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Letter from the Editor

On behalf of our Editorial Board, I am proud to present the fifth volume of the LSE Law Review.

Now in its fifth year of publication, the LSE Law Review has not only consolidated the quality of its publication but also established a strong presence on the LSE campus. To publish more of the outstanding submissions we receive, the Editorial team has worked tirelessly to expand our annual publication cycle to three issues: Summer, Winter, and Spring. To promote a culture of engagement with legal academia amongst the LSE law student body, the Seminars team organised an incredible line up of events, including: Constitutional Reform and Academic Publishing: 1970-2020, a collaboration with Oxford University Undergraduate Law Journal which featured Dr Jo Murkens from LSE and Professor Paul Craig from Oxford; and, Pathways to Academia – A Panel Discussion, a fruitful conversation on entering the profession of legal academia, which featured PhD Student in Law Ms. Mireira Garces de Marcilla Muste, Dr Sarah Trotter and Professor Conor Gearty.

To build our presence beyond LSE, the Liaisons team established collaborative partnerships with the law reviews of other universities. Notably, we hosted our first editorial workshop with King’s Student Law Review led by Dr Jo Braithwaite. Additionally, to consolidate our online presence, Michelle designed our first newsletter providing insights into latest legal developments from our Notes Editors, interviews with our previous authors, and updates on our upcoming events.

The academic year of 2019-2020 also marked the transition of our publication to Houghton St Press, the student imprint of LSE Press. This platform has allowed us to streamline our submissions
process, better showcase our work (accessible online here: http://lawreview.lse.ac.uk/), and most importantly, connect and knowledge exchange with other student journals across the LSE community. We are indebted to Ms. Lucy Lambe and Ms. Claire Delahunty for their invaluable assistance throughout this process.

To our authors, thank you for selecting the LSE Law Review to publish your enriching contributions, and for your hard work throughout the editorial process.

As always, we extend our eternal gratitude to the LSE Department of Law, especially Professor Niamh Moloney and Ms. Sarah Lee, for their continued support and enthusiasm for this project. We are also deeply appreciative for the LSESU Law Society’s commitment to generously supporting the Review’s growth.

We would also like to thank our Gold Corporate Sponsor and Prize Sponsor for Best Overall Submission, 3 Verulam Buildings, and Prize Sponsor for Best Case Note, Francis Taylor Building, for their continued generous support.

I would like to personally thank the incredible members of the Editorial Board 2019-20: Akvile, Ananya, Andrea, Ann-Marie, Annie, Austin, Claudia, Edward, Grace, Himmy, Ines, Jarren, Jason, Jia Man, Julius, Leontine, Mateusz, Michelle, Mythili, Namrah, Nikki, Rachelle, Ravneet, Samuli, Samantha, Sanzi, Skye, William, and Zoe. It has been an absolute pleasure to work alongside you. Thank you for tolerating my antics! I hope to have the chance to organise a reunion in less difficult times and I look forward to staying in touch.

A special thank you to my Deputy Editor-in-Chief, Jarren, for his diligence and commitment, and to our Junior Editors, for giving me hope in the solar future of our Review!

Gloria Schiavo
Editor-in-Chief 2019-20
LSE Law Review Editorial Board
Finding Sexual Minorities in United Nation’s Sustainable Development Goals: Towards the Deconstruction of Gender Binary in International Development Policies

Warisa Ongsupankul*

ABSTRACT

‘Leave No One Behind’ is an underlying principle enshrined in United Nation’s Sustainable Development Goals (SDGs), among which Goal 5 aims to achieve ‘gender equality and empower all women and girls’. The question remains as to the manner in which the term ‘gender’ is interpreted. Does it accommodate the sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) of non-conforming individuals? This paper will examine the gender politics within the United Nations which resulted in the failure of SDGs to explicitly recognise the rights of sexual minorities in its agenda. Bearing in mind that all Goals are interrelated and that marginalisation by oppressive institutions is often interconnected and cannot be examined separately from one another, this paper will also consider how such exclusion has had a negative impact not only on the achievement of Goal 5 but also on the overall success of the SDGs. Harnessing the insights of feminist legal theories, this paper will address the challenges as well as propose a more inclusive framework that goes beyond the sex/gender binary to promote gender equality in all of its manifestations.

* PhD Candidate at Monash University and a casual research assistant at the School of Humanities and Social Sciences, Deakin University. The idea of writing this paper came from the field work the author undertook in 2018 at Association Shams, an NGO defending the rights of sexual minorities in Tunisia. This paper is also developed from her conference presentation at the 3rd International Conference of the NIDA Law for Development on 23 November 2018 at National Institute of Development Administration (NIDA) in Bangkok, Thailand.
“If the immutable character of sex is contested, perhaps this construct called ‘sex’ is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.”

Judith Butler in _Gender Trouble: Feminism and the Subversion of Identity_

**INTRODUCTION**

In 2015, all United Nations member states adopted the 2030 Agenda for Sustainable Development, a shared blueprint for peace and prosperity for people and the planet, and the 17 Sustainable Development Goals (SDGs), which reflect global efforts ‘to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind’. The 17 SDGs carry on the work begun by the Millennium Development Goals (MDGs), which globalised an international effort between 2000-2015 to end poverty in its various dimensions. However, unlike the MDGs which only concerned developing countries, the SDGs apply universally to all United Nations member states and are considered by advocacy groups to be more comprehensive and ambitious than the MDGs.2

In addition, although SDGs are non-binding in nature and states are expected to implement the SDGs by establishing a national framework, monitoring progress, and arranging follow-ups and reviews to ensure the achievement of all 17 Goals, the SDGs are considered to not only reflect existing commitments expressed in various international legal instruments, but also have the potential to fill the gaps in fragmented international law.3

2 ICLEI Briefing Sheet, ‘From MDGs to SDGs: What are the Sustainable Development Goals?’ (2015) 1 Urban Issues 2, contrasting MDGs and SDGs in that the latter are ‘uniformly applicable to all countries of the world, removing the ‘developing’ versus ‘developed’ dichotomy that left the MDGs open to criticism’; Jon Coonrods, From MDGs to SDGs: Top 10 Differences (August 2014) <https://advocacy.thp.org/2014/08/08/mdgs-to-sdgs/> accessed 4 April 2019.
Among the important challenges mentioned in the SDGs is gender inequality. Goal 5 seeks to ‘achieve gender equality and empower all women and girls’. Nevertheless, the wording of Goal 5 focuses exclusively on the equality between men and women or boys and girls. In other words, the experiences of sexualities minorities whose sexual orientation, gender identity and expression, or sex characteristics (SOGIESC) do not conform to cultural norms or expectations, are nowhere to be seen in the Targets and Indicators of Goal 5 or in the other 16 Goals. The silence of the international community towards the oppression of sexual minorities is alarming, considering that those individuals have been subjected to patterns of violence similar to women, if not greater.

Questions arise as to how the drafters of SDGs decide whether or not to protect particular genders. Whose gender is likely to be treated equally, and whose gender is not? In other words, what genders count as genders worthy of protection in the eye of international development policies remains controversial. In an attempt answer these questions, the title of this paper, ‘Finding Sexual Minorities in the United Nations Sustainable Development Goals’ deliberately resonates with Doris Buss’s paper titled ‘Finding Homosexuals in Women’s Rights.’

Therefore, this paper aims at examining the context, cause, and consequences of the exclusion of sexual minorities from the SDGs. Section II will start by looking at Goal 5, as it explicitly concerns gender, and examine its

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5 The paper follows the definitions provided by the Yogyakarta Principles and other documents such as International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) reports.

6 OutRight UN Program, Commission on the Status of Women (CSW) Civil Society (CSO) Guide (April 2018) <www.outrightinternational.org/content/commission-status-women-civil-society-guide> accessed 4 April 2019 explaining that although LBTI women, trans and gender non-conforming persons face gender-based violence and discrimination, they are often excluded from the benefits of many international development investments and have also suffered from a foreclosed definition of ‘women’ in the CSW.

exclusion of sexual minorities. Section III will then consider the impacts that such exclusion has on the SDGs more broadly. Finally, Section IV will discuss some strategies and challenges, from the perspective of feminist legal scholarship, in using SDGs and human rights law to promote gender equality.

I. EXCLUSION OF SEXUAL MINORITIES

In 1948, United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR), with a Preamble starting with the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. However, it remains unclear as to what qualifies an individual to be regarded as a member of the human family. When a government or the international community decide that a certain population cannot effectively enjoy certain human rights or that their rights do not fall under the scope of human rights due to their sexual orientation or gender identity, does this imply that they deserve a lower place in a society?

It was not until 1994 – fifty years after the adoption of the UDHR – that the United Nations Human Rights Committee agreed that anti-sodomy laws were in violation of the right to privacy enshrined in Article 17 of the International Covenant on Civil and Political Rights. Even in the 21st century, the lives of sexual minorities, in many parts of the world, are so undervalued that they are subject to social exclusion, discrimination and severe criminal punishments. In the political organs of the United Nations, the question as to whether violence, restriction on sexual freedom, and discrimination more broadly suffered by

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9 Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); See International Covenant on Civil and Political rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 17(1) states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.

SOGIESC non-conforming individuals, are human rights issues is highly debated.10

Thus, this Section begins by outlining the contested scope and definition of ‘gender’ within the United Nations system to shed light on which identities the term ‘gender’ stipulated in Goal 5 aims to embrace. It will then elaborate on how Goal 5 fails to capture the lived experiences of sexual minorities.

Definition and Scope of Gender in Relation to SDGs

The effort to achieve gender equality and the empowerment of women was on the agenda of the Millennium Development Goals (MDGs) before it was absorbed into the SDGs.11 This comes as no surprise given that the elaborated details in both MDGs’ Goal 3 and SDGs Goal 5 both reveal how women in different parts of the world continue to experience violence and inequality in education, employment, and decision-making.

Since Goal 5 does not give us a clear definition as to the term ‘gender’ and does not provide the extent to which the term includes sexual minorities, attention should be given to the historical context so as to examine the discussions regarding such term within the UN system from which the SDGs derive.12 In tracing the history of sex/gender notion in international law, Dianne Otto discusses two problems of international human rights law’s approach to gender: the understanding of gender as binary system (i.e. male/female), and the asymmetric assumption that women are in a disadvantaged position (i.e. male>female), resulting in women’s vulnerability, dependency and the need for

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12 See Jane Adolphe, “‘Gender’ Wars at the United Nations’ (2012) 11 Ave Maria Law Review 1 (considering four possible understandings of the concept of gender within the U.N. system: (1) gender as a social construct; (2) gender as a cultural aspect of femininity and masculinity, but based on the biological sexes, male and female; (3) gender as synonymous with women and sex, or women and children; and (4) gender meaning the two sexes, male and female, within the context of society).
special protections.\textsuperscript{13}

It was not until 1995, at the Fourth World Conference on Women in Beijing, that a distinction was made between sex, which relates to biology, and gender, which relates to socially constructed category. Although this distinction has not changed the perception that biological bases determined social conceptions of man and woman, and that gender was a dualistic construction, it served as a means to challenge culturally constructed notions of gender roles that limit women from exercising rights and freedoms such as health and reproductive rights.\textsuperscript{14} Moreover, the draft agreement in Beijing included the term ‘sexual orientation’ primarily to refer to discrimination of women’s rights on the basis of sexual identity. However, this was deleted on the last day of negotiations.\textsuperscript{15}

According to Doris Buss, the key opponents were from the Christian Right, who are defined as ‘a broad range of American organizations that have tended to form coalitions, both domestic and international, around an orthodox Christian vision and a defense of nuclear family formation’\textsuperscript{16} and the Holy See, both of which saw the nexus between ‘radical’ feminist activism and homosexual activism whose end can be achieved through the international recognition of women’s rights. These entities feared the sex/gender distinction would threaten the sanctified status of the ‘natural family’ by changing the existing social division of labour. Moreover, given that women are no longer necessarily just mothers and wives, and the move towards universal access to abortion as a human right, these entities feared this distinction would also legitimise a host of so-called ‘unnatural’

\textsuperscript{14} ibid 204.
\textsuperscript{15} Buss (n 7) 266 stating that ‘the phrase ‘sexual orientation’ was kept bracketed – and subject to negotiation – until the early hours of the morning on the last day of negotiations when it was struck out’.
\textsuperscript{16} Doris Buss and Didi Herman, Globalizing Family Values: The Christian Right in International Politics, (University of Minnesota Press, 2003) xviii. See also Doris E Buss, ‘Finding the Homosexual in Women’ s Rights’ (2004) 6 International Feminist Journal of Politics 257 (Buss also refers to Christian Rights as groups which self-define as ‘orthodox religious believers’ who are active, to varying degrees, in the ‘natural family’ politics at the UN, whereas the Holy See is a permanent observer at the UN, and thus can vote on the final document, add reservations to conference agreements, access state only meetings and rooms and negotiate alongside other states).
practices like homosexuality, lesbianism, bisexuality and trans-genderism.\(^{17}\)

Afterwards, the next significant change came with the adoption of ‘gender mainstreaming’ as a UN system-wide strategy for achieving women’s equality. This involved providing room for interpretations by treaty monitoring bodies to disrupt the normalisation of sex/gender hierarchies and break the gender binary system as well as presumed heterosexuality. For example, the Committee Against Torture included ‘gender, sexual orientation [and] transgender identity’ in its non-exhaustive list of characteristics and factors that may increase the risk of torture or cruel, inhuman or degrading treatment.\(^{18}\) Moreover, the United Nations High Commissioner for Refugees has acknowledged that ‘refugee claims based on differing sexual orientation contain a gender element’ and thereby, claims of ‘homosexuals, transsexuals or transvestites who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination’ could be considered as a refugee claim.\(^{19}\) Lastly, the Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism provides that ‘gender is not synonymous with women but rather encompasses the social constructions that underlie how women’s and men’s roles, functions and responsibilities, including in relation to sexual orientation and gender identity, are defined and understood.’\(^{20}\)

However, when it came to international policy requiring global partnership as in the case of the SDGs, there seemed to be difficulty in reaching a consensus regarding the approach towards sexual minorities. On the one hand, Deputy

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Director of Human Rights Campaign Global Jean Freedberg observed that, despite the efforts of the lesbian, gay, bisexual and transgender (LGBT) community during the SDGs’ three-year negotiation process to add the terms sexual orientation and gender identity wherever marginalized and vulnerable groups were specified, “it became clear, when a lead U.N. official said [in September 2014] that LGBT rights ‘were off the table,’ [and] that efforts to include specific identity-based language might even backfire.”

Thus, we can assume the failure of the SDG to include sexual minorities in its agenda was due to the need to compromise with countries whose cultural norms made it impossible to include issues of gender and sexual diversity in international settlements.

On the other hand, United Nations bodies still attempted to assure sexual minorities that they were indeed included in the SDGs. For example, in 2015, the first year in which SDGs come into effect, United Nations entities adopted a joint statement calling on states to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex adults, adolescents and children. The aforementioned Joint Statement clearly recognized that guaranteeing the human rights of sexual minorities would be essential to the achievement of SDGs.

This was followed by the then-United Nations Secretary General Ban Ki Moon’s speech at the High-Level LGBT Core Group Event

21 Human Rights Campaign, ‘Op-ed: What Does the UN’s Agenda 2030 Mean for LGBT People?’ (September 2015) <www.hrc.org/blog/op-ed-what-does-the-uns-agenda-2030-mean-for-lgbt-people> accessed 11 January 2019, reporting that “in the face of opposition from a bloc of countries, including Russia and most African, Middle Eastern, Asian, and Caribbean countries, as well as the Vatican and religious groups, a consensus emerged to ease up on those efforts rather than risk derailing negotiations or rolling back previously agreed-upon language”.


stating that “there are 17 sustainable development goals all based on a single, guiding principle: to leave no one behind. We will only realize this vision if we reach all people regardless of their sexual orientation or gender identity.”

Nevertheless, Section III demonstrates that if Goal 5 is to be understood literally and independently, the SDGs can be seen to adopt a conservative notion of gender, through its selective language and limited narratives, and therefore fail to address the conditions of sexual minorities.

The Forgotten Victims

During the Nazi regime, homosexuals comprised a separate category of prisoners in concentration camps and were marked with a pink triangle – which has become the symbol of today’s gay rights movement. After the war, however, the treatment of homosexuals in concentration camps went unacknowledged by most countries. It was not until 2002 that the German government formally apologised to the gay community, and not until 2005 that the European Parliament adopted a resolution on the Holocaust that included the persecution of homosexuals. This exclusion of the homosexuals from historical narratives is arguably one of the reasons why the persecution of sexual minorities persists around the world today.

Regardless, the wordings of all targets and indicators of Goal 5 focus exclusively on women and girls, and thus exclude the lived experiences of sexual minorities. For example, although seventy-three states still criminalise homosexuality by punishments ranging from imprisonment, lashes to the death penalty and transgender youths are considered to be ‘among the most vulnerable


26 See https://antigaylaws.org/all-countries-alphabetical.
and marginalised young people in society’, these urgent matters are not included within Target 5.1 and Target 5.2 which instead aim at ending all forms of discrimination and violence against all ‘women and girls’. Moreover, Target 5.3 and its indicators recognise female genital mutilation as an example of harmful practices but overlooks the detrimental effects of intersex genital mutilation (IGM) done to intersex children without their consent, the existence of forced male circumcision, and anal examination performed in some countries to verify male’s homosexuality, even though such practices may lack medical necessity and may amount to torture.

Furthermore, both Target 5.4 and Target 5.5 promote women’s effective participation in professional and public life. Yet, the problem of securing employment faced by sexual minorities is equally alarming, if not more. For instance, in Tunisia, if a person has been convicted of crimes relating to homosexuality, the conviction will be recorded in the individual’s Criminal Record No.3 (bulletin judiciaire) for five years. During this time, disclosure is required when applying for jobs or identity control throughout the country. Where an individual has offences on this criminal record, potential employers tend to automatically reject the application. As a consequence, those convicted of homosexuality crime often resort to sex work, having little possibility of securing lawful employment. Since sex work is illegal, these people are excluded even more so from mechanisms of social protection.

29 See, for example, Mark Lamont, ‘Forced Male Circumcision and the Politics of Foreskin in Kenya’ (2018) 77 African Studies 293.
31 Interview with Bouhdid Belhadi, Director Executive of Association Shams for Decriminalisation of Homosexuality in Tunisia (Tunis, Tunisia, 9 April 2018); For other countries, see e.g. Colectivo Ovejas Negras, Center for International Human Rights of Northwestern University School of Law, and Heartland Alliance for Human Needs & Human Rights, Global Initiative for Sexuality and Human Rights, ‘Human Rights Violations Against Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) People in
Last but not least, Target 5.6 aims to achieve universal access to sexual and reproductive health and reproductive rights by highlighting the importance of information, education and women’s ability to make informed decisions. Once again, sexual minorities and their particular concerns are excluded from specific mention. There are, for example, lesbians who are victims of hate crimes such as corrective rape arranged by the family to ‘cure’ their lesbianism. It is interesting to note that this practice persists even in countries where same-sex marriage is legal, such as South Africa. This demonstrates that homophobic attitudes can persist despite progressive legislation. As for sex education, anti-gay curriculum laws (also known as ‘no promo homo’ laws) which prohibit or restrict the discussion of homosexuality in US public schools result in LGBTQ youth not only being marginalised, but also exposed to bullying and stigmatisation.

Therefore, it is clear that discrimination based on SOGIESC can be faced by any individual depending on that person’s particular context such as where they live, what socio-economic situation they are in, etc. By focusing exclusively on ‘women’ broadly, Goal 5 represents neither an inclusive nor an accurate perception of gender inequality.

II. IMPACTS OF THE EXCLUSION OF SEXUAL MINORITIES ON THE SDGS

The United Nations recognises the three core elements the SDGs encompass: economic growth, social inclusion and environmental protection, all of which are interconnected and essential for the achievement of sustainable

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Uruguay: a Shadow Report’ (2013) 7 stating that ‘transgender people face automatic rejection in applying for jobs nearly 100 percent of the time, which leads them to resort to sex work’.


development agenda. In this respect, the SDGs can be said to reflect the United Nations Development Programme’s continuous effort to advance human security, as opposed to the traditional notion of state security which is primarily seen through political and military perspectives. This new understanding of human vulnerabilities highlights seven areas most vulnerable to threats: economic security, environmental security, food security, personal security, health security, political security, and community security. This section will outline the link between the exclusion of sexual minorities and other SDGs through the aforementioned framework of seven areas of human security concepts.

**Economic Security**

Economic security can be said to encompass Goal 1 (No Poverty), Goal 2 (Zero Hunger), Goal 4 (Quality Education), and Goal 8 (Decent Work and Economic Growth). Studies have shown a causal link between the social exclusion of sexual minorities and the economy of the country. In 2014, the World Bank published a study titled ‘The Economic Cost of Homophobia’, examining a case study of homophobia in India and its impact on the economy. The study illustrates how homophobia as a basis for social exclusion (violence, prison, job loss, discrimination, family rejection, harassment in school, and pressure to marry) leads to certain individual-level outcomes (less education, lower productivity, lower earnings (i.e. more poverty), poorer health (i.e. shorter lives), and lower labour force participation). This in turn results in poorer economic-level outcomes: higher health care and social program costs, lower economic output, fewer incentives to invest in human capital. The report concluded that homophobia and the exclusion of LGBT people cost the Indian economy between 0.1 percent and 1.7 percent of its GDP in 2012.

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34 United Nations (n 1).
Earlier that year, the World Bank postponed a US$90 million loan to Uganda after the country enacted a law institutionalising the punishment of homosexuality. The Bank considered that such a law would adversely affect health programmes that the loan was intended to support. Bank president Jim Kim also argued that ‘when societies enact laws that prevent productive people from fully participating in the workforce, economies suffer’. 37 More recently, Brazil confirmed the World Bank’s case study of India, concluding that exclusion from access to educational opportunities can exacerbate the precarious economic situation of sexual minorities. For instance, many LGBT people have stopped attending schools after suffering violence there. As a result, they were unable to attain adequate levels of schooling in order to access employment. 38 Moreover, familial rejection of a youth’s sexual orientation and gender identity is an important reason for increased rates of homelessness and needs to enter the child welfare system faced by LGBT youth. 39

Therefore, it cannot be denied that the SDGs’ effort to secure economic security including quality education cannot be achieved without addressing the discrimination and social exclusion faced by sexual minorities around the world.

Health Security

Goal 3 (Good Health and Well-Being) has been linked with disease prevention and education. What remains problematic is the way in which the medical community qualifies and evaluates sexual minorities according to its established sets of psychological definitions and assessment such as the Diagnostic and Statistical Manual (DSM). Homosexuality was previously regarded as a condition deviating from ‘normal, heterosexual development’ and it was not until 1973 that the American Psychiatric Association (APA) removed the diagnosis of ‘homosexuality’ from the DSM. 40 Even then, same-sex attraction

continues to be pathologised by some national medical associations. Sometimes, these medical associations also cooperate with the police to perform forced anal examination to verify proof of anal sex despite the fact that such tests lack scientific validity and medical necessity.\textsuperscript{41}

The lack of sexual interest or desire that asexual people experience has also been historically pathologised as a disorder. A recent study shows there is no evidence to suggest that asexuality is a psychiatric disorder, sexual dysfunction, or paraphilia, but rather a recognisable sexual orientation.\textsuperscript{42} Furthermore, at present, transgenderism is often understood to be the manifestation of ‘gender dysphoria’, the diagnosis of which is crucial for individual seeking insurance support for sex reassignment surgery or treatment, or who seek a legal change in status.\textsuperscript{43} Lastly, sex characteristic variations are still largely referred to as a disorder of sex development (DSD) which justifies coerced medical intervention to ‘normalise’ the intersex body into one of two genders.\textsuperscript{44}

As a group of United Nations and international human rights experts recognised, such ‘forced, coercive and otherwise involuntary treatments and procedures can lead to severe and life-long physical and mental pain and suffering and can violate the right to be free from torture and other cruel, inhuman or degrading treatment or punishment’.\textsuperscript{45} Thus, it is clear that if the pathologisation of sexual minorities and these discriminatory practice continue, Goal 3 cannot be universally achieved.

\textsuperscript{41} Human Rights Watch (n 30).
\textsuperscript{42} Brenna Conley-Fonda and Taylor Leisher, ‘Asexuality: Sexual Health Does Not Require Sex’ (2018) 0 Sexual Addiction & Compulsivity 4; The Asexual Visibility and Education Network (AVEN) suggests asexual people seek to inform clinicians and society-at-large that their sexual orientation is not a sexual desire disorder needing to be treated.
\textsuperscript{43} Judith Butler, Undoing Gender (Routledge 2004) 5.
Environmental Security

Environmental security may concern a combination of threats related to global ecosystems and thus can be linked with Goal 6, 7, 11, 13. Although such natural threats can affect anyone regardless of their gender or sexuality, the way in which humans deal with these threats through relevant organisations and capacity can be discriminatory. Therefore, the marginalisation of sexual minorities is also evident during times of natural and environmental disasters.

State institutions or NGOs may be discriminatory through their own arrangements and practices. For example, since the categorisations of affected groups in Disaster Risk Reduction (DRR) are usually limited to only male and female, transgender individuals are not documented as an affected group and are therefore denied relief services including temporary housing, health access and even basic sanitation services. Moreover, as ‘family’ is generally defined in nuclear heterosexual terms of man, woman, and children, sexual minorities whose family compositions might not correspond with such terms risk being excluded from security relief efforts.

Personal Security, Political Security and Community Security

Finally, personal security, political security and community security can be translated into Goal 16 (Peace, Justice, and Strong Institutions) which seeks to ‘reduce all forms of violence’ (Target 16.1), ‘promote the rule of law… and ensure equal access to justice’ (Target 16.3), develop effective, accountable and

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46 Mekler (n 44) 162, Mekler gives examples as follows: after the 2005 tsunami in India, Aravanis, India’s gender variant people, experienced systematic discrimination when it came to health care, housing, and sanitation. In Pakistan, transgender people were denied access to internally displaced person (IDP) camps after disaster flooding because they had no proper identification cards (citations omitted).

47 Mekler (n 44) 162, During the 2008 earthquake in Haiti, MSM were systematically denied food because rations were directed at women. MSM had no registered women in their home and were thus not eligible to receive rations.

48 Human Development Report 1994 (n 35) 30, Community security invokes a reassuring set of values providing a cultural identity through membership within a group, family, organization, ethnicity, and so forth.
transparent institutions (Target 16.6), and ‘promote and enforce non-discriminatory laws’ (Target 16.B), all of which cannot be achieved if SOGIESC issues are not taken into account seriously.

This can be clearly seen in countries where the oppression of non-normative sexualities is systematically perpetuated by the state. For example, in the Chechen Republic, (a part of Russia) real and perceived gay men have been abducted, held prisoner, tortured, and killed by authorities in what witnesses have called concentration camps. Unfortunately, the state-sponsored abuse and detention of gay men in the Chechen Republic is not exceptional. Drawing from the author’s experience in working at an LGBTQ activist NGO in Tunisia, where same-sex relations are criminalised under Article 230 of the Tunisian Penal Code, it is clear that the Tunisian democratic transition (which inspired Arab Spring) did not contribute to the protection of sexual minorities to the degree one might expect. This is because the problem was and still remains due to deep-rooted patriarchal attitudes and homophobic socio-cultural norms, which have been used and perpetuated by elected politicians as arguments to justify the preservation of Article 230 of the Penal Code.

In this regard, sexual minorities in Tunisia can neither invoke rights and freedoms as guaranteed in the new constitution nor seek protection from family, state institutions, or the justice system, due to those institutions being the source of their marginalisation in the first place. When being physically or verbally harassed by others, these minorities prefer not to report the incidents to the police for fear of being arrested under Article 230 and are consequently denied access to the justice system. Moreover, their right to privacy is often violated through police raids at their houses and surveillance conducted over their telephonic and electronic communications in order to find evidence to prosecute them under Article 230. In correctional facilities, they are exposed to verbal and physical

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50 See Wahid Al Farchichi and Nizar Saghiyeh, ‘Homosexual Relations in the Penal Codes: General Study Regarding the Laws in the Arab Countries with a Report on Lebanon and Tunisia’ (2009).
violence, such as rape from the fellow inmates. There is both selectivity and
discrimination in their treatment, as illustrated by when the police to choose to
arrest certain homosexuals, and the arbitrariness when courts pronounce the
sentence for the offences, which can range from one day to one month without
reference to any standardised criteria.

One might argue that the discrimination faced by sexual minorities in
Tunisia is caused by Tunisian religious traditions and cultural values and attempts
should on changing public opinion, rather than state institutions. However, this
paper argues that unless those individuals are certain they could be themselves in
public without being persecuted by state-sponsored homophobic/transphobic
institutions, and that their human dignity is regarded as equal to others’ in the eyes
of the law, it is more likely that the society will take for granted the status quo of
those discriminatory laws and its consequent implications. Therefore, the state
institutions and civil society should work hand in hand, and unconditional upon
the other’s participation, in order for the transformative dialogue and institutional
reform to start.

III. POSSIBLE STRATEGIES USING FEMINIST LEGAL THEORIES

What we can conclude from the previous sections is that despite aiming to
promote ‘gender equality’, the SDGs’ silence on other gender identities is by no
means an accident and carries on the international community’s long struggle over
the notion of sex and gender. At this point, it is unlikely that the wording of Goal
5 would be revised. Nevertheless, since the SDGs are not a binding legal
instrument, it is dependent on states and NGOs to decide how they will
implement the recommended policies to meet the targets. Therefore, this section

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51 Interview with Bouhdid Belhadi, Director Executive of Association Shams for
Decriminalisation of Homosexuality in Tunisia (Tunis, Tunisia, 9 April 2018); Interview
with Abbaessatar Khowldi, asylum applicant seeking protection from sexuality-based
persecution (Tunis, Tunisia, 14 April 2018). See also Tunisian Coalition for the Rights of
52 The punishment is in fact deemed to be life-imprisonment as it cannot change an
individual’s sexual orientation. Thus, homosexuals in Tunisia face the constant risk of
being arrested and being put into prison.
53 Guillaume Allusson, ‘Social Repression in a Democracy: A Case of Tunisia’ (Turkish
Policy Quarterly, 21 March 2018) <http://turkishpolicy.com/article/901/social-
will propose strategies utilising feminist legal theories which could be adopted so that SDGs can be used to achieve true gender equality.

To justify my choice of methodology, it is therefore essential to understand what feminist legal theories are and how they are relevant in the context of this paper. It is generally accepted that there is no single, stable, and fixed body of thought characterising feminism. Instead, feminist methodology, rather than containing a uniform substantive agenda, is a methodological description. Nevertheless, it can be said that all feminist methods appeal to a central question: ‘how to understand gender from a critical and equality-driven perspective’.55

Moreover, the reason for incorporating a ‘legal theory’ element is because law is important to both feminist projects and SOGIESC considerations since women and sexual minorities share similar struggles caused by structural inequalities, whether they be in the form of patriarchy, heteronormativity, cis-normativity, or compulsory sexuality which are embedded in law and legal institutions. As Jill Marshall puts it, ‘law defines; it both includes and excludes entities as human beings to be protected by human rights law. It allows, permits, protects and provides; it also recognises, misrecognises and ignores identities. In doing so, it conditions the formation of certain types of identity’.56

Like any legal field, international law is said to hold a vision of autonomous legal rationality, separating legal fields and political fields, as there is the need for law to provide an objective and neutral basis for governing self-interested individual States.57 However, as Section II (1) of this essay has shown, gender politics seems to be incapable of being dealt with by a legal method because we cannot guarantee the objectivity and impartiality of the result. Yet, a critical position towards the illusion of objectivity in legal argument does not have to lead us to legal nihilism, according to Martti Koskenniemi. Instead, we should lower

our expectations of certainty and take the moral-political choices seriously even when arguing ‘within the law’.\textsuperscript{58}

With that in mind, this section will adopt various insights from feminist legal theorists and as well as those who might not self-define as feminist but whose critical engagement with the law helps us to understand how gender equality could be achieved more effectively in the context of the SDGs. In this regard, the possible strategies can be categorised into three sub-sections: recognising the limits of rights discourse; improving existing anti-discrimination doctrine; and fixing structural inequalities which are the source of the discrimination of women, sexual minorities, and any other gender.

**Recognising the Limits of Rights Discourse**

When it comes to advancing gender equality, the most prevalent approach at both national and international levels seems to be the equality doctrine as manifested in anti-discrimination laws. In this regard, it can be seen from the elaboration of Goal 5 that it aims to tackle gender-based discrimination. Nevertheless, the particulars of Goal 5 are enumerated in binary terms: boys/girls and men/women. This poses two challenges to the achievement of gender equality itself.

The first challenge lies in SDGs’ presumed universality as an international development policy. However, as we have seen from the previous Section, the notion of ‘gender’ is by no means universal, and neither is the term ‘women’. Both notions differ across society due to them being products of socioeconomic construction.\textsuperscript{59} For example, in a minority of countries, e.g. Denmark and Argentina, one can change one’s gender in the official documents without prior medical intervention, whereas in most countries, including Thailand, it is not legal to change the gender status even after the sex reassignment surgery.\textsuperscript{60}

\textsuperscript{58} ibid 536.
Moreover, Goal 5’s narratives of child marriage, forced marriage, and female genital mutilation might reflect a controversial image of feminised and infantilised developing countries in desperate need of assistance from the developed countries. The question, then, is how to accommodate specificities in our cultural diversity. This is particularly pertinent considering the various levels of acceptance for non-normative sexualities among different countries, not to mention the resistance of many non-western countries arising from the view of women’s and LGBT rights as a western invention.

The other challenge concerns the nature of the subject itself. In international law, gender continues to be understood as closely linked to biological sex. It serves as a social meaning given to the biological differences of male and female bodies. However, this is problematic as sex, in nature, is not a dichotomy but rather a continuum. It is society that imposes a bipolarity.

The aforementioned example reveals the paradoxes and limits of the law, especially in human rights discourse, in advancing gender equality. The more rights are catered to women, the more likely they are to institutionalise certain assumptions regarding women, such as their vulnerability, violability, heterosexuality, etc. Furthermore, such specialisation ignores the other differences within the group such as race, class, age, and disability which intersect with gender to shape our individual experience, since it is hard for anti-discrimination laws to capture the multiplicity of social powers pressures. As Wendy Brown questions:

62 Moya Lloyd, ‘(Women’s) Human Rights: Paradoxes and Possibilities’ (2007) 33 International Studies Review 91, 93; For example, Chechen leader Ramzan Kadyrov denies allegation of gay persecution in Chechen republic because he contends that there are no gay men in Chechnya, and if there are, they should move to Canada.
“[H]ow can rights be procured that free particular subjects of the harms that porn, hate speech, and a history of discrimination are said to produce without reifying the identities that these harms themselves produce? Second, how to navigate the difficulty of differences among marked groups – this woman feels oppressed while that one feels liberated by pornography.”

The ‘sameness/difference’ dilemma has long been embedded in the jurisprudence on feminist legal theory as shown in the persistent need to choose, depending on circumstances, either to claim equality for women on the basis of similarities between the sexes, or argue for special treatment for women on the basis of fundamental sexual differences.

For example, Target 5.4 seeks to ‘recognize and value unpaid care and domestic work [performed by women] through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate’. This came from the statistical survey that most of unpaid care work such as cooking, cleaning, washing clothes and kitchenware, water collection, fuel management, pet care, taking care of sick and elderly is done by women and girls in families and communities.

Thus, one could argue that women who bear disproportionate child-care responsibilities should not receive additional support from the labor market if the law is to be gender-neutral, whereas others might contend that ‘female workers’ should be given special protection as marriage may have a detrimental impact on women’s careers. While the former argument leads to indifference towards the specific disadvantages faced by women, the latter assumes a strict dichotomy of sex, i.e. maleness and femaleness, requiring disadvantages produced by gender to

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be remedied by reference to sex. It also ignores the diversity within the group and those in between such as male workers who assume the primary child-care and domestic responsibilities, female workers who take the role of an ideal worker, and heterosexual or homosexual couples who might arrange their responsibilities in other ways.

Therefore, if we seek to rectify such inequalities by only giving economic value to the unpaid care and domestic work done by women and not by challenging social attitudes towards the distribution of labour in the society, such measures, even though well-intended, can reproduce the stereotype that childrearing and domestic work are naturally a women’s roles. Instead, a preferable alternative is to address the disadvantage as it is – ‘anyone [not mothers], who has eschewed ideal worker status to fulfill child-care responsibilities’.

As a consequence, it could be said that in order for the SDGs, or any policy promoting gender equality, to be implemented effectively across societies, it should not be limited to a rights discourse. A transformative dialogue which goes beyond the rigidity of language is needed so as to empower the local community as an agent of change. For example, there exists initiatives from progressive Muslim communities to spread the understanding that Islam indeed supports many kinds of diversity. In particular, the view that sexual and gender diversity were acknowledged in the Quran and therefore, common punishments for homosexuality in Islamic countries have no basis in the Islamic scriptures. As some scholars rightly suggested, the efforts of LGBTQ activists and NGOs should not be based solely on the implementation of human rights standards, but equally on a thoughtful and matured understanding of the Islamic religion as well as other culturally based reasonings.

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70 See Katharine T Bartlett and Rosanna Kennedy (ed.) (n 67) 5.
In addition, the language of the SDGs is broad and flexible enough to be employed as a means to address the situation of sexual minorities. Hence, by recognising Goal 5’s limits in promoting gender equality and its effect on the overall achievement of SDGs, and by having awareness of the fact that the language of law or policy is susceptible to societal and political power dynamics, we can encourage the relevant stakeholders to interpret and implement SDGs in a more inclusive way.\textsuperscript{74}

For example, Goal 4 (Quality Education) can be used to reform school curriculums to promote LGBTQ-inclusive education. This would make the school a safer place for LGBTQ youth and empower youths with autonomy and a respect for difference.\textsuperscript{75} With regard to Goal 3, states and NGOs should ensure that the socially accepted standards of ‘good health and well-being’, which may be discriminatory to sexual minorities, are not used by national medical associations or other institutions as a tool to reinforce discrimination and stigmatisation of these individuals. In this way, the SDGs can provide new opportunities to protect and empower sexual minorities around the world.

**Rethinking Anti-Discrimination Doctrine**

Despite the aforementioned challenges and the importance of non-legal measures, we should not give up law as a site for struggle. Instead, Otto advises us to accept the categorical approach of law for it enables us to communicate and to act; ‘without categories, classifications and comparisons, we are left with a world of infinite \textit{sui generis} items and without a basis for making judgments of justice, ethics or rights\textsuperscript{,76} It is only by engaging critically with the language and


practices of law that law and rights-based rhetoric can empower marginalised groups to challenge the forces that cause their subordination in the first place.\textsuperscript{77}

This is particularly true in the present era where law functions as a modern expression of collective ideals and is thus an essential element in promoting social reforms.\textsuperscript{78} For example, the law can serve as a source of discrimination, as in the case of sodomy laws, or of protection, as in the case of anti-discrimination laws. Moreover, the previous Sections have shown that the power of language is undoubtedly acknowledged by relevant stakeholders at the United Nations. As Cushman rightly observes:

Language is the weapon of choice at the United Nations – where politicians ‘negotiate’ instead of vote, where battles are fought with words instead of bullets and where victory is won with syllables not swords. That’s because U.N. delegates, charged with protecting human rights worldwide, understand that words communicate ideas and ideas have powerful consequences.\textsuperscript{79}

The question is thus how the language of the law should be framed and understood to effectively protect women and sexual minorities. In this regard, attention can be given to the two different forms of anti-discrimination policies described by Darren Rosenblum: identity-based and category-based protection. Rosenblum criticised Convention on the Elimination of all Forms of Discrimination against Women’s (CEDAW) framing on women, in that ignoring other identities and the broader power disparities related to sex can only serve to marginalise the Convention itself.\textsuperscript{80}

Goal 5 and CEDAW are therefore identity-based as they concern only a particular group of fixed ‘women’s’ identity and not on systems of oppression, whereas the Convention on the Elimination of All Forms of Racial Discrimination (CERD), for example, is category-based as it prohibits all

\textsuperscript{77} Dianne Otto (ed), Gender Issues and Human Rights (Elgar Research Review in Law 2013).
\textsuperscript{78} Kathryn L Power, ‘Sex Segregation and the Ambivalent Directions of Sex Discrimination Law’ (1979) 1 Wisconsin Law Review 55, 63.
\textsuperscript{80} Darren Rosenblum, ‘Unsex CEDAW, or What’ s Wrong With Women’s Rights’ (2011) 20 Columbia Journal of Gender and Law 98, 141.
discriminations on the basis of race but ‘does not limit the range of victims who can be subject to discrimination or consequent protections.’

Hence, what Goal 5 could have done is adopt a categorical framework condemning all forms of discrimination based on sex, gender, and sexuality. In that case, examples like intersex genital mutilation and forced male circumcision in Kenya would then be qualified as sex/gender-based violence falling under the scope of Goal 5. Such articulation could draw a model from the Yogyakarta Principles adopted in 2006, which lay down principles on the application of international human rights law in relation to SOGIESC. As explained by the interpretative guide to the Principles:

"[T]he drafters sought to uphold the universal nature of human rights by avoiding wording that would limit rights to particular groups. Thus, instead of speaking about the rights of heterosexuals, homosexuals, lesbians, gay men, bisexuals, or transgender people, each Principle is said to apply to all people regardless of the characteristic of actual or perceived sexual orientation or gender identity."'

Therefore, by expressing the rights in this way, individuals would not be required by Goal 5 to categorise themselves through identity labels which might not conform with what they genuinely self-identify. This should be done together with making explicit the varied experiences of people facing gender-based violence across different socio-cultural backgrounds so as to balance the universality of human rights and the particularity of gender inequality.

On the other hand, taking into account the limits of law and paradoxes of human rights discourse – especially the contestable nature of category and the indeterminacy of sex/gender construction as elaborated in Section VI (1) – this paper suggests that Judith Butler’s theory of gender performance could serve as a

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81 ibid 145 (Rosenblum further clarifies that whereas approximately half of all humans are women, all individuals may be construed as having a racialised identity. Thus, race is a category, not an identity).

framework which allows for a more politically sensitive understanding of how individuals are sexed and gendered by state institutions through law. The theory of gender performance asserts that gender is not a noun, i.e. something we have, but a verb, i.e. something we do, and that our gender performance contributes to the construction of the binary of male and female sex that it is said to reflect within a dominant heterosexual matrix.\textsuperscript{83}

Such an understanding of gender is liberating in that it does not force us to adhere to a fixed empirical identity of ‘man’, ‘woman’, ‘gay’, ‘lesbian’, etc. In contrast, it allows us to disrupt the rigid dominant cultural narrative, to accommodate gender fluidity and subjectivities, and to regard those whose modes of doing gender do not conform to social norms as equal in dignity and freedom, not merely as individuals for whom others have to have tolerance.

Thus, when it comes to gender equality, the law or a policy should refuse to institutionalize gender in any form. This does not mean that the law should be gender-blind as it can still recognize the expression gender self-determination of each individual whether as a man, woman, non-binary, or any other gender. The point, as argued by Christopher Hutton, is that the law should not ‘constitute its subjects as sexed in particular ways; nor should it appeal to language, theology, science, psychology or medicine for some underlying, legally operationalizable truth about sexual identity’.\textsuperscript{84} Nor should it presume commonalities among all groups as this might lead to the generalization about women based on the situation of a certain culture or exaggeration of the gender bias as compared to other forms of oppression inflicted upon person of any sex or gender.\textsuperscript{85}

**Fixing Structural Inequalities**

As Section IV (1) showed, one of the law’s limits, due to its function to preserve institutional stability and continuity, is its conservative force. Activists are thus forced to work within and even strengthen the very structures they must

\textsuperscript{83} Judith Butler, ‘Gender Trouble: Feminism and the Subversion of Identity’ (Routledge 1990) 1.

\textsuperscript{84} Christopher Hutton, ‘Legal Sex, Self-Classification and Gender Self-Determination’ (2017) 11 Law and Humanities 64, 80.

dismantle. In other words, the attempt to utilise SDGs to tackle inequality solely based on group identity will not rectify sexist policies and practices, since Goal 5’s focus on ‘women’ enshrines the male/female binary and reinforces the rigidity of the permitted categories while erasing other identities in between.

As a consequence, it might be preferable to shift the attention from the application of law to the analysis of law as a technology of gender. As Carol Smart notes, ‘instead of asking ‘how law can transcend gender?’, the more fruitful question has become, ‘how does gender work in law and how does law work to produce gender’? Similarly, Deborah Rhode concludes that feminist legal critics, by challenging both structural inequalities and the normative assumptions that underlie them, focus more on undermining the role that gender plays in a society than on predicting the precise role that gender would play in a good society.

Following this line of logic, the role of law in tackling inequality should no longer focus primarily on discrimination against defined groups at an individual level, but rather on ‘fixing systems of power and privilege that interact to produce webs of advantages and disadvantages.' Taking the issue of sex and gender, the constraint of law lies in its inability to reflect the full spectra of sex and gender. Therefore, instead of seeking to create a more inclusive set of legal categories to cover a wide range of sexual identities, it should aim to de-institutionalise the gendered structure of society, shifting from women’s rights and LGBTQ rights paradigms to ones which interrogate the institutional practices that produce the identities and inequalities in the first place.

In this respect, it is important to identify the structural flaws of what Martha Fineman called ‘foundational myths’ according to which the equality doctrine, upon which anti-discrimination law is grounded, derives the liberal notion that each individual is an autonomous and independent subject, born free and endowed with the same inalienable rights, and can exercise his/her freewill and

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87 Carol Smart, ‘The Woman of Legal Discourse’ (1992) 1 Social & Legal Studies 29, 34
89 ibid.
be held responsible for it. As a consequence, the argument requires the state to limit its intervention, especially in field of the free market and the private family.\textsuperscript{90}

On the contrary, Martha Fineman challenges the passive role of state based on public/private dichotomy by invoking an alternative concept of ‘shared, inevitable vulnerability’ which is inherent in the human condition through our bodily needs and the messy dependencies they carry. Accordingly, the reality of our shared vulnerability inevitably influence how we construct our societal institutions and how such institutions provide us with physical assets, human assets, and social assets.\textsuperscript{91} In this sense, the same-sex marriage debates, according to Fineman, are a good example of the attempt to reveal how the state, through laws governing the institution of marriage, privileges some while leaving others outside of its protective structure.\textsuperscript{92}

Such a shift in attitude encourages a more responsive political culture in that each and every individual in the society to has an interest to disprove the existence of inequalities, regardless of whom such inequalities are inflicted upon, since all of us, being in a constant state of possible harm varying in every aspect of life as elaborated in the SDGs, cannot escape our shared vulnerability and thus are interdependent on one another.

This concept also corresponds with the interconnected nature of the SDGs in which the challenges and solutions contained in the agenda are interrelated and thus require integrated approach which go into fixing the structural flaws, rather than merely fixing the individual problem at the superficial level. Moreover, this will facilitate forming coalitions which need not be organized around differing


\textsuperscript{91} Martha Fineman, ‘The Vulnerable Subject: Anchoring Quality in the Human Condition’ (2008) 20 Yale Journal of Law & Feminism 1, 12-14, explaining that “institutions that provide us with physical assets are those that impart physical or material goods through the distribution of wealth and property. Human assets are innate or developed abilities to make the most of a given situation such as health and education. Social assets are networks of relationships from which we gain support and strength, including the family and other cultural groupings and associations, such as trade union and political parties.”

\textsuperscript{92} ibid 22.
identities but among those who have not benefited as fully as others from current societal organization.93

Therefore, it can be seen that since both sexual minorities and women struggle for autonomy over one’s body and right to non-discrimination, women’s rights activists should consider sexual minorities as political allies in challenging the structural inequalities and social biases which prevent them from exercising their rights and freedoms.

CONCLUSION

By criticising the SDGs’ exclusion of sexual minorities, this paper does not contest Goal 5’s descriptive assessment of women’s situation, nor does it attempt to undermine the international effort to improve women’s lives. Women’s present conditions deserve greater attention and a central place in the international agenda, but this centrality does not necessitate or justify their placement as the sole gender or sex identity meriting protection from discrimination.

On the contrary, this paper argues that gender equality could not truly be achieved, if Goal 5 focuses exclusively on women, adopting an essentialist identity-based approach, thereby ignoring differences within ‘women’ and other identities. Instead, we should adopt an inclusive category-based approach while acknowledging the indeterminate, fluctuating, and socially-constructed character of those categories pertaining to sex, gender, and sexuality. This can be done only if we also challenge the heteronormative and cis-normative assumptions that underlie structural inequalities at both the international and national levels.

The exclusion of SOGIESC considerations from a widely adhered international agenda such as SDGs does not concern only those who self-identify as such. Calling for remedial actions and socio-legal reform with regards to unequal institutional arrangements concerning sexual minorities will pave the way for addressing and correcting the disadvantage and power imbalances that persist in society in other areas of human security.

93 ibid 17.
Therefore, by addressing gender inequality in all of its manifestations, any effort to implement SDGs would be better positioned to accomplish not only Goal 5, but also other SDGs as a whole, and thus genuinely fulfilling its promise of ‘leaving no one behind’.
The Coherence of the Principle of Patient Autonomy in the English Medical Law: A Re-evaluation

Nahide Basri*

ABSTRACT

By comparing and contrasting four specific areas within English medical law—inform consent, mental capacity of adults, mental capacity of children, and mental health—this essay observes a fundamental shift from medical paternalism towards patient autonomy in the UK. The general position is that a competent adult with capacity has an almost absolute right to informedly consent to or refuse medical treatment, while those not qualifying as such are assisted so far as practicable in enabling them to make choices concerning their medical treatment in the most autonomous way possible. However, this commitment to patient autonomy lacks coherence. This essay identifies three main reasons for this. Firstly, a degree of unjustified paternalism remains even with regard to competent adults—especially in the case of mentally ill patients. Secondly, by viewing autonomy in predominantly individualistic terms, the law disregards how patients’ interdependences and relationships may be constitutive—not destructive—of their autonomy. Thus, it unfairly subjects those incapable of an individualised sense of independence to the ‘best interests’ test. Thirdly, the ‘best interests’ test is ill-equipped to uphold such patients’ autonomy. This essay argues that re-envisioning autonomy in relational terms is a vital starting point to address the current incoherencies.

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INTRODUCTION

The rise of bioethics, challenging the ‘doctor knows best’ foundations of conventional medical ethics, is reflective of a fundamental shift in medical law from medical paternalism towards patient autonomy.\(^1\) For the purpose of clarity, this essay defines autonomy as the ability of the patient to exercise self-determination with regards to their treatment, comprising three aspects: (1) agency: setting their own goals in life; (2) independence: acting free from the coercive influence of others; and (3) rationality: reasoning in accordance to one's own values and desires.\(^2\) Comparing and contrasting four areas within English medical law – informed consent, mental capacity of adults, mental capacity of children, and mental health – this essay identifies a clear rise in recognition of patient autonomy. Informed consent law relates to the ability of a competent patient to make autonomous decisions regarding their own treatments. In contrast, mental capacity law of adults and children sets a threshold to determine the level of competency and understanding patients need to display before being allowed to make such decisions. Mental health law deals with similar issues but does so specifically with mentally ill patients in mind. A comparative analysis of these four areas in the English medical law shows that the general position is that a competent adult with capacity has an almost absolute right to informedly consent to or refuse medical treatment. T, while those that do not qualifying as such – whom we will refer to as ‘the vulnerable’ – are assisted so far as practicable in enabling them to make choices concerning their medical treatment in the most autonomous way possible.

Unfortunately, a close analysis demonstrates that this shift towards patient autonomy lacks coherence. Firstly, even with regard to competent adults, a degree of unjustified paternalism remains – blatantly so in the case of the mentally ill. Secondly, protection of patient autonomy is envisaged predominantly in individualistic terms. This disregards the ways in which patients’ interdependences and relationships may be constitutive, not destructive, of their independence, and

thereby their autonomy. By generally not viewing autonomy relationally, the law seems to categorise patients artificially as ‘the autonomous’ and the ‘vulnerable’, thereby subjecting those incapable of an individualised sense of independence, i.e. the latter, to the ‘best interests’ test. Thirdly, this matters because the autonomy of ‘the vulnerable’ under this test, while now assuming greater recognition, is not adequately protected.

I. THE ADULT WITH CAPACITY: AN ABSOLUTE RIGHT TO MAKE DECISIONS ABOUT THEIR TREATMENTS?

The patients’ right to make decisions about their treatments is essentially a negative right, involving the right to give informed consent or competent objection to treatment. Both informed consent and mental capacity law reflect the dominance of patient autonomy by recognising that such decisions are no longer automatically determined by medical opinion, but are rather made by individual patients exercising a choice based on their own values and preferences.

The landmark case on informed consent, Montgomery v Lanarkshire, demonstrates this. It establishes that healthcare professionals owe a duty of care to disclose to patients “material” information about their treatment, where the test for materiality is “whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particularly patient would be likely to attach significance to it.” This significantly departs from the precedent of Bolam v Friern Hospital Management Committee, which held that healthcare professionals’ duty of disclosure would be discharged if they acted in a way “accepted as proper by a responsible body of skilled medical men.” Bolam’s position is a blatant manifestation of paternalism, where the starting

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6 ibid at [11].
7 [1957] 1 WLR 583.
point is what the reasonable doctor considers relevant to disclose to the patient.\textsuperscript{8} Even the subsequent jurisprudence re-focusing on the patient such as in \textit{Pearce and Pearce v United Bristol Healthcare NHS Trust},\textsuperscript{9} where Lord Woolf held that the risk significant to a reasonable patient should be disclosed, is inadequate in terms of protecting patients’ autonomy.\textsuperscript{10} It assumes that patients are objectively reasonable, while in fact they may not be;\textsuperscript{11} what they regard as a ‘significant risk’ varies with their own values and life goals. The importance of \textit{Montgomery}\textsuperscript{12} lies in recognising, and challenging this, re-focusing on what the specific patient would regard as material. This aligns the law closely with the ethical guideline in General Medical Practice (GMC), which suggests that doctors should “work in partnership” with the individual patient to “maximise patients’ opportunities…to make decisions for themselves.”\textsuperscript{13} Indeed, only with the knowledge of risks material to them can patients make fully autonomous decisions.

The overarching principle in \textit{Montgomery},\textsuperscript{14} that while healthcare professionals may advise patients on medical matters, the latter retain the ultimate choice to accept or refuse treatment based on their own priorities, is similarly reflected in mental capacity law. It requires that an adult patient should, by default, be able to determine their own treatment due to the presumption of capacity in s 1(2) Mental Capacity Act 2005 (“MCA”).\textsuperscript{15} This presumption can only be rebutted with the satisfaction of a diagnostic threshold of “impairment of, or a disturbance in the functioning of, the brain” in s 2(1) and the refutation of the patient’s cognitive capabilities in s 3(1). The latter establishes a low threshold, such as the ability to understand the relevant information in s 3(1)(a), interpreted generously as requiring only a general understanding of the risks and benefits of the treatment in \textit{Heart of England NHS Foundation Trust v JB}.\textsuperscript{16} This ensures that patients are not easily denied the autonomy to determine their treatment just because they cannot

\textsuperscript{8} Robert Heywood and Jose Miola, ‘The changing face of pre-operative medical disclosure: placing the patient at the heart of the matter’ [2017] LQR 133.
\textsuperscript{9} [1996] EWCA Civ 878
\textsuperscript{10} Emily Jackson, \textit{Medical law} (4\textsuperscript{th} edn, Oxford University Press 2016)
\textsuperscript{12} \textit{Montgomery} (n 5) 88.
\textsuperscript{13} Heywood (n 8).
\textsuperscript{14} \textit{Montgomery} (n 5) 88.
\textsuperscript{15} Mental Capacity Act 2005, s 1(2).
\textsuperscript{16} [2014] EWHC 342.
or do not understand everything about their condition/treatment. Thus, competent patients are allowed to make decisions contrary to their best interests (Airdale NHS Trust v Bland\(^7\)), in contrast to the position of incapacitated adults and children, as explained below. This is enshrined in legislation in s 1(4), which allows patients to make “unwise” decisions, and is depicted in Kings College NHS Foundation v C,\(^8\) where the competent individual was allowed to reject life-saving treatment as she thought her life, characterised by alcohol, men and glamour had lost its “sparkle”.\(^9\) As MacDonald J. stated, while the decision may be regarded as “unreasonable, illogical or even immoral”,\(^10\) it is a manifestation of her autonomy *per* her own priorities. As in Montgomery,\(^11\) this protects autonomy not in the thin sense of self-determination - patients simply doing what they want - but in a thicker sense as rational self-determination,\(^12\) thus allowing patients’ *agency* to determine their own values, and to *rationalise* accordingly. This is welcome: deontologically, it allows patients choices regarding their own bodies; consequentially, it lends them greater control, and thereby responsibility, regarding their own treatments.

**Paternalism: Disappearing and Reappearing**

Nevertheless, while both informed consent law and mental capacity law operate parallel to each other to foster patient autonomy, the introduction of a ‘therapeutic exception’ (“TE”) in Montgomery\(^13\) inserts a level of paternalism akin to that in Bolam which stands at odds with the patient-empowering ethos of the MCA. The TE entitles a “doctor…to withhold information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient’s health.”\(^14\) On the face of it, TE can be easily justified. As Deavey and Holm argue, extensive medical expertise and knowledge of healthcare professionals means that it is important to allow them to withdraw information

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\(^{17}\) [1993] AC 789.

\(^{18}\) [2015] EWCOP 59.

\(^{19}\) ibid.

\(^{20}\) ibid at [97].

\(^{21}\) Montgomery (n 5) 88


\(^{23}\) Montgomery (n 5) 88.

\(^{24}\) Montgomery (n 5) 88.
from patients in exceptional cases where it would be necessary to do so.\(^{25}\) Indeed, the Court was insistent that this was only a “limited exception” that did not intend to “subvert that principle [of disclosure].”\(^{26}\) This is reflected in the terminology change from “therapeutic privilege” to “therapeutic exception”.\(^{27}\) Thus, initially, TE, with its emphasised exceptionality, seems to strike a desirable balance between protecting patient autonomy in general and maintaining a degree of deference to the expertise and knowledge pertaining to the medical judgment.\(^{28}\)

Despite this, the lack of exploration of its scope potentially allows a pathway for paternalism to creep in through the backdoor. As Cave argues, this generates a dangerous possibility that TE might be utilised to prevent patients making ‘irrational’ decisions which would put them in serious harm.\(^{29}\) If so, this sits incoherently with the MCA whose benchmark for autonomous decisions is not irrationality, but rather capacity.\(^{30}\) Of course, the actual dissonance between TE and the MCA is contingent on the practical implementation of the MCA’s autonomy-enhancing ethos. The MCA might be similarly incapable of supporting competent patients’ ‘unwise’ decisions if measures are not taken to alter the findings of the House of Lord Select Committee in 2014 to the effect that that the dominance of patient autonomy in the MCA, through features such as the assumption of capacity, is not well-understood or implemented \textit{in practice} by healthcare professionals. As the vast majority of capacity decisions taken by these professionals and are rarely disputed in court,\(^ {31}\) this seriously compromises patient autonomy. We could contend that abolishing TE and raising awareness concerning the MCA is necessary to address these incoherencies.

\textbf{The limitations of an individualistic focus}

In both informed consent and mental capacity law, the protection of autonomy is understood predominantly in individualistic terms. In informed


\(^{26}\) ibid 91.

\(^{27}\) Cave (n 11).

\(^{28}\) Devaney and Holm (n 25).

\(^{29}\) Cave (n 11).

\(^{30}\) ibid.

\(^{31}\) Jackson (n 10).
consent law in *Montgomery*, the focus is solely on the doctor-patient relationship, assuming that patients make decisions on the basis of ‘material’ information alone and independently of others. Hostility towards relatives/friends influencing patients’ decisions is depicted in *Re T (Adult: refusal of medical treatment)* where the refusal of the patient in question to accept a blood transfusion was held to be a decision not autonomously arrived at but influenced by her mother. Surely, where there is a coercive force of others amounting to undue influence which mitigates consent, this cannot enhance (relational) autonomy. Nevertheless, it is of paramount importance to distinguish between relationships that are coercive and relationships that are merely influencing. The latter should not be rejected automatically: as many patients explain, their interdependencies are vital components of their own personhood and identity, and thus, are often not destructive but constitutive of their autonomy. This, however, seems not to be reflected in the current law. For example, Gilbar suggests that *Re T* depicts an individualistic bias. As she suggests, the Court’s judgement did not adequately deal with the possibility that the patient agreed with her mother’s view because the patient’s relationship with her mother is a crucial part of her own identity. Indeed, it might be that a relational (though of course, qualified) view of autonomy could have led to a different conclusion. Given this possibility, *Re T* represents an example of how the court’s (overly-)individualistic interpretation of autonomy might sometimes lead to a denial of autonomous choice to the patient.

The individualistic approach towards autonomy is also still predominant in capacity law. By allowing an almost unlimited legal right to individuals to refuse life-saving treatment in cases like *Kings College*, law ignores the impact patients’ decisions can have on people surrounding them - to whom they have moral obligations. The gap between patients’ legal rights and moral obligations might mean that while law protects rational self-determination, it does not ensure moral

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32 *Montgomery* (n 5).
34 Gilbar (n 3).
35 Herring (n 4).
36 Gilbar (n 3).
37 ibid.
38 ibid.
39 Maclean (n 22).
rational self-determination.\(^{40}\) While moral obligations may initially be viewed as detrimental to the individual patient’s autonomy, in a Kantian framework, one’s autonomy can only be realised through moral actions.\(^{41}\) The latter perspective envisages autonomy in relational terms, as one which can only be attained in the context of our relationships with others. Yet, the current law’s individualistic focus wholly disregards patients’ moral responsibilities towards others, fostering a selfishly limited conception of autonomy.

Therefore, the individualistic protection of autonomy is limited in two ways: firstly, it can deny patients the right to make influenced but still autonomous choices, and secondly, it neglects patients’ moral obligations towards others. Moreover, it is also problematic because it leads to an unjust distinction between those considered capable of being ‘autonomous’ and the others - ‘the vulnerable’.

II. INCAPACITATED ADULTS AND NON-ADULTS, LES MISERABLES: (MIS)DRAWING THE BOUNDARIES

In contrast to competent adults deemed worthy of the right to autonomy stand others, children, incapacitated adults and mentally ill patients (Les Miserables) are allowed only a restricted level of autonomy.\(^{42}\) Indeed, if such groups are unable to fulfil the three-fold requirements of autonomy, giving them the right to determine their treatment will not uphold their autonomy, and can even be harmful. Yet, there are two reasons why the invisible line drawn between ‘the autonomous’ and ‘the vulnerable’ can be unfair.

Firstly, the law’s aforementioned reliance on an unrealistic image of an independent, rational and free patient categorises others engaged in interdependent relationships, such as children, incapable of autonomous decisions. This is problematic, because the autonomy of such groups is protected to a far lesser extent, even if they may be just as capable of autonomous decisions as those deemed competent under the s 3(1) of the MCA. The legal distinction child capacity law draws between children’s right to consent to or reject treatment demonstrates this. On one hand, *Gillick v West Norfolk*\(^{43}\) aligns child capacity law

\(^{40}\) ibid.

\(^{41}\) ibid.

\(^{42}\) Herring (n 4).

\(^{43}\) [1986] AC 112.
closely with adult capacity law, holding that a mature minor having reached a sufficient understanding has a right to consent to treatment, even if parents oppose treatment. This criterion separates Gillick-competent children from other young minors. Lord Scarman’s judgement is particularly radical, suggesting that parents’ right to consent to any treatment is extinguished when a child reaches a sufficient level of maturity and understanding.\textsuperscript{44} Such an approach resonates with the functional approach of Mental Capacity Law, where protection of autonomy is contingent on patients having established a certain level of understanding. Nevertheless, a degree of incoherency exists, as the recognition of the right to consent to treatment is not matched by a right to refuse treatment. Judges display particular reluctance in finding children who refuse treatment to be Gillick-competent, such as in \textit{Re E (A minor)}.\textsuperscript{45} In that case, Ward J. found that to be Gillick-competent, a 15-year-old child refusing a blood transfer needed to understand the manner of his ensuing death and the extent of his family’s consequent suffering. As Jackson suggests, this is an “excessively demanding test”;\textsuperscript{46} even “most adults do not fully understand what it is like to die”.\textsuperscript{47} Such a stringent approach is also at odds with the much lower threshold for (adult) capacity in s 3(1) of MCA (above). The rhetoric of \textit{Gillick} is further rebuffed in \textit{Re R (A Minor)}\textsuperscript{48} which holds that the refusal of the Gillick-competent mature minor of treatment can be trumped by the consent of the parent or the court. This substantially compromises the Gillick right to autonomy on the part of children.

Arguably, this reluctance to allow children to refuse life-saving treatment is partly justified on the grounds of ‘transitional paternalism’.\textsuperscript{49} Adults have obligations towards young people to ensure that they become self-governing in the future. Indeed, overriding children’s present autonomy to make decisions which could harm themselves can be seen as protecting their future autonomy to reconsider such decisions at a more mature level. This partially explains the inconsistency between adult and children capacity law. However, there remains a group of children who are of sufficient capacity to make their own decisions. The

\begin{itemize}
\item \textsuperscript{44} ibid.
\item \textsuperscript{45} [1993] 1 FLR 386.
\item \textsuperscript{46} Jackson (n 10).
\item \textsuperscript{47} ibid.
\item \textsuperscript{48} [1992] Fam 11 CA.
\item \textsuperscript{49} Faye Tucker, ‘Developing Autonomy and Transitional Paternalism’ (2016) Bioethics 30, 9.
\end{itemize}
The Coherence of the Principle of Patient Autonomy

consistency of the boy’s decision in Re E, demonstrated by his refusal of treatment at the age of 18 and his consequent death,\textsuperscript{50} perhaps exemplifies this. Yet, the binary approach drawn between consenting and rejecting treatment based not on the child’s capacity in functional terms but rather their \textit{status} as a child leads to an almost \textit{automatic} denial of autonomy with regards to the latter. This is at odds with s 2(3) MCA which states that lack of capacity cannot be established based on a person’s age alone. Thus, unlike Montgomery’s emphasis on patient autonomy for competent adults, the (limited) autonomy granted to children appears not an end in itself, but merely instrumental in allowing doctors to treat children without incurring liability. This inconsistency occurs because law expects patients to be independent and free in order to uphold their autonomy, automatically classifying those who cannot fit this idealised image as vulnerable and unable to decide for themselves.

Secondly, the law employs a medicalised understanding of disability used to identify ‘the vulnerable’ which is overly restrictive.\textsuperscript{51} This means that the law over-reliance on medical information when determining what constitutes disability. This is evident in both the MCA and the Mental Health Act 1963 (“MHA”).\textsuperscript{52} The diagnostic threshold, “impairment of, or a disturbance in the functioning of, the main or brain” outlined in s 2(1) MCA 2005 and an almost identical provision in s 1(2) MHA, provides the basis for interfering with patient autonomy, to force treatment, or even detain individuals against their will. The diagnostic focus ignores the impact of the wider context relationally affecting their capacity for autonomy, and overlooks the extent to which these groups’ disabilities may be socially constructed.\textsuperscript{53} For example, the repeated findings of incapacity in anorexia cases, such as \textit{Re E},\textsuperscript{54} \textit{Re L},\textsuperscript{55} and \textit{NH Foundation Trust v Ms X},\textsuperscript{56} on the basis that the obsessive fear of gaining weight deprives those concerned of the competence to weigh up their choices and to make a competent decision as required by s 3(1)(c) displays a continuing insensitivity towards the broader social and political

\textsuperscript{50} Jackson (n 10).
\textsuperscript{51} Beverley Clough, “‘People Like That’: Realising the Social Model in Mental Capacity Jurisprudence” (2016) Medical Law Review 24, 3.
\textsuperscript{52} Section 1(2) Mental Health Act (MHA) 1983.
\textsuperscript{53} ibid.
\textsuperscript{54} Re E (Medical treatment: Anorexia) [2012] EWCOP 1639.
\textsuperscript{55} The NHS Trust v L [2012] EWHC 2741 (COP).
\textsuperscript{56} [2014] EWCOP 35.
context surrounding anorexia.\textsuperscript{57} This is exemplified in Ms X,\textsuperscript{58} where Ms X was held to lack the capacity to make decisions regarding her anorexia, but not her alcoholism. The court distinguished her alcoholism from anorexia, holding that with the former she made an active choice to drink alcohol. Nevertheless, such a choice may not be freer than one exercised in relation to anorexia: in both cases, the act – the decision to drink or the decision not to eat – is not wholly unwilling in the sense of absence of control over it, but compelled, in that she has severe difficulties in controlling it.\textsuperscript{59} Thus, the Court’s conclusion perhaps reflects societal attitudes towards the two conditions; while anorexia is considered an illness and consequently not the sufferer’s fault, alcoholism is regarded as morally repulsive and blameworthy. Again, this ignores the wider social context in which alcoholism occurs.\textsuperscript{60} In fact, medicalisation of disabilities can be used to shift the focus away from the state’s obligations under the UNCRPD Article 12(2) to ensure that disabled people “enjoy legal capacity on equal basis with others in all aspects of life,”\textsuperscript{61} despite the UK being a signatory to it. It overlooks the extent to which these groups’ disabilities may be socially constructed. Thus, categorisations (‘the vulnerable’ and ‘the autonomous’), predominantly informed by an individualistic and ‘medicalised’ understanding of autonomy, are not always reflective of one’s ability to exercise autonomy.

Consequently, it is predominantly the individualistic approach towards autonomy which leads to potential mis-categorisations, overlooking the way in which patients’ autonomy can be fostered or restricted by their relationships and their context. The extent to which these categorisations matter depends on the extent to which ‘vulnerable’ patients’ autonomy is fostered within the best interests test.

\textsuperscript{57} Beverley Clough, ‘Anorexia, Capacity, and Best Interests: Developments in the Court of Protection Since the Mental Capacity Act 2005’ 2 (2016) Bioethics 30, 9.
\textsuperscript{58} Ms X (n 56).
\textsuperscript{60} ibid.
\textsuperscript{61} United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD” or “CRPD”).
III. CHILDREN AND INCAPACITATED ADULTS – ACCOMMODATING AUTONOMY WITHIN THE BEST INTERESTS PARADIGM?

While children and incapacitated adults are subjected to the best interests test, this does not mean an outright rejection of their autonomy – rather, the need to respect their autonomy is an integral part of the test. Under s1(a) of the Children Act (“CA”) 1989, children’s welfare has to be the court’s paramount consideration in any medical decision. Under both the welfare checklist in s1(3) and the Code of Practice (“CoP”), any assessment for the children’s best interests must include their views and wishes. Similarly, incapacitated adults are governed by the best interests test under s 1(5) MCA, which, as elaborated in s.4, require respect for patient autonomy, obligating the court to consider factors such as the patients’ beliefs and values (s 4(6)(b)) along with other factors important to them (s 4(6)(c)). The analogy between the legal rights of children and incapacitated adults is outlined by Munby J. in Re X (A Child)\(^62\) that, while such people may lack the ability to exercise autonomy, judges should strive to attach “very considerable weight…[to] clear wishes and feelings.” Within adult capacity law, this is reflected in case law. A salient example is Aintree University Hospitals NHS Foundation Trust v James,\(^63\) where Lady Hale claimed that “the purpose of the best interests test is to consider matters from the patient’s point of view” in order to allow them to make “the choice which is right to him as an individual human being.”\(^64\) A similar trend in favour of upholding patient autonomy is evident in child capacity law as exemplified in Gillick. Thus, in both adult and child capacity law, respect for patient autonomy is one of the many factors judges should consider, and the case-law depicts an increasing level of importance attached to it.

Furthermore, both the law regarding children and incapacitated adults can potentially accommodate a relational analysis, which can offer a more realistic protection of autonomy. In An NHS Trust v DE (2013),\(^65\) for example, the court held that undergoing vasectomy was in the incapacitated (adult) patient’s best interests: in addition to enabling him to have a long-term relationship with his girlfriend without having children (as he wanted), King J. also contended that the

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\(^{63}\) [2013] UKSC 67.
\(^{64}\) ibid.
\(^{65}\) [2013] EWHC 2562.
treatment would greatly please his parents, thus conferring upon him the benefit of seeing them happy. This views welfare not only on individualistic terms, but as something which may be achieved in consideration of those surrounding us, although importantly, his parents’ happiness is taken into account only because this would make him happy. Still, the decision may uphold the patient’s autonomy in the Kantian sense, taking into account the will of the patient in a way that does not disregard his moral duties towards others. Such an approach can reconcile the relational protection of autonomy with an individualistic protection. The ability to accommodate a relational view is similarly evident in children capacity law. Under s 1(3) CA, the welfare of the child is determined by factors including the capacity of his parents “for meeting his needs” (s 1(3)(f)), his “background or any characteristics of which the court considers relevant” (s 1(3)(d)) and the child’s “emotional…needs”. While these factors are relevant only to the extent that they affect the child’s welfare, which is the court’s sole consideration (per Lord Dermott, J v C), they demonstrate an acknowledgement of the importance of the child’s relationships. For instance, in Re T (A Minor) (Wardship: Medical Treatment), while there was a unanimous agreement of the medical opinion that the child should receive life-saving treatment, the court refused to authorise it. This was because authorising the treatment in the face of his mother’s opposition would adversely affect her, and thereby undermine his welfare which depended on his mother. Arguably, this relational approach towards welfare risks undermining the child’s individual autonomy, as identifying the child’s interests with his mother’s as “one” in this “unusual case” (per Butler-Sloss LJ) arguably hides the child’s independent interests. This difficulty with the relational approach, however, can be eliminated, by limiting relational approach to caring relationships, excluding abusive relationships (above). Still, a confusion remains. As both DE and Re T demonstrate, the protection of autonomy is conducted covertly within the umbrella of the ‘best-interests’ test, making it difficult to identify the actual weight attached to the child’s autonomy. This undermines clarity in law because the protection welfare does not always intersect with the protection of autonomy. Children as well as adult capacity law should more explicitly protect relational

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66 Herring (n 4).
69 ibid.
autonomy (in the qualified sense), as lack of clarity might often lead to obscuring it with (paternalistic) welfare considerations.71

IV. A STARK CONTRAST: MENTALLY ILL PATIENTS

While the autonomy of children and incapacitated adults is assuming importance within the welfare paradigm, the issue of patient autonomy is sorely neglected with regard to mentally ill patients.

Theoretically, this should not be so. The ordinary rules of consent (see above) apply to mentally ill patients with capacity. Therefore, where mentally ill patients are detained informally – the most common method of detention – their autonomy seems to be respected in two ways. Firstly, a patient can choose to be detained voluntarily. The Code of Practice for MHA states that consent should be based on sufficient knowledge of the purpose, nature and likely effects of treatments, paralleling a patient-focused autonomy model similar to that in Montgomery. Secondly, they are free to leave, which displays continuous, not just one-off, respect for patients’ autonomy. Yet, this is not always the case when it comes to practice. Many patients consent to detention without being provided with adequate information on its implications, and only do so because they fear being otherwise detained under the stigmatic MHA.72 This means that consent may be uninformed and actually not fully voluntarily. This stands in contrast to the emphasis on informed consent in Montgomery, which obligates providing patients not just all the “material” information, but also doing so in an emphatic manner which makes it comprehensible to the patient (Lybert v Warrington Health Authority).73 The right to informed consent can therefore be seen as compromised in the case of the mentally ill. Furthermore, informally admitted patients may effectively be prevented from leaving a given facility. This is exposed in R(L) v Bournewood Community and Mental Health NHS Trust,74 where the informally admitted patient was denied access to his carers due to a sense that such contact could lead him to want to leave. As the European Court of Human Rights

71 ibid.
(“ECtHR”) held, contrary to the House of Lord’s (“HL”) judgement, this constitutes a deprivation of liberty, even if the patient is compliant and not actively attempting to leave, amounting to a violation of Art 5 in the absence of procedural safeguards stated in Art 5(4). The introduction of the Deprivation of Liberty Safeguards (“DoLS”) in response to this EctHR decision, however, still does not protect patient autonomy in a substantive sense. DoLS only introduces certain *procedural* safeguards when restricting patient autonomy.\(^{75}\) It fails to promote the substantive protections for disability rights in the CRPD, which, in its guideline on Article 14, explicitly prohibits detention of people based on their disabilities.\(^{76}\) The mismatch between law and practice, akin to that currently the case with the MCA, has adverse implications on the protection of autonomy.

With regards to formal detention and forced treatment under the MHA, there is an explicit conflict with the MCA. While the former respects the autonomy of adults with capacity, the MHA disregards this threshold, rendering it lawful to forcibly detain and treat competent adults. Under s 2, the patient can be detained to enable assessment for up to 28 days “if he is suffering from mental disorder of a nature or degree which warrants the detention of patient” *and* “he ought to be so detained in the interests of his own health or safety or... protection of other persons.” Such wording is problematic when discussing patient autonomy. Firstly, “nature or choice” runs contrary to the “least restrictive alternative” principle both in the MHA 1983 Code of Practice and s 1(6) and the MCA, because it may authorise the detention of a patient suffering from an illness the “nature” of which but not the “degree” of which necessitates detention.\(^{77}\) This highlights not only an internal incoherency within Mental Health Law, but also in relation to Mental Capacity Law. Furthermore, the MHA authorises the detention of individuals not solely for their interests, but also to “protect” other people. In Millian terms, autonomy can be infringed justifiably in order to prevent harm to others.\(^{78}\) Nevertheless, the notion that mentally ill people harm others rests on the erroneous assumption that mental illness diagnosis is an accurate reflector of

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\(^{76}\) ibid.

\(^{77}\) Jackson (n 10).

\(^{78}\) Maclean (n 22).
violent behaviour.\textsuperscript{79} As it is not always so,\textsuperscript{80} the detention of mentally ill people on this basis is unjustified and discriminatory. Denying them the right to autonomy this way infringes Article 14 of the CRPD. Section 3, which authorises non-consensual admission for treatment for up to 6 months, displays the same two defects in a magnified form, given the length of the time during which patient’s autonomy will be disregarded. It also allows forced treatment as long as “appropriate medical treatment is available for him.” This replaces the previous treatability test, a change introduced in 2007 in order to facilitate the detention of the mentally ill people whose personality disorders may not be ‘treatable’. As these sections are designed to facilitate the detention of (objecting) mentally ill patients, they run directly against the whole concept of patient autonomy.

A major exception to patient autonomy is s 63, which states that “the consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering”. This is “unusually inconsistent and discriminatory in the way it deals with questions of competence and patient autonomy with regards to mental disorder”.\textsuperscript{81} While this authorisation is limited to treatment regarding “mental disorder,” it has been widely interpreted. An example of this is the force-feeding of anorexic patients in Re KB (Adult) (Mental Patient: Medical Treatment).\textsuperscript{82} The authorisation of force-feeding against the patient’s wishes is not only medically counter-productive, but also severely destructive of the patient’s will and autonomy.\textsuperscript{83} Following the introduction of the Human Rights Act (HRA), courts have displayed greater reluctance to force treatment on someone with capacity, such as in R (Wilkinson) v Broadmoor Special Hospital Authority and others.\textsuperscript{84} Nevertheless, the ECHR is not well-equipped to provide meaningful protection for patient autonomy. In addition to its limited procedural focus (above), it also displays significant deference to clinical judgement. In Herczegfalvy v Austria,\textsuperscript{85} the ECtHR held that treatments considered a “therapeutic necessity” cannot amount to inhuman/degrading treatment violating Article 3 of the ECHR. Similar to the problematic TE in Montgomery, this

\textsuperscript{79} Jackson (n 10).
\textsuperscript{80} ibid.
\textsuperscript{81} Richardson (n 2).
\textsuperscript{82} [1994] 19 BMLR 144.
\textsuperscript{84} [2002] 1 WLR 419.
\textsuperscript{85} ECHR 24 Sep 1992.
allows room for clinical paternalism to override patient autonomy. Many psychotropic treatments forced on individuals have side-effects such as obesity and the lessening of mobility, but mentally ill patients are not permitted to reject treatment by calculating its advantages and risks of their own volition.\textsuperscript{86} We can contend that mentally ill patients’ autonomy is very widely disregarded both in law and in practice, which is in stark contrast to informed consent and mental capacity law.

**CONCLUSION**

The above discussions adumbrate an overall trend in favour of protecting patient autonomy, even with regard to groups considered ‘vulnerable.’ Nevertheless, such a pattern is hampered by the following incoherencies:

1. TE introduces the possibility of paternalistic qualifications within the context of an otherwise absolute right for competent adults to determine their treatment, in contrast to the approach in *Montgomery* and the patient-oriented ethos of the MCA.

2. There seems to be an implicit distinction between ‘autonomous’ and ‘vulnerable’ patients. The latter are excluded from the right to autonomy granted to competent adults.\textsuperscript{87} This is problematic because such a distinction between the ‘vulnerable’ and the ‘autonomous’ depends on an unrealistic, individualistic and medicalised approach towards autonomy, resulting in unjustified binary distinctions.

3. The legal treatment of children and incapacitated adults is better able to accommodate a relational protection of autonomy which may be more meaningful and realistic in terms of patient autonomy. Nevertheless, this is not done explicit enough, and often obscured within a broad welfare paradigm.


\textsuperscript{87} Herring (n 4).
4. The mental health law presents us with a blatant exception to the primacy of patient autonomy. The authorisation of forceful detention and treatment of competent adults is clearly incompatible with the guiding principles of the MCA and informed consent law.

Consequently, the protection of autonomy has not been wholly coherent. By acknowledging that patients’ autonomy is defined, fostered or limited by their relationships and context, the undesirable distinction drawn between ‘the autonomous’ and ‘the vulnerable’ can be effaced. This can perhaps be the starting point from which to address the current incoherencies.
Afghanistan: Towards Wider Interests of Justice?

Samantha Clare Goh*

INTRODUCTION

The Pre-Trial Chamber (“PTC”) II of the International Criminal Court (“ICC”) handed down its much-awaited decision on the request for authorisation of an investigation into the situation in Afghanistan1 earlier this year. The escalating conflict in Afghanistan has generated thousands of civilian casualties, many of whom were also victims of acts potentially constituting war crimes within the ICC’s jurisdiction.2 Thus, the decision that the investigation would not be in the interests of justice to pursue came as a surprise to the legal community, as given the presumed dormancy of the provision – many had thought that any admissible case would ipso facto be in the interests of justice to pursue. Indeed, it was widely assumed that the decision would only be subject to review by the PTC where the Office of the Prosecutor (“OTP”) had decided not to pursue an investigation solely in the interests of justice.3 This case note will analyse the role of state cooperation in the PTC’s interests of justice determination in light of the principle of complementarity, which holds that the ICC should only intervene where a State Party was “unwilling or unable”4 to investigate a crime falling under

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1 Situation in the Islamic Republic of Afghanistan (Decision on the Authorisation of an Investigation) ICC-02/17 (12 April 2019).  
2 Situation in the Islamic Republic of Afghanistan (Request for Authorisation of an Investigation) ICC-02/17 (20 November 2017) [273].  
the ICC’s jurisdiction. The objectives of domestic institution-building that the principle was conceived to foster will be considered, before concluding that the PTC’s overt focus on prosecutorial success is misguided.

I. THE CASE

The OTP submitted the request to authorise a *proprio motu* investigation into the ongoing situation in the Islamic Republic of Afghanistan ("Afghanistan") in November 2017, pursuant to Article 15(3) of the Rome Statute.5 The escalating conflict in Afghanistan has raged on for almost two decades, with what started as a Taliban insurgency spreading into a guerrilla-style war drawing in actors from beyond the state’s borders, including the US and other international forces. The investigation concerned alleged crimes against humanity and war crimes in the territory of Afghanistan, and was classified into three “categories” according to the different groups allegedly responsible for the crimes, namely (i) the Taliban and other armed groups, (ii) Afghan Forces, and (iii) US Forces and the CIA.

The PTC examined whether there was a “reasonable basis to proceed” as per Article 53(1)6 by assessing jurisdiction, admissibility, and whether it served the interests of justice to undertake the investigation. For an investigation to be admissible, it needs to meet the admissibility criteria of gravity and complementarity. The PTC, uncontroversially and in line with general academic consensus, agreed with the majority of the OTP’s arguments, going so far as to make positive determinations on both the jurisdiction and admissibility requirements – only to subsequently deem that there were “substantial reasons to believe that an investigation would not serve the interests of justice”.7

The PTC proceeded to list three factors considered in arriving at the determination: (1) significant time elapsed between alleged crimes and the Request, (2) scarce cooperation obtained by OTP, and (3) accessibility of relevant evidence and potential relevant suspects to the investigation.8 In relation to factors 1 and 3, the PTC cited the long preliminary examination, the lack of action towards the preservation of evidence, and the worsening political situation in

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5 Rome Statute, art 15(3).
6 Rome Statute, art 53.
7 Afghanistan (n 1) [87].
8 ibid [91].
Afghanistan complicating the process of obtaining evidence. On the issue of scarce state cooperation, which is the main focus for the purposes of this note, it was deemed that changes within the political landscape in Afghanistan and key States made it “difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future”. In particular, the OTP’s “difficulties in securing albeit minimal cooperation from the relevant authorities” were noted.

The above factors were said to “possibly compromis[e] [the OTP’s] chances for success”. As such, the PTC was of the opinion that “the prospects for a successful investigation and prosecution [were] extremely limited”. It was postulated that the failure of such an investigation could in turn create “frustration and possibly hostility vis-à-vis the Court”, negatively impacting the ICC’s ability to credibly pursue the objectives it was created to serve. Such was the reasoning that ultimately led to the conclusion that it would not be in the interests of justice to pursue the investigation.

Questionable points of law could be raised concerning the PTC’s treatment of state cooperation in relation to the principle of complementarity, and the wide interpretation of the interests of justice provision to equate it with the institutional preservation of the ICC.

II. STATE COOPERATION AND COMPLIMENTARITY

The extent of state cooperation (or lack thereof) is apparent from the OTP’s preliminary examinations, and reflects varying levels of willingness to cooperate according to the “category” that was being pursued. As regards Taliban forces, the OTP noted efforts taken by the Afghan government to “build its capacity to meet its obligations under the Rome Statute” and to “facilitate national investigations and prosecutions of ICC crimes”. Among these efforts included the update of the country’s Criminal Procedure Code, and a new Penal Code Bill

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9 ibid [92]-[93].
10 ibid [94].
11 ibid [95].
12 ibid [96].
13 ibid.
14 Afghanistan (n 2) [273].
incorporating Rome Statute crimes and specifying superior responsibility. Afghan authorities showed more restraint in proceedings against members of the Afghan Forces. Whilst a “limited number” of proceedings had been instituted, all cases were eventually dismissed. Although the national proceedings have been found to be insufficient, there is little to indicate that authorities would have shown resistance to cooperation if the case had been brought to the international plane, given previous co-operation with other international bodies including the UN Committee Against Torture (CAT) and UN Assistance Mission in Afghanistan.

In a contrasting vein, reports concerning the willingness of US authorities to cooperate are a vastly different matter. From the outset, the OTP stated that specific information on national proceedings were sought from US authorities but “not receive[d]”, leaving it unable to obtain sufficient information “despite a number of efforts taken”. The OTP thus had to rely on publicly available information contained in open sources on which to base its report. A common theme of US obstinacy was notable throughout the OTP’s assessment. This included CAT observations that the US provided “minimal statistics” and insufficient information leading to an inability to assess compliance, and the delay of a Polish Prosecutor General’s investigation into a CIA detention facility on its territory due to “a lack of US Government cooperation”. Indeed, it appears that the PTC’s references to the difficulty in seeking the cooperation of “relevant authorities” was its implicit and diplomatic way of referring to US authorities.

15 The doctrine of superior responsibility as per Rome Statute art 28(b) states that “a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates”.  
16 Afghanistan (n 1) [277]-[278].  
18 UNAMA/OHCHR ‘Treatment of Conflict-Related Detainees in Afghanistan: Preventing Torture and Ill-treatment under the Anti-Torture Law’ (April 2019) 26  
19 Afghanistan (n 2) [290].  
20 ibid [296].  
21 ibid [305].  
22 ibid [330].  
23 Afghanistan (n 1) [94].
In and of itself, the decision to factor in a state’s willingness to cooperate with ICC investigators is already dubious, insofar as it is a consideration of extra-legal and prudential factors. Seen through the lens of complementarity, however, the decision could arguably be said to turn everything the ICC was founded to stand for, on its head. The principle of complementarity was a founding cornerstone of the Rome Statute, giving states primary responsibility to investigate and prosecute core international crimes. The OTP has largely taken a “positive” approach to complementarity, taking the stance that not only should State Parties retain this primary responsibility, but that they should be encouraged, or induced, to do so where possible. An ethos of domestic accountability and capacity-building is thus emphasised in the ICC’s fight against impunity. However, the decision not to authorise an investigation on the basis of lack of state cooperation – in other words, accountability – not only excuses such behaviour, but encourages such behaviour.

As a “court of last resort”, it is the raison d’être of the ICC to be able to extend its reach where others cannot. This notion is seen in many features of the court, such as its potential for universal jurisdiction or its ability to override immunity. Complementarity can be conceived of as a spectrum – with governments that are willing and able on one end, and governments that are significantly unwilling or unable on the other. It is at this further end where the larger proportion of impunity gaps would have existed pre-ICC.

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24 See the discussion on the wide construction of the interests of justice determination later in this paper, and its relation to the non-derogatory nature of jus cogens norms.
28 Rome Statute, art 27(2).
It is this amalgamation of factors that makes trying difficult cases – that is, cases which might prove difficult to investigate due to absence of state cooperation – inherent to the role of the ICC. When following the doctrine of command responsibility or dealing with officials with immunity, the individual in question is almost always going to have a certain level of authority within the state. The principle of complementarity meanwhile filters cases such that the admissibility of an investigation is predicated on there having been a minimum level of domestic resistance to delivering justice. Oftentimes, the impunity normally is so grave that is goes to the very heart of the state’s exercise of sovereign prerogatives, and it is this quality that warrants the domestic extrication of the case and its elevation to the international fora. All factors considered, this leaves the ICC in a position where state cooperation is hard to come by. Lack of state cooperation unfortunately is part and parcel of the job.

In the context of this case, a third new level of state cooperation which determines whether an investigation will proceed has been created. The first is where a state is cooperative such that initiative is taken to undertake sufficient domestic proceedings. Such investigations will be deemed inadmissible for reasons of complementarity and the case tried domestically. The second is where it is domestically deficient, but cooperates internationally. The domestic deficiency is necessary for a positive determination of admissibility, and proceedings are brought before the ICC. These two constitute the traditional complementarity binary. The Afghanistan case has introduced a third layer, where the state is domestically deficient and refuses to cooperate internationally, so much so that it goes beyond legal questions of complementarity and admissibility, and it is deemed “not in the interests of justice” to proceed with the investigation.

This setback for promoting accountability and capacity-building in domestic institutions is two-fold because of the cooperation of the Afghan government. This is particularly so in relation to allegations against Taliban Forces, with authorities having made efforts to build its capacity to facilitate prosecutions. Where in other cases the ICC had taken the opportunity to engage
constructively,\textsuperscript{31} in the present case they have washed their hands of the situation, whilst simultaneously rewarding the US for its obstructive ways.

In this context, the determination on interests of justice functions as the anti-complementarity provision, stipulating that it is acceptable not to cooperate with investigations even if a state seeks to avoid standing before the ICC, as long as they are sufficiently uncooperative so that an investigation is not in the “interests of justice”. In other instances, complementarity is “intended to preserve the ICC’s power over irresponsible states that refuse to prosecute those who commit heinous crimes”,\textsuperscript{32} and it is against that refusal that the ICC carries on its fight against impunity. The fluidity with which a lack of state cooperation can be construed to fit into either of these narratives is a dangerous tool of unfettered discretion. Given previous similar instances involving other recalcitrant states,\textsuperscript{33} it is hard to defend against accusations of US exceptionalism, and the Courts need to be wary of the danger of it becoming a “one rule for them, another for us” situation.

Besides the danger it poses for the legitimacy of the ICC, the practical implications of factoring state cooperation into decisions are extensive as well. The lack of cooperation from national authorities in the ICTY trials provides a glimpse into potential repercussions, such as the confinement of successful cases to that of low-ranking officials.\textsuperscript{34} Further, more cases are likely to be tried \textit{ex post facto}, after the criminal incidents have come to a conclusion and normally as a product of regime change when authorities begin to cooperate, as was the case in Serbia,\textsuperscript{35} which means the ICC might have a limited ability to make an actual difference to the situation whilst it is ongoing.

\begin{footnotesize}
\begin{enumerate}
\item Such as in Guinea. Colish (n 29).
\item Mohamed M El Zeidy, \textit{The Principle of Complementarity in International Criminal Law} (Martinus Nijhogg 2008) 158.
\item Previous investigations in Kenya and Georgia faced similarly dismal prospects of state cooperation.
\item Hekelina Verrijn Stuart & Marlise Simons, \textit{The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese - Interviews and Writings} (Amsterdam University Press 2009) 53.
\item It was only after Slobodan Milošević was overthrown as President of Serbia in 2000 that the ICTY began to receive tangible cooperation. Despite having been established in 1993, its efforts in the region until then proved modest.
\end{enumerate}
\end{footnotesize}
III. SUCCESSFUL INVESTIGATIONS: IN THE INTERESTS OF JUSTICE?

Of course, in the examples drawn from the ICTY, the relevant individuals already had cases brought against them, so the reality is that the presence of an investigation made little practical difference. Even if the Afghanistan investigation had been authorised, it would have been doomed to failure from lack of state cooperation. This is the utilitarian argument the PTC employ – since the consequences would be the same anyhow, resources should be conserved and efforts should be focussed on successful prosecutions. This approach provides relief to the ICC’s tattered reputation,36 and perhaps instils better hope for its continued institutional functioning, given the criticism received from delayed investigations and the fact that the ICC has only ever produced three convictions that have survived appellate review.37 Alongside political threats levelled by US authorities,38 there was the an overwhelming sense that this was simply not a battle that the ICC had the wherewithal to face:

“[T]he Court is not meant - or equipped - to address any and all scenarios where the most serious international crimes might have been committed; therefore, focussing on those scenarios where the prospects for successful and meaningful investigations are serious and substantive is key to its ultimate success.”39

However, even if it makes no practical difference to the outcome, to refuse to authorise the investigation would be to legally permit the outcome. The concept of the ICC was founded on the idea of a body which upholds a set of fundamental norms by punishing certain jus cogens wrongs which shock the global conscience

39 Afghanistan (n 1) [90].
of mankind. This normative flavour in theory presupposes leaving no room for derogation, yet the decision not to authorise an investigation on the basis of prudential reasons overrides the moral imperative underlying the norms in question. In doing this, the ICC has lost its status as signaller of international normative standards to states. Not too long ago was it claimed that the most serious situations are chosen for investigation, so as to make examples and fulfil the Court’s didactic legalist function. Such endeavours have now been sacrificed on the altar of its newfound focus on “successful” investigations, under the guise of interests of justice.

Yet despite its wide construction of the interests of justice provision, the PTC has taken a rather narrow view of what justice could entail. The ICC’s overarching objective of the “effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities” was relied upon to justify the prioritisation of state compliance. To reduce justice to the continued existence of the ICC, and by extension a mere quantum of successful investigations, is misguided. The problem here is the conflation of compliance with effectiveness, in assuming that the ICC would be most effectively able to uphold the norms it espouses through higher levels of state compliance. In reality, the concept of justice reaches much further than the bounds of the ICC as an institution, and relinquishing this institutional egocentrism might allow for the realisation of justice on a wider level.

The traditional Austinian view which sees the ICC as only as powerful as its coercive power is perhaps lacking, and a wider view takes into account its political influence on state behaviour. The principle of complementarity serves as a humble reminder of this, and coupled with the ICC’s norm-signalling function, encourages the pursuit of justice on a national level and leaves the ICC as a court

41 Deputy Prosecutor’s Remarks, ‘Introduction to the Rome Statute Establishing the ICC and Africa’s Involvement with the ICC’ (14 April 2009).
43 Afghanistan (n 1) [89].
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of last resort. As the OTP once remarked: “As a consequence of complementarity
the number of cases that reach the court should not be a measure of its efficiency.
On the contrary, the absence of trials before this court, as a consequence of the
regular functioning of national institutions, would be a major success.”

Perhaps the greatest irony lies in the fact that the attainment of the ICC’s core objective
might be best achieved in a world where it has little need to be employed.

CONCLUSION

The interests of justice determination in the PTC’s Afghanistan ruling
seemed like a knee-jerk ruling seeking the institutional preservation of the ICC, in
response to the existential threat to the ICC’s authority posed by US authorities.
However, having to preside over difficult cases, oftentimes involving little state
cooperation it is intrinsic to the role of the ICC and its fight against impunity to
have to preside over difficult cases, oftentimes involving little state cooperation.
As such, investigatory or prosecutorial failure might prove to be more common
than success. The answer is not to altogether forego investigating such cases, and
in doing so abandon long-standing legal principles like complementarity.
Continuing down this idealistic path might strike one as a trade-off between global
standard-setting and ICC potency. However, it is preferable that the Court
continues to aspire towards concrete global normative standards of justice, even
if it potentially means recurring institutional failure, than to achieve standards that
fall below what ought to be aspired towards in the first instance. To do the latter
might well prove to be a pyrrhic victory.

45 Luis Moreno-Ocampo, ICC Prosecutor, ‘Statement Made at the Ceremony for the
Solemn Undertaking of the Chief Prosecutor of the International Criminal Court’ (16
June 2003).
Regulating the Use and Conduct of Cyber Operations through International Law: Challenges and Fact-finding Body Proposal

Jiang Zhifeng*

ABSTRACT

Although cyber operations present an emerging threat to international peace and security, there is a lack of interstate agreement on the international regulation of cyber operations. One prevailing response is to theoretically extend existing international law to the cyber domain. This paper, however, challenges this existing response. It argues that international law is theoretically limited in regulating the use and conduct of cyber operations. With regards to use, there are limits to prohibiting cyber operations as internationally wrongful acts of a state. Three internationally wrongful acts are examined. These are prohibited “use of force”, as well as violations of the non-intervention and self-determination principles. With respect to conduct, there are limits to constraining the destructive effects of cyber operations through International Humanitarian Law (IHL). The character of cyber warfare and the nature of societies in which cyber warfare is conducted pose unique challenges to the applicability and effectiveness of IHL provisions. In order to address the limitations faced by international law in regulating the use and conduct of cyber operations, this paper concludes by proposing an independent fact-finding body.

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INTRODUCTION

The threat of mutually assured destruction posed by nuclear weapons has constrained and deterred the blatant use of conventional weapons in interstate disputes between major powers. Cyber operations thus offer an attractive strategic alternative of imposing costs on states while avoiding full-blown conventional warfare. For this reason, cyber operations are also particularly attractive tools in asymmetric conflicts. Cyber operations refer to the “employment of cyber capabilities to achieve objectives in or through cyberspace.”¹ Such objectives include physical damage, as well as economic and political disruption. This paper will analyse two types of cyber operations: Those used to inflict physical damage such as civilian causalities and infrastructural damage and those that inflict non-physical damage, namely economic and political disruption.

The capacity to cause damage both within and outside of cyberspace has led to the characterization of cyberspace as the fifth domain of war. In contrast to the air, land, sea, and space domains of warfare, cyberspace is arguably more anarchical due to the current dearth of international laws governing cyberspace. Regulatory responses to cyber operations conducted within and through cyberspace have largely revolved around the use of national laws. National laws are insufficient. This is because the cyber domain faces a security dilemma, a situation where “the means by which a state tries to increase its security decrease the security of others.”² A state’s efforts to increase its cyber security through the creation of more sophisticated cyber defensive and offensive weapons can cause states to subjectively feel vulnerable, thereby leading to continuous build-up of cyber weaponry. This is attributable to how states “act in terms of the vulnerability they feel, which can differ from the actual situation”³ and that “states are uncertain about their adversaries’ motives, lacking confidence that others are pure security seekers”.⁴ This security dilemma faced by states is more acute in cyberspace. Cyber operations are offense-dominant, in that they are strategically advantageous, financially cheaper, and technically easier to attack first than to

³ ibid 174.
defend against an attack. This is because “an attacker has to be successful only once, whereas the defender has to be successful all of the time”, especially where modern society is a “target-rich environment” due to heavy reliance on cyber technology.\(^5\)

Furthermore, the effectiveness of an offensive cyber operation is transient, in that it is contingent on the continuing existence of the vulnerability in the cyber system. The longer a state withholds an attack, the greater the likelihood that the vulnerability will be identified and patched. Furthermore, first strike cyber operations can limit and even neutralize the ability of the victim state to launch both conventional and cyber retaliatory attacks.\(^6\) Such advantages associated with offensive cyber operations increase incentives for first strikes. This is not true of nuclear weapons and conventional weapons in a world where mutually assured destruction and second strike capabilities have negated the advantages of offensive attacks vis-à-vis defense.

This paper aims to contribute to existing legal scholarship in two ways. First, this paper contends that existing international law is inadequate in regulating the use and conduct of cyber operations. With respect to the legality of using cyber operations, there are fundamental limits to classifying cyber operations as internationally wrongful acts. With respect to regulating the conduct of cyber operations, cyber operations challenge the effectiveness of international humanitarian law (IHL) in limiting civilian causalities in situations of armed conflict. Second, with respect to addressing regulatory gaps in the cyber domain, this paper challenges the existing focus on an international cyber treaty. By integrating law and political science perspectives, this paper instead proposes an independent fact-finding body without prosecutorial or enforcement capabilities as a possible regulatory measure for the cyber domain.


I. CYBER OPERATIONS AS INTERNATIONALLY WRONGFUL ACTS

While cyber operations that inflict substantial physical damage may be illegal, cyber operations that cause non-physical damage are not outlawed under international law. For a cyber operation to be considered an internationally wrongful act of a state, it must (a) be attributable to the state under international law, and (b) constitute a breach of an international obligation of the state.\(^7\)

The problem of attribution

First and foremost, before a cyber operation can be legally attributable to a state, it must be possible to identify the actor behind the operation. The “prior process of tracing material proof of the identity of the perpetrator” is required before entering the next stage of whether the act can be legally imputed to the state.\(^8\) Identification of specific cyber warfare actors, however, may be complicated by the deliberate use false-flag operations, IP address masking, and identity ‘spoofs’ to obstruct identification. Nevertheless, the identification of cyber operations is not impossible but is instead a matter of degree in terms of accuracy and speed.\(^9\)

Assuming that the perpetrators behind cyber operations are identified, for the state to be internationally responsible for a cyber operation, the operation has to be attributable to the state under international law. The nature of cyber operations poses serious challenges to finding attribution. Given the clandestine and loose relationship between state and the non-state actors, it is improbable for cyber operations to meet the high thresholds of attribution under Articles 4 and 5 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which reflect customary international law.\(^10\)

\(^8\) Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) [1986] ICJ [57].
requires the actor to function as an organ of a state by exercising legislative, executive, or judicial functions. Article 5 requires the actor to exercise elements of governmental authority, in that the internal law of the state has authorized the actor to exercise public functions. Unlike conventional warfare, where the armies of two states engage in armed conflicts, cyber operations intricately involve non-state actors, such as politically or financially-driven lone hackers or informal groups of hackers, as well as private entities such as private military and security corporations. Using non-state proxies or outsourcing cyber warfare operations to private corporations to conduct cyber warfare can allow states to strategically distance themselves from cyber operations through plausible deniability.

The other two attribution tests would be the effective control test laid out in *Nicaragua* and *Bosnia Genocide* and the overall control test stipulated by *Tadic*. The thresholds of these tests are, however, not easily met. Under the effective control test, cyber operations of non-state actors could only be attributable to the state if the relationship is of such complete dependence that it would be right to equate the non-state actors with an organ of the state. Heavy financial subsidies and other support such as the training, arming, equipping and organizing of non-state actors by states are insufficient for attribution or the finding that the state directed or controlled the cyber operation under Article 8 of ARSIWA.

The *Tadic* overall control test provides a lower threshold, in that it is necessary to prove that the state exercised some measure of authority over non-state actors and it issued specific instructions to them concerning the performance of cyber operations, or that it ex post facto publicly endorsed those acts. Given the advantage of plausible deniability, states have no incentive to publicly endorse cyber operations. While it may be possible to attribute non-state conduct to a state under *Tadic*, the International Court of Justice (ICJ) has not accepted the overall control test in interstate disputes. Among the reasons offered by the ICJ are that the test was employed for the purpose of determining whether an armed

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13 *Prosecutor v Dusko Tadic* (Judgment) ICTY-94-1-A (15 July 1999) [120]-[123].
14 *Nicaragua* (n 8) [109]-[110], see also *Bosnian Genocide* (n 10) ICJ [399]-[400].
15 ibid, [109]-[110], [115].
16 *Bosnian Genocide* (n 10) [403].
conflict was international and that the test broadens the scope of state responsibility beyond the fundamental principle of international responsibility, namely that states are responsible only for their own conduct.\textsuperscript{17} Moreover, the I.L.C. has noted that the overall control test is “directed to issues of individual criminal responsibility, not State responsibility.”\textsuperscript{18}

**Problems with classifying cyber operations as breaches of international obligations**

Apart from attribution, cyber operations have to constitute a breach of an international obligation of the state for them to be considered an internationally wrongful act of states. Three internationally wrongful acts are examined. These are prohibited “use of force”, as well as violations of the non-intervention and self-determination principles.

*(A.) Cyber operations as prohibited “use of force”*

Article 2(4) of the UN Charter stipulates that member states “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” While cyber operations that cause substantial physical damage may breach the prohibition on the use of force, cyber operations that cause non-physical economic and political disruption do not constitute “use of force”.

*(A.1) Plausibility and limits of classifying cyber operations that cause substantial physical damage as “use of force”*

The Tallinn Manual classifies cyber operations as constituting “a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force.”\textsuperscript{19} The Manual represents the effects-based interpretation of Article 2(4) of the UN Charter. The physical consequences, not the method of an operation, determine whether cyber operations amount to a “use of force”\textsuperscript{20}.

\textsuperscript{17} ibid [403], [404], [406].
\textsuperscript{18} I.L.C. (n 11) 48.
\textsuperscript{19} Schmitt (n 1) 330-337.
\textsuperscript{20} ibid 328.
Should a particular cyber operation result in substantial physical damage to civilian life and property, the operation would violate the prohibition on the use of force. The effect-based interpretation has validated in the *Legality of the threat of use of Nuclear Weapons* Advisory Opinion, in which the ICJ stated that UN Charter Article 2(4) applies to “any use of force, regardless of the weapons employed” even though it “neither expressly prohibits, nor permits, the use of any specific weapon”.21

Although there appears to be an emerging academic consensus that cyber operations that result in substantial physical damage can constitute “use of force”,22 there are limits to the interpreting the “use of force” in terms of its physical consequences, as opposed to the use of kinetic weapons that results in physical damage. In other words, the correct albeit stricter interpretation of Article 2(4) would take into account the modality and the physical impact of the weapon. This implies that cyber operations, including those that result in physical damage, do not constitute “use of force” as their modality is not kinetic in nature. The effects-based interpretation “represents a hard break from the Charter’s instrument-based approach and thereby relies on inherently subjective assessments among states that have divergent strategic capabilities, vulnerabilities, and interests.”23 The UN Charter was drafted at a time when there exists the kinetic nature of a weapon directly corresponded with its physical impact. Cyber operations do not fit into this paradigm. As non-kinetic weapons with the potential to inflict substantial physical damage, cyber operations do not clearly constitute a “use of force” even if they inflict substantial physical damage. For instance, the effects-based interpretation would classify the cyber operation ‘Stuxnet’, which destroyed Iranian nuclear facilities through the use of malicious computer code, as no different from a missile bombing of the same Iranian facilities. Despite its physical impact, “Stuxnet has not been definitely identified as a use of force by any State and seems unlikely to be.”24

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Notwithstanding the original intent of the UN Charter drafters, the crucial challenge facing the effects-based interpretation is that there is a lack of state practice and *opinio juris* with respect to classifying cyber operations as a “use of force” even if they result in physical damage. The requirement of actual state practice and *opinio juris* is highlighted by the exclusion of economic sanctions from the scope of the use of force even though “from an effects-based perspective, comprehensive and long term economic sanctions can be as severe as the use of force” and “as devastating as the effects of war”.25 If effects were the only yardstick in determining what constitutes “use of force”, there is no justification to exclude economic sanctions. Even if one accepts that the modality of weapons is not a necessary criterion of Article 2(4), cyber operations have yet to be accepted as “use of force”.

A common argument in favour of the effects-based interpretation is that the deployment of non-explosive weapons such as bacteriological, biological, and chemical devices conceivably amount to the use of force because of its physical impact on life and property.26 Nevertheless, this argument ignores the widespread state practice and *opinio juris* against the deployment of such devices. In contrast to the cyber operations, multilateral instruments such as the 1972 Biological Weapons Convention and the 1997 Chemical Weapons Convention indicate international agreement on the prohibition of using such weapons even for war purposes. Multilateral conventions may play an important role in “recording and defining rules deriving from custom”.27 In contrast, there is no internationally agreed upon definition of what cyber operations constitute “cyber attacks”. Even theoretical attempts to prove that cyber warfare should qualify as armed conflict within the context of the use of force under Article 2(4) “have not so far been accepted generally.”28 Due to the lack of any state consensus on definitions and the threshold of physical impact that would qualify a cyber operation as a use of force, whether a cyber operation would constitute a use of force would vary from state to state and their particular strategic interests.

27 *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment)* [1985] ICJ Rep 13 [2].
(A.2) Cyber operations that cause non-physical damage do not constitute “use of force”

The prevailing focus on cyber operations inflicting substantial physical damage may be misplaced. The focus should instead be on cyber operations that cause political and economic disruption. As cyber operations are auxiliary tools that supplement traditional conventional weapons, it is unlikely that a standalone ‘cyber war’ will happen and situations where cyber operations are deployed to inflict physical damage are likely to be those involving conventional warfare. Moreover, the advantage of cyber operations precisely lies in their capacity to inflict costs short of the widespread civilian damage arising from conventional warfare, which has become politically and militarily risky in a geopolitical environment stabilized by nuclear weapons. Akin to sub-conventional warfare tactics such as terrorism, cyber operations allow states to gain strategic advantages without risking full-blown conventional war. Cyber operations inflicting economic and political disruption, rather than substantial civilian damage, are a likelier threat to international peace and stability.

Economically, cyber operations can destabilize the economic system of states by disrupting financial institutions such as banks and businesses. Cyber operations can obstruct economic activity and undermine economic confidence through cyber attacks on payment systems, manipulating, altering and corrupting financial data, as well as impairing the wide infrastructure, such as telecommunications, that the financial system depends upon. For instance, the North Korean Lazarus Group “routinely looks for ways to compromise banks and exploit crypto currencies”. In 2007, Russian-distributed denial of service (DDoS) cyber attacks on Estonia not only shut down the websites of its government ministries, banks, and political parties, but also disabled its

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parliamentary email server, the IT capabilities of its ministries, and even prevented credit card transactions for several days.\(^{32}\)

On the other hand, cyber operations can disrupt the internal political affairs of a state by undermining public trust in state institutions, aggravate social discord and spur separatist or anti-establishment movements through information technology. Methods used by cyber operations include using fake social media account ‘trolls’ and automated account ‘bots’ to spread ‘fake news’ or divisive content as well as the leaking of politically damaging information acquired through hacking and spear phishing.\(^{33}\) Furthermore, political disruption has military implications. As observed in the 2014 Russian-Ukrainian conflict, the political disruption caused by such cyber operations can also weaken military capabilities of a state by undermining public support for military actions through the online spreading of disinformation to discredit governmental actors and aggravate civil distrust.\(^{34}\) Such impacts are psychological in nature; they do not involve direct and violent physical damage. More severe interference can encompass cyber hacking of electoral systems and databases, compromising the integrity of political processes of states.

Such cyber operations, however, do not fall within the scope of the “use of force” under Article 2(4) of the UN Charter even if the effects-based interpretation of “use of force” were accepted. Cyber operations that cause non-physical damage, especially economic and political disruption, would not constitute an illegal “use of force”. This is because “force” in Article 2(4) does not include economic and political disruption.

According to Article 31(1) of the Vienna Convention on the law of treaties (VCLT), the meaning of “force” in Article 2(4) has to be interpreted within the “context and in light of [the UN Charter’s] object and purpose.” In interpreting the context of the treaty’s purpose, reference is made to the treaty’s preamble.\(^{35}\)

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\(^{34}\) Yuriy Danyk, Tamara Maliarchuk and Chad Briggs, ‘Hybrid War: High-Tech, Information And Cyber Conflicts’ (2017) 16 Connections: The Quarterly Journal 14

\(^{35}\) Vienna Convention on the law of treaties 1969, art 31(2).
The preamble of the UN Charter calls on states to ensure that “armed force shall not be used”. The term “force” is referenced in Articles 41, 44 and 46, which all contextualize “force” in terms of armed force. The ICJ in Nicaragua ruled that the “prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter.” In addition, the travaux préparatoires of the UN Charter show that the proposal to expand the ambit of Article 2(4) to include economic and political coercion was “decisively defeated”. During the 1945 San Francisco Conference, the majority of states rejected the 1945 Brazilian, Ecuadorian and Iranian proposals to expand the meaning of “force” to encompass economic and political coercion.

This restrictive interpretation of “force” as armed force is further affirmed by later UN resolutions such as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1974 Declaration on the Definition of Aggression, and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations. In fact, when deciding a draft paralleling UN Charter Article 2(4), the UN Commission on Friendly Relations rejected arguments that “force” encompassed all forms of political and economic pressure.

Although such cyber operations are not prohibited “use of force”, they may conceivably violate international legal principles of non-intervention and self-determination. This paper will now analyze the possibility and the limits of relying on these two principles in regulating cyber operations that cause economic and political disruption. The next two sections will solely focus on cyber operations that disrupt the economic and political systems of states.

36 Nuclear Weapons (n 21) [38].
The principle of non-intervention entails “the right of every sovereign State to conduct its affairs without outside interference”.\textsuperscript{43} As an expression of sovereign equality of states and an embodiment of respect for territorial sovereignty,\textsuperscript{44} the principle of non-intervention is part of customary international law.\textsuperscript{45} The non-intervention principle forbids states to “intervene directly or indirectly in internal or external affairs of other States”.\textsuperscript{46} Political and economic disruption arguably violate the non-intervention principle because a prohibited intervention is one that uses coercion to interfere in matters in which a state has sovereignty to decide freely, of which includes “the choice of a political, economic, social and cultural system.”\textsuperscript{47}

Various United Nations General Assembly (UNGA) Resolutions indicate that the principle of non-intervention is applicable to cyber operations that interfere in the internal political and economic affairs of states. Although non-binding, UNGA Resolutions are “not wholly without normative force” because they “form part of the broader normative context within which expectations of what is reasonable or proper State behavior are formed.”\textsuperscript{48} The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty stipulates that “no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any State.”\textsuperscript{49} The Declaration also declared that no states might “use or encourage economic, political or any other type of measures to coerce another State” to secure any kind of advantages from it.

Similarly, the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States affirms that the duty of non-intervention requires states to refrain from “all other forms of interference” against the “political, economic and cultural elements” of a state

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\item \textsuperscript{43} Nicaragua (n 8) [202].
\item \textsuperscript{44} Malcolm N Shaw, \textit{International Law} (6th edn, Cambridge University Press 2008) 1148.
\item \textsuperscript{45} Nicaragua (n 8) [202]. See also \textit{Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)} [2005] ICJ [164].
\item \textsuperscript{46} Nicaragua (n 8) [205].
\item \textsuperscript{47} ibid [205].
\item \textsuperscript{48} Vaughan Lowe, \textit{International Law} (Oxford University Press 2007) 95, 96.
\item \textsuperscript{49} United Nations General Assembly, 2131 (XX), 21 December 1965.
\end{itemize}
\end{footnotesize}
because such interference violates a state’s “inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State”.

In fact, the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States represents “a consensus” on “the fundamental principles upon which the international legal order is based”, of which the non-intervention principle is one of the seven “irreducible core of principles”. The 1976 Declaration on Non-interference in the Internal Affairs of States similarly condemns the “all forms of overt, subtle and highly sophisticated techniques of coercion, subversion and defamation aimed at disrupting the political, social or economic order of other states.” These instruments suggest that there is no restriction as to the form of interference and the impacts of interference encompass more than direct military force. Therefore, cyber operations that disrupt the economic and political systems of states arguably violate the non-intervention principle. There are, however, two limits to using the non-intervention principle.

First, the non-intervention principle and international law are ill equipped to take into account the kinds of coercion present in politically disruptive cyber operations. The element of coercion “defines, and indeed forms the very essence of, prohibited intervention” and uses force. Cyber operations that seek to alter preferences of an electoral or undermine domestic confidence in a government do not involve compulsion of a state to act or choose in one way or another. Internationally recognized forms of coercion, such as retorsion, reprisals, economic sanctions, and the direct or indirect use of armed force, entail observable and tangible measures that influence a state’s actions overtly. Politically disruptive cyber operations are, however, harder to prove and quantify. Such operations may not even involve observable conflicts of compulsion because they insidiously alter a people’s political preferences by shaping their perceptions, beliefs and cognitions online in such a way that they unconsciously accept certain orders of things.

For instance, foreign cyber operations have shaped public opinion and undermined democratic processes during the Brexit
referendum and the 2016 presidential elections. These operations manipulated social media algorithms by utilizing bots to feign the popularity of particular politicians and political views through increased followers and ‘likes’, drowning out political hash tags, and online smear campaigns.\(^{56}\) Therefore, online electioneering aimed at influencing and altering an electorate of another state does not meet the high threshold of coercion and does not violate the non-intervention principle.

Second, classifying cyber operations as violations of the non-intervention principle rather than “use of force” limits the effectiveness of international law in regulating and deterring cyber operations. Moreover, there are different legal implications of classifying cyber operations as violations of non-intervention instead of Article 2(4). While non-intervention is characterized as customary international law, the prohibition on the use of force under Article 2(4) is \textit{jus cogens},\(^{57}\) ranking higher than treaty law and customary international law in the international hierarchy of norms.\(^{58}\) \textit{jus cogens} norms are non-derogable\(^{59}\) and bind states regardless of consent and state practice.\(^{60}\) The ICJ in \textit{Nicaragua} stressed the necessity of distinguishing between armed attacks, which are “the most grave forms of the use of force” from “other less grave forms”.\(^{61}\) This difference in gravity arguably accounts for the varying legal consequences between breaching the non-intervention principle and the prohibition on the use of force. In situations involving breaches of the non-intervention principle, victim states are


\(^{57}\) International Law Commission, ‘Draft articles on the law of treaties with commentaries’, \textit{Yearbook of the International Law Commission Volume II} (1966) 247. See also \textit{Nicaragua} (n 8) [190], [202].


\(^{61}\) \textit{Nicaragua} (n 8) [191].
generally restricted to non-forcible countermeasures whereas states can respond forcibly with graver countermeasures in cases involving the use of force.\textsuperscript{62} Self-defence under Article 51 of the UN Charter necessarily requires ‘armed attack’; violation of non-intervention principles through economically or politically disruptive cyber operations does not suffice. The necessity of ‘armed attack’ hence “constitutes an integral part of Article 51; no self-defence can be exercised if no armed attack occurs.”\textsuperscript{63} In the \textit{Wall} Advisory Opinion, the ICJ affirmed that the right of self-defence only exists in the case of an armed attack by one state against another.\textsuperscript{64} The fact that cyber operations do not meet the threshold of ‘armed attack’ under Article 51 due to a lack of physical damage undermines the deterrence capacity of the non-interference principle. Unlike the prohibition on the use of force, which can trigger the right to individual or collective self-defence against cyber operations that inflict substantial physical damage, violations of non-interference can best allow non-forcible countermeasures.

Such threats fail to deter states from interfering in the political and economic systems through indirect, non-military means. This is evident from how the non-intervention principle is “has long been regularly breached by states – at least in relation to the ‘non-forcible’ actions that it covers – without much in the way of legal, or even political, consequence” and still “struggles to restrain state behaviour”.\textsuperscript{65} As \textit{jus cogens}, the use of force is particularly perceived negatively, especially in light of its direct destructive physical impacts on life and property.\textsuperscript{66} In contrast, while economic or political consequences can be disruptive or destabilizing, they “emerge much more slowly, and thereby allow opportunity for reflection and resolution, compounds the danger of escalation.”\textsuperscript{67} Therefore, while cyber operations can breach the non-intervention principle, the varying legal

\textsuperscript{63} Tom Ruys, ‘\textit{Armed Attack’ And Article 51 Of The UN Charter}’ (Cambridge University Press 2013) 67.
\textsuperscript{64} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)} [2004] ICJ [139].
\textsuperscript{65} Green (n 38) 109-110.
\textsuperscript{66} Henderson (n 62) 652.
status and its concomitant legal consequences mean that impunity is likely to persist.

(C) Cyber operations as violations of the principle of self-determination

Self-determination is another principle that may be used to regulate economically and politically disruptive cyber operations. Enshrined in Article 1(2) of the UN Charter, the right to self-determination is a customary norm.\(^{68}\) Principle 5 of the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States stipulates, “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development”.\(^{69}\) Cyber election meddling is violates the right to of self-determination because its application “requires a free and genuine expression of the will of the peoples concerned.”\(^{70}\) After all, self-determination is “a legal concept that captures the right of a people to decide, for themselves, both their political arrangements (at a systematic level) and their future destiny (at a more granular level of policy).”\(^{71}\)

A limiting factor is that this principle has largely been situated in the context of decolonization and the right of “non-self-governing territories” to emerge as sovereign, independent states.\(^{72}\) Specifically, the customary status of self-determination is confined to “the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination.”\(^{73}\) Although the ICJ has seemingly applied self-determination principles beyond decolonization situations to include the right of the Palestinian people to self-determination,\(^{74}\) it is still applied in terms of territorial statehood, not psychological manipulation or election meddling.

\(^{68}\) Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ [152].
\(^{69}\) United Nations General Assembly, 2625 (XXV), 24 October 1970.
\(^{70}\) Western Sahara (Advisory Opinion) [1975] ICJ [55].
\(^{72}\) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ [52]. See also Western Sahara (n 70) [54] and Chagos (n 68) [160].
\(^{73}\) Chagos (n 68) [160].
\(^{74}\) Wall (n 64) [115], [118].
Even if the applicability of self-determination is expanded to situations beyond the decolonization context, reliance on self-determination as a regulatory principle faces the same limits as non-intervention, particularly with respect to self-defence under Article 51. This is because in cases where self-determination is applied to existing states, the “principle of self-determination normally takes the well-known form of the rule preventing intervention in the internal affairs of a State, a central element of which is the right of the people of the State to choose for themselves their own form of government.” This specific application of self-determination, however, faces the same aforementioned limits as non-intervention.

II. INTERNATIONAL HUMANITARIAN LAW AND CHALLENGES POSED BY CYBER OPERATIONS

The use of cyber operations in situations of armed conflicts (“cyber warfare”) also presents new challenges to IHL. Cyber warfare refers to the “means and methods of warfare that consist of cyber operations amounting to, or conducted in the context of, an armed conflict, within the meaning of IHL.” Cyber operations can be used as a standalone tool of armed conflict, or to complement conventional warfare. In both circumstances, cyber operations pose unique challenges to the application and effectiveness of IHL. Despite the customary legal status of the Martens clause, which stipulates that IHL also applies to new technologies, the character of cyber warfare and the nature of societies in which cyber warfare is conducted pose unique challenges to the effectiveness of IHL in achieving its purpose of limiting the destructive effects of armed conflict.

75 James Crawford, The Creation of States in International Law (Oxford University Press, 2007) 126.
How the character of cyber warfare challenges the applicability of IHL

The involvement of non-state actors and the loose and clandestine relationships between the state and non-state actors in cyber warfare inhibits the legal capacity of the IHL to constrain the effects of armed conflicts. Similarly, the use of non-state actors poses the serious challenge of legal attribution.

IHL applies to two types of armed conflicts, namely International Armed Conflicts (IAC) and Non-International Armed Conflicts (NIAC). As IAC only applies to armed conflicts between states, for IHL to even apply in cyber warfare involving non-state actors, the cyber conduct of non-state actors has to be attributable to the state. Legal attribution enables the conflict to be classified as an IAC, which then triggers the applicability of IHL. As previously argued, legal attribution is a challenge. In an IAC where states tacitly support non-state actors, the legal difficulty of attribution would imply that IHL is inapplicable to conduct by non-state actors.

An even more challenging IAC situation would be voluntary civilian participation in hostilities without any state support. This is a likely situation because compared to conventional weaponry, there are lower financial barriers to conducting cyber warfare and cyber methods are more accessible online. Such low barriers to entry into cyberspace mean that civilians can easily conduct hostile cyber operations against the hostile state. Direct civilian participation in hostilities could increase civilian causalities by justifying retaliatory cyber operations. This is because direct civilian participation removes their protection from attacks. Direct civilian participation in cyber warfare also challenges the direct applicability of IHL because such attacks by civilians are not attributable to the state. Apart from challenging the relevancy of IHL’s conceptualization of armed conflicts as either IAC or NIAC, the difficulty of attribution problematizes the application of the IHL in cyber warfare. Even if cyber operations by non-state actors inflict significant damage to civilian objects, legal attribution problems challenge the applicability and relevancy of IHL in limiting humanitarian costs.

As only armed conflicts between a state and an organized armed group qualify as NIACs, for IHL to even apply in such a cyber warfare scenario, the non-state

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78 Additional Protocol 1 (AP 1) art 51(3).
actors must have some form of organization. A minimum level of organization would exist if the group had a hierarchical command structure, disciplinary rules, and the ability to determine a unified military strategy. These actors, however, are unlikely to be organized as virtual groups; they are linked only by online communication and group members may not know each other. This implies that the non-state actors involved in civil conflicts would not be held liable under IHL even if they were to cause widespread civilian causalities by damaging nuclear power plants, dams, air traffic control systems, transportation, and satellites through disruptive cyber operations.

Furthermore, the convergence between artificial intelligence (AI) and cyber warfare would create serious legal attribution and responsibility issues under IHL. Cyber warfare conducted by AI-driven machine learning computers and malicious malware can autonomously identify and exploit system vulnerabilities, thereby possessing sophisticated capacity to inflict greater civilian casualties. Additionally, autonomous robots, rather than human soldiers, may increasingly be the actors conducting cyber warfare.

Apart from the challenge of determining which actor should be legally responsible for IHL violations caused by autonomous cyber warfare weapons, another challenge is the difficulty of determining the legality of new methods of warfare under Article 36 of Additional Protocol 1 (AP1), especially where AI cyber weapons continuously learn, adapt and evolve as they interact with their environment. In other words, as AI cyber weapons constantly undergo transformation in their lethal capabilities in reaction to changing military situations, it is challenging, if not impossible, to pin down or review the exact lethal capability of the weapon at any point in time. As these malicious cyber bugs and codes operate autonomously, they may lead to indiscriminate civilian impacts in both the targeted state and third-party states that are uninvolved in the conflict.

79 Additional Protocol 2 (AP 2) art 1.
80 Prosecutor v. Ljube Boskoski Johan Tarculovski (Trial Chamber Judgment) ICTY IT-04-82-T (2008) [194]-[203].
82 Kriangsak Kittichaisaree, Public International Law Of Cyberspace (Springer 2019) 231.
Automated retaliatory “hacking back”\textsuperscript{84} cyber attacks that inflict severe civilian causalities also complicate legal attribution and responsibility.

**How cyber warfare in technologically advanced societies challenges IHL principles**

*Distinction*

The changing nature of society due to technological advancements problematizes the application of IHL in cyber warfare. In the Internet of Things (IOT) society, dual use infrastructure and the interconnectivity between critical civilian infrastructure and cyber Internet systems challenge the application of the IHL rules of distinction and discriminate attacks. By blurring the line between military and civilian targets, dual use objects and IOT facilities complicate efforts to determine if a cyber operation constitutes a violation of IHL. Since such blurring is very much a consequence of technological progress, establishing that a state intentionally integrated its civilian and military facilities so as to deter and shield its military objectives from attacks is difficult, if not impossible. This problematizes the application of IHL rules, namely precaution against locating military objectives within densely populated civilian areas\textsuperscript{85} and attacks on civilian objects.\textsuperscript{86} As dual use infrastructure can simultaneously possess civilian and military functions, this also poses challenges to the determination of when a civilian object loses its “civilian character and qualifies as a military objective” that is liable to attack.\textsuperscript{87} This is especially so when facilities that are originally designed for civilian uses have military roles, and vice versa.

*Discriminate attacks*

Given that the “definition of indiscriminate attacks is an implementation of the principle of distinction”,\textsuperscript{88} the challenges facing the IHL distinction also problematize the prohibition against indiscriminate attacks, which are attacks not


\textsuperscript{85} AP 1. Art 58.

\textsuperscript{86} AP 1. Art 52.


\textsuperscript{88} ibid 43 (Rule 13).
directed at a specific military objective. The difficulty in conducting warfare at specific military objects is due to the phenomenon of ‘civilian creep’, where accelerated permeation of advanced technologies into every civilian aspect of society obstructs accurate targeting. Given the interconnectivity between cyber and civilian infrastructure, even when cyber operations are precisely targeted at specific military objects that “by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”, they could trigger severe collateral impacts on civilian lives and objects.

Additionally, cyber warfare in an IOT society also introduces new objects vulnerable to armed attack. During cyber warfare, cyber operations can alter, manipulate or even destroy civilian data, including electoral votes, health records, and banking account information. Although destroying or altering data may not lead to direct physical harms, such cyber operations during warfare do not only impede or disrupt governmental functions, but are also contrary to military necessity and general protection of civilian objects. In a cyber-dependent IOT society, an acute challenge would be to reconsider and debate the interpretation of “civilian objects” in the context of the object and purpose of IHL in protecting civilians from the scourge of warfare. Moreover, under IHL, the damage to civilian objects arguably does not necessarily need to entail a violent physical impact on civilian lives. As evident from article 53 of AP1, which prohibits “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”, the focus of IHL is on limiting the collateral effects of warfare on the civilian population. The challenge of re-examining what kinds of civilian objects in IOT society

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89 AP 1. Art 51(4)(a).
91 AP 1. Art 52(2).
93 AP 1. Art 52(1) and 52(3).
require protection from cyber operations is pertinent if IHL were to fulfil its important purpose of “the safeguarding of the lives and dignity of human beings”.

Proportionality

‘Civilian creep’ also poses challenges to the IHL rule of proportionality, which prohibits excessive civilian costs in relation to concrete and direct military advantage. Cyber operations’ direct impacts may be nonlethal or temporary, but they may indirectly result in severe civilian harms. For example, while cyber operations may inconvenience the civilian population by temporarily disabling Internet information transmission, such operations may cause the loss of lives because hospitals are unable to communicate vital information. As such, the direct impacts of cyber operations may be proportionate to the military advantage gained, but the indirect impacts may be unexpectedly disproportionate even when feasible precautions are taken. Proportionality is “couched in the language of expectation and anticipation” or “what is reasonably foreseen in advance of an attack”; therefore “what is ‘excessive’ collateral damage to civilians/civilian objects is determined on the basis of the original expectation (of the collateral damage) and anticipation (of the military advantage) as formed before, not after, the damage”. The interconnectedness between cyber and civilian infrastructure problematizes the task of determining whether a cyber operation is proportionate. It also poses the challenge that cyber operations may still result in disproportionate civilian costs even if there is adherence to IHL proportionality standards. Therefore, IHL rules may not be sufficient in limiting excessive civilian costs arising from cyber warfare.

95 Jean S Pictet, Commentary I on the Geneva Convention (International Committee of the Red Cross 1952) 12.
98 ibid 851.
99 AP 1. Art 57(2).
Proposal: International independent fact-finding body

This essay proposes that an international independent fact-finding body be established to address the limitations faced by international law in regulating the use and conduct of cyber operations. This body’s primary purpose is to investigate and identify the actors responsible for cyber operations. It would also identify the economic and political impacts and the specific IHL violations arising from these particular operations. After independent investigations, the body will publish its findings. This proposed body would focus on fact-finding and will not have prosecutorial or enforcement capabilities akin to the International Criminal Court. Upon the publication of the investigation report, the victim state, not the body, will decide whether to respond and if it chooses to do so, it will decide on the kind of legal remedies and punitive measures, including individual or collective sanctions, arbitration, or litigation.

Granting the body jurisdictional capabilities over international law violations arising from cyber operations would face significant difficulties in acquiring state consent. Furthermore, even if the body had prosecutorial powers, it could not compel states to surrender individuals responsible for particular cyber operations. By providing information and removing anonymity, fact-finding plays an indispensable role in crystalizing international legal norms and creating taboos surrounding the use and conduct of cyber operations in the long term. This challenges the notion that prosecutorial or enforcement capabilities are necessary to constrain state behaviour.

Regarding the conduct of cyber operations, this fact-finding body can reduce the legal ambiguity surrounding the application of IHL in contexts of cyber warfare. With respect to the conduct of cyber operations in warfare situations, the detailing of the humanitarian impacts of cyber operations is required to categorize specific types of cyber warfare as violations of IHL. Although this body does not have prosecutorial or enforcement powers, it can still contribute to greater clarity and consistency in how IHL applies to cyber warfare, thereby minimizing legal ambiguity. Greater clarity arising from the body’s investigative reports can constrain and structure the conduct of cyber warfare in accordance with IHL rules. Even though the body’s reports are non-binding, they can set soft law standards for states to reorient and adjust their cyber warfare conduct. This is possible because “much norm advocacy involves pointing to discrepancies
between words and actions and holding actors personally responsible for adverse consequences of their actions”, in other words, the body functions by providing “the information and publicity that provoke cognitive dissonance among norm violators.”  Examples of such bodies, which offer non-enforceable yet norm-contributory reports, include the complaint mechanisms of the United Nations Special Rapporteurs, Working Groups, and Human Rights treaties. In the long run, the normalization of IHL rules in cyber warfare contexts may facilitate the creation of multilateral treaties, which restrict or prohibit the use of certain cyber warfare operations and particular cyber warfare targets.

With respect to the use of cyber operations, this fact-finding body can potentially constrain states from even using cyber operations. As previously argued, given the difficulties of classifying cyber operations as internationally wrongful acts of a state under international law, it is currently practically and theoretically difficult to rely on international law, namely the prohibition on the use of force, non-intervention, and self-determination, to outlaw or prohibit cyber operations as internationally wrongful acts. If so, *jus ad bellum* arguably does not offer a fruitful approach in protecting international peace and security from cyber operations. Rather than attempting to theoretically fit cyber operations into the legal frameworks of “use of force” or drafting a new treaty stipulating the conditions under which the use of cyber operations is legally permissible, a more effective approach would be to capitalise on incipient international *norms* of sovereignty and non-intervention to ‘name and shame’ economically and politically disruptive cyber operations. To utilize such stigmatizing effects of international legal norms, the identification of culpable actors is necessary. This is because “norms cannot get much purchase in a world without serious attribution” as “anonymity is a norm destroyer.”  Through fact-finding investigations and monitoring, this body removes anonymity.

The importance of the body’s monitoring function can also be elucidated with reference to how international monitoring entities are most needed in international issues that have diffused and indirect costs, such as cyber operations that inflict political and economic disruption. In accounting for the kind of

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monitoring arrangements in different international issues, professor Xinyuan Dai offers a framework to do so (Figure 1). The framework first comprises of ‘Interest Alignment between Noncompliance Victims and Their State’, which refers to states’ interests in protecting potential victims of legal non-compliance and this would in turn affect their interests in monitoring instances of non-compliance. Secondly, the ‘Availability of Noncompliance Victims as Low-Cost Monitors’, which is determined by whether noncompliance imposes direct and easily detectable impacts on victims. As indicated by the top left quadrant in Figure 1, the presence of alignment and availability of victims would mean that states and victims would monitor non-compliance. Cyber operations that cause substantial physical damage would fall within this quadrant. This is because not only do states and victims both share an interest in ensuring such operations are unlawful uses of force, the effects are easily and directly felt and seen by the victim population, which would then increase political pressure on states to retaliate or monitor future uses of such operations. In such scenarios where there exists interest alignment between states and cyber victims as well as the easily detectable victim impacts, both states and victims would be incentivized to conduct monitoring and fact-finding. In any case, as previously argued, such cyber operations are likely to be used as complements in conventional warfare and are improbably used as standalone tools.

What then is of interest would be a cyber operation that inflicts non-physical effects. In contrast, while there exists interest alignment, the availability of non-compliance victims is low as the effects of political and economic disruption tend to be diffused, indirect, and covert. If so, monitoring by treaty organizations such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is necessary. Monitoring by a treaty organization is necessary because it removes states’ ability to hide behind masks of anonymity and uncertainty by ‘naming and shaming’ responsible states. Although this paper’s proposed body is not a treaty body akin to the NPT, the justification is similar, in that a monitoring body is required in cases where cyber operations inflict non-physical effects.

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104 ibid 408.
105 ibid 414.
This ‘naming and shaming’ works because it builds on the incipient international norms of sovereignty and non-intervention. Regardless of the legal consequences, there exists international stigma associated with such actions. This is evident from how the ‘nuclear taboo’, which refers to the norm prescribing against the use of nuclear weapons, has delegitimized nuclear weapons as weapons of war to such an extent that nuclear weapons remained unused even in cases where the self-interest borne out of mutually assured destruction does not exist; nuclear states such as the United States would rather lose a war than resort to nuclear weapons against non-nuclear states such as Vietnam.\footnote{Nina Tannenwald, \textit{The Nuclear Taboo} (Cambridge University Press 2008) 3, 5, 10, 27.} By finding attribution through fact-checking, the body crystallizes and capitalizes on the stigma associated with violations of the existing norms of sovereignty and non-intervention to bear upon politically and economically disruptive cyber operations.

Therefore, the theoretical difficulties of applying international law principles in the cyber domain does not preclude the geopolitical reality that the norms associated with such principles influence the normative expectations of interstate relations. For instance, although the international law principle of non-intervention faces theoretical limits in prohibiting cyber election interference,
non-intervention principle still provides a normative framework regulating interstate relations. Actions that violate such a norm are stigmatized regardless of whether they theoretically fit into the non-intervention framework. Such stigma against the use of cyber operations operates through ‘outcasting’, which is a non-violent way of enforcing international law and norms by denying those who violate international rules and norms the benefits available to the rest of the international community.\(^\text{107}\)

Additionally, by investigating and identifying the territorial and political origins of cyber operations, the body can simultaneously contribute to the consolidation of due diligence norms in the cyber domain. Due diligence comprises of the obligation not to allow territory or cyber infrastructure under its governmental control to be used for cyber operations that adversely affect other states.\(^\text{108}\) This involves extending the duty to prevent transboundary harm in international environmental law to the domain of cyber warfare. The due diligence obligation to prevent transboundary harm refers to “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.\(^\text{109}\) This obligation is recognized as “part of the corpus of international law”.\(^\text{110}\) Such obligations are procedural and require states from which the harm originates to take all possible and appropriate measures to prevent and minimize such harm from causing damage to areas beyond national jurisdiction.\(^\text{111}\)

Extension of such a principle to cyber warfare would mean that states are expected to be responsible for cyber operations that emanate from their territory even if legal attribution cannot be made out. Such an extension represents a shift from the traditional requirement of attribution for the assignment of state responsibility for internationally wrongful acts under Article 2 of ARSIWA. This lowering of the threshold for assignment of state responsibility is especially pertinent in the cyber domain, where the nature of cyber activity and the relationships between actors involved in cyber operations render technological and legal attribution difficult. Applying this duty would prevent states from

\(^{107}\) Oona Anne Hathaway and Scott Shapiro, The Internationalists: How A Radical Plan To Outlaw War Remade The World (Simon & Schuster) 375.

\(^{108}\) Schmitt (n 1) 30-42.

\(^{109}\) Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) (Judgment) [1949] ICJ [22].

\(^{110}\) Nuclear Weapons (21) [29].

masking their cyber warfare operations behind clandestine relationships with non-state actors. Additionally, due diligence addresses situations where states outsource cyber operations to another state or to non-state actors located in another state. Due diligence not only deters states from conducting cyber operations on behalf of other states, but also incentivizes states to ensure that their territory is not used to conduct cyber operations. Moreover, this norm bypasses a crucial challenge posed by cyber operations, namely identification of the location where the operation originated does not offer knowledge of the actors responsible.

The maintenance of international peace and security is a perennial and quintessential challenge facing international law. The indeterminacy of theoretically extending international law to encompass new issues and developments, such as cyber operations, need not require drafting a new international cyber treaty. In any case, a new cyber treaty is politically infeasible. There have been calls for an International Cyber Convention on cyber attacks and a ‘Digital Geneva Convention’ on the conduct of cyber operations. The geopolitical realities of cyber operations as military strategic tools of inflicting costs on other states while avoiding full-blown conventional warfare render it politically infeasible for states to agree on the applicable rules for cyberspace. The fraught political difficulties of an international cyber treaty is evident from how the United States, Russia, and China refused to sign the 2018 Paris Call for Trust and Security in Cyberspace. It is a non-binding declaration that did not stipulate any substantive rules, but merely expressed a “willingness to work together, in the existing fora and through the relevant organizations, institutions, mechanisms and processes to assist one another and implement cooperative measures” in cyberspace. Therefore, geopolitical realities problematize the possibility of states agreeing on an international cyber treaty.

Nevertheless, a treaty is neither the only nor most effective way of regulating cyberspace. Through monitoring and investigative reports, a fact-finding body can contribute to the gradual and cumulative crystallization of legal

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114 Paris Call for Trust and Security in Cyberspace, 12 November 2018.
norms with respect to cyber operations as well as the stigmatization of cyber operations. Without informational transparency, stigma and norms cannot take root. In this proposal, however, investigative reports are not the only way in which legal ambiguity is reduced. The other complementary way is how victim and non-victim states react to these reports. As previously proposed, the body will not have enforcement powers with respect to its reports. The body only investigates and publishes the report; it leaves the decision of whether to respond and how to respond to victim and non-victim states. The reactions of victim and responsible states as well as neutral states to these reports can contribute to the gradual illumination, if not consolidation, of state practice and *opinio juris* on particular uses and conduct of cyber operations. At the very least, state responses to the body’s investigative reports offer a window into how different states approach and conceptualize the use and conduct cyber operations. After all, one crucial obstacle to finding regulatory solutions in emerging international issues such as those in the cyber domain is the relative absence of information on state practice. Therefore, an international cyber treaty or the granting of enforcement powers is neither the only nor most effective way to address existing theoretical limits of international law in regulating cyber operations. The proposal also implies that in situations of international legal indeterminacy, an analysis of *how* norms shape state behaviour and *how* international legal principles can be integrated as norms rather than codified as enforceable rules can go a long way in maintaining peace and security.

In conclusion, one prevailing approach to regulating the use and conduct of cyber operations is to theoretically extend existing international law to the cyber domain in the form of an international cyber treaty. This approach, however, faces geopolitical constraints and theoretical limitations. With respect to use of cyber operations, there are theoretical limits to prohibiting cyber operations as internationally wrongful acts of a state. With respect to conduct of cyber operations, the character of cyber warfare and the nature of societies in which cyber operations are conducted pose unique challenges to the applicability and effectiveness of IHL in constraining the destructive humanitarian effects of cyber operations. By stipulating rights and obligations, treaties are an intuitive legal mechanism for addressing international legal lacunas. Such a treaty-based approach is, however, likely ineffective not only because of realpolitik but also the theoretical limits of international law with respect to the cyber domain. Conversely, an independent fact-finding body can play an important facilitative
role in the development of norms in cyberspace. By gradually crystallizing and capitalizing on international legal norms, an independent fact-finding body can address the current limitations faced by international law in regulating the use and conduct of cyber operations.
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R v Evans: An Uneasy Precedent?

Ann-Marie Sous*

INTRODUCTION

In this piece, I discuss the recent case of R v Evans, in which the Court of Appeal allowed the defence to adduce evidence regarding the complainants’ sexual history with third parties in the context of a rape trial. I will assess the academic debate surrounding the controversy the case brought through the expansion of s 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 to allow such evidence to be adduced. As such expansion has been criticised on the basis that it has created a tension between the complainant’s right to privacy and the defendant’s right to a fair trial, I will outline the criticism of Evans by various academics, addressing whether these criticisms are sound, and put forward my ideas regarding how the problems of Evans can be resolved (i.e. through a cultural change, as opposed to legislative change).

In recent years, there have been several high-profile cases involving victims of sexual offences speaking out. It appears therefore timely to review the current law of evidence in this specific context. In particular, the current law concerning sexual history evidence (SHE) has been criticised on the basis that the ruling in R v Evans\(^1\) extends the law too far such that it imbalances the trial by working to the detriment of the complainant, particularly her right to privacy. Indeed, there has been a sense that Evans has led to a regression in the law. The Youth Justice and Criminal Evidence Act 1999 was implemented to protect complainants and

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prevent against the so-called ‘double myth’, however, with Evans as precedent, their protections have been put at risk and the ‘double myth’ has returned.

Firstly, this article will outline the law on SHE and give a brief overview of the Evans case. Then, it will assess whether the law needs reform, drawing on academic debate. Finally, this article will discuss current proposals for reform and put forth its own reform idea. This article strongly argues that the current SHE regime works to the detriment of the complainant in some instances, however, this is due to a misapplication of the law rather than a problem with the law itself. To reform the law and make it more restrictive would work to the detriment of the defendant and his right to a fair trial. Thus, instead of reforming the law, a cultural change is needed regarding the public perception of sexual offences and gender roles. This cultural change would alleviate issues such as deterring victims and victim-blaming. More importantly, this reform option would not compromise either the right of the defendant or the complainant.

I. UNDERSTANDING THE CURRENT LAW

The admissibility of SHE is governed by the Youth Justice and Criminal Evidence Act 1999. According to s 41, there is a general ban on the admission of SHE so that the defence is not allowed to ask questions in cross-examination or adduce evidence of the complainant’s sexual behaviour. Sexual behaviour is defined under s 42(1)(c) as meaning previous sexual encounters with the defendant or any other person. In some instances, however, the court may grant leave to the defence to adduce SHE contained in s 41(3)(a), (b) and (c). Per s 41(3)(a), a court may grant leave if SHE is relevant to an issue other than the issue of consent. Other issues include: whether the defendant had a reasonable belief in consent,\(^2\) whether the offence was fabricated, or whether there is a false identity issue. Meanwhile, s 41(3)(b) allows the defence to adduce evidence where there is evidence of sexual behaviour “at or about the same time” as the offence. In the case of R v A, “at or about the same time” was defined in dicta as being constrained to twenty-four hours.\(^3\) Finally, s 41(3)(c) provides that evidence of sexual behaviour may be adduced where it is “so similar” to any sexual behaviour the complainant engaged in with the defendant or which took place at the same

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\(^{3}\) (No 2) [2001] UKHL 25.
place/time. This was seen in R v T where it was held that the fact that the complainant had engaged in sexual behaviour previously with the defendant at the same place made it more likely she consented.

However, these exceptions found within s 41(3) are subject to further restrictions. First, the evidence must relate to “specific instances” of sexual behaviour; second, a refusal of leave might have the result of rendering an unsafe verdict; finally, the purpose must not be to impugn the credibility of the complainant.

Case law has further expanded the instances where SHE may be adduced by the defence and this has been evidenced by both R v A and Evans. In R v A, the House of Lords allowed defence counsel to adduce evidence of SHE between the complainant and defendant to provide the jury with context to make a fully informed decision. Indeed, there were concerns that the current regime prevented the jury from knowing the context and potentially prevented the defendant from putting a defence forward. Thus, the court found that the legislation was too restrictive in this respect. The court went as far as to say that preventing the jury from knowing the context could amount to a violation of the defendant’s right to a fair trial per Article 6 of the European Convention on Human Rights. Hence, the court introduced an implied provision based on fairness through their s 3 power of the Human Rights Act (HRA). This provision established that if it is necessary to adduce SHE for fairness then it is admissible.

Meanwhile, in Evans, the court expanded the s 41(3)(c) provision by allowing SHE regarding conduct between the complainant and third parties to be adduced. The context was that the defendant (Evans) was initially found guilty of rape in 2012. The defendant appealed his conviction; new evidence was brought to light concerning two other men. The two men claimed they had sex with the complainant around the same time as the alleged rape and described their encounters as similar to Evans’ account. Indeed, the Court of Appeal identified the following ‘similar’ elements: the complainant “had been drinking”; she

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5 41(6) of YJCEA.
6 41(2)(b) of YJCEA.
7 41(4) of YJCEA. For further elaboration see R v Martin [2004] 2 Cr App R 22.
8 (n 3) at [46].
“instigated certain sexual activity”; she “directed her sexual partner into certain positions” and “used specific words of encouragement.” This was enough to satisfy s 41(3)(c) and so, the defendant was acquitted. However, some commentators have been particularly critical of these developments, arguing that reform is necessary because (a) the current law tilts the balance too heavily in favour of the defendant at the expense of the complainant’s right to privacy; and (b) it creates a significant risk that the jury takes irrelevant evidence into account.

II. CONSIDERING THE ARGUMENTS FOR REFORM

Certain commentators have viewed Evans and R v A as setting an uneasy precedent which effectively deters victims from reporting sexual offences through the fear of cross-examination of their sex life. Indeed, by establishing that sexual behaviour does not have to be “bizarre” or “unusual” effectively sets a very low bar on the admission of SHE. However, others have read the ruling in a more sympathetic light. Dent and Paul, for instance, disagree with this claim and argue that it is not the law that deters victims from reporting but the media coverage of sexual offences. In contrast, McGlynn uses empirical data, like surveys and police records, to highlight that the court process, including admission of SHE, does impact on complainants’ decision-making. McGlynn shows that the admissibility of SHE results in many complainants withdrawing their claims for fear of the potential invasion of their privacy and that their sex life may be the subject of the trial, and concludes that there is a need for reform. Indeed, by sacrificing the complainant’s private life, this interpretation of the provision arguably goes against Article 8 of the European Convention on Human Rights. Hence, a “legal system that allows extensive examination might one day be contrary to Article 8.”

14 McGlynn (n 10) at 10.
15 DS v HM Advocate [2007] UKPC 36 per Baroness Hale of Richmond.
Some have also argued that the ruling of \textit{Evans} evidences a need for reform because the current law encourages victim-blaming.\textsuperscript{16} Arguably, with \textit{Evans} we see a shift in attention from “probative credibility” to “moral credibility”.\textsuperscript{17} Moral credibility “refers to the general ability of a witness to tell the truth.”\textsuperscript{18} Moral credibility is problematic since it can “distract jurors attention from the consideration of rape, directing them towards that of sex”\textsuperscript{19} and thus lack of consent versus consent. This ‘Madonna-whore complex’ (in which chastity is moral, and so, trustworthy, whereas unchastity is immoral, and so, untrustworthy) finds that “women of ill-repute are not to be trusted in their testimony.”\textsuperscript{20} Indeed, Smart observes in a rape trial the complainant’s previous sexual relations are “reconstructed into a standard form of sexual fantasy… in which she becomes the slut who turns men on and indicates her availability through every fibre of her clothing and demeanour”\textsuperscript{21} and so, during the trial, the body “becomes literally saturated with sex.”\textsuperscript{22} In this respect, SHE “risks introducing irrelevant or prejudicial material which may distort rather than promote the fact-finding role of the trial”\textsuperscript{23}. Instead, it makes the complainant’s sex life, and behaviours more generally, the subject of the trial. Thus, jurors focus on the ‘respectability’ of women complainants, with evidence of previous sexual activity or any other activity that attracts moral judgement reducing their ‘respectability’ which, in turn, reduces the assessment of credibility. This essentially shifts legal and moral blame from the defendant to the complainant.

When considering this point in the context of \textit{Evans}, the argument concerning moral credibility is particularly persuasive. \textit{Evans} has been viewed by some as particularly invasive of the complainant’s private life. Baird, in particular, fears that with \textit{Evans} as a precedent, rape trials could become inquisitions into the complainant’s sex life,\textsuperscript{24} and within the adversarial trial, these inquisitions can be

\textsuperscript{16} McGlynn (n 10) at 7.
\textsuperscript{17} Aileen McColgan, ‘Common Law and the Relevance of Sexual History Evidence’ [1996] 16 OJLS 275.
\textsuperscript{18} Thomason, (n 11) at 351.
\textsuperscript{19} McGlynn (n 10) at 5.
\textsuperscript{20} Thomason (n 11) at 352.
\textsuperscript{21} Carol Smart, ‘Law’s power, the sexed body, Feminist discourse’ [1990] Journal of Law and Society 17(2), 194, 205.
\textsuperscript{22} Smart (n 21) at 203.
\textsuperscript{23} McGlynn (n 10) at 6.
\textsuperscript{24} Vera Baird et al., \textit{Seeing is believing: the Northumbria Court Observers Panel Report on 30 Rape trials 2015–2016.}
quite terrifying seeing as the prime tactic is to discredit complainants. Complainants have, therefore, described the task of appearing in court as “worse than the rape itself.”25 Evans, in this respect, effectively perpetuates the ‘double myth’ that because a woman consented on one occasion, she is more likely to consent on another. Likewise, it perpetuates the ‘double myth’ in the minds of the jury that because of the complainants’ previous sexual activity, she is morally questionable and so, untruthful. Thus, this type of evidence being adduced may, as Redmayne suggests, result in a prejudicial effect whereby the jury might “take a dim view of the complainant.”26 The law on the admissibility of SHE, therefore, needs to be reformed because concerns surrounding the moral credibility of the complainant could result in prejudicial effect against her, which could sway the jury in the defendant’s favour. However, Dent and Paul are critical of the arguments stating that Evans represents a return to the ‘double myth.’ Instead, they highlight that s 41 is a high bar for SHE to be admitted, and that Evans was a very particular case with a particular set of facts, so it is more the exception than the rule.27 Yet, this is not the case. As shown by Evans, the threshold is not that high.28 Indeed, in Evans, evidence was admitted because in previous sexual encounters, the complainant had been drinking and had used a particular phrase/position. Such commonplace behaviour was considered unusual and this significantly lowers the bar for ‘similarity’. Thus, reform is necessary to overcome issues surrounding moral credibility and prejudicial effect.

Finally, commentators such as Redmayne have argued that Evans is problematic in that it assigns probative value to SHE, when such evidence has little probative value.29 Indeed, just because someone consents to someone on one occasion, that does not make it more or less likely that they will consent to that person (or another person) on another occasion. There “is no probative connection between consenting to one person and consent to a different person.”30 Criticisms that Evans has brought to light regarding the perpetuation of the so-called ‘double myth’ has led to increased calls for reform.

26 Mike Redmayne, ‘Myths, relationships and coincidences: the new problems of sexual history’ [2003] E & P 75, 82.
27 Dent and Paul (n 13) at 7.
28 McGlynn (n 10) at 4.
29 Redmayne (n 26) at 6.
30 McGlynn (n 10) at 4.
III. PROPOSALS FOR REFORM

There have been several proposals for reform. For instance, the Harman reform proposed a complete abolition on s 41 exceptions, such that complainants should never be cross-examined regarding their sex life. Commentators such as McGlynn have argued in favour of the Harman reform on the basis that SHE should always be excluded since it is irrelevant. They ask: what is the relevance between consenting to one person on one occasion and consenting to another person on another?

Yet this article does not favour such a drastic option. Instead, to view SHE as never relevant is equivalent to viewing the offence of rape from the perspective of the complainant only. This is problematic because the law is already too restrictive. It is, as Birch claims, “draconian” and amounts to “legislative overkill” which goes too far against the rights of the defendant. Hoyano’s study also revealed that many within the law profession viewed the law as already too restrictive. The Canadian court considered an option similar to the Harman reform and concluded that a complete prohibition is inconsistent with the fundamental rights of the defendant to a fair trial. Thus, to reform the law in this way would imbalance the law such that the complainant receives too much protection at the expense of the defendant’s right to a fair trial. This can result in “miscarriages of justice” because to abolish the s 41 exceptions would mean that the jury has no context upon which to base its decision. This could ultimately lead to unsafe convictions, and perhaps more worrying, it could lead to false convictions. False convictions should be avoided at all costs since they can have

32 McGlynn (n 10) at 10.
34 Laura Hoyano, “The Operation of YJCEA 1999 section 41 in the Courts of England & Wales: views from the barristers’ row” (An independent empirical study commissioned by the Criminal Bar Association (2018)). Also see Laura Hoyano, ‘Cross-Examination of Sexual Assault Complainants on Previous Sexual Behaviour: views from the barristers’ row’ [2019] Crim LR 77.
36 Dent and Paul, (n 13) at 11.
“deleterious consequences” which can result in “social, psychological and economic damage.”

Instead, this article favours the view that there is no problem with the existing law itself. It has simply been misapplied. Indeed, commentators such as Dent and Paul have attempted to reconcile Evans on the basis that it is a simple application of the law. Dent and Paul claim that due to the similarity between the sexual behaviour of the complainant with the defendant and the complainant with third parties, the case is somewhat analogous to R v T. However, such an argument is unpersuasive because Evans and R v T are not analogous. The case of T concerned SHE between the complainant and the defendant, not the complainant and third parties (like in Evans). Stark’s claims are more persuasive in that the court has “misdirected” its attention to s 41(3)(c) when it should have invoked s 41(2)(b). Thus, the law itself does not need to be reformed, but rather attention should be refocused to s 41(2)(b) as opposed to s 41(3)(c). By focusing on s 41(2)(b) as opposed to s 41(3)(c) would mean the complainant would not have their private life scrutinised as harshly, and so their right to privacy would be upheld.

Rather than a change to the existing law, a better option is a cultural change in people’s attitudes. This change would more easily accommodate the current law without compromising either the right of the defendant to a fair trial or the right of the complainant to privacy. Changing the law is unlikely to have a practical impact especially where those applying these rules of evidence have entrenched views on women and how they behave. When SHE is admitted, even where it is relevant, juries will place considerable weight upon it and effectively create a “smokescreen of immorality around the complainer.” Rape complainants are therefore judged on the basis that women should be adhering to certain moral standards. Failing these standards means there is a high price to pay in that it is unlikely that the jury will trust their testimony. Public and jury education is necessary for this improvement to take place. This would ensure that unfair

acquittals based on stereotypes would not take place. Where there is a cultural change to people’s attitude on rape, issues such as deterrence and victim-blaming will rarely arise. Whilst such an option may not seem attainable, with the growing awareness concerning sexual crimes, especially in light of #MeToo, we are arguably seeing this cultural change take place, albeit slowly. In the meantime, the law should follow Stark’s recommendations that greater attention should be redirected towards s 41(2)(b) rather than the similarity gateway. However, for the law to work effectively in the long term, a change in cultural beliefs about women is necessary such that cases like Evans never occur again.

**CONCLUSION**

To conclude, Evans is certainly a problematic case in that it has expanded the scope of s 41(3)(c) such that SHE is much easier to adduce due to the low bar (not having to be ‘unusual or ‘bizarre’). Yet to reform the law in the complainant’s favour would make the law too restrictive and would come at the expense of the defendant’s right to a fair trial. Although there are certainly persuasive reasons pointing to the need for reform, reform to the law is not necessary. Cultural change combined with a refocusing of the court’s attention to s 41(2)(b) could overcome issues such as victim-blaming and deterrence, without compromising either the defendant’s right to a fair trial or the complainant’s right to privacy.
One Belt One Road Disputes: Does China Have Dispute Resolution Methods Fit for Purpose?

Jia Zuo*

INTRODUCTION

The One Belt One Road Initiative (‘OBORI’ or ‘OBOR’) is a top-level project primarily aimed at increasing infrastructure output and investment. It has been implemented in more than 60 countries across the world and has had a far-reaching impact on transnational trade. In order to respond to the increasing need for legal services to assist in the implementation process, China endeavours to provide a fair and trustworthy legal environment by establishing innovative international commercial courts in certain cities¹ and by reforming existing international arbitration rules.² Meanwhile, there remain many challenges to construct a collaborative legal system which covers a large range of jurisdictions, legal customs, and business approaches. This essay contends that the Chinese approach to arbitration and adjudication, since the launch of the OBORI, has undergone a paradigm shift from a domestic approach towards a dynamic and internationalised one. This is a result of the enhancement of the recognition and enforcement of foreign arbitral awards, the introduction of ad hoc arbitration, and the establishment of the China International Commercial Court (‘CICC’).

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However, to achieve China’s ambitious plan of promoting its dispute resolution mechanism to an international level, it could further enhance the independence and efficiency of its dispute settlement institutions.

The essay begins with an overview of China’s OBORI and the methods of dispute resolution available. In the second section, it discusses a recent Chinese arbitration case that signifies a revised approach by the Chinese courts: encouraging the recognition and enforcement of foreign arbitral awards. The second part of this section then analyses the newly promulgated rules regarding *ad hoc* arbitration, which are considered an influential reform of China’s arbitration law. Thirdly, the essay comments on China’s dispute resolution mechanism for OBOR disputes by further assessing the advantages and disadvantages of the establishment of the CICC. Finally, the essay concludes that further development of more open and independent dispute resolution institutions will encourage China’s broader cooperation in OBOR projects.

### I. OBORI AND THE CONCEPT OF DISPUTE RESOLUTION

Experimenting with a radically new approach towards international trade and investment, the OBORI is different from previous free trade agreements in that it provides an ambitious infrastructure-led economic integration plan. Historically, the Silk Road marked an epochal period in encouraging profound communication and intersection between East and West in terms of trade, culture, and civilisation. Analogously, the OBORI signifies a new stage in the development of the Chinese economy, with its economic expansion westward.

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and the export of its development model. This titanic infrastructure project provides significant opportunities for investors around the globe to increase their engagement with transnational commercial co-operation, including construction projects, resource production, energy exploitation, transportation, banking, manufacture, international capital markets, retail and consumer goods business fields. Meanwhile, it also benefits the national economies of the countries along the OBOR routes. According to a 2019 World Bank Report concerning the OBOR transportation corridors, the countries involved in this project, that have a comparative advantage in natural resources but were previously deficient in terms of infrastructure, “are expected to see a significant 7.6% increase in foreign direct investment due to the new transportation links.”

On the other hand, these potential gains come with considerable risks. These include those relating to operations, credit risks, government effectiveness, political stability, and legal and regulatory frameworks. From China’s perspective, its overseas investments and workers may be directly exposed to regional political conflicts or security concerns. The OBORI project itself, in turn, faces inherent risks arising out of weak domestic institutions and poor economic circumstances in many participating economies, especially those with

11 ibid.
12 Economic Intelligence Unit, “Prospects and Challenges on China’s ‘One Belt, One Road’: A Risk Assessment Report” (The Economist, 2015) 8.
13 Joel Wuthnow, “China Strategic Perspectives 12” (Institute for National Strategic Studies, 2012) 56.
high-debt vulnerabilities.\textsuperscript{14} To tackle these underlying risks in the OBORI, the Chinese government has introduced certain dispute resolution mechanisms that will be specifically elaborated on in the second and third sections of this essay. Before explaining those mechanisms, I will discuss the various dispute resolution methods in general terms.

There are four primary methods in the overall spectrum of dispute resolution mechanisms\textsuperscript{15} by which commercial parties can solve their business disputes:\textsuperscript{16} negotiation, mediation, arbitration, and litigation. Amongst them, negotiation and mediation can be seen as informal as they do not conclude in binding decisions and are generally conducted through reciprocal consultation, whilst the latter two are binding and enforceable.\textsuperscript{17} The enforcement of mediation, in contrast to arbitration and litigation, depends completely on the parties’ voluntary implementation,\textsuperscript{18} and the process is critically dependent on the parties’ negotiation skills. As for litigation, one of its disadvantages is that national courts may often be viewed as being politically partial.\textsuperscript{19} Comparatively, arbitration may have advantages in being more efficient in terms of speed and cost.\textsuperscript{20} Moreover, arbitration reflects the autonomy of commercial bodies to a significant extent based on the parties’ freedom of contract.\textsuperscript{21} For instance, they can select the applicable law and arbitrators of their preference, as well as elect to

\textsuperscript{14} Yiu (n 9) 97.
\textsuperscript{16} Chaisse and Matsushita (n 7) 172.
\textsuperscript{17} Hunter (n 15) 382.
\textsuperscript{21} Yang Shihong (n 18) 91.
have the proceedings be confidential. According to studies by both Queen Mary University of London and PricewaterhouseCoopers, arbitration has become the most popular tool for international commercial disputes. In the context of OBORI projects, whichever method of dispute resolution is chosen, owing to its long-term and multinational nature, it is essential for both clients and their lawyers to pay close attention to early risk management and divergent understanding of dispute resolution strategies.

II. A SIGNIFICANT ARBITRATION CASE AND AD HOC ARBITRATION IN CHINA

In order to fulfil the need for a highly efficient and secure settlement of international disputes, the Supreme People’s Court of China (‘SPC’) has released a series of opinions regarding the interpretation of arbitral awards and typical OBOR cases since the start of the OBORI. The opinions are aimed at encouraging a reform towards an international and foreign-friendly dispute resolution system in China. Although China’s legal system, which is generally modified from the civil law system, does not recognise the enforcement or binding effect of Court’s Opinions, the SPC’s guiding opinions are considered highly persuasive and “in particular certain decisions can be read as generating legal norms with a binding effect on lower courts.” In *Siemens Co Ltd v Shanghai Golden Landmark Co Ltd*, the SPC has endorsed a more welcoming attitude

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24 Hunter (n 15) 388.
25 Gu (n 2) 8.
26 China & Hong Kong Legal Research Guide: Case Law, the University of Melbourne, China’s Supreme Court by Ronald C. Keith, Zhiqiu Lin & Shumei Hou, Taylor & Francis, 2013.
towards the recognition and enforcement of foreign arbitral awards, which allows Chinese foreign-related enterprises to more freely adopt international arbitration as their preferred method of dispute resolution.

In this case, a dispute arose between two Chinese companies during the performance of a sale and purchase contract. Under the agreement, the dispute was heard by an arbitration tribunal seated in Singapore and the award was in favour of the seller. Subsequently, the buyer paid a portion of the damages awarded, but still owed an outstanding payment to the seller. The seller, therefore, applied to the No. 1 Intermediate People’s Court of Shanghai for recognition and enforcement of the award under the New York Convention. The buyer argued that since all aspects of the dispute – including the subject-matter, the companies’ personalities, and the performance of the contract – were based within China rather than overseas, the foreign arbitral award was unenforceable as Chinese arbitration law prohibits non-‘foreign-related’ disputes to be arbitrated outside its jurisdiction. However, the court concluded that the contractual relationship was ‘foreign-related’, and as a result, the arbitral award should be recognised and enforced in accordance with the New York Convention. The SPC took two factors into account. Firstly, both parties are wholly foreign-owned enterprises registered in the China (Shanghai) Pilot Free Trade Zone (the ‘FTZs’ or ‘Shanghai FTZ’), an area that enjoys “preferential policies to safeguard foreign investors’ legitimate rights and interests” with its special legal and regulatory framework. Secondly, the transaction had close relationships with foreign investors located outside Chinese territory. This was shown from the performance of the contract, which bore certain features of a ‘foreign-related’ matter in two aspects. First, the goods were transported from outside of Chinese territory to the Shanghai FTZ where authorities carried out supervision of the bonded goods; second, the importation process into Chinese territory was not completed until the goods were transferred from inside the FTZ to outside the FTZ after customs clearance.

The significance of this case is that it has reinforced China’s fundamental commitment to abide by its obligations under international treaties such as the New York Convention. In line with the arbitral award, the SPC in 2015 published several Opinions on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road,” emphasising the importance of effective judicial remedies for Chinese and foreign market players. In the same vein, the SPC issued an opinion in 2017 regarding support for the construction of FTZs, which constitutes an authoritative legal interpretation on the validity of foreign arbitrations in China. The court’s broader interpretation of “foreign elements” displays Chinese courts’ increasingly enforcement friendly approach to foreign awards. Pursuing commercial arbitration in line with international standards is crucial to bolster the confidence of investors. Upholding the validity of international arbitral awards made under foreign arbitral institutional rules

33 “China International Commercial Court | CICC - Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones” [Article 9 of] which provides:

“[I]f a party opposes the recognition or enforcement of an arbitration award rendered in a foreign-seated arbitration merely on the ground that there is no foreign-related element, the courts shall not uphold the objection if (a) at least one of the parties to the arbitration dispute is a foreign-invested company registered within a pilot free trade zone; (b) the parties entered into an arbitration agreement submitting disputes to arbitration seated outside mainland China; (c) the opposing party was the claimant who initiated the foreign-seated arbitration in the first place, or the opposing party was the respondent who participated in the foreign-seated arbitration without challenging the validity of the arbitration clause throughout the arbitration.”

promotes the internationalisation of arbitration.\textsuperscript{36} It further strengthens the international credibility of rule of law in China and promotes a stable and predictable legal environment for businesses operating in the OBORI.\textsuperscript{37}

Nonetheless, the scope and concept of ‘foreign-related’ disputes are still matters of concern in Chinese arbitration and adjudication practice. While the SPC in this decision construed the term ‘foreign-related’ relatively flexibly and broadly, there is no specific legislation in this regard.\textsuperscript{38} Since the parties in this case were both registered in Shanghai, and the FTZs enjoy a strategic legal status, it would be over-simplistic to suggest that this will remain as an invariable and settled interpretation in future Chinese judgments.

Another notable development in Chinese arbitration reform that exemplifies the arbitration-friendly trend of Chinese courts is the introduction of \textit{ad hoc} arbitration in the FTZs. Before, it was legally void for two parties to conclude an arbitration agreement without specifying an arbitration commission. Nevertheless, under the Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones, the courts are permitted to take a friendly approach to validating \textit{ad hoc} arbitration agreements, if concluded between parties who are registered in FTZs.\textsuperscript{39} Compared to the previous strict rules of unitary institutional arbitration, \textit{ad hoc} arbitration permits parties to choose freely amongst different institutional rules, rather than merely choosing the institutions that will administer the arbitration.\textsuperscript{40} This improves procedural autonomy and flexibility in OBORI dispute resolution.\textsuperscript{41}

However, there are two principal defects in the limited reform launched in China’s FTZs. Firstly, the inconsistency with China’s Arbitration Law causes uncertainty in the implementation of \textit{ad hoc} arbitration. According to China’s Arbitration Law, promulgated in 1994, an arbitration agreement must contain a

\begin{itemize}
\item [\textsuperscript{36}] ibid.
\item [\textsuperscript{37}] “Stanford Law School China Guiding Cases Project , B&R Cases TM, TC12” (n 21) 5.
\item [\textsuperscript{38}] Gu (n 2) 23.
\item [\textsuperscript{39}] “CICC - Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones” (2016) para 9
\item [\textsuperscript{40}] Tietie Zhang, “Enforceability of \textit{Ad Hoc} Arbitration Agreements in China: China’s Incomplete \textit{Ad Hoc} Arbitration System” (2013) 46 Cornell International Law 40, 380.
\item [\textsuperscript{41}] Gu (n 35) 276.
\end{itemize}
designated arbitration institution; otherwise, it is invalid. Article 15 further requires arbitral institutions to be organised by the PRC government and be subjected to China Arbitration Association. These rigid legislative stipulations on arbitration defeat the autonomy of parties. Yet, they have not been abrogated. The legal framework of arbitration in China has fallen far behind international arbitration practice as well as the expectation and needs of foreign investors.

Secondly, a general lack of independence in the administrative processes inhibits parties from applying proper arbitration procedures. As arbitration commissions in China have the obligations of administrative registration and are supervised by governments during establishment, the independence and integrity of Chinese arbitration commissions are questionable, concerning the local governments’ organisational and supervisory roles. Consequently, Chinese parties and even legal practitioners tend to rely more on courts than arbitrators. Although the SPC’s Opinion has relaxed the parties’ choices of *ad hoc* arbitration, there is no explicit clarification with regards to the requirements of certainty in the regulation; nor have any specific *ad hoc* arbitration rules been clarified.

Thus, with the wave of pro-arbitration reform in the practice and opinions of the Chinese judiciary, the characteristics rooted in the Chinese legal system and legislative restrictions cast doubts on the efficiency of the *ad hoc* arbitration development. Chinese law does not provide for the legal status of *ad hoc* arbitration and there is uncertainty in its implementation owing to the lack of

45 ibid (n 27).
48 Gu (n 2).
independence. To tackle these defects, a more open and liberalised reform⁴⁹ has to be accelerated by either China’s arbitration institutions or the legislature. This is critical in enhancing the competitiveness of China’s dispute resolution mechanism and to better suit the need for dispute resolution of parties in OBORI projects.

III. INNOVATIONS AND PITFALLS OF THE ESTABLISHMENT OF THE CICC

Apart from promoting the development of arbitration, the SPC consistently strives to strengthen its judicial assistance for OBORI and to improve international governance and the development of the rule of law in China. Modelled on the examples of international commercial courts in England and Singapore, China established its first international commercial court (“CICC”) in 2018.⁵⁰ The CICC is a mini-circuit court, which is subordinate to the SPC. With the mission of handling international commercial and investment disputes and especially OBORI cases,⁵¹ the CICC has set up three separate tribunals in Beijing, Shenzhen, and Xi’an respectively.⁵² Established in these three significant pivots on the OBOR connecting the main economic development regions, the CICC strategically creates an international and fair dispute resolution environment.⁵³ It indicates significant strides on the part of China in the construction of a mature system of dispute resolution in the OBORI. These advantages are, in particular, an innovative dispute resolution structure, high-quality judges, and a more efficient and convenient procedure.

Regarding its innovative structure, the CICC synthesises arbitration, mediation, and adjudication as a ‘one-stop-shop’ service.⁵⁴ This means that the

⁵¹ ibid (n 18).
⁵³ ibid.
⁵⁴ CICC (n 39) Art 11.
alternative dispute resolution methods are all integrated “organically”.55 With regards to the CICC’s coordination with mediation procedure, based on parties’ consent, the court can entrust a member of international commercial mediation institutions to mediate the case.56 Alternatively, under the consent of both parties, the court may conduct the mediation by one judge, a collegial bench, or a member of the Expert Committee (discussed below).57 Thereby, parties who reach a mediation agreement can request the CICC to make a statement that renders the agreement enforceable. Regarding integrating arbitration into the CICC, to strengthen the parties’ autonomy, it empowers the parties to gain access to alternative dispute resolution directly through its dispute resolution partner institutions.58 This ‘one-stop-shop’ service platform can efficiently utilise China’s existing resources of international arbitration and mediation institutions,59 including five international commercial arbitration institutions and two mediation centres.60

Secondly, its capacity to deal with international commercial disputes is evidenced by the profiles of the CICC judges. Until now, the SPC has appointed 15 judges to the CICC. A reading of their resumes attests to their professional knowledge and experience in dispute settlement in international investment and

56 ibid (n 18) 24.
57 Art 94 and 95 of 2017 CPL. See also art 3 of the Supreme People's Court’s Provisions on Several Issues Concerning the Civil Mediation of the People's Court effective as of 1 November 2004.
60 The five international commercial arbitration institutions are namely: China International Economic and Trade Arbitration Commission (CIETAC), Shanghai International Economic and Trade Arbitration Commission (SHIAC), Shenzhen Court of International Arbitration (SCIA), Beijing Arbitration Commission (BAC), China Maritime Arbitration Commission (CMAC), China Council for the Promotion of International Trade Mediation Center, and Shanghai Commercial Mediation Center (SCMC).
trade law.}\textsuperscript{61} As required by the CICC Provisions, these 15 judges have all worked in the SPC for an average of six years, have extensive experience in trials, and possess thorough understandings of international law and Chinese law.\textsuperscript{62} Among them, 12 judges hold PhDs in Law conferred by leading Chinese universities such as Tsinghua University and Peking University,\textsuperscript{63} and most of them have studied abroad in different jurisdictions, such as the UK, USA, and Canada.\textsuperscript{64} In the meantime, a comprehensive integrated judicial reform\textsuperscript{65} has been implemented following the 19th Communist Party Congress report, which encourages the development of a multi-faceted dispute resolution mechanism and cultivation of more qualified judges. To cope with the growing number of foreign-related disputes and increasingly complex legal issues,\textsuperscript{66} an International Commercial Expert Committee has been established.\textsuperscript{67} Comprised of 12 Chinese and 20 non-Chinese legal professionals\textsuperscript{68} who provide expert knowledge on foreign law,\textsuperscript{69} the Expert Committee is able to make decisions indirectly via the mediation procedure,\textsuperscript{70} and to deliver advisory and strategic opinion to the CICC.

In addition to the innovative court structure and high-quality judges, the CICC has pioneered the adoption of modern procedures for the submission of

\begin{footnotes}
\item[61] Huiqin Jiang, “China’s International Commercial Court: A Dispute Settlement Mechanism for the Belt and Road Initiative” \textsuperscript{18}.
\item[63] Jiang (n 61).
\item[67] CICC (n 39) Art 12.
\item[68] Erie (n 55).
\item[69] Jiang (n 61).
\item[70] Cai and Godwin (n 19).
\end{footnotes}
evidence\textsuperscript{71} in designing an electronic filing and transmission system via audio-visual facilities.\textsuperscript{72} It also simplified its notarial process, by removing requirements for all overseas evidence to be notarised. Instead, it places greater emphasis on examinations at hearings. English evidence, based on both parties’ understanding and affirmation, can be submitted directly to the court without translation. These measures, to a large extent, have facilitated procedural efficiency and provided convenience for far-flung foreign litigants.\textsuperscript{73}

However, it should not be neglected that the CICC, as a Chinese court, also faces its own institutional constraints.\textsuperscript{74} It cannot be detached from the social settings and political restrictions in China that every Chinese court has to confront. These potential pitfalls include the perceived political function that the court plays, the limitations placed on judges, and the enforcement of awards.

Firstly, there are concerns that the political requirements imposed on the CICC and its subservient status to the SPC\textsuperscript{75} influence the impartiality and independence of the CICC.\textsuperscript{76} The political requirements imposed on the CICC, according to the Supreme People’s Court Monitor, are at least two-fold. First, the establishment of the CICC must be in line with China’s Central Committee’s Fourth Plenum Decision,\textsuperscript{77} which emphasises the need to protect China’s

\textsuperscript{71} Gu, ‘China’s Belt and Road Development and a New International Commercial Arbitration Initiative in Asia’ (n 31) 174.


\textsuperscript{74} Cai and Godwin (n 19).


sovereignty, security, and development interests. Second, courts must support important government strategies, particularly the major economic development policies that promote foreign trade and investment (such as the OBORI itself), as asserted by SPC President Zhou Qiang’s 2018 report to the National People's Congress. This articulation of the CICC’s political functions has given rise to stakeholders’ concern about Chinese governmental control over its processes and greater uncertainty of the outcomes in OBORI-related disputes.

Secondly, as SPC Judge Gao Xiaoli argued, the prohibition of the engagement of foreign judges or international legal counsel under China’s current judicial system will become the primary obstacle in upgrading the CICC into a trustworthy and high-quality international court. It is clear that the CICC operates as a platform to further internationalise China’s dispute resolution institutions. However, Art. 9 of the PRC Law on Judges stipulates that judges of Chinese courts must be Chinese nationals, making it impossible for foreign nationals to serve on the bench. Compared with the international courts in Dubai and Singapore, where a significant characteristic is the presence of international judges, the CICC’s Expert Committee is only able to provide advice


79 Supreme People’s Court Monitor (n 65).


82 ibid (n 78).

83 ibid (n 78).

opinions and serve mainly as mediators. Ultimately, the Expert Committee is insufficient to render the court internationally credible.

Furthermore, the absence of bilateral treaties for the enforcement of civil judgments and the limited number of reciprocity partners for the enforcement of foreign court judgments undermine the enforceability and effectiveness of CICC judgments. As of November 2019, China concluded only 39 judicial assistance treaties related to civil matters with other states among the whole 78 OBORI partners. Without a treaty or prior judicial authority from that jurisdiction confirming a relationship of reciprocity, parties in the OBORI will meet increasingly unpredictable commercial risks in an uncertain legal environment. Given the sub-optimal legal environment CICC faces, there seems to be ample room for China to improve its international commercial court as a centre for settlement of OBOR disputes.

CONCLUSION

In light of increasing demand for transnational dispute resolution arising from the OBOR project, China is committed to providing a well-suited legal environment by accelerating the reform of its legal services. In this essay, I have argued that China’s dispute resolution mechanisms have witnessed rapid development, but there is still room for substantial improvement in terms of its level of internationalisation and independence. In support of the varied transactions and co-operation between OBOR states and regions, China has established the CICC, promoted the recognition and enforcement of foreign

85 (Trial) Notice of the General Office of the SPC’s Working Rules for the International Commercial Expert Committee: “[T]he members of the International Commercial Expert Committee serve a four-year term, are appointed by the SPC, and are serving mainly a mediation function.” Erie (n 55).
88 Wilske (n 23) 180.
arbitration awards, and introduced *ad hoc* arbitration in the FTZs. However, the practicability of *ad hoc* arbitration, the enforcement of judgements by the CICC, and its functional limitations have aroused heated controversy. In order to safeguard the confidence of investors and co-operating parties in OBORI projects, an in-depth reform of independence of arbitral and judicial institutions would be welcomed. Ultimately, a successful implementation of the OBORI dispute resolution mechanism would encourage multinational companies to engage in transnational business with China.
How Can the Methodology of Feminist Judgment Writing Improve Gender-Sensitivity in International Criminal Law?

Kathryn Gooding*

ABSTRACT

The Feminist Judgments Project has been utilised in a number of jurisdictions, including the UK, US, Canada and Australia, to critique real-life judicial judgments and to re-write these problematic judgments using feminist judging methodologies. This paper seeks to demonstrate the utility of the application of feminist judging methodologies to judgments and decisions from international criminal law mechanisms, with a specific focus on sexual and gender-based crimes, as a means to improve gender-sensitivity in international criminal judicial decision-making. Through an analysis of feminist judgments and feminist dissenting opinions from the UK, US and International Criminal Court, the main hallmarks of feminist judging are identified. The author uses the hallmarks of feminist judging to create her own Feminist Judgment based on a decision from the Prosecutor v Ongwen case before the International Criminal Court, to display the indeterminacy of judicial decision-making in international criminal law and to demonstrate how greater gender-sensitivity can be achieved at the International Criminal Court through feminist judicial reasoning.

INTRODUCTION

The field of international criminal law has been consistently criticised for its lack of gender-sensitivity. Suzan M. Pritchett argues that international law is a gendered system, which has failed to reflect the experiences or needs of women.¹


Whilst it must be conceded that the attitude of the international bench has improved towards women, and that sexual and gender-based crimes are receiving unprecedented attention, particularly in the International Criminal Court,² significant problems remain. The gendered elements of international crimes are systematically overlooked, and the impacts of sexual and gender-based crimes on men, and the corresponding implications for women, are ignored. Many of these problems stem from the lack of diversity and consequential lack of differing perspectives on the international criminal bench. Hilary Charlesworth and Christine Chinkin argue that there has been a notable lack of women in the development of international law, which has produced a narrow and inadequate jurisprudence, perpetuating the unequal position of women around the world.³

On nine of the twelve international courts, women made up 20 percent or less of the bench in mid-2015.⁴ In the international criminal field, the bench has been defined by a lack of gender diversity. At the time of writing, male judges outnumber female judges on the current bench of the International Criminal Court (ICC) by two to one.⁵ In 2016, all 14 permanent judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) were men.⁶

This lack of gender diversity is highly concerning because there is evidence to suggest that women and men may approach certain legal issues differently. Rosemary Hunter argues that, on the basis of an assessment of English and Welsh judges, non-traditional judges reach different decisions. She claims that female judges can alter the outcomes of cases by bringing a “gendered sensibility”⁷ to the process of decision-making. One reason for this phenomenon may be that all

² See for example ICC Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014).
judges bring their life experience to the process of judging.\(^8\) Female judges have markedly different experiences to male judges, in particular with their experiences of giving birth to and raising children, sexism, and discrimination. These alternative experiences could lead to judgments more accurately reflecting the reality and diversity of human experience, not simply the male life experience.

It is submitted that a means to improve gender-sensitivity in international criminal law would be for judges of the international criminal bench to utilise feminist methodologies of judging in their reasoning and in determining case outcomes. Berger, Crawford and Stanchi argue that feminism strives to embrace justice for all and associates itself with movements for the representation of historically marginalised groups.\(^9\) By prioritising the views and interests of historically marginalised groups, feminist theories allow us to challenge the concepts and rules of the international legal order, which are built on “sexed and gendered hierarchies of difference”.\(^{10}\) This is not to say that by having greater gender diversity on the international bench, there would be an explicit move towards feminist judging. However, greater diversity on the bench is indicative of broader perspectives brought to international judging, as can be seen with the impact that women have on the domestic judging process.

Many feminist judgment projects have arisen around the world, whereby original decisions from different jurisdictions are re-written using feminist methodologies of judging. The first feminist judgments project was originally set up by a group of Canadian legal academics, who published six judgments. These judgments were rewritten opinions of the Canadian Supreme Court, which re-interpreted the Canadian Charter of Rights and Freedoms using feminist reasoning.\(^{11}\) The feminist judgments project was then taken up in 2010 by English feminist scholars, who re-wrote judgments that were problematic from a feminist perspective.

\(^8\) ibid.  
\(^{10}\) Charlesworth and Chinkin (n 3) 44-45.  
perspective.\textsuperscript{12} There have also been similar projects in Australia\textsuperscript{13} and Ireland,\textsuperscript{14} and an international feminist judgments project is also underway.\textsuperscript{15}

Feminist judgment projects are a demonstration that, at the time these cases were decided, the cases could have been reasoned and decided differently. Therefore, they are an alternative means of feminist legal critique.\textsuperscript{16} Feminist judgments projects consider alternative ways in which judgments could have been approached and decided in a fairer way, prioritising overlooked viewpoints and contextualising legal issues. Feminist judgment projects are based on the notion that the law can be considered to be indeterminate, therefore it is possible to make choices between varying interpretations of the law.\textsuperscript{17} This means there is scope for feminist perspectives to enter the process of judging to impact judicial reasoning and outcomes to reach a fairer result. This is because a feminist judge is more likely to consider the specific contextual facts of a case, and to consider how the decision will individually impact historically disadvantaged groups, including women.\textsuperscript{18}

At the moment, there has been very little application of the feminist judgment project to the international criminal law field. The aim of this paper is to show how the feminist judgment project can be applied to the international criminal law field, and how the utilisation of feminist judging methodologies would directly lead to reasoning and case outcomes that prioritise gender-sensitivity. Bringing in alternative perspectives, in this case feminist perspectives, will show the impact that greater diversity in perspectives on the international criminal bench would have on both reasoning and outcomes of cases. In order to

\textsuperscript{12} Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), \textit{Feminist Judgments: from Theory to Practice} (Hart Publishing, 2010).
\textsuperscript{13} Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), \textit{Australian Feminist Judgments: Righting and Rewriting Law} (Hart Publishing 2014).
\textsuperscript{15} Loveday Hodson, Troy Lavers (eds), \textit{Feminist Judgments in International Law} (Hart Publishing 2019).
\textsuperscript{18} Berger, Crawford and Stanchi (n 9).
highlight this, the author will create an international criminal feminist judgment, which will consist of a ‘Feminist Re-Writing’ of the Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives, in the case of The Prosecutor v Dominic Ongwen. This international criminal feminist judgment will use feminist reasoning to highlight the plight of male victims of sexual violence in conflict, and to demonstrate how feminist methodologies can lead to alternative reasoning and case outcomes which prioritise gender-sensitivity in a previously overlooked area of international criminal law. I will take a post-modern feminist perspective to my international criminal feminist judgment. Post-modern feminist theory focuses on the operation of the law in the life of the individual and argues that the law does not simply oppress women and advantage men. Post-modern feminism is also concerned with how the law constitutes identities, such as ‘masculinity’ and ‘femininity’. It prioritises the plurality of different experiences of women and men, and the importance of context in analyses.

The construction of an international criminal ‘Feminist Re-Writing’ necessitates an initial discussion of the features of the feminist mode of reasoning through an analysis of feminist features exhibited in domestic judgments. There will then be an examination of how this mode of reasoning can be applied to international criminal law, specifically utilising the case study of sexual and gender-based crimes against men and boys in conflict. These analyses will then be utilised to re-write the Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives in the case of The Prosecutor v Dominic Ongwen from a feminist perspective.

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19 Prosecutor v Ongwen (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).
20 Charlesworth and Chinkin (n 3) 44-45.
21 ibid.
22 Prosecutor v Ongwen (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).
I. RE-WRITING A JUDGEMENT FROM A FEMINIST PERSPECTIVE - METHODOLOGY

The objective of those writing feminist judgments is to re-write judgments whilst observing the same rules and constraints that the original judges were bound by. This means that those writing feminist judgments must be bound by the same legal rules, the same facts, and the same rules regarding reasoning and judgment-writing that were applied in the original case. Therefore, in writing the Feminist Re-Writing of the Ongwen Decision, I will adhere to the constraints of international criminal law, as well as the constraints created by the original decision itself. This means that in writing the Feminist Re-Writing of the Ongwen Decision, I must abide by certain international criminal procedural principles. As I am re-writing an International Criminal Court decision, I am bound to apply principles found within the Rome Statute to the judgment-writing, particularly Article 22. This is the *nullum crimen sine lege* principle, which specifies that there cannot be the retroactive application of the law to the conduct in question, and that the definition of a crime must be strictly construed and cannot be extended by analogy. An example of this substantive legality approach is evident in Judge Cassese’s Separate and Dissenting Opinion in *Prosecutor v Erdemović*. Judge Cassese argued that a policy-oriented approach in criminal law runs afoot of the *nullum crimen sine lege* principle, and that the majority should have come to their conclusion through recourse to the existing rules of international law. The *nullum crimen sine lege* approach therefore restricts judicial creativity and activism, obliging judges to apply *lex lata*. Furthermore, the Rome Statute guarantees the fair trial rights of the accused through Article 64, and Article 21(3) emphasises that the application and interpretation of the legal sources of the ICC must be consistent with internationally recognised human rights, meaning that all applications of law must be consistent with the rights of the accused to a fair trial. This shows that feminist judgment writing cannot radically reshape the law; it must adhere to the constraints of the law to reach a realistic outcome.

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23 Hunter, McGlynn and Rackley (n 17) 13.
25 *Prosecutor v Erdemović* (Judgment) (Separate and Dissenting Opinion of Judge Cassese) IT-96-22-A (7 October 1997) para 49.
26 ibid.
27 Rome Statute (n 25) arts 64 and 21(3).
In order to identify the features of feminist judgment writing that will be applied to create the Feminist Re-Writing of the Ongwen Decision, I will analyse a number of case studies, made up of ‘real life’ feminist judgments and feminist judgments written by feminist scholars as a critique. These features of feminist judgment writing will then be used in the Feminist Re-Writing of the Ongwen Decision to critique the original decision from a feminist perspective. These case studies all raise feminist issues and have different focuses, all of which are relevant to the Feminist Re-Writing of the Ongwen Decision, even if the facts of the cases vary drastically to the facts of the Ongwen decision.

*Sheffield City Council v E – Feminist Judgment*

Nicola Barker and Marie Fox created a feminist re-writing of this English marriage law judgment. The main issue before the Court was the question of which issues had to be understood before a person could be said to have the capacity to enter a marriage. In the original decision, Munby J decided that the appropriate test for capacity was whether a person understood the “duties and responsibilities that normally attach to marriage”, not whether a person had made a good choice of spouse. This approach was completely rejected by Nicola Barker and Marie Fox in their feminist judgment. They believed that the identity of the partner is central to the form the marriage takes in real life, and so the appropriate test for capacity to marry should be whether E understands the nature of the marriage she intends to enter, and that domestic violence and sexual abuse may be a possible consequence of marrying S, in light of his history of sexual violence.

An important feature of the feminist judgment is that it emphasises the false dichotomy that is portrayed in the original decision between autonomy and agency on the one hand, and vulnerability and victimhood on the other hand. In liberal legal theory, individuals may only be one or the other, and it often results in a position where autonomy is viewed as masculine, and vulnerability as

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28 *Sheffield City Council v E* [2004] EWHC 2808 (Fam) para 19.
29 ibid para 68.
31 Hunter, McGlynn and Rackley (n 17) 22.
feminine. The feminist judgment in this case dispels this myth, and shows that individuals can occupy the positions of both autonomy and vulnerability simultaneously, meaning that a person can be both an agent and a victim.

**R v A (No. 2) – Feminist Judgment**

This was an English criminal evidence case concerning a challenge under the Human Rights Act 1998 to the rape shield enacted in section 41 of the Youth Justice and Criminal Evidence Act 1999. Section 41 concerns the admissibility of sexual history evidence, which prevents the introduction of evidence or questioning about a complainant’s sexual behaviour, unless the court permits it in certain circumstances. However, the question of leave raises questions of relevance of sexual history evidence. This case was decided by a panel of male judges, whose analysis of the concept of ‘relevance’ was drawn from their own male perspectives. The judges came to the conclusion that the straightforward application of section 41 meant that ‘relevant’ evidence could not be submitted and that breached the defendant’s right to a fair trial. Therefore, they pursued an alternative interpretation of section 41 to allow the wider admission of evidence on the issue of consent to sexual relations. The feminist judgment by Clare McGlynn takes a completely different approach to the relevance of sexual history evidence, prioritising the autonomy of the complainant to make a decision to consent to sexual relations. She emphasises the fact that “the choice to engage in sexual activity is always made afresh within the specific circumstances existing at the time.”

An important feature of this feminist judgment is a scepticism of human rights discourse as a means of protection of vulnerable people and women. As rights increase in number, they have a tendency to clash with each other, and often in liberal legalism, the rights of the accused to a fair trial take precedence.
Therefore, in the original decision, the House of Lords held that section 41, which was designed to protect complainants in sexual assault trials from demeaning questioning about their sexual history, was incompatible with a defendant’s right to a fair trial under Article 6 of the European Convention of Human Rights. However, the feminist judgment rejects this finding and shows how the relevant provisions do not conflict with a defendant’s right to a fair trial, and that seemingly conflicting rights can be accommodated with each other.\(^{39}\) In her feminist judgment, Clare McGlynn concludes that Article 6 right to a fair trial is not engaged because she argues that “all substantially relevant sexual history evidence is capable of being accommodated within Section 41’s gateways for the submission of sexual history evidence.”\(^{40}\) McGlynn argues that judges must take into account the right to respect for the private life of the complainant, enshrined in Article 8 of the European Convention on Human Rights, which prevents unnecessarily intrusive questions.\(^{41}\) She argues that a balance must be struck between the various interests at play, and that the defendant still has the ability to submit substantially relevant sexual history evidence through Section 41.\(^{42}\) It is simply that the balancing of the rights means that the defendant does not have the right to have all evidence admitted.

**Judge Sotomayor’s Dissenting Opinion in *Utah v Strieff***

This is an example of a real-life American judgment reflecting feminist theory. In this case, Strieff challenged the admissibility of evidence obtained by police after he was illegally detained.\(^{43}\) The Utah Supreme Court agreed with Strieff, however the US Supreme Court majority reversed that decision.\(^{44}\) Judge Sotomayor dissented and came to the conclusion that police should not be allowed to carry out “unreasonable searches and seizures with impunity”.\(^{45}\) She argued that the majority opinion essentially provided the police permission to carry out illegal stops, so long as the police later found an outstanding warrant for that individual, so to be able to justify earlier searches carried out.\(^{46}\)

\(^{39}\) McGlynn (n 37) 211-227.
\(^{40}\) ibid 224-226.
\(^{41}\) ibid.
\(^{42}\) ibid.
\(^{43}\) *Utah v Strieff* 136 S. Ct. 2056 (2016) [2060].
\(^{44}\) ibid.
\(^{45}\) ibid. (Sotomayor, J., dissenting) paras 2065-2066
\(^{46}\) ibid paras 2067-2068.
Judge Sotomayor’s dissent bears a number of feminist features in both her reasoning and ultimate decision. She wrote from her ‘professional experiences’, by including a number of contextual facts related to race, to explain how “people of colour are disproportionate victims of this type of scrutiny”\(^ {47}\) and to explain the dangers that they face in their encounters with police. She employed feminist practical reasoning to reveal the implications of the majority’s decision, prioritising the individual lived experiences of victims of illegal searches, and emphasising the importance of the autonomy of individuals to be free from illegal searches, as illegal searches “risk treating members of our communities as second-class citizens”.\(^ {48}\) She also moved away from traditional legal authorities and cited law review articles and scholarly books to support her conclusions regarding the dangers that people of colour face when confronted with police, and to explain the difficulties in gaining housing and jobs that those with arrest records face.\(^ {49}\)

**Conclusion**

From these varied case studies, it is possible to see that feminist methodologies prioritise the voiceless, or those who suffer “socially constructed prejudices based on pre-existing power structures”.\(^ {50}\) Feminist reasoning and judging is therefore defined by giving due regard to marginalised voices and experiences, emphasising intersectional experiences of gender, providing social and legal context to issues, drawing upon wider materials such as social science research, and reasoning with reference to actual lived experiences of individuals.\(^ {51}\) The case studies also show that feminist judging is marked by a scepticism of rights discourse, and it attempts to undermine the false and gendered dichotomy of agency and victimhood. These themes and features of feminist judging will all be utilised in the Feminist Re-Writing of the Ongwen Decision, to explore how to better represent the experiences of excluded or marginalised voices, and how greater gender-sensitivity can be gained in international criminal judging through the utilisation of feminist methodologies of judging.

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\(^ {47}\) Berger, Crawford and Stanchi (n 9).

\(^ {48}\) ibid.

\(^ {49}\) ibid.

\(^ {50}\) Enright, McCandless and O’Donoghue (n 14) 52.

II. THE APPLICATION OF FEMINIST JUDGING METHODOLOGIES TO INTERNATIONAL CRIMINAL LAW: CASE STUDY OF MALE VICTIMS OF SEXUAL VIOLENCE IN CONFLICT

Introduction

In order to explore the utility of applying feminist methodologies to international criminal judgments, I will use a case study that explores the issue of sexual violence against men and boys in conflict through a feminist lens. This will show how feminist methodologies to judging can have varied application to various areas within international criminal law that do not solely focus on implications for women. In the following section, I will determine the extent to which sexual violence against men and boys has been historically neglected by international criminal courts and tribunals. Through a feminist re-writing of a problematic ICC decision, arising out of the Prosecutor v Dominic Ongwen, specifically the Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives,52 I will explore how feminist judging methodologies can be utilised to ameliorate the attitude of the international legal community towards male victims of sexual violence, and show more generally, how feminist judging methodologies can be used to prioritise historically side-lined issues and perspectives, and lead to fairer outcomes. This analysis will demonstrate how feminist judging is a useful lens through which one can grapple with issues that do not contain conventional feminist concerns. This examination necessitates an initial discussion about male victims of sexual violence, how this can be considered to be a feminist issue, and the problems with international criminal law’s attitudes towards sexual and gender-based violence, particularly against men and boys.

52 Prosecutor v Ongwen (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).
Overview: Sexual Violence against Men and Boys in Conflict-Settings

Sexual violence against men and boys has been prevalent throughout history, and has been reported in at least 25 conflict or repressive situations in the last three decades: in Argentina, Central African Republic, Democratic Republic of the Congo, Greece, and Northern Ireland, to name but a few. Kampala-based Refugee Law Project found that through assessing male refugee populations from eastern Democratic Republic of the Congo, the NGO found that more than one in three men had experienced sexual violence in their lifetime. Despite the high numbers of men and boys affected by sexual violence, particularly in conflict settings, their plight has been consistently overlooked by the international criminal legal system, investigators and healthcare professionals.

There are many compounding reasons why male victims of sexual violence have been overlooked. A significant reason is that there is a substantial lack of reporting by male victims to the competent authorities due to stigma, shame and perceived loss of masculinity integral to social standing within a community. A study carried out by Refugee Law Project found that 67 countries criminalise men who report abuse due to the criminalisation of same-sex acts. Therefore, victims who report to the police are at risk of being arrested. Furthermore, the victims may not view their victimisation as sexual because it might be that they have an assumption that men cannot be raped due to their cultural or societal background. This aligns with many of the reasons why male sexual violence is overlooked by investigators, medical and humanitarian personnel. These personnel may also

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55 ibid.
56 ibid.
57 Refugee Law Project (n 54).
assume that men will not be targeted with sexual violence, they may not be trained to recognise signs of male sexual violence, and they may assume that only rape constitutes sexual violence, rather than recognising that other acts, such as castration and forced sexual acts, can also constitute sexual violence.\textsuperscript{59} This reinforces the view that only women and girls can be victims of sexual violence, leading to it being denoted on the international level as something committed ‘against women and girls’, as Sivakumaran explains is the prevalent term used in United Nations Resolutions.\textsuperscript{60} Sexual violence against men and boys during conflict occurs for many of the same reasons as sexual violence committed against women and girls. Rape is a crime of domination and control, often used to humiliate, degrade, disempower and terrorise a civilian population. For example, in Bosnia, rape was an instrument of ethnic cleansing, used to terrorise a population from a certain ethnic group in order to force the population to abandon its territory.\textsuperscript{61} However, sexual violence against men and boys also occurs for reasons that are different to female sexual violence. Masculinity and victimhood are seemingly inconsistent, as the concept of hegemonic masculinity positions the heterosexual male at the top of the gender hierarchy.\textsuperscript{62} Deviating from this norm is to emasculate the victim, as male victims of sexual violence embody subordinate masculinities, who are seen as ‘abnormal’ due to the sexual violence casting aspersions of homosexuality.\textsuperscript{63} Therefore, sexual violence against male victims functions to masculinise and empower the perpetrator, and to feminise and conquer the victim, and by extension, the community.\textsuperscript{64}

**Feminist Implications**

It is paramount to recognise that feminist reasoning can be applied to scenarios that are not strictly concerning women, as demonstrated by the focus on male victims of sexual violence in the present discussion. Nancy E. Dowd

\textsuperscript{59} ibid.

\textsuperscript{60} Sandesh Sivakumaran, ‘Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict’ (2010) 92 International Review of the Red Cross 259.

\textsuperscript{61} Joshua Goldstein, *War and Gender* (CUP 2004), 362.


explains that examining men is a feminist issue, and that instead of focusing exclusively on women’s equality, it is also necessary to acknowledge when men and boys are also disadvantaged by constructions of hegemonic masculinity.\textsuperscript{65} Examining men through a feminist lens does not mean that women will be considered less in academic discourse. It simply provides for a more realistic understanding of gender subordination, which can also include the subordination of men. If this approach is utilised on the international criminal level, the utility of which will be exemplified in the upcoming feminist re-writing of the \textit{Ongwen} Decision, there will be far greater gender-sensitivity amongst judges and decision-makers who will ultimately be able to examine the true cost of war on both men and women.

Discourses of gender dictate the very distinction between combatant and victim. A traditional construction of war is of a male soldier, and his masculinity is defined in relation to his ability to function as a combatant, and as a “protector”.\textsuperscript{66} This construction depends on an “other”, constructed as feminine, and as denoting victimhood.\textsuperscript{67} Women are consistently portrayed as being in need of protection and of being incapable of overcoming the binary of protector/protected, to become protectors themselves.\textsuperscript{68} However, sexual violence against men undermines these binaries. It is a means of feminising the enemy, and at the same time constructs the armed perpetrators as masculine. This means that male victims of sexual violence are portrayed as female, and thus victims. Moreover, treating sexual violence as something that happens frequently to anyone during war, whether to women, men or children, would create a more accurate representation of war, and would undermine the construction of “women as rape victims”, which denotes victimhood and weakness.\textsuperscript{69} This would undermine the traditional binary of masculine/combatant and feminine/victim. Therefore, the plight of male victims of sexual violence during war is in fact a feminist issue, and one which exemplifies the flexibility of feminist discourses to

\textsuperscript{66} Helen M Kinsella, ‘Securing the Civilian: Sex and Gender in the Laws of War’ in Michael Barnett and Raymond Duvall (eds), \textit{Power in Global Governance} (CUP 2005), 249-272.
\textsuperscript{67} Goldstein (n 61) 251.
\textsuperscript{68} Kinsella (n 66).
take into account gender perspectives which have been historically overlooked on the international level.

International Criminal Law and Sexual Violence against Men and Boys

The issue of the historic neglect of male victims of sexual violence in international criminal law must be contextualised, to understand that initially sexual violence was rarely dealt with on the international level, and that the law of armed conflict and international criminal law were slow to address the issue of sexual violence against women. It is necessary to show that inroads have been made to improve gender-inclusivity at the international criminal level, however, much remains to be done. Suzan M. Pritchett argues that international law itself is a gendered system, which has “failed to reflect the experiences or needs of women.”70 She argues that these entrenched attitudes have meant that violence against women was consistently overlooked, as sexual violence was considered to be something that occurred against women in the domestic sphere.71 This meant that in early international criminal prosecutions, wartime sexual violence against women was hardly accounted for. The Charter for the Nuremberg International Military Tribunal failed to include any form of sexual violence as a crime within the jurisdiction of the Tribunal.72 Rape was included as a Crime Against Humanity under Control Council Law No. 10.73 However, other sexual and gender-based crimes were hardly touched upon during the trials.74

The formation of the ICTY and ICTR were huge turning-points in the recognition of female victims of sexual violence. In Akayesu, the ICTR defined rape as a weapon of war that can constitute an act of genocide, and found that the rape of Tutsi women was systematic and accompanied by a specific intent to

71 ibid.
72 Charter of the International Military Tribunal (adopted 08 August 1945, entered into force 08 August 1945) 82 UNTS 279.
73 Control Council Law No. 10 (20 December 1945), art II(1)(c).
kill those women.\textsuperscript{75} The ICTY and ICTR were the first to prosecute wartime rape as a crime against humanity.\textsuperscript{76}

Despite these inroads, and the explicit move towards greater gender-sensitivity on the international criminal level, the international criminal tribunals consistently overlooked the plight of male victims of sexual violence. This attitude has led to two main issues, whereby sexual violence is often not charged in any form in the indictment, even if there is evidence provided that sexual violence did occur against men and boys. Furthermore, even where sexual violence has been prosecuted, it has often not been characterised as sexual violence. Touquet and Gorris argue that these challenges remain due to the implicit gender-stereotypes among judges, prosecutors and investigators, of women being the sole victims of sexual and gender-based violence, and of rape being the only form of sexual violence.\textsuperscript{77} This perpetuates the invisibility of male victims of sexual violence, and demonstrates the continued ignorance of the international criminal courts towards the modalities and actors involved in sexual violence perpetrated against both men and women in war.

The RUF case before the Special Court for Sierra Leone demonstrates the case where sexual violence against men and boys is not represented in any form in the indictment even though evidence of sexual violence against men and boys emerges. The indictment refers to the “widespread sexual violence committed against civilian women and girls [which] included brutal rapes, often by multiple rapists and forced ‘marriages’”.\textsuperscript{78} However, evidence of sexual violence against men and boys arose in the trial.\textsuperscript{79} This was a deeply problematic formulation, as limiting the charges to civilian women and girls meant that witness testimony on sexual violence against men and boys could not form the basis of any conviction.\textsuperscript{80}

In other cases, when male sexual violence has been prosecuted, it has often not been characterised as sexual violence. It has more often been characterised as

\textsuperscript{75} Prosecutor v Akayesu (Judgment) ICTR-96-4-T (2 September 1998) at 732.

\textsuperscript{76} Vojdik (n 64).

\textsuperscript{77} Touquet and Gorris (n 58).

\textsuperscript{78} Prosecutor v Sesay, Kallon and Gbao (Indictment) SCSL-04-15-T (13 May 2004) para 54.


\textsuperscript{80} Sivakumaran (n 55).
torture and inhuman treatment at the ICTY and ICTR. Part of the reason for this is that the Statutes of the ICTY and ICTR only made explicit reference to rape,\textsuperscript{81} and did not make explicit reference to any other form of sexual violence, such as sexual slavery or a residual category of “any other form of sexual violence”. Therefore, ICTY and ICTR Prosecutors were forced to fit evidence of sexual violence under other categories, that being the crime against humanity or war crime of torture, the crime against humanity of inhuman treatment, or the war crime of cruel treatment. In Tadić, ‘oral sexual acts’ and sexual mutilation were charged in the indictment as torture or inhuman treatment, and wilfully causing great suffering, among others.\textsuperscript{82} In Simić \textit{et al.}, the ICTY Trial Chamber characterised as torture the assault of a detainee with a police truncheon and forcing male detainees to perform oral sex on each other and on the perpetrators.\textsuperscript{83}

However, this has been an issue at the ICC even though the Rome Statute explicitly lists other acts of sexual violence as crimes against humanity or war crimes.\textsuperscript{84} In the Kenyatta case, the forced circumcision of men and penile amputation, even though they were prosecuted by the Office of the Prosecutor as ‘other forms of sexual violence’ as part of the crimes against humanity charge,\textsuperscript{85} were not considered to be forms of sexual violence by Pre-Trial Chamber II in the confirmation of the charges. Pre-Trial Chamber II stated that they were not acts of a sexual nature, and should instead be prosecuted as the crime against humanity of ‘other inhumane acts’.\textsuperscript{86} The Pre-Trial Chamber reached this decision “in light of the serious injury to body that the forcible circumcision causes and in view of its character.”\textsuperscript{87} The Pre-Trial Chamber’s analysis shows that it viewed

\begin{footnotesize}
\textsuperscript{81} Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 UN SC res. 827) (ICTY Statute) art 5(g); Statute of the International Criminal Tribunal for Rwanda (adopted 08 November 1994 UN SC res. 955) (ICTR Statute) art 3(g).

\textsuperscript{82} Prosecutor \textit{v} Tadić (Indictment) IT-94-1-I (14 December 1995) at counts 8-11.

\textsuperscript{83} Prosecutor \textit{v} Simić (Judgment) IT-95-9-T (17 October 2003) at para 728 and 772.


\textsuperscript{85} Prosecutor \textit{v} Kenyatta (Decision on Prosecutor’s Application for Summonses to Appear) ICC-01/09-02/11 (8 March 2011) at para 27.

\textsuperscript{86} ibid.

\textsuperscript{87} ibid.
\end{footnotesize}
penile amputation as not sufficiently sexual, and as more of a physical injury, overlooking the fact that violence to sexual organs causes great physical injury.

It is highly problematic that sexual violence is not being prosecuted as such, and acts are not being recognised for their sexual nature. Erikkson argues that rape must be understood as a sexual manifestation of aggression, because this allows the courts a greater appreciation of the other methods used to subjugate an enemy group in armed conflict.\textsuperscript{88} By not recognising sexual violence as such, this overlooks the methods used by groups to cause terror and to dominate a population. Also, if male sexual violence is not labelled as such, it perpetuates the idea that sexual violence is a crime that only affects women and girls,\textsuperscript{89} conflating femininity with weakness and victimhood. This undermines the emotional and physical damage suffered by the men and boys,\textsuperscript{90} and renders male victims invisible.

The ICC has made a number of improvements, indicating that it may be pursuing a gender-inclusive approach. In 2014, the Office of the Prosecutor of the ICC released a policy paper on sexual and gender-based crimes. The policy paper refers to “victims” in gender-neutral terms and defines sexual and gender-based violence in broad terms, including “non-sexual attacks on women, girls, men and boys because of their gender”, to ensure that the term represents the full spectrum of violence that any person may experience.\textsuperscript{91} Also, the ICC case law is signalling a gender-inclusive approach. In\textit{ Bemba}, the accused was convicted of murder, rape and pillage under command responsibility.\textsuperscript{92} This was the first ICC case that explicitly charged and convicted an accused of crimes of sexual violence against men and boys, as well as women and girls.\textsuperscript{93} Despite this move towards greater gender-sensitivity within the ICC, many issues remain. The latest problematic development within the ICC concerns the\textit{ Ongwen} case before the Trial Chamber. The issues arising from this case will be analysed, and re-

\textsuperscript{88} Maria Erikkson, \textit{Defining Rape: Emerging Obligations for States Under International Law?} (Martinus Nijhoff Publishers 2011), 58.
\textsuperscript{89} Oosterveld (n 79).
\textsuperscript{90} Vojdik (n 64).
\textsuperscript{91} ICC Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014), 3-5.
\textsuperscript{92} \textit{Prosecutor v Bemba} (Judgment) ICC-01/05-01/08 (21 March 2016) at 752.
interpreted utilising feminist judging methodologies in order to construct a Feminist Re-Writing of a Decision taken from *Ongwen* that prioritises gender-sensitivity.

### III. DECISION ON THE LEGAL REPRESENTATIVE REQUEST FOR RECONSIDERATION OF THE DECISION ON WITNESSES TO BE CALLED BY THE VICTIMS REPRESENTATIVES IN THE CASE OF *THE PROSECUTOR V DOMINIC ONGWEN*

**Background**

Dominic Ongwen was a leader of the Lord’s Resistance Army, an insurgent group that has been fighting against the Government of Uganda since 1987.\(^{94}\) The LRA has been involved in a campaign of extreme violence against civilians and Ugandan soldiers, which has included acts of murder, sexual violence, mutilation, and the abduction of children.\(^{95}\)

The International Criminal Court issued a warrant for his arrest, and the arrest of other LRA leaders, including Joseph Kony, who remains at large. Ongwen was charged with crimes against humanity under Article 7 of the Rome Statute, and war crimes under Article 8 of the Rome Statute, for direct and indirect perpetration of acts of murder, torture, cruel treatment, enslavement, pillaging, persecution, conscription and use of child soldiers.\(^{96}\) He was also charged with a number of sexual and gender-based crimes as crimes against humanity and war crimes, including forced marriage, torture, rape, sexual slavery, enslavement and outrages upon personal dignity.\(^{97}\) These charges also included charges for direct and indirect co-perpetration. However, significantly, the sexual and gender-based crimes were stated in the Decision on the Confirmation of Charges as only in relation to women and girls.\(^{98}\) The charges of direct perpetration of sexual and

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\(^{95}\) ibid.

\(^{96}\) *Prosecutor v Ongwen* (Decision on the Confirmation of Charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016).

\(^{97}\) ibid paras 86-141.

\(^{98}\) ibid para 102.
gender-based crimes related to eight identified women and girls.\textsuperscript{99} The charges of indirect perpetration only concerned evidence of the abduction of women and girls with a view to them becoming ‘wives’, where the women were forced to serve as domestic servants, as forced exclusive conjugal partners, and as sexual slaves.\textsuperscript{100} This is very problematic from a feminist perspective, as formulation of the sexual and gender-based crimes in this way, as limited solely to acts committed against women and girls in this specific context, means that witness testimony concerning different sexual and gender-based crimes committed in a different context against men and boys cannot form the basis of a conviction. This also created problems when evidence of sexual violence against men and boys came to light, and the Legal Representatives of Victims (LRVs) sought to submit witness testimony to this effect.

\textbf{Procedural History}

The LRVs sought leave to present factual witnesses on a number of issues before Judgment, including the infliction of sexual violence on men and boys in the context of attacks on IDP camps and in the context of the abduction and abuse of child soldiers,\textsuperscript{101} despite the fact that the charges for sexual and gender-based crimes in the indictment only concerned acts committed against women and girls in the context of their abduction and their subsequent use as ‘wives’. The LRVs argued that it was important for the Chamber to hear this evidence, in order to emphasise that the sexual violence committed by the LRA was not limited to women and girls, and that a significant number of men and boys were victims of rape, were forced to carry out rapes, or were forced to sexually abuse the bodies of those killed.\textsuperscript{102} The LRVs argued that hearing this evidence would assist the Chamber in creating a holistic and accurate understanding of the type of violence utilised by the LRA,\textsuperscript{103} and that it was necessary to hear the evidence due to the need for the ICC to recognise this type of harm, in light of the under-reporting,

\textsuperscript{99} ibid para 102-135.
\textsuperscript{100} ibid para 136-140.
\textsuperscript{101} Prosecutor v Ongwen (Victims’ request for leave to present evidence and to present victims’ views and concerns in person) ICC-02/04-01/15-1166 (2 February 2018) paras 16 and 21.
\textsuperscript{102} ibid.
\textsuperscript{103} ibid para 17.
stigma and shame attached to sexual violence against men and boys, particularly in Uganda.\textsuperscript{104}

The Trial Chamber determined that the proposed topic of the infliction of sexual violence on men and boys “exceeded the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber.”\textsuperscript{105} The Chamber emphasised that the charges for sexual and gender-based crimes concerned solely crimes against women and girls.\textsuperscript{106} As the acts described in the proposed testimony by the factual witnesses would concern sexual violence against men and boys, the Chamber determined that the evidence would be beyond the scope of the charges, and rejected the request by the LRVs to call these factual witnesses.\textsuperscript{107}

The LRVs submitted a request for reconsideration of the Decision of the Trial Chamber to exclude the testimony of witnesses regarding sexual violence against men and boys,\textsuperscript{108} and this led to the Trial Chamber ‘Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives’, which is the subject of the Feminist Writing and discussion of gender-sensitivity at the ICC.

The Original Decision

Relevance of Evidence of Sexual and Gender-Based Violence to the Confirmed Charges

From a feminist perspective, the Chamber’s Decision was highly problematic. The Chamber provided a superficial discussion as to how there was not an error of reasoning in the original Decision. The Chamber restated the finding that presenting evidence on sexual violence against men and boys would “exceed the facts and circumstances of the sexual and gender-based crimes in this

\textsuperscript{104} ibid para 20.
\textsuperscript{105} Prosecutor v Ongwen (Decision on the Legal Representatives for Victims Requests to present Evidence and Views and Concerns and related requests) ICC-02/04-01/15-1199-Red (6 March 2018) para 57.
\textsuperscript{106} ibid.
\textsuperscript{107} ibid para 57-59.
\textsuperscript{108} Prosecutor v Ongwen (Request for reconsideration of the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests”) ICC-02/04-01/15-1203 (12 March 2018).
case”,\textsuperscript{109} as the sexual and gender-crimes charges confirmed by the Pre-Trial Chamber were restricted to sexual and gender-based crimes committed against women and girls in the context of their abduction to become ‘wives’. As the Prosecution did not bring forward charges of sexual and gender-based crimes that could encompass the evidence of sexual violence against men and boys, it was important that the Chamber nevertheless encompassed the evidence of male sexual violence in other confirmed charges, such as the charges of conscription of child soldiers, as the LRVs submitted that sexual violence against men and boys was used as a means in which to forcibly recruit child soldiers.\textsuperscript{110} This approach would have ensured that the lived experiences of men and boys affected by sexual violence were reflected on the Chamber record. However, the Chamber failed to do this.

In rejecting the evidence of male sexual violence, the Court has contributed to the continued invisibility of male victims of sexual violence, who already suffer from high levels of stigma, shame, fears of emasculation, and fears of being branded as homosexual, particularly in Uganda due to the presence of laws that criminalise same-sex acts. The Court had an opportunity to shed light on these issues through encompassing the evidence in non-sexual and gender-based crimes charges, such as in the charges of torture as a crime against humanity. Significantly, there is also evidence to suggest that sexual violence was utilised as a means in which to recruit child soldiers, whereby sexual violence was used as a means to terrify child soldiers into submission.\textsuperscript{111} Furthermore, there is evidence to suggest that sexual violence was used as a means to establish control over abductees.\textsuperscript{112} The Chamber had the opportunity to consider the gendered implications of these other crimes, such as the crime of conscription of child soldiers and the crime of enslavement, which posed an opportunity to understand the different modalities of sexual violence, as an instrument to terrify for varying purposes. The Chamber’s disregard for the importance of hearing evidence of male sexual violence evidences the Chamber’s lack of gender-sensitivity, and its reinforcement of the invisibility of male sexual violence survivors.

\textsuperscript{109} Prosecutor v Ongwen (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018) paras 8-10.
\textsuperscript{110} Prosecutor v Ongwen (n 108) para 18.
\textsuperscript{111} ibid para 18.
\textsuperscript{112} ibid para 18.
Establishment of the Truth

The Chamber noted that the LRV was concerned that the exclusion of the evidence would undermine the establishment of the truth in the proceedings.\(^{113}\) In response to this concern, the Chamber merely asserted that not granting leave to call the witnesses is “not a determination on the truthfulness of the allegations.”\(^{114}\) This overlooks the fact that the Chamber Decisions and Judgments are an important record of the events and acts committed by Ongwen. By omitting male victims of sexual violence from the official record of acts committed by the LRA, the Chamber is contributing to the continued neglect of attention to male victims of sexual violence in international criminal law, ignoring their suffering during the atrocities committed by the LRA. This also reinforces the perception that only women and girls are victims of such crimes. This again contributes to the invisibility of male victims of sexual violence and overlooks the importance of their testimony in establishing the facts.

Fair Trial Concerns

The Chamber also emphasised that the rights of victims to participate in Court proceedings, pursuant to Article 68(3) of the Rome Statute, need to be balanced with the Article 67 rights of the accused, without attempting to reconcile both sets of rights.\(^{115}\) It simply allows the superiority of the rights of the accused in this case, without exploring how the manifestation of the rights of the male victims to participate in this case would undermine the rights of the accused, and how both sets of rights could be reconciled in these circumstances, to allow for the representation of the interests and experiences of male victims of sexual violence in the proceedings before the Chamber.

Conclusion

In this Decision, the Chamber displayed a lack of gender-inclusivity, as it did not recognise the gendered implications of sexual violence and other crimes, which has contributed to the invisibility of male victims of sexual violence. The next section contains the Feminist Re-Writing of the ‘Decision on the Legal

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\(^{113}\) Prosecutor v Ongwen (n 109) para 12.

\(^{114}\) ibid para 12.

\(^{115}\) ibid para 12.
Representative for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives’. The Feminist Re-Writing will seek to confront the issues highlighted above and improve the reasoning and outcomes using feminist judging methodologies.
TRIAL CHAMBER IX

Before: Judge Kathryn Gooding

SITUATION IN UGANDA
IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives

Trial Chamber IX (‘Chamber’) of the International Criminal Court (‘Court’), in the case of The Prosecutor v. Dominic Ongwen, having regard to Articles 64(2), 67(1), 68(3), 69(3) of the Rome Statute (‘Statute’), issues the following ‘Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives’.\(^{116}\)

I. Procedural history and submissions

1. On 2 February 2018, the CLRV and LRV\(^{117}\) filed their final lists of witnesses and requests for leave to present evidence.

2. On 6 March 2018, the Chamber issued its Decision on the CLRV and LRV requests, allowing the CLRV to call three witnesses and the LRV to call four witnesses.\(^{118}\) The Chamber rejected the remainder of the

\(^{116}\) Prosecutor v Ongwen (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).

\(^{117}\) Prosecutor v Ongwen (Victims’ requests for leave to present evidence and to present victims’ views and concerns in person) ICC-02/04-01/15-1166 (2 February 2018).

\(^{118}\) Prosecutor v Ongwen (Decision on the Legal Representatives for Victims Request to Present Evidence and Views and Concerns and related requests) ICC-02/04-01/15-1199-Red (6 March 2018).
requests, including the LRV requests to present factual witnesses on the issues of sexual violence inflicted against men and boys (‘Decision’).\(^{119}\)

3. On 12 March 2018, the LRV filed a request for reconsideration (‘Request’).\(^{120}\) The LRV recommends that the Chamber re-examines its decision not to call the witnesses who seek to provide testimony about the infliction of sexual violence against men and boys by the Lord’s Resistance Army (‘Anticipated Testimony’).\(^{121}\)

4. The LRV recognises that the power of the Chamber to reconsider its own decisions is exceptional.\(^{122}\) However, it argues that reconsideration is justified, as the Chamber committed an error of reasoning\(^{123}\) in rejecting the request to call the three witnesses, which causes an injustice.\(^{124}\)

II. Analysis

5. Reconsideration of a Decision is an exceptional measure, which can only be done if a clear error of reasoning has been demonstrated or where it is necessary to prevent an injustice.\(^{125}\)

6. The LRV submits that the Chamber erred in finding that the testimony on the subject of sexual violence against men and boys is beyond the scope of the charges. The LRV argues that because Charges 50 to 68 of the indictment concern sexual violence specifically against women and girls, it is true that the acts in the Anticipated Testimony are not within the scope of these charges. However, the LRV submits that the topics

\(^{119}\) ibid.
\(^{120}\) Prosecutor v Ongwen (Request for reconsideration of the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests”) ICC-02/04-01/15-1203 (12 March 2018).
\(^{121}\) ibid para 42.
\(^{122}\) ibid paras 38-41.
\(^{123}\) ibid paras 10-26.
\(^{124}\) ibid paras 27-37.
of the Anticipated Testimony are covered by the other charges in the indictment.  

Prosecutorial Strategy

7. The Chamber considers that it is unfortunate that the Prosecutor did not reflect evidence of sexual violence against men and boys in charges 50 to 68 relating to sexual and gender-based violence against women and girls. As the Anticipated Testimony is not part of the facts and circumstances described in the charges for sexual and gender-based crimes against women and girls, the Anticipated Testimony would be beyond the scope of these charges. It notes the difficulties in investigating sexual violence perpetrated against men and boys stemming from the lack of visibility and under-reporting of this violence, in light of the stigma, fears of emasculation and criminalisation of same-sex acts in Uganda. Accordingly, it is paramount that the Prosecutor considers the various gendered implications of crimes against both men and women during the investigatory stages, to ensure that sexual violence against men and boys is recognised for its sexual nature in the confirmation of the charges, and that the plight of men and boys is not overlooked.

Relevance of Evidence of Sexual and Gender-Based Violence to the Confirmed Charges

8. In this Decision, as the charges have already been confirmed, the Chamber will analyse how evidence of sexual violence against men and boys may support the facts and circumstances described in the other charges brought by the Prosecutor. The Chamber considers that rapes committed during the attack in Abok IDP Camp by LRA fighters against civilian men both in the camp, and once abducted by the fighters, would come within a number of the charges:

- Charges 42-45: Torture, cruel treatment and inhumane acts as war crimes and crimes against humanity under Articles 7(1)(f), 7(1)(k) and 8(2)(c)(i) of the Statute.

126 Prosecutor v Ongwen (n 120) paras 11-26.
- Charge 49: Enslavement as a crime against humanity under Article 7(1)(c) of the Statute;
- Charge 69: The conscription of children into an armed group as a war crime under Article 8(2)(e)(vii) of the Statute.

9. It has been well established that rape constitutes an act of torture. The Kunarac et al. ICTY Appeals Chamber held as follows:

Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.\(^{127}\)

10. The Mucić et al. ICTY Appeals Chamber held as follows:

It is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. [...] Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture.\(^{128}\)

11. The sexual violence was perpetrated for the purpose of punishment, intimidation and humiliation. It was also linked to the widespread and systematic attack against the civilian population in Abok IDP Camp, as well as the wider armed conflict. The Chamber finds that the evidence is not sufficient to prove the elements of the crimes on its own, however the evidence is sufficiently relevant to the elements of the charges to be able to be considered to be within the scope of the charges of torture, cruel treatment and inhumane acts as crimes against humanity and war crimes.

12. The Chamber notes that sexual violence was a means in which child soldiers were recruited, whereby they were terrorised by the LRA into

\(^{127}\) Prosecutor v Kunarac et al. (Appeal Judgment) IT-96-23/1-A (12 June 2002) paras 149-151.

\(^{128}\) Prosecutor v Mucić et al. (Judgment) IT-96-21-T (16 November 1998) paras 495-496.
subvention. This is similarly the case for adult abductees who were enslaved by the LRA, whereby sexual violence was a means of intimidation through which the LRA established control over abductees.

13. Whilst the Chamber considers that it would have been preferable for the sexual nature of the crimes to be recognised and reflected by appropriate sexual and gender-based crimes charges within the indictment, it is paramount that the experiences of the men and boys affected are nevertheless represented within Trial proceedings, and the opportunity arises for the accused to answer the allegations. The Chamber concludes that the Chamber erred in finding that the Anticipated Testimony would be beyond the scope of the charges of the indictment.

**Establishment of the Truth**

14. The Chamber notes the LRV’s concerns regarding injustice stemming from the lack of establishing the truth regarding the allegations contained in the Anticipated Testimony. The Chamber recognises the lack of jurisprudence and explicit recognition of sexual violence against men and boys in wider society. It recalls studies that show that the majority of international attention is focused on female victims of sexual violence. Men and boys in Uganda are particularly discouraged from disclosing sexual violence perpetrated against them due to societal assumptions that men cannot be raped, as it is the antithesis of being ‘masculine’ and autonomous. Studies show that to be raped is to be feminised, and so emasculated, denoting connotations of victimhood

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130 Graham Carrington and Elena Naughton, ‘Unredressed Legacy: Possible Policy Options and Approaches to Fulfilling Reparation in Uganda’ (International Center for Transitional Justice, December 2012).


and weakness to both the victim and wider community.\textsuperscript{133} Sexual violence against men and boys is also highly stigmatised in Uganda leading to very few reports made by male victims of sexual violence, due to fears of being branded as homosexual, and the corresponding fear of being prosecuted for sodomy under Ugandan law.\textsuperscript{134}

15. The Chamber considers that allowing men and boys to testify would show that they can be both victims and agents. It would empower the victim, create a more accurate record of the alleged atrocities, and engender greater prominence of the issue of male victims of sexual violence. The Chamber emphasises that it would more accurately establish the truth in this case.

\textit{Fair Trial Concerns}

16. The Chamber notes that Article 68(3) and Article 69(2) read together grants victims leave to present evidence where the personal interests of the victims are affected, where the presentation of evidence is consistent with the rights of the accused under Article 67(1), where the hearing of evidence is appropriate and affects the issues in the case, and the hearing of evidence is necessary for the determination of the truth.\textsuperscript{135} Therefore, it is important to reconcile the rights of participation of the victims and the rights of the accused to a fair trial.

17. In response to the LRV’s requests for leave to call witnesses, the Defence submitted that the LRV failed to submit a list of evidence.\textsuperscript{136} The Defence alleges that this failure violates the accused’s right to have adequate time and facilities for the preparation of his defence and to examine the witnesses against him, pursuant to Article 67(1)(b) and (e).\textsuperscript{137}

\textsuperscript{133} ibid.
\textsuperscript{134} ibid.
\textsuperscript{135} Prosecutor \textit{v} Ongwen (n 118) para 15.
\textsuperscript{136} Prosecutor \textit{v} Ongwen (n 120) para 11.
\textsuperscript{137} ibid para 11.
18. The Chamber indicates that the rights of participation of the victims and the rights of the accused to a fair trial can be reconciled, where the Defence is given the opportunity to examine the witnesses who testify and where the Defence has adequate opportunity to prepare its defence, pursuant to Article 67(1)(b) and (e). This necessitates the disclosure of evidence the LRV intends to use and the identities of the witnesses sufficiently in advance. 138 Accordingly, the rights of the accused to a fair trial do not preclude the testimony of male victims of sexual violence, so long as disclosure is carried out sufficiently in advance.

19. In respect of the exceptionality of reconsideration, the Chamber finds that the omission of evidence and the lack of opportunity to testify would harm already vulnerable male victims, and would misrepresent the events that occurred. It is paramount that the Trial Judgment reflects as accurately as possible the harms perpetrated against the victims. Accordingly, the Chamber considers that these factors justify the exceptionality of the measure of reconsideration.

20. Accordingly, the Chamber considers that there are exceptional circumstances justifying the reconsideration of the Decision and consequently accepts the Request.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ACCEP Ts the Request.

138 ibid para 20.
IV. COMMENTARY ON THE FEMINIST RE-WRITING

This section serves as a commentary to the ‘Feminist Re-Writing’ of the Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives. In this commentary, there will be a discussion of the explanations for the various decisions within the case as well as the feminist justification for these decisions. There will also be an explanation of the feminist methodology used for the reasoning, which will utilise the features of feminist reasoning extracted from the feminist judgments in Section 2, ‘Re-Writing a Judgment from a Feminist Perspective – Methodology’.

Prosecutorial Strategy

Paragraph seven of the ‘Feminist Re-Writing’ articulates how it is unfortunate that the Prosecutor failed to reflect the evidence of sexual violence against men and boys in the charges, as the sexual and gender-based crimes charges are only in relation to acts committed against women and girls.\(^{139}\) This paragraph acts as a plea for greater gender-sensitivity at the investigatory stage. Prosecutors must recognise the modalities of sexual violence, particularly as against men and boys. Consequently, they must take into account how much longer it will take to investigate this evidence, as it will take a significant amount of time to establish a relationship of trust with the victim, to allow them to open up about their experiences of sexual violence.\(^{140}\) Furthermore, this evidence frequently remains hidden out of fear on the part of the victim of being ostracised from their communities or of being accused of consensual homosexual activity, and of being prosecuted as such.\(^{141}\) Therefore, paragraph seven serves as a call to the Prosecution to seek out excluded voices and experiences, in this case of male

\(^{139}\) Prosecutor v Ongwen (Decision on the Confirmation of Charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016). paras 86-141.


victims of sexual violence. This is feminist reasoning similar to that utilised by Judge Sotomayor in her Dissenting Opinion in *Utah v. Strieff*, in which she prioritises the often-overlooked experiences of victims of illegal searches and how illegal searches perpetuate racial divides in society.\textsuperscript{142} However, this paragraph also warns that this will entail a longer investigatory period, as it is more difficult to bring this type of evidence to light.

**Relevance of Evidence of Sexual and Gender-Based Violence to the Confirmed Charges**

Paragraphs eight to thirteen of the ‘Feminist Re-Writing’ reach an alternative conclusion to that of the Original Decision, in that the Feminist Re-Writing finds that evidence of sexual violence against men and boys can be encapsulated by the other charges, such as torture, enslavement, and conscription and use of child soldiers, and thus the evidence is not beyond the scope of the charges. Paragraph thirteen notes that it would have been preferable that appropriate sexual and gender-based crimes charges were confirmed, so that the sexual violence against men and boys could be recognised for its sexual nature. As elaborated upon previously, if sexual violence against men and boys is not labelled as such, it perpetuates the idea that only women and girls can be victims of sexual violence.\textsuperscript{143} This therefore conflates femininity with weakness and victimhood. It is necessary to dispel these myths and to understand more fully the specific harms suffered by male victims of sexual violence. In this case, as the sexual and gender-based crimes charges only concern sexual violence committed against women and girls in the context of their abduction to be ‘wives’ of the LRA, it is true that the evidence of sexual violence against men and boys would be beyond the scope of the charges. This is why paragraphs eight to thirteen exemplify how sexual violence against men and boys can be encompassed by alternative non-sexual or gender-based crimes charges, as it is more important that sexual violence against men and boys is represented in the framework than not at all.

This approach utilises the feminist methodology utilised by Judge Sotomayor in *Utah v. Strieff*, where she emphasises the individual lived experiences

\textsuperscript{142} *Utah v. Strieff* 136 S. Ct. 2056 (2016).

of people of colour who are disproportionately affected by abuses of police power.\textsuperscript{144} In the Feminist Re-Writing, the aim was to utilise similar reasoning of prioritising the lived experience of male child soldiers, victims of the IDP attacks or abductees from the IDP camps, which was marked by sexual violence in conjunction with the other confirmed charges, such as torture, and the conscription and use of child soldiers.

**Establishment of the Truth**

Paragraphs fourteen and fifteen explore the argument of the LRV that preventing male victims of sexual violence from appearing as witnesses would be an injustice. The Feminist Re-Writing explores the importance of admitting such testimony in light of the need to establish the truth in the course of the proceedings and to provide an accurate portrayal of the events. The Feminist Re-Writing in these two paragraphs utilises a number of feminist methodological devices, such as the use of facts and information derived from law review articles to contextualise the discussion and provide a more informed discussion, which was also carried out by Judge Sotomayor in *Utah v Strieff*.\textsuperscript{145} The use of facts and discussion to contextualise serves to provide a deeper understanding of the type of harm sexual violence inflicts against men and boys and why it is important to shed light on sexual violence against men and boys in the context of the lack of attention given to the issue in international criminal law. Furthermore, these paragraphs seek to dispel the false dichotomy between autonomy and victimhood, enunciated upon in the feminist re-writing of *Sheffield City Council v E*.\textsuperscript{146} The false dichotomy dictates that victimhood is denoted as something essentially feminine, and autonomy as something essentially masculine. The dichotomy also means that individuals can only occupy one of these positions at any time. By listening to their testimony in the Chamber proceedings, male sexual violence survivors would be acknowledged to be victims of sexual violence, as their testimony would reflect the violence inflicted against them by the LRA. However, they would simultaneously be provided with the autonomy to recount their own experiences to the Court, which would allow male sexual violence survivors to control the

\textsuperscript{144} *Utah v Strieff* (n 142).

\textsuperscript{145} *Utah v Strieff* (n 142).

narrative and establish a reliable Court record that accurately reflects all of the abuses committed by the LRA. This would allow male victims of sexual violence to actively participate in the Chamber proceedings and contribute to the establishment of the truth. This would therefore allow the male victims of sexual violence to occupy both positions of victimhood and autonomy simultaneously, and contribute towards undermining the false dichotomy between victimhood and autonomy.

**Fair Trial Concerns**

Paragraphs seventeen and eighteen display a scepticism of utilising the human rights framework as a means to protect vulnerable and overlooked individuals, such as male victims of sexual violence. This scepticism was explored in the feminist re-writing of *R v A (No. 2)*, in which it was argued that the human rights framework often denoted a prioritisation of the rights of the accused to a fair trial over alternative rights, such as the rights of participation for victims in criminal proceedings. The feminist approach taken in the Feminist Re-Writing seeks to show how varying rights can be accommodated in a way that does not undermine the rights of vulnerable individuals in international criminal proceedings, nor does it undermine the rights of the accused to a fair trial. The Feminist Re-Writing aims to show how the right of the male victims to participation in the proceedings can be balanced with the rights of the accused to a fair trial, and that one right need not take precedence over the other.

**Conclusion**

By placing male victims of sexual violence at the centre of the Chamber proceedings through the application of feminist methodologies, the Feminist Re-Writing seeks to show how a different perspective can directly lead to alternative reasoning and alternative Decision outcomes that balance the rights of the accused to a fair trial with the right of victims to participation in the proceedings. This approach prioritises the previously overlooked accounts and perspectives of male victims of sexual violence, and allows for their effective representation and participation in proceedings that concern them. The Feminist Re-Writing aims to show how the International Criminal Court could vastly increase its gender-sensitivity if it utilised this approach, as it would ensure the representation of

\[147\] ibid 23.
gender issues concerning male victims of sexual violence that have been historically overlooked in international criminal discourse.

CONCLUSION

The Feminist Re-Writing of the Ongwen Decision demonstrates the difference that feminist methodologies of judging can have on Decisions and Judgments that concern various areas of international criminal law. The Feminist Re-Writing exemplifies a number of prominent feminist features of judging extrapolated from domestic law feminist judgments: the use of reasoning that undermined the false dichotomy between agency and autonomy, and victimhood and vulnerability; the use of reasoning that evidenced a scepticism of human rights discourse as a means of protection for vulnerable people, as well as reasoning that attempted to reconcile supposedly conflicting rights; the inclusion of contextual facts and alternative sources, such as law review articles and scholarly books; a focus on the overlooked gendered dimensions of international crimes; and an emphasis on prioritising excluded voices and experiences, in this case of male victims of sexual violence in conflict.

Utilising these feminist features of judging directly led to alternative reasoning and case outcomes when compared to the original Ongwen Decision, as the Feminist Re-Writing actually reasoned in favour of the Legal Representatives of the Victims, to grant them leave to present a number of witnesses. This is the completely opposite result to that determined in the original Ongwen Decision. The example of the case study of male victims of sexual and gender-based violence was intended to be a tool to exemplify the flexibility of feminist methodologies to various areas of international criminal law, demonstrating the fact that feminist methodologies can be utilised in thematic areas that do not necessarily concern women.

Using these features, the Feminist Re-Writing was able to improve gender-sensitivity in judging, as it was able to emphasise the overlooked gender dimensions of international crimes. For example, the Feminist Re-Writing was bound by the fact that the Prosecutor had not brought any specific sexual and gender-based crimes charges that related to men and boys, therefore the reasoning found a way to look at the gendered elements of non-sexual and gender-based crimes, such as the crimes of conscription of child soldiers and enslavement, so
that the evidence of male victims could still be presented in the course of the proceedings.

This was important in the context of gender-sensitivity, because allowing the male victims to present their evidence was a significant step in providing them the opportunity to dispel the myth that only women and girls are victims of sexual violence in conflict, and to recognise more accurately the modalities of wartime sexual violence as a crime that affects both men and boys, women and girls. It is hoped that the calls for greater gender diversity on the international bench will directly lead to greater diversity in perspectives in judging. This then leaves the possibility for feminist perspectives to be represented in international criminal judging. This would be a significant step forward in establishing greater gender justice for both men and women through improved gender-sensitivity in judging in the international criminal system.
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An Examination of the Practicability of Antony Duff and John Gardner’s Legal Moralism as a Basis of Criminalisation in Contemporary English Criminal Law

Thomas Yeon

ABSTRACT

This article critically examines the role played by moral values in the scope and structure of criminal offences. In analysing the nature and practicality of legal moralism as a basis of criminalisation, comparisons will be made to notions of responsibility and judgement, and public accounts of criminal law. For focusing on the use of notions of morality per se, this article will not discuss in detail the differences between accounts of legal moralism and public morality. Based on the account of legal moralism advanced by Antony Duff and John Gardner, this article seeks to offer a revised and more nuanced account of the role played by legal moralism in offering a comprehensive account of the scope and structure of criminalisation based on moral wrongs and the State’s jurisdiction in punishing offenders.

INTRODUCTION

At the broadest level, Legal Moralism stipulates that the basis of criminalising an action should mirror a moral wrongdoing; this equates moral wrongs with criminal wrongs. Such equation has been of topical interest in terms of its justification and applicability towards contemporary social contexts and judicial practices. A justification of criminalisation on grounds of morality must be based on a defensible definition of morality, not one which confuses it with mere feelings of distaste. Legal moralism is generally split into two schools: (i) positive legal moralism, and (ii) negative legal moralism. A positive legal moralist

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argues that the wrongfulness of an action provides a positive reason to criminalise it for the furtherance of particular objectives; the reason does not have to be conclusive in justifying the criminalisation of the conduct, but it has to be a good reason. A negative moralist, in contrast, argues that wrongfulness is a necessary condition for criminalisation, but it does not provide any positive reason to criminalise; positive reasons for criminalisation lie elsewhere — for example, in the broader social context. The two views are logically independent. To say that the absence of wrongfulness is a conclusive reason against criminalisation is not to say that the presence of wrongfulness is any kind of reason for criminalisation.²

To offer a more thorough examination of the nature of moral values and their use in criminal law, this article focuses on the accounts of legal moralism advanced by Antony Duff and John Gardner, which “take morality very seriously on its own terms”.³ It is because their accounts focus exclusively on the nature of moral values per se, and how such values’ suggestion on appropriate behaviours should shape the content of criminal law. Given the existence of copious academic literature on the famous Hart-Devlin debate in the 1960s on the utilitarian nature of moral values in the context of criminal law, the Hart-Devlin debate will not be the subject of this article. This article will be divided into three parts. PART I begins with an analysis of the nature of legal moralism and the Millian harm principle, and legal moralism’s relationship with the notion ‘responsibility’ in terms of a defendant’s liability as an autonomous agent. It argues that legal moralism must have recourse to the notion of ‘responsibility’ in order to reflect one’s accountability under criminal law. In the theory-based discussion of this part, references will be made to the contractarian theory of responsibility and the Kantian Categorical Imperative (‘CI’). In PART II, the article moves on to explore the nature of legal moralism as a normative justification for the general part of criminal law, and its applicability in articulating mala in se and mala prohibita crimes. It contends that while legal moralism can justify the criminalisation of mala in se crimes, it would be impractical to use it as the sole or predominant basis for criminalising mala prohibita crimes. The discussion in this part is predominantly theoretical and examples will be used to illustrate the aforementioned concepts; references will also be made to issues of labelling. In PART III, it will examine

critically the function of legal moralism in making the criminal law a coercive State instrument, offering a hybrid account of jurisdiction-morality values for criminalisation. The crimes of manslaughter and rape will be discussed, and Malcolm Thorburn’s public law account of criminal law will be compared to legal moralism in justifying the criminalisation of the aforementioned crimes.

This article argues that Duff and Gardner’s accounts of legal moralism, despite reflecting the intrinsic responsibility and moral duties that one ought to owe to another and the public, fail to capture the public element of criminal law in terms of the reflection of one’s responsibilities towards the society. A revised account of legal moralism should strike a balance between reflecting the moral qualities of a crime and the moral responsibility and criminal culpability of an individual, whilst articulating their social position in the society.

PART I: THE NATURE OF LEGAL MORALISM AND THE NOTION OF RESPONSIBILITY

1.1 The Foundational Status of Harm and Multifaceted Nature of Morality

1.1.1 The Harm Principle and the Context of Criminal Law

Criminalisation, as an instance of the State deploying its coercive power to prohibit and regulate behaviour, requires robust justifications. The justification(s) offered for criminalising a particular behavior must be able to explain adequately why the targeted behavior should not merely be discouraged but prohibited. A commonly referenced justification is John Stuart Mill’s harm principle, which argues that the only purpose of exercising power rightfully over an individual is to “prevent harm to others”.\(^4\) The undesirable nature of ‘harm’ provides a sound theoretical justification for a State to take actions to minimise its impacts on a polity. However, recourse to the harm principle itself is insufficient, as not all crimes necessitate harm.\(^5\) Different conceptions on the nature and extent of harm generated by an undesirable activity suggest that it is not argumentatively sound to justify criminalising such activity based on the need to prevent ‘harm’ itself; an


\(^5\) For example, a heavy commercial vehicle parking on verges, footpaths or the central reservations of roads violates section 19 of the Road Traffic Act 1988 (‘RTA’). However, the crime does not cause any harm in the Millian sense.
example is the criminalisation of homosexual relationships before its decriminalisation in 1967. A pluralism recognising multiple reasons, on both individual and societal levels, for criminalisation should be welcomed, as it reflects a diverse range of wrongs and undesirable outcomes warranting criminal law’s response. Under such plurality, by marking out certain kinds of wrong as apt for criminalisation, the harm principle serves to suggest which wrongs fall within the ambit of criminal law.

In contrast to civil law, a key aspect of criminal law is condemnation. For instance, although both fines and taxes require one to make a payment to the State, they differ in principle. A fine condemns the conduct fined as wrongful, while a tax usually merely intends to discourage the activity taxed. Although criminal law rarely enforces significant positive obligations, it prohibits continuing unlawfulness by the means of negative obligations. In the context of criminalisation, when we attribute responsibility for an action, we consider it as blameworthy, springing from a blameworthy state of mind. The blameworthy state of mind reflects the defendant’s culpable intention and the blameworthy values manifested in their criminal act. In defining a wrongful act as criminal, the law categorises and condemns such conduct as wrong. The underlying wrong is deemed to concern those to whom it speaks to, and warrants the consequences attached to the criminal act. The identification and categorisation of such blameworthiness, however, cannot be done based on the harm principle. This is because the harm principle does not cater to the internal state of mind of the individual – it sheds no light on the mens rea of an offence. It does, however, cater

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6 Section 1, Sexual Offences Act 1967.
8 ibid 140.
9 ibid 81.
11 For example, contract law may enforce a positive obligation by ordering specific performance.
12 Ashworth (n 10) 236.
to the result of the conduct – following the *actus reus* of the offender – on the victim(s).

Although a lot of wrongs labelled ‘criminal’ are morally condemnable or dubious at least, the actual practice of criminal law is an amalgam of different ideas that have prevailed at different times in the history of the practice. General changes in social attitudes, from being conservative to increasingly liberal in recent decades, have resulted in certain behaviors, which were criminal in the past, becoming decriminalised.\(^{15}\) Even when moral values may appear as a sound stand-alone justification in delineating the scope and structure of criminalisation, the deployment of criminal law *ex-ante* as an autonomy-restricting device must meet the stringent demands of social regulation that any form of authoritative legal regulation must satisfy.\(^{16}\) When disagreements arise amongst contrasting moral values, it is difficult for either side to prove its case.\(^{17}\) This is because the inherent subjectivity of the vast majority of moral values renders the question of their convincingness a matter of extent, not a matter of correctness. Nonetheless, the open-ended nature of moral values does not mean they cannot be used as a sound basis for criminalisation. What is required is an account explaining the role played by morality in an account of criminalisation.

1.1.2 Accounts of Legal Moralism and the Traditional Account of Moral Responsibility

As outlined in the introductory section of this article, the two strands of legal moralism (positive and negative) are logically independent. To say that the absence of wrongfulness is a conclusive reason against criminalisation is not to say that the presence of wrongfulness is any kind of reason for criminalisation.\(^ {18}\) Criminalisation is not necessarily solely dependent upon the existence of a wrong that may be said to warrant criminal law’s response. The focus on wrongfulness as a constituent element of criminalisation can encapsulate the harm principle at a bare minimum. The wrongfulness of an activity concerns the harm the enactment of legislation aims to prevent.

\(^{15}\) For example, homosexuality was a criminal wrong before 1967 due to the perceived moral indecency it carries; homosexuality was decriminalised under section 1 of the Sexual Offences Act 1967.


\(^{18}\) Duff (n 2).
A strong version of legal moralism provides a more ambitious interpretation of the idea that crimes should be moral wrongs. An advocate of this position is Michael Moore, who argues that the function of criminal law is to attain retributive justice by punishing all and only those who are morally culpable in the ring of some morally wrongful action. The infliction of a moral wrong warrants retribution against the wrongdoer. Outside of such ring of action, the accused can and should never be adjudged guilty for any behavior alleged to be criminal. The whole realm of moral wrongdoing should be used as a starting point for determining the scope of criminalisation. However, such an account is unrealistic in delineating the scope of undesirable behavior that should be prohibited. The issue with such premise is twofold. Firstly, it gives no weight to any public perceptions of morality and assumes that the aforesaid starting point is a shared criterion. There is no guarantee that everyone in the community holds similar opinions as to what moral wrongdoing means. Secondly, it may impose punishments which are not necessarily proportionate to the gravity of the crime itself in terms of moral culpability. A lack of moral consensus undermines Moore’s theory because it attempts to use the coercive tool (i.e. criminal law) of the State, in a coercive manner (to attain retributive justice), on wrongdoers who might not necessarily share the same moral values as those falling within the realm of wrongdoings in Moore’s theory. This generates the potential of subjecting one to moral values which are not commonly subscribed, but they nevertheless underpin the relevant criminal legislation because the legislators themselves deem it necessary. Given it is very difficult for everyone to share the same moral values, Moore’s theory is impractical.

The traditional account of moral responsibility makes mental capacity a necessary condition of being responsible. For example, a mentally capable individual’s failure to take care of their disabled sibling may give rise to criminal responsibility for gross negligence manslaughter. People are morally responsible for their actions only if their actions issue from their free will. On its strong

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19 Duff (n 7) 84.
21 For example, to prohibit smoking indoors under Moore’s account would subject smokers to a morally unjustified restriction.
position, for an agent’s action to issue from a free will, it must not be caused completely by external events preceding it. For instance, an intoxicated person’s action does not issue from a free will if the intoxicating substance was administered to them without their consent. It is only an individual’s subscription of morally wrong values that lead to their subsequent criminal activity, without external factors contributing to the latter. This gives rise to two rejections to legal moralism, with the weak and strong suggestions arguing the insufficiency and uselessness of appeals to moral values respectively. Firstly, the weak rejection suggests that appeals to immorality per se can never be sufficient to justify the criminal prohibition of an act. Such reasons must be joined with other reasons that appeal to issues which the prohibition responds to,\(^2\) for example general societal benefits that may be achieved from the criminalisation of such behaviour. Secondly, the strong objection argues that appeals to immorality are in any event weightless and irrelevant to the conduct’s impacts on individual and collective welfare. Given the inherent subjectivity of moral values, it would be argumentatively unsound to use moral reasons to underpin the criminalisation of a particular behaviour deemed undesirable. While the two objections raise valid criticisms on the argumentative value of moral values as the ground for criminalisation, they ignore the criminal law’s role in delineating one’s responsibility towards themselves and others. Although the notion ‘moral responsibility’ may obscure the actual nature and severity of criminal responsibility, the incorporation of moral values into the notion ‘responsibility’ provides a clear conceptual framework as to its meaning on both individual and relational levels. It offers a clear understanding as to the meaning of one’s responsibility for their behaviour, and one’s responsibility to others in a society as manifested in the legal obligation on them to refrain from carrying out certain behaviours.

1.2 The Cruciality of ‘Responsibility’ in Defining One’s Status under Criminal Law

When one is adjudged legally culpable by a court, the existence of a social consensus on the wrong(s) of their action may be implied.\(^{24}\) This is because as English courts no longer create new common-law offences,\(^{25}\) any guilty conviction must be either for a crime created by an Act of Parliament or a crime not (yet) abolished by an Act of Parliament. The criminality of their activity is based on the observed phenomenon that society considers the aforementioned action as criminal and deserves to be labelled as such. Following so, it is necessary to survey to what extent, and in what ways, moral norms supplement or establish the norms of criminal responsibility. As a tool to prohibit and thus deter particular kinds of behavior deemed undesirable in the society, the society’s opinion(s) are crucial starting points in understanding what moral norms are necessary of protection and thus actions encroaching upon or violating against such norms classified criminal.

In the context of legal moralism, when criminals violate moral norms cherished by the society, the criminal law must provide a forceful response in the form of criminal punishment. However, in reality, an acknowledgement of consensus in terms of moral convictions among citizens does not automatically lead to the proposition that we ought to use it as our legal basis for criminalisation. Recognising a relationship between social consensus and criminal law does not mean it will always be possible to find such consensus. Society’s views on morality change over time.\(^{26}\) A crime can attempt to answer social concerns of morally dubious activities but fails to explain what responsibilities the defendant breached. The moral fallibility of law necessitates the construction of an account of responsibility which can exist with or without moral values as a constituent element.

An account of criminal law, which focuses solely on the defendant, fails to distinguish between responsibility for an act and responsibility for a crime. Responsibility delineates a certain level of co-operation and mutual understanding between citizens:\(^{27}\) for example, their understanding as to the circumstances under


\(^{25}\) R (on the application of Monica) v Director of Public Prosecutions [2018] EWHC 3508 (Admin), [85].

\(^{26}\) Green (n 24). See (n 15) above for an example.

\(^{27}\) Ashworth and Horder (n 1) 54.
which an individual should face legal sanctions for their actions which are adjudged to be criminal. Such co-operation is not necessarily only viable when there is a consensus on the nature of a moral value. In delineating responsibility, an individual is also ascribed a *status* in the society. Such status would change following a criminal breach of responsibility. Alice Ristroph accurately highlights that responsibility is a matter of human relationships; it involves agents other than the defendant. The personal trait of the defendant, however, does not provide a sufficient basis *per se* for imposing criminal responsibility. A public account of responsibility is required, in the sense that the crime in question warrants a collective response. The ‘seriousness’ of a wrong cannot be characterised independently of the distinction between ‘public’ and ‘private’ wrongs: the difference lies not in the degree of seriousness, but in its social character.

In coating an additional layer to the notion ‘responsibility’, Sandra Marshall and Antony Duff argue that fundamental wrongs such as murder and rape are crimes because they injure an important ‘Rechtsgüter’. A term featured prominently in German discussions of the proper aims and functions of criminal law, Rechtsgüter represents the notion of a significant legally protected interest. Similar to Ristroph’s account, Marshall and Duff’s notion of ‘responsibility’ is grounded in the societal aspect of criminal law, based on matters significant to interpersonal relationships. However, criminalising an activity solely on grounds of injuring a Rechtsgüter does not reflect the idea of genuinely ‘public’ goods. This is because such ‘public’ goods cannot be reduced to aggregates of individual goods; such goods have to be values that people can share similar views on and the reason(s) underlying such views. To equate an aggregate of individual goods as a genuine ‘public’ good assumes that the reasons for the need to uphold each individual good is identical and thus can be assimilated as a ‘public’ good. The nature of Rechtsgüter, however, provides no guarantee on the genuine ‘public’ nature of a value that is said to underpin the relevant criminal legislation. This is because matters significant to each interpersonal relationship may differ on a case-

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30 An example would be promoting respect for a right not to be physically harmed without lawful justifications.
31 Examples of such ‘public’ goods are values collectively upheld and depended upon by the society.
by-case basis, yet Marshall and Duff proposed no explanation as to the jump between aggregate individual goods and ‘public’ (i.e. the society as a whole) goods. Considering this issue under the notion ‘responsibility’, it becomes clear that the notion of ‘responsibility’ should be based upon goods that can be properly said to represent a unified interest on behalf of the society. Such goods, in light of their overarching importance (as identified), should be upheld by holding violators of such goods criminally responsible. The language of ‘responsibility’ expresses normative judgements about the nature of one’s actions in relation to the addressee(s) and their status in relation to other individuals in a society.32

1.3 Individual Responsibility as an Articulation of Identity and Social Position

1.3.1 The Categorical Imperative

In regulating individual behaviour, criminal law requires us to respect one another. Such respect stems from the need for one to constrain their behaviour which, while may advance their interests, is detrimental to the interests of the target of their action that is criminal. We would need to explain why the State should prohibit certain kinds of conduct by defining them as criminal ‘wrongs’. Part of the explanation would consist of an account of the respect from the law due to the defendant, whose conduct the State seeks to regulate and prohibit.33 It would also be necessary to explain the duties one owes to another as shaped, but not forcefully imposed, by the State’s guidance. It should be inquired how the combination of the following theoretical accounts remedies the deficiencies of legal moralism.

Immanuel Kant’s Categorical Imperative provides an answer to the question of the basis for respecting people. The Kantian perspective is useful because for Duff, the project of legal moralism is to ‘explore the implications of the Kantian demand that we should respect other people as rational and autonomous moral agents’.34 It adopts a deontological approach in shaping people’s activities and beliefs based on a set of moral imperatives, instead of focusing merely on the need to respect individuals. What makes an imperative moral is its practicality, which

32 Ristroph (n 28) 116-117.
33 Duff (n 7) 87-88.
in turn gives the reason for a moral judgement; such practicality has to be universal.\textsuperscript{35} The CI determines whether our maxims are real, on the assumption that morality is something real.\textsuperscript{36} Moreover, a Kantian moral agent should be able to act independently of any coercion. In the context of criminal law, this means the respect an individual owes to another should be grounded in at least three elements: practicality, rationality, and morality. For a Kantian, a human practice or institution is rational insofar it is governed by a discernible set of constant and coherent principles. Assuming the Kantian account can be replicated in criminal law, a rational and practical system of criminal law would be governed by a set of moral imperatives constituting its general part. Apart from setting out lists of wrongful conduct and values, such Kantian general part will also set out the list of rational and practical behaviours that one should display; failure to meet such standards may warrant punishment if such failure leads to the commitment of a crime set out in the special part. Under such a framework, legal moralism provides the universality and rationality required for forming the imperatives which stipulate the respect we as moral agents due to others.

However, it is submitted that Kant’s CI should not be directly replicated in criminal law. He never held that such will should be necessary for legal fidelity, as it is for moral flourishing. Criminal law concerns compliance with established norms and avoidance of defined wrongs, not subscription to moral norms which contribute to social prosperity. Kant’s account, however, is more focused on encouraging individuals to uphold good behaviours, instead of restraining themselves from bad/undesirable ones. Moreover, the imperative is a principle of right actions, whereas criminal law principles are principles of wrong actions.\textsuperscript{37} Such distinction suggests that, if the Kantian CI is adopted as the framework of criminal law, criminal law may become over-restrictive in terms of regulating individual behaviour: any action that does not fall within the parameters of ‘right’ behaviour would be ‘criminal’. This imposes strenuous obligations on one’s conduct – in that they will be required to exhibit certain moral values in their actions. This may open a Pandora’s box of opportunities to further restrict individual behaviour for values and ideals which are not necessarily commonly subscribed. In light of the


\textsuperscript{36} ibid 214.

purported rationality and practicality of the Kantian account for articulating a conceptual framework for criminalisation, it should be inquired to what extent it matches the public dimensions and contractarian conceptions of criminal law. It will be argued below that the public dimension and contractarian conception serve to explain, on top of the Kantian requirements of a moral agent, an account of individual responsibility.

1.3.2 The Public Dimension and Contractarian Theory of Criminal Law

The aforementioned Kantian perspective can be supplemented by the public dimension of criminal law and a contractarian theory to offer an adequate account of criminalisation. Matthew Matravers argues that it is difficult for legal moralism to justify the imposition of moral constraints on the pursuit of self-interest. In maximising self-interest, one can infringe another’s interests. Under a social system of mutual respect, the Kantian perspective of moral agents contracting to live together provides a reasonable assurance of mutual compliance towards the ‘moral contract’ between them. They are all bound to the ‘contracts’, with the Kantian demands of moral agency providing guidance on how individuals should behave. However, this still does not equate one committing to contribute to an agenda of social cooperation. In the context of criminal responsibility, a key distinction between Kantianism and contractualism is that the former focuses on the context of humanity and assumes that everyone shares an equal status, while the latter suggests that responsibility can be created by individuals within a polity. However, ‘moralising’ such contracts (i.e. infusing it with moral values) does not necessarily justify the use of criminal law’s coercive power. It is also potentially inconsistent with the liberal nature of the England and Wales’s legal order. A pure contractarian conception of criminal law is inadequate in encapsulating an account of individual responsibility for two reasons.

39 For example, the maximisation of wealth via stock fraud infringes the victims’ right to participate fairly in legitimate trading.
40 Matravers (n 38) 71.
41 See the latter parts of 1.3.2 and PART III for more detailed explanations on this point.
The first objection towards a pure contractarian account of criminal law, infused with the Kantian sense of ‘agreement’, is that it is inconsistent with the Kantian demand of using people as ends, not as means to an end. By contracting to live well together, one is technically ‘using’ another to further their means. A contractarian conception illustrates the mutual dependence between individuals in the protection of fundamental moral values. However, given the inconsistency with the aforementioned Kantian demands, such a contract should be seen as furthering the mutual objective of upholding universally recognised moral values. It should not be seen as protecting one’s personal moral preferences and the benefits they receive from it.

Proceeding to a second objection, a pure contractarian account is also incompatible with the traditional principles of criminal law in a liberal state. Given a ‘contract’ in such context concerns two individuals only, the State’s intervention by virtue of ‘breach of contract’, which in itself is a private matter, is incompatible with the public essence of exercise of criminal law (the deployment of coercive State power in restraining and condemning criminal behaviour). Even if there is a convergence of views on universally recognised issues, for example murder, this still does not justify using moral wrongfulness as the basis for the State to ‘invoke the contract’ on behalf of an individual and respond to the relevant breach. However, such use of moral wrongfulness as a basis of condemnation is required under a traditional account of legal moralism. It would be necessary for the ‘contract’ to be re-conceptualised as a public matter, of which a ‘breach’ would warrant a State response. A conceptualisation of being responsible for ‘breach of contract’ because of the defendant’s status in the polity allows the State to intervene and provide a coercive response. Such artificial construction of status is not permitted under a pure Kantian conception of criminal law. Principles of political morality on the exercise of State powers, in balancing the contractarian account of criminal law and concerns of the general polity, support a more particularist and less paternalistic criminal law than moral principles alone would demand.42 In placing moral principles as a constituent element for an account of criminalisation, the role of moral values may be maintained whilst avoiding criticisms of systematising moral wrongfulness into crimes.

At this point, one aspect of the original Kantian account considered above remains undiscussed: the independence of moral agents from influences of external factors. Independence is crucial as it directly influences our status as autonomous agents. In light of the inconsistency between the Kantian focus of ‘right’ actions and the criminal law’s focus of ‘wrong’ actions, it should be examined whether principles of action can be articulated in terms of the moral character of the individual as an autonomous agent, whilst maintaining the independence of an individual when they are deciding on their actions.

1.3.3 The Necessity and Desirability of Independence

Authenticity demands that we strive for independence in our ethical lives. It suggests that one’s actions should be based on their ethical values and beliefs, instead of being dictated by external influences. It is damaged when one is made to accept, without critical evaluations, another’s judgement in the place of their own about the values their behaviour should display.\(^{43}\) This partially reflects the demand of legal moralism by articulating the nature of ‘moral wrongfulness’ and the moral values people should not subscribe to. While the wrongfulness constraint does not delineate the scope of ‘right’ actions, the fact that such ‘wrongs’ may include controversial values makes it possible to articulate a restrictive framework of moral principles guiding individual actions. Wall coins such articulation of a framework as ‘soulcraft’.\(^{44}\) This refers to the use of criminal law to foster an ethical environment that promotes self-respect and good character. Although soulcraft provides valuable guidance for one in developing their behaviour, it is inconsistent with the permissive nature of criminal law in England and Wales. It can compromise the authenticity of citizens to whom legislations are directed at by subjecting them to State-dictated principles and rigid manipulations. Compromising the authenticity of citizens and attempts to do so are also inconsistent with the focus of autonomy in criminal law, which emphasises the importance of one being able to act freely within lawful boundaries without external constraints. At this point, it is clear that the CI, despite offering various methods for characterising an individual as an autonomous moral agent, is impractical for determining whether a particular

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\(^{44}\) ibid 466-470.
action is morally ‘wrong’. It may also transform criminal law into an over-paternalistic instrument.

1.4 A Relational Perspective of Responsibility as an Accurate Illustration of Interpersonal Relationships in Criminal Law

The relational perspective suggests that ‘responsibility’ is best articulated if we understand it relationally.\textsuperscript{45} This refers to the responsibility one owes to another as a member of a polity. The responsibilities are generated by virtue of one’s membership of the polity, according to the standards and expectations of behaviour that the polity imposes on an individual. In the legal moralism context, this suggests that moral theories must be formulated as useful rules and standards for action. This allows the law to articulate the protections one is guaranteed by the moral responsibilities others owe to them, the breach of which would constitute a criminal offence. In contrast to the individual account discussed above, the relational perspective shifts the focus onto the impacts of the wrongdoer’s action. It also provides an adequate account of criminal defences by showing why despite the satisfaction of the constituent elements of a crime, the defendant has a defence.

However, advocates of this perspective would need to explain why justifications or excuses would also necessarily be relational. This is because they form an integral part of criminal law by providing reasons on which an accused, despite their criminal behaviour, should not bear responsibility for the actions in question. In this context, John Gardner identified two explanations for responsibility. The Hobbesian view suggests that as rational beings we all want to avoid responsibility, i.e. refusing to accept responsibility and thus avoid consequences which flows from the acceptance of responsibility; in contrast, the Aristotelian view suggests that as rational beings we all want to assert and accept responsibility.\textsuperscript{46} Between them, the Aristotelian view of responsibility matches the nature of English criminal defences, as such view requires one to provide an adequate account of one’s actions for raising a successful defence. It also recognises one’s criminal responsibility within the polity they belong to.\textsuperscript{47} In

\textsuperscript{46} ibid 165.
\textsuperscript{47} This warrants the State’s intervention by virtue of conviction.
offering an adequate account of belonging in a polity by virtue of explaining one’s responsibility therein, it is necessary to illuminate the nature of the relationship between the defendant and the rest of the society, and why it is valuable.\textsuperscript{48} For one to show actual responsibility, they must not only prove their responsibility to the community, but also why such responsibility matters. An explanation which lacks either element would not elucidate their position under criminal law and any responsibility they might bear therein, making the purported contribution futile. John Gardner argues that persuading one to accept an inadequate rational explanation of another’s criminal responsibility is, for humans as rational beings, a ‘pyrrhic victory’.\textsuperscript{49} Being inadequate in substance, making one accept such an explanation would fail to articulate and justify the true extent of the responsibility that they should be deemed to owe to society. In the course of offering such an explanation, one provides an account of their responsibility and the nature of their actions to the victim(s) and the community. Such an account articulates their relationship with the aforementioned parties in light of their alleged criminal engagement. At this point, moral wrongdoings are not only affecting the defendant’s character and the victim’s well-being, but also the society by the imbalance between the defendant and the rest of the society in terms of moral status. The defendant, having failed to adhere to the moral values underpinning the law they violated, thus is adjudged as ‘guilty’ and different from other citizens. Their participation in the polity makes them answerable to their fellow members, in particular to the victim(s) of their crime, when they were facing prosecution.

Such perspective supplements the lack of public appeal in legal moralism by recognising that discussions on criminal wrongdoing should include other members of a polity. The effects of wrongdoing concern both the defendant and the general community due to the change in the relationship as caused by the wrongdoing itself. The key is for one to have structured explanatory dialogues in public, the object of explanation being other members of the polity.\textsuperscript{50} One’s ability to offer a rational explanation for their actions can be affected by the moral values they subscribe to. The more morally evil the values they subscribe to, the less


\textsuperscript{49} Gardner (n 45) 166. The necessary connection between law and morality displayed here reflects John Gardner’s jurisprudential stance as a hard positivist. For an example of his general argument in favour of a necessary connection between law and morality, see John Gardner, ‘Legal Positivism: 5½ myths’ 46 American Journal of Jurisprudence (2001) 199.

\textsuperscript{50} ibid 167.
likely the explanation can be rational and accepted by the community. The notion ‘moral wrongfulness’ in legal moralism serves as an independent criterion in determining whether the moral characters reflected in a defendant’s action fall into the realm of criminal wrong. If it does, the defendant is guilty; if it does not, this implies a valid defence is raised. In bridging the traditional account of moral responsibility with notions of ‘responsibility’ discussed in this part, one must be able to give a rational account of their actions to the general public and, if applicable, the victim. A logical explanation of such responsibility invites an examination on the roles of the general and specific parts of criminal law in defining criminal responsibility. It also asks to what extent does legal moralism serve as a guiding structure in the criminalisation of *mala in se* and *mala prohibita* crimes.

**PART II: THE GENERAL PART OF CRIMINAL LAW AND THE CLASSIFICATION OF CRIMES IN THE SPECIFIC PART**

### 2.1 The Importance of Labelling in the Context of Criminalisation

The question for a legal moralist, in providing an account of the classification of crimes into *mala in se* and *mala prohibita* crimes, is the influence of moral values in the aforementioned classifications. It will be argued that whilst it is not difficult to justify the criminalisation of *mala in se* crimes based on a traditional account of legal moralism, it would be extremely difficult for it to justify the criminalisation of *mala prohibita* crimes. Before moving on, it is useful to first clarify what the two types of offences mean: *Mala in se* crimes are pre-legally wrong: wrongs *recognised* by at least the majority of a society; in contrast, *mala prohibita* crimes are not pre-legally wrong, and are only criminal by virtue of legislation (or by common law).\(^{51}\)

To clarify conceptually the process of criminalisation, it is necessary to consider ‘whether they are legally or only sociologically defined processes’.\(^{52}\) The process of criminalisation, in elucidating the systematic and constitutional functions of criminal law, should be established from the wider social and political contexts of the principles it attempts to uphold. In *PART I*, it was explained why

\(^{51}\) *Monica* (n 25).

it is more realistic to view criminal law from a societal perspective. Criminal law (and the imposition of criminal responsibility) is not only an individual matter; it is also an instance of State response to certain wrongdoings and a matter of interpersonal relationships. Criminal law is also a matter of judgement: the imposition of a label. In general, to label means description without any accompanying attempt of categorisation. The imposition of a label per se does not provide the reasons for which the label was imposed in the first place and the associated consequences. However, it would be impractical to operate a purely descriptive system of criminal law, whereby the offender’s conduct is set out in narrative form without any attempts of categorising a group of labels sharing similar gravity or characteristics into one category. This is because a purely descriptive system is not required to elucidate upon the nature of a crime and the reason(s) for which it is classified as a criminal activity; its function is merely to state the existence of such offence simpliciter. From the perspective of a legal moralist, a practical system of criminal law would impose on the convicted defendant a label reflecting the moral gravity of the crime. An example would be the differentiation between murder and manslaughter, and the details on and reasons for distinguishing between the different types of offences. Labelling does not only concern the crime itself, but more importantly, the defendant’s legal and social statuses. This is because the label (flowing from the conviction) will be associated with the defendant’s future life in the form of a criminal record, possibly tainting it and causing them to suffer from, inter alia, less favourable treatment and stigmatisation.

A criminal label is only appropriate if it is based accurately on the crime’s essence and the relevant background context. From the context of the act in question, the nature and essence of the act can be elucidated, thus allowing an appropriate label to be attached. For example, the notion ‘causing death’ in the offence ‘causing death by dangerous driving’ reflects its non-murderous nature. The basis of criminalisation is the dangerous nature of the act and lack of regard the driver has for the safety of other road users. If the legislature fails to substantiate the reasons for criminalisation, any label imposed would be

54 (n 5) section 2.
55 If the defendant is driving with the purpose of killing the victim, they would have been charged with murder instead.
controversial as it would be difficult for legislators to justify their approach to the disputed act. Furthermore, labelling signifies the degree of condemnation that should be attributed to the offender, indicating to the society how the offender should be regarded as. Criminal law speaks to society as well as wrongdoers when they are convicted under it.56

2.2 The Multifaceted Nature of the General Part of Criminal Law and its Contributions to the Special Part

The criminal law of England and Wales is composed of two parts. The ‘general’ part is made up of theories that cross the boundaries between different families of criminal offences; it focuses on the meaning of those individual doctrines and their applicabilities. On the other hand, the ‘special’ part supplies the details of criminal offences and arranges them into ‘families’ of offences.57 For example, the crime of murder is underpinned by a general part principle and/or value of immorality to deprive one their right to life without lawful justifications, and supplemented by the respective actus reus and mens rea as defined by common law.58

The principles of criminal law applicable to their justifications fall within the general part.59 If a traditional account of legal moralism is adopted as our sole or predominant basis of criminalisation, moral wrongfulness would guide our development of criminal law, supplemented by other policy objectives. The constituent elements of each crime, i.e. the special part, would also be influenced by a ‘moralistic’ general part. Given criminal law answers to practical reasons and

56 Chamlers and Leverick (n 53) 226.
57 Gardner (n 37) 205.
58 The actus reus for murder in common law was defined by Sir Edward Coke in Institutes of the Laws of England (1797), a document widely recognised as a foundational document of the common law: ‘Murder is when a man of sound memory and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the King’s peace, with malice aforthought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day of the same.’ The mens rea for murder in common law was either and intent to kill (R v Matthews & Alleyne [2003] EWCA Crim 192) or intention to cause grievous bodily harm (R v Woollin [1999] AC 82).
principles guiding the State’s exercise of coercive power, the resolutions it provides to legal and factual disputes falling within its ambit must be comprehensive and conclusive. Rationality detests loose ends in legal questions.60

Regarding the addressees of criminal law as the same poses the threat of ignorance, or at least omitting, of a great deal of information about their character and conduct, and the factual matrix of their cases. This gives rise to questions on the appropriateness of the premise of such account of criminalisation.61 For example, attributing the same level of responsibility to a defendant with PTSD and a mentally sound patient ignores the former’s mental incapabilities. This may lead to accusations of unfair labelling. The content of the general part is derived from and can be supplemented by abstract form offences in the special part. Likewise, one’s views about crimes, in terms of their essence and reasons for deterrence against them, are influenced by principles in the general part. For example, principles derived from mala in se crimes are likely to be radically dissimilar from those derived from a broader sample of crimes, including crimes with moral characters which are not inherently ‘wrong’.62 This is because the principles derived from the respective types of crimes, given the difference in terms of the gravity of their nature and consequences, are unlikely to be of the same importance. Therefore, for a legal moralist, it is pertinent to guarantee that the use of moral values in justifying the criminalisation of particular behaviours will reflect the gravity of the crime in terms of the label imposed on the accused and the consequences the accused faces in the case of a conviction. This ensures that the demand for moral agency picks up the law’s claim to moral authority. This requirement is met if we regard the word ‘moral’ as indicating the fundamentality of the relevant considerations in labelling an act criminal. In recognising a favour of pluralism on top of consistent moral concerns, this captures at least both traditional mala in se and mala prohibita crimes. However, it will be argued below that legal moralism faces enormous difficulties in criminalising the latter on their traditional reading.

60 Gardner (n 37) 206-207.
61 Lucy (n 48) 205.
2.3 The Varying Influences of Morality in *Malum In Se* and *Malum Prohibitum*

A viable theory of criminalisation must be able to specify the conditions under which criminalisation would not be justified.\(^{63}\) These conditions serve to filter out claims of criminalisation which, despite being cogent on the surface of the argument, are inappropriate when taking into account other factors, for example the actual need for criminalisation and the balance of societal benefits and detriments as a result of criminalisation. Moreover, these conditions are crucial as it caters to social concerns and external influences which may render the criminalisation of ‘borderline’ offences an unviable option. It would be difficult to explain why the criminalisation of an activity can be warranted unless it is shown that the agent has committed a wrong sufficiently severe to warrant the criminal law’s response. In classifying crimes based on the character of their wrongfulness, two categories of crimes may be identified: *malum in se* and *malum prohibitum*.

2.3.1 *Malum In Se*

*Malum in se* crimes involve attacks on the common goods of a polity, that every reasonable man in the community would identify as ‘wrong’ (not as a matter of law). In such cases, the role of criminal law is to acknowledge, rather than designate, the wrongfulness of an act through a declaration of criminalisation. An example is murder — an act which every reasonable man would agree is wrongful. They would agree it is morally culpable for one to deprive another of the right to life unless defences are available. Other *malum in se* crimes include rape\(^ {64}\) and wounding with intent to do grievous bodily harm.\(^ {65}\) Such crimes do not need to be solely a moral wrong. For a legal moralist, it is easy to justify the criminalisation of *malum in se* crimes. The moral wrong is the wrongfulness of the conduct itself. Adequate responses from a legal moralist will need to take into account and make salient the wrong.\(^ {66}\)

\(^{63}\) ibid 73.

\(^{64}\) Section 1(1), Sexual Offences Act 2003 (‘SOA’).

\(^{65}\) Section 18, Offences Against the Person Act 1861 (‘OAPA’).

\(^{66}\) Duff (n 2) 231.
When speaking of acting ‘morally’, we are attempting to protect ourselves from consequences we deem harmful. A great deal of morality is concerned with harm prevention. Central provisions of the criminal law prohibiting heinous crimes, for example murder and rape, are concerned to prevent serious moral wrongs;\(^\text{67}\) they fall within the wrongfulness constraint easily. As \textit{mala in se} crimes violate fundamental moral understandings cherished by reasonable men in a community and pose grave harms to the wronged victims, moral values can easily support the legal, institutional, and political justifications for their criminalisation.

2.3.2 \textit{Malum Prohibitum}

The reasons not to commit \textit{mala prohibita} crimes are post- rather than pre-legal. Although some reasonable men may consider such acts to be morally wrongful, the consensus generated is unlikely to be as strong as \textit{mala in se} crimes. For example, while some may argue that drink-driving\(^\text{68}\) is a moral wrong as it abuses the freedom of consuming alcohol against the safety of other road users, others may contend that no criminalisation is warranted unless the defendant endangers their safety by intoxicating themselves. In such a case, positive legal moralism would fail to explain why the nature of the action itself warrants the criminal law’s response. It is because it implies that the combined acts of drinking and driving could always be sufficient to justify criminalisation.\(^\text{69}\) Even if retreating to a negative account, criminalisation would still be difficult to justify as the relevant moral contentions imply there are competing issues and claims to balance. Not only is the satisfaction of the wrongfulness constraint debatable, but it would also be difficult for a reason to serve as \textit{the} determinative negative reason for criminalisation.

The existence of \textit{mala prohibita} crimes also requires doctrines in the general part to provide a principled basis of criminalisation which can be independent of morality.\(^\text{70}\) Such basis should not afford moral values a significant weight. The general part, in using moral wrongfulness as guiding principles, should have regard to objectives the criminalisation of an act seeks to achieve. For example,

\(^{68}\) (n 5) section 4(1).
\(^{70}\) Husak (n 62) 67-68.
parking offences are not created gratuitously, but as an element of some general transportation strategies. In such an instance, the law acts as a conduit to the strategic objectives. Correspondingly, the reasons for one to refrain from committing such offence are twofold: (i) respect of the law’s authority, and (ii) respect of the further objectives underlying criminalisation. At this point, the objectives themselves can incorporate moral values of, for instance, mutual respect between road-users.

Although mala prohibita crimes are generally less severe compared to mala in se crimes, this does not diminish the requisite cogency of justifications underlying their criminalisation. In using ‘objectives’ as a yardstick, the focus of criminalisation may deviate from its structure. This leads to a failure to respond to the problems giving rise to propositions of criminalisation in the first place. It is usually very hard to discern moral values that underpin mala prohibita crimes: there are either significant controversies, or there is only trivial attention to the moral basis of the crimes. To remedy such a deficiency, Antony Duff suggests that a malum prohibitum crime should be framed as an act that is not wrongful before the legal regulation that prohibits it; the key is to separate the questions of enactment and enforcement of legislation of the crime. The former question concerns a decision to regulate the act, and the latter question concerns the necessity of a legal mechanism delineating the details of regulation. This proposal is worthy of examination as it connotes the notion of responsibility discussed in PART I.

For mala prohibita crimes, the claim ‘because it is the law’ is part of a citizen’s reason for action. Any claims to obedience based solely on this phrase are tautological. However, the enactment of criminal legislation generates a sense of citizenry responsibility to comply with the legislation. The prohibited act is now publicly marked. Once the relevant legislation is enacted, every concerned individual would have a moral responsibility to respect others coming under its protection. Every individual enjoys an equal moral status before it. It is not only a responsibility to the individual themselves as a moral agent, but also to the concerned group of individuals. A breach of such responsibility thus constitutes a

71 Duff (n 7) 90-92; Duff (n 14) 128-129.
72 The qualification ‘concerned’ is added since mala prohibita crimes often respond to issues which do not concern the whole community. For example, an adult without a driver’s licence is not a ‘concerned individual’ vis-a-vis a law laying down speed limits on highways.
moral wrong. It is because it equates to putting themselves in an unequal position compared to others, obtaining advantages they would otherwise not receive. In criticising Antony Duff’s account, Thom Brooks suggests it may trivialise non-
mala in se crimes as crimes which we merely have some good reason to criminalise.73 Whilst Antony Duff’s account may trivialise the non-moral reasons relevant to criminalisation under legal moralism, it is submitted that a recourse to the notion ‘responsibility’ strengthens the basis of criminalisation by illustrating the defendant’s violation of established moral norms and responsibility to respect the law. The question of enforcement can then replace the inquiry on a good reason for criminalization; the key question would become whether the satisfaction of such good reason per se would be sufficient to include it under the ambit of the now-criminalised act. Such responsibility, unlike responsibility under mala in se crimes, is artificially constructed. Responsibility under mala in se crimes, in contrast, arises from the wrong inherent in the act itself.

2.4 The Insufficiency of Mere Categorisation of Crimes in Explaining the Coercive Nature of Criminal Law

In the preceding analysis, it is argued that private moral accounts provide weak justifications. When the ‘we’ are to ‘do something’ as a polity, or a government acting on a polity’s behalf, the claim that ‘X is our business’ must be grounded in some conceptions of the res publica — of what the policy’s enterprise of norms and values includes. In recognising the collective nature of the action and making the relevant wrong(s) salient, it is also necessary to provide a normative account of the nature of the act in question.74 By making the wrong and any unspoken moral principles salient, the general part of criminal law becomes more well-equipped in placing moral values as a significant concern in detailing the particulars of a proposed offence.

The criminalisation question cannot be detached from the wider social and political contexts.75 It needs to be answered with a normative account underpinning the condemnable nature of offences and the purposes of labelling such behaviour as ‘criminal’. The notion ‘public wrong’, despite ostensibly encompassing both general and specific parts of the criminal law, only offers

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73 Brooks (n 67) 344.
74 Meyer (n 52) 240-241.
75 ibid 241.
limited coverage for *mala in se* crimes. For instance, to argue rape and murder are public wrongs because they injure public morality distorts the focus on the type of wrongfulness that makes them criminalisable. The wrongfulness of rape and murder that renders them criminal offences is not solely grounded on their offensiveness to public morality. Their fundamental wrongfulness concerns a simpler issue: an unjustifiable attack against and injury to one’s bodily integrity. The criminal law is not merely moral law given institutional form. It is a component of the political structure of the State, which caters to both individual and public interests. Furthermore, the notion becomes more problematic in the context of *mala prohibita* crimes. In defending the applicability of legal moralism in justifying the criminalisation of such crimes, Antony Duff argues they can be specified on the ground of citizenship. By virtue of being a citizen of a particular society, they are expected to be guided by their moral values reflected in those crimes (and accordingly reject those which are deemed undesirable). Their status as a citizen in a polity is defined by the moral reason(s) to obey the law, such that those not guided by them are subject to criminal sanctions. Whilst appeals to citizenship allow citizens to bind themselves together and provide a consistent account in making a *malum prohibitum* crime defendant answerable publicly, it does not accord with the structure of interpersonal relationships. The assumption therein is that every member of the polity shares an equal interest in the defendant’s actions. While the notion ‘citizenship’ illustrates the importance of commitment to established norms, a normative account based on legal moralism should nonetheless respond to the nature of human relationships and the private jurisdiction of each individual.

PART III: THE RELATIONSHIP BETWEEN PRIVATE AND PUBLIC ASPECTS OF MORAL WRONGS – A PUBLIC LAW PERSPECTIVE

3.1 Criminal Law as A Matter of Jurisdiction Rather than Morals

Criminal law concerns the exercise of public power by the State; it is not private enforcement of morals. A crime is an official recognition of a wrongful act. An account of criminal law failing to reflect the public nature of the exercise

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76 Duff (n 7) 141.
77 ibid 92-93.
78 Thorburn (n 3) 22-23.
of such coercive power is inadequate. The ‘public’ character of a crime is an implication, rather than ground, of its criminalisable character. An appeal to the public character of a crime encourages a consistent normative account to be given because it focuses attention on the idea of ‘public’.\textsuperscript{79} Private moral practices, on the other hand, may differ widely from one group of people to another on what is a ‘wrong’. Given the differing degree and perceptions on the meaning of ‘wrong’, it would be dangerous for individuals to be able to use the coercive power of criminal law to punish others on the ground that they have violated private, personal moral codes.

In criticising legal moralism as impractical and failing to appeal to the public aspects of the criminal justice system, Michael Thorburn proposes a ‘public law account’ of criminal justice, focusing on the legitimacy of the use of State power.\textsuperscript{80} This account offers a direct rebuttal against the positions advanced by Antony Duff and John Gardner. On this account, criminal law delineates and regulates the ‘private’ jurisdiction of individuals; this refers to the sphere of autonomy within which individuals are allowed to act freely solely based on their own will. It would also see the use of the State’s power as a matter of exercising its ‘public’ jurisdiction. State power would be exercised for protecting both private and public jurisdictions in the case of an unjustified transgression of either of them by an individual. The question criminal law should focus on, Thorburn argues, is the wrongfulness in \textit{usurping} jurisdiction.\textsuperscript{81} In identifying jurisdiction as a key tenet justifying the use of State power, Thorburn accurately recognises that it would be impractical and unjustified for the exercise of such power to be grounded solely in the wrongs committed by the defendant. The occurrence of wrong by a morally objectionable act does not \textit{per se} warrant the deployment of criminal law to prohibit it.

‘Jurisdiction’ of individuals is important in the context of the present article because it appeals directly to the structure of interpersonal relationships, a matter discussed in \textit{PART I}. The key point of defining and allocating jurisdictions is to allow them to be exercised by its holders. In criminal law, jurisdiction is crucial because the State needs to maintain the equal legal and moral status of individuals, the latter of which is balanced by the use of criminal sanctions in the case of any

\textsuperscript{79} Duff (n 7) 142.
\textsuperscript{80} Thorburn (n 3) 24.
\textsuperscript{81} ibid 41.
violations by one. It does so by allocating spheres of jurisdictions to individuals reflective of their status.\textsuperscript{82} If legal moralism is applied in full force in such context, there will be an ill-substantiated distribution of jurisdictions. This is because it would fail to explain why it is the State, and the State only, that should use its power to respond to the wrong(s) committed by the defendant, and the private moral injuries suffered by the victim. By focusing on the wrongfulness of a particular infringement of jurisdiction, although a common view of the ‘wrong’ in question can be elucidated, it does not explain whether such use of State power is appropriate. A convincing account of criminal law must specify some values that can be considered as part of the polity’s self-definition. Whilst this ostensibly resembles the concept of *soulcraft* discussed in *PART I*, the present values are different — they have a clear and indisputable position in a liberal legal order.\textsuperscript{83} *Soulcraft*, on the other hand, is more concerned with the promotion of one’s ascription to ethical values and realising them in their actions.

### 3.1.1 The Relationship Between State Powers and Political Authority

A liberal state guarantees its citizens that they can have their moral preferences without the need to worry whether such preferences will undermine their status as moral equals. While a focus on ‘jurisdiction’ presents no logical flaws in shaping interpersonal relationships and the spheres of State power, it is difficult to see why the law should solely or predominantly focus on them. Such focus ignores the moral status of an individual in defining oneself in a community. It only focuses on the limits of the sphere of permissible activity, without providing an account for the content of values and principles within the sphere of permissible activity. Moreover, a public law explanation may also fail to define the character of the moral wrong underlying a criminal act in the general part of criminal law by only focusing on the State’s exercise of power, but not the reasons underlying so.

The seriousness of a wrong is unlikely to have sufficient gravity to warrant criminalisation *per se* unless the wrong is first shown to be a public one.\textsuperscript{84} The bulk

\textsuperscript{82} For example, a doctor has jurisdiction to perform treatment in a medical emergency in order to save a patient’s life.

\textsuperscript{83} *Thorburn* (n 3) 23-24.

\textsuperscript{84} Duff (n 7) 144. Wrongs satisfying such gravity are likely to be the most serious *mala in se* crimes, for example murder.
of the law must at least represent the majority’s view of common goods. Where individual self-interests are likely to conflict with one another, it is necessary to uphold the promise of equality before criminal law, thus justifying the use of State power.  

Whilst the classification of an act as ‘criminal’ marks a public response, this does not by itself make the crime affect the ‘public’ as a whole. In contrast, some wrongs remain a public matter even if committed in private and are solely targeted against the victim. An example is violent domestic abuse: if it is a wrong against interested individuals, and frequently, women in general. Compared to a public law account, a moralistic account may import an illiberal conception of criminal law. That being said, if Michael Thorburn’s account is to be preferred, its examination cannot be reliant on the public perceptions of criminal law. It is necessary to check against the exercise of jurisdiction not as a matter of fact, but mutual respect for moral values between individuals. It is because a sole focus on a public law account may ignore the moral values which shape the status of an individual in a polity. It also ignores the mutual contributions between individuals to uphold moral values, and any changes in moral status if one fails to do so. Therefore, in terms of involvement of State power and public law concerns, the political aspect of criminal law should be understood as part of a larger institution of the State’s exercise of political power. The next section will discuss how the conception of crimes as a hybrid matter of public law and morality, instead of solely relying on either account, provides a comprehensive account of criminalisation and articulates the nature of interpersonal relationships.

3.2 The Comprehensiveness of a Hybrid Account in Explaining Offences Causing Physical Harm to Another

This section examines two offences: manslaughter resulting from loss of control and rape. It argues that a traditional account of legal moralism does not provide a comprehensive solution in substantiating their criminalisation. It will also discuss the potential limits of enforcement of ‘jurisdiction’ in the context

85 Dworkin (n 17) 205.
86 Domestic abuse can take place in a wide variety of forms against not only spouses but also other members of the family, for example children. The most relevant legislation criminalising different types of domestic abuse is the Domestic Violence, Crimes and Victims Act 2004.
87 Brooks (n 67) 349.
88 Sections 54-56, Coroners Justice Act 2009 (‘CJA’).
89 (n 64) section 1.
of the two offences below, arguing it can be remedied by recourse to moral values and a moral definition of ‘wrong’. This discussion aims to establish that private wrongs, in light of the deficiencies of legal moralism as identified in Parts I and II, can and should be criminalised under a jurisdiction-morality hybrid account.

3.2.1 Voluntary Manslaughter by Loss of Control

The reason for the present focus is twofold: firstly, this subsection examines situations where the defendant’s moral qualities are highly disputed, instead of instances where one suffers an abnormality of mind. Secondly, this partial defence reflects the Aristotelian account of responsibility. Voluntary manslaughter by loss of control is *prima facie* a private matter. On a literal interpretation, it focuses only on the relationship between the victim and the defendant. If successfully established, it gives rise to a manslaughter conviction instead of murder. As a *malum in se* crime, it satisfies a legal moralist’s principles for criminalisation with flying colours. However, the recognition of the act of killing as non-murderous ostensibly defeats the premise of moral wrongfulness. As the defendant is deemed *justified* in acting in a *wrong* way, it must be inquired whether moral values can have any influence in defining the Homicide Offence.

Kate Fitzgibbon argues the Homicide Offence recognises that the emotion of fear can lead to the perpetration of lethal violence which warrants a manslaughter label. Section 54(1) CJA 2009, in stating the contribution of ‘qualifying triggers’ to the defence, recognises the non-murderous moral quality of the defendant’s intention. On the other hand, the exclusion of section 55(6) factors as valid triggers recognise the limits of using moral fallibility as a justification for imposing a manslaughter but not murder label. Whilst the elucidation of the nature of qualifying triggers demonstrates a considerable influence of moral values on the Homicide Offence, the controversial moral quality of the act renders its use as the sole or predominant basis of criminalisation unsafe. Section 54(4), in excluding ‘desire for revenge’ as a valid loss of control,

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90 For the purposes of the present discussion (unless otherwise specified), the partial defence will be referred to as ‘the Homicide Offence’, as its successful establishment does not result in an acquittal.


92 (n 88) sections 55(3)-(5).
recognises two issues. Firstly, it recognises the deliberate infringement of another’s private jurisdiction of their right to life as an inapplicable circumstance for the partial defence. Secondly, it recognises the desire for revenge as a moral wrong which does not warrant any exemptions from the coercive power of criminal law. Although the latter issue can be argued as evidence of the influence of legal moralism, it is weak evidence. A desire for revenge is a private moral practice, thus not necessarily warranting the use of State power. Similarly, for the qualifying triggers discussed above, a traditional legal moralist view does not directly explain why the application of triggers make the crime non-murderous, as the triggers focus on the issue of moral fallibility, not moral wrongs.

In R v Daves,\(^93\) the defendant was deemed to have incited violence under section 55(6)(a). On the scope of section 54(1), the Court of Appeal stated that provided there was a loss of self-control, it is immaterial whether the loss was sudden or not.\(^94\) The moral wrong in question does not have to be constituted by an exhaustive list of short-term factors; it may encompass long-term issues contributing to the moral quality of the defendant’s mindset. The court’s decision on the ambit of section 55 also illustrates that an interpersonal account of criminal law helps encompasses the moral qualities of the defendant: ‘Neither qualifying trigger is available to the defendant who has deliberately sought to provide himself with an excuse to use violence’.\(^95\) This shows how a jurisdiction-morality account can best represent the Homicide Offence in question and other mala in se crimes. Firstly, in terms of the moral qualities of the defendant in ‘seeking revenge’, which is what the legislation is aiming to prohibit. Secondly, in terms of the status of the victim, as the one for whom the defendant is responsible for. Moreover, the high threshold for bad behaviour amounting to an excuse for the use of violence\(^96\) shows that only a serious moral wrong can amount to a ‘murderous’ infringement of jurisdiction, thus warranting the State to impose a murder rather than manslaughter label.

From the preceding analysis, it can be seen that the loss of self-control and violation of the victim’s jurisdiction is, on Thorburn’s account, prima facie a moral wrong. The recognition that there are instances where people would lose their

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\(^93\) [2013] EWCA Crim 322.

\(^94\) ibid [54].

\(^95\) ibid [57].

\(^96\) ibid [58].
control and kill another reflects the limitation on the exercise of State power in convicting one of murder rather than manslaughter. Building on the public response warranted by the killing and the fundamentality of the right not to be harmed without lawful justifications, the Homicide Offence recognises that the influence of moral values can and should adjust accordingly in light of the factual matrix. This is not considered in detail in a traditional account of legal moralism. The aforementioned flexibility is supported by the ‘non-deliberate’ transgression into another’s jurisdiction and the subsequent State response in labelling the defendant as a criminal. In particular, the justifications for State interventions in exercising its coercive power in such cases reflect that a positive legal moralist’s sole focus on the wrong itself is impractical. A sole focus on the wrong of killing, thus ignoring the contributory factors underlying the act, would ipso facto mean all convictions on manslaughter are murder.

3.2.2 Rape

Similar to the Homicide Offence discussed above, rape is a malum in se crime. The physical and psychological harms rape victims suffer are undeniably grave. Even if the victim does not suffer any physical harm, the psychological trauma also warrants the State to ensure, by the means of criminal legislation, that such trauma would not be inflicted on anyone. In terms of the mens rea of the offence, section 1(1)(c) SOA 2003 states that one commits the offence if one does not reasonably believe the victim consented. This reflects the moral values the offence aims to protect: the respect for another’s bodily integrity and jurisdiction over their sexual autonomy. In R v Braham,\(^\text{97}\) the Court of Appeal recognised that the 2003 Act deliberately did not make genuine belief in consent sufficient.\(^\text{98}\) A defendant’s claim of delusional belief of consent cannot in law render a reasonable belief that the victim consented when she did not.\(^\text{99}\) The recognition of an objective standard of assessment on the issue of belief illustrates the influence of universally recognised wrongs in justifying the criminalisation of illegitimate intrusions of bodily integrity.\(^\text{100}\) The lack of consent from the victim and reasonable belief from the defendant also upset the sexual equality between them, with the perpetrator intruding into the sexual autonomy jurisdiction of the victim.

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\(^\text{97}\) [2013] EWCA Crim 3.
\(^\text{98}\) ibid [36].
\(^\text{99}\) ibid [35].
\(^\text{100}\) As expressed by the sexual autonomy guaranteed to everyone under the Act.
This also results in inequality in terms of moral status between the parties, with the defendant treating the victim as a means to their sexual desires. The violation of jurisdiction by the perpetrator triggers the State’s jurisdiction to maintain moral and sexual equality between the parties.

While archetypal rape cases involve immediate inflections of physical and psychological harms, rape victims can suffer no physical and psychological harm. Such a scenario arises when the victim was unconscious during the incident, suffered no physical injuries, and was unaware of the incident until informed by a third party. Criminalising such act is prima facie inconsistent with the harm principle and legal moralism, as neither harm nor moral wrongs were caused and committed to the victim until and/or unless they were informed of the incident. Without being informed by a third party, the victim may never know about the incident. However, the aforementioned theories do not prevent the law from showing sensitivity to other features of those wrongs in defining them for legal purposes. In the present context, this begs the question of whether the character of the wrongfulness of the action is reflected by the notion of ‘wrong’ in the legal moralist’s sense. Although legal moralism in such instance cannot be applicable in full force, it remains an open question what the exact nature of the wrong in such case of rape is.

In recognising the lack of a necessary link between harm and rape, John Gardner and Stephen Shute argue that the wrongfulness of rape lies in the violation of use-value; its criminalisation should be grounded on the failure of the perpetrator to respect the victim’s choice to use their body for activities other than sexual intercourse. As there are no differences between male and female in terms of sexual autonomy, it would be sound to proceed on the premise that everyone has an equal bodily-value to determine their sexual engagements. Whilst the focus on bodily value diminishes the focus on moral wrongs concerning the degradation of the victim’s body upon notification by the third party, this approach has three advantages in strengthening an account of criminalisation. Firstly, it

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101 In light of the perceived sexual equality between individuals.
102 Section 1(1) SOA 2003 did not stipulate any infliction of harm a condition of conviction.
103 For example, the police informing the victim after the rapist is arrested.
105 ibid 198, 203-205.
recognises the underlying moral wrong and failure for the perpetrator to respect the use-value of another’s body. Secondly, it recognises the respective private jurisdictions of individuals and the prohibition on violation of jurisdiction even though no tangible harm is caused. Thirdly, the focus on use-value in articulating offences succinctly places everyone on an equal plane regarding their right to choose how to use their own body. The violation of bodily-value as a moral value triggers the State’s jurisdiction to maintain the equality of bodily-value and respect for its use among all members of a polity. A hybrid account effectively articulates the moral values the State chooses to protect, and the necessity to ensure no individual usurps another’s private jurisdiction over the use of their own body.

3.3 The Benefits of an Overarching Protection for Interested Individuals by Public Goods and Common Values

In explaining the need to prevent the conflation of individual and common goods under the notion ‘morality’, Sandra Marshall and Antony Duff propose that criminal law should aim to protect public or collective goods. It should ask whether any individual goods should count as ‘common’ goods, thus falling under criminal law’s protection. For instance, convicting a rapist does not only punish him for his actions, but also making clear to the community that they need to see the wrong done to the victim as a wrong done to ‘us’. In R v R, a husband was convicted of raping his wife. Although the case concerned a marital relationship, it was recognised that the law should evolve in light of changing social, economic, and cultural developments. Marriage was no longer seen as embodying sexual entitlements for men, and all women are afforded equal protection under rape laws. The gradual recognition of marriage as a partnership of equals justifies the criminalisation of marital rape. This amounts to a recognition that the harms caused by marital rape are same as non-marital rape, insofar as women define themselves as a community united by mutual concerns. The immorality of rape against the victim thus concerns all interested individuals. It shows how attacks

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106 Marshall and Duff (n 29) 9.
107 ibid 11.
108 ibid 19.
110 ibid 616 and 619.
111 In the context of marital rape, this refers to a general group of women sharing a wrong committed to a member of the group.
on an individual’s right(s) under a Rechtsgüter can be understood as being simultaneously wrongs against the community the individual belongs to.

A holistic justification of criminalisation in the aforementioned ‘public interest’ account necessitates the conclusion that the violation of such interest triggers the State’s jurisdiction in defending cherished moral values. It also needs to specify some values that can be claimed to be public, the breach of which would necessitate public condemnation. That being said, moral wrongs still play a considerable role in delineating the scope of the State’s jurisdiction in terms of punishment. The violation of egregious wrongs, for example a desire to revenge under a purported act of manslaughter, would trigger the State’s jurisdiction in convicting the defendant of murder instead of manslaughter. In using moral values to sketch the boundaries of the State’s jurisdiction in exercising its coercive powers, an account of criminalisation reflects a communal respect for moral values, and the consequences one faces if one fails to observe so. Such an account also shows what responsibilities one owes to another and the protection one enjoys from other’s adherence to their responsibilities. It also illustrates the responses one would receive from the State if one fails to observe such responsibilities. Therefore, as a matter of regulating interpersonal relationships and circumstances of State interventions, an account of criminalisation must be conceived as a hybrid account consisting of elements in terms of jurisdiction and morality concerns.

**CONCLUSION AND FURTHER REMARKS**

This article has argued that it would be impractical for an account of criminalisation to be based solely or predominantly on moral concerns. The account of legal moralism offered by Antony Duff and John Gardner attempts to draw close comparisons between moral wrongs and criminal wrongs, allowing the law to appeal to moral principles in guiding individual behaviour. While a predominant focus on wrong reflects the issues criminal law is designed to tackle, it does not appeal to an individual’s status and responsibilities as a member of a polity. It is not only necessary for one to be responsible as a member of a polity, but also to other citizens and the State. In elucidating the nature of acts within the ambit of criminal law, the criminal law also imposes a label of guilt reflective of

112 Duff (n 7) 143-144.
the gravity of the crime in question. As criminal law concerns the exercise of State coercive power, an account of criminalisation requires its foundations and principles to appeal to its public aspects and be accountable to its addressees. To warrant the use of criminal law as a legitimate State instrument, legal moralism would need to reflect its public essence, issues of individual responsibilities, and conflicting opinions on the moral characters of a purported criminal act.

Although a comprehensive account of criminalisation encapsulating defences cannot be sketched in the limited space of this article, such an account can be strengthened by addressing the moral foundations and normative contours of criminal defences. As an account of criminal wrongs, legal moralism provides no direct explanation as to the scope and structure of criminal defences. In defending against a criminal charge, the defendant offers at least one reason for their acts and why they should be acquitted. Whatever notions of ‘motivating’ or ‘explanatory’ reasons based on which one claims to have good reason to act, such reasons are constituted by our desires and choices, and social norms and concerns. They can be based on moral preferences. For legal moralism to play a larger role than the limited position suggested in this article, it would be desirable for an account of criminalisation to respond to such moral preferences as well.

Criminal defences are not merely a matter of reflecting the moral innocence or blamelessness of defendants. It also restrains the State’s use of its coercive powers. Therefore, an account of criminalisation delineating the normative contours of criminal defences necessarily sketches the limits on the exercise of State jurisdiction in responding to alleged criminal behaviour. Such an account should at least offer a theoretical framework regarding the scope and structure of justificatory defences and exculpatory defences. Firstly, for justificatory defences, an account of criminalisation should not only explain the purported moral innocence of the defendant, but also the respective restraints on the use of State power to label the act in question as ‘criminal’. It is because such claims to moral innocence are likely to be controversial. Norms not encapsulated under the wrongfulness constraint may be deployed as a basis of a justificatory defence. That being said, an account of criminalisation delineating the limits of State

114 For example, disagreements surrounding a citizen’s right to arrest a suspected offender under section 3(1) of the Criminal Law Act 1967.
115 Duff (n 7) 266.
jurisdiction in, for example, exercising its coercive power against a successful claim of self-defence, may strengthen the normative justification for an acquittal. It is necessary to determine the ‘decision-maker’ authority of the defendant to define their legal and moral status. Secondly, for exculpatory defences, an account of criminalisation should explain why even if the defendant has committed a moral wrong recognised by the criminal law, it would be unjust to condemn them for not acting differently and better during the incident.\(^{116}\) While it is not necessarily the case that a defendant will be acquitted under an exculpatory defence,\(^{117}\) they are absolved from the criminal responsibility following a conviction. This gives rise to a scenario where a defendant’s wrong falls under the wrongfulness constraint, but an exculpatory defence absolves them of any criminal responsibility they would face if the defence fails. Legal moralism, however, provides no direct explanation to such logical contradiction. This calls for an account of criminalisation that is not solely or predominantly based on moral values.

When determining whether the accused is blameworthy, two layers of analysis are necessary: whether the person did anything wrong, and whether the person is responsible for doing it.\(^{118}\) In doing so, an account of criminalisation sketches the process of imposing a judgement on the defendant based on the defence(s) advanced. While questions on the moral character of the defendant serve to articulate their status in the polity they belong to, such questions miss out the relational aspect of individual jurisdictions with one another. English criminal law, in treating every individual as a free and equal moral agent,\(^ {119}\) recognises that everyone has their private spheres of actions and beliefs. Beyond discourses on the roles of morality, an adequate account of criminal defences should provide an explanation of the respective restrictions on the State’s jurisdictions in exercising its coercive power in light of a successful defence. Therefore, a comprehensive account of criminalisation based on legal moralism can and should address the roles played by morality in both criminal offences and defences. In doing so, it should also articulate the nature of one’s responsibility and status in the polity to

\(^{116}\) Duff (n 113) 840.
\(^{117}\) For example, a successful plea of the insanity defence results in a special verdict of ‘not guilty by reason of insanity’. It does not result in an acquittal.
\(^{118}\) Gardner (n 37) 237.
\(^{119}\) Thorburn (n 3) 42.
provide a well-substantiated account to the enterprise of criminal law as an exercise of State’s coercive power against individuals.
Regulating the Scope of Employment in the Gig Economy: Towards Enhanced Rights at Work in the Age of Uber

Luca Deon*

ABSTRACT

The growth of the gig economy sector presents challenges for employment lawyers. Firms such as Uber label their workforce as 'independent contractors', meaning many in the gig economy often lie outside the parameters of employment protection laws. Fortunately, recent cases show that courts are not prevented by the mere label of ‘independent contractor’ from holding those working in the gig economy as workers. However, as this paper argues, it is not satisfactory to rely solely on litigation to enhance rights at work in the gig economy. The Taylor Review 2017 suggests that updating statutory definitions of personal scope is needed to address the issue. Many commentators and think tanks have labelled this proposal as too pragmatic and argue that a uniform test of employment is preferable. The main thesis of this paper is that pragmatic change, building on the progress made in case law, would be more effective. This is because the retention of an intermediary category of worker, or ‘dependent contractor’, allows for both flexibility and enhanced rights. Nonetheless, the government has not implemented any form of legislative change, meaning that over one million people in the gig economy remain without the rights they should be entitled to. This paper concludes that legislative change is therefore greatly needed to protect gig economy workers.

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INTRODUCTION

Labour markets are in a constant state of change. Many businesses are shifting their focus towards digital platforms, requiring a flexible workforce which can provide for consumer demands at the click of a button.¹ The emergence of the gig economy encapsulates this trend. The gig economy is defined as a “labour market characterised by the prevalence of short-term contracts or freelance work, as opposed to permanent jobs”.² Uber, Deliveroo and eCourier all operate under such a business model. In the UK, it is estimated that 1.1 million people work within the gig economy.³ These developments in the labour market can lead to uncertainty over the legal status and rights of workers,⁴ raising concerns over exploitation.⁵ Consequently, the gig economy has been the subject of contentious legal and political debate. The British Labour Party has criticised it to be creating more ‘insecure work’ which allows employers to ‘duck their responsibilities’.⁶ The American senator and presidential candidate, Elizabeth Warren, has expressed a similar view.⁷

The basis of this criticism is the argument that, in the gig economy, workers’ rights are side-lined in the guise of market efficiency. Gig economy businesses purport to be ‘matchmakers’ of consumers and self-employed independent

⁴ Here, the word ‘workers’ is used in its non-technical, non-legal sense.
contractors, often through the means of a mobile app or website. As independent contractors, those working in the gig economy fall outside the scope of employment. The implications of this cannot be understated. Independent contractors have a separate legal status to ‘employees’ and ‘workers’, meaning they are not covered by employment law protections, such as unfair dismissal or the National Minimum Wage. Instead, they are treated like services under a commercial contract. As per Prassl, this means that “employers can dip into the crowd to meet their constantly changing staffing needs” whilst the so-called independent contractors “are left without security or protection”.

Litigation emerging from the gig economy has successfully challenged the highly questionable notion that gig economy workers are self-employed contractors and thus not entitled to employment protection laws. The recent Uber case is a notable example of a successful worker status claim. However, even when a claimant is successful in claiming worker status, they are not afforded the same level of protections given to somebody with employee status. The legislative distinction between worker and employee means that even the successful claimants in gig economy cases are still not offered the full package of statutory protection. This has led to numerous proposals for legislative change. A pragmatic view of retaining the worker-employee distinction was taken in the 2017 Taylor Review. However, the review has been criticised by groups such as the Institute of Employment Rights, who labelled its proposals “a gift to the gig economy”.

This paper will assess how successfully the scope of employment in the gig economy is currently being determined by tribunals and courts. It will also make the case for greatly needed legislative change to ensure that all those working in the gig economy are afforded the same protections as other ‘workers’, not just the successful claimants. This analysis will consist of three parts: Part I will provide an overview of the gig economy, the current law on the scope of employment and

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8 Sarah O’Conner, Aliya Ram and Leslie Hook, ‘Uber ‘workers’ ruling deals blow to gig economy’ (Financial Times, 10 November 2017).
its importance. Part II will focus on the positive steps taken in recent cases to protect gig economy workers, by recognising them as workers rather than independent contractors. Finally, in Part III, there will be an assessment of the proposals for legislative change made in the Taylor Review and analysis explaining why such proposals would be more effective than a uniform test of employment.

I. THE LAW GOVERNING THE SCOPE OF EMPLOYMENT AND ITS IMPORTANCE IN THE GIG ECONOMY

In order to assess how rights at work can be extended to those working in the gig economy, it is important to appreciate the different levels of protection within the main categories of employment relationships. This is known as the scope of employment and is split into three main categories: employees, workers and self-employed. Determining an individual’s employment status has significant implications for their rights and protections, as the following breakdown of the tripartite system demonstrates.

1. Employees

Employees have full access to employment rights and protections. The definition of an employee can be found in Section 230(1) of the Employment Rights Act 1996:13

In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

Due to the circularity of the definition, the courts have been required to interpret the parameters of what constitutes a contract of employment. This has resulted in the creation of several tests to determine the legal status of an individual engaged to carry out work, mainly aimed at distinguishing whether an arrangement is a contract for services or a contact of services. The courts take a practical approach and are willing to consider the reality of a situation rather than the express terms of a service contract.14 Whilst this paper will not consider the tests for employee status, it is important to appreciate the significance of the courts in

determining the appropriate employment category and the implications of such a decision.

Employees are entitled to the full set of statutory employment rights, including statutory minimum notice, protection from unfair dismissal and redundancy payments. They also have the benefit of protection on a business transfer.

2. Workers

The ‘worker’ category is the intermediary category between the self-employed and employees. Section 230(3) of the Employment Rights Act 1996\(^\text{16}\) defines a worker as:

\[\text{an individual who has entered into or works under (or, where the employment has ceased, worked under)—}\]

\[(a) \text{ a contract of employment, or}\]

\[(b) \text{ any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.}\]

As per section 230(3)(a), employees are also classed as workers. But as paragraph (b) indicates, the category of ‘worker’ is wider than that of ‘employee’ as it also includes other contracts for work or services. Workers who are not employees are therefore known as ‘limb (b)’ workers. In the Byrne Brothers\(^\text{18}\) case, the Employment Appeal Tribunal described the intermediary category of workers as having the dependency on a single employer as an employee, but also the independent position to look after themselves as the self-employed do.\(^\text{19}\) Workers


\(^{16}\) Employment Rights Act 1996, s 230(3).


\(^{18}\) Byrne Brothers (Formwork) Ltd v Baird and Others (2002) IRLR 96 (EAT).

\(^{19}\) ibid [17].
are entitled to the Nation Living Wage (NLW) or National Minimum Wage (NMW), minimum levels of paid holiday, yet unlike employees they are not entitled to maternity or paternity leave and many other employee rights.  

3. Self-Employment

The category of ‘self-employed’ people is analogous to the term ‘independent contractors’. These are people who run their own business, meaning they are not covered by employment law. As Collins explains, this is because ‘businessmen dealing with each other at an arm’s length should not be responsible for each other’s economic and physical security’. Self-employed people may be contracted by a business or consumer to perform a service, such as construction. These are classified as contracts for service, unlike an employee’s contract of service. Contracts for service are governed by commercial contract rules, alongside a few rights provided at work, such as protection against discrimination and limited health and safety protection.

Most of those working in the gig economy are classed as self-employed independent contractors, rather than workers or employees. Consequently, those working in the gig economy have very few rights at work. There is a clear incentive for gig economy firms to class those who work for them as self-employed independent contractors. In doing so, they forgo the statutory duties an employer has over both employees and workers. By evading the bulk of employment law, gig economy firms can reduce their costs as they have no duty to pay for sickness or holidays, for instance.

Commentators such as Collins argue that contract law alone is ‘unsuitable’ for regulating employment relationships. As is the case for employment

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21 ibid.
contracts, a breach of contract may create secondary obligations, such as compensatory damages. However, the general law of contract does not confer the more extensive and substantive obligations which feature in employment law. This is because, to a large extent, contract law and employment law have separate aims and purposes. In the commercial context, contract law serves to “protect the free flow of trade” and puts a large emphasis on freedom of contract ideals. On the other hand, as per Kahn-Freund, the purpose of labour law is to act as a “countervailing force” to the inequality of bargaining power which is inherent to the employment relationship. As previously mentioned, the genuinely self-employed operate at arms-length from the business they contract with and they manage their own working life, making this a non-issue. On the contrary, for employees and workers, who are subordinate to the employer they are contracted to work for, commercial contract law alone would be inappropriate.

As will be explored throughout this paper, the working life of those in the gig economy is often far closer to that of a ‘worker’. This culminates into a concerning situation whereby, in reality, gig economy workers have the obligations of a ‘worker’, yet merely the far weaker rights of an independent contractor under a commercial contract. It is for this very reason that contract law alone is unsuitable in protecting gig economy workers. Those working in the gig economy are without the strong ‘countervailing force’ needed to protect them from inadequate pay and conditions.

An example of the ‘countervailing force’ of employment law, that is not afforded to many in the gig economy, is the minimum wage rate. The assumption behind the minimum wage is that market wage rates for certain labour markets would be too low for somebody to make a living off. The minimum wage sets a wage rate above the market equilibrium, to protect working people from exploitatively low pay. However, as gig economy workers are ‘independent contractors’, they are not entitled to such protection. The Taylor Review noted that a concerning implication is that the oversupply of labour in the gig economy can push the hourly rate below the National Minimum Wage. This demonstrates

27 Paul Davies and Mark Freedland (eds), Kahn-Freund’s Labour and the Law (Stevens & Sons, 1983) 12.
the tangible difference that the ‘independent contractor’ label makes for gig economy workers and their own financial situation.

Therefore, the rise of the gig economy as a new form of labour market is both celebrated and condemned. Proponents of this form of labour market point to the flexibility it allows for both employers and independent contractors, operating under the more laissez-faire rules of commercial contract law. Independent contractors are paid for the ‘gigs’ they do, whether that is food delivery for Deliveroo, or a car journey for Uber. In addition, independent contractors have greater independence and more control over their time.29

The business model of Uber demonstrates this. Founded in 2009, Uber is a multinational company that matches independently contracted drivers to passengers who pay for a ride. Fare-paying passengers register via the Uber app in order to book a ride; the app then locates a driver in the area through GPS data, giving the option for the driver to accept or decline the booking.30 The GPS data from the driver’s smartphone throughout the trip is used to calculate a recommended fare, but drivers have a degree of discretion over the price they charge. This discretion is limited, as Uber remains entitled to its “service fee”.31 In London alone, the company has around 30,000 drivers catering for over two million registered passengers.32

The independence afforded by Uber drivers and other independent contractors in the gig economy has been labelled as “disruptive” innovation and “micro-entrepreneurship” by some proponents.33 Prassl argues that these claims obscure the realities of work in the gig economy.34 As recent case law has established, the notion of gig economy workers35 as ‘independent contractors’ simply does not match the reality of their work. Prassl labels this as the “platform paradox” whereby gig economy firms purport to be matchmakers of consumers

31 ibid.
34 ibid.
35 Here, the term ‘workers’ is used in its non-technical, non-legal sense.
and independent contractors through an app, yet the firm has close control over the delivery of the service,\footnote{Jeremias Prassl, \textit{Humans as a Service: The Promise and Perils of Work in the Gig Economy} (1st edn, OUP 2018) 5.} for instance, by stipulating the terms and conditions, performance and payment.\footnote{ibid.} In effect, the relationship between the gig economy firm and the ‘independent contractor’ is similar to that of an employer and an employee/worker.\footnote{ibid.} The implications of this means that those working in the gig economy have no access to statutory employment rights, despite the reality of their work being more integrated into a business model than their contract suggests. The following section on recent case law explores how judges have approached this issue and the factors they have taking into consideration.

\section*{II. RECENT LITIGATION ON THE SCOPE OF EMPLOYMENT IN THE GIG ECONOMY}

It is necessary to analyse the effectiveness of judicial decisions in relation to the scope of employment in the gig economy. This requires a consideration of what constitutes an effective decision. Essentially, it is the degree to which courts are ensuring those working in the gig economy are correctly categorised, distinguishing between truly ‘independent contractors’ and those who are actually ‘workers’ in all but name. The implication of the courts finding that an ‘independent contractor’ is indeed a ‘worker’ is that successful claimants are brought into the parameters of key statutory employment protections. This has the effect of enhancing rights at work for those in the gig economy, who could otherwise be vulnerable to exploitation and maltreatment by a firm.

Davidov argues that this can be done by a purposive approach to contractual interpretation.\footnote{Guy Davidov, ‘Who is a worker?’ [2005] 34(1) ILJ, 57.} The reason Parliament has retained the intermediary category of ‘worker’ is to broaden the reach of employment regulations by catching those with a degree of independence over their working life but who are still significantly dependent on a single employer.\footnote{ibid 58.} Considering the analysis made in Part I, the category of ‘worker’ is arguably far more of an accurate description of those working in the gig economy. This is the line of argument that has been successful in recent case law.
The *Dewhurst* case is one of many cases arising from the gig economy wherein which tribunals were asked to determine worker status. The claimant was a self-employed contractor, as stipulated by their contract with City Sprint, a bicycle courier service. As an independent contractor, the claimant was not entitled to two days’ holiday pay, which is a right afforded only for workers and employees. The claimant successfully argued that they were a “limb b” worker, rather than self-employed. The tribunal Judge Joanna Wade held that the claimant’s working practices did not reflect the contract, which she described as “indecipherable”. The tribunal held that City Sprint had a significant degree of control over the claimant in order to maintain consistency throughout the business model. Additionally, the bicycle couriers did not have security of tenure, as they had to toe the line in order to guarantee future work. The level of control the firm has over a contractor is therefore a key factor taken into account by tribunals to determine employment status. The ruling in *Dewhurst* has been followed in subsequent tribunal decisions, notably *Boxer v Excel*, where the employment tribunal held the courier was indeed a worker and entitled to one week’s holiday pay.

Perhaps one of the most landmark judgments was laid down by the Court of Appeal in *Aslam v Uber* in 2017. The case was concerned with whether Uber drivers, who were contracted as self-employed, were entitled to be paid the National Minimum Wage. As previously mentioned in Part I, Uber runs a lucrative business model, and has over 30,000 drivers in London alone. The Court of Appeal found that the claimants were workers. This drew widespread attention in the media as “the latest sign of the growing resistance” to the notion that gig economy workers are self-employed. The Court of Appeal agreed with the tribunal that Uber’s claim of being “a mosaic of 30,000 small businesses linked to a common platform” was “faintly ridiculous”.

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41 *Dewhurst v Citysprint UK Ltd* ET/220512/2016.
42 ibid [29.3].
43 ibid [46.1].
44 ibid [46.2].
48 *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) [90].
In its judgment, the Court of Appeal cited previous employment case law, such as *Autoclenz v Belcher*. The *Autoclenz* case set a precedent for courts to read beyond the four corners of the contract, as “the written documentation may not reflect the reality of the relationship”. In the *Uber* case, the evidence collected by the Employment Tribunal supported the claim that in reality Uber drivers met the statutory definition of a worker. The thirteen reasons given included the fact that Uber interviews and recruits its drivers; Uber sets the default route and “the driver departs from it at his peril”; Uber subjects its drivers to a rating system, in effect amounting to a performance management procedure; and, Uber reserves the power to amend the driver’s terms unilaterally. The Court of Appeal agreed with these points, meaning the claimants were workers and entitled to National Minimum Wage. The case is set to be heard before the Supreme Court.

The Financial Times commented on the case by stating that these decisions meant the stakes were high for gig economy companies. Although these decisions only extend to the claimants themselves, there is a clear implication for the Uber business model, as labour costs would rise and would therefore be passed on to consumers through higher prices. Another implication is that if drivers were no longer classed as independent contractors, they would have less flexibility. Although these observations are accurate, it is important to note the work of labour law academic Kahn-Freund. Kahn-Freund observed that the main purpose of employment law is to correct the imbalance of power between an employer and those they employ. It is not sufficient to argue that some Uber drivers prefer the flexibility of being classed as an ‘independent contractor’, when the reality of their work says otherwise, as this would contradict the purpose of employment law to protect against exploitation.

In 2018, the Supreme Court gave further guidance on distinguishing between a worker and independent contractor in the *Pimlico Plumbers*. In this case, a plumber was held to be a worker rather than an independent contractor,

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51 *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) [92].
53 Paul Davies and Mark Freedland (eds), *Kahn-Freund’s Labour and the Law* (Stevens & Sons 1983) 12.
meaning that the claimant could pursue claims of unlawful deductions in pay and holiday pay. The Supreme Court built upon previous case law and focused particularly on two important factors. The first is the concept of personal service. It is necessary for a claimant to show they had undertaken to personally perform the service for the firm, known as a contract for services, rather than a contract of services.\textsuperscript{55} It is relevant to ask whether the claimant could appoint a substitute to do their work, indicating the degree of independence afforded to independent contractors under a contract of services. Lord Wilson noted that the claimant in \textit{Pimlico Plumbers}, Mr Smith, had limited faculties to appoint a substitute.\textsuperscript{56} However, this right arose not from the contract itself but from concessions made by Pimlico Plumbers.\textsuperscript{57}

The second factor that the Supreme Court discussed was that Pimlico Plumbers had “tight control” over the claimant. This degree of control was reflected in the requirements on the claimant to wear branded uniform, carry an identity card and drive in a branded van which had a tracker installed in it.\textsuperscript{58} The contract also made references to wages, unfair dismissal and ‘gross misconduct’, which Lord Wilson described as “a grip on his economy inconsistent with his being a truly independent contractor”.\textsuperscript{59}

The \textit{Dewhurst}, \textit{Uber} and \textit{Pimlico Plumbers} cases all demonstrate a direction of travel taken by tribunals and courts to classify individual gig economy claimants as workers. Addison Lee drivers have also had successful worker status claims.\textsuperscript{60} However, there is a notable exception. In \textit{R (on the application of the IWGB) v Central Arbitration Committee},\textsuperscript{61} the Independent Workers Union of Great Britain lost a judicial review against the decision of the Central Arbitration Committee (CAC), who held their union was not eligible for statutory recognition. Statutory recognition is the process whereby a trade union can be allowed to represent a group of workers in order to collectively bargain on their behalf. As per Section

\textsuperscript{55} ibid [24]-[25].
\textsuperscript{56} ibid [25] (Smith LJ).
\textsuperscript{57} ibid.
\textsuperscript{58} ibid [48].
\textsuperscript{59} ibid [48] (Smith LJ).
\textsuperscript{60} Addison Lee workers successfully claimed worker status in the following Employment Appeal Tribunal cases: \textit{Addison Lee Ltd v Lange} UKEAT/0037/18/BA; \textit{Addison Lee Ltd. v Gascoigne} UKEAT/0289/17/LA.
\textsuperscript{61} \textit{R (on the application of IWGB) v CAC} [2019] EWHC 728, [2019] IRLR 530.
296 of the Trade Union and Labour Relations (Consolidation) Act 1992,\textsuperscript{62} only a union whose membership comprises of workers can satisfy the requirements of statutory trade union recognition. The CAC held that the Deliveroo drivers were independent contractors, not workers. Therefore, the IWGB union, who sought to represent the drivers, was not eligible for statutory recognition in relation to Deliveroo. A key factor behind this reasoning was that Deliveroo drivers had an express right to use a substitute, meaning they were not obliged to provide a personal service. In practice, substitution was uncommon. Deliveroo drivers were not obliged to accept work and therefore had no need to use a substitute. Substitution also has the drawback for drivers of having to lend someone else their equipment and password.

The High Court subsequently dismissed the judicial review challenge, holding that the CAC’s decision did not violate Article 11 of the European Convention on Human Rights, which protects the right to freedom of assembly, as the drivers were deemed to be self-employed.

It is clear from recent case law that tribunals and courts have been instrumental in ensuring that those working in the gig economy do not have their workers’ rights side-lined as a result of firms labelling them as independent contractors. The decisions have, for the large part, been in favour of the claimant. Notable gig economy companies such as Uber and Addison Lee have been affected by these decisions. What links *Dewhurst*, Uber and the *Pimlico Plumbers* decisions together is the role of courts and tribunals looking beyond the contract at the reality of the claimant’s working conditions. These decisions have ensured that the purpose of “limb b” worker category is not redundant, particularly in the gig economy where it may be a stretch to argue that workers are employees. This is exactly the purposive approach commentators such as Davidov have advocated for.\textsuperscript{63}

However, the common law alone is not enough to ensure enhanced rights at work in the gig economy. Firstly, tribunals and courts have made it clear that these decisions only apply to the claimants, not to the entire workforce of a firm. This means that all those working in the gig economy would have to bring claims of worker status in order to claim for the employment protections they should be

\textsuperscript{62} Trade Union and Labour Relations (Consolidation) Act 1992, s 296.
\textsuperscript{63} Guy Davidov, ‘Who is a worker?’ [2005] 34(1) ILJ, 57.
afforded anyway. This is not a satisfactory position for the law to be in. It almost implies that it is down to the gig economy worker\textsuperscript{64} to protect themselves by bringing litigation, rather than the firm itself, completely undermining the Kahn-Freund notion that the purpose of employment law is to protect the weaker position of the worker.

In addition to this, as shown in the \textit{Deliveroo} case before the CAC and High Court, not all decisions are held in favour of the claimant, even when the basis for the ‘independent contractor’ label is questionable. The implications of such decisions mean that trade unions cannot bargain on behalf of gig economy workers, leaving many in the gig economy who are underpaid without any form of representation.

Finally, it is worth noting that even when someone in the gig economy is classed as a worker, they still are not afforded the full set of employment law protections which an employee has. This asymmetry in rights cannot be dealt with at common law level. In fact, all tribunals and courts can do is give effect to the legislative distinction between an employee and worker, not challenge it. Therefore, notwithstanding the positive steps made by the common law to protect many in the gig economy, some form of legislative change is essential to enhance their rights at work.

\section*{III. THE TAYLOR REVIEW PROPOSALS ON THE SCOPE OF EMPLOYMENT AND THE EFFECTIVENESS THESE PROPOSALS COULD HAVE IN PROTECTING WORKERS IN THE GIG ECONOMY}

As Prime Minister, Theresa May commissioned the Taylor Review of Modern Working Practices in order to review the difficulties many workers face, which she highlighted in her “burning injustices” speech.\textsuperscript{65} The review was led by Matthew Taylor, Chief Executive of the Royal Society of the Arts.

\textsuperscript{64} Here, the word ‘worker’ is used in its non-technical, non-legal sense.
Chapter five of the report, “Clarity in the law” deals with the scope of employment.\(^{66}\) Whilst Taylor concluded that the tripartite distinction of employee, worker and independent contractor “works reasonably well”, the report also said there is a need to amend it in order to deal with changing labour markets.\(^{67}\) The focus of the amendment would be on the line drawn between ‘workers’ and ‘self-employed’, which as Part II of this paper highlights is not always a clear distinction. Taylor recommends that the category of ‘worker’ should be renamed ‘dependent contractor’, which is the term used in Canadian employment law.\(^{68}\)

It is important to clarify what this change in terminology could mean for those in the gig economy. The Taylor Review acknowledges the flexibility afforded to gig economy workers,\(^{69}\) such as the freedom to take on or refuse work.\(^{70}\) However, as Taylor mentions, over-supply of contractors in the gig economy can push the hourly rate below the National Minimum Wage. It is therefore important to ensure these key protections are extended to these types of contractors, who are not genuinely self-employed.

A ‘dependent contractor’ category would update legislation to reflect new types of business models, whereby contractors are not necessarily independent, rather they are deemed sufficiently dependent on the firm contracting them. This would provide greater clarity and scope to the intermediary category, meaning that gig economy firms would no longer be able to justify the ‘independent contractor’ label. This modernises the law, as it covers gig economy workers more explicitly. Taylor states that this could all be done by adapting current legislation, not overhauling it. Other recommendations which would help in more borderline cases include an online tool to provide individuals with an indication of employment status.

This could tackle the limits of the common law in only being able to grant successful claimants worker status, and would likely also have the effect of bringing the Deliveroo drivers from the *Deliveroo* case into the parameters of

\(^{67}\) ibid.
\(^{68}\) ibid 35.
\(^{69}\) Here, the word ‘worker’ is used in its non-technical, non-legal sense.
‘dependent contractor’ status. Additionally, it would greatly enhance rights at work in the gig economy, by ensuring the rights currently afforded to workers, such as holiday and sickness rights, cover all dependent contractors, whilst not compromising the flexibility of their work.

Whilst to some degree implementing the Taylor proposals would allow for legislation to do “more of the work and the courts less” when determining the scope of employment in the gig economy, the report has been criticised for its pragmatism. The IDS Employment Law Brief labelled the proposal to rename workers ‘dependant contractors’ as “cosmetic rather than substantive”, and argued that it only serves to give the impression that the Government is doing something to help those in the gig economy. This is true to some degree, but there is no reason why governments cannot implement Taylor’s proposals whilst also extending many employee rights to ‘dependent contractors’.

Hugh Collins, a notable employment law academic, wrote that the Taylor Review was a “missed opportunity” for the government to adopt a unified test of employment, rather than the current employee-worker distinction. This alludes to the fact that even when worker status is extended to those in the gig economy, they are still not afforded the bundle of rights that an employee has. Collins argues that there is rarely a justification in affording workers some rights but not others. Instead, the distinction which concerns the reach of employment protections should be made on the question of whether one is an employee or self-employed.

The Institute of Employment Rights (IER), who are influential in the formation of the British Labour Party’s employment policies, also advocate for a unified test of employment. They note that retaining the worker category, or ‘dependent contractors’, means that many in the gig economy have their rights undercut. Consequently, the IER states “this rebranding exercise is a gift to the gig

71 ibid 35.
72 IDS Employment Law Brief (2017, 1074, 2).
74 ibid.
economy”. It is worth noting that the 2019 Labour Party Manifesto proposes to “end bogus self-employment”, and “create a single status” of employment. The implications of this policy would be far-reaching. It would not only afford those in the gig economy the rights of worker status, but also extend employee rights to them too.

Indeed, no approach is a silver-bullet. However, Taylor is right to acknowledge that “redefining the boundaries of employment”, such as through a unified test, fails to take into account the flexibility that many in the intermediary category enjoy. A unified test of employment would essentially put a nail in the coffin for the current gig economy business model. Take the example of Uber. By overly tightening the rules of employment, Uber would perhaps no longer be able to successfully compete with the traditional ‘black cab drivers’. Politicians such as Ian Austin, a former Labour minister, have opined that Uber’s technological approach should be applauded and not be punished by stringent regulations. By adopting a unified test of employment, there would be less incentive for many firms to operate, since it is the flexibility enjoyed by both Uber and its drivers that contributes to the firm’s success.

The Taylor Review notes that the binary employment and self-employment exists in regards to taxation, but also notes that if it were bought into employment law, it would overly restrict the flexibility that work in the gig economy provides. Those who push for a unified test must realise that the consequence would probably culminate in the end of the gig economy, resulting in many people potentially losing their jobs. However, the Institute of Employment Rights would perhaps argue that this acceptable given the perceived inadequacies of the current law.

76 ibid.
Unless a Labour government was to be elected under its current manifesto, it seems unlikely that the unified test approach would be adopted, especially considering the current Conservative government has yet to enact the Taylor proposals from two years ago.\(^82\) On that basis, the recommendations made by Taylor would likely be welcomed, as they would give greater clarity on the employment status of those working in the gig economy, which would mean enhanced rights for over 1.1 million people. The Taylor Review proposals are pragmatic but, given the inaction by Parliament to address the issues facing gig economy workers, their implementation would be a step in the right direction.

**CONCLUSION**

It is clear that those working in the gig economy are currently not afforded the rights they should be entitled to. As per recent case law, the day-to-day realities for those working in the gig economy do not correspond with the ‘self-employment’ label purported by the contract. As self-employed independent contractors, those working for popular companies such as Uber, Deliveroo and Addison Lee have very limited rights. Not allowing for these workers\(^83\) to be covered by employment law protections, in the guise of market efficiency and flexibility, is scandalous. Tribunals and courts have been right to rebut this false notion.

If the Kahn-Freud account of employment law is still held to be true, that the law must rectify imbalance of power in employer-employee relationships, then further action needs to be taken. Whilst there have been positive steps made in recent case law, only successful claimants are granted worker-status, not the entire workforce. It is unsatisfactory to put the burden of regulation upon workers to litigate for rights they should be entitled to regardless. In addition, the judiciary have understandably found it challenging to establish a clear and consistent set of principles, despite Supreme Court cases such as *Pimlico*. Whilst judgments such as *Uber* and *Dewhurst* should be welcomed, cases such as *Deliveroo* demonstrate that it can be evidentially challenging to prove one’s worker status.

Legislative change is desperately needed to clarify the scope of employment in the gig economy. The pragmatic view taken in the Taylor Review to retain the

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\(^82\) This paper was written during the 2019 General Election campaign.

\(^83\) Here, the term workers is used in its non-technical, non-legal sense.
tripartite distinction, but to clarify the distinction between workers and independent contractors, would be a positive step. However, for many commentators this proposal does not go far enough to give gig economy workers full access to employment rights. They prefer the adoption of a uniform test of employment, allowing for those working in the gig economy to be classed as ‘employees’. It is persuasive to argue a uniform test would be too onerous on firms who are engaging in technological innovation. As a consequence, many who enjoy the flexibility offered to them in the gig economy would potentially lose their job as a result of more stringent regulations. It is beyond the scope of this paper to assess the extent to which this would be true. Despite this, it is still worth highlighting to show that, for now, a pragmatic change in legislation could be more effective.

The trade-off between flexible labour markets and stricter regulations on employers is the question at the centre of any proposal to change legislation. Given the current political uncertainty in the UK, even pragmatic change will be welcomed by those who advocate for enhanced rights at work in the gig economy.
Treaties, Peremptory Norms and International Courts: Is the Hierarchy Theory Treading Water?

Madeleine Lusted

INTRODUCTION

In its recent report, the ILC addressed two main outstanding issues relating to *jus cogens* norms: the existence of regional *jus cogens* and the possibility of an illustrative list.¹ The report concludes with draft conclusion 24, which proposes a non-exhaustive list of the “most widely recognised”² peremptory norms, such as the prohibition of genocide and aggressive use of force. Peremptory norms are no doubt a “positive part of international law,”³ yet are still conceptualised by some as “a dramatic (or threatening) magic.”⁴ The ILC’s report is perhaps an attempt to concretise *jus cogens* as, in Kolb’s words, an “operational concept of law”, rather than a mere extension of natural law theory or lofty ideals. This post offers the thesis that, whilst such a mission is admirable, the operation of peremptory norms as envisaged by the ‘hierarchy theory’⁵ remains impeded by the dominance of treaties as a source of international law. Furthermore, this seems unlikely to change in the immediate future because treaties are a primary vehicle for the enforcement of state sovereignty, which remains paramount in an international legal sphere dominated by positivist notions of state consent. The

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¹ ILC, ‘Fourth report on peremptory norms of general international law (jus cogens)’ 71st session (9 April - 7 June; 8 July - 9 August 2019) UN Doc A/CN.4/727.
² ibid 63.
⁴ ibid.
conflict is thus characterised by the dichotomy between \textit{realpolitik} and international ideals.

‘Treaty’ will be used in the sense envisaged by Article 2(1)(a) VCLT – “[a]n international agreement concluded between states… and governed by international law…” . This post proceeds from the definition of ‘peremptory norm’ offered by H.R. Fabri, who characterises it as a “hierarchy (of norms) … linked in turn with the idea of safeguarding… a supposedly universal, common core of human values.”\textsuperscript{6} Another critical feature of \textit{jus cogens} norms is pointed out by Kolb, who states that such a norm “does not allow derogation”; likewise, Ragazzi highlights the “disability” of States to “contract out of” a norm of \textit{jus cogens}.\textsuperscript{8} The non-conditionality of peremptory norms would seem to make their applicability a simple matter, but this is not borne out in reality for several reasons. Firstly, the article considers the treatment of peremptory norms and treaties by international courts; secondly, it considers the socio-legal importance of treaties and \textit{jus cogens} norms.

The issue of the hierarchy theory, and the operation of peremptory norms versus treaties, remains important despite the large volume of literature on the subject. If peremptory norms are to assume the role assigned to them – to protect normative ideals and prevent gross infringements of human rights – they must have practical bite. The obstacles to progression must therefore be recognised in order to be overcome. There is otherwise the danger that peremptory norms become merely a theoretical ideal.

\textbf{I. COURTS AND THE HIERARCHY THEORY}

The consequences of \textit{jus cogens} norms are made explicitly clear by Art. 53 VCLT 1969: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” Furthermore, Art. 64 gives retrospective application to \textit{jus cogens}: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” This embodies the ‘hierarchy’ or ‘trumping’

\textsuperscript{7} Kolb (n 3) 2.
\textsuperscript{8} Ragazzi, \textit{The concept of international obligations erga omnes} (OUP 1997).
argument, as expressed by Bates: *jus cogens* norms are to prevail over all other sources of international law, including treaties.\(^9\) However, although *jus cogens* are certainly acknowledged by international courts, it is argued that they are a less favoured means of deciding cases than treaties. Crawford admits that they remain “something of a curiosity”\(^10\). Hence, “few are the instances in which a court or tribunal has applied the concept so as to determine the outcome of a case.”\(^11\) This is a critical observation illustrated by the case of *Al-Adsani*.\(^12\)

In *Al-Adsani*, the European Court of Human Rights (ECtHR) rejected the argument that application of the doctrine of state immunity to Kuwait, under the SIA 1978, infringed his rights under Art. 3 ECHR (prohibition on torture) and Art. 6 (right to a fair trial). The applicant argued that his claim related to torture, the prohibition of which is a *jus cogens* norm, and hence such prohibition took “precedence over treaty law and other rules of international law”\(^13\). A majority of 9:8 held that the Art.3 right had not been infringed: “notwithstanding” the “special character” of the prohibition of torture, the Court found itself unable to discern in the “the international instruments, judicial authorities or other materials” any basis for the applicant’s argument.\(^14\) The case is significant because, as a treaty, the European Convention on Human Rights (ECHR) should be hierarchically subordinate to the prohibition of torture as a *jus cogens* norm. Thus, according to the hierarchy theory, the ECHR was the wrong yardstick by which to measure the applicant’s case.

Of particular note is the centrality of multilateral treaties in the Court’s reasoning – the court noted that “none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.”\(^15\) This is illuminating as it suggests that the ‘hierarchy’ envisaged by the VCLT 1969 is not

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11 ibid.
12 *Al-Adsani v UK* App no 35763/97 (ECHR, 21 November 2001).
13 ibid [57].
14 *Al-Adsani* (n 12) [61].
15 ibid.
being enforced at the judicial level. If the hierarchy model is correct, the *jus cogens* prohibition of torture should have taken clear precedence, such that recourse to the aforementioned treaties would be irrelevant. If peremptory norms are at the apex of the hierarchy, why mention treaties at all?

Furthermore, the Court referred to the ILC’s 1999 Report on Jurisdictional Immunities of States and their Property.\(^{16}\) Citing the working group’s findings, it noted that whilst some states had shown “some sympathy” for the idea that state immunity should be waived where it conflicted with peremptory norms, “in most cases… the plea of sovereign immunity had succeeded.”\(^{17}\) The Concurring Opinion of Judge Pellonpää joined by Sir Nicolas Bratza is also illuminating:

> “Although giving absolute priority to the prohibition of torture may at first sight seem very ‘progressive’, a more careful consideration tends to confirm that such a step would also run the risk of proving a sort of “Pyrrhic victory”. International cooperation, including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations.”\(^{18}\)

This suggests a certain judicial reticence in developing international law beyond what is accepted by states. The Court’s reasoning appears to be driven by two main considerations: i) the lack of state practice in waiving state immunity in favour of *jus cogens* norms; ii) the centrality of state immunity in diplomatic relations between states, and the policy implications of impeding such immunity. This is clearly at odds with the functionality envisaged by the ILC report, which requires *jus cogens* to ‘trump’ treaties in order to fulfil their role of safeguarding human rights considerations.

It may be argued that the hierarchical concept of *jus cogens* was nevertheless acknowledged in the *Al-Adsani* judgment: the Joint Dissenting Opinion considered that “the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which

\(^{16}\) *Al-Adsani* (n 12) [62].

\(^{17}\) ibid.

\(^{18}\) *Al-Adsani* (n 12) Concurring Opinion of Judge Pellonpää Joined by Judge Sir Nicolas Bratza [27].
does not have the same status.”

Thus, the hierarchy theory is acknowledged by at least some amongst the judiciary. However, this does not convince as a counterargument. As Bates points out, *jus cogens* “only really featured in the reasoning of the minority, with the majority taking their stand on different reasoning.”

This post has already illustrated how the reasoning of the majority centred around multilateral treaties and policy considerations. Moreover, Bates persuasively suggests that this is not merely an outlier amidst a sea of acceptance of the hierarchy theory: he cites the *Arrest Warrant Case* as illustration of the fact that “*a jus cogens* norm did not automatically make ineffective other rules of international law.”

Both the *Arrest Warrant Case* and the case of *Jones* are examples of rulings in which claims to state immunity were upheld despite suspected violations of *jus cogens* norms. In *Jones*, the House of Lords upheld Saudi Arabia’s claim to state immunity despite the applicants’ allegations of torture at the hands of Saudi officials. This “hammered another nail in the coffin” of the hierarchy theory, and indeed it submitted that the theory is currently treading water. Whether it will remain so in the future is beyond the scope of this post.

A final possible counter-argument against this state of affairs may be found in the argument of Cassese, who suggests that no “consistent practice” of *jus cogens* norm by states is necessary to render them operational; it is sufficient for members of the international community to “evince” acceptance of the norm. The rejection of ‘consistent practice’ as the benchmark of recognition would seem to imply that any statement by a state indicating acceptance of a norm as *jus cogens* would do. The implications of this argument are thus that enforcement of the hierarchy theory by courts is neither here nor there: *jus cogens* are operational, whether or not this is reflected in practice. This is superficially attractive as an

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19 *Al-Adsani* (n 12) Joint Dissenting Opinion [1].
20 *Bates* (n 9) 656.
22 *Bates* (n 9) 657.
23 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* (Secretary of State for Constitutional Affairs and others intervening); *Mitchell and others v Al-Dali and others* [2006] UKHL 26.
24 *Bates* (n 9) 657.
argument: it seems to adhere to the intuition that the highest human rights ideals, such as prohibition of genocide and torture, should not depend for their existence on the whims of States or courts. For example, it is not seriously contested that prohibition of torture is a *jus cogens* norm, even though States have and do torture individuals.

However, Cassese ultimately provides the correct answer to the wrong question. “Most” international lawyers accept the existence of *jus cogens* and also accept their “operation” within a system of international law, as pointed out by O’Connell. What this post questions, however, is the practical operation of *jus cogens* vis-à-vis treaties. In this sense, Cassese is over-idealistic. The idea that peremptory norms trump all other sources of international law is a hollow statement if courts reject the hierarchy in the first place. According greater importance to treaties becomes an easier way of ensuring that the development of international law does not too often outpace what is accepted by states (since treaties, by definition, are built around the intentions of the parties). Lord Lloyd-Jones concurs with the approach in *Al-Adsani*: there is a need for “judicial restraint in developing international law beyond what is accepted by States.” Cassese himself acknowledges the lack of ‘bite’ of *jus cogens*: it has “never had the effect proper to the notion,” i.e., to nullify a treaty contrary to its content. Cassese conversely posits that *jus cogens* have “perhaps” fulfilled a deterring role by forestalling the conclusion of agreements contrary to peremptory norms, and thus cannot be characterised as a “flop”. However, this is firstly very difficult to prove beyond doubt, and secondly, as seen by the examples given in section 2), States can and do enter into and revoke treaty obligations even if this will have a deprecative effect on *jus cogens* norms (for example, the withdrawal from a treaty designed to impede aggression and/or use

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28 Cassese (n 25) 160.
29 Cassese (n 25).
of nuclear weapons). It is ultimately difficult to reconcile Cassese’ faith in the theoretical success of *jus cogens* with the practice of states and courts.

The explanation for *jus cogens’* lack of bite is helpfully spelled out by the Carnegie Endowment for International Peace, as referenced by O’Connell. This stated that:

“… the only method of deriving [*jus cogens*] is judicial determination. Thus, it is left to the judge to extract *jus cogens* limitations from the legal system as a whole…”

Hence, the ‘hierarchy theory’, despite its embodiment in Arts. 53 and 64 VCLT, appears to have been declawed by the Courts. Peremptory norms may not depend on state practice for their existence but, in realistic terms, they depend on judicial enforcement for their operation as the ‘trump cards’ of international law. It is submitted that this will significantly impede the fulfilment, in practice, of Kolb’s conception of *jus cogens* as an “operational concept of law”. Deprived of a bite, *jus cogens* cede their position in the normative hierarchy of international law to treaties.

II. *JUS COGENS* AS NEW INTERNATIONAL LAW?

On a final note, this article turns to the argument that *jus cogens* will supersede treaties as a source of international law because they are representative of a ‘new’ international order, in which human rights concerns prevail. Cassese aptly summarises this position: *jus cogens* are a “hallmark” of the “new international community” – for the first time, peremptory norms restrain the “hitherto unlimited law-making power of states.” They thus represent a “novel approach” to international relations in which “community concerns”, to some extent, prevail.

31 O’Connell (n 26) 82.
33 Cassese (n 25) 161.
over States’ self-interest. The inference is that peremptory norms are the better means of delivering outcomes which adhere to international human rights standards, whilst treaties are somewhat outmoded because they promote state or party sovereignty.

There is the potential for discussion on this point which far exceeds the scope of this post. Nonetheless, it is sufficient for our purposes to briefly point out that this argument falls into the familiar trap of over-simplification. It is true that *jus cogens* represents an inroad into ‘traditional’ sources of international law, insofar as they are normative safeguards of the most basic human rights. However, it is a mistake to suppose that i) treaties are no longer ‘contemporary’, or that ii) there is no overlap in normative function between treaties and *jus cogens* – treaties can also play a role in safeguarding human rights. International law is “shaped and constrained” by the “norms” of international society,\(^{34}\) but this is not the exclusive purview of *jus cogens* alone.

Recent developments are an apt reminder of the prevalence of treaties as a source of international obligations. In 2017, the US withdrew from the Paris climate agreement.\(^{35}\) Stalled negotiations between the EU and Switzerland over a treaty have disrupted “cross-border share trading and strained bilateral ties.”\(^{36}\) As of August 2nd, 2019, the US formally withdrew from the 1987 INF Treaty.\(^{37}\) Treaties, rather than *jus cogens*, still form the blueprint for many international agreements and developments. Treaties concretise the intentions of states and, thus, reaffirm state sovereignty. This is not a function which can be overtaken by peremptory norms as these are not concerned with States’ self-interest. This is nonetheless not to say that the two share some roles; notably, their mutual capacity to safeguard normative ideals.

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35 Milman (n 30).
In her May 2019 lecture at the Blavatnik School of Government, University of Oxford, Leila Sadat\(^{38}\) dealt extensively with the role of the Rome Statute in establishing the International Criminal Court (ICC) and the challenges posed to the Treaty by protectionist State policies. This serves as a pertinent example of a treaty which, in establishing the ICC, performed a human rights function in ensuring a mechanism by which perpetrators of the worst abuses could be brought to justice.

Admittedly, however, the need to remain vigilant as to the implications of \textit{realpolitik} and state practice remains: for example, US National Security Advisor John Bolton has previously attacked the ICC,\(^{39}\) potentially undermining the work of the court in enforcing \textit{jus cogens} norms in relation to crimes against humanity. The US is also not a State Party to the Rome Statute, despite its ratification by many other States. Politics has the potential to outflank legality insofar as state sovereignty remains decisive. Thus, the problem of less-than-ideal political realities in enforcing \textit{jus cogens} is not fully satisfied either by a reliance solely on treaties or solely on courts. Nonetheless, the power of treaties as a source of international law remains strong because they are a convenient means of safeguarding the interests of individual states. Peremptory norms often do not have this advantage, unless they happen to be embedded in treaties which provide some service to the interests of states: for example, Art. 2(4) of the UN Charter prohibits the “threat or use of force” against the “territorial integrity or political independence” of any State. This embodies the peremptory norm against aggression or use of force. However, it is also beneficial to states insofar as it provides some protection for their territorial and political sovereignty.

In sum, it is perhaps a disservice to peremptory norms to compartmentalise them wholly from treaties. If \textit{jus cogens} are to be effective, they must represent concrete action as well as lofty ideals. This is best understood when it is recognised that \textit{jus cogens} are merely one route to a common destination. Future enforcement of \textit{jus cogens} may, in theory, be made more effective by a flexible

\(^{38}\) Leila Sadat, ‘Current challenges to international justice: lean in or leave?’ (Lecture, 13 May 2019) Blavatnik School of Government, University of Oxford.

approach which considers treaties and *jus cogens* (especially where a treaty purports to represent *jus cogens*) in tandem. Unfortunately, the discussion of the *Al-Adsani* case in section 1) above demonstrates the judicial tendency to consider *jus cogens* in isolation from treaties and to give preference to the treaties.

**CONCLUSION**

Kolb rightly concludes that “there can be no doubt as to the necessity of the notion of *jus cogens* in a fully-fledged legal order whose development has moved beyond the most primitive stages…”40 Peremptory norms play a vital function in policing the normativity of international law. However, at least two significant problems have emerged from this discussion: i) peremptory norms are dependent on judicial enforcement and thus their efficacy is compromised, as the case of *Al-Adsani* demonstrates; ii) reliance on treaties remains a tempting alternative in cases where policy or state practice would render the enforcement of a *jus cogens* norm inconvenient. The cumulative effect of these issues is to remove the practical bite from Arts. 53 and 64 VCLT. Without implementation by international courts, the hierarchy argument is little more than a theoretical ideal. Hence, whilst the ILC Report is right to highlight other issues, such as the controversy over regional *jus cogens*, the comprehensive image of peremptory norms envisioned by the report’s draft conclusion 24 is as yet an ideal. The chasm between the archetype and the reality is something which must be resolved if peremptory norms are to keep up with treaties as a means of resolving cases in international law. Hopefully there may yet be a reconciliation of Cassese’ faith in *jus cogens* and political realism.

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40 Kolb (n 3) 127.
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