[59] Where an on-duty officer uses an ADMS in the exercise of their discretionary decision-making power, they are exercising a public function on behalf of the public body.[60]
The claim must be justiciable.[61]	Whether the matter may be resolved through the application of legal standards.[62]	The principles of just decision-making are largely established by the courts. Thus, it is well within their remit to review how police decision-makers have used ADMS.[63]
The claimant must have standing (*locus standi*).[64]	The applicant must have 'a sufficient interest' in their claim.[65]	Individuals, *directly affected* by an ADM-informed decision, will possess a sufficient interest. Note: police use of ADMS has already been successfully reviewed.[66]

[57] LexisNexis, 'Judicial Review—What It Is and When It Can Be Used' (*LexisNexis*, 2024) <www.lexisnexis.co.uk/legal/guidance/judicial-review-what-it-is-when-it-can-be-used?utm_source=google&utm_medium=cpc&utm_campaign=BL_LN_retargeting_Search_RDSA|Legal_DSA&utm_content=103437&utm_term=&gad_source=1&gclid=EAIaIQobChMIu7-K0u-yhgMViY9QBh0SJgh-EAAYASAAEgJvJPD_BwE> accessed 20 November 2022.

[58] *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815.

[59] Police Foundation and the Policy Studies Institute, 'The Role and Responsibilities of the Police' (1996) <www.police-foundation.org.uk/publication/inquiry-into-the-roles-and-responsibilities-of-the-police/> accessed 26 February 2023.

[60] Brown (n 40).

[61] Anne Dennett, *Public Law Directions* (2nd edn, OUP 2021).

[62] Ibid.

[63] Binns, Edwards and Williams (n 2).

[64] Dennett (n 61).

[65] Senior Courts Act 1981 s 31(3); Civil Procedure Rules Part 54; *R v IRC* [1982] AC 617; *R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1997] UKHL 25; *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386.

[66] Hannah Couchman, 'Report: Policing by Machine' (*Liberty*, 1 February 2019) <www.libertyhumanrights.org.uk/issue/policing-by-machine/> accessed 21 February 2023.

3.3 Limitations to Judicial Review

Claimants must bring claims as soon as possible and within three months[67] and exhaust all alternative remedies, or the permission for a JR action will not be granted.[68] These rules have implications for cases relating to ADMS use.

Many individuals subject to ADM processes do not know that they are being subjected to them,[69] and may not know until the time limit has passed. Even where an individual does know, three months is very little time for individuals or pressure groups to gather evidence, hear back from Freedom of Information requests,[70] and build a case. In the context of challenging the decision-making processes of police, one alternative remedy would be to issue a formal complaint,[71] but one's ability to do so still depends on knowing one is subject to ADM processes.

Other significant barriers include high costs, heavily restricted Legal Aid, the need to exhaust alternative remedies,[72] and uneven access to the justice system.[73]

Judicial Review has the potential to establish new common law norms in relation to ADM and hence it is worth examining how JR principles might be applied in real-life examples. Nonetheless these limitations are a reminder that JR cannot be viewed as the *sole* redress to the gap in the regulatory framework concerning the lawful use of ADMS.

4 ADMS in Practice: The Harm Assessment Risk Tool (HART) and the Gangs Violence Matrix (GVM)

[67] Civil Procedure Rules Part 54.5(1)(b).
[68] *O'Reilly v Mackman* [1983] UKHL 1.
[69] Couchman (n 66); *O'Reilly v Mackman* [1983] UKHL 1.
[70] Ibid.
[71] Elliott and Thomas (n 25).
[72] *O'Reilly v Mackman* [1983] UKHL 1.
[73] Ibid.

This section will critically examine how the courts could apply the non-fettering and non-delegation principles to HART and GVM, ADMS that were used in separate police discretionary decision-making contexts, to guide the lawful use of ADMS.

4.1 What were the HART and GVM Systems?

HART was an ADMS used by the Durham Constabulary (DC)[74] to assist custody officers making decisions on whether to keep an individual in their custody, release them, or refer them to their out-of-court disposal program (Checkpoint).[75] Drawing from a dataset comprising 104,000 arrest and custody records spanning from 2008 to 2012,[76] HART predicted the likelihood of an individual reoffending within the next two years by cross-comparing the individual's data with its database.[77] HART would generate one of three possible outcomes: high-risk (the individual was highly likely to commit a new serious offence), moderate-risk (the individual was likely to commit a non-serious offence), and low-risk (the individual was unlikely to commit another offence).[78] These outcomes were then utilised by the custody officer responsible for making the decision.[79]

The DC have disclosed that HART used the Random Forest (RF) algorithm,[80] a forecasting algorithm that creates and combines numerous decision trees to make probability predictions.[81]

[74] Centre for Public Impact, 'Durham Constabulary's AI Decision Aid for Custody Officers: A Case Study on the Use of AI in Government' (*Centre for Public Impact*, 2018) <www.centreforpublicimpact.org/assets/documents/ai-case-study-criminal-justice.pdf> accessed 19 December 2022.
[75] Ibid.
[76] Ibid.
[77] Cambridge University, 'Helping Police Make Custody Decisions Using Artificial Intelligence' (*Cambridge University*, 26 February 2018) <www.cam.ac.uk/research/features/helping-police-make-custody-decisions-using-artificial-intelligence> accessed 19 December 2022.
[78] Ibid.
[79] Ibid.
[80] Best Practice AI, 'Durham Police Constabulary improves custody decisions by predicting whether offenders will re-offend using machine learning that results in 98% avoidance of false negatives' (*Best Practice AI*, 2022) <https://www.bestpractice.ai/ai-case-study-best practice/durham_police_constabulary_improves_custody_decisions_by_predicting_whether_offenders_will_re-offend_using_machine_learning_that_results_in_98%25_avoidance_of_false_negatives> accessed 12 June 2024.
[81] Adele Cutler, David Cutler and John Stevens, 'Random Forests' (2011) ML 45.

Crucially, RFs are black box models,[82] meaning that the mechanisms through which RF algorithms arrive at their outcomes are uninterpretable by humans.[83]

Due to the extensive resources necessary for consistently refining and updating the model, HART was discontinued in 2020.[84] However, analysing how ADM models are implemented and the impact they have upon human dictionary decision-makers is a useful exercise in identifying potential legal issues and shaping higher-standards for future use of ADM tools in policing.

Similarly, the GVM was a database and predictive tool developed by the Metropolitan Police (Met) for forecasting gang-related violence in London.[85] The GVM contained information on suspected gang members and associates, including name, date of birth, address, ethnicity, history of firearms or knife crime, carrier of weapons, presumed associates, and any other relevant police intelligence.[86] An officer would input data on an individual being added to the GVM, for the GVM to cross-reference with its database and generate a harm score denoting the predicted risk of said individual engaging in gang violence.[87] The harm score was color-coded: red signified high-risk, yellow medium-risk, and green low-risk. This score largely informed authorising officers' decisions to issue a section 60 stop and search,[88] as part of the Met's 'intelligence-led stop and search'[89] approach in choosing which individuals to target.[90]

In 2022, the Met faced legal action over the use of the GVM. The claimants successfully argued that the use of the tool was unlawful,[91] on the grounds that the GVM was racially discriminatory and had contravened individuals' Article 8[92] rights.[93] In response, the Met agreed to overhaul

[82] Ujwal Pawar, 'Let's Open the Black Box of Random Forests' (*Analytics Vidhya*, 4 December 2020) <www.analyticsvidhya.com/blog/2020/12/lets-open-the-black-box-of-random-forests/> accessed 20 February 2023.
[83] Ibid.
[84] Durham Constabulary (n 80).
[85] Amnesty International (n 21).
[86] StopWatch, 'The Gangs Matrix' (*StopWatch*, 2024) <https://www.stop-watch.org/what-we-do/projects/the-gangs-matrix/> accessed 18 January 2023.
[87] Amnesty International (n 21).
[88] Rachel Pain, 'Escaping the Matrix: Met Admits Gangs Matrix Unlawful' (*Mountford Chambers*, 18 November 2022) <www.mountfordchambers.com/escaping-the-matrix-met-admits-gangs-matrix-unlawful/> accessed 23 March 2023.
[89] Amnesty International (n 21).
[90] Ibid.
[91] Pain (n 88).
[92] Human Rights Act 1998 art 8.
[93] Pain (n 88).

the GVM. While the claim did not revolve around fettered or delegated discretion, it underscores the court's authority to intervene and set guidelines for the lawful implementation of ADMS within police discretionary decision-making frameworks.

The specific algorithm used by the GVM is undisclosed.[94] As such, the analysis of GVM cannot critique the specific algorithm used and, instead, focuses upon predictive algorithms and generative intelligence (GI) more broadly.

4.2 Detention, Release and the Role of ADM

After an adult individual has been arrested and charged with an offence, it is at the custody officer's discretion to order said individual's release from police detention,[95] refer them to out-of-court disposal, or keep the individual in detention.[96] To detain an individual, the custody officer must have reasonable grounds for doing so, such as: belief that detention is necessary for the safety of others[97] or for the individual's own protection.[98] When making such decisions, custody officers are legally obliged to consider *all* the relevant factors and *only* these factors, such as the condition, behaviours, and risk factors relating to the detainee, in accordance with the Policing and Crime Act 2017[99] and the Bail Act 1976.[100]

4.3 Stop and Search and the Role of ADM

The stop and searches of gang suspects predominantly take place under section 60 of the Criminal Justice and Public Order Act 1994.[101] A senior officer, of Inspector level and above, may authorise any uniformed police officer to conduct a stop and search.[102] The authorised

[94] Ibid.
[95] Police and Criminal Evidence Act 1984 s 38(1).
[96] Ibid s 38(2).
[97] Ibid s 38(1)(a)(iv).
[98] Ibid s 38(1)(a)(vi).
[99] Policing and Crime Act 2017.
[100] Bail Act 1976.
[101] Criminal Justice and Public Order Act 1994 s 60; The Metropolitan Police, 'Section 60 Criminal Justice and Public Order Act 1994 Standard Operating Procedures' (*The Metropolitan Police*, January 2012) <www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/policies/search-powers-under-section-60-criminal-justice--public-order-act-1994-standard-operating-procedures-sop> accessed 26 February 2023.
[102] Lauren Nickolls and Grahame Allen, 'Police Powers: Stop and Search' (*House of Commons Library*, 20 July 2022) <https://researchbriefings.files.parliament.uk/documents/SN03878/SN03878.pdf> accessed 18 January 2023.

police officer(s) conducting the stop and search do not need to have suspicion nor reasonable grounds *themselves* regarding the individual they are targeting.[103] However, the authorising officer must 'reasonably believe'[104] that the stop and search is necessary to prevent 'serious violence',[105] to retrieve a 'dangerous instrument or offensive weapon',[106] or to stop an individual who is carrying a 'dangerous instrument or offensive weapon' without 'good reason'.[107]

Authorising officers must base their decision on 'objective factors', namely intelligence.[108] Here is where GVM is significant. As the GVM is designed to predict which individuals are at risk of engaging in gang violence, and is also a database of intelligence, it has played an essential role in informing gang-related stop and search targets.[109] Therefore, it is necessary to analyse *how* authorising officers may have used the GVM to inform their decisions and whether such use was lawful.

4.4 Fettering of Discretion

When ADMS are integrated into discretionary decision-making, there is a risk that decision-makers may be unlawfully influenced by the system's outcomes. This influence may lead to decision-makers fettering their discretion by failing to consider individual circumstances, failing to keep an open mind and/or by utilising the ADMS' outcomes rigidly.

4.4.1 Consider the relevant individual circumstances

First, in order to retain their discretion,[110] a decision-maker must consider the relevant individual circumstances of the matter.[111] A *consideration* is the action of taking the factors that

[103] The Metropolitan Police (n 101).
[104] Criminal Justice and Public Order Act 1994 s 60(1).
[105] Ibid s 60(1)(a).
[106] Ibid s 60(1)(aa).
[107] Ibid s 60(1)(b).
[108] Nickolls and Allen (n 102).
[109] Amnesty International (n 21).
[110] Mark Elliott and Jason NE Varuhas, *Administrative Law* (5th edn, OUP 2016).
[111] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694.

affect the decision into account.[112] A *relevant* consideration includes the general principles behind a decision and the specific facts that inform the context.[113]

HART compared information about a new detainee against a vast pool of data, that was not specific to the individual detainee.[114] The practice of custody officers primarily relying on predictive outcomes derived from the historical data of *other* individuals, rather than solely on the unique circumstances of the individual detainee, appears to be at odds with the fundamental obligation to consider the relevant individual circumstances of each detainee.

However, the tool was integrated for use in this specific context.[115] Therefore, in the view of DC, the predictive outcome of HART was itself a 'consideration' that custody officers were expected to consider.[116] Notably, this view has not been formalised in law.[117] Thus, the courts will need to address the extent to which decision-makers can lawfully consider the outcomes generated by ADMS into their decision-making.[118]

Nevertheless, it remains difficult to see how decision-makers using the outcomes of ADMS in their decision-making are able to consider *only* the relevant individual circumstances. For example, DC, attracted criticism after it was revealed that HART used postcode data, often denounced as a proxy for race.[119] Critics claimed such historic data has no place in determining today's policing practices.[120]

These criticisms underscore several factors that complicate the lawfulness of decision-makers considering the outcomes of ADMS. First, overreliance on historical data may be contrary to considering present circumstances. Second, biased data is inherently incompatible with considering individual circumstances. The overrepresentation of minority groups in police intelligence is the consequence of harmful police practices involving the disproportionate

[112] Ibid.
[113] Timothy Endicott, *Administrative Law* (5th edn, OUP 2021).
[114] Centre for Public Impact (n 74).
[115] Ibid.
[116] Ibid.
[117] Williams (n 4) 2.
[118] Ibid.
[119] Couchman (n 66).
[120] Ibid.

targeting of said minority groups.[121] Thus, biased data cannot capture individuals on a case-by-case basis. Last, and more broadly, data that pertains to the actions of others can only provide custody officers with limited insight on the individual before them.

Presumably the accuracy of an algorithmic tool will be a key metric[122] regarded by the courts in their assessment of how ADMS can be used in a discretionary decision-making context. When surveyed, Durham police officers, including custody officers, cited accuracy as the central consideration when choosing to deploy an algorithmic tool.[123] HART was found to have a higher accuracy rate than custody officers in predicting the risk of reoffending by 1.6%.[124] Thus, if accuracy were the chosen metric, custody officers utilising HART may be expected to consider the outcomes of HART as very significant.[125] However, the accuracy of HART was only 53.8%, arguably more akin to the flip of a coin than something that could be consistently relied upon to provide accurate results. This demonstrates how using accuracy as the *sole* metric for determining the lawfulness of using ADMS in discretionary decision-making contexts will be insufficient, as the perceived accuracy of an ADMS is not necessarily reflected in reality. Surely then, it will be necessary to have multiple metrics to measure lawfulness.[126] To avoid decision-makers inadvertently relying on irrelevant and harmful considerations from an ADMS, as discussed above, one metric needs to be sensitive to biases.

The consequences of failing to address bias in data, which enable ADM**S** to perpetuate bias, are further highlighted by the Mets' use of the GVM tool. The Met claim that the GVM is an intelligence tool, designed to prevent gang violence by monitoring gang suspects.[127] However, not every individual on the GVM is there because they are a gang suspect. The Met has faced

[121] Michael Shiner and others, 'The Colour of Injustice: "Race", Drugs and Law Enforcement in England and Wales' (2019) LSE Press <https://www.lse.ac.uk/united-states/Assets/Documents/The-Colour-of-Injustice.pdf> accessed 6 June 2024.
[122] Williams (n 4) 2.
[123] Marion Oswald and others, 'The UK Algorithmic Transparency Standard: A Qualitative Analysis of Police Perspectives' (2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155549> accessed 6 June 2024.
[124] Durham Constabulary (n 80).
[125] Williams (n 4) 2.
[126] Ibid.
[127] The Metropolitan Police, 'Gangs Violence Matrix' (*The Metropolitan Police*, 2024) <https://www.met.police.uk/police-forces/metropolitan-police/areas/about-us/about-the-met/gangs-violence-matrix/#:~:text=How%20does%20the%20matrix%20work,at%20risk%20from%2C%20gang%20violence> accessed 18 January 2023.

harsh criticism after revelations that the GVM generated its predictive harm scores in a guilt-by-association manner,[128] which is contrary to considering relevant *individual* circumstances.

Forty per cent of individuals on the GVM have been assigned a harm score of 0, meaning there are no charges, nor police intelligence, linking them to gang violence in the past two years.[129] Nevertheless, these individuals have remained on the GVM because of their *presumed* association with a gang suspect on the GVM.[130] Guilt-by-association is a logical fallacy:[131] just because an individual knows or is associated with a gang suspect does not mean they are a gang member *themselves*. However, many individuals were subjected to frequent stop and searches, were monitored, followed, and even harassed because they were kept on the GVM.[132] As the GVM was factoring in guilt-by-association as a decision-point, authorising officers utilising this system were fundamentally at risk of failing to consider the individual circumstances.

Furthermore, as the gang associations were *presumed*, they may have been incorrect and therefore irrelevant. Thus, discretionary decision-makers using ADMS that incorporate speculative data are at risk of fettering their discretion by (accidentally) taking irrelevant considerations into account.

The Met, however, has argued that creating a web of associations is useful in understanding the scale of gang influence in an area.[133] The associative decision-points were embedded into the GVM specifically for monitoring potential suspects.[134] As such, the Met views the predictive harm scores generated by the GVM as 'considerations' that must be taken into account during a human officer's decision-making process.[135] Again, the view that ADM predictive outcomes are 'considerations' has not yet been recognised by law.[136]

It might be argued that predictive ADMS fundamentally fail to capture the individual as they conduct comparative analysis.[137] Both HART and the GVM captured the individual strictly

[128] Amnesty International (n 21).
[129] Ibid.
[130] Ibid.
[131] Gerald Lebovits, 'Say It Ain't So: Leading Logical Fallacies in Legal Argument, Part II' (2016) 88 NYSBA 64.
[132] Amnesty International (n 21).
[133] The Metropolitan Police (n 127).
[134] Ibid.
[135] Amnesty International (n 21).
[136] Williams (n 4) 2.
[137] Binns, Edwards and Williams (n 2).

within the context of others, as predictive models are designed to identify correlation in datasets to forecast the likelihood of a particular outcome.[138] However, the 'mathematical process of statistical optimisation'[139] does not necessarily have to be at the cost of a decision-makers' ability to produce relevant and individualised considerations. If, in a policing context, the outcome of a predictive ADM tool can be viewed as a piece of intelligence, arguably it ought to be a consideration. Thus, the courts will need to determine how predictive outcomes fit within the broader puzzle of intelligence-gathering.

Using ADMS that produce predictive outcomes based on correlating data sets, evidently risks undermining a decision-maker's ability to consider nuanced individualised circumstances and only factor in relevant considerations. Consequently, this raises several important points where the courts could offer clarity: what, if any, ADM outputs may count as intelligence for use in a discretionary decision-making context, the weight that ADM generated intelligence should hold in this context, and how, if at all, discretionary decision-makers might lawfully 'consider' generative intelligence.[140]

4.4.2 Open mind

Decision-makers must also keep an open mind[141] during the process. Keeping an open mind has been defined as a decision-maker having a preparedness 'to change their views if persuaded that they should',[142] relinquishing any absolutism in reasoning,[143] and appreciating the nuances of the matter at hand.[144]

Importantly, the use of an algorithmic support tool does not *necessarily* hinder a custody officer's ability to be open-minded. With regards to detention and arrest, custody officers must still consider the judgement of the arresting officer, who may attempt to persuade them, for

[138] Ibid.
[139] Jenna Burrell 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) 3 Big Data & Society 1–12, 10.
[140] Binns, Edwards and Williams (n 2).
[141] *R v Environment Secretary, ex parte Brent LBC* [1982] QB 593.
[142] *Island Farm Development Ltd v Bridgend County Borough Council* [2006] EWHC 2189.
[143] Keith E Stanovich and Richard F West, 'Reasoning Independently of Prior Belief and Individual Differences in Actively Open-Minded Thinking' (1997) 89 Journal of Educational Psychology 342–357.
[144] Ibid.

example, from detaining the individual against the outcome of HART or such similar tools.[145] Arguably, an ADMS simply operates as another source of information. Therefore, whether an ADMS can be lawfully utilised as an additional resource appears to hinge upon how it impacts the discretion of the decision-maker. If the predictive outcome of the ADMS is used as a 'final say' that supersedes the custody officer's own judgement, then the custody officer narrows their judgement,[146] closes their mind, and is therefore fettering the exercise of their discretion.

The officers from DC using HART described accuracy as the central way of determining algorithmic legitimacy,[147] and accuracy was a key justification for officers' extensive use of HART.[148] This demonstrates how the perceived accuracy of ADMS, even where the tool is only marginally more accurate than the human decision-makers, can have a significant, and potentially undue, influence upon decision-makers.[149]

Alternatively, the open-mind requirement only asserts that a decision-maker is *prepared* to change their view if persuaded.[150] It may be that the custody officer simply happened to agree with the outcome generated by HART.

Similarly, the GI element of the GVM was largely regarded by the Met as an added factor in their intelligence-gathering process, making it a beneficial tool for decision-makers. However, if the content of the GI is symptomatic of bias in policing, it reinforces stereotyping (a form of absolutist categorisation)[151] and is therefore a constraint upon a decision-maker's ability to remain open-minded while making their decisions.[152] Here, it would clearly be unlawful for a police officer using the GVM to simply agree with a discriminatory outcome.

As mentioned, the Met faced legal scrutiny after the GVM was found to be racially biased.[153] The 72% of individuals flagged as responsible for gang violence on the GVM were black men,

[145] College of Policing, 'Identifying, Assessing and Managing Risk' (*College of Policing*, 31 December 2020) <www.college.police.uk/app/major-investigation-and-public-protection/managing-sexual-offenders-and-violent-offenders/identifying-assessing-and-managing-risk> accessed 25 February 2023.
[146] Williams (n 4) 2.
[147] Oswald and others (n 123).
[148] Centre for Public Impact (n 74).
[149] Oswald and others (n 123).
[150] *Island Farm Development Ltd v Bridgend County Borough Council* [2006] EWHC 2189.
[151] Ibid.
[152] Williams (n 4) 2.
[153] Pain (n 88).

while only 27% of those actually responsible for serious violence in London are black.[154] This reveals a twofold problem, racial bias in the collection of gang-related intelligence as well as the transformative power that ADMS can have upon human discernment.[155]

The concept of what constitutes a gang is very broad.[156] The Trident Gang Command define gangs as: discernible groups of predominantly young people, engaging in criminal activity, who claim a territory, bear some identifying feature, and are in conflict with other similar groups.[157] Such broad criteria leaves the process of labelling an individual as a gang suspect vulnerable to subjectivity.[158] While individuals may only be added to the GVM if two corroborated pieces of intelligence suggest they are a gang member, officials within Gangs Unit have reported a 'lack of clear process, governance and criteria' for how officers should determine suspected gang membership.[159] The Met has refused to provide information regarding the standards and processes for adding individuals to the GVM public.[160] Nonetheless, the disproportionate representation of young black men on the GVM indicate that this selection process is riddled with bias and stereotypic policing practices.[161]

It is no surprise that an intelligence database on which young black men are overrepresented, like the GVM, would result in a disproportionate number of predictive outcomes recommending young black men for 'intelligence-led' section 60 stop and searches.[162] Rather, the question is whether authorising officers were able to identify instances of bias and disregard the GVM's outcome if any alternative information was available, or there were nuanced factors to consider. Arguably, if one database holds a significant amount of police intelligence on gang violence, there is less opportunity to access alternative information. Nonetheless, authorising officers are entrusted, by statute, to be competent decision-makers, who know how to exercise their own

[154] Centre for Crime and Justice Studies, 'Dangerous Associations: Joint Enterprise, Gangs and Racism' (*Centre for Crime and Justice Studies*, 25 January 2016) <www.crimeandjustice.org.uk/publications/dangerous-associations-joint-enterprise-gangs-and-racism> accessed 19 January 2023.
[155] Mireille Hildebrandt, 'Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics' (2017) 68 UTLJ 12–35 <https://www.utpjournals.press/doi/abs/10.3138/utlj.2017-0044> accessed 6 June 2024.
[156] Amnesty International (n 21).
[157] Centre for Social Justice, 'Dying to Belong: An In-depth Review of Street Gangs in Britain' (*Centre for Social Justice*, 13 February 2009) <www.centreforsocialjustice.org.uk/library/dying-to-belong-an-in-depth-review-of-street-gangs-in-britain> accessed 30 January 2023.
[158] Amnesty International (n 21).
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Criminal Justice and Public Order Act 1994 s 60.

discretion, despite challenges.[163] It is a legal requirement for public sector bodies handling the data of individuals to implement processes for handling this data fairly, lawfully and with regard to the rights of these individuals.[164] Thus, we may presume that an authorising officer would have means of vetting intelligence other than the GVM'S ADM outcomes. Yet, this did not appear to change the disproportionate targeting of a community.[165]

The impact of ADMS on human discernment arises as an additional problem. The term 'judgmental atrophy'[166] describes how data-driven decision-making can 'transform the environment we depend upon, while also transforming ourselves in the process'.[167] This term might be applied to the authorising officer who fails to recognise or mitigate, bias when using ADM tools in their decision-making processes. If the authorising officer over-relies upon an ADM tool, they close their own mind. This is because the environment for authorising section 60 stop and searches[168] has been transformed (becoming a largely automated process) by ADM tools, and the discretionary capabilities of the decision-maker are transformed (narrowed) by the ADM tool.

The impact of ADMS on the decision-maker can also been described as a 'hypernudge'[169] towards a particular course of action.[170] Predictive algorithmic outcomes are expressed in simplistic, often categoric, terms which immediately limit the extent to which ADMS can facilitate nuanced and complex human decision-making.[171] For example, individuals on the GVM are ranked 'low-risk', 'medium-risk', and 'high-risk' in terms of how likely they are to engage in gang violence.[172] Where an individual (D) is ranked 'medium-risk', an authorising officer, prima facie, may decide that permitting a section 60 stop and search[173] of D is a reasonable, intelligence-led preventative measure. However, the GVM does not convey in its simplistic expression, for example, that D knows some members of their community who are involved in a gang but is not a gang member nor involved in criminal activity themselves, and

[163] *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] UKHL 3.
[164] Data Protection Act 2018 art 5(1).
[165] Amnesty International (n 21).
[166] Hildebrandt (n 155).
[167] Ibid.
[168] Criminal Justice and Public Order Act 1994 s 60.
[169] Karen Yeung, "'Hypernudge": Big Data as a Mode of Regulation by Design' (2017) 20 Information, Communication & Society 118–136.
[170] Ibid.
[171] Ibid.
[172] Amnesty International (n 21).
[173] Criminal Justice and Public Order Act 1994 s 60.

that D is only likely to engage in violence if at risk of becoming a victim of gang violence. Notably, this scenario is of frequent occurrence as 75% of individuals listed on the GVM are victims of serious violence.[174] An open-minded approach toward interpreting the intelligence relating to D might recognise that D has been identified as a potential victim, rather than a potential perpetrator. A close-minded or hypernudged[175] approach might cause an authorising officer to allow the stop and search of D, simply because D has been flagged by the GVM.

Thus, the courts will need to address how ADMS can (if at all) be used to supply intelligence that informs discretionary decision-making processes. Seemingly, despite their perceived accuracy and decision-making streamlining, ADMS risk perpetuating bias and discrimination in policing. Accordingly, the courts will need to investigate how discretionary decision-makers can be mindful of bias, particularly in relation to interpreting the simplistic expressions of these systems, and demonstrate independence in their decision-making processes.

4.4.3 Exercising discretion without rigidity

Decision-makers must be willing to deviate from established policies or guidelines where necessary to ensure they do not fetter their discretion by being too rigid.[176]

This is particularly relevant in the case of HART where, for example, custody officers must make discretionary decisions[177] to assess the static and dynamic risks associated with detainees. Over-application of HART's predictions, and other ADMS more broadly, could constitute rigidity as discretionary decision-makers are supposed to make their decisions on a case-by-case basis.[178]

Static risk factors comprise the collection of historical data on an individual's criminal record and previous offences.[179] As this data is static, it falls short in capturing the complexity of dynamic and fluid risks that are prone to change over time[180] and is therefore insufficient as the

[174] Amnesty International (n 21).
[175] Yeung (n 169).
[176] Cobbe (n 39).
[177] Police and Criminal Evidence Act 1984 s 38(1)(a)(iii).
[178] *British Oxygen Co Ltd v Minister for Technology* [1971] AC 610; *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] UKHL 3.
[179] College of Policing (n 145).
[180] Ibid.

sole basis for individual risk assessments. Dynamic risk factors relate to the changeable factors in an offender's personal circumstances, attitudes, and behaviour. Hence, dynamic factors are essential considerations in individual risk assessments and predicting reoffending.[181]

For example, a detainee (A) has previously been convicted for violent physical assault. A has since secured stable employment at a grocery store for the last three years. A still lives in an area where crime rates are relatively high, but A has distanced themself from prior associates. However, A recently stole from the grocery store while at work and has been taken into custody on suspicion of theft. A is presently detained and awaiting a decision on whether they should be processed through the criminal justice system or referred to Checkpoint.

In the case of A, the static risk factors alone depict an individual with a history of violent criminal activity, from a high-risk area, who has recently committed another offence. Based on these factors, HART is likely to categorise A as a 'high-risk' individual,[182] which would deny A entry into the Checkpoint program.

However, it is also essential to consider the dynamic factors. A has made considerable efforts to rehabilitate their life in the past three years. This includes finding stable employment and refraining from criminal activity, which are significant indicators of positive change. Moreover, A has expressed remorse and regret for their recent minor offence, which demonstrates cooperativeness and a willingness to take responsibility for their actions. Given these dynamic factors, it seems reasonable to conclude that A's risk level is better characterised as 'medium-risk', and that A would benefit from the Checkpoint program.

As dynamic risk factors are changing and under ongoing assessment by the custody officer, they cannot be input into HART.[183] Thus, without HART having access to the dynamic risk factors associated with a detainee, it cannot make nuanced case-by-case decisions like a custody officer. Instead, there is a risk that a detainee is reduced to the information that a custody officer can input, such as criminal history, age, gender, and residential postcode,[184] and the rest is down

[181] Ibid.
[182] Ibid.
[183] Fair Trials 'FOI Reveals over 12,000 People Profiled by Flawed Durham Police Predictive AI Tool' (*Fair Trials*, 15 August 2022) <www.fairtrials.org/articles/news/foi-reveals-over-12000-people-profiled-by-flawed-durham-police-predictive-ai-tool/> accessed 1 March 2023.
[184] Cambridge University (n 77).

to the uninterpretable calculations of HART, drawing from historic data that is non-specific to the detainee in question. Thus, if officers rely too heavily on a system that cannot account for evolving risk factors like a human custody officer, their decision-making process is at risk of being overly rigid, failing to account for individuals on a case-by-case basis.

Perhaps here the perceived accuracy[185] of HART poses a problem: it seems only *fair* to apply a system that has greater accuracy than custody officers in the decision-making processes for each detainee. Indeed, the courts are increasingly accepting of strictly applied policies, so long as these polices demonstrably ensure 'consistency and efficiency'[186] while also considering the unique facts of a case. Arguably, ADMS promote such consistency and efficiency,[187] whereas human custody officers draw from their years of experience to create differing rules and perspectives that shape their decisions.[188] However, the courts have also held that consistency and efficiency may not be pursued 'at the expense of the merits of individual cases'.[189] Current ADMS, such as HART, are not equipped to discern and assess individual dynamic risks in the same way that a human custody officer can as they lack empathy, sufficient socio-legal context, and sensitivity.[190] In the case of HART, this is demonstrated in the consistent over-estimations made by the tool when predicting an individual's risk level.[191]

The over-estimation demonstrated by HART reveals that a certain rigidity in applying correlative data exists within ADMS processes. However, looking beyond the inner-workings of the tool itself, this rigidity also seems present in the human decision-maker's application of ADMS generated outcomes as evidenced by the Met's use of the GVM.[192]

If GI is a product of the database that a predictive ADM tool draws and learns from,[193] then the predictive outcomes of the ADM tools are only as good as the data they have access to.[194]

[185] Durham Constabulary (n 80).
[186] Government Legal Department, 'The Judge Over Your Shoulder — A Guide To Good Decision Making' (*GOV UK*, September 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf> accessed 1 March 2023.
[187] Cobbe (n 39).
[188] Durham Constabulary (n 80).
[189] *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173.
[190] Centre for Data Ethics and Innovation (n 23).
[191] Fair Trials (n 183).
[192] Ibid.
[193] Mireille Hildebrandt, 'New Animism in Policing: Re-Animating the Rule of Law?' in Ben Bradford and others (eds), *The Sage Handbook of Global Policing* (Sage 2016).
[194] Amnesty International (n 21).

However, because these predictive outcomes are presented simplistically ('high-risk', 'low-risk', 'yes', 'no'), they are often interpreted by humans as factual conclusions rather than probabilities based upon a specific dataset.[195] It is this appearance that may lead discretionary decision-makers to rigidly applying the outcomes of predictive ADMS when making decisions.[196] This phenomenon is demonstrated in how the Met's 'intelligence-led' section 60 stop and searches[197] consistently targeted black men and black neighbourhoods.[198]

The nature of intelligence-led operations is cyclical:[199] intelligence is recorded, which leads to targeted policing activity, which uncovers further intelligence, and the cycle repeats. Thus, it is important for discretionary decision-makers to bear this factor in mind. There is a risk that, without a level of flexibility in how intelligence is interpreted or acted upon, certain individuals or neighbourhoods could become overrepresented during the course of intelligence-led operations. This is precisely what happened in the case of the GVM.[200] Black men and black neighbourhoods were the primary targets for intelligence-led (GVM-led)[201] section 60 stop and searches, before the GVM was overhauled.[202] Accordingly, 'black' and 'black' postcodes became learned decision-points that were utilised by the GVM.[203]

It is the duty of an authorising officer, and discretionary decision-makers generally, to ensure they are not exercising their discretion rigidly. The GVM's continual, disproportionate flagging of black men for section 60 stop and searches[204] was perpetuated by authorising officers allowing these stop and searches. It ought to have occurred to authorising officers that, aside from issues of major algorithmic bias within the GVM, they were responsible for perpetuating the cyclical, chronic policing of certain people and postcodes. The rigidity of the authorising officers in approving the GVM's outcomes demonstrates a failure to lawfully exercise their discretion.

[195] Hildebrandt (n 193).
[196] Ibid.
[197] Criminal Justice and Public Order Act 1994 s 60.
[198] Amnesty International (n 21).
[199] Shiner and others (n 121).
[200] Amnesty International (n 21).
[201] Ibid.
[202] Criminal Justice and Public Order Act 1994 s 60.
[203] Amnesty International (n 21).
[204] Criminal Justice and Public Order Act 1994 s 60.

The court will therefore need to clarify how decision-makers may demonstrate critical, nuanced, decision-making when utilising ADMS that operate in a 'blanket policy'[205] manner. For example, considering whether the predictive outcome aligns with alternative intelligence sources, the views of relevant colleagues, as well as the decision-maker's own experience. In the case of the GVM, authorising officers might want to check exactly what data is stored on an individual and whether it is sufficient, or relevant, to generating a harm score.

4.4.4 Delegation of discretion and rubber stamping

Although the non-delegation principle pertains to human delegation, it also has implications for the use of ADMS.[206] If a decision-maker has acted upon the dictates of an ADMS without exercising their own judgement to arrive at a decision, there is concern that they have delegated their discretion.

If statute confers decision-making powers onto a specific individual, such authority cannot be transferred or delegated to another party.[207] A decision-maker who fails to exercise their own discretion, and merely approves of a decision that has been recommended or made for them, has 'rubber stamped'[208] their decision and therefore acted unlawfully.

A nominated decision-maker may seek guidance from others without necessarily relinquishing their decision-making authority,[209] provided that the decision is not entirely dictated to the decision-maker[210] (for example, where the decision-maker takes advice but retains their power to disagree).[211] This is precisely what DC claimed when justifying their use of HART.[212] The DC stated that their custody officers retained their independence through two essential avenues: First, the custody officer possessed the discretion to disregard the predictive results generated by HART.[213] Second, that custody officers have legal obligations to consider all relevant factors

[205] Cobbe (n 39).
[206] Ibid.
[207] *Noon v Matthews* [2014] EWHC 4330 (Admin); *R v London Borough of Tower Hamlets, ex p Khalique* [1994] 26 HLR 517.
[208] *R v Home Secretary ex p. Walsh* [1992] COD 240.
[209] *H Lavender & Son v Minister of Housing and Local Government* [1970] 1 WLR 1231.
[210] *Ellis v Dubowski* [1921] 3 KB 621.
[211] *Mills v London County Council* [1925] 1 KB 213.
[212] Centre for Public Impact (n 74).
[213] Ibid.

in their decision-making process, in accordance with the Policing and Crime Act 2017[214] and the Bail Act 1976.[215]

However, the extent to which custody officers exercised their discretion or *truly* considered relevant factors is difficult to ascertain.

HART was implemented amidst a shrinking police workforce in the DC due to budget cuts, meaning its staff were (and are) tasked to do more with less resources.[216] Under such circumstances, picture a busy night at the police station where a custody officer is managing multiple detainees. Some detainees are exhibiting disruptive and threatening behaviour, and the work environment is highly stressful. The custody officer is required to process two new detainees, both of whom were uncooperative during their arrest. To begin the processing of the first detainee (B), the custody officer inputs B's basic information into HART and attempts to gather more information through questioning B. However, B remains uncooperative. HART identifies B as a high-risk individual and suggests remanding B in custody, denying B access to the Checkpoint program. Although, in the custody officer's experience, detainees will usually become more cooperative once they have settled in, the officer is under pressure to process detainee C and, feeling rushed, the custody officer authorises HART's recommendation to detain B.

In stressful situations, it is plausible to see how custody officers may rely on predictive tools in pursuit of efficiency.[217] Importantly, a decision-maker has only delegated their discretion where they did not possess authority over the final decision and did not exercise their own independent judgement.[218] In the example above, the custody officer has still retained the power to make the final decision, however, the extent to which the officer exercised their own independent judgement is less convincing. Simply signing-off on decisions does not constitute an exercise of judgement.[219] Where the authorised decision-maker merely approves of the advice of others,

[214] Policing and Crime Act 2017.
[215] Bail Act 1976.
[216] Centre for Public Impact (n 74).
[217] Oswald (n 3) 376.
[218] Elliott and Varuhas (n 110).
[219] *Ellis v Dubowski* [1921] 3 KB 621.

HART's predictive outcome in this case, without exercising their own discretion, the decision-maker has 'rubber stamped'[220] a decision, and therefore delegated their discretionary power.

As the DC argue, custody officers could simply be taking the advice of the ADMS and, while retaining their discretion to refute it, happen to agree with the outcome of HART.[221] However, given the perceived accuracy of HART, it has been argued that custody officers may have felt pressured to 'delegate responsibility to the algorithm'[222] to avoid reproach from their superiors.[223] Aside from comparing the written records detailing both HART's outcome and the rationale and ultimate decision made by the custody officer,[224] it is unclear how to make a procedural distinction between the outcomes of HART and the final decision made by the custody officer.[225] Thus, the deciding question[226] is whether, by deploying HART, custody officers acted in a manner that conflicts with the wording, purpose, and context of the statute that confers their decision-making powers.[227]

Custody officers may exercise their discretionary decision-making powers to detain or release individuals, for example, if they possess 'reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence'.[228] The 'reasonable grounds' requirement is predicated on a belief that custody officers possess an 'institutional ability'[229] to make such decisions based on their knowledge and expertise. In contrast, HART produces outcomes based upon grounds that cannot be explained due to the uninterpretable nature of the black box model.[230] Accordingly, if a custody officer cannot decipher the reasoning of the ADMS, but still relies on its prediction to inform their decision, the custody officer has delegated their discretion by failing to exercise their own judgement. Similarly, the

[220] *R v Home Secretary ex p. Walsh* [1992] COD 240.
[221] Centre for Public Impact (n 74).
[222] Marion Oswald and others, 'Algorithmic Risk Assessment Policing Models: Lessons from the Durham HART Model and "Experimental' proportionality"' (2018) 27 Information and Communications Technology Law 223–250.
[223] Mark Bridge and Gabriella Swerling, 'Bail or Jail? App Helps Police Make Decision About Suspect' *The Times* (London, 11 May 2017) <www.thetimes.co.uk/article/bail-or-jail-app-helps-police-make-decision-about-suspect-kv766zjc9> accessed 13 February 2023.
[224] Centre for Public Impact (n 74).
[225] Jennifer Cobbe, 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision- Making' (2019) 37 CUP 1–34.
[226] Hutchings (n 45).
[227] LexisNexis (n 52).
[228] Police and Criminal Evidence Act 1984 s 38(1)(a)(iii).
[229] Elliott and Varuhas (n 110).
[230] Pawar (n 82).

'necessary' requirement underpins how custody officers are expected to act out of necessity.[231] HART, however, is designed to offer a prediction based upon input data, which is not the same as exercising one's expertise to assess whether the action that may *seem* the best approach truly *is* necessary. Thus, if a custody officer failed to exercise their own judgement and simply relied upon HART's suggestion, the custody officer delegated their discretion.

The Met also claimed that the GVM's GI was a guidance tool, rather than instructional. Although, the Met's guidance and instructions for the use and interpretation of the GVM is not publicly available making this claim difficult to critically examine. However, even with access to the Met's procedures for the use of ADMS, it will be challenging for the courts to identify a clear procedural difference between the outcomes of an ADMS and the discretionary decision-maker's ensuing decision.[232] The perceived sophistication of ADMS can lead to humans trusting these systems over their own capabilities.[233] Thus, there is risk of human decision-makers, even unintentionally, giving primacy to the outcomes of ADMS,[234] thereby 'rubber stamping'[235] the ADMS' outcomes.[236]

Furthermore, as discussed in the previous section, the pressure on discretionary decision-makers, such as authorising officers, to make difficult decisions on sensitive issues, such as whether to authorise the section 60 stop and search[237] of a gang suspect, may also push officers towards relying on GI tools to make accurate, swift decisions *for* them.[238]

When addressing this issue, the courts will likely reinforce how discretionary decision-makers bear responsibility for ensuring they act in accordance with their statutory powers.[239] Thus, decision-makers must always ask themselves if their use of an ADMS is aligned with the wording, purpose, and context of the statute that confers their decision-making powers.[240]

[231] College of Policing (n 145).
[232] Cobbe (n 225).
[233] Hildebrandt (n 155).
[234] Ibid.
[235] *R v Home Secretary ex p. Walsh* [1992] COD 240.
[236] Hildebrandt (n 155).
[237] Criminal Justice and Public Order Act 1994 s 60.
[238] Oswald (n 3) 376.
[239] Hutchings (n 45).
[240] LexisNexis (n 52).

As previously mentioned, an authorising officer must 'reasonably believe'[241] that allowing a section 60 stop and search[242] is 'expedient'[243] to prevent: serious violence,[244] to retrieve a dangerous instrument or offensive weapon,[245] or to apprehend an individual carrying said instrument or weapon without good reason.[246] Clearly, the GI produced by the GVM, which is expressed simply as a harm score of 'low-risk', 'medium-risk', or 'high-risk', is insufficient *alone* to provide an authorising officer with sufficient knowledge to 'reasonably believe'[247] much at all. Yet, the 'expedient'[248] requirement considerably broadens what *exactly* it is that the authorising officer must believe.

It certainly appears expedient to utilise the GI of the GVM: the GVM efficiently combines data to produce a probability on the risk an individual poses, and an authorising officer may favour this generative outcome in pursuit of efficacy and convenience. The wording of the statute, after all, does not require an authorising officer to act out of necessity, but out of convenience. The very definition of 'expedient' is taking convenient or practical action.[249] Thus, it appears the priority is whether the stop and search will be of use, and determining what is useful is at the authorising officer's discretion. On this basis, a simple generative probability, such as 'medium-risk', may indicate it is on-balance worth police time and resources to conduct a stop and search, regardless of whether the stop and search itself is *truly* necessary or appropriate.

However, a discretionary decision-maker must still exercise their *own* judgement.[250] Accordingly, the authorising officer cannot, lawfully, arrive at *their* reasonable belief to authorise a section 60 stop and search[251] by solely relying on the outcome of the GVM, regardless of how expedient this may seem.

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[241] Criminal Justice and Public Order Act 1994 s 60(1).
[242] Ibid s 60.
[243] Ibid s 60(1)(a).
[244] Ibid.
[245] Ibid s 60(1)(aa).
[246] Ibid s 60(1)(b).
[247] Ibid s 60(1).
[248] Ibid s 60(1)(a).
[249] *Cambridge Dictionary*, 'Expedient' (*CUP*, 2024) <https://dictionary.cambridge.org/dictionary/english/expedient> accessed 13 February 2023.
[250] *Lavender Son ltd v Minister of Housing and local Government* (1970) 3 All ER 871; *R v Home Secretary ex p. Walsh* [1992] COD 240.
[251] Criminal Justice and Public Order Act 1994 s 60.

Considering the growing judicial acceptance of stricter policies,[252] the courts will need to establish *how* decision-makers can ensure that their decision-making processes contain sufficient variation to cater for individual circumstances. To this end, the courts must delineate how a procedural distinction can be drawn between the recommended outcomes of ADMS and the final decisions made by human decision-makers. The courts will need to examine if, and how, a machine can be positioned in an advisory capacity to establish whether a substantive distinction can be drawn between taking the advice of an algorithmic decision support tool and simply 'rubber stamping' the predictive suggestions of such tools.

5 Conclusion

Evidently, there is urgent need for an unambiguous and robust legal framework guiding the use of ADMS, particularly in policing contexts where just decision-making should be paramount.[253] Using a doctrinal approach, this article has illustrated the potential for the courts to adapt established principles of lawful human decision-making to suit the realm of machine-assisted decision-making. While the courts cannot solely address this gap in the regulatory framework for police use of ADMS, they can certainly utilise the public law toolkit[254] to assist in building the groundwork.

This article has argued that the courts are best placed[255] through the JR process and despite its limitations to shape the future of how ADMS can be used lawfully in police discretionary decision-making contexts. As ADMS pose a threat to the proper exercise of decision-makers' discretion[256] illegality was identified as the most relevant JR ground, with the focus being on the non-fettering[257] and non-delegation[258] principles. Having demonstrated that police use of ADMS in discretionary decision-making context is very likely to be amenable to JR, the article proceeded to explore the application of the non-fettering and non-delegation principles to two real-life examples, HART and the GVM.

[252] Elliott and Varuhas (n 110).
[253] Police Foundation and the Policy Studies Institute (n 59).
[254] Williams (n 4) 2.
[255] Hogarth (n 37).
[256] Per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[257] *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] UKHL 3.
[258] *Lavender Son ltd v Minister of Housing and local Government* [1970] 3 All ER 871.

These examples emphasised how predictive outcomes that are derived from obscure big-data analysis risk limiting a decision-makers' ability to make relevant, individualised considerations. They also showed how the historic data used to train these systems are often the product of discriminatory police practices and increase the risk of embedding bias (particularly racial bias) into algorithmic decision-points. Other risks include, discretionary decision-makers placing (subconscious) supremacy in the outcomes of these systems, thereby hindering their ability to keep an open mind and trusting the simplistic expressions of these systems, which typically read as definite conclusions (eg, 'high-risk'), more than their own training. Additionally, ADMS by design, promote consistency: analysing and re-analysing datasets in search of meaningful data patterns and thus, their use raises concerns regarding rigidity.

Consequently, the courts have an important role to play in shaping how ADMS might be lawfully used by decision-makers offering guidance on a matter of issues. Namely, how to ensure the kind of data used is both relevant and free from bias, and how to ensure independence of mind in the discretionary decision-makers' processes. The courts may also direct as to whether discretionary decision-makers can utilise ADMS in a 'blanket policy' manner and stipulate how decision-making processes that utilise ADMS can guarantee sufficient variation that caters for individual circumstances.

Crucially, the courts will need to establish if, and how, a machine can be positioned in an advisory capacity, particularly regarding sensitive issues in police discretionary decision-making. This guidance will need to consider: 1) if and how ADMS can be used in an advisory capacity, 2) how decision-makers can consider individual circumstances when using big-data ADM tools, 3) whether ADMS can be used in a blanket-policy manner, and 4) how decision-makers can demonstrate a distinction between their reasoning processes and the outcome generated by the ADMS.

Even though JR does not present a *complete* solution to the issue of regulating the lawful use of ADMS in police discretionary decision-making contexts, the article has demonstrated how JR principles are relevant and useful in considering the lawful use of ADMS. As machines, at the moment, cannot be held legally accountable, discretionary police decision-makers utilising ADMS are burdened with drawing the distinction between taking the system's 'advice' and 'rubber stamping' its predictive outcomes. The courts will need to determine how a procedural

distinction might be made between the recommended outcomes of ADMS and the human decision-maker's final decision to guide the lawful use of ADMS. Future research will need to address how the interpretability of ADMS may be improved to ensure these systems operate as scrutable tools that serve,[259] rather than undermine, human decision-making.

[259] Benjamin Cartwright, 'Regulating the Robot: A Toolkit for Public Sector Automated Decision-Making' (2021) 10 OUULJ 23.

Defending Strong Constitutional Review in a Declining Democracy: The Case of Indonesia's Eroding Limitation of Power

Azeem Marhendra Amedi

Abstract

Indonesia's constitutional democracy is in constant decline. Various attacks to undermine constitutional limitation of power and to shrink civic space using legal tools were used by the current Joko Widodo's regime. The exercise of strong constitutional review by the Indonesian Constitutional Court may be the answer to prevent tyranny. Some global legal scholars, like Jeremy Waldron, believe that this is not the case. They believe that the mechanism lacks legitimacy and becomes problematic in a democratic system to resolve rights issues. This article demonstrates that in the case of a declining democracy, the Court's power to strike down unconstitutional legislation is still needed. The research was conducted using theoretical analysis to study the arguments against the practice of strong constitutional review and uses theories that defend the mechanism as a rebuttal. Historical approaches were also utilised to help explain the history of democratisation in Indonesia, the phenomena of democratic decline, and the judiciary's contribution to democratisation. The study suggests that the strong constitutional review mechanism is still the most suitable in Indonesia's decaying democracy, where the Court can contribute to the improvement of institutional checks and reform, as well as reasserting constitutional limitations. Despite the Court's openness and limitations, constitutional review remains a useful mechanism but insulation from political interference and increasing diversity of the Court can improve the robustness of the process and its legitimacy.

1 Introduction

Freedom House's report on Indonesia's democracy index in 2023 indicated that the country is yet again declining further as a flawed democracy, scoring only 58 out of 100.[1] In 2018, Indonesia scored 65 and has suffered continuous decline every year since then.[2] President Joko Widodo (Jokowi) has led various methods to minimise constitutional limitation of power to the government. Today, Indonesia is slightly returning to a more authoritarian government—something that it has tried to escape from 25 years ago.[3]

First, many civilians were criminalised on the grounds of defamation, slander, and hate speech, which threatened the freedom of expression and press.[4] Second, Jokowi's government formed a supermajority in the Indonesian legislature—the People's Representative Council (DPR) by taking advantage of the flawed party system and passing legislation that limited the opposition to compete in future elections.[5] Lastly, they barred the public from being able to participate in the legislative process, ignoring the principles of transparency and accountability, despite being obligated by the law.[6]

Indonesians can only pin their hope on their Constitutional Court. Since its establishment in 2003 through Law No. 24/2003 on the Indonesian Constitutional Court, its power to strike down unconstitutional legislation acts as a 'counter-majority' force against the government and to protect fundamental rights.[7] The Court has led the nation's democratisation process and the public has given their approval to the Constitutional Court to exercise 'judicialization of politics'[8] in Indonesia.

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[1] 'Freedom in the World 2023 Country Report: Indonesia' (*Freedom House,* 2023) <https://freedomhouse.org/country/indonesia/freedom-world/2023> accessed 17 April 2023.
[2] Ibid.
[3] See Paul J Carnegie, 'Democratization and Decentralization in Post-Soeharto Indonesia: Understanding Transition Dynamics' (2008) 81 Pacific Affairs 515.
[4] Amnesty International Indonesia, 'Indonesia: Silencing Voices, Suppressing Criticism: The Decline in Indonesia's Civil Liberties' (*ASA,* 7 October 2022) <www.amnesty.org/en/documents/asa21/6013/2022/en/> accessed 26 April 2023.
[5] Derwin Tambunan, 'The Intervention of Oligarchy in the Indonesian Legislative Process' (2023) 8 Asian Journal of Comparative Politics 10.
[6] Saru Arifin, 'Illiberal Tendencies in Indonesian Legislation: The Case of the Omnibus Law on Job Creation' (2021) 9 The Theory and Practice of Legislation 386.
[7] Hans Kelsen in Lars Vinx (tr), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015).
[8] 'Judicialization of politics' refers to 'a spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making for a and processes' in an abstract sense. However, in the context of judiciary's involvement in the political setting, Hirschl defines this as the concrete form of the term, meaning that the court's power is expanding to help guiding policy decisions and redrawing the lines to limit state powers and 'ordinary'

The enforcement of strong constitutional review is criticised by global legal scholars, despite its advantages. The institution itself is seen as undemocratic because of the appointment of the judges and the decision-making process. Notable critiques towards strong review came from Jeremy Waldron[9] and Alexander Bickel. They believed that the exercise of such a mechanism in any democratic country does not fit with political equality and democracy. A decision to strike down a statute does not value differing views of rights in the society and is made by a limited number of judges without involving the public. Meanwhile, rights issues are multifaceted, thus it is not appropriate for judges to become the sole authority to settle the dispute.[10]

However, those arguments may not be relevant to Indonesia's current condition. The increasing power gained by the political majority in both the executive and the legislative branches also increases the likelihood of disregarding constitutional limitation of power and commitment to the protection of the fundamental rights of citizens. This, in turn, further threatens democracy. A counter-majoritarian measure is needed to set boundaries and return the power to its proper constitutional democratic track—in the form of the Indonesian Constitutional Court.

This article will undertake qualitative secondary research utilising primary legal sources as well as secondary sources from various literature. Legal-doctrinal and theoretical literature will be the central reference, but it will also include some historical sources to give context on the issue. A combination of doctrinal, comparative, and historical analytic approaches will be utilised.

The first section of this article comprises theoretical findings and analysis of various legal and political phenomena that indicate a decline of Indonesian constitutional democracy. This section also explores the Indonesian Constitutional Court's role in saving democracy. The second section introduces the theoretical debate on the exercise of strong constitutional review.

rights jurisprudence. *See* Ran Hirschl, 'The Judicialization of Politics' in Robert Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2011) <https://academic.oup.com/edited-volume/35474/chapter-abstract/303819594?redirectedFrom=fulltext> accessed 10 May 2023.

[9] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346.

[10] Ibid. See also Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962).

The third section challenges arguments against strong constitutional review because they fail to recognise the overall development of democracies around the world. The latter part of this section includes suggestions to avoid the institution of becoming a 'deviant' to democracy itself. Finally, it will conclude on the retention of the current model of strong constitutional review in Indonesia, and its significance to the practice of constitutional adjudication in declining democracies around the world.

2 Indonesian Constitutional Democracy in Peril

Indonesia has retained some components of constitutional democracy. First, Indonesia has not scrapped the implementation of competitive, free and fair democratic elections. Periodical democratic elections are still in place, which still opens up the possibility of a rotation of power.[11] Second, liberal freedom of speech and association that are synonymous with the practice of democracy are still promulgated in the 1945 Indonesian Constitution.[12] Despite several obstructions and suppressions by the government, Freedom House indicated Indonesian citizens still enjoy 'partly free' freedoms of expression and association.[13] Lastly, the integrity of the rule of law—which includes the legal rules, institutions, and the exercise of legal procedures to settle cases and to seek remedies—still exists and are in a stable condition.[14] Although there have been some attempts to tamper with the institutional power checks upheld by legal institutions, particularly the Constitutional Court[15] and the Corruption Eradication Commission,[16] as well as the unfinished reform of the National Police,[17] the state is still held accountable by the law. Despite retaining three components of constitutional democracy, Jokowi's government is slowly damaging democracy. The damages to constitutional democracy do not happen in an instant but in a slow, incremental and inconspicuous fashion.

[11] Marc F Plattner, 'From Liberalism to Liberal Democracy' (1999) 10 Journal of Democracy 121.
[12] Constitution of the Republic of Indonesia 1945 arts 28 and 28E(3).
[13] Freedom House (n 1).
[14] Ibid.
[15] Jimly Asshiddiqie, 'The DPR Attacks the Constitutional Court—and Judicial Independence' (*Indonesia at Melbourne*, 10 October 2022) <https://indonesiaatmelbourne.unimelb.edu.au/the-dpr-attacks-the-constitutional-court-and-judicial-independence/> accessed 10 May 2023.
[16] Thomas Power, 'Assailing Accountability: Law Enforcement Politicisation, Partisan Coercion and Executive Aggrandisement under the Jokowi Administration' in Thomas Power and Eve Warburton (eds), *Democracy in Indonesia: From Stagnation to Regression?* (ISEAS Publishing, 2020) 292–294.
[17] Fachrizal Affandi, 'Police a Missing Passenger in Indonesia's Reform Train' (*The Jakarta Post*, 1 October 2022) <www.thejakartapost.com/opinion/2022/09/30/police-a-missing-passenger-in-indonesias-reform-train.html> accessed 10 May 2023.

Azis Huq and Tom Ginsburg define this as a 'constitutional retrogression', where the decay of constitutional democracy is concealed using legal methods and institutions.[18]

During Jokowi's tenure, the incremental damages done to constitutional democracy have become more apparent. Particularly, in the way his government has tried to weaken the limitation of power that has been stipulated in the 1945 Constitution. This has been achieved by expanding the government's influence and power, as well as eliminating resistance in the society. To achieve this, Jokowi's government acquired a dominant portion of the legislature, to make sure that the opposition possessed less power.

Approximately 82% of the total seats in the DPR are now held by political parties that backed Jokowi to run for presidency in 2014 and 2019. This leaves the opposition parties with less than 18% of the total seats.[19] With this supermajority, there is less pushback for governing parties to achieve their objectives, which are to seize economic resources, win state patronage and divide power among themselves.[20] One of those objectives was realised when the governing parties adopted the new presidential threshold in the General Election Law in 2017. Each political party had to secure at least 20% of the total seats in the DPR or 25% of the national vote in the previous election to be able to nominate a presidential candidate. This played into the hands of the ruling coalition by allocating presidential candidacies only for the governing alliance and forcing the opposition to join the ruling alliance or to forever be beaten.[21]

The supermajority also attempted to expand their powers through amending laws to weaken institutional checks. In 2019 lame duck legislators decimated the anti-graft institution, the Corruption Eradication Commission (KPK), through their amendment of the KPK Law.[22] Furthermore, a rushed amendment to the Law of the Indonesian Constitutional Court led to an attempted court-packing, where political power intrudes with the composition of judges, in order to favour the status quo.[23] Modifications to laws attempted by the supermajority

[18] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 U Cal LA L Rev 94–96.
[19] Asrinaldi, Mohammad Agus Yusoff and dan Zamzami Abdul Karim, 'Oligarchy in the Jokowi Government and Its Influence on the Implementation of Legislative Function in Indonesia' (2022) 7 Asian Journal of Comparative Politics 196.
[20] Ibid 196–199. See also Marcus Mietzner, 'Indonesian Parties Revisited' in Power and Warburton (eds), n 16, 206.
[21] Mietzner (n 20) 1024–1025.
[22] Power (n 16).
[23] Asshiddiqie (n 15).

demonstrate that Jokowi's regime wants to keep limiting its power as little as possible to advance their economic agenda.[24]

Attempts to undermine constitutional democratic principles did not stop there. Citizens have frequently been denied the opportunity to participate in the discussion of legislation, particularly those who are directly impacted by or have special interests in relevant topics. For instance, the Job Creation Law was found to be 'conditionally unconstitutional' by the Indonesian Constitutional Court. The deliberation process of the Law excluded some affected parties, such as indigenous communities and migrant workers unions. This violated Article 96 of Law No. 12/2011 on Legislation, which obligated a wide public participation in the discussion of a draft legislation.[25] Not only that, dissident suppression and centralisation of decision-making further advanced the goals of developmentalism. Jokowi issued a Government's Regulation in lieu of a Law on the Amendments of Mass Organisation Law (*Perppu Ormas*) to arbitrarily outlaw the existence of Hizbut Tahrir Indonesia (HTI), one of the most prominent non-party political opponents of Jokowi's government. HTI was believed to be an organisation that 'goes against the ideas of Pancasila'.[26] Furthermore, police violence cases are on the rise.[27] Cases of intimidation, persecution, use of violence, and criminalisation against critical voices using vague provisions on 'defamation', 'hate speech' and 'slander' promulgated in the Penal Code and Electronic Information and Transactions Law (ITE Law) were increasingly brought against civilians and journalists who exercise freedom of expression and freedom of press.[28] Those cases of repression threatened freedom of speech, despite being guaranteed by Articles 28 and 28E(3) of the 1945 Constitution.

Indonesians can only pin their hope on the Constitutional Court to protect their guaranteed constitutional rights. The Court is the 'guardian of the constitution', founded to maintain constitutional order. The Court's role is increasingly becoming more predominant in the current situation of the state, due to their power to strongly strike down possible threats and injuries to citizens' constitutional rights.

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[24] Power (n 16).
[25] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020. See also Petra Mahy, 'Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments' (2022) 17 Asian Journal of Comparative Law 51.
[26] Vedi R Hadiz, 'Indonesia's Year of Democratic Setbacks: Towards a New Phase of Deepening Illiberalism?' (2017) 53 Bulletin of Indonesian Economic Studies 270.
[27] Amnesty International Indonesia (n 4).
[28] Ken MP Setiawan, 'A State of Surveillance? Freedom of Expression under the Jokowi Presidency' in Power and Warburton, n 6, 258.

The creation of the Indonesian Constitutional Court took inspiration from South Korea's democratisation experience.[29] Both countries have experienced leaderships of autocratic ex-military generals. South Korea, on one hand, initiated a constitutional amendment in 1987, where it established a specialised Constitutional Court. The Court was founded based on an agreement between three main political parties to liberalise the nation and reinstate constitutional supremacy.[30]

The Indonesian Constitutional Court was influential in the protection of constitutional principles and rights. The Court has a good track record in defending constitutional rights against possible or existing threats in the Indonesian legal and political system. It struck down articles from the Penal Code that contains a provision of *Lèse Majesté* that can criminalise 'alleged expressions of hate' against the Indonesian Government. The Court cited the provision's colonial character, its weaponisation during the New Order regime to punish critics, and how it violated freedom of expression stipulated in the Constitution.[31] The Court also contributed to protecting the freedom of the press from being interfered with by the state.[32] It guaranteed equal political participation to those previously accused as members or sympathisers of the banned Indonesian Communist Party.[33] Furthermore, emphasising citizens' right to participate in legislation, the Court adopted the 'meaningful participation' doctrine.[34] With those landmark decisions, the Court has contributed extensively to the democratic transition.[35]

[29] South Korea had been one of the most influential countries to the foundation of the Indonesian Constitutional Court. This has been explicitly stated by politicians who initiated Constitutional Amendments and conducted a comparative study in South Korea, saying that the country was a model to new democracies in Asia. Ibid 52–53. See also Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003) 210–212.

[30] Ibid. See also James M West and Dae-Kyu Yoon, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?' (1992) 40 Am J Comp L 73.

[31] Indonesian Constitutional Court Decision No. 6/PUU-V/2007. See also Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge 2018) 82–83.

[32] Indonesian Constitutional Court Decision No. 005/PUU-I/2003.

[33] Indonesian Constitutional Court Decision No. 11-17/PUU-I/2003.

[34] This doctrine was first introduced in Indonesia after studying the case of *Doctors for Life International v Speaker of the National Assembly* from the South African Constitutional Court. 'Meaningful participation' doctrine orders lawmakers to engage in public consultation when drafting and deliberating a law, particularly to the potentially impacted communities. This engagement gives democratic legitimacy of the law, respects citizens' right to participate in governance, and avoids rights violation. See Indonesian Constitutional Court Decisions No. 32/PUU-VIII/2010 and No. 91/PUU-XVIII/2020. See also *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC) 1.

[35] Hendrianto, n 31, 81.

The establishment of a separate and independent court that adjudicates constitutional issues in a democratic state, especially in a new democracy, does not sit well with legal and political scholars who are against the practice of strong constitutional review. Conferring the power to strike down products of a democratic process to an institution that lacks democratic legitimacy is a 'counter-majoritarian difficulty', and the establishment of such practice is an irony in a constitutional democracy.[36] This is where the Indonesian Constitutional Court and other constitutional tribunals face criticism, on whether the institution is a show of commitment to constitutional democracy or a deviant in the system.

3 Cases against Strong Constitutional Review

Despite the growing approval of some states of a strong constitutional review practice, the idea actually does not sit well with some global legal scholars. Notably, respected scholars Alexander Bickel and Jeremy Waldron have criticised the relevancy of the practice within a democratic system. The idea that a judiciary is unsuited to resolve cases on constitutional rights originally came from Bickel et al.,)[37] who highlighted issues in the judicial deliberation process. Bickel stated that the popular will was being reversed by the judiciary through the judicial review process as judges asserted themselves over the majority and dictated the course of democracy. Bickel is referring to the term 'counter-majoritarian difficulty', where popular sovereignty is not as 'sovereign' as the name suggests, thanks to the Court blocking the will of the majority. Useful examples of this can be found in various US Supreme Court cases. The US Court decided against the New Deal framework and frustrated the general will of the American people escape the Great Depression, due to some of the framework's nature to push workers beyond their boundaries in the name of economic recovery.[38] Despite the judiciary being an 'additional mode of access for citizen input into the political system', Bickel insisted that it does not mean it has some political equality.[39]

Jeremy Waldron took inspiration from Bickel's work and further challenged the existence of strong judicial review around the world. While Bickel's criticisms were directed towards the

[36] Bickel (n 10).
[37] Barry Friedman, 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' 73 NY U L Rev 333.
[38] See *Morehead v New York ex rel. Tipaldo* 298 US 587 (1936).
[39] Ibid., 1395.

American system, Waldron proved that Bickel's arguments could be relevant to the general case.

Waldron begins by forming four assumptions where judicial review is not a necessity and the judiciary's involvement in legislation in redundant: (1) a well-functioning democratic legislature which was elected periodically by universal adult suffrage and featured fair competition; (2) a well-functioning judiciary to settle individual disputes and uphold the rule of law; (3) commitment by most members of the polity and most of its officials to the idea of individual and minority rights; and (4) persistent, substantial, and good faith disagreement about rights.[40] Waldron believes that legislative decision-making has more legitimacy. Legislative settings have mechanisms which allow the citizens to participate in solving issues.[41] This is where the judiciary lacks, in the aspect of what he called 'process-related reason'. The deliberation process in the court is not justifiable in terms of democratic legitimacy, since judges do not allow public participation.[42] This is supported by Justice Antonin Scalia's view—just because the public pressures the court to acknowledge their opinions, does not mean they are forced to accommodate such views because the court's independence shall prevail.[43]

A further argument that Waldron presents is that the judicial setting is less than effective compared to the legislative process in settling disagreements about rights. In the process of deciding cases, judges tend to align with one of the views on the issue that is before them and will decide in favour of one side or the other. Meanwhile, the legislature can invite various subjects and views to make the deliberation more substantial. Therefore, there is no reason why a decision by the court stands when there are multiple alternative views of the issue at hand.[44] Waldron perceives a decision coming from a strong judicial review mechanism lacks justified authority, which he termed as an 'outcome-related reason'.[45] When cases reach appellate levels, they lose the main substance of the case, which makes the settlement process less robust. The judiciary often fails to view the multifaceted nature of rights. Its consideration to solve cases is

[40] Disagreements about rights are merely the idea of which rights someone ought to have or ought to be prioritised over others. Such disagreements can be settled in a legislative setting, where the representation of different perspectives regarding rights are present and every issue is deliberated carefully in that forum. Waldron (n 9) 1360–1362.
[41] Ibid 1371–1372.
[42] See Richard A Posner, *How Judges Think* (Harvard University Press 2008) 3.
[43] Antonin Scalia's dissenting opinion in *Planned Parenthood of Se. Pa. v. Casey* [1992] 505 U.S. 833, 999-1000, in Waldron (n 9) 1390.
[44] Ibid 1393–1394.
[45] Waldron (n 9) 1376–1379.

narrowed only to provisions and interpretations of constitutional documents. This statement echoes Bickel's findings in the *Brown v Board of Education* case. US Supreme Court judges preferred to go with the best interpretation of the Due Process clause that fitted within the best set of moral values[46] in order to seek legitimacy from the available provisions and past decisions to justify their position in the case.[47]

The prevailing court's decision on an issue also affects the perception of 'judicial supremacy'. This places the judicial power in defining the meaning of constitutional texts as the authoritative one, which makes it binding to all national institutions.[48] The concept itself was originally presented to settle disagreements on rights or controversies arising under the constitution. Nevertheless, judicial supremacy becomes a problem in a constitutional democracy, since it places judicial decisions as authoritative interpretations of constitutional provisions.[49] It denies the possibility of different means of interpretations coming from other institutions or subjects. Letting the judicial review dictate the popular sovereignty does not represent democratic values, and therefore the practice and the institution is a 'deviant' to the democratic system.[50]

When the judiciary becomes supreme, it can also become tyrannical. A court's decision may not acknowledge different perspectives on the issue, but it continues to be an authoritative law of the land. On the other hand, decisions made by elected representatives, who represent the aspirations of the majority of citizens, may be more acknowledging and accommodating. Even before the voting procedure started, the deliberation process has included the voices and views of the minority and therefore the process in the legislature makes the institution less of a threat of become a tyranny.[51]

Despite all of those issues presented by Bickel and Waldron the claim that constitutional review is a deviant practice to a democracy may not be accurate for new democracies. Particularly in the context of Indonesian democracy which needs a more robust checks and balances system and constitutional protection. It is important to understand why a strong constitutional review conducted by the judiciary is still relevant to the age of democratic retrogression.

[46] Bickel (n 10).
[47] Waldron (n 9) 1379–1384.
[48] Friedman, (n 38) 352. See also Walter F Murphy, 'Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter' (1986) 48 The Review of Politics 406–412.
[49] Ibid 10–11.
[50] Bickel (n 10).
[51] Ibid 1396.

4 In Defence of Strong Constitutional Review

4.1 Where Assumptions Fail

Waldron's general case against strong review may be relevant in Indonesia's case, due to its democratic system being influenced by Western traditions. The adoption of judicial review not only followed the South Korean example but also took inspiration from the American democracy that pioneered judicial review and the system of checks and balances to control state institutions.[52] On the other hand, Indonesia also adopted Hans Kelsen's approach to the centralised judicial review system where only a single constitutional judiciary has the power to annul unconstitutional legislation as the 'guardian of constitution'.[53] Furthermore, human rights provisions stipulation in the 1945 Constitution were also inspired by Western democracies—increasing numbers of countries incorporated human rights into their constitutional documents as a consequence of 'constitutionalisation'.[54]

However, Waldron's assumptions are not relevant to the case of Indonesia. The DPR as the legislature lacks the important attributes to ensure a well-functioning legislative body. Waldron assumes that in the legislation process, the representatives are equipped with elaborate and responsible procedures, as well as a set of robust scrutiny mechanisms to ensure a substantial legislative product and accommodation of public interests and opinions.[55]

First, the problem of the un-representativeness of political parties within DPR contributes to the failure of the first assumption. In reality, the DPR being dominated by the ruling supermajority disregards minority views. They rush the deliberation processes, refuse to engage in wider public consultations and do not provide sufficient transparency of the processes, despite being obligated by the Law of Legislation.[56] According to Mietzner, Indonesian

[52] Judicial review and the checks and balances system are correlated. The judiciary has the power to interfere in the legislation process, in order for them to fully consider constitutional provisions, despite the division of labour that they have. See Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 233–234.
[53] Kelsen in Vinx (n 7) 45.
[54] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).
[55] Ibid 1361.
[56] Mahy (n 25) 61. See also section 2 paragraph no. 5.

political parties do not adequately represent a range of ideas or social classes which further distances the populace from them. Interests of elites who join the party or provide financial support—often the party leaders—are major factors in the formation of political parties.[57] This detachment of parties away from their real constituencies has led to parties being driven by their leaders' own interests. They tend to form a coalition with those who have similar agendas, resulting in a lack of representativeness and public control over political parties.[58]

Second, despite having a well-functioning judiciary most members of the society lack respect for individual and minority rights. This is a major obstacle in the attempt to achieve good-faith disagreements in what rights somebody ought to have. The lack of acknowledgement of individual and minority rights is most likely caused by deepening polarisation in the country's social and political dynamics which culminated in the highly controversial Jakarta's 2017 Gubernatorial Election. The Former Governor of Jakarta, Basuki Tjahaja Purnama (famously called Ahok), who came from a double-minority background (Christian- and Chinese-Indonesian) was openly condemned by conservative Muslim voters. Those who voted for him were accused of blasphemy. This incident made the ethnic minority's participation in the ruling government even bleaker.[59] This was made worse when Jokowi enacted the *Perppu Ormas* to disband HTI and Islam Defenders Front (FPI), both of whom are the largest conservative Muslim organisations in Indonesia.

Third, the ruling government also continues to disregard the individual's right to express opinions. Jokowi's presidential administration used state apparatus to silence his political opponents affiliated with banned organisations.[60] Illiberal actions and policies enacted by the Jokowi administration further shrank civic space such as the criminalisation cases of civilians on the grounds of 'defamation', 'treason' or 'hate speech'.[61] Amnesty International Indonesia found that between 2019 and 2022, there have been 316 cases of criminalisation using draconian provisions of the revised Information and Electronic Transactions (ITE) Law on

[57] Mietzner (n 20) 193–198.
[58] Burhanuddin Muhtadi, 'Jokowi's First Year: A Weak President Caught between Reform and Oligarchic Politics' (2015) 51 Bulletin of Indonesian Economic Studies 359–361.
[59] Eve Warburton, 'Deepening Polarization and Democratic Decline in Indonesia' in *Political Polarization in South and Southeast Asia: Old Divisions, New Dangers* (Carnegie Endowment for International Peace 2020).
[60] Power (n 16). See also Abdurrachman Satrio, 'Constitutional Retrogression in Indonesia in the Times of Joko Widodo's Government: How the Constitutional Court Can Save Democracy?' (2018) 4 Constitutional Review 425.
[61] Ibid 69. See also Amnesty International Indonesia (n 4) and Power (n 16) 277.

defamation and hate speech on the internet. This affected many academics, journalists and activists.[62]

Additionally, Waldron's assumptions are not utopian, but rather more applicable to well-established democracies. Indonesia is still a relatively new democracy since the reform only kickstarted in 1998 after the fall of the authoritarian New Order regime. Indonesia was not a full-fledged democracy until the ratification of the Fourth Amendment of Indonesia's 1945 Constitution in 2002.[63] Even two decades later, Indonesia appears to be taking a step backwards in its implementation of constitutional democracy. The shrinking of civic space has limited the opposition's ability to challenge the incumbent. Furthermore, the reduction of institutional checks has been a recurring theme in Jokowi's present administration, resembling the past authoritarian regime.[64] Suharto, the autocratic leader of the New Order regime, along with his party Golkar, dominated the People's Consultative Assembly (MPR) and DPR from his re-election in 1971 until 1998. They promoted a series of developmentalist policies to minimise resistance inside the DPR, manipulated the independence and impartiality of the Supreme Court at that time, and punished dissidents by arresting, kidnapping, torturing and assassinating them.[65] Similarly, in Jokowi's regime the governing supermajority utilises their domination to stipulate partisan policies to advance their agendas,[66] while the minority remains helpless.[67] Moreover, the problematic representation of parties in the DPR also makes this worse. Mietzner explains that the flawed party system which affects the representativeness of the parties also has undesirable implications in the decision-making process in the DPR.[68] The DPR cannot successfully represent the interests of their constituencies. For instance, indigenous societies have been reported to have felt left out and unconsulted regarding the permits of land use stipulated in the Job Creation Law.[69]

Furthermore, Dworkin asserts that in a constitutional democratic system a decision by the majority can be declared legitimate only when the individual is assured that they have been as

[62] Amnesty International Indonesia (n 4).
[63] See Hendrianto (n 31) 43–44; Asshiddiqie (n 15).
[64] Power (n 16).
[65] Ibid.
[66] Tom Ginsburg and Azis Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 143.
[67] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 648.
[68] Mietzner (n 20).
[69] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020.

equally considered and respected as others.[70] The individual's interests should thus be taken seriously. Parties' aspirations, therefore, shall fully reflect the will of their constituencies. The Job Creation Law once again serves as a good example that corroborates Dworkin's view. The lawmaking process was found to have explicitly disenfranchised certain groups such as migrant workers' unions and indigenous societies. Furthermore, lawmakers had provided little to no transparency of the deliberation process. The Court declared the Law to be conditionally unconstitutional and ordered the DPR to amend the Law by accommodating previously disenfranchised groups in the deliberation process within two years.[71] Here, the Court did not completely strike down the Law, so it did not completely dictate the will of the majority as Bickel feared it would.[72]

Besides, Waldron also appears to overlook cases of strong judicial review in some parts of the world. He does not attempt to pay attention to the experiences of new or declining democracies. In those circumstances, the judiciary needs to step up to improve institutional checks and balances, so the three state institutions can walk hand-in-hand to preserve constitutional democracy. Accordingly, the Indonesian Constitutional Court does not have authority above the directly elected institution. Rather, it is a form of constitutional control and a complete package for effective checks and balances.[73] With the mechanism of strong judicial review as a means of constitutional control, the legislators are forced to be more sensitive to constitutional responsibilities. So, whenever the legislature wants to draft a new law, they may want to pay more attention to constitutional provisions so the law does not get struck down by the Court.[74] Instead of judicial supremacy, Indonesia adopted a principle of constitutional supremacy. Indonesians pin their hope on the Constitutional Court to maintain constitutional order as a form of distrust to their political representatives. The Court's power to strongly strike down possible threats and injuries to citizens' constitutional rights caused by lawmaking is meant to function

[70] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 25.
[71] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020.
[72] Bickel (n 10) 3–4.
[73] Asshiddiqie (n 15) 245–246. Asshiddiqie's statement might have been inspired by Hans Kelsen's view of constitutional adjudication. Kelsen believed that the constitution as the basic norm of a legal system gives validity to legislations and rules underneath it, since it contains foundational principles and boundaries to limit institutional powers in a polity. To guarantee the validity (or constitutionality) of legislations, there needs to be a mechanism to annul any legislative acts that are defective and not conforming to the constitution, hence the constitutional court with the power to exercise strong judicial review is needed to guarantee the basic norm. See Kelsen in Vinx (n 7) 25–48, Hans Kelsen, *The Pure Theory of Law* (University of California Press 1978), and Joseph Raz, 'Kelsen's Theory of the Basic Norm' in *The Authority of Law: Essays on Law and Morality* (OUP 1979).
[74] Dimitrios Kyritsis, 'A Moral Map of Constitutional Polyphony' in Dimitrios Kyritsis (ed), *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017) 53.

as keeping the Constitution as the supreme law of the land, in order to prevail before the interests of the political elite.

This function has been showcased numerous times by the Court, for instance, in the striking down of the *Lèse Majesté* provision on the Penal Code that was used to criminalise critics of the Indonesian Government. The Court cited the provision's colonial character, since it was meant to protect the Dutch Royal Family as the Head of the Colonial States. Then, it was weaponised during the New Order regime—led by an autocratic Suharto—to punish critics in order to make developmentalism successful. In the present 1945 Constitution, with the right to freedom of expression being guaranteed by Article 28E(3) of the Constitution, and to align with the democratic character of Indonesia, the *Lèse Majesté* provision was found to be unconstitutional. Therefore, the Court decided to uphold constitutional rights protection by striking it down.[75]

Thus, the Court only operates within the boundaries set by the 1945 Constitution and the Law of the Constitutional Court to keep the government's power within constitutional boundaries. Indonesian constitutional amendment initiators believed the preconditions that led to the autocratic leadership of the New Order occurred when the government paid no regard to constitutional provisions and principles. Meanwhile, the judiciary at that time, the Supreme Court, had no real power to stop arbitrary actions and undemocratic decisions. It was necessary to allocate constitutional review power to the Constitutional Court to give the Court the ability to control the exercise of state power.[76]

4.2 Legitimacy of the Decision

Waldron also argued that when it comes to decision-making, the legislature possesses more democratic legitimacy than the judiciary since the members involved in the deliberation process have been elected to represent the citizens.[77] The legislature reflects the citizens' ideas and aspirations, provides equal weight to every voice and allows robust discourses. However, due to the lack of representativeness in DPR[78] and the limited involvement of citizens in the

[75] Indonesian Constitutional Court Decision (n 31).
[76] Hendriant (n 31) 52.
[77] Waldron (n 9) 1353–1374, and Friedman (n 38), 345–348. See also section 3 paragraph no. 4.
[78] Mietzner (n 20).

legislation process, Indonesia's legislative process lacks democratic legitimacy.[79] Dworkin's argument on equal consideration to all citizens strengthens the need for a strong judicial review mechanism—when part of the population is denied asmoral members of the decision, a judiciary therefore needs to step in to ensure they are not disenfranchised.[80] Although the deliberation in the judiciary is done by judges who are not elected by the people, it does not mean the judicial process has no legitimacy. The legitimacy of the Constitutional Court's decisions stems from its stipulation in the 1945 Constitution. In fact, it is a form of citizens' aspiration to confer power to the Court in order to control legislation.[81] Moreover, the decision made by the Constitutional Court is not limited to the moral judgments of the Constitutional Justices, due to the review system that was put in place.

First, the Court implements an '*actio popularis'* mechanism that opens the possibility for citizens to directly file a petition for constitutional review. Article 51 of the Law of the Constitutional Court allows Indonesian citizens to file an abstract constitutional review case to the Court. Applicants do not have to be involved in a specific case to present it before the Court. This makes it one of the most open and accessible constitutional courts in the world.[82] This mechanism guarantees direct involvement of citizens to check and balance the state's power, especially for those whose rights have been disregarded by the state. Despite little or no evidence on why such a mechanism was adopted,[83] Indonesia's struggle against authoritarianism in the past could have sparked the idea. It can be assumed as a form of distrust towards the government and an endeavour to restrain the Government for the protection of individual rights. The *actio popularis* mechanism is also a form of 'public action', even when the petitioner is simply an individual citizen, it can be seen as a representation of the general public. Justice Harjono in the Court's Decision No. 2-3/PUU-V/2007 explained that

[79] Power (n 24) and Mahy (n 25).
[80] Dworkin (n 71) 25.
[81] Hendrianto (n 31) 45–48.
[82] Tom Ginsburg, 'Memo on Comparative Constitutional Review' <www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf> accessed 12 May 2023.
[83] There was no real historical proof from the transcript of the Amendment Deliberation from 1999 to 2002 and the drafting process of the Law of the Indonesian Constitutional Court on why was the *actio popularis* mechanism adopted. The deliberation only focuses on the comparison with countries that have adopted a specialised constitutional court like South Korea, Italy, Austria, Hungary and many others. *See* Hendrianto (n 14) 53, and Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman (Comprehensive Text of the Amendments of the 1945 Constitution of the Republic of Indonesia),* book 6 (Secretariat General of the Indonesian Constitutional Court 2010).

constitutional rights possessed by an individual are also possessed by other citizens, and the decision of the Court can affect the general public (*erga omnes*).[84]

Second, the Constitutional Court is the only judicial institution that reviews the constitutionality of a statute. The Court is a stand-alone, centralised institution whose decision is final and binding. Cases do not need to go through time-consuming processes such as trials from the district level.[85] Waldron's worries about losing the 'meat and bone' of the issue due to the case being settled at an appellate level are thus not relevant. Petitioners can bring up the issue as it is before the justices for the first time so that the 'meat and bone' are still intact. Lastly, the Constitutional Court is sensitive to the state's political context, public opinion on the issue at hand and public perception of the Court as an institution.[86] Constitutional justices need to consider the impact of their decision since it will affect the wider public, hence they need to understand the political context surrounding the society. It is important to note that the Court not only deals with constitutional issues but also political ones (judicialization of politics). Therefore, the justices need to bear in mind that public opinion should prevail before the intention of the political majority in the DPR.[87]

To illustrate the fruit of Indonesia's strong constitutional review system, Decision No. 013-022/PUU-IV/2006 is a good example. In this case, the petitioners had asked the Court to review the constitutionality of the *Lèse Majesté* provisions on the defamation of the Heads of State (the President and Vice President) stipulated in the Penal Code. The Court struck down the provisions because they were found to be against the spirit of Indonesia's current state of constitutional democracy. The petitioners, in the name of the Indonesian people, felt their guaranteed constitutional right to freedom of expression was violated by the provisions stipulated in the Penal Code. The Court's sensitivity to the political context also played a very important role in the annulment of those provisions. The Court found that *Lèse Majesté* provisions are no longer relevant to the current governmental setting that uses a presidential

[84] Justice Harjono's dissenting opinion on the Indonesian Constitutional Court Decision No. 2-3/PUU-V/2007. See also Vicente F Benítez-R, '"With a Little Help from the People": *Actio Popularis* and the Politics of Judicial Review of Constitutional Amendments in Colombia 1955–90' (2021) 19 ICON 1023.

[85] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* [Indonesian Constitution and Constitutionalism]. (Konstitusi Press 2006) 227.

[86] According to Stephen Gardbaum, constitutional tribunals will tend to understand the circumstances surrounding them and can become sensitive to different political influences around them, like the outcome of an election and/or public opinion. See Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?' (2018) 29 Duke J Comp & Intl L 18–27.

[87] Dominic Nardi, 'Indonesia's Constitutional Court and Public Opinion' (*New Mandala*, 22 February 2018) <www.newmandala.org/indonesias-constitutional-court-public-opinion/> accessed 8 June 2023.

system, and, in order to protect the people's sovereignty above the state, the Court decided to repeal the provisions since nobody is higher than the people themselves.[88]

4.3 Authority of the Decision

The finality of the Constitutional Court's decision is absolute, but the decisions not only solve disputes between the different perspectives of rights. They also force the government not to neglect already existing rights guaranteed by the 1945 Constitution. It needs to be recalled that the problem with Indonesian democracy is not about settling the debates on what rights the people ought to have, but rather pushing the government to commit to the rights guaranteed by the Constitution.[89] Therefore, the Court's level of authority is justified. Dworkin claims that the majority's choice does not always mean it is the best for the general public. Decisions are sometimes forced upon the minority regardless of whether the question of political equality or any moral question has been answered after its promulgation is cleared.[90] To use Waldron's terms, decisional and topical majority decisions may spark moral questions on whether the decisions suit the existing constitutional principles.

Even in the case of Indonesia, the decisional majority—which is at present the governing supermajority in the DPR—may be different from the topical majority in certain issues. The decisional majority agreed to the Job Creation Law while the topical majority pushed for wider public participation and transparency. Similarly, the decisional majority back in the age of the Dutch Colonial Government promulgated the *Lèse Majesté* clause in the Penal Code. This was later retained by the Indonesian national government in its infancy, but further exploited by the ruling majority during the authoritarian New Order era.[91] In order to keep the legislature and their legislation within the boundaries of constitutional democracy, the Court must have the authority to force the state to meet the Constitution's demands. According to Ackerman, this is how to put constraints on the political majority in the legislature—forcing them to follow the principles upheld by the people and laid out in the Constitution as well as preventing them from disregarding popular sovereignty.[92]

[88] Indonesian Constitutional Court Decision No. 013-022/PUU-IV/2006.
[89] Kelsen in Vinx (n 7) 45.
[90] Dworkin (n 71) 16.
[91] Setiawan (n 28).
[92] Ackerman (n 68) 668–669.

Moreover, giving such authority to the Court not only allows it to strike down legislation which violates the 1945 Constitution, but it also serves as a counter-majoritarian institution. The strong review mechanism is utilised to provide adequate institutional checks and balances. The supermajority is still subject to public scrutiny as mandated by the Constitution, further safeguarding citizens' rights and consolidating constitutional democracy.[93] So, the proposition to reject judicial supremacy by Waldron, and Bickel respectively, can be only agreed upon to a certain extent. The Court cannot always enter the political sphere and interfere with its process, but without the Court being one of the key players in pushing for institutional reform through its exercise of constitutional review, constitutional limitation of power will not be realised in Indonesia.[94]

Additionally, giving only a limited amount of authority to the Constitutional Court could also mean rejecting the notion of a 'juristocracy'—a condition that Hirschl finds happening in most democratic countries. The rise of juristocracy is caused by expanding the authorities of the judiciary to promote judicial supremacy and better limitation of power.[95] Expansive power is never good, even for the judiciary. Indonesia made the correct decision to equip the Constitutional Court with the power not to completely annul a law (conditionally constitutional). Furthermore, it may only limit reviewing legislation that is petitioned by citizens and other recognised legal subjects if the petitioners possess constitutional rights that were violated by the law.[96]

Hendrianto also believes that Hirschl's thesis does not fit in the Indonesian context. The authority of the Indonesian Constitutional Court was allocated due to the strong will of both the politicians responsible for constitutional amendments and the wider public at that time to enforce stronger limitations on the ruling government's power.[97] In that spirit, the Court's decision is understood as not something that cancels what the democratic process has established, but as help in improving the democratic process itself. It is in the nature of the

[93] Hendrianto (n 31) 7. See also Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) 10 Journal of East Asian Studies 397.
[94] Kyritsis (n 75).
[95] Hirschl calls this the 'hegemonic preservation' theory, where politicians strategically allocate bigger powers to judges in order to help them defend their authority. Hirschl (n 55).
[96] Asshiddiqie (n 15).
[97] Hendrianto (n 31) 50.

judicial review process that the judiciary simply forces the state to follow the law and gives impact to the legislature's intention.[98]

The points discussed above are well reflected in the recent case of the Job Creation Law whereby the Court declared the Law conditionally unconstitutional. The Law lacked 'meaningful participation' mandated by Article 96 of Law No. 12/2011 on Legislation, due to the DPR not including impacted groups of citizens.[99] The Court helped the DPR and the President to respect the Constitution and to fulfil the right to the participation in government of citizens. It is also important to note that the decision of conditional unconstitutionality gives some room for the Law to be implemented under certain conditions. This, in turn, does not undermine the importance of the democratic process. The Court respects the political majority's decision but still ensures the Law aligns with constitutional principles.

4.4 An Answer to Tyranny of the Majority

Waldron's question on whether strong judicial review is the right answer to tyranny of the majority will be discussed next. As explained in the previous sections, Indonesia's democratic institution is not in good working order. The supermajority bars the public from actively participating—the House of Representatives is unlikely to represent the citizens as discussed previously—and from seeing a transparent decision-making process in the government. Punishment for dissidents and interventions in other state institutions are also swift. The combination of all those phenomena strongly hints the state is becoming tyrannical. Those tyrannical signs can only be tackled by a mechanism of strong constitutional review. Waldron also argues that even a judicial decision can become tyrannical when it does not recognise, or even disregards, different perspectives on the disagreements of rights issues. Seeing how the judiciary can be one-sided when adjudicating a case on such matters, it can be said that the judicial institution does not allow the contrary viewpoint to be more considered.[100]

However, the case of the Indonesian Constitutional Court is different in this aspect. The Indonesian Constitutional Court's involvement in the political sphere is a control mechanism towards political power to ensure respect for the constitution as the apex law. The 1945

[98] *Osborn v Bank of the United States* 22 US 738 (1824).
[99] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020. See also Mahy (n 25).
[100] Waldron (n 9) 1379–1384.

Constitution contains the fundamental norms that lay down the foundation of the state.[101] By entrusting the Court with the power to assert the dominance of constitutional principles, interbranch checks will become more effective and the process will encourage institutional reform for both the executive and legislative branches.[102] Alternatively, the mechanism serves as a channel for the people, particularly for minorities, to be acknowledged whenever the legislature fails to do so, such as in the case of Job Creation Law.

The role of the Indonesian Constitutional Court also highlights the importance of 'judicialisation of politics'. Hirschl describes this as a channel for the people to further assert constitutional provisions over the executive and the legislature through the process of adjudication. This means the judiciary has more political influence than ever to limit state institutions, despite only being a negative legislator.[103] However, an effective judicialisation of politics can only be achieved by fulfilling certain conditions. Justices shall have their own ideological preferences that are independent of the government or the legislature. Whenever Constitutional justices are faced with constitutional questions, they are not always inclined to defend what the state wants, even if there is a principle of presumption of validity (*praesumtio iustae causa*) that applies in every constitutional review case. Variations in justices' preferences, regardless of which institutions they were appointed by, are going to ensure robust constitutional control and their interpretations can go beyond mere formalism.[104]

Unfortunately, the lack of variations of ideological preferences recently led to a decline in the quality of the Indonesian Constitutional Court in the past few years. This decline is due to various circumstances, ranging from the deference of Constitutional justices to the members of the government to the sudden replacement of Constitutional justices. For instance, the case of Justice Arief Hidayat who was reported for lobbying several DPR representatives to endorse and re-elect him as the Chief Justice.[105] Other cases include the amendment of the Law of the Constitutional Court and the sudden dismissal of Justice Aswanto—who had two years left to his tenure—by the DPR because he went 'against' the government's agenda.[106] In fact, political power's intervention in judicial institutions can be damaging to the independence and

[101] Asshidiqie (n 86) 226.
[102] Ginsburg and Huq (n 18) 214.
[103] Hendrianto (n 31) 18.
[104] Huq and Ginsburg (n 18) 146.
[105] Hendrianto (n 31) 231–232.
[106] Asshiddiqie (n 15).

impartiality of the Court, and those attempts can be seen as ways to pack the Court to align with the supermajority's preferences in which the Court loses its 'judicial heroism'.[107] Further, judicial heroism is an important aspect that contributes to the effectiveness of a strong review system. Despite being a very difficult term to define, Cass Sunstein defines it as judges being 'entirely willing to invoke an ambitious understanding of the Constitution to invalidate the decisions'.[108] Of course, Sunstein's definition must come with conditions. The conditions include that the decisions in question have been found to ignore constitutional rights and the Court has some clear limitations on their powers so that the Court would not be tyrannical.

The Court must be faithful to the protection of individual liberties. Whenever the citizens petition for a review of a provision or a statute that is violating their fundamental freedom, the Court must prioritise its protection. Failure to exercise this protection will result in governing institutions being more susceptible to abuse of power and repression of opposition groups. For instance, when President Jokowi passed the Government Regulation in Lieu of Law on Mass Organisation,[109] the Constitutional Court should have been the institution to strike down the Law when a petition to review the constitutionality of the Law was filed as its delivery had now shrunk the freedom of association in the country.[110] Furthermore, giving expanded power and authority to a judiciary could also undermine the protection of citizens' rights.

The Thai Constitutional Court serves as an example of an overly-expanded judicial authority. They submitted themselves to the ruling military junta and disbanded several pro-democracy parties from 2015 to 2018, resulting in the repression of civil and political rights.[111] In 2017, the Thai military dictatorship held a referendum to draft and ratify a new Constitution. Unfortunately, the drafting process was limited so that only the members of the military government could have a vote in the deliberation. Nonetheless, the newly ratified Constitution now allocates greater power to the Court, such as dismissing the membership of representatives and dissolving political parties based on citizens' petitions. This is by no means a good thing, as it encourages the removal of opposition party members, allowing the military government to fill those seats with their own candidates and consequently decrease the resistance in

[107] Hendrianto (n 31) 15.
[108] Cass R Sunstein, 'Constitutional Personae' (2014) 2013 The Supreme Court Review 436.
[109] See sub-section 2.1.
[110] Satrio (n 61) 279–280.
[111] Eugénie Mérieau, 'Democratic Breakdown through Lawfare by Constitutional Courts: The Case of Post-"Democratic Transition" Thailand' (2022) 95 Pacific Affairs 475..

governance.[112] As a result of the increased power, the Court is more committed to protecting the longevity of the military government, undermining the effectiveness of separation of power and weakening the protection of freedom of association. Thus, the allocation of judicial power—especially when the judiciary often interacts with constitutional and political issues—must be proportional. Extensive power may turn the Court tyrannical, but keeping it to a bare minimum will not guarantee to save constitutional democracy.

5 Defensible Practice for a Decaying Democracy

By observing the experiences of Indonesia, from its blooming democracy at the beginning of the 21st century to its regression in the last five years, it is clear that the Indonesian Constitutional Court is still the preferred institution to solve constitutional issues in the nation. Despite criticisms of the global practice of strong constitutional review conducted by judiciaries around the world, it should not be scrapped for Indonesia's new but declining constitutional democracy. The mechanism was meant to impose constitutional limitation of powers to the political power-holders and to preserve the supremacy of the 1945 Constitution. The Court has had democratic legitimacy since it was born from the public's demands to prevent the rise of another authoritarian regime. It is also an alternative channel for citizens to fight for their rights when the DPR fails to consider them. Moreover, the Court's decision does not always result in the annulment of laws but can be decided as conditionally constitutional to improve political process in the DPR. This mechanism is the best way to prevent the supermajority in the government from becoming tyrannical. Of course, Indonesia's constitutional democracy cannot be saved through the practice of strong review without keeping a number of things in mind. The mechanism still has some flaws. Constitutional tribunals should expand the diversity of ideologies between Constitutional justices to maintain robustness in the decision-making process. Full commitment to the protection of fundamental rights is a must for the Court. Although there is a principle of *presumptio iustae causa,* the principle of 'constitutional supremacy' should prevail. With those things applied, the strong constitutional review can become the best mechanism to preserve constitutional limitation of power, which in turn can save Indonesian democracy.

[112] Eugénie Mérieau, 'Democratic Breakdown through Lawfare by Constitutional Courts: The Case of Post-"Democratic Transition" Thailand' (2022) 95 Pacific Affairs 475.

Contextualising the Law on Pre-Nuptial Agreements in England: A Comparative Study and a Proposal for Reform

Emily Patterson

Abstract

Over ten years ago, Lady Hale stated 'there is not much doubt that the law of marital agreements is in a mess.'[1] However, with no reforms being implemented, the 'messy law' subsists. This article analyses the English legal approach and compares it with the Australian one to discuss whether statutory change to make pre-nuptial agreements (PNAs) legally binding is needed. It will argue against the stereotype that PNAs are only suitable for uber-wealthy individuals and instead claim that PNAs should be considered by anyone wishing to protect their assets. First, the conventional objections to PNAs and the transformation of traditional attitudes are explored; demonstrating that such objections are no longer influential. This is followed by a discussion of English case law explaining the difficulties posed in applying precedent. The Australian law is then examined, outlining the effects that binding financial agreements have had for the public and practitioners. Finally, a proposal for reform by the Law Commission is evaluated, in tandem with the Australian law, to suggest what change to the English approach could look like. The article concludes that PNAs should be made legally binding, to respect the autonomy of individuals and to provide practitioners with clarity when advising clients, but that safeguards are paramount in this reform process to minimise the risks associated with the formation of PNAs.

[1] *Radmacher v Granatino* [2010] UKSC 42 [133].

1 Introduction

Pre-nuptial agreements (PNAs) exist differently within a legal context than media portrayal. Media accentuation of high-profile divorces has presented PNAs as underhand contracts that protect extreme wealth. This article challenges this stereotype and suggests that since PNAs, in their simplest form, protect individual assets in divorce, they are suitable for all parties entering a marriage. With recent statistics outlining that 41% of marriages do not make it to their 25th anniversary,[2] methods of dealing with assets post-divorce, such as legally binding PNAs, need to be addressed.

To understand the embedded stereotypes and provide an alternative perspective suggesting that these agreements are suitable for wider use, society's view on PNAs will first be contextualised. Having opposed these stereotypes, the article will outline the current legal status of pre-nuptial agreements following the case of *Radmacher* and the limitations of the law through understanding precedents set within case law. Following this, the traditional objections of adopting legally binding PNAs will be identified and subsequently criticised for their lack of evolution to a 21st century society.

The article then turns to the Australian approach as inspiration for potential improvements. Australia was chosen for several reasons. It is historically associated with the UK and is a member of the Commonwealth. Australia operates as a unitary state as does the English legal system, and most importantly, Australia has taken a progressive approach in relation to PNAs. After understanding the Australian framework, both the legal and practical implications will be analysed to ascertain whether this approach would be suitable for English law to introduce and what areas need to be addressed before its implementation.

The article will ultimately conclude that to mirror society's progressive views and to clarify the legal position of pre-nuptial agreements reform is desperately needed. Using the Australian approach as a suggested framework provides some progressive ideas for such a reform, however

[2] Office for National Statistics, 'Divorces in England and Wales 2021' (*ONS*, 2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2022#:~:text=3.-,Divorce%20rates,(opposite%2Dsex%20only).> accessed 6 April 2024.

the implementation of safeguards under this reform does raise concerns and would need to be addressed before any English reform.

2 PNAs and the English Law

2.1 What is a PNA and why does it Matter?

English law does not provide a statutory definition of PNAs; without this, they are 'a somewhat ill-defined, yet extremely wide, category'.[3] Dalling provides a suitable definition for this article, defining a PNA 'as a contract that is entered into by a couple intending to marry, prior to the date of the marriage, which purports to regulate the financial aspect of any future reallocation of assets upon divorce.'[4] The standard motivations for a PNA are one party has generated wealth in the form of inheritance or from a successful career, which they wish to protect from a spouse in the event of divorce. The stereotypical purpose being to retain as much of one's individual assets as possible.

Considering this, PNAs have generally been regarded by society as only suitable for the 'uber-wealthy'. This article will challenge this stereotype, advocating that PNAs are appropriate for wider public use. When discussing PNAs, it should be emphasised that they are applicable for all who wish to protect their assets. This has been reinforced by the courts who stressed that those entering PNAs are not solely for 'the predominantly male super-rich anxious to ensure that the contemplated marriage will prove too expensive on its future dissolution'.[5] Practitioners have outlined that the range of assets dealt with as part of a PNA, have varied from £50,000 to up to £250 million.[6] Therefore, PNAs are 'no longer restricted just to an elite band of people in 'big money' cases'[7] and, should be considered regardless of wealth.

[3] Clare Robinson, 'Pre-nuptial Agreements—the End of Romance or an Invaluable Weapon in the Wealth Protection Armoury?' (2007) 13 Trusts & Trustees 207.
[4] Samuel Jed Dalling, 'Regulating Prenuptial Agreements: Balancing Autonomy and Protection' (2013) Durham University 2.
[5] *Radmacher v Granatino* [2009] EWCA Civ 649 [27].
[6] Emma Hitchings, 'A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements: Research Report for the Law Commission' (University of Bristol 2011) 31.
[7] Anne Barlow & Janet Smithson 'Is Modern Marriage a Bargain: Exploring Perceptions of Pre-Nuptial Agreements in England and Wales (2012) 24 Child & Family Law Quarterly 307.

The 'greater emphasis on self-determination and self-sufficiency'[8] within family law provides the optimal backdrop for understanding the importance of pre-nuptial agreements. The certainty provided by a legally binding agreement would be opposite to financial remedy proceedings where the overriding decision is made by a single judge if parties cannot agree. As Robinson suggests, 'it seems inevitable that, given the prospect potentially of losing half of your assets on divorce, clients are seeking a remedy and are looking to PNAs to provide it.'[9] This is compelling when noting the average cost of litigation for financial remedy proceedings, and the time proceedings can take to finalise. Lord Justice Rix seems to support the position stating that 'it is much better, and more honest, for that agreement to be made at the outset'[10] rather than following a difficult relationship breakdown.

There is no explicit statute concerning the law on PNAs and much of the guidance stems from precedent set within case law. Under section 23 MCA 1973, the court has the power to make a variety of orders, following a decree of divorce.[11] Parties to a PNA cannot override the court's discretion in deciding how to redistribute their assets, however, the agreement is to be considered alongside other factors under section 25(2) Matrimonial Causes Act (MCA) 1973.[12] Therefore, how courts treat agreements will vary on a case-by-case basis[13] creating, 'a somewhat ambiguous standing'.[14] This 'ambiguous standing' of PNAs was arguably emphasised by the case of *Radmacher v Granatino*.

2.2 The *Radmacher v Granatino* Case

The landmark *Radmacher* case took place between Mr Granatino and Mrs Radmacher. The parties signed a PNA in 1998, prior to their marriage of eight years. The parties had two children who were aged four and seven at the time of separation. The PNA was encouraged by the wife's family, as she was to inherit a proportion of the family's wealth. The agreement defined that 'neither party was to derive any interest in or benefit from the property of the other party during the marriage or on its termination.'[15] When the agreement was drafted, the husband earned

[8] Dalling (n 4) 13.
[9] Robinson (n 3) 207.
[10] *Radmacher* (n 5) [73].
[11] Matrimonial Causes Act 1973 (MCA) 1973 s 23.
[12] MCA 1973 s 25(2).
[13] Gareth Miller, 'Prenuptial agreements in English Law' (2003) 6 PCB 416.
[14] Brigitte Clark 'Prenuptial Contracts in English Law: Capricious Outcomes or Legislative Clarification?' (2010) 32 The Journal of Social Welfare & Family Law 238.
[15] *Radmacher* (n 1) [12].

£120,000 a year until 2002, where he began studying for a doctorate, which reduced his income. Originally, Mr Granatino was awarded £5.5m to provide a home and form of income, however in the Court of Appeal it was held that 'the award should make provision for the husband's role as the father of the two children but should not otherwise make provision for his own long-term needs'.[16] Mr Granatino appealed to the Supreme Court which raised the question of what principles should be applied when considering the weight attached to an agreement.[17]

The Supreme Court emphasised that 'it is the Court, and not any prior agreement between the parties, that will determine appropriate ancillary relief when a marriage comes to an end.'[18] However, the judges approached the enforceability differently, than had ever been done in previous cases. Two main issues were raised within the case: what circumstances in the making of the agreement should detract from its enforceability, and whether under the circumstances at the time of divorce it would be fair or just to depart from the agreement.[19] The court proposed the following test; if 'both the husband and wife … enter into it of their own free will, without undue influence or pressure, and informed of its implications',[20] the PNA will be considered legally binding. The judgment confirmed that the court is right to give decisive weight to PNAs,[21] satisfying this test.

The court referred to the government consultation 'Supporting Families',[22] which contained suggested scenarios where an agreement would not be legally binding, regardless of the case's circumstances. These included: where there are children involved, where the agreement is unenforceable under contract law, or would cause significant injustice, where there has not been full disclosure of assets, and where the agreement is made less than 21 days prior to marriage. It was suggested these would act as safeguards in the formation of agreements, as Lord Phillips outlined 'it is necessary to have black and white rules of this kind if agreements are otherwise to be binding'.[23] Lord Phillips highlighted that where duress, fraud or misrepresentation are present, this will 'negate any effect the agreement might otherwise have'[24] and conduct that

[16] Ibid [16].
[17] Ibid [2].
[18] Ibid [7].
[19] Ibid [67].
[20] Ibid [68].
[21] Ibid [70].
[22] Ministerial Group on the Family 'Supporting Families: A Consultation Document' (1998) 12 PCLB 5–7, para 4.24
[23] *Radmacher* (n 1) [69].
[24] Ibid [71].

falls short of duress 'will also be likely to eliminate the weight to be attached to the agreement'.[25] However, he concluded that whilst safeguards are 'likely to be highly relevant',[26] he outlined that 'there is no need for them'[27] to be prescribed into law.

The court proposed that an agreement satisfying the test would be legally binding unless 'in the circumstances prevailing it would not be fair to hold the parties to their agreement'.[28] This sought to address concerns of upholding an agreement 'where there has been a significant passage of time and change of circumstances since the signing of the PNA'.[29] Unsurprisingly, the first material change in circumstance being a child of the parties under the age of 18.[30] The court emphasised that it would be important to give respect to the individual autonomy of the parties in signing the agreement[31] and the exclusion of 'non-matrimonial property'[32] when considering an agreement's fairness. The court highlighted the importance of parties' present and future needs concluding an agreement would not be upheld if it placed either party 'in a predicament of real need'.[33]

The majority ruled it would be fair to give 'decisive weight' to the agreement and Mr Granatino should have only been granted provision due to his role as a father, as the Court of Appeal had held. However, Baroness Hale provided a dissenting opinion centred around the premise a PNA may be deliberately designed to disadvantage one spouse in the event of divorce.[34]

2.3 Developments following the *Radmacher* Precedent

The *Radmacher* case demonstrates a transformation in how PNAs will be considered. However, overturning the orthodox approach without prescribing it into law has created a 'varied and unpredictable position of pre-nuptial contracts under judicial consideration' which 'leaves the law potentially costly and urgently in need of legislative attention.'[35] This is evident in the post-

[25] Ibid.
[26] Ibid [69].
[27] Ibid.
[28] Ibid [75].
[29] Clark (n 14) 243.
[30] MCA 1973 s 25(1).
[31] *Radmacher* (n 1) [78].
[32] Ibid [79].
[33] Ibid [81].
[34] Nigel Lowe and others, *Bromley's Family Law* (12th edn, OUP 2021) 324.
[35] Clark (n 14) 245.

Radmacher case law, which has dealt with issues of fairness and need, and circumstances arising from the formulation of PNAs.

The issue of fairness and parties' needs, divided the justices in *Radmacher* however, the courts have subsequently, adopted a more lenient approach. In *Luckwell v Limata,*[36] the parties signed a PNA and two post-nuptial agreements outlining the husband would not make a claim on his wife's property upon divorce. However, the court chose not to uphold the agreement since it would have placed the husband in 'real need'. This demonstrated that 'current and likely future need'[37] could outweigh an agreement that would have otherwise been legally binding under the *Radmacher* test. Similarly, in the case of *Ipekçi v McConnell,*[38] Justice Mostyn emphasised that 'needs when assessed in circumstances where there is a valid prenuptial agreement' should not be considered 'markedly less than needs assessed in ordinary circumstances.'[39] This highlights that in determining the weight given to an agreement, needs will always be considered despite parties having signed an agreement outlining a different distribution of assets. However, as Bray emphasised, ''need' is a subjective concept',[40] open to a judge's interpretation and is therefore, difficult to identify.

When considering safeguards, 'sound legal advice is obviously desirable'[41] as Lord Phillips stated, acting as a sign of the parties' 'determination and their intention to create legal relations.'[42] The extent of this, however, is difficult to understand within case law.

In *Kremen v Agrest,*[43] the PNA was not upheld following the wife not having received independent legal advice. Justice Mostyn emphasised 'that it will only be in an unusual case where it can be said that absent independent legal advice',[44] a marital agreement will be upheld. However, in *Versteegh v Versteegh,*[45] even though the wife made the same argument, the court upheld the agreement concluding that in jurisdictions where PNAs are commonplace, the individual will likely understand the repercussions of the agreement regardless of receiving

[36] *Luckwell v Limata* [2014] EWHC 502 (Fam).
[37] Ibid [138].
[38] *Ipekçi v McConnell* [2019] EWFC 19.
[39] Ibid [27].
[40] Judith Bray, 'The Effect of "Fairness" on Prenuptial Agreements' (2014) 26 Denning Law Journal 273.
[41] *Radmacher* (n 1) [69].
[42] Anne Sanders, 'Private Autonomy and Marital Property Agreements' (2010) 59 The International and comparative law quarterly 593.
[43] *Kremen v Agrest* [2012] EWHC 45 (Fam).
[44] Ibid [73].
[45] *Versteegh v Versteegh* [2018] EWCA Civ 1050.

independent legal advice. This demonstrates inconsistencies in applying the precedent providing little certainty as to the importance of independent legal advice to the court. It is also concerning when noting that 94% of people find it 'very or fairly important for both partners making a binding PNA to take legal advice',[46] with some even regarding it as 'fundamental to the basic concepts of English culture of fairness and justice.'[47]

The the extent to which parties disclose their financial assets is also considered an important safeguard. As Clark emphasises, 'the law remains unclear as to the extent of the effect of non-disclosure of assets on the weighting of the PNAs in the ancillary relief exercise.'[48] It was highlighted in *BN v MA,*[49] that full disclosure is not 'a necessary pre-condition' to satisfy the criteria for fairness.[50] Despite this, the agreement in *WW v HW*[51] was upheld although the husband disclosed exaggerated financial figures. The court determined that this was done to 'deliberately mislead' his future wife and her legal advisers to ensure the marriage took place.[52] Similarly, in *Z v Z,*[53] the agreement was upheld, despite the wife only being aware her husband 'was doing well'[54] financially. However, whilst there may be some flexibility in the case law, 'cases where these safeguards are not present should be the exception rather than the rule.'[55]

As outlined in *Radmacher* undue influence and duress are vitiating factors however, the courts have enforced a high threshold for evidence of their presence. In *KA v MA,*[56] the husband threatened not to marry unless his wife signed a PNA, which she did, despite being under 'immense pressure to do so.'[57] The court concluded this did not amount to an 'exploitation of a dominant position'[58] vitiating the wife's signing of the agreement since both parties were 'mature, consenting adults.'[59] Similarly in *V v V,*[60] a young pregnant woman signed an agreement with her husband who is ten years older. The wife raised the children and the

[46] Joanna Miles, 'Marriage and Divorce in the Supreme Court and the Law Commission: For Love or Money? (2011) 74 Modern Law Review 308.
[47] Dalling (n 4) 103.
[48] Clark (n 14) 242.
[49] *BN v MA* [2013] EWHC 4250 (Fam).
[50] Ibid [30].
[51] *WW v HW* [2015] EWHC 1844 (Fam).
[52] Ibid [18].
[53] *Z v Z* [2011] EWHC 2878 (Fam).
[54] Ibid [46].
[55] Anna Heenan, 'Family: The After-Shock' (2012) 162) New Law Journal 797.
[56] *KA v MA* [2018] EWHC 499 (Fam).
[57] Ibid [39].
[58] Ibid [60].
[59] Ibid.
[60] *V v V* [2011] EWHC 3230 (Fam).

husband worked. The court concluded, applying *Radmacher*, that the weight given to the PNA should not be reduced due to the 'inequality of bargaining position'[61] as 'the agreement was not one that was not willingly and honestly entered by both parties.'[62]

Both cases demonstrate that in determining whether a vitiating factor is present, the court tends to take a stricter approach. This stricter approach is concerning since a lack of equal bargaining position has been outlined as 'a potential danger with a PNA'[63] and the lack of undue influence or pressure was an important element of the test laid out in *Radmacher*.

2.4 How has *Radmacher* affected Practitioners advising on PNAs?

As inferred, it is difficult to ascertain how much weight the court assigns to factors in the context of PNAs. Therefore, an unsurprising consequence for practitioners is how successfully they can advise their clients when drafting a PNA.

The key challenge for practitioners' is identifying a clients' needs; as Miller highlights, 'the position becomes all the more complex'[64] when predicting these needs for a fair PNA. Since *Radmacher*, demand for PNAs has increased 'by those attempting to combat the uncertainties of divorce'.[65] However, practitioners highlighted a tendency for these enquiries to 'drop-off.'[66] Whilst practitioners cited a number of reasons why clients did not follow through with agreements, a common reason was 'no guaranteed outcome'.[67] This suggests when clients gain a fuller understanding of the legal status afforded to PNAs, they are deterred from drafting the agreement. Therefore, 'there remains considerable scope for parties to dispute the amount of weight to be afforded to an agreement',[68] increasing costs, a consequence that parties seek to avoid in drafting a PNA.

[61] Ibid [64].
[62] Ibid.
[63] Miller (n 13) 422.
[64] Jan Miller, 'Pre-nuptial Pursuit' (2015) 165 New Law Journal 11.
[65] Heenan (n 55) 796.
[66] Hitchings (n 6) 23.
[67] Ibid 24.
[68] Miller (n 64) 10.

As Dalling contends, 'both autonomy and protection are embraced to varying degrees'[69] in the case law. The lack of 'hard and fast rules'[70] makes it almost impossible for practitioners to conclusively advise clients and deters parties from pursuing this as a form of protecting their assets. Further statutory guidance is needed to provide guidance outline the legal standing of binding PNAs and the formalities required to make a valid agreement, in order promote PNAs as a successful method of protecting assets.

3 'Legally binding PNAs': A Good Idea?

3.1 In Support of legally binding PNAs

The lack of clarity in the current legal position highlights that a legally binding PNA would allow for a smoother transition upon divorce. The current dynamic social context only strengthens this position further. For example, it is obvious the 'nuclear family' is no longer the norm and families exist in many different forms that the law must consider. Ribet contends that PNAs would be a 'sensible option' for divorced couples where both parties have had their individual assets reduced having undergone divorce proceedings with a previous partner.[71] A legally binding PNA ensures all parties' assets remain their property, avoiding fears of losing assets as experienced following their first divorce.

Similarly, Dalling outlined that 'a higher median age at first marriage coupled with an increased volume of remarriages'[72] means newlyweds now hold significant wealth prior to marriage which may require protection. This demonstrates there is no conventional formula for marriage; parties enter marriage at different ages having acquired various levels of wealth. As Lady Hale outlined in *Radmacher*, 'nowadays there is considerable freedom and flexibility within the marital package'[73] and a legally binding PNA would give all parties the freedom to protect their assets.

However, whilst social attitudes have significantly transformed over recent years, the objections to a legally binding pre-nuptial agreement still seem to carry weight amongst society and practitioners.

[69] Dalling (n 4) 14.
[70] Stephen Gilmore and Lisa Glennon 'Hayes & Williams' Family Law' (7th edn, OUP 2020) 80.
[71] Julian Ribet, 'Hedging One's Bets' (2010) 160 New Law Journal 1479.
[72] Dalling (n 4) 5.
[73] *Radmacher* (n 1) [132].

3.2 Conventional Objections

The most common objection cited is that PNAs 'foresee the end of a marriage before it has even begun',[74] making the parties' separation imminent. This has shaped the legal approach of many jurisdictions that such agreements 'violated public policy because they facilitated divorce'.[75] Public policy arguments focus on the protection of the public rather than the individual.[76] Leech argues that the 'historic repugnance' exhibited by English law towards PNAs and their anticipation of a failed marriage centres around the sanctity of marriage.[77]

When noting the intrinsic links marriage holds with religion, this is particularly convincing. It could be suggested the legal system has mirrored the sacredness of marriage through enforcing policies providing it with stronger legal protection. This is supported by Lady Hale in *Radmacher,* who contended that marital status means the parties 'contract into a package which the law of the land lays down' which traditionally was shaped by religious ideals.[78] Under this view, parties to marriage should 'not (be) free to vary at will'[79] their own affairs and it is the responsibility of the state to ensure marriage is afforded its 'higher status'.

Whilst this argument is persuasive under society's lens, legally it has been argued that PNAs no longer violate public policy. In *MacLeod v MacLeod,* a Privy Council decision which discussed a post-nuptial agreement, the validity of marital property agreements was discussed and concluded that it is time for the public policy rule 'to disappear'.[80] This was justified as the rule was founded on the assumption there is 'an enforceable duty of husband and wife to live together' however, this duty no longer exists.[81] Some argue that this does not legitimise the abolition of the 'public policy argument' since it is a Privy Council decision, meaning its precedent is not binding on the English courts. Nevertheless, the judgment has been cited to demonstrate the public policy argument no longer exists by institutions recognising the weaker

[74] Robinson (n 3) 209.
[75] Sanders (n 5) 582.
[76] Dalling (n 4) 15.
[77] Stewart Leech, 'With "All" My Worldly Goods I Thee Endow—The Status of PNAs in England and Wales' (2000) 34 Family Law Quarterly 198.
[78] *Radmacher* (n 1) [132].
[79] Sanders (n 5) 581.
[80] *MacLeod v MacLeod* [2008] UKPC 64 [39].
[81] Ibid [38].

'status' of marriage. For example, the Law Commission quoted the decision in concluding that 'the evolution of the law and changed social attitudes have rendered this public policy rule obsolete'.[82] As Lord Justice Thorpe summarised 'marriage is not generally regarded as a sacrament and a divorce is a statistical commonplace'.[83]

A more convincing argument against legally binding PNAs is protecting a financially weaker spouse. This stems from the fear that 'allowing couples to oust the jurisdiction of the court to make orders for financial relief'[84] could leave the weaker in desperate financial need. Lady Hale highlighted in *Radmacher*, that this is central to the concept of a PNA. She outlined that society 'can all too easily lose sight of the fact that … the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she would otherwise be entitled'.[85] Lady Hale also specified the 'gender dimension'[86] to such agreements, as the financially weaker spouse is generally the woman. Some argue gender roles are blurred within 21st century marriages however, many couples continue to adopt the stereotypical 'homemaker/breadwinner' roles within their family dynamic.[87] Therefore, there is a disparity in how legally binding PNAs may negatively affect women compared to men.

This links to the concern that PNAs create a financial incentive.[88] In drafting a PNA, parties can avoid court proceedings and escape responsibility of spousal maintenance.[89] As a result, there is a risk to the state of using finite resources to provide for a spouse, who has been left vulnerable through relying on a PNA. This highlights the safeguarding concern of pressure to sign an agreement, felt by the economically weaker party, emphasising an obvious power imbalance. As Robinson suggests, 'pressure on a party to enter into a PNA can take the form of obvious direct spoken or written pressure from the other party or, perhaps, their family'.[90] Whilst there may be safeguards in place to minimise this, it is difficult to identify, creating a legitimate concern of financial vulnerability, both for the state and parties entering into an agreement.

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[82] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343 2014) para 4.28.
[83] *Radmacher* (n 5) [29].
[84] Dalling (n 4) 16.
[85] *Radmacher* (n 1) [137].
[86] Ibid.
[87] Dalling (n 4) 22.
[88] Joanna Miles 'Marriage and Divorce in the Supreme Court and the Law Commission: For Love or Money?' (2011) 74 Modern Law Review 431–432.
[89] Ibid.
[90] Robinson (n 3).

Practitioners have highlighted one of their difficulties in providing accurate advice on PNAs is predicting the parties' circumstances in the event of divorce. In one study, the process was described by more than one practitioner 'as attempting to gaze into a crystal-ball'.[91] It was the 'ultimate fairness' of agreements that raised participants' concerns in the Law Commission's consultation[92] as it would be difficult to formulate an agreement that would remain fair for both parties in the possibly distant future.[93] Lady Hale in *Radmacher*, emphasised it would be 'difficult, if not impossible'[94] to do so. However, some practitioners raised that their advice is only 'discretionary' and therefore, should not be treated as definitive by the court or clients.[95] Dr Therese Callus notes that PNAs 'require a certain amount of crystal ball gazing which is neither conducive to a predictable result, nor necessarily fair'.[96]

Considering all the above, any reform should seek to reduce these concerns through implementing safeguards that ensure that parties are aware of the effects of their agreement.

4 The Case Study of Australia: What Could We Do Differently?

4.1 Why Australia?

Australia has historically demonstrated 'an unwillingness to enforce private agreements'[97] removing the court's power to make financial orders upon divorce. Prior to 2000, agreements between spouses could only be entered post-separation and had to be registered with the court.[98] The Family Law Amendment Act 2000, established the ability for binding financial agreements to be entered into before, during or following marriage. The rationale behind this reform was to acknowledge the changing perception of marriage being an 'economic partnership' in addition to a 'social relationship'.[99] The reform provides spouses with greater certainty over

[91] Hitchings (n 10) 38.
[92] Law Commission (n 82) para 5.22.
[93] Ibid.
[94] *Radmacher* (n 1) [176].
[95] Hitchings (n 10) 38.
[96] Law Commission (n 82) para 5.48.
[97] John Eldridge, 'Lawful-Act Duress and Marital Agreements' (2018) 77 CLJ 34.
[98] Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16 International Journal of Law, Policy and the Family 127.
[99] Explanatory Memorandum to Family Law Amendment Bill 1999 5.

their assets post-divorce[100] in response to a changing social context that the English courts have failed to provide thus far.

4.2 Binding Financial Agreements in the Australian Law

The binding financial agreements are defined in section 90B Family Law Act 1975, as a written agreement made 'between people who are contemplating entering into marriage with each other,'[101] to decide 'how in the event of the breakdown of the marriage,'[102] their assets will be dealt with and if either spouse is to receive any maintenance.[103] These financial agreements 'operate as a means of exclusion of the operation of section 79'[104] of the same Act, which grants the court power to 'make such order as it considers appropriate'[105] in property settlement proceedings.

Section 90G(1) emphasises that a financial agreement will be considered binding 'if, and only if' certain requirements are met[106] including: that the agreement is signed by all parties,[107] both parties have received independent legal advice about the effect the agreement has on their rights as well as the advantages and disadvantages of making the agreement.[108] Each party should receive a signed statement by their solicitor stating the advice has been provided,[109] a copy of which is given to the other party and vice versa.[110] In addition, the Federal Justice System Amendment (Efficiency Measures) Act introduced section 90G(1A),[111] following significant case law developments. This states an agreement will be considered binding if it has been signed by all parties[112] but one or more of the other requirements outlined in section 90G(1)[113] is not

[100] Eleanor Rowan, 'A "Thorne" in the Side for Family Lawyers in Australia: Undue Influence and Prenuptial Contracts' (2018) 40 Journal of Social Welfare and Family Law 238.
[101] Family Law Act 1975 (FLA) 1975 s 90B(1)(a).
[102] FLA 1975 s 90B(2)(a).
[103] FLA 1975 s 90B(2)(b).
[104] Christopher J Turnbull, 'Family Law Property Settlements: Principled Law Reform for Separated Families' (Queensland University of Technology 2017) 56.
[105] FLA 1975 s 79(1).
[106] FLA 1975 s 90B(1).
[107] FLA 1975 s 90G(1)(a).
[108] FLA 1975 s 90G(1)(b).
[109] FLA 1975 s 90G(1)(c).
[110] FLA 1975 s 90G(1)(ca).
[111] Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009 sch 4A.
[112] FLA 1975 s 90G(1A)(a).
[113] FLA 1975 s 90G(1A)(b).

satisfied and the court deems it 'unjust and inequitable' for the agreement not to be binding on the parties.[114]

Section 90K sets out circumstances where binding financial agreements will be set aside by the court. These include where the agreement has been entered into fraudulently,[115] where circumstances have changed materially such as a child of the marriage[116] meaning it is impracticable to uphold under these circumstances,[117] where either party has displayed unconscionable conduct[118] and where the agreement would be considered void, voidable or unenforceable under contract law.[119] This is reinforced by section 90KA which states the validity, enforceability and effectiveness of agreements, 'is to be determined by the court according to the principles of law and equity.'[120] The court retains the power to make an order as to the maintenance of a party to the marriage if, the party would be 'unable to support himself or herself without an income tested pension, allowance or benefit.'[121]

The case law of binding financial agreements can be categorised into two groups: the interpretation of section 90G in relation to 'independent legal advice' and the interpretation of section 90K in considering whether to set aside agreements.

A controversial issue surrounds how the courts enforce compliance with the requirements in section 90G. In *J v J*,[122] the wife sought to rely on an agreement without a statement proving the parties had received independent legal advice and the wording on the certificate did not comply with the requirements of section 90G at the time. The court placed 'real significance'[123] on the words 'if and only if', in section 90G and that 'something approaching full compliance, or something that if looked at in a less than strict light, might come close to establishing compliance, is not enough.'[124] Justice Collier concluded that he was not 'satisfied at the time the husband signed the agreement there had been explained to him the advantages and disadvantages of him entering into the agreement.'[125]

[114] FLA 1975 s 90G(1A)(c).
[115] FLA 1975 s 90K(1)(a).
[116] FLA 1975 s 90K(1)(d).
[117] FLA 1975 s 90K(1)(c).
[118] FLA 1975 s 90K(1)(e).
[119] FLA 1975 s 90K(1)(b).
[120] FLA 1975 s 90KA.
[121] FLA 1975 s 90F(1) and (1A).
[122] *J v J* [2006] Fam CA 442.
[123] Ibid [19].
[124] Ibid [20].
[125] Ibid [32].

This issue was also discussed in *Black v Black*.[126] Parties entered an agreement that the parties would both deposit monies into a joint account to purchase a house, to be treated as joint property if their relationship broke down. When this transpired, the husband sought the agreement to be set aside after 'his solicitor did not re-certify the agreement'[127] after amending it. The judge concluded the agreement did contain a statement that was 'certified in the annexure to the agreement',[128] however, the Full Court concluded 'that strict compliance is necessary to oust the court's jurisdiction to make adjustive orders under s.79.'[129] A decision in favour of strict compliance was not positively received by various legal professionals,[130] resulting in the introduction of section 90G(1A) which 'relax[ed] certain requirements'[131] of binding financial agreements and restored confidence in their binding nature.[132]

The second controversy relates to the grounds one may rely on to set aside an agreement under section 90K where the contradictory precedent has muddied the strength of these grounds. In *Blackmore v Webber*,[133] an Australian man began living with a Thai woman who was a student. When she fell pregnant, the couple planned to marry. Five days before their wedding, the husband presented her with a financial agreement which she reluctantly signed two days later after obtaining legal advice. The wife alleged the agreement be set aside for being void under section 90K(1)(b) due to the presence of duress. The court noted that the proximity of the wife signing the agreement to the marriage, the wife's pregnancy, and her impending visa expiration constituted 'illegitimate' pressure on the wife to sign the agreement which amounted to duress.[134]

The more recent case of *Thorne v Kennedy*[135] discussed financial agreements made by a wealthy property developer,[136] and his wife, a less wealthy woman.[137] The husband told his wife that to

[126] *Black v Black* [2008] Fam CAFC 7.
[127] Ibid [27].
[128] Ibid [31].
[129] Ibid [45].
[130] Owen Jessep, 'Marital Agreements and Private Autonomy in Australia' in Jens M Scherpe *Marital Agreements and Private Autonomy in Comparative Perspective* (Bloomsbury Publishing 2012) 35.
[131] Explanatory Memorandum to Federal Justice Amendment (Efficiency Measures) Bill (No 1) 2008 2.
[132] Ibid.
[133] *Blackmore v Webber* [2009] FMCA Fam 154.
[134] Ibid [106].
[135] *Thorne v Kennedy* [2017] HCA 49.
[136] *Kennedy v Thorne* [2016] Fam CAFC 189 [8].
[137] Ibid [7].

marry, a PNA would have to be signed as he wished to leave his fortune to his adult children.[138] The agreement was signed a few days prior to the wedding, despite the wife's solicitor advising the agreement was 'no good' and should not be signed.[139] The High Court ruled that the agreement be set aside due to Mr Kennedy having taken 'unconscientious advantage of Ms Thorne's position of special disadvantage.'[140] They outlined key factors including: the emotional circumstances in which the agreement was entered, whether there was any time for reflection, the nature of the parties' relationships, the relative financial positions of the parties and the independent advice that was received.[141] Prior to this, parties had been able 'to shield behind the principle of independent legal advice to rebut any presumption that advantage has been taken of a superior position.'[142] However, this case demonstrated that independent legal advice is not a complete bar to the presence of a vitiating factor.

4.3 The Effect on Couples and Practitioners

Fehlberg and Smyth's study noted short-term consequences of binding financial agreements, after one year. It was noted that enquiries increased from two-three per year to four-six.[143] They highlighted the groups who made enquiries including: couples with a significant asset disparity, who have previously been involved in family proceedings, or been married before.[144] Wade observed a further pattern of 'counter-culture couples who live in alternative communities and do not want their assets divided under FLA 1975.'[145]

However, enquiries are again, not always followed through. A major factor for this being the 'difficulty experienced at a personal level between couples during the process of negotiating agreements.'[146] It is unsurprising that 'firm belief on the part of clients who are about to embark on a marriage … that nothing can go wrong'[147] results in unsuccessful negotiations. Therefore, the options available to parties are not fully explored.

[138] Ibid [11].
[139] Ibid [16].
[140] *Thorne* (n 135) [74].
[141] Ibid [60].
[142] Renati Grossi, 'The Discomfort of Thorne v Kennedy: Law, Love and Money' (2019) 44 Alternative Law Journal 283.
[143] Fehlberg and Smyth (n 98) 135.
[144] Ibid 134.
[145] John Wade, 'Marriage and Cohabitation Contracts' (2011) 17 The National Legal Eagle 3.
[146] Fehlberg and Smyth (n 98) 135.
[147] Martin Bartfeld, 'Financial Agreements—Just A Little Bit Binding' (2012) 22 Australian Family Lawyer 38.

The main effects that binding financial agreements have had relate to practitioners. As Brierley highlights, 'solicitors have an underpinning role by putting the "binding" in binding financial agreements.'[148] The government anticipated that these agreements would increase solicitors' workload but it was 'not possible to estimate the extent of the increased workload.'[149] The reality being that it has intensified since 'independent legal advice is required in the legislation as the central means of protecting the less advantaged party to a financial agreement.'[150] This determines that practitioners instructed to draft agreements 'have a high risk of being guilty of professional negligence.'[151]

The requirement for solicitors to provide a signed statement proving the advice has been received, raises the issue of practitioners' 'potential professional liability'[152] if the agreement is upheld. The fear of being held liable was emphasised by one study, where a practitioner explained 'he had referred clients wishing to enter financial agreements to other solicitors rather than acting for them himself'[153] to avoid such liability. This is unsurprising when noting Wade's comments that with patterns of marital life, most financial agreements will be re-examined by critical eyes searching for loopholes.'[154] Brierley suggests that the increase in family law claims 'is directly attributable to binding financial agreements and the failure of some solicitors to properly understand their responsibility when preparing or drafting a BFA or providing independent advice on one.'[155] This demonstrates that further education should be provided to practitioners.

Another factor exaggerating this issue, is where practitioners draft agreements close to the marriage date. Therefore, solicitors will be under pressure to provide 'quick, rapid, and cheap advice without proper instructions.'[156] The time needed to explain the effect of the agreement

[148] Christopher Brierley, 'Love, Contractually: Risks in Advising on Binding Financial Agreements' (2011) 49 Law Society Journal 54.
[149] Explanatory Memorandum to Family Law Amendment Bill 1999 8.
[150] Fehlberg and Smyth (n 98) 137.
[151] John Wade, 'The Perils of Prenuptial Financial Agreements in Australia: Effectiveness and Professional Negligence (Bond University 2012) 1.
[152] Fehlberg and Smyth (n 98) 135.
[153] Ibid.
[154] Wade (n 151) 1.
[155] Brierley (n 148) 54.
[156] Helen Richter, 'Binding Financial Agreements: Assessing and Managing the Risks' (2001) 23 Law Society of South Australia 35.

to the client and the 'increased cost of adequately performing that role'[157] contrasts the service most clients will be expecting.

This study was conducted prior to the introduction of section 90G(1A) which allows agreements with errors to remain legally binding. Yet, as the Legal Practitioners' Liability Committee (LPLC) outlines 'while this gives some relief for things like referring to the wrong sections in the agreement, it may not go so far as to cure inadequacies in the advice given'[158] and consequently, the protection seems only in relation to drafting mistakes. The LPLC noted that aside from drafting errors, the main areas leading to inaccuracies were either, 'the practitioner failed to give the advice required by s.90G'[159] or 'the practitioner failed to keep adequate file notes of the advice they gave and failed to confirm that advice in writing.'[160] It is important to consider this impact on practitioners as legal developments will become useless if practitioners are unwilling to draft PNAs. Therefore, understanding the view of practitioners is vitally important to best ensure that PNAs are not avoided and are encouraged.

4.4 What can we Learn from the Australian Approach?

In allowing parties to remove the court's jurisdiction the Australian law has 'opted for a relatively certain and inflexible approach to marital agreements where the focus is on the circumstances of an agreement's formation.'[161] It is suggested that whilst the amendments afforded couples autonomy, the judiciary were mindful of needing to 'exercise a protective function.'[162] This is demonstrated through *Black v Black* and *J v J*, where the courts consistently 'upheld the need to fulfil the statutory requirements'[163] to be bound to an agreement. In particular, the focus on independent legal advice has had limitations in its role as a 'safeguard'[164] and places a heavier liability on practitioners. However, as McKay reinforces, on balance 'it is far better to legislate compulsory legal advice and risk professional negligence claims'[165] than leaving parties unprotected.

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[157] Brierley (n 148) 54.
[158] Legal Practitioner's Liability Committee, 'Focusing on Family Law: An LPLC Practice Risk Guide' (*LPLC*, 2020) 5 <https://lplc.com.au/resources/practice-risk-guides/focusing-on-family-law> accessed 2 May 2023.
[159] Ibid 9.
[160] Ibid.
[161] Eldridge (n 97) 35.
[162] Dalling (n 4) 81.
[163] Ibid.
[164] Fehlberg and Smyth (n 98) 137.
[165] Anita Mackay, 'Who Gets a Better Deal? Women and Prenuptial Agreements in Australia and the USA' (2003) 7 University of Western Sydney Law Review 121.

However, the influence of this advice on enforcing agreements has decreased following *Thorne v Kennedy* concluding that advice would not act as a bar to vitiating factors, in addition to section 90G(1A) allowing for mistakes within agreements. Some practitioners argue that judicial intervention undermines the certainty of agreements and 'if courts are cautious about enforcing agreements, the effectiveness of legislation allowing BFAs is in practical terms undermined.'[166] This is stressed by practitioners emphasising that the legislation makes 'it hard to guarantee that a client would in the future have the "certainty" they were hoping to achieve.'[167] Therefore, legal professionals wish for 'the return of approval of agreements by a court'[168] to escape their liability. In contrast the courts are reluctant to do this due to lack of resources.[169] The issue has subsequently evolved into 'whether the closely-bounded analysis required by the Australian scheme'[170] is an appropriate price to pay for providing autonomy to couples through binding financial agreements.

5 Is Change Needed and What Might Change Look Like?

5.1 Changing PNAs Law: Advantages and Concerns

A frequent comment within the debate on PNAs is how they are treated by English law versus other jurisdictions. One group characterised the law as 'increasingly out-of-step with international practice'.[171] The lack of uniformity across jurisdictions has meant that 'international issues often arise in cases involving nuptial agreements'[172] as 'those with significant assets who may have an international lifestyle'[173] stereotypically would require such an agreement. Disputes become complex where parties originate from different jurisdictions, leading to as Beaton outlines, separating couples racing to seize the jurisdiction with which

[166] Belinda Fehlberg, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform' (2018) 46 Federal Law Review 385.
[167] Fehlberg and Smyth (n 98) 136.
[168] Bartfeld (n 147) 43.
[169] Ibid.
[170] Eldridge (n 97) 35.
[171] Law Commission (n 82) para 5.15.
[172] Practical Law Family, UK Practice Note, 'Nuptial Agreements Overview' <https://uk.practicallaw.thomsonreuters.com/5-521-8765?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 15 May 2023.
[173] Ibid.

marriage has the furthest connection.[174] As stressed by Lord Justice Rix 'we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the members states of Europe.'[175]Achieving legal uniformity in the context of pre-nuptial agreements would allow for a smoother process for all parties and Member States.

The jurisdictions of Sweden, Canada, and certain US states have made PNAs fully enforceable,[176] thus prioritising parties' independence to decide their own distribution of assets. This sentiment is mirrored in the findings of Barlow and Smithson, where 58% of participants agreed that 'binding PNAs are a good way of allowing couples to decide privately what should happen in the event of a divorce.'[177] Lord Phillips emphasised that weight should be given 'to the decision of a married couple as to the manner in which their financial affair should be regulated'[178] being well-informed adults. By not awarding this autonomy and overriding an agreement that parties are happy to be bound by, there is the potential danger of the court being viewed as 'paternalistic and patronising.'[179] As Lord Justice Rix argued, 'there is fairness and justice too in a proper appreciation of party autonomy'[180] and this approach would realise other benefits. As Dalling suggests 'it is conceivable that affording parties such levels of autonomy will strengthen marriage as an institution.'[181]

For those who have been married before and acquired individual wealth, agreements would 'ensure a more stable basis for marriage'[182] and encourage parties to marry who were deterred from it without a PNA. Coupled with the fact that 'the old public policy objections having withered away',[183] the conclusion is it is no longer sensible to restrict the status of PNAs and the law is in desperate need of change.

The overriding concern with introducing legally binding PNAs into English law is ensuring protection of individuals bound by agreements. Some argue that since there are no established rules under the English system, the court can currently 'take full advantage of the flexibility to

[174] Kim Beatson, 'Family: Failing to go the Distance' (2012) 162 New Law Journal 125.
[175] *Radmacher* (n 5) [29].
[176] Roiya Hodgson, 'Pre-Marital Agreements' in Roiya Hodgson (ed), *Family Law* (12th edn, OUP 2021) 125.
[177] Barlow and Smithson (n 7) 307.
[178] *Radmacher* (n 1) [78].
[179] Ibid.
[180] *Radmacher* (n 5) [83].
[181] Dalling (n 4) 27.
[182] Clark (n 14) 241.
[183] Miles (n 32) 439.

alleviate injustice that would otherwise result'[184] and any change in the status quo would threaten this. As raised by Lord Phillips, 'parties who make such agreements are not necessarily on an equal standing, above all emotionally'[185] since they can be blinded by their relationship. This is linked to public concerns regarding gender equality and fairness which was 'linked to a general view that the financially weaker spouse … should not be left with nothing at the end of a marriage.'[186]

Therefore, it is important that 'the court should retain a residual discretion to intervene'[187] as achieved in the US, Canada, New Zealand and Australia, where the courts 'have the final word on whether to hold the parties to what they have signed.'[188] Some suggest this is 'not necessarily going to provide certainty of outcome',[189] but in the words of Miller, is a 'degree of uncertainty such a bad thing if the trade-off is that it enables the court to protect individuals?'[190] A small degree of uncertainty, if only to afford protection, is not an unreasonable suggestion, considering the concerns of two very distinct financial positions of parties' to a PNA.

5.2 Addressing Implementation Concerns

Any implementation of legally binding PNAs is reliant on carefully drafted legislation which protects individuals through appropriate safeguards. It is important to recognise Dalling's comments that the regulation of PNAs cannot be absolutist or rigid.[191] Instead, some flexibility is required to avoid the consequences of tight restrictions experienced by Australia prior to section 90G(1A). A reform proposal suggested by the Law Commission, recommended the introduction of 'qualifying nuptial agreements' according to which the jurisdiction of the court would be excluded provided that certain safeguards were met.[192]

The recommended requirements for a qualifying nuptial agreement differed from that implemented in Australia. Five elements of a binding financial agreement were suggested:

[184] Clark (n 14) 244.
[185] *Radmacher* (n 1) [126].
[186] Law Commission (n 82) para 5.26.
[187] Clark (n 14) 244.
[188] Dalling (n 4) 23.
[189] Ribet (n 71) 1480.
[190] Miller (n 64) 11.
[191] Dalling (n 4) 11.
[192] Ibid para 5.8.

contractual validity, execution, timing, disclosure, and legal advice. Consultees agreed that contractual validity is 'an essential pre-requisite for the validity of a qualifying nuptial agreement.'[193] As a result, these agreements would 'have the protection of the safeguards built into contract law'[194] and so could be considered 'void, voidable or unenforceable'.[195] Agreements will, therefore, be excluded based on undue influence. However, the Commission opted against a presumption of undue influence since 'there will be a risk that a presumption will be found in every case'.[196]

It was recommended that any qualifying nuptial agreement be made in writing, including all express terms, 'to ensure an appropriate level of formality'.[197] A further recommendation was for agreements to be made via deed to 'impress upon the parties the formal and legally binding nature of the agreement.'[198] Parties should also sign a statement 'stating that he or she understands that the agreement is a qualifying nuptial agreement and that it will remove the court's discretion.'[199] These safeguards would ensure parties' awareness of the agreement's effects minimising the risk this would later be challenged.

The Commission suggested a timing requirement would 'relieve the pressure, or the feeling of compulsion, to sign an agreement because of the impending wedding.'[200] However, any statutory time period may be considered 'arbitrary' since 'it would simply be a figure determined, by the legislator, with no real factual grounding or formulaic calculation for its deduction.'[201] The Commission noted imposing such a time limit would only 'divert the pressure to another day',[202] but concluded that ensuring an agreement be signed at least 28 days prior to the wedding would limit the risk of pressure 'even if it cannot be eradicated.'[203]

Another requirement was financial disclosure. One practitioner involved with the consultation, explained that negotiating a qualifying nuptial agreement without disclosure would be like

[193] Ibid para 6.6.
[194] Ibid para 6.11.
[195] FLA 1975 s 90K(1)(b).
[196] Law Commission (n 82) para 6.28.
[197] Ibid para 6.32.
[198] Ibid para 6.35.
[199] Ibid para 6.40.
[200] Ibid para 6.44.
[201] Dalling (n 4) 100.
[202] Law Commission (n 82) para 6.45.
[203] Ibid para 6.65.

'operating blindfolded'.[204] Whilst it is acknowledged that some level of disclosure is paramount to such an agreement, the question is 'whether statute should demand that full and frank disclosure'[205] take place. The Commission adopted that 'the appropriate disclosure requirement is one of disclosure of material information'[206] and defined materiality as 'that which would reasonably be considered to matter to the individual in deciding to enter the agreement.'[207]

The final consideration outlined the advice provided to parties prior to entering the agreement. It is unsurprising that the Commission proposed that 'both parties received legal advice at the time that the agreement was formed'[208] as without doing so, the proposal would do little in addressing concerns of individual protection. However, the Commission provided a different viewpoint as to the advice's content. They recommended practitioners should advise that the agreement would prevent the court to interfere with the financial terms of the nuptial agreement, with the exception of financial needs, and explain how the rights of the party advised will be affected by the agreement.[209]

The Law Commission's proposal and the considerations therein, provide a rounded suggestion for reform inclusive of views from professionals, practitioners, and individuals. The recommended requirements therefore reflect society's priorities of a proposed reform, and can constitute a sound starting point. However, it should be recognised that this is only a proposal; Australia's post-reform experiences will therefore shed light on how recommendations, such as these, may be realised in practice.

5.3 Improving the Law Commission's Approach by Considering Australia's Study

The Law Commission's paper also included specific advice in relation to the proposals that was tailored to practitioners. Considering the new requirement of 28 days, the Commission identified that this could act as a 'potential negligence trap for practitioners',[210] as 21 days is

[204] Ibid para 6.72.
[205] Dalling (n 4) 56.
[206] Law Commission (n 82) para 6.88.
[207] Ibid para 6.93.
[208] Ibid para 6.105.
[209] Ibid para 6.142.
[210] Ibid para 7.48.

currently cited as the usual requirement despite not being statutory. Bartfeld proposed two improvements to Australia's approach. First, a 'cooling off' period allowing parties to reflect on the agreement thus strengthening its validity[211] and second, a sunset clause making agreements lasting several years terminate automatically to prevent them from applying in the distant future.[212] This idea was supported in Barlow and Smithson's study where 'a number of participants spontaneously recommended a sunset clause approach whereby the agreement expired'[213] and these ideas were 'endorsed by the majority of the follow-up sample.'[214] It would therefore be logical to implement these into a reform alongside the Commission's proposals.

Another area covered in the recommendations is that of disclosure which is both key to the process of drafting PNAs and difficult to accurately define for all circumstances. As the Law Commission outlined, 'it is not possible to set out exactly what disclosure will mean in all situations.'[215] As Dalling notes "both parties to financial relief proceedings are already required to 'make full and frank disclosure of all material facts to the other party and the court' as part of a Form E".[216] However, the Commission noted this 'may be too extensive or disproportionate'[217] and proposed having as a minimum requirement the provision of a schedule of assets.[218] Professor John Wade contends that in practice, 'many clients are in too much haste and want to avoid expenses'[219] to make the full disclosure required by the Australian approach. In defining materiality as 'that which would reasonably be considered to matter to the individual in deciding to enter the agreement'[220] the Commission's proposal requires a lower level of disclosure than the Australian approach. Thus, it avoids the practical implications of increasing time and costs.

The most important impact for practitioners, is the safeguard of independent legal advice. In addition to the above requirements of legal advice, the Commission also suggested that advice might 'usefully cover': advantages and disadvantages of the agreement, provision for parties' needs, the need for disclosure and that the agreement will subsist regardless of changes over

[211] Bartfeld (n 147) 42.
[212] Ibid.
[213] Barlow and Smithson (n 7) 311.
[214] Ibid.
[215] Law Commission (n 82) para 7.50.
[216] Dalling (n 4) 121.
[217] Ibid para 7.52.
[218] Ibid.
[219] Wade (n 151) 2.
[220] Law Commission (n 82) para 6.88.

time.[221] The Commission supplemented this, commented on the non-exhaustive nature of the list provided and stated that 'lawyers will need to ensure that they advise fully on the client's specific situation.'[222]

The lack of clarity on what advice would satisfy the independent legal advice requirement is suggestive of a need for a statutory reform to provide a specific outline for what is required. Unlike the Australian approach, the proposal outlines that 'it is for the lawyer to determine the detail' of the advice. [223] This is a concerning proposal placing a heavy burden on practitioners and could lead to inconsistent advice. The Commission proposed that evidence of such advice should be provided through 'a statement signed by both lawyer and client to the effect that the client has been advised.'[224] However, as seen in Australia, statements cannot always be used as conclusive evidence of advice. Consequently, clearer requirements of the formalities of the legal advice should be implemented to avoid disputes arising for practitioners.

6 Conclusion

This article has been focused on critiquing the English law approach to PNAs whilst exploring the rationale underpinning the law's current position. The objections to PNAs are based in the entrenched stereotype that PNAs are only suitable for wealthy individuals and on an old-fashioned notion of marriage. However, perceptions of marriage have been shifting with increased focus on the parties' autonomy and the law should reflect these changes. A wider use of PNAs would be a logical move towards that direction.

An instrumental step in awarding PNAs legal enforceability was made in *Radmacher*. However, the lack of statutory implementation failed to establish principles in how PNAs were to be treated by the courts thereafter. As Lady Hale stated, 'without legislation, it is not self-evident what the right answer should be'[225] and this sentiment has been reflected in subsequent case law. The inconsistencies relating to how safeguards should be applied, how fairness is achieved, and how parties' needs are prioritised, has exacerbated the unclear position of the legal status

[221] Ibid para 7.59.
[222] Ibid para 7.60.
[223] Ibid para 6.143.
[224] Ibid para 6.145.
[225] *Radmacher* (n 1) [156].

of PNAs. Practitioners have therefore struggled to provide advice when applying precedents set by the case law to the position of their clients.

Making PNAs legally binding in England would mirror the approach taken by several other jurisdictions including Australia. Providing individuals the ability to determine the distribution of their own assets would allow individuals to be independent of the court's jurisdiction, mirroring society's focus on autonomy and self-sufficiency.

The Law Commission's proposal provides a sound starting point, however, considering the difficulties Australia has had, the proposal should be reassessed to include certain additions. These are the implementation of a reflection period and 'sunset clause' approach, as well as providing some clarification on practitioners' advice requirements.

It is obvious that without reform, the law on PNAs will remain unclear and convoluted. The legislature needs to acknowledge this and finally give PNAs 'legally binding' status. The relevant statute should be carefully drafted, using the Law Commission's proposal as guidance. It is vital to ensure that adequate protection is provided to individuals entering PNAs and that practitioners are not burdened with substantial legal responsibility, but ultimately, legally binding PNAs can provide certainty as to the distribution of assets upon divorce and therefore are the way forward.

Betrayed, Deceived and Violated: A Critical Feminist Analysis of the *R v Lawrence* Judgment

Lauren Seery-Loudon

Abstract

This article considers the judgment in the case of *R v Lawrence* from a feminist perspective. Currently, scholarly discussion of the judgment highlights several key issues, including the court's failure to recognise pregnancy risks as being closely related to sexual intercourse and the importance of conditional consent in sexual relations. There is a lack of feminist analysis of the judgment in existing scholarship and to fill this gap, this article will first review feminist literature on the notion of consent, discuss a wide range of views in relation to women's capacity and agency to consent, and highlight how sexual relations have always been considered from a male perspective. Then, this article will further explore women's views on the notion of consent and the specific concerns raised in the *R v Lawrence* case through empirical research, findings of which show that women are overwhelmingly uncomfortable with the situation that has arisen in the case and that the majority of women believe that there should be criminal punishment for those who are deceitful in attempts to have unprotected sex. This article will argue that from a critical feminist perspective, the judgment in *R v Lawrence* has failed to justly and fairly assess the consequences closely connected to sexual acts, recognise the conditional consent that was present in this case, and consider women's concerns when consenting to sex.

1 Introduction

Sexual assault is a crime that impacts many women across the UK with statistics showing that one in four women will suffer some sort of sexual assault or abuse in their lifetime.[1] Such crimes are among some of the hardest to prosecute, with only two in a hundred accused rapes resulting in a charge.[2]

R v Lawrence[3] is a case which has brought into question how effective the sexual offences legislation is on managing deceit, especially in relation to the notion of conditional consent. In the case, the defendant lied about having a vasectomy and had sexual intercourse with the complainant, who only agreed to have sex on the basis of the defendant's claims of infertility. The court ruled that this type of deceit did not negate the consent of the complainant. The outcome of this case now sits in case law with discomfort and leaves the position of women's concerns when consenting to sexual acts undetermined.

Legal scholars have questioned the court's failure to consider the deceit involved in the case, the notion of conditional consent, and the close connection between sexual acts and pregnancy risks. Despite the scholarly debate so far, there is a lack of feminist analysis of the judgment in current literature, even though the outcome of the case would significantly affect women if they happen to unfortunately be caught in a similar scenario.

This article seeks to contribute to the current scholarship by providing a critical feminist analysis of the judgment which is missing in existing scholarship. This article will focus on exploring the following questions: What does feminist literature think about consent? To what extent do women consider pregnancy risks when consenting to sexual intercourse? Do women believe that deceit over vasectomy status negates consent? To what extent should the creation of significant risk through the non-disclosure of information impact criminal liability, if at all?

[1] 'Rape, Sexual Assault and Child Sexual Abuse Statistics' (*Rape Crisis England & Wales*, 2023) <https://rapecrisis.org.uk/search/?query=Rape%2C+Sexual+Assault+and+Child+Sexual+Abuse+Statistics> accessed 1 September 2023.
[2] Ibid.
[3] *R v Lawrence* [2020] EWCA Crim 971.

To answer these questions and consider whether the court judgment is fair and just from a feminist perspective, this article will first review the facts, arguments and judgment of the case and consider scholarly commentary on this topic. Second, to ground the feminist analysis, this article will review feminist literature and discuss the wide range of feminist views on the notion of consent in sexual relations. This article will highlight the dominance of patriarchal perspectives and how women's views are excluded. Third, this article will explore women's views on the notion of consent through empirical research. Finally, this article will combine findings from the feminist literature review and empirical research to make two arguments: first, the court judgment fails to consider women's perspectives on consent within sexual relations and second, the notions of deceit and conditional consent need to be reassessed in the court ruling and within the broader legal framework to level the playing field between the parties consenting to sexual acts.

2 What is so Controversial about *R v Lawrence*?

To understand why the *R v Lawrence* case is so controversial, an understanding of consent within current legislation and case law is needed. This section will then consider the facts of the case and the arguments presented by the prosecution and defence before going on to detail the reasoning behind the appeal court's decision. Finally, this section shall discuss the commentary following this case on why the court's decision is contentious.

2.1 What does Consent mean and when can it be Negated? A Review of Current Legislation and Case Law

The Sexual Offences Act 2003 describes consent as follows: 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'[4]

Consent is the most fundamental aspect of deciding whether what took place was sex between consenting adults or rape (or another sexual offence). The absence of consent determines whether a wrong, and a crime, has been committed.

Within the legal framework and subsequent case law, consent can be negated on several grounds. For example, for any sexual activity with a child under the age of 13, consent does not

[4] Sexual Offences Act 2003 s74.

need to be established as children are considered not to have the capacity to consent to such acts.[5] Case law has determined various other incidences when consent is negated, for example if a condom was removed without the knowledge of the other person.[6]

In addition, section 76 of the 2003 Act establishes that a complainant did not consent, and the defendant did not believe that the complainant consented when:

> *'(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;*
> *(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant*'[7]

This section establishes that deceit by a defendant can negate the consent of a complainant in so far as the court can recognise that the deceit was related to the nature and purpose of the act. Additionally, it establishes that the defendant in such cases cannot believe the complainant has consented. It is the court's application of this provision that is pertinent to the debates around the *R v Lawrence* case.

2.2 What is *R v Lawrence* about?

The facts of the *R v Lawrence* case are as follows: The complainant (R) and the defendant (Lawrence) met using an online dating site in 2014. Their messages and phone calls later became sexually explicit. The pair discussed a sexual encounter that R had with another man. Lawrence asked whether the man used a condom. R replied that the man did not wear a condom as 'he had the snip years ago'. Lawrence replied, 'so have I'. Later in July 2014, the pair met in person, spent the evening together, and then returned to R's home. In the evidence submitted to the court, R stated that she made it clear to Lawrence that she did not want to risk becoming pregnant and sought assurances from Lawrence that he had had a vasectomy. Lawrence gave assurances and the pair had sexual intercourse on two occasions without the use of any contraception. Lawrence left during the night and in the morning sent messages to R, stating 'I

[5] Incidents of sexual nature with children under the age of 13 is detailed in the Sexual Offences Act 2003 from ss 5 to 19 as well as Familial child sex offences in ss 25 to 26.
[6] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849; as well as *R (F) v DPP* [2014] QB 581; [2013] EWHC 945 for agreement to withdraw that did not happen.
[7] Sexual Offences Act 2003 s 76.

have a confession. I am still fertile. Sorry.' R read these messages and later found out she was pregnant and underwent a pregnancy termination procedure.[8]

The case was initially heard at the Nottingham Crown Court in 2019, where the jury convicted the defendant to two counts of rape for falsely representing that he had a vasectomy,[9] among other sexual offences against other complainants within the same case. The defendant appealed the counts of rape and took the case to the Court of Appeal in 2020, where the court decided to overturn the previous ruling. The court ruled that the actions of the defendant did not constitute rape and that his false representations did not negate the consent of the complainant. This article discusses the ruling of the case at the Court of Appeal.

2.3 What were the Arguments of the Case?

The prosecution argued that the complainant's consent was vitiated by the defendant's deception as to his fertility status. This relates to section 76 Sexual Offences Act 2003, which highlights that the complainant did not consent when 'the defendant intentionally deceived the complainant as to the nature and purpose of the relevant act'.[10] Prosecutors argued that the defendant's deceit was sufficiently closely connected as part of the act of sexual intercourse. This was because one of the fundamental purposes of sexual intercourse is the 'procreation of children'.[11] The prosecution argued that the deceit should negate the complainant's consent. In essence, the prosecution argued that the complainant's consent was conditional on the defendant not being fertile. The prosecution argued that even if the defendant believed that the complainant was consenting, this was an unreasonable belief given the prior conversations which took place around the subject matter.[12] This links to section 76 of the 2003 Act again, which states that the defendant cannot believe that a complainant consented when they are intentionally deceived.

The defence on the other hand argued that the deceit went towards the *consequences* of the sexual act—namely that there was a risk of pregnancy—rather than to the act itself. They argued that the pregnancy risk was not sufficiently connected with the sexual act. The defence argued

[8] Full details of the facts can be found in the case transcription: *R v Lawrence* (n 3) [3]–[7].
[9] *R v Lawrence* (n 3) [1].
[10] Sexual Offences Act 2003 s 76.
[11] *R v Lawrence* (n 3) [14].
[12] Ibid [6].

that ejaculation entering the vagina was related to an integral part of the sexual act but that the consequence of this ejaculation was not. As the deception went not to the physical act itself, but to the 'quality of the ejaculate and the potential consequences and risks associated with it',[13] the defence argued that the complainant had consented to every aspect of the physical act.[14] The defence cited *Assange*[15] and *R(F) v DPP*,[16] in which consent was on the basis that ejaculate would not enter into the complainant's vagina, and argued that in this case, the ejaculate was 'not sought to be avoided'.[17]

2.4 What was the Court Ruling?

The Court of Appeal accepted the appeal and quashed the defendant's convictions of two counts of rape. The court stated that the deception regarding fertility was not capable of negating consent.[18] The judgment outlined that a lie about fertility was different to lying in regard to wearing a condom or engaging in intercourse not intending to withdraw despite having promised to do so.[19] The court did not believe that the defendant's deception was closely connected to sexual act.[20] Important to the court's reasoning was that the complainant did not impose any physical restrictions to the sexual intercourse.[21] Specifically, the court stated:

> '*she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it.*'[22]

In other words, the court was not convinced that fertility status is related closely enough to the sexual act in order to negate consent and ruled that the incidents that took place were not rape.

[13] Ibid [19].
[14] Ibid [20].
[15] *Assange v Swedish Prosecution Authority* (n 6)—complainant agreed to sexual intercourse only if Assange wore a condom, but he did not do so or removed it during intercourse.
[16] *R (F) v DPP* (n 6)—complainant consented to intercourse only on the basis that the defendant would withdraw before ejaculation but he never intended to comply with that condition and did not do so.
[17] *R v Lawrence* (n 3) [11].
[18] Ibid [43].
[19] Ibid [36]; *Assange v Swedish Prosecution Authority* (n 6).
[20] *R v Lawrence* (n 3) [35]–[37].
[21] Ibid 37.
[22] Ibid.

2.5 How did Legal Scholars react to the Judgment?

Scholarly discussion around the case has centred around the connection between sexual acts and pregnancy risks and the notion of conditional consent in sexual relations.

In relation to the risk of pregnancy resulting from sexual acts, it has been argued that the 'vasectomy versus condom' distinction arising from the case is merely an artificial one as both are measures to protect against the same potential consequence, namely pregnancy.

Dyson argued the case's discussion of sex and pregnancy as:

> '*creating the untenable claim that ejaculate containing fertile sperm is not physically different than ejaculate without it … focuses only on physical elements of the conduct, ignoring all other things which a reasonable person might say were related to sex.*'[23]

The court's statement that it considered pregnancy as not 'closely connected to the nature or purpose of sexual intercourse' and instead as connected to the 'risks or consequences associated with it' has been confusing to scholars, who find the reasoning 'probably hard to follow'.[24] Dyson argues that for a great number of people, the very purpose of sex is to reproduce and become pregnant. The idea that pregnancy is not closely connected to the nature or purpose of sexual intercourse is certainly an idea that leads to confusion and leaves the case sitting uncomfortably in the legal framework.

In relation to conditional consent, Dyson further argues that to decide the nature of the sexual activity, one has to look at the terms the parties participating in the sexual act have agreed to.[25] The defendant and the complainant in the *R v Lawrence* case agreed to unprotected sex with certain conditions, but the complainant did not know that the conditions were not being met. Dyson states '[t]he sperm created a factually relevant risk and one the parties agreed to exclude',[26] highlighting the pair in the case had agreed to sex and the consent was conditional on the exclusion of this risk.

[23] Matthew Dyson, 'Redefining Sexual Conditions' (Criminal Law Reform Now Network Report, 2023) 39 < http://www.clrnn.co.uk/media/1031/clrnn3-deception-report.pdf> accessed 7 June 2023.
[24] Ibid 40.
[25] Ibid.
[26] Ibid.

Buxton in his analysis further explores conditional consent, arguing that:

> '*Any condition whatsoever, if found to have been seriously intended as a precondition to intercourse, should vitiate consent if deception is practised by the defendant to create the false impression that the precondition is fulfilled.*'[27]

What the deception was about has been given more weight than the very fact that there was a deception in this case. If it was not for Lawrence's claim of infertility, the complainant would not have consented to sexual intercourse. Herring raises this issue further, stating:

> *'if a condition is put on consent then the consent is only effective if that condition is met, regardless of the triviality of the condition.'*[28]

The condition in this case was that the complainant did not wish to be exposed to the risk of pregnancy as an outcome to sex.

Within the broader legal framework, the case of *R v Lawrence* has raised questions on how the 2003 Act deals with deceptions in sexual offences. Dsouza highlights that within the 2003 Act, there has been an unexplained failure by the Parliament to include a provision similar to section 3 of the Sexual Offence Act 1956, which previously criminalised obtaining consent by deception, reading as:

> *'It is an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse in any part of the world.'*[29]

In comparison to the 2003 Act, the 1956 Act is far more open to interpretation and the circumstances that fall under it as a result. The idea that the Parliament intended to decriminalise deceiving people to obtain consent is certainly odd. Leaving deceptions to be dealt with through section 76 of the 2003 Act has placed an onerous reliance on the nature and purpose of the act, which has been left to the courts to navigate. When the court does decide on the nature and

[27] Richard Buxton, 'Consent in Rape: Fact, Not Law' (2020) 79 CLJ 391.
[28] Jonathan Herring, 'Consent Mistaken' (Criminal Law Reform Now Network Report, 2023) 56–57 <http://www.clrnn.co.uk/media/1031/clrnn3-deception-report.pdf> accessed 7 June 2023.
[29] Sexual Offences Act 1956 s 3; Karl Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' (2014) 7 Crim LR 492 at 499–500.

purpose of the sexual act in relation to consent and deception, its reasoning could lead to confusion, as in the case of *R v Lawrence*.

2.6 Why is a Feminist Analysis of the Case Needed?

Despite the keen scholarly debate on the *R v Lawrence* case, there has been no feminist analysis of the judgment thus far. Such a lack of feminist analysis is at odds with a wider movement, which reconsiders judgments from feminist perspectives due to many holding the view that the law is built upon and facilitates the continuation of patriarchal perspectives. One telling example is the Feminist Judgments Project across the globe which aim to create judgments which are fairer and just from feminist perspectives, considering the impacts of patriarchy on the society.[30] Given its impacts on women, reconsidering *R v Lawrence* from a feminist perspective is a useful exercise to analyse the case outcome. Besides, as Lather describes, adopting a feminist methodology would ensure it overcomes the invisibility or distortion of the female experience.[31] Feminist research is a transformative methodology as it attempts to 'redress the power imbalance between the sexes'[32] which is closely aligned with social justice and attempts to reduce power imbalance.[33] A feminist methodology is embedded in the review of feminist literature in Section 3, as well as in the empirical research components, which will be detailed in Section 4 to help thoroughly reconsider the outcome of *R v Lawrence* from a feminist perspective.

3 Feminist Perspectives on Consent

Consent is the most fundamental issue when distinguishing between sex and rape. To analyse *R v Lawrence* from a critical feminist perspective, feminist views on consent will be explored. It must be noted that feminism is not singular—it is a wide- and far-reaching movement with a range of views. From radical feminist Catherine MacKinnon and liberal feminist Katie Roiphe to those sitting within the middle ground like Sylvia Walby and Lois Pineau, this section will navigate the landscape of feminist movement and their perceptions of consent.

[30] Rosemary Hunter, 'The Feminist Judgements Project' (*UKSCBlog*, 17 January 2010) <https://ukscblog.com/the-feminist-judgments-project/> accessed 17 July 2023.
[31] Patti Lather, 'Feminist Perspective on Empowering Research Methodologies' (1988) 11 Women's Studies International Forum 569.
[32] Helen Kara, *Research and Evaluation for Busy Practitioners: a Time-Saving Guide* (Policy Press 2012) 238.
[33] Helen Kara, *Creative Research Methods in the Social Sciences: A Practical Guide* (Policy Press 2015) 38; Kara (n 32) 46.

3.1 Radical Feminism: All Penetrative Sex is Rape …?

MacKinnon, a radical feminist, has often been misunderstood to have believed that all penetrative sex is rape.[34] This misunderstanding was a result of MacKinnon, like others such as Carole Pateman, sharing in their criticism of women's capacities to consent under the social contract. After all, 'if the accused knows us, consent is inferred.'[35]

Pateman poignantly describes this in her work, 'Women and Consent', that '[o]nly if women are seen as "free and equal individuals" is their consent relevant at all'.[36] MacKinnon echoed similar views throughout her works. These views stemmed from women lacking the power and ability to consent historically, resulting in a flawed assumption of consent within relations (such as husband and wife relations). This view lends itself to a belief that all penetrative sex is rape. If women are not free and equal individuals, which they cannot be under the patriarchal system, women cannot consent at all. The lines between rape or sexual assault and consensual sex are blurred as a result.[37]

MacKinnon did not believe that all penetrative sex was rape, but rather that in a world constructed by sex inequality with all-encompassing gender norms, we must question 'the supreme transformative power we assign to consent'.[38] As MacKinnon writes:

> *'If sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept.'*[39]

Central to radical feminism the idea that men and women can consent on an equal footing is false. Rape to MacKinnon is defined in male sexual terms and the law adjudicates the level of acceptable force from the level of normal male sexual behaviour, rather than from the victims', or women's, point of view.[40] Force, despite not being a requirement for rape since

[34] Joseph J Fischel, *Screw Consent* (1st edn, University of California Press 2019) 13.
[35] Catherine MacKinnon, 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 Signs 635, 648.
[36] Carole Pateman, 'Women and Consent' (1980) 8 Political Theory 149, 152.
[37] Allison Moore and Paul Reynolds, 'Feminist Approaches to Sexual Consent' in M Cowling and P Reynolds (eds), *Making Sense of Sexual* (Ashgate 2004) 33; Moore and Reynold raise that this theory 'effectively reduce all heterosexual sex to an act of rape'.
[38] Fischel (n 34) 14.
[39] MacKinnon (n 35) 650.
[40] Ibid 649.

1841 in the UK,[41] has remained a huge rape myth[42] and is still included in the rape legislation in many other countries.[43] When force as a requirement for rape is within public consciousness, it is unsurprising that other male behaviour to procure sex without the use of physical force was seen as acceptable. MacKinnon, in her work 'Privacy and Equality', highlights this point, stating:

> *'it cannot be so presumed under the conditions of inequality, because what one lets happen under unequal conditions may not be the same as what one wants.'*[44]

When inequalities exist, it must be recognised what happens under this condition may not be clear. One may tolerate behaviour out of fear or lack of choice, for example. Lack of violence does not mean that the actions were consensual.

Feminists who raise these larger philosophical questions over women's capacities to consent could be coined with being on the more extreme sides of the feminist spectrum. In doing so, they raise key questions about our society which allow us to think more critically. MacKinnon has highlighted the idea that sex has been and still is determined through a male perspective.

3.2 Liberal Feminism

The idea that all feminists believe that women have absolutely no control would be naïve. There are feminists who would argue that feminism has gone too far by the arguments that radical feminism raises. For example, Moore and Reynold, in *Making Sense of Sexual Consent,* criticise the analysis of radical feminism as denying the possibility of consent as it 'takes away the sexuality of those women who give positive accounts of sexual relations'.[45] It is not just positive

[41] Carolyn A Conley, 'Rape and Justice in Victorian England' (1986) 29 Victorian Studies 519, 520.
[42] Rape Myths are gendered stereotypes of what constitutes rape, or is a requirement of rape, which often place the victim at fault of their assaults. 'Rape and Sexual Offences—Annex A: Tackling Rape Myths and Stereotypes' (*The Crown Prosecution Service*, 2021) <www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes> accessed 17 August 2023.
[43] For more details in Europe see Amnesty Report that discusses the 23 European countries that have legal definitions based on force, threat of force or coercion and not on lack of consent: 'Europe: Right to Be Free from Rape—Overview of Legislation and State of Play in Europe and International Human Rights Standards' (*Amnesty International*, 1 June 2021) 12 <www.amnesty.org/en/documents/eur01/9452/2018/en/> accessed 17 July 2023.
[44] Catherine MacKinnon, 'Privacy and Equality: Notes on Their Tension' (2000) 21 The Tocqueville Review 77, 83.
[45] Moore and Reynolds (n 37) 33.

accounts of feminism though, as there are feminists who place significant responsibility on women within sexual relations.

Katie Roiphe, in response to the discussion around sexual harassment policy across American college campuses, wrote her infamous book *The Morning After: Fear, Sex and Feminism*.[46] In her book, she argued that women's freedom is curtailed by feminists[47] and believed that women are responsible for their own actions. Roiphe argued that women, specifically students on college campuses in the US, were being conditioned to victimhood and refusing to acknowledge their own responsibilities. Women were not just able to make their own decisions, but also, in Roiphe's view, they should withstand pressures.[48] So far that coercion and manipulation would not negate consent,[49] Roiphe would consider it 'problematic' to call an encounter rape when a woman was given drugs or alcohol, as that woman has free choice whether to take it.[50] Roiphe believed the idea that women can be coerced 'portrays women as mentally and emotionally weak and effectively infantilises them'.[51] Roiphe placed significantly more responsibility onto women within sexual encounters, which has resulted in a great amount of criticism for her views.

Pollitt criticises that Roiphe 'wants women to be more vocal about sex, yet here she is dismissive of the suggestion that men ought to listen'.[52] Moore and Reynold, likewise to Pollitt in her article, highlight the lack of empirical evidence to support the statements Roiphe raises,[53] as she writes from personal experience[54] rather than an expression of women's views as a whole. Moore and Reynolds additionally raise that Roiphe believes verbal coercion is able to negate consent, which could open any form of sexual intercourse to be considered rape should a woman regret it down the line.[55] Looking at the liberal movement, arguably too much emphasis is placed on a women's agency that harassment against women becomes the women's problem to avoid rather than at the fault of men's inappropriate behaviour. Moreover, this view

[46] Katie Roiphe, *The Morning After: Sex, Fear and Feminism* (Hamish Hamilton 1993).
[47] Katha Pollitt, 'Not Just Bad Sex' (*The New Yorker*, 1993) <www.newyorker.com/magazine/1993/10/04/not-just-bad-sex> accessed 17 July 2023.
[48] Roiphe (n 46) 68
[49] Moore and Reynolds (n 37) 35
[50] Roiphe (n 46) 53
[51] Ibid 67
[52] Pollitt (n 47).
[53] Moore and Reynolds (n 37) 35; Pollitt (n 47).
[54] Moore and Reynolds (n 37) 36; Pollitt (n 47).
[55] Moore and Reynolds (n 37) 35.

fails to recognise the gendered lens which can impact a women's ability to consent that radical feminism tried so desperately to bring to light.

3.3 The Middle Ground and 'risky' Women

In 'Date Rape', Lois Pineau discusses the idea of 'risky' women, arguing that there is a 'belief that a woman generates some sort of contractual obligation whenever her behaviour is interpreted as seductive'.[56] Estrich further believes there has been a focus on the behaviour of a victim throughout decisions by the courts and resistance to force has previously been used as an indicator of whether a male's behaviour is non-consensual.[57] In addition, Estrich raises a common belief that women who put themselves into certain situations, such as behaving in sexually provocative ways, 'shouldn't complain when they are compromised'.[58]

Scholars show that it is increasingly common for women to be held to higher levels of responsibility and told that they should have never put themselves into situations which may lead to risks. Malloch echoes this, stating that 'victim status is often a status that needs to be earned'[59] and women are expected to implement strategies to avoid being harmed. Force may not be a legal requirement now,[60] but it hasn't left the public consciousness still as a rape myth.[61] Problematically, this shifts blame from the perpetrator to the victim, holding women responsible for being sexually assaulted. Additionally, the feminist perspective highlights that the ignorance of male behaviour and over-analysis of women's behaviour continue the thesis that sexual relations is considered from a male perspective.

Walby highlights the importance of a middle ground in viewing the notion of consent, arguing that, '[women are] engaging in sexual relations on what might be regarded as an "uneven playing field" but they are still "playing."'"[62]

[56] Lou Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 Law and Philosophy 217, 229–230.
[57] Susan Estrich, *Real Rape* (Harvard University Press 1987) 29–41.
[58] Susan Estrich, 'Palm Beach Stories' (1992) 11 Law and Philosophy 5, 10.
[59] Margaret S Malloch, "'Risky" Women, Sexual Consent and Criminal "Justice"' in Cowling and Reynolds (n 37) 112.
[60] Force is no longer a requirement for rape in UK sexual offence law—see (n 41).
[61] See (n 42).
[62] Moore and Reynolds (n 37) 37.

Walby's assessment attempts to recognise the impacts of patriarchy on women's experiences while not reducing them to being unable to consent or placing an over emphasis on their agency. Such a middle-ground view has been echoed by more contemporary feminist scholars, such as Aria Srinivasan who famously wrote,

> '*We want feminism to be able to interrogate the grounds of desire, but without slut shaming, prudery or self-denial: without telling individual women that they don't really know what they want, or can't enjoy what they do in fact want, within the bounds of consent*.'[63]

Middle-ground perspectives recognise that women can want to have sex, but the all-encompassing, sometimes coercive, harassing and violent methods to procure sex which sadly take place in society must be taken into account.

Despite the variance in their views on consent, different schools of feminism do share one argument in common, namely that the male perspective has been the overarching and normative perspective in society. As Moore and Reynolds argue, 'Sexuality is determined by and characterised through a male referent, predicated on male desire, pleasure, fantasy and power.'[64]

Given the patriarchal norms of the society, it must be noted that perspectives on consent have been developed persistently from a male perspective. The rape myth that force is a requirement for an act to be considered rape confirms that a patriarchal view of sex prevails. As Srinivasan asserts, 'it is patriarchy that makes sex, as we know it, what it is'.[65] To balance the playing field, and consider the *R v Lawrence* case from a critical feminist perspective, we must consider consent from a women's perspective and adapt accordingly.

The discussion on the merits and pitfalls of various feminist views on the issue of consent is important for developing a feminist understanding of consent and exploring how best to approach consent in the context of analysing the *R v Lawrence* case from a feminist perspective, given the lack of feminist analysis on this case so far. Feminists have importantly recognised

[63] Aria Srinivasan, *The Right to Sex: Feminism in the Twenty-First Century* (Bloomsbury 2022) 86.
[64] Moore and Reynolds (n 37) 31.
[65] Srinivasan (n 63) 77.

that women can want to have sex, but that does not mean they should be blamed for sexual acts of which consent is questionable. They also recognise that historically and continuously, perceptions of sexual relations have been dominated by male perspectives. When looking at the case of *R v Lawrence*, it is appropriate to take on a more middle-ground approach which attempts to balance the playing field between sexual partners. After considering the feminist literature in this section, it is now important to consider women's views on the notion of conditional consent within sexual relations and how they would be impacted by the deception that took place in the *R v Lawrence* case through empirical research.

4 Empirical Research: What Do Women Think about Consent in Sexual Relations?

4.1 Methodology

To understand women's views on the notion of consent and the issues arising from the *R v Lawrence* case, semi-structured interviews and surveys were undertaken. For semi-structured interviews, invitations were sent via email to over 20 women's organisations from various communities, such as organisations that support women with experience of sexual assault and women's religious groups. After participants expressed an interest to participate, the participant information sheet and consent form were sent to them prior to the interview. Two interviewees participated in the semi-structured interviews. To collect opinions from the wider public and to understand women's views on consent, the risk of pregnancy when consenting to sex, and their opinions on the issues arising from *R v Lawrence*, an anonymised survey was launched. The survey was designed through a Google Form using the University of York's secure server. It was then distributed to all the women's groups contacted for an interview and through the author's own social media. Fifty-five respondents completed the survey.

Interviews were transcribed verbatim and anonymised. Thematic analysis was undertaken to analyse the transcripts. Thematic analysis is described as a 'matrix-based method for ordering and synthesising data'[66] which allows researchers to see patterns and themes. Undertaking thematic analysis meant themes were identified as they developed organically rather than

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

approaching the data with a pre-set framework. Thematic analysis was also undertaken to analyse the data collected through the open questions on the survey to identify reoccurring themes. The rest of the survey results are presented in graphs and charts for further analysis.

The key limitation of this research is the relatively small sample size. Due to the scope of the research and resource constraints, though the author intended to interview 10 to 12 people from various women's organisations, only two participants responded. Similarly, only 55 respondents completed the survey though the author aimed for a higher response rate. Nonetheless, the data collected in this research would still contribute to the discussion on the *R v Lawrence* case as well as wider discussion on the notion of conditional consent and deception, by providing an understanding on women's views on the issues at hand.

Besides, exercising reflexivity is important when conducting research. This is the ability of the researcher to consider their own bias as it may shape the study to fit their objectives, which would impact the validity of the research.[67] Throughout the research process, the author was fully aware of her feminist perspectives and constantly checked in on her own bias to ensure it was not pre-determining the research outcomes.

4.2 Findings

Thematic analysis of the interview transcripts and the data collected from the survey reveals several clear reoccurring themes among participants in relation to women's views on the *R v Lawrence* case and wider issues concerning consent and deception. Notably, women throughout the empirical research process consistently expressed concerns over the scenario presented in *R v Lawrence*.

4.2.1 Pregnancy is within women's consciousness when consenting to sex

In the survey, when asked about how much of a consideration there is to the risk of pregnancy when consenting to sex, only 25.9% (n=14) of women were never concerned about the risk of pregnancy. A total of 24.1% (n=13) responded it was 'always' on their mind and 50% (n=27) responded that they sometimes think about it. It is important to note that 54.7% (n=29) of

[67] Alan Bryman, *Social Research Methods* (OUP 2008) 262.

participants stated that they use contraception all of the time when having intercourse and the vast majority of participants were in a relationship (n=37), which may impact participants' concerns over the risk of pregnancy. It can be deduced from these results that even when using contraception, some women are still concerned about pregnancy. Furthermore, interviewees highlighted that the 'onus and responsibility falls on the women to protect herself' from pregnancy, showing that the risk of pregnancy is always on women's mind when consenting to sex.

4.2.2 Feeling 'betrayed', 'deceived' and 'violated' when being lied to

When women were asked how they would feel if someone lied about their fertility status in an open question in the survey, what resulted was an overwhelming reoccurrence of similar phrases used by the participants. Words like 'betrayed', 'uncomfortable', 'assaulted', 'violated' and 'disrespected' were the most common responses. It was clear that the vast majority of women felt extremely uncomfortable and shared they may feel 'harmed' or 'assaulted' by such deceit. Women also felt that it was the 'withholding of information that could have altered my decision', which is particularly important considering the majority of women consider the risks of pregnancy sometimes, if not all the time, when consenting to sex.

Akin to the survey participants, interviewees brought up the impact of deceit on women's trust and emotions. Interviewee 2 raised that if a person has lied about his fertility status, 'then what else are they lying about'. Furthermore, when asked about the feelings of women who have been lied to about fertility status, Interviewee 1 stated:

> *'oh pissed, you know to put it bluntly ... angry, you feel betrayed, deceived and especially about that case because I think if somebody's deliberately deceiving you'.*

Additionally, similar to the survey respondents, Interviewee 1 stated that someone lying about their fertility status is 'going to impact on the actions that she [the person lied to] may or may not take to prevent that or protect herself from that … so again that the outcome of that has put the onus on the woman 'well you should have protected yourself'. Clear from these responses is that a woman's behaviour may have changed depending on what is said by a potential sexual partner and even if a woman is not fully informed, she can still be left with the onus of failing to have protected herself. Throughout the empirical research, many women have expressed an

extreme emotional response to the situation in which a woman is deceived. However, Interviewee 2 highlighted that 'some women may feel that's a violation and other women may not', showing that there is some variance in women's reactions to a situation when they are deceived.

4.2.3 Before reading the case: women were uncertain about criminalisation over deceit

Women did not hold an overwhelming opinion one way or another when first asked if they believe that deceit regarding fertility status should be criminalised. A third, 33.3% (n=18) of women believed that it should be criminalised but nearly 43% (n=23) of participants were unsure on the matter. Considering the results of later questions in the survey following participants reading a scenario that mirrored *R v Lawrence*, this question initially may have been difficult to picture for participants. Those who at this point believed deception regarding fertility status should be criminalised had raised two key concerns: the validity of consent and the risk of pregnancy.

> '*They are not being given all of the information that they need to give informed consent… I would view this as sexual assault and would then expect that criminal charges could ensue.*' (Survey response)

> *'Fear of pregnancy should not be minimised, invasion of women's body and the deceit could be the difference between consent and not'* (Survey response)

> *'Pregnancy and childbirth are inherently risky situations, which can result in death or lifelong disability. Even putting this aside, the long-term physical, psychological, financial and practical implications of pregnancy, abortion or childbirth and motherhood are so profound that if a male were to deceive a female regarding his fertility, it would be tantamount to forcing that life and those risks on her without her consent.'* (Survey response)

Women's responses assumed that the consent given under these circumstances is invalid or believe that it shouldn't be considered valid. Further, despite not being prompted to discuss

pregnancy, responses show that women automatically consider pregnancy to be linked with the potential to impact a woman's life physically, mentally and financially. Interviewees echoed the concerns of survey participants, highlighting the risks associated with pregnancy and the difficult choice of terminating pregnancy, which can 'traumatise her'. Moreover, interviewees highlighted that she may feel 'forced to maybe try and have a long-term relationship with that individual'. Consistently through these responses, it was clear that there are potentially life changing consequences as an impact from non-consensual sex on women.

Some women, on the other hand, did not believe that it should be criminalised, mainly due to privacy reasons. Respondents stated that 'it's a personal preference not to disclose that information' and '[it's a] personal matter and should be solved personally', showing that some women do not wish this to enter the criminal realm.

4.2.4 After reading the case: women felt overwhelming uncomfortable

Following the participants reading the scenario mirroring the facts in the *R v Lawrence* case, their views did change. Participants were overwhelmingly uncomfortable with the scenario. All but one respondent were very or quite uncomfortable with the scenario.

Women were asked whether they believed the person who lied about their fertility status in the scenario deserves a form of criminal punishment. 69.1% of participants (n=38) believed this should be the case, which was a 35.8% increase as compared to the response before the scenario was presented. This is a significant increase showing women believing what happened in *R v Lawrence* is something they are greatly uncomfortable with.

Table 1: Women's views on whether deceit regarding fertility status should be criminalised before and after reading the R v Lawrence scenario

	Q1: *Before the Scenario* **Do you believe that deceit regarding fertility status should be criminalised?**	**Q2: *After the Scenario*** **Do you believe that the person who lied about their fertility status deserves a form of criminal punishment?**
Yes	33.3% (n=18)	69.1% (n= 38)
No	24.1% (n=13)	12.7% (n=7)
Unsure	42.6% (n=23)	18.2% (n=10)

4.2.5 Deceit as rendering sex non-consensual

When asked about their reasoning for supporting criminal punishment for the person deceiving the women in the scenario, a consistent theme was that women stated that they would feel this was conditional sex. As described by one of the survey respondents: 'It can be seen as a breach on the conditions to the contract of consent'.

This respondent was not the only one who held such views, as persistently participants would describe the situation along the lines of:

> '*She gave consent under false pretences which means that she did not in fact give consent.*' (Survey respondent)

> *'If all information was given to the woman, she would have more of an informed choice in the matter.*' (Survey respondent)

> '*She consented to having unprotected sex on the basis that he was infertile. Therefore if he lied then this was unconsensual sex.*'(Survey respondent)

One participant even described this scenario to be 'forced pregnancy without consent'. Through the participants' responses, it is clear that they feel extremely uncomfortable with the scenario where there was deception about a person's fertility status and they do not believe the consent given on such occasions is valid.

4.2.6 'You need to protect yourself'

Some respondents did place an onus on the woman to have protected herself in the scenario, as described in the responses below:

> '*[H]e put at risk the physical and mental health of the woman, but it is also the women's responsibility of ensuring the information provided by the man is true*.' (Survey respondent)

> '*She should have still used protection for the sake of catching any diseases or infection*.' (Survey respondent)

Some respondents place an emphasis on the woman in the scenario as having a responsibility to ensure the information provided is true. However, only a minority of participants held such beliefs (12.7%; n=7).

Through empirical research, it has become evident that women were widely uncomfortable with what happened in *R v Lawrence* and placed an emphasis on the concerns over pregnancy and conditional consent when consenting to sexual acts.

5 Discussion—Was it Rape?

This section will combine the feminist literature review on consent and the empirical research results to argue that from a critical feminist perspective, the judgment of *R v Lawrence* fails to consider the key concerns of women and fails to properly recognise the ways in which deceit invalidates consent.

5.1 The Danger of Treating Pregnancy with Triviality

Given that in *R v Lawrence*, the court ruled that the deception was 'related not to the physical performance of the sexual act but to risks or consequences associated with it',[68] it is important to compare the court ruling with the views discussed in feminist literature and identified in the empirical findings on this matter. Scholars as earlier discussed found the courts' judgment

[68] *R v Lawrence* (n 3) [37].

uncomfortable. Dyson found it an 'untenable claim'[69] that ejaculate with sperm is not physically different to ejaculate without it and that the idea of pregnancy was not closely connected to sex is difficult to make sense of. While the feminist scholarship reviewed in this article did not directly discuss pregnancy, it did highlight an important point for understanding sexual relations, especially combined with the empirical research findings, namely that societal understanding of sex has been shaped from the male point of view.[70] Additionally, since pregnancy does not have the same direct impacts for men as it does for women, a distorted view that pregnancy does not relate to the sexual act arises. If we combine this with the comments of women in interviews and surveys, tension between the court reasoning and the views of women and feminists becomes more evident.

Consideration of the physical risks and mental impacts of possibly having a child, as well as the responsibilities and the financial burden incurred is core in a woman's decision-making process when consenting to sex. A quarter of women surveyed said pregnancy was always on their mind when consenting to sex, with around half stating it was sometimes on their mind, showing the majority of women consider pregnancy risks when consenting to intercourse, despite the vast majority of them using contraception *all of the time* when having sex. It can be concluded that for these women, pregnancy is something which is closely connected to sex and is not just an unwanted outcome, as the court has ruled.

Women highlighted that lying about one's fertility status was withholding information, which may alter a women's decision as it is pertinent information for the decision to consent to sexual relations. Some women even claimed that this would be 'forced pregnancy without consent'. From this discussion, it can be concluded that pregnancy and sex are intrinsically linked from women's perspectives and to treat these concerns as 'triviality' is evidence that consent in sexual relations is still shaped primarily and predominantly by male perspectives.

Herring believed that conditional consent is only effective when the pre-set condition is met—regardless of the condition.[71] Buxton, akin to Herring, believed if a precondition to intercourse was not fulfilled, it would invalidate the consent.[72] Further, feminist scholars questioned

[69] Dyson (n 23) 39.
[70] Moore and Reynolds (n 37) 31.
[71] Herring (n 28) 56–57.
[72] Buxton (n 27).

consent as a meaningful concept when power imbalances are at play. The withholding of information and deceit that took place in the *R v Lawrence* case has placed a power imbalance between the sexual partners and from a feminist perspective, it would impact the validity of the consent given. Survey results showed that women overwhelmingly did not believe that the consent in the case scenario was valid. Participants believed such a deceit would 'constitute a form of violence or coercion', and that there was a breach of the conditions placed on the intercourse, leading to non-consensual sex. Women did not believe the consent in this scenario was meaningful and the majority of women believed the person being deceitful should face criminal consequences.

5.2 'But she took a Risk and Should deal with the Consequences!'

There was a group of women in feminist scholarship and empirical research that did believe women who take risks should have to deal with the consequences. Roiphe, for example, placed a lot of agency and responsibility on women in these situations. Roiphe, given her assessment of women who are put at risk in sexual relations, could have likely placed a lot of agency on the complainant in this case and expected her to deal with the consequences involved. A minority of women in the empirical research held similar views and despite sharing such an opinion, they still expressed discomfort with the scenario. Participants recognised the risk the deceitful person put upon the woman, but also believed that the woman has the responsibility for ensuring the information provided was true.

Scholars such as Estrich and Pineau highlight that women do want to participate in sexual relations, but that they are put on an uneven playing field. To set an expectation on the women to ensure the information provided by the man is true is a difficult one in this case. It places the women into a position of risk if they feel that the man could potentially be violent or otherwise harmful, for example, when the man could have been truthful in the first place and did not feel the need to use deceit to gain unfiltered access to the woman sexually. This discussion is particularly interesting when the right to privacy is considered.

5.3 The Right to Privacy

Interesting comments arose that some women believed that the right to privacy should be prioritised as 'it's a personal preference not to disclose that information'. But where is the line

drawn to which a person's privacy can be overruled? How should one deal with such a case where it's difficult for a woman to easily 'fact check' the information provided by her sexual partner that can lead to serious consequences?

Gibson raises a persuasive argument over who should be prioritised in a scenario like this. Gibson argues that 'the harm which D's deception does to V's right to sexual autonomy justifies prioritising that right over D's right of non-disclosure',[73] meaning that priority should be placed upon the party who may be harmed over the right of the other party to withhold information. In other words, it is recognised that someone's right to privacy can be overruled when there is potential harm to the other person's sexual autonomy. This argument is relevant in the case of *R v Lawrence* as the defendant lied to the complainant in order to have unfiltered sexual access to her though the defendant understood the physical and mental harm that pregnancy could potentially cause to the complainant.

5.4 Should the Defendant have been Charged?

The majority of women reacting to the case scenario in the empirical research felt that the person being deceitful should have received a criminal charge. Many of the women did not believe that the consent given was valid considering the deceit that took place. Though the case has not been discussed in the feminist literature reviewed, it could be safely assumed that the feminist perspectives discussed in this article would feel uncomfortable with the scenario. The actions of the defendant placed a power imbalance between the sexual partners and such deceit enabled him to gain sexual access that would have otherwise not been given. When combining the analysis of legal scholars, feminist views on consent and the overwhelming concerns by women in the empirical research, the consent given by the complainant in this case would not be considered valid and therefore, the act could be considered rape.

5.5 What about men who are lied to?

What about if men are lied to? What about if a woman lies that she's on the pill? Would we hold the same levels of criticism against the man for not protecting himself, as many have claimed towards the woman in such a case scenario?

[73] Matthew Gibson 'Deception, Consent and the Right to Sexual Autonomy' (Criminal Law Reform Now Network Report, 2023) 51 < http://www.clrnn.co.uk/media/1031/clrnn3-deception-report.pdf > accessed 7 June 2023; Johnathan Herring, 'Mistaken Sex' (2005) Crim LR 511, 523.

This article has evidenced the importance of recognising that deceit should negate consent, regardless of the gender of the subject. If something is conditional for sexual intercourse, it should be considered to invalidate the consent given if the conditions were not met. If a woman does similarly to a man, it should be assumed that they should be subject to the same consequences.

6 Conclusion

In order to consider *R v Lawrence* from a feminist perspective, scholarly commentary on the case, feminist literature on the notion of consent and results of the empirical research undertaken on this matter have been reviewed. Legal scholars commenting on the *R v Lawrence* outcome were quick to raise concerns over the court's reasoning in their assessment of what was 'closely related' to sex. A review and discussion of feminist perspectives on consent highlighted the need to ensure there is neither the invisibility nor the distortion of women's views in a society where views on sexual relations remain dominated by male perspectives. Empirical research highlighted that women stressed the importance of consent being valid and the concerns over pregnancy risks from sex should not be trivialised.

This article has evidenced that from a feminist perspective, the complainant in this case did not give valid consent. When the defendant was deceitful and did not meet the conditions that were set out by the complainant when consenting to sexual intercourse, the consent given was tainted. Commentators on this case have highlighted this, and feminist literature has stressed the importance of equality within sexual relationships, which was absent in this case, when considering the validity of consent.

Empirical evidence showed the majority of women felt uncomfortable with the deceit that took place in the case and questioned the validity of the complainant's consent under such circumstances. This research evidenced that women's concerns over pregnancy risks should not be ignored as this is intrinsically linked to their decision-making process when consenting to sex. It must be noted that there are feminist scholars who placed significant emphasis on the agency of women, and this was echoed by a minority of women in the empirical research responses. Some scholars' views that it is important to ensure those who can be potentially

harmed by deceitful behaviour should be prioritised over someone's right to non-disclosure, or ability to lie, should also be taken into consideration.

It is clear the judgment of *R v Lawrence* is neither fair nor just from a critical feminist perspective. Scholars have raised concerns over the court's assessment on what is closely connected to 'the nature or purpose of the relevant act'[74] that is involved in sexual acts. From a feminist perspective, women's views on consent have been ignored and the male perspective has continued to dominate societal understanding of sexual relations. The court's judgment failed to recognise the conditional nature of the consent given by the complainant and chose to focus on the subject matter of the deceit rather than recognising the invalidation of consent by the defendant's deceit. This case has highlighted that it is necessary for the legislative framework regarding deceit and conditional consent to be revisited to incorporate feminist perspectives on the subject matter.

[74] Sexual Offences Act 2003 s 76.

An Exploration of How Current Legislations Restrict Women's Access to Abortion Services in England

Caitlin Day

Abstract

Despite scholarly and public criticism, under the current legislative framework, abortion remains criminalised in England and offenders could be subject to life imprisonment. This article seeks to contribute to scholarly debate on the design and impacts of the Abortion Act 1967, by providing a comprehensive review on how the current legislative framework restricts access to abortion services. This article argues that the discretionary power granted to doctors by the Abortion Act, the criminalisation of abortion and the stigma stemming from it, and the lack of effective oversight of the conscientious objection mechanism have significantly restricted access to abortion services in England by imposing multiple barriers. The article concludes by considering how two proposed law reforms, namely decriminalisation of abortion and abortion-on-request, could potentially render abortion services more accessible in England.

1 Introduction

While a survey shows that as many as 69% of respondents believe that abortion is legal, [1] abortion has in fact always been and remains a criminal offence in England ever since the introduction of The Offences Against the Person Act (OAPA) 1861, under which offenders are subject to life imprisonment.[2] In 1939, following the judgment in *R v Bourne*,[3] a legal exception was created whereby if the pregnancy would make a woman a 'physical or mental wreck', the procurement of abortion would not constitute a criminal offence.

In the absence of a national health service in the 1930s, the legal exception had led to several doctors in England interpreting this exception very liberally and charging women high fees for private abortions,[4] essentially turning the legal exception into a tool which doctors could use to legally justify performing abortions on women who were willing to pay high fees. Consequently, this created a large class divide between wealthy women and working-class women, with the latter who could not afford to pay the high fees for private legal abortions being forced to seek illegal abortions associated with high mortality rates.[5]

To combat these problems and expand access to abortion, in 1967 a private member's bill (PMB), now known as the Abortion Act 1967 (Abortion Act), was passed, providing doctors with four legal grounds for performing abortion procedures without constituting criminal offences. [6] However, the legal grounds specified in the Abortion Act do not translate into a right to abortion. Instead, abortion remains criminalised with the harshest of sentences.

From 2014 to 2022, at least seventeen women have been investigated by the police for having had abortions[7] and since 2022, at least six women have been awaiting criminal trial for offences

[1] BBC, 'Anne Robinson on her abortion "black doom"' *BBC* (London, 11 October 2017) <https://www.bbc.co.uk/news/uk-41565851> accessed 12 June 2024.
[2] Offences against the Person Act 1861 s 58.
[3] *R. v Bourne* [1939] 1 KB 687; [1938] 3 All ER 615, 694 (Macnaghten J).
[4] Emily Jackson, *Medical Law: Text, Cases, and Materials* (6 edn, OUP 2022) 773.
[5] Ibid 773.
[6] Abortion Act 1967 s 1.
[7] Charlotte Proudman, 'Think Abortion is Legal in Great Britain? Ask the Two Women Currently Facing Life Sentences' *The Guardian* (London, 19 August 2022) <www.theguardian.com/commentisfree/2022/aug/19/abortion-legal-great-britain-women-life-sentences-roe-v-wade> accessed 12 January 2023.

under the OAPA.[8] Furthermore, with the conditions laid out in the Abortion Act, women face multiple barriers and restrictions when they seek an abortion, raising questions over the accessibility of abortion services under the current legislative framework.

Despite keen scholarly and public debates, the accessibility of abortion services under the current legislative framework, in particular how the Abortion Act and the OAPA restrict access to abortion services, has been under-researched in current literature. 'Access' is given its literal meaning and refers to whether a woman can obtain an abortion. To contribute to current scholarly and public debates, this article will highlight the barriers imposed by the current abortion laws and argue that the discretionary power granted to doctors by the Abortion Act, the criminalisation of abortion and the stigma it generates, and the lack of effective oversight of the conscientious objection (CO) mechanism, have significantly restricted access to abortion services in England.

This article is structured as follows: first, the Abortion Act will be reviewed to examine how it restricts access to abortion services and argues that subjecting access to multiple disproportionate interferences and a liberal interpretation of the Act is not a sufficient governing mechanism. Second, it explores the societal perception of abortion to analyse how through criminalisation, abortion has been stigmatised, which subsequently impacts access. The purpose of criminal law will also be evaluated to argue that governing abortion within the criminal law framework is unjustified. Third, the use of the CO mechanism by doctors, which provides doctors with the right to object to abortion treatment,[9] and the lack of effective oversight thereof, will be reviewed to assess their consequences on the accessibility of abortion services. A key focus here will be the power dynamic between doctors and their patients and the intersection between the criminalisation of abortion and the CO mechanism. Finally, this article will discuss how the current legislative framework could be restructured through two proposed reforms, namely the decriminalisation of abortion and abortion-on-request, and evaluate if and how these proposed reforms could remove the current barriers to accessing abortion services.

[8] Zoe Williams, 'The Women Being Prosecuted in Great Britain for Abortions: Her Confidentiality Was Completely Destroyed' *The Guardian* (London, 10 November 2023) <www.theguardian.com/world/2023/nov/10/the-women-being-prosecuted-in-great-britain-for-abortions-her-confidentiality-was-completely-destroyed> accessed 3 February 2024.
[9] Abortion Act 1967 s 4.

2 How Does the Abortion Act Restrict Access to Abortion Services?

2.1 The Four Legal Grounds for Obtaining Abortion do not Translate into a Right to Abortion

Most women in England access an abortion under a liberal interpretation of the Abortion Act, leading to the statue being described as 'harmless legal fiction'.[10] Under section 1(1)(a) of the Abortion Act, a pregnancy can legally be terminated if there is a greater risk of harm to the woman's 'physical or mental health' as compared to continuing the pregnancy.[11] Calkin argues that this clause is interpreted very liberally, effectively enabling abortion-on-request.[12] A key reason for this is that it is statistically safer to have an abortion at any early gestation than to carry a pregnancy to full-term,[13] meaning abortions at early gestations can always be justified on this ground. Some would read the Abortion Act as offering no restrictions since there appears to be a loophole which women will almost always satisfy, at least at early gestations. The British Pregnancy Advisory Services (BPAS) stated that while the Abortion Act grants doctors a gatekeeping role with 'a great deal of latitude' in deciding whether a woman may have an abortion, such broad discretion for authorising abortions does not translate into a right to abortion on demand.[14]

The same legislation which currently provides access to abortion services on certain grounds could easily be used to restrict access,[15] rendering the Abortion Act a dual-edged sword. The Abortion Act does not include an entitlement to access an abortion nor does it require that a liberal interpretation guides medical practices. This means that access to abortion services and exemption from criminalisation currently depends on the latitude with which two doctors apply and interpret the risks imposed by the pregnancy to the woman's physical or mental health,[16]

[10] Emily Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9 Social and Legal Studies 467, 472.
[11] Abortion Act 1967 s 1(1)(a).
[12] Sydney Calkin and Ella Berny, 'Legal and Non-Legal Barriers to Abortion in Ireland and the United Kingdom' (2021) 5 The Journal of Medicine Access <https://journals.sagepub.com/doi/full/10.1177/23992026211040023> accessed 15 October 2022.
[13] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, MUP 2016) 404.
[14] British Pregnancy Advisory Service, 'Abortion Law in Great Britain' <https://www.bpas.org/our-cause/campaigns/briefings/abortion-law-in-great-britain/> accessed 12 June 2024.
[15] Lula Mecinska, Carolyne James and Kate Mukungu, 'Criminalization of Women Accessing Abortion and Enforced Mobility within the European Union and the United Kingdom' (2020) 30 Women & Criminal Justice 391, 394.
[16] Samantha Halliday, 'Protecting Human Dignity: Reframing the Abortion Debate to Respect the Dignity of Choice and Life' (2016) 13 (4) Contemporary Issues in Law 287, 304.

rather than being protected by a right to access abortion services enshrined in the law. Ward addresses how there is no explicit criteria by which doctors are bound[17] and the decision on whether to perform an abortion on justified grounds is within the doctors' sole discretion, implying that doctors could easily deny abortions and restrict access. This further highlights the fragility of access and the lack of protection provided as there is no guarantee that a woman would be able to have an abortion. Though in practice, women can access abortion services by invoking one of the four legal grounds, within the current legal framework, it is entirely possible that women can easily be denied access to abortion, which raises serious concerns for women.

2.2 Empowering Doctors as Gatekeepers reinforces Patriarchal Notions

The legality and accessibility of an abortion rests upon the approval and confirmation of two doctors,[18] even if objectively a ground has been satisfied. This is a central argument against claims that abortion is in practice available on-request,[19] as doctors are granted sole discretion and are empowered as gatekeepers. This provides doctors with an unjustified degree of power[20] which is not held over any other medical procedures.

By placing the decision within the doctors' hands, women are left powerless and are forced to attempt to persuade doctors that they satisfy the requirements outlined in the Abortion Act. This usually involves the woman having to portray themselves as weak and desperate,[21] to gain sympathy, and to convince the doctors, which can be humiliating. This is exacerbated by the need to convince two doctors instead of just one.[22]

A stark power imbalance is present between the woman and the doctors. Doctors already enjoy an elevated status in society and the Abortion Act grants them even more power and control. Women are taken out of the decision-making process with the belief that doctors are best

[17] Abigail Ward, 'If a Woman's Personhood Is Truly Represented by the Law, Then She Must Also Be the Ultimate Source of Both the Decision to Abort and the Meaning given to that Decision. A Discussion with Reference to UK Abortion Law' (2016) Bristol Law Review 113, 116.
[18] Abortion Act 1967 s 1(1).
[19] Jane O'Neill, "'Abortion Games": The Negotiation of Termination Decisions in Post-1967 Britain' (2019) 104 (359) History (London) 169, 171.
[20] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (1st edn, Hart Publishing 2001) 86.
[21] Yunjiao Liu, 'Medical Gatekeeping and Access to Abortion: Opening the Floodgate or Embracing Patient Autonomy?' (2010) 10 Manchester Review of Law Crime & Ethics 121, 124.
[22] Ward (n 17) 116.

positioned to assess the eligibility of women to get legal abortions, which impedes accessibility as women cannot access an abortion without first impressing two doctors.

The gendered nature of abortion must be addressed here. Placing doctors in control is a clear reflection of the prevailing societal attitudes when the Act was passed, as evidenced by parliamentary debates where women were considered unstable and helpless.[23] The Act was never formulated to empower women.

Attitudes towards women and their rights have altered since the 1960s and though women are now considered legal persons, as evidenced by the Equality Act,[24] such recognition for women's rights has not been reflected in abortion law. The abortion clauses reinforce the patriarchal notion that women are unfit to make their own decisions,[25] disempowering women in society as they are not awarded the same level of bodily autonomy as men, defined as the ability to make their own choices regarding their bodies.[26]

Instead, women are forced to conform to the patriarchal stereotype of being weak and vulnerable when they persuade doctors to grant them a legal abortion. This works to ensure that women do not feel 'entitled'.[27] The design of the Act disempowers women as they are not free to make the decision on procuring an abortion though the decision concerns their own bodies. Furthermore, Priaulx addresses how accessible abortions need to be made if women are to be released from patriarchal control.[28] This implies that while doctors are gatekeepers, women are not empowered because the Act operates to maintain control over women.

Evidence suggests that the two-doctor requirement is opposed by doctors themselves,[29] implying that doctors do not intend to exploit the discretionary power granted to them. Nevertheless, this power is still bestowed in doctors, providing them with control over women's bodies and the possibility to abuse this power should they wish to.

[23] Ellie Lee, 'Tensions in the Regulation of Abortion in Britain' (2003) 20 Journal of Law and Society 532, 535.
[24] Equality Act 2010.
[25] Lee (n 23) 535.
[26] Jackson (n 4) 209.
[27] Jackson (n 20) 82.
[28] Nicky Priaulx, 'The Social Life of Abortion Law: On Personal and Political Pedagogy' (2017) 25(1) Medical Law Review 73, 91.
[29] Ellie Lee, Sally Sheldon and Jan Macvarish, 'The 1967 Abortion Act Fifty Years On: Abortion, Medical Authority and the Law Revisited' (2018) 212 Social Science & Medicine 26, 29.

2.3 Women cannot access Abortion Services at a Later Stage of Pregnancy

A further barrier is the twenty-four-week gestation limit whereby an abortion can only be performed up until this point,[30] unless the woman's life is at risk,[31] or the foetus would suffer from 'physical or mental abnormalities'.[32] Many academics argue that this has little practical impact, as evidence shows that eighty-nine percent of abortions are performed within the first ten weeks of pregnancy, with only one percent of abortions performed at twenty weeks.[33] As such, Jackson argues that the Act functions to make all abortions under twenty-four weeks lawful,[34] and that the time limit does not impact accessibility. This could in theory suggest the gestation limit is over-generous considering the proportion of abortions performed several weeks before the limit, implying access would not be compromised if an even tighter limit was imposed.

However, it is imperative to look beyond the statistics and question why most women have early-gestation abortions. Simply because most abortions take place during the first trimester does not mean that this is the only period during which women want abortions. Instead, it is likely to be the result of the lack of accessibility of second-trimester abortions.

There is evidence suggesting that the way doctors judge whether an abortion should be granted has created an earlier gestation limit in practice. For example, doctors might deny abortion requests during the second trimester due to advancements in neonatal medicine and foetal viability at later gestations.[35] Therefore, it is more likely that women would be denied access to abortion during the second trimester.[36] This was demonstrated in *Saxby v Morgan*[37] whereby the complainant's doctor refused to perform an abortion, citing that the procedure would be too advanced, though the complainant was only nineteen-weeks pregnant, five-weeks within the

[30] Abortion Act 1967 s 1(1)(a).
[31] Abortion Act 1967 s 1(1)(c).
[32] Abortion Act 1967 s 1(1)(d).
[33] Office for Health Improvement & Disparities, 'Abortion Statistics, England and Wales: 2021' (*GOV.UK*, 30 January 2023) <www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2021/abortion-statistics-england-and-wales-2021#contents> accessed 15 February 2023.
[34] Jackson (n 10) 470.
[35] John Wyatt, 'Medical Paternalism and the Fetus' (2001) 27 Journal of Medical Ethics ii15, ii17.
[36] Jackson (n 20) 75.
[37] *Saxby v Morgan* [1997] 4 WLUK 304, [1997] PIQR P531.

legal limit of obtaining an abortion. This presents a real danger to women who might not discover their pregnancy until later, for example, because of irregular menstrual cycles.[38] Access is therefore dependent upon the discretion of doctors, notwithstanding the seemingly generous limit, and provides a possible explanation for why the statistics show a high proportion of first-trimester abortions.

It is also essential to consider if there is a medically justified reason for the gestation limit being set at twenty-four weeks. Research from the Royal College of Obstetricians and Gynaecologists (RCOG) found that abortions at later gestations did result in an increased risk of morbidity, but crucially this increase was not of statistical significance.[39] Furthermore, this research was conducted almost forty years ago. Medical development may have further reduced the morbidity risks. This implies that further research on the safety of second-trimester abortions is required to investigate if this can justify doctors refusing to perform abortion procedures during the second trimester. This may subsequently demonstrate that imposing the twenty-four-week limit is medically justified and is necessary from a medical point of view. Nevertheless, if doctors refuse to perform abortions at earlier gestations within the legal limit, this still shows that abortions in England are not as accessible as they are initially assumed to be.

If doctors refuse to perform an abortion even though it is within the twenty-four-week legal limit, younger women would be disproportionately disadvantaged. Teenagers are one and a half times more likely to seek an abortion after thirteen weeks[40] out of worries and therefore delay making an appointment.[41] Such data is not routinely published within abortion statistics, making it challenging to draw up-to-date conclusions. Nevertheless, teenagers are potentially the age group that would be the most detrimentally impacted by an unwanted pregnancy, as they are likely to still be in education and do not have adequate resources to raise a child. Kobayashi further argues how accessing an abortion is highly critical in shaping teenagers'

[38] Roger Ingham and others, 'Reasons for Second Trimester Abortions in England and Wales' (2008) 16(31) Reproductive Health Matters 18, 24.
[39] The Royal College of General Practitioners and the Royal College of Obstetricians and Gynaecologists, 'Induced abortion operations and their early sequelae' (1985) 35 Journal of the Royal College of General Practitioners 175.
[40] Social Exclusion Unit, *Teenage Pregnancy* (Cm 4342, 1999) para 8.14.
[41] Ellie Lee, 'Young Women, Pregnancy, and Abortion in Britain: A Discussion of Law "In Practice"' (2004) 18(3) International Journal of Law, Policy and the Family 283, 285.

futures.[42] This emphasises the need for accessible abortions to help young women secure their futures.

2.4 Reinforcing the Class Divide

Socio-economic factors also constitute access barriers.[43] A high level of knowledge about how the Abortion Act operates is required to challenge a doctor's refusal to perform an abortion.[44] Many women lack the knowledge that they have a right to seek a second opinion and instead interpret an initial denial as ineligibility.[45] Generally, affluent women are more likely to hold a full appreciation of their rights as a patient and understand the Abortion Act.[46] They are therefore more likely to seek a second opinion if their request is initially rejected and convince doctors that they meet the legal grounds specified in the Abortion Act. This further amplifies the power and discretion doctors hold over women from lower socio-economic groups who might not possess the knowledge required to challenge doctors' decisions or ask for a second opinion, and therefore go without the abortion they need.

Because of the design of the Act, women are forced to seek ways around it if their initial request is rejected and those without sufficient knowledge about the Act are not equipped to do so effectively. A reason for the enactment of the Abortion Act was to eliminate the class divide between affluent women who could afford to pay for an abortion and women from working-class backgrounds whose only option was an unsafe backstreet abortion.[47] It is clear to see this disparity in access is still present, albeit in a different form, because of the design of the Act. This has been referred to as the 'modern manifestation of backstreet abortions'[48] which the Act was designed to eliminate, showing how by being too restrictive, the Act is not fulfilling its purpose.

[42] Alicja Kobayashi and Madeline Thomas, 'Does Access to Abortion Vary Across the UK?' (*Economic Observatory*, 5 October 2022) <www.economicsobservatory.com/does-access-to-abortion-vary-across-the-uk> accessed 4 January 2023.
[43] Elizabeth Chloe Romanis and Jordan A Parsons, 'Legal and Policy Responses to the Delivery of Abortion Care During COVID-19' (2020) 151(3) International journal of gynecology and obstetrics 479, 480.
[44] Liu (n 21) 130.
[45] Jackson (n 20) 86.
[46] O'Neill (n 19) 178.
[47] Jackson (n 4) 773.
[48] Emily Ottley, 'Abortion on Request: A Desirable Response to the Criminalisation of Abortion in England and Wales?' (2020) 11 King's Student Law Review 54, 55.

2.5 Early Medical Abortion (EMA) does not remove all Barriers to access Abortion

In 2022, the measure launched during the COVID pandemic that permits early medical abortion (EMA) pills to be taken at home following a remote consultation with doctors[49] became a permanent amendment. This provides a glimmer of hope that abortion legislation is starting to be reformed to make abortion more accessible by breaking down the barriers which previously existed. This development contrasts with Mecniska's argument that the law does not reflect recent medical developments in abortion care.[50]

As women can take the EMA medication at a time most convenient to them,[51] they are able to work around other commitments, minimising the impacts their abortion has on their routines. For instance, women might no longer need to take time off work as they can now plan to take the medication during their day off, reducing the financial impacts of having an abortion. Furthermore, the barrier of having to travel to a clinic is removed. This increased control given to women[52] makes abortion more accessible. Abortion rates peaked in 2021,[53] which was possibly a result of the increased accessibility of abortion with the home use of EMA. Yet, it must be noted that the pandemic brought high levels of financial and job uncertainty, which may also explain why more women sought an abortion,[54] as they felt unable to have children in the given circumstances. It will be interesting to see if this increase continues to measure and if this was a result of the new EMA rules, or the implications of the pandemic.

Yet, it must be noted that EMAs are not accessible for all women. Acquiring EMAs relies on having access to the 'internet or a private telephone'.[55] Complications are therefore present for women in controlling relationships who cannot talk freely on the phone or have their calls monitored. This means the advantages provided by EMAs are not universally present and many

[49] Health and Care Act 2022 s 178(4).
[50] Mecinska, James and Mukungu (n 15) 394.
[51] Sally Sheldon, 'British Abortion Law: Speaking from the Past to Govern the Future' (2016) 79(2) Modern Law Review 283, 311.
[52] Sally Sheldon, 'The Medical Framework and Early Abortion in the UK: How Can a State Control Swallowing?' in Rebecca J Cook, Joanna N Erdman and Bernard M Dickens (eds), *Abortion Law in Transnational Perspective* (University of Pennsylvania Press 2014) 192–193.
[53] Office for Health Improvement & Disparities (n 33).
[54] BPAS, 'BPAS Comment Re: Abortion Statistics 2021' (*BPAS*, 21 June 2022) <www.bpas.org/about-bpas/press-office/press-releases/#:~:text=%E2%80%9CThe%20pandemic%2C%20and%20the%20policies,continuing%20or%20ending%20a%20pregnancy> accessed 15 February 2023.
[55] Romanis (n 43) 482.

women may still be left with significant barriers to overcome. Furthermore, EMAs have not removed the barriers imposed by the Abortion Act.[56] Accessing EMAs is still contingent on approval by two doctors, which is a gruelling barrier to overcome and fails to remove the gatekeeping role doctors play. In addition, EMAs are only available for pregnancy of up to ten weeks,[57] meaning this is not an option for second trimester abortions. Although the new EMA regulations hold the potential to reduce certain barriers and make abortion more accessible, this has not gone far enough for abortion to be accessible for all women.

3 How Does the Criminalisation of Abortion Stigmatise and Restrict Access?

By governing abortion within the criminal framework,[58] abortion is portrayed as inherently wrong, which has implications on the societal perception of abortion. With the so-called 'abortion stigma',[59] negative attributes are given to women seeking termination, labelling them as 'inferior' to the 'ideals of womanhood'.[60] The link between abortion stigma and its implications on access is vastly overlooked. Besides, the criminalisation of abortion further intensifies its stigmatisation, which in turn restricts access to abortion.

3.1 Role of Criminal Law

A key role of criminal law is to deter others from committing criminal acts out of fear of repercussions. Parsons asserts that criminal law functions for social control and integration[61] by punishing individuals for going against socially accepted standards, which in turn facilitates the normalisation of desired behaviours.[62] By this logic, by governing abortion within the criminal system, women are deterred from seeking an abortion out of fear of criminal consequences, which reduces women's ability to access an abortion as criminalisation generates this fear barrier. It is essential to consider how widespread the knowledge is that

[56] Adelyn LM Wilson, 'The Health and Care Act 2022: Inserting Telemedicine into the Abortion Act 1967' (2023) 31 Modern Law Review 158, 161.
[57] Health and Care Act 2022 s 178(4).
[58] Offences against the Person Act 1861 s 58.
[59] Alison Norris and others, 'Abortion Stigma, A Reconceptualization of Constituents, Causes and Consequences' (2011) 21 Women's health issues S49.
[60] Anuradha Kumar, Leila Hessini and Ellen MH Mitchell, 'Conceptualising Abortion Stigma' (2009) 11(6) Culture, Health & Sexuality 625, 628.
[61] Talcott Parsons, 'The Law and Social Control' in William M Evan (ed), *Law and Sociology: Exploratory Essays* (Free Press of Glencoe 1962) 58.
[62] Ibid.

abortion is a criminal offence in England. Research shows that only 13% of individuals knew that abortion was a criminal offence,[63] suggesting that fear of prosecution is not a key factor of consideration when a woman seeks an abortion, implying the deterrence function is not being achieved. This means that criminalising abortion does not achieve the rationales and purposes of criminal law.

The aforementioned research was conducted in 2017 and figures might be outdated. There has been extensive media coverage on the legality of abortion since its decriminalisation in Northern Ireland[64] and the overturning of *Roe v Wade*[65] is likely to have raised awareness on the criminal status of abortion. Nevertheless, this still provides a valuable insight into how well the criminalisation of abortion is known.

According to Mill's harm principle,[66] the power of criminal law is only justified when criminalisation prevents harm to others.[67] This is supported by the Sentencing Act[68] whereby the court must consider 'the protection of the public'[69] when determining sentences. If this argument is applied to abortion, imposing criminal sanctions on women seeking an abortion is a disproportionate use of power. Denying a woman a safe abortion by trained professionals will not protect her from harm, but will instead exacerbate the harm as women have reported to resort to any means to terminate an unwanted pregnancy.[70] The Abortion Act was enacted to reduce instances of women obtaining unsafe backstreet abortions,[71] which arguably has not been completely eradicated and therefore, it remains in question how the law is protecting women when it functions to restrict their access to abortion services and criminalises them for seeking an abortion. Unregulated abortions are conducted without proper medical attention and resources and have a higher mortality rate.[72] Governing abortion under the criminal law framework results in increased harm to women, which is contrary to the harm principle that aims at justifying the use of criminal sanctions.

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[63] BBC (n1).
[64] The Abortion (Northern Ireland) Regulations 2020.
[65] *Roe v Wade* 410 US 113 (1973).
[66] John Stuart Mill, *On Liberty and Other Essays* (Introduction and Notes by John Gray (ed), OUP 1998) 11.
[67] Ibid 12.
[68] Sentencing Act 2020 s 57.
[69] Sentencing Act 2020 s 57(2)(d).
[70] Christian Fiala and Joyce H Arthur, "'Dishonourable Disobedience"—Why Refusal to Treat in Reproductive Healthcare is not Conscientious Objection' (2014) 1 Woman, Psychosomatic Gynaecology and Obstetrics 12, 18.
[71] Jackson (n 4) 774.
[72] Fiona de Londras and others, 'The Impact of Criminalisation on Abortion-Related Outcomes: A Synthesis of Legal and Health Evidence' (2022) 7 BMJ Global Health 1, 7.

Views that foetuses are human beings could arguably justify criminal sanctions. Marquis compares abortion to murder and depriving the unborn foetus of its future,[73] which could justify the use of criminal law as it seeks to protect foetuses from harm. However, it must be considered that there is a lack of consensus surrounding whether a foetus is considered a human being. Therefore, instead of taking for granted the argument that foetuses are human beings, other viewpoints should also be considered when developing abortion laws. Marquis' argument and the harm principle are only valid if one believes that foetuses are human beings. A full exploration of the pro-life versus pro-choice debate is outside the scope of this article as this is not directly linked to the accessibility of abortion services and therefore will not be explored any further. However, it is important not to assume that the argument that foetuses are human beings is a definitive fact when determining whether abortion should be criminalised.

3.2 Criminalisation reinforces Social Stigma around Abortion

It is important to evaluate the societal perception of abortion to assess how the criminalisation of abortion has shaped such perceptions and how such perceptions in turn affects access to abortion services. A survey shows that 34% of respondents do not support an abortion when a woman does not want a child.[74] Pro-life protests outside abortion clinics[75] show that unfavourable perceptions of abortion still exist. The portrayal of these views, especially when they receive extensive media coverage,[76] creates the potential to influence societal perception on abortion. The criminal law framework governing abortion reinforces and even justifies anti-abortion perceptions, as criminal law paints a picture of what behaviours are desirable.

Criminalising abortion also creates a 'chilling effect'[77] that influences women's perception of their ability to access an abortion. This chilling effect makes abortion seem 'morally

[73] Don Marquis, 'Why Abortion is Immoral' (1989) 86(4) Journal of Philosophy 183, 192.
[74] Alison Park and Rebecca Rhead, 'Personal relationships: Changing attitudes towards sex, marriage and parenthood' in Park, A., Bryson, C., Clery, E., Curtice, J. and Phillips, M. (eds) *British Social Attitudes: the 30th Report* (NatCen Social Research, 2013), available at <https://natcen.ac.uk/sites/default/files/2023-08/bsa30_personal_relationships_final.pdf> accessed 14 June 2024.
[75] *Dulgheriu v Ealing LBC* [2019] EWCA Civ 1490; [2020] 1 WLR 609.
[76] Priaulx (n 28) 87.
[77] Mecinska, James and Mukungu (n 15) 391.

questionable',[78] as women might think that if they seek an abortion, they would be doing something inherently wrong[79] as the criminal law framework differentiates abortion from all other medical procedures[80] and leads to the abortion stigma. Besides, by threatening the possibility of life imprisonment, women are deterred from seeking an abortion out of fear of prosecution. This can result in women carrying an unwanted pregnancy or resorting to unsafe methods of termination.[81] As such, it is clear to see how the chilling effect has constituted a substantial barrier to accessing abortion services.

From another perspective, Cook explains how abortion stigma impacts access by creating two types of stigma.[82] First, a 'perceived stigma' is generated whereby women are concerned with how other people will react.[83] This can cause worry and anxiety for many women and results in them either delaying accessing abortion services as they hesitate about whether an abortion is right for them or avoiding seeking an abortion altogether. Delaying an abortion can result in women passing the statutory time limit and there is evidence suggesting that women are more likely to be denied an abortion at a later gestation,[84] as explained at length earlier. It is crucial for women to feel comfortable accessing abortion services to avoid their request being denied at a later stage. This shows how, by criminalising abortion, a perceived stigma is generated, which in turn imposes a barrier for women to overcome.

In addition, criminalising abortion results in 'internalised stigma' whereby the connotations associated with abortion are incorporated into a women's perception of herself.[85] This produces feelings of 'guilt or shame'[86] after receiving an abortion. This can prevent women from accessing an abortion again in the future if they require one to avoid these negative feelings. This is amplified by the criminal law framework which reinforces the idea that abortion is wrong,[87] making women feel guilty. Therefore, criminalisation results in women developing

[78] BMA's Medical Ethics Committee, 'Decriminalisation of Abortion: A Discussion Paper from the BMA' (*BMA*, 2017) 28 <https://www.bma.org.uk/media/1142/bma-paper-on-the-decriminalisation-of-abortion-february-2017.pdf> accessed 4 June 2023.
[79] Ottley (n 48) 58.
[80] Swara Saraiya, 'Conceiving Criminality: An Evaluation of Abortion Decriminalization Reform in New York and Greater Britain' (2018) 57 (1) Columbia journal of transitional law 174, 204.
[81] Ottley (n 48) 55.
[82] Rebecca J Cook, 'Stigmatized Meanings of Criminal Abortion Law' in Cook, Erdman and Dickens (n 52) 354.
[83] Ibid 355.
[84] Jackson (n 20) 75.
[85] Cook (n 82) 355.
[86] Kristen M Shellenberg and others, 'Social Stigma and Disclosure about Induced Abortion: Results from an Exploratory Study' (2011) 6 Global Public Health S111, S114.
[87] Saraiya (n 80) 204.

damaging perceptions of themselves and their behaviour, which in a way reduces access by making vulnerable women feel guilty about their actions.

3.3 Criminalisation of Doctors performing Abortions

Potentially resulting from the abortion stigma, insufficient education and training is provided to medical students with several medical schools providing less than two hours of clinical teaching on abortion procedures.[88] This stands in contrast to the eight teaching hours that cover the ethical-legal aspects of abortion,[89] which reinforces abortion as an ethical topic rather than a common medical procedure. This could contribute to the anti-abortion beliefs amongst medical students, which discourage them from choosing a speciality where they would be continually faced with abortion requests.

Furthermore, abortion is not a mandatory part of obstetrics and gynaecology (OBGYN) training in England, showing yet again the lack of education related to abortion provided throughout a doctor's career.[90] The lack of attention and importance given to abortion procedures during medical school reinforces the stigma around abortion,[91] though abortion is one of the most common procedures for women with one in three women having had an abortion.[92]

Research conducted in 2008 supports the view that there is a perpetuation of anti-abortion beliefs among medical students.[93] Some of the participating medical students in the UK thought that abortion was morally wrong when considering the rights of the foetus.[94] It is possible that since the research was conducted attitudes towards abortion in this context have changed given the increase in abortion rates.[95] However, the cohort of students participating in the research

[88] Catriona Rennison and others, 'Abortion Education in UK Medical Schools: A Survey of Medical Educators' (2022) 48(3) BMJ Sexual and reproductive health 6.
[89] Ibid.
[90] Sheelagh McGuinness, 'A Guerrilla Strategy for a Pro-Life England' (2015) 7(2) Law, innovation and technology 283, 307.
[91] Joy Hodkinson and Marina Politis, 'Abortion Teaching Must Empower Medical Students and Doctors to Advocate for Reproductive Justice' (2022) 378 BMJ 1.
[92] Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36(2) Oxford journal of legal studies 334, 344.
[93] R Gleeson and others, 'Medical Students' Attitudes Towards Abortion: A UK Study' (2008) 34(11) Journal of medical ethics 783, 784.
[94] Ibid.
[95] Office for Health Improvement & Disparities (n 33).

would now be practising doctors who operate today while possibly holding those same anti-abortion beliefs.

Doctors' worries that they could be subject to criminal prosecution since they operate within questionable limits of discretion[96] constitute another access barrier. Lee found evidence of fear and insecurities among doctors regarding the threat of prosecution they could face.[97] This supports the argument that by criminalising doctors for performing abortion, they may be reluctant to perform the medical procedure, hence further restricting access to abortion.

However, there has only been one reported case since the enactment of the Abortion Act where a doctor has been prosecuted under the Act.[98] This potentially implies that doctors' fears of prosecution might be exaggerated as the possibility of them being investigated is exceptionally slim. Nevertheless, doctors' fears should not be dismissed, especially considering that some MPs are now pushing for doctors to face prosecution regarding abortion services, including for paperwork inaccuracies.[99] The existence of such initiatives, may help explain why doctors are fearful and reluctant to provide an abortion. Furthermore, the possibility of prosecution could further deter junior doctors from specialising in OBGYN.

It is possible that a woman may be denied an abortion due to the doctor being fearful that they would be prosecuted if they were investigated, constituting yet another barrier to accessing abortions. This could result in women turning to unsafe methods of termination or being forced to carry an unwanted pregnancy. The law should not induce fear in doctors nor force women to adopt unsafe methods. Rather, women who meet the criteria under the Act[100] should be able to access an abortion. By criminalising abortion, the Abortion Act does not achieve its intended purposes.

4 Does the Conscientious Objection Mechanism Restrict Access?

[96] Liu (n 21) 127.
[97] Lee, Sheldon and Macvarish (n 29) 31.
[98] *R v Smith (John Anthony James)* [1973] 1 WLR 1510; [1974] 1 All ER 376.
[99] Liu (n 21) 133.
[100] Abortion Act 1967 s 1(1).

The Abortion Act provides doctors with the right to refuse to carry out an abortion if they hold a conscientious objection.[101] This is when the doctors' own beliefs and values conflict with the proposed treatment and they therefore refrain from performing the procedure.[102]

Though the World Health Organisation recognises that CO reduces the standard of abortion care,[103] limited literature has focused on the impacts CO has on access to abortion. In fact, CO presents another barrier to access abortion by reducing the number of doctors willing to perform abortion procedures, reinforcing the power imbalance between doctors and patients, and rendering abortion an ethical issue rather than a medical procedure.

4.1 CO shrinks the Pool of Providers of Abortion Services

Conscientious objection provides a way for doctors to avoid being stigmatised and discriminated against within their profession for performing certain procedures, which in some cases can result in violent threats against them.[104] Instead of being used to exercise genuine conscience, CO can be invoked as a convenient tool[105] to prevent these negative consequences. In the case of abortion, invoking CO in such a way would reduce the number of doctors willing to perform an abortion. If there are fewer willing doctors, abortion services are stretched further, which can cause delays. Delays can push women over the legal time limit, as previously discussed, meaning they can no longer access a legal abortion. Women might then resort to seeking dangerous illegal abortions that carry a higher mortality rate[106] and face the risk of prosecution. Moreover, doctors are more likely to object to abortions at later gestations.[107] This means that if a woman's appointment is delayed, it would be possible that she would encounter an objecting doctor, which would impede her access to abortion services.

[101] Abortion Act 1967 s 4(1).
[102] General Medical Council, 'Personal Beliefs and Medical Practice' (*GMC*, 7 April 2020) <www.gmc-uk.org/professional-standards/professional-standards-for-doctors/personal-beliefs-and-medical-practice/personal-beliefs-and-medical-practice> accessed 15 February 2023.
[103] World Health Organisation, 'Safe Abortion: Technical and Policy Guidance for Health Systems' (*WHO*, 2015) <https://iris.who.int/bitstream/handle/10665/173586/WHO_RHR_15.04_eng.pdf> accessed 24 January 2023.
[104] Leila Hessini, 'A Learning Agenda for Abortion Stigma: Recommendations from the Bellagio Expert Group Meeting' (2014) 54 Women & Health 617, 618.
[105] Fiala and Arthur (n 70) 17.
[106] de Londras and others (n 72) 7.
[107] Ingham and others (n 38) 20.

There is recent evidence suggesting that the lack of abortion providers due to doctors holding CO, means that junior doctors have limited learning opportunities.[108] These consequences have already been explored earlier and the same implications apply here.

In addition to the other consequences of inadequate training explored above, a concern arises in relation to CO specifically because regardless of whether a doctor holds CO, they are still required to perform an abortion if the woman's life is at risk.[109] If a doctor has insufficient training in performing abortions due to holding CO, it may interfere with their ability to save a woman's life in emergencies. From this perspective, not only is the lack of training for doctors impacting accessibility, it is also threatening the lives of women who would die without a safe abortion, such as those with ruptured ectopic pregnancies. Ideally, abortion and OBGYN training should be a mandatory part of a medical school's curriculum to ensure women's safety.

Furthermore, many junior doctors are discouraged from performing abortions due to the fear that they will be stigmatised.[110] This poses serious concerns for the future of abortion services[111] whereby access could become even more restricted as fewer doctors choose to specialise in OBGYN and those who do then claim CO to avoid stigmatisation. In other words, allowing CO reduces the quantity of abortion providers and operates to dissuade doctors from performing an abortion whenever concerns over stigmatisation arise.

A key example of how CO can reduce the pool of providers is shown in Italy where 71% of OBGYN are registered as holding CO.[112] This has had severe consequences on accessibility as many women are forced to travel to find a willing doctor,[113] or to continue the pregnancy unwillingly. This has occurred despite abortion being governed by a seemingly liberal law, showing yet again the importance of examining beyond the letter of the law to analyse how

[108] Jasmine Meredith Davis, Casey Michelle Haining and Louise Anne Keogh, 'A Narrative Literature Review of the Impact of Conscientious Objection by Health Professionals on Women's Access to Worldwide 2013– 2021' (2022) 17(9) Global Public Health 2190, 2199.
[109] Abortion Act 1967 s 4(2).
[110] Fiona de Londras and others, 'The Impact of "Conscientious Objection" on Abortion-Related Outcomes: A Synthesis of Legal and Health Evidence' (2023) 129 Health Policy 1, 9.
[111] Sophie LM Strickland, 'Conscientious Objection in Medical Students: A Questionnaire Survey' (2011) 38 Journal of medical ethics 22, 24.
[112] Tommaso Authorino, Francesco Mattioli and Letizia Mencarini, 'The Impact of Gynaecologists' Conscientious Objection on Abortion Access' (2020) 87 Social Science Research 1.
[113] Daniel Rodger and Bruce P Blackshaw, 'Quotas: Enabling Conscientious Objection to Coexist within Abortion Access' (2021) 29 Health Care Analysis 154, 158.

accessible abortion is in practice. The lack of safeguards to prevent CO from being abused endangers the availability and access to abortion.

The example of Italy demonstrates the possibility of CO becoming so widespread it completely undermines access to abortion which could potentially also manifest in England.[114] However, it must be noted that Italy is heavily influenced by Catholicism,[115] which includes a belief that abortion is equivalent to murder,[116] and which might explain why a significant number of doctors hold CO. In contrast, England is becoming more secular with an increasing percentage of individuals not following any religion,[117] implying religious beliefs might not be as influential. Nonetheless, Authorino found that the rate of doctors holding CO is disproportionately high compared to the rate of people having religious beliefs in Italy,[118] suggesting that religious beliefs may not be the only factor for claiming CO. Arguably, as discussed earlier, the associated social implications and fear of stigmatisation in performing abortion offer a plausible explanation for CO being more widespread.

4.2 The potential Abuse of Conscientious Objection

A CO can be misused when appropriate safeguarding measures are lacking.[119] If a regulatory framework was put in place with strict guidance regarding when CO could be used, doctors would not be able to misuse their power. Use of CO should be limited to instances when doctors have a genuine claim. Without an effective oversight mechanism, CO becomes 'impossible' to manage[120] and doctors can continue to abuse it. Therefore, there is a need to strengthen the oversight mechanism governing CO to ensure that it is invoked only when a genuine objection exists.

[114] Fiala and Arthur (n 70) 15.
[115] Rachel Anne Fenton, 'Catholic Doctrine Versus Women's Rights: The New Italian Law on Assisted Reproduction' (2006) 14(1) Medical Law Review 73, 75–76.
[116] Francesca Minerva, 'Conscientious Objection, Complicity in Wrongdoing, and a Not-so-Moderate Approach' (2017) 26(1) Cambridge Quarterly of Healthcare Ethics 109, 111.
[117] Census 2021, 'Religion, England and Wales: Census 2021' (*Office for National Statistics*, 29 November 2022) <www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/bulletins/religionenglandandwales/census2021> accessed 12 January 2023.
[118] Authorino Mattioli and Mencarini (n 112) 5–6.
[119] Brooke R Johnson Jr and others, 'Conscientious Objection to Provision of Legal Abortion Care' (2013) 123 International Journal of Gynecology & Obstetrics S60.
[120] Fiala and Arthur (n 70) 13.

It remains to be discussed as to which regulations should be implemented and the form they might take. For example, would doctors be subjected to civil or criminal proceedings if they are found to be abusing CO? The Council of Europe found that abuses of CO are mainly a result of insufficient 'oversight mechanisms',[121] supporting the need for a stronger regulatory system. Although this report was conducted over thirteen years ago, which suggests that it might lack temporal validity, there have been no further regulatory changes or evidence thereof in practice. This demonstrates the need for stricter regulations to prevent CO from being misused when it comes to performing abortion procedures.

Doctors are required to refer patients to other practitioners when they decline to perform an abortion, as held in *Barr v Matthews*[122] and stated in the General Medical Council's (GMC) guidance.[123] This could mitigate the implications of encountering an objecting doctor because being referred to another doctor implies that women can still access an abortion and that abortion is not necessarily medically an incorrect course of action. Nonetheless, according to Londras' study, most research evidence suggested 'an inconsistent and fragmented approach to referrals where conscientious objection is invoked'.[124] This could potentially be attributed to doctors feeling that by referring, they still hold moral responsibility.[125] This will have implications for women who are left without a referral and therefore cannot access an abortion. Crucially, however, Londras failed to review any English studies, which leaves open the question of how effective the referral requirement is in England in practice.

4.3 CO renders Abortion an Ethical Question rather than a Medical Procedure

Allowing CO impedes access to abortion by reinforcing the idea that abortion is ethically questionable by adding 'ethical doubt'[126] around the procedure. A CO poses abortion as a moral question when CO is specified as a legitimate ground for doctors to refuse to perform an

[121] Council of Europe Parliamentary Assembly, 'Women's Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection' (*Council of Europe*, 2010) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12506&lang=en> accessed 3 February 2023.
[122] *Barr v Matthews* [1999] 3 WLUK 382; (2000) 52 BMLR 217 (227) (Alliott J).
[123] General Medical Council (n 102).
[124] de Londras and others (n 110) 7.
[125] Udo Schuklenk, 'Conscientious Objection in medicine: Private Ideological Convictions must not Supercede Public Service Obligations' (2015) 29(5) Bioethics ii.
[126] Sheelagh McGuinness, 'Conscience, Abortion and Jurisdiction' (2020) 40(4) Oxford journal of legal studies 819, 825.

abortion, casting ethical doubts over the procedure. This entrenches abortion within an ethical, rather than a medical framework, despite abortion being one of the most common female medical procedures.[127]

In other words, invoking CO treats abortion as an ethical issue rather than a medical procedure. This is demonstrated by most academics focusing on the ethical basis underpinning CO[128] as opposed to exploring its practical implications in the context of delivering abortion services. By questioning the moral nature of abortion, the societal perception that abortion is problematic is reinforced. This leads to stigma around abortion as the legislation validates the ethical nature of abortion by allowing doctors to invoke CO to avoid performing abortion. This impacts access by dissuading women from seeking an abortion out of fears that they will be stigmatised and marked differently,[129] as previously explained. Revoking CO in abortion procedures would help reposition abortion away from the ethical framework.

The counterargument is that CO is necessary because abortion is in fact an ethical issue. Brock asserts that CO is justified as it is based on deeply held values which define a doctor's moral integrity and who they are.[130] The debate regarding whether CO has ethical support is outside the scope of this article. However, it must be noted that while the ethical dimension of abortion needs to be considered, this should not be the only ground that justifies restrictions on women's access to healthcare as the medical dimension of abortion should also be considered.

4.4 Invoking CO out of Fears of Criminal Consequences

It is essential to consider how criminalisation works alongside CO to further impede access to abortion. Criminalisation reinforces the negative stigma surrounding abortion, which explains why CO is invoked as this allows doctors to retreat from participating in a procedure with potentially severe criminal repercussions. Also, by framing abortion within both the ethical and criminal frameworks, the idea that abortion is problematic is reinstated[131] because both frameworks portray abortion as inherently wrong. The decriminalisation of abortion might reduce the instances where CO is invoked as abortion would then be given the same non-

[127] Sheldon (n 92) 344.
[128] Authorino, Mattioli and Mencarini (n 112) 2.
[129] Bruce G Link and Jo C Phelan, 'Conceptualizing Stigma' (2001) 27 Annual Review of Sociology 363, 367.
[130] Dan W Brock, 'Conscientious Refusal by Physicians and Pharmacists: Who is Obligated to do What, and Why? (2008) 29(3) Theoretical Medicine and Bioethics 187, 189.
[131] McGuinness (n 126) 825–826.

criminal standing as all other medical procedures, which could help eliminate the ethical doubts surrounding CO.

Furthermore, even where the grounds for an abortion are satisfied, the medical decision could still be scrutinised and investigated.[132] By governing abortion within the criminal framework, CO serves as a favourable option for doctors to protect themselves from prosecution and the burden of having to defend their decision at a criminal court. This incentivises doctors to use CO as a guaranteed method of avoiding criminal prosecution, especially considering that claims of CO currently go unchallenged. In other words, CO and criminalisation work in parallel to restrict women's access to abortion.

5 How Should Abortion be Governed to Increase Accessibility? Two Proposed Reforms

The OAPA and the Abortion Act restrict access to abortion services by granting discretionary power to doctors to decide whether the grounds for obtaining a legal abortion are met, criminalising abortion, and allowing doctors to use CO to reject abortion requests. Two proposed reforms will be considered to evaluate if and how these reforms could increase the accessibility of abortion services.

5.1 Decriminalisation of Abortion

The argument concerning how the criminalisation of abortion creates access barriers leads to the suggestion that to eliminate these barriers, abortion should be decriminalised. This is supported by multiple medical bodies including the British Medical Association (BMA).[133]

Decriminalisation would enhance access by mitigating the 'chilling effect'[134] criminalisation creates as the moral doubts cast by criminal law on abortion would be removed. Women would no longer be dissuaded from obtaining an abortion out of the fear that they would be stigmatised or prosecuted. Cardéna's research in Uruguay found that decriminalisation was a central factor

[132] Zoe L Tongue, 'On Conscientious Objection to Abortion: Questioning Mandatory Referral as Compromise in the International Human Rights Framework' (2022) 22(4) Medical Law International 349, 356.
[133] British Medical Association, 'The Law and Ethics of Abortion: BMA Views' (*BMA*, March 2023) <www.bma.org.uk/media/3307/bma-the-law-and-ethics-of-abortion-report-march-2023-final-web.pdf> accessed 2 April 2023.
[134] Mecinska, James and Mukungu (n 15) 391.

in shifting the negative perception of abortion and catalysing a change in the overall societal attitude towards abortion.[135] Therefore, decriminalising abortion is vital to improving accessibility of abortion services and necessary to eliminate access barriers by removing the negative connotations induced by criminalisation.

Decriminalisation might also reduce the instances CO is invoked when performing abortions by removing ethical doubts around abortion within the legal framework. This could result in fewer doctors invoking CO out of fear of criminalisation[136] by removing the criminal consequences following abortion and the stigma around it. This would make abortion more accessible by increasing the pool of abortion providers, which could help reduce instances of delays as more doctors would be available. Furthermore, this would also increase the likelihood that a woman's first consultation is with a willing doctor, making it less likely that she would be dissuaded by an objecting doctor. However, though abortion has been decriminalised in every Australian state, research shows evidence of pharmacists refusing to stock or dispense EMA pills as they hold CO.[137] This calls for the need to review the scope of CO and oversee its exercise. Arguably, decriminalising abortion could reduce the instances of CO being invoked, hence removing the current barriers on accessing abortion services.

Concerns have also been raised that if abortion was decriminalised, it would become deregulated and enter a 'legal vacuum',[138] which raises the argument that abortion should remain criminalised to ensure women's safety. However, redefining the criminal nature of abortion within legislations and regulating abortion practices are not the same issue. Besides, a 'web'[139] of civil and criminal frameworks are already in place to ensure abortions are regulated and safe. For example, actual bodily harm or grievous bodily harm offences covered by the OPA[140] could be used if a pregnancy is terminated without the woman's consent, demonstrating how further criminal sanctions do not provide any additional safety protection. No other medical procedure is subjected to the level of regulation as abortion. This implies

[135] Roosbelinda Cardénas and others, "'It's Something That Marks You": Abortion Stigma after Decriminalization in Uruguay' (2018) 15 Reproductive Health 1, 6.
[136] Tongue (n 132) 356.
[137] Rebekah Yeaun Lee, Rebekah Moles and Betty Chaar, 'Mifepristone (RU486) in Australian Pharmacies: The Ethical Practical Challenges' (2015) 91(1) Contraception 25, 27.
[138] Sheldon (n 92) 337.
[139] Jonathan Herring, Emily Jackson and Sally Sheldon, 'Would Decriminalisation Mean Deregulation?' in Sally Sheldon and Kaye Wellings (eds), *Decriminalising Abortion in the UK: What Would It Mean?* (1 edn, Bristol University Press 2020) 58.
[140] Offences Against the Person Act 1861 ss 47 and 20.

criminalising abortion is unnecessary and unjustified as this serves no safety purpose and instead works to limit access through imposing restrictions and inciting fear.

Legislative reforms decriminalising abortion have recently been proposed through a private member's bill (PMB) in the House of Commons. Diana Johnson (Labour) introduced the Abortion Bill,[141] seeking to decriminalise abortion by removing criminal liability of abortion performed up to twenty-four weeks of pregnancy. Unfortunately, this bill did not progress past its second reading due to the timing restraints of the PMB procedure.[142] Nevertheless, the bill received majority support during its first reading,[143] suggesting a parliamentary willingness to debate and potentially reform abortion law. This willingness is further supported by the recent decriminalisation of abortion in Northern Ireland,[144] leading to discussion around decriminalisation in other devolved nations[145] by demonstrating that decriminalisation is not a radical suggestion. This proposed reform offers a viable option for how abortion could be regulated and governed by decriminalising abortion and removing the stigma stemming from criminality and fear of prosecution.

However, certain elements of the proposed bill would still retain some access barriers. For instance, CO continues to be protected without proposals on strengthening its regulation mechanism to manage its use and ensure it is not abused. Besides, while Johnson did include a clause providing the Secretary of State with a duty to ensure women can access an abortion in a timely manner,[146] it did not specify details regarding how this would take shape. Without specifying such detail or putting in place more effective oversight mechanisms, doctors would still be able to use CO to avoid performing abortion, which would continue to restrict access to abortion. On the other hand, decriminalising abortion might reduce the incentive for doctors to invoke CO as CO would no longer be needed as a tool for doctors to protect themselves against a possible criminal conviction. This would result in CO only being used for its intended purpose

[141] Abortion HC Bill (2017–19) [276].
[142] Robert Brett Taylor and Adelyn LM Wilson, 'UK Abortion Law: Reform Proposals, Private Members' Bills, Devolution and the Role of the Courts' (2019) 82(1) Modern Law Review 71, 83.
[143] House of Commons, 'Abortion Division 244: held on Tuesday 23rd October 2018' (*UK Parliament*, 23 October 2018) <https://hansard.parliament.uk/Commons/2018-10-23/division/5ED9E03E-C55A-4EFC-8C73-86BFB3F7A2BA/Abortion?outputType=Names> accessed 3 March 2023.
[144] The Abortion (Northern Ireland) Regulations 2020.
[145] Sally Sheldon and others, "'Too Much, too Indigestible, too Fast?" The Decades of Struggle for Abortion Law Reform in Northern Ireland' (2020) 83(4) Modern Law Review 725, 796.
[146] Abortion HC Bill (2017–19) [276] s 3(1)(4).

of protecting the beliefs and genuine conscience of doctors. This could suggest that the need for stronger regulations governing the use of CO might not be as central to reforms as initially considered. Nevertheless, decriminalisation on its own would not remove the other access barriers imposed by the Abortion Act, including the sole discretion awarded to doctors. This suggests a more far-reaching reform might be required.

5.2 Abortion-on-Request

Another proposed reform to enhance accessibility to abortion services is enabling women to obtain an abortion upon their request.[147] This is a step further than decriminalisation as abortion-on-request would also remove doctors as gatekeepers and place the decision in the hands of women. Since women are the primary party impacted by an unwanted pregnancy, they are far better suited to make the decision regarding the termination[148] as opposed to a doctor who is only temporarily present in a woman's life and cannot possibly fully understand and appreciate the woman's personal circumstances. This would increase the accessibility of abortion services as the requirement of getting two doctors' approval would be removed. Furthermore, access would no longer hinge on a liberal interpretation of the Act as women would be able to access an abortion upon request, essentially protecting their right to abortion.

However, certain barriers which have been explored earlier would remain, including the gestation time limit. It is likely that a time limit would still be in place as this is seen in other jurisdictions that have similar laws, such as South Australia where the limit is set at twenty-two weeks.[149] This would still limit how accessible abortions are at later gestations. Furthermore, questions such as whether CO could be exercised and under which circumstances would need to be considered. Both these points demonstrate how the wider picture needs to be examined if abortion is to be governed by abortion-on-request to improve accessibility to abortion services.

Allowing abortion-on-request would also reposition abortion as a medical procedure, offering women increased bodily autonomy by respecting their sole decision to undergo an abortion. The shift from medical paternalism to patient-centeredness has been vastly documented in

[147] Ottley (n 48) 58.
[148] Sally Sheldon, 'A Missed Opportunity to Reform an Outdated Law' (2009) 4(1) Clinical Ethics 3, 4.
[149] Termination of Pregnancy Act 2021 (South Australia).

literature,[150] but this shift is yet to be seen in abortion practices because of the paternalistic assumptions underpinning the Abortion Act. The Act shows how women are given an inferior status within the law considering the limited control they are given over their own bodies. Abortion-on-request would mitigate the 'disempowering effect'[151] that being forced to gain doctors' approval generates, as doctors would no longer be in the position to judge a woman's decision.

Despite the shift to patient-centeredness, patients do not have the absolute right to receive any treatment they desire[152] and this is reflected within the GMC guidelines.[153] Adopting an abortion-on-request system would be against this established practice as women would be provided a right that does not exist for any other medical procedure. This would effectively flip the scales whereby abortion would become the most accessible medical procedure. However, Ottley asserts that abortion-on-request would not be 'irreconcilable with existing principles' as the presumption that a woman knows what is in her best interest in this situation would prevail.[154]

Arguably, though women understand their own circumstances and the social factors[155] surrounding their own abortion better than a doctor, as with other medical procedures, certain medical checks prior to the abortion would still be needed to ensure the safety of the woman instead of performing an abortion straight away after receiving a woman's request. In other words, it is contestable whether abortion should be treated differently from other medical procedures by being made available upon request. Furthermore, the recent legislative change in France providing women with an explicit right to access an abortion[156] could support the notion that an abortion-on-request system could align with existing medical practice and that there is space within the legislative framework for women to be afforded this right.

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[150] Sheldon (n 92) 345.
[151] Fran Amery, 'Solving the "Woman Problem" in British Abortion Politics: A Contextualised Account' (2015) 17(4) British journal of politics and international relations 551, 556.
[152] *R (Burke) v General Medical Council* [2005] EWCA Civ 1003 [31] (Lord Phillips MR).
[153] General Medical Council (n 102).
[154] Ottley (n 48) 67.
[155] Sheldon (n 148) 4.
[156] George Wright, 'France Makes Abortion a Constitutional Right' (*BBC News*, 4 March 2023) <https://www.bbc.co.uk/news/world-europe-68471568#:~:text=Parliamentarians%20voted%20to%20revise%20the,when%20the%20result%20was%20announced> accessed 4 June 2024.

In summary, decriminalisation might be the more practical reform to increase the accessibility of abortion services by aligning abortion with every other medical procedure in terms of their non-criminal nature within the current legal frameworks, hence reducing the stigma and fear of prosecution surrounding the procedure.

6 Conclusion

This article has assessed the accessibility of abortion services in England under the current legislative framework in three aspects: the conditions imposed by the Abortion Act, the stigmatisation created from criminalising abortion, and the unregulated use of CO. This article has shed light on the contrast between common misunderstandings of abortion accessibility[157] and the strict legislative framework which operates to restrict access to abortion. This article also highlights the potential danger posed to women when they do not have a right to access an abortion.

This article has shown how the Abortion Act and OAPA create barriers that limit access to abortion. The limitations imposed by the two acts intersect to exacerbate the barriers women face when accessing abortion services. A central issue highlighted is the power imbalance between doctors and patients when discretionary power is granted to doctors as gatekeepers under the current legislative framework. Multiple barriers are created through the conditions specified in the Abortion Act itself and from criminalising abortion, which incentivises doctors to invoke CO to avoid performing abortion even though it would mean forcing their beliefs onto vulnerable women by denying them access to abortion. For abortion to be accessible, all three aspects highlighted in the article must be addressed.

Two proposed reforms were discussed. While this article highlights the access barriers created by current abortion law, further research into the specifics of legislative reform and their implications is needed. This article contributes to current scholarly debate on abortion law and the potential reform thereof by analysing the accessibility of abortion services under the current framework in England. Academia plays a key role in highlighting these issues with the hope that progressive PMBs can regain momentum or encourage further debates in the Parliament. Progress has been made with reforms allowing at-home EMAs, the decriminalisation of

[157] BBC (n1).

abortion in Northern Ireland,[158] and France becoming the first country to provide women with a constitutional right to access an abortion. This offers a glimmer of hope that reform can be taken further, and abortion will become more accessible for future generations.

[158] The Abortion (Northern Ireland) Regulations 2020.

Global Ivory Legislation: Is it a Case of Material Culture vs the Elephant?

Genevieve Celeste Steele

Abstract

While concerns surrounding elephant conservation and the contentious ivory trade have been subjects of academic discourse throughout modern history, there exists a relative absence of scholarly examination regarding the impact of the emerging no-trade consensus on the ivory art market, in response to the Convention on International Trade in Endangered Species of Wilde Fauna and Flora (CITES) Regulations 1975. This knowledge gap is particularly pronounced in countries that have recently implemented bans on ivory trade, such as the United Kingdom. This analysis takes into consideration the historical and contemporary roles of these countries in the sourcing, production and trade of elephant ivory, as well as the cultural and historical significance of ivory within their respective societies. The inclusion of such factors enables the assessment of the effectiveness of each nation's domestic ivory legislation in combatting the concerns that CITES sought to address and evaluates whether such legislative mechanisms are proportionate in their objectives and outcomes. As such the main argument of this discourse will propose that not all the observed effects of new ivory legislation can be justified when alternative, more effective measures could be implemented, which do not necessitate a total prohibition on the trade of ivory.

1 Introduction

The poaching of elephants for the purpose of collecting their sought-after ivory is far from a new concept. In fact, it is a phenomenon which has endured for nearly 40,000 years.[1] Yet it has taken millennia of artisanal ivory use and the perilous decline of elephant populations for the world to recognise the urgent need for international conservation and ivory trade legislation. Campbell Pederson's work, which delves into the material's intricate history, usage and composition, has illuminated the profound cultural disparities in humanity's relationship with ivory. Such disparities will be shown in this article to ultimately shape the divergent international stance on ivory legislation, morality and ethics.[2]

This article will display the intricate challenges posed by these cultural and historical disparities, not only for conservation and legislation but also for the international ivory art markets, where ivory has been legally traded since antiquity. There will be focus on the pivotal role played by the Convention on International Trade in Endangered Species of Wilde Fauna and Flora (CITES) Regulations 1975, which has been the catalyst in the growing development of the international 'no-trade consensus'[3] on ivory, the implications of which will be thoroughly explored. This research spans continents, encompassing the legislative approaches of Africa, China, the US and the UK, comparing how various CITES member states have adopted CITES Regulations within their own domestic legislation. In doing so this article will consider the profound influence of diverse socio-cultural and historical factors and as such, how the significance of ivory within different cultures affects the formation and enforcement of domestic ivory legislation. Ultimately showing the complex interplay between cultural diversity, historical context and contemporary conservation efforts; all of which converge in the legislation which now governs international art markets and the trade of ivory.

2 The Elephant in the Art Market

2.1 Material Culture

[1] Maggie Campbell Pedersen, *Ivory* (Crowood Press 2015) 11.
[2] Ibid 15–19.
[3] Jennifer Sills and others, 'Ivory Crisis: Growing No-Trade Consensus' (2018) 360 Science 227.

Ivory has been traded for thousands of years, with virtually all countries across the world having used ivory in some form since antiquity.[4] However, the complex interrelationship between humans and ivory has perhaps been overlooked until recently.

The 2017 British Museum exhibition 'Living with Gods' showcased a mammoth ivory artefact dating to the Ice Age some 40,000 years ago. Known simply as 'Lion Man', the figure is sculpted with great technical skill and features the head of a cave lion with a partly human body, as such, it is considered the world's oldest known anthropomorphic statue.[5] The complex relationship between humans, ivory and religious/spiritual practice is also shown by Palaeolithic finds such as grave goods carved in the form a female figures collectively termed 'Venuses' and 'considered to be the first representations of a complete human form'.[6] The association between religion and ivory was well developed through early antiquity with the Greeks. Ivory's first association to Christianity appears in the devotional objects of the Byzantine empire, with its secular use spreading across the whole of Europe in the form of diptychs, statues and panels.

The trade routes for such objects can be traced back to ancient Egypt and across every major continent, with the main sources of ivory remaining the same as in the present day, Africa and India. 'While sources for early elephant hunts are scarce, the accounts that do exist depict the brutal methods that were used to kill them'.[7] From longbows to traps and the use of javelins, historical methods of elephant poaching were undoubtedly violent and dangerous to those who participated. With the development and trade of firearms in Africa in the 'later 19th century hunting elephants was no longer dangerous' and killing them became more efficient.[8] The evolution of hunting technology and international popularity of ivory resulted in the African

[4] Campbell Pedersen (n 1) 169–177.
[5] 'The Lion Man: An Ice Age Masterpiece' (*The British Museum*, 2017) <www.britishmuseum.org/blog/lion-man-ice-age-masterpiece> accessed 6 September 2023.
[6] Campbell Pedersen (n 1) 180.
[7] Julia Martinez, 'Elephant in the Gallery: The Problem of Historic Ivory Collections' (Saving Earth Encyclopaedia Britanica, 2024) <www.britannica.com/explore/savingearth/elephant-in-the-gallery-the-problem-of-historic-ivory-collections> accessed 27 August 2023.
[8] Campbell Pedersen (n 1) 35.

elephant population going from approximately 'five million'[9] in the 19th century to just '415,000'[10] at present.

3 International Responses to Elephant Endangerment

3.1 The Development of CITES

In light of such statistics there is an international acknowledgement that elephants have been in decline and should be protected, as is evident from the internationally accepted treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora Regulations. The drafting of CITES in 1973 was in response to the International Union for Conservation of Nature (IUCN) concerns regarding a lack of international awareness as to the mass elephant poaching that had been occurring throughout the 20th century. The CITES treaty was the first international attempt at protecting endangered species. Today, CITES has conservation agreements with 184 parties, covering more than 40,000 species of animals and plants.[11]

Asian Elephants have been included in Appendix 1 of CITES since its enforcement in 1975. Species of an Appendix 1 classification are 'species threatened with extinction … [and] … Trade in specimens of these species is permitted only in exceptional circumstances.'[12] Whereas the African Elephant is classed as Appendix 1 for elephant populations bar Botswana, Namibia, South Africa and Zimbabwe which are classed as Appendix 2. Appendix 2 'includes species not necessarily threatened with extinction, but in which trade must be controlled.'[13] Member states are expected to implement these classifications and trade restrictions within their own domestic legislation. It is the aim of CITES 'to ensure that international trade in wild animals

[9] Marianna Szczygielska, 'Elephant Ivory, Zoos, and Extinction in the Age of Imperialism (1870s–1940s)' (*MPIHS*, 2019) <www.mpiwg-berlin.mpg.de/feature-story/elephant-ivory-zoos-and-extinction-age-imperialism-1870s-1940s#:~:text=According%20to%20the%20World%20Wildlife,as%20a%20result%20of%20hunting> accessed 27 August 2023.
[10] 'A US Ban on Elephant Ivory Carves out a Better Future for the Species' (*WWF*, 2016). <https://www.worldwildlife.org/magazine/issues/winter-2016/articles/a-us-ban-on-elephant-ivory-carves-out-a-better-future-for-the-species?> accessed 27 August 2023.
[11] 'What is CITES?' (*CITES*, 2024) <https://cites.org/eng/disc/what.php> accessed 27 August 2023.
[12] 'How CITES Works?' (*CITES*, 2024). <https://cites.org/eng/disc/how.php#:~:text=Appendix%20I%20includes%20species%20threatened,utilization%20incompatible%20with%20their%20survival.> accessed 27 August 2023.
[13] Ibid.

and plants is legal, sustainable and traceable, and does not threaten the survival of the species in the wild.'[14]

Yet, despite CITES Regulations and increasing international domestic law on the trade of ivory, 'between 2010 and 2012 poachers killed more than 100,000 African elephants to supply the black-market demand'.[15] Consequently, a pivotal ethical dilemma emerges as specific elephant populations confront mortality rates outpacing their ability to reproduce, hindering any sustained growth in their numbers. Furthermore, this article contends that the unwarranted extermination of contemporary elephants, driven to the brink of extinction for the sake of tourist trinkets and artworks, lacks ethical and moral justification.

However, there remains 'contentious global debate over which ivory policy would best protect elephants: banning all ivory trade or enabling regulated trade to incentivize and fund elephant conservation'.[16] Movement towards a total ivory trade ban within consumer and manufacturing countries is increasing, while regions within ivory source countries remain dramatically unresolved as to the best course of conservation (as will be discussed below). This dichotomy between source and consumer countries regarding legislation in the opinion of CITES Secretary-General Willem Wijnstekers, is reflective of socio-economic differences.[17] 'While richer countries can often afford to promote conservation through strict protection, many poorer nations must do so in ways that benefit local communities and bring in much-needed cash for conservation.'[18]

While this article agrees that socio-economic needs play an important role in domestic ivory legislation, it also aims to highlight that ivory legislation has and continues to be effected by a country's cultural history and role within the ivory art market, amongst other factors. Additionally, while there may appear an international consensus on the immorality of sourcing and use of modern ivory, there is no such consensus regarding the trade, use and preservation of antique ivory. The following sections will discuss the effect of such influencing factors upon

[14] What is CITES? (n 11).
[15] Kimbra Cutlip, 'Where Do Important Ivory Artifacts Fit in the Race to Save Elephants from Poaching?' *Smithsonian Magazine* (Washington, 18 June 2015) <www.smithsonianmag.com/smithsonian-institution/where-do-important-ivory-artifacts-fit-race-save-elephants-poaching-180955636/> accessed 27 August 2023.
[16] Duan Biggs and others, 'Breaking the Deadlock on Ivory' (2017) 358 Science 6369.
[17] CITES Press Release, 'CITES Sets Strict Conditions for Any Possible Future Ivory Sales' (*CITES*, 12 January 2021) <https://cites.org/fra/news/pr/2002/021112_ivory_decision.shtml> accessed 6 September 2023.
[18] Ibid.

different domestic ivory legislation, while analysing their effectiveness with regard to CITES' aims.

3.2 Africa: The Source of the Problem?

'Ivory was one of the earliest commodities exported from Africa' and also one of the most valuable.[19] Prior to the CITES Regulations Africa had a prominent history of ivory trading, due to it being the natural habitat of the African elephant but also as a consequence of its natural coastal geography making it a prime trade route. As such, Africa has acted as an international exporter of ivory since the time of the ancient Egyptians, and with the development of transportation, trade routes and colonisation its elephant population has dwindled significantly.[20]

Historically, the trade of ivory in Africa was subject to the rule of its colonial governments whom Galaty refers to as 'gatekeepers' of the ivory trade.[21] During this time Galaty argues the economic value of ivory to the colonial governments outweighed any concerns as to conservation.[22] Moreover, Galaty links Africa's long history of war, violence, colonialism and lack of domestic independence to the historical lack of ivory legislation and reduced elephant populations.[23] Therefore the listing of the African elephants on Appendix 1 of CITES in 1989, prohibiting the commercial trade of ivory was a dramatic socio-legislative change for Africa.

There are a recognised fifty-two African states/territories many of which suffer from 'political instability, civil strife, war, economic underdevelopment and weak legal systems' as such it is difficult to access any accurate ivory legislation which has been enforced since CITES 1989.[24] However, fifty of the fifty-two recognised African states are now signatory members of CITES and as such are expected not to deal in ivory unless exceptional circumstances apply. To qualify as an exceptional circumstance the import of such ivory must not be primarily for commercial purposes or detrimental to the survival of the species, likewise exportable ivory must be legally

[19] John Galaty, '*Ivory: Power and Poaching in Africa* by Keith Somerville' (2017) 50 International Journal of African Historical Studies 533.
[20] Campbell Pedersen (n 1) 169–171.
[21] Galaty (n 19).
[22] Ibid.
[23] Ibid.
[24] Jane Williams (updated by Vincent Moyer), 'Sources of Online Legal Information for African Countries' (*GLOBALEX*, 2019) <www.nyulawglobal.org/globalex/African_Law1.html> accessed 27 August 2023.

obtained.[25] Such expectations do not apply to the African states of Botswana, Namibia, South Africa and Zimbabwe, for which African elephants are classed as Appendix 2 which only requires the control of their trade.

Since the induction of CITES in 1989, Africa has been a point of regular academic and political dispute regarding its trading of ivory. Some of Africa's ivory trading, such as the 1997 CITES agreed sale of 50 tonnes (5,446 tusks) from African stockpiles to Japan, was legalised under the justification that such funds would be used for elephant conservation.[26] Yet many academic researchers suggest there is large scale illegal poaching and exporting of ivory occurring across Africa irrespective of CITES Regulation. Supporting this theory is the fact at least 30,000 African elephants have been poached annually since their listing in Appendix 1.[27] The continuation of illegal poaching in Africa is reiterated by the 2019 research by Sosnowski and others who quote 'almost 600,000kg of illegal ivory has been seized since 1991'.[28] With scientific testing proving that many such seizures made between 2002 and 2004 of African exports featured ivory 'derived from animals that had died less than 3 years before ivory was confiscated.'[29] While these figures broadly suggest poor and ineffective enforcement of CITES-influenced domestic legislation across Africa, African states remain in contention regarding the most effective solution to their illegal poaching problem.

States such as Kenya would support a total African ban on the trade of ivory, and the destruction of ivory stockpiles as promoted by their 2016 ivory burn.[30] Such support stems from the belief that in banning ivory trade and burning the stockpiles they will 'eliminate demand for ivory and put value instead on living elephants' thus allowing elephant conservation.[31] Other states such as Zimbabwe remain opposed to a complete ivory ban, suggesting in their 2022 CITES amendment proposal that a complete ban would be detrimental to local communities, and reduce their economic ability to fund elephant conservation.[32]

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[25] How CITES Works? (n 12).
[26] CITES Press Release (n 17).
[27] Dhiren Sehgal, 'Elephants, Ivory and CITES' (2017) 47 Envtl Poly L 2, 5.
[28] Monique C Sosnowski and others, 'Global Ivory Market Prices since the 1989 CITES Ban' (2019) 237 Biological Conservation 392.
[29] Ibid.
[30] Paula Kahumbu, 'Why It Makes Sense to Burn Ivory Stockpiles' *The Guardian* (London, 23 April 2016) <www.theguardian.com/environment/africa-wild/2016/apr/23/why-it-makes-sense-to-burn-ivory-stockpiles> accessed 6 September 2023.
[31] Ibid.
[32] 'Consideration of Proposals for Amendment of Appendices I and II' (CITES Nineteenth Conference of Parties, Panama, November 2022).

Zimbabwe and other Southern African states propose new amendments to their Appendix 2 elephant listing which would allow the sale of specified amounts of legally sourced ivory, under the justification that the economic income of sales would contribute to urgently needed funds for 'the community conservation programmes'.[33] Moreover, states such as Zimbabwe have proved to a certain extent that control and enforcement measures can effectively allow population replenishment while allowing some legal trade. Monitoring of the elephant populations of Botswana, Namibia, South Africa and Zimbabwe through Monitoring the Illegal Killing of Elephants (MIKE) sites, shows 'either increasing trends or mild and non-significant declines recently'.[34]

However, despite some statistics supporting that elephant populations in Southern and East Africa have increased annually by 5% since CITES, it is apparent when viewing Africa as a whole, with regard to continually decreasing elephant populations as well as seized export statistics, that anti-poaching enforcement and CITES-influenced legislation are failing.[35] All the while, government stockpiling and ivory destruction has reduced the commercial supply of ivory but not reduced the commercial demand. Consequently, analysis indicates that prices have been increasing since the elephant CITES listing, with illegal raw ivory being the most expensive and as such, incentives for the poorer African populations to illegally poach ivory are increased.[36]

In turn there undoubtedly remains a need for effective and unanimous legislative measures and enforcement in Africa to stop poaching and the illegal export of ivory, a task which the CITES Regulation alone has not achieved.

3.3 China: Craft and Culture vs Conservation

The Chinese have long revered ivory as a symbol of wealth and status, a luxury material rooted deep into the country's rich cultural tapestry.[37] The historical significance of ivory in China is

[33] Ibid.
[34] Ibid.
[35] African Wildlife Foundation, 'Elephant Conservation Progress Report' (2022) <https://www.awf.org/sites/default/files/2022-08/2022%20Elephant%20Conservation%20Progress%20Report.pdf> accessed 5 June 2024.
[36] Sosnowski and others (n 28).
[37] Campbell Pedersen (n 1) 241.

profound with recorded ivory usage dating back to the Han Dynasty, spanning from 209 BC to 220 AD.[38] Throughout these 3,600 years of material use, China has established itself as a global hub for ivory craftsmanship. One of the common uses of ivory in Chinese culture was the art of carving figurines, traditionally those depicting religious and mythical icons.[39] China's historic and cultural associations with ivory have meant the manufacture of such items persists today.

Following its membership to CITES in 1981 China was expected to prohibit the commercial trade of ivory in accordance with its membership but, since the early 20th century Chinese ivory manufacture has been enjoying a renaissance in popularity.[40] The Chinese Government in response to CITES membership enacted its Wildlife Protection Law in 1989 with the aim of protecting endangered species and wildlife. Following the Wildlife Protection Law 1989 and the addition of the African elephant to CITES Appendix 1, the Chinese Government 'stockpiled raw ivory, considering these stockpiles an official and legalised supply'.[41] Efforts were then made to control manufacture and trading rights through the implementation of a 'licensed legal regime that sanctions ivory trade as long as the ivory is being traded within the country'.[42]

Under this regime the Chinese government supplies 'legal' ivory from its stockpile to licenced factories with limited retail outlets. In theory this regime should only allow legally obtained raw ivory to be manufactured and sold by a set number of suppliers, thus disallowing illegal ivory into the market. However, enforcement of the licensing regime has proven ineffective on multiple levels.

First, non-licenced retail outlets continued to sell ivory of unknown provenance with only forty-five of Beijing's one hundred and fifty-six outlets being licenced.[43] Therefore, without effective enforcement of the licencing regime, the legalisation of some ivory trade has acted 'as a screen, shielding the parallel illegal ivory trade which is highly prevalent in China'.[44]

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[38] Ibid.
[39] 'Myth and Magic in the East Asian Ivory and Jade Collections' (*PMAG*, 2021). <www.stokemuseums.org.uk/pmag/myth-and-magic-in-the-east-asian-ivory-and-jade-collections/#:~:text=The%20sea%20port%20city%20of,also%20exported%20to%20the%20West> accessed 6 September 2023.
[40] Ibid.
[41] Sehgal (n 27) 2.
[42] Ibid.
[43] Ibid.
[44] Ibid.

Second, the problem of illicit ivory trade is added to by a lack of scientific and gemmological testing at both points of manufacture and sale to distinguish modern from historic ivory sources/materials.[45] With a licencing system that relies on the self-certification by manufacturers to provenance their ivory stockpiles, without scientific verification it is hardly surprising illicit ivory is being worked and traded for profit.

Consequently, following international blame for the 'ivory holocaust'[46] as a result of its major manufacturing and consumerism role in the ivory trade, China announced in 2016 that it would impose a complete domestic ivory ban. The ban has been praised by conservationists as a complete U-turn in Chinese policy, ceasing the manufacture and retail abilities of all previously accredited ivory outlets by December 2017.[47]

The Wildlife Trade Monitoring Network (TRAFFIC) organisation following the 2018 ban surveyed the previously legal ivory outlets for compliance to the ivory ban finding 76% of retailers were still in business but selling alternative products such as 'mammoth ivory, emerald and jade products'.[48] Additionally despite 'some small accessories (below 0.5 g) which were suspected to be elephant ivory products, no other elephant ivory products were found'.[49] However, assessment of the other (not previously licenced) outlets found 354 illegal retailers with approximately 2,812 ivory products for sale, TRAFFIC suggest these figures show an increase of 22% in the amount of illegal ivory products available between 2017–2018 despite the ivory ban.[50] Moreover, it is stated that of the 2,812 products available 2,126 were the product of new ivory (post-1989).[51]

Organisations such as TRAFFIC suggest the illicit trade and manufacture of ivory is now more limited to cities bordering Vietnam, and as such the illicit trade of ivory has become less internalised within China.[52] Yet, academics such as Gao suggest that while conservationists may have hoped the ban would reduce Chinese consumer demand, after the ban analysis of media coverage suggests that the 'macro-public opinion throughout China became more

[45] Ibid.
[46] Benjamin Haas, 'Under Pressure: The Story behind China's Ivory Ban' *The Guardian* (London, 29 August 2017) <www.theguardian.com/environment/2017/aug/29/story-behind-china-ivory-ban> accessed 27 August 2023.
[47] Yu Xiao, 'China's Ivory Market After the Ivory Trade Ban in 2018' (TRAFFIC Briefing 2018).
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.

positive about elephant ivory'.[53] In fact academic Gao suggests 'the ban may have drawn more attention to the perceived value of ivory in art and culture, making ivory seem more desirable'.[54] But, such assertions as to China's current domestic attitude on ivory are widely contradicted.[55] Organisations such as WWF claim that based on annual statistical study China's consumer demand for ivory continues to fall in response to the 2017 ban, with demand now 'less than half of pre-ban levels'.[56]

This article proposes that whilst assertions such as those made by WWF that the demand amongst Chinese ivory consumers has lessened, this appears to be contradicted when confronted with statistics regarding the continued illegal trade of ivory within China. While there has undoubtedly been a reduction in manufacture as shown by TRAFFIC's report, the increase in available new ivory products would suggest continued ivory consumerism within China.[57] This article finds that such conclusions appear logical when considering the historical, cultural and spiritual value of ivory in China, in turn this article would conclude that there has yet to be a complete change in China's domestic consumer attitude towards one of its most culturally treasured materials.

3.4 US: Consumers and Risks to other Cultural Crafts

Unlike the other countries discussed in this article, the US does not have as long of a cultural history of carving or consuming ivory products. In fact, ivory products were introduced by the people of the British colonies and from 'the turn of the twentieth century, huge amounts of ivory were being imported into the United States'.[58] In response to increasing ivory imports and concerns with conservation the US introduced three federal laws to govern its ivory trade.

Chronologically these laws were the Lacey Act 1900, the Endangered Species Act 1973 and the African Elephant Conservation Act 1988. Together the aforementioned laws reduced the

[53] Kat J McAlpine, 'Examining Changes in Public Opinion on Ivory in China' (*Yale School of Environment*, 7 February 2023) <https://environment.yale.edu/news/article/examining-changes-public-opinion-ivory-china> accessed 27 August 2023.
[54] Ibid.
[55] Ibid.
[56] 'Demand for Elephant Ivory in China Drops to Lowest Level Since National Ban' (*WWF*, 2021) <www.worldwildlife.org/press-releases/demand-for-elephant-ivory-in-china-drops-to-lowest-level-since-national-ban> accessed 27 August 2023.
[57] Xiao (n 47).
[58] Campbell Pedersen (n 1) 264.

categories of legal ivory imports drastically, imposing age restrictions which only accepted pre-1979 tusks and antiques of over 100 years in age.[59] The effectiveness of this legislation is reflected in Stiles and Martins research study of the US ivory market, which discovered the market was reducing in 2007 with only 120 ivory craftsmen left of the 1,400 documented in 1989.[60] However, despite such changes to manufacturing levels the same study also found that in 2008 the US had 'the second largest ivory retail market in the world after China/Hong Kong'.[61]

In 2016 following the outcry by CITES for more to be done to tighten ivory control, 'the US Fish & Wildlife Service announced new federal regulations implementing a nearly complete ban on commercial elephant ivory trade in the United States'.[62] These regulations prohibit the import or export of any ivory commercially, aside from those under the antiques exemption of the Endangered Species Act 1973.[63] The regulations on non-commercial ivory import and export are broader in scope but still limited to scientific specimens or ivory acquired before 1976 which forms part of a household, inheritance, musical instrument or is an antique.[64] Following these new regulations the organisation TRAFFIC identified '1,589 ivory items offered in physical retail premises'[65] in 2016, this is a major reduction in ivory trade from the '24,004 ivory items in the 657 outlets'[66] found in 2008. Such statistics undoubtedly show the effectiveness of US ivory legislation in reducing commercial trade but, there is concern that 'the impacts of broadly written State ivory bans' are indirectly and unfairly penalising other non-elephant ivory craftspeople within the US.[67]

While the US does not have an established cultural history of working elephant ivory, North American states have a rich history in working marine ivory species such as walrus, narwhals and whales.[68] Likewise, states in Southern America have an ancient culture of bone carving

[59] US Fish and Wildlife Services, 'Guidance on What Can I Do with My Ivory' (*FWS*, 2016) <https://www.fws.gov/sites/default/files/documents/What%20Can%20I%20Do%20With%20My%20Ivory_%20%281%29.pdf> accessed 5 June 2024.
[60] Ibid.
[61] E Martin and D Stiles, *Ivory Markets in the USA* (Save the Elephants 2008) 5.
[62] WWF (n 10).
[63] FWS (n 59).
[64] Ibid.
[65] Rachel Kramer and others, 'The US Elephant Ivory Market: A New Baseline' (TRAFFIC Report 2017) 5.
[66] Martin and Stiles (n 61).
[67] US Subcommittee on Fisheries, Water and Wildlife, *Examining the Impacts of the Federal African Elephant Ivory Ban and Related State Laws* (US Government 2016) 2 <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg22605/pdf/CHRG-114shrg22605.pdf> accessed 5 June 2024.
[68] Campbell Pedersen (n 1) 264–267.

from fossil ivories such as mammoth and mastodon.[69] In his address to the US Senate, Dan Sullivan Senator for Alaska directly addressed his concerns that new US regulations where now being used to ban the 'selling of, tooth or tusk from a species of elephant, hippopotamus, mammoth, walrus, whale, narwhal, or piece thereof, whether raw ivory or worked ivory'.[70] The Senator's concern was that the broadening of scope to cover all ivory sources would be detrimental to Alaskan natives who rely on such materials/animals not only as a cultural craft capable of economic profit, but also as a food source.[71]

Although some conservationists may argue the selling of all ivory is morally/ethically wrong, this article would point out that the ivory usage in Alaska is not wasteful, as Walruses are hunted primarily as a food source not as an ivory source like elephants. In addition, the use/crafting of extinct ivory species such as mammoth which 'can be differentiated from elephant ivory by a simple field test' is 'a legitimate and ethical trade' which does not involve the killing of animals.[72] Moreover, neither of the aforementioned species are listed on the CITES endangered species list. In fact, the Marine Mammal Protection Act 1972 'explicitly allows Alaska Natives to harvest walrus for subsistence purposes and permits the sale of authentic articles of Native handicraft factioned from them'.[73]

However, ivory craftsman Lee Downey has recognised that the new ivory ban has made customers reluctant to purchase fossil and other ivories despite the legality of their trade, so much so he will be leaving the fossil ivory trade.[74] Not only are non-elephant ivory craftspeople suffering from the ethical/legal concerns of the public in light of increased elephant ivory restrictions, in consequence of new in-state bans covering all tusks and teeth they now face legal restrictions beyond the federal standard and exceeding CITES' ivory trade intent.[75] So, while the US federal ivory law may be effectively reducing the trade and crafting of elephant ivory, it is also negatively affecting non-elephant ivory craftspeople by imposing new legal burdens without the same level of ethical justification which corresponds to species conservation.

[69] Ibid.
[70] US Subcommittee on Fisheries, Water and Wildlife (n 67).
[71] Ibid.
[72] Erin Hogarth and Duncan Pay, 'Fossil Ivory Update with Lee Downey' (*GIA*, 2020) <www.gia.edu/gems-gemology/summer-2020-gemnews-fossil-ivory-update-with-lee-downey> accessed 27 August 2023.
[73] US Subcommittee on Fisheries, Water and Wildlife (n 67) 3.
[74] Hogarth and Pay (n 72).
[75] US Subcommittee on Fisheries, Water and Wildlife (n 67).

Whilst conservation organisation WWF praise the US' near total-ban as 'a major victory' which shows 'the US government will not tolerate the slaughter of elephants'.[76] This article would actively disagree with that statement as the US Government actively allows and encourages the unnecessary slaughter of elephants through one of its statutory import provisions. Under section 4(d) of the Endangered Species Act 1973 the US Government allows for the import of sport-hunted trophies limited to two African elephant trophies per hunter per year. This article would argue that the inclusion of such an exception actively promotes the commercial slaughter of elephants in Africa and as such is an unjustifiable and direct conflict with CITES' aims of conservation and ethics.

3.5 UK: A new Era of Ivory Legislation

The oldest ivory artefacts in the UK serve as a reminder of the expanse of the Roman Empire and since the Roman's introduction of ivory its 'use never ceased'[77] in the UK until the Ivory Act 2018 effectively banned the trading of ivory. Although the UK is not a source of raw ivory nor viewed as a prolific manufacturer of ivory goods, it has undeniably acted as a consumer and trader of ivory goods throughout history.

However recent legal history shows the UK has made efforts to reduce its role in the illicit ivory trade. First, through its CITES membership and adoption of the European Unions Commission Regulations (EEC) 3418/83[78] and 3626/82,[79] which introduced import and export controls of endangered species. The aforementioned regulations were later adopted in domestic legislation by the Control of Trade in Endangered Species Regulations (COTES) 1997. The COTES[80] Regulations, which set out the UK's domestic ivory legislation, were heavily scrutinised as 'open to abuse and fraud'.[81] As a consequence of such criticisms and the continued international decrease of elephant populations, the UK recently enacted the Ivory Act 2018.

[76] WWF (n 10).
[77] Campbell Pedersen (n 1) 190–191.
[78] Commission Regulation (EEC) 3418/83 of 28 November 1983 laying down provisions for the uniform issue and use of the documents required for the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora [1983] OJ L344/1.
[79] Commission Regulation (EEC) 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora [1982] OJ L384/1.
[80] The Control of Trade in Endangered Species Regulations (COTES) 1997.
[81] Caroline Cox, 'The Elephant in the Sales Room: Ivory and the British Antiques Trade' (2016) 23 IJCP 321.

The Ivory Act 2018 diminishes the ability to trade both antique and new ivory objects within the UK and abroad and is praised as 'an extraordinary achievement'.[82] This article will now set out the current law under the Ivory Act 2018 with regard to trade, while analysing its effect on elements of the art market such as traders, antique dealers and auction houses.

The largest alteration to UK ivory legislation comes under section 1 of the Ivory Act 2018 which states 'dealing in ivory is prohibited'.[83] As such it is no longer legal to buy, sell, hire, offer to buy, sell or hire and import or export ivory goods within the UK in accordance with section 1(2) of the Act.[84] However, since ivory is understood as the 'ivory from the tusk or tooth of an elephant',[85] the Act does legislate the ability to include other species where appropriate within its section 37(2).[86]

Section 1[87] is responsible for the prohibition of all trade in elephant ivory across the UK art market. This is a dramatic evolution from the COTES[88] Regulations which did not directly prohibit the trade of ivory but merely regulated trade in keeping with the EU certification scheme as set out by the Commission Regulations (EEC) 3418/83[89] and 3626/82.[90] Under COTES[91] Regulations antique traders could 'sell worked ivory provided that the sellers can certify that the item in question has been carved before June 1947'.[92] In doing so COTES[93] theoretically allowed the maintenance of a legal and legitimate antique ivory trade while illegalising the sale of modern post-1947 ivory. This exemption was contentious however, as it relied on the self-certification of traders and as such was 'open to abuse and fraud'.[94] The Ivory Act[95] while still allowing some exemptions to trade (to be discussed accordingly), has a certification process which is instead overseen by the Secretary of State as stated in its section

[82] Caroline Cox, 'The Elephant in the Courtroom: An Analysis of the United Kingdom's Ivory Act 2018, Its Path to Enactment, and Its Potential Impact on the Illegal Trade in Ivory' (2021) 24 Journal of International Wildlife Law & Policy 105.
[83] The Ivory Act 2018.
[84] Ibid s 1 (2).
[85] Ibid s 37(1).
[86] Ibid s 37(2).
[87] Ibid s 1.
[88] The Control Of Trade In Endangered Species Regulations 1997.
[89] Commission Regulation (EEC) 3418/83 [1983] OJ L344/1.
[90] Commission Regulation (EEC) 3626/82 [1982] OJ L384/1.
[91] The Control Of Trade In Endangered Species Regulations 1997.
[92] Cox (n 81).
[93] The Control Of Trade In Endangered Species Regulations 1997.
[94] Cox (n 81).
[95] The Ivory Act 2018.

2(2)[96] and with the assistance of appropriate advisory bodies section 2(5).[97] In removing the self-certification method the Ivory Act 2018 should avoid the trader bias to profit on illegally obtained ivory, while allowing within the exemptions some minor trade within the art market to continue.

The first exemption to the prohibition on ivory trade is set out under section 2 of the Ivory Act 2018 which makes an item exempt if '(a) the item is pre 1918, and (b) the item is of outstandingly high artistic, cultural or historical value'.[98] Where the owner of the ivory item believes the aforementioned conditions are relevant they can apply to the Secretary of State for an exemption certificate. The conditions of certification as previously mentioned are much stricter than the previous law, while taking into account additional factors such as rarity under section 2(3),[99] the current legislation also requires the institution ascribed by the Secretary of State to be able to physically inspect the item to assure the conditions are met section 3(3).[100]

Additionally made exempt under the Ivory Act 2018, are ivory items with small ivory surface areas or content. Under section 6 pre-1918 portrait miniatures with a surface area of no more than 320 cm^2 are exempt from the ivory prohibition.[101] Similarly under section 7 items that predate 1947 with an ivory volume of less than 10% can be exempt.[102] Likewise section 8 allows the trade of musical instruments predating 1975 with an ivory volume of less than 20%.[103] Unlike the section 2[104] exemption however, the aforementioned exemptions do not require the Secretary of State to arrange a physical inspection. Certification for small volume ivory items remains as it was under COTES,[105] under section 10(1(d)) of the Ivory Act 2018[106] the applicant need only provide an explanation of how the item satisfies the relevant conditions thus traders may self-certify their own ivory. Provided the Secretary of State is satisfied the relevant conditions have been met for an exemption certificate to be granted, these ivory items may continue to be traded within the UK art market.

[96] Ibid s 2(2).
[97] Ibid s 2(5).
[98] Ibid s 2.
[99] Ibid s 2(3).
[100] Ibid s 3(3).
[101] Ibid s 6.
[102] Ibid s 7.
[103] Ibid s 8.
[104] Ibid s 2.
[105] The Control Of Trade In Endangered Species Regulations 1997.
[106] The Ivory Act 2018.

Import and export regulations under the Ivory Act 2018 remain practically unchanged from COTES, in order to deal in ivory which under section 1(2) includes the import and export of items, the ivory item must be accompanied by the relevant exemption certificate.[107] Although domestic trade under COTES was poorly enforced, case law would support that customs management of illegal ivory exports was highly effective and consistent. Comparing cases shows an unbiased approach to applying section 49 of the Customs and Excise Management Act 1979 which enforces the forfeiture of improperly imported goods. Whether the importer is an art gallery such as in *Mayfair Gallery Ltd*[108] importing goods for commercial purposes, or an individual importing for non-commercial purposes as in *Sidhom v The Director of Border Revenue,*[109] customs enforcement under COTES was unbiased and strict where the correct certification was not provided. The judgment in *Sidhom v The Director of Border Revenue* stated: 'Ignorance of the law is no excuse in the eye of the law' a lack of knowledge as to the legal requirements for ivory imports is not a sufficient justification for the restoration of illegally imported goods.[110] Likewise, the retrospective filing for import certification after goods have been seized would not be accepted in *Mayfair Gallery Ltd v Director of Border Revenue*.[111] Considering the strict and consistent approach of courts and customs under COTES and given the Ivory Act 2018 has reduced the number of items available for certification, while simultaneously strengthening the certification application system, it is reasonable to presume equally successful import/export control will be maintained.

4 Proposed Alternatives and Amendments to Ivory Bans

The call for a global prohibition on the trade of ivory is a sentiment echoed by many academics and conservationists, who argue such measures would effectively reduce poaching and protect elephants.[112] While there is a growing 'no-trade consensus',[113] with countries such as the US, China and the UK implementing domestic trade bans, there is yet to be a comprehensive global

[107] Ibid s 1(2).
[108] *Mayfair Gallery Ltd v Director of Border Revenue* [2017] UKFTT 233.
[109] *Sidhom v The Director of Border Revenue* [2015] UKFTT 664 (TC).
[110] Ibid.
[111] *Mayfair Gallery Ltd v Director of Border Revenue* (n 108).
[112] Elizabeth L Bennett, 'Legal Ivory Trade in a Corrupt World and its Impact on African Elephant Populations' (2015) 29 Conservation Biology 54.
[113] Biggs and others (n 16).

ivory trade ban. Critics of these trade bans raise significant concerns that such bans paradoxically increase the perceived value and in turn the scarcity of both legal and illegal ivories.[114] However, many of the proposed alternatives are not viewed without criticism or controversy.

4.1 Destruction

Many conservationists remain unsatisfied by current international ivory laws suggesting that preservation of any ivory regardless of justifications such as education, art, history and culture are not proportionate. Instead they propose destruction of ivory artifacts as a radical and controversial alternative.[115] In both UK and international law the right to destroy is an inherent component of the right to property, under this reasoning an owner is entitled to treat their property as they see fit regardless of whether doing so results in the wasting of a valuable resource or destruction of cultural heritage.[116] Consequently, in recent years multiple mass ivory destructions have been held in public with the aim of raising awareness of conservation and poaching.

The largest ivory burn took place in Kenya in 2016, with one hundred and five tons of elephant tusk estimated to represent '8,000 elephants' burnt in public.[117] While this burn spiked public interest initially its response was found to be fleeting and failed to reach the intended demographic of consumers, dealers, poachers and traffickers.[118] While conservations such as John Calvelli of the US Wildlife Society argue destruction is effective on the basis that it acts as a 'physical reminder of the commitment by governments, organizations, and the public to save elephants.'[119] Anti-destructionists such as Michael 't Sas-Rolfes are sceptical and concerned that destructive acts 'could backfire, reinforcing perceptions of ivory's scarcity and supporting high black market prices'.[120] Moreover, there are concerns the destruction only acts as good PR for governments and does not tackle more prominent issues, such as increasing 'the

[114] Ibid.
[115] Caroline Good and others, 'Elephants Never Forget, Should Art Museums Remember Too? Historic Ivory Collections as Ambassadors for Conservation Education' (2019) 28 Biodiversity and Conservation 1331–1342.
[116] John G Sprankling, *The International Law of Property* (1st edn, OUP 2014) 293.
[117] 'Largest Ivory Burn Kenya 2016' (*WWF*, 2016) <https://wwf.panda.org/wwf_news/?267833/LARGEST-IVORY-BURN-KENYA-2016> accessed 27 August 2023.
[118] Good and others (n 115).
[119] Jani Hall, 'Does Destroying Ivory Save Elephants? Experts Weigh In' (*National Geographic*, 2017) <www.nationalgeographic.com/animals/article/wildlife-watch-ivory-crush-elephant-poaching > accessed 27 August 2023.
[120] Ibid.

effectiveness of anti-poaching operations, improve law enforcement in demand countries, and reduce demand among consumers'.[121]

Aside from the aforementioned points regarding conservation concerns, a prevailing concern with destruction is that it removes cultural heritage, history and art irrevocably. Previous crushes and burns have not been limited to new ivory objects, for example the 2015 US crush included illegally seized antique ivory. Despite prominent conservationists such as Prince William who is royal patron of the TUSK charity, stating he wishes to destroy all ivory within the royal possession, even Charlie Mayhew co-founder and CEO of Tusk concedes the destruction of genuine antiques and items of real cultural value would be the act of a philistine.[122]

Others have compared ivory to similarly controversial points of cultural heritage with Mark Dodgson secretary general of BADA stating, 'we wouldn't bulldoze the city of Bristol because it was built on the profits of slavery',[123] a point which reiterates that in destroying historic ivory items we do not save the elephants which died for their production. In consideration of these points although the destruction of modern ivory and ivory stockpiles may reduce the quantity of illegal ivory capable of being illegally traded, this author is swayed to the arguments for conservation of cultural heritage for genuine historic ivory. Instead, a more effective international solution that directly tackles law enforcement issues, anti-trafficking measures and reduces demand amongst relevant demographics should be explored as an alternative to destruction.

4.2 Scientific Testing and Law Enforcement

One of the main arguments for the trade prohibition is that it is very difficult to distinguish legal ivory from illegal ivory in the markets, making the legal ivory trade a perfect cover for smuggling.[124] As in the case of many other gemstones, effective ivory identification has proven historically to be problematic with regard to establishing country of origin and accurate dating. If a combined scientific approach was able to create an effective non-destructive testing method

[121] Ibid.
[122] Good and others (n 115).
[123] Ibid.
[124]Stefan Merker, 'Identifying the Origin of Elephant Ivory with Isotopes' (TRAFFIC Bulletin 2012) 56.

to discern the origin and age of ivory, in both raw and worked form, then global law enforcers would be better equipped to identify legal/illegal ivory while preserving important historical artifacts and targeting key geographical poaching hotspots and trade routes.

While the visual non-destructive identification techniques are taught and promoted by CITES, WWF and TRAFFIC, to aid industry in distinguishing ivory species, these methods rely on the identification of Schreger lines which are not definitive to dating ivory. So, whilst these methods are promoted by CITES and others they should only be used for 'preliminary' identification, as recognised by gemmologists Yin and others 'identification of fossil and modern ivories based on Schreger angles requires caution.'[125]

Developments in non-destructive conclusive ivory testing methods have expanded to include scanning electron microscopy (SEM), infrared spectral analysis (FTIR) and laser-induced breakdown spectroscopy (LIBS).[126] While the aforementioned testing is ideal for ivory artifacts as both methods are virtually non-destructive and capable of distinguishing species, none of these tests can provide distinctive answers as to age of the elephant ivory. Meanwhile the many date-oriented exceptions under sections 2, 6, 7 and 8 of the Ivory Act 2018 have made ivory dating intrinsic to enforcement in the UK. Whilst the use of carbon isotope testing may appear an obvious solution to ageing ivory, such testing is 'invasive'[127] and requires the sacrifice of some material to produce results. Furthermore, there are concerns regarding the accuracy of carbon isotope dating as it is known there 'is a margin of error of several years,'[128] under the Ivory Act 2018 a seven-year margin of error can make a significant difference between legal and illegal ivory.

4.3 Uniting Africa's Legislation and Enforcement

Both academics and CITES recognise the need for an African solution to what at its source is a predominantly African problem. As previously discussed despite most African states' membership to CITES, illegal poaching has continued with at least 30,000 African elephants being poached annually.[129] As recognised by Biggs this statistic is not only a result of poor

[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Sehgal (n 27) 5.

individual state governance but reflective of the lack of unity in ivory enforcement across African states.[130] Within Africa there is what Galaty describes as a 'conservation conundrum,' with some African states supporting an outright ivory ban while other states encourage the trade of ivory as a mechanism of supporting conservation.[131]

With the aim of combatting this disunification CITES has enabled the African Elephant Conservation Meetings since 1996, bringing together African states to create an African Elephant Action Plan. Yet there has been 'continued polarisation' in creating a unified African lead solution, Biggs believes, to combat this recognition of 'the different moral perspectives of stakeholders' involved is required.[132] An effective African Elephant Action Plan ought to recognise the need for such 'trade-offs' between the negotiating states, while some may be morally opposed to the ivory trade, other states may require trading ivory to fund their local economies and conservation so for a unified policy to exist concessions will have to be made.[133]

While this article agrees with Biggs that a uniform policy to regulate the ivory trade in Africa needs to be established and enforced by the African states to which it applies, as opposed to a policy dictated by intervening international states, this article would highlight that as a poorer country, Africa most likely does not have the economic means to enforce this plan once established. If CITES and its member states genuinely intend to reduce ivory poaching and smuggling, they could pool together funding in support of new African elephant conservation measures. If CITES members were to economically support an African conservation and anti-poaching plan the need for trade bans would be significantly reduced, as modern ivory sources would be well policed and new ivory would not dilute the antiques trade.

4.4 An International Certification Scheme

As suggested by Sehgal, closing loopholes within ivory registration and enforcement by imposing a serial registration system could theoretically ensure the close monitoring of the ivory trade without the need for a complete ban.[134] Given that CITES 'imposes upon each Member State the obligation to create a domestic permit system for the control of the trade of

[130] Biggs and others (n 16).
[131] Galaty (n 19).
[132] Biggs and others (n 16).
[133] Ibid.
[134] Sehgal (n 27) 4.

listed species',[135] this article would propose modifying this system to certify and trace antique ivory items so that they may continue to be legitimately traded. This system would go beyond the current CITES permit system, by requiring the scientific testing/dating of any ivory item that the permit applicant may wish to trade. CITES member states would be required to agree a unanimous cut-off date for antique ivory, in turn this would unify trade regulations across CITES members while allowing the trade of genuine antiques. Items which are dated via testing and classified as genuine antiques, would receive a certification featuring a detailed description, imagery, testing results and a unique serial number. This type of system was previously attempted by CITES in 1989 to a lesser extent, and only in application to marking raw ivory tusks with serial numbers.[136] This system was problematic as once raw ivory was worked serial numbers were removed and the traceability of legal and illegal tusks was lost.

However, this article proposes a serial number certification scheme that only applies to worked antique ivory objects. Such a scheme is not unheard of within gemmology and is currently used to certify and distinguish natural diamonds from laboratory grown diamonds. 'The laboratory grown diamond's girdle is also laser inscribed with the report number as well as the words "lab grown". These steps are taken in the interest of clear delineation for consumers.'[137] The same structure in laser engraving ivory antiques with serial numbers, while requiring some small-scale alteration to the antiques surface would allow the continued preservation and trade of ivory with artistic and historic value/significance. Moreover, there is proof within gemmology that a legally enforced international certification scheme can work to reduce ethical issues, with the Kimberly Process Certification Scheme boasting that now 99.8% of the world's diamonds come from conflict-free sources'.[138] While these types of certification scheme would be a large improvement for ivory traceability, they can be prone to fraud and alteration as exterior surface inscriptions can be removed or faked by criminals.

Consequently, this suggests ivory certification could potentially go further and consider the possibility of a scheme mirroring the recently developed 'emerald paternity test' technology.[139]

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[135] David Favre, 'Elephants, Ivory and International Law' (2001) 10 RECIEL 227.
[136] Ibid.
[137] 'Laboratory Grown Diamond Report' (*IGI*, 2022) <https://www.igi.org/reports/lab-grown-diamond-jewelry-report/ > accessed 6 September 2023.
[138] 'Working Together to Halt Conflict Diamonds' (*Kimberly Process*, 2016) <https://www.kimberleyprocess.com/en/kp-action> accessed 6 September 2023.
[139] 'Emerald Paternity Test' (*Gübelin*, 2017) <www.gubelingemlab.com/tl_files/content/03%20Gemmology/Gem%20Lab/Documents/ggl_broschuere_provenance-proof.pdf> accessed 6 September 2023.

Gubelin Gem Labs have developed ground-breaking technology which uses DNA-based nanoparticles, infused by liquid, inserted into the tiniest internal fissures which build the structure of the gemstone.[140] This unique DNA code is encrypted with retrievable information regarding age and origin and is undetectable to the eye, such encryptions are only accessible by a specific gem testing device and thus not prone to fraud.[141] As a porous material there is no feasible reason why ivory like emeralds could not be subject to DNA paternity encryption, such a scheme would allow the trade of not only antique ivory but also ethically sourced modern ivory, thus, allowing states in Africa to ethically fund their own conservation projects. As such there is nothing stopping the effective control of a legal ivory trade other than an international willingness to do so.

5 Conclusions

This article has consistently supported the ground-breaking nature of the listing of the African elephant in Appendix 1of CITES. It was deemed a necessary step in the global effort to reduce illegal poaching and championing elephant conservation. While the importance of elephant conservation has remained undisputed within this article, the international legislative mechanisms created in response to CITES Regulations under the justification of elephant conservation have undergone rigorous interrogation. The effectiveness of CITES and CITES-inspired ivory bans as seen in the US, China and most recently the UK, have been called into question throughout this study. Whilst this article agrees that because of present-day poaching the stringent control of modern ivory manufacture and trade in countries where statistical and scientific data identified illicit trade is imperative, it does not maintain the view that the growing global consensus and movement towards a total ivory trade ban is a proportionate solution to the ivory crisis.

As pointed out in the preceding sections, trade bans have not been found to actively bolster conservation and anti-poaching efforts within the countries at the heart of the ivory crisis. Instead, international efforts have inadvertently hindered the abilities of these economically disadvantaged third world countries, hindering their ability to fund vital projects aimed at conservation and anti-poaching enforcement. Moreover, this article suggests that ivory trade

[140] Ibid.
[141] Ibid.

bans are negatively affecting all areas of the art market, with antique and indigenous non-elephant ivory manufacturers facing particularly severe repercussions, despite their ethical sourcing practices.

Whilst this article does not advocate that economic, historical,or artistic value should come before concerns of species conservation, it has highlighted that present day scientific and gemmological certification methods could effectively control and regulate an antique ivory market, much like those adopted by other gem species. A regulated antique ivory market could theoretically preserve significant historical, artistic and cultural items, without posing a threat to the current elephant population with which CITES is primarily concerned.
Nonetheless, this article remains sceptical about the feasibility of implementing such alterations to allow for a small-scale antique ivory trade given the associated costs and enforcement requirements. Instead, the trade of ivory will likely remain limited to the small number of exemptions made under each state's domestic legislation.

While these exemptions suggest a collective desire to protect high-value and artistically or historically important ivory artifacts, the limited scope of exemptions leaves a large proportion of ivory artifacts excluded. With no economic or appreciable value, these artefacts will likely be destined for destruction or fade into obscurity. Such outcomes appear unjust when exemptions such as those for hunting trophies are maintained over the preservation of art, history or indigenous crafts, effectively mocking the intent of CITES.

Therefore, whilst this article has demonstrated through comparative analysis, that CITES membership and regulations have laid the foundations for a ban on the trade of ivory, and consequently facilitated the removal of ivory from the legal art market in three out of the four countries discussed. This article has raised several important questions regarding the proportionality of impact on the art market versus the impact upon elephant conservation. In turn it has highlighted the complex interplay between legislation, cultural contexts, economic interest and the complex conservation requirements in the evolving world of ivory art and trade.

Grave-Robbing, Private Collections and Repatriation: A Case Study on Cultural Heritage in the United States

Ellie Allan

Abstract

This article discusses the 2014 case study of Don Miller, during which over 5,000 artefacts and 2,000 human remains were seized by the FBI's Art Theft Department from the 91-year-old's home in Indiana, US. This case study is presented in the context of changing public and legal opinions of cultural heritage, particularly as it pertains to Native American cultural patrimony and human remains. This case study has been chosen for scrutiny because it exemplifies attempts reckoning of dissonant pasts at a state level through the Native American Graves Protection and Repatriation Act (NAGPRA), while simultaneously unravelling some of the historical factors that make Don Miller's large private collection not so much an outlier as it is symptomatic of social and legal worldviews of the 20th century. Finally, this article hypothesises the increased discovery and inheritance of difficult and tarnished personal collections in the United States. This article advises that the 'Miller' case, while hopefully an extreme, is an example of what may become prolific in the next few decades as generations who are to inherit these collections become increasingly more uncomfortable with their difficult content.

> ‘NAGPRA is a part of a larger historical tragedy: the failure of the United States Government and other institutions, to understand and respect the spiritual and cultural beliefs and practices of Native People … [we] hope that the understanding, sensitivity, and moral outrage that gave rise to and is reflected in NAGPRA will likewise result in across-the-board protection and respect for traditional Native American religions—which continue to be under assault in the last decade of the 20th century.’[970]

1 The Don Miller Case

In 2014 the FBI’s Department of Art Theft seized over 7,000 objects from the private collection of 91-year-old Don Miller in Indianapolis, Indiana. This raid, led by Tim Carpenter, was the largest seize of illicit artefacts and antiquities recorded in US history and was the result of an anonymous tip that Miller had in his possession a hoard of questionable antiquities. He had previously been reported in 2008 for allegedly owning parts of a nuclear weapon. The report was not entirely false as agents found uranium being stored by Miller in a glass cabinet.[971] Among the official reports was a passing comment that would be the catalyst for Carpenter's investigation: Miller ‘had a very large collection of Native American artifacts’.[972]

After two follow-up visits Carpenter was sure that among Miller’s hoard were many illicit objects including pre-Columbian and Chinese artefacts that were protected by treaties. In 2014, after consulting archaeologists, anthropologists and a vast array of potentially relevant legislation, Carpenter and his 100-man task force knocked on Miller’s door and informed him that they were there to remove some of his collection. Despite the absence of a search warrant, Miller cooperated with the FBI and a six-day removal operation followed to remove 5,000 cultural artefacts.[973] The process of cataloguing and extracting Miller’s collection was spearheaded by Purdue University Anthropology Professor Holly Cusack-McVeigh and graduate students within the department.[974] The items included:

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[970] Jack Trope and Walker Echo-Hawk, ‘The Native American Graves Protection and Repatriation Act: Background and Legislative History (1992) 24 Arizona State Law Journal 77.

[971] Josh Sanburn, ‘How the FBI discovered a real-life Indiana Jones in, of all places, Rural Indiana,’ (*Vanity Fair*, Nov 2021) <https://www.vanityfair.com/style/2021/10/how-the-fbi-discovered-a-real-life-indiana-jones-in-indiana> accessed 29 Jan 2024.

[972] Ibid.

[973] Sanburn (n 2).

[974] Ibid.

> '*2,500-year-old Chinese jewellery … an Egyptian sarcophagus … a dugout canoe that travelled the Amazon River … dinosaur eggs, a Tibetan cowbell, a fossilized crocodile skull, pre-Columbian weapons, Ming Dynasty vases, shrunken heads, Nazi helmets, Aztec figurines, Celtic axes*.'[975]

Miller was quite open about his collection and the acquisition process, which he admitted included bribing archaeological workers (with a box of cigarettes or a bottle of alcohol) while travelling in the military, on holiday and on mission trips.[976] Miller opened his home for neighbours, reporters, for the local school children and boy scouts[977] and by all accounts was a well-liked member of the community. But among Miller's amateur museum there was an assortment of items that turned this avid history buff into a man with a far more troublesome and nefarious pursuit. Found in Miller's possession were around 2,000 bones[978] taken from indigenous burial sites.[979] The human remains were largely housed in black bin bags.[980] Some of the human skulls had hand-hammered arrow heads and bullets lodged into the bone and Pete Coffey (representative of the MHA Nation[981]) noted in Ben Lewis' podcast Art Bust[982] that Miller had carved the top of one skull and used it as a fruit bowl.

Miller's active role in obtaining these remains was later proved by photographic evidence that showed Miller digging in rural burial sites. One image showed his ear-to-ear grin, as he posed next to a child's casket.[983] It is thought that Miller obtained all of these human remains himself,

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975 Ibid.

976 Ibid.

977 Samantha Smart, 'Righting a Decades-old Wrong: FBI Art Crime Team repatriates over 450 Haitian Artifacts' (2020) Columbia Journal of Law & the Arts <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/271> accessed 29 Jan 2024.

978 There is some ambiguity in the reporting of how many full skeletons were made up from Miller's miss-match of remains. For example, the FBI website (2019) (<https://www.fbi.gov/news/stories/fbi-seeks-owners-of-recovered-cultural-artifacts-022719>) and *Vanity Fair* (2021) (<https://www.vanityfair.com/style/2021/10/how-the-fbi-discovered-a-real-life-indiana-jones-in-indiana>) report that approximately 500 full skeletons were in the collection. *Vanity Fair* report that in 2016, 30 full remains were reburied by the MHA Nation and a 2022 Notice of Inventory Completion by Federal Bureau of Investigation's Art Theft Program made the statement that the remaining 138 skeletons could not be identified. Leading to the conclusion that the original figure of 500 is misleading, and the more likely number is 168.

979 Sanburn (n 2).

980 Ibid.

981 Also known as the Three Affiliated Tribes: the Mandan, Hidatsa, and Arikara peoples.

982 Ben Lewis, 'Don Miller's Basement Part 1' (*Art Bust, USG Audio*, 2021) <https://www.everand.com/podcast-show/594459484/Art-Bust> accessed 6 June 2024.

983 Smart (n 8).

by decades of grave-robbing across the United States and Mexico.[984] Over the course of the next few years, the human remains underwent osteological analysis to determine whose ancestors they were which resulted in 30 of the remains being affiliated with the MHA Nation of North Dakota and reburied in 2016,[985] leaving the 138 unidentified remains to be reburied by the Pokagon Band of Potawatomi in a mass grave.

By 2019, the FBI had repatriated artefacts to Native American tribes, Indigenous Canadian tribes, and to Mexico, Peru, Colombia, Spain, Cambodia, Iraq and China.[986] The 361 artefacts that were returned to China during an exchange ceremony at the Eiteljorg Museum, and in 2020, over 450 objects were repatriated to the Republic of Haiti make both of these the largest reparations from the US to the respective countries.[987] A year after the 2014 event, Don Miller passed away.[988]

2 Scientific Racism and Collecting 'the Other'

There is not enough space in this article alone to cover the complex web of historic racism that Native American people have been subjected to since the European settlers first stepped foot in Jamestown. All of these factors deserve space to be fully explored and researched in relation to the Miller case study. This article hopes to briefly shed some light on the question of how and why Miller, and others like him, collect in such extremes. The dissonant past and present that shrouds indigenous existence is one reason why addressing historical mistreatment is both incredibly sensitive and vital, as the targeting of Native American heritage is both a symptom of subjugation and at the same time a particular tool of the imperial manifesto to eradicate, control and deny people respect, even in death. In attempting to rectify the past and move forward with productive resources, it is essential to consider cases such as Miller's for he is not an outlier (although he was an extreme) but rather symptomatic of social worldviews. The Don

[984] Sanburn (n 2).
[985] Ibid.
[986] Domenica Bongiovanni, 'U.S. Returns Hundreds of Artefacts to China' *Indianapolis Star* (Indiana, 1 Mar 2019).
[987] 'FBI Art Crime Team Announces the Repatriation of Over 450 Cultural and Historical Artifacts to the Republic of Haiti February' (FBI, 14 February 2020) <https://www.fbi.gov/news/press-releases/fbi-art-crime-team-announces-the-repatriation-of-over-450-cultural-and-historical-artifacts-to-the-republic-of-haiti#:~:text=The%20479%20Haitian%20artifacts%20were,federal%20law%20and%20international%20treaties > accessed 27 April 2024.
[988] 'Dr Don C Miller Obituary' *The Indianapolis Star* (Indiana, 26 Mar 2015).

Miller case is a shocking and uncomfortable example of the changing public and legal opinions on race, history and heritage. Miller was able to grave-rob as prolifically as he did for three primary reasons: first, the mainstream representation of Native American people that presented Indigenous people as racialised caricatures which was reinforced by institutional exhibitions and visual culture,[989] second, the long-lasting impact of scientific racism which asserted indigenous inferiority and third, the inadequate legal protection for indigenous heritage which made Native American burial sites easy targets.

A long tradition of collecting the Native American body was well established by the 19th century, which saw the proliferation of digging indigenous graves in the name of science and knowledge production.[990] The 19th century also saw the Myth of the Vanishing Indian, which narrated the falsehood that Native American people were 'becoming extinct', like exotic animals. This myth resulted in the mass collection of both Native American heritage and human remains by both the institution and the everyday person who wished to possess 'the disappearing race' for their cabinets of curiosity. This notion was perpetuated in publications, which regurgitated ideas such as:

> '*It should be held in dutiful remembrance that [the Indian] is fast passing away from the face of the earth. Soon the last red man will have faded for ever from his native land and those who come after us will trust out scanty records for his knowledge of habits and appearance… .*'[991]

Scientific racism played a fundamental role in the process of subjugation, namely the work of Samuel Morton in the 19th century and later the theories of Madison Grant of the 20th century which were 'promoted by 20th century polices of assimilation as well as mainstream cultural productions … (including) the Hollywood industry.'[992] The long-lasting impact of these

[989] There is a history of representing Native American people in art, literature and film which curates the Native man as a savage, drunken inferior while Native American women are depicted as helpless, sexualised bodies who need saving from the Native man. Native American religious traditions have been fetishised as both mystically curious and backwards, barbarous.

[990] Bernard Peters, 'Indian-Grave Robbing at Sault Ste Marie 1826' (1997) 23 Michigan Historical Review 49.

[991] Brian W Dippie, *The Vanishing American: White Attitudes and United States Indian Policy* (University Press of Kansas 1991) 27.

[992] Sophie Croisy, 'Fighting Colonial Violence in "Indian Country": Deconstructing Racist Sexual Stereotypes of Native American Women in American Popular Culture and History' (*Angles*, 2017) 5 <https://journals.openedition.org/angles/1313> accessed 6 June 2024.

theories cannot be emphasised enough. The scientific community sought to provide evidence of Native inferiority, and Morton's theories of polygenism and craniology were used by settlers to maintain the dichotomy of 'us' (civilized Europeans) and 'the other' (uncivilised Natives), to categorise indigenous people as being in need of saving and civilising, because of scientific findings.[993] The intention was to produce scientific evidence to back up the superiority of settlers, justifying both the European natural right to settle but also the continued right to govern. Consequently, this time period is marked by a prevalence of grave-robbing continuing through the 20st century. The aftermath is still seen in collections of human remains residing in institutions and private collections like Miller's.

With Native American graves still not adequately protected by law, the 20th century saw the practice of grave-robbing being written about and published in archaeological journals that documented the authors' experiences with looting. Don Miller published two particular articles with the Central States Archaeological Societies Inc entitled: 'Fun on a Sunday Afternoon' (1958) and 'Indiana Collectors Go on Vacation' (1960),. The first article narrates Miller and his wife on a typical Sunday outing, scouring the landscape 'looking for likely Indian campsites'.[994] The latter article is an even darker confession, Where Miller describes exploring the abandoned living quarter of the Sioux tribe of South Dakota, which still had standing but abandoned settlements containing 'furniture, saddles and other living utensils'.[995] Miller and his wife dug into pits on the land, that were oftentimes used to preserve grain or to dispose of rubbish.[996] Upon finding 'two large human leg bones protrude[ing] from the mud',[997] they marked the grave and returned the next morning. Miller describes finding the skeleton in a foetal position, photographing the remains and he noted that '[t]he Indian had had an excellent set of 32 teeth.'[998] Miller concludes the article with the following paragraph:

[993] The legacy of pseudoscience theories of phrenology, particularly the research conducted by Morton on craniology and polygenism has a violent, murky presence within the context of the institution. Craniology asserted that one can deduce racialised character traits based on an analysis of the human skull, including the size and presence of texture or bumps. Polygenism theorises that each race had been created by God separately with different, and specific characteristics that can be seen through racialised traits.

[994] Don Miller, 'Fun on a Sunday Afternoon' (1958) 4 Central States Archaeological Journal 130.

[995] Don Miller, 'Indiana Collectors Go on Vacation' (1960) 7 Central States Archaeological Journal 76.

[996] Ibid 77.

[997] Ibid.

[998] Ibid.

> '*The Indian today knows nothing of his ancestry or tradition. The government checks come regularly and too often find their way to the local bars where the money is put into circulation again. In many ways one feels pity for a group of Indians like these Sioux who were once a proud nation but now reduced to such a purposeless and uncertain future*.'[999]

These two articles provide an insight into the racialised worldview in which Miller operated. He relied upon orientalist constructions of race that classified the Sioux Tribe as leeching addicts, lacking in agency and having lost a sense of pride and community. He uses derogatory language and racial stereotypes to justify himself as a righteous vigilante, seeking to find and save buried treasures, an idea that has only been bolstered by *Vanity Fair* comparing of him to Indiana Jones.[1000] The naturalisation of the worldview was so prolific that his work was published, without fear of repercussions.

3 The Remains in Miller's Basement

There is a series of relevant state, federal and international legislation intertwined with this case. Most relevant to this article is the Native American Graves and Repatriation Act 1990 (NAGPRA), as it showcases the fruit of this legislation in action. NAGPRA was the first, serious legislation that sought to address hundreds of years of maltreatment. It reframed the ownership of Native American remains and material heritage as an infringement on human rights. The primary intention of NAGPRA is to 'protect all Native American human remains, funerary sacred objects, and cultural patrimony, as well as return the items found on federal or tribal lands to their respective tribes.'[1001] The Act also made it unlawful to transport, buy and sell Native American human remains and objects of cultural patrimony without 'the right of possession to those remains.'[1002] A violation of NAGPRA can result in a fine and/or up to 12 months' imprisonment.[1003] This Act enforced a mandatory repatriation of Native American remains and cultural heritage found after 1990 and NAGPRA facilitates restitution of human

[999] Miller (n 25) 78.
[1000] Sanburn (n 2).
[1001] Laura Ruth Talbert, 'Native American Graves Protection and Repatriation Act: Requiring Federal Recognition Digs its Own Grave' (2012) 37 American Indian Law Review 197.
[1002] Ibid.
[1003] 8 USC § 1170.

remains and objects that individuals and institutions wish to return.[1004] This made NAGPRA, 'the first comprehensive approach to treating the Native American cultures as living cultures, worthy of respect for both their past contribution to North American society and their continuing vitality.'[1005] In this sense, NAGPRA's passing and its condition that Native American heritage be treated with respect has the purpose not only of restitution, but 'the ultimate result is the returning to Native American groups the ability to control their own identify, their history and their heritage.'[1006] NAGPRA is a civil rights based legislation,[1007] acknowledging the violation of Native Americans First Amendment Free Exercise right regarding Freedom of Religion, as well as the Sovereign rights of Indian Nations.[1008] The agency for Native Americans to practice religious and spiritual freedoms is a constitutional right which for hundreds of years was grievously ignored.

NAGPRA was also passed in order to address the different treatment given to Native American graves. As discussed by Patty Gerstenblith in her seminal textbook *Art, Cultural Heritage, and the Law: Cases and Materials* (2004), prior to 1990 it was not a criminal offence to loot or destroy Native American burials sites. Gerstenblith notes that '[this] different legal treatment of the burials of Native Americans and burials of the dominant European-derived culture was probably the most striking area of cultural inequality.'[1009] The legal reason for this distinction was that grave protection laws only applied to cemetery graveyards and graves that had an identifiable headstone. Gerstenblith outlines this problem as follows:

> '*[a]lthough state statutes have long criminalized the desecration or interference with religious structures, human gravesites, and cemeteries, such statues were rarely, if ever, applied to scientific study of graves. The laws generally require or are interpreted to require that burials had to be in "cemeteries" or had to be marked in order to receive protection. Native American burials are often solitary or in small groups, do not have headstones, and are not placed in enclosed*

[1004] It also served as an anti-trafficking legislation by highlighting specifically Native American antiquities and artefacts as protectable objects.
[1005] Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Case and Materials* (first published 2004, Carolina Academic Press 2008) 1122.
[1006] Ibid.
[1007] Trope and Echo-Hawk (n 1) 59.
[1008] Ibid 50.
[1009] Gerstenblith (n 36) 1110.

> *cemeteries. Therefore, these state statutes were not applied to prevent or punish casual or even intentional desecration of Native American burials*.'[1010]

The legal battle for equal treatment after death is one example of how late-stage legislation attempts to reverse a long-standing history of discriminatory worldviews.

Due to Miller's own confession, as well as photographic evidence, it was determined that some of the collection did meet the NAGPRA requirements as the remains:

> '*[c]ame into possession or control after November 16, 1990, and was removed from:*
> *(A) An unknown location; or*
> *(B) Lands that are neither Federal nor Tribal lands as defined in this part*.'[1011]

Miller cooperated with law enforcements and agreed to turn over all the remains,[1012] which included those that were in his possession prior to 1990.

It is through the appropriate channels outlined by NAGPRA in sections 43 of the Code of Federal Regulations (CFR) 10.1(d) and 10.10 that newly 'discovered' collections of Native American remains and heritage objects can be resituated to closely affiliated tribes. After coming into 'custody of [the] holding or collection',[1013] the FBI were required to follow the appropriate provisions laid out in NAGPRA.[1014] These provisions are outlined by eight steps, and as mandated by the Act, the FBI were in consultation with tribal officials from the nearest indigenous tribe, the Pokagon Band of Potawatomi, to ensure proper care and treatment of the remains found in Miller's basement.[1015] This included, for example, grappling with the statutory demands of FBI evidence standards, which required the task force to document the

[1010] Ibid.
[1011] 43 CFR 10.8(b).
[1012] Sanburn (n 2).
[1013] 43 CFR 10.8(b)(2).
[1014] There is not enough space within this article to unpack fully the development of NAGPRA, or to review the legislation in a critical manner. Therefore, I would urge readers to continue their reading into the legislation through other sources. Particularly I would recommend Talbert (n 32) 171–202. This article, while precise in its own way, outlines the development of NAGPRA, its predecessors, as well as offering a critique on its shortcomings.
[1015] Sanburn (n 2).

human remains photographically.[1016] This violated the tribal community's perspective of the dignity of the dead, and some find this practice deeply offensive.[1017] In response to this dilemma, Carpenter asserted that:

> '*[w]e [the FBI] had to set up a system where we could do that in very tightly controlled private spaces. We had Native American consultants on-site with us. They had the opportunity to do offerings to the ancestors, to do spiritual rituals. We don't normally give that level of access, but we felt it was imperative in this case to do it.*'[1018]

The remains were removed from Miller's black bin bags by archaeologists, who cried as they placed children's skulls, and mismatched remains in better storage so they could be transported and undergo an osteological analysis to determine whose ancestors they were.[1019]

Although it is difficult to determine exactly how many bones, and full skeletal remains Miller had in his collection due to conflicting reporting, *Vanity Fair* has reported after a year-long process of osteological analysis that around thirty of the remains belonged to the MHA Nation of North Dakota, and the other remains were unable to be linked to a specific tribe.[1020] In a 2022 Notice of Inventory Completion by Federal Bureau of Investigation's Art Theft Program, it was noted that there remained 138 skeletons that had still not been affiliated with a tribe. One difficulty faced in this process was determining which remains belonged together, as:

> '*Miller had taken pieces from other skulls, a different mandible, someone else's teeth, and bones, and glued it all together, Frankenstein-like. Miller, it turns out, was a stager. He thought less like an archaeologist and more like a storyteller*.'[1021]

[1016] Audie Cornish, 'FBI Struggles to Return Artifacts Seized from Indiana Farm to Their Rightful Homes' (*NPR*, 6 March 2019) <https://www.npr.org/2019/03/06/700873632/fbi-struggles-to-return-artifacts-seized-from-indiana-farm-to-their-rightful-hom> accessed 27 April 2024.
[1017] Ibid.
[1018] Ibid.
[1019] Ibid.
[1020] Sanburn (n 2).
[1021] Ibid.

The FBI's role was to remove the remains from danger, and have them returned safely to their place of resting.[1022] The Potawatomi agreed to bury the rest of the remains which were unable to be linked to specific tribes 'in a mass grave in Indiana.'[1023]

4 Conclusion: What Now?

Miller's home, truly an archive of history, had never been questioned by anyone prior to the FBI seize.[1024] He was of a generation of Americans who grew up when the legacy of scientific and cultural racism was both more pronounced, blatant and ubiquitous. Any legislation that existed during this time or since may have seemed alien or inapplicable to him. Socially, he was considered eccentric, as opposed to problematic.

The passing of NAGPRA signalled a state-level acknowledgment of America's dissonant past and an assertion that the collecting, exhibiting and looting of Native American material heritage needs to be reframed and addressed. In the next few decades, it is possible to hypothesise that there will be many private collections uncovered which are similar to Miller's, full of Native American artifacts, funerary objects and human remains. It is likely that there are many other similar collections to be inherited by children and grandchildren of collectors like Miller. As public opinion continues to evolve around these topics, it is likely that the generations who are to inherit these collections will find themselves increasingly uncomfortable with their content**.** The restitution of these items will continue to affect Indigenous communities and the slow return of material heritage is but one element that will contribute to Indigenous autonomy and sovereignty. The respectable treatment of heritage and of the dead is a prerogative from which Native American have historically been excluded.

[1022] Cornish (n 47).

[1023] Sanburn (n 2).

[1024] This article is only able to explore a portion of the Don Miller case, as I have chosen to focus on the role NAGPRA and the human remains found in his collection, the article does not cover the extensive repatriation efforts that have occurred since the seize. Furthermore, the personality of Miller and his life is particularly interesting, and a part of this case, that deserves further exploration. The majority of the reporting on Miller has been conducted by newspapers and by media outlets including *Vanity Fair*, who have produced the most extensive coverage on this case to date. There also remain some unanswered questions, namely if only 5,000 cultural artefacts were seized in the FBI's six-day operation, where is the rest of the collection now and have the other 35,000 objects been investigated further?

To What Extent Should Non-Human Animals Have Legal Rights?

Roma Beke

Abstract

Recent developments in animal welfare legislation in the UK have further advanced the protection of animal rights in domestic law, from the Animal Welfare (Sentience) Act 2022 to the more recent Pet Abduction Bill in January 2024, while international developments such as the 'rights of nature' doctrine have been used to ascribe legal status to non-living entities such as rivers. Both developments raise an interesting question about the advancement of non-human animals' legal status: to what extent should non-human animals have legal rights? This article explores several elements to determine the potential scope of such rights. First, it finds that the multitude of theories on the subject have prevented socio-legal theorists from reaching an agreement on how animals should be treated in society compared with humans. Second, it determines that prevailing socio-cultural preferences for certain non-human animals contradict scientific findings about sentience and make it difficult to create enforceable animal welfare law. Third, it suggests that the applicability of the rights of nature doctrine to non-human animal rights is limited because inanimate environments like rivers are not conscious, and therefore courts can interpret their purpose however they see fit. Finally, it concludes that the complexity of the issues means that the law should not establish which rights should be granted until the legal community can reach consensus on how animals might benefit from specific rights in a practical sense.

1 Introduction

The UK has made significant strides in animal welfare legislation that further advances the protection of animals in domestic law. The Animal Welfare (Sentience) Act 2022, formally recognises animals as 'sentient beings'. The Pet Abduction Bill (January 2024) would make the theft of pet cats and dogs a criminal offence. The bill follows principles established in the Sentience Act, which acknowledges that animals can experience trauma and emotional harm from being taken from their owners. However, society's limited understanding of animal welfare leaves a plethora of unanswered questions about the implementation of non-human animal legal rights (animal rights) and the complex socio-legal issues it might bring. Moreover, domestic legislation combined with international legal developments in other countries, the recognition of the 'rights of nature', or the entitlement of the natural environment to 'legal personhood status' and legal rights, raise an interesting question: *To what extent should non-human animals have legal rights?*

This article explores the acceptability of granting animals legal rights, providing insights from both case law and academia. First, the article will analyse various justifications for animal rights from moral and ethical points of view. Second, it will debate whether all animals should be given the same rights. Third, it will explore whether the concept of the 'rights of nature' could support the recognition of animal legal rights. Finally, the article will examine the potential types of rights animals could have.

2 Moral and Ethical Theories

As a result of the wide range of theories in ethical discussions, animal rights advocates have found justifications for animal rights through several different approaches. For instance, proponents of the interest theory of rights argue that because 'animals have intentions and therefore interests, as opposed to non-sentient living beings, which only have needs',[1] animals deserve legal rights. The backbone of this theory is the 'particular-interest principle', which maintains that animals can only hold rights that would advance their interests.[2] According to

[1] Tom Sparks, Visa Kurki and Saskia Stucki, 'Editorial: Animal Rights: Interconnections with Human Rights and the Environment' (2020) 11 Journal of Human Rights and the Environment 149, 153.
[2] Ibid.

Mañalich, evidence demonstrating animals have intention and interests in need of protection suggests that animals should, at the very least, have the 'legal right to continued existence'—as demanded by 'quasi-personhood'—as well as any other rights depending on the species' unique interests and needs.[3]

In contrast, utilitarian perspectives assert that whether an animal has intentions or interests is irrelevant. However, proponents of the interest theory and utilitarians could come to the same conclusion regarding animal rights as a whole. For utilitarians, weighing up all suffering and happiness experienced by living beings, which helps determine how to produce the greatest good, should imply the inclusion of sentient, animals in that evaluation of interests.[4] Furthermore, prioritising human suffering over animal suffering constitutes 'speciesism'.[5] The best way to counteract this bias is to convey the same regard for animal legal rights and protections that humans are entitled to.

This perspective has increased in popularity among animal rights activists over the last few decades at the expense of rights theories. Utilitarians argue rights theories are unequipped to supply conclusive 'normative guidance'[6] on classifying the legal status of animals. Unlike animal rights advocates who demand the 'immediate abolition of animal exploitation', utilitarians believe that the best way to reduce animal suffering is through a 'realistic', measured approach.[7] Such an 'incremental' approach would involve small but consistent steps that support animal rights reforms in relevant issues, for instance incremental bans on animal experimentation.[8] Utilitarianism might then seem the most rational approach to resolving the issue of animals' legal rights.

However, the utilitarian belief in 'the greatest good for the greatest number' has been used to support statements that might be deemed unethical in the context of human rights and animal welfare. Singer asserted that 'under some circumstances, it would be permissible to use nonconsenting humans in experiments if the benefits for all affected outweighed the detriment

[3] Ibid.
[4] Animal Ethics, 'Utilitarianism' (*Animal Ethics*, 2024) <https://www.animal-ethics.org/utilitarianism/> accessed 20 March 2024.
[5] Ibid.
[6] Gary L Francione, 'Animal Rights Theory and Utilitarianism: Relative Normative Guidance' (1997) 3 Animal 75, 76.
[7] Ibid.
[8] Ibid.

to the humans used in the experiment.'[9] Essentially, he argued that species differences alone cannot justify the differences in exploitation between humans and animals, just as differences in gender, religion or other protected characteristics cannot justify discriminatory treatment.[10]

Perhaps due to such controversies, other theories have continued to prevail. One such theory is inherent value theory which states that each individual possesses moral value that is distinguished from any type of intrinsic value.[11] Regan suggests that humans and animals are both 'subjects-of-a-life' that possess equal inherent value.[12] Because they are both 'subjects-of-a-life', the respect principle of the theory not only necessitates the 'attribution of equal value' but those of equal value should never be treated as a 'means to an end', no matter how beneficial the outcome might be.[13] Subsequently, any form of animal exploitation violates the respect principle by determining that any interest of an animal can be ignored as long as humanity's interests are prioritised.[14]

It is clear that creating consensus on a legal theory to ascertain the legal rights of animals is difficult when utilitarian advocates and inherent rights theory proponents are inherently opposed. It is especially challenging when established ideas of ethics, such as Kant's foundation of human rights, is predicated on beliefs that refuse to acknowledge any responsibility for animals.[15] Kant's categorical imperative holds 'rational self-conscious human beings should always be treated as ends in themselves and never as mere means', and all other living things can be used and exploited as tools for humanity's interests.[16] Moreover, not all animal rights advocates desire the introduction of non-human animals' legal rights for the sake of animal welfare. Virtue animal ethics is more concerned with the effects of humans' participation in animal exploitation and abuse on the development of humanity's moral character than on animals' safety.[17]

[9] Ibid 78.
[10] Ibid.
[11] Ibid 81.
[12] Ibid.
[13] Ibid 82.
[14] Ibid.
[15] Charles Magles, 'Animals: Moral Rights and Legal Rights' (1985) 1 Between the Species 10.
[16] Ibid.
[17] Animal Ethics, 'Virtue Ethics and Care Ethics' (*Animal Ethics*, 2014) <www.animal-ethics.org/?s=Virtue+Ethics+and+Care+Ethics> accessed 20 March 2024.

3 Non-Human Animals: Not a Monolith

Discussions which consider the possibility of granting animals legal rights, commonly centre on domesticated animals such as cats and dogs, If passed, the Pet Abduction Bill would only make the theft of cats and dogs a new criminal offence in England and Northern Ireland.[18] Prioritising certain animals over others in a legal context raises the question: how can we determine which animals are capable of holding legal rights and therefore deserve to have their rights guaranteed?

3.1 Animal Welfare Act 2006 and Animal Welfare (Sentience) Act 2022

One authoritative source which has determined which animals should be 'protected' is the Animal Welfare Act 2006.[19] Section one, clarifies that an 'animal' refers to a vertebrate, although section four establishes that if an appropriate national authority extends the definition to an invertebrate, the animal must be 'capable of experiencing pain or suffering'.[20]

Having the capacity to experience pain or suffering—a crucial characteristic to be labelled a 'sentient being'—is paramount in considering which non-human animals deserve legal rights. Research into the 'science of feeling' pushed the UK Government to '[announce] in November 2021 that animal welfare protections were to be extended to cephalopod molluscs and decapod crustaceans—including octopuses, lobsters and crabs—[in the Animal Welfare (Sentience) Act].'[21, 22] On one hand, it is encouraging that the government amended the Act to include protections for these invertebrate animals after scientists provided supporting evidence for their sentience. On the other hand, it is discouraging that the animals most often considered for legal

[18] British Broadcasting Corporation, 'Cat and Dog Theft Set to be Made Criminal Offence' (*BBC*, 19 January 2024) <https://www.bbc.co.uk/news/uk-politics-68021178> accessed 20 March 2024.
[19] Animal Welfare Act 2006.
[20] Animal Welfare Act 2006 s 1.
[21] Animal Welfare (Sentience) Act 2022.
[22] Jonathan Birch, 'The Science of Feeling: Why Octopuses, Lobsters and Crabs Require Animal Welfare Protection' (*LSE*, 18 January 2022) <https://www.lse.ac.uk/research/research-for-the-world/politics/the-science-of-feeling-why-octopuses-lobsters-and-crabs-require-legislative-protection#:~:text=Drawing%20on%20over%20300%20existing,scope%20of%20animal%20welfare%20law> accessed 20 March 2024.

protections and rights are those we find 'cute' or have empathy for, such as dogs and cats.[23] Octopi, who are so intelligent they have shown the ability to solve mazes in experiments,[24] are frequently ignored because humans have difficulty relating to them. As Birch declares, 'there is a danger' in thinking that such animals do not feel.[25]

Animals that we deem 'cute' as a result of sociocultural prejudices are often the ones who are afforded protections, despite sentience being an objective characteristic.[26] For instance, the Pet Abduction Bill would only make the theft of pet cats or dogs a criminal offence, even though people keep a variety of animals as pets. Cultural attitudes in the West regarding dogs and cats have led to these animals receiving a higher social status compared to other sentient animals. It is critical to recognise their supposed 'cuteness' makes it easier to empathise with such animals, providing humans with an emotional stake to fight for their protection and welfare. Animals not deemed 'cute,' such as decapod crustaceans[27] have only been more readily recognised as sentient following scientific research. Possessing characteristics which make it challenging to have empathy for their welfare means that their legal protections 'range from strong (Norway and New Zealand), through circumstantial (Australia and Italy) to non-existent (in many other countries)'.[28] Lobsters and dogs both share pain, but only one of those animals is afforded certain protections due to their cultural significance as 'man's best friend'.

In order for the law on animal rights to be more unified, it must apply to all sentient animals, and be continually updated to keep up with the latest scientific findings'.[29] Changing the law to incorporate these elements would demand that legislation is only based on science and not on cultural attitudes. Such change would be difficult to implement in the current political structure.

4 The Rights of Nature

[23] Ibid.
[24] Lisa Hendry, 'Octopuses Keep Surprising Us—Here Are Eight Examples How' (*NHM*, 2024) <https://www.nhm.ac.uk/discover/octopuses-keep-surprising-us-here-are-eight-examples-how.html> accessed 20 March 2024.
[25] Birch (n 22).
[26] Sarah Wolfensohn, 'Too Cute to Kill? The Need for Objective Measurements of Quality of Life' (2020) 10 Animals 1, 4.
[27] Anthony Rowe, 'Should Scientific Research Involving Decapod Crustaceans Require Ethical Review?' (2018) 31 Journal of Agricultural and Environmental Ethics 625.
[28] Ibid.
[29] Ibid 5.

According to the global network Global Alliance for The Rights of Nature, the rights of nature is the:

> '*Recognition that our ecosystems … have rights … to exist, persist, maintain, and regenerate its vital cycles … [and] rather than treating nature as property under the law … we the people have the legal authority and responsibility to enforce these rights on behalf of ecosystems*.' [30]

The aim of the doctrine is to ensure that the natural environment is protected to the strongest levels possible to not infringe upon an ecosystem's inherent rights.[31] Proponents assert that protecting these rights are in humanity's best interests due to their compatibility with the 'right to a clean and healthy environment' as recognise by the United Nations General Assembly.[32] Furthermore, several indigenous cultures believe that the rights of nature doctrine is consistent with traditions emphasising balance with nature.[33] Recently, more courts have been willing to recognise the legal rights of local ecosystems.[34] In 2017, New Zealand became the first country in the world to '[grant] the status of a legal person' to a river through the Te Awa Tupua Act, which provided the 'Whanganui river [with] the "rights, powers, duties, and liabilities of a legal person"' and assigned 'two guardians responsible for maintaining the river's "health and well-being"'.[35]

Following the recognition of the Whanganui River's legal rights, as well as those of other rivers across the world,[36] scholars considered whether the core tenets of the right of nature doctrine can be applied recognising animals' rights.[37] Some scholars argue that recognising animals' rights can be justified more easily than establishing the rights of rivers or trees because animals

[30] Global Alliance for The Rights of Nature, 'What are the Rights of Nature?' (*GARN*, 2024) <https://www.garn.org/rights-of-nature/> accessed 20 March 2024.
[31] Tiffany Challe, 'The Rights of Nature—Can an Ecosystem Bear Legal Rights?' (*Columbia Climate School*, 22 April 2021) <https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits//> accessed 20 March 2024.
[32] Human Rights Council, *Resolution 48 The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/48/L.23/Rev.1 (5 October 2021).
[33] Global Alliance (n 30).
[34] Matthias Kramm, 'When a River Becomes a Person, Journal of Human Development and Capabilities' (2020) 21 Journal of Human Development and Capabilities 307.
[35] Ibid.
[36] Palash Srivastav, 'Legal Personality of Ganga and Ecocentrism: A Critical Review' (2019) 4 Cambridge Law Review 151.
[37] Kristen Stilt, 'Rights of Nature, Rights of Animals' (2021), 134 Harvard Law Review 281.

are ‘conscious and self-conscious living beings who act intentionally, with agency, and communicate intelligently and deliberately’, and therefore are capable of holding personhood status.[38]

However, currently accepted definitions of legal personhood do not refer to any requirements for consciousness, intention, or communication. Rather, it solely ‘involves either the holding of rights and bearing of duties or the “legal capacity” to hold rights and bear duties.’[39] Therefore, the inherent concept of legal personhood and the rights of nature doctrine should, in theory, already provide a grounding framework for animals to hold legal rights. If the rights of nature doctrine established that nature holds legal rights, then animals should already hold the right to have claims made on their behalf using the rights of nature doctrine.[40]

Despite this presumption, there have been several challenges providing remedies for animals involved in legal disputes that are not observed in disputes involving inanimate parts of nature.[41] A possible reason for the difference in these challenges may lie within the complexity of varying species in the natural world. Various parts of an environment have unique relationships with humans, which may be considered in such judgments. It is useful to ascertain how case law has treated the recognition of inanimate natural elements such as rivers to establish if there is a possibility for application to animals.

4.1 *The Atrato River* Case

The Atrato River case, or judgment (T-622/16), was decided in Columbia’s Constitutional Court in 2016. The case was prompted by representatives of local indigenous communities living near the river basin, who were concerned about illegal mining operations polluting the river with toxic chemical substances such as mercury and cyanide.[42] These toxic chemicals posed a significant health risk to the indigenous communities, who depended on the river for drinking water, farming, fishing, and other daily activities.[43] Moreover, it was found that since

[38] Kramm (n 34) 311.
[39] Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford Academic 2019), 1, 4.
[40] Stilt (n 37) 279.
[41] Ibid 283.
[42] Constitutional Court of Colombia (2016) *The Atrato River* Decision (T-622/16) s 2.4.
[43] Ibid.

the illegal mining operations, incidences of illness had increased among the populations.[44] Following these considerations, the Sixth Review Chamber laid out several execution orders with the intention of 'guaranteeing the fundamental rights of the ethnic communities of the Atrato River Basin'.[45] Among these orders was the government's recognition of 'the Atrato River, its basin, and tributaries … as an entity subject to rights of protection, conservation, maintenance, and restoration by the State and ethnic communities.'[46]

Rather than focus solely on how the river's rights were being violated by environmental degradation, the indigenous communities argued that the consequences of the mining on the river basin's biodiversity had resulted in an infringement of their groups' socio-cultural, territorial, cultural, economic, and political rights,[47] thus highlighting the impacts on human rights as opposed to protecting the rights of nature as a necessity in and of itself, for the river's sake. Furthermore, the understanding that biodiversity is essential for the 'next generations' propelled the court to establish that the state must 'adopt comprehensive public policies on conservation, preservation, and compensation.'[48]

These factors suggest a limit to the applicability of the rights of nature doctrine to the possible rights of animals for one major reason; because inanimate parts of the environment are not conscious beings, rights of nature judgments can interpret their purpose however courts see fit. For example, 'the purpose of a river … is to serve humans, through access to water, transportation, and the animals who live in them'.[49] In contrast, animal welfare experts may not deem an animal's purpose to be the fulfilment of humanity's interests, especially if the intrinsic value of an animal is considered.[50] Perhaps, the only purpose of animal species is to survive, as evolution has intended. Accordingly, it is difficult to assert that the 'rights of nature' can be extended to support the recognition of animal legal rights because animals have unique needs and challenges that rivers do not face. There is no possibility for rivers to be exploited in zoos or laboratories,[51] or to be malnourished or killed, and thus the laws determining the rights of these groups must be different. Rather than rely on the 'rights of nature' doctrine as

[44] Ibid.
[45] Ibid s 10.1.
[46] Ibid s 10.2(1).
[47] Ibid s 9.17.
[48] Ibid s 5.58.
[49] Stilt (n 37) 284.
[50] Lawrence Odey Ojong, 'Singer's Notion of Speciesism: A Case for Animal Rights in Ejagham Culture' (2019) 2 IJEPEM 116, 118.
[51] Stilt (n 37) 284.

the singular justification for providing animals with legal rights, it would be better to explore other explanations, whether through science or moral theories, to further investigate this issue.

5 What kind of Rights do Animals Deserve?

Such potential rights depend on the needs and complexity of the species in question.

One proposition from Motoarcă, is that animals should be granted the political 'right to vote'.[52] Motoarcă's proposition would work similarly to the guardianship system set-up. Whanganui River case animals would be provided with representatives from a 'politically neutral committee consisting of scientific experts' to enforce animal rights and serve the interests of the animal(s) they represent on their behalf.[53] This right is founded on the 'all affected interests' principle, which asserts that all beings impacted by a government's policies should have a say in those policies.[54]

Although this idea may be justified by democratic principles, the study which proposed this right mentioned several controversial ideas. It compared the current lack of animal voting rights to the time when 'women and slaves'[55] did not have voting rights, and also argued that just as children and persons with disabilities[56] have access to legal representation, animals deserve the same rights. Such comparisons to vulnerable populations are demeaning to those groups. However, the fact that governments and rights of nature advocates have been willing to appoint legal representation for environmental features suggests that voting rights for animals could become viable legislation, assuming there is significant support as well as further legal development to determine the parameters of those rights.

Another discussion surrounding animal rights was posed by the US case *Naruto v Slater*.[57] Representatives of a monkey brought copyright infringement claims to a wildlife photographer who alleged ownership and copyright of images taken of the monkey. The court concluded that the monkey could not 'sue corporations, and companies for damages and injunctive relief

[52] Ioan-Radu Motoarcă, 'Animal Voting Rights' (2024) 84 Analysis 56.
[53] Ibid.
[54] Ibid 58.
[55] Ibid 59.
[56] Ibid 56.
[57] *Naruto v Slater*, 916 F.3d 1148 (9th Cir. 2018).

arising from claims of copyright infringement' because the 'monkey—and all animals, since they are not human—lack statutory standing under the Copyright Act'.[58] Essentially, any 'work' produced by an animal is not a property of which they can own a copyright, nor can they sue for damages.[59] The case raised several questions as to the recognition of legal rights. For example, what authority should determine if an animal has the right to sue when a dispute arises? Also, how 'would a court know whether it was properly understanding the concerns raised by the animal?'[60] The numerous unanswered questions about the real-life implementation of animal legal rights demonstrate that these issues are far more complex than society's existing understanding of animal welfare.

6 Conclusion

It is clear there is significant potential for the further development of animal rights law beyond current legislation. As scientific advancement reveals more about the sentience of vertebrates and certain invertebrate animals and shows that animals have needs that must be protected, it appears that proposals such as the guardianship representative system proposed in rights of nature cases and by legal theorists could provide innovative solutions to the issue of animals not having their interests adequately safeguarded by the law. Nevertheless, there remains a plethora of unanswered questions surrounding the implementation of animal rights, which highlights that such issues are much more intricate than current sociocultural attitudes and legislation can resolve. This suggests that while animals do deserve some extent of legal rights, the law should not establish which rights should be granted (the right to vote, the right to sue for damages, etc) until there is consensus from the legal community on what the benefits of those rights would be for the animals, as well as the implications on amending the law.

[58] Ibid [4].
[59] Ibid.
[60] Ibid.