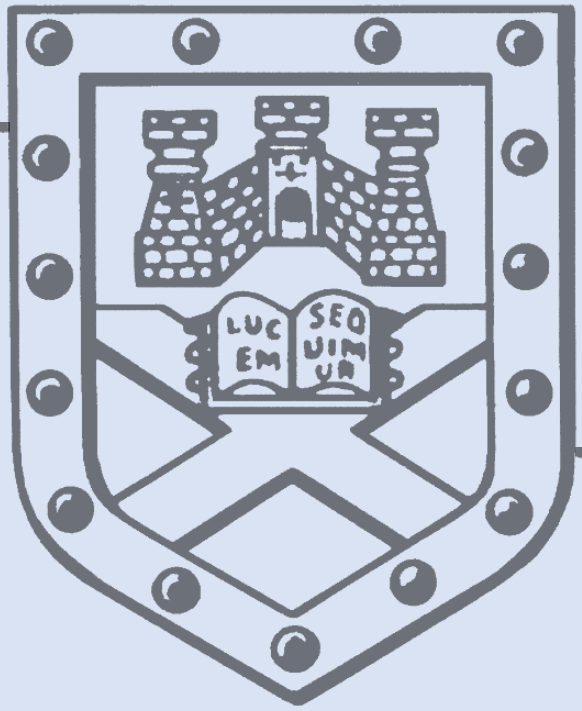
EXETER LAW REVIEW



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EDITORIAL

It has been my honour and privilege to act as Co-Editor-in-Chief of the Exeter Law Review 46th Annual Journal 20/21. The Journal has always been a means of highlighting the immense talent that the University of Exeter (and beyond!) have to offer, and I am proud to say that this year is no different. Although I was fortunate enough to work alongside Halle Fowler and Joshua Prior on their respective pieces, I have also had the opportunity to overview our Editorial Board's fantastic efforts across a broad range of legal specialisms.

Despite the additional difficulties brought about by the COVID-19 pandemic, the Review has progressed significantly this year. We started off with the largest recruitment cycle ever experienced and, following a rigorous interview process, we have an incredibly strong editorial team, including the largest female identifying editorial board within notable years. In such a male-dominated profession as law, this is something I am incredibly proud to have enabled. Furthermore, we have forged long-term partnerships with two external academic journals, LSE and Cambridge Law Reviews, thus facilitating greater cross-university academic discourse in the future. Additionally, we have formalised the Exeter Law Review Podcast through the introduction of a Podcast Manager and dramatically increased its outreach, both through its adoption on various platforms including Spotify and Apple Podcasts and our collaborative efforts with other academic journals. The Podcast continues to be a platform to highlight the fascinating and innovative work being completed within the Faculty. Our podcast currently has listeners from ten different countries, and it is exciting to see how many more can be reached in the future. Finally, I am pleased to have been in a position to introduce two French articles within the Journal, something which has not been accomplished since its inception in 1965. However, in the essence of full disclosure, I must admit that my French GCSE does not quite equip me with the necessary skills to run this portion of the Journal. Therefore, I must extend my immense gratitude to my Co-Editor-in-Chief, Shania Essah Aurelio, for her commendable efforts within both the French and English aspects of the Exeter Law Review.

It is not possible for me to imagine my time at the Review without Shania. She has been my support during stressful times, my unrelenting cheerleader and, of course, the *Shan* to my *Fran*cisco! I am incredibly grateful to her for all her hard work and dedication to the Editorial Board and I know that her constant enthusiasm and infectious drive will be sorely missed.

I also wish to extend thanks to Dr Catherine Caine for her unwavering support. Catherine has been integral to the success of the Exeter Law Review this year, ensuring that we always knew we had support within the Law School.

Thank you to everyone who has contributed to making the 46th Annual Journal such a success. To our authors, thank you for trusting us with your work and I hope you agree that we have enhanced your already fascinating articles. To my board, thank you for your commitment, passion and tenacity. It has been wonderful to see you all grow as editors and I am proud to have been your Editor-in-Chief.

Finally, I wish to thank you, the reader. I hope that our enthusiasm, dedication and academic curiosity shines through and that you enjoy reading the 46th Edition of the Exeter Law Review Annual Journal.

Frances Eve Hand
Editor-in-Chief

EDITORIAL

It is with great pleasure that we present the 46th Volume of the Exeter Law Review's Annual Journal. I am immensely proud of our editors for producing high-calibre work given the complications introduced by the global pandemic. We are fortunate to have an outstanding team who approached this challenge with commendable dedication, skill, and passion. Through our efforts, we worked towards increasing access to legal academia using our various platforms.

I am incredibly honoured to be exposed to the quality of research in my time at the Review, as well as the diverse minds from which these ideas have originated. It is remarkable that the authors of the *dissertations juridiques* in this volume were given the same question, but they brilliantly approached the prompt in their unique ways. It is inspiring to witness how originality of thought is actively encouraged within Exeter's legal community, especially with the Exeter Law Review being the oldest student-led law review in the United Kingdom. With this, I am humbled by the opportunity of working on such amazing pieces of work all year-round. These conversations leave me all the more optimistic on the future of legal academia, further concretising how the law is *truly* informed by — and made for — societal progression.

As Frances has mentioned, we have highlighted the importance of French law this year through our debut *dissertations juridiques* in this issue. This, of course, would not have been possible without the help of Dr Frédéric Rolland — I am immensely grateful for his enthusiasm and unfaltering support for our goals throughout the academic year. It was time to cast the spotlight on Exeter's award-winning bijurisdictional law programme, and it has been an honour to have led the Review's first-ever French editorial team. It was a privilege to work closely with our French editors, Marine and Violaine, who have undertaken their roles with such proficiency, drive, and commitment. There really is no other team that I would decipher pages of French law scripts with.

Despite the interruptions brought on by the COVID-19 pandemic, this year has been *unifying*. I am floored by how international and diverse this year's editorial board is, as well as the collaborations that we have embarked with external partners. I am very much looking forward to seeing these relationships develop in the future.

Indeed, this editorial would not be complete without a love letter for Frances. I cannot imagine my time at the Review without her animated voice notes, sing-alongs, and commendable tolerance for my puns. She is absolutely stellar, and I wish her all the best as she "masters" the law at the University of Oxford this October. There is no doubt in my mind that she will excel in this new chapter of her legal journey. I also extend this to our brilliant editors, from whom I have read such fantastic work and engagement with the authors of this issue. I did not know that a flawless bit of cross-referencing could invoke such a physical reaction within me, and this can only be a testament to their talents. A warm and earnest thank you is also in order for Dr Catherine Caine, who has been nothing short of wonderful, and Tia Ebarb Matt for her continuous support.

I did not think that a 13-year-old girl who incessantly cried because she could not keep up with all the English spoken in a new country would find herself 8 years later as a Co-Editor-in-Chief of an academic journal — yet here we are.

My heart is full; and I hope that *you*, dear reader, will enjoy these excellent pieces of work just as much as we enjoyed putting them together.

Shania Essah Ceralde Aurelio
Editor-in-Chief

The Law of Reciprocity in Public International Law and the Protection of Human Rights

Kaushalya Balaindra[*]

INTRODUCTION

In the absence of an overarching authority governing public international law, the law of reciprocity has been widely recognised as a 'foundational'[1] element of international law. This essay will proceed in two parts: In Section I, this essay will discuss the operation of reciprocity in treaty law and customary international law, submitting that it plays the same roles in each area — namely as an enforcement mechanism and a system to maintain interstate relations. In Section II, this essay will examine the law of reciprocity in the human rights conventions and submit that the absence of reciprocity affords adequate protection to human rights.

I(A). RECIPROCITY IN TREATY LAW

In the context of treaties, the law of reciprocity not only has a 'pivotal role in modern inter-state relations',[2] but it is also recognised as a 'significant contributor to international co-operation'.[3] It also acts as an enforcement mechanism to ensure compliance with international agreements. Watts notes that the law of reciprocity operates in both an obligational and an operational sense.[4]

The obligational function speaks directly to the maintenance of peaceful interstate relations and stems from the 1969 Vienna Convention on the Law of Treaties (VCLT).[5] Articles 11 and 26 of the 1969 VCLT indicate that states only owe obligations under a treaty to another state if the latter state has consented to be bound by that same treaty — and its provisions

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[1] Sean Watts, 'Reciprocity and the Law of War' [2009] Harv Int'l L J 365, 365.

[2] Shahrad N. Fard, 'Is Reciprocity a Foundation of International Law or Whether International Law Creates Reciprocity?' (DPhil thesis, Aberystwyth University 2013) 14.

[3] ibid; Mike Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 89.

[4] Watts (n 1) 371.

[5] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (1969 VCLT).

within — as the former.[6] Jinks similarly noted the use of reciprocity as 'a means to ensure mutuality of obligations between the parties' vis-à-vis a treaty.[7]

The rules surrounding the practice of 'reservations' illustrate the obligational function of the law of reciprocity.[8] A 'reservation' is a unilateral statement made by a state when adopting a treaty, and that statement is indicative of that state's intention to modify the legal status of certain provisions within the treaty.[9] Thus, the state will not be bound by the provisions within said treaty in its entirety.

Hypothetically, if State A made a reservation to Treaty X and State B accepts such reservation or abstains from commenting on it, the reservation then becomes applicable to both States as per article 21(1)(b) 1969 VCLT. In fact, State B can invoke the reservation against State A despite not submitting it in the first place. If, for instance, State B had objected to the reservation, the treaty relationship remains intact — but the specific provision affected by State A's reservation does not apply to both states.[10] This is adequately reflected in practice, as evident in the Libyan Reservation to the 1961 Vienna Convention on Diplomatic Reservation[11] regarding the opening of diplomatic bags.[12] Though Libya has not sought to rely on this reservation or to exploit it, as the United Kingdom did not object to it, it is entitled to benefit from this reservation and make requests for a search when necessary.[13] Therefore, as recognised by Goldsmith and Posner, the law of reciprocity encourages co-operation amongst States as they would 'reciprocally refrain from activities… that would otherwise be in their self interest in order to reap… long-term benefits'.[14] Reciprocity ensures that reserving states are not the only states who benefit from their reservations, thus also maintaining a balance of the rights and interests of states.

Lord McNair notes that the continued operation of a treaty is contingent on the operational function of reciprocity.[15] Watts recognised that many legal scholars have often described the operational function of reciprocity by citing the legal maxim *inadimplenti non est adimplendum* ('there is no need to perform for one who has not performed').[16] This implies

[6] Watts (n 4).
[7] Derek Jinks, 'The Applicability of the Geneva Conventions to the "Global War on Terrorism" [2004] Virginia Journal of International Law 165, 191.
[8] Watts (n 1) 374.
[9] 1969 VCLT (n 5) art 2(1)(d).
[10] ibid art 21(3).
[11] Vienna Convention on Diplomatic Reservation, 24 June 1964, 500 UNTS 95 (entered into force 24 April 1964).
[12] ibid art 27(4).
[13] Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' [1985] AJIL 641, 648
[14] Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 12 (OUP 2006) 12.
[15] Lord McNair, 'The Law of Treaties' [1986] OPIL 573.
[16] Watts (n 1) 375.

that states are bound by certain treaty obligations only to the extent that other states observe those provisions in practice.[17] Consequently, reciprocity is 'invoked as an appropriate standard of behaviour'[18] for states to comply with their agreements and follow through with their legal obligations.[19]

Prior to the 1969 VCLT, there are at least two occasions where international tribunals made references to the operational function of reciprocity. Firstly, in the *Diversion of Water from the Meuse*,[20] though the majority of the Permanent Court of Justice came to the conclusion that the Netherlands had not breached the Treaty of 1863,[21] it is important to note Judge Anzilloti's dissenting opinion. He acknowledged the importance of the legal maxim (*inadimplenti non est adimplendum*) and described it as 'so just, so equitable, so universally recognised, that it must be applied in international relations also'.[22] Secondly, in the *Tacna-Arica* arbitration case,[23] where Coolidge (the arbitrator) had examined Peru's claim to be discharged from its obligations under the Treaty of Ancon[24] pursuant to Chile's alleged breach. In Coolidge's Opinion, he explicitly confirmed the remedy of terminating a treaty where another State has fundamentally breached its obligations so as to 'frustrate the purpose of the agreement'[25] – in other words, failing to observe the treaty obligations in practice.

Once the 1969 VCLT came into force, two strains of observational reciprocity have been identified: 'positive' and 'negative' reciprocity.[26] The 1969 VCLT makes explicit reference to the exercise of negative reciprocity. For instance, in the case of bilateral treaties, if one of the states breaches its treaty obligations, the other state can use the breach as grounds to terminate the treaty.[27] Alternatively, positive reciprocity is described as the 'more hopeful strain',[28] as it refers to states making 'efforts to induce reciprocal compliance from other actors through continued respect for an international norm or treaty provision'[29] despite a state's legal right of non-compliance in the event of a breach or non-accession of a treaty by other states. Despite the two strains, only negative reciprocity has an express provision

[17] ibid.
[18] Robert O. Keohane, 'Reciprocity in International Relations' [1986] Int'l Org 1, 1.
[19] Fard (n 2) 12.
[20] *Diversion of Water from the Meuse Case (Netherlands v Belgium)* 1937, Judgment No 25 PCIJ Series A No 70.
[21] ibid [58].
[22] ibid [211].
[23] *Tacna – Arica Arbitration* [1925] 2 Reports of International Arbitral Awards 921.
[24] ibid 924.
[25] ibid 944.
[26] Watts (n 1) 376.
[27] 1969 VCLT (n 5) art 60(1).
[28] Watts (n 1) 378.
[29] ibid 377-378.

under international law, thus imposing an obligation on states. As recognised by Baker, reciprocity therefore has a 'powerful constraining factor on the activities of states'.[30]

I(B). RECIPROCITY IN CUSTOMARY INTERNATIONAL LAW

Pursuant to the 'ambiguous',[31] 'flexible and non-central'[32] nature of customary international law (CIL), it may appear difficult to identify the operation of the law of reciprocity in this context. On one hand, scholars from the early twentieth century such as Le Fur and Kalshoven argue that reciprocity has been equally applied in both treaty law and CIL — thus occupying the same roles in both areas.[33] On the other hand, current scholars such as Villiger argue that the law of reciprocity operates differently in each realm.[34] The International Law Commission observed that the legal maxim *inadimplenti non est adimplendum* is 'apparently not applicable in the context of' CIL.[35] This essay will favour the former view, submitting that reciprocity maintains a balance of interests amongst states and also deters states from pursuing interests that are only beneficial to them.

The 'golden rule'[36] of CIL is that in the context of general customary international law, any state claiming a right under that law has to 'accord all other states the same right'.[37] This, in itself, highlights the law of reciprocity maintaining a balance between the interests and rights of states by minimising any potential unfair advantage sought by the claiming state.[38] Alongside that, as recognised by Bryers, reciprocity also acts as an 'important constraint'[39] on states' behaviour with regard to existing or emerging rules under CIL. This is highlighted by the United States of America (United States) issuing the Truman Proclamation on the Continental Shelf — by making an outright exclusive jurisdiction claim over its continental shelf resources.[40] The United States were aware that any rule or right that derives from this will be equally applicable to other states as well.[41] Consequently, the law of reciprocity places limitations on states' conduct as sharing certain rights may in fact be detrimental to their own interests.[42]

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[30] J Craig Barker, *International Law and International Relation*s (London: Continuum 2000) 31.
[31] Watts (n 28) 378.
[32] Fard (n 2) 71.
[33] Louis Le Fur, *Des Représalles en Temps De Guerre* (1999) 24; Frits Kalshoven, *Belligerent Reprisals (International Humanitarian Law) (International Humanitarian Law Series)* (2nd edn, Martinus Nijhoff Publishers 2005) 24.
[34] Mark E. Villiger, *Customary International Law and Treaties* (Dordrecht Boston, Lancaster: Martinus Nijhoff Publishers 1985) 274-275.
[35] International Law Commission, *Year of The International Law Commission* (UN Doc.A/CN.4/SER.A/1999) [42].
[36] Fard (n 2) 70.
[37] Byers (n 3) 162.
[38] Fard (n 32).
[39] Byers (n 37).
[40] President Harry S. Truman, *Executive Order* 28 September 1945.
[41] ibid.
[42] Fard (n 36)

The law of reciprocity's role as a 'constraint' is further reinforced in the doctrine of persistent objector. The doctrine holds that a state may be exempt from following a new rule under CIL so long as the state has opposed the rule from the start of its formation and has consistently maintained this position.[43] This essay submits that by placing such constraints, the principle of reciprocity seeks to discourage the practice of persistent objections.[44]

Reciprocity places a 'substantial'[45] amount of pressure on objecting states as it requires them to maintain their obligations with other states with respect to the old rule, whilst the other states are not required to reciprocate this deal and they reap the benefits of the new rule without needing to share with the objecting state.[46] Therefore, if the objecting states are not persistent with their objection, they have to abandon that title. This is illustrated by the United States, the United Kingdom, and Japan with regard to their persistent objection to the emergence of a twelve-mile width to the territorial sea. Contrary to that, they supported a three-mile limit.[47] Foreign vessels were permitted to operate outside the three-mile limit of the objecting states' territories, but these objecting states were excluded from waters within twelve-miles of other states' coastlines. This led to them abandoning their 'persistent objector' position.[48] Consequently, where there is a lack of 'overarching sovereign',[49] Parisi and Ghei recognise that the principle of reciprocity encourages the act of 'returning like behaviour'[50] — thus creating a balance of rights and interests within states and also acting as a 'deterrent'.[51]

II. RECIPROCITY IN HUMAN RIGHTS CONVENTIONS

In the context of human rights protection, it is important to note the two main sources, namely, human rights conventions and humanitarian conventions. Provost notes that the difference between the two is that former 'grant[s] positive rights to the individual'[52] whereas the latter uses other means to protect the individual's interests.[53] This essay will predominantly address human rights conventions and argue that whilst non-applicability

[43] *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131.
[44] Byers (n 3) 165.
[45] ibid.
[46] ibid.
[47] Elihu Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law' [1958] ICLQ 514, 537-542.
[48] Shunji Yanai & Kuniaki Asomura, 'Japan and the Emerging Order of the Sea: Two Maritime Laws of Japan' [1977] Jap Ann Int'l L 48, 92.
[49] Byers (n 3) 161.
[50] Francesco Parisi and Nita Ghei, 'The Role of Reciprocity in International Law' [2003] Cornell Int'l L J 93, 94.
[51] Fard (n 32).
[52] René Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 143.
[53] Matthew Craven, 'Legal Differentiation and the Concept of Human Rights Treaty in International Law' [2000] EJIL 489, 500.

of reciprocity adequately affords protection on a theoretical level, it appears to fail in practice.

As discussed in Section I, the law of reciprocity governs areas of treaty law in relation to reservations and material breaches. The essay will focus on the substantive effect of these practices in relation to human rights conventions.

Alongside the Human Rights Committee (HRC), many academic commentators such as Meron and Watts also recognise the *erga omnes* ('towards everyone') character of human rights conventions[54] which is highlighted in the practice of reservations. When reservations are made to a human rights convention, the outcome is significantly different to the outcome of a reservation that is made to any other convention. The HRC stated that the rules adopted in article 21 1969 VCLT are 'inappropriate to address the problem of reservations to human rights treaties'.[55] Therefore, only the obligations of the reserving state towards individuals under its controls will be put into effect.[56] As noted by Pellet, regardless of whether another state accepts or objects a reservation, the obligations of the objecting or accepting state under the human rights treaties do not change,[57] thus ensuring the protection of human rights of the individuals in the reserving state.

This is further exemplified by the ability of the reserving state to bring forward a claim against another state for breaching an obligation that does not apply to the reserving state pursuant to the reservation.[58] Contrary to what Horn[59] and Campiglio[60] suggest, a state who is in breach of its human rights obligations cannot be excused solely because the claiming state is not subject to the same obligations. The claiming state is seen as 'act[ing] on behalf of the community of states party to the treaty to enforce public order norms protecting individuals'.[61] The International Court of Justice (ICJ) confirms this in the *Barcelona Traction case*.[62] It concluded that in relation to obligations excluding those derived from human rights conventions, the claiming state must be owed the breached obligation — thus acting in accordance with its national legal interest.[63]

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[54] UN Human Rights Committee, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declaration under Article 41 of the Covenant* (CCPR/C/21/Rev1/Add.6) (GC No 24) [11]; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991) 198-201; Watts (n 1) 420; Provost (n 52) 167.
[55] GC No 24 (n 54) [17].
[56] Provost (n 52) 144.
[57] Special Rapporteur Alain Pellet, *Second Report on Reservation to Treaties* (UN Doc A/CN 4/477) [155].
[58] Provost (n 52) 144-145.
[59] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Elsevier Science Ltd 1988) 158-159.
[60] Cristino Campiglio, 'Profili internazionali della questione del Québec' [1991] Rivistia di Diritto Internazionale 73, 187-189.
[61] Provost (n 52) 145.
[62] *Case Concerning Barcelona Traction, Light, and Power Company, Ltd* [1970] ICJ Rep 1.
[63] ibid [34]-[35].

Similarly, in the context of material breaches, the non-applicability of the principle of reciprocity ensures protection of human rights. This essay will now observe the implementation of article 60(5) 1969 VCLT, which states that 'treaties of a humanitarian character'[64] are exempt from the application of articles 60(1)-(3) 1969 VCLT. It must be noted from the outset that when Switzerland proposed article 60(5) in the conferences prior to adopting 1969 VCLT, they did intend to include 'conventions concerning… the protection of human rights in general'.[65] As a logical corollary, this implies that when one state violates their obligations under a human rights convention, other states party to that convention cannot invoke that breach to terminate or suspend the treaty itself or treaty relations.[66] Therefore, as noted by Watts, article 60(5) 1969 VCLT places a 'restriction on negative reciprocity'[67] in order to afford protection of human rights.

However, as per article 4 1969 VCLT, the provisions encompassed within the 1969 VLCT do not apply retroactively and, therefore, article 60(5) does not impact most human rights conventions unless it can be attributed to the status of a customary norm. On one hand, Zoller is sceptical of the reach of article 60 as affording customary status which would lead to 'so many distorting effects on international relations'.[68] On the other hand, Gomaa states that article 60(5) has been reflected in custom when it was drafted,[69] and this position has been affirmed by the ICJ in its *Namibia Advisory Opinion*.[70] The ICJ held that article 60 'in many respects' reflects custom,[71] and the general principle concerning the right to terminate a treaty on account of a breach is applicable to all treaties excluding those that afford protection of human rights.[72]

However, in practice, the lack of reciprocity underpinning human rights conventions implies that adequate protection is not afforded to human rights. Posner argues that less attention is paid to violations of human rights norms as opposed to violations of international humanitarian law pursuant to the absence of reciprocity.[73] He discusses the United States' conflict with Al-Qaeda,[74] particularly the counterterror tactics of using coercive interrogation methods. He notes that there is a significant lack of criticism targeting the violation of human rights norms[75] contained in the Convention Against

[64] Provost (n 52) 143.
[65] Craven (n 53).
[66] Provost (n 52) 167.
[67] Watts (n 1) 423.
[68] Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Martinus Nijhoff 1984) 17-18.
[69] Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Brill 1996) 113.
[70] *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia* [1971] ICJ Rep 3.
[71] ibid 47.
[72] ibid.
[73] Eric A. Posner, 'Human Rights, the Laws of War, and Reciprocity' [2012] LEHR 148, 150.
[74] ibid 148.
[75] ibid 149.

Torture (CAT)[76] and the International Covenant on Civil and Political Rights (ICCPR),[77] whereas the majority of debates in the United States concerned the Geneva Conventions.[78] This is evident in the statements issued by President Bush at the time where he described such interrogation techniques as 'lawful',[79] although the United States had ratified a number of human rights treaties and these techniques were in violation of the norms that were contained in them.

This alludes to a wider and more fundamental problem that human rights conventions face in practice: compliance. As international humanitarian law 'reflects the reciprocal nature of international legal enforcement',[80] states have been more inclined to act in compliance in comparison to human rights obligations. This is evident in a study conducted by Neumayer, where despite the ratifications of the ICCPR and CAT, there was an incline in the amount of personal integrity violations.[81] This is further corroborated by Hathaway who found that ratifications of the ICCPR, CAT, the Genocide Convention, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[82] had either little or detrimental impact on the human rights norms that were meant to be protected by the respective treaties.[83] This is indicative of the fact that compliance with human rights obligations are minimal and Posner attributes this limited compliance to the argument that 'human rights treaties rejected reciprocity'[84] and, as established earlier, reciprocity plays a significant role in treaty law to enforce compliance with treaty obligations as there is no international enforcement mechanism to do so.

However, Maniatakis suggests that human rights conventions should adopt 'positive reciprocity' and integrate it into human rights conventions.[85] In doing so, he claims that it will 'positively engage states to implement their obligations' and 'would encourage the promotion of human rights'.[86] Though this may seem ideal, it is difficult for this to play

[76] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[77] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 26 June 1987).
[78] Geneva Convention Relative to the Protective of Civilian Persons in Time of War (Fourth Geneva Convention), 12 Aug 1948, 75 UNTS 287 (entered into force 21 Oct 1950).
[79] President George W. Bush, 'Missile Defence and the War on Terror: Address at the National Defence University' (23 October 2007) <https://georgewbush-whitehouse.archives.gov/news/releases/2007/10/20071023-3.html> accessed 13 February 2020.
[80] Posner (n 73) 161.
[81] Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' [2005] J Conflict Resol 925, 941-945.
[82] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 (entered into force 3 September 1981).
[83] Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' [2002] Yale L J 1935, 2020.
[84] Posner (n 73) 171.
[85] Ari Maniatakis, 'Principle of Reciprocity: A Hidden Value in Humanitarian Conventions' (14 November 2015) <http://www.hscentre.org/latest-articles/principle-reciprocity-hidden-value-humanitarian-conventions/> accessed 4 March 2020.
[86] ibid.

out in practice, particularly to the extent of States accepting this new formulation and limiting their sovereignty but also relying on the 'good will' of the States. It may appear idyllic, but it is not realistic.

CONCLUSION

To conclude, it is evident that 'reciprocity [is] at the heart of international law'[87] as it plays a significant role in a decentralised system with no overarching enforcement authority. With respect to both treaty law and customary international law, the law of reciprocity maintains interstate relations by appropriately balancing the rights and interests of each state. As recognised by Fard, it is also a 'strong tool in targeting state behaviour by incentivising… them toward compliance and away from wrong-doing'.[88]

In relation to the protection of human rights, on a theoretical level, the absence of the operation of reciprocity in reservations and material breaches emphasises the protection of human rights by characterising human rights conventions as a 'unilateral undertaking by states to respect and enforce'[89] such rights rather than a 'reciprocal exchange'[90] of obligations. However, this is undermined in practice, as from studies discussed above it is evident that there is minimal compliance with human rights conventions despite ratifications. This, as a result, has detrimental impacts on the provision of human rights protection. As suggested by Maniatakis, this could potentially be remedied by encouraging 'positive reciprocity' rather than rejecting the law of reciprocity in its entirety.[91] Although, it must be noted that this suggestion appears to be quite optimistic.

[87] Posner (n 73) 170.
[88] Fard (n 2) 11.
[89] Provost (n 52) 143.
[90] Craven (n 53).
[91] Maniatakis (n 85).

The Compatibility Gap between Smart Contracts and the English Contract Law of Interpretation

*Ikenna Henry**

THE MECHANICS

SMART CONTRACT

A smart contract is computer code that upon the occurrence of specified conditions (agreed terms), is capable of running automatically according to pre-specified functions *(if you do the agreed term, X, the smart contract will automatically execute, giving you result, Y)*. The terms of the agreement are written into lines of code,[1] can be stored and processed on a distributed ledger and will write any resulting change into the distributed ledger.[2]

A smart contract is normally embedded into a blockchain network.[3]

BLOCKCHAIN TECHNOLOGY

A blockchain is a type of distributed ledger technology;[4] a decentralised database[5] that updates a continuous list of all records in real time,[6] maintained by a consensus algorithm

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[1] Jake Frankenfield, 'Smart Contracts' (*Investopedia*, 8 October 2019) <www.investopedia.com/terms/s/smart-contracts.asp> accessed 19 August 2020.

[2] Chamber of Digital Commerce, 'Protecting State Smart Contracts Innovation, One Signature at a Time' <digitalchamber.org/protecting-state-smart-contracts-innovation/> accessed 20 August 2020.

[3] David Futter and Tara Waters, 'DLT in Commercial Contracts: An Introduction to Blockchain, DLT and Smart Contracts for Commercial Practitioners' *(Practical Law Commercial)* <https://uk.practicallaw.thomsonreuters.com/Document/I8545423cf96211e8a5b3e3d9e23d7429/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_a617170> accessed 20 August 2020.

[4] ibid.

[5] Michèle Finck, 'Blockchains and Data Protection in the European Union' [2017] Max Planck Institute for Innovation and Competition Research Paper No. 18-01, 1.

[6] Sarah Green, 'Smart Contracts, Interpretation and Rectification' 2018 Lloyd's Maritime and Commercial Law Quarterly 235-236 <https://research-information.bris.ac.uk/ws/portalfiles/portal/168042075/2018_LMCLQ_234_Sarah_Green.pdf> accessed 20 August 2020; Ramya Rathan Kumar, 'Impact of Blockchain Technology on Data Protection and Privacy' [2017] 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040969> accessed 20 August 2020.

and stored on multiple nodes (computers),[7] thereby protecting the records from reversion and tampering.[8] Blockchain Technology works on the basis that every computer with access to the blockchain network holds a replica of each time-stamped transaction that has ever occurred, and verifies each of such transactions without the need for an intermediary. Thereby leaving an audit trail of past happenings.[9]

INTRODUCTION

There is no specific body of law that covers the use of smart contracts.[10] However, academic commentary discusses that, due to the flexible nature of the English common law, smart contracts can in principle be accommodated for.[11] The most recent non-binding authority, the UK Jurisdiction Task Force's report, concludes that smart contracts can be legally binding and have contractual force, as long as the requirements of traditional contract law are met.[12] While this view carries general consensus amongst scholars, this essay takes the view that the law still fails to account for the technicalities that come into play in the practical operation of smart contracts. This essay will highlight a compatibility gap still evident between English contract law and smart contracts by looking into the area of interpretation.

This essay proposes that there be a shift from strict objectivity and a call for the courts to make the interpretative approach of contracts more flexible and on a case by case basis, depending on the role the smart contract plays. For this to operate in practice, there needs to be an established consortium of programmers within the courts, dedicated to working closely with judges to ascertain parties' intentions. These programmers will become a part of the litigation process, ensuring that the interpretation of smart contracts is a collaborative activity between programmers and judges.

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[7] Finck (n 5), 1.

[8] Kumar (n 6).

[9] Lee Grant, 'What is Blockchain? – Definition, Origin, and History' (*TechBullion,* 6 September 2016) <https://techbullion.com/blockchain-definition-origin-history/> accessed 20 August 2020.

[10] Jones Day, *Blockchain for Business* (White Paper, September 2017) <https://www.jonesday.com/files/upload/Blockchain%20for%20Business%20White%20Paper2.pdf> accessed 20 August 2020; UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts* (The LawTech Panel Delivery Panel, November 2019).

[11] ibid; Futter and Waters (n 3).

[12] UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts* (n 10); Requirements for a legally binding contract are offer, acceptance, consideration and an intention to create legal relations with all the terms certain and agreed to; Practical Law Commercial, 'Contracts: Formation' <https://uk.practicallaw.thomsonreuters.com/Document/I59a16d97e04611e398db8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)> accessed 21 August 2020.

CURRENT CONTRACT LAW: INTERPRETATION

Interpretation is the process of deriving the meaning of what contracting parties intended from the words that they used in an agreement.[13] Per *Wood v Capita,*[14] the task of judges is to "*ascertain the objective meaning of the language which the parties have used to express their agreement*".[15]

THE LAW'S WEAKNESSES

USING THE EXPRESSED AGREEMENT

One of the pressing issues for the use of smart contracts is in the forensic process of its interpretation in court. In English Law, an objective test is used to ascertain the intention of the parties to the contract. The standpoint of a reasonable person is adopted,[16] and the express terms in a contract are the starting and end point for questions of interpretation.[17] The senior courts have issued a series of warnings to judges not to disregard or override the literal wording of the contract in pursuit of commercial common sense.[18] Thus, if the terms of the contract are clear and unambiguous, the courts should not depart from the contract.[19] For this reason, the UK Jurisdiction Taskforce does not view the interpretation of smart contracts to be an issue,[20] as it sees no difference between both smart contracts and clear contracts in natural human language. Code is generally clear and unambiguous, leading to easy interpretation of smart contracts.

However, this view ignores the crucial fact that technically, the lexicon of natural human language and that of code is different.

To illustrate this point, let us look at the interpretation of the statement, *"go to the shop and buy a newspaper. If there are any eggs, get a dozen*".[21]

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[13] Norton Rose Fulbright, 'Smart Contracts' (2019) < https://www.nortonrosefulbright.com/en-gb/knowledge/publications/1bcdc200/smart-contracts#section5 > accessed 21 August 2020; *Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1)* [1997] UKHL 28.
[14] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.
[15] ibid [13] (Hodge LJ).
[16] *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36 [17] (Neuberger LJ).
[17] *Bank of Credit and Commerce International (BCCI) SA (in compulsory liquidation) v Ali (No. 1)* [2001] UKHL 8, [39]; Gerard McMeel QC, 'Contracts: Interpretation' *(Quadrant Chambers)* <https://uk.practicallaw.thomsonreuters.com/Document/Ib55520f5e83211e398db8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)> accessed 21 August 2020.
[18] *Arnold v Britton* (n 18) (Lord Neuberger).
[19] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [18].
[20] UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts* (n 10).
[21] Green (n 6).

The average human being would interpret this to mean; if the shop has eggs, purchase one newspaper and a dozen eggs.[22] A computer, however, would interpret this to mean; if the shop has eggs, purchase a dozen newspapers rather than one.[23] So in this case, a computer will not buy a dozen eggs, because it has not been instructed to; the subject matter in question connected to the 'buy' command is a newspaper. Whereas human beings can infer the meaning of a statement made from its context and standard social experience, a computer most likely has no such experience. Therefore, using the smart contract as the only basis for interpretation can lead to a misinterpretation of the parties' intentions.

The UK Jurisdiction Taskforce then proposes that like a conventional contract, the courts could look beyond the contract for interpretation, where the intention of the parties cannot be ascertained from the smart contract.[24] However, this proposition works where the smart contract is used merely as a tool to execute an original agreement, in part or wholly. In this instance, an agreement has already been discussed in human language (wet language) after which programmers transform the language into a body of code.[25] It is therefore much easier for the courts to look beyond the smart contract, as a natural written agreement is available. This argument is weakened when an agreement is solely defined by the smart contract as a body of code. This is because English Law states that where a contract is in writing, the courts will interpret that which is in writing and so agreed, and not what was intended to be agreed.[26] Therefore, if code is well known to be clear and unambiguous, and the smart contract contains all the terms of the agreement, the courts should, according to the law, not depart from that contract.

As a result, the interpretation of the parties' intentions still remains an issue.

REASONABLE PERSON TEST

Additionally, the 'reasonable person' test fails to operate with smart contracts, because one human understanding is no indication as to what a complex body of code means to a computer. It is not as straightforward as merely translating a foreign language to English. So even when an expert is engaged to interpret the body of code into natural human language, the expert's precise predictions of highly complex code could differ in practice from what was originally agreed. This is because, when interpreting computer code, the expert has to interpret what the effect of certain combinations of words in context will

[22] ibid.
[23] ibid.
[24] UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts* (n 10), paras 153.
[25] Green (n 6).
[26] *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736; [2013] Ch 305 [99] (Lewison LJ); Gerard McMeel QC, 'Contracts: Interpretation' *(Quadrant Chambers)* <https://uk.practicallaw.thomsonreuters.com/Document/Ib55520f5e83211e398db8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)> accessed 21 August 2020.

have on the artificial intelligence within the smart contract carrying out execution.[27] The mere existence of code capable of executing contractual promises reveals nothing about whether parties actually agreed to contract on the basis of such code.[28] The interpretation of such code is likely to lead to a 'reasonable coder' test,[29] in which the judge will have to decide on what the programmer of the smart contract meant, but not necessarily what the parties to the agreement intended. There is a real possibility for misinterpretation between programmers and the parties, as the average commercial businessman is unlikely to ever read the source code written by his firm's programmers.[30]

Furthermore, understanding code is a specialist skill, which directly contradicts the concept of an objective 'reasonable person' test, as the average person does not understand code. A smart contract may contain a complex variety of coding languages, emphasising such specialist nature.

The 'reasonable person' test also does not work with computers, because there can be no such thing as the 'reasonable computer' test. A computer is either functional, or not.[31] The objective test is therefore incompatible with the interpretation of smart contracts.

THE LAW'S STRENGTHS

The strength in the current law, however, lies in its ability to consider *"all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*[32] Background includes knowledge from the genesis of the transaction, the context and the market in which the parties are operating.[33] Depending on its method of use, this allows some form of compatibility with the interpretation of smart contracts. Regarding the use of a smart contract as a small part of executing an agreement, judges will not struggle with the interpretation of parties' intentions. As aforementioned, this is because there is likely to be a natural human agreement, which is a legally binding contract in its own right and which the courts can refer to. Additionally, in the scenario in which the parties rely solely on the body of code within the smart contract, the parties may still be able to provide context to the agreement, after the body of code has been translated into natural human language. This is the case where there is a business process document

[27] Green, (n 6), 245.
[28] UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts* (n 10), paras 145.
[29] Norton Rose Fulbright, 'Smart Contracts' (n 13).
[30] A string of instructions for a computer command; TechTarget, 'Source Code' <https://searchapparchitecture.techtarget.com/definition/source-code> accessed 21 August 2020; Green, (n 6), 241-242.
[31] ibid 240.
[32] *Investors Compensation Scheme v West Bromwich Building Society and Others* (n 15) (Lord Hoffmann).
[33] *Reardon Smith Ltd v Yngvar Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989*; Merthyr (South Wales) Ltd v Merthyr Tydfil CBC* [2019] EWCA Civ 52*6*.

that gives a programmer a guide to work from when translating the agreement into machine language to instruct the computer. This aspect of the law allows judges to look at the smart contract in the context in which the agreement was made.

However, within the law, there still lies a gap, namely that it is not clear at which point background knowledge becomes extrinsic evidence or prior contractual negotiations.[34] Albeit, there is some guidance that re-enforces the position of English law; in that *"the reliance placed in some cases on…surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision … the clearer the natural meaning the more difficult it is to justify departing from it"*.[35] Thus, the practical reality is that there are not many circumstances in which an English court would hold that the "meaning" of a smart contract consisting solely of a body of code is something other than that expressed in code.[36]

As a result, the difficulty of interpretation still remains. Even when the coded contract is translated into natural human language, the syntax and logical architecture of code is such that, without knowing the context of its initial design objectives, the intention of the parties remain ambiguous. Especially for anyone unfamiliar with the conceptual organisation of computing instructions.[37] Therefore, for the interpretation of smart contracts consisting solely in code, extrinsic evidence such as pre-contractual negotiations and conduct is required, which the law currently does not allow.

PROPOSED REFORM

This essay puts forward the proposal that to accommodate the use of smart contracts, traditional contract law must retract from the strict objective test. Instead, it should adopt a more flexible approach of both an objective and subjective test, in which a consortium of expert programmers and judges work together to interpret a smart contract. This, however, depends on the use of the smart contract. When it is solely used to define the terms of an agreement, the flexible approach that this essay proposes should be used. On the other hand, when the smart contract is used as a mere tool to execute part of a wider agreement, the objective test should still operate. This is because in the latter scenario, the parties do not depend exclusively on a body of code containing all the terms. Thus, there is likely to be a natural human agreement already available for the judge to look at in order to gain context when interpreting the parties' intentions. In the former scenario however, no such natural human agreement exists, and the parties rely solely on the body of code.

[34] *Investors Compensation Scheme Case Ltd v West Bromwich Building Society (No.1)* (n 15) (Lord Hoffmann).
[35] *Arnold v Britton* (n 18) (Lord Neuberger).
[36] UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts* (n 10), para 150.
[37] Norton Rose Fulbright (n 13).

Hence, regarding the use of smart contracts, judges should proceed on a case by case basis as to their approach in ascertaining the parties' intentions.

The *Bolam test*[38] should be used as an initial model. The judges in that case were required to seek out a professional body's opinion regarding the concept of "reasonable conduct" within the medical profession.[39] It followed the reasoning that professionals that are specially trained in a field are in a much better position to determine adequate conduct within that specific field; than judges that have only been trained solely in law. As per *Bolitho*,[40] it was further emphasised that the judges still held the discretion as to whether to apply the opinions of such specialist professionals. A similar approach could suffice in cases where smart contracts are solely used. A consortium of coders would translate the body of code into natural human language and explain the context in which the terms of the agreement in question operates. They may all have different contextual interpretations of the intentions of the parties to the contract, hence the subjectivity element. This will give the judge access to a variety of possible outcomes that show what the parties to the agreement might have intended. Under the judge's discretion, they can ascertain a final logical outcome using the objective reasonable person test. Adopting this method may give programmers more dominance in the litigation procedure. However, in accordance with established principles of English Law, the proper interpretation of parties' intentions is a matter for the court.[41] Therefore, the role of the judge will still remain as the final decision maker.

In order for such an approach to operate, judges will have to look at extrinsic evidence such as pre-contractual conduct/negotiations of the parties and what the parties intended to agree. Thereby moving away from the objective approach,[42] adopted by English Law.[43]

The weakness of such an approach is that certainty will inevitably be threatened.[44] Judges cannot read the individuals' minds.[45] An objective approach stems from its universality. Universality promotes certainty because it provides a means external to the parties of deciding what their words mean; but whilst being external, remains accessible to them so

[38] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
[39] ibid.
[40] *Bolitho v City & Hackney Health Authority* [1998] AC 232, 243 (Browne-Wilkinson LJ).
[41] Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th edn) Main Work, 5-06.
[42] David McLauchlan, 'Deleted Words, Prior Negotiations and Contract Interpretation' (2010) 24 NZULR 227; David McLauchlan, 'Some Fallacies Concerning the Law of Contract Interpretation' [2017] LMCLQ 506; Gerard McMeel, 'Prior Negotiations and Subsequent Conduct – the Next Step Forward for Contractual Interpretation' (2003) 119 LQR 272.
[43] *Wood v Capita Insurance Services Ltd* (n 14) [15] (Lord Hodge); *Rainy Sky SA and others v Kookmin Bank* (n 18); *Arnold v Britton* (n 18) [17] (Lord Neuberger).
[44] *Wood v Capita Insurance Services Ltd* (n 14) [15] (Lord Hodge); Richard Buxton, '"Construction" and Rectification After *Chartbrook*' [2010] CLJ 253, 261.
[45] Norton Rose Fulbright (n 13).

that they have the opportunity to understand how their words will be interpreted.[46] Additionally, *"one of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."*[47] Thus, looking into any pre-contractual conduct/negotiation, removes the ability for reasonable certainty to be attained.[48] As a result, the current objective approach provides such certainty to ascertain parties' intentions. The objective approach also reduces the cost of the litigation process, which would be more expensive if pre-contractual negotiations were included in the process of interpreting a contract; as is argued by its advocates.[49]

While the case for the objective approach operates effectively within the context of natural human contracts, and the aspect of certainty remains a concern, it is weakened when applied to a smart contract. In a natural human contract, lawyers are mostly involved in the process of forming legal relations up until the drafting of the contract. Therefore, there is no need to look further than the final contract for an interpretation of the parties' intentions. In the context of smart contracts – this is not as straightforward. Parties will have to negotiate the agreement first, and then outsource third-party programmers to translate the agreement. The programmers will most likely not have any substantive interest in the substance of the agreement itself, and so there is far more likely to be an error in contextual translation.[50] Thus, making it inherently uncertain to rely on only one body of code during interpretation. Even the UK Jurisdiction Taskforce admits that "*a judge will need to look beyond the four corners of the code to interpret it".*[51] Additionally, due to the decentralised and open-source nature of blockchain technology that allows smart contracts to operate, there will be multiple computers, possibly in multiple jurisdictions, working on one agreement. These computers will also have to each verify the terms added to the body of code, as they all have a replica of every iteration. With this complex multi-channel communication involving various different parties, it is more likely than not that an error will be made. There are far too many processes involved as compared to the formation of a natural human contract. The parties' intentions from final negotiations, may likely be lost in communication before the final form of the smart contract. Accordingly, regarding smart contracts, the law needs to allow courts to include pre-contractual evidence to ascertain the parties' intentions in order to arrive at a more certain outcome during the interpretation process.

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[46] ibid.
[47] *Wood v Capita Insurance Services Ltd* (n 14) [15] (Lord Hodge).
[48] Paul S Davies, 'The Meaning of Commercial Contracts' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Oxford: Hart Publishing 2015) 221; McLauchlan, 'Deleted Words, Prior Negotiations and contract Interpretation' (n 42); Thomas Bingham, 'A New Thing Under the Sun: The Interpretation of contracts and the ICS Decision' (2008) 12 Edin L Rev 12, 374.
[49] Paul S Davies, 'The Meaning of Commercial Contracts' (n 48), 221; McLauchlan, 'Deleted Words, Prior Negotiations and contract Interpretation' (n 42).
[50] Green (n 6), 247.
[51] UK Jurisdiction Task Force, *Legal Statement on Cryptoassets and Smart Contracts* (n 10), para 151.

English Law should, therefore, adopt a more flexible approach to accommodate the interpretation of smart contracts.

Concerning the costs of litigation, the group of advocates[52] for the exclusion of pre-contractual conduct/negotiation raises a valid point. The various processes of building a smart contract, may in fact prove more expensive than it is worth, especially during the litigation process. It will include the appointment of programmers at every stage of negotiations, to ensure that no miscommunications arise between the agreement stage and that of programming the agreement into a smart contract. While this might be feasible for multinational corporations that have access to such capital, the use of smart contracts might marginalise the everyday consumer that cannot afford such a sophisticated way of contracting.

Additionally, though open-source platforms such as Ethereum provide smart contract functionality for anyone to build, the fact still remains that coding is a specialist skill, and the average person does not understand code. As a result, the goals of the smart contract as crafted by Nick Szabo, to increase transparency and improve accountability are inherently undermined.[53]

CONCLUSION

Currently, the law of interpretation does to some extent accommodate the hybrid use of smart contracts; when it is used as part of a wider agreement as a tool to execute certain terms of a natural human contract. In such a scenario the judge can look at the overall context of the agreement easily, with aid of the natural human contract available to decipher the parties' intentions from the smart contract. However, for the use of smart contracts solely, there is no such accommodation. Hence, the law must evolve to become more flexible to allow the admissibility of pre-contractual conduct/negotiations in court. This must be implemented alongside a consortium of programmers and judges working together to ascertain parties' intentions from a body of code. The role of the judge will still remain to arrive at one objective decision, but it will have evolved to become a more collaborative role rather than the traditional individual role.

[52] Paul S Davies, 'The Meaning of Commercial Contracts' (n 48), 221; McLauchlan, 'Deleted Words, Prior Negotiations and Contract Interpretation' (n 42).
[53] Nick Szabo, 'Formalizing and Securing Relationships on Public Networks' (*Satoshi Nakamoto Institute,* 1997) <https://nakamotoinstitute.org/formalizing-securing-relationships/> accessed 21 August 2020.

Does Hong Kong need a Law of Adverse Possession?

Harry Crabtree[*]

ABSTRACT

Hong Kong passed the Land Titles Ordinance in 2004, which intends to bring the country in line with other modern common law jurisdictions.

Whilst yet to be enacted, the Law Reform Commission have considered the effect of adverse possession and how reform should look. This debate is especially interesting, given the short period Hong Kong has left until China is due to take full control in 2047. The uncertainty over what happens in 2047 is an important consideration when reforming adverse possession in the interim period.

Adverse possession is evaluated firstly by comparison to England and Wales, considering where divergences have occurred from the position in 1997. Whilst following the reforms of the Land Registration Act is a viable option for Hong Kong, there are weaknesses that should be avoided. Moreover, when considering how adverse possession operates in practice in Hong Kong, it has a clearly limited role which challenges the traditional justifications of the doctrine. For the issues posed, there is currently no adequate reason for adverse possession to remain as it is.

Several options for reform are considered: distinguishing bad faith squatting, adopting a statutory encroachment scheme, adopting the present position in England and Wales, and following Singapore in abolishing adverse possession. The similarities between Hong Kong and Singapore are clear, demonstrating that abolishing adverse possession is the best option, and would assist the implementation of the title registration system.

INTRODUCTION

Adverse possession has been summarised as 'possession inconsistent with the title of the person with the paper title to the land'.[1] In Hong Kong, the rules for AP are set out in case law and the Limitation Ordinance. [2]

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[1] *Cheung Yat Fuk v Tang Tak Hong and others* [2004] 7 HKCFAR 70 [7] (Bokhary PJ).

[2] Limitation Ordinance (Cap 347) [1965] (Hong Kong).

This essay intends to evaluate whether, following British rule, Hong Kong's laws on adverse possession have diverged from the pre-Land Registration Act 2002 (LRA) position, and whether Hong Kong should follow the reforms taken in England and Wales.[3] The concept of law reform in Hong Kong is of particular interest given the current political situation and protests, primarily resulting from their relationship with China. Following the Land Titles Ordinance,[4] the Law Reform Commission has considered reforming adverse possession,[5] sparking academic debate. The Law Reform Commission's considerations will feature throughout this essay.

Whilst many academics have considered how adverse possession may be reformed, discussion on the abolishment of the doctrine has been lacking. This essay will argue for abolishment, adopting a comparative consideration in its support. Leading academics such as Alice Lee, a prolific writer on Hong Kong land law,[6] still sees a role for adverse possession,[7] albeit with modernisation and more clarification.[8] Malcolm Merry is highly critical of how adverse possession operates in practice.[9] Dominic Chiang offers an alternative view that adverse possession should be abolished, and it should be replaced by a system such as statutory encroachment.[10] Adding to the debate, this essay will evaluate the current law on adverse possession and compare it to the position in England and Wales, before considering adverse possession's operation in practice and a range of options for reform — offering a more holistic approach than what was previously available. Ultimately, it will disagree with the Law Reform Commission recommendations, suggesting that Hong Kong should follow Singapore in the outright abolition of adverse possession.

This essay's methodology will involve a black letter law approach,[11] with a comparative aspect.[12] Starting by comparing the positions of Hong Kong and England and Wales, this will demonstrate the absence of any development on adverse possession, before evaluating adverse possession's operation in practice in Hong Kong, adding more weight to the argument for abolishing the doctrine. Finally, reform options will be considered — ultimately recommending the abolishment of adverse possession.

[3] Land Registration Act (LRA) 2002.
[4] Land Titles Ordinance (Cap 585) [2004] (Hong Kong).
[5] The Law Reform Commission of Hong Kong, *Adverse Possession* (2014).
[6] Say H Goo and Alice Lee, *Land Law in Hong Kong* (4th edn, LexisNexis 2019).
[7] Alice Lee, 'Adverse Possession and Proprietary Estoppel as Defences to Actions for Possession' (1999) 29(1) HKLJ 31-44.
[8] Alice Lee, 'An Unsolved Problem for Adverse Possessors of New Territories Land' (1996) 26(1) HKLJ 7-20.
[9] Malcolm Merry, 'Adverse Possession, Default Judgment and the Disappeared Owner' (2018) 48 HKLJ 511-532.
[10] Dominic Chiang, 'In Search of a Legal Solution for Boundary Encroachments in Hong Kong: Adverse Possession vs Statutory Encroachment' (2016) 10 HKJLS 59-82.
[11] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Bloomsbury 2011).
[12] Geoffrey Samuel, *Comparative law and its methodology'* in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017).

EVALUATING HONG KONG'S CURRENT ADVERSE POSSESSION LAWS

HONG KONG'S UNIQUE SITUATION

An appreciation of Hong Kong's legal mentality is important before commencing a comparison with England and Wales.[13]

Following the Treaty of Nanjing of 1842, when the British took control of Hong Kong, they immediately sought to assert their authority.[14] The success of this implementation is apparent today given the prominence of English law in Hong Kong, despite the 'handover' to China resulting from the Sino-British Declaration. Moreover, British doctrines such as the rule of law are often considered to contribute to Hong Kong's prosperity today.[15]

Since 1997, Hong Kong has been a Chinese Special Administrative Region, managing all of its own affairs other than foreign and defence policy. China is due to take full control in 2047. The Basic Law operates as a mini-constitution, guaranteeing the continued application of common law and equity in Hong Kong.[16] It is noteworthy however, that article 8, unlike others,[17] does not specify its fifty-year duration, posing potential dispute in 2047. This enigma, coupled with strong measures taken by China towards re-establishing influence,[18] suggests a continuing power struggle. These measures have caused unrest, resulting in citizens of Hong Kong protesting for their sovereignty.[19] With three different countries trying to assert their role in Hong Kong's sovereignty,[20] a unique position has arisen.

The conflicting ideologies of China's communist regime and Hong Kong's currently capitalist regime are likely to cause further issues in 2047 when deciding Hong Kong's future. This was emphasised upon China turning communist, as many refugees fled to the capitalist, British-ruled Hong Kong, which offered an escape to the mainland's social and economic issues. Hong Kong was all the more attractive to these refugees due to Britain's acknowledgement and preservation of Chinese customs and laws,[21] such as *feng shui* and T'so settlements. This attitude of the British would also have greatly assisted the implementation of English law into the foreign jurisdiction.

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[13] ibid 126; Pierre Legrand, 'How to compare now' (1996) 16(2) LS 232-242.
[14] Supreme Court Ordinance (No 15 of 1844) (Hong Kong); Application of English Law Ordinance (Cap 88) [1966] (Hong Kong).
[15] Eric Marcks, 'English Law in Early Hong Kong: Colonial Law as a Means for Control and Liberation' (2000) 35 Texas Int'l L J 265, 269.
[16] Basic Law 1997, art 8 (Hong Kong).
[17] ibid art 5.
[18] Steven Levine, 'Hong Kong's Return To China' (Britannia, 1998) <https://www.britannica.com/topic/reversion-to-Chinese-sovereignty-1020544> accessed 18 March 2020.
[19] Helier Cheung and Roland Hughes, 'Why are there protests in Hong Kong? All the context you need' (*BBC*, 4 September 2019) <https://www.bbc.co.uk/news/world-asia-china-48607723> accessed 29 March 2020.
[20] Here considering Hong Kong as a country.
[21] Eric Marcks (n 15) 274.

Likewise, China's complex civil jurisdiction conflicts with Hong Kong's common law. Chinese law is considered a main source of law in Hong Kong,[22] albeit of minimal influence.[23] The familiarity of the Hong Kong legal system to Western powers supports its operation as a gateway to China.[24] This has assisted in the exponential growth of the Chinese economy,[25] questioning whether China may wish to retain the status quo in 2047.

ADVERSE POSSESSION IN HONG KONG, WITH REFERENCE TO ENGLAND AND WALES

GENERAL CONSIDERATIONS

All land in Hong Kong is held as leasehold estates,[26] usually for 50-year periods.[27] Previously owned by the Crown, all land is now owned by the Government.[28] The only freehold estate in Hong Kong is St John's Cathedral, representing a fundamental difference to England and Wales where freehold estates reflect ultimate ownership.

Whilst the LRA reformed adverse possession in England and Wales,[29] no such fundamental changes have occurred in Hong Kong since the Limitation Ordinance,[30] which is based on the Limitation Act 1939.[31] Part of the LRA's rationale was the perceived ease with which a squatter could acquire title to the land, intending to restrict adverse possession in relation to registered land.[32] Having been considered 'undoubtedly welcome',[33] it is immediately questioned whether Hong Kong should follow suit.

Chen and Gordon also consider that the Hong Kong system essentially follows the pre-LRA position, 'with minor deviations'.[34] Dixon goes even further to suggest that the concept applied in Hong Kong 'would have been familiar before 1925, let alone before 2003'.[35] This demonstrates the crucial importance of reform for Hong Kong, where it is

[22] Basic Law 1997 art 18.
[23] ibid art 22.
[24] Noah Sin, 'Explainer: How important is Hong Kong to the rest of China?' (*Reuters*, 5 September 2019) <https://www.reuters.com/article/us-hongkong-protests-markets-explainer/explainer-how-important-is-hong-kong-to-the-rest-of-china-idUSKCN1VP35H> accessed 29 March 2020.
[25] ibid.
[26] Possession of a lease is commonly considered to be ownership, with sub-leasing common.
[27] Simon Reid-Kay, 'Commercial real estate in Hong Kong: overview' (*Practical Law*, 1 December 2019) <https://uk.practicallaw.thomsonreuters.com/Document/I1e3f43fab84e11e498db8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)> accessed 29 March 2020.
[28] Basic Law 1997 art 17.
[29] LRA 2002 (n 3).
[30] Limitation Ordinance (Cap 347) [1965] (n 2).
[31] Limitation Act 1939.
[32] Barbra Bogusz, 'Bringing Land Registration into the Twenty-First Century. The Land Registration Act 2002' (2002) 65(4) MLR 556, 562.
[33] ibid 563.
[34] Lei Chen and Sng Ban Chuan Gordon, 'Whither Adverse Possession in Hong Kong? A Comparative and Statistical Study' (2014) 78(5) Conv 413, 416.
[35] Martin Dixon, 'Adverse possession in three jurisdictions' (2006) Conv 179, 187.

clear that adverse possession is severely outdated. However, given the criticisms of the current English system being 'unduly complex',[36] it is important to consider whether Hong Kong's lack of divergence was preferable.

THE REQUIREMENTS OF ADVERSE POSESSION, WITH REFERENCE TO ENGLAND AND WALES

Requirement 1

The first requirement of adverse possession, *corpus possessionis*, entails that the squatter must be in actual possession of the land. With the English position from *Powell* being equally required in Hong Kong,[37] there is no divergence here.[38] Given the nature of adverse possession, this requirement is straightforward. In Hong Kong's leased landscape, it is important to note that a squatter may grant a lease or a license to another who can adversely possess that land from them,[39] demonstrating use of the land as if one's own.

Requirement 2

Possession must also be 'adverse' in nature, with an intention to possess the land, *animus possidendi*.[40] This requires that the possession be inconsistent with the title of the paper owner, and without their consent.[41] Other than some minor aspects, as discussed below, this requirement is also wholly the same as the position in England and Wales.[42]

Divergence over the hypothetical willingness to pay rent, or a license fee if demanded,[43] has attracted attention.[44] Hong Kong consider that such a willingness contradicts the intention to possess,[45] as not intending to exclude the paper owner means that, '[h]is intention to possess was not "as of wrong" but "as of right"'.[46] Whilst the rationale here is somewhat clear, it questions the basis of the law as

[36] Maynard Ming-Yat Leung, 'Reforming the Law of Adverse Possession in Hong Kong' (2008) 2 HKJLS 43, 71.
[37] *Powell v McFarlane* [1977] 38 P & CR 452 (Ch), 471 (Slade J).
[38] eg *Chu Kwok Wai v Tang Wing Tung Anthony* [2013] HKEC 545.
[39] *Tang Kwan Tai v Tang Koon Lam* [2002] HKCA 323.
[40] *Powell v McFarlane* (n 37) 470 (Slade J).
[41] *Cheung Yat Fuk v Tang Tak Hong & Others* (n 1).
[42] *Powell v McFarlane* (n 37) 470 (Slade J).
[43] Lei Chen and Sng Ban Chuan Gordon (n 34) 417.
[44] *Lau Wing Hong & Others v Wong Word Hung & Others* [2006] 4 HKLRD 671, [33]-[34] (Recorder McCoy SC); *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No 5)* [2007] 5 HKC 122, [81]-[83] (Lam J).
[45] *Wong Tak Yue v Kung Kwok Wai David & Another* [1998] 1 HKC 1 (CFA).
[46] ibid [13E]-[13F] (Li CJ).

protecting only those who are not acting in the right way — this should not be the foundation of any law. In England and Wales, such willingness is irrelevant provided that possession is maintained.[47] Hong Kong's failure to distinguish innocent and wilful trespassers causes unfairness.[48] There is a conflict of interest between ensuring that land is used to its potential and discouraging intentional trespass. Bad faith is not intrinsic to *adversity*, with the adverse effect of the paper owner also losing title occurring from good faith squatters.

The English position of granting certain priorities to a good faith squatter is preferred,[49] as supported by Leung.[50] Hong Kong's position, whilst more *adverse* in nature, encourages bad faith squatting; this has been considered as a 'necessary restriction' on the circumstances when the true owner can bring a right of action.[51] Whilst achieving an 'absurd result', it is intended to restrict the scope of adverse possession.[52] Encouraging bad faith squatting is an undesirable policy — if such a restriction is deemed necessary, it should be questioned whether the law should exist *ab initio*. Despite this, Harman LJ has considered the ability to adversely possess land in England and Wales without a whole intention to become the owner as 'contrary to common sense'.[53] Regardless, the Hong Kong Law Reform Commission proposed to eliminate this divergence.[54] This would be desirable in deterring bad faith squatters — however, this would equally be achieved by eradicating adverse possession altogether.

By encouraging trespass, adverse possession has been considered akin to theft.[55] However, Fennell disagrees, suggesting that, '[i]t is inconsistent to view someone as a thief or a bad faith actor for doing nothing more than knowingly employing the law's own process for acquiring land'.[56] Such a view is limited in strength, as a mere gap in the law does not mean that action should be acceptable. Abolishing adverse possession would satisfy both arguments, with the law not condoning this theft-like action.

[47] *J A Pye v Graham* [2002] UKHL 30 [46] (Lord Browne-Wilkinson).
[48] Maynard Ming-Yat Leung (n 36) 64.
[49] LRA 2002 (n 3) sch 6 para 5.
[50] Maynard Ming-Yat Leung (n 36) 68.
[51] *Secretary of Justice v Chau Ka Chik Tso* [2011] HKEC 1617 [106].
[52] Maynard Ming-Yat Leung (n 36) 65.
[53] *Hughes v Griffin* [1969] 1 All ER 460 (CA), 28E (Harman LJ).
[54] The Law Reform Commission of Hong Kong (n 5) para 7.64.
[55] Maynard Ming-Yat Leung (n 36) 63.
[56] Lee Fennell, 'Efficient Trespass: The Case for 'Bad Faith Adverse Possession' (2006) 100(3) Northwestern ULR 1037, 1044.

Leung concedes that without requiring an intention to possess, the court would be awarding people land that they did not intend to receive 'at the great expense of the original owner'.[57] Distinguishing good faith squatting could align this concern, as such a squatter still possesses the requisite intention. Merrill suggests that an alternative option could require a bad faith possessor to pay for what they take,[58] but evidential issues would arise. This is especially the case in Hong Kong where there are so many boundary issues.

Conversely, Fennel argues that adverse possession should require bad faith,[59] disagreeing that a bad faith squatter is 'a scoundrel'.[60] She suggests that claimants should document their awareness by an action such as an offer to purchase.[61] Problematically, this would mean that the squatter requires an intention to pay, which would then not fit with the current adverse possession framework in Hong Kong. Moreover, if someone had an offer rejected, most would revise their offer or walk away, unless their initial offer was disingenuous. This requires an awareness of adverse possession, which is uncommon, hence protecting only those with the relevant knowledge, limiting the number of people who can make use of adverse possession.

Requirement 3

Finally, the adverse possession must elapse 60 years against a government landlord and 12 years otherwise.[62] The clock starts when the squatter takes possession and the land owner disposes of or stops using that land.[63] Possession must be continuous,[64] although a squatter may acquire it from their predecessor.[65] Whilst the potential to cause hardship is recognised,[66] the ability to elapse time by granting a lease or a licence is important in Hong Kong's dynamic property market.[67] Even before full title is acquired, the squatter can recover their title by virtue of possession against anyone who has a lesser title.[68]

[57] Maynard Ming-Yat Leung (n 36) 64.
[58] Thomas Merrill, 'Property Rules, Liability Rules and Adverse Possession' (1985) 79 Northwestern ULR 1122, 1126.
[59] Lee Fennell (n 56).
[60] ibid 1046.
[61] ibid 1038-1041.
[62] Limitation Ordinance (Cap 347) [1965] (n 2) s 7.
[63] ibid s 8.
[64] ibid s 13(2).
[65] *Tsang Keung v Fung Wai Man* [2000] HKCU 751 (Deputy Judge Gill).
[66] The Law Reform Commission of Hong Kong (n 5) para 2.8.
[67] *Wong Kar Shue & Others v Sun Hung Kai Properties Ltd & Another* [2006] 2 HKC 600.
[68] *Asher v Whitlock* (1865) LR 1 (QB) 5.

The previous owner's title is extinguished upon expiration of the limitation period without notice, making the death 'sudden and silent'.[69] This has been criticised as a 'ticking time bomb for any unwary purchaser'.[70] This caused Chiang to question whether the passing of time should be a determining factor,[71] preferring a holistic approach under a scheme of statutory encroachment,[72] which enables parties to consider all relevant circumstances in their case.[73] The ignorance of limitations is demonstrated by Chen and Gordon's study, showing that 13.6% of landowners who were affected by adverse possession tried resolving disputes without legal action, eventually costing them their land.[74] Such drastic consequences arising from a poorly known action is unfair, and likely to benefit unaware possessors or those with relevant knowledge. Moreover, it creates a 'litigate or die' mentality rather than promoting out-of-court resolution.[75]

Whilst the pre-LRA regime in England and Wales operated for both registered and unregistered land,[76] reform was only in relation to registered land.[77] Part of the rationale for reform was protecting the concept of indefeasibility of title.[78] The unregistered land regime remains,[79] operating in the same way as all land in Hong Kong. In England and Wales, the owner of registered land has a chance to object to the adverse possession application and then two years to evict the squatter.[80] This was intended to 'severely limit both the scope and attraction of adverse possession'.[81] This also protects a landowner who is unaware of adverse possession, giving them a reasonable period in which to act.

[69] Dominic Chiang (n 10) 76.
[70] Lei Chen and Sng Ban Chuan Gordon (n 34) 421.
[71] Dominic Chiang (n 10) 72-73.
[72] Considered later for reform.
[73] Dominic Chiang (n 10) 77.
[74] Lei Chen and Sng Ban Chuan Gordon (n 34) 419.
[75] ibid.
[76] LRA 2002 (n 3) s 96.
[77] ibid sch 6.
[78] HM Land Registry, 'Practical guide 4: adverse possession of registered land' (*UK Government*, 17 February 2020) < https://www.gov.uk/government/publications/adverse-possession-of-registered-land/practice-guide-4-adverse-possession-of-registered-land> accessed 13 April 2020.
[79] Limitation Act 1980 ss 15 and 17.
[80] LRA 2002 (n 3) sch 6, paras 3-4.
[81] Lydia Chan, 'Hong Kong Land Titles Ordinance: The Shape of Things to Come' (2005) 35 HKLJ 627-650, 644.

England and Wales have experienced a drop in adverse possession applications since the LRA.[82] Pawlowski and Brown explain this by reference to difficulties in complying with the exceptional grounds of paragraph 5.[83] One of these grounds, mistake as to boundary under a reasonable belief that they are the owner,[84] has been criticised by the Law Commission.[85] In order to claim adverse possession, this person must realise their mistake; it is unclear however, how long they have left to claim from becoming aware.[86]

There are two possible understandings of this requirement. Firstly, that the reasonable belief must be held for ten years prior to the application.[87] However, evidential issues arise. The second understanding is that reasonable belief cannot end more than a short time before making the application:[88] commanding support from the Law Commission who recommended a 12-month period to make an application.[89] This is still problematic in establishing the point where reasonable belief ended.[90] However, this would require a general understanding of adverse possession, which is often not the case and cannot be expected. Whilst intended to promote good faith squatting, the underlying issues do not make it a good option for Hong Kong's reform.

Hong Kong has not diverged from the initial position of this requirement in 1997. Given the many issues with the reformed law in England and Wales, and the Law Commission revising it,[91] a reform to follow the LRA should not be taken by Hong Kong.

EVALUATING THE DOCTRINE OF ADVERSE POSESSION IN HONG KONG IN PRACTICE

The efficiency and operation of adverse possession in Hong Kong is determined by many 'extra-legal' factors.[92] The practical operation of adverse possession is important to understand before considering reform.

[82] Mark Pawlowski and James Brown, 'Adverse Possession and the Transmissibility of the Possessory Rights – the Dark Side of Land Registration?' (2017) 2 Conv 116, 117.
[83] ibid.
[84] LRA 2002 (n 3) sch 6, para 5(4).
[85] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) para 17.45.
[86] ibid para 17.46.
[87] *IAM Group v Chowdrey* [2012] EWCA Civ 505.
[88] *Zarb v Parry* [2011] EWCA Civ 1306.
[89] Law Commission (n 85) para 17.61.
[90] ibid para 17.50.
[91] ibid.
[92] Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge Cavendish 2007), 230.

THE PROPERTY MARKET

With a land mass of 1,073 km² and a population of 7.5 million,[93] Hong Kong has a land shortage, contributing to 'skyrocketing' property prices,[94] and sky-scraping buildings. Hong Kong has the highest price per square metre of land in Asia,[95] further driven up by an influx of Chinese buyers following reform, attempting to revive the mainland housing market.[96] These high prices have resulted in people in Hong Kong taking every opportunity to take possession of spaces, regardless of their size or nature,[97] for example a roof.[98]

It is still questioned whether the scarcity of land in Hong Kong justifies the harsh nature of adverse possession.[99] Often, adverse possession is justified as ensuring full use of land;[100] however, it seems unlikely that Hong Kong will need such an incentive. Being so densely populated, land becomes 'extremely limited, expensive and vigorously pursued'.[101] As a result of the dynamic market and the prevalence of multi-storey buildings, Hong Kong only has about twenty adverse possession cases per year,[102] questioning how essential it really is.

CHANGE TO A REGISTRATION OF TITLE SYSTEM

There has been a proposed transformation from a registration of deeds system to registration of title.[103] Hong Kong may be the first fully-developed economy to attempt to undergo such reform.[104] It is intended to better protect the marketability of land.[105] The effect of this would mean that a registered proprietor would have 'an indefeasible title against the whole world'.[106]

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93 Central Intelligence Agency, 'Hong Kong World Factbook' (*CIA*, December 2019) <https://www.cia.gov/library/publications/the-world-factbook/attachments/summaries/HK-summary.pdf> accessed 12 March 2020.
94 Alfred Yang and Eric Hong, 'Should the Doctrine of Adverse Possession be Abolished in Hong Kong?' (2017) 8(2) The King's Student LR 66, 66.
95 Anonymous, 'Square Metre Prices in Hong Kong compared to Asia' (*Global Property Guide,* 2020*)* <https://www.globalpropertyguide.com/Asia/Hong-Kong/square-meter-prices> accessed 4 April 2020.
96 Anonymous, 'Hong Kong housing bubble! Mainland buyers blamed' (*Global Property Guide,* 6 November 2009) < https://www.globalpropertyguide.com/Asia/Hong-kong/Price-History-Archive/Hong-Kong-housing-bubble-Mainland-buyers-blamed-1059> accessed 2 April 2020.
97 Lei Chen and Sng Ban Chuan Gordon (n 34) 415.
98 *Incorporated Owners of Wah Kin Mansion v Hong Kong Grouting Co Ltd* [2003] HKLT 10.
99 Alfred Yang and Eric Hong (n 94) 77.
100 The Law Reform Commission of Hong Kong (n 5) para 2.7.
101 Lei Chen and Sng Ban Chuan Gordon (n 34) 414.
102 The Law Reform Commission of Hong Kong (n 5) preface para 10.
103 Land Titles Ordinance (Cap 585) [2004] (n 4).
104 Lydia Chan (n 81) 636.
105 Maynard Ming-Yat Leung (n 36) 50.
106 Lydia Chan (n 81) 630.

Whilst adverse possession assists in the conveyancing of land, it contradicts the indefeasible title offered by a title registration system.[107] In adopting title registration systems, most common law jurisdictions either abolish adverse possession[108] or restrict it.[109] Currently, it is proposed that the existing rules of adverse possession will apply to the registered title regime, potentially offering further reasoning for the inability to implement it.[110] Woods advocates a holistic viewpoint, as comparative analysis reveals 'no uniform consensus on how the doctrine should interact with the registered title system'.[111]

The insurance principle of registered land systems means that the state indemnifies any loss caused by inaccuracies in the register. Initially, the proposed scheme did not offer this, leading Dixon to question: 'if the State is not confident enough to back its registration system by underwriting it, why should landowners?'[112] Whilst this has since been rectified,[113] a lack of confidence in the scheme has contributed to it not taking effect as of yet. Furthermore, given that title can currently be insured to the same effect, and this is rarely done other than by developers,[114] it is questioned how important this is in the Hong Kong landscape.

Due to the 1997 handover,[115] initial steps towards a title registration system in 1988 were fruitless until the Land Titles Ordinance.[116] Even this is yet to materialise despite intending to take effect in 2006. Part of the reason for this is the complex issue of many imperfect titles arising as a result of improper execution of documents, resulting in conveyancing being 'slow, complex and expensive'.[117] In 2005, Chan recognised the political urgency for a title registration system, suggesting that this was the last chance to introduce such a system.[118] Whilst Hong Kong may have missed an opportunity, it is suggested that there may be more political impetus for this to happen before 2047, when China is likely to further restrict changes which were orchestrated by Hong Kong themselves. When adverse possession originated, possession was justifiably considered the best evidence of ownership,[119] working well under the existing deed registration system. This argument will carry less strength once a title registration system is in place.[120]

[107] Lei Chen and Sng Ban Chuan Gordon (n 34) 427.
[108] Alfred Yang and Eric Hong (n 94) 74.
[109] LRA 2002 (n 3).
[110] Land Titles Ordinance (Cap 585) [2004] (n 4) s 28.
[111] Una Woods, 'The English Law on Adverse Possession: A Tale of Two Systems', (2009) 38(1) CLWR 27, 31 and 38.
[112] Martin Dixon, *Modern Land Law* (11th edn, Routledge 2018) 37.
[113] Land Titles Ordinance (Cap 585) [2004] (n 4) ss 84-90.
[114] Simon Reid-Kay (n 27).
[115] Lydia Chan (n 81) 627.
[116] Land Titles Ordinance (Cap 585) [2004] (n 4).
[117] Lydia Chan (n 81) 629.
[118] ibid 649.
[119] Maynard Ming-Yat Leung (n 36) 43.
[120] ibid.

Lee recognises that rather than transplanting the English system, 'which would have been much simpler and easier', the legislators took features from a range of sources 'in unprecedented juxtaposition.'[121] This questions whether Hong Kong's willingness to consider other jurisdictions is dangerous, despite offering a theoretically balanced and well-considered approach.[122] Leung believes that adopting the English approach is still an option.[123] Despite this, Lord Hoffman believes that this may not work as Hong Kong lacks the theory of guaranteed ownership arising from title strength.[124] Making such a change may require more extensive adoption of the current English law, which itself is subject to widespread criticism.

To deal with the issue of compatibility, Chen and Gordon argue that adverse possession should not be possible for registered land.[125] Whilst this may find short term balance in the benefits of facilitating unregistered land and not conflicting the principle of indefeasibility, the issues of adverse possession remain such that its outright abolition is preferable.

LAW REFORM COMMISSION

The Law Reform Commission has highlighted some traditional adverse possession justifications in its recent report, though these have been doubted.[126]

Firstly, adverse possession is considered to protect against stale claims and people sleeping on their rights.[127] This presumes that people are aware that a cause of action has been accrued in their favour — otherwise, they cannot be considered as sleeping on their rights. Leung's study showed that only 12% of respondents knew what adverse possession was, thus challenging this presumption and restricting its application.[128]

Given that knowledge is not a precondition of adverse possession, Dockray argues that it cannot provide a comprehensive explanation of it.[129] Given that the date of possession becoming adverse is irrespective of the owner's knowledge of infringement, it would be 'patently unfair to deprive' them of the land under the justification of them sleeping on their rights.[130] This issue is emphasised where a landowner has too much land to realistically

[121] Alice Lee, 'Land Registration: Validity, Priority and Statutory Interpretation' (2016) 46 HKLJ 415, 426.
[122] Basic Law 1997, art 84.
[123] Maynard Ming-Yat Leung (n 36) 68-69.
[124] *Chan Suk Yin and Another v Harvest Good Development Ltd* [2006] 1 HKLRD 185 (Lord Hoffmann).
[125] Lei Chen and Sng Ban Chuan Gordon (n 34) 429.
[126] Alice Lee (n 8) 7.
[127] The Law Reform Commission of Hong Kong (n 5) para 2.6.
[128] Maynard Ming-Yat Leung (n36) 48.
[129] Martin Dockray, 'Why do we need adverse possession?' (1985) Conv 272, 274.
[130] Lei Chen and Sng Ban Chuan Gordon (n 34) 418.

police, making awareness of squatters more difficult.[131] It is recognised that where landowners become aware, they take immediate action.[132]

Secondly, it is suggested that adverse possession avoids land becoming undeveloped and neglected.[133] Dockray supports this, given that the improvement and maintenance of land is in the public interest, albeit only in certain circumstances.[134] Considering the population density of Hong Kong, land is a 'scarce resource' which adverse possession promotes efficient use of.[135] Despite this, the threat of adverse possession is only effective when it is known about, which Leung's study suggests it is not.[136] Furthermore, given the value of land in Hong Kong, it seems that it would generally only be left undeveloped for reasons such as a developer awaiting market fluctuations. Conversely, Chen and Gordon suggest that, in such situations, the owner will be able to perform annual checks and take legal action where necessary.[137] There may even be some positive value to non-use, such as investment, sentimental, and environmental benefits.[138] This is especially the case in Hong Kong where the scarcity of land makes it a valuable commodity, whereby it is in the developer's interest to wait for development to become most beneficial. Arguably, adverse possession diminishes the value of land in discouraging owners from letting prolonged use of land, even where it may be practicable to do so.[139]

Almost a quarter of recent adverse possession cases involve a disappearing owner or heir. However, if land is returned to the Government, they can ensure that it is re-distributed to someone in need,[140] rather than in favour of 'opportunistic squatters to seize the land as "legal windfall"'.[141] Leung is also assertive that abandonment is merely a presumption that should be displaced if an owner ever reappears.[142] His study demonstrates the lack of land abandoned in practice; with much of this having occurred in World War II, when abandonment rates would have been in decline.[143] Furthermore, Fennel believes that ownership includes the 'prerogative to use or not use the land as one pleases'.[144] Leung supports this, suggesting that most Hong Kong people believe in the libertarian model,

[131] Maynard Ming-Yat Leung (n 36) 48.
[132] ibid.
[133] The Law Reform Commission of Hong Kong (n 5) para 2.7.
[134] Martin Dockray (n 129) 276-277.
[135] Maynard Ming-Yat Leung (n 36) 53.
[136] ibid 48.
[137] Lei Chen and Sng Ban Chuan Gordon (n 34) 420.
[138] Maynard Ming-Yat Leung (n 36) 55.
[139] Jeffrey Stake, 'The Uneasy Case for Adverse Possession' (2001) 89 Geo L J 2419, 2432.
[140] Maynard Ming-Yat Leung (n 36) 58.
[141] Lei Chen and Sng Ban Chuan Gordon (n 34) 420.
[142] Maynard Ming-Yat Leung (n 36) 54.
[143] ibid 55.
[144] Lee Fennell (n 56) 1065.

believing that original owners should be able to do as they wish without any risk of losing the land.[145]

Another proposed justification is that adverse possession prevents hardship in cases of mistake,[146] such as where the squatter has improved the land.[147] Once the title registration system is implemented, this will hold less strength as it will be easier to validate entitlement and ensure that improvement is on one's own land. Until this point, improvement may well occur with reasonable belief of entitlement.[148]

Even with cases of mistake, hardship can occur either way — the squatter will have spent time and money, whilst the title owner risks losing their land. Chen and Gordon suggest that a requirement of good faith would make this balancing act easier, recognising that only 31% of adverse possession cases currently involve good faith.[149] The all-or-nothing remedy results in it being 'excessive compared to the trespass committed'.[150] A bad faith squatter's potential loss should not outweigh the title owner's loss — making such a distinction, as will be considered later, would better justify the remedy.[151]

The final justification considered was adverse possession's role in facilitating the conveyancing of unregistered land.[152] This seems most important given the proposed registration system, as adverse possession may assist in ensuring that the register is comprehensive. Despite this, the use of adverse possession would be limited and will diminish once the system is more complete. More immediate benefit can be found in curing defects in past titles, facilitating and cheapening investigations of land.[153] English courts have also recognised the benefit for unregistered land, 'avoiding protracted uncertainty where the title to land lay'.[154]

Chen and Gordon recognise the limits of this — with adverse possession operating as a 'double edged sword', increasing transaction costs for potential purchasers and having to undertake extra checks, making adverse possession 'more a hindrance than a help'.[155] Consequently, the traditional justifications of adverse possession no longer hold the same weight, making the abolition of adverse possession desirable.

[145] Maynard Ming-Yat Leung (n 36) 62.
[146] The Law Reform Commission of Hong Kong (n 5) para 2.8.
[147] Whilst unfairness may arise when the owner gets land back in a better position, proprietary estoppel may step in.
[148] Martin Dockray (n 129) 275.
[149] Lei Chen and Sng Ban Chuan Gordon (n 34) 420.
[150] ibid 428.
[151] ibid 425.
[152]The Law Reform Commission of Hong Kong (n 5) para 2.13.
[153] Maynard Ming-Yat Leung (n 36) 49.
[154] *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30 [2] (Lord Bingham).
[155] Lei Chen and Sng Ban Chuan Gordon (n 34) 421.

BOUNDARY ISSUE

From the handover, until February 2012,[156] 16% of adverse possession cases involved owners being mistaken about the boundaries[157] or the exact location of the land.[158] Many of these issues occur due to discrepancies between legal boundaries on the Demarcation District sheets or New Grant Plans, and physical boundaries in the New Territories. Ordinarily, sale of land occurs in accordance to physical rather than legal boundaries.[159] The discrepancies arose due to primitive cadastral surveys undertaken by the British occupying Hong Kong, by people lacking 'adequate professional surveying qualifications', resulting in unreliable plans.[160] These inaccuracies make it common for land to be infringed without realising.[161]

The Law Reform Commission suggests that adverse possession is the only practical solution to these land title problems.[162] It can be seen that the resolution of imperfect titles and correcting defective conveyancing or ground plans are the most common uses of adverse possession in Hong Kong.[163] Leung recognises that adverse possession offers a practical and inexpensive means of drawing new boundaries without expert survey.[164] Despite this, given the size and value of land in Hong Kong, it may be worth the Government investing in a proper surveying of land to ensure that the title registration system can be as effective as possible.[165] Efforts to find temporary fixes are not sufficient, as 'boundary disputes have a habit of reappearing until finally resolved'.[166] The Law Reform Commission believes that a new survey may be ineffective with unhappy people choosing not to accept new boundaries; it is an issue better left to the Land Titles Ordinance.[167] The Land Titles Ordinance would offer more certainty and confidence in boundaries.

Furthermore, the identification of boundaries is often influenced by *feng shui* concerns,[168] which play an important role in Hong Kong property. Despite originating from mainland China, the concept was lost there to move society forward. Whilst the British ensured that *feng shui* was respected, 2047 will likely see further conflict over its preservation.

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156 ibid 419.
157 eg *Wong Lai Man v Wong Tat Kwong* [2010] HKEC 66.
158 eg *Cheung Yat Fuk v Tang Tak Hong* [2004] 7 HKCFAR 70.
159 *Eastwood v Ashton* [1915] AC 900 (HL).
160 Dominic Chiang (n 10) 60.
161 Lei Chen and Sng Ban Chuan Gordon (n 34) 419.
162 The Law Reform Commission of Hong Kong (n 5) para 7.21.
163 *Bridges v Mees* [1957] Ch 475 (HC); *Wong Luen Chun & Anor v Secretary for Justice* [1998] 4 HKC 122.
164 Maynard Ming-Yat Leung (n 36) 52.
165 Conrad Tang, 'Legal Sanction of Boundary' (2004) 15 The Hong Kong Institute of Surveyors Journal 72.
166 *Zarb v Parry* [2011] EWCA Civ 1306 [58] (Arden LJ).
167 The Law Reform Commission of Hong Kong (n 5) para 7.53.
168 Dominic Chiang (n 10) 60; The Law Reform Commission of Hong Kong (n 5) para 4.18.

ENCROACHMENT

The doctrine of encroachment, which refers to the period of use before adverse possession is claimed, has been considered 'an obscure and confused doctrine'[169] and a 'tangle'.[170] Despite this, the Law Reform Commission decided that this area required no reform.[171] Chiang considers adverse possession to be Hong Kong's 'only practical solution' to these problems.[172] However, an alternative option would be statutory encroachment, which is used in Australia.[173] Statutory encroachment offers compensation, countering the all-or-nothing criticism.[174] Unlike adverse possession, this compensation can consider whether an encroaching owner acts in bad faith.[175]

Chiang believes that a good solution for encroachment would be preventative and remedial.[176] The role of criminal law preventing trespass is contradicted by adverse possession's encouragement of partaking in that criminal behaviour. Disqualifying bad faith squatting would protect the integrity of the concept of ownership. Furthermore, the current failure to distinguish bad faith may result in discontented neighbours deliberately encroaching adjacent land.[177]

There is a presumption that a tenant encroaching neighbouring land does so as an extension of their lease,[178] for the landlord's benefit, whether the land encroached also belonged to the landlord or not.[179] Where the land encroached upon belongs to a third party, it is considered 'anomalous but explicable on the basis of adverse possession'.[180] With the encroacher not taking possession themselves, this reflects a peculiar exception to adverse possession.[181] Whilst chaos may arise if smaller plots could be recognised between two larger plots, neither option is preferable. Abolishing adverse possession entirely would mean that the tenant is merely trespassing on neighbouring land.

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169 Kevin Low, 'Demystifying the Doctrine of Encroachment' (2012) 42 HKLJ 687, 687.
170 *Smirk v Lyndale Developments Ltd* [1975] Ch 317 (CA), 323 (Pennycuick VC).
171 The Law Reform Commission of Hong Kong (n 5) para 7.53.
172 Dominic Chiang (n 10) 65.
173 Encroachment of Buildings Act 1922 (New South Wales); Encroachment of Buildings Act 1982 (New Territory); Encroachments Act 1944 (South Australia); Property Law Act 1974, ss 182-194 (Queensland); Property Law Act 1969, s 122 (West Australia).
174 Lei Chen and Sng Ban Chuan Gordon (n 34) 428.
175 Dominic Chiang (n 10) 61.
176 ibid 64.
177 ibid 71.
178 *Tabor v Godfrey* (1895) 64 LJQB 245 (QB).
179 *Smirk v Lyndale Developments Ltd* [1975] 1 Ch 317 (CA).
180 Kevin Low (n 169) 688.
181 Tom Ng, 'Case Commentary: *Secretary for Justice v Chau Ka Chik Tso* – The Doctrine of Encroachment: Theories and Problems' (2013) 7 HKLJ 215, 224.

Contrary to the English position, encroached land belonging to a third party would also go to the initial landlord.[182] Contrasting with the tenant, the landlord appears to obtain all the benefit without any of the risk,[183] which is criticised for granting 'a windfall for little or no effort or anxiety'.[184] Whilst we may wish to protect landlords from their tenants adversely possessing their neighbouring plots, it is unfair when those plots belong to others. A preferable solution to avoid this conundrum would be abolishing adverse possession.

TSO'S

T'sos are ancestral settlements where the same land is passed down through generations. These traditional practices, as protected by the British whilst implementing their legal framework, are typically considered to be Chinese customary trusts, and have been mostly retained in the New Territories.[185] Two main aspects have been judicially recognised:[186] firstly that there is an intention starting from the founders that the particular parcel of property should be retained, and secondly that a member's interest lasts their entire lifetime.[187]

Every time a new member is born, a new equitable interest and new limitation starts to run,[188] expiring six years after the member ceases to be an infant. T'so land is effectively immune from adverse possession,[189] requiring proof of the entire lineage having been extinguished. This is especially difficult given the ability to add new members in the future under Chinese laws and customs.[190]

This desire to preserve T'sos is 'the result of historical happenstance'.[191] The Law Reform Commission has recommended that no change is needed here,[192] recognising the cultural importance of T'so land. Therefore, reforming adverse possession would not be expected to affect T'so land.

[182] *Lau Wing Hong & Others v Wong Wor Hung & Anor* [2006] 4 HKLRD 671.
[183] ibid (Recorder McCoy SC).
[184] ibid [132] (Recorder McCoy SC).
[185] Peter Wesley-Smith, 'Identity, Land, Feng Shui and the Law in Traditional Hong Kong' (1994) 10 Austl JL & Soc'y 213, 214; Malcolm Merry, 'Are T'sos Really Trusts?' (2012) 42 HKLJ 669, 670.
[186] *Tang Kai-chung v Tang Chik-shang* [1970] HKLR 276, 320 (Mills-Owens J).
[187] Belinda Sheung-yu, 'Chinese Customary Law - An Examination of Tsos and Family Tongs' (1990) 20 HKLJ 13, 14.
[188] Land Titles Ordinance (Cap 585) [2004] (n 4) ss 7(2) and 22.
[189] *Leung Kuen Fai v Tang Kwong Yu T'ong or Tang Kwong Yu Tso* [2002] 2 HKLRD 705.
[190] The Law Reform Commission of Hong Kong (n 5) para 6.59.
[191] Malcolm Merry, 'Are T'sos Really Trusts?' (2012) 42 HKLJ 669, 669.
[192] The Law Reform Commission of Hong Kong (n 5) para 7.61.

MULTI-STOREY BUILDINGS

As multi-storey buildings in Hong Kong are held by way of a tenancy in common,[193] making their interests separate and distinct — a plaintiff must show adverse possession against each owner.[194] If the plaintiff is a tenant then adverse possession cannot succeed, as it would require consent to their own possession in their capacity as a tenant in common. This severely limits adverse possession in multi-storey buildings.

Despite their statutory remit to manage common parts of the building and ensure compliance with the deed of mutual compliance, incorporated owners are able to claim adverse possession.[195] This seems illogical as their private possession would be regarded as consensual and it is likely that they would not have many questions asked, given their already regular presence in the buildings. Given the unlikelihood of adverse possession occurring in a multi-storey building, any reform option would have little effect here.

EXTENSION OF CROWN LEASES

The New Territories Lease (Extension) Ordinance was intended to give effect to the joint declaration.[196] After debate as to whether section 6 was intended to create new leases (hence restarting limitation periods) or extend existing ones,[197] it was considered that leases were extended, which does not interrupt the adverse possession.[198]

GOVERNMENT LEASE

With all land in Hong Kong being held on lease by the Government, the possessory title acquired during adverse possession will be challengeable by the Government — good title will only be obtained once the Government's claim is also statute barred.[199] This pressurises the Government to continuously check up on all of their land, which costs time and money. However, this is somewhat mitigated by the longer limitation period. Abolishing adverse possession would enable this time and money to be spent on other matters.

After successfully claiming adverse possession against a government lessee, the squatter could still be evicted by the Government who possesses better title.[200] Furthermore, the dispossessed lessee may surrender their lease, ending the adverse possessor's title to the

[193] Contrasting England and Wales where leases must be held as joint tenants: Law of Property Act 1925, s 1(6).
[194] *Incorporated Owners of Chungking Mansions v Shamdasani* [1991] 2 HKC 342.
[195] *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & Others* [2006] 5 HKC 288 [35] (Yuen JA).
[196] New Territories Leases (Extension) Ordinance (Cap 150) [1988].
[197] ibid s 6.
[198] *Lee Bing Cheung v Secretary for Justice* [2013] 3 HKC 511.
[199] Land Titles Ordinance (Cap 585) [2004] (n 4) s 7.
[200] ibid s 9(1).

lease and, enabling their eviction.[201] Regardless of when dispossession occurs, time does not run against the landlord until the tenancy is terminated.[202] Despite this, if a landlord grants a new lease, the lessee may eject the squatter even if the new lessee happens to be the original lessee.[203]

APPROACH OF THE COURTS

The courts have been very open to what can be adversely possessed, including the external part of a wall.[204] This general willingness has extended to the courts of first instance, often making declarations in the squatter's favour[205] by using an exception to the general rule that declarations should not happen without trial. Merry recognises that this is 'becoming the norm in adverse possession claims', [206] criticising this as being 'wrong in principle and unjustified by precedent'. [207] Given the form of relief being a declaration of title, this should not be possible without trial, even if it is done in the interest of speed. Merry considers that the jobs of squatters and their lawyers are easy, as the hearing is more of a formality with a pre-determined verdict.[208] This issue would equally be solved in abolishing adverse possession.

OPTIONS FOR REFORM

SHAPE OF REFORM

It is important that any reform fits Hong Kong's 'economic, political and legal background'.[209] The absence of adverse possession and limitation rules in China leaves the future in doubt,[210] especially with regard to whether Hong Kong will remain separate or become assimilated into China.[211] Tai suggests that Hong Kong will continue operating under the Basic Law after 2047,[212] which is supported by Gittings who suggests that immediate change will be 'far from inevitable'.[213] Uncertainty in 2047 is inevitable, but it should not deter any change in the interim period.

[201] *St Marylebone Property Co Ltd v Fairweather* [1963] AC 510 (HL), 540 (Lord Radcliffe).
[202] *Tsang Wing Kit Eric & Anor v Occupiers & Others* [2009] 3 KHC 496 [17] (Deputy Judge To).
[203] *Chung Ping Kwan & Others v Lam Island Development Co Ltd* [1996] 2 HKLR 315.
[204] *Mak Kam Chuen v Triple Joy Investments Ltd & Anor* [2012] 1 HKC 412.
[205] eg *Wu Chi Kwong v state of Cheung Man Yau* [2008] 3 HKLRD 503.
[206] Malcolm Merry (n 9) 511.
[207] ibid.
[208] ibid 515.
[209] Peter De Cruz (n 92) 224.
[210] Property Law of the People's Republic of China (2007) (CN).
[211] Danny Gittings, 'What Will Happen to Hong Kong after 2047' (2011) 42 Cal W Int'l LJ 37, 39.
[212] Benny Tai, 'Basic Law, Basic Politics: The Constitutional Game of Hong Kong' (2007) 37 HKJL 503, 577.
[213] Danny Gittings (n 211) 41.

There are some important considerations to bear in mind when reforming. Watson advocates for legal transplants, where the system of one jurisdiction is taken and implemented into another.[214] Care must be taken, however, in case the original meaning is lost when changing boundaries.[215] The hierarchy of transplants suggests that smaller transplants are more likely to work, as more extensive transplants risk becoming an irritant.[216]

Due to the drastic consequences of adverse possession and its consideration as a 'magical rule',[217] caution is required when considering reform. There are several options being considered, which include partially accepting adverse possession, statutory encroachment, distinguishing good faith squatting and, finally, abolishing adverse possession. This final option would be the most beneficial for Hong Kong.

FOLLOW THE RECOMMENDATIONS OF THE LAW REFORM COMMISSION: PARTIAL ACCEPTANCE OF ADVERSE POSSESSION FOLLOWING THE LRA

Ultimately, the Law Reform Commission recommend following the LRA,[218] seeing that it strikes the right balance 'between protecting the paper owner and the squatter'.[219] Given the current law being so similar to the pre-LRA position, this reform is a viable option, especially considering the workability of transplantation. The priority given to good faith squatters is a particularly attractive feature.[220]

Following the first instance European Court of Human Rights' appeal of *JA Pye*,[221] suggesting adverse possession conflicted the right to enjoy one's property,[222] 'ripples' were caused in Hong Kong as a result,[223] concluding that adverse possession did not infringe their fundamental rights.[224] Whilst Hong Kong is clearly influenced by the English legal landscape, this does not mean it should follow the LRA.[225]

[214] Alan Watson, 'Legal transplants and law reform' (1976) 92 LQR 79.
[215] Pierre Legrand, 'How to compare now' (1996) 16(2) LS 232; Geoffrey Samuel (n 12) 126.
[216] Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies* (1998) 61 MLR 11.
[217] Lei Chen and Sng Ban Chuan Gordon (n 34) 413.
[218] The Law Reform Commission of Hong Kong (n 5) para 7.34.
[219] ibid para 7.32.
[220] LRA 2002 (n 3) sch 6 para 5.
[221] *JA Pye v United Kingdom* [2005] 11 WLUK 453.
[222] ibid, 42.
[223] Martin Dixon (n 35) 185.
[224] *Harvest Good Development Ltd v Secretary for Justice and others* [2007] 4 HKC 1; Basic Law 1997 arts 6 and 105 (Hong Kong).
[225] LRA 2002 (n 3).

Despite conceding that, due to the leasehold system, the value of adverse possession in assisting conveyancing was less in Hong Kong than other jurisdictions.[226] It was proposed that, considering the aforementioned justifications, adverse possession should remain for unregistered land.[227] The absence of a single regime in reform has already faced criticism from academics.[228]

Whilst this option is not preferable for Hong Kong, there are some aspects of the LRA which Hong Kong may wish to adopt. The intended e-conveyancing system will greatly assist land registration with certainty and efficiency: Hong Kong should try and implement it from the outset.

STATUTORY ENCROACHMENT AS ILLUSTRATED BY AUSTRALIA

Five Australian jurisdictions have introduced statutory encroachment which applies to both registered and unregistered land.[229] Only two of these jurisdictions also allow adverse possession. The court has a wide discretion regarding remedies,[230] which is when encroachment occurs by 'a building': interpreted liberally as a man-made structure of substantial and permanent character.[231]

Chiang advocates that statutory encroachment would currently be preferable to adverse possession and under the prospective title registration system,[232] believing that it should be introduced irrespective of the adverse possession reform.[233] Chiang proposes that it would offer a 'more elegant and satisfactory legal solution for resolving Hong Kong's encroachment problems'.[234]

The prompt relief offered by statutory encroachment is a major advantage — passage of time is not determinative, and the courts have wide discretionary powers when it comes to awarding remedies.[235] Such discretion may be useful in the context of adverse possession to ensure that, given the general lack of knowledge on adverse possession, it would ensure

[226] The Law Reform Commission of Hong Kong (n 5) para 7.18.
[227] ibid para 7.21.
[228] Lei Chen and Sng Ban Chuan Gordon (n 34) 424.
[229] Encroachment of Buildings Act 1922 (New South Wales); Encroachment of Buildings Act 1982 (New Territory); Encroachments Act 1944 (South Australia); Property Law Act 1974, ss 182-194 (Queensland); Property Law Act 1969, s 122 (West Australia).
[230] Encroachment of Buildings Act 1922, s 3(2) (New South Wales); Encroachment of Buildings Act 1982, s 6(1) (New Territory); Encroachments Act 1944, s 4(2) (South Australia); Property Law Act 1974, s 185(1) (Queensland); Property Law Act 1969, s 122(2) (West Australia).
[231] *Exp Van Achterberg* [1984] 1 Qd R 160, 162; *Ward v Griffiths* (1987) 9 NSWLR 458, 460.
[232] Dominic Chiang (n 10) 61.
[233] ibid 79.
[234] ibid 82.
[235] ibid.

that the outcome of an adverse possessor was not unfair. Whilst possessory title can be offered by adverse possession, the courts' ability to order the conveyancing of land to an encroaching owner better assists conveyancing.[236] The ability to offer compensation is desirable, as the current lack of such has been judicially challenged as being disproportionate to adverse possession's aims.[237] The current 'all or nothing' approach has been heavily criticised by Chen and Gordon considering the 'drastic consequence' of losing land without compensation.[238]

Chiang prefers the deterrent effect from statutory encroachment.[239] However, Leung considers the reality that as far as a squatter is concerned, 'vacant land is a good place to seek shelter whether the doctrine of adverse possession exists or not.'[240] On this basis, the outcome of adverse possession is arguably not the reason for squatters' actions, challenging the need for adverse possession or the compensation of statutory encroachment.

DISTINGUISHING GOOD FAITH SQUATTING, ILLUSTRATED BY CANADA

Despite the policy implications, Hong Kong currently does not distinguish good and bad faith squatting.[241] Statutory encroachment does consider this, with Western Australia barring relief if encroachment is intentional or arising from gross negligence.[242] Chen and Gordon find difficulty justifying the lack of distinction in the modern context.[243] Chiang supports this, recognising the extent of hardship suffered where improvements are made to land in good faith.[244]

Canadian courts have taken a strict approach, such that an opportunistic squatter is precluded from action if they are possessing in bad faith.[245] Whilst this would make adverse possession more attractive, abolishing adverse possession would produce the exact same result.

[236] Dominic Chiang (n 10) 82.
[237] *The Hong Kong Buddhist Association v Cheung Ka Leung, Michael* [2006] HKCU 1520, [65] (Saunders).
[238] Lei Chen and Sng Ban Chuan Gordon (n 34) 413.
[239] Dominic Chiang (n 10) 82.
[240] Maynard Ming-Yat Leung (n 36) 56.
[241] eg *The Hong Kong Buddhist Association v Cheung Ka Leung, Michael* [2006] HKCU 1520.
[242] Property Law Act 1969, s 122(2) (West Australia).
[243] Lei Chen and Sng Ban Chuan Gordon (n 34) 425.
[244] Dominic Chiang (n 10) 71.
[245] *Hamson v Jones* (1989) 52 DLR (4th) 143, [154]-[155].

THE ABOLITION OF ADVERSE POSSESSION, ILLUSTRATED BY SINGAPORE

Singapore abolished the doctrine of adverse possession for all land.[246] Hong Kong should follow this option for reform, especially given their similarities to Singapore 'in its population density, urbanisation and land prices'.[247] Moreover, it is suggested that Hong Kong and Singapore may be 'better able to utilise modern surveying techniques to the extent that such boundary discrepancies do not arise or arise less often'.[248] Whilst Leung suggests that Singapore has no means of adjusting their boundaries, they incur few boundary issues given that the country is 'small, highly developed and affluent where more modern surveying techniques are used'.[249]

Strangely, the Law Reform Commission did not consider Singapore, despite also being a former British colony operating under English common law.[250] Singapore's housing situation is also similar.[251] Chen and Gordon support the proposition that Hong Kong should abolish adverse possession for all land, following the Singapore model, in order to help implement the title registration system.[252] The scarcity of adverse possession cases in Hong Kong implies that adverse possession plays a minor role in settling land disputes,[253] suggesting that it no longer has an important role in the facilitation of conveyancing unregistered land.[254]

Abolishing adverse possession would have the major advantage that title can only be acquired through registration,[255] which is supported by the current lack of awareness of adverse possession. Moreover, it would save court and government time, offering an economic advantage.[256] Adverse possession's absence would assist the implementation of the title registration system by no longer contradicting the indefeasible title.

Leung recognises that 'it appears that no great difficulty has been encountered in those jurisdictions where adverse possession no longer exists'.[257] Some form of provision

[246] Singapore Land Titles Act (Act no 27 of 1993), ss 50 and 177.
[247] Lei Chen and Sng Ban Chuan Gordon (n 34) 428.
[248] Malcolm Park and Ian Williamson, 'The need to provide for boundary adjustments in a registered title land system' (2003) 48(1) Australian Surveyor 50, 52 <http://ssrn.com/abstract=1537971> accessed 19 April 2020.
[249] Maynard Ming-Yat Leung (n 36) 52.
[250] Lei Chen and Sng Ban Chuan Gordon (n 34) 426.
[251] ibid.
[252] ibid.
[253] Hong Kong Island and Kowloon combined have had under 5 cases of AP per year.
[254] Lei Chen and Sng Ban Chuan Gordon (n 34) 426.
[255] ibid 425.
[256] Fiona Burns, 'Adverse possession and title-by-registration systems in Australia and England' (2011) 35 MULR 773, 815.
[257] Maynard Ming-Yat Leung (n 36) 70.

offering compensation to a mistaken improver may offer a good compromise, as used in the New Territory and Queensland.[258]

CONCLUSION

Adverse possession should be abolished in Hong Kong as it no longer serves an important purpose, whilst also threatening the establishment of a title registration system.[259] With the unique situation in Hong Kong regarding the continued power grab, radical reform would be difficult; however, it is proposed, given the absence of adverse possession in China, that this reform would be workable.

Currently, Hong Kong's position regarding adverse possession is the same as that of England and Wales pre-LRA.[260] Whilst the new English regime has attractive features such as prioritising good faith squatters,[261] the practical considerations of Hong Kong make abolition preferable. The lack of adverse possession cases coupled with the desire to implement a title registration system suggest that this option would be the most effective. The perceived advantages of adverse possession are mitigated by the lack of awareness of the doctrine.

Alternative options such as statutory encroachment and distinguishing bad faith would not provide the advantages justifying reform. Hong Kong's clear similarities with Singapore, as well as Singapore's success in implementing a title registration system, demonstrate that it is the best approach for Hong Kong to take.

[258] Property Law Act 1974 Pt 11, Div 2 (Queensland); Encroachment of Buildings Act 1982 Pt III (New Territory).
[259] Land Titles Ordinance (Cap 585) [2004] (n 4).
[260] LRA 2002 (n 3).
[261] ibid sch 6 para 5.

« Le critère du droit administratif n'existe pas » : Une appréciation juridique critique de la citation de Jean Rivero dans le domaine du droit administratif français

Victor Aupetit[*]

INTRODUCTION

« *J'ai eu jusqu'ici la simplicité de voir que ce que nous appelons la justice administrative est une création de Napoléon, c'est du pur ancien régime* ».

Cette affirmation d'Alexandre de Tocqueville au chapitre '*La Justice Administrative est une Institution d'Ancien Régime'* de son ouvrage *L'Ancien Régime et la Révolution* illustre à merveille l'existence d'une continuité historique et juridique du régime administratif français, indépendante des bouleversements politiques et constitutionnels. Cette continuité transparaît à travers la corrélation qui apparaît entre l'Édit de Saint-Germain-en-Laye (1641) et les lois des 18 et 24 août 1790. Avec l'Édit de Saint-Germain-en-Laye, le roi, en réaction à l'activisme parlementaire, déclare les juridictions compétentes pour connaître des litiges entre personnes privées mais pas lorsque l'État est partie. On devine une césure entre la justice applicable aux personnes privées normales au droit civil et la justice applicable dans les litiges où l'administration est en cause. Les lois des 16 et 24 août 1790 se comprennent comme une continuité et un renforcement de l'Édit de Saint-Germain-en-Laye car la séparation des fonctions judiciaires et administratives crée une soustraction de l'intégralité du contentieux administratif aux juridictions judiciaires, interdisant au juge judiciaire de connaître des litiges concernant l'administration. Ces lois laissent par ailleurs l'administration libre de tout contrôle et de toute sanction.

Le législateur va remédier à cela avec l'article 52 de la Constitution du 22 frimaire an VIII (1799) qui crée le Conseil d'État. Celui-ci est amené à conseiller l'administration notamment dans les conflits qu'elle pourrait connaître avec l'administré. Ainsi est né la théorie du ministre juge : le Conseil d'État peut donner des conseils au ministre, mais lui

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seul peut statuer sur le litige car lui seul est juge de droit commun. Cette théorie va prendre fin avec le processus de juridictionnalisation de la justice administrative.

La loi du 24 mai 1872 établit le Conseil d'État comme juridiction suprême de l'ordre administratif, libre de juger pour le bien des administrées. Cette fonction est cumulée avec celle de conseiller du gouvernement, le Conseil d'État étant organiquement rattaché à l'administration. Autrement dit, l'administration contentieuse est amenée à juger l'administration active.

Il faut bien comprendre que le droit administratif français se base sur une conception du principe de séparation des pouvoirs. Alors que la conception classique veut que le pouvoir judiciaire soit indépendant du pouvoir exécutif parce qu'il peut justement exercer un contrôle sur lui, le raisonnement français se base sur un fondement inverse. En effet, en France, contrairement à l'Angleterre, l'indépendance du pouvoir exécutif est comprise comme garantie précisément parce qu'il ne peut pas être contrôlé par le pouvoir judiciaire. Autrement dit, la fonction de juger l'administration est comprise comme une composante de la fonction d'administrer : « juger c'est encore et toujours administrer » (de Pansey). Ce raisonnement pose d'emblée la question de la légitimité démocratique d'une administration qui se jugent elle-même ?

Et pourtant, c'est le raisonnement de base du droit administratif français. Le droit administratif français se définit tout d'abord comme un droit dérogatoire, exorbitant du droit commun. Le tribunal des conflits dans son arrêt *Blanco* en date de 1873, précédé par le Conseil d'État dans ses arrêts *Rothschild* et *Gloxin* en date de 1855, écarte explicitement l'application du Code civil comme norme de référence du droit administratif. L'ainsi le soin de produire le droit applicable en matière administrative est ainsi laissé au Conseil d'État. L'arrêt *Cadot* de 1889 du Conseil d'État établit l'indépendance du Conseil d'État de l'administration active et établit une distinction entre recours contentieux et non-contentieux. Les décisions du Conseil Constitutionnel, la validation des actes administratifs, et le Conseil de la Concurrence, respectivement en date de 1980 et 1987, consacrent constitutionnellement l'existence, l'indépendance, et la réserve de compétence du Conseil d'État.

Le droit administratif est toujours d'actualité car il est le produit des différents pouvoirs, la jurisprudence administrative étant concurrencée de plus en plus par le législateur national et communautaire.

Le droit administratif se compose également comme un droit des prérogatives — des privilèges étatiques. L'administration peut imposer unilatéralement des obligations sur les administrées et recourir à la force pour faire exécuter ces obligations. Ainsi que toute décision bénéficiant du privilège du préalable, c'est-à-dire étant présumé légale et exécutoire. La théorie de présence publique établit ainsi le droit administratif comme un droit éminemment inégalitaire. Plusieurs écoles ont tenté de trouver un critère au droit

administratif : l'école du *service public* et l'école de la *puissance publique*. Mais il s'avère que ces critères sont tous valables, aucun n'étant supérieur à un autre tout étant complémentaires. C'est sans doute ce qui a poussé Jean Rivero a affirmé que « le critère du droit administratif n'existe pas ». Cette affirmation est lourde de sens et nous invite à nous questionner sur l'existence d'un critère unique de définition du droit administratif. Si le droit administratif est un droit aux multiples facettes, n'existe-t-il pas une constante lui ayant permis de perdurer depuis un siècle et demi maintenant ? Le droit administratif n'est-il pas, au-delà des toutes ses caractéristiques, l'expansion même de la démocratie ?

C'est la question à laquelle on se propose de répondre en se limitant à la France, à la création du Conseil d'État et à sa jurisprudence.

Pour répondre à cette question, on verra le Conseil d'État comme promoteur de l'État de droit (I) et le modelage du droit administratif pour l'administré (II).

I. LE CONSEIL D'ÉTAT : PROMOTEUR DE L'ÉTAT DE DROIT

A. LE CONSEIL D'ÉTAT : GARANT DU PRINCIPE DE LÉGALITÉ ET DE LA HIÉRARCHIE DES NORMES

L'état de droit se comprend comme un état dans lequel l'administration et les pouvoirs publics sont soumis au droit auquel il heurte, convient-il d'ajouter, une hiérarchie des normes bien établie.

Le Conseil d'État a toujours veillé au respect par les actes de l'administration, du principe de légalité, respect de la loi et donc une plus large mesure, du respect du principe de juridicité, respect du droit, et du respect de la hiérarchie des normes que cela implique. Ainsi, il a toujours veillé au respect de la source constitutionnelle et rappelle la primarité de celle-ci dans l'ordre interne (CE *Sarran et Levacher et autres*, 1998). La suprématie conférée par l'article 55 de la Constitution aux engagements internationaux ne s'applique pas en ordre interne avec disparition de nature constitutionnelle. Cette formule du Conseil d'État sera employée par la Cour de Cassation dans son arrêt *Fraisse* du 2 juin 2000. Le Conseil d'État a donc joué un rôle dans la détermination du rang des sources de légalité qui s'impose à l'action administrative. De plus, il contribuera à l'enrichissement du bloc de constitutionnalité lorsqu'il déclare, audacieusement, comme principe fondamental reconnu par les lois de la République, le principe selon lequel l'État doit refuser l'extradition d'un étranger lorsqu'elle est demandée dans un but politique (CE *Koné*, 1996).

Cette tentative normative peut être vue comme une immixtion du juge administratif dans l'élaboration du bloc de constitutionnalité qui revient normalement au Conseil Constitutionnel d'élaborer. N'en demeure pas moins que cela s'inscrit dans une urgence du Conseil d'État de contribuer à former et à faire respecter cette hiérarchie des normes par l'administration. Par l'arrêt *Nicolo* de 1989, le Conseil d'État ouvre le contrôle de conventionalité au juge administratif qui peut annuler un acte pris en conformité avec une loi, qui ne serait pas conforme à une norme du bloc de conventionalité. Ce bloc de conventionalité sera également enrichi puisque le Conseil d'État y apportera le droit communautaire dérivé: directives et règlements communautaires (CE *Boisdet*, 1990 et *Rothmans*, 1992).

Ainsi, le Conseil d'État établit la compétence de sa propre compétence mais il est aussi respectueux de la place qu'occupe les autres institutions de la République française. En effet, il refusera d'opérer un contrôle de constitutionnalité sur la loi puisqu'il se refuse d'annuler un acte pour la conformité avec une loi qui serait elle-même inconstitutionnelle (CE *Arrighi*, 1936). Ou lorsqu'un acte est pensé en conformité avec un traité qui serait lui-même inconstitutionnel (CE *Commune de Porta*, 2002). Le Conseil d'État laisse ainsi au Conseil Constitutionnel le soin d'exercer le contrôle de constitutionnalité sur la loi ou les traités, démontrant l'ambition démocratique du Conseil d'État et affirmant la légitimité de sa place en tant qu'Institution.

B. LA JURISPRUDENCE DU CONSEIL D'ÉTAT : UNE SOURCE PROPRE ET CONTINUE DE PROTECTION DES DROITS FONDAMENTAUX

Le Conseil d'État et le droit administratif ont tiré une partie importante de leur légitimité de par une jurisprudence qui a assuré la protection des grandes libertés contre l'intrusion exercée de l'administration sur les administrés. Sur la terre d'une jurisprudence parfois plus que contentieuse, il a posé les jalons de la protection des droits fondamentaux.

Le Conseil d'État a ainsi toujours veillé au respect de la liberté de culte, (CE *Abbé Olivier*, 1909) de la liberté d'association (CE *Amicale des Annamites de Paris*, 1930), de la liberté du commerce et de l'industrie (CE *Daudignac*, 1951) à la liberté de presse (CE *Frampar*, 1960) et au droit des étrangers à une vie familiale normale (CE *Gisti*, 1978). Le Conseil d'État a aussi joué un rôle précurseur en matière d'égalité entre homme et femme (CE *Demoiselle Bobard*, 1936), d'égalité de moyen devant le service public (CE *Société des Concerts*

Conservatoires, 1951 ou CE *Société du Journal de l'Aurore*, 1948) à l'égalité d'accès à la fonction publique indépendante des opinions politiques des candidats (CE *Barel*, 1954), ainsi qu'au droit de grève dans la fonction publique que le Conseil d'État conclut avec le principe de continuité du service public (CE *Dehaene*, 1960) ou encore à l'égalité des citoyens devant la justice (CE *Rassemblement des nouveaux avocats de France*, 1979). La protection des droits fondamentaux va pleinement bénéficier des principes généraux du droit ; « principes non écrits, non expressément formulé[s] par le texte prononcé par le Conseil d'État sur la forme de l'Esprit Général du droit et s'imposant à l'administration dans son action ». Par exemple, dans son arrêt *Commune de Morsang sur Orge* (1995), le Conseil d'État s'est basé sur la dignité humaine comme fondement d'ordre public pour interdire la pratique du lancer de nain. Cette jurisprudence est révélatrice du fait que le droit administratif évolue avec son temps par une jurisprudence qui s'unifie.

En effet, cet arrêt s'inscrit relativement à l'évolution du droit européen des droits de l'homme : The Human Rights Act en Grande Bretagne établit en 1998, soit trois ans après. Par ailleurs, le Conseil d'État, pour être en adéquation avec le domaine médical et son évolution, a établi le libre choix du médecin traitant par le patient (CE *Syndicat des médecins libéraux*, 1998). Ces principes généraux du droit ont une valeur supérieure (CE *Syndicat des Ingénieurs Conseils*, 1959) et le Conseil d'État leur donne une valeur législative dans son arrêt (CE *Syndicat Algérien de défense des immigrants*, 1960). Cela pose la question de la légitimité démocratique d'une création législative par le Conseil d'État inscrit lui-même dans le bloc de légalité des normes à valeur législative. N'en demeure pas moins que la valeur normative du Conseil d'État va être protégé constitutionnellement par le Conseil Constitutionnel dans sa décision de 1991, loi parlant disparition relative à la santé publique et aux injustices raciales. Constitutionnellement renforcée, la théorie des principes généraux du droit, le sera d'autant plus qu'elle sera reconnue par le Conseil Constitutionnel en décembre 1991. Il convient de remarquer que ces principes participent d'un univers démocratique français : combler les lacunes législatives dans un souci d'égalité. Les principes permettent de protéger l'administré lorsque l'Administration possède un pouvoir règlementaire autonome ou un pouvoir discrétionnaire important.

Le droit administratif apparaît donc à travers la jurisprudence du Conseil d'État comme une garantie et une protection de l'État de droit par un juge administratif qui veille au respect de la hiérarchie des normes et à la protection des droits fondamentaux. Cela témoigne d'un souci de protection de l'administré qui n'aurait été possible sans la mise à disposition d'un contentieux en sa faveur.

II. LE MODELAGE DU DROIT ADMINISTRATIF POUR L'ADMINISTRÉ

A. LA MOBILISATION ET LE PERFECTIONNEMENT DU MÉCANISME CONTENTIEUX : L'ACCEUIL DE L'ADMINISTRÉ PAR UNE DÉMOCRATISATION DU PROCÈS ADMINISTRATIF

Le droit administratif est caractérisé par les règles du procès administratif que le Conseil d'État a progressivement ouvert à l'administré. Tout d'abord, on observe des voies de recours très largement ouvertes avec le recours pour excès de pouvoir ouvert même sans texte le prévoyant (CE *Dame Lamotte*, 1950) ou une conception très libérale de l'intérêt à agir dont la loi a été posée au début du siècle (CE *Casanova*, 1901). Si cet intérêt peut être personnel (CE *Schwartz et Martin*, 1981), il peut aussi être collectif (CE *Syndicat des patrons coiffeurs de Limoges*, 1906) : un syndicaliste, groupement professionnel ou amateur si elle défend un intérêt collectif peut obtenir un recours pour excès de pouvoir. On observe également un élargissement des moyens susceptibles d'être soumis au recours pour excès de pouvoir. Avec l'arrêt de 1875 *Prince Napoléon*, le Conseil d'État accepte d'annuler un acte qui serait pris pour une raison politique. L'invulnérabilité contentieuse des mesures d'ordres intérieures est également de moins en moins de mise. Les sanctions disciplinaires des détenus et des militaires (CE *Hardouin et Marie*, 1995) sont susceptibles de recours pour excès de pouvoir, tout comme les actes de protection des fonctionnaires (CE *Camara*, 1962). Le Conseil d'État va également resserrer son contrôle sur les circulaires impératives dans l'arrêt *Duvignères* (2002).

Une autre évolution progressive et continue est à analyser pour ce qu'elle apporte à la protection des droits des administrés. C'est l'approfondissement du contrôle qu'exerce le juge administratif. Par exemple, depuis l'arrêt *Benjamin* (1933), le juge administratif opère un véritable contrôle de proportionnalité des mesures de police pouvant porter atteinte à une liberté publique. Il vérifie que la restriction apportée à une liberté est justifiée en son principe par une situation particulière mais aussi si la mesure contestée est strictement nécessaire à la préservation de l'ordre public. Ce contrôle de légalité se transforme aussi en un contrôle de l'opportunité de la mesure et permet une protection maximale des libertés des administrés. De même, en matière d'opération d'urbanisme et d'aménagement, le juge administratif procède dans l'exercice du contrôle de légalité à l'application de la théorie du bilan mettant en balance l'utilité publique de l'opération projetée d'un côté et l'attente aux intérêts publics et privés de l'autre (CE *Ville Nouvelle Est*, 1971). En matière de protection des droits étrangers, il vérifie aussi la proportionnalité des mesures de police avec l'attente à la vie familiale de

l'étranger (CE *Madame Babas et Belgacem*, 1991). De même, le contrôle autrefois limité sur l'erreur manifeste d'appréciation s'est transformé en un contrôle de la prolifération juridique des faits (CE *Gomel*, 1914).

Cet affinement du contrôle du juge administratif illustre bien une démocratisation du contentieux permettant une plus grande marge de manœuvre de l'administré en vue du contentieux.

L'action du juge administratif permet d'atténuer l'idée selon laquelle le droit administratif est un droit du déséquilibre puisque la nature inégalitaire et le risque d'arbitraire inhérent à la notion de ce droit sont compensés par un perfectionnement du contentieux qui permet un accueil du justiciable par une justice accessible et protectrice.

B. MODERNISATION DES RAPPORTS ADMINISTRATION–ADMINISTRÉ : VERS UNE DÉMOCRATISATION DE L'ADMINISTRATION

Des nouvelles pratiques démocratiques ont vu le jour ces dernières décennies au sein de l'administration française. Elles permettent une démocratisation de l'administration en ce sens qu'elles contribuent à l'amélioration des rapports administrations–administrés. Les politiques répondant à une exigence de transparence administrative, d'accessibilité des documents administratifs, de publicité, de simplification du droit, et des procédures administratives ou encore de la participation de l'usager avec des processus administratifs. Ces pratiques sont issues d'un mouvement législatif et réglementaire visant à permettre à l'usager de mieux comprendre les circuits administratifs et les procédures administratives souvent complexes — l'état administratif français est souvent présenté comme « un marquis administratif » (RFDA 2003).

La loi du 6 janvier 1978, *la loi informatique et libertés*, permet de concilier l'utilisation optimale des moyens informatiques par l'administration dans le respect des droits et libertés de l'administré, ce qui améliore l'accessibilité. La loi du 17 juillet 1978 crée un véritable droit d'accès des usagers aux documents administratifs les concernant (CADA) et généralise les publications des circulaires ministérielles dont on sait qu'elles contiennent souvent des prévisions juridiques opposables avec moyens. La loi du 17 juillet 1979 oblige l'administration à motiver les décisions défavorables par les raisons du fait et du droit qui les justifient. La loi du 12 avril 2000 sur les rapports entre l'administration et les administrés oblige une mise à disposition des documents administratifs concernant les moyens, cette mise

à disposition constituant une mémoire du service public. D'autre part, un nouvel acteur est apparu récemment dans le procès administratif, il s'agit de « l'amicus curiae » (AJDA 2011) qui est invité à former des observations d'ordre général permettant de trouver une solution au litige. Ce nouvel outil procédural témoigne d'une politique d'ouverture des juridictions administratives vis-à-vis de la société civile.

Il est important de remarquer que cette entreprise de démocratisation de l'administration est un processus en cours comme en témoigne la présentation par le Premier ministre lors du Conseil des Ministres du 24 avril 2013 d'un projet de loi ordinaire et d'un projet de loi organique relative à la transparence de la vie publique. Il serait prématuré d'avancer que l'administration est une « maison de rêve ». Il n'en demeure pas moins que le droit administratif qui est historiquement un droit du secret, s'est graduellement transformé en un droit de la transparence administrative où le citoyen est non seulement citoyen politique mais devient aussi un citoyen administratif, plus seulement assujettie à l'action de l'administration mais en plein sujet de droit. Il participe, par exemple, aux processus administratifs lors des référendums locaux.

D'autre part, on observe également une volonté du Conseil d'État de remédier à l'hermétisme et au laconisme qui caractérisent ses arrêts, s'éloignant ainsi de l'impositions — brévités auxquelles il était soumis. Cette pédagogie nouvelle transparaît par exemple dans l'arrêt *Bleitrach* (2010) qui est anormalement long. Cette pédagogie entraîne une lisibilité et une intelligibilité de ses arrêts et les rends plus accessibles pour l'administré. On peut se demander par ailleurs si cette transparence n'est pas un moyen pour l'administration, active ou contentieuse, d'asseoir son pouvoir : rendre l'administration transparente, c'est la rendre plus abordable, accessible ou lisible certes, mais c'est aussi la rendre moins vulnérable aux contestations des administrés par la réduction du contentieux qu'elle implique.

Ainsi, on s'est proposé de démontrer que par la promotion de l'État de droit par la protection de la hiérarchie des normes et des droits fondamentaux de l'administré à hisser la jurisprudence du Conseil d'État ; et par un droit administratif qui s'est modelé pour l'administré par une double démocratisation — celle du contentieux et celle de l'administration — il apparaît que ce qui a permis au droit administratif de perdurer est inextricablement lié à l'adoption du Conseil d'État aux exigences démocratiques de l'état français, ce qui permet de proposer l'hypothèse suivante : et si le critère démocratie était en fait le critère maître, la norme, ou le vecteur du droit administratif français.

L'appréciation juridique d'un critère du droit administratif qui « n'existe pas » selon Jean Rivero, dans le cadre du droit administratif français

Kathryn Claire Lister[*]

INTRODUCTION

« Il n'y a aucune raison de poser à priori que le droit administratif s'organise autour d'un seul principe ».

Cette citation de Jean Rivero illustre tout le paradoxe du droit administratif comme un droit qui ne s'est pas enfermé dans des définitions restrictives — un droit qui est en constante évolution.

L'absence de « critère » de ce droit paraît surprenante. Par « critère », nous voulons parler d'un moyen de définition — ou plus largement — de la raison d'être du droit administratif. La question se pose donc de savoir sur quel principe ce droit se base-t-il.

Le droit administratif est un droit particulièrement français qui s'est développé par les circonstances historiques. Il peut être défini comme un droit autonome (arrêt *Blanco*, 1873), un droit inégalitaire (c'est-à-dire le privilège du préalable dans le but de l'intérêt général), et un droit jurisprudentiel.

En termes de limites, nous nous limiterons à une analyse du droit administratif en France, à l'heure actuelle. Cependant, il sera intéressant d'analyser l'évolution de sa création à sa situation actuelle. En effet, pourquoi le droit administratif nous apparaît-il ainsi aujourd'hui ?

L'histoire du droit administratif nous offre une explication au fait que ce droit manque d'un critère définitionnel. En effet, il détient un caractère d'origine à caractère évolutif, aux contours incertains et ne s'est jamais tourné vers des définitions restrictives.

Pendant la Révolution, il y est apparu l'idée de créer une juridiction administrative séparée de la juridiction judiciaire. S'il aurait été plus facile de fusionner les deux, c'est bien l'histoire

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qui en a décidé autrement. La loi des 16 et 24 août 1790 a interdit aux juridictions judiciaires — nous voyons donc le début d'une indépendance qui se forge.

En revanche, par cette loi, l'administration reste encore libre de toute sanction. Par l'article 52 de la Constitution du 22 frimaire an VIII, le Conseil d'État est créé, mais reste seulement conseiller du gouvernement. C'est la théorie du ministre-juge. Par la suite va s'opérer une juridictionnalisation du Conseil d'État ce qui explique l'existence du droit administratif aujourd'hui. Par la loi du 24 mai 1870, le Conseil d'État devient une juridiction à part entière. Par les arrêts *Rothschild* et *Gloxin* (1875) et l'arrêt *Blanco* (1873), le Code civil est écarté comme norme de référence — ceci explique la base jurisprudentielle de ce droit. Du plus par l'arrêt *Blanco*, la juridiction administrative est déclarée comme indépendante de la juridiction judiciaire, et par l'arrêt *Cadot*, la juridiction administrative est déclarée comme indépendante de l'administration. Le Conseil d'État devient donc l'organe suprême juridictionnel en droit administratif.

Pour comparer ce droit, nous nous tournerons vers la Grande Bretagne. En effet, en Grande Bretagne, il n'existe pas de juridiction séparée, l'État et les particuliers sont placés au même niveau et il est admis que le juge judiciaire puisse juger l'administration. Par là, nous voyons que le droit administratif en France est un droit très particulier. Albert Venn Dicey en particulier a toujours été très critique de l'idée d'une justice administrative séparée, car une telle idée n'est pas compatible avec l'idéal du régime de la loi. En revanche, il est intéressant de remarquer qu'à l'heure actuelle en Grande-Bretagne, un système de droit administratif semble se développer. En effet, Lord Diplock dans l'arrêt *O'Reilly v Mackman* (1983) a ouvertement déclaré l'existence d'un droit administratif. Ce développement reste limité dans le sens où, le système en Grande Bretagne ne constitue pas encore un droit séparé, mais ne contient que des règles particulières. Cette comparaison sert surtout de base à montrer que le droit administratif en France apparaît comme l'expression d'une interprétation paradoxale de la séparation des pouvoirs.

En termes de théorie, la théorie finaliste de Montesquieu, celle de la « traditionnelle séparation des pouvoirs » se voit éradiquer par l'existence du droit administratif. Léon Duguit du côté de l'école du service public, voit la finalité du droit administratif comme le service public — c'est le service public qui justifie l'existence de l'administration. En revanche, Maurice Hauriou soutient l'école de la puissance publique. En revanche, il semble possible de concilier les deux et de voir le droit administratif comme un droit visant l'intérêt général. D. Cruchet a pu dire que le droit administratif ne se basait sur aucun critère identifiable.

L'intérêt de ce sujet est de comprendre comment et pourquoi ce droit existe en l'absence de critère net et identifiable. L'importance et la place que ce droit a pu prendre à l'absence d'un critère définitionnel nous pousse en effet à conclure que le droit administratif « relève du miracle » (Prosper Weil).

I. L'ABSENCE DE CRITÈRE DU AU TRAVAIL AUDACIEUX DU JUGE ADMINISTRATIF

A. L'ABSENCE DES DÉFINITIONS RESTRICTIVES ET PROTECTION RELATIVE DES ADMINISTRÉS

Il est possible d'attribuer l'absence d'un critère par le fait que le droit administratif, contrairement à la tradition juridique française, n'est pas un droit codifié et doit, donc, en grande partie son existence au travail créateur du juge administratif.

Toute possible définition du droit administratif se verra donc basée dans les décisions du Conseil d'État. Ce dernier participe en effet au respect du principe de légalité mais participe également à la mutation et la création des normes à juger, tout en créant les règles de son propre procès. Il participe donc à l'évolution et la création du droit administratif, rôle normalement détenu par le législateur : son pouvoir normatif relève réellement d'un paradoxe. Peut-on dire que le critère du droit administratif relève de son caractère paradoxal ? Peut-être, mais cela reste extrêmement flou — c'est bien cette incertitude et cette protection relative des administrés qui illustrent et définissent bellement le droit administratif français.

Nous avons vu ce caractère évolutif et incertain du droit administratif dans l'activité du Conseil d'État par rapport à la hiérarchie des normes. Si le juge administratif a toujours refusé de juger la conformité de la Constitution et de la loi (arrêt *Arrighi*, 1936) et la conformité de la Constitution avec un traité international (arrêt *Commune de Porta*, 2002), ce n'est qu'en 1989 avec l'arrêt *Nicolo* qu'il s'attribue la compétence de juger la conformité d'une loi française avec un traité international — c'est ce qu'on appelle le contrôle de conventionalité.

D'autant plus par l'arrêt *Sarran et Levacher* (1998), le juge administratif participe ouvertement à la détermination du rang des sources de légalité en déclarant que « la suprématie ainsi conférée aux engagements internationaux ne s'impose pas dans l'ordre interne aux dispositions de nature institutionnelle ».

Cette participation du juge administratif dans la hiérarchie des normes sert à montrer que le critère n'existe pas, ou en tout cas, n'existe pas sur la base d'une hiérarchie des normes certaine. En effet, le juge administratif donne à la hiérarchie des normes des bords fluctuants ce que confirme l'absence d'un critère définitionnel précis.

Pouvons-nous chercher le critère autre part ? Certains ont pu penser que la justification du droit administratif pouvait se trouver dans le principe de légalité, souvenu par le recours pour excès de pouvoir.

Est-ce la justice, la protection contre l'illégalité administrative qui donne à ce droit sa raison d'être ? En quelque sorte, oui, mais à nouveau, c'est le juge administratif qui établit la condition de recevabilité, un rôle qui ne lui serait normalement pas attribué.

La recevabilité des circulaires illustre de nouveau les contours flous de ce principe de légalité. Si l'arrêt *Notre Dame de Kreisker* (1954) établit une différence entre les circulaires règlementaires (susceptibles des recours) et les circulaires interprétatives (non susceptibles des recours), cette jurisprudence se trouve complétée par l'arrêt *Mme Duvignères* (2002) qui fait la distinction entre une circulaire impérative et la circulaire non-impérative. Il faut que le juge fasse très attention à la rédaction de ces circulaires et à leur façon d'être interprété par les ministres des circulaires émettant des conseils pouvant être perçus comme des ordres par certains, et la justice sera susceptible de laisser passer des actes à caractère normatif sans possibilité de recours. Ces circulaires illustrent donc la face cachée de l'administration et suggèrent pour certains que c'est peut-être l'arbitraire qui apparaît comme le critère le plus flagrant du droit administratif, argument soutenu par Danièle Lochak. Pour celle-ci, l'absence d'un critère clair relève du fait que le juge administratif offre seulement une protection relative aux administrés, car il peut, à tout moment, modifier les règles de son propre procès. En théorie, le critère du droit administratif serait donc l'arbitraire, l'incertitude, et les contours fluctuants de ces règles. Nous verrons qu'en pratique, cela n'est pas le cas.

Nous pouvons dernièrement nous tourner vers le service public pour montrer l'absence d'une définition restrictive du droit administratif en général. Son « impression conceptuelle » (J. Chevallier) a résulté du fait de l'éclatement de l'idée qu'activité publique et personne publique forment le service public, éclatement dû à deux arrêts fondamentaux : l'arrêt *Société commerciale de l'Ouest africain* (1921), qui fait naître la notion de service public industriel et commercial (SPIC), et l'arrêt *Caisse Aide Primaire et Protection* (1938). La « crise » du service public montre la réticence du juge administratif de rentrer dans des définitions trop restrictives et de se lier les mains pour l'avenir.

Nous avons donc vu que l'absence d'un critère est dû à l'origine jurisprudentielle du droit avec un juge administratif qui n'établit pas des contours certains du fonctionnement de ce droit et préfère ne pas se lier les mains.

B. LES PRINCIPES GÉNÉRAUX DE DROIT : UN DROIT EN CONSTANTE ÉVOLUTION

Les principes généraux de droit (PGD) montrent également ce droit comme un droit constamment en évolution, aux contours fluctuants ce qui nous indique un droit difficile à définir à l'aide d'un critère unique.

Si ces PGD illustrent toute la question de la légitimité démocratique du juge administratif, cela montre de nouveau le critère du droit administratif comme s'articulant autour du paradoxe de ce même droit. Ce critère n'est clairement ni suffisant ni assez précis.

Ces décisions de justice qui s'imposent à l'administration mais ne viennent pas modifier la loi sont particulièrement évolutives dans le sens ou par une décision de justice, il est aisé de modifier la règle devenue inadaptée. C'est l'arrêt *Dame veuve Trompier-Gravier* (1944) qui fait naître la notion de PGD et l'arrêt *Aramu* (1943) qui établit que ces principes peuvent être créés même en l'absence de textes. En revanche, pour éviter de donner au droit administratif le critère « arbitraire », le juge administratif refuse de créer ces principes « ex nihilo » et déclare puiser ces principes dans l'esprit national juridique français. De plus, il se limite dans la création de ces principes, chose remarquée par l'auteur Domenico Memma.

Est-ce donc la puissance normative du Conseil d'État qui se voit devenir le critère du droit administratif ? S'il est possible de voir dans un critère pareil, un élément d'arbitraire, particulièrement en remarquant les tentatives d'immixtion du juge administratif (arrêt *Koné*, 1996) la validation du Conseil d'État comme institution et comme producteur des normes peuvent nous faire penser que c'est bien l'activité jurisprudentielle audacieuse du juge administratif qui reflète le mieux l'existence du droit administratif. En effet, ces principes s'imposent au pouvoir réglementaire (arrêt *Syndicat général des ingénieurs conseils*, 1959) et pour le Conseil d'État ont une puissance législative.

La décision du 23 janvier 1987 est la consécration constitutionnelle du Conseil d'État par le Conseil Constitutionnel. La décision du 16 janvier 1991 va plus loin en établissant et en admettant la puissance normative du juge administratif par les PGD et son aptitude à définir le contenu et la valeur de ces principes. Finalement, par la décision du 19 décembre 1991, le Conseil Constitutionnel consacre la théorie des PGD.

Nous avons, grâce à ces deux parties, pu montrer que l'absence d'un critère est peut-être dû au travail audacieux et évolutif du juge administratif.

II. UN NOUVEAU CRITÈRE, CELUI DE LA DÉMOCRATIE ADMINISTRATIVE ?

A. UN DROIT BASÉ SUR LES DROITS ET LIBERTÉS FONDAMENTAUX

En l'absence de critère définitionnel, il semblerait que le juge administratif a paradoxalement créé un réel critère de façon « discrète ». La « raison d'être » de ce droit semble au fur et à mesure de son existence d'être basée sur la protection des droits et des libertés fondamentaux — liée d'une certaine façon à la protection de l'intérêt général et à la démocratie (que nous verrons plus tard).

Un regard sur les PGD nous montre clairement cela. Le principe d'égalité illustre parfaitement notre proposition avec une multitude des PGD basés sur une telle idée. L'égalité devant le service public d'abord, a été établie par l'arrêt *Société des concerts du conservatoire* (1951) et développée par la suite par l'arrêt *Denoyez et Chorques* (1974). L'égal accès aux emplois publics est établi par l'arrêt *Barel* (1954) et l'égalité des citoyens devant la justice administrative est mise en place par l'arrêt *Rassemblement des nouveaux avocats de France* (1979).

De plus, l'arrêt *Commune de Morsang-sur-Orge* (1995) illustre la force d'un tel argument où le Conseil d'État a établi le principe de la dignité humaine et la protection de l'administré contre lui-même.

Il semble donc que c'est la défense des droits et des libertés fondamentaux qui constituent la base fondamentale du droit administratif français.

L'exemple de la police administrative est flagrant. Si la police administrative est en existence pour éviter toute atteinte à l'ordre public, il faut comprendre que c'est le juge administratif qui établit les contours autour de la possibilité d'une mesure de police.

L'évolution de la police administrative nous indique un réel penchement du juge administratif vers les libertés individuelles et les interdictions générales absolues seront généralement jugées illégales. L'arrêt *Société Les Films Lutétia* (1959) nous indique que le travail du Conseil d'État combine l'ordre public avec la moralité publique.

De plus, la mesure doit respecter le principe de légalité (arrêt *Pariset,* 1875) et la mesure doit être nécessaire et proportionnée (arrêt *Abbé Olivier,* 1909). De plus, depuis l'arrêt *Benjamin* (1933), le juge sera réticent d'admettre et d'accepter des mesures de police, susceptibles d'aller à l'encontre des libertés.

L'exemple du service public et les « lois Rolland » illustre aussi un droit tourné vers les droits fondamentaux et l'intérêt général. La continuité du service public établie par les arrêts *Heyriès* (1918) et *Dehaene* (1950) nous montre l'intérêt du droit administratif pour les individus. La continuité établit par les arrêts *Alitalia* (1989) et *Société du journal de l'Aurore* (1948) constitue l'expression d'un droit qui désire être en harmonie complète avec les besoins et désirs des citoyens en question.

Le principe d'égalité fondé par l'arrêt *Société des concerts du conservatoire* (1951) forme l'idée d'un droit basé sur la non-discrimination, principe bien établit dans la Convention européenne des droits de l'homme.

De plus, par la loi du 30 juin 2000 sur les référés libertés, le juge administratif a été nommé comme promoteur actif des libertés publiques.

Il semble donc possible de défendre que le droit administratif se fonde de plus en plus ouvertement sur un critère basé sur la défense des droits et des libertés fondamentaux — c'est peut-être bien cela la raison d'être du droit administratif.

B. DES MOUVEMENTS VERS UN DROIT PLUS DÉMOCRATIQUE

À côté des critères des droits et des libertés fondamentaux, il est possible de montrer que la démocratie apparaît de plus en plus comme un critère du droit administratif.

Il est en effet paradoxal que c'est parce que le juge administratif agit de façon audacieuse et potentiellement anti-démocratique en se donnant le rôle de « jurislateur » qu'aucun critère n'émerge, mais qu'à partir de cette situation, une nouvelle expression de la démocratie fait naissance.

Si nous voyons « démocratie » comme la séparation traditionnelle de la séparation des pouvoirs ou la possibilité pour les citoyens d'élire les créateurs de la loi, le droit administratif ne remplit pas ces critères. En revanche, l'indépendance des décisions du Conseil d'État et la noblesse intellectuelle que celui-ci a pu montrer illustre une nouvelle conception de la démocratie. Si les membres du Conseil d'État sont situés organiquement du côté de l'exécutif et sont formés à l'École nationale d'administration et non l'École nationale de la magistrature (Danièle Lochah), le miracle relève du fait de l'autonomie et de l'indépendance de cette institution.

De plus, la transparence administrative est devenue une donnée fondamentale de la démocratie administrative comme démocratie française, contribuant donc à l'idée du développement d'un nouveau critère démocratique. Le droit administratif français, traditionnellement un droit aristocratique du secret, est devenu progressivement un droit de la transparence administrative.

En effet, la publicité, la communication, la participation des usagers, et l'accessibilité des documents sont devenus des enjeux cruciaux de la démocratie administrative. Ces changements sont symboliques de l'intervention croissante du législateur national et européen et illustrent le passage du citoyen français et démocratique au citoyen administratif (Durelle-Marc).

Trois lois illustrent notre position : la loi du 6 janvier 1978 relative à l'informatique, la loi du 17 juillet 1978 relative à la relation entre l'administration et les administrés (accessibilité aux documents administratifs, généralise la publication des circulaires), et la loi du 11 juillet 1979 sur la motivation des décisions administratives.

Une autre poussée vers la démocratisation du droit administratif se manifeste par le nouvel intérêt du législateur national et européen pour le droit administratif. Avec la création du code de la justice administrative, on voit une légitimation du travail du Conseil d'État apparaître, même si le code ne constitue pas vraiment un texte codifié et apparaît plutôt comme une compilation de textes. De plus, le champ d'action du juge administratif se trouve limité par le droit communautaire.

En conclusion, il semble que l'absence d'un critère clair et identifiable est dû en grande partie à l'origine jurisprudentielle du droit administratif et à la réticence du Conseil d'État de s'enfermer dans des définitions trop restrictives. En effet, M. Waline a pu dire que « nous ne savons pas ce qu'est exactement le service public parce que la jurisprudence ne veut pas le dire ».

En revanche, l'activité du Conseil d'État semble avoir donné naissance à deux critères fondamentaux et très défendables : celui de la défense des droits et libertés fondamentaux et celui de la démocratie administrative, résultat certes inattendu mais certainement miraculeux.

Populism, Personality, and Science: The Conflicting Role of Rationality and Public Morality in the Failure of English Anatomy Reform Through the Anatomy Bill 1828-29

*Joe Lewin**

INTRODUCTION

The English anatomy schools of the late 18th and 19th centuries were undoubtedly regarded as institutions of fear. Numerous high-profile cases such as the Burke and Hare Murders[1] and the Case of the Italian Boy[2] shocked the historic cities of London and Edinburgh. They became emblematic of the perceived barbarity of the Anatomy Schools, and those people who supplied their stock: the bodies of the dead.

There is an assertion that it was these acts of murder, contemporarily referred to as 'Burking', which caused the Parliament at Westminster to finally address the idea of proper regulation of the Anatomy Schools.[3] Others have hypothesised the overriding influence of the fast-growing medical profession and its desire for improved legal protection to improve their craft and — for some — find fame and fortune, often at the expense of poorer patients.[4] Although compelling and well-detailed, this article will not attempt to expand on or necessarily criticise these arguments.

The journey of anatomy reform was a troubled one. Initiated through a Parliamentary Select Committee in 1828, after a failed Bill the following year, it was not until 1832 that any successful legislation would find itself passing both Houses of Parliament to become

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[1] National Archives, HO 17/12/47.
[2] Wellcome Collection, 'Handbill describing trial of Bishop, Williams and May' < https://wellcomecollection.org/works/kjuzb55s> accessed 10 March 2020.
[3] King's College London, 'The Anatomy Act 1832' (*Special Collections Exhibition)* < https://kingscollections.org/exhibitions/specialcollections/charles-dickens-2/italian-boy/anatomy-act> accessed 15 April 2020.
[4] Ruth Richardson, *Death, Dissection and the Destitute* (Penguin 1989) 43-47.

law. Subsequently, there is an examination of why this initial attempt at reform was unsuccessful.

With a predominant focus on testimony given before the Parliamentary Select on Anatomy in 1828, this article will argue that initial attempts at reform were decidedly too medical-focused in both their scope and discourse; reform was used to accommodate the rational worldview of the growing medical profession. There will be a discussion on the failure of reform and its result from the clash of scientific cultural thinking with that of the perceived views of the wider public and of the views of those sitting within Parliament itself.

The eventual reform in 1832 marked a decided cultural shift into the science of the Victorian Scientific Age. However, this rationality is the very thing that had previously hindered the progress of anatomical law reform.

THE PARLIAMENTARY SELECT COMMITTEE ON ANATOMY 1828: AN EXERCISE IN PUBLIC RELATIONS?

The four-year long journey of anatomy reform starts in the spring of 1828. Following a motion in the House of Commons on the 20th April, the first witnesses appeared before the Parliamentary Select Committee on Anatomy on the 28th April. The aim of this Committee was to inquire into the profession of Anatomy and its modes and methods of '… obtaining [s]ubjects for [d]issection'.[5] Chaired by Henry Warburton MP, the Committee called upon some of the most eminent surgeons and anatomists of the day from the biggest hospitals and privately-run schools in London.[6] From the testimony, it is clear that there was an acute awareness amongst the witnesses of the negative views held towards anatomy and, specifically, the trade in bodies that accompanied it. This filtered into the discourse of the press and the courts when passing judgement; beyond this, the science of anatomy had even become the source of inspiration for prominent literary works such as Mary Shelley's *Frankenstein* (1823).

Consequently, before the Committee, it is clear that there was a concerted effort by members of the medical profession to create a marked difference in the perception of those different actors involved in the supply and demand stages of body acquisition. The supply element consisted of those resurrection men who exhumed and sold the bodies of the recently deceased. On the other hand, the demand element was led by the needs of the medical profession who, according to the Royal College of Physicians, were required to complete courses in dissection; there was a necessity to provide certification of this fact in

[5] Wellcome Collection, Select Committee on Anatomy, 'Report from the Select Committee on Anatomy' (HC 1828) <https://wellcomecollection.org/works/hyjrxujv> accessed 17 January 2020, 3.
[6] Amongst those represented included Guys Hospital, Great Windmill Street, the practice established by William Hunter, and St Bartholomew's, see *Figure 1*.

order to practice.[7] During testimony, the so-called resurrectionists who traded in exhumation were sensationalised by the medical witnesses, referred to as the 'lowest dregs of degradation',[8] 'men of abandoned character',[9] and — somewhat less strongly — '[p]ersons of doubtful character'.[10] Sir Astley Cooper, the president of the Royal College of Surgeons, even ventured as far to say that these men would not be beyond using *him* as a subject for exhumation had they deemed him good enough.[11] These words were evidently intended to shock. The use of highly pejorative language perpetuated the idea of the medical elite being kept at the mercy of a profession that represented the epitome of a criminal underclass. This notion can be furthered through a witness before the Committee who later wrote that these so-called resurrection men are those who had 'sunk through the grades of vice and depravity' before joining the ranks of grave robbery.[12]

This behest to distance themselves may have been the result of growing judicial intolerance to the practices used to acquire bodies for the new schools. The legal starting point began at the time of Sir Edward Coke. A general belief existed that taking a body from a grave for any purpose could not be a crime.[13] Within his 17th century work on the laws of England, Coke expounded the idea that a body once buried is *nullius in bonis* — the property of no man.[14] Practically, this meant that those 'stealing' from graves could not be tried for theft of the body itself. However, the alleged resurrectionist could perhaps be tried for the theft of any garments or tangible items buried with the body.[15] This laissez-faire judicial attitude meant that many cases did not come before the courts and the true nature and magnitude of the trade was left to the imagination of the press and of the public.

Despite this, in *The King Against Lynn*,[16] the court decided to depart from authority set out by Coke and pursue the criminalisation of the disinterment of bodies more rigorously. In justification, the court stated it to be a practice contrary to proper morals. There was an argument that procuring a recently buried corpse for the purposes of dissection did *not* ameliorate the nature of the conduct.[17] Here, dissection is moved into an amoral position.

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[7]Select Committee on Anatomy (n 5) Appendix 11: Regulations of the Court of Examiners of the Society of Apothecaries, London; applicable to Persons who commenced attendance on Lectures since February 1828; see also Apothecaries Act 1815, Parliamentary Archives HL/PO/PU/1/1815/55G3n404.

[8] Select Committee on Anatomy (n 5) 14, 17-18 [40].

[9] ibid 33 [221].

[10] ibid 28, 29 [172].

[11] ibid 14, 17-18 [40]; These words of the unscrupulous lengths that resurrection men would go to in committing crime were echoed by William Lawrence in his testimony *ibid* (n 5).

[12] Hume Tracts Collection, James C Somerville, 'A letter addressed to the Lord Chancellor, on the study of anatomy' (1832) <https://www.jstor.org/stable/60206355> accessed 17 January 2020, 6.

[13] The exception being the taking of a body for the purposes of Witchcraft; *The King Against Lynn* (1788) 2 TR 733.

[14] Sir Edward Coke, Co Inst 3, 203.

[15] ibid; *Haynes's Case* (1388) 77 ER 1388, 77 ER 1389.

[16] (1788) 2 TR 733.

[17] ibid 734.

While the use of bodies for dissection had been sanctioned by the state through positive law since the era of Henry VIII,[18] it was not viewed as a discipline which was worthy of deference by a court of law. On balance, between the benefits of supplying the medical profession and the act of non-consensual exhumation of bodies, the need for scientific progress was morally equal.

However, the nature of the supply-demand relationships of the body trade meant that one branch could not exist without the other. The medical profession needed exhumations in order to practice, and resurrectionists needed practicing doctors to drive profits.[19] Shifting the supply side out of pure moral and 'ecclesiastical cognizance'[20] and into the sphere of criminal punishment also had the effect of changing the normative perception of dissection. If the body-snatcher and the dissectors were in some way jointly complicit in the exhumation and trade of bodies in the eyes of the law, it stands to reason that the act of dissection itself could fall victim to the expanding moral compass that the criminal law seemed to be developing.

The lack of immunity for dissectors from the moral judgment of the law was a trend that was set to continue in later jurisprudence emanating from the criminal courts. Indeed, judges capitalised upon the relationship between body-theft and anatomy in order to emphasise the gravity of the offence and strengthen the justification for harsher criminal punishment. For example, *The King v Cundick*[21] was decided upon just six years before the committee sat to consider reform. This case concerned an undertaker who was charged with the burial of an executed prisoner (who had been spared a court-ordered punishment of dissection). The undertaker failed to complete burial and instead sold the body to a doctor for the purposes of dissection. The indictment, appended to the 1828 Report, read as follows:

> "… [Cundick] being an evil-disposed person, and of a most wicked and depraved disposition, and having no regard to his said duty, nor to religion, decency, morality, or the laws of this realm, did not nor would not bury the said body so delivered him as aforesaid; but on the contrary therefore, on the 11th September, in the year aforesaid, at, &c. aforesaid, unlawfully and wickedly, and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same, for the purposes of being dissected, cut in pieces, mangled and destroyed, to the great scandal and disgrace of religion, decency, and morality, in contempt of

[18] Dr Clutterbuck, 'LECTURES ON THE Diseases of the Nervous System' (1827) 8 The Lancet 101, 106-107.
[19] Somerville (n 12) 9.
[20] *The King Against Lynn* (1788) 2 TR 733, 733.
[21] (1822) 171 ER 900.

> our Lord the King and his laws, to the example of all other persons in like cases of offending, and against the peace…"[22]

Here, the familiar label of the criminal underclass of body snatchers presented by the witnesses in 1828 is present throughout the judgment given. However, what is perhaps more interesting is the court's interpretation of the intention of the offender. The court seemed to suggest that it was not simply the intention to derelict the undertaker's duty to the body and refuse to bury it — or even to simply sell it — that elevated the offence to one of extreme moral repugnance. The very thing that warranted such a strong judicial response was the specific intention to steal and sell the body for the purposes of dissection. While no members of the medical profession were charged in this particular case, it made an interesting moral in-road into its work. By 1822, it seems that it was the resurrection men *and* the anatomists who faced stigmatisation in plying their respective trades.

Media reporting on the crimes of the resurrection men during this period increasingly began to include details of the dissection which resulted from the body's theft and sale; The Times' report of *Cundick* highlights this.[23] Alongside the familiar characterisation of resurrectionists as 'suspicious-looking men' who were found to be 'lurking' around (which echoed the judgement given by the court) stood an intriguing line of detail. The press report briefly mentioned the act of dissection that followed the crime. This was included despite the fact that these details had not been mentioned in official law reports and that no member of the medical profession faced charges for dissecting the stolen body. While brief, the article described the nature of the recovered body as having had the upper part of the skull removed and then replaced.[24] Thus, its inclusion in the press was used to incite sensationalism around the conviction of the rogue undertaker, using the intricacies of dissection as an aggravating factor which was employed to attract wider public attention and, possibly, condemnation.

This trend — and possibly its effect — can be highlighted through the report taken from the Glasgow Chronicle (1823), which detailed the capture of two resurrection men caught in the act of removing a body from a graveyard. As well as reporting the apprehension of the offenders and their almost severe vigilante punishment from a crowd whose 'indignation […] rose to the highest pitch',[25] the Chronicle also detailed an incident of an attack on a local anatomy school. This attack was a direct consequence of the perceived harvesting of local bodies for use in anatomy. Upon entering the lecture rooms in the City, the crowd was greeted with a smell that was 'almost intolerable'.[26] In the dissecting room

[22] ibid [13].
[23] Times Digital Archive, *The King v Cundick The Times* (London, 8th April 1822).
[24] ibid.
[25] Times Digital Archive, Editorial, 'From the Glasgow Chronicle, March 1' *The Times* (London, 5th March 1823).
[26] ibid.

itself could be found 'one large tub filled with a number of heads, legs and arms […] seeping in water' and the 'naked body of a female, with her long flowing hair […] lying on the table entire'.[27]

These are striking images which fully display the growing concern of populist thought surrounding the work of the anatomy schools. The image, perhaps, of the female body with particular emphasis on her long, flowing hair foregrounds traditional representations of beauty associated with the female form and the vulnerability associated with nudity.[28] This serves to create a stark contrast to the perceived barbarity which surrounded it: a body with its entrails hanging out and a 'complete skeleton […] hanging at the end of the room'.[29] Interestingly, the Chronicle and the horrified Glaswegian onlookers applied the labels of 'indignation' and horror respectively to both the act of resurrectionism *and* the business of the medical profession in an equally stigmatising manner.

This scene seems reminiscent of the etching by William Hogarth, The Four Stages of Cruelty: The Reward of Cruelty (*see Appendix 2*).[30] This work was one of four politico-educational works made by Hogarth looking into the life of a fictional criminal. The scene set in this print is one that bears a striking resemblance to the one described by the Glasgow Chronicle. Two skeletons of former dissected convicts hang over the dissecting table as four medical men toil over the body of the deceased. His eyes are gouged out, his displayed entrails are being eaten by a dog; beside him was a pot — evoking images of a witch's cauldron — boiling skull and bones. The nature and purpose of this source was in its deterrent effect. In evoking well-known components and motifs of the macabre, dissection was portrayed as the gravest of punishments inflicted after death with even the face of the executed criminal (albeit missing an eye) resembling one of pain and anguish.[31]

This shift in judicial thinking from conceiving the trade in bodies along the mere formalist proprietary thinking of Coke to one that is within the strong moral judgment of the criminal law evidently proved a public relations problem for the medical profession of the day. Three years after testimony had been given and a year before reform was successfully achieved, James Somerville — a witness at the 1828 inquiry — remarked that the profession up to that point was 'only known […] by acts of humanity and kindness' to

[27] ibid.
[28] This idea of innocence bears a striking resemblance to the visual reporting of the crimes of Burking such as that of the Italian boy; see *Appendix 1*.
[29] Times Digital Archive, Editorial, 'From the Glasgow Chronicle, March 1' *The Times* (London, 5th March 1823).
[30] British Museum Collection Online, Cc, 2.170; Royal Academy of Art Collections, 17/3558: The Reward of Cruelty (*Four Stages of Cruelty*, plate 4).
[31] This also conflicted with the anatomical art used by the Royal Academy of the time to teach anatomy; see Royal Academy of Art, 03/1436 for an example.

patients in distress.[32] As a result, this growing perception of barbarity was seen to be particularly damaging. The Committee inquiry, comprised mainly of those from the medical sector, was evidently a way to facilitate this positive press. To understand this strategy, it is useful to identify what the profession believed to be the cause of the mounting legal stigma against courses in dissection.

THE REWARD OF CRUELTY:[33] CRIMINAL DISSECTION

Many of the witnesses laid the blame for the increased stigma with the state's categorisation of dissection as a criminal punishment for murder. The view of dissection as a special punishment dates back to the beginning of the 18th century. In a pamphlet anonymously presented to both Houses of Parliament over 100 years previously, an indication was expressed at the ineffectual nature of the 'mildness and clemency' implicit in the punishment of the criminal law.[34] The mere fact of imposing only the death penalty on convicted offenders, according to the unnamed author, did not seem to act as an appropriate deterrent to murder and other crimes caught within the wide remit of the Bloody Code. The author advocated here for a return to more 'Roman punishment' such as hanging in chains or being strung up on 'the wheel'.[35]

These punishments were evidently employed to add a special level of degradation. Even after death, these practices ensured the total destruction of a man's character and earthly presence. Implicit to this idea of condemning a man's body to be brutally interfered with post-execution is the attachment of certain attributes to a corpse. If an executed man's body is capable of degradation and humiliation, it must necessarily follow that the body itself is something more than a mere vessel for the human consciousness. For the punishment to be effective, there must be a dominant view of the body as sacred and sacrosanct so that it both punishes the offender and creates the deterrent effect through the revulsion of the entire moral community.[36]

Post-mortem punishment was adopted by Parliament in 1751 through An Act For Better Preventing the Horrid Crime of Murder. This sanguinary edition to the already named 'Bloody Code' mandated the prompt execution of a person convicted of 'wilful murder'

[32] Hume Tracts Collection, James C Somerville, 'A letter addressed to the Lord Chancellor, on the study of anatomy' <https://www.jstor.org/stable/60206355> accessed 17 January 2020, 8.
[33] British Museum Collection Online, Cc,2.170; Royal Academy of Art Collections, 17/3558: The Reward of Cruelty (*Four Stages of Cruelty*, plate 4).
[34] Anonymous, 'Hanging Not Punishment Enough For Murtherers, High-way man, and House-Breakers' (Printed for A Baldwin in Warwick-Lane, 1701) <http://www.earlymodernweb.org.uk/waleslaw/hanging.htm#note> accessed 26 March 2020, 2.
[35] ibid 3.
[36] This view of the inherent value in the body, even when deceased, can be seen in the description of the body of the naked woman in the Glasgow Chronicle; see (n 27).

the next day but one after the sentence had been passed.[37] After such execution, the bodies of those convicted in the City of London or in Middlesex were to be delivered to the Surgeons' Company to be dissected and anatomised.[38] Burial — or the removal of the body of the executed criminal — before its dissection was strictly prohibited.[39] This remained in force throughout the latter half of the 18th century and remained on the statute books when the Committee sat to determine the nature and methods of dissection in 1828. The rationale behind this punishment was twofold: (i) creating a state-mandated and official mode through which the growing medical profession could acquire their stock; and (ii) using the perceived horror of the act of dissection as a method of deterrence against the crime of murder in England and Wales.

Providing the medical profession with an increased supply of bodies, however, was perhaps considered to be an incidental effect of the provision. Considerations of law and order, especially for the older generation of law-makers, were considered a paramount concern. This morally-charged discourse, though perhaps dwindling amongst the Commons, was confirmed by the legislature well into the 1820s. Scarcely a week before the first testimony was heard by the Committee, the House of Lords sat to consider the third reading of the Offences Against the Person Bill. At the third reading, Earl Grey was quick to bring a motion of amendment before the House to ensure that dissection still attached itself as a special punishment for those convicted of murder. In support of the proposed amendment, Earl Grey stated that due to the broad spectrum of offences for which the death penalty was applicable, the use of dissection was necessary to 'give an additional terror against the commission of that greatest offence next to treason'.[40] Furthermore, he was quick to dismiss the particular sensitivities that the House seemed to have previously held towards the medical profession. The Marquis of Lansdowne had previously brought an amendment removing the sentence of dissection in order to specifically combat the stigma faced by members of the medical profession in conducting dissection.[41] Earl Grey, however, dismissed these concerns as broadly speculative, and seemed to believe that the necessity of community protection via the arm of the criminal law was paramount.[42]

The view expounded in the Earl's speech faced criticism by members of English medical circles. On 26th April 1828, a week after the Grey amendment was adopted and passed by the House of Lords, a direct response was written to Earl Grey in The Lancet. The author was quick to dismiss the law and order arguments of the noble Lord as 'puerile and

[37] Parliamentary Archives HL/PO/PU/1/1751/25G2n29; An Act for Better Preventing the Horrid Crime of Murder 1751 (25 Geo 2 c 37), s 1.
[38] An Act for Better Preventing the Horrid Crime of Murder 1751 (25 Geo 2 c 37), s 2.
[39] An Act for Better Preventing the Horrid Crime of Murder 1751 (25 Geo 2 c 37), ss 3 and 5.
[40] HL Deb 15 April 1828, vol 18, cols 1142-1445, 1443.
[41] HL Deb 28 March 1828, vol 18.
[42] HL Deb 15 April 1828, vol 18, cols 1142-1445, 1443.

unphilosophical'.[43] The argument that dissection spread a salutary terror through the community was said to be founded on shaky reasoning since the Earl had also asserted that murder was a crime already marked out in public opinion as one of severe gravity. Where this is already applicable, the journalist for The Lancet found it hard to accept that dissection would so act to further the deterrent.[44] Due to this, there is a strong indication here that the author believed that the Lords were creating unreasonable and unnecessary barriers to the advancement of the field of anatomy. The rule was seen to be driven purely by reason of the shock, horror, and stigma felt by relatives or friends of the executed. Populist ideas were used by Members of the Lords to preserve the criminal stigma of anatomy that was peculiar to English law.[45] This late addition to the Bill by Earl Grey was, however, acquiesced to by the House at its third reading and duly accepted by the Commons. The perpetuation of anatomy as amongst the most severe punishments capable of being inflicted on offenders in England and Wales was then reinforced as late as 1828.[46]

Arguably, there is some bias implicit in the view of a medical journalist writing for The Lancet. There is an obvious indication that the writer, in wanting to advance the causes of the legal freedoms of anatomists, would seek to tear down the arguments of the Earl as outmoded and quite detached from the reality of dissection. However, despite increasing judicial hostility towards the medical profession and the incidents of public outrage shown towards them in carrying out their work, there is some evidence that the reporting of the dissection of executed criminals fell very short of creating images of the 'national horror'[47] that was supposed to bolster law and order. Reports of executions throughout the early years of the 1800s show the sentence of dissection mentioned only in passing, with the great dramatisation — and even reverence — given to the treatment of the death of the convicted criminal.[48]

ELEMENTARY, MY DEAR WATSON: THE ROLE OF RATIONALITY IN ANATOMY REFORM

VIVE LA RÉVOLUTION: FRENCH ANATOMY REFORM

Against this cultural backdrop, with all its macabre connotations, the medical profession sought a mode of body acquisition which would both please the public conscience and

[43] Editorial, 'London, Saturday, April 26, 1828' (1828) 10 The Lancet 113, 113.
[44] ibid 114.
[45] ibid 116.
[46] Parliamentary Archives, HLP/PO/PU/1/1828/9G4n179; Offences Against the Person Act 1828 (9 Geo 4 c 31), s 3.
[47] Editorial, 'London, Saturday, April 26, 1828' (1828) 10 The Lancet 113.
[48] Times Digital Archive, Editorial, Winchester Assizes, *The Times* (London, 11th March 1819); Times Digital Archive, Editorial, 'Execution', *The Times* (London, 23rd April 1821); Times Digital Archive, Editorial, 'Execution of William Cornwall' *The Times* (London, 10th August 1813).

allow for the significant expansion of the teaching of anatomy. Amongst the possible modes of reform considered by the Anatomy Committee was that of the French system, particularly drawing on the policies of the Parisian schools where upwards of 200 English medical students had flocked in order to receive their education. This was due to its comparatively small cost and the operational ease of the system in obtaining subjects for dissection.[49]

In reading this section, it is perhaps helpful to consider the theoretical contributions of the likes of the pioneering sociologist, Max Weber. A feature of his sociological work is the concept of instrumental rationalisation. Starting with the religious revelations of the Reformation, Weber highlights the change in the understanding of the nature of God, for example. According to the enlightened theory, the Christian deity was divinely transcendent, meaning that God was detached from the everyday occurrences of nature and humanity on earth. This left a theoretical vacuum within which major aspects of the world — such as nature, disease, even the development of capitalism — required an explanation. Without a recourse to God, rational scientific thought was to become the dominant discourse and would guide society into the increasingly secular, rational state that we might recognise today.[50]

An interesting aspect of French culture immediately preceding this period was its contemporary struggles in redefining the role of religion and religious teaching in society after the Revolution in 1789. Traditionally, the role of religion — the Catholic Church in particular — was associated with supernatural notions of the Divine Right of Kings and had strong sympathies with the absolute monarchy that the Revolution sought to democratise. France in its revolutionary state was therefore keen to establish a new order of authority and dogma which found its root in the democratic state rather than the doctrine and education of the Church.[51] A step towards this was made in 1790 by the French National Assembly who passed a motion banning all religious orders in France, closing down monastic orders that had previously served the community in providing education or other community services.[52] The role of religious orders in educating the French population was particularly under scrutiny by the Assembly. In an article

[49] HC Deb 22 April 1828, vol 19, cols 14-16; see also Editorial, 'French Schools: Paris – No 2' (1826) 7 The Lancet 258, 258.
[50] Steve Bruce, 'Secularisation: In Defence of an Unfashionable Theory' (OUP 2015) 44; Max Weber, 'The Protestant Ethic and the Spirit of Capitalism' (Routledge Classics 2011).
[51] For an interesting discussion on how this state-centred worldview can function in much the same way as religious dogma see; Robert E Stauffer, 'Bellah's Civil Religion' (1975) 14 The Journal for the Scientific Study of Religion.
[52] Gale Primary Sources, 'March 1. From the London Gazette of Feb 27' London Chronicle 1st March 1790 <https://link.gale.com/apps/doc/Z2000591629/BBCN?u=kings&sid=BBCN&xid=cb61569d> accessed 1 April 2020.

documenting proceedings in the Argus in 1790, the view of one Member on the question of the suppression of Religious Orders, M. De La Rouchefoucault, was reported as follows:

> "He said that the question had already been discussed and decided upon by public opinion […] That if such institutions were formerly useful to husbandry and literature, they are no longer so: That their ancient utility is no argument for their continuance: That Monasteries tend little to promote the purposes of education, because persons so little connected to society can fill the minds of the youth only with absurd prejudices …".[53]

While not specifically focused on the idea of *scientific* rationality, here is a clear acknowledgement in the French National Assembly at the time that both the legislature and the public viewed religious dogma as inadequate in informing the basis of socialisation into wider society. This suggests that contemporary French society had developed — or was, at least, in the midst of developing — a discourse that relied less on the 'magic' of religion and the divine character this bestowed upon absolutist monarchy and more on the kind of Weberian rationality that increased secularisation might imply. The apparent ease with which the French Assembly was able to accept this further suggests a distinctly rational worldview held by the country's law-making elite. A result of this may have been the creation of an echo-chamber of accepted thinking and views which set an unconscious and predetermined trajectory for the type of laws that it would pass. For example, within the same press report, a Member was reported to have been greeted by smiles from 'even the gravest of hearers' when attempting to extoll the virtues of monastic orders in the community.[54] These 'hearers' were the Member's adversaries who were in support of the outright ban on religious orders, revealing the rational thought of the period to be a discourse that was rather factional or exclusive in its nature.

The move away from religion, however, does not necessarily suggest a shift towards a scientific rationality. For example, as noted by John Crosse who was documenting his time in the medical schools of Paris, suppression seemed to be a key theme of the French government immediately post-Revolution. This suppression extended not just to the influence of monastic religious orders and teaching, but to the teachings of science and medicine throughout French medical institutions.[55] It was not until three years into the Revolution that a comprehensive framework of medical education was re-introduced with

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[53] Gale Primary Sources, 'French Intelligence' Argus, 19 February 1790 <https://link.gale.com/apps/doc/Z2000107279/BBCN?u=kings&sid=BBCN&xid=6e7730d7> accessed 1 April 2020.

[54] ibid.

[55] John Crosse, 'Sketches of the Medical Schools of Paris' (London Smith and Davy 1815), King's College London, St Thomas's Historical Books Collection R784.P25 CRO < https://archive.org/details/b21304622/page/n6/mode/2up> accessed 1 April 2020.

the establishment of various institutions of teaching that were kept under public control.[56] These schools were open to the benefit of all, not just those who were committed to obtaining a degree in medicine and pursuing a career within the field.[57] While having the effect of liberalising the medical field in terms of broadening the opportunity for its teaching, Crosse discusses that the rationale behind the swathes of reform was the liberalisation of society in general and a general attempt to break down the social barriers which were so implicit in the authoritarian regime that came before it.[58] Crosse lauded the system for opening up the study of Anatomy to those who faced impediments such as 'obscurity of birth' and 'want of fortune'.[59] It was further emphasised that any member of the public — the so-called curious — could attend a lecture on the learned art of medicine, including the topics of anatomy.[60]

In Revolutionary France, therefore, it seems that it was the merger of the medical profession into the state-public sphere that allowed for its greater acceptance by the French public and, *ergo*, lay the ideological groundwork within which the public was able to accept and understand the role of dissection in medical education.[61] In practice, this was achieved through the provision of free access to the inner workings of the dissecting schools and the creation of the image of doctors as public servants, rather than men of a certain social class exploiting the poor for profit.[62] It is perhaps this public-focused mandate of the medical profession, coupled with its thirst to disseminate medical knowledge to all — not just the privileged few — which allowed for the ease in acquiring bodies for dissection for the Parisian schools. Unlike their English counterparts, the bodies of all those who died in Parisian hospitals who remained unclaimed by relatives after 24 hours were delivered to the teachers of Anatomy for use in a form of medical education, including dissection.[63]

The English Anatomy Committee cited this method with approval due to its discretion in providing an ample supply of bodies and the seeming indifference of the French public.[64] For example, an article in The Lancet stated that, amongst those who die in the Parisian hospitals, '… not one-fourth of those […] are claimed by their friends'.[65] In one year, this

[56] ibid 5.
[57] Although those wishing to be examined on the subjects of the lectures and demonstrations offered were required to pay a fee called an inscription; *ibid* 8, 12.
[58] ibid 17.
[59] ibid 18; It was also applauded by medical professionals more widely in England, see The Lancet 'French Schools: Paris – No 2' (1826) 7 The Lancet 258, 258.
[60] John Crosse (n 55) 8, 12.
[61] ibid 8, 12, 23.
[62] Crosse states in his book that the public role of the teachers of medicine in Paris was often made at the sacrifice of private practice; *ibid* 23.
[63] Select Committee on Anatomy, *Report from the Select Committee on Anatomy* (HC 1828) 10.
[64] ibid.
[65] The Lancet, 'French Schools: Paris – No 2' (1826) 7 The Lancet 258, 258-259.

allowed for the possible collection of 7089 bodies who had died in civil hospitals — making France amongst the best equipped dissecting centres in Europe.[66]

A PECULIARLY ENGLISH RATIONALITY: THE PURSUIT OF SCIENCE

This kind of French rationality did not, however, find itself easily translated into English law. Unlike the French system, England, since the time of Oliver Cromwell, had not undergone a radical revolutionary period which changed the very nature of law-making in such a paradigm-shifting way. Instead, England held onto a system that was proud of its constitutional monarchy; it very much sought to continue with the legal reasoning of the past.[67] England's relatively stable system of democratic constitutional monarchy set it at a diametric opposite to the changing value-system of France. As evidenced, a shift in macro-political opinion in France allowed anatomy to become a prevalent and accepted practice. This is because it was neither solely the preserve of a privileged class, nor regulated, in part, by the state through the criminal law.[68]

This is not to say that some form of rationality was not developing in England at the time; however, instead of this forming part of a quasi-socialist revolution like the French, the stimulus for change was perhaps led by a growing intellectual class. Due to education not being compulsory for all classes until the reign of Queen Victoria, this class was also undoubtedly constituted by those who could afford a higher level of education.[69] An interesting aspect of this, however, is that this intellectual class was disembedded from the heart of law-making, unlike the social reformists of the French National Assembly.[70] This may well explain the long history of encroachment of the law, both moral and punitive, into medical matters and Parliament's delayed legislative action in 1832.

Previous to the Anatomy Act 1832, the treatment of the topic dissection and anatomy within the walls of Parliament and government had taken two distinct forms: that of the traditional punitive stance such as that taken by Earl Grey, or discretionary deferential treatment by Ministers.[71] Against this backdrop, it seemed that there was one figure who vigorously sought direct reform through the positive law. This wider campaign for reform was led by Henry Warburton MP, whose motion in the House of Commons led to the

[66] ibid.
[67] See discussion at (n 42).
[68] See discussion at (n 59).
[69] The Wellcome Collection, J G Guthrie, A letter to the Right Hon. The Secretary of State for the Home Department, containing remarks on the report of the Select Committee, on anatomy, and pointing out the means by which the science may be cultivated with advantage and safety to the public (First published 1829) < https://wellcomecollection.org/works/c9aat8gx> accessed 20 April 2020, 5-6.
[70] As the Earl Grey's speech in the House of Lords indicates, see (n 40).
[71] Select Committee on Anatomy (n 5) 49 [451]-[452].

establishment of the Select Committee, and who was the key figure defending the resulting Bill in the Commons.[72] Warburton himself has since been described as a true Benthamite supporter[73] — Bentham having famously donated his own body to science after his death in 1832.[74] The kind of scientific rationality and advancement that Bentham was so keen on in life and in death, evidently found resonance in Warburton's own personality and life outside of Parliament. Recommended for election as a Fellow into the Royal Society in 1809,[75] Warburton was a keen and active member of the flourishing scientific community of pre-Victorian Britain.

In order to be inducted, proposed Fellows had to undergo a process of endorsement by existing Fellows — those who had already been recognised as leaders in scientific knowledge. Those who endorsed Warburton as 'a [g]entleman well versed in many branches of [n]atural [k]nowledge'[76] included William Haseldine Pepys identified by the Royal Society as a distinguished chemist and 'author of the improvements in various chemical apparatus',[77] and William Babbington who held the position of Senior physician at Guy's Hospital and who was professed to be 'eminently learned in Chemistry and Mineralogy'.[78]

At the time, the Royal Society seemed to be a melting pot of collaboration regarding the facilitation of new scientific endeavours and breakthroughs — and Warburton was not exempt from participation. For example, in a letter to the administration of the Society in 1831, Warburton expressed his intention and pleasure to help a recently appointed Committee whose aim was to revise the Royal Society's Charter.[79] However, his engagement in the Society went beyond mere governance administration. Royal Society records show that, in the same year, he also appeared to be a key figure in securing government funding for one of Charles Babbage's Calculating Machine projects.[80] In letter correspondence from what appears to be Marc Isambard Brunel — father of Isambard Kingdom Brunel — Warburton was a key contact regarding the calculation of the requisite level of funding for such a project.[81] On the same project, he also appeared to have chaired

[72] So much so, he brought the Bill back for a second time after its withdrawal from the Lords in 1829.
[73] Richardson (n 4) 108.
[74] Editorial, 'Dissection of Mr Bentham' *The Observer* (London, 10th June 1832) 3; Bentham's body continues to be displayed as an auto-icon at University College London. However, bizarrely, his real mummified head remains in a safe after students from the rival King's College London stole it in 1989 and used it as a football on the Kingsway, see King's College London, 'The Lion Goes from Strength to Strength: 1981-1993' (Alumni Online) < https://alumni.kcl.ac.uk/reggie-history/strength-to-strength> accessed 14 April 2020
[75] Formally known as the Royal Society of London for Improving Natural Knowledge.
[76] The Royal Society, EC/1808/12: Warburton, Henry.
[77] The Royal Society, EC/1807/17: William Haseldine Pepys.
[78] The Royal Society, EC/1805/03: William Babbington.
[79] The Royal Society, DM/1/32: Letter from Henry Warburton.
[80] Charles Babbage, of course, being known as inventor of the Analytical Engine, a predecessor to the modern computer.
[81] The Royal Society, DM/4/147: Letter from I M Brunel to Henry Warburton.

a meeting considering the communication from a contact at the Treasury on funding for the project, and the appointment of inspectors for the project.[82]

Though the records held by the Royal Society regarding the frequency and brevity of Henry Warburton's activities are incomplete, the nature of his recorded work in the early 1830s — and the structure of the Society itself — may lead one to draw several conclusions. The nature of the election process for a fellowship of the Royal Society — that of proposal by existing members — may suggest the existence of a distinct micro-culture or discourse that would have been prevalent within the society at that time. This is perhaps a natural result of proposing and electing one's own colleagues and peers. Warburton's interaction with the Society at both the project and managerial level suggests that he was well-versed in its procedures and culture. In addition, his work on the Babbage project may show him to have used his knowledge of, and contacts in, government and Parliament in order to facilitate the aims and projects of the Society and its Fellows. This might then explain his own vigour in pushing a consideration of anatomy reform in Parliament from 1828 through to 1832.

This would also perhaps explain the peculiar composition of the Parliamentary Select Committee as it existed in 1828. As illustrated, the debate concerning anatomy outside the walls of Parliament was overwhelmingly focused on the moral repugnance of body snatching, the murders associated with the trade, and the stigma of dissection as fuelled by its use in criminal punishment.[83] Despite this, a striking aspect of this Report is its dominant focus and reliance on the testimony of existing members of the medical profession and scientific community. Amongst the 38 witnesses called before the Committee, 30 were active members of the medical profession (either as an acting MD or surgeon, lecturer, or administrative professional).[84] Amongst them, 13 were — or would later become — Fellows of the Royal Society, alongside Henry Warburton MP. *Figure 1* demonstrates that these figures were often considered to be amongst the most authoritative of medical witnesses brought before the Committee, including the respective Presidents of the Royal College of Surgeons and the Royal College of Physicians. Indeed, the first day of testimony was made up exclusively of fellows of the Royal Society.

[82] The Royal Society, DM/4/149: Incomplete minutes of a meeting of the Committee to consider Mr Stewart's letter respecting Mr Babbage's machine; The Royal Society, DM/4/150: Letter from Henry Warburton.
[83] See (n 36).
[84] Select Committee on Anatomy (n 5) pp
14, 23, 28, 33, 35, 36, 39, 42, 43, 45, 47, 52, 56, 62, 64, 66, 67, 73, 75, 76, 78, 80, 81, 85, 87, 88, 100, 112, 117.

Name of Witness	Occupation	Date Elected as Fellow	Date of Testimony
Sir Astley Patton Cooper	President of the Royal College of Surgeons, Teacher in Anatomy and Surgery at Guy's and St Thomas's Hospital.[85]	18/02/1802[86]	28th April 1828
Sir Benjamin Collins Brodie	Surgeon to St George's Hospital and teacher of surgery in the school of Anatomy at Great Windmill Street.[87]	18/02/1810[88]	28th April 1828
John Abernethy	Surgeon and lecturer on anatomy and surgery at St Bartholomew's Hospital.[89]	14/04/1796[90]	28th April 1828
William Lawrence	Surgeon to St Bartholomew's Hospital.[91]	11/11/1813[92]	28th April 1828
Joseph Henry Green	Surgeon and teacher of anatomy and surgery at St Thomas's Hospital.[93]	24/02/1825[94]	1st May 1828
Caesar Henry Hawkins	Lecturer on Anatomy, and demonstrator on Great Windmill Street.[95]	5/06/1856[96]	1st May 1828

[85] Select Committee on Anatomy (n 5) 14.
[86] The Royal Society, EC/1801/17: Cooper, Sir Astley Paston.
[87] Select Committee on Anatomy (n 5) 23.
[88] The Royal Society, EC/1809/09: Brodie, Sir Benjamin Collins.
[89] Select Committee on Anatomy (n 5) 28.
[90] The Royal Society, EC/1796/03: Abernethy, John.
[91] Select Committee on Anatomy (n 5) 33.
[92] The Royal Society, EC/1813/10: Lawrence, Sir William.
[93] Select Committee on Anatomy (n 5) 36.
[94] The Royal Society, EC/1824/21: Green, Joseph Henry.
[95] Select Committee on Anatomy (n 5) 39.
[96] The Royal Society, EC/156/07: Hawkins, Caesar Henry.

Herbert Mayo	Surgeon to Middlesex Hospital and lecturer on Anatomy in Great Windmill Street.[97]	17/04/1828[98]	1st May 1828
Richard Dugard Grainger	Teacher of Anatomy in the School of Webb-Street.[99]	22/01/1846[100]	1st May 1828
James Moncrieff Arnott	Physician[101]	25/05/1843[102]	2nd May 1828
John Webster	MD[103]	7/03/1844[104]	2nd May 1828
Sir Henry Halford	President of the Royal College of Physicians.[105]	8/03/1810[106]	5th May 1828
Joshua Brookes	Lately a lecturer of Anatomy in Blenheim Street.[107]	18/11/1819[108]	5th May 1828
Dr James Macartney	Professor of Anatomy and Surgery in Trinity College Dublin.[109]	21/02/1811[110]	14th May 1828

Figure 1: Anatomy Committee Witnesses and the date of their induction to the Royal Society

Similar to the swathes of reform made by the French National Assembly, the course and nature of the inquiry into anatomy led by the Committee may have been shaped by this small group of intellectuals. This claim is, again, perhaps strengthened when we consider how the witnesses themselves had also gained entry into the fellowship of the Royal Society.

97 Select Committee on Anatomy (n 5) 42.
98 The Royal Society, EC/1828/15: Mayo, Herbert.
99 Select Committee on Anatomy (n 5) 45.
100 The Royal Society, EC/1846/04: Dugard, Richard Grainger.
101 Editorial, 'James Moncrieff Arnot FRS' (1885) 1 British Medical Journal 1271, 1271.
102 The Royal Society, EC/1843/18: Arnott, James Moncrieff.
103 Select Committee on Anatomy (n 5) 73.
104 The Royal Society, EC/1844/10: Webster, John.
105 Select Committee on Anatomy (n 5) 76.
106 The Royal Society, EC/1809/11: Halford, Sir Henry.
107 Select Committee on Anatomy (n 5) 81.
108 The Royal Society, EC/1819/15: Brookes, Joshua.
109 Select Committee on Anatomy (n 5) 106.
110 The Royal Society, EC/1810/16: Macartney, James.

Figure 2 sets out the clear links that each witness had with one another. Emanating from the earliest entrant into the Society — John Abernethy in 1796 — there is a clear line of succession through which a particular view of the medical world could have been disseminated. We can see that Sir William Lawrence — who originated as both an apprentice and lodger of Abernethy — and Sir Benjamin Collins Brodie played key roles in the election of other witnesses later in the 19th century. Later Royal Society records also show that some of these proposals for election were made as result of a Fellows personal knowledge of the proposed candidate.

Witness and Member of the Royal Society	**Witness to the Committee who had recommended them for Fellowship**
Sir Astley Paston Cooper	John Abernethy[111]
Sir Benjamin Collins Brodie	John Abernethy[112]
Sir William Lawrence	John Abernethy, Sir Benjamin Collins Brodie[113]
Caesar Henry Hawkins	Sir William Lawrence, John Webster[114]
Richard Dugard Grainger	Joseph Henry Green (recommended by "personal knowledge")[115]
James Moncrieff Arnott	Sir Benjamin Collins Brodie, Sir William Lawrence (both recommended by "personal knowledge")[116]
John Webster	Sir Benjamin Collins Brodie, Sir William Lawrence[117]
Dr James Macartney	John Abernethy, William Babbington[118]

Figure 2: Witnesses before the Committee who had been recommended for Fellowships by other Witnesses

This almost nepotistic, relationship-based election into the community of the Royal Society evidently had an effect on the nature of the questioning given by Warburton. The nature

111 The Royal Society, EC/1801/17: Cooper, Sir Astley Paston.
112 The Royal Society, EC/1809/09: Brodie, Sir Benjamin Collins.
113 The Royal Society, EC/1813/10: Lawrence, Sir William.
114 The Royal Society, EC/156/07: Hawkins, Caesar Henry.
115 The Royal Society, EC/1846/04: Dugard, Richard Grainger.
116 The Royal Society, EC/1843/18: Arnott, James Moncrieff.
117 The Royal Society, EC/1844/10: Webster, John.
118 The Royal Society, EC/1810/16: Macartney, James; Babbington had also acted as proposer for the chair of the Committee, Henry Warburton; see discussion at (n 78).

of his inquisitorial style revealed some of the universally accepted assumptions that underlined the paradigm of accepted medical thought at the time.[119] For example, when leading the questioning of the four witnesses on the first day of testimony, a pure scientific focus was rather firmly established through the prevalent use of leading questions. Warburton is documented as asking Sir Astley Cooper questions such as 'what is your opinion on the necessity of dissection […] and for the further improvement of that science?'.[120] Continuing into testimony with a Royal Society peer, Sir Benjamin Collins Brodie, Warburton inquired 'is it not desirable […] that there should be a supply of subjects […]?' when evaluating the practicalities of keeping a well-functioning anatomy school adequately furnished. On a one-word reply of undoubtable agreement from Brodie,[121] Warburton cemented this assumption, but two questions later asked, 'do you not think that the greatest injury is inflicted on society […] in the ignorance of anatomy?'[122]

This style of questioning revealed several distinct features of this shared thought-paradigm which would go on to have a palpable effect in influencing the content of the draft Bill that was to result. Firstly, while the witnesses were quick to slander the characters of those engaged in resurrectionism, the actual trade in bodies was not given such strong treatment. The issues raised before the committee concerning the trade itself were often conceived in greatly sanitised detail of a commercial or operational flavour. Examples include the rising cost of obtaining corpses, commercial monopolies held by resurrectionists,[123] and even the hindrance to the work of anatomy schools that accepting the body of a murder might excite. Dr Somerville, for example, remarked of the 'annoyance' caused by public interest in a body of an executed felon received by the anatomy school at which he worked for the purpose of dissection.[124] This distinctly clinical worldview was emphasised further in the testimony of Abernethy and Lawrence, both of whom seemed to deny the existence of any stigma affecting the public with regards to either resurrectionism or dissection.[125] Williams even remarked that the only thing that particularly occurred to him about the practice of exhumation was that it was a 'violation of law'.[126]

There is a strong sense, therefore, that this scientific rationality shared similar characteristics with that seen in France. As discussed, there may have been indications of a paradigm accepted thinking within the National Assembly allowing for the cumulative development of a distinct brand of thought.[127] The questioning led the focus of the inquiry

[119] For more expansion on the concept of scientific paradigms, see Steve Fuller, *The Structure of Scientific Revolutions (1962)* (2002) 36 Australia and New Zealand Journal of Psychiatry 821.
[120] Select Committee on Anatomy (n 5) 14, Question asked to Cooper.
[121] Quite literally the word 'undoubtedly'; *ibid* 23 [107].
[122] Select Committee on Anatomy (n 5) 23 [107], [110].
[123] Select Committee on Anatomy (n 5) 47 [426].
[124] Select Committee on Anatomy (n 5) 47 [431].
[125] Select Committee on Anatomy (n 5) 29 [173] [179] [196] [216]; 33 [221].
[126] Select Committee on Anatomy (n 5) 33 [221].
[127] See discussion at (n 53).

firmly into one which sought to address the needs of the medical profession, the practicalities in their work, and the general advancement of their field. This focus came at the expense of wider public attitudes and was discounted with ease by the Committee. This was perhaps exacerbated through the discussion of the medical advancements of French and other European systems, in which England was seen to be falling behind.[128]

An example of the particular effect of this culture can be seen in a letter of correspondence written for The Lancet in February 1829 by the Irish physician, Peter Hennis Green, writing under the pseudonym of 'Erinensis'. This letter discussed some of the assumptions implicit in the recommendations made by the Committee for reform. These will be discussed later on. However, in introducing his opposition to some of the views expressed by the Committee — both through witness testimony and the official report — Green expressed some prescient reservations regarding the reception of his view by the wider medical profession. In expressing his view, Green indicated that a 'fear of appearing singular' in favouring a view contrary to so many of his contemporaries would perhaps have 'determined his silence'.[129] To state such a contrary view, Green believed he would suffer the 'misfortune' of being considered an 'eccentric'.[130]

The disconnect of the deeply scientific and medical focus of the proposed law with the view of the general population — and, as Erinensis suggests, even mankind itself — is emphasised later in the correspondence. For example, he draws his own experiences as a physician in Dublin where a Mr Macartney had proudly boasted of a successful enrolment,[131] upon a registry of the names of those who would volunteer their bodies for dissection upon their demise.[132] This, it is supposed, was proof of a clear social attitude that was, despite the criminal law, decidedly indifferent to — if not in favour of — post-mortem dissection. In a somewhat prescient observation — given the focus of this body of work — Green points out that these volunteers listed upon Macartney's registry were those of his 'stoical disciples' whom he hypothesises would volunteer to accompany Macartney to the moon had that been what was asked of them.[133] These were said to be of such a small number so as to amount to 'a very insignificant fraction […] which scarcely need be taken into account'.[134]

[128] Though this was only begrudgingly admitted by the Witnesses; Select Committee on Anatomy (n 5) 33.
[129] Erinensis, 'On the Contemplated Projects for Supplying Subjects for Dissection' (1829) 12 The Lancet 679.
[130] ibid.
[131] Dr James Macartney, who testified before the Committee on the law as it existed in Ireland at the time; see (*Figure 1*).
[132] Erinensis, 'On the Contemplated Projects for Supplying Subjects for Dissection' (1829) 12 The Lancet 679, 681.
[133] ibid.
[134] ibid.

Nonetheless, upon publication of the Report in July 1828, the Committee recommended legislation in line with the views of its witnesses. Unfortunately, as the records of the Committee deliberations were destroyed in a fire in 1834, nothing more may be said as to the role of Members of Parliament in these deliberations.[135]

THE IRRECONCILABLE DICHOTOMY: SCIENCE, STIGMA, AND THE END OF THE ROAD FOR THE ANATOMY BILL

The distinct discourse of the science-orientated Committee outlined above finds itself well reflected in the proposed Bill drafted on 20th May 1829 for entry into the House of Lords.[136] The handwritten Bill, which ultimately failed, has two key elements: (i) the creation of a statutory offence for the crime of disinterment and (ii) the introduction of a French-style system for the use of unclaimed bodies in dissection. These provisions read as follows:

Be it enacted by the King's most gracious majesty -:

> '[It is a criminal offence to] Aid or assist in the disinterment of any … body in any … burial ground or vault … by otherwise digging or otherwise disturb the ground or a grave…'

The Bill sought to make this punishable by six months imprisonment for first time offenders, increasing to two years for serial offenders.

> 'Be it enacted that shall any person die during imprisonment in any prison or shall die in any hospital or workhouse and the body of … person shall be unclaimed or its disposal not otherwise provided for by law it shall be lawful for the party having custody of the body to deliver the body to a licensed school for anatomy.'

Figure 3: Anatomy Bill 20th May 1829 [137]

These two provisions are evidently a direct result of the two overriding purposes of the Committee testimony proffered by the anatomists of the day. Firstly, to separate the reputations of those sensationalised resurrection men from that of the distinctly rational medical men, by applying a distinct criminal label. Secondly, in order to counter this confirmation of criminality, the law sanctioned a medical claim over dead bodies in order

[135] Ruth Richardson, *Death, Dissection and the Destitute* (Penguin 1989) 130.
[136] Records of the 1828/29 Bill in the House of Commons in the official Parliamentary archive seem to be woefully lacking. This was perhaps due to a fire that partially destroyed the old Houses of Parliament in 1834.
[137] Parliamentary Archives, Anatomy Bill 1828 HL/PO/JO/10/2/114. Please note that the italicized section of Figure 3 is a personal comment from the author.

to give public approval to the practice of anatomy. This public approval was to be further supported by the repeal of criminal dissection as punishment.

Green, however, points out that the thrust of this legislation relied on the fallacy that the criminal statute acted to *uphold* an artificial stigma associated with dissection, rather than to reinforce an already existing stigma and revulsion of public morals felt against the practice.[138] The evidence of this fallacy has been clearly seen throughout this work, whether it be through the petitions made to Parliament by the public to increase public terror against committing murder by making dissection a punishment, or by the reports of attacks against anatomists and resurrectionists in the press.[139] The Bill also contrived to assign this cultural stigma to those in workhouses, hospitals, and prisons — those who were viewed to represent the poorest of society.[140]

The abject rationality of the Committee and its evidently sanitised view of the subject of medical dissection sparked a great reaction of indignation against the suggested legislative reform which followed. The Age described the bill as 'cold-hearted', 'unfeeling', and 'inhuman',[141] while The Times remarked of the Bill's almost 'irreligious' content.[142] The Bill also faced a petition against it by the Royal College of Surgeons and letters of condemnation by other medical professionals through the medium of The Lancet.[143] This was despite the fact that the proposals made in the Bill had all been accepted or suggested by those men testifying before the Committee. Sir Robert Peel later remarked in the Commons that this feeling of 'indignation and alarm' was far too present for wider acceptance of the recommendations set out in the Bill.[144] Due to this, and from some strong objections from those noble Members of the Lords,[145] the Bill was withdrawn and would not return — albeit in altered form — until 1831 when it was reintroduced to the Commons by Henry Warburton.[146]

CONCLUSION

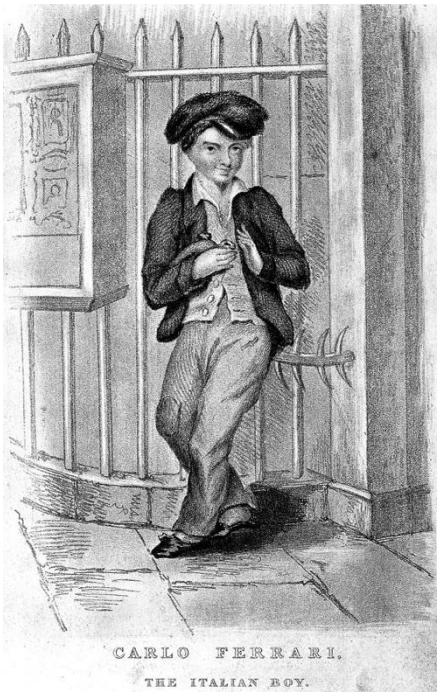
[138] Erinensis, 'On the Contemplated Projects for Supplying Subjects for Dissection' (1829) 12 The Lancet 679, 681.
[139] See (n 34), (n 36).
[140] This was expressed most strongly in a letter to the Editor of the Lancet by a resident of a Worcester workhouse, known only as 'One of the "unclaimed".'; see Editorial, 'Anatomy Bill' (1829) 12 The Lancet 319, 320.
[141] Nineteenth Century UK Periodicals, Editorial, 'THE ANATOMY BILL was withdrawn on Friday night, never, we hope, to be intruded upon us again' *The Age* (London 7th June 1829).
[142] Times Digital Archive, Editorial, 'The Anatomy Bill was withdrawn last night for which we are not sorry. There was a general feeling against it' *The Times* (London 6th June 1829).
[143] Editorial, 'Anatomy Bill' (1829) 12 The Lancet 319.
[144] HC Deb 12 December, vol 9, cols 157-206, 177.
[145] Though very little Hansard record can be found from 1829, these sentiments were repeated in the Commons debate during the Bill's re-introduction in 1831; HC Deb 15 December, Vol 9, cols 301-307, 302-303, 305-306.
[146] HC Deb 15 December, vol 9, cols 301-307, 301.

The withdrawal and failure of the first Anatomy Bill in 1829 was evidently a result of the medical profession trying to achieve too much too quickly. While the closed paradigm of scientific thought — based on rational understanding of the world and a thirst for scientific progress — was much prevalent amongst leading members of contemporary society and had peaked the sympathies of some within the walls of the English legislature, its divergence from the status quo was too marked to fully appeal to the public conscience. For what must have seemed time immemorial, the public had witnessed the perceived horrors of dissection — used by the state as a weapon to punish those who had committed 'that greatest crime, next to treason'.[147] Whether they assumed this role voluntarily or not, modern medicine men of self-described respectability, effectively became state executioners. The macabre tales from the dissection room and the feared resurrectionists with whom collaboration was a necessity only served to reinforce this image.

Attempting to impose a scheme of dissection on the bodies of the unclaimed, which in France depended upon an amoral cultural attitude towards the practice against this backdrop of popular opinion, was fraught with problems from the start. In proposing this reform, Warburton exposed the ignorance (or wilful blindness) of medical thought to that of the rest of society. This failure in foresight and of understanding defined its failure. It was not until 1832 that any successful legislative attempts would be seen again.

[147] HL Deb 15 April 1828, vol 18, cols 1142-1445, 1443.

APPENDIX



Appendix 1: The Italian Boy

Appendix 2: The Reward of Cruelty

Should Revenge Porn be Legislated as a Sexual Crime?

Halle Sian Fowler[*]

ABSTRACT

This article analyses the flawed legislative understanding of revenge porn. Revenge porn is a form of digital sexual abuse, involving the non-consensual distribution of private sexual images. The perpetrator motivations behind such abuse are not only highly gendered and representative of toxic masculinity, but they are also inherently sexual. However, revenge porn is not legislated as a sexual crime, instead it is misguidedly legislated as a communications offence. Although revenge porn is a digital crime, it causes tangible harm, that victims experience as sexual harm. Due to the digital nature of revenge porn, distribution can be exponentially amplified, drastically increasing the harm caused. When comparing revenge porn to another digital sexual offence known as upskirting, the similarities between the two reveals the hypocrisy that revenge porn is merely legislated as a communications offence, whereas upskirting is acknowledged as a sexual crime.

Revenge porn legislation fails to recognise the experiences of the victims, nor does it understand revenge porn's role in the furtherment of the patriarchal subordination of women. In proposing reformed legislation, these issues are directly addressed, providing guidance to consider the gendered nature of revenge porn appropriately. Furthermore, in providing clarity as to the sexual nature of revenge porn, this proposal aims to tackle both the lack of police knowledge and societal misunderstanding towards revenge porn, which currently perpetuates a victim-blaming narrative. Legislating revenge porn as a sexual offence will be a vital step forward in acknowledging the devastating range of image-based sexual abuse prevalent in society.

INTRODUCTION

The objective of this article is to examine whether the offence of non-consensual distribution of private sexual images, colloquially referred to as revenge porn, should be legislated as a sexual crime. The incentives for criminalisation are undeniable. Revenge porn can cause immense harm; be it emotional, financial, psychological, or physical. However, feminist critiques of s33 Criminal Justice and Courts Act 2015 (CJCA 2015) expose a severe

weakness: revenge porn is not legislated as a sexual crime.[1] It is evident from feminist research literature that perpetrator motivations are profoundly rooted in patriarchal gender inequalities.[2] Technology is used as a tool to intimidate, harass, humiliate, coerce and blackmail women, resulting in sexual harm.[3] Accordingly, revenge porn exacerbates existing patterns of gendered violence.[4] Legislative failure to acknowledge revenge porn as gendered sexual abuse ignores the victim. Instead, this has established the societal view that revenge porn is a result of victims' wrongdoing rather than abusive and gendered digital violence. Thus, this article will argue the importance of recognising revenge porn as being innately sexual.

Chapter 1 of this article will use feminist legal theory to outline the gendered and sexual motivations behind revenge porn. It will determine that the intentions of perpetrators are sexual and rooted in gender violence narratives. Chapter 2 will outline the varied and devastating harm suffered by victims and analyse the disproportionate effect of revenge porn on female victims. This chapter will also include a critical analysis of the social and legal understandings of revenge porn. Chapter 3 will critically evaluate the evolution of revenge porn legislation, analysing issues with the current law.[5] This chapter will also analyse a parliamentary debate detailing proposals for new legislation, identifying the weaknesses and limitations of this proposal. Chapter 4 will examine the final arguments for legislation to recognise revenge porn as a sexual crime. Revenge porn will be compared to the sexual offence of upskirting, uncovering the hypocrisy that these two image-based abuse crimes are not legislated in accordance with each other. Additionally, reformed legislation will be proposed and discussed. Such legislation acknowledges the gendered and sexual nature of revenge porn and proposes the introduction of revenge porn within the Sexual Offences Act 2003 (SOA 2003). This article will conclude with confirmation that revenge porn should be a legislated sexual offence.

WHAT IS REVENGE PORN?

Revenge porn is a form of digital image-based abuse.[6] This term 'revenge porn' refers to the criminal offence laid out in s33 CJCA 2015, which criminalises the disclosure of private sexual photographs and films with intent to cause distress.[7] Sharing private sexual photos

* LLB Exon.

[1] Criminal Justice and Courts Act 2015 (CJCA 2015) s 33.

[2] Molly Dragiewicz and others, 'Technology Facilitated Coercive Control: Domestic Violence and the Competing Roles of Digital Media Platforms' (2018) 18 FMS 609, 613.

[3] Nicola Henry and Anastasia Powell, 'Beyond the "Sext": Technology-Facilitated Sexual Violence and Harassment against Adult Women' (2015) 48 ANZJC104, 115.

[4] Dragiewicz and others (n 2) 609.

[5] CJCA 2015, s 33.

[6] Emma Bond and Katie Tyrrell, 'Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales' [2018] JIV 1.

[7] CJCA 2015, s 33.

without the consent of the person in the image is illegal as per s33.[8] Easy access and mass use of social media platforms amplify the ease of distribution of these images. Additionally, many images are distributed on specific revenge porn websites where hundreds of thousands of people actively seek out such images.[9] Thus, the resulting harm can be catastrophic. Additionally, due to the digital nature of this harm, the effect can be immediate, devastating and in many cases, irreversible.[10] Victims may face the consequences of such abuse for life. Some perpetrators will distribute addresses and personal details alongside these images, making victim identification and further harassment likely.[11] Although revenge porn is a digital crime, it causes real-world harm.

This article will focus on the gendered nature of revenge porn, and thus will consider the effect of such abuse from a feminist perspective. While social media is ubiquitous in everyday life, legislative protections are outdated and fail to consider the predominantly gendered-basis of revenge porn.[12] However, image-based abuse is not just an experience of gender.[13] Online abuse affects people across different genders, age groups, races and religions.[14] Therefore whilst consideration of such factors is outside of the scope of this article, it is essential for the development of online abuse legislation that broader research considers these factors.[15]

TERMINOLOGY

The colloquial term 'revenge porn' must be understood by both society and legislators.[16] This term is value-loaded and fails to convey the extent of the harm suffered.[17] The distribution of non-consensual images is not always motivated by vengeance.[18] While the law requires the intention to cause distress, 'revenge' implies that a victim has committed

[8] ibid.
[9] Samantha Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12 FC 22, 23.
[10] Mary Anne Franks, 'Drafting an Effective "Revenge Porn" Law: A Guide for Legislators' [2014] SSRN <http://www.ssrn.com/abstract=2468823> accessed 11 February 2020.
[11] Bates (n 9), 23.
[12] Dragiewicz and others (n 2), 613.
[13] Bond and Tyrrell (n 6), 3.
[14] Dragiewicz and others (n 2), 612.
[15] Azmina Dhrodia , 'Unsocial Media: The Real Toll of Online Abuse against Women' (*Medium*, 21 November 2017) 2. <https://medium.com/amnesty-insights/unsocial-media-the-real-toll-of-online-abuse-against-women-37134ddab3f4> accessed 3 February 2020.
[16] Bates (n 9), 23.
[17] Clare McGlynn, Erika Rackley and Ruth Houghton, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25 Fem L S 25, 30; Bates (n 9), 23.
[18] Franks (n 10), 2; Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 S &L S 397, 400.

some wrongdoing inciting such distribution.[19] Not only does this encourage harmful victim-blaming, but it implies that society should tolerate such retaliation.

Moreover, although these images are private and sexual, these images are not pornography.[20] In some instances, consent is obtained before the creation of images, but this is not always the case.[21] 'Porn' implies choice and legitimacy in the creation and distribution of these images; thus 'porn' is misunderstood in this context.[22] Despite these issues, the term continues to be used widely by academics. Therefore, establishing the correct terminology to use within these terminological boundaries has proven problematic. However, the 'non-consensual distribution of private sexual images' language does not concisely reference this crime. Whilst one wishes to avoid the use of the term 'revenge porn', this article is limited by the terminological confinements of previous works. It will also refer to non-consensual image distribution practices as revenge porn.[23] However, this terminology must be understood within the context explained above. Therefore, this article uses revenge porn to acknowledge the non-consensual distribution of private sexual images with an intention to distress, not to imply fault nor consent. One hopes that the use of 'revenge porn' will become obsolete over time in favour of less value-loaded language.

PERPETRATOR MOTIVATIONS FOR COMMITTING REVENGE PORN

INTRODUCTION

Chapter 1 will utilise feminist legal theory to expose the motivations behind acts of revenge porn. By analysing these motivations from a feminist perspective, the gendered and sexual nature of revenge porn will become evident. In illustrating the masculine bias of the law, feminist legal theory exposes the masculine motivations underpinning gendered crimes such as revenge porn. Men can be victims of revenge porn, and women can commit revenge porn; however, women are disproportionately affected.[24] Therefore, acknowledging the underlying gendered motivations behind revenge porn will better inform the legislative understanding of why such abuse occurs and how to best respond legislatively. The motives behind gendered and sexual crimes are fuelled by a desire for power, which incites abuse. It is this desire for power and control, manifesting as abuse, that reinforces the argument that revenge porn should be legislated as a sexual offence. By

[19] Sophie Maddocks, '"Revenge Porn": 5 Important Reasons Why We Should Not Call It by That Name' (*GenderIT.org*, 16 January 2019) <https://www.genderit.org/articles/5-important-reasons-why-we-should-not-call-it-revenge-porn> accessed 3 February 2020.
[20] Franks (n 10), 2.
[21] Maddocks (n 19); Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37 OJLS 534, 536.
[22] McGlynn, Rackley and Houghton (n 17), 38; ibid.
[23] Henry and Powell (n 18) 401; Jeff Hearn and Matthew Hall, '"This Is My Cheating Ex": Gender and Sexuality in Revenge Porn' 22 Sexualities 860, 861.
[24] Elena Sharratt, 'Intimate Image Abuse in Adults and under 18s' [2019] SWGfLhttps://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf accessed 3 February 2020; This disproportionate nature will be analysed in Chapter 2.

understanding such power dynamics and ensuring the application of the law recognises such motivations, those vulnerable can be better protected. This includes women, but also vulnerable men and minorities such as 'women of colour, religious or ethnic minority women, lesbian, bisexual, transgender or intersex women, women with disabilities or non-binary individuals who do not conform to traditional gender norms of male and female'.[25] Critical analysis of revenge porn legislation will demonstrate how the masculine foundation of the law amplifies these systemic vulnerabilities. On establishing the masculine foundation of revenge porn, this article will continue to use feminist legal theory to critique the legislative response to revenge porn and propose reform.

APPLYING FEMINIST THEORY TO A LEGAL ANALYSIS OF REVENGE PORN

Feminist legal theory aims to understand how the law is impacted by gender, arguing that as the authors and actors of the law are predominantly male, the law itself is inherently masculine.[26] In 2020, 66% of Members of the House of Commons, 73% of Members in the House of Lords,[27] and 71% of Court Judges are men.[28]

This male-dominated legal system is reflective of a patriarchal society, in which men hold power and exclude women. Theorists argue that the effect of this oppressive domination of legal masculine authority and influence is apparent within the male-centric terminology and written content of the law.[29] This masculine legislative influence, combined with a heavy domination of male actors of law, results in the laws' nature and application becoming tainted with a masculine bias.[30] Correspondingly, this bias affects the application of judicial and legislative, objective and subjective decisions.[31] Thus, these decisions and concepts resonate with the values and experiences of a particular group, i.e. the men who define the meaning of these concepts, with the values and experiences of women largely ignored.[32] Resultantly, the legal 'norm' becomes the experiences and views of a specific focus group: men.[33] Those who are not men are 'othered' and alienated from the law.[34]

[25] Dhrodia (n 15), 2; Legislation must consider interlinking structural inequalities that affect victim experiences of revenge porn. Full consideration of additional structural inequalities should be considered in wider research.
[26] Ngaire Naffine, 'In Praise of Legal Feminism' (2002) 22 LS71.
[27] Elise Uberoi, Chris Watson and Esme Kirk-Wade, *Women in Parliament and Government* (House of Commons Library Briefing Paper 01250, 2020) <https://commonslibrary.parliament.uk/research-briefings/sn01250/> accessed 16 April 2020.
[28] Ministry of Justice, 'Judicial Diversity Statistics 2018' <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2018/> accessed 16 April 2020.
[29] Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 Notre Dame L Rev 886.
[30] Naffine (n 26); Finley (n 29).
[31] Finley (n 29).
[32] Naffine (n 26), 3; Finley (n 29).
[33] Finley (n 29).
[34] Naffine (n 26).

Feminist legal theorists analyse the ways masculine law damages women by ignoring their experiences when legislating and creating policy.[35] Critics question the validity of male-dominated legislative bodies governing over solely female experiences, without acknowledging that they may not fully understand specific issues associated with other genders, for example, abortion laws.[36] Such a lack of understanding creates difficulties when legislating on crimes that statistically affect a higher number of women, such as 'revenge porn' as per s33 CJCA 2015.[37]

Due to this masculine "lens", the legal experiences of those other than men must be understood within the law's masculine construction. It is not that the law fails to address or comprehend women. Rather, legislation is based on male understandings of female experiences 'refracted through the male eye, rather than women's own definitions' that inform the law.[38] For example, women consider revenge porn abuse as sexual; however, predominantly male legislators have not perceived revenge porn as sexual, evidenced by a failure to legislate s33 CJCA 2015 as a sexual offence.[39] Ultimately, the law should act to prevent and protect, and for crimes such as revenge porn legislation of any kind is preferable to ignoring these damaging behaviours. A lack of criminalisation would indulge and further the patriarchal motivations for the suppression of women and minorities.[40] Therefore, when conducting legislative review, it is essential to consider the impact of masculine bias and construction on the female legal experience for the benefit of all genders. Thus, this article will analyse the effectiveness of revenge porn legislation in protecting the interests of victims by utilising feminist legal concepts and arguments.

THE MOTIVATIONS FOR REVENGE PORN IS SEXUAL

In their study, Hearn and Hall assessed messages distributed alongside revenge porn and how these messages presented ideas of sexual motivations for revenge porn. These included making a person feel sexually discarded, presenting the person in the image as a sexual trophy, causing sexual humiliation or presenting embarrassing sexual dissatisfaction,[41] thereby directly acknowledging the sexual motivations of the offence. The sexual nature of these messages corresponds with Henry and Powell's finding that perpetrators may have diverse motivations, including 'revenge, coercion, humiliation, blackmail, sexual gratification, social notoriety and financial gain'.[42]

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[35] ibid.
[36] Ritu Prasad, 'Should Men Have a Say in Abortion Debate?' *BBC News* (18 May 2019); Erin Durkin and Max Benwell, 'These 25 Republicans – All White Men – Just Voted to Ban Abortion in Alabama' *The Guardian* (15 May 2019)
[37] Hearn and Hall (n 23), 862; Henry and Powell, 'Sexual Violence in the Digital Age' (n 18), 399.
[38] Finley (n 29).
[39] CJCA 2015, s 33.
[40] Nicola Lacey, 'Unspeakable Subjects: Feminist Essays in Legal and Social Theory' (1999) 62(6) MLR 958.
[41] Hearn and Hall (n 23), 872.
[42] Henry and Powell, 'Sexual Violence in the Digital Age' (n 18), 402–403.

Sexual entitlement has also been identified as a significant motivation behind revenge porn, with other prominent motives including entertainment, as well as anger and punishment.[43] Men who post revenge porn photos of their ex-partners digitally may enjoy the power and punishment dynamic of revenge porn, relishing in the suffering they inflict.[44] Furthermore, in consideration of the sexual domination characteristic of pornography, revenge porn for entertainment serves a comparable purpose. There is a clear link between the entertainment aspect of pornography and the additional aims of revenge porn. If men are consuming violent or 'revenge' pornography, these images will be feeding into patriarchal, sexist and complicit masculine practices, encouraging the use of women for their bodies.[45] Revenge porn, particularly when consumed as 'traditional pornography', continues the gender-sexual dynamics of power, control and abuse.[46] Therefore, the inherently sexual motivations of revenge porn must be considered by legislation.[47]

The patriarchal beliefs promoted by revenge porn demonstrate a sexual objective. Revenge porn should, therefore, be understood as a part of the spectrum of gendered, sexualised abuse conceptualised by McGlynn and Rackley as the 'continuum of image-based sexual abuse.[48] Digital and non-digital sexual abuses often converge,[49] notably when non-digital sexual assault is recorded or photographed and then digitally distributed as revenge porn.[50] Furthermore, revenge porn abuse is often interconnected with other non-consensual digital abuses, for example, the distribution of images taken by 'upskirting'.[51] Therefore, to establish appropriate legislative protections for, and considerations of victim experiences, revenge porn must be understood within the wider 'continuum' of other sexual offences, digital or non-digital.[52]

REVENGE PORN IS A GENDERED CRIME

Analysis of crimes, such as revenge porn, that disproportionately affect women over men, reveal the issues with the gendered nature of the law. As will be discussed, the motivations of perpetrators establish revenge porn as a gendered crime and sit within the broader context of patriarchal gender inequality.[53] Revenge porn results from social gender

[43] Emma Fulu, *Why Do Some Men Use Violence against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific* (UNDP, UNFPA, UN Women and UNV 2013).
[44] Bates (n 9), 25.
[45] Hearn and Hall (n 23), 862.
[46] ibid, 874.
[47] The effect of sexuality on victim experience is outside the scope of this article, however Hearn and Hall consider sexuality, arguing that the display of sexual orientation, whether heterosexual or same sex, is through power and control. ibid.
[48] McGlynn, Rackley and Houghton (n 17), 26.
[49] Bond and Tyrrell (n 6).
[50] McGlynn, Rackley and Houghton (n 17), 35.
[51] Sexual Offences Act 2003 (SOA 2003), s 67.
[52] McGlynn, Rackley and Houghton (n 17), 26.
[53] Gendered crime here refers to the abuse of power between men and women, but this can include other genders.

inequality and hierarchisation that shapes normative expectations of femininity and masculinity.[54] Such structural gendered inequality includes sexist and heterosexual social norms.[55] Revenge porn can affect men, and so male victims should be considered within legislation and research. However, it is essential that legislation recognises that the majority of victims of revenge porn are female. Therefore, the legislation should, on review of the predominantly gendered (and sexual) nature of revenge porn, place female experiences at the forefront. Reform must understand the abuse of power that underpins revenge porn.

When discussing the image-based abuse crime upskirting,[56] MP Stella Creasey held: 'without recognising the role of misogyny in the day-to-day experiences of women in our society, our legal and Criminal Justice System masks the true extent of the hostility that exists against gender'.[57] Revenge porn is but one online manifestation of masculine assertion of power, that exacerbates existing patterns of gendered violence.[58] Henry and Powell, on reviewing international literature, recognise the prevalence and persistent nature of sexual abuse and harassment.[59] The internet facilitates 'multiple, recurring and interrelated' forms of gender-based violence against women,[60] such as revenge porn. As a result of the highly gendered nature of the violence, image-based offences are often relational to other sexual offences.[61] Legislative progression in this area should review other forms of image-based abuse to ascertain whether they, along with revenge porn, should be legislated as sexual offences, thereby identifying the harmful sexual motivations that lie beneath these crimes.[62]

THE ROLE OF MEN IN REVENGE PORN

Having established that revenge porn is a crime motivated by patriarchal ideals that benefits male domination, the role of men in revenge porn shall now be analysed. Bates argues that the perpetrator's motivation for revenge porn hails from patriarchal desires of power and a hatred of women and is therefore innately masculine. Perpetrators have a desire to reaffirm stereotypical gender roles, where men are seen as dominant and powerful and women as subordinate and weak.[63] The intention is to show the victims as vulnerable; a trait associated with femininity; therefore, regardless of the gender of the victim (male,

[54] Nicola Henry and Anastasia Powell, 'Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research' (2018) 19 Trauma, Violence, & Abuse 195, 196.
[55] Dragiewicz and others (n 2), 610.
[56] SOA 2003 s 67A. Chapter 4 will compare upskirting and revenge porn. These crimes are both image-based digital crimes involving the non-consensual creation of sexual images.
[57] HC Deb 5 September 2018, vol 646, col 254.
[58] Dragiewicz and others (n 2), 609.
[59] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 54), 195.
[60] Dhrodia (n 15), 1.
[61] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 54), 195.
[62] Such consideration is beyond the scope of this article.
[63] Bates (n 9), 25.

female, non-binary, genderqueer, etc.), revenge porn will always be an inherently masculine, sexual crime.

Men may learn toxic hegemonic masculine practices throughout their lives, predominantly through interactions with other men, who may actively encourage characteristics of patriarchy and resultantly promote the abuse of women.[64] Therefore, revenge porn demonises sexually confident women and encourages the subordination of women, ultimately deterring them from using social media and isolating them from their digital community.[65] This acts as another form of perpetrator control, especially when trying to regain control over a past relationship and their sense of ownership over the victim. This particularly applies to women who threaten patriarchal male authority, notably those partaking in non-traditional activities such as empowered female sexual activity.[66] Revenge porn is an example of such abuse, which controls women digitally. This control is present not only within ongoing romantic relationships, but also in their failed counterparts. Men may lash out in anger at those who leave, as punishment for their new perceived lack of control.[67] Image-based sexual abuse can, therefore, be understood to reflect, amplify and support anti-feminine patriarchal attitudes and values.

The harm caused by revenge porn is multifaceted and does not originate solely from the initial distribution.[68] Often, names and addresses of the victim are shared alongside the image, encouraging further harm by others.[69] Such encouragement contributes to the peer-support mentality of these male communities, greenlighting such abuse. *Threats* to share revenge porn must also be considered a severe sexual abuse crime.[70] These can be used to coerce and control both women and men in a relationship where domestic abuse is already present.[71] It is clear that malicious perpetrators do not fear legislative consequences. Thus, the deterrent effect of the current legislation is questionable.[72] In many cases, perpetrators benefit from a "veil" of internet anonymity, particularly with subsequent sharing being largely untraceable.[73] Therefore, judicial or legislative acknowledgement of the malicious

[64] Walter S DeKeseredy and Martin D Schwartz, 'Thinking Sociologically About Image-Based Sexual Abuse: The Contribution of Male Peer Support Theory' (2016) 2 Sexualization, Media, & Society 1, 4.
[65] The negative digital effects of revenge porn are explored in Chapter 2.
[66] DeKeseredy and Schwartz (n 64), 4.
[67] ibid, 5.
[68] Chapter 2 considers the harms caused by revenge porn.
[69] Sarah Bloom, 'No Vengeance for Revenge Porn Victims: Unravelling Why This Latest Female-Centric, Intimate-Partner Offense Is Still Legal, and Why We Should Criminalize It' (2014) 42 Fordham Urb L J 233, 243.
[70] The criminalisation of threats to distribute is explored in chapters 3 and 4.
[71] Clare McGlynn and Erika Rackley, 'More than "Revenge Porn": Image-Based Sexual Abuse and the Reform of Irish Law' (2017) 14 IPB 38, 40.
[72] Franks (n 10), 3.
[73] Bloom (n 69), 247.

nature of perpetrator motivations for revenge porn is essential to fully acknowledge the severity of violence within revenge porn.

Pornography

This article has established that revenge porn should not be considered equivalent to pornography due to the non-consensual distribution and/or creation. However, critiquing the gendered themes of pornography is necessary to illuminate elements of the sexual and gendered nature of perpetrator motivations. Hearn and Hall argue that pornography is heavily embedded in gender and sexual power relations and is, therefore, representative of gendered-sexual domination.[74] As the primary role in porn for actresses is to provide sex to men, women are characterised as subordinate.[75] Furthermore, women are often shown to experience pleasure in response to male aggression and domination.[76] Pornography can, therefore, be understood to reflect, amplify and support sexist attitudes, values and violence.[77] Then, seeking out porn which is violent, abusive, physically hurtful or depictive of emotional trauma must impact how men view women. If men actively seek 'porn' that has been distributed as 'revenge', this feeds into the narrative that women are subordinate and men should treat them as such.[78] Therefore, accessing and viewing revenge porn in this manner perpetuates these themes. Revenge pornography sites are specifically created to hold and enable the mass viewing of revenge porn images.[79] The internet, therefore, facilitates the accessing and viewing of harmful and often violent non-consensual content. Encouraging patriarchal motives normalises harmful sexual practices, particularly if the 'revenge' notion of revenge porn is appealing to potential viewers.[80]

CONCLUSION

This chapter has established that the law itself is inherently masculine and therefore damages women, by largely ignoring female experiences when legislating and creating policy.[81] Acts of revenge porn are understood to lie within the broader context of patriarchal gender inequality. Men who distribute revenge porn may enjoy the power and

[74] Hearn and Hall (n 23), 861.
[75] DeKeseredy and Schwartz (n 64), 4.
[76] ibid; Hearn and Hall (n 23), 861.
[77] ibid.
[78] DeKeseredy and Schwartz (n 64).
[79] Samantha Pegg, 'A Matter of Privacy or Abuse? Revenge Porn in the Law' (2018) 7 Crim L R 512, 512; The Law Commission has considered the difficulties of monitoring and legislating over websites based in the UK and abroad. Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018), paras 10.153-10.155.
[80] DeKeseredy and Schwartz (n 64), 5.
[81] Naffine (n 26).

punishment nature of revenge porn and desire to reaffirm stereotypical gender roles,[82] thereby, relishing in the suffering they inflict.[83] Distributing revenge porn acts as an example to men that women are subordinate, and men should treat them as such.[84] Image-based sexual abuse can, therefore, be understood to support anti-feminine patriarchal attitudes and malicious values. Image-based sexual abuse is often interconnected with other non-digital and digital forms of sexual abuse and violence, such as upskirting.[85] Therefore, revenge porn must be considered within the wider 'continuum' of other sexual offences, to establish appropriate legislative protections and considerations of victim experiences.[86] Acknowledgement that revenge porn is a sexual crime, motivated by sexual, gendered and patriarchal intentions, would make a clear statement against digital sexual violence towards women. Moreover, the legislation should punish the violence associated with anti-women culture, and the lawmakers' response must educate society against the pro-patriarchal motivations of revenge porn situated within wider digital misogyny. The digital nature of revenge porn does not change the sexual motivations of revenge porn perpetrators, and it is essential that this is recognised by legislation.

CONSEQUENCES OF REVENGE PORN FOR VICTIMS

Chapter 1 outlined the motivations behind perpetrator acts of revenge porn, establishing revenge porn as gender-based violence. Chapter 2 will now discuss the consequences of revenge porn for victims, ascertaining how revenge porn can result in life-changing harm for victims. The harm of revenge porn can be psychological, emotional, financial and physical. In analysing this harm, this discussion will establish the damage done by digital sexual abuse, facilitated through its distribution. Although revenge porn is a digital crime, it is imperative to understand this crime within the context of everyday life. Chapter 2 will therefore analyse the societal response rhetoric to acts of revenge porn, a result of which is the advancement of gender-based victim-blaming. Finally, the consequences of revenge porn will be understood as sexual, relying on the experiences of victims. The argument will be made that revenge porn is a sexual crime, due to the sexual nature of the harm caused and should, therefore, be legislated as such.

DISPROPORTIONATE EFFECT ON WOMEN

In her 'Report on Digital Violence Against Women and Girls', the Special Rapporteur attested 'women are both disproportionately targeted by online violence and suffer

[82] Bates (n 9), 25.
[83] ibid.
[84] DeKeseredy and Schwartz (n 64).
[85] This will be further explored in Chapter 4.
[86] McGlynn, Rackley and Houghton (n 17), 26.

disproportionately serious consequences as a result'.[87] Anyone could be a victim of revenge porn, as the photos used can be shared, or created, without consent. However, to provide sufficient protection, legislative and procedural responses should recognise that the number of women affected by acts of revenge porn is significantly higher than the number of men affected. In their research, Hearn and Hall have found that 90% of victims of revenge porn are women.[88] This is in agreement with Henry and Powell's broader findings that women are the main targets of online digital sexualised violence.[89] Further, this is consistent with the wider gendered nature of sexual abuse where women are significantly more likely to be victims of sexual assault than men.[90] Subsequently, revenge porn, as a form of sexual assault, must be understood within the context of wider gendered and sexual violence against women. In the 2019 'Violence Against Women and Girls Report by the Crown Prosecution Service,' 85% of sexual offences were committed by male perpetrators.[91] Understanding the gendered nature of revenge porn should encourage adequate recognition of the resulting harm. Developing legislation that adequately considers the sexual nature of harm and consequences for victims is essential to both discourage these behaviours and ensure that legislation recognises the severity of revenge porn harm for women.

It is not only *the number* of women affected but *how* women are affected that is disproportionate. Bond and Tyrell argue that female victims face a stigma that does not affect male victims to the same extent.[92] Furthermore, victim-blaming often dominates societal attitudes towards female victims of revenge pornography,[93] by placing the responsibility for the existence of the image on the victim.[94] As will be discussed, victim-blaming itself is a gendered phenomenon. In the 'Intimate Image Abuse in Adults and Under 18's' report by the Revenge Porn Helpline, the gendered patterns of victimisation and perpetration were abundantly clear.[95] The report found that callers to their helpline

[87] Dubravka Simonovic, 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Online Violence against Women and Girls from a Human Rights Perspective' (Human Rights Council 2018)<Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective> accessed 11 March 2020.
[88] Hearn and Hall (n 23), 862.
[89] Henry and Powell, 'Sexual Violence in the Digital Age' (n 18), 399.
[90] Office for National Statistics *Sexual Offences in England and Wales: Year Ending March 2017* (February 2018), s 6 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017#which-groups-of-people-are-most-likely-to-be-victims-of-sexual-assault> accessed 2 May 2020.
[91] Crown Prosecution Service, *CPS Violence Against Women and Girls Crime Report 2018-2019* (2019) <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf> accessed 6 February 2020.
[92] Bond and Tyrrell (n 6), 3.
[93] ibid.
[94] Michael Salter, 'Justice and Revenge in Online Counter-Publics: Emerging Responses to Sexual Violence in the Age of Social Media' (2013) 9 CMC 225.
[95] Sharratt (n 24).

were disproportionately female,[96] reaching the general consensus that male victims are impacted less severely than female victims. Male sextortion victims, sextortion being the threat of distributing revenge porn images, 'carried little shame or self-blame, received a higher proportion of positive police responses and were able to move on quickly from their experiences'.[97] In contrast, 'female victims experienced a great deal of shame and self-blame, received a higher number of negative police responses, suffered lasting social and emotional impact and commonly described their experiences as sexually violating'.[98] The disproportionate effect of revenge porn provides further evidence that revenge porn is indeed a gendered crime. It is, therefore, essential that legislation criminalising revenge porn recognises this; to create policies that effectively acknowledge that revenge porn is not just image-based abuse; but another example of continued male abuse against women.

REVENGE PORN HARM

It is vital to understand the varied harm caused by revenge porn to establish whether the legislative response is suitable or effective. Lawmakers should consider that such harm is facilitated by the internet,[99] and can vary in harm caused. Furthermore, and most importantly, the harm caused by revenge porn can be immediate, devastating and in many cases, irreversible.[100]

Psychological Harm

A report by the Revenge Porn Helpline found that revenge porn impacted a victim's mental health significantly.[101] Victims can experience depression, anxiety and fear; this is supported by Bates, who carried out the only mental health and revenge porn study to date.[102] Victims may experience increased anxiety and amplified worry about who has seen the image already and who will see it next.[103] Bates found that victims of revenge porn also experienced increased depression, anxiety and post-traumatic stress disorder.[104] Furthermore, in agreement with Bates' findings, Bloom argues that being a victim of revenge porn results in an increased vulnerability towards suicide.[105]

[96] ibid, 27.
[97] ibid.
[98] ibid.
[99] Franks (n 10), 2.
[100] ibid.
[101] Sharratt (n 24), 13.
[102] Simonovic (n 89) para 27.
[103] Dragiewicz and others (n 2), 611.
[104] Bates (n 9).
[105] Bloom (n 69), 242.

Given that revenge porn shares many similarities with sexual assault and sexual harassment, it should come as no surprise that the revenge porn victims in Bates' study experienced many of the same mental health effects that sexual assault victims experience.[106] Overall, the findings of this study reveal striking similarities between the mental health effects of the violation for revenge porn victims and non-digital sexual assault victims. Thus, due to the severity of harm caused, revenge porn, should be classified as a sexual offence, as Bates recommends.[107]

Revenge porn victims may suffer from further psychological consequences affecting their everyday life, worsening as distribution progresses.[108] Victims may develop damaging coping mechanisms, which can include binge drinking, self-medication, denial and obsession.[109] Furthermore, a victim's self-esteem and confidence may be detrimentally affected due to the loss of control they experience, resulting in loss of trust in others.[110] The proven psychological effects of revenge porn are severe and destructive; hence, the lack of research into these effects on victim mental health is immoral.[111] Further research should consider both the short and long-term effects of revenge porn to gain further insight, particularly to establish the extent of psychological harm, as lack thereof for this is incredibly dangerous and damaging, and must be acknowledged by legislation.

Financial Harm

Revenge porn can have severe and long-lasting effects on a victim's financial stability and income. Victims may face immediate financial detriment following revenge porn distribution, potentially leading to job loss or consequential loss of opportunity.[112] In modern times many employers screen candidates' online reputations.[113] An employer's ability to access these images online without knowing the non-consensual nature of the image may affect the candidate's application negatively, resulting in reduced job opportunity.[114] Furthermore, these 'professional costs' may be a continuous issue throughout the victims' lives,[115] harming their professional reputation perpetually.[116]

[106] Bates (n 9), 33.
[107] ibid, 39.
[108] ibid, 38.
[109] ibid, 35, 38.
[110] ibid, 30, 34.
[111] ibid, 22.
[112] Bloom (n 69), 241.
[113] Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest L Rev 345, 352.
[114] ibid.
[115] ibid.
[116] ibid.

Once an image is on the internet, it is extremely challenging to completely remove it, meaning the harm is continuous and long-lasting.[117] Whether it is from damaged reputations, an actual loss of employment or loss of opportunity, revenge porn can severely impact a victim's career and financial stability,[118] and cause grave impact.[119]

Physical Harm

A further consequence of revenge porn may be physical harm, particularly if the creation was non-consensual. Legislation must recognise that the posting or threat of posting revenge porn might be part of ongoing coercion and control within an abusive relationship. Fear of this digital abuse may leave victims isolated, rendering them unable to leave the relationship for fear of distribution.[120] Additionally, revenge porn may create opportunities for the abuse to still continue for those who have left the abusive relationship.[121] The digital nature of revenge porn can, therefore, amplify domestic abuse.[122] Stroud discusses the potential for 'real-life harassment', with revenge porn inciting and providing the opportunity for further abuse towards the victim by others.[123] Citron and Franks found that in 50% of cases, addresses are posted alongside the image.[124] These posts can also include the victim's full name, phone number, home and work addresses and other personal information.[125] Distributing revenge porn images along with contact information like names and addresses, may encourage strangers to confront the person offline.[126] Bloom confirms that victims often experience offline threats by third parties and their ex-partners.[127] Revenge porn may be a digital crime, but it has physical, tangible real-world consequences, and therefore avoiding such abuse is not a simple matter of turning off the digital device.[128]

[117] Bates (n 9), 23.
[118] Bloom (n 69), 242.
[119] Alexa Dodge, 'Nudes Are Forever: Judicial Interpretations of Digital Technology's Impact on "Revenge Porn"' (2019) 34 Can JL & Society 121, 134.
[120] McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 40.
[121] Bond and Tyrrell (n 6), 4.
[122] Hearn and Hall (n 23), 874.
[123] Scott R Stroud, 'The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn' 29 (2014) JMME 168, 127.
[124] Bond and Tyrrell (n 6), 6.
[125] Aubrey Burris, 'Hell Hath No Fury like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute.' (2014) 66 Fla L Rev 2326, 2327; McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 39.
[126] Citron and Franks (n 115), 351.
[127] Bloom (n 69), 242.
[128] Henry and Powell, 'Beyond the "Sext"' (n 3), 114.

Digitalised Harm

In modern times, elements of relationships are conducted online, such as online dating and sexting.[129] Adults, as well as teenagers, may partake; however, much literature on revenge porn focuses on the teenage experience of the internet, negating focus on adults.[130] This misrepresentation arguably reduces the severity of the crime and encourages conceptualisation of these problems as those of naive teenagers.[131] This misrepresentation is problematic as this encourages age-based victim-blaming, minimising the acknowledgement of adult victims. The law must recognise that modern society navigates relationships and sexual interactions, both digitally and non-digitally. Those who partake in either activity should not be labelled as naive, as this label denies acknowledgement that revenge porn is heavily gendered, maliciously motivated sexual assault. Franks notes that digital-based abuse has the potential to be more damaging than harassment offline.[132] As will be discussed, the amplification and potential permanence of revenge porn is astronomical.[133] Therefore, the dangerous digital nature of revenge porn must be taken seriously and should be adequately reflected in legislation.

Amplification

The internet provides a staggering means of amplification, extending the reach of content in unthinkable ways. Furthermore, the digital nature of revenge porn increases the risk of distribution, potentially reaching thousands, even millions of people at the click of a mouse.[134] The internet offers unprecedented potential to revenge porn perpetrators, compared to what can be achieved offline. Facilities such as 'high levels of online storage, computer and phone synchronicity, ease of replicability and mobility regardless of location' arguably worsen the risk of harm.[135] Moreover, digital images can be easily replicated to exist despite the removal of the original image, continuing the violation of the victim's privacy indefinitely.[136]

Legislation should allow for judicial consideration of the digital-memory nuances, data saving and sharing abilities of devices and the potential for redistribution.[137]

[129] Sexting definition: the activity of sending text messages that are about sex or intended to sexually excite someone 'Sexting' <https://dictionary.cambridge.org/dictionary/english/sexting> accessed 2 May 2020.
[130] Henry and Powell, 'Beyond the "Sext"' (n 3), 105.
[131] ibid.
[132] Mary Anne Franks, 'Unwilling Avatars: Idealism and Discrimination in Cyberspace' (2011) 20 Colum J Gender & L 224, 255–256.
[133] Bloom (n 69), 246.
[134] Citron and Franks (n 115), 350.
[135] Dragiewicz and others (n 2), 611.
[136] Dodge (n 121), 136.
[137] ibid, 138.

> Therefore, the perpetual digital threat of revenge porn must be legislatively acknowledged, and revenge porn should not be reduced to image sharing. The offence must be understood as an act of potentially unending and lifelong digital abuse.[138]

APPLYING FEMINIST THEORY TO INTERNET USE

When women do access the internet, they face online forms and manifestations of violence that are part of the 'continuum of multiple, recurring and interrelated' forms of gender-based violence, such as harassment, privacy violations, direct or indirect threats of physical violence or image-based abuse.[139] This chapter has established that women are more likely to be victims of revenge porn than men,[140] and that women are disproportionately affected by revenge porn.[141] When applying feminist theory to the use of internet by women, it becomes clear that female experiences of the internet are far different from male experiences. Franks argues that men use revenge porn as a form of punishment for disapproved female action; however, when men commit these same actions, they are not met with the same disapproval or penalty.[142] This dominance, boosted and enabled by violence, is a result of cultural and social orders that encourage the continuation of dominant masculinity.[143] To further illustrate, in order to gain and maintain such dominance, men rely on violence and damaging behaviour, with such victimisation and abuse facilitated by the internet, which has served them in this respect as a predominantly unregulated platform. [144]

Victims of revenge porn suffer a loss of liberty. Rather than empowering women, the internet becomes a weapon of punishment, resulting in adverse effects of digital debilitation. Women may shut down their social media,[145] or retreat from the internet.[146] Amnesty International's online poll recorded that 76% of women said they made some changes to the way they used social media platforms.[147] Despite facilitating harm, the internet is also a platform for 'support, self-expression and activism'.[148] However, if women no longer feel able to participate on the internet, they may become isolated from a platform

[138] ibid, 139.
[139] Simonovic (n 89), 5; Dhrodia (n 15).
[140] Josh Halliday, 'Revenge Porn: 175 Cases Reported to Police in Six Months' *The Guardian* (11 October 2015) <https://www.theguardian.com/uk-news/2015/oct/11/revenge-porn-175-cases-reported-to-police-in-six-months> accessed 6 March 2020.
[141] See (n 89).
[142] Bloom (n 69), 251.
[143] Sharratt (n 24), 28.
[144] Dhrodia (n 15), 3.
[145] Bates (n 9), 26.
[146] Dhrodia (n 15), 2.
[147] ibid.
[148] Dragiewicz and others (n 2), 614.

that often provides them with community.[149] Even if a woman decides to keep her internet presence, revenge porn ultimately deprives her of her freedom to construct her own online identity.[150] Victims of revenge porn may feel forced to change their names to avoid association with the distributed images.[151] Therefore, revenge porn can damage women's freedom to live their lives on their terms.

SOCIETAL REACTION TO REVENGE PORN

Society's reaction to revenge porn is beleaguered with victim-blaming, similarly to the societal response to sexual assault. [152] The societal reaction to revenge porn, is reminiscent of the victim-blaming culture surrounding rape.[153] Amnesty International*'s* Sexual Assault Research found that 'blame culture' attitudes exist over female clothing, drinking, perceived promiscuity and whether a woman has clearly said 'no' to the man.[154] Focusing the fault of the crime on a failure to take preventative action actively encourages victim-blaming when women fail to take precautions and are subsequently assaulted, rather than addressing perpetrator actions.[155] This is especially the case when revenge porn images were created consensually and later distributed non-consensually.[156] Critics advise women to abstain from taking nude photographs.[157] Commonly, the police and media tell women that the way to prevent abuse is to refuse to share pictures of themselves in the first place.[158]

However, society must recognise that 'sexting' is now considered normal behaviour, and for all genders are known to partake in sexting.[159] Women's freedom to take photos of their body should be advocated for, not criticised, encouraging the empowerment of women rather than their subordination. Furthermore, women should not have to live in fear of male perpetrators, having to take precautions rather than relying on adequate protection.

Encouraging precautions justifies and tolerates male violence, thereby encouraging the patriarchal notion that males must be dominant and therefore, women are subordinate. Furthermore, this notion rationalises male methods of maintaining dominance, even if this

[149] ibid; Maddocks (n 19).
[150] Bloom (n 69), 244.
[151] ibid, 241.
[152] Bates (n 9), 25.
[153] SOA 2003, s 1.
[154] Amnesty International UK, 'UK: New Poll Finds a Third of People Believe Women Who Flirt Partially Responsible for Being Raped' <https://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being> accessed 18 April 2020.
[155] Bates (n 9), 25.
[156] McGlynn and Rackley, 'Image-Based Sexual Abuse' (n 21), 543.
[157] Bloom (n 69), 250.
[158] McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 43.
[159] Bond and Tyrrell (n 6), 5.

is achieved through violence. When forms of 'image-based' abuse are not identified as abnormal, society subconsciously justifies this, therefore, enabling and encouraging the dismissal of female complaints.[160] Through victim-blaming, society serves the dangerous patriarchal anti-women culture. The emphasis must be placed on why men act in this way, not what women can do to mitigate their impending victimisation.

Stigma

Upon understanding the prevalence of societal victim-blaming, it is vital to acknowledge the damaging effect it has on victims. Stigma against those who are victims encourages the silencing and censoring of women.[161] It can change the digital landscape for younger generations of women, limiting their participation and freedom of expression in both digital and public life.[162]

The societal reaction to revenge porn is comparable to that of blaming the victim for having been raped. Individual perpetrator abuse and humiliation of a partner or ex-partner can intersect with broader cultures of online misogyny.[163] Women are shamed for nudity and for being sexually active, reducing female power and control over her own body.[164] The fear of being ostracised from society increases the emotional distress from revenge porn.[165] The distribution of images non-consensually has a debilitating impact on victims:[166] women have to contend with shame and embarrassment in addition to their victimization.[167] This shame and stigma have equally devastating legal consequences ; Koss identified that shame, stigma and embarrassment were barriers to victims reporting their sexual assaults to the police.[168] Therefore, revenge porn stigma does not harm solely one person, it harms all victims and, by extension, all of society.[169]

Revenge porn shames women for their use of the internet and subsequently forces them to isolate themselves from it. Women should be allowed to share intimate images if they wish, but consent should be absolute, not dictated by societal judgement. Revenge porn demonstrates the fine line between harm and consent,

[160] McGlynn, Rackley and Houghton (n 17), 40; Liz Kelly, *Surviving Sexual Violence* (Univ of Minnesota Pr 1988) 104.
[161] Dhrodia (n 15), 2.
[162] ibid.
[163] Dragiewicz and others (n 2), 613.
[164] McGlynn and Rackley, 'Image-Based Sexual Abuse' (n 21), 548.
[165] Bond and Tyrrell (n 6), 6.
[166] ibid.
[167] Bates (n 9), 26.
[168] Mary P Koss, 'Restoring Rape Survivors:Justice, Advocacy and a Call to Action' (2006) 1087 Ann N Y Acad Sci s 206, 223.
[169] Citron and Franks (n 115), 362.

and the difficult relationship society has with the concept that some women distribute images consensually, and these images can then be subsequently distributed non-consensually.

Upon acknowledging the societal reaction to revenge porn, legal response must aim to educate society about the patriarchal motivations behind it and the effect this crime has on victims. Legislation should, therefore, help in framing the societal reaction against revenge porn, away from stigma and victim-blaming, and towards addressing the patriarchal issue of sexual abuse, whether it be online or offline.

REVENGE PORN HARM IS SEXUAL ABUSE

In understanding the balance of power, or lack thereof, that motivates revenge porn, the gendered and sexual motivations of the crime are clear. Victims experience revenge porn as a form of sexual abuse.[170] The common characteristics of revenge porn are interlinked with those of sexual abuse.

Revenge porn, as a form of sexual assault, can be used to abuse, intimidate, coerce, threaten and force women into submission,[171] demonstrated by the victim's altered or lack of internet use. Such an intrusion into a victim's personal life can have vast psychological effects, comparable to sexual assault. The initial creation of the image or film may be abusive, violent, forceful, or physically damaging for a victim. When this is shared, victims are affected by emotional, psychological, physical, and financial harm. Furthermore, intimidation and a tangible threat can be present in the subsequent and continuing coercive use of these images and in the threat of exposure.[172]

Revenge porn is a brutal, physical, and digital intrusion into a person's life, body, and online domain. The harm of sexual abuse includes the violation of fundamental rights to sexual autonomy, integrity and sexual expression.[173] It is not for society, nor the law, to dictate the experiences of women or to belittle those experiences; women experience these phenomena as a form of sexual assault.[174] Therefore, legislation must consider revenge porn as sexual abuse and resultingly classify revenge porn as a sexual crime.

[170] McGlynn, Rackley and Houghton (n 17), 41.
[171] ibid, 27.
[172] ibid, 35.
[173] ibid, 36.
[174] ibid.

CONCLUSION

Revenge porn facilitates systemic structural discrimination and gender-based violence against women.[175] The harm caused by revenge porn can have physical, mental, and financial effects and can be immediate, devastating and, in many cases, irreversible.[176] This harm is facilitated by the internet.[177] Victims are impacted to varying degrees due to the way the image was created and threats of – and actual - distribution of the images. Therefore, the harm caused by revenge porn must be understood as a series of differing but interconnected harms. Revenge porn may be a digital crime, but it has offline consequences. Therefore, when considering revenge porn as a criminal offence it is necessary to consider the digital nature of revenge porn and understand this offence as not just one of image distribution, but as an act of potentially unending and lifelong harm.[178] Developing legislation that adequately considers the range of harm and effects for victims is essential to discourage these behaviours and ensure that sentencing actively reflects the severity of revenge porn.

Revenge porn must be a legislated sexual crime in response to the experiences of victims and their lived experience of sexual harm. As victims experience revenge porn as sexual assault, revenge porn is undoubtedly a sexual crime. Even the societal response to revenge porn is reflective of other sexual offences. It should not be the responsibility of women to mitigate male wrongdoing. Legislation must address the gendered motivations for revenge porn and the subsequent sexual consequences. Thus, lawmakers should help to breakdown the societal stigma and victim-blaming, and address the patriarchal issue of sexual abuse, online or offline.

CRITIQUING THE DEVELOPMENT OF LEGAL FRAMEWORK ON REVENGE PORN

Chapters 1 and 2 established the largely gendered motivations behind revenge porn and the destructive consequences for victims. In analysing victims' experiences, it is evident that revenge porn as digital sexual abuse is a profoundly damaging facilitator of serious harm. Legislation must recognise the patriarchal motivations behind revenge porn, to ensure effective legislative response that considers the motivations behind such crimes. Chapter 3 will critique the development of legislation in response to revenge porn. In considering the historical construction of revenge porn legislation, this article aims to acknowledge the ethos behind the s33 CJCA 2015 offence of *non-consensual distribution of private sexual images and films*. This chapter will identify and discuss the issue with this law,

[175] Simonovic (n 89), 5.
[176] Franks (n 10), 2.
[177] ibid.
[178] Dodge (n 121), 139.

arguing that current legislation does not consider revenge porn as a gendered and sexually motivated crime. Furthermore, the effect this has on victim experiences will also be considered. Finally, this chapter will consider new Parliamentary motions towards reform. In acknowledging and assessing weaknesses of this proposal, a preferable direction for reform is suggested and will be discussed further in Chapter 4.

LEGISLATIVE HISTORY

Maddox presents the idea that revenge porn repackages old-age harm as a new-fangled digital problem, arguing that non-consensual image sharing has been around for decades. Still, technology has changed the process of such distribution.[179] One could argue that the distribution of private sexual images, that submit to violent patriarchal ideals, has been present in society for years, in the form of pornography. Before the creation of s33 CJCA 2015, revenge porn as such was not a specific legal offence. Offences could be convicted under s127 of the Communications Act 2003 or the Malicious Communications Act 1988, but this was unclear and legislatively complex.[180] Additionally, a revenge porn offence may have also amounted to an offence of harassment under the Protection from Harassment Act 1997. In 2015, s33 CJCA 2015 was enacted to criminalise the non-consensual disclosure of private sexual images with the intention to distress. However, even now, revenge porn can be considered to be somewhat criminalised by a wide array of legislation; this piecemeal approach needs consolidation to ensure legislative clarity.[181]

Currently, s33 CJCA 2015 criminalises revenge porn as a communication offence. As has been established, revenge porn results in immense sexual harm for victims, that facilitates the fulfilment of patriarchal goals through abuse.[182] Therefore, the classification of revenge porn as merely a communication offence is unjust. Victims of revenge porn have a lawful interest in fair labelling and legislation should appropriately reflect the suffering and harm caused to a victim.[183] Fair labelling of revenge porn would acknowledge the sexual harm caused and the sexual motivations of perpetrators. Some victims of penetrative sexual assaults have admitted that they would 'prefer that the offender is convicted of rape, as a conviction for sexual assault does not adequately reflect the harm suffered'.[184] Not only do the consequences of revenge porn interlink with wider sexual abuse harm, but victims experience revenge porn as sexual assault.[185]

[179] Maddocks (n 19).
[180] Law Commission (n 81), para 10.45.
[181] McGlynn, Rackley and Houghton (n 17), 25.
[182] Lacey (n 40).
[183] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 238.
[184] ibid, 236.
[185] McGlynn, Rackley and Houghton (n 17), 30 .

In legislating revenge porn as a communication violation, rather than innately sexual, legislation fails to convict perpetrators of an adequately labelled offence. A further argument for fair labelling, identified by *Chalmers and Leverick,* is ensuring that the offence labels reflect public opinion.[186] However, it may be more essential for the law to seek to shape public opinion, rather than conform to it, especially with less socially understood crimes like revenge porn.[187] Societal attitudes towards revenge porn can be a barrier against victims reporting their sexual assaults to the police, thereby advancing and enhancing dangerous patriarchal anti-women culture.[188] Therefore, it is vital to acknowledge crimes committed as a gendered and sexual abuse, and the labelling of s33 CJCA 2015 fails to recognise nor address this.

ISSUES WITH S33 CRIMINAL JUSTICE AND COURTS ACT 2015

While it is essential to criminalise the non-consensual distribution of private sexual images, the current law is flawed. S33 CJCA 2015 does not acknowledge the gendered and sexual nature of perpetrator motivations, nor the consequences for victims of revenge porn. In failing to acknowledge the sexual nature of revenge porn, this legislation fails to protect those for whom revenge porn interlinks with other patterns of harassment or abuse.[189] For those in domestically abusive relationships, the distribution, or threat of distribution, can exacerbate pre-existing abuse.[190] Revenge porn must, therefore, be understood as part of the continuum of sexual abuse,[191] and as a form of abuse that can contribute to sexually abusive relationships.[192] This is unacceptable and must be addressed to ensure victims are appropriately safeguarded. Under s33 there were 206 prosecutions in 2015-16, 465 prosecutions in 2016-17, 464 prosecutions in 2017-18 and a further 376 in 2018-19.[193] However, before 2018 there were 7,806 reported incidents of revenge porn.[194] There is a critical concern that one in three allegations are withdrawn after charge.[195] Therefore, Chapter 3 will consider the effectiveness of s33 to understand why allegations are withdrawn and do not result in a conviction.[196]

[186] Chalmers and Leverick (n 185), 246.
[187] ibid, 241.
[188] Koss (n 170), 223.
[189] Pegg (n 80), 530 .
[190] McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 40.
[191] McGlynn, Rackley and Houghton (n 17), 26.
[192] Pegg (n 80), 11.
[193] Crown Prosecution Service (n 93), A54 ; CJCA 2015 s 33.
[194] 'One in Three Revenge Porn Claims Dropped' *BBC News* (14 June 2018) <https://www.bbc.com/news/uk-england-44411754> accessed 13 April 2020.
[195] ibid.
[196] CJCA 2015, s 33.

Images

*S*35(2) of the CJCA 2015 defines a photograph or film as 'private' where it 'shows something that is not of a kind ordinarily seen in public'.[197] *Pegg* is very critical of the 'private sexual' wording, arguing that the terminology lacks clarity.[198] Certainly, it is difficult to precisely define imagery understood as 'sexual'.[199] Although s35(2) considers those images not typically seen in public, differing opinions of privacy may be confused here. 'Sexual' is arguably a subjective term. One may consider only full nudity sexual; others may consider a woman in a bikini to be ordinarily seen in public, but a woman in underwear may be private and sexual. Discretion here lies with the Court.[200] Although beneficial to have some flexibility in the law, what may classify as a private sexual image is somewhat unclear. Furthermore, it is hypocritical that this offence is not a sexual one, despite liability hinging on the disclosure of a private, sexual image.[201] There is an apparent legislative disconnect that must be addressed.

Distribution and Threats to Distribute

Distribution of an image is relatively simple to establish; either an image is in the public domain, or it is not. Whilst the legislative approach to distribution is not problematic, a failure to acknowledge threats to disclose images presents a clear issue. Currently, threats to disclose private and sexual images do not fall under s33 CJCA 2015.[202] Disclosure must occur for the offence to apply, which is concerning because it is easy to follow through on threats to disclose and actually disclose the image.[203] There is an apparent legislative disconnect here. There is also a lack of attention to third party sharing. While third party sharing would count as disclosure, a conviction will depend on whether the third party intended to cause distress.[204] This ignores the experience of the victim whose images can go viral.[205] Therefore, specific procedure on threats to distribute and third party sharing should be contained within s33.[206]

[197] Photograph and film are outlined in CJCA 2015, s 34(4).
[198] Pegg (n 80), 519.
[199] Law Commission (n 81), para 10.61-10.65.
[200] Pegg (n 80), 519.
[201] ibid, 514.
[202] Law Commission (n 81) para 10.90.
[203] ibid, 10.93.
[204] ibid, 10.85.
[205] Go Viral definition: If a video, image, or story goes viral, it spreads quickly and widely on the Internet through social media and e-mail. 'Go Viral' <https://www.collinsdictionary.com/dictionary/english/go-viral> accessed 16 May 2020.
[206] CJCA 2015, s 33.

Consent

*S*33(a) of the CJCA 2015 requires that the photo or film was distributed non-consensually. However, consent is not defined in s33 CJCA 2015. This has been criticised by academics and the Law Commission.[207] A critical legislative challenge is responding to situations where, originally, consensual sexual imagery is misused as a form of 'public harassment, revenge and public shaming'.[208] The *Civil Rights Initiative* found that 80% of photos posted in revenge porn situations were 'selfies'[209] originally taken consensually by the person in the image.[210] However, consent to share images in one context does not serve as consent to distribute the same image in another context.[211]

As discussed in Chapters 1 and 2, 'sexting'[212] is an acceptable practice in modern relationships and such sharing of images infers implied or express understanding that such images will remain confidential.[213] It is not, and should not be, unreasonable to expect that private photos shared between intimate partners should remain private and not be distributed online.[214] It seems that the phenomenon of revenge porn demonstrates the overlapping boundaries between acceptable 'romantic' behaviours and digital sexual abuse.[215] *Henry and Powell* found that coercive behaviours contributed to women 'agreeing' to intimate images being taken within an already violent relationship.[216] Legislation must clarify that one-off consensual sharing does not always qualify full consent for the image to be subsequently shared. Furthermore, s33 does not explicitly acknowledge that a naked photo sent by the person in the image may not have been consensual.[217]

As discussed in Chapter 2, victims of revenge porn often face societal victim-blaming. This is fuelled by the idea that victims incite their own harm, by having sent the images in the first place.[218] As a result, the focus of legal, educational and policy responses should be on understanding the non-consensual creation and distribution of the image.[219] Therefore, legislation should clearly state that when

[207] Pegg (n 80) 521–523; Law Commission (n 81), para 10.97.
[208] Henry and Powell, 'Beyond the "Sext"' (n 3), 111.
[209] Selfie definition: a photograph that you take of yourself, usually with a mobile phone. Selfies are often published using social media. 'Selfie' <https://dictionary.cambridge.org/dictionary/english/selfie> accessed 16 May 2020.
[210] Henry and Powell, 'Beyond the "Sext"' (n 3), 111.
[211] Citron and Franks (n 115), 355.
[212] 'Sexting' (n 131).
[213] Citron and Franks (n 115), 354.
[214] Burris (n 127), 2329.
[215] Henry and Powell, 'Beyond the "Sext"' (n 3), 114.
[216] ibid, 113.
[217] CJCA 2015, s 33.
[218] Bloom (n 69), 250.
[219] Henry and Powell, 'Beyond the "Sext"' (n 3), 115.

images are initially shared consensually, additional consent to distribute the image is required. Such a statement would refocus attention away from victim-blaming and stigma-fuelled responses and instead address victims feeling embarrassment and shame on top of all of the other harm caused by revenge porn.[220]

Intent to Cause Distress

S33(1)(b) CJCA 2015 requires that the defendant disclosed the private, sexual photography intending to cause distress. Such a requirement means that not all revenge porn distribution is illegal. A loophole is created when revenge porn disclosures are purely financially or sexually motivated.[221] This is a serious concern, having established the capacity for sexual and abuse motivations behind revenge porn. Arguably the harm to the victim is the same regardless of the perpetrator's motivations; the amplification ability of the internet remains the same and the result is no less humiliating, nor inevitable.[222]

Additionally, this separates intention to cause distress when creating the image and intention to cause distress when distributing the image. Therefore, an image or film may be created by filming a sexual assault, but subsequently distributed for financial gain. Here, the legislation may not apply, even though the harm is arguably greater.[223] Such an arbitrary distinction between motivations completely disregards the harm caused to the victim.[224] Furthermore, requiring an intention to distress directly contradicts the ethos of the Sexual Offences Act 2003 (SOA 2003). For most of the offences in the SOA 2003 there is no motive requirement at all.[225] Sexual offences are so because of the mode of offending, not the motive[226] and victims experience revenge porn as sexual assault.[227] Although the sexual motivations for revenge porn are evident, a law that places the motivation of the perpetrator of higher importance than the experience of the victim risks overlooking the harm caused.[228]

[220] Bates (n 9), 26.
[221] Pegg (n 80), 530 .
[222] ibid 530; Sharratt (n 24), 7.
[223] Henry and Powell, 'Sexual Violence in the Digital Age' (n 18), 406.
[224] Franks, 'A Guide for Legislators' (n 10), 6.
[225] Clare McGlynn, 'Voyeurism (Offences) (No.2) Bill. Written Evidence Submitted to the Public Bill Committee' para 2.6 <https://publications.parliament.uk/pa/cm201719/cmpublic/Voyeurism/memo/VOB01.htm> accessed 19 March 2020.
[226] McGlynn, Rackley and Houghton (n 17), 37.
[227] Henry and Powell, 'Beyond the "Sext"' (n 3), 114 .
[228] McGlynn, Rackley and Houghton (n 17), 36.

Concluding Remarks on the Issues with s33 Criminal Justice and Courts Act 2015

While this article has questioned the social understanding, albeit lack thereof regarding revenge porn, the police understanding of what constitutes revenge porn, and the offence laid out in s33 is also limited.[229] This is extremely concerning, as uncertainty regarding how to respond to allegations of revenge porn may lead to miscommunications with victims and inconsistencies in police responses.[230] It can be questioned whether this contributes to the one in three allegations that are dropped pre-trial.[231] Research conducted by *Bond and Tyrell* certainly supports this.[232] After interviewing 783 police officers about s33 offences, they found a 'significant lack of understanding and confidence felt by police' in investigating revenge porn.[233] Furthermore, 94.7% of police interviewed revealed they had received no training on the issue.[234]

If victims cannot rely on the police to adequately respond to allegations of revenge porn, legislation is inadequate. Furthermore, there is little that they can do to get those images removed from the internet. Victims certainly cannot rely on the websites to help, as there is no monetary or legal incentive for them to remove the images or films from their sites.[235] Therefore, this legislation lacks clarity and as a result, is misinterpreted by the police.[236] S33 arguably fails to provide certainty for victims, who may experience inconsistent responses from different police forces.[237] This uncertainty and lack of clarity is unacceptable, and reform should urgently address this.

ONLINE HARMS LEGISLATION PROPOSAL 2020

Parliament is currently seeking to create new 'Online Harms Legislation', to tackle online harm and place greater responsibility on digital platform companies.[238] In analysing the parliamentary debate, it became abundantly clear that, so far, the discussion fails to acknowledge the sexual nature of revenge porn. Not only did the debate falter by misinterpreting online abuse as that which only affects young people, but the debate did not consider the sexual nature of online abuse as needing to be separately acknowledged.

[229] Bond and Tyrrell (n 6) 7; CJCA 2015, s 33.
[230] Bond and Tyrrell (n 6), 10.
[231] 'One in Three Revenge Porn Claims Dropped' (n 196).
[232] Bond and Tyrrell (n 6).
[233] CJCA 2015, s 33.
[234] Bond and Tyrrell (n 6), 11.
[235] Bloom (n 69), 253.
[236] Bond and Tyrrell (n 6), 7.
[237] CJCA 2015, s 33.
[238] HC Deb 13 February 2020, vol 671, cols 972-981.

The debate deliberated fake news, trolling, online sales of weapons, abuse of the electoral system, incitement to suicide and revenge porn.[239]

However, just because these offences exist on a digital platform, does not mean they affect victims in the same way, nor are perpetrators motivated in the same way. Grouping such crimes in one place is a gross disservice to the victims of revenge porn, who experience sexual assault alongside digital abuse. Additionally, it fails to address the patriarchal impetus behind revenge porn. Although this offence is digital, the harm affects a victim's daily life. Revenge porn is experienced as a sexual offence by victims, manifested as a sexual offence by perpetrators and so should be legislated as a sexual offence. The Law Commission is reviewing current image-based abuse legislation to establish whether it is fit for purpose. Such a review is welcomed and will be reported in 2021. It is essential that revenge porn legislation legally acknowledges revenge porn as a sexual offence, thereby listing it within the Sexual Offences Act 2003.

CONCLUSION

The current law on revenge porn is ineffective and should be reformed to legislate revenge porn as a sexual offence. Within s33 CJCA 2015, there is a distinct lack of clarity, ranging from the non-specific terminology used, to the unclear questions of third-party distribution liability. Furthermore, s33 remains situated alongside additional legislative acts that confuse the legal landscape surrounding image-based sexual abuse.[240] Moves to consolidate and clarify this legislation are necessary. It is concerning that legislation dealing with such potentially harmful and destructive crimes does not place the experience and harm caused to a victim at the forefront of legal response. The s33 'intention to cause distress' requirement is damaging and should be seen as a legislative failure in its inability to fully comprehend the gendered issues of revenge porn. Whilst the motivations for revenge porn have been identified as gendered and sexual, irrespective of perpetrator intentions, this crime causes immense and potentially unending harm.

Revenge porn represents hatred-fuelled online violence, manifesting in sexual harm, and is arguably powered by vehement sexual motives. In order to change this landscape and address these attitudes, legislation must recognise revenge porn for what it is: a sexual offence. Furthermore, revenge porn must be understood within the broader context of online gendered abuse and wider sexual abuses, not just another form of digital harm. Only then will victims receive sincere acknowledgement of their experiences, and perpetrators will be held accountable for the actual level of harm they have caused. Furthermore, increasing the clarity of revenge porn legislation would tackle the issues with police

[239] ibid 973, 976, 977, and 980.
[240] McGlynn, Rackley and Houghton (n 17), 26.

responses. This would encourage greater acknowledgement of the dangers of revenge porn and promote proactivity from the police against instances of revenge porn and reports of alleged revenge porn distribution. Chapter 4 will set out new proposed legislation to specifically tackle the issues raised with s33. This legislation will identify revenge porn as a separate legal issue in its own right and encourage the conception of distributing revenge porn as a serious sexual offence.

REFORMING REVENGE PORN LEGISLATION

INTRODUCTION

This article has outlined how revenge porn is committed and manifested as sexual abuse but is legislated as a communication offence under s33 CJCA 2015.[241] Chapter 4 will set out the final arguments supporting the enactment of revenge porn as a sexual offence. Revenge porn will be compared with upskirting, an alternative image-based sexual offence.[242] By uncovering their similarities, one will argue that revenge porn should be legislated as a sexual offence, in accordance with upskirting legislation.[243] The practical and legal benefits of legislating revenge porn as a sexual offence will be considered, namely granting victims anonymity and the essential role of the Sexual Offenders Register. Finally, in consideration of the identified issues with s33 CJCA 2015, new reformed legislation will be proposed that shall address the concerns identified in chapter 3 and will introduce revenge porn within the Sexual Offences Act 2003.

COMPARING REVENGE PORN AND UPSKIRTING

The Voyeurism (Offences) Act 2019 criminalises 'upskirting' and adds two new sexual offences to s67 of the Sexual Offences Act 2003. Upskirting is the act of taking a photo or video up a woman's skirt (or man's kilt) non-consensually.[244] Perpetrators become 'aroused and are sexually gratified' by this observation.[245] One questions whether those creating/accessing revenge porn images and films experience similar sexual gratification. Indeed, both upskirting and revenge porn deal with private and sexual images, and the creation of such images in both instances can be non-consensual (or always non-consensual when considering upskirting). [246] Comparatively, both revenge porn and upskirting can be experienced as sexual assault, and these crimes have the same maximum sentence.

[241] Bates (n 9), 25.
[242] SOA 2003, s 67A.
[243] ibid.
[244] Law Commission (n 81), x.
[245] Wesley McCann and others, 'Upskirting: A Statutory Analysis of Legislative Responses to Video Voyeurism 10 Years Down the Road' (2018) 43 Crim Justice Rev 399, 400.
[246] Law Commission (n 81), 253.

However, only upskirting is a legislated sexual offence. Those convicted of upskirting may be registered on the Sexual Offenders Register by the Court, but this does not apply for revenge porn. Furthermore, the distribution of identifiable upskirting images likely enhances the harm caused by upskirting.[247] However, the current legislation does not tackle the distribution of such images, and this falls to revenge porn legislation.[248] Once again, there is a hypocrisy that an image created through upskirting is a sexual offence, but when distributed, further sexual harm is not recognised. Digital image-abuse must be understood within the context of other digital, gendered, and sexual abuse crimes. These crimes are representative of a phenomenon of sexual violence against women, simply on a digital platform.[249] Therefore, based on comparison and the clear similarities with upskirting legislation, revenge porn should be legislated as a sexual offence.

REVENGE PORN SHOULD BE A LEGISLATED SEXUAL CRIME

The practical and legal benefits of legislating non-consensual distribution of images as a sexual crime would likely result in more prosecutions and convictions of the offence, by allowing anonymity for victims.[250] Currently, one in three allegations of revenge porn are withdrawn by complainants[251] and a majority of cases remain unreported.[252] Victims have identified a reluctance to participate in prosecutions due to a lack of anonymity and broader feelings of a lack of police support.[253] Without having anonymity, and by publishing the victim's name in court records, this further lack of privacy would only advance the harm suffered.[254] Anonymity is vital to ensure victims do not face a further violation of their privacy when they pursue charges.[255] MPs have endorsed such an argument.[256] Anonymity is crucial to increase a victims' willingness to report these crimes to the police and thus result in successful prosecutions, as well as to protect complainants from further harm.[257]

[247] Alisdair A. Gillespie, '"Up-Skirts" and "Down-Blouses": Voyeurism and the Law' (2008) 5 Crim L R 370, 379; McGlynn (n 227) [3.1].
[248] Gillespie (n 249) 379; CJCA 2015, s 33; SOA 2003, s 63.
[249] Clare McGlynn and Erika Rackley, 'Why "upskirting" Needs to Be Made a Sex Crime' (*The Conversation*, 17 August 2017) <http://theconversation.com/why-upskirting-needs-to-be-made-a-sex-crime-82357> accessed 3 February 2020.
[250] ibid.
[251] 'One in Three Revenge Porn Claims Dropped' (n 196).
[252] Bond and Tyrrell (n 6), 6.
[253] 'One in Three Revenge Porn Claims Dropped' (n 196).
[254] Bloom (n 69), 288.
[255] Lizzy Buchan, 'Over 80 Labour MPs Urge Theresa May to Offer Anonymity to Revenge Porn Victims' *The Independent* (7 July 2018) <https://www.independent.co.uk/news/uk/politics/revenge-porn-victims-anonymity-labour-urge-theresa-may-law-change-maria-miller-richard-burgon-dawn-a8434451.html> accessed 3 February 2020.
[256] ibid.
[257] McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 47.

Legislating revenge porn as a sexual crime would grant the court the right to record the perpetrator on the Sexual Offenders Register. MP Dr Lisa Cameron argues that those who commit image-based digital abuse crimes such as upskirting (and therefore arguably revenge porn) are likely to go on to commit contact offences.[258] It is therefore essential that victims feel able to report revenge porn perpetrators to the police and the police recognise that offenders have committed serious crimes and take action to prohibit reoffending. Additionally, acknowledging revenge porn as a sexual offence would positively impact education and prevention campaigns that highlight and address the gendered and sexualised reality of image-based sexual abuse.[259] Such campaigns are vital to encourage society to question victim-blaming narratives around gendered abuse and condemn those that partake in such activity.

Support for victims is also essential. In the UK, the *Revenge Porn Helpline* has provided support to thousands and is a critical resource.[260] Recognising the abuse and sexual nature of revenge porn would arguably encourage further support and services to aid victims in their recovery. Furthermore, legislating revenge porn as a sexual offence would acknowledge and appropriately criminalise acts of sexually motivated digital abuse.

NON-CONSENSUAL CREATION AND DISTRIBUTION OF PRIVATE SEXUAL IMAGES ACT 2020

This article argues that revenge porn should be legislated as a sexual offence.

Current revenge porn legislation is ineffective and does not provide sufficient protection for victims. After identifying further issues with the 2015 legislation, the following reformed Non-consensual Creation and Distribution of Private Sexual Images Act 2020 is proposed in tables 4.1 and 4.2.

Table 4.1: Non-consensual Creation and Distribution of Private Sexual Images Act 2020.

(1) The Sexual Offences Act 2003 is amended as set out in the subsection (2)
(2) After section 66 (exposure) insert-

'66A Non-consensual Creation and Distribution of private sexual Images

[258] HC Deb 18 June 2018, vol 643, col 45.
[259] McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 48.
[260] ibid.

For the purposes of these offences a private sexual image or recording relates to:

1. Images or recordings of the naked body or,
2. Images or recordings of underwear covering genitals, buttocks or breast, or
3. Images or recordings of sexual acts.

Offence 1: The non-consensual creation of private sexual images;

(1) A person (A) commits an offence if—
- a) A creates a private sexual image or recording of another (B).
- b) A does so-
  - i. without consent from B, or
  - ii. without reasonably believing that B consents.

Offence 2: The non-consensual distribution of private sexual images;

(2) A person (A) commits an offence if—
- a) A distributes a private sexual image or recording of another (B);
- b) A does so-
  - i. without consent from B, or
  - ii. without reasonably believing that B consents.

Offence 3: The threat to create or distribute private sexual images;

(3) A person (A) commits an offence if—
- a) A threatens to create a private sexual image or recording, or
- b) A threatens to distribute a private sexual image or recording.

Table 4.2: s66A Explanatory Notes

1. Section 66A makes it an offence for a person to non-consensually create, distribute or threaten to distribute private sexual photographs and films.
2. For the purposes of subsections 1(b), 2(b) and 3(b) without consent includes those images and films shared consensually between two people and later distributed without subsequent consent.

This proposal identifies revenge porn within the Sexual Offences Act 2003, resolving fair labelling issues with the current legislation. This proposed offence is listed under s66 Sexual Offences Act 2003 offence of exposure. Preferably, an appropriate image-based sexual abuse sub-section would be introduced to the Sexual Offences Act 2003; however, for now, listing this crime under s66 exposure is considered most appropriate.[261]

[261] SOA 2003, s 66.

The proposed legislation describes three interpretations of 'private sexual images and films' in the hope of providing clarity where previous law is vague. Whilst the term 'intimate' was considered, this definition is ambiguous with regards to image distribution.[262] Some flexibility remains, and ultimately discretion lies with the magistrate or jury, but this does encourage a more comprehensive view of sexual privacy in considering underwear. Further research could ascertain whether to include swimwear alongside underwear. Such a proposition to add swimwear may face criticism for its general nature. However, much swimwear and underwear can be considered comparative and for many women being photographed in swimwear can be harmful.[263]

The proposed reform includes an explanatory note to confirm that non-consensual distribution would include images consensually shared between two people, without consent to share that image further. As discussed in chapter 2, acknowledgement that this form of non-consensual image distribution is criminal, is crucial to an improved legislative response to revenge porn.[264] Unlike s33 CJCA 2015, the proposed legislation does not consider defendant intention, thereby closing the loophole when revenge porn creation or disclosure is purely financially or sexually motivated.[265] Furthermore, this resets the balance between the motivation for, and mode of, perpetration. The reformed legislation focuses on condemning and criminalising the act itself and acknowledges the awful harm caused to victims, rather than viewing the sexual motivations as principal importance. Removing the onus on defendant intention shows a clear stance against instances of revenge porn, regardless of whether a defendant intended to cause distress or upset.

Revenge porn is serious and can psychologically, emotionally, and financially harm victims. This harm should be acknowledged, regardless of whether the defendant intended to harm. The victim has been impacted by the distribution, thus fulfilling the requirement for this offence.

CONCLUSION

Revenge porn should be legislated as a sexual crime because the act of distributing revenge porn itself is innately sexual. The intentions behind revenge porn are understood as sexual, as are the images themselves and the resulting harm. [266] In comparing revenge porn

[262] Definition of intimate: having, or being likely to cause, a very close friendship or personal or sexual relationship. 'Intimate' <https://dictionary.cambridge.org/dictionary/english/intimate> accessed 2 May 2020.
[263] Olivia Petter, 'Company Shames Woman Applying for a Job by Posting Her "Unprofessional" Swimwear Photo on Its Instagram' *The Independent* (3 October 2019) <https://www.independent.co.uk/life-style/women/company-shames-woman-applying-for-a-job-by-posting-her-unprofessional-bikini-photos-on-its-instagram-a9135181.html> accessed 3 May 2020.
[264] McGlynn and Rackley, 'Image-Based Sexual Abuse' (n 21), 543.
[265] Pegg (n 80), 530 .
[266] Bates (n 9), 25.

legislated under s33 CJCA 2015 and upskirting contained in the Voyeurism (Offences) Act 2019, the similarities between the two are evident. Revenge porn and upskirting are significantly similar enough to warrant questions about the disparity in legislation between the two. It is hypocritical to fail to acknowledge revenge porn within the continuum of sexual abuse, in line with other image-based sexual abuse crimes. Such hypocrisy is a standard of masculine criminal law that fails to acknowledge female suffering for what it is. Revenge porn is more than a communication offence. It is sexual abuse and legislation must recognise this, to acknowledge both the suffering of victims and actions of perpetrators.

This final chapter has outlined the practical benefits of legislating revenge porn as a sexual offence. Namely, the benefit of anonymity for victims of sexual crimes, which is likely to increase convictions, with greater victim participation in court. Additionally, by allowing the recording of perpetrators on the Sexual Offenders Register, this will not only raise the profile of revenge porn as something inviting significant penalty, but this will also have a beneficial effect on the social perception of revenge porn. Members of the public are discouraged from victim-blaming narratives, discouraging such stigma, and supporting victims. Furthermore, such a framework would encourage further backing for holistic approaches for support and necessary services for those affected.

The issues acknowledged in chapter 3 with the current legislation have been addressed and suggestions for improvement provided in the form of reformed legislation. Greater clarity is necessary to establish the types of images covered by revenge porn legislation. Additionally, by removing the requirement of perpetrator intention, the proposed legislation has acknowledged that revenge porn can be financially or sexually motivated and still cause the victim intense distress, regardless of whether the perpetrator intended to cause this. Finally, options for proposed sentencing guidelines aim to reflect defendant intention to ensure this is still acknowledged by the legislation. By placing this legislation firmly within the Sexual Offences Act 2003, revenge porn is appropriately legislated as a sexual crime.

CONCLUSION

Revenge porn is sexual abuse. Revenge porn allows perpetrators to assert masculine dominance through digital abuse.[267] The motivations behind revenge porn are comparable to other sexual crimes and involve breaches of privacy, consent and violation of the body.[268] Revenge porn is the exertion of sexual control as sexual abuse, and although this

[267] ibid.
[268] Bloom (n 69), 278.

does not involve direct physical contact, it manifests as sexual abuse.[269] The Sexual Offences Act 2003 itself provides that physical contact is not necessary for a sexual assault to take place, recognising offences such as grooming, indecent exposure and upskirting.[270] Therefore revenge porn is a contactless form of digital sexual abuse. Furthermore, revenge porn images are sexual. They are private, sexual photos and films. It is because these images are sexual and explicit that the images go viral, the level of amplification potential is so high, and there is a dangerous market in their distribution.[271] Additionally, the language posted alongside these images is often sexualised.[272] Finally, revenge porn harm is sexual and is a horrendous invasion of sexual privacy.[273] For the victims of revenge porn, this crime manifests as sexual assault,[274] and the consequential harm manifests similarly to that of sexual assault harm.[275] It is, therefore, time that revenge porn is categorised as sexual harassment and abuse.[276] Not only would this benefit the protection provided by the law, but this would acknowledge that the victim's suffering is 'legitimate and deserving of recognition'.[277]

The current legislation on revenge porn has limited capacity to recognise the harm caused to victims and legislating revenge porn as merely a communications offence is inherently flawed. Revenge porn represents patriarchy-serving, masculine abuses of power. Legislating revenge porn as a sexual offence would condemn the 'culture of hostility and aggression' that fuels gendered and sexual abuse. Without effective, fairly labelled legislation, the problem of revenge porn will likely get worse.[278] Furthermore, legislating revenge porn as a sexual offence would recognise revenge porn within the broader context of other online forms of sexual violence and harassment. Only when the full extent of hostility and aggression that feeds into revenge porn is understood, will the law entirely acknowledge victim experiences and ensure that perpetrators will be held accountable for the actual harm caused and condemn such behaviour.[279] The current law on revenge porn focuses too heavily on the perpetrator's act, rather than the victim. The proposed, reformed legislation therefore returns the attention to the harm caused to the victim and rebalances the abuse of power.

[269] Citron and Franks (n 115), 362.
[270] McGlynn, Rackley and Houghton (n 17), 37
[271] McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 43.
[272] ibid.
[273] Bates (n 9), 38.
[274] McGlynn and Rackley, 'More than "Revenge Porn"' (n 71), 44.
[275] Bates (n 9), 39.
[276] Bloom (n 69), 278.
[277] ibid, 277.
[278] DeKeseredy and Schwartz (n 64), 3.
[279] Citron and Franks (n 115), 349.

In focusing on the female victim, this article has outlined the disproportionate nature of revenge porn. Consideration of victim ethnicity and religion would further inform legal understanding as to the effect of revenge porn on victims. The proposed legislation should, therefore, be understood as representative of gendered reform; further reform that considers wider vulnerabilities such as race and religion is welcomed. Additionally, revenge porn is but one form of digital image-based abuse. Therefore, consideration of additional image-based crimes would benefit this area of the law.

Finally, legislating revenge porn as a sexual offence would confront societal victim-blaming narratives. Consequently, it would encourage members of the public to question perpetrators, moving away from victim-blaming and towards supporting victims, whilst discouraging such stigma. Furthermore, such an approach would encourage greater backing for holistic approaches to support and services for those experiencing revenge porn. The law is not the sole remedy for revenge porn. Educational programmes promoting ethical digital behaviour should act as primary prevention measures, by encouraging respectful relationships and discussions about gender inequalities and corresponding gendered violence.[280] There is much work to do, legislatively and socially, to tackle crimes motivated by sexual abuses of power. Therefore, legislating revenge porn as a sexual crime is a much-needed step towards gender and sexual equality. Reform of this area is vital and overdue.

[280] Henry and Powell, 'Sexual Violence in the Digital Age' (n 18), 411.

Connected and Autonomous Vehicles, Cyber Threats, and the UK Motor Insurance Framework: Is the Automated and Electric Vehicles Act 2018 Fit for Purpose?

*Joshua Prior**

ABSTRACT

This article sets out to explore the challenges posed by a cyber-attack on connected and autonomous vehicles in light of the recent Automated and Electric Vehicles Act 2018. The focus is placed upon the physical damage to infrastructure and the deaths caused in the event that such vehicles are hacked and directed into buildings and gatherings of people. Greater emphasis is placed upon a systemic attack in which damage is carried out by vehicles spanning an entire fleet. The analysis of this article will demonstrate a lack of any viable avenue to compensation for victims within the current United Kingdom (UK) insurance infrastructure. This article concludes by proposing a no-fault compensation scheme which is adapted to meet the challenges posed by cyber threats.

INTRODUCTION

This article begins with the discovery of a gap in the compensatory framework of the UK motor insurance industry. The root cause of this has been the recently enacted Autonomous and Electric Vehicles Act 2018 (AEVA).[1] In an attempt to extend the existing regulatory framework under the Road Traffic Act 1988 (RTA),[2] the AEVA has overlooked what appears to be a potentially dangerous threat — cyber-attacks on connected and autonomous vehicles (CAVs). In the context of this discussion a cyber-attack is an attack upon a computer or computer network 'which attempts to… make unauthorised use of an asset.'[3] The literature and commentary make use of the term 'hacking', which in essence

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[1] Automated and Electric Vehicles Act 2018, hereafter 'AEVA 2018'.

[2] Road Traffic Act 1988, hereafter 'RTA 1988'.

[3] International Standard, 'Information technology — Security techniques — Information security management systems — Overview and vocabulary', ISO/IEC STANDARD 27000, 1.

captures this same idea. Therefore, the terms will be used interchangeably throughout this discussion but refer to the same concept.

This article aims to demonstrate how undeveloped the existing frameworks are in dealing with the matter of cyber-attacks and how, as a result, this will lead to victims without any route to compensation. Moreover, the current framework leaves insurers without any recourse to reimbursement, following the imposition of their strict liability. The primary focus is, therefore, placed upon the conceptual and interpretational challenges posed by cyber-attacks, with a secondary focus on the physical implications of this failure, following a cyber-attack across an entire fleet. It has been hypothesised that 'new generations of attackers will seek to exploit vulnerabilities introduced by the technologies that underpin such vehicles,'[4] with the possible motivations for such attacks being criminal, financial, state sponsored[5] or, as addressed in chapter 2, terrorism. This article concerns itself with the property damage and injury or loss of life following the breach of the vehicle's system, leading to potentially multiple vehicles being directed into gatherings of people or buildings. However, matters of criminal or tortious liability will not be considered. In relation to the wider cyber security and hacking discussion, matters of data protection and data privacy will not be examined and fall outside the scope of this article.

CONNECTED AUTONOMOUS VEHICLES AND THEIR SUSCEPTIBILITY TO CYBER THREATS

This article adopts the Society of Motor Manufacturer's position on what constitutes a CAV:

> 'Vehicles with some levels of automation do not necessarily need to be connected, and vice versa, although the two technologies can be complementary. Technology convergence, however, will result in intelligent vehicles that are both connected and autonomous, hence connected and autonomous vehicles (CAVs)'.[6]

It must be noted that modern technology does not reflect the true capabilities of either the connectivity, nor the autonomy, that forms the basis of the subsequent analysis. However, with the AEVA ambitiously attempting to govern these future technologies, it is indeed appropriate to criticise its current form in light of the future challenges that will be posed by the technology. In fact, it was the intention of the legislators to develop a 'rolling

[4] G De La Torre, Paul Rad, Kim-Kwang Raymond Choo, 'Driverless vehicle security: Challenges and future research opportunities' Future Generation Computer Systems (2018) The International Journal of eScience, 1.
[5] ibid.
[6] Society of motor manufacturers and Traders, 'Connected and autonomous Vehicles: Position Paper' (February 2017) 5 < https://www.smmt.co.uk/wp-content/uploads/sites/2/SMMT-CAV-position-paper-final.pdf> accessed 12 September 2018.

programme of reform that will keep … regulations up to date'.[7] Thus, this paper exploits the window of opportunity provided by the gap between the development of the technology and the existing regulations to expose its weaknesses. Subsequently it makes recommendations for how to better deal with the challenges of cyber-attacks.

The government has issued guidance principles for the cyber security of autonomous vehicles which emphasises minimising threats and establishing a resistance to attacks.[8] SAE International has also published their guidance on similar matters and directs manufacturers in developing the safest possible product.[9] However, these steps simply minimise the chances of a cyber-attack and do not eradicate the threat completely. The likelihood of a potential cyber-attack on a CAV becomes ever more apparent considering the history of the technology's development. In the earlier stages of their testing in 2010, researchers were able to access the vehicle's Electronic Control Unit through its wireless tire pressure monitoring systems, thus gaining control of the vehicle.[10] Later, in 2016, another set of researchers were able to remotely hack into a Tesla Model S, a much more advanced system, in which they were able to externally control essential driving functions.[11] It is submitted that future CAVs will likewise be susceptible to these external threats posed by vulnerabilities in onboard software or weaknesses in the hardware. Integration of increased connectivity poses an even larger threat, as this effect would happen on a massive scale. Thus, it is hypothesised that exponential levels of property damage and injury or death will occur, requiring urgent compensation.

THE IMPLICATIONS OF AN UNDEVELOPED INSURANCE INFRASTRUCTURE AND THE CHALLENGES OF CYBER-ATTACKS

Attention was first drawn to the issue by the Association of British Insurers (ABI) and Thatcher's Research:

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[7] Centre for Connected and Autonomous vehicles, 'Pathway to driverless cars: Proposals to support advanced driver assistance systems and automated vehicle technologies' (Centre for Connected and Autonomous Vehicles, 2016) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/536365/driverless-cars-proposals-for-adas-and_avts.pdf > accessed 20 December 2018.

[8] Department for Transport, Centre for the Protection of National Infrastructure, and Centre for Connected and Autonomous Vehicles, The Key Principles of Cyber Security for Connected and Automated Vehicles (HM Government, 6 August 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/661135/cyber-security-connected-automated-vehicles-key-principles.pdf> accessed 26 March 2019.

[9] SAE International, SAE J3061 "Cybersecurity Guidebook For Cyber-Physical Vehicle Systems" (SAE, 17 January 2012) <https://interact.gsa.gov/sites/default/files/J3061%20JP%20presentation.pdf> accessed 26 March 2019.

[10] William J Kohler and Alex Colbert-Taylor, 'Current Law and Potential Legal Issues Pertaining to Automated, Autonomous and Connected Vehicles' (2015) 31 Santa Clara High Tech LJ 99, 133, 132.

[11] Rob Price, Car hackers found a way to trigger a Tesla's brakes from miles away, (Business Insider, 20 September 2016) <https://www.inc.com/business-insider/researchers-tesla-hack.html> accessed 27 January 2019.

> 'with regards to cybersecurity, a crucial distinction will be between potential cyber breaches affecting individual vehicles and 'systemic' attacks across an entire vehicle fleet or cohort. In the event of a systemic attack, it is clearly inappropriate that this be seen as a responsibility for motor insurers, and if adequate alternative measures are not established, this could make providing insurance for automated vehicles unattractive or even entirely unviable'.[12]

This prospect is alarming, as it appears that the consumer will be forced to absorb the liability. This was flagged up when introducing the Act to the House of Commons for its fifth reading by Minister for Transport, Mr. John Hayes. He indicated that in the situation where a CAV is hacked and begins 'communicating duff information'[13] to other vehicles, consumers may be exposed to considerable liability, as it is their vehicle which has caused a chain reaction of damage and 'no one else will accept responsibility' for it.[14] These findings have serious implications. Firstly, insurers are unlikely to provide any form of compensation for hacked vehicles on a large scale, and as will be later demonstrated, it is unlikely that they will even provide cover for individual hacks. Secondly, under the current regime, consumers will potentially incur significant liability, absorbing the financial burden without any recourse or compensation.

This paper is separated into four chapters. Chapter one will consider the various provisions of the AEVA in light of individual and systemic cyber-attacks. Chapter 2 focuses on insurers, proposing that the provision of a form of cyber insurance is essential. Existing insurance schemes and funds will be examined in the context of cyber-attacks to determine whether they will provide any applicable means of compensation. Chapter 3 will explore the liability of manufacturers and their position under the current product liability law. Chapter 4, in light of the inadequacy of existing frameworks, develops an outline of a no-fault compensation scheme as a practical solution. Before advancing to chapter 1 and its analysis of the AEVA, an account of why it has been enacted and the system it seeks to extend will be examined briefly below.

A BRIEF HISTORY OF THE AUTOMATED AND ELECTRIC VEHICLE ACT 2018

It is well established that insurance is compulsory for vehicle owners in the United Kingdom.[15] This obligation is facilitated by the Road Traffic Act 1988 which has the broad

[12] Association of British insurers and Thatcham research, 'Lords science and Technology select committee inquiry on autonomous Vehicles, ABI and Thatcham research Joint response' (October 2016), 9 <https://www.abi.org.uk/globalassets/sitecore/files/documents/consultation-papers/2016/10/abi-response-to-lords-science-and-technology-select-committee.pdf > accessed 20 March 2019.
[13] ibid.
[14] ibid.
[15] RTA 1988, s143.

effect of requiring 'drivers to carry insurance against possible liability to passengers and other road users in respect of death, personal injury and property damage.'[16] This is a driver-centric body of law which prohibits certain actions and behaviours, resulting in potential action in criminal courts[17] or the tort system.[18]

Vehicles have become more technologically advanced since the passing of the Act in 1988, the most significant being the integration of artificial intelligence (A.I). Steering, braking and acceleration can now all be handled by the vehicle with no human input required. It is worth noting at this point the various stages of autonomy and the degree to which they influence driving functionality. This paper adopts the Society of Automotive Engineers (SAE) guidelines on the various stages of autonomy. Modern CAVs are at stage three, requiring driver fall back in circumstances where the technology deems itself incapable of performing driving functions.[19] These are often characterised as 'semi-autonomous'. For the purpose of my thesis, I will be focussing primarily on stage four and five vehicles, where there is little to no expectation that a user will have to respond to any request to intervene and may be deemed fully autonomous.[20]

With the introduction of CAVs, the role of driving switched from a human to the vehicle itself, impacting the applicability of previous legislation in a number of ways. Primarily, the main incompatibility arose out of the requirement for third-party insurance to cover the vehicle user and their actions.[21] As the vehicle user no longer controls the driving functionality, it was uncertain whether the requirement of compulsory insurance could be implemented. Furthermore, under the RTA, the test of use is 'control of the vehicle'. Therefore, as established in *Brown v Roberts*, passengers were not covered under the insured driver's policy, as they did not qualify as a vehicle user.[22] When using a CAV, the control test becomes obsolete, as the user qualifies more as a passenger than a driver, and thus existing insurance laws were inapplicable to this new technology.

The AEVA sought to bridge this gap and provides an extension of the existing insurance framework. A user must take out insurance to make use of an AV, and in the event of a crash, the insurer immediately incurs the liability. This has been the policy decision of legislators, placing first instance liability upon the insurer.[23] What this avoids is the need

[16] Robert M Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet and Maxwell, 2016), 23-001.
[17] See RTA 1988 ss 1, 2 and 3 outlining the criminal offences that may be committed.
[18] ibid, ss 4 and 5 outlining the negligent acts that may be committed.
[19] SAE International, J3016_201609, 17.
[20] ibid.
[21] As noted by Lord denning in *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, 760: 'The policy of insurance which a motorist is required by statute to take out must cover any liability which may be incurred by him arising out of the use of the vehicle by him.'
[22] *Brown v Roberts* [1965] 1 QB 1.
[23] Centre for Connected and Autonomous vehicles, 'Pathway to driverless cars: Consultation on proposals to support Advanced Driver Assistance Systems and Automated Vehicles Government Response' (Centre for

for product liability, which was a non-starter due to its non-compulsory nature and limited application.[24] A key theme of the legislation is its approach, one which predicts future technology and seeks to combat any subsequent disputes by being one step ahead of the developments. This evolved in light of the ridge between the notoriously slow pace of the legislative process in modernising the law and the rapid pace of technological development. This piece of legislation aims to position the UK as a global leader in this field, securing investment and setting the pace for regulation in the international community. With that aim in mind, chapter 1 will focus on the implications of hacking, on both an individual and systemic level, to the AEVA.

THE CHALLENGES CYBER-ATTACKS POSE TO THE AEVA

This chapter's focal point is the newly passed Automated and Electric Vehicles Act 2018 (AEVA). Appreciating its historical relevance is crucial to understanding its current form. However, with a future focussed approach, there is clear oversight of an overtly serious and likely threat. Through unpicking the various provisions, it will be demonstrated that the Act is unable to adequately deal with the challenges posed by cyber-attacks. I offer critique of four particular areas of the Act. Firstly, the definition of what constitutes an autonomous vehicle. Secondly, the AEVA's "safely driving" criteria and its ambiguity. Thirdly, the ability of the insurer to exclude liability and how hacking challenges the way this provision operates in practice. Finally, the cap placed on insurer's liability and how this proves problematic, following a large-scale hack.

WHAT CONSTITUTES AN AUTOMATED VEHICLE FOR THE PURPOSES OF THE AEVA?

The RTA defines a 'motor vehicle' as 'a mechanically propelled vehicle intended or adapted for use on roads.'[25] No new definition has been provided in the AEVA as to what constitutes a CAV. Instead, the Act places an obligation on the Secretary of State to keep 'an up to date list of all vehicles which may be capable of safely driving themselves'.[26] In practice, this will consist of vehicles primarily in Levels 4 and 5,[27] due to their minimal risk condition.[28] Furthermore, section 8(1) interprets a vehicle as driving itself when it is not

Connected and Autonomous Vehicles, January 2017) s3.11 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/581577/pathway-to-driverless-cars-consultation-response.pdf > accessed 18 February 2019.

[24] See Consumer Protection Act 1987, hereafter 'CPA 1987'.

[25] Irrespective of the form of power used to effect the propulsion. The phrase "mechanically propelled" appears to extend to any form of propulsion, e.g electricity in *Eleison v Parker* (1917) 81 J.P. 265; or steam in *Waters v Eddison Steam Rolling Co* (1914) 78 J.P. 327; RTA 1988 (n 2), s185(1).

[26] AEVA 2018, s1.

[27] SAE (n 19).

[28] Society of Automotive Engineers, "Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles" J3016 JUN2018, s3.17.

being 'controlled' or 'monitored' by an individual.[29] Connotations of these terms point towards a focus on the more highly automated vehicles, which would likely result in the exclusion of Level 3 vehicles.[30] Those vehicles with lower levels of automation and mere 'driver assistance systems'[31] are likely to be covered under the RTA 1988 and fall outside the scope of this thesis.

This can be contrasted with Germany, another key player in this arena, who developed its first regulatory response to the question of CAVs back in 2016. Through an amendment made to the Vienna Convention, the Autonomous Vehicles Bill was passed, allowing the testing and driving of autonomous vehicles on German roads.[32] The difference was in its initial definition of what constituted an autonomous vehicle and this led to those vehicles with higher levels of automation, primarily level 4 and 5, being excluded from the scope of the Act.[33] Unlike the AEVA, its short-sighted focus was concerned with the lower levels of automated vehicles, reflecting the technology that existed at the time. This approach hindered it from effectively regulating fully autonomous vehicles, a consequence the German Federal Highway Research Institute previously recognised.[34] Furthermore, the AV Bill did not change the general liability concept under German law and so it was incompatible with the current road traffic laws.[35] This resulted in both the driver and the 'owner' incurring liability when the vehicle was involved in an accident while in automated driving mode.[36]

The main drawback of this approach is that it requires substantial amendments in order to adapt to emerging technology. Such was the case in 2017, when further amendments had to be made to enable the testing of fully autonomous vehicles on the roads.[37] This is reflective of a minority view that 'evolution is occurring too rapidly and there are too many uncertainties for productive regulation at this time,' thus legislators should look to 'to develop standards and regulations over time, as the technology matures.'[38] It is upon these grounds that the two Acts primarily differ.

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[29] AEVA 2018, s8 sub-s1(a).
[30] SAE (n 19), 19.
[31] These include features such as lane-keeping systems, adaptive cruise control, park assist; See 'What is Ford Co-Pilot360™ Technology?' (Ford, 2019) <https://www.ford.com/technology/driver-assist-technology/#Co-Pilot360-00b35d044f3c7a92e4b0382cc075b09d-ai> accessed 26 March 2019.
[32] The amended Art 8 (5bis) and Art 39 of the Vienna Convention on Road Traffic entered into force on 31 March 2016 for Germany. The Bundestag voted for the amendments to be transposed into national law on 29 September 2016 and the implementation act entered into force on 7 December 2016.
[33] RTA; Straßenverkehrsgesetz, StVG (pre-2017 amendments).
[34] Department for Transport, 'The Pathway to Driverless Cars: A detailed review of regulations for automated vehicle technologies' (2015) 26.
[35] ibid.
[36] *Bundesgerichtshof* (*BGH*) (10 July 2007) in [2007] neue Juristische wochenschrift (NJW), 3120 marginal no 7.
[37] RTA; Straßenverkehrsgesetz, StVG, s(1)(a) and (b).
[38] James M Anderson, Nidhi Kalra, Karlyn D Stanley, Paul Sorensen, Constantine Samaras and Oluwatobi A. Oluwatola, Autonomous Vehicle Technology, RAND Corporation (RAND, 2016) 139

The AEVA avoids the need for any substantial amendments or revisions through adopting a future-gazing approach, as opposed to the incremental approach taken by German legislators. This actively combats the rift which is often drawn between the rapid pace of technological development and the notoriously slow pace of change within the law. Public Bill Committee member Karl Turner had stressed that 'there is a real risk in not legislating now'[39] as opposed to the problems that might be faced if it is done 'later down the line.'[40] As a result, the AEVA has bravely taken this regulatory step forward and attempted to be a market leader. Yet, what must be noted is that it still remains a mere 'skeleton and that regulation will have to come as technology improves.'[41] However, this approach has led to the ambiguity of certain terms within the Act, such is true for the criteria of "safely driving itself". [42]

THE "SAFELY DRIVING" CRITERIA

The aforementioned Level 4 and 5 vehicles will need to satisfy the requirement of 'safely driving themselves'[43] to be listed by the Secretary of State as a CAV and thus legally be allowed to drive on public roads. This test requires two conditions to be met; firstly, the vehicle has to be able to drive 'safely' and secondly, that the driving needs to be carried out by the vehicle itself. Focusing on the former, there is no specification within the Act as to what this means. It is submitted that the Secretary of State may interpret this along two contrasting lines. Firstly, as an objective standard. In order to satisfy the 'safely' requirement, both the hardware and software need to be in working order, fully updated and capable of performing on the roads. This has been the approach of the German legislation, requiring that the vehicle's 'automated functions are working properly' in order for it to drive on public roads.[44] In the event of a hack, in which one of the sensory systems[45] is likely to fail or at the very least, compromised,[46] it is suggested that such a standard of safety will not be met by the vehicle. This has profound implications when seeking to rely on the AEVA to obtain compensation. Firstly, insurers may seek to evade liability by claiming that the hacked vehicle was not fit to drive on public roads, as it was unable to meet the standard criteria to be covered under the Act. Secondly, the list of CAVs

<https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR443-2/RAND_RR443-2.pdf> accessed 21 March 2019.

[39]PBC Deb (Bill 112) 14 November 2017, 133 <https://publications.parliament.uk/pa/cm201719/cmpublic/Automated/PBC112_Combined_1-7_16.11.2017.pdf> accessed 15 March 2019.

[40] ibid.

[41] ibid.

[42] AEVA 2018, s1(a).

[43] ibid.

[44] RTA (n 35).

[45] G De La Torre (n 4), 2

[46]Alexander Polyakov, 'How AI-Driven systems can be hacked' (Forbes, 20 May 2018) <https://www.forbes.com/sites/forbestechcouncil/2018/02/20/how-ai-driven-systems-can-be-hacked/#7256217979df> accessed 18 March 2019.

must be kept 'up to date'[47] and in the event of a hack, certain vehicles may be removed, affecting the various policies already in place. In either case, it appears that the objective approach is taken and victims may be left without compensation.

Alternatively, Schellekens has submitted a more subjective test, in which the safety of the vehicle is to be determined relative to the capabilities of a human driver.[48] Conceptually this does prove to be a difficult test to meet, as the skills between drivers vary significantly. However, the standard would, in practice, match that of the safest human driver, who in the given situation, would fare no better in preventing the accident from occurring.[49] This may be more favourable, as it does allow for error and mistakes. However, in the event of a hack, it is uncertain as to how such a standard could apply.

When the Secretary is faced with interpreting the Act, as no current standard is proposed, it is uncertain as to whether an objective or a subjectively human test would be favoured. Considering the implications of connectivity however, it is submitted that a safety standard may be derived from the number of other vehicles it may be connected to. The main advantages of connected vehicles are that they facilitate 'safer quicker and more efficient movement.'[50] The more connected the fleets become, the more they are able to take advantage of these benefits, establishing a new standard of what may be considered 'safe'. Tests can be carried out to establish a minimum level of connectivity which when achieved, constitutes a level of safety through which the driving may be assessed. This may offer an alternative to the existing standards. However, its application in the event of a large-scale hack may prove problematic. Although it establishes a level of safety by improving the manner in which vehicles operate, the more connected the vehicles, the more vulnerable it is to cyber threats. It is connectivity that facilitates the possibility of a large-scale attack and thus its use as a standard of safety appears paradoxical in this context.

In the earlier House of Commons stages, Karl Turner had proposed an amendment which would have added the much-needed clarification. This is set out below:

> '(c) an automated vehicle may be listed, under section 1,
>
> as being capable of driving itself "safely" if the
>
> vehicle is designed and manufactured to be—

[47] AEVA 2018, s1.
[48] Maurice Schellekens, 'Self-driving cars and the chilling effect of liability law' (2015) *CLS Rev* 506, 510.
[49] ibid.
[50] Atkins, 'Connected and autonomous vehicles, Introducing the future of mobility' (Atkins, 2018) 2 <https://www.atkinsglobal.com/~/media/Files/A/Atkins-Corporate/north-america/sectors-documents/highways-and-bridges/library-docs/brochures/CAV_Report-NorthAmerica_v2.pdf> accessed 21 February 2019.

> (i) capable of driving itself in a manner unlikely to cause damage to the automated vehicle or another vehicle, or injury to a person, on the road or surrounding area, and
>
> (ii) protected from hacking risks that the manufacturer knew, or ought reasonably to have known, are likely to cause damage to the automated vehicle or another vehicle, or injury to a person, on the road or surrounding area.'[51]

Amendment (ii) provides guidance that is superior to the proposals previously discussed. It is suggested that the failure to include this clarification amongst the Act will hinder the Secretary's task of identifying the relevant CAVs. With this task in the not so distant future, it is proposed that the Legislators should look at returning to these amendments to flesh out the 'skeleton'[52] that is the AEVA.

Turning to the 'driving themselves' criteria, it is submitted that a cyber-attack poses a fundamental issue. The Act offers clarification on its definition stating that a vehicle will be deemed to be driving itself when it 'is operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual.'[53] There is no indication as to whether this is internal or external control. The assumption is that the drafters of this legislation were concerned with internal control, presumably from a driver, in order to differentiate it from lower levelled automated vehicles. However, it is uncertain what this means in relation to 'self-parking' and 'summoning' functions, which both involve the 'driver' controlling or at the very least monitoring the vehicle externally through a smart device, functions already performed by Tesla vehicles.[54] In the event that a third party is injured during either of these functions, a highly likely prospect, it is uncertain as to whether the Act will apply.

Turning to the matter of hacking, it is the author's view that a cyber threat may constitute a level of external control. If a hacker is able to control the driving functionalities of the

[51] PBC Deb (n 41), 133.
[52] ibid.
[53] AEVA 2018, s8(1).
[54] The Tesla Team, 'Summon Your Tesla From Your Phone' (Tesla, 10 January 2018) <https://www.tesla.com/blog/summon-your-tesla-your-phone> accessed 4 March 2019.

vehicle remotely, then a hacked autonomous vehicle will fail to qualify under the scope of the AEVA. Insurers may seek to exclude liability by making the case that a hacked vehicle does not fall within the AEVA's definition of a CAV. This may prove detrimental to victims as it significantly restricts their options for compensation.

EXCLUDING LIABILITY UNDER THE AEVA

The AEVA imposes strict liability upon an insurer to pay out following an accident of a CAV. This obligation is limited under section 4, which outlines two main conditions regarding the onboard software of the vehicle which could enable the insurer to limit or exclude liability altogether. These are set out below:

> '4. Accident resulting from unauthorised software alterations or failure to update software
>
> (1) An insurance policy in respect of an automated vehicle may exclude or limit the insurer's liability under section 2(1) for damage suffered by an insured person arising from an accident occurring as a direct result of—
>
> (a) software alterations made by the insured person, or with the insured person's knowledge, that are prohibited under the policy, or
>
> (b) a failure to install safety-critical software updates that the insured person knows, or ought reasonably to know, are safety-critical.' [55]

Under s4(1)(a) 'alterations' are not specifically defined by the Act.[56] However, postulating the intentions of the legislators, such a provision was designed to prevent modifications which enable system reconfigurations, i.e. maximum speed or braking distances. It is submitted that as a protective measure, policy providers will most likely seek to be as restrictive as possible, prohibiting almost any alterations made to the vehicle's software.

Hacking raises a question as to alterations 'made by the insured person'. Sinanian argues that 'over the air' updates, essential for the functioning of the vehicle, may be 'mimicked'[57] by hackers and installed on vehicles, essentially carrying out an unauthorised alteration to the onboard software. It is submitted that 'over the air; updates, which have been modified

[55] AEVA 2018, s4.
[56] ibid s4(6).
[57] See Michael Sinanian, 'Jailbreak: What Happens When Autonomous Vehicle Owners Hack into Their Own Cars' (2017) 23 Mich Telecomm & Tech L Rev 357.

or overridden by hackers, may constitute an alteration for these purposes.[58] On the one hand, insurers may seek to limit liability based on this line of reasoning, as the policy agreement would unlikely include the alteration in question. However, from the insured's perspective, they may seek to rely on the fact that such an alteration was carried out without their knowledge. If this position is successful, an insurer will be unable to exclude their liability if a CAV has been hacked in this manner. This may prove financially damaging on a large-scale hack.

Under s(4)(1)(b), the Act does not specify whether there is an allowance of time, where upon expiration, the software must have been installed. This is largely due to the complexities in qualifying what a 'safety critical' update constitutes. The AEVA does however provide clarification on this matter/ It states that an update would be safety critical if 'it would be unsafe to use the vehicle in question without the updates being installed.'[59] Contention over 'unsafe' does leave the matter unresolved.[60] For the moment, it may be safe to assume it will be interpreted according to current understandings of safety in motor insurance law.[61]

On the matter of 'safety critical', the practicalities of using the vehicles propose a set of problems. In a move away from owner-drivers to more fleet based and shared vehicles, complexities arise as to the responsibility for updating the vehicle. With numerous people falling under such categorisation, the responsibility to update appears burdensome. However, legislators are assuming that in practice, 'the overwhelming majority of software updates will be automatically installed over-the-air without the owner needing to do anything.'[62] However, it is questionable whether all manufacturers will take this approach. The installation of an update renders the vehicle unresponsive and may impact upon the passenger's journey if it has to pull over at some point to install new software.[63] Users might avoid vehicles in which they are unable to choose where and when updates are installed,impacting upon whether manufacturers make this an industry standard policy.[64]

[58]Cliff Banks, 'Connected car over the air updates not a sure thing' (The Banks Report, 28 November 2016) <http://www.thebanksreport.com/manufacturers/connected-carover-the-airupdates> accessed 21 February 2019.
[59] AEVA 2018, s4(6)(b).
[60] Prof Robert Merkin QC and Margaret Hemsworth, *Law of Motor Insurance* (2nd edn, Sweet and Maxwell, 2015) 410.
[61] See *Barrett v London General Insurance Company Limited* [1935] 1 KB 238, 241.
[62] Baroness Sugg, 'Response to second reading of the Autonomous and Electric Vehicles Bill' (Department for Transport, 2018) <http://data.parliament.uk/DepositedPapers/files/DEP2018-0391/Baroness_Sugg_letter_-_terminology_in_the_AEV_Bill.pdf> accessed 15 March 2019.
[63] Gareth Corfield, 'UK gov expects auto software updates won't involve users' (The Register, 9 May 2018) <https://www.theregister.co.uk/2018/05/09/autonomous_vehicles_update_software_ota_uk_gov/> accessed 15 March 2019.
[64] ibid.

It is submitted that there is a possibility that vehicles may be able to download and install updates whilst running. The Act remains silent on the matter of an accident occurring whilst such a process is being carried out. Precautions must be taken by insurers to fully inform policy holders of their responsibility for updating onboard systems and liability potentially faced if they fail to do so. Manufacturers must take on the responsibility of providing clarification on which updates qualify as safety critical.. However, some have raised concerns of a 'blanket policy of labelling'[65] all updates as safety critical. This could prove detrimental to the users, as insurers will have an easy excuse to exclude liability in the event of a hack.

THE CAP ON COMPENSATION

As this Act serves as an extension of the RTA, the same limitations exist in relation to the cap placed on potential pay-outs by insurers. This is set at a maximum of £1,200,000.[66] In the event of a large-scale hack, it is suggested that the total damage caused will amount to demands of compensation over and above this maximum threshold. Urban areas will likely see the full-scale adoption of the CAVsas these locations will provide opportunities for the many benefits of the technology to be fully realised. . In the event of a mass hack, urban areas are the most vulnerable and subject to the highest risk as they contain the highest value real estate and the densest population per square foot. Latham J opined in *Lunt* that a vehicle constitutes a "dangerous weapon."[67] The reality behind this reasoning will be demonstrated through reference to three independent attacks which used motor vehicles.

The two terrorist bombing attacks in the London financial district, one in 1992[68] and the other in 1993[69] and the other in Manchester in 1996[70] were all carried out through the use of a motor vehicle. The result of these attacks led to property damage of $897 million, $1212 million and $996 million respectively.[71] A further concern is pedestrians. They pose an easy target for hacked vehicles seeking out destruction. In order to get a flavour of how

[65] Claire Williams, 'Self-driving cars and "safety-critical" software updates' (Technology law update, 30 November 2017) <https://www.technology-law-blog.co.uk/2017/10/self-driving-cars-and-safety-critical-software-updates.html> accessed 13 March 2019.
[66] RTA 1998, s145 sub-s(4)(b).
[67] *Lunt v Khelifa* [2002] EWCA Civ 801, [20] *per* Latham LJ.
[68]The Associated Press, 'Car Bomb Kills at Least 2 and Hurts 80 in London' (The New York Times, 11 April 1992) <https://www.nytimes.com/1992/04/11/world/car-bomb-kills-at-least-2-and-hurts-80-in-london.html> accessed 3 January 2019.
[69]'1993: IRA bomb devastates City of London' (BBC News, 24 April 1994) <http://news.bbc.co.uk/onthisday/hi/dates/stories/april/24/newsid_2523000/2523345.stm> accessed 3 January 2019.
[70]Rumeana Jahangir, 'Manchester IRA bomb: Terror blast remembered 20 years on' (BBC News, 15 June 2016) <https://www.bbc.co.uk/news/uk-england-manchester-36474535> accessed 3 January 2019.
[71] Jessica Dillinger, 'Most Expensive Terrorist Attacks In The World' (Worldatlas, 25 April 2017) <https://www.worldatlas.com/articles/the-price-of-terrorism-the-most-expensive-terrorist-attacks-in-the-world.html> accessed 20 March 2019.

much this could cost, in 2017, the average personal injury claim from motor vehicles in the UK stood at £10,816.[72] Multiplied amongst numerous victims, this places a significant financial burden upon insurers. From this data, it is clear as to how much damage can be caused and the massive strain that is left on insurers. Although it might be in the insurer's interest to cap this amount, it is in the public interest that these amounts be extended. However, the extension of the caps will be fairly limited in practice. The possible remedies to this will be discussed in the following chapters.

The aforementioned German Act increases the maximum liability limits by 100%, with the cap on property damage set at €2 million and death or injury set at €10 million.[73] The move was done to combat the high risk of the current technology and risks that stage three or four vehicles pose with the handover phase of driving.[74] This does raise the question of whether the U.K should follow suit. Although the current figures are reflective of the current technology and the objective of the testing of the vehicles, it is of importance that the high risk of the vehicles, even if not purely for the coverage of hacking, in their early stages of testing and implementation receive adequate cover when accidents occur.

CONCLUSION

The above critiques illustrate the AEVA's inadequacy in handling the challenges posed by hacking. This proves detrimental to victims of a hacked CAV and is amplified when this is extended to a systemic hack across an entire fleet. Considering the implications of the latter, the cap placed on compensation severely limits a route to compensation for victims. The AEVA has failed to provide clarity for insurers on this matter leaving their liability in the event of a cyber-attack unresolved. In chapter 2, the position of insurers will be considered in light of these critiques, to determine whether the insurance industry is able to accommodate the compensation arising out of a cyber-attack on CAVs.

ALTERNATIVE ROUTES WITHIN THE INSURANCE INDUSTRY

Chapter 1 illustrated the conceptual and interpretational challenges posed by hacking, creating much uncertainty around the insurer's first instance liability as imposed by the AEVA.[75] ABI and Thatcham Research have stated that "In the event of a systemic attack, it is clearly inappropriate that this be seen as a responsibility for motor insurers, and if

[72] 'Average motor insurance claim at a record level says the ABI' (ABI, 9 March 2019) <https://www.abi.org.uk/news/news-articles/2018/03/average-motor-insurance-claim-at-a-record-level-says-the-abi/> accessed 12 February 2019.
[73] RTA 1988, s12.
[74] Aaron Turpen, 'Switch from autonomous driving to manual control opens window of risk' (New Atlas, 8 December 2016) <https://newatlas.com/stanford-autonomous-driving-manual-transition-danger/46832/> accessed 12 February 2019.
[75] AEVA 2018, s2.

adequate alternative measures are not established, this could make providing insurance for automated vehicles unattractive or even entirely unviable."[76] Alternative routes within the insurance industry exist, the caveat being that both require the classification of the event as a terrorist act. Pool Reinsurance Company (Pool Re) and the Motor Insurance Bureau (MIB) both provide cover in the event of a terror attack, with Pool Re specifically providing for cyber terrorism. They do however cover two separate aspects, the MIB has its focus on injury and death whilst Pool Re turns to the commercial property damage. However, it will be demonstrated that their narrow focus and under-inclusive policies preclude them from adequately dealing with the problem at hand.

It is proposed that an 'adequate alternative measure' would be the provision of a cyber insurance policy. Such a policy would be integrated into the motor insurance policy and would seek to provide cover in the event of a hack and can be extended to an even wider policy concerning data protection.[77] There is a range of difficulties in providing such coverage, however, the benefits far outweigh the detrimental impact upon victims of such an attack.

A SYSTEMIC CYBER-ATTACK AS A TERRORIST ACT

Two systems are of particular interest in providing the required compensation. Firstly, the MIB. This is a UK guarantee fund that compensates victims of negligent, uninsured or untraced drivers.[78] It is facilitated by the contract between the MIB and the secretary of State, namely the Uninsured driver's agreement[79] and the Untraced drivers agreement,[80] which enables a third-party victim to claim against the Bureau itself. The fund is financed through insurance premiums and the typical annual cost is £30 from each insured driver's insurance policy.[81] It has been extensive in its coverage with the total compensation paid out since 1946 in excess of £2 billion.[82] The strength of the MIB is its already established infrastructure with its membership and funding scheme indicating the extent to which it has integrated into the insurance industry. As its primary form of compensation relates to death or injury, this will be the focus of the discussion. [83]

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[76] Association of British insurers and Thatcham research (n 12), 9.
[77] Data protection and wider cyber security concerns will not be covered under the scope of this thesis. However, their inclusion is for the completeness of discussion, as the argument for cyber insurance is stronger when it covers more than physical damage resulting from a hack; See Department for Transport (n 36), 100-108.
[78] John Birds, *Birds' modern insurance law* (10th edn, Sweet and Maxwell, 2016), 430.
[79] Motor insurers Bureau, 'uninsured drivers' agreement' (2015).
[80] Motor insurers' Bureau, 'untraced drivers' agreement' (2017).
[81] Lucy Trevelyan, 'The Motor Insurers' Bureau ('MIB')' (Inbrief, 2019) <https://www.inbrief.co.uk/motoring-law/motor-insurers-bureau/> accessed 25 March 2019.
[82] ibid.
[83] Cover provided for property damage is limited to £1 million (clause 11 of the 2015 uninsured driver's agreement) and is thus more adequately dealt with under the policy of Pool RE for purposes of terrorism.

Secondly, Pool Reinsurance company (Pool Re), set up by the British Government and the association of British insurers (ABI) to provide reinsurance cover losses due to acts of terrorism.[84] It is a bona fide mutual reinsurance company[85] comprising of approximately 115 insurance company members and 120 Lloyd's syndicates.[86] Its primary role is to "enable the commercial market to underwrite the risk of damage to commercial property caused by an act of terrorism at relatively risk-reflective rates by mitigating their exposure to the catastrophic losses associated with major attacks".[87] The Scheme provides comprehensive cover for damage to commercial property and the associated business interruption costs. Since its foundation, Pool Re has provided effective protection for the UK economy and currently underwrites over £2 trillion of exposure in commercial property to terrorism risk across the UK mainland.[88] It has since expanded its cover to include acts of cyber terrorism, and this will form the basis of the discussion.

The Motor Insurer Bureau's Expansion to Include Acts of Terrorism

The MIB traditionally excluded acts of terrorism. Previously, under the 2015 Uninsured Drivers Agreement, clause 9 stipulated that the "MIB is not liable for any claim, or any part of a claim, where the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism within the meaning of section 1 of the Terrorism Act 2000."[89] This was amended by the 2017 agreement after it was found that this exclusion was not permitted under EU law.[90] Under this agreement, Article 75 of the articles of association, insurers were obligated to deal with claims which resulted from the use of a vehicle in a terrorist act.[91] All UK insurance companies are under a compulsory obligation to be a part of the membership of the MIB,[92] and thus all UK insurers incurred this liability.

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[84] Reinsurance Act (Acts of Terrorism) 1993, s2(a).
[85] Insurance Companies Act 1982, s3.
[86] Elizabeth A Kessler, 'Political Risk Insurance and the Overseas Private Investment Corporation: What Happened to the Private Sector?' (1992) 13 NYL SOH J INT'L & ComP L 203, 206.
[87] Pool Re, 'About Us' (Pool Re 2018) <https://www.poolre.co.uk/who-we-are/about-pool-re/> accessed 4 December 2018.
[88] ibid.
[89] Uninsured driver's agreement (n 81) Chapter 23, Section 3.
[90]Harper Macleod LLP, 'Motor Insurers Bureau - new Untraced Drivers Agreements in force as of 1 March 2017' (Harper Macleod, 1 March 2017) <https://www.harpermacleod.co.uk/hm-insights/2017/march/motor-insurers-bureau-new-untraced-drivers-agreements-in-force-as-of-1-march-2017/> accessed 7 March 2019.
[91]MIB Members' consultation, 'terrorism liabilities' (MIB, 7 February 2018) <https://www.mib.org.uk/media/398358/mib-members-consultation-terrorism-liabilities.pdf> accessed 7 March 2019.
[92] Matthew Channon, Lucy McCormick and Kyriaki Noussia, *The Law and autonomous Vehicles* (Routledge, 2019), 32.

Seeking to change this arrangement, a vote was held in 2018 to remove this obligation, placing the sole responsibility on the MIB, funded through the MIB levy system.[93] Members overwhelmingly supported this move, achieving the 75% majority vote required for the alteration of the articles to be effective.[94] The move follows concerns by motor insurers and reinsurers in relation to cover and pricing for motor terrorism risks after several domestic and international terrorist events. As of the 1st of January 2019, the MIB will deal with all third-party motor claims where terrorists driving vehicles either kill or injure people.[95] The market will continue to fund the MIB through a levy, in the same way as they deal with uninsured or untraced drivers currently.[96] Their worst-case scenario predicts up to 3 terrorist attacks in a year with a maximum of just over £60 million in pay-outs.[97]

On the one hand, the MIB have considered the implications of terrorism when it has been "caused by, or arising out of, the use of the vehicle."[98] This requirement of "use" under the RTA has been developed by case law, most notably in the EU case *Vnuk*.[99] This case sets out that insurers will be obliged to cover damages that are a result of the use "…that is consistent with the normal function of that vehicle..".[100] The MIB argues that in the case in which a "terrorist drives a vehicle at innocent pedestrians,"[101] the movement of the vehicle will constitute "a use consistent with the normal function of the vehicle"[102] and thus would fall within the cover provided. This approach was intentional as to exclude cases, examples of which were covered in chapter 1, where parked vehicles were fitted with bombs and detonated remotely, causing devastating damage to property and injuring numerous people. [103] It is suggested that this line of reasoning could be extended to cover hacks. In the event that a CAV is hacked and remotely controlled by an individual, by virtue of the vehicle's motion, it is being utilised for its normal function of propelling itself along a road. However, it is unlikely that the MIB sought to cover

[93] MIB Members' consultation, 'Terrorism Liabilities' (MIB 7 February 2018), 3 <https://www.mib.org.uk/media/411959/mib-members-response-to-consultation-terrorism-liabilities-100418.pdf > accessed 7 March 2019.
[94] Mark Hemsted, 'MIB to handle motor terrorism claims' (Clyde and Co, 25 July 2018) <https://www.clydeco.com/blog/insurance-hub/article/mib-to-handle-motor-terrorism-claims> accessed 4 December 2018.
[95]Motor insurers Bureau, 'Articles of Association' (MIB, June 2018) Article 75(2)(viii) <https://www.mib.org.uk/media/423529/mib-articles-of-association-19-july-2018.pdf> accessed 7 March 2019.
[96] ibid.
[97] MIB Members' consultation (n 93), 8.
[98]RTA 1988, s145(3)(a).
[99] *Vnuk v Zararovalnica Triglav* (2014) C-162/13.
[100] ibid.
[101] MIB Member's consultation (n 93) 12.
[102] ibid.
[103] ibid.

such acts under its policy and thus the success of a claim of this sort appears improbable.

On the other hand, the current policy is one which remains driver central. The terrorist in question must be in control and be driving the vehicle in order for a claim to be made.[104] In the *Anderton* case, the driving of a vehicle was defined as "a person sitting in the driving seat directing and controlling the movement of the vehicle by means of a steering wheel, using the brakes as and when required, the engine being used for propulsion".[105] The obvious problem arises in a situation where a terrorist has taken control of the vehicle and engaged autonomous features of the vehicle. The extent to which the liability can then be attributed to the terrorist is not covered or even considered. A further problem is posed in the instance of a hack to a fully autonomous vehicle. A terrorist may remotely control the driving functionality of the vehicle to the extent where this control is synonymous with the provision's interpretation of "driving". It is doubtful whether such action will fall under the vision the MIB has for this new development in its policy.

Adapting the MIB to Connected and Autonomous Vehicles

The biggest threat to the existence of the MIB is the very motive and objectives that define its purpose in the insurance market. It was founded and operates today to deal with unidentifiable drivers. According to the Royal Society for the Prevention of Accidents, "95% of all road accidents involve some human error, and in 76% of road accidents the human is solely to blame."[106] CAV's will significantly decrease the human error component[107] and the lack of accountability and intractability of vehicles will witness a decline. As standard, the vehicles utilise a range of cameras and transmit large quantities of data which could pinpoint the time and location of any incident. The government welcomes the use of these technologies to be able to determine liability, provided the data is stored and accessed appropriately.[108] Furthermore, it is submitted that CAVs will implement black box technology. A black box is "a device in an automobile that records information which can be used

[104] MIB Member's consultation (n 94), 11-12.
[105] *McQuaid v Anderton* [1981] 1 WLR 154, 155-156.
[106]'City safety: driver behaviour and urban driving' (*Mixtelematics*, 14 July 2014) <http://www.mixtelematics.co.uk/blog/city-safety-driver-behaviour-and-urban-driving> accessed 12 March 2019.
[107] As noted by the association of British insurers (ABI): 'The benefits of driver assistance and automation come from eliminating driver errors that contribute to causing collisions', in ABI and Thatcham Research, 'Regulating Automated Driving: The UK insurer View' (July 2017) 24 <https://www.abi.org.uk/globalassets/files/publications/public/motor/2017/07/regulating-automated-driving/ > accessed 18 February 2019.
[108] ibid 110.

to monitor vehicle performance or determine a cause in the event of an accident".[109] Germany is already pushing for this as a compulsory requirement[110] and it is likely that the U.K will follow suit considering the considerable benefits it seeks to bring regarding safety and accountability.

For the MIB to exist in an age of CAVs, they must embrace the adoption of a cyber insurance policy. The MIB has already questioned the technology's impact on its levy system and is considering methods of adapting the means by which it raises funds.[111] Terrorism and other policies under the MIB need to find a way to adapt, switching the focus from the driver to the vehicle itself. Hacking and its ability to interfere with driving functionality may bring it within the scope of future policies. Untraceable and unidentifiable hackers of vehicles pose an ideal case to which the MIB could mould such a policy. This is a welcomed development as the attribution of blame and accountability of hackers is made incredibly difficult through the veil of anonymity they operate within through online networks. Moreover, such large-scale hacks are likely to be carried out by groups with complex organisational structures. Insurers lack the resources required to trace such culprits. Thus, the traditional role of the MIB may be revived, dealing instead with untraced hackers who have caused death or injury to third parties.

With its established position in the insurance market, such a policy should, in theory, come at no extra cost to the user. This can be achieved through reattributing funds from the traditional framework to a more cyber orientated one. One stumbling block for such an approach is that the AEVA does not establish any relationship with the MIB and so it remains unsettled as to whether the MIB is under an obligation to provide cover for CAVs.[112] The existing agreements have not been updated to include CAVs and so revision is required in either case in order for the MIB to step in.[113]

[109] 'Definition of black box' (*Merriam Webster Dictionary*)<https://www.merriam-webster.com/dictionary/black%20box> accessed 7 March 2019.
[110]Caroline Copley, Germany to require 'black box' in autonomous cars (*Reuters*, 18 July 2016) <https://www.reuters.com/article/us-germany-autos/germany-to-require-black-box-in-autonomous-cars-idUSKCN0ZY1LT?utm_campaign=trueAnthem:+Trending+Content&utm_content=578cf01e04d301656c3324ff&utm_medium=trueAnthem&utm_source=twitter> accessed 27 January 2019.
[111] MIB Strategic Review, 'Future direction: 2016 – 2020' (MIB 2016) <https://www.mib.org.uk/media/332294/issue-mibstrategicreview_futuredirection2016_2020highres.pdf> accessed on 5 December 2018.
[112] Channon (n 95), 32.
[113] ibid.

Pool Re and Terrorism Insurance

Pool Re has defined cyber terrorism as "an act of politically-motivated violence involving physical damage or personal injury caused by a remote digital interference with technology systems."[114] This is essentially a two-limb test. It is suggested that a hack which is carried out on a CAV falls within the requirement of "remote digital interference" and the resulting damage of crashed vehicles will constitute "physical damage or personal injury." The point of contention surrounds the criteria of "politically-motivated." Pool Re does not carry out this assessment itself, relying on government intelligence and sanction.[115] This might be a particularly high threshold to meet. Moreover, due to the "political stigma"[116] attached to such attacks, the government will be reluctant to declare an act is that of terrorism, unless the evidence is overwhelmingly so.

One major limitation is the myriad of complexities faced when tracing the perpetrators of cyber-attacks. This includes identifying the unspecified location of hackers, analysing the codes of the systems that were hacked and discovering the identities of the person or group involved in the attack. This is a resource draining process, the consequence of which is the excessively high premiums charged. Fleming "has been a vociferous critic of what his group perceives as exorbitant rates that are impervious to change". [117] This is made more controversial through their affiliation with the Government, in which they operate as the primary insurer of terrorism, due to many private insurers failing to compete with the size and resources that such a relationship facilitates.[118] Brice contends that the government, through making use of its unparalleled access to risk information, should be able to obtain cheaper premiums than what they currently charge.[119] Until such a time however, the scheme remains expensive, which serves as a barrier to effective insurance of cyber terrorism. Another consequence of Pool Re's process is that the extended investigations into such cyber-attacks may leave those who urgently require the compensation in a vulnerable position.

Another limitation is that the cover provided is restricted to commercial property, excluding personal injury and private real estate.[120] There is a high chance that a percentage of the damage caused will result in personal injury or death and private

[114] Tamara Evan et al, *Cyber Terrorism: Assessment of the Threat to Insurance* (Cambridge Centre for Risk Studies 2017).
[115] ibid.
[116] William B Brice, 'British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re' (1994) 15(3) UPaJInt'l BusL 441, 460.
[117] ibid.
[118] ibid.
[119] ibid.
[120].Question UIN 108926 from Neil Coyle MP to HM Treasury (20 October 2017).

property, perhaps in the form of residential housing, leading to many still left out of pocket. The procedural matters will delay pay-outs, leaving the large pool of funds out of reach, until a thorough assessment is reached. The narrow focus on terrorism precludes all other motives and instances where such motives cannot be ascertained. Furthermore, the rather high threshold established for an act of terror can potentially fall short for the borderline cases. Past successful claims under the scheme have been met by slow and infrequent payments under this government-subsidised insurance program.[121] Such has been the criticism of similar government backed reinsurance schemes, most notably Flood Re, as they fail to adequately and effectively distribute the required compensation.[122] Pool Re therefore would insufficiently provide for the proposed scenario.

CONSIDERING THE CASE OF CYBER INSURANCE

As information technology becomes more intertwined with motor vehicles so must cyber insurance begin to integrate into the field of motor insurance. Incrementally, as more CAVs are used on the roads, the traditional human fault-based model of motor insurance will cease to operate as before, ultimately rendering it non-commercially viable for insurers. It is estimated, for the US insurance industry, that CAVs will disrupt the insurance market to the extent of an estimated loss of $25 billion, a total of 12.5% of the total market by 2035.[123] Therefore, new methods of raising finance need to be adopted for insurance companies to maintain any share they have of the motor insurance industry. One such method could be through the provision of cyber insurance for motor vehicles. This sector of insurance is unexploited and highly lucrative for insurers, estimated to raise a potential $12 billion in annual premiums in the US, [124] which may help offset the potential losses incurred through declined use of previous models of motor insurance. These trends will soon be reflected amongst the UK insurance industry as insurance companies prepare to underwrite the potential £28 billion CAV market.[125] The AEVA has the potential to prime insurers in developing such policies, minimising the disruption and adequately insuring the emerging technology.

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[121] *Munton Bros Ltd v. Secretary of State for Northern Ireland* [1983] NI 369 (CA).

[122] Mateusz Bek and Johanna Hjalmarsson, 'Flood Re - Planning for the Future or Postponing the Inevitable' (2014) 16 Env L Rev 163.

[123]Lawrence Karp and Richard Kim, 'Insuring Autonomous Vehicles' (Accenture 2017) <https://www.accenture.com/t20170530T040532__w__/pl-en/_acnmedia/PDF-53/Accenture-Autonomous_Vehicles.pdf> accessed 21 March 2019.

[124] John Cusano and Michael Costonis, 'Driverless Cars Will Change Auto Insurance. Here's How Insurers Can Adapt' (*Harvard Business Review*, 5 December 2017) <https://hbr.org/2017/12/driverless-cars-will-change-auto-insurance-heres-how-insurers-can-adapt> accessed 21 December 2018.

[125] 'Market Forecast for Connected and Autonomous Vehicles' (Transport Systems Catapult 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642813/15780_TSC_Market_Forecast_for_CAV_Report_FINAL.pdf> accessed 14 March 2019.

One barrier facing the technology is the general distrust of the vehicles regarding their safety and high risk. Findings from surveys undertaken in the U.S., U.K., and Australia showed that 67.8% of the respondents "expressed moderate to high concerns in self-driving vehicle's security".[126] This includes concerns over cyber security. When asked "How concerned are you about the following issues related to self-driving vehicles?" 40.1% were very concerned with the security of the system (software) in relation to hacking and 39.9% were very concerned with the vehicle security in relation to hacking.[127] This can be traced back to media reports and the influence it has had on public perception. However, failings in past technology also play a role in diminishing the trust of the vehicles. This was seen in the *Flynn* case in which some Chrysler vehicles were susceptible to hacking and at threat of being controlled remotely.[128] The value in cyber insurance is, therefore, not limited to the financial benefits but may serve as a piece of mind to many users who wish to utilise the technology, tearing down the existing social barriers.

Developing such a policy will however prove troublesome for insurers. The creation of policies and pricing strategies is particularly difficult due to the uncertain risks and uncertain liabilities such a hack may propose. Although it might be possible to estimate the damage caused,[129] the certainty of it happening is incalculable, and this is an essential part of calculating policies for insurers. Furthermore, there is an inherent lack of case law on the matter and thus there is no existing precedent or ruling which may indicate the court's interpretation of the new legislation, serving as a further stumbling block for insurers.[130] When faced with a lack of data, insurers charge higher premiums.[131] Insurers need to be aware of the negative implications of producing expensive cyber insurance policies. The Department of Transport has predicted that standalone CAV premiums, i.e. those which exclude cyber insurance, will potentially be quite expensive.[132] The implications of not doing so may prove costly for consumers as they are forced to take out multiple policies. As Efford advises, "there might be a whole new area of insurance with clauses in the small print of an insurance policy that requires people to be covered in the event of an automated vehicle being hacked."[133]

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[126] Brandon Schoettle and Michael Sivak, 'A Survey of Public Opinion About Autonomous and Self-Driving Vehicles in the U.S. the U.K. and Australia' (UMTRI 2014), 40 <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/108384/103024.pdf> accessed 12 January 2019.
[127] ibid 14.
[128] *Flynn v FCA US LLC* (2017) WL 3592040, 19-23.
[129] De La Torre (n 4) 1; This is in relation to civilian casualties and deaths resulting from previous terror attacks where cars were driven into large groups of people, relevant for personal injury claims. For property damage amounts see Tamara Evan et al (n 118).
[130] Christopher C French, 'Insuring against Cyber Risk: The Evolution of an Industry (Introduction) (2018)' 122 Penn St L Rev 607.
[131] Paul Tullis, 'Self-Driving Cars Might Kill Auto Insurance as We Know It' (*Bloomberg*, 19 February 2019) <https://www.bloomberg.com/news/articles/2019-02-19/autonomous-vehicles-may-one-day-kill-car-insurance-as-we-know-it?srnd=hyperdrive> accessed 12 March 2019.
[132] Department for Transport (n 37), 111.
[133] Public Bill Committee (n 42), 139.

However, it is suggested that the expensiveness of premiums can be drastically cut down through accessing the large amounts of data across entire fleets enabling insurers to underwrite without having to wait for years of data. This element of connectivity, namely the massive amounts of real-time data that is generated, will turn the relationship with policyholders "from static and transactional to dynamic and interactive."[134] Cyber insurance should be affordable because it is essential, this is one manner in which it may be achieved. It is suggested that a truly successful cyber insurance policy should integrate within the existing motor insurance policy as to reduce costs and prevent the user from adopting a dual policy agreement in order to make use of the vehicles. However, cyber insurance is not compulsory in the way that motor insurance is. Legislators must consider whether such insurance should be made compulsory.

On balance, the reason underpinning the lack of consideration towards cyber threats is a result of the Law Commission opinion that the hacking of CAVs is to be dealt with within the confines of the Computer Misuse Act (CMA).[135] This follows the reasoning of Lord Hoffman's definition of a computer as a "device for storing, processing and retrieving information."[136] Since the vehicles make use of a collection of systems to collect, process and transmit data, the definition of a computer prima facie applies, and it falls within the scope of the CMA. I believe the commission has erred in this approach. Firstly, the CMA has been highly criticized for its inability to bring hackers to justice.[137] In the controversial *Bedworth* case[138] courts ultimately acquitted the defendant of three separate charges of conspiracy under the CMA, leading some commentators to doubt its ability to adequately deal with the crime of hacking.[139] Secondly, and most importantly, the CMA brings an action within the criminal court system. With the primary purpose of sentencing, fines are statutorily restricted. [140] As large sums of compensation will be required, it is clear to see how action under this approach is not appropriate. For these reasons, the AEVA should encompass rather than delegate provisions for hacking and cyber security, bringing an action under the jurisdiction of civil courts where compensation may be achieved.

[134] Deloitte Centre for Financial Services, '2019 Insurance Outlook - Growing economy bolsters insurers, but longer-term trends may require transformation' (Deloitte 2018), 29 <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Financial-Services/gx-fsi-dcfs-2019-insurance-industry-outlook.pdf> accessed 12 March 2019.
[135] Law Commission, Automated vehicles, A joint preliminary consultation paper (Law Com CP No 240, 2018) 161, 8.52.
[136] *DPP v McKeown* [1997] 1 WLR 295 (HL); [1997] 2 Cr App R 155 (HL) 163.
[137] Andrew Charlesworth, 'Between Flesh and Sand: Rethinking the Computer Misuse Act 1990' (1995) 9 Int'l YB L C&T 31.
[138] See Andrew Charlesworth, 'Legislating against computer misuse: the trials and tribulations of the UK Computer Misuse Act 1990', (1993) 4(1) JLIS 80.
[139] ibid.
[140] Computer Misuse Act 1990, s(3)(a); Criminal Justice Act 1982.

CONCLUSION

The difficulty of tracing hackers makes the application of terrorism specific policies an unlikely source of compensation for victims. Furthermore, the available policies have proven to be under inclusive when it comes to CAVs. However, the AEVA provides little guidance over the direction such insurance organisations should look at taking. In the time available before CAVs grace the roads, the AEVA needs to recognise the importance of cyber insurance. There are many barriers to overcome and clarity on behalf of the legislator will facilitate the accelerated adoption of the technology on a large scale. With compensation unlikely to flow from the insurance industry, Chapter 3 will consider whether the manufacturer should be the one to provide the compensation.

MANUFACTURER LIABILITY

SHOULD LIABILITY BE PLACED UPON THE MANUFACTURER?

Consideration must be given towards imposing liability upon manufacturers. One positive implication would be that manufacturers fine tune all their software before release as opposed to rushing it to market "in the hope that users will find the bugs and report them."[141] This will raise overall standards and instil a greater sense of trust in the technology. However, this does not appear to be the majority view. When introducing the Act to parliament, Clive Efford foresaw that manufacturers will claim that "every reasonable step has been taken to prevent hacking",[142] and thus the manufacturer will not "be held liable, and nor can the people who wrote the software. It is unlucky, but it is your responsibility as the driver of the vehicle, because your vehicle has been hacked and has caused an accident."[143] Users cannot be forced to incur such significant costs, especially if there is fault on the part of the user.

Schellekens advances the argument that if manufacturers are exposed to liability, this could initiate a "chilling effect" on the innovation of the technology,[144] at a time when it is incredibly crucial.[145] Childers furthers this point, arguing that in terms of the full capabilities that may be realised by level 5 vehicles and advanced A.I, the technology is still very much in its infancy.[146] The imposition of liability appears misdirected and may impede all future efforts in this sector to develop increasingly advanced vehicles. The approach of the UK has been to encourage the development and innovation of CAVs and thus, the imposition

[141] Joseph L Reutiman, 'Defective Information: Should Information be a "Product" Subject to Products Liability Claims?' (2012) 22 Cornell JL & Pub Pol'y181, 796.
[142] Public Bill Committee (n 42), 139.
[143] ibid.
[144] Schellekens (n 51).
[145] Seldon J Childers, 'Don't Stop the Music: No Strict Products Liability for Embedded Software' (2008) 19(1) U Fla J L & Pub Pol'y 125, 153.
[146] ibid 173.

of liability in this sense appears to counter their intentions and aims for the foreseeable future. For this reason, it appears unlikely that liability will be incurred by manufacturers.

It does appear that practice might dictate that manufacturers don't incur liability in the event of a mass hack. Sir Oliver Letwin makes the argument that taking responsibility for hacking will give way to the economic factors of many vehicle manufacturers as it "is not in the interests of particular manufacturers to worry very much about this issue."[147] As a manufacturer's primary concern is the production of something "good to drive, cheap and normally safe"[148] the additional obligation to ensure a higher standard of safety in regard to hacking will be secondary and potentially ignored. This is due to the additional costs involved, which would in turn create more expensive vehicles, impacting upon the competitiveness of the vehicle within the market. Letwin phrases it rather bluntly, "I am not particularly worried that Britain may be brought to a halt, because I am not Britain; I am a manufacturer, and I am answerable to my shareholders, not to the electors of the UK."[149] This statement does however ignore the role of corporate social responsibility. With matters of national security and public wellbeing, it is submitted that shareholders are not simply limited to those who have invested capital, but are extended to the government and more importantly, the public, who stand to lose the most in such an attack.

On the other hand, if the manufacturer is able to deflect responsibility in this manner, it opens up the consumer to considerable liability. This was raised by Clive Efford, who had requested that "an amendment requiring every step to be taken to protect the vehicles from hacking" be tabled into the Act.[150] Although this strikes a greater balance, considering the arguments against liability of manufacturers, it is unlikely that such a demanding provision will be included in the AEVA any time soon.

THE BARRIER OF SOFTWARE INTEGRATION IN PRODUCT LIABILITY LAW

In the case where an insurer is held liable for the hacking of a CAV, they may seek to be reimbursed by the manufacturer in instances where the root cause was faulty software or hardware. This route is granted to insurers by Section 5 of the AEVA 2018 under product liability law.

Prior to the development of CAV's product liability was relatively straightforward. Liability would result from faulty parts, design failure, defects or failure to warn.[151] A standard vehicle is unquestionably a product, neatly falling under the Consumer Protection Act's

[147] Public Bill Committee (n 42), 144.
[148] ibid.
[149] ibid.
[150] ibid 139.
[151] CPA 1987.

(CPA) definition as "any goods or electricity… and includes a product which is comprised of another product, whether by virtue of being a component part or raw material or otherwise".[152] A point of contention arises due to the fact that CAVs are not simply stand-alone vehicles. When introducing the Act to the House of Commons for its Fifth Reading, Minister for Transport, Mr. John Hayes quite rightly pointed out, "the critical thing is to understand that an autonomous vehicle will, in practice, be a combination of sophisticated software and technology—the mechanical components of the car and the software that drives it."[153] The intertwined relationship between software and hardware makes it difficult to treat the two separately, both in a practical and legal sense.

As a matter of interpretation there is uncertainty over whether software qualifies as a product for the purposes of the CPA. The current case law does not recognise software as a product under the CPA.[154] This has been the consequence of an outdated concept of goods, a matter recognised by Lord Penrose in *Beta Computers*.[155] The European Commission is expected to release guidance on this matter during the first half of 2019,[156] however, until such clarification is provided, it is uncertain whether it constitutes a service, product or both.

Assuming that it is classified as a product, the matter of software has further implications in the application of strict liability in relation to defects. The term 'defect' has been subject to change over time. The following body of case law indicates a shift from the once onus responsibility placed on manufacturers to a more balanced one which maintains a greater sense of equilibrium between consumer and manufacturer interests.

Justice Bernard Barton in *National Blood Authority*[157] first established that "if the level of safety was below the level consumers could properly expect, the product was defective, and the supplier liable, even though there might be nothing which could be done."[158] This was later overruled by Justice Gary Hickinbottom in *Wilkes,*[159] calling for the court to "maintain a flexible and holistic approach to the assessment of the appropriate level of safety."[160] Justice Geraldine Andrews in *Gee*[161] furthered this, establishing the current

[152] ibid s1(2)-(3).
[153] Public Bill Committee (n 42), 139.
[154] See *St Albans City and DC v International Computers Ltd* [1996] 4 ALL ER 481; R. *(on the application of Foster) v Secretary of State for Justice* [2015] EWCA Civ 281; *Computer Associates UK Ltd v Software Incubator Ltd* [2018] EWCA Civ 518, [2018] 2 All ER (Comm) 398.
[155] *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* [1996] SLT 604 [67].
[156] Commission, 'Report on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products' (Communication) COM (2018) 246 final.
[157] *A v National Blood Authority* [2001] 3 All ER 289.
[158] ibid.
[159] *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627.
[160] ibid.
[161] *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB).

standard of safety, "a defect is determined by the level of safety that the public was entitled to expect at the time the product was first introduced to market".[162] This has since been codified within section 3(1) of the CPA:

> "(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes "safety", in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury."[163]

Since the current test relies heavily on public perception, marketing will play an integral role in raising awareness and establishing a sense of trust in the technology. As discussed previously, the public perception of CAVs on the whole is relatively negative because most view the vehicles as untrustworthy, particularly following recent accidents. However, manufacturers should be discouraged from establishing unreasonable expectations in advertisements that make the claim that their autonomous vehicles will be "error free."[164] The modern consumer has high expectations of current technology. Manufacturers should be aware that this expectation is likely to transfer to CAVs, furthering the requirement to provide accurate and data driven advertisements which create a realistic rather than an idealistic perception of the product. If the current test is held at the "expected safety," it is then the obligation of software manufacturers to provide the users with all relevant information regarding risks and usage. However, with the users of vehicles placing their lives at risk, they would come to expect a high degree of safety. This establishes a rather high threshold for manufacturers to meet, emphasising the need to balance manufacturer and consumer interests. With the fast-paced development of the technology, this perceived level of safety will be subject to change and will lead to a great degree of uncertainty for the courts to ascertain.

It has been submitted that software may become "defective" if it is unable to differentiate between the regulation and rules of the road in one country, say England and different ones across the border in Ireland.[165] This may occur in instances where software is designed outside the territory where it is being employed. If users expect the vehicle to seamlessly drive between these two countries, then any accident arising out of the failure to recognise street rules may cause it to fall under a potential claim using product liability. This matter

[162] ibid.
[163] CPA 1987, s3(1).
[164] David C Vladeck, 'Machines Without Principals: Liability Rules & Artificial Intelligence' (2014) 89(1) Wash L Rev 117, 126.
[165] Michaela Herron, 'Autonomous Vehicles And UK Product Liability Law: Part 1' (*Law 360*, 19 November 2018) <https://www.law360.com/articles/1103022/autonomous-vehicles-and-uk-product-liability-law-part-1> accessed 6 March 2019.

is particularly relevant in a post-Brexit legal system. Current insurance and law relating to motor vehicles is heavily regulated by the EU's sixth consolidated motor insurance directive[166] which codifies previous motor insurance directives. This directive harmonises laws across all EU member states, but whether Britain will retain these laws and whether countries within the United Kingdom will adopt varying traffic laws is yet to be determined.

A CLAIM IN NEGLIGENCE

A claim under product liability may be established through the law of negligence. Negligence is predicated upon a duty to provide reasonable care to those who might foreseeably use their products.[167] In contrast to CPA, it is the reasonableness of the expectations of the product rather than the consumer's expectation that constitutes the focus for any claim. However, it is uncertain what a reasonable standard will be in this case. The courts will encounter difficulty in determining what such a standard may constitute as what is reasonable will change as the technology advances. In turn this will make it difficult to rely on previous cases when developing a new series of case law. It is submitted that a favourable approach, in this case, could be from a software testing perspective. "The manufacturer may argue that its extensive testing of the AV showed that the software reached an appropriate standard of driving ability and that this constitutes reasonable care by the manufacturer."[168] The primary advantage for the courts with this approach is that it avoids the requirement of extensively analysing the complex software, the focus instead rests on the observation of how the software operates.

However, as touched on previously, users of the vehicles, as they are placing their lives in the hands of the vehicles, will expect a high reasonable standard. This reasonable standard is the standard of the overall safety of the vehicle. The user cannot, however, expect a perfectly safe design — reasonable safety is not equivalent to absolute safety.[169] If it is unreasonable for manufacturers to expect automated vehicles to be fool proof, "courts might find that consumers should also not expect automated vehicles to be entirely free of software defects".[170]

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[166] Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

[167] *Donoghue v Stevenson* [1932] AC 562 (HL).

[168] Adam Sanitt, Shiv Daddar, Marcus Evans, Autonomous vehicles: United Kingdom (Norton Rose Fulbright, 2019) <https://www.aitech.law/publications/2018/q1/av-uk/> Adam Sanitt et al, 'Autonomous vehicles: The legal landscape of DSRC in the United Kingdom' (*Norton Rose Fulbright*, July 2017) <https://www.nortonrosefulbright.com/en-pk/knowledge/publications/85e2f81c/autonomous-vehicles-the-legal-landscape-of-dsrc-in-the-united-kingdom> accessed 21 March 2019.

[169] Mark A Geistfeld, 'A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation' (2017) 105 CLR 1611.

[170] Sunghyo Kim, 'Crashed Software: Assessing Product Liability for Software Defects in Automated Vehicles' (2018) 16 Duke L & Tech Rev 300.

THE IMPLICATIONS OF CONNECTIVITY

As the adoption of technology becomes more widespread, manufacturers will seek to exploit a share of the market. Mixed fleets from various vehicle companies will start to form a new network of transportation. Competing brands will, therefore, have to differentiate themselves from their competitors. This may be done through unique design, build quality and perhaps price, however, it is submitted that their choice of onboard software will set their product apart from competitors. On the one hand, market competitors may seek to collaborate when it comes to developing Autonomous driving functions. The sharing of skills and expertise may drive innovation, translating into higher economic returns. An example of this is the recent partnership between BMW and Daimler, the German automaker that owns Mercedes-Benz.[171] These two manufacturing giants have partnered together in order to advance developments into autonomous driving, with aims of building level 3 through to level 5 vehicles. Although, from an innovative perspective, this is favourable, it has profound legal implications.

Through opening the door for a product liability claim, the act allows an insurer to claim, in theory, from either a software developer, if the software is defective, or from a vehicle manufacturer, if a part was defective. If multiple vehicles are hacked, which have similar software installed, the developer's liability is no longer limited to a specific manufacturer, but to potentially multiple manufacturers using the software. This raises the question of how the allocation of liability between software, parts and vehicle manufacturers will be achieved during a hack which spans multiple vehicles. The insurer might face difficulties when claiming back if liability is to be spread throughout multiple entities, ultimately decreasing the amount to be reclaimed[172] and resulting in what Wenzel predicts as "endless litigation". [173]

CONCLUSION

It is unlikely that manufacturers will take responsibility for a systemic hack unless they are prompted by regulations or additional legal liability. The AEVA needs to reconsider the implications of this. The legislation was passed in an effort to stimulate investment and development of the technology in the UK, and thus it is uncertain whether steps will be taken which would, from a manufacturer's perspective, impede developments.

[171] Sean Szymkowski, 'BMW and Daimler team up for self-driving car development' (*The Car Connection*, 2 March 2019) <https://www.thecarconnection.com/news/1121794_bmw-and-daimler-team-up-for-self-driving-car-development> accessed 18 March 2019.
[172] Daniel A Crane et al, 'A Survey of Legal Issues Arising from the Deployment of Autonomous and Connected Vehicles' (2017) 23 Mich Telecomm Tech L Rev 191, 260.
[173] Scott L Wenzel, 'Not Even Remotely Liable: Smart Car Hacking Liability' (2017) U Ill JL Tech & Pol'y 49, 60.

The AEVA opens up the possibility to claim back through product liability law, but this body of law is largely un-adapted to deal with the demands of CAV technology. Current product liability requires urgent updates to better suit more technologically advanced products.

CONSIDERING A NO-FAULT COMPENSATION SCHEME FOR VICTIMS OF A SYSTEMIC CYBER-ATTACK

Chapter 1 has demonstrated the uncertainty surrounding the liability of insurers in the event of a CAV being hacked, even more so when this is carried out on a systemic level. The cover provided for by the AEVA can therefore not be relied upon by victims seeking compensation following such an attack. Chapter 2 explored the alternative routes that exist within the insurance industry to conclude that they were not developed with this event in mind and so their policies cannot be extended to provide any form of compensation. Chapter 3 established that manufacturers will not be held liable for such an event, the AEVA intentionally evades direct product liability claims to manufacturers, shielding them from any potential pay-outs. The result of this is twofold. Firstly, victims will be left without the much-needed compensation following such an attack. Secondly, city infrastructure will suffer crippling damage, requiring urgent compensation in order to recover. It appears unlikely that such cover will be available under existing frameworks. These eventualities are grossly unsatisfactory. It is submitted that the UK should not have to wait for such an event to happen in order to respond, action must be taken sooner in preparation for the looming threat that exists. This final chapter provides an outline for a no-fault compensation scheme (NFCS) which could be adopted to provide cover in such a scenario. It will focus on two fundamental aspects. Firstly, how such a fund would take shape and how it will deal with the challenges posed by hacking. Secondly, to explore how such a fund may be financed.

RECONCEPTUALISING A NO-FAULT COMPENSATION SCHEME FOR CYBER-ATTACKS

"A NFCS provides compensation without the need to find a responsible defendant and without proof of negligence and subsequent causality".[174] Schemes of this nature have been set up in New Zealand, Quebec, Israel and Sweden to deal specifically with the matter of car accidents.[175] Schellekens has submitted a proposal of a NFCS for driverless vehicles as an alternative to a legislative approach. Building on the groundwork of this proposal, it is submitted that there is much potential in adapting this to cover the compensation needed

[174] Maurice Schellekens, 'No-fault compensation schemes for self-driving vehicles' (2018) 10(2) Law, Innovation and Technology 314, 319.
[175] Robert H Joost, Automobile Insurance and No-Fault Law (2nd edn, Clark -Boardman -Callaghan, 2nd edn 1992).

following a systemic cyber-attack. The most promising characteristic of this scheme, in the context of a cyber-attack, is the lessened significance in providing evidence of negligence. Hackers are able to retain a large degree of anonymity online and tracing hackers in large scale attacks thus far has proved to be an unfruitful exercise.[176] Enabling victims to claim without the need to establish who is responsible makes this model suitable when faced with the initial challenge of identifying cyber criminals.

Another aspect is that, in most cases, NFCS often limit or exclude recourse to tort.[177] One of its main benefits is that it serves as a more efficient and faster route to compensation than the tort system.[178] As mentioned before, product liability, which is governed by the law of tort, is largely unequipped to handle the hacking of CAVs, "there is likely to be a lengthy multi-year—if not multi-decade—time period during which courts struggle to develop and/or adapt negligence and products liability jurisprudence to autonomous vehicles."[179] Therefore, it seems that it is more practical and cost effective to seek recourse through a NFCS than to gamble in the court system.[180]

From an insurance perspective, NFCS "pays out if and when a defined, uncertain factual event occurs".[181] In this case, it is suggested that the event could be defined along the lines of 'a hack which affects a fleet of vehicles, resulting in the damage and destruction of property and the injury or loss of life to persons'. One important point to note is that "a victim does not have a right to compensation in respect of all his harm but is limited to an amount fixed in advance in law."[182] A fund of this nature would not seek to entirely cover the losses incurred by victims as the amount of compensation and the number of claims would be quite extensive. Rather, the aim of the fund would be to distribute compensation according to the losses suffered in order to ease the burden incurred by victims. Moreover, it may "serve as an extremely useful stop-gap method of compensating victims until the jurisprudence in this area is better developed."[183]

[176] Larry Greenemeier, 'Seeking Address: Why Cyber Attacks Are So Difficult to Trace Back to Hackers' (*Scientific American*, 11 June 2011) <https://www.scientificamerican.com/article/tracking-cyber-hackers/> accessed 12 March 2019.
[177] Joost (n 181) ch 7.
[178] Michael K Steenson and Joseph M Sayler, 'The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating A Template for Compensating Victims of Future Mass-Tort Catastrophes' (2009) 35 Wm Mitchell LRev 524, 544.
[179] Tracy H Pearl, 'Compensation at the Crossroads: Autonomous Vehicles & Alternative Victim Compensation Schemes' (2019) 60 Wm & Mary L Rev 1827, 1863.
[180] Gillian K. Hadfield, 'Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund' (2008) 42 Law & Soc'y Rev. 645, 646.
[181] Schellekens (n 180) 319.
[182] ibid 319-320.
[183] Pearl (n 185), 1864.

There is, however, one major drawback to a NFCS. Unlike the well-established tort system, "victim compensation funds must be created anew each time they are utilized".[184] For something like hacking, it proves to be quite a novel situation which would require creating a new fund "without much of a blueprint."[185]

HOW COULD IT BE FUNDED?

Manufacturers

Schellekens advances the argument that manufacturers of CAVs should be obliged to take out the insurance to fund a NFCS.[186] In the event of a hack, it is the software of the vehicle that has failed to operate as intended, resulting in the vehicles causing widespread damage. "By taking out insurance, the manufacturer assumes responsibility for his product."[187] Existing NFCS are funded by the owners of the vehicles, the primary reason being that they are able to provide the much-needed information regarding the time, place, nature of the crash. Presuming they comply with data protection regulations,[188]it has been argued that the connectivity between the vehicles will enable manufacturers to gather large amounts of data on all their vehicles, thus making it easier for them to assume responsibility in the event that a vehicle crashes.[189] As of today, manufacturers such as Toyota have assumed this responsibility, compensating victims following the malfunction of its autonomous software.[190] It is submitted that in such instances this may be seen as advantageous to manufacturers as it serves as an alternative to costly and reputation damaging litigation.

However, as mentioned in Chapter 3, manufacturers are unlikely to take responsibility in practice. If the hack occurred after they had issued a safety critical update, there continues to be a strong case to exclude liability on their part. Although some manufacturers such as Volvo have come forward to accept responsibility in the event that their autonomous vehicle causes an accident,[191] it is

[184] ibid 1861.
[185] Steenson and Sayler (n 184), 544.
[186] Schellekens (n 180), 324.
[187] ibid.
[188] This is currently governed by General Data Protection Regulation (EU) 2016/679 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[189] ibid.
[190] Sophia H Duffy & Jamie P Hopkins, 'Sit, Stay, Drive: The Future of Autonomous Car Liability' (2013) 16(3) Sci & Tech L Rev 453, 454–55.
[191] Kirsten Korosec, 'Volvo CEO: We will accept all liability when our cars are in autonomous mode' (*Fortune*, 7 October 2015) <http://fortune.com/2015/10/07/volvo-liability-self-driving-cars/> accessed 21 March 2019.

uncertain as to whether this transfers to the context of NFCS. Furthermore, the fund will require all manufacturers to take out the insurance, and thus it is insufficient for individual manufacturers to contribute whilst others opt out.

Fuel Levy

An alternative to this form of funding may be derived from a fuel levy, much like how the Road Access Fund in South Africa currently operates.[192] A percentage of each unit of fuel constitutes an amount which is contributed to the fund each year. The AEVA lays out the framework through which such a development to electric and hydrogen refuelling infrastructures may be achieved thereby providing the ideal basis upon which such a levy may operate.[193] It can be viewed as a "compulsory contribution to social security benefits which is used only for the specific purposes as provided for in legislation."[194] However, a scheme of this nature will likewise require some statutory authorisation and could prove to be difficult considering the lobbying involved and the varying support of the public.

CONCLUSION

This form of NFCS does solve many of the issues raised throughout this paper and may be a viable and practical solution to the matter at hand. However, such a fund requires legislative backing and there is a myriad of complexities involved in setting up a fund of this size. A NFCS of this nature is a highly ambitious project and requires further research and studies in order to expand on the foundations set out above.

CONCLUSION

The ambitious move by UK legislators to take on the challenges posed by connected and autonomous vehicles must be commended. What they have been able to achieve is a unique position as regulatory leaders in this highly competitive field. However, the major criticism, as outlined in this paper, is how it overlooks the serious matter of cyber-attacks. This is particularly concerning considering the potential for such attacks to result in physically damaging consequences. Moreover, the AEVA is ill-suited to deal with the challenges posed to the policies it seeks to extend due to complications arising from interpretation in light of such an attack.

[192] 'Fuel levy' (*Road Accident Fund* 2019) <https://www.raf.co.za/About-Us/Pages/Fuel-Levy.aspx> accessed 4 March 2019.
[193] AEVA 2018, pt 2, ss10 and 11.
[194] ibid.

Many of the points raised were discussed during the Act's introduction to parliament, however, the failure to include such important alterations is a mistake that legislators should seek to amend. There is much potential in the fund outlined in chapter 4, however, it is suggested that more research is needed in this area. In sum, legislators, manufacturers and insurers should recognise this threat and act before any of the crippling consequences are felt by the public at large.

To what extent does English law provide parents with the right to determine their children's religious upbringing, to the detriment of the child's independent right to freedom of religion?

*Luke Masters**

ABSTRACT

In the context of recent developments prompting greater scrutiny of parents' religious rights and beliefs, this article explores the primacy of parental rights within English law and children's few religious rights. It demonstrates how the maintenance of deference to parents creates a gap in protection for most children in religious families whose parents will not come before family courts. It also explores how the treatment of children's rights minimises their status as developing members of society, by treating them as the objects of parental rights. It highlights how these two factors contribute to a perceptible lack of protection from harm which may be caused by parental beliefs. It therefore argues in favour of explicitly recognising children's independent right under article 9 (Art.9) of the European Convention on Human Rights, and their developing capacities as right holders to address these problems in the current framework. It further suggests children's empowerment as right-holders requires objective, critical, and pluralistic religious education and relationships and sex education.

INTRODUCTION

The primacy of parental rights within English law, over children's negligible religious rights, allows the child's beliefs and interests to be ignored by parents and society. Parents' rights were historically absolute.[1] Today however, a parent's right to determine their children's religious upbringing remains very strong.[2] The integration of Articles 8 and 9 of the European Convention of Human Rights (ECHR) into domestic law prevents arbitrary interference with family life or parents', and to an extent children's, religious freedoms

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[1] *Re Agar-Ellis* (1878) 10 Ch D 49 (CA) 71-72 (James LJ).

[2] *R (Williamson) v Secretary of State for Education and Employment and Others* [2005] UKHL 15, [2005] 2 AC 246 [72] (Baroness Hale).

unless proportionately pursuing a legitimate aim with evidence of serious harm.[3] Therefore to reflect this protection,[4] most parental decision-making will not be reviewed unless the State or another parent brings proceedings.[5] Nevertheless, parents' rights are subject to more limitations following the recognition of children's rights, and increased use of ECHR rights.[6]

However, recent legal and social developments have demonstrated the dangers of the parent-centric approach in the current law. The inclusion in 2019 of LGBTQ+ relationships in the new RSE (Relationship and Sex Education) curriculum, reflecting rights under the Equality Act 2010, provoked controversy thus highlighting the detrimental prioritisation of parental rights.[7] Parents alleged their rights to raise children according to their religious beliefs were violated, believing they had the *right* to teach their children that LGBTQ+ identities are inherently sinful or immoral.[8] This discourse refuses to acknowledge that their children, who may identify as LGBTQ+ in the future, have the right to adequate education, and to protection from psychological harm.[9]

Furthermore, recent cases have required family courts to assess the welfare of children living within ultra-orthodox religious communities;[10] *Re A* in particular raises questions about reconciling religious freedom, welfare, and LGBTQ+ parents' right to equality.[11]

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[3] Human Rights Act 1998 (HRA 1998), ss 1 and 2; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Arts 8 and 9; *Vojnity v Hungary* App no 29617/07 (ECtHR, 12 May 2013) [37]; *London Borough of Tower Hamlets v B* [2015] EWHC 2491 (Fam), [2015] 2 FLR 877; *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29.

[4] *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [20] (Baroness Hale).

[5] *Re G (Children) (Religious Upbringing: Education)* [2012] EWCA Civ 1233, [2013] 1 FLR 677 [91]-[93] (Munby LJ); Jane Fortin, 'A Decade of the HRA and its Impact on Children's Rights'(2011) 41(2)] Fam Law 176, 180.

[6] *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 (HL); *R (Axon) V Secretary of State for Health (Family Planning Association Intervening)* [2006] EWHC 37 (Admin), [2006] QB 539; Rachel Taylor, 'Reversing the Retreat from Gillick? R (Axon) v Secretary of State for Health' (2007) 19(1) CFLQ 81, 92-96; Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (n 5), 176-78.

[7] Robert M Vanderbeck and Paul Johnson, 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools' (2016) 30(3) IJLPF292, 299-301.

[8] *Birmingham City Council v Afsar and others* [2019] EWHC 3217 (QB), [2020] ELR 81 [37]-[39] (Warby J); Nazia Parveen, 'School Defends LGBT Lessons After Religious Parents Complain' (*The Guardian*, 31 January 2019) <https://www.theguardian.com/education/2019/jan/31/school-defends-lgbt-lessons-after-religious-parents-complain> accessed 26 April 2020; Nazia Parveen, 'Birmingham School Stops LGBT Lessons After Parents Protest' (*The Guardian*, 4 March 2019) <https://www.theguardian.com/education/2019/mar/04/birmingham-school-stops-lgbt-lessons-after-parent-protests> accessed 26 April 2020; Nazia Parveen, 'Birmingham Primary School To Resume Modified LGBT Lessons' (*The Guardian*, 3 July 2019) <https://www.theguardian.com/world/2019/jul/03/birmingham-primary-school-to-resume-modified-lgbt-lessons> accessed 26 April 2020.

[9] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) Arts 19 and 28; *A Local Authority v M* [2016] EWHC 1599 (Fam), [2017] 1 FLR 1389 [6]-[7] (Newton J). See also *Re G* (n 5) [37]-[38] (Munby LJ).

[10] Children Act 1989 (CA 1989), s 1.

[11] *Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2017] EWFC 4, [2017] 4 WLR 201 [162]-[164] (Jackson J).

Cases concerning radicalisation have also demanded greater assessment of religious beliefs.[12] This risks discriminatory treatment given the overwhelming focus on Muslim families, demonstrating, at the very least the appearance of, bias against Islamic perspectives.[13] In 2016 the Committee on the Rights of the Child (CRC) raised concerns about the compatibility of compulsory collective worship and young people's limited rights to withdraw in English Law, with the Convention on the Rights of the Child (UNCRC).[14] Elsewhere the CRC has underlined that States must accept children's independent religious rights during adolescence, not maintaining parental rights beyond their relevance to children's development.[15] These developments underline the need to affirm children's religious rights alongside parental rights under English Law.

Religious rights lack clear definition, as they are at an intersection of both family and human rights law. The limited basis for judicial intervention leaves much of these rights' content unexplored, with cases limited to Strasbourg jurisprudence, or fact-specific family cases, with few purely human rights cases to outline the parents' and children's rights. Parents' right to decide their child's religious upbringing is recognised as part of parental responsibility but lacks express statutory definition.[16] Likewise, it is only implicitly recognised through the right to respect for parents' religious convictions under Art.2 Protocol 1.[17] However the European Court of Human Rights (ECtHR) has recognised that Articles 2, 8 and 9, provide parents with the right to promote their religious convictions within their children's upbringing.[18] Yet the ECtHR has not defined the limitations on this right.

Children's right to freedom of religion under Art.9 is unclear in scope and content, as the ECHR does not expressly recognise children's rights. Furthermore, the UNCRC only has limited status as an interpretative tool by domestic courts and the ECtHR,[19] except for

[12] *London Borough of Tower Hamlets* (n 3); *Re K (Children)* [2016] EWHC 1606 (Fam); *A Local Authority v M and others* [2017] EWHC 2851 (Fam), [2018] 2 FLR 875.
[13] Rachel Taylor, 'Religion as Harm? Radicalisation, Extremism and Child Protection' (2018) 30(1) CFLQ 41, 59.
[14] UNCRC (n 9), Art 14; UN Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (12 July 2016) UN Doc CRC/C/GBR/CO/5, paras 35-36.
[15] UN Committee on the Rights of the Child, 'General Comment 20' in Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2016) UN Doc CRC/GC/2016/20, para 43.
[16] CA 1989, ss 2 and 3; *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FLR 678 (F) 685 (Wall J).
[17] ECHR (n 3) Protocol No 1, Art 2.
[18] *Vojnity* (n 3) [37]; Rachel Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education ' (2015) 29(1) IJLPF 15, 18-19.
[19] *Neulinger v Switzerland* App No 41615/07 (ECtHR, 6 July 2010), [131]; *Jeunesse v Netherlands* (2014) 60 EHRR 789; *R (SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 [137] (Lord Hughes); Stephen Gilmore, 'Use of the UNCRC in Family Law Cases in England and Wales' (2015) 25(2) Intl J Child Rts 500, 503-5.

limited, and geographically unequal implementation throughout the UK.[20] Therefore, rights such as the freedom of religion under Art.14 remain unenforceable.

Whereas the Children Act 1989 remains the cornerstone of family law, providing a dependable framework to protect children.[21] It has adapted to diversification of religious and cultural practices, acceptance of LGBTQ+ identities, and an evolving understanding of psychological harm.[22] The 1989 Act was designed to serve all children, not just those suffering abuse and neglect.[23] However, Baroness Hale has acknowledged that the Act does not adequately define potential harm caused by the internalisation of religious beliefs prejudiced against women or LGBTQ+ people.[24] Thus demonstrating the gap in the protection afforded by the act, requiring affirmation of children's rights to protect all children.

This dissertation argues that this detrimental focus on parents' rights creates a protection gap through the discretion afforded to parents, with very limited basis for courts to prevent harm, allowing parents to take actions which do not advance their children's welfare. This reflects that the failure to recognise children as holding independent religious rights, alongside minimal recognition of their developing capacities under Art.5 UNCRC,[25] minimises their agency as developing citizens. This encourages negligible treatment of their rights by courts and within society, undermining this protection from harm. Therefore, any solution must address how not-yet-competent children enjoy these rights, and how children's religious rights are reconciled with parents' rights to manifest their beliefs through their children's upbringing.[26]

Explicitly recognising children's independent right under Art.9 ECHR, and the inherent rights therein, could partially address this protection gap. Explicit recognition of children's developing capacities would nurture children's agency as developing citizens throughout courts and society. Rights are in themselves insufficient, their exercise must be empowered through objective and pluralistic religious education (RE), and relationships and sex

[20] UNCRC (n 9), Art.14; Department of Education, *The United Nations Convention on the Rights of the Child: How Legislation Underpins Implementation in England* (15 March 2010) <https://www.gov.uk/government/publications/united-nations-convention-on-the-rights-of-the-child-uncrc-how-legislation-underpins-implementation-in-england> accessed 7 April 2020, 15-19;
Rachel Taylor, 'Putting Children First? Children's Interests as a Primary Consideration in Public Law' (2016) 28(1) CFLQ 45, 49-57ff 64.
[21] Jo Delahunty, 'The 30th anniversary of the Children Act 1989: is it Still Fit for Purpose? Part II' [2019] Fam Law 641, 653.
[22] ibid 653. See also Jo Delahunty, 'The 30th anniversary of the Children Act 1989: is it Still Fit for Purpose?' [2019] Fam Law 490.
[23] Dame Brenda Hale, 'Controversy: In Defence of the Children Act' (2000) 83(6) Arch Dis Child 463, 463.
[24] Baroness Hale of Richmond, 'Freedom of Religion and Freedom from Religion' (2017) 19 Ecc LJ 3, 11-12.
[25] UNCRC (n 9), Art 12.
[26] Rachel Taylor, 'Parental Responsibility and Religion' in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds), *Responsible Parent and Parental Responsibility* (Hart Publishing 2009) 138.

education (RSE). This would ensure all children are informed to develop their own beliefs and decide for themselves on issues which directly (and indirectly) implicate their religious rights.

Children's rights are often portrayed as incongruent with parental rights. However, children's religious rights are relational because parents and religious communities are fundamental in nurturing beliefs through education.[27] Therefore, explicitly recognising children as independent right-holders would rebalance the law to address this protection gap, and be a lawful restriction of parental rights to protect children's rights.[28] This dissertation is not arguing that a religious upbringing is always negative; in fact, studies show most children have positive feelings about their upbringings.[29] However, it is important to empower children to make independent decisions about their faith, to protect children's rights and beliefs if they conflict with their parents.

This will be argued by first considering this dissertation alongside the current literature. Chapter 1 demonstrates how the parent-centred focus in English Law encourages negligible consideration of children's interests, creating a protection gap for children not involved in litigation. Chapter 2 examines the minimisation of children as developing citizens, holding limited religious rights in English Law and having their status as right-holders undermined in human rights, and family law cases. Finally, Chapter 3 explores how recognising children's rights under Art.9, and their evolving capacities, could affirm their rights in courts and beyond, thus, closing this protection gap. This also requires children's empowerment as right holders through rigorous RE and RSE to enable exercise of these rights and to protect against psychological harm.

LITERATURE REVIEW

Children's religious rights are a relatively new area of study within children's rights, emerging alongside litigation about RE, and religious clothing in public schools since 2000.[30] Existing literature discusses some issues addressed within this dissertation: analysing 'welfare' in religious upbringing; evaluating children's rights generally in English law; and religious rights in international law.

[27] Anat Scholnicov, 'The Child's Right to Religious Freedom and Formation of Identity' (2007) 15(2) Intl J Child Rts 251, 259f.
[28] ECHR (n 3), Arts 8(2) and 9(2); *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711, [53].
[29] Janet Lees and Jan Horwath, "Religious Parents... Just Want the Best for Their Kids': Young People's Perspectives on the Influence of Religious Beliefs on Parenting' (2009) 23(3) Children & Society 162, 171-72; Jan Horwath, Janet Lees, and Peter Sidebotham, 'The influence of religion on adolescent family life in England: an explanatory study of the views of young people and parents' (2012) 59(2) Social Compass 257, 272-73.
[30] Sylvie Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (2008) 16(4) Intl J Child 475, 475-76.

However, the literature has not conceptualised enhancing children's religious rights as a solution to problems caused by the predominance of parental rights.

A concern throughout this literature is the dissonance between religious parents who are living together. Even those with extreme beliefs are unlikely to have their decision-making disturbed by courts, whereas parents in conflict are subject to judicial scrutiny. Johnson questions why parents in conflict have their decision-making evaluated according to objective welfare criteria, whereas those parents who agree can make decisions on the 'highly subjective basis' of their beliefs.[31] Rather than engage with the protection gap left by this stark differentiation between parents, Johnson argues a child's present and future autonomy can be starkly defended within the welfare inquiry in cases before the courts;[32] but this alone is insufficient to close this gap.

The judicial approach to extreme beliefs has often been deficient. Taylor has argued that seeking to encourage values of pluralism, tolerance and respect, in cases concerning strict religious upbringings and radicalisation, is not necessarily illegitimate.[33] However, without established constitutional values the court will ultimately impose majority values, constructing 'shared values' which exclude the minority groups and beliefs before them.[34] Or at least the Court would be perceived to be doing this so,[35] which would undermine their legitimacy as a neutral body.[36] These procedural concerns are emphasised throughout Taylor's writing, cautioning against the use of 'vague, over-broad and unstable'[37] concepts of extremism and radicalisation within the intrusive child protection jurisdiction.[38] She argues engaging with political questions like labelling certain beliefs as 'extreme' could undermine public confidence, and threaten the human rights of the parties involved.[39] Utilising Taylor's work, Eekelaar argues to redress this by developing different interpretations of welfare in religious communities through education rather than court interventions which risk the integrity of welfare.[40] Whilst pertinent to redress the pressing concerns of majoritarianism in family law, this solution does not encompass the issue caused by the minimal recognition of children's rights.

[31] Simon Johnson, 'Religion, children and the family courts' [2013] Fam Law 574, 582.
[32] ibid 583.
[33] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (n 18) 32.
[34] Rachel Taylor, 'Secular Values and Sacred Rights: Re G (Education: Religious Upbringing)' (2013) 25(3) CFLQ 336, 342-44; ibid 24.
[35] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education ' (n 18), 32.
[36] Taylor, 'Secular Values and Sacred Rights: Re G (Education: Religious Upbringing)' (n 34), 348.
[37] Taylor, 'Religion as harm? Radicalisation, extremism and child protection' (n 13), 59.
[38] ibid 51-53ff.
[39] ibid 42ff 59.
[40] John Eekelaar, 'Welfare and discrimination: Re M' [2018] Fam Law 393, 397.

Jivraj and Herman demonstrate majoritarianism within family case-law, wherein conflicting and overlapping lenses are used to 'understand' 'non-Christianness'. [41] This has led to judgments incorporating underlying orientalist narratives, western-centric discourses which support a Christian-centric normative understanding of secularism and religion.[42] Jivraj highlights how Christian values are used as a benchmark in discourses on faith within education, whereas Muslim schools and values are seen as dangers requiring regulation.[43] These Christian-centric ideas therefore undermine protection for minority communities. This is influenced by the ingrained orientalised narratives which are accepted and propagated by the ECtHR, resulting in racialised lesser protection for minority religious groups.[44] Skeet highlights how visibly Muslim women are subject to narratives of victimisation; and presented as a danger to equal rights for all, which allows for unjustifiable restrictions of their rights.[45] This jurisprudence reinforces harmful stereotypes within European societies, justifying increased restrictions on visibly Muslim people.[46] These unconscious influences must be understood to engage with how they undermine protection of children's rights, whilst also explaining the disproportionate response to 'radicalised' Muslim families in recent cases.

These works, while raising important concerns, do not provide alternative means to protect children's rights. Nevertheless, this scholarship remains important to understand the need to prevent creeping procedural threats to parents' rights, whilst enhancing children's rights. This is one way this dissertation will build upon previous literature, addressing these concerns by empowering children as independent right-holders.

Throughout the literature there is clear debate about reconciling parents' rights and children's rights. Taylor highlights the community and family-oriented nature of a child's religious experiences, arguing that the large freedom afforded to parents is not necessarily inconsistent with children's interests.[47] Although she acknowledges the risk of conflating children's interests with their parents' in the current framework, she focuses on the difficulty in assessing welfare when restrictions are allowed only if there is solid evidence of harm.[48] However, by forwarding no means to protect children's interests in cases where there is no convergence, the risk of conflating interests remains.

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[41] Suhraiya Jivraj and Didi Herman, 'It is Difficult for a White Judge to Understand: Orientalism, Racialisation, and Christianity in English Child Welfare Cases' (2009) 21(3) CFLQ 283, 306.
[42] ibid 307; Charlotte Helen Skeet, 'Orientalism in the European Court of Human Rights' (2019) 14(1) Religion and Human Rights 31, 37-38.
[43] Suhraiya Jivraj, 'Interrogating religion: Christian/secular values, citizenship and racial upliftment in governmental education policy' (2013) 9(3) IJLC318, 336.
[44] Skeet (n 42), 61-63.
[45] ibid 61-62.
[46] ibid 62-63.
[47] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (n 18), 20.
[48] ibid 20-21.

Academic discussion of whether paramountcy under s.1 CA 1989 fulfils the requirements of Art.8, although prominent in the 2000s, is relevant for reflecting concerns about insufficient focus on rights within family law.[49] This is demonstrated by the consistent failure of family court to expressly consider even parents' ECHR rights, beyond superficial acknowledgement.[50] Choudhry argued paramountcy should be abandoned to facilitate transparent reasoning, with children's interests remaining primary but not all defeating, therefore promoting discussion of rights.[51] Fortin adds a rights-based approach could strengthen decision-making in family courts, because it would reverse the deterrence posed by the 1989 Act to fully explore children's convention rights and how they promote said interests.[52] Whilst the bulk of this work is not convincing, especially given Langlaude argues the approach under English law is likely within the margin of appreciation in most cases.[53] However its focus on emphasising rights to ensure their fair consideration is very pertinent to this dissertation.

Current literature highlights the inadequacy of current standards of children's religious rights in international law.[54] Kilkelly suggests the rights under the UNCRC and ECHR are ambiguous and vague as currently interpreted, inadequate to provide effective protection.[55] These standards privilege parents' rights, favour secularism over religious freedom, and excuse States from guaranteeing even basic protection for children's independent rights. [56] Kilkelly emphasises using the right under Art.2 UNCRC to non-discrimination and the right under Art.12 to express views and have them be respected, to develop a more positive interpretation of Art.14.[57] Despite being internationally focused, this argument remains important by indicating guiding principles for improving English law.

[49] Jonathan Herring, 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' (1999) 11(3) CFLQ 223; Shazia Choudhry and Helen Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25(3) OJLS 453; Shazia Choudhry, 'Clashing Rights and Welfare: A Return to a Rights Discourse in Family Law in the UK' in Martha Albertson Fineman and Karen Worthington (eds), *What is Right for Children?: The Competing Paradigms of Religion and Human Rights* (Ashgate Publishing 2009), 282.

[50] Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69(3) MLR 299, 302; Choudhry (n 49) 275-76; Fortin 'A Decade of the HRA and its Impact on Children's Rights' (n 5), 177-180.

[51] Choudhry and Fenwick (n 49) 492; Choudhry (n 49), 282. See also: Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (n 50), 306-312.

[52] ibid 306-308.

[53] Sylvie Langlaude, 'Parental Disputes, Religious Upbringing and Welfare in English Law and the ECHR' (2014) 9(1) Religion and Human Rights 1, 26.

[54] Taylor, 'Parental Responsibility and Religion' (n 26), 138.

[55] Ursula Kilkelly, 'The Child's Right To Religious Freedom in International Law: The Search for Meaning' in Martha Albertson Fineman and Karen Worthington (eds), *What is Right for Children?: The Competing Paradigms of Religion and Human Rights* (Ashgate Publishing 2009) 267-68.

[56] ibid 267-68.

[57] ibid 268.

Furthermore, Langlaude argues 'welfare' has been used in Strasbourg jurisprudence to protect the child's rights by limiting parents' rights.[58] She analyses welfare in religious rights cases as revolving around facilitating children to choose a religion later in life, with emphasis that children of mixed heritages understand their backgrounds.[59] Langlaude highlights the Court has not adopted one approach to reflect the seriousness of children's rights, using 'paramount', 'particularly important' and 'crucial' to describe the weight afforded.[60] This demonstrates the limited approach taken in both domestic and international law, whilst affirming the legitimacy of the solution in this dissertation.

Fortin highlights a dissonant approach to children's rights under the ECHR. The ECtHR and domestic courts acknowledge claims to protection in areas like in education or immigration matters;[61] whereas, in private law cases they ignore the child's individual rights.[62] While procedural requirements may explain the failure to explore children's rights, this does not excuse this adult-centred decision-making.[63] She argues the enunciation of children's convention rights in every case could ensure proper discussion of their rights,[64] although within proposals to overhaul paramountcy to a rights-based approach. Proposing greater focus by enunciating children's rights is convincing but imperfect because it does not reflect that children's rights require specific provisions to reflect specific needs. Elsewhere, Fortin argues children's convention rights under Articles 8 and 10 could be enhanced through adopting the *Gillick* test, consistent with requirement for mature thought and competence deriving from Strasbourg jurisprudence.[65] This logic will be applied by this dissertation, proposing express affirmation of children's rights under Art.9; as well arguing that until such express recognition, courts can ensure appropriate religious autonomy is afforded by applying *Gillick* to Art.9.

This literature review has enunciated how this dissertation builds upon the gaps in current literature, to prove the need to expressly affirm children's religious rights to reduce the primacy of parent's religious rights.

[58] Langlaude, 'Parental Disputes, Religious Upbringing and Welfare in English Law and the ECHR' (2014) (n 53), 30.
[59] ibid 29.
[60] ibid 14.
[61] Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (n 5), 183.
[62] ibid 183.
[63] ibid 183.
[64] Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (n 50), 307-308ff 313-14.
[65] ibid 320; Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (n 5), 182-83.

TO WHAT EXTENT DOES THE CURRENT LAW PRIVILEGE PARENTS' RIGHTS?

Current law, and judicial frameworks, focus detrimentally on parents because children's rights are not explicitly recognised, and therefore receive insufficient attention within litigation and in society as a whole. This negligible approach perpetuates the proprietary connotations visible in early cases because children are treated as objects of litigation for their parents or the state, not as independent right-holders. Without express recognition as right-holders, children not subject to litigation are left without protection. Recent cases concerning cognitive radicalisation demonstrate this protection gap legitimised by deference and parent's inviolable human rights. So, expressly recognising children's rights would ensure accountability to fairly considering their interests in litigation,[66] as well as facilitating protection within wider society.

THE HISTORICAL APPROACH

The historical approach to children's religious upbringing is important because the law retains this deferential, proprietary approach, bolstered by the protection of parents' rights under the HRA 1998. 19th century cases regard children as their father's property, [67] with insufficient scrutiny to effectively protect children's interests. Fathers enjoyed a legal right to decide their children's religious beliefs and education in that religion; this right was so strong it remained enforceable against their children's mother beyond their death.[68] The law did not distinguish between children's general education and their religious upbringing, until compulsory education was introduced in 1880.[69] This triggered divergence between non-intervention in the parental sphere and increased public intervention in education.[70]

That a parent could 'decide' their children's beliefs demonstrates the treatment of children as property, to whom beliefs could be dictated. It was likely uncontroversial that parents could indoctrinate children in Christian values given Christianity's past dominance of English law and society.[71] However the last census reported that only 62.5% of households

[66] Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (n 50), 308; Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford and others (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing 2017) 65-69.
[67] *Re Agar-Ellis* (n 1), 71-72 (James LJ).
[68] *Hawksworth v Hawksworth* (1870-71) LR 6 Ch App 539 (CA); *Re Agar-Ellis* (n 1).
[69] Elementary Education Act 1870; Elementary Education Act 1880; Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (n 18), 17.
[70] ibid 17.
[71] *Bowman v Secular Society Ltd* [1917] AC 406 (HL), 428 (Lord Finlay); *R (Johns) v Derby City Council* [2011] EWHC 375 Admin, [2011] 1 FLR 2094 [38]-[39] (Munby LJ); Sir James Munby, 'Law, Morality and Religion in the Family Courts' (Law Society's Family Law Annual Conference, London, 29 October 2013) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/law-morality-religion-munby-2013.pdf> accessed 17 October 2019, 7-9.

define themselves as Christian, whereas 30.4% identified as belonging to another religion or none.[72] Thus, demonstrating the need to distinguish between religious education and upbringing to address dangers of religious beliefs being dictated to children as fact, not belief.[73]

Lord Upjohn analysed early cases as a conflict between faiths, with little regard for the child's welfare, nor for mother's rights.[74] Courts would not review or challenge decisions on education (secular or religious) unless the father's character was at fault.[75] This continued until mother's rights and children's welfare were codified in 1925.[76] Arguably it was not until parental responsibility, to children and other parents, was introduced in 1989 that the law shifted towards more genuine consideration of children's interests and welfare.[77] Children's welfare is now the paramount consideration in all proceedings concerning their upbringing.[78] Although parental responsibility removed any explicit possessive connotations,[79] these connotations remain implicit in the treatment of children as objects, not right-holders.

THE CURRENT LAW

The current law distinguishes between education as the child's right, and parents' right to determine religious upbringing.[80] However, continued deference to parents reinforces treatment of children as objects of parental rights rather than right-holders themselves. Whilst religious upbringing and education significantly impact children, they also represent significant civil rights for parents owing to proximity with their beliefs. [81] Many devout, or even undevout parents, believe there is no better way to advance welfare than raise their children in faith, reflecting their cultural heritage and imparting a desire to live according to these principles.[82] In *Williamson,* Baroness Hale emphasised that parents be allowed

[72] Office for National Statistics, 'DC1202EW (Household Composition By Religion Of Household Reference Person (HRP)) - Nomis - Official Labour Market Statistics' (*Nomisweb*, 2013) <https://www.nomisweb.co.uk/census/2011/dc1202ew> accessed 14 April 2020.
[73] *Re M* (Children) [2014] EWHC 667 (Fam) [23] (Holman J).
[74] *J v C* [1970] AC 668 (HL) 717 (Lord Upjohn). See also *Stourton v Stourton* (1857) 8 De GM & G (Ch) 760, 44 ER 583, 587-88; *Ward v Laverty* [1925] AC 101 (HL) 108 (Lord Cave LC); *Re Carroll (An Infant)* [1931] 1 KB 317 (CA) 336 (Lord Hewart LJ).
[75] *Re Agar-Ellis* (n 1) 71-72 (James LJ); See also Taylor, 'Parental Responsibility and Religion' (n 26), 125.
[76] Guardianship of Infants Act 1925, s 1.
[77] CA 1989 (n 10), s 2; Delahunty, 'The 30th anniversary of the Children Act 1989: Is it Still Fit for Purpose?' (n 22), 494-96.
[78] CA 1989 (n 10), s 1(1).
[79] Delahunty, 'The 30th anniversary of the Children Act 1989: Is it Still Fit for Purpose?' (n 22) 494.
[80] Daniel Monk, 'Parental Responsibility and Education: Taking a Long View' in Rebecca Probert, Stephen Gilmore, and Jonathan Herring (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009) 145-46.
[81] ibid 145-46; Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education ' (n 18), 18-19.
[82] Johnson (n 31) 575; ibid 18-19.

significant autonomy to discharge their parental responsibilities, as parents, not the state, are responsible for the child's upbringing.[83] Consequently, parents are entitled to exercise their children's religious rights on their behalf, and interfere with their independent freedoms. [84] Thus, parents' human rights demand respect for their choices, absent evidence of exposing children to dangerous practices, physical or psychological harm.[85]

Re B emphasised that parents could be criminals, discriminate against minorities, and hold anti-social political or religious beliefs.[86] Although these behaviours could be adopted by their children, they are not bases for removal in itself, in the absence of demonstrable harm.[87] For example, the court has rejected membership of a white-supremacist group as sufficient justification for care proceedings in itself.[88] The indignation in the judgement,[89] is a stark contrast with racialised rhetoric used towards allegedly 'radicalised' families. Especially given that the latter proceedings failed or were withdrawn in many cases, with parents described as caring 'observant Muslims'.[90] Therefore, the court's rejection in *Re K* that cases disproportionately targeted Muslims is unconvincing.[91] These cases show the harms of this hazy deferentially. In *Re X* the judge highlights there may be cases where otherwise good parents expose their children to significant harm, driven by fanatical religious beliefs.[92] This harm may therefore not be necessarily apparent, thus demonstrating the high threshold imposed by parents' human rights which facilitates acts which may be plainly undesirable.[93] However, the courts have highlighted that parents are responsible for protecting their children from any extreme beliefs espoused by their other parent, or they would be seen as responsible by association.[94] Nevertheless, this demonstrates the need to affirm children as independent right holders to legitimise their protection.

[83] *Williamson* (n 2) [72] (Baroness Hale); Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education ' (n 18), 18.
[84] Jeroen Temperman, 'State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers' (2010) 32(4) Hum Rts Q 865, 870.
[85] *Vojnity* (n 3) [37].
[86] *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 3 All ER 929 [28] (Lord Wilson), and [143] (Baroness Hale).
[87] ibid [28] (Lord Wilson); *A Local Authority* (n 9) [6] (Newton J).
[88] *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1 [71] (Sir James Munby P).
[89] ibid [71] (Sir James Munby P).
[90] *Re X (Children) (No 3)* [2015] EWHC 3651 (Fam), [2017] 1 FLR 172 [100]; *Re Y (Children) (No 3)* [2016] EWHC 503 (Fam), [2017] 1 FLR 1103 [47] (Sir James Munby P); *Re K* (n 12) [1]-[3], [15]-[21], and [9]-[10] (Hayden J).
[91] *Re K* (n 12) [23]-[24] (Hayden J).
[92] *Re X* (n 90) [96] (Sir James Munby P).
[93] Sir James Munby (n 71), 9-10.
[94] *A Local Authority* (n 9) [73]-[74] (Newton J).

The current framework provides such onerous protection to parents' beliefs, impeding the protection of children from invasive beliefs in most cases, maintaining this protection gap. The refusal in older cases to substantially scrutinise parents' beliefs or judge the merits of one religion against another,[95] was cemented by interpretative use of ECHR rights since the 1960s.[96] This entrenched deference to parents reflects the need to not question the validity of religious beliefs or doctrines under Art.9.[97] English Courts therefore presume respect for parents' beliefs unless they are legally and socially unacceptable, immoral or socially obnoxious.[98] This protection gap is demonstrated by parental transmission of their beliefs, where it is generally left to parents' discretion unless there is evidence of indoctrination. In *Re M,* Holman J underlined that strongly instilling children with religious beliefs was protected by the courts;[99] but indoctrinating children with extreme beliefs, or intolerance towards other cultures and religions, constitutes abuse.[100] Even within the courts, the distinction between strongly instilling and indoctrination is near-impossible to police;[101] thus, frustrating protection within courts and within society where it does not apply.

However, only parents' beliefs are absolutely protected. Their manifestation may be qualified to protect children's rights, or to protect children's physical or psychological health and emotional wellbeing.[102] Therefore, neither courts nor Parliament in a pluralist society, could judge whether it is in all children's best interests to receive a religious upbringing because this would disproportionately interfere with parents' beliefs.[103] However, Parliament can dictate that certain manifestations are contrary to the welfare of all children.[104] Family courts can also consider whether decisions in relation to the manifestation of beliefs are reasonable to advance children's welfare.[105] Taylor highlights it is unclear how behaviours can be challenged without questioning their doctrinal basis;[106]

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[95] *Re Carroll* (n 74), 336-37 (Lord Hewart LJ).
[96] *P, C and S v UK* (2002) 35 EHRR 31; *Re B* (n 4) [20] (Baroness Hale); P J Duffy, 'English Law and the European Convention on Human Rights' (1980) 29(4) ICLQ 585, 585-89.
[97] *Williamson* (n 2) [22] (Lord Nicholls); *Re G* (n 5) [35] (Munby LJ); Taylor, 'Secular Values and Sacred Rights: Re G (Education: Religious Upbringing)' (n 34), 340-41.
[98] *Re G* (n 5) [36] (Munby LJ).
[99] *Re M* (n 73) [23] (Holman J).
[100] ibid [23] (Holman J).
[101] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education ' (n 18), 23.
[102] ECHR (n 3) Art 9(2); *Vojnity* (n 3) [38]; *A Local Authority* (n 9) [6]-[7] (Newton J). See also *Re G* (n 5) [37]-[38] (Munby LJ).
[103] *Re Carroll* (n 74), 336 (Lord Hewart LJ); Johnson (n 31), 575; Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (n 18) 19; Julie Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (2017) 6(1) OJLR 24, 28-29.
[104] *Williamson* (n 2) [50]-[52] (Lord Nicholls); Johnson (n 31), 582.
[105] *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163 (CA); *Re G* (n 5) [33] and [51] (Munby LJ). See also *Hoffmann v Austria* (1994) 17 EHRR 293, [30]-[36]; *Palau-Martinez v France* (2005) 41 EHRR 9, [36]-[37] and [41]-[42].
[106] Taylor, 'Secular Values and Sacred Rights: Re G (Education: Religious Upbringing)' (n 34), 341.

arguably, however, this is a limited review of beliefs through practices, reflecting necessary scrutiny to ensure children's welfare. Therefore, while general deference to parents is too onerous, within litigated cases, courts engage in appropriate review of parent's religious practices to ensure protection of children.

Until recent cases around radicalisation, family courts had ensured equal treatment of different religious groups by focusing on concrete effects on children's welfare.[107] In *Re T* the Court of Appeal criticised the disproportionate focus on a Jehovah's Witness mother's beliefs, simply because they would isolate children from 'ordinary society and family life', whereas other evidence indicated their welfare was better served living with her.[108] Scarman LJ emphasised alleged dangers from membership of a minority sect must not be overstated.[109] This approach reviews children's welfare whilst appropriately protecting parents' rights. *Re B and G* demonstrates this, wherein although it was preferable the children remained with their father, custody was awarded to their ex-scientologist mother to protect them from Scientology's influence.[110] The judgment, upheld by the Court of Appeal, forensically assesses the risk of indoctrination by the group, against other factors of their welfare.[111] Although Scientology has received a degree of modern acceptance,[112] this judgment appropriately scrutinises potential harm to those children. This focus has also protected against disproportionate interference under Art.9.[113] In *Re A and B* the court terminated an abusive father's parental responsibility for pursuing the fleeing family in breach of multiple orders.[114] The court considered evidence of advocating extreme beliefs about murdering homosexual children and women who de-converted.[115] This was proportionate because there was significant risk to the children, whatever level of involvement he was allowed.[116] Whereas in *Vojnity* the ECtHR held severing contact because of extreme religious beliefs was disproportionate, because children were only exposed to discomfort and embarrassment, not harm.[117] Therefore, by maintaining the focus on children's welfare, courts have been able to proportionately scrutinise religious beliefs insofar as they may affect children.

[107] *Re G* (n 5) [35]-[36] (Munby LJ).
[108] *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239 (CA).
[109] ibid 244-45 (Scarman LJ). See also *Re G* (n 5) [34] (Munby LJ).
[110] *Re B and G (Minors) (Custody)* [1985] FLR 134 (F).
[111] ibid 157 (Latey J) affd *Re B and G (Minors) (Custody)* [1985] FLR 493 (CA) 502 (Dunn LJ).
[112] *Kimlya and Others v Russia* App nos 76836/01 and 32782/03 (ECtHR, 1 October 2009), [70]-[81]; *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [2014] AC 610. See also *Church of Scientology Moscow v Russia* (2008) 46 EHRR 16.
[113] *Hoffmann* (n 105); *Palau-Martinez* (n 105); *Ismailova v Russia* App no 20110/13 (ECtHR, 17 April 2014).
[114] *Re A and B (Children: Restrictions on Parental Responsibility: Radicalisation and Extremism and Radicalisation in Private Law)* [2016] EWFC 40, [2016] 2 FLR 977.
[115] ibid [81]-[83] (Russel J).
[116] ibid [136] (Russel J).
[117] *Vojnity* (n 3) [38] and [43].

This past balance has been renegotiated by increased scrutiny of 'fundamentalist' beliefs, placing focus on beliefs rather than their secular effects.[118] This undermines rights because the suggestion that beliefs are inherently harmful risks legitimising discriminatory treatment. Therefore, it is concerning that judges applied heavily politicised notions to judge the beliefs of minority groups without a defined basis, when state neutrality requires states have no power to assess the legitimacy of religious beliefs.[119] However, by maintaining high standards of evidence, courts have protected parents' rights and rejected 'orientalised misconceptions of Islamic devoutness'.[120] In *Re K* the court rejected children's oblique vulnerability, through being raised by parents with extreme beliefs, as a risk of serious harm in itself.[121] Instead harm was posed by extreme beliefs coupled with active promotion of terrorism, where children were actively targeted through living with their parents.[122] This rejection of extreme beliefs as inherently harmful is a compelling balancing between protecting children, and guarding against majoritarianism. Radicalisation is harm which courts must prevent, but the practice of focusing on risks posed by beliefs parents were not proven to hold,[123] facilitated disproportionate interference.

The principle of extreme beliefs as being inherently harmful, is dangerous and unprincipled. However, it reflects genuine concerns about coercion and psychological harm children may be exposed to under the current framework. Children's vulnerability and resilience to extreme views masquerading as religious faith is important to their health and development.[124] This dissertation proposes objective, critical and pluralistic RE to equip children to critically develop their own beliefs. Although this would not remove all the risks posed by this wide discretion, it would be a proportionate interference to protect children's religious rights and mental integrity,[125] which could protect children from any parents who genuinely use their beliefs to inflict harm.

WELFARE AND RELIGIOUS UPBRINGING

Restrictions on scrutinising parental behaviour mean the current assessment of welfare regarding questions of religious upbringing is constrained, perpetuating this protection gap.

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[118] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education ' (n 18) 16ff 23.
[119] *Moscow* (n 112) [58].
[120] Susan Edwards, 'Negotiating Faith, Culture and Gender in J v B and The Child AB' [2018] 48 Fam Law 56, 58.
[121] *Re K* (n 12) [13] and [23] (Hayden J).
[122] ibid [23]-[24] (Hayden J).
[123] *Re X* (n 90) [100] (Sir James Munby P); *Re Y* (n 90) [47] (Sir James Munby P); *Re K* (n 12) [1]-[3], [15]-[21], and [9]-[10] (Hayden J). See also Jo Delahunty J and Chris Barnes, 'Radicalisation cases in the Family Courts: Part 3: Threshold' [2016] 46 Fam Law 733, 736-37.
[124] *Re I (Children: Child Assessment Order)* [2020] EWCA Civ 281, [15] and [33] (Peter Jackson LJ).
[125] ECHR (n 3)Art 9(2); *Vojnity* (n 3) [37]-[38]; *A Local Authority* (n 9) [6]-[7] (Newton J).

Judges act as a reasonable judicial parent: receptive to change, broad-minded, tolerant, and slow to condemn.[126] For devout parents, every decision is influenced by their faith.[127] Therefore, it can be impossible to extricate religious beliefs from wider parental decision-making, complicating scrutiny of decisions without inadvertently scrutinising beliefs. So, courts are unable to establish a fixed concept of best interests, and must accommodate the cultural, social, and religious values in each case, [128] thus encouraging deference to parents. This is demonstrated by cases of children living in very strict religious communities. *Re T* recognised that a narrower life within a strict religious community was not inimical to welfare but was only one factor to consider.[129] Whereas in other cases, welfare has required the restriction of some religious activities to prevent isolation from 'normal' life.[130]

This is further demonstrated by *Re G,* where a mother wanted her children to be educated in orthodox schools, outside the ultra-orthodox Charedi Jewish community, to afford children of both sexes greater opportunities in the future.[131] The court prescribed equality of opportunity as a fundamental value: the encouragement of aspiration, equipping children to decide the life they want, who they want to be, and be able to achieve those aspirations.[132] The court ultimately awarded custody to their mother with co-educational education, which better satisfied the children's welfare by ensuring education beyond 16.[133] The decision itself is welcomed for reflecting children's interests, that a strict religious upbringing may not advance welfare if it undermines the child's future opportunities. Taylor highlights procedural concerns because the decision is justified by values merely imputed to the reasonable parent.[134] In the absence of established constitutional values, this risks judges imposing their perception of majority values onto religious minorities,[135] which the judgment itself warns against.[136] Langlaude argues this analysis focuses on education rights with regards to the children's opportunities, preserving their choice to remain with, or leave, the community as adults.[137] However, they acknowledge that this inadvertently scrutinised the community's values.[138] The dangers of this unprincipled approach are demonstrated by past discrimination against same-sex parents, according to

[126] *J v C* (n 74), 722 (Lord Upjohn); *Re G* (n 5) [33]-[34], [51] (Munby LJ).
[127] *Re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2005] 2 FLR 802 [37]-[38] (Baroness Hale); *Re K* (n 12)*; A Local Authority v N* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399 [26] (Munby J).
[128] *Re J* (n 127) [37]-[38] (Baroness Hale).
[129] *Re T* (n 108), 245 (Scarman LJ).
[130] *M v H (Educational Welfare)* [2008] EWHC 324 (Fam), [2008] 1 FLR 1400 [106]-[110] (Charles J).
[131] *Re G* (n 5).
[132] ibid [80] (Munby LJ).
[133] ibid [84] (Munby LJ).
[134] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (n 18), 24.
[135] ibid 24; Skeet (n 42), 57ff 62-63.
[136] *Re G* (n 5) [34] (Munby LJ).
[137] Langlaude, 'Parental Disputes, Religious Upbringing and Welfare in English Law and the ECHR' (2014) (n 53), 20.
[138] ibid 21-23.

heteronormative preconceptions of parenthood.[139] Arguably however, this demonstrates how courts could rely on children's rights, rather than imputed values, to avoid majoritarianism and engage with children's interests.[140]

This case perfectly demonstrates the protection gap in current law, in that the decision has no application beyond family courts. Where parents from very devout sects agree, they are left undisturbed by the family courts,[141] therefore their children's opportunities could be similarly undermined. This lack of impact outside the family courts, alongside deference to parents, demonstrates the need to affirm children's rights to provide a legitimate basis to qualify parents' rights if required to protect children's interests. If children were considered as right-holders, not merely objects of parental rights, the complex interests of all children could be protected within courts and beyond.[142]

PARENT-CENTRIC APPROACH TO RELIGIOUS UPBRINGING

Restrictions on scrutinising parents' decisions encourage a parent-centric approach, with limited consideration of children's rights and interests. This results in their continued treatment as the objects of parental rights, as demonstrated by *Re A*. This is an extremely complex case including competing factors, its handling of which can be criticised, whilst accepting the Family Court's decision as the appropriate balance at that time. Here, a transgender woman who left an ultra-orthodox community, appealed against the Family Court's decision to award only indirect contact with her children.[143] Parental involvement is presumed as in the child's best interests;[144] however both parents had agreed their children would be raised in the community which believed she had broken religious law. [145] Jackson J rejected contact would be too much for the children, rather, it would be unacceptable for the community.[146] However the Court of Appeal criticised that direct contact was not even trialled because the community threatened ostracization.[147] Eekelaar suggests the court believed it was unacceptable that community discrimination could outweigh the benefits of maintaining contact;[148] the court asserting insufficient weight was

[139] *C v C (A Minor) (Custody: Appeal)* [1991] 1 FLR 223 (CA); *Salgueiro da Silva Mouta v Portugal* App no 33290/96 (ECtHR, 21 December 1999); *Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2017] EWCA Civ 2164, sub nom *Re M (children) (Ultra-Orthodox Judaism: Transgender) (Stonewall Equality Ltd and another intervening)* [2018] 3 All ER 316 [46] (Sir James Munby P). See also Taylor, 'Secular Values and Sacred Rights: Re G (Education: Religious Upbringing)' (n 34), 342.
[140] Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (n 5), 180.
[141] Joanne Ecob and Florence Iveson, 'An orthodox approach to education' [2013] 43 Fam Law 56, 60.
[142] Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (n 50), 306-308.
[143] *Re A* (n 139).
[144] CA 1989 (n 10) ss 1(2A) and 1(2B); UNCRC (n 9)Art 9(3); *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 (CA); *Johansen v Norway* (1997) 23 EHRR 33, [52]; *Bronda v Italy* (2001) 33 EHRR 4, [51].
[145] *Re A* (n 139) [70] (Sir James Munby P).
[146] *Re A* (n 11) [163]-[166], [170], [173]-[177], and [180]-[181] (Jackson J).
[147] *Re A* (n 139) [78]-[81] (Sir James Munby P).
[148] Eekelaar, 'Welfare and discrimination: Re M' (n 40), 396-97.

afforded to the paramountcy of the child's best interests.[149] This criticism is undermined by the fact that the Court of Appeal did not consider the children's views nor Art.12 UNCRC, which the Family Court had highlighted as requiring that Children's views must be duly considered.[150] Eekelaar argues in favour of the Family Court's decision, that although possible to imagine a case where direct contact was in the children's best interests, it was not the case here.[151] Fenton-Glynn has argued although the lower decision was adult-centred, it remained focused on the children's welfare, with indirect contact satisfying their need for parental involvement.[152] However, the decision seems unreasonable given only contact was sought, the weight the Family Court afforded to the community genuinely reflects the impact on children's welfare. However, it is worth noting that the parent has now desisted their claim for contact, in order to best reflect the children's interests.[153]

Re A is important for how it approaches the 'conflict' between one parent's religious freedom and a transgender parent's right to equality. The court maintained its focus was on the children's interests, not questions of religious law.[154] Courts cannot legislate the limits on a parents' religious freedom. Nor could the court challenge the community's attitudes towards transgender people, even though this was in the child's best interests.[155] However, the judgment reiterates religious beliefs cannot justify one parent creating a damaging view of the other, as in secular cases.[156] Edwards argues *Re A* demonstrates the flawed understanding of welfare for children of transgender parents applied in.[157] In *Re C* it was held important to the children's welfare to understand their parent's transitioning, ceasing direct contact until they could develop a sufficient understanding.[158] This suggests the Family Court, although generally reflecting the children's welfare, depreciated the benefit of children coming to understand their parent, and the long-term effect of losing contact.

This chapter has underlined the parent-centric approach under the current law, with limited consideration of children's interests due to their lack of recognition as right-holders. It also demonstrates the protection gap created by respect for parents' human rights, and the dangers this can present for children.

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[149] *Re A* (n 139) [130]-[135] (Sir James Munby P).
[150] *Re A* (n 11) [56], [137]-[142], and [144]-[149] (Jackson J); Eekelaar, 'Welfare and discrimination: Re M' (n 40), 394-95. See also *Re S (Contact: Children's Views)* [2002] EWHC 540 (Fam), [2002] 1 FLR 1156.
[151] Eekelaar, 'Welfare and discrimination: Re M' (n 40), 396.
[152] Claire Fenton-Glynn, 'Children's welfare vs community interests: contact, religion and transgender rights' [2018] 48 Fam Law 134, 136.
[153] *Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2020] EWFC 3.
[154] *Re A* (n 139) [70] (Sir James Munby P).
[155] Fenton-Glynn (n 152), 136.
[156] *Re A* (n 139) [64] (Sir James Munby P).
[157]Edwards, 'Negotiating faith, culture and gender in J v B and The Child AB' (n 120), 61.
[158] Re C (Children) (Contact: Moratorium: Change of Gender) [2006] EWCA Civ 1765, [2007] 1 FLR 1642.

TO WHAT EXTENT ARE CHILDREN'S RELIGIOUS RIGHTSALREADY PROTECTED IN ENGLISH LAW?

Children's right to hold a religion, or none, is not explicitly recognised under Art.9 ECHR or in domestic law. Children are ostensibly right-holders as Art.9 is drafted to include 'everyone', with obligations to secure equal rights without discrimination.[159] However in practice, provisions are interpreted through an adult-centric prism which denies children explicit recognition as right holders.[160] This means the adult-centric approach in human rights litigation pays insufficient attention to children's rights and interests. This demonstrates the CRC's argument that constitutional guarantees of rights for everyone do not ensure respect for children's rights.[161] Children rights are often relegated to being back-up claims in the ECtHR, with substantive discussion concentrating on parents' rights, like in *Lautsi* and *Angelini* which accepted children's rights under Art.9(1) at face value without enunciating their scope.[162] The increased use of the UNCRC by the ECtHR has led to increased recognition of children's rights, however the effect on English law is limited because the ECtHR is limited to reminding States of their obligations to children.[163]

Additionally, family courts have increasingly referenced UNCRC rights,[164] although the effect on children is limited because courts are not obliged to consider these provisions. Art.3, which underlines children's best interests as a primary consideration, and children's right to be heard under Art.12 are most frequently cited, with Art.14 rarely referenced.[165] This use is limited to avoiding interpretational ambiguities of statute, or aiding the development of common law, and to assist the interpretation of the ECHR.[166] Although this growth in references to the UNCRC are positive for demonstrating engagement with children as right holders, judges must engage with the substantive content of these rights to ensure proper protection.[167] In its 2015 report to the CRC, the UK claimed Art.14 UNCRC was expressed through Art.9 ECHR, and was therefore enforceable in the courts.[168] The CRC's report did not draw attention to practical difficulties enforcing children's rights, as children are typically dependent on adults to bring proceedings on their

[159] ECHR (n 3) Arts 1, 9 and 14. See also Kilkelly (n 55), 252-53.
[160] Sylvie Langlaude Doné and John Tobin, 'Article 14: The Right to Freedom of Thought, Conscience and Religion' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 477.
[161] UN Committee on the Rights of the Child, 'General Comment 5' in Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2003) UN Doc CRC/GC/2003/5, Para 21.
[162] *Angeleni v Sweden* (1988) 10 EHRR CD123 (Commission Decision), [3]; *Valsamis v Greece* (1997) 24 EHRR 294 [34]-[38]; *Lautsi v Italy* (2012) 54 EHRR (GC) 3,[78].
[163] Department of Education, 'The United Nations Convention on the Rights of the Child: How Legislation Underpins Implementation in England' (n 20) 15-19; Hollingsworth and Stalford (n 66), 54.
[164] Gilmore (n 19), 503-4.
[165] ibid 504-5.
[166] *SG and Others* (n 19) [137] (Lord Hughes).
[167] Hollingsworth and Stalford (n 66). 54.
[168] UN Committee on the Rights of the Child (n 14) paras 16-17.

behalf, thus providing limited independent protection.[169] Therefore, additional legislation may be required to facilitate that children can exercise clearly realisable and directly invokable rights themselves,[170] because children's rights still lack visibility beyond the courts.

The cumulative effect of negligible judicial treatment and lack of express implementation of children's rights under the ECHR or UNCRC in domestic law, means children's religious rights are not enforceable, or visible in society. Arguably the UNCRC imposes positive obligations on States to develop children's rights as political citizens.[171] Therefore children's religious rights must be expressly affirmed to ensure protection within and beyond the courts.

CHILDREN'S RIGHTS IN ENGLISH LAW

Gillick is the landmark children's rights case, explicitly rejecting absolute parental authority as presented in previous authorities,[172] but this has failed to develop into meaningful recognition of children as right-holders. However, it remains important for establishing the expectation of consulting a not yet competent child's wishes and feelings.[173]

Gillick concerned a Roman Catholic mother who sought to prevent her daughters accessing contraceptive advice and treatment without her consent.[174] Lord Scarman held that children under 16 could consent to treatment themselves, if they were sufficiently mature and could understand relevant information to decide whether to consent.[175] The decision triggered academic debate around the 'demise' of parents' rights once children's independent rights were recognised and unimpeachable by parents or judges.[176] Furthermore, in *Axon* a near-identical claim to *Gillick* under Art.8 ECHR was rejected.[177] Silber J held any violation would have been justified to protect children's rights.[178] They emphasised parents' rights under Art.8(1) dwindle as their children develop competency to

[169] Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (n 5), 180.
[170] UN Committee on the Rights of the Child (n 14) para 21.
[171] Aoife Daly, "'Demonstrating Positive Obligations": Children's Rights and Peaceful Protest in International Law' (2013) 45(4) Geo Wash Intl L Rev 763, 811-813; Hollingsworth and Stalford (n 66), 57-8.
[172] *Gillick* (n 6), 170 (Lord Fraser) and 183-84 (Lord Scarman).
[173] *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386 (F) 393 (Ward J); *Re S (A Minor) (Consent to Medical Treatment)* [1994] 2 FLR 1065 (F), 1074-5 (Johnson J); Stephen Gilmore and Lisa Glennon, *Hayes & Williams' Family Law* (6th edn, OUP 2018) 444-45. See also CA 1989 (n 10), s 1(3)(a).
[174] *Gillick* (n 6).
[175] ibid 188-89 (Lord Scarman).
[176] John Eekelaar, 'The Emergence of Children's Rights' (1986) 6(2) OJLS 161, 180-82; John Eekelaar, 'The Eclipse of Parental Rights' (1986) 102 LQR 4, 7-9. See also: Andrew Bainham, 'Is Anything Now Left of Parental Rights?' in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009) 24.
[177] *Axon* (n 6) [150]-[152] (Silber J).
[178] ibid [150]-[152] (Silber J).

understand and make their own choices within family life, citing Articles 12 and 16 UNCRC in support.[179] This was upheld as reversing the 'retreat' from *Gillick* by recognising children's rights under the HRA 1998, [180] but again children's rights did not materialise, and parental rights remain predominant.

The wish to ensure children receive life-saving treatment has created an unreasonable threshold for competency,[181] representing an unsatisfactory denial of children's rights. Post-*Gillick* cases have restricted competent children's rights, upholding their right to decide for themselves only if this reflects their best interests.[182] In cases concerning young Jehovah's Witnesses' refusing blood transfusions, the court held the children were not competent to refuse treatment.[183] Although they understood death in abstract, they did not understand the pain and distress they and their family would suffer.[184] This allows their non-consent to be overruled by parents or the court, and their consent by the court.[185] In *Re L* this extended to depriving L of key information required to make an informed decision.[186] Whilst affirming their best interests is acceptable in principle, it has fostered ambiguities regarding children's rights.[187] This has frustrated the accommodation of children's developing capacities throughout English law.

Bridge argues against accepted analysis of beliefs within competency assessment, as requiring maturity, rationality, and understanding, because this does not reflect the personal nature of belief.[188] *Re R* emphasises courts should not assess the strength of the child's religious convictions.[189] It would be more satisfactory that competency decides the weight courts afford to children's beliefs, and explicitly recognised certain decisions like refusing life-saving treatment, as beyond the scope of competent children's rights. This would better accommodate evolving capacities, whilst recognising children's autonomy is appropriately circumscribed.[190] This would build on the approach taken to children's beliefs in *Re E*.[191] The judge affirmed E's religious convictions as genuine and deeply held but at 15, their free will was conditioned by very powerful expressions of faith, demonstrated by preferring

[179] ibid [129]-[130] (Silber J).
[180] Taylor, 'Reversing the Retreat from Gillick? R (Axon) v Secretary of State for Health' (n 6), 97.
[181] Emma Cave, 'Goodbye Gillick; Identifying and Resolving Problems with the Concept of Child Competence' (2014) 34(1) Legal Studies 103, 104-107.
[182] *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64 (CA) 93 (Nolan LJ). See also Taylor, 'Reversing the Retreat from Gillick? R (Axon) v Secretary of State for Health' (n 6) 82-83.
[183] *Re E* (n 173); *Re S (A Minor)* (n 173).
[184] *Re E* (n 173) 391 (Ward J); *Re S (A Minor)* (n 173), 1076 (Johnson J).
[185] *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 (CA); *Re W* (n 182).
[186] *Re L (Medical Treatment: Gillick Competence)* [1998] 2 FLR 810 (F); Caroline Bridge, 'Religious Beliefs and Teenage Refusal of Medical Treatment' (1999) 62(4) MLR 585, 591.
[187] Cave (n 181), 107-109.
[188] Bridge (n 186), 589.
[189] *Re R* (n 105), 174-75 (Purchas LJ).
[190] Bridge (n 186), 594.
[191] *Re E* (n 173).

to die rather than defy religious teachings.[192] The judge recognised that young people's strongly expressed convictions must be duly considered, but wishes to die are inimical to their wellbeing.[193] This is a non-paternalistic approach to children's beliefs by upholding their legitimacy and genuinely considering them. This is reflected in *Re P,* where the judge affirmed that if the child is close to majority and holds established religious convictions, an order may not be made if it would delay death for mere months.[194] However this approach must be consistently developed and universally applied, to meaningfully recognise children as developing citizens.

CHILDREN AS RELIGIOUS RIGHT-HOLDERS

English law inadequately protects children's religious rights, maintaining the primacy of parents' rights under Art.9. Although parents' religious rights likewise lack a concrete basis, they are affirmed and implemented further in law, such as parents' right to seek exemption from RSE,[195] RE [196] and collective worship.[197] Children have no such rights, excepting sixth form students' right to withdraw from collective worship.[198] Furthermore, in *Williamson,* which concerned the ban on corporal punishment in schools, the judgment focused solely on whether the ban violated parents' rights to discipline their children according to biblical standards.[199] Baroness Hale's dissenting judgment highlights there was no consideration of any of the children's rights or their views, nor were they represented.[200] This demonstrates how inadequate express recognition translates into a clear unwillingness in case-law and statute, to recognise children as right holders.

This is demonstrated by the undermining of children's manifestation of their beliefs in *Begum*. This concerned B's practical exclusion from education for wearing a Jilbab, which was not permitted under the school's uniform policy, to reflect her strict adherence to Islam.[201] The House of Lords significantly recognised B's own rights under Art.9.[202] However the case demonstrates a parent-centric approach to rights, which is visible in how her parent's consent legitimised the restriction of B's rights. The majority saw that B voluntarily attended a school which did not accept the Jilbab as an important factor to justify interference.[203] However Baroness Hale highlights B's parents had chosen her

[192] *Re E* (n 173), 393 (Ward J).
[193] ibid.
[194] *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327, [2004] 2 FLR 1117 [9]-[11] (Johnson J).
[195] Education Act 1996 (EA 1996), s 405.
[196] School Standards and Framework Act 1998, s 71(1).
[197] ibid s 71(1A).
[198] ibid s 71(1B).
[199] *Williamson* (n 2) [34]-[36], [41], [49]-[52] (Lord Nicholls).
[200] ibid [71]-[72] (Baroness Hale).
[201] *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.
[202] ibid [1] (Lord Bingham), [41] (Lord Nicholls).
[203] ibid [32]-[34] Lord Bingham, [54]-[55] (Lord Hoffmann), [88]-[89] (Lord Scott).

school which led to this infringement.[204] The decision is also insufficient because it is overly-restrictive towards children's manifestation of their beliefs. Without manifestation, freedom of religion is without effect.[205] Baroness Hale's judgment argues that because children's beliefs are less developed than those of an adult, although this is still an interference with their right, this interference can be more readily justified.[206] That courts are more willing to interfere with beliefs purely on the basis of age, runs contrary to *Gillick* which encourages respect for children's decisions. Although the range of decisions children could make could be justifiably restricted, religious dress could not be justifiably excluded from the manifestation of a 14-year old's Art.9 rights, solely on the basis of their age.

This justification in *Begum* is further undermined by the problematic jurisprudence upon which it is based. The court upheld the interference with Art.9 as legitimate and proportionate to protect the freedoms of others.[207] Strasbourg jurisprudence has been criticised for forwarding unsubstantiated, orientalised notions of religious dress as infringing other persons' rights within public spaces and education.[208] The CRC has underlined concerns that the ECtHR does not ensure a connection between these aims and interference with children's rights.[209] This directly impinges on the right enjoyed under Art.9, particularly portraying women from minority religious groups as a threat to western religious values; fuelling discourse around the 'clash of cultures'.[210] Especially when contrasted with *Lautsi* which upheld the crucifix as a neutral, passive symbol,[211] this demonstrates preference to western religious symbols through an inconsistent application of 'neutrality', thus construing Islamic symbols as threats.[212] The dissent in *Lautsi* better reflects reality by arguing that crucifixes are more capable of infringing religious freedom than religious clothing- as clothing reflects the individual's own rights- whereas States have no right of religious freedom.[213] This demonstrates the presence of orientalised discourses towards religions other than Christianity, which undermine the rights of children from religious minorities under Art.9.

Subsequent cases demonstrate a less restrictive approach than *Begum,* circumscribing the manifestation of children's beliefs according to the intimate link between manifestation

[204] ibid [92] (Baroness Hale).
[205] *Williamson* (n 2) [16] and [23] (Lord Nicholls).
[206] *Begum* (n 201) [93] (Baroness Hale).
[207] [32]-[34] (Lord Bingham), [58]-[64] (Lord Hofmann), [94] and [96]-[97] (Baroness Hale).
[208] *Dahlab v Switzerland* App No 42393/98 (Commission Decision, 15 February 2001), 15; *Leyla Sahin v Turkey* (2007) (GC) 44 EHRR 5, [115]-[116]; Skeet (n 42), 39-43; Temperman (n 84), 887-89
[209] UN Committee on the Rights of the Child, 'Concluding Observations on the Third and Fourth Periodic Reports of France' (22 June 2009) UN Doc CRC/C/FRA/CO/4, paras 45-46; Langlaude Doné and Tobin (n 160), 510-12.
[210] Jivraj and Herman (n 41), 296-97; Skeet (n 42), 43-46ff, 47-53.
[211] *Lautsi* (n 162) [72]-[74].
[212] Ringelheim (n 103), 43-46. See also Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case Law of the European Court of Human Rights' [2007] 3 ECL Review 367, 383-84.
[213] *Lautsi* (n 162) para O-IV 19.

and beliefs.[214] In *Watkins-Singh* the court accepted that W wearing a Kara reflected her sincere wish to represent her race and Sikh faith.[215] The court rejected that allowing this would open the floodgates, requiring acceptance of all other jewellery, because the Kara was uniquely significant for W's race and religion.[216] Furthermore, in *Playfoot* the court rejected that preventing C wearing a 'purity ring', reflecting a belief in chastity, interfered with Art.9.[217] The court upheld this was not intimately linked to the claimant's belief, and emphasised she was not obliged to wear it.[218] The court held that banning jewellery, except any intimately linked with religious belief, was necessary to promote cohesion by erasing class-differences between students.[219] Although *Eweida* later rejected this interpretation of intimate link as only including obligatory manifestations.[220] Unfortunately, *Watkins-Singh* propagates an orientalised dichotomy of the Kara as being unobtrusive compared to garments worn by Muslim women.[221] This demonstrates differential treatment to *Begum* and *X,* which both concerned Muslim girls wanting to wear religious clothing, wherein their rights were instantly restricted and this intimate link was not considered. These cases demonstrate differential treatment of children as right-holders by unduly restricting the manifestation of their beliefs, with limited statutory rights, thus rendering any rights under Art.9 effectively theoretical.

CHILDREN'S RELIGIOUS RIGHTS IN FAMILY LAW

Turning to family law, the parent-centric approach under the CA 1989 treats children as objects of their parents' rights rather than right-holders, undermining their agency as developing citizens. This is visible in the lack of meaningful recognition of children's developing capacities to hold and manifest their own beliefs, [222] rather any recognition is confined to adjudicating parental rights. For example, it is recognised that it advances children's welfare to have contact with both parents' cultural heritage and families, but this may require restrictions to allow them to develop their own understanding.[223] In *Re N* the court restricted the right of both parents to 'teach' their respective religions, according to the child's capacities at the time, but allowed the child to attend worship with both

[214] *Arrowsmith v UK* (1981) 3 EHRR 218; *C v UK* (1983) 37 DR 142. See also *Eweida and others v UK* (2013) 57 EHRR 8 [82].
[215] *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School and Rhondda Cynon Taf Unitary Authority* [2008] EWHC 1865 (Admin), [2008] 3 FCR 203 [62] (Silber J).
[216] ibid [78] (Silber J).
[217] *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin), [2007] 3 FCR 754.
[218] ibid [23]-[24] (Michael Superstone QC).
[219] ibid [36] (Michael Superstone QC).
[220] *Eweida* (n 214) [82].
[221] *Watkins-Singh* (n 215) [77]-[78] (Silber J); Skeet (n 42) [61]-[62].
[222] *Re C (A Child) (Child's Religious Choice)* [2012] EW Misc 15 (CC).
[223] *Re Z (A Child) (Specific Issue Order: Religious Education)* [2002] EWCA Civ 501; *Re A and D (Local Authority: Religious Upbringing)* [2010] EWHC 2503 (Fam), [2011] 1 FLR 615; *Re N (*A Child: Religion: Jehovah's Witnesses) [2011] EWHC 3737 (Fam), [2012] 2 FLR 917 [85] (Bellamy J); *Re C (A Child) (Child's Religious Choice)* [2012] EW Misc 15 (CC) [66] (Platt J). See also *Re A (Specific Issue Order: Parental Dispute*) [2001] 1 FLR 121 (CA); *Re T (A Child)* [2005] EWCA Civ 1397.

parents.[224] The court wanted to avoid 4-year old N becoming conflicted between their beliefs and loyalty to each parent.[225] At face value this protects N from undue influence, but in reality its focus remains on their parents' rights.

For younger children, a singular approach normally favours the community of their upbringing. In *Re S* as the 4-year old was growing up in a Muslim community it was better he was raised as Muslim.[226] The judge focused on educating S to respect Sikhism until they were 'significantly older' when encouraging this faith would be appropriate.[227] Whereas in a similar case concerning older children, the court emphasised that their minds were sufficiently developed that they would favour one of their parents' religion.[228] However, the parents must respect each other in the children's education, in order to protect children's choice to follow one (or no) religion.[229] In this case the court refused circumcision, leaving this until the children were old enough to make their own informed decision.[230] This demonstrates cursory discussion of children's developing capacities for religious belief, whilst maintaining the overwhelming focus on parents.

Family courts normally only superficially consider children's views in religious upbringing cases. There are few cases where children's views are discussed such as *Re G*, but there is no evidence of considering children's views despite how significant the measures were.[231] This constitutes a denial of agency, even if the court would ultimately decide that their best interests are not served by implementing their views. It also interferes with their Art.8 rights, interpreted in line with Art.12 UNCRC, as requiring that children who are capable of forming their own views have the opportunity to express their views, in order to ensure protection of their rights.[232] Given the significant impact of measures in religious upbringing cases, this would apply by analogy to children's views under Articles 8 and 9. *Re A* is an exception which hopefully indicates change. Here, the Family Court paid significant attention to the eldest child's views according to Art.12, saying that they had formulated their view against having contact, through a pragmatic understanding of their family's circumstances within the community.[233]

However, *Re A* can be contrasted with *Re S* as a more grounded consideration of children's religious views and interests. This concerned separated parents, an atheist mother and a

[224] *Re N* (n 223) [90]-[91] (Bellamy J).
[225] ibid [90]-[91] (Bellamy J).
[226] *Re S (Change of Names: Cultural Factors)* [2001] 2 FLR 1005 (F) [1014]-[1016] (Wilson J).
[227] ibid 1015 (Wilson J).
[228] *Re S (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam), [2005] 1 FLR 236 [83] (Baron J).
[229] ibid [83] (Baron J).
[230] Ibid [83] (Baron J).
[231] *Re G* (n 5); Taylor, 'Secular Values and Sacred Rights: Re G (Education: Religious Upbringing)' (n 34) 342. See also *Re A (Specific Issue Order: Parental Dispute)* [2001] 1 FLR 121 (CA).
[232] *M and M v Croatia* App no 10161/13 (ECtHR, 3 September 2015) [181].
[233] *Re A* (n 11) [137]-[142] and [144]-[149] (Jackson J).

fervent Roman Catholic father who was extremely devout.[234] Their children had voluntarily ceased contact with their father, expressing no wish to see him or receive further religious instruction.[235] The father sought orders they attend Catholic schools, not attend religious or sex education classes, and to compel the mother to encourage their faith.[236] The Court of Appeal underlined the 11 and 13-year olds children's feelings should be respected.[237] However, the court also emphasised the need to facilitate separating their thoughts on their religious beliefs from their thoughts about their father, to promote continued contact with the non-custodial father.[238] This demonstrates greater emphasis on nurturing the children's beliefs, whilst placing separate emphasis on maintaining the parental relationship. This also reflects the failure in *Re A* to consider the impact on their long-term welfare of losing access to their parent during key developmental years.[239]

WELFARE IN RELIGIOUS RIGHTS CASES

The values underlying the welfare approach in these cases facilitate the limited protection that children's rights and interests receive. The current understanding of religion and communities is adult-centric, which can problematise understanding how their faith and their community impact their welfare. The child's welfare is contextualised in their familial, educational and social environment, and their ethnic and religious communities.[240] In *Re J*, the court emphasised the need to separate adult-centred conceptions of faith, from the child's perspective.[241] Adults may recognise faith through birth-right, or a ceremony of induction; or conceive of faith as participatory, associational and developing.[242] However a child's 'emotional, intellectual, and spiritual sense' of religious faith develops through worship and teaching within the family and religious community.[243] These religious beliefs may be significant in forming the child's cultural and racial identity, even if they later reject them.[244] Therefore it may be impossible to isolate aspects of the familial religious upbringing from the child's beliefs.[245] Thus, courts widely understand the importance of religious communities, as in cases concerning circumcision it is a deciding factor. In cases where the child is raised in a religious community the court has ordered circumcision to

[234] *Re S (Minors) (Access: Religious Upbringing)* [1992] 2 FLR 313 (CA).
[235] ibid [315]-[316] (Butler-Sloss LJ).
[236] ibid [313] (Butler-Sloss LJ).
[237] ibid [320]-[321] (Butler-Sloss LJ).
[238] ibid [320]-[322] (Butler-Sloss LJ).
[239] *Re B (Minors: Access)* [1992] 1 FLR 140 (CA), 146 (Tyrer J); ibid [320]-[322] (Butler-Sloss LJ).
[240] *Re G* (n 5) [30] (Munby LJ).
[241] *Re J (A Minor) (Prohibited Steps Order: Circumcision)* [2000] 1 FLR 571 (CA) [15] (Thorpe LJ).
[242] ibid [15] (Thorpe LJ); Michael Ipgrave, 'Religion in a Democratic Society: Safeguarding Freedom, Acknowledging Identity, Valuing Partnership' in Nazila Ghanea-Hercock and others (eds), *Does God Believe in Human Rights* (Martinus Nijhoff Publishers 2007) 53-59.
[243] ibid [15] (Thorpe LJ); Taylor, 'Secular Values and Sacred Rights: Re G (Education: Religious Upbringing)' (n 34), 345-347.
[244] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (n 18), 20.
[245] ibid [20].

facilitate better integration. [246] Whereas within a secular community, the court emphasised the isolation the child may feel as a result of fulfilling the parent's wishes. [247] However, Jivraj and Herman highlight the construction of religious communities in opposition to a Christian-centric notion of English secularity, thus ignoring cultural factors influencing decisions regarding children's religious identities.[248] Moreover, *Re A* demonstrates the danger of communities becoming an overbearing focus in decision-making. The Court of Appeal placed the children in a vacuum away from how the community's attitudes would impact their welfare;[249] whereas the Family Court adequately acknowledged this impact without prioritising either parent or the community.[250] However, previous concerns about stigmatising contact demonstrate the need for a middle ground in accepting the importance of community for children's religious identities, whilst adequately serving children's long-term welfare.

Within welfare the courts have emphasised a wide, pluralistic approach to accommodate parents' divergent views about the religious, moral or secular objectives they pursue for their children.[251] Relevant interests include ethical, social, moral, medical, religious, cultural, emotional and welfare considerations.[252] Therefore, the court's objective is to maximise the child's opportunities in every sphere of life, and protect these opportunities as they enter adulthood.[253] Consequently, welfare is broadly interpreted to include everything related to the child's development, extending through present minority and future adulthood.[254] Therefore, it may be necessary to subject children to unwanted life-saving medical treatment, so they can freely decide about treatment for themselves when they reach the age of 18, as was the case in *Re P*.[255] In *Re G* this required a more 'open' education to ensure children's opportunities once they reached majority.[256] This future-focused approach is positive, but reflects inconsistency regarding what decisions competent children can make. This may require restriction on parents' religious rights to allow children to develop their own beliefs in the future.[257] In *M* the welfare of radicalised children was served by reunification with their father, which would ensure they regained proper perspective on their Muslim faith and provide for a balanced and meaningful childhood.[258]

[246] *Re S* (n 226) [1014]-[1016] (Wilson J).
[247] *Re J* (n 16) [697] (Wall J), affd *Re J* (n 241).
[248] Jivraj and Herman (n 41), 292-95.
[249] Fenton-Glynn (n 152), 136.
[250] ibid [136].
[251] *Re G* (n 5) [39] (Munby LJ).
[252] CA 1989, s 1(3); *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327, [2004] 2 FLR 1117 [12] (Johnson J); *Re G* (n 5) [27] (Munby LJ).
[253] *Re G* (n 5) [80] (Munby LJ).
[254] ibid [26] (Munby LJ); Langlaude, 'Parental Disputes, Religious Upbringing and Welfare in English Law and the ECHR' (2014) (n 53), 29-30.
[255] *Re P* (n 194); *Re W* (n 182), 94 (Nolan LJ); *Re G* (n 5) [81] (Munby LJ).
[256] *Re G* (n 5) [84]-[88] (Munby LJ); Langlaude, 'Parental Disputes, Religious Upbringing and Welfare in English Law and the ECHR' (2014) (n 53), 20.
[257] *Re N* (n 223) [90]-[91] (Bellamy J).
[258] *A Local Authority* (n 12) [4] and [25] (Newton J).

However, both Taylor and Jivraj separately warn against unduly restricting parents' rights to authorise the child's involvement in rites and rituals, so as not to preclude children's opportunity to integrate into religious communities as adults.[259] Whilst this future-oriented approach is positive, its inconsistent application affirms the need to expressly protect children's religious rights to ensure a uniform approach.

However, the current approach to welfare inadequately reflects the risk of harm to children within religious communities, which may require overruling the child's views to reflect this. In *Re R* the court emphasised the child's religious convictions and desire to remain within the community were factors to consider but are not to override the paramountcy of their welfare.[260] The Court ultimately ordered residence with his father due to the harm which the son had suffered within the Brethren community. Furthermore, in *Re S* the court expressed concern that the child's confusion about their illness left them vulnerable to influence by their parents and other believers.[261] This demonstrates limited recognition of the coercion and psychological harm which children may suffer within religious communities. *Re E* also acknowledges the complexity of children's religious beliefs as tied to their parents', therefore may reflect a wish to honour their parents.[262] *Re K* also recognises that since teenagers are more alert to parental views, they are potentially more vulnerable to the influence of parents' extreme beliefs than infants are.[263] This is an important recognition of the power imbalances within families, which could cause harm if children are coerced into acting in a certain way, even subconsciously, by having adopted their parent's beliefs from a place of seeming autonomy.

This inability of the courts to adequately protect children from harm is due in part to the limited statutory and judicial protection of children's rights. This also prevents their consistent, express consideration within welfare. Thus, affirming children's religious rights could ensure protection within litigation balanced against parental rights. This could also ensure protection for children not involved in litigation against invisible harms through objective, pluralistic and critical education, and encourage cultural acceptance of their developing capacities.

[259] Taylor, 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education ' (n 18), 20; Jivraj and Herman (n 41), 295-96.
[260] *Re R* (n 105) [174]-[175] (Purchas LJ).
[261] *Re S (A Minor)* (n 173) [1075] (Johnson J).
[262] *Re E* (n 173) [393] (Ward J).
[263] *Re K* (n 12) [20] (Hayden J).

THE CASE TO ENHANCE CHILDREN'S RELIGIOUS RIGHTS IN ENGLISH LAW

This article has explored two problems in the current law. Firstly, parents have significant discretion in the religious upbringing of their children in the absence of significant harm. This leaves a large protection gap where children's upbringing must be respected unless it crosses this threshold. This applies even though their upbringing may not always advance their welfare, as it may limit their future opportunities, or subject them to potential psychological harm. Secondly, children are not treated as developing citizens, with the independent ability to develop beliefs and make decisions about their own religious lives. Instead, parents have primary responsibility and children's developing religious beliefs are barely considered under law. This chapter addresses these concerns by proposing statute expressly recognise children as independent right-holders under Art.9 ECHR.

The solution proposed by this dissertation comes in three parts. Firstly, statute affirming children's independent religious rights, and their ancillary rights to this under English law. This standard would build on the flaws in Art.14 UNCRC, to reflect the interdependence of children's religious rights with their parents' rights, and reflect children's developing capacities. Just as parents' rights over a child's religious upbringing have wide implications, this right will have implications outside explicitly religious matters. Therefore, children's religious rights include issues of identity and sexuality covered by RSE, to counterbalance any potentially harmful parental instruction.

Secondly, there must be greater recognition of children's developing capacities under Art.9. Developing capacities are already considered within family law cases but, applying a similar test to *Gillick* would facilitate the application of this outside courts, encouraging greater respect for children's religious rights within society, and help combat the current protection gap. This could be achieved, as in *Gillick,* without statute and rather through judicial reinterpretation of the requirements imposed under Art.9. Finally, in-depth RE, and RSE could be utilised as tools to enhance children's status as right holders, and to act as a counterbalance to the protection gap created by parents' human rights.

A NEW RIGHT?

Expressly protecting children's religious rights would cement children as religious right holders and ensure greater visibility within, and beyond, litigation. While Art.9 ECHR and Art.14 UNCRC are useful starting points, they do not reflect the required nuance. Art.9 especially does not reflect that children gain capacity for mature thought at different times. Therefore, our starting point will be Art.14.

Art.14(1) establishes children's right to freedom of thought, conscience and religion.[264] Art.14(2) requires States to respect parents' rights and duties, to direct the child's exercise of their rights consistent with their evolving capacities.[265] Whilst this acceptance of parents' rights to shape religious identity is uncontroversial, no other UNCRC rights define their content according to parental rights.[266] This failure to outline the boundaries between evolving capacities and parental direction, weakens the child's right as its content is not easily discernible. This failure to set limits on parental direction blurs the distinction between acceptable direction, and imposition or control. However certain limits can be inferred from rights like Art.12, and the freedom from physical or mental violence under Art.19.[267] Thus, threatening or causing a child to experience physical, mental, or emotional harm if they defy parental expectations, would likely be illegitimate direction.[268] Art.14 also omits explicit protection from coercion in exercising the right, as under Art.18 ICCPR,[269] which seems illogical given the children's susceptibility to coercion within family life.

Whilst the Art.14 provision diminishes the child's independent right, its subsequent interpretation treats children as "small adults and autonomous individual believers".[270] The CRC has emphasised legislation should facilitate the child's free choice of religion including forming part of a religious community of their own free will and being familiarised with other cultures.[271] Whilst affirming the development of children's independent rights, this approach inadequately reflects the relationship with parents and religious communities.[272] Langlaude argues this disproportionate autonomy construes religion and religious community as negative and inherently harmful.[273] She argues it is best to define the right in relation to community and family,[274] but remove parental control over children's religion by recognising competent children as having rights which do not align with parental rights.[275] Kilkelly argues for a more positive interpretation according to key UNCRC principles, stressing Art.14 as an independent right with parental involvement only where justified according to the child's age and maturity.[276] Thereby both authors underline the need to enunciate positive and negative rights flowing from the right, and the ages children

[264] UNCRC (n 9), Art 14(1).
[265] ibid Art 14(2).
[266] Scholnicov (n 27), 252.
[267] United Nations Convention on the Rights of the Child, Arts 12 and 19; Kilkelly (n 55), 250.
[268] Langlaude Doné and Tobin (n 160), 495.
[269] ibid (n 160), 491.
[270] Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (n 30), 502.
[271] UN Committee on the Rights of the Child, 'Initial Report of the Republic of Korea' (13 February 1996) UN Doc. CRC/C/15/Add.51, para 14; Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (n 30) 485; Langlaude Doné and Tobin (n 160), 489.
[272] Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (n 30), 502.
[273] ibid (n 30), 493-99.
[274] ibid (n 30), 500-502.
[275] Langlaude Doné and Tobin (n 160), 479.
[276] Kilkelly (n 55), 268.

may exercise them, to facilitate protection if necessary.[277] Both arguments provide coherent concerns, highlighting the need to underline children's right independent from their parents, whilst recognising the key involvement of parents and communities in the formation of religious identity. These principles will therefore inform the approach proposed in this dissertation, improving upon the flaws of Art.14.

Temperman argues the Slovenian Constitution incorporates the principles under the UNCRC of recognising children's best interests and evolving capacities, alongside parents' rights.[278] The provision underlines parents have the right to provide their children with a religious and moral upbringing according to their beliefs.[279] It emphasises that parental direction must be appropriate to the child's age and maturity, and be consistent with their free conscience and religious and other beliefs.[280] Whilst a positive start, it remains parent-centred.

In light of this, I would propose the following provision, which internalises children's developing capacities to exercise religious rights, whilst affirming the status of both children's and parents' rights under Art.9 ECHR:

> "Children have an independent right to freedom of thought, conscience, and religion under Art.9 ECHR. This right entitles the manifestation of their beliefs, free choice of religion, and all other rights inherent to Art.9.
>
> Children's competency to exercise this right shall be assessed according to their developing capacities for mature thought and understanding required to develop religious beliefs.
>
> Until children reach competency their parents have the right to direct their children's exercise of this independent right, consistent with these developing capacities, as part of a religious and moral upbringing according to parental beliefs."

This right should encourage the internalisation of children's religious rights beyond the courts, similar to the incorporation of *Gillick* into standard clinical practice.[281] It would seek to engage communication between children and wider society, rather than providing them abstract, unenforceable rights.

[277] Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (n 30), 501; Kilkelly (n 55), 268.
[278] Temperman (n 84), 869-70.
[279] Slovenian Constitution 1991, Art 41.
[280] ibid, Art 41.
[281] Cave (n 181), 113-15.

This statute would also establish the negative and positive rights inherent as the child becomes competent, to protect children's independent rights if necessary. Key rights include the freedom of worship, the right to exemption from religious events at school, the right not to be forced to practice a religion or participate in religious services (privately or publicly).[282] Therefore once competent, the child could participate in religious rituals without parental consent, and freely attend places of worship.[283] This would include ending the parental monopoly on opting out of, or into: RSE, RE and collective worship, by providing competent children with identical statutory rights. This would also continue developments in recent RSE guidance, which includes an obligation to allow children to opt into sex education against their parent's requests to withdraw, up to three terms before turning 16.[284] Whilst this focuses upon 'competent' children with the ability to exercise their right, children who are not yet competent should also have their rights respected, demonstrating the need to modify compulsory worship as highlighted by the CRC.

The final resort for this right is the obligation on the State to ensure respect for children's religious choices within and outside the family home. Case law demonstrates the imbalance and risk of coercion or undue influence within the home. Taylor argues Art.3 UNCRC places a remedial obligation on states when children are invisible to political and legal processes, not represented or protected through their parents.[285] Therefore the state must ensure mechanisms for enforcement are available if respect is not afforded.

EVOLVING CAPACITIES UNDER ARTICLE 9

The current minimal understanding of children's evolving religious capacities in family courts should be developed to apply to all families through applying a test similar to *Gillick,* as outlined above. In its 1994 report to the CRC, the UK claimed parents' rights to determine their child's religious upbringing were interpreted according to *Gillick,* wherein the child's right could take precedence when they reached sufficient maturity.[286] Although

[282] Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (n 30), 486-88.
[283] ibid (n 30), 488.
[284] Department of Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education: Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers' (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805781/Relationships_Education__Relationships_and_Sex_Education__RSE__and_Health_Education.pdf> accessed 7 April 2020, paras 45-50.
[285] Taylor, 'Putting Children First? Children's Interests as a Primary Consideration in Public Law' (n 20), 48.
[286] UN Committee on the Rights of the Child, 'Initial Report of the United Kingdom of Great Britain and Northern Ireland' (28 March 1994) UN Doc CRC/C/11/Add.1, para 172; Department of Education, 'The United Nations Convention on the Rights of the Child: How Legislation Underpins Implementation in England' (n 20), 52-54.

visible in the interpretation adopted by the government in recent RSE guidance,[287] it finds no implementation elsewhere. Mentioned without meaningful application, or visible only implicitly in future-focused cases like *Re G*, *Re A and D* highlights that younger children's religious faith is undeveloped so changes according to their parents' faith.[288] As they develop, children make their own choices irrespective of their parents' feelings, which parents cannot interfere with once children reach capacity.[289] Baroness Hale's dissent in *Begum* recognises every child's developing capacities to make autonomous moral judgments throughout adolescence which may lead them to make different decisions to their parents.[290] However, no lordships considered applying *Gillick* to educational decisions, to recognise B was wearing the Jilbab of her own volition.[291] Consequently this has not been applied throughout English law, remaining an abstract legal concept divorced from practical reality.

Developing Fortin's argument that *Gillick* reflects the requirements for mature, developed thought under Art.8, this test is an appropriate way to demarcate when children achieve the competency to exercise their rights under Art.9.[292] Currently parents, particularly those not in conflict, can exercise their rights without regard to the child's views, meaning children's views are lost in parent-centric law.[293] Thus, even if the statutory aspect of this chapter were not adopted, judges could reinterpret *Gillick* to improve the presence and enforceability of children's Art.9 rights beyond the courts. Indeed, if this approach, incorporating UNCRC principles, were taken for all children's rights under the ECHR, this could integrate children's rights within common law. However, this recognition alone is not enough, requiring education to empower children as right holders.

RELIGIOUS EDUCATION AND RELATIONSHIPS AND SEX EDUCATION

Developing education could address the key tensions discussed in this dissertation. Firstly, by tempering the strength of parental rights, thus qualifying their rights through education to protect children's rights.[294] Secondly, education can be understood as enhancing children's agency as religious rights holders, by allowing them to develop their own beliefs

[287] Robert Long, 'Relationships and Sex Education in Schools (England)' (2020) House of Commons Library Briefing Paper No 06103 <https://commonslibrary.parliament.uk/research-briefings/sn06103/> accessed 7 April 2020 15-16; Department of Education (n 284) paras 45-50.
[288] *Re A and D* (n 23) [73] (Baker J). See also *Stourton* (n 74) [588] (Turner LJ).
[289] ibid [73] (Baker J).
[290] *Begum* (n 201) [92]-[93] (Baroness Hale).
[291] Susan Edwards, 'Imagining Islam … of Meaning and Metaphor Symbolising the Jilbab, R (Begum) V Headteacher and Governors of Denbigh High School' [2007] 19 CFLQ 247, 261-63.
[292] *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam) [2004] 2 FLR 949 [29]-[30], [36], [46], and [57]-[58] (Munby J); Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (n 50), 320; Fortin (n 5), 182-83.
[293] Taylor, 'Parental Responsibility and Religion' (n 26), 132-33.
[294] Ryan Hill, 'Open Options Education and Children's Religious Upbringing: A Critical Review of Current Discussions Taking Place in the UK Parliament' [2019] OJLR 1, 7.

and identities through thorough RE and RSE. This therefore protects even those children who are not competent.

Empowering children's rights to counterbalance their parents' rights in this way has not been thoroughly discussed. However, Judge Rozakis' concurring judgment in *Lautsi* highlights the lesser influence of parents and schools in a multicultural society, as children are exposed to wider ideas and beliefs outside these environments.[295] To prepare children for life in multicultural societies, parents' rights may be afforded less weight, being outweighed by the interests of society as a whole.[296] Therefore, a pluralistic curriculum engaging with the beliefs of different groups to empower children as religious right holders could be justified on this basis. The scope of this dissertation is too limited to engage with the content of this education, and the legal structure surrounding religion within education, but highlights key principles from Strasbourg jurisprudence to address these key concerns.

Art.2 Protocol 1 ECHR, imposes a positive obligation on states to respect pluralism by accommodating parents' religious or philosophical convictions,[297] and ensuring fair treatment of minorities.[298] Therefore any accommodations, like exemptions, must be available without discrimination.[299] This involves more than just acknowledgment, but requires genuine consideration of accommodations to avoid conflicts with parental convictions.[300] This obligation extends to all educational functions,[301] including the organisation of public education, and its general supervision. Furthermore, the option of private education or home schooling does not exempt States from ensuring pluralism in state schools.[302] Art.2 is interpreted alongside Art.9, thus imposing a duty of neutrality on the state alongside a duty to maintain religious harmony and tolerance.[303] This requires that RE and RSE curriculums are designed and presented in an objective, critical and pluralistic manner.[304] Parents' rights do not entitle them to keep their children ignorant about religion and philosophy,[305] or prevent States from imparting religious knowledge, directly or indirectly.[306] Cases have affirmed that the obligatory inclusion of sex education, or RE, does not remove parent's right to educate children from a parental perspective.[307] Therefore refusing exemptions would not constitute a disproportionate restriction, as

[295] *Lautsi* (n 162) [O]-[I] 3.
[296] ibid (n 162) [O]-[I] 3-4.
[297] *Valsamis* (n 162) [26]-[27].
[298] *Kjeldsen* (n 28) [50]; *Valsamis* (n 162) [27].
[299] *Hasan and Eylem Zengin v Turkey* (2008) 46 EHRR 1060 [73]-[75].
[300] *Valsamis* (n 162) [27]; *Lautsi* (n 162) [61].
[301] *Valsamis* (n 162) [27].
[302] *Kjeldsen* (n 28) [54]-[55]; *Folgerø v Norway* (2008) 46 EHRR 1147 [101].
[303] *Lautsi* (n 162) [60].
[304] *Kjeldsen* (n 28) [53].
[305] *Folgerø v Norway* (2008) 46 EHRR 1147 [89].
[306] *Lautsi* (n 162) [62].
[307] *Kjeldsen* (n 28) [54]; *Valsamis* (n 162) [31]; *Lautsi* (n 162) [75].

parents are free to educate their children after school and at weekends.[308] Therefore, this could sufficiently accommodate parents' beliefs if the curriculum is objective, critical and pluralistic, and the state ensures teachers or schools do not exceed the accepted curriculum.[309]

RE is a fundamental tool for encouraging informed exercise of children's religious rights. In *Lautsi* the ECtHR reiterated objective, critical and pluralistic teaching of religious knowledge in a neutral environment, as key to enable children to develop a critical mind regarding religious beliefs.[310] The CRC has also recognised this as necessary to promote tolerance, understanding and respect between ethnic and religious communities within a multicultural society.[311] Although the margin of appreciation allows States to afford greater weight to certain religions according to their place in history and tradition,[312] this cannot include differential treatment to that religion in educational terms. In *Folgerø* there were qualitative and quantitative differences in teaching towards Christianity, suggesting aims went beyond transmission of knowledge, instead encouraging engagement with Christian beliefs.[313] The Court held the manifest differences were so significant they could not be avoided through a uniform pedagogical approach thus violating Art.2.[314] To meet the requirements of objectivity and pluralism, the syllabus must reflect the diversity of religions, and denominations within the state.[315] Although giving preference to majority denominations is not in itself a departure from pluralism and objectivity,[316] the court has underlined that predominance may lead to children facing conflict between values taught in school and their families' values.[317] Currently, English law requires reflecting principal religions with a predominant focus on Christianity.[318] This should indicate change towards a diverse, multicultural curriculum in English law, reflecting the need to encourage children to develop their own beliefs, whilst developing tolerance and understanding within a multicultural society.[319] Achieving this would require that parents cannot opt their children out of RE to ensure uniform teaching to empower children's rights.

[308] *Dojan v Germany (Admissibility)* (2011) 53 EHRR SE24, [69]. See also *Konrad v Germany (Admissibility)* (2007) 44 EHRR SE8.
[309] *Kjeldsen* (n 28) [53]-[54].
[310] *Lautsi* (n 162) [62]; Scholnicov (n 27), 259-60.
[311] UN Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Reports of Former Yugoslavian Republic of Macedonia' (23 June 2010) UN Doc CRC/C/MKD/CO/2, paras 65-66.
[312] *Folgerø v Norway* (2008) 46 EHRR 1147 [89].
[313] ibid [93]-[95].
[314] ibid [95].
[315] *Hasan* (n 299) [66]-[70].
[316] *Mansur Yalçın and others v Turkey* App no 21163/11 (ECtHR, 16 September 2014) [71].
[317] ibid [75]-[76].
[318] EA 1996 (n 195) s 375.
[319] Commission on Religious Education, 'Religion and Worldviews: The Way Forward, A National Plan for RE' (2018) <https://www.commissiononre.org.uk/wp-content/uploads/2018/09/Final-Report-of-the-Commission-on-RE.pdf> accessed 26 April 2020; Richard Adams, 'Welsh Parents Lose Opt-Out for Sex, Relationship and Religious education' (*The Guardian*, 21 Jan 2020) <https://www.theguardian.com/politics/2020/jan/21/sex-relationship-and-religious-education-to-be-compulsory-in-wales> accessed 26 April 2020. See also David Lundie and Cathal O'Siochru, 'The Right of

Turning to RSE, the same requirements regarding content and delivery apply.[320] The ECtHR has distinguished between RE as teaching tenets, whereas sex education imparts objective knowledge.[321] Therefore allowing parents to exempt their children from RE, but not sex education is consistent with Art.14 ECHR.[322] In *Dojan* the court rejected the argument that the curriculum advanced a liberal, emancipatory image of sexuality inconsistent with their religious beliefs, which would lead to premature "sexualisation".[323] Rather the curriculum was based on current scientific and educational standards, conveyed in an objective, critical and pluralistic way to communicate necessary information and protect against child abuse.[324] The current unqualified parental right of withdrawal goes far beyond that required by the ECHR.[325] Therefore, as with RE, creating a broad curriculum which parents cannot opt out of would serve to empower children through exercising the wide impact of their religious rights.

Current guidance on Relationship and Sex Education (RSE) came into force in September 2020.[326] Relationship education is now compulsory for all Primary and Secondary Age students, alongside the sexual element of the Secondary Age curriculum.[327] However the parental right of withdrawal applies to the sexual element of secondary RSE education, and any non-compulsory sex education provided at primary school level.[328] Although not a statutory right as proposed above, the mature under-16-year olds' ability to opt into sex education contrary their parent's withdraw,[329] is a significant vindication of young people's autonomy. This could facilitate children receiving education which their parents, religious or not, object to; this is particularly significant for LGBTQ+ youth who are not affirmed by their parents. This demonstrates the need to create opportunities within education for children to experiment with and understand their identities, whilst also combating

Withdrawal from Religious Education in England: School Leaders' Beliefs, Experiences and Understandings of Policy and Practice' (2019) 41 British Journal of Religious Education <https://www.tandfonline.com/doi/full/10.1080/01416200.2019.1628706> accessed 26 April 2020.

[320] *Kjeldsen* (n 28) [53].

[321] ibid [53]-[54].

[322] ibid [56].

[323] *Dojan* (n 308) [12].

[324] ibid [64] and [68].

[325] Vanderbeck and Johnson (n 7), 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools', 311.

[326] Children and Social Work Act 2017, ss 34 and 35; The Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019; Department of Education (n 284).

[327] Children and Social Work Act 2017, ss 34; The Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, sch 1.

[328] EA 1996, s 405; The Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, sch 1; Department of Education (n 284) paras 45-50.

[329] Department of Education (n 284) paras 45-50.

structural prejudice against sexual and gender minorities through education.[330] Overall, this underlines the importance of all children receiving this education.

Inconsistent implementation of previous RSE guidance failed to equip heterosexual youth with literacy as sexual citizens due to inconsistent implementation.[331] This is heightened for LGBTQ+ youth, who are excluded by focus on heterosexual sexual acts, and sex-negative teaching regarding pregnancy and transmission prevention.[332] This practical exclusion demonstrates the legacy of s.28, which prevented Local Authorities from 'promoting homosexuality' until its abolition in 2003.[333] Still its effects remain through pressure exerted by non-affirming interpretations of major faiths on educational frameworks.[334] In face of protests, new guidance allows schools to determine how to include LGBTQ+ people in the curriculum.[335] This is worrying given past inconsistent implementation of requirements to discuss relationships besides heterosexual marriage;[336] especially as new guidance was put in place to raise awareness and acceptance of LBGTQ+ people. In litigation indirectly challenging the curriculum, opponents alleged teaching LGBTQ+ equalities represented unlawful discrimination against Muslim children and their parents because their religion did not encompass same sex relationships.[337] This argument eclipses the experiences of many LBGTQ+ Muslims.[338] It also demonstrates the abuse of children's rights as a basis to remove children, some of who may be LBGTQ+, from the curriculum which simply sought to normalise LGBTQ+ relationships. Robinson explores how religious discourses are employed by those in positions of power to restrict the child's

[330] Francesa Romana Ammaturo, 'Raising queer children and children of queer parents: Children's political agency, human rights and Hannah Arendt's concept of 'parental responsibility'' (2019) 22 Sexualities 1149, 1154-56ff and 1159-116.

[331]Kerry H Robinson, "Difficult Citizenship': The Precarious Relationships Between Childhood, Sexuality and Access to Knowledge' (2012) 15 Sexualities 257, 271; Eleanor Formby and Catherine Donovan, 'Sex and Relationships Education for LGBT+ Young People: Lessons from UK Youth Work' (2020) Sexualities (Forthcoming), 2ff 10.

[332] Robinson (n 331) 265-67; Formby and Donovan (n 331), 4.

[333] Local Government Act 1988, s 28; Local Government Act 2003, s 122.

[334] Vanderbeck and Johnson (n 7), 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools' 293ff 313-14; Robert M Vanderbeck and Paul Johnson, 'Homosexuality, Religion and the Contested Legal Framework Governing Sex Education in England' (2015) 37 Journal of Social Welfare and Family Law 161,173-75.

[335] Department of Education (n 284) paras 36-37.

[336] EA 1996, s 403; Department for Education and Employment, 'Sex and Relationships Education Guidance' (2000), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/283599/sex_and_relationship_education_guidance.pdf > accessed 7 April 2020, para 1.21; Vanderbeck and Johnson (n 7), 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools' 310-14; Formby and Donovan (n 331), 2.

[337] *Birmingham City Council* (n 8) [37] (Warby J).

[338] Dervla Sara Shannahan, 'Some Queer Questions from a Muslim Faith Perspective' (2010) 13 Sexualities 671, 671-76; Saima Mir, 'I Feel Caught in the Middle': Queer Muslims on the LGBTQ Lessons Row' (*The Guardian,* 27 March 2019) <https://www.theguardian.com/education/2019/mar/27/caught-in-middle-queer-muslims-lgbtq-lessons-schools-protests> accessed 26 April 2020.

access to knowledge (which is protected in Art.13 UNCRC) by representing education as a parental matter, whilst parents ultimately fail to fulfil this role.[339]

Fundamentally, although parent's beliefs must be respected in democratic society, their manifestation is not absolute.[340] *Johns* recognised Art.9 could be qualified to protect children from foster carers who did not affirm LGBTQ+ identities.[341] Although Art.9 protects all parents from such interference with their family lives,[342] education can provide information to counteract such degrading views to protect children's physical and mental integrity under Art.19 UNCRC. This would empower them to resist harmful interpretations masquerading as belief.[343] This would not be an undue restriction as parents maintain their rights to educate children themselves, and outside mainstream public education. Therefore, the current level of obligatory RSE strikes an adequate balance between parents' and children's rights as currently accepted in English law.

It was also alleged 'British values' were used to promote 'LGBT subjects' without proper consultation, with destructive impact on children's religious and cultural traditions.[344] This argument is unconvincing given the curriculum focused on encouraging tolerance not promoting 'gay lifestyles'.[345] But it raises compelling concerns about majoritarian values being imposed on minority groups. Values of social citizenship like equality are important in public policy and education, but care must be taken to ensure minorities are accommodated, not subject to racialised western conceptions of citizenship.[346] Steps must be taken to reflect diverse value systems within a pluralistic society, avoiding the creation of false dichotomies between religious, secular and LGBTQ+ perspectives and ideas.[347] However, steps to accommodate parental convictions cannot legitimise the undermining of the content and objectives of this education.[348]

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[339] UNCRC (n 9), Art 13; Robinson (n 331) 259ff 266-67; Vanderbeck and Johnson (n 7) , 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools', 296-97

[340] Campbell and Cosans v United Kingdom (No 2) (1982) 4 EHRR 293, para 36; *Williamson* (n 2) [22]-[23] (Lord Nicholls); *Johns* (n 71) [47] (Munby LJ); *Re G* (n 5) [36] and [38] (Munby LJ).

[341] *Johns* (n 71) (Munby LJ).

[342] ECHR (n 3), Arts 8 and 9; *Vojnity* (n 3), para 37; *London Borough of Tower Hamlets* (n 3); *Christian Institute* (n 3).

[343] *Re I* (n 124) [15] and [33] (Peter Jackson LJ).

[344] *Birmingham City Council* (n 8) [39] (Warby J).

[345] Parveen, 'School Defends LGBT Lessons After Religious Parents Complain' (n 8); Parveen, 'Birmingham Primary School To Resume Modified LGBT Lessons' (n 8). See also Vanderbeck and Johnson (n 7), 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools' 308ff 310-12.

[346] Jivraj (n 43), 337.

[347] Mary Lou Rasmussen ML, 'Secularism, Religion and 'Progressive' Sex Education' (2010) 13 Sexualities 699, 708ff 710-11; Heather Shipley, 'Religious and Sexual Orientation Intersections in Education and Media: A Canadian Perspective' (2014) 17 Sexualities 512, 523-24.

[348] Vanderbeck and Johnson (n 7), 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools', 310-12.

Whilst the current empowerment of competent children is a positive development, this approach does not ensure adequate safeguarding of LBGTQ+ youth if schools can narrow content themselves. Therefore, guidance must be interpreted to ensure uniform protection of children, but appropriately reflecting the perspective of the communities which children come from.

CONCLUSION

The dissertation focuses on the children's vulnerability to harm under the current legal framework, whereby their religious rights are not expressly protected thus receive negligible consideration. Chapter 1 focused on parental rights, demonstrating the parent-centred focus of religious rights in English law, which encourages insufficient regard for children's interests. This singular protection of parents' human rights creates a gap in protection with courts unable to prevent harm. Chapter 2 examined children's limited religious rights in domestic law, linking this to the paternalistic restriction of their rights by courts, and the refusal to treat children as genuine right-holders in family law. Finally, Chapter 3 highlighted how expressly recognising children's rights under Art.9, and their evolving capacities to exercise said rights, could ensure recognition of children's religious rights and protection from harm. This includes through education empowering them to exercise these rights. These chapters have highlighted the inadequacy of current regimes to protect against harm. Cases have highlighted that children may have their future opportunities severely restricted because of parents' religious rights;by being subject to coercion or internalising harmful parental beliefs,[349] however, cases advance no means of protecting all children from these harms.

Therefore, this dissertation proposes explicitly recognising children's religious rights by statute to protect children against these harms. This requires recognition of children's developing capacities within the law and beyond, allowing them to be respected in a manner appropriate for their age and status as developing citizens. Recognising children's rights is insufficient in itself, but requires objective, critical and pluralistic RE which parents cannot opt out of to encourage critical development of their own beliefs. Protecting children from harm also requires comprehensive RSE to affirm developing LGBTQ+ identities which may clash with parental religious beliefs. This obligatory education would be compliant with parents' human rights to educate their children themselves, whilst pursuing a legitimate aim of fostering tolerance.

Furthermore, allowing parents to opt their children out of only the sexual aspect of current RSE strikes an appropriate balance between children and parents' rights. However, the "relationships" aspect of this education, which parents cannot opt out of, must be

[349] *Re E* (n 173); *Re G* (n 5); *Re B* (n 86); *A Local Authority* (n 9).

LGBTQ+ inclusive to protect all children from harm regardless of parental beliefs. The bottom line is that evidence shows inclusive RSE lowers the risk of domestic abuse and adverse mental health for LGBTQ+ youth.[350] It also increases visibility and normalises these identities, helping combat bullying of LGBTQ+ students and staff.[351] Thus by placing the focus within education on children's rights, when children become competent they could opt out of RE as they deem appropriate, and opt into sex education against their parent's withdrawal.

Recent context has emphasised the need to address problems in the current framework of religious rights, which can be addressed with gradual developments rather than wholesale constitutional reform. Other rights have been expressed throughout English Law, such as children's rights under Art.8 ECHR and Art.3 UNCRC being recognised and protected throughout immigration law;[352] whereas children's Art.9 rights are unique in their persistent denial throughout English Law. Ultimately, the approach proposed in this dissertation could provide protection for all of children's rights under the ECHR by integrating them within the domestic legal order. This would also ensure children's ECHR rights are internalised in common law, to protect these rights, even in the event of the potential repeal of the HRA 1998.

Since the time of writing, the *Bell v Tavistock* judgment *handed down* in November 2020 brought the issues explored throughout this dissertation into a stark reality.[353] The case indicates how significantly the subsequent interpretation of *Gillick* has qualified the key principles it set out. The Court held that Children aged 16 and over would require the Court's consent to receive puberty blockers as treatment for gender dysphoria; it also indicated that any child under 13 would be highlight unlikely to be competent, and it would be highlight doubtful that any children between 13 and 16 could be competent to consent to treatment.[354] This case indicates that transgender children do not have the same right to make autonoous decisions about their bodies or medical treatment as cisgender children. This would act as another qualification of children's already limited rights in English Law and is a worrying indication that not all children are equal under the law. However, the decision will be appealed in June 2021 and the Family Court has recently ruled that a parent can consent to this treatment on their child's behalf.[355]

[350] Formby and Donovan (n 331), 4-6.
[351] Shipley (n 248) 518-520; Vanderbeck and Johnson (n 7), 'The Promotion of British Values: Sexual Orientation Equality, Religion, and England's Schools', 297-8.
[352]Borders, Citizenship and Immigration Act 2009 (BCIA 2009), s 55; *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166 [21]-[25] (Baroness Hale); R (B) v Secretary of State for the Home Department [2013] EWHC 2281 (Admin); Makhlouf v SSHD [2016] UKSC 59, [2017] 3 All ER 1 [47] (Lady Hale).
[353] *Bell v Tavistock* [2020] EWHC 3274 (Admin).
[354] *Bell* (n 353) [151]-[153] (Dame Victoria Sharp P).
[355] *Ab v CD and others* [2021] EWHC 741 (Fam).

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