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EDITORIAL

It is with immense honour and excitement that we present the 49th volume of the Exeter Law Review 2024. The Journal aims to promote the finest academic writing by scholars and students alike. We are pleased that this year's edition features the work of amazing authors from around the world, and our very own students from Exeter Law School. It has been our privilege to lead the Journal during both of our final years at Exeter Law School and we could not have done it without the flawless cooperation of our editorial team.

Being a part of the Law Review editorial board for much of our time at Exeter Law School has helped us develop many essential skills such as analytical thinking, teamwork, and resilience. Most importantly, it has underscored how essential the people you work with are to your team's success. We were fortunate to have a world-class team around us this year, and thus want to thank them all.

Firstly, we wish to extend our gratitude to Dr Lisa Cherkassky, both for honouring us with our roles, and being a constant support system to us while balancing this role with our law degrees and other responsibilities. To Bernadette, Caitlin, Eddie, Joel, Julietta, Liberty, Olivia, Rosie, Sneha and Taha, the members of the 49th edition editorial board: Thank you for your constant resilience, and commitment to the Law Review and to your roles. This Edition would not have been possible without your tireless work. Finally, to our successors, Courtney and Matt, we share our warmest wishes. The fact you both were chosen for this role showcases your ability to run the Journal, as well as our belief that you will continue to champion the values consistently upheld by the Exeter Law Review.

NIKOLAI: *From a personal standpoint, I would like to thank my friends, family and everyone who has supported me during my time at the ELR and who motivated me to keep going. I would also like to extend my endless gratitude to Scarlett, my amazing Co-Editor-in-Chief, without whom none of this would have been possible. Your endless positivity radiates any room you step into and is truly inspirational. I am incredibly proud of what we achieved at the Exeter Law Review together and this time will be a greatly cherished memory of mine in the future.*

SCARLETT: *I am eternally grateful to my parents, for their constant support and unwavering confidence in my abilities; to my sister, an invaluable source of guidance, motivation, and proofreading! And to my partner for his consistent encouragement, reassurance, and patience. Finally, I could not have wished for a more hardworking, dedicated, or compassionate Co-Editor-in-Chief than Nikolai, and I am immensely proud of our work together on the Journal. I am truly indebted to you all.*

The 49th Edition showcases important topics ranging from abortion to transitional justice: some of which were written by our very own team! We are incredibly excited to finally publish it, and hope you enjoy reading it as much as we enjoyed putting it together.

Nikolai Gurtner and Scarlett Paterson-Holt

Co-Editors-in-Chief,

Exeter Law Review 2023/2024

Non-State Actors and Transitional Justice: A Power Shift from State-Driven Approaches

Amelia Clark

ABSTRACT

Transitional justice, historically dominated by state mechanisms and international organisations, increasingly sees contributions from a diverse array of non-state actors, including non-governmental organisations, community groups, and international advocacy networks. This article explores the growing influence of non-state actors in the realm of transitional justice and examines how their involvement challenges traditional, state-driven approaches. It focusses on the United Nations as a non-state actor and its involvement in the conflict of East Timor to highlight the significance of non-state actors supporting state-driven approaches in carrying out transitional justice.

INTRODUCTION

Transitional justice seeks to address historical injustices following violent conflict or political change through a 'diversity of strategies employed globally'.[1] Annan furthers this definition of transitional justice by defining it as comprising of the 'full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[2] However, whilst there is a clear picture as to what transitional justice consists of, achieving both Annan and Buckley-Zistel *et al.*'s definitions are appearing to be problematic within the current international community.

Mutua expresses that 'transitional justice is a subset … of the human rights movement' which has emerged with a 'Eurocentric hue' post-1945 due to the Western identities of the drafters.[3] Such a view

[1] Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, 'Transitional justice theories: an introduction' in Susanne Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge 2013) 1.
[2] United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General' (23 August 2004) UN Doc S/2004/616, para 8.
[3] Makau Mutua, 'What is the future of transitional justice?' (2015) 9 International Journal of Transitional Justice 3

has been shaped by Cassese and Leary's opinions that the West imposed its philosophy of human rights on the international community due to its geopolitical power across the globe.[4] Thus, achieving transitional justice through state mechanisms in various states, specifically the Global South, is proving to be challenging as 'close attention must be paid to the context and location' of where the injustices are happening so as to not apply a 'one-size-fits-all' approach.[5] Therefore, it is becoming increasingly common for non-state actors (NSAs) to aid in the delivery of transitional justice for victims, to deem that justice has been delivered. However, there are sentiments that NSAs only pose challenges towards state mechanisms of achieving transitional justice.

As such, the role of NSAs within transitional justice appears to be more significant and influential in pursuing the goal of justice. Therefore, this essay will first assess the roles of state and non-state actors within transitional justice, before focussing on how the two interact with each other to achieve transitional justice, with an emphasis on the United Nations (UN) as an NSA. Finally, it will consider the challenges NSAs pose to state-driven approaches to transitional justice by considering the case of East Timor. Throughout this assessment, the central argument will be that the power of NSAs challenges the dominance of state actors in shaping transitional justice agendas to ensure that the process is more inclusive and responsive to the needs and aspirations of affected communities. Whilst this essay creates the perceived outlook that NSAs positively challenge state-driven responses to transitional justice, armed NSAs challenge such approaches either negatively or in support of solely victim reparations in lieu of aiding the state,[6] but this discussion exceeds the scope of this essay and therefore shall not be assessed in further detail.

[4] Antonio Cassese, 'The General Assembly: Historical Perspective 1945–1989,' in Philip Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon 1992); Virginia Leary, 'The Effect of Western Perspectives on International Human Rights,' in Abdullahi Ahmed, An-Na'im and Francis M. Deng (eds.) *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution 1990).
[5] Mutua (n 3).
[6] Kieran McEvoy, Cheryl Lawther and Luke Moffett 'Changing the script: non-state armed groups, restorative justice and reparations' (2022) 14(2) Journal of Human Rights Practice 454.

I. UNDERSTANDING TRANSITONAL JUSTICE

Teitel's definition of transitional justice is explained as 'the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrong-doing of repressive predecessor regimes'.[7] Within this definition, the focus is primarily on re-establishing the rule of law in post-conflict states with legal mechanisms, which include criminal prosecutions, constitutional justice, and historical inquiry. These approaches of transitional justice place emphasis on the state to carry out such mechanisms, which may not always be done depending on the political climate of a state. Further, Roht-Arriaza criticises such a 'problematic' definition for 'overvaluing' the law as Teitel focusses predominantly on political regime, rather than post-war contexts.[8]

As a result, Roht-Arriaza provides a wider context for her definition of transitional justice, which is a 'set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[9] It can be ascertained that the focus of this definition broadens the mechanisms beyond the law to include, for example, truth commissions. However, in order to achieve the broadest definition of transitional justice to include the greatest range of mechanisms, Nagy suggests looking at Mani's 'holistic approach' to transitional justice[10] which sets out a three-step approach towards 'reparative' justice.[11] This three-step approach involves restoring the rule of law, such as 'reforms … to the judiciary', rectifying human rights violations 'through trials, truth commissions … and traditional mechanisms', and redressing the inequality that underlies war.[12] This three-step approach to securing transitional justice allows for an interaction between state and non-state actors to work in

[7] Ruti Teitel, 'Theoretical and international framework: transitional justice in a new era' (2003) 26(4) Fordham International Law Journal 893.
[8] Rosemary Nagy, 'Transitional justice as global project: Critical reflections' (2008) 29(2) Third World Quarterly 275, 277; Naomi Roht-Arriaza, 'The new landscape of transitional justice' in Naomi Roht-Arriaza & Javier Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century* (CUP 2006) p 2.
[9] ibid.
[10] Nagy (n 8) 277.
[11] Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War (Polity Press 2002) p 17.
[12] ibid.

collaboration to aid victims in seeking reparations or reconciliation from the atrocities experienced, through either victim support or funding. This also includes the ability to draw upon knowledge from civil society or local knowledge as it does not solely rely upon the rule of law and prosecutions to carry out justice for victims. Thus, this essay shall use this broad three-step approach when considering NSA challenges posed towards state-driven approaches to transitional justice.

As a result of this discussion, it is necessary to briefly assess the role of the victim within transitional justice in order to properly assess whether the power of NSAs challenges state-driven approaches. Transitional justice mechanisms are designed 'to renegotiate the social contract after mass violence'.[13] However, throughout the use of these mechanisms, a detrimental binary is placed upon the victim and groups them together as one. Borer, Bouris, Mcevoy and McConnachie all argue that an 'ideal victim' label is placed upon the victims, defining it 'as a person without agency'.[14] This label is a 'troubling binary' because it does not fully understand the complexity of a victim,[15] nor recognise a victim as being a human. Thus, it is vital that any transitional justice mechanisms used ensure that the victim is not labelled and is fully appreciated as seeking reparations.

Therefore, due to there being many definitions and much contention as to what transitional justice is, as well as the role of the victim throughout seeking remedy or reparations, it can be inferred that there are many elements which make up the mechanisms that carry out transitional justice. Yet it is important to have a balanced approach when assessing the context of the injustices which took place. Consequently, it is necessary to establish what the predominantly state-driven approaches are to achieving transitional justice.

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[13] Bronwyn Leebaw, 'Lost, Forgotten, or Buried? Transitional Justice, and the Memory of Resistance' (2013) 2(2) Politica & Societa 237; Sonali Chakravarti, *Sing the Rage: Listening to Anger After Mass Violence* (University of Chicago Press 2014).

[14] Tristan Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa' (2003) 25(4) Human Rights Quarterly 1088; Erica Bouris, *Complex Political Victims* (Bloomfield 2007); Kieran McEvoy and Kirsten McConnachie, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy' (2012) 9(5) European Journal of Criminology 527.

[15] Paul Gready and Simon Robins, 'Rethinking civil society and transitional justice: lessons from social movements and 'new' civil society' (2017) 21(7) The International Journal of Human Rights 956.
Erin Baines, ''Today, I want to speak out the truth': Victim agency, responsibility, and transitional justice' (2020) 9(4) International Political Sociology 316, 317.

II. STATE-DRIVEN VS NSA APPROACHES TO TRANSITONAL JUSTICES

Gready and Robins set out that the 'mainstream definition' of transitional justice has 'four pillars: criminal prosecutions, truth commissions, reparations and institutional reform'.[16] This definition focusses on a top-down approach to transitional justice. A top-down approach to transitional justice, which is implemented primarily by state bodies at a national level, is centred upon legal frameworks, institutional reform, and governmental initiatives to carry out such justice. Therefore, the use of state interventions to address past human rights violations using legalistic methods is emphasised as the most common approach by states. Baines considers this is because transitional justice is rooted within 'humanitarian legalism' and therefore explains the 'excessive focus on individual responsibility' through the use of legal mechanisms.[17] Further, both international and domestic legal systems are 'the route to accountability' in the area of reparations,[18] thus explaining the state-centric and legalistic mechanisms used predominantly within transitional justice. Thus, this 'mainstream' focus on state legalistic mechanisms underscores the top-down approach to transitional justice and therefore provides an insight into the emphasis on individual accountability and the utilisation of legal avenues to do so.

However, Mutua proffers that whilst criminal sanctions (and thus legalistic mechanisms used as a whole) posed against perpetrators are significant within the transitional justice process, they have too narrow an impact due to their limited utility.[19] This is due to solely implementing a top-down approach to transitional justice, as emphasised by McGaughey et al*,* whereby criticisms towards a 'top-down approach to transitional justice point to failures of [such] formal mechanisms'.[20]

Whilst there are positives of a top-down approach to transitional justice, such as the abundance of state resources to allocate towards prosecutions and institutional set-ups to carry out truth commissions,

[16] Gready and Robins (n 15).
[17] Baines (n 15) 319.
[18]McEvoy, Lawther and Moffett, (n 6) 455.
[19] Mutua (n 3) 5.
[20] Fiona McGaughey, Rachel Rafferty and Amy Maguire, 'Transitional justice from above and below: exploring the potential glocalising role of non-governmental organisations through a Northern Ireland case study' (2023) 74(3) Northern Ireland Legal Quarterly 472, 483.

Gready and Robins discuss the top-down legalistic approaches as being 'overly structured' and 'lack[ing] transformative potential'.[21] Therefore, this consideration both highlights and criticises the rigidity of solely legal mechanisms in carrying out transitional justice, conferring that there are other, and therefore, better approaches that could be carried out, such as integrating a bottom-up approach into transitional justice mechanisms which do not solely rely on a state-driven and state-centric approach to transitional justice.

A bottom-up approach to transitional justice incorporates local communities that are connected to grassroots communities which are sensitive to local dynamics and complexities.[22] As previously mentioned, Mutua stated that 'close attention must be paid to the context and location' when carrying out transitional justice,[23] so therefore if there are no local actors or even NSAs aiding in the shaping of transitional justice, such justice will not actually be carried out in the most appropriate way. Due to this necessity of local involvement, McGaughey et al. set out that 'an effective transitional process must engage with society as a whole, going beyond purely legal measures' in order to promote state and citizen relationships.[24] As a result, the role that NSAs and civil society, to which Scott categorises as 'actors beyond the state',[25] is integral to the process through various means, such as the support of victims, as well as alleviating a 'state-centric' and 'cookie-cutter approach' to transitional justice when thinking about victim reparations. Therefore, a collaboration between the state and NSAs could deliver the most accurate and relevant methods of transitional justice to local communities, whether that be through legal mechanisms, such as criminal prosecutions or through other methods, such as memorials or better victim support. This essay shall now focus on the role of the UN as an NSA in the transitional justice process.

[21] Paul Gready and Simon Robins, 'From transitional to transformative justice: a new agenda for practice' (2014) 8(3) International Journal of Transitional Justice 339, 343.
[22] Patricia Lundy and Mark McGovern, 'Whose justice? Rethinking transitional justice from the bottom up' (2008) 35(2) Journal of Law and Society 265.
[23] Mutua (n 3) 5.
[24] McGaughey, Rafferty and Maguire (n 20) 473.
[25] James C Scott, Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed (Yale University Press 1998) 310 and 313.

III. THE UNITED NATIONS

The year 2004 was the turning point of the UN's involvement with transitional justice. Annan's definition, outlining what the UN defines transitional justice as, illustrates the broad range of the mechanisms available to achieve such justice.[26] The Secretary-General acknowledged that these mechanisms 'include both judicial and non-judicial mechanisms, with differing levels of international involvement'.[27] However, initially, Article 71 of the UN Charter restricted the involvement of NSAs in transitional justice.[28] Article 71 stipulates that 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence'.[29] Consequently, when it came to engaging with UN human rights bodies in the aftermath of human rights violations, there were minimal opportunities for non-governmental organisations (NGOs) or NSAs to participate in reparations. As a result, they often found themselves on the periphery of international human rights frameworks.[30] However, in 1994, the Secretary-General noted that NGO involvement has not only justified the inclusion of Article 71, but that it has far exceeded the original scope of these legal provisions.[31] The significance of the UN setting out that solely legalistic, state-driven mechanisms are not what transitional justice demands in every context, and therefore the inclusion of the role that NGOs can play both domestically and internationally is pivotal.

In 2010, the Secretary-General issued the 'Guidance Note on the United Nations Approach to Transitional Justice', in which three approaches for strengthening UN transitional justice were set out: 1) addressing the root causes of conflicts, 2) integrating human rights and transitional justice into peace processes, and 3) coordinating disarmament and reintegration efforts with transitional justice

[26] United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General' (23 August 2004) UN Doc S/2004/616, para 9.
[27] ibid para 8.
[28] Charter of the United Nations (adopted 26 June, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 71.
[29] ibid.
[30] McGaughey, Rafferty and Maguire (n 20) 484.
[31] Economic and Social Council, 'General review of arrangements for consultations with non-governmental organizations: report of the Secretary-General' (7 June 1994) UN Doc E/AC.70/1994/5/Add.1.

activities.[32] These three points not only reinforce the UN's desire to aid in the transitional justice process within communities, but also link to peace-building priorities by reinforcing the prevention of human rights violations from occurring in the first place. Thus, whilst transitional justice focusses on accountability and justice for victims, peacebuilding places a greater emphasis on the political cooperation of a state and building trust between communities. With the UN highlighting the promotion of peacebuilding and thus aiming to prevent conflict, it allows for Campbell and Peterson's 'ideal version of the state' to be 'democratic, accountable, provide security and basic welfare services for their populations through formal state institutions'.[33] As such, with the UN placing emphasis on its desire to be involved within transitional justice, it allowed for other NSAs to also participate in every aspect of the transitional justice process as NSAs can connect 'top-down legalistic justice initiatives' with 'bottom-up efforts'.[34] It can do so by carrying out an intermediary role with the more formal support of UN human rights bodies. Therefore, with this balanced approach and the increasing cooperation between the UN and NSAs, the goal of achieving transitional justice is much more productive than solely relying on state-driven, legalistic approaches due to the power that the UN holds within the international community.

Further, the broad meaning of transitional justice draws upon the UN's expertise on a range of issues, including 'the promotion of human rights, protection from violence, and sustainable development'.[35] This expertise exceeds beyond the scope of what a State could provide within transitional justice, and therefore the power of NSAs positively challenges state dominance in ensuring that transitional justice is carried out in a way which truly benefits local communities. Additionally, the role of the UN as an NSA demonstrates that both a bottom-up approach integrated with a top-down approach to transitional justice, as well as the acknowledgment that NSAs often operate in the space between these two

[32] United Nations, 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice' (March 2010) UN Doc ST/SG(09)/A652.
[33] Susanna Campbell and Jenny Peterson, 'Statebuilding' in Roger MacGinty (ed.) *Routledge Handbook of Peacebuilding* (Routledge 2013) p 337.
[34] McGaughey, Rafferty and Maguire (n 20) 477.
[35] Alison Davidian and E Kenney, 'The United Nations and transitional justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds.) *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 185.

approaches in order to ensure that justice is tailored to the community and is not a 'one-size-fits-all' approach.[36] Such an approach shall now be explored in a case study of East Timor in which UN peace operations had been given a mandate to address transitional justice. It is necessary to highlight that in relation to East Timor, NSAs relating to militia, military or armed groups shall not be considered within this discussion.

IV. EAST TIMOR

After the invasion by Indonesia in 1975, the state of East Timor suffered mass human rights abuses and displacement,[37] and as a result, Resolution 1272 was introduced to allow for UN intervention in order to restore peace and security to the territory.[38] As well as the UN was involved in the delivery of transitional justice through the United Nations Transitional Administration in East Timor (UNTAET). Resolution 1338 set out the mission of UNTAET, which consisted of assisting in the development of civil and social services and providing security and maintaining the law.[39] Linking to the 'civil and social services' strand of the mission, the support of civil society within East Timor allowed for NSAs to truly have a benefit within the transitional justice process. Scott discusses that the contribution of civil society within transitional justice is significant because of its practical skills and localised knowledge which a state does not possess.[40] This civil society element to transitional justice reinforces the benefits of a bottom-up approach as well as its necessity as McGaughey argues that civil society participation is especially needed for 'societies emerging from mass violence',[41] which reflects the need for it in East Timor.

Leading on from this, a multifaceted approach beyond civil society had to also be taken by various other NSAs such as Yayasan Hak, Fokupers, the Justice and Peace Commission, and the East Timorese

[36] McGaughey, Rafferty and Maguire (n 20) 486.
[37] ICTJ, 'Timor Leste' (*ICTJ*) <https://www.ictj.org/location/timor-leste> accessed 3 September 2024.
[38] UN Security Council, 'Security Council Resolution 1272' (25 October 1999) UN Doc S/RES/1272.
[39] UN Security Council, 'Security Council Resolution 1338' (31 January 2001) UN Doc S/RES/1338.
[40] Scott (n 25).
[41] McGaughey, Rafferty and Maguire (n 20) 482.

Alliance for an International Tribunal (Alliansi, as abbreviated by Kent),[42] all of whom arguably played a greater role in supporting victims and their families. They demonstrated the need for local non-state actors in the delivery of justice and acted as a key link between communities. Alliansi, for example, specifically sought for an international tribunal for East Timor to mirror those which were used in the aftermath of the atrocities in Rwanda and the former Yugoslavia.[43] Further demonstrating the aforementioned importance of cooperation between NSAs and the UN, Alliansi lobbied with the UN Human Rights Council to achieve the most proactive way forward for the East Timorese people. Roht-Arriaza sets out that in relation to the victim, frustration may be increased for them if a single mechanism is focussed upon during transitional justice.[44] She proffers the example of those testifying in truth commissions who consequently do not receive state reparations.[45] This is detrimental within the transitional justice process and therefore highlights the significance of NSA involvement to offer the support which the state fails to provide.

Additionally, despite difficulties between local NGOs and official truth-seeking commissions, as well as NGOs lacking capacity, experience and funding,[46] the UN was able to provide for these hindrances. The Commission for Reception, Truth, and Reconciliation in East Timor (CAVR) report in 2006, under the UNTAET, named *Chega!* dispersed any criticism of NSA involvement in East Timor,[47] therefore cementing the important role that NSAs had in the transitional justice process. Such success can be evidenced through local memory practices, which better support victims' families rather than criminal prosecutions as they allow for memorials and commemorations to live on and benefit local communities. Lundy and McGovern also provide the argument that numerous a number of scholars state that transitional justice is most successful when it emerges from local organisations which are

[42] Lia Kent, 'Local memory practices in East Timor: Disrupting transitional justice narratives' (2011) 5(3) International Journal of Transitional Justice 434, 448.
[43] ibid 449.
[44] Naomi Roht-Arriaza, 'External Actors and Transitional Justice (Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy)' [2004] Swisspeace 33.
[45] ibid.
[46] ibid.
[47] ETAN, 'Chega! The report of the commission for reception, truth, and reconciliation Timor-Leste' (ETAN, 2006) <https://www.etan.org/news/2006/cavr.htm> accessed 3 September 2024.

connected to communities through bottom-up initiatives, enhancing its sustainability.[48] However, this is only possible if there is NSA support towards these grassroots organisations as they may rely 'on the protection and resourcing provided by governmental and international support'.[49]

The response towards transitional justice would not have been possible without responsiveness and inclusivity. If solely state-driven approaches to transitional justice had been taken in East Timor, the NSAs would not have been able to bridge the gap of purely legal mechanisms to achieve transitional justice; victims' demands for better justice would not have been served. Therefore, the case study of East Timor demonstrates that NSA involvement within the transitional justice process is essential alongside state-driven approaches because not only do NSAs hold states accountable if they have active involvement with the human rights violations being carried out,[50] they can also assist communities from a grassroots level. It is clear that a large range of tools and approaches are necessary to contribute to transitional justice; therefore, it is understandable that a collaboration is needed between states and NSAs, which a standalone approach may not be able to provide, whether that be victim support or resources.

Therefore, it can be ascertained that without the UN reports in support of NSA involvement, coupled with the efforts for collaboration from Alliansi, NSA activities would not have created as big of a justice impact in East Timor. Further, it is clear from East Timor that the power of NSAs positively challenges state-driven approaches to transitional justice because of their contributions, including truth-telling processes, reparations for victims, institutional reform, and community-based reconciliation initiatives.

[48] Patricia Lundy and Mark McGovern, 'Whose justice? Rethinking transitional justice from the bottom up' (2008) 35(2) Journal of Law and Society 265.
[49] Lina Strupinskienė, ''What is reconciliation and are we there yet?' Different types and levels of reconciliation: a case study of Bosnia and Herzegovina' (2017) 16(4) Journal of Human Rights 452.
[50] Joanna Quinn, 'The impact of state abdication on transitional justice: when non-state actors and other states fill the post-transition gap' (2021) 9(2) Peacebuilding 114, 127.

CONCLUSION

In conclusion, this essay has, for the majority, considered the benefits of NSAs challenging state-driven approaches to transitional justice. Whilst there are positives to state-driven approaches, with the predominant one being prosecutions because of their ability to use the rule of law towards persecutors of human rights violators, this is not always the best approach for local communities in achieving justice. Additionally, according to Lundy and McGovern, a primarily top-down approach to transitional justice according to Lundy and McGovern, highlights the shortcomings of these formal mechanisms in achieving their goal.[51] States implementing a 'one-size-fits-all' approach whereby trials and truth commissions are the only form of transitional justice that they provide to affected communities should instead shine a 'focus on legal processes [which are] adequate to resolve individual and social harm'.[52]

States are supported by NSAs who are willing to provide aid within transitional justice if the state reciprocates resourceful support. This has been reflected in the consideration of both the UN as an NSA and the case of East Timor. The UN plays a significant role within the transitional justice process through its support of bottom-up initiatives. If NSAs and therefore NGOs are involved in UN international monitoring, their impact will be greater because of this more formal support.[53] Further, state governments themselves should support the work that NSAs and NGOs carry out within transitional justice so that they can engage with the mechanisms of the UN.[54] This is necessary for a number of reasons, including on-the-ground victim support within the community to be witnessed internationally to seek justice, as well as garnering support and funding for their missions. East Timor is an important case in support of NSA power in transitional justice as it clearly demonstrates that in post-conflict territories, human rights must be upheld and supported, even in remote communities.

[51] Lundy and McGovern (n 48).
[52] Laurel Fletcher and Harvey Weinstein, 'Violence and social repair: rethinking the contribution of justice to reconciliation' (2002) 24(3) Human Rights Quarterly 584.
[53] McGaughey, Rafferty and Maguire (n 20) 509.
[54] ibid.

Therefore, it has been demonstrated with a range of evidence that NSAs do not challenge state-driven approaches to transitional justice, but instead, the power of NSAs complements these approaches to no detriment, whilst continually recognising the victim throughout the mechanisms used.

The European Court of Human Rights, Democracy and Populism

Ahmed Diab

ABSTRACT

In light of growing hostility from consecutive UK Conservative Governments and from various populist states across Europe towards the European Court of Human Rights, this article aims to analyse the Court's ability to defend constitutional democratic ideals on the basis that the European Convention on Human Rights was (in part) established to act as a safeguard against European democracies' potential descent into totalitarianism. It argues that the Court is ultimately ill-equipped to deal with the threat posed by populism, as the ideology of populism renders the Court ripe for delegitimization in the domestic context and is poorly equipped to compel compliance with the Convention due to its fundamental adherence to the principle of subsidiarity. It subsequently concludes that the conception of the Court as the final backstop against totalitarianism are largely misplaced.

INTRODUCTION

Although the European Convention on Human Rights (ECHR) and its incorporation into the United Kingdom's domestic legal order via the Human Rights Act 1998 has undeniably had a seismic effect on individual rights, its future in the UK is by no means guaranteed. A consistent feature of the successive Conservative governments since 2010 has been hostility towards the ECHR and cognately, the European Court of Human Rights (ECtHR), albeit with varying levels of fervour.[1] Perhaps most

[1] See for example, Nicholas Watt, 'Cameron refuses to rule out leaving European convention on human rights' *The Guardian* (London, 3 June 2015) <https://www.theguardian.com/law/2015/jun/03/cameron-refuses-to-rule-out-leaving-european-convention-on-human-rights> accessed 30 April 2024; Anushka Asthana and Rowena Mason, 'UK must leave European convention on human rights, says Theresa May' *The Guardian* (London, 25 April 2016) <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> accessed 30 April 2024; Esther Webber, 'Boris Johnson rages at the European Court of Human Rights. But will he act?' *Politico* (London, 16 June 2022) <https://www.politico.eu/article/uk-boris-johnson-slams-the-european-court-of-human-rights-but-will-he-act/> accessed 30 April 2024; Adam Forrest, 'Liz Truss 'prepared to withdraw' UK from European Convention on Human Rights' *The Independent* (London, 13 July 2022) <https://www.independent.co.uk/news/uk/politics/liz-truss-uk-human-rights-convention-b2122084.html> accessed 30 April 2024.

worryingly, as late as February 2023, previous Prime Minister Rishi Sunak outright 'threat[ened]' withdrawal from the Convention following the ECtHR's last-minute intervention in the Rwanda deportation policy, and concerns that new legislation to curb migration may be considered unlawful by the Court.[2]

Although some may characterise the Conservatives' hostility towards the ECHR as merely routine party politics, channelling electoral frustration at often controversial ECtHR judgments towards 'Labour's Human Rights Act',[3] others have identified such backlash as part of a movement of 'British populism' and its lasting love affair with Euroscepticism.[4] Whilst it would be inaccurate to describe the recent Conservative government as a populist regime, it undoubtably employed populist rhetoric in its mobilisation of the electorate. Notably, an op-ed by former Justice Secretary Rt Hon Dominic Raab urging for withdrawal from the ECHR argues for the need to abandon the 'stifling [force of] political correctness' and to reinject a healthy dose of common sense' into the UK's human rights regime[5] are strongly reminiscent of the populist belief in the consciousness of the 'real' people and similarly 'common sense' as the 'basis of all good politics'[6] as opposed to the ideals of the 'new, … progressive, … politically correct' class.[7]

The UK is of course not alone amongst the Convention's contracting parties in its growing scepticism towards the ECtHR:

> … for some time, the Strasbourg Court has been under substantial pressure resulting from

[2]Kitty Donaldson, 'Sunak Says 'All Options on Table' for UK Withdrawal From ECHR' *Bloomberg* (London, 16 June 2022) <https://www.bloomberg.com/news/articles/2022-06-16/sunak-says-all-options-on-table-for-uk-withdrawal-from-echr> accessed 30 April 2024; Jessica Elgot, 'Tory MPs to push for UK exit from European convention on human rights' *The Guardian* (London, 5 February 2023) <https://www.theguardian.com/politics/2023/feb/05/tory-mps-to-push-for-uk-exit-from-european-convention-of-human-rights> accessed 30 April 2024.
[3] Jessica Elgot, 'Liz Truss halts Dominic Raab's bill of rights plan' *The Guardian* (London, 7 September 2022) <https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan> accessed 30 April 2024.
[4] David Towriss, 'The Human Rights Act: The next casualty of British populism?' (*International IDEA Institute for Democracy and Electoral Assistance*, 27 June 2022) <https://www.idea.int/blog/human-rights-act-next-casualty-british-populism> accessed 30 April 2024.
[5] Dominic Raab, 'Ripping up the edicts of European human rights judges will make us freer and our streets safer' *The Sun* (London, 21 June 2022) <https://www.thesun.co.uk/news/18961973/european-human-rights-dominic-raab/#> accessed 30 April 2024.
[6] Cas Mudde, 'The Populist Zeitgeist' (2004) 39 Government and Opposition 541, 547.
[7] ibid 561.

> criticism and resistance against the ECtHR.… In particular, the populist explosion has resulted in even greater pressure being imposed on the Strasbourg Court …[8]

This populist challenge is presented by three contracting states in particular: Poland, Hungary and Turkey. Freedom House no longer considers Poland or Hungary to be 'consolidated democrac[ies]' for the purpose of its annual 'Democracy Index'[9] and while Turkey is not assessed in Freedom House's Democracy Index, it has consistently been classified as a 'hybrid regime' in similar democracy indexes.[10] Pressure from these 'problem states' ranges from public criticism against the Court and its judgments, with Hungarian public mobilisation against the Court on one end of the spectrum, such as descriptions of the ECtHR as 'a threat to the security of the [European] people' and its judges as 'some idiots in Strasbourg' from Prime Minister Viktor Orbán and Speaker of the Hungarian Parliament respectively;[11] to outright institutional backlash on the Court. Turkey in 2016, for example, temporarily suspended the Convention as part of its state of emergency declaration deemed necessary by Prime Minister Tayipp Erdogan's Government with the support of Parliament to 'route out all [supporters of the 2016 military coup] from the state apparatus'.[12]

Given the pressing challenge presented by the surge of European populist backlash towards the ECtHR and growing concerns of increased use of populist mobilisation on behalf of consolidated democracies (such as the hostility displayed by the previous British Government), it is worth assessing the ECtHR's

[8] Jan Petrov, 'The populist challenge to the European Court of Human Rights' (2020) 18 International Journal of Constitutional Law 476, 477.
[9] Freedom House, 'Nations in Transit 2022: Hungary' (Freedom House 2022) <https://freedomhouse.org/country/hungary/nations-transit/2022> accessed 30 April 2024; Freedom House, 'Nations in Transit 2022: Poland' (Freedom House 2022) <https://freedomhouse.org/country/poland/nations-transit/2022> accessed 30 April 2024.
[10] Economist Intelligence, 'Democracy Index 2022' (Economist Intelligence Unit 2022) <https://www.eiu.com/n/campaigns/democracy-index-2022/> accessed 30 April 2024.
[11] Eszter Polgári, 'Hungary: 'Gains and Losses'. Changing the Relationship with the European Court of Human Rights', in Propelier, Lambrecht & Lemmens (eds), *Criticism of the European Court of Human Rights* (1st edn, CUP 2016), 308; Sarantis Michalopoulos, 'Orban attacks the European Court of Human Rights' *Euractiv* (31 March 2017) <https://www.euractiv.com/section/global-europe/news/orban-attacks-the-european-court-of-human-rights-at-epp-congress/> accessed 30 April 2024.
[12] Editorial, 'Turkey's failed coup attempt: All you need to know' *Al Jazeera* (15 July 2017) <https://www.aljazeera.com/news/2017/7/15/turkeys-failed-coup-attempt-all-you-need-to-know> accessed 30 April 2024.

ability in dealing with this continued change in European politics, from the hegemony of liberal constitutional democracy to the increased prominence of illiberal populist ideologies.

This research is particularly important as the threat to European democracy presented by populism invokes the core purposive underpinnings of the ECtHR; the Court's existence cannot be separated from the historical context in which the ECHR emerged, that is Europe as a 'war-shattered continent' in which 'there were real fears in the western democracies over the spread of communism'.[13] The major motivating force for the drafting of the Convention was arguably to create an international document enshrining 'free Europe's ardent belief in human rights and democracy' and the creation of 'an international mechanism by which 'free Europe' could protect itself against the installation of a totalitarian regime.'[14]

This indeed appears to be supported by the rhetoric of the Conventions drafters:

> … [d]emocracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control... It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation, menaced by this progressive corruption…[15]

ECtHR dicta echoes assertions of the importance of democracy as a fundamental aim of the Convention regime,[16] not only identifying 'political democracy' as 'a fundamental feature of the European public order', but further that the promotion and maintenance of the 'ideals and values of a democratic society' underlies the very purpose of the Convention system.[17] More recently (and perhaps more boldly), former Secretary General (SG) of the Council of Europe (CoE), Thorbjørn Jagland,

[13] Ed Bates, The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights (OUP 2010), 5.
[14] ibid 5-6.
[15] Pierre-Henri Teitgen, 'French representative Pierre-Henri Teitgen in a speech for the Consultative Assembly in 1949' in Council of Europe (ed), *Collected Edition of the 'Travaux Préparatoires' of the ECHR* (Vol I, Brill 1975), 292.
[16] See for example, *Mathieu-Mohin and Clerfayt v. Belgium* App no. 9267/81 (ECTHR, 2 March 1987), para 47.
[17] *Gorzelik v Poland* App no. 44158/98 (ECtHR, 17 February 2004), [89].

asserted that the Convention system 'remains the ultimate backstop for our democracies, preventing a slide towards a more antagonistic and chauvinistic Europe'.[18]

This article aims to test this hypothesis, analysing how well placed the ECtHR is to deliver its mandate in safeguarding democracy, specifically in the context of its ability to respond to the counter-democratic threat posed by populism in Europe. It should be noted however that a comprehensive evaluation of the Court's ability to achieve this broad and complex aim, is beyond the scope of this article (and would likely require long-term interdisciplinary research).[19] This work instead conducts close analysis of some of the main challenges faced by the Court in this context, in which it is argued that the Court is ultimately ill-equipped to deal with the threat posed by European populism.

Section one clarifies some key terms important to this discussion in which definitions are disputed, namely populism and democracy, while also further elucidating the link between the ECHR and democracy. Section two identifies the challenge faced by the ECtHR in the context of populism presented by its ideological vulnerability to populist attack; here it is argued that the Convention regime can aptly be characterised as illegitimate and immoral under the ideology of populism on the basis of i) the populist conception of popular sovereignty and its vision of politics as the authentic expression of the will of the people; ii) the populist, antagonised, moralistic worldview and vilification of elites, in which the Court may be characterised as the 'enemy of the people'; and iii) populism's homogenised and exclusionary conception of the people, further characterising the Convention system as acting against the interests of the 'real' people on the basis that it protects minority groups whom are often vilified under populism. Section three then turns to the Court's substantive ability to safeguard democracy against populism by analysing key obstacles identified in the Court's case law. It is argued here that the Court's fundamental principle of subsidiarity presents an obstacle to the Court

[18] Thorbjørn Jagland, 'State of Democracy, Human Rights and the Rule of Law: Populism – How strong are Europe's checks and balances?' (Council of Europe 2017), 5.
[19] Amrei Müller, 'The European Court of Human Rights and the Rise of Authoritarianism in Russia' in Jure Vidmar (ed), *European Populism and Human Rights* (Brill 2020), 217.

effectively safeguarding democracy, evident in i) the Court's application of Article 18; and ii) its manifestation of procedural subsidiarity in Article 35.

I. KEY TERMS: POPULISM & DEMOCRACY

Before proceeding to the substance of this article, it is worth clarifying two key concepts for the purpose of this discussion: populism and democracy; in both cases a vast body of literature has emerged aiming to define these nebulous concepts and their core characteristics in which consensus is rare.

A. POPULISM

This article relies on Abts and Rummens' comprehensive conceptualisation of populism and its core elements, chosen here on the basis that it effectively surveys the breadth of the literature, identifying the main elements which are highlighted recurrently and persuasively.[20]

Firstly, populism relies on a 'central antagonistic relationship between 'the people' and 'the elite'';[21] the populist appeals to 'the people' to revolt against the established power structure and dominant ideas on the basis of a moralised worldview in which society can be separated into good and evil.[22] On this basis, populism is directly opposed to the notion of pluralism as political 'opponents are not just people with different priorities and values, they are evil!' Consequently, compromise is impossible as it 'corrupts' the purity.'[23]Secondly, the populist calls for the restoration of popular sovereignty, based on a belief that 'politics should be based on the immediate expression of the general will of the people'.[24] Populism is generally hostile to representative and intermediary democratic institutional arrangements, instead favouring more direct forms of democracy such as referenda or plebiscitary ratification in which a charismatic leader acts and speaks directly on behalf of 'the people'.[25]

[20] Koen Abts and Stefan Rummens, 'Populism versus Democracy' (2007) 55 Political Studies 405, 408.
[21] ibid, 408.
[22] Margaret Canovan, 'Trust the people! Populism and the Two Faces of Democracy' (1999) 47 Political Studies 2, 3.
[23] Mudde (n 6) 544.
[24] Abts and Rummens (n 20) 408.
[25] ibid 408.

Lastly, populism relies on a conceptualisation of the people as a homogenous unit, thus making the identification of will of the people possible; rather than a

> … heterogeneous collection of social groups and individual subjects with diverse values, needs and opinions … the people are considered to form a collective body which is capable of having a common will and a single interest, and which is able to express this will and to take decisions.[26]

To form this artificial, monolithic conception of the electorate, the populist relies on an exclusionary conception of 'the people' whereby the 'morally pure people' are 'extracted' from the general population of the given polity. Relying on populism's central antagonism, it excludes the 'elite, the ruling class and other power wielders, foreigners and the media', but further often relies on 'ethnic, religious, linguistic (or sometimes, socioeconomic) lines' to reveal the 'real', 'morally pure' people.[27]

B. STRASBOURG'S CONCEPTION OF DEMOCRACY

Democracy is similarly contested in constitutional law and political science literature. It is beyond the scope of this article to evaluate the normative claims to conceptions of democracy; instead, it seeks to assess the ECtHR against *its own* conception of democracy, which is submitted to be largely synonymous with liberal constitutional democracy. The Court's case law strongly indicates that it rejects a thin conception of democracy, that is, a system marked by 'open, free and fair' elections *only.*[28] This may be expected from an institution whose operation is often inherently counter-majoritarian; as the Court identified in *Sorensen v Denmark* and *Rasmussen v Denmark*, 'democracy does not simply mean that the views of the majority must always prevail'.[29]

[26] ibid 408-409.
[27] Raphaël Girard, 'Populism, 'the People' and Popular Sovereignty' in Maria Cahill, Colm O'Cinneide, Seán Ó Conaill and Conor O'Mahony (eds), *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland* (Routledge, 2021) 79-82.
[28] Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 Foreign Affairs 22, 22.
[29] *Sorensen v. Denmark* and *Rasmussen v. Denmark*, Apps. 52562/99 and 52620/99 (ECtHR, 11 January 2006),[58]; Joseph Zand, 'The Concept of Democracy and the European Convention on Human Rights' (2017) 5 University of Baltimore Journal of International Law 195, 200.

Rather, notions of liberal constitutionalism are woven into the Court's conception of democracy, i.e., a structuring of state institutional arrangements defined by:

> … (1) *a democratic electoral system*, most importantly periodic free-and-fair elections in which a losing side cedes power; (2) *the liberal rights to speech and association* that are closely linked to democracy in practice; and (3) the stability, predictability, and integrity of law and legal institutions—*the rule of law*—functionally necessary to allow democratic engagement without fear or coercion.[30]

A 'democratic electoral system' is of course given significant weight by the general scheme of the Convention and the ECtHR, as is indicated by Court's identification of democracy as 'the only political model contemplated in the Convention and the only one compatible with it.'[31] The characteristic nature of free, fair and open elections to democracy is further enshrined in Article 3 of Protocol No. 1, in which '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature', a provision 'accordingly [afforded] prime importance in the Convention system'.[32]

It is perhaps trite to further identify liberal rights as core to the ECHR. As recognised by Jean-Paul Costa, former ECtHR President, the Convention enshrines 'the essential components of political liberty and was intended to protect them', formally recognising 'the freedom to engage in political activity' and 'participate in public life at every level', notably by way of Articles 10 and 11 of the Convention, enshrining the rights to freedom of expression and to freedom of assembly and association respectively.[33]

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[30] Aziz Huq and Tom Ginsburg 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78, 87 (emphasis added).
[31] *Gorzelik* (n 17) [92].
[32] Mathieu-Mohin and Clerfayt (n 16) [47].
[33] Jean-Paul Costa, 'The links between democracy and human rights under the case-law of the European Court of Human Rights' (Council of Europe, Helsinki, 5 June 2008) <https://www.echr.coe.int/Documents/Speech_20080605_Costa_Helsinki_ENG.pdf> accessed 30 April 2024, 1-2.

It may be equally trite to identify the rule of law as a core value of the Convention system; again, the Preamble to the ECHR identifies the rule of law as part of the 'common heritage' of the contracting states.[34] The concept of the rule of law has further been important in the Court's case law; in *Golder v United Kingdom* for example, the Court interpreted Article 6(1) of the ECHR broadly, inferring the inherent right of access to the courts from the reference made to the rule of law in the Convention Preamble.[35] Indeed, various substantive guarantees developed in the Court's case law may be attributed from this notion, such as the principles of legality, legal certainty, equality of individuals before the law, the possibility of a remedy before a court and the right to a fair trial.[36] As former President Costa identifies succinctly, the ECtHR's conception of 'democracy rests upon the rule of law';[37] further identifying accountability on behalf of states to their citizens in the international legal order as one of the primary achievements of the Convention system.[38]

II. THE ECTHR'S IDEOLOGICAL VULNERABILITY TO POPULIST ATTACK

The first challenge faced by the ECtHR and the wider Convention regime is the apparent irreconcilability between the populist constitutional project and notions of the rule of law and constitutionalism. As identified in the previous section, a foundational feature of populism is the zealous belief in popular sovereignty based on the immediate and authentic expression of the general will of the people. Since populism relies on an artificial conception of the people as a homogenous unit, populists tend to conflate the notion of 'temporal majorities, that is to say electoral majorities at a particular time and place' with the people as a whole.[39] Thus, upon electoral success, the populist leader 'instantiate[s] the authentic will of the people through his acts and his character' and is able to

[34] Preamble to the European Convention on Human Rights.
[35] *Golder v United Kingdom* App no 4451/70 (ECtHR 21 February 1975) [34].
[36] Linos-Alexandre Sicilianos, 'The Rule of Law and the European Court of Human Rights: the Independence of the Judiciary' (Speech at the Montenegrin Academy of Sciences and Arts, Montenegro, 28 February 2020) <https://www.echr.coe.int/Documents/Speech_20200228_Sicilianos_Montenegro_ENG.pdf> accessed 30 April 2024, 2-3.
[37] Costa (n 33) 2.
[38] ibid 1.
[39] Girard (n 27) 78.

act directly on behalf of the people via the authority of the state.[40] The populist leader is supposedly able to assimilate the general will of 'the people', 'since it stems from the shared consciousness of the people – the common sense' of concerns, desires, and values shared and understood by the populist leader.[41] As such, populism strongly rejects 'the emphasis on the limitation of political power through legal norms and the subjection of power to higher norms'[42] within the Convention's conception of democracy as an unnecessary fetter on the populist constitutional project of unifying politics with the general will of the people.[43]

Perhaps more fundamentally, populism's conception of popular sovereignty may render the Convention's status as a higher legal norm *a priori* illegitimate. As opposed to liberal constitutionalist understandings of democracy in which sovereignty is related to the state, its legal system and thus, its constitution, populists situate sovereignty in 'the people' alone; the law itself cannot found the legitimacy for the basis of a political community, for the populist, the opposite is true: 'the law needs to be the expression of the political will of such a community' and subsequently, 'the people' and by extension the authority of the state remains ultimately unbound by the law.[44] For example, Poland's populist regime advocates for a vision of democracy in which the 'nation as a political community of all citizens that constitute the state is the primary category,' against a view which is portrayed as primarily legalistic, in which 'the attribute of sovereignty is transferred to the law itself, in particular to the most important of normative acts—the constitution'.[45]

Popular sovereignty is characterised in a revolutionary sense as the *pouvoir constituent,* with the legitimacy to intervene in the political process *wherever* there is a gap between the authority of the

[40] Ming-Sung Kuo, 'Against Instantaneous Democracy' (2019) 17 International Journal of Constitutional Law 555, 558.
[41] Petrov (n 8) 481.
[42] Paul Blokker, 'Populism as a Constitutional Project' (2019) 17 International Journal of Constitutional Law 536, 539.
[43] Petrov (n 8) 483.
[44] Blokker (n 42) 550-551.
[45] Jan Majchrowski et al., 'Report of the Team of Experts on the Issues Related to the Constitutional Tribunal of 15 July 2016' (Polish Constitutional Tribunal 2016) <http://www.sejm.gov.pl/media8.nsf/files/ASEA-ADRKC8/%24File/Report%20of%20the%20Team%20of%20Experts%20on%20the%20Issues%20Related%20to%20the%20Constitutional%20Tribunal.pdf.> accessed 30 April 2024, 3.

state and the will of the people.[46] Subsequently, for the populist there is no distinction between ordinary and constitutional politics – politics must always be an expression of the general will, and where there is a discrepancy between the general will and higher legal norms 'the people' must always take primacy.[47] Thus, the ECtHR's repeated characterisation of the Convention 'as a constitutional instrument of European public order' will be particularly problematic to the populist.[48] Under the Convention regime, the state must amend any provisions of its constitution which are inconsistent with the Convention, unless it can be interpreted in a way that is consistent with the Convention,[49] regardless of where the Convention ranks in the domestic constitution's hierarchy of laws.[50]

A. POPULISM, INSTITUTIONALISM AND LIBERAL INTERNATIONALISM

Of course, in the populist constitutional project's central search for authenticity in politics, it is not only the liberal values of constitutionalism and the rule of law that come under attack, but also its counter-majoritarian institutions and checks and balances actors, especially those of a judicial capacity. Through the lens of populism, judicial accountability of state authority mutes the voice of the people, disenfranchising 'the people' of '*real* political power' in favour of 'unaccountable institutions'.[51] The populist constitutional project thus seeks 'to re-centralise political power in the hands of the people (or in the hands of a populist leader who impersonates the people), away from … the judiciary'.[52] Such sentiment is demonstrated by the Polish regime's publications regarding the reform of the judiciary, in which it is argued that 'judicial reforms are necessary to counter an imbalance between powers' relating to 'the peculiar bureaucratic corporate culture which has emerged in the Polish administration

[46] Girard (n 27) 91.
[47] Petrov (n 8) 482.
[48] *Loizidou v Turkey* App No 15318/89 (ECtHR 23 March 1995), para 75; see also e.g. *Al-Skeini and Others v the United Kingdom* App No 55721/07 (ECtHR 7 July 2011) para 141; *Al-Dulimi and Montana Management Inc v Switzerland* App No 5809/08 (ECtHR 21 June 2016), para 145; *Aliyev v Azerbaijan* App Nos 68762/14 and 71200/14 (ECtHR 20 September 2018), para 225.
[49] *Loizidou* (n 48) para 75; Council of Bars and Law Societies of Europe, 'The European Court of Human Rights: Questions & Answers for Lawyers' (Council of Bars and Law Societies of Europe 2014) <https://www.echr.coe.int/documents/guide_echr_lawyers_eng.pdf> accessed 30 April 2024, para 40.
[50] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* App No 45036/98 (ECtHR, 30 June 2005), paras 153-157; Council of Bars and Law Societies of Europe (n 49), para 40.
[51] Girard (n 27) 78 (emphasis in original).
[52] ibid 87.

of justice' on the basis that the judicial system was inaccessible and concerned with the justification of judgments on formal grounds, rather than actual fairness – in short, 'citizens were deprived of the ability to exert influence' on the judicial institutions.[53]

Furthermore, judicial bodies may further be characterised as separate from the people, forming part of the morally impure elite 'other' within populism's antagonised worldview – its counter-majoritarian operation is said to be 'methods by which political elites preserve their power in the face of the majority's will'[54]. The people are not only disenfranchised of their political power, this power is bestowed upon elite institutions 'which do not act *for* the people, but rather rule *above* them'.[55] Again, this was made explicit by the Polish State, which identified the purpose of judicial reforms as making 'judges equal to ordinary people, not above them'.[56]

The ECtHR's 'technocratic and non-majoritarian' character (i.e., its judicialisation of political questions, removing them from the sphere of popular/representative politics) can thus easily be characterised as 'institutionalised elitism and a threat to democracy' by the populist.[57] This is particularly so since the Court is increasingly tasked with answering questions that impinge on what Hirschl describes as issues of 'mega-politics': i.e., 'core political controversies that define the boundaries of the collective or cut through the heart of entire nations'.[58] The Court regularly engages with issues of citizenship, immigration, religion, sexuality, marriage and other core issues of the polities' identity.[59] Regardless of the normative value of the Court's involvement in these areas, it must be acknowledged that the Court's judicialisation of such issues 'can contribute to their de-politicization

[53] Blokker (n 42) 541; White Paper on the Reform of the Polish Judiciary 19 (2018).
[54] Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39 Legal Studies 435, 444.
[55] Girard (n 27) 78 (emphasis in original).
[56] See e.g., Monika Scislowska and Vanessa Gera, 'Polish Govt Gets More Power Over the Courts, Defying EU' *US News* (Warsaw, 8 December 2017) <www.usnews.com/news/world/articles/2017-12-08/polands-outgoing-pm-vows-to-keep-serving-populist-govt> accessed 30 April 2024; Girard (n 27) 78.
[57] Petrov (n 8) 483. See also Frank Vibert, The Rise of The Unelected: Democracy and The New Separation of Powers (CUP 2007), 3.
[58] Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 Annual Review of Political Science 93, 98.
[59] Erik Voeten, 'Populism and Backlashes Against International Courts' (2020) 18 Perspectives on Politics 407, 413.

and, thereby, to the anxiety of the people stemming from the lack of control over these pressing issues'.[60]

The delegitimisation of the Court is exacerbated by the Court's transnational character in that it

> … offers an additional ground for populist leaders to attack [its] authority … based on sovereignty or identity. It is much easier to challenge an institution as unrepresentative of the will of the people if the judges are foreign and take decisions in foreign locales.[61]

The Court thus exists within an intersection of the generalised anxiety over loss of popular control over political issues and the generalised anxiety surrounding the loss of national sovereignty in favour of 'the increasing power of transnational institutions without electoral accountability'.[62] Such anxiety is particularly pertinent to European populism and its trend towards increased scepticism of pan-European integration.

This Euroscepticism is evident in communications from the Hungarian Parliament, for example:

> We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.[63]

This mirrors Orbán's rhetoric surrounding the European project on that basis that it implicitly claims 'that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests. [It] thinks that [it] know[s] the needs of the Hungarian people better than the Hungarian people themselves'.[64]

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[60] Petrov (n 8) 485.
[61] Voeten (n 59) 413.
[62] Selen Ercan and Jean-Paul Gagnon, 'The Crisis of Democracy: Which Crisis? Which Democracy?' (2014) 1 Democratic Theory 1, 1; Tom Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 Hague Journal on the Rule of Law 9, 31.
[63] Gábor Halmai, 'Populism, authoritarianism and constitutionalism' (2019) 20 German Law Journal 296, 299.
[64] ibid 300.

Through the populist lens, the ECtHR's substantive development of rights beyond a strictly originalist reading of the Convention via its dynamic interpretative methods, the permeation of its case law in the jurisprudence of domestic courts and its influence on national legislation and constitutions may look like a liberal internationalist straightjacket, 'restricting policy choices, imposing the liberal language of political correctness and turning these polities into democracies without choices'.[65] This is compounded with commonly held perceptions of the failures of globalisation, in that its benefits 'were not equally distributed, leaving many feeling left behind by globalisation, international liberalism and its institutions'.[66] These institutions subsequently provide 'a convenient target for populists' in that they 'have been able to blame globalisation and international law for insecurity and economic dislocation as a way to undermine the establishment elites who constructed them'.[67] The sum effect of these tenets of the populist ideology presents a bleak prognosis for the Strasbourg Court; 'the more the people view democratically elected governments as being overruled … by unaccountable regional or international institutions', such as the ECtHR, 'the more attractive populism's call to regain national sovereignty… becomes'.[68]

B. POPULISM, PLURALISM AND MINORITY RIGHTS

The populist hostility towards the ECtHR as a creation of the international liberal elite and thus corrupt', 'morally impure' and 'enemies of the people'[69] is exacerbated by the Court's inherent jurisdiction of protecting vulnerable and unpopular minorities – often groups specifically distinguished as separate from the 'pure people' or even threats to them.[70] The Court for example, has issued numerous judgments in favour of 'prisoners, immigrants and other minority groups who may be the target of populist identity politics', rendering it ripe for populist ideological attack.[71] Indeed,

[65] Petrov (n 8) 481.
[66] ibid 484.
[67] Eric Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 Arizona State Law Journal 795, 816.
[68] Sheri Berman, 'The Pipe Dream of Undemocratic Liberalism' (2017) 28 Journal of Democracy 29, 37.
[69] See for example, Mudde (n 6) 543; Blokker (n 42) 544; Girard (n 27) 82.
[70] Voeten (n 59) 407-408.
[71] ibid 407.

'international human rights norms are increasingly viewed' under populism 'as particularly non-democratic and individualistic obstacles to the collective identity of the people'.[72]

The Court considers pluralism a core principle, explicitly identifying the achievement of a balance between the majority electoral position and individual rights to ensure 'fair and proper treatment of minorities and avoid abuse of a dominant position' as fundamental to its conception of democracy.[73] Similarly, the Court recognised in *Gorzelik* that 'on numerous occasions' it has 'affirmed the direct relationship between democracy, pluralism' and the Convention,[74] going on to define pluralism as 'the genuine recognition of, and respect for, diversity and dynamics of cultural conditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts'.[75] This creates obvious tension with populism's monist conception of the people detailed above.[76]

The current populist explosion across Europe largely characterises 'the real people' as 'the heartland', that is, 'a mythical and constructed … [community] … in which a virtuous and unified population resides'.[77] This conception of the people is often characterised as a 'silent majority', consisting of the 'hard-working, slightly conservative, law-abiding citizen, who, in silence but with growing anger sees his world being 'perverted' by progressives, criminals and aliens'.[78] For European populists, this heartland of the people is almost always based on 'a nativist, racialised conception of the people', excluding 'non-native and immigrant populations'.[79] These right-wing populist parties capitalise on feelings of alienation held particularly by older and less educated voters who may often feel threatened by the changing social and cultural values and identities of their polities, as well as the perceived impact on their employment opportunities/security posed by low-wage migrant workers. From this perceived loss of cultural identity, and feelings of exclusion from contemporary society, 'populist

[72] Petrov (n 8) 484.
[73] *Sorensen and Rasmussen* (n 29) para 58; Zand (n 29) 200.
[74] *Gorzelik* (n 17) para 88.
[75] ibid para 92.
[76] Girard (n 27) 81.
[77] Mudde (n 6) 545-546.
[78] ibid 557.
[79] Girard (n 27) 83.

parties and movements that criticize or reject immigration and pluralism' subsequently become highly attractive.[80]

This is particularly so with the influx of migrants from the Middle East and Africa seeking refuge in Europe, the Hungarian situation being a notable example. In September 2015 the Hungarian Parliament issued a resolution stating that Hungary should defend its borders by 'every necessary means' against 'waves of illegal immigration' to protect 'the jobs and social security of the Hungarian people.'[81] This rhetoric was met with several State acts including the declaration of a crisis situation, the construction of a fence along the border with Serbia, changes to the law criminalising entry into the country through the border fence, and the expansion of police and military powers in securing the border, such as, authorising the use of rubber bullets, tear gas grenades and pyrotechnical devices.[82]

Since the beginning of the migrant crisis, the Court has issued numerous judgments in favour of igrants as against the Hungarian State,[83] and as early as 2015, former CoE SG Jagland wrote to Orbán expressing concerns regarding legislation changes surrounding the migrant crisis, asking for 'reassurances that … Hungary will remain committed to its obligations under the European Convention on Human Rights'.[84] Orbán has subsequently publicly attacked the Court and Convention system as a 'threat to the security of EU people and [an] invitation for migrants', whom he described as a 'Trojan Horse of terrorism'.[85] Thus, the Court's protection of these minorities may 'provide kindling to already burning populist fires', spurring its side-lining and delegitimisation.[86]

[80] Yvonne Donders, 'Diversity in Europe: from Pluralism to Populism?' in Jure Vidmar (ed), *European Populism and Human Rights* (Brill 2020), 67-8.
[81] Amnesty International, 'Fenced Out: Hungary's violations of the rights of refugees and migrants' (Amnesty International Publications 2015) <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR2726142015ENGLISH.pdf> accessed 30 April 2024, 5.
[82] ibid.
[83] See for example: *Ilias and Ahmed v Hungary* App No 47287/15 (ECtHR, 14 March 2017); *Shahzad v Hungary* App No 12625/17 (ECtHR, 8 July 2021); *H.M. and Others v Hungary* App No 38967/17 (ECtHR, 2 June 2022); *Alhowais v Hungary* App No 59435/17 (ECtHR, 2 February 2023).
[84] 'Secretary General questions Hungary over human rights' (Council of Europe, 15 September 2015) <https://www.coe.int/en/web/portal/news-2015/-/asset_publisher/9k8wkRrYhB8C/content/secretary-general-questions-hungary-over-human-rights> accessed 30 April 2024.
[85] Michalopoulos (n 11).
[86] Voeten (n 59) 408.

III. SUBSIDIARITY AS A CHALLENGE TO THE COURT'S SUBSTANTIVE ABILITY TO ACT AS A SAFEGUARD FOR DEMOCRACY

The dilemma faced by the Court is twofold; as well as being ideologically vulnerable to delegitimisation and thus sidelining in a domestic context, the Court appears to have little authority to compel compliance with the Convention from member states who are no longer committed to the Court's ideological basis of liberal constitutional democracy. In this section, some of the Court's case law in relation to illiberal states within the CoE's membership will be reviewed, identifying some key barriers to the Court's ability to safeguard democracy. It is argued here that the common thread running through this case law is the Court's foundational principle of subsidiarity undermining the Court's function as a safeguard against democratic backsliding. It is important to note that there are persuasive normative justifications for the Court's employment of the principle of subsidiarity, and that it is not the purpose of this article to comprehensively evaluate the value of the Court's subsidiary role; it is instead questioned here whether the principle of subsidiarity can be reconciled with the notion of the Court as the most effective safeguard afgainst democratic backsliding.[87]

A. SUBSTANTIVE SUBSIDIARITY, THE PRESUMPTION OF GOOD FAITH AND ARTICLE 18 ECHR

One way in which the principle of subsidiarity manifests itself in the Court's case law is in its interpretation of Article 18. Article 18 reads that 'the restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'.[88] Despite its modest wording, the provision represents lofty ambitions; the inclusion of Article 18 is presented within the *Travaux Préparatoires* of the Convention as an 'application of the theory of misapplication of power',[89] its object and purpose being

[87] See Jagland (n 18).
[88] Article 18 ECHR.
[89] Teitgen (n 15).

> …to ensure that no State shall in fact aim at suppressing the guaranteed freedoms, by means of minor measures which, while made with the pretext of organising the exercise of these freedoms on its territory, or of safeguarding the letter of the law, have the opposite effect.[90]

Essentially, the provision is targeted at bad faith restrictions of rights and abuse of power 'by outlawing the restriction of rights for any ulterior purpose' or 'hidden agenda',[91] particularly abuses of power intended to quash political contestation by restricting the rights of 'an opposition which [the state] considers [politically] dangerous'.[92]

This arguably renders the provision particularly well-suited to respond to the counter-democratic threat of European populism, having the potential to

> '…function as an early warning system for European States who are at risk of [democratic backsliding] … a function that might prove crucial given the worrisome contemporary developments in a number of Council of Europe States, such as Hungary, Poland, Russia and Turkey.'[93]

Indeed, Article 18 reflects the Convention's drafters' acute awareness of the fact that 'what we must fear today is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means';[94] since the misuse of state apparatus and the criminal justice system to suppress opposition, civil society and other voices of dissent are often the hallmark of totalitarianism, the finding of a violation of Article 18 has the potential to be the most effective tool available to the ECtHR to sound the alarm where democracy is threatened within the Council of Europe, as was envisaged by the drafters of the Convention.[95]

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[90] ibid.
[91] Floris Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?' (2018) 9 Goettingen Journal of International Law 109, 112.
[92] Teitgen (n 15).
[93] Tan (n 91) 113.
[94] Ludovico Benvenuti, in Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the ECHR,* (Vol. II., Brill 1975), 136. See also Tan (n 91) 116.
[95] Tan (n 91) 120; Teitgen (n 15).

Reference to pseudo-legitimate means aiming to quash liberal systems of political contestation mirrors Scheppele's description of the covert pursuit of 'autocratic designs' hidden 'in the pluralism of legitimate legal forms' attributable to the growing occurrence of 'autocratic legalism',[96] in which democratically elected executives 'use their electoral mandates to dismantle by law the constitutional systems they inherited', the ultimate aim being 'to consolidate power and to remain in office indefinitely, eventually eliminating the ability of democratic publics to exercise their basic democratic rights, to hold leaders accountable and to change their leaders peacefully'.[97] This phenomenon of autocratic legalism has been observed within the CoE's membership in Poland and Turkey, and most pertinently in Hungary, with Orbán's regime being identified by Scheppele as her 'archetypal case' of democratic backsliding.[98]

However, the operation of Article 18 cannot be readily reconciled with the deeply embedded notion of the 'subsidiary nature of the international machinery of collective enforcement established by the Convention',[99] which has since been enshrined in the preamble of the ECHR upon the enactment of Protocol 15.[100] An important aspect of this notion is the characterisation of the Convention regime as a cooperative system between its institutions and national authorities, which largely 'rests on the general assumption that public authorities in member States act in good faith' when taking measures to secure Convention rights to their citizens.[101] It is then perhaps not surprising that Article 18's function of identifying and sanctioning bad faith restrictions of Convention rights has been largely undermined by the strong general presumption of good faith on behalf of national authorities.

[96] Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545, 547-548.
[97] ibid 545.
[98] ibid 549-550.
[99] Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium App Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; and 2126/64 (ECtHR, 23 July 1968), para 10.
[100] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Aug. 1, 2021, Europ.T.S. No. 213.
[101] *Kavala v Türkiye* App no 28749/18 (ECtHR, 11 July 2022), para 169. See also *Khodorkovskiy v. Russia* App No 5829/04 (ECtHR, 31 May 2011), para 225; *Merabishvili v. Georgia* App No. 72508/13 (ECtHR, 14 June 2016), para 100; Müller (n 19), 246-247;.Jeffrey Kahn 'The 'Anti-Deference' Device: Article 18 of the European Convention on Human Rights' (2022) 31 Journal of Transnational Law & Policy 177, 119.

Historically, Article 18 has been of little relevance in the ECtHR's case-law, with the Court not finding any violations of Article 18 until the case of *Gusinskiy v Russia* in 2004.[102] This has arguably been largely attributable to the Court's presumption of good faith which has historically 'strongly affected' the Court's interpretation of Article 18, leaving it with an extremely narrow scope for its application and 'an exceptionally onerous threshold to prove misuse of power'.[103] For instance, this is reflected in the Court's (past) practice of considering complaints of alleged Article 18 violations 'unnecessary to examine' where it could be found that other Articles had been violated, most notably Articles 5, 6 and 7 on the grounds of the arbitrary application of domestic law.[104] As former ECtHR Judge Helen Keller has argued, this practice limited the application of the Article to a point of almost no scope of application whatsoever.[105]

This is further reflected in the Court's past imposition of special evidentiary standards in Article 18 cases. Firstly, the Court imposed a one-sided burden of proof placed 'firmly and irreversibly upon the applicant'; even where an arguable prima facie case alleging a violation of Article 18 had been made, the respondent state was under no obligation to rebut the claims, the presumption of its good faith being maintained until the contrary was proven by the applicant.[106] Moreover, the Court explicitly imposed a 'very exacting standard of proof'.[107] In some cases, the Court considered that this standard would be exhausted where the applicant could 'convincingly show' that the State acted with ulterior purposes,[108] but in a number of cases further required 'incontrovertible and direct proof'.[109] In *Khodorkovskiy and Lebedev v. Russia* for example, the Court rejected domestic court findings in

[102] *Gusinskiy v Russia* App No 70276/01 (ECtHR, 19 May 2004).
[103] Başak Çalı and Kristina Hatas, 'History as an afterthought: the (re)discovery of Article 18 in the case law of the European Court of Human Rights' in Helmut Philipp Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (Edward Elgar Publishing Limited 2021), 176.
[104] Müller (n 19) 249; Tan (n 91) 122.
[105] Helen Keller and Corina Heri, ''Selective criminal proceedings and Article 18 ECHR: The European Court of Human Rights' untapped potential to protect democracy' (2016) 36 Human Rights Law Journal 1, 9. See also Tan (n 91) 122.
[106] *Khodorkovskiy* (n 101) para 903; Tan (n 91) 126.
[107] *Khodorkovskiy* (n 101) paras 899, 66 and 256. See also e.g., *Lutsenko v. Ukraine* App No 6492/11 (ECtHR, 3 July 2012), para 107; *Dochnal v. Poland* App No 31622/07 (ECtHR, 18 September 2012), para 112.
[108] *Khodorkovskiy* (n 101) paras 260 and 900.
[109] See e.g., *Khodorkovskiy* (n 101) para. 260; *Dochnal* (n 107) para 116; *Nastase v. Romania* App No 80563/12 (ECtHR, 18 November 2014), para 109.

extradition procedures that the applicants' prosecutions were politically motivated on the basis of this extremely high standard of proof.[110] This standard was considered by several ECtHR judges to be 'prohibitively high' so as to render Article 18 effectively illusory.[111]

The Court reconsidered its approach towards complaints of alleged Article 18 violations in *Merabishvili v Georgia,* resulting in a generally more claimant-friendly environment with regard to the Court's standardisation of its approach to proof, finding that 'it can and should adhere to its usual approach of proof rather than special rules'.[112] Thus, the applicant no longer solely bears the burden of proving their allegation of an Article 18 violation; the 'general rule' that 'the burden of proof is not borne by one or the other party' instead being applied.[113] The standard of proof required by the Court was also softened, requiring that allegations are proved 'beyond reasonable doubt', allowing for limited use of 'circumstantial evidence' and 'sufficiently strong, clear and concordant inferences'.[114] These are certainly welcome developments, and appear to have made a marked difference in applicants' ability to successfully make complaints of Article 18 violations. In the 5 years since the *Merabishvili* judgment, the Court has found 15 breaches of Article 18 (including *Merabishvili* itself), compared to 7 violations of Article 18 pre-*Merabishvili.*[115]

However, it is submitted here that Article 18 still lacks potency in its perception as an alarm bell for democratic backsliding as it may be shown that the Court's presumption of good faith on behalf of the state still lingers in its interpretation of the provision. The main concern in this regard is the Court's introduction of the 'predominant purpose test', which allows the Court to find that a state has violated Article 18 where the State has a *plurality of purposes* for their restriction of the applicant's rights. The Court accounts for the possibility that the state authorities pursued more than one aim when restricting

[110] *Khodorkovskiy* (n 101) para 908.
[111] Joint Concurring Opinion of Judges Sajó, Tsotsoria and Pinto de Albuquerque, Appended to *Tchankotadze v. Georgia* App No 15256/05 (ECtHR, 21 June 2016), para 7.
[112] *Merabishvili* (n 101) paras 310 and 316.
[113] ibid para 311.
[114] ibid para 314.
[115] 'Guide on Article 18 of the European Convention on Human Rights' (Council of Europe/ECtHR 2022) <https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf> accessed 30 April 2024, para 23.

rights, some being legitimate aims while others advance ulterior purposes. Thus, the Court may find a violation of Article 18 where the State pursued a legitimate aim, but also pursued an ulterior purpose, so long as the former was the *predominant purpose*.[116]

Although this is an improvement from previous interpretations of Article 18, it arguably does not go far enough as it still paradoxically presumes a degree of good faith on behalf of the respondent state where there is a plurality of purposes, despite Article 18's function in sanctioning bad faith exercise of state authority. This potentially leaves too much 'wiggle room' for States committed to illiberal abuses of power; indeed, it is hard to reconcile with the notion that 'there should be no misuse of the restrictions placed on the rights and freedoms set out in the Convention.'[117] Even if the Court must concede that the evidence available shows that the State authorities acted with an ulterior purpose in limiting an individual's rights, the state may do so with impunity, so long as its purposes were 'mostly' legitimate.

The practical effect of this approach may prove to 'leave a wide margin of appreciation for governments to implement illegitimate restrictions, by combining them with legitimate purposes',[118] or at least creating the appearance of a legitimate predominant purpose 'by masking their improper agendas in a more sophisticated way'.[119] As identified in the partly dissenting opinion of Judges Yudkivska, Tsotsoria and Vehabović in the *Merabishvili* case, this considerable room for state authorities to manoeuvre around Article 18 not only significantly undermines the alarm bell function of Article 18, but further undermines the notion of the ECtHR as 'the conscience of Europe, the guardian of human rights, and a contributor to the transition from totalitarianism to democracy and the rule of law in Europe'.[120]

[116] *Merabishvili* (n 101) para 309.
[117] Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović, appended to *Merabishvili* (n 101), para 16.
[118] ibid.
[119] ibid para 37.
[120] Concurring Opinion of Judge Serghides, appended to *Merabishvili* (n 101), para 38.

Relatedly, it is highly questionable whether the Court's approach maintains the seriousness of a finding that Article 18 has been violated.[121] To weigh legitimate and illegitimate purposes against one another arguably normalises counter-democratic misuses of power by 'treating them with the ordinary logic of administrative law'[122] and turning 'bad faith into a banal state of affairs'.[123] This increasingly casual approach may dilute the finding of a violation of Article 18, making violations 'lose their edge, as an extremely serious' breach 'that signifies a complete disregard for the rule of law', potentially putting the 'value of the provision at risk'.[124] To use the analogy preferred by the drafters of the Convention, the sounding of the alarm bell, by way of Article 18, may now be considerably quieter. Thus, the Court's presumption of good faith, and relatedly claimant-adverse historic and current interpretation of Article 18, considerably undermines the potential of Article 18 in responding to the counter-democratic threat posed by European populism, particularly in relation to its employment of autocratic legalism.

B. PROCEDURAL SUBSIDIARITY, FORMALISM AND ARTICLE 35 ECHR

The principle of subsidiarity also manifests itself in the Convention system's procedural formalism. Notably, Article 35(1) ECHR provides that '[t]he Court may only deal with the matter after all domestic remedies have been exhausted'.[125] As identified in *Vučković and Others v. Serbia*, this rule is closely linked to the notion of subsidiary in that it 'is based on the assumption … that there is an effective remedy available in respect of the alleged violation', with the primary responsibility of securing and protecting Convention rights resting on domestic authorities (Article 1), limiting the Court's role to that of a supervisory capacity (Article 19).[126] However, as former President of the ECtHR, Robert Spano, recognises, 'the exhaustion rule' must be applied 'with some degree of flexibility and without

[121] Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović, appended to *Merabishvili* (n 101) para 21.
[122] Cali & Hatas (n 103) 176.
[123] Başak Çali, 'Merabishvili v. Georgia: Has the Mountain Given Birth to a Mouse?' (*Verfassungsblog,* 3 December 2017) <https://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/> accessed 30 April 2024.
[124] Tan (n 91) 137-138.
[125] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 35(1).
[126] *Vučković and Others v. Serbia* App No 17153/11 (ECtHR, 25 March 2014), paras 69-77.

excessive formalism';[127] thus, the rule is not to be applied where domestic remedies are not capable of effectively remedying the impugned state of affairs or does not offer reasonable prospects of success.

This need for flexibility in the application of Article 35 is especially pertinent in the context of European populism democratic backsliding. Crises of judicial independence in Poland, Hungary and Turkey are well-documented;[128] thus, although domestic remedies may theoretically be available, it is highly doubtable that these remedies will be effective or will be successfully relied upon. Engaging with the question of the effectiveness of domestic remedies provides a valuable opportunity for the Court to scrutinise the state of judicial independence and the rule of law in these Member States, further acting as the alarm bell for democratic backsliding. More importantly, flexible consideration of the rule in Article 35 and meaningful engagement with the question of the effectiveness of domestic remedies also facilitates individual justice, preventing individuals from having to labour through potentially time-consuming and financially burdensome legal procedures in which there may be no realistic prospect of success, or in which the remedy granted will not effectively address the harm suffered.

However, recent ECtHR case law suggests that the Court's approach to Article 35 emphasises procedural formalism over flexibility and pragmatism and thus, concerns arise as to whether the Court is effectively responding to the situation in democratically backsliding populist states.[129] The danger in the Court's formalistic approach is made evident is the case of *Köksal v Turkey*.[130] This case concerned the Turkish post-coup purging of the civil service in which over 50,000 public servants,

[127] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487, 489.
[128] See for example, Gábor Halmai, 'Is There Such Thing as 'Populist Constitutionalism'? The Case of Hungary' (2018) 11 Fudan Journal of the Humanities and Social Sciences 232; Reuters Staff 'How Turkey's courts turned on Erdogan's foes' *Reuters* (Istanbul, 4 May 2020) <https://www.reuters.com/investigates/special-report/turkey-judges/> accessed 30 April 2024; Wojciech Sadurski, 'Populism and Human Rights in Poland' in Gerald L Newman (ed) *Human Rights in a Time of Populism* (CUP 2020).
[129] Mikael Rask Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' (2021) 2 European Convention on Human Rights Law Review 180, 201.
[130] *Köksal v Turkey* App No 70478/16 (ECtHR, 6 June 2017).

including the applicant (a teacher), were dismissed based on their alleged affiliation with structures, groups or organisations determined by the National Security Council to be engaged in terrorism or other activities deemed to be against Turkish national security interests. The applicant had complained of violations of various Convention rights, but the application was dismissed based on the applicant's failure to exhaust domestic remedies under Article 35; the applicant had not resorted to the contemporaneously created 'State of Emergency Inquiry Commission', which was established to assess the measures implemented in the context of the state of emergency declaration, including the dismissals of public servants. The existence of this Commission was relied upon by the Court despite the well-documented, counter-democratic rule of law crisis seen in Turkey, and academic literature existing from the inception of the Commission detailing its lacking independence,[131] as well as serious doubts as to the possibility of effective domestic remedies for the mass-dismissal of public servants raised by the CoE's own Venice Commission.[132]

A similar approach has been employed by the Court in relation to Hungary. The Court appears to be concerned with the mere existence of a potential remedy provided by the Hungarian Constitutional Court and not the realistic prospects of success in legal proceedings or the effectiveness of remedies.[133] Again, this is the case despite well-documented concerns regarding the independence of the Hungarian judiciary.[134] Thus, 'the Court insists on subsidiarity, procedurally as well as formally' based on what Madsen describes as an 'as if' logic; the Court assumes that domestic remedies available in Member States are formally effective, this assumption being revisited only after the fact.[135] The Court's insistence on procedural subsidiarity effectively ignores the political and legal domestic climates in

[131] Bill Bowring, 'The Crisis of the European Court of Human Rights in the Face of Authoritarian and Populist Regimes' in Avidan Kent, Nikos Skoutaris and Jamie Trinidad (eds), *The Future of International Courts: Regional, Institutional and Procedural Challenges* (Routledge 2021), 80.
[132] European Commission for Democracy Through Law (Venice Commission), 'Opinion on Emergency Decree Law Nos 667–676 Adopted Following the Failed Coup of 15 July 2016' (adopted by the Venice Commission at its 109th Plenary Session, 9th–10th December 2016), paras 92–140.
[133] See *inter alia László János Mendrei v Hungary* App No 54927/15 (ECtHR, 19 June 2018); *Szalontay v Hungary* App No 71327/13 (ECtHR, 12 March 2019).
[134] See Halmai (n 128).
[135] Madsen (n 129) 201.

Member States, even where democratic and rule of law crises are well-known and the probability of effective remedies is known to be low; applicants are thus required to pursue statistically futile domestic remedies before resorting to the ECtHR.[136] This is difficult to reconcile with its stance taken in *Akdívar and Others v Turkey*, in which it was emphasised that 'the existence of the remedies in question must be sufficiently certain not only in theory, but in practice' in assessing the accessibility and effectiveness of remedies for the purpose of Article 35.[137] Moreover, the Court explicitly identified that it 'must take *realistic* account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the *general legal and political context* in which they operate'.[138]

As well as the obvious constraints on individual justice in this context, the Court's formalistic interpretation of Article 35 prevents itself from valuably engaging with the autocratic threat faced in democratically backsliding populist Member States. In the case of Turkey for example, the Court's emphasis on procedural subsidiarity did not only prevent (or at least delay) the Court from engaging with the State's autocratic move to purge the civil service, but also prevented it from engaging with the question of judicial independence and the rule of law. Subsequently, the Court's partial function as a safeguard or alarm bell for dangerous democratic backsliding is significantly undermined by procedural subsidiarity.

CONCLUSION

To conclude, this article has aimed to analyse the ability of the ECtHR in safeguarding liberal constitutional democracy in Member States from the counter-democratic threat presented by populism in light of the growing trend of democratically backsliding populist governments across Europe, backlash against the Court, and growing use of populist rhetoric in the everyday politics of ostensibly consolidated democracies. In essence, this article set out to test the assertion of former CoE SG,

[136] ibid.
[137] *Akdivar and Others v Turkey* App No 21893/93 (ECtHR, 16 September 1996), para 66.
[138] ibid para 69.

Thorbjørn Jagland, that the Convention system 'remains the ultimate backstop for our democracies, preventing a slide towards a more antagonistic and chauvinistic Europe'.[139] It was argued here that, although such assertions may be consistent with the purposive underpinnings of the Court and wider Convention system, the current picture of the significant challenges faced by the Court overwhelmingly indicates that it is falling short of this lofty goal.

The first part of this discussion defined the academically contested key terms of populism, which was defined mainly with reference to Abts and Rummens' comprehensive definition; and democracy, which was defined with reference to ECtHR dicta as being largely synonymous with the concept of liberal constitutional democracy. Then, the first challenge to the ECtHR presented by populism was identified as its ideological incompatibility with populism, making it vulnerable to sidelining and delegitimization in the domestic context. First, it was argued that populism's conception of popular sovereignty as politics expressing the unmediated general will of the people is inherently antithetical to the Convention as a legal constitutionalist instrument limiting state authority. The Court was then shown to be vulnerable on account of populism's moralised antagonism towards perceived elitist and technocratic institutions, especially those of an international nature. Lastly, it was shown that the Court and Convention's core principle of pluralism and protection of minorities, who may be characterised as enemies of the 'real people' under populism's exclusionary conception of the people, may further trigger backlash and present its regime as illegitimate under populism.

Then the focus was shifted to evaluating the Court's substantive response to democratic backsliding in Europe, identifying the Court's principle of subsidiarity as a significant obstacle to the Court effectively safeguarding constitutional liberal democracy. This was shown with reference to two areas of the Court's jurisprudence where the principle of subsidiarity may undermine the Court's response to populism; firstly, the case-law concerning Article 18 was analysed, showing that the Court's presumption of good faith deriving from the principle of subsidiarity has limited the effectiveness of

[139] Jagland (n 18).

Article 18 as an alarm bell for democratic backsliding within Member States. Finally, the Court's Article 35 jurisprudence was analysed, identifying that the Court's formalistic approach, derived from its notion of procedural subsidiarity, has further impacted the Court's ability to engage with the question of democratic backsliding in Member States and limits individual access to justice.

A theme persisting throughout this discussion is that the Convention regime may indeed be effective at safeguarding democracy so long as Member States recognise the legitimacy of the Convention and the Court's jurisdiction and are willing to participate in its cooperative system; however, where Member States are no longer willing to cooperate, the Court's continued authority is at risk. It may then become liable to sidelining and delegitimization in the domestic context, while the Court's subsidiary role renders its authority to compel compliance with its judgments and the Convention all but illusory. Its regime of human rights litigation 'may be a supervisory mechanism that can correct egregious excesses' but ultimately 'it is no replacement for lacking political culture in certain states'.[140]

Expectations of the Court acting as a final backstop against democratic backsliding into authoritarianism are thus likely misplaced; the Court may sound the alarm when it finds democratic backsliding, impose costs, and slow down the process, but cannot stop it. To treat it as such may prove Vidmar's laments that 'in the ECHR context, we have perhaps started to expect too much from supra-national human rights treaty regimes' to be well placed. [141] With regard to legal responses to populism more generally,

> …perhaps we are now at the stage when we cannot expect miracles from [the law] … populism is a socio-legal concept. While it does have legal implications, one cannot legislate against it. The legal process can deal with some of its symptoms, but cannot suppress the root-causes.[142]

[140] Jure Vidmar, 'Final Remarks on Populism's Effect on Human Rights and Democracy in Europe' in in Jure Vidmar (ed), *European Populism and Human Rights* (Brill 2020), 322.
[141] ibid.
[142] ibid.

This article subsequently concludes by calling for further research into the wider CoE regime (e.g., the Venice Commission, the Parliamentary Assembly of the Council of Europe, the Committee of Members, its Secretary General and other Member States themselves) in its ability to exert robust and sustained political pressure on these problematic Member States to supplement the Court's limited ability to respond to the counter-democratic threat of populism.

A Comparative Study of Election Law Changes in Hungary 2010-2024 and Germany 1993

Ben Friggens

ABSTRACT

This article considers the threat that modern populism poses to democracy. Taking a specific focus on changes to election laws, as free and fair electoral systems are fundamental to democracy, this article will compare the approaches taken by Viktor Orbán and Adolf Hitler. It will be submitted that this is a worthwhile comparison because both cases depict a leader who, whilst advocating for their interpretation of the people, was able to abuse pre-existing constitutional frameworks to implement legal changes that removed any opposition threat, allowing for consolidation of power. As such, if the ruling party has no real possibility of losing power in elections, then the political system ceases to be democratic. For this reason, democratic forces should be mindful of populist leaders who hide behind a façade of elections, when a closer study of the legal frameworks these elections are run on depicts a bias toward the plurality party. By framing the outcome of Orbán's electoral changes as somewhat comparable to those in Nazi Germany this article looks to stress the worrying implications that legally rigging elections can have. It will be suggested that considering the lessons of the past is the best way to inform us on how to defend against the new wave of authoritarian strategies looking to challenge modern democracy. Being aware of those lessons learnt with such devastating consequences can remind us of the fragility of democracy and warn us against the dangers of failing to act swifty in the face of calculated attacks on democratic principles.

INTRODUCTION

In 2024 around 2 billion people will have the opportunity to vote in elections, far more than ever before. With over 70 countries holding elections, this could be seen as a testament to democracy, representing a milestone in mankind's ideological evolution,[1] and symbolising progress toward universalising Western liberal democratic ideals. However, it appears that instead, we are no closer to the 'end of history' than when Fukuyama first suggested it in 1989.[2] The upcoming elections will take place amidst a background characterised by spreading illiberalism',[3] growing discontent among young people towards democracy[4] and the rise of populist leaders intent on weakening independent institutions and undermining the 'liberal elements' of political systems.[5]

Hungary provides a quintessential example of this trend. According to Przeworski and Limongi's 1997 analysis, a country that had changed governments through free and fair elections at least twice and had a per capita income which is higher than Argentina in 1975 had a democracy that was 'certain to survive'.[6] By this measure, Hungary should enjoy a liberal democracy that could be expected to live forever. However, in recent years Prime Minister Viktor Orbán's policies have attacked the rule of law, asserted control over the media, and entrenched loyalists in 'every corner of the state',[7] leading Mounk to suggest that Hungary has transitioned from a durable democracy to an 'elected dictatorship'.[8] Whilst Przeworski and Limongi's predictions may have been overoptimistic, the evidence of consistent net declines in democratic performance across the globe cannot be ignored. For example, reports from the Global State of Democracy Initiative show a six-year decline pattern that they call a 'democratic

[1] Francis Fukuyama, 'The End of History?' (1989) 16 The National Interest 3, 4.
[2] ibid.
[3] Alec Russell, 'Can Democracy Survive in 2024?' *Financial Times* (3 January 2024) https://www.ft.com/content/077e28d8-3e3b-4aa7-a155-2205c11e826f accessed 23 April 2024.
[4] Roberto Stefan Foa, Andrew Klassen and others, '*Youth and Satisfaction with Democracy: Reversing the Democratic Disconnect?*' (Cambridge: Centre for the Future of Democracy 2020), 2.
[5] Yascha Mounk, 'The End of History Revisited' (2020) 31(1) Journal of Democracy 22, 31.
[6] Adam Przeworski and Fernando Limongi, 'Modernization: theories and facts' (1997) 49(2) World Politics 155, 167.
[7] Miklós Bánkuti, Gábor Halmai, Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23(3) Journal of Democracy 138, 145.
[8] Mounk (n 5) 31.

recession'.[9] Furthermore, the Varieties of Democracy Institute has reported that in 2022 the level of democracy enjoyed by the 'average global citizen' had regressed 'back to 1989 levels', with the last 30 years of democratic growth 'eradicated'.[10] Ironically, by regressing to 1989 levels, we return to Fukuyama's 'The End of History'.[11]

Amidst the backdrop of spreading global illiberalism and democratic regression, this article focuses on the threat modern populism poses to democracy. There has been much discussion of the ways populist leaders, and specifically Orbán, undermine democracy. However, this article takes a more specific focus on the effect of changes to electoral laws. This is because a democratic electoral system is the fundamental basis of democracy, so analysing changes to election laws can be a key gauge in measuring democratic regression. Considering the recent rise of the Alternative für Deutschland (AfD) party and the frequent comparisons between AfD members and the Nazi party,[12] in addition to the growing instances of right-wing populists across the globe, this article analyses the threat that populism poses to democracy by asking to what extent can the electoral law changes implemented by the Nazi regime in Germany and Viktor Orbán's Fidesz Magyar Polgári Szövetség ('Hungarian Civic Alliance') (Fidesz) Party in Hungary be compared. The Nazi party has been selected because it provides an example of the most extreme form of democratic erosion. Hungary has been selected because it was once a democracy expected to live forever,[13] the Fidesz party has governed for longer than any other populist party in Europe,[14] and the party has had significant time to implement its changes, so events in Hungary can be seen as an archetypal example of Euro-populism.

[9] Global State of Democracy Initiative, 'Global Patterns' (*International IDEA* 2023) https://www.idea.int/gsod/2023/chapters/global/ accessed 10 April 2024.
[10] Vanessa A. Boese, Nazifa Alizada, Martin Lundstedt and others, '*Autocratization Changing Nature? Democracy Report 2022'* (Varieties of Democracy Institute 2022), 6.
[11] Fukuyama (n 1) 4.
[12] 'Gabriel compares AfD members with Nazis' (*Spiegel Politics*, 6 December 2016) <https://www.spiegel.de/politik/deutschland/gabriel-vergleicht-afd-mitglieder-mit-nazis-a-1097149.html> accessed 23 April 2024.
[13] Przeworski and Limongi (n 6) 167.
[14] Angelos Chryssogelos, '*Is there a populist foreign policy?'* (Chatham House 2021), 10.

This article begins by outlining the ideological differences between fascism and populism, the contextual foundations that led to the rise of each party, and how each party altered electoral laws, to show that whilst the approaches differ in appearance, the outcome is not dissimilar. Ultimately, it will be argued that modern populism, albeit less extreme than fascism, can represent the adoption of authoritarian strategies against a democratic backdrop. Because of this, it will be suggested that the comparison illustrates strong reasons to be wary of populist strategies.

I. FASCISM AND POPULISM IN HISTORY

To allow a comparative analysis of historical authoritarianism and modern populism, definitions must first be considered. Populism is often defined by reference to Mudde, who argues that it describes a 'thin-centred ideology' that separates society into two homogenous and antagonistic groups (which he refers to as the 'pure people' and the 'corrupt elite') and advocates for the 'general will' of the pure people.[15] The current article, however, whilst agreeing with the substance of Mudde's definition, will omit the 'corrupt elite' terminology, because the enemy of the 'pure people' will vary depending on the leader's political standpoint. To allow for a definition that is applicable across the political spectrum, the current article will adopt the definition of a 'thin-centred ideology'[16] that advocates for the 'sovereign rule of the people as a homogenous body'.[17]

Secondly, it is submitted that the term 'fascist' presents potential issues because it is a 'historically specific term' that Benito Mussolini used to define his regime in Italy.[18] The term has not only been confounded with Nazism[19] but is also frequently being used to describe modern-day political actors,[20] meaning the historical specificity of fascism is 'erased'.[21] This results in potential difficulty

[15] Cas Mudde, 'The Populist Zeitgeist' (2004) 39(4) Government and Opposition 541, 543-544.
[16] ibid.
[17] Koen Abts and Stefan Rummens, 'Populism versus Democracy' (2007) 55 Political Studies 405, 409.
[18] Mabel Berezin, 'Fascism and Populism: Are They Useful Categories for Comparative Sociological Analysis?' (2019) 45 Annual Review of Sociology 345, 348.
[19] ibid 349.
[20] 'Joe Scarborough has a new name for Trump: "He's a fascist"' (*Salon.com*) <https://www.salon.com/tv/video/vuli6z> accessed 23 April 2024.
[21] Berezin (n 18) 348.

conceptualising fascism[22] and risks historical inaccuracy. As Gilbert Allardyce has argued, fascism must be placed in 'historical boundaries'[23] because fascism itself is not an ideology, as it offered no ideals to carry forward to the future, and consequently died when the men carrying the name were defeated. Therefore, this article will omit the term 'fascism' because its definitional impossibility means it has little generic application across regimes, meaning that it is unhelpful in a transhistorical analysis.

Finchelstein argues that a continuity exists between 1930's fascism (in which he included Nazism), and populism. Whilst noting that talking about fascism and populism as if they are the same is problematic, he emphasises the importance of thinking about both 'in terms of the past'.[24] Finding that the terms are 'contextually connected', Finchelstein suggests that it is puzzling that they are not generally analysed together.[25] There are key differences between any conception of fascism and that of populism, including the role of violence.[26] However, a compelling argument is made that populism arose from the defeat of fascism. After its global defeat, it became evident that the 'fascist experience' needed to return to the 'democratic path',[27] leading to an 'authoritarian regime form of democracy'[28] that represented the 'emergence of modern populism'.[29] The result is a populist regime that shares the 'presence of the people-antipeople binary' defining political relations with 'fascism',[30] but stops short of fully marginalising 'enemies of the people' from political processes by using violence.[31]

Finchelstein continues to suggest that, because of populism's underpinnings, 'fascism is always looming over'.[32] Whilst this is contrary to the current article's approach of confining fascism to the 1930s, a relevant point can be made by substituting fascism for terms that have transhistorical value.

[22] ibid 349.
[23] ibid 388.
[24] Federico Finchelstein, *From Fascism to Populism in History* (University of California Press 2017), 6.
[25] ibid 25.
[26] ibid 24.
[27] ibid 97.
[28] ibid.
[29] ibid 117.
[30] ibid 93.
[31] ibid.
[32] ibid 172.

Totalitarianism is a form of government with the essence of 'total terror',[33] whose principle of action is the 'logicality of ideological thinking',[34] with leaders that 'command and rest upon mass support'[35] using and abusing 'democratic freedoms' to abolish them and is often used to describe the Nazi regime.[36] When comparing our definition of populism to that of totalitarianism, we see that both are built upon the mass support of the people, but totalitarianism goes further in the sense that it includes 'total terror' and the abuse of democratic systems to ultimately abolish them.[37] Following the end of World War 2, fascist regimes lost the key factor of violence, and without this, it is unlikely that modern populist regimes would be able to return to the 'total terror' of totalitarianism.[38] However, it is arguable that democratic freedoms can be, and are, used and abused by populists to reduce or abolish them, with the later analysis of Orbán's use of election laws attempting to demonstrate this. Although lacking the terror present in totalitarianism, it will be shown that the actions of Orbán could be seen to represent 'populist authoritarianism',[39] which poses 'major threats' to democracy,[40] and that consequently populism does have the potential to return to its anti-democratic 'origins'.[41]

To assess the extent to which Orbán's populism has, or may, return to anti-democratic foundations, this article will first compare the historical backdrop of the totalitarian approach in Germany and the populist approach in Hungary, to assess the contextual differences between the rise of each regime. This article then seeks to ascertain whether the transition from totalitarianism to populism represents a shift in ideology towards democratic values or is instead a reflection of changing political backgrounds and the increased need for a façade of democratic legitimisation to mask authoritarian policies. The latter may pose significant future challenges for democracy.

[33] Hannah Arendt, *The Origins of Totalitarianism* (London: George Allen and Unwin Ltd 1967), 466.
[34] ibid 474.
[35] ibid 306.
[36] ibid 312.
[37] ibid 466.
[38] ibid.
[39] Pippa Norris, 'Is Western Democracy Backsliding?, Diagnosing the Risks' (2017) HKS Working Paper No. RWP17-012, 10 <https://www.hks.harvard.edu/publications/western-democracy-backsliding-diagnosing-risks> accessed 23 April 2024.
[40] ibid.
[41] Finchelstein (n 24) 173.

A. HISTORICAL BACKDROPS

Adolf Hitler's rise to power in Germany is well-documented, and brevity prevents a more comprehensive discussion of the events from the end of World War 1 to the rise of the Nazi party. For the current article's purpose, the contextual backdrop pre-1933 will be summarised in several relevant points. Firstly, following the end of World War 1, Germany was left governed by the Weimar Republic. A new constitution was written (The Weimar Constitution), which represented a step towards a democratic system of government. This Constitution outlined three central political forces, the *Reichstag*, the Chancellor, and the President. Embedded in the Constitution was Article 48, which allowed the President to declare a state of emergency and rule by decree. This ultimately gave a constitutional foundation for dictatorial actions, which proved fundamental in Hitler's passing of the Enabling Act in 1933. Secondly, Germany had suffered greatly during the Great Depression. This led to widespread 'disillusionment', as many Germans no longer believed that democracy could solve 'their, or their country's problems',[42] and in 1933, the number of unemployed had reached 6,128,000.[43] By opening 'festering wounds' that had been only 'superficially bandaged',[44] the depression created a belief that democracy itself was responsible for Germany's suffering. With social misery intensifying and democratic government imploding, democracy became 'too weak to survive', and a shift to authoritarian rule was 'inevitable'.[45]

Hitler proved to benefit from the frustration with the current system. The Nazi party became attractive to voters because it proposed more than limited government reforms – it pledged to clear the old system entirely and destroy opponents.[46] Kershaw refers to an eighteen-year-old clerk, who spoke of Hitler's 'practical proposal for the renewal of the people' and expressed his commitment to the Nazi goal of 'destroying all parties',[47] highlighting the public support for radical change at a time of national

[42] Sheri Berman, Democracy and Dictatorship in Europe (OUP 2019) 236.
[43] Gilbert Fergusson, 'A Blueprint for Dictatorship. Hitler's Enabling Law of March 1933' (1964) 40 International Affairs (London) 245, 257.
[44] Ian Kershaw, *To Hell and Back: Europe, 1914-1949* (Penguin Books 2016) 208.
[45] ibid 207.
[46] ibid 210.
[47] ibid 210.

suffering. The Nazi's rise hinged on the fragmentation of party politics, discrediting state authority, and the freedom to develop a movement that 'promised a radical alternative'.[48] These same pre-conditions were present in post-war Italy and facilitated the rise of the fascist movement, but the described political backdrop was not confined to fascist regimes as the attraction of authoritarianism in this period can be seen throughout Europe. Varying political and economic tensions led to around three-fifths of Europeans living under some form of oppressive authoritarian rule at the start of World War 2.[49] It is therefore evident that anti-democratic rule was the zeitgeist, and it is important to be aware of this when making comparisons to the modern day.

Whilst the circumstances leading to Orbán consolidating power in Hungary differ from those present in 1930s Europe, parallels can be drawn between the two. The constitutional structure of Hungary from 1990 to 2010 guaranteed stability in the sense that governments remained in power for their four-year mandate, but this came at the price of the administration being constrained by qualified majority rules. As such, reforms were obstructed, with excessive bureaucracy weakening the government.[50] These constitutional measures meant that Hungary was unable to react quickly to external challenges,[51] and the global financial crisis of 2008 came at a time when the government was losing its political credibility, resulting in the crash of the Hungarian economy. Parallels can be seen with the 1930s perception that the current political systems were no longer able to help the people, with democracy becoming 'weak' when the trust of its citizens is lost.[52] When the 2010 elections came around, voters were beginning to view the government as producing a 'weak Weimar state' that was unable to maintain order.[53] The need for strong political leadership increased and as was seen in 1930s Germany, people became open to the 'unknown'[54] as an alternative to the current failing system.

[48] ibid 232.
[49] ibid 245.
[50] ibid 12.
[51] ibid 5.
[52] ibid 12.
[53] ibid.
[54] ibid.

However, some fundamental differences do exist between the two periods. Firstly, the economic situation in the 1930s was significantly worse than that of the 2000s, so it is 'difficult' for us to 'recapture the mood' in Germany.[55] Furthermore, whilst authoritarianism could be seen as the zeitgeist of the 1930s, Fidesz came to power at a time when democracy in Europe appeared to be 'the only game in town'.[56] The Hungarian transition towards illiberalism arose despite the country's membership in the European Union (EU), a group of democratic states with the primary aim of 'promoting peace and prosperity in post-World War 2 Europe'.[57] Membership of the EU requires a country to have institutions that guarantee democracy and the rule of law,[58] meaning there is an expectation of constitutional liberal democracy within member states. This article will later discuss whether the EU has sufficient powers to effectively prevent the 'slide to authoritarianism',[59] but for current purposes, it suffices to say that the democratic principles of the EU reduces the emergence of outwardly authoritarian policies within a member state. EU funding is a significant reason for this, as since joining the EU in 2004 Hungary has received roughly 2 percent of GDP annually from EU funds, constituting a 'major source of foreign currency for the economy'.[60] It is argued that consequently, Orbán's consolidation of power required more subtle methods than those employed by the Nazi party, with such methods necessary because of the shift in global social views on democracy and EU membership. The following section will consider the difference in approaches to election laws to illustrate that, although Orbán's methods are more subtle, his methods still represent authoritarian changes that have resulted in a similar outcome to the Nazi approach.

[55] Fergusson (n 43) 257.
[56] Bojan Bugaric, 'Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism' (2019) 17 International Journal of Constitutional Law 597.
[57] Bojan Bugaric, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2017) LEQS Paper No.79/2014, 1.
[58] Consolidated version of the Treaty on European Union [2012] OJ C326/13 ('TEU'), Article 2.
[59] Bugaric (n 57) 37.
[60] European Commission, '2023 Country Report – Hungary' COM(2023) 617 final, 3 <https://economy-finance.ec.europa.eu/system/files/2023-05/HU_SWD_2023_617_en.pdf> accessed 23 April 2024.

II. CHANGES TO ELECTORAL LAWS

A democratic electoral system is the fundamental basis of any conception of democracy, so considering changes to election laws can be a key gauge in measuring democratic regression. Whilst the electoral law changes made by each party have been helpfully documented, and comparisons have been made between the Nazi approach and other states,[61] there does not appear to be any comparison made between the outcomes of the electoral changes in Hungary and Germany. This could be down to the differing contexts in which these changes were made, a hesitancy to risk branding anti-democratic policies as 'Nazi', or simply because the changes made differ in substance. However, this article suggests that, whilst the changes made in each regime do differ in substance, the effect of the changes are comparable and can help us in evaluating the challenges that modern populists can pose to democracy. For this reason, the current article will compare the legal foundations and the changes made by each party to assess the extent to which populist legal changes can result in authoritarian outcomes. Following this, the effect will be analysed, and it will be suggested that, whilst the changes differ in extent and substance, the outcomes present potentially worrying similarities.

To avoid a theoretical discussion of the differences between formal and substantive conceptions of the rule of law, this article will consider the legal validity of the constitutional changes made by each party at the most basic level. This article is concerned specifically with the changes made once each party came to power, so it is therefore beyond its scope to analyse the tactics used to obtain electoral success[62] and the following preconditions for the electoral changes will be explained without an in-depth discussion on substantive compliance with the rule of law.

[61] Fergusson (n 43) 245.
[62] See ibid 339-341.

A. LEGAL FOUNDATIONS

Hitler's foundation for power was, in terms of observing constitutional procedure, 'legal' in a formal sense.[63] The Nazi Party gained a *Reichstag* majority (in coalition with the German National People's Party) on the 5th of March 1933 and, 19 days after the Nazis were elected, the first organic statute of the Reich was passed. This 'Law to Remedy the State of Emergency of Volk and Reich',[64] known as the 'Enabling Act', gave Hitler the power to make laws without any involvement from the *Reichstag*. The preamble of the Act makes clear that it was made in compliance with requirements for changing constitutional laws, meaning a two-thirds majority (with at least two-thirds of the *Reichstag* present) voted in favour.[65] Further, whilst the *Reichstag* Fire Decree[66] had rescinded the mandates of 81 deputies from the Communist Party in February and several of the Social Democratic Party deputies did not vote, the majority was so great that the Act would have still passed even if these deputies had been present and voted 'no'.[67]

The Enabling Act meant that Hitler could draft laws himself; it came into effect on the day of publication[68] and provided the constitutional basis for his legislative changes. The quick passage of the Act illustrates the 'speed and efficiency' of the totalitarian machine[69] when compared to the stagnated democratic processes the country had become accustomed to, which served to alleviate some of the public's concerns about the previous legislative processes. As Fergusson suggests, there were surely many Germans who felt that they now 'have a government that will get things done'.[70]

In Hungary, Orbán won the 2010 election, referred to as their last 'free and fair balloting',[71] with 53 percent of votes. However, because of the country's disproportionate election system, which meant the

[63] ibid 261.
[64] Anson Rabinbach and Sander L. Gilman, 'Law to Remedy the State of Emergency of Volk and Reich (1933)' in *The Third Reich Sourcebook* (1st edn, University of California Press 2013), 52.
[65] Karl Loewenstein, 'Dictatorship and the German Constitution: 1933-1937' (1937) 4 The University of Chicago Law Review 537, 542.
[66] Verordnung des Reichspräsidenten zum Schutz von Volk und Staat vom 1933 (RGBI I, S. 83)
[67] Richard Evans, The Coming of the Third Reich (The Penguin Press, New York 2004) 354.
[68] Gesetz zur Behebung der Not von Volk und Reich (RGBl. I S. 141) Article 2.
[69] Fergusson (n 43) 256.
[70] ibid.
[71] Kim Lane Scheppele, 'How Viktor Orbán Wins' (2022) 33 Journal of Democracy 45, 52.

dominant parties' leads were extended due to the way party-list seats were calculated,[72] Orbán's votes resulted in 68 percent of seats. Whereas the Nazi's Enabling Act still required the support of the Centre Party for the necessary majority, the electoral law and 'easy constitutional amendment rule' in Hungary had handed 'unconstrained power'[73] to Fidesz. This meant that they were able to pass constitutional amendments and ultimately enact a new constitution with the votes of their party alone. Although a four-fifths vote of Parliament was required to approve the rules for drafting a new constitution, which Fidesz did not have, they were able to use their two-thirds constitutional majority to amend the constitution and remove this provision, ensuring that they no longer had to consult the opposition parties and enabling them to revise the constitution using only their votes.[74]

It has been suggested that the 2010 election, in providing Orbán with a constitutional supermajority, put him 'above the law',[75] and this article agrees for several reasons. First, the easy removal of the four-fifths provision, which had aimed to 'protect the interests of minority parties',[76] demonstrates his ability to amend the constitution to suit his goals. By removing this parliamentary constraint, his supermajority allowed him to enact a new constitution (The Fundamental Law[77]) which was only debated before parliament for nine days.[78] Second, the features of The Fundamental Law serve Orbán's 'revolutionary intention' of removing checks and balances.[79] Whilst the Constitution appears to contain checks and balances, such constraints are 'illusionary'[80] because the judiciary has been substantially weakened,[81] independent boards such as the Electoral Commission 'no longer ensure multi-party

[72] ibid.
[73] ibid, 52.
[74] Gábor Halmai, Kim Lane Scheppele, and Miklós Bánkuti, 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press, 2012) 254.
[75] Scheppele (n 71) 52.
[76] Gábor Halmai, Kim Lane Scheppele and Miklós Bánkuti (n 74), 254.
[77] Fundamental Law of Hungary (25 April 2011).
[78] Scheppele (n 71) 52.
[79] Gabor Halmai, 'Hungary's road from liberalism to illiberalism and autocracy: A Schmittian perspective' (2023) 22 Contemporary Political Theory 406, 416-7.
[80] Bánkuti, Halmai, and Scheppele (n 74) 238.
[81] Gábor Halmai, 'A Coup Against Constitutional Democracy: The Case of Hungary' in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP, 2018) 243, 256.

representation',[82] and party loyalists have been placed in crucial positions for extraordinarily long terms.[83] As will be seen, the Constitution and the laws accompanying it have had a substantial effect on every election preceding that which handed Orbán his supermajority. Consequently, this leads the current article to suggest that the 2010 election has placed Orbán not only above the *law* but also above the reach of the *people.*

B. ELECTORAL APPROACHES

This article concedes that the Nazi Party and Fidesz's changes to the electoral systems differ greatly in terms of methodology, as would be expected considering the difference in the contexts surrounding each regime. The Nazi approach was bold and sweeping in its goals of achieving a one-party state. Following the Reichstag Fire Decree on the 28th of February, the Communist Party was no longer a threat to the Nazis when they were elected in March. Therefore, once coming to power, they focused their attention on the Social Democratic Party and the Centre Party (these three parties combined made up more voters than the Nazis had ever won in a free election[84]). In May 1933, the Nazi paramilitary organisations stormed the social democratic-orientated trade offices and, when confident that the Party could no longer call on its union support, seized the party's assets by court order.[85] The Christian Centre Party required more care, as Hitler did not want to antagonise the Christian allegiance that existed within the majority of the population.[86] Instead of suppressing the Party by direct force, as with the Social Democrats, Hitler made promises of autonomy to the Catholic Church in return for sacrificing the Party.[87] After dispensing with the major political forces, the rest were dealt with easily[88] and with little fight,[89] leaving only the Nazi Party remaining. Following this, the Enabling Act allowed

[82] Bánkuti, Halmai, and Scheppele (n 74) 238.
[83] ibid.
[84] Evans (n 67) 369.
[85] ibid 358
[86] ibid 363.
[87] ibid 366.
[88] ibid 370-373.
[89] William L. Shirer and Ron Rosenbaum, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (RosettaBooks 2011) 294-5.

Hitler to enact The Law Against the Formation of Parties (*Gesetz gegen die Neubildung von Parteien*[90]) on the 14th of July 1933, which made it illegal to set up or maintain any other parties and declared the Nazi Party to be the 'only political party in Germany'.[91] Capitalising on the lack of 'defiance'[92] from opposition parties and utilising the constitutional powers that the Enabling Act had provided, the Nazi Party was able to use legal mechanisms (except for the role played by the Party's paramilitary organisations, which is typical of the 'terror' aspect of totalitarianism[93] and beyond the parameters of this article) to remove all prospect of party opposition and consequently eradicate democracy.

The approach in Hungary, on the other hand, has been much more subtle and incremental. On the surface, the two approaches seem worlds, as well as years, apart, as today in Hungary, over a decade from Fidesz's electoral victory, there are still elections and opposition parties. However, Kim Lane Scheppele has suggested that the opposition parties are unable to get 'anywhere near the halls of power'.[94] The following analysis of the electoral law changes made by Orbán will serve to substantiate this argument and show that, despite employing incremental election law changes, the result is not too far from that in 1933.

Firstly, Orbán's constitution halved the size of parliament, which required an alteration in constituency boundaries. The government drew these new constituencies 'behind closed doors',[95] and passed the new definitions of the boundaries in the Act on The Elections of Members of Parliament (Election Act) 2011[96] which can only be amended by a two-thirds majority.[97] After four years in power, Orbán was re-elected in the 2014 parliamentary elections. The Organization for Security and Co-operation in

[90] Das Gesetz gegen die Neubildung von Parteien vom 14 Juli 1933 (RGBl. I, S. 479).
[91] ibid.
[92] Shirer and Rosenbaum (n89) 295.
[93] Arendt (n 33) 466.
[94] Scheppele (n 74) 59.
[95] ibid 52.
[96] Government of Hungary, 'Act CCIII/2011 On The Elections of Members of Parliament of Hungary (as of 3 March 2014) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF%282014%29037-e> accessed 24 April 2024 ('Election Act') .
[97] ibid s 25.

Europe (OSCE) observed the election and published their Final Report in July 2014,[98] noting that Fidesz enjoyed an 'undue advantage',[99] with the recently amended legal framework[100] negatively affecting the electoral process.[101] The OSCE criticised the new constituencies as the disparities in district sizes deviated from the 10 percent standard recommended by the Venice Commission,[102] yet these disparities have grown over time.[103] In the 2022 election 25 of the 106 districts exceeded the Commission's recommendations.[104] The Hungarian law mandates that the districts should not vary by more than 15 percent,[105] which the Venice Commission tolerated despite it being greater than their recommendations.[106] However, the 15 percent permitted by Hungarian law refers to a variation of 15 percent below and 15 percent above the mean number of voters in a district, whereas the Venice Commission's 10 percent recommendation is a 10 percent *overall* deviation. This means that, if the average constituency consisted of 10,000 voters, the law would allow a variation between 8,500 and 11,500 (3,000 voters), which would be 2,000 voters more than by the Venice Commission's calculation (which would permit a range of 9,500 to 10,500 voters). In the actual districts, the variation was even larger than this,[107] with a 2012 Political Capital study showing that under the initial Fidesz electoral map, typically left-wing districts were '5 to 6 thousand larger' than those on the right, meaning that with an equal number of votes, Fidesz would be allocated 10 more seats than its left-wing opposition.[108] Constituency bias has remained consistent throughout Orbán's time in leadership, with

[98] ODIHR International Election Observer Mission (IEOM), 'Hungary, Parliamentary Elections, 6 April 2014: OSCE/ODIHR Limited Election Observation Mission Final Report' (Office for Democratic Institutions and Human Rights, 2014) <https://www.osce.org/files/f/documents/c/0/121098.pdf> accessed 15 March 2024.
[99] ibid 1.
[100] See Election Act, Government of Hungary, 'Fundamental Law of Hungary (prior to the Ninth Amendment, adopted on 15 December 2020)' (25 April 2011) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e> accessed 24 April 2024, and Government of Hungary, 'Act XXXVI of 2013 on Electoral Procedure' < https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)062-e> accessed 24 April 2024.
[101] ODIHR/IEOM (n 98) 1.
[102] Venice Commission, 'Code of Good Practice in Electoral Matters' CDL-AD (2002) 23, s 2.2.
[103] Scheppele (n 71) 53.
[104] ODIHR/IEOM (n 98) 11.
[105] Election Act, s 4(4).
[106] Kim Lane Scheppele, 'Hungary: An Election in Question, Part 2' (Paul Krugman, 'The Conscience of a Liberal, *The New York Times*, 24 February 2014) <https://archive.nytimes.com/krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-2/> accessed 24 April 2014.
[107] ibid.
[108] Political Capital Policy Research and Consulting Institute, 'Halfway Into the Hungarian Electoral Reform,' (19 April 2012), 4 <https://www.valasztasirendszer.hu/wp-content/uploads/PC-FES_ConferencePaper_HalfwayIntoTheHungarianElectoralReform_120417.pdf > accessed 15 March 2024.

parliament consistently declining to revise boundaries[109] despite some exceeding the maximum deviation permitted by the Election Act.[110] Furthermore, as the Election Act requires a two-thirds majority to amend, it is unlikely that these boundaries will be revised, bringing Hungary further out of line with the Venice Commission's recommendations that the distribution of seats must be reviewed 'at least every ten years',[111] and ensuring that they will continue to favour Fidesz. The 'lack of transparency'[112] in the redistricting process, the difficulty in amending the boundaries in the future, and the apparent bias that these present towards Fidesz, have led to allegations of gerrymandering,[113] and it is hard to disagree with these allegations.

In addition to changing the constituency boundaries, the election changes have pushed the opposition parties to sacrifice their respective ideologies. It is argued that the new election framework meant the opposition would have to 'join forces' to beat the system,[114] and several factors serve to substantiate this. Orbán's election framework removed the second-round runoff for individual constituencies, which meant that a candidate could win with less than half the votes.[115] With Fidesz's support base, this system made it easier for them to prevail in constituencies and consequently meant that the opposition parties would have to unite before the election and put forward one candidate against Fidesz[116] to give themselves a chance of beating the incumbent Party.[117] In addition to this, if the smaller parties wanted to maintain separate national party lists, they would have to 'compete with one another in the individual constituencies',[118] because the 2011 Election Act meant that all parties who offered a national party list were now required to run candidates in 'at least 27 individual constituencies within at least 9 counties and in Budapest'.[119] If this were to occur, the opposition would be further

[109] ODIHR/IEOM (n 98) 11.
[110] Election Act, s 4(6).
[111] Venice Commission (n 102) s 2.2 (v) and (vi).
[112] Political Capital Policy Research and Consulting Institute (n 110) 4.
[113] ODIHR/IEOM (n 98) 4.
[114] Scheppele (n 71) 54.
[115] ibid 53.
[116] ibid 53.
[117] ibid 53-54.
[118] ibid 54.
[119] Election Act, 8(1).

divided and Orbán's candidates would be 'assured of winning'.[120] Whilst more indirect than the Nazi approach, some parallels can be drawn to the pre-Enabling Act strongarming of opposition parties to either sacrifice their ideologies, or the party itself.[121]

In addition to forcing the smaller opposition to sacrifice their parties' ideologies and join forces, Orbán's election laws also ensured that they were faced with higher hurdles when they did so. For example, Section 14 of the Election Act specified that a single party needed 5 percent of the national vote to enter parliament.[122] However, two joint parties were required to win 10 percent of the vote and, further, joint parties of three or more were required to win 15 percent of the vote.[123] As such, Orbán's election law has managed to simultaneously force the opposition parties to run together at the expense of their party ideologies, whilst making it considerably harder for them to meet the threshold required to enter parliament.

An analysis of the opposition approach in the 2014, 2018 and 2022 elections illustrates the worrying implications that this has had on democracy. In 2014, despite the 15 percent vote threshold, five centre-left parties joined together and formed the new Unity Alliance, with the other centre-left party, Magyarország Zöld Pártja (LMP) refusing to join. The result was a 26 percent vote share for Unity Alliance, a 5 percent vote share for LMP, and a 45 percent share for Fidesz.[124] The split in the centre-left opposition vote had cut 'in half the number of constituencies that the opposition would have won', meaning that Fidesz could capture '91 percent of the constituencies' with their vote share.[125] The fragmentation of the opposition continued in 2018, with Orbán winning 80 percent of the constituencies (although the opposition gained strength in Budapest). It became evident from these elections that, for the opposition to defeat Orbán, it not only must be unified between the centre-left

[120] Scheppele (n 71) 54.
[121] Evans (n 67) 366.
[122] Election Act, s 14(1).
[123] ibid, ss 14(2) and 14(3).
[124] Erin Marie Saltman, 'Fidesz have won a clear victory in Hungary's elections, but their supermajority hangs in the balance' (*LSE*, 7 April 2014) <https://blogs.lse.ac.uk/europpblog/2014/04/07/fidesz-have-won-a-clear-victory-in-hungarys-elections-but-their-supermajority-hangs-in-the-balance/ > accessed 24 April 2024.
[125] Scheppele (n 71) 54.

parties but also include the right-wing *Jobbik Magyarországért Mozgalom* (Jobbik) party, which had won 20 percent of votes in 2014. This was furthered following Orbán's 2020 amendment to the Election Law, which required a party running a national list to run candidates in 71 constituencies,[126] rather than the 27 required in 2018. Competition between the left and right in each constituency would result in them all losing,[127] so they were forced to sacrifice their respective parties' identities and merge into one – the United for Hungary party. The fact that the left and right-wing opposition, despite agreeing on 'very little', had to sacrifice their party identities in an attempt to prevent 'continued autocracy'[128] illustrates the anti-democratic implications of the election system that Orbán designed. These implications become even more extreme when it is seen that, in the 2022 elections, Fidesz won their fourth consecutive term with 54 percent of the votes and 83 percent of the constituencies. This translated to 135 seats in parliament, ensuring that Fidesz retained its supermajority,[129] despite all six of the leading opposition parties running together to try and dislodge Orbán.

To deal with any threat posed by United for Hungary in the 2022 election, Orbán legalised 'voter tourism', where voters can register to vote in a different district to their registered address. The Hungarian Helsinki Committee had already noted that 'voter tourism' was 'widespread' on the 2018 Election Day,[130] despite it being 'unlawful'.[131] However, Orbán's 2021 Amendment[132] to the Law on the Register of Personal Data and Residential Addresses of Citizens[133] introduced a new legal definition of 'residence', which now refers to the address a citizen uses for official communication[134]

[126] Government of Hungary, 'Act CLXVII of 2020 on the Amendment of Certain Acts relating to Elections', s 3. <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)069-e> accessed 24 April 2024.
[127] Scheppele (n 71) 54.
[128] ibid 54.
[129] Nigel Walker, 'Hungary: 2022 general election' (House of Commons Library, 11 April 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-9519/CBP-9519.pdf> accessed 24 April 2024.
[130] Hungarian Helsinki Committee, 'A Threat Assessment of the 2022 Hungarian Parliamentary Elections' (9 February 2022), 5 <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/02/HHC_ElectionThreatAssessment_February2022.pdf> accessed 24 April 2024.
[131] ibid 5.
[132] Government of Hungary, 'Act CXIX of 2021'.
[133] Government of Hungary, 'Act LXVI of 1992 on Keeping Records on the Personal Data and Address of citizens', s 5(2) <https://static.valasztas.hu/parval2006/en/02/1992_66tv.html> accessed 24 April 2024.
[134] Zsuzsanna Végh, 'Legalized vote tourism threatens next year's parliamentary election in Hungary' (*European platform for democratic elections*, 7 December 2021) <https://www.epde.org/en/news/details/legalized-vote-tourism-threatens-next-years-parliamentary-election-in-hungary.html> accessed 24 April 2024.

rather than the place they live. This amendment had a large effect on the 2022 Election because it meant that Fidesz supporters could now vote in constituencies that were more closely contested, essentially legalising the 'voter-tourism' method they had employed in the past elections.[135] It also gave potential for 'near-abroad' Hungarians, those living out of the country who had previously only been able to vote for the party national lists, to be moved into Hungary where they could also vote in the constituency elections. 'Near-abroad' voters who had never lived within the current borders of Hungary have voted 'overwhelmingly' for Orbán,[136] securing the last mandate needed for his two-thirds majority in both 2014 and 2018.[137] The Hungarian government keeps the list of these voters secret, which means that the opposition 'does not know who these voters are'[138] and consequently cannot target them with political campaigns. With the 2021 Amendment, Orbán legalised the practice of moving Hungarians to different constituencies to vote and potentially opened the door for some of his 'near-abroad' supporters to be moved into Hungary and vote in both party and constituency elections and, whilst there are no official indicators of this, journalists have reported an instance of a two-bedroomed house near Hungary's border with Ukraine that, according to the official registry, is the 'residence' of over 100 people.[139] This is in addition to 'hundreds of people' being transported across the border from Ukraine to vote in the 2018 election.[140] Therefore, it seems likely that, in the close-run constituencies, the law to allow 'voter-tourists' may have played a significant part in securing Fidesz's victory. In addition to the legalisation of 'voter-tourism', the dichotomy that exists between the approach to 'near-abroad' voters and expatriate voters further demonstrates Orbán's control over the elections. Whilst the 'near-abroad' voters are allowed to mail in their votes via 'unsecured mail

[135] Elliott Goat and Zsofia Banuta, 'Fresh evidence of Hungary vote-rigging raises concerns of fraud in European elections' (*Open Democracy*, 17 May 2019) <https://www.opendemocracy.net/en/breaking-fresh-evidence-hungary-vote-rigging-raises-concerns-fraud-european-elections/> accessed 24 April 2024.
[136] Scheppele (n 71) 56.
[137] ibid.
[138] ibid.
[139] Attila Bátorfy and András Becker, 'Phantom residents are voting and collecting pensions near the border with Ukraine' (*Atlatszo*, 25 May 2018) <https://english.atlatszo.hu/2018/05/25/phantom-residents-are-voting-and-collecting-pensions-near-the-border-with-ukraine/> accessed 24 April 2024.
[140] Goat and Banuta (n 135).

ballots',[141] Hungarians who have kept their addresses but are living abroad must vote in person at polling stations 'overseen by Hungary's National Polling Office'.[142] In the United Kingdom, where almost 190,000 Hungarians live, there are only three polling stations.[143] In addition to highlighting an anti-democratic system that potentially prevents some from having their voices heard, with some reports showing that only 11 percent of Hungarian emigrants would vote for Fidesz,[144] the current voting system also shows an imbalance between expatriates and 'near-abroad' voters that further favour Fidesz. If expatriates could vote with the same ease as the 'near-abroads', then the election results could well have reflected this. Instead, it only serves to demonstrate yet another one of Fidez's tools to safeguard power.

C. SIGNIFICANCE

The previous analysis of the electoral changes in Hungary highlights how Orbán crafted his elections in a way that resulted in all the main parties uniting against him, yet they 'still could not win'.[145] The Nazi Party, by immediately using and abusing Germany's democratic mechanisms to subsequently destroy them, has been provided as a deliberately extreme example, but the effect of their electoral law changes does not differ extremely from that in Hungary. Orbán has used legal mechanisms to create a system where the opposition parties are unable to get 'near the halls of power',[146] and where they have had to sacrifice party ideologies to offer any meaningful political challenge. With his constitutional supermajority, Orbán has repeatedly demonstrated that he can 'keep modifying the electoral playing field',[147] and whilst this incremental approach differs from that of the Nazi Party, in the sense that Hungary still runs 'competitive' elections, the extent of this competition has been drastically reduced.

[141] Scheppele (n 71) 56.
[142] Lili Rutai, 'A Tale Of Two Diasporas: The Battle For Hungarian Voters Abroad' (*Radio Free Europe Radio Liberty*, 21 February 2022) <https://www.rferl.org/a/hungary-election-diaspora-Orbán-marki-zay/31712662.html> accessed 24 April 2024.
[143] ibid.
[144] 21 Kutatokozpont, 'A távoltartotttömeg' (11 February 2022) <https://21kutatokozpont.hu/wp-content/uploads/2021/11/a_tavoltartott_tomeg_2022_02.pdf> accessed 24 April 2024.
[145] Scheppele (n 71) 50.
[146] ibid 59.
[147] ibid 58.

Whilst in Nazi Germany the opposition parties put up little fight, even supporting the Enabling Act, the Hungarian opposition has been more resistant to the plurality party, but this had little consequences for Orbán. Whereas banning political opposition to solidify power, as in Nazi Germany, would have been unrealistic in Hungary because of its position in the EU, instead Orbán has modified the rules to ensure that the opposition is unable to challenge him. The resulting system maintains a 'democratic façade'[148] by holding regular elections, whilst eliminating the tangible possibility of these elections resulting in any change of power. If the ruling party has no real possibility of losing power, as was, of course, the case in Nazi Germany but is increasingly more evident too in Hungary, this is out of line with a conception of a democratic system as one in which parties lose elections.[149] As such, despite the façade of elections, Hungary is now an 'illiberal state',[150] rather than any sort of democracy.

Therefore, when considering the extent to which the election law changes in Nazi Germany and Hungary can be compared, it becomes evident that although the approaches differ in substance and scope, both cases depict a leader who, in the name of 'the people',[151] was able to abuse pre-existing constitutional designs to bring election law changes that removed any substantial threat from democratic opposition to their power. In Nazi Germany, this was by the swift banning of opposition parties, whereas in Hungary, this was achieved by shaping election laws to 'disadvantage the opposition'.[152] This comparison highlights that if constitutional designs hand too much power to the plurality party, the consequences can be devastating.

Furthermore, whilst this comparison has focussed on Orbán, it has aimed to show the general threat that modern populists pose to democracy when they 'legally' rig elections.[153] By framing the outcome of this as somewhat comparable to Nazi Germany, this article stresses the worrying implications that

[148] Jan-Werner Müller, 'Eastern Europe goes south: disappearing democracy in the EU's newest members' (2014) 93(2) Foreign Affairs 14, 15.
[149] Przeworski and Limongi (n 6) 10.
[150] Viktor Orbán, 'Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014' (The Budapest Beacon, 29 July 2014) < https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/> accessed 24 April 2024.
[151] Mudde (n 15).
[152] Scheppele (n 71) 50.
[153] ibid 46.

changing election laws can have, and reminds the reader of the fragility of democracy, serving as a warning against 'any complacent belief' that there are liberal democracies that are 'immune to… authoritarian populist trends'.[154] This is because 'by its nature' populism,[155] in the sense that it allows a 'strongman'[156] to disregard constitutional checks and balances, should be seen as 'a dangerous threat to democracy'.[157] As Roth highlights, we should not forget the 'demagogues of yesteryear' who, after claiming a 'privileged insight' into the people's wishes, 'ended up crushing the individual'.[158] By viewing modern populism as an 'authoritarian regime form of democracy'[159] that is 'contextually connected'[160] to totalitarian regimes of the past, the current author hopes that the lessons learnt then will not be forgotten, and events will not be repeated.

III. WHAT THIS MEANS FOR DEMOCRACY

Nazi minister Joseph Goebbels observed that 'one of the best jokes of democracy' is that it 'gives its deadly enemies the means to destroy it'[161] and, if the argument of this article is correct, his observations are still accurate as Hungarian citizens are now unable to change their government through elections because it is 'no longer a democracy'.[162] Therefore, this article now turns to the options available for constitutional liberal democracy to defend itself when elections are stripped of their transformative power. The two main safeguards that this article will focus on are the EU, because a key difference between the backdrops of Nazi Germany and Hungary post-2010 was the growth of shared liberal democratic ideals in Europe as influenced by EU membership, and constitutional frameworks, as this

[154] Russell Hogg, 'Rethinking populism and its threats and possibilities: Ponowne zastanowienie się nad populizmem – jego wyzwaniami i możliwościami' (2022) XLIV/1 Archives of Criminology 15, 21.
[155] Abts and Rummens (n 17) 407.
[156] Kenneth Roth, 'The Dangerous Rise of Populism: Global Attacks on Human Rights Values' (*Human Rights Watch*, 2017), 8 < https://www.hrw.org/sites/default/files/populism_0.pdf> accessed 24 April 2024.
[157] Abts and Rummens (n 17) 407.
[158] Roth (n 156) 2.
[159] Finchelstein (n 24) 97.
[160] ibid 25.
[161] Joseph Goebbels, 'Das wird immer einer der besten Witze der Demokratie bleiben, dass sie ihren Todfeinden die Mittel selber stellte, dutch die sie vernichret wurde', quoted in GH Fox and G Nolte, 'Intolerant Democracies' (1995) 36 Harvard International Law Journal 1, 1.
[162] Scheppele (n 71) 59.

article has outlined the important role that constitutions can play in legitimising and facilitating legal changes that benefit the plurality party.

A. THE ROLE OF THE EU

Considering Hungary's position as an EU Member State, this article has examined both the financial importance of the EU to Hungary and the democratic nature of the EU.[163] It has also shown that by changing the election laws to consolidate power, Orbán is well on the way to achieving his goal of 'illiberalism' within the EU[164] and that 'democracy as such is under attack'.[165] Muller, discussing whether the EU ought to play a role in protecting liberal democracy in Member States, argues that the Union has the 'normative' and 'legal' authority to do so[166] because Member States have voted to follow EU rules and have established sanctions for those who do not follow such rules.[167] Article 7 of The Treaty on the EU,[168] which can deprive a Member State of voting rights,[169] provides an example of these sanctions. However, because it requires a unanimous vote in the European Council, Article 7 is 'very difficult to use'[170] and 'unworkable'.[171] This is demonstrated when there is more than one 'illiberal' government within the EU,[172] as Hungary and Poland committed themselves to 'blocking sanctions against one another'.[173] Although November's election, bringing 'pro-European' Prime Minister Donald Tusk to power in Poland, may have removed Warsaw's support from Orbán,[174] the

[163] TEU, article 2.
[164] Orbán (n 150).
[165] Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) European Law Journal 141, 142.
[166] ibid 141.
[167] ibid 144.
[168] TEU, article 7.
[169] ibid.
[170] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, 12.
[171] D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11(3) European Constitutional Law Review 512, 533.
[172] Pech and Scheppele (n 170) 12-13.
[173] ibid.
[174] Gabriela Baczynska, 'EU lawmakers urge pressure on Hungary to respect rule of law' *Reuters* (12 January 2024) <https://www.reuters.com/world/europe/eu-lawmakers-urge-pressure-hungary-respect-rule-law-2024-01-12/> accessed 24 April 2024.

European Commission has consistently 'failed to trigger Article 7' in the face of persistent rule of law breaches;[175] it is unlikely that the Article will have much practical effect on defending democracy.

As a result of the belief that it 'could not act with tools available',[176] the Commission adopted the 'Rule of Law Framework'[177] in 2014. This instrument focuses on a 'structured dialogue' between the Member State and the Commission[178] and was 'clearly designed' for the 'case of Hungary'[179] but first activated in Poland following the Law and Justice Party ('*Prawo i Sprawiedliwość*' -PjS) winning an absolute majority in 2015 with only 38 percent of the vote. Instead of engaging in dialogue however, the Polish Government focussed on 'denying the legality' of the framework,[180] and the Commission was forced to conclude that Poland had 'failed to implement' any of its recommendations.[181] Even then, the Commission did not activate Article 7, a choice that would be preferred to 'prevent the capture of the Constitutional Tribunal',[182] instead playing 'for more time'.[183] This application failed to 'draw the right lessons' from the case of Hungary,[184] where the Commission did not act promptly to prevent Orbán from entrenching power, highlighting the weakness of a 'discursive approach' when a government is 'bent on deliberately undermining constitutional checks on power'.[185] In such a situation, 'soft'[186] and 'fruitless discussion'[187] only give the government time to consolidate its power and is 'unlikely to bring' any 'meaningful change'.[188] Furthermore, the Tavares Report,[189] which called for Hungary to be 'carefully monitored by the Commission' with the goal of 'triggering Article 7' if

[175] Pech and Scheppele (n 170) 17.
[176] ibid 14.
[177] Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law (2014) COM/2014/0158 final.
[178] Pech and Scheppele (n 170) 14.
[179] ibid.
[180] ibid 16.
[181] ibid.
[182] ibid 17.
[183] ibid.
[184] ibid 27.
[185] ibid.
[186] Kochenov and Pech (n 171) 534.
[187] Pech and Scheppele (n 170) 27.
[188] Kochenov and Pech (n 171) 532.
[189] Committee on Civil Liberties, Justice and Home Affairs, 'REPORT on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)' (Rui Tavares, European Parliament 2013).

the government did not change its practices,[190] led to 'no concrete actions'.[191] This leads the author to believe that the EU's answers to illiberalism demonstrate a 'tendency to procrastinate'[192] that, considering the 'rapid' consolidation of power by populist leaders,[193] can be detrimental to democracy and is inadequate as a mechanism of defending against leaders who are bent on disregarding constitutional checks on power.

As such political constraints 'paralyse' EU institutions,[194] this author believes that the only way the EU can efficiently halt democratic erosion is by financial sanctions. Hungary is one of the largest recipients of EU funding,[195] receiving roughly 2 percent of its GDP annually from EU funds. This article argues that it is the risk of financial loss, rather than political discourse, that led to a more democratic façade in Hungary and, relatedly, could lead to an 'end' to 'Orbán's rule'.[196] Orbán has already 'put the state budget in red' after expensive 2022 election giveaways,[197] and the EU has suspended some €6 billion in cohesion funds[198] over concerns regarding Orbán undermining the rule of law.[199] With interest rates for 10-year Hungarian government bonds standing at the 'highest rate in the EU',[200] it may be European financial pressure that provides the best defence of liberal democratic values, especially considering the Union's repeated resistance to instigate any meaningful political sanctions.

[190] Pech and Scheppele (n 170) 32.
[191] ibid.
[192] ibid 34.
[193] David Landau, 'Populist Constitutions' (2018) 85 The University of Chicago Law Review 521, 523.
[194] Pech and Scheppele (n 170) 43.
[195] ibid.
[196] Scheppele (n 71) 59.
[197] ibid.
[198] Thu Nguyen, 'The European Union's Hungary Problem' *(Internationale Politik Quarterly*, 13 March 2024) < https://ip-quarterly.com/en/european-unions-hungary-problem> accessed 24 April 2024.
[199] Baczynska (n 174).
[200] Nguyen (n 198).

B. CONSTITUTIONS

A key aspect that this article has highlighted as instrumental in both the Nazi Party and Fidesz's consolidation of power was the pre-existing constitutional frameworks. In both Hungary and Germany, the countries' constitutional frameworks allowed for 'constitutional trojan horses' to subvert the institutions from within.[201] It is for this reason that the current article has emphasised the importance of learning lessons from the past. Considering present-day Germany, where much of the country's politics is 'coloured by' its Nazi past',[202] leaders seem aware of the importance of learning from historical experiences. This article now returns to the AfD Party to illustrate the role that constitutional safeguards could play in protecting democracy.

The AfD has surged to '23 percent support' in the national polls,[203] achieved by 'harvesting resentments'[204] and declaring that the 'project of an open and liberal Europe has to end'.[205] The party has been branded 'populist',[206] but some argue that even this is an 'underestimation'[207] that camouflages the party's dangers.[208] Invoking terms such as *das Volk führen –Volksführer,* the AfD illude to 'images of Nazi Germany',[209] whilst reframing 'Nazi themes' of 'friend versus foe' perceptions to apply to modern enemies.[210] The party's 'rampant nationalism' has been 'spiced up with racism',[211] and the effect of this is amplified when considering Germany's unique history. Consistent with the theme of this article, it is evident that democratic forces cannot 'wait until it is too late' again.[212]

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[201] Ivan Ermakoff, 'Law against the Rule of Law: Assaulting Democracy' (2020) 47 Journal of Law and Society 164.
[202] James Angelos, 'Germany's far-right AfD is soaring. Can a ban stop it?' *Politico* (12 January 2024) <https://www.politico.eu/article/can-a-ban-stop-the-rise-of-germanys-far-right/> accessed 24 April 2024.
[203] ibid.
[204] Thomas Klikauer, 'Alternative Für Deutschland: The AfD: Germany's New Nazis or Another Populist Party?' [2020] Liverpool University Press 3.
[205] ibid.
[206] Carl C. Berning, 'Alternative für Deutschland (AfD) – Germany's New Radical Right-wing Populist Party' (15 ifo DICE Report 2017) 16.
[207] Klikauer (n 204) 94-5.
[208] ibid.
[209] ibid 6.
[210] ibid 94-5, 172.
[211] ibid 7.
[212] ibid 176.

Article 21(2) of the German Basic Law[213] renders parties that 'seek to undermine or abolish the free democratic basic order'[214] unconstitutional. This means that the German Federal Court (BVerfG) has the power to ban parties that are seen as a threat to democracy. Although the BVerfG rejected an application to ban the National Democratic Party in 2017[215] because it had limited influence and campaigning capability, the AfD's growth suggests that Article 21(2) may be called into question again soon. Calls for a party ban are growing 'louder' amid reports that members attended a secret meeting of right-wing extremists to discuss a 'master plan' for deporting migrants and 'unassimilated citizens',[216] but concerns exist around the implications of political exclusion, particularly considering Arendt's focus on 'isolated individuals' as a precondition for the success of totalitarianism.[217] Militant democracy runs a risk of furthering the populist narrative of 'elitist' institutions attempting to silence the people[218] and isolating individuals which could lead to stronger solidarity within outlawed groups. However, the current article agrees with Rummens and Abts, who see this as an 'unfortunate but not necessarily problematic' side effect[219] as parties able to participate in democratic systems should be held accountable to the substantive requirements of such systems. If they are not, then they should be considered as 'potentially dangerous antagonistic enemies' of the liberal democratic regime,[220] and the values that the democratic system is built upon should rightly be suspended to defend against such a threat. Whether the BVerfG will be required to determine the constitutionality of the AfD is yet to be seen. However, what is important to the current article is the fact that they *can*, if needed, step in to defend the democratic order. The German Basic Law takes lessons from the country's historical

[213] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 19 December 2022 (Federal Law Gazette I p. 2478) ('German Basic Law')
[214] ibid article 21(2).
[215] Judgment of the 17th January 2017 2 BvB 1/13
[216] Angelos (n 202).
[217] Arendt (n 33) 323.
[218] RM Stahl and BA Popp-Madsen, 'Defending Democracy: Militant and Popular Models of Democratic Self-defense' (2022) 29 Constellations 310, 325.
[219] Stefan Rummens and Koen Abts, 'Defending Democracy: The Concentric Containment of Political Extremism' (2010) 58(4) Political Studies 649, 659.
[220] ibid 653.

experience, and it is suggested that defenders of democracy do not forget these lessons when deciding whether to take decisive action to defend democracy against its enemies.

CONCLUSION

In summary, this article has considered the extent to which the election law changes made by the Nazi Party in 1933 can be compared to those made by Fidesz from 2010 to the present day. Whilst on the surface the links between the regimes appeared tenuous, the parallels between the constitutional foundations for each party's legal power outline the need for safeguards to prevent subversion from within. It has been shown that when too much power is placed in the hands of the majority party, they are quickly able to consolidate their rule by eroding constitutional checks and balances as, in both Hungary and Nazi Germany, the constitutional majorities allowed for the subsequent legal changes. In both cases, parties were able to build on their constitutional foundations to bring legal changes that removed any substantial opposition threat. In Nazi Germany, this was achieved by making all other political parties illegal, whereas in Hungary, this was done by shaping the laws to favour Fidesz to the extent that all the major opposition forces combined could still not challenge Orbán's power. It is submitted that the approach in Hungary reflects how authoritarian strategies can be adapted to democratic times, with the same anti-democratic implications. It is this 'democratic façade'[221] that can be more difficult to defend against as, being naturally more incremental and subtle, it can mean that a party's anti-democratic intentions may not be evident until it is too late.

It is for this reason that the current article has warned against complacency and stressed the need to learn from the past. As shown, authoritarianism looms over modern populism, and populism has the potential to return to its anti-democratic 'origins'.[222] Therefore, it is important to be wary of parallels between modern populism and the 'demagogues of yesteryear',[223] as the latter also began by speaking on behalf of the *demos* but proceeded to completely erode democracy. Whilst populism today is by no

[221] Müller (n 148) 15.
[222] Finchelstein (n 24) 173.
[223] Roth (n 156) 2.

means akin to the terror and destruction of 20th-century totalitarianism, this comparison has served to illustrate that democracy, having come a long way in the last decade, remains fragile. The elections in 2024 are likely to be shadowed by illiberalism and a new wave of populist leaders intent on undermining constitutional liberal values. Because of populists' novel approaches, and their facades of democracy, it is pertinent to consider the past. This may allow for quicker identification of authoritarian strategies before it is too late.

Pass-on: The Court's Tools for Quantification of Damages

Balint Garamvolgyi

ABSTRACT

This paper discusses how courts deal with the issue of quantification of damages in competition litigation cases, namely where pass-on has to be considered. Pass-on occurs when a direct purchaser transfers any overcharge it incurred from the anti-competitive behaviour onto indirect purchasers (usually consumers) down the chain of distribution. An analysis of the Supreme Court's decision in Sainsbury's v MasterCard shows how courts are assisted by the 'broad axe' method to quantify damages without the need for complete precision, thereby keeping the cost of litigation at a reasonable level. The paper however goes further to consider how the Competition Appeal Tribunal has recently used Umbrella Proceedings to consolidate cases and consider common pass-on issues that were not clarified by the Supreme Court. The author submits that courts are greatly assisted and therefore must rely on both the broad axe method and the Umbrella Proceedings jointly in order to calculate damages where pass-on arises. Only by utilising them both can quantification be done with accuracy and reliability, resulting in consistent outcomes for similar cases and keeping the cost of proceedings at a reasonable level.

INTRODUCTION

London is often considered a leading 'competition litigation forum'[1] as the English jurisdiction offers claimants, among others, the 'loser-pays' costs rule and increasing legal certainty around procedural and substantive issues.[2] Nonetheless, most cases brought by claimants in relation to anti-competitive behaviour, may that be cartels or abuse of dominant position,[3] are normally settled out of court for

[1] European Commission, 'Impact Assessment Report. Damages actions for breach of the EU antitrust rules' COM (2013) 404 final, art 52.; Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges' (2021) 3 Revue Des Droits De La Concurrence 232, 235.
[2] Jon Lawrence and Anna Morfey, 'Tactical Manoeuvres in UK Cartel Damages Litigation' in Mihail Danov, Florian Becker and Paul Beaumont (eds), *Cross-Border EU Competition Law Actions* (Hart Publishing 2013).
[3] Competition Act 1998, s 2, 18.

want of both confidentiality and because the risks and costs associated with competition litigation can be disproportionate to potential benefits.[4] However, where courts do have to make a determination as to damages awarded it has become increasingly clear that there are only guidelines and broad legal doctrines to guide them in making complex econometric calculations.[5] This has become evident in the case of pass-on where courts make calculations on a case-by-case basis, risking miscalculation that could potentially result in different outcomes for similar cases.

This paper aims to evaluate the extent to which courts are assisted by the 'broad axe' approach and the Umbrella Proceedings Orders in quantifying damages where pass-on arises. Studies show that most retailers or merchants pass-on any cost increase, such as interchange fees or tax increases almost fully to consumers, making the issue live in almost all competition cases where a chain of distribution is involved.[6] While it is right for courts not to come up with a single formula or test applicable uniformly across all sectors and cases, further guidance is nonetheless necessary to properly quantify damages in a way that provides a fair and satisfactory outcome for the parties while keeping the cost of litigation at a proportionate level.

In order to systemically address these difficulties this paper will be split into three parts. Section I sets out the key issues regarding quantification of damages where pass-on arises, highlighting the influence of EU law on English courts' approach as well as analysing the theory underlying the principle of full compensation. Section II discusses how the 'broad axe' approach was utilised by English courts and assesses its usefulness by analysing the Supreme Court's judgment in *Sainsbury's v MasterCard.*[7]

[4] Barry J. Rodger, 'Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005' 2008 29(2) ECLR 96, 110; Christopher Hodges, 'Delivering Competition Damages in the UK' (2012) Oxford Legal Studies Research Paper No. 66/2012 <https://ssrn.com/abstract=2170385> accessed 27 June 2024, 3; European Commission, 'Impact Assessment Report. Damages actions for breach of the EU antitrust rules' COM (2013) 404 final, art 63.

[5] European Commission, 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser' (Communication) 2019 OJ C 267/4; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL).

[6] Directorate-General for Competition, Ernst & Young and Copenhagen Economics, *Study on the application of the Interchange Fee Regulation: Final Report* (Publications Office of the European Union, 2020) 170; Michael Bergman and Niels Lynggård Hansen, 'Are excise taxes on beverages fully passed through to prices? The Danish evidence' (2019) 75 FinanzArchiv: Public Finance Analysis 323.

[7] Sainsbury's Supermarkets Ltd v Mastercard Incorporated [2020] UKSC 24, [2020] 4 All ER 807.

Following the Competition Appeal Tribunal's (CAT) decision to join these cases together for effective case management, Section III will analyse as to what extent the Umbrella Proceedings Orders assist English courts in quantifying damages and clarifying the rules on pleading pass-on. While the CAT's Practice Directions and Judgments have offered some support, they still identified 'evidential', 'definitional', and 'legal' difficulties in the calculation of pass-on that must be overcome.[8] The author will consider how the 'broad axe' approach is a satisfactory doctrinal justification for awarding damages, but further factors, rules, and guidelines set out by the CAT are imperative in assisting lower courts to remedy the uncertainties arising from the quantification of damages where pass-on is present.

I. PASS-ON AND QUANTIFICATION

Effective remedies for private actions[9] regarding anti-competitive behaviour, alongside investigations by National Competition Authorities (NCA), provide extra deterrence[10] and therefore courts have long recognised the benefit in allowing individuals to claim compensation for their losses.[11] In the UK private follow-on actions are available under s47A of the Competition Act 1998, which have been the most popular form of competition litigation,[12] as opposed to stand-alone actions, since claimants can rely on an already established infringement decision. A claim for damages in competition law is based on the tort of statutory duty, set out in Chapter I and II of the Competition Act 1998, requiring the claimant to show actionable harm, such as a finding of competition law infringement by an NCA.[13] The main issue for most follow-on actions is quantifying the damage caused by the anti-competitive behaviour so that the claimant can be placed back in the situation as if the infringement has never happened (the 'counterfactual' scenario) and receive full compensation.[14]

[8] Competition Appeal Tribunal Practice Direction 2/2022; *The Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 31.
[9] Commission of the European Communities, 'White Paper on Damages actions for breach of the EC antitrust rules' COM (2008) 165 final, 4.
[10] Renato Nazzini, *Competition Enforcement and Procedure* (2nd Edition, OUP 2016) 3.31.
[11] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, paras 27-28.
[12] Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges' (2021) 3 Revue Des Droits De La Concurrence 232, 236.
[13] Jane Stapleton, 'The Gist of Negligence: Part 1 Minimal Actionable Damage' (1988) 104(Apr) LQR 213.
[14] Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 (HL) 39.

Much of the UK's modern approach to quantification of damages in competition law was shaped by EU law via directives and Court of Justice decisions, which are worth briefly setting out. Following the 2014 EU Damages Directive,[15] within the EU the aim of quantification of damages is based on the compensatory principle, which is similar to the UK approach on awarding full compensation while avoiding over- or under-compensation.[16] Unlike in the United States,[17] EU and UK courts do not award exemplary or punitive damages to claimants as a way of deterrence.[18]

A key issue arising in quantification of damages is 'pass-on'. Pass-on is the amount of increased overcharge from an anti-competitive behaviour that a direct purchaser from a cartel (such as a supermarket) passes onto the indirect purchasers (consumers). This arises in almost every case where there are intermediaries between the cartelists and the end users in a supply chain, thus the overcharge is either partially or fully passed-on or absorbed at each stage.[19] While UK courts were aware of this issue as an 'important consideration for claimants',[20] it was the Damages Directive that created comprehensive rules on how to deal with pass-on. Elements of the Damages Directive, including the articles on pass-on, have been incorporated into the Competition Act 1998 and therefore are still good law post-Brexit.[21]

Pass-on has been described as both a sword (offensive) for indirect purchasers to claim,[22] and a shield (defensive) for cartelists to use as a defence against a claim brought by direct purchasers.[23] The

[15] Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (Damages Directive).
[16] Jessica Simor et al, 'Private Enforcement' in Ros Kellaway et al (eds), *UK Competition Law: The New Framework* (OUP 2015) 8.76.
[17] Hanover Shoe v United Shoe Machinery Corporation 392 US481, 88 S Ct 2224 (1968).
[18] Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, art 3(3); Case C-453/99 *Courage v Crehan* [2001] ECR I-6297*; Rookes v Barnard* [1964] AC 1129 (HL) 1226–27; Competition Act 1998, Schedule 8A, para 36.
[19] Cento Veljanovski, Cartel Damages: Principles, Measurement, and Economics (OUP, 2020) 18.11.
[20] BCL Old Co v Aventis [2005] CAT 2 [38].
[21] Competition Act 1998, sch 8A, paras 8-11; Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, SI 2017/385, sch 1, para 4.
[22] Mark Brealey QC and Kyla George, *Competition Litigation: UK Practice and Procedure* (2nd edition, OUP 2019) 16.37.
[23] Peter Davis et al, Damages Claims for the Infringement of EU Competition Law (OUP, 2015) 3.83.

Damages Directive makes it explicitly clear that pass-on can be invoked as a defence[24] and that both direct and indirect consumers can claim against cartelists for harm passed onto them.[25] This approach is underlined by sound policy reasons and stays true to the nature of the compensation principle, rather than a US-style enforcement rationale, ensuring that no party is over- or under-compensated.[26] The UK Supreme Court followed this approach in *Sainsbury's v MasterCard,*[27] which will be discussed in Section II.

However, the quantification of pass-on is by no means a simple calculation and certain jurisdictions took different approaches to the issue. In the USA the Supreme Court prohibited the pass-on defence[28] and indirect purchasers were refused standing to use pass-on to claim damages.[29] The Canadian Supreme Court while allowed offensive pass-on, it rejected pass-on as a defence.[30] This is following the US's rationale that indirect purchasers' standing increases administrative costs, possibly introduces duplicative recovery,[31] and that there would be an insurmountable task for courts to quantify the exact amount of pass-on.[32] While those are legitimate concerns, this approach may be counter-intuitive as cartelists and direct purchasers may 'gang up to inflict external harm on an innocent third-parties'.[33] Cartels may make covert side payments to direct purchasers, who therefore tacitly benefit from the cartel, while cartelists are shielded from claims by indirect purchasers.[34] The UK Supreme Court made it clear that this approach does not represent the law of England and Wales, and that a difficulty in quantifying damages cannot be a bar to allowing legitimate claims where damage was caused.[35] In

[24] Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, art 13.
[25] ibid, art 12 and 14.
[26] Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers* (3rd Edition, OUP 2023) 10.112.; Peter Davis et al, *Damages Claims for the Infringement of EU Competition Law* (OUP, 2015) 3.81.
[27] Sainsbury's (no 7).
[28] Hanover Shoe v United Shoe Machinery Corporation 392 US471, 88 S Ct 2224 (1968), paras 10-12.
[29] *Illinois Brick v Illinois* 431 US 720, 97 S Ct 2061 (1977).
[30] Pro-Sys Consultants Ltd v Microsoft Corporation 2013 SCC 57.
[31] *Sainsbury's* (no 7), [197].
[32] Cento Veljanovski, Cartel Damages: Principles, Measurement, and Economics (OUP, 2020) 18.37.
[33] Cédric Argenton et al, *EU Cartel Law and Economics* (OUP, 2020) 6.174.
[34] Maarten P Schinkel et al, 'Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion' (2008) 39(3) RAND Journal of Economics 683, 685.
[35] *Sainsbury's* (no 7), [196].

other jurisdictions the issue of calculating pass-on was approached from a different perspective. In Hungary, contrary to the EU approach,[36] there is an automatic but rebuttable presumption that cartels create a 10% overcharge, thus saving courts the trouble of calculating exact damages.[37] Although there is evidence that the median overcharge for cartels is 10%,[38] this can range from anywhere between 1% and 34%, with different sectors showing different levels of susceptibility to anti-competitive behaviour and rates of overcharge. Thus, while this solution may look advantageous, it is overly simplistic and risks overcompensation[39] which is why the Office for Fair Trading (the predecessor of the current Competition and Markets Authority) at the time did not adopt such a presumption offered in a Consultation Paper.[40] Since this approach must be rejected as well, courts are left with the option to allow indirect purchasers to sue, based on the principles of English law, leaving them to grapple with quantification on a case-by-case basis.

English courts are painfully aware of the issues vis-a-vis pass-on, such as an assessment of what groups have been affected by the overcharge and the need for legal rules on proximity and causation to limit claims to a fair but reasonable level.[41] Pass-on also varies depending on the level of competition within a specific market. In highly competitive markets, where buyers can switch to alternatives, pass-on may not be available, requiring direct purchaser to either absorb the overcharge and stay competitive or exit the market.[42] In other markets with different pricing setting structures, such as cost-plus pricing, it may even be possible for the direct purchaser to pass on the overcharge in full and more.[43] These varying factors further undermine the doctrinal coherence and practicality of approaches such as Hungary's

[36] *Fővárosi Ítélőtábla* 20.Gf.40.050/2020/36–II. [80].
[37] Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, 88/G. § (6).
[38] Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges' (2021) 3 Revue Des Droits De La Concurrence 232, 237.
[39] Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, art 12(2).
[40] Department for Business Innovation & Skills, Private Actions in Competition Law: A Consultation on Options for Reform (BIS, 2012), 4.40.
[41] Cédric Argenton et al, *EU Cartel Law and Economics* (OUP, 2020) 6.169.
[42] Gunnar Niels, Helen Jenkins, James Kavanagh, *Economics for Competition Lawyers* (3rd Edition, OUP 2023) 10.117.
[43] ibid, 10.131.

and highlight the need for a case-by-case quantification of competition damages.[44] A further issue which is often pleaded alongside pass-on is the so-called 'volume effect', whereby direct purchasers 'suffered a loss of profit' on goods effected by the cartel through a reduced volume of sales.[45]

While there a range of economic methods and models that can be used to quantify competition damages,[46] where pass-on arises it must be completed on a case-by-case basis and a standard rate cannot be assumed if the aim is to award damages without running the risk of over- or under-compensation. The Damages Directive and the *2019 Guidelines for national courts*[47] offer some solutions to these issues, such as explicitly recognising full and partial pass-on and allowing national courts to estimate the level of pass-on when quantifying damages.[48] This power to estimate has become a crucial factor as it balances the parties' rights to be compensated in full while acknowledging that reaching a precise number would be excessively difficult.[49] Prior to the EU Damages Directive, English courts have already developed a similar power of estimation, the 'broad axe approach', which can be applied to ensure that litigation can be conducted justly and at proportionate cost for all parties involved, in line with the principles in the Civil Procedure Rules.[50] Section II will consider how the UK Supreme Court interpreted and applied the 'broad axe' in the case of *Sainsbury's v MasterCard,*[51] and whether it is sufficiently satisfactory in enabling courts to quantify damages where pass-on arises.

[44] Mark Brealey QC and Kyla George, *Competition Litigation: UK Practice and Procedure* (2nd edition, OUP 2019) 16.64.
[45] *Sainsbury's* (n 7), [192].
[46] Oxera et al, Quantifying antitrust damages. Towards non-binding guidance for courts (Publications Office of the European Union, 2009) 37.
[47] European Commission, 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser' (Communication) 2019 C 267/4.
[48] Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, arts 12(3), 12(5).
[49] ibid, art 17.1.
[50] Civil Procedure Rules 1998, 1998/3132, s1.1.
[51] Sainsbury's (n 7).

II. BROAD AXE APPROACH

First articulated in the case of *Watson Laidlaw*, compensation is accomplished to a 'large extent' by 'exercise of sound imagination' and the 'practice of the broad axe'.[52] Courts have since relied on this approach extensively to 'overcome challenges in proving quantum'[53] without the need for complete precision,[54] especially where the exact damages cannot be calculated without excessive litigation costs. Judges have avoided setting out any strict rules and retained a wide discretion when quantifying damages.[55] Nonetheless some guidance has been slowly developed in relation to specific elements of quantification, such as pass-on. The existence of a pass-on 'defence' has already been acknowledged by English courts – albeit only obiter – as part of quantification in several cartel cases,[56] however, questions as to the method and extent of applicability of the broad axe approach remained unascertained.[57]

The courts were given the opportunity to clarify the law on quantification of damages and the application of the broad axe method where pass-on arises in the case of *Sainsbury's v MasterCard*. The case began as a stand-alone claim[58] against MasterCard for their operation of a payment scheme that resulted in restricting competition by effect as it fixed the interchange fee (MIF) between participating banks. The claimed overcharge was the difference between the actual MIF paid and the estimated highest lawful bilateral interchange fee parties would have paid without the anti-competitive behaviour (the counterfactual scenario).[59] The CAT considered both the issue of quantification of damages and MasterCard's defence as to whether the overcharge had been passed on to Sainsbury's customers.[60]

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[52] Watson Laidlaw & Co Ltd v Pott Cassels & Williamson (A Firm), 1914 SC (HL) 18 at 29-30.
[53] Bill Batchelor and Kaweh Resasade and Jonathon Egerton-Peters, 'Complexities in antitrust litigation UK update' (2020) 13(1) GCLR 29, 33.
[54] *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2009] 3 WLR 198, [159].
[55] Daniel Beard KC, 'Quantification of Damages in Competition Law: A brief paper for the purposes of discussion', (Competition Appeal Tribunal 20th Anniversary Conference, Cambridge, May 2023) 21-22.
[56] *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch); [2009] 3 WLR 1200 [37]; Sarina Williams, ''Pass-on' in the UK post-interchange: a weapon for defendants or a Pyrrhic victory?' 2020 13(4) GCLR 145, 147.
[57] Sainsbury's Supermarkets Ltd v Mastercard [2016] CAT 11 [483].
[58] Mark Friend, 'Credit cards and interchange fees: damages for breach of competition law' (2017) 133(Apr) L.Q.R. 208, 209
[59] *Mallett v McMonagle* [1970] 1 AC 166 (HL) 176.
[60] *Sainsbury's* (n 57), [422](2).

The tribunal identified a number of difficulties. These were labelled as 'legal' (the test for pass-on), 'definitional' (factors needed to show pass-on) and 'evidential' (what can be adduced to show pass-on) issues. [61] While the 'definitional' and 'evidential' issues were considered by the CAT, those were only truly addressed in later proceedings (see Section III). In relation to the 'legal' difficulty the tribunal went on to assess the pass-on 'defence' but confirmed that it was not a defence at all but part of the process of quantification of damages for which already existing rules can be applied.[62] The issue was characterised as 'akin to one of causation'[63] and therefore pass-on applies only where the subsequent transaction arose out of the consequences of the breach.[64] To establish such a link, the court looked in-depth at Sainsbury's budgeting method to see if there could be a nexus between product pricing and the MIF overcharge. It found that due to the complexity of Sainsbury's pricing structure it was 'unknowable'[65] and could not be determined how they dealt with the MIF. Since it would be 'impossible to say'[66] whether an increase in a specific product price could be attributable to the overcharge, MasterCard's pass-on defence failed for want of an identifiable causal connection.[67] Contrarily, when it came to the issue of calculation of interest, the court in that instance did however find that about 50% of the MIF was passed on, despite its previous ruling on a lack of causal connection.[68] MasterCard appealed this issue to the Court of Appeal claiming that it showed an inconsistent application of the broad axe approach.[69] The Court of Appeal dismissed the argument, finding that the CAT was entitled to rely on different approaches when considering quantification for the pass-on defence and calculating interest. [70] The court found no inconsistency[71] and stated that the

[61] *The Merchant* (n 8), [18]. Can this be rephrased because it says Sainsburys at n 10
[62] Sainsbury's (n 57), [484](3); British Westinghouse Electric and Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd (No.2) [1912] 1 AC 673 (HL) 688.
[63] *Sainsbury's* (n 57), [475].
[64] *Westinghouse* (n 62), [690]-[692].
[65] ibid, [464].
[66] ibid, [459].
[67] ibid, [485].
[68] ibid, [525] – [526].
[69] *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2018] EWCA Civ 1536, [2019] 1 All ER 903 [321].
[70] ibid, [339].
[71] ibid, [337].

broad axe principle was only applicable where there is a 'lack of evidence as to the amount of loss', not when establishing pass-on.[72]

MasterCard appealed this 'broad axe issue' vis-à-vis the required degree of precision as to the calculation of damages to the Supreme Court, which overturned much of the Court of Appeal's findings.[73] Since the claims were issued before the Damages Directive took effect, it did not govern the appeal.[74] Therefore the court had to apply the rules of English law, although the court stated that the Directive can help interpret the already existing requirements of EU law.[75] The Supreme Court went on to uphold some of the key principles already set out by the CAT, such as the nature of the 'defence', causation, burden of proof, and the required precision for quantification.[76] Although it did not overturn the CAT's decision, the Supreme Court did disagree with the Court of Appeal's strict – and inconsistent – approach to quantification.[77] The Supreme Court rightly clarified that such a dual approach to the broad axe principle would result in differing burdens of proof, potentially leading to a 'serious risk of systemic over-compensation to direct purchaser claimants',[78] with the defendant facing damages greater than the overcharge (in MasterCard's case potentially 1.5 times).[79] Ultimately, the appeal succeeded, and while the Court of Appeal did not hold that the exact amount of the loss must be quantified, it did err in requiring a greater degree of precision in the quantification of pass-on.[80]

The Supreme Court and CAT judgements have provided direct and much needed clarification, thereby alleviating the 'legal' difficulty identified by the CAT regarding the precision in quantification of damages.[81] While the dicta has been considered a useful assistance by lower courts in later competition

[72] ibid, [331].
[73] *Sainsbury's* (n 7), [175].
[74] ibid, [190].
[75] ibid, [191].
[76] ibid, [196], [215], [216], [219].
[77] Gunnar Niels, Helen Jenkins, James Kavanagh, *Economics for Competition Lawyers* (3rd Edition, OUP 2023) 10.141.
[78] Sarina Williams, ''Pass-on' in the UK post-interchange: a weapon for defendants or a Pyrrhic victory?' 2020 13(4) GCLR145, 152.
[79] Cento Veljanovski, 'The law and economics of pass-on in price fixing cases' (2017) 38 ECLR 209, 216.
[80] *Sainsbury's* (n 7), [226].
[81] *The Merchant* (n 8), [51].

litigation,[82] it also rendered pass-on a 'key battleground', inevitably requiring that cases with claimants at different levels in the chain of distribution be heard jointly to avoid duplicative recovery.[83] While the broad axe principle for quantification strikes a balance between 'rule-of-thumb presumptions and implausibly grand economic models',[84] sometimes the 'only guidance the law can give is to lay down general principles which afford at times but scanty assistance'.[85] Section III will therefore analyse how hearing cases jointly, such as the Multilateral Interchange Fee Umbrella Proceedings (MIF UP), allows for a more precise calculation of the overcharge and level of pass-on without the need for 'difficult and complicated inquiries' for each individual case. [86]

III. UMBRELLA PROCEEDINGS

While the *Sainsbury's* case assists the courts in determining how and what rules should apply to the issue of pass-on, it does not necessarily allow them to quantify damages in a consistent manner without risking over- and under-compensation.[87] While 'there is a real lack of clarity as to how 'pass on' questions are to be resolved',[88] consolidation of similar cases may offer a solution. Although these proceedings may be in different jurisdictions and issued at different times, a joinder can resolve the 'perils of bilateral dispute resolution'[89] by avoiding inconsistency in outcomes. This approach was recommended by the EU within the Damages Directive,[90] and was suggested by the Court of Appeal as a satisfactory option available for the CAT.[91] The aim of the UP is to use estimates (as per the broad axe approach) and the CAT's flexible case management powers to find a 'consistent and logical

[82] Royal Mail Group Ltd v. DAF Trucks Ltd and others ('Trucks I') [2023] CAT 6; NTN Corporation v Stellantis NV [2022] EWCA Civ 16, [2022] 2 All ER (Comm) 706.
[83] Sarina Williams, ''Pass-on' in the UK post-interchange: a weapon for defendants or a Pyrrhic victory?' (2020) 13(4) GCLR 145, 154.
[84] Bill Batchelor and Kaweh Resasade and Jonathon Egerton-Peters, 'Complexities in antitrust litigation UK update' (2020) 13(1) GCLR 29, 33.
[85] British Westinghouse (n 62), 688.
[86] *Jebsen v East and West India Dock Co* (1875) LR 10 CP 300 (Lord Denham CJ).
[87] *The Merchant* (n 8), [4].
[88] Dune Group Limited v Mastercard Incorporated [2022] CAT 14 [20(1)].
[89] *The Merchant* (n 8), [13].
[90] Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, rec 44.
[91] *Sainsbury's* (n 69), [358].

approach to establishing pass-on'[92] expeditiously and at a proportionate cost which binds as many current and future parties as possible to avoid re-litigation of the issue.[93]

In June 2022 the CAT issued its Practice Direction[94] that allowed for the creation of a new Umbrella Proceeding to determine issues in relation to the MIF litigations. It used the CAT's powers to consolidate cases with Ubiquitous Matters, [95] in this case the determination of pass-on, that arise in similar proceedings.[96] While there are over 1,000 cases with a variety of enterprises in 39 sectors,[97] some quantum issues in relation to pass-on have enough overlapping elements that it could be considered 'generic'.[98] A key issue in the proceedings is that the MIF overcharge is so small that it can be difficult to identify.[99] Furthermore, the evidence is vast, and its allocation is asymmetrical due the adversarial nature of the English jurisdiction, as was stressed by the Supreme Court and the EU.[100] Therefore, the CAT considered that earlier post-*Sainsbury's* pass-on cases, on the type of admissible evidence and legal guidance on establishing a causative link,[101] provide little assistance for such a novel case.[102] Thus, the need to employ greater case management powers by use of these orders is crucial if courts are to find a method to properly quantify damages when pass-on arises.

The MIF UP gave the Tribunal the chance to reconsider in-depth those 'definitional' and 'evidential' difficulties that, while arose in the *Sainsbury's* case, were not sufficiently clarified.[103] The definitional

[92] *Dune Group* (n 88), [35].
[93] ibid, [14], [18], [20](1), [37].
[94] CAT Practice Direction 2/2022.
[95] Competition Appeal Tribunal Rules 2015, SI 2015/1648, r 17.
[96] *Merchant Interchange Fee Umbrella Proceedings* (Umbrella Proceedings Order), 4 July 2022.
[97] Dune Group (n 88), [11]; Umbrella Interchange Fee Claimants v Umbrella Interchange Fee Defendants [2023] CAT 60, [26].
[98] *Dune Group* (n 88), [25].
[99] *Umbrella* (n 97), [28(1)].
[100] *Sainsbury's* (n 7), [216]; Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, rec 47.
[101] *Royal Mail Group Ltd v DAF Trucks Ltd* [2021] CAT 10, [42]; *NTN Corporation v Stellantis NV* [2022] EWCA Civ 16, [2022] 2 All ER (Comm) 706, [33].
[102] *Umbrella* (n 97), [11](2)(iii).
[103] *The Merchant* (n 8), [18].

issue is one as to the exact definition and scope of the pass-on defence, whereby the CAT considered that a merchant can react in four ways (or through a mixture of those) to the overcharge:[104] It can either

(1) make less profit, which would be a case of 'absorption' and thus no pass-on arises,

(2) cut back on spending,

(3) reduce spending by negotiating with suppliers and employees, or

(4) increase its prices, in what is considered pass-on *par excellence.*[105]

While there is pass-on in option (4) and none in option (1), the definitional issue arises in relation to options (2) and (3). The Supreme Court aimed to assist by suggesting that only if the merchant adopted options (3) and (4), or a mixture, would pass-on arise.[106] However, the CAT considered that the distinction between options (2) and (3) were not made clear[107] and the Supreme Court's clarification is not entirely helpful and considered this to be only *obiter* and not part of the *ratio* of the case.[108] Thus, the definitional difficulty remains to be addressed at later hearings. This distinction and exact categorisation of reaction to an overcharge has also been criticised by academics for being misconceived and unnecessary therefore clarification on the exact definition of pass-on is much needed.[109]

The 'evidential' issue is one of even greater concern as it relates to the evidence that can be adduced during pleadings to establish the necessary causative link. The CAT relied on expert evidence, following which it concluded that there is a difference between a legal and economist definition, stating that a legal definition is stricter and requires a causal connection.[110] While only the *effect* of mitigation needs to be shown,[111] as proving a conscious *decision* to pass-on would result in a 'vanishingly small' successful claims, it is nonetheless difficult to identify where the pass-on ended up.[112] In light of the

[104] *Sainsbury's* (n 57), [434].
[105] *The Merchant* (n 8), [29].
[106] *Sainsbury's* (n 7), [206].
[107] *The Merchant* (n 8), [31].
[108] ibid, [33].
[109] Cento Veljanovski, 'The law and economics of pass-on in price fixing cases' (2017) 38 ECLR 209, 212.
[110] *Sainsbury's* (n 57), [484](4).
[111] *The Merchant* (n 8), [43].
[112] ibid, [23].

Supreme Court's broad axe judgment stating that 'unreasonable precision'[113] is not required for quantification and considering the need for proportional costs in adducing evidence,[114] the CAT has allowed only the use of econometric evidence and existing studies on pass-on.[115] While restrictions on the introduction of evidence for parties to rely on is an extreme use of the CAT's case management powers,[116] this is a necessary step as other methods may be 'disproportionate' and 'hopeless' in solving the evidential difficulty.[117]

The CAT in its Third Ruling on Pass-on[118] found that these 'definitional' and 'evidential' issues are inherently interlinked as parties cannot determine what relevant evidence to present if the necessary factors to identify pass-on are not set out either by the parties themselves or by the Tribunal.[119] Therefore, to find a test for pass-on, the parties were directed to rely on joint economic expert evidence,[120] to keep costs proportionate, and to agree on a (sector-specific) list of factors and options for gathering evidence.[121] While the CAT retained the liberty to revisit this approach it certainly seems like a positive step towards resolving disagreements between the parties.[122] A key worry is that these interlocutory hearings are only supposed to provide a 'blueprint for trial' and be 'outcome neutral',[123] therefore a full quantification trial will still be necessary to actually quantify pass-on, further increasing the cost to parties.[124] Disagreements between expert economists as to whether factual evidence or economic theory should apply remain,[125] as the deadlines for joint reports have already been extended by the CAT, highlighting the complex nature of the pass-on issue.[126]

[113] *Sainsbury's* (n 7), [209].
[114] Civil Procedure Rules 1998, 1998/3132, s1.1.
[115] *The Merchant* (n 8), [61(1)].
[116] Competition Appeal Tribunal Rules 2015, SI 2015/1648, r 4.
[117] *Umbrella* (n 97), [35]; *The Merchant* (n 8), [61](3).
[118] *Umbrella* (n 97), [11](2)(iii).
[119] ibid, [36].
[120] ibid, [37].
[121] ibid, [38] – [40].
[122] ibid, [52].
[123] MOL (Europe Africa) Ltd v Mark McLaren Class Representative Ltd [2022] EWCA Civ 1701, [2023] Bus LR 318.
[124] Ibid, [11](2)(ii).
[125] Belinda Hollway, *Ships Passing in the Night: Proving Pass-on* (Competition Appeal Tribunal 20th Anniversary Conference, Cambridge, May 2023) 3.9.
[126] Merchant Interchange Fee Umbrella Proceedings (Amended).

Recently the Supreme Court confirmed in the case of *Merricks*[127] that for collective proceedings the tribunal may award damages using the broad axe method for the group as a whole without the need for quantification of damages for each individual member of the class.[128] Collective Proceedings Orders (CPO) are seen as beneficial in allowing end consumers, whom individually suffered negligible amount of damages but paid a monopoly price, to bring actions at a proportionate cost, thereby widening access to justice and closing the enforcement gap.[129] For this reason, the CAT allowed the *Merricks Collective Proceedings* to take part in the MIF UP so that it may 'extrapolate backwards' from the data and findings to resolve pass-on in its own case.[130] The ability to award aggregate damages for collective proceedings shows how the court can apply the broad axe approach to award damages for claimants, assisted by the more precise data and calculation made in the MIF UP to achieve fair compensation at reasonable costs.[131]

Overall, the Umbrella Proceedings have shown themselves to be an incredibly useful tool in the CAT's arsenal to consolidate cases with common issues and overcome difficulties that arise in relation to the same anti-competitive behaviour. They ensure that no party is under- or overcompensated, keep litigation costs to a reasonable level and alleviate some of the risks that come with bilateral dispute resolution. In the case of the MIF UP it shows how the CAT can use its extensive case management powers to separate out difficulties and consider them in individual interlocutory hearings and trials to figure out how best quantify damages where pass-on arises.

[127] Mastercard Incorporated and others v Walter Hugh Merricks CBE [2020] UKSC 51, [2021] 3 All E.R. 285 [77].
[128] Competition Act 1998, s 47B.
[129] Mihail Danov and Duncan Fairgrieve and Geraint Howells, 'Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers' in Mihail Danov and Florian Becker and Paul Beaumont (eds), *Cross-Border EU Competition Law Actions* (Hart Publishing 2013).
[130] *Umbrella* (n 97), [74].
[131] Competition Act 1998, s 47C(2).

CONCLUSION

This research paper has established that while the issue of quantification of damages where pass-on arises is far from solved, courts have come up with procedures and legal principles to assist with their task of compensating all parties fairly and appropriately. Section I discussed the nature and development of pass-on and analysed the underlying principles by comparing the courts' approach to quantification of damages with other jurisdictions. It also highlighted the key issues that arise from a procedural standpoint, such as cost of litigation, adducing evidence, and the method of calculation, as well as the uncertainty around the legal principles such estimation of damages, burden of proof, and the exact definition of pass-on. These key issues were considered by the CAT to be: 'legal', 'definitional', and 'evidential'. In relation to solving these, further litigation will take place before the CAT in 2024 to decide on the exact pass-on test to be used, therefore, to comment or speculate on any possible test would be improper. These hearings and trials are expected to create a clearer and more certain framework for parties to navigate both current and future pass-on litigation.[132]

Section II considered the history of the broad axe method and its application in modern competition litigation. It is a useful tool in assisting courts to avoid unnecessary and costly analysis of exact damages and instead affords some wiggle-room for courts to make estimates. The *Sainsbury's* judgment has become a starting point for future competition cases as it alleviated the legal issues around burden of proof, the nature of pass-on as an element of quantification of damages, and established that a causative link is necessary. While the broad axe approach assists courts by providing the necessary legal justification and doctrinal underpinning to calculate damages, that by itself would not be enough to remedy the procedural uncertainties during litigation.

The 'definitional' and 'evidential' issues were considered in-depth in Section III, which analysed the MIF UP and reflected broadly on the use of Umbrella Proceedings. Consolidating cases based on similar common ground issues not only allows for costs to remain at a proportionate level but also

[132] Belinda Hollway, 'Ships Passing in the Night: Proving Pass-on' (Competition Appeal Tribunal 20th Anniversary Conference, Cambridge, May 2023) 4.4.

gives both parties and the courts the time and ability to consider and resolve specific questions in a way that binds all current and future parties. Courts must ensure that damages for cases regarding the same or similar anti-competitive behaviour are calculated on the same grounds to ensure consistency and fairness in outcomes. In the case of pass-on this was approached by consolidating and hearing MIF cases together.

Overall, if courts rely on both the broad axe approach and the Umbrella Proceedings, they are adequately assisted in their task to quantify damages where pass-on arises. Using these together, as was seen in the *Merricks Collective Proceedings*, gives the necessary assistance to courts to quantify damages with accuracy and reliability, resulting in consistent outcomes for similar cases. Such an increase in procedural certainty may in turn encourage settlements between parties, further reducing costs and increasing access to justice.

Abortion Law in England and Wales: Time for a Change?

Saskia Johnson

ABSTRACT

Abortion is currently criminalised in England and Wales; this may present stigma and unwarranted obstacles to women who need or want an abortion. Given that abortion law is an amalgamation of viewpoints and contexts from 1861 to 1967, this complication is predictable. England and Wales are left with an outdated position on a medical procedure impacting one in three women.[1] This paper argues that reform is needed, with the goal of decriminalisation, critically contrasting the practical and theoretical issues of the Abortion Act 1967 (hereafter 'the 1967 Act'). Further, drawing upon points of incompatibility with twenty-first-century attitudes, it exposes that the 1967 Act is largely based upon the anxieties of a different society, dated not only through discourse surrounding women but the evolution of medical paternalism. This paper also analyses what this means for women in vulnerable positions such as migrant women. It concludes that arguments dominated by foetal viability are flawed. Ultimately, this essay illustrates that the expansive operation of the 1967 Act is insubstantial when considering its deficiencies and that a standard healthcare approach to abortion should be welcomed.

INTRODUCTION

Abortion law requires fundamental reform to bring about the complete decriminalisation of abortion. The current law on abortion is outdated, resulting in an overly restrictive statute that perpetuates abortion stigmas and results in delays in accessing abortion services. Abortion law in England and Wales is a contentious subject;[2] therefore, there are various arguments to consider.

1 'Reforming Abortion Law' (Royal College of Obstetricians & Gynaecologists, June 2023) < https://www.rcog.org.uk/about-us/campaigning-and-opinions/position-statements/reforming-abortion-law/> accessed 23 March 2024.
2 Emily Jackson, Medical Law: Text, Cases, and Materials (6th edn, OUP 2022) 1.

Currently, in England and Wales, abortion law is established in the Offences Against the Person Act 1861 (hereafter 'the 1861 Act'), with defences provided by the 1967 Act. Thus, to start this critical discussion, it is useful to contextualise the law on abortion and how it has come to its current existence. Secondly, abortion law is criticised by reference to developments within patient autonomy and the practice of medicine. Further, the need for decriminalisation is explored through a gendered analysis of the stigmatising effects of the Abortion Act 1967. Finally, this paper will show what outright decriminalisation could look like.

This paper concerns only the legal framework surrounding abortion in England and Wales. Therefore, it will scrutinise abortion law in this jurisdiction without giving weight to the antagonistic question of whether abortion is morally correct.

I. ABORTION LAW DEVELOPMENT

The development of abortion law reveals how outdated the laws concerning abortion are. Abortions have been criminalised since 1803 in England and Wales,[3] once carrying a potential death sentence,[4] and the '1861 Act' solidified the criminalisation of abortions under sections 58 and 59. The criminalisation of abortion was consistent with the commonplace religious beliefs held in the 19th century. This is evidenced by the use of the religious term 'quickening' (meaning the period when the soul enters the body) in abortion statute until 1837.[5] The 1861 Act carries a maximum sentence of life imprisonment for procuring an abortion. However, Judge Macnaghten created an exception in *Bourne,*[6] considering that there was a lawful way for doctors to use poisons/instruments if the pregnant woman was in 'imminent danger of death', or would become a 'physical or mental wreck'.[7] While the law was starting to evolve, this was seen as only a 'law for the rich'[8] owing to the high costs of procuring an

3 Lord Ellenborough's Act 1803, s 1.
4 Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36(2) OJLS 334, 338.
5 Offences Against the Person Act 1837.
6 R v Bourne [1939] 1 KB 687, 694-95.
7 ibid, 694-95.
8 Fran Amery, 'Intersectionality as Disarticulatroy Practice: Sex-Selective Abortion and Reproductive Politics in the United Kingdom' (2015) 37 New Political Science 509, 510.

abortion from a private doctor.[9] Therefore, many women were still driven to dangerous backstreet abortions.[10] The Infant Life Preservation Act 1929 sanctioned an exception in the interest of preserving the life of the mother and protecting the child during the process of childbirth. The 1861 Act, accompanied by the 1967 Act, is the legislation which currently dictates abortion.

The 1967 Act expanded abortion by providing four defences to abortions:

s. 1 Subject to the provisions of this section a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith-

> (a) the pregnancy has not exceeded its twenty-fourth week and that the continuation of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated;
>
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

s. 2 In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) or (b) of subsection (1) of this section, account may be taken of the woman's actual or reasonably foreseeable environment.

In essence, the abortion law currently presiding over women's bodies in 2024 is one that was proposed over 150 years ago. Only minor amendments have been made, and it will be argued that the law no longer serves a functional role within the reality of twenty-first-century abortion procedures.

9 Pam Lowe, '(Re)imagining the 'Backstreet': Anti-abortion Campaigning against Decriminalisation in the UK' (2018) 24(2) Sociological Research Online 206.
10 Fran Amery (n 8) 510.

A. AN EXPANSIVE ACT

There are grounds to argue that the law is still appropriate because s.1(a) of the 1967 Act provides for an expansive operation, meaning that if a woman wishes to obtain an abortion, it will automatically be in the interest of her mental health to procure one.[11] In 2021, 98% of abortions were carried out under section 1(a), and 99.9% of those were distinguished for a 'risk to mental health'.[12] In addition, it is always physically safer for a woman to not be pregnant, thus creating a far-reaching Act.[13] Nonetheless, this expansive operation fails to address the remaining deficiencies in the 1967 Act, namely the delays it leads to, which continue to warrant decriminalisation.[14]

II. THE CONTEXT OF 1967

To critique abortion law, we must question why the law in England and Wales has materialised in this way. The primary aim in 1967 was to prevent dangerous abortions.[15] This is visible in the legislation from its emphasis on medical professionals and the two-doctor requirement,[16] which ensures that abortions are performed under medical control. The goal of the 1967 Act was to strike a balance between protecting women from risky backstreet abortions and the perceived harmful consequences of having an abortion itself. [17] This objective is still noble today; however, the current availability of straightforward and low-risk abortions renders the extensive regulation in the 1967 Act outdated. For instance, deaths resulting from abortions are no longer a reality in the UK,[18] and the understanding

11 Emily Jackson (n 2) 782.
12 'Abortion statistics for England and Wales: 2021' (Office for Health Improvement & Disparities, 2022) <https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2021/abortion-statistics-england-and-wales-2021#commentary> accessed 3 May 2024.
13 Sheldon (n 4) 343.
14 'Complications from abortions in England: comparison of Abortion Notification System data and Hospital Episode Statistics 2017 to 2021' (Office for Health Improvement & Disparities, 2023) < https://www.gov.uk/government/statistics/complications-from-abortions-in-england-2017-to-2021/complications-from-abortions-in-england-comparison-of-abortion-notification-system-data-and-hospital-episode-statistics-2017-to-2021#results> accessed 22 March 2024.
15 Sheldon (n 4) 343.
16 Abortion Act 1967, s 1(1).
17 Sally Sheldon and others, The Abortion Act 1967: A Biography of a UK Law (CUP 2022) 87.
18 'Number of Deaths involving abortion, in England and Wales, for the years 2020 and 2021'(Office for National Statistics, 2023) < https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/numberofdeathsinvolvingabortioninenglandandwalesfortheyears2020and2021> accessed 22 March 2024.

that abortions lead to negative mental health has been contradicted.[19] Moreover, Parliamentary debate indicates that the 1967 Act was also entangled with more outdated intentions.[20] It was presented that one 'side benefit' of making women consult their doctors for approval, would be that doctors will soothe women's anxieties about the pregnancy and thus stop her from having one at all.[21] The abortion procedure is a medical matter; however, the decision to abort is often social. Kirkman et al found that every participant had taken into account their own life circumstances when contemplating an abortion.[22] Readiness for motherhood, the man concerned, and finances were frequently cited.[23] Therefore, medical professionals are given the authority to determine social decisions and not medical matters. This appears to confuse the Parliamentary intention of preventing backstreet abortions with the outdated intention of abortion prevention. For instance, David Steel, the member of Parliament responsible for the 1967 Act, argued that discussions with medical professionals with 'common sense' would 'reassure women...leading to no abortion at all'.[24] Ottley's study reveals that doctors themselves have recognised this implication from the 1967 Act (i.e., that women do not know what is in their best interests), which can perpetuate a harmful characterisation of women.[25] Yet, in stark contrast, Kirkman's research in Australia found that 'complex decision-making' was adopted by women in this position.[26] Ultimately, the law on abortion emerges distinctly from a context that is disconnected from today's medical advancements and attitudes toward socio-medical care.

19 Sheldon, 'The Decriminalisation of Abortion' (n 4) 344.
20 HC Deb 22 July 1966, vol 732, cols 1076, 1086. < https://hansard.parliament.uk/commons/1967-07-13/debates/147b02e7-28d5-4ba0-93ce-b0003c127e2a/MedicalTerminationOfPregnancyBill> accessed 1 July 2024.
21 ibid.
22 Maggie Kirkman and others, 'Reasons Women Give for Contemplating or Undergoing Abortion: A Qualitative investigation in Victoria, Australia' (2010) 1 Sexual & Reproductive Healthcare 149, 152.
23 ibid 152.
24 Sally Sheldon, 'Who is the Mother to Make the Judgement?': The Constructions of Woman in English Abortion Law' (1993) 1 Fem LS 3, 14.
25 Emily Ottley, 'Abortion on Request: A Desirable Response to the Criminalisation of Abortion in England and Wales?' (2020) 11 King's Student L Rev 53, 67.
26 Maggie Kirkman and others (n 22) 150.

III. ROOTED IN MEDICAL PATERNALISM

Sheldon argued that abortion law is in need of fundamental reform due to its disconnection from advancements regarding medical paternalism.[27] There has been a retreat from medical paternalism visible in the Supreme Court's rejection of medical paternalism in *Montgomery*.[28] The Supreme Court provided several justifications for its new stance, but it was particularly evident that the doctor-patient relationship was changing.[29] Specifically, patients are now 'consumers exercising choice' as opposed to 'passive recipients'.[30] However, the 1967 Act continues to engage with the former concept. According to section 1 of the Act, registered medical professionals must determine in good faith that the pregnant woman satisfies one of the requirements in subsections (a) through (d). Two practitioners must complete and sign Form HSA1 certifying their opinion that there are grounds for abortion.

Moreover, Section 2 specifically states that medical professionals may consider the woman's 'environment' in this decision.[31] This explicitly designates medical professionals as the decision-makers in both medical and social contexts. Ensuring that doctors, rather than women, make these social decisions, is a manifestation of the 'doctor knows best' mentality that prevailed in the past and continues to govern abortions today.[32] O'Neill and Sheldon argue that doctors 'are not equipped to make this decision'.[33] As most women described their 'complex lives and social contexts' as reasons for their abortion,[34] it seems inappropriate that this decision would be made by someone who is not involved in women's complex personal lives or environment. This argument holds merit as reports have evidenced the fact that doctors themselves felt that 'women should have the right to determine

27 Sheldon, 'The Decriminalisation of Abortion' (n 4) 345.
28 Montgomery v Lanarkshire Health Board [2015] UKSC 11 2 WLR 768, [81].
29 Luke Sizer and Philip Arnold, 'The Changing Paradigm of the Doctor-patient Relationship: Montgomery v Lanarkshire Health Board and Developments in the 'Duty to Warn'' (2016) 129 N Z Med J 71.
30 Montgomery (n 28), [75].
31 Abortion Act 1967, s 2.
32 Sheldon, 'The Decriminalisation of Abortion' (n 4) 345.
33Jane O'Neill, 'Abortion Games: The Negotiation of Termination Decisions in Post-1967 Britain' (2018) 104 The Journal of the Historical Association 169, 172; Sheldon, 'Who is the Mother to Make the Judgement?' (n 24) 18.
34 Kirkman (n 22) 154.

their own reproductive decisions'.[35] In fact, a 2021 study, in line with research conducted in 2018,[36] confirmed that doctors felt that the two-doctor authorisation in abortion decisions was 'antithetical' to their set of values and negatively affected their medical ability.[37] Both findings indicate that doctors are not equipped to make social and personal decisions for the patient, nor do they feel that it is appropriate to do so. The law in France serves as a favourable approach to abortion, illustrating the antiquated nature of the 1967 Act. In France, abortion 'on request' is permitted and is treated like all other medical procedures, requiring disclosure of risks and medical information; yet doctors do not play a part in the decision-making regarding broader environmental or social factors.[38] This is a credible arrangement, as doctors can continue to act within their medical remit without becoming involved in social and environmental factors which they may be ill-equipped to assess. Therefore, it seems that the shift away from medical paternalism in the twenty-first century no longer supports the apparent over-extension of doctors' authority suggested in the 1967 Act.

Some feel an argument can be made that the complete decriminalisation of abortion is unnecessary due to the aforementioned wide operation of subsection 1(a) in the 1967 Act. For instance, few, if any, women do not satisfy the criteria stated in section 1.[39] However, the foundation of this argument inherently acknowledges that the two-doctor authorisation is only used as a formality, and crucially, a delay to the process.[40] Although the two-doctor signature requirement had intentions to protect women and doctors,[41] it has become clear that it no longer serves this purpose in today's society. This is not to deny that doctors can and have played a useful role in the abortion process. For instance, one doctor's account specified that she helps safeguard her patients and becomes involved in patients' stories.[42]

35 Hannah Pereira, 'The Professional Identity of Doctors who Provide Abortions: A Sociological Investigation' (PhD thesis, University of Kent 2021) 1, 124.
36 Ellie J Lee, Sally Sheldon and Jan Macvarish, 'The 1967 Abortion Act Fifty Years on: Abortion, Medical Authority and the Law Revisited' (2018) 212 Social Science and Medicine 26, 31.
37 Pereira (n 35) 105.
38 Art L2212-1 CSP.
39 Ottley (n 25) 64.
40 Sheldon, 'The Decriminalisation of Abortion' (n 4) 346.
41 Kate Gleeson, 'The Strange Case of the Invisible Woman in Abortion-law Reform' in Jackie Jones and others (eds), Gender, Sexualities and Law (Routledge 2011) 215, 220.
42 Pereira (n 35) 185.

However, the House of Commons Science and Technology Committee's investigation concluded that the two-doctor authorisation 'contributed to delays' and found 'no good evidence that… the requirement for two doctor's signatures serves to safeguard women…. In any meaningful way'.[43] Due to the wide operation of the 1967 Act, evidence brought forward illustrates that the HSA1 form, which contains approval from two doctors, is considered only an administrative process, often signed without any consultation or reading about the patient.[44] Thus, the two-doctor HSA1 process lacks any ability to protect or inform women.

These conclusions have further been supported by Lee et al's research revealing that doctors have found that the 1967 Act slows down the process of procuring an abortion, compromises the service, and creates arbitrary barriers that undermine their medical professionalism.[45] Moreover, given that black women are almost four times more likely to die in childbirth,[46] intersectional feminists argue that any delays to the process can end up unfairly disadvantaging these women. For these reasons, the two-doctor signature requirement, which reflects a particular brand of medical paternalism and has been reduced to only an administrative process, appears to no longer achieve its intention of protecting women and in fact conflicts with the public policy aim of encouraging earlier abortions.

Caulfield attempted to illustrate abortion as 'a major and often risky procedure', opining that decriminalisation would put women in danger without medical regulation.[47] This argument against decriminalisation hinges on the idea that unsafe abortions may take place, which is a legitimate concern. However, it overlooks clinical advancements in safe and effective abortion methods.[48] In fact, it is now riskier to carry a pregnancy to term than to abort the pregnancy.[49] Furthermore, framing

43 Science and Technology Committee, Scientific Developments Relating to the Abortion Act 1967 (HC 2006-07, 12-1) 35.
44 Pereira (n 35) 42.
45 Lee, Sheldon and Macvarish (n 36) 29, 30.
46 Marian Knight and others (eds), 'Saving Lives, Improving Mother's Care' (MBRRACE-UK 2022) 6. < https://www.npeu.ox.ac.uk/assets/downloads/mbrrace-uk/reports/maternal-report-2021/MBRRACE-UK_Maternal_Report_2021_-_FINAL_-_WEB_VERSION.pdf> accessed 1 July 2024.
47 Lowe (n 9) 211.
48 Kinga Jelinska and Susan Yanow, ''Putting Abortion Pills into Women's Hands': Realizing the Full Potential of Medical Abortion' (2018) 97 Contraception 86.
49 Jackson (n 2) 782.

abortion as a harmful procedure to mental health is misleading;[50] while there is prior research suggesting that women may experience feelings of lowered self-esteem after abortions,[51] Biggs and Rocca's 5-year study suggested that there was little association between adverse mental health and abortions.[52] In fact, adverse mental health issues were only apparent when women were denied an abortion.[53] This challenges the notion that abortion cannot be decriminalised due to the high risk to physical and mental health. These findings, when paired with the limited role that doctors actually play in abortion decisions, indicate that criminalisation no longer fulfils any identifiable purpose in today's society.

IV. THE OBSCURITY SURROUNDING FOETAL VIABILITY

Section 1(a) of the 1967 Act, which legalises 98% of abortions,[54] is restricted by a 24-week gestation period. Consequently, the focus in abortion law has been placed on regulating foetal viability.[55] To fully understand viabilities place in the law, the extent to which it is sensitive to an individual foetus is important. The current legal standard for viability, contained in the Infant Life Preservation Act 1929, is 'a child capable of being born alive'.[56] Yet, Brooke J suggested a focus on the 'capacity to breathe'.[57] These constructions are obscure and dependent on factors like survival rates, duration of survival *ex utero,* and the presence of disabilities.[58] C v S has shown that English courts are willing to examine individual evidence regarding foetal viability.[59] Yet, there has been no further clarification as to the duration of life after birth for a foetus to be deemed 'viable'.[60] Therefore, viability-based

50 Lowe (n 9) 211.
51 David M Fergusson, L John Horwood and Elizabeth M Ridder, 'Abortion in Young Women and Subsequent Mental Health' (2006) 47 Journal of Child Psychology and Psychiatry 16, 16.
52 Antonia Biggs and Corinne Rocca, 'Forecasting the Mental Health Harms of Overturning Roe v Wade' [2022] BMJ 1, 1.
53 ibid.
54 Abortion Statistics, England and Wales: 2014 (Department of Health 2015).
55 Elizabeth Romanis, 'Is 'Viability' Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States' (October 2020) 7(1) Journal of Law and Biosciences 1, 12.
56 Infant Life Preservation Act 1929, s 1(1).
57 Rance and Another v Mid-Downs Health Authority and Another [1991] 1 QB 587 (QB) 20-1 (Brooke J).
58 Romanis (n 55) 12.
59 C v S, 1 All ER 1230 (1987).
60 Romanis (n 55) 12.

arguments and their place in the law have been subject to strong criticism by academics.[61] For instance, it is argued that viability is 'nonsensical' because the concept of viability is nothing more than a probability.[62] This argument challenges that viability can exist clearly, or logically, in the law. The report produced by the House of Commons Science and Technology Committee extends upon this, stating that the viability boundary in the law is problematic due to the continuous and variable nature of foetal development based on sex, weight, and access to medicine.[63] Therefore, it concluded that any viability boundary within the law is solely arbitrary.[64] Furthermore, the 24-week gestation period is somewhat contingent on the idea that there will be a spike in late-term abortions in the absence of this restriction.[65] The available abortion rates in Canada, however, appear to contradict this notion.[66] In fact, abortion rates have been declining since the complete repeal of Canadian abortion law and gestation periods.[67] This further calls into question how useful a viability timeline is in practice. Considering these arguments, the translation of foetal viability into a legal boundary may be too obscure to be used as the dividing line between a criminal offence and a legal procedure.

V. STIGMATISING EFFECTS OF THE 1967 ACT

The stigma surrounding abortion and the personal experiences of women are understandably varying and complex. It can be argued that the 1967 Act is both a cause and consequence of stereotypes and stigma surrounding abortion, for instance, Sheldon criticises abortion's place in criminal law as representing the most 'intrusive and punitive of state powers'.[68] Thus, the presence of abortion in the 1861 Act structurally preserves the stigma that abortion is wrong.[69] Admittedly, this argument only applies to people aware of abortion's legal standing.

61 Shai J Lavi, 'Beyond Natural Potentiality: Brain-Death Pregnancy, Viable Fetuses, and Pre-implanted Embryos' (2017) 11(2) Law & Ethics of Human Rights 161, 182; Science and Technology Committee (n 43) 18.
62 Shai J Lavi (n 61) 182.
63 Science and Technology Committee (n 43) 14.
64 ibid.
65 Romanis (n 55) 26.
66 Jeanelle Sabourin and Margaret Burnett, 'A Review of Therapeutic Abortions and Related Areas of Concern in Canada' (2012) 34 Obstet Gynaecol Can 532, 537.
67 ibid 537.
68 ibid.
69 ibid.

Moreover, it has been argued that the fact that women must justify and evidence their need for seeking an abortion is intrusive and degrading.[70] Biggs and Rocca take this criticism further by explaining that these structural stigmas lead to negative mental health repercussions, such as internalised shame and guilt.[71] Stigma can be experienced through harassment, humiliation or condemnation in accessing abortion services.[72] Stigma can also be internalised by incorporating negative perceptions and experiences into their own self.[73] The stigmas associated with abortion range from being inappropriately pregnant to reckless conception to choosing to terminate in order to make up for one's foolishness.[74] This is incredibly damaging as one-third of women in the UK procure an abortion at some point in their lives.[75] However, another problem is that research suggests that decriminalising abortion will not remove the stigma entirely. Researchers found that while abortion 'on request' in Australia did achieve a shift in power from doctors to women, the stigma associated with abortion remained.[76]

While some doctors advocated for the complete integration of abortion services into the National Health Service (NHS) healthcare system in order to address stigmas, others contended that the primary cause of these prejudicial attitudes was the criminality of abortion.[77] On the reverse, one doctor reported that 'most people aren't really worried about the legal thing';[78] instead, it was the individual's personal stance that created a stigma.[79] This finding is consistent with the ongoing stigma surrounding both women and abortion providers in Australia, despite the Abortion Law Reform Act 2008. Either

70 Joan Greenwood, 'The New Ethics of Abortion' (2001) 27 J Med E 2, 3.
71 Biggs and Rocca (n 52) 1.
72 Rebecca Cook 'Stigmatized Meanings of Criminal Abortion Law' in Rebecca Cook, Joanna Erdman and Bernard dickens (eds), Abortion Law in Transnational Perspective (University of Pennsylvania Press 2014) 355.
73 ibid 355.
74 Kirkman (n 22) 152.
75 Imogen Goold, '1 in 3 Women in the UK Will Have an Abortion – So Why Is It So Secret?' (University of Oxford, 12 October 2017) <https://www.law.ox.ac.uk/news/2017-10-12-1-3-women-uk-will-have-abortion-so-why-it-so-secret> accessed 3 May 2024.
76 Louise Keogh, Danielle Newton and others, 'Intended and Unintended Consequences of Abortion Law Reform: Perspectives of Abortion Experts in Victoria, Australia' (2017) 43 Journal of Family Planning and Reproductive Healthcare 18, 22.
77 Pereira (n 35) 210-11.
78 ibid 196.
79 ibid.

way, almost all doctors were 'keen' to remove abortion stigmas and to have abortion procedures properly regulated in line with other areas of medicine.[80] This attitude is to be anticipated, as abortion is a common medical procedure and doctors themselves often feel stigmatised for the role they play. Therefore, it is important that these stigmas of wrongdoing are minimised.

A. VULNERABLE GROUPS

Women who possess an 'intersectional identity' face not just the gendered burdens aforementioned, but also the cultural burdens associated with their intersectional identities.[81] These unique experiences, often overlooked in traditional feminist theory, highlight an additional perspective on the criminalisation of abortion.[82] Although it is important to recognise that women without financial stability can access abortions through the NHS, many migrant women of 'uncertain status' still lack access to the NHS.[83] As such, a 2007 study discovered that some migrant women have inevitably turned to illegitimate abortions.[84] Jackson also argues that the two-doctor regulation disproportionately affects women who struggle with language or travel barriers, suggesting that decriminalisation of abortion could remove these obstacles.[85] However, this must be paired with adequate funding and resources to ensure equal access for these groups. Research has indicated that women who have been disadvantaged due to their socioeconomic status or abuse must also be considered in abortion reform. Individuals who are refused access to abortion services are more likely to remain in contact with violent partners[86] and face financial instability.[87] Clearly, any abortion law reform must consider these

80 ibid 125.
81 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policy' (1989) 1 U Chi Legal F 139, 140.
82 ibid.
83 Gwyneth Lonergan, 'Reproductive Justice and Migrant Women in Great Britain' (2012) 23 Women: A Cultural Review 26, 39.
84 Penny Haslam, 'Illegal Abortions Still Blight UK' (BBC News, 23 November 2007) <http://news.bbc.co.uk/1/hi/health/7108026.stm> accessed 3 May 2024.
85 Emily Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9 S & L S 467, 471.
86 Sarah Roberts, Antonia Biggs and others 'Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion' (2014) 12 BMC Medicine 144, 5.
87 Diana Foster, Antonia Biggs and others 'Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion' (2018) 172 JAMA Paediatrics 1058.

vulnerable groups and intersectional experiences to ensure an appropriate reform. Although this essay does not explore each vulnerability in detail, it is important to recognise their role in informing effective abortion reform.

VI. DECRIMINALISATION AND REFORM

Decriminalisation will not be sufficient without increased financing and access to abortion. Nevertheless, abortion as standard healthcare has pointed to ease of access, improved patient choice, reduced waiting times and thus, reduced gestational age that abortions are currently performed.[88] Moreover, decriminalisation would more accurately represent the modern notion of patient autonomy, whereby a doctor's role is to 'support' a patient in making decisions. In turn, decriminalisation would allow abortion to be treated like most medical procedures and would still require fully informed consent. As decriminalisation does not mean deregulation, this would leave abortion services subject to the complex regulations that govern other healthcare services thus, having no impact on abortion rates.[89] As demonstrated earlier, France's abortion 'on request' policy allows doctors to be involved in the process, as with most procedures.[90] This would allow women to be entitled to healthcare without facing the potential stigmatising effects of being an exception to a rule.[91] This paper does not intend to flesh out the numerous forms that abortion 'on request' might take, depending on time limits or mandatory waiting periods imposed by certain countries. However the central tenet of abortion 'on request' means that 'doctors or healthcare professionals are not required to, attest to, or certify, the existence of a particular reason or justification for the abortion'.[92] Thirty-nine out of the forty-seven European countries have adopted this reform of abortion law.[93] Gestational limits varying between 10-

88 Sally Sheldon, 'A Missed Opportunity To Reform an Outdated Law' (2009) 4 Clinical Ethics 3, 4.
89 Sheldon, 'The Decriminalisation of Abortion' (n 4) 365.
90 Ottley (n 25) 67.
91 Elisabeth Attwood, 'The Rights Gap: How the Law of Abortion in England and Wales Has Deprived Women and Foetuses of Their Inalienable Human Rights' (2014) 5(2) King's Student L Rev 1, 9.
92 Sheldon, 'The Decriminalisation of Abortion' (n 4) 359.
93 'European Abortion Laws; A Comparative Overview' (Center for Reproductive Rights 13 September 2023) https://reproductiverights.org/wp-content/uploads/2020/12/European-abortion-law-a-comparative-review.pdf accessed 1 July 2024.

24 weeks have continued throughout these all reforms.[94] Ultimately, the 1967 Act no longer keeps pace with our modern-day practice. For these reasons, the Royal College of Obstetricians and Gynaecologists, the British Medical Association, and the Royal College of Midwives have backed calls for the decriminalisation of abortion.[95]

CONCLUSION

The points raised throughout this essay support a reform of abortion law resulting in decriminalisation.[96] The development of abortion law in England and Wales, or lack thereof, is expressive of the outdatedness of the law. Further, when broken down, the wording within the 1967 Act can be seen to reflect the context of 1967 and its antiquated notions. When posed against case studies citing practical deviations from any meaningful medical intervention in practice, it becomes clear that abortion law is cumbersome and out of step with the reality of the twenty-first-century abortion process. Specifically, by evaluating the place of viability in the law, it becomes apparent that aspects of abortion law are inherently uncertain. Moreover, personal accounts of medical professionals and women involved in the process demonstrate that abortion law not only prohibits the accessibility of an effective abortion service but imposes an enduring stigma for both parties involved. Finally, by highlighting the voices that are absent from the law, this article affirms that omitting to decriminalise abortion is no longer an option. This article briefly evaluated decriminalisation resulting in abortion becoming part of standard healthcare in England and Wales and the myriad benefits of such decriminalisation.

94 Ibid.
95 The Law and Ethics of Abortion (British Medical Association, 2022); 'Women's Health Leaders Renew Calls for the UK Government To Decriminalise Abortion' (Royal College of Obstetricians & Gynaecologists, 8 August 2022) <www.rcog.org.uk/news/women-s-health-leaders-renew-calls-for-the-uk-government-to-decriminalise-abortion/> accessed 1 July 2024: Position Statement Abortion (Royal College of Midwives, 2022).
96 Sheldon, 'The Decriminalisation of Abortion' (n 4) 336.

Protecting Democratic Institutions from the Dangers of Social Media: A Comparative Legal Analysis

Courtney Jones

ABSTRACT

This article will focus mainly on polarisation and radicalisation resulting from social media use. It will then connect this to the undermining of democracy in Western societies, with a particular focus on the United States (US) and European Union (EU). Finally, this article will provide a comparative analysis of current regulatory frameworks in these two jurisdictions in order to propose potential regulatory solutions while considering how to balance regulation with human rights, especially freedom of expression. While social media may not be entirely responsible for political polarisation and radicalisation, it has significantly contributed to these phenomena through the rapid spread of misinformation and hate speech that can be prevalent on online social platforms. While the European Union has stronger protections against online harms caused by social media than the United States, stronger regulation is still needed to protect liberal democracy. Any regulation of social media platforms must be compliant with applicable human rights laws. Upon comparing the laws of the European and United States, a global, harmonised approach to regulating social media will be proposed that will suggest implementing requirements for the function of algorithmic recommender systems as the best approach to protect democracy.

INTRODUCTION

In 'Anti-Social Media', Siva Vaidhyanathan writes that 'If you wanted to build a machine that would distribute propaganda to millions of people, distract them from important issues, energise hatred and bigotry, erode social trust, undermine journalism, foster doubts about science, and engage in massive surveillance all at once, you would make something a lot like Facebook'.[1]

1 Siva Vaidhyanathan, Anti-Social Media: How Facebook Disconnects Us And Undermines Democracy (OUP 2018) 19.

This quote highlights issues regarding the harms that result from the proliferation of social media. The focus of this article will be on the polarisation and radicalisation resulting from widespread social media use, connect social media to the undermining of democracy in Western societies, particularly the United States (US) and European Union (EU), and compare current regulatory frameworks in the two jurisdictions to propose potential new regulatory solutions while considering how to balance increased regulation with human rights, especially freedom of expression.

First, the article will consider how social media contributes to polarisation and radicalisation and poses a threat to democracy. The social media platforms considered will include Facebook, Instagram, YouTube, TikTok and X (formerly Twitter), given they are the largest or fastest growing social media platforms.[2] As Facebook is the most widely used social media company in the world,[3] it will be the most discussed social media platform in this article. YouTube, Instagram and TikTok are included due to their popularity among younger users,[4] and X because of its introduction then removal of fake news.[5] Research on social media and democracy will adopt an interdisciplinary approach and will include research from politics and psychology. Political cultures in the EU and US will be considered for analysis and will highlight the need for harmonised global regulation. The psychology of polarisation and radicalisation (particularly confirmation bias, motivated cognition and information processing)[6] is an important consideration given that those who use social media platforms to harm democracy rely

2 Stacy Dixon, 'Most popular social media platforms in the United Kingdom (UK) as of the third quarter of 2022, by usage reach' (Statista, 12 September 2023) <https://www.statista.com/statistics/284506/united-kingdom-social-network-penetration/> accessed 06 March 2024; Shelley Walsh, 'The Top 10 Social Media Sites & Platforms' (Search Engine Journal, 4 July 2024) <https://www.searchenginejournal.com/social-media/social-media-platforms/> accessed 9 July 2024.
3 ibid.
4 Monica Anderson, Michelle Faverio and Jeffrey Gottfried, 'Teens, Social Media and Technology 2023' (Pew Research Center, 11 December 2023) < https://www.pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/> accessed 10 July 2024.
5 Karuna Sharma, 'As Twitter introduces steps to combat fake news, it has added 14 million monetizable Daily Active Users since the last quarter' (Business Insider India, 16 May 2020) <https://www.businessinsider.in/advertising/ad-tech/article/twitter-introduces-steps-to-combat-fake-news/articleshow/75742936.cms> accessed 29 July 2022; Amanda Silberling, Cody Corrall and Alyssa Stringer, 'Elon Musk's X: A complete timeline of what Twitter has become' (TechCrunch, 5 June 2024) < https://techcrunch.com/2024/06/05/elon-musk-twitter-everything-you-need-to-know/> accessed 10 July 2024.
6 Rebecca K Helm and Hitoshi Nasu, 'Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation' (2021) 21 Human Rights Law Review 302, 305.

on psychological manipulation embedded within these platforms.[7] These psychological processes play a role in polarisation and radicalisation of social media users and are influenced by the platforms' use of content recommender algorithms. As Rochefort has observed, social media 'platforms are in the midst of a legal and social reckoning'.[8] Governments and citizens are becoming increasingly aware of online content manipulation, and pressure is mounting on social media platforms to do something about it. This 'reckoning' has led to current academic analysis of how users of social media platforms can be better protected from misinformation (information designed to mislead users by looking like… traditional media')[9] and fake news which lead to polarisation, radicalisation and which threaten both American and European democracies. The European Parliament has previously identified five key areas of concern – surveillance, personalised content, false information, censorship and manipulation.[10] The following discussions on regulating social media will consider how regulation must curb each of these concerns and how doing so will protect democracy. These proposed regulations must be balanced with human rights considerations.

In analysing regulatory needs arising from 'algorithmically dictated content', some key terms need defining. First, Russo defines polarisation as 'the distance of political positions among citizens and elites on public policies, and relevant political issues'.[11] Greater polarisation therefore indicates a greater difference between citizens' political positions. Russo goes on to then define radicalisation as 'when deep political polarisation and risks of violence converge'.[12] Therefore, radicalisation exists where polarisation has greater propensity to lead to violence.

7 Siva Vaidhyanathan, Anti-Social Media: How Facebook Disconnects Us And Undermines Democracy (OUP 2018) 160.
8 Alex Rochefort, 'Regulating Social Media Platforms: A Comparative Policy Analysis' (2020) 25 Comm L & Pol'y 225, 228.
9 Amélie Heldt, 'Let's Meet Halfway: Sharing New Responsibilities in a Digital Age' (2019) 9 Journal of Information Policy 336, 343.
10 Costica Dumbrava, 'Key social media risks to democracy: Risks from surveillance, personalisation, disinformation, moderation and microtargeting' (2021) European Parliamentary Research Service PE 698.845 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/698845/EPRS_IDA(2021)698845_EN.pdf> accessed 10 July 2024.
11 Juan Russo, 'Polarisation, Radicalisation, and Populism: Definitions and Hypotheses' (2021) 48 IAPSS Journal of Political Science 7, 9.
12 ibid.

Algorithmically dictated content will refer to content recommended by algorithms. This is similar to an algorithmic ranking system, defined by the US Filter Bubble Transparency Act as 'a computational process…used to determine the order or manner that a set of information is provided to a user on a covered internet platform'.[13] Therefore, algorithmically dictated content is that which has been selected by the algorithmic recommender system.

Finally, filter bubbles and echo chambers are worth defining. Helm and Nasu define filter bubbles as being 'where unseen algorithms select information likely to be preferred by the user'.[14] This process is accomplished with the use of algorithmic recommender systems. Further, they define echo chambers as 'where people consume information from like-minded voices they have chosen'.[15] The difference, then, is that filter bubbles are created by algorithmic recommender systems whereas echo chambers are created by virtue of who a social media user chooses to follow. This is confirmed by Zuiderveen and others, who refer to echo chambers as 'self-selected personalisation' and filter bubbles as 'pre-selected personalisation'.[16] Echo chambers are rooted in confirmation bias, where people seek information which supports their worldview and dismiss information which might challenge them.[17]

The 'incorporeal and borderless nature' of social media has undermined the power of lawmakers,[18] placing regulatory power in the hands of social media companies, creating pseudo-administrative bodies.[19] Stronger global regulation is needed to reduce the power of these platforms given their propensity to cause harm. The ideal solution is that of a global agreement for the regulation of social media platforms, to be rooted in international law and state-platform cooperation. This body would be responsible for monitoring and ensuring compliance with new regulatory frameworks.

13 Filter Bubble Transparency Act, S 2024, 117th Congress (2021) <https://www.congress.gov/bill/117th-congress/senate-bill/2024/text> (US).
14 Helm and Nasu (n 6) 325.
15 ibid.
16 Zuiderveen Borgesius and others, 'Should we worry about filter bubbles?' (2016) 5(1) Internet Policy Review <https://policyreview.info/articles/analysis/should-we-worry-about-filter-bubbles> accessed 10 July 2024.
17 Helm and Nasu (n 6) 4.
18 Andrew Murray, Information Technology Law (4th edn, OUP 2019) 55.
19 Heldt (n 9) 338.

I. SOCIAL MEDIA'S CONTRIBUTION TO POLARISATION, RADICALISATION AND HARMING DEMOCRACY

Polarisation and radicalisation are intertwined, in that radicalisation is polarisation with risk of violence.[20] The impact algorithmically dictated content has had on radicalisation has drawn global attention by academics and governments alike. The issue has been summarised by the Online Harms White Paper:

social media platforms use algorithms which can lead to 'echo chambers' or 'filter bubbles… [which] can promote disinformation by ensuring that users are not exposed to rebuttals… and can also mean that users perceive a story to be far more widely believed than it is.[21]

Further, the European Parliamentary Research Service (EPRS) outlined the concern that 'personalised information increases the fragmentation (or polarisation) and *radicalisation* of public opinion' (emphasis added).[22] While this 'convergence' of social media content may explain the prevalence of misinformation, it does not sufficiently explain increased radicalisation as a result. This may happen through the amplification of 'extremist content at the expense of more moderate voices'.[23] Although amplification of extremist content was only found on YouTube in this study, such amplification exists on other platforms, particularly TikTok and Instagram.[24] A Wall Street Journal podcast suggests that teen girls who seek nutrition and fitness content are advertised accounts promoting disordered eating.[25] Moreover, Bavel et al reviewed studies and found that 'Deactivating Facebook reduced issue (i.e.,

20 Russo (n 11).
21 Department for Digital, Culture, Media & Sport and Home Office, Online Harms White Paper (White Paper, Cm 57, 2019) para 4.
22 Dumbrava (n 10).
23 Joe Whittaker and others, 'Recommender systems and the amplification of extremist content' (2021) 10(2) Internet Policy Review <https://policyreview.info/articles/analysis/recommender-systems-and-amplification-extremist-content> accessed 10 July 2024.
24 Georgia Wells, Jeff Horwitz and Deepa Seetharaman, 'Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show' Wall Street Journal (14 September 2021) <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739> accessed 10 July 2024; Zoe Thomas, 'The TikTok Spiral, Part 1: Descent' Wall Street Journal Tech News Briefing Podcast (27 December 2021) <https://www.wsj.com/podcasts/tech-news-briefing/the-tiktok-spiral-part-1-descent/90b0fef4-d48d-426d-854f-cab1b1f7afd0> accessed 10 July 2024.
25 ibid.

policy preferences) polarization and marginally reduced affective (i.e., feelings about the other party) polarization'.[26] However, they also found that content convergence may not be the only source of political polarisation on social media. US Republicans made to follow Twitter bots which retweeted views they opposed became increasingly polarised.[27] This opposes the echo chamber-filter bubble narrative, suggesting that viewing content one disagrees with can actually reinforce preexisting beliefs. Therefore, it is possible that regulating algorithmic recommender systems may actually have little impact on political polarisation.

Indeed, some suggest the prevalence and impact of echo chambers on social media platforms is overstated.[28] Stark and Stegmann note that 'To create echo chambers, users must be involved online in very homogenous networks, in which all members share their opinions' but that social media platforms 'are particularly suited to maintaining volatile or sporadic contacts with friends from various contexts'.[29] However, this fails to recognise the reaction-based design of social media algorithms which often rely on generating strong emotions within users to boost engagement, and therefore maintain attention to the social media platform. Requiring social media platforms to offer chronological timelines by default, discussed in more detail below, could mitigate some of these harms.

A. SOCIAL MEDIA'S IMPACT ON DEMOCRACY

In 2016, the Trump campaign used social media micro-targeting which ultimately led to his presidency.[30] This highlights how online phenomena like filter bubbles, echo chambers and

26 Jay J. Van Bavel and others, 'How social media shapes polarization' (2021) 25(11) Trends in Cognitive Sciences 913, 913.
27 ibid.
28 Birgit Stark and Daniel Stegmann, 'Are Algorithms a Threat to Democracy? The Rise of Intermediaries: A Challenge for Public Discourse' (2020) Algorithm Watch <https://algorithmwatch.org/en/wp-content/uploads/2020/05/Governing-Platforms-communications-study-Stark-May-2020-AlgorithmWatch.pdf> accessed 11 July 2024.
29 ibid.
30 Paul Lewis and Paul Hilder, 'Leaked: Cambridge Analytica's blueprint for Trump victory' (The Guardian, 23 March 2018) <https://www.theguardian.com/uk-news/2018/mar/23/leaked-cambridge-analyticas-blueprint-for-trump-victory> accessed 11 July 2024.

misinformation can lead to offline problems including violence[31] and changes in electoral outcomes.[32] This is perhaps best exemplified by the 2021 Capitol Riots, where the New York Times noted that the rioters' 'online activism became real-world violence'.[33]

Additionally, '[t]he increasing importance of social media as a source of news and information… make it crucial for us to understand its role in the UK's EU Referendum'.[34] Allen noted that '26% of people used social networks to share and receive information about the referendum in the run-up to polling day'.[35] Social media therefore likely had an impact on voters' exposure to dissenting arguments,[36] and may have impacted the outcome.

B. POLARISATION RESULTING FROM LACK OF DATA PROTECTION

Online polarisation may be a result of inadequate data protection, particularly in the US where, at the time of writing, no federal statute exists to protect consumer data. Social media platforms are therefore able to collect user data to target them with personalised content, which can then lead to polarisation. Although some argue that the negative impacts of social media are overstated,[37] they nonetheless acknowledge at least some impact, whether through 'affective polarization' or 'facilitating a distorted picture' of issues.[38] The data mining employed by social media platforms has been termed surveillance capitalism.[39] Social media platforms essentially accept users' personal data as payment for services. This allows platforms to micro-target users with personalised content, thereby enhancing filter bubble

31 Georgia F. Hollewell and Nicholas Longpré, 'Radicalization in the Social Media Era: Understanding the Relationship between Self-Radicalization and the Internet' (2022) 66(8) International Journal of Offender Therapy and Comparative Criminology 896.
32 Adasa Nkrumah Kofi Frimpong and others, 'The Impact of Social Media Political Activists on Voting Patterns' (2022) 44(2) Political Behavior 599.
33 Sheera Frenkel, 'The storming of Capitol Hill was organized on social media' The New York Times (6 January 2021) <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html> accessed 11 July 2024.
34 Max Hänska and Stefan Bauchowitz, 'Tweeting for Brexit: how social media influenced the referendum' in John Mair and others (eds), Brexit, Trump and the Media (Abramis Academic Publishing 2017) 27.
35 Katherine Allen, 'The Social Media Echo Chamber in the Post-Factual Age' The Tilt (15 December 2019) <https://www.thetilt.com/content/social-media-echo-chamber> accessed 11 July 2024.
36 ibid.
37 Stark and Stegmann [n 28].
38 ibid.
39 Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' (2015) 30(1) Journal of Information Technology 75, 76.

and echo chamber effects, and resulting in heightened online polarisation. These issues may be more prevalent in the US given its market-based approached to data protection.[40] The consequences of this can be political. If data can be mined to target individuals with sales advertisements, then it can be mined to target with political advertisements and modify political behaviour,[41] or engage in political violence.[42]

40 Paul M Schwartz and Daniel J Solove, 'Reconciling Personal Information in the United States and European Union' (2014) 102 Calif L Rev 877, 902.
41 Stark and Stegman [n 28].
42 Dumbrava [n 10].

C. SOCIAL MEDIA'S IMPACT ON MISINFORMATION

Helm and Nasu indicate that certain psychological biases impact how credible a reader perceives sources of information.[43] If something is published that aligns with the reader's worldview, they are more likely to view that source as credible. When viewed as more credible, a user is more likely to share this post with their network to spread their point of view. If other users deem the sharer to be credible, they may also view the post's information as credible and share it, and so the misinformation pandemic spreads.[44] However, research has shown that these effects can be mitigated by labelling unreliable or fake news sources.[45] When a social media platform flags something as false, users typically trust the flag, even when the source is reliable.[46] Therefore, a carefully constructed method of flagging is one way to mitigate the harmful effects of social media. Indeed, this approach has been adopted by Instagram.[47] However, problems continue to persist in this approach, including content being reported that is deemed not to be misinformation,[48] and transparency in how fact-checkers decide to label flagged content.

Frimpong and others highlighted that social media use correlated positively with political participation.[49] They highlight a study US study which showed that social media 'acts to strongly reinforce the views of people who are already interested in politics and that such people are more likely

43 Rebecca K Helm & Hitoshi Nasu, 'Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation' (2021) 21 Human Rights Law Review 302.

44 Amber Hinsley and others, 'Credibility in the time of COVID-19: Cues that audiences look for when assessing information on social media and building confidence in identifying 'fake news' about the virus' (2022) 6(1) Open Information Science 61.

45 Dongfang Gaozhao, 'Flagging fake news on social media: An experimental study of media consumers' identification of fake news' (2021) 38(3) Government Information Quarterly <https://www-sciencedirect-com.uoelibrary.idm.oclc.org/science/article/pii/S0740624X21000277?via%3Dihub> accessed 1 August 2024.

46 Ibid.

47 'Why posts on Instagram may be marked as false information' (Instagram, 2024) < https://help.instagram.com/388534952086572> accessed 21 July 2024.

48 Shayan Sardarizadeh, 'Instagram fact-check: Can a new flagging tool stop fake news?' (BBC, 13 September 2019) <https://www.bbc.com/news/blogs-trending-49449005> accessed 21 July 2024.

49 Frimpong and others (n 32) 603.

to turn out to vote'.[50] This supports the hypothesis that social media affects democracy, particularly election outcomes.

Although social media can be positive for democracy, particularly in authoritarian countries,[51] there is concern that online misinformation can lead to growing mistrust in governments and traditional institutions, like public health officials,[52] even elections themselves.[53] Consider the 2021 Capitol riots: many rioters believed online conspiracy theories that the presidential election had been stolen by Biden.[54] Other conspiracy theories spread through social media, including that vaccines were being used to implant chips in people's bodies.[55] Although these conspiracy theories are false, the spread of misinformation on social media convinced people that they were, or could be, true.[56]

Social media may also impact political debate. Jones notes that 'the manipulation of political debate presents a large and expanding threat to democracy' and the existing checks and balances currently implemented are insufficient 'against technologies which are constantly developing, often covert, and have generally been implemented without regard to… democratic interest'.[57] This was made clear by Facebook's whistle-blower, Frances Haugen.[58] NBC News stated that documents obtained from

50 ibid.
51 Helen Margetts, 'Rethinking Democracy with Social Media' (2019) 90 Political Quarterly 107.
52 Alex Migdal, 'How the spread of COVID-19 misinformation is undermining trust in public health' CBC (28 April 2021) <https://www.cbc.ca/news/canada/british-columbia/covid-misinformation-trust-public-health-1.6001767> accessed 18 July 2024.
53 Greg Miller, 'As U.S. election nears, researchers are following the trail of fake news' Science (26 October 2020) <https://www.science.org/content/article/us-election-nears-researchers-are-following-trail-fake-news> accessed 18 July 2024.
54 Shannon Bond and Bobby Allyn, 'How the 'Stop the Steal' movement outwitted Facebook ahead of the Jan. 6 insurrection' NPR (22 October 2021) <https://www.npr.org/2021/10/22/1048543513/facebook-groups-jan-6-insurrection> accessed 18 July 2024.

55 Erin Black and Katie Schoolov, 'Why the Covid vaccines can't contain a tracking microchip or make you magnetic' CNBC (1 October 2021) <https://www.cnbc.com/video/2021/10/01/why-theres-no-5g-tracking-microchip-in-the-covid-vaccine.html> accessed 18 July 2024.

56 ibid.
57 Kate Jones, 'Protecting political discourse from online manipulation: the international human rights law framework' (2021) 1 European Human Rights Law Review 68, 68.

58 David Ingram and others, 'The Facebook Papers: Documents reveal internal fury and dissent over site's policies' NBC News (25 October 2021) <https://www.nbcnews.com/tech/tech-news/facebook-whistleblower-documents-detail-deep-look-facebook-rcna3580> accessed 18 July 2024.

Facebook showed that employees had concerns about Facebook's lack of response to polarisation, misinformation and calls for violence.[59]

However, social media's relationship with democracy is not entirely bad. As noted by Frimpong and others, there are benefits to social media, particularly in authoritarian countries.[60] Social media decreases 'information asymmetry by improving voters' information access across platforms with different media' and has 'encouraged the development of civic engagement'.[61] This is beneficial where political dissidents have traditionally been silenced. It seems, however, that harms caused by social media could outweigh the benefits.[62]

II. SOCIAL MEDIA PLATFORMS AS ADMINISTRATIVE BODIES

The rapid growth of social media platforms over approximately the last two decades has resulted in platforms developing what strongly resembles administrative bodies.[63] The number of users on an individual platform is often outweighs the population of individual countries.[64] The establishment of administrative bodies by social media platforms raises questions about the democratic legitimacy of these administrative-like bodies, especially given that platforms have become modern equivalents to the public square.[65] In traditional democracies, eligible voters have the power to indirectly influence the laws and policy by voting for decision-makers, and sometimes through referendums. Moreover, legislation in some jurisdictions may be challenged in court. However, social media platforms provide only two options: follow the platform's rules or be removed. Users have no opportunity to input on rules or decide who makes them. At a time when public discourse overwhelmingly takes place on social media, legitimacy of the platforms' administrative bodies must be considered. Heldt notes that

59 ibid.
60 Frimpong and others (n 32) 600.
61 ibid.
62 Helm and Nasu (n 43).

63 Stark and Stegman (n 28).
64 Stacy Dixon, 'Most popular social networks worldwide as of January 2022, ranked by number of monthly active users' (Statista, January 2022) <https://www.statista.com/statistics/284506/united-kingdom-social-network-penetration/> accessed 6 March 2024.
65 Heldt (n 9)

administrative measures used by social media platforms 'are increasingly similar to the instruments used by the state and to principles enshrined in administrative law'.[66] However, these platforms are doing so without input from the users impacted by these decisions.

It Is worth noting that the Facebook Oversight Board ('FOB') resembles a Supreme Court. It reviews only cases of significance, and its decisions set precedents.[67] Complaints may be brought to the FOB either by Facebook or by user appeals, though not every appeal will be considered. This is similar to a Supreme Court which only exams questions of law of public significance, and whose decisions create binding precedents.[68]

Heldt criticises the delegation of the decision to remove unlawful content to the platform as a 'privatization of the judiciary'.[69] She criticises the decision-making power of private companies in deciding which content is permissible and which should be removed. Content moderators are therefore like tribunals – they make decisions on acceptable speech and can decide whether an individual user who breached the rules will be sanctioned. Users can appeal content removals and may have the post reinstated, although appealing content allowed to remain is not possible.[70] As noted by Heldt, 'By delegating this task [of deciding permissibility of user-generated content] to social media platforms, the State has factually given the responsibility to decide upon the lawfulness of content to the reviewers in charge of content moderation'.[71] This creates issues as users seek content removal for unlawful content.

While increasing democratic legitimacy is a good thing, there are practical difficulties in doing so for larger social media platforms, including who makes decisions and how. If social media platforms are

66 ibid 338.
67 Brent Harris, 'Global Feedback and Input on the Facebook Oversight Board for Content Decisions' (Meta, 27 June 2019) <https://about.fb.com/news/2019/06/global-feedback-on-oversight-board/> accessed 18 July 2024.
68 Our Government: The Judicial Branch' (The White House, 2024) <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/> accessed 18 July 2024.
69 Heldt (n 9) 342.
70 'How do I appeal Facebook's content decision to the Oversight Board?' (Facebook, 2024) <https://www.facebook.com/help/346366453115924> accessed 21 July 2024; 'Our range of enforcement options' (X, 2024) <https://help.x.com/en/rules-and-policies/enforcement-options> accessed 21 July 2024.
71 Heldt (n 9) 342.

becoming increasingly state-like and eventually implement elections, confirming user identity would create further complications. Requiring such identification could violate data protection laws, and rules on platform elections would need creation. This leads to another critically important question – in effecting these changes to social media platforms – do social media platforms *become* digital states? Further research in this area will be beneficial.

Rules restricting freedom of expression for users must be implemented in accordance with the rule of law. Such restrictions must be both necessary and proportional, and any sanctions must be proportional to the offence. When social media platforms decide rules for which content is lawful, a 'one-size fits all' approach may be inappropriate. Content moderators and policy drafters will struggle to avoid over- or under-restricting content unless a cohesive approach is adopted across social media platforms and jurisdictions. In adopting this approach to moderation, transparency and cultural competency are key. Such harmonisation is desirable, allowing users across platforms to understand the rules. Moderators with cultural and basic legal competency would allow appropriate decision-making.

III. A COMPARISON OF CURRENT LAW

A. LAWS REGULATING SOCIAL MEDIA IN THE UNITED STATES

Understanding laws on freedom of expression is important given the focus on content and regulation. Freedom of speech is protected differently in the US and EU. In the US, freedom of speech is protected by the First Amendment of the Constitution which states that 'Congress shall make no law… abridging the freedom of speech'.[72] This is subject to a strict set of limitations including 'fighting words', defamation and obscenity.[73] There is no specified limitation on hate speech.[74] 'Fighting words' were defined as 'personally abusive epithets which… are… inherently likely to provoke violent reaction'.[75] Therefore, regulating content would presumably be unconstitutional in the US given the nearly

72 US Const amend I.
73 R.A.V. v City of St. Paul 505 US 377 (1992).
74 Matal v Tam 137 SCt 1744 (2017).
75 Virginia v Black 583 US 343 (2003).

absolute right to freedom of speech. It was also held that 'strict scrutiny for a First Amendment violation is applicable, if it [the regulation] targets speech based on its communicative content'.[76] Accordingly, unless the content falls within one of the listed limitations to the First Amendment, it cannot be restricted based on the message it expresses. This provides context to section 230 of the Communications Decency Act 1996 ('the 1996 Act') which stipulates that 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.[77] It is therefore not possible to hold platforms liable in the US for hateful content by their users. As many influential social media companies are based there, this presents a layer of complexity when battling online hate speech and misinformation. It is possible for each state to proscribe speech that would incite violence without the law being struck down for unconstitutionality.[78] Consequently, there are scenarios where hate speech *could* be sanctioned if it could be proved before the courts that the speech would or did incite violence.

B. LAWS REGULATING SOCIAL MEDIA IN THE EUROPEAN UNION

In the EU, freedom of expression is protected for signatories to the European Convention on Human Rights ('ECHR') under article 10.[79] While speech is not expressly mentioned, expression inherently includes the right to free speech.[80] However, freedom of expression in ECHR jurisdictions can be restricted where it is 'prescribed by law and necessary in a democratic society'.[81] This allows for wider restrictions on speech and expression than that permitted by the US. The right to freedom of expression is accordingly more absolute in the US than in ECHR jurisdictions. ECHR signatories can therefore legislate restrictions on hate speech, defined as 'all forms of expression that spread, incite, promote,

76 City of Austin, Texas v Reagan National Advertising of Austin, LLC 142 SCt 1464 (2022).
77 Communications Decency Act 1996 47 USC § 230.
78 Bible Believers v Wane County 805 F3d 228 (US) (2015).
79 Article 10 European Convention on Human Rights.
80 Council of Europe, 'Guide on Article 10 of the European Convention on Human Rights: Freedom of expression' (Guide) (2022) < https://rm.coe.int/guide-on-article-10-freedom-of-expression-eng/native/1680ad61d6> accessed 21 July 2024.
81 Article 10(2) European Convention on Human Rights.

or justify… forms of hatred based on intolerance',[82] which would be deemed unconstitutional in the US.[83]

C. COMPARING THE EUROPEAN AND AMERICAN APPROACHES

Section 230(a)(5) of the 1996 Act recognises that Americans are increasingly 'relying on interactive media for a variety of political, educational, cultural and entertainment services'.[84] The 1996 Act goes on to state the policy of the US as preserving 'the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation'.[85] It is therefore evident that the US takes a free-market approach to SM, as opposed to the human rights-based approach adopted by ECHR jurisdictions. In section 230(b)(2), the CDA highlights that platforms will not be held liable for the *removal* of or restriction of access to certain content, whether that material is protected by the US Constitution or not.[86] The US will therefore not hold platforms accountable for rules they impose in self-governance. This is a more *laissez-faire* approach to content moderation than that which is desired by ECHR jurisdictions. This ability to self-moderate has an obvious business purpose: users may be more inclined to choose platforms with their preferred content permissions. This platform selection could contribute to echo chambers. This contribution to echo chambers could be harmful to democracies by preventing the exposure to contrasting views.

Section 230 of the 1996 Act restricts liability of platforms for transmitting user-generated content.[87] This has been upheld by case law where Facebook was held not to have developed or be liable for content shared by a terrorist group.[88] This is surprising given the US' anti-terrorist political culture. However, it is understandable when considering the business-centred approach to social media and

82 'Hate Speech' (European Court of Human Rights, 2023) <https://www.echr.coe.int/documents/d/echr/FS_Hate_speech_ENG> accessed 21 July 2024.
83 Communications Decency Act 1996 47 USC § 230.
84 ibid.
85 Ibid.
86 ibid.
87 Valerie C Brannon and Eric N Holmes, 'Section 230: An Overview' (R46751, 4 January 2024) US Congressional Research Service <https://crsreports.congress.gov/product/pdf/R/R46751> accessed 21 July 2024.
88 Force v Facebook 934 F3d 53 (US) (2019).

hesitance to hold platforms liable. In this case, the plaintiffs submitted that Facebook provided a platform which enabled terrorist attacks. Katzmann J states in his judgment that 'it strains the English language to say that in targeting and recommending…writings to users… Facebook is acting as 'the *publisher* of … information provided by another information content provider."'.[89] The 1996 Act along with this judgment highlights the US' hesitancy to hold platforms liable for content posted by users, or even for their algorithmic recommender systems. Comparatively, the EU's Regulation on promoting fairness and transparency for business users of online intermediation services recognises that 'providers of services often have superior bargaining power, which enables them to… behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of… consumers'.[90] This divergence may be closing. Many jurisdictions are passing laws to mitigate the impacts of social media.[91] For example, France passed the *Proposition de Loi relative à la lutte contre la manipulation de l'information*,[92] and Germany amended its Network Enforcement Act to 'better fight online hate speech'.[93] These laws impose transparency requirements during election periods and provide the ability to sue platforms to have fake news, defined as 'false stories that appear to be news',[94] removed.

The French law on press freedom implements three criteria. To order the removal of fake news, it must be disseminated deliberately on a large scale, be manifest, and either lead to a disturbance of the peace or compromise the outcome of an election.[95] Additionally, Ghosh suggests that change is likely on the horizon to this *laissez-faire* attitude in the US, particularly given how conspiracy theories which

89 934 F3d 53 (US) p 3 (emphasis in original).
90 Council Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.
91 Thorin Klosowski, 'The State of Consumer Data Privacy Laws in the US (And Why It Matters)' The New York Times (6 September 2021) <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/> accessed 21 July 2024.
92 Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation d'information.

93 'Germany: Network Enforcement Act Amended to Better Fight Online Hate Speech' (2022) Library of Congress <https://www.loc.gov/item/global-legal-monitor/2021-07-06/germany-network-enforcement-act-amended-to-better-fight-online-hate-speech/> accessed 21 July 2024.

94 'fake news', Cambridge Dictionary (2024) <https://dictionary.cambridge.org/dictionary/english/fake-news> accessed 21 July 2024.
95 Loi n° 2018-1202 (n 98).

proliferated on social media led to the insurrection of the US Capitol.[96] Recognition of the dangers posed by an unregulated digital communication environment may lead to the adoption of a European approach to social media regulation in the US. Texas attempted to enact a law that would prevent social media companies from 'censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person…'[97] However, this law was blocked by the Supreme Court through an injunction while its enforceability was decided.[98] The US Supreme Court has since remanded the issue back to state courts stating that the parties had not considered the full scope of the law they were challenging, and provided guidance to the lower courts suggesting that lower courts must 'evaluate the full scope of the law's coverage… then decide which of the law's applications are constitutionally permissible and which are not'.[99]

IV. REGULATORY OPTIONS FOR SOCIAL MEDIA PLATFORMS

Principles-based regulation has been proposed to regulate social media, defined as relying 'upon substantive standards or objectives imposed on industry stakeholders to achieve legislative purposes' and imposing 'a general standard for conduct',[100] exemplified by the French law described *supra*. However, leaving it to regulators to decide which conduct should be sanctioned is problematic, particularly if the goal is to harmonise platform requirements across jurisdictions. This approach will likely result in certain conduct being sanctioned in one jurisdiction and not another and could depend on the different political cultures. A better approach would be to adopt a rules-based regulation, which relies 'upon detailed, prescriptive requirements, specifying in advance what specific actions will be

96 Dipayan Ghosh, 'Are We Entering a New Era of Social Media Regulation?' Harvard Business Review (14 January 2021) <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation> accessed 21 July 2024.
97 SB 5, 2021 Leg Sess 87(2) (Tex 2021) <https://legiscan.com/TX/text/SB5/id/2424632>.
98 Netchoice v Paxton 27 F4th 119 (US); Lauren Feiner, 'Supreme Court blocks Texas social media law that tech companies warned would allow hateful content to run rampant' CNBC (31 May 2022) <https://www.cnbc.com/2022/05/31/supreme-court-blocks-texas-social-media-law-tech-companies-warned-would-allow-hateful-content-to-run-rampant.html> accessed 21 July 2024.
99 Moody v Netchoice, LLC 603 US ____ (2024) p 30.

100 Pieter Nooren and others, 'Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options' (2018) Policy & Internet 10(3) 264, 282.

penalized'.[101] This approach would provide more certainty to platforms and users as to which conduct will be proscribed. However, this method also presents issues. As technology and user behaviour rapidly develops, new forms of sanctionable conduct not covered by present legislation might arise. This could be resolved by imposing strict requirements on platforms to eliminate certain content (e.g., fake news) and increasing transparency of targeting strategies.

Rochefort highlights four criteria for evaluating any new policy attempting to regulate social media: effectiveness, administrative difficulty, cost, and political acceptability.[102] He further mentions that there will be resistance to any attempts to restrict communications because of potential implications for freedom of expression.[103] However, the two jurisdictions examined in this article have already implemented laws protecting freedom of expression, and reforming social media in a way compatible with this will not unduly restrict citizens' expression.

A. FORMAL VS SUBSTANTIVE CONTENT REGULATION

Heldt has stated that 'regulation is defined as a 'rule or directive made and maintained by an authority', hence subject to constitutional proviso and bound to the principles of necessity and proportionality'.[104] This subsection will examine formal vs substantive regulation of content and suggest the preferable method.

Although opposers to substantive regulation argue that the state should not have the ability to decide which information is accurate, certainly a valid argument, the citizens of many countries rely on their government institutions for reliable information (e.g., the Centre for Disease Control). There are ways to alleviate concerns about the politicisation of information when allowing government institutions to regulate content. First, the decision on what is truth should arguably not be made by elected officials or groups. Truth should not depend on the current election cycle. Responsibilities for producing fact-

101 ibid.
102 Alex Rochefort, 'Regulating social media platforms: a comparative policy analysis' (2020) 25 Comm L & Pol'y 225, 233.
103 ibid.
104 Heldt (n 9) 337.

checking guidelines for social media platforms should lie with an institution independent of any parliamentary body and should be made up of reputable journalists and relevant experts. Alternatively, news outlets sharing content on social media could be required to apply for approval from an independent journalism standards board to be considered a source of news by the platform, and once approved will be labelled as such. Creating this distinction between reliable news media and pages created by those not bound by journalistic standards will allow platform users to more easily distinguish between information which may be relied upon and that which may not. Appointees of this independent regulatory body could provide training to employees of social media platforms and produce guideline materials on flagging content, detecting fake news, and censoring hateful content. The European Parliament has suggested that 'deleting and labelling content can be counterproductive, as it may reinforce perceptions about unfair and unjustified censorship of particular views and groups'.[105] However, this issue of perception can be avoided by not labelling based on content but on registration requirements and whether the source itself meets a set of pre-determined standards.

Barrie Sanders argues that any regulatory framework for content removal on social media 'should clearly distinguish between unlawful speech and 'lawful but harmful' content'.[106] Such a distinction suggests that different levels of regulation would be required – content deemed unlawful should automatically be removed, while a lower standard of action would apply to 'lawful but harmful' content. However, this must be done carefully to avoid violating freedom of expression. Improvements to algorithms are required to ensure that content is not unnecessarily and excessively removed, and there should be an appeals process to have content reinstated where there is no violation.

In regulating content, it may not be necessary to *remove* content but simply to apply transparency rules so that any 'news' coming from an unreliable source will be marked as such. To avoid said flagging, news agencies could register using the process described above. Implementing a flagging system as

105 Dumbrava (n 10) 22.

106 Barrie Sander, 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law' (2021) 32(1) European Journal of International Law 159, 178.

opposed to opting for content removal may be more aligned with laws on freedom of expression. It could prevent social media platforms from breaching human rights laws by over-removing content. This would avoid conflicts with current US law.[107] The news websites themselves would be considered publishers and could be made to meet approval requirements before sharing on large platforms.

If the flagging process, though unlikely, is practically too complicated to be implemented, a less difficult alternative would be to require social media platforms to have stricter rules on paid advertising for pages purporting to be news outlets, similar to political candidate registration requirements implemented by Facebook.[108] While this would not eliminate the spread of harmful content, it might reduce the harmful spread of misinformation.[109] Although the registration requirement may be less effective than other methods described above, it is perhaps more efficient to implement because such a process can be automated. Additionally, because this method would not result in censorship, it is a more politically acceptable option.

Another option is providing more agency to users in structuring their timelines. Before its acquisition by Elon Musk, Twitter had provided its users with the ability to select a chronological timeline instead of an algorithmic one.[110] Unfortunately, this change has since been eliminated. Requiring platforms to provide users with an option for a chronological timeline could provide more balanced timelines depending, naturally, on whom a user chooses to follow. This could also reduce or even prevent filter bubbles created by recommender algorithms by eliminating content recommendations or at least restricting them to those who actively select it. The chronological timeline should be the default for platforms, making algorithmic timelines an opt-in instead of an opt-out option. Similar to creating

107 US Const amend I; Communications Decency Act 1996 47 USC § 230.
108 'Get authorized to run ads about social issues, elections or politics' Meta Business Help Centre (2024) <https://www.facebook.com/business/help/208949576550051?id=288762101909005&country_select=UM> accessed 21 July 2024.
109 Lata Nott, 'Political Advertising on Social Media Platforms' (American Bar Association, 25 June 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms/> accessed 21 July 2024.
110Natt Garun, 'How to switch your Twitter feed to a chronological timeline' (The Verge, 6 March 2020) < https://www.theverge.com/2020/3/6/21167920/twitter-chronological-feed-how-to-ios-android-app-timeline> accessed 21 July 2024.

registration requirements for news accounts, requiring platforms to switch to chronological timelines as default will have no negative implications on the right to freedom of expression. Implementing it would be less challenging, as it does not contain content review and removal processes. Finally, it is not only politically acceptable but perhaps favourable, as it provides more agency to users.

B. CO-REGULATION

It has been suggested that co-regulation is the best option for digital platforms going forward.[111] Nooren defines this as regulation which 'combines binding legislative and regulatory action with actions taken by the actors most concerned'.[112] Jones argues that 'international human rights law requires both states and internet platforms to take steps to quell manipulation online, and that international law ought to form the conceptual framework by which to frame responses to the challenge of online manipulation',[113] an assertion with which this article largely agrees. By having states and platforms work together, states can rely upon the operations expertise of the platforms, while platforms can obtain a greater understanding of the legislative framework and human rights implications of their products. Nooren argues that by including them in the regulatory process, better compliance with the new regulations is ensured.[114] Additionally, by including platforms in the process, greater harmonisation across jurisdictions will be ensured, reducing cost and administrative complexity while increasing certainty and protections for users. Jones was correct in stating that platforms should not be left to self-regulate for a number of reasons, not least because 'it is the state which has the democratic mandate and guardianship of the public interest'.[115] Therefore, by having both states and platforms participate in the regulatory process of SM, better human rights protections are ensured for users, and processes like judicial review and constitutional challenges may be enabled.

111 Pieter Nooren and others, 'Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options' (2018) Policy & Internet 10(3) 264, 285.
112 ibid.
113 Jones (n 57), 69.
114 Nooren and others (n 115). This cross-ref probably needs updating
115 Jones (n 117) 74.

C. PERSONAL VS PLATFORM LIABILITY

In regulating social media platforms, we must consider who should be liable for a platform's content. This question has already been answered in the US, though perhaps not effectively for the digital world in which we now live. A 1996 US law determined that social media platforms will not be liable for the content posted by their users.[116] However, this is likely ineffective in motivating social media platforms to ensure the reliability and safety of content. Similarly, social media platforms in the EU are exempt from liability for merely hosting content.[117] In this subsection, it will be argued that liability for content on social media platforms should be shared by users and the platforms themselves.

Regarding personal liability for online social media content, there should be no difference between online hate speech and illegal content and its offline equivalent. If something done offline would result in legal sanction, the same should result for the same behaviour online. Users repeatedly posting illegal content should rightly have their accounts removed from the platform. However, given the ease of creating anonymous profiles on social media platforms, holding individuals liable for illegal content is practically difficult, as it can be impossible to identify who created the post.

Holding platforms liable for content they host can be complicated, given that the number of users on social media platforms and the number of posts is in the billions.[118] The US and EU have similar approaches regarding platform liability for user-generated content. Platforms are expected to remove illegal content once it becomes aware of its existence. As noted earlier, the 1996 Act precludes platforms from being held liable for content posted by their users.[119] However, in the EU, section 40 of the Directive on electronic commerce stipulates that 'service providers have a duty to act… with a view to preventing or stopping illegal activities' and that the 'Directive should constitute the

116 Communications Decency Act 1996 47 USC § 230.
117 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178. Expand journal for consistency
118 Stacy Dixon, 'Most popular social media platforms in the United Kingdom (UK) as of the third quarter of 2022, by usage reach' (Statista, 12 September 2023) <https://www.statista.com/statistics/284506/united-kingdom-social-network-penetration/> accessed 06 March 2024.
119 Communications Decency Act 1996 47 USC § 230.

appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information'.[120]

Content hosts (social media platforms) are exempt from liability online in 'cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network'.[121] Exceptions from liability for social media platforms in the EU are essentially where they are a mere conduit, chasing or hosting the content.[122]

The Directive on electronic commerce diverges from the law in the US, which seeks mainly to protect freedom of speech in accordance with the Constitution. The US does not have similar restrictions as set out in Article 10(2) ECHR.[123] The Court of Justice of the European Union ('CJEU') explains the EU's approach to limiting platform liability.[124] It specifically denotes that social media platforms will generally be considered hosts.[125] Even where a platform will not be held liable for the content it hosts, this does not preclude the court of a Member State from requiring the platform 'to terminate or prevent an infringement, including by removing the illegal information or by disabling access to it'.[126]

Although the US and EU may both require social media platforms to remove illegal content, they diverge on the illegality of content given the different approaches to restrictions on freedom of expression, as discussed in section V.

Considering the practical difficulties in holding both individuals and platforms liable for content, the best approach is to hold them separately liable. The illegal content should be removed where an individual user can be identified. Where there are multiple occurrences of an individual user posting

120 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178.
121 ibid.
122 Andrea Bertolini, Francesca Episcopo and Nicoleta-Angela Cherclu, 'Liability of online platforms' (2021) European Parliamentary Research Service < https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf> accessed 21 July 2024.
123 US Const amend I; Article 10(2) European Convention on Human Rights.
124 Case C-18/18 Glawischnig-Piesczek v Facebook Ireland [2019] ECLI 821.
125 ibid paras 24, 28.
126 Ibid para 24.

illegal content, the user may be temporarily banned from the platform. Penalties by the state should only occur in the most extreme of circumstances (e.g., child sexual exploitation). Where the user is unable to be personally identified, the content should be removed, and where there are repeat occurrences, the account ought to be removed. Where a platform fails to have adequate illegal and harmful content detection practices and/or fails to remove illegal content within a reasonable period once being made aware of it, the platform should be held liable for hosting such content. Only in risking liability for hosting such content will platforms be motivated to take more decisive action against it.

D. CIVIL VS CRIMINAL LIABILITY

The question of whether to impose civil or criminal liability on platforms for not failing to prevent online radicalisation and allowing harmful content is a complex debate. Imposing financial penalties may be insufficient where the biggest social media platforms can earn tens of billions of dollars in revenue per quarter[127] given that these penalties result in relatively minimal financial losses. Helm and Nasu suggest that criminal liability is an appropriate remedy for the continued publishing and platforming of fake news, which could be extended to other forms of harmful online content.[128] This approach this would likely violate the European Convention on Human Rights by failing a test of proportionality and would likely be difficult to implement unless the penalty imposed was a fine. However, in this scenario, the loss to the company would not be substantially different from that which would result from civil liability. As noted by Helm and Nasu, the view of the ECtHR is that 'the central question as regards restrictive measures of a general nature is not whether less restrictive measures should have been adopted, but whether… the legislature acted within the margin of appreciation afforded to them'.[129] Liability in criminal law would also likely fail a First Amendment challenge in

127 'Meta Earnings Presentation Q4 2023' Meta (2023(< https://s21.q4cdn.com/399680738/files/doc_financials/2023/q4/Earnings-Presentation-Q4-2023.pdf> accessed 21 July 2024.

128 Helm and Nasu (n 43).

129 ibid, 314.

the US,[130] although some states have imposed laws preventing the dissemination of false and misleading content within or near an election period.[131]

While criminal sanctions might be considered a more extreme option in holding platforms accountable, they may be a useful method to deter individuals from sharing illegal and/or harmful content in the first place. However, given the global nature and reach of these platforms, there will be legal complexities in determining which jurisdiction has authority (e.g., the state of the user or the domicile of the platform's corporation). These complexities could be resolved by creating an international body responsible for the regulation and oversight of online social media platforms.

Although holding social media companies responsible for harmful and/or illegal widely disseminated on their platforms is necessary, there are ways to do this proportionally to human rights obligations. Helm and Nasu suggest two alternatives to this – information correction and content removal – discussed above.[132] Not mentioned in their article, however, is the formal regulation of the algorithms used to produce content recommendations in a user's timeline, a regulatory option which may be an effective alternative.

V. HUMAN RIGHTS CONSIDERATIONS

A. FREEDOM OF SPEECH AND EXPRESSION

Many internet neutrality advocates might be opposed to the idea of regulating social media, particularly given the possibility of over-restricting content.[133] However, restricting content is not new, given that laws regulating freedom of speech in liberal democratic states restrict citizens from engaging

130 City of Austin, Texas v Reagan National Advertising of Austin, LLC 142 SCt 1464 (2022).
131 Helm and Nasu (n 43).

132 ibid.
133 'Net Neutrality: An Intellectual Freedom Issue' (2018) American Library Association <https://www.ala.org/advocacy/intfreedom/netneutrality> accessed 21 July 2024.

in hate speech or inciting violence.[134] The right to freedom of speech in the US is protected by the First Amendment of the Constitution,[135] while within the EU, it is protected by Article 10 of the ECHR.[136] According to Johnson and Youm, 'Given that the United States and Europe 'share a common freedom and the rule of law' tradition, their free speech jurisprudence more often converges than diverges'.[137] Given this, it would be expected that regulating SM platforms in either jurisdiction would require a similar balance between online safety and freedom of expression. Imposing criminal liability on platforms, as proposed by Helm and Nasu,[138] might be viewed as violating the right to freedom of speech in either jurisdiction, especially given that the platforms aren't *creating* the content but simply hosting it. However, careful construction could prevent violating these laws.

As noted by Helm and Nasu, 'some level of restriction on freedom of expression is inevitable due to the need to discourage the creation and distribution of fake news, rather than just prevent its spread'.[139] Such a restriction on freedom of expression would not necessarily violate the ECHR, as Article 10 provides that 'the exercise of these freedoms…may be subject to formalities, conditions, restrictions or penalties as are prescribed by law *and are necessary in a democratic society*…'.[140] It is not unusual that freedoms should be *reasonably* restricted (i.e., necessary and proportional) to protect the goals outlined by Article 10. Throughout the COVID-19 crisis, many governments around the world temporarily restricted citizens' personal freedom to protect public health. Preventing the spread of misinformation online might have reduced the number of people refusing to follow restrictions. Restricting online content may also be compliant with the First Amendment of the US Constitution,[141]

134 Melissa Block, 'Comparing Hate Speech Laws In The U.S. And Abroad' NPR (3 March 2011) <https://www.npr.org/2011/03/03/134239713/France-Isnt-The-Only-Country-To-Prohibit-Hate-Speech> accessed 21 July 2024.

135 US Const amend I.
136 European Convention on Human Rights, article 10.
137 Bruce E H Johnson and Kyu Ho Youm, 'Commercial Speech and Free Expression: The United States and Europe Compared' (2009) 2 J Int'l Media & Ent L 159, 3.
138 Helm & Nasu (n 131). This cross-ref may need updating
139 ibid 303.
140 Article 10(2) European Convention on Human Rights (emphasis added).
141 US Const amend I.

although these restrictions would have to be carefully crafted to ensure compliance. It was held in *US v Killingsworth*[142] that whether a post on social media are threats or 'protected political hyperbole' is a question of fact to be left to the jury, and therefore laws should be specific about the content they restrict.

B. DATA PROTECTION AND PRIVACY RIGHTS

Content recommender algorithms collect a user's data to decide what to show the user in which order.[143] Stronger data protection laws, both in the US and EU, may help with the spread of harmful content. The GDPR is an excellent starting point, and the US should look to this model of data protection to inform its own laws. However, a greater understanding among the population about how their data is mined by SM platforms for profit is needed so that users can understand how they are impacted.

C. PROPOSAL FOR AN INTERNATIONAL REGULATORY AGREEMENT

The best way forward in regulating social media platforms is through a harmonised agreement across jurisdictions that balances human rights with business needs and considers differences among human rights laws. This agreement should include a requirement that social media platforms implement chronological timelines as default, with an opt-in process for algorithmic timelines should the platform continue providing these. In requiring platforms to meet these objectives, filter bubbles will be reduced or eliminated. Larger platforms should have a registration process for news accounts and automatically flag unverified news accounts. Doing so will promote stronger media literacy and encourage users to question content before sharing it on their own profiles. Enhanced media literacy is crucial to minimising the harms to democracy caused by social media. Where platforms do host harmful content and do not remove it within a reasonable timeframe, they should be made liable as hosts. The penalties

142 2022 WL 294083.
143 Badreesh Shetty, 'An In-Depth Guide to How Recommender Systems Work' builtin (2 March 2023) <https://builtin.com/data-science/recommender-systems> accessed 21 July 2024.

for hosting this content must be in line with human rights laws and not violate users' freedom of expression. However, they should help to motivate the platform to combat the epidemic of fake news and harmful content online.

A global regulatory agreement similar in structure to the Paris Agreement[144] or the International Covenant on Civil and Political Rights ('ICCPR')[145] is the ideal method for regulating social media. This would ensure consistency across jurisdictions, providing certainty for users and allowing for free expression while protecting democracy and maintaining business efficacy. Included in this agreement would be filter bubble transparency like that of the US Filter Bubble Transparency Act,[146] stronger data protection on platforms and clear disclosures of verified news sources.

CONCLUSION

This article argues that stronger regulations are needed to govern social media platforms to protect democracy from an online world in which harmful content proliferates. The comparative approach helped to examine potential regulatory mechanisms from the perspectives of two jurisdictions with different approaches to content regulation. Social media has impacted global democracy, as outlined *supra*. The algorithms used by social media platforms often lead to users viewing more extreme content over time, leading to polarisation and radicalisation. As noted by the European Parliament, 'Once regarded as great enablers of democracy, social media are nowadays blamed for many of the ailments of democracy. They are criticised for spreading disinformation, sowing discord, manipulating citizens and undermining democratic institutions'.[147] It is suggested that implementing stronger SM

144 United Nations Paris Agreement <https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf?gad_source=1&gclid=CjwKCAjw4_K0BhBsEiwAfVVZ_5848yLdy8PlAb-b8g6zwh0S3QfkJL--fxH-TH4z57AyJ6HHTFZm3hoCnc0QAvD_BwE> accessed 21 July 2024.
145 United Nations International Covenant on Civil and Political Rights <https://www.ohchr.org/sites/default/files/ccpr.pdf> accessed 21 July 2024.
146 Filter Bubble Transparency Act, S 2024, 117th Congress (2021).
147 Dumbrava (n 10).

regulation using a harmonised, global approach is the best way to protect democracy from further harm caused by social media.

As suggested by Margetts, we must 'accept that digital platforms are part of our democratic system… and that political systems must accommodate the change, through a process of institutional catch-up'.[148] Social media platforms are not going anywhere, and stronger regulation is needed to protect our democracies.

148 Helen Margetts, 'Rethinking Democracy with Social Media' (2019) 90(1) Political Quarterly 107, 115.

Copyright for Couture: An Analysis of How Intellectual Property Law Could Promote the Sustainable Development of the UK Fashion Industry

Francesca Mauro

ABSTRACT

This article undertakes a comprehensive analysis of the UK copyright framework's suitability for fashion designs within the context of sustainable development. The limitations of the UK industrial property rights framework are scrutinised, in order to justify a focus on copyright as the better-suited IP asset for fashion designs.

In connection to fashion, this article provides a systematic evaluation of the European Union's copyright framework and emphasises the impact of distinguishing between 'applied art' and 'pure art' on affording protection. The interrelatedness of copyright and the sustainable development of the fashion industry contrives a possibility of addressing the environmental and social sustainability challenges encountered by the industry. Moreover, the research also reveals that recent CJEU judgments have mitigated discriminatory features of copyright protection within national European jurisdictions and assesses the potential impact on current and future UK case law.

To posit that these developments can foster sustainable development in the realm of fashion, the prospective challenges connected to sustainability, including the doctrine of exhaustion and its potential adverse repercussions on the emergence of sustainable fashion practices in the UK, are explored. The article concludes by outlining the requisite measures that copyright law should adopt to respond to the aforementioned challenges effectively and articulates the values and arguments that warrant consideration. Overall, this asserts that copyright law has a vital role in promoting sustainable development within the UK fashion industry.

INTRODUCTION

Operating at the intersection of art, utility, and of innovation and imitation, the phenomenon of *fashion* is legally intriguing.[1] This convergence presents a hindrance for the global expansion of a business and industry that works intimately with intellectual property (IP) law. *Prima facie*, the heart of fashion is new designs. Yet, intertwined with originality is a certain element of derivative creativity. This irreconcilability makes fashion's relationship with IP law a difficult concept and questions whether the current IP framework is fit for fashion.[2] One could also presume that IP law has little concern with matters regarding the future of our planet, delegating issues related to the environment and human rights to various other areas of legislation, regulations, policies and permits, or perhaps even social movements. However, the triadic relation between fashion, IP law, and sustainable development has been amalgamated by one segment of the industry: fast-fashion. This article argues that, contrary to low-protection or no-protection regimes, continental perspectives on the copyright protection of original and creative fashion designs may contribute to the creation of an IP environment that incentivises the sustainable development of the UK fashion industry.

Appreciating the interrelatedness of fashion, sustainable development, copyright, and IP requires a multidisciplinary approach. Section 1 begins by emphasising the distinction between original designs and copies; and separating fashion from trends, to understand how the fashion industry works. Utilising the literature surrounding fast-fashion business practices and the United Nations' Sustainable Development Goals[3] completes the legal discussion. In Section 2, an analysis of the relationship between fashion and IP is supported by American scholarship, which helps to compare and contextualise the current problems within the EU and UK legal framework. This forwards the argument in Section 3, which finds the inadequacies of industrial property rights responsible for permitting and, to a certain extent, even facilitating the injustice that has become intrinsic to the fast-fashion revenue model. This substantiates the causal nexus between the IP framework and the fashion industry's culture of over-production and over-consumption, which has led to environmental degradation and growing global inequalities. Section 4 observes how the status of fashion as an 'applied' art has been an obstacle to obtaining copyright protection and reflects on how the CJEU's decisions in *Cofemel*[4] and *Brompton*[5] challenge legal demarcation within national jurisdictions, evidencing the positive influence this has

[1] Heidi Härkönen, 'Fashion and Copyright: Protection as a Tool to Foster Sustainable Development' [2021] Acta Electronica Universitatis Lapponiensis 17.
[2] See Violet Atkinson and others, 'A Comparative Study of Fashion and IP: Trade Marks in Europe and Australia' (2018) 13(3) Journal of Intellectual Property Law & Practice 194.
[3] United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/Res/70/1.
[4] Case C-683/17 Cofemel – Sociedade de Vestua´rio SA v G-Star Raw CV [2019] ECR I-363.
[5] Case C-833/18 Brompton Bicycle Ltd v Chedech / Get2Get [2020] ECR I-461.

made on UK case law. As *Maisons de Couture* (Fashion Houses) embrace an ostensible emphasis on authenticity and concomitant respect for artisans and the environment, this article hypothesises that protecting these fashion designs could hinder fast-fashion copying and, concurrently, unite the fashion industry with values of quality and sustainability.[6] The counter-arguments of bestowing protection to fashion designs are addressed in Section 5, which focuses on the potential for over-protection to frustrate the market of sustainable fashion. This article concludes that the UK jurisdiction must adopt a nuanced approach to the retained EU copyright *acquis* (of the community), to maintain a balance between the exclusive rights owed to designers and the freedom for circular innovation.

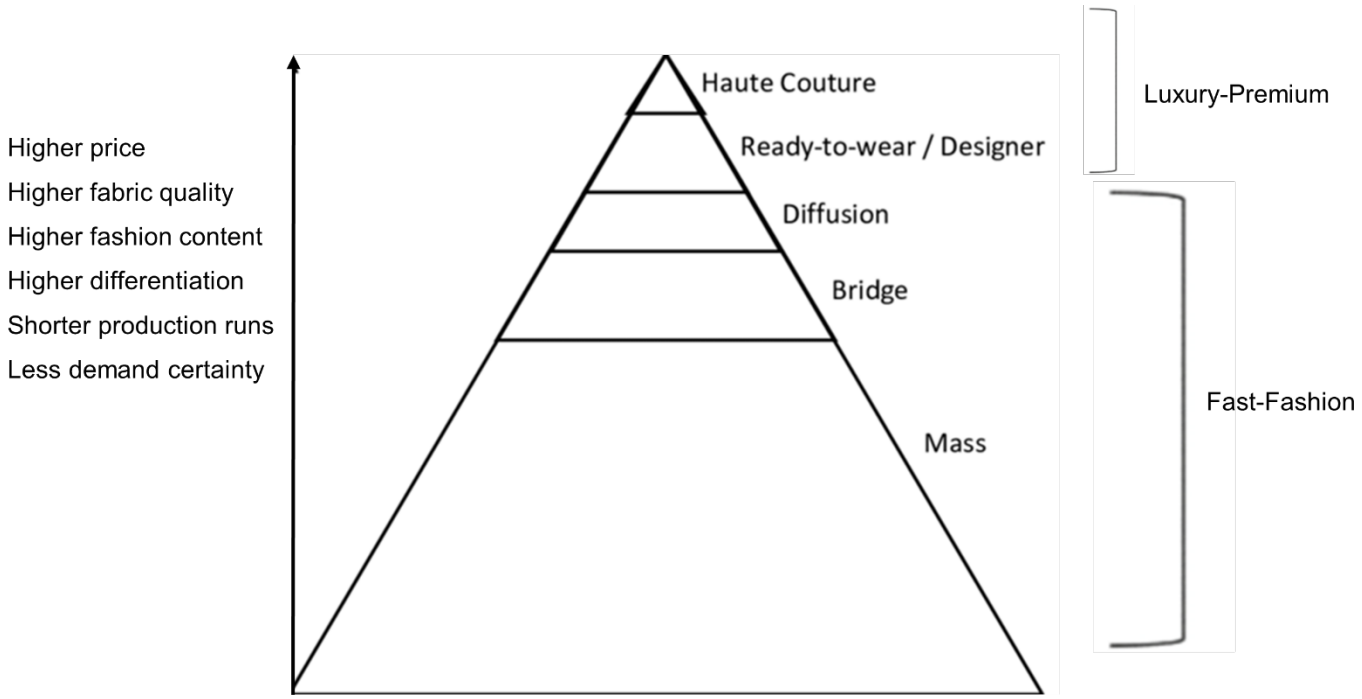
I. TREND DIFFUSION

From the designer's original vision to the consumer's wardrobe, fashion is a visual art made tangible through fashion design.[7] As both an object and behavioural process, fashion enables the wearer to homogenise their identity with aesthetic self-expression.[8] Whilst fashion inevitably changes over time, it remains a discernible and inseparable part of society. Fashion is not a monolithic entity; different designers, brands and individuals vary in their approach to design creation. Creative innovation is, however, one element that all original fashions share. A separate meaning can be afforded to a 'trend', which refers to an imitation of a selective design that, once popular, is admired ephemerally. This stitches a fine line between inspiration and imitation, with the latter tarnishing the reputation of the original design and, thus, shortening the phase of consumer desirability.

Traditional explanations of the trend diffusion theory are based on social dichotomies. Veblen observes fashion as a paradigm of social status.[9] Simmel expands, explaining that 'as soon as the lower classes begin to copy their style, the upper classes adopt a new one'.[10] However, contemporary fashion appears to operate through differences instead of hierarchies. The influence of globalisation, digitalisation and targeted-marketing campaigns indicates that contemporary trend diffusion is guided and controllable. Trends are no longer rooted in 'one place, one person, one brand, one look, or one meaning'.[11] It follows that re-acknowledging fashion's cultural significance and accepting fashion designs into the scope of copyright-protected subject matter could be a solution to slowing the circulation of trends. In controlling trend-cycles, it may also be viable to control the industry's sustainable development. This

[6] Annamma Joy and others, 'Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands' (2015) 16(3) Fashion Theory 273.
[7] Yuniya Kawamura, *Fashion-ology: An Introduction to Fashion Studies* (2nd edn, Bloomsbury Visual Arts 2018) 1, 2.
[8] George B. Sproles, 'Fashion Theory: A Conceptual Framework' in Scott Ward, Peter Wright and Ann Abor (eds), *Advances in Consumer Research* (1, 1974) 463, 472.
[9] Thorstein Veblen, The Theory of the Leisure Class: An Economic Study in the Evolution of Institutions (1st edn, Macmillan 1899).
[10] Georg Simmel, 'Fashion' (1904) 10 *International Quarterly* 130, 135.
[11] See Maria Mackinney-Valentin, 'Trend Mechanisms in Contemporary Fashion' (2013) 29(1) Design Issues 67, 74.

requires differentiating between designers that produce original designs and those responsible for perpetuating trends, through copying the work of others. The Fashion Pyramid provides a visual representation of this concept, illustrating the segmented structure of the industry.[12] At a basic level, the structure varies from a high-end/high-margin/low-volume tip to a low-end/low-margin/high-volume basis, as follows:



The Fashion Pyramid (Figure 1.1)

The first category refers to *Haute Couture* (High Fashion) and *Prêt-à-porter* (Ready-To-Wear Designer). These designers approach style creation led either by an individual (the lead designer) or through a market-driven search conducted by structured teams.[13] Although some designs are mass-produced, the final product is original and considered to be the result of the designer's own intellectual creations.

The second category represents the larger fast-fashion proportion of the industry and is inclusive of Diffusion, Bridge, and, in particular, Mass Market segmentations. They are followers in the process of style creation and specialise in making fashion attainable for the larger public. This business model 'adapt[s] merchandise assortments to the current and emerging trends' as quickly as possible or, in other words, copies.[14]

[12] Paolo Cillo and Gianmario Verona, 'Search Styles in Style Searching: Exploring Innovation Strategies in Fashion Firms' (2008) 41(6) Long Range Planning 650.
[13] ibid.
[14] Donald Sull and Stefano Turconi, 'Fast Fashion Lessons' (2008) 19(2) Business Strategy Review 4, 5.

Therefore, one can hypothesise that a copyright framework which fails to view fashion as a form of visual art, and as a product of an author's original intellectual creation, fosters an industry environment where originality is lost, design copying is tolerated and the consumer exigency for new trends is accelerated.[15] Once the trend opportunity has been exploited to exhaustion, the appeal is lost amongst the fashion cognoscenti[16] and the *original* design is induced into obsolescence.[17] The search for the new 'new thing' repeats in perpetuity, which encourages consumers to prematurely reject their clothing, in an endless endeavour to be *en vogue* (fashionable). This is the fast-fashion business model. Here lies the formula: more trends equals more consumption, which equals more commercial incentives to market cheaper, low-quality copies of creative designs at the expense of the environment and garment workers.

A. SUSTAINABLE DEVELOPMENT AND THE FASHION INDUSTRY

The term 'sustainable' has no legally objective definition and, despite the frequent interchange of the words, sustainability is not synonymous with 'sustainable development'.[18] Accordingly, this research uses the definition found in the Brundtland report: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[19] As an industry that constantly produces new commodities, it appears that fashion's very *raison d'être* (purpose) is diametrically opposed to a number of the United Nations' 17 Sustainable Development Goals (SDGs).[20] The most significant, and perhaps most amendable through IP law, is SDG 12. This underscores an indispensable need for 'fundamental changes in the way our societies produce and consume goods' to achieve global sustainable development.[21] Whilst accountability for sustainability-related issues surpasses the price tag of clothing, over production and overconsumption are, arguably, embodied by the fast-fashion linear model of: take, make, and dispose.

In an industry where there are few legal risks involved in copying, fast-fashion companies *take* the successful and original designs of other creators and strategise unethical methods of production, to earn far higher profit margins than their traditional fashion retail counterparts.[22] Today, fashion brands

[15] Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECR I-6569, paras 35-37.
[16] Persons who have superior knowledge and understanding.
[17] Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 Virginia Law Review 1687, 1718-1728.
[18] Haydn Washington, *Demystifying Sustainability Towards Real Solution* (1st ed, Routledge 2015) 1, 2.
[19] Gro Harlem Brundtland, 'Our Common Future: Report of the World Commission on Environment and Development' (4 August 1987) UN Doc A/42/251 82e.
[20] Mark K. Brewer, 'Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility' (2019) 8(4) Laws 24, 3.
[21] United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/Res/70/1 [28].
[22] Joy and others (n 6) 276.

produce almost twice the number of clothing collections, compared with pre-2000 figures when the fast-fashion phenomena first emerged.[23] This corresponds with an increase in textile manufacturing, requiring the industry to *take* huge quantities of raw materials, escalating the levels of pollution and leaving a significant carbon footprint, by contributing 8-10% towards the world's CO2 emissions.[24] This relationship with consumption conflicts with SDG 12 and suggests that facilitating the move *towards* more circular practices now 'relies on the total abandonment of the fast-fashion model' of production.[25]

The global apparel supply chain's complexity causes a lack of transparency, hindering the assessment of fast-fashion's impact on human rights. To keep consumer interest and, thus, production costs as low as possible, offshoring garment manufacture to the Global South has become 'business as usual'.[26] A lack of legally uniform labour standards enables retailers to cherry-pick developing countries where the *de facto* protection of human rights is low, or disregarded.[27] As subsidiaries remain largely unregulated, North American and European retailers are immunised from any legal liability, through minimising their control over the supply chain.[28] Nonetheless, the human cost of fashion was symbolised in the collapse of the Bangladesh Rana Plaza Factory, which led to the official death toll of 1,132 garment workers due to safety regulations being ignored.[29] This tragedy brought attention to the reality of garment factory working environments: where workers are beaten; forced to work long hours, in dangerously hot and chemically-ridden facilities, and earn a salary equivalent to $10 a month.[30]

The flagrant impacts of fast-fashion also extend to the UK, with garment workers in Boohoo's Leicester-based factories receiving £2-3 per hour; yet, amidst allegations of modern slavery, publishing

[23] Nathalie Remy, Eveline Speelman, and Steven Swatz, 'Style that's Sustainable: A New Fast Fashion Formula' (2016, McKinsey & Company) <https://www.mckinsey.com/capabilities/sustainability/our-insights/style-thats-sustainable-a-new-fast-fashion-formula> accessed 6 July 2024.
[24] United Nations Climate Change, 'Fashion Industry Charter for Climate Action: Climate Action Playbook' (5 November 2021) <https://unfccc.int/sites/default/files/resource/Fashion%20Industry%20Carter%20for%20Climate%20Action_2021.pdf> accessed 6 July 2024.
[25] Kirsi Niimäki and others, 'The environmental price of fast fashion' (2020) 1 Nature Reviews: Earth and Environment 189, 198.
[26] Härkönen (n 1) 44.
[27] Uma Rani and others, 'Minimum Wage Coverage and Compliance in Developing Countries' (2013) 152(3-4) International Labour Review 381, 381–82.
[28] Iris M. Young, 'Responsibility and Global Justice: A Social Connection Model' (2006) 38(2) Social Philosophy and Policy 709, 714–15.
[29] Liana Foxvog and others, 'Still Waiting: Six months after history's deadliest apparel industry disaster, workers continue to fight for compensation' (Clean Clothes Campaign, International Labour Rights Forum 2013) 1, 22 < https://cleanclothes.org/resources/publications/still-waiting> accessed 6 July 2024.
[30] Michael Ross, 'The True Cost' Attacks the Business of Fast Fashion' (May 29, 2015) [documentary].

a revenue increase of 44%, in the same financial year.[31] Undoubtedly, this approach has engendered a 'race to the bottom'.[32] For the everyday consumer, purchasing fast-fashion provides instant gratification and fulfils the desire to own a variety of styles. For textile workers, however, fast-fashion equates to low wages, unsafe working conditions and abuse.

From this understanding, an ineffective IP framework appears courteous to fast-fashion design copyists and while staying in style may not cost the consumer, the environment and garment workers are paying the price. Whilst the 2030 Agenda for Sustainable Development fails to adequately consider IP rights as a tool for promoting the SDGs,[33] this article argues that strengthening the IP protection afforded to *original* and creative fashion designs, as artistic works, could hinder over-production; waste and pollution; and promote the protection of garment workers, both offshore and domestically; and, in turn, improve the fashion industry's sustainable development.

II. LITERATURE REVIEW

Academics have incessantly debated the economic implications of America's limited protection for fashion designers and comment, predominantly, on the legislative attempts to pass the Innovation Design Protection Act (IDPA).[34] Scholars are discernibly divided into two categories: (1) those who advocate for stronger or redeveloped protections,[35] and (2) those who argue that appropriation mechanisms are not relevant to the fashion industry.[36] Raustiala and Sprigman argue the latter and support fashion continuing to exist in IP's 'negative space': a domain that IP *could* regulate, but does not.[37] The authors contend that an upsurge in design copying has simultaneously led to an increase in revenue and profits. In explaining how the fashion industry retains an unusual stability, notwithstanding a low-IP regime, Raustiala and Sprigman conclude the theory of a 'piracy paradox'.[38] Indeed, they suggest further that fashion design is *so* distinctive from other 'artistic works' that the

[31] The Boohoo Group, 'Modern Slavery Statement' (*boohooplc.com,* February 2021) <https://www.boohooplc.com/sites/boohoo-corp/files/all-documents/modern-slavery-statement-2020.pdf> accessed 6 July 2024.
[32] Josephine Moulds, 'Child Labour in the Fashion Supply Chain' *The Guardian* (19 January 2015) < https://www.theguardian.com/p/44qtj/sgp> accessed 6 July 2024.
[33] Hans Morten Haugen, 'Why are Intellectual Property Rights (IPRs) Hardly Visible in the Sustainable Development Goals (SDGs)?' in O. A. Rognstad and I. B. Ørstavik (eds), *Intellectual Property and Sustainable Markets* (Edward Elgar, 2021) 12, 12-37.
[34] Innovative Design Protection Act of 2012 (United States Senate), s 325 in 2007, 2009 and, most recently, in 2011/2012.
[35] Scott Hemphill and Jeannie Suk, 'The Law, Culture, and Economics of Fashion' (2009) 61(5) Stanford Law Review 1147.
[36] Silvia Beltrametti, 'Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community' (2010) 8(2) Northwestern Journal of Technology and Intellectual Property 147, 173.
[37] Kal Raustiala and Christopher Sprigman, 'Response: The Piracy Paradox Revisited' (2009) 61(5) Stanford Law Review 1201, 1202.
[38] Raustiala and Sprigman, 'The Piracy Paradox' (n 17) 1687, 1691.

vitality, and perhaps survival, of the industry is paradoxically dependent on a culture that tolerates copying.[39]

By contrast, Hemphill and Suk have questioned the existence of the 'piracy paradox'. They critique Raustiala and Sprigman's generalisations that design piracy is beneficial and instead assert the need to separate fast-fashion firms into 'designers' and 'copyists'.[40] The acknowledgement that fast-fashion's rampant copying is a threat to innovation and detracts from the expressive aspects of design agrees with the opinion of this article: that copyright law should aim to protect the genuine creativity of designers. Moreover, their analysis conforms with the *l'unité de l'art* (unity of art) approach adopted by the CJEU in *Cofemel* and *Brompton*, as discussed in Section 4. Hemphill and Suk's work supports the need to protect original designs from close copying, to the extent that flocking and differentiation can also be conserved.[41] They observe 'flocking' as a participation in collective trends and 'differentiation' as a desire to express individuality. These concurrent tastes are reflected in fashion; designs tend to allude to popular components from trends, whilst also including features that differentiate them from other pre-existing designs. Their theory of demand is summarised as the 'interaction of the tastes for differentiation and for flocking, or more precisely, differentiation within flocking'.[42] As such, the fashion industry is perceived to benefit from the derivative reworking of original designs; such designs are conducive to a consumer's opportunity to flock *without* hindering the ability to differentiate, due to visual distinguishability.

In addition to the central discord on the appropriate regulatory regime for the fashion industry, the rationale for protecting fashion designs is also contentious. Hemphill and Suk insist that copyright should apply, to protect the *consumer* interest in differentiation.[43] This argument affords an idiosyncratic reading to copyright law and policy, which Raustiala and Sprigman's response is critical of. Raustiala and Sprigman correctly point out that, unlike trademark laws, the doctrine of copyright is not intended to protect consumers against confusion; the integrity of consumer purchasing decisions is also not a factor.[44] Rather, the purpose of copyright is to provide *author's* exclusivity, as needed, to incentivise the creation of original works. Accordingly, protecting the personhood of an author concurs with protecting sustainability; copyright law exists to enhance creativity and innovation, per se, as opposed to reducing copying. However, by protecting fashion designers as authors, it is possible to frustrate the harmful business practices of fast-fashion companies. One can therefore infer, although

[39] ibid 1687.
[40] Hemphill and Suk, 'The Law, Culture, and Economics of Fashion' (n 35) 1170.
[41] ibid 1152.
[42] ibid 1165.
[43] ibid 1179.
[44] Raustiala and Sprigman, 'The Piracy Paradox Revisited' (n 37) 1206.

excluded from the wider debate, that *reversing* the 'piracy paradox' would have the inadvertent benefit of promoting the fashion industry's sustainable development, particularly with regard to SDG 12.

Whether original fashion designs should be entitled to *any* form of copyright protection has constituted the main area of focus within legal literature. The disagreement amongst academics on *what* and *who* should be protected has largely adhered to concerns regarding the interests of brands, designers and consumers. Such evaluations prioritise the economic interests of the fashion industry, despite differing on whether line-by-line copying of designs supports innovation,[45] or produces systematic harm for the industry.[46] Despite their respective vindications, Hemphill and Suk, like Raustiala and Sprigman, collectively conclude that a low-IP regime permits the production of imitative designs.[47] On the ecology of fashion, Raustiala and Sprigman submit a striking analogy: 'fashion piracy may be *parasitic* on original designs, but it is a parasite that does not kill its host'.[48] They assert that, although design copying may harm individual designers it also, paradoxically, strengthens the industry.[49]

Current academic consensus views the law as playing a dissimulated role in driving the evolution of fashion trend cycles. Raustiala and Sprigman comment on the link between protection and the speed of fashion, attesting that 'if copying were illegal, the fashion cycle would occur very slowly'.[50] The process of trend diffusion is inevitably cyclical, but it is copying that accelerates the consumer exigency for new designs. To agree with Raustiala and Sprigman, regulation that acquiesces design piracy accelerates trend circulation, increases the demand and consumption of clothing, and induces rapid turnover and additional sales.[51] From the perspective of sustainability, however, there is a need to question whether the contemporary industry needs 'a turbocharger to the fashion cycle' at all.[52] To decrease the excessive production and consumption of fashion goods, it may be more desirable for IP law to instead be *putting a foot on the breaks* of this culture of copying.

[45] ibid.
[46] Hemphill and Suk, 'The Law, Culture, and Economics of Fashion' (n 35) 1193.
[47] Raustiala and Sprigman, 'The Piracy Paradox Revisited' (n 37) 1209.
[48] ibid.
[49] ibid.
[50] Raustiala and Sprigman, 'The Piracy Paradox' (n 17) 1722. See also Kal Raustiala and Christopher Sprigman, 'The Knockoff Economy: How Imitation Sparks Innovation' (2012) 12 UCLA School of Law, Law-Economics Research Paper 43, 44.
[51] ibid, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (n 17) 1733.
[52] Raustiala and Sprigman, 'The Knockoff Economy' (n 50) 49.

III. INDUSTRIAL PROPERTY RIGHTS

This Section explains why the inadequate protection provided by industrial property rights has led to the fashion industry operating in IP's 'negative space'.[53] Section 3.1 questions the relevance of the current UK and EU design rights, scrutinises the duration of protection, and assesses the feasibility of reform. Section 3.2 explains that rather than protecting the creative outputs of designers, trademark law protects commercial interests, which is not considered a priority for sustainable development. An appraisal of industrial property rights strongly suggests that copyright law could re-balance the IP equilibrium surrounding the fashion industry by hindering the production of copies that imitate the *design* itself. Arguably, this could incentivise more sustainable business practices through decreasing the production, sales, and consumption of fast-fashion.

A. DESIGN RIGHTS

As Registered and Unregistered Design Rights address the design element of items,[54] many deem these rights to be the most appropriate IP protection available to UK-based fashion designers.[55] However, a lack of information accessible to designers, in addition to the registration costs, has raised a concurrent scholarly debate questioning the relevance and benefit obtained from registering such rights.[56] Specifically, Derclaye argues that the scope of the available rights has been so limited by the UK courts that litigation procedures are now frivolous, asserting that 'even if the design is found to be valid, it will not be found to be infringed'.[57] Many recent UK design cases, including *PMS v Magmatic*,[58] adhere to Derclaye's comment.[59] Further, Janssens and Lavanga's study includes two supporting convictions: the perception that design rights are 'irrelevant' and, in light of the fashion industry's velocity and seasonal nature, that design piracy is an 'inevitable' result or 'requirement'.[60] These

[53] Raustiala and Sprigman, 'The Piracy Paradox Revisited' (n 37) 1201, 1202.
[54] Copyright, Designs and Patents Act (CDPA 1988), s 213.
[55] Alice Janssens and Mariangela Lavanga, 'An Expensive, Confusing, and Ineffective Suit of Armor: Investigating Risks of Design Piracy and Perceptions of the Design Rights Available to Emerging Fashion Designers in the Digital Age' (2018) 24(2) Fashion Theory 229, 231. See also Estelle Derclaye, 'Are Fashion Designers Better Protected in Continental Europe than in the United Kingdom? A Comparative Analysis of the Recent Case Law in France, Italy and the United Kingdom' (2010) 13(3) Journal of World Intellectual Property 315.
[56] Elif Bascavusoglu-Moreau and Bruce Tether, 'Design Economics Chapter Two: Registered Designs & Business Performance — Exploring the Link' (2011) 6 Intellectual Property Office Report 1, 22.
[57] Derclaye (n 55) 328.
[58] PMS International Group Plc v Magmatic Ltd [2016] UKSC 12.
[59] Note the anomalous decision in *Rothy's Inc v Giesswein Walkwaren AG* [2020] EWHC 3391 (IPEC). Here, the IPEC ruled that the Giesswein Walkwaren AG's "Pointy Flat" shoe infringed a Registered Community Design held by Rothy's Inc. Rothy's succeeded in their registered design claim due to their carefully prepared design drawings, which effectively gave them IP protection over the recycled material and knitted texture of their shoes. This judgment suggests that design features can be protected if registered decision applications include high-resolution images that show details that are "claimed" as part of the protected design.
[60] Janssens and Lavanga (n 55) 247.

sentiments validate Raustiala and Sprigman's conclusions,[61] connecting the 'piracy paradox' theory and the concept of induced obsolescence to the UK fashion industry. Notably, the market over-saturation and increasing competition generated by fast-fashion companies appear influential in this indifference towards design protection, thus justifying the need to consider design rights and, more broadly, the applicability of IP protection to the contemporary fashion industry.

Achieving sustainable development is contingent on slowing the trend circulation that the fast-fashion phenomenon has accelerated. This corresponds with incentivizing designers to create long-lasting, timeless pieces. Assuming a slower trend cycle, designs would remain fashionable for longer periods, extending the market life of fashion designs. However, as academic consensus has shown, registering designs is considered an 'irrelevant' practice among UK designers and the current three-year term of protection for design appearance is, plausibly, insufficient. Critically, the Recitals in the Preamble to the Community Design Regulation seem to acknowledge the relationship between protection and the speed of trends. As noted under Recital 16, industry sectors that 'produce large numbers of designs for products frequently hav[e] a short market life', whereby 'protection without the burden of registration formalities is an advantage and the duration of protection is of *lesser significance*'.[62] This is, perhaps, a reflection of the contemporary fashion industry: the popularity of fashion designs is short-term by nature, and the transience of trends is, arguably, part of the appeal. As a consequence of the supposed 'induced obsolescence' of fashion,[63] a design may become so obsolete that, after three years, there would be no lucrative motivations for fast-fashion companies to mass-produce copies.

Moreover, following the EU (Withdrawal) Act,[64] UK designers are now confronted with a legal quandary. To qualify for unregistered protection, under either EU or UK rights, the first disclosure of the design is required to be within the respective jurisdictional boundaries.[65] Therefore, transnational fashion businesses must choose between two separate rights: the Community Unregistered Design Right (UCDR) *or* the UK Supplementary Unregistered Design Right (SUDR).[66] The simultaneous disclosure requirements make these unregistered rights mutually exclusive and positions the UK

[61] Raustiala and Sprigman, 'The Piracy Paradox' (n 17) 1687; 'The Piracy Paradox Revisited' (n 37); 'The Knockoff Economy' (n 50) 43.
[62] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1 amended by Council Regulation (EC) No 1891/2006 of 18 December 2006 amending Regulations (EC) No 6/2002 and (EC) No 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs [2006] OJ L386/14.
[63] See Raustiala and Sprigman, 'The Piracy Paradox' (n 17).
[64] European Union (Withdrawal) Act 2018.
[65] See also: German Supreme Court held that there is no UCD if first disclosure is outside the EU: I ZR 126/06 - Gebäckpresse II (BGH) [2009] GRUR 79 II.
[66] Registered Designs Act 1949; The Design and International Trade Marks (Amendment etc.) (EU Exit) Regulations 2019.

fashion industry in an unfavourably smaller geographical scope of protection. As the IPO's 2022 review expresses, there is concern that companies 'are already choosing to disclose in the larger EU market';[67] with an industry preference for obtaining the pan-European UCDR, as opposed to the UK-exclusive SUDR, the future of events, such as London Fashion Week, also seems to be 'at risk'.[68]

Irrespective of the registered regime subsisting largely unchanged, the UK's withdrawal from the EU implicates a major disadvantage for UK-based designers whose unregistered protections, although questioned pre-Brexit, are now clearly unenforceable outside the UK. For fast-fashion copyists, this erosion of IP assets further facilitates exploiting the work of UK-based designers, simply by manufacturing in other countries or regions. Observably, the UK's design rights framework is in a current state of counterproductive flux; the SUDRs afford inadequate protection to the commercial interests of fashion houses, both in and beyond the UK's jurisdictional scope, therefore inadvertently consenting to the continuation of the environmental and social vices inherent to fast-fashion business practice. A failure to redress the legal uncertainties regarding relevance, applicability and enforcement of the SUDRs, guarantees the over-production of cheap design copies stolen indiscriminately. To a certain degree, a rationalisation of the SUDRs protection inadequacy pertains to the perception of fashion as a replaceable commodity, therefore, impeding the sustainable development of the fashion industry.

Conceiving a solution to the fundamental flaws of the UK's design right system without a complete overhaul raises several practical issues, as reflected in the IPO's 2022 review.[69] One radical approach to reform has been led by the 'Anti-Copying in Design' pressure group, who borrow from the provisions of the Intellectual Property Act 2014, with their proposals to extend a corresponding criminal sanction to the infringement of unregistered designs.[70] Aside from the obvious controversies regarding propriety, this proposition would be of questionable benefit due to the inability for third parties to know, with certainty, whether any particular design is subject to SUDR protection. Whilst the IPO's recent consultation has recommenced discourse, the aforementioned reform was already considered in the 2013 Impact Assessment, before the amendments to UK design law and implementation of Sections 35ZA to C. Here, the IPO concluded it would be 'too complex', 'difficult

[67] Intellectual Property Office, 'Reviewing the designs framework: Calls for views on designs: Government response' (Consultation outcome, 25 January 2022) [25] <https://www.gov.uk/government/consultations/reviewing-the-designs-framework-call-for-views/outcome/call-for-views-on-designs-government-response> accessed 6 July 2024.
[68] ibid.
[69] Intellectual Property Office 'Reviewing the designs framework: Calls for views on designs: Analysis of responses' (Consultation outcome, 25 January 2022) <https://www.gov.uk/government/consultations/reviewing-the-designs-framework-call-for-views/outcome/calls-for-views-on-designs-analysis-of-responses> accessed 6 July 2024.
[70] Westminster Media Forum, 'The Future for the Intellectual Property and Copyright Regulation in the UK' (8 April 2022) <https://www.westminsterforumprojects.co.uk/publication/IP-and-Copyright-22> accessed 6 July 2024.

to enforce' and 'may prevent companies from innovating'.[71] A further remark deliberated on whether an offence exclusive to registered protection could encourage 'companies to register their design rights',[72] as opposed to relying on the lesser protections offered to unregistered designs. Echoing this apprehension, the IP Federation's 2022/23 review sustains the opinion that reform will deter businesses from 'bringing legitimate products to the market' and, in turn, 'will stifle innovation in the UK'.[73] Further difficulties arise concerning the suitability of criminal courts to engage with the intricacies of design law. This merits future consideration on reforming the Intellectual Property Enterprise Court (IPEC), perhaps by way of introducing a Designs Court to address such infringement claims.

Although the reform concerns outlined above are validated in *de jure* terms, the limited evidential use of prosecution presents a contrasting *de facto* reality which, beyond acting as a deterrent, fails to substantiate the effectiveness of creating a criminal offence for design copying. As confirmed in the IPO's 2018 FOI release, no prosecutions had commenced in the four years following the amendments.[74] It appears convincing that the criminal sentence for registered design infringement is scarcely imposed; however, an updated account of the IPO's data on the number of proceedings, their subsequent outcomes, and the sentences imposed, would be insightful. This question of effectiveness counters the arguments, both in favour and in opposition, of extending criminal sanctions to unregistered design infringement. From a broader perspective, the SUDRs afford a short-term nature of protection, which suggests seeking injunctions against design copyists may be an unproductive pursuit, if not obtained quickly and with sufficient time remaining before right expiry. If we presuppose the successful implementation of these current reform proposals, then pursuing criminal penalties against intentional copies of unregistered designs would lead to parallel, if not worse, issues of time-sensitivity for infringement claims.

B. TRADEMARKS

Fashion houses often rely on trademark law to protect their brand name, their respective logos, emblems, marketing slogans, and even store layouts.[75] Trademarks act as identification signs that differentiate high-end products from competitors. Monogrammed initials, such as Coco Chanel's 'CC'; Louis Vuitton's interlocking 'LV'; Karl Lagerfield's 'FF' for Fendi; and, Guccio Gucci's inverted

[71] Registered Designs Act 1949, s 35ZA, 35ZB, 35ZB.
[72] Intellectual Property Office, 'Introduce a criminal offence for the deliberate infringement of a UK or EU Registered Design' (Impact Assessment: Final Stage, 22 August 2013) BIS0376.
[73] IP Federation Review, 'Evolving the UK designs framework' (2022/2023) ISSN 2634-3207, 43.
[74] Intellectual Property Office (FOI release) 'Prosecutions under section 35ZA of the Registered Designs Act 1949' FOI/2017/544 (26 April 2018).
[75] See Case C-421/13 *Apple Inc. v Deutsches Patent- und Markenamt* (German Patent and Trade Mark Office) [2014] ECR I-2070.

'GG', are just some iconic examples. However, the protection of fashion designs—the focus of this article—is limited under trademark law. A sole exception exists when the logo or colour is *part* of the design;[76] where the fashion product *is* the fashion brand, and where the fashion brand *is* the fashion product. Integration of a trademark into the design—for example, Burberry's distinctive plaid pattern—can offer significant protection *if* the trademark is an essential element that determines the item's appearance.

Nonetheless, obtaining design protection through trademarks requires evidence of 'acquired distinctiveness' and consumer recognition of the mark *as* a brand.[77] The Louis Vuitton beige chequerboard pattern is, undoubtedly, considered widely renowned and part of the brand's signature, yet it was recently declared invalid by the EUIPO.[78] Although there is a marked difference in satisfying requirements for distinctiveness throughout the European Union, as opposed to solely in the UK, unconventional trademarks remain in a difficult position, as most designs display the trademark discretely. Furthermore, trademark law formalities require each design to be registered separately, making the process costly, time-consuming, and unlikely to be pursued by small brands or independent designers.[79] Therefore, whilst trademark law may provide effective protection against counterfeits, as Raustiala and Sprigman have stated, it cannot be relied upon to prevent fast-fashion companies from imitating, replicating, or copying a design.[80]

IV. FASHION AS 'ART': EU COPYRIGHT CASE LAW

As Section 3 discussed, industrial property rights are ill-equipped to incentivise sustainable business practices; they are better suited for commercial interests and cannot substitute copyright protection. Section 4.1 explores the complex relationship between fashion and copyright, including how the distinction between 'pure' and 'applied' art constrains fashion to the 'edges of IP'.[81] Section 4.2 examines recent CJEU decisions that recognise the equal treatment of all works, removing the different requirements for protection, and indicating that fashion designs *can* be copyrightable work. Finally, Section 4.3 considers the relevance of EU jurisprudence in UK case law and argues that retaining the *l'unité de l'art* (unity of art) approach can effectively govern the fashion industry's sustainable development.

[76] Trademarks Act 1994, s 3(1).
[77] ibid.
[78] Case T-275/21 Louis Vuitton Malletier v EUIPO - Wisniewski (Représentation d'un motif à damier II) [2022] ECR II-654.
[79] Härkönen (n 1) 72.
[80] Raustiala and Sprigman, 'The Piracy Paradox Revisited' (n 37) 1206.
[81] Annette Kur, 'Protection for fashion: The European experience' in Rochelle Dreyfuss and Jane Ginsburg (eds) *Intellectual Property at the Edge: The Contested Contours of IP* (Cambridge University Press, 2014) 180.

A. THE PURE 'ART' VS 'APPLIED' ART DISTINCTION

The conceptual demarcation between *pure* art and *applied* art established a lack of consensus, within the EU's copyright framework and negatively impacted the fashion industry, designers, cultures, and the environment.[82] The term *applied* art refers to creative outputs that incorporate aesthetic character and functionality which, although innate to fashion, made acquiring protection difficult. Misinterpretation of the Berne Convention principle led MS to presume that domestic competence should be exercised to 'determine the extent of the application of their laws to works of applied art, […] as well as the conditions under which such works, designs and models shall be protected'.[83] Consequently, acquiring copyright protections for works of *applied* art was subject to inconsistent legal differentiation. Further requirements of 'artistic' or 'aesthetic' criterion for works with functional elements, as per the Italian *scindibilità* and German *Stufentheorie*, also demanded a higher originality threshold.[84]

The utilitarianism argument seeks to justify this distinction, premised on the notion that rewarding creators with copyright is not a goal, but a means to further productivity. However, whilst a lack of protection may not have hindered the productivity of the fashion industry, it has hindered innovation. The following sections outline how the *l'unité de l'art* approach to copyright could reverse this 'piracy paradox', by dislodging the foundations of the fast-fashion business model: copying. In principle, this would slow the environmentally and socially harmful consequences of fast fashion.

B. RECENT CJEU DECISIONS

COFEMEL

Following the legacy of case law, such as *Flos*,[85] *Painer*[86] and *Infopaq*,[87] the CJEU's judgment in *Cofemel* harmonised the application of copyright law within the EU by subjecting works of *applied* art to the same criteria as any other 'work'.[88] With concern to whether the G-Star Raw jean style was entitled to copyright protection as a 'work', the CJEU ruled the Portuguese 'aesthetically significant visual effect' requirement as subjective and, therefore, non-compliant with the standard of uniform

[82] Härkönen (n 1) 28.
[83] The Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221, art 2(7), 7(4).
[84] Härkönen (n 1) 53.
[85] Case C-168/09 Flos SpA v Semeraro Casa e Famiglia SpA [2011] ECR I-181.
[86] Case C-145/10 Eva-Maria Painer v Standard VerlagsGmbH and others [2013] ECR I-138, [97].
[87] *Infopaq* (n 15) [43].
[88] *Cofemel* (n 4) (Opinion, AG Szpunar) [27], [29].

interpretation mandated by the InfoSoc Directive.[89] This clarified that national copyright laws with 'aesthetic' requirements were incompatible with the EU objectivity criterion. This means, that for bestowing copyright protection, there are only two prerequisites:

(1) An identifiable subject matter with 'sufficient precision and objectivity' (Point 32)[90]

(1) An 'original subject matter': the 'author's own intellectual creation' as an expression of his 'free and creative choices' (Points 29 and 30)[91]

To constitute a 'work', under Article 2(a), the subject matter must be the product of its author's own intellectual creation.[92] This requirement cumulatively fulfils the additional and autonomous concept of 'originality'. Firstly, the notion implies that an original object is at hand, meaning it derives from an intellectual creation. This can only be related to its author which, in turn, reflects the author's free and creative choices.[93] The CJEU's rejection of aesthetic considerations removes the element of assessment that involves an 'intrinsically *subjective* sensation of beauty experienced by each individual who may look at that design'.[94] Conversely, an objective assessment enables the subject matter to be identified with greater precision. Secondly, to qualify as a 'work', the elements are required to show an expression of such creation. If the exercise of creative freedom is not remarkable in the creation of an object, either because of technical constraints or rules, then the creation in question lacks the originality requirement.[95] This establishes *how* originality should be intended and how far these effects reach. As the appearance of a fashion design is the same, regardless of the observer, the only remaining condition for copyright to arise is originality. Essentially, the EU originality criterion can be seen as a metaphorical 'ceiling',[96] which prevents national approaches from imposing any additional conditions. In making the requirements for protection the same for both *applied* art and *pure* art, all 'work' is eligible for protection, regardless of purpose, and regardless of whether the 'work' is considered aesthetic or utilitarian. Provided a design meets the aforementioned criteria, it can be considered a 'work' and, therefore, afforded copyright protection. Nothing further is required.[97]

[89] Council Directive (EC) 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) [2001] OJ L167/10, art 2(a).
[90] *Cofemel* (n 4) [32]; confirming Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2018] ECR I-899 [40]-[41].
[91] *Cofemel* (n 4) [29], [30]; confirming Case C-604/10 *Football Dataco Ltd and others v Yahoo! UK Ltd and others* [2012] ECR I-115.
[92] *Infopaq* (n 15) [37].
[93] Painer (n 86).
[94] *Cofemel* (n 4) [53]-[54].
[95] Following *Infopaq* (n 15).
[96] Koray Güven, 'Eliminating 'Aesthetics' from Copyright Law: The Aftermath of Cofemel' (2021) 71(3) GRUR International 214.
[97] Eleonara Rosati, 'CJEU rules that copyright protection for designs only requires sufficient originality' (2019) 14(12) Journal of Intellectual Property Law & Practice 931.

BROMPTON BICYCLE

Through re-iterating that the originality criterion must not include supplementary requirements, the decision in *Brompton*[98] echoes *Cofemel*, *Infopaq*,[99] *BSA*,[100] *FAPL*,[101] *Painer*,[102] *Football Dataco*,[103] *SAS*[104] and *Levola Hengelo*.[105] In considering the copyright validity of a foldable bike, the CJEU contended that, provided that the functional features 'reflect [the author's] personality in that subject matter, as an expression of free and creative choices',[106] a subject matter can satisfy the condition of originality and thus may be eligible for copyright protection. This means that, regardless of any 'technical considerations', originality and functionality can coexist,[107] which advances the tenet that copyright extends to the expression of ideas, not ideas per se. Thus, the eligibility of copyright protection for fashion design does not appear to be hindered, even where the designer is limited by factors that affect the necessary functional considerations of a garment.

C. IMPACT ON UK CASE LAW

Prima facie consideration of *Cofemel* and *Brompton* suggests an improvement in copyright accessibility for fashion design through an approach influenced by the French *l'unité de l'art* theory.[108] Accordingly, art can be defined 'neither by beauty', nor the 'aesthetic feeling it tends to arouse', which asserts that, to restrain courts from making subjective aesthetic judgments, there must be no criterion to separate art from industry.[109] This legally impartial treatment of art conveys a shift towards the 'continental European'[110] focus on the protection of the person of the author.[111] In harmony with the French Intellectual Property Code, the CJEU embraces a rather liberal attitude towards protection for applied art creations, which suggests a promising relation between fashion design, copyright eligibility and, therefore, sustainable development.

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[98] Brompton (n 5).
[99] *Infopaq* (n 15).
[100] Case C-393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany (BSA) v Ministerstvo kultury [2010] ECR I-816.
[101] Case C-403/08 Football Association Premier League Ltd and Others v QC Leisure and Others [2011] ECR I-631.
[102] *Painer* (n 86).
[103] Football Dataco (n 91).
[104] Case C-406/10 *SAS Institue Inc. v World Programming Ltd* [2012] ECR I-259, paras 33, 40.
[105] Levola Hengelo (n 90).
[106] *Brompton* (n 5) para 27.
[107] ibid para 26.
[108] French Code de la propriété intellectuelle (version consolidée au 30 juin 2022) (French Intellectual Property Code) Part I: Literary and Artistic Property, enshrined in articles L 112-1 and 513-2.
[109] Uma Suthersanen, *Design Law in Europe* (2nd edn, Sweet & Maxwell 2000) 137.
[110] Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (1st edn, Princeton University Press 2014) 15.
[111] Jane Ginsburg, 'Tale of Two Copyrights: Literary Property in Revolutionary France and America' 64(5) Tulane Law Review 991, 993.

RESPONSE CLOTHING

An express acceptance of the decisions in *Cofemel* and *Brompton* can be found in *Response Clothing*.[112] Here, the UK Intellectual Property Enterprise Court (IPEC) found it necessary to re-interpret the 'artistic quality' requirement found under Section 4(1)(c) of the CDPA, to conform with EU law. The IPEC upheld the copyright protection on a 'wave' jacquard fabric design, on the basis that 'it would have required skill and creativity to devise' the work.[113] Furthermore, since 'no sufficiently similar design existed before it was created, it must have been the expression of the author's free and creative choices',[114] thus fulfilling the EU originality requirement. Although the judgment constitutes a clear shift from previous case law, HHJ Hacon found it unnecessary to consider whether functional items that lack aesthetic appeal may be impacted by UK copyright protection.[115] Nonetheless, whilst the judgment in *Response Clothing* did not seek to address the issue of whether Directive 2001/29 has the effect of removing all the 'gaps' in the copyright protection available for 'works',[116] it appears that the UK's elimination of aesthetic appeal is appropriate for the sake of conformity.

WATERROWER

The debate on how 'works of artistic craftsmanship'[117] should be interpreted has been reignited in *WaterRower*.[118] In light of *Cofemel* and *Brompton*, a High Court judge declared the claimant had 'real prospects of establishing that the WaterRower is a work of artistic craftsmanship'.[119] Whilst the Courts of first instance are bound by retained EU case law, the Court of Appeal or Supreme Court could choose to depart from the EU standards, to make copyright case law in the UK consistent with Section 51 of the CDPA 1988. As fashion design is considered simultaneously aesthetically appealing and functional, this case may be decisive in ascertaining whether copyright protection will be able to address fashion's unconventional relationship with IP law. Until this case is decided, it remains uncertain whether the innovative and original creative outputs of UK fashion designers will remain susceptible to cheap-chic copies made by fast-fashion retailers. The outcome, therefore, also finds the sustainable development of the UK fashion industry at a crossroads of great significance.

[112] Response Clothing Ltd v The Edinburgh Woollen Mill Ltd [2020] EWHC 148 (IPEC).
[113] ibid [37].
[114] ibid [59]-[60].
[115] ibid.
[116] Härkönen (n 1) 49.
[117] CDPA 1988 (n 54), s 4(1)(c).
[118] WaterRower (UK) Ltd v Liking Ltd (T/A Topiom) [2022] EWHC 2084 (IPEC).
[119] ibid, Stone J [81].

V. DOES THE UK NEED A SUSTAINABILITY-ORIENTED EXHAUSTION DOCTRINE?

Insofar as the UK courts continue to apply CJEU jurisprudence, works of applied art are accepted within the scope of copyright protection under the *same* conditions as works of pure art. Whilst the previous Sections in this article have shown the negative effects that under-protection of fashion designs has caused, simultaneous concerns have been raised regarding the risk of over-protection.[120] As Bently states, 'the return of industrial copyright' creates an overlap of copyright and design rights, which allegedly threatens the freedom of competition.[121] This Section considers whether the free-of-formalities protection afforded by copyright could lead to monopoly rights, specifically regarding the market of sustainable fashion.

Section 5.1 reaffirms the advantages of protecting *original* fashion designs, based on the presumption that the manufacturing practices of luxury fashion houses lend favourably to circular practices. In contrast, the concept of obsolescence explains why fast fashion can never be sustainable: clothing repair is *unnecessary*, as garments are discarded before the end of their lifespan; *uneconomical*, because new garments are inexpensive; or, *impossible* because the garments are made from low-quality materials.[122] Section 5.2 delves into the intricacies of a strong copyright regime by examining the potential IP-related challenges that could arise from the latest trend of 'upcycling'. This design-based, circular approach to fashion is a *volte-face* towards consumption, offering socially and environmentally beneficial fashion choices; where *waste* is turned into *value* and encompassing the concept that what is old can, simultaneously, be new. This Section concludes that exceptions to exclusive rights can ensure the balance between 'upcycling' versus infringement and, therefore, promote the circular and sustainable development of the UK fashion industry. This requires maintaining the CDPA limitations to adaptation rights and departing from the rightsholder-centric view suggested in EU case law.

[120] *Cofemel* (n 4) (Opinion, AG Szpunar) [52].
[121] Lionel Bently, 'The Return of Industrial Copyright?' (2012) 10(19) European Intellectual Property Review 1, 6.
[122] Greg Peters and others, 'The need to decelerate fast fashion in a hot climate - A global sustainability perspective on the garment industry' (2021) 295 Journal of Cleaner Production 1, 2.

A. OBSOLESCENCE: ABSOLUTE VS RELATIVE

Per person, the UK buys more clothes than any other country in Europe.[123] The term 'planned obsolescence' describes how fast-fashion companies 'downgrade' the quality of products to increase consumerism and stay ahead of market competition, which both enforces and encourages a disposable mentality towards clothing.[124] UK consumers buy new fashion products either 'every month' or 'every six months', with data analysis citing two rationales for buying behaviour: either the product is no longer considered wearable, or due to the consumer simply wanting something new.[125] Thus, the environmental and social sustainability problem is based on a two-fold understanding of obsolescence: absolute *and* relative.

Absolute obsolescence means the product is no longer able to be used, is usually completely worn out and needs to be replaced. In contrast, relative obsolescence takes place *before* absolute obsolescence and involves an observable discrepancy between the product's *actual* lifetime and *usage* time; consumers do not use the product until the end of its life span, because they perceive it to be obsolete beforehand.[126] Bisschop et al. reason that rapid trend circulation *and* a lack of clothing quality simultaneously contribute towards a 'psychological obsolescence' by emotionally manipulating consumers to make short-term profits.[127] As such, the fast fashion phenomenon is morally ambivalent, undermines consumer confidence and embodies a socially-ingrained obstacle to environmental sustainability, on account of the 336,000 tonnes of clothing that ends up in UK bins annually.[128]

Conscious consumers acknowledge the heterogeneity between the business practices of fast- fashion and luxury brands, expressing a preference towards sustainable environmental and ethical practices when dealing with luxury fashion goods.[129] A consumer's interest in whether the material contents of their luxury apparel are 'sourced from transparent and ethical supply chains'[130] and willingness to pay

[123] Environmental Audit Committee, *Fixing Fashion: Clothing Consumption and Sustainability* (HC 2019-02 1952). According to the House of Commons report, people in the UK buy 26.7kg. This is significantly higher than the European figures reported by ECAP: Germany (16.7kg), Denmark (16.0kg), France (9.0 kg), Italy (14.5kg) and the Netherlands (14.0kg). See also European Clothing Action Plan, *Driving Circular Fashion and Textiles* (2019) <http://www.wrap.org.uk/ecapsummaryreport> accessed 6 July 2024.
[124] Kamilla Baša and Eseme Szabó Farkas, 'Buying Behaviour and Planned Obsolescence in the Fashion Industry' [2022] Sociálno-Ekonomická Revue 12.
[125] ibid.
[126] Antonio Fels and others, 'Social Media Analysis of Perceived Product Obsolescence' (2016) 50 Procedia CIRP 571-576.
[127] Lieslot Bisschop and others, 'Designed to Break: Planned Obsolescence as Corporate Environmental Crime' (2022) 78 Crime, Law and Social Change 271-293.
[128] Hubbub, 'What to do with old clothes' <https://www.hubbub.org.uk/what-to-do-with-old-clothes> accessed 6 July 2024.
[129] Isaac Cheah and others, 'Conceptualising country-of-ingredient Authenticity of Luxury Brands' (2016) 69(12) Journal of Business Research 5819, 5825.
[130] ibid. See also Tae-Im Han and Leslie Stoel, 'The Effect of Social Norms and Product Knowledge on Purchase of Organic Cotton and Fair-Trade Apparel' (2015) 7(2) Journal of Global Fashion Marketing 89, 102.

a premium for such products is referred to as 'ethical mainstreaming'.[131] The authenticity of sustainable and ethical practices, artisan skills and the origin of craftsmanship also influence a consumer's product judgement of luxury branded products.[132] To create consumer desire, luxury fashion houses often use quality materials and craftsmanship to produce more durable clothing and accessories, which lends to more sustainable business practices. Joy et al., propose that fashion brands specifically marketed as 'sustainable' face the consumption challenge of embodying the same consumer desire in common with their luxury counterparts.[133] Hence, high fashion houses have the opportunity to lead the industry towards sustainable development. To phrase the rhetoric simply: 'Why toss an item designed to last, with timeless—as opposed to deliberately, time-limited—style?'[134]

B. UPCYCLING FROM AN EXCLUSIVE RIGHTS PESPECTIVE

Using quality materials to manufacture garments and accessories allows for the possibility of repairing, reusing, or repurposing the original piece, lending luxury fashion to sustainable and creative practice. In the words of Vogue, upcycling is 'the biggest trend in fashion right now', with fashion houses, from Stella McCartney to Louis Vuitton, founding a new prestige for using archive materials to create new designs.[135] However, this practice of creative reuse is not solely used by the original *Maisons de Couture*, with an increasing number of third-party designers utilising old or used apparel to create products with a higher retail value.[136] Following the expansion of protection afforded to the fashion industry, one may question whether granting exclusive rights could invite powerful fashion houses to attempt an overreach of their brand protection, instigate absolute monopolies and incentivise invoking IP rights to restrict unrelated third-party businesses from upcycling.

Simply put, the interface between sustainability and IP rights may pivot on the applicability of the doctrine of exhaustion to upcycled fashion. This principle allows for legitimately acquired copies of protected subject matter to be resold once a product has been placed on the relevant market directly by, or via consent from, the rightsholder. This is referred to as 'exhaustion', or the 'first sale' doctrine, as the IP-right owner cannot rely on their exclusive rights to prevent the further distribution or circulation of those products; these resale goods can then be subject to parallel trade, under the current

[131] Craig Thompson and Gokcen Coskuner-Balli, 'Enchanting Ethical Consumerism: The Case of Community Supported Agriculture' 7(3) Journal of Consumer Culture 275, 303.
[132] Cheah and others (n 129).
[133] Joy and others (n 6) 273, 290.
[134] ibid 291, 292.
[135] Emily Chan, 'Upcycling is the Biggest Trend in Fashion Right Now' *(Vogue UK*, 23 November 2020) <https://www.vogue.co.uk/fashion/article/upcycling-trend-ss21> accessed 6 July 2024.
[136] Reet Aus and others, 'Designing for Circular Fashion: Integrating Upcycling into Conventional Garment Manufacturing Processes' (2021) 8(34) Fashion and Textiles 3, 4.

UK+EEA regime.[137] However, US case law indicates that upcycling a branded product, even once IP rights are exhausted, can give rise to legal proceedings. The most recent, *Chanel v Shiver and Duke*, involving an independent company repurposing authentic "CC" buttons into jewellery, evidenced that selling materially altered goods constituted trademark infringement.[138] Although neither the UK, nor the CJEU, have specifically addressed upcycling in case law, it seems that upcycling could be considered infringement if third-party designers do not obtain a licence.

A discrete focus on the exhaustion of the distribution right under UK copyright law further validates the thesis of this article: that protecting fashion designs as artistic works can foster the sustainable development of the UK fashion industry. However, per contra to the arguments forwarded in the previous Sections this requires divergence from the EU copyright *acquis*, in addition to maintaining the UK's closed-list system of 'works'. This argument follows from the CJEU's ruling in *Art & Allposters v Stitching Pitctoright*, involving Allposters selling posters depicting copyrighted paintings on a canvas medium. To transfer the protected image from a paper poster and onto canvas, Allposters used a chemical process which caused the image of the protected work to disappear from the original paper poster. The claimant, Pictoright, successfully argued that the sale of these canvassed reproductions constituted an infringement of copyright. The CJEU's decision addressed the following two issues:

(1) Alteration of a medium of a protected work

Although the InfoSoc Directive makes no explicit reference to the adaptation right, the CJEU argued that the replacement of the physical medium, as took place through the canvas transfer, resulted in the creation of a new object *incorporating* the protected work.[139] Thus, establishing no additional copy is necessary for reproduction to occur.[140]

(2) Exhaustion of the distribution right

As the original work changed from paper to canvas, the CJEU interpreted Article 4(2)[141] to mean that the distribution right of the second work was not exhausted. The reproduction of the protected work had 'undergone an alteration of its medium' and then placed on the market again in a new, reproduced

[137] Intellectual Property Office, 'UK's Future Exhaustion of Intellectual Property Rights Regime' (Closed consultation,7 June 2021) <https://www.gov.uk/government/consultations/uks-future-exhaustion-of-intellectual-property-rights-regime> accessed 6 July 2024.
[138] Chanel Inc v Shiver & Duke LLC [2021] (1:21-cv-1277 SDNY); see also Chanel, Inc vs. Beth Val Colbert Greenberg [2013] (1:13-cv-08301 SDNY).
[139] Case C-419/13 Art & Allposters International BV v Stitching Pictoright [2015] ECR I-27 [43].
[140] Maśa Galič, 'The CJEU Allposters Case: Beginning of the End of Digital Exhaustion?' (2015) 37(6) European Intellectual Property Review 389, 394.
[141] Council Directive (EC) 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 4(2).

form.[142] The purpose of the distribution right is to give authors control over the initial marketing of 'each tangible object *incorporating* their intellectual creation', therefore the second work required the consent and reasonable remuneration of the rightsholder[143] for the distribution right to be exhausted.[144] As the consent of the copyright holder did not cover the distribution of the new reproduction, Allposters were found to be infringing.

In rationalising such a conclusion, the CJEU placed importance on 'whether the altered object itself, *taken as a whole*, is physically the object that was placed onto the market with the consent of the rightsholder'.[145] A clear interpretation of 'taken as a whole' is not provided in this judgment, which makes it difficult to establish when a new reproduction occurs, particularly where the physical medium of the original work is maintained and then *combined* with a different medium. Thus, if a third-party designer chooses to upcycle a copyright-protected garment or accessory, by cutting and sewing the original work, or adding other textiles, it remains unclear whether this would classify as a new form of reproduction.

A forewarning of an incorrect interpretation of the exhaustion doctrine is provided in Mezei's commentary on the Finnish Copyright Council's (FCC)[146] statement in *Tableware jewellery and copyright*.[147] With regard to copyright-protected broken porcelain tableware upcycled into commercial jewellery, the majority opinion of the FCC considered the jewellery to be a 'new form' of reproduction and concluded, in reliance on *Art & Allposters*,[148] that exhaustion of the distribution right did not apply, even if the identical elements were incorporated into the secondary jewellery. The dissenting opinion noted that using pieces of broken tableware cannot be considered to belong in the core of the author's economic rights and does not amount to reproduction, as it is not a 'multiplication' of the underlying works, as in *Art & Allposters*,[149] but a *reuse* of the same copies that were first authorised for sale in the Community. The innovative upcycling of the shattered porcelain continued the lifespan and added commercial value to an object considered unusable for its original purpose. Mezei agrees, criticising

[142] *Art & Allposters* (n 139) [49].
[143] ibid [47], citing *Football Association* (n 101) [107].
[144] Art & Allposters (n 139) [46].
[145] ibid [45].
[146] 'The FCC does not issue legally binding rules, but provides recommending statements that are widely accepted as important secondary legal sources by Finnish legal academics' Péter Mezei and Heidi Härkönen, 'Monopolising Trash: A Critical Analysis of Upcycling under Finnish and EU Copyright Law' (2023) 18(5) Journal of Intellectual Property Law 360, 361.
[147] Statement TN 2021:9 'Astiakorut ja tekijänoikeus', cited from ibid.
[148] Art & Allposters (n 139).
[149] ibid.

the 'outdated' view on the limits to exhaustion; rather than promoting a circular economy, the FCC's interpretation seeks to 'monopolise trash'.[150]

Under the CDPA, the copyright owner has the exclusive right to copy and distribute their work.[151] For artistic works, this includes the making of a copy in three dimensions of a two-dimensional work and vice versa.[152] The copyright owner is also entitled to prevent unauthorised persons from doing anything aforementioned concerning the work as a whole, or any substantial part of the work.[153] As per the CJEU's decision in *Art & Allposters*,[154] it is at least arguable that upcycling, and thus converting, a copyright-protected 'artistic work' for commercial advantage may infringe the author's economic right of reproduction or the copyright in the original work. This argument would, however, be dependent on the facts of each case and *how* a court interprets the scope of the reproduction right.

The CJEU appear to interpret reproduction as including, or at least overlapping, with the adaptation right;[155] with the broadening of the former right at the expense of the latter.[156] However, besides compliance with the Berne Convention, which states that 'authors of artistic works shall enjoy the exclusive right of authorising adaptations, arrangements, and other alterations of their works',[157] the InfoSoc Directive makes no explicit reference to the adaptation right.[158] Furthermore, due to the adaptation right lacking formal horizontal effect in the EU, the reclaimed legal sovereignty of the UK, and the systematic approach of the Berne Convention, the expansion of the copyright protection afforded to fashion designs does not appear to frustrate upcycling under domestic UK law. This is because the CDPA provides a separate adaptation right which *explicitly* does not apply to artistic works.[159] Thus, transformative redistributions of upcycled, copyright-protected designs are covered by the UK's exhaustion doctrine. Classified as new, original, and independent works, this form of sustainable fashion may even merit copyright protection in and of itself.

Unlike other EU national perspectives on the adaptation right, the CDPA appears to appropriately balance the author's exclusive rights with wider societal interests. Ergo, contrary to Mezei's reproach

[150] Mezei and Härkönen (n 146).
[151] Copyright, Designs and Patents Act (CDPA 1988), s 17, 18.
[152] ibid, s 17(3); see Rosie Burbridge, *European Fashion Law: A Practical Guide from Start-up to Global Success* (1st edn, Elgar Practical Guides 2019) 56-72.
[153] CDPA 1988 (n 151), s 16(3).
[154] Art & Allposters (n 139).
[155] ibid; see also *Infopaq* (n 15) and *Painer* (n 86) [97].
[156] Galič (n 140) 389-394.
[157] The Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221, art 12.
[158] InfoSoc Directive (n 89).
[159] CDPA 1988 (n 151), s 21(1).

of the EU *acquis*,[160] there is no need to re-conceptualise the UK exhaustion doctrine. Rather, it should function as sovereign from EU precedents.

CONCLUSION

This article does not proclaim that bestowing copyright protection to fashion *designs* would absolve the fashion industry from the exploits of planetary and human turmoil. Our society has come to acknowledge, accept, and then avert attention from the unsustainable ways we make, use, and throw away our clothes. This cultural phenomenon will survive any 'calls to action to end poverty and inequality, protect the planet, and ensure that all people enjoy health, justice and prosperity'.[161] It pervades into the UK's system of governance and manifests into a legal cynicism for change.[162] As such, this article aimed to take a more unconventional approach to legislative redress. Based on Raustiala and Sprigman's undertakings that 'if copying were illegal, the fashion cycle would occur very slowly',[163] this article has utilised the literature surrounding fast-fashion design copying to theorise on the features of UK IP law that are connected to the 'piracy paradox' and induced obsolescence. Reflecting on the objectives, justifications and limitations of industrial property rights rationalises *how* the law permits design piracy and, ergo, a lack of sustainability. Conversely, this allows the legal discussion to explore whether the relationship between copyright law and fashion could be purposively engaged to promote sustainable development. It appears to affirm that adopting the unity of art approach can disincentivise the production of fast-fashion design copying, slow down both the circulation and trends, and therefore hinder the damage caused by the overproduction and overconsumption of clothing.

To contribute to the literature that nexuses copyright protection and design piracy, this article advanced a UK perspective. Our withdrawal from the EU allows for consideration of whether divergence from EU case law precedent is desirable for the protection of fashion designs. This article aspires to demonstrate that copyright is one amenity that can promote environmentally and socially sustainable business practices. This is not to claim that copyright law is the *only* legislative instrument with the capacity to fulfil such an objective, but rather that the framework for industrial property rights would be inadequate without transformative revisions. Undoubtedly, this topic requires further research into the unethical practices that luxury fashion brands also pursue. The exploitation of animals in the

[160] Mezei and Härkönen (n 146).
[161] United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/Res/70/1.
[162] See Environmental Audit Committee, *Fixing Fashion: Clothing Consumption and Sustainability* (HC 2019-02 1952) <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1952/full-report.html> accessed 6 July 2024.
[163] Raustiala and Sprigman, 'The Knockoff Economy' (n 50) 43, 44.

production of leather is but one example. Moreover, greater discourse on the interplay between the tenets of intellectual property law, environmental law, and human rights law in the regulation of the fashion industry is to be developed in my future research.

The Right to Dignity Safeguards Abortion in a Liberal Democracy: Using Intersectionality and Dignity to Protect Abortion in Liberal Democracy

Ayobami Olufemi-White

ABSTRACT

This article examines the concept of 'dignity' in the context of reproductive rights and abortion. It aims to provide a comprehensive understanding of the role of dignity in shaping the discourse on reproductive rights and abortion, with a focus on its implications for women's experiences and vulnerabilities. It also examines the ethical dilemma of abortion, arguing for a proportional consideration of dignity and the importance of upholding it as an essential value in liberal democracy. Finally, it advocates for the use of qualified universalism and human dignity as vital tools in addressing the unique challenges faced by people with intersecting identities in accessing abortion.

INTRODUCTION

In 1991, the United States Supreme Court struck down a Texas law that criminalised homosexual sex and pointed to the protection of dignity within the right to privacy under the Fourteenth Amendment.[1] *Casey* reiterated this in the context of abortion.[2] Thirty years later, *Dobbs v Jackson Women's Health Organization*[3] overturned *Roe v Wade*[4] after 50 years.

The reason for this paper is that the judgement of the US Supreme Court in *Dobbs v Jackson* points to the inconsistent treatment of dignity by the US and the US's ignorance of the international communities' positions on the issue of abortion access.

1 Lawrence v Texas 539 US 558 (2003).
2 Planned Parenthood v Casey 505 US 833 (1992).
3 Dobbs v Jackson Women's Health Organization 597 US 1392 (2022).
4 Roe v Wade 410 US 113 (1973).

Section 1 begins by discussing how dignity is a rejection of the degrading treatment of individuals and defines what constitutes degrading treatment and how it has been employed to protect women's rights. Section 2 identifies a causal link between abortion bans and the degrading treatment of women. It points to the preferable method of balancing the dignity interests of the foetus and pregnant person as exemplified in the case of *Vo v France*.[5] Section 3 discusses how the courts have a key role in protecting dignity, democracy, and human rights in countries where abortion is restricted. Section 4 proposes the use of qualified universalism and human dignity as vital tools in addressing the unique challenges faced by people with intersecting identities in accessing abortion. Consequently, this article argues that abortion access must be protected as a matter of human dignity in any country that describes itself as a 'liberal democracy'.

I. THE CONCEPT OF DIGNITY

At the inception of modern South Africa, Nelson Rolihlahla Mandela said: 'We enter into a covenant that we shall build the society in which all South Africans will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity'.[6] The foundational value of the post-apartheid South African constitution is dignity.[7] Dignity is antithetical, often a rejection of a past of degrading treatment, and invoked to provide a new basis for society.

5 Vo v France App no 53924/00, (ECtHR, 8 July 2004).
6 Nelson Mandela, 'Statement Of The President Of The African National Congress, Nelson Mandela, At His Inauguration As President Of The Democratic Republic Of South Africa, Union Buildings' (Inaugural Speech, Pretoria, 11 May 1994) <www.africa.upenn.edu/Articles_Gen/Inaugural_Speech_17984.html> accessed 28 January 2024.
7 Constitution of the Republic of South Africa 1996, Chapter 1.

A. DIGNITY AS THE KAIROS OF HUMAN RIGHTS

The concept of dignity offers a symbolic possibility to denounce an inhuman past and create a new beginning.[8] An Enlightenment-era example of the symbolic possibility of dignity can be seen in the preamble to the 1848 decree abolishing slavery in the French empire.[9] The decree expressed a call for abolition, recognition of human dignity, extensive civil rights for emancipated individuals, and an enthusiastic acceptance of the concept of 'social equality' as designated by the French government.[10] In contemporary human rights discourse, dignity similarly invokes a universal moral obligation of social equality.[11] Hollenbeck identifies that the declarations of dignity in several constitutions were a direct response to the immorality of constitutional orders in the 20th Century.[12] As a result, the moral obligation of dignity exists beyond the group identity or division. Dignity means there is a derived duty of respectful treatment because of humanity's 'irreplaceable worth'.[13] Waldron identifies 'the modern notion of human dignity does not cut loose from the idea of rank instead, 'it involves an upwards equalisation of rank'.[14] On legislative and judicial levels, dignity has transformed countries and international bodies. Consequently, as such Dupre suggests that dignity has gone beyond being symbolic to become a compass towards modernity',[15] a statement of inclusivity,[16] the synchrony of rights,[17] and a transformative tool.[18]

B. VIOLATIONS OF DIGNITY AS A MEASURE OF DEGRADING TREATMENT

In European Court Human Rights (ECtHR) and other international courts, judges have often connected certain rights with human dignity including the 'right to life, equality, the fulfilment of personality or

8 Catherine Dupré, The Age of Dignity: Human Rights and Constitutionalism in Europe (Hart Publishing 2015) 157.
9 Rebecca Scott, 'Dignité/Dignidade: Organizing Against Threats to Dignity in Societies after Slavery' in Christopher McCrudden and others (eds), Understanding Human Dignity (British Academy 2013) 61.
10 ibid 64.
11 David Hollenbach, 'Human Dignity: Experience and History, Practical Reason and Faith' in Christopher McCrudden and others (eds), Understanding Human Dignity (British Academy 2013) 128.
12 ibid.
13 ibid.
14 Jeremy Waldron, 'How Law protects Dignity' (2012) 71(1) Cambridge Law Journal 200, 212.
15 Dupré (n 8) 165.
16 ibid 154.
17 ibid 161.
18 ibid 158.

the prohibition of torture, inhuman or degrading treatment or punishment'.[19] Daniel Bedford specifies that regarding the prohibition of degrading treatment and torture, 'human dignity has now become integral to assessing what constitutes degrading treatment'.[20] In 1978 in the case of *Tyler v UK,*[21] the ECtHR found the practice of corporal punishment in schools was a violation of Article 3, the prohibition of torture and degrading treatment, outlining that one of the primary purposes of the article was the protection of personal dignity.[22]

In 2015, in the case of *Bouyid v Belgium,*[23] the ECtHR determined that the slapping of the adolescent applicant by a police officer constituted a violation of dignity and therefore also a violation of Article 3. The court stated that there was a particularly strong link between the concept of 'degrading treatment' under Article 3 and respecting dignity.[24] Initially, the Fifth Section Court followed the orthodox approach to degrading treatment, by asserting the slapping of the defendant was unacceptable but not a violation of Article 3.[25] However, the Grand Court's stance was that any use of physical force that was not strictly necessary due to a person's conduct diminished human dignity and, in principle, constituted a violation of Article 3.[26] Mavronicola suggests the Grand Chamber's reasoning was 'both sensitive to the particular relational factors that determine the character of a particular treatment – factors which go to the iniquity of the perpetrator's act and the vulnerability of the victim's circumstances, for example – and distinguished from the subjective human experience of the treatment at the same time, making the assessment of whether it has been 'diminished' or otherwise attacked an objective question'.[27] In *Bouyid,* the court highlighted the power imbalance and the vulnerability of

19 Dupré (n 8) 162.
20 Daniel Bedford, 'Key Cases on Human Dignity under Article 3 of the ECHR' (2009) 2 EHRLR 185.
21 Tyler v UK (1980) 2 EHRR 1.
22 ibid 13.
23 Bouyid v Belgium App no 23380/09 (ECtHR, 28 September 2015).
24 ibid 26.
25 ibid, Third Party Intervention of Human Rights Centre of Ghent University.
26 ibid 16.
27 Mavronicola, 'Bouyid v Belgium: The 'Minimum Level of Severity' and Human Dignity's Role in Article 3 ECHR' [2016] Cyprus HR Law Rev 1, 13.

the adolescent applicant at the time of the event.[28] Hence, it can be said that individual vulnerability is key to identifying violations of dignity.[29]

According to Greene, there is a 'cardinal axiom' view at the prohibition of torture and degrading treatment under Article 3 of the ECHR is a virtually absolute right; shown by ECtHR's rulings including *A v UK,*[30] *Mocanu v Romania,*[31] and *Z.A v Russia.*[32] The American theorist Richard Dworkin's baseline analysis of dignity suggests that certain rights like the prohibition of torture can be understood as clear violations of dignity and cannot be justifiably encroached on.[33] These rights carry a strong positive obligation by the state to prevent their violation.

C. DIGNITY, WOMEN, AND INTERNATIONAL HUMAN RIGHTS

In the words of Joanna Keer, 'the magnitude of women's rights abuses demands international action'.[34] Consequently, dignity has been useful in circumventing antiquated gender norms that contribute to the human rights abuses of women. Since its legal inception in the United Nations Universal Declaration of Human Rights (UDHR), dignity has underlined the equality of men and women. Daly submits that the UDHR was 'universally appealing'.[35] It was the 'first international statement of rights to recognize the 'inherent dignity' of 'all members of the human family'.[36] Subsequently, in 1979, the preamble of the Convention on the Elimination of Discrimination against Women (CEDAW) underscored that discrimination against women 'violates human dignity'.[37] Subsequently, dignity has been used in court

28 Bouyid (n 23) 29.
29 ibid 30.
30 A and Others v UK App no 3455/05 (ECtHR, 19 February 2009) 126.
31 Mocanu and Others v Romania App no 18213/16 (ECtHR, 5 May 2022) 315.
32 Steven Greene, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15 Human Rights Law Review 101; ZA and Others v Russia App no 61411/15 (ECtHR, 28 March 2017).
33 Richard Dworkin, Is Democracy Possible Here? Principles for a New Political Debate (Princeton University Press 2006) 36.
34 Joanna Kerr, Ours by Right Women's Rights as Human Rights (1st edn, Zed Books 1993) 32.
35 Erin Daly, Dignity Rights: Courts, Constitutions, and the Worth of the Human Person (University of Pennsylvania Press 2021) 13.
36 ibid 13.
37 Convention on the Elimination of All Forms of Discrimination against Women (adopted December 18 December 1979, entered into force 3 September 1981) 1249 UNTS 14 (CEDAW).

decisions prohibiting sex discrimination. In 2017, in *Carvalho Pinto de Sousa Morais v Portugal,*[38] ECtHR held that when gender stereotypes play a role in decision-making, preventing access to necessary healthcare is an attack on human dignity.[39] In 2021, in *Kamau v Attorney General,*[40] the Kenyan Supreme Court found dignity to be incompatible with the practice of female genital mutilation; a practice linked to an antiquated view of female purity. [41]

Dignity and the rights of women are linked further in the indignity of marital rape. In 1995, the case of *SW v UK,*[42] *w*as significant as it marked the first time that dignity was a central focus of the discussion of ECtHR,[43] reaffirming the criminalisation of marital rape in the UK. According to the orthodox Common Law principle, as Sir Matthew Hale infamously outlined 'the husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract'.[44] However, ruling ex post facto the ECtHR rejected the precedent and the applicant's reliance on Article 7, which prohibits retrospective liability. The court discarded the marital exception defence for rape and deemed it 'unacceptable' as it went against the civility of the institution of marriage and was contrary to human dignity.[45] The court pointed to dignity and discussed the contemporary societal views of women's equality in marriage and outside of it, along with their autonomy over their bodies.[46] In its Kairos function, dignity was able to circumvent a long-standing common law principle and ensure that the innate worth of women was beyond reproach even in marriage.

VIOLENCE AGAINST WOMEN; GENDERED DEGRADING TREATMENT

38 Carvalho Pinto De Sousa Morais v Portugal App no 17484/15 (ECtHR, October 2017).
39 ibid 22.
40 Kamau v Attorney General [2021] KEHC 450 (KLR).
41 Beth D Williams-Breault, 'Eradicating Female Genital Mutilation/Cutting' (2018) 20(2) Health Hum Rights 223, 227; ibid 30.
42 SW v UK App no 20166/92 (ECHR, 22 November 1995).
43 Dupré (n 8) 100.
44 Matthew Hale, History of the Pleas of the Crown (first published 1736, Will & Mary 2023) 629.
45 ibid.
46 SW v UK (n 42)16.

When it comes to combating violence against women, especially in the context of domestic abuse, dignity has been used to protect women's rights and prevent degrading treatment of a gendered nature. In 2017, in the case of *Volodina v Russia,*[47] the court held that Russia failed to comply with its obligations under Article 3 of the Convention to protect the applicant from physical and psychological abuse by her former partner.[48] The court emphasised the humiliating nature of domestic violence, which aims to debase women's dignity through physical, sexual, psychological, or economic violence.[49] McQuigg identifies that the 'findings of the ECtHR cannot …be said to be surprising'; the judgement follows the trajectory of international legal criticism of Russia's handling of domestic abuse.[50] The Committee for Elimination of Discrimination against Women (CEDAW Committee) had previously criticised Russia for underreporting cases of violence against women and for insufficient victim protection services.[51] Russia's failure to ratify the Istanbul Convention, which enhanced protection for victims of domestic abuse, was criticised.[52] The ECtHR's intervention reflects the importance of dignity and international courts in combating gender-based violence in the absence of adequate state intervention.

Dignity is critical in combating physical, psychological, and degrading treatment, especially towards women. Hence, it is unsurprising that in issues like abortion, where the physical, psychological, and mental integrity of women is more likely to be impinged on, dignity is salient.

II. DIGNITY, INTERNATIONAL HUMAN RIGHTS LAW, AND ACCESS TO ABORTION

47 Volodina v Russia App no 41261/17 (ECtHR, 1 June 2017).
48 ibid 48.
49 ibid 44.
50 Ronagh J A McQuigg, 'The European Court of Human Rights and Domestic Violence: Volodina v Russia' (2021) 10 International Human Rights Law Review 155, 161.
51 UN Committee for the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Eighth Periodic Report of the Russian Federation' (20 November 2015) UN Doc CEDAW/C/RUS/CO/8.
52 Convention on Preventing and Combating Violence Against Women and Domestic Violence (European Convention on Human Rights, as amended) (ECHR).

In 1964, Gerri Santoro, a domestic abuse victim, was denied a legal abortion and resorted to an illegal procedure performed by her partner using a medical textbook and borrowed medical equipment, which resulted in her death.[53] In 1973, Ms. Magazine published a haunting photo of Gerri Santoro naked and bleeding, galvanising the pro-choice movement and leading to the landmark ruling of *Roe v Wade*.[54] This tragic event illustrated the relationship between violence against women, degrading treatment, and unsafe abortions when legal access to abortion is removed. Hence, it is essential to consider the connection between abortion, human rights, and dignity.

A. ABORTION AS AN INTERNATIONAL HUMAN RIGHTS ISSUE

Abortion is part of the global human rights discussion. Human Rights Watch has described legal access to abortion as a human right.[55] Leah Hoctor identifies that a plethora of substantive legal documents including 'treaty interpretation, jurisprudence and materials, international and regional human rights mechanisms have articulated how a series of restrictions on access to abortion implicate and contravene a range of human rights'. [56] More specifically, restrictive abortion laws create conflicts with reproductive health, which can contribute to gender-based violence and torture. Additionally, banning abortions often results in the degrading treatment of women due to a rise in unsafe abortions.

ABORTION IN THE CONTEXT OF REPRODUCTIVE JUSTICE AND GENDER-BASED VIOLENCE

Ratified in 1978, the CEDAW Article 12 specifies that women should have equal access to healthcare services, including reproductive healthcare.[57] Contraception and abortion treatment are recognised as

53 Jade Macmillan and Joanna Robin, 'Before Roe v Wade Fell, Gerri Santoro's Death Galvanised America's Abortion Movement. This Is Her Story' ABC News (Washington DC, 25 June 2022) <www.abc.net.au/news/2022-06-26/before-roe-v-wade-gerri-santoro-galvanised-abortion-movement/101168136> accessed 8 April 2023.
54 Carmen Rios, 'Daring to Remember: Tell Us Your Abortion Story' Ms Magazine (Washington DC, 25 June 2022) <https://msmagazine.com/2022/09/14/daring-remember-tell-us-story-life-roe/> accessed 8 April 2023.
55 Human Rights Watch, 'Q&A: Access to Abortion is a Human Right' (Human Rights Watch, 24 June 2022) <www.hrw.org/news/2022/06/24/qa-access-abortion-human-right> accessed 9 March 2023.
56 Leah Hoctor, 'Abortion' in Christina Binder and others (eds), Elgar Encyclopaedia of Human Rights (5th edition, Edward Elgar Publishing 2022) 5.
57 CEDAW (n 37) art 12.

essential to overall reproductive health by the American College of Obstetricians and Gynaecologists,[58] and other leading organisations like the British Medical Association,[59] that represent physicians who treat women and birthing people. More severely, in 2017, the CEDAW Committee's General Recommendation on Gender-Based Violence noted that denying women's sexual and reproductive health, which included the criminalisation of abortion, constitutes gender-based violence that can give rise to degrading treatment and torture.[60] Restricting access to abortion has implications for reproductive autonomy and degrading treatment.

THE CAUSAL RELATIONSHIP BETWEEN RESTRICTIVE ABORTION LAWS, THE RISE IN ILLEGAL ABORTIONS, AND DEGRADING TREATMENT

Several international bodies have highlighted the causal relationship between restrictive abortion laws, the rise in unsafe abortions, and the subsequent increase in rates of degrading treatment and mortality risks associated with illegal abortions. The Special Rapporteur's report on torture confirms that illegal abortions are a prime cause of preventable death for women. [61] Data shows that countries with more restrictive abortion laws had 31% of abortions categorised as 'least safe', while countries with the fewest restrictions had only 1%.[62] In 2016, the Report of the Special Rapporteur on torture also found that clandestine abortions have long-term adverse psychological and physical effects on women.[63] Before this, in 2006, the Torture Committee's periodic report on Peru found that the country's restrictive abortion law meant the state had failed to take steps to prevent acts that endanger the physical and

58 'Abortion Policy' (American College of Obstetricians and Gynaecologists, 2022) <www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy> accessed 13 April 2023.
59 'Decriminalisation of Abortion: a Discussion Paper from the BMA' (BMA, February 2017) <www.bma.org.uk/media/1142/bma-paper-on-the-decriminalisation-of-abortion-february-2017.pdf> accessed 13 April 2023.
60 Volodina v Russia (n 47) 7.
61 UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc A/HRC/31/57, 12; 'Abortion Fact Sheet' (World Health Organization, 25 November 2021) <www.who.int/news-room/fact-sheets/detail/abortion> accessed 13 April 2023.
62 'Abortion Worldwide 2017: Uneven Progress and Unequal Access' (Guttmacher Institute, 2017) <www.guttmacher.org/report/abortion-worldwide-2017 > accessed 13 April 2023.
63 UNHRC (n 61) 12.

mental health of women.[64] Because of the Peruvian laws, women resorted to illegal procedures, which exposed them to degrading treatment.[65] The Torture Committee identified the state's positive obligation to prevent this.[66] Correspondingly, the CEDAW, [67] and others in 2017 recommended the repeal of provisions that criminalise abortion as a matter of preventing violence against women and degrading treatment.[68] *Bouyid* established dignity's fundamental role in what constitutes degrading treatment, especially under the ECHR.[69] This means that there needs to be a consideration of the strong link between the ill-treatment of women restricted from receiving abortions and dignity.

64 UN Committee Against Torture, 'Peru Conclusions and Recommendations of the Committee against Torture' (25 July 2006) UN Doc CAT/C/PER/CO/4, 5.
65 ibid 6.
66 ibid 6.
67 UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 35 on Gender-based Violence against Women, Updating General Recommendation No. 19' (26 July 2017) UN Doc CEDAW/C/GC/35, 12.
68 UNHRC (n 61) 22.
69 Bouyid (n 23) 22.

B. ABORTION AND DIGNITY

NON-VIABLE PREGNANCIES AND ABORTION ACCESS: UPHOLDING HUMAN DIGNITY FOR PREGNANT PERSONS

Abortion access, especially for non-viable pregnancies, is necessary to uphold the human dignity of the pregnant person. In 1983, a constitutional referendum in Ireland resulted in the insertion of Article 40.3.3 into the Constitution. This guaranteed the equal right to life of the unborn and the mother but referring to 'women' as 'mothers' and 'foetuses' as 'babies'. [70] This phrasing skewed the line between infanticide and abortion, even in non-viable pregnancies. Subsequently, several international bodies recommended changes to Irish abortion laws.[71] In *A, B and C v Ireland,*[72] the applicants argued that 'the criminalisation of abortion was discriminatory and caused an affront to women's dignity'.[73] The ECtHR held that although their treatment fell outside the scope of Article 3 of the ECHR, it did not 'underestimate the serious impact of the impugned restriction on the first and second applicants'.[74]

This was prior to *Bouyid* contextualising the scope of what constituted degrading treatment. In 2012, Savita Halappanavar was denied a termination even though she was miscarrying, and her foetus had no chance of surviving, resulting in her death.[75] Subsequently, the Torture Committee advised, that Ireland 'clarify the scope of legal abortion through statutory law and provide for adequate procedures to challenge differing medical opinions as well as adequate services for carrying out abortions in the State party, so that its law and practice is in conformity with the [Torture] Convention'.[76] Correspondently, the Protection of Life During Pregnancy Act 2013 was passed, but women remained

70 The Irish Constitution 1937, art 40.3.3.
71 Fiona de Londras, 'Fatal Foetal Abnormality, Irish Constitutional Law, and Mellet v Ireland' (2016) 24(4) Med Law Rev 591, 598.
72 A, B and C v Ireland App no. 25579/05 (ECtHR, 16 December 2010).
73 ibid 45.
74 ibid 68.
75 Kitty Holland & Paul Cullen 'Woman 'Denied a Termination' Dies in Hospital' The Irish Times (Ireland, 14 November 2012).
76 Committee Against Torture, Concluding Observations of the Committee Against Torture: Ireland, (17 June 2011) UN Doc CAT/C/IRL/CO/1, para 26.

limited in their ability to make real choices about whether to continue a pregnancy. None of the legal provisions highlighted dignity.

However, in *Mellet v Ireland,*[77] the connection between access to abortion and dignity was explicitly stated.[78] Amanda Mellet, the applicant, was informed that her foetus had a heart defect and could therefore not receive an abortion in Ireland despite the foetus's non-viability. Instead, she travelled to Liverpool to terminate the pregnancy without any assistance from Ireland. The Committee made it clear that the events that took place violated Mellet's dignity outlining that Ireland had 'failed to demonstrate that the interference was proportionate'.[79] Further that restriction 'attacked her physical and psychological integrity, dignity and autonomy', caused Amanda to endure 'trauma and stigma', and 'serious mental pain and suffering'.[80] The Human Rights Committee highlighted the unnecessary nature of the restriction stating their 'was no purpose other than to impair the author's enjoyment of her right to information related to abortion services abroad and was disproportionate in the light of the detrimental impact on her dignity and well-being'.[81] This shows that abortion restrictions in the case of non-viable pregnancies are an explicit violation of dignity.

ABORTION BANS AS INTENDED FORMS OF GENDERED DISCRIMINATION

International bodies like the Human Rights Committee have found restrictive abortion laws to constitute a particularly gendered form of ill-treatment. Paralleling the use of dignity in *Volodina v Russia,*[82] by the ECtHR, the Committee acknowledged the gendered nature of the ill-treatment and violation of dignity that Mellet faced. The Human Rights Committee held that the 'Irish abortion ban traumatizes and 'punishes' women who need to terminate non-viable pregnancies'.[83] More specifically the law had 'a distinct and specific impact on women and the consequences of the legislation on the

77 Amanda Jane Mellet v Ireland (2013) Select Decision of the Human Rights Committee CCPR/C/116/D/2324/2013.
78 ibid 13.
79 ibid.
80 ibid.
81 ibid 14.
82 Volodina v Russia (n 47).
83 Amanda Jane Mellet v Ireland (n 77) 6.

personal integrity, dignity, physical and mental health and well-being of women are severe'.[84] Additionally, that the Committee highlighted that Ireland or another State 'cannot invoke women's biological difference to men and their reproductive capacity as a basis for permissibly restricting their rights'. [85] Likewise, in a letter addressed to a Brazilian Supreme Court Justice, several United Nations (UN) organisations highlighted that overly restrictive abortion laws are designed to discriminate against women and can fulfil the intent and purpose criteria of the Torture Convention. [86] Siegel identifies that the religious opposition to abortion is premised on defending the 'dignity' of traditional gender roles and controlling the sexual behaviour of women.[87] This all-underscores that abortion bans are intended forms of gendered discrimination and ill-treatment.

THE IMPORTANCE OF DIGNITY AND SAFE ACCESS ZONES IN THE PRE-ABORTION PROCESS

Globally, women have faced harassment from anti-abortion advocates at abortion clinics.[88] In response to this, buffer zone laws have been passed. In 2000, the US Supreme Court ruled, in *Hill v Colorado,*[89] that Colorado's buffer zone legislation was constitutional. However, in 2014, *McCullen v Coakley,*[90] a law with a larger buffer zone was declared unconstitutional. None of these judgements provided a clear link between the violation of dignity and the harassment by anti-abortion activists. However, in 2022, the Abortion Services (Safe Access Zones) (Northern Ireland) Bill 2022 was passed. This was the first

84 ibid 14.
85 ibid 14.
86 UNGA Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entry into force 26 June 1987) art 1; UNOHC, 'Letter to the Honorable Madame Justice Ministra Cármen Lúcia from the Mandates of the Working Group on the Issue of Discrimination Against Women in Law and in Practice; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Special Rapporteur on the Rights of Persons with Disabilities; and the Special Rapporteur on Violence Against Women, Its Causes and Consequences' 8.
87 Reva B Siegel, 'Dignity and sexuality: Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage' (2012) 10(2) ICON 355, 378.
88 'Clashes at America's Abortion Clinics are Getting Noisier' The Economist (Mississippi, 27 November 2021) <www.economist.com/united-states/2021/11/27/clashes-at-americas-abortion-clinics-are-getting-noisier> accessed 9 April 2023.
89 Hill v Colorado 530 US 703 (2000).
90 McCullen v Coakley 573 US 464 (2014).

piece of British legislation prohibiting protests outside abortion clinics. The Attorney General ,when discussing the bill, outlined that 'primary purpose is to ensure that women have access to premises at which treatment or advice concerning the lawful termination of pregnancy is provided, under conditions which respect their privacy and their dignity, thereby enabling them to access the health care they require, and promoting public health'.[91] This highlighted that women could now expect a fundamental right to privacy and dignity especially because 'they are visiting a hospital at a time when they are profoundly vulnerable'.[92] Therefore, there is increasing recognition of the vulnerability of pregnant women and the risk of encroachment on their dignity.

THE VIOLATION OF DIGNITY: RESTRICTIVE ABORTION LAWS AND THE PLIGHT OF RAPE VICTIMS

Correspondingly, restrictive abortion laws grossly encroach on dignity, especially in the context of rape victims trying to access abortion. The ECtHR has linked restricting rape victims' access to abortion to violating Article 3 of the Convention, a right definitionally linked to dignity. In *P.S. v Poland,*[93] the ECtHR found that Poland violated Article 3 when an adolescent who was raped, who legally had the right to an abortion, was obstructed. In the concurring opinion, Judge De Gaetano, mirroring *Bouyid*, outlined those public authorities 'should never have been allowed to degenerate, as happened in the instant case, into trickery, deceit and the emotional manipulation of a vulnerable person, which constitute an abuse of the dignity of the person'.[94] This reasoning reasserted the connection between vulnerability, dignity, and degrading treatment.

91Attorney General for Northern Ireland's Reference - Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32, 72.
92 ibid 63.
93 PS v Poland App no 57375/08 (ECtHR, 30 October 2012).
94 ibid 43.

It is imperative to note that the dignity interest of the foetus has not been addressed. The complex ethical and legal considerations surrounding abortion require a nuanced approach that considers the competing interests and rights of all parties involved.

III. CONFLICTING DIGNITY INTERESTS IN ABORTION CASES

The dissenting judgement in *Dobbs v Jackson Women's Health Organization,*[95] stated that removing the constitutional protection of abortion would lead to 'the profound loss of autonomy and dignity that coerced pregnancy and birth always impose'.[96] Justice Kavanaugh countered that pro-life advocates purport that 'fetus is a human life' and 'that all human life should be protected as a matter of human dignity'.[97] Abortion remains a contentious issue, because of this it is essential to explore and explain the issues surrounding this abortion debate.

A. EXPLAINING AND EXPLORING THE DIVERGENT APPROACH TO DIGNITY

THE DILEMMA PROPOSED BY DIGNITY IN ABORTION CASES

Dignity protects the legal right to an abortion; however, the relationship between the rights of the foetus and dignity is complex and has been a topic of extensive debate. Dworkin's baseline analysis has suggested certain rights can be understood as baseline violations of dignity.[98] However, abortion access has been linked to two rights considered to be baseline violations of dignity: the right to life of the foetus and the prohibition of torture for the woman. Hence, O'Mahoney argues that 'it seems reasonably clear that abortion is the subject of such a level of disagreement that it comes nowhere close to Dworkin's notion of 'baseline' violations of human dignity'.[99] O'Mahoney's argument is based on the idea that the UDHR facilitates cultural divergence in the understanding of dignity by

95 Dobbs v Jackson Women's Health Organization (n 3) (2022)
96 ibid 52.
97 ibid 1.
98 Richard Dworkin, Is Democracy Possible Here?: Principles for a New Political Debate (Princeton University Press 2006) 36.
99 Conor O'Mahoney, 'There is no such thing as a right to dignity' (2012) 10(2) ICON 551, 568.

normatively discussing specific rights.[100] This ambiguity can lead legislators and judges to use their normative understanding of dignity, which may differ from established views.

However, O'Mahoney overlooks the fact that the generality of the concept of dignity and the approach to balancing dignity in the UDHR was intended to exclude cultural and religious influences. Hugh identifies two reasons for this: first, the process of ratifying the UDHR required a secular reference to dignity. Hugh outlines the 'phrasing of the ratified document …allowed the Committee to take no position on the nature of man and of society and to avoid metaphysical controversies, notably the conflicting doctrines of spiritualists, rationalists, and materialists regarding the origin of the rights of man'.[101] Second, for dignity to be truly inclusive, it needed to transcend a Judaeo-Christian framework for universal participation.[102] Daly identifies this openness as beneficial and allows for a revolutionary utility of dignity.[103] It is also important to note that the UDHR establishes that the dignity of a human being begins at birth, not at conception.[104]

THE DIVERGENT APPROACHES TO FOETAL RIGHTS AND DIGNITY

International, and domestic courts have usually taken three distinct approaches to determine whether a foetus has the right to life. Under the first approach, the ECtHR in *Vo v France*[105] argued that a foetus does not have the right to life under the ECHR.[106] Then, Germany has taken a pragmatic approach by stating that the foetus has the right to life with certain exceptions.[107] According to the third approach, in countries like Peru, the foetus has an absolute constitutionally codified right to life.[108] However, US Supreme Court has taken several approaches to the application of dignity and the right to life of the foetus. It has diverged from recognising the importance of the 'life' of the foetus to affirming the

100 ibid.
101 Glenn Hughes, 'The Concept of Dignity in the Universal Declaration of Human Rights' (2011) 39(1) Journal of Religious Ethics 1, 2.
102 ibid 15.
103 Daly (n 35) 27.
104 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) art 1.
105 Vo v France (n 5).
106 ibid.
107 BVerfG, Order of the Second Senate of 28 May 1993, 2 BvF 2/90, para 1–434.
108 Constitution of the Republic of Peru 1993, art 2.

autonomy of dignity of the woman and only recognising an interest in life post-viability. In *Carhart,*[109] the US Supreme Court upheld a law restricting access to abortion, with Justice Kennedy stating that the legislation 'expresses respect for the dignity of human life'.[110] However, in a dissenting opinion, Justice Bader Ginsburg relied on the view of dignity asserted in *Casey*, [111] in which the Supreme Court affirmed women's decisional autonomy and access to abortion.[112] The court held that abortion was 'central to personal dignity and autonomy'[113] and 'an element of basic human dignity'.[114] The implication of these divergences in approach is that, as Baer identifies, there is a perception that dignity is a 'black box'. [115] To elucidate this misconception around dignity, the reason for this divergence must be explained.

EXPLAINING THE DIVERGENT APPROACHES IN THE CONTEXT OF THE US CONSTITUTION, THE EUROPEAN UNION'S FRAMEWORK, AND THE GERMAN CONSTITUTION

To understand why these regions, use dignity in the abortion debate so differently, the historical context and the uses of dignity in their jurisprudence must be explored. Unlike the US, the European Union,[116] and Germany,[117] have codified the concept of dignity into a positive rights framework. There is much more clarity on what dignity is in the European context than in America. Additionally, the contents of their constitutions are shaped by their constitutional moments. The German Basic Law was drafted in response to the atrocities of the Nazi regime, which is why it has a strong commitment to rights, with dignity serving as a foundational element of that commitment.[118] The US, on the other hand, has a

109 Gonzales v Carhart 550 US 124 (2007).
110 ibid 157 (Kennedy).
111 Planned Parenthood v Casey (n 2) 833 (1992).
112 Gonzales v Carhart (n 109) 170 (RBJ) (2007).
113 Planned Parenthood v Casey (n 2) 851(1992).
114 ibid 916.
115 Susanne Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59(4) UTLJ 417, 456.
116 Charter of Fundamental Rights of the European Union [2000] OJ C364/7, art 1.
117 Basic Law for the Federal Republic of Germany 1949, art 1.
118 Catherine Dupré (n 8) 157.

negative rights Constitution,[119] that prioritises limiting government power in response to perceived British colonial overreach.[120] Hence, the concept of dignity is only useful in the US if it is compatible with individual freedom and negative obligations.[121] For example, in the context of abortion, the anti-abortion movement in the US uses dignity to preserve the negative obligation to protect the right to life for the foetus.[122] The pro-choice movement, takes a similar negative rights approach in its advocacy of the preservation of bodily autonomy and the right to privacy as a matter of dignity.[123] As Betty Friedan exemplifies by asserting the right an abortion is 'to assert woman's right to choose, and to define the terms of our lives ourselves, move women further to full human dignity'.[124] In Europe, however, the context is more focused on ensuring a positive role for the government and this can be seen through Baer's triangular conception of dignity.[125]

119 Jackson v City of Joliet, 715 F 2d 1200, 1203 (7th Cir 1989).
120 Library of Congress, 'British Reforms and Colonial Resistance, 1767-1772' (Library of Congress) <www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/american-revolution-1763-1783/british-reforms-1767-1772/> accessed 9 April 2023.
121 Daly (n 35) 144.
122 James J Zumpano Jr, 'Abortion in the United States: A Cry for Human Dignity' (2020) 15 Intercultural Hum Rts L Rev 285, 333.
123 Betty Friedan, 'Abortion: A Woman's Civil Right' in Linda Greenhouse and Reva B Siegel (eds), Before Roe v Wade: Voices That Shaped the Abortion (Yale Law School 2012) 39.
124 ibid.
125 Baer (n 115).

B. UTILISING BAER'S TRIANGULAR FORMATION OF DIGNITY TO RESOLVE THE DILEMMA OF THE DIGNITY OF THE FOETUS

The German legal scholar Baer suggests using a triangular formation to address discrepancies in the use of dignity.[126] She argues that 'the right to dignity could... supplement equality, which leads us to conceptualize a right to decide (a liberty claim) under conditions of equal opportunities free from oppression and subordination (equality), in respect of and recognizing all parties involved (dignity)'.[127] This approach considers the deep socio-cultural understanding of pregnancy, childbirth, maternity, parenthood, and family in the context of abortion and prenatal rights.[128] It considers systematic inequality and proportionality.[129] Hence there are only two approaches to abortion somewhat consistent with Baer's view of dignity: recognising that the foetus does not have the right to life or recognising the foetus' right to life with certain exceptions.

BALANCING THE DIGNITY OF WOMEN AND THE RIGHT TO LIFE OF THE FOETUS: THE GERMAN MODEL OF ABORTION LAW

The German model of conferring the right to life to the foetus with certain exceptions balances both dignity interests. Although abortion is a crime in Germany, the German Constitutional Court has decided that it should remain unprosecuted,[130] primarily to prevent the eugenic uses of abortion in Nazi Germany.[131] Given the historical context, Böckenförde argued that the 'starting point for the penal regulation can be none other than a general prohibition of abortion'.[132] Unlike other authorities who consider illegal abortions to be a persuasive objection, Böckenförde, a devout Catholic, believed that the prevalence of illegal abortions at the time was a direct consequence of the 'special inability of

126 ibid 417.
127 ibid 466.
128 ibid.
129 ibid.
130 BVerfG (n 107) para 203.
131 Ernst-Wolfgang Böckenförde, Mirjam Künkler and Tine Stein, 'Abolition of Section 218 of the Criminal Code? Reflections on the Current Debate about the Prohibition of Abortion in German Criminal Law [1971]' in Mirjam Künkler and Tine Stein (eds), Religion, Law, and Democracy: Selected Writings (OUP 2020) 318.
132 ibid 333.

developing human life to protect itself'.[133] Therefore, for Böckenförde, abortion must remain criminal to preserve human dignity.[134]

Despite the stance that abortion is a crime, especially post-reunification, the German Constitutional Court has continued to emphasise the importance of balancing the Böckenförde idea of necessary criminalisation with the dignity of women. In the landmark case of *BvF 2/90*,[135] the German Constitutional Court held that, while the foetus had a right to protection under Article 2 (the right to life under the Basic Law),[136] and the inviolability of dignity under Article 1, this must be balanced with a woman's inviolable right to dignity.[137] Women's rights, such as the right to life and the freedom to develop their personalities, must also be protected.[138] Therefore, the legislature must strike a balance between the duty to protect the unborn and the rights of women.[139] However, because the German Basic Law lacks a discussion of this balance, the court suggested that several considerations, such as the principle of proportionality, should guide the determination of the balance.[140] To ensure this balance, the provision of counselling was considered necessary.[141] In 2015, religious groups in Croatia argued that the right to life in the constitution was incompatible with abortion access in the country.[142] As a result, Croatian women were restricted from accessing abortion, thus resorting to black-market abortions.[143] In response, the Croatian Constitutional Court relied on the provisions from German and international law, holding that the balance between the rights claimed on behalf of the foetus and those of the pregnant person was necessary, as they are 'inextricably interconnected'.[144]

133 ibid 333.
134 ibid 333.
135 BVerfG (n 107).
136 ibid para 30.
137 ibid para 31.
138 ibid para 32.
139 ibid para 86.
140 ibid para 86.
141 ibid para 25.
142 Masenjka Bacic, 'Abortion Rights Under Fire in Croatia' (BalkanInsight, 30 November 2016) <https://balkaninsight.com/2016/11/30/abortion-rights-under-fire-in-croatia-11-29-2016/> accessed 6 January 2024.
143 ibid.
144 Constitutional Court of Croatia [Decision of February 21, 2017, regarding abortion] Rješenje Ustavnog Suda Republike Hrvatske, broj: U-I-60/1991 i dr od 21 veljace 2017, 26.

BALANCING THE DIGNITY OF FOETUS AND WOMEN: PROTECTING FOETAL DIGNITY WITHOUT GRANTING PERSONHOOD

Warren asserts that 'there is room for only one person with full and equal rights inside a single human skin'.[145] It is impossible to confer the definitive right to life on a foetus without undermining the rights of the pregnant person and ignoring the ambiguous nature of foetal rights. There are lines of cases dating back decades showing that there is a lack of consensus on the status of the embryo in terms of personhood, including *Paton,*[146] *Vo,*[147] *and Tysiqc*. [148] The US Supreme Court's decision in *Roe v Wade* concluded that the foetus had a compelling interest in life at viability, requiring state protection.[149] In 1981, in *Paton*, the European Commission of Human Rights rejected the argument that the British Abortion Act 1967 violated Article 2 of the ECHR, the right to life.[150] The European Commission of Human Rights distinguished between the unborn and the born, stating that the restrictions on the right to life according to the European Convention 'by their nature, concern persons already born and cannot be applied to the foetus'.[151] The Commission substantiated this by arguing that the general usage of the term 'everyone' of the Convention does not include the unborn.[152]

As Plomer suggests, *Paton* presented a dichotomy between the judgement and its implication.[153] Even though the right to life was not conferred on the foetus, there was still a debate on whether the right to life could be applied with certain limitations.[154] Plomer suggests that the Commission in Paton could have clarified the conflicts in rights by simply stating that because of the ambiguous status of the foetus, 'a State cannot discharge an obligation to protect 'life' without specifying whose life is to be

145 Mary Anne Warren, 'The Moral Significance of Birth' (1990) 4(3) Hypatia 46, 63.
146 Paton v UK (1981) 3 EHRR 408.
147 Vo v France (n 5).
148 Tysiąc v Poland App no 5410/03 (ECtHR, 20 March 2007).
149 Roe v Wade (n 4).
150 Paton v UK (n 146) 413.
151 ibid.
152 ibid.
153 Aurora Plomer, 'A Foetal Right to Life? The Case of Vo v France' 5(2) Human Rights Law Review 311, 317.
154 ibid.

protected'.[155] Subsequently, in 2004, *Vo* acknowledged this ambiguity and provided a method of protecting the foetus' dignity based on the potentiality of life.[156] In 2015, the Croatian Constitutional Court relied on *Vo* to argue that it is not possible to determine reliably and non-arbitrarily at which point the 'ontological leap' from a non-being to a being occurs.[157] Courts, post-*Vo*, identify that the foetus has civil law protection because of the potentiality of life and has the protection of human dignity beyond Article 2.[158] Dignity protects the rights of the foetus as a potential life and the rights of women as persons.

Courts and academics have two ways to reconcile the two dignity interests in abortion. However, in the face of popular opposition, it is often difficult for people seeking an abortion to assert their right to abortion as a matter of dignity. Hence, the democratic function of the international courts must be established and acknowledged.

IV. DIGNITY AS A REGULATOR OF DEMOCRACY

Dignity is foundational to the protection of all rights.[159] According to Dworkin, respect for human dignity is pivotal to the functioning of a democratic society.[160] One of the infinitely contentious issues within democracy is the issue of the tyranny of the majority. However, modern constitutionalism, through its commitment to human rights, has used dignity to mitigate this.[161] In 2004, a property owner attempted to evict a gay tenant after their partner died. In response to the property owner and other opposition to LGBT rights, Lady Hale in *Ghaidan,*[162] highlights the foundational importance of dignity, stating that 'it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority'.[163]

155 ibid.
156 Vo v France (n 5) 38.
157 Constitutional Court of Croatia (n 144) 82.
158 ibid 38.
159 Daly (n 35) 130.
160 Ronald Dworkin, Justice for Hedgehogs (Harvard University Press 2011) 320.
161 Tom Bingham, Rule of Law (Penguin Books 2011) 57.
162 Ghaidan v Godin-Mendoza [2004] 2 AC 557.
163 ibid 605.

Abortion restrictions, like homophobic laws, are often by-products of the tyranny of the majority. Legislation on abortion in the US is predominantly passed by white cis-gendered men, while abortion is predominantly performed by women of colour.[164] In situations where legislative measures like constitutions and statutes fail to provide access to safe and legal abortion, it becomes necessary to have external safeguards in place to ensure that individuals have the right to access abortion services, irrespective of a vocal minority.

A. THE EXTERNALITY OF DIGNITY AND IMPLICATIONS FOR CONSTITUTIONALISM

Dignity is a persuasive tool for protecting minority rights because of its externality and foundational importance to constitutionalism. Dupré argues that human dignity is not limited to the law but extends beyond.[165] The externality of human dignity can be seen by the position of dignity in constitutional texts. As Dupre states 'human dignity is textually outside: outside the normatively binding part of the constitution (in the Preamble), or outside the list of positive rights enumerated in the constitution'.[166] Furthermore, the use of the expression 'inviolability' to describe dignity ensures an earnest guarantee to prevent its breach.[167] For example, the German Basic Law's Article 79.3 is colloquially labelled the 'eternity clause'.[168] The clause ensures that the most fundamental rights, which are derived from dignity, exist for eternity.[169]

Dupré identifies that uniquely 'European constitutionalism has arguably endeavoured to substantiate',[170] the dignity 'promise by creating a distinct institutional framework for liberal democracy revolving around sophisticated human rights guaranteed in constitutions, thus making human dignity the 'highest moral notion of democratic humanity''.[171] Dignity is also the basis of

164 Susan A Cohen, 'Abortion and Women of Color: The Bigger Picture' (2008) 11(3) Guttmacher Policy Review 2, 3.
165 Dupré (n 8) 166.
166 ibid.
167 ibid 178.
168 Basic Law for the Federal Republic of Germany (n 118) art 79.3.
169 Dupré (n 8) 82.
170 ibid.
171 ibid 70.

international human rights law more broadly, as evidenced by the UDHR and other conventions.[172] Multinational organisations like the European Union and the UN also implicitly endorse the externality-eternity perspective on human dignity.[173] This is evident in the conception of dignity in the Lisbon Treaty,[174] and the EU Charter.[175] Upon examining the relationship between dignity and revoking a past of degrading treatment, it is unsurprising that the externality of dignity plays a pivotal role in modern constitutionalism. Dupré observes that dignity's externality ensures that it exists even after the constitution is changed and precedes the historic degrading treatment.[176]

B. THE PIVOTAL ROLE OF INTERNATIONAL LAW AND JUDGES PLAY IN ENFORCING DEMOCRACY IN THE 21ST CENTURY.

Daly identifies that there has also been a growth in the role of constitutional courts within democracy due to international law.[177] Dupré highlights 'constitutional courts have also been an innovation of post-Second World War constitutionalism'[178] and how their reference to each other's case law, as well as comparative and European law, has 'been instrumental for the construction of human dignity, making it a fully European concept, tightly woven into the fabric of European constitutionalism'.[179] This is also evident in the context of abortion, the Croatian Constitutional Court relied on German law, international treaties and European law to ensure its decision adhered with established European constitutionalism and respected the codified clarified view of dignity. Similarly, international courts have a quasi-constitutional court function.[180] Dupré outlines that while supranational courts may not strictly be considered constitutional courts, they play a significant role in protecting human rights and

172 UDHR (n 104), Preamble.
173 Dupré (n 8) 168.
174 Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 2.
175 Charter of Fundamental Rights of the European Union (n 116), art 1.
176 Dupré (n 8) 168.
177 Daly (n 35) 147.
178 Dupré (n 8) 92.
179 ibid 91.
180 ibid.

interpreting primary law, [181] especially the ECtHR, which established civil and political rights and allows individual applicants to petition against human rights violations and abuses.[182]

DEFENSIVE MECHANISM FOR DEMOCRATIC GOVERNMENTS IN THE FACE OF ILLIBERAL OPPONENTS

More broadly, in human rights law, international courts have several democratic functions that enhance dignity and democracy for all. Bellamy identifies the judicialization of international human rights law as a defensive mechanism for young democracies against illiberal opponents.[183] He proposes that 'the governments of new democracies can rationally see such international commitments as helping to lock in the domestic *status quo* against their non-democratic opponents'.[184] A country that exemplifies this is Poland. Poland joined the Council of Europe in 1991 and has been a party to the ECHR since 1993.[185] Poland has lost three cases regarding abortion at the ECtHR.[186] These decisions are responses to the populist bureaucracy making decisions that are not representative of the people. In Poland, 66% of respondents in 2020 said they favour legal abortion in the first trimester, yet the country continues to have restrictive abortion laws.[187] This divergence between the people and the decisions means the court's intervention is necessary.

SUPPLEMENTARY NATURE OF INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS

181 ibid 92.
182 ibid.
183 Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25(4) EJIL 1019, 1032.
184 ibid.
185 Marta Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon' (2022) 14 HJRL 73,79.
186 ibid.
187 Anna Grzymala-Busse, 'Europeans Are Overwhelmingly Pro-Choice, But That Doesn't Mean Women's Rights Are Safe' (The Guardian, 29 June 2022) <www.theguardian.com/world/commentisfree/2022/jun/29/europeans-pro-choice-womens-rights-roe-v-wade-us-poland> accessed 13 April 2023.

Regarding corrupt or weak democracies, Takata's 'Two-tiered bounded deliberative democracy' theory argues for the supplementary nature of international human rights law.[188] Takata outlines 'if a national deliberative process has deficiencies, human rights treaty organs must fill the gaps by conducting intrusive examinations on the substance of the decision'.[189] These human rights treaties and courts enhance the 'two-tiered bounded deliberative democracy' because the interventions prevent and often compensate for the negative consequences of national inefficiencies.[190] In the context of abortion, this theory means that in Peru, where the corrupt government is failing to adequately protect women, international human rights organisations can intervene to ensure decisions are informed by globally accepted human rights standards. In the case of *K.L. v Peru*,[191] the state eventually compensated the applicant because of the UN committee's findings.[192]

188 Hinako Takata, 'Reconstructing the Roles of Human Rights Treaty Organs under the 'Two-Tiered Bounded Deliberative Democracy' Theory' (2022) 22(2) Human Rights Law Review 1, 14.
189 ibid.
190 ibid.
191 KL v Peru (2005) CCPR/C/85/D/1153/2003.
192 'Peru Compensates Woman in Historic UN Human Rights Abortion Case' (UN Office of the United Nations High Commissioner for Human Rights, 18 January 2016) <www.ohchr.org/en/stories/2016/01/peru-compensates-woman-historic-un-human-rights-abortion-case> accessed on 13 April 23.

UNCOVER PAROCHIAL BIASES

Imperfections in the judicial process can be corrected by democratic mechanisms like international courts. Bellamy outlines 'the international level may allow lessons to be learned from other democracies and certain unfounded parochial biases and prejudices to be challenged'.[193] The democratic process is not perfect, especially in the US.[194] An example of this function of international law is the heavily criticised US Supreme Court case of *Gonzalez*.[195] When the US Supreme Court did not find a constitutional violation in *Gonzalez*, the Inter-American Commission held that there was a systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence.[196] In response to the Supreme Court's argument that the police did not have a positive duty to uphold a restraining order against her ex-husband. The Inter-American Commission underscored the need for law enforcement to 'respect and protect human dignity and maintain and uphold the human rights of all persons in the performance of their duties'. [197] *Dobbs v Jackson* repeats the mistakes of *Gonzalez* by concealing the parochial bias made by the court. Hence, there is a need for domestic reliance on international courts and commissions to ensure that dignity is protected as a matter of democracy.

Dignity has a cyclical relationship with democracy, with international institutions and courts acting as safe guardians of democracy and dignity. Dignity within democracy has also been a persuasive tool due to its external-eternal framework for protecting minority rights in the face of the tyranny of the majority.

193 Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25(4) EJIL 1019, 1033.
194 ibid.
195 Gonzalez v USA Case No 12.626 Inter-American Commission Human Right Report No 80/11 (2011).
196 ibid 14.
197 ibid 51.

V. THE GROWTH OF INTERSECTIONALITY IN INTERNATIONAL LAW

Dignity has already been framed as the antithesis of degrading treatment. In*, East African Asians,*[198] ECtHR found that racial discrimination was a violation of dignity and constituted degrading treatment.[199] Hence, where the issues of dignity, human rights, and ill-treatment converge in racial violence, international bodies are vigilant towards this defacement of dignity. In 2020, in *R.R. v Slovakia*,[200] a case involving a Roma man who was subjected to ill-treatment, the ECtHR made a very salient point that *'racial violence is a particular affront to human dignity'*.[201] Hence, authorities must utilise every possible measure to prevent racism and racial violence to maintain a democratic society in which diversity is valued.[202]

A. INTERNATIONAL LAW AND INTERSECTIONALITY

If racism, sexism, racial violence, and gender-based violence are affronts to dignity, what happens when they converge? Crenshaw's concept of intersectionality, first coined in 1989, illustrates how different forms of inequality can intersect and intensify, leading to complex obstacles that may not be fully comprehended through traditional legal thinking, often resulting in intersectional subordination.[203] This can also occur on a human rights basis. The importance of intersectionality was discussed at the Expert Group Meeting on 'Gender and Racial Discrimination' of 2001, particularly for human rights.[204] Crenshaw's attendance had an impact, with the report highlighting the potential contributions of intersectional theory within the UN's human rights work.[205] Consequently, the CEDAW Committee has increasingly recognised intersectionality as pivotal to treaty interpretation. There was a recognition of intersectional discrimination in the CEDAW report, General

198 East African Asians v United Kingdom App no 4403/70 (ECtHR, 14 December 1973).
199 ibid 55.
200 RR v Slovakia App no 20649/18 (ECtHR, 1 September 2020).
201 ibid 37.
202 ibid 37.
203 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U Chi Legal F 139, 150.
204 UNGA, 'Report of the Expert Group Meeting on Gender and Racial Discrimination' (11 May 2001) UN Doc A/CONF.189/PC.2/20, 9.
205 ibid, Annex I.

Recommendation No. 35.[206] The Committee on the Elimination of Racial Discrimination also articulated an intersectional approach to recognising discrimination.[207] Bond points out that 'the treaty bodies' inclusion of intersectionality in these documents can have a significant impact on the extent to which states internalize the normative content of rights guarantees, including intersectional interpretations of rights'.[208]

B. DIGNITY, INTERSECTIONAL SUBORDINATION AND REPRODUCTIVE JUSTICE

ABORTION BANS AS INTERSECTIONAL SUBORDINATION

Abortion bans are not only gendered degrading treatment but also lead to intersectional subordination. Unsafe abortions disproportionately impact poor women of colour globally. In Brazil, where abortion is prevalent but illegal.[209] However, abortion-related deaths are almost twice as high for brown women and three times higher for black women compared to white women in Brazil.[210] Black Brazilians are overrepresented among those living in poverty,[211] similar trends exist in the US.[212] In India, despite the court's extending abortion access to unmarried women,[213] women of lower caste are more likely to undergo unsafe abortions.[214] All of this highlights the intersectional impact of race, gender, caste, and poverty on a woman's health and experience in the context of abortion.

DIGNITY AND INTERSECTIONAL SUBORDINATION

206 (n 67) 12.
207 Committee on the Elimination of Race Discrimination, Rep of the Comm on the Elimination of Race Discrimination on Its Fifty-Sixth and Fifty-Seventh Sessions, General Recommendation No. 25: Gender-Related Dimensions of Racial Discrimination (2000) UN Doc A/55/18, 44.
208 Johanna Bond, Global Intersectionality and Contemporary Human Rights (OUP 2021) 75.
209 Kia Lilly Caldwell, Health Equity in Brazil: Intersections of Gender, Race, and Policy (University of Illinois Press 2017) 39.
210 ibid 39.
211 ibid 39.
212 Cohen (n 164) 3.
213X v The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr Civil Appeal No 5802 of 2022 (India).
214 Deepa Parent, 'Indian Women Cautious about Supreme Court's 'Historic' Abortion Ruling' openDemocracy (London, 12 October 2022) <www.opendemocracy.net/en/5050/india-abortion-supreme-court-unmarried-women/> accessed 13th April 2023.

Intersectional Subordination is incompatible with a respect for human dignity. In *Cantú Et Al v Mexico,*[215] an indigenous girl, Valentina Rosendo Cantu was raped and tortured by soldiers in Mexico on February 16, 2002. *Cantú* marked the first time that the Inter-American Court considered rape and sexual violence as a matter of torture and the court analysis highlighted the intersectional subordination of Valentina.[216] The court accounted for the fact that Cantu was victimised because of her indigeneity, age, gender, and poverty. This heightened her vulnerability to such a perverse impingement on her dignity by state actors. [217] Using this, the court determined that the state violated her right to personal integrity and dignity enshrined in the American Convention.[218] Dignity prohibits torture and degrading treatment caused by intersectional subordination.

INTERSECTIONAL SUBORDINATION, REPRODUCTIVE AUTONOMY, AND DEGRADING TREATMENT

The ECtHR have also underscored the importance of reproductive autonomy and respecting Roma women. In the case of *VC v Slovakia*,[219] the ECtHR found that the coerced sterilisation of a Roma woman violated both Article 3 and Article 8, the right to private and family life. Relating to Article 3, the court emphasised that imposing medical treatment without the consent of a mentally competent adult patient, intentional or not, is incompatible with a respect for human dignity. The court found that such action constituted degrading treatment and a violation of Article 3.[220] Regarding the violation of Article 8, the court noted the risk of sterilisation and vulnerability of Roma women to violations of their reproductive autonomy and the need to exercise appropriate supervision of sterilisation practices.[221]

C. RESOLVING INTERSECTIONAL SUBORDINATION INSTITUTIONALLY

215 Rosendo Cantú Et Al v Mexico, Inter-American Court of Human Rights Series C No. 216 (31 August 2010).
216 Johanna Bond (n 208) 108.
217 Rosendo Cantú Et Al v Mexico (n 215) 68.
218 ibid 36.
219 VC v Slovakia App no 18968/07 (ECtHR, 8 November 2011).
220 ibid 27.
221 ibid 35.

ARTICLE 14: INSTITUTIONALLY ADDRESSING INTERSECTIONAL SUBORDINATION

Rubio-Marin and Moschel identify that in *VC v Slovakia,* 'the intersecting discrimination between race and gender' was 'completely bypassed'.[222] They suggest that a violation of Article 14, the prohibition of discrimination, should have been found in connection with the violations of Articles 3 and 8 of the Convention.[223] The dissenting opinion in *VC v Slovakia* makes a compelling argument for this.[224] By focusing only on individual violations of Articles 3 and 8 of the Convention, the ECHR fails to recognise the broader context of discrimination against the Roma minority in Slovakia. The systemic nature of the discrimination reflected the historical context of state-sanctioned sterilisation of Roma women under the Communist Regime. The dissent identified evidence of negative public and political opinion towards the Roma minority and several accounts of sterilised Roma women without their informed consent.[225] This suggests that the sterilisations were racially motivated. The ECtHR's failure to consider the impact of systemic discrimination on marginalised groups undermines its ability to address issues of racialised violence. Finding a violation of Article 14 would recognise the strongest form of discrimination and incentivise appropriate systematic redress.

222 Ruth Rubio-Marin and Mathias Moschel, 'Anti-Discrimination Exceptionalism: Racist Violence Before the ECtHR and the Holocaust Prism' (2015) 26(4) EJIL 881, 898.
223 ibid.
224 VC v Slovakia (n 218) 45.
225 ibid.

QUALIFIED UNIVERSALISM

As shown by *VC v Slovakia,* there are still systemic failures that need to be addressed to achieve true reproductive rights and prevent the ill-treatment of all individuals, particularly those who are marginalised. Consequently, Bond proposes qualified universalism, which encourages an intersectional approach to human rights abuses.[226] Instead of recognising only those right violations that focus on racism or sexism, excluding other identities, the intersectional analysis provides a way for identifying all the applicable human rights that are violated in each situation along multiple axes of oppression.[227] Qualified universalism advocates for the 'universal application of human rights to all but, it acknowledges 'that individuals do not experience human rights violations in the same ways'.[228]

UNIVERSAL DIGNITY WITH CONTEXTUALISED RISK

The concepts of dignity and qualified universalism can work together to establish a baseline for protecting human rights in liberal democracies through the concept of Universal Dignity with Contextualised Risk (UDCR). In the context of abortion, this concept entails recognising the specific risks of ill-treatment faced by women of colour, gender non-conforming individuals, disabled individuals, and those who are poor when access to abortion is restricted. This is evident in the divergent treatment of cases such as Mellet and Halappanavar, both of whom had high-risk pregnancies. Mellet, a white Irish woman, was able to travel and obtain an abortion, while Halappanavar, an Indian dental student, could not and tragically died in the process.[229] The UDCR approach acknowledges that both women's experiences violated their dignity as women by Baer's triangular formation of dignity but specifically recognises, using Qualified Universalism, that Halappanavar was especially vulnerable due to her immigrant status, non-whiteness, and non-Catholic faith in Ireland. This consideration underscores the importance of removing restrictive abortion laws

226 Johanna E Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 EMORY L J 71, 155.
227 ibid.
228 ibid.
229 Kitty Holland & Paul Cullen (n 75).

to prevent the racialised degrading treatment of women. Additionally, the protection of dignity, even for unpopular minorities, underscores the importance of recognising the inherent dignity of these groups, regardless of societal perceptions and ensuring access to equal reproductive autonomy.

Consequently, intersectionality must be integrated into human rights laws to protect everyone's rights, especially in areas like abortion access, addressing historical and systemic failures that disproportionately affect people with intersecting identities.

CONCLUSION

This article highlighted the importance of human dignity in shaping the discourse surrounding legal abortion access, particularly within liberal democracies. It explored the multifaceted connection between abortion, dignity, and the degrading treatment of women, discussing how denying access to safe and legal abortions violates dignity in many ways. It argued for Baer's triangular formation, which ensures proportionality and socio-legal considerations. It stressed that in the face of opposition to civil rights, the external-eternity framework of dignity makes it a persuasive tool in human rights protection. It also emphasised the importance of upholding dignity as a fundamental value in liberal democracy. It proposed a new framework, Universal Dignity with Contextualised Risk, which combines dignity and intersectionality as crucial tools in addressing the unique challenges faced by women of colour in accessing abortion. This article outlines that ensuring access to safe and legal abortion is essential in upholding the dignity of individuals, particularly women, in all their diversity in liberal democratic societies.

The Dysfunction of the Functional Approach to Harmonising Securities Market

Dimitri Papadopoulos

ABSTRACT

There are four parts to this article, which collectively criticise the International Institute for the Unification of Private Law's (UNIDROIT) functional approach to harmonising securities markets through the Geneva Securities Convention. The first part of this article analyses the legal issues that are created by intermediation through cross-border securities investments and the corresponding policies underpinning UNIDROIT's harmonisation project embodied by the Geneva Securities Convention. These considerations offer an analytical framework through which the Geneva Securities Convention's substantive provisions are subsequently analysed. The second part of this article conducts a comparative analysis of the different legal characterisations afforded to intermediated securities in civilian and common law jurisdictions, thereby charting the lacunae that UNIDROIT sought to mend in its harmonisation efforts. The third part of this article argues that the functional approach to harmonisation adopted by UNIDROIT deprives the Geneva Securities Convention of the substance necessary to harmonise diverging national conceptions of intermediated securities. The fourth part of this article briefly examines whether further reform is capable of remedying the shortcomings identified throughout the article.

INTRODUCTION

This analysis argues that International Institute for the Unification of Private Law's (hereafter: UNIDROIT) functional approach to harmonisation under the Geneva Securities Convention[1] (hereafter: GSC) contributed to its failure to harmonise substantive rights for investors in intermediated securities. To provide necessary context, UNIDROIT functions as an intergovernmental organisation

[1] Convention on Substantive Rules Regarding Intermediated Securities 2009 (Geneva Securities Convention), which can be accessed at https://www.unidroit.org/instruments/capital-markets/geneva-convention/ (accessed 12 September 2024).

seeking to bring private international law into harmony through the creation and promotion of uniform rules, laws and principles. This article criticises its approach to harmonising the substantive rights of investors in intermediated securities. Implicit in this central claim are two criticisms that must be proven, namely that the GSC failed to harmonise the rights of investors in intermediated securities *and* that UNIDROIT's functional approach caused such failures. This article addresses both elements, collectively, in the following four parts. The first part of this article analyses the legal issues that are created by intermediation through cross-border securities investments and the corresponding policies underpinning UNIDROIT's harmonisation endeavours embodied by the GSC. These considerations offer a framework through which the GSC's substantive provisions are subsequently analysed. The second part of this article conducts a comparative analysis of the different legal characterisations afforded to intermediated securities in civilian and common law jurisdictions, thereby charting the lacunae that UNIDROIT sought to mend in its harmonisation efforts. Building upon the first two sections, the third part of this article directly addresses the dual criticisms that are seminal to this article's central claim, that the functional approach to harmonisation adopted by UNIDROIT deprives the GSC of the substance necessary to harmonise the diverging national conceptions of intermediated securities. The fourth and final part of this article concludes by examining whether further reform is capable of addressing the shortcomings of the functional approach to harmonisation identified throughout the article.

I. ANALYTICAL FRAMEWORK

A. ISSUES INTERMEDIATION INTRODUCED

The transformation of securities markets from paper-based to electronic systems proliferated transnational investments in securities, creating the need to harmonise diverging national practices and their disparate legal characterisations.[2] Under the outdated paper-based systems, an investor's physical

[2] Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Texts, Cases and Materials* (2nd edn, Oxford University Press 2015) 425.

possession of securities in bearer form provided them with direct rights against issuers.[3] Intermediation complicated securities markets by interposing intermediaries between the ultimate investors of securities and their issuers through the immobilisation (where central depositories hold physical securities that are electronically transferred between investors) or dematerialisation (where securities only exist in electronic form) of securities.[4] At present, intermediated securities (such as shares and bonds) are transferred through electronic book entries executed by central depositories to first-tier intermediaries that invest in securities and maintain accounts for their investors, who might, in turn, act as intermediaries for further investors (*et cetera*).[5] By facilitating transfers electronically, as opposed to physically transferring paper certificates between investors, intermediation reduces the practical complexities associated with transnational investment in securities and creates indefinite chains of intermediation culminating in the ultimate investor who does not maintain accounts for any further investors.[6]

To accommodate intermediation, most jurisdictions extended the same legal principles governing paper-based securities to intermediated securities.[7] While drawing legal parallels ensures certainty within national jurisdictions, it poses a 'major problem'[8] for transnational commercial activity, that parties hailing from incompatible legal traditions will have conflicting expectations regarding their rights and liabilities.[9] The default private international law rule established in the Hague Securities Convention complicates matters further by designating the applicable law as that of the jurisdiction

[3] Marek Dubovec, *Law of Securities, Commodities and Bank Accounts: The Rights of Account Holders* (Edward Elgar Publishing 2014) 29–36.
[4] Goode, Kronke and McKendrick (n 2) 427.
[5] Geneva Securities Convention, art 1(d).
[6] Roy Goode and Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, Oxford University Press 2020) para 21.21.
[7] Louise Gullifer and Jennifer Payne, 'Conclusion' in Louise Gullifer and Jennifer Payne (eds), *Intermediation and Beyond* (Hart Publishing 2019) 373–74.
[8] ibid 373.
[9] Luc Thévenoz, 'The Geneva Securities Convention: Objectives, History, and Guiding Principles' in Pierre-Henri Conac, Ulrich Segna and Luc Thévenoz (eds), *Intermediated Securities* (Cambridge University Press 2013) 6–9; Gullifer and Payne (n 7) 361–62.

where the relevant intermediary 'has its [principal] place of business',[10] which potentially subjects each investor in an intermediation chain to a different legal regime.[11]

To demonstrate the issue associated with intermediation, consider a two-tiered structure where one intermediary maintains a portfolio of securities issued by a central depository for a single ultimate investor.[12] The private international law rules stipulate that the ultimate investor's rights against the intermediary, and the intermediary's rights against the issuer, each depend on the jurisdiction in which their respective immediate counterparties conduct business. Therefore, despite investing in the *exact same securities*, the ultimate investor will have different rights against the intermediary than the intermediary will enjoy vis-à-vis the issuer where the intermediary and issuer operate in different jurisdictions (regardless of whether those jurisdictions share the same legal tradition). The addition of more intermediaries, diversified portfolios and the pooling of accounts, which are all common in practice,[13] compound these incongruences. When drafting the GSC, UNIDROIT sought to harmonise the rights of investors to mitigate legal risks and uncertainties associated with the 'holding and disposition of intermediated securities […] since domestic legal frameworks are not necessarily compatible'.[14] The remainder of this section will analyse the policies underpinning UNIDROIT's functional approach to harmonisation, which informs the framework through which the GSC's failure to achieve harmonisation will be exhibited in the balance of this article.

B. UNIDROIT'S POLICIES UNDERPINNING HARMONISATION

Understanding the policies underpinning the GSC is necessary to substantiate both elements of the central claim. These policies indicate UNIDROIT's intention to harmonise the substantive rights of investors in securities markets and the extent of harmonisation that UNIDROIT endeavoured to

[10] Hague Securities Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary 2002, arts 5(2) and 5(3).
[11] Gullifer and Payne (n 7) 373–74.
[12] Adapted for the present purposes from Luc Thévenoz, 'Intermediated Securities, Legal Risk, and the International Harmonization of Commercial Law' (2008) 13 SJLBF 384, 387–99.
[13] ibid 388–89.
[14] Hideki Kanda and others, *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* (Oxford University Press 2012) 3.

achieve. Correspondingly, UNIDROIT's policies provide a metric to assess whether the GSC was a success or failure by examining whether UNIDROIT achieved its harmonisation ambitions and the role that the functional approach played in that outcome. According to its Official Commentary, the GSC's main objectives were to achieve 'internal soundness'[15] and the 'compatibility of [legal] systems'[16] by ensuring that all Contracting States guarantee an irreducible core of rights to harmonise the protections transnational investors in intermediated securities markets receive.[17] Crucially, the GSC adopts a 'functional'[18] approach to harmonisation by dictating the effects that the enforcement of investors' rights should achieve without prescribing the substantive legal means that Contracting States must provide to realise them.[19] The functional approach was considered necessary to ensure that the GSC applied to all Contracting States regardless of how each characterises intermediated securities as a matter of law,[20] which manifests in the GSC's extensive deference to 'non-Convention law'.[21]

C. ANALYTICAL FRAMEWORK

As its policies indicate, UNIDROIT's functional approach is intended to achieve harmonisation by employing neutral language 'capable of being applied in different types of legal systems'.[22] The framework that this analysis uses to demonstrate the GSC's failure to harmonise substantive rights provides that, between the juxtaposing ambitions of achieving formal uniformity and substantive rigour,[23] the GSC's functional approach favours the former to the detriment of the latter. It is argued that the imbalance caused by UNIDROIT's functional approach prevents the GSC from achieving its policy objectives of harmonising the substantive rights of investors. This framework is applied throughout this article, beginning with the next section's comparative analysis of how common law

[15] ibid 4.
[16] ibid.
[17] ibid.
[18] ibid 5.
[19] Philippe Dupont, 'Rights of the Account Holder Relating to Securities Credited to Its Securities Account' in Pierre-Henri Conac, Ulrich Segna and Luc Thévenoz (eds), *Intermediated Securities* (Cambridge University Press 2013) 91.
[20] Thévenoz, 'Geneva Securities Convention' (n 9) 16–18.
[21] Geneva Securities Convention, preamble, arts 1, 7, 9-13, 15-16, 18-19, 22-26, 28, 31 and 34-36.
[22] Christophe Bernasconi and Thomas Keijser, 'The Hague and Geneva Securities Conventions: A Modern and Global Legal Regime for Intermediated Securities' (2012) 17 ULR 549, 556.
[23] JS Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 LQR 530, 534.

and civilian jurisdictions characterise intermediated securities. The next section reveals the substantive gap the GSC must mend to be considered successful in its harmonisation efforts.

II. HARMONISING INVESTORS' RIGHTS

A. NATIONAL LEGAL CHARACTERISATIONS OF INTERMEDIATED SECURITIES

There are two predominant approaches adopted by national legal systems in their characterisation of intermediation at law.[24] The only similarity shared between all national characterisations is the participation of central depositories, ultimate investors and the intermediaries interposed between them.[25] Otherwise, the diverging conceptions of property law across domestic jurisdictions cause inconsistent characterisations of investors' rights, manifesting in different legal analyses of the involvement of cross-border intermediaries.[26] Two predominant characterisations of intermediation can be distilled from the major securities markets, which will be labelled according to how they characterise investors' rights vis-à-vis issuers: indirect and 'direct'[27] ownership. While investors in some jurisdictions (such as England and Germany) can demonstrate either type of ownership under certain arrangements,[28] reducing all domestic characterisations of intermediated securities into the binary of indirect or direct ownership models is a necessary generalisation to comprehensively analyse the GSC within a single article.[29] The rest of this section compares the direct and indirect models, demonstrating the diverging features of national legal characterisations that UNIDROIT intended to address using a functional approach as to not interfere 'with basic national doctrines of property law',[30] which as this article contends contributed to the GSC's failure to achieve substantive.

[24] Thévenoz, 'Intermediated Securities' (n 12) 385.
[25] Dubovec (n 3) 42.
[26] Victoria Dixon, 'The Legal Nature of Intermediated Securities: An Insurmountable Obstacle to Legal Certainty?' in Louise Gullifer and Jennifer Payne (eds), *Intermediation and Beyond* (Hart Publishing 2019) 48–55.
[27] Thévenoz, 'Intermediated Securities' (n 12) 404.
[28] ibid 409-10.
[29] For a more detailed account of the specific differences between these two models, see Dixon (n 26) 55–71.
[30] Thévenoz, 'Geneva Securities Convention' (n 9) 18.

The two ownership models conveniently (and predictably) correspond to distinctions between common law and civilian jurisdictions. The first national model is indirect ownership, under which only central depositories own securities, with subsequent investors merely possessing 'an indirect or derivative interest'.[31] The indirect model (operative in England, the U.S.A. and other common law jurisdictions)[32] considers investors' rights as deriving from their intermediary's interests in the securities.[33] Consider the English legal analysis, which regards intermediation as a series of sub-trusts that provide investors indirect rights against issuers. Under the English legal analysis, only the first-tier investor legally owns securities who, acting as an intermediary, holds their interests on trust for investors that maintain accounts with them.[34] Correspondingly, a sub-trust is created for the benefit of every subsequent investor in the chain as each 'intermediate trustee holds on trust only his interest in the property held on trust for him'.[35] In indirect ownership models, all investors beneath the first-tier intermediary do not possess direct rights against issuers because all investors' interests derive exclusively from those held by their intermediaries (qua trustees), creating 'rights [enforceable] only against their own counterparty'.[36] Therefore, drawing on existing principles of equity and trusts, English law grants investors enforceable rights without affording legal ownership that nevertheless protects them from insolvent intermediaries as beneficial interests are shielded from another's insolvent estate.[37] The American model provides similar legal protections without relying on trusts. The Uniform Commercial Code grants investors proprietary interests in the assets held by intermediaries, recognising investors' exclusive rights 'to exercise all the rights and powers of an owner'[38] and where securities are pooled, a 'proportionate property interest in the fungible bulk'[39] sufficient to protect investors from their intermediary's insolvency.[40] Therefore, regardless of the legal

[31] Thévenoz, 'Intermediated Securities' (n 12) 404.
[32] Dixon (n 26) 63.
[33] Thévenoz, 'Intermediated Securities' (n 12) 408.
[34] *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 [226].
[35] ibid.
[36] *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486 [10].
[37] Thévenoz, 'Intermediated Securities' (n 12) 407; Dixon (n 26) 63–64.
[38] Uniform Commercial Code, art 8-207(1).
[39] ibid art 8-313(2).
[40] Thévenoz, 'Intermediated Securities' (n 12) 408; Dixon (n 26) 69.

form taken, the hallmark of indirect models is that investors can only exercise their interests against their immediate intermediaries (in their capacity as sub-trustees or trustees) rather than directly against issuers or intermediaries further up the chain.[41] As their labels indicate, the indirect model differs significantly from the direct model.

The second model is direct ownership, under which investors own securities and intermediaries merely act in an administrative capacity.[42] The direct model (operative in most EU Member States and other prominent civilian jurisdictions such as China, Brazil and Japan)[43] regards all investors as legally owning securities with direct rights against issuers.[44] In direct ownership models, the interests of intermediaries are 'limited to possession only',[45] sufficient to facilitate the enforcement of investors' rights against issuers. Direct model jurisdictions extend principles governing paper-based securities to intermediated securities that consider dematerialisation and immobilisation as not altering an investor's legal title to securities and their corresponding rights directly against issuers.[46] For instance, Germany extends proprietary rights provided in its Civil Code (article 868) to recognise investors' ownership and possessory rights in intermediated securities.[47] The upshot is that most indirect model jurisdictions regard electronic book entries as equivalent to physically delivering paper-based certificates, which 'does not alter the contractual or corporate relationship between investors and issuers'.[48] By recognising that investors 'maintain a direct relationship with securities issuers'[49] despite exercising their rights through third parties, direct models safeguard investors' securities from an intermediary's insolvency (as the relevant securities never form part of the insolvent's estate) and regard investors as proportionate co-owners in the instance of pooled accounts.[50] Thus, the hallmark

[41] Thévenoz, 'Intermediated Securities' (n 12) 408.
[42] ibid 404.
[43] Dixon (n 26) 57.
[44] ibid.
[45] ibid 58.
[46] Thévenoz, 'Geneva Securities Convention' (n 9) 405.
[47] Dixon (n 26) 68.
[48] Thévenoz, 'Intermediated Securities' (n 12) 405.
[49] ibid 406.
[50] ibid 405–06.

of direct models is their characterisation of ultimate investors as legal owners, which facilitates the direct enforcement of their rights against issuers. The remainder of this section compares the two models, demonstrating the degree of incompatibility the GSC intended to harmonise.

B. COMPARATIVE ANALYSIS BETWEEN DIRECT AND INDIRECT MODELS

Conducting a comparative analysis of the two models reveals the degree of divergence that the GSC must mend to achieve its policy ambitions of harmonising the substantive rights of investors. The difference between the direct and indirect models is a by-product of 'path-dependence'[51] as national jurisdictions extending legal principles governing paper-based securities to intermediation merely entrenches the differences between common law and civilian legal traditions. While civilian jurisdictions have relied on physical possession to demonstrate ownership, common law jurisdictions have historically recognised that investors can have interests in paper-based securities without having legal title through equitable principles and the advent of trusts.[52]

Although both models work well in isolation, their incompatibilities manifest upon transnational investment in intermediated securities. The greatest inconsistency between the models is how they characterise intermediaries and, correspondingly, investors' rights. Indirect models consider each intermediary as having proprietary interests in securities, against only whom investors can enforce their interests. In contrast, direct systems characterise intermediaries as having possessory interests to facilitate investors' rights against issuers. Consequently, inconsistencies arise where issuers and investors are situated in jurisdictions with a different legal tradition than the intermediaries that are imposed between them.[53] Taking the two-tiered example provided above, assume that the issuer is Spanish, and that the investor is French. The parties might expect the investor to have the direct rights against the issuer that is associated with their legal ownership of securities under the direct ownership model characteristic of civilian jurisdictions (such as France and Spain). However, the imposition of

[51] ibid 408.
[52] ibid 409.
[53] Dixon (n 26) 65–67.

an intermediary whose place of business is in England introduces an indirect model into the intermediation chain that relegates the French investor's legal ownership to an equitable interest that is only enforceable against the English intermediary rather than directly against the Spanish issuer (assuming the default private international law rule applies). The inverse conflict arises where the issuer and ultimate investor are located in common law jurisdictions with an intermediary operating in a civilian jurisdiction. The different characterisations of investors as direct or indirect owners of securities is based on national legal doctrine,[54] which the functional approach fails to harmonise. Rather, the functional approach merely identifies an irreducible core of substantive rights that investors in all Contracting States should enjoy. The next section analyses the GSC's substantive provisions using the framework provided, demonstrating that UNIDROIT's functional approach relies on abstract drafting to achieve formal uniformity without mending the differences between common law and civilian legal traditions, which contributed to the GSC's failure to achieve its policy ambitions of harmonising investors' rights.

III. ANALYSING FUNCTIONAL HARMONISATION

It is argued that UNIDROIT's functional approach deprives the GSC of the substance necessary to harmonise the diverging national approaches to intermediated securities, thereby failing to meet its policy objectives. To accommodate the diverging characterisations of different national legal jurisdictions, the GSC undertook a functional approach to harmonisation that set out core rights Contracting States must provide investors without dictating the legal characterisation that such rights should take.[55] Initially, echoing the cautions of Hobhouse,[56] many Negotiating States expressed concern that the functional approach pursued formal uniformity to the detriment of substantive rigour, reducing the GSC's capacity to establish substantive rules harmonising investors' rights.[57] In contrast, various commentators argue that the functional approach is effective, achieving the GSC's policy

[54] Thévenoz, 'Geneva Securities Convention' (n 9) 16–18.
[55] Kanda and others (n 14) 5.
[56] Hobhouse (n 23) 534.
[57] Thévenoz, 'Geneva Securities Convention' (n 9) 13.

ambitions of protecting investors' rights compatibly across jurisdictions.[58] Specifically, proponents of the GSC praise the functional approach for harmonising substantive differences between civilian and common law approaches to intermediated securities[59] by providing Contracting States a guide to structure their national legal frameworks[60] without disrupting domestic conceptions of property rights.[61] By applying the framework provided to the GSC's provisions, this section disproves these assertions and demonstrates that the functional approach contributed to the GSC's failure to harmonise the substantive rights of investors.

Article 9 of the GSC, which purports to harmonise the rights of ultimate investors, epitomises the failure of the functional approach. The article states that investors have 'the right to receive and exercise any rights attached to the securities'[62] against their intermediaries or issuers,[63] including dividends, voting rights and 'such other rights […] conferred by the non-Convention law',[64] which means the applicable national law.[65] Crucially, the protections created by article 9 are *conditional* as they apply only if, and to the extent, they are permitted by *non-Convention law*, which either expressly conditions article 9,[66] or is made conditional by reference to other articles in the GSC.[67] Likewise, article 28 completely delegates to *non-Convention law* the substantive obligations that intermediaries owe to investors, creating scope for Contracting States to diminish investors' rights by eliminating or reducing intermediaries' liabilities.[68] The GSC establishes rights investors should have but delegates their substance and the corresponding obligations that intermediaries should bear entirely to *non-Convention law*. In a bid to accommodate all national intermediation models and achieve uniformity

[58] Thévenoz, 'Intermediated Securities' (n 12) 384–85; Bernasconi and Keijser (n 22) 555; Charles Mooney, 'The Truth About Shortfall of Intermediated Securities – Perspectives under the Geneva Securities Convention, United States Law, and the Future EU Legislation' in Pierre-Henri Conac, Ulrich Segna and Luc Thévenoz (eds), *Intermediated Securities* (Cambridge University Press 2013) 161.
[59] Mooney (n 58) 161.
[60] Bernasconi and Keijser (n 22) 555.
[61] Thévenoz, 'Intermediated Securities' (n 12) 384–85.
[62] Geneva Securities Convention, art 9(1)(a).
[63] ibid art 9(2)(b).
[64] ibid art 9(1)(d).
[65] ibid art 1(m).
[66] ibid arts 9(1)(a)(ii), 9(1)(c), 9(1)(d) and 9(3).
[67] ibid arts 9(1)(b) and 9(2).
[68] Mooney (n 58) 182-83.

in form,[69] the functional approach allows Contracting States to dictate the application and potency of substantive rights and liabilities.[70] Therefore, quite paradoxically, the GSC purports to harmonise protections that it does not establish, guarantee or substantiate.

Applying article 9 to the framework provided proves that the functional approach contributed to the failure of the GSC's efforts that intended to harmonise the substantive rights of investors in transnational intermediated securities. The GSC's reference to *non-Convention law* epitomises the inherent tensions between formal uniformity and substantive rigour that plague all harmonisation efforts. From a uniformity perspective, deferring to national law is necessary to ensure that the GSC applies to direct and indirect models in form.[71] The only similarity between the models is the parties participating in intermediation.[72] Otherwise, the rights and obligations of each party derive from domestic doctrines of property law, which are matters that UNIDROIT considered should remain the province of Contracting States to foster broader applicability and as to not disrupt 'the structure and characterisation of [investors'] rights and interests'[73] that 'differ widely'[74] across national legal systems. From a substantive perspective, deference to national law deprives the GSC of the substantive rigour necessary to achieve its policy ambitions.[75] Applying article 9 to the two intermediation models demonstrates that the formal approach's lack of encroachment on national characterisations of investors' rights prevents the GSC from protecting such rights in a harmonised manner.[76] The rights afforded to ultimate investors are strongest under direct models where investors can directly enforce their proprietary rights to securities, and personal rights, against issuers 'at the top of the chain'.[77] The relatively weaker position of investors in indirect systems reduces the actionability of their derivative interests in securities, and personal rights, to their immediate intermediaries, which cannot be enforced

[69] Thévenoz, 'Intermediated Securities' (n 12) 416–17.
[70] ibid 423.
[71] Dixon (n 26) 75–76.
[72] Thévenoz, 'Intermediated Securities' (n 12) 425.
[73] Kanda and others (n 14) 62.
[74] ibid.
[75] Dixon (n 26) 75–76.
[76] Dupont (n 19) 95.
[77] Thévenoz, 'Intermediated Securities' (n 12) 419.

against issuers unless a co-ordinated effort of enforcement through the chain of intermediaries between the ultimate investor and issuer succeeds as a form of 'multi-tiered entitlement'.[78] Rather than attempt to reconcile the models, the functional approach describes the effects that investors' rights should achieve in a manner that accommodates the characterisation of investors as direct or indirect owners of securities.[79] However, as this analysis demonstrated, relying on non-Convention law to provide substance creates scope for Contracting States to undermine harmonisation efforts.[80]

Applying the framework to the GSC's substantive provisions proves that the functional approach's aim to achieve formal uniformity deprives the GSC of the substance necessary to protect investors' rights in a harmonised manner, which formed UNIDROIT's policy ambitions. The articles examined illustrate that the GSC does not legally characterise or guarantee investors' rights against intermediaries or issuers but delegates such matters to *non-Convention law*. Echoing the praises of its proponents (above), the GSC's Official Commentary commends UNIDROIT for harmonising investors' rights by establishing uniform legal obligations.[81] However, the preferred analysis contends that the GSC does not *establish* obligations but *merely recognises the features that are already inherent in all intermediation models*.[82] In providing that investors' rights derive from issued securities and can be enforced by investors through intermediaries acting in any capacity,[83] the GSC 'only recognises what is already the de facto situation'.[84] Put alternatively, the GSC does not create substantive rules harmonising investors' rights but provides a restatement of the attributes common to all intermediation models.[85] The functional approach contributed to the GSC's neutral drafting that leaves significant scope for divergence across Contracting States.[86] While restatements could have harmonising effect

[78] ibid.
[79] Pierre-Henri Conac, 'Rights of the Investor' in Pierre-Henri Conac, Ulrich Segna and Luc Thévenoz (eds), *Intermediated Securities* (Cambridge University Press 2013) 105–12.
[80] Dupont (n 19) 103.
[81] Kanda and others (n 14) 181.
[82] Conac (n 79) 123–25.
[83] Geneva Securities Convention, arts 1, 9 and 29.
[84] Conac (n 79) 128.
[85] Thévenoz, 'Intermediated Securities' (n 12) 430–31.
[86] Gullifer and Payne (n 7) 391.

(for example, UNIDOIRT's Principles of International Commercial Contracts 2016), the GSC intended to protect the substantive rights of investors in a harmonised manner rather than recognise uniform principles shared between jurisdictions. By deferring extensively to non-Convention law, the GSC accommodates the ownership models of intermediated securities found in both common law and civilian jurisdictions by drafting highly abstract provisions that do not provide the necessary legal characterisation of investors' rights to mend the gap between direct and indirect models. Applying the framework provided this section argued that the functional approach, including its reliance on abstract drafting to achieve formal uniformity without engaging in the differences between direct and indirect intermediation models, *contributed* to the GSC's failure to achieve its intended ambitions of harmonising substantive rights. The final section analyses whether reform can overcome the GSC's failure.

IV. REFORM

The overall academic consensus, within which there are two camps, argues that further reform is unnecessary. The first camp, to which Mooney belongs, argues that reform would be futile as the GSC achieves 'harmony with the non-Convention law'.[87] However, quite paradoxically, Mooney's statement implicitly supports the need for reform. Mooney's description of the GSC as being *in harmony with non-Convention law* necessarily means that it failed to *harmonise non-Convention law*. Crucially, the objective of any harmonisation effort is, as UNIDROIT's policies indicate, to mend the differences between diverging legal systems and *create a new, irreducible standard* to which Contracting States subscribe. Correspondingly, while this analysis agrees with Mooney's observation that the GSC is *in harmony with non-Convention law*, considering its extensive deference to *non-Convention law*, it disagrees with Mooney's assessment that deference under the functional approach achieved the substantive harmonisation that UNIDROIT intended.

[87] Mooney (n 58) 165.

The second camp praises the GSC for the degree of harmonisation it achieved, praising the GSC as a 'remarkable achievement *as it intended to harmonize* […] a very difficult area of law'[88] that serves as 'inspiration for States and regional organizations that wish to modernize their securities system'.[89] The second camp appreciates that national property law doctrines underpinning direct and indirect intermediation models cannot be entirely harmonised but that their incompatibilities can, at best, only be mitigated to varying degrees.[90] While this analysis is sympathetic to the juxtaposing tensions of uniformity and rigour that trouble all harmonisation efforts,[91] it is not as forgiving of UNIDROIT as the second camp. It was the deliberate choice of UNIDROIT to pursue its policy ambitions of harmonising investors' rights through a functional approach that does not legally characterise or guarantee an irreducible core of substantive rights. Consequently, contrary to the second camp, it is argued that the GSC's failure to achieve harmonisation should not be attributed to circumstantial difficulties, but rather to strategical error.

The GSC's failure to harmonise the substantive rights of transnational investors in intermediated securities will persist unless the functional approach to harmonisation is disregarded. Recognising the GSC's shortcomings,[92] UNIDROIT produced a Guide to bolster ratification.[93] Unfortunately, the Guide perpetuates UNIDROIT's functional approach because it merely describes the ends that the GSC sought to achieve.[94] Crucially, abandoning the functional approach by engaging with the legal characterisation of intermediated securities provides the only means to achieve UNIDROIT's policy ambitions. Some commentators predict that distributed ledger technology might facilitate direct ownership models regardless of the jurisdictions of participating parties.[95] At this stage, it is too

[88] Spyridon Bazinas, 'The Geneva Securities Convention and UNCITRAL Texts on Secured Transactions Compared' in Thomas Keijser (ed), *Transnational Securities Law* (Oxford University Press 2014) 115 (emphasis added).
[89] Goode, Kronke and McKendrick (n 2) 456.
[90] Thévenoz, 'Geneva Securities Convention' (n 9) 16–18; Dixon (n 26) 74–75; Gullifer and Payne (n 7) 392.
[91] Hobhouse (n 23) 534.
[92] Bazinas (n 88) 116.
[93] Dixon (n 26) 71–73.
[94] UNIDROIT Legislative Guide on Intermediated Securities 2017, preamble.
[95] Goode, Kronke and McKendrick (n 2) 456; Gullifer and Payne (n 7) 400–01.

speculative to discern whether technological developments, which created the initial need for harmonisation, will render harmonisation efforts moot.

CONCLUSION

This article demonstrated that UNIDROIT's functional approach to harmonisation was the factor that contributed to the GSC's failure to harmonise the substantive rights of intermediated securities investors. This article developed in four sections. The first part of this article analysed the legal issues that were introduced by intermediation through cross-border securities investments and the corresponding policies underpinning UNIDROIT's harmonisation effort embodied by the GSC. These considerations established a framework through which the GSC's substantive articles were analysed. The second part of this article conducted a comparative analysis of the different national legal characterisations afforded to intermediated securities in various civilian and common law jurisdictions, which mapped out the lacunae that UNIDROIT sought to mend in its harmonisation efforts. Building upon these previous two sections, the third part of this article directly addressed both criticisms seminal to this article's central claim, that the functional approach to harmonisation adopted by UNIDROIT deprives the GSC of the substance necessary to harmonise the diverging national conceptions of intermediated securities and to protect investors' rights. Correspondingly, the fourth part of this article concluded that reform would only cure the GSC's failure if the functional approach were jettisoned for more substantive harmonisation. It remains to be seen whether technological advancements will render the need for formal legal harmonisation moot.

Flying too close to the son: How a libertarian attitude towards germline therapy could affect the world

Taha Ragheb

ABSTRACT

Currently, the law on the availability of germline editing is not built in enough detail to avoid the danger of misuse or misinterpretation, as it remains too uncertain. The purpose of this paper is to highlight and discuss the positive and negative impacts germline editing could have in the future, to suggest a reform of the current law in place and the scope of its application. The relevant legislation and common law were analysed to find the current standpoint on germline therapy, as well as using a wide variety of academic literature to develop this discussion to come to a balanced conclusion. Using these sources, it was clear that the current legislation took a step towards restricting access rather than shying away from control of this technology. Academic arguments in favour of and against the use of germline technology were also used to conclude whether the law was right in its approach, and to what extent it may be acceptable to use this technology. This led towards a finding that neither complete prohibition nor complete authorisation would be the right step, but rather a middle ground, leaning towards a general restriction of the technology with the limited exception of therapeutic use, must be drawn, with a much greater level of detail being required in the legislation.

INTRODUCTION

In the modern day, humankind seemingly develops new technologies that could so easily push humanity into a new era every other week. Recently, genetic editing has become a huge topic of discussion in the academic world, as it could prevent many genetic diseases, by using Clustered Regularly Interspaced Short Palindromic Repeats (CRISPR) technology. Imagining what this world free of genetic disease may look like seems like an idealistic take on the suffering so many experience. So, what relation does this have to the law? It seems so outlandish to even consider that this technology

should be restricted in any way upon first impression, especially considering any restriction placed upon the UK's researchers will not stop research on this technology altogether; it will simply continue without the UK. As Dohn has put it, 'an outright ban in the U.S. on gene editing research … would not only fail to curtail research in other countries, but it may also drive scientists to … perform such research'.[1]

However, with any innovation, there will always be a way to manipulate it for a worse outcome. With this technology rapidly advancing, it is of the utmost importance that all relevant arguments are considered before it is too late. Demand for "perfect babies" has already been witnessed, as 'people competed to discover who had healthier children with "Better Baby Contests", in which children were evaluated alongside vegetables' in the 20th century.[2] In the modern day, imperfection is as equally sought out as perfection through misuse of other reproductive technologies, as a deaf couple in America sought to have a deaf child by seeking out deaf donors.[3] They later achieved their goal, shocking the world, but not shocking all, as some '29% of [deaf] respondents gave a positive answer to the question of whether they would prefer to parent a deaf child'.[4] Evidently, there is a huge demand for both perfection and imperfection in society and it would not be so long until another case of misuse comes along where the law falls short on strong legislative guidance.

This paper discusses arguments for and against germline editing of embryos, to find the best suggestion for the next legal steps. The first section will analyse the current legislation, in the United Kingdom, to discover the current standpoint on this technology. Sections two and three discuss the arguments in

[1] Michael R. Dohn, 'Preventing an Era of "New Eugenics": An Argument for Federal Funding and Regulation of Gene Editing Research in Human Embryos' (2018) 25 Richmond Journal of Law & Technology 1, 23.
[2] Teryn Bouche and Laura Rivard, 'America's Hidden History: The Eugenics Movement' (*Nature News,* 18 September 2014) <www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444> accessed 11 May 2024 cited in Fawzaan M. Hashimi, 'Necessity or Vanity: Designer Babies, CRISPR, and the Future of Genetic Modifications' (2019) 7 International Journal of Scientific Research and Management 35, 38.
[3] Liza Mundy, 'A World of Their Own' (*The Washington Post,* 31 March 2002) <www.washingtonpost.com/archive/lifestyle/magazine/2002/03/31/a-world-of-their-own/abba2bbf-af01-4b55-912c-85aa46e98c6b/> accessed 11 May 2024.
[4] A Middleton, J Hewison, and RF Mueller 'Attitudes of Deaf Adults Toward Genetic Testing for Hereditary Deafness' (1998) 63 American Journal of Human Genetics 1175 cited in Nicola Jane Williams, 'Choosing Deafness? A Liberal Exploration of the Legal Prohibition on Selection for Disability in England and Wales' (2018) 14 Contemporary Issues in Law 326.

favour of germline therapy, analysing the moral obligations concerned with protecting life and the impact of article 2 and 8 of the European Convention on Human Rights (ECHR),[5] and other authorities, in strengthening the availability of germline therapy. Section four, five, and six discuss arguments against germline therapy. In section four, the concern for a new wave of eugenics is considered, followed by section five which looks at social disparity and separation that could be caused by such technology, by looking at current factors that divide our society already, such as wealth and power. The final substantive section will shed light on the true effect germline editing could have on disabled people. Following the main body of discussion, the conclusion will provide a suggestion for reform in this area of medical ethics and law.

I. CURRENT UK LEGISLATION

The United Kingdom has two statutes that cover the scope of genetic modification of embryos. These are the Human Fertilisation and Embryology Act 1990, and the Human Fertilisation and Embryology Act 2008. In this section, the certainty of the legislation will be assessed, as well as extracting the purpose of the legislation in relation to gene editing, to understand the political standpoint of the UK on this matter. This will be done by analysing the approach of parliament for each statute separately. Following this, the separate public body created under these acts will be assessed for its relevance on how this technology might be incorporated in the future.

A. THE 1990 ACT

The 1990 Act is in place to 'make provision in connection with human embryos and any subsequent development of such embryos …, prohibit certain practices in connection with embryos and gametes … [and] establish a Human Fertilisation and Embryology Authority'.[6] From this description, there is an immediate sense of defensiveness and hesitation from the law makers on this technology, which may be due to the lack of understanding on this technology at this time. The use of language such as

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [1950].
[6] The 1990 Act, introductory text.

'prohibit' implies the 1990 Act is in place to restrict use of this technology, not advance it. This is furthered by the establishment of an 'authority' under section 5 which illustrates how policy makers felt so concerned about potential abuse of said technology that a new taskforce dedicated to this area of law must be established. This is known as the Human Fertilisation and Embryology Authority (henceforth referred to as the "Authority").

The original 1990 Act was uncertain in its approach to germline editing, as the main provision in reference to such technology is found in section 3(3)(d), which stated, 'a licence cannot authorise … subsequent development of an embryo.' Considering the context of the section, it seems this provision is generally aimed at preventing the use of embryos in a way that might be unnatural to its normal development. This is further illustrated as the original 1990 Act stated that 'a licence … cannot authorise altering the genetic structure of any cell while it forms part of an embryo'.[7] Although it is generally quite vague, it refers exactly to the kind of technology this paper discusses. There is little else in the original 1990 Act that makes a deeper reference to germline editing, which may imply its prevalence in the community at that time was of little to no presence, but it is clear that policy makers did not want to allow such technologies to be used for treatment purposes. However, the more relaxed approach towards granting research licences in Schedule 2 may imply that policy makers were open to allowing germline therapy for treatment purposes in the future. Therefore, the original 1990 Act did not totally seek to hamper the progress of such technology but took a more reserved approach in granting easier access to research.

Considering the lack of availability of germline technology at this time, coupled with the lack of research and knowledge that still surrounds its use and its future implications, it seems likely that parliament took a defensive approach towards granting a licence for treatment purposes specifically, as the risk of harm was greater than the potential benefit, mainly due to the lack of research.

B. THE 2008 ACT

[7] The 1990 Act, sch 2 1(4).

The main purpose of the 2008 Act was to amend the 1990 Act. The most important amendment made, in relation to this discussion, was seen in section 3ZA. The previous section 3(3)(d) in the 1990 Act was omitted, as per section 3(3)(b). The updated legislation now states:

> An embryo is a permitted embryo if … (b) no nuclear or mitochondrial DNA of any cell of the embryo has been altered, and (c) no cell has been added to it other than by division of the embryo's own cells.[8]

However, section 3ZA(5) provides an exception to this rule, stating:

> An embryo can be a permitted embryo, even though the egg or embryo has had applied to it in prescribed circumstances a prescribed process designed to prevent the transmission of serious mitochondrial disease.

This is hugely important because it captures the political standpoint of the UK in one go and further illustrates the jump in understanding for this technology in comparison to the 1990 Act, because it is far less vague. From this extract, it is clear the UK is not in favour of allowing genetic editing for purposes unrelated to health but does accept that this technology has a place in preventing disease and suffering. Besides this, the 2008 Act, in Schedule 2 section 3, states that the Human Fertilisation and Embryology Authority may grant permission for 'sex selection'. What is interesting about this section of the Act is that it later states 'a licence … cannot authorise any practice designated to secure that any resulting child will be of one sex rather than the other', unless 'there is a particular risk that a woman will give birth to a child who will have or develop [gender-related illnesses]'. This reinforces the point that policy makers do not accept use of this technology for any trivial or vanity-based reasons, but there is an exception for bettering the health of the child.

Despite the huge changes made in the legislation's attitude towards the application of germline therapy, it still seemed too restrictive and defensive of an approach. This was explored by Eijkholt, who asserted that there was an expectation for the new 2008 Act to take a liberal approach toward procreative

[8] The 2008 Act, s 3ZA(4).

autonomy,[9] which would essentially open the floodgates and allow parents to have total control over genetic modification of their children. On this point, Gill phrases this as '[seeing] the practice of genetic selection as an extension of parental decisions made after a child is born'.[10] This expectation was encouraged by the Science and Technology Committee, who 'contributed to expectations that reproductive technologies would be governed by a liberal approach in the UK',[11] going so far as to state that,

> [T]here are no compelling reasons for a statutory authority to make judgements on whether or not a family can seek preimplantation tissue typing, provided they fall within the parameters set by Parliament.[12]

Marleen concludes on the impact of the 2008 Act by stating that 'the 2008 Act is as silent on any concept of procreative autonomy as the 1990 Act, and seems to reject procreative autonomy rather than to endorse it'.[13] This can also be seen by analysing the Human Fertilisation and Embryology Act (HFEA) bill explanatory notes. In considering the meaning of 'serious physical or mental disability …',[14] policy makers were somewhat at a standstill as to what this means, but it was clear that there was a focus not to accept complete procreative autonomy outside of therapeutic purposes. The explanatory notes stated 'embryos that are known to have an abnormality … are not to be preferred to embryos not known to have such an abnormality'. Sully explains the impact of this, stating that,

> Outside the UK, the positive selection of deaf donors in order deliberately to result in a deaf child has been reported. This provision would prevent selection for a similar purpose.[15]

[9] Marleen Eijkholt, 'Procreative Autonomy and the Human Fertilisation and Embryology Act 2008: Does a Coherent Conception Underpin UK Law?' (2011) 11 Medical Law International 93.
[10] Lawrence E. Gill, 'Designer Eugenics: Germline's Future Interests' (2016) 5 Ave Maria International Law Journal 112, 117.
[11] Eijkholt (n 9), 99.
[12] Science and Technology Committee, 'Fifth Report of Session 2004-05' (House of Commons, Volume 1 <https://publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/7i.pdf> accessed 11 May 2024) 22.
[13] Eijkholt (n 9) 113.
[14] The 2008 Act, sch 2.
[15] Jackie Leach Scully, ''Choosing Disability', Symbolic Law, and the Media' (2011) 11 Medical Law International 197, 199.

Clearly, the 2008 Act stands firm in stamping out arguments in favour of complete procreative autonomy, unrelated to the section 3ZA(5) exception, as the departure from the expectation to allow for greater procreative autonomy illustrates legislator's attention to misuse of such technologies. However, the 2008 Act falls short in tying up all loose ends, as it does not expand on the meaning of 'serious physical or mental disability', which leaves the law vulnerable to misuse as there is room for interpretation.

C. HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, THEIR POWER, AND WHY IT POSES A THREAT

The Authority was established by the HFEA in section 5, building upon the Warnock Report, which stated 'the authority should be specifically charged with the responsibility to regulate and monitor the practice in relation to those sensitive areas which raise fundamental ethical questions'.[16] Therefore, the purpose of the Authority is to regulate new reproductive technologies to ensure that they are in line with the legislation, as legislators identified that the law will not be able to keep up with the ever-expanding growth of technology and science, which stands as one of the Authority's greatest strengths. The Authority regulates the wealth of such technologies through licensing. The HFEA states that 'no person shall bring about the creation of an embryo except in pursuance of a licence',[17] of which the Authority is permitted to grant licences for the purpose of 'activities in the course of providing treatment services',[18] 'activities in the course of providing non-medical fertility services',[19] 'authorising the storage of gametes, embryos or human admixed embryos',[20] and 'authorising activities for the purposes of a project of research'.[21] Here lies the power of the Authority, as they can grant or reject activities that are unfit according to the HFEA.

[16] Warnock Report, 'Report of the Committee of Inquiry into Human Fertilisation and Embryology' (Department of Health and Social Security, 1984) 75.
[17] The 2008 Act, s 3(1).
[18] ibid, s 11(1)(a).
[19] ibid, s 11(1)(aa).
[20] ibid, s 11(1)(b).
[21] ibid, s 11(1)(c).

This discretionary power is best illustrated in *Quintavalle*.[22] In this case, a couple sought to use Prenatal Genetic Diagnosis (PGD) in conjunction with tissue typing to have a child that is capable of treating their diseased sibling, using their umbilical cord blood, in turn coining the phrase "saviour sibling". The justification of this judgement is not something this paper seeks to delve into, as there is already a wealth of academic writing on this. However, the key takeaway from this judgement is the court's respect for the Authority's discretionary powers. Importantly, the court stated:

> [The court is] simply not concerned with the conditions under which tissue testing should be licenced, assuming it is licensable at all- nor even, indeed, with whether it should be licenced. [The court's] sole concern is whether the Act allows the authority to licence tissue typing were it in its discretion to think it right to do so.[23]

More recent cases, such as *Assisted Reproduction and Gynaecology Centre,*[24] further illustrate the court's respect, as it was stated that 'the court must consider whether the [Authority's] decision was within the range of reasonable decisions… In my judgement, the decision was not irrational'.[25] Although this restricts the Authority slightly, by incorporating principles of reasonableness and rationality, there is a consistent respect shown for the Authority's decision making. Although some argue that the court did not take enough steps to insert their opinion on the matter, this paper asserts that this respect is well-founded and important, as *Quintavalle* identified that:

> The fact that these decisions might raise difficult ethical questions is no objection. The membership of the authority and the proposals of the Warnock committee and the White Paper make it clear that it was intended to grapple with such issues.[26]

However, as well-principled this authority is, it is difficult not to identify the potential threat that this poses to the future of germline editing. The little intervention the courts seek to impose on the decisions

[22] R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority (2005) UKHL 28.
[23] ibid, 575.
[24] R (on the Application of Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority (2017) EWHC 659 (Admin).
[25] ibid, [119].
[26] *Quintavalle* (n 22), [26].

of the Authority is concerning. This can be seen in *Quintavalle,* as Lord Brown stated, 'suitability is for the woman, the limits of permissible embryo screening are for the authority'.[27] This judgement opens the door not only for greater subjective authority which could lead to non-medical germline editing, but also insists that the court is not equipped to handle discussions on whether the Authority made the right decision when acting within their power reasonably. Sheldon and Wilkinson identify the same cause for concern, taking a calmer approach to the situation, stating that:

> [T]here is no reason why selection can't be allowed for some purposes but not others. Indeed, that is the present position and there is no reason to believe that such a position couldn't be maintained, if Parliament … decided that that is what it wanted. So a slide is not inevitable.[28]

This is an agreeable point. Others such as Lord Brown argue in favour of a similar relaxed standpoint, claiming:

> In the unlikely event that the authority were to propose licencing genetic selection for purely social purposes, Parliament would surely act at once to remove that possibility… failing that, in an extreme case the courts supervisory jurisdiction could be invoked.[29]

Although supposing that the likelihood of germline editing abuse might currently be low, it is still too great a risk to hope that this position is maintained without action. Therefore, Parliament must ensure the roadmap to germline editing use is clear and neither too restrictive nor too permissive. This in turn supports the necessity of this paper in highlighting the potential implications inaction could have. However, it is unfortunate that today technology moves much faster than academic and scientific understanding of the implications of said technology, which is why the decision of an undemocratic public body (the Authority) on such technology is so important in deciding how this issue plays out and why second consideration of the Authority's power and role must be taken.

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[27] *Quintavalle* (n 22), [62].
[28] Sally Sheldon and Stephen Wilkinson, 'Should selecting saviour siblings be banned?', (2004) 30 Journal of Medical Ethics 533, 534.
[29] *Quintavalle* (n 22), [62].

II. MORAL OBLIGATIONS

One of the most commonly recurring standpoints in favour of this new technology is based on morality. Brown condenses this point well, by stating 'it stands to reason that using [Human Germline Genome Editing (HGGE)] therapeutically to prevent an individual from suffering with a serious and life-limiting hereditary illness, would be within the best interests of their dignity'.[30] This moral concept of dignity has been long held, even since Aristotle's time, as Brown states that 'the suffering they experience will, under Aristotle's definition of dignity, become an impediment to their complete enjoyment of their naturally endowed capacities'.[31] The idea of using such technologies to prevent unnecessary suffering is the focus of this section.

III. THE BASIC MORAL ARGUMENT IN FAVOUR OF GERMLINE THERAPY

The moral obligation this paper is concerned with is in preventing unnecessary suffering, which Jonas supports by claiming '[it is] morally wrong to allow suffering to go on needlessly when it can be controlled'.[32] It is a simple and well concluded point that many may first consider when questioned with the topic at hand, as it is a natural, empathetic instinct to avoid unnecessary pain and suffering where possible. This moral obligation is taken further by voices such as Fletcher, who claims:

> We ought to recognise that children are often abused preconcetively [sic] and prenatally, not only by their mother's drinking alcohol, smoking, and using drugs non-medically but also by their knowingly passing on or, risking passing on genetic disease.[33]

Interestingly, the phrase 'knowingly passing on or, risking passing on' is reminiscent of criminal law,[34] which sparks a further debate considering whether there should be a legal duty, based on the described moral obligation, to avoid having children that may be born with a likelihood of having a genetic

[30] James Brown, 'Genetic Modification: Should we Cross the Rubicon and Legalise Human Germline Genome Editing? Avoiding 'Designer DNA' Using a Regulatory Approach Based on Human Rights Principles' (2021) 4 Edinburgh Student L Rev 82, 86.
[31] ibid.
[32] Hans Jonas, 'Eugenics: old ideas, new tools' (1996) 3 University College London Jurisprudence Review 116, 117.
[33] Joseph Fletcher cited in Hans Jonas, 'Eugenics: old ideas, new tools' (1996) 3 University College London Jurisprudence Review 116, 120.
[34] ibid.

disease. Cherkassky argues in favour of this suggestion, as she states choosing an embryo with a higher likelihood of disability should constitute a section 18 offence under the Offences Against the Person Act 1861, because, 'but for the actions of the mother, the disability would not have manifested into life'.[35] She references American case law that asserts such a liability may exist, stating 'a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right … damages for such harm should be recoverable by the child'.[36] Whether this duty should be a legal duty or not is not the topic of this paper, but it firmly highlights the consensus that a moral obligation to give our children the best chance of being born healthy is supported by many, therefore the new genetic technologies that are developing today must be considered favourably if we are pursuing the idea that every child has the same right to be born healthy. Other commentators, such as Sir Galton, suggest that,

> Enough is already known of the laws of heredity to make it certain that the marriage of one class of persons will lead on the whole to good results, and that of another class to evil ones.[37]

It is evident that this is an outdated frame of mind, being expressed in 1909, because many in our modern society marry with no agreed prospect of having a child. However, what is illustrated in this point is the continuing and longstanding presence of this moral obligation to protect the rights of our future children, expressed as far back as a century ago.

IV. WHERE THE MORAL OBLIGATION AND PROCREATIVE AUTONOMY DIFFER

Although the moral duty to protect the health of children usually benefits arguments of procreative autonomy, there are some examples, previously touched upon, that do not coincide with each other. As previously stated, there has been a greater trend in choosing disability, as some '29% of [deaf]

[35] Lisa Cherkassky, 'Selecting a Disabled Embryo can Constitute Grievous Bodily Harm' (2015) 21(1) Medico-Legal Journal of Ireland 16, 20.
[36] *Smith v Brennan* 157 A.2d 497 (N.J. 1960) at 503.
[37] Francis Galton, *Memories of My Life* (London: Methuen & Co, 1908) 158.

respondents gave a positive answer to the question of whether they would prefer to parent a deaf child'.[38] Some academics, such as Eijkholt have pointed out that:

> Procreative autonomy could justifiably be limited to prevent harm to others. … [R]estrictive provisions would not imply a rejection of the principle as long as they only prohibit the selection of such terrible conditions where non-existence is preferable over existence.[39]

She goes on to explain that an issue with this is that,

> The ambiguity that this background example entails is illustrated by the discussion whether or not deafness is a condition so serious that it could justifiably be excluded from the scope of procreative autonomy.[40]

With a lack of certainty as to what 'serious physical or mental disability' may be,[41] procreative autonomy and the moral obligation may not neatly coexist at all times, due to the rise in choosing disability.

Davis suggests that such a dilemma should be viewed as 'a conflict between respecting parental autonomy and the child's potential autonomy'.[42] This is a good approach to the situation, but more certainty must be ascertained as to whose autonomy must be respected more in the circumstance where they compete. Davis' so called 'wrongful handicap conundrum'[43] is further explained as he claims '[where a child] could not have existed otherwise than in his suboptimal state … he has not been harmed by being born in his damaged state'.[44] This is a poor argument as it uses the hindsight of the current unhappiness of the child to argue that he has no right to complain because he is alive as opposed

[38] n 4.
[39] Eijkholt (n 9) 108.
[40] ibid.
[41] The 2008 Act, sch 2.
[42] D.S. Davis, 'Genetic Dilemmas and the Child's Right to an Open Future' (1997) 28 Rutgers Law Journal 562 cited in Nichola Jane Williams, 'Choosing Deafness? A Liberal Exploration of the Legal Prohibition on Selection for Disability in England and Wales' (2018) 14 Contemporary Issues in Law 325, 325.
[43] Nichola Jane Williams, 'Choosing Deafness? A Liberal Exploration of the Legal Prohibition on Selection for Disability in England and Wales' (2018) 14 Contemporary Issues in Law 325, 338.
[44] D.S. Davis, 'Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures' (2001) Routledge, 35 cited in Nichola Jane Williams, 'Choosing Deafness? A Liberal Exploration of the Legal Prohibition on Selection for Disability in England and Wales' (2018) 14 Contemporary Issues in Law 325, 338.

to never being conceived. Furthermore, this perspective is not in line with the court's belief. The key reason why a child's right to be born healthy should be held so sacredly is illustrated well in cases *Re O,*[45] *Re S,*[46] *Re R,*[47] *Re A,*[48] and *An NHS Trust v SR,*[49] where the court avoided allowing parents to deny life-saving treatment for their offspring. Feinberg asserts that these judgements were built upon 'rights in trust',[50] which is in place to prevent children from making life changing decisions before maturity, which could then be used inversely to argue that the parents should wait 'until the child grows to maturity and is legally capable of making [such decisions] himself'.[51] Therefore, the key reason the moral obligation should be held over procreative autonomy, in cases where they collide, is because the victim of choosing disability has had no say in that decision, even though it is a hugely life changing choice. This follows what is known as the Welfare Principle,[52] which Williams points out is a staple of legislation which affects the wellbeing of a child.[53] The importance of the Welfare Principle is further illustrated,[54] as Gilmore points out that authorities ought to consider 'the person whose voice may be the quietest both literally and metaphorically … [and] who has the least control …'.[55] This is in line with key legislation, as the Children Act 1989 states, 'when a court determines any question with respect to (a) the upbringing of a child … the child's welfare shall be the court's paramount consideration'.[56] Therefore, although procreative autonomy and the moral obligation to ensure our children are born healthy may coincide with each other, they may not always do so, in which cases the moral obligation should prevail, as is consistent with the 2008 Act, which only prescribes use of this technology in favour of preventing genetic disease and stays in line with the Welfare Principle.[57]

[45] Re O (A Minor) (Medical Treatment) [1993] 2 FLR 149.
[46] Re S (A Minor) (Medical Treatment) [1993] 1 FLR 337.
[47] Re R (A Minor) (Blood Transfusion) [1993] 2 FLR 757.
[48] Re A (Children) (Conjoined Twins: Medical Treatment) [2001] 1 FLR 267.
[49] *An NHS Trust v SR* [2013] 1 FLR 1297.
[50] Williams (n 43) 340.
[51] J. Feinberg, 'Freedom and Fulfilment: Philosophical Essays' (1992) Princeton University Press, 76 cited in Williams (n 43) 340.
[52] HL Deb 6 March 1990, col. 1100.
[53] Williams (n 43) 329.
[54] HL Deb 6 March 1990, col. 1100.
[55] S. Gilmore, 'A Critical Perspective on the Welfare Principle' in LA Long and J Rouche, 'The Law and Social Work: Contemporary Issues for Practice' (2001) 1 Palgrave Macmillan, 5 cited in Williams (n 43) 338.
[56] Children Act 1989, s 1.
[57] HL Deb 6 March 1990, col. 1100.

Although the moral obligation strengthens the argument in favour of germline therapy, it further illustrates the weakness of the current legislation, as it highlights the uncertainty of the section 3ZA(5) of the 2008 Act exception since there is not enough clarity as to what disability is.

V. SECTION III – HUMAN RIGHTS OBLIGATIONS

Other countries show a keen interest in furthering the legal availability of germline therapy for therapeutic purposes too. Yotova identifies the standpoint of European conventions which attempt to allow 'genetic interventions [for] therapeutic, preventive and diagnostic purposes'.[58] However, these conventions suffer the same uncertainty as the UK legislation, as the key issue with these attempts has been the lack of definition for important terms such as 'therapy', 'prevention', 'enhancement',[59] etc., and the lack of support by members in ratification. Although the UK has provided no clear support for these instruments, other authorities may be of relevance, such as the ECHR, even though it does not expressly discuss germline therapy.

Since the 31st of January 2020, the UK has left the European Union, affecting its trade connections and legal authorities. However, the European Convention on Human Rights still has effect in the UK, as the Human Rights Act 1998 states, in section 1(2), 'those [convention] articles are to have effect for the purposes of this Act…', later listing relevant convention rights in Schedule 1. Articles 2 and 8 ECHR are of relevance in this section, as there is academic debate as to their application to germline therapy.

A. ARTICLE 2 ECHR

Article 2 ECHR states 'everyone's right to life shall be protected by law'. Although this is focussed on protecting those that are already alive, its application could be expanded, as the court in *LCB v UK* stated that 'the government submits that … there may be an obligation under Article 2 of the Convention to take appropriate steps to safeguard life'.[60] The court insists on an obligation to take

[58] Rumiana Yotova, 'Regulating Genome Editing under International Human Rights Law' (2020) 695 International & Comparative Law Quarterly 653, 663.
[59] ibid.
[60] *LCB v United Kingdom* (1999) 27 EHRR 212 [63].

steps to avoid future breaches of this right, which could be expanded to argue germline editing should be used to prevent future disease that may alter the life expectancy of a person. However, the rights of the embryo in the application of article 2 are unsteady,[61] as the European Court of Human Rights (ECtHR) has stated 'the full protection of the right to life starts only with the birth of the child'[62] and so only 'human dignity' is owed to that embryo.[63] Although this narrows the application of article 2,[64] Brown argues 'dignity would be respected by accepting the use of HGGE for the therapy of hereditary diseases'.[65] Although this is a convincing argument, it seems difficult to hope courts will uphold such an interpretation of dignity when the omission of rights available to embryos is so crystal clear. Therefore, article 2 does not provide as much protection for this right as was first contemplated, especially when considering the adverse risk such technology could have. Chua identifies this same risk, stating "CRISPR/Cas-9 can also cause pre-conception injuries through 'off-targets', by inducing potentially-fatal genetic disorders in edited embryos".[66] Chua suggests 'article 2 requires the UK to heed the level of risk associated with germline therapy before legalising it'[67] as it could leave them open to liability for claims using the same article 2 right, since it could harm the same life it seeks to better. Therefore, the right to life argument does not hold enough strength to ensure a right to use germline therapy in all instances as there is greater precedence in rejecting an embryo's right to life, and the current safety of this technology benefits arguments against its use using the same article 2 right,[68] a right to be born without the risk of adverse effects of this technology.

B. ARTICLE 8 ECHR

[61] ECHR (n 5).
[62] *Brüggemann and Scheuten v Germany* (1977) DR 10, 100 cited in Rumiana Yotova, 'Regulating Genome Editing under International Human Rights Law' (2020) 695 International & Comparative Law Quarterly 653, 660.
[63] Decision of 20 October 1992, BVerfGE 87, 209, cited in Rumiana Yotova, 'Regulating Genome Editing under International Human Rights Law' (2020) 695 International & Comparative Law Quarterly 653, 659.
[64] ECHR (n 5).
[65] Brown (n 30) 92.
[66] Hillary Chua, 'Designer Babies and the Law: A Legal Analysis of Human Germline Editing in Light of the UK's Human Rights Obligations' (2017) 8 King's Student Law Review 68, 82.
[67] ibid, 83.
[68] ibid.

Article 8 states 'everyone has the right to respect for his private and family life, his home and his correspondence'.[69] The respect for private life has been assessed with regard to genetic modification in cases outside of the UK. In *SH v Australia,*[70] it was '[considered] that the right of a couple to conceive a child and to make use of medically-assisted procreation for that purpose is also protected by Article 8'.[71] Although this makes greater reference to technologies that aim to help parents conceive a child rather than genetically modify their children, it could be applied to germline therapy as it must similarly be respected as a private matter. A more relevant case was *Costa and Pavan v Italy,*[72] where the court held the applicants desire to conceive a child unaffected by genetic disease of which there are healthy carriers and to use Assisted Reproductive Technology (ART) and PGD to this end attracts the protection of Article 8, as this is a form of expression of their private and family life'.[73] This translates well to this discussion, as the court succinctly summarises the effect of article 8 on the choice to use such procreative technology.[74] Therefore, article 8 provides a strong argument in favour of using procreative technologies generally, widening the scope of its use as well.[75]

VI. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Besides the ECHR,[76] another authority may have a great effect on germline therapy's legality and scope of use. Brown identifies that the United Nations' International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) could be interpreted to open the door to greater use of germline therapy.[77] Article 12 and 15 of the ICESCR recognise the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health', and the 'right of everyone to enjoy the

[69] ibid.
[70] *SH (App. No.57813/00), Grand Chamber judgement of November 3 2011* cited in Hillary Chua, 'Designer Babies and the Law: A Legal Analysis of Human Germline Editing in Light of the UK's Human Rights Obligations' (2017) 8 King's Student Law Review 68, 73.
[71] SH (App. No.57813/00), Grand Chamber judgement of November 3 2011, [82].
[72] Costa and Pavan v Italy (App. No.54270/10), judgement of August 28, 2012.
[73] ibid, [50].
[74] ECHR (n 5).
[75] ibid.
[76] ibid.
[77] Brown (n 30), 88.

benefits of scientific progress and its applications' respectively. These rights seem widely open to interpretation and may even go beyond just therapeutic use. Article 12 could especially be interpreted to argue that, if given the opportunity, parents should have the right to provide their children with the chance to be born with greater academic or physical ability if science allows it, because it would be 'the highest attainable standard of physical and mental health', if interpreted literally. He goes on to state 'these provisions have so far not trickled down to therapeutic HGGE … due to the worries of any risks involved with the procedure',[78] which follows the same line of argument made by Chua. Therefore, when this technology becomes safe enough to use without fear of adverse effects, this argument does lend support for the use of germline editing, not only for health reasons but also to advantage a child in unnatural ways, which may have a big impact on the availability and scope of this technology.

In conclusion, there is room to argue in favour of the right to use germline therapy, especially so when there comes a time where there is less risk of adverse effects. When this time comes, there is a danger that this right may be used to develop children beyond just, therapeutic uses. As discussed in Section II, the law is still largely ambiguous in its definitions, which could allow some to argue that enhancement of mental capabilities and physical traits must be part of these rights, as this choice should be respected in accordance with article 8[79] and remains on course with Articles 12 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. The law must provide greater certainty before this technology becomes risk free and commonplace, otherwise society's subjective understanding of these rights and what constitutes a healthy child will lead to inevitable misuse.

VII. EUGENICS

A large concern with genetic modification is to do with procreative autonomy. If full procreative autonomy is to ever be granted, there is a possibility of change in what mankind may look like one

[78] Brown (n 30), 88.
[79] ECHR (n 5).

day. The topic of discussion in this section will be the gateway to eugenics through genetic modification, and why full authorisation of such technology cannot be allowed.

Eugenics is the practice of disallowing those that may be disabled, physically or mentally, from passing on their genes in the hopes of improving the human race, in a twisted and controlled take on Darwinism. This was infamously used by the Nazi regime, which sought to eradicate disabled people as they saw it as a contamination of society. Concerns that such a vile practice may be linked to genetic modification are spreading throughout the academic realm, with some claiming 'if genetically modified designer babies are permitted to all interested parents it might serve as a backdoor to modern eugenics'.[80] Dohn similarly states "by eliminating 'undesirable' traits and thereby promoting the development of 'superior individuals', gene editing is pursuing the same goals as the eugenics movement of the last century".[81] Therefore, the legislation must be revised to ensure there is objectivity in what is considered as a disability, otherwise there is room for misinterpretation and 'modern eugenics'.[82] This discussion will be split into two parts, considering the impact of a eugenics agenda led by the government, and an attitude towards normalisation of eugenics by society.

A. EUGENICS LEAD BY GOVERNMENTAL REGIME

Although it seems unlikely that any country would pursue such a regime again after the atrocities of World War II, it is worth consideration to further understand eugenics and how governments have interacted with it. After all, our only example of such practices being used is by the government. The American case of *Buck v. Bell* illustrates this well.[83] Suter explains 'Buck v. Bell marks the pinnacle of legal legitimacy of compulsory sterilisation and also represents much of what was wrong with eugenics…',[84] as Judge Holmes stated 'three generations of imbeciles are enough'[85] in holding

[80] Fawzaan M. Hashimi, 'Necessity or Vanity: Designer Babies, CRIPSR, and the Future of Genetic Modifications' (2019) 7 International Journal of Scientific Research and Management 35, 38.
[81] Michael R. Dohn, 'Preventing an Era of "New Eugenics": An Argument for Federal Funding and Regulation of Gene Editing Research in Human Embryos' (2018) 25 Richmond Journal of Law & Technology 1, 22.
[82] Hashimi (n 80).
[83] *Buck v. Bell* [1927] 273 U.S. 200.
[84] Sonia M. Suter, 'A Brave New World of Designer Babies' (2007) 22 Berkeley Tech Law Journal 897, 912.
[85] *Buck* (n 83) 207.

sterilisation laws did not infringe Carrie Buck's rights. Although this case was held in 1927 and other cases in the U.S., such as *Skinner v. Oklahoma,*[86] went on to discourage the practice, Melillo reports 'as of 2004, seven states still had laws allowing for compulsory sterilisation … [and] even the Patient Protection and Affordable Care Act included sterilisation as a "preventative care" service'.[87] This same practice has been demonstrated in the British Supreme court. In *Re B,*[88] the court found that sterilisation of a mentally handicapped woman was legal, which, upon first impression, is all too reminiscent of *Buck v. Bell.*[89] However, the British Supreme court did not act in the same way as the U.S. courts, as the recurring reason for this decision was to act in the 'best interests of the ward',[90] as she did not understand the implications of unprotected sex, contraceptives and its natural link to pregnancy. A similar case, in *F v West Berkshire FA,*[91] upheld the same principles when considering sterilisation, taking all steps to consider what was in the best interest of the mentally incapable person. Therefore, although we have witnessed some examples where courts have upheld actions that could be regarded as pursuing eugenics, the reality is far more likely that the government seeks to place the claimant's best interest at the top of all considerations, distancing itself from the judgement in *Buck v. Bell,*[92] which shows its age today as it was only really pursuant of eugenic policies.

B. EUGENICS LEAD BY SOCIAL NORM

It may be difficult to imagine a modern eugenics movement as swiftly as is worried. This is because a eugenics movement would more likely move at a rapid pace if there was a regime leading it, such as that of the Nazis. However, public attitude and social norms could act as worse catalysts to eugenics than any regime. If parents were given full procreative control to genetic modification, at a time where there is minimal risk and great potential to not only ensure their child is born free of genetic disease

[86] Skinner v. Oklahoma ex rel. Williamson [1942] 316 U.S. 535.
[87] Ariel S. Tazkargy, 'From Coercion to Coercion: Voluntary Sterilisation Policies in the United States' (2014) 32 Law & INEQ 135 cited in Tara R. Melillo, 'Gene Editing and the Rise of Designer Babies' 50 Vanderbilt Journal of Transitional Law 757, 769.
[88] Re B (A Minor) (Wardship: Sterilisation) [1987] AC 199.
[89] *Buck* (n 83).
[90] *Re B* (n 88), 204.
[91] *F v West Berkshire HA* [1989] 2 All ER 545.
[92] *Buck* (n 83).

and disability but delve further into boosted physical and mental capabilities, there may be some hesitancy and controversy in the first decade or so of the technology's use, but after however many years it is difficult not to envision a society where greed and societal norms force people to view genetic modification as a must do. Hashimi explains 'parents would conceivably want the best for their kids, which would entail their kids to be at the top'.[93] On the same line of argument, Brown states:

> Equality is a deeply rooted concept within human rights. It is usually manifested in the form of equal protection under the law and non-discrimination. In the field of genetic modification, the principle of equality reinforces the requirement of a strict prohibition of any enhancement.[94]

This links perfectly well with the understanding of what may drive such a societal change. With the world entering an era of oversaturation and overpopulation, genetic modification may be used just to ensure that children are not born at a disadvantage, which inevitably leads many parents to do the same in pursuit of equality, leading to a new era of humankind, born impossibly perfect. As Suter summarises, 'once one individual uses a technique or drug that enhances performance, the pressure on other competitors to do the same is enormous'.[95] This exact point is backed up by the American Medical Association Council on Ethical and Judicial Affairs, who stated the biggest risk with regard to this issue is 'that the aggregate result of individual choices creates societal and cultural norms which substantially influence or limit the scope of autonomous decision making in regard to the use of genetic technology'.[96] This stands as a far greater threat than any governmental regime because such a regime may be toppled by the same 'aggregate' opinion.[97] When that opinion favours such practice of germline technology in the pursuit of equality, whether society knows it or not, they all pursue eugenic practices. Therefore, the government must be very cautious about what is within the legal scope of genetic modification and must take action to solidify our understanding of what is and is not within

[93] Hashimi (n 80), 38.
[94] Brown (n 30), 92.
[95] Suter (n 84), 935.
[96] American Medical Association Council on Ethical and Judicial Affairs, CEJA Report A – A-91: Ethical Issues in Carrier Screening of Cystic Fibrosis and Other Genetic Disorders (1991) cited in Sonia M. Suter, 'A Brave New World of Designer Babies' (2007) 22 Berkeley Tech Law Journal 897, 937.
[97] ibid.

the bounds of germline editing. It cannot be allowed for these impossibly perfect children to become the new societal norm.

CONCLUSION

The law governing accessibility to this new wave of technology must be revised as the understanding for this technology progresses. As it stands, the current legislation took a step forward in leaning towards restriction. The law stands clear in stating that 'an embryo is a permitted embryo if [it has not been genetically modified]'.[98] However, the scope of section 3ZA(5)[99] is the main source of concern, as it allows a pathway into the realm of genetic modification. This paper asserts that this exception should be further restricted to prevent the opportunity for unnecessary genetic modification, but still leave an appropriate gap for therapeutic purposes. If there is no update made to this area of the law, there is room for the Human Fertilisation and Embryology Authority to accept its application which could then lead to some of the discussed issues becoming a reality, especially so when there is a precedence.

The purpose of the section 3ZA(5)[100] exception may be relevant to ideas of a moral obligation towards future children. The idea of preventing unnecessary and avoidable suffering is something inherent in society, which might be something legislators took into account. Besides an underlying moral obligation, other authorities exist in favour of the exception. Human rights obligations, mainly pursuant to the ECHR,[101] but also relevant domestically in the Human Rights Act 1998, provides two rights that may strengthen the position towards germline therapy to prevent genetic disease. The right to life has some room for relevance here, however there is greater precedence in rejecting the right to life until that child is born, so this is a weaker argument. However, the article 8 right provides a stronger argument. Not only has the ECtHR identified the use of similar procreative technologies is protected by article 8, but other authorities such as the ICESCR further its strength and expand its scope.

[98] The 2008 Act, s 3ZA(4).
[99] The 2008 Act.
[100] ibid.
[101] ECHR (n 5).

However, the use of the ICESCR could be of future concern, as it may allow use of germline therapy for purposes beyond therapeutic purposes.

Moving forward, there are three key actions the government must take to ensure the dangers discussed in this paper are avoided. Firstly, there must be greater clarification as to what disability is in the context of the law. Although disability is more of a social rather than objectively physical or mental issue, as expounded upon in Section VI, there must be greater detail from legislators explaining what disability is for the purposes of the section 3ZA(5) exception,[102] otherwise there is room for deviation into non-therapeutic uses to creep into the scope of this exception. Many that live with disability would not describe it as such, which concerns the application of the current legislation in courts, as it lacks the rigidity to draw a clear line between these arguments. As discussed in Section II, the moral obligation to ensure children are born healthily must prevail over procreative autonomy, which the HFEA already seeks to restrict. Secondly, the Human Fertilisation and Embryology Authority must be specifically guided by the government to avoid widening the scope of germline therapy for non-therapeutic purposes. Although this is of lesser concern and is in any sense unlikely to happen, the potential of misapplication will allow the door for conversation of non-therapeutic use to be ajar, which can only serve to impact this area of the law negatively. The notion of non-therapeutic use must be stamped out, otherwise the natural desire to allow children to be born with every possible advantage will someday become commonplace. The worst outcome of inaction will be a germline therapy culture, which will make those that choose not to use germline therapy feel ostracised and will lower the understanding and compassion towards disabled persons, or even non-modified children, of the future. Finally, germline technology must be government funded to some extent. Without government funding, private actors will reap the rewards of early investment, causing greater disparity between the rich and the poor, as it can be assumed the earliest applications of successful germline therapy will be expensive. Government must allow for equal and fair use of medical technology; therefore, they must

[102] The 2008 Act.

invest in its future to allow equal and equitable use of this technology to exist earlier than what could be expected without any investment.

Besides these criticisms, this paper concludes that the current legislation has managed to create an effective authority to manage what may transpire in the future, which must be commended as it is not an easy task. The general restrictive approach is the right approach to take when considering the future of germline therapy, as the potential negative impacts of both authorisation and prohibition are too great to risk. With these suggestions acted upon, there is no doubt that this area of law will be well guarded and will allow courts to create precedents that further explain and uphold the purpose of the HFEA. Alongside this, with greater guidance, the Human Fertilisation and Embryology Authority will similarly be able to better regulate this area of technology.